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

Ali M Abid, John Marshall Law School
Restorative Justice in the Gilded Age:
Shared Principles Underlying Two Movements in Criminal Justice

by 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 has done to his victim should negate his guilt. 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 accountable directly to that community for how they conduct their roles. 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 U.S. 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. Trials are rare and fraught with so much procedure that speaking on one’s own behalf is unwise.²

Furthermore, the US system does not produce the same effects as the hypothetical system above. The scandal of mass incarceration in the United States is, by now, well known. According to the 2008 study by the Pew Center on the States, one in every one hundred American adults is behind bars.³ 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.⁴ 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 reentering prison within three years of release.⁵

Nevertheless, the informal and communal system outlined above has existed in this country in the past, and two very different criminal justice movements would like to see its revival. The first of these 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.⁶ 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.⁷ These movements have developed separately, though this paper argues that they share many principles and may be of great use to one another.

² See infra, section IV(B).
⁴ Id. at 6.
⁵ Id. at 4; see also Recidivism, Bureau of Justice Statistics, available at: http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17 (recounting the results of recidivism studies from 1994 and 1983 and finding that offenders returned to prison within three years at rates of 67.5% and 62.5%, respectively).
⁶ See Umbreit et al., infra note 8, at 514-26.
⁷ See infra, section IV.
Since the mid-1970s, a majority of states in the US and dozens of countries around the world have implemented Restorative Justice mechanisms to reduce rates of recidivism and revitalize communities plagued by crime.\textsuperscript{8} Restorative Justice focuses on reintegrating the offender with the community by making them understand the harm caused by their offense and having them repair the damage directly to the victim.\textsuperscript{9} The movement characterizes crime as the violation of one person by another and not as an offense against the state. 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.\textsuperscript{10} 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 the victim’s needs are met more fully than through the conventional criminal justice system.

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 11\textsuperscript{th} century.\textsuperscript{11} 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.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{9} Gerry Johnstone, \textit{Restorative Justice: Ideas, Values, and Debates} 77 (2d Ed. 2011)
\item \textsuperscript{10} Umbreit et al., \textit{supra} note 8, at 534.
\item \textsuperscript{11} Johnstone, \textit{supra} note 9, at 30-35; David Cayley, \textit{The Expanding Prison:: The Crisis in Crime and Punishment and the Search for Alternatives} 167 (1998).
\item \textsuperscript{12} Id.
\end{itemize}
Reviving this system, however, has presented many problems for Restorative Justice proponents, including fears that this system may not comport with constitutional protections.\textsuperscript{13}

The second approach to criminal justice that I focus on has no clear name as of yet. It comprises a group of criminal justice historians and legal scholars, 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 United States during the late 19\textsuperscript{th} and early 20\textsuperscript{th} centuries.\textsuperscript{14} During this time, 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.\textsuperscript{15}

To explain this viewpoint, I draw particularly upon the work of Howard J. Stuntz, the former Henry J. Friendly professor of law at Harvard University, who argues in his book, \textit{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.\textsuperscript{16} 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.\textsuperscript{17} 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

\textsuperscript{13} \textit{See infra} section III(B).

\textsuperscript{14} 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., \textit{See infra} IV.B.

\textsuperscript{15} \textit{See infra} section IV(A).


\textsuperscript{17} \textit{See infra} section IV(A).
the beginning of this article.\textsuperscript{18} 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. Yet I argue 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, I argue 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 mechanisms used by the justice system of urban centers in the Gilded Age and their success can provide new tools for the Restorative Justice movement and answer many of its critics.

Part I 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 19\textsuperscript{th} and early 20\textsuperscript{th} centuries in America: how it came to be; its chief characteristics, which allowed it to keep down both crime and prison populations; and how we have gone from that system to the one we have today. 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.

\textbf{II. Restorative Justice: Principles, Mechanisms, and Claims}

\textsuperscript{18} Id.
A. The Concept of Shame: Its Lighter and Darker Sides

There was a time in the West where 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.\textsuperscript{19} Generally the “uncoupling of shame and punishment” has been celebrated, but Restorative Justice theorists seek to reclaim the idea of shame and stress its importance as part of crime control.\textsuperscript{20} They distinguish, however, between destructive, stigmatizing shaming on the one hand and redemptive, reintegrating shaming on the other.\textsuperscript{21} The conventional criminal justice system, they argue, stigmatizes offenders, preventing them from ever reentering legitimate society and pushing them into criminal subcultures.\textsuperscript{22} 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 reenter legitimate society with their dignity restored.\textsuperscript{23}

a. Stigma in the Conventional Criminal Justice System

Proponents of Restorative Justice argue that the conventional criminal justice system\textsuperscript{24} focuses too much on assigning blame and inflicting punishment. These foci stigmatize the offender in a way that prevents his reintegration with legitimate society while at the same time

\textsuperscript{19} Johnstone, \textit{supra} note 9, at 98.
\textsuperscript{20} Id. See also \textit{John Braithwaite, Crime, Shame and Reintegration} 59 (1989).
\textsuperscript{21} Braithwaite, \textit{supra} note 20, at 100-101; Johnstone, \textit{supra} note 9, at 73-75, 83; Cayley, \textit{supra} note 11, at 273-276.
\textsuperscript{22} Johnstone, \textit{supra} note 9, at 73-75; Braithwaite, \textit{supra} note 20, at 102; \textit{Howard Zehr, Changing Lenses: A New Focus for Crime and Justice} 33-40 (2005).
\textsuperscript{23} Braithwaite, \textit{supra} note 20, at 102-103; Johnstone, \textit{supra} note 9, at 73-80. 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. Tony Marshall, Restorative Justice: An Overview, page 30, available at: \url{http://library.npia.police.uk/docs/homisc/occ-resjus.pdf} and also at: \url{www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf}. See infra section III.B.b for more.
\textsuperscript{24} I will refer to the current system of criminal justice, and it’s 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.
insulating the offender from the harm he has caused to the victim and his own potential feelings of remorse. 

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.

Once an ex-felon experiences this sort of rejection they seek out criminal subcultures that “reject their rejectors.”

Criminal activity becomes an easier way for them to earn a living and criminal subcultures become the only communities from which they draw respect.

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 even law-abiding communities. 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.’

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. Plea-bargaining and criminal

---

25 Braithwaite, supra note 20, at 102-103; Johnstone, supra note 9, at 73-80.
26 John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian, 46 UCLA L. Rev. 1727, 1738 (1999) [hereinafter “Braithwaite, Future”]; also found in Johnstone, supra note 20, at 75.
27 Braithwaite, supra note 20, at 55 and 83.
28 Id.
29 Id. at 103.
30 The interview was with David Cayley. Cayley, supra note 11, at 236.
trials in the conventional system are focused on assigning an individualistic version of blame.\textsuperscript{31} The crimes are also presented in abstract and archaic ways, multiple charges are the subject of bargaining and are switched for lesser or greater charges depending on the offender’s willingness to comply.\textsuperscript{32} 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.\textsuperscript{33}

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’).”\textsuperscript{34} Because the system focuses on their guilt so much 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.\textsuperscript{35} 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 they might make reparation and reenter legitimate society. Reintegrative shaming, it is argued, brings these more helpful concerns to the fore.

\textbf{b. Reintegrative Shaming}

\textsuperscript{31} Zehr, supra note 22, at 73-74.
\textsuperscript{32} Johnstone, supra note 9, at 81; Zehr, supra note 22, at 72. See also Hon. Robert Yazzie, “Life Comes From It”: Navajo Justice Concepts, 24 New Mexico Law Review 175, 180-189 (1994) (comparing the conventional ‘vertical’ criminal justice system to the ‘horizontal’ one of the Navajo and pointing out that the idea of truth is often convoluted and abstracted in harmful ways in the conventional system).
\textsuperscript{33} Id.
\textsuperscript{34} Braithwaite, Optimistic and Pessimistic Accounts, supra note 8, at 47 (and also found in Johnstone, supra note 9, at 81).
\textsuperscript{35} Johnstone, supra note 9, at 81; Zehr, supra note 22, at 72.
Shame, many proponents of Restorative Justice argue, is a necessary and good
component of society and reflects our communal, rather than individual, nature.\textsuperscript{36} Shame
reminds us of the “deep mutual involvement we have with one another.”\textsuperscript{37} These
interdependencies do not limit our independence, but are in fact necessary for freedom.\textsuperscript{38} John
Braithwaite theorizes that we can shame without stigmatizing; and that shame is a necessary part
of crime control.\textsuperscript{39} This theory is based on the insight that the “individuals who resort to crime
are those insulated from shame over their wrongdoing.”\textsuperscript{40} 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 in conformity with the legitimate
society. For these reasons, reintegrative shaming has two chief characteristics that distinguish it
from stigmatizing shaming: (1) it has a finite, rather than indefinite, duration; and (2) there are
efforts to maintain the bonds of respect throughout the process.\textsuperscript{41}

How this principle is put into practice is explored in the following section.

\textbf{B. The Methods of Restorative Justice and its Outcomes}

\textbf{a. Encounters Between the Stakeholders}

Restorative Justice programs take many forms such as victim-offender mediation and
reconciliation programs (VORPS), family group conferencing, peacemaking circles, and more.\textsuperscript{42}
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

\textsuperscript{36} Johnstone, supra note 9, at 106.
\textsuperscript{37} Johnstone, supra note 9, at 81, citing Carl Schneider, Shame, Exposure, and Privacy 138 (1977).
\textsuperscript{38} Id.
\textsuperscript{39} See generally Braithwaite, supra note 20.
\textsuperscript{40} Id., at 1.
\textsuperscript{41} Id.
\textsuperscript{42} Umbreit et al., supra note 8, at 519-520.
previous positions.\textsuperscript{43} In these encounters the parties are encouraged to speak for themselves rather than through lawyers.\textsuperscript{44}

The relevant community to be included varies depending on the nature of the offense.\textsuperscript{45} The role of the community here is to express shame and censure regarding the offender’s actions while at the same time displaying respect and openness to the offender as a person.\textsuperscript{46} 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 as discussed earlier; in other words, they know the offender well enough to know when he or she is making excuses or being dishonest.\textsuperscript{47} For certain smaller offenses, only the families of the victims and offender may be necessary. For other crimes that may hurt larger sections of the population, the community members might represent the neighborhood or several neighborhoods.\textsuperscript{48}

The third party mediator is tasked with facilitating the conversation between the primary stakeholders, making sure that everyone’s needs are being met, and preventing harmful routes the conversation may take toward stigmatization on the part of the community or exculpatory strategies on the part of the offender.\textsuperscript{49} The final plan for reparation developed by the assembled parties need not seem the optimal solution to the third party facilitator, but must seem, on the

\textsuperscript{43} Id. at 523-526.
\textsuperscript{45} This view is not shared by all Restorative Justice proponents. 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. \textit{See Johnstone}, supra note 9, 126-129.
\textsuperscript{46} Id. at 125.
\textsuperscript{47} Id. at 38.
\textsuperscript{48} See note 45.
\textsuperscript{49} Umbreit et al., supra note 8, at 29-30, 58.
whole, mutually beneficial to the group developing it. The reparation plans (or sentences) need not be based on precedent; rather, flexibility and “democratic creativity” are encouraged. In fact, the reparation plans must be flexible to reflect the harms to the particular victim and what is necessary for the particular offender to reenter legitimate society.

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. Restorative Justice programs on the other hand are informal (often meeting in community centers), layspeak is used (describing the acts in terms that relate to the experience of the parties), the process is centered on the expression of emotion, and direct verbal communication between the parties is encouraged.

b. Three stages: Awareness; Shame and Censure; Redemption and Restoration

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

First, the offender must become aware of the full impact of his crime on the victim and the community. 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 community.

---

50 Johnstone, supra note 9, at 122.
51 Id. at 27.
52 Zehr, supra note 22, at 211-214.
53 Id.
54 Johnstone, supra note 9, at 80.
55 For those exculpatory techniques, see Braithwaite, Optimistic and Pessimistic Accounts, supra note 8, at 47.
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 vent their anger and frustration at the actions of the offender. All the while, however, they must maintain that they are condemning the actions of the offender and not the offender him or herself. The offender then has a chance to feel remorse and also express disapproval of what he or she had done. This gives the offender the opportunity to separate what he sees as his true self from the crime he committed, as does the restoration and redemption phase that follows.

Third, the offender is encouraged to help devise and carry out a plan of reparation to restore the victim to his or her status before the crime. Once this is agreed to, the victim and then the community may offer to forgive the offender right then or after the reparation is complete. At some point the offender is officially welcomed back into the community in what are commonly known as decertification ceremonies. Gestures such as these complete the Restorative Justice program and announce the restoration of not just the victim’s status but also the offender’s status before the crime.

c. 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 24 percent. Furthermore, of those

---

56 Braithwaite, supra note 20, at 102; Johnstone, supra note 9, at 83-84.
57 Id.
58 Id.
participants who did reoffend, the programs reduced both the frequency and seriousness of subsequent offenses. Major studies have found recidivism rates reduced from anywhere between 16 percent and 33 percent. All studies that have examined participants’ offense rates before and after restorative sessions found an overall reduction.

Multivariate analyses have pointed out certain key factors within Restorative Justice programs that correlate strongly with reduced reoffending. These factors touch upon the offender’s experience and include: having a memorable conference/circle, not being made to feel 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.

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 decreased. In a Canadian study, the town of Sparwood, British Columbia subjected all its juvenile offenders to Restorative Justice programs as opposed to the traditional court

---

60 Sarah Nelson, Lane County Department of Youth Services: Evaluation of the Restorative Justice Program 13 (2000); Jane Wynne & Imogen Brown, Can Mediation Cut Reoffending?, 45 Probation J. 21, 24-25 (1998); Umbreit et al., supra note 8, at 545.
63 Id.
64 Braithwaite, Optimistic and Pessimistic Accounts, supra note 8, at 27-29.
system for three years and, by the second year of the experiment, the recidivism rate had plummeted by 67% from the pre-experiment average.66

C. Outcomes: Effect on Victims and Communities

a. Victims

Despite the subject of the above sections, 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 they accuse of being too offender-focused.67 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.68 Victims are given no special place in the conventional criminal trial; they are placed on the same level as any other witness to the crime and, despite the efforts of the victim’s reform movement, many of their most crucial needs are not being met.69

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.70 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. Recovery can come through the voluntary compensation by the offender to the victim. 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 or she did was wrong and it restores those lost conceptions of the recoil phase.71 The Restorative Justice

66 Id.
67 Zehr, supra note 22, at 211-214; Cayley, supra note 11, at 230–31.
68 Zehr, supra note 22, at 182.
69 See e.g., Johnstone, supra note 9, at 55-57.
70 Zehr, supra note 22, at 19-22.
71 Id.
program makes victims feel empowered, due to their ability speak and assert their self-worth, and also makes them feel secure, due to their community’s involvement and their knowing that something is being done about the damage to them.72

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.73 Restorative Justice proponents respond by saying that the conventional system deprives victims of compensation because imprisoned offenders are not often able to get jobs and pay back their victim via judgments following civil suits; furthermore, many victims are too poor to attempt civil remedies in the first place for the government offers no assistance.74 And, with punitive sanctions are so high, offenders will do much more to avoid punishment, shying away from acts of apology or reparation that they may have otherwise done. In other words, the offender remains a combatant against the victim and, in so doing, further victimizes them.

b. 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.75 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.76 Although most Restorative Justice practitioners and scholars do not go as far as

72 Id. at 30-32. Johnstone, supra note 9, at 64.
73 Johnstone, supra note 9, at 56.
74 Id.
75 See generally, Nils Christie, Conflicts as Property. 17(1) The British Journal of Criminology 1-15 (1977)
76 Id.
Christie, nearly all see conflicts as opportunities for empowering the community and changing it for the better.\textsuperscript{77} 

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.\textsuperscript{78} 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.”\textsuperscript{79} 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.\textsuperscript{80}

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

\textsuperscript{77} Johnstone, supra note 9, at 120. 
\textsuperscript{78} See e.g., Braithwaite, supra note 20, 84-94. 
\textsuperscript{79} 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 (1994). 
\textsuperscript{80} Cayley, supra note 11, at 168.
individual worldview and what they term as a “relational worldview.”\textsuperscript{81} In the individual worldview the focus is on meeting an individual’s wants and desires, but, in a relational one, the most prized thing is transformation that integrates the individual’s strength with compassion toward others.

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. Some, like Tony Marshall, have suggested that these communities lack the considerable infrastructure, time from members, money, and sense of community to effectively run anything as involved as victim-offender mediations.\textsuperscript{82} They suggest that smaller, simpler programs be introduced at first to build up communitarian feeling before larger programs can take hold. Although these and other difficulties are addressed more thoroughly in Section 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.

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.\textsuperscript{83} Western countries, including Great Britain, abandoned this system of justice in the 11\textsuperscript{th} century when state powers started to monopolize the administration of criminal

\textsuperscript{81} Bush & Folger, supra note 79, at 242.


\textsuperscript{83} Cayley, supra note 11, at 167. Johnstone, supra note 9, at 30-35.
justice and the use of force. By the mid-19th century, European colonial powers had made their system of criminal justice ubiquitous throughout the world, replacing their conquered territories’ restorative systems.\textsuperscript{84} 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. 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.\textsuperscript{85} Since then, these systems have expanded to non-native groups and have gained acceptance throughout Europe, Southeast Asia, and in the statutory schemes of 30 U.S. states.\textsuperscript{86}

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. The conventional image of ‘penal progress’, as described by Gerry Johnstone, starts with the assumption that pre-modern societies were lawless.\textsuperscript{87} “Justice” largely consisted of one party getting vengeance upon the other and this commonly led to unending vendettas between families or clans. Slowly this system was replaced with another based on money and trade where the offender could buy off vengeance against him. The offender would pay \textit{bot}, or betterment, to his victim and \textit{wite}, a fine of sorts, to the king or local feudal lord.\textsuperscript{88} As the central state power grew, fines were systemized and expanded. The central power took to demanding

\textsuperscript{84} Id.
\textsuperscript{85} Umbreit, \textit{supra} note 8, at 534; and Marshall, \textit{supra} note 81, at 7, 16.
\textsuperscript{86} 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. Umbreit, \textit{supra} note 8, at 552.
\textsuperscript{87} Johnstone, \textit{supra} note 9 at 31.
\textsuperscript{88} Id. at 32.
fines of those who committed negligent or accidental wrongs and physically punishing those who committed intentional or malicious wrongs.89

Restorative Justice scholars, however, suggest that systems of reparation and conferences were in place long before the government-imposed system of fines came about.90 Vendettas and revenge were the exceptions to the rule and only happened where restorative processes were weak.91 For modern day examples they point to practices from societies that never developed the Western system, such as Navajo peacemaking circles and the Wagga model based on system of the Maori.92 These societies define in crime in the same way as Restorative Justice practitioners, as a violation of one person by another. The Navajo process consists of members of the community, the victim, and the offender all coming together to have a conversation about the act as facilitated by a respected member of the community.93 The offender is encouraged to arrive at a reparation plan voluntarily – central to this process is the belief that coercion must be avoided.94

Restorative Justice proponents claim that the ubiquity of the conventional system may have blinded us to other, better systems and also to what was lost when we went from restorative societies to the ones we have now. Specifically, they 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.

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

89 Id.
90 Id. at 33.
91 Id.
92 Id.
94 Id.
romanticizes and, in a way recolonizes, the past and indigenous groups throughout the world.95 Others, like Gerry Johnstone, question the utility of the connection, wondering if these premodern systems could or should be revived within the context of modern communities and criminal law.96

B. Controversies
a. 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.97 Modern citizens have less interaction with and less knowledge of their direct neighbors. Can such weakened modern communities shame offenders and bring them back into the fold? John Braithwaite, the founder of the reintegrative shaming framework, says they can but that we must change what we consider a community. 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.98

96 Johnstone, supra note 9 at 40.
97 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 middle-20th. Though the work represents focuses on what is, relatively, a small part of sociological study that has been noting the decline in communitarianism since the rise of industrialization.
98 John Braithwaite, Shame and modernity, 33(1) British Journal of Criminology 1, 13 (1993).
Johnstone points out that these communities are not necessarily strong enough to exert the kind of influence necessary for Restorative Justice; individuals often withdraw from these communities at will without suffering any shame or harm.\textsuperscript{99} Furthermore, extending the definition of communities this 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 process, we just have to be resolved to find them.\textsuperscript{100} Others are skeptical to varying degrees regarding how true this assertion is. This debate continues in the scholarship.

b. Is Shaming Oppressive? Is it in Accordance with Human Rights?

Some commenters have expressed concern over encouraging communities to become so deeply involved with criminal justice and to shame those who violate the community’s rules. Whitman, for one, fears that stirring up community indignation will result in communities acting irrationally and oppressively enforcing their own mores.\textsuperscript{101} David Cayley fears that the effect may be to weaken already weak parties in the communities.\textsuperscript{102} He notes that communities are not often egalitarian or homogenous; there are some in the community who carry more or less power, who are more or less socially desired.\textsuperscript{103} 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; and the victims of these offenders may receive more or less justice depending on whether their offender was someone the community is disposed to like or dislike.

\textsuperscript{99} Johnstone, supra note 9 at 43.
\textsuperscript{100} Id.
\textsuperscript{101} See generally James Whitman, What Is Wrong With Inflicting Shame Sanctions?, 107 Yale Law Journal 1055 (1998); also discussed in Johnstone, supra note 9, at 107-08.
\textsuperscript{102} Cayley, supra note 11, 199-214.
\textsuperscript{103} Id.; also Johnstone, supra note 9, at 25.
Johnstone noticed the manifestation of some of these issues in his study of victim offender mediations; at times the members of the community who are invited as third parties have ongoing feuds with the offenders.\textsuperscript{104} At that point, the conferences unravel, resulting in degradation ceremonies rather than Restorative Justice. The 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.

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. 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. Again, this debate continues.

c. 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. 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.\textsuperscript{105} 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,

\textsuperscript{104} Johnstone, supra note 9, at 104.
\textsuperscript{105} Braithwaite, Optimistic and Pessimistic Accounts, supra note 8, at 50.
for other acts, for which there is no consensus regarding there reprehensibility, communities should feel free to disregard them.\textsuperscript{106} Johnstone finds this “seriously misguided,” as many laws that may be unpopular are necessary for the protection of minority groups.\textsuperscript{107}

Again, most Restorative Justice theorists believe that there must be some balance between the ‘democratic creativity’ of Restorative Justice mechanisms and some manner of 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.

These controversies center on fears of the unintended consequences that the broad implementation of restorative justice mechanisms might have within the framework of modern state such as the US. However, we find that these principles have been tested, and to good result, in the US criminal justice system just a century ago.

\textbf{IV. Restorative Justice In the Gilded Age}

Between the mid-19\textsuperscript{th} century and the start of World War I, thirty million Europeans made their way to the US and settled mostly in the Northern cities and in the industrial belt.\textsuperscript{108} Following their arrival, there was an uptick in the crime rate that quickly subsided along with inmate populations.\textsuperscript{109} In the first two thirds of the 20\textsuperscript{th} 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.\textsuperscript{110}

\textsuperscript{106} Id.
\textsuperscript{107} Johnstone, supra note 9, at 46
\textsuperscript{108} Stuntz, supra note 16, at 15-16.
\textsuperscript{109} Id. at 17-18.
\textsuperscript{110} Id. at 17-22.
At first glance, the difference in impact makes little sense, as the reaction to both migrations was initially similar. Both migrations caused political backlashes on the part of those already in the cities, centering on fear that the arriving populations would cause increases in vice and crime. In response to the first migration of European immigrants, there was a generation of legislation dedicated to fighting vice, which resulted in the 18th Amendment among many pieces of legislation. 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. 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 100 grams of powder cocaine—crack cocaine was more commonly associated with African Americans despite the fact that the represent only a small minority of crack users. African Americans were also able to expand their political influence, though less comprehensively than the immigrant communities of the 19th century.

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? Howard J. Stuntz, in his study of these two migrations and how the US criminal justice system has changed over time, argues that, although these two groups of people moved into the exact same cities and amidst the exact same fears, they were actually migrating into vastly different criminal justice systems. I argue, that the more effective criminal justice system of the Gilded

---

111 Id. at 23-24.
112 Id.
113 Id. at 173. See also David A. Sklansky, Cocaine, Race, and Equal Protection, 47 Stanford Law Review 1283 (1993).
114 Stuntz, supra note 16, at 15-16.
Age, to which the European immigrant population was delivered, was far more in line with
Restorative Justice principles.

We now turn to an examination of the Gilded Age system in more detail, its crime and
incarceration rates, origins, chief characteristics, and how we have gone from that system to the
one we have today.

A. Criminal Justice in the Gilded Age

a. Crime and Incarceration Rates were low and stable

Crimes rates in the Northern and Midwestern Cities during the Gilded Age were quite
lower and more stable than today. For example, between 1875 and 1925, the homicide rate in
New York City hovered steadily between a low of 2 per 100,000 to a high of 6. Whereas in the
period 1950-2000, the lowest rate was 4—occurring in the early 1950s—and the highest was
31.\textsuperscript{115} 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 of rapidly rising levels of violent crime
in the second half of the twentieth century until the 1990s (though New York’s crime drop in the
90s was more pronounced than these other cities).\textsuperscript{116} These fluctuations in the homicide rate are
representative of the fluctuations in the rate of crime as a whole.\textsuperscript{117}

The imprisonment rate was similarly stable and low during the Gilded Age.\textsuperscript{118} The
imprisonment rate in New York City decreased rather steadily from 1890 to 1925, from 138 to
just over 50 per 100,000.\textsuperscript{119} Between 1950 and 2000, however, the imprisonment rate dipped

\textsuperscript{115} Stuntz, supra note 16, at 132-133.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Samuel Walker, Popular Justice 105 (Oxford University Press 1980); see also Roger Lane, Murder in
America: A History 147-190 (1997)
\textsuperscript{119} Stuntz, supra note 10, at 134-135.
from 100 in 1950 to just over 50 in 1972, and then rocketed upwards to 400, its all-time high, in 1998. Again, other major urban centers showed similar trends. It is important to note that drops in the crime rate during the Gilded Age were accompanied by drops in the incarceration rate, not increases. However, in the second half of the twentieth century, as we will see, the incarceration rate’s increases and decreases seemed to be unaffected by, and unaffected of, fluctuations in the crime rate.

b. Treatment of Suspect Classes

Members of suspect classes received more fair treatment under the criminal justice system of the Gilded Age North than one might expect. This is not to say, of course, that discrimination was not rampant at the time, it was; 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 leniency toward these classes.

Take, for example, the case of women who are accused of murdering 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.

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:

---

120 Id.
121 Lane, supra note 118, at 334. Defense lawyers are able to argue the existence of “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.
In 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.122 This trend existed, not just in Chicago, but in all the major, industrializing cities of the time.

African Americans also received fairer treatment than might be expected. Studies of 19th century Philadelphia and Chicago have shown that black men fared equally well as white men when accused of murder (though there was a disparity between black and white female murder defendants at Chicago during this time).123 In either case, even where discrimination and disparate impacts were clearly measurable, there was nothing like the massive racial imbalance there exists in the prison population today. Historians and 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.124 “A mere 22 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.”125 Adler in particular notes that generic self-defense arguments nearly always persuaded jurors of the era.126

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

c. Origins

At the time of the Founding, crime victims brought charges directly against the alleged criminal; the victims, not public prosecutors, decided which crimes merited prosecution and

---

122 Stuntz, supra note 16, at 136. See also Lane, supra note 118.
123 Lane, supra note 118, at 197-199. Also See Randolph Roth, American Homicide (Harvard University Press 2009)
125 Id.
126 Id.
which did not.\textsuperscript{127} In that way, criminal law functioned far more like civil law still does today. Most urban centers did not have professional police forces, but rather groups of ordinary citizens taking part as night watchmen.\textsuperscript{128} Prosecutors received piecework pay and “simply ratified the wishes of small constabularies and crime victims.”\textsuperscript{129} 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.\textsuperscript{130}

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 offices, salaries replaced piecework pay, and the new politicization rewarded those prosecutors who punished crimes the public most wanted them to punish.\textsuperscript{131} Professional police forces replaced the groups of watchmen.\textsuperscript{132} 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: “By the 19\textsuperscript{th} century’s end, most of the cities of the Northeast and Midwest were ruled by immigrants and their children. They dominated local police forces: Irish cops decided which Irish criminals to arrest.”\textsuperscript{133}

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

\textsuperscript{127} Stuntz, supra note 16, at 72.
\textsuperscript{128} Id. at 89.
\textsuperscript{129} Id. at 88.
\textsuperscript{130} Walker, supra note 118, at 44.
\textsuperscript{131} Stuntz, supra note 16, at 88-90.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 91.
By the late 19\textsuperscript{th} 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.

First, trials were far more common. A Today 95 percent of felony convictions are obtained by guilty plea.\textsuperscript{134} Jury acquittals are rare. Trials as a whole are rare. At the turn of the last century, however, 60 percent of felony charges ended in conviction and far far fewer defendants pleaded guilty.\textsuperscript{135} Stuntz argues that this difference was due in large part to the lack of procedural rules and protections that applied during the Gilded Age.\textsuperscript{136} Scrutinizing criminal procedures, police practices, and trial procedure requires lengthy trials, extensive motion practice, and expensive trials 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.\textsuperscript{137}

\textsuperscript{135} Stuntz, supra note 16, at 139.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
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 become.\textsuperscript{138} Rather, when deciding upon the existence of scienter, criminal intent, they very often were judging whether or not a criminal defendant deserved punishment.\textsuperscript{139} The concept of scienter, the “vicious will” that must accompany all crimes, was far more vague then.\textsuperscript{140} 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. How and why the scienter requirement has been minimized is explored in some more depth in the next section.

Third and last, 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 US have most commonly been elected at the county level. 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.\textsuperscript{141} 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.\textsuperscript{142} Again, this all changed in the late twentieth century, when the suburban populations within these counties bloomed and deprived took over political power over the system and representation in the jury pool.

\textsuperscript{139} \textsuperscript{\textit{Stuntz, supra} note 16, at 84, 139-140.}
\textsuperscript{140} \textsuperscript{Id.}
\textsuperscript{142} \textsuperscript{Id. and \textit{Stuntz, supra} note 16, at 84, 141.}
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. One key feature that was missing from 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.

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

B. The Demise of the Gilded Age system and the rise of Mass Incarceration

Following World War II, the United States saw an increase in crime spanning two generations. 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.\(^\text{143}\) Detroit’s rate multiplied by eight, New York’s by six, and most other cities had their rates either triple or quadruple.\(^\text{144}\) 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.\(^\text{145}\)

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 44


\(^{144}\) Id.

\(^{145}\) Id.
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 30 percent.‘’\(^{146}\) 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.\(^{147}\) The incarceration rate went from one the lowest in the world to the absolute highest.\(^{148}\) The increase in punishment for the African American community was even more dramatic.\(^{149}\) 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.\(^{150}\) 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 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.

\[ \text{a. Loss of Local Control} \]

\(^{146}\) Id. and Stuntz, supra note 16, at 5.  
\(^{147}\) Id. at 232.  
\(^{149}\) Id.  
\(^{150}\) Id. and Stuntz, supra note 16, at 47.
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 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.\footnote{Id. and Stuntz, supra note 16, at 192.}

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-20\textsuperscript{th} 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.\footnote{See infra section IV.B.b. See also Sasha Abramsky, Crime, Punishment, and Vengeance in the Age of Mass Imprisonment (Beacon Press 2007).} 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 \textit{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.  

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

b. 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*; and it applied the exclusionary rule against the states in *Mapp*.  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.  

Sophisticated defendants, chronic recidivists and the wealthy, could navigate their new rights more deftly than the innocent or the poor.  

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.

156 See generally Richard A. Leo, *The Impact of Miranda Revisited*, 86 *Journal of Criminal Law and Criminology* 621 (1996) (analyzing the results of the study of police interrogations and finding that rights are chiefly invoked by recidivists and those accused of white collar crimes).
157 Id.
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. 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. Crime and anti-Warren Court rhetoric featured at the center of campaigns for President and in the campaigns for state governorships. Though Republican governors and legislatures led the way, the officials of all states wanted to appear as punitive as possible. 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.”

Stuntz provides an account of the 1986 legislation that set the sentencing ratio between crack cocaine and powder cocaine; it 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. 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.”

158 Pew Center Report, One in One Hundred, supra note 3, at 17.
159 Stuntz, supra note 16, at 236-241. See also Sasha Abramsky, Crime, Punishment, and Vengeance in the Age of Mass Imprisonment (Beacon Press 2007)
160 Stuntz, supra note 16, at 240.
161 Id. at 241.
162 Id. at 173.
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 it changed the nature of criminal laws.

c. 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.\(^{163}\) Drug charges as a whole are often used as indirect ways of punishing other, harder to prove offenses such as violent crimes;\(^ {164}\) urban gangs are adept at intimidating witnesses to prevent the prosecution of violent crimes, so prosecutors have the ability to charge them with easier-to-prove drug offenses that carry hefty penalties. “Charge stacking” is another tool for the prosecutor, meaning they can charge multiple offenses based on the same conduct and bargain with the offender to reduce the amount of charges in exchange for a plea.\(^{165}\) Legislatures have so obliged prosecutors by developing many related series of crimes that survive the double jeopardy rule.\(^ {166}\)

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.\(^ {167}\) These rules have not limited prosecutors; in fact, they have contributed to the power the prosecutor has during

\(^{163}\) Id. at 260-262.

\(^{164}\) Stuntz, supra note 16, at 80.


\(^{166}\) Id.

\(^{167}\) See generally Erik Luna and Paul G. Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1 (2010).
plea-bargaining.\textsuperscript{168} Appellate judges, legislators, and prosecutors matter more in the current system and the moral evaluations of trial judges and juries matter less.

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.

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 that crimes happened in; 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. By the time the Great Migration of African Americans came about, none of these three mechanisms was available. No wonder the two migrations played themselves out so differently.

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 have developed separately, their criticisms of the current system and their visions for better criminal justice systems demonstrate that these approaches share values of communitarianism and flexibility in the administration of criminal justice. Restorative Justice proponents, in particular, have often presented their movement as a wholly separate from the

criminal justice systems that have existed for nearly a millennium in Western states; though we can see aspects of restorative justice at work even in the relatively 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.\textsuperscript{169} Communitarianism is a condition of societies. A communitarian society acknowledges the interdependencies that exist between people in a community, it fosters mutual respect and trust, and it encourages people to take responsibility for one another.\textsuperscript{170} These societies, so central to the Restorative Justice vision, were exemplified by the urban centers in the Gilded Age. Stuntz describes the Gilded Age system as follows:

\begin{quote}
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.\textsuperscript{171}
\end{quote}

This is exactly the society advocated for by many Restorative Justice proponents. The loss of this balanced, communitarian society in the mid-20\textsuperscript{th} century—when these communities lost voting control over their criminal justice system—resulted in the excess of punishment we have today.

B. Flexibility in the Administration of Justice

\textsuperscript{169} \textbf{Braithwaite, supra} note 20, at 100.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textbf{Stuntz, supra} note 16, at 31.
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. 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.

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. Rules regarding criminal intent were more vague and open to a wider variety of defenses. 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.

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

172 See supra section II.B and accompanying notes.
173 See supra section IV.B.c. and accompanying notes.
174 See supra section III and accompanying notes.
Critics also question whether community control is even possible. 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. Critics have questioned whether these systems can be revived in societies were communal relations are not as strong as those in tribes or small villages.\(^{175}\)

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. Juries drawn from these communities, along with judges and prosecutors, were able exercise the control necessary to keep both incarceration and crime rates low. Furthermore, major studies of communities in the US that are plagued by both crime and incarceration, has found that shame from their communities has a profound impression on the members that have been convicted of offenses—though the stigmatizing nature of the shame as created by the conventional criminal justice system prevents the offenders from ever reentering society.\(^{176}\) It seems that our society would very much prefer a system more in line with Restorative Principles and would also be able to carry it out.

**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

\(^{175}\) Id.
differences, the Gilded Age system tested the most controversial aspects of Restorative Justice—community control and relatively lax procedural protections—to good result. 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 augment or complement that system or to outright replace it. 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 come into play. The connections between these movements, their mechanisms and principles, should prove useful for proponents of both approaches in seeking reforms.