

# ATITUDINI

## **“Law and Justice Are Not Always the Same”<sup>1</sup>: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse**

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### **Abstract:**

*The article begins by considering the concept of justice as applied to cases of intimate partner abuse, arguing that the retributively focused criminal justice system is an imperfect source of justice for many people subjected to abuse. Part II of the article suggests principles that should guide the development of justice systems designed for people subjected to abuse. Part III proposes and describes community-based justice forums for responding to abuse, using examples from international human rights structures created or used to address human rights abuses to flesh out the proposal. Finally, the difficult questions raised by seeking justice outside of state-based systems are the subject of Part IV of the article.*



### **Rezumat:**

*Articolul începe prin luarea în considerare a conceptului de justiție, așa cum se aplică în cazurile de abuzuri între parteneri, susținând că sistemul de justiție penală concentrat pe represiune este o sursă imperfectă de justiție pentru mulți oameni supuși abuzurilor. Partea a II-a a articolului sugerează principii care ar trebui să ghideze*

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<sup>1</sup> Jason A. Merchey, Building a Life of Value: Timeless Wisdom to Inspire and Empower US 225 (2005) (quoting Gloria Steinem).

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*dezvoltarea sistemelor de justiție destinate persoanelor supuse la abuzuri. Partea a III-propune și descrie forumuri de justiție ale comunităților pentru a răspunde la abuzuri, folosind exemple din structurile internaționale ale drepturilor omului, create sau utilizate pentru a aborda abuzurile asupra drepturilor omului, în vederea concretizării propunerilor. În cele din urmă, dificilele problemele ridicate de aflarea dreptății în afara sistemelor judiciare de stat fac obiectul părții a IV-a a articolului.*

**Keywords:** justice, intimate partner abuse, restorative justice, retributive justice

### Introduction

Mary Walsh turned to the criminal system to seek justice after being abused by her partner. Following that experience, Walsh warned other women: "For your own peace of mind, be prepared to throw any illusions about 'justice' you might have had out the window."<sup>2</sup> Clearly Walsh did not find the justice she sought through the criminal justice system. Whether other people subjected to abuse<sup>3</sup> find justice through the criminal or civil justice systems depends in large part upon what exactly justice means to them.

In cases involving intimate partner abuse, the person defining justice is usually not the person subjected to abuse, but rather an actor within the legal system - a police officer, a prosecutor, an advocate, or a judge - and those individuals define justice in terms of what the legal system has to offer. People subjected to abuse may conceive of justice quite differently, however, in ways that the legal system is not well suited to address.

The systems that deliver justice are (or should be) the result of deliberate choices about justice goals and forum design. We can, according to social

science professor Lisa Blomgren Bingham, "design justice."<sup>4</sup> Bingham explains that using the principles of dispute system design, institutions can intentionally create systems to handle conflict and carry out their missions, rather than allowing systems for delivering justice to incrementally evolve, as has traditionally been the case.<sup>5</sup> Justice design allows for the creation of "new rules, organizations, institutions, and forums to serve various goals related to public policy."<sup>6</sup> But, she warns, not every system can provide every form of justice. The type of justice produced by a system can vary based on who designed the system, what their goals were, and how they exercise power within the system.<sup>7</sup> The issue, then, is finding the specific response that meets both the substantive and procedural justice needs of the individual. For people subjected to abuse who are interested in punishment, whose goals are congruent with the legal system's goals of safety and accountability (as defined by the state),<sup>8</sup> and who are willing to use state based systems, society offers a response: the criminal justice system. Imperfect though that response might be, in theory it meets

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<sup>2</sup> Judith Lewis Herman, *Justice from the Victim's Perspective*, *Violence Against Women*, May 2005, at 571, 582.

<sup>3</sup> See Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* 199 n.1 (2012) (defining the author's use and intended scope of the phrase "women subject to abuse").

<sup>4</sup> Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 *Ohio St. J. on Disp. Res.* 1, 1 (2008).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 21, 33.

<sup>8</sup> Susan Schechter, *Expanding Solutions for Domestic Violence and Poverty: What Battered Women with Abused Children Need From Their Advocates* 6 (2000) ("While many helping professionals think of her safety solely in physical terms and, as a result, urge her to leave the violence, she may think of her safety more broadly. Safety for her may be food, shelter, or a ride to work or the clinic.").

the justice needs of some people subjected to abuse.<sup>9</sup> For people who are more interested in healing and are willing to work through state systems, society also offers a response, albeit a more limited one: restorative justice. But for those who are not interested in a state-based response, little by way of justice exists for people subjected to abuse. This article seeks to fill that void by suggesting the development of community based forums to deliver justice.

In her 2003 article, *Battering, Forgiveness and Redemption*, law professor Brenda Smith suggested a number of alternative models that might be used to address intimate partner abuse,<sup>10</sup> including truth commissions,<sup>11</sup> Rwanda's gacaca courts, Native Hawaiian healing and Navajo Peacemaking.<sup>12</sup> Building on her work, and recognizing that there are parallels between the experiences of people seeking justice for violations of human rights<sup>13</sup> and people subjected to intimate

<sup>9</sup> See, e.g., Cary Ashby, *Domestic Violence Victim Says 'Justice Was Served': Man Sentenced to 18 Months in Prison, Norwalk Reflector* (Ohio), Aug. 24, 2013, <http://www.norwalkreflector.com/article/3344456>.

<sup>10</sup> Brenda V. Smith, *Battering, Forgiveness and Redemption*, 11 *American University J. Gender, Soc. Pol'y & L.* 921 (2003).

<sup>11</sup> Approximately forty different truth commissions have been convened to respond to human rights abuses ranging from apartheid in South Africa to civil war in Sierra Leone to lynching in Greensboro, North Carolina. Margaret (Peggy) Maisel, *Have Truth and Reconciliation Commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis of the Past and Formula for the Future*, 20 *Cardozo J. Int'l & Comp. L.* 143, 143 (2011). The work of the truth commission is to "investigate, gather evidence, create a public record, and respond to human rights abuse," leading to the creation of a report that documents human rights abuses and makes recommendations about how to heal both individual victims of human rights abuses and the broader society. Roslyn Myers, *Truth and Reconciliation Commissions 101: What TRCs Can Teach the United States Justice System About Justice*, 78 *Revista Juridica de la Universidad de Puerto Rico* 95, 100 (2009). Truth commissions are centered around the principles of restorative, rather than retributive justice, and are committed to the idea that "neither individual victims nor entire communities can move beyond violent criminal events without the public recognition of suffering, the collaborative effort of understanding the complete story of what happened, and gestures of remorse from the ones who caused it." *Id.* at 101.

<sup>12</sup> Smith, *supra* note 10.

<sup>13</sup> Over the last several years, the application of international human rights norms to domestic legal issues in the United States has become more common. See, e.g., *The Bringing Human Rights Home Lawyer's Network*, <http://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network>

(last visited Feb. 24, 2013). International human rights norms can be a valuable tool in bringing justice to people subjected to abuse. The human rights approach provides a broader lens for considering the needs of people subjected to abuse, is more focused on prevention than on remediation, and is "more open to an intersectional analysis that combines gender discrimination with discrimination based on race, class, language, religion, national origin, and other factors in ways not possible through existing U.S. legal remedies." Sally Engle Merry et al., *Law From Below: Women's Human Rights and Social Movements in New York City*, 44 *L. & Soc'y Rev.* 101, 104 (2010). The movement to apply human rights norms in cases of intimate partner abuse in the United States was sparked by the deaths of the three daughters of Jessica Lenahan (formerly Gonzales). In June 1999, Simon Gonzales, the ex-husband of Jessica Lenahan (formerly Gonzales), kidnapped their three daughters, in violation of a protective order issued by the court in Castle Rock, Colorado. Notwithstanding the order's language requiring that police enforce violations of the order, police repeatedly refused to search for the girls, who were later found dead in Simon Gonzales' car in the parking lot of the Castle Rock police station. In *Town of Castle Rock v. Gonzales*, the United States Supreme Court refused to find that the language requiring enforcement of the order constituted an enforceable right. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). Frustrated by the Supreme Court's decision, Ms. Lenahan turned to the Inter-American Commission on Human Rights to vindicate her after her husband kidnapped her three daughters in violation of a protective order, an order police in Castle Rock, Colorado refused to enforce. The Inter-American Commission, in a landmark ruling, held that the United States was responsible for violations of Ms. Lenahan's human rights related to the failure to enforce her protective order and the failure to prevent and eradicate violence against women in the United States. Caroline Bettinger Lopez, *Introduction: Jessica Lenahan (Gonzales)*

partner abuse, this article borrows from the structures used to find justice after atrocity, including truth commissions and community-based courts, to flesh out what community-based justice forums to address intimate partner abuse might look like. In the tradition of law professor Donna Coker's exploration of Navajo peacemaking as a potential resource for women subjected to abuse,<sup>14</sup> the article imagines how international human rights processes might productively inform efforts to create new alternatives for finding individualized justice, voice, validation and vindication outside of the criminal justice system.

The article begins by considering the concept of justice as applied to cases of intimate partner abuse, arguing that the retributively focused criminal justice system is an imperfect source of justice for many people subjected to abuse. Part II of the article suggests principles that should guide the development of justice systems designed for people subjected to abuse. Part III proposes and describes community-based justice forums for responding to abuse, using examples from international human rights structures created or used to address human rights abuses to flesh out the proposal. Finally, the difficult questions raised by seeking justice outside of state-based systems are the subject of Part IV of the article.

**Justice can be substantive or procedural, distributive, retributive, restorative or transformative.**

### **I. What is Justice for People Subjected to Abuse?**

In 1937, law professor Gerhart Husserl wrote, "[w]hat is justice? This question has been asked again and again. But it seems to us that no satisfactory answer has as yet been given."<sup>15</sup> This question - what is justice? - is one that philosophers have asked since the beginning of recorded history and one that is still being asked today, without a definitive answer. Philosopher Jeffrie Murphy describes justice as "the regular enforcement of the rules that make social stability (and thus social life) possible..."<sup>16</sup> Philosophy professor Kenneth Ehrenberg explains that "[j]ustice is about situations of actual or potential conflict and the outcomes to these conflicts or the distributions made based on the resolution of these conflicts."<sup>17</sup> Justice is sometimes defined through tautology - as law professor Megan Carpenter notes, Merriam-Webster's dictionary defines justice as the

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v. United States: Implementation, Litigation, and Mobilization Strategies, 21 Am. U. J. Gender, Soc. Pol'y & L. 207, 220-21 (2012). Advocates are incorporating this idea that freedom from domestic violence is a fundamental human right into legislative efforts and litigation on behalf of people subjected to abuse. *Id.* at 226-27. This work to bring substantive human rights norms to bear on behalf of people subjected to abuse in the United States is groundbreaking and hugely important, but it is not the subject of this article.

<sup>14</sup> Donna Coker, Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking, 47 UCLA L. Rev. 1 (1999).

<sup>15</sup> Gerhart Husserl, Justice, 47 Int'l J. Ethics 271 (1937).

<sup>16</sup> Jeffrie Murphy, Mercy and Legal Justice, in Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy 182 (1988).

<sup>17</sup> Kenneth M. Ehrenberg, Procedural Justice and Information in Conflict-Resolving Institutions, 67 Alb. L. Rev. 167, 168 (2003).

“administration of what is just,” “the quality of being just,” and “the principle... of just dealing.”<sup>18</sup> Justice may not be subject to static definitions; as social science professors Harvey M. Weinstein and Eric Stover explain, “[j]ustice is a process - often a contentious one - that can evolve into different forms over time.”<sup>19</sup> In the context of crime, law professor Sophie Evekink suggests, justice should mean doing right by all stakeholders: victims,

offenders, the state, families and communities.<sup>20</sup> But for the woman whose husband and two sons were killed during an attack on her village, justice is “just a word. It means nothing.”<sup>21</sup> For political systems and states, justice is often defined through the ability to impose criminal and civil sanctions on wrongdoers.<sup>22</sup> Justice can be substantive or procedural,<sup>23</sup> distributive,<sup>24</sup> retributive, restorative, or transformative.<sup>25</sup>

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<sup>18</sup> Megan M. Carpenter, *Bare Justice: A Feminist Theory of Justice and Its Potential Application to Crimes of Sexual Violence in Post-Genocide Rwanda*, 41 *Creighton L. Rev.* 595, 601 (2008).

<sup>19</sup> Harvey M. Weinstein & Eric Stover, Introduction: Conflict, Justice, and Reclamation, in *My Neighbor, my Enemy: Justice and Community in the Aftermath of Mass Atrocity 12* (Eric Stover & Harvey M. Weinstein eds., 2004).

<sup>20</sup> Sophie Evekink, *Retributive or Restorative? Prospects for Justice for Those Who Live Side-by-Side with Their Aggressors 4* (Working Paper, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2209959](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209959).

<sup>21</sup> Eric Stover, *Witnesses and the Promise of Justice in the Hague*, in *My Neighbor, my Enemy*, supra note 19, 114–15.

<sup>22</sup> Richard J. Goldstone, Foreword, in Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence IX* (1998); Kent Greenawalt, *Amnesty's Justice*, in *Truth v. Justice: The Morality of Truth Commissions 200* (Robert I. Rotberg & Dennis Thompson eds., 2000); Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 *J. L. & Relig.* 1, 2 (2001).

<sup>23</sup> Procedural justice refers to the means by which conflicts are resolved, the “adjudicatory process” used to determine an outcome. While most philosophers concern themselves with substantive, or outcome, justice, Ehrenberg makes a case for the importance of procedural justice, arguing that faith in the process can overcome concerns about the rightness of a particular result. Philosopher Kenneth Ehrenberg points to three ways that institutions can fail to provide procedural justice: in scope (by either failing to adjudicate cases within its scope or reaching beyond its scope); through procedure (by using improper means to resolve

conflict); or in outcome (by reaching an unjust result despite acting within the proper scope and using appropriate procedure). Ehrenberg, supra note 17, at 178–89. Procedural justice has a great deal of value in cases involving intimate partner abuse. As law professor Deborah Epstein has explained, people who abuse are more likely to comply with protective orders and other judicial decrees when they believe that the process for entering such orders has been fair. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 *WM. & Mary L. Rev.* 1843, 1846 (2002). Process is also important for people subjected to abuse. Voice - the opportunity to articulate one's position, goals and concerns for a finder of fact - is an essential component of procedural justice. Alan J. Tomkins & Kimberly Applequist, *Constructs of Justice: Beyond Civil Litigation*, in *Civil Juries and Civil Justice: Psychological and Legal Perspectives 261* (Brian H. Bornstein et al. eds., 2008). Moreover, just process may ensure that people subjected to abuse are able to reach their substantive justice goals. The concepts of procedural and substantive justice are, in fact, intertwined; whether the process can be deemed just may depend in large measure upon what outcome an individual hopes to achieve.

<sup>24</sup> The theory of distributive justice, which focuses on the morality of the distribution of economic benefits and burdens among members of society, is most often associated with John Rawls. *Distributive Justice*, *Stanford Encyclopedia of Philosophy*, available online at <http://plato.stanford.edu/entries/justice-distributive/>.

<sup>25</sup> As social science professor Lisa Blomgren Bingham notes, not only are there a number of varieties of justice, but the definitions for terms like “procedural justice” may vary depending on the context in which the term is being used - social psychology versus jurisprudence, for example. Bingham, supra note 4, at 28.

Justice can require recognition<sup>26</sup> and it can require reparation. Justice can be found through the state, outside of the state, and through some combination of both.<sup>27</sup> In the context of intimate partner abuse, however, the three most frequently discussed types of justice are retributive, restorative, and transformative.

#### A. *Retributive Justice*

What most people are likely to think of when they hear the word justice is

retributive or corrective justice. A crime or wrong is committed; a judge or some other legal actor, after an appropriate process, finds that the perpetrator is responsible and condemns the perpetrator to suffer some appropriate punishment as a result of that wrong.<sup>28</sup> As philosopher Jeffrie Murphy explains, “[w]e (society) hire this individual [the sentencing judge] to enforce the rule of law under which we live. We think of this as ‘doing justice’....”<sup>29</sup> Retributive justice

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<sup>26</sup> Justice as recognition is concerned with the undervaluing of marginalized groups; recognition is a response to cultural injustice, manifested through cultural domination, non-recognition, and disrespect. Remedying cultural injustice (like racism, sexism, and heterosexism) requires cultural or symbolic change.

Political and social science professor Nancy Fraser explains: This could involve upwardly revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognizing and positively valorizing cultural diversity. More radically still, it could involve the wholesale transformation of societal patterns of representation, interpretation and communication in ways that would change everybody’s sense of self. Nancy Fraser, *Justice Interruptus: Critical Reflections On The “Postsocialist” Condition* 15 (1997). Victims of harm play an active role in processes designed to provide justice as recognition. In fact, victim participation is essential to achieving justice as recognition, because the harm cannot be named and exposed without hearing the victim’s story. Moreover, justice as recognition envisions storytelling unconstrained by the rules and mores that govern trials in the adversarial system, contemplating stories told with emotion and guided by what the victim, rather than what a court, deems relevant. Justice as recognition is “vindicatory,” providing validation for victims and imposing some burden on perpetrators, as a means of recognizing their wrongdoing. Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 *Cornell Int’l L. J.* 675, 702–04 (2008).

<sup>27</sup> Law professor Susan Herman, for example, envisions a justice system for victims of crime that runs parallel to and does not require engagement with the criminal justice system, but that charges the state with keeping victims safe and preventing revictimization. In Herman’s “parallel justice” system: All victims would be offered immediate support, compensation for their losses, and practical

assistance. When their more urgent needs have been met, they would be offered opportunities to describe the harms they have experienced and set forth what they need to get their lives back on track. Government officials would marshal as many resources as possible to meet their short-and long-term needs. Susan Herman, *Parallel Justice for Victims of Crime* 56 (2010). In a parallel justice system, the government is responsible for taking the lead to ensure that a victim’s needs are met. *Id.* at 64. In partnership with the private sector and the community, parallel justice case managers with governmental authority would be made available to hear victims’ stories and help victims access needed resources. *Id.* at 122–23. Parallel justice, according to Herman, is intended to meet the goals of both the victim of crime and of society. *Id.* at 58–59. Safety is parallel justice’s overriding concern, although Herman never discusses what safety means, or what happens when victims of crime define safety differently than the government does. Although Herman recognizes that some victims of crime will not be interested in or able to access the criminal justice system, parallel justice nonetheless requires victims of crime to interact with the government in some way in order to receive services and supports. Parallel justice assumes a benign, helpful government that victims of crime will be willing to approach; it fails to consider the ways in which the state is a harmful and intrusive force for many low income people, people of color, and undocumented people, and the reluctance of those groups to ask the state for assistance as a result. Andrea Smith, *Beyond Restorative Justice: Radical Organizing Against Violence*, in *Restorative Justice and Violence Against Women* 261–66 (James Ptacek ed., 2010). While its goal is “to provide justice to victims by helping them rebuild their lives,” the path to that justice runs through the state. Herman, *Parallel Justice*, *supra*, at 75.

<sup>28</sup> Haldemann, *supra* note 26, at 677.

<sup>29</sup> Murphy, *supra* note 16, at 167.

is necessarily state-centered justice, relying on judges to determine guilt and mete out punishment and on state-run penal systems to enforce those punishments.<sup>30</sup>

The argument that punishment is central to justice takes a number of forms. Righting the wrong done through crime requires more than simply knowing who committed that crime. Justice, in a retributive sense, requires that perpetrators suffer as a consequence of their actions. Punishment, then, has value in and of itself, as a formal response to a wrong that cannot be superseded by other methods of accountability (like public shaming) or the simple recognition that a crime has been committed.<sup>31</sup> As political science professors Amy Gutman and Dennis Thompson explain: “[j]ustice is not achieved when a murderer or rapist publicly acknowledges his crimes but is not brought to trial and suffers no further punishment... Even if the victims received financial compensation, the demands of justice... would not be satisfied.”<sup>32</sup>

Formalizing punishment also ensures that societal norms are upheld. Notwithstanding the wishes of the individual victim of crime, punishment expresses society’s condemnation of the act committed and sends a message to others contemplating such wrongdoing that it will not be tolerated. Punishment also reestablishes the victim’s right to a place within the community, a right that may have been called into question by the crime. As law professor Martha Minow

writes, “[t]hrough retribution, the community corrects the wrongdoer’s false message that the victim was less worthy or valuable than the wrongdoer; through retribution, the community reasserts the truth of the victim’s value by inflicting a publicly visible defeat on the wrongdoer.”<sup>33</sup>

Retributive justice also acts as a check on vigilante self-help as a reaction to crime. Ensuring that punishments are given, and relegating the work of punishment to judges, is crucial because it prevents individuals from seeking vengeance by “transferring the responsibility for apportioning blame and punishment from victims to a court that acts according to the rule of law.”<sup>34</sup>

Justice, in the realm of intimate partner abuse law and policy, has most often been seen through a retributive lens. The declaration that domestic violence is a crime, which began in the late 1970s,<sup>35</sup> the criminalization of intimate partner abuse beginning in the 1980s,<sup>36</sup> the development of policing and prosecutorial techniques specifically designed to address intimate partner abuse,<sup>37</sup> and the subsequent devotion of millions of dollars in federal funds to the criminal justice response,<sup>38</sup> all attest to the restorative justice orientation of intimate partner abuse law and policy.

Given the mandate that the legal system categorize intimate partner abuse as a crime, and the subsequent lengthy and often frustrating fight to have that demand met by the legal system,<sup>39</sup> some

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<sup>30</sup> Haldemann, *supra* note 26, at 678.

<sup>31</sup> As Mheli Mxenge, the brother of Griffiths Mxenge, a lawyer and member of the ANC murdered and mutilated by South African police in 1981, stated, “[o]nce you know who did it, you want the next thing - you want justice!” Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *Truth v. Justice*, *supra* note 22, at 26.

<sup>32</sup> Gutmann & Thompson, *supra* note 31, at 25.

<sup>33</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* 12 (1998).

<sup>34</sup> Weinstein & Stover, *supra* note 19, at 14.

<sup>35</sup> Goodmark, *A Troubled Marriage*, *supra* note 3, at 17–18.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 107–113.

<sup>38</sup> *Id.* at 19–20.

<sup>39</sup> *Id.*

advocates are resistant to the idea that retributive justice does not meet the justice needs of people subjected to abuse. That assessment - that justice can be found through the criminal justice system - is true for some people subjected to abuse. For a number of reasons, however, the criminal justice system is an imperfect vehicle for finding justice for many others.

First, the criminal justice system can deprive people subjected to abuse of voice. The criminal justice system is a poor venue for unfettered storytelling of the kind that some people subjected to abuse want. "Courtrooms are hardly safe and secure environments for the recounting of traumatic events," argues social science professor Eric Stover.<sup>40</sup> Courts, concerned with ensuring procedural justice for offenders, adhere to strict evidentiary and process requirements that necessarily mediate the stories of victims of crime.<sup>41</sup> But according to psychologist Judith Herman, "[v]ictims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any

personal attempt to construct a coherent and meaningful narrative."<sup>42</sup> That failure to provide an open forum can be problematic for those testifying. Witnesses are warned to keep their stories short and to the point; this narrowing of witness stories can leave victims unsatisfied with the court process<sup>43</sup> and can distort the underlying narrative in problematic ways.<sup>44</sup> Skillful cross-examination can make the credibility of even the most truthful witness look dubious.<sup>45</sup> The structured setting of a trial simply fails to meet the justice needs of many victims of crime. In fact, psychologist Judith Herman states, "if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law."<sup>46</sup>

Moreover, the state's goals in responding to intimate partner abuse may be very different than the goals of the individual who has been subjected to abuse, which can deprive people subjected to abuse of voice. Police and prosecutors are charged with enforcing the laws, police by making arrests and ensuring that sufficient evidence exists to

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<sup>40</sup> Stover, *Witnesses and the Promise*, supra note 21, at 106.

<sup>41</sup> Margret E. Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 *Violence Against Women* 71, 72 (2011); Minow, supra note 33, at 239; Teresa Godwin Phelps, *Shattered Voices: Language, Violence and the Work of Truth Commissions* 63 (2004).

<sup>42</sup> Herman, *Justice from the Victim's Perspective*, supra note 2, at 574.

<sup>43</sup> Joseph Roy Gillis et al., *Systemic Obstacles to Battered Women's Participation in the Judicial System: When Will the Status Quo Change?*, 12 *Violence Against Women* 1150, 1160 (2006); Susan L. Miller & M. Kristen Hefner, *Procedural Justice for Victims and Offenders? Exploring Restorative Justice Processes in Australia and the U.S.*, *Justice Q.* (2013), at 9, available at <http://www.tandfonline.com/doi/full/10.1080/07418825.2012.760643#>. UuFJYBAo5aQ.

<sup>44</sup> Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 *Crim. L. Rev.* 545, 550 (1999) (explaining that "[w]hen information is mediated through justice agents, there is a higher likelihood of loss or distortion of critical details").

<sup>45</sup> Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in *Truth v. Justice*, supra note 22, at 74 ("Prosecution witnesses at trials undergo constant interruption and aggressive cross-examination; they are not treated with... deference and respect..."); see also Shriver, supra note 22, at 11 (describing the courtroom as "a playing field in which the most skilled, rather than the most truthful, side will win").

<sup>46</sup> Herman, *Justice from the Victim's Perspective*, supra note 2, at 574.

prosecute, and prosecutors by securing convictions in those cases that go to trial. Some people subjected to abuse, however, are not interested in arrest or prosecution.<sup>47</sup> That difference between goals can mean not only that people subjected to abuse fail to find justice through the criminal system, but also that they are actively harmed by the system. People subjected to abuse are told by police to “press charges or shut up,” or threatened that if they fail to separate from their abusers (the legal system’s preferred intervention in cases involving intimate partner abuse),<sup>48</sup> “there would be no one there” when they called for help again.<sup>49</sup> In New York City, police detectives have begun running criminal background searches on people who call for assistance in intimate partner abuse cases, “so cops can have leverage if the accuser gets cold feet about pressing charges.”<sup>50</sup> Knowing that police policy could lead to incarceration for minor offenses such as unpaid tickets, people subjected to abuse are less likely to report that abuse to law enforcement.

Prosecutors, too, have their own goals for intervention.<sup>51</sup> Broadly stated, the goal

of a criminal justice intervention in a case involving intimate partner abuse is to punish the abuser to protect the victim,<sup>52</sup> who is a witness, not a party, to the action. In that role, victims have little control over what happens during prosecution,<sup>53</sup> and little recourse when their justice goals are undermined. Because the criminal justice system serves the state, some prosecutors feel empowered to act unconstrained by the wishes of individual victims.<sup>54</sup> Prosecutor Michelle Kaminsky explains:

Prosecutors are public officials who are held publicly accountable. If a woman is injured because we failed to follow through on a case, regardless of a victim’s wishes, we will be held responsible. I would be a liar if I didn’t acknowledge how this truth affects my decision making process.<sup>55</sup>

Some prosecutors came to the criminal justice system in order to change that system, so that it would better serve people subjected to abuse.<sup>56</sup> How they carry out that mandate, though, may put them at odds with individuals with different goals.<sup>57</sup> Former prosecutor and law professor Michelle Madden Dempsey, for

<sup>47</sup> In fact, many crime victims are reluctant to assist criminal justice professionals, given the costs of cooperation, but, as criminologists Edna Erez and Joanne Belknap note, “battered women have been uniquely singled out by system’s agents as ‘problematic’ victims/witnesses.” Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women’s Assessment of the Criminal Processing System’s Responses*, 13 *Violence and Victims* 251, 252 (1998); see also United Nations Entity for Gender Equality and the Empowerment Of Women, supra note 118, at 94 (explaining that “women themselves do not necessarily equate justice with prosecutions: revognition of what they have endured and the means to rebuild their lives often takes precedence over going to court”).

<sup>48</sup> See generally Goodmark, *A Troubled Marriage*, supra note 3.

<sup>49</sup> Erez & Belknap, supra note 47, at 256.

<sup>50</sup> Jamie Schram & Dan Mangan, *NYPD Using Criminal Background Checks to Push Victims in Domestic- Violence Cases*, N.Y. Mar. 16, 2013,

[http://www.nypost.com/p/news/local/squeeze\\_on\\_abuse\\_victims\\_Vd720156ATRojvyh0CfPwN](http://www.nypost.com/p/news/local/squeeze_on_abuse_victims_Vd720156ATRojvyh0CfPwN).

<sup>51</sup> Erez, supra note 44, at 554.

<sup>52</sup> Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecution*, 109 *Harv. L. Rev.* 1849, 1870 (1996).

<sup>53</sup> Sanford Levinson, *Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process*, in *Truth v. Justice*, supra note 22, at 218.

<sup>54</sup> Hanna, supra note 52, at 1872.

<sup>55</sup> Michelle Kaminsky, *Reflections of a Domestic Violence Prosecutor: Suggestions For Reform* 114 (2011). Other prosecutors aren’t as thoughtful about those decisions; Kaminsky describes one prosecutor who bragged to an audience as a national domestic violence conference that she had women arrested and jailed when they did not cooperate with her, explaining, “I was just covering my ass.” *Id.*

<sup>56</sup> Hanna, supra note 52, at 1873.

<sup>57</sup> Kaminsky, supra note 55, at 13.

example, has argued that the state should force women subjected to abuse to testify in cases where the violence is serious and ongoing and reinforces patriarchy within the relationship and in society, prosecution is likely to reduce the violence, and strong community interests are served by requiring the victim to testify.<sup>58</sup> Putting aside the question of whether prosecution can ever guarantee a reduction in intimate partner abuse,<sup>59</sup> law professor Michelle Madden Dempsey's stance means actively disregarding the desire to avoid the criminal justice system of those people whose justice goals are not met through that system. When prosecutors have their own goals, victim's voices can be silenced.<sup>60</sup>

Validation is another crucial component of justice, but some victims of crime seek a type of validation that the criminal justice system cannot provide. The criminal justice system is predicated on the presumption of innocence; until a verdict has been rendered, a judge cannot convey anything to a witness that suggests the judge believes in the truthfulness of the witness's testimony or the rightness of the cause, lest a mistrial be declared. In fact, judges and juries may appear skeptical of or even hostile to a witness's claims in their attempts to adhere to the presumption of innocence.<sup>61</sup> Validation of witnesses' stories by the

presiding officers, explained Judge Albie Sachs of the South African Constitutional Court, was one of the key differences between a court and a truth commission: "Tutu cries. A judge does not cry."<sup>62</sup> Archbishop Desmond Tutu could provide the validation sought by the witnesses before the South African Truth and Reconciliation Commission (TRC) in a way that a judge simply cannot, by virtue of the role a judge plays within the adversarial system. While judges may be able to provide that validation post-conviction - and while many victims feel gratified when judges reflect the victim's sense of harm in making sentencing determinations<sup>63</sup> - that validation may come too late for some people subjected to abuse.

Some people subjected to abuse are simply not interested in finding vindication through retributive justice. For some, that lack of interest is related to perceptions of how useful the criminal justice system will be. Retributive justice assumes that prosecution will result in conviction, thus deterring future criminal behavior.<sup>64</sup> Even if prosecution routinely led to convictions, an unsupportable claim in the context of intimate partner abuse,<sup>65</sup> many people subjected to abuse would still be skeptical of the system's deterrent effect on future abuse.<sup>66</sup> For others, the concern is with retribution itself. A criminal trial, writes law

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<sup>58</sup> Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* 208(2009).

<sup>59</sup> Goodmark, *A Troubled Marriage*, supra note 3, at 214 n.5.

<sup>60</sup> Bell et al., supra note 41, at 79.

<sup>61</sup> Minow, supra note 33, at 239. They may also actually be hostile to claims of abuse and victimization. Mary Coombs, *Telling the Victim's Story*, 2 *Tex. J. Women & L.* 277, 280 (1992); Goodmark, *A Troubled Marriage*, supra note 3, at 77.

<sup>62</sup> Minow, supra note 33, at 247.

<sup>63</sup> Erez, supra note 44, at 553.

<sup>64</sup> Dumisa B. Ntsebeza, *The Uses of Truth Commissions: Lessons for the World*, in *TRUTH V. JUSTICE*, supra note 22, at 161-63.

<sup>65</sup> See Goodmark, *A Troubled Marriage*, supra note 3, at 110-113 (discussing various problems with criminal prosecutions of domestic violence cases).

<sup>66</sup> Erez & Belknap, supra note 47, at 263. In one small Canadian study, all twenty of the women surveyed, who had used the legal system in the past, said they would not use the legal system again. Gillis et al., supra note 43, at 1160. Paula Barata notes, however, that dichotomous thinking about whether the system is "good" or "bad" oversimplifies the more complex views that many women subjected to abuse hold about criminal justice system intervention. Paula Barata, *Abused Women's Perspectives on the Criminal Justice System's Response to Domestic Violence*, 31 *Psychology of Women Q.* 202, 209 (2007).

professor Martha Minow, “announces a demand not only for accountability and acknowledgment of harms done, but also for unflinching punishment.”<sup>67</sup> Philosopher Jeffrie Murphy characterizes criminal law as enabling society to express its anger, resentment and hatred and legitimizing its desire for revenge.<sup>68</sup> But some people subjected to abuse are not interested in punishment, revenge, hatred or resentment. Instead, they want to preserve their relationships, without the abuse. Studies have repeatedly shown that women subjected to abuse opt out of the legal system because they love their partners and want to continue their relationships.<sup>69</sup> The criminal justice system’s focus on punishment is simply inconsistent with that goal.

Finally, for some people subjected to abuse, the criminal justice system - indeed, any state system - is not a safe and comfortable place within which to seek justice.<sup>70</sup> People of color, who are already overrepresented in the criminal justice system, may have concerns about approaching the state for assistance, fearing that the state will intervene punitively against their partners or against them.<sup>71</sup> Mothers of color who seek assistance, for example, may instead find their children being removed by child

protective services for their failure to protect those children from exposure to violence.<sup>72</sup> Women with undocumented partners may be unwilling to turn to the criminal system, given the potential for deportation of their partners and the loss of economic, parenting, and other forms of support. Moreover, in this Secure Communities era, undocumented immigrant women may justifiably fear that reporting abuse to police could lead to their own arrest and deportation.<sup>73</sup> Lesbian, gay, bisexual and particularly transgender people subjected to abuse experience significant rates of harassment and abuse at the hands of police, even when (especially when) they report intimate partner abuse.<sup>74</sup> Andre Cooley called police after his boyfriend became violent - and three days later, was fired by the Forrest County, Mississippi Sheriff’s Office. Although a supervisor told him informally he was fired for being gay, the official statement from the Sheriff’s Office was that Cooley had been fired because he had called police more than once regarding intimate partner abuse.<sup>75</sup> When transgender people call police for assistance, their requests for help are often ignored; worse still, transgender people are frequently arrested by those same police officers they called for help.<sup>76</sup>

<sup>67</sup> Minow, *supra* note 33, at 26.

<sup>68</sup> Jeffrie Murphy, Introduction, in *Forgiveness and Mercy*, *supra* note 16, at 2, 4.

<sup>69</sup> Goodmark, *A Troubled Marriage*, *supra* note 3, at 96–97.

<sup>70</sup> Levinson, *supra* note 53, at 225. Engaging with the legal system can be a terrifying prospect for even the most educated and experienced; even Judge Learned Hand once said “I should dread a lawsuit beyond almost anything else short of sickness and death.” Today, Levinson suggests, “one suspects that Hand would expand his qualms to include the entire legal system, and not only a formal ‘lawsuit.’” *Id.*

<sup>71</sup> Loretta Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women’s Movement*, in *Restorative Justice and Violence Against Women*, *supra* note 27, at 24; Gillis et al.,

*supra* note 43, at 1152, 1163 (noting similar problems in Canada); MS. Foundation For Women, *Safety and Justice for All: Examining the Relationship Between the Women’s Anti-Violence Movement and the Criminal Legal System* 12–15 (2003).

<sup>72</sup> Goodmark, *A Troubled Marriage*, *supra* note 3, at 67–69.

<sup>73</sup> *Id.* at 72–73.

<sup>74</sup> Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 *Harv. C.R.- C.L. L. REV.* 51 (2013).

<sup>75</sup> John D. Sutter, *No One Should Be Fired for Being Gay*, CNN.COM (Mar. 22, 2013, 12:51 PM), <http://www.cnn.com/2013/03/22/opinion/sutter-employment-discrimination-lgbt>.

<sup>76</sup> [ria.europa.eu/en/content/juris/c2\\_juris.htm](http://ria.europa.eu/en/content/juris/c2_juris.htm) Goodmark, *Transgender People*, *supra* note 74, at 76.

Transgender people have similarly fraught exchanges with courts and prosecutors.<sup>77</sup> As a result, very, very few transgender individuals willingly choose to interact with the criminal justice system when they are subjected to abuse.<sup>78</sup> For many people subjected to abuse, “the process [of the criminal justice system] is the punishment.”<sup>79</sup>

Given all of these concerns, some scholars have suggested turning away from the criminal justice system altogether and employing other strategies to combat intimate partner abuse. As law professor Angela Harris asks, “[i]f reliance on the criminal justice system to address violence against women and sexual minorities has reached the end of its usefulness, to where should advocates turn next?”<sup>80</sup> This article does not go so far as to suggest that the criminal justice system can never provide justice for people subjected to abuse; a zero sum choice between retributive and other forms of justice is incompatible with the idea of individualized justice. For those who are interested in retributive justice and willing to live within the state’s definitions and goals, that system should be available.<sup>81</sup> Notwithstanding that caveat, however, the next section of the article seeks to answer Harris’ question about where to turn next in finding justice

for people subjected to abuse, and looks to international human rights processes to do so.

### *B. Restorative Justice*

Where retributive justice is centered on punishment, restorative justice’s goals are the repair and healing of relationships damaged by conflict and other harms.<sup>82</sup> Proponents of restorative justice reject the language of “crime,” arguing that “the state and the law should not have a monopoly on defining injury.”<sup>83</sup> Instead, restorative justice seeks to repair harms caused by the actions of offenders by asking offenders to acknowledge the harm they have caused and identify ways to redress that harm.<sup>84</sup> In lieu of punishment, offenders are held accountable for their actions through reparations and rehabilitation, with an eye towards reintegrating both offenders and their victims into their communities.<sup>85</sup> Underlying restorative justice efforts is the belief that social norms are best reinforced through social shaming, rather than state-imposed sanction on offenders.<sup>86</sup> “After appropriate rituals of guilt, responsibility, and penance,” restorative justice proponents argue, offenders should be reintegrated into society.<sup>87</sup> Restorative justice is also noteworthy for centralizing the needs and

<sup>77</sup> *Id.* at 81–82.

<sup>78</sup> *Id.* at 83.

<sup>79</sup> Miller & Hefner, *supra* note 43, at 22 (quoting M.M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1979)).

<sup>80</sup> Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation* 37 *Wash. U. J. L. & Pol’y* 13, 38 (2011); see also Aya Gruber, *The Feminist War on Crime*, 92 *Iowa L. Rev.* 741, 826 (2007) (arguing that feminists should no longer advocate for or support criminalization of domestic violence).

<sup>81</sup> Other scholars have come to the same conclusion. See, e.g., Donna Coker, *Transformative Justice: Anti-Subordination Practices in Cases of Domestic Violence*, in *Restorative Justice and*

*Family Violence* 150 (Heather Strang & John Braithwaite eds., 2002) (“Adoption of a transformative process does not mean that domestic violence should be decriminalized.”).

<sup>82</sup> Haldemann, *supra* note 26, at 677.

<sup>83</sup> Harris, *supra* note 80, at 47.

<sup>84</sup> *Id.* at 46.

<sup>85</sup> C. Quince Hopkins et al., *Responding: Two New Solutions: Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 *St. Louis Univ. Pub. L. Rev.* 289, 294 (2004).

<sup>86</sup> John Braithwaite, *Crime, Shame and Reintegration* 178–79 (1989).

<sup>87</sup> Harris, *supra* note 80, at 41.

goals of victims of crimes in its processes.<sup>88</sup> As a result of this victim-centeredness, research finds high levels of victim satisfaction with restorative justice, with victims reporting decreased fear and anxiety and increased feelings of dignity, self-respect and self-confidence.<sup>89</sup> Offenders also report perceiving restorative justice processes as fair in both process and outcome.<sup>90</sup>

Restorative justice is defined as much through the processes it employs to redress harm as through its goals. Those practices include victim-offender mediation;<sup>91</sup> conferencing, which brings together a number of individuals and can include the victim, the perpetrator, family and community members and service providers;<sup>92</sup> and circles, including peacemaking circles, used in some indigenous communities,<sup>93</sup> and sentencing circles, designed to allow the victim, family and community to have input on sentencing in criminal cases.<sup>94</sup>

While feminist antiviolence efforts and restorative justice share a number of principles,<sup>95</sup> feminists have expressed concern about using restorative justice in cases of intimate partner abuse. Sociologist James Ptacek groups those concerns into three general categories:

safety, accountability, and political concerns.<sup>96</sup> First, feminist have concerns about safety, worrying that restorative justice practitioners fail to understand and respect the unique characteristics of and challenges posed by intimate partner abuse and, as a result, do not account for those factors in their programs.<sup>97</sup> Second, feminists express skepticism that offenders will actually be held accountable for their actions through restorative justice, viewing such initiatives as, law professor Donna Coker has suggested, “cheap justice.”<sup>98</sup> Third, feminists fear that turning to restorative justice and other alternatives to the criminal justice system risks losing the recognition that intimate partner abuse is, in fact, a crime, and decreases the power of women to demand action from the criminal justice system.<sup>99</sup>

Nonetheless, restorative justice could provide an alternative to what some characterize as an ineffectual criminal justice system response in cases involving intimate partner abuse.<sup>100</sup> Sociologist Lawrence Sherman, who published some of the earliest research on arrest policy in cases involving intimate partner abuse, points out, “[s]ince there is no evidence that standard justice is any

<sup>88</sup> Harris, *supra* note 80, at 43; Kiss, *supra* note 45, at 71

<sup>89</sup> Goodmark, *A Troubled Marriage*, *supra* note 3, at 170.

<sup>90</sup> Miller & Hefner, *supra* note 43, at 4.

<sup>91</sup> James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in *Restorative Justice and Violence Against Women*, *supra* note 27, at 8.

<sup>92</sup> *Id.* at 9.

<sup>93</sup> *Id.*

<sup>94</sup> See Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (1997), available at [http://publications.gc.ca/collections/collection\\_2009/justice/J22-12-1997E.pdf](http://publications.gc.ca/collections/collection_2009/justice/J22-12-1997E.pdf).

<sup>95</sup> Frederick & Lizdas, *supra* note 71, at 40–45.

<sup>96</sup> Ptacek, *supra* note 91, at 19.

<sup>97</sup> Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to*

*Restorative Justice*, in *Restorative Justice and Family Violence* 56–58 (Heather Strang & John Braithwaite eds., 2002). Similar concerns have been raised in the context of cases involving sexual violence. See Estelle Zinsstag, *Sexual Violence Against Women in Armed Conflicts and Restorative Justice: An Exploratory Analysis*, in *Feminist Perspectives, On Transitional Justice: From International and Criminal to Alternative Forms of Justice* 209 (Martha Albertson Fineman & Estelle Zinsstag eds., 2013).

<sup>98</sup> Donna Coker, *Enhancing Autonomy*, *supra* note 14 at 85.

<sup>99</sup> Ptacek *supra* note 91, at 20.

<sup>100</sup> Goodmark, *A Troubled Marriage*, *supra* note 3, at 106–35 (summarizing the social science literature on the criminal justice response to domestic violence and concluding that evidence is at best equivocal as to the efficacy of the criminal justice system in responding to domestic violence).

more effective than doing nothing in response to an incident of domestic violence, the only challenge to restorative justice is to do better than doing nothing.”<sup>101</sup> Moreover, studies suggest that restorative justice processes may provide greater procedural justice for people subjected to intimate partner abuse than the traditional criminal justice system.<sup>102</sup>

### C. Transformative Justice

Concerned about the application of restorative justice to cases involving intimate partner abuse, but interested in looking beyond the criminal justice system for responses to such cases, law professor Donna Coker outlined a vision for deploying what some scholars have called transformative justice.<sup>103</sup> Transformative justice shares some of the core beliefs of restorative justice: skepticism about the effectiveness of the criminal justice system and a commitment to the idea that harm, not crime, should be the touchstone for intervention.<sup>104</sup> Law professor Angela Harris notes two crucial differences between the two, however. First, transformative justice is explicitly centered on principles of anti-subordination. As Harris writes, “[t]he aim of transformative justice is to recognize and grapple with the complicated ways in

which race, gender, and other modes of domination are mutually entwined... each incident of personal violence should be understood in a larger context of structural violence.”<sup>105</sup> Second, Harris explains, transformative justice recognizes that restorative justice’s reliance on the state and on institutions like “community” or “family” may be problematic, given the power imbalances that inhere in these institutions.<sup>106</sup> While transformative justice is focused on security, it recognizes that no one vision of security will address the needs of all who suffer harm.<sup>107</sup> Law professor Erin Daly has suggested that another essential component of transformative justice is contextuality - transformative justice is deeply rooted in the time, place, and particular circumstances of the community seeking justice.<sup>108</sup>

In the context of intimate partner abuse cases, transformative justice is concerned with creating communities, defined not through traditional institutions, but by people subjected<sup>109</sup> to abuse; those communities are charged with supporting the autonomy of people subjected to abuse.<sup>110</sup> While reintegration of people who abuse into the community may be a goal, that goal is secondary to the restoration of their partners’ autonomy.<sup>111</sup> Transformative justice projects consider

<sup>101</sup> Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. Soc. Pol’y & L. 263, 281 (2000).

<sup>102</sup> Miller & Hefner, *supra* note 43, at 21.

<sup>103</sup> Donna Coker, *Transformative Justice*, *supra* note 81. Law professor Donna Coker’s theory builds on the work of Ruth Morris, a sociologist and social worker who pioneered the concept of transformative justice in the context of penal reform. See, e.g., Ruth Morris, *Stories of Transformative Justice* (2000). Law professor Erin Daly has written about transformative justice in the context of societies in transition in the aftermath of human rights abuses. She argues that the overarching aim of transformative justice in that context is to fundamentally change society by inculcating new values. Erin Daly, *Transformative Justice: Charting*

*a Path Towards Reconciliation*, 12 Int’l Legal Perspectives 73, 83 (2002). In Daly’s conception, transformative justice also has two more specific goals, reconciliation and deterrence, though reconciliation is broadly defined. *Id.* at 84.

<sup>104</sup> Harris, *supra* note 80, at 57.

<sup>105</sup> *Id.* at 58.

<sup>106</sup> *Id.* at 49; see also Smith, *Beyond Restorative Justice*, *supra* note 27, at 263.

<sup>107</sup> Harris, *supra* note 80 at 59.

<sup>108</sup> Daly, *Transformative Justice*, *supra* note 103, at 99, 113.

<sup>109</sup> *Id.* at 145.

<sup>110</sup> Coker, *Transformative Justice*, *supra* note 81, at 148.

<sup>111</sup> *Id.* at 144.

the relationship between abusers' own oppression and their use of abusive tactics, but do not excuse such behavior as a result of economics, racism, heterosexism, or other indicia of oppression. Law professor Donna Coker sees transformative justice as expanding the range of responses available to people subjected to abuse without exposing them to the dangers inherent in the criminal justice system and traditional restorative justice practices.<sup>112</sup>

One crucial question that scholars have not answered is what transformative justice might look like in practice - how do you operationalize the principles of transformative justice? Organizations like Generation Five have similarly outlined visions of a transformative justice agenda for handling child sexual abuse, but have yet to create structures to actually do the work. One possibility for bringing transformative justice to life is through the creation of a community-based justice forum centered on certain key principles. Those principles, and what that system might look like, are the subject of the next two sections.

## II. Alternative Visions of Justice for People Subjected to Abuse

Theories of justice abound. Some focus on victims of crime or harm; others on what offenders or society are due. At different times, people subjected to abuse may find one or another type of justice more or less helpful or appropriate, depending on their justice goals. Drawing on both the specific research on people subjected to abuse as well as the broader literature on seeking justice for victims of mass atrocity and human rights abuses,

I suggest a number of principles that should inform any justice response - retributive, restorative, or transformative - to intimate partner abuse.

### A. Individualized Justice

Just as justice has different meanings for those who attempt to define it, it has different meanings for those who seek it. As social science professors Harvey M. Weinstein and Eric Stover write:

Justice, like beauty, is in the eye of the beholder and can be interpreted in a variety of ways. For many of our informants, justice meant having a job and an income; for others, it was returning to the home they had lost; still others saw justice as the ability to forget the past and move on with their lives. For some, justice was testifying at a trial against the soldiers and paramilitaries who had murdered their families and destroyed their homes. For others, justice had to be exacted by revenge. Some said justice could only take place on their neighbors looked them directly in the eye and apologized for betraying them.<sup>113</sup>

Two people who have experienced the same violence may have very different expectations of what justice is and notions of what they want from justice processes.<sup>114</sup> For one survivor of sexual violence, harsh punishment is justice; for another, justice meant support that enabled her to feel comfortable when her attacker was released into her community.<sup>115</sup>

Individualized responses are particularly important for people subjected to abuse. Empowerment has long been a central focus of the battered women's movement.<sup>116</sup> Definitions of empo-

<sup>112</sup> Id. at 150.

<sup>113</sup> Weinstein & Stover, *supra* note 19, at 4; see also MINOW, *supra* note 33, at 4 (laying out differing justice goals of survivors of violence).

<sup>114</sup> Gutmann & Thompson, *supra* note 31, at 40.

<sup>115</sup> Emily Amick, *Trying International Crimes on Local Lawns: The Adjudication of Genocide Sexual Violence Crimes in Rwanda's Gacaca Courts*, 20 Colum. J. Gender & L. 1, 95 (2011).

<sup>116</sup> Goodmark, *A Troubled Marriage*, *supra* note 3, at 124-30.

werment echo the language of autonomy and agency, calling for self-determination, controlling one's environment, and providing women with the necessary tools to make meaningful choices.<sup>117</sup> Slotting people subjected to abuse into one vision of justice is disempowering; only through individualized determinations of justice can people subjected to abuse exercise autonomy and experience empowerment. As U.N. Women noted in its 2011–12 report *Progress of the World's Women: In Pursuit of Justice*, “[j]ustice may be collectively desired, but it is individually experienced.”<sup>118</sup> Even justice as defined through the oft-expressed dual goals of the battered women's movement - safety for women subjected to abuse and accountability for abusers<sup>119</sup> - may be too narrow to meet the particularized needs for justice of some individuals subjected to abuse.

#### *B. Voice*

Simply having the opportunity to tell one's story, unmediated and in whatever form one chooses, is an essential element of justice for those who have been harmed. As law professor Martha Minow writes, “[t]he chance to tell one's story and be heard without interruption or skepticism is crucial to so many people,

and nowhere more vital than for survivors of trauma.”<sup>120</sup> The need for voice has been apparent among survivors of human rights violations, who attest to the “healing power of telling their story.”<sup>121</sup> Voice is important on a number of levels: to allow people subjected to abuse to establish the facts, to frame them as they see fit, and to be recognized as valid and trustworthy sources of information, thus restoring their dignity.<sup>122</sup> Voice is also linked to perceptions of fairness of process.<sup>123</sup> The opportunity to tell one's story, argues law professor Teresa Phelps is: [A] radical kind of justice, justice that returns dignity to those who have been victimized; justice that gives back the power to speak on one's own words and to shape the experience of violence into a coherent story of one's own, thereby allowing for a renewed (or new) sense of autonomy and sense of control....<sup>124</sup>

One man who was blinded by a police officer during South Africa's apartheid likened his appearance before the TRC to having his physical injuries healed. He stated, “I feel like what has been making me sick all the time is the fact that I couldn't tell my story. But now I - it feels like I got my sight back by coming here and telling you the story.”<sup>125</sup>

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<sup>117</sup> *Id.* at 124; see also Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* 320 (1982).

<sup>118</sup> United Nations Entity for Gender Equality and the Empowerment of Women, *2011–2012 Progress of The World's Women: In Pursuit of Justice* 10 (2011).

<sup>119</sup> Goodmark, *A Troubled Marriage*, *supra* note 3, at 106–35.

<sup>120</sup> Minow, *supra* note 33, at 58.

<sup>121</sup> Kiss, *supra* note 45, at 72. Law professor Erin Daly describes the impact of testifying on those who came before South Africa's Truth and Reconciliation Commission: “In hearings, victims often approached the Commission almost in a foetal position as they came to take their seats and relate their stories. They told stories as they saw them,

as they experienced them, as they perceived what had happened to them. As they left their seats, the image was wholly different. They walked tall. They were reintegrated into community. They could re-assume their roles in society; they could manage themselves and the world them again.” Daly, *Transformative Justice*, *supra* note 103, at 149. Daly's observations speaks not just to the power of voice, but to validation as well, a concept described *infra*.

<sup>122</sup> Andre Du Toit, *The Moral Foundations of the South African Truth and Reconciliation Commission: Truth as Acknowledgment and Justice as Recognition*, in *Truth v. Justice*, *supra* note 22, at 136; Minow, *supra* note 33, at 239.

<sup>123</sup> Miller & Hefner, *supra* note 43, at 3.

<sup>124</sup> Phelps, *supra* note 41, at 111.

<sup>125</sup> Minow, *supra* note 33, at 67.

That story can be told in a variety of settings. For some, voice can be found through the criminal justice system, through testimony in criminal trials or victim impact statements at sentencing.<sup>126</sup> Voice is also an essential element of restorative justice processes, where victims of crime are empowered to tell their perpetrators how the choices perpetrators make change victims' lives.<sup>127</sup> But people subjected to abuse have sought out other venues to tell their unmediated stories. Fifteen women in Rhode Island, for example, came together to narrate their experiences of abuse through a one-act play.<sup>128</sup> Although the group's original intent was to educate others about intimate partner abuse, several of the women noted that the experience of telling their stories, some for the first time, helped them to heal as well.<sup>129</sup> "I feel like it has finally come up, and I can finally release it and do away with it," explained Satta Jallah, one of the cast members.<sup>130</sup> Technology has facilitated this desire to share stories; people subjected to abuse are writing blogs, self-publishing e-books, and posting to message boards about their experiences.<sup>131</sup> All of these efforts point to the importance of voice. People subjected to abuse need to be heard. Justice processes should ensure that they are.

### C. Validation

In her study of people who had been subjected to physical and sexual abuse, psychologist Judith Herman found that validation - "an acknowledgment of the basic facts of the crime and an acknowledgment of harm" - was of the utmost importance to her respondents.<sup>132</sup> A number of studies of women subjected to abuse have made similar findings - that women seek "a mechanism to communicate loudly and clearly that they were serious, and a public record of the abuse and their effort to stop it."<sup>133</sup> Others who work with victims of harm confirm the victim's need for validation. Pumla Gobodo-Madikizela, who served on the Human Rights Committee of South Africa's Truth and Reconciliation Commission, saw a similar need in those who came before the TRC: "[M]any victims conceive of justice in terms of revalidating oneself, and of affirming the sense 'you were right, you were damaged, and it was wrong.'"<sup>134</sup> Validation is, in one sense, what gives voice its impact; simply communicating what one has experienced is powerful, but not nearly as powerful as when that story is acknowledged and its content validated.<sup>135</sup> Validation affirms the victim's personhood and restores the victim's dignity, a condition taken from the

<sup>126</sup> Erez, supra note 44, at 551–52.

<sup>127</sup> Miller & Hefner, supra note 43, at 11. Having a voice in the process makes restorative processes feel more legitimate than the criminal justice system to victims of crime. *Id.* at 13.

<sup>128</sup> Erika Niedowski, *RI Domestic Survivors Write, Perform Play*, Boston. Com (Dec. 10, 2012), <http://www.boston.com/news/local/rhode-island/2012/12/10/domestic-violence-survivors-write-perform-play/EDXkkD7ODOBWaZSHBtdLhl/story.html>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Paula Carrasquillo, *Domestic Violence Victims Are Speaking Out, Handing Out a Dose of*

*Reality*, Wash. Times, Dec. 6, 2012, <http://communities.washingtontimes.com/neighborhood/living-inside-out-loud/2012/dec/6/domestic-violence-victims-are-speaking-out-handing/>.

<sup>132</sup> Herman, *Justice from the Victim's Perspective*, supra note 2, at 585.

<sup>133</sup> Jill Davies et al., *Safety Planning with Battered Women: Complex Lives/Difficult Choices* 70 (1998); see also Erez & Belknap, supra note 47; James Ptacek, *Battered Women in the Courtroom* 152–53 (1999).

<sup>134</sup> Minow, supra note 33, at 60.

<sup>135</sup> Erez, supra note 44, at 553; minow, supra note 33, at 70–71.

victim by abuse.<sup>136</sup> Recognizing the importance of validation, South Africa's TRC worked intentionally to create "a tone of caregiving and a sense of safety."<sup>137</sup> To that end, at the end of each TRC hearing in South Africa, law professor Teresa Phelps reports, a commissioner would sum up the witness's testimony and affirm and thank the witness for participating.<sup>138</sup>

#### *D. Vindication*

If validation is an acknowledgment of harm, vindication is "a clear and unequivocal stand in condemnation of the offense."<sup>139</sup> psychologist Judith Herman's research indicates that next to validation, vindication is what victims of physical and sexual abuse most equate with justice.<sup>140</sup> Vindication requires the community to publicly stand with the victim of conflict and to hold the offender accountable for her actions. That public sanction can come in many forms: through criminal punishment<sup>141</sup>, for example, but also through public shaming. As political science and history professor Robert Rotberg writes about the truth and reconciliation process in South Africa, "[e]xposure is punishment. It is a powerful component of accountability."<sup>142</sup> That

vindication, in turn, can right the power imbalances that exist between the perpetrator and the victim of harm, bringing society's weight to bear on the side of the victim.<sup>143</sup>

### **III. Seeking Justice Beyond the Justice System**

Some would argue that the criminal justice system already provides the key elements of justice described in Part II: sentences tailored to the individual circumstances of each case, an opportunity for the victim of crime to speak, validation in a finding that the victim's story is credible, and vindication in the form of punishment. And it is true that some people subjected to abuse can meet their justice goals through the criminal justice system. But for the many people who find that the criminal justice system does not deliver justice, there ought to be other options. Community-based justice forums could meet that need.

Women around the world use informal (non-state based) justice systems to address a number of issues, including intimate partner abuse, even where well-functioning state systems exist.<sup>144</sup>

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<sup>136</sup> David Crocker, Truth Commissions, Transitional Justice and Civil Society, in *Truth v. Justice*, supra note 22, at 102.

<sup>137</sup> Minow, supra note 33, at 246.

<sup>138</sup> Phelps, supra note 41, at 110.

<sup>139</sup> Herman, *Justice from the Victim's Perspective*, supra note 2, at 585.

<sup>140</sup> *Id.*; see also Weinstein & Stover, supra note 19, at 10 ("We pursue justice because we wish to be vindicated and, more importantly, to have what we have lost returned. Yet it seldom is.").

<sup>141</sup> Kiss, supra note 45, at 74.

<sup>142</sup> Robert I. Rotberg, Truth Commissions and the Provision of Truth, Justice, and Reconciliation, in *Truth v. Justice*, supra note 22, at 16.

<sup>143</sup> Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and the Truth Commission*, in *Truth v. Justice*, supra note 22, at 268.

<sup>144</sup> United Nations Entity for Gender Equality and the Empowerment of Women, supra note 118, at 52, 66. Informal justice has been defined as "the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law." Fergus Kerrigan et al., *Informal Justice Systems: Charting a Course for Human-Rights Based Engagement* 8 (2011). Informal justice systems can include justice dispensed by traditional leaders, religious leaders, local administrators with adjudicative or mediation functions, customary or community courts, and community mediators. *Id.* at 54. Reliance on informal justice is heavy in some countries. *Id.* at 7 (explaining that over 80% of disputes in some countries are resolved through informal justice).

While some have argued that this preference for informal justice may indicate that marginalized communities find it difficult to access formal justice systems,<sup>145</sup> this preference may also reflect an unwillingness to submit themselves to the jurisdiction of the state.<sup>146</sup> International human rights organizations are beginning to recognize that informal justice systems are a legitimate means of delivering justice to those who cannot or will not engage with state-based justice systems.<sup>147</sup> The experiences of those who have used international human rights processes like truth commissions, gacaca courts,<sup>148</sup> and nari adalats, demonstrate that it is possible to achieve individualized justice, defined as voice, validation, and vindication, through non-state based processes. Combining various components

of such processes could spur the development of community-based justice delivery systems to respond to intimate partner abuse in the United States.

#### A. Structuring Community Justice Forums

Community-based justice forums could be established in a variety of community spaces - child care centers, schools, churches, recreation centers, barbershops, and hair salons<sup>149</sup> - to ensure that justice is visible on the ground. These forums would not be tied to the state. This independence from the criminal justice system would deny community-based justice forums the use of tools like subpoenas to collect information. While the lack of such powers could arguably make collecting stories of abuse more difficult, the Greensboro

<sup>145</sup> United Nations Entity for Gender Equality and the Empowerment of Women, *supra* note 118, *id.* at 66.

<sup>146</sup> Kerrigan and his co-authors noted a number of factors that drive people to choose informal justice over state-based systems, including unavailability, excessive cost, ineffectiveness, inappropriate outcomes, inadequacy, inappropriate or unfamiliar procedures, and illegitimacy. Kerrigan et al., *supra* note 114, at 76–77.

<sup>147</sup> *Id.* at 67. Under international law, states maintain their responsibility to ensure that informal justice systems comply with human rights standards. *Id.*; see also *id.* at 11.

<sup>148</sup> In Rwanda, community members traditionally found “justice on the grass” through gacaca tribunals. Lori A. Nessel, *Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women That Flee*, 15 *Mich. J. Int’l L.* 101, 102 (2006). Elders, known as *inyangamugayo*, or “persons of integrity,” heard community disputes over property, family relations, inheritances, and other matters. Megan M. Carpenter, *Bare Justice: A Feminist Theory of Justice and Its Potential Application to Crimes of Sexual Violence in Post-Genocide Rwanda*, 41 *Creighton L. Rev.* 595, 643 (2008). Dating back to the pre-colonial period in Rwanda, gacacas were convened on an *ad hoc* basis throughout colonial rule and afterwards, as conflicts in the community arose and required resolution. Maya Goldstein-Bolocan, *Rwandan*

*Gacaca: An Experiment in Transitional Justice*, 2004 *J. Disp. Resol.* 355, 376 (2005); see also Maureen E. Laflin, *Gacaca Courts: The Hope for Reconciliation in the Aftermath of the Rwandan Genocide*, *Advoc. (Idaho)*, May 2003, at 19, 20. Traditionally gacaca has been described as a restorative justice practice, “because it does not seek to achieve justice by punishing the perpetrator, but to restore social order by finding communal, compromised solutions, and by reintegrating the offender within the community... Gacaca aims at restoring peace and social harmony within the community affected by the conflict.” Goldstein-Bolocan, *supra*, at 376–77. Following the 1994 Rwandan genocide, faced with a broken criminal justice system, the Rwandan government looked to gacaca to provide access to justice for those who had been victimized during the conflict and to heal communities through truth-seeking and reconciliation. Nessel, *supra* note 148, at 102. In their post-conflict incarnation, gacaca tribunals are local, village-based informal dispute resolution forums vested by the state with the power to hear a variety of matters associated with the genocide. *Id.* at 117. Gacaca courts brought together victims, perpetrators and community members on a weekly basis to address allegations of abuse, hear confessions, and try contested cases. *Id.* Lawyers are not permitted to appear at gacaca tribunals, in order to maintain the “open, participatory nature of the proceedings,” and judges are “laypersons with limited legal training.” *Id.*

<sup>149</sup> Smith, *Battering*, *supra* note 10, at 929.

Truth Commission stated in its final report that securing voluntary participation was more valuable than compelling participation.<sup>150</sup> Law professor Peggy Maisel argues that governmental ties are not essential to the viability of truth commissions (and, by extension, other community based justice forums), explaining that the body's independence is of the utmost importance, "so that the community owns and trusts its process, people feel all sides of a story are heard, the truth is fully investigated, and the conclusions lead to some form of action."<sup>151</sup> Drawing from the truth commission model, the forums would not be bound by the rules of the adversarial system<sup>152</sup> or restricted to what is deemed relevant by a judge.<sup>153</sup> Like truth commissions, community justice forums would be able to consider a broader range of information without sacrificing the ability to ascertain truth.<sup>154</sup> The absence of the adversarial process creates a climate within which those subjected to abuse can feel more free and comfortable in telling their stories.<sup>155</sup> Moreover, because they are not adversarial, such forums can also be explicitly victim-centered. As law

professor Roslyn Myers explains in the context of South Africa's Truth and Reconciliation Commission, "the needs of the victims drove the proceedings."<sup>156</sup>

One goal of these proceedings would be to create space (both physical and psychic) for and to facilitate the telling of stories about intimate partner abuse and to provide redress other than criminal punishment, particularly for marginalized communities. Transitional justice mechanisms have enabled voices that have traditionally been subjugated to come to the fore. The victim-centered focus of truth commissions, for example, enhances participants' ability to achieve voice in that process. South Africa's truth commission allowed victims to tell their stories, uninterrupted, and created a setting in which stories could comfortably be told, with sympathetic listeners and the provision of support both before and after testimony.<sup>157</sup> "Accorded initiative for picking and choosing among the facts of their case, and permitted to speak in the language most comfortable for them," explains religion professor Donald Shriver, Jr., "victims could take charge of advancing truth as relevant to their life

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<sup>150</sup> *Id.*

<sup>151</sup> 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 Perspectives*, supra note 97, at 215, 242.

<sup>152</sup> The Greensboro truth commission was not state sponsored; it came about as a result of a grassroots movement and gained legitimacy as a result of its independence from the state and the community support that led to its creation. Maisel, *Greensboro and Beyond*, supra note 151, at 235, 241–42.

<sup>153</sup> Rotberg, supra note 142, at 15.

<sup>154</sup> Law professor Erin Daly argues that the willingness to hear a range of information - victim narratives as well as "historical or other forms of truth" - indicates the victim-centered nature of the process. Daly, *Transformative Justice*, supra note 103, at 148.

<sup>155</sup> This less adversarial process is tied directly to the ability to find justice; as law professor Peggy Maisel explains, "it is the means or process, not just the outcomes, that determines whether real change will occur." Maisel, *Have Truth*, supra note 11, at 152; see also Phelps, supra note 41, at 109.

<sup>156</sup> Myers, supra note 11, at 116; see also Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 *Cardozo J. Conflict Resol.* 421, 483 (2007); Minow, supra note 33, at 60; Rotberg, supra note 142, at 10, 11. But, warns law professor Martha Minow, truth commissions must be careful how they categorize witnesses; "[T]here are dangers that a truth commission focuses so much on victims that it deters participation by those who view themselves as survivors, not victims." Minow, supra note 33, at 69. Law professor Teresa Phelps argues, however, that by telling stories, people can transition from "victim" to "survivor." Phelps, supra note 41, at 56.

<sup>157</sup> Haldemann, supra note 26, at 709.

experience.”<sup>158</sup> Telling such stories is not easy; as reporter Antje Krog writes of South Africa’s Truth and Reconciliation Commission, “[o]ver months we’ve realized what an immense price of pain each person must pay just to stammer out his own story at the Truth Commission. Each word is exhaled from the heart; each syllable vibrates with a lifetime of sorrow.”<sup>159</sup> But telling one’s story in this type of supportive forum can be similar to therapy, helping witnesses “to move beyond trauma, hopelessness, numbness, and preoccupation with loss and injury.”<sup>160</sup>

The benefits of providing a forum for voice to victims of harm extend beyond the individual. Sharing their narratives not only restores dignity to the witnesses,<sup>161</sup> but is also a more effective way to communicate with society at large about the harms suffered by the storytellers.<sup>162</sup> Community justice forums could similarly create new spaces to hear the voices of people subjected to abuse and of those who abuse, under certain conditions. Such communication is essential in achieving validation and vindication; only when stories are told can the community acknowledge the wrong that has been done. In fact, law professor Frank

Haldemann argues, that is precisely why truth commissions are so valuable - because they have the “capacity to give recognition to the victims and their pain, while also affirming a position of collective solidarity with them.”<sup>163</sup> That recognition sends a message that individuals matter, and their suffering matters.<sup>164</sup>

Another goal is to ensure that perpetrators of abuse are held accountable for their actions. Some have questioned whether alternative justice mechanisms can hold individuals accountable to a degree comparable to the criminal justice system.<sup>165</sup> To a certain extent, though, the answer to that question depends on what kind of accountability an individual seeks. A truth commission, for example, may be inferior to a trial, argues law professor Frank Haldemann, because punishment through the justice system is the most effective way of conveying the community’s moral disapproval and ensuring that perpetrators of harm suffers some consequence for what they have done.<sup>166</sup> But law professor Brenda Smith notes that public shaming of the kind that occurs in a community justice forum can be a powerful form of accountability.<sup>167</sup> India’s

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<sup>158</sup> Shriver, *supra* note 22, at 14.

<sup>159</sup> Antje Krog, *Country of my Skull* 132 (1998).

<sup>160</sup> Minow, *supra* note 33, at 67.

<sup>161</sup> *Id.* at 239.

<sup>162</sup> James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 *L. & Contemp. Probs.* 123, 134 (2009). Antje Krog, who reported on South Africa’s Truth and Reconciliation Commission, writes, “[i]t is asking too much that everyone should believe the Truth Commission’s version of the truth. Or that people should be set free by this truth, should be healed and reconciled. But perhaps these narratives alone are enough to justify the existence of the Truth Commission. Because of these narratives, people no longer can indulge in their separate dynasties of denial.” Krog, *supra* note 159, at 112–13.

<sup>163</sup> Haldemann, *supra* note 26, at 710.

<sup>164</sup> Minow, *supra* note 33, at 71. Additional validation can come from providing witnesses with the transcripts of their testimony, to reinforce that

“what they experienced was real, was taken seriously, and is part of the historical record.” *Id.* at 128 (quoting therapist Andrea Barnes).

<sup>165</sup> Contra Declan Roche, *Accountability in Restorative Justice* 160–187 (2003) (refuting arguments that restorative justice mechanisms cannot hold abusers accountable).

<sup>166</sup> Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 *Cornell Intl. L. J.* 675, 712–14 (2008).

<sup>167</sup> E-mail from Brenda Smith, July 7, 2010, on file with author. Smith wrote a law review article in which she discussed her father’s abuse of her mother. Her father later scolded her for exposing his wrongdoing, admitting that it was true but disclosing his shame at others knowing what he had done. Smith suggests that a truth commission process could have a similar effect on perpetrators.

Antje Krog describes a different kind of accountability in the South African context: Just before midnight, six black youths walk into the Truth

nari adalats<sup>168</sup> adhere to the belief that social accountability is a more powerful tool than legal sanctions.<sup>169</sup> Although the nari adalats do use the threat of legal intervention to compel compliance,<sup>170</sup> they often rely on humor and shaming to secure compliance with their recommendations and resolutions.<sup>171</sup>

Alternative justice forums like truth commissions can also hold institutions and systems accountable.<sup>172</sup> Through the

truth commission process, society not only validates the stories of individual victims but also acknowledges its own complicity in those wrongs. In South Africa, the truth commission process forced “[a]ll sectors of its society... to look at their own participation in apartheid - the business community, the legal, medical and university communities. A substantial number of white South Africans, all of whom willingly or unwillingly benefited

Commission’s offices in Cape Town. They insist on filling out the forms and taking the oath. Their application simply says: ‘Amnesty for Apathy.’ They had been having a festive Saturday evening in a township bar when they started talking about the amnesty deadline and how millions of people had simply turned a blind eye to what was happening. It had been left to a few individuals to make the sacrifice for the freedom everyone enjoys today.... ‘The act says that an omission can also be a human rights violation,’ one of them quickly explains. ‘And that’s what we did: we neglected to take part in the liberation struggle. So, here we stand as a small group representative of millions of apathetic people who didn’t do the right thing. KROG, *supra* note 159, at 159.

<sup>168</sup> India uses a variety of informal justice systems to supplement its formal court system, which is largely inaccessible to numerous rural and impoverished Indians. Binny Seth, *Institutionalized Corruption in India: Judicial Systems, Ineffective Mechanisms, and Movements of Reform*, 15 *Touro Int’l L. Rev.* 169, 175 (2012). Among those systems are lok adalats, or “people’s courts.” *Id.* at 175. Lok adalats resolve cases informally, through mediation, “guided by the principles of justice, equity, and fair play.” *Id.* at 177. Nari adalats (women’s courts), a variation on the lok adalats, are informal courts designed specifically to promote women’s human rights, including freedom from intimate partner abuse. Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law Into Local Justice* 156 (2009). Village collectives, seeing violence as a significant community concern but recognizing that the formal legal system would not adequately address the issue, created nari adalats in response, with the support and assistance of a rural women’s empowerment program called Mahila Samakhya (MS). Nandita Bhatla & Anrudha Rajan, *Private Concerns in Public Discourse: Women-Initiated Community Responses to Domestic Violence*, *Econ. & Pol’y Wkly.*, Apr. 26, 2003, at 1658– 60. Nari adalats are held once or twice a month. Kulsum Mustafa, *Quiet! The Women’s Court*

is in Session (June 7, 2009), <http://www.boloji.com/index.cfm?md=Content&sd=Articles&ArticleID=1854#sthash.poErDnTq.dpuf>. They are staffed by sahyoginis (activists) and members of the sanghas (women’s collectives) in the village. Merry, *supra*, at 156. Few of the women who work with the nari adalats are educated, and many are dalits (people of low caste status). *Id.* The women use their status as community members to inform their work with the nari adalats, deploying “their knowledge of local practices, customs, and social networks to gather evidence and negotiate agreements.” *Id.* at 157. They also receive training in administrative procedures and working with police and other officials. Mustafa, *supra*. Members of the nari adalats travel throughout the region, convening in public places to hear grievances and give advice. Merry, *supra*, at 156; Mustafa, *supra*. Cases begin when one side informs the nari adalat of a grievance orally or in writing; negotiation happens only when both sides are present. Sanghas collect information about the claims, develop support for women, and monitor compliance with agreements. Bhatla & Rajan, *supra*, at 1660. During the arbitration process, the complainant is asked to speak first and given the opportunity to say whatever they want to say; that narrative is followed by a response from the other party. Members of the nari adalat ensure that community members remain attentive throughout the narratives. *Id.* at 1662. Achieving resolution often requires that the nari adalat meet several times; agreements are memorialized through written, signed documents. *Id.* at 1660. The mission of the nari adalats is to provide “sacha nyay” (“true justice”), justice defined by what the woman asserts is best for her. International Center for Research on Women, *Women-Initiated Community Level Responses to Domestic Violence: Summary Report of Three Studies* 51 (2002).

<sup>169</sup> International Center for Research on Women, *supra* note 168, at 68.

<sup>170</sup> *Id.* at 68.

<sup>171</sup> Merry, *supra* note 168, at 157.

<sup>172</sup> Shriver, *supra* note 22, at 10.

from this evil system, have experienced regret or shame or embarrassment.”<sup>173</sup> Similarly, in Greensboro, North Carolina, the focus of the truth commission was not just on the individuals who participated in lynchings, but on the institutions that allowed lynchings to happen, through active or tacit support.<sup>174</sup>

The proceedings would be tailored to the needs of people subjected to intimate partner abuse, certainly including, but not limited to, women subjected to abuse. Some truth commissions, particularly South Africa’s Truth and Reconciliation Commission, have been criticized for failing to be sufficiently attentive to the needs of women subjected to abuse or harm.<sup>175</sup> Although many women testified before the TRC, few talked about their own experiences of violence and abuse; those who did testify found that commissioners seemed unwilling to explore their stories.<sup>176</sup> As law professor Peggy Maisel recounts, “[i]nstead of asking sensitive and well-placed questions, the interviews failed to

recognize the women’s pain and perpetuated the violence that created it.”<sup>177</sup> In response to a report documenting the problems of taking a gender-neutral approach to truth gathering, South Africa’s TRC adopted a number of practices intended to make the process more accessible to women, particularly women who had been sexually abused.<sup>178</sup> Those practices included allowing women to make confidential statements, permitting women to have their statements taken by women, holding closed hearings presided over by women commissioners, and providing psychological and social work support to women who testified.<sup>179</sup> Those techniques created an official yet safe space within which women could give public voice to their experiences.<sup>180</sup>

Concerns were also raised about the treatment of women in gacaca tribunals. Traditionally, women were excluded from gacaca tribunals, leading some to worry that women generally would not feel comfortable participating in gacaca courts.<sup>181</sup> Those fears seem to have been

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<sup>173</sup> Goldstone, *supra* note 22, at xii.

<sup>174</sup> Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 *Law & Ineq.* 263, 272 (2003). As law professor Sherrilyn Ifill explains, “[l]ynching required the cooperation of educators, religious leaders, political leaders, law enforcement, shopkeepers, and countless others... Lynching required the complicity of both white institutions and ordinary white individuals.” *Id.* at 294–95.

<sup>175</sup> Tristan Anne Borer, *Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons From South Africa*, 15 *Violence Against Women* 1169, 1170 (2009); see also Maisel, *Have Truth*, *supra* note 11, at 153–59; Maisel, *Greensboro and Beyond*, *supra* note 151, at 217, 226 (arguing that the failure to consider gender was apparent in the exclusion of women from the creation of the TRC, the failure to include abuse specific to women in TRC’s mandate, and the treatment of female witnesses).

<sup>176</sup> Maisel, *Have Truth*, *supra* note 11, at 157.

<sup>177</sup> *Id.* at 159.

<sup>178</sup> Borer, *supra* note 175, at 1177; Maisel, *Have Truth*, *supra* note 11, at 159. South Africa’s TRC never abandoned its gender neutral approach, however, instead treating women “as a special

group similar to children and youth, which meant they received separate treatment and were not an integrated part of the nation.” *Id.* at 160.

<sup>179</sup> Borer, *supra* note 175, at 1177. Despite these changes, however, many women still refused to testify. Maisel, *Have Truth*, *supra* note 11, at 160.

<sup>180</sup> Beth Goldblatt, *Evaluating the Gender Content of Reparations: Lessons from South Africa*, in *What Happened to the Women?: Gender and Reparations for Human Rights Violations* 79 (Ruth Rubio-Marin ed., 2008). The truth telling process was not positive for everyone, however; some women found that participating in the TRC left them angry or made them feel more vulnerable. *Id.*

<sup>181</sup> There is some disagreement among scholars as to whether and when women were permitted to participate in gacaca historically. Compare Goldstein-Bolocan, *supra* note 148, at 376 (stating that women could participate in gacaca as parties), with Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 *S. Cal. Rev. L. & Women’s Stud.* 167, 192 (2005) (contending that the direct participation of women in gacaca was prohibited, and that women could not represent themselves in gacaca, instead having male family members bring claims on their behalf).

unfounded; in research conducted by the Rwandan government, men and women declared their intent to participate in gacaca at roughly equal rates, and as of 2005, were participating at comparable rates.<sup>182</sup> Concerns about safety have also been raised.<sup>183</sup> A problematic and important question, given the widespread rape and sexual violence during the genocide, has been whether gacaca tribunals are a safe and supportive venue for adjudicating those claims. Because of the stigma attached to sexual assault, some doubted that women would come forward publicly to share stories of rape and sexual violence.<sup>184</sup> Moreover, as a result of their precarious economic situation, women desperately need community support, support that could be lost if they incurred the shame that could come with testifying before a gacaca.<sup>185</sup>

Learning from the South African experience, Sierra Leone's truth commission made gender an explicit consideration from the body's inception.<sup>186</sup>

Commissioners intentionally investigated women's political, legal, health, and social welfare concerns and included abuse of women in the private sphere as part of their mandate.<sup>187</sup> Sexual violence was specifically addressed from the start of the Commission's work, both because of what Sierra Leone had learned from other truth commissions and because sexual violence was such a widely experienced harm during the ten years of conflict in Sierra Leone.<sup>188</sup> Commissioners received training to better prepare them to address these issues, held public meetings to help women understand the truth commission process, and conducted hearings specifically on women's issues, which were among the most heavily attended sessions held by the commission.<sup>189</sup> Women testified at open hearings, but were only questioned by women commissioners.<sup>190</sup> Their privacy was guarded carefully; women testified behind screens and were given private spaces for waiting in order to safeguard their

<sup>182</sup> Wells, *supra* note 181, at 185–86, 193.

<sup>183</sup> Wells, *supra* note 181, at 180 (arguing that in an atmosphere where fundamental human rights are not guaranteed, testifying will feel unsafe). Another concern that has arisen since the gacacas were reinstated is the problem of retaliatory violence. Immigration lawyers in the United States have seen a number of cases involving Rwandan refugees seeking asylum as a result of violence that occurred after the applicants testified in gacaca proceedings. As law professor Elizabeth Keyes explains: One would expect that there would be a clear fault-line between genocidaires and "good guys" (and certainly between genocidaires and the state/police), but that is sadly not the case. Often the genocidaires have friends in sufficiently high places (a police chief or higher) that they can retaliate freely against witnesses. The government seems willing to let these attacks go uninvestigated - [perhaps because] the attacks disrupt [the government's] tightly controlled narrative about accountability and the rule of law. E-mail from Elizabeth Keyes, University of Baltimore School of Law, Sept. 19, 2013, on file with the author; see also Jeffrey Gettleman, *The Global Elite's Favorite Strongman*, N.Y. Times, Sept. 4, 2013, <http://www.nytimes.com/2013/09/08/magazine/paul->

[kagame-rwanda.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/08/magazine/paul-kagame-rwanda.html?pagewanted=all&_r=0) (describing post-genocide Rwanda under the leadership of Paul Kagame). Keyes believes that the overall political context within which mechanisms such as gacaca are used have a profound impact on their effectiveness and ability to dispense real justice. E-mail from Elizabeth Keyes, University of Baltimore School of Law, Sept. 9, 2013, on file with the author. The increase in the number of claims taken to the tribunals in Rwanda may be attributable to these fears of retribution. My thanks to law professor Seval Yildirim for this observation.

<sup>184</sup> Amick, *supra* note 115, at 62–63. Nonetheless, as Lawrencia, a gang-rape survivor, told Emily Amick, "nothing can ever allay the pain she feels in her heart, [but] gacaca offers a chance at justice she wishes she could have." *Id.* at 74.

<sup>185</sup> Wells, *supra* note 181, at 183, 191.

<sup>186</sup> Maisel, *Have Truth*, *supra* note 11, at 165–66; Estelle Zinsstag, *supra* note 97, at 207.

<sup>187</sup> Maisel, *Have Truth*, *supra* note 11, at 166.

<sup>188</sup> Zinsstag, *supra* note 97, at 205, 207.

<sup>189</sup> Maisel, *Have Truth*, *supra* note 11, at 167–68.

<sup>190</sup> *Id.* at 168. Other truth commissions have adopted similar measures. Borer, *supra* note 175, at 1180.

identities.<sup>191</sup> Moreover, gender was pervasive in the final report of Sierra Leone's TRC, which discussed the political, economic, educational, and social facets of women's lives and made specific recommendations about providing economic and educational opportunities and protecting women from abuse.<sup>192</sup> Similarly, the gacaca tribunals adopted special rules for the testimony of women who experienced sexual violence. The 2001 gacaca law allowed women to testify in closed chambers or to report abuse in writing, anonymously.<sup>193</sup>

The key, then, to creating a forum that is responsive to the needs of women, particularly women who have been subjected to some form of violence or abuse, is to take gender into account from the beginning.<sup>194</sup> A community justice institution must recognize that the mechanisms of power are gendered and, from its inception, acknowledge the ways in which gender will affect the positions taken and decisions made. With a gendered lens in place, law professor Peggy Maisel argues, structures like truth commissions are well-suited to consider not only societal conflicts or human rights abuses, but also social problems particular to women, those "harms from which women most need protection," like

intimate partner abuse.<sup>195</sup> Using the language of human rights to describe the problem of intimate partner abuse, Maisel explains, allows for inquiry into both the complicity of state actors in intimate partner abuse and the role of the community in creating a climate where intimate partner abuse can flourish.<sup>196</sup> Moreover, casting intimate partner abuse as a violation of human rights may give women subjected to abuse the security and confidence they need to participate in the process.<sup>197</sup> Maisel cautions, however, that education about intimate partner abuse may first be necessary to ensure widespread community support for the truth commission process.<sup>198</sup> The community justice process should enable state and community actors to recognize their own roles in intimate partner abuse, not in an attempt to shame or humiliate them, but rather to help them work to end abuse and rebuild community.<sup>199</sup>

The body's mandate would also include a specific charge to study how intimate partner abuse affects people of color; lesbian, gay, bisexual, and transgender people; disabled people; and low income people.<sup>200</sup> The protections made available to women in some justice forums would also be available to other marginalized groups. This broader casting of the protections created by the truth

<sup>191</sup> Maisel, *Have Truth*, supra note 11, at 168.

<sup>192</sup> *Id.* at 169. Similarly, the Commission for Reception, Truth and Reconciliation in Timor-Leste featured a dedicated gender unit which partnered with women's organizations and adopted provisions specifically intended to encourage the participation of women. United Nations Entity for Gender Equality and the Empowerment of Women, supra note 118.

<sup>193</sup> Wells, supra note 181, at 189–90. The law was further amended in 2004 to require that a victim make accusations of sexual violence privately to a gacaca judge (who can be a woman) or a prosecutor, and again in 2008, to allow complaints to be submitted to judicial police. Amick, supra note 115, at 45; Nessel, supra note 148, at 120. Nonetheless, Nessel notes, many women do not know that they can give testimony in private, and

the request to testify privately often leads to an assumption that the woman is a survivor of sexual violence. *Id.*

<sup>194</sup> Maisel, *Have Truth*, supra note 11, at 178.

<sup>195</sup> Maisel, *Have Truth*, supra note 11, at 180.

<sup>196</sup> Maisel, *Have Truth*, supra note 11, at 180–81.

<sup>197</sup> *Id.* at 182–83.

<sup>198</sup> *Id.* at 180.

<sup>199</sup> *Id.* at 182–83.

<sup>200</sup> Establishing a broad mandate is essential in setting a tone for the work of the body and ensuring inclusion. Maisel, *Greensboro and Beyond*, supra note 151, at 222 (arguing that the narrow mandate of the South Africa TRC led to the exclusion of the voices of women).

commissions in South Africa and Sierra Leone and the *nari adalats* recognizes that women are not the only victims of intimate partner abuse. The necessity of engaging the state may keep other people subjected to abuse, particularly gay men and transgender people, from seeking assistance.<sup>201</sup> Failing to anticipate the needs of these groups or defining them out of alternative systems could preclude them from turning to these systems, depriving them of the opportunity to seek justice.

Members of the community justice forum could reach out to potential participants generally through neighborhood information sources (newspapers, online forums, community organizations) and in a more targeted manner, through organizations and service providers working with people subjected to abuse. Participants would have to affirmatively opt in to the processes, assuaging concerns about the claims of women and other marginalized groups being devalued and about the manipulation of informal justice systems by partners with greater power in the relationship.<sup>202</sup> Testimony could be given publicly or in camera, orally or in writing, anonymously or by name.<sup>203</sup> Abusers would also be permitted to provide testimony, but only after admitting and accepting responsibility for their abusive behavior, and only with the permission of their partners. Providing

public testimony helps to increase the accountability of perpetrators to the community; perpetrators also feel more accountable when they are able to play an active role in the victim's healing process.<sup>204</sup> Hearing from abusers may be central to meeting the justice goals of individual people subjected to abuse and is a crucial component in analyzing the ways in which the community may have enabled abuse to occur.

The definition of abuse used by the community-based forum should be broad enough to capture the range of experiences of people subjected to abuse.<sup>205</sup> At a minimum, the definition should encompass physical, psychological/emotional, economic, reproductive, and spiritual harm.<sup>206</sup> Moreover, the definition should be revisited as the social science research identifies additional ways in which abusers deprive their partners of autonomy and liberty.<sup>207</sup>

Community justice forums might also facilitate dispute resolution for those people subjected to abuse who have specific issues that they want to address. Like *gacacas* or *nari adalats*, community justice forums could consider claims made by people subjected to abuse and attempt to help the parties come to some agreement. The orientation of such efforts would have to be explicitly victim-driven - as with the *nari adalats* - no person subjected to abuse would be pressured

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<sup>201</sup> See, e.g., Goodmark, *Transgender People*, supra note 74, at 87–88.

<sup>202</sup> See supra Part I.A; see also United Nations Entity for Gender Equality and the Empowerment of Women, supra note 118, at 71.

<sup>203</sup> Maisel, *Greensboro and Beyond*, supra note 151, at 251; see also Kerrigan et al., supra note 144, at 154–55 (describing both open and closed informal justice models and noting “The former gives the advantages of ‘justice as theatre’ in setting an example of what is fair in a community and apparently helps in enforcing decisions. The latter provides a confidential forum that is more intimate and accessible in delicate cases, especially for

women and vulnerable persons. An ideal model might give room for both.”).

<sup>204</sup> Miller & Hefner, supra note 43, at 16.

<sup>205</sup> Ruth Rubio-Marin, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, 19 *Wm. & Mary J. Women & L.* 69, 84 (2012) (explaining that reparations are meaningless when the forms of harm that are covered are defined too narrowly to capture women's lived experiences).

<sup>206</sup> Goodmark, *A Troubled Marriage*, supra note 3, at 45.

<sup>207</sup> *Id.* at 34–38.

or coerced into accepting a resolution that did not meet their goals. This type of effort is most likely to raise concerns for the traditional battered woman's movement, raising the specter of mediation and the host of critiques of that process.<sup>208</sup> A commitment to achieving the justice goals of people subjected to abuse may require this type of close negotiation with their abusers, particularly when they are choosing to remain in relationships with their partners or have children in common, and community justice forums could provide a venue outside of the legal system for engaging in that work.

Community support and participation is essential to the success of these systems. Community has been an essential component of the success of the *nari adalats*. As Nandita Bhatla and Anuradha Rajan write, "the arbitration process is based on a fundamental perspective that decisions can be more effectively enforced if the people of the community are involved - that they own, control and validate the decisions."<sup>209</sup> Underlying the *nari adalat* structure is the belief that community-based justice can create greater safety and security for women, particularly women subjected to abuse, than inaccessible and ineffective formal justice structures.<sup>210</sup> Moreover, the *nari adalats* are transforming the communities in which they operate by changing community norms about the treatment of women.<sup>211</sup> Similarly, community participation is essential in the *gacaca* model; the hope is that participation will, in the long term, help

sustain peace and transform society.<sup>212</sup> *Gacaca* tribunals seek to heal the community through securing confessions and requiring that perpetrators perform community service (including tilling fields, donating goods and labor, or helping the victim's family).<sup>213</sup>

Community members would be engaged in a number of roles. Community-based justice forums could be staffed by local community organizations serving people subjected to abuse and abusers, those with the expertise to provide support and services to participants. After appropriate training on intimate partner abuse, other community members would be engaged as witnesses - not to the abuse, but to the stories of the participants. Transparency of process and ensuring that people sensitive to stories of abuse are well-represented among those chosen would be essential in the selection of witnesses (or commissioners or adjudicators, depending on the nature of the forum).<sup>214</sup>

Involving the community as listeners serves a number of goals. Community members can convey the sense of the community that abuse will not be tolerated and can set community standards for responding to intimate partner abuse through their reactions (both verbal and in the form of individual remedies) to the stories of people subjected to abuse. As documented in the research on *nari adalats*, engaging the community can create a greater sense of safety and security for people subjected to abuse.

<sup>208</sup> *Id.*

<sup>209</sup> Bhatla & Rajan, *supra* note 168, at 1661.

<sup>210</sup> *Id.* Moreover, developing community-based justice responses is consistent with research showing that women are more likely to turn to informal support systems before reporting to law enforcement or other institutions. International Center for Research on Women, *supra* note 168, at 73.

<sup>211</sup> Bhatla & Rajan, *supra* note 168, at 1661.

<sup>212</sup> Goldstein-Bolocan, *supra* note 148, at 382; Jason Strain & Elizabeth Keyes, *Accountability in the Aftermath of Rwanda's Genocide*, in *Accountability for Atrocities: National and International Responses* 121 (Jane E. Stromseth ed., 2003).

<sup>213</sup> Nessel, *supra* note 148, at 117.

<sup>214</sup> Kerrigan et al., *supra* note 144, at 168.

Moreover, community members would be charged with unearthing and acknowledging the community's own complicity in perpetuating intimate partner abuse, as well as with determining what changes the community might make in response to the stories it hears. Such forums encourage community dialogue; in Rwanda's gacaca courts, for example, victims, perpetrators, family, and community members all had the opportunity to discuss the allegations, and in that dialogue, to challenge community norms around violence.<sup>215</sup> Community-based justice forums could strengthen communities and repair damaged relationships, as Sarah Wells argued in the Rwandan context, "by bringing people together and making them responsible for the achievement of justice in their communities."<sup>216</sup>

Community justice forums can change the ways in which the community views intimate partner abuse. Once solely a private issue, violence within the home in India became a matter of public concern after the institution of the nari adalats.<sup>217</sup> Exposing these issues to community view has had a number of consequences. First, the shaming that comes with being called before the nari adalat for violence within the home serves as a form of social sanction; refusing to comply with the plan drawn up by the nari adalat is further fodder for community disapproval.<sup>218</sup> Moreover, perpetrators' justifications for violence are robbed of power when the

nari adalats refuse to accept those justifications, creating a perception in the community that violence is never acceptable.<sup>219</sup> Gender stereotypes that give men license to use violence and require women to tolerate it are challenged and new community standards of right and wrong within relationships are created by the nari adalats' refusal to validate the use of violence.<sup>220</sup> Community members feel more responsible for reacting to violence, and women subjected to abuse view their communities as a primary source of support that enables them to seek assistance.<sup>221</sup> Finally, the nari adalats raised the status of women within civil society by asserting women's rights to publicly assess justice.<sup>222</sup> Holding forums in local communities makes justice visible on the ground; community members are exposed both to the harms done and the justice dispensed as a result of those harms.<sup>223</sup>

Community-based justice forums would provide people subjected to abuse with the opportunity to explore both individual and collective accountability for intimate partner abuse. Participants would be encouraged to detail not just what their partners did, but how the community and/or the state reacted or failed to react in ways that exacerbated the person's suffering.<sup>224</sup> Community-based justice forums would explore the interconnections between the actions of individual perpetrators and the community

<sup>215</sup> Goldstein-Bolocan, *supra* note 148, at 382–83.

<sup>216</sup> Wells, *supra* note 181, at 177. But see Laflin, *supra* note 148, at 21.

<sup>217</sup> Bhatla & Rajan, *supra* note 168, at 1659; Merry, *supra* note 168, at 156.

<sup>218</sup> Bhatla & Rajan, *supra* note 168, at 1661.

<sup>219</sup> *Id.* at 1662.

<sup>220</sup> *Id.* at 1662.

<sup>221</sup> *Id.* at 1662; International Center for Research on Women, *supra* note 168, at 73.

<sup>222</sup> Best Practices Foundation, RE: Creating Women-Sensitive Systems of Justice (Nov. 10,

2012), available at <http://bestpracticesfoundation.wordpress.com/2012/11/10/hello-world/>; Bhatla & Rajan, *supra* note 168, at 1663.

<sup>223</sup> Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 *NYU J. Int'l L. & Pol'y* 355, 377 (2002); Goldstein-Bolocan, *supra* note 148, at 384.

<sup>224</sup> Such actors might include "law enforcement officers, prosecutors, and judges, but also doctors, social workers, the media, religious institutions, neighbors, and members of the immediate family of both the woman and her batterer." Maisel, *Greensboro and Beyond*, *supra* note 151, at 252.

or state, helping the community to identify sites for structural change as well as individual reparation.

As in the context of truth commissions, the broadest goal of these community-based justice forums would be societal reconstruction, a goal that is no less important in the context of intimate partner abuse than in the context of genocide. Remaking societal conceptions of intimate relationships, creating community norms that reject intimate partner abuse, and conceptualizing the pursuit of justice as the right of the individual subjected to abuse rather than as society's right and responsibility could fundamentally change the ways that communities respond to intimate partner abuse. Ultimately, the power to create justice would be redistributed from the state to the community by charging the community with administration of these systems.

### *B. Reparations*

The ultimate responsibility of community-based justice forums is to document and publicize the extent and nature of intimate partner abuse within the community and to make individual and systemic suggestions for reparation and reform.<sup>225</sup> The provision of reparations is particularly essential for justice to be done; as Genevieve Painter writes, “[f]or many victims and survivors struggling to put their lives back together after brutal conflict, reparations may be the policy

decision with the most direct impact on their day-to-day lives.”<sup>226</sup> Reparations serve as “the physical embodiment of a society’s recognition of, and remorse and atonement for, harms inflicted,” reimbursing victims for loss but also reintegrating victims into the community.<sup>227</sup> Reparations can also help to shift the community’s moral condemnation in the aftermath of violence. Law professor Ruth Rubio-Marin explains that some forms of abuse “uniquely act as forms of ‘ongoing’ violations in which the primary violation - the original act committed by the perpetrator - is often accompanied by a chain of harmful reactions from surrounding (and often loved) people,”<sup>228</sup> which shifts blame for the act from the abuser to the abused. Reparations can serve a transformative justice function when they acknowledge this phenomenon and re-center moral responsibility for abuse where it belongs: on the abuser.<sup>229</sup> In the context of sexual violence, Colleen Duggan and Adila M. Abusharaf have argued that reparations can also change societal norms around the responses to such violence, establishing a societal consensus that such claims must be heard and accountability for those crimes established and by identifying the structural conditions that enabled such abuse to occur in the first instance.<sup>230</sup> Debate around the creation of reparations programs can help to surface these issues and begin the change process.<sup>231</sup>

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<sup>225</sup> As law professor Erin Daly explains, uncovering truth cannot be transformative unless those truths are shared with the public. Daly, *Transformative Justice*, supra note 103, at 130.

<sup>226</sup> Genevieve Renard Painter, *Thinking Past Rights: Towards Feminist Theories of Reparations*, 30 *Windsor Yearbook of Access to Just.* 1, 6 (2012).

<sup>227</sup> Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, in *My Neighbor, my Enemy*, supra note 19, at 122.

<sup>228</sup> Rubio-Marin, *Reparations for Conflict-Related*, supra note 205, at 75.

<sup>229</sup> Rubio-Marin, supra note 205, at 76.

<sup>230</sup> Colleen Duggan & Adila Abusharaf, *Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice*, in *The Handbook of Reparations* (Pablo de Greiff ed., 2006).

<sup>231</sup> *Id.* at 637.

Reparations can be moral or material.<sup>232</sup> Moral reparations can include apologies and acknowledgments of harm,<sup>233</sup> either from individual abusers or from a society that failed to adequately address intimate partner abuse.<sup>234</sup> Such acknowledgments serve to “bear public witness to the crimes committed.”<sup>235</sup> Moral reparations imposed on individuals have an internal component; the shame and societal sanction are “a punishment that a person feels, and has to live with, even if it doesn’t show on the outside.”<sup>236</sup> Material reparations can be economic or could come in the form of services for the person subjected to abuse.<sup>237</sup> Economic reparations could reimburse people subjected to abuse for the costs of medical care, lost employment time or opportunities, property damage, or lost

housing.<sup>238</sup> Reparations could also cover less tangible losses, compensating people subjected to abuse for pain and suffering (including the loss of standing within the community) related to the abuse they have endured.<sup>239</sup> Material reparations can also take the form of services for people subjected to abuse; in a number of post-conflict societies, for example, women victims have received preferential access to health services and free health care as reparations.<sup>240</sup> In Guatemala, reparations were designed to help women cope with the psychosocial consequences of sexual violence and to dignify victims of violence.<sup>241</sup> In South Africa, ninety percent of the victims who testified requested housing as reparations.<sup>242</sup> Other material reparations address structural inequities in access to

<sup>232</sup> Rubio-Marin, *supra* note 205, at 75. The Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparations cites seven categories of reparations: physical, mental health and other rehabilitative services; compensation and restitution; justice initiatives; programs to restore dignity using symbolic tools; truth telling; educational initiatives; and the reform of discriminatory laws and customs. Painter, *supra* note 226, at 20.

<sup>233</sup> *Id.*

<sup>234</sup> See, e.g., United Nations Entity for Gender Equality and the Empowerment Of Women, *supra* note 118, at 21 (explaining that in response to the Mexican government’s failure to adequately respond to the murders of hundreds of women in Ciudad Juarez, Mexico was ordered to provide “symbolic redress and guarantees of non-repetition, including a commitment to investigate the murders and implement gender training for the police.”)

<sup>235</sup> Painter, *supra* note 226, at 15.

<sup>236</sup> Daly, *Transformative Justice*, *supra* note 103, at 135.

<sup>237</sup> Rubio-Marin, *supra* note 205, at 73–74. The civil and criminal legal systems have been stingy in providing such reparations to people subjected to abuse, even when the law explicitly provides for such remedies. In his study of the Massachusetts civil protection order courts, criminologist James Ptacek found that of 20 requests for compensation in the Dorchester court (of a sample of 250 cases), no petitioner was awarded compensation for losses suffered as a result of abuse. In Quincy, seven women sought compensation (of a sample of 250);

two received it. James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Response* 131–32 (1999). Judges also refused to award alimony, rendering the right to compensation “an ‘empty right’” in those two courts, considered among Massachusetts’ best in responding to abuse. *Id.* at 132.

<sup>238</sup> Haldemann, *supra* note 26, at 728

<sup>239</sup> Haldemann, *supra* note 26, at 728. Law professor Ruth Rubio-Marin cautions that lump sum payments may create problems for, and even endanger, women. She suggests instead that reparations be provided in smaller sums over time or through micro-finance institutions. Rubio-Marin, *supra* note 205, at 93–94.

<sup>240</sup> Painter, *supra* note 226, at 16. Those services have been problematic in Rwanda, however, where they have “contributed to tensions between classes of survivors,” and victims have chosen not to use the medical cards that provide them with services rather than be questioned by medical staff about why they should receive free care, when others are forced to pay. *Id.* Moreover, law professor Ruth Rubio-Marin notes, reparations specifically tailored to the needs of victims of sexual and reproductive violence have not been implemented, although a number of post-conflict societies have discussed them. Rubio-Marin, *supra* note 205, at 72.

<sup>241</sup> Claudia Paz & Paz Bailey, *Guatemala: Gender and Reparations for Human Rights Violations, in What Happened to the Women?*, *supra* note 180, at 112–13.

<sup>242</sup> Painter, *supra* note 226, at 17.

business capital and opportunities; in Sierra Leone, women requested access to micro-credit and skills training,<sup>243</sup> while in Peru, women demanded education for their children and jobs for themselves, as well as physical and mental health services and compensation.<sup>244</sup> Reparations can also be collective. In South Africa, collective reparations for women included laws to prevent intimate partner abuse and rape, police and military training, improved social services for all women, and laws and policies to address women's poverty and need for economic opportunity.<sup>245</sup> Reparations might also be forward-looking, focusing on future prevention of or protection from gender-based violence.<sup>246</sup>

Material reparations can never truly compensate people subjected to abuse for the non-monetary harms they have experienced; as law professor Martha Minow writes in the context of genocide, "[e]ven the suggestion that it can may seem offensive."<sup>247</sup> But just as in tort law, material reparations can counterbalance a loss that cannot truly be restored with some other form of payment.<sup>248</sup> Moreover,

monetary reparations can "become symbolic objects around which wrongs are acknowledged,"<sup>249</sup> pairing the material and representational aspects of reparation. In this way, reparations are related to validation and vindication; while "[t]he reparations themselves cannot undo the violence that was done," the determination of appropriate reparations provides yet another opportunity for people subjected to abuse to tell their stories, and "[i]f heard and acknowledged, they may obtain a renewed sense of dignity."<sup>250</sup>

The guiding principle for the determination of reparations is that the person subjected to abuse deems the remedy acceptable.<sup>251</sup> Too often, remedies in the criminal justice system are determined based on what the abuser has and is willing to give: money, an apology, a promise to stay away. In a community justice forum, the remedy cannot be what the abuser is willing to give, but rather, must be what the person subjected to abuse needs or wants. This is particularly true of apologies. The fact that an abuser is willing or even wants to

<sup>243</sup> *Id.* at 18; see also Kristin V. Brown, *Business Helped Them to Escape: Program Helps Survivors of Domestic Abuse Build Ventures and Confidence*, *Times Union*, Mar. 18, 2013, <http://www.timesunion.com/local/article/Business-helped-them-to-escape-4362170.php>; Goodmark, *A Troubled Marriage*, *supra* note 3, at 186–91 (discussing how micro-finance could be used to address the needs of women subjected to abuse).

<sup>244</sup> Julie Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in *What Happened to the Women?*, *supra* note 180, at 147. Peru's reparations scheme was comprised of six programs: Symbolic Reparations, Health Reparations, Educational Reparations, Citizen Rights Restoration, Economic Reparations, and Collective Reparations. *Id.* at 156.

<sup>245</sup> Goldblatt, *supra* note 180, at 82.

<sup>246</sup> Colleen Duggan, *Foreward*, in *What Happened to the Women?*, *supra* note 180, at 18.

<sup>247</sup> Minow, *supra* note 33, at 93, 103; see also Haldemann, *supra* note 26, at 729. It may also be possible to dispense with proving harms in order to

qualify for reparations; "consideration could be given to designing reparations programmes that do not require evidence, which may be difficult to provide or place women at further risk." United Nations Entity for Gender Equality and the Empowerment Of Women, *supra* note 118, at 97.

<sup>248</sup> Haldemann, *supra* note 26, at 728–29.

<sup>249</sup> Duggan & Abusharaf, *supra* note 230, at 641; Painter, *supra* note 226, at 25–26.

<sup>250</sup> *Id.* at 93; see also Haldemann, *supra* note 26, at 729.

<sup>251</sup> Rubio-Marin, *supra* note 205, at 97. The *nari adalats* have adopted this principle, recognizing that "punishment for the perpetrators does not equal justice for the woman" in each case, but that women may have more pressing concerns that the *nari adalat* agreements are better placed to address. Bhatla & Rajan, *supra* note 168, at 1661. Those concerns might include a desire to repair their marriages, fears about the lack of economic support for themselves or their children should the relationship end, or an unwillingness to return to their natal families.

apologize should not determine whether that apology happens; no apology should be given unless the person subjected to abuse is open to receiving that message.<sup>252</sup> Moreover, people subjected to abuse should never be pressured, or even asked, to accept apologies that they are not ready to hear. Such actions shift the focus of the provision of justice from the abused to the abuser, in contravention of the goals of community-based justice. One way to ensure that reparations are responsive to the needs of those who they are meant to compensate is to ensure that the voices of victims shape the reparations scheme. In the case of violence against women, it is essential to have input from the women affected, understanding that not all women will want the same things from a reparations program.<sup>253</sup> Without those voices to counteract gender bias within the system creating it, a reparations program is likely to have gender-biased results.<sup>254</sup>

Reparations are rarely used to compensate people subjected to abuse in the United States.<sup>255</sup> Some have argued that this failure stems from uniquely American notions of justice, which “create additional hindrances to achieving the transformative remedies and grassroots-developed reparations that would be most helpful to victims.”<sup>256</sup>

Moving away from the criminal justice system and towards community-based justice might create the space to make reparations more readily available.<sup>257</sup>

Using various facets and philosophies of human rights processes, it is possible to construct a community-based system of justice separate from the state for people subjected to abuse. But the creation of such a system raises a number of important questions about the role of the state, the gendered nature of justice, and the concept of community. Those questions are considered in the next section.

### *C. What Constitutes Success?*

Community justice forums would need to engage in ongoing evaluation to determine whether their efforts are successful. Success would hinge on whether the person subjected to abuse believed that the process has given them the justice they sought, however they might define it.

There is some evidence beyond the anecdotal that such efforts have been successful in other parts of the world. One study found that of the 1200 cases handled by the four nari adalats in one district in India, a majority of the cases were successfully resolved.<sup>258</sup> Both men and women reported that the process was

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<sup>252</sup> In the South African Truth and Reconciliation Commissions, victims were free to accept, refuse or ignore apologies. Minow, *supra* note 33, at 114.

<sup>253</sup> Ruth Rubio-Marin, *The Gender of Reparations: Setting the Agenda, in What Happened to the Women?*, *supra* note 180, at 28.

<sup>254</sup> *Id.* at 31.

<sup>255</sup> Reparations also haven't focused on the victimization of women. As law professor Ruth Rubio-Marin explains, “reparations programs to help victims of gross violations of human rights have not focused on the forms of victimization that women are more commonly subject to, nor are they designed with an explicit gender dimension in mind.” Rubio-Marin, *The Gender of Reparations*, *supra* note 253, at 23.

<sup>256</sup> Calleigh McRaith et al., *Due Diligence Obligations of the United States in the Case of*

*Violence Against Women*, in *Violence Against Women in the United States and the State's Obligation to Protect: Civil Society Briefing Papers on Community, Military, and Custody* 21 (2011).

<sup>257</sup> One could argue that reparations should be available regardless of whether women are willing to participate in a community justice process. In South Africa and Timor Leste, for example, tying access to reparations to willingness to participate in truth gathering meant that many women were denied reparations. Rubio-Marin, *The Gender of Reparations*, *supra* note 253, at 34.

<sup>258</sup> Merry, *supra* note 168, at 156–57 (citing Mekhala Krishnamurthy, *In the Shadow of the State, in the Shade of a Tree: The Politics of the Possible in Rural Gujarat* 3 (2002)); see also International Center for Research on Women, *supra* note 168, at 53–55.

transparent, neutral and fair, and expressed appreciation for the work of the nari adalats.<sup>259</sup> Women described experiencing *maan samman ke saath nyaya*, translated as justice with honor and dignity.<sup>260</sup> Women who used the nari adalats reported greater confidence in their ability to address new problems in their relationships and an improvement in their relations with their husbands.<sup>261</sup> Although the nari adalats hear a range of issues involving women, they have been deployed most successfully in cases of intimate partner abuse.<sup>262</sup> More than half of the women who used the nari adalats reported that violence had ceased; in other cases, violence reduced but did not stop altogether, or took other forms (psychological abuse, for example).<sup>263</sup> Even in those cases where the violence did not stop, however, women reported an increase in confidence,<sup>264</sup> underscoring how empowering these processes can be for women subjected to abuse. This finding is particularly important, Nandita Bhatla and Anuradha Rajan explain, “as the vision with which these forums were initiated is not that violence should end, but that the women

should recognize and exercise their agency and rights as individuals.”<sup>265</sup>

There have been, however, unintended consequences of the growing influence of the nari adalats. First, the nari adalats report an increase in the number of cases raised by men.<sup>266</sup> Additionally, in some cases, although the intervention of the nari adalat stops the physical violence, other forms of abuse (like psychological abuse) may continue or increase.<sup>267</sup> The nari adalats may have less influence in some of these types of cases that the law currently does not reach.<sup>268</sup> It is important to note, however, that complete cessation of violence was not necessary for women to feel more empowered and self-confident after the intervention of the nari adalats.<sup>269</sup> In their study of the nari adalats, Bhatla and Rajan found that the community perceived nari adalats as “sites where ‘justice’ is done.”<sup>270</sup>

This type of community-based justice could provide a viable alternative for people subjected to abuse who are unwilling to engage the state. But such a radical reimagining of justice provision raises significant questions, about the role

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<sup>259</sup> International Center for Research on Women, *supra* note 168, at 54–55. Despite their explicitly feminist mandate, nari adalats have been seen as neutral because both sides are given the opportunity to speak, facts are collected, and consensus with members of community is achieved. Bhatla & Rajan, *supra* note 168, at 1662.

<sup>260</sup> International Center for Research on Women, *supra* note 168, at 54.

<sup>261</sup> *Id.* at 53–54.

<sup>262</sup> Merry, *supra* note 168, at 156–57 (citing Krishnamurthy, *supra* note 258. Their success is especially noteworthy in Uttar Pradesh, which has the highest rates of crimes against women and lowest rates of female literacy in India. Mustafa, *supra* note 168.

<sup>263</sup> Bhatla & Rajan, *supra* note 168, at 1663. Bhatla and Rajan caution, however, that the reduction in violence “reflects a change in behavior but not necessarily a change in attitude, which is more difficult to measure.” *Id.* at 1664; see also Best Practices Foundation, *supra* note 222 (“Men

from the families of the sangha know they are aware of their rights and that there is a forum called the Nari Adalat, so they are careful these days.”).

<sup>264</sup> Bhatla & Rajan, *supra* note 168, at 1663. One police inspector in Gujarat province also believes that the incidence of suicide among women has decreased as a result of the presence of the nari adalats. Best Practices Foundation, *supra* note 222.

<sup>265</sup> Bhatla & Rajan, *supra* note 168, at 1663.

<sup>266</sup> International Center for Research on Women, *supra* note 168, at 55. A typical complaint: my wife has run away, with “no reflection of the real problem, and certainly not of his role.” *Id.*

<sup>267</sup> *Id.* at 71.

<sup>268</sup> *Id.* at 60–61, 64, 68–69.

<sup>269</sup> *Id.* at 71.

<sup>270</sup> Bhatla & Rajan, *supra* note 168, at 1662; see also Mustafa, *supra* note 168, (quoting Sumita, a rural judge: “Women bring their problems to these courts without any reservations. They have full faith that they will get justice here.”).

of the state, the problems of gendered justice, the existence of community, and the provision of resources. Those questions are considered below.

#### IV. Questions to Consider

##### A. *What Are the Consequences of Removing the State From the Pursuit of Justice?*

The right to keep order in American society, as in many democratic societies, belongs exclusively to the state. Because the right to keep order belongs to the state, the responsibility for the imposition of justice has been delegated to the state as well. In the context of intimate partner abuse, the state has chosen to seek justice through the criminal justice system, a decision championed by the battered women's advocates of the 1980s.<sup>271</sup> That philosophy is reflected in the statement of former prosecutor Jeanine Pirro, who served on the Attorney General's Task Force on Family Violence: "[w]e believe [intimate partner abuse] is a criminal problem and the way to handle it is with criminal justice intervention."<sup>272</sup>

In the criminal justice system, victims of crime are witnesses, not parties. Individuals have some voice within that system, most notably through victim impact statements, but no power over

what the ultimate determination of the court will be. Providing community-based justice mechanisms as an alternative to state-administered retributive justice shifts the power to determine what justice is from the state to the individual. This power shifting, however, could come at a cost. Community-based justice may provide justice for individuals, but may not comport with the state's desire to punish wrongdoers, even in cases where the underlying behavior at issue clearly meets the definitions of a crime. The expressive function of the law is potentially undermined where the law is silenced. A community-based justice system could blunt the state's message of condemnation for intimate partner abuse.<sup>273</sup> Moreover, the delegation of intimate partner abuse to informal justice systems could undermine the state's responsibility for ensuring the human rights of its citizens under international law, to the extent that informal justice systems fail to comport with human rights norms.<sup>274</sup>

The problem with the delegation of justice to the state, however, is that it fails to take into account how the person subjected to abuse defines justice. What is the recourse for those who are most affected by a particular crime if they do

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<sup>271</sup> Goodmark, *A Troubled Marriage*, supra note 3, at 16–19.

<sup>272</sup> William I. Hart et al., *Attorney Generals' Task Force on Family Violence: Final Report 11* (1984).

<sup>273</sup> Law professor Julie Goldscheid has noted that international human rights law and advocacy, through its focus on urging state responsiveness, implicitly assumes that state involvement is useful and positive and that increased state involvement will help to end gender based violence. Under international human rights law, the duty of the state is complex - to protect, prevent, prosecute. Julie Goldscheid, "The U.S. Context: Outcomes of the U.S. Regional Due Diligence Consultation," Program on Human Rights Institute, "Human Rights and Violence Against Women: Applying the Due Diligence Framework," Northeastern University, November 7, 2013. The question that advocates for

people subjected to abuse face is how to take advantage of state resources without inviting state abuses. I have argued elsewhere that we have yet to find that balance in the United States. See generally Goodmark *A Troubled Marriage*, supra note 3. Until we are able to find that balance, we will continue to need alternatives to state based systems. That assessment of the risks and rewards of state involvement may be different, however, where state responses to intimate partner abuse are more affirmative (services, structural change) than punitive (retributive justice).

<sup>274</sup> Informal justice systems can fail to provide human rights protections in a number of ways, including failing to make decisions that comport with basic human rights principles and failing to treat women and minority groups as equals. Kerrigan et al., supra note 144, at 90.

not agree with the state's method of seeking justice? If voice, validation and vindication are more important than retribution to an individual person subjected to abuse, and if that individual believes that voice, validation, and vindication cannot be achieved through the criminal justice system, we actively deny that person justice if we fail to provide some alternate mechanism for seeking it. Moreover, using the criminal justice system could affirmatively harm a person subjected to abuse, either through the trauma of being engaged with that system or because of the abuser's reaction to prosecution. People subjected to abuse should not be forced to bear the burden of seeking justice for the rest of society, particularly when doing so might be harmful to them.

One justification for the creation of alternate justice systems in post-conflict societies has been the inability of court systems in those nations to disseminate justice. The United States, with its robust criminal justice system, would not seem to have that problem. An argument could be made, though, that despite the efforts of advocates and others over the past forty years, courts in the United States are in some senses inaccessible to people subjected to abuse, and therefore unable to dispense justice. First, in the criminal system, people subjected to abuse lack a voice of their own. In addition to the constraints imposed by courtroom procedure and evidentiary rules, their voices are filtered through the state, because they are witnesses rather than parties to the action. This tension becomes clear, for example, when the

state asks a court to impose a criminal stay-away order on a defendant over the objections of the person subjected to abuse.<sup>275</sup> In addition, the economic obstacles to participating in prosecution (taking time from work, transportation, the need for child care) can be a formidable barrier to accessing the justice system. Moreover, the bias that remains against people subjected to abuse, particularly those in marginalized groups, can make the system feel inhospitable and unjust.

Another concern is that creating community-based justice systems might relieve the state of its responsibility to respond to intimate partner abuse, giving up the hard fought gains of the last forty years. Some have questioned, for example, whether the endorsement of gacaca will allow Rwanda to ignore needed reforms in the criminal justice system.<sup>276</sup> In creating such systems, it would be crucial to be clear about their role as an alternative to, rather than a replacement for, the state response to intimate partner abuse, to be invoked only when the person subjected to abuse wants to bypass state-created systems of justice. The community-based justice system could also run parallel to the existing criminal justice system, allowing people subjected to abuse to invoke the alternate system but to reserve the right to engage in criminal prosecution if the outcome of the alternate justice system proves unsatisfying.<sup>277</sup>

#### *B. The Problems of "Gendered" Justice*

A frequent worry for feminists considering alternative systems of justice

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<sup>275</sup> See, e.g., *Lambert v. State*, 61 A.3d 87 (Md. Ct. Spec. App. 2013).

<sup>276</sup> Nessel, *supra* note 148, at 103 (citing the need for gender sensitivity and witness protection in the criminal courts).

<sup>277</sup> Law professor Laurie Kohn has suggested

such an alternative in the context of restorative justice programs in the civil system. See generally Laurie Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence*, 40 *Seton Hall L. Rev.* 517 (2010).

is whether the proposed system will somehow undermine the status of women in the legal system. Early efforts to introduce mediation in family law cases, for example, drew criticism that such systems would result in second class justice for women denied the opportunity to litigate their claims.<sup>278</sup> Similarly, feminists have expressed concerns that alternative justice mechanisms might push intimate partner abuse back into the private realm, undoing decades of advocacy designed to make these private intrafamily harms a public responsibility.<sup>279</sup> When proposing a system in response to a harm that primarily affects women,<sup>280</sup> those concerns are necessarily heightened.

The form of alternative justice being proposed is another concern. Although used to address problems in marriage and divorce, for example, participation in *gacaca* was historically restricted to men.<sup>281</sup> Only women who were parties to the issue being heard were permitted to participate, and women were not included among the community members empowered to adjudicate individual cases.<sup>282</sup> Even when women were parties, they were represented by their brothers or fathers in cases involving disputes with their husbands.<sup>283</sup> While women are participating in the restructured *gacaca* courts in post-conflict Rwanda, it is worth asking whether a

process traditionally closed to women is the best model for developing a new form of justice for women.

Moreover, some have questioned the utility of truth-telling a form of justice for women, arguing that such processes may, in fact, be gendered male.<sup>284</sup> While men may have no qualms about public truth-telling, will women feel powerful enough to publicly discuss intimate partner abuse, and will that feel like justice? Lack of power within some societies has kept women from fully participating in post-conflict truth-based fora; in both South Africa and Rwanda, women have reportedly been unwilling to engage in community-based justice mechanisms, although women's testimony was prominent in Sierra Leone's truth and reconciliation process.<sup>285</sup> Finally, community-based truth systems assume that truth-telling will be curative. For women subjected to abuse, however, talking about physical, sexual, emotional, or reproductive abuse may "feel more like re-victimization than therapy." Not all testimony restores the dignity or promotes the healing of the witness.<sup>286</sup> But the experiences of women subjected to sexual assault vary widely; while some women avoided the *gacaca* courts, others, including victims of sexual assault, saw them as a place to find justice. As Emily Amick writes, "[t]he five survivors this Author spoke to all

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<sup>278</sup> See, e.g., Sara Cobb, *The Domestication of Violence in Mediation*, 31 *L. & Soc'y Rev.* 397, 398 (1997); Sara Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 *Cardozo Women's L.J.* 235, 235 (2002). Special courts designed to mediate minor offenses created just the type of problem in Brazil, where 60 to 80% of the plaintiffs were women alleging intimate partner abuse; as a result, "most domestic violence cases were effectively decriminalized." Brazil's *Maria de Penha Law*, named for a woman subjected to horrific intimate partner abuse which was largely ignored by the state, ended that practice. United Nations Entity for Gender Equality and the Empowerment

of Women, *supra* note 118, at 69–70.

<sup>279</sup> Stubbs, *supra* note 97, at 51.

<sup>280</sup> According to a recent report by the Bureau of Justice Statistics, about 80% of the victims of intimate partner violence between 1993 and 2010 were women. Shannon Catalano, *Intimate Partner Violence, 1993–2010* 3 (2012).

<sup>281</sup> See *supra* note 180 and accompanying text.

<sup>282</sup> See *supra* note 180 and accompanying text.

<sup>283</sup> Wells, *supra* note 181, at 192–93.

<sup>284</sup> Nessel, *supra* note 148, at 122.

<sup>285</sup> Maisel, *Have Truth*, *supra* note 11, at 171–

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<sup>286</sup> Wells, *supra* note 181, at 192.

stated a desire to participate in gacaca for the sexual violence crimes committed against them, and all wanted justice.”<sup>287</sup>

### C. *The Problem of Community*

Many of the alternative justice methods discussed supra rely on community involvement for their success. Nari adalats and gacacas draw heavily on community participation to adjudicate individual claims; truth commissions and symbolic tribunals require the community to become involved as listeners, to provide validation to those who give testimony. Law professor Peggy Maisel contends that the success of the truth commission may hinge on the community’s willingness to engage in the process of unearthing past abuses.<sup>288</sup> The effectiveness of these tribunals depends, to some extent, upon the shared cultural context and experiences of community members, a sense that the community speaks with one voice.<sup>289</sup> Alternative justice methods may be effective in small communities, where relationships between individuals and families are stronger and where members of the community must, to some extent, rely on each other for support and assistance. But in the United States, where academics

have documented the fragmentation and fraying of community,<sup>290</sup> it is fair to ask whether sufficient community exists to make such efforts worthwhile. A similar concern was raised about the effectiveness of gacaca, given the lack of community cohesion following the Rwandan genocide. Communities were tremendously changed by the genocide; Rwanda experienced an influx of immigrants from outside the country after the conflict ended, and new villages were created after the conflict, bringing together people with no previous relationships upon which to build.<sup>291</sup> As law professor Maureen Laflin writes, “[c]ommunities that never were are difficult to ‘rebuild.’”<sup>292</sup>

Moreover, even if community ties were strong enough to sustain alternative justice systems, relying on the community to resolve claims of intimate partner abuse may seem problematic unless entrenched community norms condemning such abuse exist. Critics of restorative justice frequently note that without strong community condemnation of abuse, people subjected to abuse are unlikely to achieve any kind of meaningful justice through such efforts.<sup>293</sup> Such clear statements of community norms may also be made more difficult by the mobility

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<sup>287</sup> Amick, supra note 115, at 71. In response to these concerns, the gacaca tribunals, like some truth and reconciliation commissions, adopted special rules for the testimony of women who experienced sexual violence. The 2001 gacaca law allowed women to testify in closed chambers or to report abuse in writing, anonymously. Wells, supra note 181, at 189–90. The law was further amended in 2004 to require that a victim make accusations of sexual violence privately to a gacaca judge (who can be a woman) or a prosecutor, and again in 2008, to allow complaints to be submitted to judicial police. Amick, supra note 115, at 45; Nessel, supra note 148, at 120. Nonetheless, Nessel notes, many women do not know that they can give testimony in private, and the request to testify privately leads to an assumption that she is a survivor of sexual violence. *Id.*

<sup>288</sup> Maisel, Greensboro and Beyond, supra note

151, at 247–48.

<sup>289</sup> United Nations Entity for Gender Equality and the Empowerment Of Women, supra note 118, at 73. One study has argued, however, that informal justice systems are particularly good at adapting to the socio-economic, political and cultural contexts of the communities within which they are embedded. The study cautions, though, that there may be difficulties in extending these methods beyond small, tightly knit communities. Kerrigan et al., supra note 144, at 16, 19.

<sup>290</sup> Robert d. Putnam, *Bowling Alone: the Collapse and Revival of American community* (2000).

<sup>291</sup> Daly, *Between Punitive and Reconstructive Justice*, supra note 223, at 380–81; Laflin, supra note 148, at 21.

<sup>292</sup> Laflin, supra note 148, at 21.

<sup>293</sup> Stubbs, supra note 97, at 52–54.

encouraged in American society. When communities regularly transform as a result of movement, the effectiveness of community sanction may be undermined.

Tightly knit communities with normative commitments to opposing abuse would be ideal settings for the institution of alternative justice mechanisms, but they may not be necessary. In fact, the creation alternative justice systems might help to create such norms.<sup>294</sup> In India, for example, the *nari adalats* helped to raise community consciousness around intimate partner abuse; holding open meetings in shared community spaces encouraged the community to begin talking about violence against women publicly and changed the community's perception of intimate partner abuse.<sup>295</sup> Moreover, the *nari adalats* have altered how the community conceptualizes violence against women, expanding the understanding of violence to incorporate things like mental abuse and suspicion - types of violence that the formal legal system may not reach.<sup>296</sup> Starting small, with women's groups or anti-violence organizations serving as the "community," and building outward as community interest and knowledge grow, may be a more viable strategy. Because the potential to have such efforts co-opted and to replicate existing gender norms within the community exists, organizers

would need to be cautious about engaging with community members who support the underlying goals of the forums. Even in communities where no strong condemnation of intimate partner abuse exists, community forums can have an impact, using the narratives of people subjected to abuse to subvert existing gender norms and assumptions.

Religious communities might seem a natural place to start, given the cohesion and relationships that already exist among members of a particular place of worship. Moreover, many religions have already created alternative justice structures for considering the claims of their adherents.<sup>297</sup> But the religious response to intimate partner abuse has been mixed, with clergy in more traditional faiths urging abused people to remain with their abusive partners in the name of family or faith.<sup>298</sup> Religious courts, like the *beth din* and *shari'ah* courts used by Jews and Muslims worldwide, have been criticized for their inability to respond appropriately to the needs of women subjected to abuse and their tendency to replicate existing power structures within religious communities.<sup>299</sup> Additionally, there is some concern that informal justice conducted through religious communities will fail to comply with international human rights norms, an essential component of any alternative justice system.<sup>300</sup>

<sup>294</sup> Coker, *Transformative Justice*, supra note 81, at 130; see also Daly, *Transformative Justice*, supra note 103, at 161 (explaining how the South African TRC reconstructed justice norms).

<sup>295</sup> International Center for Research on Women, supra note 168, at 44–46.

<sup>296</sup> *Id.* at 60–61.

<sup>297</sup> Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 *Vt. L. Rev.* 157, 166–70 (2012) (describing arbitration in the Jewish, Christian and Muslim communities).

<sup>298</sup> Marie M. Fortune, *Faith is Fundamental to Ending Domestic Terror*, 33 *Women's Rts. L. Rep.* 463, 465–68 (2012).

<sup>299</sup> See, e.g., Madelaine Adelman, *No Way Out: Divorce-Related Domestic Violence in Israel*, 6

*Violence Against Women* 1223 (2000); Rivka Haut & Susan Aranoff, *Religious Courts Are Treating Agunot Unfairly*, N.Y. *Jewish Week*, Oct. 25, 2011, available at <http://www.thejewishweek.com/editorial-opinion/opinion/religious-courts-are-treating-agunot-unfairly>; Maryam Namazie, *What Isn't Wrong with Shari law? To Safeguard Our Rights There Must Be One Law for All and No Religious Courts*, *Guardian*, July 5, 2010, <http://www.theguardian.com/law/2010/jul/05/sharia-law-religious-courts>; see also Susan Moller Okun, *Is Multiculturalism Bad for Women?*, in *Is Multiculturalism Bad for Women* 9 (Joshua Cohen et al. eds., 1999).

<sup>300</sup> Kerrigan et AL., supra note 144, at 19.

Nonetheless, Sally MacNichol, Co-Executive Director of CONNECT, a New York City organization that works to end family violence using a variety of restorative justice techniques, reports that such an intervention made a huge difference in the life of one Muslim woman.<sup>301</sup> The woman called CONNECT's legal advocacy helpline, and legal advocates urged her to get an order of protection. The woman was not interested in using the civil justice system, however. She wanted her partner out of the home and believed that her imam would be the only one who could persuade him to leave. The imam had refused to become involved, however, because the couple was not married. CONNECT talked with a sheik in the community, who first spoke with the woman to find out what she wanted, then met with both the imam, who continued to refuse to help, and the man, who was not willing to move. The sheik then sought out other imams, who came together for a Koranic reading and established a religious mandate for handling the situation, which they communicated to the man through the sheik. Ultimately, the man left the home peacefully - a sort of nari adalat run by imams rather than sahyoginis. In this situation, the support of the geographic community was far less important than the support of the faith community, and the provision of religious communal justice essential to the woman's sense of self and safety. Her initial negative experience with her imam was transformed by the work of the community of imams convened by CONNECT. CONNECT is seeking to create additional community spaces in

which to continue this type of work.<sup>302</sup>

Given changes in technology, those communities need not necessarily exist in physical space. Alternative justice could take place in virtual communities where support for people subjected to intimate partner abuse is strong. Ultimately, as law professor Donna Coker has pointed out in the context of transformative justice, we will have to build our own communities in order to find justice for people subjected to abuse.<sup>303</sup>

#### *D. The Practical Questions*

Creating alternative justice mechanisms raises a number of practical questions as well. First, how would such systems be funded?<sup>304</sup> Competition for funding among social service, government, and advocacy agencies serving people subjected to abuse is fierce. Allocating funding to alternative justice mechanisms could well mean taking money from the criminal justice system, a politically unpopular position. Even if initial funding is made available, sustainability of such programs is always an issue. With turnover in staff, community burn-out, and the preference many funders express for seeding new and novel projects rather than those that are more firmly established in communities, ensuring that such mechanisms remain available over the long-term could be an issue.<sup>305</sup> Finally, there is the problem of co-optation. Community ownership of these alternative justice mechanisms is essential to their success, but once a grassroots project or movement becomes successful, it often sees increasing professionalization and co-optation by the state and by established service

<sup>301</sup> Telephone interview with Sally MacNichol, Co-Executive Director of Connect, New York City, Sept. 13, 2013.

<sup>302</sup> *Id.*

<sup>303</sup> Coker, *Transformative Justice*, supra note 81.

<sup>304</sup> Zinsstag, supra note 97, at 210–11.

<sup>305</sup> The nari adalats faced this same issue. International Center for Research on Women, supra note 168, at 46.

providers, who may not be as community-centered. The professionalization of the battered women's movement is a perfect example of this type of problem.<sup>306</sup>

Community-based justice forums, both formal and informal, are being fostered throughout the United States. In Maine, a truth and reconciliation commission is looking at the treatment of the Wabanaki people by the state's child welfare system.<sup>307</sup> The Black Women's Blueprint is in the early stages of organizing the Black Women's Truth and Reconciliation Commission on Sexual Assault, a truth commission designed "to examine the history, context, causes, sequences, and consequences of rape/sexual assault on Black women for the purpose of healing and transformation for survivors."<sup>308</sup> CONNECT continues to use community resources to find ways to meet the needs of people subjected to abuse who refuse to turn to the state. Community-based justice is already a reality for some people subjected to abuse in the United States. The question is whether it can provide a viable alternative to the criminal justice system.

### Conclusion

"Prosecutions will never be enough on their own.... [M]any women will not seek justice in this way."<sup>309</sup> But people subjected to abuse need not be limited to the systems of justice currently available to them through the state. We can design justice, and we can, through the creation of alternative justice systems, design it in ways that specifically address their needs.

Community-based alternative justice mechanisms could provide people subjected to intimate partner abuse with the kind of individualized justice they seek, justice that is attentive to the need for voice, validation, and vindication. Such systems need not displace the state response to intimate partner abuse, but could provide an alternative forum for those who are unwilling to engage with the state or who cannot meet their justice goals through retributive state-based systems. At the very least, thinking about the development of alternatives to the criminal justice response to intimate partner abuse should highlight the ways in which the retributive system fails to meet the needs of some people subjected to abuse for justice. Moreover, designing alternative systems of justice suggests alterations that could be made within the criminal justice system - for example, greater input into decisions about arrest, prosecution, and sentencing - that would better meet the individualized justice goals of people subjected to abuse. Around the world, in a variety of contexts and communities, people are seeking and finding justice outside of state-annexed criminal justice systems. Why not make those same opportunities available to people subjected to abuse in the United States?

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<sup>306</sup> See Goodmark, *A Troubled Marriage*, supra note 3, at 25-26; Schechter, supra note 117.

<sup>307</sup> Esther Attean et al., *Truth, Healing, and Systems Change: The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Process*, 91 *Child Welfare* 15 (2012).

<sup>308</sup> Black Women's Blueprint, *Fact Sheet: Black Women's Truth and Reconciliation Commission on*

*Sexual Assault*, available at <http://www.scribd.com/doc/174770484/BWTRCFactSheet>; see also *Black Women's Blueprint*, <http://www.blackwomens-blueprint.org/> (last visited Feb. 24, 2013).

<sup>309</sup> United Nations Entity for Gender Equality and the Empowerment Of Women, supra note 118, at 101.