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"Law and Justice Are Not Always the Same": Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse

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“LAW AND JUSTICE ARE NOT ALWAYS THE SAME”:
CREATING COMMUNITY-BASED JUSTICE FORUMS FOR
PEOPLE SUBJECTED TO INTIMATE PARTNER ABUSE

LEIGH GOODMARK**

INTRODUCTION.....	707
I. WHAT IS JUSTICE FOR PEOPLE SUBJECTED TO ABUSE?	711
A. <i>Retributive Justice</i>	714
B. <i>Restorative Justice</i>	722
C. <i>Transformative Justice</i>	724
II. ALTERNATIVE VISIONS OF JUSTICE FOR PEOPLE SUBJECTED TO ABUSE	726
A. <i>Individualized Justice</i>	726
B. <i>Voice</i>	727
C. <i>Validation</i>	729
D. <i>Vindication</i>	730
E. <i>Finding Individualized Justice, Voice, Validation, and Vindication Through Retributive, Restorative, and Transformative Justice</i>	731
III. SEEKING JUSTICE BEYOND THE JUSTICE SYSTEM.....	731
A. <i>Structuring Community Justice Forums</i>	734
B. <i>Reparations</i>	746
C. <i>What Constitutes Success?</i>	751
IV. QUESTIONS TO CONSIDER	753
A. <i>What Are the Consequences of Removing the State from the Pursuit of Justice?</i>	753
B. <i>Does Community-Based Justice Provide “Gendered” Justice?</i>	756
C. <i>What Constitutes Community? And Can Communities Provide Accountability?</i>	758
D. <i>Can Community-Based Justice Really Work?</i>	761
CONCLUSION	762

INTRODUCTION

Mary Walsh sought justice through the criminal system after being abused by her partner. Following that experience, Walsh warned other women: “For your own peace of mind, be prepared to throw any

* JASON A. MERCHEY, BUILDING A LIFE OF VALUE: TIMELESS WISDOM TO INSPIRE AND EMPOWER US 225 (2005) (quoting Gloria Steinem).

** Professor of Law, University of Maryland Francis King Carey School of Law. Thanks to the University of Maryland Francis King Carey School of Law for its generous support of this project. Special thanks to Professors Brenda Smith (whose work inspired this Article and whose feedback strengthened it significantly); Elizabeth Keyes; Deborah Eisenberg; Donna Coker; Seval Yildirim; Jana Singer; Barbara Bezdek; Tara Urs; and Sabrina Balamwalla. Early drafts of this Article were presented at the 2013 meeting of the Law & Society Association; the 2013 meeting of LatCrit; and FLT at 30: Geographies of Violence: Place, Space, and Time, Emory Law School, January 25, 2014. My thanks to the participants in those workshops for their feedback. My thanks also to Kara Citarella for research assistance and to Anna Johnston for her editing expertise. All mistakes are, of course, mine.

illusions about ‘justice’ you might have had out the window.”¹ Walsh clearly did not find the justice she sought through the criminal justice system. Whether other people subjected to abuse² 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.”³ Bingham explains that by 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.⁴ Justice design allows for the creation of “new rules, organizations, institutions, and forums to serve various goals related to public policy.”⁵ But, she warns, not every system can provide every form of justice. The type of justice produced by a system varies based on who designed the system, what their goals were, and how they exercise power within the system.⁶ The issue, then, is finding the specific response that meets both the substantive and procedural justice needs of the individual.

In the context of transitional justice, law professor Jaya Ramji-Nogales has argued for “bespoke” justice—the design of justice systems that are attentive to local norms and stakeholder interests.⁷ A similar argument could be made for bespoke justice in the context of intimate partner abuse. For people subjected to abuse who are inter-

1. Judith Lewis Herman, *Justice from the Victim’s Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 571, 581-82 (2005) (quotation marks omitted).

2. 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”).

3. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 1 (2008).

4. *Id.* at 1-3.

5. *Id.* at 3.

6. *Id.* at 21.

7. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT’L L. 1, 3, 63 (2010).

ested in punishment, whose goals are congruent with the legal system's goals of safety and accountability (as defined by the state),⁸ and who are willing to use state-based systems, society offers a response: the criminal justice system. Though that response may be imperfect, in theory, it meets the justice needs of some people subjected to abuse.⁹ For people who are more interested in healing and are willing to work through state systems, society sometimes offers a response—restorative justice—although the availability of that response is limited. 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,¹⁰ including truth commissions,¹¹ Rwanda's *gacaca* courts, Native Hawaiian healing, and Navajo Peacemaking.¹² Building on her work and recognizing that there are parallels between the experiences of people seeking

8. Susan Schechter, *Expanding Solutions for Domestic Violence and Poverty: What Battered Women with Abused Children Need from Their Advocates*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, Dec. 2000, at 1, 7, available at http://www.vawnet.org/Assoc_Files_VAWnet/BCS13_ES.pdf ("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.").

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

10. Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 934 (2003).

11. 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, 144 (2011). The work of the truth commission is to "investigate, gather evidence, create a public record, and respond to human rights abuses," 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 JURÍDICA DE LA UNIVERSIDAD DE P.R. 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.

12. Smith, *supra* note 10, at 951-53.

justice for violations of human rights¹³ and people subjected to intimate 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 addressing 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,¹⁴ this 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.

This Article begins by considering the concept of justice as applied to cases of intimate partner abuse, exploring how retributive, restorative, and transformative justice operate in these cases. This Article argues that the retributive-focused criminal justice system is an imperfect source of justice for many people subjected to abuse and offers restorative and transformative justice as promising alternatives.

13. 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 Lawyers' Network*, COLUM. L. SCH. HUMAN RIGHTS INST., <http://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network> (last visited Mar. 1, 2015). International human rights norms can be valuable tools 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 LAW & 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, 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. 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. 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) 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.

14. *See* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 1 (1999).

Part II of this 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, fleshing out the proposal by using examples from international human rights structures created or used to address human rights abuses. Finally, the difficult questions raised by seeking justice outside of state-based systems are the subject of Part IV of this Article.

I. WHAT IS JUSTICE FOR PEOPLE SUBJECTED TO ABUSE?

In 1937, law professor Gerhart Husserl wrote, “What is justice? This question has been asked again and again. But it seems to us that no really satisfactory answer has as yet been given.”¹⁵ 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.”¹⁶ 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.”¹⁷ Justice is sometimes defined through tautology—as law professor Megan Carpenter notes, Merriam-Webster’s dictionary defines justice as the “administration of what is just,” “the quality of being just,” and “the principle . . . of just dealing.”¹⁸ Justice may not be subject to static definitions; as social science professors Harvey M. Weinstein and Eric Stover explain, “Justice is a process — often a contentious one — that can evolve into different forms over time.”¹⁹ In the context of crime, law professor Sophie Evekink suggests that justice should mean doing right by all stakeholders: victims, offenders, the state,

15. Gerhart Husserl, *Justice*, 47 INT’L J. ETHICS 271, 271 (1937).

16. Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162, 182 (1988).

17. Kenneth M. Ehrenberg, *Procedural Justice and Information in Conflict-Resolving Institutions*, 67 ALB. L. REV. 167, 169 (2003).

18. 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).

19. Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 1, 12 (Eric Stover & Harvey M. Weinstein eds., 2004) [hereinafter MY NEIGHBOR, MY ENEMY].

families, and communities.²⁰ 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.”²¹ For political systems and states, justice is often defined through the ability to impose criminal and civil sanctions on wrongdoers.²² Justice can be substantive or procedural,²³ distributive,²⁴ retributive, restorative, or transformative.²⁵ Justice can require recognition,²⁶ and it can require reparation. Justice can be

20. Sophie A Evekink, *Retributive or Restorative? Prospects for Justice for Those Who Live Side by Side with Their Aggressors* 4 (Lincoln Coll., Univ. of Oxford, Working Paper No. 9, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209959.

21. Eric Stover, *Witnesses and the Promise of Justice in The Hague*, in MY NEIGHBOR, MY ENEMY, *supra* note 19, at 114-15 (quotation marks omitted).

22. Richard J. Goldstone, *Foreword to 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) [hereinafter TRUTH V. JUSTICE]; Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1, 2 (2001).

23. 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, philosopher Kenneth 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. 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.

24. 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. See *Distributive Justice*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2014 ed.), available at <http://plato.stanford.edu/entries/justice-distributive/>.

25. 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 3, at 28.

26. 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

found through the state, outside of the state, and through some combination of both.²⁷ In the context of intimate partner abuse, however, the three most frequently invoked types of justice are retributive, restorative, and transformative.

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).

27. 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 support. 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 255, 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, *supra*, at 75.

A. Retributive Justice

What people are most 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 proportionate punishment as a result of that wrong.²⁸ As philosopher Jeffrie Murphy explains, “We (society) hire this individual [the sentencing judge] to enforce the rule of law under which we live. We think of this as ‘doing justice.’”²⁹ Retributive justice is necessarily state-centered justice, relying on judges, who determine guilt and mete out punishment, and on state-run penal systems to enforce those punishments.³⁰

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.³¹ As political science professors Amy Gutman and Dennis Thompson explain: “Justice 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.”³²

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, “Through retribution, the community corrects the wrongdoer’s false message that the victim was less worthy or valuable than the wrongdoer; through retribution, the com-

28. Haldemann, *supra* note 26, at 677.

29. Murphy, *supra* note 16, at 167.

30. Haldemann, *supra* note 26, at 678.

31. 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 22, 26.

32. Gutmann & Thompson, *supra* note 31, at 25.

munity reasserts the truth of the victim's value by inflicting a publicly visible defeat on the wrongdoer."³³

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."³⁴

In the realm of intimate partner abuse law and policy, retributive justice has reigned. The declaration that domestic violence was a crime, which began in the late 1970s;³⁵ the criminalization of intimate partner abuse beginning in the 1980s;³⁶ the development of policing and prosecutorial techniques specifically designed to address intimate partner abuse;³⁷ and the subsequent devotion of millions of dollars in federal funds to the criminal justice response³⁸ all attest to the retributive 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 the legal system enforce the criminal law in cases involving intimate partner abuse,³⁹ some advocates are reluctant to consider, or resistant to the idea, that retributive justice does not meet the justice needs of people subjected to abuse. And it is true that justice can be found through the criminal justice system 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 the ability to testify, in the broadest sense, to the harm that they experienced. 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.⁴⁰ Courts, concerned with ensuring procedural justice for offenders, adhere to strict evidentiary and process requirements that

33. MINOW, *supra* note 22, at 12.

34. Weinstein & Stover, *supra* note 19, at 14.

35. GOODMARK, *supra* note 2, at 17-18.

36. *Id.*

37. *Id.* at 107-13.

38. *Id.* at 19-20.

39. *Id.* at 18.

40. Stover, *supra* note 21, at 106.

necessarily mediate the stories of victims of crime.⁴¹ But according to psychologist Judith Herman, “Victims 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.”⁴² 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 process⁴³ and can distort the underlying narrative in troubling ways.⁴⁴ Skillful cross-examination can undermine the credibility of even the most truthful witness.⁴⁵ The structured setting of a trial simply fails to meet the justice needs of many victims of crime. In fact, Herman states, “[I]f one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.”⁴⁶

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. Police and prosecutors are charged with enforcing the laws—police by making arrests and ensuring that sufficient evidence exists to 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.⁴⁷ That

41. See MINOW, *supra* note 23, at 239; TERESA GODWIN PHELPS, SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS 63 (2004); 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).

42. Herman, *supra* note 1, at 574.

43. 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); see also Susan L. Miller & M. Kristen Hefner, *Procedural Justice for Victims and Offenders?: Exploring Restorative Justice Processes in Australia and the U.S.*, 32 JUSTICE Q. 142, 155-59 (2013), available at <http://www.tandfonline.com/doi/full/10.1080/07418825.2012.760643#UuFJYBAo5aQ>.

44. 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”).

45. Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE, *supra* note 22, at 68, 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”).

46. Herman, *supra* note 1, at 574.

47. 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*

conflict 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),⁴⁸ “there would be no one there” when they call for help again.⁴⁹ In New York City, police detectives ran criminal background searches on people who called for assistance in intimate partner abuse cases, “so cops can have leverage if the accuser gets cold feet about pressing charges. . . .”⁵⁰ Knowing that police policy could lead to incarceration for minor offenses, such as unpaid tickets, if they fail to provide assistance in the investigation, people subjected to abuse are less likely to report that abuse to law enforcement.

Prosecutors, too, have their own goals for intervention.⁵¹ Broadly stated, the goal of a criminal justice intervention in a case involving intimate partner abuse is to punish the abuser and to protect the victim,⁵² who is a witness and not a party to the action. In that role, victims have little control over what happens during prosecution,⁵³ and little recourse when their justice goals are undermined. Prosecutors may make choices that conflict with the goals of their witnesses out of their genuine concern for people subjected to abuse. 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

Assessment of the Criminal Processing System’s Responses, 13 VIOLENCE & VICTIMS 251, 252 (1998); see also UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, 2011-2012 PROGRESS OF THE WORLD’S WOMEN: IN PURSUIT OF JUSTICE 94 (2011) [hereinafter UN ENTITY FOR GENDER EQUALITY] (explaining that “women themselves do not necessarily equate justice with prosecutions: recognition of what they have endured and the means to rebuild their lives often takes precedence over going to court”).

48. See generally GOODMARK, *supra* note 2.

49. Erez & Belknap, *supra* note 47, at 256.

50. Jamie Schram, *NYPD Using Criminal Background Checks to Push Victims in Domestic-Violence Cases*, N.Y. POST (Mar. 16, 2013), http://www.nypost.com/p/news/local/squeeze_on_abuse_victims_Vd720156ATRojvyh0CfPwN.

51. Erez, *supra* note 44, at 554.

52. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecution*, 109 HARV. L. REV. 1849, 1870 (1996).

53. See Sanford Levinson, *Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process*, in TRUTH V. JUSTICE, *supra* note 22, at 211, 218.

would be a liar if I didn't acknowledge how this truth affects my decision making process.⁵⁴

Some prosecutors came to the criminal justice system in order to make the system more responsive to people subjected to abuse.⁵⁵ How they carry out that mission, though, may put them at odds with individuals with different goals.⁵⁶ For example, former prosecutor and law professor Michelle Madden Dempsey has argued that the state should force women subjected to abuse to testify in cases where the violence is serious and ongoing, where it reinforces patriarchy within the relationship and in society, where prosecution is likely to reduce the violence, and where strong community interests are served by requiring the victim to testify.⁵⁷ Putting aside the question of whether prosecution can ever guarantee a reduction in intimate partner abuse,⁵⁸ 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.⁵⁹ Whatever the reason for the choices they make, prosecutors are empowered to act unconstrained by the wishes of individual victims.⁶⁰ When prosecutors have their own goals, victims' voices can be silenced.⁶¹

People subjected to abuse cannot expect to have their experiences validated by the criminal justice system. 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.⁶² Validation of witnesses' stories by the presiding officers, explained Judge Albie Sachs of the South African Constitutional Court,

54. MICHELLE KAMINSKY, REFLECTIONS OF A DOMESTIC VIOLENCE PROSECUTOR: SUGGESTIONS FOR REFORM 14 (2011). Other prosecutors aren't as thoughtful about those decisions; Kaminsky describes one prosecutor who bragged to an audience at 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.*

55. Hanna, *supra* note 52, at 1873.

56. See KAMINSKY, *supra* note 54, at 13.

57. MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 208 (2009).

58. GOODMARK, *supra* note 2, at 140 n.5.

59. See DEMPSEY, *supra* note 57, at 208.

60. Hanna, *supra* note 52, at 1872.

61. Bell et al., *supra* note 41, at 79.

62. MINOW, *supra* note 22, at 9, 25-26. They may also actually be hostile to claims of abuse and victimization. GOODMARK, *supra* note 2, at 77; Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 280 (1993).

was one of the key differences between a court and a truth commission: “Tutu cries. A judge does not cry.”⁶³ 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 determinations⁶⁴—that validation may come too late for some people subjected to abuse.

Some people subjected to abuse are simply not interested in retributive responses. 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.⁶⁵ Even if prosecution routinely led to convictions, an unsupportable claim in the context of intimate partner abuse,⁶⁶ many people subjected to abuse would still be skeptical of the system’s deterrent effect on future abuse.⁶⁷ For others, the concern is with retribution itself. A criminal trial, writes law professor Martha Minow, “announces a demand not only for accountability and acknowledgment of harms done, but also for unflinching punishment.”⁶⁸ Philosopher Jeffrie Murphy characterizes criminal law as enabling society to express its anger, resentment, and hatred and legitimizing its desire for revenge.⁶⁹ 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

63. MINOW, *supra* note 22 at 73.

64. Erez, *supra* note 44, at 553.

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

66. See GOODMARK, *supra* note 2, at 110-13 (discussing various problems with criminal prosecutions of domestic violence cases).

67. 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 C. Barata, *Abused Women’s Perspectives on the Criminal Justice System’s Response to Domestic Violence*, 31 PSYCHOL. WOMEN Q. 202, 209 (2007).

68. MINOW, *supra* note 22, at 26.

69. Jeffrie Murphy, *Introduction*, in FORGIVENESS AND MERCY, *supra* note 16, at 2, 4.

to continue their relationships.⁷⁰ The criminal justice system's focus on punishment is 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.⁷¹ 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.⁷² For example, mothers of color who seek assistance may, instead, find their children being removed by child protective services for their failure to protect those children from exposure to violence.⁷³ 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,⁷⁴ undocumented immigrant women justifiably fear that reporting abuse to police could lead to their own arrest and deportation.⁷⁵ 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.⁷⁶ Andre Cooley called police after his boyfriend became violent—and three days lat-

70. GOODMARK, *supra* note 2, at 96-97.

71. Levinson, *supra* note 53, at 225. Engaging with the legal system can be a terrifying prospect for even the most educated and experienced person. Judge Learned Hand once said, "I should dread a lawsuit beyond almost anything else short of sickness and death." *Id.* Today, Levinson suggests, "[O]ne suspects that Hand would expand his qualms to include the entire legal system, and not only a formal 'lawsuit.'" *Id.*

72. 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); James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, 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).

73. *See, e.g.*, GOODMARK, *supra* note 2, at 67-69.

74. Secure Communities is a partnership between the Immigration and Customs Enforcement (ICE) division of the U.S. Department of Homeland Security and local law enforcement that encourages local law enforcement to check and report the immigration status of those who come into contact with police. *See* Editorial, *The 'Secure Communities' Illusion*, N.Y. TIMES (Sept. 5, 2014), <http://www.nytimes.com/2014/09/06/opinion/the-secure-communities-illusion.html>. Advocates have collected the stories of a number of women who called police for assistance after being abused and found themselves in deportation proceedings after local police reported them to ICE. *See, e.g.*, Shankar Vedantam, *Call for Help Leads to Possible Deportation for Hyattsville Mother*, WASH. POST (Nov. 1, 2010, 3:33 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/01/AR2010110103073.html>.

75. GOODMARK, *supra* note 2, at 72-73.

76. Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 72-78 (2013).

er, was fired by the Forrest County, Mississippi Sheriff's Office.⁷⁷ 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.⁷⁸ When transgender people call police for assistance, their requests for help are often ignored, or worse, they are arrested by the same police officers they called for help.⁷⁹ Transgender people have similarly fraught exchanges with courts and prosecutors.⁸⁰ As a result, very few transgender individuals willingly choose to interact with the criminal justice system when they are subjected to abuse.⁸¹ For many people subjected to abuse, "the process [of the criminal justice system] is the punishment."⁸²

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, "If 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?"⁸³ 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 designing justice based on individual needs. For those who are interested in retributive justice and are willing to seek justice within the constraints of the state-based system, that system should be available and should function sensitively and effectively.⁸⁴ Notwithstanding that caveat, however, the next section of this Article seeks to answer Harris' question about where to turn

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

78. *Id.*

79. Goodmark, *supra* note 76, at 76.

80. *Id.* at 81-82.

81. *Id.* at 83.

82. Miller & Hefner, *supra* note 43, at 163 (quoting M.M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979)).

83. 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).

84. 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* 128, 150 (Heather Strang & John Braithwaite eds., 2002) ("Adoption of a transformative process does not mean that domestic violence should be decriminalized."). For one vision of changes that could improve the function of the legal system, *see* GOODMARK, *supra* note 2, at 160-77.

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.⁸⁵ Proponents of restorative justice reject the language of "crime," arguing that "the state and the law should not have a monopoly on defining injury."⁸⁶ Instead, restorative justice seeks to repair harms caused by the actions of offenders by asking offenders to acknowledge the harm they have caused and to identify ways to redress that harm.⁸⁷ 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.⁸⁸ Underlying restorative justice efforts is the belief that social norms are best reinforced through social shaming rather than state-imposed sanction of offenders.⁸⁹ "[A]fter appropriate rituals of guilt, responsibility, and penance," restorative justice proponents argue, offenders should be reintegrated into society.⁹⁰ Restorative justice is also noteworthy for centralizing the needs and goals of victims of crime in its processes.⁹¹ 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.⁹² Offenders also report perceiving restorative justice processes as fair in both process and outcome.⁹³

Restorative justice is defined as much through the processes it employs to redress harm as it is through its goals. Those practices include victim-offender mediation;⁹⁴ conferencing, which brings together a number of individuals and can include the victim, the perpetrator, family and community members, and service providers;⁹⁵ and

85. Haldemann, *supra* note 26, at 677.

86. Harris, *supra* note 83, at 47.

87. *Id.* at 46.

88. C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 294 (2004).

89. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 178-79 (1989).

90. Harris, *supra* note 83, at 41-42.

91. *Id.* at 43; Kiss, *supra* note 45, at 71.

92. GOODMARK, *supra* note 2, at 170.

93. Miller & Hefner, *supra* note 43, at 4.

94. James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 27, at 5, 8.

95. *Id.* at 9.

circles—including peacemaking circles, used in some indigenous communities,⁹⁶ and sentencing circles, designed to allow the victim, family, and community to have input on sentencing in criminal cases.⁹⁷

While feminist antiviolence efforts and restorative justice share a number of principles,⁹⁸ 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.⁹⁹ First, feminists are concerned 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 the dangers such cases can present in their program design.¹⁰⁰ Second, feminists express skepticism that offenders will actually be held accountable for their actions through restorative justice, viewing such initiatives as “cheap-justice.”¹⁰¹ Third, feminists fear that turning to restorative justice and other alternatives to the criminal justice system risks obscuring the fact that intimate partner abuse is a crime and decreases the power of women to demand action from the criminal justice system.¹⁰²

Nonetheless, restorative justice could provide an alternative to what some characterize as an ineffectual criminal justice system response in cases involving intimate partner abuse.¹⁰³ Sociologist Lawrence Sherman, who published some of the earliest research on arrest policy in cases involving intimate partner abuse, points out, “Since there is no evidence that standard justice is any 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

96. *Id.*

97. 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.

98. Frederick & Lizdas, *supra* note 72, at 40-45.

99. Ptacek, *supra* note 94, at 19.

100. Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, *supra* note 84, at 42, 56-58. 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 189, 209 (Martha Albertson Fineman & Estelle Zinsstag eds., 2013).

101. Coker, *supra* note 14, at 85.

102. Ptacek, *supra* note 94, at 20.

103. GOODMARK, *supra* note 2, 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).

nothing.”¹⁰⁴ 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.¹⁰⁵

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 articulated a vision for deploying what some scholars have called transformative justice.¹⁰⁶ 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.¹⁰⁷ 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, “The 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 [E]ach incident of personal violence should be understood in a larger context of structural violence.”¹⁰⁸ 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.¹⁰⁹ While transformative justice is focused on security, it recognizes that no one vision of security will address the needs of all who suffer harm.¹¹⁰ Law professor Erin Daly has suggested that transformative justice must be contextual—

104. Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL’Y & L. 263, 281 (2000).

105. Miller & Hefner, *supra* note 43, at 21.

106. Coker, *supra* note 84. 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 generally 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 PERSP. 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.

107. Harris, *supra* note 83, at 57.

108. *Id.* at 58.

109. *Id.* at 49; see also Smith, *supra* note 27, at 263.

110. Harris, *supra* note 83, at 59.

transformative justice is deeply rooted in the time, place, and particular circumstances of the community seeking justice.¹¹¹

In the context of intimate partner abuse cases, transformative justice is concerned with creating and empowering communities, defined not through traditional institutions, but by people subjected to abuse. Those communities are charged with supporting the autonomy of people subjected to abuse.¹¹² While reintegration of abusers into the community may be a goal, that goal is secondary to the restoration of their partners' autonomy.¹¹³ Transformative justice projects consider 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.¹¹⁴ 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.¹¹⁵ Transformative justice recognizes that communities share accountability for intimate partner abuse when they fail to prevent harm from occurring or when they promote harm, but it focuses on the community's capacity to safeguard those who experience intimate partner abuse.¹¹⁶

Transformative justice seeks to improve the community's ability to respond to intimate partner abuse.¹¹⁷ Transformative justice projects provide community members with the skills to address intimate partner abuse and assess accountability on both the individual and the community levels.¹¹⁸ Creative Interventions, a transformative justice project in Oakland, California, has developed a number of tools and projects to address intimate partner abuse, including the Storytelling and Organizing Project (STOP) and the Community-Based Intervention Project.¹¹⁹ STOP collects stories of community engagement around incidents of intimate partner abuse, using the stories to inform others about how those interventions were carried

111. Daly, *supra* note 106, at 99, 113.

112. Coker, *supra* note 84, at 148.

113. *Id.* at 144.

114. *Id.* at 145.

115. *Id.* at 150.

116. Donna Coker & Ahjane Macquoid, *Alternative U.S. Responses to Intimate Partner Violence*, in *COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE* (Rashmi Goel & Leigh Goodmark, eds.) (forthcoming 2015).

117. *Id.*

118. *Id.*

119. *Tools*, CREATIVE-INTERVENTIONS, <http://www.creative-interventions.org/tools/> (last visited Mar. 2, 2015).

out and what lessons were learned.¹²⁰ Mimi Kim, the founder of Creative Interventions, explains that using such stories subverts the dominant paradigm of intervention by state actors “by privileging stories of violence intervention carried out within the spheres of home, family, friendships, work, and community.”¹²¹ In partnership with a number of other organizations working to end gender violence, Creative Interventions created the Community-Based Intervention Project, a community-organizing model focused on recruiting allies and training community facilitators—not professionals, but individuals who are from the community, familiar with the parties, understand the contextual dynamics of intimate partner abuse, and are removed from the crisis itself—to respond to discrete incidents of abuse.¹²²

The work of Creative Interventions offers one vision of how to actualize transformative justice in cases of intimate partner abuse. Another possibility for bringing transformative justice to life is through the creation of community-based justice forums centered on certain key principles. Those principles, and what form community-based justice might take, are the subject of the next two Parts.

II. ALTERNATIVE VISIONS OF JUSTICE FOR PEOPLE SUBJECTED TO ABUSE

Theories of justice abound. Some focus on victims of crime or harm; others focus 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

120. See *Welcome to the StoryTelling & Organizing Project*, STOPVIOLENCEEVERYDAY, <http://www.stopviolenceeveryday.org/> (last visited Mar. 2, 2015).

121. Mimi Kim, *Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability*, 37 SOC. JUST. 14, 18 (2011-12).

122. *Id.* at 22.

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 once their neighbors looked them directly in the eye and apologized for betraying them.¹²³

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.¹²⁴ For one survivor of sexual violence, harsh punishment was justice; for another, justice was support that enabled her to feel comfortable when her attacker was released into her community.¹²⁵

Individualized responses are particularly important for people subjected to abuse. Empowerment has long been a central focus of the battered women's movement.¹²⁶ Definitions of empowerment 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.¹²⁷ Confining people subjected to abuse to one vision of justice is disempowering. Only through individualized justice can people subjected to abuse exercise autonomy and self-determination. 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."¹²⁸ 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 abusers¹²⁹—may be too narrow to meet the particularized needs 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

123. Weinstein & Stover, *supra* note 19, at 4; *see also* MINOW, *supra* note 22, at 4 (laying out differing justice goals of survivors of violence).

124. Gutmann & Thompson, *supra* note 31, at 40.

125. 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).

126. GOODMARK, *supra* note 2, at 124-30.

127. *Id.* at 124; *see also* SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 320 (1982).

128. U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 10.

129. GOODMARK, *supra* note 2, at 106-35.

those who have been harmed. As law professor Martha Minow writes, “The 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.”¹³⁰ The need for voice has been paramount among survivors of human rights violations, who attest to the “healing power of telling their story.”¹³¹ 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.¹³² Voice is also linked to perceptions of fairness of process.¹³³ 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 in 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 control¹³⁴

One man who was blinded by a police officer during South Africa’s apartheid era likened his appearance before the TRC to having his physical injuries healed, stating: “I feel what has been making me sick all the time is the fact that I couldn’t tell my story. But now I—it feels I got my sight back by coming here and telling you the story.”¹³⁵

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.¹³⁶ Voice is also an essential element of restorative justice processes, where victims of crime are empowered to describe how the choices perpetrators

130. MINOW, *supra* note 22, at 58.

131. Kiss, *supra* note 45, at 72. Law professor Erin Daly describes the impact of testifying on those who came before South Africa’s TRC:

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, *supra* note 106, at 149. Daly’s observations speak not just to the power of voice, but to validation as well, a concept described *infra* Part II C.

132. Andre Du Toit, *The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition*, in TRUTH V. JUSTICE, *supra* note 22, at 122, 136; MINOW, *supra* note 22, at 84.

133. Miller & Hefner, *supra* note 43, at 144.

134. PHELPS, *supra* note 41, at 111.

135. MINOW, *supra* note 22, at 67.

136. Erez, *supra* note 44, at 551-52.

made changed victims' lives.¹³⁷ Given the constraints inherent in the criminal justice system, people subjected to abuse have sought out other venues to tell their unmediated stories. For example, fifteen women in Rhode Island came together to narrate their experiences of abuse through a one-act play.¹³⁸ 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.¹³⁹ Kathy, one of the cast members, explained: "I had a lot of reservations about whether my story was actually going to help anybody It was probably the most difficult thing I've done, but it was also therapeutic I learned that I didn't put myself there, and I did everything I needed to do to get out of it safely. I feel grateful."¹⁴⁰ 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.¹⁴¹ 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 utmost importance to her respondents.¹⁴² 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

137. 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.

138. Casey Nilsson, *Rhode Island's Survivors: October is Domestic Violence Awareness Month. See a Play Written and Performed by Local Survivors of Domestic Abuse, and Help Break the Chain of Violence.*, RHODE ISLAND MONTHLY (Oct. 3, 2014, 3:25 PM), <http://www.rimonthly.com/Blogs/ridaily/October-2014/Rhode-Islands-Survivors/>.

139. *Id.*

140. *Id.*

141. See, e.g., *Surviving Domestic Violence Is Within You!*, SURVIVING-DOMESTIC-VIOLENCE.COM, <http://www.surviving-domestic-violence.com/> (last visited Apr. 2, 2015) (blog on intimate partner violence); *The Silence of Domestic Violence: The Story and Ongoing Experience of a Domestic Violence Survivor*, SILENCE OF DOMESTIC VIOLENCE BLOG (Mar. 8, 2015, 2:43 PM), <http://thesilenceofdomesticviolence.blogspot.com/> (blog on experiencing intimate partner violence); *Where to Find Help: Chats and Message Boards*, WOMENSLAW.ORG, http://www.womenslaw.org/gethelp_national_chats.php (last visited Apr. 2, 2015) (describing resources).

142. Herman, *supra* note 1, at 585.

their effort to stop it.”¹⁴³ 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 TRC, saw that 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 are right, you were damaged, and it was wrong.’”¹⁴⁴ 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.¹⁴⁵ Validation affirms the victim’s personhood and restores the victim’s dignity, a condition taken from the victim by abuse.¹⁴⁶ Recognizing the importance of validation, South Africa’s TRC worked intentionally to create “a tone of care-giving and a sense of safety.”¹⁴⁷ 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.¹⁴⁸

D. Vindication

If validation is an acknowledgment of harm, vindication is “a clear and unequivocal stand in condemnation of the offense.”¹⁴⁹ Psychologist Judith Herman’s research indicates that next to validation, vindication is what victims of physical and sexual abuse most equate with justice.¹⁵⁰ Vindication requires the community to publicly stand with the victim of conflict and to hold offenders accountable for their actions. That public sanction can come in many forms: through criminal punishment,¹⁵¹ 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, “Exposure is

143. JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES 77 (1998). *Accord* JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 152-53 (1999); Erez & Belknap, *supra* note 47.

144. MINOW, *supra* note 22, at 60.

145. *Id.* at 70-71; Erez, *supra* note 44, at 553.

146. David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in TRUTH V. JUSTICE, *supra* note 22, at 99, 102.

147. MINOW, *supra* note 22, at 72.

148. PHELPS, *supra* note 41, at 110.

149. Herman, *supra* note 1, at 585.

150. *See id.* at 585; *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.”).

151. Kiss, *supra* note 45, at 74.

punishment. It is a powerful component of accountability.”¹⁵² 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.¹⁵³

E. Finding Individualized Justice, Voice, Validation, and Vindication Through Retributive, Restorative, and Transformative Justice

Individualization, voice, validation, and vindication can be achieved to greater or lesser extents in the justice systems discussed in Part I of this Article. Individualized justice might be easier to achieve in restorative and transformative justice systems, which are not tied to due process requirements or state norms, than through the retributive criminal justice system—unless, of course, the individual’s preference is for punishment meted out by the state. All of the systems offer opportunities for voice but mediate voice in different ways. In the retributive system, people subjected to abuse can testify, though that testimony is filtered through the rules of evidence and the structure of a criminal trial. They can provide victim impact statements, though that opportunity comes only after a verdict has been rendered. Restorative and transformative justice processes like conferences, mediations, truth commissions, and community interventions provide forums in which people subjected to abuse can share their stories, but those stories might be mediated by what an individual feels comfortable disclosing to community members. A criminal conviction and sentence can serve as validation and vindication when the sentence is commensurate with the victim’s assessment of the harm; a community’s understanding and condemnation of wrongdoing and provision of support can serve the same function. Determining whether justice has been done in cases involving intimate partner abuse turns on the individual’s experience of both the process and the outcome.

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

152. Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE, *supra* note 22, at 3, 16.

153. Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in TRUTH V. JUSTICE, *supra* note 22, at 261, 268.

some people subjected to abuse do 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 provide an alternative option for those seeking justice.

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.¹⁵⁴ While some have argued that this preference for informal justice may indicate that marginalized communities find it difficult to access formal justice systems,¹⁵⁵ this preference may also reflect an unwillingness to submit themselves to the jurisdiction of the state.¹⁵⁶ International human rights organizations are beginning to recognize that informal justice systems are legitimate means of delivering justice to those who cannot, or will not, engage with state-based justice systems.¹⁵⁷ The experiences of those who have used international human rights processes like truth commissions, *gacaca* courts,¹⁵⁸

154. U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, 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., UNDP, UNICEF, & UN WOMEN, *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 eighty percent of disputes in some countries are resolved through informal justice).

155. U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 66.

156. 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 154, at 76-77.

157. *Id.* at 68. Under international law, states maintain their responsibility to ensure that informal justice systems comply with human rights standards. *See id.* at 11.

158. 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 (2007). Elders, known as *inyangamugayo*, or “persons of integrity,” heard community disputes over property, family relations, inheritances, and other matters. Carpenter, *supra* note 18, at 643. 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 (2004); *see also* Maureen E. Laflin, *Gacaca Courts: The Hope for Reconciliation in the Aftermath of the Rwandan Genocide*, THE ADVOC., 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 communi-

and *nari adalats*¹⁵⁹ demonstrate that it is possible to achieve individualized justice, voice, validation, and vindication through non-state based processes. These models could inform the development

ty 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 and 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. See Nessel, *supra*, 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. See *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.*

159. 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.* *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 (2006). 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). See Nandita Bhatla & Anruadha 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 per month. Kulsum Mustafa, *Quiet! The Women’s Court Is in Session*, *BOLOJI.COM* (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. See 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 in working with police and other officials. See Mustafa, *supra*. Members of the *nari adalats* travel throughout the region, convening in public places to hear grievances and to give advice. See MERRY, *supra*, at 156; see also 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. See Bhatla & Rajan, *supra*, at 1660. During the arbitration process, the complainants are 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. INT’L CTR. FOR RESEARCH ON WOMEN, *WOMEN-INITIATED COMMUNITY LEVEL RESPONSES TO DOMESTIC VIOLENCE: SUMMARY REPORT OF THREE STUDIES* 51 (2002).

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 salons¹⁶⁰—to ensure that justice is visible on the ground. These forums would not be tied to the state. 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 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."¹⁶¹

Drawing from the truth commission model, the forums would not be bound by the rules of the adversarial system¹⁶² or restricted to information deemed relevant by a judge.¹⁶³ Like truth commissions, community justice forums would be able to consider a broader range of information without sacrificing the ability to ascertain the truth.¹⁶⁴ Eschewing the adversarial process creates a climate within which those subjected to abuse can feel more comfortable and free in telling their stories.¹⁶⁵ 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 TRC, "the needs of the victims [drive] the proceedings."¹⁶⁶

160. Smith, *supra* note 10, at 944.

161. 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 100, at 215, 242 (citations omitted).

162. 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. *Id.* at 234-35, 241-42.

163. Rotberg, *supra* note 152, at 15.

164. Law professor Erin Daly argues that the willingness to hear a range of information—victim narratives as well as "historical and other forms of truth"—indicates the victim-centered nature of the process. Daly, *supra* note 106, at 148.

165. 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, *supra* note 11, at 152. *Accord* PHELPS, *supra* note 41, at 109.

166. Myers, *supra* note 11, at 116; *see also* MINOW, *supra* note 22, at 60; 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); Rotberg, *supra* note 152, at 10, 11. But, warns law professor Martha Minow, truth commissions must be careful how

One goal of the proceedings would be to create space (both physical and psychic) to facilitate the telling of stories about intimate partner abuse and to provide redress other than criminal punishment. Transitional justice mechanisms have enabled voices that have traditionally been subjugated to come to the fore. For example, the victim-centered focus of truth commissions enhances participants' abilities to achieve voice in that process. South Africa's truth commission allowed victims to tell their stories without interruption and created a setting in which stories could comfortably be told, with sympathetic listeners and the provision of support both before and after testimony.¹⁶⁷ "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 experience."¹⁶⁸ Telling such stories is not easy; as reporter Antje Krog writes of South Africa's TRC, "Over 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."¹⁶⁹ 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."¹⁷⁰

These forums could also provide space for stories that the legal system has been reluctant to hear. The legal system is responsive to a narrow set of claims about abuse made by "victims" who present with a particular set of characteristics: weak, meek, passive, appropriately emotional but not overly so.¹⁷¹ People who fight back against their abusers, who are angry about what has been done to them, or who otherwise fail to conform to victim stereotypes may find their voices muffled in or their stories rejected by the legal system.¹⁷² Community justice forums would provide a space in which non-conforming stories could be shared.

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 22, 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.

167. Haldemann, *supra* note 26, at 709.

168. Shriver, *supra* note 22, at 15.

169. ANTJIE KROG, COUNTRY OF MY SKULL 132 (1998).

170. MINOW, *supra* note 22, at 67.

171. GOODMARK, *supra* note 2, at 54, 63-70.

172. See generally Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008).

Community justice forums could also help people subjected to abuse and their partners to re-order their ongoing relationships. In many cases of intimate partner abuse, the parties continue to be involved in each other's lives in some way—as partners, as co-parents, or as members of the same community—after a criminal or civil justice system intervention. A recent study in Bennington, Vermont's Integrated Domestic Violence Court found that seventy percent of the couples seen by that court either were not separated or did not plan to remain separate.¹⁷³ Even when couples are separated, they may have ongoing relationships because they are co-parenting their children (by choice or court order) or because they live and work in the same small geographic areas. Using restorative practices like conferencing or victim-offender mediation, facilitated by experts in intimate partner abuse, couples could create plans that acknowledge the past abuse in their relationships, establish clear and concrete expectations about those relationships going forward, and determine appropriate sanctions to be enforced by the community if those agreements are breached.¹⁷⁴

The benefits of providing a forum for victims of harm extend beyond the individual. Sharing their narratives not only restores dignity to the witnesses,¹⁷⁵ but is also a more effective way to communicate with the wider community about the harms suffered by the storytellers.¹⁷⁶ Community justice forums could create new spaces to hear the voices of people subjected to abuse and of those who abuse. 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

173. David Suntag, DV and the Traditional Court Model: Why We Fail & What We Can Do About It: The Integrated Docket (IDV) Alternative, PowerPoint Presentation at Restorative Justice Conference, Responsive Regulation & Complex Problems, Burlington, Vermont (July 18, 2014) (on file with the author).

174. This type of project could (and should) be based on the work of Joan Pennell, who has created, implemented, and studied conferencing programs in the context of intimate partner abuse and child protection. See, e.g., Joan Pennell & Mimi Kim, *Opening Conversations Across Cultural, Gender, and Generational Divides: Family and Community Engagement to Stop Violence Against Women and Children*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 27.

175. MINOW, *supra* note 22, at 17.

176. James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 LAW & CONTEMP. PROBS. 123, 134 (2009). Antje Krog, who reported on South Africa's TRC, writes: “It 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 169, at 112-13.

pain, while also affirming a position of collective solidarity with them.¹⁷⁷ Such a recognition sends a message that individuals matter and that their suffering matters.¹⁷⁸

Community-based justice forums can help to ensure that perpetrators of abuse are held accountable for their actions. Some have questioned whether alternative justice mechanisms can hold individuals accountable in ways that are comparable to the criminal justice system.¹⁷⁹ To a certain extent, the answer to that question depends on what kind of accountability an individual seeks. For example, a truth commission 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 of wrongdoers' actions and ensuring that perpetrators of harm suffer some consequence for what they have done.¹⁸⁰ But law professor Brenda Smith notes that public shaming of the kind that occurs in a community justice forum can also be a powerful form of accountability.¹⁸¹ India's *nari adalats* adhere to the belief that social accountability is a more powerful tool than legal sanctions.¹⁸² Although the *nari adalats* use the threat of legal intervention to compel com-

177. Haldemann, *supra* note 26, at 710.

178. MINOW, *supra* note 22, 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).

179. *Contra* DECLAN ROCHE, ACCOUNTABILITY IN RESTORATIVE JUSTICE 160-87 (2003) (refuting arguments that restorative justice mechanisms cannot hold abusers accountable).

180. Haldemann, *supra* note 26, at 712, 714.

181. E-mail from Brenda Smith to author (July 7, 2010, 18:02:02 EDT) (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. *Id.*

Antje Krog describes a different kind of accountability in the South African context:

Just before midnight, six black youths walk into the Truth 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 169, at 159.

182. INT'L CTR. FOR RESEARCH ON WOMEN, *supra* note 157, at 68.

pliance,¹⁸³ they often rely on humor and shaming to secure compliance with their recommendations and resolutions.¹⁸⁴

Alternative justice forums, like truth commissions, can also hold institutions and systems accountable.¹⁸⁵ Through the truth commission process, communities have not only validated the stories of individual victims but also acknowledged their own complicity in those wrongs. In South Africa, for example, 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 from this evil system, have experienced regret or shame or embarrassment.”¹⁸⁶ 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.¹⁸⁷

Community justice proceedings would be tailored to the needs of people subjected to intimate partner abuse, including, but not limited to, women subjected to abuse. Some truth commissions, particularly South Africa’s TRC, have been criticized for failing to be sufficiently attentive to the needs of women subjected to abuse or harm.¹⁸⁸ 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.¹⁸⁹ As law professor Peggy Maisel recounts, “Instead of asking sensitive and well-placed questions, the interviews failed to recognize the women’s pain and perpetuated the violence that created it.”¹⁹⁰ In response to a report documenting the problems of taking a gender-neutral ap-

183. *Id.* at 68.

184. MERRY, *supra* note 157, at 157.

185. Shriver, *supra* note 22, at 10.

186. Goldstone, *supra* note 22, at xii.

187. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 *LAW & INEQ.* 263, 272 (2003). As law professor Sherrilyn Ifill explains, “Lynching 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.

188. 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, *supra* note 11, at 153-59; Maisel, *supra* note 161, 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).

189. Maisel, *supra* note 11, at 157.

190. *Id.* at 159.

proach 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.¹⁹¹ Those practices included allowing women to make confidential statements, permitting women to have their statements taken by other women, holding closed hearings presided over by women commissioners, and providing psychological and social work support to women who testified.¹⁹² Those techniques created an official yet safe space within which women could give public voice to their experiences.¹⁹³

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 would not feel comfortable participating in *gacaca* courts.¹⁹⁴ Those fears seem to have been 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.¹⁹⁵ Concerns about safety have also been raised.¹⁹⁶ A problematic and

191. Borer, *supra* note 188, at 1177; Maisel, *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." Maisel, *supra* note 11, at 160.

192. Borer, *supra* note 188, at 1177. Despite these changes, however, many women still refused to testify. Maisel, *supra* note 11, at 160.

193. 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., 2006). 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.*

194. There is some disagreement among scholars as to whether and when women were permitted to participate in *gacaca* historically. Compare Goldstein Bolocan, *supra* note 158, 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).

195. Wells, *supra* note 194, at 185-86, 193.

196. *Id.* 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 them 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.

important question, given the widespread rape and sexual violence during the genocide, was whether *gacaca* tribunals were 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.¹⁹⁷ Moreover, as a result of their precarious economic situations, women desperately needed community support, support that could be lost if they incurred the shame that could come with testifying before a *gacaca*.¹⁹⁸

Learning from the South African experience, Sierra Leone's truth commission made gender an explicit consideration from the body's inception.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ 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.²⁰² Women testified at open hearings but were only questioned by women commissioners.²⁰³ Their privacy was guarded carefully; women testified behind screens and were given private spaces for waiting in order to safeguard their identities.²⁰⁴ Moreover, gender was pervasive in the final report of Sierra Leone's

E-mail from Elizabeth Keyes, Univ. of Balt. Sch. of Law, to author (Sept. 19, 2013, 13:29 EST) (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 (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 to author, *supra*. 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.

197. Amick, *supra* note 125, at 62-63. Nonetheless, as Lawrencia, a gang-rape survivor, told Emily Amick, "[N]othing 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.

198. Wells, *supra* note 194, at 183, 191.

199. Maisel, *supra* note 11, at 165-66; Zinsstag, *supra* note 100, at 207.

200. Maisel, *supra* note 11, at 166.

201. Zinsstag, *supra* note 100, at 205-07.

202. Maisel, *supra* note 11, at 167-68.

203. See *id.* at 168. Other truth commissions have adopted similar measures. Borer, *supra* note 188, at 1180.

204. Maisel, *supra* note 11, at 168-69.

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.²⁰⁵ 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.²⁰⁶

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.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ 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.²¹⁰ Maisel cautions, however, that education about intimate partner abuse may first be necessary to ensure widespread community support for the truth

205. *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; the Peruvian TRC also established a unit dedicated to gender. Susanne Buckley-Zistel, *Truth Commissions, Human Rights and Gender. Normative Changes in Transitional Moments*, paper presented at ISA Human Rights Joins Conference, Istanbul, Kadir Has University (June 16-18, 2014); U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 95.

206. Wells, *supra* note 194, 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 125, at 45; Nessel, *supra* note 158, 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. Nessel, *supra* note 158, at 120.

207. Maisel, *supra* note 11, at 178.

208. *Id.* at 180.

209. *Id.* at 180-81.

210. *Id.* at 182-83.

commission process.²¹¹ 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 to help them work to end abuse and rebuild community.²¹²

The community justice forum'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; low income people; and others from marginalized communities.²¹³ The protections made available to women in some justice forums would also be available to other groups. This broader casting of the protections created by the truth 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.²¹⁴ 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 any opportunity to seek justice.

Members of the community justice forum could reach out to potential participants through general 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. People subjected to abuse would have to opt in to community justice. Vesting the power to invoke these processes in people subjected to abuse should help to assuage concerns that the claims of women and other marginalized groups would be devalued and about the manipulation of informal justice systems by partners with greater power in the relationship.²¹⁵ Testimony could be given publicly or *in camera*, orally or in writing, anonymously or by name.²¹⁶ Abusers would also be permitted to provide testimony, but only after admitting and accepting responsibility for

211. *Id.* at 180.

212. *Id.* at 182-83.

213. Establishing a broad mandate is essential in setting a tone for the work of the body and in ensuring inclusion. Maisel, *supra* note 161, at 222 (arguing that the narrow mandate of the South African TRC led to the exclusion of the voices of women).

214. *See, e.g.*, Goodmark, *supra* note 76, at 87-88.

215. *See supra* Part I.A; *see also* U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 70-71.

216. *See* Maisel, *supra* note 161, at 251; *see also* KERRIGAN ET AL., *supra* note 154, 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.").

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.²¹⁷ Hearing from abusers may be central to meeting the justice goals of individuals 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.²¹⁸ At a minimum, the definition should encompass physical, psychological/emotional, economic, reproductive, and spiritual harm.²¹⁹ Moreover, the definition should be revisited as social science research identifies additional ways in which abusers deprive their partners of autonomy and liberty.²²⁰

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 specific claims made or issues confronted 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 or coerced into accepting a resolution that did not meet their goals. This type of effort is most likely to create concern among advocates for people subjected to abuse, raising the specter of mediation and the host of critiques of that process.²²¹ A commitment to achieving the justice goals of people subjected to abuse may require this type of close negotiation with their abusers, however, particularly when they are choosing to remain in relationships with their partners or have children in common. 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, as is clear in the case of the *nari adalats*. As Nandita Bhatla and Anuradha Rajan write, “[T]he arbitration process is based on a fundamental perspective that decisions can be more effec-

217. Miller & Hefner, *supra* note 43, at 156-57.

218. 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).

219. GOODMARK, *supra* note 2, at 45.

220. *Id.* at 34-38.

221. *Id.*

tively enforced if the people of the community are involved—that they own, control and validate the decisions.”²²² 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.²²³ Moreover, the *nari adalats* are transforming the communities in which they operate by changing community norms about the treatment of women.²²⁴ 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.²²⁵

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 and charged with hearing 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).²²⁶

Involving the community as listeners serves a number of goals. Community members can convey the sense that abuse will not be tolerated and can set common 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

222. Bhatla & Rajan, *supra* note 159, at 1661. Tara Urs notes that in Cambodia, domestic violence is viewed not as a family matter, but as a community matter; in two out of three cases of domestic violence, a traditional dispute resolution system known as *somroh-somruel* is used to resolve cases at the community level. Tara Urs, *Coercive Feminism*, 46 COLUM. HUM. RTS. L. REV. 85, 122-23 (2014).

223. Bhatla & Rajan, *supra* note 159, at 1661. 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. U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 73.

224. Bhatla & Rajan, *supra* note 159, at 1662.

225. Goldstein Bolocan, *supra* note 158, 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). *Gacaca* tribunals seek to heal the community through securing confessions and requiring that perpetrators perform community service (including tilling fields, donating goods and labor, and helping the victim's family). Nessel, *supra* note 158, at 117.

226. KERRIGAN ET AL., *supra* note 154, at 168.

to abuse.²²⁷ 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 opportunities to discuss allegations and to challenge community norms around violence.²²⁸ 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."²²⁹

Community justice forums can change how 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*.²³⁰ Exposing these issues to community scrutiny 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.²³¹ Moreover, perpetrators' justifications for violence are robbed of power when the *nari adalats* refuse to accept them, creating the perception in the community that violence is never acceptable.²³² Gender stereotypes that give men the license to use violence and that 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.²³³ Community members feel greater responsibility for reacting to violence, and women subjected to abuse view their communities as primary sources of support that enable them to seek assistance.²³⁴ Finally, the *nari adalats* raised the status of women within civil society by asserting women's rights to publicly assess justice.²³⁵ Holding forums in local communities makes justice visible on the ground; community mem-

227. See *infra* text accompanying notes 276-83.

228. Goldstein Bolocan, *supra* note 158, at 382-83.

229. Wells, *supra* note 194, at 177. But see Laffin, *supra* note 158, at 21.

230. MERRY, *supra* note 159, at 156; Bhatla & Rajan, *supra* note 159, at 1659.

231. Bhatla & Rajan, *supra* note 159, at 1661.

232. *Id.* at 1662.

233. *Id.*

234. *Id.*; INT'L CTR. FOR RESEARCH ON WOMEN, *supra* note 159, at 73.

235. Bhatla & Rajan, *supra* note 159, at 1663; RE: *Creating Women-Sensitive Systems of Justice*, BEST PRACTICES FOUND. (Nov. 10, 2012) [hereinafter *Women-Sensitive Systems of Justice*], <http://bestpracticesfoundation.wordpress.com/2012/11/10/hello-world/>.

bers are exposed both to the harms done and to the justice dispensed as a result of those harms.²³⁶

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.²³⁷ Community-based justice forums would explore the interconnections between the actions of individual perpetrators and the community 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 transitional justice. 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.²³⁸ The provision of reparations is particularly essential for justice to be done. As Genevieve Painter writes, "For 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."²³⁹ Repa-

236. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL'Y 355, 377 (2002); Goldstein Bolocan, *supra* note 158, at 384.

237. Such actors might include "law enforcement officers, prosecutors, and judges, but also doctors, social workers, the media, religious institutions, neighbors, and the members of the immediate family of both the woman and her batterer." Maisel, *supra* note 161, at 251.

238. As law professor Erin Daly explains, uncovering truth cannot be transformative unless those truths are shared with the public. Daly, *supra* note 106, at 130.

239. Genevieve Renard Painter, *Thinking Past Rights: Towards Feminist Theories of Reparations*, 30 WINDSOR Y.B. ACCESS TO JUST. 1, 6 (2012). *But see* David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*,

rations are a concrete means of alleviating pain and redressing harm.²⁴⁰ But reparations can also serve as “the physical embodiment of a society’s recognition of, and remorse and atonement for, harms inflicted,” reimbursing victims for loss while reintegrating victims into the community.²⁴¹ Reparations can help to shift the community’s moral condemnation in the aftermath of violence. Law professor Ruth Rubio-Marín 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,”²⁴² 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.²⁴³ In the context of sexual violence, Colleen Duggan and Adila M. Abusharaf have argued that reparations can change societal norms around the responses to violence by fostering a societal consensus that such claims must be heard and that accountability for those crimes be established, and by identifying the structural conditions that enabled such abuse to occur in the first instance.²⁴⁴ Debate around the creation of reparation programs can help to surface these issues and begin the change process.²⁴⁵

Reparations can be moral or material.²⁴⁶ Moral reparations include apologies and acknowledgments of harm,²⁴⁷ either from individual abusers or from a society that failed to adequately address intimate partner abuse.²⁴⁸ Such acknowledgments serve to “bear public wit-

87 WASH. U. L. REV. 1043, 1058-70 (2010) (cataloging the objections to the provision of reparations).

240. Buckley-Zistel, *supra* note 205, at 11.

241. Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, in MY NEIGHBOR, MY ENEMY, *supra* note 19, at 122.

242. Rubio-Marín, *supra* note 218, at 75.

243. *Id.* at 76.

244. Colleen Duggan & Adila Abusharaf, *Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice*, in THE HANDBOOK OF REPARATIONS 624-25 (Pablo de Greiff ed., 2006).

245. *Id.* at 637.

246. See Rubio-Marín, *supra* note 218, 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 239, at 20.

247. Painter, *supra* note 239, at 20.

248. See, e.g., U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 21 (explaining that in response to the Mexican government’s failure to adequately respond to the murders of hundreds of women in Ciudad Juárez, Mexico was ordered to provide “symbolic redress

ness to the crimes committed.”²⁴⁹ 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.”²⁵⁰ Material reparations can be economic or come in the form of services for the person subjected to abuse.²⁵¹ Economic reparations could reimburse people subjected to abuse for the costs of medical care, lost employment time or opportunities, property damage, or lost housing.²⁵² 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.²⁵³ Material reparations can also take the form of services for people subjected to abuse. In a number of post-conflict societies, for example, female victims have received preferential access to health services and free health care as reparations.²⁵⁴ In Guatemala, reparations were designed to help women cope with the psychosocial consequences of sexual violence and to dignify victims of violence.²⁵⁵ In South Africa, ninety percent of the victims who testified requested housing as reparations.²⁵⁶ Other material reparations address structural inequities in access to business

and guarantees of non-repetition, including a commitment to investigate the murders and implement gender training for the police”).

249. Painter, *supra* note 239, at 20.

250. Daly, *supra* note 106, at 135.

251. Rubio-Marin, *supra* note 218, 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), and two received it. PTACEK, BATTERED WOMEN IN THE COURTROOM, *supra* note 143, at 131-32. 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.

252. Haldemann, *supra* note 26, at 728.

253. *Id.* 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 218, at 93-94.

254. Painter, *supra* note 239, 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 to avoid being 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 that reparations specifically tailored to the needs of victims of sexual and reproductive violence have not been implemented, though a number of post-conflict societies have discussed them. Rubio-Marin, *supra* note 218, at 72.

255. Claudia Paz & Paz Bailey, *Guatemala: Gender and Reparations for Human Rights Violations, in WHAT HAPPENED TO THE WOMEN?*, *supra* note 193, at 112-13.

256. Painter, *supra* note 239, at 17.

capital and opportunities; for example, in Sierra Leone, women requested access to micro-credit and skills training,²⁵⁷ while in Peru, women demanded education for their children and jobs for themselves, as well as physical and mental health services and compensation.²⁵⁸ 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.²⁵⁹ Reparations might also be forward looking, focusing on future prevention of, or protection from, gender-based violence.²⁶⁰

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, "Even the suggestion that it can may seem offensive."²⁶¹ But, as in tort law, material reparations can counterbalance a loss that cannot truly be restored with some other form of repayment.²⁶² Moreover, monetary reparations can "become symbolic objects around which wrongs are acknowledged,"²⁶³ 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."²⁶⁴

257. *Id.* at 18; *see also* GOODMARK, *supra* note 2, at 186-91 (discussing how micro-finance could be used to address the needs of women subjected to abuse); Kristin V. Brown, *Business Helped Them to Escape: Program Helps Survivors of Domestic Abuse Build Ventures and Confidence*, TIMES UNION, <http://www.timesunion.com/local/article/Business-helped-them-to-escape-4362170.php> (last updated Jan. 5, 2015).

258. Julie Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity, in WHAT HAPPENED TO THE WOMEN?*, *supra* note 193, 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.

259. Goldblatt, *supra* note 193, at 82.

260. Colleen Duggan, *Foreword to WHAT HAPPENED TO THE WOMEN?*, *supra* note 193, at 18.

261. MINOW, *supra* note 22, 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." U.N. ENTITY FOR GENDER EQUALITY, *supra* note 48, at 97.

262. Haldemann, *supra* note 26, at 728-29.

263. Duggan & Abusharaf, *supra* note 244, at 641. Painter, *supra* note 239, at 25-26.

264. MINOW, *supra* note 22, at 93; *see also* Haldemann, *supra* note 26, at 729.

The guiding principle for the determination of reparations is that the person subjected to abuse deems the remedy acceptable.²⁶⁵ Too often, penalties in the criminal justice system are assessed based on what the abuser has and is willing to give: money, an apology, and a promise to stay away. In a community justice forum, the remedy cannot be what the abuser is willing to give but 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 wants to apologize should not determine whether that apology is made; no apology should be given unless the person subjected to abuse is open to receiving that message.²⁶⁶ 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.

The voices of victims must shape any reparations scheme. In the context of violence against women, experience has shown that it is essential to have input from the women affected, understanding that not all women will want the same things from a reparations program.²⁶⁷ Without those voices to counteract gender bias within the system creating it, a reparations program is likely to have gender-biased results.²⁶⁸

Reparations are rarely used to compensate people subjected to abuse in the United States.²⁶⁹ 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 vic-

265. Rubio-Marin, *supra* note 218, 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 159, at 1661. Those concerns might include a desire to repair their marriages; fear about the lack of economic support for themselves or their children, should the relationship end; or an unwillingness to return to their natal families.

266. In the South African TRCs, victims were free to accept, refuse, or ignore apologies. MINOW, *supra* note 22, at 114.

267. Ruth Rubio-Marin, *The Gender of Reparations: Setting the Agenda, in WHAT HAPPENED TO THE WOMEN?*, *supra* note 193, at 28.

268. *Id.* at 31.

269. Reparations also have not 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.” *Id.* at 23.

tims.”²⁷⁰ Moving away from the criminal justice system and towards community-based justice might create the space to make reparations more readily available.²⁷¹

C. What Constitutes Success?

Community justice forums would need to engage in ongoing evaluation to determine whether their efforts are successful. Success should be evaluated on both individual and community levels. Success would hinge on whether those subjected to abuse believe that the process has given them the justice they sought, however they might define it. Success would also be reflected in changes in community norms around intimate partner abuse.²⁷² Since the inception of the battered women’s movement, advocates have understood that decreasing intimate partner abuse required changing the perception that such abuse was acceptable in intimate relationships and have worked towards that goal.²⁷³ Public reactions to recent high profile cases of intimate partner abuse beg the question of how successful the effort to change community norms has been.²⁷⁴ Community justice forums could reinvestigate those efforts.

There is some evidence that community-based justice is changing attitudes regarding intimate partner abuse 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.²⁷⁵ Both men and women reported that the process was transparent, neutral, and fair, and they expressed appreciation for the work of the *nari adalats*.²⁷⁶ Women described experiencing

270. 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 9, 21 (2011).

271. 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, *supra* note 267, at 34.

272. Ramji-Nogales, *supra* note 7, at 3 (arguing that the measure of success in transitional justice should be whether social norms opposing mass violence have been successfully reconstructed).

273. SCHECHTER, *supra* note 127, at 71.

274. See, e.g., Laken Litman, *Female Ravens Fans Defend Ray Rice: “I’m Keeping My Jersey.”* U.S.A TODAY (Sept. 11, 2014, 7:38 PM), <http://ftw.usatoday.com/2014/09/ray-rice-fans>.

275. MERRY, *supra* note 159, 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 INT’L CTR. FOR RESEARCH ON WOMEN, *supra* note 159, at 53-55.

276. INT’L CTR. FOR RESEARCH ON WOMEN, *supra* note 159, at 54-55. Despite their explicitly feminist mandate, *nari adalats* have been seen as neutral because both sides are

maan samman ke saath nyaya, translated as justice with honor and dignity.²⁷⁷ Women who used the *nari adalats* reported greater confidence in their abilities to address new problems in their relationships and improvements in their relations with their husbands.²⁷⁸ Although the *nari adalats* hear a range of issues involving women, they have been deployed most successfully in cases of intimate partner abuse.²⁷⁹ 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).²⁸⁰ Even in those cases where the violence did not stop, however, women reported an increase in confidence,²⁸¹ 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.”²⁸²

There have been, however, unintended consequences from the growing influence of the *nari adalats*. First, the *nari adalats* report an increase in the number of cases raised by men.²⁸³ 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.²⁸⁴ The *nari adalats* may have less influence in cases involving issues that the law currently does not reach.²⁸⁵ It is important to note, however, that complete cessation of violence was not necessary for women to feel more empowered and self-confident

given the opportunity to speak, facts are collected, and consensus with members of the community is achieved. Bhatla & Rajan, *supra* note 159, at 1662.

277. INT’L CTR. FOR RESEARCH ON WOMEN, *supra* note 159, at 54.

278. *Id.* at 53-54.

279. MERRY, *supra* note 159, at 156-57 (citing KRISHNAMURTHY, *supra* note 275). 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 159.

280. Bhatla & Rajan, *supra* note 159, 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 *Women-Sensitive Systems of Justice*, *supra* note 235 (“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.” (quoting a member of a *nari adalat* in Karnataka)).

281. Bhatla & Rajan, *supra* note 159, 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*. *Women-Sensitive Systems of Justice*, *supra* note 235.

282. Bhatla & Rajan, *supra* note 159, at 1663.

283. INT’L CTR. FOR RESEARCH ON WOMEN, *supra* note 159, at 55. A typical complaint: my wife has run away, with “no reflection of the real problem, and certainly not of his role.” *Id.*

284. *Id.* at 71.

285. *Id.* at 60-61, 64, 68-69.

after the intervention of the *nari adalats*.²⁸⁶ In their study of the *nari adalats*, Bhatla and Rajan found that the community perceived *nari adalats* as “sites where ‘justice’ is done.”²⁸⁷

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 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 that right 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.²⁸⁸ That philosophy is reflected in the statement of former prosecutor Jeanine Pirro, who served on the Attorney General’s Task Force on Family Violence, which ushered in the era of criminal justice intervention in intimate partner abuse cases: “We believe [intimate partner abuse] is a criminal problem and the way to handle it is with criminal justice intervention.”²⁸⁹

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 the ultimate determination of the court. 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 is clearly criminal as a mat-

286. *Id.* at 71.

287. Bhatla & Rajan, *supra* note 159, at 1662; *see also* Mustafa, *supra* note 159 (quoting J. Sumita, a rural judge: “Women bring their problems to these courts without any reservations. They have full faith that they will get justice here.”).

288. GOODMARK, *supra* note 2, at 16-19.

289. WILLIAM L. HART ET AL., ATTORNEY GENERAL’S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 11 (1984).

ter of law. 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.²⁹⁰ 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.²⁹¹

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 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.²⁹² 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

290. 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, CUNY Sch. of Law, *The U.S. Context: Outcomes of the U.S. Regional Due Diligence Consultation, Remarks at Northeastern University School of Law's Program on Human Rights Institute, Human Rights and Violence Against Women: Applying the Due Diligence Framework* (Nov. 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, *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).

291. Informal justice systems can fail to provide human rights protections in a number of ways, including by failing to make decisions that comport with basic human rights principles and by failing to treat women and minority groups as equals. KERRIGAN ET AL., *supra* note 154, at 90.

292. A related question is why people experiencing intimate partner abuse should be able to opt out of the criminal justice system when other victims of crime cannot. One answer is that these cases involve the most intimate (and constitutionally protected) relationships in people's lives; through mandatory interventions, the state is given the power to terminate these relationships without the input or agreement of the parties to that relationship, resulting in what Jeannie Suk has called a "state-imposed de facto divorce." Jeannie Suk, *Criminal Law Comes Home*, 116 *YALE L.J.* 1, 8 (2006). The only other criminal intervention that allows the state to re-order private family relationships in this way occurs in the context of child abuse and neglect, where the state has an independent duty to protect children who are thought to be unable to protect themselves. Equating people subjected to abuse with children is profoundly problematic.

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.²⁹³ 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.²⁹⁴ In addition, the economic obstacles to participating in prosecution (taking time from work, transportation, and 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 inaccessible.

Another concern is that creating community-based justice systems might relieve the state of its responsibility to respond to intimate partner abuse, relinquishing the hard fought gains of the last forty years.²⁹⁵ Similar arguments have been made about other community-based justice systems. Some have questioned, for example, whether the endorsement of *gacaca* will allow Rwanda to ignore needed reforms in the criminal justice system.²⁹⁶ It is crucial to be clear that community-based justice functions 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 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

293. KERRIGAN ET AL., *supra* note 154, at 7.

294. *See, e.g.*, Lambert v. State, 61 A.3d 87 (Md. Ct. Spec. App. 2013).

295. *See, e.g.*, Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1689-92 (2004).

296. Nessel, *supra* note 158, at 103 (citing the need for gender sensitivity and witness protection in the criminal courts).

alternate justice system proves unsatisfying.²⁹⁷ Still, it is fair to ask whether informal and formal justice systems can peacefully coexist. The presence of an informal justice system could detract from the state system in a number of ways, including legitimacy, participation, and funding.²⁹⁸ Without studying the implementation of a parallel system, however, it is impossible to know what the impact of its creation would be.

*B. Does Community-Based Justice Provide
“Gendered” Justice?*

A frequent concern for feminists considering alternative systems of justice 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.²⁹⁹ 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.³⁰⁰ When proposing a system in response to a harm that primarily affects women,³⁰¹ those concerns are necessarily heightened.

What happens in the community is not private, however; it is simply a different form of public adjudication. Siting justice within the community creates opportunities for a far greater number of community actors to hear about and act in response to stories of abuse. Arguably, moving consideration of intimate partner abuse into

297. Law professor Laurie Kohn has suggested such an alternative in the context of restorative justice programs in the civil system. *See generally* Laurie S. 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).

298. My thanks to Professor Jana B. Singer for this observation.

299. *See, e.g.*, Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW & 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 this type of problem in Brazil, where sixty to eighty percent 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. U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 69-70.

300. *See* Stubbs, *supra* note 100, at 51.

301. According to a recent report by the Bureau of Justice Statistics, about eighty percent of the victims of intimate partner violence between 1993 and 2010 were women. SHANNON CATALANO, INTIMATE PARTNER VIOLENCE, 1993-2010 3 (2012).

community spaces makes those matters more public than handling them within a legal system that not everyone can or will access.³⁰²

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.³⁰³ 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.³⁰⁴ Even when women were parties, they were represented by their brothers or fathers in cases involving disputes with their husbands.³⁰⁵ 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 as a form of justice for women, arguing that such processes may, in fact, be gendered male.³⁰⁶ 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 forums; for example, 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.³⁰⁷ 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.³⁰⁸ 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, "The five survivors this Author spoke to all stated a desire to partici-

302. In Cambodia, Tara Urs explains, the community is much more likely to be aware of intimate partner abuse because of community-based dispute resolution than it would be if cases were handled by courts, which are largely shielded from public view. Urs, *supra* note 222, at 46.

303. See *supra* note 180 and accompanying text.

304. See *supra* note 180 and accompanying text.

305. Wells, *supra* note 194, at 192-93.

306. See Nessel, *supra* note 158, at 122.

307. Maisel, *supra* note 11, at 171-74

308. Wells, *supra* note 194, at 192.

pate in *gacaca* for the sexual violence crimes committed against them, and all wanted justice.”³⁰⁹

C. *What Constitutes Community? And Can Communities Provide Accountability?*

Many of the alternative justice methods discussed herein rely on community involvement for their success. *Nari adalats* and *gacacas* draw heavily upon community participation to adjudicate individual claims; truth commissions and symbolic tribunals require the community to become involved as listeners and 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.³¹⁰ 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.³¹¹ 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,³¹² it is fair to ask whether sufficient community exists to make such efforts worthwhile. Similar concerns were 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 relation-

309. Amick, *supra* note 125, at 71. In response to these concerns, the *gacaca* tribunals, like some TRCs, 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 194, 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 125, at 45; Nessel, *supra* note 158, at 120. Nonetheless, Nessel notes, 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. Nessel, *supra* note 158, at 120.

310. Maisel, *supra* note 161, at 247-48.

311. U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 73. One study has argued, however, that informal justice systems are particularly good at adapting to the socioeconomic, 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 154, at 16, 19.

312. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

ships upon which to build.³¹³ As law professor Maureen Laflin writes, “Communities that never were are difficult to ‘rebuild.’”³¹⁴

Moreover, even if community ties are 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 using restorative justice in cases of intimate partner abuse frequently note that without strong community condemnation of abuse, people subjected to abuse are unlikely to achieve any kind of meaningful justice.³¹⁵ Establishing clear statements of community norms may also be made more difficult by the mobility 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 of alternative justice systems might help to cultivate such norms.³¹⁶ 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.³¹⁷ 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 abuse that the formal legal system may not reach.³¹⁸ 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 both the potential to have such efforts co-opted and to replicate existing gender norms within the community exist, organizers would need to be cautious about engaging 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.

313. Daly, *supra* note 236, at 380-81; Laflin, *supra* note 158, at 21.

314. Laflin, *supra* note 158, at 21.

315. Stubbs, *supra* note 100, at 52-54.

316. Coker, *supra* note 84, at 130; *see also* Daly, *supra* note 106, at 161 (explaining how the South African TRC reconstructed justice norms).

317. INT’L CTR. FOR RESEARCH ON WOMEN, *supra* note 159, at 44-46.

318. *Id.* at 60-61.

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.³¹⁹ 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.³²⁰ 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.³²¹ 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.³²² 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.³²³ The woman called CONNECT's legal advocacy helpline, and legal advocates urged her to get an order of protection.³²⁴ The woman was not interested in using the civil justice system, however.³²⁵ She wanted her partner out of the home and believed that her imam was the only one who could persuade him to leave.³²⁶ The imam refused to become involved, however, because the couple was not married.³²⁷ CONNECT talked with a sheik in the community, who first spoke with the wom-

319. 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).

320. Marie M. Fortune, *Faith is Fundamental to Ending Domestic Terror*, 33 WOMEN'S RTS. L. REP. 463, 465-68 (2012).

321. 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 WK. (Oct. 25, 2011), <http://www.thejewishweek.com/editorial-opinion/opinion/religious-courts-are-treating-agunot-unfairly>; Maryam Namazie, *What Isn't Wrong with Shari'ah? To Safeguard Our Rights There Must Be One Law for All and No Religious Courts*, GUARDIAN (July 5, 2010, 9:18 PM), <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).

322. KERRIGAN ET AL., *supra* note 154, at 19.

323. Telephone Interview with Sally MacNichol, Co-Exec. Dir., CONNECT, N.Y.C. (Sept. 13, 2013).

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

an 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.³²⁸ The sheik 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.³²⁹ Ultimately, the man left the home peacefully³³⁰—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.³³¹

Given changes in technology, 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 to find justice for people subjected to abuse.³³²

One benefit of relying on communities is the potential for ensuring greater accountability among community actors. Holding police, judges, and prosecutors accountable for their failure to appropriately and seriously attend to claims of intimate partner abuse is nearly impossible, requiring the individual who has been badly served to confront entrenched political and institutional actors. By contrast, community leaders may be more directly accountable to those they serve and with whom they live, work, and socialize.³³³ Moreover, because community leaders will have opted into participation in community-based justice processes, there is reason to believe that they will be more engaged and responsive than those for whom addressing intimate partner abuse is an unwanted aspect of a larger job.

D. Can Community-Based Justice Really Work?

Creating alternative justice mechanisms raises a number of practical questions as well. First, how would such systems be funded?³³⁴

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. Coker, *supra* note 84.

333. Urs, *supra* note 222, at 45.

334. Zinsstag, *supra* note 100, at 210-11.

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.³³⁵ 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.³³⁶ 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 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.³³⁷

CONCLUSION

Notwithstanding all of these questions and challenges, community-based justice forums, both formal and informal, are being fostered throughout the United States. In Maine, a TRC is looking at the treatment of the *Wabanaki* people by the state's child welfare system.³³⁸ The Black Women's Blueprint is in the early stages of organizing the Black Women's TRC 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."³³⁹ CONNECT continues to use community resources to find ways to meet the needs of people

335. Jana B. Singer makes the same argument in the opposite direction about building court-based services in family law cases, positing that increasing the services available through courts will detract from existing community-based resources. Jana B. Singer, *Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 367 (2009).

336. The *nari adalats* faced this same issue. INT'L CTR. FOR RESEARCH ON WOMEN, *supra* note 159, at 46.

337. See GOODMARK, *supra* note 2, at 25-26; SCHECHTER, *supra* note 127, at 25-26.

338. Esther Altvater Attean et al., *Truth, Healing, and Systems Change: The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Process*, 91 CHILD WELFARE 15 (2012).

339. BLACK WOMEN'S BLUEPRINT, FACT SHEET: BLACK WOMEN'S TRUTH AND RECONCILIATION COMMISSION ON SEXUAL ASSAULT (2015), available at <http://www.scribd.com/doc/174770484/BWTRCFactSheet>; see generally BLACK WOMEN'S BLUEPRINT, <http://www.blackwomensblueprint.org/> (last visited Feb. 24, 2013).

subjected to abuse who refuse to turn to the state.³⁴⁰ 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.

“Prosecutions will never be enough on their own [M]any women will not seek justice in this way.”³⁴¹ 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?

340. MacNichol, *supra* note 323.

341. U.N. ENTITY FOR GENDER EQUALITY, *supra* note 47, at 101.

