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RESTORATIVE JUSTICE: UPLIFTING HUMAN RIGHTS FOR THE MARGINALIZED, VULNERABLE, VICTIMIZED, AND THE UNITED STATES AS A WHOLE

by *Meghana Vodela**

“If our desire for justice is not rooted primarily in the pursuit of restoration, then reconciliation will be nearly impossible to achieve. It is precisely because grace is undeserved that makes it grace.”

—Jamie Arpin Ricci¹

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¹ Jamie Arpin-Ricci (@jamiearpinricci), TWITTER (Dec. 31, 2017, 5:30 PM), <https://twitter.com/jamiearpinricci/status/947595965292089344>. Jamie Arpin-Ricci is an “author, pastor, & community activist. He lives & serves at the intersection of faith, sexuality, & community renewal.” *Id.*

INTRODUCTION

It is no secret that the criminal justice system in the United States is in need of reformation. Retributive justice requires that an offender who breaks the law should receive a punishment proportional to the offense they committed.² This theory of punishment emerged in the United States rapidly during the 1970s and 1980s and has been the backbone of the criminal justice system.³ Although the goals of retributive justice purport to encourage deterrence and rehabilitation, these goals are often unmet. Retributive justice has created a judiciary system that struggles to effectively rehabilitate and facilitate successful re-entry for offenders into society in the United States.

The use of the retributive justice system has been coined the “punitive excess era.”⁴ This form of punishment continues to jeopardize fundamental human rights due to racial disparities in enforcement (by targeting Black, Hispanic, and Indigenous populations), the implementation of harsh sentencing, and also the criminalization of social issues such as homelessness, food insecurity, safety, and mental illness.⁵

This Article seeks to address the problems and issues that retributive justice disproportionately causes for ethnic minorities by neglecting the needs of those whose cultures are not aligned with individualistic ideologies modeled by most Eurocentric cultures. With such a lack of inclusivity in a nation as diverse as the United States, it is no surprise that retribution often results in judicial inequity.

² *Retributive Justice*, STAN. ENCYCLOPEDIA OF PHIL. (Jul. 31, 2020), <https://plato.stanford.edu/entries/justice-retributive/>.

³ See Daryl V. Atkinson, *A Revolution of Values in the U.S. Criminal Justice System*, CTR. FOR AM. PROGRESS (Feb. 27, 2018), <https://www.americanprogress.org/article/revolution-values-u-s-criminal-justice-system/>.

⁴ *Id.*

⁵ See Jeremy Travis & Bruce Western, *The Era of Punitive Excess*, BRENNAN CTR. FOR JUST. (Apr. 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess#:~:text=We%20call%20this%20new%20reality,and%20punishment%20has%20become%20a.>

Alternatively, restorative justice bases its principles on addressing the harm caused by crime in a holistic manner, emphasizing the needs of the offender, victim, and society as a whole.⁶ Since the impact of restorative justice is astonishingly more inclusive of the needs of all cultures, especially within communities of color, it is a more effective model of justice to provide fairness and equality for all. Additionally, its principles more effectively reflect what the criminal justice system should embody in the United States: equality, an appreciation for individuality, proportionality, consistency, fairness, and justice. The implementation of restorative justice is a solution to the inequities exacerbated by the retributive method, as its impact would curtail infractions upon human rights, as the retributive approach was even historically utilized to justify the genocide of the People of the First Nations, chattel slavery, the policing, targeting, and killing of enslaved individuals, Jim Crow, and the war on drugs.⁷ Restorative justice is clearly a more effective framework of justice in providing fairness and equality for all who are affected by crime and involved with the American justice system. The principles within this theory address the needs of communities of color, the indigent, the marginalized, and the vulnerable. The incorporation of restorative justice within the U.S. justice system will manifest a justice system that is deliberate in preserving human rights.

⁶ See *Restorative Justice Theory of Change*, RESTORATIVE JUST. NETWORK (2022), <https://restorativejustice.org/what-is-restorative-justice/restorative-justice-theory-of-change/>.

⁷ See James H. Sweet, *Slave Resistance*, NAT'L HUMAN. CTR., <http://nationalhumanitiescenter.org/tserve/freedom/1609-1865/essays/slaveresist.htm> (last visited May 13, 2022); Barbara Sherrod, *Restorative Practices Require Power Be Redistributed to Black and Brown Children*, JUV. JUST. EXCH. COMM'N (Apr. 10, 2019), <https://jjie.org/2019/04/10/restorative-practices-require-power-must-be-redistributed-to-black-brown-children/>.

I. BACKGROUND

Retributive justice adheres to the principle that an offender who breaks the law must receive a punishment that is proportional to their offense.⁸ While this theory emerged in the United States around the 1970s and 1980s, the history of retributive justice can be dated much further back in the history of humankind.⁹ During the beginning of all systems of law or “code,” retributive principles trumped all other notions of how rights and law should be enforced.¹⁰ This is the underlying foundation of the *lex talionis* or the principle of “eye for an eye,”¹¹ a well-known idiom that can be found in various forms in biblical texts and even in one of the oldest forms of written law, the Law of Twelve Tables which was drafted by a committee of Roman judges in 451–450 BCE.¹² This phrase exemplifies the foundation of retribution (also known as the punitive approach), which is the current model and theory from which the current U.S. criminal justice system finds its roots.¹³

German philosopher, Immanuel Kant, added to the discourse on retributive justice by noting in his book that “judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all

⁸ *Retributive Justice*, *supra* note 2.

⁹ See Daniel Small, *Too Much Justice: The United States' Pursuit of Retribution*, 41 WILLAMETTE UNIV. COLL. OF L. SOC. JUST. & EQUITY J. 48, 50–51 (2013).

¹⁰ *Id.*

¹¹ *Id.*

¹² See Exodus 21:24 (King James); see also *The Code of Hammurabi*, AVALON PROJECT, <https://avalon.law.yale.edu/ancient/hamframe.asp> (last visited May 13, 2022).

¹³ Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 34; see generally Small, *supra* note 7, at 50–51 (discussing the foundations of retribution).

cases be imposed on him only on the ground that he has committed a crime.”¹⁴ Kant believed that justice could only achieve justice if every guilty person was punished and that the legitimacy of law depends on law being used to service such justice. Kant was not alone in these beliefs. Cicero’s *De Legibus* (first century BCE) and Hegel’s *Elements of the Philosophy of Right* (1821) were also key pieces in literature that thoroughly advocated for retribution as a society’s main form of justice as well.¹⁵

The role that retributive justice played in the American legal system was further embraced as the punitive approach during the 1970s and 1980s when the President Lyndon B. Johnson led “War on Crime” era began due to the rise in economic distress, public concern regarding crime, and the perception of race within U.S. political institutions and culture during that time period.¹⁶ This movement was also supported and amplified by President Reagan, President Clinton (1994 Crime Bill), President Trump, and President Biden in their various political capacities.¹⁷

The values underlying retributive justice have evolved over time and can be interpreted in multiple ways, but according to the Stanford Encyclopedia of Philosophy, there are three principles that have been consistently held as the cornerstone of retribution:

- (1) that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a

¹⁴ See Immanuel Kant, *The Right of Punishing and Pardon-ing*, in *THE METAPHYSICS OF MORALS* (translated by W. Hastie, 2010), http://acad.depauw.edu/~jeremyanderson/old/120s05/120z_kant.html#:~:text=Juridical%20punishment%20can%20never%20be,inflicted%20has%20committed%20a%20crime.

¹⁵ See GEORGE WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 127 (translated by H.B. Nisbet, Cambridge Univ. Press 1991).

¹⁶ *Id.* at 105–07.

¹⁷ See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 307–32 (2017); Udi Ofer, *How 1994 Crime Bill Fed Mass Incarceration Crisis*, ACLU (June 4, 2019), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis>.

proportionate punishment;
(2) that it is intrinsically morally good—good without reference to any other goods that might arise—if some legitimate punisher gives them the punishment they deserve; and
(3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.¹⁸

However, this theory of justice is not only ineffective at deterring crime, but it also infringes upon human rights by often imposing harsh and unfair punishments upon offenders who are often victims of poverty, substance abuse disorders, or who struggle with mental health disorders.¹⁹ Furthermore, the punitive approach is modeled from a Eurocentric model of justice, a model that is not inclusive of the needs of all cultures. This model is tailored to suit societies that are based on individualistic cultures and values.²⁰ Those who embody individualistic values see themselves as independent, autonomous beings who are only “loosely connected to the groups of which they are a part.”²¹ The level of commitment they provide to others is generally incentivized by their perceived level of benefit. The priorities of one with individualistic values are their own primary concerns, needs, personal freedoms, and achievements.²² If there are competing interests between the group they belong to and their own individual needs, the individual’s needs will generally trump the needs of the group.²³ In other words, one who holds individualistic perspective will prioritize their own

¹⁸ *Retributive Justice*, *supra* note 2.

¹⁹ See William R. Kelly, *Why Punishment Doesn’t Reduce Crime*, *PSYCHOL. TODAY* (Apr. 25, 2018), <https://www.psychologytoday.com/us/blog/crime-and-punishment/201804/why-punishment-doesnt-reduce-crime>.

²⁰ See Yanyan Zhang et al., *A Cross-Cultural Study of Punishment Beliefs and Decisions*, 120 *PSYCHOL. REP.* 5 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/0033294116679654>.

²¹ HARRY C. TRIANDIS, *INDIVIDUALISM AND COLLECTIVISM* 2 (1995).

²² *Id.*

²³ *Id.*

needs over the needs of others, and is incentivized by consequences that affect their own personal gain. For these reasons, retribution is arguably more effective when addressing a crime committed by an individualist who is only deterred or understands the gravity of their mistakes when they are met with a consequence.

However, it is important to acknowledge that not all cultures are rooted in individualistic values. Many cultures in the world (especially those of color) are collectivist cultures which use restorative practices to uphold justice within their societies.²⁴ “Restorative practices can be traced back to the people of First Nations and Indigenous Africans [. . .] The Nguni people spend days in a circle speaking life into a person who has done harm until they are whole (without shame) again.”²⁵ Tribes such as the Nguni people believed that the remedy to harm was to heal all parties involved, including the offender.²⁶ A Nguni proverb, “Umuntu, ngumuntu, ngabantu,” is translated as “I am because we are and we are because I am.”²⁷

The principles of the Nguni tribe exemplify the contrast of collectivism to individualism, as collectivism follows a more utilitarian approach and prioritizes the interests of the group over the interests of one specific individual,²⁸ even when obligations to the group are not beneficial to the individual’s personal needs.²⁹ Norms, obligations, and duties to

groups are collectivists’ primary concerns, with high value placed on group solidarity.³⁰

There are three underlying principles of restorative justice: (1) repair: crime causes harm, and justice requires repairing that harm; (2) encounter: the best way to determine how to do that is to have the parties decide together; and (3) transformation: can cause fundamental changes in people, relationships, and communities.³¹

A justice system that is not tailored to serve all of its people will not be able to deliver equitable justice. The lack of consideration of the needs of a collectivist ideology is especially troublesome in a country as racially diverse as the United States. Not only does our criminal justice system disproportionately affect people of color—African Americans and Hispanics make up thirty-two percent of the U.S. population, while at the same time comprising fifty-six percent of the incarcerated population—but it does not effectively serve the population that it affects the most.³² Along with the fact white people are less likely to be incarcerated in the United States, “[B]lack and Hispanics are far more likely than [w]hites to be victims of violent and property crimes.”³³ This is troubling considering that the American justice system is rooted in punitive justice, a theory that is preferred by those who identify as white in the United States.³⁴

²⁴ See GEERT HOFSTEDÉ, *CULTURE AND ORGANIZATIONS: SOFTWARE OF THE MIND* 50–51 (1997); see generally Zhang et al., *supra* note 20.

²⁵ Sherrod, *supra* note 7.

²⁶ *Restorative Minds: An Overview*, MINN. DEP’T OF EDUC., https://education.mn.gov/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE089457&RevisionSelectionMethod=latestReleased&Rendition=primary (last visited May 13, 2022).

²⁷ *Id.*

²⁸ Charlotte Nickerson, *Understanding Collectivist Cultures*, SIMPLY PSYCH. (Sept. 22, 2021), www.simplypsychology.org/what-are-collectivistic-cultures.html.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*; *Three Core Elements of Restorative Justice*, RESTORATIVE JUST. NETWORK, <https://restorativejustice.org/what-is-restorative-justice/three-core-elements-of-restorative-justice/> (last visited May 13, 2022).

³² *Criminal Justice Fact Sheet*, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited May 13, 2022).

³³ Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, SENT’G PROJECT (Sep. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/> (emphasis in original).

³⁴ *Id.*

As Nazgol Ghandoosh found:

Whites are more punitive than [B]lacks and Hispanics even though they experience less crime. For example, while the majority of whites *supported* the death penalty for someone convicted of murder in 2013, half of Hispanics and a majority of [B]lacks *opposed* this punishment. Compared to [B]lacks, whites are also more likely to support the “three strikes and you’re out” laws, to describe the courts as not harsh enough, and endorse trying youth as adults.³⁵

Many communities of color globally embody collectivist and community-based cultures.³⁶ Societal values in collectivistic cultures are more concerned with how their actions affect other members of society than in individualistic cultures, and they value their progress based on how society is progressing as a whole.³⁷ Because retributive justice prioritizes punishing alleged offenders rather than rehabilitating them, retributive justice cannot effectively meet these needs of a collectivist culture, which promotes harmony and cohesion within a community rather than solely focusing on an individual.³⁸ The retributive approach tends to approach crime as if the harm only affects the individual victim.³⁹ This mentality is not shared by those who prioritize the needs of their community. In order for society to thrive, proper implementation of restorative justice requires one to reflect upon how they may inadvertently contribute to institutional and systemic

³⁵ *Id.* (emphasis in original).

³⁶ See TRIANDIS, *supra* note 21, at 2, 12, 28, 34–35, 43–44; see also HOFSTEDE, *supra* note 24, at 50–51; EDWARD C. STEWART & MILTON J. BENNETT, *AMERICAN CULTURAL PATTERNS: A CROSS-CULTURAL PERSPECTIVE* 94–96, 110, 133–38, 142–47 (1991) (for a brief discussion of individualism and individualists in the United States).

³⁷ *Id.*

³⁸ Austin Johnson, *Growing Together: Measuring Collective Empathy Through Restorative Justice* (2017) (M.S.W. dissertation, Cal. State Univ., Chico), https://csuchico-dspace.calstate.edu/bitstream/handle/10211.3/196375/Johnson_Spring2017_MastersProject.pdf?sequence=1.

³⁹ *Id.*

harms, even if it only begins by acknowledging how one’s privilege allows them to benefit from these forms of oppression.⁴⁰ For example, white and non-Black practitioners, lawmakers, and judges must acknowledge that white supremacy culture is embedded within the foundation of our justice system. Racism along with sexism, misogyny, misogynoir (anti-Black racist misogyny⁴¹), ableism, xenophobia, classicism, linguistic oppression, and curriculum violence continue to plague our justice system and will continue to do so until there is accountability and active efforts in dismantlement.⁴² Until these prejudices embedded within our legal system and culture are dismantled, retribution will continue to uphold the oppressive frameworks that are foundational to our judicial system and continue to harm our vulnerable populations.

However, another theory of justice more effectively grapples with the shortcomings related to punitive justice, along with more effectively meeting the needs of communities of color: the theory of restorative justice. Restorative justice is “a theory of justice that emphasizes repairing the harm caused by criminal behavior.”⁴³ Restorative justice incorporates the needs of all who were affected by a crime. It focuses on resolving the harm that results from a crime to the benefit of all parties, rather than solely emphasizing that a crime was committed and that the alleged criminal should be punished.⁴⁴ Through this philosophy, restorative justice can fill the gaps of need within communities of color.

By more effectively supporting an offender’s re-entry to society, reducing recidivism, addressing the needs of all who were harmed when a crime was committed, and acknowledging that crime cannot be simplified to a “one-size-fits-all” approach, restorative justice is

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Lesson 1: What Is Restorative Justice?*, CTR. JUST. & RECONCILIATION (2022), <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/#sthash.Xt1gHKpU.dpbs>.

⁴⁴ *Id.*

a more effective model of justice to provide fairness and equality for all cultures. The impact of restorative justice is much more inclusive of the needs of all cultures, especially those who identify as Black, Hispanic, and Indigenous, racial groups that are disproportionately affected by crime as both victims and mass incarceration. Hence its principles better reflect the type of values the criminal justice system should implement to uphold human rights in the United States.⁴⁵

II. RESTORATIVE JUSTICE ENCOURAGES REHABILITATION WHICH PROMOTES EFFECTIVE RE-ENTRY INTO SOCIETY AND DECREASES RATES OF RECIDIVISM

Studies have found that implementing practices that focus on rehabilitation rather than a harsh punishment have better long-term effects for an incarcerated person and the society in which they exist.⁴⁶ By giving a voice to the harm and focusing efforts on healing rather than making sure that a specific punishment fits the crime, an incarcerated person has a better chance of effective re-entry into society.⁴⁷ Offenders who are able to successfully participate in re-entry programs are able to effectively support themselves through legitimate employment opportunities. Stable employment for offenders creates a decrease in recidivism and an increase in public safety, which benefits society as a whole.⁴⁸ Since the restorative justice approach specifically focus on rehabilitating the offender, these principles have yielded success in recidivism reduction,

⁴⁵ See HOFSTEDE, *supra* note 24.

⁴⁶ *Id.*

⁴⁷ *Reentry Programs*, CHARLES KOCH INST. (Sep. 5, 2018), <https://charleskochinstitute.org/stories/reentry-programs/#:~:text=Successful%20reentry%20programs%20give%20former,recidivism%20and%20improving%20public%20safety>. The article asserts that preparation for successful re-entry begins the day that the offender is incarcerated. One's access to mental health treatment, substance abuse recovery, community building programs, education, and skills training will yield a much higher likelihood for successful re-entry, than those who are not provided such opportunities.

⁴⁸ *Id.*

and restitution collection, unlike the traditional retributive-justice process. The traditional retributive justice process can result in higher rates of victim dissatisfaction and lack of rehabilitation for offenders, linked to higher rates of recidivism, and even worse criminal behavior.⁴⁹

A study conducted at Sam Houston State University concluded that programs that emphasize restorative justice, including victim-offender mediation and community impact panels, have more effectively decreased recidivism rates among juvenile offenders when compared to traditional punitive court procedures.⁵⁰ This methodology included a sample of 551 youth who were either assigned to traditional court or minimal restorative justice proceedings in a five-year span.⁵¹ In this study, forty percent of juveniles committed a new offense within an average of three and a half years.⁵² However, when the data was further broken down, it was found that recidivism rates were nearly fifty percent for youth processed through traditional juvenile courts, while those in restorative justice educational programs showed only a thirty-one percent rate for recidivism.⁵³ The statistics were even lower for those in more intensive restorative justice programs. Only twenty-four percent of offenders who participated in community panels, twenty-seven percent of those who participated in indirect mediation, and thirty-

⁴⁹ David Newton, *Restorative Justice and Youthful Offenders*, FED. BUR. OF INVESTIGATION L. ENF'T BULLETIN (Oct. 6, 2016), <https://leb.fbi.gov/articles/featured-articles/restorative-justice-and-youthfuloffenders#:~:text=Restorative%20justice%20entails%20more%20than,resulting%20in%20worse%20criminal%20behavior>.

⁵⁰ Sam Houston State University, *Research Reveals Restorative Justice Reduces Recidivism*, PHYS.ORG (July 28, 2016), <https://phys.org/news/2016-07-reveals-justice-recidivism.html>. This study was conducted between 2000–2005 and conducted research on offenders who participated in restorative justice programming in a small, mostly rural area in the Upper Midwest region of the United States. The average age of the sample size was fifteen years old. Offenses ranged from property crimes, curfew violations, substance abuse related charges, traffic offense, disorderly conduct, to even violent crimes.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

three percent of those in direct mediation re-offended after completing those programs.⁵⁴

Jeffrey Bouffard, a professor in the Department of Criminal Justice and Criminology and Research Director for the Correctional Management Institute of Texas at Sam Houston State University, concluded the following:

Our results generally not only support the effectiveness of RJ (restorative justice) programming as compared to traditional juvenile court processing but also suggest that each type of RJ intervention, even those that are minimally involved, reduces recidivism risk relative to juvenile court proceedings [...] This pattern of results would suggest that in many cases, it may be possible to use less intensive RJ approaches and still receive promising results.⁵⁵

Based on social science research, restorative justice decreased recidivism rates by helping offenders rehabilitate and successfully re-enter society. Meeting these goals and promoting the improvement of members of society rather than supporting the cycle of incarceration is undoubtedly better for society as a whole.

III. RESTORATIVE JUSTICE SEEKS GREATER JUSTICE FOR ALL PARTIES INVOLVED

Restorative justice acknowledges the offender's crimes, the victims' needs and all the parties, leading to greater justice for all parties involved. Practices that rely on retribution as a foundation tend not to meet the needs of persons whose values are embedded in a collectivist culture because retribution focuses on punishing an alleged criminal in a way that reciprocates the effects of the crime committed. Unfortunately, "justice" is often used as a veil to legitimize racial profiling, hypervigilant policing,

mass incarceration, and even execution of Black, Indigenous, and brown people. These issues do more than disproportionately infiltrate communities of color, but they also target children who are unfortunately not shielded from these prejudicial atrocities. Restorative justice principles address crime in a holistic manner, by acknowledging the totality of harm caused by a crime, including the harm to relationships, others involved, and the community at large. For this reason, it is more effective in harm mitigation because its principles do not merely simply the implications of crime as a law being broken. This allows willing parties the opportunity to discuss such harms and collaborate for a more fruitful resolution. The principles of restorative justice takes a step further and provides alternative methods or solutions even in situations where parties may not be readily willing to meet and collaborate.⁵⁶

By taking account of the needs of all parties harmed by a particular crime and incorporating their opinions and voices when determining an appropriate punishment, restorative justice addresses the needs of collectivist values that focus on the needs of the community rather than solely the individual who committed the crime.⁵⁷ For example, Islamic law and its tenets of *Qisas* (retaliation), *Suluh* (practices of conciliation), and *Diyya* (restitution), forgiveness, and community service are all forms of restorative justice.⁵⁸ These tenets focus on the prioritization of the victim's needs and restoration, rather than conviction of the offender.⁵⁹ *Diyya*, in particular, calls for a payment of money to the victim who has suffered the effects of a crime.⁶⁰ Rather than forcing an offender to pay the *Qisas* penalty, the victim is allowed to directly receive this payment in the form

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *What Is Restorative Justice*, RESTORATIVE JUST. MEDIATION PROGRAM, <https://www.sdrjmp.org/programs-services-v1/what-is-restorative-justice/> (last visited Apr. 22, 2022).

⁵⁷ Sherrod, *supra* note 7.

⁵⁸ Absar Aftab Absar, *Restorative Justice in Islam with Special Reference to the Concept of Diyya*, 3 J. VICTIMOLOGY & VICTIM JUST. 38, 38–52 (2020).

⁵⁹ *Id.*

⁶⁰ *Id.*

of Diyya, which can substitute any requirements that have not been met under Qisas.⁶¹

Studies in Canada have shown that restorative justice can improve victim satisfaction and generate positive mental health impacts for all participants, among other benefits.⁶² In 2021, the Canada Department of Justice found that victims and survivors who participated in the restorative justice process were satisfied felt more prioritized and experienced higher levels of satisfaction with the outcome of their cases. A meta-analysis by Strang et al. “showed that victims and survivors who go through a [restorative justice] process are more satisfied about the handling of their case than those who do not go through a [restorative justice] process.”⁶³ Victims reported the following benefits: higher likelihood of receiving an apology from the offender, feeling safer, psychological benefits including decreased fear, anxiety, decreased anger, and increased sympathy towards the offender.⁶⁴ Further, “[m]any victims and survivors have reported that the opportunity to participate in [restorative justice] and express themselves reduces their desire for revenge, and they would recommend the process to others.”⁶⁵

This study also found that victims and survivors who chose to participate in the restorative justice process felt more than just satisfaction with their experiences.⁶⁶ They also described feeling empowered by the process.⁶⁷ This is contrasted with

⁶¹ *Id.*

⁶² See generally Jane Evans, Susan McDonald & Richard Gill, *Restorative Justice: The Experiences of Victims and Survivors*, CANADA DEP’T OF JUST. (2021), <https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd11-rr11/p5.html>. This study was conducted to bridge the gap between the needs of the Indigenous victims of crimes and the retributive process. Indigenous victims did not find satisfaction when participating in traditional court processes. *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

the experiences of victims who participated in the punitive criminal justice process.⁶⁸

IV. RESTORATIVE JUSTICE PRACTICES ACKNOWLEDGE AND ADDRESS THAT A ONE-SIZE-FITS-ALL APPROACH CANNOT EFFECTIVELY MEET THE NEEDS OF CRIMINAL JUSTICE

The retributive approach grants a judge a narrow range of options for punishment when a person is convicted of breaking the law, such as incarceration, imposing of hefty penalty fines, or a combination of both.⁶⁹ These options are often both too limited and too generalized to achieve justice. It is important to understand that there should be no “one-size-fits-all” approach to punishments or sentencing. No two crimes are exactly the same, no two offenders have the same needs or concerns, and no two victims can be made whole with the same remedy.

Regarding why an offender is motivated to commit a violent crime, offenders from individualist cultures are often motivated by self-interest “through the pursuit of hedonism” to meet one’s needs, such as coping with personal pain or committing acts in the interest of one’s personal principles.⁷⁰ Motivating factors of violent crimes by offenders from collectivist cultures are generally based on community or group issues or goals such as defending family, gang, community, saving their honor, or commitment to interpersonal obligations.⁷¹ Clinicians have found that undersanding the cultural implications of offenders’ motivations is vital in their treatment, healing, and overall ability to maintain accountability for their actions.⁷² Furthermore, clinicians are encouraged to incorporate an understanding of cultural implications that affect offenders rather than develop “the

⁶⁸ *Id.*

⁶⁹ U.S. DEP’T OF JUST., *JUDGES AND DISCRIMINATION: ASSESSING THE THEORY AND PRACTICE OF CRIMINAL SENTENCING* 3 (2003), <https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf>.

⁷⁰ Katie Seidler, *What Can Culture Add to an Understanding of Criminal Violence*, AUSTRALIAN PSYCHOL. SOC. (June 2011), <https://www.psychology.org.au/what-can-culture-add-understanding-criminal-violence>.

⁷¹ *Id.*

⁷² *Id.*

typically 'thin' and culturally absent stories that are developed through the criminal justice process."⁷³ If a clinician is involved with the rehabilitative process, it is important for them "to work in culturally sensitive ways with offenders within the forensic treatment process, which may even include working collaboratively with cultural representatives in order to develop a more responsive treatment process."⁷⁴

V. CRITICISMS OF RESTORATIVE JUSTICE

A. *The Burden of Dismantling Existing White Supremacy in the United States Justice System*

Proponents of traditional judicial processes and retribution have expressed concerns regarding the implementation of restorative justice practices. One criticism of restorative justice is that the practice cannot be effectively implemented or incorporated into our justice system until racism and white supremacy are dismantled and no longer play roles in the foundation of our justice system.⁷⁵ Critics argue that since modern western societies and the foundation of their legal systems have been generally envisioned and created by the white, heterosexual, affluent, adult, male, the systems have been created to cater to this demographic whether it's how the law is enforced, whom it is enforced upon, and who it ultimately benefits.⁷⁶

Critics of restorative justice argue that the law cannot be expected to remedy racial injustices legally before they are recognized as injustices socially.⁷⁷ There is a theory that because the U.S. justice system prioritizes the needs of white citizens, the racist nature of the the criminal justice system must be acknowledged by the majority (i.e. white America) before restorative

⁷³ *Id.* (citation omitted).

⁷⁴ *Id.* (citation omitted).

⁷⁵ Evans et al., *supra* note 62.

⁷⁶ Barbara Hudson, *Beyond White Man's Justice: Race, Gender and Justice in Late Modernity*, 10 THEORETICAL CRIM. 29, 30 (Feb. 1, 2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.995.6073&rep=rep1&type=pdf>

⁷⁷ *Id.*

justice can actually be implemented and effectively carried out.⁷⁸ However this argument is paradoxical in that it believes that a solution to a problem cannot be implemented until that problem is already solved. One cannot wait for racism to stop existing in order to implement practices that deter racist policies. This argument is also inherently rooted in racism, because it fails to recognize the needs of Black, brown, and Indigenous people by stating that their needs and cultural values cannot be justified until approved by the white "standard."⁷⁹ Acknowledgment and agreement from white America need not and should not be the necessary prerequisites for the needs of communities of color to finally be met. The injustices faced Black, brown, and Indigenous people are injustices plagued by society in its entirety.

As Barbara Sherrod has argued:

We must respect that this process is strong enough to stand on its own, trust that people of color can model justice and be accountable to one another and our youth without the inference of whiteness [. . .] We owe it to . . . Indigenous peoples to honor and follow this process without any addendums rooted in white culture. Because without them, we would not have this practice to decentralize whiteness and provide a holistic way of life for ourselves and our [B]lack and brown [communities].⁸⁰

B. *Victims' Concerns*

Proponents of the punitive approach argue that restorative justice may not be effective in meeting the needs of victims. In one study, some victims were concerned that their offenders were not truly engaged in the process, nor were they truly remorseful for their crimes.⁸¹ Victims also expressed dissatisfaction when they did not understand what to expect from

⁷⁸ Sherrod, *supra* note 7.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Evans et al., *supra* note 62.

the restorative justice process or how to prepare for the process.⁸² Other victims were dissatisfied when the offenders did not actually follow through on the agreement that was made or when the victims were not updated about the offender's progress after the restorative justice proceeding was completed.⁸³ The conclusions from these findings showed that in order for the process to be arranged, an offender must genuinely accept responsibility for their actions and must be willing to follow through with their rehabilitative process. This is essential not only for the offender's progress but for the victim's healing process.

These studies also showed some key components when considering whether or not to rearrange the restorative justice process. Researchers found that crime reduction through restorative justice processes were more effective to remedy violent crimes in comparison to a property crime.⁸⁴ The process was also found to be more effective for crimes committed against identifiable victims.⁸⁵

In no way should these studies deter the implementation of restorative justice, but they should provide observations on how to provide more effective implementation. The Canadian Department of Justice reported that victims and survivors who participated in the restorative justice approach report feelings of empowerment by the process, a higher likelihood of receiving an apology from the offender, feeling safer, and are less likely to feel vengeful toward the offender.⁸⁶ Victims who participated in this approach are even more likely to recommend this process to others.⁸⁷ Contrary to critics' arguments, restorative justice is actually more effective in focusing and addressing the needs of victims, than retributive justice. Retribution prioritizes punishment and convictions, which require processes that often alienate victims' needs.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

C. *Recidivism Rates*

Concerns regarding recidivism are often used to criticize restorative justice because the punishments are not as harsh as those imposed by the punitive approach. However, studies have shown that harsher punishments do not deter crime.⁸⁸ Furthermore, restorative practices in comparison to retributive practices more effectively combat recidivism.⁸⁹ As previously addressed, restorative justice programs provide offenders with resources and opportunities to enable their successful re-entry to society.⁹⁰ Statistics show that restorative justice better deters repeat offenses than those who are processed through traditional court processes and the punitive approach.⁹¹

CONCLUSION

The United States' justice system prides itself on providing equality and justice for all. Unfortunately, due to the plethora of various forms of prejudice woven into our history and government, oppression and injustices are forced upon our most vulnerable populations every day. These forms of prejudice include racism, sexism, xenophobia, ableism, classism, linguistic oppression, and much more. The punitive approach especially neglects the needs of communities of color, especially Black, Hispanic, and Indigenous populations, which is incredibly worrisome considering more than fifty-six percent of the incarcerated population are persons of color. Persons with mental health diagnoses and substance abuse disorders are also severely neglected by the justice system, even though they make up a large percentage of those who are incarcerated. Since retribution focuses on punishing offenders without an individualized approach, these underlying issues that often plague offenders that the criminal justice tends to neglect. This results in the United States

⁸⁸ Sam Houston State University, *Research Reveals Restorative Justice Reduces Recidivism*, PHYS.ORG (July 28, 2016), <https://phys.org/news/2016-07-reveals-justice-recidivism.html>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

justice system depriving those who are struggling with mental health or substance abuse-related disorders of the justice they deserve. Furthermore, the system does not support deterrence against future offenses, since the underlying problems are never addressed.

Because there are clear gaps within the current U.S. criminal justice system and its use of the retributive system, those gaps can be addressed by integrating the values and principles set forth by restorative justice. Although restorative justice may not be applicable or effective in every situation, it is clear that the long-standing punitive approach is inadequate in addressing the needs of all offenders. Restorative justice's holistic approach does not hyperfocus on convictions but actually addresses the needs of victims while also addressing the needs of offenders, vulnerable populations, and society as a whole. By addressing the needs of offenders and aiding in their rehabilitation, offenders are deterred from future crime, benefiting society as a whole. Through this process, the needs of victims are more effectively met, leading to the amplification of their voices and a greater chance of restoration after the crime. The restorative justice process incorporates the collectivistic values of communities of color and uses personalized approaches that are better suited for vulnerable populations facing prejudices, mental health concerns, and substance abuse disorders. If the U.S. justice system incorporates restorative justice into the foundation of its principles, the gaps created by the traditional punitive approach can be bridged. This shift in approach could better American society as a whole and ultimately uplift access to basic human rights for all.