

ARTICLE

In the Aftermath of Rampage Shootings: Is Healing Possible? Hard Lessons from the Red Lake Band of Chippewa Indians and Other Indigenous Peoples

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ABSTRACT

This Article produces insights, ideas, and findings which link mass shootings and communal responses in the United States and on American Indian reservations. This Article compares the aftermath of these tragedies in non-indigenous communities with the responses when the tragedies have occurred in certain Native American¹ communities, including comparisons between indigenous and non-indigenous courts. It looks to the roots of the Native American approach in indigenous historical evidence. Described is an institutional weakness in the Anglo-European judicial model in how it responds to the aftermath of heinous crimes. Explored is the adaptation of certain practices from indigenous peoples as a method of contributing to healing, closure, and reconciliation following heinous criminal behavior. Further explored is the possibility of incorporating face-to-face, interpersonal interactions between mass shooting victims, offenders, and their families.

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This Article discusses mass murders and violence. It contains material which readers may find disturbing and might be triggering to survivors of violence.

1. This Article will use “Native American” when referring to people. The Article will use “American Indian” when referring to reservations or tribes, as these are legal terms.

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INTRODUCTION

On a cold December morning in 2012, Adam Lanza blasted his way through a locked elementary school and into infamy, shattering a window and the lives of twenty-six families. In many ways, Lanza's crime was very similar to that of Jeffrey Weise, a member of the Red Lake Band of Chippewa Indians of Northern Minnesota, who conducted a mass shooting at the Red Lake High School. What differs between these two shootings is how their respective communities—American and Native American—responded in the aftermath. This Article examines how American society reacts to the horrors of mass shootings. It describes insights, ideas, and findings that link rampage shootings and communal responses in the United States and on Indian reservations, setting the stage for the future study of both the mindset of the shooters and how communities heal in the aftermath.

What happened in Newtown, Connecticut, in December 2012 was so disturbing that a campaign to convince the world it was a hoax garnered mass interest.² The perpetrators of that disturbing campaign, referred to as “truthers,” could capture the imagination of the public, in part because the reality itself was so jarring.³ Twenty-year-old Adam Lanza dressed himself in all black, put on a pair of fingerless gloves, and drove to an elementary school. At 9:30 a.m., Lanza, armed with three powerful guns, including a military-style assault rifle and enough bullets to kill hundreds of people, shot his way through the front door. In just ten minutes, he killed twenty first-graders and six teachers and administrators. His first victim, his mother Nancy Lanza, lay dead in her bed at the family home. Lanza's last shot was to himself. There were twenty-eight dead in all.

In counting victims, Nancy Lanza is usually excluded. When President Barack Obama spoke in Newtown at the memorial service he said, “We gather here in memory of twenty beautiful children and six remarkable adults,” deliberately not counting Nancy Lanza.⁴ The University of Connecticut honored the shooting victims with a ceremony before a men's basketball game, with twenty-six students standing at center court holding lit candles.⁵ Officials and victims' family members gathered at the Newtown Town Hall to mark a moment of silence on December 21, 2012.⁶ The bells of the nearby Trinity Episcopal Church rang in honor of the victims. The bells

2. See Hunter Stuart, *Sandy Hook Hoax Theories Explained: Why Newtown 'Truther' Arguments Don't Hold Up*, HUFFPOST (Feb. 11, 2013, 10:25 AM), https://www.huffingtonpost.com/2013/02/11/sandy-hook-hoax-theories-explained-debunking-newtown-truther_n_2627233.html [<https://perma.cc/2ERE-85F3>].

3. “Truthers” is the term given to the network of conspiracy theorists who perpetuated a false campaign that the Newtown tragedy never occurred, that it was staged with actors, empty coffins, and other disturbing false claims. One visible truther is Alex Jones, a conservative media personality. Several surviving victims of Newtown have sued Jones in the State of Connecticut Superior Court for defamation. The suit is pending. See *Lafferty v. Jones*, No. UWY-CV18-6046436-S (Conn. Super. Ct. filed May 23, 2018).

4. See Kevin Sullivan, *In Newtown, Nancy Lanza a Subject of Sympathy for Some, Anger for Others*, WASH. POST (Dec. 19, 2012), https://www.washingtonpost.com/national/in-newtown-nancy-lanza-a-subject-of-sympathy-for-some-anger-for-others/2012/12/19/5a425f1c-4a1e-11e2-ad54-580638ede391_story.html [<https://perma.cc/7UKY-WXPM>].

5. *Id.*

6. *Bells Toll for Newtown Victims One Week After Shooting*, TRIB LIVE (Dec. 21, 2012), <https://triblive.com/news/adminpage/3177847-74/lanza-nancy-shooting> [<https://perma.cc/4C88-GV5U>].

were rung twenty-six times, not twenty-seven. In Newtown, the number was always twenty-six.

Nancy Lanza was not counted as a victim because she was blamed for either contributing to the murders or failing to prevent them. Nancy Lanza legally purchased all of the weapons used by Adam Lanza.⁷

Seven years before the massacre, Adam Lanza was diagnosed with Asperger's Disorder and described as having significant social impairments.⁸ Many parents of slain Sandy Hook Elementary School children clearly held Nancy Lanza responsible. Nicole Hockley, the mother of six-year-old victim, Dylan Hockley, was one of them. "It's clear that he had mental illness and intervention was not made," she told *The New York Daily News*,⁹ "[a]nd there was not responsible gun ownership, either."¹⁰ "There was obviously a breakdown in terms of the parenting and the structure in that house," said Bill Sherlach, husband of slain Sandy Hook Elementary School psychologist Mary Sherlach.¹¹

Public opinion in the United States seems to treat Nancy Lanza, "a gun enthusiast who had taught Adam to shoot,"¹² as "an accessory to the crime, rather than its victim."¹³ Emily Miller, an editor at the *Washington Times* summed up that sentiment: "[W]e can't blame lax gun-control laws, access to mental health treatment, prescription drugs or video games for Lanza's terrible killing sprees. We can point to a mother who should have been more aware of how sick her son had become and forced treatment."¹⁴

Alissa and Robbie Parker, parents of six-year-old Emily Parker, a first-grader killed at Sandy Hook Elementary School, disagree that Nancy Lanza was not counted as a victim because she was blamed for the tragedy. According to the Parkers, Nancy Lanza belongs in a separate category of victims than the others:

The reason we (the group of Sandy Hook families) do not address her specifically, is that we consider her death a domestic dispute, whereas the number of victims in the mass shooting are those at the school, where the mass shooting took place. Basically, she belongs in the total number of victims by the hands of Adam Lanza, but the number 26 victims accounts for those that had nothing to do with the [members of the] Lanza family who lost their lives.¹⁵

7. Stephen J. Sedensky III, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012*, 2 (2013), http://health-equity.lib.umd.edu/4223/1/Sandy_Hook_Final_Report.pdf [<https://perma.cc/VM9T-69UA>].

8. *Id.* at 34.

9. Carol Kuruvilla & Vera Chinese, *Families of Newtown Victims Say Adam Lanza's Mom Shares Blame for Raising a Murderer*, N.Y. DAILY NEWS (Nov. 28, 2013, 1:41 AM), <https://www.nydailynews.com/news/national/newtown-families-blame-adam-lanza-mom-raising-murderer-article-1.1531903> [<https://perma.cc/CWZ9-579L>].

10. *Id.*

11. *Id.*

12. Andrew Solomon, *The Reckoning*, NEW YORKER (Mar. 7, 2014), <https://www.newyorker.com/magazine/2014/03/17/the-reckoning> [<https://perma.cc/P7XH-2Y8X>].

13. *Id.*

14. *Id.*

15. E-mail from Alissa Parker to author (Sept. 23, 2016, 2:47 PM) (on file with author).

In the aftermath of horrific mass killings, the enormity of the horror of the mass killing of innocent victims causes victims to search for fault. The killers' parents and family members often face blame or extreme hatred for either causing the violence or failing to prevent it. They are treated as pariahs themselves.

Nevertheless, Alissa and Robbie Parker do not think these parents should be treated as pariahs or vilified by society.

We would like parents to be able to courageously see the struggles their children have and stop at nothing to get them the proper help and treatment without the fear of stigma or backlash from their peers or community. It is important to look at her role as Adam's mother and provider to better understand the struggles and obstacles she faced in trying to help Adam as best as she felt she could. Looking at this situation can hopefully help us all learn from those mistakes (not just Nancy's but the 'system' as a whole) and progress forward. We feel like placing blame, pointing fingers etc. is an easy way to project our own fears and insecurities onto someone else and not place the responsibility on ourselves.¹⁶

This Article compares American and Native American reactions to mass shootings, as well as the mechanisms designed to provide justice to the affected communities. While American reactions to mass shootings tend to ostracize the offender and his or her family through a retributive system of justice, Native American reactions tend to implement a community healing process embracing and forgiving the offender.

Part I defines the crisis of mass shootings, or rampage murders, as they are referred to and explained in this piece.¹⁷ It then examines two American mass school shootings: Columbine and Newtown.

Part II examines two mass school shootings that occurred on Indian reservations: Red Lake High School and Marysville Pilchuck High School.

Part III examines patterns in the aftermath of mass shootings and responses from communities, victims, and their families. This includes reports of courtroom testimony of mass killing survivors, victims, and their family members. Part III also compares the adversarial structure of the American legal system with the history of indigenous dispute resolution among select groups of peoples in North America. The American legal system leaves little room for healing after rampage shootings, as it encourages the silence of anyone who might have answers and prioritizes protecting rights rather than solving problems. Alternatively, the Native American system focuses on forgiveness, grounded in religious belief, as well as peacemaking and other modern approaches to restorative and therapeutic justice.

Part IV addresses many important questions: Can the indigenous traditions studied provide a formula for approaching the aftermath of modern-day mass shootings when they occur outside of native communities? How can indigenous traditions of offenders and their families speaking face-to-face with victims and their families be adapted to modern non-indigenous peoples? What cultural and social distinctions exist which make adaptation of the indigenous practices cited less likely?

16. *Id.*

17. The terms "shooting" and "murder" are used interchangeably.

I. THE CRISIS OF RAMPAGE SHOOTINGS IN THE UNITED STATES

Hardly a week seems to pass in the United States without disturbing news of a gunman appearing at a school or workplace and opening fire on innocent victims in a shooting rampage. The term “rampage” seems to perfectly capture this epidemic.¹⁸ A rampage involves attacks on multiple parties selected almost at random.¹⁹ Sometimes, intending to kill a small number of victims, killers ultimately fire off a barrage that kills and maims many. These attacks usually target whole institutions, such as schools or workplaces, rather than individuals.

Although the term rampage is used interchangeably with serial murder, or spree murder;²⁰ rampage is a relatively recent term.²¹ Mass murder is a single episodic act of violence occurring at one time and in one place.²² Authorities classify murders of three or more, or in some cases four or more, victims as “mass murders.”²³ The terms “rampage killings” and “rampage murders” are used interchangeably here, as are “mass murder” and “mass killing.” The term “shooting” is used where appropriate, as guns are the primary weapons in most of these incidents. When the incident occurred at a school, a common but not universal theme, the term school shooting is applied.

In most instances, killers do not know or have any relationship with their victims. Lanza in Newtown, Connecticut, Jared Lee Loughner in Tucson, Arizona, James Holmes in Aurora, Colorado, and Aaron Alexis in Washington, D.C., are all mass killers who had no relationship with their victims. These shootings forced the country²⁴ to conduct the kind of searching and self-examination that only a total shock can.²⁵

Rampages give rise to more questions than answers. Americans struggle to determine what causes these tragedies and why they seem to occur with great frequency. Are we no longer able to keep ourselves and our children safe in our communities? Are schools, movie theaters, and shopping malls no longer inviolable? Is there now more mental illness than before? If so, is it going untreated? Are powerful weapons so

18. See JAMES ALAN FOX, JACK LEVIN & KENNA QUINET, *THE WILL TO KILL, MAKING SENSE OF SENSELESS MURDER* 175-90 (2012). The authors use the word “mass killer” to refer to those who target family, former and current coworkers, as well as total strangers, without a political motive. See *id.* at 175. This Article will refer to “rampage” and “mass killing” in the same way. See also Ben “Ziggy” Williamson, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?* 60 FLA. L. REV. 895 (2008); see generally Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case For Institutional Liability*, 35 J.C. & U.L. 503 (2009). Many terms are used in academic references to describe the same type of occurrence. See James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 CRIME & JUST. 407, 408, 437 (1998) (mass murder, spree killing, going berserk, running amok).

19. KATHERINE S. NEWMAN ET AL., *RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS* 15 (2004).

20. Ronald M. Holmes & Stephen T. Holmes, *Understanding Mass Murder: A Starting Point*, 56 FED. PROBATION 53, 53 (1992).

21. FOX, LEVIN & QUINET, *supra* note 18.

22. Holmes & Holmes, *supra* note 20, at 53.

23. *Id.*

24. The focus of this paper is on mass shootings primarily in the United States, although they occur throughout the world. For purposes of this Article, I exclude political killings and acts of warfare or terrorism.

25. NEWMAN ET AL., *supra* note 19, at 14.

commonplace that we are no longer surprised when they are used to mow down innocent people? Did the killers exhibit warning signs that were ignored?

So often with rampage killings, society itself is the target. The shooter focuses his or her rage at a school, factory, or mall. The resulting pain impacts the greater community, both nationally and internationally. This section will discuss how the adversarial structure of the American legal system leaves little room for the healing process necessary after rampage murders by detailing what transpired in two notable school rampages in the United States and examining the aftermath.

A. Rampage Shootings in the School Setting: Two Non-Indigenous Cases

1. Columbine High School, Jefferson County, Colorado

The 1999 rampage in Colorado is referred to with one word: Columbine.²⁶ Eric Harris and Dylan Klebold used two words: Judgment Day.²⁷ Courtesy of live television coverage, the world witnessed Columbine in real time. The images were shocking. For nearly two years, without ever alerting their parents, teachers, friends or the local police, high school students Eric Harris, eighteen, and Dylan Klebold, seventeen, plotted murderous mayhem.²⁸

On the morning of April 20, 1999, the boys entered the crowded school, dressed in infantry-style clothing, and placed bomb-laden duffle bags in the commons and cafeteria.²⁹ Then, Harris and Klebold went to their cars in the parking lot and suited up, armed with a semiautomatic handgun, a 9mm carbine rifle, and two shotguns.³⁰

When the sets of propane and gasoline bombs in the commons and cafeteria did not go off as planned, Harris and Klebold convened in the parking lot and grabbed their guns. Students were picnicking outside. Harris and Klebold started shooting at the students outside and throwing pipe bombs in their direction.³¹

Harris and Klebold then walked into the school. Their spree was captured on surveillance cameras. Harris and Klebold threw pipe bombs down hallways and shot students in the cafeteria and the library, killing ten.³² During the mayhem, television station camera crews flocked to the high school and went live within twenty-eight minutes. Harris and Klebold did not die in a shoot-out with police, but rather committed suicide in the library.

In all, thirteen were killed by Harris and Klebold: twelve students and one teacher.³³ The two suicides of the killers made the death toll

26. Abbreviated hereinafter as “Columbine.”

27. DAVE CULLEN, COLUMBINE 32 (2009).

28. *Id.* at 359.

29. *Id.* at 33.

30. *Id.*

31. See Gina Lamb, *Times Topics: Columbine High School*, N.Y. TIMES (Apr. 17, 2008), <https://www.nytimes.com/topic/organization/columbine-high-school> [<https://perma.cc/9GLV-URH5>].

32. *See id.*

33. Here is a list of the victims who died at the hands of Klebold and Harris: Cassie Bernall, 17; Steven Curnow, 14; Corey DePooter, 17; Kelly Fleming, 16; Matthew Kechter, 16; Daniel Mauser, 15; Daniel Rohrbough, 15; Rachel Scott, 17; Isaiah Shoels, 18; John Tomlin, 16; Lauren Townsend, 18; Kyle Velasquez, 16; William “Dave” Sanders, 47. *Columbine High School Shootings Fast Facts*, CNN (Mar. 25,

fifteen.³⁴ Twenty-four students were wounded, and at least one student permanently disabled.³⁵

The live television broadcast of this horrific spectacle caused shockwaves throughout the world. Littleton, Colorado, appeared to Americans to be the last place they would expect to witness mass murder. As such, Columbine became a tremendous media story. It was the number one story of 1999 on CNN and the seventh-most covered media event of the 1990's.³⁶ Sixty-eight percent of Americans closely followed the Columbine news story.³⁷ The dramatic nature of the events of Columbine led to the high level of media coverage. It became a "defining event" for journalists,³⁸ who had never covered an event like Columbine before. Columbine came to symbolize the school shooting crisis.³⁹

Columbine has influenced subsequent school shootings. In September 2006, Brian Draper and Tory Adamcik killed Cassie Jo Stoddart in Boise, Idaho. Draper was obsessed with Columbine; he and Adamcik warned people that they were going to commit a "Columbine-like" school shooting.⁴⁰ In a videotape mailed to NBC News, Seung-Hui Cho, the Virginia Tech college student who killed thirty-two people in 2007, referred to Klebold and Harris as "martyrs."⁴¹ The State's Attorney investigating the Sandy Hook Elementary School murders reported that Adam Lanza "had an obsession with mass murders, in particular the April 1999 shootings at Columbine High School in Colorado."⁴²

Additionally, in April 2014, a copycat scheme set to coincide with Columbine's fifteenth anniversary was discovered and foiled in Minnesota. John LeDue, a seventeen-year-old high school student, stockpiled guns and bomb-making materials at his home and a storage facility.⁴³ Like Klebold and Harris, he planned a decoy event to distract police and planned to detonate bombs in the cafeteria.⁴⁴ A neighbor who

2018), <https://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/> [https://perma.cc/AM8E-LXA4].

34. See Lamb, *supra* note 31.

35. See Susan Donaldson James, *Columbine Shootings 10 Years Later: Students, Teacher Still Haunted by Post-Traumatic Stress* (Apr. 13, 2009), <https://abcnews.go.com/Health/story?id=7300782&page=1#.Ua4zCuuXxTA> [https://perma.cc/356A-5B65].

36. Glenn W. Muschert, *Frame-changing in the Media Coverage of a School Shooting: The Rise of Columbine as a National Concern*, 46 SOC. SCI. J. 164, 165 (2009) (citing Glenn W. Muschert, *Media and Massacre: The Social Construction of the Columbine Story* (2002) (unpublished Ph.D. dissertation, University of Colorado at Boulder)), http://www15.uta.fi/arkisto/aktk/projects/sta/Muschert_2009_Frame-changing-in-a-Media-Coverage-of-School-Shooting.pdf [https://perma.cc/5RLB-PAKM].

37. *Id.*

38. *Id.*

39. See *id.*

40. Stoddart v. Pocatello School Dist. # 25, 239 P.3d 784, 786 (Idaho 2010).

41. *Shooter: 'You Have Blood On Your Hands,'* CNN (Apr. 18, 2007), <http://edition.cnn.com/2007/US/04/18/vtech.nbc/> [https://perma.cc/N7KT-YV29].

42. Sedensky, *supra* note 7, at 3.

43. Pat Pheifer, *Waseca Teen Accused in School Shooting Plot Had Been Planning for Months*, STAR TRIB. (May 2, 2014, 9:25 PM), <http://www.startribune.com/local/257505631.html> [https://perma.cc/D73Z-6DCQ].

44. *Id.*

observed LeDue walking through her yard with large bags called the police. Authorities arrested LeDue before he could stage his Columbine-like massacre.

2. Sandy Hook Elementary School, Newtown, Connecticut

On December 14, 2012, Adam Lanza, twenty, shot and killed his mother, Nancy Lanza, as she slept in the family home in Newtown. He used a twenty-two caliber Savage Mark II rifle,⁴⁵ shooting her twice in the head.⁴⁶

At around 9:30 a.m., Lanza drove to the Sandy Hook Elementary School in Newtown.⁴⁷ He parked his car in front of the school and then approached the entrance. Lanza was armed with three guns—a Bushmaster Model XM 15-E2S rifle, a Glock 10mm handgun, and a Sig Sauer P226 handgun—and hundreds of rounds of live ammunition.⁴⁸ A fourth gun, an Izhmash Saiga-12, twelve-gauge shotgun, was found in the car.⁴⁹

The front door of the school was locked, but Lanza blasted his way into the school building, blowing out plate glass windows next to the front door. Lanza immediately shot and killed two faculty members who had approached him to investigate the gun shots.⁵⁰

Lanza shot at other staff members in the hallway, wounding two.⁵¹ He next entered two first-grade classrooms, shooting and killing twenty first grade students and four faculty members. Nine children ran out of one of the classrooms, with some hiding in the bathroom. At 9:40 am Lanza committed suicide by firing one fatal shot with the Glock 10mm handgun.⁵² Lanza's rampage lasted just ten minutes.

Lanza's targets, first-graders, set him apart from other rampage killers. The faces of twenty dead children, twelve innocent little girls and eight innocent little boys, tore open a raw nerve across the world. The children were referred to as babies.⁵³ "I've been here for 11 years," said Laura Feinstein, a reading support teacher who survived the rampage. "I can't imagine who would do this to our poor little babies."⁵⁴

American suburban communities like Newtown, Connecticut, and Littleton, Colorado, are settings easily recognizable to many people. Similarly, the Virginia Tech rampage also occurred in a recognizable setting, the college town of Blacksburg, Virginia. There were more casualties suffered in the Virginia Tech rampage than any other school shooting in history. As with Columbine, there were many missed warning signs about the shooter, Seung-Hui Cho, including his violent writings, stalking complaints, and mental health problems.

45. Sedensky, *supra* note 7, at 5.

46. Edmund H. Mahoney & Dave Altimari, *A Methodical Massacre: Horror and Heroics*, HARTFORD COURANT (Dec. 15, 2012), <https://www.courant.com/community/newtown/hc-xpm-2012-12-15-hc-timeline-newtown-shooting-1216-20121215-story.html> [https://perma.cc/MEY9-PWDN].

47. Abbreviated hereinafter as "Newtown."

48. Sedensky, *supra* note 7, at 9.

49. *Id.* at 13.

50. Mahoney & Altimari, *supra* note 46.

51. Sedensky, *supra* note 7, at 11.

52. *Id.* at 12.

53. *Id.*

54. *Id.*

Now, this article will consider rampages that occur in less familiar settings: American Indian reservations.

II. WHEN MASS MURDER OCCURS ON AN INDIAN RESERVATION: STUDIES IN CONTRAST

The Red Lake Band of Chippewa Indians is an American Indian tribe with a reservation (Red Lake Reservation) located on a vast expanse of nearly 800,000 acres of land and water in Northern Minnesota.⁵⁵ There are four reservation communities: Little Rock, Ponemah, Redby, and Red Lake.⁵⁶ The Tribe is governed by an eleven-member Tribal Council. Seven Hereditary Chiefs serve for life in an advisory capacity. The seven are descendants from the leaders who negotiated land agreements with the United States in 1889.⁵⁷ The seven chiefs resisted the allotment of the Dawes Allotment Act of 1887,⁵⁸ and as a result, all land is now held in common by all tribal members. As such, the Red Lake Reservation is referred to as a closed reservation and very few non-members live there.⁵⁹ Many of the families at Red Lake are tied together in seven clans⁶⁰ and ninety-five percent of its residents are tribal members.

The Tribe refused a 1934 effort to merge with six other Chippewa bands in order to preserve Anishinaabe heritage and tradition.⁶¹ The Ojibwe language is still spoken on the Red Lake Reservation.⁶²

A. Rampage Shooting in the School Setting: Two Indigenous Cases

1. Red Lake High School, Red Lake Reservation⁶³

Sixteen-year-old Jeffrey Weise, a Red Lake Chippewa Indian, lived with his grandmother, Shelda Lussier. Weise's mother lived in a nursing home in another city and suffered from brain damage resulting from an auto accident.⁶⁴ Weise's father committed suicide years before.⁶⁵

On the morning of March 21, 2005, Weise went to his grandfather's home. He shot and killed his grandfather, Daryl Lussier, and Lussier's girlfriend in their

55. See *Tribes: Red Lake Nation: Unique in Indian Country*, GOV'T OF MINN., http://mn.gov/indianaffairs/tribes_redlake.html [<https://perma.cc/6AQZ-AZHF>].

56. *Id.*

57. *See id.*

58. *See id.*

59. *See* GOV'T OF MINN., *supra* note 55.

60. The seven tribes are Bear, Turtle, Bullhead, Eagle, Kingfisher, Marten, and Fisher. *See* RED LAKE NATION, <http://www.redlakenation.org/BlogRetrieve.aspx?PostID=645111&A=SearchResult&SearchID=5116751&ObjectID=645111&ObjectType=55> [<https://perma.cc/YFB5-W6ZA>].

61. *See Tribal History & Historical Photos*, RED LAKE NATION, <http://www.redlakenation.org/tribal-government/tribal-history-historical-photos> [<https://perma.cc/WXA8-3RVQ>].

62. *See* GOV'T OF MINN., *supra* note 55.

63. The tragedy at the Red Lake High School is abbreviated hereinafter as "Red Lake."

64. MARY ELLEN O'TOOLE, *Jeffrey Weise and the Shooting at the Red Lake Minnesota High School: A Behavioral Perspective*, in *SCHOOL SHOOTINGS: INTERNATIONAL RESEARCH, CASE STUDIES, AND CONCEPTS FOR PREVENTION 177, 178* (Nils Bockler, Thorsten Seeger, Peter Sitzer & Wilhelm Heitmeyer eds., 2013).

65. *Id.*

sleep⁶⁶ with a .22 caliber pistol.⁶⁷ He then grabbed a twelve-gauge shotgun, a .44 caliber automatic pistol, and ammunition from the house. He loaded the two guns and drove his grandfather's tribal police cruiser to Red Lake High School.

Once he arrived at the school, Weise, dressed in black, walked straight through the front entrance metal detectors, which were attended by two unarmed security officers.⁶⁸ He shot and killed one of them.⁶⁹ Next, with surprising calm and composure, he walked down the halls,⁷⁰ shooting at students and teachers.⁷¹ At one point, he asked students huddled in the back of a classroom, "Do you guys believe in God?" One boy answered no and then Weise began shooting, killing five students.⁷² During his shooting rampage, Weise entered several classrooms at least twice, killing and wounding students and teachers both times.⁷³

Four Red Lake Tribal police officers rushed to the school. Once inside, the officers located Weise and shot at him.⁷⁴ Weise retreated to a classroom where most of his victims lay dead, and killed himself with his grandfather's shotgun.⁷⁵

In all, Weise killed his grandfather, his grandfather's girlfriend, the school security guard, and six students and teachers.⁷⁶ Including Weise, ten people died at Red Lake on March 21, 2005.⁷⁷ Five wounded students, two of whom required specialized surgery, were treated at two hospitals.⁷⁸ Until Red Lake, there had not been a widely-reported rampage shooting involving Native American people. Within a span of eight months, three mass shootings occurred involving Native Americans.

66. *Id.* at 130.

67. Monica Davey, *Behind the Why of a Rampage, Loner With a Taste for Nazism*, N.Y. TIMES (Mar. 23, 2005), <https://www.nytimes.com/2005/03/23/us/behind-the-why-of-a-rampage-loner-with-a-taste-for-nazism.html> [<https://perma.cc/EHJ7-HNTE>]. The ownership and source of this gun remains unknown to this day.

68. See O'TOOLE, *supra* note 64, at 181.

69. *See id.*

70. *See id.*

71. *See id.*

72. See John Rosengren, *Everyday Hero: Jeff May*, READER'S DIG. (Sept. 2005), <https://www.rd.com/truestories/inspiring/everyday-hero-jeff-may/> [<https://perma.cc/6DVH-YJRW>].

73. See O'TOOLE, *supra* note 64, at 181.

74. Reports differ as to whether the tribal police wounded Weise. Compare O'TOOLE, *supra* note 64, at 182 (stating officers shot and injured Weise), John Patrick Egelhof, *What I Learned at the Red Lake School Shooting*, RED LAKE NATION NEWS (Dec. 31, 2012), <https://www.redlakenationnews.com/story/2012/12/31/opinion/what-i-learned-at-the-red-lake-school-shooting/7765.html> [<https://perma.cc/6K4B-5CDN>] (same), and Associated Press, *E-mail Gaves [sic] Glimpse into School Shooting*, MINN. PUB. RADIO (Mar. 30, 2005), http://news.minnesota.publicradio.org/features/2005/03/30_ap_redlakeupdate/ [<https://perma.cc/3VX2-P7QW>] (same), with Davey, *supra* note 67 (stating officer shot Weise, but bullets may have missed him or bulletproof vest may have prevented injury).

75. O'TOOLE, *supra* note 64, at 182.

76. R.S. Littlefield et al., *A Case Study of the Red Lake, Minnesota, School Shooting: Intercultural Learning in the Renewal Process*, 2 COMM., CULTURE & CRITIQUE 3, 362 (2009).

77. O'TOOLE, *supra* note 64, at 177. Here is a complete listing of the fatalities at Red Lake: Darryl Lussier, 59 (Weise's grandfather); Michelle Sigana, 31 (Lussier's girlfriend); Derrick Brun, 28 (school security guard); Neva Rogers, 62 (English teacher); and students Dwayne Lewis, 15; Chase Lussier, 15; Alicia White 14; Thurlene Stillday, 15; Chanelle Rosebear, 15; Jeffrey Weise, 16 (the perpetrator).

78. David Meimer, *Grief and Shock After School Shootings*, NBC NEWS (Mar. 25, 2005, 4:46 PM), http://www.nbcnews.com/id/7296455/ns/us_news-life/t/grief-shock-after-school-shootings/#.XGnb8ehKjD4 [<https://perma.cc/2EHG-HQYJ>].

2. Marysville Pilchuck High School, Marysville, Washington

On October 24, 2014, a tragedy occurred in Marysville, Washington.⁷⁹ According to local police, fifteen-year-old Marysville Pilchuck High School student Jaylen Fryberg shot and killed four classmates in the high school cafeteria before using the gun to commit suicide.⁸⁰ Two others were injured. Fryberg was a member of the Tulalip Indian Tribes of Washington State. He and many of his victims were associated with the Tribes and the Muckleshoot Reservation.⁸¹ The school was not located on the Reservation but nearby.

Fryberg first sent text messages asking several of his friends and cousins to meet him in the school cafeteria. Fryberg arrived in the cafeteria and shot five students with a .40 caliber Beretta handgun.⁸² Four of those five students died and at least two others were injured; Fryberg was the fifth fatality. The victims were Shaylee Chuckulnaskit, fourteen, Zoe Raine Galasso, fourteen, Gia Soriano, fourteen, and Fryberg's fifteen-year-old cousin, Andrew Fryberg.⁸³ Fryberg's other cousin, Nate Hatch, fourteen, was shot in the jaw.⁸⁴ Police claimed the handgun was registered and owned legally by a Fryberg family member.⁸⁵

III. COMPARING RESPONSES AND MODELS OF JUSTICE AFTER RAMPAGE SHOOTINGS IN AMERICAN AND NATIVE AMERICAN CULTURES

A. *Comparing Anger and Response*

1. Anger at the Shooter

The anger directed at the shooters in Columbine and Newtown stand in stark contrast with the Native American community's response to the shooters in Red Lake and Marysville.

a. *American Mass Shootings*

The mourning process, funerals, and burials conducted by the families of rampage shooters like Eric Harris, Dylan Klebold, Adam Lanza, and others were marked with solitude and secrecy. Communities shunned the mourning families.⁸⁶ There are no

79. Abbreviated hereinafter as "Marysville."

80. Elisabeth Wiley, *Sheriff: Wash. Shooter Arranged to Meet His Friends via Text*, USA TODAY (Oct. 28, 2014), <https://www.usatoday.com/story/news/nation/2014/10/27/washington-school-shooting-investigation/18027369/> [<https://perma.cc/7CZN-J82J>]; see also Kirk Johnson, Ian Lovett & Michael Paulson, *2 Die, Including Gunman, in Shooting at Washington State High School*, N.Y. TIMES (Oct. 24, 2014), <https://www.nytimes.com/2014/10/25/us/shooting-reported-at-high-school-north-of-seattle.html> [<https://perma.cc/BW2J-KD2S>].

81. Wiley, *supra* note 80.

82. *Id.*

83. Associated Press, *Fifth Teen Dies Following Washington School Shooting*, WASH. TIMES (Nov. 8, 2014), <https://www.washingtontimes.com/news/2014/nov/8/5th-teen-dies-following-washington-school-shooting/> [<https://perma.cc/Q9N2-JGKP>].

84. *Id.*

85. Mike Carter, *Father of Marysville Shooter Sentenced to Two Years for Illegal Gun Possession*, SEATTLE TIMES (Jan. 11, 2016), <https://www.seattletimes.com/seattle-news/crime/father-of-marysville-shooter-sentenced-to-two-years-for-gun-possession/> [<https://perma.cc/2TWD-MN6Q>].

86. See Sarah Kaplan, *How to Bury a Pariah: How Killers like Those in San Bernardino and Columbine Are Laid to Rest*, HOUS. CHRON. (Dec. 17, 2015), <https://www.houstonchronicle.com/news/nation-world/nation/article/Burying-a-pariah-How-killers-like-those-in-San-6706076.php> [<https://perma.cc/QN8G-9BBA>].

known details about a funeral or burial for Eric Harris.⁸⁷ If either was done, it was done in secrecy. Dylan Klebold's parents privately cremated Dylan's body and held a very small private service.⁸⁸

Although communities hold well-publicized vigils and prayer services following non-indigenous massacres⁸⁹—charitable giving spontaneously and generously flows⁹⁰—battle lines form as Americans divide into camps. Both conspiracy theorists and activists dive, head first, into a social media frenzy. Adversaries square off in protracted criminal and civil litigation as fast targets are sought for prompt castigation of blame and punishment. Anyone who can be arrested is arrested.

b. Indigenous Mass Shootings

The aftermath of the Red Lake and Marysville rampages are distinct from the Columbine and Newtown rampages with regard to how the communities treated the deceased offender in death. While Peter Lanza, for example, the father of Adam Lanza, had to deal with any potential funeral, burial, or cremation for his son in complete secrecy,⁹¹ the Red Lake and Tulalip communities treated Jeffrey Weise's and Jaylen Fryberg's deaths with dignity.⁹²

At Red Lake, there was very little public talk of anger or revenge toward Weise on the Red Lake Reservation.⁹³ There was no talk of filing lawsuits against the Tribe or others. "That's not our way," said Brenda Child, a historian at the University of Minnesota who grew up on the Red Lake Reservation.⁹⁴

We're all one community. It's an Indian thing. It's different than a suburb of Denver. We have a long history together in this particular place. Since it's your own extended family suffering in the aftermath of this, people are feeling a lot of sympathy It makes our relationships deeper and more complicated.⁹⁵

Another example of unusual compassion and a surprising lack of bitterness at Red Lake is that of Jodi May, the mother of student Jeffrey May, who Weise shot. Jodi May knew Weise's grandparents: His grandmother helped raise her when she was a

87. *Id.*

88. *Id.*

89. Jeremy Peters, *A Day of Mourning*, N.Y. TIMES (Apr. 20, 2007), <https://www.nytimes.com/2007/04/20/us/20cnd-virginia.html> [<https://perma.cc/M7JM-TRRX>].

90. Greg Allen, *Fund for Victims of Parkland Shooting Reaches \$7.5 Million*, NPR (Apr. 20, 2018, 4:39 PM), <https://www.npr.org/2018/04/10/601268131/fund-for-victims-of-parkland-shooting-reaches-6-5-million> [<https://perma.cc/9Q5J-ABZK>].

91. Kaplan, *supra* note 86.

92. See Tom Robertson & Tom Scheck, *Red Lake Buries Four on Monday*, MINN. PUB. RADIO (Mar. 28, 2005), http://news.minnesota.publicradio.org/features/2005/03/28_scheckt_threefunerals/ [<https://perma.cc/9J9E-D84J>] (Jeffrey Weise's funeral); Scott North, *3rd Update Tulalip Tribes Quietly Mark the Death of the Marysville Shooter*, EVERETT HERALD (Oct. 30, 2014, 12:01 AM), <http://www.peninsuladailynews.com/news/3rd-update-tulalip-tribes-quietly-mark-the-death-of-marysville-shooter/> [<https://perma.cc/Q4SH-V6GL>] (Jaylen Fryberg's funeral).

93. See Meimer, *supra* note 78.

94. *Id.*

95. *Id.*

child. With the existence of these family ties on the reservation, it is understandable that Jodi May held no bitterness toward Weise:

I have a lot of things going on in my mind about the shooter. But that was when it first happened. I can't really say for anybody else, but it happened – we can't take it back. If he was a loner, and to my knowledge my boys were his friends – I don't know. I don't have no grudge against nobody, I just want my son to get better.⁹⁶

May remained in the hospital for more than a year and required difficult physical rehabilitation. He could speak, but with a slight slur. He walked with a limp and his left arm was paralyzed.⁹⁷ Despite this, his mother still showed compassion and sympathy toward the shooter.

Additionally, Jeffrey Weise's family had no difficulty finding a place to hold a funeral or to bury him. Minutes after the funeral for the murdered security guard concluded at St. Mary's Catholic Mission, the church filled up again for the funeral of Weise himself.⁹⁸ Weise was given a church funeral that was well-attended, which is extremely unusual for a rampage shooter. Weise's family asked news media to leave the church during the service.⁹⁹ The service for Weise drew a somber and large crowd of several hundred people.¹⁰⁰ Kim Baker, an attendee at Weise's funeral, said she was ready to forgive Weise. Her comments are illuminating: "He was also a member of Red Lake and he was also somebody's son, brother, uncle . . . and the way I look at it, he still deserves some recognition from the community so he can't be forgotten."¹⁰¹

The Tulalip Tribe held a funeral ritual for Jaylen Fryberg at the tribe's community center.¹⁰² More than 1,000 people attended the memorial.¹⁰³ For days, Fryberg's death was privately marked with traditional drumming, singing, dancing, and story-telling.¹⁰⁴

The treatment of Jeffrey Weise and Jaylen Fryberg reflects the close family ties that Native American people still possess today. The *Los Angeles Times* reported that Wanda Parkhurst, a distant relative of Weise, considered him a victim who hurt people because he was picked on and he was under the influence of the neo-Nazi websites he visited.¹⁰⁵ Referring to the families of Weise's victims, she said, "those families have a right to hate, but they also have to look at what caused it."¹⁰⁶

96. Howie Padilla, *A Long Year at Red Lake: Suddenly It Was up to Shane*, STAR TRIB. (March 19, 2006), at 1A.

97. *Id.*

98. Robertson & Scheck, *supra* note 92.

99. *Id.*

100. *Id.*

101. *Id.*

102. North, *supra* note 92.

103. *Id.*

104. *Id.*

105. Associated Press, *Tribe Gives Victims Aid to Shooter's Family, Citing a 'Double Burden'*, L.A. TIMES (Apr. 15, 2005, 12:00 AM), <http://articles.latimes.com/2005/apr/15/nation/na-redlake15> [<https://perma.cc/AFK6-ZKHA>].

106. *Id.*

2. Anger at the Shooter's Family

Community responses to the surviving parents of mass shooters and the forgiveness that the parents receive from the community and victim's family also varies. In American mass shootings, surviving parents and other immediate family members of those killed and injured by rampage shooters most typically focus intense anger upon their attackers' families. However, in Red Lake and Marysville, the community members evidence sympathy for the shooter's family.

a. American Mass Shootings

About ten years after Columbine, the mother of shooter Dylan Klebold, Susan Klebold, ended her silence and wrote a moving article in *O Magazine*, titled "I Will Never Know Why."¹⁰⁷ In this article she explains her surprise and shock that her son was one of the shooters in this mass killing. "None of us could accept that he was capable of doing what he did," she wrote.¹⁰⁸ Like many mass shootings, warning signs were missed: "[h]e'd written a school paper about a man in a black trench coat who brutally murders nine students. But [the family had] never seen that paper."¹⁰⁹

Susan Klebold recalled the community response:

But while I perceived myself to be a victim of the tragedy, I didn't have the comfort of being perceived that way by the community. I was widely viewed as a perpetrator or at least an accomplice since I was the person who raised a 'monster.' In one newspaper survey, 83 percent of respondents said that the parents' failure to teach Dylan and Eric proper values played a major part in the Columbine killings. If I turned on the radio, I heard angry voices condemning us for Dylan's actions. Our elected officials stated publicly that bad parenting was the cause of the massacre.¹¹⁰

b. Indigenous Mass Shootings

After Red Lake, the community's preparation of a memorial and funeral for the shooter's grandfather evidences sympathy rather than anger. Red Lake tribal members began collecting bundles of sage to be given as gifts and burned during funeral ceremonies.¹¹¹ They assembled blankets and toys to be placed in caskets. A private memorial service was held on the Wednesday following the tragedy.¹¹²

Weise's grandfather, Daryl Lussier, was treated the same as the other victims. He was one of the first to be buried and a memorial service was held for him at the Tribe's own Humanities Building. At the memorial service for Lussier there was singing and a drum circle.¹¹³ Lussier was given a dignified burial. He was dressed in his

107. Susan Klebold, *I Will Never Know Why*, O MAG. (Nov. 2009), <http://www.oprah.com/omagazine/susan-klebolds-o-magazine-essay-i-will-never-know-why> [<https://perma.cc/8SFD-G8G8>].

108. *Id.*

109. *Id.*

110. *Id.*

111. P.J. Huffstutter, *Red Lake Reservation Readies Burial Rituals*, L.A. TIMES (Mar. 24, 2005, 12:00 AM), <http://articles.latimes.com/2005/mar/24/nation/na-shooting24> [<https://perma.cc/G2J6-CT3F>].

112. *Id.*

113. *3 Red Lake Shooting Victims Buried*, WASH. TIMES (Mar. 27, 2005), <https://www.washingtontimes.com/news/2005/mar/27/20050327-120417-8694r/> [<https://perma.cc/XV34-R3PE>].

police uniform with an eagle feather in his hands and an American flag was placed in his casket.¹¹⁴ More than one hundred police officers attended the five-hour funeral for Lussier alongside United States Senator Norm Coleman and Minnesota Governor Tim Pawlenty. The Governor actually spoke at the funeral.¹¹⁵

Publicly, Lussier was spoken about reverentially. He was referred to by his nickname, "Dash."¹¹⁶ "If you knew him, you said Dash, and everyone knew who you were talking about," said Ed Naranjo, a retired Bureau of Indian Affairs official who worked with Lussier. "He was that kind of individual who could calm a very hot situation," said Naranjo.¹¹⁷

In the days following Red Lake, a memorial fund received more than \$200,000 in donations,¹¹⁸ and the Tribe voted to award the family of the perpetrator \$5,000 in victim's aid.¹¹⁹ Red Lake Tribal Secretary Judy Roy said that the Tribal Council decided unanimously that Weise should be considered a victim, and that his family should get help paying for his funeral and burial.¹²⁰ Roy said of the \$5,000, "It's not for him, it's for the family . . . they have a double burden."¹²¹ Weise's family received a second award from a small private fund managed by a Red Lake Tribal member and distant relative of Weise, Wanda Parkhurst.¹²² Parkhurst included Weise's family in the nearly \$1,500 she raised and distributed.

Jodi May was sympathetic to Weise: "The way I think of it, you know, he was a victim before this happened. Nobody reached out to help him."¹²³

Family members of other victims were not unanimous in their support of the Tribal Council's action. Donna Lewis, whose son was killed by Weise, was outraged.¹²⁴ As the Council debated the award for Weise, she stormed out of the meeting.¹²⁵ "He ain't no victim in this . . . He was a murderer," she said.¹²⁶ She blamed Weise's family: The family "knew he was having problems," and should have helped him, she said.¹²⁷ A family member of a second victim was also critical of the Tribal award. Victoria Brun, the sister of slain security guard, Derrick Brun, asked: "Why are they considering him to be a victim when he killed everybody. . . . The people who donated the money have a right to know and question how the money is divided."¹²⁸

114. *Id.*

115. *Id.*

116. *What Happened at Red Lake on March 21, 2005?*, RED LAKE NATION NEWS (Mar. 21, 2012), <https://www.redlakenationnews.com/story/2012/03/21/news/what-happened-at-red-lake-on-march-21-2005/03212012103127380720.html> [<https://perma.cc/2ASE-EQQF>].

117. *Id.*

118. Associated Press, *supra* note 105; *see also* Littlefield et al., *supra* note 76, at 371.

119. Littlefield et al., *supra* note 76, at 371.

120. Associated Press, *supra* note 105.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

As in Red Lake, the community in Marysville expressed sympathy towards the shooter's family. Michelle Galasso, the mother of a shooting victim, spoke of a visit she had with Jaylen Fryberg's mother after the rampage. The two mothers embraced, and Galasso told Mrs. Fryberg, she loved her.¹²⁹ Galasso did not blame Fryberg's parents and acknowledged they were also grieving.¹³⁰ Of Fryberg's mother, Galasso said, "She's hurting. She's grieving. She lost her child as well."¹³¹ Galasso stated:

In order for me to heal from this, I have to forgive because I cannot waste my life hating or being angry. I just can't . . . I'll never know why he did it and he took away one of the best things that I ever brought into this world, but he's a child too.¹³²

Just as the Red Lake Chippewa Indian community supported the family of Jeffrey Weise, the Tulalip Tribes of Washington supported the family of Jaylen Fryberg. While denouncing his murderous actions, the Tribes made it clear that they stood side-by-side with Fryberg's family: "It is our custom to come together in times of grief. The tribe holds up our people who are struggling through times of loss. We are supporting the family of Jaylen Fryberg in their time of loss, but that does not mean we condone his actions."¹³³

At Red Lake and Marysville, the families of rampage killers were not treated as pariahs or accomplices. The tribes did not vilify the parents of the shooter for providing access to the fatal weapons. The two indigenous communities allowed the deceased rampage killers to be treated with dignity, even in the aftermath of the bloodbaths they generated.

B. Comparative Models of Justice

One major juxtaposition between Anglo-European and indigenous systems of justice is that the latter encourages the families of the offender and victim to talk things out after the offense.¹³⁴ Indigenous systems of justice therefore work in a "horizontal" structure allowing victims to demand answers, to sit face-to-face with offenders, and ask, "Why?" The indigenous model provides that escape valve for serious outpourings of emotion severely lacking in Anglo-European adversarial or "vertical" systems of justice where the state imposes a punishment on the victim.

The section compares and contrasts American vertical system of justice with Native American horizontal system of justice. First, an exploration of the American system of justice reveals many shortcomings, namely the defendant often remains

129. Richard Walker, *After Wash. State School Tragedy Northwest Communities Focus on Love, Healing and Forgiveness*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 12, 2014).

130. *Id.*

131. *Id.*

132. *Id.*

133. Press Release, Tulalip Tribes, Tulalip Tribes Statement on Recovery from Marysville Pilchuck School Shooting (Oct. 29, 2014), <https://www.tulaliptribes-nsn.gov/Home/NewsArchive/TulalipTribesstatementOctober292014/tabid/845/Default.aspx> [<https://perma.cc/J4L5-WBJ5>].

134. See Richard A. Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L.Q. 295, 295-320 (1959); see generally MICHAEL BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY (1968).

silent during proceedings in hopes of limiting civil or criminal liability thereby preventing the victim from obtaining closure and healing.

Second, this section provides a detailed historical overview and specific examples of Native American restorative justice practices within a “horizontal” system of justice, highlighting the opportunity for retribution and community healing that such a system provides.

1. The Advised Wall of Silence for Shooters and Their Families in the American “Vertical” System of Justice

In the American vertical system of justice, the state in a criminal prosecution seeks to punish the defendant, or a party to a civil suit often seeks money. As such, attorneys often construct a wall of silence to protect their clients. The criminal prosecution of Michael Carneal for the West Paducah, Kentucky shooting at Heath High School¹³⁵ and the civil suit subsequently filed against his parents, exemplify how defendants often remain silent and eliminate victims’ chances to gain closure and begin the mental and emotional healing process.¹³⁶

Michael Carneal was fourteen when he committed the shooting at West Paducah. He was originally charged as an adult with three counts of murder, five counts of attempted murder, and one count of burglary.¹³⁷ In October 1998, Carneal pleaded “guilty but mentally ill,”¹³⁸ under Kentucky law.¹³⁹ The sentencing hearing offered very little satisfaction to the survivors or their families. It was a brief hearing presided over by Judge Jeffrey Hines.¹⁴⁰ There was no trial.¹⁴¹ Carneal himself did not make any statement.¹⁴² He offered no apology, and did not ask for forgiveness.¹⁴³ He did not speak. Carneal’s attorney, Thomas Osborn, made a brief statement on Carneal’s behalf where he claimed his client was remorseful.¹⁴⁴ Carneal entered into a plea agreement with the State of Kentucky and was sentenced by Judge Hines to the maximum allowed sentence: life in prison without the possibility of parole for twenty-five years.¹⁴⁵

Judge Hines allowed surviving victims or family members to speak. Sebrina Steger, mother of Kayce Steger, directed her thoughts to Judge Hines:

135. Abbreviated hereinafter as “West Paducah.”

136. *James v. Wilson*, 95 S.W.3d 875, 882 (Ky. Ct. App. 2002).

137. See Brian Cabell, *Kentucky School Shooter “Guilty but Mentally Ill,”* CNN (Oct. 5, 1998, 12:58 PM), <http://web.archive.org/web/20070913115713/http://www.cnn.com/US/9810/05/paducah.shooting/> [https://perma.cc/GRM7-SGFV].

138. *Id.*

139. KY. REV. STAT. ANN. § 504.130 (West 2019). The statute provides: “(1) The defendant may be found guilty but mentally ill if: (a) The prosecution proves beyond a reasonable doubt that the defendant is guilty of an offense; and (b) The defendant proves by a preponderance of the evidence that he was mentally ill at the time of the offense. (2) If the defendant waives his right to trial, the court may accept a plea of guilty but mentally ill if it finds that the defendant was mentally ill at the time of the offense.” *Id.*

140. NEWMAN ET AL., *supra* note 19, at 194.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Cabell, *supra* note 137.

Kayce's murder . . . has affected every aspect of our lives, from our daily routines to our belief system. Not only have we lost our daughter, but we have lost being a normal family. We have lost the ability to be the parents we want to be to our surviving children . . . We have a life sentence of grief. We have no hope of parole.¹⁴⁶

One victim, Missy Jenkins, pushed her wheelchair past Carneal's parents and stared hard at Carneal. She insisted he confront what his gunshots had done to her body:

I want Michael to look at me. I want to tell you that I'm paralyzed from my chest down . . . I really feel helpless. I can't go to the bathroom like regular people. It is hard to get dressed . . . I have to live like this every day . . . I don't know why you did this to me and to everybody else, but I know I'm not going to forget it, because I see it every day in my mind . . . I don't have any hard feelings towards you . . . I can live this way. It's going to be hard, but I can do it.¹⁴⁷

Stephen Keene, the older brother of Craig Keene, wounded by Carneal, punctuated his speech with a demand for accountability by Carneal:

Michael, I watched you gun down three girls . . . I watched you shoot my brother and try to kill him and four other people . . . You look at me right now! [Carneal looked up] Thank you . . . I don't know what was going on in your head. What would drive somebody to do this? Respond! . . . I wish I could just hide [like you] . . . Today you will get sentenced. Today you will spend the rest of your life in jail.¹⁴⁸

Why did Carneal maintain silence? A criminal defense attorney would likely have advised Carneal to be extremely cautious about making any statements for many reasons. The statement might not come out as the attorney and client planned and might result in the judge rejecting the plea for a more severe sentence. The statement could be used against the defendant in subsequent parole hearings, appellate hearings, or new trial after an appeal. Lastly, the statement could be used against the defendant or his family in future civil litigation for money damages. Although Michael Carneal's silence likely worked to his legal advantage, it frustrated the victims' ability to obtain closure in the criminal trial.

Indeed, the families of several victims filed a subsequent civil suit against Carneal's parents in Kentucky state court one year after the shooting, and the advised wall of silence had a similar effect.¹⁴⁹ The plaintiffs in that suit alleged that Michael's parents "owed a duty to exercise ordinary care to prevent their son [Michael] from harming others. . . . [and the parents] breached this duty of ordinary care" by "fail[ing] to properly secure the weapons in the house."¹⁵⁰ The plaintiffs alleged that Michael

146. NEWMAN ET AL., *supra* note 19, at 190-91.

147. *Id.* at 192.

148. *Id.*

149. Complaint at ¶ 1, *James v. Carneal*, 95 S.W.3d 875 (Ky. Ct. App. 2002) (No. 1999-CA-000787-MR).

150. *Id.* at ¶ 2.

acted as “the conduit” of his parents under the law and sought to hold the parents vicariously liable for their son’s actions by seeking compensatory and punitive damages.¹⁵¹

Michael Carneal and his parents had every incentive to say as little as possible with regard to the civil suit. Their out-of-court silence, and their refusal to offer explanations or apologies, impacted the suit.¹⁵² The trial court Special Judge William L. Shadoan eventually granted summary judgment for the parents, finding they breached no duty of care. The decision was affirmed on appeal.¹⁵³

Civil suits like the negligence suit filed against Michael Carneal’s parents after West Paducah are not uncommon.¹⁵⁴ Victims have also filed suits seeking damages from a wide variety of other potential tortfeasors.¹⁵⁵ Victims seek accountability and answers. They try to make sense out of something which cannot be made sensible. Sometimes they take actions into their own hands. Ironically, in taking action, they actually contribute to the conditions that block their access to people from who they desperately seek answers, explanations, and justice.

Thus, the walls of silence that are built by the Western system of “vertical” criminal and civil justice leave mass shooting victims demanding accountability with no ability to get it. The vertical model leaves the shooters and the surviving parents of the shooters stuck in a horrible morass of guilt and shame. It provides for no meaningful dialogue between culpable parties and those mourning with horrible grief.

The failure of the Anglo criminal justice model to provide face-to-face interaction in murder cases has been exposed in this section, detailing a case where victims or their families have expressed a desire for interaction. The walls of separation erected between offenders and victims, along with the impact of what I call “advised silence,” leave a trail of profound individual and collective dissatisfaction. In the next section, we examine the history of restorative justice in certain indigenous cultures, which includes examples of families of offenders and their victims talking things out.

2. The Native American “Horizontal” System of Justice

There is a rich history of indigenous peoples with unique systems of traditional restorative practices of justice. Restorative justice practices were the predominant characteristic of traditional dispute resolution methodologies, although punitive practices, no doubt, also existed.¹⁵⁶ A fundamental principle common to many

151. *Id.* at ¶ 7.

152. NEWMAN ET AL., *supra* note 19, at 186.

153. *See Wilson*, 95 S.W.3d at 888, 910-11.

154. *See, e.g.*, the suit filed after the Columbine shooting: *Shoels v. Klebold*, 375 F.3d 1054, 1056 (10th Cir. 2004) (noting the Shoels first filed suit in 2000), *cert. denied*, 543 U.S. 1147 (2005); and the suit filed after the Jonesboro Arkansas shooting: Complaint, *Wright v. Golden*, No. Civ-98-294(B) (Cir. Ct. of Craighead County, Ark., filed Aug. 10, 1998).

155. *See* Amended Complaint, *Shoels v. Stone*, No. 00CV903, 2000 WL 34248508 (Colo. Dist. Ct. May 9, 2000). (bringing action against law enforcement officials).

156. Take the Kikuyo people of Kenya, for example. After a murder, the victim’s family invaded the lands of the murderer. *See* Sarah Kinyanjui, *Restorative Justice in Traditional Pre-Colonial Criminal Justice Systems in*

Native American people is the spiritual basis of much traditional indigenous law.¹⁵⁷ This section will examine Native American practices, as well as common, consistent themes across tribes: dialogue, making both the injured and offending parties whole,¹⁵⁸ and the treatment of killings as reparable wrongs.¹⁵⁹

a. Historical Overview of Traditional Native American Restorative Justice Practices Among Various Tribes

Methods of making people whole among Native American cultures have varied. For example, the Ojibwe, a major component group of the Anishinaabe-speaking peoples in North America, focused on cleansing spirits of both the victim and offender as a method of repairing injuries done to both and aiding their futures as community members.¹⁶⁰ They reject a focus on blame and punishment.

The Inuit, a North American indigenous people occupying what are now the Arctic regions of Alaska, Canada, and Greenland, went to great lengths to avoid even the perception of offender punishment. They held community meetings which focused on the event and possible solutions as possible and hypothetical future events.¹⁶¹

The Iroquois were a confederation of several tribes of indigenous people, inhabiting what is now the northeast United States and parts of Canada. Among the Iroquois, a killer's family would meet with the killer to attempt to persuade him to confess guilt. If they did, the family of the killer sent a strip of white wampum, which are beads made from clams, to the victim's family or clan to signal their desire to make reparations.¹⁶² The wampum might be accepted, and the death pardoned. If the wampum was refused, it meant that the victim's family would retaliate and claim a killing within the killer's family or clan.¹⁶³ Sometimes the killer's family reacted with a decision to kill the offender themselves, which would protect the clan from revenge.¹⁶⁴

The Iroquois employed mourning rituals after a crisis. These mourning rituals were common among American Indian Woodlands tribes.¹⁶⁵ The Iroquois ceremony was called the Condolence Council and it was wholly consistent with the Native American belief that relationships of close connection were sustained by shared suffering and solidarity in times of crisis.¹⁶⁶ The Iroquois mourning ritual included the

Kenya, 10 TRIBAL L.J. 1, 11 (2009). They would call out the family of the murderer by cutting down plants. *Id.* This invasion was called *king'ore kia mubriga*. *Id.* They would kill the murderer or someone from his family to settle the matter. *Id.*

157. See CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 10 (1st ed. 2004).

158. Jon'a F. Meyer, *History Repeats Itself: Restorative Justice in Native American Communities*, 14 J. CONTEMP. CRIM. JUST. 42, 42-44 (1998).

159. *Id.*

160. See *id.* at 45.

161. See *id.*

162. See *id.* at 44.

163. *Id.*

164. *Id.*

165. See ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800, 54 (1999).

166. See *id.*

smoking of a sacred pipe and of sharing a bowl of food to eat together.¹⁶⁷ The ritual also included telling stories spoken by the wampum that rekindled the fire to bind the mourners close and, significantly, to wipe away any bad blood between two sides.¹⁶⁸

The Karok, an indigenous people inhabiting what is now California, utilized a system of compensation for all crimes, including death.¹⁶⁹ In that system, crimes could be forgiven as long as there was sufficient compensation. Compensation was not always in the form of remuneration. Sometimes it involved caring for the victim's family, or "waiting on" an injured victim.¹⁷⁰

b. The Crow Dog Case and Restitution to the Victim

The Crow Dog murder case of 1881 illustrates how some American Indian tribes resolved murder cases with compensation from the offender to the family of the victim.¹⁷¹ Both Crow Dog (actually named Kan-gi-shun-ca) and Spotted Tail (actually named Kan-gi-shun-ca) were members of the Brule Sioux band of the Sioux Nation of Indians, and Spotted Tail was recognized by the Sioux as a great chief.¹⁷²

Crow Dog, a warrior, killed Spotted Tail in what appears to have been motivated by an interest in controlling the chief's power.¹⁷³ The Sioux Nation dealt with the murder in the traditional Sioux method of dispute resolution.¹⁷⁴ Peacemakers met with both families. The matter was settled tribally with \$600 cash, eight horses, and one blanket given to Spotted Tail's family by Crow Dog.¹⁷⁵

Chief Spotted Tail was well known in Washington, D.C., as a Native American leader. This restorative method of justice resulted in uproar outside of Indian Country that there had been no Anglo-style prosecution or penalty. A federal prosecution of Crow Dog resulted but was unsuccessful.¹⁷⁶ Crow Dog's conviction was overturned by the United States Supreme Court on jurisdictional grounds.¹⁷⁷

In addition to compensation, another fairly common condition imposed by American Indian tribes in murder and other serious cases was banishment.¹⁷⁸ Similar to an indigenous African concept known as the "social death," banishment removed

167. *See id.* at 56.

168. *Id.*

169. *See* GARROW & DEER, *supra* note 157, at 44.

170. *Id.*

171. *See generally* *Ex parte* Kan-gi-shun-ca (otherwise known as "Crow Dog"), 109 U.S. 556 (1883).

172. *See* Hon. Gaylen L. Box, *Crow Dog: Tribal Sovereignty and Criminal Jurisdiction in Indian Country*, 50 *ADVOC.* 13, 15 (2007).

173. *See id.*

174. *See* SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 1 (1994) (noting that U.S. Supreme Court reversed Crow Dog's conviction because, at the time, the United States had no criminal jurisdiction over Indian tribes in "Indian country," and that the Sioux should administer their own law with respect to Crow Dog).

175. *Id.* at 1.

176. *See generally* *United States v. Crow Dog*, 3 *Dakota* 106 (1882) (published in abridged form at 14 *N.W.* 437).

177. *See Ex parte* Kan-gi-shun-ca, 109 U.S. at 572.

178. *See* Patrice H. Kunes, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 *N.M. L. REV.* 85, 110 (2007).

and ostracized the offender from the community.¹⁷⁹ Where there was an unintentional killing, one tribe, the Cherokee, allowed the offender to flee to a “sacred city of refuge” where they would be safe.¹⁸⁰

c. Navajo Justice Through Peacemaking Circles: Talking Circles, Sentencing Circles, and Healing Circles

The Navajo people (or Diné) are an indigenous people who live in what is now the Southwest United States. Traditional Navajo concepts of justice are rooted in the goal of healing. Central to obtaining healing is the Navajo concept of *hózhó*.¹⁸¹ The concept is not easily translated but is sometimes translated as harmony and balance.¹⁸² “Traditional Navajos understand *Diné bi beenahaz’áanii* as values, norms, customs, and traditions that are transmitted orally across generations and which produce and maintain desired relationships and desirable outcomes in Navajo society.”¹⁸³

Proper social relationships are critical to achieving *hózhó*. The Navajo have a complex system of kinship and clans, and requirements of kinship solidarity, or *k’è*.¹⁸⁴ According to Navajo jurist and scholar Raymond Austin, kinship is of the utmost importance to the Navajo, as clan relatives provide the essentials a Navajo needs for physical, mental, emotional, and spiritual well-being.¹⁸⁵ *K’è* includes taking personal responsibility for achieving harmony with equally valuable members of one’s family and clan, with whom each person is firmly linked.

The purpose of Navajo justice is to bring finality to the issues before them, correct the imbalances, and bring all parties back to *hózhó*.¹⁸⁶ Through “talking things out” with respect under the principles of *k’è*, the Navajo bring those in conflict into *hózhó*.¹⁸⁷

Modern Navajo “peacemaking” derives from traditional Navajo principles of Navajo justice and is premised upon participation by all those affected, including victims. According to Philmer Bluehouse and James W. Zion, “[T]he Navajo horizontal (peace planning) system of justice uses Navajo norms, values, moral principles, and emotions as law. *K’è* and *k’èi* are only two of these precepts. There are many others, which are expressed in Navajo creation and journey scripture, songs, ceremonies, and prayers.”¹⁸⁸

179. John O. Omale, *Justice in History: An Examination of ‘African Restorative Conditions’ and the Emerging ‘Restorative Justice’ Paradigm*, 2 AFR. J. CRIMINOLOGY & JUST. STUD. 33, 46 (2006).

180. GARROW & DEER, *supra* note 157, at 26.

181. RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 53-62 (2009).

182. *Id.* at 53.

183. *Id.* at 40.

184. *Id.* at 83.

185. *Id.* at 88.

186. See Office of Navajo Nation President & Vice-President v. Navajo Nation Council, No. SC-CV-01-10, 2010 Navajo Sup. LEXIS 15, at *16 (Navajo May 28, 2010).

187. *In re Mental Health Servs. for Bizard v. Navajo Nation*, No. SC-CV-55-02, 2004 Navajo Sup. LEXIS 20, at *5-6 (Navajo Nov. 9, 2004); see also *Atcitty v. Dist. Court for the Judicial Dist. of Window Rock*, No. SC-CV-25-96, 1996 Navajo Sup. LEXIS 8, at *7 (Navajo Oct. 16, 1996).

188. Philmer Bluehouse & James W. Zion, *Hozhoji Naat’aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327, 331 (1993).

One ceremony or ritual, in particular, that is important to peacemaking is the Blessingway Ceremony, which Navajos regard as an important backbone of their beliefs.¹⁸⁹ Among other uses, Navajo employ the Blessingway Ceremony to “avert misfortune, to invoke positive blessings that man needs for a long and happy life”¹⁹⁰ The ritual can last two days.¹⁹¹

The comprehensive peacemaking process is used to reach a consensus. Consensus of all of the participants is critical to resolution of the dispute, concern, or issue. With full voluntary participation (*t’áá altso athil ka’iijée’go*) and consensus, a resolution is reached with all participants giving their sacred word (*hazaad jidisingo*) that they will abide by the decision.¹⁹² The resolution (guided by *Diné be beenahaz’áanii*), in turn, is the basis for restoring harmony (*bee hózhónáhodoodleel*).¹⁹³ *Hózhó* is established if all who participated are committed to the agreement and consider it as the final agreement from which the parties can proceed to live in harmony again.¹⁹⁴ Finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement (*ná bináheezláago bee t’áá lahji atgha’deet’á*).¹⁹⁵

Navajo peacemaking operates within this belief system and worldview. In 1982, Navajo judges created the modern Navajo Nation Peacemaking program at a judicial conference, drawing heavily from traditional Navajo methods of dispute resolution for its programmatic elements.¹⁹⁶ Today, the Navajo Nation Courts provide several types of peacemaking. Traditional peacemaking, *hózhóji naat’aah*, is one such traditional service obtainable through the peacemaking program.¹⁹⁷

If a court order is sought for a dispute, peacemaking cannot be initiated. Such matters need to be first filed in court, and then referred to peacemaking by the court for all or part of the dispute. However, once the peacemaking process begins, the Navajo Judicial Branch can begin the process. Within the process itself, there are four types of participants in Navajo peacemaking: (1) the Peacemaker,¹⁹⁸ (2) the troubled individuals themselves, (3) the family members, workmates, friends, or others affected by the behavior of the troubled individual or knowledgeable about the chaos, and (4) the observers.¹⁹⁹

189. See Leland Clifton Wyman, *Navajo Ceremonial System*, in HANDBOOK OF NORTH AMERICAN INDIANS, SOUTHWEST 536, 540 (Alphonso Ortiz, ed., 1983).

190. *Id.* at 539.

191. *Id.*

192. PEACEMAKING PROGRAM OF THE JUDICIAL BRANCH OF THE NAVAJO NATION, PLAN OF OPERATIONS 2-3, (2012) <http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf> [<https://perma.cc/U5TZ-7E88>].

193. *Id.*

194. *Id.*

195. See *Navajo Nation v. Kelly*, No. SC-CR-04-05, 2006 Navajo Sup. LEXIS 14, at *10-11 (Navajo July 24, 2006).

196. PEACEMAKING PROGRAM OF THE JUDICIAL BRANCH OF THE NAVAJO NATION, *supra* note 191, at 2.

197. *Id.* at 4, 6.

198. Robert Yazzie, “Life Comes of It”: *Navajo Justice Concepts*, in NAVAJO NATION PEACEMAKING 42, 51 (Marianne O. Nielsen & James W. Zion eds., 2005).

199. PEACEMAKING PROGRAM OF THE JUDICIAL BRANCH OF THE NAVAJO NATION, *supra* note 191, at 1.

Traditional Navajo Peacemaking begins in a place of chaos, “*hóochxo’lanáhóót’i*,” with chaos existing in either one person or several. Because Navajo people typically avoid individual face-to-face confrontations, communal peacemaking provides a solution to this cultural difficulty; peacemaking allows people to air their grievances to each other and to the community.²⁰⁰ In this place of chaos, this environment of emotional and cultural difficulty, the Peacemaker uses his or her skills and fortitude to help the community confront the chaos and move towards restored relationships between the parties, among families, or within the clan. Engagement with the Peacemaker provides the sense of identity and pride reaped from Navajo historical and cultural foundations.²⁰¹

During engagement, the Peacemaker scolds, educates, persuades, implores, pleads, and cajoles the individual or group, pushing them towards openness, to listen, share, and make decisions together.²⁰² Through stories and teachings, with the help of elders, the Peacemaker dispenses wisdom in order to guide the person or group toward a restoration of relationships.²⁰³ Apologies and offering forgiveness are important elements of the peacemaking process. Resolving damaged feelings is the core material of peacemaking sessions, *hózhóji naat’aah*.²⁰⁴ Depending on the skill of the Peacemaker, *hózhó* may be short or may take several sessions.²⁰⁵

In murder cases, the Navajo Judicial Branch does not utilize formal peacemaking or subject individuals to the traditional restitution approach in similar fashion to the Crow Dog case discussed herein.²⁰⁶ Today, peacemaking is used by a vast array of indigenous peoples throughout the United States.²⁰⁷ In addition to peacemaking, three other types of restorative programs are common today among indigenous peoples in the United States: (1) talking circles, (2) sentencing circles, and (3) healing circles.

A talking circle involves individuals sitting in a circle, expressing themselves one after another.²⁰⁸ Talking circles require the participants to be active, give their attention, be focused, and to concentrate.²⁰⁹ Participants have equal status within the circle,²¹⁰ just as they are in Navajo peacemaking. Commonly, speakers take hold of a

200. *Id.* at 8.

201. *Id.* at 8-9.

202. *Id.* at 9.

203. *Id.*

204. *Id.*

205. *Id.*

206. See HARRING, *supra* note 174, at 1.

207. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 257-58 (1997) (“Peacemaking was known to have been practice among the indigenous people in the Pacific Northwest, the Plains, the Southeast, Alaska, and Hawaii.”).

208. Paulette Running Wolf & Julie A. Rickard, *Talking Circles: A Native American Approach to Experiential Learning*, 31 J. MULTICULTURAL COUNSELING & DEV. 39, 39 (2003).

209. See *id.* at 39 (“This method . . . encouraged members to be open to other viewpoints by listening with their heart while another individual speaks.”).

210. Indigenous Peacemaking Initiative, *Frequently Asked Questions About Peacemaking*, NATIVE AM. RTS. FUND, <https://peacemaking.narf.org/about-peacemaking/frequently-asked-questions-about-peacemaking/> [https://perma.cc/XYQ2-TXNV].

physical item, or a “talking piece,” then pass the item around the circle to the next speaker.²¹¹ The talking piece might be a feather or some other object that has either personal or cultural significance.²¹² When the talking piece is used, only the individual holding the talking piece is permitted to speak.²¹³ Historically, native cultures used talking circles as a way of bringing people together for the purposes of teaching, listening, and learning.²¹⁴ More recently, both tribal and non-tribal communities use talking circles as healing processes to address individual grievances.²¹⁵

A sentencing circle, on the other hand, is “a community-directed process, conducted in partnership with the criminal justice system, to develop consensus on an appropriate sentencing plan that addresses the concerns of all interested parties.”²¹⁶ A sentencing circle, which integrates tribal traditions and structure, occurs once someone has entered a guilty plea in an external court system.²¹⁷ The use of sentencing circles began in the Yukon in the early 1980s and is now being regularly used in Minnesota.²¹⁸

One type of peacemaking circle is the healing circle, which focuses on healing an individual, rather than resolving a dispute between two parties. Separate healing circles may be held for the victim and offender.²¹⁹ For the victim, a healing circle may be part of a larger circle process whereby both the victim and the offender meet face-to-face.²²⁰ However, if it is more appropriate and more constructive, the victim’s healing circle may be conducted independently from the offender’s circle.²²¹ Holding face-to-face or separate circles is therefore a matter of what achieves the most productive outcome in terms of individual wholeness.²²² Furthermore, in situations where the offender has not been identified or sentenced, a healing circle may be conducted because the focus on this process is to heal the victim of a crime.²²³ Notably, outside of indigenous communities, the restorative practices detailed here have been limited largely to non-serious and misdemeanor offenses.²²⁴

211. See Running Wolf & Rickard, *supra* note 208, at 40-41.

212. *Id.* at 40.

213. *Id.* at 41.

214. *Id.*

215. See Indigenous Peacemaking Initiative, *supra* note 209; Hon. Janine P. Geske & India McCause, *Neighborhoods Healed Through Restorative Justice*, 15 DISP. RESOL. MAG. 16, 16-18 (2008); see also Running Wolf & Rickard, *supra* note 208, at 39.

216. *Sentencing Circles*, NAT’L CRIM. JUST. REFERENCE SERV. (Dec. 5, 2007), <http://nij.gov/topics/courts/restorative-justice/promising-practices/Pages/sentencing-circles.aspx> [<https://perma.cc/7R7B-T9KL>].

217. *See id.*

218. Janelle Smith, *Peacemaking Circles: The “Original” Dispute Resolution of Aboriginal People Emerges as the “New” Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL’Y 329, 332, 346 (2003).

219. Indigenous Peacemaking Initiative, *supra* note 210.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. See Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1653 (2000) (“There are nearly as many felony as non-felony offenses referred to the program with burglaries, robberies, thefts and forgeries the most common. A number of murder, vehicular homicide, kidnapping and sexual assault cases have been handled as well.”).

d. The Cheyenne Tribe and Tribal Conferences

The Cheyenne also illustrate the reliance on restorative practices and dialogue in obtaining justice. The Cheyenne are an indigenous people living in the midwestern American plains, and part of the Algonquin group of tribes. After 1833, they were divided into a northern division in southeastern Montana and eastern Wyoming, and a southern division in western Oklahoma and eastern Colorado. The Cheyenne were a nomadic, semi-pastoral, hunting people.²²⁵

The Cheyenne were governed by an organization that consisted of two orders: the tribal chiefs comprising of a Council of Forty-four, and military (soldier) societies.²²⁶ Both groups participated in the process of deciding how cases were resolved.²²⁷

Homicide cases involving offenders from enemy tribes were handled differently by the Cheyenne than those involving Cheyenne offenders. For example, in the nineteenth century, the Cheyenne sought revenge for the murder of two brothers, the sons of Red Robe, by members of the enemy Crow Tribe.²²⁸ Many Cheyenne charged into the Crow camp, killing many Crows.²²⁹ Therefore, in some ways, conflict resolution involving non-Cheyenne people sometimes looks more like intertribal warfare than the individual criminal dispute resolution systems articulated above.

Llewellyn and Hoebel report that there were sixteen homicides from 1835 to 1879.²³⁰ When one Cheyenne murdered another, it was viewed as a sin that “bloodied the Sacred Arrows” and endangered the entire tribe.²³¹ The Cheyenne believed that after committing a murder, an offender began an internal disintegration which had a corresponding odor.²³² The tribe could purify itself by eliminating the taint through banishment of the murderer.²³³ Thus, while banishment had a punitive affect, the purpose for the Cheyenne was not to punish but to cure a wound suffered by the community.

After a murder, the tribal chiefs would convene a conference. A tribal council, or sometimes the military society, performed an investigative function.²³⁴ A decree of banishment followed. The banishment of a Cheyenne murderer, a severe punishment, was not permanent.²³⁵ Rather, banishment was an indeterminate sentence that could be commuted if certain conditions were met.²³⁶ In order for a commutation to occur, the sentenced must obtain consent from the council, the military agency, and

225. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE*, vii (1941).

226. *Id.* at 67.

227. *See id.* at 12.

228. *Id.* at 3-6.

229. *Id.* at 5.

230. *Id.* at 132.

231. *Id.* at 133.

232. *Id.* (“With murder a man began his internal corruption, a disintegration of his bodily self . . .”).

233. *Id.*

234. *Id.* at 136.

235. *Id.* at 137.

236. *Id.*

the father of the victim. An offering of tobacco as an expression of contrition was also common among the Cheyenne.²³⁷

The case of the murder of the Cheyenne Chief Eagle by Cries Yia Eya illustrates how an indeterminate murder sentence could be commuted. Sometime between 1860 and 1890, Cries Yia Eya killed Chief Eagle in what is referred to as a “whiskey brawl.”²³⁸ The chiefs banished Cries Yia Eya.²³⁹ One day, Cries Yia Eya returned to the exterior of the Cheyenne camp with bundles of tobacco, sending in word that he was “begging to come home.”²⁴⁰ The tobacco was intended for distribution among the tribe.

After a debate among the various soldier societies, one soldier announced that he believed the “stink” associated with a murderer had “blown from him.”²⁴¹ The soldiers were sent to attempt to persuade the father of Chief Eagle to allow Cries Yia Eya to return and to accept the tobacco.²⁴² Chief Eagle’s father agreed, so long as Cries Yia Eya vowed to conduct himself appropriately in the future.²⁴³ Accordingly, Cries Yia Eya was allowed to return.²⁴⁴

Even after being allowed to return to the community, murderers still suffered a level of ostracism. It is reported that they could never again touch their lips to the tobacco pipe of another man nor eat from their bowls.²⁴⁵ Pawnee, a Southern Cheyenne chief who behaved dishonorably in his youth commented, “You may run away, but your people will always remember.”²⁴⁶

The history of the resolution of murders among indigenous peoples reveals many common themes. For numerous indigenous groups, community participation by elders and leaders form an essential component. Dialogue between the families of offenders and the families of victims forms another commonality. For most groups, the restoration of social harmony stood as the ultimate goal.

IV. MOVING FORWARD: BORROWING INDIGENOUS CONCEPTS OF RESTORATIVE JUSTICE IN THE WAKE OF AMERICAN MASS SHOOTINGS

The indigenous dispute resolution practices discussed in the previous section are credited as an inspiration for a movement in Anglo-European courts toward two trends: modern-day restorative justice practices and therapeutic justice.²⁴⁷

237. *Id.* at 139.

238. *Id.* at 12.

239. *Id.*

240. *Id.*

241. *Id.* at 13.

242. *Id.*

243. *See id.* (“[The Chief Eagle said] ‘I shall listen to you. Let [Cries Yia Eya] return! But if that man comes back, I want never to hear his voice raised against another person.’”).

244. *Id.*

245. *See id.* at 85 (referring to the case of Little Wolf who killed Starving Elk: “To him the murderer’s stigma stuck . . . and because of it he could not touch his lip to the pipe with other men. . . . [H]e did not eat from other men’s bowls.”).

246. *Id.* at 9.

247. Bruce J. Winick & David B. Wexler, *Introduction* to JUDGING IN A THERAPEUTIC KEY 3, 3 (Bruce J. Winick & David B. Wexler eds., 2003) (acknowledging the roots of “problem solving courts” that address social, mental health, and other problems can be traced back to indigenous and tribal justice systems in present-day Australia, Canada, New Zealand, and the United States).

However, how influential has history been on the current restorative justice movement? A number of scholars have explored this question. John Braithwaite believes our contemporary restitution model is a historical anomaly: “Restorative justice has been the dominant model of criminal justice throughout most of human history for all of the world’s peoples.”²⁴⁸ Some scholars sing praises for restorative justice, lamenting our current reliance on a punitive system and considering it inferior. For example, Elmar G.M. Weitekamp writes, “forms of restorative justice, as we could find them in acephalous societies and especially early state societies, seem to be the better answer to the crime problem of today’s societies.”²⁴⁹

The academic community debates whether the historical record from which restorative justice proponents advance their arguments is entirely accurate.²⁵⁰ At least two scholars believe restorative justice scholars have wandered into a danger zone, employing historical arguments to create an “origin myth.”²⁵¹ One such scholar is Kathleen Daly, a criminologist and restorative justice advocate.²⁵² Daly criticizes what she views as superficial and selective historical accounts, claiming that these accounts give restorative justice history a “pre-modern past [that] is romantically (and selectively) invoked to justify a current justice practice.”²⁵³ Daly believes this intellectual dishonesty is mistaken and may ultimately harm the ultimate acceptance of restorative justice, an outcome she views unfavorably.²⁵⁴

Douglas Sylvester shares Daly’s concerns.²⁵⁵ He says restorative justice scholars are “intent on minimizing the role that punitive processes, such as the ‘blood feud’ played in ancient cultures.”²⁵⁶ Indeed, there are many examples in history of indigenous peoples throughout the world who resorted to the use of punitive measures, even death under certain circumstances.²⁵⁷ Sylvester unearthed the research of scholars such as Weitekamp and E. Adamson Hoebel, and Hoebel’s study, *The Law Of Primitive Man*.²⁵⁸ Sylvester compared their research to their conclusions. “As it turns out,” says Sylvester, “the restorative justice conclusion is either grossly overstated or flatly contradicted,” referring to Hoebel’s conclusions.²⁵⁹ Sylvester says the research of

248. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999).

249. Elmar G.M. Weitekamp, *The History of Restorative Justice*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 75, 75 (Bazemore & Walgrave eds., 1999).

250. See, e.g., Kathleen Daly, *Restorative Justice: The Real Story*, 4 PUNISHMENT & SOC’Y 55, 55 (2002) (“Advocates’ claims about restorative justice contain four myths. . . . I show that the *real story* of restorative justice differs greatly from advocates’ mythical *true story*.”) (emphasis original).

251. *Id.* at 62 (“[A]dvocates do not intend to write *authoritative histories* of justice. Rather, they are constructing origin myths about restorative justice.”) (emphasis original); see also Douglas Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471, 501 (2003).

252. Daly, *supra* note 250, at 79.

253. *Id.* at 63.

254. *Id.*

255. See generally Sylvester, *supra* note 251, at 501.

256. See *id.*

257. See *supra* note 156 and accompanying text.

258. E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* (1961).

259. Sylvester, *supra* note 251, at 501.

Hoebel and others, such as Laura Nader and Elaine Combs-Schilling,²⁶⁰ finds a restorative, victim-oriented, and restitution-based approach to be common historically, but the approach also permitted violence and even death to an offender who failed to pay the determined restitution.²⁶¹

Perhaps, then, the attempt to elevate restorative justice's historical link could well be fantasy. The fantasy is especially pernicious in law, as law promotes history as precedent for modern practice. "For lawyers," says Robert W. Gordon, "the past is primarily a source of authority—if we interpret it correctly, it will tell us how to conduct ourselves now."²⁶²

Nonetheless, today's therapeutic jurisprudence recognizes that courts can play an important role in solving the underlying problems common to offenders and their families. These courts are often called "problem solving courts," and they focus on problems like family dysfunction, addiction, delinquency, domestic violence, and mental health.²⁶³ In problem solving courts, it is no longer enough for courts to adjudicate facts and legal issues; their objective is to change future behavior and ensure the health and wellbeing of the community.²⁶⁴

Interest in restorative justice and therapeutic justice began to gain momentum in the 1970s and 1980s. The Navajo Nation in the United States created the Peacemaker Court in 1982.²⁶⁵ By the 1990s, restorative programs had spread to all Western countries with at least 700 in Europe and 300 in the United States.²⁶⁶ Today, there are three basic categories of restorative justice programs, depending on who runs the programs: (1) private community-based programs, (2) religious institution programs, and (3) criminal justice system programs.²⁶⁷

Thus, it makes good sense why both restorative justice and therapeutic justice have taken root today. The prevalence of gun violence in the United States, whether a rampage at a school or a concert, a gang-related drive by shooting, or a fatal domestic violence tragedy, have contributed to "a growing sense of personal danger, a drastic deterioration of community fabric which breeds fear, isolation, and estrangement from those who are different from us."²⁶⁸ Mass incarceration and the modern Western reliance on punishment lead many scholars, like Professor Mark Umbreit at

260. Laura Nader & Elaine Combs-Schilling, *Restitution in Cross-cultural Perspective*, in *RESTITUTION IN CRIMINAL JUSTICE* 27 (Joe Hudson & Burt Galaway eds., 1977).

261. Sylvester, *supra* note 251, at 501.

262. Robert W. Gordon, *Forward: The Arrival of Critical Historicism*, 49 *STAN. L. REV.* 1023, 1023 (1997).

263. Greg Berman & John Feinblatt, *Problem Solving Courts: A Brief Primer*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 73 (Bruce J. Winick & David B. Wexler eds., 2003).

264. *Id.* at 73.

265. Laurie A. Arsenault, *The Great Excavation: "Discovering" Navajo Tribal Peacemaking Within the Anglo-American Family System*, 15 *OHIO ST. J. ON DISP. RESOL.* 795, 800 (1999-2000).

266. Leena Kurki, *Incorporating Restorative and Community Justice into American Sentencing and Corrections*, in *SENTENCING CORRECTIONS: ISSUES FOR THE 21ST CENTURY* 4 (Sept. 1999).

267. Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?* 3 *APPALACHIAN J. L.* 1, 7 (2004).

268. MARK UMBREIT & MARILYN PETERSON ARMOUR, *RESTORATIVE JUSTICE DIALOGUE, AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE* 1 (2011).

the University of Minnesota, to conclude that punishment, alone, “seem[s] to have made little progress, if any, in solving the levels of crime and violence.”²⁶⁹

Accordingly, modern cases end up in restorative justice programs in a variety of ways. They can be sent to programs in lieu of, before, or following an arrest. They can be diverted to a program outside of the court system.²⁷⁰ Courts themselves may administer a restorative program and cases may be sent to a restorative program after a conviction but before sentencing.²⁷¹ Restorative programs might be part of sentencing procedures.²⁷²

Victim-Offender Mediation is the most well-developed and established type of restorative justice dialogue.²⁷³ The goal of Victim-Offender Mediation (sometimes called “Victim-Offender Reconciliation Programs, or VORP) is to hold offenders accountable for their conduct, while also providing for the possibility of assistance and compensation for victims.²⁷⁴ Victim-Offender Mediation gives interested victims the opportunity to meet with offenders and does so in a safe and structured environment.²⁷⁵ The process for Victim-Offender Mediation is that, typically, a victim and offender enter into direct mediation, a dialogue facilitated by one or possibly two mediator/facilitators.²⁷⁶ Occasionally, the dialogue takes place with the victim and offender in separate rooms, and the dialogue involves a third party who brings information from one party to the other, a process known as “shuttle” mediation.²⁷⁷ Today, there are more than 300 Victim-Offender Mediation programs in the United States.²⁷⁸

An example of a Victim-Offender Mediation program being used in felony cases is one implemented in 1991 in Des Moines, Iowa, in the Polk County Attorney’s Office, where they established a VORP.²⁷⁹ Since its inception, the program has conducted more than five thousand victim-offender mediations.²⁸⁰ This now includes as many felonies as non-felonies with many burglaries, robberies, thefts and forgeries included. Several murders, vehicular homicides, kidnappings, and sexual assaults have been handled at the Polk County Iowa VORP.²⁸¹

A. How Much of Indigenous Practices Can Be Borrowed?

While there are undoubtedly lessons to be gleaned from approaches among indigenous peoples to rampage shootings, caution is advised. A number of features of the

269. *Id.*

270. *Id.* at 122; see also Marianne O. Nielsen, *Navajo Nation Courts and Peacemaking*, in *NAVAJO NATION PEACEMAKING* 144-47 (Marianne O. Nielson & James W. Zion eds., 2005).

271. UMBREIT & ARMOUR, *supra* note 268, at 122.

272. Robert Yazzie & James Zion, “*Navajo Thinking: Peacemaking Planning and Policy*,” in *NAVAJO NATION PEACEMAKING* 194 (Marianne O. Nielson & James W. Zion eds., 2005).

273. UMBREIT & ARMOUR, *supra* note 268, at 111.

274. *Id.* at 112.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 118.

279. Gay, *supra* note 224, at 1653.

280. *Id.*

281. *Id.*

Red Lake Tribe and its “closed” reservation that distinguish it have been identified. Close knit family ties and the importance of clan systems of kinship in certain American Indian tribes have also been detailed here. The importance of Navajo values and their relationship to Navajo law has been outlined. The importance of familial relationships, and how they impact the Native American community aftermath of mass shootings in some Native American communities was summed up Kim Baker, a Red Lake Chippewa Indian woman who said this outside of Jeffrey Weise’s funeral: “He was a member of Red Lake and was somebody’s son, brother, uncle. And the way I look at it he still deserves some recognition from the community so he can’t be forgotten.”²⁸²

Deeply rooted spiritual beliefs and how they impact certain Native American practices and legal traditions have also been explained. The Anglo conceptions of forgiveness have been established as having their roots and influences in traditional western religious beliefs such as Judaism and Christianity. A number of examples of community responses outside of indigenous communities further suggest that religious and spiritual beliefs impact the willingness to forgive and heal in the wake of horrific criminal actions. Two such examples are the responses in 2006 of the Amish of Nickel Mines, Pennsylvania and the Parker family of Newtown, Connecticut in 2012.²⁸³

Indeed, prominent scholars urge proceeding with caution in adopting native practices to non-native courts. Carole E. Goldberg has noted the urge to import a number of American Indian tribal dispute resolution practices (including the invocation of tribal common law in court proceedings, referring disputes to elder panels, and peacemaking) as alternatives to the traditional Western-style Anglo courts.²⁸⁴ She referred to this urge as the potential for “over-extended borrowing.”²⁸⁵

Peacemaking, as discussed throughout this Article, is the most common indigenous dispute resolution method cited as a candidate for borrowing or appropriation. There are, no doubt, many existing obstacles for any non-indigenous culture that tries to adopt peacemaking.²⁸⁶ As Angela Riley points out, Navajo Nation peacemaking is “inherently ‘religious’ in that it draws on ceremony, prayer, ritual and the supernatural to restore balance, harmony and peace to the world.”²⁸⁷ The Navajo

282. Robertson & Scheck, *supra* note 92.

283. Jeff Benedict, *Witnessing Grief and Compassion in Newtown*, DESERET NEWS (Dec. 18, 2012, 12:40 PM), <https://www.deseretnews.com/article/765618130/Witnessing-grief-and-compassion-in-Newtown.html> [<https://perma.cc/B3QZ-TRVE>].

284. Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1011 (1997).

285. *Id.*; see also Robert V. Wolf, *Widening the Circle, Can Peacemaking Work Outside of Tribal Communities? A Guide for Planning*, CTR. FOR CT. INNOVATION, http://www.courtinnovation.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf [<https://perma.cc/G5DM-QK2W>].

286. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1097-99 (2007).

287. *Id.* at 1097; see also Howard L. Brown, *The Navajo Nation’s Peacemaker Division: An Integrated, Community Based Dispute Forum*, 24 AM. INDIAN L. REV. 297, 299 (2000) (describing how Navajo courts use traditions and customs to inform their jurisprudence).

Blessingway Ceremony cited earlier is one such traditional ceremony, or ritual, used to restore harmony.²⁸⁸

Adopting indigenous practices that have foundations in religious or spiritual beliefs to non-indigenous cultures may run afoul of what Joseph Kalt and Stephen Cornell call the “cultural match.”²⁸⁹ Further, the Establishment Clause of the First Amendment of the United States Constitution makes appropriation or borrowing of a strict Navajo-style peacemaking somewhat problematic.²⁹⁰

I do not suggest that Navajo-style peacemaking is the solution to the treatment of rampage shooters or their families. I do not hold out peacemaking or any other single indigenous practice as a roadmap toward forgiveness, reconciliation, and healing following heinous criminal offenses. Rather, I illuminate the dispute resolution practices that have existed among tribal people before adversarial Western Anglo vertical systems existed.

I suggest a role for filling an identified need among some victims of rampage murders and other heinous crimes. That need is for face-to-face, interpersonal encounters between victim and their families and offenders and their families. It is evident that there are practices of some indigenous cultures, historical and modern, along with modern select examples of non-indigenous peoples (such as the Amish) that have been more amenable to reconciliation.

This Article contrasts those examples to the examples of finger-pointing, blame-seeking and litigious conduct in non-indigenous cultures. It also highlights the practice among non-indigenous peoples of the treatment of family members of offenders as pseudo-accomplices, a practice not common to the aftermath of the two Native American tragedies studied. One cogent example of the contrasting aftermath is the resistance of non-indigenous communities to allow burial of rampage murderers in the community. In the Native American cultures studied (as well as that of the Amish of Nickel Mines, Pennsylvania), the offenders were buried and memorialized with dignity.²⁹¹

CONCLUSION: SOME FINAL THOUGHTS

The research outlined here leaves us with a number of important questions: Can face-to-face, interpersonal interactions between rampage murderers or their families and victims or their families result in reconciliation and greater healing in the days following rampage murders? Is there a role for government—be it the judiciary, the police, or other executive branch agencies—to play in facilitating or encouraging those interactions? Is there a role to play for non-governmental institutions?

288. Wyman, *supra* note 189.

289. Stephen Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't*, in JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS 7, 12, 16 (2006).

290. U.S. CONST. amend. I. The clause of the Amendment states, in relevant part: “Congress shall make no law respecting an establishment of religion”

291. See, DONALD KRAYBILL, STEVEN NOLT & DAVID L. WEAVER-ZERCHER, AMISH GRACE: HOW FORGIVENESS TRANSCENDED TRAGEDY 38 (2010).

A by-product of the adversarial system, particularly in the United States, is the wall of separation between offenders and their victims, who occasionally talk at each other in sentencing hearings in modern courtrooms, but hardly ever speak to one another. Another attribute we have detailed is that of “advised silence,” where attorneys advise their clients not to utter a word, because, as the standard issue *Miranda* rights card says, what they say “can and will” be used against their interests.²⁹²

Dialogue and interaction make possible understanding, confession, apology, forgiveness, and potentially reconciliation. Thus, in rampage murder cases, cracks in the wall of separation are appearing. The families of victims and offenders are seeking, on their own, interpersonal, face-to-face meetings with one another. The meetings are consistent with the research outlined here that says that forgiveness heals. Reconciliation can be encouraged and facilitated by mental health providers and counselling professionals who treat people harmed by rampage murders.

The rich history of dispute resolution among a sampling of indigenous peoples provides a tradition of “talking things out” and community involvement in a dialogue between families of offenders and victims. Restorative justice and therapeutic justice are in place, in a limited context, in court systems around the world. Thus, we have long passed the point where dispute resolution is the only legitimate function served by criminal courts.

There are several possibilities for how the healing process might be integrated into the modern criminal court system and still be consistent with American constitutional limitations.²⁹³ A detailed examination of how such a system would operate is fodder for future legal scholarship.

Following a rampage murder, what can be done to reverse the practice of society demonizing the parents and family members of rampage killers, and treating them as outcasts, social pariahs, and even pseudo-accomplices? Parents of rampage murderers often share in the suffering.

One of the lessons of the Red Lake and Tulalip tribes is that the treatment of parents and family members of mass murderers can be treated with respect and compassion. Parents of the mass murderer suffer the remainder of their own lives knowing the carnage their offspring reigned upon a community. Where the mass murderer dies, their parents also grieve. They too have a child to bury or a body to dispose of. Should they have to escape the community to conduct secret funerals or burials in the cloak of darkness?

292. *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

293. There are clear Constitutional impediments to integrating a fully mandatory and binding restorative justice program in the United States if participation is mandatory for the offender before adjudication of criminal charges or before the sentence is imposed. Mandatory offender participation at those stages is not permissible because it may violate a criminal defendant’s right not to be “compelled in any criminal case to be a witness against himself,” protected by the Fifth Amendment and extended to the states in the Fourteenth Amendment. U.S. CONST. amend. V, XIV; *see Kastigar v. United States*, 408 U.S. 441, 453 (1972). The constitutional privilege against self-incrimination, however, no longer exists once there is no longer a possibility of incrimination, thus opening up the possibility to offender participation once jeopardy no longer exists. *Mitchell v. United States*, 526 U.S. 314 (1999).

Can statutory definitions of “victims” be changed to encompass a broader range of those people profoundly affected by rampage murders? Should statutory or regulatory barriers to awarding governmental “victim” compensation for mental health treatment for family members of offenders, family members of victims, or of first responders be reconsidered? The example of the response to the tragedy at Red Lake is the opening salvo for such an examination. Unless they themselves were killed or injured in the attack, family members of the rampage murderer do not meet traditional statutory definitions of a crime victim. They are excluded. When they are not direct victims but suffer, nonetheless, their compensation would require amending legal definitions of what constitutes a victim.²⁹⁴

Merriam Webster defines “victim” as “one that is acted on and usually adversely affected by a force or agent.”²⁹⁵ The family members of the mass murderer, family members of those murdered, and the first responders are “sufferers,” or “casualties,” of the tragedy. First responders bear the wounds of the horrors they experience upon entering and processing a rampage murder scene. Try to imagine the trauma suffered by the police officers and emergency medical technicians responding to the war-like scenes at Columbine or Newtown. If Peter Lanza, for example, could not have afforded mental health treatment to process the implications of the pain and suffering his son caused, should society have refused to assist him? Peter Lanza, too, is a grieving father.

Several possibilities are explored here for integrating the healing process into the modern criminal court system, while still being consistent with American constitutional limitations. Suggested are examples for how, following a rampage murder, steps can be taken to reverse the practice of society demonizing the parents and family members of rampage killers, and treating them as outcasts, social pariahs, and even pseudo-accomplices. Parents of rampage murderers often share in the suffering. The recommendations made for mass murders equally apply to all serious crimes where physical and emotional wounds are inflicted.

The monumental and enduring task of figuring out how to end a seemingly endless repetition of the gruesome shedding of innocent blood is a steep and rugged mountain to climb. Substantial challenges persist to eradicating them where conflicting attitudes exist toward regulation of guns within a constitutionally permissible framework. Add in the problems of near epidemic proportions facing (almost exclusively) men, and mostly young men, of depression, suicide, mental illness, legal and illegal substance abuse, and the challenges approach the insurmountable.

I leave for others and another day facing those challenges head-on, figuring out how to make workplaces and schools safe again, restoring serenity to houses of

294. Under most victim compensation statutes, a victim of violent crime may be compensated for pecuniary losses. *But see, e.g., In re Application of Drake*, 47 Ill. Ct. Cl. 563, 575 (1993) (denying mother of victim surviving a violent crime certain forms of restitution because violent crimes statute does not include relatives as victims). Recovery under a state fund is limited to those crime victims who can prove that they have suffered actual out-of-pocket loss for which they will not be compensated from any other source.

295. *Victim*, MERRIAM-WEBSTER DICTIONARY ONLINE (2018), <https://www.merriam-webster.com/dictionary/victim> [https://perma.cc/6YQ6-YNW7].

worship, or any of the modern-day places people congregate. I do so not out of a lack of interest, but because what is explored here is something different and something that receives scarce attention elsewhere.

Jeremy Richman, the father of six-year-old Avielle Richman, murdered by Adam Lanza at the Sandy Hook Elementary School, said this:

[W]e would often hear people say, I can't imagine what you're going through. I can't imagine how hard it must be. I can't imagine losing your child. And while we appreciated the sentiment, the fact was that they were imagining it. They were putting themselves into our shoes, for at least a second. And as hard and as horrible as it sounds, we need people to imagine what it is like. We need to empathize with each other, to walk a mile in each other's shoes. Without that imagination, we'll never change.²⁹⁶

Richman is right. We can only imagine the excruciating pain when innocent children, parents, or siblings are gunned down. Just as forgiveness is complex, so is any rational construction of the correct approach to the aftermath of rampage murders. The empathy suggested by Avielle Richman's father is not exclusive to the parents of an innocent child murdered. It is all encompassing. The pain radiates deeply and impacts many. Empathy should be without limits.

The range of emotions that exist after the murder of a family member, from profound rage to irreconcilable sadness, have existed throughout the human experience. Much has changed, though, in modern society regarding social complexity and dispute resolution. The adversarial system replaced existing systems in the Native American and other indigenous communities, which were characterized by greater community participation and greater family interaction leading toward the resolution of brutal crimes.

Sadly, we know there will be another horrific, painful rampage shooting. When there is, rather than responding in haste and hatred, perhaps a page can be torn from history and given a fresh understanding.

296. FINAL REPORT OF THE SANDY HOOK ADVISORY COMMISSION (2015), http://www.shac.ct.gov/SHAC_Final_Report_3-6-2015.pdf [<https://perma.cc/6AV8-4YWU>].