

# RESTORATIVE JUSTICE, AFFIRMATIVE ACTION SENTENCING LEGISLATION AND THE CANUCKS: LESSONS FROM OUR NORTHERN NEIGHBOR

In the early 1970s, the United States criminal justice system formally shifted to the retributive theory that dominates the correctional system today.<sup>1</sup> Retributive justice assumes that crime can only be remedied by exacting a proportionate response upon the criminal.<sup>2</sup> Therefore, the theory presumes that offenders should have their liberty taken away through incarceration or the death penalty. Prisons, once viewed as a place for reformation, are used today to denounce, deter and incapacitate.<sup>3</sup>

The retributive focus produced immediate results. From 1972 to 2003, the U.S. prison population increased over 500%.<sup>4</sup> During that same period, the U.S. population only rose 37%.<sup>5</sup> Today, the United States has the

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1. See generally MARC MAUER, RACE TO INCARCERATE: THE SENTENCING PROJECT (The New Press 2d ed. 2006) (1999) ("This book may be interpreted as a critique of the 'tough on crime' movement that has characterized the nation's approach to crime and criminal justice for more than a quarter century."). Prior to the retributive focus was the rehabilitative focus. *Id.* at 46. Indeterminate sentencing was held as a foundation of rehabilitative sentencing because its proponents believed that it provided the "carrot" for prisoners to behave well during incarceration, and provided prison officials a tool in discipline. With the rise of crime in the 1960s, rehabilitation came under fire, starting with Richard Nixon's presidential campaign, themed "Law and Order." *Id.* Eminent minds of the day, such as Harvard professor James Q. Wilson, argued that rehabilitation was ineffective. *Id.* Instead, he argued, isolation and punishment should be the two primary purposes of the correctional system. *Id.* (citing JAMES Q. WILSON, THINKING ABOUT CRIME 172 (Basic Books 1975)). Rehabilitation in correctional systems was criticized for lacking consistency, due to indeterminate sentencing, and rehabilitation was held up as having no appreciable effect. *Id.* In 1974, the final nail was driven into the coffin of rehabilitation with a review of 213 juvenile and corrections programs by Robert Martinson, which concluded, "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on rehabilitation." *Id.* (citing Robert Martinson, *What Works: Questions and Answers About Prison Reform*, 35 PUB. INT. 22-54 (1974)). Martinson went on to reconsider his propositions in a later article, acknowledging that some of the programs worked some of the time. *Id.*

2. A classic example of retributive theory in action is the Determinate Sentencing Law, which was passed in California in 1976: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." 7 Cal. Penal Code § 1170(a)(1) (2000).

3. Anthony N. Doob & Cheryl Marie Webster, *Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate*, 40 LAW & SOC'Y REV. 325, 339 (2006). Charles Dickens said, during the 1840s when visiting a Pennsylvania jail, "Those who devised this system . . . and those benevolent gentlemen who carry it into execution do not know what . . . they are doing. . . I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body." MAUER, *supra* note 1, at 9.

4. MAUER, *supra* note 1, at 1. In 1972, the estimated prison population was just under 200,000, but by 2003, it was about 1,400,000. *Id.* at 10. From 1985 to 2000, federal and state governments opened up a new prison each week to keep up with the rate of incarcerated prisoners. *Id.* at 1.

5. *Id.*

highest rate of incarceration in the world.<sup>6</sup> Compared to other industrialized countries, the U.S. incarceration rate is five to ten times greater than that of its counterparts.<sup>7</sup> Even after controlling “for crime categories that are defined in the most consistent ways internationally,” the United States still incarcerates more people per incident.<sup>8</sup> These high incarceration rates fail to deter criminals from recidivism.<sup>9</sup> One study found a 67.5% recidivism rate for those released from jail.<sup>10</sup>

Arguably, these high incarceration rates would be justifiable if U.S. crime ran parallel to imprisonment rates. Unfortunately, that is not the case. Criminologists studying incarceration concluded that only 12% of the increase in prison rates was explained by increases in crime.<sup>11</sup> The remaining 88% was due to changes in sentencing policy.<sup>12</sup>

A disturbing effect of these sentencing policies is an alarmingly disproportionate rate of incarceration for African Americans.<sup>13</sup> Compared

6. Christopher Hartney, *US Rates of Incarceration: A Global Perspective*, NAT'L COUNCIL ON CRIME AND DELINQUENCY (Nov. 2006), [http://www.nccd-crc.org/nccd/pubs/2006nov\\_factsheet\\_incarceration.pdf](http://www.nccd-crc.org/nccd/pubs/2006nov_factsheet_incarceration.pdf). “The US has less than 5% of the world’s population but over 23% of the world’s incarcerated people.” *Id.* at 1.

7. MAUER, *supra* note 1, at 11. Compared to the industrialized world, “[t]he U.S. rate of incarceration per capita now dwarfs that of almost all such nations . . . . Ironically, in recent years the United States has competed only with its old Cold War rival Russia for the dubious distinction of maintaining the world lead in the rate at which its citizens are locked up.” *Id.* at 10.

8. Hartney, *supra* note 6, at 5.

9. MAUER, *supra* note 1, at 64. Interestingly, even in the early eighties, national commissions already noted that incarceration did little to deter or incapacitate offenders. *Id.* (citing ALFRED BLUMENSTEIN, JACQUELINE COHEN & DANIEL NAGIN, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (Nat’l Acad. Press 1978)). One paper written by the Reagan Justice Department remarked that “the most striking finding is that incapacitation does not appear to achieve large reductions in crime,” and that current policies “can cause enormous increases in prison populations.” *Id.* (citing JACQUELINE COHEN, *INCAPACITATING CRIMINALS: RECENT RESEARCH FINDINGS 3 & 5* (Nat’l Inst. of Justice 1983)).

10. RENFORD REESE, *PRISON RACE 101* (Carolina Academic Press 2006) (citing U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1994* (Bull. No. NJC 193427) (2000)). The study was conducted in over fifteen states with a group of 272,111 prisoners. *Id.* It found that 67.5% were rearrested for serious misdemeanor or felonies within three years. *Id.* Interestingly, in Texas, half of recidivists had not committed crimes. Rather, they had violated conditions of their probation or parole. *Id.* at 98 (citing Matt Stiler & Alexis Grant, *Clogging the System*, HOUS. CHRON., Mar. 5, 2006).

A legislative study found that many nonviolent offenders believe that serving prison time is easier than meeting all the rigid requirements of a probation or parole contract. There are monthly drug tests, supervisory fees, mandatory community service hours, and court-ordered attendance at regular substance-abuse treatment and anger-management sessions.

*Id.*

11. Hartney, *supra* note 6, at 7 (citing THE SENTENCING PROJECT, *COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS* (2003)).

12. *Id.*

13. *Id.* at 3.

to whites, blacks are six times more likely to be incarcerated.<sup>14</sup> Every day, approximately one-third of black men in their twenties are supervised by the criminal justice system.<sup>15</sup> Meanwhile, black women have the dubious distinction of being the fastest growing segment of the prison population.<sup>16</sup> One recent study posited that if the United States made the necessary reforms to reduce minority confinement by fifty percent, the U.S. incarceration rate would drop from first to fifth in the world.<sup>17</sup>

Increasingly, U.S. citizens, lawmakers, social scientists and criminal justice professionals have acknowledged and begun to search for solutions on how to repair the broken U.S. criminal justice system.<sup>18</sup> Some have even recommended that affirmative action be applied to prison sentencing.<sup>19</sup> This Note explores whether incorporating a restorative justice philosophy can begin to break the systemic racism that infiltrates the U.S. criminal justice system. Specifically, this Note looks at Canada's decision to implement a form of affirmative action that incorporates restorative justice in its sentencing procedures. Part I further details racially disparate sentencing in both the United States and Canada. Part II introduces the theory of restorative justice, details how restorative justice

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14. *Id.*

15. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (citing THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995)). Supervision under the criminal justice system includes incarceration, probation or parole. *Id.*

16. *Id.* at 1274 n.15 (citing MAUER, *supra* note 1). "The number of incarcerated black women is growing faster than that of black men or the overall prison population, increasing by more than 200% between 1985 and 1995." *Id.*

17. Hartney, *supra* note 6, at 3 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR (2005), and U.S. CENSUS BUREAU, POPULATION DIVISION, ANNUAL ESTIMATES OF POPULATION BY SEX, RACE AND HISPANIC OR LATINO ORIGIN FOR THE U.S.: APRIL 1, 2000 TO JULY 1, 2005 (No. NST-EST2005-03) (2006)).

18. MAUER, *supra* note 1, at xiii. In 2003, U.S. Supreme Court Justice Anthony Kennedy spoke before the American Bar Association ("ABA") and said of the criminal justice system, "our resources are misspent, our punishments too severe, our sentences too long." *Id.* In response to these comments, the ABA spent a year researching criminal justice policy and issued a report with the following recommendations: mandatory minimum sentences be repealed, alternatives to incarceration be further explored and a task force be created to reduce "unjustified racial and ethnic disparities." *Id.*

19. Roberts, *supra* note 15, at 1304.

The mounting evidence of mass imprisonment's collateral damage to African American communities shows that the extent of U.S. incarceration is not only morally unjustifiable, but morally repugnant. By damaging social networks, distorting social norms, and destroying social citizenship, mass incarceration serves a repressive political function that contradicts democratic norms and is itself immoral. This state-imposed injury warrants both affirmative action in the criminal justice system and the massive infusion of resources in inner city neighborhoods to build local institutions, support social networks, and create social citizenship.

*Id.* (footnote omitted).

is being integrated in both countries and examines how restorative justice addresses racially disproportionate sentencing in Canada. Part III discusses why Canada's attempt to use restorative justice legislation to curb disparate prison sentencing practices against minorities should not be applied in the United States at present. Finally, this Note suggests that despite all this, it is important for the United States to push forward in restorative justice programs.

## I. BACKGROUND OF SENTENCING IN THE UNITED STATES AND CANADA

### A. *Incarceration in the United States*

In the United States during the 1980s, the retributive theory produced two major movements in the criminal justice system. The first was a "Tough on Crime" stance that created mandatory minimum sentences and generally longer sentencing.<sup>20</sup> The second focused on the effects of drugs, resulting in the government announcing a "War on Drugs."<sup>21</sup> Today, scholars generally acknowledge that this "War on Drugs" is what accounts for the country's escalating prison population and racial disparities within prison populations.<sup>22</sup> As of June 2005, 2,186,230 Americans were locked up in U.S. jails and prisons.<sup>23</sup> Of those incarcerated, 38.9% were black, despite the fact that African-Americans comprised only 12.8% of the nation's population.<sup>24</sup> While many associate the incarceration of African

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20. REESE, *supra* note 10, at 77.

21. The "War on Drugs" emphasized a "get tough on crime by any means necessary philosophy." *Id.* at 77.

22. Roberts, *supra* note 15, at 1275.

Ironically, and in retrospect quite tellingly, the first inmate admitted to the Eastern State Penitentiary was a "light skinned Negro in excellent health," described by one observer as "one who was born of a degraded and depressed race, and had never experienced anything but indifference and harshness." Two centuries later, the confluence of issues of race and class with the prison system has become a fundamental feature of the national landscape.

MAUER, *supra* note 1, at 4 (citing NEGLEY K. TEETERS & JOHN D. SHEARER, *THE PRISON AT PHILADELPHIA, CHERRY HILL: THE SEPARATE SYSTEM OF PRISON DISCIPLINE, 1829-1913* (Columbia University Press 1957)). The topic of what causes racially disparate incarceration is enormous and too large to address in this Note. However, some have suggested that the new "Tough on Crime" laws also came on the heels of an increased use of television, and on the continued cultural highlighting of African American and Latino men as criminals. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 988 (2004).

23. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2005* (2005), available at <http://www.ojp.udsoj.gov/bjs/pub/press/p02pr.htm>.

24. *Id.* at 8. "An African American man born in 1991 has a 29% chance of being imprisoned, compared with a 16% chance for a Latino man, and a 4% chance for a white man. There are more young black men in prison than in college." Butler, *supra* note 22, at 996-97.

Americans with an increased level of crime, the still-increasing numbers actually have more to do with changes in sentencing rules.<sup>25</sup>

Racial bias, specifically fear of African American men, is firmly entrenched in U.S. culture.<sup>26</sup> This culture of fear towards black men feeds upon itself, and it taints the manner in which justice is administered at both the judicial and legislative level. At the judicial level, the U.S. Sentencing Commission found that a “statistically significant relationship between race and sentence remained even after considering the nature of the offense and the prior criminal record of the defendant.”<sup>27</sup> On average, 25% of whites were sentenced below the applicable mandatory minimum, while only 18% of blacks and 11.8% of Hispanics were granted sentences below the minimum.<sup>28</sup>

Sentencing disparities exist at the legislative level as well. Despite the fact that whites report a higher rate of illegal drug use, blacks accounted for 60% of those incarcerated for drug charges in 1998.<sup>29</sup> One common example of sentencing disparities is the mandatory minimum sentence for crack cocaine (generally viewed as the cocaine of choice for African Americans), but not for powder cocaine.<sup>30</sup> Despite the fact that there is little scientific difference between the two types of cocaine, up until late 2007 the punishment for carrying crack cocaine was one hundred times greater than the punishment for carrying powder cocaine.<sup>31</sup> In November

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25. Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC’Y 9, 11 (2001). “88 percent of the tripling of the national prison population from 1980 to 1996 is explained by changes in the imposition of punishment (51 percent a greater likelihood of incarceration upon conviction and thirty-seven percent longer prison terms), while changes in crime rates explain only 12 percent of the rise.” *Id.* at 12 (citing Alfred Blumstein & Allan J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST.: REV. RES. 17 (1999)).

26. REESE, *supra* note 10, at 40. One of the startling manners in which this is revealed is on the issue of rape. Of the men in prison for rape, 29% of them are black. Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, Apr. 19, 2004, at A14. Yet, sixty-five percent of those men were ultimately exonerated for the crime. *Id.* “Rapes of white women by black men, for instance, represent less than ten percent of rapes according to the Justice Department.” *Id.* Nevertheless, “in half of the rape exonerations where racial data was available, black men were falsely convicted of raping white women.” *Id.*

27. Nancy Gertner, *Federal Sentencing Guidelines: A View From the Bench*, 29 HUM. RTS. 6, 8 (Spring 2002).

28. *Id.*

29. *Id.* (citing WILLIAM J. CHAMBLISS, DRUG WAR POLITICS: RACISM, CORRUPTION, AND ALIENATION, IN CRIME CONTROL AND SOCIAL JUSTICE, 299, 301 fig. 12.5.)

30. Butler, *supra* note 22, at 988. “[C]rack cocaine was thought to be the preferred form in the black community . . . Crack cocaine is powder cocaine that is cooked with baking soda until it forms small solid pieces. Crack is smoked rather than inhaled. It is less expensive than powder cocaine and has a briefer intoxicating effect.” *Id.*

31. *Id.* at 988–89.

There is little scientific support for the proposition that crack cocaine merits more punishment than powder on a harm principle, and virtually no support for the hundred-to-one federal

2007, the U.S. Sentencing Commission reduced the recommended sentencing for crack cocaine and urged Congress “to repeal the mandatory prison term for simple possession” of crack cocaine.<sup>32</sup>

The success of a theory should depend upon whether it achieves its stated goals. Retributive justice aims to denounce, deter and incapacitate. Yet, incarceration is so prevalent in African American communities that some scholars contend that prison has lost its ability to denounce and deter because prison is viewed as a rite of passage for certain young African American men.<sup>33</sup>

The reality is that the stigma of jail for this population has vanished.<sup>34</sup> Retributive justice’s only success is in incapacitating offenders. In the process, it has also incapacitated the families and communities that offenders left,<sup>35</sup> and has often left offenders unprepared to participate

differential. The U.S. Sentencing Commission has proposed that the distinction be reduced. Likewise, President Clinton’s drug czar recommended no disparity in punishment, and, during the presidential campaign of 2000, George W. Bush also rejected a distinction. Thus far, however, Congress has refused to budge, in part because of the strong cultural bias against crack cocaine.

*Id.* The result is that a crack distributor who is caught with five grams of crack (street value of \$500), will receive the same sentence of a powder distributor who has five hundred grams of powder (street value of \$40,000). *Id.* at 988.

32. *U.S. Sentencing Ranges Lowered for Crack Cocaine*, NPR.ORG, Nov. 2, 2007, <http://www.npr.org/templates/story/story.php?storyId=15885119>. The U.S. Sentencing Commission “cut the sentence range for first-time offenders possessing 5 grams or more of crack cocaine to 51 to 63 months. The old range was 63 to 78 months. The new range for first-time offenders possessing at least 50 grams is 97 to 121 months in prison, down from 121 to 151 months.” *Id.*

On December 10, 2007, the United States Supreme Court also weighed in on the issue, announcing holdings for *Kimbrough v. United States*, 128 S. Ct. 558 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007). *Kimrough* held that while a judge must consider federal sentencing guidelines for cocaine violations, the Guidelines were ultimately advisory only. *Kimrough*, 128 S. Ct. at 564. “The statute says nothing about the appropriate sentences within these brackets, and [the Court] decline[d] to read any implicit directive into that congressional silence.” *Id.* at 571. In *Gall*, the Court found that judges could impose sentences below the specified range in the Guidelines. *Gall*, 128 S. Ct. at 591. Federal appeals courts are to use a “deferential abuse-of-discretion standard” when looking at appeals. *Id.*

33. Butler, *supra* note 22, at 997.

34. *Id.* Incarceration has become such a common reality for some communities that scholars now question the effectiveness of incarceration in deterring crime. *Id.*

35. Legislators have asserted that the “tough on crime” actions have benefited rather than harmed the black community. *Id.* at 1003. More recently, studies testing this assumption show that it has done just the opposite. Roberts, *supra* note 15, at 1281. Statistically, poor blacks live in areas that are racially and economically segregated. *Id.* at 1276.

Research in several cities reveals that the exit and reentry of inmates is geographically concentrated in the poorest, minority neighborhoods. As many as one in eight of the adult male residents of these urban areas is sent to prison each year and one in four is behind bars on any given day. A 1992 study, for example, showed that 72% of all of New York State’s prisoners came from only seven of New York City’s fifty-five community board districts. . . . Prisoners typically return to the same communities where they lived prior to incarceration.

beneficially when they return to society.<sup>36</sup> These outcomes not only affect African Americans, they affect American society as a whole. Increased and disparate sentencing perpetuates fear and furthers racial divisions in our society, while doing little to deter or denounce original or recidivist offenders.

### *B. Incarceration in Canada*

While Canada has not been immune to the “get tough on crime” zeitgeist,<sup>37</sup> it has chosen a markedly different path than that of its North American neighbor. For instance, while Canada has mandatory minimums for violent offenses with firearms, it struck down mandatory minimums for drug offenses in 1987.<sup>38</sup> Moreover, since the 1960s, despite crime increases mirroring those of the United States, imprisonment rates in Canada have remained relatively stable.<sup>39</sup> Today, Canada acknowledges that incarceration is not the best solution for most offenses because it cannot meet the multi-faceted goals of Canadian sentencing.<sup>40</sup>

*Id.*

36. *Id.* at 1277 (citing Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 1, 7–8 (2002)).

Thirty years of forced removal to prison of 150,000 young males from particular communities of New York represents collective losses similar in scale to the losses due to epidemics, wars, and terrorist attacks—with the potential for comparable effects on the survivors and the social structure of their families and communities.

*Id.* “[I]ncarceration has become a systemic aspect of community members’ family affairs, economic prospects, political engagement, social norms, and childhood expectations for the future.” *Id.* It has contributed to the damaging of social networks, distortion of social norms, and destroyed social citizenship. *See generally* Roberts, *supra* note 15.

37. Robin J. Wilson, Bria Huculak & Andrew McWhinnie, *Restorative Justice Innovations in Canada*, 20 BEHAV. SCI. & L. 363 (2002).

38. Doob & Webster, *supra* note 3, at 334. In 1987, “the Supreme Court of Canada ruled . . . that this mandatory minimum penalty constituted cruel and unusual punishment under Section 12 of the Charter of Rights and Freedoms.” *Id.*

39. *Id.* at 327–28, 333 fig.5. Despite the fact that Canada has a similar “crime culture” to that of the United States and England, its response to crime has been dramatically different. *See id.* at 329–32.

With regard to homicide rates, Canada’s rate is one-third that of the United States, yet from 1960 until the 1990s both had similar proportional increases. *Id.* at 329.

40. *See generally id.* at 326–38. Canada is not immune to punitive policies; one area in which it has cracked down is firearm violence. In 1996, the legislature passed laws to create mandatory minimum sentences for offenders guilty of any ten serious violence firearm crimes. *Id.* at 333. Canada has also made it more difficult for incarcerated offenders to receive parole, and easier for juveniles over the age of sixteen to be tried as adults for serious violent crimes. *Id.*

In *R. v. Gladue*, the Supreme Court of Canada cited a Canadian Sentencing Commission report, which states:

Perhaps most significant is that although we regularly impose this most onerous and expensive sanction [prison], it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed

Despite these differences, Canada similarly faces a disproportionate minority population languishing in the prison system. In particular, one Canadian judge remarked that “prison has become for young native men, the promise of a just society which high school and college represent for the rest of us.”<sup>41</sup> While Aboriginal people in Canada account for just 3% of the population, they represent 22% of the provincial prison population.<sup>42</sup>

Similar to African Americans in the U.S., there is evidence that the high Aboriginal populations in jails are due in part to systematically heavier sentences for Aboriginals, compared to non-Aboriginal offenders.<sup>43</sup> Canadian scholars also agree that “colonialism’s dual legacies of systemic inequality and cultural oppression” play large roles in Aboriginal prevalence in Canada’s jails.<sup>44</sup> For example, Aboriginal cultures place a strong emphasis on individual integrity and responsibility.<sup>45</sup> Consequently, this often means that Aboriginals will plead guilty, despite the fact that the state offered a plea bargain or that the presence of mitigating circumstances could have resulted in a lesser charge.<sup>46</sup> For these differing reasons, Canadian scholars, like U.S. scholars, have come to recognize that “the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community.”<sup>47</sup>

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committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences.

R. v. Gladue, [1999] 1 S.C.R. 688, 717 (Can.). The Standing Committee on Justice and Solicitor General stated:

It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution. . . . Most offenders are neither violent nor dangerous. Their behavior is not likely to be improved by the prison experience.

*Id.* at 717–18.

41. *Id.* at 721.

42. Prison Facts & Statistics, [http://www.prisonjustice.ca/politics/facts\\_stats.html](http://www.prisonjustice.ca/politics/facts_stats.html) (last visited Feb. 22, 2008).

43. Melissa Williams, *Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada*, 5 BUFF. CRIM. L. R. 451, 453–54 (2002).

44. *Id.* at 465.

45. *Id.* at 468.

46. *Id.* at 469. “A further complication arises from the fact that many Aboriginal languages have no synonyms for ‘guilt’ and ‘innocence’ in their moral discourses, which tend to focus only on whether one has or has not committed a certain act.” *Id.*

47. *Id.* at 477 (quoting R. v. Gladue, [1999] 1 S.C.R. 688, 725 (Can.)).



While the United States refused to repeal sentencing laws that clearly have a disproportionate impact on African-Americans, Canadians had a markedly different response.<sup>48</sup> Canada's government made a public commitment to its citizens to reduce the level of incarceration among Aboriginal peoples in one generation to a level that mirrors the percentage they represent in the population.<sup>49</sup> Therefore, by the mid 1990s, Canada, which is at the forefront of restorative justice innovation, inserted restorative justice practices and philosophies at the federal and provincial level.<sup>50</sup> Specifically, they used affirmative action sentencing legislation to attempt to reduce the disproportionate number of Aboriginal Canadians represented in the criminal justice system.<sup>51</sup>

## II. RESTORATIVE JUSTICE

### A. *History and Overview of Restorative Justice*

The modern restorative justice movement began quietly in Kitchener, Ontario, Canada in 1974.<sup>52</sup> While restorative justice incorporates both rehabilitative and retributive elements into its philosophy, its focus is fundamentally different from these two theories.<sup>53</sup> Rather than recognizing

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48. "It has been through the law and the administration of justice that Aboriginal people have experienced the most repressive aspects of colonialism." *Id.* at 470–71 (quoting ROYAL COMMISSION ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE: A REPORT ON ABORIGINAL PEOPLE & CRIMINAL JUSTICE IN CANADA).

49. Jonathan Rudin & Kent Roach, *Colloquy on "Empty Promises": Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders: Broken Promises: A Response to Stenning and Roberts' "Empty Promises,"* 65 SASK. L. REV. 1, 17 n.5 (2002). The speech declared, "Canada must take the measures needed to significantly reduce the percentage of Aboriginal people entering the criminal justice system so that within a generation it is no higher than the Canadian average." 137 Official Report, H.C. (No. 0021st session) (Jan. 30, 2001) 14–15.

50. See Wilson et al., *supra* note 37, at 364.

51. Doob & Webster, *supra* note 3, at 342.

52. Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 259 (2006). The first restorative justice programming in Kitchener was a Victim Offender Reconciliation Program ("VORP"). *Id.* at 259. VORP (also commonly referred to as Victim Offender Dialogue ("VOD")) is a program in which a willing offender and victim meet. *Id.* at 269. The meeting is facilitated by a mediator and both parties are independently prepared prior to the mediation. *Id.* The meeting involves "naming what happened, identifying its impact, and coming to some common understanding, often including reaching an agreement as to how any resultant harm would be repaired." *Id.* A support person for the victim is permitted, and the process can occur throughout many stages of the justice process: pre-arrest, pre-court referral, pre-sentencing, post-sentencing and during incarceration. *Id.* See also Guy Masters, *What Happens When Restorative Justice is Encouraged, Enabled and/or Guided by Legislation?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 227–38 (Howard Zehr & Barb Toews eds., 2004).

53. See Umbreit et al., *supra* note 52, at 255. Similar to rehabilitative theories, restorative justice acknowledges the need to respect offenders and provide them with resources so they can ultimately

two primary stakeholders, the offender and the state (as the victim), restorative justice recognizes three primary stakeholders when a crime has been committed: the victim, the offender and the community.<sup>54</sup> Thus, restorative justice focuses on repairing the harm done to the victim, holding the offender responsible and accountable to the victim and using the community to support the victim.<sup>55</sup> Together, all three groups work to examine what caused the harm and search for ways to reduce the likelihood of such harm occurring again.<sup>56</sup>

Two significant factors that lead to criminal “offending” are antisocial attitudes and peer affiliations.<sup>57</sup> Restorative justice puts offenders face-to-face with the consequences of their actions. While a police officer, prison official or parole officer may not be able to convince an offender to make changes, family and peer confrontation resonates on a deeper level.<sup>58</sup>

The restorative justice theory is not a set of programs and laws that the U.S. criminal justice system can apply to “cure” the system.<sup>59</sup> Rather, the restorative theory is a theory that the United States can integrate into programs, legislation and the entire framework in which we deliver justice. It is a radically different response to crime in our communities. Justice becomes a community commitment linked to community safety, rather than a commodity delivered by disconnected strangers,<sup>60</sup> and justice is delivered within a model better able to account for the strengths and limitations of all parties. Proponents believe that restorative justice has the ability to impact family life, workplace behavior and even political conduct.<sup>61</sup>

reintegrate into the larger community and refrain from unlawful activity. *Id.* at 256. Restorative justice and retributive theory are similar in a commitment to vindication. *Id.* at 257. While both theories are committed to responding in a proportional manner, the theories have vastly differing opinions on what is a proportional response. *Id.* Retributive theory holds that pain, often in the form of deprivation of liberty or life is a proportional response. Restorative theory holds that vindication can be found in: (1) acknowledging the victim’s harms and needs, and (2) the offender actively taking responsibility (often through some form of restitution, community service, apology, etc.). *Id.* at 257.

54. *Id.* at 256.

55. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 14–18 (Good Books 2002).

56. *Id.*

57. Wilson et al., *supra* note 37, at 372.

58. *Id.*

59. ZEHR, *supra* note 55, at 12.

60. Umbreit et al., *supra* note 52, at 258. *See also* Wilson et al., *supra* note 37, at 248 (referring to JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 17–26 (1989)).

61. Umbreit et al., *supra* note 52, at 258.

### *B. Prevalence of Restorative Justice*

In the past twenty-five years, restorative justice has grown into an international movement.<sup>62</sup> The restorative justice theory informs criminal justice systems globally, in places such as Australia, Canada, Japan, New Zealand, South Africa and much of Western Europe.<sup>63</sup> In the United Kingdom, there is an effort towards broad systemic change so that restorative justice principles and practices may be adopted nationwide.<sup>64</sup> International organizations such as the Council of Europe, the European Union, and the United Nations have policies promoting the use of restorative justice practices in criminal justice matters.<sup>65</sup>

### *C. Restorative Justice Practices*

Many practices evolve from the philosophy of restorative justice. Programs mentioned in this Note, such as Victim Offender Dialogue (“VOD”),<sup>66</sup> Group Conferencing<sup>67</sup> and Sentencing Circles (“Circles”) focus on dialogue<sup>68</sup> and provide an opportunity for the victim and offender

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62. *See id.* at 261. For additional information about restorative justice internationally, see <http://www.restorativejustice.org>.

63. Umbreit et al., *supra* note 52, at 261. European countries employing restorative justice include the United Kingdom, Austria, Germany, Denmark, Finland, Sweden, Ireland, the Netherlands, Luxembourg, Switzerland, Albania, Slovenia, Romania, Poland, Bulgaria, Italy, Spain and the Ukraine. *Id.* at 262.

64. *Id.* at 266.

65. *Id.* at 261. The U.N. adopted the proposal, “Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters” in 2002. *Id.* The Council of Europe “focused on the restorative use of mediation procedures in criminal matters and it adopted a set of recommendations in 1999 to guide member states . . . in using mediation in criminal cases.” *Id.* at 262.

66. *Id.* at 273. *See supra* text accompanying note 52.

67. *Id.* at 269. Group Conferencing invites the support groups of both offender and victim into a meeting, and involves several different facilitators. *Id.* These meetings can either involve a scripted process or be more open ended. *Id.*

68. *Id.* at 270. In Circles, the community is engaged in democratic decision-making, power-sharing and sharing the responsibility. Circles not only bring in victims, offenders and supporters from each side, but also bring in community members as well. *Id.* These can also be called “peacemaking circles,” “restorative justice circles,” “repair of harm circles,” and “sentencing circles.” *Id.* Sentencing Circles were originally taken from Aboriginal cultures, and then modified to fit the overarching theory of restorative justice. Wilson et al., *supra* note 37, at 364. Today it combines a “respect for due process, mediation, interest-based negotiation and consensus-based decision-making with aboriginal healing and peacekeeping concepts.” *Id.* In this process the community members act as the judges and decide what type of restitution is required. *Id.* Failure to comply with Circles can result in incarceration. *Id.* at 366. In Canada, Circles are used after facts have been established during trial, but prior to sentencing by a judge. *Id.* at 365. “Sentencing Circles contest the reason emotion dualism, as well as the concept of impartiality by standing in opposition to a rule-based, ‘objective,’ hierarchical system.” *Id.* at 368. Sentencing Circles have been used in response to serious crimes where there is an identifiable victim (“e.g. robbery, criminal negligence causing death, and assault”). *Id.* at 365.

to meet face-to-face in a controlled, facilitator-directed environment.<sup>69</sup> These practices are voluntary and not employed unless the victim and offender are assessed for suitability by criminal justice professionals.

#### D. Satisfaction Rates

VOD, Group Conferencing and Circles report high satisfaction rates.<sup>70</sup> In comparison to groups that have gone through the traditional court process, restorative justice participants report greater satisfaction than their counterparts.<sup>71</sup> In terms of perceived fairness, over 80% of participants in VOD and Group Conferencing felt that the agreement process and the agreement itself were fair for both parties.<sup>72</sup>

#### E. Restitution Rates

Restitution and repayment is also a critical component to restorative justice processes.<sup>73</sup> Offenders often apologize and provide some type of monetary restitution, community service or some other form of creative repayment.<sup>74</sup> In a meta-analysis of both VOD and Group Conferencing, the offenders showed a “substantially higher completion rate” compared to other offenders.<sup>75</sup>

Sentencing Circles are not appropriate for every crime, especially when power differentials between victim and offender is significant. For example, sexual assault, spousal assault, child-victim and adult-offender crimes. *Id.* at 370. There have been attempts to create restorative justice practices for sexual offenders. See Wilson et al., *supra* note 37, at 375–78.

69. These processes bring offenders face to face with the direct consequences of their actions and provide an opportunity to apologize. They also leave victims: (1) feeling safer and (2) having a greater sense of justice than if they had gone through traditional court processes. They give victims a safe place to ask questions that are often left unanswered in the traditional justice system. Together they, along with any support members and facilitators, discuss restitution and repayment solutions. The repayment or restitution that is required is often far more personal than one issued by a judge or jury, and the facilitator/community holds offenders accountable to follow through with their actions.

70. Umbreit et al., *supra* note 52, at 273.

71. *Id.* at 274. VOD has the highest satisfaction rate out of the three front end practices. Typically nine out of ten participants would recommend the process to others. *Id.*

72. *Id.* at 278. VOD fairness rates were consistent across “setting, cultures, and types of offenses reported.” *Id.* A study of burglary victims in Minneapolis found that those who participated in VOD had an 80% fairness rate in comparison to a 38% fairness rating for those that went through the traditional system. *Id.* (citing Mark S. Umbreit, *Mediation of Victim Offender Conflict*, J. OF DISP. RESOL. 85, 85–87 (1988)). Another study from Australia found a 72% fairness rate for restorative justice users in comparison to 54% using traditional court process. *Id.* at 279 (citing LAWRENCE SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE AND DETERRING CRIME* (1997), available at <http://www.aic.gov.au/rjustice/rise/working/risepap4.html>).

73. Umbreit et al., *supra* note 52, at 279.

74. *Id.* at 280.

75. *Id.* (citing JEFF LATIMER, CRAIG DOWDEN & DANIELLE MUISE, *THE EFFECTIVENESS OF*

### *F. Restorative Justice Recidivism Rates*

The question of recidivism rates brings up a point of tension within the restorative justice movement. There are some who argue that recidivism rates should not be the only factor considered when examining the effectiveness of the theory.<sup>76</sup> Others argue that, regardless of whether a victim receives a level of closure by participating, the theory does nothing to change the system if offenders recidivate.<sup>77</sup>

The results of comparison studies indicate that the impact of restorative justice programs such as VOD, Group Conferencing and Circles has been mixed.<sup>78</sup> Despite this, as evidenced by the prevalence of these programs worldwide, there is a widely held belief that restorative justice, if carried out properly, positively affects recidivism rates.<sup>79</sup> In a forty-six study review, thirty-four studies found positive effects, seven found mixed results, two were neutral and three had negative results.<sup>80</sup> Regardless of what side of the debate one takes, scholars agree that more research with consistent measurement criteria, along with an established definition of “good practice,” is vital.<sup>81</sup>

### *G. Restorative Justice in the United States*

While it is unfamiliar to the general public, restorative justice has begun to influence criminal justice professionals in America. In the United States, some argue that “a revolution is occurring in criminal justice. A quiet, grassroots, seemingly unobtrusive, but truly revolutionary movement is changing the nature, the very fabric of our work.”<sup>82</sup>

The American Bar Association (“ABA”) officially endorsed VOD in 1994.<sup>83</sup> As of 2005, thirteen states are systemically integrating restorative justice into their criminal justice system to create radical change.<sup>84</sup> Twenty-nine states have specific statutes authorizing the use of VOD, “a

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RESTORATIVE PRACTICES: A META-ANALYSIS 9–12 (2001).

76. Umbreit et al., *supra* note 52, at 284.

77. *Id.*

78. *See generally id.* at 284–89.

79. RESTORATIVE JUSTICE CONSORTIUM, THE POSITIVE EFFECT OF RESTORATIVE PROCESSES ON RE-OFFENDING (2006), <http://www.restorativejustice.org.uk/?Resources:Research:UK> 2006.

80. *Id.* It should be noted that the majority of these studies were based on age.

81. *Id.*

82. Umbreit et al., *supra* note 52, at 268.

83. *Id.* at 260 (citing Criminal Justice Policy on Victim-Offender Mediation/Dialogue, 1994 A.B.A Res., available at <http://www.vorp.com/articles/abaendors.html>).

84. *Id.* at 261. The states include Arizona, California, Colorado, Illinois, Iowa, Minnesota, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont and Wisconsin.

hallmark of restorative justice.”<sup>85</sup> Almost all states have some type of restorative justice program in their justice system.<sup>86</sup> Even the U.S. Department of Justice distributes literature and has training programs regarding restorative justice.<sup>87</sup> Clearly, restorative justice theories are beginning to gain respect and relevance in the United States.

#### *H. Restorative Justice in Canada*

As the birthplace of the modern restorative justice movement, Canada has a long tradition of restorative justice innovation.<sup>88</sup> One particularly controversial innovation titled Bill C-41 (“C-41”), was enacted by the Canadian legislature in September of 1996.<sup>89</sup> The Bill “altered the sentencing landscape in Canada” by expressly codifying the purpose and principles of sentencing.<sup>90</sup> In the Criminal Code, the legislation did two things.

First, C-41 provided judges the option of conditional sentences.<sup>91</sup> Conditional sentences permit offenders who are sentenced to less than two years in prison to serve their period of imprisonment in their community.<sup>92</sup> Only offenders whom the judge deems not to be a danger to the community are permitted a conditional sentence.<sup>93</sup> This legislation has “given life” to the concept of restorative justice.<sup>94</sup> The purpose of

85. *Id.* at 263.

86. *Id.*

87. U.S. DEP’T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, THE RESTORATIVE JUSTICE AND MEDIATION COLLECTION, [http://www.ojp.usdoj.gov/ovc/publications/infores/restorative\\_justice/bulletin1/welcome.html](http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/bulletin1/welcome.html).

88. Wilson et al., *supra* note 37, at 364.

89. Leslie Pringle, Steven Skurka & Elsa Renzell, *Northern Lights: Incarceration Without Jail: Canada Undertakes a Radical Sentencing Reform*, 24 CHAMPION 34 (2000).

90. Canada Criminal Code, R.S.C., C.41s. 718.2(e) (1996). Section 718.1 explains the principles behind sentencing and requires proportionality. “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” *R. v. Gladue*, [1999] 1 S.C.R. 688, 699 (Can.).

91. Pringle et al., *supra* note 89, at 34–36.

92. *Id.* at 34. The impetus for this decision was the reality that prisons were failing in their job of deterrence and reformation. *Id.*

93. *Id.*

94. *Id.* An example of a restorative justice back end process used after sentencing and a period of incarceration is the voluntary Parole Suspension Process. Wilson et al., *supra* note 37, at 371. This allows offenders given sentences over two years to be placed into federal jurisdiction. *Id.* Under Canadian law, some of these offenders are able to spend a part of their sentence under supervision back in their community. *Id.* Parole officers then supervise the offenders and monitor the offenders’ risk to the community. *Id.* Offenders are not free to go as they please; rather they also must participate in a process which uses community group conferences to discuss and hold them accountable for how they will repair the harm they have done. *Id.* The Criminal Code of Canada and the Corrections and Conditional Release Act permit this action. *Id.* The National Parole Board (“NPB”) makes the

conditional sentencing is to use the community as a facilitator of restoration.<sup>95</sup> Rather than the stigmatization of prison, conditional sentencing forces the offender to be held accountable to the victim and community he or she has harmed, and together they focus on how to repair the injury.<sup>96</sup>

The second radical step was a measure to fix the problem of Aboriginal offender sentencing by implementing Section 718.2(e) (“718.2(e)”) of C-41.<sup>97</sup> Section 718.2(e) states that: “All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”<sup>98</sup>

The response to this law was decidedly mixed and people offered different opinions on the success of such a plan based on different theoretical underpinnings.<sup>99</sup> Some labeled the law as a “race based

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decision, while a separate group monitors the offenders. *Id.*

95. Pringle et al., *supra* note 89, at 36 (citing *R. v. Laliberte*, (2000) S.J. No 138 (Can.), per Vance J.A. at para. 48.).

96. *Id.* This specific measure in C-41 has produced inconsistent sentencing as some judges apply the measure, while others who are unwilling to do so hold that the matters of denunciation and deterrence trump in the particular matter at case. *Id.* at 37. For a greater analysis of the Canadian Court cases that have come out of the legislation please read Pringle, *supra* note 89.

97. A Canadian research group concluded that three major factors accounted for the overrepresentation of Aboriginals in the Canadian prisons: culture clash, socioeconomic disadvantage and colonialism. Rudin & Roach, *supra* note 49, at 17. Ultimately, the research found that the history of colonialism was the largest factor, making the Aboriginal people feel “both personally, and as a people . . . inferior and unable to accomplish anything of merit.” *Id.* at 19. While the culture clash theory explains why on average more Aboriginal people plead guilty (most Aboriginal cultural practices require people to take responsibility for their actions so that the line is blurred between legal liability and personal responsibility) it does not answer why in some Canadian prisons 95% of the Aboriginal inmates were adopted or raised in foster care. *Id.* at 17. Socio-economic theory fails in that while impoverished people are disproportionately found in jail, there is no explanation as to why Aboriginal people are commonly found in such an impoverished condition. *Id.*

98. Canada Criminal Code, R.S.C. 718.2(e), *supra* note 90. A similar mandate was incorporated into Canada’s youth justice legislation in 2003. Canada Youth Criminal Justice Act, s.38(2)(e), 2003 S.C. (Can.).

99. Ultimately, these differing opinions stem from a deeper theoretical debate between formal and substantive equality. These theories provide the underpinning as to why courts and justice systems impose sentences in the manner they do. Rudin & Roach, *supra* note 49, at 24. Formal equality posits that as human beings we are all fundamentally equal and similarly situated. *Id.* Discrimination then occurs when one group of people is singled out for their race, gender, disability, etc. and treated differently because of it. *Id.* Proponents of formal equality argue that this discrimination creates a horizontal inequality. *Id.* 718.2(e), formal equality proponents will argue, is simultaneously over- and under-inclusive. *Id.* It is over-inclusive in that not all Aboriginal peoples will need special consideration due to social hardships. *Id.* Additionally, some people do not fall under the Aboriginal category but have suffered social difficulties. *Id.* In contrast, substantive equality holds that discrimination exists in two forms: (1) express discrimination, and (2) failure to acknowledge the disadvantaged condition of certain groups in Canadian society. *Id.* at 25. Thus, while formal equality proponents would declare that *Gladue* is unfair and a form of reverse discrimination, substantive

discount” that created a reverse discrimination regime that favored Aboriginals.<sup>100</sup> Others were afraid that the language in 718.2(e) was not strong enough and would not significantly change the sentencing of Aboriginal people.<sup>101</sup> Finally, some argued that restorative justice sentencing is not preferential treatment, but is simply recognition of the unfair treatment that minorities have long endured and judges should stop ignoring.<sup>102</sup> There is also the problem of application. Since the revisions to the Criminal Code did not provide any guidance on how to implement 718.2(e), courts were given the task of interpretation.

### *I. Judicial Interpretation & Application of Section 718.2(e): Regents v. Gladue*

In 1999, the Canadian Supreme Court decided *Regents v. Gladue*,<sup>103</sup> which provided guidance on how 718.2(e) was to be enforced. The Supreme Court interpreted 718.2(e) as a response to the overrepresentation of Aboriginal people in prisons.<sup>104</sup> The Court held that when sentencing Aboriginal offenders, two issues must be considered.<sup>105</sup> The first is “[t]he unique systemic or background factors which may have

equality proponents hold that *Gladue* is a justifiable attempt to lessen the discriminatory effects that Aboriginal persons must endure. *Id.* at 26.

100. Dale E. Ives, *Inequality, Crime and Sentencing: Borde, Hamilton and the Relevance of Social Disadvantage in Canadian Sentencing Law*, 30 QUEEN’S L.J. 114, 123 (2004).

101. Adam Vasey, *Rethinking the Sentencing of Aboriginal Offenders: The Social Value of s. 718.2(e)*, 15 WINDSOR REV. L. & SOC. ISSUES 73, 97 (2003). Vasey suggests that *Gladue* and *Wells* do not guarantee Aboriginals will be given lighter sentences. *Id.* Consideration of several factors, including whether or not there is strong community support, is important. In fact, some even go as far as to suggest that conditional sentencing and/or restorative justice sentencing is *more* onerous. *Id.* at 83. Back in their community, offenders must take responsibility for their actions and make reparations to the community and victim. These actions must be done while offenders live in the community and while they are under tight control. *Id.* at 82–84.

102. *Id.* at 89–90. “The beliefs that ‘free will’ drives crime, that people choose to become criminals and therefore deserve what they get, is modified by the notion that the community has a part to play, both in creating criminals and in rehabilitating them.” Charlie J. Trueman, *Closing the Gap Between Researchers and the Courtroom*, 12 FED. SENT’G REP. 180 (1999). This argument focuses heavily on the belief that when judicial discretion is eliminated and sentencing is based on mandatory minimums, justice is incomplete; “[a] society that goes down this path has forgotten that mercy is a major component of justice.” *Id.*

103. *R. v. Gladue*, [1999] 1 S.C.R. 688 (Can.). The plaintiff, Jamie Gladue, pled guilty to manslaughter for stabbing her paramour to death. *Id.* During sentencing, the judge held that since Gladue did not live on a reservation it was unnecessary to apply 718.2(e). *Id.* at 689. He then sentenced her to three years in jail, and ten years’ weapons prohibition. *Id.* at 701. On appeal, the Court of Appeals upheld the ruling, but unanimously held that the court was wrong to assume that 718.2(e) did not apply simply because Gladue did not live on a reservation. *Id.* at 702. This then led to the appeal to the Supreme Court. *Id.*

104. Rudin & Roach, *supra* note 97, at 22.

105. *Gladue*, 1 S.C.R. at 690.



played a part in bringing the particular aboriginal offender before the courts.”<sup>106</sup> The specific evidence concerning the offender’s background and various circumstances<sup>107</sup> is also to be provided by the offender. If he or she is underrepresented, the judge is required to seek out the information.<sup>108</sup> Second, courts have to look at the “types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”<sup>109</sup>

Ultimately, the purpose of these tests was to ensure that alternative restorative justice options for sentencing were considered for Aboriginal offenders. In contrast to the minimum standards found in the United States, sentencing for Aboriginals was to proceed on an individualized basis. Courts had to ask, “For this offense, committed by *this* offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?”<sup>110</sup> This, however, did not completely obliterate the importance of denunciation, deterrence and incapacitation that prison sentences could provide. In both *Gladue* and *R. v. Wells*<sup>111</sup> (a subsequent case affirming the rationale in *Gladue*), the Supreme Court held that there are practical limitations in cases such as manslaughter, rape and other serious violent crimes.<sup>112</sup>

In *Gladue* the Court noted that prison, a place of submission and often disenfranchisement, would perpetuate the racism experienced by the

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106. *Id.*

107. *R. v. Wells*, [2001] 141 C.C.C. (3d) 368, 274. The “judge should be able to discharge his or her duty to inquire into the offender’s particular circumstances by reviewing and considering the information in the offender’s pre-sentence report.”

108. *Gladue*, 1 S.C.R. at 690.

109. *Id.*

110. *Ives*, *supra* note 100, at 120.

111. *Wells*, 141 C.C.C. 368. An Aboriginal man, James Wells was sentenced to 20 months in jail and a ten-year firearms prohibition after he was found guilty for sexually assaulting a woman. *Id.* Wells then appealed on the grounds that 718.2(e) was not considered. *Id.* The Court of Appeals upheld the conviction, holding that this crime warranted a sentence that focused on deterrence and denunciation. *Id.* The Supreme Court upheld the conviction as well, highlighting 742.1 to explain its rationale. *Id.* Based on *Gladue* and *R. v. Proulx*, [2000] 140 C.C.C. (3d) 449, 742.1 requires that a sentencing judge consider whether the offender poses a risk to the community. *Id.* The judge must also seriously consider conditional sentences in all cases (unless there is a minimum term of imprisonment). In this instance, the Supreme Court held that the judge had examined the specific situation, found that there were no appropriate anti-sexual assault programs in the community, and therefore there were no appropriate community-based sanctions available. *Vasey*, *supra* note 101, at 80-1.

112. *Wells*, 141 C.C.C. 368. Jail is not the opposite of restorative justice, The judge also recognized possible exceptions to incarceration if there were specific programs in the violent offender’s community which was designed to apply restorative justice principles. *Id.* ¶ 50.

Aboriginal people.<sup>113</sup> Thus, while incarceration might satisfy formal equality, *Gladue* suggests that alternative restorative sentences could better address the causes of the individual's behavior and therefore deter future crime.<sup>114</sup> Arguably, restorative justice's focus on community and victim would also enhance the accountability of the offender and strengthen the self-help response of the community.

In 2003, the consideration of ethnic heritage and socio-economic factors was also extended to apply to African Canadian offenders. In *Regents v. Borde*,<sup>115</sup> the Court "accepted in *obiter* the extension of a *Gladue*-like approach to African Canadian offenders."<sup>116</sup> The Court held that Aboriginal and African Canadian people had similar socio-economic conditions, such as poverty, family dislocation and substance abuse, that resulted in disparate incarceration rates.<sup>117</sup>

113. *Gladue*, 1 S.C.R. at 725.

114. Rudin & Roach, *supra* note 49, at 20.

115. In *Borde v. Hamilton*, [2003] 172 C.C.C. (3d) 15, a young African Canadian male was sentenced to five years and two months for aggravated assault and other offenses. On appeal, his lawyer argued that systemic factors had contributed to his actions. *Id.* The judge in the case examined the documents provided by the lawyer, and noted that the "reports chronicled a history of poverty; discrimination in education, the media, employment and housing; and overrepresentation in the criminal justice systems and in prisons." *Id.* at 17. The individual also had personal circumstances, including "an absentee father, a mother who suffered from mental illness and who had abandoned the family for a brief period, a chaotic home life including stays in foster homes, alcohol abuse, chronic truancy, and limited employment skills and prospects." Rudin & Roach, *supra* note 49, at 125. During appeal, the court reduced the sentence to four years and two months because of the offender's chaotic circumstances, but held that the serious and violent nature of the crime did not permit a different type of sentence. *Borde*, 172 C.C.C. at 35.

116. *Ives*, *supra* note 100, at 117. Despite the fact that African Canadians viewed sentencing similar to other Canadians, the Court held that alternative, restorative justice sentencing could still be applied. Focusing on Aboriginals, the court held that 718.2(e) still applied to all offenders and the principles are "sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes." *Id.* Furthermore, the Court held that while the judge had an automatic duty to consider systemic factors for Aboriginals, it was not legislatively required for African Canadian offenders. *Id.*

117. *Ives*, *supra* note 100, at 124. The same year, the case extension was affirmed in *R. v. Hamilton*, [2001] 172 C.C.C. (3d) 114. Two women plead guilty for importing cocaine into Canada. *Id.* They were given conditional sentences of partial house arrest and curfew after the trial court judge held that systemic racism, gender discrimination, poverty and single motherhood had all contributed to the women's decisions. *Id.* at 224. The Court of Appeals then held that the lower court was correct in examining the socioeconomic factors. *Id.* However, the lower court had erred because importing cocaine was both serious and violent, thereby requiring a period of incarceration. *Id.* Since both women would have been paroled at the time of the Court of Appeals decision, the court held it would not be in the best interest of the State or the women to incarcerate them. *Id.* at 146-48.

*J. Effects of C-41*

In 2001, five years after C-41 was passed, Canadian researchers examined the effects of the sentencing reforms. They concluded that while the rates of Aboriginal incarcerations may have declined in the 1990s, the law was most likely not the cause.<sup>118</sup> The statistics showed that both Aboriginal and non-Aboriginal incarcerations decreased during that period.<sup>119</sup> Furthermore, it was likely that the impact of C-41 would not increase as time passed.<sup>120</sup> Researchers noted that it was unlikely that judges, who had ignored the Supreme Court's clarification for two years, would be motivated to act any time soon.<sup>121</sup>

III. ANALYSIS: WHILE AFFIRMATIVE ACTION SENTENCING IN CANADA IS A STEP IN THE RIGHT DIRECTION, SIMILAR LEGISLATION SHOULD NOT BE ADOPTED IN THE UNITED STATES AT PRESENT

The United States should not implement sentencing legislation that directs judges to consider restorative justice practices, particularly with regard to African American offenders, because restorative justice is not yet systemically integrated into the American criminal justice system.

Despite the fact that Canada has been at the forefront of restorative justice innovation, and both the Canadian legislature and the Canadian Supreme Court supported implementing sentencing reform, ultimately the law had virtually no effect on Aboriginal sentencing. This confirmed Canadian skeptics' theories that 718.2(e) would have little impact on a judiciary that was already "steeped in retributivist tradition."<sup>122</sup>

It is also unlikely that, even if U.S. judges were given the discretion provided in 718.2(e), there would be any discernable effect in African American sentencing. Judges in the United States have been raised in the

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118. Julian V. Roberts and Ronald Melchers, *The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001*, CANADIAN J. CRIMINOLOGY & CRIM. JUST. 211 236 (Apr. 2003). The study showed that during the 1990s, both Aboriginal and non-Aboriginal admissions declined—Aboriginal admissions actually declined more slowly in comparison. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* "The position taken by the Parliament, and subsequently the Supreme Court, may play an important role in sensitizing actors in the criminal justice system to the problem, but at the end of the day, the best intentions of both bodies to accelerate the reduction in Aboriginal admissions to custody appear to have been thwarted." *Id.* at 237.

122. Vasey, *supra* note 101, at 84.

retributivist tradition, and an American version of 718.2(e) focused on African Americans would have minimal effect.<sup>123</sup>

Such larger scale legislation should not be implemented until smaller scale programs and research are conducted. While Canada and other European countries have been willing to apply restorative justice to their adult offenders, the United States has been slower and more wary of doing so.<sup>124</sup> It is only in the past decade that the United States has begun to take the initiative to systemically integrate restorative justice into its jurisdictions.<sup>125</sup> Passing such sweeping legislation without having restorative justice programs in which to place offenders could result in failure.

As restorative justice continues to be systemically integrated in towns, cities and states, it is important that the practice remain viable and culturally appropriate for both victims and offenders. Incarceration is failing in part because it is no longer culturally relevant to certain impoverished African American communities.<sup>126</sup>

In these communities, restorative justice practitioners must do two important things: first, they must seek to unite their communities,<sup>127</sup> and second, they must be culturally relevant to offenders without compromising their commitment to heal victims.<sup>128</sup> Some studies have suggested that an Afrocentric restorative justice view would be a viable alternative in impoverished African American communities.<sup>129</sup> However,

123. *Doob v. Webster*, *supra* note 3, at 346. "U.S. crime policy for nearly two decades has been driven much more by ideology, emotion and political opportunism than by rational analysis of options and reasoned discussion." *Id.* Since the 1990s the United States has legislated in a manner that demonstrates it believes that it is possible to legislate away the crime problem. We are currently in a stage of deterrence and incapacitation. *Id.* at 354.

124. See generally Robert B. Coates, Mark S. Umbreit & Betty Vos, *Restorative Justice Systemic Change: The Washington County Experience*, 68 FED. PROBATION 16 (Dec. 2004). Washington County, Minnesota, is one American model that shows the strength in slowly building restorative justice theory into sustainable and effective programs which eventually spur meaningful change. *Id.*

125. See generally *supra* note 79.

126. Butler, *supra* note 22.

127. Roberts, *supra* note 15.

128. U.S. DEP'T OF JUSTICE, OVC BULLETIN, *Multicultural Implications of Restorative Justice: Potential Pitfalls and Dangers* (July 2000), [http://www.ojp.usdoj.gov/publications/infores/restorative\\_justice](http://www.ojp.usdoj.gov/publications/infores/restorative_justice). "The key to progress toward adoption of restorative justice frameworks is increased sensitivity to cross-cultural issues and dynamics that affect restorative justice programs and the administration of justice itself." *Id.* As the United States begins to develop more restorative justice programming it is vital that practitioners acknowledge both cross cultural issues and the diverse issues that exist within cultures. *Id.* Differences between cultures can be found in a variety of behaviors such as: (1) proximity of conversant, (2) body movements, (3) paralinguage or vocal cues and (4) variations in density of language. *Id.* at 7-9.

129. See M. Jenkins, *Afrocentric Theory and Restorative Justice: A Viable Alternative to Deal with Crime and Delinquency in the Black Community*, 3(2) J. SOC. & SOCIETAL POL'Y, 17-32 (2004);

the picture of what a culturally relevant program is for African American offenders coming from impoverished communities has yet to be defined.<sup>130</sup>

Application of restorative justice theory does not mean the elimination of incarceration. The Canadian Supreme Court recognized this and placed practical limitations in its *Gladue* decision.<sup>131</sup> Ultimately, if either the victim or offender is unwilling to participate in restorative justice programs these limitations must be honored.<sup>132</sup>

#### IV. CONCLUSION

The current retributive focus in the United States has resulted in a disproportionate number of African Americans sentenced to jail and disintegrated social networks, norms and citizenship in impoverished black communities.<sup>133</sup> This reality runs counter to our nation's promise of equality for all and demands that we find a solution. As restorative justice practitioners develop more programs and gain experience in delivering such practices through culturally relevant methods, legislation proposing affirmative action sentencing and directing offenders towards restorative justice programming can and should be considered.

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M. Jenkins, *How Do Culture, Class and Gender Impact Restorative Justice*, CRITICAL ISSUES IN RESTORATIVE JUSTICE (H. Zehr, & Barbara Toews eds., 2004); and Morris Jenkins & M. Boss, *Treatment for Juvenile Offenders: A Restorative Justice Afrocentric Approach*, SOCIAL POLICY TIMES, 2, 8–10 (2003).

130. Morris Jenkins, *Gullah Island Dispute Resolution: An Example of Afrocentric Restorative Justice*, 37 J. BLACK STUD. 299, 300 (2006).

131. *R. v. Gladue*, [1999] 1 S.C.R. 668 (Can.).

132. By maintaining voluntary programs, restorative justice practices are better able to protect victims against the risk of re-victimization.

133. *Supra* note 34.

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