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Reorienting Restorative Justice: Initiating a New Dialogue of Rights Consciousness, Community Empowerment and Politicization

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REORIENTING RESTORATIVE JUSTICE: INITIATING A NEW DIALOGUE OF RIGHTS CONSCIOUSNESS, COMMUNITY EMPOWERMENT AND POLITICIZATION

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ABSTRACT

For the last three decades scholars have explored the practice of restorative justice as a crime control mechanism in a multitude of settings. Much of the discourse has focused on restorative justice as an alternative to traditional punitive and retributive criminal justice processes. Whether restorative or punitive, criminal justice processes that seek to address harm are not apart, above, or outside social, cultural and political relations. This Article seeks to initiate a new dialogue of justice and argues that the ontology of restorative justice should to be viewed to include a liberatory moment of politicization focused on promoting equality and human relationality. Such a reorientation presents a new way of understanding restorative justice as political demands, specifically demands for emancipation, for an end to domination and oppression, and the right to have a meaningful, rather than tokenized, voice. This ideological approach to restorative justice is more inclusive, multifaceted, and as such, more responsive to the needs of increasingly complex social, legal, and political structures. Further, this approach challenges a reconsideration of how to envision the taxonomies of relational accountability and political empowerment. A more political account of restorative justice also shows why an agreement on practice or experience is unnecessary, as the purpose is not to show the validity or legitimacy of restorative justice, but instead to challenge dominant ideologies.

I. INTRODUCTION

Restorative justice occupies an important and central role in contemporary national politics, international relations, and the

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processes of globalization. It has evolved since the early 1970s in the United States, Canada, and Europe.[1] Restorative justice initially emerged as an isolated initiative that, while grounded in ideas of restoring harm, was not captured as a "restorative justice" concept.[2] It is only since the late 1980s and early 1990s that a body of practices, social movements, theory-formation, ethical reflection, and empirical research has been collectively identified with the term restorative justice.[3] Since that time restorative justice has become a central issue in theoretical and policy debates and a ubiquitous theme in justice reform. In contrast to punitive justice, which perceives crime largely as harm to protected social values, restorative justice emphasizes relational harms caused by crime or deviance from a social norm. Thus, restorative justice creates space for an alternate dialogue of reparation of harm focused on maintaining membership within a specific community, rather than removal from it.

Much of the literature isolates restorative justice as a response, act, process or experience guided by questions to repair harm, whether based on a singular or community experience. Scholars of restorative justice in multiple institutional and community contexts have considered the impact, both positive and negative, of restorative practices to transform harm. Critics of restorative justice argue it is incoherent when compared to norma-

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[1] MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE (2010); Paul McCold, *The Recent History of Restorative Justice: Mediation, Circles and Conferencing*, *in* HANDBOOK OF RESTORATIVE JUSTICE 23, 35–41 (Dennis Sullivan & Larry Tifft eds., 2006); Mark Umbreit & Marilyn Peterson Armour, *Restorative Justice Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL'Y 65 (2011); Mark Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Many Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 514 (2007); Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 253 (2005).

[2] McCold, *supra* note 1, at 24; Rashmi Goel, *Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At Cross Roads or Cross Purposes?*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 60 (James Ptacek ed., 2010) (describing justice circles operated by aboriginal communities in Canada); Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand*, *in* RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS 257 (Andrew Von Hirsch et al. eds., 2003) (describing family group conferences in New Zealand, conducted pursuant to the 1989 Children, Young Offenders and their Families Act); DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 12–19 (3d ed. 2006) (summarizing the ideological movements that contributed to the evolution of the restorative justice movement).

[3] JOHN BRAITHWAITE, RESTORATIVE AND RESPONSIVE REGULATION 10–12 (2002); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999).

tively precise theories of criminal justice such as retributivism or deterrence.[4] They characterize restorative justice as a values-based framework, which is not settled or clear. Competing visions of good restorative justice practices are as diverse, characterizing the processes and experiences as transformation beyond repairing harm, as they promote values such as empowerment, social support, undominated dialogue, and storytelling.[5] While the study and scholarly dialogue has led to a rich understanding of restorative practices, it is prescriptive in nature seeking to explore restorative justice as an alternative to existing structures often shown to fail offenders, victims, and society, questioning their efficacy. Restorative justice is most commonly defined as what it is an alternative to. Juvenile justice, for example, has shifted from a retributive to rehabilitative focus during the past century from a justice to welfare-oriented model. For the past twenty years restorative justice has been promoted as a third model or new orientation. The appeal to liberals as a less punitive justice system. The appeal to conservatives is its emphasis on accountability. But operating from these and other process-oriented assumptions of restorative practices, as an alternative response to crime and victimization,[6] has limited the broader universality of restorative justice and its emancipatory potential as undominated dialogue.

The goal of this Article is to argue that the ontology of restorative justice should not be bound only to a transformational pro-

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[4] C.L. Ten, *Review Essay: Dominion as the Target of Criminal Justice,* CRIM. JUST. ETHICS 40, 40–46 (1991); Andrew Ashworth & Andrew von Hirsch, *Desert and the Three Rs*, 5 ISSUES IN CRIM. JUST. 9, 9–10 (1993); Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 770 (2000); Stephen Hooper & Ruth Busch, *Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea*, 4 WAIKATO L. REV. 101 (1996); Evelyn Zellerer, *Community-Based Justice and Violence against Women: Issues of Gender and Race*, 20 INT'L J. OF COMP. & APPLIED CRIM. JUST. 233, 236 (1996). *See also* John Braithwaite, *Holism, Justice and Atonement*, 1 UTAH L. REV. 389 (2003); Braithwaite, *supra* note 3 (summarizing theoretical critiques of restorative justice).

[5] HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 279 (2005); GORDON BAZEMORE & MARA SCHIFF, JUVENILE JUSTICE REFORM AND RESTORATIVE JUSTICE: BUILDING THEORY AND POLICY FROM PRACTICE 37 (2005); William Bradshaw & David Roseborough, *Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism*, 69 FED. PROBATION 15, 17 (2005); Jessica A. Focht-Perlberg, *Two Sides of One Coin – Repairing the Harm and Reducing Recidivism*, 31 HAMLINE J. PUB. L. & POL'Y 219, 246–52 (2011); Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 305–30 (2012); Mark S. Umbreit, Ted Lewis & Heather Burns, *A Community Response to a 9/11 Hate Crime: Restorative Justice Through Dialogue,* 6 CONTEMP. JUST. REV. 383, 386–87 (2003); Robin J. Wilson, Franca Cortoni & Andrew J. McWhinnie, *Circles of Support & Accountability: A Canadian National Replication of Outcome Findings*, 21 SEXUAL ABUSE: J. RES. & TREATMENT 412, 412 (2009).

[6] MARK UMBREIT, THE HANDBOOK OF VICTIM-OFFENDER MEDIATION xxv (2001).

cess related to repairing harm, but rather viewed as a liberating moment of politicization. Thus, restorative justice is not simply a proposition about accountability, repairing harm or values framing to transform justice systems. To view it as such misses the experience of people claiming restorative justice for their own struggles. Instead restorative justice should be re-theorized as a way to confront injustice that becomes a political demand, specifically one for emancipation, for an end to domination and oppression, and the right to have a meaningful, rather than tokenized, voice. Restorative justice is not a matter of redemptive politics in which subordinated people overcome the past. Instead, it allows for a connection between the lived experiences of a past harm to a present vision of overcoming oppression by dominant structures of authority. A political account of restorative justice compels us to consider how we envision taxonomies of relational accountability and political empowerment. It also explains why an agreement on practice or experience is unnecessary, as the purpose is not to show the validity or legitimacy of restorative justice but instead challenge dominant ideology. As a political demand, restorative justice is socially constructed and the meaning must vary in different contexts and will be shaped by the social forms of power confronted as well as the complexity of the restorative processes. Thus, restorative justice becomes an essential communicative act, which invites those who have suffered an injury to initiate a new dialogue of justice.

II. UNDERSTANDING RESTORATIVE JUSTICE

Restorative justice is built upon the ontology of participation of all community members with a profound respect for social and interpersonal relations, and the reality that individuals often experience multiple identities within a social group.[7] Restorative justice responds to offending behaviors in an alternative manner to those adopted in the punitive systems commonly found in colonial, neocolonial, and industrialized states.[8] In contrast, retributive justice

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[7] Restorative justice can also be viewed as a social contract and the basis of civil society through a practical aim of empowering stakeholders to consider a revised vision of justice, which seeks to recognize, through their active involvement a broader notion of participatory and deliberative processes. *See* Liam Leonard & Paula Kenny, *The Restorative Justice Movement in Ireland: Building Bridges to Social Justice Through Civil Society*, 18 IRISH J. SOC. 38, 41–42 (2010).

[8] Shannon A. Moore, *Restorative Justice: Toward a Rights-Based Approach*, *in* CHILDREN'S RIGHTS IN CANADA – A QUESTION OF COMMITMENT 179–207 (Brian Howe & Katherine Covell eds., 2007); Shannon A. Moore & Richard C. Mitchell, *Rights Based Restorative Justice: Towards*

is grounded in the use of punishment as a communicative act to an individual with a single identity, perpetrator. As scholars have noted, reliance on a simplistic victim/perpetrator dichotomy raises serious concerns.[9] Restorative justice seeks to disrupt the limitations of socially constructed identities of victims and perpetrators. Such disruption is critical as a single identity lens based on victimhood often further undermines social status. As Angela Harris has noted, "[the] story of [a] woman as [a] victim is meant to encourage solidarity by emphasizing women's shared oppression, thus denying or minimizing difference," but this story also "denies the ability of women to shape their own lives" and "may thwart their abilities" to "create their own self-definitions."[10] Similar to the human rights discourse, the voices of individuals who are most vulnerable, subordinated, and oppressed are lifted up in the deliberative experience of restorative justice. The process of transforming harmful experiences is grounded in oral and affective responses that weave together personal and political narratives, particularly when addressing the complexity of multiple identities. Given the dynamic nature of restorative justice, it should not be isolated to an understanding of formal processes, but rather expanded because of its potential to reorient, restore, and redefine power. Through a process of narration and re-narration, the collective experiences of all participants, regardless of perceived or actual social status, become united into a series of new identities allowing labels of victim or perpetrator to fall aside.

Grounded in republican political theory, restorative justice focuses on voluntariness, non-domination, respect, dialogue, empowerment, corrective justice and the mending of relationships.[11]

Critical Praxis with Young People in Conflict with the Law, *in* THE UN CHILDREN'S RIGHTS CONVENTION: THEORY MEETS PRACTICE. PROCEEDINGS OF THE INTERNATIONAL INTERDISCIPLINARY CONFERENCE ON CHILDREN'S RIGHTS, GHENT, BELGIUM 549–64 (Fiona Ang et al. eds., 2007); ZEHR, *supra* note 5, at 184.

9 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 613 (1990); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 45 (1984). *See also*, Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U. L. REV. 367, 369 (2005).

10 Harris, *supra* note 9, at 613.

11 *See* John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563 (2002) (listing constraining values as: non-domination, empowerment, honoring legally specific upper limits on sanctions, respectful listening, equal concern for all stakeholders, accountability and appealability and respect for the fundamental human rights; listing maximizing values of restorative justice as: restoration of human dignity, property loss, safety/injury/health, damaged human relationships, communities, the environment, emotional restoration and the restoration of freedom, compassion, peace, a sense of duty as a citizen, the provision of social support to develop human capabilities to the full and prevention of future injustice; and listing emergent as:

According to Braithwaite and Pettit, state exercise of authority is seen as inherently arbitrary, requiring a radical reorganization of political life so "that this domination, this subjection to the arbitrary will of another"[12] is eliminated or, at least, minimized. From this foundation, restorative justice aims to reflect a commitment to economic and political equality.[13] Restorative justice is dynamic with respect to responsibility, as it is not a single-variable framework, but rather an experience of discovery of responsibilities by multiple situated individuals whose subordination may have been unnoticed, resisted, or even denied. Institutional, governmental, and community experiences of restorative justice create the opportunity and the medium for responsibilities to be acknowledged, but also for a mode of analysis in which all of the dimensions of power can be discerned, acknowledged, and challenged. From this construction, restorative justice does not always need to be empirically successful in outwardly transforming the economic, social or political landscape to achieve crucial liberatory outcomes for individuals. Such outcomes may be simply a shift in the dominant paradigm, in ways of contrasting and understanding realities. For example, restorative justice can demonstrate to marginalized peoples that resistance is possible, even against powerful forces of oppression. It can also create structures and networks of people that are essential to a larger mobilization attempt. Further, the restorative justice experience itself can expose marginalized people to the strength in a collective or common understanding of power and thus make them more likely to resist oppression in the future. This normative perspective of outcomes explicitly embraces Zehr's notion of the political and transformational potential of restorative justice to address the systemic dimensions of injustice bound in the structures that order our relationships in society to do "what is necessary in most cases is to find a new reality."[14]

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remorse over injustice, apology, censure of the act, forgiveness of the person and mercy). Braithwaite has acknowledged that many will find these values vague, lacking specificity of guidance for the practice of restorative justice, but he cautions that the values must be broad to avoid legalistic regulation of the practice, placing it at odds with the philosophy that grounds it. *See also* JOHN BRAITHWAITE, RESTORATIVE AND RESPONSIVE REGULATION 15 (2002).

12 John Braithwaite & Phillip Pettit, *Republicanism and Restorative Justice: An Explanatory and Normative Connection*, *in* RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 149 (Heather Strang & John Braithwaite eds., 2000). Braithwaite and Pettit emphasize that unlike liberal theory, which focuses on protecting individuals against the sovereign, republican theory relates to protection against other forms of domination resulting from social injustice and violence.

13 JOHN BRAITHWAITE, *Inequality and Republican Criminology*, *in* REGULATION, CRIME, FREEDOM: COLLECTED ESSAYS IN LAW 76 (John Braithwaite ed., 2000).

14 ZEHR, *supra* note 5, at 274.

III. RESTORATIVE JUSTICE AND THE DEVELOPMENT OF RIGHTS CONSCIOUSNESS

By approaching restorative justice from a political perspective, to defend dignity and demand empowerment, one can easily see how it can speak directly to the need for a broader set of rights and demands. Individual rights consciousness derives from the intersection of a person's life experience with the particular interpretive frameworks that are available in the social environment.[15] As Engle suggests, the relevance or irrelevance of rights depends in large part on how individuals come to understand their own identities and on the stories they and others tell to make sense of their lives.[16] Individuals continually construct and reconstruct their understandings of self as they interact socially and move forward through new experiences.[17] In adopting an understanding of rights consciousness within the context of restorative justice, one must accept that through restorative processes individuals draw upon and resist identity formation and social interactions. In this way restorative justice reaffirms that rights consciousness is not required to be fixed and immutable and, in fact, should reflect a more fluid approach to demands and responses for equality. The ability to explore identity as multiple intersecting subjectivities, each established within discourses and discursive practices, helps to explain why subordinated people turn to restorative justice to address harm and oppression, and how the multiplicity of their experiences are a locus for the operation of resistance.[18] Further, the adaptation and reconfiguration of restorative justice in different local institutions, meanings, and practices, whether legal or non-legal, challenges us to inquire more deeply into the flow of ideas and meanings to capture the lived experience of variably positioned people. This is of particular interest when considering the transnational nature of restorative justice and its strong commitment to human dignity.[19]

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15 David M. Engel, *Vertical and Horizontal Perspectives on Rights Consciousness*, 19 IND. J. GLOBAL LEGAL STUD. 423, 427 (2012).

16 *Id.*

17 *Id.* at 427–28.

18 SUSAN F. HIRSCH & MINDIE LAZARUS-BLACK, CONTESTED STATES: LAW, HEGEMONY, AND RESISTANCE 13 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).

19 This raises further areas of inquiry concerning rights consciousness. For example, one could inquire as to whether localized experiences and discourse of restorative justice can reveal penetration and appropriation of positive political rights by people who are excluded from local, national, and even global political discourses.

From a position of new legal realism, a political understanding of restorative justice offers further insight when examining situations of power inequality and how legal consciousness and the production of legal knowledge is embedded in rights claiming. As Minow has explained, recognizing rights, even if that recognition is informal, can give rise to a "rights consciousness" that encourages individuals to imagine and act in a new view of their rights even if they have neither been enforced nor even formally recognized.[20] In this way, restorative justice's use of language to identify harm, establish accountability, and repair the harm recognizes the creation of a narrative based on the disruption to address conflict.[21] Thus, the relationship between rights consciousness and restorative justice from a political framework can be viewed explicitly in the nature of the questions asked and remedies sought.[22] Similar to Felstiner, Abel and Sarat's influential model of rights consciousness and the mobilization of rights,[23] restorative justice allows individuals, communities, and even society to claim, name, and ultimately challenge existing structures of power in seeking an alternative outcome for punishment. While a more political experience of restorative justice can vary in significant ways, it emphasizes catalyzing and strengthening the capacity of individuals. As a communicative interaction of rights consciousness, restorative justice aims to create a fuller description of the wrong. It recognizes the pluralism of our world and allows a normative dis-

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20 Martha Minow, *Interpreting Rights: An Essay for Robert Cover,* 96 YALE L.J. 1860, 1886 (1987). *See also* Penelope Harley, *The Globalization of ADR: Feeling the Way Forward? (Ruminations of a "Female, Peace-making Interested, Restorative Justice Oriented Flake")*, 27 HAMLINE J. PUB. L. & POL'Y 283, 291 (2006) (arguing restorative justice practices seek to ensure fair and equal participation of all parties, particularly those more marginalized in society).

21 *See* ZEHR, *supra* note 5, at 271 (identifying restorative justice as a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible). Further, he states that there are six guiding questions of restorative justice: (1) Who has been hurt?; (2) What are their needs?; (3) Whose obligations are these?; (4) What are the causes?; (5) Who has a stake in this situation?; and (6) What is the appropriate process to involve stakeholders in an effort to address causes and put things right? *Id.*

22 Studies of the development of rights consciousness and the implementation of rights in society, in the context of restorative justice, are conspicuously lacking from the literature.

23 William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC. REV. 631, 635–37 (1980–1981) (the three stages in the transformation of disputes: *naming*, which occurs when a person identifies a particular experience as injurious; *blaming*, which occurs when a person attributes an injury to the fault of another individual or social entity; and *claiming*, which occurs when a person with a grievance voices it to the person or entity believed to be responsible and asks for a remedy).

ruption of our different beliefs to find commonalities and mutual and reciprocal respect.

Consider the restructuring of New Zealand's youth justice system from one based on punishment to one based on the traditional practices of its indigenous people and restorative justice principles.[24] While often studied within larger systems, restorative justice should not be understood as official actors serving as the principal means by which justice is experienced. Further, while it encourages both bottom-up and top down expressions, it does not support a zero sum approach to the responsibility of restoration. The idea of community is used very flexibly, but always requires an identification of the harmed community in context. As South Africa has illustrated,[25] restorative justice, operating to create a national rights consciousness[26] by educating even those who felt uninvolved in or even denied the injustices of apartheid, can enhance "community norm development."[27] Further, in Guatemala, Fullard and Rousseau have noted the powerful impact of a truth commission on the indigenous Mayan community by propelling their demands into a national context.[28] Similarly, Sieder promotes the importance of memory politics in Guatemala's healing and democratization, and echoes assertions made in support of restorative

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24 Umbreit et al., *supra* note 1, at 266.

25 As South African Archbishop Demond Tutu explained,

> We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of ubuntu, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he [or she] has injured by his [or her] offense.

DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 54–55 (1999).

26 JEREMY RIFKIN, THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS (2009).

27 Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 173–74 (2007). Rather than establishing guilt or innocence of individual perpetrators, truth and reconciliation commissions focus on broad patterns of violence and their causes and seek to establish a more comprehensive record of past injustices. *See* Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 954 (2001).

28 Madeline Fullard & Nicki Rousseau, *Research Brief: Truth Telling, Identities, and Power in South Africa and Guatemala*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (June 2009), http://www.ictj.org/sites/default/files/ICTJ-Identities-TruthCommissions-ResearchBrief-2009-English.pdf. It is important to note that restorative justice and truth commissions are not identical practices, but emerge from a similar philosophical framework that engages a counter narrative to dominant political histories and structures.

justice.[29] All of these instances reflect a restoration of social equality that was neither in isolation of an individual harm nor subsumed by a broader wrong to society, but instead placed in a distinctive context that required response to an end of domination and injustice.

A political understanding of restorative justice, imbued with rights consciousness, is at once both empirical and normative. From an empirical standpoint it captures how restorative justice empowers people. Restorative justice begins from and defines itself in terms of the reality of violation, alienation, and disregard among people. Its central concept of restoring relationships supposes that it is disregard or violation of acceptable human relationships that stands at the core of its agenda, practically and philosophically. But this description is normatively influenced. It begins with the proposition that restorative justice is for something: challenging power, achieving emancipation, and ending domination. As such the positive normative value should not simply be captured from the practice, but from the experience of claiming restorative justice as speaking a truth that varies from a dominant and subordinating narrative or structure. I am not, however, suggesting that claiming restorative justice should be misunderstood to speak a moral truth to power, but rather confronting power. Nor should this view of restorative justice be confused with the "politics of apology" that emerged in the 1990s.[30] While scholars have argued that the apology has become a form of political speech with increasing significance and power,[31] such apologies are often without a larger context for civil discourse focused on the disruption of power and reorientation of privilege. While such apologies give legitimacy to public claims of inequality and discursively move political debates, subordinated people remain unable to access the traditional structures and systems of power that these apologies are

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29 Rachel Sieder, *War, Peace, and the Politics of Memory in Guatemala*, *in* BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 209–34 (Nigel Biggar ed., 2003). "Memory politics" or the "politics of memory" has been deeply implicated in a host of contested issues relating to culture, truth, reparations, history, identity struggles and nation-building. Memory as representations of the past of a particular group of people is relevant, both for the present and the future, in constructing or reconstructing, claiming or rejecting group identities, in making claims to land and other resources, and in various other issues. *See* JACOB CLIMO AND MARIA CATTELL, SOCIAL MEMORY AND HISTORY: ANTHROPOLOGICAL PERSPECTIVES (2002).

30 Michael Cunningham, *Saying Sorry: The Politics of* Apology, 70 POL. Q. 285, 285–88 (1999).

31 Allan Luke, *The Material Affects of the Word: Apologies, "Stolen Children" and Public Discourse*, 18 DISCOURSE: STUD. CULTURAL POL. EDUC. 343, 345 (1997).

bound to. Further, apologies are often deemed inadequate or disappointing if they do not convey an appreciation of the suffering, anger or mistrust experienced as a result of harm.[32] In contrast, restorative justice disperses power to outsider communities, acknowledges, and builds upon the complex identities of individuals and communities as a communicative act connected to an evolving rights consciousness. This progression allows outsiders to claim a newly expressed normative position by authoring their political identities. As Walker notes, restorative justice, by putting a priority on inquiry, dialogue and the voices of those stigmatized and harmed, can more meaningfully contribute to emancipation.[33]

The harms underlying the need for a restorative, rather than a retributive or a deterrent, outcome concern power, privilege, and subordination with a common focus on reasserting humanity.[34] Consider the demands of the people of Greensboro, North Carolina, as manifested in the Greensboro Truth and Reconciliation Commission,[35] which reflected a more inclusive notion of rights to address legacies of racial segregation and exclusion.[36] As Inwood notes, by engaging with a grassroots process that drew upon restorative justice and focused on coalition building in Greensboro, restorative justice connected people who had been excluded from the culture of the city.[37] He argues that the Greensboro case study exemplifies civic engagement that is possible when "broader conceptions of justice are deployed strategically to upend histories of exclusion and marginalization that define modern racism."[38] When experienced in a public way, such as a truth commission, restora-

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32 Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377, 388–89 (2006).

33 *Id.* at 389–90.

34 A post-structuralist concept of the self as the location of multiple and potentially contradictory subjectivities, each established within discourses and discursive practices, provides a helpful way to conceptualize the complex positioning of individuals and communities who have sought to redefine power relationships through a lens of restorative justice.

35 The Greensboro Truth and Reconciliation Commission was a civil society initiative tasked "to examine the 'context, causes, sequence and consequences,' and to make recommendations for community healing around the tragedy in Greensboro, N.C., on Nov. 3, 1979, which resulted in the deaths of five anti-Klan demonstrators." *See* Greensboro Truth and Reconciliation Commission Report: Executive Summary, GREENSBORO TRUTH AND RECONCILIATION COMMISSION 2 (May 25, 2006), http://www.greensborotrc.org/exec_summary.pdf.

36 Joshua Inwood, *The Politics of Being Sorry: The Greensboro Truth Process and Efforts at Restorative Justice*, 13 SOC. & CULTURAL GEOGRAPHY 607, 610–11 (2012).

37 *Id.* at 662.

38 *Id.*

tive justice can be understood to function as a definitional drama.[39] For Turner, social dramas are processes of conflict resolution that take public, dramatic, and predictable forms.[40] They function to reintegrate aggrieved social groups into the community. In Myerhoff's reformulation, social dramas shifted from simply practices of conflict resolution to strategies for visibility and affirmations of collective social value and identity.[41] As a definitional drama, subordinated people participating in restorative justice can envision themselves as valued and empowered actors while simultaneously repairing harm and challenging hegemonic visions of reality.

In Greensboro, restorative justice operated instrumentally, as a challenge to existing structures, agents, and systems of power, and expressively, as a challenge to the sociocultural manifestations of power relationships in everyday life. Through the truth and reconciliation commission marginalized people in Greensboro were able to assert political legitimacy and challenge elites. As this experience illustrates, restorative justice can function as a moment of political, economic or social demands or it can be a demand for recognition of alternative norms for an individual or group identity. In both cases, restorative justice challenges power in its multitude of forms. The process of confronting all voices as they express responses to the restorative questions framing the present issue, as well as past issues that have given rise to the need for a restorative intervention, suggests its usefulness for dominated peoples to raise claims of equality for all.[42] In essence, restorative justice opens the space for a new dialogue based not on arbitrary, inherited, or exclusive power, but rather by confronting the ideology of freedom and equality from past harms that have been perpetuated by systems of domination.[43] As the social meaning of restorative justice

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39 The term definitional drama draws on Victor Turner's concept of social drama and Barbara Myerhoff's reformulation of Turner's concept as a definitional ceremony. *See* VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY (1974); Barbara Myerhoff, *Life Not Death in Venice: Its Second Life, in* REMEMBERED LIVES: THE WORK OF RITUAL, STORYTELLING, AND GROWING OLDER 257–76 (Barbara Myerhoff & Mark Kaminsky eds., 1992).

40 TURNER, *supra* note 39, at 41.

41 Myerhoff, *supra* note 39, at 263.

42 I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011) (arguing that the most disenfranchised minority communities do not only need less incarceration and more jobs and schooling; they need to claim their political and social citizenship).

43 Consider the potential relationship between restorative justice, viewed political demands, and the theory of the right to the city. Current scholarship on the right to the city advocates for a radical openness which links individuals who struggles appear distinct, together as a commu-

evolves, so does its appeal and efficacy to challenge entrenched barriers to equality. Alfieri notes that to the extent racial reconciliation suffers from contingent identity constructions, narrative integrity may be realized only through tolerance for pluralism and experimentation in telling the stories of community resistance.[44] He suggests that telling stories about the history of such places as Village West, Overtown, and Liberty City offers crucial narratives of conflicts over race and space.[45] Alfieri argues the significance of connecting community-based legal-political strategies to restorative justice initiatives and to reparations movements[46] in order to memorialize the devastation wrought by private exploitation and public neglect.

Pranis argues that restorative justice empowers by institutionalizing the hearing of stories narrated by subordinated people.[47] In restorative justice conferences, after each individual narrates his or her individual story, new stories are coauthored by a plurality of stakeholders in the injustice. This re-narration allows for the development of new political identities. These participatory circles function as micro-institutions of deliberative democracy that foster re-narrations of identities. As Niemeyer and Tschudi suggest, restorative justice presents narrative alternatives to dominant legal discourse that: "(1) assist persons in finding an authorial voice, (2) invite meaningful co-authorship of life narratives by ensuring the participation of both protagonists and supporting characters, and (3) recruit a relevant audience for the performance of a new narra-

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nity of marginalized peoples *see*king to reclaim space within a city. Restorative justice provides not only the space for these collective experiences, through process or practice, but establishes a new more formalized recognition of shared narratives of disenfranchisement. *See* Kafui A. Attoh, *What Kind of Right is the Right to the City?*, 35 PROGRESS HUM. GEOGRAPHY 669, 674–76 (2011) (discussing the right to the city and collective exercises of power). Attoh indicates that while not the central focus of his article, the idea of the right to the city suggests new forms of citizenship. He asserts that whatever form this citizenship takes it will rest on a social process through which individuals and social groups engage in claiming and expanding rights. *See id.* at 682.

44 Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CAL. L. REV. 1829, 1869 (2007).

45 John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1243–55 (1995); Audrey G. McFarlane, *Race, Space and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 343–49 (1999).

46 Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 814–34 (2006).

47 Kay Pranis, *Democratizing Social Control: Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations*, *in* RESTORATIVE COMMUNITY JUSTICE 287 (Gordon Bazemore & Mara Schiff eds., 2001).

tive that transforms the conflict."[48] The moment of co-authorship creates a narrative in many voices, each transforming the other. The circle's story "engender[s] a greater humility and tolerance for the vicissitudes of life on the part of all participants."[49] Levad suggests that restorative justice can bring about fundamental change on the individual and systemic levels through its cultivation of vivid moral imagining among its participants.[50] She argues that since the realization of justice as equity requires an expansive moral imagining, restorative practices allow participants to enter each other's stories and draw connections, creating a framework of commonality from which to envision a different future where they are empowered to address the realities of injustice.[51] For Levad, moral imaging empowers people to create new images of their world to organize and give meaning to the experiences arising from relationships.[52]

IV. A POLITICAL IDENTITY OF RESTORATIVE JUSTICE

By reorienting restorative justice as a political demand in the broadest sense, it becomes a normative claim about how things should be, reflecting a conviction that all people should be treated as equals challenging the order of things and confronting the structures of power and privilege. Restorative justice seeks to emancipate the oppressed and give a voice to those who do not have one. Further, it shifts the central identity of restorative justice from one of a narrative of surviving, transcending, or repairing a present injustice[53] to a discourse of liberation and justice by connecting the "mute experience of being wronged and political arguments about justice."[54] In this capacity, restorative justice is no longer an isolated transaction but it is also seen as one that acknowledges past injustices from which a new rights consciousness emerges at the intersection of individual identity construction and the restorative

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48 Robert A Neimeyer & Finn Tschudi. *Community and Coherence: Narrative Contributions to the Psychology of Conflict and Loss*, *in* NARRATIVE AND CONSCIOUSNESS: LITERATURE, PSYCHOLOGY, AND THE BRAIN 171–72 (Gary D. Fineman et al. eds., 2003).

49 *Id.* at 177.

50 AMY LEVAD, RESTORATIVE JUSTICE: THEORIES AND PRACTICES IN MORAL IMAGINATION 21–22 (2011).

51 *Id.* at 222.

52 *Id.* at 224.

53 Pranis, *supra* note 47; Neimeyer & Tschudi, *supra* note 48.

54 IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 72 (2000).

discourses available for dealing with experience and conflict. The restorative interaction functions to establish a new relationship ideally built on shared power that seeks to answer for structural violence, social domination or marginalization to disrupt patterns of disrespect and the material conditions that express and enable these patterns.

Walker, for example, argues that restorative justice provides a promising framework for a discourse of reparations for American slavery if restorative justice is properly understood as transformative and not focused on restoring a status quo, but rather on building relationships in the direction of "moral adequacy."[55] She posits,

> [T]hat we understand "restoration" in all contexts as normative: "restoration" refers to repairs that move relationships in the direction of becoming morally adequate, without assuming a morally adequate status quo ante. Morally adequate relations are ones in which three conditions obtain. In them, people are confident that they share some basic standards for the treatment of each other. People are able to trust each other to abide by those standards or at least to acknowledge fault if they (or others) do not abide by them. And so, finally, people are entitled to be hopeful that unacceptable treatment will not prevail, that unacceptable behavior will not be defended or ignored where it occurs, and that victims will not be abandoned in their reliance on our shared commitment to our standards and to each other.[56]

By embracing the authenticity of experience, restorative justice provides emancipatory vocabulary, which seeks to free people from harm, raise standards by which governments judge one another, and by which they are judged, both by their own people, and by the elites we refer to collectively as the global community.

Given dramatic shifts in political and international legal understandings concerning the responsibilities of states to address human rights abuses and violations, restorative justice has been further thrust into a dialogue concerning political practices of reparations. Various governments have embarked on their own restorative justice programs, largely in response to the demands of political constituencies. For example, in Peru, funding was provided to victims of mass violence during Peru's civil war with the Shining Path guerrilla movement through a range of programs, including a collective reparations program to address the social, eco-

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55 Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377 (2006).

56 *Id.* at 384.

nomic, and institutional harm suffered by marginalized communities.[57] Discussing cases of mass repression and violence, de Grieff argues for an expressly political understanding of reparation programs that considers their efficacy in terms of creating conditions for recognition, civic trust, and social solidarity.[58] Thompson positions her argument for historical obligations for repairing wrongs, such as theft of land from indigenous peoples or slavery and servitude, on "reparation of restoration" focusing on not simply returning to the state of society before the harm, but rather on the repairing of the social and political relations damaged by the injustice.[59] Further, as Schimmel asserts, given the history of multiple legal and moral failures in Rwanda, a new framework is needed to acknowledge restorative justice in response to genocide and to "empower genocide survivors, to advance their capacity to actualize their human rights, and to serve to reintegrate them on the basis of their equal rights and human dignity into the society that so violently betrayed them."[60] He argues that the primary concerns of restorative justice post-genocide as being centered on protecting and realizing the rights and needs of survivors and ensuring their well-being.[61]

In this more political context, demands for reparations of relationships can be expressed outside the traditional legal, political, and social systems—systems that have challenged emancipation and often furthered domination and oppression. Returning to the case study of the Greensboro Truth and Reconciliation Commission, Inwood offers valuable insight into Walker's ideas of addressing the historical burden of racial injustice and inequality given the

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57 Ruth Rubio-Marin, Claudia Paz y Paz Bailey & Julie Guillerot, *Research Brief: Indigenous People and Reparations Claims: Tentative Steps in Peru and Guatemala*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (June 2009), http://www.ictj.org/sites/default/files/ICTJ-Identities-Reparations-ResearchBrief-2009-English.pdf.

58 Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451–77 (Pablo de Grief ed., 2006).

59 JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATIONS AND HISTORICAL INJUSTICE xix (2002).

60 Noah Schimmel, *The Moral Case for Restorative Justice as a Corollary to the Responsibility to Protect: A Rwandan Case Study of the Insufficiency of the Impact of Retributive Justice on the Rights and Well-Being of Genocide Survivors*, 11 J. HUM. RTS. 161, 162 (2012).

61 *Id.* at 166. *See also* Kaitlin M. Roach, *What Choice Did Rwanda Have? Rebuilding a Modern System after the Genocide That Maintained the Traditional Ideals of Unity, Resolution, and Reconciliation*, 17 GONZ. J. INT'L L. 1, 16 (2014) (Discussing the Rwandan Abunzi mediation system, an indigenous, pre-colonial system, that has been modernized and mandated into law as necessary step towards reconciliation. The Abunzi system is based on traditional notions of unity, resolution, and reconciliation.).

nature of retributive justice systems.[62] Similar to Levad, Inwood suggests that the Greensboro Truth and Reconciliation Commission's broad understanding and application of restorative justice became a process of "imagined alternatives" to traditional systems of power.[63] Within this new reality, historically marginalized members of the Greensboro community became integrated into the political landscape. Inwood asserts that restorative justice allowed for a larger and more complex narrative placing conditions of social, political, and economic inequality at the center.[64] In this way, restorative justice furthered knowledge as power. As co-narratives grew, so did the knowledge of just and unjust, universal and local, victim and violator, harm and remedy. Justice became more than a spoken idea. It was made, experienced, articulated, and performed. Restorative justice offered a political language in which past experiences of justice-achieved and justice-failed could be retrospectively described and cataloged to act as a stimulus to emancipatory creativity. Restorative justice gave oppressed people in Greensboro the tools to name their oppression and the capacity to fight against it. As a commissioner noted, "the community focus brought people together to talk about the history of our city and the relationships that exist among the races and cultures here"[65] and "I am now focused on a different form of community-building, one focused on cultivating confidence in people who are often ignored by leadership."[66]

As the Greensboro Truth and Reconciliation Commission illustrates, a more political understanding of restorative justice answers the global appeal of such practices based not just on their practicality, but also on their ideological character. Domination and oppression are global phenomena, and likewise people seeking to be free from such domination are also universal. This universality also explains why the practice and ideological character of restorative justice need not be identical for all people; the process of seeking emancipation is as diverse as the contexts in which it occurs. This becomes even more apparent when we free ourselves from a vision of restorative justice as only relational to crime and victimization and instead consider broader narratives of accounta-

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62 Inwood, *supra* note 36, at 610–11.

63 *Id.* at 612. Inwood also notes that the emphasis on restorative justice and community building linked with the refusal of city officials to engage with the truth commission "necessitated a political process that worked outside local civic institutions." *Id.*

64 *Id.* at 614–15.

65 *Id.* at 616.

66 *Id.*

bility. Consider the Zwelethemba restorative justice initiative in South Africa. The initiative began with the local community to develop community-based conflict resolution centered on peace committees.[67] The initiative adopted two restorative approaches, the first to address particularized disputes and the second to address broader issues. The emphasis of the initiative was not on specific outcomes, but on empowering people to understand their own knowledge and capacity to seek a solution.[68] Similarly, in Northern Ireland, community-based restorative initiatives were established to respond to informal systems of justice by the Republican and Loyalist paramilitaries through violence and banishment.[69] The restorative justice programs were designed not only to provide an alternative to the paramilitary punishment but also to develop social capital and promote social justice through civil society.[70] In this context, restorative processes are understood as mechanisms of individual and community empowerment by creating spaces to displace passive statist responsibility with active responsibility in civil society.

From these diverse examples one can begin to recognize the universality of restorative justice and its increased proliferation across the globe.[71] Restorative justice interrogates the cumulative

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67 MARGARITA ZERNOVA, RESTORATIVE JUSTICE IDEALS AND REALITIES 21 (2007).

68 *Id.* at 22.

69 *Id.* at 23.

70 Liam Leonard & Paula Kenney, *The Restorative Justice Movement in Ireland: Building Bridges to Social Justice Through Civil Society,* 18 IRISH J. SOC. 38, 46–53 (2010).

71 Violet Odala, *The Spectrum for Child Justice in International Human Rights Framework: From "Reclaiming the Delinquent Child" to Restorative Justice*, 27 AM. U. INT'L L. REV. 543 (2012) (discussing the potential for restorative justice to be recognized as a human right). The restorative justice has been formalized into various international legal protocols and instruments. For example, in 2002, the United Nations Economic and Social Council endorsed a Declaration of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Justice Matters. *See* GERRY JOHNSTONE, A RESTORATIVE JUSTICE READER 485–88 (2003). In 2009, the World Congress on Restorative Juvenile Justice declared that the adoption of restorative approaches within juvenile justice systems consistent with the ongoing implementation of the United Nations Convention on the Rights of the Child. *See* Shannon A. Moore & Richard C. Mitchell, *Theorising Rights-Based Restorative Justice: The Canadian Context*, 19 INT'L. J. CHILD. RTS. 81, 81 (2011). In the same year, the United Nations Human Rights Council also adopted Resolution 10/2 on Human Rights in the Administration of Justice, in Particular Juvenile Justice encouraging states to use alternative measures, such as diversion and restorative justice. *See* U.N. Human Rights Council, *Human Rights in the Administration of Justice, in Particular Juvenile Justice*, at 1, U.N. Doc. A/HRC/10/L.15 (Mar. 20, 2009). The emergence of restorative justice at the international level is also exemplified by the emergence of various judicial bodies. *See* Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 734 (2006) (noting international restorative justice tribunals in Cambodia, East Timor, Iraq, Kosovo, and Sierra Leone).

burdens imposed on many peoples of the world and calls for a normative restoration of memories of past inhumane wrongs. Restorative justice is grounded in repairing harms to human dignity and is often associated with claims of human rights. This nexus allows the experience of reparation to be understood as more than an abstract or universalized notion. Rather, it is contextualized in light of history, culture, power, privilege, and the nature of the violations committed. This dimension underscores the transnational nature of restorative justice as not simply about a response to crime or victimization. It is as Sullivan and Tifft suggest, a "process of transformation, of examining and dislodging the justifications for treating others as less than one's self."[72] In an emancipatory context, this transformation allows a normative expression of justice as freedom from domination. Bush and Folger's transformative mediation theory provides insight into the emergence of global restorative justice.[73] Bush and Folger assert the importance of two values within a transformational approach, rather than a problem-oriented approach, to restorative justice.[74] These are empowerment and recognition. Empowerment transforms individual voices and experiences from being weak and alienated to strong and constructive. Recognition means acknowledgement and empathy for the position of others. For Bush and Folger, the interaction between empowerment and responsiveness shifts relationships from destructive, alienating, and dehumanizing, to constructive, connecting, and humanizing.[75] Understanding restorative justice situated within this theory answers questions not only about its appeal from a democratic perspective, but also as an experience of knowledge production and expression of power to delegitimize the status quo and strategies of domination.

V. CONCLUSION

It is imperative to articulate the complex and contradictory locations of power to renegotiate and refashion new ways of legally and politically intervening and articulating the experiences of op-

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72 DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES 168 (2001).

73 ROBERT BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 81–84 (1994).

74 *Id.* at 81.

75 *Id.* at 81–112.

pression. A political view of restorative justice defines itself in terms of the realities of violation, alienation, and subordination. It seeks to shatter silences and expose oppression by using unconventional narratives to pursue an emancipatory objective. This orientation of restorative justice challenges us to reevaluate categorizations of relational accountability, reparation, and empowerment. The nature of restorative justice exposes participatory potential through the inclusion of those who have felt alienated from formal processes and institutions. In this way, restorative justice seeks to balance the self and the other in order to discard entrenched historical and social realities aimed at perpetuating the status quo. Further, while it focuses on the present, it acknowledges and memorializes past suffering through a strengthened collective memory.

The inclusion of restorative justice in the field of politics does not mean, however, that it loses its moral principles and values. It simply means there may be new dimensions of ideas and practices that have yet to be explored. For example, how does one weigh the costs and benefits of pursuing an emancipatory objective in the narratives of restorative justice compared to other discourses? How do efforts to work more intently within restorative justice narratives compare with efforts to develop alternative narratives? How does the diversity of restorative justice affect a praxis of anti-subordination? What does community empowerment look like in inter-state systems? Further, while there is no single unified conception of restorative justice that covers the entire field of interpersonal, social, and historical injustices, ranging from everyday harms to large-scale violence, repression, and abuse and legacies of subordination, perhaps an exploration of a liberatory ideal of restorative justice, will spark fresh comparative analysis and discourse of ideas and realities, and bridge the gap between them.

If a view of restorative justice as a political demand and an engagement in a struggle over power and privilege is recognized, we should expect restorative justice to become contentious. First, because it represents a demand that people give up arbitrary power or inherited privilege. As history has shown us, those who enjoy the benefits of power will fight vigorously to maintain such power, not wanting to answer questions about subordination, distribution of wealth and privilege, or limiting the exercise of power. Second, even among those that accept an ideology of restorative justice as a political demand, conflict will arise over the meaning of emancipation or liberation. Third, by defining restorative justice within the

context of promoting political agency some will seek to situate certain demands as legitimate or illegitimate in the realm of differing political and cultural disputes. Further, there will likely be disagreement as to whether these political demands are inclusive or exclusive of other rights-based discourse. These moments of contentiousness reinforce limiting restorative justice to a narrow understanding not grounded in an emancipatory framework. Moving past these tensions can shape new conceptions of participation, collective belonging, political activism, liberation, and justice.