DESIGNING A PRISONER REENTRY SYSTEM HARDWIRED TO MANAGE DISPUTES

INTRODUCTION: THE REENTRY PROBLEM

What goes in must come out. Although life and death sentences receive the most press,[1] most federal inmates serve a finite prison sentence. When their time is up, they return to their communities, most to the same problems that led them to commit crime in the first place.[2] Approximately six out of ten prisoners released from prison this year will be rearrested within two years.[3] Although recidivism is not a new problem,[4] in the last ten years criminal justice reformers have become increasingly committed to reducing this number.[5] One recently developed method to reduce recidivism is the reentry court, a model that purports to provide released prisoners with the skills and support necessary to reintegrate into the community and overcome the obstacles that have led them to commit crime in the past.[6]

The United States desperately needs a system to manage the dispute-ridden process of successfully reintegrating prisoners into society. Reentry courts are not the first dispute resolution system designed to reform convicts or reduce recidivism. For most of the twentieth century, the primary purpose of prison was to treat and rehabilitate inmates.[7] The rehabilitative ideal stood on solid ground for decades, but it went from revered to reviled in only a few short years.[8] For this reason, any effective system must be able to correct the mistakes of the

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[1] *See, e.g.*, Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1; Katie Zezima, *Jury Issues First Death Sentence in New Hampshire Since the 1950s*, N.Y. TIMES, Dec. 19, 2008, at A29.

[2] *See* Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity To Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 259, 288–90 (2009).

[3] Laura Knollenberg & Valerie A. Martin, *Community Reentry Following Prison: A Process Evaluation of the Accelerated Community Entry Program*, FED. PROBATION, Sept. 2008, at 54, 55; *cf.* Lyles-Chockley, *supra* note 2, at 261.

[4] Scholars have bemoaned the recidivism problem since the early twentieth century. *See, e.g.*, Simeon E. Baldwin, *The Fundamental Principles of Criminal Justice*, 22 YALE L.J. 30, 32 (1912); Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 456 (1928).

[5] *See* Melissa Alexander & Scott VanBenschoten, *The Evolution of Supervision in the Federal Probation System*, FED. PROBATION, Sept. 2008, at 15, 15.

[6] *See* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, REENTRY COURTS: MANAGING THE TRANSITION FROM PRISON TO COMMUNITY 2 (1999), *available at* http://www.ncjrs.gov/pdffiles1/ojp/sl000389.pdf.

[7] *See* David E. Johnson, Note, *Justice for All: Analyzing* Blakely *Retroactivity and Ensuring Just Sentences in Pre-*Blakely *Convictions*, 66 OHIO ST. L.J. 875, 880 (2005).

[8] *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1173 (2009); *see also* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 7 (1981).

past in a sustainable way. This Note argues that scholars and practitioners of dispute systems design (DSD) have articulated several important criteria for designing such a system: any successful reentry system must involve stakeholders, operate when the timing is right, and incorporate a process for revisiting and reevaluating itself.

This Note proceeds in four parts. Part I identifies three DSD principles that apply to the criminal justice system. Part II examines past attempts to reintegrate prisoners into society through rehabilitation and argues that the three identified DSD principles explain rehabilitation's downfall in the 1970s. Part III lays out the current attempts to battle the reentry problem through supervised release and reentry courts and argues that, while the current attempts do a better job of incorporating the three principles, there is still room for improvement. Part IV examines these principles in greater detail and suggests ways in which a new reentry system could better incorporate each principle.

I. THREE PRINCIPLES FOR AN EFFECTIVE REENTRY SYSTEM

Dispute systems design is an offshoot of alternative dispute resolution scholarship that approaches dispute resolution in a systematic manner and seeks to design systems that allow institutions to manage effectively not just one dispute, but every dispute.[9] Criminal justice reformers should recognize that DSD can provide enormous insight into the process of creating a system to resolve the reentry problem. Reentry involves a series of disputes: prisoners and other actors disagree about appropriate conduct after release, appropriate punishment for misconduct, and what assistance should be provided to the prisoner to help him reform. For example: A releasee leaves his halfway house early because he is tired of the restriction on his movement and wants to see his wife; the probation officer brings him before the judge, who revokes his supervised release and sends him back to prison. He gets out and returns to supervised release. He is now angry at his probation officer and the judge; he has lost any remaining belief in a system that would impose what he feels was such a harsh punishment for such a small infraction; and he is not one step closer to more freedom of movement or more time with his wife. Consider another example: A second prisoner leaves prison with no job skills and no place to live. He goes to live with his cousin who is still running

[9] *See, e.g.*, CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS 44 (1996). *See generally* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED (PON Books 1993) (1988); Khalil Z. Shariff, *Designing Institutions To Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133 (2003).

drugs, and even though he wants to stay out of trouble, the temptation to reoffend is too great and he eventually gets rearrested for possession. The probation officer brings him before the judge, and he is sent back to prison. He gets out, and the cycle begins again.

There must be a better way to resolve these disputes. The first releasee could have spoken to his probation officer before he left the halfway house and explained his interests in freedom of movement and in seeing his wife. The releasee and the officer could have negotiated a solution that served the officer's interest in monitoring the releasee to ensure that he did not go back to his former life of crime, but also allowed him to spend time with his wife.[10] Similarly, the probation officer could have helped the second releasee find a free place to live away from temptation, like a halfway house, before he started his downward spiral. The prosecutor could have called a friend willing to hire the releasee for a low-skill job and a community organization could have provided free job-skills training. According to prevailing negotiation and dispute resolution theory, these outcomes would have been better, less costly resolutions to the conflicts.[11] But those are just two examples out of the multitude of conflicts that might occur throughout the reentry process. DSD approaches disputes from a macro level, providing guidance on how to create a system that will manage each dispute in an optimal manner as it arises.

DSD literature suggests three principles that designers should use to create a reentry system hardwired to resolve disputes. First, the reentry system should include all stakeholders in the process.[12] The involvement of all relevant parties (1) allows all relevant parties to express their interests, a vital step toward producing trades that create value,[13] and (2) lends the system legitimacy because the stakeholders gain a sense of ownership in the process and its outcome.[14]

Second, the reentry system should allow for dispute resolution when the timing is right:[15]

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[10] Some, if not many, probation officers currently encourage this type of discussion and use problem-solving methods to approach disputes. However, this Note is about embedding this type of exchange into the system so that it will occur more often than not, regardless of the background and beliefs of the probation officer.

[11] *See, e.g.*, ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Penguin Books 2d ed. 1991) (1981).

[12] *See* Shariff, *supra* note 9, at 143–44.

[13] For an extensive discussion of interest-based negotiation and value-creating trades, see generally FISHER ET AL., *supra* note 11; and ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING (2000).

[14] *See* COSTANTINO & MERCHANT, *supra* note 9, at 49 ("If *you* build it, [stakeholders] may or may not use it. On the other hand, if *they* build it, they will use it, refine it, tell their friends about it, and make it their own.").

[15] *See generally* I. William Zartman, *Timing and Ripeness*, *in* THE NEGOTIATOR'S FIELDBOOK 143 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

> Parties resolve their conflict only when they are ready to do so — when alternative, usually unilateral, means of achieving a satisfactory result are blocked and the parties feel that they are in an uncomfortable and costly predicament. [During that ripe period], they grab onto proposals that usually have been in the air for a long time and that only now appear attractive.[16]

Professor I. William Zartman argues that this period often happens during a "mutually hurting stalemate," which occurs when parties realize they are "locked in a conflict from which they cannot escalate to victory and this deadlock is painful to both of them (although not necessarily in equal degree or for the same reasons), [so] they seek an alternative policy or way out."[17] Thus, a mutually hurting stalemate has two components: (1) pain, such that each party believes that the continued course cannot lead to victory; and (2) a way out, "a sense that a negotiated solution is possible and that the other party shares that sense and the willingness to search [for that solution]."[18]

Third, the reentry system should incorporate a process for revisiting and reevaluating the system.[19] To be sustainable, a system must be able to adapt over time as new information is revealed, new opportunities are presented, cultures shift, and methods lose effectiveness. The techniques that are effective today may not be when implemented in exactly the same way ten years from now. Building a system "with the knowledge that opportunities will exist to correct failures, respond to uncertainties, and incorporate experience may also create a willingness among parties to try solutions that otherwise would be too risky."[20] A system based on these principles will correct for the problems of the past and allow for a sustainable future.

II. PAST SOLUTIONS: PAROLE AND THE REHABILITATIVE IDEAL

In 1949, Justice Black spoke of the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."[21] He stressed that "[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[22] Throughout most of American history, the primary means of managing

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[16] I. William Zartman, *The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments*, *in* CONTEMPORARY PEACEMAKING 19, 19 (John Darby & Roger Mac Ginty eds., 1st ed. 2003).

[17] *Id.*

[18] *Id.* at 20.

[19] *See* Shariff, *supra* note 9, at 154.

[20] *Id.* at 155.

[21] Williams v. New York, 337 U.S. 241, 247 (1949) (citing People v. Johnson, 169 N.E. 619, 621 (N.Y. 1930)).

[22] *Id.* at 248.

a prisoner's reentry into society was rehabilitation during imprisonment. "[T]he rehabilitative ideal [wa]s the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders . . . ."[23] Central was the premise "that an offense is merely symptomatic of an inner need or conflict . . . and that it is the responsibility of the criminal justice system to treat, to correct, and to rehabilitate the offender."[24] This ideal manifested itself in several ways. After conviction, judges sentenced criminals to indeterminate sentences.[25] In prison, therapists used a host of treatments on the prisoners, attempting to cure the diseases that made them commit crime.[26] Treatments differed depending on the scientific trend of the time. At various points in history, prisons used solitary confinement, hydrotherapy, and aversion therapy to reform prisoners.[27] When members of a parole board determined that a prisoner had been cured and was fully rehabilitated, they released him from prison on parole.[28] And if the prisoner committed another crime, he was sent back to prison to resume rehabilitation.[29]

Today, rehabilitative goals are strikingly absent from both the federal sentencing guidelines and state sentencing measures,[30] as a result of a radical change during the 1970s wherein rehabilitation went from common to condemned. The following sections explore the factors that led to this fall and how the three aforementioned principles of DSD could have prevented it.

A. The Rehabilitative Ideal Failed To Follow Three Principles of DSD

The rehabilitative prison system was not sustainable because it did not follow three core principles of DSD. First, the prison system did not involve all stakeholders. Treatment professionals and prison personnel made decisions about treatment methods; the prisoner, court,

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[23] ALLEN, *supra* note 8, at 2.

[24] FREDERICK A. HUSSEY & DAVID E. DUFFEE, PROBATION, PAROLE, AND COMMUNITY FIELD SERVICES 111 (1980).

[25] *Id.*; *see also* HOWARD ABADINSKY, PROBATION AND PAROLE 152–57 (3d ed. 1987).

[26] *See* ABADINSKY, *supra* note 25, at 149; HUSSEY & DUFFEE, *supra* note 24, at 111.

[27] ALLEN, *supra* note 8, at 3, 47, 51–52; *see also* David J. Rothman, *Perfecting the Prison*, *in* THE OXFORD HISTORY OF THE PRISON 111, 121–22 (Norval Morris & David J. Rothman eds., 1995).

[28] ABADINSKY, *supra* note 25, at 149, 152.

[29] *Id.* at 149, 200–15.

[30] *See* 28 U.S.C. § 994(k) (2006) (forbidding the U.S. Sentencing Guidelines from requiring "a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment"); Johnson, *supra* note 7, at 880 & n.27. *But see* Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951 (2006) (arguing in the juvenile context that rehabilitation never went away, but just went underground, leading to the rise of specialty courts).

and community had no input into the process.[31] The parole board made decisions about releasing the prisoner. While some stakeholders were likely able to provide information to the board, they were only privy to the information-collecting process, not the decisionmaking process.

Second, the prison system was not designed to operate only when the timing was right. No attempt was made to determine if the prisoner was desperate for change or even believed change was possible. Indeed, the treatments imposed on the prisoner were designed not to require consent.[32] Also, the system was not designed to convince the nonprisoner stakeholders that change was possible. Instead, the system required a general belief that humans could change. When societal conditions no longer supported this belief in human malleability, the system was unable to survive.

Third, the prison system did not incorporate an effective evaluation mechanism. Treatment providers were largely given a blank check and allowed to use whatever methods they thought best. Although such providers may have individually tracked the efficacy of their methods and come up with best practices, prisons did not have systematic procedures for evaluating progress toward providers' goals and adapting their actions in response to the data.

B. Resulting Critiques of the Rehabilitative Ideal

Because it lacked the aforementioned principles, the rehabilitative ideal was vulnerable to three critiques. The first was that it threatened the political goals of a democratic society. This critique was really a disagreement over the purposes of the prison system and took multiple forms. The radical leftists argued that rehabilitation was a form of social indoctrination by which the powerful rich repressed and controlled minorities and the lower class.[33] Involving community members in the reentry process could have addressed this argument by ensuring that not only the rich and powerful were setting goals and measuring progress.

Another group rejected the paternalistic and coercive nature of rehabilitation:

> When . . . the rehabilitative effort moves from the use of devices like those of traditional psychotherapy to . . . extreme therapies — psychosurgery, aversive conditioning, and certain other forms of behavioral modification

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[31] *Cf.* Edgardo Rotman, *The Failure of Reform*, *in* THE OXFORD HISTORY OF THE PRISON, *supra* note 27, at 169, 191 (noting that, at that time, courts did not have jurisdiction to interfere in the running of prisons).

[32] *Cf. id.* at 185 ("[T]he life of the inmate was controlled for the prisoner, giving him or her no chance for initiative or judgment.").

[33] *See* ANTHONY M. PLATT, THE CHILD SAVERS (1969).

> — the state employs rehabilitative techniques that typically impose feelings and perceptions on the subject that in a meaningful sense are not of his own making . . . .[34]

Although it is doubtful that any system instituted in a prison could be completely free of coercion,[35] the types of treatment in rehabilitative prisons neither required "a meaningful assent to the initiation" nor "a continuing consent and a continuing effort on the part of the subject, which [would have] ma[de] behavioral changes as they occur[red] his personal achievements."[36] Without this required voluntarism, the only checks on the state's power and methods were its benevolence and ability to determine what was best for an inmate without his input. The rehabilitative ideal could have addressed this critique by involving the prisoner in the design and operation of the reentry process. In this way, he would have had a chance to express his interests, brainstorm options, and opine on solutions to issues he was facing. Although he would not have had sole control over the actions he would have been required to take, his involvement would have been a far cry from the strict paternalism exhibited in rehabilitative-ideal treatments such as psychosurgery.

Other groups argued that the criminal justice system often imposed harsher punishments and "tortures" (for example, longer incarceration) in the name of rehabilitation than it would have in the name of retribution or punishment,[37] and that rehabilitation was not as important as deterring future criminals and incapacitating current offenders. Some critics held up public order as the ultimate concern and argued that rehabilitation did not and could not work. These critics argued that the justice system could accomplish only so many goals with limited prison dollars and that it should spend more money on taking criminals off the street than on attempting to cure lost souls. Involving all stakeholders in the process of designing the reentry system would have allowed them to agree on the goals for the system. A system that incorporated more than one purpose of punishment, such as the system of imprisonment followed by supervised release ex-

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[34] ALLEN, *supra* note 8, at 45; *see also* Rotman, *supra* note 31, at 191.

[35] The prison environment is fundamentally coercive. Even if prisoners are given a choice, that choice will be influenced by their beliefs regarding the imprisoners' reactions to each option. *Cf.* Anne Owers, *Submission to Vera Commission*, 22 WASH. U. J.L. & POL'Y 231 (2006) (suggesting that the mentally ill in prison do not receive proper care because prison is "essentially a coercive environment," *id.* at 237).

[36] ALLEN, *supra* note 8, at 46.

[37] "To the rehabilitationist, differences in penal treatment are not disparities so long as they reflect genuine therapeutic considerations: treatment is to be made commensurate with the criminal, not with his criminal act, and is to be distributed among offenders 'according to their needs.'" *Id.* at 73. For more information on punishments during the era of the rehabilitative ideal, see Rotman, *supra* note 31, at 184.

plained below in section III.A, would have been better able to address this critique.

A second critique was that the rehabilitative ideal had a "tendency in practical application to become debased and to serve other social ends far removed from and sometimes inconsistent with the reform of offenders."[38] For example, in 1870 the Cincinnati correctional congress established a *Declaration of Principles* for Elmira, an institution that was to be dedicated to the reform and rehabilitation of criminals.[39] "Within ten years . . . Elmira 'was just another prison.'"[40] Mental hospitals, juvenile facilities, and institutions for the poor have followed this same tendency toward perversion of purpose.[41] Professor Francis Allen catalogs two characteristics of rehabilitation that make it vulnerable to debasement. First, rehabilitation uses a language of "euphemism and obfuscation."[42] Once "the use of cattle prods on inmates become[s] 'aversion therapy' and the playing of a powerful fire hose on the backs of recalcitrant adolescents 'hydrotherapy,'"[43] it becomes easier and easier to justify extreme methods. Second, rehabilitation's goals and methods are exceedingly vague. Because rehabilitation is so flexible, rehabilitative goals can fall prey to the need for punitive or deterrent ends and budget constraints.[44] The rehabilitative ideal could have avoided the debasement problem by involving all stakeholders in the operation of the reentry system. If multiple people with multiple interests were deciding which actions should be taken and holding the actors accountable for their methods and results, one stakeholder would be less able to pervert the system and to use it for purposes for which it was not designed.

A final critique was that rehabilitation lacked a coherent methodology. Before the 1960s, "[t]he possibilities of malicious or even mistaken uses of power in rehabilitative programs were rarely adverted to, revealing a largely unquestioned reliance on the therapist's dedication

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[38] ALLEN, *supra* note 8, at 49; *see* Rothman, *supra* note 27, at 125.

[39] ALLEN, *supra* note 8, at 50; *see* ABADINSKY, *supra* note 25, at 145–46; HUSSEY & DUFFEE, *supra* note 24, at 72.

[40] ALLEN, *supra* note 8, at 50.

[41] *Id.*

[42] *Id.*; *see* Rothman, *supra* note 27, at 125 ("[T]he rhetoric of the reform program continued to cloak the prison with the mantle of legitimacy long after the reality of reform had disappeared.").

[43] ALLEN, *supra* note 8, at 51.

[44] *Id.* at 54 ("[G]iven the intensity of the punitive pressures, on the one hand, and the vagueness of rehabilitative criteria, on the other, the temptations to self-deception of correctional personnel in such cases must often prove irresistible. In many instances the latent function of rehabilitative theory is to camouflage punitive measures that might otherwise produce protest in the community." (footnote omitted)); Rotman, *supra* note 31, at 178–79 ("Despite the therapeutic pretense, prescriptions were in fact not very different from the old reformatory methods. Indeed, the therapeutic model of rehabilitation remained, during the first decades of the twentieth century, much more of a labeling than a curative instrument.").

to science and to his professionalism as sufficient guarantees against abuses of authority."[45] Critics believed that, despite decades of study and the constant search for better treatment methods, social scientists "d[id] not know how to prevent criminal recidivism through rehabilitative effort."[46] Therefore, critics argued that all attempts to do so were a waste of time and money that could be spent on other programs to promote safety and justice. This critique could have been avoided by incorporating an effective evaluation mechanism, which would have provided data on which methods were working and allowed the stakeholders to adapt the system accordingly.

C. The Fall of the Rehabilitative Ideal

The failure to follow the three identified principles made the rehabilitative prison system unsustainable when societal opinion changed. According to Allen, a culture receptive to the rehabilitative ideal generally has two characteristics: (1) a belief in the malleability of human nature and the ability of social institutions to effect change; and (2) a consensus on the values underlying rehabilitation and the goals of treatment.[47] He argues that, although these conditions persisted throughout most of the twentieth century, they disappeared during the 1960s and 70s.

People must believe that criminals can change their ways in order to justify spending resources on programs and treatments to rehabilitate them. Rehabilitation last rose to popularity during the antebellum period, a time of great reform and belief in the improvement of self and society.[48] However, this strong sense that a person could improve and change began to disappear over time.[49] By the 1970s, therapy strove to understand behavior, not to change it.[50] The lack of a focus on people's ability to change validated feelings of futility and resignation that were especially pronounced when directed outward toward others.

Along with a strong belief in the ability of man to change, the time period of the rehabilitative ideal evidenced an enormous faith in social

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[45] ALLEN, *supra* note 8, at 34.

[46] *Id.* at 57; *see* Rotman, *supra* note 31, at 178 ("[T]herapeutic failure reflected just how little was actually known about the origins of deviant behavior or about how to respond to it in therapeutic fashion.").

[47] ALLEN, *supra* note 8, at 11–12.

[48] *Id.* at 14–15; *see also* Rothman, *supra* note 27, at 116–17. *See generally* ANTE-BELLUM REFORM (David Brion Davis ed., 1967).

[49] *Cf.* Rothman, *supra* note 27, at 126 (stating that prison guards, wardens, legislators, and citizens became "cynical about the idea of reform" as time went on).

[50] *See* ALLEN, *supra* note 8, at 26. *See generally* Jeffrey Scott Brown, *Being Present, Owning the Past, and Growing into the Future: Temporality, Revelation and the Therapeutic Culture*, *in* THE RIVER OF HISTORY 173 (Peter Farrugia ed., 2005).

institutions.[51] Prisons, after all, were usually run by the government. In order to believe that the government is capable of administering therapy, one must believe that the government is both well-intentioned and effective. Both of these beliefs had been called into question by the mid-1970s.[52] Many felt that the government responsible for Watergate, the Vietnam War, and the brutal treatment of protesters in the 1960s could not be trusted to have the public's best interests in mind.[53] Indeed, during that time period many middle- and upper-class citizens, unused to police harassment, had become "the objects of criminal prosecution" for their social protests.[54] Those encounters led many social protesters to "see criminal justice as the interest of the stronger, as an exercise of social control devoid of moral authority."[55] As society lost confidence in the ability of people to change, it similarly lost confidence in the ability of social institutions to change people.[56]

Allen's second cultural argument is that rehabilitation requires a common value system or goal, which was no longer possible during the 1970s. In the late nineteenth and early twentieth centuries, society placed a strong emphasis on hard work and family.[57] During this time, rehabilitative treatment focused on recreating the family[58] and emphasized manual labor as therapeutic.[59] Since society shared a common view of the moral ideal, it was relatively easy to determine a prisoner's progress. In the "pluralistic society" of the early 1970s, however, it became harder to define the point at which a prisoner was re-

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[51] *See, e.g.*, HORACE MANN, TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS (Boston, 1849), *reprinted in* 4 LIFE AND WORKS OF HORACE MANN 222, 232–33 (George C. Mann ed., 2d ed. 1891) (expressing confidence in the public education system as the cure for most of the ills of society).

[52] *See* Rotman, *supra* note 31, at 194 (documenting "an anti-institutional movement in American society" during the mid-1960s).

[53] Many also feared the specific tools of rehabilitation. *See, e.g.*, ALLEN, *supra* note 8, at 24 ("One of the tendencies of the Vietnam era was to view the practice of psychiatry as a mode of social control.").

[54] *Id.* at 36.

[55] *Id.*

[56] A great example of the lack of faith in social institutions was the debate about the public education system, which many felt could not be expected to produce literate high school graduates. *See, e.g.*, Edward B. Fiske, *Controversy Is Growing over Basic Academic Competency of Students*, N.Y. TIMES, Apr. 19, 1978, at B4. *See generally* James Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7 (1968) (questioning the possibility and metric of educational equality).

[57] ALLEN, *supra* note 8, at 20 ("The primacy of the family in child rearing, and hence in the creation and preservation of societal values, was vigorously asserted and confidently defended in the antebellum United States."); *cf.* Rothman, *supra* note 27, at 116 (suggesting that during the period of 1820–1850, many blamed criminality on the lack of both parental guidance and a father's discipline).

[58] ALLEN, *supra* note 8, at 15.

[59] *See id.* at 37; Rothman, *supra* note 27, at 122.

habilitated.[60] In particular, that period saw a rising debate about what constituted criminal behavior worthy of punishment. Efforts to decriminalize such acts as private sexual behavior,[61] drug use,[62] and juvenile status offenses[63] "reflect[ed] not a search for consensus so much as a recognition of its absence."[64] A society that could not agree on what actions to criminalize had an equally hard time agreeing on the characteristics of a rehabilitated, functional member of society. Consequently, rehabilitative goals became increasingly vague. This result could have been mitigated, despite the 1970s' pluralistic nature, had the rehabilitative ideal involved all stakeholders and allowed them to iron out the goals for the prisoner together.

III. THE STATUS QUO: SUPERVISED RELEASE AND THE RISE OF THE REENTRY COURT MODEL

A. Supervised Release

After the indeterminate sentencing and parole that characterized the rehabilitative ideal disappeared,[65] the federal courts instituted a system of post-release observation called supervised release.[66] When a judge sentences a defendant to a prison term, he also sentences her to a term of supervised release to be served after her prison term ends.[67] In addition, her sentence includes a variety of conditions, some that the court must impose (for example, refraining from illegal drug use) and some specific to her situation (for example, residing in a halfway house), that she must abide by during her term of supervised release.[68] During this time, she must also check in periodically with her probation officer and avoid further legal trouble. If she is able to meet these criteria for the entire term of her supervised release, her engagement with the criminal justice system ends, and she is free to go on her

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60 ALLEN, *supra* note 8, at 29.

61 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

62 *See* Seth Davidson, Note, *Criminal Liability for Possession of Nonusable Amounts of Controlled Substances*, 77 COLUM. L. REV. 596, 596 n.1 (1977) (noting efforts to decriminalize possession of small quantities of drugs).

63 *See* Alan Sussman, *Judicial Control over Noncriminal Misbehavior*, 52 N.Y.U. L. REV. 1051 (1977).

64 ALLEN, *supra* note 8, at 29.

65 *See generally* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.) (establishing sentencing guidelines and a determinate sentencing system).

66 Knollenberg & Martin, *supra* note 3, at 54.

67 *See* 18 U.S.C. § 3583 (2006). For some offenses, a minimum term of supervised release is required by statute; for all others, the judge may impose a term of supervised release at his discretion, not to exceed certain maximums. *Id.* § 3583(a).

68 *See id.* § 3583(d).

way. If she does not meet these criteria, her probation officer can impose certain sanctions or bring her before the sentencing court so that the judge can impose sanctions. If she has violated one or more of her conditions, her supervised release can be revoked, and she can be sent back to prison[69] — not to resume her prior sentence, but to serve a separate sentence for violating the terms of supervised release.[70] When that second prison term is finished, she will usually return to supervised release[71] with the same, or often more restrictive, conditions.

Unlike the rehabilitative ideal, supervised release involves the prosecutor and the defense attorney in the reentry process. However, this system still leaves out many important stakeholders. It also fails to include an effective evaluation mechanism and to take proper timing into account. A better system would do all three.

B. The Rise of Reentry Courts

For most of its existence, supervised release focused on outputs: releasing prisoners into society and getting them through their supervision period without reoffending.[72] In 2002, a Federal Judicial Center conference for federal probation and pretrial services leaders created the Charter for Excellence,[73] which stated that "[w]e are outcome driven and strive to make our communities safer and to make a positive difference in the lives of those we serve."[74] This charter, along with recommendations from a 2004 assessment of the probation system, "fueled a momentum" toward changing the focus from outputs to outcomes. "No longer is federal probation simply interested in measuring traditional outputs, but instead it has made a firm commitment to become an outcome-driven agency where resources and energies are focused around achieving targeted goals of protection and recidivism reduction."[75] This commitment marks a significant shift to focusing on reducing recidivism even after the supervision period ends. Com-

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[69] The statute mandates revocation and a subsequent prison term upon a finding that a releasee has refused to comply with drug testing or been found in possession of a controlled substance or a firearm. *Id.* § 3583(g); Ryan M. Zenga, Note, *Retroactive Law or Punishment for a New Offense? — The Ex Post Facto Implications of Amending the Statutory Provisions Governing Violations of Supervised Release*, 19 W. NEW ENG. L. REV. 499, 499 (1997) ("If a defendant fails to abide by the mandated conditions, the court has several options, which include extending the term, modifying the conditions, or revoking supervised release and imposing another term of imprisonment.").

[70] 18 U.S.C. § 3583(e), (g).

[71] *Id.* § 3583(h).

[72] Alexander & VanBenschoten, *supra* note 5, at 15–16.

[73] *Id.* at 15.

[74] U.S. PROB. & PRETRIAL SERVS., CHARTER FOR EXCELLENCE (2002), *available at* http://www.uscourts.gov/fedprob/system/CharterHandout.pdf.

[75] Alexander & VanBenschoten, *supra* note 5, at 15.

bined with federal funding under the Second Chance Act of 2007,[76] these changes have led to the creation of the reentry court, a type of problem-solving court[77] designed "to facilitate reintegration of offenders into the community upon their release from correctional facilities" and to provide necessary services "to assist the participant in reentry into his or her community."[78]

While there is no single model for a reentry court, reentry courts tend to share six common characteristics: "(1) assessment and planning; (2) active oversight; (3) management of support services; (4) accountability to community; (5) graduated and parsimonious sanctions; and (6) rewards for success."[79] To oversee the progress of a small group of releasees, reentry courts use a variety of stakeholders, often including probation officers and judges, and sometimes including public defenders and prosecutors.[80] Each releasee has a personalized action plan that he must follow.[81] Periodically, the releasees come before the judge in either a formal or informal setting, where they explain their progress and receive acknowledgement from the judge.[82] The acknowledgement may consist of graduated sanctions or rewards.[83]

Although reentry models vary widely,[84] it may be beneficial to examine the inner workings of one example. The Western District of Michigan established the Accelerated Community Entry (ACE) program in 2005 to "increase the opportunity for success by significantly addressing the criminogenic factors related to recidivism in [released] offenders."[85] The program accepts participants that have a Risk Prediction Index score that indicates they are highly at-risk for recidi-

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[76] Pub. L. No. 110-199, 122 Stat. 657 (to be codified in scattered sections of 42 U.S.C.).

[77] For a general overview of the evolution of problem-solving courts, particularly drug courts, see Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417 (2009).

[78] Knollenberg & Martin, *supra* note 3, at 55.

[79] Claire McCaskill, *Next Steps in Breaking the Cycle of Reoffending: A Call for Reentry Courts*, 20 FED. SENT'G REP. 308, 309 (2008).

[80] *See* CHRISTINE LINDQUIST ET AL., REENTRY COURTS PROCESS EVALUATION (PHASE 1): FINAL REPORT 28, 34, 44 (2003), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/202472.pdf (describing the methods used by three state reentry courts).

[81] Reentry Policy Council, Announcement, Reentry Courts: An Emerging Trend (Sept. 20, 2005), http://reentrypolicy.org/announcements/reentry_courts_emerging_trend.

[82] *See Federal Problem Solving Courts (View from the Court)*, *in* U.S. SENTENCING COMM'N, SYMPOSIUM ON ALTERNATIVES TO INCARCERATION 181, 191–92 (2008) [hereinafter *View from the Court*], *available at* http://www.ussc.gov/SYMPO2008/Material/10_FINAL_FederalProbSolvCourts.pdf.

[83] *See* Reentry Policy Council, *supra* note 81.

[84] *Compare* LINDQUIST ET AL., *supra* note 80, at 28, 34, 44, *with* Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 130 (2007) (suggesting that many state and local reentry courts do not involve prosecutors and defense attorneys in the process).

[85] Knollenberg & Martin, *supra* note 3, at 56.

vism.[86] The ACE Team consists of "court personnel, government, defense counsel, and treatment providers."[87] The judge "makes final decisions on rewards and sanctions" for releasees' progress.[88] The probation officer informs the judge of the participants' conduct, "encourages the attendance of family" and other stakeholders at hearings, and makes recommendations for rewards and sanctions in line with ACE's mission.[89] Treatment providers inform the court and make recommendations regarding mental health and substance abuse treatment. Halfway house case managers inform the court of participants' conduct while at the halfway house and make recommendations regarding placement. Prosecutors ensure that "proper court procedures are maintained and assist[] in the presentation of evidence to the court when necessary."[90] And defense counsel ensure "that participants' rights are protected, represent[] participants effectively during modification or revocation hearings, and provide[] recommendations to the court" in participants' best interests.[91] The ACE Team meets with the participants in monthly hearings. Minor violations of conditions of supervision are reported orally at the hearing, while "[m]ore serious violations may be addressed in court prior to the ACE hearing if there is a significant danger to the community as a result of the offender's behavior."[92] Sanctions can range from modification of the conditions of supervised release to revocation and a new term of imprisonment.[93] For each successful month, participants earn a reward. After accumulating twelve rewards, a participant graduates during a ceremony "held during the monthly hearing."[94] After this final monthly hearing, the participant moves to traditional supervised release for an additional year.[95] If "this period of time [is] satisfactorily completed, a request for early termination of supervision is made by the probation officer."[96]

Reentry courts offer several benefits over supervised release. First, the collaboration of the usually adversarial players in the criminal justice system leverages their combined resources for services and sup-

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[86] *See id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* In addition to their conditions of supervised release, "[p]articipants are required to seek or maintain employment, attend drug and alcohol counseling, and obey the law." U.S. PROB. & PRETRIAL SERVS., W. DIST. OF MICH., ACCELERATED COMMUNITY ENTRY PROGRAM 1, http://www.miwd.uscourts.gov/PROBATION/ACE_Program/Brochure.pdf (last visited Jan. 31, 2010).

[93] Knollenberg & Martin, *supra* note 3, at 56.

[94] *Id.*

[95] *Id.* at 56–57; *see also* U.S. PROB. & PRETRIAL SERVS., *supra* note 92, at 1.

[96] Knollenberg & Martin, *supra* note 3, at 57.

port. Second, frequent interaction with the court allows releasees to have positive interactions with judges, authorities whom they usually see only when they are being punished. This frequent interaction also allows for immediate intervention when a participant begins to backslide. Finally, reentry courts have much more flexibility to intervene and adapt programs than do courts and probation officers in traditional supervised release. For example, it may be difficult for a probation officer who notices that a releasee is having difficulty staying drug-free in his home environment to send him to a halfway house or to connect him with some other program that may help him. The probation officer has very little enforcement authority beyond the conditions of supervised release, and resorting to the busy sentencing court may result in either no change or a revocation of supervised release, a much harsher sanction than is necessary. In a reentry court, however, all players are familiar with the particular successes and struggles of each releasee, and they can work together to impose an appropriate sanction or convince the releasee to change his environment on his own.[97] Notably, the releasee himself is not a player in this system.

Reentry courts are the closest the criminal justice system has come to a reentry system based on core DSD principles. As noted earlier, they often involve many of the stakeholders in the operation of the system. As exemplified by the ACE program, they also place a strong emphasis on evaluation and improvement. However, the next Part suggests several ways to improve reentry courts.

IV. IMPROVING ON THE STATUS QUO: DESIGNING A SUSTAINABLE SYSTEM TO MANAGE REENTRY DISPUTES

Although none of the past or present systems have fully utilized the three principles, reentry courts have come the closest. Given the difficulties in creating a system from scratch, this section uses reentry courts as the jumping-off point for reform.

A. Involving Stakeholders in the Design and Implementation of the System

A core concept of dispute resolution theory is that "resolving conflict in a truly sustainable way requires talking to each other in a fashion that reveals our mutual interests and allows us to find joint solutions to problems."[98] Consequently, in designing a system that is hardwired to resolve disputes, all relevant stakeholders must be in-

[97] *Cf. View from the Court*, *supra* note 82, at 192 (remarks of Judge Aiken).

[98] Shariff, *supra* note 9, at 143 (citing FISHER ET AL., *supra* note 11).

volved.[99] This Note identifies several stakeholders, but it is essential that any systems designer conduct an assessment to ensure that all stakeholders are taken into account.[100]

1. The Releasee. — The most easily identifiable stakeholder is also the most frequently overlooked: the prisoner. In the old era of the rehabilitative ideal, the prisoner had no say in how he was to be rehabilitated. This practice was one of the root causes of the political critiques, whose proponents feared that prisoners' autonomy suffered because they were coerced into participating in the rehabilitation to begin with and remained passive throughout, with major changes taking place in their lives and minds without their consent. Involving the prisoner in both designing and implementing the solution to the dispute assuages that concern to some extent. It ensures that his voice will be heard and his interests taken into account.[101] Also, having more than a token role in the dispute resolution process should legitimize the result of that process in his own mind.[102] These effects will be even stronger if he has a role not only in the development of the solution to the dispute, but also in the development of the system through which the solution is achieved.[103] It is therefore essential to

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[99] That is not to say that all parties must enjoy an equal say in the proceedings. Indeed, one of the struggles with designing dispute management systems in a criminal environment is that power differentials will never be remedied. The State, standing in the shoes of "society," will always have more power than the releasee, but giving the releasee a voice, even if it is a quiet one, can still yield benefits.

[100] For more on the importance of conducting an assessment prior to designing a dispute resolution system, see COSTANTINO & MERCHANT, *supra* note 9, at 96–97; URY ET AL., *supra* note 9, at 20, 40.

[101] *But see* Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85 (1996) (arguing that some people have "self-agency" problems, *id.* at 86 (internal quotation marks omitted), in that they are not well able to represent their own interests in negotiations). Releasees may be particularly susceptible to self-agency problems. One possible solution could be for an authorized agent, such as a public defender, to help the releasee articulate and advocate his own interests.

[102] The field of procedural justice argues that a person's perception of the fairness of a decision has more to do with the procedure by which the decision was made than with the decision itself. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 1 (1988). Input during the decisionmaking process is a component of procedural justice. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2d ed. 2006); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 492 (2008).

[103] *See* Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 907 (2002) ("It is not surprising that one's presence at, or absence from, the negotiating table at which dispute system design choices are made should have an impact on the resulting program."); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 464 (2007) ("One of the most effective ways to increase a disputant's satisfaction with a dispute resolution process is to permit the disputant to have some say in how the process will unfold.").

involve releasees in both developing a reentry system and implementing that system.[104]

Reentry courts have taken an important step in creating more access to the court and allowing releasees to be present during the intermediate decisionmaking process.[105] However, reentry courts have not taken the necessary further step of making the releasee a part of the team. Although he is an observer and can report his actions to the team, he is only a participant in the information-collection process, not in the decisionmaking. A more effective system would allow the releasee not just a seat in the room, but one at the collaboration table. Designers should also be careful to involve the releasee in the process of designing this system. Involvement can be achieved by making the releasee a full member of the team, with all of the benefits and responsibilities this entails.[106]

2. The Community. — When a person is released from prison, he returns to his community, where he must find a place to live, obtain employment, and coexist with other community members. Also, if he commits another crime, it is likely to be in his own community. For this reason, the releasee's immediate community is also a stakeholder that must be represented in the reentry system. Reentry courts generally involve the community tangentially, through relationships with employers. Occasionally, an employer or the releasee's family members will attend court sessions for support and to learn about the process, but the community has no representative in the process itself. An improved system would ensure that at least one community member is present to air the community's interests.

3. The Government. — The government includes at least two stakeholders. The executive branch has many interests, including prosecuting crime, and is most often represented by the prosecutor. Although prosecutors can often be ideally suited to represent the executive branch's interests, there is a strong possibility for a principal-agent problem. A principal-agent problem occurs when an agent has interests that conflict or are in tension with those of his principal.[107] The prosecutor acts as the agent of the executive, but his interests are influenced by his personal beliefs on crime prevention and concerns about his personal career. In order to manage this tension between the

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[104] Involving each releasee directly in the design would require constant re-creation of the system, so the better way to give releasees input into the design is through representation. Since both current prisoners and successfully reformed convicts have something to add, both should be represented in the design process.

[105] *See View from the Court*, *supra* note 82, at 192 (remarks of Judge Aiken).

[106] A natural criticism of this suggestion is that the releasee might only make or vote for counterproductive suggestions. This is certainly possible, but the releasee will not be the only person making the decision and can be outvoted by other members of the team.

[107] *See* MNOOKIN ET AL., *supra* note 13, at 74–76.

prosecutor and executive, the designer should consider methods of monitoring the prosecutor's actions and holding him accountable.[108] To the extent that these problems would exist in a new system, they are already present in the current systems. The beauty of the collaborative process is that the prosecutor is not the main decisionmaker. His power is diluted by those of the rest of the stakeholders.[109]

A second government stakeholder is the judge.[110] The judge has always been involved in reentry through sentencing, but reentry courts have gone further, involving the judge throughout the entire reentry process. According to DSD, this is a positive change, but the reentry system must be careful not to give the judge too much control over decisions; all relevant stakeholders should have a say.

4. The Probation Officer. — If any stakeholder has a unique position in the reentry process, it is the probation (or sometimes parole) officer. Technically a representative of the government, the probation officer is also responsible for overseeing the day-to-day activities of the releasee. She is often the first person to intervene when a releasee is backsliding and the first to learn about a releasee's success. Of all the stakeholders, she will often be the most responsible for implementing the decisions of the reentry decisionmaker. She has invaluable insight on how strategies are actually executed and which ones are successful. For these reasons, it is essential that the probation officer be a part of the decisionmaking team, where she will be able to provide more insight than she could if she merely reported on the releasee's activities.

5. Treatment Providers. — A final group of stakeholders consists of the professionals who provide services during the reentry process. Composed of drug counselors, halfway house managers, and many others, this group deals with releasees' day-to-day problems. During the former era of the rehabilitative ideal, the therapists and counselors in this role had a lot of say in the determination of whether the prisoner was ready for parole. In the supervised release process, in contrast, this group has very little input and no decisionmaking power. The group's role in reentry courts is between the two extremes, with the treatment professionals reporting on the releasee's actions, challenges, and successes. A slightly better approach would involve them in advising on the releasee's placement.

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[108] For more strategies on dealing with the principal-agent tension, see *id.* at 76–91.

[109] Because their power becomes diluted, prosecutors are likely to resist a shift to a more collaborative process. It is only when the prosecutor realizes that he must let go of power in order to obtain a better solution that he will embrace the new system. That is why it is so important to place reentry systems first in communities desperate to reduce their recidivism rate. This issue is discussed in the next section.

[110] *See* Hallie Fader, *Designing the Forum To Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 HARV. NEGOT. L. REV. 481, 489–90 (2008).

B. Timing: Approaching a Mutually Hurting Stalemate

Because a mutually hurting stalemate can often drive parties to change their methods when nothing else can, any system that is hardwired to resolve disputes should include a mechanism for operating when parties are nearing one. A designer could incorporate this element in two ways: through the placement of systems and through the selection of participants.

1. Are Circumstances Right for the Nonreleasee Stakeholders? — First, the designer should only seek to introduce the system in communities that are desperate to change their recidivism rate, because powerful actors in the community have strong incentives to resist change. Using a collaborative process for making reentry decisions requires a shifting of power away from those who have had the primary responsibility for and control over reentry decisions in the past to those stakeholders who have not. Those who have historically been powerful — probation officers, prosecutors, and to some extent judges — are likely to resist this type of shift. That resistance could range from delaying or preventing the system change in the first place to following through on the letter of the change but not on its spirit, such as by allowing the releasee to "participate" in the process but ignoring all of his suggestions and contributions. As a result, the system will be less effective. After "testing" the new system awhile, the parties in power may decide to abandon it because it does not work — without ever actually giving the system a chance to succeed.

To avoid the resistance problem and to give systems the best opportunities for success, new reentry systems should be placed first in jurisdictions that are convinced their current methods cannot work and desperate to find something that will. Before they will give away part of their decisionmaking power, the parties in power at a placement site must perceive that the current methods are losing the battle against recidivism and that the problem is so critical that the parties are unwilling to surrender the fight. Only then will they truly buy in to the changes and embrace the collaborative process.

2. Are Circumstances Right for the Releasee? — Second, the system should only seek to include releasees who are desperate for help in restarting their lives.[111] In such an individualized process as reentry, it is not enough for circumstances to be right for most or many releasees. Instead, each individual releasee-participant must be desperate to change. To allow for this requirement, the system should be placed at a site where the nonreleasee parties are sufficiently suffering, then only select individual participants who are sufficiently suffering.

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[111] "Desperate" may mean that they believe they will recidivate without help or that they know they need help with other issues, including finding a job, obtaining housing, or getting sober.

Any reentry court model must include a method for selecting participants. The program in the Western District of Michigan determines eligibility based on risk of recidivism using the Federal Judicial Center's Risk Prediction Index. While riskiness is an important factor, a better system would also base eligibility on a releasee's motivation — or desperation — to change.[112] A possible reason that this factor is not currently considered is that it is hard to measure. Perhaps a reentry system could encourage self-selection of highly motivated releasees by removing extrinsic incentives, such as the possibility of a shortened period of supervision. A more straightforward, but more manipulable, method would be to examine the prisoner's words and actions: Has she already taken steps to change her life? Has she told friends, family, her probation officer, or other inmates that she wants to change? While not as easy to calculate as a number, this qualitative assessment has the potential to allocate limited resources to those who will benefit most.

3. Fostering the Sense that a Negotiated Solution Is Possible. — Finally, all parties must believe that they have a way out. Allen stresses the impact that the cultural environment had on the success and failure of the rehabilitative ideal.[113] A systems design approach also requires a conducive environment, but in a more specific sense: the stakeholders must believe that the releasee is malleable and that a collaborative reentry process can be effective. It is not enough that the stakeholders are hurting if the probation officer does not believe that the recidivism rate can get better, or the releasee does not believe that she can live a life without crime. The way out becomes clear as a party sees that its opponent is also hurting and looking for a better way.[114]

The nonreleasee stakeholders have plenty of reasons to believe that releasees are incapable of or unwilling to change.[115] To combat this problem, the parties should communicate with each other about their situations. For example, the designers could encourage the multiple stakeholders to talk to each other about the problems recidivism has created and the need for change. That way each nonreleasee party would see that all of the other parties are ready to come to a solution. Second, if a qualification method is chosen that involves collecting

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[112] This is not to say that a new reentry system could not benefit all releasees. A mutually hurting stalemate would be most important during the early years of the system. Eventually, as the new system became more established and many releasees successfully reentered society, more and more stakeholders would see the benefits of the system and choose it over the old methods. Since the stakeholders would believe in the system and be invested, they would be more likely to participate in good faith, and the system could accept participants who were not as desperate to change.

[113] *See supra* section II.C, pp. 1347–49.

[114] *See* Zartman, *supra* note 16, at 20; *cf. id.* at 25.

[115] *Cf. supra* section II.C, pp. 1347–49.

qualitative indicators of the releasee's willingness to change, reviewing that data should reassure the other stakeholders that the releasee is ready to collaborate.

The other issue — the releasee's belief that a collaborative solution is possible — seems more difficult. Even a releasee who is genuinely desperate for change may have a hard time believing that the criminal justice system wants to help instead of hurt her. One way to signal to the releasee that the other parties are willing to collaborate in good faith would be to show the releasee prior success cases and convince her that the stakeholders are repeat players in the reentry system, so they have an incentive to collaborate fairly.[116] If signaling is not possible, perhaps the stakeholders could draft an agreement to collaborate in good faith.[117] Then, if the releasee believed that one or more parties were breaching that agreement, she could petition a neutral third party for permission to leave the reentry program and return to supervised release, or to sanction the breaching party. The third party would have to be truly neutral (not, for example, a judge who was a party to the collaborative process) in order to lend a sense of legitimacy to the agreement. A third option would be for the reentry program to be terminable at will, so the releasee would have nothing to fear; if after entering the program she believed that the other parties were not trying to help her, she could simply exit the program and return to supervised release. Once both sides are desperate for change and believe that collaboration is a way out, sustainable dispute resolution is possible.

C. Sustainability: Revisiting and Reevaluating the System

Evaluation is important because it allows a system to "clarif[y] its goals and measure[] progress toward and achievement of those goals."[118] The former era of rehabilitation did not allow for true evaluation. Although it promised flexibility toward changing treatment methodologies, it was wedded to one political ideology: rehabilitation. As the culture shifted away from rehabilitation and toward valuing more retributive and deterrent policies, that system was unable to adapt. Reentry courts and supervised release are more politically adaptable because they bifurcate the punishment process. Since they

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[116] *Cf.* TOM SIEGFRIED, A BEAUTIFUL MATH 87–90 (2006) (suggesting that reputation for cooperation and "tit for tat" strategies can induce cooperation).

[117] *Cf.* CELESTE A. WALLANDER, MORTAL FRIENDS, BEST ENEMIES 95 (1999) (identifying a binding agreement with provisions for monitoring and enforcement as a strategy to overcome defection); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475 (2005) (proposing a system in which lawyers could sign an agreement to opt in to more stringent ethics standards before negotiating).

[118] COSTANTINO & MERCHANT, *supra* note 9, at 168.

operate after incarceration, these systems allow the public to pursue deterrence, retribution, incapacitation, or any other politically preferred purpose of punishment during incarceration, and rehabilitation afterward.

However, the supervised release program does not incorporate the type of evaluative process that is necessary for sustainability. The federal supervised release program was put into effect by Congress through the Sentencing Reform Act of 1984,[119] which did not include a provision for revisiting it. The only way to change that system is through the formal legislative process. In contrast, evaluation and gauging progress are core components of the reentry court model.[120] The reentry court model is also more flexible because its procedures and components are not law. An ideal, sustainable dispute resolution system should include provisions requiring constant collection of data to measure progress, frequent evaluation of progress toward goals, and periodic revisitation of those goals to ensure that they are still relevant and important.[121] In addition, these provisions should be specific. The designers should consider not only what outcomes and progress will be measured, but also what metric will be used. Finally, it is not enough to see a gap in progress and do nothing. The system must be designed such that the results of the evaluation will lead to meaningful improvements.

CONCLUSION

Americans desperately need a way to successfully reintegrate prisoners into their communities. A successful reentry program will not prevent all recidivism, but it is a chance to help those releasees who are ready to change and also to reduce both the recidivism and the overall-crime rates in the process. The development of a reentry court model is an admirable attempt at creating such a system, but history and the field of DSD suggest that involving all stakeholders, operating when all stakeholders are ready to change, and incorporating an evaluation mechanism would make the system more effective and sustainable. Although these improvements will not on their own halt recidivism in its tracks, they will help establish a system that has the potential to do so.

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[119] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[120] Knollenberg & Martin, *supra* note 3, at 55. For a process evaluation of the ACE program in the Western District of Michigan, see *id.* at 57–59.

[121] *See* COSTANTINO & MERCHANT, *supra* note 9, at 168–86 (laying out an evaluation cycle that consists of clarifying goals, determining methodology, establishing a baseline, implementing the system, charting progress, modifying the system, measuring the result, and reclarifying goals).