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HUMAN RIGHTS, HUMAN DUTIES: MAKING A RIGHTS-BASED CASE FOR COMMUNITY-BASED RESTORATIVE JUSTICE

APARNA POLAVARAPU*

ABSTRACT

Restorative justice is often framed as an alternative to the criminal legal system, and thus justifications of restorative justice tend to be rooted in the language of the criminal system. However, this approach limits our way of thinking about the practice of restorative justice, especially non-state, community-based practices. This Article argues for an independent, rights-based justification to support these community-based practices. By offering an in-depth analysis originating from a rights-based perspective, this Article engages with two underdeveloped areas of scholarly literature and suggests a new way of thinking about the day-to-day practice of restorative justice through a human rights lens. First, it takes a step towards filling the relative absence of robust analysis exploring modern day-to-day restorative justice—as opposed to the transitional justice or purely indigenous justice mechanisms—from the perspective of human rights law. Second, it engages with the relatively neglected discourse on non-state individual and community duties to promote human rights and joins the voices arguing for the recognition of such duties. Third, this Article theorizes the content of the dignity claim held by parties who have been harmed or committed harm. It then develops the corresponding duty to promote human dignity after an interpersonal harm has been committed. This Article concludes by arguing that this duty is at least partially fulfilled by community-based restorative justice practices. When engaging in these practices, duties are mainly borne by individuals and non-state communities, with the state bearing duties to permit and support such practices, to the extent those practices meet their ethical obligations, as well as to meet certain needs.

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INTRODUCTION

Restorative justice in legal or law-adjacent literature is often discussed as an alternative to the criminal system. The scholarly framing thus tends to be comparative and rooted in the language of the criminal legal system. Because practices are so often compared to the criminal legal system, evaluations of practices may compare the experiences of parties, the outcomes, or the rates of recidivism. This framing is also evident in non-academic works aimed at the general public. In The Little Book of Restorative Justice, a widely read introductory text, restorative justice is explained, in part, in the context of what the criminal system does wrong that restorative justice


can do better.\textsuperscript{3} This justification of restorative justice thus relies on the criminal legal system.

However, restorative justice, as a means of repairing harm,\textsuperscript{4} is more than simply an alternative approach to achieving the purported ends of a state’s criminal system. In fact, to the extent we embrace the view that the actual goals of the criminal system are punishment or retribution, restorative justice can even be differentiated based on its own goal of repair.\textsuperscript{5} The definition of restorative justice is subject to contestation, but in my view, restorative justice is a standalone approach to addressing interpersonal harm, with some very key differences from a criminal system’s approach to harm.\textsuperscript{6} The process of restorative justice is one that involves bringing together and exploring the needs of the parties who have harmed, the parties who have been harmed, and community stakeholders.\textsuperscript{7} Animating this process is an ethic of care, with the goals of repairing harm, supporting responsible parties in arriving at accountability, and meeting the needs, to the extent such needs are related to the harm and to the degree possible, of each of the parties.\textsuperscript{8} Unlike the criminal system, restorative justice focuses on harms that have occurred, rather than criminal laws that have been violated.\textsuperscript{9} Contextualizing restorative justice only in comparison to the criminal system artificially limits the scope of the practice.

Because of the expansive possibilities of restorative justice, I advocate for community-based restorative justice practices that may work with the state out of necessity but are not part of the state.\textsuperscript{10} Community-based restorative justice can address harms that arise within the community that do not meet the elements of a crime.\textsuperscript{11} It


\textsuperscript{4} There is some disagreement about whether certain practices should be described as restorative justice, restorative approaches, or restorative practices. Id. at 12–13. My own approach is to use the term “restorative justice” to describe the practice when participants are seeking to repair harm. I use “restorative practices” when these same practices are used to promote community-building or serve other goals not immediately connected to repairing harm.

\textsuperscript{5} Id. at 30.


\textsuperscript{7} Id.

\textsuperscript{8} Id.

\textsuperscript{9} Id. at 982 n.260.

\textsuperscript{10} Aparna Polavarapu, Dangerous Liaisons: Restorative Justice and the State, in The Criminalization of Violence Against Women 269 (Heather Douglas et al. eds., 2023) [hereinafter Polavarapu, Dangerous Liaisons].

\textsuperscript{11} Id. at 272–73.
can be more responsive to the complexity of harm, including by acknowledging either the outside forces that may have facilitated the harm or the multiple and sometimes multidirectional layers of other harm that may underlie the act in question.\textsuperscript{12} For those who seek to avoid law enforcement or other state institutions, it can also address those harms that do meet the elements of a crime, while avoiding the state altogether.\textsuperscript{13}

If restorative justice is not—or should not be—dependent on the shortcomings of the criminal system to justify its existence, then it requires its own independent, positive basis of support. It is my argument that a rights-based analysis, rooted in human rights and human duties, can offer this positive basis of support for non-state, community-based restorative justice on its own merits.

Scholarly discussion about restorative justice from a robust human rights perspective has been limited.\textsuperscript{14} Because restorative justice is regularly presented as an alternative to the criminal system, the conversation about rights often focuses on whether restorative justice offers the same rights protections expected of criminal processes.\textsuperscript{15} Though arguments are made that restorative justice enhances other human rights, “they are seldom supported by empirical evidence or a thorough analysis of human rights and their justifications.”\textsuperscript{16} Evaluations of restorative justice practices tend to focus on the satisfaction of the parties involved, rather than whether the parties felt that their human rights were respected.\textsuperscript{17}

Attempts to assess restorative justice practices against the rights protections expected of criminal processes have been met with

\textsuperscript{12} Id. at 271–72.

\textsuperscript{13} For example, a group of organizations in Contra Costa County, California, developed an inter-organization restorative justice practice to address domestic violence with an explicit goal of avoiding law enforcement officers and criminal legal institutions. MIMI KIM, NON-LAW ENFORCEMENT RESTORATIVE JUSTICE ADDRESSING DOMESTIC AND SEXUAL VIOLENCE: EVALUATION RESULTS FROM THE CHAT PROJECT PILOT 7 (2022).


\textsuperscript{16} Ward & Langlands, supra note 14, at 356.

\textsuperscript{17} Id.
criticism. Indeed, it is questionable whether evaluations focusing on the rights typically afforded criminal defendants are suitable for assessing restorative justice practices, especially those practices operating outside the state or even those that do work with the state but do not contemplate the loss of a liberty interest, the creation of a criminal record, or any other related and devastating consequence as an outcome. Skelton and Sekhonyane argue that although restorative justice and other justice practices may not always square with the narrow rights prescriptions that are applied to criminal legal processes, they may better align with broader concepts of rights:

The way forward may lie in broadening the discourse around rights. The confines of the due process conceptualization of rights will tie the field down to providing a mirror of the standard criminal justice process. Human rights encompass a broader view but are still, as reflected in international instruments, based on a very individualized approach. In countries that have a history of indigenous conflict resolution a more communitarian approach to rights is evident.\(^{18}\)

The standards to which restorative justice practices must be held, accordingly, would be differently articulated.\(^ {19}\) Harvey, thinking more broadly about rights, suggests that top-down, overly legalistic framings of human rights are problematic and “put at risk the critical practice of rights.”\(^ {20}\) He argues for a “human rights law in perspective” approach, recognizing the importance of engaging with discourse “from below,” where we find such critical practice, when assessing restorative justice practices against human rights.\(^ {21}\)

Some scholarship attempts to connect restorative justice and human rights by tracing underlying commonalities. Gavrielides,

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19. Skelton & Sekhonyane offer an example from South Africa:
   Systems that run parallel and are not interdependent are more likely to set up their own rules for practice that promote restorative justice and human rights, and do not as easily fall into the trap of creating a set of narrow rules designed to meet the needs of a criminal justice trial. A project in South Africa, for instance, has set up a code of good practice for their peace-making process, which transcends details like whether a person is presumed innocent or is entitled to legal representation. It promotes instead concepts such as 'we create a safe and secure environment in our community, we do not gossip about our work or other people, we are consistent in what we do, our aim is heal, not to hurt.'

Id. at 591–92.
21. Id.
thinking about restorative justice in terms of “offender” rehabilitation, argues that human rights and restorative justice share certain values and principles. Braithwaite suggests that language in various human rights documents supports values aligned with what participants seek from restorative justice processes. Braithwaite uses these values to set “constraining” and “maximizing” standards for restorative justice practices. Several of these standards, such as “respectful listening,” “emotional restoration,” and “restoration of compassion or caring,” are not rights themselves, but are extracted from more peripheral human rights documents, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. In both pieces of scholarship, the focus lies outside of delving into the content of human rights treaties to develop the connections between established human rights and restorative justice.

While the literature touches on human rights, the absence of an in-depth analysis of restorative justice originating from a rights-based perspective is evident. “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.” Ward and Langlands address this gap by analyzing how restorative justice practices impact human rights. In this piece, I seek to address this gap by developing the human rights case for restorative justice.

In the related subject matter areas of indigenous justice and transitional justice, the connections to human rights are drawn more clearly. For example, the call to respect minority and indigenous

22. Gavrielides argues that these shared principles are:
   • Reparation and restoration
   • Involvement in decision making and empowerment
   • Rule of law, fairness, proportionality and due process
   • Voluntariness
   • Equality, diversity and non-discrimination
   • Respect and dignity
   • Confidentiality
   • Brotherhood and solidarity
   • Freedom from fear.


24. Id. at 569–70.

25. Id. at 568–69.


27. Id. at 357.
rights can include an obligation to support indigenous justice practices,\(^ {28}\) in which many restorative justice practices around the world are rooted.\(^ {29}\) However, this obligation is owed to indigenous communities, while many modern restorative justice practices also exist outside those communities. In addition, the relationship between restorative justice and indigenous justice does not mean restorative justice is equivalent to indigenous justice. Many of the practices seen outside indigenous contexts are adaptations of some kind rather than exact replicas.\(^ {30}\) In this Article, my focus is on the broader array of restorative justice practices found in various communities, including those far removed from the indigenous context.\(^ {31}\) In the field of transitional justice, truth commissions, typically implemented in the wake of widespread human rights abuses or violations of international humanitarian law, have been tied to the following human rights: a people’s right to truth, a corresponding duty to preserve memory, and victims’ right to know.\(^ {32}\) From these, a right to be known—held by those who have suffered gross human rights violations—has been theorized.\(^ {33}\) Truth commissions have been described as a form of restorative justice,\(^ {34}\) though they operate quite differently from the day-to-day practice of restorative justice that is the focus of this Article.

Writing a human rights justification of community-driven restorative justice appears difficult on its face, given that international human rights law emphasizes state authority even as it seeks to limit the state.\(^ {35}\) States are primary duty-bearers under international human rights law.\(^ {36}\) Individuals are the primary rights-holders. I


\(^{29}\) Polavarapu, Myth-Busting, supra note 6, at 957.

\(^{30}\) Id. at 957–58.

\(^{31}\) In any case, while some indigenous practices are equivalent or similar to restorative justice, it is not necessarily true that all indigenous practices around the world are a form of restorative justice. Id.


\(^{33}\) Jennifer Lackey, Wayne and Elizabeth Jones Professor of Philosophy, Northwestern University, Presidential Address at the 119th Central Division meeting of the American Philosophical Association (Feb. 25, 2022).


\(^{35}\) International human rights treaties obligate states to fulfill the human rights obligations articulated therein. States essentially agree to limitations on their own behavior within their own borders.

\(^{36}\) This is most evidenced by the fact that the international human rights system is structured to engage with states as the primary duty-bearers. See infra text accompanying notes 39–44.
find myself in agreement with Harvey—and others—that international human rights law, through the act of codification and legalization, has long elevated a top-down, state-centered approach to rights.37 But a deeper look at the development of human rights law, internationally and comparatively, yields a more complex picture. As I describe in this Article, human rights law also extends duties to non-state actors, including individuals and community groups.38

Thus, in this Article I engage with two underdeveloped areas of scholarly literature and suggest a new way of thinking about the day-to-day practice of restorative justice through a human rights lens. First, I take a step toward filling the relative absence of robust analysis exploring modern, day-to-day restorative justice from the perspective of human rights law. Second, I engage with the relatively neglected discourse on non-state individual and community duties to promote human rights and join the voices arguing for the recognition of such duties. Third, working with the right to dignity, I theorize the content of the dignity claim held by parties who have been harmed or committed harm, develop the corresponding duty to promote human dignity after an interpersonal harm has been committed, and argue that this duty is at least partially fulfilled by engagement with community-based restorative justice practices.

This Article proceeds in three substantive parts. In Part I, I examine what role, if any, exists for non-state duties in human rights promotion and protection. I begin by exploring the textual references to individual and group duties in international, regional, and national rights documents. I then consider the various arguments that have been put forth about individual and group duties and conclude by finding that individuals and community groups do bear specific human rights duties, including the duty to promote dignity and the common good. This opens the door to reconsider duties with respect to multiple rights, but I begin, as many rights documents do, with dignity. In Part II, I explore some of the various understandings of dignity and arrive at a conceptual core that allows us to develop the content of a duty to promote dignity, acknowledging that the content of this duty may vary in differing contexts. In Part III, I develop the specific content of the duty to promote dignity after interpersonal harm has occurred. I further demonstrate how community-based restorative justice offers an opportunity for individuals and communities to fulfill their duties to promote the dignity of those affected—those who have harmed and been harmed—in a way that the criminal laws currently fail to do.

37. Harvey, supra note 20, at 14.
38. See discussion infra Part I.
legal system does not. I conclude by arguing that the existence of a non-state duty to promote dignity creates a human rights justification for the development of community-based restorative justice practices. In the engagement of these practices, duties are mainly borne by individuals and non-state communities, but the state may also bear duties to permit and support such practices to the extent those practices meet their ethical obligations, as well as to meet certain needs of the parties.

I. DUTIES AND DUTY-BEARERS UNDER HUMAN RIGHTS LAW

The development of international human rights law was significant because it elevated the individual as a recipient of rights within an international system that previously was largely about the rights and obligations of states. In that way, it was transformative. However, when human rights entered international law, they were bound by the constraints of the international legal system. Traditionally, under the consent-based international legal system, states are only obligated to guarantee those rights they have explicitly consented to guarantee, or those that are required to be protected pursuant to customary international law.

It is logical that where there is a right-holder, there is a corresponding duty-bearer. In the operation of international human rights law, duty-bearers are primarily understood to be states. Treaties are agreements between states, thus states are the parties agreeing to the obligations. Human rights treaty bodies engage in dialogue with states parties about their status on implementing the human rights treaties, with a focus on state action or inaction. In addition, to the extent a judicial or quasi-judicial function is available, petitioners alleging human rights violations must assert their claim against a state party. When the actions of private individuals undermine

41. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (“[T]he present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”); Inter-American Commission on Human Rights, Mandate and Functions, ORGANIZATION OF AMERICAN STATES, https://www.oas.org/en/iachr/jsForm/?File=en/iachr/mandate/functions.asp [https://perma.cc/88WU-9VK5] (“In furtherance of its mandate, the Commission: . . . [r]eceives, analyzes and investigates individual petitions in which violations of human rights are alleged to have been committed . . . by a Member State of the OAS . . . ”).
another’s human rights, it is the state that can be held accountable for failing to adequately regulate the offending private behavior.\(^{42}\)

Though international humanitarian law and international criminal law impose direct obligations onto and exercise jurisdiction over individuals,\(^{43}\) human rights law has avoided asserting similar jurisdiction even as it seeks to impact the behavior of non-state actors.\(^{44}\)

However, this model of states-as-sole-duty-bearers does not perfectly match with the language of human rights documents. Nor does it comport with some of the expectations of the various voices and instruments involved with the development of human rights law.\(^{45}\) Who bears what duty is not so simply decided. Despite this incongruence, duties are relatively underdiscussed in human rights discourses.\(^{46}\)

What constitutes a duty is also subject to debate. Some distinguish between “duty” and “responsibility,” viewing duties as denoting a legally binding commitment as opposed to a morally required responsibility,\(^{47}\) while others do not.\(^{48}\) In their article tracing the history of duties, Berdion Del Valle and Sikkink make a deliberate choice to use the term “duty” more expansively, noting that “this choice reflects historical patterns of usage, in which the term duty could convey, simultaneously, legal, political and ethical meanings.”\(^{49}\)

Similarly, in this Article, I root my analysis in the legal expressions of individual and group duties, but given that, in many cases, these are not subject to legal coercion or enforcement, my use of the word “duties” is more reflective of the broader expectations of behavior that are written into the varying texts.

In the remainder of this Part, I locate expressions of individual and group duties in various human rights texts, and review some of

\(^{42}\) For example, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) has stated that states are obligated to take “effective measures” to “ensure that the media respect and promote respect for women,” and should take measures to overcome “attitudes, customs, and practices” that contribute to violence against women. Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19 \(\S\) 24(d)–(f) (1992).


\(^{44}\) See Andrew Clapham, Human Rights Obligations of Non-State Actors 74–75 (2006).

\(^{45}\) See discussion infra Section I.A.


\(^{48}\) Del Valle & Sikkink, supra note 46, at 192 n.20.

\(^{49}\) Id.
the arguments that have been put forth relating to the shape of any duties that may fall to non-state actors. I conclude that the development of human rights was intended to be built on state and non-state duties, and that the existence of these duties should inform the societal structures we create and perpetuate.

A. Textual Sources of Individual and Other Non-State Duties

Written references to individual duties can be found in international, regional, and domestic human rights documents. Article 29 of the Universal Declaration of Human Rights (UDHR), adopted in 1948, states: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”50 Other provisions of the UDHR contain expectations of individual behavior in other ways. The preamble states that the UN General Assembly

[p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures . . . to secure their universal and effective recognition and observance . . . .51

Article 30’s general rule of interpretation has been interpreted as a duty-creating provision for non-state actors, in that it specifies that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth [”]52 in the UDHR.53 However, though this language may reflect an implied duty, it is also a common interpretive rule.

These textual references are light in comparison to the amount of duties-related discussion preceding and during the drafting history of the UDHR.54 Countries and leaders around the world have, at different times, understood rights and duties as a necessary pairing. Some pre–World War II constitutions, including several in Latin America, incorporated duties alongside rights.55 During World

51. Id. at pmbl.
52. Id. at art. 30.
55. Id. at 212.
War II, when approached by H.G. Wells to offer input on Wells’ own draft of a declaration of rights, Gandhi suggested instead, “Begin with a charter of the Duties of Man, and I promise the rights will follow as spring follows winter.” Gandhi remained steadfast in his emphasis on duties as a precursor of rights. When asked by a UNESCO philosophers’ committee to submit their reflections on human rights, he and other intellectual and political luminaries wrote of duties. Gandhi wrote in his letter, “I learned from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done.” Philosopher Chung-Shu Lo similarly wrote that “the basic ethical concept of Chinese social political relations is the fulfillment of the duty to one’s neighbor, rather than the claiming of rights.” Additionally, a proposed declaration on the rights of man submitted at the San Francisco Conference in 1945 included a reference to individuals’ duties “as members of society” in a preambular provision.

From its earliest draft, the UDHR included language acknowledging individual duties. The preamble to an early draft identified duties rather prominently, stating, “that this Bill, being constantly present in the minds of all men, may unceasingly remind them of their rights and duties . . . .” The preliminary drafting history included resolutions, drafts, and outlines making reference at various times to individuals’ duties to the state, international community, and to society. Arguments in support of the inclusion of duties language emphasized the full exercise of rights by all members of society was only possible if individuals also fulfilled their duties to society. Yet references to duties were also viewed with suspicion as potentially undermining the emphasis on rights.

59. Id.
60. Id.
62. GLENDON, supra note 58, at 76.
63. Id. at 66, 275.
64. Daes, supra note 61, at 17–19.
65. Id. at 18 ¶¶ 17 & 21–22, 19 ¶¶ 29–31.
The drafting history of the American Declaration of the Rights and Duties of Man (American Declaration) lends credence to those who are wary of including references to individual duties in rights documents. The American Declaration, drafted and adopted only slightly earlier than the UDHR, influenced the drafting of the UDHR.\(^\text{67}\) Some proposed drafts of the American Declaration included detailed state duties, but these were eventually not included in the final document, due to the discomfort of some national delegations.\(^\text{68}\) Though there are multiple possible reasons why this choice was made, one potential implication is, of course, that states were seeking to limit their potential culpability under international law.\(^\text{69}\) If that is the case, then adding references to individual duties could understandably be viewed as creating even greater opportunities for states to abdicate their responsibilities.

The final draft of the American Declaration includes a reference to individual duties in the preamble and an entire chapter laying out ten individual duties.\(^\text{70}\) These are the duties to society, to children and parents, to acquire a minimum level of education, to vote, to obey the law, to serve the community and nation (including by military service if required), to cooperate with the community and nation in provision of social security and welfare, to pay taxes, to work, and to avoid taking part in the political activities of another state that reserves those activities to citizens.\(^\text{71}\) The preambular provisions on duty are more robust than their counterparts in other international documents, referencing individual duties in five out of the six paragraphs.\(^\text{72}\) Of note, the preamble states, “The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.”\(^\text{73}\)

It is jarring then that the UDHR has only one mention of individual duties in its operative provisions.\(^\text{74}\) In the first draft of the

\(^{67}\) Id. at 215–16.

\(^{68}\) Id. at 216–17.

\(^{69}\) Id. Another proffered reason was that the Declaration was meant to serve as a clear and powerful expression of rights, and too much emphasis on state duties would weaken that goal. Id. at 217.


\(^{71}\) Id. at arts. XXIX–XXXVIII.

\(^{72}\) Id. at pmbl.

\(^{73}\) Id.

\(^{74}\) UDHR, supra note 50, at art. 29(1).
UDHR, duties were not only mentioned more often than in the final draft, they were also included in Articles 1 and 2, preceding any mention of rights in the operative provisions.75 In the drafting debates, some of the pushback to the inclusion of duties language emphasized the idea that individual rights should receive greater prominence than duties in a declaration of rights.76 Despite the subsequent pruning, the final language in Article 29 was still considered a victory for the Latin American advocates of duties, because it “recognized that community was necessary to the enjoyment of rights and that duties were essential to the protection of that community.”77

That the UDHR, a document about rights rather than obligations, doesn’t specify states as duty-bearers gives rise to some argument about who are intended to serve as duty-bearers. Throughout the document references are made to individuals, nations,78 and groups, potentially suggesting that the rights listed therein could be claimed against non-state actors just as much as against states.79 On the other hand, certain provisions of the UDHR seem to specifically contemplate states. As Onora O’Neill notes, “[w]hereas traditional liberty rights for all have to be matched by universal obligations to respect those rights . . . other universal rights cannot be secured by assigning identical obligations to all agents and agencies.”80 Looking to Articles 13, 14, and 15 of the UDHR, which provide, in order, a right to freedom of movement, a right to asylum, and a right to nationality, she finds rights that can only be ensured by states.81 These provisions, she argues, reveal the UDHR’s assumption of bounded states as the “primary agents of justice.”82

The UN General Assembly intended the UDHR to be followed by a binding covenant on human rights, 83 though due to differences over the rights content that states were willing to agree to, the UDHR gave rise instead to two different treaties: the International Covenant on Civil and Political Rights (CCPR) and the International

75. Del Valle & Sikkink, supra note 46, at 220–21.
76. Id. at 222–23.
77. Id. at 224.
78. Nations are not equivalent to states. “Few states are nation-states; many nations spread across a number of states; the individuation of societies, peoples, and countries is notoriously complex.” See Onora O’Neill, Agents of Justice, in GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS? 37, 40 (Andrew Kuper ed., 2005).
80. O’Neill, supra note 78, at 40–41.
81. Id. at 41–42.
82. Id. at 42.
Covenant on Economic, Social, and Cultural Rights (CESCR), known together as the International Bill of Human Rights. The CCPR and CESCR include a reference to individual duties in their respective preambles, both stating: “Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant . . . .” The CCPR also describes the freedom of expression as carrying with it “special duties and responsibilities” with a view to protecting the rights and reputation of others, national security, public order, public health, or public morals. A far more dramatic change happened in the Americas: from the American Declaration to the American Convention on Human Rights, duties were pared down to a single provision stating, “Every person has responsibilities to his family, his community, and mankind.”

In 1983, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Special Rapporteur) published a report that discusses, in part, the legal weight of the individual duties language in international human rights documents. After reviewing the history leading up to the drafting of the UDHR, the report’s commentary offers the following on the language of Article 29: “In choosing the word ‘community’, the intention had been to point out, quite rightly, that the State was not the only social group concerned.” The Special Rapporteur describes the duty of the individual laid out in the operative provisions of the UDHR as a general, morally driven rule for individual behavior. The report later asserts that though the UDHR is not binding, it has quasi-legal significance, in part due to the view that infringement of the rights located in the UDHR can be regarded as violations of the United Nations Charter (UN Charter).

86. CCPR, supra note 85, at art. 19(3).
88. Daes, supra note 61, at 48–53.
89. Id. at 19 ¶ 31.
90. Id. at 17 ¶ 2.
91. Id. at 49–50 ¶¶ 186–87.
provisions of the UDHR are now considered binding as norms of customary international law.\footnote{Hurst Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25 GA. J. INT’L & COMPAR. L. 287, 289 (1995/96).} In addition, all member states of the United Nations are now measured against the standards set by the UDHR in the Human Rights Council’s Universal Periodic Review.\footnote{Implemented in 2008, the Universal Periodic Review is a review conducted by the UN Human Rights council to assess the human rights record of every member state of the United Nations. Regardless of their treaty ratification status, all member states are assessed against the rights set out in the UDHR. Basic Facts About the UPR, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/upr/basic-facts [https://perma.cc/6HL2-HWUY].}

Though general duties are only mentioned in the preambles to the CCPR and CESCR, this does not necessarily diminish their importance. The drafting history suggests that the principle of individuals owing duties was understood as one of four key principles setting the scope for and guiding the operative provisions of the covenants.\footnote{Daes, supra note 61, at 20 ¶¶ 53, 55.} The Special Rapporteur further argues that these preambular provisions have legal significance.\footnote{Id. at 50 ¶ 190.} Citing the Vienna Convention on the Law of Treaties, she argues “that every word and part of a treaty is presumed to have a meaning and to produce some legal effects.”\footnote{Id.} In addition to serving as an interpretive tool, she argues that the preamble can also serve as a “direct source of legal obligations.”\footnote{Id.}

Elsewhere, duties were more explicitly laid out in the operative provisions of human rights treaty documents. The African (Banjul) Charter on Human and Peoples’ Rights (Banjul Charter) developed a more in-depth focus on duties, which resulted in significant criticism predominantly emphasizing the fact that such language could be viewed as permitting state violations of human rights.\footnote{Makau wa Mutua, The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, 35 VA. J. INT’L L. 339, 359 (1995).} However, it is argued that the Banjul Charter deliberately included a chapter on duties\footnote{African Charter on Human and Peoples’ Rights Part I, Chapter II, June 27, 1981, 21 I.L.M. 38 [hereinafter Banjul Charter].} in order to incorporate the interconnectedness and importance of community that characterizes many African societies.\footnote{wa Mutua, supra note 98, at 360.} In such societies, individuals are expected to be responsible for the well-being of others in their community as well as the community writ large.\footnote{See id. at 360–63.} These ideas are reflected in multiple provisions in the
Charter, which affirm an individual’s duties towards others without discrimination and with a goal of “reinforcing mutual respect and tolerance,” to preserve the family unit, and “to contribute to the . . . moral well being of society.”

Admittedly, even in light of this argument, some of the provisions in the Banjul charter can seem quite alarming. The same language emphasizing family and community can potentially be used to justify subordinating rights of certain groups for the sake of elevating “tradition.” In addition, some provisions exalt the state in a document that is meant to limit state abuses and delineate state obligations to guarantee rights. For example, individuals are expected “[t]o preserve and strengthen social and national solidarity, particularly when the latter is threatened.” It is possible to read this as calling for the subordination of rights when deemed necessary to strengthen the nation-state. On the other hand, African scholars have argued that the content of these duties can be developed by human rights bodies in a manner that is consistent with the pre-colonial customary ideals of promoting social harmony, kinship, and social structures, rather than as tools benefiting corrupt leaders.

The European human rights system, perhaps the most robust of all the intergovernmental rights systems in terms of reach, is relatively lacking in duties language. The European Convention on Human Rights (European Convention) includes no general reference to duties. Like the CCPR, the European Convention does assert that “duties and responsibilities” accompany the freedom of expression. But is this an actual duty or responsibility, or is this simply another way of stating that the right may be limited? It is arguable that this is, in practice, no different from the other limitations provisions in the Convention, and that the reason this provision explicitly references duties and responsibilities while the others do not is simply to add emphasis. However, it is notable that the

103. Id. at art. 29(1).
104. Id. at art. 29(7).
105. wa Mutua, supra note 98, at 371.
107. In fact, critics have argued that the duties provisions protect state actions over individual rights when the two are in conflict. wa Matua, supra note 98, at 373.
108. Id. at 374–75.
110. Id. at art. 10(2).
other limitations clauses in the Convention do not mention duties, that this is the only reference to individual duties within the Convention, and that the European Court of Human Rights explicitly references individual duties and responsibilities in its article 10 freedom of expression case law.\textsuperscript{112}

Many years after the adoption of the UDHR and the entry into force of the aforementioned treaties, a 1997 Universal Declaration of Human Responsibilities, proposed by the InterAction Council and endorsed by political leaders from around the world, sought to serve as a complement to the UDHR.\textsuperscript{113} In this document, the language of duties shifted to a language of responsibilities. The preamble states, in part, that “all people, to the best of their knowledge and ability, have a responsibility to foster a better social order, both at home and globally, a goal which cannot be achieved by laws, prescriptions, and conventions alone . . . .”\textsuperscript{114} The substantive provisions largely refer to the responsibilities of persons, but the language also periodically references the responsibilities of people, groups, organizations, states, and members of certain professions.\textsuperscript{115} Appended to the declaration are the Conclusions and Recommendations by a High-Level Expert Group Meeting, which emphasize the relationship between rights and duties: “the idea of a human right only makes sense if we acknowledge the duty of all people to respect it. Regardless of a particular society’s values, human relations are universally based on the existence of both rights and duties.”\textsuperscript{116} This declaration was met with criticism from multiple groups, all largely raising the fear that it was a means of undermining the human rights gains of prior decades.\textsuperscript{117}

Only two years later, the General Assembly passed Resolution 53/144, entitled “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.”\textsuperscript{118} This resolution has been criticized as mainly reiterating the view of states as primary agents of responsibility,\textsuperscript{119} and admittedly it does not add much in the way of individual responsibilities. However, it does include some explicit language regarding non-state

\begin{flushleft}
\textsuperscript{112} Id. at 37–38; European Convention, supra note 109.  \\
\textsuperscript{113} INTER-ACTION COUNCIL, A UNIVERSAL DECLARATION OF HUMAN RESPONSIBILITIES 1 (1997).  \\
\textsuperscript{114} Id. at pmbl.  \\
\textsuperscript{115} Id. at arts. 12–15.  \\
\textsuperscript{116} Id. at 8.  \\
\textsuperscript{117} Del Valle & Sikkink, supra note 46, at 229–30.  \\
\textsuperscript{118} G.A. Res. 53/144 (Mar. 8, 1999).  \\
\textsuperscript{119} Del Valle & Sikkink, supra note 46, at 230.
\end{flushleft}
responsibilities. The declaration prohibits anyone from participating in violating the human rights or fundamental freedoms of others and requires that everyone who “can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms.”\(^{120}\) Most interesting is Article 18, which begins with the language of Article 29 of the UDHR but goes a step further:

1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.
2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.
3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.\(^{121}\)

Still, the impact of this document in the international human rights arena appears to be rather minimal thus far.\(^{122}\)

The greatest movement to recognize individual duties appears to be in national constitutions. An empirical analysis found that sixty-two percent of all independent state constitutions include at least one duty, with the most referenced duties being the vertical duties owed to the state.\(^{123}\) But duties owed toward other individuals and the community are also not uncommon. In 2017, sixty-four constitutions included a duty to protect the environment and natural resources, fifty-two included a duty to educate and raise children, thirty-eight to respect the rights of others, twenty-one to assist parents and the elderly, twenty to promote the common good, and eleven to promote peace, democracy, and social justice.\(^{124}\) Some interesting themes come out of this work. One is that while the

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121. Id. at art. 18.
122. Del Valle & Sikkink, supra note 46, at 230.
123. Id. at 233.
124. Id. at 235.
concept of duties cannot be confined to a singular region of the world, the study found that no former British colony has a constitution that expresses duties. Another is that the language of duties is often integrated with rights language, supporting the view that duties exist because of the relationality of human rights. It is also likely that this study is underinclusive, as the results were gathered from an algorithm that only searched for the terms “duty” and “obligation." The expression of individual duties and responsibilities in constitutional instruments is thus potentially even further reaching.

B. The Nature of Duties

Duties and responsibilities of individuals and groups are listed in international, regional, and national rights documents. What is the import of this? Do textual references matter if they have not given rise to legally actionable claims? Do duties need to be enforceable in a court in order to have legal significance? How we view duties is very much tied to how we view human rights, which is reflective of the ideological disputes that shaped the development of human rights and how we think about the history of human rights today. “The debate on the history of human rights... is a debate about the meaning of the term ‘human rights’, whether we should conceptualize it as a global social movement, as empathy with the avoidable suffering of others, or the transnational regulation of humanitarian concerns.”

The traditional view locates duty only in states, regardless of textual references to individual or group duties. If one were to define rights based on existing international practice, a human right is an entitlement, the violation of which would permit intervention from outside forces. In this conceptualization, duties primarily fall to states, and secondarily to the international community, other states, or “capable” non-state agents who gain the right to intervene when states fail in fulfilling these duties.

A different institutional view also finds state institutions to be primary duty-bearers, but with individuals in society carrying a secondary duty that is triggered under certain conditions. Samantha

125. Id. at 232–33.
126. See id. at 239–42.
127. Id. at 232–33 n.212.
129. Clapham, supra note 44, at 25; Besson, supra note 47, at 245.
Besson argues that international human rights duties are secondary duties of states to create their own primary duties under domestic law.\textsuperscript{132} Because these rights require equality, she asserts that human rights require democracy, and vice versa.\textsuperscript{133} In this model, the institutions that bear human rights duties are those that are in a jurisdictional relationship with rights-holders.\textsuperscript{134} Individuals have collective duties that are activated either prior to the creation of appropriate institutions or upon institutional failure.\textsuperscript{135} Besson distinguishes responsibilities from duties, and allows for the possibility of ongoing individual responsibilities even when there are no active individual duties.\textsuperscript{136} Responsibilities, as described by Besson, are concurrent with human rights duties, and include the responsibilities to protect, remedy, and respect.\textsuperscript{137} However, they are indeterminate with respect to their own content or to whom any one of them is allocated.\textsuperscript{138} In this way they are distinguished from duties, which Besson argues have specific content and specific means of allocating said content to the relevant duty-bearers.\textsuperscript{139} The responsibilities are collective, and exist to “help prevent human rights violations by human rights duty-bearers or remedy those violations when human rights duty-bearers are unable or unwilling to fulfill their duties.”\textsuperscript{140}

It is easier to allocate duties to individuals and other non-state actors when rights are viewed as having a moral basis, rather than simply being created by law or arising from current political reality. A naturalist view of human rights finds codified rights to simply be the legal expression of moral rights whose existence does not depend on legal recognition.\textsuperscript{141} The language of human rights law itself engages with natural law ideas. The preamble of the Universal Declaration of Human Rights begins with, “[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice

\begin{itemize}
\item Besson, \textit{supra} note 47, at 250.
\item \textit{Id.} at 249.
\item \textit{Id.} at 253.
\item \textit{Id.} at 257–58.
\item \textit{Id.} at 247–48.
\item \textit{Id.} at 261–63.
\item Besson, \textit{supra} note 47, at 262.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{BIEITZ, supra} note 130, at 103 (“It is true that naturalistic views, at least, are foundationalist in an obvious sense: they interpret international human rights as the public, doctrinal expression of a distinctive underlying order of moral values conceived as rights.”); Thomas Pogge, \textit{Human Rights and Human Responsibilities}, in \textit{GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS?} 3, 9–10 (Andrew Kuper ed., 2005).
\end{itemize}
and peace in the world . . . .”142 Similar ideas are repeated in multiple international and regional human rights instruments,143 as well as in constitutional documents around the world.144 Domestic legal systems also engage with rights from both positivist and natural law perspectives. For example, in the United States, rights claims are expected to be rooted in law, yet the Declaration of Independence famously asserts that certain rights are inalienable.145

Accepting a naturalist construction creates a problem for those who seek to locate duty only or mostly in states. A conception that only recognizes human rights as claimable against governments would relieve individuals of any responsibility, which is especially problematic in undemocratic nations or where democratic institutions have failed.146 Pogge finds this outcome to not only be “morally implausible,” but also inconsistent with the way we discuss human rights.147 For example, human rights records are discussed as belonging to a country, rather than a government alone.148 Drawing from Article 28 of the UDHR, which states, “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized,” Pogge argues that rights offer moral claims against a social and institutional order, as well as against those individuals who collaborate in the imposition

142. UDHR, supra note 50, at pmbl.
143. E.g., American Convention, supra note 87, at pmbl. (“Recognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality . . . .”); Banjul Charter, supra note 99, at pmbl. (“Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings . . . .”); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbl., Dec. 10 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (“Considering that . . . recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that those rights derive from the inherent dignity of the human person . . . .”).
144. E.g., GRUNDGESETZ[GG][BASIC LAW], art. 1(2) (GER.), https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [https://perma.cc/VF3K-JYA7] (“The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.”); CONSTITUTION, art. 17 (PAN.) (“The rights and guarantees recognized by this Constitution must be considered as minimum standards which do not exclude others which are related to fundamental rights and the dignity of the individual.”); CONSTITUTION, art. 20(1) (UGANDA) (“Fundamental rights and freedoms of the individual are inherent and not granted by the State.”).
146. Pogge, supra note 141, at 11–12.
147. Id. at 12.
148. Id.
of said order. The corresponding moral duty or responsibility is weightier for the more powerful and wealthy—those who have greater ability to shape the social and institutional order. In this framing, human rights are to be protected against both governmental and social threats.

Griffin argues differently for expanding the category of duty-bearers, suggesting that the identity of a duty-bearer cannot always be known in advance, and may change over time. “What . . . is needed is deliberation about ability, responsibility, fairness of burden, speed with which help can be delivered, and so on.” Rights may give rise to multiple duties, and multiple duty-bearers. It is even possible for these duties, in aggregate, to fail to satisfy the entirety of the corresponding human rights claim. Exploring whether a right is claimable, he argues that what is important is to be able to specify a description of the duty-bearers. Even if they don’t exist at the time, they may eventually.

The 1983 Special Rapporteur report describes the duties set out in the UDHR and International Bill of Rights as morally driven, but with legal effect. In developing a functioning conception of duty, the Special Rapporteur offered certain foundational propositions, including the following:

(c) Duties are apprehended by reason alone . . . .
(d) Duties may conflict . . . .
(f) Any action which is a duty for an individual in a given situation would also be a duty for another individual in a similar situation . . . .
(g) If an action is a duty for an individual, he is morally responsible or legally obliged to carry it out . . . .
(i) Only a rational being can have a duty, and then only towards another rational being or to the community.

149. Id. at 14–15 (quoting UDHR, supra note 50, at art. 28).
150. Id. Pogge’s primary concern in this chapter is the issue of global poverty. To address this concern, he identifies those bearing the moral responsibility as “the governments and peoples of the most powerful and affluent countries.” Id. at 31.
151. Id. at 16.
152. JAMES GRIFFIN, ON HUMAN RIGHTS 102, 108 (2008).
153. Id. at 108.
154. Id.
155. Id. at 109–10.
156. Id. at 110.
157. Id.
158. Daes, supra note 61, at 17 ¶ 2, 40 ¶ 110.
159. Id. at 39 ¶ 98.
Drawing from the UDHR, the CESCR, the CCPR, the UN Charter, and other international human rights documents, as well as responses from nation state respondents to its 1976 survey about duties, the Special Rapporteur offers multiple duties that individuals owe to the community and to other individuals. Among these are several that are potentially relevant to discussions about community-based restorative justice. These include the duties to promote the general welfare, the purpose of which includes promotion of human dignity, “to protect the bodily integrity and human dignity of every other individual,” and “of mutual help and solidarity.” Additionally, drawing from the right to education, the rapporteur finds a “responsibility of every individual, through teaching and education . . . to prevent violence as a means of achieving economic, social and political goals.”

And what of duties as related to “community”? To the extent the term “community” is equivalent to the state, the duties are more easily mapped onto the language of human rights documents. However, the 1976 state survey responses reveal that community is understood more expansively. While some referred to the state as the embodiment of community, other states understood community to include other social groups bonded through some common characteristic. The Special Rapporteur’s report itself defined community rather expansively, considering the community to be any group of people bonded together by social characteristics, territory/location, or in other ways associated with one another. Notably, the Special Rapporteur poses and analyzes this definitional question only in the context of duties owed to the community, leaving open the question of what duties are owed by non-state communities.

C. So, What Can We Say About Duties?

There is more than ample evidence in historical and current texts and practices and in our understandings of human rights to support the notion that individuals and communities owe one another duties. The concept of duties “has been resilient over time and
across regions.” If any rights are at all “inalienable” or “inherent,” then, as Pogge argues, it is untenable for us to rely solely on state institutions to ensure our human rights. One need not look to nondemocratic or failed states to make this point. The access to justice literature alone demonstrates that exercising one’s own rights via state legal institutions often requires overcoming significant hurdles. Of course, we must take great care to ensure that duties are not used to degrade rights or privilege harmful practices under the guise of duties toward the common good. But taken hand in hand with rights, duties offer a way for rights to meaningfully exist without having to solely rely on courts or other forms of governmental intervention.

Even viewing human rights law from a purely state-obligation perspective supports the assertion that non-state actors bear duties. Among states’ human rights obligations is the obligation to “protect” human rights. Such obligation may include protecting against behavior from non-state actors by engaging in preventive measures or by penalizing behavior that undermines rights. Thus, state action is required by the international, regional, or domestic legal system to enforce human rights law’s behavioral expectations of individuals, groups, or other non-state actors.

To the extent community means more than the state, an interesting question arises: what role is there for the community in the context of human rights? The community is owed some duties, but is the community also a duty-bearer? It is not referenced explicitly in most duty-bearing provisions in international, regional, or domestic rights law. As an entity that is between individual and state, the community ought to also be understood as a duty-bearer, but with slightly different parameters than either individual or state duty-bearers. As with individuals and local governments, communities may be limited by state laws and regulations that are designed to ensure full protection of human rights. But what non-legal responsibilities might communities have? As groups of individuals,
communities bear responsibilities similar to those that an individual would bear. It is logical that a group would bear the duties that are shared by the individuals comprising the group. Yet, as an entity that is more than and different from a diffuse collection of individuals, a community can also bear responsibilities that are more statelike. As the Special Rapporteur notes, “the fundamental right of the individual is his right to develop freely and fully his personality, which implies that the community has to establish for all the factors essential to that development.”175 Although this duty seems to be conceptualized as falling on the state-as-community,176 some aspects of this could reasonably be understood to also fall on non-state communities.

It is unrealistic to assume that the duties of individuals and communities align perfectly with the entirety of the rights set forth in human rights instruments. Some duties can only be borne by the state,177 and in any case, as Griffin clearly lays out, not all duties can be borne by all actors.178 Thus, let us say that there exist generalized non-state duties to promote human rights, which may be made more specific upon the explication of a particular human rights claim.

In the case of community-based restorative justice, I begin this exercise of explicating the content of a right and its corresponding duty by referring back to the duties laid out by the Special Rapporteur in her report. From my experience as a restorative justice practitioner and scholar, the duties relating to promotion of dignity,179 to mutual solidarity,180 and the right to education181 seem most immediately relevant. I focus here on dignity.

II. DIGNITY

Multiple scholars have asserted that restorative justice promotes the dignity of the people who have been harmed, those who have harmed, or both.182 But what does that mean? It has been argued that dignity is served because restorative justice addresses

175. Daes, supra note 61, at 40 ¶ 104.
176. Id. at 39–40 ¶ 103.
177. O’Neill, supra note 78, at 42.
178. See Griffin, supra note 152, at 108–10.
179. Daes, supra note 61, at 55 ¶ 250, 58 ¶ 282.
180. Id. at 60 ¶¶ 301–03.
181. Id. at 62 ¶ 322.
the impacts of a harm to a person in ways that the legal system does not.\footnote{183} Additionally, the encouragement of a wrongdoer to take responsibility has been suggested as promoting equality and dignity.\footnote{184} Dignity has also been related to the freedom to forgive (or not).\footnote{185}

“Dignity,” as I describe in this part, appears regularly in rights language. Dignity “has acquired a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.”\footnote{186} Dignity has been explored in multiple fields, including bioethics, philosophy, and of course, law.\footnote{187} Despite this, there is a lack of clarity and consistency about what constitutes a right to dignity.\footnote{188}

In the UN Charter, the goal of reaffirming faith in dignity is presented as one of the justifications for the creation of the United Nations.\footnote{189} It also appears in the very first preambular paragraph and several operative provisions of the UDHR.\footnote{190} It holds a position of prominence in Article 1 of the UDHR, which specifies that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”\footnote{191} Elsewhere, the UDHR references the “economic, social and cultural rights indispensable for [a person’s] dignity” and specifies a right to remuneration allowing for “an existence worthy of human dignity.”\footnote{192} The preambular provisions of the CCPR and CESCR recognize that the rights in their

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\footnote{183. Morris, supra note 182, at 598–99.}
\footnote{184. Skelton & Frank, supra note 15, at 209.}
\footnote{185. Braithwaite, supra note 23, at 570–71 (citing Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (1998)).}
\footnote{186. Oscar Schachter, Human Dignity as a Normative Concept, 77 AM. J. INT’L L. 848, 849 (1983).}
\footnote{187. See, e.g., Clair Morrissey, The Value of Dignity in and for Bioethics: Rethinking the Terms of the Debate, 37 THEORETICAL MED. BIOETHICS 173 (2016); Rex D. Glensy, The Right to Dignity, 43 COLUM. HUM. RTS. L. REV. 65, 73–77 (2011) (providing a brief overview of some of the philosophical contributions to the concept of dignity). In this Article, my analysis focuses on the language of human rights, and I do not directly engage with the dignity discourses in bioethics or philosophy. That being said, many analyses of dignity across fields delve into Kantian ethics or include at least a brief mention of Pico della Mirandola’s The Oration on the Dignity of Man. See Giovanni Pico della Mirandola, Oration on the Dignity of Man 14–15 (A. Robert Caponigri, trans., Gateway 1956). It is not uncommon for human rights conceptions of dignity to draw from Kantian ethics, and, as is evident in this Article, my conclusions about how to think about dignity also reflect those ethics. See discussion infra text accompanying notes 248 to 259.}
\footnote{188. See Schachter, supra note 186; see also Glensy, supra note 187, at 66.}
\footnote{189. U.N. Charter, pmbl. (“We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . .”).}
\footnote{190. UDHR, supra note 50, at pmbl. & arts. 1, 22–23.}
\footnote{191. Id. at art. 1.}
\footnote{192. Id. at arts. 22–23.}
respective texts “derive from the inherent dignity of the . . . person.”193 In their operative provisions, the CCPR requires that “[a]ll persons deprived of their liberty shall be treated . . . with respect for the inherent dignity of the human person,”194 and the CESCR specifies within the right to education that education be directed towards “the full development of the human personality and the sense of its dignity. . . .”195

Regional instruments also incorporate dignity. In its preamble, the American Declaration affirms inherent dignity, and equates duties to the expression of dignity.196 Later in the document, the right to private property is described as meeting essential needs and supporting dignity.197 The subsequent American Convention avoids dignity in its preamble but in its operative provisions connects dignity to the right to humane treatment for those deprived of their liberty,198 limitations on states’ use of forced labor for incarcerated persons,199 and the right to privacy.200 The Banjul Charter references dignity in its preamble, citing it as one of the “essential objectives for the achievement of the legitimate aspirations of the African peoples,” and as threatened by forces such as colonialism and apartheid.201 The Banjul Charter also treats dignity as a standalone right: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”202 Among this group, the European Convention on Human Rights stands alone, and does not include any references to dignity.203 However, later European human rights instruments do, including the European Social Charter, which provides for the right to dignity at work,204 and the European Union Charter of Fundamental Rights, which references dignity in its preamble and organizes the first 5 rights articulated therein

193. CCPR, supra note 85, at pmbl.; CESCR, supra note 85, at pmbl.
194. CCPR, supra note 85, at art. 10(1).
195. CESCR, supra note 85, at art. 13(1).
196. American Declaration, supra note 70, at pmbl.
197. Id. at art. XXIII.
198. American Convention, supra note 70, at art. 5(2).
199. Id. at art. 6(2).
200. Id. at art. 11(1).
202. Id. at art. 5.
203. European Convention, supra note 109.
204. European Social Charter (Revised) art. 26, opened for signature May 3, 1996, 2151 U.N.T.S. 277. This article specifically addresses, with an eye towards protecting dignity at work, the right to be free from sexual and other forms of harassment, bullying, or victimization. Id.
under the title, “Dignity.” These are the rights to dignity, to life, to physical and mental integrity, to be free from torture and inhuman and degrading treatment or punishment, and to be free from slavery or forced labor. In addition, numerous other international rights instruments contain references to dignity, both in preambular and operative provisions.

Dignity began to appear in constitutional instruments in the early 20th century, though only sparingly. The number of constitutions referencing human dignity grew dramatically after World War II, with the constitutions of the former Axis Powers—Italy, West Germany, and Japan—leading the way. A 2012 study found that 162 of the world’s constitutions at the time included references to human dignity. “The inclusion of human dignity in new constitutions has become nearly a universal feature.” As the number of constitutions including the term “dignity” has increased, so has the number of instances within a constitution where dignity is mentioned, as the concept of dignity is increasingly attached to a growing number of rights.

Of these 162 constitutions, a total of ninety-seven included references to dignity in preambular clauses or fundamental principles, where human dignity is identified as a value underlying or justifying the constitutional instrument, rather than as the object of an operative instruction. But many countries do also include human dignity in their constitution’s operative provisions. One common practice is to use human dignity as a means of guiding state action in certain areas, such as detention and incarceration, labor, and welfare. For example, constitutional provisions may provide that those who are incarcerated be treated with dignity.

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206. Id. at arts. 1–5.
208. Id. at 664.
211. Id.
212. Id.
213. Id. at 465–66.
214. Id. at 475.
215. Id. at 476.
217. Id. at 477.
References to dignity in labor and welfare provisions may relate to labor conditions, compensation, pension, other socioeconomic assistance, or conditions otherwise deemed necessary for living with dignity.\textsuperscript{218} Later constitutions have begun to recognize human dignity as a standalone right.\textsuperscript{219} In countries around the world with a legally justiciable right to dignity, the right has been found by courts to guarantee certain welfare conditions such as social security, minimal subsistence, and housing.\textsuperscript{220}

Dignity is also sometimes used to express limitations on constitutional rights, or to define duties of citizens.\textsuperscript{221} In terms of limitations, some constitutions identify risks or harm to the dignity of others as a justification for limiting another right.\textsuperscript{222} These provisions either limit the exercise of rights generally or they limit specific rights, such as the rights to education, property, and freedom of expression.\textsuperscript{223} Depending on how a state government views dignity, such limitations may be rights enhancing, in that they prevent individual exercises of rights that undermine another individual’s or group’s dignity, or they may be used to improperly claw back the reach of constitutional rights.\textsuperscript{224} Likewise, constitutional duties to respect or promote the dignity of others may enhance overall rights or may prioritize the state over individual rights.\textsuperscript{225}

Though dignity is not understood as a justiciable right in the United States, it has been referenced in various court opinions.\textsuperscript{226} In these opinions, dignity has been invoked by judges in determining whether constitutional rights have been violated, but in varying ways with respect to different rights, and sometimes in different ways with respect to the same right.\textsuperscript{227} In terms of the Eighth Amendment right to be free from cruel and unusual punishment and the Fourth Amendment protection against unreasonable searches and seizures, human dignity is referenced by the U.S. Supreme Court to "signal conduct so reprehensible as to violate the core precept of what it

\textsuperscript{218} See id. at 477–80.
\textsuperscript{219} Id. at 482.
\textsuperscript{220} Glensy, supra note 187, at 113.
\textsuperscript{221} Shultziner & Carmi, supra note 209, at 484–88.
\textsuperscript{222} Id. at 484–87.
\textsuperscript{223} Id.
\textsuperscript{224} See id.
\textsuperscript{225} See id. at 486–87.
\textsuperscript{226} Glensy, supra note 187, at 86–95.
\textsuperscript{227} Id. at 92–93. Glensy makes this point by reviewing various United States Supreme Court case law relating to due process rights under the Fifth Amendment, the Eighth Amendment right to be free from cruel and unusual punishment, the Fourth Amendment protection against unreasonable search and seizure, and the due process and equal protection rights under the Fourteenth Amendment. Id. at 86–92.
means to be human.228 In other cases, state and federal, dignity is expressed in terms of autonomy, liberty, due respect, and elements of equality.229 Like the U.S. Supreme Court, the European Court of Human Rights has invoked dignity when ascertaining the existence of a violation of a right set out in the European Convention on Human Rights.230 Notably, neither of the underlying documents in these cases—the U.S. Constitution and the European Convention—contains the word dignity.231 While the European Court of Human Rights has not identified dignity as a standalone right, it has established it as a principle that runs through the entire Convention.232

Despite the frequency with which the term shows up in rights documents and judicial opinions, it is evident that there is no clear and universally agreed-upon definition for dignity. As described herein, the instruction to respect dignity has been understood to require respect for autonomy, preservation of physical integrity, prevention of humiliation or debasement, equal treatment, respect for privacy, and the guarantee of a minimum level of social and economic welfare.233 It has also been described as the foundation for or the animating principle behind all other rights. As one author has described, dignity has been used as a positive right, a negative right, a heuristic (that is, a principle or concept underlying other rights), or as a rhetorical device for its expressive value.234 Common in many of the textual references to dignity is the notion that respect for dignity is the guiding principle and basis of the treaty or constitutional document in which such reference is contained.235 Yet, because understandings of the content of the right vary across political contexts and worldviews, even those documents that claim to be rooted in respect for dignity range in the number and types of rights guaranteed.236

If dignity is the foundation of all rights, and could be tied to any right, it becomes rather unwieldy as a metric. The UDHR does not offer a definition of dignity, though that was perhaps a necessary political compromise given the competing ideologies of the various

228. Id. at 90.
229. See id. at 86–95.
230. Id. at 105–06.
231. Id. at 105; U.S. CONST.; European Convention, supra note 109.
233. As my review does not cover every rights-granting document and rights-creating or rights-clarifying judicial decision in the world, this Article likely excludes other interpretations of dignity.
234. See Glensy, supra note 187, at 111–40 (elaborating on each of these approaches to human dignity).
235. See Doron Shultziner, Human Dignity—Functions and Meanings, 3 GLOB. JURIST TOPICS 1, 2–3 (2003).
236. Id. at 5.
nations involved in the drafting debates. How can one ascertain the content of a duty to promote human dignity? Is that the equivalent of promoting every human right available to those around us? The content of such a duty would be impossible to ascertain, and the term dignity would be arguably meaningless.

Fortunately, certain themes arise from these varied uses of dignity. McCrudden suggests a minimum core to human dignity, which expresses that all persons have an “intrinsic worth” (the ontological claim) that should be respected and recognized by others (the relational claim). Shultziner similarly describes a thin meaning of human dignity—which he describes as one component of a thicker definition—that relates to human moral worth. Those actions that debase or humiliate are thus violative of human dignity. Beyond this minimum core, it is hard to find similarity across the globe. Thick definitions of human dignity can vary greatly depending on the world-view and ideology of the creator of the definition. Judicial interpretation has moved in numerous and sometimes competing directions, country to country and sometimes within a country. Dignity can range from being inviolable to something that can be balanced against other rights or limited in pursuit of legitimate interests. Jurisdictions with more individualistic conceptions of rights may consider dignity to express the negative right to be left alone to make one’s own choices, whereas others with more communitarian views may see it as a positive welfare right. Though dignity is often described as a source from which other rights flow, it has been used to support restrictions on other rights. Even the minimum core/thin definition yields understandings of human dignity that are subject to debate or changeable over time, depending on what is considered humiliating or degrading.

That judicial differences abound is not undermining. Comparative legal analysis regularly yields examples of differences in rights


238. McCrudden, supra note 207, at 679. To this he also adds a “limited-state claim,” that the state must be understood to exist for the sake of the individual. Id.

239. Shultziner, supra note 207, at 679. To this he also adds a “limited-state claim,” that the state must be understood to exist for the sake of the individual. Id.

240. Id.

241. Id. at 6–8.

242. Glensy, supra note 187, at 86–107 (describing how dignity has been used in domestic courts in the United States and other countries); McCrudden, supra note 207, at 681–96.


244. Id. at 699–700.

245. Id. at 702–04; Shultziner & Carmi, supra note 209, at 483–87.

adjudication across countries. The content of a right to life, for example, can range from a limited right to be free from state-sanctioned murder to a robust right to life with that includes access to certain socioeconomic conditions. While the parameters of the right may vary across nations, we can agree upon what the right includes at a minimum, and agree that it has utility despite a lack of global agreement about every potential application. A minimum core relating to the intrinsic worth of a person can be enough to develop a working understanding of dignity in the context of responding to interpersonal harm.

Beginning with this idea that dignity refers to the “intrinsic worth” of a person, Oscar Schachter develops certain corollaries about the nature of dignity. Schachter argues that “nothing is so clearly violative of the dignity of persons as treatment that demeans or humiliates them.” He includes in this violation any official statements that vilify groups or reduce a sense of self-respect. Though he elucidates this aspect of violation with respect to an obligation to respect the personal beliefs of individuals and groups of individuals, a similar idea is applicable in the context of responding to harm: persons who have been harmed and who have committed harm should be treated with a minimum degree of respect and also be free of such statements. In addition, if respect for dignity includes respecting a person’s autonomy and freedom to make choices, it follows that such persons are responsible for their own actions. Schachter’s definition of dignity does not stop with autonomy. Noting that identity is more complex than the individual self, he acknowledges that respect for social group connections is also an

247. For example, in India, the right to life has been interpreted to mean more than mere physical existence . . . the Court has read it into it, inter alia, the right to health, livelihood, free and compulsory education up to the age of 14 years, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights of under-trials, convicts and prisoners. Surya Deva, Public Interest Litigation in India: A Critical Review, 28 CIV. J. Q. 19, 24–25 (2009) (citations omitted). In addition, the UN Human Rights Committee has interpreted the CCPR’s guarantee of a right to life as requiring “measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.” Human Rights Committee, General Comment No. 36, ¶ 26 (2019). On the other hand, the United States has pushed back against this interpretation by the Human Rights Committee, asserting that the right was meant to include “actual killings of one person by another” and that any expansion of the right was inappropriate. Observations of the United States of America on the Human Rights Committee’s Draft General Comment No. 36 on Article 6—Right to Life, ¶¶ 36–38 (Oct. 6, 2017).

248. Schachter, supra note 186, at 850.

249. Id.

250. Id.

251. Id.
important part of a person’s inherent dignity. 252 Additionally, he argues that dignity requires a minimum degree of socioeconomic needs being met, though he seems less certain about the connection between dignity and substantive equality. 253 Respect for dignity, Schachter later argues, may involve positive social promises in areas of education, benefits, and leadership. 254

Looking to international and regional rights instruments, at least some of Schachter’s conceptualization is supported by law. It is generally understood in the human rights world that enslavement and torture, two of the utmost forms of degradation, are violations of dignity. 255 The concerns for the dignity of people who are incarcerated or otherwise deprived of their liberty, as expressed in the CCPR and other rights instruments, 256 ties dignity to both physical integrity and autonomy. The implication of these provisions is that the loss of autonomy immediately puts dignity at risk. Taken in conjunction with the language in the UDHR and the CESCR, both of which relate the free development of personality with dignity, 257 the relationship between autonomy and dignity is strengthened. The importance of socioeconomic needs, though less accepted in the United States, can be derived from the provisions relating to socioeconomic rights in the UDHR and the proliferation of various socioeconomic rights that reference dignity in other rights instruments. 258 Though the exact rights that are connected with dignity vary, the emphasis on these types of rights across numerous instruments suggests at least some level of agreement that dignity requires a minimum basket of socioeconomic needs be met. These limited but consistent references to dignity support both the individualistic and communitarian aspects of Schachter’s conceptualization that respect for a

252. Id. at 851.
253. Id.
254. Schachter, supra note 186, at 853.
256. CCPR, supra note 85, at art. 10(1); EU Charter on Fundamental Rights, supra note 205, Title I; American Convention, supra note 87, at arts. 5(2), 6(2); G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, at art. 17(1) (Dec. 18, 1990) [hereinafter Convention on Migrant Workers].
257. UDHR, supra note 50, at art. 22; CESCR, supra note 85, at art. 13(1).
258. UDHR, supra note 50, at arts. 22, 23; Convention on Migrant Workers, supra note 256, at art. 70 ("States Parties shall take measures . . . to ensure that working and living conditions of migrant workers and members of their families . . . are in keeping with the standards of fitness, safety, health and principles of human dignity."); McCrudden, supra note 207, at 669–70 (identifying in various rights instruments associations of the concept of dignity to labor, the right to food, abolition of extreme poverty, and education).
person’s dignity requires respecting their autonomy, providing for essential socioeconomic goods, and refusing to degrade or debase them.\(^{259}\)

To the extent we can agree upon this elaboration of the inherent worth of a person as forming the content of a right to dignity, we must next identify what a duty to promote dignity entails. The content of the duty depends on the content of the corresponding right.\(^{260}\) The content of a right is not static and may be circumstance dependent.\(^{261}\) When thinking about restorative justice, we concern ourselves with the circumstances of interpersonal harm. At this point, the right to be free from interference is already lost, as we acknowledge the right of society to intervene. Thus, how is dignity implicated? What is its specific content in these circumstances? We must consider how to respect the inherent worth of all parties involved and ask, how can we avoid subjugating them? As I explain in Part III, infra, avoiding subjugation necessarily involves both negative and positive duties. Negative in the sense that we do not treat the parties involved as objects. Positive, in that we take steps to support the parties involved, so that harm can be repaired, and accountability achieved.

III. MAKING THE CASE: RESTORATIVE JUSTICE, DUTY, AND DIGNITY

We have established that individuals and groups can be duty-bearers of human rights, and that among these duties include the duty to promote the common good and dignity of others. Accepting an ever-present duty would create an easy starting point for analysis. But even working with the more limited conception that individuals and social groups only have a residual or secondary duty that is activated prior to the development of institutions or upon the failure of institutions,\(^{262}\) a duty to engage in restorative practices is supportable. State institutions that are meant to address harms (criminal and non) are arguably failing in numerous ways.\(^{263}\) Thus our duty is activated, but what is the content of this duty in the context of interpersonal harm?

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259. Schachter, supra note 186, at 850–51.
260. Griffin, supra note 152, at 108.
261. Id. at 108–09.
To establish the duty, we must first establish the specific claims. Rights-holders here include the harmed parties, responsible parties, and community members. Using Schachter’s conception of dignity, we can look to whether autonomy and social group connections are being respected, and whether essential needs are being met.

Autonomy requires being treated as an end, rather than a means to an end; to have the freedom to act, instead of being acted upon. For all parties, this means having the freedom to fully participate in the resolution of the harm. In all of my restorative justice workshops and seminars, I ask participants and students to think through what they have needed when they’ve harmed others or when they have been harmed, and several themes emerge. For the harmed party, these needs often include, acknowledgment of their experience of the harm, admission of what happened by the person responsible, and effective reparation of the harm. From the perspective of responsible parties, needs are expressed as a desire to be accepted back in their community, to repair the harm, to gain understanding about what they have done, and to be heard about their own experiences. For the responsible party, as Schachter notes, having the right to make one’s own choices exists in tandem with the duty to take responsibility. A responsible party also has a duty to respect the dignity of the person they have harmed; they do so by taking responsibility and repairing that harm. To the person harmed and the community, the responsible party may also owe a duty to abstain from repeating the wrongful behavior. The community—in this case perhaps both non-state and state-as-community—owes a duty to create space for that obligation to be fulfilled, and to support the harmed party in actively taking responsibility.

Because autonomy is not absolute, and people are members of social groups, respecting dignity also requires allowing the maintenance of social supports and connections. Both harmed and responsible parties may feel a sense of isolation after a harm has occurred. Respecting the dignity of both these parties may also require a strengthening of their relationships with their communities. Responsible parties may additionally require some education and support to maintain community connections and avoid re-engaging in the problem behavior.

264. My references to “community” herein will largely refer to non-state community. To the extent I refer to a community duty owed by the state, I explicitly refer to “the state” or “state-as-community.”
265. Schachter, supra note 186, at 850–51.
266. This is an oft-used explanation of autonomy, often attributed to Kant. Id. at 849.
267. I am grateful to sujatha baliga for introducing me to this exercise as a means of introducing people to restorative justice practices.
268. Schachter, supra note 186, at 850.
What are the socioeconomic supports necessary? People who have experienced harm may need numerous supports ranging from medical care, mental health care, financial support, housing, and other forms of restitution. Responsible parties may also require support. In changing their future behavior, they may need to address and resolve past harms that were inflicted upon them by others. Responsible parties may not be able to fulfill a promise to avoid committing that same harm in the future if certain basic needs—shelter, healthcare, food—are not met.

Thus, the duty that arises when a harm has occurred includes obligations to: allow for parties to fully participate in the resolution of the harm, repair the harm, support the maintenance of community connections, and meet the minimum socioeconomic needs of the parties involved to recover from the harm or repair it, as applicable. It is my argument that community-based restorative justice offers the opportunity for individuals and communities to fulfill at least some of these duties. Socioeconomic needs can be partially addressed by communities, but many of these needs may require larger scale action, giving rise to governmental duties that can only be met through law- and policy-making processes. State duties may also include supporting these community practices, as appropriate. Though there may be inconsistent outcomes due to the nature of restorative justice, implicating and upsetting certain expectations of equality, I do not view this as necessarily undermining dignity.

A. What Is Community-Based Restorative Justice?

We begin with some preliminary discussion about what we mean by restorative justice. “The theory of restorative justice has to a large extent developed through practice, and will probably continue to do so.” My own writing is based on my own experiences with restorative justice, through my own practice and by participating in the practice of others, as well as on restorative justice scholarship. Scholars and practitioners continue to negotiate definitions and understandings of what types of practices constitute restorative justice, which is appropriate given that restorative justice is part of a group of experiments designed to push back against state systems that perpetuate harm in many ways.

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270. Ashworth, supra note 263, at 578.
271. See id. at 580–81; Zehr, supra note 3, at 6–7.
Restorative justice seeks to achieve multiple goals. Ashworth describes the “keynotes” of restorative justice as “empowerment, dialogue, negotiation and agreement.” To that I would add: accountability, repair, and reintegration. I have elsewhere defined restorative justice, which I distinguish from more general restorative practices, as a practice that:

1. reframes how we consider harm by focusing on the harm that has been committed, what needs must be fulfilled, and who bears the obligations to fulfill those needs; 
2. involves a process that brings together the interests of the responsible party, the harmed party, and community stakeholders; 
3. allows all parties to engage in a free discussion and exploration of the harm and the circumstances surrounding it; 
4. includes collaborative determination of what accountability looks like; and 
5. seeks to support the responsible party in arriving at accountability and reintegrating into the community, which requires making reparation, taking responsibility for the harm and its impacts, and sometimes also taking steps to avoid committing future harm. Encapsulated in this definition is the notion that parties will be treated with dignity and respect for their humanity.

Outcomes are designed to be context-specific and thus may not be the same across like harms. However, where restorative justice practices have longevity, standard sets of agreements may be developed to support accountability for specific harms.

What I call community-based restorative justice refers to those practices that are operating within communities. These practices may work with the state in that they may accept referrals from the criminal system or even accept funding, but they are not part of the state. They are housed in community, accessible to community, and are not incorporated into any state institutions.

Though I dislike describing restorative justice in terms of the criminal system, it can provide a helpful comparison given that the criminal system is one of the dominant methods used to respond to harm. Such comparison also illuminates some important characteristics of restorative justice. With respect to duties, the most noteworthy characteristic of community-based restorative justice is that

272. Ashworth, supra note 263, at 578.
273. Polavarapu, Myth-Busting, supra note 6, at 970; Morris, supra note 182, at 598.
274. Polavarapu, Myth-Busting, supra note 6, at 970.
275. Ashworth, supra note 263, at 578.
276. For example, the Men as Peacemakers Domestic Violence Restorative Circles Program has a list of required outcomes they draw from. Domestic Violence Restorative Circles, MENAS PEACEMAKERS, https://www.menaspeacemakers.org/dvrc [https://perma.cc/8R6S-9WKF].
community members can satisfy their duties to promote dignity because they are directly involved in the repair harm process. This is unlike criminal processes. For example, in the United States, generally speaking, the criminal system distances individuals and communities from their connections to the harm that has been committed. In criminal cases, the harm is refashioned as a crime against the state and the response is outsourced to the state. In addition, the participation in a criminal process by the person who has been harmed may be limited to testimony actively shaped by attorneys. The person responsible for the harm may experience some consequences, but these are consequences set by law and owed to the state, rather than the person or people who were hurt. The people who were harmed and who committed the harm are thus quite passive in the criminal context; the state acts upon them. In contrast, in restorative justice processes we lean into the harm, and the parties directly connected to the harm are encouraged to be active participants in the process.

Duties and responsibilities are at the core of community-based restorative justice. Foundational questions of the process explore needs: What are the needs of the person or people who experienced the harm, the person or people who committed the harm, and the community? How can we meet these needs, and who is responsible for meeting those needs? The person who committed the harm has a duty to repair the harm. With more complex harms, sometimes parties have both committed and experienced harms, and they bear responsibilities of repair towards one another. The community also has obligations. The entire process supports the parties who may be feeling isolated from the community. The community thus has a responsibility to prevent the loss of community relationship, as well as to support the responsible party in their journey toward accountability.

B. Autonomy

Under our conception of dignity, restorative justice allows community members to fulfill their obligations to promote dignity in several ways. Firstly, in restorative justice, more so than in a criminal legal system, participants treat responsible parties as agents rather than things. Restorative justice promotes dignity by allowing individuals to bring their full selves to a repair harm process.

278. Id. at 31.
279. Linda Radzik, Offenders, the Making of Amends and the State, in HANDBOOK OF RESTORATIVE JUSTICE 192, 192 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).
Rather than having testimony limited and shaped by laws, rather than being told whether a particular injury is legally actionable because it meets or does not meet legally defined elements, and rather than having a story shaped by outside forces, restorative justice allows participants to be known. People who have been harmed are able to share exactly how they have been impacted by the harm. Responsible parties can share why they acted as they did and acknowledge their actions. By offering a choice to repair harm, responsible parties can act to repair harm, as opposed to being acted upon by the state.

Dignity is also promoted by the creation of an environment in which all parties can participate freely. Facilitators are expected to recognize power imbalances and create safe environments for the restorative process. This is a deliberate consideration in many practices addressing domestic violence. Free participation also requires being inclusive of people across, inter alia, race, culture, disability, and class. Not all practices calling themselves restorative engage in the necessary level of care to be inclusive. However, it is not only possible for restorative practices to be inclusive and address power imbalances, but it is also in line with the values of restorative justice to be so. This is markedly different from the adversarial system, in which outcomes are heavily influenced by the relative wealth, power, and ability to access sophisticated legal counsel of the parties involved.

While some have raised the concern that restorative justice practices can be coercive and thus detrimental to dignity, I am unpersuaded that this is an issue of restorative justice as much as it is an issue of state practices. Ward and Langlands express concern that wrongdoers cannot fully consent to participate in restorative justice in cases where they are not adequately informed about their rights, or if they feel coerced to participate for fear of the negative consequences they incur if they do not. With respect to the first critique, restorative justice facilitators are expected to

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281. KIM, supra note 13, at 54; AMANDA DISSEL & KINDIZA NGUBENI, GIVING WOMEN THEIR VOICE: DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE IN SOUTH AFRICA 6 (2003).
283. Morris, supra note 182, at 608.
285. Id. at 362.
create a space that adequately provides for and protects each participant. Of course, there will be instances where this does not happen in practice, but it is an underlying ethic of the practice.\textsuperscript{286} If one is searching for rights to be specified in the same way they are in the criminal system, they will be disappointed. As Morris points out, restorative justice does not ignore the rights of those who have committed harm.\textsuperscript{287} Instead, it “place[s] 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 [responsible party’s] responsibility or to get the most lenient sanction possible.”\textsuperscript{288} Practices must still be evaluated to ensure they protect the human rights of the parties involved, but those rights are necessarily going to be expressed differently than they are in the criminal system.

As for the question of coercion, while I am in full agreement that restorative justice processes are not devoid of coercion—in fact, I believe true voluntariness is outright impossible\textsuperscript{289}—I do not believe the degree of coercion necessarily rises to such a level that it undermines dignity. To the extent the concern relates to fear of social backlash, the coercion arises out of community reaction to the wrong committed. Whether or not a restorative justice process is available, the responsible party risks backlash if they fail to take the socially sanctioned option for addressing the harm. This is to be expected when a person has violated a social norm. In the case of wrongdoing, a responsible party’s agency is balanced against the rights of the person or people they harmed, and society. A fundamental interpretive principle in human rights is that rights cannot be exercised in a manner that destroys the rights of others.\textsuperscript{290} It is generally understood that intervention can and should occur to address the harm.

To the extent that the coercion critique is focused on choosing between restorative justice and the criminal system, the question is whether the degree of coercion in consenting to participate in restorative justice is high enough that it would undermine dignity. The choice between a criminal trial and a restorative justice process may very well not be an authentic choice, as a responsible party may be

\textsuperscript{286} Morris, supra note 182, at 608.
\textsuperscript{287} Id. at 602.
\textsuperscript{288} Id.
\textsuperscript{289} Polavarapu, Myth-Busting, supra note 6, at 966–67.
\textsuperscript{290} This is expressed in every human rights treaty that comes to mind, including the core UN and regional treaties. CCR, supra note 85, at art. 5; CECR, supra note 85, at art. 5; American Convention, supra note 87, at art. 29(a); European Convention, supra note 109, at art. 17; Banjul Charter, supra note 99, at art. 27(2).
compelled to choose restorative justice for fear of harsher sanctions at the hands of a court. This concern is even more salient for youth. For example, in New Zealand’s family group conferencing, youth are given the opportunity to participate in family group conferencing if they admit responsibility and agree with the facts laid out in the police report.\textsuperscript{291} In the alternative, they are likely to go before a judge.\textsuperscript{292} Though past research has shown that the young people felt adequately involved in these conferences,\textsuperscript{293} I tend to agree that this is a highly coercive situation that can undermine dignity. However, the loss of dignity here stems from the attachment of the practice to a criminal legal system which refuses to offer alternative and less frightening noncriminal options in the absence of what is essentially a confession. I have elsewhere discussed my own caution with restorative justice practices that are connected to criminal legal processes.\textsuperscript{294} Though some connection may be necessary given the current dominance of the criminal system, restorative justice practices risk being co-opted by the state and must be deliberate about maintaining enough separation to ensure the integrity of the practice. Restorative justice does not take the place of investigation, nor is it meant to compel confession.

When removed from this form of state attachment, restorative justice is better able to promote dignity by respecting participants’ agency and humanity.

C. Socioeconomic Essentials

To some degree, the duty to respect dignity with respect to provision of socioeconomic essentials can be met through restorative justice, but not entirely. Through community-based restorative justice, community members can promote the dignity of the wrongdoer by supporting them in arriving at accountability. It is also possible to meet some of the socioeconomic and other needs of the harmed parties. However, given the allocation of resources and the way benefits are made available in many societies, there are some limitations as to how much a non-state community can fulfill this particular duty.

One of the community’s roles in restorative justice is to support both the harmed parties and the people who are harmed.\textsuperscript{295} With

\begin{itemize}
  \item \textsuperscript{291} Ward & Langlands, supra note 14, at 363.
  \item \textsuperscript{292} Id.
  \item \textsuperscript{293} Morris, supra note 182, at 604–05.
  \item \textsuperscript{294} Polavarapu, \textit{Dangerous Liaisons}, supra note 10.
  \item \textsuperscript{295} ZEHR, supra note 3, at 26.
\end{itemize}
respect to people who have committed harm, this is not a simple extraction of payment (financial or otherwise) to repair harm, but true support. In some cases, this means offering additional opportunities for the responsible party to work through past harms they have experienced. These past harms may not only have contributed to the harm at the center of the current repair harm process, but they also may contribute to the commission of future harms if left unaddressed. Supporting the responsible party also means recognizing that they may be unable to make fully informed decisions, or commit to accountability agreements, when their minimum needs remain unmet. Thus, supporting their accountability journey requires understanding and sometimes meeting those needs as well. Some of the success of the Circles of Support and Accountability (COSA), a program that works with people recently released from incarceration who have committed repeat sexual offenses, is credited to the fact that COSA offers prosocial supports to the participants in its program. Providing support for accountability also means investing time. For example, processes to address domestic violence can take many months to conclude. The circles of Hollow Water, which addressed sexual harm, incorporated follow up circles in which responsible parties must report back to the community, six months after the sentencing circle, on how they have progressed with their accountability plans. The amount of time spent in these processes can range significantly depending on needs and other circumstances.

The needs of harmed parties are varied. The 2022 National (U.S.) Survey of Victims’ Views on Safety and Justice demonstrates

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296. Ward and Langlands note that an excessive focus on accountability in restorative justice processes creates an opportunity to discount any past harms the wrongdoer experienced. Ward & Langlands, supra note 14, at 366. However, restorative justice should be creating opportunities for that wrongdoer to address the harms they’ve experienced. In the healing circles of Hollow Water, for example, at least some of those who have committed abuse had also experienced abuse at the hands of others; separate circles created for responsible parties provided opportunities to address and work through these past harms. CHRISTINE SIVELL-FERRI, THE FOUR CIRCLES OF HOLLOW WATER  (1997). On the other hand, emphasis on the past harms experienced by responsible parties may occur at the expense of addressing the current harm inflicted. Rashmi Goel, No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases, 15 Wis. WOMEN’S L.J. 293, 324 (2000). Care must be taken to ensure that processes to support the responsible party do not infringe upon the process to address the harm they have inflicted.

297. Ward & Langlands, supra note 14, at 363. For example, research demonstrates that stable housing and social support is linked to reduction in violent recidivism and sexual recidivism. Wilson, Cortoni & McWhinnie, supra note 2, at 414.

298. Wilson, Cortoni & McWhinnie, supra note 2, at 415–16, 426.


300. SIVELL-FERRI, supra note 296, at 156–57.
that people who have experienced criminal harm desire support in the form of, \textit{inter alia}, compensation, medical assistance, physical therapy, mental health support, and housing.\footnote{Alliance for Safety and Justice, supra note 269, at 18, 20.} Much like the needs of those who have committed harm, these needs can require more resources than individual community members or community restorative justice practices can offer. With respect to this aspect of dignity, individuals and local communities can be partial duty-bearers, but adequate satisfaction of this claim may also require state involvement.

\textbf{D. Does Equality Matter?}

Our concept of dignity does not include equality, but should we be worried about equality in outcomes? Restorative justice outcomes are not always the same for parties who have committed similar harms, which causes consternation for critics, as it may be indicative of disproportionate outcomes, perhaps due to vengeful parties.\footnote{Ward & Langlands, supra note 14, at 364–65.} This concern may lead to an immediate preference for the state. However, at least in the United States, though impartiality and consistency in sentencing are meant to characterize the criminal system, the reality is that bias and inconsistency are part and parcel of the system.\footnote{There is tremendous research in this area, but I will offer some of the recent data sources that make this point in various ways. Ashley Nellis, \textit{The Color of Justice: Racial and Ethnic Disparity in State Prisons} 5 (2021); Bruce Western & Jessica Simes, \textit{Criminal Justice, Pathways}, State of the Union Issue 2019, at 18–19; Somil Trivedi, \textit{Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It’s Time to Suck the Venom Out.}, ACLU CRIM. L. REFORM PROJECT (Jan. 13, 2020), https://wp.api.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out [https://perma.cc/TF83-GESD].} With the rise of victim impact statements and other ways that harmed parties can influence the system, harmed parties are also able to influence sentencing and parole hearing outcomes.\footnote{See, e.g., Shirene Hansotia, \textit{Reevaluating Crime and Punishment in South Carolina} 57 (2021).}

In restorative justice, wrongdoers who have engaged in similar acts may experience different consequences. If dignity is tied to equal treatment, then this would seemingly undermine dignity. But perhaps dignity is preserved because consequences are based on numerous factors, including more than the identity of the parties, rather than on preset standards that are applied because a small percentage of the entire story fits preset elements set out in law. The question of equality may be more aptly directed towards how meaningfully different parties are able to engage with and participate in the process.
Accountability agreements are meant to be collaboratively concluded, ideally incorporating the voices and considering the interests of all involved. Practices that commit to certain minimum standards can avoid disproportionate or egregious outcomes. It is also not certain that there would be enormous variation in consequences of community-level practices. Community and program norms tend to guide outcomes, and there is likely to be some commonality in outcomes for similar harms committed by different people.\(^{305}\)

Still, the possibility of disproportionate or egregious outcomes in restorative justice is a real concern. Not all practices will operate in accordance with theory.\(^{306}\) The inclusion of community especially raises concerns regarding the rights of the parties and equality.\(^{307}\) Community-driven justice can theoretically create a patchwork quilt of justice outcomes across localities, as each community’s norms drive outcomes.\(^{308}\) I have elsewhere raised related concerns about community involvement.\(^{309}\) Those considered in the minority or on the fringe of a close-knit community may face discrimination or other threats to fairness. While this is not a fatal indictment of restorative justice, it is one that must be carefully considered in any restorative justice practice.

As with other critiques of restorative justice, this is a critique that can and has been leveled against criminal systems as well.\(^{310}\) The history of the United States is unfortunately riddled with examples of jury involvement leading to racist outcomes.\(^{311}\) Ashworth argues that the important difference is that the state system understands this disparity to be a flaw, whereas restorative justice may see it as a feature.\(^{312}\) I disagree. The feature in restorative justice is that carefully crafted outcomes can be responsive to the specific circumstances of the harm and encourage true accountability. In addition, it is possible to address some of these concerns by setting guidelines to be followed when crafting accountability agreements.

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305. See, e.g., Domestic Violence Restorative Circles, supra note 276; Polavarapu, Myth-Busting, supra note 6, at 983.
306. See Braithwaite, supra note 15, at 158.
308. Ashworth, supra note 263, at 582.
309. Polavarapu, Myth-Busting, supra note 6, at 987–92.
312. Ashworth, supra note 263, at 582.
While some raise the concerns of overly burdensome forms of accountability, a related concern is that other parties will experience no accountability. But restorative justice operates under the presumption that accountability does not look the same for each person. In addition, though accountability in restorative justice is sometimes dismissed as simple community service projects, in other settings the accountability work is intensive and difficult. The process of going through this type of justice can involve working with professionals to uncover and address the internal reasons why one has committed such a harm, and outcomes can include agreements to continue this and other harm repair work over a long period of time.

Safeguards are necessary. We must be mindful of the ways restorative justice practices can result in discriminatory and unjust outcomes, and work towards reducing the likelihood of such outcomes. Dignity does not require the same outcome for the same type of harm in every instance. In fact, dignity could be undermined if set outcomes were applied regardless of factors such as age, personal history, and specific circumstances of the harm. However, dignity would also be undermined if participants in a restorative justice process faced any form of discrimination or biased treatment. While it is inappropriate to evaluate restorative justice practices using the same rights analyses used to evaluate criminal processes, restorative justice practices must be evaluated, in their own way, to ensure they protect the human rights of those involved. With care and deliberation, community-based restorative justice practices can mitigate these concerns and promote the dignity of all parties.

CONCLUSION

In this Article, I sought to create a human rights justification for the existence of community-based restorative justice practices. Relying on the language of duties in human rights legal instruments, I have demonstrated how these practices allow individuals and community groups to fulfill their duties to promote the dignity of their fellow community members in the aftermath of an interpersonal harm. Through these practices, individuals and communities can promote dignity by treating parties as active participants in

313. Id. at 583.
315. SIVELL-FERRI, supra note 296, at 156–57.
repair-harm processes, engaging social supports for the parties, and operating with an intent to meet at least some of the related needs of the parties.

The state is not excluded from duty. Sometimes a duty-bearer cannot fulfill the entire content of a duty. With the current structure of society, it is not likely that community members will be able to satisfy the entire duty to promote dignity via restorative justice. Where the dignity of harmed parties or responsible parties requires a set of socioeconomic needs met, the duty may be impossible for the community to bear. Other duty-bearers, including the state, may need to step in to fully satisfy the duty and the corresponding right. Even where the state fails to fulfill or even acknowledge this duty, by identifying the needs, community-based restorative justice creates the opportunity to fulfill these duties, if not now, then in the future. States may also bear duties to permit and support the development of community-based restorative justice, without engaging in co-optation.

Though I describe community-based restorative justice as rights-enhancing, individual practices must also be evaluated to ensure that they do not violate rights, as theory and practice are not always aligned. Practices must be evaluated to ensure that they do not perpetuate existing bias or engage in discrimination, that they are inclusive and provide equally meaningful access regardless of race, culture, class, disability, or other such characteristic, and that they protect against other rights violations that may occur.

Restorative justice may also be rights-enhancing in numerous and as yet unexplored ways. Viewing restorative justice through the lens of the right to dignity, as I have done, is only a first step. Promotion of dignity may not be the only human rights duty being borne by communities supporting restorative justice. Duties to provide education, for example, may be triggered when a responsible party commits a harm and may be fulfilled with an ethical implementation of community-based restorative justice. This Article merely begins the process of identifying the basket of duties that are fulfilled, and rights that are promoted, by community-based restorative justice. The application of human rights to the day-to-day practice of restorative justice is still in great need of theoretical exploration.