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Edited by G. Grandi and S. Grigoletto

L. Alici, T. Chapman, G. Grandi, S. Grigoletto, B. Pali,
F. Schweigert, E. Tiarks, S. Worboys, H. Zehr

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Philosophical Insights for a Theory of Restorative Justice

III *Why Theory Matters*

Giovanni Grandi, Simone Grigoletto

1 *Restorative Justice Beyond Crime: A Vision to Guide and Sustain our Lives*

Howard Zehr

17 *The Restorative Ideal of Justice*

Frank Schweigert

43 *Restorative Justice and the Problem of Incoherence in Sentencing*

Elizabeth Tiarks

71 *The Fragility of Forgiveness. Supererogatory Goals for a Restorative Approach to Conflict Management*

Simone Grigoletto

91 *Through a Glass Darkly. Our Imperfect Understanding of Forgiveness and Why It Matters*

Stephanie Worboys

- 113 *A Politics of Remembrance. Towards an (International Criminal) Justice of Reparation*
Luca Alici
- 133 «*Inciting to good and murmuring at evil*». *The Medieval Concept of 'synderesis' and the Restorative Process*
Giovanni Grandi
- 155 *Restorative Justice and Conviviality in Intercultural Contexts*
Brunilda Pali
- 179 *Searching for Community in Restorative Justice*
Tim Chapman

Book Reviews

- 205 M. Quante, *Studi sulla filosofia di Karl Marx*
(Giulia Battistoni)
- 212 M. Bienenstock, *Cohen und Rosenzweig. Ihre Auseinandersetzung mit dem deutschen Idealismus*
(Pierfrancesco Fiorato)
- 219 M. Biscuso, *Leopardi tra i filosofi. Spinoza, Vico, Kant, Nietzsche*
(Pierfrancesco Lorenzini)

THE RESTORATIVE IDEAL OF JUSTICE

by Francis J. Schweigert*

Abstract. *The restorative ideal of justice is presented here in relation to three other ideals of justice to clarify the central dynamics and aims of restorative justice. Two common elements are community deliberation and the engagement of victims and offenders. Complementarities in these elements of practice and variations in their level and intensity reflect different ideals of justice: retributive, reparative, restorative, and redemptive. Further examination of these ideals indicates that each contributes essential elements of justice to the practice and pursuit of the restorative ideal. The reassertion of moral righteousness at the heart of retributive justice is incorporated in the restorative ideal by the victim and offender's shared recognition of the norms violated and the reaffirmation of those norms – and, in some cases, the enrichment and expansion of these norms. The reincorporation of offenders and victims that is central to redemptive justice is achieved in restorative justice by the community's reception of the agency of offenders and victims in remedying the harms done and affirmation of their role as builders of community and morals. The deliberative determination of equity in reparative justice is present in the processes of restorative justice through which victims, offenders, supporters, and community members face the facts of harms done, the cost to persons and community, and the labor required to build a more just and thriving community. This essay concludes that in restorative justice the deliberative processes revolve around the victim and offender in their shared willingness to turn this occasion of offense into a project of improvement personally and communally. This is the truly revolutionary heart of restorative justice, that victims and offenders become agents of societal betterment and that crime becomes an opportunity for building community and strengthening moral and social norms.*

Keywords. *Restorative Justice; Reparative Justice; Retributive Justice; Redemptive Justice; Moral Righteousness; Deliberation*

1. Introduction

The restorative ideal of justice offers a goal and pathway for societal response to offenses by members. To better grasp the

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meaning of this ideal, I present it here in relation to three other ideals for the practice and pursuit of justice in response to offenses: the retributive ideal, the reparative ideal, and the redemptive ideal. All four ideals lie within Aristotle's general category of rectificatory justice, yet each offers a different aim and sets out a different pathway to achieve that aim¹.

This investigation will focus on the philosophical requirements and general elements of each of these ideals, to clarify concepts and relations. References to secondary literature and recent research will be limited, with attention given instead to long-standing and fundamental work on morality and ethics. Although I will attempt throughout this essay to address matters of justice with universal relevance, I will refrain for the most part from citing specific cases or surveying cross-cultural studies. Previous studies convince me that widely varying cultural and historical roots converge in common moral and philosophical foundations of restorative justice and justice generally², and I will work here from those foundations. The four ideals of justice presented here are in practice and amenable to empirical and historical studies. Hopefully, a heuristic examination such as I present here will clarify key concepts and the distinctions among these ideals and thus contribute to continuing study and practical experiments in justice.

An *ideal*, in the sense used in this essay, is a guiding idea: an idea powerful enough to name a goal and provide a pathway to achieving that goal. An ideal names a reality that is achievable and judged to be worth achieving. The ideals of justice addressed here are therefore practical ideals, in a dual sense: They arise from practice and can be understood as generalizations of the experienced efforts and aims of communities attempting to address wrong-doing in a way that advances overall justice for the community, and they are meant to guide and extend the practice of justice for future benefit.

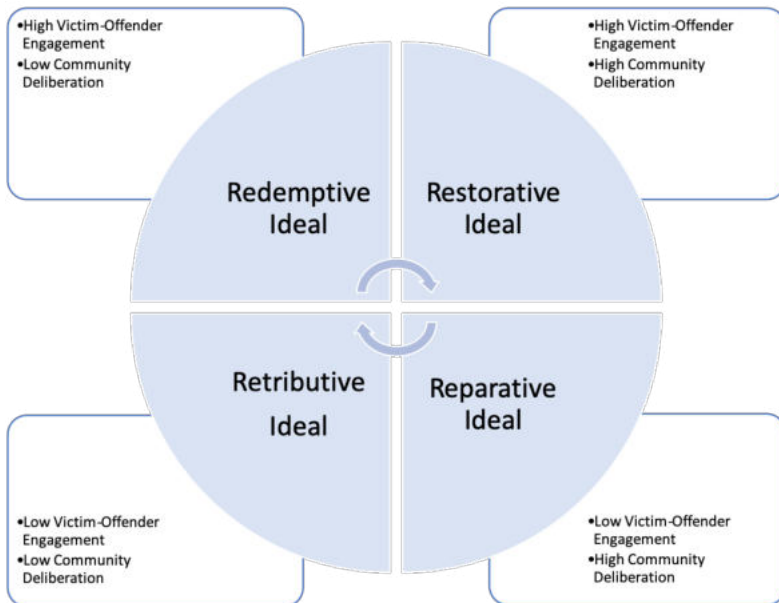
¹ Aristotle, *Nicomachean Ethics*, Book V, 1131-1132.

² F.J. Schweigert, *Moral and Philosophical Foundations of Restorative Justice*, in J. Perry (ed.), *Repairing Communities through Restorative Justice*, Lanham (MD), American Correctional Association, 2002, pp. 19-37.

2. Basic Terms and Framework

The retributive, reparative, restorative, and redemptive ideals of justice differ in many ways, yet all involve in some way two component powers: the ability of victims and offenders to recognize, address, and resolve the injustice or offense that has brought them together and the ability of communities to reason together about what matters to them as a community and to design means to achieve those ends. The first component can be called victim-offender engagement; the second can be called community deliberation. Both of these powers depend upon structures and procedures designed to invoke them and to create the social space and means for their exercise. Although social structures, social practices, and individual abilities vary from place to place and time to time and take many forms, these two powers appear to be characteristic of humans and human communities in general and not limited to specific cultures.

Figure 1. The Component Powers of Justice



The operation of these component powers helps clarify the distinctive nature of the restorative, reparative, redemptive, and retributive ideals of justice. As the following diagram illustrates, the each ideal is made possible by social structures and processes that enable victim-offender engagement and community deliberation in varying ways and intensities.

Each of these two component powers employs a basic element of justice: victim-offender engagement employing justice as moral conviction, and community deliberation expressing justice as justification.

Victim-offender engagement is an expression of the moral capacity of a community or society to inculcate its values and mores in the consciences of members so that each member can be – indeed, is expected to be – the author of his or her own moral choices. In this way, every society ensures itself of replication through the thousands of moral decisions made every day by its members facing unique circumstances that demand creative responses. Morality is in one dimension pre-reflective, since it is rooted in the individual prior to rational examination or explanation, and in this dimension it carries with it an authority that seems to each person both self-evident and beyond question. At the same time, morals have a dimension of social accountability that requires each individual, once she or he has reached the age of reason, to be able to perceive the good that is at stake, judge what should be done, prioritize and act for the good, and explain the decisions made³. The clear expectation is that each person can provide reasons to connect decisions and actions to the solidly rooted values and norms of the society, so that his or her actions can be seen as *moral* – that is, morally conforming to shared values. Thus, morality has the character of being both creative and conservative, individually rooted and socially accountable, grounded in the capacity of each mature member of a society to embody and enact a set of firm values and norms and at the same

³ This description of moral responsibility follows the four component theory of James Rest. See J.R. Rest, *Background: Theory and Research*, in J.R. Rest, D. Narvaez (eds.), *Moral Development in the Professions: Psychology and Applied Ethics*, Hillsdale, Lawrence Erlbaum Associates, pp. 1-26.

time grounded in the capacity of society to instill and demand accountability and responsibility in carrying these values and norms into the work, home-making, leisure, and governance of the society.

Understood in this light, victim-offender engagement draws upon the capacity within both victims and offenders to find within themselves values of respect for persons and property, fellowship, empathy, care for others, and other moral convictions – and at the same time, to find within themselves a way to enact these values and contribute to a sense of responsibility for the moral quality of society, a society that is worth living in, that is, a society that replicates the moral society into which one has been born and in which one has been reared.

Community deliberation, on the other hand, is an expression of the human capacity for practical reason⁴. This is at the individual level the capacity to plan one's own life in a rational way: assessing one's options, setting goals, choosing means to achieve those goals, evaluating one's progress, re-assessing options, and revising goals and means. Because humans are social animals, this individual capacity for practical reason involves others, not only in the making and execution of plans but in determining the worth of plans (and the worthiness of means). Even more, this capacity can be exercised communally to develop communal plans and guide shared action. Indeed, every society has some sort of mechanism for this communal deliberation, allowing members of the community to reason together for the good of the whole.

Each of these capacities has within it an implicit notion of justice: on one hand, a notion of justice as moral conviction; on the other hand, a notion of justice as deliberative justification. To some extent, we might suppose that each person has internalized both notions of justice and is able to draw upon both notions as the situation requires, but we must also recognize that individual abilities vary and social situations are not always conducive to the

⁴ For a succinct presentation of practical reason, see J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993.

exercise of respect and practical reason. The innate capacity for justice is not automatically activated and effective; each person must learn the good by seeing it done and by doing it⁵. Nevertheless, respect for human dignity requires the anticipation of these capacities in each person as sufficient to pursue justice, even if these capacities are not fully developed and not always engaged. Justice will often be incomplete.

The capacity for moral conviction enables individuals to perceive violations of justice and feel compelled to bring justice to bear on the circumstances and perpetrators of injustice. Individuals do not need to consult with the community to arrive at a perception of injustice – they know injustice when they see it – and this perception brings with it an impulse or imperative to correct injustice. All this is experienced as moral conviction, prior to rational deliberation. Explaining their convictions is a latter step.

Justice as communal deliberation begins where moral conviction leaves off. Moral conviction puts the matter on the table but is not sufficient to determine what is just or unjust or how the injustice can be remedied. More than individual declaration or explanation is required. Rather, the community must subject its members' moral convictions to ethical reflection, to determine what sort of violation has occurred, if any, and what line of corrective action may be justified⁶. It is only at the point of justification that justice is owned by the community and thus becomes a basis for collective corrective action.

⁵ F.J. Schweigert, *Learning the Common Good: Principles of Community-Based Moral Education in Restorative Justice*, «Journal of Moral Education», XXVIII (2), 1999, pp. 163-183.

⁶ This discussion rests on the distinction between morals and ethics in H.N. Lee, *Morals, Morality, and Ethics: Suggested Terminology*, «International Journal of Ethics», XXXVIII (4), 1928, pp. 450-456.

3. *The Ideal of Retributive Justice: Moral Righteousness*

The retributive ideal most clearly expresses the moral convictions of a settled community and its inherited sense of righteousness. Rooted in pre-reflective norms and values, these moral convictions evoke a sense of the world as it should be and a sense of the community and its members when they are right with the world. Wrong-doing violates this world-right order. In this sense, the offender – in harming another person in body, spirit, or property – has violated an objective order as much as another person. Retribution is the action taken to set the world right.

The most ancient and clear form of retribution is vengeance, the moral demand to avenge the wrong suffered. Vengeance can vary from the impulse of revenge to the codifications of vendetta in which an offense against an individual is treated as a violation of family (clan, tribe, community) honor and integrity – a violation which lays upon the victimized community a moral obligation to restore righteousness that can extend across generations⁷. As soon as the violation becomes known, the demand for retribution arises: It is a matter of clear-sighted moral conviction without the need for dialogue between the victim and offender or the need to deliberate as a community. Indeed, the paramount model of the retributive ideal is the heroic individual who sees the violation in all its egregiousness, rises up to embody the community's righteous rage and revenge, and puts things right. The avenger is the moral exemplar of the community, demonstrating how important it is to uphold righteousness.

The avenger is the defender of personal, family, or communal honor and at the same time the redeemer of the injured person, freeing the victim from the degrading status that the offense has imposed. To be harmed by another without cause and with harmful intent violates the victim's integrity and dimin-

⁷ Among many sources, see P.A. French, *The Virtues of Vengeance*, Lawrence (KS), University Press of Kansas, 2001, and J. Diamond, *Vengeance Is Ours*, «The New Yorker», XXI, 2008, pp. 74-87.

ishes his or her dignity. To suffer an assault, burglary, or swindle evokes a sense of shame as well as the bodily injury or loss of goods. The victim feels reduced as though treated like dirt or like an animal. Retribution reclaims dignity for the victim by punishing the offender. The avenger upholds the cause of the injured person, a vindication that may not seem reasonable and yet is deeply felt.

Where the duty of punishment rests on the community rather than the family, this responsibility is often associated with or constitutive of established authorities in religious or secular leadership, either individuals holding office or groups such as a circle of elders. The presumption is that these persons, individually or collectively, know the demands of morality and can pronounce on guilt and penalties. At times, however, these established authorities are seen to fail in this duty and a moral exemplar arises from outside the authority structure to call the community to fidelity and to call the offender to account. The moral righteousness at the center of the retributive ideal is always in need of reassertion.

At the same time, the claim of moral righteousness is always in danger of being subverted by other interests or in the service of other ambitions. One of the perennial tasks of moral learning is the willingness to listen and be led to righteousness with a loyalty to received tradition that is not a blind obedience. The natural genius of morality as a function of communal living is that the values and norms of the community become embodied by individuals and enacted in light of their personal perceptions and decisions. This allows for and enables the highly nuanced exercise of morals to fit the endless variety of social circumstances. In this sense, morals cannot ever be simply a matter of applying a rule; morality must always be enacted to fit the situation, re-creating norms in a way that conforms to righteousness and extends and adapts righteousness to the new situation⁸. There are no guaran-

⁸ The role of interpretation in moral behavior is carefully explicated in H-G. Gadamer, *Truth and Method*, 2nd rev. ed., trans. by J. Weinsheimer, D.G. Marshall, New York, Crossroad Publishing Company, 1991. Original published 1960.

tees in pursuing this learning and maturation; everything must be tested but without losing connection to the moral core of the community.

The development of law results from the gradual conversion of moral ownership by religious or local leaders to ownership under legal authority – a system of laws and the positions established to create and uphold the law⁹. The king's law replaced the communal traditions of tribes and feudal rule of local lords, and the king's law was in turn replaced by a rational basis of law derived from the will of the people. Along with this shift to the rule of law came the use of the jury system to safeguard against misuse of law's moral authority either due to error or to manipulation for other ends. This insertion of community deliberation into the system of retributive justice brought the risk that righteousness would be delayed or derailed, that the jury would be swayed by eloquence or sympathy and not rule righteously. Yet, for the most part, the risk of a wrongful punishment was enough to keep some deliberative system in place and the judge was still positioned to speak impartially on behalf of the law and to impose a sentence accordingly.

The retributive ideal fits well with a regime of state-sponsored justice in which crimes are treated as offenses against the state. The moral offense against the community's sense of righteousness parallels the legal offense against the laws of the state, so that the state's prosecution vindicates the victim's status and respect for the law at the same time. Apart from contributing evidence for the trial or sentencing (as in a victim impact statement), there is little need for victim and offender engagement. These parties at the center of the offense have a passive role in deliberations to establish guilt and determine punishment. The deliberations take place on behalf of the state and its laws.

⁹ On the invention of law, see S.J. Shapiro, *Legality*, Cambridge (MA), Harvard University Press, 2011.

4. *The Ideal of Redemptive Justice: Saving the Person*

If it can be said that retribution aims to return the world to rightness by degrading the offender, then it can be said that redemption aims to go beyond the return to rightness by redeeming the offender from degradation. Redemption therefore complements the moral dynamic in the retributive ideal of justice; the upholding of righteousness by punishing the offender is completed by returning the offender to community and to the community's righteousness.

The ideal of redemption thus addresses a fundamental flaw in the exercise of retribution: the pain it leaves upon the person of the one who is punished deprives the community of this person's abilities and generates the liability to descend into a spiral of violence. As much as the moral avenger feels the satisfaction of restoring honor to the victim by degrading the offender, the offender can feel the shame of being degraded – and seek to even the score¹⁰. Worse yet, the shame of exclusion can be felt so severely that the offender loses regard for life – his or her own and that of family and community as well. Self-destructive rages or impulses can result in suicide or suicide-homicide, chemical addictions, sprees of crime, or other avenues expressing the offender's recognition of having no value in the eyes of the upright and therefore no reason to conform to its standards. Even if admitting guilt, the offender may feel that the punishment was out of proportion to the offense or that the avenger took vengeance too far in a proud, vicious, destructive, or even gleeful punishment. The offender can be left seething with a desire to set things right by punishing the punisher.

¹⁰ There is a large literature on the dynamics of shame, honor, and vengeance. For a recent overview, see J. Jacquet, *Is Shame Necessary? New Uses for an Old Tool*, New York, Pantheon Books, 2015. For a detailed study, see D.L. Nathanson, *Shame and Pride: Affect, Sex, and the Birth of the Self*, New York, W.W. Norton & Company, 1992. For a cross-cultural study, see R. Naroll, *The Moral Order: An Introduction to the Human Situation*, Beverly Hills (CA), Sage Publications, 1983.

In this light, the redemptive ideal can be seen for what it is: not an unctuous sympathy for the down-trodden but a realistic recognition that the work of justice cannot be finished with righteous reassertion and punitive degradation. Degradation without a pathway back to membership is banishment, exile, and ultimately death. Such punishments have to be the exception or the society would fail to thrive or even survive. Offenses are part of human affairs and far too common to result in banishment on a regular basis; the community can survive only by norms of reintegration¹¹.

It must also be recognized that offenses degrade the victim, who also needs a pathway back to full membership. The victim's degradation can take various forms – bodily injury, loss of property, loss of honor, exposure of weakness – and in many cases the losses incurred cannot be repaired or undone. The victim must live on, having been thrust into a new and unwelcome reality. One can think of many painful examples: the family members of a victim of a capital crime, a survivor of rape or assault, the partner betrayed by embezzlement or fraud. In addition to the losses incurred is the sometimes crippling resentment, the handicapping inability to ever trust others again, the disabling fear of another assault.

In the aftermath of offenses, both the offender and victim need redemption.

When punishment is rendered on behalf of the law or the community to restore right order, the role of the victim is ambiguous. The victim may or may not seek or receive personal compensation or satisfaction directly. Yet the victim and the community are the beneficiaries of punishment in the sense of being restored in honor and stability. In the redemptive ideal, this wholeness or satisfaction of the victim (or the victimized community) is extended to the offender, to bring the one who has been punished back into good standing. The pain of punishment and the shame of exclusion that have degraded the offender are

¹¹ The seminal work is J. Braithwaite, *Crime, Shame, and Reintegration*, London, Cambridge University Press, 1989.

removed by personal reincorporation of the offender into the community and the community's righteousness.

At its most personal level, the victim and offender together take ownership of the communal dimension of the violation and therefore of the redemption. The victim who has suffered the injury embodies the violation in a very personal way as an individual but also as a representative of the community, being the person most qualified to know the extent of the injury and its cost in terms of future membership in community. Similarly, the victim is in a position to take personal ownership of the offender's degradation as a remedy to the victim's own degradation and therefore is able, on behalf of both, to claim redemption. Ultimately the victim must come to see that his or her own redemption and reintegration are linked to the reintegration and redemption of the offender as together they stand in testimony to the fact that justice has been done and good order is restored.

Redemptive justice therefore revolves around the moral righteousness of the community. It is enacted through keen moral insight and personal recognition of the realities of pain, loss, exclusion, and inclusion. Although this process could be aided by deliberation, it is not fundamentally a deliberative process. How deliberation might contribute to saving the person will be addressed below under the ideal of restoration.

5. The Ideal of Reparative Justice: Justice as Equity

Reparative justice complements the retributive ideal not by a focus on the offender but by a focus on the offense and the harm it has done. Where retribution upholds righteousness by degrading the offender, reparation upholds righteousness by requiring the offender to repair the damage done. Offenders thus become agents of righteousness acting on behalf of the victim and the community they have harmed.

Community deliberation is essential to assess the harm done and to determine how it can be repaired. To grasp the power of the reparative ideal – and later in this essay the restorative ideal – it is essential to appreciate the human capacity for deliberation.

Community deliberation is an inherently human activity, an expression of our social nature – even in times of great stress. Hannah Arendt noted how, during the Hungarian uprising against Soviet domination in the 1950s, the people spontaneously formed councils in the factories, armed forces, communities, and elsewhere – in which people deliberated together on economic and political concerns and worked out local solutions¹². Leslie Anderson and Lawrence Dodd observed the same dynamic in local councils in post-revolutionary Nicaragua¹³. Nevertheless, the fact of deliberation as a universal and familiar human capacity does not mean its role in human thriving or survival is clear.

It might be assumed that deliberation contributes most directly to the unity or agreement that undergirds human cooperation, but this is not the case. As the eminent sociologist Robert Park noted, talk leads just as often to war as it does to peace; «discussions», he wrote, «rarely ever make peace»¹⁴. Unity and agreement are secondary – and uncertain – outcomes of deliberation. Indeed, discussions at all levels of social organization, from married couples to nations, often serve to make clear the differences that divide people as much as serving to find common ground. Skillful facilitators of processes such as strategic planning or restorative or reparative justice conferences keenly feel the expectation that they bring group deliberations to agreement. This expectation reveals the weakness of these types of deliberation and obscures the true value of deliberation in human affairs. The agreements reached are sometimes forced and hence contrived. In planning, the most common distortion of the community's work is the attempt to include all perspectives in the list of so-called strategies or in the objectives listed under each strategy. The outcome of the process is a range of possibly good

¹² J. Thomason, *Miracle Workers: What the Resistance Can Still Learn from Arendt*, «Commonweal», CXLVI (11), 2019, p. 18.

¹³ L.E. Anderson, L.C. Dodd, *Learning Democracy: Citizen Engagement and Electoral Choice in Nicaragua, 1990-2001*, Chicago, University of Chicago Press, 2005.

¹⁴ R. Park, *Morale and the News. On Social Control and Collective Behavior*, Chicago, University of Chicago Press, 1967, pp. 249-267, p. 254. Original published 1941.

directions for work, which is merely a reiteration of the difficulty with which the process began. Of course, this lack of progress is often welcomed by the established leadership because it leaves them in position to do what they think is best, as they are now empowered to act on behalf of the group and claim to be carrying out the strategies derived from the group process. The members of the group, tired by the process, are relieved to get back to work even as they are jaded by the process. Those who see that their voices were marginalized rightly recognize the reinforcement of their disadvantage in the work going forward.

Deliberation does not necessarily reveal common ground. The information and perspectives shared by the participants may reveal deep-seated and strongly held differences that cannot be reconciled. Indeed, the value of deliberation may lie exactly in revealing these differences and thus providing essential understanding for moving forward as a community. Less obviously but very importantly, deliberation assumes the dignity and place of each member of the consultation, so that unity is found in common membership even when it is not found in agreement on perspectives, information, or actions to be taken. Despite disagreements, the sharing by participants may reveal agreement on fundamental values or find agreement around new information that is shared.

The true value of deliberation in human affairs is information and awareness. This was best pointed out to me by a member of the Lakota nation in South Dakota in response to my observation that one of the problems with the circle process is the difficulty in persuading people to come to agreement. He responded that his community would never go into a circle to persuade another person of anything. That would be an affront to the dignity and self-determination that belongs to each person. The community goes into a circle so that each member can bring to the circle his or her knowledge and perspective, share it with the community, and thereby give each person in the circle a larger or clearer view of the matter at hand. After listening in the circle, each person can leave the circle and do what he or she believes is best¹⁵.

¹⁵ H. Valandra, personal communication, ca. 2004.

The significance of an eagle feather as the talking piece for Dakota peace-making circles in Minnesota was explained with a similar reference. The eagle flies high above the earth and has a broad view of the whole area and, at the same time, the eagle's keen eyesight enables it to focus on key details of movement or images that can be picked out from the broad sweep in view – details that would be missed if one was standing on the ground and seeing only what was immediately in one's surroundings. Similarly, the peace-making circle provides participants with a broad view of the context of the offense or issue of concern – past and present, local and societal, familial and jurisdictional – as well as a view of essential details that are known only by persons in positions to know these things. The time taken to listen as the feather goes around is essential to providing this broad and detailed view of events and circumstances.

Deliberation is not necessarily a democratic process. The participants are not necessarily in a decision-making role for the community. The purpose of deliberation may be served when the leader of the community has heard all that the participants have to contribute, and equipped with this knowledge and perspective, the leader can act to more surely achieve the good of the community. However, there certainly can be times when the circle is explicitly convened to make a decision as a group. In such cases, the usual range of decision-making processes comes into play as the situation demands. If time is available and the cohesion of the group is more important than quick action, more time can be taken in trying to reach consensus. If the need for action is urgent, the options can be clarified and put to a vote or the decision can be delegated to a smaller group or a single individual. Recognizing clear priorities on the continuum from urgent and immediate action to group harmony and cohesion allows deliberation to proceed according to its purpose without violating rights of participation or the value of membership.

With these considerations regarding deliberation in mind, it can be instructive to view the challenges and the possibilities in the reparative ideal in a situation of widespread historical injustice

such as slavery in the United States¹⁶. Without question the harm done has been extensive, from the first landing of enslaved Africans at Jamestown in 1619 through almost 250 years of legal slavery, followed by 100 years of legalized segregation and discrimination. Deliberation necessarily encounters great challenges in assessing harms and in determining repairs in this case, as well as challenges in identifying the offender who must make the repairs.

Before we can address the reparative challenge, however, we have to reckon as a society with the failure of the retributive ideal. Although President Abraham Lincoln supposed that the Civil War might be a vast communal degradation required as retribution for the vast communal offense of slavery¹⁷, this understanding was not universal, and with the collapse of Reconstruction following the war, many of the inequalities of slavery were reasserted and legalized in Jim Crow laws. Despite the terrible suffering of the war and the moral vision of President Lincoln and others like him, the moral lesson of retribution was unclear.

The failure of the retributive ideal was closely followed by the failure of the redemptive ideal. In a fundamental miscarriage of redemptive justice, the victorious Northern states failed to fully reintegrate the victims of slavery in the South or to consistently integrate Black residents in the North. There were many reasons for this, ranging from racial prejudice to economic ambition to a lack of political courage and foresight on the part of the victors and the defeated. The result was a partial and disputed redemption that left animosity and shame in place throughout the nation, allowing those who wished to reassert righteousness based on a belief in white superiority able to do so.

¹⁶ The historical sketch that follows is informed by J. Lepore, *These Truths: A History of the United States*, New York, W.W. Norton & Company, 2018.

¹⁷ «[God] gives to both North and South this terrible war as the woe due to those by whom the offense came» (A. Lincoln, *Second Inaugural Address*, Mar. 4, 1865: retrieved Nov. 27, 2019 from the National Park Service, Lincoln Memorial, at <https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm>).

Even this far-too-brief review of the crime of slavery is enough to see that the failures of retributive and redemptive justice have left us with a very uncertain foundation for reparation. This difficulty is compounded by the fact that living with these injustices and incorporating them into basic law – the U. S. Constitution – and into economic and social structures has diffused the offense across the entire country and infused it in all its inhabitants. It seems that the only possible approach will be to place the nation as a whole in the roles of offender and victim. Yet, despite this confusion of offenders and pervasiveness of harms, the reparative ideal may provide a guide to seeking justice. There is a great need to investigate and name the harms done and the offending beneficiaries, work that can proceed without demanding agreement, confession, forgiveness, or even a clear path forward. As parts of the historical record and harms done become clear, deliberations can move toward identifying remedies. There is no inherent need to finish the work in one grand solution, although there would no doubt be some who would express that kind of urgency and push for a solution to close off all possible future appeals, expansions, or reversals. In this case, it seems more realistic to proceed in terms of information gathering and agreement on evidence, moving forward incrementally as clarity is achieved – and thus keeping in view the reparative ideal of justice.

This discussion clarifies an aspect of reparative justice, that moral righteousness is not the primary driver of the reparative ideal. Reparative justice does not appeal to a given moral core but rather grounds itself in communal, deliberative justification. Justice is accepted as that which can be justified under the scrutiny and elaboration of the deliberative body – that is, under the standards of public reason. It is a constructivist conception of justice¹⁸. Its final appeal is therefore not to an unchanging moral righteousness but to a provisional and revisable outcome. It is

¹⁸ For a thorough discussion of practical reason, deliberation, and justification in a constructivist theory of justice, see R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans. by J. Flynn, New York, Columbia University Press, 2007.

justice as justification. As reasonable as this might seem to a rationalist democratic citizen, it is not so easily compatible with a conviction that offenses must be resolved in accord with a received or divine moral tradition. Yet the advantages of justification are clear in a society where different received moral traditions are extant and the demands of morality are debatable even within particular moral traditions. Fundamentally, even within these traditions, something like the logic of justice as justification must be operative to garner communal support for the dominant moral persuasion or decision governing particular instances. In reference to the determination of reparations for slavery, it could be a clear advantage to claim nothing more than a reasonable compensation and leave the question of ultimate moral righteousness unsettled.

It is also clear that victim and offender engagement is not essential to the exercise of reparative justice. Because the determination of equity turns on matters of objective evidence available to all and on deliberative processes conducted at the level best matched to the offense, the victims and offenders may or may not be directly involved. In any case, their agreement or agency is not determinative of a just outcome. Again, in reference to the long-standing offense of slavery, it could be a clear advantage that engagement of victims and offenders is unnecessary. It would immediately obviate the need to limit the identity of victims to current populations of African Americans or limit the identity of offenders to descendants of Southern whites – or white Americans in general. The focus instead would be on the offense and its objective ramifications over the 400 years of slavery and legal or *de facto* white supremacy. It would allow for investigators to name harms that were and were not delimited by race, and it would allow decision-makers to consider compensations or remedies with broader public benefit. As indicated in the previous paragraph, such expressions of justice will be unsatisfactory to those who consider moral righteousness essential to a just outcome. But it seems on the matter of reparations for slavery that moral righteousness is out of reach and other pathways to justice are needed. Reparative justice is a viable pathway.

6. *The Ideal of Restorative Justice*

The preceding paragraph points toward the essential distinction between reparative and restorative justice, in that the restorative ideal places the agency of victims and offenders at the center of the work of justice. In restorative justice, the deliberative processes described above revolve around the victim and offender in their shared awareness of the offense and the harm done, their shared appreciation for the fracture of relations and loss of community and interpersonal trust, and their shared willingness to turn this occasion of offense into a project of improvement personally and communally. This is the truly revolutionary heart of restorative justice, that victims and offenders become architects and agents of societal betterment and that crime becomes an opportunity for building community and strengthening moral and social norms.

It thus becomes evident that the restorative ideal captures a core element of each of the previously reviewed ideals of justice. The reassertion of moral righteousness at the heart of retributive justice is incorporated in the restorative ideal by the victim and offender's shared recognition of the norms violated and the reaffirmation of those norms – and, in some cases, the enrichment and expansion of these norms. The reincorporation of offenders and victims that is central to redemptive justice is achieved in restorative justice by the community's reception of the agency of offenders and victims in remedying the harms done and their role as builders of community and morals. The deliberative determination of equity in reparative justice is present in the processes of restorative justice where victims, offenders, supporters, and community members face the facts of harms done, the cost to persons and community, and the labor required to build a more just and thriving community.

The richness of the sense of justice achieved is obviously a great strength of the restorative ideal, but it also points to the difficulty involved in achieving it by opening up multiple opportunities or intersections for failure. An examination of these

liabilities can present pathways to clarify the aims and principles of restorative justice and strengthen restorative processes.

6.1 Affirming Righteousness

The great attraction of moral righteousness – and thus the desirability of retribution – is that it appeals to a standard to which all are equally accountable; it is above questioning and taken as given, if not God-given. Yet, experience shows that this givenness is not uniformly received and is capable of distortion. A common distortion of moral righteousness occurs as self-righteousness, in which an individual claims to represent or embody the righteousness of the community or tradition or divinity. Equipped with self-righteousness, this individual can justify a personal interpretation of morals, offenses, and punishments ostensibly on behalf of the community but also as a reinforcement of individual authority and righteousness. In doing so, this individual highlights the contrast between his or her own moral excellence and the moral depravity of the offender, thus putting any recovery for the offender out of reach. Even if this is done in the name of the community, the ambition of self-regard puts morals at the service of self-promotion. The deliberative setting of restorative justice and its appreciation of the agency of the offender directly challenge or at least question this temptation to self-righteousness; holding oneself up as a model of moral excellence is difficult under full view of the community in a deliberative setting. Literature provides eloquent examples of the corrective power of public scrutiny in exposing and disarming self-righteousness, perhaps the most well-known being the simple statement, «He that is without sin among you, let him first cast a stone at her»¹⁹.

A second difficulty with the givenness of moral righteousness is the necessity that morals must always be a matter or act of interpretation. The great strength of morality as a mechanism of human social functioning is that each individual is equipped by personal conscience to see the morality required in the myriad

¹⁹ *John*, 8:7, King James Version.

situations that present themselves, interpreting moral demands with endless flexibility and yet retaining moral integrity. Indeed, it is a requirement of morals that they can be justified, that reasons can be given, that the moral actor-interpreter can explain how his or her action remains true to the morality of the community or tradition. Restorative justice engages this capacity for moral interpretation by placing the victim and offender at the center of the determination of justice. By the fact of their respective involvement in the offense, these two have a crucial perspective on the nature of the violation – the victim because of having suffered the harm and therefore knowing it intimately and personally, and the offender by having committed the offense and being in a unique position to own it. Informed by the deliberations of the community in a circle or conference or mediation, the victim and offender at the heart of the matter provide a powerful interpretation of the morals at stake. The surrounding community may immediately recognize the righteousness of their interpretation and welcome it with affirmation, or the community may greet the interpretation with skepticism or objections. Either way, the victim and offender cannot simply be replaced since they have been selected by the offense itself to be in the positions they occupy; their interpretation carries a weight that no other participants in the process can bring to it.

6.2 Saving the Person

In order for the moral authority of victims and offenders to be heard and effective, some means is needed to place this moral authority in view of the community and give it a voice in addressing the offense and the accompanying degradation of the victim and offender. Restorative justice provides for this through processes of deliberation that give a central role to the agency of victims and offenders.

It is important to point out that participation in victim-offender conferencing or circles does not necessarily or dependably bring about reconciliation. Restorative justice bears on the restoration and betterment of the community, including the

victim and offender, but their personal reconciliation is not essential to this ideal of justice. Each can play his or her role even if forgiveness is neither sought nor granted. Even so, restorative processes provide a setting conducive to reconciliation. Victims and offenders are able to be present in a way that allows them to be known by each other and by key members of their community. This knowledge without pretense or blinders enables them to break through barriers of self-righteous anger and pain, and the support of the community enables them to accept one another and themselves as they are and as they have been changed by the offense – accepting this not as the final outcome or result of the offense but as the starting point for building something better, something they themselves can play a key role in building.

Redemption within restorative processes, then, arises in the shared role of community betterment. This is a step apart from the ideal of redemptive justice but it does not leave the redemption of persons out. They are reintegrated in their agency as builders of community. Neither the shame of victimization nor the shame of offending is allowed to have lasting claim to these persons. They are restored as members of the community with effective roles to play in rebuilding and extending the good that has been endangered.

6.3 Restoring Equity

Any offense against a person is a violation of equity, since the offender forcibly dominates the victim and seizes something from the victim without merit or just cause, be it good health and bodily integrity, property, or peace of mind and social respect. As discussed above, it is the ideal of reparative justice to identify the harms done and seek out the means to repairing what has been damaged or lost. The tremendous challenge, however, is the fact that the clock cannot be turned back and there is no way to truly or exactly repair or replace what has been broken or destroyed. Rather, the reparative task is to find equitable means for offenders to address the harms done in a way that can at least return to the victim a meaningful measure of the good that was lost and – as best as possible – set the victim once again on a viable life

path. These means are worked out in a deliberative process overseen by the community so that the facts of the matter are definitive.

What restorative practices add to this deliberation and repair is the agency of the victim and offender. By freely placing themselves in the center of the process, they can assure the community that the harms done and the repairs identified are in fact meaningful to them. Indeed, by undertaking this constructive public role they already begin restoring the equity that has been damaged or lost.

7. Conclusion: Advancing the Work of Justice

Aristotle devoted all of Chapter 10 of the *Nicomachean Ethics* to a discussion of justice and its various kinds, providing a series of distinctions regarding different aims and understandings of this important element of human life and morals. The presentation here on the retributive, redemptive, reparative, and restorative ideals of justice is an extension of that earlier discussion. Both discussions have the same practical aim: to further in some way the work of justice.

Primate studies have shown that humans are not alone in having a keen sense of injustice; chimpanzees have been observed to react abruptly and angrily when food is distributed unfairly²⁰. In one experiment, two groups were happy to receive their equal food distributions, but when one group received more, the other group angrily refused to eat the share that had previously been satisfactory. This apparently universal awareness of unfairness is felt immediately and acutely and is the fundamental impulse that drives the pursuit of justice. To undertake that pursuit, however, the simplicity of the initial impulse must be translated into the

²⁰ For a detailed study of reciprocal exchange expectations among primates as a foundation for justice, see F. de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals*, Cambridge (MA), Harvard University Press, 1996.

complex elements of justice that have been employed in responding to and correcting offenses in human societies from our earliest awareness: moral righteousness, equity, victim and offender engagement and redemption, communal deliberation, and restoration. These elements of justice are distinct yet complementary. It is hoped that by the clarification of terms and their relations in practice, justice can be advanced.

All the social elements of justice are available when offenses occur and the community attempts to address the offenses. Practitioners of justice can recognize and express in some way each of the four ideals of justice. Indeed, it is important that we do so, that we recognize and express, in some way, the moral righteousness of the community; that we search out some determination of equity between offenses and accountabilities; that we recognize the degradation of offenders and victims when offenses are committed and somehow restore good social standing and the integrity of communal honor; that we employ deliberation in some procedure to seek out information and weigh blame, pain, and consequences. Despite their differences, these four ideals of justice work with the same elements and can contribute together to the wholeness of justice in our communities.

The interdependence of these elements of justice can allow practitioners to adjust to the circumstances and possibilities in each case. In the practice of restorative justice, for example, circle keepers or conference conveners may become aware that certain elements of justice need greater attention or clarification. Perhaps the degradation of victims or offenders has been severe and greater attention must be given to redeeming their sense of human dignity and community membership. Perhaps there is disagreement on the morals at stake or their relative importance; maybe this disagreement can be resolved through clarification, but maybe clarifications will reveal fundamental moral disagreements that must be recognized. Perhaps the search into facts underlying the offense will uncover long-standing inequities that must at least be recognized, if not addressed and corrected in this case. It should be helpful for practitioners of restorative justice to recognize that the ideal according to which they are proceeding differs in important ways from the ideals of retribution, redemp-

tion, and reparation yet shares in their basic aims. At the same time, we should keep in mind the uniquely powerful aims of the restorative ideal of justice in order to realize its benefits most effectively to the betterment of the societies and communities in which we live.

The work of justice proceeds case by case. Despite this particularity in history and circumstances, however, some general requirements of justice seem to be universally recognized: that basic human needs must be met, that equitable distribution of goods must be proportional to both need and merit, that human dignity requires fair and equal participation in society and its opportunities, that the duties and privileges of office are a public trust provisional upon performance, and that offenses must be addressed and corrected. Justice must be done, despite societal differences in how matters of justice are practiced and the biases and obstacles that get in the way. Questions of justice are never settled once and for all, and every society in every age must take up its responsibility equipped with the tools it has received – and expand that set of tools to address new circumstances with received knowledge, new information, and social experimentation.

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