

# Restorative Justice in the Gilded Age: Shared Principles Underlying Two Movements in Criminal Justice

Ali M. Abid

---

### Recommended Citation

Abid, Ali M. "Restorative Justice in the Gilded Age: Shared Principles Underlying Two Movements in Criminal Justice." *American University Criminal Law Brief* 8, no. 1 (2012): 29-47.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Criminal Law Brief* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# Restorative Justice in the Gilded Age: Shared Principles Underlying Two Movements in Criminal Justice

ALI M. ABID

## I. INTRODUCTION

A man accused of a robbery is brought before members of his own community. He is encouraged to speak on his own behalf, and he freely admits to the offense. Nevertheless, he asks for mercy, not

because he can point to any particular defenses as we know them, but rather he argues that his desperation leading up to the act, his deep remorse, and his willingness to repair the damage he inflicted to his victim should negate his guilt. In determining the man's punishment, the community members are permitted to take all these factors into account, scrutinizing his remorse, augmenting his plan for reparation, and, if they so choose, deciding

against punishment altogether. The impartial mediator presiding over the proceeding, and the person responsible for bringing the victim's case against the offender, are also members of the same community and are directly accountable to that community for how they conduct themselves. Under this system, both punishment and crime are rare; the administration of justice is apportioned equally among races and classes; and recidivism is low.

Which criminal justice system is this? It is certainly not the criminal justice system of the United States. Juries in the United States are tasked with determining the fact of guilt, not evaluating how morally deserving a defendant is of punishment. Juries are not, typically, members of the immediate community of the defendant, and judges and prosecutors are not politically accountable to those communities, but rather, to broader voting populations.<sup>1</sup> Trials are rare and the procedure is complex.<sup>2</sup>

Furthermore, the U.S. system does not produce the same effects as the hypothetical system described above. The scandal of mass incarceration in the U.S. is, by now, well known. According to a 2008 study by the Pew Center, one in every one hundred American adults is behind bars.<sup>3</sup> The system's

disproportionate impact upon the African American population is similarly notorious, with one of every nine black men between the ages of twenty and thirty-four in prison or in jail.<sup>4</sup> And, despite the nine-fold increase in state and federal prison populations since the early 1970s, the recidivism rate has remained intransigent, with well over fifty percent of offenders re-entering prison within three years of release.<sup>5</sup>



The informal and communal system outlined above existed in this country in the past, and two very different criminal justice movements would like to see its revival. The first is the Restorative Justice movement, which has spawned hundreds of victim and offender mediation programs around the world and draws its practices from the peacemaking circles of Native American tribes.<sup>6</sup> The second

movement is the culmination of the work of historians and legal scholars on the criminal justice system of American cities during the Gilded Age, a system marked by its local community control and low crime rate.<sup>7</sup> Even though these movements have developed separately, this Article argues that they share many principles and may be of great use to one another.

Since the mid-1970s, a majority of states in the U.S. and dozens of countries around the world have implemented Restorative Justice mechanisms to reduce rates of recidivism and revitalize communities plagued by crime.<sup>8</sup> Restorative Justice focuses on reintegrating the offender within the community by making him or her understand the harm caused by the offense and having him or her directly repair the damage to the victim.<sup>9</sup> The movement characterizes "crime" as, the violation of one person against another, rather than as an offense against the state.<sup>10</sup> Restorative Justice programs take many forms, such as, victim-offender mediation, family group counseling, peacemaking circles involving members of the community, and other methods by which the community, the offender, and the victim interact.<sup>11</sup> By gaining a renewed sense of their community and the impact of the offense, it is argued that individuals are far

less likely to reoffend and that victims' needs are met more fully than through the conventional criminal justice system.<sup>12</sup>

Most Restorative Justice practitioners and theorists draw the roots of their movement from the justice systems of native and aboriginal groups throughout the world and from historical accounts of the justice systems in the West before the eleventh century.<sup>13</sup> They argue that the psychological and communitarian principles behind Restorative Justice have been ignored in the West ever since the state takeover of the criminal justice system in the early feudal era.<sup>14</sup> Reviving this system, however, has presented many problems for Restorative Justice proponents, including trying to dispel fears that this system may not comport with individuals' constitutional protections.<sup>15</sup>

The second approach to criminal justice that this Article examines does not have an identifying name. Supporters of this approach include criminal justice historians, legal scholars, and political conservatives and liberals alike, who would like to see a return to the criminal justice mechanisms that existed in the urban centers of the U.S. during the late nineteenth and early twentieth centuries.<sup>16</sup> During this time, known as the Gilded Age, the cities of the Northeast and Midwest had, by our standards today, small inmate populations, low levels of crime, and—perhaps most surprisingly—less discriminatory treatment of suspect classes.<sup>17</sup>

To explain this viewpoint, this Article will draw particularly upon the work of William J. Stuntz, the former Henry J. Friendly professor of law at Harvard University, who argues in his book, *The Collapse of American Criminal Justice*, that the loss of local democratic control over criminal justice mechanisms, coupled with the criminal procedure innovations introduced by the Warren Court, led to the 'tough on crime' political backlash that has fueled the rise in incarceration.<sup>18</sup> During the Gilded Age, political power over judges, prosecutors, and police forces came from those very same communities who were most often faced with criminal punishment, as did the pool of jurors.<sup>19</sup> Furthermore, trial procedures were simple, and the legal definition of crimes made them open to the types of defenses and moral evaluations illustrated in the hypothetical at the beginning of this Article.<sup>20</sup> This, Stuntz and others argue, created a system that was at once lenient and effective.

Proponents of Restorative Justice and the proponents of a return to the Gilded Age system use different terminology, suggest different reforms, and draw their movements from different origins.<sup>21</sup> Yet this Article argues that these movements share key principles, and the forms of criminal justice they fight for bear strong resemblances to one another. These shared principles include communitarianism and flexibility in the administration of justice. Specifically, this Article argues that the Restorative Justice community does itself a disservice by describing itself as wholly foreign to the criminal justice system of the United States. The successful mechanisms used

by the justice system of urban centers in the Gilded Age, can provide new tools for the Restorative Justice movement and answer many of its critics.

Part II of this Article describes various aspects of the Restorative Justice movement: the criminological theory of reintegrative shaming on which many restorative programs are based; its procedures; and its effect on victims and communities. Part III illustrates the movement's origins and current controversies surrounding its implementation. Part IV describes: the criminal justice system that existed in the late nineteenth and early twentieth centuries in America, how it came to be, its chief characteristics—which allowed it to keep down both crime and prison populations, and how the United States transitioned from that system to our current system. Part V describes the shared principles of communitarianism and flexibility in the administration of criminal justice that unites both the Restorative Justice movement with justice from the Gilded Age, and how the justice system of the Gilded Age can inform Restorative Justice and respond to its critics.

## II. RESTORATIVE JUSTICE: PRINCIPLES, MECHANISMS, AND CLAIMS

### A. THE CONCEPT OF SHAME: ITS LIGHTER AND DARKER SIDES

There was a time in the West when public shaming was a prominent part of criminal punishment. Chain gangs, public floggings, and pillorying were once common forms of public humiliation for the convicted.<sup>22</sup> Generally, the "uncoupling of shame and punishment" was celebrated, but Restorative Justice theorists seek to reclaim the idea of shame and stress its importance as part of crime control.<sup>23</sup> Restorative Justice supporters distinguish, however, between destructive, stigmatizing shaming, and redemptive, reintegrating shaming.<sup>24</sup> The conventional criminal justice system, they argue, stigmatizes offenders, which prevents them from ever re-entering legitimate society, and pushes them into criminal subcultures.<sup>25</sup> Reintegrative shaming, as produced through Restorative Justice techniques, forces the offender to experience shame and remorse over their criminal act, but then allows them to re-enter legitimate society with their dignity restored.<sup>26</sup>

#### 1. *Stigma in the Conventional Criminal Justice System*

Proponents of Restorative Justice argue that the conventional criminal justice system focuses too much on assigning blame and inflicting punishment.<sup>27</sup> This has the effect of stigmatizing the offender in a way that prevents his reintegration with legitimate society, while at the same time insulating the

offender from the harm he caused to the victim and his own potential feelings of remorse.<sup>28</sup>

John Braithwaite, who first formulated the criminological theory of reintegrative shaming, describes the stigmatizing effect of prison as follows:

Prisons are schools for crime; offenders learn new skills for the illegitimate labor market in prison and become more deeply enmeshed in criminal subcultures. Prison can be an embittering experience that leaves offenders more angry at the world than when they went in. The interruption to a career in the legitimate labor market and the stigma of being an ex-con can reduce prospects of legitimate work on completion of the sentence.<sup>29</sup>

Once an ex-felon experiences this sort of rejection he or she may seek out criminal subcultures that “reject their rejectors.”<sup>30</sup> Criminal activity becomes an easier way for them to earn a living and criminal subcultures become the only communities from which they draw respect.<sup>31</sup>

In some communities, particularly those facing a disproportionate amount of criminal punishment, criminal subcultures are more pronounced and can be more attractive to some than law-abiding communities.<sup>32</sup> In an interview, Howard Zehr, another prominent Restorative Justice scholar, relates a conversation about shame and respect he had with a prisoner serving a life sentence without parole in a Pennsylvania prison:

I said, ‘When you were growing up in North Philly, what gave you shame and what gave you respect?’ And he said, ‘Well, what gave me respect is what you would think should give me shame.’ He said, ... ‘I remember my first arrest. I rode through my community in the back of that police car, and it was the proudest moment of my life. I had become a man.’<sup>33</sup>

This inversion of values and sources of esteem is the product of stigma and is encouraged by the procedures of the conventional criminal justice system.<sup>34</sup> Plea-bargaining and criminal trials, in the conventional system, are focused on assigning an individualistic version of blame.<sup>35</sup> The crimes are also presented in abstract and archaic ways, multiple charges

are the subject of bargaining and are exchanged for lesser or greater charges depending on the offender’s willingness to comply.<sup>36</sup> These procedures are at odds with how offenders view their actions (not as individual decisions, but as guided by their environment) and that disconnect allows them to adopt exculpatory psychological strategies to insulate themselves from the immense stigma the system is attempting to put on them.<sup>37</sup>

John Braithwaite summarizes the five major exculpatory strategies as follows: “denial of victim (‘We weren’t hurting anyone’); denial of injury (‘They can afford it’); condemnation of condemners (‘They’re crooks themselves’); denial of responsibility (‘I was drunk’); and appeal to higher authorities (‘I had to stick by my mates’).”<sup>38</sup> Because the system focuses on their guilt to such a large extent, and because the stigmatic costs are so high, offenders also focus on what they see as their persecution and on the mitigating factors of their crime.<sup>39</sup> What offenders do not focus on—and what is not encouraged by the conventional system—is accepting responsibility for their crimes, the effect of the crimes on their victims, and how the offender might make reparation and re-enter legitimate society. Reintegrative shaming, it is argued, brings these more helpful concerns to the fore.<sup>40</sup>

---

*The goal is then not to shame so permanently that offenders start drawing their conceptions of right and wrong from criminal subcultures, but to shame enough so that they are brought back into conformity with the legitimate society.*

---

## 2. Reintegrative Shaming

Shame, many proponents of Restorative Justice argue, is a necessary and good component of society and reflects our communal, rather than individual, nature.<sup>41</sup> Shame reminds us of the “deep mutual involvement we have with one another.”<sup>42</sup> These interdependencies do not limit our independence, but are in fact necessary for freedom.<sup>43</sup> John Braithwaite theorizes that we can shame without stigmatizing, and that shame is a necessary part of crime control.<sup>44</sup> This theory is based on the insight that the “individuals who resort to crime are those insulated from shame over their wrongdoing.”<sup>45</sup> The goal is then not to shame so permanently that offenders start drawing their conceptions of right and wrong from criminal subcultures, but to shame enough so that they are brought back into conformity with the legitimate society. For these reasons, reintegrative shaming has two chief characteristics that distinguish it from stigmatizing shaming: (1) finite, rather than indefinite, duration; and (2) efforts to maintain the bonds of respect throughout the process.<sup>46</sup>

The following section examines how this principle is implemented.

## **B. THE METHODS OF RESTORATIVE JUSTICE AND ITS OUTCOMES**

### *1. Encounters Between the Stakeholders*

Restorative Justice programs take many forms, including victim-offender mediation and reconciliation programs (VORPS), family group conferencing, peacemaking circles, and more.<sup>47</sup> What they all have in common is that they feature a facilitated conversation between the primary stakeholders in the conflict (the victim, the offender, and representatives of their community or communities) about the impact of the offense and what can be done to restore the parties to their previous positions.<sup>48</sup> In these encounters, the parties are encouraged to speak for themselves rather than through lawyers.<sup>49</sup>

The relevant community to be included varies depending on the nature of the offense.<sup>50</sup> The role of the community here is to express shame regarding the offender's actions, while at the same time displaying respect and openness to the offender as a person.<sup>51</sup> The community members also prevent the offender—due to their deep knowledge of him or her—from adopting the exculpatory psychological strategies that insulate one from feelings of remorse. Stated alternatively, they know the offender well enough to detect when he or she is making excuses or being dishonest.<sup>52</sup> For certain smaller offenses, only the families of the victims and offender may be necessary.<sup>53</sup> For crimes that affect larger sections of the population, the community members involved in the proceeding should be drawn from the neighborhood or several neighborhoods that were hurt by the offender's actions.<sup>54</sup>

The third party mediator is tasked with facilitating the conversation between the primary stakeholders to make sure that everyone's needs are met, and to prevent the conversation from taking harmful routes towards stigmatization on the part of the community or exculpatory strategies on the part of the offender.<sup>55</sup> The final plan for reparation developed by the assembled parties need not represent the optimal solution to the third party facilitator, but must only be mutually beneficial to the group developing it.<sup>56</sup> The reparation plans (or sentences) need not be based on precedent; rather, flexibility and “democratic creativity” is encouraged.<sup>57</sup> In fact, the reparation plans must be flexible to both reflect the harms done to the particular victim and the requisite steps for the particular offender to re-enter legitimate society.<sup>58</sup>

Restorative Justice programs distinguish themselves from conventional trials in a number of ways. The conventional trial is formal and meets in a courthouse, the language used during the process is technical, emotions are minimized, and victims and offenders certainly do not engage in direct communication.<sup>59</sup>

Conversely, Restorative Justice programs are informal (often meeting in community centers), use lay speak (describing the acts in terms that relate to the experience of the parties), center the process on the expression of emotion, and encourage direct verbal communication between the parties.<sup>60</sup>

### *2. Three Stages: Awareness, Shame and Censure, Redemption and Restoration*

The goal of Restorative Justice programs are to move the primary stakeholders through three phases: (1) awareness of harm; (2) shame and censure; and (3) restoration and redemption.<sup>61</sup>

First, the offender must become aware of the full impact of his crime on the victim and the community.<sup>62</sup> As mentioned earlier, the conventional criminal justice system allows the offender to adopt certain neutralizing, exculpatory techniques, but, in Restorative Justice conferences, the offender is confronted directly with the words of the victim and of the community.<sup>63</sup> The excuses that the offender might resort to in a conventional trial — that the victim deserved it, could afford it, and so on — are challenged.

Second, the community and victim are allowed to express anger and frustration at the actions of the offender.<sup>64</sup> However, the community must maintain that they are condemning the actions of the offender and not the offender himself.<sup>65</sup> The offender then has a chance to feel remorse and express disapproval of what he had done. This gives the offender the opportunity to separate what he sees as his true self from the crime he committed.

Third, the offender is encouraged to help devise and carry out a plan of reparation to restore the victim to his status before the crime.<sup>66</sup> Once this is agreed to, the victim and the community may offer to forgive the offender right then or after the reparation is complete.<sup>67</sup> At some point, the offender is officially welcomed back into the community in what is commonly known as a decertification ceremony.<sup>68</sup> This gesture completes the Restorative Justice program and announces the restoration of not just the victim's status but also the offender's status before the crime.

#### **i. Outcomes: Effect on Recidivism**

One of the major claims of the Restorative Justice movement is that these processes will lower the chance that the offenders will offend again. A recent meta-analysis of every major Restorative Justice program for juveniles, consisting of a sample size of over 11,000 offenders, found that the programs reduced the recidivism rate by twenty-four percent.<sup>69</sup> Furthermore, of those participants who did reoffend, the programs reduced both the frequency and seriousness of subsequent offenses.<sup>70</sup> Major studies have found recidivism rates reduced from anywhere between sixteen percent and thirty-three percent following completion of Restorative Justice programs.<sup>71</sup>



In fact, all studies that have examined participants' offense rates before and after restorative sessions found an overall reduction in criminal activity after these sessions.<sup>72</sup>

Multivariate analyses have pointed out certain key factors within Restorative Justice programs that correlate strongly with reduced reoffending.<sup>73</sup> These factors touch upon the offender's experience and include: having a memorable Restorative Justice conference, not feeling like an outsider, agreeing with the outcome and the methods, and meeting the victim and apologizing to him or her, or to the family of the victim.<sup>74</sup>

The dramatic effect that Restorative Justice has on recidivism is not merely due to the self-selection of the offenders who choose to participate. Studies have been performed wherein the offenders subjected to restorative programs have been selected randomly, and the recidivism rates have still decreased.<sup>75</sup> In a Canadian study, the town of Sparwood, British Columbia subjected all of its juvenile offenders to Restorative Justice programs as opposed to the traditional court system for three years and, by the second year of the experiment, the recidivism rate had plummeted by sixty-seven percent from the pre-experiment average.<sup>76</sup>

## C. OUTCOMES: EFFECT ON VICTIMS AND COMMUNITIES

### 1. *Victims*

Despite the subject of the above parts, Restorative Justice proponents are quick to point out that it focuses on the needs of the victims and communities far more than the conventional criminal justice system, which proponents accuse of being too offender-focused.<sup>77</sup> Indeed, unlike the conventional criminal justice system, Restorative Justice characterizes crimes as a violation of one person by another, rather than as an abstract offense against the state.<sup>78</sup> Victims are not given a special place in the conventional criminal trial, but are placed on the same level as any witness to the crime, where, despite the efforts of the victims' reform movement, many of their most crucial needs are not met.<sup>79</sup>

Howard Zehr posits that there are three phases in a victim's reaction to crime: impact, recoil, and — for those who go through something akin to Restorative Justice — recovery.<sup>80</sup> Impact is the initial feeling of trauma following the crime, and recoil consists of the shattering of the perception that the world is an orderly, meaningful place where our personal autonomy is respected.<sup>81</sup> Recovery can come through the voluntary compensation by the offender to the victim.<sup>82</sup> Compensation, symbolic or otherwise, that the offender makes to the victim through the Restorative Justice process conveys to the victim that the offender realizes what he did was wrong and it restores those lost conceptions of the recoil phase.<sup>83</sup> The Restorative Justice program makes victims feel empowered, allowing them to speak and assert their self-worth, providing security through

community involvement, and reassuring them that something is being done about the damage inflicted upon them.<sup>84</sup>

Some who defend the conventional criminal justice system say that by having the state punish the offender, the state is in essence showing solidarity with the victim and thus, responding to their needs.<sup>85</sup> Restorative Justice proponents respond by saying that the conventional system deprives victims of compensation because imprisoned offenders are often not able to get jobs and pay back their victim from judgments following civil suits, and many victims are too poor to litigate civil remedies.<sup>86</sup> Additionally, with high punitive sanctions, offenders will do much more to avoid punishment, shying away from acts of apology or reparation that they may have otherwise done.<sup>87</sup> In other words, the offender remains a combatant against the victim and, in so doing, further victimizes them.

### 2. *Communities*

Restorative Justice's effect on communities reflects its transformative potential. Nils Christie, a prominent Restorative Justice scholar, has suggested that Restorative Justice programs should not presuppose that conflicts ought to be solved.<sup>88</sup> Rather, conflicts are valuable commodities and it may be more important that communities come together and participate in the discussion of conflicts, perhaps even living with them, rather than assuming that one side must change.<sup>89</sup> Although most Restorative Justice practitioners and scholars do not go as far as Christie, nearly all see conflicts as opportunities for empowering the community and changing it for the better.<sup>90</sup>

This transformative aim comes from the recognition that many current communities do not have the strong set of interdependencies and communitarian relationships that make Restorative Justice effective.<sup>91</sup> In many instances, victims and offenders do not feel as though they belong to the same community at all. By using Restorative Justice mechanisms, however, those relationships might be created for the first time. Empowerment of the community, according to the work of Bush and Folger, comes about when the community members experience "a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face."<sup>92</sup> This goal is another reason why the third party facilitators must not project their views of what the best solution might be onto the parties, but rather let the parties come to their own solutions.

For many, the concept of community is defined by the ability of groups to handle conflicts. David Cayley summarizes Nil Christie's views on community as follows:

Community, he says, is made from conflict as much as from cooperation; the capacity to resolve conflict is what gives social relations their sinew. Professionalizing justice 'steals the conflicts', robbing the community of its ability face trouble and restore peace. Communities lose

the confidence, their capacity, and finally their inclination to preserve their own order. They become instead consumers of police and court ‘services,’ with the consequence that they largely cease to be communities.<sup>93</sup>

To Bush and Folger, and most Restorative Justice scholars, the effects of mediation reach far beyond the particular people involved. Rather, these programs reflect a choice between an individual worldview and what they term as a “relational worldview.”<sup>94</sup> In the individual worldview the focus is on meeting an individual’s wants and desires, but, in a relational one, the goal is transformation that integrates the individual’s strength with compassion toward others.<sup>95</sup>

Unfortunately, getting grassroots community involvement has posed a challenge for Restorative Justice practitioners. Aside from the aboriginal and tribal councils that began the modern Restorative Justice movement, getting communities from large urban centers involved has been quite difficult.<sup>96</sup> Some, like Tony Marshall, have suggested that these communities lack the considerable infrastructure, time, money, and sense of community to effectively run involved victim-offender mediations.<sup>97</sup> These theorists suggest that smaller, simpler programs be introduced at first to build up communitarian feeling before larger programs can take hold.<sup>98</sup> Although these and other difficulties are addressed more thoroughly in Part III(B), on current controversies and challenges to the movement, it is important to note here that many scholars attribute these difficulties to the conventional criminal justice system’s effect on modern communities, and the vastly different origins of the Restorative Justice movement.<sup>99</sup>

### III. RESTORATIVE JUSTICE: ORIGINS AND CONTROVERSIES

#### A. ORIGINS

Most Restorative Justice scholars claim Restorative Justice practices reflect the justice systems in the pre-modern West and in the justice systems of native and aboriginal groups throughout the world.<sup>100</sup> Western countries, including Great Britain, abandoned this system of justice in the eleventh century when state powers started to monopolize the administration of criminal justice and the use of force.<sup>101</sup> By the mid-nineteenth century, European colonial powers had made their system of criminal justice ubiquitous throughout the world, replacing their conquered territories’ restorative systems with their preferred method of criminal justice.<sup>102</sup> Many of the indigenous groups in these areas, however, held onto these restorative systems and practiced them without official state sanction. Starting in the mid-1960s these groups started to reassert the legitimacy

of their systems.<sup>103</sup> The Maori people of New Zealand and native Canadian tribes first gained national statutory support for peacemaking circles in their countries in the mid-1980s.<sup>104</sup> Since then, these systems have expanded to non-native groups and have gained acceptance throughout Europe, Southeast Asia, and in the statutory schemes of thirty U.S. states.<sup>105</sup>

The Restorative Justice proponents’ history of criminal justice represents a marked difference from the traditional, linear story of the advancement and humanitarian evolution of criminal justice.<sup>106</sup> The conventional image of “penal progress,” as described by Gerry Johnstone, starts with the assumption that pre-modern societies were lawless.<sup>107</sup> “Justice” largely consisted of one party getting vengeance upon the other and this commonly led to unending vendettas between families or clans.<sup>108</sup> Slowly this system was replaced with another based on money and trade where the offender could buy off vengeance against him.<sup>109</sup> The offender would pay *bot*, or betterment, to his victim and *wite*, a fine of sorts, to the king or local feudal lord.<sup>110</sup> As the central state power grew, fines were systemized and expanded. The central power took to demanding fines of those who committed negligent or accidental wrongs and physically punishing those who committed intentional or malicious wrongs.<sup>111</sup>

Restorative Justice scholars, however, suggest that systems of reparation and the use of conferences were in place long before the government-imposed system of fines came about.<sup>112</sup> Vendettas and revenge were the exceptions to the rule and only happened where restorative processes were weak.<sup>113</sup> For modern day examples, Restorative Justice scholars point to practices from societies that never developed in the Western system, such as Navajo peacemaking circles and the Wagga model based on the system of the Maori.<sup>114</sup> These societies define crime in the same way as Restorative Justice practitioners, as a violation of one person by another.<sup>115</sup> The Navajo process consists of members of the community, the victim, and the offender all coming together to have a conversation about the act, facilitated by a respected member of the community.<sup>116</sup> The offender is encouraged to arrive at a reparation plan voluntarily.<sup>117</sup>

Restorative Justice proponents claim that the ubiquity of the conventional system may have blinded us to better systems, and also to what was lost when we transitioned from restorative societies to our current society.<sup>118</sup> Specifically, proponents suggest that with state takeover of the criminal process, victims became neglected, shaming went from reintegrative to stigmatizing, and the process became far more costly.<sup>119</sup>

Many Restorative Justice scholars do not accept the pre-modern and indigenous origin story. Kathleen Daly, for one, dismisses it as a creation myth that is destructive in that it romanticizes and, in a way recolonizes, the past and indigenous groups throughout the world.<sup>120</sup> Others, like Gerry Johnstone, question the utility of the connection, wondering if

these pre-modern systems could or should be revived within the context of modern communities and criminal law.<sup>121</sup>

## B. CONTROVERSIES

### 1. *Are Modern Communities Capable of Restorative Justice?*

It is generally acknowledged that we have moved from societies of communal relations to ones of non-communal relations due to industrialization, urbanization, and the rise of technology.<sup>122</sup> Modern citizens have less interaction with and less knowledge of their direct neighbors.<sup>123</sup> Can such weakened modern communities shame offenders and bring them back into the fold? John Braithwaite, the founder of the reintegrative shaming framework, says this is possible if we change what we consider a community.<sup>124</sup> Instead of geographic units, modern communities are collections of people with shared interests. Braithwaite describes this as follows:

The contemporary city-dweller may have a set of colleagues at work, in her trade union, among members of his golf club, among drinking associates whom he meets at the same pub, among members of a professional association, the parents and citizens' committee for her daughter's school, not to mention a geographically, extended family, where many of these significant others can mobilize potent disapproval. There are actually more interdependencies in the nineteenth- and twentieth-century city; it is just that they are not geographically segregated within a community.<sup>125</sup>

Johnstone points out that these communities are not necessarily strong enough to exert the kind of influence necessary for Restorative Justice, causing individuals to withdraw from these communities at will without suffering any shame or harm.<sup>126</sup> Furthermore, extending the definition of communities broadly, risks including the criminal subcultures that would not shame an individual for engaging in criminal activity. Braithwaite responds to these criticisms by claiming that for nearly all individuals there are some people in their lives

that would be capable of exercising enough control over them to carry out Restorative Justice processes.<sup>127</sup>

### 2. *Is Shaming Oppressive? Is it in Accordance with Human Rights?*

Some commentators have expressed concern over encouraging communities to become so deeply involved with the criminal justice system by shaming those who violate the community's rules.<sup>128</sup> James Whitman, for one, fears that stirring up community indignation will result in communities acting irrationally and oppressively enforcing their own mores.<sup>129</sup> David Cayley fears that the effect may be to weaken already weak parties in the communities.<sup>130</sup> He notes that communities are not often egalitarian or homogenous; there are some in the community who carry more or less power, and maintain more or less socially desirable positions within the community.<sup>131</sup> Depending on an offender's place in the social hierarchy, they may receive more or less leniency at the hands of a Restorative Justice conference, while the victims of these offenders may receive more or less justice depending on the offenders place in the community.<sup>132</sup>

Johnstone noticed the manifestation of some of these issues in his study of victim offender mediations.<sup>133</sup> When this occurs, the conferences unravel, resulting in degradation ceremonies rather than Restorative Justice.<sup>134</sup> This fear is magnified when one considers that procedural protections for the offender are far more relaxed in these programs as compared with a conventional criminal trial.<sup>135</sup>

Restorative Justice proponents defend the relaxed procedural protections and heightened community involvement by pointing

to the underlying principles and how they differ from the principles underlying the conventional criminal justice system. They argue that as restoration and reparation, not punishment, are the results of these processes, procedural and constitutional protections are less necessary.<sup>136</sup> Communities that actually know and care about the reintegration of the offender and justice for the victim are far less likely to be volatile or capricious than the highly punitive conventional criminal justice system.<sup>137</sup> Again, this debate continues.

---

***[M]ost Restorative Justice theorists believe that there must be balance between the “democratic creativity” of Restorative Justice mechanisms and oversight by the state, in order to protect minority groups and human rights, but where that balance is to be struck is still a matter of great debate.***

---



### 3. Does Community Control Undermine the Rule Of Law?

What if an offender is charged by the state for violating a law that the community disagrees with? Under a pure Restorative Justice system, where the community, offender, and victim arrive at a reparation plan together, they may elect not to punish the offender at all.<sup>138</sup> Would this not undermine the rule of law? Could Restorative Justice deal with ‘victimless’ crimes? John Braithwaite embraces this uncertainty by saying that Restorative Justice might serve as a good measurement of what should and should not be criminalized.<sup>139</sup> He feels that there will always be consensus regarding the criminality of certain acts, such as assault, murder, rape, robbery, etc., so there is little risk of Restorative Justice leading to a dangerous level of lawlessness; and, for other acts, for which there is no consensus regarding their reprehensibility, communities should feel free to disregard them.<sup>140</sup> Johnstone finds this “seriously misguided,” as many laws that may be unpopular are necessary for the protection of minority groups.<sup>141</sup>

Again, most Restorative Justice theorists believe that there must be balance between the “democratic creativity” of Restorative Justice mechanisms and oversight by the state, in order to protect minority groups and human rights,<sup>142</sup> but where that balance is to be struck is still a matter of great debate.

These controversies center on fears of the unintended consequences that broad implementation of restorative justice mechanisms might have within the framework of modern states.<sup>143</sup> However, we find that these principles have been tested, and to good result, in the U.S. criminal justice system just a century ago.<sup>144</sup>

## IV. RESTORATIVE JUSTICE IN THE GILDED AGE

Between the mid-nineteenth century and the start of World War I, thirty million Europeans made their way to the U.S. and settled mostly in the Northern cities and in the industrial belt.<sup>145</sup> Following their arrival, there was an uptick in the crime rate that quickly subsided along with inmate populations.<sup>146</sup> In the first two thirds of the twentieth century, seven million African Americans made their way from the South to the cities of the Northeast and Midwest, again there was an uptick in the crime and incarceration rates, but this one was far more long lasting and far more severe.<sup>147</sup>

At first glance, the difference in impact makes little sense, as the reaction to both migrations was initially similar. Both migrations caused political backlashes by those already in the cities, centering on fear that the arriving populations would cause increases in vice and crime.<sup>148</sup> In response to the first migration of European immigrants, there was a generation of

legislation dedicated to fighting vices, which resulted in the 18th Amendment among many other pieces of legislation.<sup>149</sup> However, within a couple generations, at the height of “Morals Legislation,” the children of these immigrants were able to gain political offices and power at every level of government, from local police chiefs and mayors, to state governors and senators, and even presidents of the United States.<sup>150</sup> The internal migration of African Americans caused a similar backlash. Notably, in 1986, Congress passed a law, which punished the possession of one gram of crack cocaine the same as the possession of one-hundred grams of powder cocaine.<sup>151</sup> African Americans were also able to expand their political influence, though less comprehensively than the immigrant communities of the nineteenth century.<sup>152</sup>

What caused the difference then? Why did the first migration result in only a modest increase in crime and incarceration, while the second one resulted in dramatic increases in both? William J. Stuntz, in his study of these two migrations and how the U.S. criminal justice system has changed over time, argues that, although these two groups moved into the same cities and amidst the same fears, they were migrating into vastly different criminal justice systems.<sup>153</sup> This Article argues that the more effective criminal justice system of the Gilded Age, to which the European immigrant population was delivered, was far more in line with Restorative Justice principles.

This Article will now turn to an examination of the Gilded Age system in more detail, its crime and incarceration rates, origins, chief characteristics, and how the U.S. has transitioned from that system to its current system.

### A. CRIMINAL JUSTICE IN THE GILDED AGE

#### 1. Crime and Incarceration Rates were Low and Stable

Crimes rates in the Northern and Midwestern cities during the Gilded Age were lower and more stable than today.<sup>154</sup> For example, between 1875 and 1925, the homicide rate in New York City hovered steadily between a low of two per every 100,000 residents to a high of six per every 100,000 residents.<sup>155</sup> Whereas in the period 1950-2000, the lowest rate was four per every 100,000 residents—occurring in the early 1950s—and the highest was thirty-one per every 100,000 residents.<sup>156</sup> Other major industrializing cities of the North and Midwest show a similar pattern of low and stable rates of homicide during the Gilded Age, and then rapidly rising levels of violent crime in the second half of the twentieth century until the 1990s.<sup>157</sup> These fluctuations in the homicide rate are representative of the fluctuations in the rate of crime as a whole.<sup>158</sup>

The imprisonment rate was similarly stable and low during the Gilded Age.<sup>159</sup> The imprisonment rate in New York City decreased rather steadily from 1890 to 1925, from 138 to just

over 50 per every 100,000 residents.<sup>160</sup> Between 1950 and 2000, however, the imprisonment rate dipped from one-hundred in 1950 to just over fifty in 1972, and then rocketed upwards to four-hundred per every 100,000 residents, its all-time high, in 1998.<sup>161</sup> Again, other major urban centers showed similar trends.<sup>162</sup> It is important to note that as the crime rate decreased during the Gilded Age, the incarceration rate also decreased.<sup>163</sup> However, this Article will demonstrate that in the second half of the twentieth century the incarceration rate's increases and decreases seemed to be unaffected by, and unaffected of, fluctuations in the crime rate.<sup>164</sup>

## 2. *Treatment of Suspect Classes*

Members of suspect classes received fairer treatment under the criminal justice system of the Gilded Age in the North than one might expect. This is not to say that discrimination was not rampant at the time; harmful discrimination on the basis of sex, race, and national origin was not only pervasive, but also legally sanctioned in ways that are unthinkable now. Yet, within the criminal justice system, there was a surprising amount of lenity toward these classes.

For example, take the case of women who murder their abusive husbands or boyfriends. Many times these killings occur, not in the midst of an attack by the abusive partner, but following a plan laid out by the abused partner. In recent decades, evidence of “battered woman’s syndrome” offers a small chance of outright acquittal for defendants and represents a hard won transformation of the self-defense rule in support of abuse victims.<sup>165</sup>

One might expect that the chances for women on trial would have been far worse a century ago, but, in fact, they were far more successful in receiving acquittals for these acts than their counterparts are today. As Stuntz puts it:

[i]n the Gilded Age, more than 80 percent of Chicago women who killed their husbands escaped punishment—among white women, the figure topped 90 percent—thanks to what contemporaries called ‘the new unwritten law’ granting women broad rights of self-defense, even when no history of domestic violence was proved.<sup>166</sup>

This trend existed, not just in Chicago, but in all the major, industrializing cities of the time.<sup>167</sup>

African Americans also received fairer treatment than might be expected. Studies of nineteenth century Philadelphia and Chicago have shown that black men fared equally well as white men when accused of murder.<sup>168</sup> In either case, even where discrimination and disparate impacts were clearly measurable, there was nothing like the massive racial imbalance that exists in the prison population today. Historians, such as Lane and Adler suggest that African American defendants fared

better proportionately than their counterparts today because all defendants, regardless of race or national origins, fared better than defendants today.<sup>169</sup> “A mere twenty-two percent of turn-of-the-century Chicago homicides led to criminal convictions; Chicago juries were quick to acquit in cases in which the killing seemed plausibly excusable.”<sup>170</sup> Adler in particular notes that generic self-defense arguments nearly always persuaded jurors of the era.<sup>171</sup>

We now turn to how this system came about and its chief characteristics.

## 3. *Origins*

At the time of the founding of the U.S., crime victims brought charges directly against the alleged criminal, and the victims, not public prosecutors, decided which crimes merited prosecution and which did not.<sup>172</sup> In that way, criminal law functioned far more like civil law functions today. Most urban centers did not have professional police forces, but rather groups of ordinary citizens taking part as night watchmen.<sup>173</sup> Prosecutors received piecemeal pay and would simply have to “ratify the choices of constables or crime victims.”<sup>174</sup> Substantive criminal law was the product of judge-made decisions rather than of legislatures; due to this fact, it reflected more nearly the conflicts of individuals against other individuals as found in the Common Law and in Blackstone’s Commentaries, rather than the public policy decisions of legislatures.<sup>175</sup>

In the years leading up to the Civil War, in response to the arriving immigrant populations, many institutional reforms took place. Prosecutors became publicly elected officials, salaries replaced piecemeal pay, and the new politicization rewarded those prosecutors who punished crimes the public most wanted them to punish.<sup>176</sup> Professional police forces replaced the groups of watchmen.<sup>177</sup> What was once a system overseen by weak state officials became larger, more democratic, and more controlled by urban political machines.

The goal of the institutional reforms may have been to protect the native-born population from young immigrant men, but the long-term effect was to empower those men. As Stuntz puts it, “[b]y the [nineteenth] century’s end, most of the cities of the Northeast and Midwest were ruled by immigrants and their children.”<sup>178</sup> “They dominated local police forces—Irish cops decided which Irish criminals to arrest.”<sup>179</sup>

## 4. *Key Traits: Common, Less Procedural Trials; Robust Criminal Intent Requirements; and Local Control*

By the late nineteenth century the institutional reforms in the Northern cities developed three basic characteristics that differentiate it from criminal justice today: (1) trials focused less on procedure and were more common; (2) substantive criminal law, particularly that of criminal intent, was more vague and more open to defense arguments; and (3) there was

local control, meaning the communities where law enforcement was most active were the ones that had the greatest amount of political power over the system.<sup>180</sup>

First, trials were far more common. Today ninety-five percent of felony convictions are obtained by guilty plea.<sup>181</sup> Jury acquittals are rare; trials as a whole are rare. At the turn of the last century, however, sixty percent of felony charges ended in conviction and far fewer defendants plead guilty.<sup>182</sup> Stuntz argues that this difference was due in large part to the lack of procedural rules and protections that applied during the Gilded Age.<sup>183</sup> Scrutinizing criminal procedures, police practices, and trial procedure requires lengthy trials, extensive motion practice, and expensive trial lawyers, all of which make trials less common. These ideas are explored more thoroughly in the next section. The important matter here is that the Gilded Age system was markedly different from our own.

Again, Stuntz puts it best:

Trials and acquittals alike were far more common than today . . . Because acquittals happened frequently, they were also less newsworthy than today. So, in the Gilded Age Northeast, prosecutors paid a smaller political price for acquittals and were less eager to avoid them today. Note the logic: less elaborate trial procedures helped defendants—not the government—by making both trials and acquittals ordinary events. Prosecutors do not invest heavily in avoiding outcomes that seemed ordinary.<sup>184</sup>

Second, criminal intent had a much larger role to play. Jurors in the Gilded Age were not limited to determining the weight to be given various pieces of evidence—they were not merely the “lie detectors” that they have since become.<sup>185</sup> Rather, when deciding upon the existence of scienter, criminal intent, they were often judging whether the defendant deserved punishment.<sup>186</sup> The concept of scienter, the “vicious will” that must accompany all crimes, was far more vague then.<sup>187</sup> This opened up trials to many types of defense arguments regarding the circumstances of the defendant’s life, his character, etc.—arguments that are only rarely or indirectly approachable today.<sup>188</sup>

How and why the scienter requirement has been minimized is explored in greater depth in the next part of this Article.

Third, the communities of working-immigrants, the ones most affected by the administration of criminal justice, were the ones that had the most power over it. Prosecutors and judges in the U.S. today are most commonly elected at the county level.<sup>189</sup> A century ago, local municipal governments were far more active than the state and federal governments and, in metropolitan counties, communities of immigrants and the poor had immense political clout due to their large populations.<sup>190</sup> Powerful urban political machines developed to elect judges, prosecutors, and

councilmen—these machines thrived on votes from these communities and answered to them. Jury pools also consisted of people from these communities.<sup>191</sup> Again, this all changed in the late twentieth century, when the suburban populations within these counties bloomed and assumed political power over the system and representation in the jury pool.<sup>192</sup>

As an aside, The Gilded Age system of the Northeastern and Midwestern cities is the focus of this movement because the Southern criminal justice system was quite distinct from it. Throughout the South, during this time, imprisonment rates and incarceration rates were much higher than in the North.<sup>193</sup> One key feature that was missing from the Southern criminal justice was local control. African Americans and poorer Southern whites were the victims of massive disenfranchisement schemes common during the post-Reconstruction era; these schemes left these groups with little control over the criminal justice system, though they were its chief targets.<sup>194</sup>

We now turn to how this system of justice changed and became the criminal justice system we have in the U.S. today.

---

*The concept of scienter, the “vicious will” that must accompany all crimes, was far more vague then. This opened up trials to many types of defense arguments regarding the circumstances of the defendant’s life, his character, etc.—arguments that are only rarely or indirectly approachable today.*

---

## **B. THE DEMISE OF THE GILDED AGE SYSTEM AND THE RISE OF MASS INCARCERATION**

Following World War II, the U.S. saw an increase in crime spanning two generations.<sup>195</sup> Starting in the mid-1950s and continuing into the early 1970s, the nationwide homicide rate doubled, while the homicide rates of larger cities multiplied

even more dramatically.<sup>196</sup> Detroit's rate multiplied by eight, New York's by six, and most other cities had their rates either triple or quadruple.<sup>197</sup> Although the nationwide crime rate stabilized at a new higher rate in the 1970s, the crime rate in larger cities still continued to climb until the modest crime drop that began in the 1990s.<sup>198</sup>

The crime rate may have progressed in one direction, but the reaction to crime did not. At first, between the years 1950 and 1972, the rise in crime was met with increased leniency: "Chicago's murder rate tripled between 1950 and 1972, while Illinois's imprisonment rate fell [forty-four] percent. In New York City, murder more than quintupled in those twenty-two years; the state's imprisonment rate fell by more the one-third. Detroit saw murders multiply seven times; imprisonment in Michigan declined by thirty percent."<sup>199</sup> That seemingly inexplicable leniency was then replaced by a massive increase in punishment. In the 1960s, the number of prison-years per murder fell by half and then, between 1970 and 2000, increased ninefold.<sup>200</sup> During this time, the incarceration rate went from one the lowest in the world to the absolute highest.<sup>201</sup> The increase in punishment for the African American community was even more dramatic.<sup>202</sup> Many attribute the increase in the inmate population to mandatory-minimum sentences, three-strikes laws, and the war on drugs, but even if one removes all the drug convictions from the data, the inmate population would still have quadrupled.<sup>203</sup> The bulk of the increase simply has to do with the fact that the government is arresting and imprisoning more people than before.

Why was the crime wave faced first with leniency, and then unprecedented outrage? The answer involves three major changes to the criminal justice system that had taken place: (1) political control shifted from the communities that were most affected by crime to those that were not; (2) the Warren Court's emphasis on protections for criminal defendants caused a "tough on crime" political backlash; and (3) substantive criminal law became less open to defenses and more the subject of official discretion.<sup>204</sup>

### *1. Loss of Local Control*

In the years following World War II, prosecutors and trial judges were still elected at the county level, but the majority of votes coming from within those counties moved from the cities to the suburbs.

In the 1940, Chicagoans were 70 percent of the population of the Chicago metropolitan area; by 1960 their share had fallen to 57 percent, by 1980 to 42 percent. During the same years, Cleveland's percentage of its metropolitan area fell from 69 to 49, then to 30. Detroit's fell from 68 to 44, then to 28.<sup>205</sup>

Suburban voters, for whom crime was not a pressing concern, outnumbered city voters. Even within the cities, crime was concentrated to particular neighborhoods, and those in more affluent and safer neighborhoods outnumbered those in the crime-ridden ones. Prosecutors and Judges, likewise, now rely on these suburban voters for their jobs. While law enforcement focuses its efforts on poorer neighborhoods, it is accountable to the desires of suburban voters who are distant from the effects of crime and criminal justice.

This distance explains both the excessive lenience during the first part of the late-twentieth century crime wave, and the incredible punitive turn in the second part. When the crime wave first began, suburban voters were insulated from it and did not notice or feel the need to respond; further spending on criminal justice, to them, may have felt like a waste. By the late 1960s, however, riots in big cities and the Warren Court's new protections for criminal defendants were highly politicized; politicians stirred up the indignation of these voting blocs to support "tough on crime" initiatives.<sup>206</sup> The voters obliged and were distanced from the costs of doing so. Stuntz describes the phenomenon as follows:

With respect to crime and criminal punishment, residents of *all* neighborhoods, safe and dangerous alike, have two warring incentives. On the one hand, they want safe streets on which to go about their business; they want to travel to parks and schools and stores without fearing for their lives and property. On the other hand, they are loath to incarcerate their sons and brothers, neighbors and friends. . . . Local political control over criminal justice harnesses both forces without giving precedence to either.<sup>207</sup>

With the loss of local political control, we also lost stability in our response to crime.<sup>208</sup> The specifics of the backlash to the Warren Court and the features of tough on crime legislation deepened the mass incarceration problem.

### *2. The Warren Court and Backlash*

The Warren Court introduced a number of innovations to the area of criminal procedure. The Court expanded warrant requirements and rights to counsel; it gave criminal defendants protections against police questioning in *Miranda*;<sup>209</sup> and it applied the exclusionary rule against the states in *Mapp*.<sup>210</sup> Though the motivation behind these rulings was undoubtedly to make the administration of criminal justice more fair and less discriminatory, the effect may have been the opposite. Some argue that these rules have made it more difficult to differentiate between the innocent and guilty, and may have, on balance, wound up benefiting the guilty more.<sup>211</sup> Sophisticated defendants, chronic recidivists and the wealthy, could navigate their new rights more deftly than the innocent or the poor.<sup>212</sup> On the



other hand, others argue that by focusing on criminal procedure, rather than the substance of criminal law, the protections of the Warren Court were more easily subverted by later Court rulings and legislatures who could broaden waiver rules and redefine crimes to escape the new procedural scrutiny; thereby, endangering the innocent.<sup>213</sup>

Although there are many differing viewpoints regarding how correctly these cases were decided, it is generally agreed that the timing of the Warren Court's decisions worked against its aims.<sup>214</sup> The Warren Court introduced all these protections for criminal defendants at a time when the crime rate was skyrocketing, fueling the rage of politicians and the public and resulting in the "tough on crime" movement and mass incarceration.<sup>215</sup> Crime and anti-Warren Court rhetoric was prominently featured in campaigns for President and in the campaigns for state governorships.<sup>216</sup> Though Republican governors and legislatures led the way, the officials from *all* states wanted to appear as punitive as possible.<sup>217</sup> And, because the votes they were vying for were the votes of suburban voters crying for more punishment, there was no incentive for officials to argue for leniency. "They were the votes of those for whom crime was at once frightening and distant, those who read about open-air drug markets and the latest gang shootings in the morning paper. Neighborhood democracy faded, and was replaced by a democracy of angry neighbors."<sup>218</sup>

Stuntz provides an account of the 1986 legislation that set the sentencing ratio between crack and powder cocaine, which serves as a good illustration of the "tough on crime" movement:

"In congressional debates preceding the passage of the bill, one member proposed a weight/sentencing ratio of twenty to one; another suggested fifty to one.<sup>219</sup> One hundred to one, the ratio finally enacted, was the highest anyone proposed. Crack-powder legislation was the product of an auction, not a political compromise."<sup>220</sup>

Without the balanced impulses of locally controlled criminal justice, legislators, courts, and prosecutors were unchecked in their drive to punish. The new punitive movement did not just increase criminal punishment, but changed the nature of criminal laws.<sup>221</sup>

### *3. Substantive Criminal Law Becomes More Indirect and Less Focused on Intent*

In order to dodge the procedural rules put in place by the Warren Court, state legislatures redefined crimes, specifically minimizing criminal intent.<sup>222</sup> Drug charges as a whole are often used as indirect ways of punishing others for more violent offenses that are harder to prove.<sup>223</sup> Urban gangs are adept at intimidating witnesses, which limits prosecutors' ability to convict members of violent crimes, resulting in prosecutors charging gang members with easier-to-prove drug offenses that

carry hefty penalties.<sup>224</sup> "Charge stacking" is another tool for the prosecutor, whereby they charge an offender with multiple offenses based on the same conduct, and engage in bargaining with the offender to reduce the amount of charges, in exchange for a plea.<sup>225</sup> In addition, legislatures have obliged prosecutors by developing many related series of crimes that survive the double jeopardy rule.<sup>226</sup>

At the same time, trial judges and juries have lost much discretion over sentencing due to mandatory minimum laws, repeat offender laws, and sentencing guidelines.<sup>227</sup> These rules have not limited prosecutors; in fact, they have contributed to the power the prosecutor has during plea-bargaining.<sup>228</sup> Appellate judges, legislators, and prosecutors matter more in the current system, and the moral evaluations of trial judges and juries matter less.<sup>229</sup>

By the time the modest crime drop of the 1990s began and crime slowly went off national political radar, the criminal justice system had been massively transformed from the one we had in the Gilded Age.

During the Gilded Age, the working class immigrants had a great amount of control over the system through three mechanisms: (1) powerful urban political machines, run on immigrant votes, which elected the prosecutors, judges, and city council members; (2) jury pools that drew from the very same working class neighborhoods where crimes occurred; and (3) the "scienter" element required for all crimes which allowed juries and lawyers to take into account a wide variety of moral and legal arguments.<sup>230</sup> By the time the Great Migration of African Americans came about, none of these three mechanisms was available. No wonder the two migrations resulted in vastly different treatment of the immigrants.

## V. THE SHARED VALUES BETWEEN THE TWO MOVEMENTS

The two approaches to criminal justice laid out in this article, the Restorative Justice movement and the Gilded Age system, pose comprehensive challenges to our current criminal justice system. Though they developed separately, their criticisms of the current system and visions for better criminal justice systems are manifested by their shared values of communitarianism and flexibility in the administration of justice. Although Restorative Justice proponents have often presented their movement as a wholly separate from the criminal justice systems that have existed for nearly a millennium in Western states, aspects of Restorative Justice principles are evident in the modern American system.

## A. COMMUNITARIANISM

John Braithwaite posits that, in order for reintegrative shaming—the goal of Restorative Justice programs—to work, communitarianism must exist or be supported by the justice system.<sup>231</sup> A communitarian society acknowledges the interdependencies that exist between people in a community, fostering mutual respect and trust, and encouraging people to take responsibility for one another.<sup>232</sup> These societies, so central to the Restorative Justice vision, were exemplified by the urban centers in the Gilded Age.<sup>233</sup> Stuntz describes the Gilded Age system as follows:

Cops, crime victims, criminals, and jurors who judged them—these were not wholly distinct communities; they overlapped, and the overlaps could be large. Rage at the depredations of criminals was tempered by empathy for defendants charged with crime: one hesitates before sending neighbors' sons to the state penitentiary. In such a system, those tempted to commit serious crimes could be reasonably confident that they would get a fair shake—which probably made the temptation less powerful. To use more contemporary terminology, the justice system of the Gilded Age relied heavily on soft power and social capital to deter crime.<sup>234</sup>

This is precisely the society advocated for by many Restorative Justice proponents. The disappearance of this balanced, communitarian society in the mid-twentieth century resulted in the excess of punishment we have today.

## B. FLEXIBILITY IN THE ADMINISTRATION OF JUSTICE

The Restorative Justice movement places great value on flexibility in the administration of justice. The needs of the particular victim and offender are at the center of any Restorative Justice program; plans for reparation are unique to the situation and to the specific culpability of each offender.<sup>235</sup> Furthermore, the proceedings are informal, direct verbal communication is encouraged, and the offense is framed in ways that relate to the experiences of those involved.<sup>236</sup>

Again, the Gilded Age system was remarkably in line with these traits. As opposed to the modern day system, trials were common and they focused far less on procedure.<sup>237</sup> Criminal intent was open to a wider variety of defenses.<sup>238</sup> Substantive criminal law was still the province of judge-made decisions and the common law, based on the conflicts between individuals rather than reflections of a legislature's policies.<sup>239</sup>

## C. GILDED AGE SUCCESS AS A RESPONSE TO RESTORATIVE JUSTICE CRITICS

The major criticisms of Restorative Justice have centered on fears that large scale implementation of these programs

might be excessively oppressive or lenient. On the one hand, community control may devolve into mob justice, and hounding of minority groups within those communities. On the other hand, communities may not enforce the laws, letting favored or powerful members of their communities go free when prosecution is appropriate.<sup>240</sup>

When we look to the Gilded Age system, however, these fears appear to be unfounded. The hallmarks of the system were its stability in rates of punishment, and its surprisingly fair treatment of suspect classes.<sup>241</sup> It is the more systemized, uniform system we have today that has produced excesses in leniency and punishment, and disproportionate punishment of minority groups.

Critics also question whether community control is even possible.<sup>242</sup> This criticism stems from Restorative Justice proponents' own insistence that their mechanisms are drawn directly from indigenous and pre-modern origins and are wholly separate from the systems that have existed in the West for nearly a millennium.<sup>243</sup> Critics have questioned whether these systems can be revived in societies where communal relations are not as strong as those in tribes or small villages.<sup>244</sup>

Again, the Gilded Age system offers a response, albeit a measured one, to these criticisms. Although the urban neighborhoods of the industrializing and increasingly heterogeneous Gilded Age may have been marginally more tightly knit than neighborhoods today, they were far more like our society than the societies several centuries earlier before the state takeover of the criminal justice system.<sup>245</sup> Juries drawn from these communities, along with judges and prosecutors, were able to exercise the control necessary to keep both incarceration and crime rates low.<sup>246</sup> Furthermore, major studies of U.S. communities that are plagued by both crime and incarceration, have found that shame imposed by their communities has a profound impression on members who have been convicted of offenses. Moreover, the stigmatizing nature of the shame created by the conventional criminal justice system prevents offenders from ever truly re-entering society.<sup>247</sup> Consequently, it appears that our society would prefer a system more in line with Restorative Principles, and would also be able to implement it.

## VI. CONCLUSION

In many ways the new Restorative Justice movement can be seen as responding to certain needs that have gone unfulfilled since the Gilded Age. Though the two systems have several differences, the Gilded Age system tested the most controversial aspects of Restorative Justice—community control and relatively lax procedural protections—and achieved good results. Restorative Justice theorists have often debated what relationship their programs should have with the criminal justice as administered by the states; whether they should position their

movement to complement that system or to outright replace it.<sup>248</sup> By examining the Gilded Age system, however, one can see how certain changes to the conventional criminal justice system might bring it more in line with Restorative Justice. These changes may include smaller geographic bases from which to elect prosecutors and judges and draw jurors; and legislation that bolsters criminal intent requirements, letting jurors' and judges' moral evaluations play a greater role in determining guilt or innocence. The connections between these movements, their mechanisms and principles, should prove useful for proponents of both approaches in seeking reforms.

<sup>1</sup> See Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 871-72 (1976) (discussing how juries must be drawn from a "representative cross section" of a community).

<sup>2</sup> See *infra*, Part IV(B).

<sup>3</sup> THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 3* (2008), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/one\\_in\\_100.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf). [hereinafter *One in 100*].

<sup>4</sup> *Id.* at 6.

<sup>5</sup> See *id.* at 4 (returning to prison for new crimes or for violating terms of prior release); see also *Recidivism*, BUREAU OF JUSTICE STATISTICS, (Nov. 6, 2012), <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (recounting the results from a 1994 recidivism study, finding that out of 272,111 persons released from prisons in fifteen states, about 67.5% of offenders were rearrested, 46.9% were reconvicted, and 25.4% resentedenced to prison for a new crime).

<sup>6</sup> See Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 515 (stating that restorative justice principles and values originated among many indigenous cultures around the world, including many Native American tribes within the United States).

<sup>7</sup> See *infra* Part IV, Restorative Justice in the Gilded Age.

<sup>8</sup> See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999) [hereinafter Braithwaite, *Optimistic and Pessimistic Accounts*] (finding that since 1974 over 300 restorative justice programs have developed in the United States, and over 500 have developed in Europe).

<sup>9</sup> See GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, AND DEBATES* 79 (2d ed. 2011) (providing that an offender's acceptance of wrongdoing and re-integration into society are the primary goals of restorative justice).

<sup>10</sup> See Umbreit et al., *supra* note 6, at 514 (distinguishing a contemporary criminal justice system that recognizes a crime as being committed against the state).

<sup>11</sup> See *id.* at 523-25 (describing different restorative justice programs around the world).

<sup>12</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 9, at 27 (citing numerous studies that found a decline in recidivism rates when restorative justice methods were used).

<sup>13</sup> See JOHNSTONE, *supra* note 9, at 30-35 (providing an overview of the pre-modern routes of restorative justice systems); see also DAVID CAYLEY, *THE EXPANDING PRISON: THE CRISIS IN CRIME AND PUNISHMENT AND THE SEARCH FOR ALTERNATIVES* 167 (1998) (describing how in Old Europe, people recognized violations of law and custom, and felt that "criminal conflicts were their business").

<sup>14</sup> See JOHNSTONE, *supra* note 9, at 34 (explaining the fiscal and political motivations behind making criminal justice an exclusive state matter).

<sup>15</sup> See *infra* Part III(B), Restorative Justice: Controversies.

<sup>16</sup> I include in this group a loose confederation of institutions and individuals who argue for the reduction in the amount of imprisonment for various reasons (groups such as the Sentencing Project and Right on Crime, e.g.), those who argue for the repeal of laws that constrain the discretion of judges and juries in sentencing, those who argue against the legislative workings behind the War on Drugs, those who argue for mechanisms such as Jury Nullification, etc. See generally *infra* Part IV, Restorative Justice in the Gilded Age.

<sup>17</sup> See *infra* Part IV(A), Criminal Justice in the Gilded Age.

<sup>18</sup> See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>19</sup> See *infra* Part IV(A), Criminal Justice in the Gilded Age.

<sup>20</sup> *Id.*

<sup>21</sup> See generally Umbreit et al., *supra* note 6, at 526-28 (providing different samples of restorative justice systems and their methods of enforcement).

<sup>22</sup> See JOHNSTONE, *supra* note 9, at 98 ("Our penal system has traditionally relied on shame as upon pain to deter criminals. Many traditional penal sanctions, such as the pillory, the chain gang, and public floggings were intended to be both shameful and painful.").

<sup>23</sup> See *id.* (intending for punishment to be both painful and shameful); see also JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 59-60 (1989) (surveying the history and motivations of the systematic "uncoupling" of shame and punishment).

<sup>24</sup> See, e.g., BRAITHWAITE, *supra* note 23, at 102 (contrasting shaming that becomes stigmatizing and shaming that is followed by reintegration); JOHNSTONE, *supra* note 9, at 73-75, 83 (describing how stigmatizing shaming can make criminal life attractive, whereas reintegrating shaming requires acceptance of wrongdoing); CAYLEY, *supra* note 13, at 273-76 (commenting on Braithwaite's analysis of stigmatizing and reintegrating shaming).

<sup>25</sup> See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 33-40 (1990) (evaluating the effects of shaming through a description of an offender's experience before his crime and through prison).

<sup>26</sup> See *id.* It is important to note that Reintegrative Shaming is not accepted by all Restorative Justice proponents due to the risk it may be excessively oppressive and in violation of human rights. See also TONY F. MARSHALL, *RESTORATIVE JUSTICE: AN OVERVIEW* 30, available at <http://library.npia.police.uk/docs/homisc/occ-resjus.pdf>.

<sup>27</sup> I will refer to the current system of criminal justice, and its attendant legal and political structure, as the 'convention criminal justice system.' Many Restorative Justice scholars refer to this system as 'retributive justice,' though, strictly speaking, it has both retributive and utilitarian philosophical underpinnings. Others refer to it as 'traditional justice' though that would not serve this Article well, as I am comparing this system with that of an earlier era.

<sup>28</sup> See BRAITHWAITE, *supra* note 34, at 102 (relating the isolation of stigmatizing shaming to an attraction to a criminal lifestyle); see also JOHNSTONE, *supra* note 9, at 76 (finding that stigmatizing an offender can often brand them as a deviant, leading to a further fall into the criminal subculture).

<sup>29</sup> John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian*, 46 UCLA L. REV. 1727, 1738 (1999) [hereinafter Braithwaite, *Future*].

<sup>30</sup> See BRAITHWAITE, *supra* note 23, at 55 (dispelling the notion that labeling someone, as a deviant or criminal, serves as a sanction that drives people away from the criminal life).

<sup>31</sup> See *id.* at 102 (describing how criminal life can become more attractive as a result of stigmatizing shaming).

<sup>32</sup> See *Id.* at 103 (describing the consequence of systematically denying economic opportunities to a group of individuals, which may foster criminal subcultures).

<sup>33</sup> CAYLEY, *supra* note 13, at 236.



- <sup>34</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 9, at 68 (comparing the crime-instigating effects of stigma with the crime-reduction effects of a proposed rehabilitative program).
- <sup>35</sup> See generally ZEHR, *supra* note 25, at 73-74 (concluding that fixing blame is central to our understanding of justice).
- <sup>36</sup> See JOHNSTONE, *supra* note 9, at 81 (explaining how the abstract and archaic presentation of charges does not relate the human consequences of an offender's actions); see also ZEHR, *supra* note 25, at 72 (describing how the presentation of charges forces both offender and victim to "speak the language of the system"); see also Hon. Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N. M. L. REV. 175, 182 (1994) (pointing out that the term "guilt" in Navajo law is meaningless because it focuses too much on inflicting retribution, instead of healing and integration).
- <sup>37</sup> See JOHNSTONE, *supra* note 9, at 81 ("The passive, non-participatory role of the offender in trial process [ ] ensures that formal criminal justice does little to bring home to offenders the reality of the harm they have caused.").
- <sup>38</sup> Braithwaite: *Optimistic and Pessimistic Accounts*, *supra* note 8, at 47 (citing Sykes and Matza (1957)).
- <sup>39</sup> See JOHNSTONE, *supra* note 9, at 81 (discussing how offenders often shut out the human consequences of their crimes).
- <sup>40</sup> See *id.* at 99 ("[W]e need shame. Attempts to control criminal behaviour through coercion and violence simply provoke counterviolence.").
- <sup>41</sup> See *id.* at 106 ("Shame protects that which is private from public intrusion, thereby allowing certain valuable activities and relationships to flourish while maintaining our essential sociality.").
- <sup>42</sup> *Id.*
- <sup>43</sup> *Id.* (advocating Schneider's argument that shaming is vital to our "interdependency and mutual involvement").
- <sup>44</sup> See generally BRAITHWAITE, *supra* note 24, at 54-57 (presenting reintegrative shaming as an alternative to stigmatizing shaming. Braithwaite uses a family model to show how an authority can shame an offender while still maintaining a sense of respect for the offender, much like a parent scolds a child without disassociating him or her from the family).
- <sup>45</sup> *Id.* at 1.
- <sup>46</sup> *Id.*
- <sup>47</sup> See Umbreit et al., *supra* note 6, at 519, 523-26 (providing examples and explanations of different restorative justice approaches).
- <sup>48</sup> See *id.* at 523-525.
- <sup>49</sup> See JOHNSTONE, *supra* note 9, at 114 ("[I]t seems prudent to consider the minimal necessary boundary of community as that limited to the parties with a direct stake in (need and responsibility in the specific conflict.)").
- <sup>50</sup> See *id.* at 126-129 (finding that the relevant community is "brought in" by the nature of the crime). All Restorative Justice proponents do not share this view. Some feel that there must be a static geographic community that is designated for the resolution of all crimes, while others feel that the community should be expanded or contracted depending on the type of crime: family members for offenses within a family on the smaller side and representatives of entire nationalities for violations of human rights or war crimes on the much larger side. *Id.*
- <sup>51</sup> See *id.* at 125 (discussing the importance of community involvement, recognizing it as the most powerful entity to influence the offender).
- <sup>52</sup> See *id.* at 38 (concluding that the community, not the lawyer, will use its knowledge of the offender to expose the "frailty" of their excuses).
- <sup>53</sup> See *supra* note 51 (stating that the crime determines which members of the community will be involved in the proceeding).
- <sup>54</sup> *Id.*
- <sup>55</sup> See Umbreit et al., *supra* note 6, at 29-30, 58 (describing the role of the mediator).
- <sup>56</sup> See JOHNSTONE, *supra* note 9, at 122 (discussing how such a process can maximize the parties "ownership of the issue").
- <sup>57</sup> See *id.* at 27 (contrasting "principled sentencing," which seeks to punish proportionately to the severity or degree of blameworthiness).
- <sup>58</sup> See *id.* (conceding that democratic creativity can result in "idiosyncratic remedies").
- <sup>59</sup> See generally ZEHR, *supra* note 25, at 211-214 (listing differences between the characteristics of the current justice system and that of an ideal restorative justice system).
- <sup>60</sup> See *id.*
- <sup>61</sup> See generally JOHNSTONE, *supra* note 9, at 80-87 (providing a broad overview of the phases of restorative justice).
- <sup>62</sup> See *id.* at 80.
- <sup>63</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 47 (listing types of exculpatory techniques).
- <sup>64</sup> See JOHNSTONE, *supra* note 9, at 83 (distinguishing the conventional penal process which employs a pyramidal structure of communication, whereas the Restorative Justice utilizes a horizontal structure of communication, stemming from the offender's peers and not an authority figure of the state).
- <sup>65</sup> See *id.* (using an example of an offender who stole a victim's car, the victim scolded the offender by emphasizing the consequences of his actions, rather than scolding the offender's character).
- <sup>66</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 20 ("Empowerment of victims to define the restoration that matters to them is a keystone of a restorative justice philosophy.").
- <sup>67</sup> See *id.* at 23-24 (discussing the honoring of obligations to victims).
- <sup>68</sup> See *id.* at 3 (providing examples of decertification ceremonies in pre-modern cultures).
- <sup>69</sup> William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROBATION, 15, 18 (2005).
- <sup>70</sup> See SARAH NELSON & LINDA WAGNER, EVALUATION OF THE RESTORATIVE JUSTICE PROGRAM 13 (2001) (finding that juveniles who met with victims had an 80.8% decrease in number of offenses, whereas those who didn't meet with victims only had a 65.3% decrease in number of offenses. Those who did not participate only had a 32.2% decrease in number of offenses); see also Jane Wynne & Imogen Brown, *Can Mediation Cut Reoffending?*, 45 PROBATION J. 21, 24-25 (1998) (finding in two separate studies that 68% and 58%, respectively, of offenders in a mediation program did not have repeat convictions in two years); Umbreit et al., *supra* note 7, at 545 (examining several studies of restorative justice programs and finding that they all had significant drops in subsequent offenses).
- <sup>71</sup> See, e.g., Jennifer L. Kerrigan, "It's Not World Peace, but. . ." *Restorative Justice: Analysis of Recidivism Rates in Campbell Law School's Juvenile Justice Project*, 30 CAMPBELL L. REV. 339, 357 (2007) (noting a 16-24% drop in recidivism rates for juvenile offenders); *Justice Reduces Crime by 27%*, SHEFFIELD TELEGRAPH, July 1, 2008, <http://www.sheffieldtelegraph.co.uk/headlines/Report-shows-restorative-justice-reduces.4238005.jp>; William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 156 (2003) (noting studies that suggest that re-offense rates are 33% lower for victim-offender mediation program participants); Hon. T. Bennett Burkemper et al., *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 129 (2007) (noting that after analyzing sixty-three programs that participants in the programs were "one-third less likely" to become repeat offenders); See also Christopher D. Lee, *They All Laughed at Christopher Columbus When He Said the World Was Round: The Not-So-Radical and Reasonable Need for A Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 534 (2011) (stating that recidivism rates drop significantly in restorative justice models).
- <sup>72</sup> See Umbreit et al., *supra* note 6, at 545.
- <sup>73</sup> See Paul McCold, Ph. D. & Benjamin Wachtel, *Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project 3-4*, 51 (1998), <http://www.iirp.edu/pdf/BPD.pdf>



(presenting studies that showed offenders in conflict mediation programs had a significantly lower arrest rate 12 months after the programs); see also Umbreit et al., *supra* note 6, at 545-46 (finding a 32% lower re-offense rate amongst participants of a family mediation program); see generally Claudia Fercello & Mark Umbreit, *Client Evaluation of Family Group Conferencing In 12 Sites in 1st Judicial District of Minnesota* 7-9, 11 (1998), available at <http://2ssw.che.edu/rjp/Resources/Documents/ferumb98.pdf>. (showing a high acceptance and overall attitude change by offenders who participated in family mediation programs).

<sup>74</sup> See McCold & Wachtel, *supra* note 73, at 3-4, 51 (focusing on a study that showed offender's positive acceptance of Restorative Justice programs).

<sup>75</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 27-29 (citing a study conducted in Washington, D.C. in which offenders were selected randomly for victim-offender mediation and the reoffender rate was "significantly lower").

<sup>76</sup> See *id.* at 28-29.

<sup>77</sup> See ZEHR, *supra* note 25, at 211-214 (including "focus on offender, victim ignored" as a characteristic of the current justice system in a list of differences between the current system and a restorative justice system); see also CAYLEY, *supra* note 13, at 230-31 (discussing the offender-victim relationship).

<sup>78</sup> See ZEHR, *supra* note 25, at 182 (classifying crime, at its core, as a violation by one person of another person).

<sup>79</sup> See JOHNSTONE, *supra* note 9, at 55-57 (discussing the inadequacies of the criminal justice system in terms of its effects on victims).

<sup>80</sup> See ZEHR, *supra* note 25, at 19-22 (using the example of a woman assaulted by a masked man with a knife to outline the three phases).

<sup>81</sup> See *id.* at 20 (including feelings of confusion, helplessness, and terror).

<sup>82</sup> See generally *id.* at 30 (discussing how the justice process should be victim-centered rather than offender-centered, allowing the victim to be more involved with decisions to be made in the case).

<sup>83</sup> See *id.* at 20 (defining the recoil phase as a wave of overwhelming feelings that a victim suffers post-incident, including, *inter alia*, depression, rage, and suspicion of strangers).

<sup>84</sup> Compare JOHNSTONE, *supra* note 9, at 64 (describing how the mediation process provides meaningful restitution for the victim) with ZEHR, *supra* note 25, at 30-32 (noting how the current system puts victims through a "second victimization," where victims suffer by being removed from the focus of the process).

<sup>85</sup> See JOHNSTONE, *supra* note 9, at 56 (rationalizing the use of punitive punishment rather than mere compensation, which would undermine the severity of the wrong).

<sup>86</sup> See *id.* at 57 (discussing various examples of how the punitive system makes reparation and reconciliation less likely).

<sup>87</sup> See *id.*

<sup>88</sup> See generally Nils Christie, *Conflicts as Property*, 17 THE BRIT. J. OF CRIMINOLOGY, 1, 1-15 (1977).

<sup>89</sup> *Id.*

<sup>90</sup> See JOHNSTONE, *supra* note 9, at 120.

<sup>91</sup> See generally BRAITHWAITE, *supra* note 23, 84-94 (concluding that most western societies turn to individualism rather than communitarianism).

<sup>92</sup> See JOHNSTONE, *supra* note 9, at 121 (citing ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND MEDIATION* 84-85 (Jeffrey Z. Rubin ed. 1994)).

<sup>93</sup> CAYLEY, *supra* note 13, at 168.

<sup>94</sup> See Bush & Folger, *supra* note 92, at 242.

<sup>95</sup> *Id.*

<sup>96</sup> See MARSHALL, *supra* note 26, at 8 (recognizing the "greater emphasis on individual privacy and autonomy," and social divides that inevitably limits community involvement).

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* (stating that if Restorative Justice is to be community-centered, there must be a community).

<sup>99</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 9, at 4 (outlining the foundation of Restorative Justice, which balances less punitive remedies and victim empowerment).

<sup>100</sup> See, e.g., JOHNSTONE, *supra* note 9, at 30-35 (providing an overview of many ancient cultures who used forms of restorative justice); CAYLEY, *supra* note 14, at 167 (giving an example of Restorative Justice in pre-modern Europe).

<sup>101</sup> See JOHNSTONE, *supra* note 9, at 30 (finding that the task of administering criminal justice became a symbol of the growing power of the centralized state, leading to the processes of apprehending and punishing offenders).

<sup>102</sup> See e.g., *id.* at 34.

<sup>103</sup> See *id.* at 30-35 (discussing the 1960s' revival of restorative justice traditions in North America, New Zealand, Australia, and elsewhere).

<sup>104</sup> See MARSHALL, *supra* note 26, at 7.

<sup>105</sup> Seven states, Delaware, Indiana, Kansas, Montana, Oregon, and Tennessee, have adopted comprehensive statutory guidelines combining the use of restorative justice programs with standard measures in an order to combat their own recidivism rates. Another sixteen states provide clear statutory authority for restorative programs but with less detail than the seven previously mentioned. Yet another seven states allow for restorative justice programs to complement, but not replace, traditional methods. See Umbreit et al., *supra* note 6, at 551-54.

<sup>106</sup> See *id.* at 552 (stressing restorative justice's focus on the strengths of the individual as the cornerstone of the theory).

<sup>107</sup> JOHNSTONE, *supra* note 9, at 31.

<sup>108</sup> See *id.* (discussing the increasingly problematic occurrences of private vengeance in early developing societies).

<sup>109</sup> See *id.* at 32 ("An offender could buy back the peace he had injured by a system of fines" to the offended party and to the king).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See *id.* at 33 (challenging the assumption that violence was the natural response to a perceived wrong and that compensation was already an option).

<sup>113</sup> See *id.* (claiming that "[w]ronged parties were usually expected to accept compensation if the appropriate amount was offered.").

<sup>114</sup> See *id.* at 35-39.

<sup>115</sup> See *id.* at 33 (seeking reconciliation between offender and victim, instead of placing blame on and punishing the offender).

<sup>116</sup> Yazzie, *supra* note 36, at 182-189 (1994) (describing peace-making techniques of Navajo tribes).

<sup>117</sup> *Id.* at 184 (finding that Navajo tribes believed coercion should be avoided because people react differently when being forced to act).

<sup>118</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 8 (documenting the shortcomings of the current criminal justice system).

<sup>119</sup> See *id.*

<sup>120</sup> See generally Kathleen Daly, *Restorative justice: the real story*, 4 PUNISHMENT AND SOC'Y 55 (2002), available at: <http://www98.griffith.edu.au/dspace/handle/10072/6547>.

<sup>121</sup> See JOHNSTONE, *supra* note 9, at 40 (acknowledging Daly's myth argument; however, criticizing its complete dismissal of accurate historical truths).

<sup>122</sup> See e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). Putnam's work represents a new classic in the field, illustrating the reduction in all forms of social capital and interaction between people in society since the mid-twentieth century. The work represents a small part of the sociological study that has been noting the decline in communitarianism since the rise of industrialization. See *id.*

<sup>123</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 84 (discussing the difficulties of applying Restorative Justice programs to modern day communities).

<sup>124</sup> See *id.* at 12-14 (maintaining that Restorative Justice is more effective in communities that are more interdependent).

<sup>125</sup> John Braithwaite, *Shame and Modernity*, 33(1) THE BRITISH J. OF CRIMINOLOGY 1, 13 (1993).

<sup>126</sup> See JOHNSTONE, *supra* note 9, at 42 (pointing out that cutting oneself off from disapproval in a modern community is often the easier option).

<sup>127</sup> See *id.* (identifying family members outside of the nuclear family, in different geographic locations that may attend the family group conference). Others are skeptical to varying degrees regarding how true this assertion is. This debate continues in the scholarship. *Id.*

<sup>128</sup> See, e.g., Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 65 (arguing that conferences will fail if they overly shame or threaten the offender).

<sup>129</sup> See generally James Whitman, *What Is Wrong With Inflicting Shame Sanctions?*, 107 YALE L. J. 1055 (1998) (discussing the possible shortcomings of a system that utilizes shaming); see also Johnstone, *supra* note 10, at 107-08 (discussing Whitman's article and analyzing possible cruelties associated with shaming).

<sup>130</sup> See CAYLEY, *supra* note 13, at 199.

<sup>131</sup> See *id.* at 207 (discussing difficulties in defining a community); see also JOHNSTONE, *supra* note 10, at 25 (arguing that communities are hierarchal social arrangements).

<sup>132</sup> See Umbreit et al., *supra* note 6, at 25 (discussing how communities have the potential to further weaken socially-weak parties).

<sup>133</sup> See JOHNSTONE, *supra* note 9, at 104 (providing an example where the victim's son, present as a supporter, was familiar with the offenders, thereby making the experience even more humiliating and traumatic).

<sup>134</sup> See *id.*

<sup>135</sup> See Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 75 (acknowledging the "bureaucratic" realities of the criminal justice system).

<sup>136</sup> But see Umbreit et al., *supra* note 6, at 521 (arguing that the safeguards should still be applied to restorative justice programs).

<sup>137</sup> See *id.* at 517 (distinguishing the Restorative Justice program's objective to repair harm, with the criminal justice system's objective to punish).

<sup>138</sup> Cf. Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 9, at 89 (providing the finding of multiple studies that found victims to be considerably less punitive than one might think).

<sup>139</sup> See *id.* at 50 ("If a group of citizens cannot agree in an undominated conference that an act of obscenity is wrong, then the obscenity should not be a crime; and the conference will fail in controlling obscenity.").

<sup>140</sup> See *id.* (stating that conduct that is "unambiguously wrong to most citizens attending a conference," will obviously constitute a crime).

<sup>141</sup> JOHNSTONE, *supra* note 9, at 46-47 (explaining that while some prohibitions are unpopular among the majority, such prohibitions are necessary for the overall protection of the community, for example smoking in public places).

<sup>142</sup> See *supra* notes 139-42.

<sup>143</sup> See Umbreit et al., *supra* note 6, at 542 (mentioning fears that broad implementation of restorative justice may sanction those who may not otherwise be sanctioned).

<sup>144</sup> See, e.g., Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 27 (reporting the results of six restitution studies, finding significant reductions in recidivism rates).

<sup>145</sup> See STUNTZ, *supra* note 18, at 15-16.

<sup>146</sup> See *id.* at 16-18 (describing the two major, urban crime waves that accompanied mass migration).

<sup>147</sup> See *id.* at 16 (recording a sharp increase in the murder rate that coincided with African-American migration).

<sup>148</sup> See *id.* at 23.

<sup>149</sup> See *id.* (passing the 18th Amendment, which banned the manufacture and sale of alcohol, and the Immigration Act of 1924, which banned mass immigration in the U.S.).

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 173. See generally David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1993) (providing a constitutional overview of the relationship between race and drugs—crack cocaine was more commonly associated with African Americans, despite the fact that they represent only a small minority of crack users).

<sup>152</sup> See STUNTZ, *supra* note 18, at 15-16 (stating that black voters became centerpieces to urban elections as they moved to northern cities).

<sup>153</sup> See *id.* at 17-22 (comparing the European immigration with the African movement to the North).

<sup>154</sup> See *id.* at 131 (concluding that policing, criminal litigation, and criminal punishment were less discriminatory and vastly more lenient than today).

<sup>155</sup> *Id.* at 132.

<sup>156</sup> *Id.* at 132-133.

<sup>157</sup> *Id.* (indicating that New York's crime drop in the 1990s was more pronounced than these other cities).

<sup>158</sup> See *id.* (finding the homicide rate coincided with a large crime wave).

<sup>159</sup> See *id.* at 134 (showing prison rates which were not only much lower than current data, but also grew and shrank very little).

<sup>160</sup> *Id.* at 134-135.

<sup>161</sup> *Id.*

<sup>162</sup> See *id.* at 133 (showing similar rates in Chicago, Boston, and Philadelphia).

<sup>163</sup> See *id.* at 134.

<sup>164</sup> See *id.* (showing a rapid drop and then steady increase in imprisonment in New York between 1950 and 2000).

<sup>165</sup> See ROGER LANE, *MURDER IN AMERICA: A HISTORY* 334 (1997) (explaining the unpopularity and effectiveness of "battered woman's syndrome"). Today, defense lawyers may argue that the defendant suffered from "battered woman's syndrome" to explain to juries why an abused person in a relationship may resort to killing even when it might appear to an onlooker that calling the police would have been the more reasonable course of action. *Id.*

<sup>166</sup> STUNTZ, *supra* note 18, at 136.

<sup>167</sup> See *id.* (stating that women accomplished the same legal results seventy years before the transformation of the women's movement).

<sup>168</sup> See LANE, *supra* note 165, at 197-199 (finding that in Chicago and Philadelphia, blacks who killed whites got the same verdicts and sentences as whites who killed blacks); see generally RANDOLPH ROTH, *AMERICAN HOMICIDE* (2009).

<sup>169</sup> STUNTZ, *supra* note 18, at 137 (finding that a large amount of acquittals were won by poor and lower class defendants, often using generic self-defense claims) (citing JEFFREY S. ADLER, *FIRST IN CRIME, DEEPEST IN DIRT: HOMICIDE IN CHICAGO, 1875-1920* 116 (2006)).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> STUNTZ, *supra* note 18, at 72.

<sup>173</sup> See *id.* at 89 (discussing the rise of the urban police forces, the first being in New York City in 1845).

<sup>174</sup> See *id.* at 88 (describing the move by prosecutors to answer voter's needs, rather than the state's).

<sup>175</sup> See SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 44-45 (1980) (finding that instruments, like the *Commentaries*, were essential in a society where most lawyers were trained by apprenticeship).

<sup>176</sup> See STUNTZ, *supra* note 18, at 88 (describing the general movement away from piecemeal prosecutors).

<sup>177</sup> See *id.* at 90 (explaining how city police forces replaced the previously inadequate urban forces).

<sup>178</sup> *Id.* at 91.

<sup>179</sup> *Id.* at 91.

<sup>180</sup> See *id.* at 83.

<sup>181</sup> *Judicial Processing of Defendants*, SOURCEBOOK OF CRIM. JUST. STATS., § 5.57 (2006) available at <http://www.albany.edu/sourcebook/pdf/section5.pdf>.

<sup>182</sup> STUNTZ, *supra* note 18, at 139 (citing statistics from Alameda County, California).

<sup>183</sup> See *id.* (describing Gilded Age procedural rules as less elaborate than those of current justice systems).

<sup>184</sup> *Id.*

<sup>185</sup> See generally George Fisher, *The jury's rise as lie detector*, 107 YALE L. J. 575 (1997)

(providing a detailed perspective of the jury's role as not only a fact finder, but in determining the truth of the matter).

<sup>186</sup> See STUNTZ, *supra* note 18, at 140-41 (discussing the juror's role).

<sup>187</sup> See *id.* (introducing "vicious will" or "evil meaning mind" as the obstacle of intent that prosecutors had to prove).

<sup>188</sup> See *id.* at 139 (arguing that defenses used to be broader and less clearly defined).

<sup>189</sup> *Id.* at 7.

<sup>190</sup> See M. Craig Brown and Barbara D. Warner, *Immigrants, Urban Politics, and Policing in 1900*, 57(3) AM. SOC. REV. 293, 301-02 (1992) (using studies of Pittsburgh and Cincinnati to illustrate the political clout of immigrant populations).

<sup>191</sup> See STUNTZ, *supra* note 18, at 30 (describing how locally selected juries decided a large fraction of serious criminal cases).

<sup>192</sup> See *id.* at 6 (listing four major changes that affected political populations: (1) crime grew more concentrated in cities; (2) suburban populations "mushroomed"; (3) jury trials became rarer; and (4) more power over criminal proceedings fell in the hands of legislators and judicial administrators).

<sup>193</sup> See *id.* at 143 (showing differences in murder rates between cities like Atlanta, Houston, Boston, and Chicago).

<sup>194</sup> See *id.* (describing differences in the level of seriousness afforded to criminal investigations between whites and blacks).

<sup>195</sup> See Federal Bureau of Investigation, *Uniform Crime Reports between the years 1950 and 1991*, available at [http://www.bpl.org/online/govdocs/uniform\\_crime\\_reports.html](http://www.bpl.org/online/govdocs/uniform_crime_reports.html).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> STUNTZ, *supra* note 18, at 5.

<sup>200</sup> *Id.* at 232.

<sup>201</sup> See *One in 100*, *supra* note 3, at 35 (showing the inmate population rise to 2,245,189 in 2005, making the U.S. the country with the highest incarceration rate).

<sup>202</sup> See *id.* at 3 (finding the incarceration rates for African Americans "especially startling").

<sup>203</sup> See *id.* (discussing the effects of certain policy measures, like the "three strikes rule" on incarceration); see also STUNTZ, *supra* note 18, at 47 (maintaining that drugs and the "three-strikes rule" were major factors in the "explosion" in incarceration rates among African Americans).

<sup>204</sup> See STUNTZ, *supra* note 18, at 239-43 (giving an overview of the changes that affected the criminal justice system over the twentieth century).

<sup>205</sup> *Id.* at 192.

<sup>206</sup> See *infra* section IV(B)(ii); See generally SASHA ABRAMSKY, AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT (2007) (offering a perspective on the relationship between punishment and vengeance in the twentieth century).

<sup>207</sup> STUNTZ, *supra* note 18, at 36.

<sup>208</sup> See *id.* at 36 (arguing that political control helps harness and balance the desire for justice with the hesitancy to incarcerate neighbors).

<sup>209</sup> See *Miranda v. Arizona*, 384 U.S. 436, 498 (1966) (requiring police officers to inform arrestees of specific rights prior to the initiation of custodial interrogation).

<sup>210</sup> See *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (allowing courts to exclude evidence that came as a result of an illegal search or seizure).

<sup>211</sup> See generally Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. OF CRIM. L. AND CRIMINOLOGY 621 (1996) (analyzing the pitfalls of administering *Miranda* warnings through various empirical studies).

<sup>212</sup> See, e.g., at 684 (mentioning that ex-convicts may be more aware of deceptive ploys to fool police).

<sup>213</sup> See *id.* at 622 (discussing the aftermath, public reaction, and legislative responses to the *Miranda* ruling).

<sup>214</sup> See *id.* at 622-23 (finding that Supreme Court decisions since *Miranda* have chipped away at its effectiveness. Also, discussing the executive response to *Miranda*, which went as far as to call the decision "illegitimate").

<sup>215</sup> But see *One in 100*, *supra* note 3, at 17 (noting that even though politicians are wary of advocating for diverse punishment strategies, they are afraid of appearing "soft" on crime).

<sup>216</sup> See STUNTZ, *supra* note 18, at 236-241 (providing an overview of the political backlash following several criminal justice decisions).

<sup>217</sup> See *id.* at 240.

<sup>218</sup> *Id.* at 241.

<sup>219</sup> *Id.* at 173.

<sup>220</sup> *Id.*

<sup>221</sup> See *id.* (discussing how legislators had little reason to focus on the consequences of their prohibitions).

<sup>222</sup> See, e.g., STUNTZ, *supra* note 18, at 260-62 (mentioning changes in substantive criminal law that occurred as a result of legislative action and procedural changes).

<sup>223</sup> See *id.* at 80 (explaining that gang violence is often impossible to prove, which prompts police to bring drug charges against the alleged offender).

<sup>224</sup> See *id.* at 79-80 (listing witness intimidation as one of the major obstacles preventing prosecutors from effectively pursuing violent crimes).

<sup>225</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520 (2001) (utilizing charge-stacking to raise the threatened sentence); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 723-24 (2005) (discussing charge-stacking in the context of raising potential punishment).

<sup>226</sup> See Stuntz, *supra* note 225, at 519 n. 71 (permitting the prosecution of overlapping offenses for a given criminal incident, but disallowing greater or lesser included offenses for the same incident under and the double jeopardy rule).

<sup>227</sup> See generally Erik Luna and Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010) (describing the conflict between mandatory sentencing and the notion that the punishment should fit the crime).

<sup>228</sup> See, e.g., *id.* at 12 (explaining increase in plea bargains when a long obligatory sentence is threatened); Erik S. Siebert, *The Process Is The Problem: Lessons Learned From United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 889 (2009) (discussing the legislative history behind strict sentencing guidelines resulting from a distrust of the judiciary); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1598 (2010) (providing a general description of plea bargaining).

<sup>229</sup> See Luna & Cassell, *supra* note 227, at 13, 65 (describing how legislators and appellate judges set mandatory sentencing which in turn increases their power).

<sup>230</sup> See STUNTZ, *supra* note 18, at 30-31 (describing the changes in urban communities that helped empower immigrant groups).

<sup>231</sup> See BRAITHWAITE, *supra* note 23, at 85-86 (defining communitarianism and essential requirements of community interdependence).

<sup>232</sup> *Id.*

<sup>233</sup> *See, e.g.,* STUNTZ, *supra* note 18, at 30.

<sup>234</sup> *Id.* at 31.

<sup>235</sup> *See infra* Part II(B) and accompanying notes.

<sup>236</sup> *See* Umbreit et al., *supra* note 6, at 516 (focusing on how Restorative Justice proceedings focus on the individuals rather than the process, thus further relating to the individuals experience).

<sup>237</sup> *See id.*

<sup>238</sup> *See* STUNTZ, *supra* note 18, at 30 (describing the introduction of a “vicious mind” into the criminal justice process).

<sup>239</sup> *See infra* Part (IV)(B)(c) and accompanying notes.

<sup>240</sup> *See infra* Part (III) and accompanying notes.

<sup>241</sup> *See* STUNTZ, *supra* note 18, at 134 (using New York as an example and showing imprisonment rates with very little fluctuation).

<sup>242</sup> *See* Braithwaite, *Optimistic and Pessimistic Accounts*, *supra* note 8, at 38 (noting that Restorative Justice communities in the Gilded Age had a different make up than communities today, and that such communities are hard to define, let alone recreate).

<sup>243</sup> *See id.* (discussing unique aspects of the Maori communities in New Zealand, as well as indigenous groups in Canada).

<sup>244</sup> *See id.* at 84 (citing critics who believe that Restorative Justice programs are better suited for rural contexts rather than multicultural cities).

<sup>245</sup> *See id.*

<sup>246</sup> *See id.* at 36 (finding when a community has strong social support and participation, criminality is low).

<sup>247</sup> *See e.g.,* DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004) (providing an analysis of the effect branding has on families with incarcerated members); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*: (2010) (discussing the stigmatizing effects of twentieth century laws and procedures that disenfranchise African Americans).

<sup>248</sup> *See infra* Part II(C) and accompanying notes.

## ABOUT THE AUTHOR

**Ali Abid** has served as the George N. Leighton Fellow for the Study of Prisoners’ Rights at The John Marshall School of Law. He received his Juris Doctorate from The John Marshall Law School in May 2011, where he graduated *magna cum laude* and served as a Lead Articles Editor for The John Marshall Law Review. He contributes the chapter, “Combating Religious Defamation: An Exploration of Blasphemy in Islamic Thought and International Practice” to *Transnational Legal Processes and Human Rights* (Ashgate Publishing, eds., Topidi and Feldman) (forthcoming, March 2013).