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An Equilibrium-Centric Interpretation of Restorative Justice and Examining Its Implementation Difficulties in America

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Learning to forgive is much more useful than merely picking up a stone and throwing it at the object of one’s anger, the more so when the provocation is extreme. For it is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and others.1

— The Dalai Lama

INTRODUCTION

The recent tendency within the American criminal justice framework reveals an ominous social landscape. It is manifested in exploding incarceration,2 recidivism,3 and the obliteration of family structure.4 The

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2. For example, during 2006, the prison population grew at a faster rate than it had during the previous five years. WILLIAM J. SABOL, HEATHER COUTURE & PAIGE M. HARRISON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2006 1 (2007), available at http://bjs.gov/content/pub/pdf/p06.pdf. “The 2.8% increase in the number of prisoners under state or federal jurisdiction was larger than the average annual
last quarter century's evolving landscape is steeped in a confusing growth rate of 1.9% from 2000 through 2005." Id.; see also Sara S. Beale, Still Tough on Crime? Prospects for Restorative Justice in the United States, 2003 UTAH L. REV. 413, 415 (quoting the estimated imprisonment rate as 699 per 100,000 of the population). According to the Bureau of Justice Statistics Bulletin for 2003, the incarceration rate has increased to an estimated 714 per 100,000 of the population. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003 2 (2004), available at http://www.bjs.gov/content/pub/pdf/p03.pdf. By the end of 2003, one in every 109 men was a sentenced prisoner under the jurisdiction of state or federal authorities. Id. at 1, 4. State prisons are operating at 16% above capacity, while federal prisons are operating at 39% above capacity. Id. at 1, 7.


Recent research has illuminated the detrimental effects of incarceration on both individuals and their communities. Incarceration can exacerbate mental illness, increase a person's risk of suicide, hinder their employability and disrupt families. Jails are associated with disease, over-crowded and inhumane conditions and high costs for counties. Furthermore, incarceration makes a person more likely to recidivate upon release.

Id.

4. See, e.g., Stewart Gabel, Behavioral Problems in Sons of Incarcerated or Otherwise Absent Fathers: The Issue of Separation, 31 FAMILY PROCESS 197, 303–314 (1992) (noting that, although little is known about the psychological reactions of children whose parents are incarcerated, the few studies in existence suggest that a variety of behavioral disorders are related to separation from a parent, the stigma associated with incarceration, and deception of children about the status of their incarcerated parents); see generally Creasie F. Hairston, The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers’ Relationships with Their Children, in CHILDREN WITH PARENTS IN PRISON: CHILD WELFARE POLICY, PROGRAM, AND PRACTICE ISSUES 93–110 (Cynthia Seymour & Creasie F. Hairston eds., 2001) (noting that while few services and programs are provided for incarcerated fathers or their children, and while the importance of father-child relationships is often ignored, the sheer number of children whose fathers are or will be incarcerated warrants a closer look at efforts to improve these children's and their families’ welfare); see also Denise Johnston, Effects of Parental Incarceration, in CHILDREN OF INCARCERATED PARENTS 59–88 (Katherine Gabel & Denise Johnston eds., 1995) (beckoning to revisit the current incarceration fundamentals and recognizing that parental incarceration and enduring trauma, separation, and inadequate care can interfere with child development, resulting in negative long-term outcomes, including intergenerational incarceration); see also BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 133–36 (2007) (noting how the stigma of incarceration affects family relationships and eventually weakens the bond); see generally MARC MAUER & MEDA CHESNEY-LIND, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (2003); see also COUNCIL ON CRIME AND JUSTICE, THE COLLATERAL EFFECTS OF INCARCERATION ON FATHERS, FAMILIES, AND COMMUNITIES 4 (2006), available at http://www.crimeandjustice.org/researchReports/Collateral%20Effects%20of%20Incarceration%20on%20Fathers,%20Families,%20and%20Communities.pdf.
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conundrum. The heavy punitive focus of the current criminal justice system has failed to reduce criminality. 5 It has also adversely impacted the crime victims. 6 This is because the general framework of prolonged incarceration does very little to heal the victim or the affected community. The offenders are rarely rehabilitated. 7 More significantly, the procedural instrumentality fails to hold them accountable for their actions. Viewing through a normative prism, locking up a human like a caged animal should be seen as an assault to the inherent human dignity on multiple dimensions 8—the process neither provides any meaningful opportunity for reconstruction and rehabilitation of the offender, nor does it restore and reconstruct the psychological wounds of the victim. Such deprivation of human values within society calls for a reexamination of the American criminal justice system. 9 This Article is about such reexamination by reimagining the contributing factors underlying the criminal justice system.


7. See State of Recidivism, supra note 5, at 2, 21–22 (examining recidivism rates generally and in Michigan).

8. By inherent human dignity, I draw attention to the inviolability of the human life force that imparts inherent dignity on human persons. Inherent human dignity has to be understood within the comprehensive conceptualization of human life, as I have explained elsewhere. See Saby Ghoshray, Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court’s Capital Jurisprudence Post-Roper, 45 J. CATH. LEGAL STUD. 561, 623–25 (2006) [hereinafter Tracing the Moral Contours]. Throughout this current work, I refer to the scope and meaning of inherent human dignity to convey an authentic view of the human person. In my view, this connotes an evolving concept, centering on the interplay amongst the uniqueness of the human being, the immutability of death, and the sacred nature of inherent human dignity. Thus, I call for viewing the subjectivity of the death penalty through the lens of an authentic, human-driven evaluation. The authentic vision of the human person may not comport with a justice mechanism fraught with the randomness and arbitrariness of the death penalty. Justice Brennan has echoed this sentiment:

The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity.


9. A hallmark of the current criminal justice framework in the United States is its punitive focus, which is manifested in prolonged incarceration for most crimes. As heavy incarceration contributes to the abrogation of human capital at multiple levels, society is
The criminal justice system in the United States is in an evolving paradox. Despite the money spent, prisons built, and humans locked away, crime has not decreased, victims have not healed, and communities have not been restored. As countless individuals get lost in the dark underbelly of the U.S. prison system, hopes eviscerate, communities fragment, and wounds never heal. This socio-legal reality invites us to search for a more effective pathway of structuring the legal consequences of criminal behavior. While the evolving trends in many western criminal justice systems show a growing tendency towards human restoration, its absence in the United States calls for inquiry. Why has the American criminal justice system become captive to a narrower formalism? Why have the dialectics of the adversarial process sublimated the restorative ideals? Identifying the restorative ideals is the key to understanding this deficit in the current criminal justice process. This Article expounds upon these restorative ideals, while examining the roadblocks for their adoption within the mainstream U.S. criminal justice system.

deprived of value in the process. This failure to recognize that every individual within a society is capable of imparting value invites us to an examination of the economic trade-off between lengthy incarcerations versus alternative punishment mechanisms. Thus, a broader inquiry into the existing incarceration philosophy might prompt us to explore alternative justice mechanisms that are conducive to preserving human capital and societal value. A pervasive societal bent towards accepting a heavy incarceration-centric justice system prompts us to identify how the erosion of human capital may be contributing towards the shaping of a criminal culture. I have defined this value proposition within a framework in which all possible value drivers for the incarceration model have been identified in order to evaluate the net value transferred to society. See Saby Ghoshray, America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 313 (2008) [hereinafter America the Prison Nation].


11. Any criminal act has adverse consequences, as crime affects individuals and their relationships. For example, when a crime is committed, it affects victims and offenders, their relationships, the relationships amongst various other individuals, and all parties' relationships with the community. By restorative ideals, I draw attention to the need for justice mechanisms to restore individuals and their relationships through a collaborative and consultative process, where each stakeholder can have a voice. See generally JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (Oxford Univ. Press 2001).
The heavy punitive focus of the American criminal justice adversarial process has evolved through various developments. Within the contemporary post-modern variant, an ever-expanding array of epistemological dimensions has enhanced our conceptual paradigm. As a result, the rehabilitative and reconstructive failures of the traditional criminal justice framework awaken us to the possibilities of the alternative justice mechanisms. The contemporary criminal justice system's inability to alleviate the pain and suffering of the victims' families is our motivation to look elsewhere for a differing conception of justice that can help restore the crime victim's loss. This idea of restoration calls for a holistic understanding of human consequences—an understanding that is shared within both the therapeutic and restorative justice mechanisms. With empathy for humans as the key driver for inculcating such understanding, these alternative justice mechanisms sharply depart from the traditional conception of the retributive justice mechanism. Despite their promise of holistically enhancing the well-being of both the victim and the offender, the mainstream criminal jurisprudence in the United States has largely kept

12. The concept of ontological dimension was given the most significant post-modern interpretation by the philosopher Heidegger. See generally STEVEN HEINE, EXISTENTIAL AND ONTOLOGICAL DIMENSIONS OF TIME IN HEIDEGGER AND DŌGEN (1985). According to Heidegger's views, the world unfolds as a set of ontological dimensions that can be explored and nature becomes a set of epistemological potentials that can be utilized for human understanding. See ANDREW FEENBERG, HEIDEGGER AND MARCUSE: THE CATASTROPHE AND REDEMPTION OF HISTORY 67 (2005) (observing that, according to Heidegger, human existence can be understood as ontology of action). Known for his existential and phenomenological exploration of the question of being, Heidegger stressed on construction of ontological variables to understand the construction of "being." See generally id.; see also TAYLOR CARMAN, HEIDEGGER’S ANALYTIC: INTERPRETATION, DISCOURSE, AND AUTHENTICITY IN BEING AND TIME (2007).


14. By a holistic understanding of legal encounters, I draw attention to the comprehensive focus needed for an idealized justice process to evaluate all adverse consequences and possible legal outcomes arising from a criminal interaction. It is only through a careful evaluation of all possibilities an idealized conception of justice can be achieved that will not focus on process only but will evaluate through a case-by-case analysis.

15. Comparatively, restorative justice is premised on imparting restoration from the deleterious impact of crime. True restoration requires bringing all stakeholders into a condition that existed before the crime occurred. This is a theoretical objective, and thus, its practical counterpart involves attempting to bring healing to the individuals—a process that involves engaging all stakeholders, including the victim and the offender. So, holistic process involves addressing the injuries and wounds to all the components that have been affected by the crime.
them out of the contemporary discourse. Thus, it is high time that we recognize their powerful impact as agents of healing and restoration. We must delve into their jurisprudential reservoir. Prior to that, however, we must identify the current structural hurdles for their implementation within the American legal process.

Despite their individual process nuances, these healing-based justice mechanisms share a commitment to seek a holistic understanding of the law’s effect on people. Their commitments are enriched by the contextual structures and social science-based methods of their process instrumentalities. Other advanced nations’ legal processes reveal their effectiveness and a fidelity towards an evolving harmonization based on their roots within international law. Yet these alternate justice mechanisms have not found meaningful incorporation with the American criminal justice system. This Article sheds revelatory light on the dichotomous genesis of the discordant evolution within the American criminal justice system, for which I have identified a number of factors, as I summarize below.

First, the fundamental precepts of these non-adversarial justice mechanisms are in contradiction to a market-driven media philosophy—a philosophy that evolves through the “monsterization” of the criminal defendant and seeks vengeance and the merchandizing of violence. Second, jurisprudence based on healing and restoration is anathema to the current corporatization of incarceration. Third, restorative justice fosters the converse of religious and theological thoughts that have historically shaped the contour of a vengeance-driven criminal justice system.

16. See generally Gabbay, supra note 13.
20. See generally America the Prison Nation, supra note 9 (observing the corporatization of U.S. incarceration as a structural hurdle against efficient use of human capital).
21. Vengeance and retribution within the various fundamental religious values has long been the backbone for developing penological practices within law as well as a central tenet for making governmental policy decisions with regards to crime prevention. See Tracing
Fourth, the linkages between the “tough on crime” mantra and political ambitions must be captured within the naked reality of twenty-first century politicization of America’s social landscape. This is an insurmountable roadblock for restorative justice to emerge through any legislative means. 22 Fifth, transitioning into a different justice mechanism is difficult due to system inertia. This inertia, manifested in contemporary social reality, ranges from the required changes in law school curricula to social mores and community expectations. Thus, the absence of restorative justice within the American criminal justice mechanism is fundamentally borne out of a paradigmatic disconnect between the law’s evolution as a function of people’s imagination and justice’s aspiration. In general, law evolves to accommodate flawed public imaginations or to give shape to political realities of the time, but often times, the conception of justice gets hijacked in such an evolution. 23 Therefore, American failure to adopt restorative justice must be seen through the contemporary divergence between the law’s trajectory and justice’s objective, as has been shaped by the evolution of the public narrative of justice.

The current narrative of justice is the result of a pervasive deficit in public imagination. This deficit is one of the difficulties in the incorporation of restorative justice within the mainstream criminal justice process. At its core, this Article proceeds in two threads. The first thread examines the substantive meaning of restorative justice and identifies its distinction from therapeutic jurisprudence. This thread explores how public imagination has shaped the current trajectory of law. Despite society’s broader aspiration for true justice, this narrative has enabled the rise of adversarial justice, where the pursuit of justice fails to restore the affected individuals and their communities. The second thread, by examining this divergence between law and justice further through multiple prisms, evaluates the current societal bias in failing to inculcate the various non-adversarial alternatives. This thread will trace a set of factors that present implementation difficulties for mainstream adoption of restorative justice within contemporary discourse. Thus, this Article proceeds as follows:

22. See discussion infra Part III.
23. See discussion infra Part III.
Part I presents some of the unique characteristics of restorative justice as seen through its holistic aspiration, value-centric idealization, and rights-based paradigm. Through these characteristics, I draw distinctions between both the traditional justice mechanism and therapeutic jurisprudence. In addition, by differentiating the traditional criminal justice equality principle, I examine the divergence between the equality doctrine and the value proposition within the context of restorative ideals of justice. This sets the stage for evaluating the efficacy of restorative justice through the conceptual paradigm of equilibrium restoration in Part II. Further, in Part II, I establish why restorative justice holds within it a more comprehensive promise for healing the affected parties to a crime. Within this discussion of equilibrium restoration, I examine the role of empathy and accountability and how these characteristics enhance the effectiveness of restorative justice as a healing mechanism. Part III then leads to an examination and evaluation of the execution difficulties of restorative justice within the American criminal justice system. Recognizing that the contemporary criminal justice system continues to remain captive to the shallow formalism of process instrumentality and the public imagination is shaped by the stronger urge to societal conformity, I conclude in Part IV that, despite its heightened promise of restoring humans, the meaningful adoption of restorative justice in the United States is difficult to achieve within the current socio-legal landscape.

I. RELATIONSHIP AND SIMILARITY BETWEEN THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE

An animating principle underlying both therapeutic jurisprudence and restorative justice is the commitment towards a holistic understanding.


25. Animated within the ideals of restorative justice is the concept of restoration through the twin threads of active participation by crime victims and community members.
of legal consequences of individual criminality. Residing within both these non-adversarial justice mechanisms is a shared interest in restoration through a comprehensive approach that attempts to heal those affected from the adverse impacts of crime. While the traditional adversarial system does not address the psychological and emotional scars of crime,

in shaping the course of justice and making the offender accountable to the victims and community. According to G.S. Bajpai,

[Restorative justice] underlines the significance of [the] role of crime victims and community members through more active involvement in the justice process, holding offenders directly accountable to the people and communities they have violated, restoring the emotional and material losses of victims, and providing a range of opportunities for dialogue, negotiation, and problem solving, whenever possible, which can lead to a greater sense of community safety, social harmony, and peace for all involved.

G.S. Bajpai, Conflict Management through Restorative Justice, 49 INDIAN POLICE J. 31, 31-33 (Jan.–Mar. 2002). According to Bajpai,

Restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the state, but as an injury or wrong done to another person or persons. It encourages the victim and the offender to be directly involved in resolving any conflict through dialogue and negotiation.

Id. For an excellent discussion of what it is that restorative justice seeks to restore, see BRAITHWAITE, supra note 11, at 11 (2002) (identifying what is to be restored as “whatever dimensions of restoration matter to the victims, offenders, and communities affected by the crime. Stakeholder deliberation determines what restoration means in a specific context.”).

26. America is waking up to a realization for the need for adequate representation of victims during the criminal punishment phase of the trial. For example, despite its narrow scope, Rule 32(i)(4) of the Federal Rules of Criminal Procedure includes a provision for crime victims to feel like integral components in the justice disbursement process by mandating that the federal court “must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.” FED R. CRIM. P. 32(i)(4)(b) (2004). Literature has recognized the failure of the traditional criminal justice mechanism in addressing the harm done to the victims of crime. See generally George P. Fletcher, The Place of Victims in the Theory of Retribution, 3 Buff. Crim. L. Rev. 51 (1999) (examining the current status of crime victims through the lens of their legal standing in arguing for incorporating a victim’s legitimate interest within future doctrinal development in punishment theories).

There has been significant development in other parts of the world as well. See Helen Reeves & Kate Mulley, The New Status of Victims in the UK: Opportunities and Threats, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE 125 (Adam Crawford & Jo Goodey eds., 2000) (identifying the changes in UK Law as a direct result of giving heightened importance to a crime victim’s interest in structuring the penological practices); see also Rights of Victims of Crime Law, 5761-2001 SH No. 1782 p. 183 (Isr.) (incorporating a list of enumerated rights for victims of crime within the Israeli criminal justice system in response to the growing disillusion and disenchantment of crime victims).
these alternative justice mechanisms do attempt to repair and restore such wounds.

Whenever more than one human is involved in an interaction, multiple consequences are possible, including, in some instances, a criminal act. Historically, lawmakers have developed rules for judicial determination of criminal consequences that society deems illegitimate or unwanted. Here, lawmakers act as representatives of the broader society and chart the law's trajectory to address such illegitimate consequences by creating rules. Shaped by legal doctrines, these rules have evolved through time. Generally, legal doctrines are borne out of the public imagination as the broader society's view. The doctrines have shaped and guided criminal law's contour, which has historically been indexed on punishing the offenders of crimes. Unfortunately, however, the majority of criminal justice doctrines have been shaped by a public imagination based on the traditional conception of retribution and vengeance. As a result, the ideals

27. During the settlement period, American colonists relied primarily on corporal and capital punishment by drawing upon English law. See David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 17 (1990) (observing that the settlement era initiative of institutionalizing the convicts and mentally ill was in response to a loosening of the early nineteenth century social fabric); see also Louis B. Schwartz, The American Penal System: Spirit and Technique, 339 Annals Am. Acad. Pol. & Soc. Sci. 1, 4–6 (1962). Schwartz outlines the influences that impacted the penal system in the U.S. Id. at 4–7. As summarized by the editors of Annals, Schwartz also asserts that the current penal system has changed and is becoming more merciful than the penal system it evolved out of:

Thus, at present, criminal laws and aims of the penal system are diverse. Certain influences, however, have affected the development of all the penal codes. These influences are the English common law, Puritan standards of the seventeenth century, and the American frontier. From the frontier comes the emphasis upon lay participation in the legal process. This is clearly represented in the institution of the jury and in its effect upon law, precedent, and court procedures. The general American and English hostility to ideology, fully as much as the lay element, has served as a brake upon codification and radical reform. As a result, the American penal system tends to be anarchic, complicated, naïvely moralistic, and lay-determined, but it is, at the same time, experimental, creative, and progressively more merciful. With the passing of the frontier and the receding into history of Puritan theocracy, the forces which produced the current penal system are yielding to new influences. The Model Penal Code, profoundly American in spirit and technique, would end the dependence of the penal code upon the common law and offers system and precision in place of frustration and bafflement.

Id. at 1.
of healing and restoration have been subsumed within the retributive idealization of vengeance in the contemporary justice mechanism.28

A. Restorative Justice—Divergence Between Healing and Public Imagination

Fundamentally, public imagination related to criminal justice has been influenced by negative emotions,29 cognitive bias,30 the media’s shaping effect, and societal symmetry.31 Yet this imagination process fails to

28. See discussion infra Part III.

29. At its core, criminal jurisprudence is predicated on a quintessential tension between two expressive mechanisms. On one hand, the process instrumentality attempts to bring out the negative emotions of fear and outrage by attempting to dehumanize the offender. See, e.g., Phillip Atiba Goff et al., Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008) (establishing the relationship between dehumanizing minority individuals and jury decisions to execute). On the other hand, the justice mechanism allows for the positive emotions of empathy and compassion to somewhat mitigate the punishment by attempting to humanize the defendant. When a society is being shaped by corporatized incarceration, the media merchandizes criminality, and a pervasive culture of fear and negative emotions tend to lord over their positive counterparts—this fundamental issue is a structural impediment towards adoption of restorative justice.

30. Cognitive bias can be seen as a function of cognitive stress that results from the difficulty or cognitive de-motivation that comes from trying to process a significant amount of subjective information. If we focus our attention to the phenomenon of cognitive stress in evidence processing by societal members, we immediately realize the differing cognitive thresholds that an individual must utilize to deal with various types of evidence. Thus, human response to cognitive stress explains why an individual will be prone to seek out an alternate path to arrive at the outcome by minimizing cognitive hurdles. This could explain why, in attempting to determine based on similar sets of information, different individuals come up with different outcomes based on individual cognitive bias that allows them to process information differently. The act of some seeking more objective-centric evidence and some others relying on more subjective-laden evidence is a manifestation within society of how cognitive bias influences the deduction process behind an individual opting or seeking to minimize uncertainty in the decision-making process. For a detailed understanding of how cognitive stress and cognitive bias affects personal deliberation, see Saby Ghoshray, Untangling the CSI Effect in Criminal Jurisprudence: Circumstantial Evidence, Reasonable Doubt and Jury Manipulation, 41 NEW ENG. L. REV. 533, 547–548 (2007).


Here, I draw attention to the complex phenomenon of social ordering in which majority members’ viewpoints gravitate toward a more socially acceptable side of an argument, as I have explored elsewhere. See generally Capital Jury Decision Making, supra note 19.
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connect with the restorative needs of affected individuals. For deep inside every affected individual is a yearning to be whole again—yet such yearning for restoration continues to remain outside the penumbra of the public imagination. As a result, the adversarial justice mechanism built on such public imagination of criminal justice does not recognize the necessity of healing the crime victims. Healing through a holistic approach to crime, on the contrary, is one of the fundamental driving forces within the process functionalities of restorative justice and therapeutic jurisprudence. Indeed, restorative justice and therapeutic jurisprudence both share the common aspiration for healing crime victims’ wounds and restoring the balance of the affected community. Often times, however, the non-adversarial elements within these two alternative justice mechanisms belie the

This sociological trend manifests itself by members of the society exhibiting a predominant bias toward one side of an argument. Symmetry is unification. This unification process proceeds through cohesion amongst members’ behavioral norms and adoption to a predictable set of societal mores, where an emergence of divergence is considered dissent. In a framework where cohesion is the desired target state, any dissent threatens the originator of dissent with expulsion from the community. Thus, the seduction of symmetry can be seen as an enticement to a desired community, where acceptance within the community is predicated upon the member following accepted principles or proper conduct. . . . Symmetry is the state of being in unison with external forces or at tandem with the external environment. Asymmetry is the state of being in contradiction with the environment. This may include either being in conflict with accepted principles of the community or being in contradiction with the behavioral modes of conduct, all of which can impose various forms of cost upon the individual attempting to decouple from the symmetry. Therefore, seduction to symmetry can often be an existential response to external stimuli. Often, seduction to symmetry is a natural tendency to travel the path of least resistance, in which the agent does not incur the cost of travelling against the societal trend.

Id. at 486 n.38. Social conformity and individual member’s amalgamation within societal symmetry has been studied through the various social science based research lenses.

As an illustration, often times, after a community is rocked by violent conduct, both a set of accepted principles and proper conduct are often promulgated. Thus, a dissenting juror during deliberation for a capital trial is faced with a de facto expulsion from the community should she consider not following the community’s accepted principles. Thus, seduction to symmetry is a process that can be either imposed upon an individual or the targeted individual could be drawn to the symmetry. Individual members of the society fall victim to the seduction to symmetry for various reasons, the most significant of which is the inability to bear the cost of being in asymmetry to their environment. See id.; see also Solomon E. Asch, Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority, in 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956); Stanton D. Krauss, Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing, 64 IND. L.J. 617, 643–44 (1989) (discussing application of the “community’s standards” and the need for “error-minimization”).
undercurrent of divergence within their respective substantive paradigms. While the detailed analysis of their divergence is not the primary focus of this work, this Article nonetheless attempts to tease out the unique aspects of the restorative justice mechanism.

Crime imparts physical trauma and inflicts psychological anguish on victims, their families, and their communities. The restorative ideals of justice must allow for healing of crime’s emotional wounds. Only through healing the psychological imbalance caused by trauma can true equity and fairness be imparted within the justice process. Healing cannot occur, however, without the active participation of the offender. An offender who is locked away long-term cannot take part in active healing, as prolonged incarceration does not allow an offender to be in active communication with the victim. Such an offender cannot accept accountability for the crime, as doing so jeopardizes the offender’s ability to prevail within the adversarial process.

This procedural inadequacy to engage the offender in active participation towards healing presents a psychological roadblock for the victim’s active restoration. The contemporary public imagination fails to capture this restorative dimension of justice, while longing for retribution as a meaningful vehicle through which to achieve justice. Yet retribution and healing are fundamentally disconnected. Years of retributive and punitive focus within the justice mechanism has effectively prevented criminal justice doctrines from realizing the goals of true healing. Driven predominately by shortsighted socio-legal factors, these doctrines have developed outside the locus of a restorative idealization of justice. Thus, absent any holistic mechanism, the mainstream criminal justice process has predominantly become a procedure-driven framework. This framework does not recognize the enhanced value of justice through restoration. By failing to recognize restoration’s transformative impact on both the victim and the offender, traditional justice has failed to incorporate any holistic healing dimension of restorative justice.


33. See discussion infra Part II.
For adequate healing of an individual, a justice mechanism must be able to tap into the restorative undercurrent of the underlying process. For the restorative process to enhance an individual at a psychosomatic level, the framework must embrace empathy as a necessary ingredient. Empathy is a vehicle to achieve restoration. Through its power of healing and transformation, empathy for the offender can alleviate the negative emotions that keep the crime victims hostage to the feelings of vengeance and retribution. By its transformative power, empathy can inject positive

34. Accepting the personhood of a violent criminal is important within the framework of restorative justice because doing so may accentuate and facilitate the process of humanizing the offender. Without humanizing the offender, the ideal of restoration falls flat on its face, as the deliberative process calls for collecting all relevant and contextual material related to the crime, criminal, and community such that various elements of the offender's personhood become unearthed before the stakeholders gather for the consultative process. “Yet, this process is not so straightforward. When a person is proven to have committed violent acts, such as taking the life of another human being, the collective empathy toward such an individual tends to diminish.” Capital Jury Decision Making, supra note 19, at 486 n.39. Similar to the difficulty that jury members face going against societal conformity and attaching traits of human personhood on a violent criminal, untrained community members or victim family members face structural difficulties humanizing the offender. See id. Ultimately, the process of humanization comes down to the ability to develop “empathy” or sympathetic feelings towards the offender. When an individual develops a feeling of extreme antagonism towards a defendant for acts of violence, it creates a barrier in the cognitive construct of the juror. As a result, an individual within the consultative decision-making process is likely to fail to humanize the defendant. This cognitive barrier has been termed in literature variably as either “empathic divide” or “empathetic divide.” CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 207-09, 238-39 (2005). I have discussed this phenomenon within the context of capital jury deliberation. See generally Capital Jury Decision Making, supra note 19 (exploring the relationships amongst empathetic divide, dehumanization, and cognitive stress).

35. See Tracing the Moral Contours, supra note 8, at 566 n.15.
36. Author Gerhard O.W. Mueller notes:
Closely related to the aim of vindication is the aim of retribution. But the addressee of retribution is a different one. It is not the law itself; it is, rather, the organized group whose rules have been violated and whose sense of security has been disturbed. This society includes, of course, the direct victim of the wrong (or his immediate relatives, in case of a homicide). Perhaps, at one time the demand of retribution was purely that of the direct victim of the homicide, namely the family. But as the law community grew from the family to the state or nation, it was that larger body which became the recipient of the retribution.

Gerhard O.W. Mueller, Punishment, Corrections, and the Law, in THE TASKS OF PENOLOGY: A SYMPOSIUM ON PRISONS AND CORRECTIONAL LAW 47, 57 (Harvey S. Perlman & Thomas B. Allington eds., 1969). Continuing on his theme of retribution, the author notes:
emotion and inject forgiveness in the cognitive constructs of the affected individuals. A change within the cognitive construct via the transformative impact of empathy enables the crime victims to connect with other individuals—such as the offender and fellow crime victims—already on a path of healing. This Article provides a theoretical framework to construct why empathy is one of the fundamental drivers for the full realization of the restorative justice mechanism.

Through their shared commitment to inculcate empathy in dealing with the adverse impacts of crime, both therapeutic jurisprudence and restorative justice fall along a continuous spectrum occupying the broader alternative justice framework. This comprehensive framework consists of therapeutic jurisprudence, restorative justice, preventative law, collaborative law, transformative justice, procedural law, and truth and reconciliation tribunals, among others. They embody a holistic

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Mr. Leopold has called it bankrupt on two grounds: "'Getting even' is not a very mature motive;" and "the second reason why it appears to me that retaliation is not a proper ground for imprisonment is that we are not consistent. We could be much more drastic in the severity of imprisonment. . . . [w]e no longer whip felons. . . . [t]he public conscience has grown too tender to permit drastic punishments." . . . Shoham and Slonim recently put their finger on the continued value of retribution when they wrote of "the currently growing realisation of many criminologists that the normative barrier against proscribed behavior (including crime) is strongly linked with the depth of the internalisation of norms and values by a certain person. The extent to which the non- (or anti-) criminal norms have been incorporated into the personality of a certain person, i.e., his being morality orientated may largely determine his chances of becoming an offender and his subsequent 'reformation' or his becoming a recidivist.


38. *Id.*

39. *Id.*

40. *Id.; see also* Tom R. Tyler & Allan Lind, Procedural Justice, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (Joseph Sanders & Lee Hamilton eds., 2001) (examining through empirical evidence the efficacy of procedural justice and calling for its broader adoption).

framework that provides contextual justice over consistent justice. Consistent justice is an outgrowth of the equality principle. Embedded within the equality doctrine is the conceptual paradigm that professes that similar human consequences should have similar legal outcomes. Here, the equality principle's focus on achieving consistent legal outcomes may have subsumed within it the aspiration towards restorative ideals of criminal justice. Thus, identifying the linkage between the equality doctrine and the criminal justice system's failure to incorporate restorative ideals will be a powerful cognitive tool with which to further evaluate the future roadmap of restorative justice within the American context.


43. Equality is enshrined in searching for similar outcomes in similar legal scenarios. Thus, equality can be seen through the prism of outcome consistency and linked with the liberty doctrine. See Kenji Yoshino, The New Equal Protection, 124 HARV. L. REV. 747, 749–50 (2011) (viewing equality and liberty as interconnected). There remains, however, some tension between the “day in court” ideals of liberty and “equal treatment” conceptions of equality. See JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 72 (1995) (showing how aggregation cuts against common law’s ability for individual justice against injury). Thus, even if one could envision a system where a seeker of justice could have his or her day in court, is it practically achievable? And if it is achievable, would each litigant achieve similar outcomes? This is a paradox of consistency in legal outcomes that conflicts with the ideals of liberty. Courts may bridge such disconnect between idealized conceptions of liberty and equality through a framework of efficiency that maximizes participation by controlling the adverse impacts of resource constraint. I have previously explored this possible framework in a different context:

In this search for justice, individuals expect a transparent and just framework in which individual grievances are adjudicated and duly compensated. On the other hand, enshrined in the equality doctrine is the expectation that similar scenarios culminate in similar outcomes. As society has grown more complex, overburdened courts have started to unravel and the need for judicial economy has taken shape [in the form of aggregated litigations]. Limits on judicial resources presented a choice: foreclosing liberty for some, or innovating a judicial forum in which all grievances by all litigants are heard by a judge or jury.

Saby Ghoshray, Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation, 44 LOY. U. CHI. L.J. 467, 500–02 (2013) (footnotes omitted). This presents a tension between consistent justice versus the contextual justice. There is no doubt that contextual justice may suffer from cost escalation, whereas consistent justice may be fundamentally divergent from the basic goal of restoration through justice mechanism.
B. Restorative Justice—Equality Doctrine versus Value-Centric Jurisprudence

The equality doctrine has matured through the quintessential tension between liberty and equality. While the liberty principle recognizes that all victims of criminal acts are entitled to justice as per the available criminal justice mechanism, the equality principle ensures that like circumstances follow like outcomes. The difficulty, however, comes from the underlying indeterminacy created by the structural conflict between these two frameworks. Interjecting this dichotomy within the process instrumentalities of criminal justice could certainly make our idealization of restorative justice difficult. Even if one could envision a system where every criminal act may be prosecuted as per the wishes of the affected stakeholders—the victim, the victim’s family, and the community in which the crime has been committed—could such outcomes be practically achievable? Indeed, such outcomes are theoretically possible. However, their realization may be problematic, as the cost of structuring such individualized criminal justice prosecutions might be difficult to achieve in practice. This is one of the fundamental structural deficiencies in achieving contextual justice that restorative process seeks to achieve.

Recognizing the above difficulty, the judicial process has evolved towards bridging such inherent disconnect between ideal conceptions of liberty and equality. In practice, it has been attempted through a framework of efficiency that maximizes participation by controlling the adverse impacts of resource constraints. Despite scholarship espousing that liberty and equality are structurally consistent, modern jurisprudence has evolved into adopting a more one-sided, equality-centric viewpoint. Thus, in an attempt to preserve equality over liberty, contemporary criminal justice has somewhat foreclosed the path to a comprehensive justice while inculcating a fixed, quantum-based punishment.

An interesting outgrowth of this is worth noting. The focus on consistency has allowed the justice mechanism to fundamentally

45. See id.
46. See id.
47. For a detailed discussion on efficiency, see Ghoshray, supra note 43, at 501–03.
48. See id. at 500 (citing Alexandra D. Lahav, The Case For "Trial By Formula," 90 TEX. L. REV. 571, 575 (2012)) (observing the interrelationship between liberty and equality while noting that traditional legal processes may support some tension between liberty and equality after all).
49. Id. at 501–02.
disconnect from an ideal realization of substantive justice.\textsuperscript{50} As a result, through its consistent invocation, procedural law has evolved as a proxy to substantive law.\textsuperscript{51} In this proxy, true substantive remedy may never be achieved. Recognizing that achieving a restoration-centric legal remedy is tantamount to bringing rectitude via transformation in procedure depends on how responsive substantive due process is to the changing dynamics of law.\textsuperscript{52} Thus, finding footprints of restorative justice has become increasingly difficult.

From a restorative perspective, the equality doctrine is indexed at a shallow framing. This resulted in the omission of various contextual and relevant dimensions that are necessary for injection into a holistic framework. As restorative justice is more consistent with a value-based framework, it is fundamentally distinct from the contemporary criminal justice mechanism's predominantly process-driven framework. This is readily witnessed through the absence of value propositions within contemporary criminal justice.\textsuperscript{53} Furthermore, the rights that are paradigmatic of the holistic ideals of restorative justice are in stark contrast with the procedural dichotomy within the contemporary usurpation of justice. Each of these distinctions, in essence, points to fundamental roadblocks towards the restorative justice mechanism's idealization within contemporary U.S. jurisprudence.

Contemporary criminal justice introduces fundamental struggles in reconciling with the idealization of restorative justice along two predominant threads—through a value proposition and via a palpable procedural bias.\textsuperscript{54} Evident in its separation away from the original goals of justice, criminal justice has inculcated the law's process through this process paradigm. Contrarily, the healing ideals of both therapeutic and restorative justice are difficult to achieve without interjecting value-driven

\textsuperscript{50} Id. at 469.

\textsuperscript{51} Here, I draw attention to the divergence between the procedural due process and the substantive due process aspects of the legal process. Substantive due process is fundamentally complex, cumbersome, and requires, often times, a case-by-case analysis to sufficiently evaluate the scope and context of law as applicable to the specific instance. However, the overall objective of judicial economy precludes the comprehensive instantiation and application of substantive law, and, as a result, procedural law has become an inferior proxy to the substantive aspiration of law within the due process paradigm. Id. at 475, 479, 499 (examining the efficiency-driven proxy of statistical, and thus procedural, extrapolation).

\textsuperscript{52} Id.

\textsuperscript{53} See generally Capital Jury Decision Making, supra note 19.

\textsuperscript{54} See id. at 483, 488, 501.
rights fundamentals into the system. Yet it is the process nuance that distinguishes restorative justice from therapeutic jurisprudence—a uniqueness that I address below.

A value-centric framework derives its fundamental premise from the recognition that every individual within a society is capable of imparting value. Restorative justice recognizes this. True restorative justice must evaluate the scope of the quantum of punishment within the context of the perceived value that society derives from the process. Often times, this would require analyzing the economic trade-off between lengthy incarceration and parole/probation. Value-centric jurisprudence invites us to recognize this trade-off within a value-driven restorative framework. Thus, while the conservative incarceration framework is predicated on the premise that incarceration enhances societal value via deterrence and incapacitation, restorative justice challenges such a premise.

From a value-centric analysis, both therapeutic and restorative justice mechanisms impart healing elements into the process. Therapeutic jurisprudence, through a commitment to value propositions, enhances both the physical and psychological constructs of affected individuals. This is enabled, in part, by the evidence-driven, social science-focused methods. Restorative justice, through its process instrumentalities, allows the competing values to be balanced by giving a wider circle of stakeholders

55. See generally id.
57. Author Nathan Leopold notes:
   The failure of imprisonment to act as a deterrent is surprising to many. I think it need not be. I think its failure is easily explicable on the basis of the individual psychology of the criminal. No one who intends to commit a crime believes that he will be apprehended. If he did, he would not commit the crime. But he always feels sure that he, at least, and this time, at least, will not be caught. With this conviction, punishment loses its significance as a deterrent. If the man about to commit the crime feels sure that he will not be caught, then he will not be punished, and the thought of imprisonment is no deterrent.
58. See Development of Therapeutic Jurisprudence, supra note 24.
59. For an analysis of how social science-based methods can be utilized in the post-modern criminal justice mechanism, see generally Capital Jury Decision Making, supra note 19; see also CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 203 (Ronald Roesch et al. eds., 2005).
the opportunity to be consulted. In allowing a wider circle of individuals to discuss a crime's effects, the healing process is more comprehensive and restoration efforts more adequate. At a surface level, this definition reveals a deeper commitment to normative consequentialism\(^{60}\) within both restorative and therapeutic justice mechanisms. Yet it is through the differences in this consequentialism and within the process versus value dichotomy that these two mechanisms stand decoupled in their substantive values. Because, as restorative justice and therapeutic jurisprudence diverge from each other, their differences manifest through the scope, constraint, and degree of freedom that are inherent in these jurisprudential frameworks.

C. Divergence Between Restorative Justice and Therapeutic Jurisprudence

There is a fundamental divergence between restorative justice and therapeutic jurisprudence. Restorative justice is a process of bringing together the individuals who have been affected by the crime. Its mechanism has a strong process component that charts a holistic process of healing for those affected. The process involves identifying the stakeholders and bringing convergence amongst them in repairing the harm caused by the crime.\(^{61}\) Restorative justice recognizes that crime shifts the equilibrium both within the system and within individuals. Inherent within restorative justice's promise to restore affected individuals is the commitment to repair the damages done to them both physically and psychologically. Structurally, this implies restoring the equilibriums of all involved. The objective of restorative justice, therefore, is to repair the damage by restoring the equilibrium at all levels. Here, we must conceptualize that repairing the damage is possible when the system equilibrium is restored. System equilibrium can be restored when individual equilibriums for all components have been restored.

When a crime is committed, equilibrium is disturbed at various levels. Those levels include the psychological construct of the victim, the victim's family, and within the community. Restorative justice embarks upon

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60. By "normative consequentialism," I draw attention to the normative ethical framework—a framework that acts as a general theory guiding human social consequences towards a better path, with the expectation that the chosen path produces the best consequence. Therefore, within the conceptual confines of normative consequentialism resides the guidepost of normative ethics that provides the criminal justice process with a newer penological dimension that is geared towards bringing about the best consequences for the society as a whole—implicitly, the end justifying the means.

restoring these various equilibriums that help humans become whole again. Thus, restorative justice attempts to restore the victim, the offender, and the community in which these actors come in contact with each other. This is done through immersion within the ambience of agreement by balancing the aspirations of all concerned, such that the final evaluation of the punishment is justified. Thus, restorative justice attempts to restore the victim, the offender, and the community in which these actors come in contact with each other. This is done through immersion within the ambience of agreement by balancing the aspirations of all concerned, such that the final evaluation of the punishment is justified. 62 Animated within the idea of restoration, therefore, is the central recognition that crime harms individuals, relationships, interactions, and community development. It is through the process instrumentalities of restorative justice that society aspires to bring the system back to the point in time before the human consequences caused such adverse outcomes.

The central tenet of restorative justice is somewhat decoupled from the culpability-centric justice mechanism. Restoration of equilibrium is not predicated upon a crime-matching quantum of punishment. This is because social science-based research has shown that, at a deeper, more fundamental level, matching punishment and extracting culpability can very rarely establish accountability for the harm. As such, the process is unable to incorporate mutual understanding of the causes and effects of crime. By not knowing or addressing the causes of crime, restoring its equilibrium is not predicated upon a crime-matching quantum of punishment. This is because social science-based research has shown that, at a deeper, more fundamental level, matching punishment and extracting culpability can very rarely establish accountability for the harm. As such, the process is unable to incorporate mutual understanding of the causes and effects of crime. By not knowing or addressing the causes of crime, restoring its

62. Id.

63. One of the early proponents of restorative justice, Howard Zehr, implores us to view the objective of criminal justice through a non-traditional lens—from the framework of crime as a violation of societal norm to harm caused to individuals and their relationships. See ZEHR, supra note 10, at 180–81. Thus, the idea of restorative justice should be predicated on how best the justice process can repair such harm and restore affected persons into an acceptable status, as opposed to how appropriate the punishment for the violation should be. Describing this non-traditional lens, Zehr observes, “Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance.” Id.

64. Id.

65. See Gabbay, supra note 13, at 359. Gabbay observed: The most acceptable working definition for a restorative justice practice was offered by Tony Marshal and endorsed by John Braithwaite, one of the leading authorities in the field: “A process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” The purpose of the process is to “restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.” The questions of “what” must be restored and “how” this restoration is to be fulfilled are answered by the participants in the restorative process, as they become empowered to make these decisions on their own.

Id.
effect becomes virtually unattainable.\textsuperscript{66} Thus, the retribution-focused,\textsuperscript{67} punitively-biased, traditional criminal justice system is fundamentally discordant with the ideals of restorative justice that are driven towards restoring the actors and their environments back to equilibrium status. Next, in Part II, I dissect this concept of equilibrium and its linkages with the ideals of restorative justice.

II. ANATOMY OF RESTORATIVE JUSTICE—EQUILIBRIUM-BASED ANALYSIS

Within society's regular interactive paradigm of human processes, multiple individual actors come into contact with each other for various active interactions. Adverse consequences arise only from a smaller subset of such interactions. This subset requires legal determination. Legal determination can simply measure and adjudicate the quantum of legal consequences of individual actors' adverse actions.\textsuperscript{68} Yet it does not contribute towards restoration of the equilibrium condition. Several factors can be presented as to why the traditional justice mechanism fails to restore equilibrium.\textsuperscript{69}

The contemporary adversarial system of guilt determination does not allow the offender to adequately accept responsibility. Accepting responsibility is a key ingredient in allowing the affected components of crime—the community and the victim—to repair their stressed conditions. Thus, restoring the system requires legal consequences to obligate the actors that changed the initial equilibrium condition to accept responsibility for their actions. If the process is more focused on punishing the individual actor by matching the crime with the designated punishment quantum, it is unable to address the stressed conditions of the affected components of the system. As a result, the process fails to bring the system back to equilibrium. Thus, as the process focus of this traditional justice mechanism is on an individual element within the system, the restoration of

\textsuperscript{66} Id. at 358–59.
\textsuperscript{67} See Mueller, supra note 36, at 57.
\textsuperscript{68} There is a limited subset of human behaviors and interactions in society that can be recognized as anti-social or offensive. Not all offensive or anti-social behaviors can be brought under the rubric of criminal penalty or incarceration, and thus, only for a smaller subset of anti-social or offensive social interaction may individuals be criminally incarcerated. Here, I draw attention to a divergent value proposition in this societal norm: such incarcerations only serve as penological ends but do not provide the society with any redeeming value.
\textsuperscript{69} See discussion supra Part I.
the environment into the equilibrium status is never achieved. On the contrary, the restorative justice mechanism is distinguished from this process in its commitment to restore the equilibrium within the system—the system consisting of the victim, the victim's family, the offender, and the community that houses the victim and the offender.

The restorative process must not necessarily focus on the appropriateness of punishment or the culpability of an individual element. Rather, its focus should be on the broader system equilibrium and how that equilibrium can be achieved through a collaborative and consultative process. This paradigm is a sharp departure from the traditional adversarial exchange mechanism. In this restoration-centric dialectic, the culpability for the crime and the appropriateness of the punishment quantum take a back seat to the overall healing of those affected. To understand how equilibrium is never restored in the traditional non-restorative criminal justice mechanism, it is instructive to appreciate the impacts of this process in the following discussion.

A. Equilibrium Destruction within Non-Restorative Justice

Traditional criminal justice does not recognize the need for restoring equilibrium. By restricting the focus on narrow formalism of individual punishment, the framework loses sight of the need to retain broader system equilibrium, while ushering in collateral damages on multiple fronts. Manifested within its non-normative consequences, non-restorative traditional criminal justice brings in its wake shattered dreams, broken

70. See discussion supra Part I.

71. By broader system, I draw attention to the comprehensive whole, consisting of crime victims, victim families, offenders, offender families, the communities where victims and offenders reside, and the agents of law and the justice process. Each of these components is related to the other components, as they reside within their respective communities. When a crime is committed, by virtue of the relationship, all the individual components are impacted to a certain degree, and the relationship gets impacted as well, causing both a disturbance and a significant change within the interconnected system—a transformation that can be seen as changes in the equilibrium. Here, the idea of equilibrium can be seen from the conceptualization of a pre-crime harmony amongst the individual components. Therefore, punishing an individual actor within this interconnected and nexus-driven framework simply addresses a part of the system without addressing the general stress that has been diffused throughout the system. However, the idea of restoration is that, by engaging in a collaborative and consultative process, all the various stressors within the system can be identified, and through exchanges and convergence of ideas, a forward-looking trajectory of action can be envisioned, and we can attempt to bring the system to a state that existed prior to the crime.

72. See discussion supra Part I.
families, and devastated communities. The process focus of traditional criminal justice is indifferent to the collateral consequences that may come in many forms—from children losing their parents while growing up to communities losing productive members of their individual societal units. On the other hand, within the contextual ideals of restorative justice resides the promise to stem the human resource destruction of a broader society. Yet it has continued to remain outside the purview of contemporary criminal justice discourse in the United States.

1. Non-restorative Justice Process and Collateral Consequence to Families

Viewed through the lens of collateral impacts, non-restorative criminal justice fails to restore equilibrium at multiple levels. One such adverse impact is seen through the fate of children of incarcerated individuals. The lack of recognition for the societal value in the destruction and absence of record-keeping creates a barrier to evaluate the depth of such children’s plight. Therefore, it is difficult to estimate the number of minor children who have at least one parent incarcerated in the United States. Beyond improper data-collection procedures and weak tracking mechanisms, lack of communication between the incarcerated parent and his or her child further contributes to a growing epidemic of family fragmentation as a result of the heavy punitive focus in criminal justice. When more than

73. For an expansive discussion of collateral consequences, see America the Prison Nation, supra note 9.

74. By its definition, restoration is imparting or restoring value that has been lost—thus the goal of restorative justice to impart or restore lost value to all parties involved.

75. See, e.g., Joyce A. Arditti, Sarah A. Smock & Tiffaney S. Parkman, "It's Been Hard to be a Father": A Qualitative Exploration of Incarcerated Fatherhood, 3 FATHERING 267, 268 (2005); Susan George & Robert Lalonde, Incarcerated Mothers in Illinois State Prisons: An Analysis of Administrative Data 6–7 (2002) (noting that files do not contain information about the children of incarcerated mothers such as “whether the mother was the custodial parent when she was admitted to prison” and that, as a result, it could not be estimated “how many children had their caregiver change when their mothers were sent to prison”).

76. Id.

77. Arditti, Smock & Parkman, supra note 75, at 268 (noting that several states do not track family data from individuals in the criminal justice system); Cynthia Seymour, Children with Parents in Prison: Child Welfare Policy, Program and Practice Issues, in CHILDREN WITH PARENTS IN PRISON 1, 3 (Cynthia Seymour & Creasie Finney Hairston eds., 2001) (noting that although case workers ascertain on a case-by-case basis when children have incarcerated parents, tracking mechanisms are weak because state systems do not
1.5 million children have at least one incarcerated parent and when at least 3.5 million children have a parent either on parole or within the probation system, the adverse impact of incarceration-centric justice is difficult to ignore. Despite the recognition that parental need is essential to the psychological development of children, the system of incarceration neither encourages nor facilitates contact between incarcerated individuals and their children.

Looking at the simplified narrow prism of the children’s plight above, it can be instantly recognized that non-restorative justice in the United States is a ticking time bomb for unleashing ever-lasting destruction of families unless a course correction is introduced. Lengthy incarceration of a criminal offender does not contribute in any way for the crime victims to heal appropriately. Instead, it injects more negative influences into society. Here, society as a whole is the biggest loser. The equilibrium is never reached. Rather, it is further disturbed, as the children of the offender might never reach their full potential as productive humans. A number of factors contribute to this reality. Inaccessibility of prisons due to remoteness, loss of income within the family, asymmetric application of civil rights remedies for the incarcerated individual, and child development issues are just a few of the items that significantly contribute to never reaching that elusive equilibrium within the society.

Loss of equilibrium as a result of crime, however, occurs on both sides, as both the victim and the offender are significantly impacted. Often, a father’s incarceration introduces an insurmountable financial hurdle for the family. This is true at both ends—during the incarceration and after the release, as reintegration within the community is an extremely difficult process that further shifts equilibrium away from the restoration point. As a result, a cycle of criminality can continue for perpetuity when the

gather parental incarceration data in a competent manner to gain any system-wide analysis benefit).

78. Arditti, Smock, & Parkman, supra note 75, at 268 (citing Seymour, supra note 77, at 1–25).
79. Id. at 269.
81. See Johnston, supra note 4, at 59–88.
individual offender cannot contribute to the family after release. 83 Here, the coveted equilibrium is never reached in some communities.

Stepping away from the financial aspect, the equilibrium-distorting impact of incarceration is very pronounced in minority communities. 84 Seen through the prism of cultural diversity, socially marginalized classes suffer significantly from incarceration. 85 Due, in part, to their interconnected and close-knit family structures, a greater number of individuals in the Latino and African-American communities 86 are impacted when financially and emotionally dependent on the incarcerated individual. 87

2. Non-Restorative Justice Process and Collateral Impact on Communities

Value destruction and equilibrium distortion extends to the communities for various reasons. First, the negative stigma of incarceration extends to the communities that experience a higher-than-average rate of prisoner mobility due to re-entry. 88 Second, the negative stigma continues as the community garners a negative reputation, resulting in organic barriers to entry for new businesses and higher income residents. 89 This, in turn, inhibits economic growth. 90 Third, negative

83. Id. at 91–104.
85. See generally id.
86. See generally id.
87. See generally id.
89. Often, the terms "bad neighborhood" or "undesirable people" characterize society’s broader view of communities to which prisoners re-enter. Once such stigma is attached to a neighborhood or inhabitants of that community, it becomes extremely difficult to develop a meaningful relationship with society generally, the impact of which can be felt at various levels, including economically. The following observation was made in recent research:

Finally, the identities of residents of the community-at-large are impacted by high levels of coercive mobility because they, and others outside the community, identify them as coming from a "bad" neighborhood. Our respondents reported this translated into residents withdrawing from mainstream society, feeling their options were limited and life chances diminished. For children, this reduced their stake in conforming to collective norms and values. The knowledge that others thought less of them because of where they lived also meant residents were
reputation and a depressed economy stifles the growth of such community’s social capital, as seen through various anecdotal evidence of poorer communities being disproportionately affected on account of its members’ incarceration.91

Negative image and erosion of social capital force the affected community to become alienated from a larger community context. As such, alienation reinforces both social and political isolation of its residents, while it further enhances the propensity for its residents to commit crime. From a criminology perspective, enhancement in recidivism may have an inverse correlation with restoration. This is because, by allowing individuals to reside within a recidivism-friendly framework, the system essentially decouples them from becoming part of a restorative process.

Restorative ideals must be extended to both the affected families and those of the offender, as both are inalienable components of the affected community. The current process instrumentality of the justice mechanism, however, does not comport with such ideals. Therefore, the idea of restoration may never be realized within the criminal justice process without making adequate adjustment into the prevailing thought process. In charting a trajectory for restorative justice, it is therefore important to craft a balance between the valuation of crime responsiveness and the length of incarceration. Such analysis must be given due weight, with the various consequences factored into charting the future trajectory. In such evaluation, the predominant focus must be on the healing of the community.

inclined to believe government officials did not care about them or their neighborhoods and that persistent racism was the true cause of conditions found in the neighborhood. In addition, residents in high incarceration neighborhoods report that as their neighborhood develops a reputation as a place for returning offenders to reside, other "undesirable" people (such as the homeless) migrate there as well. The consequence of high levels of ex-offenders and other transients is diminished feelings of safety in the neighborhood. Finally, while many residents took pride in their neighborhood, others expressed a desire to leave, indicating a low level of belonging.


90. See Watt & Nightingale, supra note 83, at 48 (evaluating the limited incentives and lack of potential for growth within disadvantaged communities).

91. BRUCE WESTERN, MARY PATTILLO & DAVID WEIMAN, IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 1, 4–5 (Mary Pattillo et al. eds., 2004).
and the individuals, as opposed to locking individuals away for as long as possible. In its über focus towards appropriately punishing an individual, the traditional criminal justice system has deviated from a holistic restoration of all the stakeholders. On the contrary, through its process instrumentalities, restorative justice brings a more value-centric punishment into the framework. The punishment involves a combination of limited incarceration and acceptance of accountability by the offender. In addition, through an interacting paradigm, the offender and the victim converge into a punishment protocol. Often times, this involves the offender compensating the victim and receiving forgiveness in return. Other times, this may involve reparations for the victim’s family and for their lives. In turn, this allows for the offender’s reintegation into the community and enables the victims to begin interacting with such offender towards a consultative healing paradigm. Despite its process focus, restorative justice is inherently value-driven. It is, therefore, instructive to understand how such values are exercised through the process instrumentalities of restorative justice in an attempt to bring equilibrium back to the system.

B. Restorative Justice—Process Focus With Value Proposition

Fundamentally, restorative justice is restoring the equilibrium through a process. This process instrumentality enables the restoration of equilibrium by efficiently connecting the elements of empowerment, empathy, and paternalism. Applied judiciously, these elements cannot only restore the equilibrium but can also inject within the system a holistic healing to all the stakeholders. This makes restoration both durable and sustainable. However, interaction amongst the various building blocks of empowerment, empathy, and paternalism is complex and must be crafted through a balanced approach that allows them to interact and bolster each other in achieving restoration. This transformative impact of restorative justice can be conceptualized through its consequences for a wider network of stakeholders.

As I identified earlier in this Article, the operationalizing of restorative justice does not focus on an individual stakeholder. Here, the focus on

93. *Id.* at 249–50, 252.
94. *Id.* at 250–51.
95. *Id.* at 249–51.
96. *Id.* at 249.
consequentialism is on a much more pervasive scope. The shaping effect is on a much more durable scale. Yet such consequentialism cannot be envisioned without empowering all stakeholders in the process. Empowerment infuses members of the victim’s family with empathy to forgive, while injecting the offender with the courage to accept responsibility. This is not achievable within the traditional adversarial process. Empowerment resides at the core of the restorative justice process. The final destination of such restoration is arrived at through a consultative process in which the rights of all stakeholders are upheld. Empowerment is both a vehicle to achieve goals and also a necessary element for some actors to engage in the process. Therefore, empowerment is also required for each stakeholder to assert and interact with other stakeholders. Without empowerment, the weaker voices are at risk of getting drowned out by a more assertive voice, relegating the process into an asymmetric adversarial replication of the traditional justice mechanism.

Empowerment of the stakeholders is also important as a bulwark against the natural tendencies of power imbalance. Power imbalance introduces domination in the system, as these processes are fundamentally human-mediated justice mechanisms. Any human-mediated justice process can be shaped by power imbalance amongst the stakeholders. Empowering all stakeholders somewhat proportionately may prevent asymmetric empowerment of some. This, in turn, enables the divergent voices to become active participants within the consultative paradigm of restorative justice mechanism.

Within the traditional criminal justice system, power imbalance establishes asymmetric rights by subsuming one competing right with a more assertive right. Here, power imbalance can cause domination of one stakeholder of the system by the other. By taking the goal of equilibrium restoration further away, it might make it virtually impossible to restore equilibrium in the system. Thus, if we can envision a system where all the stakeholders are equivalently empowered, the issue of domination can be minimized. Empowering individual stakeholders within

97. See supra note 34 and accompanying text.
98. See Zehr, supra note 10, at 187–91.
100. When two competing rights are interacting within a regulated space, the inefficiency or the structural defects of the supervising framework allows for one of the competing rights to rise above the others. This happens when some actors within such space suffer from lack of empowerment or empowerment is asymmetrically distributed.
the restorative justice mechanism can minimize the asymmetric usurpation of power within the process.

By empowering the stakeholders, the community members, the victims' families, and the offenders, the restorative justice mechanism can take the adversarial focus away from the hands of the lawyers and judges. By bringing positive emotions,\textsuperscript{101} higher order values of forgiveness, and accountability,\textsuperscript{102} the restorative justice system can decouple itself from the negative emotions of vengeance and retribution.\textsuperscript{103} By separating away from the punitive bias of the process, the restoration of the community interests can be restored and the interests of the victims' families enhanced. This reliance of restorative justice on positive emotions is in sharp contradiction to its traditional criminal justice counterpart that focuses more on the process instrumentality-driven societal conception\textsuperscript{104} and not on fundamental, value-based rights.

Despite the paradigm's radical departure from traditional jurisprudence, the focus on empowerment can infuse the restorative framework with two relevant components—empathy and responsibility. Responsibility breeds restoration when the offender takes responsibility for the crime.\textsuperscript{105} This allows the healing process to begin. Thus, without getting into the distinction between active and passive responsibility, as has been explored in detail elsewhere,\textsuperscript{106} I shall connect the idea of taking responsibility with the fundamental goal of restorative justice in the next Section.

C. Restoration Through Accepting Responsibility and Empowering Individuals

Although the intensity for acceptance of responsibility is directly correlated to the degree of restoration imparted on the process,\textsuperscript{107} we can reframe this conceptual dimension without involving the granularity of

\textsuperscript{101} See supra note 29 and accompanying text.

\textsuperscript{102} See generally John Braithwaite, Holism, Justice and Atonement, 2003 UTAH L. REV. 389 (2003) (establishing how forgiveness and accountability are necessary ingredients in charting the road towards restoration within a process in which the justice mechanism is equally committed to both the affected parties to the crime and the party that has perpetrated the crime).

\textsuperscript{103} See supra note 21 and accompanying text.

\textsuperscript{104} See discussion supra Section I.B.

\textsuperscript{105} See discussion supra Section I.C.

\textsuperscript{106} See Restorative Justice and Therapeutic Jurisprudence, supra note 92, at 253–57.

\textsuperscript{107} Id.
responsibility. By taking responsibility, a stakeholder can inject trust and empowerment in the other stakeholders. This, in turn, enables the healing process to begin through restoration. By connecting the responsibility of the offender to the crime and its adverse impacts, other stakeholders can begin to move the entire system towards the initial point of equilibrium without active influence from outside entities.

In a typical criminal justice process, the system consists of external and internal elements. Internal elements are the actors within the legal process whose actions form the basis of determination of the legal outcome. This includes the offender, the victim, and the community. The system’s external elements are the legal representatives of all sides—the mediator, the jury, and the judiciary. A fundamental difficulty of the traditional process is that it requires the dispute mechanism to be decided by the external apparatus, much to the relative sublimation of the desires and the sensibilities of the internal elements.

When the consequences of legal outcomes are decided by the external elements, true restoration is rarely achieved. The system is unable to retreat and retrench to its original condition because true restoration requires acceptance of responsibility. In the traditional adversarial system, the idea of taking responsibility is in conflict with self-preservation. Self-preservation, as a fundamental objective of an adversarial system, prevents the acceptance of responsibility, as doing so would be a sacrifice of self-interests. Since the adversarial process reaches its outcome through a negotiated paradigm, truth does not necessarily rise to the surface. Rather the appearance of truth is allowed to prevail and is manifested as the benchmark for justice. Despite the appearance of justice within the adversarial system, the internal stakeholders in the system are not empowered and the offender has never taken responsibility. Thus, equilibrium is never achieved and restoration is theoretically unattainable within the traditional framework. As a result, the justice mechanism remains divorced from true restoration.

D. Empathy—Forming the Undeniable Linkages Amongst Humans Within a Restorative Framework

How does empathy connect the stakeholders, enable the process of empowerment, and allow responsibility and accountability to be aligned in achieving restoration? To have empathy is to have openness. Moreover, empathy within one’s cognitive construct enables the individual to broaden his or her cognitive faculties to analyze human actions through his or her
Without empathy, individuals may recognize human actions at a superficial level without deductive abstraction. Yet such deductive abstraction is necessary in order to recognize that all actions come from a multitude of factors and substantive causalities. Empathy enables an individual to recognize causal connections and causal sources of adverse and injurious actions. Having empathy allows stakeholders, the victim, and the community to be open to the healing process and forgiveness. This allows all stakeholders to eliminate feelings of vengeance and other ill feelings, allowing them to instead converge within a consultative manner to bring the system back to its original equilibrium. Thus, empathy is a key ingredient that allows the distinction between normative consequentialism and positive outcome to be understood within a restorative framework, an area I shall illuminate below.

E. Restorative Justice through the Promise of Normative Consequentialism

Normative consequentialism presupposes that the consequences of any action must not be justified through the integrity of the process. Instead, it allows for such consequences to be evaluated through a lens of justness that is so inherent and so fundamental that it must be decoupled from the shaping effect of the adversarial system. Normative consequentialism takes us closer to a full realization of true justice. A positive outcome is predicated on the law’s evolution, and its trajectory is predetermined by contemporary practices and social mores. On the contrary, normative consequentialism is based on a fundamentally ordered set of presuppositions—some core, value-laden, absolutist precepts that must form the trajectory through which all consequences of human actions must
be judged. This realization requires a bond with empathy to see the world through an inherent justness and a structural correctness that remains unperturbed by the shaping effect of externally-imposed stimuli. This brings us to the next element in a full evaluation of restorative justice’s process instrumentalities: the idea of paternalism that connects all these elements.

Fundamentally, paternalism is born out of positive law, such that one stakeholder or a subset of stakeholders within the participating circle of the restorative justice process can shape the outcome. Paternalism occurs when there is a power imbalance and domination within the system. Therefore, in the presence of paternalism, true restoration can never happen. Paternalism is the framework in which the procedural elements dictate that the trajectory of a legal outcome must follow a predetermined set of rules that value the consistency of outcome over the contextual relevance of the causes of human action. Paternalism eliminates causality from the discussion process, subsuming within the collaborative process the other voices. In so doing, it subjugates those other voices by imposing upon them a more assertive voice. In paternalism, the idea of justice is relegated to the process of achieving an outcome based on a set of rules rather than treating the issues holistically.

Paternalism strips empowerment from a subset of stakeholders in favor of another subset of stakeholders. Thus, the paternalism-centric process asymmetrically subjugates a set of rights over other sets of rights. Restorative justice differs from this paternalism-centric process in that within its process instrumentalities, the ill effect of paternalism is much more reduced. In the current discourse, I shall refrain from granularizing the various shades of paternalism. Rather for the purpose of my present discourse, I conceptualize paternalism as a vehicle for developing the construct for power imbalance and domination in the system. Thus, I see paternalism as a contradictory component for achieving the goals of the

114. Positive law is defined as man-made law, designed to address specific acts at a specific point in time applicable for a specific geographical region. See Positive law Definition, BLACK'S LAW DICTIONARY 1006 (abr. 9th ed. 2010). Thus, positive law is derived either through legislative enactments or through judicial act and, as such, distinguishes itself from natural law as neither inherent nor divine. Conceptually, positive law also distinguishes itself from normative law in that it does not require an ethical or consequential component. See generally JAMES BERNARD MURPHY, THE PHILOSOPHY OF POSITIVE LAW: FOUNDATIONS OF JURISPRUDENCE (2005).

115. See Restorative Justice and Therapeutic Jurisprudence, supra note 92, at 248–49.

restorative justice process. It is therefore important to recognize that the process instrumentalities of restorative justice must decouple themselves from the shaping effect of paternalism within the system.

Examining the full participation of all stakeholders through the process instrumentalities, value propositions, and the rights paradigm, it is instructive to recognize that restorative justice is less about giving appropriate punishment and more about healing. Furthermore, restorative justice is less about getting the process right and more about hearing all the voices proportionately. It is less about imposing the rule of law and more about seeking fundamental justice that has the healing power of restoring all the stakeholders involved in an adverse outcome from human interaction. The most telling question before us then is this: why is restorative justice so difficult to implement in the United States? Next, I analyze the hurdles and the societal landscape that is at the root cause for the inertia in the system.

III. IMPLEMENTATION DIFFICULTIES IN RESTORATIVE JUSTICE—SEARCHING FOR THE CAUSE OF INERTIA

Adoption of restorative justice is difficult in the United States for various reasons. First, the fundamental precept of restorative justice is in contradiction to the corporate objective of today's media. Since its philosophy is premised at "monsterizing" the criminal defendant and merchandizing crime, its pecuniary interest calls for the vengeance-
driven penological practice to continue,\textsuperscript{118} and as such, this focus helps in the mass merchandizing of violence.\textsuperscript{119} Second, adoption of restorative justice in the United States will significantly impede the growing trends in the corporatization of incarceration. The corporatized prison system’s explosive growth has deeply entrenched, vested interests that are committed not to allow the current criminal justice mechanism to make a course correction or contemplate changes to a more holistic justice mechanism.\textsuperscript{120} Third, the ideals of restorative justice flow contrary to the historical trends that shaped the existing criminal justice mechanism. Fourth, being tough on crime\textsuperscript{121} enables political assent\textsuperscript{122} in a post-9/11 socio-legal landscape.\textsuperscript{123} A deeply entrenched political framework will be hard-pressed to allow the current contours of the justice mechanism to attenuate from their punitive-centric course. Finally, there is the issue of inertia. This inertia is obvious when transitioning from an adversarial to a value-centric, inquisitorial-leaning system. It is difficult due to system

\textsuperscript{118} See generally Katherine Dunn, \textit{Just as Fierce}, MOTHER JONES, Nov.–Dec. 1994, at 34. According to writer Katherine Dunn:

\begin{quote}
\textit{On the rare occasion when a woman has been held responsible for her actions, she’s been branded a monster far more frightening than a male perpetrating the same acts. For years scholars believed female criminals were hormonally abnormal, with more body hair, low intelligence, even an identifiable bone structure. Freud thought all female criminals wanted to be men. The female criminal violates two laws—the legal and cultural stricture against crime and the equally profound taboo against violent females.}
\end{quote}

\textit{Id.} at 38.


\textsuperscript{121} See Beale, supra note 2, 428–30 (observing that politicians running on a “tough on crime” platform have historically been successful within the American body politic, despite such stance being more rhetorical than having any substantive value).

\textsuperscript{122} \textit{Id.} at 429–31.

inertia that might manifest in various required changes in curriculum, social mores, and community expectations. These factors are some of the roadblocks that prevent injecting the mainstream criminal justice system with the ideals of restorative justice. Next, I dissect these factors for a more nuanced appreciation of the difficulties of restorative ideals to rise to the surface.

A. Corporatized Incarceration as a Roadblock for Restorative Justice

With the available statistics bolstering the ground reality, America’s contemporary incarceration paints a grim reality unfolding in the dark underbelly of its criminal jurisprudence. Despite the doctrinal scientific research and the social science-based analysis overwhelmingly pointing to the futility of the incarceration-centric model, the United States has quietly piled up unenviable statistics. For example, the Chinese population outnumbers its U.S. counterpart by almost eight times, and yet the incarcerated population in the United States exceeds its Chinese counterpart by more than half million individuals. Moreover, the U.S. population represents less than ten percent of the world’s population, and yet again more than twenty-five percent of the world’s incarcerated individuals reside within the U.S. prison system. These glaring statistics have prompted observations that rightfully declare, “no other society in

124. Here, I draw attention to the fact that contemporary criminal justice is predominantly focused on an adversarial process developed over two centuries. See Tom Smith, Zealous Advocates: The Historical Foundations of the Adversarial Criminal Defence Lawyer, 2 L., CRIME & HIST. 1, 5-6 (2012), available at http://www.pbs.plymouth.ac.uk/solon/journal/vol.1%20issue1%202012/Smith.pdf. The legal tradition has been built on such fundamentals and has matured through the decades, while creating institutional cohesion through school curriculum and scholarship. Adoption of a new paradigm in the legal process comes with the significant cost of changing some of the institutional legacies.

125. By social mores, I refer to the accepted principles or proper conduct that is expected of a member of the society. See supra note 31 and accompanying text.

126. Communal conformity is the desired end-state of an individual within the symmetrization process. Conformity is the driving force behind the seduction to symmetry that individual members of society go through, and as a result, the individual behaves as per the expectation placed on her by the community in which she belongs. See Capital Jury Decision Making, supra note 19, at 509–10, 512–13 (explaining the role of community expectation and social conformity within the criminal justice process).

127. See discussion supra Section I.B.


129. Id.
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human civilization has imprisoned so many of its own citizens." It is against this emerging reality that we must trace the root cause of opposition towards restorative justice.

Incarceration in America is big business. With the criminal justice system in the United States permanently shifting its focus from rehabilitative ideals to a pronounced punitive and retributive focus, many states have already stripped authority from their parole boards and resorted to a predominantly fixed sentencing regime. This has resulted in a significant increase in the average length of incarceration, even for non-violent crimes. Consequently, the size of the incarcerated population has outpaced, in proportion, its general counterpart. This has created a fertile ground for incarceration-based corporations' interests to creep into the system, hijacking the states' responsibility and allowing their own interests to effect the new changes that take place in states' responsibility towards its citizens, while abrogating prisoners' rights across the country.

The existing inertia within the contemporary criminal justice mechanism must, therefore, be seen through the evolving prism of predatory capitalism within the U.S. prison industry. Looking at these glaring statistics should awaken us to this dystopian reality. The number of private prisons has grown from five hundred to one thousand in the last

130. Id.
132. Id. at 313–14, 322.
133. Id. at 314, 318–19 (evaluating the increasing rate of incarceration relative to population growth).
135. Id.
136. Id.; see Camp and Gaes, supra note 134, at 16.
decade.\textsuperscript{137} Rationales can be furnished in support of this observation. Yet such rationales only help in unraveling the questionable motives working behind this explosion in the number of prisoners in this country. This is because it has been established that private contracting of prisoners for work has become a strong driver for incarceration, especially when the number of private prisons are significantly increasing.\textsuperscript{138} Moreover, it has created a multi-billion dollar industry.\textsuperscript{139} Therefore, the time has come to take an introspective look into the dynamics behind punitive justice and the relationship with the escalation of prison privatization.

Delving into the archives of history, it can be seen that the expansion of incarceration began in the late 1960s.\textsuperscript{140} At that time, the criminal justice process began to shift into a more punitive focus.\textsuperscript{141} This shift resulted from an acceleration of the law enforcement agencies’ influence in both the jurisprudence and within the legislative enactments within the United States.\textsuperscript{142} The resulting framework has been bolstered through various restrictive covenants in law and through changes in public policy.\textsuperscript{143} This is manifested in unmistakable terms through an example, such as the government’s embrace of the war on drugs paradigm.\textsuperscript{144} This

\begin{itemize}
\item \textsuperscript{137} JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES 2005 (2008). Some states, including Idaho, Texas, and West Virginia, forbid private prisons from holding serious offenders, such as violent felons, allowing only low- and medium-security private facilities. See generally Demetria L. McCain, Note, Malesko v. Correctional Services Corp. in the Second Circuit: Pursuing Damages for Constitutional Violations by the Private Prison Industry, 44 HOW. L.J. 399 (2001); see also Cody Mason, Too Good to be True: Private Prisons in America, THE SENT’G PROJECT 8 (January 2012), available at http://sentencingproject.org/doc/publications/incTooGoodto be True.pdf [hereinafter Too Good to be True].

\item \textsuperscript{138} See Hartney & Glesmann, supra note 120, at 4–7; see also Too Good to be True, supra note 137, at 5–6.

\item \textsuperscript{139} See id. at 2.


\item \textsuperscript{141} See id.

\item \textsuperscript{142} See America the Prison Nation, supra note 9, at 337.

\item \textsuperscript{143} See id. at 319, 337.

\item \textsuperscript{144} See Dan Check, The Successes and Failures of George Bush’s War on Drugs, DRUGSENSE, http://www.tfy.drugsense.org/ftfy/bushwar.htm (last visited Sept. 30, 2013) (noting that “war on drugs” financing primarily focused on law enforcement with only 30% funding for prevention, education, and treatment). See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2006 9 tbl.12 (2007), available at www.bjs.gov/content/pub/pdf/p06.pdf (reporting that at year-end 2003, federal prisons held a total of 158,426 inmates, of whom 86,972 (55%) were drug offenders.
\end{itemize}
has resulted in the prison population getting a significant boost in the last three decades.\textsuperscript{145} Along this journey, enabled by political influence, correctional corporations have become a \textit{de facto} partner in the government's own punitive agenda.

Within this changing dynamic of the justice mechanism, the federal prison industry has almost become a mass producer of various consumer goods. As more states embraced a restrictive and punitive criminal justice agenda—by passing heavy incarceration-focused laws, such as the three strike law—the buildup of federal prisons multiplied significantly within the last five years.\textsuperscript{146} Consequently, the availability of more individuals to work at either no wage or a fraction of the minimum wage enabled corporatized prison systems' profits to soar.\textsuperscript{147} This has created an efficient partnership between the private prison industry and the government. For example, the state of Ohio has agreed to sell the Lake Erie Correctional Institution to the Corrections Corporation of America (CCA) for seventy-two million dollars.\textsuperscript{148} In some states, contracts guarantee a minimum of 90\% inmate occupancy rate.\textsuperscript{149} Such deliberate focus in continuing the current status of the punitive justice mechanism has been bolstered by governmental backing and corporate interests. Together they present a strong bulwark against introducing restorative justice within the incarceration-friendly contemporary criminal justice system. The sinister intent of the prison corporation is revealed in its recent annual report which observed, "The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or

By comparison at year end 2000, federal prisons held 131,739 total inmates of whom 74,276 (56\%) were drug offenders); \textit{see also} Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 1998 Statistical Tables 18 tbl.2.5 (2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf98.pdf. It is startling to note that, among persons convicted of drug felonies in state courts, whites were less likely than African-Americans to be sent to prison. \textit{Id.} While 42\% of convicted white defendants received a prison sentence, 55\% of African-American defendants received prison sentences. \textit{Id.}

146. \textit{Id.}
147. \textit{See} Too Good to be True, \textit{supra} note 137, at 16.
149. \textit{See} Hartney & Glesmann, \textit{supra} note 120, at 16.
parole standards and sentencing practices or through the decriminalization of certain activities. . . . \textsuperscript{150}

This corporate mandate presents, in unmistakable terms, one of the biggest hurdles against the changing of the guard in American jurisprudence. For its meaningful adoption within the mainstream criminal justice system, restorative justice must overcome an all-pervasive inertia arriving from various parlances, including the existing government-private sector nexus. Corporate dominance within law enforcement is so deeply entrenched that changing course towards decriminalizing certain acts or lowering the statutory mandatory minimum sentence in the quantum of incarceration—necessary stepping-stones for the adoption of restorative justice—is going to be extremely difficult to achieve unless a fundamental change takes place within society. The chances of such a paradigm shift are very low.

B. Restoratives Justice As A Contradiction To Media Objective

Contrary to the popular saying, crime does pay—especially if the recent popularity of crime depiction in the media is the yardstick by which to judge. The last decade has seen an explosion of crime-based and crime-themed discourses in popular media. \textsuperscript{151} Particularly through the continued coverage and tabloid-type packaging of popular trials and the dramatization of criminal trials, \textsuperscript{152} the criminal justice process has become a desired and highly profitable commodity. \textsuperscript{153} Media’s identification of criminal behavior and criminalization as a commodity has resonated passionately within the audience, \textsuperscript{154} creating a fertile ground for the punitive justice process to proliferate and prosper. \textsuperscript{155}

Imagine this scenario: the victims of a violent crime, their families, and the offender are engaged in a consultative process with the various restorative justice professionals. However, the downside to this scenario is that, if the stakeholders continue to engage in a restorative justice process, the scope of dramatization will evaporate. This will eviscerate the need to commoditize the crime, its victims, and the offenders. Thus, if the majority

\textsuperscript{151}. See Fox & Van Sickel, supra note 119, at 88–99.
\textsuperscript{152}. Id. at 88–90, 97–99.
\textsuperscript{153}. See id. at 91–92.
\textsuperscript{154}. See id. at 97–98, 104–07, 122.
\textsuperscript{155}. See id. at 123–24, 126–27.
of criminal cases are disposed of through mutually acceptable consultative processes, there will be no public spectacle with the alluring adversarial tension. With the attenuation in frequency, the appetite for dramatizing adversarial tension within the criminal justice process will be much reduced, leading to a significantly reduced offering of crime dramas and crime-themed shows. Adoption of restorative justice will reduce tension in the justice mechanism, which, in turn, will impact the market for the merchandizing-process uncertainties of criminal justice and the system struggles of the adversarial process. This is neither desired nor intended by the media corporations, which have created a significant market and fan following based on the current incarceration-centric criminal justice process.

Restorative justice seeks to eliminate human suffering, reducing personal distress without adopting the adversarial struggle of the traditional justice mechanism. Yet there are implementation hurdles in its adoption in the United States. The corporate media plays a significant role in placing a veritable roadblock against inculcating meaningful restorative justice.

Anecdotal evidence reveals the media’s expanding market based on human misery. Despite incidence of criminality falling precipitously during the 1990s, the same period witnessed a significant rise in crime shows and crime-themed television and cable-channel shows. As has been noted by others, the sustained drop in crime rates in the 1990s could have been the most opportune time for the system to test some fundamental changes that would lead towards inculcating the restorative justice paradigm. Yet the very same period saw increasing incarceration through legislative enactments like the “three strike law” and its other variants. Along the same time, the television viewing market had seen near saturation of crime-based media coverage. This emerging phenomenon has fundamentally altered the cognitive constructs of individuals by manufacturing an exaggerated view of the crime rate and its impact on society. While empathy and a departure from paternalism remain the two key elements for developing a restorative justice framework, a flawed cognitive construct and an exaggerated conception of crime’s impact lessens the possibility of developing empathy.

Thus, corporatized media may have engineered a social discourse by deliberately introducing both an incomplete and a distorted narrative that

156. See supra note 119 and accompanying text.
157. Id.
158. See Capital Jury Decision Making, supra note 19.
159. See Fox & Van Sickle, supra note 119, at 2, 64 tbl.2.3, 68-79.
has captivated contemporary citizens. Bolstered by a flawed narrative, they decouple themselves from the positive emotions of life. Along the process, they relinquish the positive human emotions. By focusing more on the debased fundamentals, citizens, therefore, allow their negative emotions to permeate through an ambience of accentuated fear of criminal behavior and the criminal defendant.\footnote{160 See discussion supra Section I.A.} Thus, restorative justice at the core rises and falls through due cultivation of empathy. Empathy is not only the driver but is also a predominant life force for the conceptualization and revitalization of the framework.\footnote{161 See discussion supra Section II.A.} Without empathy, paternalism cannot be stripped out of the adversarial process. Without empathy, the stakeholders cannot come to the meeting table with a transparent viewpoint. And yet the media's über focus on the adverse collateral consequences of crime\footnote{162 See discussion supra Section III.B.} continues to strip away the citizen's ability to cultivate empathy, which, in turn, presents a substantial roadblock to inculcating restorative justice in American jurisprudence.

C. Theology Based Historical Trends—Roadblock for Restorative Justice

A section of the American population believes in judicial sanction premised on the ideals of just punishment.\footnote{163 See MAXFIELD, MARTIN & KITCHENS, supra note 32, at 1 (“The Sentencing Reform Act of 1984 charged the U.S. Sentencing Commission with developing the ‘means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing . . . .’ These statutory purposes are: just punishment, deterrence, incapacitation, and rehabilitation.”); see also 28 U.S.C. § 991(b)(2) (2012).} The evolution of this belief system can be traced to the early history of the original colonies, which borrowed its penological practice from the British criminal justice system.\footnote{164 See supra note 27 and accompanying text.} The British system emphasized strict incarceration for most and the death penalty for some criminal infractions.\footnote{165 See generally HARRY POTTER, HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND FROM THE BLOODY CODE TO ABOLITION (1993); see also Steven Wilf, Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England, 5 YALE J.L. & HUMAN. 51 (1993).} These strict punitive sanctions were predicated on the premise that societal value can be enhanced by embracing the set of primary objectives: deterrence,\footnote{166 See Furman v. Georgia, 408 U.S. 238, 342–60 (1972) (Marshall, J., concurring) (discussing the primary objectives of punishment concepts of retribution and deterrence and their relationship to capital punishment). Justice Marshall systematically considered and
retribution, incapacitation, rehabilitation, and vengeance. While deterrence, retribution, incapacitation, and rehabilitation have been explicitly mentioned in literature, vengeance only exists within a social construct and has significantly shaped the prolonged incarceration model within the American justice system within this post-modern era. Nonetheless, an incarceration framework that explicitly relies on these objectives is not a sustainable model due to its inability to both fulfill incarceration’s penological objectives and impart value to society. Yet it continues to present a veritable roadblock against introducing a restoration-and healing-focused criminal justice framework.

D. Examining The Hurdle Through The Prism Of Seduction To Symmetry

My current inquiry is an attempt to understand the didactic process through which society has come to embrace traditional criminal justice process while continuing to yearn for healing. Failure of this didactic process in restoring affected individuals from the deleterious impacts of crime, in turn, can inform us of how individuals’ shallow conceptual constructs are both mediated and restricted by their propensity for social conformity. The phenomenon of becoming captive to this social conformity in contemporary society is a disturbing trend. Yet it has not found much introspection in contemporary discourse. In my view, confronting this trend is a key to understanding the hurdles that obstruct adopting empathy-driven restorative justice. However, in this context, we must understand the scope, context, and the shaping effect of the “seduction to symmetry” as a roadblock towards restorative justice.

eliminated each one of them. Id. First, he eliminated retribution by itself as a legitimate penological objective as he contended that “the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.” Id. at 343. Secondly, he rejected arguments that the death penalty is a necessary deterrent to crime in society. Id. at 354. Citing research, and supporting the idea that the death penalty is no more effective of a deterrent than life imprisonment, Justice Marshall asserted that “[i]n light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.” Id.

167. See supra note 21 and accompanying text.
168. See MAXFIELD, MARTIN & KITCHENS, supra note 32, at 1 (discussing statutory purposes of sentencing).
169. Id.
170. See supra note 21 and accompanying text.
171. Id.
172. See generally Capital Jury Decision Making, supra note 19.
173. See supra note 31 and accompanying text.
Understanding seduction to symmetry will require a discursive construction of the temporal and spatial dimensions of individual deliberations towards forming views on crime, criminality, and the impact of crime on community. This is important because such deliberations eventually facilitate and stymie the empathetic construct and emotional experience required for conceptualizing a personhood of the criminal defendant. Without conceptualizing such personhood of the criminal defendant, it is virtually impossible to respond to the call for restorative justice. Thus, the journey to explore the essential question of how one human can engage in deductively constructing the logic for restoring an individual must follow the complex process of excavating these interrelated issues in two distinct threads.

While I am hopeful for society eventually accepting the restorative ideals of justice, I am apprehensive at the initial roadblocks facing the mass adoption of such ideals. Unfortunately, the success of restorative ideals to rise above other punitive frameworks is restricted by the structural inertia of the society that is both grounded in the perspectives of cultural norms and conceptually static at the praxis of communal conformity. Yet these issues struggle within the multiple dimensions that converge at the nexus of the cultural meaning of human personhood, conformity, and experience. Delineating each of these dimensions is difficult and

174. See supra note 34 and accompanying text.
175. See supra note 29 and accompanying text.
176. Communal conformity is the desired end state of an individual within the symmetrization process. Conformity is the driving force behind seduction to symmetry that individual members of the society go through. See supra note 29 and accompanying text.
177. Death penalty jurisprudence is in tension between two expressive mechanisms. On one hand, the process instrumentality of fact-finding brings out the negative emotions of fear and outrage by attempting to dehumanize the capital defendant. On the other hand, the bifurcated trial’s mitigating phase attempts to bring out the positive emotions of empathy and compassion by attempting to humanize the defendant. Humanizing requires embracing and exploring the meaning of self for the capital defendant, which might conflict with the indigenous conception of the juror’s own self that has been shaped and mediated by cultural tendencies and patterns. Ultimately, a capital juror is saddled with the unenviable task of confronting such confusions and with the awesome responsibility of determining whether a fellow human lives or dies.
178. See supra note 31 and accompanying text.
179. Here, I generally draw attention to the life experience the capital juror brings to the jury deliberation. Despite the nuances of legal statutes and jury instructions, capital jury deliberation is highly subjective and shaped by the individual juror’s life experience, preconceived notions, and cognitive biases. Thus, the decision capital juries make on the life or death question of a defendant is the outcome of a multiple factor analysis and results from various tendencies and experiences.
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requires an epistemological framework, for which I bring in the concept of seduction to symmetry.\(^{180}\) As I have defined earlier, seduction to symmetry is social structuring in which minority viewpoints are submerged by the stronger impulse of the majority viewpoints. Here, a majoritarian bias works its way into the dialectic process such that through successive iteration, more and more of the minority or unpopular viewpoints get submerged by the stronger viewpoints until a state of unification is reached. Here, symmetry acts as a vehicle to force unification. This unification process proceeds through cohesion amongst members’ behavioral norms and compels non-conforming members towards adoption of a predictable set of societal mores with an emergence of divergence considered dissent. In a framework in which cohesion is the desired target state, any dissent threatens the originator of dissent with expulsion from the community. Thus, the seduction of symmetry can be seen as an enticement to a desired community, where acceptance within the community is predicated upon the member following accepted principles of the community.\(^{181}\) Thus, adopting restorative justice will require going against the strong force of seduction to symmetry and embrace somewhat of a counter-intuitive viewpoint. In essence, embracing restorative justice calls for breaking the symmetry within the seduction to symmetry. Within the cognitive failures and moral delimitation of the post-9/11 socio-legal landscape, breaking such symmetry is highly unlikely in the near term.

CONCLUSION

This Article is about reflection, reexamination, and reinterpretation. Reflecting on the punitive ideals over the last several decades, this Article confronts us with a darker reality of the American criminal jurisprudence. Seeing the societal value destruction through an ultra-aggressive incarceration framework, we must recognize the need for a reexamination of the current penological ideals. This prompts us to explore the various alternative justice mechanisms, including therapeutic jurisprudence and restorative justice.

Identifying the core characteristics of restorative justice, this Article places the process in a new light. Residing within its value-centric framework is the commitment to restore individuals. As this restorative ideal is further illuminated through the justice mechanism’s rights paradigm, its holistic framework opens up for a newer interpretation. The

\(^{180}\) See Capital Jury Decision Making, supra note 19, at 514–17.

\(^{181}\) Id. at 514–15.
efficacy of restorative justice is better evaluated through an equilibrium-based analysis. Recognizing crime's impact as equivalent to destabilizing the equilibrium in a system, the process instrumentalities of restorative justice are seen through its promise to bring equilibrium back to the system of stakeholders.

Noting the deeper transformative enhancement restorative justice can impart to individuals and society, this Article explores the poignant question of why such a holistic justice process has not become an integral part of the U.S. criminal justice system. A number of roadblocks, including the aggressive market-driven media's merchandizing of crime as well as the nexus between corporatized prison systems and governmental policy, have been identified as some of the root causes of such inertia. Yet at a deeper level, the failure of the U.S. criminal justice system to extricate itself from the shallow formalism is driven by a deficit in public imagination.

Finally, as the American criminal justice process continues to remain hijacked within the process instrumentalities of the adversarial system, the idea of normative consequentialism seems a fleeting reality. Despite consequentialism's higher ideals and greater promises for restoration, the public imagination towards crime's impact on communities continues to shape the American jurisprudential contour. In this journey, the law's trajectory seems hopelessly divergent from the promise of healing-centric justice as it continues to remain captive to a flawed narrative. As this narrative is shaped by the urge towards societal conformity, the crime victim's yearning towards restoration gets subsumed within much stronger impulses of conformity. Unless society breaks free from the shackles of this seduction to symmetry, restorative justice in America will continue to languish outside the penumbra of its criminal justice framework.