

NOTE

ANTI-CARCERAL FUTURES:

A COMPARATIVE PERSPECTIVE OF RESTORATIVE AND TRANSFORMATIVE JUSTICE PRACTICES IN THE UNITED STATES AND NEW ZEALAND

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ABSTRACT

The United States and New Zealand, two democratic and progressive nations, rely heavily on incarceration structures plagued with institutional racism as their primary form of justice. Several international standards, most notably the United Nations Standard Minimum Rules for Non-Custodial Measures, advocate for more context-inclusive justice systems that focus on the social and economic factors that often lead to crime, rather than the ex-post form of justice that is incarceration. Despite each nation's passage of restorative justice legislation to divert individuals away from the carceral structure, their incarceration rates remain exorbitant compared to the rest of the world, with recidivism rates remaining consistently high. This Note argues that these international standards are in line with the modern-day transformative justice and prison abolition movements, and that their principles should be at the forefront of the United States and New Zealand's criminal justice reform. By addressing the root causes of crime and affording individuals the opportunity to engage with expansive restorative justice systems, the United States and New Zealand can lay the foundation for a global anti-carceral future.

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| | |
|--|------|
| ABSTRACT..... | 1215 |
| I. INTRODUCTION | 1217 |
| II. INTERNATIONAL LAW ENCOURAGES | |
| ALTERNATIVES TO INCARCERATION | 1222 |
| A. United Nations Standard Minimum Rules for Non- Custodial Measures | 1223 |
| B. Other Non-Binding International Obligations Regarding Non-Custodial Measures | 1226 |
| III. DOMESTIC LAWS INCORPORATING RESTORATIVE JUSTICE | 1228 |
| A. United States..... | 1229 |
| 1. State Legislation..... | 1230 |
| 2. Failures of the Legislation | 1234 |
| B. New Zealand | 1239 |
| 1. Sentencing Act of 2002..... | 1240 |
| 2. Failures of the Legislation | 1244 |
| IV. RECOMMENDATIONS FOR ANTI-CARCERAL FUTURES..... | 1246 |
| A. The United States..... | 1249 |
| 1. State Legislation on Alternatives to Incarceration..... | 1249 |
| 2. Financial Support for Alternatives to Incarceration..... | 1250 |
| 3. Strengthen Community-Based Infrastructures | 1252 |
| B. New Zealand | 1253 |
| 1. Sentencing Act Amendments..... | 1253 |
| 2. Incorporate Māori Customs into the Criminal Justice System | 1254 |
| 3. Transform Social and Economic Structures | 1256 |
| C. General Recommendations | 1258 |
| 1. Investment in Community Programs..... | 1260 |
| 2. Extirpate Racial Bias From Government | 1262 |
| V. CONCLUSION | 1264 |

“On the whole, people tend to take prisons for granted. It is difficult to imagine life without them. At the same time, there is reluctance to face the realities hidden within them, a fear of thinking about what happens inside them. Thus, the prison is present in our lives and, at the same time, it is absent from our lives.”

*Angela Davis.*¹

I. INTRODUCTION

Candace Harp-Halow, a twenty-nine-year-old single mother of five, has been in and out of the criminal justice system since she was twelve years old.² Raped at age thirteen, Candace dropped out of school after only completing the eighth grade.³ She still battles a drug addiction that began as a coping mechanism in her teenage years and persisted through all of her subsequent arrests.⁴

Harold Sylvester became involved in a drug organization and subsequently witnessed the murder of his father.⁵ After getting caught dealing, Harold spent twenty years in and out of the criminal justice system, at one point placed in the cell directly across from his father’s killer.⁶ Once he exited prison, Harold’s status as a formerly incarcerated individual limited his options of livelihood, leading him to return to drug dealing after each incarceration period and to overdose on three separate occasions.⁷

These stories are not isolated tales. Candace and Harold are only two examples of the millions of individuals with similar

1. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 15 (2003).

2. Lottie Joiner, *She has spent nearly a lifetime suffering in the system*, USA TODAY (Apr. 21, 2018, 10:36 PM), <https://www.usatoday.com/story/opinion/policing/2017/10/09/suffering-system-recidivism-incarceration-prison-jail-policing-the-usa/708781001/> [https://perma.cc/RRW3-P3X5].

3. *Id.*

4. *Id.*

5. Eileen Rivers, *Re-entry into society, or back to prison?*, USA TODAY (Dec. 31, 2017, 4:27 PM), <https://www.usatoday.com/story/opinion/policing/reentry/column/2017/12/29/reentry-incarceration-corruption-prison-barriers-recidivism-policing-usa/979903001/> [https://perma.cc/3Q3S-6VEY].

6. *Id.*

7. *Id.*

unfortunate circumstances in criminal justice systems worldwide.⁸ Incarceration, a state-sanctioned punishment, has become the leading form of justice against offenders,⁹ despite various international law standards that promote the use of alternatives to incarceration.¹⁰ States that utilize this system justify its use by invoking concepts of deterrence, rehabilitation, and public safety.¹¹

Candace and Harold each dealt with incredible hardships, including sexual abuse, violence, and substance abuse. Studies show that mental health issues, substance abuse, poverty, education, and employment are all factors that contribute to an individual's likelihood to come in contact with the criminal justice system.¹² Yet, at no point in time did the system ever

8. In this Note, "criminal justice system" broadly encompasses any state action that leads to any form of state-sanctioned punishment.

9. A retributive justice system relies on the basic concept of retribution, which is a punishment or reward in a balanced exchange. This can be seen as the basic idea of "an eye for an eye." When put into the context of a criminal justice system, crime is defined as a violation of the law, and the goal of the system is to identify the individual who committed a crime and administer punishment. Howard Zehr, *Restorative Justice: The Concept*, CORRECTIONS TODAY, Dec. 1997, at 68, 69, edsgcl.20438182. In this note, for ease of writing, "offender" refers to any individual who commits a crime. Although this paper uses the term offender, it is necessary to note the importance of language. Individuals who committed crimes or have any contact with the criminal justice system should not be reduced to one act or one attribute. For any reform efforts to be successful, the individuality of persons in contact with the system must be stated and understood. See generally, *An Open Letter to Our Friends on the Question of Language*, CENTER FOR NU LEADERSHIP OF URBAN SOLUTIONS (2020).

10. See *infra* Part II.

11. Eleanor Hannon Judah & Michael Bryant, *Rethinking Criminal Justice: Retribution vs. Restoration*, 23 J. OF RELIGION & SPIRITUALITY IN SOCI. WORK: SOC. THOUGHT, 1 (2004) ("Our present criminal justice philosophy is based on the concept of retribution, that is 'something given or demanded in repayment, especially punishment.'"); Joseph Weiler, *Why Do We Punish?: The Case for Retributive Justice*, 12 UNIV. BRIT. COLUM. L. REV. 295, 296-97 (1978). The Bureau of Prison holds that their philosophy, since the early 1970s, recognizes that the goals of the prison system include deterrence, incapacitation, and rehabilitation. *Historical Information*, BUREAU PRISONS <https://www.bop.gov/about/history/timeline.jsp> [https://perma.cc/4C9M-RAR5] (last visited Jan. 3, 2021). In 2013, Attorney General Eric Holder also stated that new laws and policies are meant to promote public safety, deterrence, efficiency, and fairness. *The Attorney General's Smart on Crime Initiative*, US DEP'T OF JUST. ARCHIVES (Mar. 9, 2017), <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative> [https://perma.cc/TCZ4-EHF8].

12. David Fergusson et al., *How does childhood economic disadvantage lead to crime?* 45 J. OF CHILD PSYCH. & PSYCHIATRY 956, 962 (2004). One study performed in partnership with Christchurch Health and Development Study in New Zealand suggests that childhood socio-economic disadvantage is associated with increases in rates of self-

adequately address those issues to better rehabilitate them and reduce the likelihood of recidivism—both of which are stated goals of a retributive justice system.¹³ The carceral structure strips incarcerated individuals of their freedoms and liberty. Upon release, it forces them to confront the harmful conditions that pre-dates their incarceration. Criminal justice systems around the world must abandon the narrow conception of justice as a dichotomy—imprisonment or freedom—to account for the social and economic circumstances that lead individuals to commit crimes in the first place.¹⁴

The United States currently utilizes a retributive justice system¹⁵ and has long been known by the moniker “incarceration nation.”¹⁶ It has the highest incarceration rate globally and by no

reported crime and officially recorded convictions. The study focused on family income and interviewer ratings of family living standards for children from birth to five years old. *Id.* Additionally, socioeconomic status (and its correlates, lower education and poverty) often affects an individual’s physical and mental health. Individuals with these issues are overrepresented in criminal justice systems. There are more people with mental and emotional disorders in jails and prisons than in mental institutions. In New Zealand, sixty percent of community-based individuals who committed a crime have an identified alcohol or drug problem and eighty seven percent of prisoners have had a substance abuse problem at some point in their lifetime. Turuki Report, *supra* note 25, at 50. Seventy-seven percent of prisoners have previously experienced some form of violence. *Id.* at 46. In the United States, approximately twenty percent of inmates in jails and fifteen percent of inmates in state prisons have a serious mental illness. *How Many Individuals with Serious Mental Illness are in Jails and Prisons*, TREATMENT ADVOC. CTR. (Nov. 2014), <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/how%20many%20individuals%20with%20serious%20mental%20illness%20are%20in%20jails%20and%20prisons%20final.pdf> [<https://perma.cc/HX7D-DNJJD>]. See *infra* Part V for a further discussion on how a transformative justice approach addresses this problem.

13. Judah, *supra* note 11, at 4.

14. “Instead of asking whether anyone should be locked up or go free, why don’t we think about why we solve problems by repeating the kind of behavior that brought us the problem in the first place?” Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/5FB3-S5UC>] (quoting renowned prison abolitionist Ruth Wilson Gilmore); see also Davis, *supra* note 1, at 12 (“larger prison populations led not to safer communities, but, rather, to even larger prison populations. Each new prison spawned yet another new prison.”).

15. A retributive justice system utilizes the theory that when an individual commits a crime, they must be punished to repay their wrongdoing. This system invokes deterrence, rehabilitation, and public safety as justifications. See *infra* Part III.

16. See generally PETER K. ENNS, INCARCERATION NATION (2016).

small margin.¹⁷ More than half of all US states have higher incarceration rates than any other nation in the world.¹⁸ Additionally, compared to similarly stable democratic nations, the United States has an incarceration rate of more than five times the next highest country.¹⁹ Further, not only does the United States incarcerate individuals at higher rates than the rest of the world, but almost eighty percent of individuals released from state prisons will be arrested for another crime within five years of their release,²⁰ and nearly sixty percent will be arrested again within three years.²¹

Although New Zealand's incarceration rate does not compare to that of the United States, it is also high by Western standards.²² The New Zealand prison population has steadily increased over the last decade²³ despite a decline in serious crime rates.²⁴ Additionally, about sixty-one percent of people released from prison commit another offense within two years of their

17. See Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/55WA-DTSL>].

18. The incarceration rate is the number of persons under the jurisdiction of local jails and state and federal correctional authorities per 100,000 residents. This includes persons held in private prison facilities under the jurisdiction of state and federal authorities. This may also include halfway houses, boot camps, weekend programs, and other facilities in which individuals are locked up overnight. See *id.*

19. The next highest country is El Salvador with an incarceration rate of 614, above only nineteen other US states. See *id.*

20. Jason Emert & Jenna Moll, *The criminal justice system's top job: Breaking the cycle of crime*, HILL (Mar. 23, 2018), <https://thehill.com/opinion/criminal-justice/379814-the-criminal-justice-systems-top-job-breaking-the-cycle-of-crime> [<https://perma.cc/FE4K-BEDQ>]; Kara McCarthy, *3 in 4 Former Prisoners in 30 States Arrested Within 5 years of Release*, BUREAU OF JUST. STAT. (Apr. 22, 2014), <https://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm> [<https://perma.cc/ZG74-9AVT>].

21. Emert & Moll, *supra* note 20; McCarthy, *supra* note 20.

22. Marcus Boomen, *Where New Zealand stands internationally: A comparison of offence profiles and recidivism rates*, DEP'T CORR. (July 2018), https://www.corrections.govt.nz/resources/research_and_statistics/journal/volume_6_issue_1_july_2018/where_new_zealand_stands_internationally_a_comparison_of_offence_profiles_and_recidivism_rates [<https://perma.cc/JA5T-SJD4>].

23. *New Zealand Overview*, WORLD PRISON BRIEF <https://www.prisonstudies.org/country/new-zealand> [<https://perma.cc/43NU-VNXZ>] (last visited May 12, 2020).

24. Ian Lambie, *Using evidence to build a better justice system: The challenge of rising prison costs*, 5 OFF. PRIME MINISTER'S CHIEF SCI. ADVISOR (Mar. 29, 2018), <https://www.pmcsa.org.nz/wp-content/uploads/Using-evidence-to-build-a-better-justice-system.pdf> [<https://perma.cc/GJ3E-JL4D>].

release.²⁵ The statistics in both countries illustrate that the current criminal justice systems, specifically their reliance on incarceration, do not address the multitude of underlying causes that lead to crime.²⁶ As such, the incarceration systems as they presently stand across the world, and particularly in the United States, are inherently flawed in their approach to crime, victims, individuals who committed a crime, and the surrounding community.

The United States and New Zealand have implemented restorative justice laws and programs in an attempt to address these flaws.²⁷ Restorative justice refers to a concept that values understanding crime as a violation of personal relationships, centralizing victims' needs, and encouraging individuals who committed a crime to take responsibility for repairing the harm they caused.²⁸ Restorative justice programs are alternative to incarceration measures that can occur at any point in the criminal justice process, from pre-arrest to pre-sentencing, and can introduce responses to crime such as monetary awards or community service.²⁹ While restorative justice is a commendable step away from strict carceral systems, many restorative justice laws exclusively focus on the crimes themselves while overlooking the criminogenic factors.³⁰ Therefore, even restorative justice

25. Te Uepū Hāpai i te Ora, Turuki! Turuki! Report 53, 12 (Dec. 2019) [hereinafter Turuki Report].

26. See TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* 71 (2014) (In President Lyndon B. Johnson's Commission on Crime he argued that the root causes of crime are related to societal structures rather than the individual who committed a crime themselves.) See *infra* Section III.C.4 for a further discussion on President Johnson's Commission on Crime.

27. See VT. STAT. ANN. tit. 28, § 2a (2021); VT. STAT. ANN. tit. 28, §§ 910-912 (1999); see also Sentencing Act 2002, s 24A (N.Z.). For a further discussion on these legislations, see *infra* Sections IV.A.1 and IV.B.1.

28. See Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J. L. & POL'Y 65, 66, 82 (2011); see also DANIEL W. VAN NESS, AN OVERVIEW OF RESTORATIVE JUSTICE AROUND THE WORLD 3 (2005). In this Note, "harm" refers to a cycle of physical, mental, and emotional damage that comes incarceration. For a further discussion on the negative effects incarceration has on individuals, see *infra* Section II.C.3. Roche Declan, *The Evolving Definition of Restorative Justice*, 4 CONTEMP. JUST. REV. 341, 347-48 (2001).

29. *Id.*

30. In this Note, "criminogenic factors" refer to factors and circumstances of an individual that are likely to cause criminal behavior. These factors include certain personality traits, family relationships, employment status, education status, and misuse

programs are insufficient to mend an inherently flawed carceral system and cure the structural violence that leads to crime.³¹

To understand the failures of incarceration as a primary mode of punishment is to understand the necessity of transforming society in a way that addresses the social and economic factors that too often lead to crime. Inherent in these understandings is the theory of prison abolition. This Note will analyze the gaps left by the United States' and New Zealand's restorative justice laws. It will recommend statutory fixes and other ways the countries can more effectively respond to crime in a manner that comports with international standards. Part II describes international law advocating for anti-carceral measures. Part III explains the ideology and principles behind restorative justice by discussing the United States' restorative justice legislation, focusing on Vermont's Title 28 legislation, and examining New Zealand's Sentencing Act of 2002. It further explains that, regardless of each of the restorative justice legislations' positive outcomes, they do not cure all the inherent flaws of their respective country's current criminal justice system. Part IV makes specific recommendations to aid lawmakers, scholars, and lawyers in the United States and New Zealand and proposes recommendations for stakeholders internationally.

II. INTERNATIONAL LAW ENCOURAGES ALTERNATIVES TO INCARCERATION

International laws and standards vary widely, from binding law to suggested recommendations,³² but even non-binding international standards can influence the way lawmakers decide national matters.³³ Scholars argue that international conventions,

of substances. Andrew, D.A., Bonta, J., & Wormith, J.S., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 *CRIME & DELINQ.* 1, 7-27 (2006).

31. Structural violence refers to systematic ways in which social structures harm or otherwise disadvantage individuals—for example, the disadvantages perpetuated by oppressive structures. *See supra* note 12 and accompanying text; *see also* *What is Structural Violence*, STRUCTURAL VIOLENCE (2013), <http://www.structuralviolence.org/structural-violence/> [<https://perma.cc/A9JQ-LRHP>] (last visited Apr. 19, 2021).

32. Advocates can use the standards to publicize discrepancies, share how other parts of the world do it, and put pressure to mobilize change at the legislative level. *See* H.L.A. HART, *THE CONCEPT OF LAW* 217-18 (1st ed. 1961).

33. Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 *GLOB. POL'Y* 127, 130-31 (2010).

non-binding resolutions, and recommendations produce benchmarks, also referred to as “soft law,”³⁴ that must be scrutinized such that Member States consistently adopt these inherent policy goals, regardless of domestic implementation status.³⁵ International law remains significant in various areas of human rights,³⁶ including state-sanctioned punishment and incarceration. Numerous international conventions, resolutions, and recommendations encourage states to utilize alternatives to incarceration measures as a primary response to crime. As such, these international instruments hold states accountable for incorporating underlying aspirations into their domestic legislation.

A. United Nations Standard Minimum Rules for Non-Custodial Measures

The central international standard proposing alternatives to incarceration is the United Nations Standard Minimum Rules for Non-Custodial Measures (“Tokyo Rules”).³⁷ These rules

34. Non legally binding international standards, such as United Nations Declarations, are often interpreted as political commitments that may one day become law but currently only carry political consequences rather than legal repercussions. Dinah L. Shelton, *Soft Law*, in *HANDBOOK OF INT’L L.* 1 (David Armstrong et al. eds., 2008), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2048&context=faculty_publications [<https://perma.cc/2ER2-RUNF>].

35. Stefan Kadelbach, *International Law and the Incorporation of Treaties into Domestic Law*, 42 *GERMAN Y.B. INT’L L.* 66, 83 (1999); see also STEPHEN P. MULLIGAN, *CONG. RESEARCH SERV.*, RL32528, *INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW* (2018), <https://fas.org/sgp/crs/misc/RL32528.pdf> [<https://perma.cc/H3E9-XLEB>]; Howse, *supra* note 33, at 128 (discussing the view that a strict focus on compliance wrongly diminishes the ‘centrality to the generation of legal meaning as well as the horizontal relation between diverse norms and regimes.’). The strength of an international law often depends on the source of the obligation and United Nations Member States’ national laws on international law incorporation. For example, when a State ratifies an international treaty made by a United Nations (“UN”) Committee, there are further issues with compliance and enforcement. Markus Schmidt, *Protection: United Nations*, in *INTERNATIONAL HUMAN RIGHTS LAW* 391-431 (Daniel Moeckli, Sangeet Shah, & Sandesh Sivakumaran, eds., 2014). See Harold Hongju Koh, *The Trump Administration and International Law*, 5213 *YALE L. SCH., FACULTY SCHOLARSHIP SERIES* 413, 416 (2017).

36. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights are some examples of governing human rights treaties.

37. G.A. Res. 45/110, Tokyo Rules (Dec. 14, 1990). Other relevant UN Rules include the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the “Bangkok Rules”), which encourage the

promulgate a framework to promote alternatives to imprisonment, and minimum safeguards for persons subject to these measures.³⁸ Taken together, the Tokyo Rules support the general principle that non-custodial measures are of “considerable potential value for offenders, as well as for the community.”³⁹ More specifically, they emphasize the importance of keeping individuals who have committed crimes within their communities⁴⁰ and propose that they should receive psychological, social, and material assistance to strengthen their links to the community.⁴¹ Additionally, any conditions attached to non-custodial measures should provide some social use that facilitates the individual’s reintegration into their community.⁴²

development and use of gender-specific non-custodial alternatives to incarceration. G.A. Res. 65/229 (Mar. 16, 2011). Additionally, the UN Convention on the Rights of the Child requires that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” G.A. Res. 44/25 ¶ 37(b) (Sept. 2, 1990).

38. G.A. Res. 45/110, Tokyo Rules ¶ 1.1. Non-custodial measures include “any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment; such decision can be made at any stage of the administration of criminal justice.” UN doc. ST/CSDHA/22, Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (1993) 3 [hereinafter Minimum Rules for Non-custodial Measures Commentary]; G.A. Res. 45/110, Tokyo Rules ¶ 2.1. Some examples may include probation, parole, community service, or paying a fine. G.A. Res. 45/110, Tokyo Rules ¶ 2.1. The Rules explicitly state that one of the fundamental aims of the Tokyo Rules is that all “Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observances of human rights, the requirements of social justice and the rehabilitation needs of the offender.” The second aim is to provide “minimum safeguards for persons subject to alternatives to imprisonment.” G.A. Res. 45/110, Tokyo Rules ¶ 1.1.

39. Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 5.

40. Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 6.

41. See Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 22-23; Tokyo Rules, *supra* note 37, ¶ 10.4. Treatment options include casework, group therapy, residential programs, and any other specialized categories. Tokyo Rules, *supra* note 37, ¶ 13.1.

42. Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 25. A social use is meant to build and strengthen the relationships between the individual who committed a crime and the community so as to enhance the individual’s chance of social reintegration. *Id.* at 22. For example, community services can be a condition of probation or a supervised release and have the potential to help build community relationships. *Alternative to Incarceration in a Nutshell*, FAMILIES AGAINST MANDATORY MINIMUMS (July 8, 2011), <https://famm.org/wp-content/uploads/FS-Alternatives-in-a-Nutshell.pdf> [<https://perma.cc/AP4B-9SFY>].

Similarly, they emphasize the need for individual treatment and support to stop the cycle of crime and recidivism.⁴³ Importantly, an individual's failure to uphold the obligations of a non-custodial measure should not automatically lead to the imposition of a custodial measure.⁴⁴

While the Tokyo Rules promote flexibility in applying non-custodial measures, they also highlight the importance of consistent application in the interest of fairness and justice. The Rules recommend domestic sentencing guidelines that assist courts in imposing non-custodial measures.⁴⁵ The Rules become binding in each state only when they are implemented through domestic legislation.⁴⁶ Individual states may delegate supervision of these measures to community groups or volunteers.⁴⁷ The underlying principles of the Tokyo Rules are meant to guide Member States that utilize anti-carceral measures to create domestic legislation that reduces prison populations.⁴⁸

43. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *The Use of Non-Custodial Measures in the Administration of Justice*, in HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 371, 394-95 (2003) [hereinafter OCHR, *The Use of Non-Custodial Measures in the Administration of Justice*].

44. Tokyo Rules, *supra* note 37, ¶ 14.3.

45. Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 9. Rule 3.2 establishes a list of criteria that an assessment for non-custodial measures should consider: the nature and gravity of the offense; the personality and background of the individual who committed the crime; the purposes of sentencing; and the rights of victims. Tokyo Rules, *supra* note 37, ¶ 3.2. Notwithstanding the recommendation of specific criteria for the imposition of non-custodial measures, Rule 3.3 requires competent judicial or other independent authorities have a considerable degree of discretion on imposing non-custodial measures. *Id.* at ¶ 3.3.

46. Kadelbach, *supra* note 35, at 66; Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 2 (discussing that the commentary provides guidance for the implementation of the Tokyo Rules).

47. Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 22-23; OCHR, *The Use of Non-Custodial Measures in the Administration of Justice*, *supra* note 43, at 388-89; see Tokyo Rules, *supra* note 37, ¶ 10.2. The Rules also require the individual who committed the crime to be involved to the greatest extent possible in the formulation and assessment of the supervision and treatment plan.

48. OCHR, *The Use of Non-Custodial Measures in the Administration of Justice*, *supra* note 43, at 395.

B. Other Non-Binding International Obligations Regarding Non-Custodial Measures

Other prominent international standards come from UN Congress resolutions.⁴⁹ In 2015, the Thirteenth Congress on Crime Prevention and Criminal Justice (“Thirteenth Congress”) produced a multitude of resolutions addressing the concern of combating crime.⁵⁰ Following the Thirteenth Congress, Member States passed the Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation (“Doha Declaration”).⁵¹ The Declaration signifies international recognition that “crime is not simply a social problem, but a grave obstacle to achieving

49. *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> [<https://perma.cc/9AE8-AJJB>]; see generally Gregory, J. Kerwin, *The Role Of United Nations General Assembly Resolutions In Determining Principles Of International Law In United States Courts*, 1983 DUKE L.J. 876, 876 (1983) (discussing the debate about the relevant weight of UN General Assembly Resolutions; whereas certain courts hold they are equally as authoritative as “full-fledged” international law, while others only hold them as “mere evidence” of international law).

50. See generally U.N. Doc. A/CONF.222/L.6, Doha Declaration (Mar. 31, 2015) [hereinafter *Doha Declaration*]. The U.N. Office on Drugs and Crime, which is organized by the U.N. sponsored Congress on Crime Prevention and Criminal Justice, gathers policymakers, practitioners, academia, intergovernmental organizations, and civil societies that are knowledgeable on the topic of crime prevention and criminal justice. The Commission of Crime Prevention and Criminal Justice acts as the implementing body to the Congress. The CCPCJ is the group that actually makes recommendations to serve as the draft recommendations for Congress to consider. The Congress meets every five years to discuss varying pertinent topics in the field. The purpose of the Congress is to “provide a forum for (a) the exchange of views between States, intergovernmental and non-governmental organizations and individual experts representing various professions and disciplines; (b) the exchange of experiences in research, law and policy development; and (c) the identification of emerging trends and issues in crime prevention and criminal justice.” Additionally, participants of the Congress include UN Member States and Observers, international organizations, non-governmental organizations and individual experts. Prior to and following a Congress meeting, they often sign and adopt relevant declarations and resolutions. *About, 14th United Nations Congress on Crime Prevention and Criminal Justice*, UNITED NATIONS OFF. ON DRUGS & CRIME (2020), <https://www.unodc.org/congress/en/about.html> [<https://perma.cc/T97K-VMBC>].

51. *Doha Declaration*, *supra* note 50.

sustainable development.”⁵² It reaffirms the international community’s commitment to ensure that all criminal justice systems fully consider every dimension of crime, “including the root causes of crime, as well as the conditions conducive to its occurrence.”⁵³ It promotes mechanisms that utilize community participation and dialogue outside of the formal criminal justice systems.⁵⁴ Lastly, it emphasizes the importance of efforts to reduce prison populations and increase the use of anti-carceral measures.⁵⁵ Following the Thirteenth Congress and the Doha Declaration, many other resolutions were passed to address issues on this topic.⁵⁶

In 2018, the Commission of Crime Prevention and Criminal Justice (“CCPCJ”) issued another resolution discussing and emphasizing the importance of past General Assembly resolutions on restorative justice.⁵⁷ The resolution notably “[e]ncourages Member States, where appropriate, to consider facilitating restorative justice processes, at relevant stages in the criminal justice process, to the extent possible and in accordance with applicable law, including by considering applying the basic principles on the use of restorative justice programmes in criminal matters.”⁵⁸ In addition, the Commission requested budgetary assistance from the UN Office on Drugs and Crime to continue its research and provide Member States with resources on building domestic restorative justice programs. In conjunction

52. *Preventing Crime to Build Sustainable Development*, UNITED NATIONS, <https://www.un.org/en/events/crimecongress2015/> [https://perma.cc/NA3Z-CJJ3] (last visited May 10, 2020).

53. *Doha Declaration*, *supra* note 50, ¶ 5(a). The conditions include social and economic status and adequate education. *Id.* ¶¶ 10(a), 10(c), 7. The Declaration addresses the need for policies and programs that foster socioeconomic development as a way to prevent crime and violence. *Id.* ¶10(a).

54. *Id.* ¶ 10(d).

55. *Id.* ¶ 5(k).

56. *See, e.g.*, G.A. Res. 72/192, U.N. Doc. A/RES/72/192 (Dec. 19, 2017). The Fourteenth U.N. Congress on Crime Prevention and Criminal Justice was supposed to be held on April 20-27, 2020 in Kyoto, Japan. Prior to the Congress, the U.N. General Assembly passed resolution 72/192 to determine the overall theme and topics. These included comprehensive strategies for crime prevention through social and economic development, education, and youth engagement programs, among others. *Id.*

57. CCPCJ Res. 27/6 (2018).

58. *Id.* ¶ 3.

with the host of resolutions to which it alludes and reaffirms,⁵⁹ this resolution illustrates the global community's approval of the restorative justice process. Moreover, the resolution recognizes restorative justice as a separate, "evolving response to crime that respects the dignity and equality of each person and builds understanding."⁶⁰

The Doha Declaration and CCPCJ resolutions are not legally binding, but rather they exemplify an international, collective vision to reduce prison populations and utilize restorative justice processes and other anti-carceral programs. They give UN Member States a reference point as each State reassesses its domestic criminal justice systems and relevant legislation. While they have been in place for many years, the United States and New Zealand still fall behind in utilizing alternatives to incarceration, as evidenced by high incarceration statistics. The following Part examines the United States' and New Zealand's efforts to incorporate anti-carceral measures of restorative justice programs into their systems in an attempt to address the pervasive flaws of a retributive justice system.

III. DOMESTIC LAWS INCORPORATING RESTORATIVE JUSTICE

A retributive justice system is self-defeating. It fails to address the social and economic hardships that often lead to crime and tends to worsen an individual and, in turn, their community. An oft-cited alternative to retributive justice systems is a restorative justice system.⁶¹ Restorative justice systems shift the focus from the wrongdoer to the victim and the community harmed.⁶² In practice, programs in such a system often replace the adversarial

59. See generally Economic and Social Council Res. 1999/26 (July 28, 1999); Economic and Social Council Res. 2000/14 (July 27, 2000); Economic and Social Council Res. 2002/12 (July 24 2002); U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, U.N. Sales No. E.06.V.15 (2006).; U.N. GAOR, 70th Sess., 4th plen. mtg. at 4, U.N. Doc. A/Res/70/1 (Oct. 21, 2015). See also G.A. Res. 40/34, 43-44 (Nov. 29, 1985).

60. CCPCJ Res. 27/6.

61. See generally Thalia González, *The Legalization of Restorative Justice: A Fifty State Empirical Analysis*, 2019 UTAH L. REV. 1027 (2019) (discussing the increase in research of restorative justice efforts over the last few decades as an alternative societal response to crime).

62. See Zehr, *supra* note 9, at 69.

system and outcome of imprisonment with a face-to-face meeting between victims, individuals who committed a crime, and a neutral third party to address the specific issues with the crime committed.⁶³ The meetings generally include a discussion of the crime itself, its impact on all parties, and an agreement on how the relevant harm may be repaired through various outlets such as community service or paying monetary restitution.⁶⁴ Restorative justice programs' goal is to divert an individual away from imprisonment toward these fully informed and agreed upon alternative outcomes.⁶⁵ This Part focuses on restorative justice practices applied prior to incarceration⁶⁶ and compares the United States' and New Zealand's efforts to incorporate restorative justice legislation. Both countries' efforts illustrate that while these reforms help reduce prison populations, they are insufficient to address the underlying causes of crime.⁶⁷

A. United States

The United States still relies on a retributive justice system, but a global shift toward restorative justice practices in the 1980s and 1990s⁶⁸ inspired some state governments and local organizations to begin diverting individuals away from the formal criminal justice system.⁶⁹ The victims' rights movement emerged

63. See Umbreit, *supra* note 28, at 76.

64. *Id.* at 76-77.

65. See Umbreit, *supra* note 28, at 75. Some proponents advocate to use restorative justice as a process to enact larger systemic change. Their vision is to use the principles underlying restorative justice to create programs that divert individuals away from the formal criminal justice system, as an effort to reduce incarceration rates and prison populations. *Id.*

66. See *infra* Sections IV.A.1 and III.B.1 for a further discussion on the diversions applied prior to incarceration.

67. See *supra* note 12 and accompanying text for a discussion on common underlying causes of crime such as mental health issues, substance abuse, poverty, and lack of education and employment.

68. US DEP'T. OF JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY xii (1998); see also Dr. Marlene Young & John Stein, *The History of the Crime Victims' Movement in the United States*, OFFICE FOR VICTIMS OF CRIME, OFFICE OF JUSTICE PROGRAMS 5 (Dec. 2004).

69. In the US, state governments are the focus of criminal justice reform because states have broad powers to implement criminal laws and impose relevant sentencing. Additionally, a vast majority of incarcerated individuals are in state prisons, as opposed to federal institutions. The federal prison population only makes up ten percent of the whole nation's prison population. Joshua Dubler & Vincent Lloyd, *Think prison abolition*

in the 1980s⁷⁰ to urge actors in the criminal justice system and legislators to consider crime victims' concerns.⁷¹ In the 1990s, several states enacted laws that broadly implemented restorative programs, including the use of conferences between victims and offenders.⁷² These mediated conferences vary based on the crime, but they are all similar in that the goal of the conference is for both parties to express their feelings and then resolve the conflict with a tangible agreement on how the individual will repair the harm.⁷³ This Section discusses US state-level implementation of restorative justice legislation, with a focus on Vermont law and the systemic gaps such legislation is unable to fill.

1. State Legislation

Restorative justice measures focusing on the relationship between victims and individuals who committed a crime emerged on the state level in the 1990s and early 2000s as a policy solution at the intersection of criminal justice, social justice, and victims' rights.⁷⁴ Today, at least thirty-five states have adopted legislation

in America is impossible? It once felt inevitable, *GUARDIAN* (May 19, 2018), <https://www.theguardian.com/commentisfree/2018/may/19/prison-abolition-america-impossible-inevitable> [<https://perma.cc/8PTT-AHHQ>]; *see also* Kushner, *supra* note 14.

70. The First Crime Victims' Bill Of Rights was passed in Wisconsin in 1980 and President Ronald Reagan proclaimed the first "Crime Victims' Rights Week" in 1981. Notably, the Office for Victims of Crime was created by the U.S. Department of Justice in 1983, which implemented recommendations from Reagan's Task Force on Victims of Crime. *See* Young & Stein, *supra* note 68, at 4, 5.

71. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 63 (1982). Prior to the enactment of the Crime Victims' Rights Act in 2004, there was a perceived imbalance of defendants' and crime victims' rights in the criminal justice system. Crime Victims Right Act 18 U.S.C. § 3771 (2004); *see also* Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedures*, 2007 UTAH L. REV. 861, 865 (2007).

72. Sara Sun Beale, *Still Tough on Crime - Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 421 (2003).

73. *See id.*; *see also* *Victim Offender Mediation*, CENTER FOR JUSTICE & RECONCILIATION (2020), <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/victim-offender-mediation/#sthash.bHBirWcS.dpbs> [<https://perma.cc/JR5T-626Y>].

74. *See* Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 269 (2000); *see also* Beale, *supra* note 72, at 418. For example, Alabama requires a written statement from the individual who committed a crime accepting responsibility for the crime. Ala Code § 45-28-82.25 (1975). *See also* Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 *J. POL'Y PRAC.* 77, 80 (2015).

that encourage the use of restorative justice practices before incarceration.⁷⁵ Vermont was one of the first states to pass laws that entrenched the ideology of restorative justice and implemented concrete alternatives to incarceration programs.⁷⁶ Vermont's restorative justice law, codified under the 'Public Institutions and Corrections' law ("Title 28"), integrates restorative justice principles into its criminal justice system.⁷⁷ It also includes implementation provisions for one of its key alternatives to incarceration programs: the adult diversion program through the use of community reparative boards.⁷⁸

Section 1 of Title 28, titled "Purposes," broadly states that "[t]he Department [of Corrections] shall formulate its programs and policies recognizing that almost all offenders ultimately return to the community, and that the traditional institutional prisons fail to reform or rehabilitate, operating instead to increase the risk of continued criminal acts following release."⁷⁹ The statute also identifies three distinct objectives: resolving disputes through non-adversarial measures, repairing the damage caused to victims and surrounding communities, and reducing the risk of recidivism.⁸⁰ Further, Section 2a, aptly titled, "Restorative Justice,"⁸¹ states in relevant part:

[i]t is the policy of this State that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of

75. Rebecca Beitsch, *States consider restorative justice as alternative to mass incarceration*, PBS (July 20, 2016). <https://www.pbs.org/newshour/nation/states-consider-restorative-justice-alternative-mass-incarceration> [<https://perma.cc/5FRG-5SH3>] (explaining that as of 2015, one study found thirty-nine statutes in twenty-one states that used restorative justice for diversionary or pre-trial processes). See also Sliva & Lambert, *supra* note 74, at 87.

76. *History of Restorative Justice*, SPRINGFIELD RESTORATIVE JUSTICE CENTER, <https://www.springfieldrestorativejustice.com/history-of-restorative-justice.html> [<https://perma.cc/T3ST-K2XD>] (last visited Apr. 19, 2021). See generally VT. STAT. ANN. tit. 28 (2021); see also VT. STAT. ANN. tit. 28, § 2(a) (2021); VT. STAT. ANN. tit. 28, §§ 910-912 (2021).

77. See generally VT. STAT. ANN. tit. 28 (2021); see also VT. STAT. ANN. tit. 28, § 2(a) (2021); VT. STAT. ANN. tit. 28, §§ 910-912 (2021).

78. VT. STAT. ANN. tit. 28 § 2a(b); see also VT. STAT. ANN. tit. 3, § 163(e)(1); VT. STAT. ANN. tit. 28 § 910a.

79. VT. STAT. ANN. tit. 28 § 1(b).

80. *Id.* § 2a(a)(1)-(3).

81. The section is placed within Title 28 of its state code that governs public institutions and corrections. *Id.* § 2(a).

criminal offenses . . . The policy goal is a community response to a person's wrongdoing at its earliest onset, and a type and intensity of sanction tailored to each instance of wrongdoing.⁸²

The statute also discusses the implementation of restorative justice approaches. It states that "law enforcement officials [should] develop and employ restorative justice approaches *whenever feasible* and [be] responsive to specific criminal acts" ⁸³ To effectuate the provisions, Vermont created Community Justice Centers ("CJCs") to facilitate a majority of the state's restorative justice programs and provide administrative and volunteer support.⁸⁴ The law governing the implementation of CJCs authorizes the legislative body of any Vermont municipality to create a CJC to "address the wrongdoings of individuals who have committed municipal, juvenile, or criminal offenses."⁸⁵ The legislation also discusses the CJC's relationship with state government entities, explaining that the centers should receive support and funding from the state's Agency of Human Services.⁸⁶ The centers can use various restorative justice approaches, including group conferencing, mediation, or restorative justice panels.

Section 2a(b) lists the provisions of criminal law that utilize alternatives to incarceration practices. These include juvenile and adult diversion programs that come after an individual is charged with a crime, when the court has found probable cause but not

82. *Id.* § 2a(a).

83. *Id.* § 2a(b) (emphasis added).

84. VT. STAT. ANN. tit. 24, § 1961 (2021). The centers host a variety of restorative justice programs including diversionary restorative justice panels and conflict mediation. Sarah Mikva Pfander, *Evaluating New Zealand's Restorative Promise: The Impact of Legislative Design on the Practice of Restorative Justice*, 15 *KÖTUITUI: N.Z. J. SOC. SCIS.* 170, 177 (2020); *see also* Beitsch, *supra* note 75. Vermont also stands unique in their approach to restorative justice because their programs were designed by the Vermont Department of Corrections, they are implemented statewide, and they are utilized in adult cases. Kurki, *supra* note 74, at 283.

85. VT. STAT. ANN. tit. 24, § 1963 (2021); *see also* VT. STAT. ANN. tit. 24, § 1961 seq. The law discusses the make-up of the advisory boards, the center's relationship with state entities, and the types of cases that are allowed to utilize this non-custodial measure. VT. STAT. ANN. tit. 24, §§ 1966, 1967 (2021).

86. STATE OF VERMONT AGENCY OF HUMAN SERVICES, *About Us*, <https://humanservices.vermont.gov/about-us> [<https://perma.cc/G7EG-2VPL>] (last visited Nov. 4, 2020).

yet adjudicated the case.⁸⁷ In a diversion program, a judge may adjourn a case to allow for a restorative program to occur before sentencing, offering the opportunity for a non-carceral sentence to be determined outside of the adversarial system. The adult diversion statute states the qualifications for a diversion program:

“[i]f a person is charged with a qualifying crime as defined in 13 V.S.A. § 7601(4)(A) and the crime is a misdemeanor, the prosecutor shall provide the person with the opportunity to participate in the court diversion program unless the prosecutor states on the record at arraignment or a subsequent hearing why a referral to the program would not serve the ends of justice.”⁸⁸

13 V.S.A. Section 7601(4)(A) defines “qualifying crime” by reference to a limited list of crimes, including misdemeanors that do not involve the sexual exploitation of children, prostitution, a violation of a protective order, and fifteen felonies—with nine of them involving drug possession.⁸⁹

Lastly, Title 28 also includes a section governing community reparative boards.⁹⁰ The State Commissioner establishes these boards, which are part of a reparative probation in which a judge sentences an offender to meet with the board.⁹¹ With guidance from various nonprofit organizations, the Commissioner appoints five to seven volunteer citizens,⁹² for terms of one to three years, to meet with the individual and the victim and facilitate a conversation to arrive at a unique agreement.⁹³

87. VT. STAT. ANN. tit. 3, § 163(e)(1) (2021); *see generally* VT. STAT. ANN. tit. 3, § 164. The statute also lists sentencing provisions that discusses how sentencing alternatives and how they are given out. This will be further discussed in the following paragraph about community reparative boards. VT. STAT. ANN. tit. 13, § 7030.

88. VT. STAT. ANN. tit. 3, § 164(e)(1) also notes any offense for which a person has been granted an unconditional pardon from the Governor.

89. VT. STAT. ANN. tit. 13, § 7601(4) § 7501(4)(p).

90. Also known as reparative boards. The boards are established for adult probationers. VT. STAT. ANN. tit. 28, § 910(a) (1999).

91. Kurki, *supra* note 74, at 283.

92. The citizens are appointed by the commissioner. VT. STAT. ANN. tit. 28, § 910(a); Kurki, *supra* note 74, at 283.

93. The process begins with a judge sentencing the individual who committed a crime to probation with a suspended sentence and then the board members may take over the case. Kurki, *supra* note 74, at 283. The panel often consists of five to seven members. The agreements are based on five restorative goals: “the victim is restored and healed, the community is restored, the offender understands the effects of the crime, the offender learns ways to avoid reoffending, and the community offers reintegration to the

Outcomes range from extensive community service to commitment to attend school or work.⁹⁴ The law establishes these boards and provides for the use of restorative justice programs when an “offender[s] is required to participate in such a program as a condition of a sentence of probation.”⁹⁵

2. Failures of the Legislation

Legislation encouraging restorative justice processes is a step in the right direction to address international law standards that advocate for recognizing the unique circumstances of each offender by understanding their relationship to victims and surrounding communities. Despite this encouraging incorporation of restorative practices into state legislation, Title 28 still contains gaps that undermine international law standards aiming to *prioritize* alternatives to incarceration. The most significant pitfalls of the legislation include their limited application, discretionary implementation, net-widening effect, and the possibility of coerced decisions.⁹⁶

Eligibility for restorative justice programs is often arbitrary.⁹⁷ Only individuals accused of certain crimes are afforded the

offender.” In 1998, forty-four reparative boards handled more than one-third of the targeted probation caseload. *Id.* The panels were added to the Vermont Statutes by Act No. 148. *Id.* See VT. STAT. ANN. tit. 28, § 2a. To understand the subjective success of a restorative justice program, researchers often rely on surveys. In New Zealand, one scholar relied on two surveys (established in 2011 and 2016) to determine victim satisfaction. Pfander *supra* note 84, at 179. See generally, NEW ZEALAND MINISTRY OF JUSTICE, VICTIM SATISFACTION WITH RESTORATIVE JUSTICE: A SUMMARY OF FINDINGS (2011), <http://www.justice.govt.nz/publications/global-publications/v/victim-satisfaction-with-restorative-justice> [https://perma.cc/DAY3-K9BL]; NEW ZEALAND MINISTRY OF JUSTICE, RESTORATIVE JUSTICE VICTIM SATISFACTION SURVEY RESEARCH REPORT, <https://www.justice.govt.nz/assets/Documents/Publications/20170303-RJ-Victim-Report.pdf> [https://perma.cc/8S93-Z5ZW] (2016). There are often “offender” satisfaction surveys and measured recidivism rates to help understand the healing process. Umbreit & Armour, *supra* note 28, at 79-80.

94. Kurki, *supra* note 74, at 283.

95. VT. STAT. ANN. tit. 28 § 910.

96. Net-widening refers to the additional conditions imposed on those who take part in a restorative justice program. Failure to comply with such conditions often results in required imprisonment sentences.

97. Judge Andrew Becroft, *Family Group Conferences: Still New Zealand’s gift to the world?*, CHILDREN’S COMMISSIONER (Dec. 2017), <https://www.occ.org.nz/assets/Uploads/OCC-SOC-Dec-2017-Companion-Piece.pdf> [https://perma.cc/U5Z6-9HN4] (stating the Oranga Tamariki Act only applies to juveniles); see also DEPARTMENT FOR CHILDREN AND FAMILIES, AGENCY OF HUMAN

opportunity to partake in the diversionary process or to come before a reparative board. This type of sorting, between violent and non-violent or adult and juvenile, is solely a reworking of who deserves to undergo the hardships of the retributive system. Statutorily prohibiting “violent offenders” the opportunity to engage in one of the more fruitful restorative justice programs does not address an understanding of how and why an individual ended up in the system, regardless of the type of crime or the age of the individual.⁹⁸ The statute explicitly defines “qualifying crime” by reference to a list of crimes, including specific misdemeanors and fifteen felonies.⁹⁹ Nine out of the fifteen qualified felonies are related to drug possession of the minimum amount of drugs needed to incur the penalty.¹⁰⁰ This leaves only very few individuals eligible for the restorative process.¹⁰¹ In Vermont, fewer than twenty percent of the total probation population are referred to reparation probation panels.¹⁰² Some may argue that individuals who committed a violent crime require incarceration to prevent any further violence. While this may be true in certain cases, it is inherently a very specific and complex process to determine whether an individual can be rehabilitated through a restorative justice process. One set of data found high levels of victim-participant satisfaction with victim-offender

SERVICES, *Balances & Restorative Justice (BARJ)* (2020), <https://dcf.vermont.gov/youth/justice/BARJ> [<https://perma.cc/N755-PL69>] (stating that their organization only serves youth on juvenile probation, at risk of becoming involved with the juvenile justice system and youth who are truant from school).

98. M. Eve Hanan, *Decriminalizing Violence: A Critique Of Restorative Justice And Proposal For Diversionary Mediation*, 46 N.M. L. REV. 123, 131 (2016).

99. See *infra* Section III.A.1.

100. See VT. STAT. ANN. tit. 13, § 7601(4). For example, one of the relevant qualifying drug crimes is title 18, section 4230(a) of the Vermont Statute related to possession of marijuana. Subsection (a) only involves strictly *possessing* marijuana or marijuana plants. There are other sections that are not considered “qualified” crimes for purposes of restorative programs, such as selling, dispensing, or trafficking. VT. STAT. ANN. tit. 18, §§ 4230(b)-(c).

101. See *supra* Section III.C.1.

102. Pfander *supra* note 84, at 181. There is also the misconception that private prisons are one of the biggest drivers behind the mass incarceration problem and the retributive justice system as a whole. Pursuant to assumption, restorative justice reforms mostly target private prisons for population reduction. However, ninety-two percent of incarcerated individuals are in publicly funded facilities. Even further, ninety-nine percent of those in jails are in public jails. Kushner, *supra* note 14.

mediations in cases of severe violence.¹⁰³ The restorative justice process should be an option for all, outside of a few exceptions, rather than only reserved for few specific offenders.¹⁰⁴

Another issue with Title 28 is the discretion it leaves open for prosecutors to decide whether to refer an offender to one of their diversionary efforts. Although prosecutors must give the individual who committed a qualifying crime the opportunity to volunteer for a diversionary program, they still have the discretion to impose incarceration if they believe it would better “serve the ends of justice.”¹⁰⁵ Further, the diversionary statute states that “State’s Attorney shall retain final discretion over the referral of each case for diversion.”¹⁰⁶ Prosecutors’ discretion can have a greater impact on incarceration rates than almost any other legislative reform.¹⁰⁷ This means that prosecutors may make judgment calls that often reflect entrenched implicit biases,¹⁰⁸ undermining the goal of utilizing non-custodial measures as a priority of the criminal justice system.

Moreover, a significant concern regarding Title 28 and other restorative justice policies, programs, and legislation is their reliance on the current criminal justice system and the threat of

103. Mark S. Umbreit, et al., *Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue*, 6 INT’L REV. OF VICTIMOLOGY 321, 340 (1999). Common Justice, a local organization based in Brooklyn and the Bronx in New York state, is the first alternative to incarceration program in the United States that focuses on violent felonies in adult courts. COMMON JUSTICE, <https://www.commonjustice.org/> [<https://perma.cc/47LJ-CPSH>] (2021). Including individuals who committed a violent crime in alternatives to incarceration, and specifically restorative justice programs is extremely pertinent to achieve the ultimate goals of international standards because fifty-three percent of people incarcerated in the United States were convicted of violent crimes. As such without including individuals who committed a violent crime, the nation will be unable to achieve large-scale transformative change. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/BL4P-3G74>].

104. See *supra* Part IV for a further discussion on proposed relevant legislative reforms.

105. VT. STAT. ANN. tit. 3, § 164.

106. *Id.* at § 163(c)(4).

107. See Judith Greene & Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration while Increasing Public Safety*, 29 FED. SENT’G REP. 22, 26 (Oct. 28, 2016).

108. Scholars found that everyone harbors unconscious stereotypes and attitudes about race which shape the way they respond to racial stimuli. Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 1009 (2013).

traditional incarceration.¹⁰⁹ In Vermont, the programs are part of a probationary measure, and thus, if an individual does not successfully partake in the program, they can be subject to further state sanctions, including incarceration.¹¹⁰ Being put under a form of social control, such as a probationary measure, can deepen or extend one's involvement with the criminal justice system. This can lead to an increased likelihood that an individual may be subject to punishment if they fail to comply with any of the necessary terms of the anti-carceral sentence.¹¹¹ This has the opposite effect of the intended goal of decarceration because it increases the types of cases that may result in incarceration if they do not comply with the stringent conditions.¹¹²

Last, even if an individual who committed a crime participates in the formation of the agreement at the end of a restorative program, they may not understand the implications of the agreement and accept it solely to avoid potential imprisonment. These restorative laws and related practices can easily mask their function as a continued instrument of state sanctions.¹¹³ This is further exemplified by the fact that the restorative justice policy goals and foundation for its reparative boards are found in Title 28, which relates to public institutions and corrections, directly associating these restorative practices with the inherently flawed retributive justice system.¹¹⁴ Restorative

109. See Hanan, *supra* note 98, at 132.

110. VT. STAT. ANN. tit. 28. § 910(a); Kurki, *supra* note 74, at 283. Success often means completion of a program (often community service), individual accountability, and restoration of harm. Completion of the tangible program or any other set of guidelines is how judges often determine whether an individual who committed a crime should be sentenced to carceral measures. State sanctions refers to punishment determined by the state.

111. Hanan, *supra* note 98, at 134.

112. Oren Gazal-Ayal & Julian V. Roberts, *Alternatives to Imprisonment: Recent International Developments*, 82 L. AND CONTEMPORARY PROBLEMS i, iv (2019).

113. Hanan, *supra* note 98, at 126; see also GENERATIONFIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE 33 (2007), http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Documents.pdf [<https://perma.cc/7JQD-SCPQ>] [hereinafter GenerationFIVE, Toward Transformative Justice]. See text accompanying note 110.

114. See *supra* Part I.

programs only operate with the threat of the retributive punishment system behind them.¹¹⁵

While there are critical pitfalls of a restorative justice system such as Vermont's, the benefits of out-of-court dispute resolution through restorative practices oftentimes outweigh those of other processes, such as the traditional process or in-court diversionary programs.¹¹⁶ Courts should still utilize restorative justice processes while accounting for its limited application, discretionary implementation net-widening effect, and the possibility of coerced decisions. Vermont's restorative justice is the earliest and most robust framework nationwide, thus a compelling case study to inform the US approach to transitioning its legal framework from one focused on retributive justice to one incorporating restorative justice principles.¹¹⁷

115. Additionally, the community reparative boards that aim to work outside the presence of a state official are still governed by the State Commissioner. The only way an individual who committed a crime may partake in a community reparative board or other restorative program is if they are arrested and charged with a crime. *See* VT. STAT. ANN. tit. 28 § 910.

116. An example of an in-court diversionary program is "drug courts," which refers to processes where judges set the terms and conditions of probation or treatment and individuals who committed a crime must often discuss personal, emotional topics in a public courtroom. Victim and participants in restorative programs, even for violent crimes, have been shown to have higher levels of satisfaction and a feeling of "procedural justice." This is likely because of their ability to partake in the actual process of healing and restoration as opposed to a court's strict rules and procedures. Hanan, *supra* note 98, at 136.

117. *See infra* Part IV. Another state example includes New Jersey's "curb-side warnings" which aim to reduce arrests. *Missed Opportunities: Youth Diversionary Programs in New Jersey*, ACLU N.J., at 3 (Jan. 2018), https://www.aclu-nj.org/files/7615/1621/6649/Youth_Diversionary_Programs_Report.pdf [<https://perma.cc/B7CV-9J7H>]. Police officers issue these pre-arrest warnings to juveniles committing a petty offense to discourage youths from engaging in criminal activity without arresting them and sending them through the formal criminal justice system. These types of anti-carceral restorative justice programs have been shown to reduce "future delinquent behavior." David B. Wilson et. al., *Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta Analysis*, OFF. OF JUST. PROGRAMS (June 2017), <https://www.ncjrs.gov/pdffiles1/ojdp/grants/250872.pdf> [<https://perma.cc/7RBN-6WHF>]. Restorative justice youth programs likewise reduce recidivism rates. Marilyn Armour, *Restorative Justice: Some Facts and History*, 27 *Tikkun* 25, 26 (2012) (citing a study of 12,000 juveniles that found a twenty-five percent decrease in recidivism rates and to the benefit of the victims, citing a study that found forty percent fewer symptoms of post-traumatic stress six months after the incident); *see also* Whitney Bryen, *Longmont program highlights restorative justice potential*, LONGMONT TIMES CALL (July 13, 2013), <https://www.timescall.com/2013/07/13/longmont-program-highlights-restorative-justice-potential/> [<https://perma.cc/YDH2-8SB8>]; Doron Pely, *Restorative Justice - Saving*

B. New Zealand

New Zealand was one of the first countries to provide for restorative justice programs for children and adults at various levels in the criminal justice system.¹¹⁸ The Māori tribal customs, traditions,¹¹⁹ and principles influenced the restorative programs used in New Zealand's modern day criminal justice system.¹²⁰ Māori customs include the core values of "reconciliation, reciprocity, and whanau involvement."¹²¹ This ideology is present today through the use of family conferences for juvenile individuals who committed a crime.¹²² Around the same time when restorative justice principles led public discourse, the government first acknowledged the overrepresentation of Māori in the criminal justice system in the 1980s and 1990s.¹²³ This concern over immense institutional racism led lawmakers to

Lives, Money and Communities, USC PRICE (May 1, 2018), <https://sci.usc.edu/2018/05/01/restorative-justice-saving-lives-money-communities/> [<https://perma.cc/6JQL-PRL8>].

118. See generally Pfander, *supra* note 84, at 15. See also Jim Boyack & Helen Bowen, *Adult Restorative Justice in New Zealand/Aotearoa*, INT'L INSTITUTE FOR RESTORATIVE PRAC. (Aug. 30, 2003) <https://www.iirp.edu/news/adult-restorative-justice-in-new-zealand-aotearoa> [<https://perma.cc/R3YD-VCNR>].

119. Restorative justice principles align with Māori customs and traditions. One example of this is the process that the whanaugatanga used when there was harm committed among their community. The community or family would hold meetings after an initial harm occurred to create a space for discussion for the victim, victim's family, and the family of the individual who committed a crime. The open dialogue aimed to help restore future social order. This moved the primary purpose away from retribution and toward community accountability and action to ensure the crime could be deeply understood and prevented from occurring again. Sir David Carruthers, *Restorative Justice: Lessons from the Past, Pointers for the Future*, 20 WAIKATO L. REV. 1, 21 (2012).

120. See *id.* at 23. The group conferences were initially used by Māori indigenous people and are considered successful if victims are satisfied and don't weigh against reform or rehabilitation of individuals who committed a crime. Group conferences also bring all relevant parties together to establish their mutual goals.

121. Carruthers, *supra* note 119, at 2. Whanau means family in the traditional Māori language. Beale, *supra* note 72, at 419.

122. See *infra* Section III.B.2.

123. JUAN TAURI, INDIGENOUS PERSPECTIVES AND EXPERIENCE: MĀORI AND THE CRIMINAL JUSTICE SYSTEM 10 (R. Walters & T Bradley, eds., 2005). Similar to the United States in relation to minorities representation in the criminal justice system, at the end of beginning of the 21st century, the Māori people comprised of 14.5% of the population, but accounted for 50.8% of the prison population, and, most striking, 53% of the youth prosecuted for all offenses except for non-imprisonable traffic offenses. *Id.* at 2-3. One of the first reports that looked at the relationship between the Māori population and the criminal justice system was published in 1980.

rethink their approach to criminal justice throughout the country.¹²⁴

1. Sentencing Act of 2002

In the 1980s, before the legal implementation of restorative justice, there was growing public concern over the criminal justice system's treatment of juveniles and the overrepresentation of Māori people in prisons.¹²⁵ Following public reaction to both concerns, New Zealand introduced the first legislation implementing restorative justice practices, The Children, Young Persons, and Their Families Act of 1989.¹²⁶ The act provides special protections for children¹²⁷ and actively engages community leaders to participate in the juvenile justice process at all stages.¹²⁸ It also establishes youth courts.¹²⁹ These youth courts only hear cases involving children between the ages of fourteen and seventeen years old and follow the same rules of a District Court, but they utilize judges specially trained to handle children matters and every case, is appointed a youth advocate.¹³⁰ Another more anti-carceral approach does not allow police to arrest children or issue a summons to children without first convening a Family Group Conference ("FGC").¹³¹ FGCs, one of the most frequently used alternatives for juvenile offenders, is a voluntary process that brings together the juvenile, their family, and a

124. See Tauri, *supra* note 123, at 13.

125. Carruthers, *supra* note 119, at 3.

126. Children's and Young People's Well-being Act 1989, (N.Z.) (also known as Oranga Tamariki Act of 1989).

127. Child is defined as an individual under the age of 14. *Id.* s 2.

128. *Id.*

129. *Id.* s 272. See also Judge FWM McElrea, *Beyond Prisons, Best Practices Along the Criminal Justice Process*, QUEENS UNIV. 1 (1998), <http://restorativejustice.org/am-site/media/the-new-zealand-model-of-family-group-conferences.pdf> [<https://perma.cc/W6TF-YQES>].

130. McElrea, *supra* note 129, at 2.

131. *Id.*; see also Ministry of Justice, Restorative Justice: Best Practice in New Zealand, 7 (2004) [hereinafter Ministry of Justice, Restorative Justice: Best Practice]. Some examples of restorative justice programs for children that have been implemented are Community Justice Panels that are in place at Christchurch, Rangatahi Youth Courts, and Kaiokohe District Court. These panels are entirely separate from district courts and hold their own trials by community representatives. There are similar panels in the United States. For example, Pennsylvania has Youth Aid/Community Justice Panels. Vermont has Community Justice Panels. Carruthers, *supra* note 119, at 4-5.

neutral third party¹³² to partake in the decision-making process to address the juvenile's criminal behavior.¹³³

With an increase in public understanding of the benefits of restorative justice for children, legislators pushed to extend the practices to adults.¹³⁴ By 1998, the seminal case of *R v. Clotworthy*¹³⁵ established the importance of restorative justice practices¹³⁶ and marked the first time a judge recognized the need to consider restorative practices in sentencing.¹³⁷ In *R v. Clotworthy* the defendant, Patrick Clotworthy, was intoxicated when he attacked a victim, slashing him in the face with a knife and demanding money.¹³⁸ Clotworthy was convicted of wounding with intent to cause grievous bodily harm and pled guilty. However, prior to sentencing, the parties agreed upon a restorative justice approach where the victim and defendant partook in a conference. The victim was adamant about *not* imposing any imprisonment on the defendant and only desired a monetary award to pay for his cosmetic surgeries. The judge was not authorized to appeal to all of the victim's concerns, such as denying any incarceration time; however, he took this factor into consideration and instead of the minimum sentence (unsuspended three and a half years imprisonment), he imposed a suspended two-year sentence and reparations to the victim of US\$15,000 and 200 hours of community service.¹³⁹ The

132. Children's and Young People's Well-being Act 1989 (N.Z.) s I, subs 4; s II, subs 20. See also Pfander, *supra* note 84, at 177.

133. Becroft, *supra* note 97.

134. Carruthers, *supra* note 119, at 6. In the 1990s there was an increase in case-by-case recommendations in local courts for outcomes involving restorative justice. Restorative justice programs were funded by Crime Prevention Unit, the police, and local Safer Community Councils. *Id.*

135. *R v. Clotworthy* [1998] NZCA 15 at 651 (N.Z.).

136. In *R v. Clotworthy* a man was convicted of wounding with intent to cause grievous bodily harm, the parties agreed upon a pre-sentence restorative justice approach that imposed a suspended two-year sentence and reparations to the victim and community work. The prosecutor appealed to try to impose a greater sentence, since this went against the sentencing starting point. *Id.*; Carruthers, *supra* note 119, at 7.

137. *R v. Clotworthy* (1998) 15 CRNZ 651 (C.A.).

138. Helen Bowen & Terri Thompson, *Restorative Justice and the Court of Appeal's Consideration in the Clotworthy Case*, FIRSTFOUND, <http://www.firstfound.org/vol.%201/bowen.htm> [<https://perma.cc/CU6Z-WEGQ>].

139. *Id.* In the Judge's sentencing notes he stated, "taking into account to the attitude of the victim, one asks the question - what is to be achieved in this particular case by a sentence of imprisonment to commence today? Firstly, there would be the debt to the taxpayer of

prosecutor appealed to try to impose a greater sentence, as two years was less than the minimum recommended sentence.¹⁴⁰ The Appellate Court held that the proper starting sentence was five years, overruling the District Court and imposing a three year unsuspended sentence instead.¹⁴¹ Although the Appellate Court accepted the prosecution's contention that the crime required a minimum two year sentence, the Court explicitly stated that restorative justice is an important sentencing factor that should be balanced amongst many others, and "the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome in that way."¹⁴² This set the stage for the significant weight restorative justice practices would have on determining sentences in New Zealand.¹⁴³ *R v. Clotworthy* prompted lawmakers to apply restorative justice principles to adults and set the path for later legislation.¹⁴⁴ The Sentencing Act of 2002 followed *R v. Clotworthy* and conferred statutory recognition to restorative justice processes for adults.¹⁴⁵

The Sentencing Act originally stated that if an offender pled guilty, there was at least one victim of the offense, no previous restorative justice processes related to the instant case had occurred, and the prosecutor informed the court that there was an accessible and appropriate restorative justice process, the court could adjourn the proceeding to allow for a restorative justice process to take place.¹⁴⁶ In 2014, Parliament broadened the availability of the process by amending language such that if the case met the previously listed criteria, the court *must* adjourn

somewhere between \$40-\$90,000 per year . . . Secondly, there would be literally no tangible or realistic benefit to the victim personally - no actual justice. Thirdly, there would be havoc wreaked upon the prisoners small, fragile family . . . Fourthly, there would be little and probably no prospect of any further reparation beyond the \$5,000 payable today."

140. *R v. Clotworthy* [1998] NZCA 15 at 651 (N.Z.); Carruthers, *supra* note 119, at 7.

141. *R v. Clotworthy* [1998] NZCA 15 at 651 (N.Z.).

142. Bowen and Thompson, *supra* note 138.

143. *R v. Clotworthy* [1998] NZCA 15 at 651 (N.Z.); Carruthers, *supra* note 119, at 7.

144. See Sentencing Act 2002; Victim's Rights Act 2002; Parole Act 2002.

145. See Ministry of Justice, Restorative Justice: Best Practice, *supra* note 131, at 7.

146. Sentencing Act 2002, s 24A (if the individual who committed a crime does not comply with all of the restorative justice agreements, the matter will be referred back to the court).

the proceedings¹⁴⁷ to allow for a restorative justice process.¹⁴⁸ Once the case is designated for sentencing post-adjudgment, the processes that the court must take into consideration include any mediated conferences and subsequent agreements reached via the facilitated discussion.¹⁴⁹ The change in legislation in 2014 proved to be effective at reducing recidivism rates.¹⁵⁰ Individuals who partook in a conference after 2014 had a thirty-two percent lower imprisonment rate within two years of their sentence compared to conferenced individuals before the legislation change.¹⁵¹ Additionally, to determine the proper restorative justice practice, the Crown Prosecutor¹⁵² assigned to the case considers a range of factors, including the type of offense and the willingness of both parties (the offender and any direct victim) to participate in restorative processes.¹⁵³ If either side does not

147. Pfander, *supra* note 84, at 176 (here, adjournment means that judges must allot time pre-sentencing to allow for the exercise of restorative justice practices if the victim, or a representative agree to partake in it).

148. Sentencing Act Amendment 2014, s 24A.

149. See Sentencing Act 2002, s 7 (purposes for sentencing include accountability for harm caused, promotion a sense of responsibility for, acknowledgment of that harm; providing for victim's interest, reparations, any outcomes of RJ processes that have occurred); Sentencing Act 2002, s 9 (court must take into account matters such as offers to make amends, any remedial agreement, response of individuals who committed a crime and their family, pre-sentence reports, cultural background, and family conferencing outcomes).

150. Restorative Justice: Impact of Section 24A of the Sentencing Act 2002 on Reoffending, Ministry of Justice 2-3 (2020), <https://www.justice.govt.nz/assets/Documents/Publications/Impact-of-S24A-of-the-Sentencing-Act-on-Reoffending-Restorative-Justice-Reoffending-Analysis-2019.pdf> [<https://perma.cc/8MTQ-2C36>] (the number of conferences also increased by fifty-one percent).

151. *Id.* In 2015 the number of cases referred for a restorative justice assessment tripled from approximately 4000 to over 12,000, compared to 2014. Justice Minister Amy Adams also noted that this increase is likely a result of victims, defendants, and the courts becoming more comfortable with the processes. RESTORATIVE JUSTICE LOWERING REOFFENDING RATE, NEW ZEALAND GOVERNMENT (Apr. 15, 2016), <https://www.beehive.govt.nz/release/restorative-justice-lowering-reoffending-rate> [<https://perma.cc/ARY6-636K>].

152. A Crown Prosecutor is an attorney appointed to prosecute cases on behalf of the Crown; similar to an Assistant District Attorney in the United States.

153. See *How Restorative Justice Works*, MINISTRY OF JUST. (Oct. 27, 2020), <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works/> [<https://perma.cc/4B9E-R468>]; *Ways to Stay out Of Court: Diversion and Restorative Justice*, COMMUNITY LAW, <https://communitylaw.org.nz/community-law-manual/chapter-33-the-criminal-courts/ways-to-stay-out-of-court/diversion-and-restorative-justice/> (last visited Apr. 19, 2021).

consent to the practices, the case will proceed through the traditional court processes.¹⁵⁴

2. Failures of the Legislation

The success of New Zealand's Sentencing Act is mainly due to the fact that qualified cases *must* be adjourned to allow for restorative justice processes to take place. Still, like Vermont's legislation,¹⁵⁵ the Sentencing Act does not completely divert individuals away from the retributive justice system.¹⁵⁶ Those whose cases meet the prerequisites are only *temporarily* diverted from the formal justice system.¹⁵⁷ The process itself is not the last step in an individual's case adjudication because the final case decision is still within the judge's discretion.¹⁵⁸ Moreover, state actors are involved throughout the restorative processes. Given the required state involvement, the restorative justice processes must include facilitators who attended accredited restorative training and utilized state-funded resources.¹⁵⁹

Further, the Sentencing Act does not identify any specific restorative programs, such as a conference with the individual, the victim, and a mediator.¹⁶⁰ While it is beneficial to have slightly less oversight from the formal criminal justice system in

154. See Ministry of Justice, Restorative Justice: Best Practice, *supra* note 131, at 25 (following these acts, more recently, New Zealand has increased their reliance on police diversion efforts through their Policing Excellence launched in 2009, which aims to reduce crime rates and police arrests. This also keeps in line with many of the international standards mentioned in Part II and additionally the International Covenant on Civil and Political Rights); see also Carruthers, *supra* note 164, at 8-9 (the program utilizes initiatives that allow for more police discretion, for example issuing a pre-charge warning instead of an official arrest. These programs have already reduced crime rates by 12 percent in only the first year of their implementation); see also *Policing Excellence, The Transformation of New Zealand Police*, NEW ZEALAND POLICE 38 (Nov. 2014), <https://www.police.govt.nz/sites/default/files/publications/policing-excellence-closure.pdf>. [<https://perma.cc/4MAQ-72GV>] (in June 2014, the total number of non-traffic prosecutions was down by 41.3 percent).

155. See *supra* Section III.A.1.

156. Sentencing Act 2002, s 24(a) (N.Z.).

157. See Pfander, *supra* note 84, at 176.

158. *How Restorative Justice Works*, *supra* note 152.

159. Pfander, *supra* note 84, at 175. The restorative programs that ensue after a mandatory pre-sentencing diversion are funded by the Ministry of Justice; Ministry of Justice, Restorative Justice: Best Practice, *supra* note 131, at 5, 6.

160. See *generally*, Sentencing Act 2002, s 24(a) (N.Z.). The act only states that the court must adjourn the proceeding to, "determine whether a restorative justice process is appropriate in the circumstances of the case." *Id.*

restorative procedures,¹⁶¹ the only guidelines of best practices to govern the programs are established by academics, practitioners, and policymakers.¹⁶² Though the New Zealand Ministry of Justice did publish these best practices, they are not codified in any statutory provisions.¹⁶³ However, the process most frequently used includes six stages: referral from the court, initial contact made with the victim and individual who committed a crime, pre-conference meeting, the conference, and post-conference agreements if applicable.¹⁶⁴ Because these stages are not codified in legislation, they are susceptible to facilitators' discretion.¹⁶⁵

Another issue arises because the victim, or a representative of the victim, must consent to the restorative process for it to occur.¹⁶⁶ This means it is possible that an individual who otherwise meets the required criteria to be referred to a restorative process will not be afforded the opportunity to take advantage of this alternative option. In a similar vein, although there was a steady increase in the number of cases referred to restorative practices after the Sentencing Amendment Act was passed in 2014,¹⁶⁷ only a minimal number of cases get to this stage because of uncooperative victims.¹⁶⁸ Last, understanding individuals who committed a crime as unique people by creating a dialogue between them, their victims, and the affected community helps to lower recidivism rates but still has a narrow focus on the individual.¹⁶⁹ The dialogues in a conference allow the defendant to take more responsibility for their actions, rather than a simple

161. Transformative justice calls for a limit on state-sanctioned punishment, thus minimizing state actors' participation in restorative processes helps achieve that goal. *See supra* Part I; *see also infra* Part IV.

162. Pfander, *supra* note 84, at 176.

163. Ministry of Justice, Restorative Justice: Best Practice, *supra* note 131, at 5, 6.

164. *Id.* at 12.

165. *Id.* at 15. New Zealand is a common law nation, thus judicial precedent remains relevant throughout the process.

166. Pfander, *supra* note 84, at 179. While the requirement of the victim's participation remains a barrier to defendants hoping to participate in a restorative justice conference, studies show victims are willing to participate in them. Eighty percent of victims who partook in the process would recommend the process to others, sixty percent had more positive views of the criminal justice system after their participation, and eighty-four percent of victims were satisfied with their overall conference experience. The process allows victims to have a longer dialogue with the defendant. *Id.*

167. *Id.* at 180.

168. *Id.*

169. Umbreit & Armour, *supra* note 28, at 76.

guilty plea or conviction. But, as with restorative justice legislation in the United States, the Sentencing Act does not address the harmful structures that lead individuals to commit crime. For these reasons, the next Part will provide recommendations for the United States, New Zealand, and other countries to take effective steps to comport with international standards towards achieving a future that does not prioritize incarceration.

IV. RECOMMENDATIONS FOR ANTI-CARCERAL FUTURES

The United States and New Zealand are equally at fault for perpetuating antiquated and unjust criminal justice systems, but they are not alone. Almost every country in the world still relies on a retributive justice system, no matter how many progressive reforms it implements or how it conceals the retributive nature.¹⁷⁰ State-sanctioned punishment in the form of imprisonment occurs across the globe and there is little to no evidence that it achieves the stated goals of deterring crime, restoring victims, and rehabilitating individuals who committed a crime.¹⁷¹

International law advocates for and provides a framework to guide states away from a strict carceral justice system and towards a context-inclusive one.¹⁷² The Tokyo Rules explicitly state that

170. Even countries that constantly maintain “higher ranked” justice systems rely on imprisonment. See Dominic Carman, *Where can you find the best justice system?*, GLOB. LEGAL CHRONICLE, (June 14, 2019) <https://www.globallegalchronicle.com/where-can-you-find-the-best-justice-system/> [https://perma.cc/KC78-GHN2].

171. One study in the United States showed that of the nine million individuals released back into society after a period of imprisonment, 67.8 percent were arrested for a new crime within three years of being released and 76.6 percent were arrested within five years. Judah & Bryant, *supra* note 11, at 2 (quoting 2002 Bureau of Justice Statistics); MATTHEW R. DUROSE ET AL., *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010* 1 (Apr. 2014). These numbers were not compiled from the whole nation but from a study done among state prisoners released in thirty states in 2005. *Id.* In New Zealand, fifty-seven percent of individuals released returned to prison within one year. This percentage comes from 2015 alone, whereas between 2006 and 2015, the rates ranged from 55.4 percent to 62.2 percent. John W. Buttle, *Imagining an Aotearoa/New Zealand without Prisons*, 3 COUNTERFUTURES 99, 108 (2017). After an individual is incarcerated for the first time, there is a high probability, at least more than fifty percent, that they will return to prison. *Id.*

172. The United Nations Standard Minimum Rules for Non-Custodial Measures (also known as the Tokyo Rules) is the key instrument that describes how States’ criminal justice systems should take into account all factors of the individual who committed a crime and the circumstances that led to their crime to determine measures that do not utilize incarceration. The Rules also emphasize that incarceration should not be the

“there is a growing belief that non-custodial sanctions and measures may constitute a better way, providing penalties that are proportionate to the offen[s]e committed by the offender and that carry greater possibilities for the rehabilitation and constructive reintegration of the offender into society.”¹⁷³ The Rules are meant to identify overarching principles, provide safeguards, and act as guidelines for the “development of more detailed rules”¹⁷⁴ within domestic legislation at all stages of government. Incorporating these principles will not only benefit offenders, but all community members, as responses to crime become more effective.

Along with other non-binding facets of international law, the Rules fully track what is known today as the prison abolition and transformative justice movements. Many scholars, such as Ruth Wilson Gilmore and Angela Davis, founders of the *Critical Resistance Project*, an anti-prison organization, have rallied behind the prison abolition movement for decades.¹⁷⁵ The prison abolition movement focuses on three pillars: moratorium, decarceration, and excarceration.¹⁷⁶ Moratorium refers to ceasing construction of new prisons; decarceration involves strategies to get individuals out of prison through conviction and sentencing reviews; excarceration is finding ways to divert individuals from situations that may lead them to encounter criminal justice systems.¹⁷⁷ These pillars are founded on the underlying principles of transformative justice. Transformative justice is an ideology whose tenets include the idea that an effective response to crime

primary measure of sentencing. *See infra* Section II for a further discussion on the Tokyo Rules and other relevant international law standards.

173. *Minimum Rules for Non-custodial Measures Commentary*, *supra* note 38, at 2. The commentary also explicitly states that just because “non-custodial” measures may be defined as “alternative” measures, it does not mean that “custody or imprisonment is the primary penal sanction and that measures or sanctions that keep an individual in the community are secondary to or less important than imprisonment.” *Id.*

174. *Id.* at 3.

175. *Id.*; *see generally* Davis, *supra* note 1.

176. *See generally* INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (Prison Research Education Action Project ed., 2005).

177. Examples of excarceration include decriminalizing drug use or fighting homelessness. John Washington, *What Is Prison Abolition?* NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition/> [<https://perma.cc/Y486-EQN3>]; *CR Structure & Background*, CRITICAL RESISTANCE PROJECT, <http://criticalresistance.org/about/not-so-common-language/> [<https://perma.cc/685R-P5ZW>] (last visited May 11, 2020).

should not be incarceration, but rather combatting the underlying socio-economic issues¹⁷⁸ inherent in governmental and societal structures that often lead to crime.¹⁷⁹

In practice, transformative justice embodies a community-based response to crime to understand each individual who committed a crime's circumstances and how their environment must be changed to effectively stop the cycle of recidivism.¹⁸⁰ The goals of transformative justice are to fix the complex issues of various oppressive structures and to reduce the probability that individuals will return to circumstances that lead them to commit crime.¹⁸¹ A full realization of transformative justice is the abolition of state-sanctioned punishment with community-based responses to crime in its place.¹⁸² As the Tokyo Rules lay out the broader requirements that encourage the United States and New Zealand to implement non-custodial measures into their legal systems to reduce the use of imprisonment, the transformative justice movement can be relied upon to help dismantle the retributive justice system in favor of a transformative justice system.¹⁸³ As two progressive nations, their actions can set the global stage for an anti-carceral future. As such, this Note makes recommendations regarding the systems in the United States and New Zealand, which help resolve the failures left behind by incarceration and current restorative justice law. The recommendations focus on moving away from a reliance on incarceration by increasing reliance on alternatives to incarceration. This Part also seeks to provide general recommendations in line with international law

178. Van Ness, *supra* note 28, at 4.

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

180. Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORM HARM [https://transformharm.org/transformative-justice-a-brief-description/#:~:text=Transformative%20Justice%20\(TJ\)%20is%20a,reduction%20to%20lessen%20the%20violence.](https://transformharm.org/transformative-justice-a-brief-description/#:~:text=Transformative%20Justice%20(TJ)%20is%20a,reduction%20to%20lessen%20the%20violence.) [<https://perma.cc/5AYA-FQPK>] (last visited November 17, 2020).

181. *Id.* "Oppressive structures" refer to the oppression inherent in many systems that benefits the privileged while hurting minorities. This includes a lack of class mobility, wage gaps along race lines that stem from political narratives pushed by people in power to maintain the status quo. *See supra* notes 12 and 31; Thomas Clancy, *What is Structural Oppression?*, RECLAIM PHILADELPHIA (Feb. 14, 2019), <https://www.reclaimphiladelphia.org/blog/2019/2/14/01q7rwoqg8jhb1fux9vzcxydl> enr [<https://perma.cc/6C5T-UVL9>].

182. *See* Mingus, *supra* note 180.

183. *See supra* Part II; *see generally* G.A. Res. 45/110, Tokyo Rules (Dec. 14, 1990).

standards that all states can follow and adapt to their domestic contexts.

A. *The United States*

1. State Legislation on Alternatives to Incarceration

Effective domestic legislation aimed at realizing an anti-carceral future that complies with the international community's goals must include reforms to reduce prison and jail populations. With fewer than ten percent of the U.S. prison population in federal prisons,¹⁸⁴ to make an effective impact in the United States, legislation must be enacted at the state and local level to affect the greater incarcerated population. The Tokyo Rules explicitly state that alternatives to incarceration measures should not be secondary to incarceration, but rather a primary response to crime.¹⁸⁵ Thus, in implementing state restorative justice statutes, states must implement provisions that *require* decisionmakers to refer individuals who committed a crime to a restorative justice program. Modeled after New Zealand's legislation, these statutes should require restorative justice practices prior to sentencing instead of giving judges the discretion to divert individuals. This ensures the programs will not be applied to offenders arbitrarily and will minimize the impact of implicit biases that are inherent in criminal justice system actors.¹⁸⁶

Additionally, legislators should enforce eligibility qualifications only to the minimum extent necessary to deter an individual who committed a crime from reoffending, to rehabilitate them, and to ultimately ensure public safety. Alternative measures to imprisonment should be the first choice in the criminal justice system, rather than a discretionary,

184. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/QE4T-FX2S>].

185. See G.A. Res. 45/110, Tokyo Rules ¶ 14.3, 2.1.

186. See CARLY WILL SLOAN, RACIAL BIAS BY PROSECUTORS: EVIDENCE FROM RANDOM ASSIGNMENT 2, 4 (2018) (finding the prosecutors have more discretion than any other party when it comes to handling alleged crimes, and there is significant evidence of prosecutor's implicit biases against opposite-race defendants for property crimes).

secondary option. Vermont's Title 28 enumerates very specific "qualifying crimes," dramatically limiting the number of individuals afforded the opportunity of a restorative justice process.¹⁸⁷ States should implement legislation that requires diversion away from imprisonment for a majority of offenses to ensure that the principles of restorative justice, focusing on the relationships between the individual who committed a crime and the victim and surrounding community, are at the forefront of reducing criminal behavior. Instead of drafting statutes that list qualified crimes, legislators should include all crimes with carve outs for proposed "exceptional" crimes. As the current criminal justice system stands, it is impossible to imagine there will be no exceptional crimes¹⁸⁸ that require custodial measures.¹⁸⁹ Lastly, some may argue that restorative processes eliminate vindication achieved through the trial and sentencing of an individual who committed a crime. However, the purpose of a restorative justice process is to include the victim in the process and outcome, still affording them a meaningful opportunity to see the individual who committed a crime take responsibility for their actions.¹⁹⁰

2. Financial Support for Alternatives to Incarceration

Another way to increase the use of alternatives to incarceration and reduce prison populations across the nation, are through government financial incentives. State and federal governments should provide more grants for implementing anti-carceral focused state programs. One example in Pennsylvania is the state's passage of Act 148 in the 1970s.¹⁹¹ Under Act 148, the state reimburses eighty percent of a county's community-based juvenile justice services costs, leading to a twenty-four percent

187. *See supra* Section III.A.

188. Some examples may include individuals who committed a violent crime, and individuals unwilling to partake in a restorative process or are a high risk of flight.

189. The theory of transformative justice looks to the future where the divestment into communities will eventually decrease crime and thus, there will be less of a need for incarceration at all. *See infra* Section IV.A.3.

190. *See supra* Part III.

191. *Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense*, JUST. POL'Y INST. (May 2009), http://www.justicepolicy.org/images/upload/09_05_rep_costssofconfinement_jj_pS.pdf [<https://perma.cc/D7NG-DG7V>].

drop in state-secured youth institutionalizations.¹⁹² More recently in 2009, the state of New York closed multiple juvenile facilities and redirected the savings to counties to strengthen their alternatives to incarceration programs.¹⁹³ Following this, the state introduced the law, “Re-direct New York,” which creates a fiscal incentive for counties to utilize alternatives to incarceration via a sixty-five percent reimbursement of costs.¹⁹⁴

While state and local level incentives are important in lowering the United States’ incarceration rate, there should be a reworking of federal grants.¹⁹⁵ Currently, there are no federal grants that directly align with restorative justice or transformative justice principles. However, instead of creating new grants, it is more efficient for the Department of Justice to merge existing funding streams to develop larger-scale grants tied to specific criminal justice goals.¹⁹⁶ Combining funds strengthens the practical impact of the grant, allowing states or localities to receive greater amounts for their specific purpose rather than smaller amounts that cannot account for the entirety of the program.¹⁹⁷ The grants should also include detailed descriptions of the purpose. For example, one grant can focus on community-

192. See *id.* at 6; see generally Annie E. Casey Foundation, No Place for Kids 2011 Report 31 <https://www.aecf.org/resources/no-place-for-kids-full-report/> [<https://perma.cc/HTV4-BGFR>] (financial reimbursement refers to states funding counties for costs they incur related to the specified purpose).

193. See *Cost of Confinement*, *supra* note 191, at 6.

194. See generally New York Juvenile Justice Coalition, RE-DIRECT NEWYORK: Reinvesting Detention Resources in Community Treatment (New York, NY: New York Juvenile Justice Coalition, 2009).

195. See generally Mike Crowley & Betsy Pearl, *Reimagining Federal Grants for Public Safety and Criminal Justice Reform*, CTR FOR AM. PROGRESS (Oct. 7, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/10/07/491314/reimagining-federal-grants-public-safety-criminal-justice-reform/> [<https://perma.cc/6DYS-TB6D>].

196. See *id.*

197. See *id.* Currently, the amount for the Edward Byrne Memorial Justice Assistance Grants (“JAG”), an important criminal justice grant, is determined by population and violent crime rate. *Id.* JAG is a formula grant, meaning all states and certain localities are entitled to receive these funds. Although the grant allows flexibility to their recipients in determining how the use the funds, as of 2019, almost sixty percent of state-level JAG funds supported law enforcement and corrections. Ed Chung et al., *The 1994 Crime Bill Continues to Undercut Justice Reform—Here’s How to Stop It*, CTR FOR AM. PROGRESS (2019), <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crimebill-continues-undercut-justice-reform-heres-stop/> [<https://perma.cc/A5ZW-2C6A>].

based alternatives that provide funding for centers such as Vermont's Community Justice Centers and other programs whose purposes include establishing a foundation in a community and addressing the circumstances that lead to crime. Evidence-based strategies should back these statements of purpose. Statistics highlighting the recidivism rates for traditional custodial measures compared to community-based measures will make the latter difficult to refute. If need be, the ABA may also help lobby for these federal grant reforms. Governments should follow these examples of providing grants to local organizations or local counties to shift responses to crime to focus on alternatives to incarceration.¹⁹⁸

3. Strengthen Community-Based Infrastructures

Key international standards for anti-carceral measures specify the importance of keeping an individual who committed a crime in their community¹⁹⁹ and the necessity for systems to provide psychological, social, and material assistance to individuals who committed a crime to strengthen their links with the community.²⁰⁰ Additionally, any conditions attached to non-custodial measures should provide some social use that facilitates the individual's reintegration into their community.²⁰¹ Accordingly, beyond diverting individuals away from the criminal justice system, the United States must strengthen community-based infrastructures. Specifically, the United States must reverse the underfunding of community-based health care providers.²⁰²

198. *See supra* Section III.A.2.

199. Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 6.

200. Treatment options include casework, group therapy, residential programs, and any other specialized categories. *Id.* at 22-23; *see* G.A. Res. 45/110, Tokyo Rules ¶ 10.4 and 13.1.

201. Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 25. A "social use" is meant to build and strengthen the relationships between the individual who committed a crime and the community so as to enhance the individual's chance of social reintegration. *Id.* at 22. For example, community services can be a condition of probation or a supervised release and has the potential to help build community relationships. FAMILIES AGAINST MANDATORY MINIMUMS, *Alternative to Incarceration in a Nutshell* (July 8, 2011), <https://famm.org/wp-content/uploads/FS-Alternatives-in-a-Nutshell.pdf> [perma.cc/AP4B-9SFY].

202. In recent years the United States has underfunded community-based health care providers. Errol Louis, *How bail, jails and more fit together: The state has a massive implementation challenge ahead*, N.Y. DAILY NEWS (Oct. 24, 2019),

Individuals with serious health needs are disproportionately incarcerated.²⁰³ The percentage of individuals with a substance abuse disorder arrested in a year is almost six times higher than those who have not been arrested.²⁰⁴ The percentage of individuals with serious psychological distress arrested in the past year is more than double than those who have not been arrested.²⁰⁵ As these numbers illustrate, health issues are a key indicator of whether someone will encounter the criminal justice system. Governments must focus on improving community-based health infrastructures to support those with these particular needs. Between 2009 and 2011, US states cut more than US\$1.8 billion from their mental health budgets.²⁰⁶ Many scholars have noted the importance of making more funds available to support local treatment and supervision programs, instead of building and supporting incarceration facilities, as these budget cuts are antithetical to progress.²⁰⁷ There must be higher allocations for these services to combat the mental health issues that plague many individuals in the criminal justice system.

B. New Zealand

1. Sentencing Act Amendments

As a pioneer in standardizing restorative justice processes, New Zealand must amend its legislation to comply with international law standards and reach the goals of transformative justice.²⁰⁸ The Tokyo Rules highlight the importance of non-custodial measures to prevent disproportionate recourse to controlled measures such as incarceration. The Sentencing Act should be amended to allow the restorative justice outcomes

<https://www.nydailynews.com/opinion/ny-oped-how-bail-jails-and-more-fit-together-20191024-enxzm3k6grhp7g7rrifi7v64q-story.html> [https://perma.cc/LU8K-WWXV]

203. See Press Release, Alexi Jones, Wendy Sawyer, Prison Policy Initiative, Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems (Aug. 2019), [Prisonpolicy.org/reports/repeatarrests.html](https://prisonpolicy.org/reports/repeatarrests.html) [https://perma.cc/82YJ-JCN9].

204. See *id.*

205. See *id.*

206. Louis, *supra* note 202.

207. Annie E. Casey Foundation, *supra* note 192, at 31.

208. Moratorium, decarceration, and excarceration, in addition to transforming social and economic structures to better communities. See generally INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS, *supra* note 176. Washington, *supra* note 177.

determined by the individual who committed a crime, victim, and facilitator to be *binding*. Restorative justice outcomes are only one factor in a judge's sentencing decision, leaving open the possibility that they will effectively ignore the restorative program and their implicit biases will inform the decision.²⁰⁹ Further, the Sentencing Act must allow the individual who committed a crime the opportunity to avail himself of restorative practices even if the victim or their representative does not consent. Although the victim-offender relationship is a vital principle of restorative justice, it puts too much power in the hands of the victims who, understandably, may make an emotionally charged decision. Restorative justice processes are meant to be a stepping stone toward transformative justice, not just to act as a quick fix of the issues inherent within the system. Thus, allowing an individual who committed a crime the necessary opportunity to partake in a holistic process that can address the underlying causes of the crime and keep them within their community, two tenets of the Tokyo Rules, cannot hinge on the victim's decision.

2. Incorporate Māori Customs into the Criminal Justice System

Institutional racism against Māori in the criminal justice system should be New Zealand's first and foremost concern. The Sentencing Act brought the statutory grounding for the use of pre-sentencing referrals to restorative justice programs and helps determine individual eligibility for alternative programs.²¹⁰ As such, New Zealand should amend the Sentencing Act to allow for Māori self-determination which they not only temporarily exit the system but are diverted completely to restorative practices that are established on local levels outside of the New Zealand government's power. One key issue to consider in this regard is how individuals self-identify as Māori.²¹¹ The most effective way to

209. Implicit biases are concerning considering the fifty-six percent disproportionate make-up of Māori in prison. *See supra* Part I. Studies also show that police have preconceived negative attitudes and ideas towards Māori. Tauri, *supra* note 123, at 4; *see generally* BEV JAMES, CHALLENGING PERSPECTIVES: POLICE AND MĀORI ATTITUDES TOWARD ONE ANOTHER (Apr. 2001).

210. *See* Pfander, *supra* note 84, at 176-77.

211. One scholar, Sam McMullan, advocates for the view that an individual's culture, rather than ethnicity, determines whether they may be considered Māori. She argues that the state should conduct an objective assessment of one's culture, utilizing the culture of the Tikanga Māori as the guiding force. Tikanga is broadly translated to

adequately address the stark disproportionality of Māori to Pākehā in the system is to allow anyone who follows Māori customs to be afforded the diversion to the alternative system.²¹² A transformative justice system comprised entirely of this alternative, community-based approach is the ultimate goal, but during this transition period, Māori must be given first preference.

New Zealand's government must bring attention to the Te Tiriti o Waitangi Treaty, which aims to create a bicultural state by allowing for and supporting Māori cultures and traditions to design and develop Māori-specific responses to crime. With a disproportionate overrepresentation of Māori in the criminal justice system,²¹³ more needs to be done to effectuate the Treaty and see it fully utilized. To do so, there should be more treaty-based education and legislative reforms that allow for Māori partnerships in key governmental functions to ensure their concerns are adequately understood and dealt with.²¹⁴ The Family Group Conferences consider certain aspects of Māori culture, such as the inclusion of family in determining the correct response to a juvenile's crime;²¹⁵ however, FGCs are inconsistently applied given the lack of resources to utilize them and the fact that important family members are often not invited to the proceedings.²¹⁶ New Zealand should establish a governance

mean "the right way to act," or as the overarching Māori custom. See Sam McMullan, *Māori Self-Determination and the Pākehā Criminal Justice Process: The Missing Link*, 10 INDIGENOUS L.J. 73, 74 n.4 (2011).

212. See *id.* at 96. Pākehā is a Māori term in common usage referring to non-Māori people, and is used to refer to New Zealanders of European descent. *Pakeha*, DICTIONARY.COM, <https://www.dictionary.com/browse/pakeha> [https://perma.cc/KF67-5K9P] (last visited Apr. 19, 2021).

213. John Pratt, *The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment*, 46 BRIT. J. OF CRIMINOLOGY 541, 541 (July 2006). Māori are disadvantaged at every step of the criminal justice system. They are less likely to have legal representation and more likely to plead guilty. They are also arrested and prosecuted more than their Pākehā counterparts. Roger Brooking, *Explaining NZ's Record High Prison Population*, PUNDIT (May 22, 2017), <https://www.pundit.co.nz/content/explaining-nzs-record-high-prison-population> [https://perma.cc/5R7E-JLUB].

214. INAIA TONU NEI, SAFE AND EFFECTIVE JUSTICE ADVISORY GROUP, HUI MĀORI REPORT 24 (July 2019); Turuki Report, *supra* note 25, at 25.

215. Becroft, *supra* note 97.

216. See *id.*

model which gives Māori and the Crown equal powers to better utilize their restorative practices for Māori-specific needs.²¹⁷

3. Transform Social and Economic Structures

Further, there must be more support for transformative justice ventures, organizations, and coalitions via budget reallocation on all levels to fully comport with international law standards.²¹⁸ The transformative justice movement recently gained momentum after New Zealand released two reports on evidence-based approaches to criminal justice reform.²¹⁹ In December 2019, Justice Minister Andrew Little discussed the implications of the reports, suggesting that there is a need to create more crime prevention mechanisms.²²⁰ In response, Justice Minister Little commissioned the Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory.²²¹ The latest report, Turuki!

217. Turuki Report, *supra* note 25, at 25. This governance model is often referred to as a Mana Ōrite model.

218. *See id.* at 39.

219. Te Uepū Hāpai i te Ora, the Safe and Effective Justice Advisory Group, released two reports in 2019 that examined the public's concerns about the criminal justice system and concluded that the system is in need of dire transformation to focus on the victims, individuals who committed a crime and their families and larger communities. TE UEPŪ HĀPAI I TE ORA, THE SAFE AND EFFECTIVE JUSTICE ADVISORY GROUP, TRANSFORMING OUR CRIMINAL JUSTICE SYSTEM (2020), <https://www.safeandeffectivejustice.govt.nz/about-this-work/te-uepu-report>. [<https://perma.cc/9T2G-YYBM>]. Another Report released in 2019 was the Te Tangi o te Manawanui Recommendations for Reform, prepared by the Chief Victims Advisor to the Government. CHIEF VICTIMS ADVISOR TO GOVERNMENT, TE TANGI O TE MANAWANUI RECOMMENDATIONS FOR REFORM (2019). Additionally, in 1999, the Quakers in Aotearoa New Zealand were the first organization to openly advocate for the use of transformative justice to combat the increasing incarceration rate, most notably of the Māori people. While they did not set a tangible action plan in place, the Society advocates fighting crime through social justice measures such as reducing poverty and unemployment, and simultaneously increasing measures to support health services, including special attention to mental health, alcohol and drug abuse and disabilities, and a focus on children's services, specifically education and literacy programs. Statement of Quakers in Aotearoa, Towards Transformative Justice (1999), <https://quaker.org.nz/towards-transformative-justice> [<https://perma.cc/4Y7X-S5NS>] [hereinafter "Quakers in Aotearoa"].

220. Press Release, Hon. Andrew Little, New Zealand Government, Speech to new direction for criminal justice reform announcement (Dec. 12, 2019), <https://www.beehive.govt.nz/speech/speech-new-direction-criminal-justice-reform-announcement> [<https://perma.cc/3PB8-UQDL>].

221. *Delivering Safe and Effective Justice – what New Zealanders think*, SAFE AND EFFECTIVE JUSTICE (June 9, 2019 9:15 AM), <https://www.safeandeffectivejustice.govt.nz/news/latest-news/delivering-safe-and->

Turuki! from Te Uepū Hāpai I te²²² (“Turuki Report”) directly approaches the issues of the current criminal justice system with an intergenerational and holistic response.²²³ Although the report is not an exact blueprint for the government to follow, it offers twelve key recommendations with ideological and tangible steps. These include cross-party political accord; the inclusion of Māori; investing in transformation; whole government involvement; a focus on mental health, substance abuse, and families; and the transformation of the justice process as a whole.²²⁴ It discusses a new community-based justice system, which focuses on investing in marginalized communities, and creates new resources and centers to aid in diminishing the multitude of risk factors for committing crime such as mental health trauma, drug and alcohol abuse, family violence, and poverty.

effective-justice-what-new-zealanders-think/ [https://perma.cc/8HVR-8AAV]. The group’s earlier report, released in June 2019, the He Waka Roimata (“Vessel of Tears”) Report, examined and identified the key issues with the current criminal justice system by focusing on the public’s opinions, taking into account perspectives from victims, individuals who committed a crime, actors in the system, and the Māori population specifically. TE UEPŪ, HE WAKA ROIMATA: TRANSFORMING OUR JUSTICE SYSTEM (June 9, 2019); see also, Thomas Manch, ‘A Vessel of Tears’: Grief and colonialism at the heart of criminal justice experience, report says, STUFF (June 9, 2019), https://www.stuff.co.nz/national/crime/113335762/a-vessel-of-tears-grief-and-colonialism-at-the-heart-of-criminal-justice-experience-report-says [https://perma.cc/927Q-3GE]. In this report the government also committed to reducing the prison population by 30 percent over the next fifteen years. Josephine Franks, *NZ’s prisons a ‘colonial eyesore’ that should be abolished, expert says*, STUFF (June 11, 2019), https://www.stuff.co.nz/national/113359223/nzs-prisons-a-colonial-eyesore-that-should-be-abolished-expert-says [https://perma.cc/G99V-HZPE].

222. Turuki Report, *supra* note 25.

223. Another organization that is bringing prison abolition and transformative justice to discussions in New Zealand is People Against Prisons Aotearoa (“PAPA”). They are an advocacy group that was created in 2015 with the objective of abolishing prisons and the need for them. Their services range from advocacy in the form of research, to leading trainings on transformative justice, to connecting with incarcerated individuals through their pen pal network. *What we do*, PEOPLE AGAINST PRISONS AOTEAROA, https://papa.org.nz/what-we-do/ [https://perma.cc/9MD7-FZFF] (last visited May 11, 2020). Spokeswoman for PAPA, Emilie Rākete, has also stated that horrendous overrepresentation of Māori in the criminal justice system is a key issue that calls for the need for prison abolition, by stating, “[i]f this government is serious about addressing entrenched poverty and poor social outcomes for Māori, it has to start with prisons. Dumping thousands of Māori into concrete boxes every year is racist violence that needs to end.” Press Release, People Against Prisons Aotearoa (Aug. 23, 2018), https://www.scoop.co.nz/stories/PO1808/S00304/prison-abolition-should-be-on-the-table.htm. [https://perma.cc/F6N2-VX3Q].

224. See Turuki Report, *supra* note 25, at 4.

Another recommendation that the Turuki Report proposes is to transform of personal taxes to address poverty,²²⁵ a key underlying risk factor to crime.²²⁶ In response to the report, the government created the Tax Working Group, which conducted a comprehensive consultation in 2018 to provide recommendations to improve the fairness and balances of the tax system.²²⁷ The working group recommended adjustments to tax thresholds and benefits to help alleviate poverty.²²⁸ The government also created the Welfare Expert Advisory Group (“WEAG”) to provide recommendations for a more fair and balanced social security system.²²⁹ Some pertinent recommendations include an increase in benefit levels and social housing investment, which are linked to poverty levels and imprisonment.²³⁰ New Zealand’s willingness to learn and engage with the idea of transformative justice is promising, but there has yet to be a cross-party accord and commitment to ensure all relevant and necessary stakeholders will work towards the same goal.²³¹

C. General Recommendations

The three pillars of prison abolition can be understood as tangible steps to achieve transformative justice: stop constructing prisons, release more incarcerated individuals, and minimize future incarcerations.²³² The prison abolition movement rejects the frameworks that exclusively rely on reforms because it

225. *Id.* at 40.

226. WELFARE EXPERT ADVISORY GROUP, WHAKAMANA TĀNGATA: RESTORING DIGNITY TO SOCIAL SECURITY IN NEW ZEALAND 41, 95 (May 2019), <http://www.weag.govt.nz/assets/documents/WEAG-report/aed960c3ce/WEAG-Report.pdf> [https://perma.cc/E5UY-WZCV] [hereinafter Welfare Expert Advisory Group, Whakamana Tāngata]; Turuki Report, *supra* note 25, at 40.

227. *What is the Tax Working Group?*, TAX WORKING GROUP, <https://taxworkinggroup.govt.nz/what-is-the-tax-working-group> [https://perma.cc/5L52-BFDT] (last visited May 10, 2020).

228. TAX WORKING GROUP, FUTURE OF TAX: FINAL REPORT, VOLUME I (2019), at 10-11, 84-89, <https://taxworkinggroup.govt.nz/sites/default/files/2019-03/twg-final-report-voli-feb19-v1.pdf> [https://perma.cc/T83G-UAUN].

229. WELFARE EXPERT ADVISORY GROUP (May 10, 2019), <http://www.weag.govt.nz/> [https://perma.cc/UPC9-RJ2G]; Welfare Expert Advisory Group, Whakamana Tāngata, *supra* note 226, at 8.

230. *Id.* at 7, 11.

231. *See* Turuki Report, *supra* note 25, at 22.

232. *See supra* Part IV.

espouses the idea that “nothing lies beyond the prison.”²³³ Transformative justice analyzes and addresses the underlying socio-economic issues²³⁴ inherent in governmental and societal structures to prevent crime.²³⁵ The movement aims to create a continuum of alternatives to imprisonment rather than a singular solution.²³⁶

One alternative to imprisonment, for example, is referral to a mental health institution.²³⁷ These institutions vindicate the deterrence and rehabilitation goals of the retributive justice system by addressing the pressing issues that a vast majority of individuals who committed a crime deal with. Referring these individuals to an alternative system that focuses on their specific issues creates more lasting results.²³⁸ The idea is not to develop a new form of incarceration under the guise of a mental health institution, but rather to highlight and understand the underlying racial and class disparities in healthcare access.²³⁹ It is important to note that even if an individual goes to a community-based program for one service, the government is often involved in a related issue. For example, suppose a mother has a substance abuse issue and goes to her local community center for resources and help. In that case, the center may instead alert Child Services, thrusting the mother back into the hands of the government and their state-sanctions.²⁴⁰ Thus, it is necessary to develop community

233. Davis, *supra* note 1, at 8.

234. Nocella, *supra* note 179, at 4.

235. *See id.* at 6.

236. *Id.* at 4.

237. *See supra* note 12 and accompanying text. *See also supra* note 31.

238. In creating this system, it must be noted that oftentimes individuals with mental health issues are punished with isolation instead of receiving adequate treatments, which then leads to a further increase in mental health symptoms. Katie Tastrom, *Disability Justice and Abolition*, NAT'L LAWYERS GUILD (June 27, 2020), <https://www.nlg.org/disability-justice-and-abolition/> [<https://perma.cc/ZP2U-7CDS>]. An alternative can also be as broad as prioritizing resources for combatting mental health issues in healthcare policy.

239. *See* Davis, *supra* note 1, at 44. Disabled people are disproportionately harmed by incarceration. Incarcerated individuals are about three to four times more likely than the general population to report having at least one disability. Jennifer Bronson, Ph.D. et al., *Disabilities Among Prison and Jail Inmates, 2011-12*, U.S. DEP'T OF JUST. (Dec. 2015), <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf> [<https://perma.cc/6JHY-J6RK>].

240. *See* GenerationFIVE, *Toward Transformative Justice*, *supra* note 113, at 35 (discussing the issues of required public reporting of domestic violence compared to private organizations and the impact on communities that aren't afforded that option).

knowledge and capacity in all interrelated areas to minimize any State involvement. Overall, the movement envisions a radical *transformation* of multiple aspects of our society to address the oppressive structures that lead to crime.²⁴¹ This is an extremely time-intensive process that must be addressed step-by-step.²⁴² The following Sections describe processes to reduce prison populations to eventually obviate global reliance on incarceration.

1. Investment in Community Programs

One of the most important aspects of transformative justice is building community-based infrastructures that serve as alternatives to imprisonment and do not rely on state sanctions.²⁴³ International standards emphasize the need for individual treatment and support of individuals who committed a crime to stop the cycle of crime and recidivism.²⁴⁴ Programs and centers in local communities that address underlying socio-economic structures are fundamental because they can understand the communities and their issues better than a further removed state system. The government must shift resources away from the carceral structure by closing prisons and using the saved funds to support community programs and centers on ways that better address the needs of individuals.²⁴⁵ Needs may vary across communities, but all community programs should generally address mental health, substance abuse, poverty, education and employment, community relationships, and family

241. *See id.*

242. *See* Kushner, *supra* note 14.

243. *See supra* Section III.A.2 and Section III.B.2.

244. OCHR, *The Use of Non-Custodial Measures in the Administration of Justice*, *supra* note 43, at 392-93.

245. Another central aspect of international standards that track transformative justice is the transfer of power and resources from the government to communities to help facilitate an offender's relationship with their community. State involvement should stop at funding so that social services and alternatives to incarceration programs can be delivered directly from communities rather than state governments. Practically, the transfer of power involves the divestment of funds, resources, and training away from criminal justice systems and prisons to community organizations to build their capacity and capability. Turuki Report, *supra* note 25, at 39; Minimum Rules for Non-custodial Measures Commentary, *supra* note 38, at 25; *see also* GenerationFIVE, *Toward Transformative Justice*, *supra* note 113, at 33, 35.

relationships.²⁴⁶ These categories are proven to be key determinants of future violence or contact with criminal justice systems, as crime rates remain higher in communities that perform poorly by these metrics.²⁴⁷ Additionally, these services constitute a holistic approach to crime and create a comprehensive support system for community members. Studies show empowering and habilitating individuals leads to greater success²⁴⁸ for the whole community. These focus areas can create safe spaces and provide useful resources within each community. They are interdependent and thus should be implemented via a centralized approach.²⁴⁹

One example of a community program that addresses these concerns is “Youth Uprising,” based out of East Oakland, California.²⁵⁰ The group focuses on strengthening and empowering youth through a variety of targeted services and programs, from educational support and job readiness, to mental health counseling and leadership engagements.²⁵¹ Their objectives are to transform the East Oakland community through youth empowerment and development. Their programs support systematic change and economic development by building up individual community members.²⁵² One of the organization’s largest funding sources is the County of Alameda.²⁵³ They also

246. Lambie, *supra* note 24, at 15-16.

247. *Id.*

248. “Success” refers to success in achieving educational, vocational, and housing opportunities. This is in contrast to substance abuse, familial issues, and a lack of education.

249. *See* Lambie, *supra* note 24, at 15. Individuals who experience sexual or violent abuse often face mental health issues; poor education puts youth at high-risk for substance abuse, unemployment, and criminal behavior. *Id.* at 15-16.

250. YOUTH UPRISING, <https://www.youthuprising.org/> [<https://perma.cc/PU4A-TLGF>] (last visited May 11, 2020) [hereinafter Youth Uprising].

251. *Id.* The organization’s “formal” includes personal transformation, systematic change, and community development to bring about community transformation. *Id.* at *Who We Are*. They offer a broad range of educational support from GED preparation courses, college tours, and financial aid assistance. *Id.* at *Career & Education*.

252. *Id.* at *Who We Are*.

253. In May 2016, the Alameda County Board of Supervisors gave the organization US\$1 million. *See County Provides Million Dollar Bailout to Youth Uprising*, ALAMEDA COUNTY GRAND JURY ASSOC. (2017), <https://acgrandjuryassn.org/county-provides-million-dollar-bailout-to-youth-uprising/> [<https://perma.cc/3TMJ-A5UC>]. Future iterations of a criminal justice system should avoid the inherent flaws and violence of the justice system enabled by the State, but government financial support is necessary for consistency and thorough development. To combat structural violence, communities

partner with various county agencies such as the Alameda County Health Care Services, Alameda County Cultural Funding, Oakland Fund for Children and Youth, and many more to forge long-lasting systemic change.²⁵⁴ Another similar organization in California is the San-Francisco based Community United Against Violence (“CUAV”), which focuses on the LGBTQ community.²⁵⁵ Their services include Peer Advocacy Counseling and supporting self-determination workshops.²⁵⁶

2. Extirpate Racial Bias From Government

As evidenced by the United States and New Zealand, harmful biases and structural violence against minorities occur around the world.²⁵⁷ Racism and discrimination permeate criminal justice systems, social welfare services, and much more. One way to break down institutional racism and discrimination is identifying bias in police departments (and other related organizations, such as prosecutor’s offices). Providing evidence-based research can help to anchor the necessary steps to address racism. For example, social psychologist Jennifer Eberhardt worked with the Oakland Police Department to provide fifty concrete recommendations on how police can build better relationships with their communities.²⁵⁸ Further, Professor Sharad Goel at Stanford University is currently creating a risk assessment tool to help eliminate explicit and implicit biases from a district attorney’s calculus on whether to charge an individual for a crime. He describes it as a “blind charging platform” that removes factors about the individual and crime from a police officer’s submitted narrative that are not deemed necessary for the decision and are

should be empowered to develop their own social services and justice processes. Because each community faces unique challenges, community leaders and members are best suited to establish appropriate measures and responses. *See infra* Section V.A.2; Turuki Report, *supra* note 25, at 39; *See supra* Part I.

254. YOUTH UPRISING, *supra* note 250, at *Partners*.

255. COMMUNITY UNITED AGAINST VIOLENCE, <https://www.cuav.org/> [<https://perma.cc/VC9E-EYPU>] (last visited May 11, 2020) [hereinafter Community United Against Violence].

256. *Id.*

257. *See supra* Part I.

258. Melissa de Witte, *Stanford scholars examine racism, social change and how to build a more just future*, STANFORD NEWS (June 2, 2020), <https://news.stanford.edu/2020/06/02/understanding-institutional-racism-protest-social-change/> [<https://perma.cc/R36N-MS2Y>].

likely to elicit biases. Some of these factors include the individuals who committed a crime's name, race, hair style, and location of the crime. All of these factors can easily entrench biases, even if they appear "neutral" on their face.²⁵⁹ Goel helped found the Stanford Open Policing Project to aid researchers, journalists, and key policymakers in investigating and improving relationships between the police and the public.²⁶⁰

While raising cultural, social, or racial awareness among relevant decision-makers can prove useful, it may also act solely as a façade of change, leading racism to become more deeply ingrained and hidden.²⁶¹ One practical approach to solve this issue is distributing grants to communities affected by economic disenfranchisement and intergenerational wealth inequalities. These grants go beyond addressing individual government officials' implicit bias and can aid in closing the gap of intergenerational wealth inequalities that are often one of the key causes of high crime rates in lower socio-economic neighborhoods that are disproportionately made up of people of color.²⁶² Depending on the States' circumstances and groups affected, this solution has been used in various situations to decrease the racial inequality gap and mitigate some of the harm of centuries of institutional racism.²⁶³

259. *Why AI is A Growing Part Of The Criminal Justice System. Should We Be Worried*, SCIENCE FRIDAY 24:25 (Sept. 13, 2019), <https://www.sciencefriday.com/segments/artificial-intelligence-is-a-growing-part-of-the-criminal-justice-system-should-we-be-worried/> [<https://perma.cc/7QML-GWVQ>].

260. De Witte, *supra* note 258.

261. *Cf.* González, *supra* note 61, at 1047 (describing three key forms of norm internalization as social, political, legal).

262. *See generally* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/DH6B-AKLU>] (discussing how slavery helped found the American economy and the housing and zoning structures of cities like Chicago were purposefully planned to keep African Americans out and within lower socio-economic neighborhoods). In 2019, the United States House of Representatives introduced Bill H.R.40 titled the "Commission to Study and Develop Reparation Proposals for African-Americans Act." Its purpose is to critically examine slavery and its lingering effects on African-Americans and society. H.R. 40, 116th Cong. (2019).

263. *See* Matthew Evans, *Structural Violence, Socioeconomic Rights, and Transformative Justice*, 15 J. HUM. RTS., 1, 4 (2016) (explaining how reparations can be an effective way to address structural violence, specifically manifested through socioeconomic inequalities); *see cf.* Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, 21 SOC. AND LEGAL STUD. 155, 173-74 (Gerry Johnstone & Joel Quirk eds., 2012) (arguing reparations are backward looking and don't address the future); *see*

V. CONCLUSION

Prison is not inevitable and should not be the answer to the social and economic vulnerabilities of individuals. Through centuries of institutionalized racism, structures of oppression are key determinants of whether an individual is likely to commit a crime and encounter the criminal justice system. These intergenerational and detrimental conditions must be addressed to stop the cycle of harm. Further, the ways in which countries like the United States and New Zealand still rely heavily on incarceration directly contradicts pertinent international law standards that require increased utilization of non-custodial alternatives to incarceration. To combat the structural violence and the mass incarceration problem that plagues the United States, New Zealand, and other nations worldwide, all States must aim to reduce prison populations through restorative justice measures that occur prior to incarceration to limit the reliance on state-sanctioned violence against individuals.

In the United States, Vermont's restorative justice law establishes important processes to incorporate restorative measures prior to sentencing. However, to better comply with international law and incorporate the vision of transformative justice, any state legislation must apply to all people who committed a crime with few exceptions instead of being limited to a few categories of individuals. It must also limit its reliance on the state by stopping state involvement in restorative justice practices at important funding. In New Zealand, the Sentencing Act also requires judges to adjourn cases to decide if restorative justice is appropriate, but still leaves open much discretion to the Judge on whether the agreement will be binding in their final sentence. The decisions of restorative practices should be binding, and they should be expanded to allow defendants to partake in different processes even if the victim chooses not to partake. Simultaneously, there must be a focus on harm prevention via massive investment of economic and social resources in communities, especially those deeply marginalized.

V.E. Jantzi, *Restorative Justice in New Zealand: Current Practise, Future Possibilities*, EMU 34 (Aug. 2001), <https://emu.edu/cjp/docs/rj-in-newzealand.pdf> [https://perma.cc/XUD5-TFMP] (discussing reparations and land reversions for Māori).

These measures will support transformative justice principles that aim to proactively prevent harm via community measures and treat any harm as a product of community structures, rather than an individual's actions. The United States and New Zealand should push for stronger efforts in this direction to become the blueprint for a true anti-carceral future for other countries to follow.

