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Legal Violence and Restorative Justice

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INTRODUCTION

This essay explores the use of "legal violence" as a key concept for unlocking and unpacking discussions of structural violence and structural racism in law and policy. The concept of legal violence has been put forth in multiple articles by sociologists Leisy Abrego, Cecilia Menjívar, and other colleagues with the intention of understanding the impact of immigration policy and law on individuals and communities.[1] Specifically, their

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1. Cecelia Menjívar & Leisy Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOCIOL. 1380 (2012); Leisy Abrego et al.,

goal has been to explore legal violence as an "analytic category" to better understand how specific legislation "makes possible and amplifies" various, mutually reinforcing forms of violence which are experienced as "normal" or "regular" effects of the law.[2] As Abrego and others state:

> Instead of narrowly focusing only on the physical injury of intentional acts to cause harm, this concept broadens the lens to include less visible sources of violence that reside in institutions and structures and without identifiable perpetrators or incidents to be tabulated. … In examining the effects of today's ramped up immigration enforcement, we turn to this concept to capture the violence that this regime produces in the lives of immigrants.[3]

Focus is placed on how "structures, laws, institutions, and practices … similar to acts of physical violence, [can] leave indelible marks on individuals and produce social suffering."[4] The emphasis is both "immediate social suffering", as well as "potentially long-term harm" with specific "repercussions."[5] Menjívar and Abrego add,

> Legal violence captures the suffering that results from and is made possible through the implementation of the body of laws that delimit and shape individuals' lives on a routine basis. Under certain circumstances, policy makers and political leaders enact laws that are violent in their effects and broader consequences. Although their effect may be considered a form of both structural and symbolic violence, we refer to it as legal violence because it is embedded in legal practices, sanctioned, actively implemented through formal procedures, and legitimated—and consequently seen as "normal" and natural because it "is the law.[6]

I encountered this concept when developing a course on Restorative Justice ("RJ") in UC Berkeley's Legal Studies department. As part of the American Cultures program, the RJ course must address a concept through the lens of at least three U.S. cultures of communities. Students who may have avoided social science and history courses at UCB were required to take at least one American Cultures course, where they would apply a comparative lens to gain a deeper understanding of U.S. history and culture. The RJ course addresses how various U.S. communities encountered Restorative Justice through different experiences of injustice, in part through racial and

Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Legislation, 5 J. MIGR. HUM. SECUR. 695 (2017). The focus of these two articles is on Central American immigrants.

2. Menjívar & Abrego, *supra* note 1, at 1380, 1384.
3. Abrego et al., *supra* note 1, at 695.
4. *Id.*
5. *Id.* at 1384–85.
6. Menjívar & Abrego, *supra* note 1, at 1387.

historical harms. The concept of legal violence forms a throughline for analyzing and comparing these communities' experiences of the law and legal systems.

Focusing on how legal structures and policies cause harm and social suffering aligns well with the goals of the Restorative Justice movement. Foundationally, Restorative Justice invites us to explore impacts, needs, and obligations that emerge out of incidents of harm and violence. "Restorative Inquiry," as some call it, asks of any situation:

> What happened?
> Who is harmed?
> What were people's intentions and motivations in doing the harm?
> What are the specific impacts?
> What needs are generated out of these impacts?
> Who is obligated to respond to the harms?
> What are processes through which people will come together to respond to impacts and needs and to come together to repair the harm?[7]

Through Restorative Inquiry, what we know as crime is recast as harm to relationships and within communities. Further, RJ creates opportunities for people to come together in restorative processes to (1) address these harms, (2) unpack their impacts, (3) determine the needs generated among all parties, and (4) investigate the question of who is obligated to create and follow through on pathways for repairing that harm. This is essential for interrupting cycles of harm and reducing further harm caused by people's engagements with the criminal legal system at all levels. Expanding these community-based processes to address greater structural concerns can be challenging. However, the concept of legal violence invites us to address each aspect of the Restorative Inquiry in turn in order to build pathways to repair.

Thinking more broadly, the application of Restorative Inquiry to laws and policies as forms of legal violence invites us to:

- Surface deeper truths about how laws and policies come to be, how they are envisioned and designed, and in what political and historical context;
- Explore the motivations and intentions behind laws and policies, and establish points of accountability among individuals and systems;
- Research and acknowledge the impacts of this legislation on individuals and communities;

7. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 28, 37, 38 (2002).

- Recognize the needs that are generated in communities in response to the impacts of these regulations;
- Bring people together to explore pathways to repair; and
- Identify who is obligated to construct and support these pathways.

This approach invites a broader study of the human agency and institutional agency behind the creation and design of a law or policy, which then requires a deeper exploration of their intent and impact. By focusing on the creation and design processes as well as its implementation and enforcement, we can map out how each aspect builds on the others when addressing harms. Further, this holistic analysis of people's experiences of the law leads to greater possibilities for acknowledgment, accountability, and, most importantly, restorative approaches to repairing relationships and communities. In the last section of the paper, I will discuss this in terms of processes of Restorative Justice and Truth, Justice, Accountability, and Repair.

A FRAMEWORK FOR EXAMINING LEGAL VIOLENCE: THE SCOPE AND SCALE OF LEGAL VIOLENCE IN IMMIGRANT COMMUNITIES

In their analyses of legal violence and its impacts, Menjívar et al. address the ways in which a series or proliferation and accumulation of laws and policies can "encage" individuals and communities into positions of being both restricted by laws and criminalized, viewed as "outside" the law altogether, unable to benefit from legal protections.[8] The authors demonstrate how laws "make immigrants simultaneously accountable to the law but also excludes them from legal protections or rights," as part of a process of the "criminalization" not only of immigrants but all people who share their identities.[9]

The process of criminalizing a group of people does not happen overnight. The authors look back to the 1980s, and particularly the 1990s, to enumerate a series of laws and policies vastly expanded in scope and scale after 9-11 and then taken to their limits during the Trump administration.[10] These include the Immigration Reform and Control Act of 1986; the Illegal Immigration Reform and Immigration Responsibility Act of 1996; Bush Era Laws and Executive Orders, including The Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005; laws passed at the state level throughout the 2000s, including Arizona SB 1070 and Alabama HB 56; and finally, Trump Era Executive Orders, including "Border

8. Menjívar & Abrego, *supra* note 1, at 1385.
9. *Id.* at 1380, 1385.
10. *Id.* at 1392, 1394.

Security and Immigration Enforcement Improvements" and "Enhancing Public Safety in the Interior of the United States" in 2017.[11]

Each new policy adds a dimension of legal violence, namely through the language of the law itself. Abrego et al. explore how legal violence "takes shape" through laws and legal language that "not only [permit] various forms of violence against immigrants, but … also [make] abuses possible and acceptable."[12] A salient example is the use of the term, "criminal alien," which has transformed our understanding of immigrants and asylum seekers both within the law and as people.[13] The goal of the phrase, according to Abrego et al., is to "produce" as many people "who—through discourse and policy, can be criminalized and incarcerated or deported as 'criminal aliens.'"[14] The concept has made "criminality" and "unauthorized status" synonymous, while "cast[ing] an increasingly wider net" around those "who could be classified as a 'criminal alien.'"[15]

These laws and policies trickle down from the federal level to state and local levels through enforcement strategies that "encage" migrants:

Once they have successfully made the journey through the highly patrolled patchwork of fences, checkpoints, and watchtowers, migrants throughout the United States face constant surveillance and the threat of deportation, forcing them to live in the shadows and to remain unseen. Together, these material and psychological barriers have transformed the United States into a nation of immigrant inmates—a nation where migrants are targeted, criminalized, policed, detained, confined, and deported.[16]

This transformation is amplified by the language of the law, which dehumanizes its targets, and, through enforcement in communities, creates a situation where, "undocumented immigrants are not perceived as fully human at the most fundamental neural level of cognition, thus opening the door to the harshest most exploitative, and cruelest treatment that human beings are capable of inflicting on one another."[17] Extreme enforcement tactics in immigrant communities, like militarized raids, double down on the criminalization of the community by explicitly associating the entire

11. Menjívar & Abrego, *supra* note 1, at 1388, 1390, 1392, 1409; Abrego et al., *supra* note 1, at 698.

12. Abrego et al., *supra* note 1, at 699.

13. *Id.* at 702.

14. *Id.* at 695.

15. *Id.* at 695–96 (The accumulation of deportable offenses that went well beyond what is normally considered violent crime (murder, rape, arson, assault) began with the 1996 laws, where the term "aggravated felony" was proposed to include such offenses as prostitution, drug possession and addiction, shoplifting, and failure to appear in court, among others. Later, new offenses were added, including writing a bad check and carrying a firearm).

16. Mary E. Mendoza, *Caging Out, Caging In: Building a Carceral State at the U.S-Mexico Divide*, 88 PAC. HIST. REV. 86, 90 (2019).

17. Menjívar & Abrego, *supra* note 1, at 1390.

community with terrorism, drug trafficking, and violent crime.[18] These raids, which have "become a common strategy to detain and deport immigrants," also increase people's fear of being deported, resulting in fear and alienation.[19]

Menjívar and Abrego turn to the theory of "symbolic violence" to explore the deeper impacts of legal violence on the psyche and the social fabric of communities: "when [legal] violence is motivated by positive intentions, or is the incidental by-product of other goals, or is socially accepted or lauded, it escapes our attention."[20] An explicit recognition of the law's capacity for violence and harm focuses attention on how laws can lead to material injuries, "such as the destruction, confiscation, or defacement of property, or the loss of earnings."[21] Thus, it is also important to recognize more symbolic forms of violence, such as "the psychological outcomes of fear, shame, anxiety, or diminished self-esteem; […] and the social consequences of public humiliation, stigmatization, exclusion, banishment, and imprisonment, all of which can have deeply devastating consequences for human beings."[22]

In addition to material impacts, Abrego and Menjívar note that people begin to internalize that they have "no rights", and that because they are "illegal," that they are "worthless."[23] Further, brutal enforcement actions reshape their self-perceptions: they are incarcerated with people who have been convicted of committing violent crimes, and they are chained up "like animals" for court appearances.[24]

These outcomes are due in large part because people are socialized to trust "legal systems." Since forms of violence are "embedded in legal practices, sanctioned, actively implemented through formal procedures, and legitimated," it is "consequently seen as 'normal' and natural because it 'is the law.'"[25] These processes of internalization can, in turn, weaken the social fabric that binds people together, allowing violence from outside communities to seep in and further stress relationships and community coherence.

The legal violence framework allows for a comparative approach with other communities. As noted, legal violence comes in the form of a proliferation of laws that criminalize the very identity and the behaviors of a community of people through the use of dehumanizing language and

18. Menjívar & Abrego, *supra* note 1, at 1388-90.
19. *Id.* at 1390-91.
20. Mary R. Jackson, *Violence in Social Life*, 28 ANN. REV. SOCIO. 387, 388 (2002).
21. *Id.* at 393.
22. Jackson, *supra* note 20, at 393.
23. Menjívar & Abrego, *supra* note 1, at 1404, 1408.
24. Daniel Martínez & Jeremy Slack, *What Part of "Illegal" Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States,* 22 SOC. & LEGAL STUD. 535, 545 (2013).
25. Abrego et al., *supra* note 1, at 699.

through structures that 'encage' people in a limbo space both inside and outside the law. Through the implementation and enforcement of the laws, people have difficulty taking care of themselves and accessing goods and services. This weakening of the social fabric reduces community coherence and care. Without the distance to analyze what is happening, people begin to internalize the dehumanizing discourse and sensibility. Ultimately, the violence caused by the law permeates communities and begins to circulate, further alienating people from one another.

LEGAL VIOLENCE AS EXPERIENCED BY INDIGENOUS PEOPLES IN THE US: A FOCUS ON THE MAJOR CRIMES ACT OF 1885

In the 1800s and early 1900s, the U.S. government targeted and criminalized Indigenous peoples in the United States through a proliferation of legislative acts, buffeted by Supreme Court decisions, that were aimed at reducing tribal sovereignty and forcing assimilation. In particular, this paper focuses on the ways the U.S. government forced Native peoples into the criminal justice system, while longstanding tribal justice systems were discredited and nearly destroyed. A pivotal movement in the extensive series of laws and policies was the Supreme Court case of *ex parte Crow Dog 109 U.S. 556 (1883)*, that led to the Major Crimes Act (MCA) of 1885.

Several scholars have discussed how Crow Dog's murder of Chief Spotted Tail on the Great Sioux Reservation in Dakota Territory eventually led to the Major Crimes Act ("MCA").[26] My focus is on the fact that the families of Crow Dog and Spotted Tail had come together in a traditional justice process of the Lakota Sioux tribe that involved the payment of restitution, to everyone's satisfaction, "quickly redress[ing] the killing and restor[ing] tribal harmony."[27] However, the "outrage" of white people outside the reservation led to a call for Crow Dog to be tried, and ultimately sentenced to death by hanging for murder in the First Judicial District Court of Dakota (of 1883).[28] While the Supreme Court ruled in favor of the exercise of tribal justice, which was protected by treaty rights, the author of the decision signaled to Congress that they needed to act to override these rights.

In his decision, Supreme Court Justice Stanley Matthews famously characterized the community-based restitution model as showing "the strongest prejudices of [the Lakota's] savage nature," and demonstrating "the red man's revenge," in contrast to the "white man's morality."[29] Many

26. Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty,* 14 AM. INDIAN L. REV. 191, 192 (1989).

27. *Id.* at 199 (according to the *Black Hills Daily Times*, Harring notes that the families agreed to a payment of $600, eight horses, and one blanket).

28. *Id.* at 212, 218 (see Harring's skeptical account of the "popular outcry").

29. *Ex parte* Kan-gi-shun-ca, 109 U.S. 556, 571 (1883).

contemporary scholars have noted the absurdity of the perspective that the imposition of the death sentence by hanging demonstrated a more "civilized" form of justice.[30] As scholars Vine Deloria Jr. and Clifford Lytle put it, "The idea … that tribal laws involved some Old Testament eye-for-an-eye mechanism that worked independently of human personality stems merely from inadequate observations of what really occurred in tribal societies."[31]

This deliberate ignorance and misrepresentation of tribal justice allowed the Supreme Court and Congress to claim they owed Indian tribes "a duty of protection," both from themselves and from angry non-Indians.[32] In reality, as Deloria and Lytle explain, the MCA came at a time when the U.S. government was assimilating Native peoples into lives that would be "agricultural and sedentary" oriented toward Christian belief systems:[33]

To allow a "primitive" form of justice to flourish in the case of the most serious crimes was unthinkable. To allow the Indians to continue to regulate their own domestic relations was considered a mild form of insanity. The slogan that characterized federal Indian policy was "break up the tribal mass" and this particular custom, to give compensation for a murder instead of invoking the death penalty, was considered a symbol of continued savage resistance to the overtures of sincere "civilized" efforts to assist the Indians.[34]

The MCA was part of a series of laws and policies meant to force Native people into federal, and later state criminal justice systems.[35] Originally, it included several categories of crimes, namely, murder,

30. Steve Russell, *Making Peace with Crow Dog's Ghost: Racialized Prosecution in Federal Indian Law*, 21 WICAZO SA REV. 61, 62 (2006).

31. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 111, 112 (1983).

32. Russell, *supra* note 30, at 63-64. Russell notes that, later, in *U.S. v. Kagama,* the Supreme Court openly made the argument that this new jurisdiction was necessary, because "Congress 'allotted' Indian reservations and opened the remaining 'surplus lands' for the use of the same overwhelmingly European settlers who were already ensconced on ceded Indian lands." In *Kagama*, "the court articulated a new set of racist assumptions to define Native people as those needing protection from each other, and protection from their own 'ill feeling' as 'wards of the nation,' dependent on the United States… largely for their daily food… and political rights. 'Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to their course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.'"

33. DELORIA & LYTLE, *supra* note 31, at 30.

34. *Id.* at 169-70.

35. U.S. DEP'T OF JUST., CRIM. RES. MANUAL § 678, *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-678-general-crimes-act-18-usc-1152 [https://perma.cc/PT8L-CHWC] (Prior to the MCA, Congress also passed the General Crimes Act of 1817, which began to place certain crimes committed by a Native American person in Indian territory under federal jurisdiction).

manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.[36] The list then grew to include felony sexual abuse, felony assault, felony child abuse or neglect, robbery, and more.[37] Notably, the MCA only applies when the perpetrator is Indian, while the victim may be Indian or "another person," namely non-Indian.[38] The main point is that Indians would be subject to the same laws, "tried in the same courts," and "subject to the same penalties as are all other persons."[39]

After the MCA came the Assimilative Crimes Act of 1898, which sought to cover acts that were "not … punishable by any enactment of Congress, [but] would be punishable … [in] the State, Territory, Possession or District."[40] In 1953, Public Law 280 ("P.L. 280") expanded Native people's vulnerability to Euro-American criminal legal systems by granting some states the rights to adjudicate and incarcerate Native people in state-level systems.[41] Deloria and Lytle write, "The statute transferred both civil and criminal jurisdiction over reservation Indians to certain states and gave permission to other states to amend their constitutions … so they could assume jurisdiction if they desired."[42] P.L. 280 further displaced "tribal authority," and brought much confusion over jurisdiction, and arbitrariness, which states took advantage of: "No one really had much understanding of how P.L. 280 was supposed to work. … It did little to offer guidelines for practical law enforcement."[43]

The delegitimizing of tribal justice systems weakened the power of traditional councils of elders and clan leadership, thereby threatening Native sovereignty.[44] Meanwhile, Congress also passed the Code of Indian Offenses in 1883, which began the process of criminalizing Native cultural and religious practices:

The following constituted offenses: plural or polygamous marriages; immorality; intoxication; destroying property of other Natives (this speaks to mourning practices: destroying the property of the deceased was customary in many tribes); any Native dance "intended and calculated to stimulate the warlike passions of the young warriors of the tribes . . . and the practices of medicine people which were seen as "anti-progressive," because medicine people used their power in "preventing the attendance of the children at the public schools, using their conjurers' arts to prevent the people from abandoning their heathenish rites and customs . . . ."[45]

36. CRIM. RES. MANUAL, *supra* note 35.
37. 18 U.S.C. § 1153.
38. DELORIA & LYTLE, *supra* note 31, at 170.
39. *Id.* at 227, 170.
40. 18 U.S.C. § 13.
41. DELORIA & LYTE, *supra* note 31, at 18-19.
42. *Id.* at 175-76.
43. *Id.* at 175.
44. LUANA ROSS, INVENTING THE SAVAGE 14 (1st ed. 1998).
45. *Id.* at 18.

At the same time, the government established the Court of Indian Offenses, which authorized government agents to prohibit dancing rituals and punish those who engaged in the practice.[46] The enforcement of the Code of Indian Offenses also culminated in the violent arrest and killing of Chief Sitting Bull in 1890.[47] Laws that promoted "the nuclear family" by allocating land to individuals and "households" targeted extended kinship systems and Indigenous modes of raising children.[48] The government's promotion of assimilationist goals is evidenced in an 1882 letter sent to the Office of Indian Affairs by the Department of the Interior: in fact, this letter became the linguistic basis for creating the "Rules Governing the Court of Indian Offenses" (also known as the Code of Indian Offenses).[49] Ultimately the language the government used at this time conveyed its ignorance and intentional misrepresentation of Indian life.[50] Punishments for engaging in cultural practices, including dances, plural marriages, practicing indigenous medicine, and more included both the "withholding of rations" and up to 30 days in prison.[51] Once these laws were put into place, many would be regularly reaffirmed by various governmental agencies. They were officially lifted in 1934, which and were strengthened by the enactment of the American Indian Religious Freedom Act.[52]

In addition, to the violation of treaties, the rights to fish, hunt, gather, and grow semi-cultivated crops like wild rice were severely eroded, resulting in the criminalization of basic practices for survival.[53] For example, in 1913, Indigenous people in the Pacific Northwest were arrested for fishing

46. Dorothy H. Bracey, *Criminalizing Culture: An Anthropologist Looks at Native Americans and the U.S. Legal System*, *in* NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 35, 40 (Jeffrey Ian Ross & Larry Gould eds. 2006) ("The federal district court in Oregon (*United States v. Clapox*, 43 Fed Rep. 575, 1888) had upheld the right of the Department of the Interior to promulgate such regulations; the court specifically mentioned the criminalization of several dances and the 'usual practices of so-called medicine men' in its approval.").

47. *Id.*

48. *Id.* at 47.

49. Letter from Henry M. Teller, Sec'y, Dep't of the Interior, to Hiram Price, Comm'r, Off. of Indian Aff. (Dec. 2, 1882), https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf [https://perma.cc/D8HR-EFP7] ("Another great hindrance to the civilization of the Indians is the influence of the medicine men, who are always found with the anti-progressive party. The medicine men resort to various artifices and devices to keep the people under their influence, and are especially active in preventing the attendance of the children at the public schools, using their conjurers' arts to prevent the people from abandoning their heathenish rites and customs. While they profess to cure diseases by the administering of a few simple remedies, still they rely mainly on their art of conjuring.").

50. Letter from Hiram Price, Comm'r, Off. of Indian Aff.s, to Henry M. Teller, Sec'y, Dep't of the Interior (Mar. 30, 1883), https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf [https://perma.cc/D8HR-EFP7].

51. *Id*.

52. ROSS, *supra* note 44, at 39.

53. Linda Robyn, *Criminalization of the Treaty Right to Fish: Response of the Great Lakes Chippewa*, *in* NATIVE AMERICANS AND THE CRIMINAL JUSTICE SYSTEM 161, 164-65 (Jeffery Ian Ross & Larry Gould eds. 2006).

on their own federally supervised lands.[54] In Montana, Native people were jailed for hunting without a license if they could not pay a fine, and lack of access to resources for survival led to poverty and starvation.[55] Native people could also be charged with misdemeanor crimes for not engaging in "work," as defined by white settlers.[56]

Luana Ross uses the language of the legal violence framework when she writes, "[l]aw has repeatedly been used in this country to coerce racial/ethnic group deference to Euro-American power."[57] Ross summarizes that the "backbone of the colonial relationship" is constituted as a web of policies that comprise a system "that imposes on indigenous populations cradle-to-grave control designed to obliterate worldview, political independence, and economic control . . . Euro-Americans sought to delegitimize Native worlds and attack their constructs including Native justice systems, which were systematically torn down, eroded and replaced."[58] She notes, "[t]o resist is criminal, risking the wrath of multiple enforcement agencies."[59] She argues that the government's goal was, "to make Natives like white people, first by means of war and when the gun smoke cleared, by means of laws—Native people instead became 'criminals.'" [60]

Ross notes that the passage of the Major Crimes Act and others that followed, was part of a larger settler project of culture suppression, forced assimilation, and the criminalizing of Native people, where "*[c]riminal* meant to be other than Euro-American."[61] Harring supplements this analysis when he adds,

> [b]y the 1880's, . . . [t]here was no more tolerance for any notion of Indian sovereignty . . . These Indian nations were simply in the way of white expansion; their treaty rights interfered with the Black Hills gold rush, railroad lines, and the westward expansion of agriculture . . . [Bureau of Indian Affairs] officials felt they needed the coercive power of the criminal law to help force the assimilation of the Indians—the forceable application of criminal law as one painful way to learn civics. [62]

It is impossible to fully acknowledge the impacts of these forms of legal violence for Native people and their communities in this short paper. Therefore, I will address only some of the impacts of the MCA that came with

54. Robyn, *supra* note 53, at 164. *See generally* DELORIA & LYTLE, *supra* note 18, at 175-77 (discussing the impacts of Public Law 280 on fishing and hunting rights).
55. ROSS, *supra* note 44, at 44-45.
56. *Id*. at 18.
57. *Id*. at 12.
58. *Id.*at 14, 29.
59. *Id.* at 29.
60. *Id.* at 14.
61. *Id*. at 12,14, 19.
62. Harring, *supra* note 26, at 195-96.

the shift from Tribal justice to the U.S. federal and state criminal legal systems. First, Deloria and Lytle summarize the ways in which the accumulation of laws and policies amounted to an assault on tribal sovereignty:

> The [] five statutory enactments—the General Crimes Act, the Major Crimes Act, the Assimilative Crimes Act, the Indian Civil Rights Act of 1968, the Public Law 280—have all encroached severally and separately upon tribal powers to deal with crime on the reservations. At one time tribes had exclusive jurisdiction over such issues. Today, their authority is but a skeleton of past powers and prestige.[63]

In addition to this assault on tribal sovereignty, the destruction of many Tribal justice systems forced Indigenous people into systems that were contrary to their values and way of life. Ada Pecos Melton has written and spoken extensively about the differences between Euro-American justice and Tribal justice systems.[64] She describes the latter as "holistic," and embedded in all aspects of culture and life:

> These systems are guided by the unwritten customary laws, traditions, and practices that are learned primarily by example and through the oral teachings of tribal elders . . . . The indigenous approach requires problems to be handled in their entirety. Conflicts are not fragmented, nor is the process compartmentalized into preadjudication, pretrial, adjudication, and sentencing stages. These hinder the resolution process for victims and offenders and delay the restoration of relationships and communal harmony. All contributing factors are examined to address the underlying issues that precipitated the problem, and everyone affected by a problem participates in the process. This distributive aspect generalizes individual misconduct or criminal behavior to the offender's wider kin group, hence there is a wider sharing of blame and guilt. The offender, along with his or her kinsmen, are held accountable and responsible for correcting behavior and repairing relationships.[65]

Understanding how Native cultures determine right from wrong are laid out in "custom and precedent" that is part of a "shared sense of reality" within the community.[66] These approaches to justice are embedded in ancestral belief systems and all relationships, as *Diné* Navajo Court Justice Emeritus Robert Yazzie explains:

63. DELORIA & LYTLE, *supra* note 31, at 177.
64. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society,* 79 JUDICATURE 126, *passim* (1995).
65. *Id.* at 126, 128.
66. DELORIA & LYTLE, *supra* note 31, at xi.

> Navajos learn "right ways" of thinking and acting through prayers and ceremonies, often internalized at an unconscious level. Western philosophy calls this the "conscience," and the Navajo conscience is expressed through language and relationships. It is part of the Navajo concept of *k'e*, a broad range of feelings about positive relationships with others, which include respect, solidarity, love, and loyalty to the clan . . . There is a Navajo maxim which describes the healing and the restoration of good relations. It is *hozho nahasdlii*. It means something like, "now that we have done these things we are again in good relations." The phrase describes *hozho*, which is a perfect state where people, things, and reality are functioning well and in good relations. That shows how the process leads to healing of the body, the mind, and the spirit.[67]

These brief glimpses into the structures and contexts of Tribal justice give an indication of what was at stake in their misrepresentation and attempted destruction by white settlers. Rather than experience a holistic, community-based approach to justice, which both strengthens and depends on human relationships, Native people are subjected to the violence of the U.S. criminal legal system.

One of the primary outcomes of these jurisdictional changes has been the mass numbers of Indigenous people—both adult and juvenile—caught up in the criminal legal system. Ross notes that, given the nature of Tribal justice, prisons were not needed in Indian country.[68] Yet, the incarceration rate for Native Americans is more than double the rate for white populations. [69] While the statistics are not necessarily reliable, in 2017, there were at least 24,000 Native people incarcerated in state and federal prisons, and almost 10,000 in local jails.[70] Over the past 20 years, the number of people in local and Indian county jails [71] increased by 61-85%. Ultimately, "[o]n a given day, 1 in 25 American Indians age 18 or older is under the jurisdiction of the [U.S.] criminal justice system.[72]

As Fania E. Davis put it, regarding the U.S. criminal justice system, "[o]urs is a system that harms people who harm people, presumably to

67. Robert Yazzie, *Hozho Nahasdlii - We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 121, 124 (1996). *See also* Robert Yazzie, *Life Comes from It*, 24 N.M.L. REV. 175 (1994).

68. ROSS, *supra* note 44, at 13.

69. Roxanne Daniel, *Since you asked: What data exists about Native American people in the criminal justice system?*, PRISON POL'Y INITIATIVE (Apr. 22, 2020) https://www.prisonpolicy.org/blog/2020/04/22/native/ [https://perma.cc/5QPL-UTVK].

70. *Id*.

71. Leah Wang, *The U.S. criminal justice system disproportionately hurts Native people: The data, visualized*, PRISON POL'Y INITIATIVE (Oct. 8, 2012) https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/ [https://perma.cc/X6X7-8473].

72. LAKOTA PEOPLE'S LAW PROJECT, NATIVE LIVES MATTER 8 (2015), https://s3.us-west-2.amazonaws.com/romeroac-stage/uploads/Native-Lives-Matter-PDF.pdf [https://perma.cc/65KP-HQXT].

show that harming people is wrong."[73] The experience of isolation in prison "is an ally of trauma, as silence fortifies traumatic stress and can perpetuate cycles of pain."[74] This trauma can be rooted in shame that is "simulated and exacerbated" through the prison experience, "as our separation from people only serves to reinforce our notions of our unworthiness and our distance from human community."[75] The long-term impacts of prison isolation are felt in relationships and at the community level, possibly increasing the likelihood of recidivism: "Isolation disengages the anchor we have placed in relationship and sets us to sea unmoored from the love, values, and obligations that otherwise guide and constrain our behavior."[76]

Ultimately, prison is a place where violence is normalized, and cycles of violence are reinforced.[77] The violence of prison is about power, control, domination humiliation, degradation, and it is most often met with impunity.[78] It leaves people in states of deep shame, "peak levels of hypervigilance and fear," and exacerbated trauma, especially where sexual violence is concerned.[79] In prison, all of this is normalized and becomes part of everyday life, "creat[ing] a context in which people experience a failure of systems or strategies for protection, and so seek out new or enhanced ones to make sure they will not be hurt again . . . . Exposure to violence requires and animates the rapid development of new safety strategies;" these strategies are often based in acts of individual or group violence.[80]

Native youth experience the brunt of these forms of legal violence. While making up "only 1 percent of the national youth population, 70 percent of youth committed to the Federal Bureau of Prisons (BOP) as delinquents are Native American, as are 31 percent of youth committed to the BOP as adults."[81] Furthermore, "Native American youth are also more likely to receive the two most severe punishments in juvenile justice systems: waiver to the adult system and incarceration."[82]

The U.S. criminal justice system applies adult status to juvenile federal offenders for a number of offenses.[83] The MCA plays a role here, because

73. FANIA E. DAVIS, THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND U.S. SOCIAL TRANSFORMATION 25 (2019).

74. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION AND A ROAD TO REPAIR 70 (2019).

75. *Id*. at 70.

76. *Id*.

77. *Id*. at 76.

78. *Id.*

79. *Id*. at 76.

80. *Id*. at 74.

81. Rebekah Joab, *Incarcerating Native American Youth in Federal Bureau of Prisons Facilities: The Problem with Federal Jurisdiction Over Native Youth Under the Major Crimes Act*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSPS. 155, 156 (2017); D.O.J. OFF. OF JUST. PROGRAM, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 118 (2006).

82. *Id.* at 158.

83. *Id.* at 160. ("[F]elony crimes of violence, drug offenses, firearm offenses; murder, assault, robbery, bank robbery, or aggravated sexual assault with a firearm, for which the

in many areas where there is concurrent jurisdiction of federal and Tribal courts, federal attorneys may look skeptically at the "shorter maximum sentences that can be imposed under tribal law."[84] "In 2008, the average time served for youth in BOP custody [Federal Bureau of Prisons]adult prisons] was thirty-one months, which more than doubled from 1999, when the average time served was fourteen months."[85]

Incarceration in adult facilities is exceedingly harmful to youth for a number of reasons. Because of the dangers involved, they are often placed into solitary confinement. "Youth incarcerated in adult facilities are thirty-six times more likely to commit suicide than youth who are housed in juvenile detention facilities."[86] Further, adult prisons don't have resources and educational programs tailored toward youth.[87] And finally, it is less likely that youth in BOP can "earn good time for early release." [88] Joab finds that, "On average, youth who were previously prosecuted as adults are thirty--four times more likely to commit subsequent crimes, as compared to youth adjudicated as juvenile delinquents."[89]

Ultimately, interactions with the criminal legal system exacerbate the conditions of what Maria Yellow Horse Brave Heart and Lemyra DeBruyn have called "historical unresolved grief."[90] These can take the form of internalizing the colonizers' messages through self-blame for what has happened to them, their families or communities, feelings of inferiority, and lack of self-worth.[91] The loss of tradition and community through forms of legal violence continues to cause long-term and intergenerational harm and trauma for individuals and communities.[92]

BLACK COMMUNITIES' EXPERIENCES OF LEGAL VIOLENCE THROUGH MASS INCARCERATION

For her groundbreaking book, *The New Jim Crow*, Michelle Alexander did the painstaking work of documenting the cumulative impact of a series of laws and policies put into place over several decades in the so-called "Wars" on Crime and Drugs. Throughout her book, Alexander argues that

offender must be at least thirteen years old to be treated as an adult; any crime of violence (including physical force against a person or property) if the offender is at least fifteen years old; crimes involving a large monetary value; and ongoing patterns of more minor offenses.").

84. Joab, *supra* note 81, at 160.
85. *Id.*
86. *Id.* at 156.
87. *Id.*
88. *Id.* at 161.
89. *Id.* at 162.
90. Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN ALASKAN NATIVE MENTAL HEALTH RSCH. 60 (1998).
91. *Id.* at 70; *see* ROSS, *supra* note 44.
92. *See* Brave Heart & DeBruyn, supra note 70, at 61.

these regulations, including the Rockefeller drug laws of the early 1960s, the Omnibus Crime Control and Safe Streets Act of 1968; Reagan's "War on Drugs" launched in 1982 and his Anti-Drug Abuse Act of 1986 and its revised version in 1988; Clinton's 'three strikes' laws and Violent Crime Control and Law Enforcement Act of 1994 led collectively to conditions of mass incarceration in the US.[93]

In ways similar to the legal violence perpetrated through immigration policy, this series of laws became "extraordinarily punitive," criminalizing behaviors associated with drug addiction, expanding the "dragnet" of people who could be incarcerated for proximity to drug possession and many other non-violent offenses.[94] The legislation applied harsher sentences and mandatory minimum sentences, as well as enhancements that amount to felony offenses.[95] Overall, these waves of legal policy increased years behind bars and reduced opportunities upon release.[96] Enforcement was stepped up through increased surveillance in certain neighborhoods, raids, and "stop and frisk" type programs.[97]

In addition to the overarching policies of the War on Drugs, Alexander explores the Supreme Court Decisions that gradually dismantled protections for people of this "undercaste," for example through a shift in the Court's "4th amendment jurisprudence:[98]

> Virtually all constitutionally protected civil liberties have been undermined by the drug war. The Court has been busy in recent years approving mandatory drug testing of employees and students, . . . permitting police to obtain search warrants based on an anonymous informer's tip, expanding the government's wiretapping authority, legitimating the use of paid, unidentified informants by police and prosecutors, approving the use of helicopter surveillance of homes without a warrant, and allowing the forfeiture of cash, homes, and other property based on unproven allegations of illegal drug activity.[99]

Alexander documents how legislators designed and passed a series of budget plans which brought exponential increases in funding for law enforcement and massive prison construction at the federal, state and local levels; at the same time, the social safety-net, along with funding for drug abuse treatment was drastically reduced. Alexander writes, "By 1996, the

93. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th ed. 2020).
94. *Id.* at 68, 81-82.
95. *Id.* at 68, 118.
96. *Id.* at 231.
97. *Id.* at 156, 169, 295.
98. *Id.* at 20, 78-79.
99. *Id.* at 79.

penal budget doubled the amount that had been allocated to AFDC or food stamps."[100]

Viewed through the lens of the legal violence framework, we see the role of language plays in laws, policies and public discourse around the criminalization of Black men and Black communities. Alexander calls attention to the ways in which Reagan Era discourse excised the language of race from the discussion, only to replace it with talk of "welfare queens," "crack whores," "crack babies," "gangbangers" and "criminal predators."[101] The specter of a "super predator,"– "radically impulsive, brutally remorseless . . . [who] have absolutely no respect for human life" – took hold.[102] People associated with the criminal legal system were transformed in the public discourse into "monsters," as Danielle Sered explains it: "a monster who is not quite human like the rest of us, who is capable of extraordinary harm and incapable of empathy, who inflicts great pain but does not feel it as we do, a monster we and our children have to be protected from at any price."[103]

Not unlike the label of 'criminal alien,' the labels and positionalities of the 'inmate,' the 'felon,' and the 'criminal' open individuals to abject cruelty in the name of 'retribution' and 'deterrence.' As Alexander has noted, "criminals" make up a "social group . . . we have permission to hate."[104] Moreover, the specter of the super predator led to the imposition of mandatory life-without-parole sentences on predominantly Black juveniles.[105] Alexander reminds us,

> Virtually all of us break the law at some point in our lives—drinking under age, experimenting with drugs, committing traffic violations, shoplifting, failing to declare tips or cash income on tax returns, or even committing acts of violence in a schoolyard fight or when our emotions spin out of control. Rationalizing mass incarceration or mass deportation on the grounds that it is meant to rid our nation of "criminals" perpetuates the false notion that "criminals" are a monolithic, deviant group that is fundamentally different than "us" and therefore unworthy of our concern. They can be eliminated without a second thought.[106]

Coining the phrase, "the new Jim Crow," Alexander made the case that the policies of the 1980s and 1990s were an extension of Jim Crow Laws

100. ALEXANDER, *supra* note 93, at 72.
101. *Id.* at 66.
102. *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/ [https://perma.cc/7AGJ-S85V] [hereinafter EQUAL JUSTICE INITIATIVE].
103. SERED, *supra* note 74, at 11.
104. ALEXANDER, *supra* note 93, at 176-77.
105. EQUAL JUSTICE INITIATIVE, *supra* note 102.
106. ALEXANDER, *supra* note 93, at xl-xli.

of the early to middle 1900s.[107] These policies were designed to control Black bodies, subject Black people to slavery-like conditions through convict leasing systems, and restrict the accumulation of wealth in Black communities.[108] In other words, the intent of the War on Crime of the 1960s and 1970s, and later the War on Drugs of the 1980s to 2000s was to maintain white supremacy structures in the U.S. by pushing back on progress made during and after the Civil Rights Movement, ultimately building a massive system aimed at the control of Black bodies:

> The term *mass incarceration* refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison. Once released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion. They are members of America's new undercaste.[109]

Less attention has been paid, as Alexander notes in the preface to the 10-year Anniversary Edition, to the extreme othering and dehumanization of people in the criminal legal system, including those who have served their time.[110] She reminds us that "the system of mass incarceration extends far beyond prison walls—shaming, stigmatizing, and controlling people whether or not they've actually spent time behind bars."[111] "[I]t is the 'prison label, not the prison time' that matters most. . . . An arrest (even without a conviction) can have serious consequences, and a criminal conviction of any kind—even if probation rather than imprisonment is imposed—can relegate someone to a permanent second-class status.[112] The result is the treatment of a group of people defined by race and class as the 'enemy': "A literal war was declared on a highly vulnerable population, leading to a wave of punitiveness that permeated every aspect of our criminal justice system and redefined the scope of fundamental constitutional rights."[113]

The legal violence that people encounter after incarceration remains opaque for most Americans. As Alexander puts it, "[o]nce released, former prisoners enter a hidden underworld of legalized discrimination and permanent social exclusion."[114] She documents the "full range of collateral consequences for a felony conviction" that fall on people, including lack of access to housing, aid, health care, jobs, a driver's license, ability to vote,

107. ALEXANDER, *supra* note 93, at 73, 77.
108. *Id.* at 196.
109. *Id.* at 15.
110. *Id.* at xxiii, xxvi.
111. *Id.* at xxvi.
112. *Id.* at xxvii-xxviii.
113. *Id.* at xxviii.
114. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press ed. 2010) [hereinafter ALEXANDER, 2010 Ed.].

and to access education; these policies cause additional harm and trauma for the most vulnerable populations.[115] She notes that courts don't see these as "punishments," and so people are not informed of these extra consequences when pleading guilty, and she equates this discrimination and exclusion with the worst of Jim Crow era laws and segregationist policies.[116]

Looking at housing as an example, we can trace a series of laws and their harmful impacts on individuals and communities. The Anti-Drug Abuse Policy of 1988 allowed for landlords or the state to evict people who engage in criminal activity from public housing.[117] The Quality Housing and Responsibility Act of 1998, created "one strike and you're out" guidelines for public housing. It gave landlords the right to check criminal records and use their own criteria to screen applicants, including those who were arrested but not found guilty, or those "they *believed* to be using illegal drugs or abusing alcohol."[118] In other words, even if a person has been arrested but not convicted of any crime, they can be excluded from public housing.[119] The Department of Housing and Development developed guidelines and a "one strike policy" to allow for screening and evictions, threatening to withhold funding if public housing administrators did not comply.[120] Such policies have been upheld by the Supreme Court.[121] The harmful impacts of these policies include increased homelessness of Black and Latinx individuals and families and all the challenges that brings.[122]

Examining the full range of discrimination and harm caused by the laws and policies of mass incarceration, Tasseli McKay summarizes,

> The repercussions of imprisonment reach into every part of daily life: parenting and intimate relationships, health, education, employment, economic well-being, community safety, and wellness. Its harms unfold across the individual lifespan, from cradle to grave. Damage accumulates at the local and national levels as well, manifesting itself in heightened infant mortality rates, diminished adult life expectancy, and greater racial disparities in each of these areas compared to other wealthy democracies.[123]

The impact on people's self-perception and sense of place in society is a significant part of this story and resonates with Abrego and Menjivar's

115. ALEXANDER, *supra* note 93, at 197.
116. *Id.* at 179.
117. Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 161-62 (1991).
118. ALEXANDER, *supra* note 93, at 181.
119. *Id.*
120. *See id.*
121. *Id.* at 183.
122. *See id.* at 182.
123. TASSELI MCKAY, STOLEN WEALTH, HIDDEN POWER: THE CASE FOR REPARATIONS FOR MASS INCARCERATION 4 (2022).

discussion of the role of symbolic violence in the dynamics of legal violence. Regarding the discrimination that limits the lives of people after being released from the criminal legal system, Alexander writes:

> Far from collateral, these sanctions can be the most damaging and painful aspect of a criminal conviction. Collectively, these sanctions send the strong message that, now that you have been labeled, you are no longer wanted. You are no longer part of "us," the deserving. Unable to drive, get a job, find housing, or even qualify for public benefits, many people with criminal records lose their children, their dignity, and eventually their freedom—landing back in jail after failing to play by rules that seem hopelessly stacked against them.[124]

ARENAS FOR JUSTICE, ACCOUNTABILITY, AND REPAIR: THE ROLE OF RESTORATIVE JUSTICE

The comparative approach laid out yields important insights into what might constitute repair in response to legal violence as experienced by distinctive individuals and communities. While there are some areas where all communities can benefit from specific reforms and modes of repair, there are also critical differences in impacts, the needs they generate, and people's visions for themselves. I will first talk about the potential of Restorative Justice approaches and then Truth, Justice, Accountability and Repair (TJAR).

In response to the harms and impacts of the Major Crimes Act and P.L. 280, federally recognized tribes have been reviving and developing parallel tribal courts or community-based justice systems. The 1934 Indian Reorganization Act created opportunities for federally recognized tribes to set up tribal justice systems.[125]As Robert Yazzie explains, in the 1950s, the Navajo created courts modelled after Arizona state courts, but in the 1980s, began to actively "revive Navajo justice methods." The elaborate Navajo system addresses all manner of crimes and harms utilizing the "peacemaking" approach.[126]

At least 19 federally recognized tribes "have written tribal codes and many more are revitalizing their courts with cultural concepts."[127] At

124. ALEXANDER, *supra* note 93, at 179.

125. Sandra Day O'Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L.J. 1, 1 (1997).

126. Robert Yazzie, *History of the Courts of the Navajo Nation*, NAVAJO NATION JUD. BRANCH (Feb. 11, 2003), https://courts.navajo-nsn.gov/history.htm [https://perma.cc/R7BH-C2JE]; *see generally*, *Navajo Nation Peacemaking Program*, TRIBAL JUST. (2021), https://tribaljustice.org/places/traditional-practices/navajo-nation-peacemaking-program/ [https://perma.cc/LTM5-CQ8S].

127. Rebecca Clarren, *Native American Peacemaking Courts Offer a Model for Reform*, INVESTIGATE WEST (Nov. 30, 2017), https://www.invw.org/2017/11/30/native-american-

present, many Tribal Courts navigate "dual justice systems", as they share "concurrent jurisdiction over the crimes enumerated in the Major Crimes Act."[128] Most significantly, tribes are strengthening sovereignty and self-determination through these developments. In addition, they are able to access justice processes that are in alignment with their principles and beliefs, what Pecos-Melton describes as, "law as a living concept that one comes to know and understand through experience… law, as life… linked to the elaborate relationships in many tribal communities."[129]

Not only are increasing numbers of Native people no longer subjected to federal or state systems, but tribal court judges are also reclaiming jurisdiction over their people who have been swept up in state and federal justice systems. As Yurok Judge Abby Abinanti puts it,

> I'm looking at: How did we resolve things before our cultural interruption, when invasion occurred? We were village people, and we sat around and had discussions. My purpose is to help you think up how to make it right if you made a mistake…. For me, jail is banishment. It's the last resort.[130]

Luana Ross suggests that reclaiming self-governance and lands are the most effective ways to address "social ills found in Native communities. . . Neocolonial racism may well account for the overrepresentation of Native people in jails and prisons, and decolonizing efforts may alleviate some social problems", citing the results from efforts by the Alkali Lake Band of Salish of Alberta, Canada.[131] Even with this positive momentum, there is still work to do to address the needs of unaffiliated and landless Native peoples who do not have access to Tribal Justice.

Peacemaking circles and other forms of tribal justice establish the basis of practice and principles of the Restorative Justice (RJ) movement. Currently, the RJ movement is grappling with positionality vis à vis its engagement of Indigenous knowledge and practice and its lack of attention to racial justice issues.[132] As Erica Littlewolf and Harley Eagle have argued, it is imperative for people in the RJ movement to study and recognize the history of the destruction of Indigenous justice systems in the name of assimilation and to support efforts to restore these systems, not only for federally-recognized tribes but all Native people who see their practice of

judge-shows-peacemaking-courts-offer-a-model-for-reform/ [https://perma.cc/EX89-5Q5K].

128. Pecos Melton, *supra* note 38, at 1, 3.

129. *Id.* at 2.

130. Clarren, *supra* note 127, at 3.

131. ROSS, *supra* note 44, at 267.

132. *See, e.g.*, EDWARD C. VALANDRA & WANBLI WAPHAHA HOKSILA, COLORIZING RESTORATIVE JUSTICE 1-2 ((2020).

Tribal justice as central to their sovereignty and self-determination.[133] Speaking to the principles that inspire RJ practitioners, they write,

> …we have come to realize the importance of NOT asking, "What is wrong with you?" but rather asking, "What has happened to you?" This question takes the focus off of seeing individuals in conflict, or offenders, or even the conflict event itself, as the main or only issue, and shifts focus back into the life of the individual, or individuals, involved in the conflict and peels back the layers endeavoring to expose the entire picture of the conflict situation. Further, this line of questioning helps us to look at systemic and historical issues that have inevitably shaped the conflict situation. For restorative justice practitioners to operate with integrity, they must be well-versed in understanding the history of colonial oppression in this land and must understand how unresolved trauma plays out in the lives of individuals and historically oppressed people groups. As Indigenous people we want restorative justice practitioners to have an acute understanding that so many deeply traumatic events have happened to Indigenous peoples on this land over the centuries.[134]

In a similar vein, Fania Davis has written, "If we do not seek both justice and healing, injustice will keep replicating itself ad nauseum and we will find ourselves intoning the very same social justice demands generation after generation."[135]

Generally speaking, the response of the RJ movement to the manifestations of legal violence described here has, for the most part, been practical and situated. Davis explains:

> Restorative justice elevates the voices of survivors, families, communities and responsible parties in ways that rarely occur in the adversarial context and, in doing so, aspires toward greater community self-governance by bringing together all members impacted by wrongdoing to identify harm, assess needs, meet responsibilities, and heal and repair harm to the degree possible. It shifts the locus of the justice project from dependence on systems and professionals to reliance on the involvement of communities and ordinary people. It moves us from an individualistic "I" to a communalist "we," thereby strengthening communities.[136]

133. Erica Littlewolf & Harley Eagle, *Indigenous Eyes to Restorative Justice*, INTERSECTIONS MCC THEORY PRAC. Q. 1, 3 (2013).
134. *Id.* at 4.
135. DAVIS, *supra* note 73, at 41.
136. *Id.* at 27-28.

Focusing where success is more likely, in schools and juvenile justice systems, community-based organizations around the country are working within and alongside these key institutions to set up alternative or diversionary processes to reduce young people's interactions with disciplinary systems that seek to punish rather than heal. The community-based organization, Impact Justice, which began implementing a pre-adjudication diversion program in Oakland, in collaboration with Community Works West, has since expanded to introduce their model in cities and organizations around the country.[137] Operating with a set of guiding core elements, Impact Justice trainers and practitioners work with community-based organizations to create diversion programs that function in collaboration with Juvenile Justice DA offices or other entities, including the police or probation.[138] Overall, RJ practitioners, like tribal judges, are focused on separating individuals from the criminal legal system in order to reduce harm, reduce the numbers of people of color in the system, and, ultimately, promote processes of repair and healing for families and communities.

Increasingly, organizations are able to offer diversion programs to adults as well, specifically with people who have committed serious acts of violence. Danielle Sered's organization, Common Justice in New York City, works with young adults, ages 16-26, focusing on violent felony cases. [139] Other organizations are expanding their scope to encompass domestic violence and intimate partner violence.[140]

RJ practitioners and activists in the U.S. also hope to expand their services to neighborhoods and communities in alignment with the goals of Transformative Justice and prison abolitionists, creating Community Centers that offer RJ-style processes that people can turn to instead of calling the police. Offering community-level restorative and transformative justice will be critical for responding to the impacts of legal violence, with an emphasis on repairing relationships within communities. These efforts can emerge organically within certain communities that still require some reviving and monetary support to fully flourish. Overall, organizations that form around "*cultura cura*", or cultural healing, while also advocating for

137. Sujatha Baliga, *Restorative Community Conferencing: A study of Community Work West's restorative justice youth diversion program in Alameda County*, IMPACT JUST. (2017), https://impactjustice.org/resources/restorative-community-conferencing-a-study-of-community-works-wests-restorative-justice-youth-diversion-program-in-alameda-county/ [https://perma.cc/225U-K8LU].

138. *Introduction to restorative justice diversion,* IMPACT JUST. (FEB. 18, 2021), https://impactjustice.org/introduction-to-restorative-justice-diversion/ [https://perma.cc/6TFD-SLEW].

139. *Our Work*, COMMON JUST., https://www.commonjustice.org/our_work [https://perma.cc/2DF6-2FPU] (last visited Feb. 6, 2023).

140. *See* Mimi E. Kim, *Non-Law Enforcement Restorative Justice Addressing Domestic and Sexual Violence: Evaluation Results from The CHAT Project Pilot*, THE CHAT PROJECT 1, 7 (Aug. 2022), https://chatproject.org/wp-content/uploads/2022/09/CHAT-Pilot-Evaluation-FULL-REPORT-August-2022.pdf [https://perma.cc/YT5W-HGEC].

social justice and policy changes, while not always utilizing the phrase "Restorative Justice," fulfill Davis's vision of integrating social justice action and healing.[141]

Beyond what Common Justice calls the "pragmatic and optimistic" work of the RJ organization, which address the direct impacts of legal violence on individuals and communities, what about structural transformations? We see a lot of effort and some progress at local, state and national levels reforming the laws and policies that have led to our current conditions of mass incarceration: policymakers and legislators are working to address the excesses of the criminal legal system, in terms of sentencing, legalizing drug use, and re-categorizing behaviors and harms as misdemeanors, rather than felonies.[142] These reforms will result in the release of people from prisons, rescinding life-sentences for minors and limiting, if not banning, the application of the death penalty, to name a few outcomes.[143] Some cities are even reducing police stops for minor automobile infractions, while others are shifting funding to mental health experts to respond to crises.[144]

Deeper change will require rethinking the principles that support the criminal justice system, which obscure the intent and impact of legal violence. For example, in her chapter "Prison's Broken Promise," Sered dismantles the mythology behind beliefs that retributive justice makes our communities safer and more secure:

> Retribution becomes more complicated when we recognize that those we are punishing are almost invariably also people we have failed to protect. Nearly everyone who commits violence has survived it, and while that in no way excuses their actions, it reminds us that state-conducted retribution for violence is carried out almost entirely against survivors of violence. We can develop respectful methods to hold people accountable that deny neither their culpability nor their humanity, but when our aim is simply to inflict pain, we end up hurting people our society failed to protect from victimization and harm in the first place.[145]

141. For Northern California examples, see the work of CURYJ of Oakland and Barrios Unidas of Santa Cruz. *Available at* CURYJ: COMMUNITIES UNITED FOR RESTORATIVE YOUTH JUSTICE, https://curyj.org [https://perma.cc/G582-5DJT] (last visited Mar. 1, 2023); SANTA CRUZ BARRIOS UNIDOS: AN INSTITUTE FOR PEACE & COMMUNITY DEVELOPMENT, https://barriosunidos.net [https://perma.cc/QF49-5RUB].

142. DANIELLE SERED, ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 29 (2017), *available at* https://d3n8a8pro7vhmx.cloudfront.net/commonjustice/pages/82/attachments/original/1506608259/accounting-for-violence.pdf?1506608259 [https://perma.cc/4U7T-VCZ3] [hereinafter ACCOUNTING FOR VIOLENCE].

143. *Id.* At 14.

144. *Id.* At 18.

145. SERED, *supra* note 74, at 89.

Sered's critique of "deterrence theory" also sheds light on how foundational concepts are applied without proper analysis. Without even realizing it, most of us have accepted the idea that the threat or experience of harsh punishments will have a deterrent effect, reducing the likelihood of crime and harm. In fact, this is a myth, according to Sered: "As a theory, deterrence is compelling enough, but in reality it is crushed by a combination of pervasive arbitrariness, a lack of civic education, extreme racial disparities, and profound despair in the communities most impacted by crime."[146] Not only do people lack the civic education, which includes the awareness of sanctions and increases in sentencing, but, "Deterrence works only if the same action typically results in the same consequences–and the reality of the US justice system could not be further from that. Sanctions are inconsistently applied…[are] shaped irrefutably by race and class, and distorted to the degree that it would make it difficult for people to predict a likely response to their own behavior" as well.[147] Further, Sered makes the case that deterrence only works if people have hope that they will be treated justly and fairly.[148] The omnipresence of legal violence, which can be seen in schools, undermines the power of deterrence.

Deterrence is frequently used as a justification for cruel and inhuman treatment of the most vulnerable. Many openly proclaim deterrence theory as a foundational principle for immigration policies that enable the legal violence described earlier. It is central to the "Prevention through Deterrence" immigration policies which reroute migrants through the dangerous Sonoran Desert terrain, resulting in the deaths of at least 8,000 migrants between 1998 and 2000.[149] It also underlies the Trump Administration's Zero Tolerance policy, which resulted in the separation of thousands of families crossing the border.[150] Caitlin Dickerson's article in *The Atlantic* from August 2022 demonstrates how the architects of the Zero Tolerance policy convinced themselves that "the goal wasn't to traumatize,": it was to stop the madness, stop the death, stop the rape, stop the children dying, stop the cartels doing what they're doing."[151] She writes, "What I never heard anyone acknowledge was that 'deterrence' methods such as family separation have been shown to increase the likelihood of these terrible outcomes—because harsher enforcement induces children and families to try

146. SERED, *supra* note 74, at 61.
147. *Id.* at 62.
148. *Id;* at 62.
149. Jessica Wolf, *Dying in the desert: How U.S. border policies contribute to migrant mortality*, UCLA (Dec. 17, 2021), https://newsroom.ucla.edu/releases/how-dehydration-leads-to-migrant-deaths-in-desert [https://perma.cc/7ELN-S5MC].
150. Caitlin Dickerson, *We Need to Take Away the Children: The Secret History of the US government's family separation policy*, THE ATLANTIC (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/ [https://perma.cc/MDT9-LQRL].
151. *Id.*

to sneak across the border using more dangerous methods, such as hiding in the back of a tractor trailer."[152] In sum, not only does deterrence cause harm, it clearly does not stop people all over the world from attempting to cross international borders.

Finally, it is critical to dismantle the myth of 'protection' laws that seek to increase police presence, criminalize more behaviors, and place more people in prisons. Sered notes, "If incarceration worked to secure safety, we would be the safest nation in all of human history."[153] Similarly, Davis writes, "Individual and community safety and security emerge from healthier and self-governing communities, not from more police or prisons."[154] In fact, research demonstrates that stronger, well-resourced communities where people's needs are met are the key to reducing violence and other forms of harm. Dr. Patrick Sharkey, an urban sociologist and professor at Princeton University, explains,

> In the 1990s as violence was falling, nonprofit organizations were forming all over the country, organizations that were formed to deal with violence itself but also to build stronger communities, organizations that were dealing with addiction, mental illness, homelessness, housing…the growth of nonprofit organizations in the 1990s stands alongside the other changes that we've talked about as a central reason for why violence fell. So, in a typical city with 100,000 people, every 10 organizations that were formed to build a stronger neighborhood, to deal with the problem of violence reduce violent crime by about 9 percent. And this finding is reinforced by lots of rigorous empirical work evaluating the work of nonprofits using randomized controlled trials, looking at interventions like after-school programming, summer jobs programming.[155]

What does it take to dismantle these mythologies? Education, accessible information, and purposeful public discussion about how policies cause violence and harm, whether intentionally or not. Dickerson's piece in *The Atlantic* offers a public account of the development, implementation and enforcement of a policy that many knew was ill-advised and would do irreparable harm.[156] In her piece, she 'names names' of all involved: her graphics indicate the rising numbers of separated children that occurred over several months of willful ignorance to what was happening and

152. Dickerson, *supra* note 150.
153. SERED, *supra* note 74, at 7.
154. DAVIS, *supra* note 73, at 28.
155. Ezra Klein, *Transcript: Rogé Karma Interviews Patrick Sharkey for 'The Ezra Klein Show,'* N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/opinion/ezra-klein-podcast-patrick-sharkey.html?showTranscript=1 [https://perma.cc/AEQ9-XKQD].
156. Dickerson, *supra* note 150.

outright lies about the impacts of the policy. Dickerson's piece potentially set the stage for a much-needed Truth Commission-style review of the Family Separation policy that continues to cause harm today. Truth Commissions generally focus on how a harmful policy unfolded, who is accountable, how to ensure it does not happen again, and ultimately, what is needed for restitution for the harmed children and families. It is unlikely that U.S. governmental bodies will help in this effort, so it should be generated by grass roots organizations.

Further, to be truly effective, processes for broad Truth, Justice, Accountability and Repair must be precipitated and organized by people who have experienced the impacts of legal violence. Still, there is currently a debate about whether these processes should be the responsibility of the state, or if they should be community-run processes. Both models have been tried in the United States in recent years.

The Wabanaki TRC, or Truth and Reconciliation Commission, was the creation of a local community-based organization, REACH, and it worked with the state and local Native leaders to develop a mandate for the Commission. Five Commissioners spent 27 months researching and preparing their report, having collected 159 statements—95 from Native people and 64 from non-Natives.[157] Esther Attean, one of the main architects of the Commission, noted, the TRC was "building a plane as we were flying it."[158] The work required "decolonizing your mind and your heart. It takes a lot of trust and a lot of love … At many points in the process the commission and REACH bumped heads—we bumped up about white privilege and racism like you wouldn't believe."[159]

Although the TRC called for "Reconciliation" in addition to truth, the main outcome was a broad account of what happened and continues to happen in Maine, painstakingly gathered through the stories that were collected from those who were harmed, as well as a review of state documents.[160] Since the Commission, Attean and others have changed their language to focus more on Truth, Healing and Change. For any movement toward reconciliation, the Maine Department of Social Welfare and the Judiciary who oversaw the abduction of children from Native families for over more than 100 years must take responsibility and recognize their roles in the state's traumatic history. The final report included 16 points of summary and 14 recommendations for the future.[161] The overarching goal is to make sure the same harm does not re-occur. It remains to be seen what can be done in

157. Dayton Martindale, *The Stolen Children of Maine: Native Wabanaki Seek Truth, Reconciliation Amidst a Cultural Genocide*, IN THESE TIMES (July 18, 2015), https://inthesetimes.com/article/stolen-children-maine-native-wabanaki-truth-reconciliation-genocide [https://perma.cc/QR8W-RZ3R].
158. *Id.*
159. *Id.*
160. *See id.*
161. *Id.*

terms of repairing the intergenerational harm for individuals and communities.

Elsewhere in the world, people are increasingly developing Commissions or other types of structures to come together to explore and reveal the truth of an experience of harm, seek accountability from those who perpetrated the harm or their current representatives, and develop pathways for repair.[162] The concept of repair must be understood broadly and creatively, and it may require symbolic approaches through reform and restitution.[163] In contrast to this approach, Canada's TRC process started with restitution: the process emerged from a settlement process that had already paid out 3.4 billion dollars to Native survivors of Canada's Residential Schools.[164] With input from hearings held across Canada, the Commission produced a report that addressed the full scope of the harm produced by Residential Schools in Canada, their assimilative purpose and role in ethnic cleansing, their short- and long-term impacts on individuals, families and communities.[165] It presented 94 recommendations that, if fully realized, would significantly improve the position of Native people in Canada in large part through the dismantling of colonial and white supremacy structures. [166]

On the topic of restitution or reparation for communities targeted with legal violence through mass incarceration, Tasseli McKay writes, "even those policy makers truly concerned with ending mass incarceration stop short of considering how we will correct the damage it has done." In her book *Stolen Wealth, Hidden Power, the Case for reparations for Mass Incarceration,* McKay turns to the idea of Transitional Justice, noting that the US is lagging behind other nations in efforts to "confront and transform a succession of violent systems of racist domination."[167] In her calculations about the costs of mass incarceration for Black communities, McKay reaches a figure of about 13 trillion dollars. These costs address disparities in health, wealth, education and more.[168] While the numbers are prohibitive, the goal is to spark interest in the kinds of processes that will surface the truths of how and why mass incarceration came about, and the repair needed to address the direct, indirect and symbolic violence caused by it's the laws, policies and enforcement associated with it.

162. *Truth and Reconciliation Commission of Canada*, GOV'T OF CANADA, https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525 [https://perma.cc/8VXM-J6R5].
163. *Id.*
164. Ian Austen, *Canada Settles $2 Billion Suit Over 'Cultural Genocide' at Residential Schools*, N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/2023/01/21/canada-indigenous-settlement.html [https://perma.cc/S4CR-TW9D].
165. *Truth and Reconciliation Commission of Canada*, *supra* note 162.
166. *Id.*
167. MCKAY, *supra* note 123, at 6.
168. *Id.* at 171.

I end with these examples of what is possible, but this is only the beginning of a much larger conversation. There are many more, examples of Truth and Reconciliation processes, as well as an array of reparations commissions and payments to discuss.[169] These processes for surfacing truths and exposing historical harms, which are meant to activate acknowledgement and accountability among those who have perpetuated, enabled or otherwise benefitted from these harms, can lead to integrated efforts to identify the needs generated from those harms and real pathways to repair and change and to follow through. This is critical to emphasize, as too many such processes are stymied by a lack of effort on the part of governments and institutions who have pledged to act.

169. *See, e.g.*, GREENSBORO TRUTH & RECONCILIATION COMMISSION, https://greensboro-trc.org/ [https://perma.cc/2JYQ-69ZP] (last visited Feb. 6, 2023) (having first rejected reconciliation processes, the Greensboro City Council now embraces reconciliation); Olivia Paschal, *Descendants of Arkansas' Elaine Massacre victims push for restorative justice*, FACING SOUTH (Oct. 7, 2020), https://www.facingsouth.org/2020/10/descendants-arkansas-elaine-massacre-victims-push-restorative-justice [https://perma.cc/U5N5-8PKP]; *Evanston Addresses Housing With the Nation's First Local Reparations Program*, OFF. OF POL'Y DEV. AND RSCH. (PD&R), https://www.huduser.gov/portal/rbc/indepth/interior-091222.html [https://perma.cc/TXK8-58J6] (last visited Feb. 6, 2023) (working for reparations for housing inequities); *African American Reparations Advisory Committee*, SF.GOV, https://sf.gov/public-body/african-american-reparations-advisory-committee [https://perma.cc/KD9R-JGBV] (last visited Feb. 6, 2023); *Equal Justice Initiative,* https://eji.org/ [https://perma.cc/5D92-WWZR] (last visited Feb. 6, 2023) (addressing the histories of slavery and lynching in the US); *Department of the Interior Releases Investigative Report, Outlines Next Steps in Federal Indian Boarding School Initiative*, U.S. DEP'T OF THE INTERIOR (May 11, 2022), https://www.doi.gov/pressreleases/department-interior-releases-investigative-report-outlines-next-steps-federal-indian [https://perma.cc/UAW2-HUBZ] (seeking to "address the troubled legacy of federal Indian boarding school policies"); *Truth and Healing Commission on Indian Boarding School Policies Act*, THE NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., https://boardingschoolhealing.org/truthcommission/ [https://perma.cc/5YYH-3DMP]; *The Native American Graves Protection and Repatriation Act (NAGPRA)*, BUREAU OF RECLAMATION, https://www.usbr.gov/nagpra/ [https://perma.cc/WM9U-RXS6] (last updated Oct. 20, 2021) (making efforts to restore ancestors, sacred objects, and more to the original homelands through NAGPRA); *California Truth and Healing Council*, CAL. GOVERNOR'S OFF. OF TRIBAL AFF., https://tribalaffairs.ca.gov/cthc/ [https://perma.cc/RVX4-ELU7].

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