

Restorative justice and the human rights of offenders: Convergences and divergences

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ARTICLE INFO

Article history:

Received 20 May 2008

Received in revised form 4 June 2008

Accepted 4 June 2008

Available online 10 June 2008

Keywords:

Restorative justice

Human rights

Offenders

ABSTRACT

Restorative justice has gained significant momentum as a justice reform movement within the past three decades, and it is estimated that up to one hundred countries worldwide utilize restorative justice practices. Although claims about the role of restorative justice in protecting human rights are repeatedly made in the restorative justice literature, they are seldom supported by empirical evidence or a thorough analysis of human rights and their justification. In this paper, we discuss how the assumptions underpinning restorative justice practices impact on offenders' human rights, and their points of convergence and divergence. We argue that while these assumptions can protect certain offender rights, they may violate others. We finish with some suggestions about how to reconcile the tensions between human rights and restorative justice, focusing in particular on the relationship between community needs and individual well-being.

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1. Introduction

Restorative justice has gained significant momentum as a justice reform movement within the past three decades and it is estimated that up to one hundred countries worldwide utilize restorative justice practices (Miers, 2001; Van Ness, 2005). The popularity of restorative justice programs has been attributed to a growing dissatisfaction with the conventional justice system and

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the assertion that this system consistently fails to take into account the needs of offenders, victims, and their communities (Consedine, 1995; Morris, 2002; Van Ness, 1996). From the beginning of its rise to prominence, restorative justice perspectives have been contrasted with the assumptions underpinning the criminal justice system in order to promote it as a fundamentally different, yet viable, approach to achieving justice. The differences between the two systems have been highlighted, and some would argue exaggerated, while their similarities have been downplayed or ignored (Daly, 2002; Dignan, 2005). Such dichotomies have promoted restorative justice as healing, reparative, and just, while current correctional systems have been labeled as punitive, retributive, and unjust (Daly, 2002).

One of the frequently cited advantages of restorative justice initiatives over the conventional justice system is its ability to better attend to the human rights of victims, offenders, and their communities (e.g., Morris, 2002; Skelton & Sekhonyane, 2007; Van Ness, 1996, 1999):

Restorative justice also emphasizes human rights and the need to recognize the impact of social or substantive injustice and in small ways address these rather than simply provide offenders with legal or formal justice and victims with no justice at all. Thus it seeks to restore the victim's security, self-respect, dignity and, most importantly, sense of control. And it seeks to restore responsibility to offenders for their offending and its consequences, to restore a sense of control to them to make amends for what they have done and to restore a belief in them that the process and outcomes were fair and just. And, finally, restorative justice encourages cultural relativity and sensitivity rather than cultural dominance. (Morris, 2002, pp. 598–599)

Although claims (such as those listed above) about the role of restorative justice in protecting human rights are repeatedly made in the restorative justice literature, they are seldom supported by empirical evidence or a thorough analysis of human rights and their justification. To the authors' knowledge, there has never been a study that has examined participants' understanding and knowledge of their human rights prior to a restorative justice encounter, followed by an evaluation subsequent to the encounter to determine whether these participants believe that their human rights have been respected. Instead, evaluations of restorative justice programs tend to focus on measuring whether victims, offenders, and community representatives are satisfied with the processes and outcomes (see Latimer, Dowden, & Muise, 2005, for a recent meta-analysis of the effectiveness of 35 restorative justice programs).

This is problematic because the lack of evidence for rights protection within restorative justice initiatives and the failure to discuss restorative justice within the context of a theoretically sound model of human rights have ensured that the debate about the role of human rights within restorative justice has remained on a somewhat superficial level (Ashworth, 2002; Morris, 2002; Skelton & Frank, 2004; Van Ness, 1996). In essence, because of its origins as a grassroots, practice-driven movement, the discussion of restorative justice has been under-theorized and its theoretical and empirical relationships to important moral concepts, such as human rights, insufficiently addressed. For example, critics of restorative justice have repeatedly voiced concerns that restorative justice programs disregard the fundamental human rights of offenders; in particular, there has been considerable apprehension about the dismissal of due process and other legal rights within restorative justice settings (Ashworth, 2002; Radzik, 2007; Warner, 1994). Restorative justice advocates have responded to these concerns in a variety of ways. Some theorists maintain that due process rights, such as proportionality, are not necessarily relevant in restorative justice settings because restorative practices are governed by values that oppose the rigid, rule-bound processes of conventional criminal justice (Braithwaite & Strang, 2001; Morris, 2002). Others have adopted a more moderate approach by arguing that there should be safeguards in place to protect the due process rights of offenders (Cavadino & Dignan, 1997; Van Ness, 1999; Walgrave, 2007).

When human rights have been more directly examined in relation to restorative justice, there has been a tendency to focus on the values evident in rights norms and protocols rather than undertake a systematic analysis of their nature and justification (e.g., Braithwaite, 2002a; Skelton & Frank, 2004; Skelton & Sekhonyane, 2007). For example, in his paper on restorative justice standards, Braithwaite (2002a) outlines three categories of standards that overlap to some degree with human rights values: *constraining* standards, *maximizing* standards that may not always be met (i.e., ideals), and a set of *emergent* standards that arise once a restorative justice process is successfully entered into (e.g., mercy, forgiveness etc.). It is interesting to note that some of the standards in the second category of maximizing constraints, such as those relating to dignity and freedom, arguably reflect the core interests that human rights aim to protect. If this is the case then it is somewhat puzzling that fundamental human rights values could be seen as simply ideals to strive for rather than mandatory constraints on permissible restorative procedures. Furthermore, in his analysis of restorative justice standards Braithwaite does not fully engage with human rights theories or perspectives to provide the kind of unified and ethically deep conception of human rights required if the two sets of ethical concepts are to be successfully integrated.

Thus, although current debates about the role human rights play within restorative justice are important, by focusing almost exclusively on the concrete level of specific rights protocols and procedures, rather than addressing the core values (e.g., agency and personhood) that human rights were formulated to protect (Gewirth, 1996; Griffin, 2008), a stalemate has emerged: advocates and critics of restorative justice practices simply repeat their perspectives on which specific rights should be given priority within their preferred justice system. Furthermore, this stalemate has, at times, led to a failure to fully consider the relationship between the values of offender autonomy, victims' need for redress, and the community good, where the difficulties created by emphasizing one of these important values is overlooked. In light of these concerns, we believe that it is timely to examine the relationship between restorative justice practices and a comprehensive human rights framework in order to provide a clearer argument for the need to protect the fundamental human rights of victims, offenders, and members of the community.

In this paper, we first delineate the key assumptions that appear to underlie restorative justice practices based on a thorough (but not exhaustive) review of the literature. We then discuss the nature of human rights and arrive at a model that will guide our subsequent analysis of how the assumptions underpinning restorative justice practices impact on offenders' human rights. We argue that while these restorative assumptions can protect certain offender rights, they may violate others because offenders are dealt with almost exclusively as wrongdoers who are held accountable for their actions, rather than as purposeful moral agents who have fundamental entitlements, as well as obligations, based on their inherent dignity as human beings. Although some of the points of tension between human rights and restorative justice perspectives and practices are applicable to the other stakeholders in restorative justice, such as victims and the community, we have chosen to focus on offenders in this paper because in our view they represent a rather neglected group with respect to the issue of human rights within the correctional practice domain (see Ward & Birgden, 2007). Of course, it must be acknowledged that this perspective conflicts with the views of victim rights activists who argue that restorative justice has failed to live up to its promise as a victim-centered justice response and that victims are little more than props in a justice paradigm focused on improving the treatment of offenders (see Green, 2007; also Herman, 2004). We disagree with this position and suggest that current restorative justice initiatives are more centrally concerned with the good of the community and victims than offenders, and when offenders' rights are factored in these are framed primarily as a set of constraints rather than a positive attempt to promote their agency and dignity.

It is important to note that both human rights and restorative justice policies are intended to deal with matters of justice; human rights concern the minimum entitlements due to a person because of their humanity and restorative justice is based on reparative procedures. However, as will become evident later in this paper, the notion of human rights is arguably a deeper ethical concept than that of restorative justice, and as a result, prescribes the ethically more fundamental and authoritative set of claims and subsequent obligations. We propose that human rights underpin and provide an ethical justification for restorative justice practices, and the associated values of empowerment, respect, repair, autonomy, dignity, healing, and reparation. Without such a justification, restorative justice is in danger of collapsing into an ethically weak form of relativism which could allow the norms of local communities to dictate restorative outcomes, despite their possible violation of universal human rights. In other words, human rights values and ideas supply a universal glue that binds together various restorative practices and outcomes, and thus provides a comprehensive and integrated ethical framework for designing and delivering restorative programs in diverse communities.

2. Defining restorative justice

To reveal the key assumptions underlying restorative justice practices, it is necessary to consider how the concept of restorative justice is defined. Unfortunately, defining restorative justice is no easy feat because of the multiple strands comprising this conception of correctional justice. Attempts to settle on a particular definition have been contentious and rather than guiding theorists towards agreement the debate around what actually constitutes restorative justice has served to highlight the existence of contrasting, and competing, perspectives (see McCold, 1998). While the term itself has the obvious implications that it is a form of *justice* that *restores* something, it is not clear what is being restored and to whom, and what justice means in this context. Dignan and Cavadino (1996) maintain that, "...the precise form of the paradigm is as yet unclear, whether in theory or practice, and the whole debate is characterized by considerable terminological and conceptual confusion" (p. 153). Restorative advocates, however, have argued that the appeal of restorative justice lies in its flexibility to encompass a wide range of initiatives and thus, any attempts to reach a definitive agreement about 'what it is' will somehow contaminate, and potentially destroy, its essence (Johnstone & Van Ness, 2007; Skelton & Sekhonyane, 2007; Zehr & Mika, 1998). Indeed, Braithwaite (1999) goes as far as to say, "An answer to the 'What is to be restored?' question is whatever dimensions of restoration matter to the victims, offenders, and communities affected by the crime. Stakeholder deliberation determines what restoration means in a specific context" (p. 6). Although Braithwaite addresses the meaning of restoration rather than justice in his definition, he does imply that justice in this context is purely procedural rather than substantive. An additional implication of this perspective is that restorative justice is a nuanced, contextual approach that eschews universal principles and is more concerned with meeting the needs and interests of stakeholders at particular times and in specific locations. Furthermore, there is the suggestion that victims, offenders, and communities ought to drive the process of seeking restoration and that a balance should be sought between these diverse, and possibly conflicting, interests.

Restorative justice models are commonly viewed as either process-based, such as that described above by Braithwaite, or outcome-based (Bazemore & Elis, 2007; Walgrave, 2007; Zernova & Wright, 2007). Theorists who believe that joint stakeholder deliberation is fundamental to achieving restoration actively promote process-based definitions of restorative justice (see McCold, 2000). One such definition is Marshall's (1999) where restorative justice is "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future" (p. 5). However, process-based definitions have been criticized for failing to include any reference to outcomes, primarily because there is no guarantee that decisions made by stakeholders about the level of reparation required from offenders will be restorative (Dignan, 2005). In comparison, outcome-based definitions tend to prioritize the role that particular outcomes have in achieving restoration; that is, the specific constellation of benefits and burdens arising from the restorative decision-making process (Zernova & Wright, 2007). Taking both the process- and outcome-based models into account, Morris (2002) advocates for an inclusive approach where the "essence of restorative justice...is the adoption of *any* form [of justice] which reflects restorative values and which aims to achieve restorative processes, outcomes, and objectives" (p. 600; italics in original). However, this definition still does not provide much insight into what is meant by restoration or justice. At this point, it is necessary to revisit

the questions posed at the beginning of this section; that is, what is being restored and to whom? And how is justice defined in this context?

To answer these questions, it is essential to consider the relationship between principles and values in restorative justice practices. Restorative justice is commonly acknowledged to be a grassroots movement that is practice rather than theory-driven (Marshall, 2007; Ashworth, 2002; Maxwell & Liu, 2007). Restorative principles and values form the foundation of, and subsequently guide, practice (Johnstone & Van Ness, 2007; Pranis, 2007; Zehr & Mika, 1998). Zehr and Mika (1998) outline three core principles that underpin restorative justice initiatives. First, criminal conduct *violates* both people and their relationships with one another. This violation harms all of the key stakeholders in crime—victims, offenders, and communities—whose needs therefore ought to be actively addressed through a restorative process of some kind. Second, crime results in both *obligations* and liabilities for offenders. The offender is obliged to take responsibility for the crime and attempt to repair the damage caused. While coercion is to be avoided, offenders may be compelled to fulfill their obligations. The intention behind holding offenders accountable is to achieve reparation rather than to punish them, although there is some tension evident between these two conflicting values (see below). Additionally, the community is obliged to support both the victim and the offender in dealing with the effects of the crime. Third, the purpose of restorative justice is to facilitate community *healing* by repairing the harm that results from crime; more specifically, the fractures occurring within relationships between victims, offenders, and the community that inevitably occur following offending. These principles have a number of human rights implications, which will be discussed later in this paper.

In order for restorative principles, such as those outlined above, to be realized within restorative justice initiatives, the stakeholders and facilitators in programs are urged to adhere to particular sets of values which are conceptually linked to the three principles and effectively unpack the notion of restorative practices. Pranis (2007) lists several values that are commonly agreed upon as essential to restorative practices including respect, responsibility, non-domination, and dignity. These values are apparent in the following quote from Morris (2002) who argues that restoration for victims involves “restoring...[their] security, self-respect, dignity and sense of control” (p. 604), while for offenders, restoration entails “restoring responsibility to them for their offending and its consequences, restoring a sense of control to them to make amends for what they have done and restoring a belief in them that the processes and outcomes were fair and just” (p. 604).

Therefore, while there is no agreed definition of restorative justice there are a number of important features evident in most contemporary restorative practices: inclusiveness, reparation, and the transformation of community and state institutions comprising the justice system. These features are associated with restorative values (e.g., repair, inclusiveness, dignity, responsibility, honesty, equality, healing, transformation, fairness etc.) and principles (e.g., crime violates interests of victims and other community members; offenders have reparation obligations), which are all intended to ameliorate the damage created by crime to relationships between victims, offenders, and other key stakeholders. Despite the wide variety in concrete restorative practices such as family group conferences, offender/victim mediation, sentencing circles and their local variations, there are commonalities evident in their core assumptions arising from the values and principles noted above. We suggest that at least four key assumptions appear to underlie most, if not all, restorative justice initiatives. First, a flexible, informal justice system (a.k.a. restorative justice) is believed to be superior to a rigid, formal system (a.k.a. the conventional criminal justice system). Second, victim participation is deemed to be a necessary precondition for just outcomes. Third, the broader concerns and interests of the community (i.e., communitarianism) should override the narrow claims of individuals when it comes to the question of what constitutes a fair and just outcome following an offence. The community includes the victim(s), offenders, family, representatives of the relevant local community, and possibly of the state, and certainly goes beyond the typical participants in a criminal justice case (e.g., prosecutors, defense lawyers, judges, offenders etc.). Fourth, cultural/social relativism is considered necessary to achieve justice. The fourth assumption relates to the specific norms, beliefs, and practices of the various groups living within a community and is a plea not to assume that the views of dominant class or group ought to determine the nature of an acceptable restorative outcome or dictate the protocols that comprise restorative practices.

It is important to note that these assumptions underlie both the process- and outcome-based definitions of restorative justice, and are interdependent. For example, the flexible, dynamic nature of restorative justice enables stakeholders to direct the process and determine the outcome, both of which may be culturally bound depending on the cultural affiliations of the participants. Considering the fundamental nature of these restorative justice assumptions, it is imperative to evaluate their impact on the human rights of offenders. However, before we embark on this discussion, it is first necessary to articulate what we mean by the term *human rights* and to specify how we intend to justify them. Our discussion is necessarily sparse given the word limitations in a wide-ranging paper such as this (for a fuller discussion, see Griffin, 2008; Nickel, 2007; Orend, 2002; Ward & Birgden, 2007).

3. Human rights

3.1. Definition and justification of human rights

A right can be viewed as a legitimate ethical claim asserted by an individual for something that is owed to him or her by another person or institution (Gewirth, 1996; Hohfeld, 1919; Orend, 2002). The claim could be for specific goods such as essential materials for survival or against other people to allow the claimant to engage in certain actions (i.e., non-interference in the rights-holder's affairs). Thus, a claim right has a number of elements: a *rights-holder* (i.e., the moral agent who makes the claim), the assertion of a *claim*, an *object* of the claim (e.g., free speech or liberty), the *recipient* of the claim (i.e., duty-bearer), and the *grounds* for the claim.

Rights in this sense are viewed as entitlements to non-interference from others in the agent's affairs or to the provision of goods that are seen as being owed to the person concerned. Rights involve *duties* or *obligation*; the recipient of the claim therefore has a duty to provide the claimant with the object in question. Rights theorists also typically make a distinction between negative and positive rights (Churchill, 2006; Freedden, 1991; Orend, 2002; Rasmussen & Den Uyl, 2005). A *negative right* is a right that imposes a duty of inaction on the duty-bearer and simply requires that the entity concerned (a person or institution) refrains from acting. A *positive right* is a right that imposes an obligation on the duty-bearer to act in certain ways in order to provide the rights-holder with a specific good.

What then are human rights? A human right is a *claim right* held by individuals in virtue of the fact that they are human beings (Griffin, 2008). Human rights are not tied to a particular social class, professional group, cultural collective, racial group, gender, or any other exclusive category. Individuals hold human rights simply because they are members of the human race and as such are considered to be entitled to a life characterized by a certain level of dignity. Such a life ultimately is based on the capacity and opportunity to form a conception of a worthwhile life and the chance to realize this conception without undue opposition from other people. The dignity of human life is thought by rights theorists to reside in the ability to make fundamental life choices for oneself and the satisfaction of basic human needs enabling individuals to live at least minimally worthwhile lives. In order to do this, it is necessary that certain *well-being* and *freedom* goods are available to the person (Gewirth, 1996; Griffin, 2008; Miller, 2007). According to theorists, human rights are grounded by reference to personhood or need considerations rather than moral facts or truths that are evident within the fabric of the world. What they mean by this is that the concept of agency and the capacity, ability, and opportunities to form and pursue important life goals (with a reasonable chance of success), depend on individuals' abilities to evaluate their goals and associated good lives conceptions, to formulate a plan to achieve them, and the possession of the basic psychological and physical well-being elements required to function as an effective physically embodied person in the world as it exists (i.e., Freedden, 1991; Gewirth, 1996; Griffin, 2008; Orend, 2002).

A number of justifications have been proposed for human rights ranging from a rational process leading to consensus on a set of entitlements and obligations to certain characteristics of human beings such as sentience, rationality, basic need/interests, or agency (e.g., Nickel, 2007; Orend, 2002). In our view the most powerful justifications are those based on needs or agency/personhood concepts, as these alone seem able to reliably extend the reach of human rights to all persons within a society and those living in different countries. Griffin (2008), for example, proposes that human rights can be grounded in three core features of persons: (a) autonomy or the ability to make important decisions for oneself, (b) possession of a set of minimal resources and capabilities, such as education and health, and (c) liberty, where other people do not prevent someone against their will from applying their conception of a worthwhile life (p. 33). In a related vein, Gewirth (1981, 1996) argues that human rights function to protect the core conditions required for people to function as agents; moral agents are individuals capable of formulating their own personal projects and seeking ways of realizing them in their day-to-day lives. According to Gewirth, individuals have rights to whatever is necessary to achieve the purposes of their actions because without such guarantees, they may not be able to function effectively at all (i.e., they will be unable to successfully realize their goals). Finally, Miller (2007) asserts that human rights are justified by their ability to ensure that individuals' basic or intrinsic human needs are met. An intrinsic need is defined as "...those items or conditions it is necessary for a person to have if she is to avoid being harmed" (p. 179). For all three theorists, what holds for any individuals with respect to their rights also extends to all other people, and in any community the rights and obligations of every person need to be respected and factored into social and political decisions (for a comprehensive description of Gewirth's theory of human rights as applied to correctional practice, see Ward & Birgden, 2007). Additionally, human rights are viewed as imposing both positive and negative duties on states and other people, which they are ethically obligated to meet within certain practical constraints (e.g., they have the resources and/or abilities to meet the claim). Furthermore, when there are competing interests and demands arising from individuals' human right claims, it is necessary to evaluate each claim with respect to its importance and to arrive at a solution that ideally achieves a balance between the entitlements of all claimants. Sometimes, it may not be possible to satisfy all just entitlements and the respective duties may be prioritized according to their degree of need or urgency.

The relationship between values and human rights is well articulated by Michael Freedden (1991) who argues that:

...a human right is a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeal for deliberate action to ensure such protection. (p. 7)

Freedden's definition points to the fact that human rights are intended to function as *protective capsules*, to provide a defensive zone around individuals so that they can get on with the business of leading good and meaningful lives. That is, a life that is chosen by them and that involves the unfolding of personal projects embodying their particular commitments. Theorists such as Griffin, Miller, and Gewirth argue that human rights protect what are considered to be the essential interests of human beings: needs, capacities, and experiences that if guaranteed respect their dignity as persons and if violated result in lives of misery and diminishment. The violation of human rights occurs when individuals are treated as objects, simply as means to other peoples' ends rather than as ends in themselves (also see Churchill, 2006; Freeman, 2002; Freedden, 1991; Gearty, 2006; Gewirth, 1981, 1996, 1998; Lomasky, 1987; Nussbaum, 2006; Orend, 2002; Talbott, 2005; United Nations, 1948). In brief, human rights create a space within which individuals can lead at least minimally worthwhile lives that allow them to maintain a basic sense of human dignity. Human rights do not exhaust the moral or justice arena and only protect the internal and external conditions necessary for a *minimally* worthwhile life. In essence, the claim is that the core requirements of personhood and agency constitute these basic conditions and ought to be vigorously defended by the state and its citizens.

3.2. The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights (UDHR) consists of a preamble asserting the dignity of human beings and 30 articles articulating specific rights to objects such as freedom from torture, security of the person, a fair trial and due process, right to own property, freedom to and from discrimination, freedom to marry, the right to work, religious freedom and so on. The UDHR was followed by two international covenants in 1966 (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights) that provided more detail on the various articles outlined in the original UN declaration (Freeman, 2002). Following Orend (2002) it is possible to group the various rights contained in the UDHR into five clusters, each cluster associated with a particular object: personal freedom, material subsistence, personal security, elemental equality, and social recognition. The human rights object of *personal freedom* refers to a subset of objects such as freedom of speech, assembly, movement, association, conscience, religion, and is associated with a number of the specific rights contained in the UDHR. Furthermore, it is directly linked to individuals' right to rely on their own judgment when deciding how to live their lives. The human rights object of *security* concerns the physical safety and welfare of individuals and includes more fine-grained objects such as freedom from torture, violence, and rights to seek asylum. The object *subsistence* refers to a subset of objects including rights to basic levels of physical health, food, water, and education. *Equality* denotes objects such as equality before the law, and freedom from discrimination on the grounds of religion, gender, disability, or some other feature considered to be irrelevant for the ascription of individuals' moral status. Finally, *social recognition* is essentially concerned with acknowledging individuals' rights to direct the course of their own lives, and to be treated in a dignified and respectful manner in accordance with their status as autonomous agents. The objects of self-respect and self-esteem are aspects of this category and point to the importance of individuals possessing positive attitudes toward themselves and their own lives (in a sense, this is the internal component of human dignity). Thus according to the UDHR and the two covenants, human rights are universal entitlements to certain objects that if obtained will result in at least minimally decent and dignified human lives.

In our view, it is useful to distinguish between the core values protected by human rights and their ultimate operationalization into more specific rights evident in documents such as the UDHR (Ward & Birgden, 2007). The movement from core values to specific ones is one of decreasing abstraction, from extremely abstract values and rights to quite specific rights such as the entitlement to paid holidays. In our conception, there are three layers to human rights: the core values of freedom and well-being protected by rights and a justificatory theory (e.g., Gewirth, 1981, 1996; Griffin, 2008; Miller, 2007), their unpacking into further subsets of goods or objects, and specific human rights specifications or policies outlined in documents such as the UDHR (see Fig. 1). The critical issue is to make sure that the rights specified in covenants and declarations are always approached in light of the five objects and core values. Failure to do so will make the various lists of human rights appear to be arbitrary, overly specific, and prescriptive. Corresponding to each of the three layers of our human rights conception are corresponding duties to respect the stated rights; advancement outward from human rights abstraction is likely to be associated with legal enforcement (alongside moral and social legitimacy) with the inner circles tending to reflect primarily moral legitimacy. This is due to the abstract nature of the core values and their corresponding vagueness.

In summary, human rights are a subset of moral rights held by all human beings that protect the basic conditions of agency or personhood and as such ensure that people have opportunities to experience lives of dignity. Values of personal freedom, material subsistence, personal security, elemental equality, and social recognition reflect these conditions, and also underpin the UDHR and its associated protocols and treaties. One of the authors has argued elsewhere that because human rights are held by all human beings, they cannot be *forfeited* by those who violate the rights of others but may in appropriate circumstances be *curtailed* (Ward & Birgden, 2007; also see Lippke, 2002). Furthermore, the degree of curtailment needs to be carefully argued for and not simply reflect the whims and administration needs of correctional institutions and the community. The possession of human rights by offenders entails that any correctional policy or practice should be in accordance with the relevant human rights protocols and the ethical (human rights) concepts underpinning them. We will now discuss the relationship between human rights and restorative justice initiatives to examine their points of convergence and divergence. Restorative justice concepts and human rights represent two important moral resources for criminal justice practitioners, and any tension or conflict between them constitutes a serious ethical and practical problem.

4. Restorative justice and human rights: points of convergence and divergence

While the four assumptions underlying restorative justice practices that we identified earlier do have the potential in some instances to protect the human rights of offenders, they also run the danger of violating the rights of offenders in certain contexts. We will now discuss these points of convergence and divergence between the assumptions at the core of restorative practice and the five human rights objects (values) outlined in the model above, namely: personal freedom, personal security, social recognition, material subsistence, and elemental equality. To reiterate, we suggest that these five values can be viewed as elaborations of the well-being and freedom values held by human rights theorists to protect the core conditions of agency (i.e., freedom, well-being/needs), and therefore to justify human rights treaties and their associated practices.

4.1. Assumption 1: a flexible, informal justice system is superior to a rigid, formal system

Both flexibility and informality are privileged within restorative justice settings, features that impact on the human rights of offenders in a number of ways. A flexible, informal justice system can potentially engender an environment where offenders are

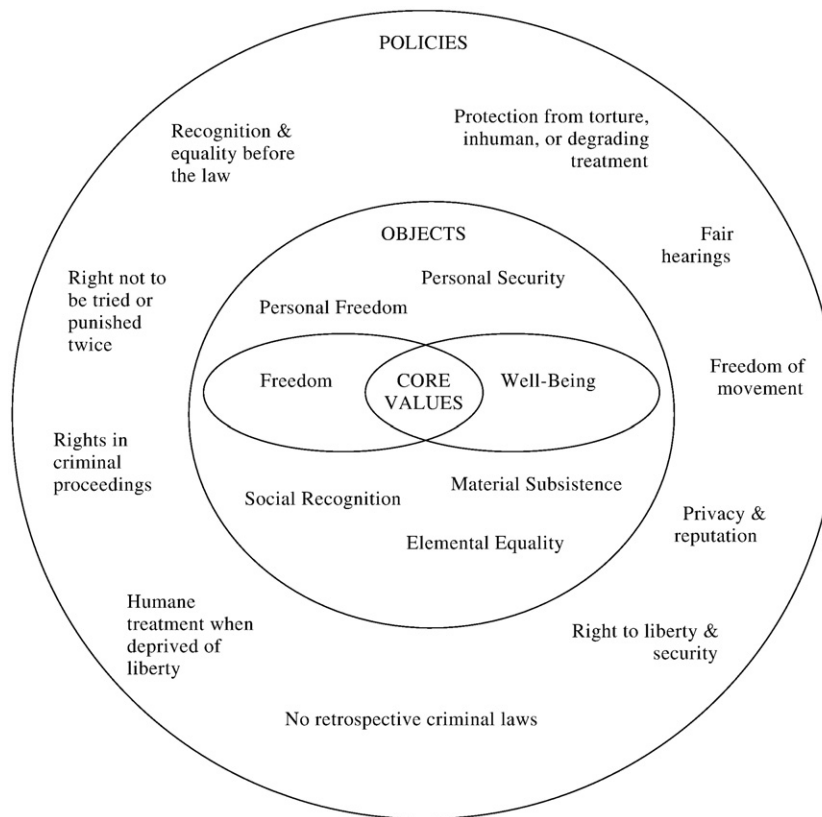


Fig. 1. A model of the structure of human rights.

free to present their perspectives and to account for their actions (Wright, 1998). Radzik (2007) argues that the restorative justice paradigm offers an ethical advantage over conventional criminal justice in that offenders are treated as moral agents: "In recognizing that wrongdoers have moral obligations, we recognize their status as agents and not 'things', as subjects and not objects. This is crucial to treating them with the respect that all humans deserve" (p. 192). She thus points to the potential of restorative justice to attend to fundamental human rights such as dignity and respect, which are, as we discussed earlier, the foundational values in most conceptualizations of restorative justice. Braithwaite (1999) concurs that "a space that gives the offender an opportunity to choose to put things right is what restores dignity. It is such a choice to put things right that most nurtures a continuing commitment to keep things right, that nurtures rehabilitation" (p. 68).

Braithwaite (1999) and Radzik's (2007) comments seem to suggest that restorative justice proceedings enable the personal freedom and social recognition of individual offenders. Both these human rights objects point to the importance of protecting freedom of choice, autonomy, and personal agency. For restorative justice initiatives to be truly respectful of these rights, it is imperative that offender participation in such proceedings is voluntary thus protecting the autonomy of the offender concerned. If participation is voluntary, it is likely to enhance the personal freedom and social recognition of the offender by providing them with a space to freely discuss the precipitants and consequences of their criminal action(s) as Braithwaite and Radzik envision.

Unfortunately, while the potential exists for offenders to be treated respectfully and with dignity as moral agents, there is equally the potential for this agency to be undermined through offenders being coerced to participate in restorative justice processes. In our view, a possible reason for this conflict is that the competing interests of victims, offenders, and the community has not been acknowledged or dealt with explicitly. It is inevitable when attempting to deal with the various interests at stake in restorative practices that there will be problems reaching a solution that satisfies all parties. The danger is that offender wishes will be trumped by those of the community and victim(s), and that the option to either accept an outcome or return to court is really a form of subtle coercion. What this objection highlights is a possible bias toward the rights of victims and the good of the community implicit in restorative practices. Our point is that it is important not to overlook the potential for human rights and restorative practices to conflict in situations where there could be significant differences in perspectives between the parties involved.

These concerns are especially pertinent given that not all restorative justice advocates believe that coercion should be avoided (e.g., Braithwaite, 1999; Walgrave, 2007). While some advocates see an absence of coercion as one of the cornerstones of restorative encounters, others take a more fatalistic approach. Braithwaite (1999), for example, likens the conventional justice system to the Sword of Damocles and states that the "challenge is to have [it]...always threatening in the background but never threatened in the foreground" (p. 64). This implies that the conventional justice system should be utilized as a coercive tool, albeit

an implicit one. Some writers appear to be more conflicted in their approach to the issue of coercion. In their recent article, [Zehr and Mika \(1998\)](#) state, “Voluntary participation by offenders is maximized; coercion and exclusion are minimized. However, offenders may be required to accept their obligations if they do not do so voluntarily” (p. 51). Nevertheless, they then go on to declare, “Unintended consequences such as the cooptation of restorative processes for coercive or punitive ends, undue offender orientation, or the expansion of social control, are [to be] resisted” ([Zehr & Mika, 1998](#), p. 53). This latter assertion belies their first and leaves the reader feeling rather confused as to what role coercion should play restorative justice practices.

Offenders may feel coerced to participate in restorative processes for a number of reasons, including fears that if they do not, they will be discriminated against or subject to more severe sanctions in court ([Ashworth, 2002](#); [Eliaerts & Dumortier, 2002](#); [Karp, Sweet, Kirshenbaum, & Bazemore, 2004](#); [Radzik, 2007](#)). It is not difficult to imagine how such discrimination may occur. For example, if restorative justice initiatives are highly valued in a community and an offender chooses not to participate in this process, the court may penalize them more harshly owing to the assumption that refusal to participate occurs because they do not want to be held accountable or lack remorse ([Ashworth, 2002](#)). [Braithwaite \(2005\)](#), for example, states that “crime should always be confronted with a presumption for mercy that is conditional upon participation in a truth-seeking process that identifies paths to prevention” (p. 283). The implication is that if offenders do not choose to participate in this “truth-seeking process”—that is, a restorative justice process—then they effectively waive their right to mercy. This comment, however, neglects the numerous reasons why offenders may choose not to participate in restorative justice encounters, which could include lack of trust based on prior experiences or mental health difficulties. Furthermore, an emphasis on mercy in restorative situations might override the autonomy (freedom) and possibly well-being rights of offenders, and places them in a position where the imposition of a lesser sentence is entirely the prerogative of others, hardly a process where the rights of all parties are respected and each actor regarded with the respect due to moral agents.

Additionally, for the choice to be considered truly voluntary, offenders need to be fully informed as to how restorative justice processes differ from those of the conventional justice system. If they are not fully informed then, by implication, the freedom to make decisions is compromised and their subsequent autonomy threatened. In this kind of situation, the voluntariness of offenders' participation in the restorative justice initiatives could be questioned and the ethical legitimacy of the outcome cast in doubt. [Eliaerts and Dumortier \(2002\)](#) argue that “legal assistance is almost unavoidable” (p. 213) in restorative justice processes to ensure that participants are fully informed before providing their consent. However, restorative justice advocates may fail to fully inform offenders of their rights, such as the right to seek legal counsel, due to the “evangelical fervor” ([Roche, 2007](#), p. 88) that often pervades restorative justice initiatives. [Ashworth \(2002\)](#) maintains that “enthusiasm for [restorative] processes may lead proponents either to overlook the need for safeguards, or to imply that they are not relevant” (p. 591).

The enthusiasm noted by [Ashworth \(2002\)](#), by the view that restorative justice processes are antithetical to those of the conventional criminal justice system, where the former is viewed as good and the latter as bad ([Daly, 2002](#)). This type of oversimplified dichotomy serves to exaggerate the differences and disregard any commonalities, between these systems ([Daly, 2002](#); [Roche, 2007](#)). The allocation of the two systems of justice into such crude value categories is problematic because restorative justice practitioners may become overconfident and believe that their system cannot violate offenders' human rights. [Roche \(2007\)](#) highlights this danger in the following statement: “[the] risk of not recognizing the potential for conferences to punish people (whether it be desired or not) is that the importance of checks and balances can be overlooked” (p. 86). In other words, restorative justice advocates may be so convinced by their own rhetoric—that restorative processes are antonymous to retributive (the status quo) justice—that they may fail to inform offenders of their rights because they believe these automatically will be protected within a restorative context. Alternatively, they may not identify human rights violations because they do not believe these can occur in restorative settings. The failure to monitor possible human rights violations is made more likely in the absence of a deep understanding of the relationship between specific justice practices and the ethical theories used to ground or justify human rights. According to the analysis utilized in this paper, human rights are best construed as protective capsules centered on agency and the inherent dignity derived from being able to formulate and pursue one's own conception of a worthwhile life ([Gewirth, 1996](#); [Griffin, 2008](#)). The specific list of human rights found in the UDHR and the numerous treaties and protocols associated with this historic document are not enough on their own to determine ethical decision-making in political, policy, and practice domains.

Coercion is a particularly salient issue in restorative justice encounters that involve juvenile offenders because of the power imbalances between young people and adults ([Allen, 1998](#); [Becroft & Thompson, 2007](#); [Braithwaite, 2002b](#); [Haines, 1998](#)). [Haines \(1998\)](#) summarizes the events of a restorative justice initiative for young offenders as follows:

...1 — a room full of adults (many of whom would be authority figures, who may be able to exert considerable power over a young person), setting the agenda, determining what is relevant, leading the proceedings and coming to conclusions, and 2 — a set of conclusions which invariably involve the young person in some form of (reparative or compensatory) action or apology making or contractual agreement which is very one-sided and biased against the young person. This is reintegrative shaming which reinforces the dominant order of society (no matter how unjust) and only if the young person is willing and capable of moving themselves back into the community. (p. 99)

Restorative justice advocates may argue that the above quote is not representative of youth justice conferences in their regions. Indeed, the regulations governing juvenile offenders and restorative justice programs do differ considerably between jurisdictions and countries. However, it is not difficult to imagine how the scenario envisioned by Haines may occur. We will use the example of family group conferences in New Zealand to illustrate our point.

In New Zealand, family group conferences are mandatory for all youth offenders who are not subject to diversionary policing (Maxwell, 2007a; Maxwell & Morris, 2006). Although youth offenders do not necessarily need to admit guilt before attending a family group conference, they are expected to agree with the facts of their case as portrayed by the police representative present at the conference, and to subsequently admit responsibility for what they have done (Maxwell & Morris, 2006). If the young person disagrees and will not accept responsibility, their case is typically referred to the youth court (Maxwell & Morris, 2006). It is highly questionable whether young people's choices in this context are truly voluntary when they are informed that the consequence of them not admitting culpability is for their case to go before a judge. Morris and Maxwell (2001) have also noted that the supposedly neutral facilitators of such conferences are typically youth justice coordinators who are employed by Child, Youth, and Family services. Child, Youth, and Family is the welfare agency in New Zealand that is responsible for investigating cases of child abuse. It is difficult to imagine how young people and their families could participate openly and honestly in a forum facilitated by a child welfare employee. To remedy this conflict of interest, Morris and Maxwell (2001) suggest that a separate statutory organization is created to manage family group conferences. Additionally, one way of dealing with concerns about the possible threats to human rights in youth conferencing has been to introduce rights-based practice frameworks and to use youth advocates (Connolly & Ward, 2008). It is necessary to stress that with youth offenders there is a complex relationship between needs and rights that is not easily dealt with, although there is certainly an awareness of the importance of addressing the problem in ways that do not violate human rights (Connolly, 2008, personal communication). It is also concerning that while the evaluations of youth conferencing in New Zealand have examined self-reported satisfaction with procedural fairness, there is no specific data available from evaluations of these conferences on whether youth offenders' human rights were respected (Maxwell, 2007a).

Considering that some advocates believe that coercion is necessary in restorative justice encounters, it is important to consider whether this argument does indeed have some merit. While coercion obviously conflicts with offenders' rights to free, autonomous decision-making, it could be argued that by engaging in criminal activities, offenders deserve to have some of their rights curtailed (see above). Voluntary participation could be one such right. Indeed, offenders who proceed through the conventional justice system are not necessarily given the option of whether or not they would like to go to court. Morris (2002) argues that restorative justice places "a different priority on the protection of offenders' rights by not adopting a procedure whereby offenders' lawyers are the main protagonists or spokespersons and their primary purpose is to minimize the offender's responsibility or to get the most lenient sanction possible" (p. 602).

However, there are two major reasons why it is critical to ensure that offenders are capable of making fully informed decisions and therefore truly do volunteer to participate in restorative justice encounters. First, while offenders are not expected to admit guilt before participating, they are typically expected to acknowledge responsibility for their actions (Maxwell & Morris, 2006; Pavlich, 2005; Skelton & Sekhonyane, 2007). This is problematic because admitting responsibility may not be in the best interests of the offender (see Warner, 1994). Second, unlike court systems, due to the informality of restorative justice processes there are not necessarily avenues through which offenders can challenge the information presented or appeal against decisions that are made (Skelton & Sekhonyane, 2007; Warner, 1994). Braithwaite (2002b) argues that since there is the potential for offenders to be treated unjustly, the "remedy has to be the absolute right of the accused to walk out of the restorative justice process and try their chances in a court of law" (p. 148). The problem with this option is that it presupposes that offenders are able to discriminate between degrees of injustice and decide whether or not they are likely to be treated more fairly in a restorative justice arena or a typical court situation.

This assumption also points to another, more troubling issue, that of offender competence. In order to be able to form a conception of a worthwhile life (including one where individuals seek redemption and re-entry into the community) and to implement it in the real world, offenders require a minimum level of freedom and well-being goods, plus an environment that is supportive of their aspirations and contains the resources necessary for them to achieve their goals (e.g., training opportunities, supportive networks etc.). Individuals with a history of deprivation and abuse may lack the necessary internal and external conditions to function as autonomous agents; that is, as people who are able to form their own views and goals on the basis of relevant information and effectively plan to realize them in an efficient and practical manner. One of us has argued elsewhere that offenders with marked deficits in adaptive and living skills may fall beneath the threshold required to live as effective agents in the world and therefore require significant degree of social and psychological scaffolding to help them lead finally worthwhile lives (Ward & Birgden, 2007). In the longer term, there needs to be active attempts to equip such individuals with the basic array of competencies required to function as independent persons in the world, necessitating considerable input from the state and its agencies, not to mention other members of the community. It is entirely possible that placing such vulnerable and poorly functioning offenders in restorative contexts is unwise and may result in unethical outcomes that violate their basic human rights to personal freedom, material subsistence, personal security, elemental equality, and social recognition. Daly (2003) notes that, "One reason that conferences succeed or fail is that offenders and victims come to conferences with varied degrees of readiness to make the process work" (p. 49). The concept of readiness has been defined in correctional treatment contexts by Ward, Day, Howells, and Birgden (2004) as "the presence of characteristics (states or dispositions) within either the client or the therapeutic situation, which are likely to promote engagement in therapy and which, thereby, are likely to enhance therapeutic change" (p. 650). Applied to restorative justice contexts, readiness refers to the presence of internal (skills, efficacy beliefs, knowledge etc.) and external conditions (supports, institutions, community resources etc.) that enable offenders to actively engage in the relevant processes in an informed and motivated manner.

Thus far, we have discussed the potential for offenders' personal freedom and social recognition to be enhanced as a result of the assumption that a flexible, informal justice system is superior to a more rigid, formal system. This seems to be a reasonable assertion, but only if offenders are able to give free and fully informed consent to participate in the process. Unfortunately, the

possible benefits of such flexibility and informality are tempered by the impact that these values have on the human rights objects of personal security and elemental equality, which incorporate due process rights (e.g., proportionality and equality before the law). The flexibility and informality prized within the restorative justice system can violate offenders' due process rights, primarily through privileging stakeholder participation and neglecting to ensure that offenders possess the basic capabilities required to make reasoned decisions concerning their lives and futures. We will now discuss how victim participation affects offenders' human rights in greater detail, before considering the potential impact of community participation on these rights.

4.2. *Assumption 2: victim participation is necessary to achieve justice*

At the most basic level, allowing the victim(s) of a crime to partly determine the consequences for an offender may violate the offender's rights to personal security, social recognition, and elemental equality. Ashworth (2002) comments that, "Impartiality is a key value in justice processes, and yet in restorative justice theory it stands in tension with other values such as participation, involvement, and empowerment" (p. 584). Impartiality is highly valued within the conventional criminal justice system because it is deemed necessary to achieve proportionality, which involves ensuring that sentences are proportional to the crime committed. This ideally should result in offenders receiving their 'just deserts'; offenders will not be subject to overly harsh or lenient punishments, and because the type of crime committed to a large extent determines what level of punishment is meted out, offenders who commit the same crime will be subject to similar sanctions.

Owing to the fact that values such as participation and empowerment are privileged over the value of impartiality in restorative justice settings, offenders who have committed the same crime may be held accountable in vastly different ways depending on the viewpoints of the other participants in the restorative process. If this does occur, an offender's right to a sentence that is proportionate to the crime committed is compromised:

The principle of proportionality goes against victim involvement in sentencing decisions because the views of the victims may vary. Some victims will be forgiving, others will be vindictive; some will be interested in new forms of sentence, others will not...If victim satisfaction is one of the aims of circles and conferences, then proportionate sentencing cannot be assured and may be overtaken in some cases by deterrent or risk-based sentencing. (Ashworth, 2002, p. 586)

This major point of tension between human rights values and restorative justice occurs because of the wish to respect the autonomy of victims and the good of the community by holding the offender to account, while at the same time overriding the offender's autonomy or freedom rights and downplaying the importance of equality of treatment.

It is not simply a question of advocates of restorative justice glossing over a conflict of values in certain contexts as some, in fact, do actively dismiss the principle of proportionality as irrelevant and inappropriate within restorative justice contexts (e.g., Braithwaite & Strang, 2001; Wright, 1998). For these advocates, proportionality belongs within the realm of the conventional justice system and has no place in restorative justice. According to Wright (1998), the lack of proportionality within restorative justice setting should not be viewed as problematic because "...while courts are aiming at consistency of punishment, where inequalities may indeed cause resentment...conferences aim at *reparation*, tangible or symbolic, which is rightly determined by the needs and wishes of the victim and the capabilities of the individual offender." (p. 83; italics in original)

The implication here is that punishment is antonymous with restoration, and reflects a belief in the dichotomy between the retributive (i.e., conventional) and restorative justice systems that we discussed earlier. Furthermore, it appears that the major emphasis is on holding the offender to account in accordance with the victim's wishes, rather than ensuring that the offender's fundamental rights to equality of treatment in legal proceedings and also to social recognition are met. There is also a suggestion that community balance or social harmony is a super-ordinate value that trumps the freedom and other core human rights of offenders (see below).

In contrast, Morris (2002) argues that achieving consistency is important but that practitioners should focus on achieving consistency in the processes rather than outcomes of restorative justice. She contends that while "[i]nconsistencies on the basis of gender, ethnicity or socioeconomic status per se...can never be right...[i]nconsistencies between outcomes which are the result of genuine and uncoerced agreement between the key parties, including victims, may be" (Morris, 2002, p. 610). Maxwell (2007b) describes how such inconsistencies come about within restorative justice programs:

Agreements that are reached...often vary considerably even when the nature of the offending and the characteristics of the offenders seem similar. The personal views and values of the individuals involved can have a major effect on decisions...In other words, what is seen as restoring the balance and harmony within the social groups can be very particular to the time, place, and people involved. (p. 22)

Advocates could, of course, fall back on the voluntary nature of restorative justice processes as a means of defending inconsistency and lack of proportionality in restorative outcomes. However, as we have already discussed, both coercion and agent competence can be an issue in such situations, especially with juvenile offenders. Skelton and Frank (2004) sum up the ambiguous nature of consent as follows: "The assumption that coercion disappears once there is consent to participate in a restorative justice process is dangerous and denies the nuances relating to power that are present in all human interactions" (p. 208). Radzik (2007) notes that considering victims can be driven to achieve restitution and offenders are often highly motivated to avoid going to prison, it is conceivable that they will each agree to reparations that do not necessarily respect their rights. Additionally, she maintains that participants should not be expected to safeguard their own rights during justice proceedings for a number of

reasons which we have already alluded to in our discussion of offender competency (Radzik, 2007). First, they may not have a sophisticated understanding of what they are entitled to. Second, participants may be culturally or socially conditioned to believe that they are not entitled to certain rights. Finally, they may not have the capability to insist upon their rights being respected.

At this point, it is useful to consider why the conventional criminal justice system has continued to place victim rights on the periphery, rather than at the centre of justice proceedings. The typical concern, touched on by Ashworth (2002), is that victim involvement in sentencing could lead to vengeful and disproportionate punishments. Radzik (2007) asks, “Will particularly vengeful victims insist upon too much in terms of restitution, while unusually kind and forgiving victims insist upon too little? Will especially repentant offenders agree to too much, while the most hard-hearted offenders will be able to negotiate lighter sentences?” (p. 202). The answer is that such outcomes are most certainly possible and it is for this reason that Ashworth (2002) argues that victims have a right to be provided with support, resources, and reparation after a crime, but they do not have the right to participate in the sentencing of the offender. In essence, the aim is to validate the victim's experience of the crime as harmful and wrong, and to assure him or her of the community's commitment to the norms that have been violated in the commission of the crime. Furthermore, the offender should be held accountable and the victim's loss of trust and hope adequately addressed. The overall aim is to restore confidence in the ability of a community to protect the victim and to restore the belief that his or her normative expectations are reasonable and that their violation constitutes a serious wrong (Walker, 2006). However, there is no requirement from a communitarian viewpoint to allow victims to decide on the sentence or outcome for an offender (see below).

Once again the issue of rights protection for juvenile offenders is an important topic of debate as critics have raised concerns about young offenders being subject to overly harsh or humiliating reparations which they may have difficulty contesting (Eliaerts & Dumortier, 2002; Umbreit & Stacey, 1996; Warner, 1994). Braithwaite (2002b) cites the example of a 12-year boy who attended a family group conference for shoplifting, the result of which was to make him to wear a t-shirt in public that said, “I am a thief.” Many restorative justice advocates do acknowledge that such non-restorative outcomes can occur within restorative justice encounters, and that benevolence and consensus are not necessarily guaranteed (Braithwaite, 2002b; Johnstone & Van Ness, 2007; Walgrave, 2007). To address this, Cavadino and Dignan (1997) argue that reparations should always fall within a set of pre-designated limits. Ashworth (2002) agrees that if restorative processes are implemented in any jurisdiction, there should be “clear and circumscribed proportionality limits” (p. 591).

Another critical issue with victim participation in restorative justice proceedings, which we have yet to explore, is that of victim identity. It is impossible to focus on the impact that victim participation may have on the offenders' rights, without questioning who qualifies as a victim. There is a common bias within many restorative justice accounts to focus on the ideal victim (Young, 2002); that is, individuals whose claims to victimization are clear-cut and unambiguous. This is problematic because it is commonly recognized in the criminal justice literature that offenders have often been victimized themselves. The fact that offenders can be victims too is sometimes mentioned within the restorative justice literature (e.g., Larson Sawin & Zehr, 2007; Morris & Maxwell, 2001; Van Ness, 1996; Zehr & Mika, 1998), but this acknowledgement is not developed beyond the notion that offenders are also entitled to restoration. Indeed, Haines (1998) notes that “restorative justice is not primarily concerned with restoring the offender (although this may be a beneficial by-product), but with restoring the harm done by the crime” (p. 107). However, this “by-product” of restoration is only available to offenders if they meet a certain set of expectations. In restorative justice encounters, offenders are

...expected to participate directly in the process, to speak about their offending and matters associated with it, to interact with the victim, to express their remorse about what has occurred, to apologize for what they have done, and to contribute to decisions about eventual outcomes. From all this, the offender is expected to have a better understanding of their offending and its consequences, to become accountable for the offending in ways they understand and to contribute to repairing the harm they have caused. (Maxwell, 2007b, p. 11)

It does not appear to be a priority within such encounters for the other stakeholders to attempt to understand offenders' potential experiences of victimization and the impact that this victimization may have had on their history of offending. Of course, this is understandable; it is difficult to imagine how this could be addressed within a restorative justice encounter without resulting in the victim feeling invalidated and disempowered. However, the fact that the victim's restoration is privileged above that of the offender's (that is, if the offender has had past experiences of being victimized), points to a lack of attention being paid to the rights of the offender to be treated with respect and dignity within restorative encounters.

This dismissal of offenders' rights to have their own experiences of victimization addressed is especially apparent in the following quote from Johnstone (2002):

...[while restorative justice] is concerned with the healing of offenders, this goal is to be pursued only insofar as it can be made compatible with the goal of achieving justice for their victims. Offenders must be held accountable to victims for the harm they have caused and must make serious efforts to repair such harm before they can expect their needs to be attended to. However...by holding offenders accountable and encouraging them to make amends for their behavior we are already beginning to meet their needs. (p. 95)

Offenders are thus expected to repair the harm they have caused to others, while the harm that others have inflicted upon them is largely ignored. To the authors' knowledge, there has never been a suggestion within the restorative justice literature to provide restorative interventions to offenders for past victimization they may have suffered. In this way, access to the identity of victim is

denied to offenders (see Pavlich, 2005, for a discussion on stakeholder identities within restorative justice). It is also interesting to note the assumption in the above quote that holding offenders accountable is a way of meeting their needs. If this statement is indicative of restorative justice encounters, then such processes may routinely violate offenders' rights to social recognition; that is, to determine what their own needs are in accordance with their status as autonomous agents.

Arguably, the emphasis in restorative justice initiatives on holding offenders accountable contributes to the discounting of offenders' experiences of prior victimization. Structural inequalities within society that may have contributed to the offender's criminal behavior in the first place may therefore be replicated within a restorative justice context where a victimized offender is not provided with the opportunity to seek their own restoration. As we have already mentioned, there are a number of ethically required responses that all victims are owed by the community and its members which revolve around a number of key moral repair tasks of giving victims a voice, vindicating their calls for justice and resentment toward the offender(s) and other responsible parties, holding the offender to account, and validating their concerns over the authority of the norms that were supposed to protect them. The dilemma is this: if victims of crime are owed acknowledgement, validation, vindication, and concerted efforts to restore or create trust and hope in other people, then surely so are victimized offenders? If individuals are victims of severe harm and they believe that their suffering is not acknowledged by the community, the offender not held accountable, and the norms not reaffirmed, they are likely to feel aggrieved and alienated. There is also a risk of distrust emerging and ultimately a loss of faith in the authority of the norms and a reduced expectation that their personal safety will be assured in the future. For example, if sex offenders have been victims of abuse themselves then it seems to follow that they have legitimate claims to moral repair initiatives from the community and mental health professionals. The fact that they have committed offenses and have been held to account for them does not on its own necessarily cancel out community, correctional agencies, and therapists' obligations. Failure to respond appropriately to victimized offenders is to risk inflicting a second level of injury on them, in effect, harming them via our neglect and failure to uphold the norms that are intended to protect members of the community (Walker, 2006). It is thus important to recognize that the boundaries between who has the right to claim the status of victim and who does not have this right are not always explicit. By replicating the conventional criminal justice system's definition of victimhood (see Pavlich, 2005), the restorative justice paradigm fails to attend to prior victimization experiences of offenders. This may be particularly applicable in the case of young offenders where the boundaries between offending and victimization can be relatively fluid, and individuals may move between one situation and the other in quick succession (e.g., intergenerational sexual abuse).

Up to this point, we have focused on the manner in which victim participation in restorative practices may violate offenders' rights to elemental equality and personal security. However, it is also the case that allowing victims to participate as stakeholders in the justice process can help facilitate positive changes in the way they regard offenders. Ward and Birgden (2007) have emphasized the importance of adopting a human rights perspective when working with offenders to ensure that they are treated as fellow human beings rather than as moral strangers. This is viewed as essential to the successful rehabilitation of offenders. Research evidence from the Reintegrative Shaming Experiments (RISE) in Canberra has provided interesting data on how victims' perceptions of offenders change following a conference encounter (Strang, Barnes, Braithwaite, & Sherman, 1999). Victims who participated in conferences felt less afraid of the offender and more sympathetic towards him/her after they had participated in a conference than they did before they took part. The RISE data thus provides some indication that victims who encounter offenders within restorative justice settings may be more likely to view offenders as fellow human beings at the end of the restorative process, when compared with victims who experience the more adversarial court system. It could be argued therefore that victim participation does have the potential to protect offenders' rights to social recognition. What this research highlights is the complex relationship between restorative justice practices and human rights, and the need to find ways of effectively integrating both sets of resources in the management of offenders and in resolving issues of victimization in a humane and just manner.

4.3. *Assumption 3: the good of the community (communitarianism) overrides that of the individual*

Most of the issues that we have raised thus far in regard to how victim participation impacts on the human rights of offenders are equally applicable to community participation in restorative justice programs. In many of the conceptualizations of restorative justice, the community is conceived of as a stakeholder along with the victim and the offender (McCold & Wachtel, 2002; Schiff, 2007; Van Ness, 2002; Zehr & Mika, 1998). Restorative justice advocates believe that when a crime is committed, it does not merely harm those immediately affected by the crime (that is, the victim and offender) but also impacts negatively on the wider community (McCold, 2004; Van Ness, 1996; Zehr & Mika, 1998). In this way, advocates see the community as having been subject to a secondary level of victimization. As such, members of the community are responsible for making known the extent of this impact and their beliefs about how it should be dealt with (Schiff, 2007). Similarly to victim participation, empowering community members to determine the level of reparation owed by offenders can violate the offenders' rights to elemental equality, social recognition, and personal security. For example, Warner (1994) comments on the potential for offenders to be discriminated against on the basis of gender and/or race within family group conferences. Since we have already discussed in some depth how victim participation may violate the due process and other legal rights of offenders, we will not revisit these issues here.

However, there are two related concerns that are specific to community participation in restorative justice that we have not yet considered, and which directly, or indirectly, impact on the human rights of offenders. First, there is very little concrete guidance in the restorative justice literature as to who qualifies as a community member. When asked to define community, restorative justice advocates typically refer to 'communities of care' which Schiff (2007) describes as "anyone who feels connected emotionally, physically, or in other ways to the victim(s), the offender(s), or the event itself" (p. 235). McCold and

Wachtel's (1998) definition of community highlights the difference between this notion of connected community versus that of geographical community:

Community is a feeling, a perception of connectedness—personal connectedness both to other individual human beings and to a group...In and of itself, community is not a place. In many areas, geographical units do not constitute or correspond to communities. The resident population may lack a sense of shared interests and there may be relatively few interpersonal connections between neighbors. (p. 72)

Both of these conceptualizations of community emphasize “connectedness” but beyond that, are vague, ill-defined, and could be criticized for being overly inclusive. Complications may arise when individuals belong to multiple communities (religious, vocational, gender-based and so on), each of which may endorse different sets of values and beliefs. The difficulty with such multiple allegiances is that they can result in conflicted loyalties and confusion over how best to frame and resolve problems. This particular problem mirrors the issue discussed earlier about value pluralism and the need to frequently balance sometimes conflicting values in criminal justice and everyday contexts (Wong, 2006).

Second, it is important to explore why community participation is considered an essential feature of many restorative justice programs. Dzur and Olson (2004) posit three reasons for community involvement in restorative justice processes: efficacy, empowerment, and education. Efficacy refers to the belief that community members are more effective than criminal justice professionals in particular justice related domains, such as supporting victims and reintegrating offenders. Empowerment relates to the idea that restorative justice enables communities to take more responsibility for social control. Finally, community participation is thought to facilitate the education of individuals on how the justice system functions and to affirm, or potentially modify, their social norms. Schiff (2007) takes a slightly different approach by arguing that the community has a number of responsibilities in the aftermath of criminal activity to ensure the well-being of its members, which include:

...developing and maintaining forums to discuss crime and its impact; identifying and communicating normative standards of collective living; conveying censure when such norms have been violated; and developing ‘collective ownership’ of the problems that crime presents in a context of informal social control and support. Moreover, communities must include and engage members in responding to crime; be informed about services and resources for victims and communities; and create a safe environment for citizens. (p. 241)

All of the reasons presented in favor of community involvement in restorative justice allude to the third key assumption underlying restorative justice, which is that the good of community is valued over and above the well-being and freedom rights of individuals. As an aside, we have used the term *communitarianism* to refer the emphasis on community goods when weighing the respective interests of individuals and the community. While we are aware that there is no necessary relationship between restorative justice practices and the ethical theory of communitarianism, there does seem to be a strong presumption on the part of a number of restorative justice advocates that an adequate ethical response to crime ought to seek to restore the relationships between the victim, offender, and the community. Furthermore, as stated above, the intent is to seek a balance where the goods of the community, in terms of such things as safety, trust, and the authority of ethical norms, are strongly supported and sustained.

Although many restorative justice advocates present community involvement and healthy functioning as ideals to strive for, in our view they do not pay enough attention to settings where social norms may be undesirable. It is difficult to imagine restorative justice practitioners advocating in favor of blatant racism or homophobia, yet certain communities may espouse such beliefs. Dignan (2005) astutely points out that

There is a presumption in much of the restorative justice literature that communities in general are reasonably benign, tolerant, likely to espouse broadly progressive values and that communitarianism is therefore ‘a good thing...[However] Many communities are intolerant, illiberal, coercive, engage in socially exclusionary practices and espouse a form of communitarianism that is not at all ‘individual centered’ but authoritarian and repressive. Where such communities claim to be adopting restorative justice practices, there are understandable concerns about the extent to which the demands of ‘the community’ may ride roughshod over the rights and interests of individual offenders or victims, particularly if they belong to ‘dissident’ or minority groups. Such concerns are accentuated where the ostensibly restorative justice processes are intended to, or do in practice, operate in the absence of any effective judicial safeguards. (p. 101–102)

As we have already mentioned, allowing community members to determine how an offender is to be held accountable for their wrongdoing and positioning the community as a stakeholder who has been harmed by an offence, can significantly impact on offenders’ rights to elemental equality and personal security. The involvement of communities in sentencing decisions thus runs the risk of “justice by geography” (Ashworth, 2002, p. 582). Although Ashworth (2002) concedes that geographical justice does occur in the conventional criminal justice system, he notes that in this system it is regarded as failure whereas in restorative justice initiatives, it may be regarded as a desired outcome.

An additional concern is how the current risk averse climate may impact on the offender's right to personal freedom (Ward & Maruna, 2007). Offenders can be viewed as essentially bearers of risk to be effectively managed or even quarantined to ensure that the community is protected and its citizens are safe. This view is associated with severe restrictions imposed on sex offenders in the USA concerning matters such as accommodation, location, and freedom of movement (Ward & Birgden, 2007). Pavlich (2005)

comments that, “When people become aware that a crime has been committed in their midst, they are made acutely aware of their vulnerability as potential victims. This, in turn, produces fear and often distrust among members; it also disturbs a presumed order of life—exactingly profound emotional costs” (p. 93). In an effort to protect themselves from being victimized, community members may impose overly restrictive sanctions on offenders which are driven by risk aversion rather than actual safety concerns. In this way, the community’s rights may be privileged, without sufficient justification, over and above those of offenders.

Pavlich (2001) identifies a further problem with community participation in restorative justice, which is that advocates “(implicitly) assume an identifiable, common, and unified community capable of being restored and/or reintegrated” (p. 57). Indeed, Skelton and Sekhonyane (2007) assert that, “Restorative justice works best in a functional community founded on the principles of good neighborliness. However, in communities of strangers such principles do not necessarily exist” (p. 587).

Another major difficulty with the assumption that communities ought to be restored is the fact that some communities may be criminogenic (Pavlich, 2005). As a result, “most [restorative justice] programs focus on restoring individual offenders to the very social settings whose strategic envelopes and power differentials generated the identities that brought them into conflict with the law in the first place” (Pavlich, 2005, p. 79). In fact, research on predictors of risk has consistently revealed antisocial peers and social circumstances to be strongly associated with increased rates of recidivism (Andrews & Bonta, 2003). In such cases, especially when there is little guidance as to which members of the community are allowed to participate in restorative encounters, community participation may actually promote criminogenic needs. Haines (1998) agrees that some forms of restorative justice do “bolster and buttress the existing social order with little or no recognition of the vast social inequalities or of the importance of considering broader issues of social justice” (p. 98). In this way, community participation in restorative justice programs can simply reinforce the social inequalities that, in all likelihood, contributed to the offender transgressing the social norms in the first place. Of course, a number of restorative justice advocates have recognized these flaws and as a result, have begun promoting the concept of transformative justice (e.g., Morris, 2000; Sullivan & Tift, 2005).

In summary, the assumption that the good of the community ought to trump individual interests appears to underpin some restorative justice policies and practices. It certainly makes sense to locate the causes of crime in social ecological variables alongside individual differences and to seek to promote the re-entry of offenders into their chosen community. It is also reasonable to view crime in both moral and legal terms, and to seek to hold offenders accountable for their offenses and to reassure victims (and the community) that what happened to them was unacceptable. From both ethical and practical viewpoints, we agree that the community ought to have some input into the criminal justice system and the punishment and rehabilitation of offenders. The key problem is that the values of freedom and well-being (and their elaboration into the five human rights values or objects) protected by offenders’ human rights can conflict with the community and victim interests in feeling safe and wanting retribution or some restoration of control. The tensions between the various stakeholders’ interests and those of the offender are unavoidable and care ought to be taken to ensure that in any given context offenders’ human rights are not violated, although some degree of curtailment may be justified. To respect the dignity of offenders, victims, and members of the community, core entitlements and duties ought to be carefully balanced and safeguards installed to ensure that the minimal threshold for a dignified and worthwhile life is met. We will now examine the impact that the final restorative justice assumption—that a culturally relative outcome is a just outcome—has on the human rights of offenders.

4.4. Assumption 4: cultural/social relativism is a precondition for justice

It is hardly surprising that cultural/social relativism is lauded as fundamental to restorative justice given the emphasis on flexibility, informality, and stakeholder-determined outcomes within this justice paradigm. Restorative justice advocates cite cultural sensitivity as one of the strengths of restorative initiatives (Braithwaite, 2002b; Morris, 2002); indeed, Consedine (1995) asserts that the family group conference model is “culturally sensitive, with whatever is culturally appropriate being the norm” (p. 106). Actively promoting cultural relativism within a justice system has a number of human rights implications. A justice system that is culturally responsive can be beneficial in that it can cater to offenders’ needs by incorporating cultural practices and beliefs into the justice proceeding. This may enhance the offenders’ rights to personal freedom and social recognition by providing them with the opportunity to define justice processes and outcomes in accordance with their cultural values. However, taking the culture of individual offenders into consideration when determining how they should be held accountable for their wrongdoing violates offenders’ right to elemental equality because it is fundamentally discriminatory. This discrimination may be positive in that the offender could benefit from it, but it is equally likely that it may result in negative outcomes (for example, an offender could be subject to harsher penalties because of stereotypes about their culture or race).

The assumption that cultural/social relativism is preferable to universal justice principles is problematic for a number of reasons. For a start, there is no guarantee that those involved in a restorative justice proceeding will be of the same culture; indeed, it is highly unlikely that cultural homogeneity is the norm within restorative justice encounters. Even if this was the case, the implication that people who belong to the same culture necessarily hold similar values and share common belief systems is simplistic and improbable (Parekh, 2006; Wong, 2006). Community belonging and cultural identity is characterized by fluidity and contradiction; as stated above, individuals are typically members of multiple communities, which may espouse contrasting values and belief systems. Pavlich (2001) contends that “notions of community are fairly exposed as contingent constructs; enunciated by specific discursive strategies that rely upon, and are shaped by, complex socio-political negotiations in particular contexts” (p. 67). Thus people may identify with particular cultural communities at certain times but not at others.

The restorative justice literature provides very little guidance as to how clashes between cultural norms and values are to be resolved within restorative encounters. Cunneen (2003) comments on the likelihood of the dominant culture’s values being

reinforced within restorative justice encounters by drawing attention to the problematic relationship that many indigenous peoples and ethnic minorities have with the state and state-run enforcement agencies (e.g., the police) owing to histories of colonization and oppression. Indeed, in such societies, “the symbolic role of the police may be one of racism and harassment” (Cunneen, 2003, p. 184). He argues that the rhetoric that promotes restorative justice as culturally sensitive does not match the reality of restorative justice programs. As a result, it is likely that when two or more cultures participate in restorative justice encounters, the processes and outcomes will reflect values that are relative to the dominant culture due to entrenched socio-political hierarchies.

A major ethical strength of a human rights perspective is that it acknowledges the essential entitlements, and the protection of these core interests, of all human beings in world (Connolly & Ward, 2008; Griffin, 2008; Parekh, 2006). While people are profoundly shaped by their culture, the combination of biologically based needs and shared living conditions entails that all human beings have certain interests in common. The function of human rights is to protect the necessary conditions for a minimally worthwhile life, and this means ensuring that each person has the capabilities to realize their goals concerning the kind of life they would like to live and also possess certain well-being goods (e.g., education, health care, adequate living conditions, freedom from physical pain etc.).

The conception of human rights presented earlier in this paper is sensitive to social and cultural differences. The notions of freedom and well-being and the various goods that constitute them legitimately vary according to local conceptions and norms (Wong, 2006). For example, in one culture education may involve secular, scientific schooling, while in another it may also involve instruction in traditional cultural beliefs and practices. In other words, the rights to the core values of freedom and well-being are shaped somewhat by local interpretations of the component goods. Of course, common human needs and interests derived from a shared human nature should also be taken into account when considering individuals' claims for the goods of well-being (Buss, 1999). The capabilities necessary to achieve the two conditions of freedom and well-being are wide-ranging and depend on the availability of social and cultural resources of one kind or another. What holds for the values protected by human rights, holds for offenders and the stakeholders in criminal justice settings including restorative justice encounters (Ward & Birgden, 2007).

5. Conclusions

In this paper, we have examined the relationship between two valuable resources for policy-makers, researchers, and practitioners in the criminal justice system arena: restorative justice and human rights. In general terms, restorative justice is a grassroots movement that has as a major aim the healing of victims and their communities following crimes, through the active involvement of key stakeholders. The aim is to restore and/or establish healthy relationships between individuals and to promote just outcomes through following an agreed upon set of procedures. In this process, the authority of the norms that were violated are reaffirmed, the unjust suffering of victims acknowledged, and their desire for reparation vindicated and facilitated. In order for individuals to promote their own interests, and to form and set out to implement their own conception of a worthwhile life, the goodwill and resources of other people and institutions are required. In fact, both restorative justice policies and human rights theory acknowledge the interdependence of people and the value of individuals and social life. Restorative justice advocates are concerned with healing communities while also respecting the dignity and needs of the relevant parties, while human rights theorists acknowledge that the well-being and freedom goods protected by rights rely on the goodwill of others to be effectively claimed and exercised.

Despite these areas of agreement, there are points of tension. Our analysis has revealed that restorative justice initiatives properly conceived and implemented have the potential to protect offenders' rights to personal freedom, subsistence, security, and social recognition but appear to frequently violate offender's rights to elemental equality. Elemental equality is critical to protecting individuals from discrimination and yet it has been disregarded within restorative settings because it conflicts with the key assumptions that stakeholder participation, flexibility, informality, and cultural relativism are necessary to ensure justice is achieved. A further problem is that if one accepts that there are a number of irreducible values evident in social and legal contexts (freedom, equality, well-being, safety, retribution etc.), it may not be possible to always reach practical solutions to justice matters that respect all values equally. In other words, some degree of tension and differential value weighting will necessarily occur in specific settings and there is no such thing as an optimal solution to the problem of balancing community, victim, and offender needs.

So what can be done to at least *minimize* the degree of conflict and to ensure that both human rights and restorative justice ideas are integrated into the justice system? Simply opting for one and dismissing or downplaying the worth of the other is, in our view, a mistake and runs the risk of losing the value inherent in each perspective. We will now briefly consider how human rights and more communitarian, restorative approaches can be reconciled to a greater degree. We have tailored our suggestions to respond to the critical viewpoint of restorative justice advocates who see great value in the traditional, cultural, and social practices of a community, and view human rights as intrinsically adversarial and individualistic and therefore as more likely to be associated with the conventional criminal justice system.

A first response to the complaint that human rights are too individualistic and contradict communitarian values is to point to the internal complexity of rights supporting cultures and societies. For example, Wong (2006) has persuasively argued that the presence of “the value of community is nevertheless real” (p. 22) in the United States and has served as a counterpoint to that of autonomy for many years. He points out that the strength of the family and the greater good of the community is evident in western cultures although they have been underemphasized at times. The critical point is that a morality centered on the good of individuals need not exclude that of the community, but rather points to a need to attend to the value of both.

Second, it can be argued that certain liberty and civic rights are necessary preconditions for the enjoyment of social and cultural rights (Li, 2006). Thus, the rights to freedom of association, expression, assembly, conscience, and religion are arguably necessary for the exercise and enjoyment of a group's social practices. Failure to guarantee these association rights may result in the oppression of the group and/or its valued practices and traditions. Therefore, the presence of individual human rights can protect the collective interests of social groups rather than necessarily undermine them.

Third, according to our conception of human rights, individuals require two sets of conditions for them to be able to advance their own conception of a good life: freedom and well-being goods (and their elaboration into the five rights values or objects). Well-being goods necessarily involve the provision of social and community services such as education, health, a sense of belonging, and so on. Furthermore, the argument for prudential or individual interests also necessarily applies to other prospective agents and their needs. Thus, from the perspective of our conception of human rights, what you are left with is a *community* of rights-holders rather than a collection of individuals jostling for supremacy (Gewirth, 1996).

A final comment on the relationship between human rights and restorative justice concerns their relative ethical depth or standing. Miller (2007) has recently argued that human rights are those entitlements based on primary human needs that if not met are likely to cause substantial harm to a person and prevent him or her from living a minimally worthwhile life. Human rights therefore apply to all people across the world, while what he terms *citizen rights* are those entitlements arising from being a member of a particular society and may vary from country to country. According to Miller, citizen rights are "the larger set of rights, possession of which guarantees someone's position as a full member of a particular society, and whose content will vary somewhat from one society to the next" (p. 183). The emphasis on community good and establishing or repairing relationships evident in restorative justice indicates it is more *directly* concerned with rights of citizens than the human rights of individuals. This is a matter of emphasis and does not amount to a dismissal of the importance of human rights by restorative justice advocates; it is simply that justice related concerns are much broader than those that come under the scope of human rights. As stated earlier, human rights function to protect the core interests of human beings and have a narrower focus than that of restorative justice. However, as Miller and others have argued, because human rights protect the threshold between a minimally worthwhile life and one characterized by suffering and a lack of dignity, they are more fundamental. Thus while human rights do not exhaust issues of justice such as what comprises a reasonable sentence or how best to deal with the legitimate grievances of victims, they do trump citizen and communitarian rights when there is direct conflict. In other words, human rights ground citizen rights and the restorative practices related to these, although in most instances the two sets of moral concepts overlap and are quite consistent. Human rights function as an ethical anchor that is able to justify many restorative justice practices and permit others that do not violate core rights values. It is a good thing to vindicate and acknowledge the suffering of victims and to accommodate the perspectives of other key stakeholders when considering how best to deal with crime and its aftermath. It is fitting to attempt to repair damaged relationships and to seek appropriate reparation from offenders. However, such practices ought to respect and protect the dignity of every person involved and appreciate that in the rush to hear all voices in restorative encounters that of the offender is not drowned out or suppressed. Human rights can help to maintain the thread linking all human beings through the defense of their core entitlements and obligations to each other and the broader social world. Offenders ought to be held accountable but they also should have the chance to turn their lives around. A cornerstone of this process is the recognition and protection of their human rights by the community and its criminal justice agencies.

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