

Restorative Justice: Dismantling Structural Racism Within the U.S. Criminal Justice
System Through Decolonization

Research Thesis

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There is no single definition of restorative justice. For the use of this paper, a clear, accepted description by Tony Marshall of the Restorative Justice Consortium (UK) serves to answer this question: what is restorative justice? "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future" (Marshall 1995; McCold 1998; McCold 1999). While Marshall's definition presents a necessary theoretical definition of restorative justice, it is not sufficient. To understand restorative justice practices it is necessary to include the indigenous judicial history that developed most of its foundational framework. Under this definition restorative programs must involve at a minimum: (a) the victims and their offenders of a specific crime meet face-to-face, where; (b) they discuss the outcome (McCold 1999). Applying Marshall's definition of restorative justice, three models of restorative justice fulfill these requirements: mediation models, conferencing models, and circle models. The practices to be explained in this paper are:

1. Mediation models:

- Community mediation (CM)
- Victim offender reconciliation programs (VORP)
- Victim offender mediation (VOM)

2. Conferencing models:

- Community conferencing (FGC and FGDM)

3. Circle models:

- Sentencing circles
- Peacemaking circles
- Healing circles

These models will be described and distinguished, and this paper will then scrutinize the application of restorative justice practices since 1970, organizing current uses under a historical context. After these practices have been described, this paper will consider the philosophy of punishment through the lens of prison abolition theory, settler-colonization theory, and feminist care labor theory to identify how restorative justice can be used as a decolonization tool that can assist dismantling structural racism within the U.S. criminal justice system.

Restorative Justice Core Process

In a just society where community members act with virtue and share mutual respect, when a misconduct is experienced, the wronged individual faces the wrongdoer about the offense. The wrongdoer listens respectfully to understand issues of the offense and the significance of its consequences so they can take responsibility for the conduct, express a sincere apology and make steps to repair that involve a plan to keep the offense from happening again. By doing so the wrongdoer is forgiven, trust is developed, and the relationship is fixed. This dynamic is ideal and exemplifies the core restorative justice model in Figure 1; only the victim and the offender participate and no intervention by a third party is needed because the victim and the offender desire to be responsible and work for a harm-reducing resolution. This action plan has four steps:

1. Identify the wrongdoing (assert facts);
2. Discuss and understand the harm caused by the wrongdoing (express one's feelings);
3. Establish terms of reparative plan and commit (agree on restitution);

4. Recognize how to correct behavior for the future (reform by alteration, substitution, or abolition) (McCold 1999).



Restorative Model Core Process

Figure 1

(McCold 1999)

The focus of this paper is not to imagine working within a just society because the U.S. criminal justice system is based upon an unequal society wrought by its settler-colonialism history. One must also ask the question, "how can relations be amended when offenders are not held accountable, and victims do not feel safe or supported?" All restorative justice models identified have the goal that the victim and the offender pursue these four steps within an unequal society. Each process is different in the ways they perform, depending on who facilitates, who is allowed to participate, and what matters will be addressed.

Mediation Model

For the mediation model face-to-face communication between the victim and the offender is conducted through a third party whose responsibility is to participate as a neutral figure and guide the dialogue (McCold 1999). The third party is normally a social work expert or trained community volunteer (McCold 1999). The focus of the mediation is to achieve the set goals of 1.) discussing how the crime affected the two parties; 2.) exchange information relevant to the crime; 3.) construct a restitution agreement in writing that is found to be satisfactory for the victim and the offender; 4.) create a plan for subsequent meetings to check in separately by

both parties. This procedure will fulfill the restorative justice core process, as represented in figure 2 (McCold 1999).

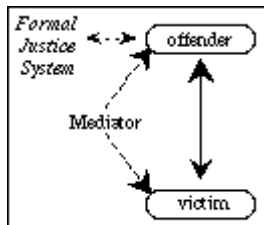


Figure 2: mediation model (McCold 1999)

Typically only the victim (there may be more than one victim), the offender, and the mediator are present for the mediation model (McCold 1999). Juvenile offenders may have their parents present to observe the mediation process, but it is not required for the facilitation (McCold 1999). For criminal cases, mediation does not typically determine judicial disposition but only the restitution amount (McCold 1999). The courts may enforce the restitution agreement and hold indirect authority over the mediation by having jurisdiction over the offender (McCold 1999).

In 1971 The Institute for Mediation and Conflict Resolution in Manhattan (IMCR) developed a practice for mediation that fulfills the restorative justice core process requirements and has become the standard process since its establishment (McCold 1999). The IMCR model instructs mediators to physically visit or call the victim and the offender to describe the mediation process and obtain consent for participation (McCold 1999). Mediation requires careful facilitation and for that reason the training to make a good mediator includes developing “listening skills such as maintaining eye contact, summarizing what participants say, identifying points of agreement and encouraging further discussion” (McCold 1999). The steps for a satisfactory mediation process are (McCold 1999):

1. Mediator is formally introduced and presents basic rules for the mediation sessions:
remain seated, no interruptions once someone speaks, no abusive language is tolerated,
and focus on creating an agreement;
2. Mediator puts forward a notice of confidentiality;
3. Mediator explains what the consequences are if the mediation is unsuccessful, such as
reverting to the courts for adjudication or to work with an arbitrator;
4. Without interruption the victim and the offender each discusses their versions of events;
5. A general discussion between the offender, the victim, and the mediator occurs;
6. The mediator facilitates an agreement between the parties on how to conduct themselves
toward each other in the future. Mediators should not insert their suggestions except
when negotiations are struggling. If needed mediators will independently discuss with
each party to legitimize the agreement.

Mediators should revisit with the two parties separately approximately within two months to inspect if the agreement is still holding (McCold 1999). The three forms of mediation models that work within the restorative justice core process are community mediation (CM), victim offender reconciliation programs (VORP), and victim offender mediation (VOM) (McCold 1999).

Community mediation programs became common in the United States beginning in the 1960s as the classical Civil Rights Movement demanded attention to the racial, class, and gender inequalities embedded in America's democracy (McCold 1999). To encourage the growth of community mediation and reform the justice system, the federal 1964 Civil Rights Act introduced the Community Relations Service (CRS) to be created within the Department of Justice (McCold 1999). A year after the Civil Rights Act was established, a Presidential

Commission on Law Enforcement and the Administration of Justice pursued a study on the overcrowded and overburdened court system (McCold 1999). The discoveries made from this commission confirmed the necessity for reforming the justice system in a way that returned authority back within oppressed communities beginning with small criminal cases between neighbors, relatives, and friends ([RSI 2019](#)). Initial programs included “the Philadelphia Municipal Court Arbitration Tribunal (1969); the Columbus Night Prosecutors Program (1971), which used law students to mediate cases in 30-minute time slots; the Institute for Mediation and Conflict Resolution in Manhattan (1975); and the Miami Citizen Dispute Settlement Program (1975)” ([RSI 2019](#)). The National Conference of the Causes of Popular Dissatisfaction with the Administration of Justice (also referred to as the “Pound Conference”) presented in 1976, created “Neighborhood Justice Centers” in Atlanta, Kansas City, and Los Angeles (McCold 1999). This development created a service to handle community conflict and is considered a legal alternative to formal adjudication for minor cases (RSI 2019). Community mediation is conducted by community dispute resolution centers organized across the United States, working in collaboration with law schools, services provided by the court system, and can be granted public funding by the Law Enforcement Assistance Administration (LEAA) through the U.S. Department of Justice (McCold 1999). Assistance is offered to a plethora of dispute cases, from those provided by the police, transferred by the courts, or self-admitted walk-ins. These centers make resolution services accessible and perform at a faster, less costly rate compared to the exasperated court system and commonly perform settlements considered more appropriate for the parties involved ([RSI 2019](#)). Supporters of CM programs believed that the process would restore autonomy in judiciary back within urban settings by working on a local level to address interpersonal disputes and inter-group conflict (McCold 1999). “Not only could mediation afford

participants a sense of power and control over their lives, the open process could also allow participants the opportunity to listen, be heard and create sustainable responses” ([RSI 2019](#)). CM programs provide a range of resolution methods, including “formal adjudication and litigation binding arbitration, nonbinding arbitration (mini-trials) and mediation” (McCold 1999). Researchers have found this restoration of power within the community has led to participants to more likely feel a sense of empowerment taking agency over their lives from the court system and improved their ability to empathize, willingness to look past judgements, and humanize the other party (RSI 2019). This model is considered settlement-based and provides a substantial level of influence by mediators compared to other processes. While a mediator cannot dictate the parties, they can be involved in specifying the issues, determining and organizing areas of dispute, inputting suggestions during sessions, and address the parties as an intermediate (McCold 1999).

Community mediation has become a professionalized field where only half identify as volunteers and some bar associations have called for certain classes of cases to be only advised by lawyers and retain power to the courts (ABA 1990). According to the American Bar Association, community mediation services include “family mediation, divorce mediation, custody mediation, landlord/tenant mediation, consumer mediation, court-annexed arbitration, labor mediation, victim-offender mediation, school-based dispute resolution, intergroup dispute resolution, public policy dispute resolution mechanisms, peer mediation and other specialized efforts” (ABA 1990). Mediation “originates from civil law labor-relations practices and is mainly utilized to avoid litigation” (McCold 1999).

The Victim-Offender Reconciliation Program (VORP) began in the early 1970s when two male adolescents were convicted of vandalism in Kitchener, Ontario (McCold 1999).

Through the advice of a probation office, the offenders were conducted in a new experiment aimed at meeting face-to-face with the victims and construct concrete debt to be paid by repairing material and interpersonal damages (McCold 1999). The probation officer, David Worth, was moved to suggest that the boys meet face-to-face and take individual responsibility for their actions due to his deep involvement within a religious group, the Mennonite Central Committee (MCC) (McCold 1999). The origins of the VORP experiment were rooted in Mennonite values of reconciliation and peacemaking. From the ordeal the two offenders felt that while it was hard, it was also beneficial. The transformative process from this case is recognized as a success, yet multiple issues developed and needed to be addressed from the experiment including “victims with a range of personal responses, the involvement of insurance companies in restitution, and the considerable time lapse between the . . . offense and the completion of the restitution process” (Joseph 1996). Addressing these problems with a fellow MCC member, Mark Yantzi, who was ordered by the trial judge to assist Worth with the Kitchener experiment, produced what is the general guidelines of VORP programming. VORP is rooted in Mennonite interpretations of mediation and uses biblical terminology to describe the restorative justice process, such as “atonement, reconciliation, obligation, responsibility, accountability, forgiveness and justification” instead of the secular language of civil dispute litigation (McCold 1999). The goal of VORP programs is to heal injured relationships and the face-to-face meetings between victim and offender is conducted to repair these bonds broken by the crime. This model is generally used for petty crimes and cases in the juvenile justice system. VORP provides the opportunity for both parties to express their sentiments and perspectives on the crime committed. This experience helps the offender humanize the victim and give an educated apology while also giving the victim space for closure by voicing their suffering. “Today it is very clear, from

empirical data and practice experience, that the majority of victims of property crimes and minor assaults presented with the opportunity of mediation chose to engage the process, with victim participation rates often ranging from about 60-70% in many programs” (Umbreit & Bradshaw 1999). Unlike community conferencing programs that are settlement-driven, Mennonite ideology makes VORP concentrated on self-empowerment of the offender by ownership and rebuild it within the victim through reparations (McCold 1999).

Activists have criticized the non-secular nature of the VORP process and its structure that encourages forgiveness to the offender (McCold 1999). Some crimes committed can never be forgiven, and it is unfair to ask that of traumatized victims. Community mediators felt that VORP’s focus on reconciliation was asking for too much; a mutual agreement is a more appropriate goal than a harmonious make up (OVC 2000). The reaction of secularizing the restorative process of VORP, and to create distance from a forgiving offender model, produced the Victim Offender Mediation (VOM) model (McCold 1999). The goals of VOM do not encourage forgiving the offender through understanding. The focus is “to hold offenders directly accountable while providing important support and assistance to victims” (OVC 2000). Trained mediators assist the victim to express themselves in front of the offender and detail the impact caused by the crime, ask questions, and be an active participant structuring the restitution plan. This approach considering power dynamics related to crime emphasizes victim healing and considers dialogue essential for violent crime cases (Umbreit & Bradshaw 1999). Unlike conferencing mediation that are settlement driven and VORP designed to repair relations that deals with typically non-violent property crimes, VOM has been studied and practiced on violent crimes including sexual assault, attempted homicide, and relatives of the victims of homicide

cases. VOM does not have supporters of the victim or offender participate in the process in order to prevent offenders from holding back their engagement (Umbreit 1994).

Victim-Offender Conferencing (VOC) was developed to allow supporters of each party to be present for the meditations as an experiment by VOM and VORP groups. On top of different mediation programs merging styles, new restorative justice approaches are blurring the lines between practices, such as mediation and conferencing (McCold 1999). Opening the mediation setting to supporters of each party enables the members of the offender's party to be actively engaged in holding the offender accountable to the restitution plan, breakdown the emotional connection that might cloud their judgement of the crime and harm caused, humanize the victim and their supporters, and have a better understanding to help change environments that encouraged the crime committed. Supporters of the victim can be of great value for emotional support and be educated on how to best help their loved one during this difficult process, unlearn biased presumptions, and be an active agent of the community.

Conferencing Models

Conferencing is "a process in which any group of individuals connected and affected by some past action come together to discuss any issues that have arisen (Warner-Roberts & Masters 1999, McCold 1999). Conferencing is similar to mediation by permitting the victim and offender of an offense to meet face-to-face with a trained facilitator as an alternative to formal judicial proceedings. However, conferencing advocates reject the use of mediation as a program for criminal cases because of its roots in civil labor law practices that place each party on morally equal footing and compromise an agreement. This does not suite the power dynamics involved in criminal victimization. "Mediation is to conferencing as civil law is to criminal law" (Moore 1995). Conferencing benefits from the social behavior of group dynamics to control

conduct within the setting, unlike mediation that relies solely on the mediator to manage the behavior between the victim and offender (McCold 1999). Mediators establish ground rules and in similar practice conference facilitators set up the group focus (McCold 1999). Mediation programs began receiving criticism in the 1980s and 1990s for the lack of support victims were not granted and conferencing advocates pointed out how harmful this can be for the power dynamics involved in domestic violence cases (McCold 1999). Because of this negative feedback, community mediation programs saw a gradual decline in domestic violence cases and conferencing began to be addressed as the superior practice for this form of offense (McCold 1999). Conferencing models vary on the input by supporters of both parties within the reparative plan agreement, who can negotiate, who can approve of decisions, and who facilitates (McCold 1999).

Family group conferencing (FGC) is a process created by the New Zealand government after it passed the Children, Young Persons, and Their Families Act (CYPF) of 1989. Under the law juvenile courts understand that adolescents and children have varying levels of maturity and cognitive levels while carrying out justice (McCold 1999). This practice addresses juvenile crime in a way that diverts the case away from the court system and is based in de-incarceration ideology as well as having roots in justice practices of the Maori people (O’Driscoll 2008). FGC is diversion driven by avoiding “harmful interventions but also includes the minimization of negative impacts in circumstances where more harmful interventions cannot be avoided” [O’Driscoll 2008](#). This practice focuses on minimizing out-of-home placements, in particular for Maori youth, by working with extended family and tribe representatives alongside social workers (O’Driscoll 2008).

In Gabrielle Maxwell and Allison Morris' *Youth Justice in New Zealand: Restorative Justice in Practice*, it is noted that the strategies of FGC include "the rights and needs of indigenous people are to be taken into account; families are to be central to all the decision-making processes involving their children and young people; young people are themselves to have a say in how their offending is to be responded to; victims are to be given a role in negotiations over possible penalties; the model of decision-making advocated is to be group consensus" (2006; O'Driscoll 2008). The conference includes the victim, the offender, families, and professionals within the court system including the police, youth advocates and community representatives also known as "lay advocates," to develop a reasonable penalty to the administering judge (O'Driscoll 2008). "In the vast majority of cases Youth Court Judges, who are not present at FGCs, accept and adopt the recommendations arrived at by the participants of the FGC" (O'Driscoll 2008). While FGC is like other restorative justice practices by holding accountable the offense in connection to the harm it has caused, unlike other programs the primary focus of FGC is the welfare of the adolescent offender (McCold 1999). In this engagement family members have direct involvement during the conferencing as collaborators with professional services for the offender's intervention (O'Driscoll 2008). The Youth Justice system activates the CYPF Act when police identify a youth exhibiting social maladjustment that is indicative of criminal offending (O'Driscoll 2008). The subsequent actions used by the police depend on the seriousness of the alleged offending incident and include (O'Driscoll 2008):

- **Warnings:** The police officer present at the offense issues a warning with a subsequent letter issued by a Youth Aid Officer concerning the warning;
- **Alternative Action:** The Youth Aid Officer constructs a diversion plan for the offender that may involve a formal apology, community work, and/or monetary reparation;

- Family Group Conference: Following the provided plan, a Youth Justice conferencing facilitator is contacted when offending cannot be solved through a warning or diversion and when a charge is intended and no arrest has been made, also known as “intention to charge;”
- Arrest: Conducted in narrowly defined instances.

The input of system professionals other than the police to address law breaking and steps made before requiring arrest is key to the diversion-driven approach of FGC and a reason behind the low youth incarceration rates (O’Driscoll 2008). Arrest is the last measure taken for conferencing and only in difficult circumstances where there is no other option in order to keep the offender away from danger. A study has discovered seven out of ten offenders who participated in FGC reduced the severity and/or frequency of their offending behavior, however authors highlighted recidivism rates should not be considered indicative of how successful the justice process works ([Spier & Wilkinson 2016](#)). “A person may reoffend less often simply due to the fact that they were caught by the police and made to account for their actions, regardless of the particular intervention applied (between intention-to-charge versus arrest). There may also be a general effect from the person aging and maturing” ([Spier & Wilkinson 2016](#)).

New Zealand’s impact on justice reform sent shockwaves across the world, impacting governments within the imperial core including Canada, Australia, the United States, and Europe. While Canada maintains a settler-colonial state that does not recognize sovereignty to indigenous peoples, the Canadian family group decision-making model (FGDM) is considered an improved version of FGC directed toward family violence and created with respect to indigenous cultural practices with harm in the family structure (McCold 1999). The practice focuses on bringing family members together for the opportunity to be involved in planning what should be done under a setting that provides safety and trained facilitators as resources. FGDM

was developed in mind of FGC's use of indigenous practices toward domestic violence combined with reintegrative shaming theory and feminist caring labor theory. Reintegrative shaming theory asserts society experiences less crime when the offender undergoes a process that addresses their offense and shames them for their actions while maintaining the offender's dignity (McCold 1999). Care labor theory was written in *Women's Caring Feminist Perspectives on Social Welfare* to address how the welfare system under patriarchy only acknowledges women as recipient to assistance, assumed the role of victim, and that patriarchy does not liberate through welfare but entrenches women within a dependency dynamic (Smith 2013). "Caring labor theory helps to clarify the structural context in which reintegrative shaming occurs and how this empowerment process spreads around the responsibility for caring. The family group conference makes it possible to listen to the voices of all participants and design culturally sound plans for meeting public standards" (McCold 1999). The theory also acknowledges how women are expected to perform formal and informal labor such as being in the workforce while also responsible for the majority of childcare, elder care, and household work (Baines et al 1991). Both conference formats are considered "community conferencing" practices and follow along relatively the same steps of procedure (McCold 1999):

1. Facilitator establishes reasons why the entire group have come together and the ground rules of the conference;
2. Authorities share report on the offense to the conference and the State's expectations moving forward;
3. Professionals deliver educational resources and information;
4. Family discusses separate from the larger group a draft that addresses the causes of the offense and recommend how to restore the damage done by the offense;

5. Facilitator and other FGC participants review and revise the plan;
6. Offender gives direct apology to the victim and answer any of the victim's questions or concerns;
7. Presents plan to the judge/caseworker/police in charge and either receive revision recommendations or be approved.

Encouragement for the FGC model can be thanked by the history of restorative practices utilized by the Maori tribes long before the occupation of New Zealand's government. It is important to be aware of the indigenous origins within the internationally acclaimed restorative model to avoid whitewashing these ancient traditions. Concepts recognized in the customs and traditions of Maori justice include whakapapa, collective responsibility, utu, muru, and ea (PACT 2020). Whakapapa, meaning genealogy, is the basis of Maori social structure; members belong to a whānau (family) who are part of an inner group, hapū, within the iwi (tribe) who are connected to a particular region that "were of great social, cultural and economic importance" (PACT 2020). Kinship and preserving these relations are a valuable and essential dynamic within the Maori culture. Intergenerational ties to one's ancestors are as respected as the sidelong relationships to fellow members within the whānau, hapū, and iwi. Collective responsibility is a key facet to Maori culture, historically it has been understood that the needs of the group are more consequential than those of the personal as "individual rights were usually indivisible from the whānau, hapū and iwi welfare" (PACT 2020). If one person has committed an offense against another, the sub-group and tribe of the offender would participate taking responsibility for the wrongdoing (PACT 2020). Whakamā, meaning essentially both remorse and disgrace, would be expressed by the offender as an individual and someone who has disgraced their surrounding kin (PACT 2020). Likewise the victim would include the individual wronged as

well as their whānau and together they would require a reparative process from the offender's party (PACT 2020). For the restorative process to move forward between parties there must be enough time for the whānau group to be briefed on all facts critical to the offense and caucus together on how to move forward through the process (PACT 2020). This can mean the facilitator will have to meet with the whānau several times pre-conference before the entire group comes together, this time length needs to be respected while also maintaining focus on the victim during deliberation (PACT 2020). Family members take collective responsibility assuring that the offender accomplishes the agreements made at the conference to maintain their group status (PACT 2020). This dynamic is used to avoid breaking these agreements which would break down the point of everyone coming together and endangers revictimization (PACT 2020). Utu is a Maori custom that comes from the expectation every action deserves a satisfactory answer, positive or negative (PACT 2020). Reciprocity encourages an equal relationship between anyone within the Maori culture, regardless of status, gender, age, or other contributing social factors. Under utu falls the tradition of muru, the idea of seeking justice through accountability (PACT 2020). Through utu seeking justice is understood as returning an equal response of repair to the level of harm deemed by the victim and their supporters (PACT 2020). Maori society pursues justice through compensation and retribution, traditionally involving the offender's party removing property from the offender's ownership (PACT 2020). This process is treated as a positive experience for both the victim and offender; the conference carves out a space for the victim's experiences and feelings to be acknowledged and respected through backing by their community and the offender is able to restore their mana, meaning status, after compensating the victim and their whānau and hapū (PACT 2020). "Muru was an effective form of social control, governing the relationships between kin and groups" (PACT 2020). Once the

status of the victim is repaired so does the offender's as a result, and ea, meaning roughly "it is over, it is done, we start from here as if the crime had never happened" is established ([PACT 2020](#)). The Maori practice of justice illustrates the restorative justice processing by using flexible and responsive tactics for the conference to understand the harm caused at great length, taking collective responsibility to ensure the offender is accountable following the agreements, focusing on the safety of the victim with the whānau held accountable for the victim's care and support, and follow up of the agreements to make ea attainable ([PACT 2020](#)). This format has been recognized to diminish the victim's fears of revictimization by the offender, lower chances of the offender recommitting the offense in the future, strengthen family bonds by being educated from the offense and supporting their victimized loved one, and avoiding incarceration as a form of punitive punishment (PACT 2020).

Circle Models

Circle processes are fundamentally rooted in traditional indigenous cultures and social practices and can be discovered in variety all over the world ([McCold 1999](#)). Two main systems of circle models follow the restorative justice process: healing circles, which are focused on a specific issue all participants share (substance abuse circles, child abuse circles, women's groups, etc.), or to support someone through their healing (circles for either victims or offenders); and sentencing circles, which are restricted to offering proposals on how to deal with criminal offenses to the courts who conduct case disposition ([McCold 1999](#)). According to McCold, "whether used as a pre-adjudicatory alternative or for determining post-adjudicatory disposition, the circle models tend to follow similar structural processes." The use of restorative practices within indigenous cultures have occurred for far longer than the development of secular Anglo-European legal systems. "Indian nations and the other indigenous nations of the world

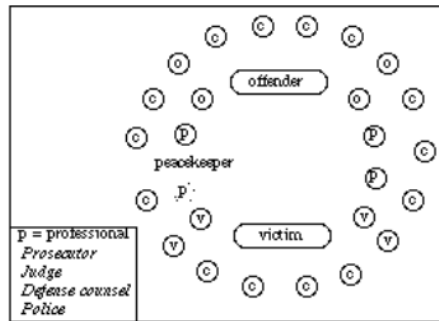
have practiced restorative justice for centuries. Whether denominated as ‘traditional Indian law,’ ‘native law,’ ‘customary law,’ ‘peacemaking’ or some other name, restorative justice is in fact the original, pre-state form of law” (McCold 1999, Zion 1998). Because of the restoration of tribal sovereignty that have occurred on North American reservations over the past century, circle model practices have been evolving to reconnect with indigenous traditions and values (McCold 1999, Dickson-Gilmore 1992). Versions of circle models differ depending on who facilitates, the intentions of the circle, and whose involvement is permitted as well as what is considered their duties (McCold 1999). Traditional beliefs of independence and individuality form the circle model understanding of power and punishing crime, which believe that one cannot dictate their decision upon another. As explained by Louise Thompson, of the Mohawk Nation of Akwesasne, “The Indian Act was forced upon us in 1898 in Canada, and it had all these rules and policies on how to conduct yourself. But we don’t force things on people. Our custom is to ask the people what they want to do—to come to a community collective agreement” ([Mirsky 2004](#)). For the purpose of this paper will be discussed three forms of circle processes used by Native Americans, First Nations, and other indigenous peoples of North America: The Navajo Nation peacemaking circles (Yazzie & Zion, 1996; Yazzie 1994), sentencing circles structure (McCold 1999), and the healing circles developed by the Hollow Water community in Manitoba, Canada (Aboriginal Corrections Policy Unit Canada 1997).

Hozhooji naat’aanii, the Navajo peacemaking system, was revived under the U.S. judicial system as a traditional indigenous dispute resolution practice within the Navajo Nation of Arizona, New Mexico, and Utah in 1982 (Yazzie & Zion, 1996). When an offense occurs against one Navajo member by another they may put forth a demand for the offender to repair the harm they have caused against them (McCold 1999). If the offender refuses, the victim may

pursue facilitation by a community leader and begin a peacemaking circle. Within the peacemaking circle family and tribe members of both parties come together to discuss the offense and arrange a plan agreement (McCold 1999). The circle begins with the group saying a prayer asking for spiritual assistance through the process (McCold 1999). All participants are then encouraged to express any feelings or grievances they have toward the injustice committed, and the victim can disclose the impact the offense has had on them (McCold 1999). The offender is the focus of the meeting and offered the space to discuss their sentiments over the wrongdoing and must take accountability under the scrutiny of their relatives and neighbors who will point out any dismissal or avoidance by their account (McCold 1999). The facilitator, known as the peacemaker, will be responsible for guiding the parties, focusing on the nature of the offense and basing judgement through traditional authoritative examples (McCold 1999). *Nahat'a*, meaning planning, is a problem-solving strategy used by the Navajo to navigate what the appropriate response to an offense should be and is considered within the circle (McCold 1999). "Following an exchange of what people think happened, the facts, and expressions of feelings about what happened and its impact, Navajos then ask, 'Where do we go from here?' Planning prompts questions such as 'What needs to be done to repair or make up for the injury?' and 'What can be done to make sure this does not happen again?'" (Yazzie & Zion, 1996). While the peacemaking circle utilizes *nalyeeh*, meaning restitution, and can enforce monetary reparation through the exchange of money, horses, or other valuable from the offender to the victim, this is not the purpose of the meeting (McCold 1999). Repairing the feelings and relationships where appropriate is considered imperative for the circle (McCold 1999). If the offender does not have the personal ability to pay *nalyeeh*, their extended family and clan members participate in repayment (McCold 1999). "The tradition isn't simply that relatives assume obligations for

others, but when an individual commits a wrong against another, it shames the person's relatives— 'He acts as if he had no relatives'" (McCold 1999). The circle is completed once an agreement plans how to avoid the offense from happening in the future which the offended must follow and will have the offender's party committed to close observation over their relative or neighbor for accountability for the long-term future (McCold 1999).

Sentencing circles are organized by the community working together with the criminal justice system to create a sentencing plan that appropriately satisfies all grievances by the parties involved (McCold 1999). Participants within sentencing circles include the victim, offender, supporters for each party, as well as law enforcement and professionals including judge, prosecutor, police, and defense attorney (McCold 1999). Sentencing circles can be found within the courtroom whereas other practices are detached from the court system. Each member of the circle is given the opportunity to speak on their feelings connected to the crime and the circle works together to find meaning from the experience as well as determine what steps must be taken to help the healing process for each person and prevent the offense from happening in the future (Pranis 1997, McCold 1999). The design of the circle can either be set up as one large circle or an interior and exterior circle, where the victim, offender, and their supporting parties are moved to the interior along with court professionals, and the exterior circle is maintained by professionals needed when requested to address particular facts as well as volunteer community members as shown in Figure 3 (McCold 1999).



(McCold 1999)

It is necessary prior to the sentencing circle that the offender has accepted responsibility, plead guilty to the crime that organized the sentencing circle, taken rehabilitative action, received support within the community and heard the opinion of the victim (McCold 1999). This preparation is important before meeting in the circle for the process to be successful and as this circle practice develops communities have recognized putting more effort into the preparation must become a priority (McCold 1999). This preparation may involve trading information, creating strategies, and education for all members to be ready to participate (McCold 1999). Successful preparation will make the circle experience last as long as two hours (McCold 1999). Lack of preparation may result in the circle to be split into two sessions; the first hearing can last two hours, with the second hearing taking accordingly less time (Stuart 1996, McCold 1999). The first circle meeting is facilitated by the judge, but sometimes two community member might be assigned to act as guides of the meeting (McCold 1999). The job of the facilitator is to guide discussions toward making an agreement; they begin the sentencing circle by saying a prayer and welcoming everyone for coming together, establishing ground rules for how the circle will go forward, and uses a sacred object such as an eagle feather to be used as a “speaking token” to be moved around the circle to whoever wishes to speak (McCold 1999). At the first circle meeting the group addresses the reasons for why they have come together (McCold 1999). The second meeting is focused on the victim, breaking down any shame or guilt they might have

internalized, commending them for the bravery it takes to come forward and share their feelings of the experience, and reminding the victim that what occurred was not their fault (McCold 1999). A third meeting is held to address the offender, “because the crime that the offender has committed has not only touched the victim, [but] it has also touched the family and the kinship system” (McCold 1999). This third meeting allows participants to directly speak to the offender and express how their offense has impacted them personally, and what expectations they have for the plan to move forward (McCold 1999). The final and fourth circle meeting is to provide recommendations of the course of punishment that the judge should take on the offender. The sentencing circle is an inclusive design by giving the community a claim to the outcome and thus have an incentive to be a part of the process (McCold 1999). Although not everyone from the community may participate, every local can be informed and join what availability exists (McCold 1999). The principal idea behind the sentencing circle is by helping others, one helps themselves; it is considered who receives the most impact by this process is neither the offender nor the victim but the community (McCold 1999). Sentencing circles strengthen the connection to one’s community and building a conception of “being in community.”

A healing circle is a group organized method for Native people to reconcile with the violence connected to white settler-colonization that have left communities fragmented. The Hollow Water Healing Program created by the Ojibwa tribe of the Anishnaabe people in Hollow Water Manitoba, Canada, addressed the root problem of sexual trauma that had attempted to destroy every facet of community life. “What Community Holistic Circle Healing (CHCH) does – facing sexual abuse head on – is the hardest part of all. By comparison, repressing and forgetting are easy. Healing must take place under the steady gaze of the traumatic reality of sexual abuse . . . It is nourished by its denial” ([Aboriginal Corrections Policy Unit Canada 1997](#)).

A reality many indigenous communities experience, Hollow Water had become entrapped in violent cycles of alcoholism and abuse to cope with the overwhelming sense of despair and marginalization wrought by U.S. empire. Berma Bushie, an original participant and organizer, describes the creation of the CHCH project and how it has saved the community from total separation from their culture in her reflection (Aboriginal Corrections Policy Unit Canada [1997](#), 149-56, McCold 1999):

“The beginnings were in the community in the early eighties. Back then, what we were faced with was alcohol abuse at its highest point. You could find a party in the community any time of the day and any day of the week. There was violence between men . . . there was also violence against women, both physically, sexually, mentally and psychologically. But the physical violence and sexual assaults were the most visible . . . in the early eighties a few of us decided to sober up. Our community was in crisis, and the question was where to start? It was such a big problem in all areas and just a very few people were talking about what was happening and trying to address the problems. In the early eighties we did a lot of talking, did a lot of crying, and slowly, over time, more and more people came together . . . over time, when I look back, it just feels like someone was leading us down this road. It was very much felt in the circles that we used. We didn't plan to start using our traditional ways, we just kind of stumbled and my impression of what happened to us is we were being led, being shown, what methods to use. People were brought into our path to help us, and so each year we were moving closer and closer to the core of the problem. At first we were saying alcoholism was the problem; suicide was the problem; child neglect was the problem; kids dropping out of school was the problem. The more we learned about ourselves, the more we learned

about our community. Those were awesome times that sent us deeper. Then we started touching on sexual abuse. I always remember one workshop where there were sixty people . . . it was there that we couldn't ignore the problem anymore because we were faced with actual numbers. For the first time we were able to talk about the sexual victimization of our past as children, and as young people in this community. It was not one incident. There were multiple incidents, multiple abusers. Many of us started off as victims, as children . . . breaking that silence for the first time was very shocking, and I think we all knew it was a crisis. People disclosed because of all the work we had been doing and because people had sobered up . . . a lot of us have gone down that road of abusing alcohol to numb the pain. Thoughts of suicide were never far away from our minds, so we had traveled that road, and we knew what the symptoms were. We came to realize that a lot of the stuff we had to deal with goes back to our childhood. It was a journey that took probably four or five years. What happened here on a small scale was one person disclosed and gave courage to the next person, and to the next person, so that over time, you begin to share the burden. It's your own pain, but it's shared because you're telling more and more people that this is what happened to you and you're giving hope to other people. As they begin to deal with their own stuff, then it comes back. You get so much back in return. That is how it works. That's how I see healing in the community—it's that web, making those connections. That's exactly what has happened amongst the women here" (149-166).

There are thirteen steps taken within the Hollow Water healing circle process (McCold 1999, Aboriginal Corrections Policy Unit Canada 1997):

1. Disclosure of offense provided by the victim;

2. Case workers will remove victim from family unit only for certain sensitive cases where there is no other option (Ex. incest), but otherwise will make sure that the victim is not in the same housing as the offender and that parents and family members are able to stay around the victim to establish safety;
3. Confrontation of the offender occurs away from the victim (group of case workers may confront offender at house, bring the offender to a public facility such as the Health Center or church, or on occasion in the outdoors) and case workers do not withdraw until the offender accepts responsibility for their victimization;
4. Support the family by establishing case workers for each member and establish case work teams for both the victim's and offender's families; assign case work manager for each team;
5. Explain the process to the offender; case work team will go with offender to the Royal Canadian Mounted Police (RCMP) to be charged; the magistrate will listen to their case and then the offender is released back to the custody of the community and taken home;
6. A defense lawyer who is knowledgeable and supportive of the CHCH and has worked with the case work team previously is assigned to the offender;
7. The offender pleads guilty in court with support of case workers and the court agrees to a time duration up to four months for specific circle meetings to commence for the offense;
8. The offender circles occur that only include the case work team and the offender in the beginning and possibly additional, recovered, offenders, respecting the offender's dignity while also making them understand their offense's impact on the victim, their family, and the community. "With each circle they add on and add on as they begin to feel the support. They begin to understand that they are not being judged, that we're here to help them, that we want the

crimes to stop and we want them to go from this place to the place where they become productive balanced people. That is the first thing they have to do” (McCold 1999). Later healing circles will open up to include the offender’s family whom the offender is responsible to admit their actions to and cannot lie because “the relationship is the key. There’s a drive to want to preserve that relationship, and to preserve it, you have to be honest” to bring the offender back from a place of denial to one of responsibility (Aboriginal Corrections Policy Unit Canada 1997);

9. Healing circles with victim, known as victim circles, include case workers meeting with the victim privately, eventually inviting the presence of their family until parents, siblings, and extended family all join. Eventually the offender joins and together with the prepared victim and their support team the victim can speak directly to their offender who sits in silence the entire meeting. Continuing, the offender’s family joins until all parties are brought together with the victim and their needs in the middle of the circle given full attention;

10. Sentencing circle commences bringing all parties together with the presence of a judge and community where the offender admits to the entire community the harm they are responsible for causing, and the community together recommends punishment to the court judge;

11. Subsequent meetings occur without the presence of the judge to confirm the sentencing agreement has continued undisturbed by case workers and community members to the offender every six months for five years;

12. Bonding circles occur after sentencing where the victim and the offender meet once a week often extending all day to discuss the pain and suffering they have both experienced by the offense;

13. Cleansing circles commence to commemorate the hard work both the offender and the victim have put into this difficult, emotional process. Normally the cleansing circles are organized by both the victim and the offender to illustrate “how much both have dealt with their pain together” (McCold 1999). Family from both parties are welcomed and everyone comes together to celebrate the growth that was achieved by these circle meetings.

These circle practices are performed to thoroughly assert the depth of harm the offender has caused and when punished by the justice system it is exercised by their family, neighbors, and community volunteers and professionals. “The people of Hollow Water do not believe in incarceration. They believe that incarceration means that offenders can hide from, rather than face, their responsibilities for the pain they have caused. The difference in Hollow Water is that offenders face their responsibilities with the love, respect, and support which the Anishinaabe people believe are due to all creatures” ([Aboriginal Corrections Policy Unit Canada 1997](#)).

Unlike in cases of domestic violence where victims only have the document of a restraining order to protect them, through the circle model they are supported by their community and loved ones with education, counseling, and preventative measures that will make their offender actively unlearn their patterns of behavior to avoid a reoccurrence to another victim in the future (McCold 1999; Yazzie 1998). Circle sentencing strengthens connections within the community by not throwing the offender away into the prison industrial system and encourages diversity, as Judge Barry Stuart of the Yukon Territorial Court observed:

“This is a good and necessary development. Significant differences in demographic composition, cultural, social, economic, and geographic conditions render each community unique. A process for resolving conflict must accommodate the special circumstances, blessing or hindering the specific ability of each community to process conflict. Recognizing the

uniqueness of each community, and the uniqueness of each dispute, warrants departing from the audacious presumption of the formal justice system that ‘one process fits all forms of disputes’” (Stuart 1996).

Philosophies of Punishment: Restorative Justice, Settler-Colonization, Abolition, and Feminist

Care Labor Theory

Natsu Taylor Saito determined in her book, *Settler Colonialism, Race, and the Law*, “if racial hierarchy is rooted in, and was essential to, the establishment of the United States as a settler colonial state and those foundational colonial relationships of power and privilege persist, then racism can be meaningfully eliminated only in conjunction with decolonization” (4).

Reorganizing the criminal justice system through anti-racist practice can be understood through the dual use of abolition theory and settler-colonialism theory. Many of the underlying racial disparities witnessed presently and historically in American society can be clearly understood if the white American came to grips with their positioning under globalization and the material history that has carved out U.S. empire. This material history demands that the white settler American understand their engagement in the continuing occupation of indigenous lands, for the settler capitalist’s proliferation innately denies the indigenous person’s path from marginalization to reclaiming sovereignty. This use of enslaved African labor by the European settlers to systematize and prosper off these stolen indigenous lands transformed the settler-colonial state into a burgeoning capitalist economy. This system was shielded by the “inclusive exclusion” method that coercively included all people of color into American society as the “excluded and subjugated Other” (Saito 2020). This was the jumpstart that has made the settler descendants and fellow white benefactors succeed since the system’s development, it has only evolved since by the practice of sustaining a “system of exploited cheap labor made up primarily

by migrants of color” that continues to crank the cogs of the capitalist economic machine today (Saito 4).

While law is not philosophy, philosophies in punishment are needed to be understood in order to understand that criminal law is regulated by the norms of its society (Kennedy 2019). There are various viewpoints of punishment used under criminal law, including retribution, “major” utilitarian theories such as deterrence and incapacitation, and “minor” utilitarian theories that include restorative justice and rehabilitation (Kennedy 2019). These types of philosophies of punishment are not evenly distributed through the practice of law. The majority of the U.S. criminal law system practices two versions of retributive justice, such as choice-based retributivism, where one is punished because of their choice to harm, and harm-based retributivism, which views that society should punish a guilty individual in response to the harm they have caused (Kennedy 2019). This preference in retributive punishment is derived from the English judicial system, whereas restorative justice practices can be found rooted from Native justice systems or communities finding new ways to punish other than this Anglo-judicial process. This Eurocentric judicial style began at the inception of colonization by leaders educated by Enlightenment-era philosophy. This approach promoted hierarchal-styled reasoning through empiricism and a vertical justice structure used today as described by Robert Yazzie (2004) in comparison to Native justice systems based in horizontal justice.

“A ‘vertical’ system of justice relies upon hierarchies and power. That is, judges sit above the parties, lawyers, jurors, and other participants in court proceedings. The Anglo-European justice system uses rank, and the coercive power that goes with rank, to address conflicts. Power is the active element in the process. Judges have the power to affect the lives of the disputants directly for better or worse. Parties to dispute have

limited power and control over the process. A decision is dictated from on high by the judge, and that decision is an order or judgement that parties must obey or else face a penalty. The goal of the vertical system, or adversarial law, is to punish wrongdoers and teach them a lesson. For example, defendants in criminal cases are punished by jail and fines. In civil cases, one party wins, and the other party is punished with a loss.

Adversarial law offers only a win-lose solution; it is a zero-sum game” (44).

This development of Western thinking cannot be detached from its hierarchal history cemented in European society since the times of feudalism as the dominant social system. This hierarchal outlook on governance, religion, the development of a capitalist economy, and the invasion of the Western hemisphere went hand in hand, as Juan Tauri (2014) described this development from the colonized peoples’ historical perspective:

“During the initial phases of colonization, mutual benefit from trade in goods and religion were key projects for advancing the ‘civilizing’ mission of colonialism (Cassidy, 2003). Religious conversion in particular, was considered vital for transforming Indigenous peoples from savage beings into ‘proper Christian subjects’ (Kidd, 1997) and better enable them to participate in the post-colonial society to come. Later, the impact of Enlightenment thinking saw science and education displace religion as key colonial projects in the colonizing endeavor (Lynch, 2000). Through these projects the ideological and practical focus of settler colonial strategy changed from saving our souls, toward policies and interventions that facilitated our removal from our lands, and preparing us to participate in the emerging capitalist economy. Underpinning these policies was the development of social Darwinian-inspired ideological rationales that presented Indigenes as inherently inferior ---biologically, genetically and intellectually—to Europeans. Malik

(1996) and Wolfe (2010) refer to this change in ideological construction of Aboriginality as the racialization of colonialism. A key colonial project that arose from the racialization of colonial ideology was the establishment of identity categories (Maddison, 2013). These included the introduction of measurements of indigeneity based on blood quantum (for example ‘full’, ‘3/4’, ‘half Maori’ [Meredith, 2006]). Relatedly, a raft of projects arose aimed specifically at ‘breeding out’ the Indigenous, exemplified in a range of eugenics programs, such as forced sterilization, that were deployed across Canada, Australia and the U.S in the latter half of the 19th, and early part of the 20th centuries (Grekul et al, 2004; Lawrence, 2000). These eugenics programs were in turn supported by a range of projects focused on eradicating Indigenous peoples’ ability to practice their culture, most notably in the form of child removal programs and residential/native schools, in the . . . U.S (Bartrop, 2001; Trocme et al 2004; Woolford, 2013). The eradication of Indigenous culture through education policy was supported by the introduction of legislation in all settler colonial jurisdictions aimed specifically at banning or criminalizing the practice of Indigenous ritual and culture. Notable examples include legislation banning. . . the Sun Dance in the U.S (Jorgensen, 1972). And lastly, there are the colonial projects that can be collectivized under the heading of ‘structural violence,’ exemplified by direct military action, forced removal of children, and the policies and actions emanating from the developing criminal justice system (Merry, 2000)” (21-22).

As mentioned previously, the only solution to the racist structuring of the U.S. criminal justice system, developed upon stolen lands of the indigenous inhabitants and labored by kidnapped and enslaved Africans, is through settler-colonialism theory working together with

abolition theory. Abolition theory does not believe the carceral state is the solution to society's problems, but the continuation of placing Black and indigenous people under a subordinated role through bondage by the state controlled by the descendants and benefactors of the white colonizer class (Alexander 2010). This evolution of tactics to subordinate Black and indigenous people can be seen throughout American history. Once the abolition of slavery occurred, the Black Codes and sharecropping system continued to economically exploit former slaves who lacked capital under white landowners, maintaining enslavement through debt (Alexander 2010). The Jim Crow era arose after the end of sharecropping to maintain racialized social control over Black Americans who were denied employment, housing, education, voting rights, and representation within democratic institutions using poll taxes, grandfather clauses, and vagrancy laws (Alexander 2010). After the 1950s Civil Rights Movement, new modes of institutionalized racism continued onward through the War on Drugs that "invoked images of lawlessness, human predators, and urban rioting, they did not need to explicitly mention race, but it was a prominent subtext of their politicking" and led to the expensive prison system made up largely by incarcerated Black, Indigenous, and People of Color (BIPOC) and, with an economic lens, preyed upon poor people (Alexander 2010; Christian 2012).

Angela Davis observed in her book *Are Prisons Obsolete*, "When the drive to produce more prisons and incarcerate ever larger numbers of people occurred in the 1980s during what is known as the Reagan era, politicians argued that 'tough on crime' stances—including certain imprisonment and longer sentences—would keep communities free of crime. However, the practice of mass incarceration during that period had little or no effect on official crime rates. In fact, the most obvious pattern was that larger prison populations led not to safer communities, but, rather, to even larger prison populations. Each new prison spawned yet another new prison.

And as the U.S. prison system expanded, so did corporate involvement in construction, provision of goods and services, and use of prison labor. Because of the extent to which prison building and operation began to attract vast amounts of capital—from the construction industry to food and health care provision—in a way that recalled the emergence of the military industrial complex, we began to refer to a ‘prison industrial complex’” (11-12).

A system that historically prospers from the exploitation of BIPOC, and capitalist incentives certified by government contracts, encourage the proliferation of prison systems. This retributive philosophy equating accountability as punishment to make justice is further decentered while profiteering becomes a main component. This exploitation begins before incarceration through the criminal law’s pleas bargaining system. In addition to BIPOC receiving harsher sentencing and are more likely to be arrested and charged compared to white people, studies have observed racial disparities in plea bargaining where prosecutors base race to estimate likelihood of recidivism when there is no criminal history to consider (“presumptions of dangerousness” based in racial stereotypes) (EJI 2017). The plea-bargaining system prospers under the economic pressures poor people experience. Even when the arrested individual emphasizes their innocence, in order to avoid incarceration that can jeopardize their housing, job security, and having no childcare assistance, they will accept a plea bargain (EJI 2015). The practice of plea-bargaining targets poor single mothers of color particularly. This occurs after being threatened of harsher sentencing by the prosecutor if the case goes to jury, even if the prosecutor is unsure of the case’s outcome (Cohen 2010). Even if not incarcerated, the victim of the plea-bargaining will have a criminal history on their personal record, creating “a lifelong barrier to accessing services, employment, voting and civic engagement, and education and housing, as well as overall financial security for individuals and their families (child custody

restrictions)” (Lake 2021). After punishment, the subordination continues when the incarcerated person returns to society relegated to a second-class status, denied welfare assistance, government housing, and for some states prohibited from the right to vote (Alexander 2010).

“Those who struggle for racial justice often find it necessary to advocate for, or challenge, administrative actions, laws, and judicial decisions. Rather than assuming that inequities can be remediated only by governmental action, we can also support local initiatives that empower subordinated communities and help us to envision paths that lead not only toward equality but also self-determination” (Saito 2020). Restorative justice practices can lead in that direction, as a tool to expand understandings of how to punish, what is harm, and how to strengthen the communities undermined by structural racism persistent within the current design of the criminal justice system. Restorative justice cannot dismantle structural racism within the web of society by itself, as data has exposed that within the New Zealand justice system, although incarceration rates have declined, the minority Maori people make up the majority of the incarcerated population (Dilawar 2018). Restorative justice practices can lead to self-determination for oppressed communities, but the racism instilled within the foundations of the U.S. empire cannot easily be uprooted. It will take the effort of addressing all systems, including health care, education, democratic institutions, housing, economic empowerment, and combating the effects of racism within the criminal justice system to dismantle this oppressive reality. These efforts are already taking position and meeting opposition, projects including education on critical race theory; defunding the police and placing greater public funding into preventative, community-driven resources; universal healthcare and education within the medical community on racist and sexist practices of health; breaking up the dual party system overfunded by corporations interested in profits over community empowerment; and so the list goes on of

grassroot initiatives created and lead by BIPOC to continue a revolution of restructure and dismantlement. Restorative justice models are only one step within this marathon of breaking down injustices impacting colonized communities across the U.S. settler-state. Although restorative justice cannot change the mind of a racist society by itself, it can assist breaking the grip racist retributive functions of justice hold over society, such as becoming less dependent on the police to regulate peacemaking in communities and disempower the prison system and its industrial complex. A restorative justice model consciously left out of this paper was the use of police conferencing, as the police force has developed through its own racist history connected to slave patrols in the South, and its history of profiling and aggressively targeting BIPOC and BIPOC communities compared to their white counterparts (Waxman 2017; Desilver et al 2020). Using a decolonization perspective in restorative justice work, it would be hypocritical to rely upon a source of colonizer violence to facilitate new ways of understanding justice for colonized peoples. While the police are situated in several restorative justice practices, they neither have total control over the process nor are at the center of developing responses to crime as the power is returned to the community to decide. These restorative justice practices that involve the participation of police can be considered not the final destination of modeling justice, but a transitional model toward the end goal of defunding the police through decolonization and abolition work.

But how can lawyers perform under a restorative justice model? In order to serve this practice, attorneys will need to relearn the concept of harm and the corrective ways harm should be addressed by society. Criminal law attorneys will need to address the racist undertones within retributive styles of punishment, including the plea-bargaining system and the prison industrial complex to which they perform as the gatekeepers (EJI 2015). This can begin at the educational

level where law schools extend the conversation of criminal law further into restorative justice models and create entire courses focused on restorative justice, such as Vermont Law School has by creating the first ever National Center on Restorative Justice (VLS 2021). The government has already begun the process of using restorative justice, by funding community mediation programs through LEAA and using restorative justice within the juvenile court system (Wilson et al 2017).

Restorative justice is not perfect. The process is dependent upon the consent of both the offender and the victim to participate and without it, no facilitation can go forward. What happens if the offender refuses to accept accountability? What if the offender chooses incarceration over a plan of reparation? While some may use restorative justice models to avoid incarceration, the process should not be considered easier. It is an emotional, long, arduous process. It is not as well organized as the standard criminal law proceedings. However, participants within restorative justice practices have found they were “more likely to have expressed satisfaction and a perception of fairness in the justice system’s response to their case than victims and offenders who were referred to the programs but never participated; telling the effect on their life of the crime and receiving an apology from the offender was more important to victims in mediation than to non-participating victims; victims who participated in mediation, especially direct mediation, were less fearful of being revictimized by the same offender; and both victims and offenders were more likely to benefit from direct face-to-face mediation than from indirect mediation” (Umbreit & Roberts 1996). Restorative justice is not the final solution to the inequalities within the U.S. criminal justice system, but it is one option that should be further researched and developed within philosophies of punishment used by the court system. Expanding upon the practices used, when family are allowed within the process feminist care

labor theory must be considered to address unequal sources support within the family dynamics. This paper has concluded that strategies based in decolonization, prison abolition, and feminist ideology are necessary tools in dismantling the unjust foundation on which the criminal justice system is based upon. Restorative justice can be one viable step in the direction of healing wounds inflicted upon BIPOC from settler-colonization, but it is not enough by itself.

Work Cited

- Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. The New Press, 2012.
- American Bar Association. "Dispute Resolution Program Directory 1990." American Bar Association Standing Committee on Dispute Resolution, 1990.
www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-. Accessed 18 June 2021.
- Baines, Carol et al. "Women's Caring: Feminist Perspectives on Social Welfare." McClelland & Stewart, 1991. www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-. Accessed 18 June 2021.
- Bartrop, P. "The Holocaust, the Aborigines, and the Bureaucracy of Destruction: An Australian Dimension of Genocide." *Journal of Genocide Research*, 2001.
ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 17 June 2021.
- Cassidy, J. "The Legacy of Colonialism." *The American Journal of Comparative Law*, 2003.
doi.org/10.2307/3649152. Accessed 20 June 2021.
- Christian, J. "The New Jim Crow: Mass Incarceration in the Age of Colorblindness." Rutgers, 2012. cljbooks.rutgers.edu/books/new-jim-crow/#:~:text=Michelle%20Alexander's%20The%20New%20Jim,to%20control%20blacks%20through%20deliberately. Accessed 12 June 2021.

Cohen, J. "When Defendants Are Threatened to Plead Guilty." *New York Law Journal*, 2010.

www.stroock.com/uploads/pub994.pdf. Accessed 2 July 2021.

Davis, Angela. *Are Prisons Obsolete?* Seven Stories Press, 2003.

Desilver, D et al. "10 Things We Know About Race and Policing in the U.S." Pew Research

Center, 3 June 2020, www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/. Accessed 20 June 2021.

Dickson-Gilmore, E. "Finding the Ways of the Ancestors: Cultural Change and the Invention of

Tradition in the Development of Separate Legal Systems." *Canadian Journal of*

Criminology, 1992. [www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-](http://www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999)

1999. Accessed 18 June 2021.

Dilawar, A. "Can New Zealand Provide the U.S. with a Model for Juvenile Justice Reform?"

Pacific Standard, 4 Sept. 2018, psmag.com/social-justice/can-new-zealand-provide-the-u-s-with-a-model-for-juvenile-justice-reform. Accessed 21 June 2021.

Equal Justice Initiative. "Research Finds Evidence of Racial Bias in Plea Deals." Equal Justice

Initiative, 2017. eji.org/news/research-finds-racial-disparities-in-plea-deals/. Accessed 28 June 2021.

—"Delaware's Access to Justice Commission's Committee on Fairness in the Criminal Justice

System." Equal Justice Initiative, 2015. courts.delaware.gov/supreme/docs/Delaware-Charging-Plea-Bargaining-Sentencing-Report.pdf." Accessed 1 May 2021.

Grekul, J. et al. "Sterilizing the 'Feeble-Minded': Eugenics in Alberta, Canada, 1929-1972."

Journal of Historical Sociology, 2004.

ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 1 May 2021.

Jorgensen, J. "The Sun Dance Religion: Power for the Powerless." University of Chicago Press,

1972. ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 23 June 2021.

Joseph, K. "Victim-Offender Mediation: What Social and Political Factors Will Affect Its

Development?" *Ohio State Journal on Dispute Resolution*, 1996.

kb.osu.edu/bitstream/handle/1811/79728/OSJDR_V11N1_207.pdf?sequence=1#:~:text=The%20factors%20that%20will%20have,be%20%22tough%22%20on%20crime. Accessed 5 May 2021.

Kennedy, Joseph. *Criminal Law: Cases, Controversies and Problems*. West Academic

Publishing, 2019.

Kidd, R. "The Way We Civilize: Aboriginal Affairs – the Untold Story." The University of

Queensland Press, 1997. Accessed 23 June 2021.

Lake, J. "Preventing and Removing Barriers to Housing Security for People with Criminal

Convictions." Center for American Progress, 14 April 2021,

www.americanprogress.org/issues/poverty/news/2021/04/14/498053/preventing-

[removing-barriers-housing-security-people-criminal-convictions/](#). Accessed 29 June 2021.

Lawrence, J. "The Indian Health Service and the Sterilization of Native American Women."

American Indian Quarterly, 2000.

ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 23 June 2021.

Lynch, M. "The Power of Oppression: Understanding the History of Criminology as a Science of

Oppression." *Critical Criminology*, 2000. www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.

Maddison, S. "Indigenous Identity, 'Authenticity' and the Structural Violence of Settler

Colonialism." Routledge, Taylor & Francis Group, 2013.

ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 23 June 2021.

Malik, K. "The Meaning of Race: Race, History and Culture in Western Society." Macmillan,

1996. ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 23 June 2021.

Marshall, T. "Restorative Justice on Trial in Britain." *Conflict Resolution Quarterly*, 12,

1995. doi.org/10.1002/crq.3900120304. Accessed 18 June 2021.

Maxwell, G. & A. Morris. "Youth Justice in New Zealand: Restorative Justice in Practice?"

Journal of Social Issues, 2006.

unafei.or.jp/publications/pdf/RS_No75/No75_10VE_O'Driscoll.pdf. Accessed 19 June 2021.

McCold, P. "Restorative Justice Handbook." American Correctional Association, 1998.

www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.

—. "Restorative Justice Practice: The State of the Field 1999." Available at

www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.

Meredith, P. "Pakeha by Law: The Europeanization of Maori 1912-1931." *New Zealand*

Universities Law Review, 2006. www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.

Merry, S. "Colonizing Hawai'i: The Cultural Power of Law." Princeton University Press, 2000.

ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 19 June 2021.

Mirsky, L. "Restorative Justice Practices of Native American, First Nation, and Other Indigenous

People of North America: Part Two." International Institute for Restorative Practices, 2004. [natjust2.pdf](#). Accessed 23 June 2021.

Moore, D.B. "A New Approach to Juvenile Justice: An evaluation of family conferencing

in Wagga Wagga.” Centre for Rural Social Research, 1995.

www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 28 June 2021.

O’Driscoll, S. “Youth Justice in New Zealand: A Restorative Justice Approach to Reduce Youth Offending.” United Nations Asia and Far East Institute, 2008.

unafei.or.jp/publications/pdf/RS_No75/No75_10VE_O'Driscoll.pdf. Accessed 19 June 2021.

Office for Victims of Crime, 2000, www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victim_sens/guide4.html. Accessed 2 July 2021.

Pranis, K. “Restoring Community: The Process of Circle Sentencing.” National Association of Community and Restorative Justice, 1997. Accessed 20 June 2021.

Restorative Justice Facilitator Induction Training. “Working with Māori in Restorative Justice.” PACT, 2020. [maori justice practices.pdf](#). Accessed 20 June 2021.

Saito, Natsu. *Settler Colonialism, Race, and the Law*. New York University Press, 2020.

Smith, S. “Carol Baines, Patricia Evans and Sheila Neysmith, eds. – Women’s Caring, Feminist Perspectives on Social Welfare.” *Social History*, 2013.

hssh.journals.yorku.ca/index.php/hssh/article/view/36901/33537. Accessed 23 June 2021.

Spier, P. & R. Wilkinson. “Reoffending Patterns for Participants of Youth Justice Family Group

Conferences Held in 2011 and 2012.” Ministry of Social Development, 2016.

apo.org.au/sites/default/files/resource-files/2016-09/apo-nid67629.docx. Accessed 21 June 2021.

Stuart, B. “Circle Sentencing: Turning Swords into Ploughshares.” Criminal Justice Press, 1996.

Accessed 23 June 2021.

Tauri, J. “Criminal Justice as a Colonial Project in Settler-Colonialism.” University of

Wollongong, 2014. ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers.

Accessed 23 June 2021.

“The Four Circles of Hollow Water.” Aboriginal Peoples Collection, 1997.

www.publicsafety.gc.ca/cnt/rsrscs/pblctns/fr-crcls-hllw-wtr/fr-crcls-hllw-wtr-eng.pdf.

Accessed 28 June 2021.

The National Association for Community Mediation. “Community Mediation Basics.”

Resolution Systems Institute, 2019. www.aboutrsi.org/special-topics/community-mediation-basics. Accessed 29 June 2021.

Trocme, N. et al. “Pathways to the Overrepresentation of Aboriginal Children in Canada’s Child

Welfare System.” *Social Services Review*, 2004.

ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 29 June 2021.

Umbreit, M. & A. Warner-Roberts. “Mediation of Criminal Conflict in England: An Assessment

- of Services in Coventry and Leeds—Executive Summary.” University of Minnesota, 1996. www.ojp.gov/ncjrs/virtual-library/abstracts/mediation-criminal-conflict-england-assessment-services-coventry. Accessed 6 May 2021.
- Umbreit, M. “Crime Victims Confront Their Offenders: The Impact of a Minneapolis Mediation Program.” University of Minnesota, 1994. journals.sagepub.com/doi/pdf/10.1177/104973159400400402. Accessed 2 July 2021.
- et al. “Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue.” *International Review of Victimology*, 1999. journals.sagepub.com/doi/pdf/10.1177/026975809900600405. Accessed 1 July 2021.
- “VLS Announces the National Center on Restorative Justice.” *Vermont Law School*, 2021, www.vermontlaw.edu/academics/centers-and-programs/national-center-on-restorative-justice. Access 6 May 2021.
- Warner-Roberts, A. & G. Masters. “Group Conferencing: Restorative Justice in Practice.” University of Minnesota, 1999. www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 1 July 2021.
- Waxman, O. “How the U.S. Got Its Police Force.” *Time Magazine*, 18 May 2017, time.com/4779112/police-history-origins/. Accessed 3 July 2021.
- Wilson, D et al. “Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis.” George Mason University, 2017. www.ojp.gov/pdffiles1/ojjdp/grants/250872.pdf. Accessed 1 July 2021.

Wolfe, P. "Race and Racialization: Some Thoughts." *Postcolonial Studies*, 2010.

www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 1 July 2021.

Woolford, A. "The Next Generation: Criminology, Genocide Studies and Settler Colonialism."

Revista Critica Penal y Poder, 2013.

ro.uow.edu.au/cgi/viewcontent.cgi?article=4202&context=sspapers. Accessed 23 June 2021.

Yazzie, R & J. Zion. "Navajo restorative justice: The law of equity and harmony." Criminal

Justice Press, 1996. www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.

Yazzie, R. "Life Comes from It: Navajo Justice Concepts." *New Mexico Law Review*, 1994.

www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.

—. "Navajo Peacemaking: Implications for Adjudication-Based Systems of

Justice." *Contemporary Justice Review*, 1998. www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.

Zion, J. "The Use of Custom and Legal Tradition in the Modern Justice

Setting." *Contemporary Justice Review*, 1998. www.iirp.edu/news/restorative-justice-practice-the-state-of-the-field-1999. Accessed 18 June 2021.