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Permalink

<https://escholarship.org/uc/item/7xb6444w>

Journal

UC Irvine Law Review , 13(3)

ISSN

2327-4514

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Publication Date

2023-05-01

Myth-Busting Restorative Justice: Uncovering the Past and Finding Lessons in Community

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A common narrative about modern restorative justice is that it is a revival of historic and indigenous justice practices that have been practiced around the world. Critics of this narrative call it a myth, arguing that the claim is overbroad and unsupported by existing evidence. Embedded in this conversation are questions about how to respect the contributions of indigenous traditions and avoid whitewashing. Such an overwhelmingly broad claim tends to lead to romanticization and whitewashing of indigenous traditions, serving the needs of largely white, Western advocates in yet another colonial endeavor. But ignoring the indigenous contribution to restorative justice altogether is whitewashing by a different route.

This Article offers three main contributions. First, it reveals the current lack of empirical grounding for the common narrative. This descriptive insight motivates the second contribution: the creation of a methodology for better ascertaining the degree to which any historic, indigenous practice did constitute restorative justice. Applying this methodology to investigate the traditional practices of the Igbo and Acholi in sub-Saharan Africa, the Article begins the work of documenting the relationship between restorative justice and historic practices, work that leads to the third and last contribution. Better conceptualizing past practices not only advances our understanding of such practices but also contributes to our understanding of modern restorative justice. Here, the case studies of the Igbo and Acholi reveal a need for restorative justice scholars to engage in greater conceptual and empirical analysis of the role of community in restorative justice practices.

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Special thanks to Professors Thalia González, Mary Louise Frampton, Tessa Davis, Lydia Nussbaum, Adriaan Lanni, Jonathan Scharrer, Susan Abraham, Amy Cohen, Deborah Weissman, and Julie Goldscheid for reading and providing feedback on drafts of this Article. Tremendous thanks also to my program associate George Higgins; the restorative justice practitioners who share space with me; and the advocates supporting reconciliation processes in Uganda who taught me so much. I must also thank my diligent and tenacious research assistants Brooke Hiltbold, Kristen Soucy, Will Arnold, and Katharine Penrod. All errors are of course my own.

Introduction	950
I. Debating the “Global” and “Historic” Roots of Restorative Justice.....	953
II. What is Restorative Justice?.....	959
A. Process-Based Definitions.....	961
B. Reframing Harm.....	965
C. Healing and Forgiveness	967
D. More Expansive Conceptions	968
E. Identifying Key Elements of Restorative Justice.....	969
III. Investigating Traditional Justice Among the Igbo and Acholi.....	970
A. Resisting the Racist and Ethnocentric Lens.....	970
B. Generalized Descriptions of Justice in sub-Saharan Africa.....	972
C. Systems in Detail.....	974
1. Igbo (Nigeria).....	974
2. Acholi (Uganda).....	978
D. Are these Practices Restorative Justice?.....	981
1. Framing of the Harm.....	982
2. Process	983
3. Arriving at Accountability and Reintegration	985
4. Are these Practices Restorative Justice?.....	986
IV. Bringing the Past Forward: Insights About Community.....	986
Conclusion.....	991

INTRODUCTION

The modern restorative justice movement is regularly tied to the past. Many practitioners and advocates, this author included,¹ often cite to existing systems of justice around the world as sources of inspiration for the modern restorative justice movement. Howard Zehr, often referred to as “the grandfather of restorative justice,”² argues that “[r]estorative justice is based on an old, common sense understanding of wrongdoing.”³ Kay Pranis likewise asserts that the assumptions underlying circle practice⁴ are “common in the worldview of most indigenous

1. See Aparna Polavarapu, *Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda*, 42 HARV. J.L. & GENDER 123 (2019) [hereinafter Polavarapu, *Global Carceral Feminism*]; Aparna Polavarapu & TED^x Tufts, *Leaving Punishment Behind: Embracing New Ideas of Justice*, YOUTUBE (June 10, 2021), <https://youtu.be/N9NqNQ8DUio>.

2. E.g., Christian B.N. Gade, “Restorative Justice”: *History of the Term’s International and Danish Use*, in NORDIC MEDIATION RESEARCH 27, 34 (Anna Nylund, Kaijus Ervasti & Lin Adrian eds., 2017); Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1029 (2019).

3. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 19 (2002).

4. A circle is one possible manifestation of restorative practice, named such because participants are seated in a circle. Circle keepers facilitate the dialogue, which can have any number of goals, including responding to harm, building community, or providing support. Though specific practices may vary, typically, all participants are given the opportunity to speak, decisions are made collaboratively, and the dialogue follows certain guidelines agreed upon by the participants. KAY PRANIS, *CIRCLE KEEPERS MANUAL* 4–8 (2004).

cultures.”⁵ Scholars tell a story of an old and widespread form of justice that is now being revived after a period of suppression.⁶

While this is an important narrative for restorative justice advocates, it is not uncontested. Other scholars push back against the sheer breadth of the claim, arguing that it is unsupported by the evidence.⁷ The argument is not that the claim lacks any truth, but that there is no supportable reason to claim that restorative justice was the dominant form of justice around the globe.⁸ Further, such an overwhelmingly broad claim tends to lead to romanticization and whitewashing of indigenous traditions, serving the needs of largely white, Western advocates in yet another colonial endeavor.⁹

But ignoring the indigenous contribution to restorative justice is whitewashing by a different route. There is an observable, direct relationship between modern restorative practice and certain indigenous practices. For example, American practitioners have been trained by members of some Indigenous groups, including the Blackfoot Confederacy and the Ojibwe.¹⁰ Robert Yazzie, a citizen of and Chief Justice Emeritus of the Navajo Nation as well as a restorative justice practitioner, describes aspects of Navajo justice as seeking to achieve restorative justice.¹¹

While these connections are evident, they do not account for the widely held view—or “myth” as described by restorative justice scholar Kathleen Daly—that “restorative justice uses indigenous justice practices and was the dominant form of pre-modern justice.”¹² As this Article argues, the truth in both accounts stems from a simple fact: it is unclear exactly how much of modern restorative justice practice

5. KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* 25–26 (2005).

6. Jon’a F. Meyer, *History Repeats Itself: Restorative Justice in Native American Communities*, 14 J. CONTEMP. CRIM. JUST. 42, 46 (1998) (describing five stages of traditional justice: “aboriginal, tolerance, reduced tolerance, secrecy, and revitalization”); John Braithwaite, *Crime in a Convict Republic*, 64 MOD. L. REV. 11, 12 (2001). Braithwaite describes five regulatory stages:

1. A pre-state stage when restorative justice and banishment are dominant;
2. A weak state stage where corporal and capital punishment dominate;
3. A strong state stage where professional police and penitentiaries dominate;
4. A Keynesian welfare state stage where new therapeutic professions such as social work colonise what becomes probation-prison-parole; and
5. A contemporarily evolving new regulatory state phase of community and corporate policing (with a revived restorative justice).

Id.

7. See, e.g., Kathleen Daly, *Restorative Justice: The Real Story*, 4 PUNISHMENT & SOC’Y 55, 56 (2002) [hereinafter Daly, *The Real Story*]; Anthony Bottoms, *Some Sociological Reflections on Restorative Justice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS 79 (Andrew Von Hirsch, Julian Roberts, Anthony Bottoms, Kent Roach & Mara Schiff eds., 2003).

8. Bottoms, *supra* note 7, at 88.

9. Daly, *The Real Story*, *supra* note 7, at 64.

10. Heather Sattler, *Expanding Vision: Exploring Value in Youth-Led Restorative Practice* (2021) (Ph.D. dissertation, Alverno College) (on file with author); S.C. Restorative Just. Initiative, *Restorative Justice & Intimate Partner Violence with sujatha baliga and Crhsi Godsey – Week 2*, YOUTUBE (Jan. 8, 2021) [hereinafter *Fundamentals of Restorative Justice Webinar*], https://youtu.be/xC5kQ__Sjk.

11. Robert Yazzie, “*Life Comes from It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180 (1994).

12. Daly, *The Real Story*, *supra* note 7.

can be found in historical, indigenous approaches to justice around the world. Without a coherent methodology, one cannot begin to investigate the truth of the matter.

One complicating factor of this debate, this Article argues, is definitional: such a question cannot begin to be answered without isolating what we mean when we employ the term restorative justice. There are numerous approaches to implementing restorative justice and multiple definitions of the term. A growing number of practitioners means a growing variety of practices, and an accompanying sense of definitional uncertainty. Though some degree of difference is to be expected within the universe of restorative justice advocates and practitioners, that universe must also be bounded for the term to be meaningful. Because the term has gained in popularity, some actors have simply affixed it as a label on existing practices without implementing any meaningful change,¹³ perpetuating these pre-existing practices under a false label. Further muddying the waters are internal disagreements within the restorative justice community as to what constitutes restorative practice. For example, though many practices are rooted in or somehow connected to criminal legal settings, some restorative justice practitioners seek to avoid working with or reinforcing the state in any form.¹⁴ Any definition or conceptualization of restorative justice must be broad enough to incorporate the diversity of practices—while still adhering to some unified core—and give space for existing debates to refine our understanding.

With a definition that identifies the key elements of restorative justice, it becomes possible to map the similarities between indigenous practices and modern restorative justice. To the extent indigenous practices do involve at least some key elements of restorative justice, they offer opportunities for learning. For example, using case studies from sub-Saharan Africa, this Article argues that past practices offer insight into how we should be thinking about community in the context of restorative justice. While “community” is considered a key component in most restorative justice definitions, what community means is underdiscussed and varies across practices.¹⁵

Thus, this Article offers three main contributions. First, it reveals the current lack of empirical grounding for the common narrative. This descriptive insight motivates the second contribution: the creation of a methodology for better

13. See, e.g., *Minnesota Senate Approves Sen. Chamberlain's Veterans Restorative Justice Act to Help Veterans with PTSD, Trauma, or Mental Health Struggles Receive Treatment Instead of Criminal Sentences*, MINN. SENATE REPUBLICAN CAUCUS (Aug. 12, 2020), <https://www.mnsenaterepublicans.com/minnesota-senate-approves-sen-chamberlains-veterans-restorative-justice-act-to-help-veterans-with-ptsd-trauma-or-mental-health-struggles-receive-treatment-instead-of-criminal-sentences/> [<https://perma.cc/6SKD-5YHE>] [hereinafter *Minnesota Senate*]. Though the move towards treatment over incarceration is laudable, I argue it functions merely as a sentencing alternative, rather than any change to the criminal process. Others are willing to label such sentencing alternatives restorative justice because they focus on consequences that are reparative and rehabilitative. However, I argue that this is an overly broad understanding of restorative justice that simply reinforces the existing criminal system. See discussion *infra* Part II.

14. Mimi E. Kim, *Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States*, 27 INT'L REV. VICTIMOLOGY 162, 169–70 (2020); South Carolina Restorative Just. Initiative, *Discussing Transformative Justice with Dr. Mimi Kim – Week 6*, YOUTUBE (Nov. 23, 2021), <https://youtu.be/eZhNMWXo2D4>.

15. See discussion *infra* Part IV.

ascertaining the degree to which any historic, indigenous practice did constitute restorative justice. Applying this methodology to investigate the traditional practices of the Igbo and Acholi in sub-Saharan Africa, the Article begins the work of documenting the relationship between restorative justice and historic practices, work that leads to the third and last contribution. Better conceptualizing past practices not only advances our understanding of such practices but also contributes to our understanding of modern restorative justice. Here, the case studies of the Igbo and Acholi reveal a need for restorative justice scholars to engage in greater conceptual and empirical analysis of the role of community in restorative justice practices.

This Article begins, in Part I, by delving into the scholarly discussion around the claim that modern restorative justice is simply a revival of a widespread and dominant historic practice and ultimately finding that the claim currently lacks adequate empirical support. Part II, seeking to develop a definition against which indigenous practices can be compared, explores the various working definitions and frameworks used by restorative justice scholars and practitioners, before suggesting a definition that identifies the key elements of restorative justice. Part III operationalizes these elements to investigate the extent to which the pre-colonial justice practices of the Igbo, in what is now Nigeria, and the Acholi, in what is now northern Uganda and South Sudan, constitute forms of restorative justice. Finally, Part IV demonstrates how looking to past practices can offer lessons for restorative justice practitioners and scholars. From the Igbo and Acholi, we are reminded to give greater attention to understanding the role of community in restorative justice practices.

I. DEBATING THE “GLOBAL” AND “HISTORIC” ROOTS OF RESTORATIVE JUSTICE

Claims connecting modern restorative justice to historic dispute resolution practices are common, sweeping, and emphatic. Such claims range in their focus, emphasizing process, underlying philosophy, or types of consequences as the proof of restorative justice. As such, they do not offer consistent evidence of the existence of restorative justice in historic practices. What they do reveal is inconsistency in how restorative justice is defined or conceptualized.

Restorative justice is regularly introduced by advocates and scholars as a dispute resolution practice with deep historical roots.¹⁶ Howard Zehr asserts that restorative justice practice has been “fed” by the justice traditions of the Maori (New Zealand), First Nations (Canada), Navajo (United States), African customary law, and jirga (Afghanistan).¹⁷ He argues that “[i]n societies where Western legal systems have replaced and/or suppressed traditional justice and conflict-resolution processes, restorative justice is providing a framework to reexamine and sometimes reactivate those traditions.”¹⁸ Among the more assertive of these claims comes from John Braithwaite, who states that, “[r]estorative justice has been the dominant

16. E.g., *The Foundations of Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 147 (Dennis Sullivan & Larry Tiffit eds., 2006); Meyer, *supra* note 6, at 42–43; Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 253 (1993).

17. ZEHR, *supra* note 3, at 62.

18. *Id.* at 5.

model of criminal justice throughout most of human history for perhaps all the world's peoples."¹⁹ He describes a "pre-state" period of history in which restorative justice, which he describes as "participatory dialogue oriented to healing rather than hurting," is dominant.²⁰

Though Braithwaite offers multiple examples to support his claim, they are inconsistent in focus. In some examples, he focuses on the mediation between parties. Describing the Sulha, Braithwaite discusses the role of peacemakers who mediate a settlement between the family of the one who has committed a harm and the family of the harmed party.²¹ The emphasis in this example is on the end result: a peace ceremony in which the two families publicly reconcile.²² A reconciliation process used by the Pashtun in Afghanistan is similarly treated: the discussion emphasizes the ceremony in which the wrongdoer makes an offering to the harmed party, the injustice is acknowledged, and the wrongdoer is accepted back into the community.²³ Though Braithwaite does not mention this, it is notable that both the Sulha²⁴ and Pashtunwali²⁵ also incorporate a right to retaliation that can give rise to blood feuds. The imperative to reconcile the families is driven by a desire to avoid such feuds.²⁶ These additional facts would likely not bother him, however, as he notes elsewhere in the same chapter that restorative traditions can and did exist alongside more retributive practices such as blood feuds.²⁷

Braithwaite's other examples of pre-modern restorative justice emphasize the consequences that flow from wrongdoing. These examples include an early European rule that a man must make amends to an enslaved woman he has raped by freeing her,²⁸ as well as an early Celtic practice of using "payment of compensation, apology, masses for the soul of the dead, and pilgrimages" as reparation for murder.²⁹ Though he suggests that the turning point away from restorative justice occurred when wrongs were reconstrued as harms against the king rather than against the injured party, he also classifies certain forms of private justice, such as the act of castrating wrongdoers, as retributive rather than restorative.³⁰

He is certainly not the only one to consider reparative consequences as examples of restorative justice. Several scholars cite to ancient codes because of their focus on compensating those who have suffered from another's wrongdoing. For example, the Code of Hammurabi and ancient Islamic Law are described as "restorative" because they provide for those who have harmed to offer

19. JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 5 (Michael Tonry & Norval Morris eds., 2002).

20. Braithwaite, *supra* note 6, at 12.

21. BRAITHWAITE, *supra* note 199, at 4.

22. *Id.*

23. *Id.*

24. Samer Fares, Feras Milhem & Dima Khalidi, *The Sulha System in Palestine: Between Justice and Social Order*, 28 PRACTICING ANTHROPOLOGY 21, 22 (2006).

25. Sudha Ratan, Guest Lecture at the University of South Carolina School of Law (Oct. 18, 2021).

26. *Id.*; Fares, Milhem & Khalidi, *supra* note 24.

27. BRAITHWAITE, *supra* note 19, at 5.

28. *Id.*

29. *Id.* at 6.

30. *Id.* at 5.

compensation to those they have harmed.³¹ Likewise, the Code of Lipit-Ishtar (c. 1875 BC), the Sumerian Code of Ur-Nammu, the Code of Eshnunna, and early Roman Law have been cited as evidence of the ancient roots of restorative justice, precisely because they provide for payment as restitution for certain offenses.³² Hebrew tradition and the broad category of “precolonial African societies” have also been referenced for their focus on restitution to those who have been harmed.³³

Some have found evidence of the global and historic roots of restorative justice in religious or spiritual philosophy. Restorative justice has been described as spiritual in nature because of its “principles of repentance, forgiveness, and reconciliation.”³⁴ Modern movements have been tied to similar principles rooted in various faiths, including Christianity,³⁵ Islam,³⁶ Hinduism,³⁷ and Buddhism.³⁸

Scholarly work has explored some of the connections between restorative justice and various indigenous spiritual traditions, emphasizing the dialogic nature of indigenous processes³⁹ as well as the underlying philosophy relating to community and connectedness. Zehr argues that concepts of interconnectedness from societies and cultures—including the Māori, Navajo, Tibetan Buddhist, and some African societies—underlie the restorative justice understanding of wrongdoing and the obligations that flow therefrom.⁴⁰ The southern African concept of *ubuntu* is regularly cited by restorative justice scholars and practitioners.⁴¹ Archbishop Desmond Tutu drew a direct connection between *ubuntu* and restorative justice, stating,

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim

31. Meyer, *supra* note 6, at 42.

32. Van Ness, *supra* note 16, at 253.

33. *Id.* at 254–55.

34. Michael L. Hadley, *Introduction: Multifaith Reflection on Criminal Justice*, in *THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE* 1, 9 (Michael L. Hadley ed., 2001).

35. See Rick Sarre & Janette Young, *Christian Approaches to the Restorative Justice Movement: Observations on Scripture and Praxis*, 14 *CONTEMP. JUST. REV.* 345, 346 (2011).

36. Andrew Fallon, *Restoration as the Spirit of Islamic Justice*, 23 *CONTEMP. JUST. REV.* 430, 439 (2020) (“[T]he overarching spirit of Islamic justice is defined and sustained by the Qur’anic themes of forgiveness, non-retaliation, empowerment, restitution and repentance and illustrated through the Prophet’s own example of interpersonal reconciliation.”).

37. BRAITHWAITE, *supra* note 19, at 3.

38. *Id.*

39. See Dirk J. Louw, *The African Concept of Ubuntu and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 16, at 161.

40. ZEHR, *supra* note 3, at 29.

41. *Fundamentals of Restorative Justice Webinar*, *supra* note 10; ZEHR, *supra* note 3, at 29. Dirk Louw argues that *ubuntu* “not only describes human being as such, it is ‘being-with-others,’ but also prescribes . . . what ‘being-with-others’ should be all about.” Adhering to *ubuntu* is thus argued as requiring, among other things, an effort to reach consensus through dialogue and maintaining an inclusive sense of community. Dirk J. Louw, *The African Concept of Ubuntu and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 16, at 161.

and perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offense.⁴²

Connectedness is foundational for some restorative justice practitioners because it offers a reason why individuals should engage in dialogue and should participate in a more humane process.⁴³

What becomes evident in reviewing these examples is that exactly what makes these historic practices or ideas “restorative” seems to vary, often depending on the person making the claim but sometimes even across examples being offered by the same person. As I have described, different philosophies and practices are viewed as restorative because they adhere to a certain process, they require compensation to be made for those who suffered harm, they emphasize forgiveness, or they present a view of humanity as interconnected. With each of these examples highlighting some different characteristic as being “restorative,” the overall strength of the claim, which frames restorative justice as a widespread historic practice, is weakened. Which characteristic is most important in identifying restorative justice? Is the existence of any one on its own enough to constitute restorative justice? Is restorative justice simply an amalgam of these ideas? If so, is it truly accurate to claim any of these practices are the same as restorative justice, as opposed to simply sources of inspiration?

In addition, philosophies justifying restorative approaches are not examples of restorative justice *per se*. I do not dispute the importance of human connection and faith for many restorative justice practitioners, but they reveal more about *why* people are drawn to restorative justice than what restorative justice is. They are not, on their own, evidence of historic restorative justice practices. Indeed, religion has also been used to justify retribution and modern, carceral practices.⁴⁴ Retribution has been permitted in societies that abide by an *ubuntu* ethic.⁴⁵

Other scholars have expressed skepticism about the sheer breadth of the claim.

Kathleen Daly has identified this claim as one of the four foundational myths of restorative justice, though not in the sense that it is fictional.⁴⁶ As she notes, the term “myth” can describe either a true story that has been altered over time, thus meriting correction, or as “origin stories that ‘encode a set of oppositions.’”⁴⁷ In this case, the encoded oppositions are an ancient and global form of justice and a modern state-centered criminal system.⁴⁸ Daly’s exploration of this myth does not investigate the truth of it, though she does assert that most restorative justice commentators focus on a 400-year period in a limited geographical space in Europe

42. DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS 54 (1st ed. 1999). *Ubuntu* has also been connected to restorative justice by the South African Constitutional Court and various South African scholars. Christian B.N. Gade, *Restorative Justice and the South African Truth and Reconciliation Process*, 32 S. AFR. J. PHIL. 10, 24-27 (2013).

43. Gade, *supra* note 2, at 24-27; N.Y. State Coal. Against Sexual Assault, *Webinar: Restorative Justice and Sexual Violence: Centering the Wisdom Needs, & Safety of Survivors*, YOUTUBE (Feb. 5, 2020), <https://youtu.be/hZ6XRof0SuI>.

44. Fallon, *supra* note 36.

45. Gade, *supra* note 2, at 27.

46. Daly, *The Real Story*, *supra* note 7, at 56.

47. *Id.* at 56-57.

48. *Id.* at 62.

when constructing the historical narrative of restorative justice.⁴⁹ The truth of the matter does not impact her ultimate argument that restorative justice advocates use this story to construct an origin myth, allowing them to present restorative justice as the “original” form of human justice that was, in many cases, bulldozed over by a form of imperialism carrying with it criminality and carcerality.⁵⁰ She does, however, note that in an effort to construct this oppositional tale, advocates risk romanticizing indigenous practices using an ethnocentric and orientalist lens.⁵¹

Bottoms likewise describes such claims about the near universality of restorative justice throughout history as a type of foundational myth, though while he agrees there is some truth to it, he also argues that it is “both overstated and decontextualized.”⁵² He points to the wide variation in dispute resolution procedures across pre-modern societies—noting that some traditional practices supported harsh, retributive penalties alongside restorative outcomes, or were dominated by elders rather than proceeding as community-driven processes with all parties given active voice—as a mark against the universality claim.⁵³ Challenging the strength of the connection between the pre-modern practices and current practices, he argues that these historic practices were operative because of their connection with societal features that are less prominent today: the lack of enforcement mechanisms for other justice measures, the community’s need for each of its members to be able to continue to live together, and the extensive social coercion accompanying these practices.⁵⁴

Despite the skepticism, there is no doubt that there is some connection between certain traditional practices and modern restorative practices. Practitioners across the Americas have been trained by various Indigenous practitioners.⁵⁵ Others have created a practice influenced by various traditions. sujatha baliga, for example, a well-known practitioner of restorative justice, cites among her teachers those who bring their Tibetan Buddhist, Mennonite, Navajo, and Māori philosophies and practices.⁵⁶

Yet even if the restorative justice skills being taught and practiced are exact replicas of the traditional practices of the trainers, that alone is not enough to support either the claims of a global practice or the general statement that these

49. *Id.* at 63.

50. *Id.* at 62.

51. *Id.* at 63. Interestingly, the inverse argument has also been made: that scholars are so entrenched in the punitive model that they ignore non-punitive historical approaches and treat punitive approaches as the baseline throughout history. JENNIFER J. LEWELLYN & ROBERT HOWSE, RESTORATIVE JUSTICE—A CONCEPTUAL FRAMEWORK 5 (Law Comm’n of Canada, 1998) (citing HERMAN BIANCHI, JUSTICE AS SANCTUARY: TOWARD A SYSTEM OF CRIME CONTROL 10 (1994)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2114291 [<https://perma.cc/JR8M-ZU6W>].

52. Bottoms, *supra* note 7, at 88. Bottoms is referencing not only Braithwaite’s claims, but also those of various RJ advocates arguing for the near universality of Navajo peacemaking processes. *Id.* (citing GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 45 (2002)).

53. *Id.* at 90–93.

54. *Id.* at 92–93.

55. Sattler, *supra* note 10, at 16; *Fundamentals of Restorative Justice Webinar*, *supra* note 10.

56. N.Y. State Coal. Against Sexual Assault, *supra* note 43, at 08:49.

practices come from “indigenous traditions.”⁵⁷ Traditional practices around the world cannot be painted with such a broad brush. Likewise, even indigenous practices in the same geographic area cannot be assumed to operate the same way. Variation will exist.

Further, even some of the most widely accepted relationships require further examination. While New Zealand’s family group conferencing (FGC) is regularly described as being based on Māori practices, Daly argues that FGC is more of an adaptation than a borrowing of Māori practices, in that it splices those traditions with modern state practices.⁵⁸ Moyle and Tauri more strongly criticize FGC as being “a predominantly Eurocentric, state-dominated intervention that marginalizes [Māori] and their cultural philosophies and practices,”⁵⁹ describing a state system that is removed from its “idealized origin myths.”⁶⁰ Tauri presents evidence that neither Māori practice nor restorative justice were even considered by the New Zealand government in the development of FGC,⁶¹ describing the subsequent references to Māori as part of a restorative justice marketing strategy.⁶² Nonetheless, he does acknowledge that FGC shares elements of Māori practice.⁶³ His critique is aimed more at the claim that FGC was adapted from Māori practices and at the colonial practice of using indigenous ideas for the state’s own gain, while continuing to subject that indigenous group to harm.⁶⁴

Some scholars and practitioners, describing the indigenous or traditional practices of a society and culture to which they belong, refer to those practices as “restorative” in nature. But this too does not offer an easy answer. Such self-labeling ought to be respected, but it does not necessarily mean these practices are similar to or the same as modern restorative justice practices. Restorative justice, as a newer term,⁶⁵ does not and should not overwrite the identity of indigenous practices. Rather, the term is descriptive of a particular type of justice, which the restorative justice community continues to struggle to define.

Discovering the degree to which past practices contain elements of restorative justice is an unfinished project.

57. This idea is eloquently conveyed in restorative justice practitioner Heather Sattler’s dissertation, which describes a conversation among Heather, her work partner, and Margaret Noodin, who is of Anishinaabe descent. “Margaret began to draw on the whiteboard a complex map of some of the many tribes in the United States. Appreciative of this, I thought I would take a picture. Then, as if she had heard me, she erased the board and said, ‘When you say that “this work comes from indigenous traditions,” it erases all of this.’ I will never forget that moment. After listening for a while, I learned that Margaret found it respectful to say that our work is ‘inspired’ by ‘indigenous traditions.’” Sattler, *supra* note 10, at 13.

58. Daly, *The Real Story*, *supra* note 7, at 63–64.

59. Paora Moyle & Juan Marcellus Tauri, *Māori, Family Group Conferencing and the Mystifications of Restorative Justice*, 11 VICTIMS & OFFENDERS 87, 101 (2016).

60. *Id.* at 96.

61. Juan M. Tauri, *An Indigenous Commentary on the Globalisation of Restorative Justice*, 12 BRIT. J. CMTY. JUST. 35, 40–41 (2014).

62. *Id.* at 43.

63. *Id.* at 41 (“It is also true that we are able to make broad comparisons between the governmental forum (FGC), and certain aspects of M[ā]ori customary justice practice.”).

64. *Id.* at 46–47.

65. Gade, *supra* note 2, at 10.

II. WHAT IS RESTORATIVE JUSTICE?

Settling on a singular definition of restorative justice is challenging. Restorative justice as a label is used broadly to describe a number of practices, some of which have very little in common with one another. Some use the term to describe any alternative to the most traditionally understood implementation of the criminal system.⁶⁶ The term has thus been used to describe new types of penalties⁶⁷ or any non-adversarial proceedings.⁶⁸ In addition, the term “restorative” is used to describe practices that are related to restorative justice practices but are not exclusively designed to respond to harm.⁶⁹

To begin, I distinguish restorative practice from restorative justice. I find myself in agreement with Llewellyn and Howse that as a form of justice, restorative justice includes those practices that seek to repair harms.⁷⁰ I use “restorative practice,” on the other hand, to describe the entire universe of practices that are based on the same principles as restorative justice. It is true that in some cases, such as in schools, restorative practices such as regular community-building circles lay the foundation for repair harm processes. Sometimes what begins as a non-harm focused practice transforms into a repair harm process.⁷¹ Though I distinguish between restorative justice and restorative practice as terms, they are interrelated. All restorative justice is restorative practice, but not all restorative practice is restorative justice. Squares and rectangles, so to speak.

From the responses to harm category, I remove analysis of Truth & Reconciliation Commissions (TRCs). Though these are often described as restorative justice, in truth they are a very specialized restorative response to situations of widespread harm that must be addressed in a different manner than everyday harms that can be localized to smaller groups of individuals. My focus in this Article is on those interpersonal harms and the more localized response to those harms.

That this Article is limited specifically to restorative responses to harm as a day-to-day practice does not add significant clarity. Even in this narrower category, restorative justice can take numerous forms. There is no singular blueprint for restorative justice, and some scholars’ conceptions of restorative justice emphasize this mutability as a key feature.⁷² As the restorative justice movement grows, people

66. Llewellyn & Howse, *supra* note 51, at 1, 18; Kathleen Daly, *What is Restorative Justice? Fresh Answers to a Vexed Question*, 11 VICTIMS & OFFENDERS 9, 11 (2016) [hereinafter Daly, *What is Restorative Justice*].

67. MINNESOTA SENATE, *supra* note 133; Daly, *What is Restorative Justice*, *supra* note 66, at 11.

68. Daly, *What is Restorative Justice*, *supra* note 66, at 11.

69. For example, restorative approaches in education reflect core values developed from restorative justice. Thalia González, Heather Sattler & Annalise J. Buth, *New Directions in Whole-School Restorative Justice Implementation*, 36 CONFLICT RESOL. Q. 207, 208 (2018). The authors describe whole school models that have environmental and cultural focuses well beyond responding to acute conflicts. *Id.* at 209.

70. Llewellyn & Howse, *supra* note 51, at 17.

71. This is something I have experienced firsthand. While I was participating in a circle, one of the facilitators made several comments that caused immediate and direct harm to some of the participants. The circle shifted seamlessly to a repair harm process, in part because the group was already quite comfortable sitting in circle and engaging in accountability-driven dialogue.

72. *Id.* at 20.

begin to shape their practice according to their own needs. Practices called restorative justice have included, *inter alia*, circles, conferences, and boards.⁷³ The actors involved may vary. Unsurprisingly, disagreements arise as to what constitutes restorative practice. Arguments abound over whether the state has any role to play,⁷⁴ whether restorative justice is only appropriate in certain circumstances,⁷⁵ and whether restorative justice excludes certain consequences,⁷⁶ to name a few.

A variation in implementation is of no concern if the practices all adhered to some core idea of restorative justice. Unfortunately, such an agreed-upon core appears to be lacking.⁷⁷ Restorative justice has been variously described in terms of what it is not, the process it employs, the underlying principles driving it, and the desired outcomes.

Restorative justice is also often cast in opposition with the criminal legal system,⁷⁸ though in my view that is a very limiting way of viewing restorative justice. Understanding what something *is not* does not always lend insight into what that thing *is*. Still, such a distinction is essential to keep in mind as we seek definition. Restorative justice is regularly offered and considered as an alternative to the existing systems that currently dominate our response to harm.

In my view, any definition of restorative justice should maintain that distinction—what is presented as restorative justice should be identifiable and distinguishable from the criminal process. I argue that restorative justice has both procedural and substantive elements. My own experience educating others about restorative justice suggests that definitions relying solely on process are very tempting, especially for members of the American legal community. However, as I demonstrate in the subsequent analysis, focusing only on process is inadequate. Restorative justice also requires a shift in how harm is framed. I also examine the concepts of “healing” and “forgiveness,” both of which are often paired with restorative justice. Though some people do find some degree of healing and/or forgiveness while engaging in a restorative justice process, I find that using such words in a definition can be undermining, as they are simultaneously grandiose in concept and not guaranteed. What I ultimately conclude is that restorative justice requires a certain set of elements encompassing process and substance, but that

73. See Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, U.S. DEP'T JUST. JUV. JUST. BULL. (Feb. 2001), <https://www.ojp.gov/pdffiles1/ojdp/184738.pdf> [<https://perma.cc/5KCZ-D4DP>].

74. Kim, *supra* note 14, at 169–70.

75. For example, while restorative justice practices are sought out by some experiencing partner violence, others strongly believe that partner violence cases are unsuitable for restorative justice. Heather Strang & John Braithwaite, *Restorative Justice and Family Violence*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE 1* (Heather Strang & John Braithwaite eds., 2002).

76. Some restorative justice practitioners see their practices as antithetical to incarceration. Kim, *supra* note 14. However, at least one restorative justice process ended in the group collaboratively agreeing on incarceration for the responsible party. Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES (Jan. 4, 2013), <https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html> [<https://perma.cc/J7N7-Q5CC>]. Some restorative justice practices work alongside the state; see Bazemore & Umbreit, *supra* note 73.

77. Daly, *What is Restorative Justice*, *supra* note 66, at 9–10; Paul McCold, *Toward a Mid-Range Theory of Restorative Criminal Justice: A Reply to the Maximalist Model*, 3 CONTEMP. JUST. REV. 357 (2000).

78. Daly, *The Real Story*, *supra* note 7, at 58–61.

these elements are still broad enough to encompass the variety of processes that can arise in response to differing circumstances.

A. Process-Based Definitions

Definitions that limit themselves to only process have been described as a “purist” form of thinking about restorative justice.⁷⁹ One such example is the definition proffered by Kathleen Daly:

Restorative justice is a contemporary justice mechanism to address crime, disputes, and bounded community conflict. The mechanism is a meeting (or several meetings of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process—prearrest, diversion from court, presentence, and postsentence—as well as for offending or conflicts not reported to the police. Specific practices will vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict.⁸⁰

This definition is among the more restrictive, as Daly makes clear that her conception of restorative justice is bounded by rules and procedures rather than values, does not prescribe a particular way of thinking about crime and justice, and does not associate restorative justice with repairing harm or restoring relationships.⁸¹ The emphasis seems to be purely on encounter.

Not all self-described purist definitions are so limited. Paul McCold describes his purist model as a voluntary process in which the parties to the conflict and their communities come together to collectively determine an outcome that includes reparation, taking responsibility, and “reinforc[ing] the social and emotional support systems of both victims and offenders.”⁸² According to McCold, “[v]ictim reparation, offender responsibility, and community of care reconciliation are the three hallmarks of the Purist model.”⁸³ His model, anchored to process but including additional elements, thus incorporates some of the ways of thinking about justice that Daly rejects.

McCold’s inclusion of community alongside the two parties directly connected to the harm or conflict is more reflective of most descriptions of restorative justice.⁸⁴ Zehr defines restorative justice as, “an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible.”⁸⁵ A fairly common visual representation of the process is a Venn diagram showing the joining of those three interests:

79. Daly, *What is Restorative Justice*, *supra* note 66, at 21.

80. *Id.*

81. *Id.* at 21–22.

82. McCold, *supra* note 77, at 373.

83. *Id.*

84. Daly, *The Real Story*, *supra* note 7, at 58.

85. ZEHR, *supra* note 3, at 37.



Figure 1: About Restorative Justice⁸⁶

Each of these three groups is understood as having needs and responsibilities relating to the wrongdoing.⁸⁷ The community's needs and responsibilities may be less immediately apparent than those of the harmed and responsible parties, but restorative justice understands the community as a stakeholder that has also suffered from the commission of harm.⁸⁸ The community's role includes supporting both the parties to the harm and facilitating the reintegration of the responsible party.⁸⁹ Thus, community is an essential actor in these definitions.

In at least some cases, practices that identify as restorative justice do not include physical presence from all three groups but could arguably be inclusive of the needs and interests of those three groups. Victim-offender dialogues (VODs), for example, are a means of making dialogue available to those who are already incarcerated. Due to institutional restrictions, this may limit the dialogue to the harmed party, responsible party, and facilitator(s).⁹⁰ Additionally, in some restorative justice processes, where the harmed party supports the process but does

86. *About Restorative Justice*, UNIV. WIS.-MADISON, <https://law.wisc.edu/fjr/rjp/justice.html> [<https://perma.cc/2M3Q-DGYJ>] (last visited Feb. 28, 2023) (citing ZEHR, *supra* note 3).

87. McCold, *supra* note 77, at 365–69.

88. *Id.* at 369–70.

89. Paul McCold, *Paradigm Muddle: The Threat to Restorative Justice Posed by Its Merger with Community Justice*, 7 CONTEMP. JUST. REV. 13, 20 (2004).

90. *Frequently Asked Questions About Victim Offender Dialogues*, AHIMSA COLLECTIVE (2017), <https://www.ahimsacollective.net/vod-faqs> [<https://perma.cc/S8WH-TBKR>]; MARK S. UMBREIT & JEAN GREENWOOD, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE (Apr. 2000), https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf [<https://perma.cc/LL8Q-2BEM>].

not wish to participate in the process for any reason, a surrogate who has experienced similar harm may serve in their stead.⁹¹

Some argue that not all these practices can claim to be fully restorative. In his *Little Book*, Zehr suggests that perhaps restorative justice should be considered as a type of spectrum, against which various practices can be considered somewhat restorative or extremely restorative.⁹² In a similar vein, the following visualization offered by McCold asserts that only those practices which include all three groups (harmed party, responsible party, community) can claim to be fully restorative, with other practices moving to “mostly” or “partly” restorative as parties drop out:



Figure 2: Types and Degrees of Restorative Justice⁹³

I have found that discussions of process can be a useful starting point for certain audiences—especially legal audiences—as process sometimes offers a more accessible insight into how restorative justice can be implemented. However, process alone is inadequate, as comparisons against the criminal and civil legal system reveal. Restorative justice is not a legal construction—practitioners and scholars come from varying walks of life and disciplines. Yet it is also understood as an alternate response to harm from the existing legal system. If it is understood only as process, it fails to distinguish itself from existing criminal and civil legal processes.

For example, the American criminal system arguably represents these three interests as well. The state, via the prosecutor, represents the public good. Community members can participate via juries. The harmed party has an opportunity to give victim impact statements, and for further redress, can opt to

91. SUJATHA BALIGA, SIA HENRY & GEORGIA VALENTINE, RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST’S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 3 n.10 (2017).

92. ZEHR, *supra* note 3, at 69–73.

93. McCold, *supra* note 77, at 401 fig.2.

file civil suit. The accused can take the stand. Yet restorative justice activists take great pains to distinguish restorative justice from the criminal process.

One distinction that is often made relates to the framing of who has suffered the injury. The criminal system frames offenses as being against the state. Restorative justice, on the other hand, contemplates both the harm experienced by the person who was harmed as well as the harm experienced by the community.⁹⁴ Accordingly, consequences experienced by the responsible party should be responsive to those harms and include reparation to the injured party.⁹⁵

Though this understanding of restorative justice as restitution separates restorative justice from the criminal process, it also raises the question, is restorative justice simply a form of civil justice? If the purpose is to simply include the three interests and ensure an outcome where reparation is made to the harmed party, then it seems that simply abolishing the criminal system and funneling all harms and disputes through our civil justice system would be appropriate. Damage awards granted by a civil jury arguably reflect community values.⁹⁶ If restorative justice offers something different from our legal system, then simply adding an element of restitution or repair to the process definition is inadequate.

Restorative justice advocates distinguish their practice from the adversarial system by pointing to the experiences of the people who have been harmed. In restorative justice, the parties' experiences are central to the process.⁹⁷ In the American criminal legal system, people who have been harmed are not the primary participants in a trial, nor are their voices centered. The prosecutor crafts the theory of the case, develops case strategy, and decides whether to offer a plea. Much like the "victim," the responsible party simply becomes an offender and engages in a very regulated type of participation in the criminal process. The primary vehicles by which parties' voices can be heard by the court include in-court testimony, which is carefully shaped and crafted by attorneys. Civil litigation operates differently in the sense that the harmed party becomes a plaintiff and is able to make decisions about how their case proceeds, but the process itself is still often similarly constrained. Rules of evidence and legal strategy limit dialogue. In restorative processes, parties are able to speak about their experiences more freely, unfettered by procedural rules and legal strategies.⁹⁸

Additionally, in both criminal and civil trials, harms are only addressed if they are recognized by law. Acts are only prosecuted if they have been criminalized. Injuries are recognized and compensated if there is a legal cause of action for which there is a remedy. Legally available forms of redress are only made available if the elements required to show crime or injury are met. Restorative justice is not so similarly constrained.

According to Zehr, one area of concern that gave rise to the restorative justice movement in the United States is that the adversarial system not only fails to create an environment that encourages people to both empathize with those they have

94. *Id.* at 373.

95. *Id.*

96. Valerie P. Hans, *What's It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935 (2014).

97. McCold, *supra* note 77, at 373.

98. *Id.*

harmed and to truly understand the consequences of their actions, but it also actively promotes the opposite.⁹⁹ Indeed, the expectation of the adversarial system is that defendants will look out only for themselves and promote a singular version of events maximizing their advantage. In such an environment, “the stereotypes and rationalizations that those who offend often use to distance themselves from the people they hurt—are never challenged.”¹⁰⁰

Given how restorative justice is so regularly described in opposition to the adversarial system, one might question then whether the restorative justice movement is simply advocating for an inquisitorial trial process. Under inquisitorial systems, like the one in France, trials are very conversational: participants speak more openly and usually directly with the judge, limited by few rules of evidence, and without being controlled by attorneys.¹⁰¹ Civil claims may be joined with criminal trials, so that civil plaintiffs may also receive reparation at the conclusion of a trial.¹⁰² Like the parties, witnesses are given the opportunity to speak openly and freely.¹⁰³ Expert witnesses do not belong to either party but are witnesses for the court.¹⁰⁴ Defendants are not required to speak, but expected to speak.¹⁰⁵ The French inquisitorial process is understood as one that arrives at the whole truth by maintaining the dignity of all those involved.¹⁰⁶ In a way, this system contains many of the elements I have already described. The nature of the harm and character are openly discussed, free narrative is encouraged, and the goal is to arrive at some more holistic version of the truth.

This is where the inadequacies of a definition focusing solely on process are revealed. Simply changing process to look more like a modern restorative justice practice does not create a restorative response to harm. Restorative justice is different from both adversarial and inquisitorial systems because restorative justice requires a fundamental shift in understanding harm.

B. Reframing Harm

In his *Little Book*, Zehr shifts the questions about harm from “What laws have been broken? Who did it? What do they deserve?” (criminal system) to “Who has been harmed? What are their needs? Whose obligations are these?” (restorative justice).¹⁰⁷ Elsewhere, Howard Zehr and Harry Mika suggest that restorative justice is driven by several key principles, which include the ideas that harm ought to be repaired, the responsible party has an obligation to “make things right as much as possible,” and that the community is obligated to both harmed parties and responsible parties with an ultimate goal of promoting general welfare.¹⁰⁸ In this

99. ZEHR, *supra* note 3, at 16.

100. *Id.*

101. Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791, 798 (2001).

102. *Id.* at 819–21.

103. *Id.* at 798.

104. *Id.* at 836.

105. *Id.* at 825.

106. *Id.* at 798–99.

107. ZEHR, *supra* note 3, at 21.

108. Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, in RESTORATIVE JUSTICE 74, 77 (Declan Roche ed., 2004).

framing, Zehr and Mika continue to use the language of the criminal system and seem to imagine restorative justice as operating within the context of the criminal system.¹⁰⁹ Others contest the institutionalization of restorative justice and root their understanding of the practice outside of state practices entirely, accepting practice connected with the criminal system as a necessity but not an ideal.¹¹⁰

Llewellyn and Howse describe a concept of restorative justice in which the central concern is “the restoration of relationships” with an eye toward social equality.¹¹¹ In at least some cases, restoring relationships to the way they were before the harm occurred would perpetuate an unequal or harmful relationship. What Llewellyn and Howse propose, then, is the restoration of what the relationship should be—a relationship “in which each person’s rights to equal dignity, concern and respect are satisfied.”¹¹² Similar to McCold’s model, they describe a voluntary process that involves truth-telling as well as free and honest narrative bounded only by rules that preserve respect for the parties and ensure security and integrity.¹¹³ Though they accept that restorative processes may not always include either the harmed or responsible party out of necessity or lack of willingness, they express a preference for a face-to-face encounter that includes all three interests: harmed party, responsible party, and community.¹¹⁴ In their conceptualization, the experiences of harmed parties “must be heard, acknowledged and repaired;”¹¹⁵ the responsible parties must be given opportunity to repair the harm, restore the relationship, and rejoin society;¹¹⁶ the community is given an opportunity to participate in the process, heal itself, and support healthy values;¹¹⁷ and the process concludes with a collaboratively negotiated agreement for resolution.¹¹⁸ The aim is for both the harmed and responsible parties to be reintegrated into the community.¹¹⁹

The requirement that the process be voluntary, included in both the McCold model and Llewellyn and Howse model, has been critiqued for being overly restrictive.¹²⁰ A voluntariness requirement excludes those who would not participate absent state coercion.¹²¹ On the other hand, as McCold writes, “[a]uthorities simply cannot compel cooperation, remorse, reconciliation, or forgiveness.”¹²² While this may be true, one must question how truly voluntary any restorative justice practice

109. *Id.*

110. McCold, *supra* note 77, at 18.

111. Llewellyn & Howse, *supra* note 51, at 15.

112. *Id.*

113. *Id.* at 73.

114. *Id.* at 73, 83–85.

115. *Id.* at 50.

116. *Id.* at 52.

117. *Id.* at 56.

118. *Id.* at 73.

119. *Id.*

120. McCold, *supra* note 77, at 381–82.

121. *Id.*

122. *Id.* at 382. This is supported by evidence from practice. For example, Chris Godsey, describing his work with the domestic violence restorative circles at Men as Peacemakers, has anecdotally described an incident where the circle could not proceed because the responsible party, referred by a judge, was not able to accept the full extent of his abusiveness. *Fundamentals of Restorative Justice Webinar*, *supra* note 10, at 01:18–20.

can claim to be. Even absent state intervention, parties may feel coerced because of community expectations or out of fear of facing other consequences if they do not. Is that voluntary or a different type of coercion? Because any such coercion is hard to measure and easy to neglect in certain situations, it should not be a required element of restorative justice.

C. Healing and Forgiveness

Softer terms such as healing and forgiveness are also commonly mentioned in restorative justice definitions, despite the fact there is no guarantee of either in such practices.¹²³ Healing is regularly identified as a concern of restorative justice.¹²⁴ In addition, the needs to forgive and be forgiven are identified as among the needs that arise out of a harm and must be addressed by restorative justice.¹²⁵ Though they are not offered as a guaranteed outcome,¹²⁶ they are often raised as possible benefits of entering into a restorative justice process. Yet both healing and forgiveness are terms that are difficult to define and evoke grandiose vision, even as scholars try to operationalize the terms into something more measurable.¹²⁷ Healing may not happen for a long period of time or without professional support services. What forgiveness means and requires is contestable, and whether one chooses to forgive would largely depend on the person making that choice. Importantly, people who accept apologies may not equate that acceptance with forgiveness.¹²⁸ While the resolution of a restorative justice process may create closure, feelings of safety, and a readiness to move on, those feelings are not necessarily equivalent to a lay person's understanding of forgiveness.¹²⁹ Deeming a restorative justice practice successful or properly implemented when the harmed party experiences healing and forgiveness would make restorative justice impossible to assess, as it would depend on the individual characteristics and natures of the parties affected by the harm, as well as the circumstances of the harm. If restorative justice produces feelings of satisfaction, closure, and reduction in anger, then those are the values researchers should measure, rather than attempting to redefine words such as healing and forgiveness in more limited fashion.

123. Daly, *The Real Story*, *supra* note 7, at 70–71.

124. McCold's model does not specify healing as a requirement for restorative justice, he does repeatedly refer to the healing benefits of restorative justice. He argues, "[r]estorative justice processes are healing in and of themselves when properly facilitated." McCold, *supra* note 77, at 400; Llewellyn & Howse, *supra* note 51, at 2; ZEHR, *supra* note 3, at 30, 48.

125. McCold, *supra* note 77, at 365–68.

126. E.g., ZEHR, *supra* note 3, at 13–14.

127. Marilyn Peterson Armour & Mark S. Umbreit, *Victim Forgiveness in Restorative Justice Dialogue*, 1 VICTIMS & OFFENDERS 123 (2006), "Theorists . . . are somewhat divided about what forgiveness entails beyond a change in motivation toward the offender. For some, forgiveness requires positive feelings toward the offender. For others, the absence of negative feelings is enough. Variability also exists as to whether or not victim forgiveness is defined as a decision or a journey, unconditional or obligatory, superficial or deep, and partial or full." *Id.* at 124.

128. A study of three restorative justice programs in England and Wales found a high rate of apologies that were accepted by the harmed parties, but these harmed parties avoided using the word "forgive" while describing their choices to accept the apologies. Joanna Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, 5 OXFORD J.L. & RELIGION 94, 103–04 (2016).

129. In at least some cases, harmed parties were also willing to accept terms like closure, but not forgiveness. *Id.* at 109–10.

D. More Expansive Conceptions

The definitions discussed thus far are rooted in process, but not all are. Acknowledging that there are multiple and sometimes competing understandings of restorative justice, Johnstone and Van Ness describe restorative justice as a concept that is appraisive, internally complex, and open.¹³⁰ It is appraisive in the sense that the degree to which a program or practice is restorative can be evaluated or measured.¹³¹ It is considered open because of the ways in which understandings of restorative justice have changed over time.¹³² The “internally complex” characteristic is substantive, with the authors noting that in order to be “credibly described as restorative justice,” a justice practice must have one or more of the following six elements: (1) an informal process involving the parties to the harm and related stakeholders discussing the harm, how it can be repaired, and how to prevent future harm; (2) an emphasis on empowerment of those impacted by the harm; (3) an emphasis on accountability by ensuring the person who has committed harm takes responsibility for their actions; (4) a process and outcome that are driven by principles and values such as respect, inclusion, and avoidance of violence or coercion; (5) the centering of the needs of the person who has been harmed; and (6) an emphasis on strengthening or repairing relationships and using healthy relationships to aid in creating resolution.¹³³ This conception is helpful in that it incorporates the varying views on restorative justice.

Yet it also demonstrates a need for a narrower conception comprised of key requirements. If only one of the six characteristics is required for a practice to be described as “restorative justice,” the term becomes overbroad and can encompass an innumerable number of outcomes. Such a capacious conceptualization renders the term unmanageable.

In addition, some of the “internally complex” elements can operate in ways that only reinforce the existing non-restorative approach. For example, conceptions of restorative justice that emphasize only the goal of repairing harm would recognize court-ordered restitution or community service as a form of restorative justice.¹³⁴ Though some support this view of restorative justice,¹³⁵ such a view would undermine much of the foundational work offered by Zehr and allow even the slightest modifications to the existing criminal system to constitute restorative justice. The term would lose meaning.

Another example is “victim empowerment,” which is a goal of the victims’ rights movement and has made headway in multiple criminal jurisdictions in the United States.¹³⁶ Though it is important to support and center the experiences of the harmed party, focusing only on this can run counter to restorative justice. In at

130. Gerry Johnstone & Daniel W. Van Ness, *The Meaning of Restorative Justice*, in A RESTORATIVE JUSTICE READER 12–13 (Gerry Johnstone ed., 2d ed. 2013).

131. *Id.* at 12.

132. *Id.* at 13.

133. *Id.* at 12–13.

134. *Id.* at 18; McCold, *supra* note 77, at 398–400.

135. *Id.*

136. SHIRENE HANSOTIA, REEVALUATING CRIME AND PUNISHMENT IN SOUTH CAROLINA 53, 57 (2021), https://www.aclusc.org/sites/default/files/field_documents/reevaluating_crime_and_punishment_in_sc.pdf [<https://perma.cc/9JJW-Y9NV>].

least some cases, it has only amplified incarceration. The increased use and acceptance of victim impact statements have been tied to harsher sentences and increased denial of parole.¹³⁷ In this case, to the extent “victim empowerment” is considered, it is only in a way that expands the state’s carceral footprint.

In some cases, restorative justice advocates emphasize only the benefits accruing to survivors of harm. Accordingly, one can find survivor circles that are focused only on supporting survivors.¹³⁸ In my view, these circles that solely focus on healing for survivors of harm may be restorative *practice* but would hardly qualify as restorative justice without some inclusion of the responsible parties. Though there are sometimes very good reasons to avoid bringing the directly involved parties in a face-to-face meeting,¹³⁹ excluding responsible parties from a restorative process altogether prevents the responsible party from making reparation and from taking steps to avoid future harm. As an alternative to the legal system, restorative justice must provide more than simply services to the harmed parties.

What restorative justice offers to and expects from responsible parties is accountability. In a criminal system focusing on punishment, responsible parties may or may not arrive at accountability.¹⁴⁰ Restorative justice, on the other hand, seeks to support responsible parties in holding themselves accountable. The combination of reparation and accountability means that there are consequences which can look and feel like punishment.¹⁴¹ What differentiates these consequences from kneejerk punitive responses is that these accountability agreements are meant to be tailored to the harm and the circumstances surrounding it with an eye toward reparation and rehabilitation.¹⁴²

E. Identifying Key Elements of Restorative Justice

From this discussion, my definition coalesces. Restorative justice is a distinct approach to justice and must be understood as such. Focusing purely on bringing certain parties together, or on empowering harmed parties, is inadequate. “Reformers” seizing on purely process-based ideas can stay true to the process

137. *Id.* at 56–58.

138. *E.g.*, *Peer Support Services*, HIVE, <https://www.thehivecc.org/services> [https://perma.cc/E8YW-ZQAS] (last visited Feb. 16, 2023); *Domestic Violence Restorative Circles*, MEN AS PEACEMAKERS, <https://www.menaspeacemakers.org/dvrc> [https://perma.cc/9MQZ-CU9L] (last visited Feb. 16, 2023).

139. In cases where the harmed party does not feel comfortable participating directly, or simply does not want to, surrogates have been used to convey to the responsible party the impact of the harm. BALIGA, HENRY & VALENTINE, *supra* note 91, at 3 n.10.

140. Punishment in criminal law often means fines or incarceration. Fines are often disproportionately felt by the poor and contribute to the phenomenon of criminalizing poverty. As Danielle Sered notes, “prison is a poor vehicle for accountability.” Though incarceration causes great harm, it does not support people who have committed harm in facing the impacts of their actions. Incarceration does not address the factors that facilitate the commission of harm, and it does not support efforts to prevent harm. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 3, 13 (2021). Some formerly incarcerated have expressed an ability to arrive at accountability during their period of incarceration, but at the same time note that incarceration itself did not support accountability. THE RABBI & THE SHRINK, #45: *Lester Young - Life Sentence to Life’s Mission*, BUZZSPROUT (Jan. 13, 2022), <https://therabbiandtheshrink.buzzsprout.com/1717235/9829239> [https://perma.cc/ZT2E-DTG9].

141. Daly, *What is Restorative Justice*, *supra* note 66, at 10.

142. BALIGA, HENRY & VALENTINE, *supra* note 91, at 2–3.

described while still perpetuating the existing state-run criminal/carceral model. A shift in philosophy—or the questions asked, as Zehr proposes—is also required. When the emphasis shifts to parties and relationships, repair and accountability are elevated. Arriving at accountability is such an important differentiating element of restorative justice that it must be considered a key element in the restorative justice definition.

Thus, in my view, which is largely aligned with the conceptualization put forth by Llewellyn and Howse, restorative justice (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. As a concept, it is certainly an alternative to the criminal legal response, but it is also much more expansive than that.

III. INVESTIGATING TRADITIONAL JUSTICE AMONG THE IGBO AND ACHOLI

From these elements, we can begin the work of evaluating the degree to which past practices can be described as restorative justice. This Article begins that work with an investigation of the historic justice practices of the Igbo and Acholi peoples, who live in what is now Nigeria and Uganda, respectively. What becomes immediately apparent is that any assertion that a long-standing or past practice is restorative justice must be accompanied by a nuanced analysis that focuses on more than singular characteristics such as outcomes, goals, or spiritual philosophies. Engaging in this more rigorous analysis requires evaluation against the operational principles I identified above: that restorative justice is a collaborative process, bringing together the affected parties and the community, that seeks to repair harm, rebuild community, and support the responsible party in finding accountability. That restorative justice understands harm differently than criminal systems.

A nuanced analysis of any indigenous practices must begin with a commitment to anti-racism and anti-ethnocentrism, especially as racism and ethnocentrism pervade many historical sources. Careful use of sources and analysis allows for a general picture of African philosophies on justice to emerge, setting the stage for a more in-depth exploration of the Igbo and Acholi justice practices.

A. Resisting the Racist and Ethnocentric Lens

Attempting to probe and classify traditional justice systems comes with its own set of obstacles. One particular problem with looking so deeply into the past, with so many writings shaped by outsiders, is that it becomes increasingly difficult to disentangle the racism and ethnocentrism from past analyses. In addition, because

so many traditional African practices operate using more flexible, unwritten norms, written primary legal sources from the past are not available.¹⁴³

The racism and ethnocentrism in works examining African custom are pervasive. For example, past commentators, unconvinced that existing African norms which provided a form of social control could be comparable to law, have argued that African peoples did not have their own form of jurisprudence because they did not have systems that closely resembled those of the West.¹⁴⁴ During the years following decolonization, international development actors viewed custom as something that should be replaced with western style traditions.¹⁴⁵ In the world of rule of law and international development, the project of understanding indigenous or customary law¹⁴⁶ is now more regularly undertaken, but from a perspective of the Ameri-European legal systems as the norm against which other systems are measured. Numerous United Nations projects, for example, frame customary law as something to be studied because it has persisted despite various legal development projects.¹⁴⁷ The baseline is the state system, and customary law is compared against it.¹⁴⁸

Fortunately, some of these traditions are also being reconstructed and analyzed by in-country thinkers. Yet even these analyses must be read with some degree of circumspection, as bias in any direction can exist with any author. Those who are trained in western or state-centric approaches to law and justice are likely to bring a degree of bias despite their best efforts. Though I have both in-country experience in sub-Saharan Africa and a related cultural experience of having my own traditions be reshaped, misconstrued, and renamed by the West, I must also consider my own position as an American-trained legal outsider.

There is also the danger of overgeneralization. For example, some scholars and commentators, generalizing *ubuntu* to the African continent, suggest that African traditional justice practices are restorative justice because they view justice “through a restorative lens” or are “underpinned by the philosophy of *ubuntu-botho*.”¹⁴⁹ Some of these discussions of *ubuntu* generalize the ethic to African

143. For example, the Igbo tradition, which I discuss in this Article, is largely oral. Joseph C.A. Agbakoba & Enyinna S. Nwauche, *African Conceptions of Justice, Responsibility and Punishment*, 37 CAMBRIAN L. REV. 73 (2006).

144. William Idowu, *African Jurisprudence and the Reconciliation Theory of Law*, 37 CAMBRIAN L. REV. 1 (2006).

145. Aparna Polavarapu, *Reconciling Indigenous and Women's Rights to Land in Sub-Saharan Africa*, 42 GA. J. INT'L & COMPAR. L. 93, 113 (2013).

146. A note on terminology. The term, “customary law,” refers to the system of norms that developed over time within any one community, ethnic group, or clan group in response to the needs of said group. Others have referred to this as indigenous law, informal law, or traditional law. I use the term “custom” because that is the common usage to describe this type of law in sub-Saharan Africa.

147. For example, a report published by the United Nations Food and Agricultural Organization examined the customary land rights that persist in various sub-Saharan African nations as the exceptions from the reach of state law. The report addresses these systems as outliers with the intent to find ways to protect them. RACHEL S. KNIGHT, *STATUTORY RECOGNITION OF CUSTOMARY LAND RIGHTS IN AFRICA: AN INVESTIGATION INTO BEST PRACTICES FOR LAWMAKING AND IMPLEMENTATION* (2010), <https://www.fao.org/publications/card/fr/c/15153c32-a5ac-524f-8404-347571485531/> [https://perma.cc/4GLW-23DK].

148. In fairness and to hold myself accountable, I must note that this is initially how I came to study customary law.

149. Gade, *supra* note 2, at 26.

traditions across the continent.¹⁵⁰ Though similar ethics may very well animate traditional justice systems across Africa, it is an overgeneralization to apply the southern African concept of *ubuntu* to the entirety of Africa below the Sahara.

Additionally, though many unwritten customs are intentionally shared through generations via the oral tradition, they are also shaped by changing external and internal forces and are not perfectly preserved through time.¹⁵¹ Analyses based on traditional forms of justice as they exist today may inappropriately attribute today's characteristics to past practice.¹⁵² However, given the role of colonial actors and post-independence development actors in the legal development of African states, it is more likely that influences over time pushed traditional systems to become more like the criminal and carceral systems of donor states.¹⁵³ To the extent elements of these customary systems can be identified as restorative justice, such elements can likely be attributed to the persistence of tradition over time. Still, it must be noted that such attribution is not guaranteed to be correct.

Some of these difficulties can be alleviated through careful use of sources. Wherever possible, I draw direct information from in-country scholars and field research based on direct conversations with people who have lived these traditions. Oral narrative is a particularly rich source of information about these unwritten traditions when it is the subject of careful, anthropological work.¹⁵⁴

B. Generalized Descriptions of Justice in sub-Saharan Africa

Generalized accounts of traditional justice mechanisms in sub-Saharan Africa describe systems that prioritize preserving and restoring social relations. This of course comes with a caveat. One cannot generalize a detailed account of traditional or customary dispute resolution or justice mechanisms across sub-Saharan Africa. In a continent with considerable geographic diversity and numerous external influences, including various religions, custom will vary. However, certain general themes have been identified by African legal scholars. As is always the case with custom, such general themes are descriptive of *multiple* customary practices but cannot be assumed to apply to *every* practice across the continent.

African legal philosophers, seeking to reclaim the theorization of their own systems from the Ameri-European philosophical traditions, have noted the

150. Cornelius Ewuso & Susan Hall, *Core Aspects of Ubuntu: A Systematic Review*, 12 S. AFR. J. BIOETHICS L. 93 (2019).

151. Idowu, *supra* note 1444, at 15.

152. As Idowu notes, "Given the historical reality of Africa, there are many dimensions to which the legal tradition in Africa can be viewed and interpreted. The question is which African theory of law or tradition is peddled here: that of contemporary Africa as constituted by the colonies, some distant entity that culturally exists no more, or a parallel culture of the pre-colonial era which is still discernible in postcolonial Africa?" Idowu, *supra* note 1444, at 15.

153. Colonial actors and post-independence development actors played significant roles in expanding the state and minimizing certain customs. With respect to dispute resolution, aid agencies have focused on developing courts, developing laws, and professionalizing actors involved in dispute resolution. *See, e.g.*, USAID, SOUTHERN AFRICA: DEMOCRACY, RIGHTS & GOVERNANCE (2017), https://2012-2017.usaid.gov/sites/default/files/documents/1860/Democracy_HR_Governance_briefer_Jan2017.pdf [<https://perma.cc/H9BG-Q6CZ>].

154. RONALD R. ATKINSON, THE ROOTS OF ETHNICITY: THE ORIGINS OF THE ACHOLI OF UGANDA BEFORE 1800, at 25 (1994).

importance of reconciliation as a theme in African views on justice.¹⁵⁵ Harms and disputes are seen as disturbances to the entire social order.¹⁵⁶ Traditional systems of justice in sub-Saharan Africa are thus less concerned with assigning guilt and blame and more interested in promoting “restoration of harmony” and providing individuals an opportunity to remain in community.¹⁵⁷ These are institutions that focus on reconciliation and balancing interests,¹⁵⁸ taking into account the various community norms governing behavior, as well as various social, economic, and political factors.¹⁵⁹ According to Idowu, “‘peace-keeping and the maintenance of social equilibrium’ stands at the heart of African law.”¹⁶⁰

The emphasis on social harmony can be explained by spiritual philosophies and cultural norms,¹⁶¹ but it has also been explained as a practical matter: small communities suffer if they cannot find a way to keep people in their communities and maintain the health of families.¹⁶² The purpose of dispute resolution is thus social cohesion.¹⁶³ Typical responses to harms included the payment of compensation, which would convey apology and atonement, with the goal of preserving relations between the opposing families or groups.¹⁶⁴

This focus on conciliation is often distinguished from the inquisitorial and adversarial systems which promote a “winner takes all” type of justice.¹⁶⁵ In his study of Ibo/Igbo¹⁶⁶ informal justice processes, Virtus Chitoo Igbokwe notes that the emphasis is on “negotiation, mediation, and conciliation.”¹⁶⁷ From the perspective of those valuing reconciliation, state courts perpetuate conflict because of the likelihood that “one party will remain aggrieved” at the conclusion of a court process.¹⁶⁸

In addition, community was such an important part of the social fabric that in at least some cases, harms were generalized to the responsible party’s immediate community. That is, a harm committed by one person was sometimes viewed as

155. Idowu, *supra* note 144, at 7–8.

156. Virtus Chitoo Igbokwe, *Socio-Cultural Dimensions of Dispute Resolution: Informal Justice Processes Among the Ibo-Speaking Peoples of Eastern Nigeria and Their Implications for Community/Neighbouring Justice System in North America*, 10 AFR. J. INT’L & COMPAR. L. 446, 457 (1998).

157. U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, HUMAN RIGHTS AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA, AT 27-28, U.N. DOC. HR/PUB/16/2, U.N. Sales No. E.16.XIV.1 (2016).

158. Fidelis Okafor, *From Praxis to Theory: A Discourse on the Philosophy of African Law*, 37 CAMBRIAN L. REV. 37, 47 (2006).

159. Igbokwe, *supra* note 1566, at 456.

160. Idowu, *supra* note 144, at 12.

161. Igbokwe, *supra* note 1566, at 456.

162. U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *supra* note 1577, at 27-28.

163. Idowu, *supra* note 1444, at 11.

164. Ntanda Nsereko, *Victims of Crime and Their Rights*, in CRIMINOLOGY IN AFRICA 35 (T. Mwene Mushanga ed., reprint 2014).

165. E.g., Idowu, *supra* note 1444, at 12; Igbokwe, *supra* note 1566, at 456–57 (citing O. Adigun, *The Equity in Nigerian Customary Law*, in FED. MINISTRY OF JUST. NIGERIA, TOWARDS A RESTATEMENT OF NIGERIAN CUSTOMARY LAWS (Y. Osinbajo & A. Kalu eds., 1991)).

166. The Igbo are sometimes also referred to as the Ibo. *Igbo*, BRITANNICA, <https://www.britannica.com/topic/Igbo> [<https://perma.cc/RM5L-6MTU>] (last visited Feb. 28, 2023).

167. Igbokwe, *supra* note 1566, at 447.

168. Okafor, *supra* note 158, at 47.

committed by that whole person's family or social group.¹⁶⁹ For example, in Somalia, killing another person triggered an obligation to pay *dia*, or blood money.¹⁷⁰ This obligation did not rest solely on the individual, but fell to all the adult male members of that individual's social group.¹⁷¹ Family is understood expansively: "[a]t the level of African ontology, a family is composed of the living, the unborn and the dead ancestors who still maintain their interest in the family and offer them protection. It is within the family that the individual perpetuates his existence."¹⁷²

This is not to suggest that the individual is erased. Disputes are raised by individuals. For example, disputes over land may be raised by the individuals or groups of individuals laying claim to a contested parcel. However, rights of ownership and access are determined by community norms relating to each individual's role in supporting their household and community, their connection to the land, and other existing rules of social order.¹⁷³ Such norms were developed based on cultural ideas and the needs of the community.¹⁷⁴ Though the dispute may be between individuals, the community is involved, and community norms shape the negotiation.

This overall emphasis on community harmony and social cohesion is certainly in line with the philosophies typically associated with restorative justice. Whether specific mechanisms could be labeled as restorative justice, however, requires closer investigation to determine how they function.

C. Systems in Detail

Analysis of all customary practices in sub-Saharan Africa is a project much too large for a single article. In any case, not all customary practices have been the subject of significant close study and field research. I focus here on the Igbo, who have inhabited the land making up the southeastern portion of Nigeria, and the Acholi, comprised of Luo speaking peoples straddling northern Uganda and Sudan. The traditions of both peoples have been researched extensively enough¹⁷⁵ to pull together a sense of how their justice systems operated in the precolonial context and make preliminary conclusions about the degree to which they are examples of restorative justice.

1. Igbo (Nigeria)

Igbo custom is unwritten and subject to variation across communities in Igboland.¹⁷⁶ Given the size of the population and the fact that custom develops to suit the needs of each community, such variation is unsurprising and evident in the

169. Nsereko, *supra* note 164, at 38.

170. *Id.*

171. *Id.*

172. Okafor, *supra* note 158, at 43 (citing VICTOR UCHENDU, *THE IGBO OF SOUTHEAST NIGERIA* 40 (1965)).

173. Polavarapu, *supra* note 145, at 111.

174. *Id.*

175. I do not, however, suggest that they have been researched exhaustively.

176. Bonachristus Umeogu, *Igbo African Legal and Justice System: A Philosophical Analysis*, 2 OPEN J. PHIL. 116, 116–17 (2012).

research on Igbo justice. Sources describing the precolonial system of justice among the Igbo rely on information passed through oral tradition, written historical and anthropological accounts, and interpretation based on current Igbo practices.¹⁷⁷ Others more squarely describe current practices, but also describe what was, so to speak.¹⁷⁸ The sources collectively describe a system of justice in which there are multiple levels of dispute resolution with significant community involvement.

Within Igbo society, multiple institutions were and are available to resolve disputes, with jurisdiction based on the type of dispute or the relationship between the disputants. There are some differences as to how scholars list these institutions, but they generally include heads of family, *umuada* (women of the family who have married outside the family), age grade,¹⁷⁹ *amala* (the village tribunal), titled men, and oracles/religious leaders.¹⁸⁰ These various institutions are responsible for norm-setting and dispute resolution for the group members under their authority.¹⁸¹ In some of these institutions, decision-making is made available only to men, even while the decisions impact all members of the group.¹⁸² At the family level, only men can participate in the decision-making; titled men make decisions to guide the society; and *mmanwu*, the guild of the masquerades through whom the ancestors are said to speak, is only open to male members.¹⁸³

The Igbo distinguish secular harms (*innu*) from those that will incur religious penalty (*nso*).¹⁸⁴ The former have also been described as *mmehie*, or private offenses, and the latter, *aru/alu* (“something the Earth abhors”).¹⁸⁵ Classification as *innu* or *nso* depends on more than the exact nature of the act committed. It can also contemplate who committed the act and against whom it was committed.¹⁸⁶ For example, killing a fellow citizen triggered religious sanction where killing a non-citizen did not.¹⁸⁷ Spiritual leaders might also suffer religious sanctions for acts that,

177. Emmanuel C. Onyeozili & Obi N.I. Ebbe, *Social Control in Precolonial Igboland of Nigeria*, 6 AFR. J. CRIMINOLOGY & JUST. STUD. 29, 33 (2012); Agbakoba & Nwauche, *supra* note 1433; Obiwuru Chidera Rex, *Justice and Its Administration in Igboland Before the Dawn of the Present Millennium*, 1 J. HIST. STUD. 28, 30 (2020).

178. See, e.g., Umeogu, *supra* note 1766; Ernest E. Uwazie, *Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria*, 34 J. LEGAL PLURALISM & UNOFFICIAL L. 87 (1994).

179. Each age grade includes those people in the village (across families) who were born within a certain period of time. Umeogu, *supra* note 176, at 117–18.

180. Uwazie, *supra* note 178, at 89–96. Various, but largely similar, versions of this list are included in other sources. Umeogu, *supra* note 176, at 117–18; Igbokwe, *supra* note 156, at 450; Rex, *supra* note 177, at 32–35. Onyeozili and Ebbe refer to the male head of household, council of elders, diviners, and oracles. Though they do not identify age grades as part of the Igbo “judicial system,” so to speak, they do acknowledge the role of age grades. Onyeozili & Ebbe, *supra* note 177, at 36–38, 40.

181. Umeogu, *supra* note 1766, at 117–18.

182. *Id.*

183. Umeogu, *supra* note 1766, at 117–18. Onyeozili and Ebbe also write that in pre-colonial Igboland, “the ‘court of original jurisdiction’ was ‘the court of the father (husband) of a household.’” Onyeozili & Ebbe, *supra* note 177, at 36. Rex writes that with respect to family or *Umunna*, “only male adults were usually allowed into its important meetings or gatherings.” Rex, *supra* note 177, at 32.

184. Agbakoba & Nwauche, *supra* note 143, at 75.

185. Onyeozili & Ebbe, *supra* note 177, at 33. Elsewhere, these are described as *mmehie* (sin) and *nso* (abomination). Rex, *supra* note 177, at 35.

186. Agbakoba & Nwauche, *supra* note 143, at 75.

187. *Id.*

if committed by ordinary citizens, would not trigger such a penalty.¹⁸⁸ Relationships are significant in determining wrongfulness and consequence.

Along with harm, Agbakoba and Nwauche also describe multiple levels of responsibility: metaphysical, corporate, and individual.¹⁸⁹ Metaphysical responsibility is triggered when there is a violation of “the cosmic and/or social order.”¹⁹⁰ Corporate responsibility means that a group is responsible for the acts of one of its own.¹⁹¹ Individual is self-explanatory. Sometimes these forms of responsibility are overlaid on one another. For example, in the case of a man committing murder, there is corporate responsibility, because the family is guilty of not properly socializing the individual who committed the violation.¹⁹² But there is also metaphysical responsibility that extends to that man’s wives and children, should he have any.¹⁹³ Though they had no role in raising him, they are an extension of him, and thus, if they remain free of consequences, parts of him remain free of consequences.¹⁹⁴

Corporate responsibility can extend beyond the family to the community. Umeogu notes that when a party is facing “the traditional Igbo seat of judgment; his family, his age grade, his kindred, and his entire community stands with him.”¹⁹⁵ Accordingly, said individual’s social or family group seeks to ensure the responsible party follows through in facing the consequences of their actions.¹⁹⁶

The system does more than simply view the individual as a member of the community; it also treats the community as a party in and of itself.¹⁹⁷ The community “has rights that ought to be respected and duties that it must perform.”¹⁹⁸ The community is a participant in the process.

In fact, it is the individual parties who may not be so well represented in the process. Though parties are involved in negotiating their own reparation,¹⁹⁹ they may not be empowered to advocate for their needs. The elders may promote unjust outcomes, the disputants may agree to unjust outcomes because the fear of social ostracization is too great, and the relative status of the parties may impact the outcome.²⁰⁰ Women’s roles are limited as they are not able to participate fully in all levels of norm-setting and dispute resolution.

The reported consequences attached to an act of harm vary, possibly due to geographic variation. In the example provided by Agbakoba and Nwauche, a man who kills another is executed and his family’s homestead and property will be destroyed.²⁰¹ Demonstrating the variation of custom, others have reported that the

188. *Id.*

189. *Id.* at 79.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 80.

194. *Id.*

195. Umeogu, *supra* note 176, at 118.

196. *Id.*

197. *Id.* at 119–20.

198. *Id.* at 120.

199. Agbakoba & Nwauche, *supra* note 143, at 81.

200. Igbokwe, *supra* note 1566, at 469.

201. Agbakoba & Nwauche, *supra* note 143, at 79.

consequence is exile, with the family again sharing in the consequence,²⁰² or that, “[w]henever the murderer is caught, he will be made to hang himself,” in order to allow “daughters of the land” to perform the necessary purification rights.²⁰³ Onyeozili and Ebbe have also stated that in pre-colonial Igboland, committing an abomination such as killing kin would cause one to become an outcast, which among some Igbo groups could lead to a form of enslavement at the hands of the oracles.²⁰⁴ Other abominations incurring severe consequences included committing incest, killing an animal dedicated to the gods, and stealing yams, which were an important Igbo crop.²⁰⁵ For offenses classified as *mmebie*, or private offenses, consequences varied, including restitution, compensation, shaming, or even sale into slavery “for a persistent recalcitrant.”²⁰⁶

Agbakoba and Nwauche consider the Igbo approach to punishment a “restorative principle of punishment” because it is designed to achieve fair order on a cosmic, spiritual, or social level.²⁰⁷ As they argue it, the restorative principle will achieve retributive, deterring, and reformative goals.²⁰⁸ Retributive because it will be responsive to the feelings of those harmed, deterring because others will see what happens if they commit similar harms, and reformative because the elements of punishment are meant to socialize the individual to live within socially acceptable parameters.²⁰⁹ Individuals who commit harm are expected to be apologetic and demonstrate changed behavior.²¹⁰

The overall goal of this system has been identified as restoring fair order,²¹¹ as well as to reduce tensions among community members.²¹² To this end, parties are meant to come to an agreement about what constitutes adequate reparation or restitution.²¹³ Agbakoba and Nwauche argue that forgiveness and mercy are important considerations for the Igbo, and that underlying these are the ideas that community members rely on one another and that any of them may find themselves needing mercy and understanding in the future, as expressed in the following Igbo proverbs:²¹⁴

Aka ni kwo aka ekpe; aka ekpe akwo aka ni
 (The right palm washes the left palm and the left washes the right)
 Ada ma echi
 (One does not know tomorrow)

202. Onyeozili & Ebbe, *supra* note 177, at 37.

203. Ikenga K. E. Oraegbunam, Crime and Punishment in Igbo Customary Law, 7 Afr. J.L. 1, 18 (quoting F.U. Okafor, *Igbo Philosophy of Law* (1992)).

204. Onyeozili & Ebbe, *supra* note 177, at 33–34.

205. *Id.*; Rex, *supra* note 177, at 35.

206. Onyeozili & Ebbe, *supra* note 177, at 34.

207. Agbakoba & Nwauche, *supra* note 1433, at 80.

208. *Id.*

209. *Id.* Onyeozili and Ebbe likewise find that the goal of punishment is to reintegrate the responsible party into the community. Onyeozili & Ebbe, *supra* note 177, at 38.

210. Agbakoba & Nwauche, *supra* note 143, at 80–81.

211. *Id.* at 81.

212. Onyeozili & Ebbe, *supra* note 177, at 38.

213. Agbakoba & Nwauche, *supra* note 143, at 81.

214. *Id.*

2. Acholi (Uganda)

Acholi traditional justice is regularly described as a form of restorative justice that highlights forgiveness and reconciliation, though in truth this assessment is usually based on misunderstandings of a single ritual.²¹⁵ Various aid and civil society organizations have seized upon the traditional ritual of *mato oput* as a means of reconciliation and peacebuilding in northern Uganda.²¹⁶ How these modern actors have implemented reconciliation does not necessarily provide insight as to how traditional justice was historically practiced anywhere in Uganda. Understanding the traditional practice requires disentangling from the current modern usage now heavily engaged with international aid dollars. Much like the Igbo, Acholi traditions are passed down orally, and much of current understandings of what was is reconstructed from these narratives.²¹⁷

Mato Oput, a form of conflict resolution used among the Acholi in northern Uganda, is probably most well-known in the international community as a means of reintegrating former members of the Lord's Resistance Army (LRA) back into their communities.²¹⁸ In the 1990s, the practice gained a great deal of attention from the international community and various media as a widely accepted Acholi practice that could be used to promote peace and reconciliation after prolonged internal civil strife.²¹⁹ This attention was accompanied by a flurry of aid activity supporting mass *mato oput* rituals in an attempt to promote peacebuilding.²²⁰ The early conversations and programming around *mato oput* have since been criticized for a number of reasons, including the fact that the ceremonies were not being conducted in a meaningful way, that the ritual was not meaningful for younger Acholi whose exposure to traditional practice was disrupted by years of warfare, that the ritual was not so readily applicable to this conflict which included multiple ethnic groups, and that the affected communities were not ready to forgive.²²¹ The critiques do not dispute the existence of *mato oput*. In fact, one point of contention is that while it was being described as a unique practice, "it was actually similar to scores of other

215. Tim Allen, *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, 107 *POLITIQUE AFRICAINE* 147, 150 (2007).

216. *Id.* at 148.

217. Atkinson, *supra* note 154, at 23–25.

218. Allen, *supra* note 215, at 147.

219. This attention is largely credited to anthropologist Dennis Pain, who authored a report arguing for the use of Acholi traditional practices to support reconciliation and amnesty for LRA combatants. Allen, *supra* note 215, at 150.

220. *Id.* at 150–51.

221. *Id.* at 150; Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 *B.C. THIRD WORLD L.J.* 345, 361 (2008); Caritas, Gulu Archdiocese, *Traditional Ways of Preventing and Solving Conflicts in Acholi* 13 (Jan. 2005), https://luitanoviolenza.cat/files/pdf/caritas_traditional_conflict_solving_in_acholi_2005.pdf [https://perma.cc/5ZLG-4D6C] [hereinafter PREVENTING AND SOLVING CONFLICTS IN ACHOLI] (“[W]e have seen the procedure being romanticized and idealized as if it was a kind of magic bulle[t] to solve any kind of conflict.”). Arguing that *mato oput* was not being implemented in a meaningful way, Allen recalls a conversation he had with an LRA brigadier: “I asked if he would perform *mato oput*. He replied that he would, but when asked if he would look in the eyes of those he had harmed, request reconciliation and pay compensation for what he had done, he just laughed, saying that he would not do that, but would do the *mato oput* that the paramount chief performed. I asked if he thought that the public ceremony was really something serious. He laughed again, saying nothing.” Allen, *supra* note 215, at 154.

African rituals associated with conflict resolution and payment of compensation following a killing.”²²²

Historically, the *mato oput* ritual itself marked the closing of the resolution of a conflict arising after one person killed another.²²³ The process of reconciliation could last years and sometimes did not even begin until years after the killing occurred.²²⁴ Before the parties could meet, a period of separation was instituted between the affected families, in part to reduce the likelihood of vengeance.²²⁵ A trusted intermediary spoke to both parties and determined when they were ready to begin a dialogue.²²⁶ The dialogue itself was not concluded until “all parties are satisfied with the account of what has happened, including reflection of the perpetrator on the motives for his or her crimes, the circumstances in which it was committed, expression of remorse, and the payment of compensation.”²²⁷ The responsible party was meant to join the reconciliation and acknowledge their guilt voluntarily.²²⁸ The community expectation was and is that if the responsible party did not take responsibility, they and their family would be tormented by the spirit of the dead.²²⁹ Appeasing the spirits is thus necessary for the health of the killer and their family.²³⁰

After the families of the responsible party and the decedent came to an agreement about appropriate compensation, the parties would drink “a concoction made from the blood of sacrificed sheep and a bitter root in such a way as to indicate that their dispute had been set aside.”²³¹ In the past, compensation required a daughter of the responsible party’s family being married into the family of the bereaved, with the intent of joining the families by a marriage through which a child would be born to replace the one who had died.²³² In later years, the practice shifted to measuring compensation in terms of cattle or money to be offered as bride price, which would be used to initiate a marriage of a woman into the bereaved’s family, again with the intended result of producing a child.²³³ For some, the *mato oput* ceremony is not deemed complete until a new child is born and given the name of the deceased.²³⁴ In either case, the compensation comes from the family of the

222. Allen, *supra* note 215, at 149.

223. *Id.*

224. Rose, *supra* note 221, at 361–62; Liu Inst. for Glob. Issues, *Roco Wat I Acoli: Restoring Relations in Acholi-land: Traditional Approaches to Reintegration and Justice* (Sept. 2005), https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf [<https://perma.cc/F7AY-5GHB>] [hereinafter *Roco Wat I Acoli*].

225. *Roco Wat I Acoli*, *supra* note 224, at 55. If the killer refuses to make an admission but is known to have committed the act, then revenge killing is permitted. The separation period is meant to forestall this possibility. *Id.* at 15.

226. *Id.* at 55.

227. *Id.* at 56.

228. *Id.* at 55.

229. *Id.*

230. PREVENTING AND SOLVING CONFLICTS IN ACHOLI, *supra* note 221, at 13.

231. Allen, *supra* note 215, at 149. For a more detailed description of this closing ritual, see PREVENTING AND SOLVING CONFLICTS IN ACHOLI, *supra* note 221, at 14–15.

232. Allen, *supra* note 215, at 149–50; *Roco Wat I Acoli*, *supra* note 224, at 56; PREVENTING AND SOLVING CONFLICTS IN ACHOLI, *supra* note 221, at 13.

233. *Roco Wat I Acoli*, *supra* note 224, at 56.

234. *Id.*

responsible party, not just the responsible party as an individual.²³⁵ Allen argues that this was a rare ritual because compensation was more likely to be negotiated when the killing occurred within a moral community, and was less likely for killings occurring during a war or feud.²³⁶ As such, he argues that the international community's use of *mato oput* to resolve inter-ethnic conflict is inconsistent with Acholi custom.²³⁷

Research suggests that Acholi traditional justice involved the same type of process even for acts other than a killing.²³⁸ Conflict resolution required voluntary involvement of all the parties, establishing the facts, determining compensation, and a reparative ritual or series of rituals.²³⁹ Because families bore collective responsibility, reconciliation was a necessary component of these rituals in order to preserve clan unity.²⁴⁰

Elders (*ladit kaka*) played an important role in guiding these justice processes at the clan level.²⁴¹ Elders were responsible for engaging in shuttle diplomacy, hearing both sides, determining compensation, and identifying the necessary rituals to address the spiritual harm.²⁴² Though the Elders appear to have played a determinative role in the dispute resolution process, they are said to have respected the need for consensus from all parties.²⁴³ At the family level, the *won-ot*, or male head of household, was responsible for dispute resolution.²⁴⁴

It is unclear the degree to which affected parties could shape the negotiation and reparation measures. Compensation was and is determined based on the circumstances of the offense, especially whether the act was committed intentionally, but was also seemingly based on a set understanding of the amount of compensation owed for each type of offense.²⁴⁵ Though Allen refers to negotiation among parties, other sources reference bylaws, according to which certain offenses trigger certain levels of compensation.²⁴⁶

In addition, women's participation in these traditional practices was limited. Women could not preside over these processes.²⁴⁷ To the extent they were included as participants, it was only when the conflict involved women or "a woman's issue" in some way.²⁴⁸

235. PREVENTING AND SOLVING CONFLICTS IN ACHOLI, *supra* note 221, at 14; *Roco Wat I Acoli*, *supra* note 224, at 13.

236. Allen, *supra* note 215, at 150.

237. *Id.* at 150–51.

238. PREVENTING AND SOLVING CONFLICTS IN ACHOLI, *supra* note 221, at 7.

239. *Roco Wat I Acoli*, *supra* note 224, at 14–16.

240. *Id.* at 16.

241. *Id.*

242. *Id.* at 15–17.

243. *Id.* at 16.

244. *Id.*

245. *Id.* at 15.

246. *Id.* at 15; Allen, *supra* note 215, at 152.

247. *Roco Wat I Acoli*, *supra* note 224, at 15.

248. *Id.*

While forgiveness is often mentioned alongside these processes, forms of vengeance were also permitted among the Acholi.²⁴⁹ Violence could be sanctioned as a means of “righting social wrongs.”²⁵⁰ In the case of a harm or transgression,

The transgressed would express desire for compensation and reparation based on available evidence (ongon) in anticipation that the delinquents would respond positively or provide alternative ongon to dispute claims by the transgressed. . . . The local narratives about lweny kaka, which was a form of moralistic violence, confirm that it was an act of revenge. It was triggered by what the aggrieved society would have collectively interpreted as wilful abscondment by the offenders, from the agreed path to restore societal justice.²⁵¹

Lweny kaka was permissible because of how entwined community is with individual wrongs.²⁵² The entire clan of the wrongdoer could thus bear responsibility and suffer vengeance.²⁵³

Spiritual and community health were important currents in the Acholi system of justice.²⁵⁴ Every wrong was understood to have a spiritual component.²⁵⁵ Divine and ancestral spirits were understood to exact misfortune upon those who had violated the social codes, and because of the importance of clan and family, such misfortune could extend to them as well.²⁵⁶ Compensation and rituals were necessary to repair the human and spiritual harm.²⁵⁷

D. Are These Practices Restorative Justice?

Both Igbo and Acholi justice practices, as described, bear some similarity with one another and with restorative justice. Though they may not be the same as modern restorative justice, they include some of the key elements I have defined. Restorative justice, as I have defined it, requires the following:

- (1) Framing harm by asking who has been harmed, what needs must be addressed, and what obligations exist, rather than asking what rules have been violated;
- (2) A process bringing together the harmed party, responsible party, and community;
- (3) A space that facilitates free and open discussion of the harm for all parties;
- (4) Collaborative determination of what that accountability looks like; and

249. John JaraMogi Oloya, *How Did Governance in Acholi Dovetail with Violence?* 141 (2015) (Ph.D. thesis, University of Bradford), https://bradscholars.brad.ac.uk/bitstream/handle/10454/15707/U02014556_PHDThesis2015_0621-%202017.pdf?sequence=1 [<https://perma.cc/5VE2-2Z9Y>]; *Roco Wat I Acoli*, *supra* note 224, at 15.

250. Oloya, *supra* note 249, at 141.

251. *Id.* at 124.

252. *Id.*

253. *Id.*

254. *Roco Wat I Acoli*, *supra* note 224, at 10.

255. *Id.* at 11.

256. *Id.* at 10–11.

257. *Id.* at 11, 14–15.

- (5) An attempt to arrive at accountability and reintegrate the responsible party.

I engage in this analysis in three parts. First, I consider how the practices frame harm. Second, I compare the process elements: who is included in the conversation? Are all parties able to participate meaningfully in a full discussion of the harm? Do all parties have a role in determining accountability? Third, I examine whether and how these practices arrive at accountability and reintegration.

Ultimately, I conclude that while these elements of restorative justice are met in intention, the community norms and power structure operate in such a way as to undermine full participation in the process and promote outcomes that would be understood as causing harm in current discourse. Still, as I note throughout, it is also likely that some modern restorative justice practices embrace these key elements in theory yet fail in implementation.

1. Framing of the Harm

Among both the Igbo and Acholi, harm is viewed as impacting the harmed individuals, their families, and the larger community. In these two societies, reparation for harms is owed to the parties harmed, but community interests in being rescued from the impacts of the harm are also important. In that way, both justice practices align with restorative justice framings.

However, in changing the framing, Zehr reminds us to ask *different* questions about harm. In the criminal system, we ask about the law being violated.²⁵⁸ In a restorative justice framework, Zehr instructs us to ask who has been harmed, what do they need, and who bears the obligations?²⁵⁹ These questions evoke an idea of acts becoming the subject of a restorative justice process based on whether they have caused actual, identifiable harm, creating a category of acts that is simultaneously broader and narrower than the category of criminal acts.²⁶⁰ These questions also inject some complexity into the comparison.

Both the Acholi and Igbo have preset rules related to wrongdoing. Among the Igbo, *nso* can trigger harsh punishment, including execution or enslavement.²⁶¹ The Acholi have “bylaws” that seem to create a schedule of compensation for wrongs, all of which are tied, to some degree, to a spiritual breach.²⁶² In both societies, these acts are considered wrongful by their nature and as set by social norms. The harm is immediately perceived upon commission of the act, though it may not be the type of direct harm Zehr or any American restorative justice practitioner may have been imagining. The harm is understood to be against the community because the violations breach spiritual relationships.

258. ZEHR, *supra* note 3, at 21.

259. *Id.* at 31–34.

260. This is the case because not all harm is crime, and not all crime is harm. United States history is peppered with examples of harms that were not criminalized, both large and small. Some of the more notable ones included enslavement, legalized discrimination, and forced sterilization of migrants in detention centers operated by Immigration and Customs Enforcement. Examples of crimes that are not harms include the anti-miscegenation laws of our recent history and, many would argue, the criminalization of marijuana and other narcotic substances.

261. See discussion *supra* text accompanying notes 201–0204.

262. See discussion *supra* text accompanying notes 241–246, 254–257.

Does this then mean that the Acholi and Igbo are more aligned with our criminal system, focusing on violations as against a set of rules? Much like our criminal code, these sets of rules in Igbo and Acholi societies claim as purpose the protection of the common good and cannot be violated without repercussion. On the other hand, while the violation of a rule may trigger a justice process, the emphasis of both Igbo and Acholi processes is on the nature of the spiritual harm and how to resolve that harm.

The existence of rules alone does not create a criminal law framing, provided the emphasis is on reparation to those harmed. With respect to the Igbo and Acholi, the framing, informed by spiritual practices, is aligned with the restorative justice directive to focus on the impacts of the harm.

2. *Process*

As described, both Igbo and Acholi justice practices bring together the harmed parties, responsible parties, and community. Both systems have expansive views of who is harmed and responsible, and thus family members are usually participants in these processes. The community is also a primary player in these processes.²⁶³

Yet as I define it, restorative justice also requires a safe space in which parties can speak freely about the harm and can collaboratively come to an agreement that supports the needs of all the parties involved. Certainly, the way Igbo and Acholi processes have been described suggest that the directly affected parties had some agency when engaging with these justice processes. Among the Igbo, it is reported that parties negotiated for appropriate reparation and restitution.²⁶⁴ On the other hand, though varying across communities, *nso* seemed to come with certain predetermined degrees of punishment within communities.²⁶⁵ What role for the parties then? It is difficult to assess how much agency parties truly had in these practices. Likewise, although in Acholi society compensation paid in response to a wrongdoing was said to be dependent on specific circumstances, these wrongs were also reportedly connected with certain pre-set levels of compensation.²⁶⁶

That similar harms lead to similar consequences does not necessarily make this process *un*-restorative. It is reasonable, in a community in which common beliefs are shared by the population, for certain outcomes to be considered the natural consequences to certain wrongs. Such consequences could feasibly be the frequent outcome of collaborative decision-making even as parties are accorded adequate opportunity for meaningful participation.

However, whether such opportunity was available is questionable. Cultural factors may have undermined the robustness of party participation. Igbokwe, describing the Igbo, points out that social norms could encourage parties to agree to outcomes they found less than favorable, and that status played a role in the ability of parties to successfully present their own needs in these processes.²⁶⁷ In addition, elders had the ability to exercise power in a manner that controlled

263. See discussion *supra* Parts III.C.1, III.C.2.

264. Agbakoba & Nwauche, *supra* note 143, at 81.

265. See discussion *supra* text accompanying notes 201–204.

266. *Roco W at I Acoli*, *supra* note 224, at 15.

267. Igbokwe, *supra* note 156, at 469.

outcomes.²⁶⁸ Whereas the Igbo are typically described as acephalous, the Acholi had more of a centralized hierarchy, in which people of power could sometimes be called upon to mediate disputes, potentially creating the same power imbalance.²⁶⁹

But similar critiques have been lodged against modern restorative justice practices. Participants are reported as deferring to facilitators and community members they perceive to be in a quasi-professional role.²⁷⁰ Real or perceived power relations impact participation. Among the Igbo and Acholi, to the extent these obstacles to equitable participation existed, they appear to have been a function of community status quo. That is, inequalities in the community were potentially replicated in the justice process. Perhaps this is always a risk with community-involved processes.

A magic window to the past may not offer any additional insight, as cultural norms also shape how people communicate through both words and silence. In his testimony to the International Criminal Court, Professor Seggane Musisi commented on the nature of the testimony offered by Ugandan witnesses:

We not only communicate verbally, but also nonverbally, in body language, in attitude, the way we relate, and also in many African cultures, including Acholi, there are certain things you don't say. For example, you don't mention private parts in ordinary conversation. These are things that, quote, do not pass through the mouth. . . . Sometimes we are not allowed to keep direct eye contact. . . .

Sometimes silence is enough. It's not worse answering that question. It might even be considered not understanding or not caring or being rude. For example if there had been massive deaths, people will come in silence, and they're expressing sorrow. You know, we could go on. . . .²⁷¹

Later, when discussing how certain events are described, he stated: “[C]ertain things are attributed, as we said before, to spirits. I have seen patients of mine who attempted suicide with rope marks in their neck, and you ask them, ‘Did you do that?’ and they said, ‘No.’ They attribute that to a spirit that did it.”²⁷²

Though Musisi is describing cultural factors as experienced in 2015, the point he makes can describe research into the past. For one, what is shared through oral narratives may convey nuances in communication that go unnoticed. Second, it raises the larger issue that restorative justice practitioners and researchers should be thinking more broadly about what communication looks like in various cultural contexts.

More certain is the limited opportunity afforded to women to participate in these processes. In both societies women were excluded from participating on equal footing with men. Among the Igbo, women were not always among the

268. *Id.*

269. *Roco Wat I Acoli*, *supra* note 224, at 16–17.

270. Meredith Rossner & Jasmine Bruce, *Community Participation in Restorative Justice: Rituals, Reintegration, and Quasi-Professionalization*, VICTIMS & OFFENDERS 107, 119–20 (2016).

271. Trial Hearing Transcript at 33, 35, Prosecutor v. Ongwen, ICC-02/04-01/15, (Apr. 2, 2021).

272. *Id.* at 37.

decisionmakers or norm setters.²⁷³ Among the Acholi, women were only included as witnesses if certain issues arose, and they were not permitted to preside over the processes.²⁷⁴ These rules reflected community norms and thus may be viewed as providing free and open narrative for the voices that are tasked with speaking on behalf of others. Following this line of reasoning, all community members could be said to be represented by these privileged voices. Nonetheless, I argue that the existence of such overt restrictions on participation limits the extent to which this element of restorative justice could be said to exist in these systems.

3. *Arriving at Accountability and Reintegration*

I have described accountability as making reparation, taking responsibility for the harm and its impacts, and—as needed—taking steps to avoid committing future harm. Supporting the responsible party in arriving at accountability will allow them to be reintegrated into the community. Engaging with this analysis in the context of the Igbo and Acholi traditional justice practices can be challenging. While the consequences meted out in these practices would violate many of today's standards, they can also be viewed as meeting the components of accountability.

The outcomes of some of the Igbo and Acholi justice processes would likely disturb a number of restorative justice practitioners, particularly those who align their practice with anti-carceral or abolitionist movements. Execution is not an outcome that seems to fit within the restorative justice framework. Indeed, some African scholars, seeking to develop connections between restorative justice and *ubuntu*, have argued that “*ubuntu* societies” avoided the death penalty, even in cases of murder.²⁷⁵ While *ubuntu* is a Southern African ethic, the point remains that restorative justice is seen as antithetical to the death penalty. However, we can see in both Igbo and Acholi practices that death *is* a possible outcome of at least some African justice practices. Among the Igbo, death was sometimes the consequence for someone who killed another.²⁷⁶ Consequences were sometimes even meted out for his family members, who may have had no hand in committing the act.²⁷⁷ Among the Acholi, vengeance was sometimes permitted.²⁷⁸ Historically, compensation that preceded *mato opul* was the delivery of a daughter of the family of the responsible party into the family of the bereaved, into an arranged marriage in which social calculations could override individual consent.²⁷⁹

Are outcomes like these, as and when used, consonant with the restorative justice view of accountability? In terms of the intent and social norms at the time, they may be viewed as achieving reparation, responsibility, and reintegration. Though these are outcomes that would cause significant outrage if they occurred today, their intent at the time was to repair harm, especially in light of the spirituality that was part and parcel of both societies. Without the appropriate consequences, the sin would not be cleansed (Igbo) or the spirits would not be appeased (Acholi).

273. See discussion *supra* text accompanying notes 181–8183.

274. See discussion *supra* text accompanying notes 247–4248.

275. Gade, *supra* note 42, at 26–27 (describing the work of other scholars).

276. See discussion *supra* text accompanying notes 201–204.

277. *Id.*

278. See discussion *supra* text accompanying notes 249–253.

279. See discussion *supra* text accompanying notes 231–235.

Could these consequences be said to support reintegration? Execution, exile, and enslavement, on their faces, do not create opportunity for the responsible party to re-enter society. On the other hand, given the prevailing societal views on spirituality, including the role of ancestors, the concept of reintegration may have been much more expansive in Igbo and Acholi societies.

Perhaps it is safest to say that the Igbo and Acholi practices exhibit the intentions to arrive at accountability and reintegration in a manner consistent with restorative justice, but the outcomes can subject the individuals involved to personal harm.

4. Are These Practices Restorative Justice?

To the extent we are describing a process in which harm is openly discussed, reparation is made, and some action is taken on the part of the responsible party to demonstrate repentance and repair, I argue that we are seeing evidence of some of the elements of restorative justice among the Igbo and Acholi traditional practices.

These practices are not perfect pictures of restorative justice. Not all directly affected parties are given the opportunity to freely engage in a dialogue about the harm. Some parties are completely excluded from the dialogue. In addition, community norms can lead to outcomes that do not offer opportunities for reintegration for the responsible party when the proper atonement is deemed to be death or exile.

But we do not need these practices to be perfect replicas of modern restorative justice to find elements of restorative justice within them. If we are attempting to satisfy the claim that restorative justice as we understand it was once the dominantly practiced form of justice around the world, we may have failed. Truthfully, we must acknowledge that modern restorative justice practice may claim all these elements yet also fail in implementation. Seeking elements of restorative justice allows for a more nuanced analysis. Indigenous practices have their own identities first. They are not simply restorative justice practiced during an earlier time period. Both Igbo and Acholi practices, as described, (1) are developed to be responsive to the perceived and actual injury caused by the wrongful act, (2) perceive the community as an essential element of the justice process, (3) bring parties together to discuss the harm and arrive at an outcome that is meant to repair the harm experienced by the parties and the community, and (4) promote moving forward as a community upon the resolution of such harm. As such, they share, to differing degrees, some of the key elements of restorative justice practice.

IV. BRINGING THE PAST FORWARD: INSIGHTS ABOUT COMMUNITY

This more rigorous analysis of the extent to which past practices constitute restorative justice creates opportunity for practitioners and scholars to use historical evidence to gain insight about modern practices. As community-driven practices with restorative justice elements, the Igbo and Acholi practices offer additional questions about the role of community that we must grapple with as we continue to develop our own understanding of restorative justice.

Community is an essential part of most restorative justice definitions for several reasons. Building on Nils Christie's work, which argues that conflicts are

property that has been stolen by the state,²⁸⁰ restorative justice advocates seek to return conflicts to the community.²⁸¹ This, in turn, empowers communities to better resolve their own conflicts and, according to some, regain control *vis-à-vis* the state.²⁸² Scholars have also argued that the inclusion of community in restorative justice practice creates legitimacy, injects important emotions into the process, and supports reintegration.²⁸³

What constitutes community remains ill-defined. The word community evades easy description.²⁸⁴ Weisberg suggests three common uses of community that relate to restorative justice: “community,” a normative concept which he identifies with communitarianism;²⁸⁵ “the community,” a “definable social entity” which can be further delimited in several ways, including by geography or as “not the state”;²⁸⁶ and “the [insert group name] community,” an extrapolation from the second grouping in which community is defined by some characteristic of the group such as racial or ethnic identity.²⁸⁷ Community can be quite diffuse or small and concrete. Having too expansive an understanding of community could result in another version of stealing conflicts from affected communities.²⁸⁸

In restorative justice practices, “community” has included lay volunteers serving as neutral parties to the process, the “micro-community” of family and friends connected to the affected parties, and “macro-community” volunteers.²⁸⁹ In some practices, leaders from local ethnic and religious communities, representatives from local government agencies, and representatives from victim support and advocacy organizations, are invited and serve as “the community.”²⁹⁰ Some practices include trained community volunteers, with repeat volunteers becoming “quasi-professionals.”²⁹¹ Sometimes the community is simply made up of those supporters selected by the directly affected parties.²⁹²

280. Nils Christie, *Conflicts as Property*, 17 BRITISH J. CRIMINOLOGY 1, 1 (1977).

281. FERNANDA FONSECA ROSENBLATT, THE ROLE OF COMMUNITY IN RESTORATIVE JUSTICE 42 (2015).

282. ROSENBLATT, *supra* note 281, at 43.

283. Rossner & Bruce, *supra* note 270, at 109; ROSENBLATT, *supra* note 281, at 46.

284. ROSENBLATT, *supra* note 281, at 60. Rosenblatt offers a sampling of how different scholars have discussed community, including: “the nature and extent of one’s community is largely a matter of individual definition,” *id.* (citing NELS ANDERSON, THE URBAN COMMUNITY: A WORLD PERSPECTIVE 27 (1960)), and “[c]ommunity is a feeling, a perception of connectedness – personal connectedness both to other individual human beings and to a group,” *id.* (citing Paul McCold & Benjamin Wachtel, *Community is Not a Place: A New Look at Community Justice*, in A RESTORATIVE JUSTICE READER 294 (Gerry Johnstone ed., 2003)).

285. Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 343–44 (2003). Weisberg creates this connection because he argues it is useful in providing some substance to the normative concept of community. However, he also refers to this identification with communitarianism as arbitrary, and he does not claim communitarianism is equivalent to the normative concept of community. *Id.* at 344.

286. *Id.* at 347.

287. *Id.* at 348.

288. Paul McCold, *Restorative Justice and the Role of Community*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 92 (1996).

289. Rossner & Bruce, *supra* note 270, at 110.

290. *Id.* at 113.

291. *Id.* at 118–19.

292. Weisberg, *supra* note 285, at 354.

Despite the emphasis on community in the restorative justice rhetoric, it remains relatively underdiscussed in restorative justice literature.²⁹³ In addition, much of the limited research on community pertains to its use in institutionalized restorative justice processes, many of which have connections to the state.²⁹⁴ The use of community in purely non-state interventions seems to suffer even greater neglect in the literature.

The research that does exist suggests that how community is constituted matters. Community representatives that are unconnected to the responsible party or are unable to achieve social solidarity with the responsible party can inhibit the process of accountability and reintegration.²⁹⁵ The reliance on community is also understood as potentially dangerous if the community is unable to support the responsible party in their path toward accountability.²⁹⁶ What these findings do not address is what happens in restorative justice processes when the community itself supports outcomes that we perceive as manifestly unjust.

The examples among the Igbo and Acholi demonstrate that community is an especially important player that merits greater attention. Community can be the creator of harm. Substantive norms can lead to harmful consequences for women, any lower status or marginalized group, or simply individuals who are “different” in some way. Among both the Igbo and Acholi, this means that, for example, women are excluded from certain key roles in the justice process.²⁹⁷ In the Acholi, the transfer of a woman from one family to another also reflects the patrilineal understandings of clan and family.²⁹⁸ Community norms and views can also lead to consequences that we would perceive as causing further harm and undermining reintegration, even if they are viewed as being reparative and reintegrative within that community. Among the Igbo, outcomes could include execution or enslavement.²⁹⁹ Community involvement in justice processes is meant to support reintegration, where reintegration “refers to the incorporation of the offender into a normative moral order of prosocial values and practices.”³⁰⁰ Execution, exile, and enslavement are the opposite of reintegration as we understand it today. In addition, the way these practices interact with women demonstrates that while responsible parties are “educated” with the goal of re-enveloping them in community, sometimes that education is based on restricting individuals to gender or behavioral norms that incorporate community biases.

The fact that customary norms can lead to discriminatory process or outcomes is well-known;³⁰¹ what this analysis offers is insight into potential trouble spots for

293. ROSENBLATT, *supra* note 281, at 41.

294. *See, generally*, Rossner & Bruce, *supra* note 270, at 109–10 (providing an overview of restorative justice literature focusing on the concept of “community”).

295. *Id.* at 116–17.

296. Weisberg, *supra* note 285, at 368–69. Weisberg offers the deinstitutionalization of American mental hospitals in the 1970s as a cautionary tale of how communities ill-equipped to support the needs of individuals being released back into them can further harm those individuals. *Id.* at 363–68.

297. *See* discussion *supra* text accompanying notes 181–183 and 247–248.

298. *See* discussion *supra* text accompanying notes 231–235 Polavarapu, *supra* note 145, at 111.

299. *See* discussion *supra* text accompanying notes 201–204.

300. Rossner & Bruce, *supra* note 270, at 110.

301. Polavarapu, *supra* note 145, at 110–11.

restorative justice. Issues such as power, bias, and discrimination are not overlooked in restorative justice literature. At least some restorative justice practices are aimed at addressing incidents of racial harm and bias.³⁰² Scholars and practitioners are also discussing the degree to which racial discrimination or tension may manifest or be neglected in restorative justice practices.³⁰³ But these questions do not effectively get at how the restorative justice process may provide a pathway for communities to create further harm.

Some scholarship has addressed the question of whether all communities are suitable for restorative justice or related justice mechanisms. Feminists have raised concerns about the danger of using restorative justice to address partner violence in communities that permit abuse.³⁰⁴ Truth and Reconciliation Commissions are sometimes critiqued for failing to achieve any transformative goals after engaging in the truth-telling process because the community lacks commitment to the goals.³⁰⁵ Elsewhere, I have written about the need for efforts to change community norms to accompany restorative justice practices in order to effectively counter gender-based violence.³⁰⁶

Community has been a particular focus for scholars considering restorative justice as a means of addressing gender-based violence. Restorative justice literature has been criticized for failing to acknowledge the role of community in creating or perpetuating harm.³⁰⁷ As Julie Stubbs notes, “the appeal to the involvement of the community in restorative justice processes offers no certainty concerning the values that will prevail in any particular restorative practice.”³⁰⁸ Still, community-driven practices are being used by some groups to address partner and sexual violence under the theory that when implemented properly, they offer better outcomes for survivors.³⁰⁹

This is an issue that extends beyond the gender-based violence context and requires us to ask difficult questions about the role of community norms when addressing harms more generally. Community norms may not simply perpetuate

302. E.g., Robert B. Coates, Mark S. Umbreit & Betty Vos, *Responding to Hate Crimes Through Restorative Justice Dialogue*, 9 CONTEMP. JUST. REV. 7, 7 (2006).

303. E.g., SONYA SHAH, CARL STAUFFER & SARAH KING, RESTORATIVE JUSTICE LISTENING PROJECT FINAL REPORT 27 (2017), https://www.ahimsacollective.net/_files/ugd/c28cc3_88347177243347d885218b250cbeacd1.pdf [<https://perma.cc/5H64-MYRN>]; Anita Wadhwa, “What Do You Want, Reparations?” *Racial Microaggressions and Restorative Justice*, in COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES 159, (Edward C. Valandra & Waqbli Wap̄háha Hokšíla eds., 2020); BALIGA, HENRY & VALENTINE, *supra* note 91, at 15–16.

304. Leigh Goodmark, “Law and Justice Are Not Always the Same”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 759 (2015).

305. Peggy Maisel, *Greensboro and Beyond: Remediating the Structural Sexism in Truth and Reconciliation Processes and Determining the Potential Impact and Benefits of Truth Processes in the United States*, in FEMINIST PERSPECTIVE ON TRANSITIONAL JUSTICE: FROM INTERNATIONAL AND CRIMINAL TO ALTERNATIVE FORMS OF JUSTICE 215, 247 (Martha Albertson Fineman & Estelle Zinsstag eds., 2020).

306. Polavarapu, *Global Carceral Feminism*, *supra* note 1, at 142–43.

307. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons in Navajo Peacemaking*, 47 UCLA L. REV. 1, 15, 97 (1999).

308. Julie Stubbs, *Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42, 54 (John Braithwaite & Heather Strang eds., 2008).

309. Goodmark, *supra* note 304, at 734–46.

power imbalances but may also promote certain consequences that are arguably harmful or violative of rights. Community involvement thus merits greater conceptual and empirical treatment in restorative justice literature.

It is tempting to argue that modern restorative justice would not be subject to such a risk. Indeed, several have pointed out that in Western societies, it is harder to find a similar degree of social cohesion that would support such community-driven processes.³¹⁰ Though this is offered as a critique or stumbling block for modern restorative justice practices, it could potentially be viewed as a redeeming feature: without such strong, coherent community presence, it becomes harder for harmful views to take root. This argument also creates room for carefully constructing “community” in restorative justice practices, whether by selecting actual community members or training volunteers, to promote the sought-after norms.

Yet, in the United States, socially cohesive communities do continue to exist, whether in the form of geographic communities, faith-based communities, or others, and sometimes they contribute to violence.³¹¹ These include communities that are knit together through generations of interconnectedness among families in a limited geographic area. In addition, faith-based communities are also seeking out restorative justice practices to address harms within their own communities.³¹² In such closed groups, the power of community norms can be significant, just as it was among the Igbo and Acholi.

Is the answer to create regulation around restorative justice? In modern day sub-Saharan Africa, it is common for women’s rights advocates to engage with custom while also utilizing the floor set by constitutional norms to demand equitable processes and outcomes.³¹³ Throughout Uganda, the government sought to ensure women’s participation in local dispute resolution by mandating the inclusion of women in local council courts, which are empowered to arbitrate certain state and customary disputes.³¹⁴

But bringing in the state in any way is unpalatable for some, and it is unclear that it would make any difference at all. The state can cause the same or similar harms to occur in different ways. Just as community-driven practices can reflect community biases and inequalities, so can state-run practices. While some restorative justice practices work with the state, other restorative justice programs developed as means of avoiding the state, in part due to deep distrust of the state-run criminal system.³¹⁵ In addition, a policy of increasing representation would not necessarily undercut harmful or discriminatory views. For example, some of the

310. Bottoms, *supra* note 7; Sally Engle Merry, *Popular Justice and the Ideology of Social Transformation*, 1 SOC. & LEGAL STUD. 161, 169-70 (1992).

311. *E.g.*, Lisa Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WISC. J.L. GENDER & SOC’Y 346, 365–71 (2008) (discussing how the patriarchal status quo in rural communities contributes to continuing gender-based violence against women).

312. *See, e.g.*, Our Lady of Lourdes Cath. Church Minneapolis, *Restorative Justice in the Catholic Church and Beyond*, YOUTUBE (Sept. 12, 2020), https://youtu.be/vrOPTyYCR_8 [<https://perma.cc/A954-W8QX>]; ABUSE VICTIMS TASK FORCE, AGENDA FOR SYNOD 2010 (2010), https://www.crcna.org/sites/default/files/safechurch_taskforce.pdf [<https://perma.cc/BX94-VLLL>].

313. Polavarapu, *supra* note 145, at 121–22.

314. Local Council Courts Act (2006) § 10, Third Schedule (Uganda).

315. McCold, *supra* note 89, at 18.

women who participated in victim offender conferences (VOCs) in South Africa to address the partner violence they were experiencing chose not to invite family or community members to their conferences, explaining that community presence would cause more harm.³¹⁶ Some even reported that after concluding the conference and seeing improved behavior from their partners, family members, including their mothers-in-law, tried to undermine their progress and accused them of bewitching their partners.³¹⁷ Women in the immediate community can be complicit in violence against other women.

Questions remain. How can restorative justice incorporate community while working against norms that promote bias, discrimination, or other harm? How do we determine what norms and outcomes are problematic? Do certain foundational norms need to be set? Who sets those norms in what is largely a decentralized field? Should community be hand-selected, as some suggest?³¹⁸ If hand-selected community has no prior relation to the parties, are they considered community? I have no doubt that individual practitioners have contemplated these questions as they arise.³¹⁹ But these are also questions that must begin to surface in the wider literature as scholars and practitioners continue to think about the future of restorative justice.

CONCLUSION

It is possible, with careful and deliberate research, to ascertain the degree to which restorative justice existed in historic practices. The claim that restorative justice has global and historic roots does not need to be set aside as some myth that cannot be investigated. This Article, by beginning with a definition of restorative justice that is comprised of several key elements, offers a methodology for investigating the question of whether and to what degree specific historic practices do, in fact, constitute restorative justice as we understand the term.

This research on its own would be valuable simply because it creates an opportunity and responsibility for researchers and practitioners to acknowledge the roots of the various elements comprising restorative justice. This approach encourages us to be truthful and nuanced in our descriptions, rather than exoticize these same practices we are trying not to erase.

With a deeper understanding of whether and how past practices reflect or constitute restorative justice, practitioners and scholars are offered more resources to support the inquiry into and development of modern restorative justice practices. An examination of the community-based practices among the Igbo and the Acholi reveals a need for greater critical thinking around the role of community in

316. Amanda Dissel & Kindiza Ngubeni, *Giving Women Their Voice: Domestic Violence and Restorative Justice in South Africa*, 6–7 (July 2003) (unpublished paper) (presented at the XIth International Symposium on Victimology) (available at <http://www.csvr.org.za/docs/gender/givingwomenvoice.pdf> [<https://perma.cc/K4SP-42JD>]).

317. *Id.* at 8-9.

318. Rossner & Bruce, *supra* note 270, at 115.

319. For example, with respect to avoiding community members who will perpetuate harm, sujatha baliga has stated that when she was working with the responsible party, she made clear that they should avoid asking their “ride or die” to join the circle. She worked with parties to invite people who would hold them accountable, instead of making excuses for or attempting to justify the harm. *Fundamentals of Restorative Justice Webinar*, *supra* note 10.

restorative justice. The analysis also incidentally identifies a need to explore the sensitivity of restorative justice practices when engaging in cross-cultural dialogue. Herein lies the additional value of this work. Identifying restorative justice elements in past practices opens the door to further analysis, offering us an opportunity to better visualize the potential obstacles for restorative justice and to set the agenda for future research.