

Just Repair

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“Just Repair” offers, for the first time, a comprehensive account of the author’s original theory of reparations for redressing atrocities. Responding to a gap in the literature concerning theoretical models for reparations, this novel theory aids governments in satisfying their international obligation to guarantee just repair for victims who have suffered a violation of their fundamental rights. Based on a decade of empirical studies of reparation programs, the author presents a user-friendly approach for governments facing daunting challenges when trying to repair the harm suffered by hundreds, and sometimes thousands, of victims of political violence, repression, and armed conflict. Governments often opt for an administrative solution when it is not feasible for every victim to use civil suits to litigate their claims. These administrative regimes often draw upon the concept of reparative justice, adopting a “legalistic” approach that calculates damages and awards lump sums or annuities. These payments technically fulfill the international obligation to protect the recognized right to reparation enjoyed by all victims of human rights violations. Yet recent scholarship questions whether administrative programs respond adequately and appropriately to the needs of victims, especially when governments implement reparation programming without consulting victims, and thus fail to meet the victims’ expectations and demands. This misaligned policy results in victim dissatisfaction with, and even rejection of, reparation programs. Yet, in exposing this problem, few scholars offer a theoretical framework for a broader analysis of why this policy failure occurs. This Article responds by suggesting that the rift between theory and practice arises in part due to the lack of a coherent theoretical framework to explain the justice aims of reparations that may not only guide the planning and implementation of reparation programs, but also third-party evaluations of these projects. Additionally, there is still minimal international law gui-

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dance of what constitutes an effective, adequate, and appropriate reparation program. Thus this Article explains the theoretical underpinning of the author's novel theory called the "justice continuum of repair," which draws from classic legal and political theories to describe the overarching justice aims of reparations in transitional justice settings. This account better accommodates the multilayered justice aims held by victims, especially in light of the great diversity of human rights violations they suffer, in addition to the variance in demographic characteristics like gender, class, age, and location. This theory builds on the work of Amartya Sen in arguing that the "positionality" of victims will influence what they perceive to be necessary to feel repaired and that a plural approach should be adopted when designing a reparation policy. To achieve this end, this Article proposes that a government should adopt a participatory approach while planning and implementing its reparation programs to accommodate better and manage the multiple justice aims and expectations of victims, and thus help to enhance the effectiveness and legitimacy of a national reparation policy. Moreover, this framework will contribute to the development of evolving international standards for assuring fair and just reparation programs. Ultimately, a pluralist theory offers a more coherent understanding of the justice aims of reparation programs while still promoting the universalistic concept of the right of reparations.

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Introduction

Our era boasts an increasing fascination with the subject of reparations in the aftermath of tragedy. The United States is most familiar with the administrative reparation programs established to compensate the vic-

tims and their families of the 9/11 attacks, the BP oil spill, and most recently the Boston marathon bombing.¹ These commissions were set up by, or in collaboration with, the Federal Government to distribute compensation to victims in lieu of individualized court proceedings.² Similarly, countries such as Germany, Chile, and South Africa have opted for non-judicial, administrative reparations programs to redress the harm caused by deliberate criminal acts.³ Unlike our experiences in the United States, these foreign programs addressed historical periods of gross and systematic human rights violations commissioned or tolerated by the State.⁴

These types of extraordinary cases belong to the field of “transitional justice,” which generally refers to the array of justice mechanisms adopted to confront and redress past atrocities.⁵ For example, after the end of Apartheid, South Africa entered a period of transition with the election of Nelson Mandela and sought to address the atrocities produced by Apartheid as part of a larger political and legal project.⁶ South Africa formed the Truth and Reconciliation Commission in 1995 to create a forum for the voices of victims as a way to repair the past.⁷ It also included a special committee to distribute monetary compensation in a more traditional form of reparation.⁸

South Africa’s program represents an innovative model of exceptional administrative remedies. While some of these programs have sought to provide an array of pecuniary and non-pecuniary measures, others default to modest monetary packages.⁹ For example, starting in 1998, the South

1. See, e.g., KENNETH FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005); Amy Schoenfeld, *Where BP’s Money is Landing*, N.Y. TIMES (July 3, 2010), http://www.nytimes.com/2010/07/04/business/04metricstext.html?_r=0; John Schwartz, *To Run Victim Fund, Boston Calls on the Specialist*, N. Y. TIMES (May 14, 2013), <http://www.nytimes.com/2013/05/15/us/in-boston-kenneth-feinberg-again-divides-a-victims-fund.html>.

2. See FEINBERG, *supra* note 1, at xv-xvi.

3. See generally PRISCILLA B. HAYNER, *Truth and Reparations*, in *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 163 (2d ed. 2010).

4. As opposed to isolated violations, gross and systematic violations affect a significant portion of individuals. While they traditionally refer to the violation of civil and political rights, some reparation programs look at the widespread violation of economic and cultural rights. Some of these violations would also rise to the level of international crimes, such as torture, genocide, and crimes against humanity. While this Article approaches the issue from a human rights approach, in some contexts of conflict it might be that a transitioning regime applies the framework of international humanitarian law, which could have implications for reparations programs. See, e.g., Julien Piacibello, *Ad Hoc Reparation Mechanisms*, 35 HOUSTON J. INT’L L. 81, 89-95 (2013). I thank Dinah Shelton for bringing to my attention the need to offer some parameters for understanding the rights violations I am discussing.

5. See generally TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

6. See generally CHARLES VILLA-VICENCIO & WILHELM VERWOERD, *LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* (2000).

7. Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in *THE HANDBOOK OF REPARATIONS* 176, 181-83 (Pablo de Greiff ed., 2006).

8. *Id.* at 181.

9. HAYNER, *supra* note 3.

African government made a one-time payment of R30,000 (US \$3,750) to some 14,000 people identified by the Truth and Reconciliation Commission as victims of crimes—such as torture and extrajudicial killings—committed during Apartheid.¹⁰ In 2001, Germany established a foundation through a negotiated settlement that paid former forced laborers of the Nazi regime DM 5,000 (approximately US \$2,500) and former slaves DM 15,000 (approximately US \$75,000) to 1.62 million claimants.¹¹

Critics of these modest payments call into doubt whether they adequately compensate for the substantial monetary and emotional harm caused by state-sanctioned terror.¹² Even more harmful is that such administrative programs, by confining themselves to very legalistic, “ordinary” versions of remedies, may miss the mark in satisfying local concepts of justice. Here, empirical research has begun to reveal how participants in transitional justice projects—especially victim-beneficiaries along with social and legal advocates—expect reparation programs to go beyond simple payment for calculable losses, even if this initial step is an important starting point.¹³

In contrast to administrative programs’ narrow vision of justice, local actors make demands and hold expectations that invoke a wider range of justice aims. The ambitious agenda they put forward can include: reparative justice to attend to the harms of victims who bore the brunt of the violence; restorative justice to mend local relations, empower victims, and foster reconciliation; civic justice to vindicate rights and cultivate active citizens in nascent democracies; retributive justice to sanction and incentivize governments to deter future crimes through better security force training and punishment for violations of the law; and even socio-economic justice to address historical inequalities underlying the human rights violations caused by conflict and repression.

All of these strands of justice weave through most transitional justice reparation processes.¹⁴ Arguably, the very nature of non-judicial, policy driven initiatives—as opposed to court adjudication—opens the door for a more expansive interpretation of the theoretical orientation of reparations in these settings. Yet, monographs authored by academics and practitioners alike confirm a high level of victim dissatisfaction that sometimes leads

10. Colvin, *supra* note 7, at 177, 189.

11. John Authers, *Making Good Again: German Compensation for Forced and Slave Laborers*, in *THE HANDBOOK OF REPARATIONS* 421, 434 (Pablo De Greiff ed., 2006).

12. See, e.g., Brandon Hamber, *Reparations as Symbols: Narratives of Resistance, Reticence, and Possibility in South Africa*, in *REPARATIONS: INTERDISCIPLINARY INQUIRIES* 252 (Jon Miller & Rahul Kumar eds., 2007).

13. See discussion *infra* Part II.B.

14. With the mainstreaming of transitional justice in global politics, more victims, their advocates, and scholars call for reparations as a part of a country’s transition to peace. See, e.g., Matthew F. Putorti, *The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context*, 34 *FORDHAM INT’L L.J.* 1131, 1154 (2011); Fernando Val-Garijo, *Reparations for Victims as a Key Element of Transitional Justice in the Middle East Occupied Territories: A Legal and Institutional Approach*, 6 *INT’L STUD. J.* 39, 39 (2009).

to rejection of government reparation policy.¹⁵ These studies detail how governments often fall woefully short of meeting the demands of victims because the actual implementation of reparation programs may not be designed to meet the varied expectations of victims, and thus the programs fall short of the theoretical justice aims they represent.

While this scholarship offers a critical examination of reparations, it typically fails to articulate a fully developed theory for its exploration, although such a framework could help direct our attention to a more lasting solution. As a result, the field of transitional justice has not come to terms with the full meaning of “just” remedies. We still lack a cohesive framework to guide our understanding of how justice informs the overarching rationale, purpose, and aim of reparation programs, as well as to help us judge whether or not reparations are adequate, effective, prompt, and appropriate—the standards established in 2005 by the United Nations’ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles).¹⁶ This failure has significant and practical consequences for actors seeking to achieve just repair for victims in transitional justice settings because programs are often designed without considering the needs or demands of victims. Oversights of this nature can have devastating consequences for democratic societies that are already fragile because of pre-existing conflict.

This Article responds to this gap by offering a novel model for our understanding of the plural justice aims of reparations. Based on an analysis of the existing literature on reparations and transitional justice, this Article presents a comprehensive examination of the “justice continuum of repair,” an organization of the most prominent theories relied upon to explain and justify different visions of reparations in the field of transitional justice. The justice continuum of repair proposes that rather than one meta-theory, a plural theory gives coherence to reparation schemes. Certainly, the exceptional nature of post-conflict reparation programs expands traditional notions of redress normally associated with peacetime domestic court settings.¹⁷ To construct the justice continuum of repair, I draw from traditional concepts of legal pluralism. Legal pluralism is an analytical device with a long history that has been insufficiently explored in the field of transitional justice.¹⁸ Thus, a second aim of this Article is to

15. See, e.g., *WAGING WAR AND MAKING PEACE: REPARATIONS AND HUMAN RIGHTS* (Barbara Rose Johnston & Susan Slyomovics eds., 2008).

16. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, pmbl., Sec. IX, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles].

17. *Id.* at princ. 2(c).

18. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159 (2007) [hereinafter Berman, *Global Legal Pluralism*] (“International law scholars have not often paid attention to the pluralist literature, nor have they generally conceived of their field in terms of managing hybridity.”). Berman notes a few exceptions including

perform this exercise. I utilize over a decade of empirical research of administrative reparation programs to offer this theoretical model as groundwork for applying the interpretive lens of pluralism to reparations in transitional justice settings.¹⁹

Specifically, this Article expands current concepts of legal pluralism by integrating an individualized approach to redress, thus inserting the fundamental question: What does a victim need to *feel* repaired? For victims to answer this question, they must be directly engaged through a participatory process. This theory embodies the notion that justice in transitional justice rests on pluralistic values and ideals that reflect both local and individualized “felt justice needs.” To determine what constitutes adequate, effective, prompt, and appropriate reparations for human rights violations requires a subjective individualized approach. Views on reparations will vary depending on a range of factors, including demographics, rights violations, and other interests of the person.²⁰ The end result will be multifaceted and complex, but ultimately a more efficacious reparation program. If programs meet these individualized views, they will be more likely to succeed because they will be seen as legitimate by the victims.²¹

William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004); Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT'L L. 713 (1998); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006). See Berman, *Global Legal Pluralism* at 1175 n.87.

19. In general, Merry observes that “[t]here has been little anthropological attention to the process by which universal human rights ideas are adopted and applied locally, particularly in areas other than indigenous rights. The nature of cultural translation is an old anthropological problem, but the globalization of human rights discourse raises it in a new guise.” Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AMER. ANTHROPOLOGIST 29, 40 (2006). Moreover, Hinton has helped to highlight how legal anthropology has been “largely silent” on the topic of transitional justice with minimal engagement with the theory. Alexander Laban Hinton, *Introduction: Toward an Anthropology of Transitional Justice*, in *TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE* 1, 6 (Alexander L. Hinton ed., 2010).

20. Of course, this approach may encounter challenges with regard to what interests will be considered legitimate, and thus further elaboration on how to reach some parameters will be discussed *infra*. This concern is raised by Hansen who also recognizes the importance of asking “whose interests transitional justice serves and what, in fact, these interests are” but realizes that “one key concern to such discussions is the question of what makes up *legitimate interests*.” Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT'L L. 1, 3 (2011).

21. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 15 (2010) (noting that “the effectiveness of transitional justice mechanisms [should] be measured by perceptions of legitimacy on the part of relevant actors”). Sirleaf argues that “perceptions of transitional justice mechanisms matter. The justice that people see and experience shapes the reality of what is. As a consequence, it is important to examine the way people most impacted by mass violence perceive transitional justice processes meant to provide redress.” Matiangai Sirleaf, *Beyond Truth and Punishment in Transitional Justice*, 54 VA. J. INT'L L. 223, 228 (2014). See Jonathan Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 INT'L CRIM. L. REV. 263, 264 (2011) (concurring that “it is vital that transitional justice theory sharpens its focus with regard to victims in order to be perceived as more accountable and legitimate”); Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of Interna-*

I recognize that in taking this approach, the proposed model will be more difficult to implement. To address this issue, I present guidelines and methodology to facilitate the application of this model, including participatory procedures, the diversification of reparation modalities, and the creation of a reparation taxonomy.

Finally, I address how the search for uniformity in standards of practice could potentially be complicated by this plural approach. Certainly, the field of transitional justice, much like human rights law generally, has been striving to universalize its standards.²² I contend that a pluralistic framework more accurately portrays the reality of reparation policy in transitional justice settings and even supports a longer term process of establishing uniformity. Due to their very nature, reparations in transitional justice evoke a necessarily dynamic vision of justice. While the universal right to reparation remains static, the *content* of this right is filled through a localized, decentralized, and victim-focused concept of repair. A growing movement of scholars support this position, including, most notably, Sally Engle Merry and Paul Berman, who seek a middle ground between the extremes of pluralism and uniformity. Ultimately, the pluralist process also serves as a critical means of fleshing out the U.N. Basic Principles standards of what constitutes adequate, effective, prompt, and appropriate reparations.

This Article proceeds in five parts. Part I introduces the unique dilemmas presented by countries with large numbers of human rights victims, often created by armed conflict, repression, and political violence. This Part then explains the advent of transitional justice as a response to these situations, paying special attention to the prevalence of truth commissions and their recommendations for distributing reparations. Part I further explains how the use of administrative reparation programs in transitional justice settings arises out of and reinforces the right to remedies and reparations in international law. Nevertheless, the actual implementation of these programs may fall short of the still undefined U.N. standards used to evaluate this universal right. I propose that this failure in reparation policy results from the lack of clear standards as well as a theoretical framework for understanding the aims of reparations. Part II presents the justice continuum of repair as a novel theoretical model that rests upon a pluralistic understanding of justice, reflecting felt justice needs of victims, such as local understandings of what it means to be repaired. Part III describes the different threads of justice, which are grounded in nascent theories of justice that scholars rely upon to justify reparation programs and constitute the justice continuum of repair. While these theories draw from classical

tional Criminal Courts: Implications for the Success of Transitional Justice Mechanisms, 45 VAND. J. TRANSNAT'L L. 405, 407 n.2 (2012) (“[N]umerous studies by psychologists and sociologists have concluded that legitimacy is important to political and legal institutions because individuals are more likely to voluntarily adopt the norms of such institutions to regulate their own conduct when the institutions are perceived as legitimate.”).

22. This effort to universalize the transitional justice process may be seen in the efforts of international inter-governmental and non-governmental agencies that promptly advise new countries undergoing transition on the norms of the field.

and contemporary legal and political philosophy, scholars adapted them to explain local understandings of repair. Specifically, the four types of justice are: Reparative Justice, Restorative Justice, Civic Justice, and Socio-Economic Justice. Part IV offers practical guidance on how to implement the pluralistic model based on a comprehensive approach to diversifying the modalities of reparations as well as instituting a participatory approach. I propose that this approach will help to develop a taxonomy of reparation standards that will lead to better standards over time and thus flesh out the parameters of a plural approach to reparations.

I. Repairing the Past

Resort to administrative reparation programs no longer exists as a sporadic or occasional response to the devastating harms caused by human rights violations. Rather, in the last decade, these programs have become regularized through the practice of transitional justice. Transitional justice is a “linguistic invention” that describes a network of actors from a multitude of countries grappling with how to redress a violent and repressive past that leaves a legacy of large scale abuse.²³ An authoritative definition of transitional justice does not yet exist due in part to its newness as a field as well as its evolving nature; in the broadest sense, however, it pertains to “the view of justice associated with periods of political change.”²⁴ Given this amorphous definition, it is unsurprising that the goals attached to transitional justice are ambitious. In particular, there is an aim to establish a “culture of legal normality after episodes in which grave crimes have been committed.”²⁵ Thus, the rule of law, accountability, democratic institution building, and national reconciliation are viewed as avenues for peace and prevention of new cycles of violence.²⁶ Transitional justice also overlaps with areas of international law related to post-conflict reconstruction, peacekeeping, conflict resolution, human rights, and development.²⁷ Redressing the harms of the past is required to achieve these aims, which occurs through judicial and non-judicial processes and mechanisms. For

23. See Paige Author, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 331 (2009) (offering an overview of the historical origins of the transitional justice field).

24. Ruti Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT’L L.J. 893, 893 (2003).

25. Frédéric Mégret, *Of Shrines, Memorials, and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice*, 5 (May 13, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403929.

26. U.N. Secretary General, *Guidance Note of the Secretary General: United Nations Approach to Transitional Justice*, 2, 3 (March 2010), http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf (“... to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”).

27. Former United Nations Secretary General Kofi Annan recognized this disciplinary overlap in 2004, issuing an important imprimatur of the field in a report to the Security Council. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Rule of Law Report*], <http://www.unrol.org/files/2004%20report.pdf>.

example, a transitioning country may resort to vetting, lustration, trials, testimony giving, institutional reform, and reparations.²⁸

To some extent, the very idea of transitional justice is defined by the justice mechanisms it galvanizes.²⁹ The range of these justice mechanisms reflects the changing face of war. The last half-century has seen a rise in internal armed struggles resulting in high levels of fatalities with as many as ninety percent of these fatalities being non-combatant civilians.³⁰ These struggles leave weakened infrastructure and fractured societies with many families who mourn the dead and struggle to survive in the absence of a primary household bread-winner. These families may still be searching for the bodies of their loved ones who count among the “disappeared.” The living suffer from torture, rape, and arbitrary detention. Children are orphaned or recruited into armed combat. Whole communities are internally displaced or forced to flee as refugees seeking exile.

Under international human rights law, all of these people are “victims” of human rights violations.³¹ Most of these victims demand some form of justice. The same breakdown, however, of the rule of law and democracy that left these populations vulnerable to abuse and power politics in the first place also forecloses the possibility of quick redress available to these victims despite their enduring demands for justice.³² This situation describes the quintessential dilemma that defines the field of transitional justice: governments facing mass atrocity grapple with the stark reality that traditional judicial mechanisms used in “ordinary” times cannot address episodes of massive human rights violations.³³ Transitional justice, as a field, can thus be conceived of as an innovative adaptation to imperfect justice while operating within the parameters of traditional notions of justice.³⁴ Transitional justice is a form of complementary justice where classic mechanisms like court hearings may prove insufficient.

For example, transitional justice historically concerned itself with the effect of amnesties negotiated to bring peace but which required forsaking

28. For a general description of these measures, see HAYNER, *supra* note 3.

29. Roht-Arriaza takes this approach to defining transitional justice. It is a “set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.” Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY* 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

30. Duncan Pedersen, *Political Violence, Ethnic Conflict and Contemporary Wars: Broad Implications for Health and Social Well-Being*, 55 *SOC. SCI. & MED.* 175, 176-77 (2002).

31. Throughout the article, I use the term “victim” in its legal sense, which refers to someone who suffered a human rights violation. This Article, however, will discuss how the term “victim” can be contested as a general term of reference.

32. See Jamal Benomar, *Justice after Transitions*, in *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 32, 41 (Neil J. Kritz ed., 1995).

33. See Carla Hesse & Robert Post, *Introduction*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 13, 20-21 (Carla Hesse & Robert Post eds., 1999).

34. Posner and Vermeule argue that transitional justice rests along a continuum of dilemmas that impact “ordinary” justice problems. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 *HARV. L. REV.* 761, 763 (2004).

traditional criminal justice proceedings. These countries opted for “alternative” justice measures like truth commissions to fill the justice vacuum.³⁵ One of the earliest examples of this “trade-off” occurred when Argentina’s military agreed to democratic elections conditioned upon the passage of amnesty laws.³⁶ The newly elected president Raúl Alfonsín formed the National Commission on the Disappearance of Persons (CONADEP, Spanish acronym) in 1983 to investigate the State’s repression and disappearance of approximately 30,000 people.³⁷ After almost a year of work, CONADEP published its report *Nunca Más* (Never Again) in 1985, which became a national best seller.³⁸ Other countries followed this example, forming truth commissions where criminal prosecutions were foreclosed.³⁹

Truth commissions became more globally recognized in the mid-1990s when the world witnessed images of Archbishop Desmond Tutu overseeing public hearings of the Truth and Reconciliation Commission, in which South African blacks offered detailed testimony of the horrors of Apartheid rule.⁴⁰ This experience helped change the perceived status of truth commissions from merely a “second best” option to foreclosed criminal trials into an important guarantor of the right to truth. Consequently, truth commissions became a centerpiece of the transitional justice field.⁴¹ They

35. See, e.g., Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 22, 22 (Robert I. Rotberg & Dennis Thompson eds., 2000) (“By the terms of their charters, these commissions sacrifice the pursuit of justice as usually understood for the sake of promoting other social purposes, such as historical truth and social reconciliation.”); Lynn Berat & Yossi Shain, *Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 163, 166 (1995).

36. See Carlos H. Acuña & Catalina Smulovitz, *Guarding the Guardians in Argentina: Some Lessons About the Risks and Benefits of Empowering the Courts*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 93, 101-02 (A. James McAdams ed., 1997) (discussing the *Ley de Pacificación Nacional* (Law of National Pacification) that granted immunity to armed and police forces for crimes committed in context of the military repression between May 25, 1973, and June 17, 1982); Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 160, 161-65 (Naomi Roht-Arriaza ed., 1995) (discussing Argentina’s amnesty laws).

37. HAYNER, *supra* note 3, at 45.

38. *Id.* at 46.

39. See generally Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT’L L. 915 (2009) [hereinafter Laplante, *Outlawing Amnesty*] (discussing this trend).

40. *Id.* at 929.

41. MARK FREEMAN, *TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS* 11 (2006) (writing that “it is difficult to conjure an example of a political or post-conflict transition [since the 1990s] in which the idea of establishing a truth commission has been overlooked”). See also Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 70, 78 (2003) (describing the rise of truth commissions as a transitional justice model). Although there are variations in form, truth commissions typically consist of a government-backed entity that conducts an investigation for a limited period of time and then issues a final report offering an official account of a violent episode that contributed to egregious human rights violations. Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 262, 269 (Neil J. Kritz ed., 1995).

retain this status today, although criminal trials are no longer viewed as a foreclosed avenue due to significant developments in international and national jurisprudence striking down amnesty laws.⁴²

Notably, truth commissions brought more focus to the idea of repair through their recommendations for national reparation programs. Priscilla Hayner, in her recently updated authoritative text on truth commissions, comments that the last decade has seen a significant increase in the creation of reparation programs and the subsequent study of these justice mechanisms.⁴³ Thus, even if it was once rare for reparations to be a dominant part of a justice strategy in post-conflict settings, these measures are now considered standard fare. With some thirty-five reparation programs to learn from,⁴⁴ more countries are opting to institute their own reparation policy either pursuant to a truth commission or even before one has been established.⁴⁵ This trend both reflects and solidifies the growing recognition that reparations are not just an afterthought in the quest for justice, but rather that they are integral to it.

A. (Re)enforcing the Right to Reparations

Although the work of transitional justice brought more attention to the subject of reparations, these measures were already serving an important function in international law and human rights law.⁴⁶ The right to effec-

While models for truth commissions vary depending on local conditions, they typically consist of a temporary investigatory body whose mandate includes establishing an official historical record of episodes of violence, repression, and other situations that give rise to human rights violations. *Id.*

42. See generally Laplante, *Outlawing Amnesty*, *supra* note 39.

43. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 164 (2d ed. 2001) (noting that this attention is seen through the “significant expansion in the literature on the subject of reparations”). Falk also notes that there has been a general lack of extensive study of reparations until recently. See Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in *THE HANDBOOK OF REPARATIONS* 478, 484–85 (Pablo de Greiff ed., 2006) (discussing international law developments that show a “wider interest in reparations”).

44. The creators of the Transitional Justice Database identified approximately thirty-five reparation programs. See *Transitional Justice Data Base Project*, <https://sites.google.com/site/transitionaljusticedatabase/>. See also TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* 39 (2010). The authors, however, have begun to expand the dataset recognizing that this number is in flux, especially because the phenomena of transitional justice reparation programs still requires further study. E-mail from Andrew G. Reiter, Assistant Professor of Politics, Mount Holyoke College, to Lisa J. Laplante, Associate Professor of Law and Director, New Eng. Sch. of Law (Sept. 24, 2012) (on file with author). For a short list of twenty-six reparation programs, see HUGO VAN DER MERWE ET AL., *ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH* 41 (2009).

45. Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz*, 28 *MICH. J. INT’L L.* 49, 51 (2006) [hereinafter Laplante & Theidon].

46. Although not adopted by states in treaty form, the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) also serve as an authoritative source on the modern law of reparations because the ILC Articles codify the basic rules of international law concerning the responsibility

tive remedy and reparations can be found in all major international human rights treaties, mirroring the provision of the Universal Declaration of Human Rights providing that “[e]veryone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law.”⁴⁷ Similarly, treaties such as the International Covenant on Civil and Political Rights direct States Parties to protect the fundamental rights of individuals, and to provide a prompt and effective remedy in the event that these rights are violated.⁴⁸

International tribunals such as the Inter-American Court of Human Rights and the European Court of Human Rights interpret this treaty law to contribute to a growing jurisprudence that has helped solidify the generally recognized right to a remedy and reparations.⁴⁹ These international tribunals adopt a legalistic approach similar to domestic courts by providing individuals with private civil remedy to seek relief for violations of their rights.⁵⁰ International judges, like their national counterparts, assess the harm suffered by the injured party to calculate damages.⁵¹ Despite the historical roots of the right to a remedy and reparations, this entitlement only recently gained increased international attention in 2005 when the United Nations approved the Basic Principles.⁵² Notably, the Basic Princi-

of states for their internationally wrongful acts. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, pt. 2, art. 28-41, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (Apr. 23-June 1 & July 2-Aug. 10 2001), <http://www.org.un/law/ilc>, reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 61-74 (2002). See generally DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 60 (2006) and Dinah Shelton, *Righting Wrongs: Reparations In The Articles On State Responsibility*, 96 AM. J. INT'L L. 833 (2002) for authoritative treatment of the subject.

47. See Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 592 (1998) for further discussion. See Basic Principles *supra* note 16, at pmbl., sec. IX, for an exhaustive list of international human rights treaties which include an “effective remedy” provision.

48. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

49. Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22 NETH. Q. HUM. RTS. 347, 354 (2004) [hereinafter Laplante, *Bringing Effective Remedies Home*]. For an overview of the development of the court's reparation jurisprudence since 1989, see generally Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

50. This redress might include criminal prosecutions, reparations, truth commissions, and even institutional reform to respond to the harms suffered by victims and to prevent the repetition of future violations. In cases of isolated violations, legal proceedings suitably attend to victims' justice demands.

51. See Jaime E. Malamud-Goti & Lucas Sebastián Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in *THE HANDBOOK OF REPARATIONS* 539, 540 (Pablo de Greiff ed., 2006) (asserting that victims typically receive reparations either through the judicial system, where they may bring lawsuits against perpetrators, or through the administrative process, where victims are defined by a statute).

52. Basic Principles, *supra* note 16. The Basic Principles provide a framework predicated on a growing body of jurisprudence arising out of both treaty and customary

ples are not merely aspirational, but articulate and codify preexisting law.⁵³ In effect, the Basic Principles clarify that the enforcement of the right to a remedy and reparations is not for the discretion of nations, but binds nations to an obligation under treaty and customary law.⁵⁴ Thus, governments hold a duty to guarantee this individual right through an adequate and effective remedy. This remedy may take the form of an administrative program, as will be explored in the next section.

B. Administering Repair

A State takes steps towards fulfilling its international obligation to repair when it adopts a national reparation plan.⁵⁵ Merely implementing *any* type of reparation policy, however, may not adequately fulfill the State's international obligation. There is not an "anything goes" exception just because the reparation policy is part of a transitional justice setting. Instead, the State needs to strive to meet the Basic Principles' minimum criteria established by Principle 2(c), which states that remedies must be "adequate, effective, prompt and appropriate."⁵⁶

Even though the policy and practice of a State Party would be evaluated against this benchmark, there is still insufficient guidance on how to apply and evaluate compliance with these norms, especially as they apply to administrative reparation plans. Despite this doctrinal gap, international monitoring bodies may nonetheless hold States Parties to these standards in the event that victims bring a complaint to an international forum against their home State for the shortcomings of its reparation programs.

For example, an individual may appeal to an international monitoring body on the basis that her government failed to provide an adequate and appropriate remedy for the violation of a primary, substantive right like the right not to be tortured.⁵⁷ If the State Party outright denied the petitioner

international law, which lay out the specific legal contours of the right to reparations. *Id.* The Basic Principles build off of G.A. Res. 40/34, Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).

53. See Basic Principles, *supra* note 16, at 4.

54. The Inter-American Court established this fact in its first contentious case of reparations. See *Velásquez-Rodríguez v. Honduras*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 25 (July 21, 1989) (citing *Factory at Chorzow*, Jurisdiction, Judgment no. 8, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26, 1927); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. ¶ 184 (Apr. 11, 1949)).

55. Principle 12 of the Basic Principles recognizes that an effective judicial remedy may include administrative and other bodies "as well as mechanisms, modalities and proceedings conducted in accordance with domestic law." Basic Principles, *supra* note 16, at 6.

56. *Id.* at 4.

57. International human rights tribunals, in theory, exist only to help strengthen the domestic remedies available to execute this obligation to repair. This principle of complementarity is illustrated in the requirement that all potential claims submitted to an international human rights court must include proof that claimants first exhausted their domestic remedies, or that State remedies were ineffectual or unavailable. This requirement not only offers States Parties the opportunity to resolve their own internal disputes, but also reinforces the principle that domestic jurisdictions are obliged to provide

access to a remedy and reparations, the dispute's outcome will be more predictable. The international body will undoubtedly decide that the State Party did in fact violate its international obligations to provide adequate reparations and will invoke its power to order the defendant State to provide reparations to the petitioner.⁵⁸ On the other hand, things become murkier if the government in fact took steps towards offering reparations, and the victims and their advocates still challenge the adequacy of these programs.

International evaluation of domestic reparation programs has already occurred during recent sessions before the Inter-American Commission on Human Rights. During these sessions, elements of civil society have asked the Commission to evaluate the perceived shortcomings of reparation policies in countries like Peru and Guatemala that have instituted reparation programs pursuant to a national truth commission's recommendation.⁵⁹ Yet, this international scrutiny of domestic reparation programs occurs in a doctrinal vacuum, leaving unclear the question of how governments can satisfy their international obligations.⁶⁰

citizens with a prompt and effective remedy. Significantly, this scenario of citizens bringing claims to international forums against their home country generally consists of cases involving individuals, or small groups or communities of people. Similar to national courts, these proceedings are designed to deal with isolated cases, even if such cases are emblematic of a more systematic type of rights violation. Given the limitations of the juridical approach to a remedy, international courts can only order a defendant State to provide reparations for the named plaintiffs in any one case. See Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 23 (1996) (discussing the absence of a class action procedure). In some cases, the international court may even take a progressive stance and order future-oriented reform of domestic laws to avoid future violations—an important action, but one that does not address the situation of other similarly situated victims. See *Loayza-Tamayo v. Peru, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 164 (Nov. 27, 1998). These international courts, like domestic courts, are not equipped to deal with the aftermath of armed conflict, state repression, and prolonged political violence that weaken institutional infrastructure and leave a large number of victims with a wide variety of rights violations. Yet, these procedural limitations do not signify that all these other victims do not possess the general right to a remedy and reparations.

58. In 1989, the Inter-American Court clarified this point in its advisory opinion where it declared, “the absence of an effective remedy for violations of the rights recognized by the Convention is *itself a violation of the Convention* by the State Party in which the remedy is lacking.” *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987) (emphasis added).

59. Inter-American Commission on Human Rights, *IACHR Hearings and Other Public Events*, ORG. OF AM. STATES, <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=EN&Topic=33> (last visited July 26, 2013).

60. HAYNER, *supra* note 3, at 164 (“National reparations programs have been shaped less by international standards or guidelines than by domestic notions of who is a ‘victim’ and by national understandings of what is possible and what is important.”). See Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 1, 3, 13 (Pablo de Greiff ed., 2006) (presenting case studies of different governments that have implemented reparation programs and assessing the challenges that these governments have faced).

Certainly there are many factors that could lead to inadequate or inappropriate reparations. State officials rarely have prior experience carrying out a broadly focused administrative reparation program and instead may fall back on a very legalistic notion of reparations as applied in courtrooms—calculating monetary damages to approximate the plaintiff's alleged losses, and ignoring the non-monetary harms that need to be repaired.⁶¹ Alternatively, State officials may adopt a minimalist approach to reparation plans, applying only symbolic sums of money or only an apology, justifying their decision on limited resources and competing social and economic issues like poverty that also must be attended to through public coffers.⁶² Similarly, they might mistakenly study comparative country experiences and approaches, even when these were considered inadequate by those countries' victims.⁶³ In some instances, officials may minimize or delay implementing reparation programs where reparations become controversial in sensitive post-war settings seeped in the residue of former ideological clashes, especially if reparations are awarded to the "enemy."⁶⁴

In this legal vacuum, governments may feel less compelled to match the ambitious proposals made by truth commissions even though these proposals often result from extensive victim consultation. Instead—without directly consulting the intended beneficiaries of these reparation programs—States may choose to develop whatever type of reparation program they are able to manage given the political, economic, and social constraints in which they operate.⁶⁵ The result is often a reparation policy

61. See discussion *infra* Part III.A.

62. In South Africa, the Parliament found the Truth and Reconciliation Commission's recommendations to be "excessive" and settled on a much smaller amount justifying other competing social needs. François Du Bois, *Reparation and the Forms of Justice, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA* 116, 125-26 (François du Bois & Antje du Bois-Pedain eds., 2008). See also Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 121, 124-27 (Eric Stover & Harvey M. Weinstein eds., 2004) (listing the different reparations programs that have been implemented in the past, but noting that in reality many victims never received the monetary reparations). Governments often claim that reparations are not always economically feasible. *Id.* at 124.

63. This observation is based on the author's own experience working with a researcher in the reparation unit of the Peruvian Truth and Reconciliation Commission. While there are more publications offering insights into the reparation experience of other countries, there are no standard "rules of the game" yet codified or generally accepted in the field, even if there are some authors who have proposed suggestions for such guidelines. Pablo de Greiff, *Justice and Reparations, in THE HANDBOOK OF REPARATIONS* 451, 455-57 (Pablo de Greiff ed., 2006).

64. Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L. L. REV. 51 (2007) [hereinafter Laplante, *Law of Remedies*] (describing the controversy in Peru over reparations for alleged terrorists).

65. For example, Lydia Bosire observes that the truth commission in the Democratic Republic of the Congo did not adequately include the participation of victims, but instead was the product of consultations among elites during peace negotiations. Lydia Kemunto Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*, 3 SUR-INT'L J. HUM. RTS. 71, 79 (2006).

that does not accommodate and align with the expectations and demands of victims who hold a wide range of ideas about what a reparation program should achieve. While it is true that reparation programs often force governments to face economic and political trade-offs, it should not be the case that reparation programs are the first program to be sacrificed, minimized, or ignored for political convenience. Yet it is currently easier for governments to take this route, given that there are still not any clear guidelines to hold them accountable if they fail to provide adequate reparations.

This policy failure has been captured by empirical and ethnographic research, carried out by both this author and other researchers, that includes interviews with victims and their advocates to assess the overall success of reparation programs.⁶⁶ When seen through the victims' point of view, few reparation programs are fully satisfactory.⁶⁷ Truth commissions create high expectations among victims who are often engaged with the commissions expecting to see the delivery of justice. Some observers of this process even worry that victims may experience re-victimization by creating new tensions, divisions, and harm.⁶⁸ Frustration may lead the victims to reject the entire reparation process, thus undermining the larger political aims of a transitional justice project such as strengthening reconciliation, democracy, and the rule of law.⁶⁹

66. Some recent examples include: Paloma Aguilar, *The Timing and the Scope of Reparation, Truth and Justice Measures: A Comparison of the Spanish, Argentinian and Chilean Cases*, in BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT 503 (Kai Ambos et al. eds., 2009); REPARATIONS: INTERDISCIPLINARY INQUIRIES (Jon Miller & Rahul Kumar eds., 2006); WAGING WAR, MAKING PEACE: REPARATIONS AND HUMAN RIGHTS (Barbara Rose Johnston & Susan Slymowics eds., 2008); WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS (Ruth Rubio-Marin ed., 2006). See also Pamina Firchow, *The Implementation of the Institutional Programme of Collective Reparations in Colombia*, 6 J. HUM. RTS. PRAC. 356 (2014) (sharing the results of an empirical study of Colombia's collective reparation program). Other empirical studies that look at transitional justice more generally also raise these types of concerns. See, e.g., Victoria Baxter, *Critical Challenges for the Development of the Transitional Justice Research Field*, in ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 325 (Hugo Van der Merwe et al. eds., 2009); CRITICAL PERSPECTIVES IN TRANSITIONAL JUSTICE (Nicola Palmer et al. eds., 2012); Eric Wiebelhaus-Brahm, TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY (2010); Paloma Aguilar et al., *Determinants of Attitudes Toward Transitional Justice: An Empirical Analysis of the Spanish Case*, 44 COMP. POL. STUD. 1397 (2011); Matiangai Sirleaf, *Beyond Truth and Punishment in Transitional Justice*, 54 VA. J. INT'L L. 223 (2014) (sharing the results of her ethnographic research examining the truth-telling and punishment processes in Ghana, Sierra Leone, and Liberia to reveal some shortcoming in these experiences); Oskar N.T. Thoms et al., *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* (U. of Ottawa Ctr. Int'l Pol'y Stud., Working Paper No. 1, 2008), <http://aixl.uottawa.ca//7Erparis/CIPSTransitionalJusticeApril2008.pdf>.

67. Carlton Waterhouse, *The Good, the Bad and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT'L L. 257, 258 (2009).

68. Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence*, 2 J. INT'L L. & INT'L REL. 25 (2006).

69. Laurel E. Fletcher, *Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation*, 72 L. & CONTEMP. PROBS. 52, 52-53 (2009) ("The design and implementation of transitional justice programs may

These accounts have brought us to a critical juncture where we need to reflect upon whether these reparations programs are really such a good idea after all. The problems associated with national reparation policies should raise alarm and compel a thoughtful reassessment of whether reparation programs in transitional justice settings make sense and should be continued. Yet, few would advocate the elimination of reparation programs altogether. Such an option is equally troublesome given that across the globe, victims of human rights violations now demand and expect reparations, especially because knowledge of this right has spread through information networks like the internet. As victims of human rights learn about reparations in other countries, they come to expect these measures in their own country. Thus, given that reparation programs are unlikely to be eliminated, it is necessary to identify solutions to the shortcomings of these programs.⁷⁰

This Article takes the position that negative experiences, as highlighted through field studies, suggest that such programs must be carried out with more careful planning. As the field of transitional justice matures, we benefit from careful reflection on how to accommodate better the interests and expectations of victims. One step is providing governments with clearer international benchmarks to guide them in the planning, implementation, and evaluation of their national reparation programs to align better with the expectations of victims. Also important is that donors to these national programs understand the best way to implement reparations to maximize success, so that they do not undermine national attempts to reach these goals.⁷¹ Thus, this Article presents a theoretical framework designed to flesh out the meaning of the criteria established by the Basic Principles. In offering this theoretical account, this Article responds to the fact that while there are many critical accounts regarding the shortcomings of reparation programs, there are few that offer a coherent theory to guide the design and implementation of administrative reparation policy.⁷²

have unintended consequences that frustrate or even exacerbate the struggles of communities emerging from mass violence or from a period of repression.”).

70. While scholars offer critical assessments of reparation programs, they generally never suggest their elimination from the transitional justice toolbox, undoubtedly because they recognize the consistent and reliable demand made by victims for reparative measures.

71. See Nicole Dicker, *Aiding Transitional Justice in Solomon Islands*, 21 *BUFF. HUM. RTS. L. REV.* 77 (2015) (describing the conflict between external donors of the Solomon Islands Truth and Reconciliation Commission and the local NGOs working with victims); Bert Ingelaere & Dominik Kohlhagen, *Situating Social Imaginaries in Transitional Justice: The Bashingantahe in Burundi*, 6 *INT’L J. TRANS. J.* 40, 40-41 (2012) (examining the clash between international donors and NGOs trying to rehabilitate the traditional *bashingantahe* process for the purposes of transitional justice).

72. A few notable exceptions include Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS* 451, 451 (Pablo De Greiff ed., 2006); Ruti G. Teitel, *Reparatory Justice*, in *TRANSITIONAL JUSTICE* (2002); Adrian Vermeule, *Reparations as Rough Justice*, in *TRANSITIONAL JUSTICE: NOMOS LI* (Rosemary Nagy, Jon Elster & Melissa S. Williams eds., 2012); STEPHANIE WOLFE, *THE POLITICS OF REPARATIONS AND APOLOGIES* 46 (Olivera Simic ed., 2013). Since authoring my first account of the justice continuum, I have noted an increase of publications on reparations indicating a collective under-

There are only nascent efforts to offer theoretical frameworks for understanding the overarching justification, purpose, and aims of reparations, and the theory that underlies these considerations. Thus, this Article is one of the first to fill this gap in the academic scholarship on reparation programs in transitional justice settings by presenting a theoretical model for explaining and bringing coherence to reparations.

II. The Plural Justice Aims of Reparations

The theoretical model of reparations presented in this Article takes as a basic premise that reparations can and should be viewed through a lens of justice.⁷³ Since ancient times, philosophers have sought to untangle the complex and contested concept of justice. They pondered what constitutes “justice” and why justice matters.⁷⁴ Often the concept of “justice” is paired with the realm of criminal trials and sanctions, or even the distribution of social goods, with less focus on how it relates to civil remedies. Yet, the infusion of rights into the realm of reparations as discussed in Part I helps to highlight that, at its core, the concept of reparations revolves around ideas of justice.

It should not be a surprise that a review of the transitional justice literature reveals that there is frequent, albeit often passing, reference to categories of justice.⁷⁵ Analysis of this growing body of writing reveals no static understanding of justice among scholars; rather, there are many

standing of the necessity of this exercise. See, e.g., Eric Yamamoto et. al., *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 *ASIAN-PAC. L. & POL'Y J.* 1 (2014). The authors define the necessary type of reparative justice as entailing four Rs: Recognition, Responsibility, Reconstruction, and Reparation. Each of these requirements hints towards other types of justice (for example, socio-economic or restorative), but all are necessary. The authors use this framework in considering reparations that could be given by the United States to victims of the Jeju 4.3 tragedy. See also Janna Thompson, *Reparative Claims and Theories of Justice*, in *HISTORICAL JUSTICE AND MEMORY* 45 (Klaus Neumann & Janna Thompson eds., 2015); Margaret Walker, *Moral Vulnerability and the Task of Reparations*, in *VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY* 110, 110 (Catriona Mackenzie et. al. eds., 2014) (“While the occasion of reparative justice is significant wrongs and wrongful harms and losses, this essay argues that the aim of reparative practices is not only or even primarily to redress those harms and losses, but to address the moral vulnerability of victims by affirming their status in accountability relations.”). Arguably, the entire field is at the stage of seeking more theoretical frameworks for a field that has been driven largely by empirical case studies. See, e.g., *THEORIZING TRANSITIONAL JUSTICE* (Claudio Corradetti et. al. eds., 2015); *TRANSITIONAL JUSTICE THEORIES* (Susanne Buckley-Zistel et. al. eds., 2013).

73. This theory was first presented in preliminary form in Lisa J. Laplante, *The Plural Justice Aims of Reparations*, in *TRANSITIONAL JUSTICE THEORIES* 66, 66 (Susanne Buckley-Zistel et. al. eds., 2013).

74. As one scholar remarks when exploring the vagueness of the term “justice”: “Do we really know what justice is?” Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2 *J. DISP. RESOL.* 349, 356 (2005).

75. This observation comes from the author’s systematic evaluation of all books, articles, and chapters on reparations in transitional justice (annotated catalogue of secondary sources on file with author).

ideas of justice often presented in abstract form. These authors sometimes are merely referencing the justice perceptions of local actors, including the government officials designing these programs and the victim-survivors intended to benefit from reparation programs.⁷⁶ A smaller number of these authors offer, sometimes in only cursory fashion, some theoretical account to explain the notions of justice they evoke. Similarly, an analysis of national reparation plans reveals very general reference to theories of justice that are offered to justify a certain reparation policy.

In digesting this growing body of literature as well as national plans, I discovered four common themes in these discussions of justice. The following section presents the theoretical model I have developed based on these findings. While this proposed account is descriptive in nature, it has normative implications that will be discussed in the following sections.

A. The Justice Continuum of Repair Model

In an exercise of imagination, I have plotted four theories of justice along an axis. For the convenience of explanation, Diagram 1 offers the reader a view of how these four theories sit on a linear “justice continuum” that expands: the idea of “reparative justice” is located at the left end of the axis. The middle of the axis brings us to “restorative justice,” which then leads to “civic justice.” Finally, we reach “socio-economic justice.”

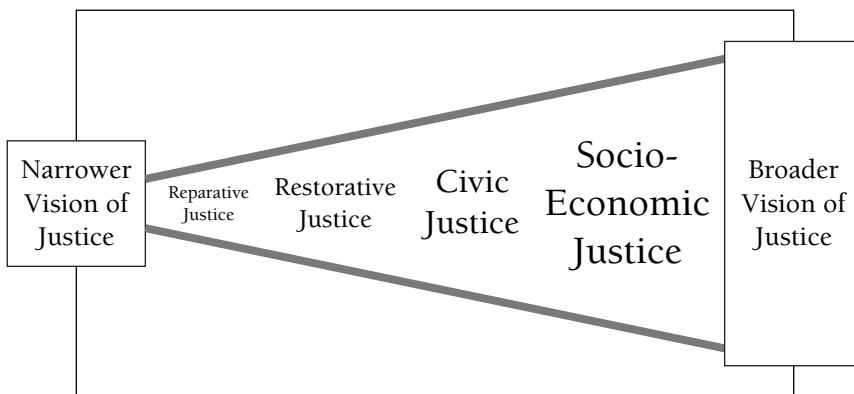
Each category of justice reflects a unique concept of justice. This analytical technique of creating categories of justice may be analogized to the approach taken by Michael Walzer, who utilized his famous “spheres of justice” to examine and describe “different distributive spheres from the inside.”⁷⁷ In Walzer’s classic monograph, each sphere represents a distinct notion of justice that corresponds with a unique meaning of social goods within the theory of distributive justice.⁷⁸ Taking a different tack, I use the same analytical technique to refer to the social meanings of harms and goods, within a general theory of justice, as it relates to reparations.⁷⁹

76. This type of trend became easier to detect upon the creation of the *International Journal of Transitional Justice* in 2006, which is dedicated exclusively to the subject of transitional justice. The construction of the justice continuum of repair relied in great part on the scholarship published by this journal.

77. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 20 (1983).

78. *Id.*

79. While it may be possible to view the overall process of reparations as a form of distributive justice (in that public funds are being distributed through these reparation measures to victims), this model actually differs from Walzer’s, in that it refers to a State’s response to its own failure to live up to Walzer’s vision of distributive justice.



Importantly, this model captures the choices made locally by those who design and implement reparations. At the same time, it reflects the expectations of those designated to receive reparations. Undoubtedly, there are other forms of justice that may fit along this continuum. There may even be additional nuances to the named justice stops revealed through practice. For the sake of clarity, however, this Article focuses on the four most predominant theories found in the transitional justice literature. Thus, the justice continuum of repair serves as a platform for further development with the understanding that there may be other categories of justice that could fit into the continuum.⁸⁰

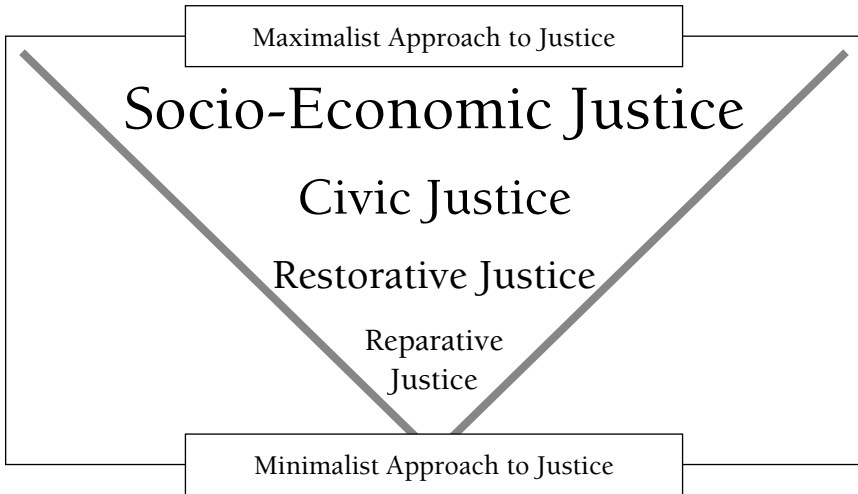
The continuum moves from a narrow(er) onto a broad(er) concept of reparations. The continuum expands depending on the understanding of *what* is being repaired, *who* is being repaired, and *how* it should be repaired. The choice of measures will depend on the particular vision of justice. The broader the notion of justice, the more time and space will be needed to implement effectively a reparation measure that falls within this justice category. On the other extreme, the narrower the theory, the more punctual the types of measures will be and thus the achievement of the justice aim.

80. The theories focused upon rely heavily on philosophy from a western perspective and could understandably be critiqued as “euro-centric” in their orientation. As observed already,

[a]lthough justice is agreed to be a universal ideal, whenever it is elaborated for use in social practice or examined at length theoretically, it appears as a concept constituted by a limited context. And since the literature results largely from experience and theory developed in Western societies, nearly all discussion is to a great extent specifically related to Western forms of social order A study of the theories currently debated suggests that they are still far from any genuinely universal theory built upon the legal experience of all societies, including African.

Gordon R. Woodman, *Legal Pluralism and the Search for Justice*, 40 J. AFR. L. 152, 153, 155 (1996). For general discussion, see BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* (1973) (acknowledging the possible inherent bias of this account, and that the justice continuum of repair serves as an evolving structure that could accommodate other cultural theories of justice).

Also important, the justice continuum of repair should be viewed as fluid and dynamic with a bi-directional flow as opposed to a static stopping point in any one sphere of justice. Similar to Walzer's account, the boundaries between the categories (or spheres in Walzer's account) are often blurred.⁸¹ There may even be a cumulative effect with the interplay of different aims of justice. Diagram 2 offers a view of this effect when the continuum is flipped upright with a layered, incremental justice approach, in that the narrow form of justice provides the foundation for a broader form of justice.



Certainly, a linear graph (and the one dimension of paper) does not quite capture how these theories may play out simultaneously—at times building on one another or alternatively taking center stage at different moments in the overall reparation process. Theories may shift and calibrate due not only to the officially stated aims of reparation programs, but also due to the actual input and push-back from local actors who shape the ongoing process.⁸² It is equally possible for a reparation program, if comprehensive, to capture and invoke all of the justice aims. Likewise, one type of reparation measure may evoke several justice aims at once. This expanding continuum promotes what Menkel-Meadow describes as

81. WALZER, *supra* note 77, at 319. Walzer observes:

A community's culture is the story its members tell so as to make sense of all the different pieces of their social life—and justice is the doctrine that distinguishes the pieces. In any differentiated society, justice will make for harmony only if it first makes for separation. Good fences make just societies. We never know exactly where to put the fences; they have no natural location. The goods they distinguish are artifacts; as they were made, so they can be remade. Boundaries, then, are vulnerable to shifts in social meaning, and we have no choice but to live with the continual probes and incursions through which these shifts are worked out. *Id.*

82. See generally ROSALIND SHAW, LARS WALDORF & PIERRE HAZAN, *LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE* (2010).

“responsive justice” which seeks to reconcile “often competing justice values simultaneously.”⁸³

B. A Plural Approach to Reparations

The justice continuum of repair can be best understood as a plural account of reparations. It rejects the common tendency to establish a singular theory in order to achieve a coherent understanding of reparations, and instead posits that a foundational theory of reparations in transitional justice should be a plural one.⁸⁴ Thus, I posit that a meta-theory actually consists of many theoretical strands to arrive at one overarching normative account.⁸⁵

This account fits naturally with transitional justice given the field’s emphasis on decentralized, localized justice processes.⁸⁶ I am bringing a plural approach to understand better the emphasis on “the local” promoted by a growing cadre of scholars. Transitional justice processes rarely occur in a uniform fashion based on a static idea of justice with a single “norm or a theoretically ideal rule for determining what is best for victims in post-conflict society.”⁸⁷ Using Ruti Teitel’s paradigm of phases of transitional justice, Dusting Sharp calls for a more expansive notion of justice and argues for an inclusive approach, moving historically undervalued means of justice, especially local ones, from the periphery to the center stage.⁸⁸ Similarly, Wendy Lambourne, in constructing a theory of justice for transitional justice, writes

[t]he intention of the model is to maximise the inclusiveness of the language used in an attempt to produce a potentially universally applicable model that leaves room for cultural interpretation and application Whilst this model risks trying to include too much and thus becoming analytically over-stretched and impractical, I believe that it is important to develop a theory that encourages practitioners to be inclusive and mindful of the complexity

83. Carrie Menkel-Meadow, *Restorative Justice: What Is it and Does it Work?* 3 ANN. R. L. SOC. SCI. 10, 170 (2007).

84. I analogize this claim of the academic tendency to feel it is necessary to find one superior theory to achieve “coherence,” such as in the field of torts which relates most closely to civil remedies such as reparations. See, e.g., John C.P. Goldberg, *Twentieth-century Tort Theory*, 91 GEO. L. J. 513 (2003). Few tort scholars offer a plural approach to tort theory, but see Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329 (2007) (arguing for a plural understanding of the rationales of tort law).

85. Hansen warns that, “in a diverse world, one risk of constructing a general theory is that it can lack sensitivity to different and nuanced circumstances.” Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT’L L. 1, 1-2 (2011).

86. See, e.g., Andrew B. Friedman, *Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights*, 46 AKRON L. REV. 727 (2013); Lieselotte Viaene & Eva Brems, *Transitional Justice and Cultural Contexts: Learning from the Universality Debate*, 28 NETH. Q. HUM. RTS. 199 (2010).

87. Heidy Rombouts, *Importance and Difficulties of Victim-Based Research in Post-Conflict Societies*, 10 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 216, 221 (2002).

88. See Dustin Sharp, *Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice*, 26 HARV. HUM. RTS. J. 149 (2013).

of human needs and responses in order to avoid the tendency to oversimplify and impose limited or one-size-fits-all solutions.⁸⁹

Her experience coupled with my own reflections on this topic lead me to believe that the very nature of transitional justice may, by necessity, require more flexible theoretical models and perhaps multiple models capable of coexisting. Yet, it is important to interrogate what “plural” means as it relates to transitional justice mechanisms, especially because very little scholarship has explored this question.⁹⁰ Undoubtedly, the account I present calls forth and builds upon ideas from the long tradition of legal pluralism. Moreover, in presenting this account, I am joining a growing number of scholars who are exploring a revised version of legal pluralism that applies to international law and human rights.⁹¹ As I will

89. Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT'L J. TRANSITIONAL JUST. 28, 46 n.61 (2008).

90. Only a few scholars have explored the pluralist account as it applies to transitional justice. See, e.g., Rosemary Nagy, *Traditional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda's Gacaca Courts*, in RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 86, 86-87 (Joanna R. Quinn ed., 2009); Rosemary Nagy, *Centralizing Legal Pluralism? Traditional Justice in Transitional Contexts*, in TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS 81, 81 (Chandra Lekha Sriram et. al. eds., 2012); Karin Ask, *Legal Pluralism and Transitional Justice in Afghanistan: A Gender Perspective*, 2003 HUM. RTS. DEV. 347 (2003); Jaya Ramji-Nogales, *supra* note 21; Dustin N. Sharp, *Addressing Dilemmas of the Global and the Local in Transitional Justice*, 29 EMORY INT'L L. REV. 71 (2014) (advocating a “local” approach over a global approach to justice that would require a pluralist or relativist approach that would be difficult in the international law context); Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 15 (2006). Some authors have applied a plural lens in analyzing international criminal law which is, arguably, a related area to transitional justice. See, e.g., KAMARI MAXINE CLARKE, FICCTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA 24 (2009); Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L. J. 1063 (2011); Tatiana E. Sainati, *Toward a Comparative Approach to the Crime of Genocide*, 62 DUKE L. J. 161 (2012).

91. This is a new revised version of legal pluralism, which some simply call “pluralism” or, like Berman, a “pluralist account.” Berman, *Global Legal Pluralism*, *supra* note 18, at 1177. One salient example of this new conversation can be seen in the written dialogue between Goodhart and Donnelly. See Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281 (2007); Michael Goodhart, *Neither Relative nor Universal: A Response to Donnelly*, 30 HUM. RTS. Q. 183 (2008); Jack Donnelly, *Human Rights: Both Universal and Relative (a Reply to Michael Goodhart)*, 30 HUM. RTS. Q. 194 (2008). See also LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 6 (Boaventura Santos & Cesar Rodriguez-Garavito eds., 2005) [hereinafter Santos & Rodriguez-Garavito]; Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263 (2006); Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40-41 (2003) (“The principle of subsidiarity, instead, gives us a conceptual tool to mediate the polarity of pluralism and the common good in a globalized world and helps us make sense of international human rights law. I argue that we should regard subsidiarity as a structural principle of international human rights law.”); M.D.A. Freeman, *Human Rights, Children's Rights and Judgment—Some Thoughts on Reconciling Universality and Pluralism*, 10 INT'L J. CHILD. RTS. 345 (2002); Erika R. George, *Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities*, 96 CALIF. L. REV. 1447, 1493 (2008) (“A framework of pragmatistic legal pluralism that appreciates how both rights and culture are mobilized locally can facilitate a move beyond the dichotomies of the universalism versus relativism debate”); Nidhi Gupta, *Women's*

explain, however, in the following section, the plural account of the justice continuum of repair expands on these existing understandings of legal pluralism by devolving to an even more individualized notion of justice.

1. *An Individualized Plural Account*

The type of pluralism inspired by the justice continuum of repair echoes, but does not exactly mirror, the concepts associated with legal pluralism. Very generally speaking, the socio-legal study of legal pluralism traditionally studied the “state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs.”⁹² In these situa-

Human Rights and the Practice of Dowry in India: Adapting a Global Discourse to Local Demands, 48 J. LEGAL PLURALISM & UNOFFICIAL L. 85 (2003); Frédéric Mégret, *Is There A ‘Right to One’s Own Law’? An Exploration of Possible Rights Foundations for Legal Pluralism*, 45 ISR. L. REV. 3, 7 (2012) (“[Y]et this hostility to legal pluralism by part of the human rights discourse does not exhaust the jurisprudential possibilities of the idea of rights in relation to it. Rights discourse is also, perhaps more discreetly, being mobilized to make the argument in favour of legal pluralism.”); Martha Minow, *Is Legal Pluralism an Ideal or a Compromise: An Essay for Carol Weisbrod*, 40 CONN. L. REV. 1287 (2007); Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 903 (2010) (“[V]alues are plural, not unitary, and are better seen that way than sanded and recast to appear singular and unitary.”); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 308 (2007) [hereinafter Berman, *Pluralist Approach*] (“[T]he important points for the current generation of international law theorists are that we need to think of international law as a global interplay of plural voices, many of which are not associated with the state, and that we need to focus on how norms articulated by a wide variety of communities end up having important impact in actual practice, regardless of the degree of coercive power those communities wield. These important conceptual legacies form the foundation of the pluralist account of international law”); Kory Sorrell, *Cultural Pluralism and International Rights*, 10 TULSA J. COMP. & INT’L L. 369, 384 (2003).

92. John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 2 (1986). The literature on legal pluralism is extensive and a full discussion is beyond the scope of this Article; it is useful, however, to provide a brief overview of legal pluralism in order to highlight a few key principles that draw out a better understanding of and appreciation for the proposed justice continuum of repair. Legal anthropologist Sally Engle Merry offers a concise overview of the foundational concepts of legal realism since the 1970s, distinguishing between a more modern approach that contrasts from the “classic” version largely influenced by John Griffiths that focused on the interaction between European colonial law and local, indigenous law systems in post-colonial societies. See Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 869 (1988) [hereinafter Merry, *Legal Pluralism*]. See, e.g., Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources*, in LAW AND THE SOCIAL SCIENCES 11, 15, 19 (Leon Lipson & Stanton Wheeler eds., 1986) (“[N]ot all the phenomena related to law and not all that are lawlike have their source in government.”); Santos & Rodriguez-Garavito, *supra* note 91, at 65–66; BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2d ed. 2002); Gunther Teubner, “Global Bukowina”: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 4 (Gunther Teubner ed., 1997); Keebet von Benda-Beckmann, *Transnational Dimensions of Legal Pluralism*, in BEGEGNUNG UND KONFLIKT: EINE KULTURANTHROPOLOGISCHE DESTANDSAUFNAHME 33, 33 (2001); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 5 AM. B. FOUND. RES. J. 425 (1980); Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. L. POL. & SOC’Y 149 (2007); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 28–34 (1981); Balakrishnan Rajagopal, *The*

tions, a tension arises when an individual feels compelled to follow conflicting norms emanating from State and non-State sources.⁹³ John Griffiths set the tone for the field by placing greater emphasis on a “juristic sense” of legal pluralism that emphasizes a hierarchical ordering of the capacity to make and enforce rules.⁹⁴

Yet, the justice continuum of repair does not necessarily refer to a clash between normative systems of rules, although this conflict could arise in certain circumstances. Rather it is more akin to the understanding of the “new legal pluralism” proposed by legal anthropologist Sally Engle Merry.⁹⁵ This more modern view moves away from an unambiguous imposition of one system over another and reveals a bidirectional rela-

Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India, 18 LEIDEN J. INT'L L. 345 (2005); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. & SOC'Y 296 (2000); Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002).

93. Merry, *Legal Pluralism*, *supra* note 92, at 869, 871, 878. For example, Pospisil designated these systems as “legal levels” in which “every functioning subgroup in a society has its own legal system which is necessarily different in some respects from those of the other subgroups.” LEOPOLD POSPISIL, *THE ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 107 (1971). Sally Falk Moore helped expand the notion of legal pluralism to refer to “semi-autonomous social fields” that consist of multiple systems of ordering in complex societies. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC'Y REV. 719, 720 (1973). In essence, the “core credo” of legal pluralism is that there are many normative orders “not attached to the state which nevertheless are law.” Brian Z. Tamanaha, *The Folly Of The “Social Scientific” Concept Of Legal Pluralism* 20 J. L. & SOC'Y 192, 193 (1993). Tamanaha critiques this view, opining, “[a]s should be immediately apparent, so generous a view of what law is slippery slides to the conclusion that all forms of social control are law.” *Id.* These “pockets” exist within state systems and exert a type of social control through their social institutions. *Id.* These so-called pockets might be corporations, universities, small social groups, community associations, and other group affiliations which lead members to feel bound by its internal norms. See, e.g., AVIGAIL I. EISENBERG, *RECONSTRUCTING POLITICAL PLURALISM* 2 (1995) (defining pluralist theories as those that “seek to organize and conceptualize political phenomena on the basis of the plurality of groups to which individuals belong and by which individuals seek to advance and, more importantly, to develop, their interests”).

94. The juristic sense of legal pluralism is a more demarcated dual legal system in which

the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system. This situation creates a range of complex legal problems, such as the need to decide when a subgroup’s law applies to a particular transaction.

Merry, *Legal Pluralism*, *supra* note 92, at 871.

95. Merry’s legal pluralism views the boundary between legal systems as more fluid with intertwined social micro-processes of an interactive dialect. *Id.* at 870, 872-73 (“The new legal pluralism moves away from questions about the effect of law on society or even the effect of society on law toward conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field.”).

tion.⁹⁶ As Merry explains,

viewing situations as legally plural leads to an examination of the cultural or ideological nature of law and systems of normative ordering. Rather than focusing on the particular rules applied in situations of dispute, this perspective examines the ways social groups conceive of ordering, of social relationships, and of ways of determining truth and justice.⁹⁷

Within this dynamic process, Merry helped to expose the process of how local communities “vernacularize”—or translate—international norms into local meanings.⁹⁸

Yet, Merry is still largely talking about collectivities or groups and how they interface with State-imposed norms, even those which are funneled down from the international system. The pluralist account proposed in this Article builds on and expands upon Merry’s dynamic concept of legal pluralism by integrating the individual perspective. To some extent it may resemble multiculturalism and relativism, although is not per se a culturally bound notion due to the fact that the individual may not even identify

96. Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L. J. 115, 151 (1984) (discussing the concept of “integral plurality” in which state law is constituted in relation to the plural social forums).

97. Merry, *Legal Pluralism*, *supra* note 92, at 889. Similarly, anthropologist Clifford Geertz emphasizes that the interpretative lens of legal pluralism helps to highlight how cultural diversity forms and communicates symbols and structures of meanings. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167 (1983). Merry discusses how Geertz argues that competing visions of social reality help to construct alternative visions of the world, and this hermeneutic approach sees coherence in a process that mingles “different senses of law” and “legal sensibilities” embedded in individual and social consciousness. Merry, *Legal Pluralism*, *supra* note 92, at 886. Geertz viewed law as “as a system of meanings, a cultural code for interpreting the world.” *Id.*

98. Merry, *supra* note 19, at 39 (“As ideas from transnational sources travel to small communities, they are typically *vernacularized*, or adapted to local institutions and meanings.”). See also Anne Griffiths, *Legal Pluralism in Africa: The Role of Gender and Women’s Access to Law*, 19 POLAR 93, 100 (1996) (“[R]ules are not self-contained in the sense that they can be said to be immune from what is going on around them, particularly as they take shape from the contexts in which people seek to apply and manipulate them.”); Franz von Benda-Beckmann, *Law out of Context: A Comment on the Creation of Traditional Law Discussion*, 28 J. AFR. L. 28, 31 (1984) (“The ways in which notions of western law are interpreted, manipulated and applied often have little in common with what legislators, legal scientists and philosophers stated to be the form and content of these laws.”). Classical legal theorists have suggested this same pluralist effect through interpretation. See, e.g., LON L. FULLER, *ANATOMY OF THE LAW* 59 (1968) (“The interpretation of statutes is, then, not simply a process of drawing out of the statute what its maker put into it but is also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied.”); Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 1 (1969) (discussing an interactional theory of law). Interestingly, a few non-international contemporary scholars have begun to propose a plural account of more traditional bread-and-butter areas of law like contract law. See, e.g., Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 149 (2010) (“Social forces give rise to law’s construction and they mediate law’s application which, in turn, shapes law’s reconstruction.”). See generally Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 (2012).

with a cultural group.⁹⁹ Instead, the plural account I propose recognizes that a victim may call forth a variety of concepts of justice that are personal to him or her in the event that the victim is asked to envision what he or she would need to repair the harm caused by a human rights violation. Thus there is a subjective element to understanding the “adequate, effective, prompt and appropriate” criteria established by the U.N. Basic Principles. As the next section explores, this subjective account builds on more recent philosophical understandings of justice.

2. *Constructs, Positionality, and “Felt Justice Needs”*

In proposing this account of pluralism I adopt Amartya Sen’s idea of “positionality,” which he views as critical to formulating concepts of justice. Positionality refers to the fact that “[w]hat we can see is not independent of where we stand in relation to what we are trying to see. And this in turn can influence our beliefs, understanding and decisions.”¹⁰⁰ Orienting the design of reparation policy to adapt to Sen’s notion of positionality raises the key question: what does it mean to *feel* repaired? What kind of justice will a victim opt for in order to feel fully repaired?

Certainly, all victims share what is arguably the universal sentiment that there needs to be some kind of response to being wronged.¹⁰¹ Yet, there is not *one* definitive way to satisfy this universal need for a response. Rather, different perspectives result in “radically different views of what constitutes justice.”¹⁰² The answer to defining justice will correspond to what I call the “felt sense” of justice. Ultimately, the *thing*¹⁰³ of reparations (the modality) only serves as the means to achieve a sense of satisfaction that comes when a person feels that justice has been served. It is the understanding of the justice aims that matters most in a reparation strategy, and not just the specific reparation measures awarded to a victim. If there is not understanding with these justice aims in the planning of an administrative reparation plan, a victim may receive a type of reparation (such as money or an apology) and still *feel* far from repaired.

This subjective plural account of justice as it applies to reparations

99. Sharafi argues that cultural relativism and multiculturalism is “an integral part of the legal-pluralist literature—despite its rather surprising failure to make this link explicit.” Mitra Sharafi, *Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through the Cultural Defense*, 71 L. & CONTEMP. PROBS. 139, 140 (2008).

100. AMARTYA SEN, *THE IDEA OF JUSTICE* 155-56 (2009). I would like to thank Jon Bauer for bringing to my attention the relevance of Sen’s theory to explaining the justice continuum of repair.

101. Renteln argues through a review of empirical research across cultures that there is a consistent desire to seek some type of a response to being harmed, even suggesting that reparations figure as a universal expectation among wronged individuals. ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* 98 (1990) (discussing how “blood money” can serve as an equivalent penalty to punishment in the quest for retribution).

102. Woodman, *supra* note 80, at 155.

103. Here I borrow the idea of “thing” from Michael Walzer who writes, “goods in the world have different meanings in different societies. The same ‘thing’ is valued for different reasons, or it is valued here and disvalued there.” WALZER, *supra* note 77, at 7.

reaffirms that the concept of a “remedy” is a construct.¹⁰⁴ Accepting the fact that repair is a construct justifies an individualized, plural approach to reparations. On this point, a recent essay by Marc Galanter cogently explains why the shell of the legal concept of reparations must be filled with a locally determined substance.¹⁰⁵ He argues that remedies are “cultural constructs” and “injury and remedy are not fixed and determinate, but labile, moving, plural, and contested.”¹⁰⁶ In part, the need for a plural approach to justice arises out of the fact that a certain class of injuries is incommensurable.¹⁰⁷ As Galanter writes,

it is not a natural given that an injury is adequately erased or cancelled or balanced by revenge, payment, condemnation, or apology. What satisfies our sense of an appropriate and adequate remedy clearly depends on the cultural presuppositions that we bring to the question. We may, however, be tempted to think that injury stands on a different footing—that a broken arm or destroyed property is “there” independent of our cultural lenses.¹⁰⁸

In essence, it is a legal fiction that certain injuries and harms can actually be repaired. Reparations strive as far as possible to achieve this impossible feat, revealing their limit as a legal fiction with potential hazards to avoid. In attempting to attach a value to the harms caused by human rights violations, we may risk a commodification of human loss.¹⁰⁹

In fact, one challenge to satisfying the U.N. Basic Principles standards of “adequate, effective, prompt and appropriate” arises out of the actual impossibility of truly repairing egregious harms caused by human rights violations. As Professor Roht-Arriaza astutely observes, the “basic paradox at the heart of reparations” is that they “are intended to return the victim to the position he or she would have been in had the violations not

104. *Id.* at 5 (observing that “justice is a human construction, and it is doubtful that it can be made in only one way”).

105. Marc Galanter, *The Dialectic of Injury and Remedy*, 44 *LOY. L.A. L. REV.* 1, 2 (2011). Although his essay frequently refers to domestic remedies such as in tort, Galanter views his analysis as applicable to reparations for historical wrongs such as those associated with transitional justice.

106. *Id.*

107. See Lisa J. Laplante, *Negotiating Reparations Rights: The Participatory and Symbolic Quotients*, 19 *BUFF. HUM. RTS. L. REV.* 217, 221-22 (2012) [hereinafter Laplante, *Negotiating Reparations*].

108. Galanter, *supra* note 105, at 2.

109. See Laplante, *Negotiating Reparations*, *supra* note 107, at 224. Likewise, Abel explains that “damages for pain and suffering commodify experience” and damages “for injuries to relationships commodify love.” Richard L. Abel, *A Critique of American Tort Law*, 8 *BRITISH J. L. & SOC’Y* 199, 207 (1981). His solution is for “an end to compensation for non-pecuniary loss, both for this reason [that human experience is unique] and because I believe that damages for intangible injury dehumanize by substituting money for compassion, arousing jealousy rather than expressing sympathy, and contributing to a culture that views experience and love as commodities.” *Id.* at 210. Others do not offer such a dramatic and potentially unfair solution, but rather call attention to the potential hazards of trying to commodify nonpecuniary loss. See, e.g., Amy H. Kastely, *Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss*, 8 *U. HAW. L. REV.* 1, 1 (1986) (arguing in favor of direct compensation for aesthetic and emotional losses in breach of contract cases).

occurred—something that is impossible to do.”¹¹⁰ For example, it is not truly possible to repair the harm suffered by a parent whose child has been “disappeared” or the harm suffered by a person who has endured torture.

Galanter contends that the resolution to this potential hazard in remedies law is to parse out a more precise definition of an injury.¹¹¹ He argues that an injury relates directly to the idea that a person’s rights or interests have been violated—they have suffered an “invasion of, insult to, or diminishment of the person.”¹¹² Here, Galanter adopts a similar notion of individualized pluralism as that proposed by this Article. He focuses on individual perceptions of not only what type of injury a person suffered, but also what type of remedy would suitably and adequately address it.¹¹³ To reiterate, it logically follows that a particular answer to these questions invariably depends on *who* perceives the injury.¹¹⁴

Applying Galanter’s subjective approach to injury and remedy in the field of transitional justice requires the consideration of factors that influence the different senses of justice. The individual’s response may be influenced by the society and social group to which he or she belongs, but it may also be entirely individualized.¹¹⁵ For example, a victim may possess a particular idea of reparations depending on the type of rights violation that he or she suffered. Moreover, victims’ demands for reparations may be shaped by their affiliations with particular victim group—such as families of the disappeared and killed, or the displaced, or survivors of torture or unjust imprisonment.¹¹⁶ A view of “appropriate, effective, prompt and adequate” may also depend on a person’s gender, age, class, ethnicity, domicile, and other demographic characteristics.

110. Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 158 (2005) [hereinafter Roht-Arriaza, *Reparations Decisions*].

111. See Galanter, *supra* note 105, at 1–3.

112. *Id.* (“[I]njury in its narrower sense emerges when the hurt entails some violation or deprivation of something we (or others on our behalf) feel that we are entitled to—bodily integrity, property, or social standing. We sometimes use these terms stripped of their normative connotations. We use ‘injury’ neutrally to describe a hurt or deprivation isolated from its normative context—for example, a broken arm or a blemished reputation.”). Galanter models this idea largely off of a standard definition he finds in *The Oxford English Dictionary* that defines “injury” as “[w]rongful action or treatment; violation or infringement of another’s rights; suffering or mischief willfully and unjustly inflicted.” *Id.* at 2–3 (citing OXFORD ENGLISH DICTIONARY 981 (2d ed. 1989)).

113. Galanter, *supra* note 105, at 1, 3 (“Perception of something as an injury—a breach in the moral order poses the question of what sort of remedy might be forthcoming (or not)—apology, purification, punishment, compensation, or whatever. Contemplation of remedy, in turn, asks about the character of the injury to be remedied, the desert of the injured, and the responsibility of the injurer.”).

114. See *id.* at 3.

115. See *id.* (“We know that some societies emphasize remedies for breaches of honor; that others emphasize material losses; that some assign different worths to the losses of different strata of persons; that the array of remedies differs from one society to another, as does the portion of those remedies that are located in the legal realm and the extent to which socially prescribed or sanctioned remedies are actually realized.”).

116. See Amissi M. Manirabona & Jo-Anne Wemmers, *Specific Reparation for Specific Victimization: A Case for Suitable Reparation Strategies for War Crimes Victims in the DRC*, 13 INT’L CRIM. L. REV. 977, 980–81 (2013).

To illustrate, a young person orphaned by the war may want to continue her education, whereas an adult who was removed from employment due to an arbitrary detention may want assistance reasserting himself in the labor market. Both of these measures, if carried out, will satisfy the quest for both socioeconomic justice and reparative justice. Alternatively, a person who suffered no material losses may need recognition of the wrong he or she suffered through a symbolic memorial or apology—a measure that relates to restorative and civic justice.¹¹⁷

A further distinction in justice aims may relate to the difference between individualized and collective forms of repair. An indigenous community may view their own repair as inextricably connected to the community as a whole. In transitional justice settings, some communities may already be engaged in ongoing reparative efforts, such as those focused on restorative justice and the resolution of local conflict.¹¹⁸ Along these lines, Clarke posits that justice as a “fictive construction” requires viewing conceptions of justice as “collections of intertwined social processes that reflect cultural and political spheres of meaning.”¹¹⁹ While these processes may not “compete” with state reparation processes in the traditional juristic sense described by Griffith, they may nonetheless create new tensions when the centralized state process arrives and disrupts this localized process.¹²⁰

The reality of so many different felt justice needs explains the multiple justice aims shared in the justice continuum of repair. It also helps to shed light on why there is often a rift between theory and practice in reparation programs. Government officials may overlook or ignore different understandings and concepts of justice held by local constituencies, who in turn may resist the approach adopted by state administrators. If a government policy appears to be too disconnected from local meanings of justice, the intended beneficiaries may reject these programs, or even co-opt the process to seek solutions to the social and political problems they find more compelling, such as those in the realm of socio-economic justice.¹²¹ For example, disagreement may arise when government lawyers propose a one-

117. See Mia Swart, *Sorry Seems to Be the Hardest Word: Apology as a Form of Symbolic Reparation*, 24 S. AFR. J. ON HUM. RTS. 50, 53 (2008).

118. KIMBERLY THEIDON, *INTIMATE ENEMIES: VIOLENCE AND RECONCILIATION IN PERU* 268-69 (2013) (describing micro-reconciliation processes in rural, indigenous communities following internal armed conflict).

119. KAMARI MAXINE CLARKE, *FICCTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* 24 (2009).

120. See Lieselotte Viaene, *Dealing with the Legacy of Gross Human Rights Violations in Guatemala: Grasping the Mismatch Between Macro Level Policies and Micro Level Processes*, 15 INT'L J. HUM. RTS. 1160, 1163 (2011).

121. Antoinette Vlieger, *Sharia on Domestic Workers: Legal Pluralism and Strategic Maneuvering in Saudi Arabia and the Emirates*, 12 J. ISLAMIC L. & CULTURE 166, 168 (2010) (describing how “disputants shop for forums for their problems and forums compete for disputes, which they use for their own local political ends”). This dynamic occurs in other legal settings and not just that of reparations in transitional justice. See e.g., Austin Sarat & William Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 L. & SOC'Y REV. 93 (1986).

time infusion of funding—the traditional legalist view of reparative justice through reparations—when communities in fact expect a restorative justice approach through community reconciliation processes. Ultimately, this misalignment arises in part from the lack of appropriate planning. In response, Part III offers a more comprehensive discussion of the various types of justice, with the aim of establishing a framework to guide the design of reparation programs to accomplish more adequately and appropriately the felt justice needs of victims.

III. The Justice Stops Along The Justice Continuum of Repair

In order to flesh out a plural theory of reparations, the next Part provides a guided tour of each “stop” along the justice continuum of repair. For the sake of comparison, each section begins with a brief overview of the traditional social, legal, and political theory that underlies the named category of justice. Then, selected examples¹²² that best illustrate each stop along the continuum will show how transitional justice scholars resort to these traditional theories of justice to explain the rationale and outcome of reparation policy. I will discuss how these accounts at times modify the traditional theory, given the unique challenges of transitional justice.

Thus, this Part offers a descriptive analysis of the theories evolving in the field, while providing a more structured model for reconciling and understanding them. As already argued, an overarching theory of justice as it relates to just repair requires bringing together these parallel strands of theory. I would contend that this dynamic between the existing theory and the experience of transitional justice does not per se signal the development of a wholly original theory. That said, the use of existing theories to examine critically the experience of transitional justice reparation programs contributes to the evolution of more modern theories that better capture the unique aspects of reparation programs in current times. In sum, the novelty of reparations in transitional justice settings raises new issues and concepts to be integrated into older ways of understanding redress. The following four categories offer an initial template to help structure this exploration and construction of a coherent theory to bridge the classic and contemporary understanding of these theories.

A. Reparative Justice

The narrower form of reparative justice rests on the more traditional, legalist approach to civil remedies through compensation.¹²³ From Plato

122. Limited space does not allow for a full discussion of each theory nor an exhaustive catalogue of all the transitional justice literature that fits into each of these justice aims. Rather, I offer select examples that best illustrate each stop along the continuum.

123. For a nearly comprehensive list of examples of transitional justice scholars who have invoked this type of justice, see Tom Allen, *Restitution and Transitional Justice in the European Court of Human Rights*, 13 COLUM. J. EUR. L. 1, 4 (2007) (highlighting that restitution for property loss reflects a commitment to the rule of law, distinguishing the present regime from its predecessor, indicating the respect for property rights); Roy Brooks, *Postconflict Justice in the Aftermath of Modern Slavery*, 46 GEO. WASH. INT'L L.

REV. 243, 269–70 (2014) (identifying two types of civil redress, including tort theory, which provides monetary damages); Tom Dannenbaum, *The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims*, 28 WIS. INT'L L.J. 234, 238 (2010) (establishing monetary reparations as essential for restoring social harmony and a *sine qua non* for establishing a lasting peace); Jemima Garcia-Godos, *Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation*, 2 INT'L J. TRANSITIONAL JUST. 63, 64 (2008) (explaining that reparations initially referred to monetary compensation paid by the losing parties in war to the victims (for example, the survivors of the Holocaust and Japanese internment)); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1056, 1094, 1096 (2010) (presenting a theory that reparations are “Janus-faced,” as they are both backward and forward-looking, and establishing four dimensions of reparation (material or nonmaterial, individual or group) in which compensation from the government, a trust fund of the offender, a pension, or social welfare entitlements fulfills the material and individually oriented dimension of reparations); Conor McCarthy, *Reparations Under the Rome Statute of the International Criminal Court and Reparative Justice Theory*, 3 INT'L J. TRANSITIONAL JUST. 250, 253, 258 (2009) (emphasizing that reparative justice theory “asserts the need for victims to be granted a degree of ownership over the dispute between them and the alleged perpetrator,” and explaining that restitution takes precedence over all other forms of reparation, as it attempts to reestablish the situation that existed before the violation); Frédéric Mégret, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes* 32–33 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501295 (arguing that in the context of the International Criminal Court establishing the Victim's Trust Fund, compensation is morally necessary so that victims are not shouldering their burden completely alone); Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266, 284 (2008) (arguing that reparations require that victims be identified, that the form of compensation be described, and that in some cases, monetary or symbolic reparations should take precedence over other costs, though by definition they do not rebalance wealth or power that would dramatically shift the balance of power in a post-conflict society); Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT'L L. 49, 76 (2011) (emphasizing the utilitarian and forward-looking nature of compensation in reparations, while restitution is more backward-looking and rights-based, which is appealing in terms of communal property); Matthew F. Purtori, *The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context*, 34 FORDHAM INT'L L.J. 1131, 1146–47, 1155 (2011) (characterizing transitional justice as having the “backward looking” goal of achieving justice for victims, a goal achieved through compensation for mental and physical injury, lost earnings, and costs for psychological, medical, legal, and social services); Val-Garijo, *supra* note 14, at 47 (highlighting compensation as one aspect of reparations, which covers any assessable damage including mental or physical harm, material damages, lost opportunities of education and work, costs for legal assistance, social services, and psychological and medical care); Lieselotte Viaene, *Life is Priceless: Mayan Q'eqchi' Voices on the Guatemalan National Reparations Program*, 4 INT'L J. TRANSITIONAL JUST. 4, 14, 15 (2009) (establishing in her discussion of the Guatemalan National Reparations Program that compensation must equal the material value of the damage caused to the victim, which is the only measure implemented thus far in Guatemala); Stephen Winter, *Towards a Unified Theory of Transitional Justice*, 7 INT'L J. TRANSITIONAL JUST. 224, 236 (2013) (highlighting, in the case of New Zealand, that monetary reparations can be successful; a more sophisticated model, however, of reparative justice incorporating more creative forms of due process is ideal); Adrian Vermeule, *Reparations as Rough Justice* 3, 9 (U. Chi. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Working Paper No. 105, 2005), <http://www.law.uchicago.edu/files/files/105.pdf> (“[I]t is permissible, even mandatory, to enact a scheme of compensatory reparations that is indefensible according to any first-best criterion of justice . . . [particularly because it] is superior to a program containing no cash compensation at all”). *But see* Frédéric Mégret, *Of Shrines,*

we get the idea that when a person “has done a wrong . . . he must make the damage good to boot” and the law “must be exact in determining the magnitude of the correction imposed on the particular offense, and . . . the amount of compensation to be paid.”¹²⁴ Plato’s student Aristotle used this idea to present the theory of corrective justice, explaining it through a metaphor of arithmetic balance in which one person who causes harm to another must offer compensation for the resulting injury in order to equalize the equation.¹²⁵ Thus, “righting a wrong” through compensation brings equality back to the relationship to produce a type of reparative justice.¹²⁶ Theorists apply the theory of corrective justice in modern private law when explaining the function of civil remedies in contract and tort law.¹²⁷ As discussed in Part II, international human rights tribunals have also adopted a reparative justice focus but with some modifications, focusing more narrowly on the specific harms that result from rights violations in individualized cases.

Taking their lead from domestic and international law, truth commissions often issue recommendations for reparations that echo the language of a very legal, rights-based concept of reparative and corrective justice. When governments, however, go on to implement these general and often ideal recommendations, they may actually run contrary to the theory of reparative justice due to technical issues in tailoring reparations to the spe-

Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice, 16 *BUFF. HUM. RTS. L. REV.* 1, 12 (2010) (criticizing the focus on compensation of reparations, as they are excessively tied to the judicial system and take a very long time to be awarded, particularly when the accused cannot afford to pay the reparations); Luis Eduardo Pérez Murcia, *Social Policy or Reparative Justice? Challenges for Reparations in Contexts of Massive Displacement and Related Serious Human Rights Violations*, 27 *J. REFUGEE STUD.* 191 (2013); Julien Piacibello, *Ad Hoc Reparation Mechanisms*, 35 *HOUS. J. INT’L L.* 81, 89, 97–98 (2013) (examining the ad hoc reparation mechanisms formed in Kosovo and Bosnia-Herzegovina to resolve land claims, and arguing that they lacked “effective compensation schemes” because of a unilateral focus on restitution).

124. Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 *AM. J. JURIS.* 97, 106 (1994) (citing PLATO, LAWS, IX & LAWS X, reprinted in *THE COLLECTED DIALOGUES OF PLATO* 1423, 1484 (Edith Hamilton & Huntington Cairns eds., 1963)).

125. ARISTOTLE, *NICOMACHEAN ETHICS*, bk. V, at 87–89 (Roger Crisp ed., trans., 2000) [hereinafter Crisp]; ARISTOTLE, *NICOMACHEAN ETHICS*, bk. V, at 120–23 (Martin Ostwald trans. 1962).

126. Jules L. Coleman, *The Practice of Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 53, 53 (David G. Owen ed., 1995) (“[C]orrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice.”).

127. See DONALD HARRIS ET AL., *REMEDIES IN CONTRACT AND TORT* 21–24, 338–42 (2d ed. 2002) (providing an overview of contract and tort law, as well as the remedies that a party may receive in each type of case). When a party breaches a contract, the available remedies are compensatory damages, restitution, exemplary damages, and literal enforcement, while in torts the remedies are usually only compensatory damages. *Id.* at 21, 338. Scholar Dinah Shelton writes, “[t]he most common principle in all legal systems is that a wrongdoer has an obligation to make good the injury caused, reflecting the aim of compensatory justice.” Dinah Shelton, *Remedies in National Law*, in *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 22, 26 (2d ed. 2006).

cific harms suffered by every victim, as would be done in a full civil trial. For example, when there are a large number of victims, governments often resort to providing a unified package for all victims, such as a lump sum figure. Argentina and Chile both used pension-like plans or lump sums to implement their reparation programs.¹²⁸ Other countries have opted for variations on these approaches.¹²⁹ Reparation programs may also give victims access to services already available to indigent populations but which may not per se respond to the exact injury suffered by the individual. These approaches may undermine the absolute legalistic concepts of corrective and reparative justice.

The tension between the principles of efficiency and fairness resembles those that arise in traditional class action lawsuits, but may be even more dramatic given that victims in transitional justice are in effect being asked to waive their right to a judicial proceeding to protect their individual right to reparation. For example, Colombia began its reparation process by establishing an administrative process to make individual payments to victims of illegal armed groups through a decree based on the idea of “solidarity with the victims.”¹³⁰ Victims and surviving family members of those who were killed or forcibly disappeared received a lump sum ranging from US \$5,000 to \$9,000.¹³¹ This program was criticized, however, for not attending to the other demands of victims, including acknowledgment of the government’s role in human rights violations.¹³² Ultimately, the program did not serve as a “full stop in the struggle for justice,” and victims continued to lobby for more actions resulting in new, more comprehensive reparation laws.¹³³

Similarly, Morocco established the Moroccan Indemnity Commission (*Commission d’Arbitrage*) in 1999 to provide economic compensation for the victims of arbitrary detention and forced disappearance during the reign of King Hassan II.¹³⁴ The Commission received 5,127 applications for compensation, as well as 8,000 testimonies delivered during 196 hearings.¹³⁵ The Commission made awards for 9,779 beneficiaries¹³⁶ that

128. María José Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, in THE HANDBOOK OF REPARATIONS 21, 21, 25 (Pablo De Greiff ed., 2006); Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in THE HANDBOOK OF REPARATIONS 55, 55, 59 (Pablo De Greiff ed., 2006).

129. See HAYNER, *supra* note 3, at 172-78.

130. C. Díaz and I. Marin, *Reparations in Colombia*, in WOMEN AND TRANSITIONAL JUSTICE: THE EXPERIENCE OF WOMEN AS PARTICIPANTS 157, 173 (Lisa Yarwood ed., 2014).

131. *Id.* at 173.

132. See *id.* at 174-75.

133. *Id.* at 175.

134. Susan Slyomovics, *A Truth Commission for Morocco*, 218 MIDDLE EAST REP. 18-19 (2001). The Commission was established by Mohammed VI, the son and heir of King Hassan II, following the King’s death in July 1999. *Id.* at 18.

135. HUMAN RIGHTS WATCH, MOROCCO’S TRUTH COMMISSION: HONORING PAST VICTIMS DURING AN UNCERTAIN PRESENT 10 (2005) [hereinafter MOROCCO’S TRUTH COMMISSION], <http://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>.

136. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE RABAT REPORT: THE CONCEPT AND CHALLENGES OF COLLECTIVE REPARATIONS 26 (2009) [hereinafter THE RABAT

ranged from US \$600 to \$300,000,¹³⁷ with the goal of repairing the material and moral damages suffered by victims.

Victims criticized this reparation program, however, because it lacked any mechanism for investigating the past to reveal the truth about human rights violations.¹³⁸ Moreover, the government officials implementing the program allegedly lacked empathy and thus alienated the beneficiaries.¹³⁹ Finally, public outreach was limited.¹⁴⁰ In response, in 2004 the Moroccan government formed the Equity and Reconciliation Commission (*L'Instance Équité et Réconciliation*), whose mission stated: “[t]urning the page on the past and building a modern and democratic state and society in which rights and duties are respected is first and foremost a social issue that engages all Moroccans.”¹⁴¹ By 2007, almost 12,000 victims had received individualized reparations that amounted to approximately US \$85 million.¹⁴² This new truth commission responded to the demands of victims by offering a more comprehensive approach to the reparation process that achieved a broader aim of justice, as explained in the next sections.

B. Restorative Justice

The theory of restorative justice, which is the next stop on the justice continuum of repair, also rests on the basic premise that reparations aim to “repair [] the harm.”¹⁴³ Howard Zehr, a leading voice on restorative justice, believes that crime “creates obligations to make things right.”¹⁴⁴ Yet restorative justice embraces a broader notion of the harm than does reparative justice, and this fact could help amend some of the more legalistic approaches taken under the umbrella of reparative justice that may be viewed as overly “Western.”¹⁴⁵ Specifically, restorative justice offers a more creative template for determining the different modalities that expand the notion of restoring a victim’s and his or her community’s well-being.¹⁴⁶

REPORT], <http://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf>.

137. HAYNER, *supra* note 3, at 172.

138. MOROCCO’S TRUTH COMMISSION, *supra* note 135, at 10-11.

139. *Id.*

140. THE RABAT REPORT, *supra* note 136, at 25-26.

141. INSTANCE ÉQUITÉ ET RÉCONCILIATION, SUMMARY OF THE FINAL REPORT 32 (2006).

142. HAYNER, *supra* note 3, at 172.

143. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 15 UTAH L. REV. 15, 15 (2003).

144. HOWARD J. ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990).

145. Stephanie Vieille, *Transitional Justice: A Colonizing Field?*, 4 AMSTERDAM L.F. 58, 58 (2012) (criticizing the one-size-fits-all approach to transitional justice, which has relied on legalistic and Western norms, and advocating for a more heterogeneous approach that accounts for indigenous and customary mechanisms of justice that do not espouse this legalistic lens).

146. For a nearly exhaustive list of examples of transitional justice scholars who have invoked this type of justice, see, e.g., Elazar Barkan, *Historical Dialogues: Beyond Transitional Justice and Conflict Resolution*, in HISTORICAL JUSTICE AND MEMORY 185, 185 (Klaus Neumann & Janna Thompson eds., 2015); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91-117 (1998) (dedicating a chapter to the theme of reparations that focuses on restorative approaches to

repair); Raquel Aldana, *A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities*, 5 J. HUM. RTS. 107, 107, 115-16 (2006) (highlighting that reparations are directly linked with the satisfaction of victims with truth commissions and restorative justice aids in correcting imbalances and restoring broken relationships through harmony, healing, and reconciliation); Laura Arriaza & Naomi Roht-Arriaza, *Social Reconstruction as a Local Process*, 2 INT'L J. TRANSITIONAL JUST. 152, 170 (2008) (highlighting the use of local initiatives as successful in integrating cultural practices and promoting community participation and ownership, making the reparations more sustainable); Roy L. Brooks, *Postconflict Justice in the Aftermath of Modern Slavery*, 46 GEO. WASH. INT'L. L. REV. 243, 276-77 (2014) (arguing that civil redress should include a restorative model which uses apologies and forgiveness, coupled with reparations, to provide healing to current members of the affected class); Kerry Clamp & Jonathan Doak, *More than Words: Restorative Justice Concepts in Transitional Justice Settings*, 12 INT'L CRIM. L. REV. 339, 342 (2012); Claire D. Dwyer, *Expanding DDR: The Transformative Role of Former Prisoners in Community-Based Reintegration in Northern Ireland*, 6 INT'L J. TRANSITIONAL JUST. 274, 274-75 (2012) (highlighting a model of disarmament, demobilization, and reintegration premised on the need to create social and economic foundations, while enabling former combatants to participate and contribute to reconstruction and peace-building); Huma Haider, *(Re)Imagining Coexistence: Striving for Sustainable Return, Reintegration and Reconciliation in Bosnia and Herzegovina*, 3 INT'L J. TRANSITIONAL JUST. 91, 106 (2009) (focusing on reparations in Bosnia-Herzegovina, and highlighting social reintegration initiatives focusing on coexistence through reengagement, reframing cross-ethnic dialogues, and rebuilding relationships); Elizabeth Jelin, *Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America*, 1 INT'L J. TRANSITIONAL JUST. 138, 156 (2007) (viewing successful reparations policies as those that see memory as a central and integral element of the policies and practices regarding the past, which can help in bringing closure to the past); Lia Kent, *Local Memory Practices in East Timor: Disrupting Transitional Justice Narratives*, 5 INT'L J. TRANSITIONAL JUST. 434, 436 (2011) (establishing that the use of highly personalized forms of justice in the form of continuing remembrance of the dead can aid in the reconstruction of everyday life, while fulfilling customary obligations and reestablishing fractured relationships and social bonds); Frédéric Mégret, *The International Criminal Court Statute and the Failure to Mention Symbolic Reparation*, 16 INT'L REV. VICTIMOLOGY 127, 143 (2009) (writing that symbolic reparations, in addition to repairing the trauma, can provide satisfaction to victims and guarantee non-repetition); Jeremy Sarkin, *Enhancing the Legitimacy, Status and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies*, 6 INTERDISC. J. HUM. RTS. L. 83, 89 (2012) (highlighting restorative justice as focused on the process of justice in which the victim participates, whereas retributive justice seeks to achieve accountability for those responsible for human rights abuses, emphasizing the right to justice); James A. Sweeney, *Restorative Justice and Transitional Justice at the ECHR*, 12 INT'L CRIM. L. REV. 313, 315-16 (2012) (seeking definitional clarity and tracking the relationship between restorative justice and transitional justice in the jurisprudence of the European Court of Human Rights, encompassing not only property restitution cases, but also cases on successor trials, amnesties, truth and memorialization, and lustration, and drawing upon recent scholarship on the sometimes antagonistic relationship between successor regimes' transitional justice policies and their human rights obligations); Waldorf, *supra* note 90, at 14 (explaining that restorative justice contrasts with retributive justice because the former emphasizes face-to-face mediation between victims and offenders, who atone for their actions while victims forgive, making this a great component of the local justice process); Orhun Hakan Yalınçak, *The Case for Restorative Justice in the Context of Crimes Against Humanity* 1 (Feb. 6, 2013) (Northeastern Univ. Sch. of Law Human Rights and the Glob. Econ. Journal, Working Paper Series), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206716 (stating that "restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future," and further elaborating that restorative justice focuses on healing but is dependent on managed expectations by avoiding the illu-

This approach requires moving beyond a strictly legal rule-based approach to calculate measurable damages.

The philosophical roots of restorative justice “can be traced to many religious and spiritual traditions and to aboriginal practices and customs around the globe.”¹⁴⁷ In modern times, restorative justice gained popularity in the 1970s and consisted mainly of mediation between victims and offenders.¹⁴⁸ Generally speaking, restorative justice encompasses “[a] process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.”¹⁴⁹ Restorative justice moves away from retributive justice’s focus on punishing offenders by inflicting an “equal and just measure of pain,”¹⁵⁰ and towards a focus on healing, for the victim, for the offender, and for the community. Thus, a restorative approach to reparations may still include material reparations but may also involve other “reparative” processes that may not look like traditional compensation.¹⁵¹

Traditional approaches to restorative justice focus more on “ordinary” interpersonal, isolated acts that would require a one-on-one mediation model. They are associated with alternative dispute resolution or other forms of conflict resolution that scholars tend not to discuss with regard to transitional justice.¹⁵²

More recently, scholars have begun to apply a restorative justice framework to recommend responses in the aftermath of mass violence.¹⁵³ As Menkel-Meadow explains, “[r]estorative justice is the name given to a variety of different practices, including apologies, restitution, and acknowledgments of harm and injury, as well as to other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment.”¹⁵⁴ Yet, in these contexts, where the primary “offender” may be the government and not just non-state actors, the processes may not fit into the conventional model of mediation. Significantly, under a reparative approach, this “offender” state is often expected to award reparations, whereas traditional theories of restorative justice prioritize informal processes residing outside of state intervention.¹⁵⁵

sions of a “cure all”).

147. Sarah Eschholz, *Restorative Justice: Social Movement, Theory, and Practice*, 28 CRIM. JUST. REV. 146, 147 (2003).

148. TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 7 (1999).

149. *Id.* at 5.

150. Strang & Sherman, *supra* note 143, at 16.

151. See Chris Cunneen, *Exploring the Relationship Between Reparations, the Gross Violation of Human Rights, and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 335, 357-58 (Dennis Sullivan & Larry Tift eds., 2006).

152. See Michal Alberstein, *ADR and Transitional Justice as Reconstructing the Rule of Law*, 2011 J. DISP. RESOL. 127, 127-28 (2011) (arguing for a deeper connection between the social institutions of alternative dispute resolution and transitional justice).

153. See, e.g., Clamp & Doak, *supra* note 146, at 359-60; Andrea K. Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 290, 314 (2009).

154. Menkel-Meadow, *supra* note 83, at 162.

155. Katherine Doolin, *But What Does It Mean? Seeking Definitional Clarity in Restorative Justice*, 71 J. CRIM. L. 427, 429 (2007).

Despite these differences, the theory of restorative justice offers valuable contributions to constructing a theory of reparations, namely because it offers a more victim-focused approach—a principle that transitional justice aims to prioritize.¹⁵⁶ Restorative justice also better accommodates a more dynamic view of “harm” because this approach calls on the beneficiary (for example, a victim-survivor) to answer the questions of “‘what’ must be restored and ‘how’ this restoration is to be fulfilled.”¹⁵⁷ By necessity, the victim must be consulted as a stakeholder in the reparation process, which not only empowers the victim, but also helps to satisfy him or her with the results.¹⁵⁸

Additionally, the empowerment of victims during the “the *process of doing justice*” can be a form of reparation.¹⁵⁹ In fact, focusing more on the *effect* of reparations instead of the *modality* of a reparation measure helps to expand what counts as reparations. In some more successful transitional justice settings, reparations have consisted of a broader range of mechanisms that do not per se resemble the narrower concept of *only* material compensation. Even experiences—such as truth commission hearings where victims can tell their truth, or trials where they may receive information about what happened to their loved ones—can produce a reparative effect.¹⁶⁰ Truth commissions have been characterized as restorative given that they provide a public forum for victims and operate on an interpersonal, non-adversarial level.¹⁶¹ Archbishop Desmond Tutu, commenting on the South African Truth and Reconciliation Commission, noted that the commission was far more restorative because it followed the

156. Menkel-Meadow, *supra* note 83, at 164, 174. For a discussion of how international tribunals are trying to bring a victim focus to their adjudications, see Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 317-32 (2011).

157. Gabbay, *supra* note 74, at 359. See also Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789, 820, 822 (2009).

158. Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1424, 1444-45 (2007) (arguing for a restorative process of allowing people to choose how they are made whole in order to correct property-induced invisibility and increase the legitimacy of existing property arrangements). See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 11 (2002); Ellen Waldman, *Restorative Justice and the Pre-Conditions for Grace: Taking Victim's Needs Seriously*, 9 CARDOZO J. CONFLICT RESOL. 91, 104-05 (2007).

159. Raymond Koen, *The Antinomies of Restorative Justice*, in *RESTORATIVE JUSTICE: POLITICS, POLICIES AND PROSPECTS* 247, 254 (Elena Van der Spuy et al. eds., 2d ed. 2008).

160. See, e.g., Onur Bakiner, *Promoting Historical Justice Through Truth Commissions: An Uneasy Relationship*, in *HISTORICAL JUSTICE AND MEMORY* 146, 146-47 (Klaus Neumann & Janna Thompson eds., 2015); TRISTAN A. BORER, *TELLING THE TRUTHS* 18 (2006); Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277, 312 (2004); Laplante & Theidon, *supra* note 45, at 75-76; Merryly Lawry-White, *The Reparative Effect of Truth Seeking in Transitional Justice*, 64 INT'L & COMP. L. Q. 141, 143-44 (2015).

161. Elmar Weitekamp et al., *How to Deal with Mass Victimization and Gross Human Rights Violations: A Restorative Justice Approach*, in *LARGE-SCALE VICTIMISATION AS A POTENTIAL SOURCE OF TERRORIST ACTIVITIES* 227 (Uwe Ewald & Ksenije Turkovic eds., 2006).

spirit of the African understanding of justice as “not so much to punish as to redress or restore a balance that has been knocked askew.”¹⁶² At a certain level, the entire transitional justice process becomes a form of reparation.

By adopting this more expansive focus, a government can repair not only physical and material losses but also emotional and relational harms.¹⁶³ For example, reparations programs can be implemented in a manner that empowers formerly passive victims by engaging them throughout the process.¹⁶⁴ Through their participation in the reparation process, victims may actually experience a less tangible reparative *effect* which is restorative in nature.¹⁶⁵ The International Criminal Court views the guarantee of victims’ participatory rights as a form of restorative justice.¹⁶⁶ Eleni Coundouriotis discusses how the act of claiming rights as an act of “self conscious agency” and self-realization contributes to healing.¹⁶⁷ Participation helps victims “to re-define their relationship to the world around them . . . [by exercising] some power over the way in which justice is carried out, to have a say in what must be done to ‘right the wrong.’”¹⁶⁸

Restorative justice’s flexibility better captures local customary approaches and thus responds to scholars’ calls to recognize the importance of honoring local approaches to justice.¹⁶⁹ Transitional justice thus builds on the narrower version of traditional one-on-one restorative justice processes to include a whole host of local rituals, ceremonies, and other processes to repair both individuals and communities.¹⁷⁰ These mecha-

162. MINOW, *supra* note 146, at 81.

163. Doolin, *supra* note 155, at 432.

164. See Lisa J. Laplante, *Evaluating Truth Commissions and Reparations Through the Eyes of Victims*, 28 L’OBSERVATEUR DES NATIONS UNIES 167, 173-74 (2011) [hereinafter Laplante, *Eyes of Victims*].

165. See Clamp & Doak, *supra* note 146, at 343 (discussing the view of scholars that restorative justice emphasizes the process over the outcome, such as through victim participation).

166. See JONATHAN DOAK, VICTIMS’ RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE 254 (2008).

167. Eleni Coundouriotis, *The Dignity of the “Unfittest”: Victims’ Stories in South Africa*, 28 HUM. RTS. Q. 842, 853 (2006). See Lisa J. Laplante, *Women as Political Participants: Psychosocial Postconflict Recovery in Peru*, 13 PEACE & CONFLICT: J. PEACE PSYCHOL. 313, 313-31 (2007).

168. Frank D. Hill, *Restorative Justice: Sketching a New Legal Discourse*, 1 CONTEMP. READINGS L. & SOC. JUST. 115, 179 (2009).

169. Rosa E. Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law”*, 101 MICH. L. REV. 2275, 2336-37 (2003) (arguing for greater use of local myths, customs, and rituals to promote rule of law in post-conflict transitions).

170. As Zartner explains,

“[t]here are other legal traditions in the world, where the focus has historically centered on rebuilding community harmony and trust, or reconciling the opposing parties in a conflict to restore balance. Some of these legal traditions find the basis for the laws and concepts of justice in religious principles, and some find it in longstanding customs of the community.

Dana Zartner, *The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies*, 22 IND. INT’L & COMP. L. REV. 297, 297 (2012).

nisms may include local burial customs, like in Zimbabwe,¹⁷¹ or processes like Uganda's Mato Oput and Rwanda's Gacaca courts, among others.¹⁷² Localized approaches to justice often better support the micro-politics of reconciliation in fractured communities, especially when "the line between victim and killer is too blurred."¹⁷³ They can create a reparative effect by restoring individual and community well-being.¹⁷⁴

For example, Zarter discusses how the preliminary pact on accountability and reconciliation, signed by the government of Uganda and the Lord's Resistance Army in 2007, specifically called for the promotion of traditional justice mechanisms like Culo Kwor, Mato Oput, Kayo Cuk, Ailuc, and Tonu ci Koka, even if they required some necessary modifications.¹⁷⁵ For example, Mato Oput, which means to drink "the bitter root," is an Acholi understanding of life based on "apology, remorse, and the acceptance of responsibility for one's actions."¹⁷⁶ In this ritual, the whole

171. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 635 (2002) (discussing community reburials of Ndebele massacre victims in Zimbabwe).

172. See, e.g., Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621, 647-48 (2009); Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 361-62 (2008); Amy Senier, *Traditional Justice as Transitional Justice: A Comparative Case Study of Rwanda and East Timor*, 23 PRACTICE: THE FLETCHER J. HUM. SECURITY 67, 72 (2008).

173. Marc Lacey, *Atrocity Victims in Uganda Choose to Forgive*, N.Y. TIMES (Apr. 18, 2005), http://www.nytimes.com/2005/04/18/world/africa/atrocity-victims-in-uganda-choose-to-forgive.html?_r=0. See also THEIDON, *supra* note 118 (discussing the process of micro-reconciliation in the rural Peruvian communities where members may be both victims and perpetrators).

174. That said, these localized processes are not without fault and have come under scrutiny. In particular, the Gacaca courts have been met by quite a bit of criticism, although they were originally touted as an exemplary form of alternative restorative justice. See Jennie E. Burnet, *(In)Justice: Truth, Reconciliation, and Revenge in Rwanda's Gacaca*, in TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE 95, 100 (Alexander L. Hinton et al. eds., 2010); Cody Corliss, *Truth Commissions and the Limits of Restorative Justice: Lessons Learned In South Africa's Cradock Four Case*, 21 MICH. ST. INT'L L. REV. 273, 299 (2013) (observing that the attempt to provide restorative justice in the Cradock Four case was relatively unsuccessful and that, although restorative justice has laudable goals, its application often results in either amnesty or inefficiency).

175. Zartner, *supra* note 170, at 313. Apuuli explains what each of these rituals signifies. Kasaija Phillip Apuuli, *The ICC's Possible Deferral of the LRA Case to Uganda*, 6 J. INT'L CRIM. JUST. 801, 806 (2008). Kulo Kwor refers to "compensation to atone for homicide as practised in Acholi and Lango cultures and to any other forms of reparation after full accountability" *Id.* at n.25. Kayo Kuk refers to "the traditional rituals performed by the Langi to reconcile parties formerly in conflict after full accountability." *Id.* at n.27. Ailuc refers to "traditional rituals performed by the Iteso to reconcile parties formerly in conflict after full accountability." *Id.* at n.28. Tonu ci Koka refers to "the traditional rituals performed by the Madi to reconcile parties formerly in conflict after full accountability." *Id.* at n.29.

176. Apuuli, *supra* note 175, at 806. The Acholi are a distinct ethnic group in Northern Uganda that make up five percent of the population and has born the brunt of the internal armed conflict in that country. Specifically, since winning its independence in 1962, Uganda has experienced civil wars and political repression. The most brutal insurgency was led by the Lord's Resistance Army (LRA) which became notorious for their recruitment of child soldiers, resulting in an arrest warrant issued by the Interna-

community partakes in the bitter drink that symbolizes the idea of never tasting the bitterness in the future; the ritual involves both the victim and the perpetrator, as well as the whole community.¹⁷⁷ In this cleansing ceremony, all participants are removed of evil spirits as a way to redress past harms.¹⁷⁸

Similarly, East Timor relied on traditional ritual practices as part of its transitional justice experience.¹⁷⁹ East Timor's transition began after a 1999 referendum led to independence from an oppressive Indonesian occupation dating back to 1975.¹⁸⁰ From 2000 to 2002, the U.N. Transitional Administration in East Timor helped to establish the Commission for Reception, Truth and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste*, or CAVR); its purpose was to undertake a nationwide truth-seeking process that included organized community reconciliation hearings.¹⁸¹ In particular, the CAVR included a "Community Reconciliation Process," the aim of which was to help reintegrate estranged members of communities who committed politically motivated crimes deemed "less serious" than other more egregious crimes.¹⁸² Under this approach, panels brokered an agreement in which 1,371 perpetrators would undertake certain actions—like community service or paying reparations to victims—with an understanding that they would be reintegrated into the community upon completion.¹⁸³ These community-based hearings allowed victims, perpetrators, and the rest of the community to participate, on a voluntary basis, in processes employing customary local rituals such as the "nahe biti boot."¹⁸⁴ This process is thought of as a restorative one, designed to bring about local reconciliation.¹⁸⁵

Wendy Lambourne observes that these types of customary ritual approaches may better ensure local and personal relevance among the ben-

tional Criminal Court against its leader Joseph Kony. See generally Janet McKnight, *Accountability in Northern Uganda: Understanding the Conflict, the Parties and the False Dichotomies in International Criminal Law and Transitional Justice*, 59 J. AFR. L. 193 (2015).

177. Apuuli, *supra* note 175.

178. *Id.*

179. Patrick Burgess, *A New Approach to Restorative Justice—East Timor's Community Reconciliation Processes*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 176, 189 (Naomi Roht-Arriaza & Javier Mariezurtena eds., 2006).

180. Kent, *supra* note 146, at 435, 440.

181. COMM'N FOR RECEPTION, TRUTH AND RECONCILIATION TIMOR-LESTE [CAVR], CHEGA! THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR-LESTE, at 2 (October 2005) [hereinafter COMM'N FOR RECEPTION, TRUTH AND RECONCILIATION], <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/09-Community-Reconciliation.pdf>. The U.N. also established a hybrid international tribunal known as the Special Panels for Serious Crimes to investigate and prosecute cases of war crimes, crimes against humanity, genocide, murder, torture, and sexual offences. *Id.* at 4.

182. *Id.* at 2.

183. *Id.* at 3.

184. The name of this ritual literally translates to "stretching or laying down the mat as a means to facilitate consensus" with the help of ancestors. Dionísio Babo-Soares, *Nahe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor*, 5 ASIA PAC. J. ANTHROPOLOGY 15, 21 (2004).

185. *Id.* at 15-16.

eficiaries of these programs.¹⁸⁶ She explains, “[i]n East Timor, for example, local community reconciliation processes were experienced as personally meaningful specifically because of the inclusion of *nahe biti* rituals.”¹⁸⁷ CAVR also held Victims’ Hearings and Healing Workshops designed to help restore the dignity of community members.¹⁸⁸ While it is true that some victims felt frustrated that perpetrators did not face criminal prosecution, there was a reported overall high rate of satisfaction among the victims.¹⁸⁹ The East Timor experience highlights that restorative justice helps repair not only relationships but also the structures and institutions in which these relationships reside.¹⁹⁰

Restorative justice offers ways to address some of the potential downsides of the narrower form of reparative justice. For example, a restorative justice focus can address some of the procedural challenges of administering a reparation program so as not to inflict new harm on the intended beneficiaries of these programs. Some local experiences reveal that nationwide registry procedures that place unreasonable burdens on the poor to prove their “victim status” may create new conflict in close-knit communities.¹⁹¹ In this instance, restorative justice helps redirect focus to the *quality* of the implementation process to ensure that it is respectful of the well-being and dignity of the beneficiaries—which in itself can have a reparative effect, given that many of these populations mistrust government agencies as a result of their past experiences. Because human rights violations rob victims of their dignity and their power, the transitional justice process must avoid re-victimizing its intended beneficiaries by relegating them to positions of powerlessness.¹⁹² Even the term “victim” may communicate a cultural perception of a broken and less effective person despite its purely legal connotation of a person whose rights were violated.¹⁹³

Through a restorative justice lens, governments may better plan the process of implementing reparations to avoid putting victims in a passive, inferior role that subjects them to disrespectful treatment. At minimum, this restorative approach requires that the public administration of reparative mechanisms should “do no harm” and ideally should actually promote well-being.¹⁹⁴ Similarly, Basic Principles affirms that victims should be “treated with compassion and respect for their dignity”¹⁹⁵ as well as “have their right to access to justice and redress mechanisms fully respected.”¹⁹⁶

186. Lambourne, *supra* note 89, at 46.

187. *Id.*

188. COMM’N FOR RECEPTION, TRUTH AND RECONCILIATION, *supra* note 181, at 38.

189. *See id.* at 34; Lambourne, *supra* note 89, at 38.

190. Lambourne, *supra* note 89, at 46.

191. Laplante, *Law of Remedies*, *supra* note 64, at 81.

192. Laplante, *Eyes of Victims*, *supra* note 164, at 173.

193. *Id.*

194. *See* Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096 (2008) (indicating that this normative baseline resembles a school of thought promoted by the notion of therapeutic jurisprudence).

195. Basic Principles, *supra* note 16, at 3.

196. *Id.*

Once again, the idea of the respectful and fair treatment of beneficiaries goes towards emphasizing the *process* of repairing the non-material harms associated with human rights violations.¹⁹⁷

C. Civic Justice

Compared to restorative justice, which relates to processes of micro-reconciliation and personal healing, civic justice relates to a macro-reconciliation process that mends the relation between citizens and the State.¹⁹⁸

197. See, e.g., ZEHR, *supra* note 144, at 15-17.

198. For examples of transitional justice scholars who have invoked this type of justice, see Elizabeth A. Cole, *Transitional Justice and the Reform of History Education*, 1 INT'L J. TRANSITIONAL JUST. 115, 120-21 (2007) (emphasizing that history education should be a part of transitional justice as schools can be an important tool to continue the work of transitional justice well after the end of a truth commission); Colleen Dugan et al., *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 INT'L J. TRANSITIONAL JUST. 192, 205 (2008) (emphasizing that a reparations policy has the capacity to strengthen or renew citizenship as "it recognizes victims as individual rights holders, and its immaterial dimension and its 'material, financial dimension' are important for restoring psychological health and dignity and for enhancing self confidence"); Ari Edward Gandsman, *Retributive Justice, Public Intimacies and the Micropolitics of the Restitution of Kidnapped Children of the Disappeared in Argentina*, 6 INT'L J. TRANSITIONAL JUST. 423, 425 (2012) (highlighting the establishment of a National Genetic Data Bank in Argentina to identify accurately familial links following the successful lobbying by the Grandmothers of the Plaza de Mayo to lead ultimately to the restoration of custody of the kidnapped children to their biological families); Briony Jones, *Exploring the Politics of Reconciliation through Education Reform: The Case of Brčko District, Bosnia and Herzegovina*, 6 INT'L J. TRANSITIONAL JUST. 126, 131 (2012) (describing how educational reform can bring together conflicting parties to promote reconciliation through the education of a new generation of citizens who will embrace the new particular norms); Keirsten McCourt, *Judicial Defenders: Their Role in Postgenocide Justice and Sustained Legal Development*, 3 INT'L J. TRANSITIONAL JUST. 272, 273 (2009) (explaining the successes of the Rwandan Ministry of Justice's Corps of Judicial Defenders in addressing the lack of legal representation for those accused of genocide crimes, and in providing advice and representation for civil claimants); Donny Meertens & Margarita Zambrano, *Citizenship Deferred: The Politics of Victimhood, Land Restitution and Gender Justice in Colombia (Post?) Conflict*, 4 INT'L J. TRANSITIONAL JUST. 189, 200 (2010) (focusing on transformative transitional justice that is sensitive to avoiding the restoration of the old discriminatory order by focusing on an inclusive definition of victimhood, recognizing historical and non-formalized property rights, and combining access-to-justice measures with empowerment and protection); Glenda Merzarobba, *Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil*, 7 SUR-INT'L J. HUM. RTS. 7, 11, 14, 21 (2010) (describing examples from Brazil of laws passed to acknowledge disappearances, the creation of a DNA database to examine exhumed bodies, the reinstatement of dismissed civil servants and military personnel, and the codification of crimes of torture); Purtori, *supra* note 123, at 1155-56 (explaining that effective guarantees of non-repetition can include institutional reform (such as civilian control of the military and security forces); compliance with international standards of due process, the establishment of an independent judiciary; the incorporation of human rights training into educational systems; and searches for the disappeared, killed, or abducted); Ruth Rubio-Marin & Pablo de Greiff, *Women and Reparations*, 1 INT'L J. TRANSITIONAL JUST. 318, 324 (2007) (conceptualizing reparations as a rights-based political process that contributes to establishing or re-establishing a systems of rights that should include victims in the design of reparation programs); Luke Wilcox, *Reshaping Civil Society Through a Truth Commission: Human Rights in Morocco's Process of Political Reform*, 3 INT'L J. TRANSITIONAL JUST. 49, 61 (2009) (emphasizing that reparations should include more than financial and social compensa-

Civic justice, although not frequently described, has been defined as “a full opportunity for all citizens to participate in the life of the commonwealth. The simple idea that all citizens must have full and equal opportunities to participate in the public realm is the basis of democratic theory and republican practice.”¹⁹⁹ This definition resembles that of “deliberate democracy,” which is “a conception of democratic politics in which decisions and policies are justified in a process of discussion among free and equal citizens or their accountable representatives.”²⁰⁰

Civic justice arises out of the process of involving victim-survivors in their capacity as citizens during all stages of designing and implementing government reparation programs.²⁰¹ Roman David and Susanne Y. P. Choi argue that truth commissions and reparations are not purely private matters, but rather encompass “a broader process of rebuilding relationships between victims and the community, society, polity, and perpetrators . . . that enables society to come to terms with its past and launch political and structural reforms. The system influences victims and victims desire to change the system.”²⁰²

The reparation process thus becomes a form of citizen restitution to amend for the fact that human rights violations trample on citizen rights. Consider, for example, that the basic rights of citizenship—freedom of association, political participation, free speech, equal and fair treatment—tend to be sacrificed during times of conflict and political violence. One frequently hears victim-survivors speak of feeling that they were treated like “second class citizens” or even “less than human” in the course of having their rights violated. This treatment harms citizen status, which requires redress.²⁰³

tion; in some cases the advancement of political rights is the most crucial form of reparations); Winter, *supra* note 123, at 228–31 (presenting examples of civic justice in New Zealand including: changes to property laws, improvement of public administration, promotion of state-institution building, reform of bureaucratic practice including the removal of corrupt officials, and ending impunity); Marcos Zunino, *Releasing Transitional Justice From the Technical Asylum: Judicial Reform in Guatemala Seen Through Technē and Phronēsis*, 5 INT'L J. TRANSITIONAL JUST. 99, 106 (2011) (highlighting judicial reform as a critical endeavor after conflict to make the judicial system more efficient, less corrupt, and more accessible to indigenous communities by providing more translators and establishing community courts to apply indigenous law in rural communities).

199. Louise G. Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States*, in ACCESS TO JUSTICE AND THE WELFARE STATE 119, 120 (M. Cappelletti ed., 1981).

200. Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy is Different*, 17 SOC. PHIL. & POL'Y 161, 161 (2000).

201. See Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J. L. & SOC'Y 265, 266 (2008).

202. Roman David & Susanne Y.P. Choi, *Victims in Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic*, 27 HUM. RTS. Q. 392, 430–31 (2005).

203. It should be noted that transitional justice reparation programs also include substantive measures of “legal restitution,” such as annulling criminal convictions due to sham trials, securing official identification documents such as birth certificates, and other legal measures that enable people to restore fully their civil and political rights.

Redressing the violation of citizen rights is also important for the government to regain the trust of its citizens, especially if it hopes to govern effectively its once-neglected constituencies. Thus, civic justice imagines a type of higher level “civil reconciliation” that repairs the relationship between the State and its subjects while lending legitimacy to the reformed government.²⁰⁴ As Erin Daly observes, “[b]y engaging in a dialogue with the public, the institutional actors can promote the values of the new government. This institutional response is often the earliest and most visible manifestation of the deepest values of the new order. As such, it can begin the transformation of the society at large.”²⁰⁵

One can see here how the boundary between restorative justice and civic justice is both fluid and malleable. The degree to which the aims of restorative and civic justice overlap and differ is therefore responsible for shaping this flexible boundary. For example, civic justice relies in part on the restorative justice notion of process, which encourages a more respectful engagement, but its justice aim is to empower the previously marginalized to become capable agents of political change as opposed to passive, wounded, and traumatized victims vis-à-vis the government. Empowering victims by giving them agency is a critical step in recovery for both the victims and for their country. Civic justice, like restorative justice, also integrates theories of conflict resolution. This broader theory of justice depends, however, on the creation and strengthening of official channels for expressing grievances and resolving political disputes. Institutionalizing these channels diminishes the risk that populations will resort to violence in order to be taken seriously.

Here, civic justice projects overlap with democracy-building programs, which begin with the understanding that violent conflicts often arise because a government systematically fails to respond to the grievances of marginalized and underrepresented constituencies.²⁰⁶ Ideally, reparation programs start establishing the habits of non-violent dispute resolution by encouraging the process of “deliberative politics” and “communicative action” where people come together to discuss, modify, and agree on laws in a manner more likely to include the voice of the underrepresented populations.²⁰⁷ These programs thus support the work of peacebuilding and peacekeeping, which recognize the precarious nature of peace and seek to capitalize on opportunities for the peaceful resolution of ongoing disputes that could potentially become full blown conflicts.

Along these lines, civic justice also assumes that even if a society has formal legal equality, it may suffer from actual social and class inequali-

204. Rubio-Marin & de Greiff, *supra* note 198, at 460–62.

205. Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73, 75 (2002).

206. See, e.g., JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 257 (2006); Aneta Wierzynski, *Consolidating Democracy Through Transitional Justice: Rwanda’s Gacaca Courts*, 79 N.Y.U. L. REV. 1934 (2004).

207. JÜRGEN HABERMAS & WILLIAM REHG, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 5 (1998).

ties.²⁰⁸ Therefore, the aim of civic justice is to include the previously marginalized and to emphasize equal protection of political rights. The focus of civic justice resonates with what Habermas recognized as the symbiosis between democracy and the rule of law.²⁰⁹ Restoring citizen status helps to cultivate a culture of rights, and reinforces the principle that all citizens have a right to “equal concern and respect” and to be treated “as an equal.”²¹⁰

Relatedly, reparations convey recognition and acknowledgment that the government failed to respect and protect the rights of its citizens. In this way, they serve almost as a sanction that symbolizes a check on arbitrary government power which the rule of law promises to deliver.²¹¹ Reparations become a type of enforcement mechanism to vindicate rights as reflected by the maxim *ubi ius, ibi remedium*—where there is a right, there is a remedy.²¹² This principle resonates with Locke’s argument that “[w]here the laws cannot be executed, it is all one as if there were no laws.”²¹³ Transitional justice settings often employ this rights framework when referring to reparations, viewing them as a means for activating a right by assuring that governments actually respect and protect these fundamental protections, or pay the cost of failing to have done so. The reparations serve as a type of quasi-sanction against the defendant government for having failed to uphold its international legal obligations, while also

208. See, e.g., IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2000); MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999); Barbara Hudson, *The Institutionalisation of Restorative Justice: Justice and the Ethics of Discourse*, 2007 *ACTA JURIDICA* 56 (2007) (discussing how the “[i]nclusion of the hitherto excluded or marginalised is emphasized”).

209. Jürgen Habermas, *On the Internal Relation between the Rule of Law and Democracy*, 3 *EUR. J. PHIL.* 12, 12–20 (1995).

210. Dworkin posits that one of the most basic assumptions of Rawls’ theory of justice is that people have a “right to equal respect and concern in the design and administration of the political institutions that govern them.” See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 182 (1977). Moreover, he argues that political morality and a liberal conception of equality require that government must treat those whom it governs with concern “as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.” *Id.* at 272; H.L.A. HART, *THE CONCEPT OF LAW* 159 (1994) (explaining that the latent “general principle” that arises in applications of the idea of justice, including compensation and redress, is “that individuals are entitled in respect of each other to a certain relative position of equality or inequality”).

211. Doolin, *supra* note 155, at 437. Professor Charles Ogletree, writing on reparations for civil rights violations of African-Americans, recognizes reparations as providing “acceptance, acknowledgment, and accounting” to emphasize that “the present is not an accident or fortuity.” Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 *U.C. DAVIS L. REV.* 1051, 1056 (2003).

212. See Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 13, 13–23 (Naomi Roht-Arriaza ed., 1995) (explaining the different theories of punishment in the context of criminal justice and arguing that in the context of international human rights violations, the theories that are most appropriate are those focused on how the violations affected the victim and society as a whole).

213. A. John Simmons, *Locke and the Right to Punish*, 20 *PHIL. & PUB. AFF.* 311, 321 (1991) (quoting JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 14 (Hackett Pub. Co. 1980)). When there is “common injury done to some person or other” the victim “has besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it.” *Id.*

satisfying the petitioner's right to reparations.²¹⁴

Ultimately, like criminal justice, reparations combat impunity by building a rights-based counter-culture that holds governments accountable for egregious human rights violations pursuant to official policy.²¹⁵ This response reinforces what classic political theory understands to be the consent-based nature of a "social contract," which entails a government protecting the fundamental rights of citizens from arbitrary abuse at the hands of its own agents as well as that of non-State actors.²¹⁶ This understanding of accountability means that civic justice also contains an element of retributive justice because civil penalties serve to exact a punishment of sorts while deterring future transgressions.²¹⁷ This approach echoes back to John Locke who explained, "[t]he damnified person has this power of appropriating to himself the goods or services of the offender, by right of self-preservation, as every man has a power to punish the crime, to prevent its being committed again, by the right he has of preserving all mankind."²¹⁸ Where reparations may be viewed as a next-best option to criminal penalties, the lens of civic justice and the sanction function of reparations suggests that they serve an important civil counterpart to criminal justice measures.²¹⁹

This process of accountability also helps to "correct the record" through official histories that may vindicate victims who are often falsely accused as being enemies of the State. For example, Spain refused for many decades to address the crimes of General Franco's regime (1939-1975) as part of a Pacto de Olvido (pact to forget) despite demands for truth and justice from the families of the disappeared.²²⁰ Though the government finally created the Law on Historical Memory in 2007 to provide for some material and moral damages, critics note that it does not address the responsibility of the State and it excludes any type of official apology "that might restore the reputation and the rights of the victims and

214. Laplante, *Bringing Effective Remedies Home*, *supra* note 49, at 348.

215. See Margaret Urban Walker, *The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things*, in JUSTICE, RESPONSIBILITY AND RECONCILIATION IN THE WAKE OF CONFLICT 205, 205 (Alice MacLachlan & Allen Speight eds., 2013) (proposing that reparations have an "expressive nature" which includes "a communicative function that requires the gesture to carry a vindictory message to victims").

216. See Maurice Cranston, *Introduction*, in JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 24, 29-30 (Betty Radice & Robert Baldick eds., 1968); E. Clinton Gardner, *John Locke: Justice and the Social Compact*, 9 J. L. & RELIGION 347, 356-59 (1992) (noting Rousseau's observation that "no government was legitimate in which the general will of all people does not control the effective lawmaking power"); Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157 (2007).

217. I explore this idea elsewhere. See Laplante, *Bringing Effective Remedies Home*, *supra* note 49, at 347.

218. Simmons, *supra* note 213, at 323.

219. RENTELN, *supra* note 101.

220. See, e.g., Paloma Aguilar, *Justice, Politics, and Memory in the Spanish Transition*, in THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES 92 (Alexandra Barahona De Brito et al. eds., 2001); Madeleine Davis, *Is Spain Recovering Its Memory? Breaking the Pacto del Olvido*, 27 HUM. RTS. Q. 858 (2005).

persons closely related to the victims.”²²¹ This need for official acknowledgment ties to the need for civic justice.

Alternatively, society at large generally ignores or stays ignorant of the plight of survivors, which only adds to the sense of wrong. Thus, restorative justice helps to raise awareness and public compassion through symbolic reparations. As an example, in the case of his exploration of enslaved Africans in early American history, Waterhouse refers to “rectifactory justice” as requiring the creation and support of monuments, memorials, museums, and other memory projects to “commemorate, honor, recognize, and humanize” the victims.²²² Arguably, Waterhouse’s theory fits within the category of civic justice and captures the idea that reparations constitute part of “wider social, political, and judicial reform processes, which together are intended to contribute to . . . ‘social reconstruction.’”²²³ Revisiting Daly’s notion of transformation, offering reparations becomes a legitimizing moment that posits that

[i]f the new democratic governments aim to secure their authority and their values, then it is necessary for them to transform their societies from ones that tolerated or fostered oppression to ones that respect human rights and democratic values. In other words, if the public was involved in some way in the original oppression, then the culture that allowed the oppression to take place or actively pursued it must be changed. Simply changing the governors won’t cure a problem that resides as well in the governed.²²⁴

Importantly, Daly recognizes that transformation is not just an end point of political-legal change, but rather the *process* of getting there. This process never ends; rather, it requires an ongoing cultural commitment.

Peru’s transitional justice experience reflected the aims of civic justice—especially the idea of political transformation.²²⁵ Upon publishing its final report in 2003, the Peruvian Truth and Reconciliation Commission (PTRC) also issued a comprehensive plan of reparations.²²⁶ Importantly, the PTRC viewed reparations as a key component to achieving a type of *macro* reconciliation, which it defined as “a process of reconstruction of a social and political pact.”²²⁷ The Plan Integral de Reparaciones (PIR) viewed national reconciliation as one key objective and included a detailed explanation as to why the State must adhere to its international obligation

221. Juan J. Garcia Blesa & Victor L. Gutierrez Castillo, *The Rights of the Victims of Past Atrocities in Spain: Reparation Without Truth and Justice*, 29 CONN. J. INT’L L. 227, 243 (2013).

222. Carlton Waterhouse, *Total Recall: Restoring the Public Memory of Enslaved African-Americans and the American System of Slavery Through Rectifactory Justice and Reparations*, 14 J. GENDER, RACE & JUST. 703, 707 (2011).

223. M. Brinton Lykes & Marcie Mersky, *Reparations and Mental Health: Psychosocial Interventions Towards Healing, Human Agency, and Rethreading Social Realities*, in THE HANDBOOK OF REPARATIONS 589, 590 (Pablo De Greiff ed., 2006).

224. Daly, *supra* note 205, at 74.

225. For a factual background of the Peruvian experience, see Part II.B.

226. See generally PERUVIAN TRUTH AND RECONCILIATION COMMISSION, 9 FUNDAMENTOS DE LA RECONCILIACION 14 (2003), www.usip.org/sites/default/files/file/resources/collections/commissions/Peru01-Report/Peru01-Report_Vol9.pdf.

227. *Id.* at 29.

to guarantee the right to reparation.²²⁸ In addition, the PIR posited that the reconciliation process would “vindicate the rights of citizens that had been trampled upon.”²²⁹ Ultimately, the PIR also called for building an *estado de derecho* (rule of law) with an active citizenry, human dignity, and equality before the law, that could contribute “to the reestablishment of civic trust and social solidarity.”²³⁰

The PIR contained measures to satisfy demands for civic justice. First, these measures included symbolic reparations such as memorials, official and public gestures, public apologies, letters to families, and public ceremonies to clear the name of those unjustly imprisoned for terrorism under Fujimori’s draconian national security laws.²³¹ All of these measures help to acknowledge the gravity of the harm caused by the State’s failure to protect the victims while also facilitating a process of recuperating the rights and dignity of citizens.²³² Second, restitution of citizen rights calls for “the return of victims to the state of full citizenship, as a subject of rights . . . to remove all legal stigma.”²³³

Another manner of restituting civic rights relates to the legal measures to adjust the status of survivors. For example, the Peruvian reparation plan granted families of the disappeared a certificate that declares their loved one to be presumed deceased in order to allow inheritance laws to apply in order to avoid a “juridical limbo.”²³⁴ Reparations also included new identification documents to replace those destroyed in the war or left behind when victims fled their homes.²³⁵ Without any official forms of identification, these victims would be unable to access other public benefits or exercise all their rights; for example, victims without official forms of identifications are unable to receive the benefits of the PIR.²³⁶ The Peruvian Ombudsman indicated that approximately 500,000 people were in need of new documentation, and at the time of their last report on the issue in 2008 they had issued new identification documents to over 90,000 victims of political violence.²³⁷ All of these measures offer “juridical rehabilitation” to help effectively reestablish a person’s full civil and political rights.²³⁸ In this way, Peru’s reparation program incorporated the aim of civic justice.

228. *Id.* at 146.

229. *Id.* at 102.

230. *Id.* at 147.

231. *See id.* at 161-63.

232. *See id.* at 184.

233. *Id.* at 183-84.

234. *Id.* at 185.

235. *Id.* at 187.

236. *Id.* at 188.

237. *See* DEFENSORÍA DEL PUEBLO, DEVOLVERLES SU IDENTIDAD ES DEVOLVERLES SUS DERECHOS: SUPERVISIÓN A LOS REGISTROS SINIESTRADOS A CONSECUENCIA DE LA VIOLENCIA POLÍTICA (2008), <http://www.defensoria.gob.pe/temas.php?des=9#r>.

238. PERUVIAN TRUTH AND RECONCILIATION COMMISSION, *supra* note 226, at 184.

D. Socio-economic Justice

While civic justice attempts to repair political inequalities, socio-economic justice seeks to remedy historical, social, and economic inequalities. With increasing frequency, transitional justice scholars and practitioners are advocating for recognition of the links between transitional justice, development, and conflict prevention.²³⁹ They recognize that the causes of

239. For examples of transitional justice scholars who have invoked this type of justice, see *LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE* (Ruth Buchanan & Peer Zumbansen eds., 2014); *TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS* (Pablo De Greiff & Roger Duthie eds., 2009). See also Antkowiak, *supra* note 49, at 384–86 (highlighting socioeconomic justice as the provision of funds in the collective interest for the community, with members of the community involved in the administration of those funds); Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights*, 32 *NETH. Q. HUM. RTS.* 183 (2014); Roger Duthie, *Toward a Development-Sensitive Approach to Transitional Justice*, 2 *INT'L J. TRANSITIONAL JUST.* 292, 296–97 (2008) (highlighting measures such as collective and individual reparations, property restitution, and rehabilitation and reintegration of victims and perpetrators to reduce exclusion, marginalization, and vulnerability by bringing them into the economy and recognizing and empowering them in order to generate economic activity); Donna Lyons, *Maximising Justice: Using Transitional Justice Mechanisms to Address Questions of Development in Nepal*, 13 *TRINITY C.L. REV.* 111, 124 (2010) (highlighting a socioeconomic-focused model which addresses, in the words of Kofi Annan, “the deep-rooted socioeconomic . . . causes that often underlie the immediate political symptoms of conflicts” before addressing the needs of the victims; a failure to address these issues will ultimately disadvantage the victims and the remainder of society in the long run); Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Towards a Positive-Peace Paradigm for Transitional Justice*, 35 *FORDHAM INT'L L.J.* 780, 784–85 (2012) (writing that one way to achieve a more balanced approach to transitional justice is to reconceptualize and reorient the “transition” of transitional justice to a broader “positive peace” in which justice for physical violence and economic violence are equally valued, rather than merely focusing on democratization and the rule of law); Frédéric Mégret, *The Case for Collective Reparations Before the ICC* 1 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196911 (defining collective reparations as those awarded to (1) an intermediary group, (2) organizations or institutions that suffered direct harm to their property dedicated to education, religion, or art, or (3) a group or category of persons (such as racial, ethnic, religious, or political), independent of the group’s legal existence); Ismael Muvingi, *Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies*, 3 *INT'L J. TRANSITIONAL JUST.* 163, 179–80 (2009) (highlighting that reparations indicate a payoff to victims of violations and can be deemed inadequate by those who suffered from systematic and institutionalized economic exploitation; such exploitation should be addressed through redistribution); Tafadzwa Pasipanodya, *A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal*, 2 *INT'L J. TRANSITIONAL JUST.* 378, 391 (2008) (writing that development in post-conflict societies that seeks to establish socioeconomic services like education and health would have a greater likelihood of success if those societies considered the historical nature of injustices and how these injustices perpetuate in the present); Simon Robins, *Challenging the Therapeutic Ethic: A Victim-Centered Evaluation of Transitional Justice Process in Timor-Leste*, 6 *INT'L J. TRANSITIONAL JUST.* 83, 102 (2012) (discussing economic support as the most prioritized mechanism of transitional justice by victims in Timor-Leste who indicated a preference for resources to address basic needs that emphasize the importance of social and economic rights); Val-Garijo, *supra* note 14, at 44–45 (emphasizing that reparations need both an individual and collective dimension because when the community as a whole has been victimized, there will be a need to help groups move forward); Viaene, *supra* note 120, at 21 (emphasizing that socioeconomic justice cannot be ignored in the debate on redress and that reparations should address specific local and cultural needs). *But see* Lyons,

violent conflicts, which in turn cause civil and political human rights violations, most often arise out of deep-rooted social and economic inequalities. In order to repair truly the harm suffered by victim-survivors suffering from these conditions and prevent new cycles of violence, governments must first repair these structural problems. Socio-economic justice may consist of a blend of “financial or other material compensation, restitution or reparation for past violations or crimes (historical justice), and distributive . . . justice in the future (prospective justice).”²⁴⁰

Some skeptics argue that distributive justice is a matter that must be separated from the subject of reparations. Certainly corrective justice, as discussed above, deals with the calculation of specific damages caused by past wrongs whereas distributive justice “is concerned with how best to allocate the goods of society” moving forward.²⁴¹ As Aristotle explains, distributive justice involves the “distributions of honour or money or the other things that have to be shared among members of the political community.”²⁴² Modern theorists, such as John Rawls, see this form of justice as a utopian ideal in which “[a]ll social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”²⁴³

The view of distributive justice in both classic and modern philosophy is forward-looking and overlooks how this theory applies as a remedy as well. On this point, philosopher Robert Nozick critiques Rawls’ theory by suggesting that the only justification of a distributive scheme of transfer payments would be one based on a “principle of rectification” to remedy past injustices.²⁴⁴ With this perspective in mind, reparations in transitional justice settings can expose the “artificial realm” between the forward and backward types of justice.²⁴⁵

Scholarship on slavery reparations primarily grapples with the distributive justice aspect of reparations, which often entail monetary or “in-kind

supra, at 123; Miller, *supra* note 123, at 285 (stating that if development is directed through reparation, it could potentially limit “the conceptualization of both conflict and redistribution”).

240. Lambourne, *supra* note 89, at 41.

241. John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1033 (2003).

242. Crisp, *supra* note 125, at 85.

243. JOHN RAWLS, *A THEORY OF JUSTICE* 62 (1973). Rawls proposes that under a “veil of ignorance” people would choose a more equitable scheme of cooperation to assure a satisfactory life given that they would have no knowledge of their class, social status, natural assets, and abilities. *See id.*

244. Robert Nozick, *Distributive Justice*, 3 PHIL. & PUB. AFF. 45, 126 (1973) (“While to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make a more extensive state necessary in the short run in order to rectify them.”).

245. *See* Culhane, *supra* note 241, at 1033; Norman S. Wilson, *Is Corrective Justice Subsidiary to Distributive Justice? Which Answer Better Captures the Meaning of Tort Law Practice?*, 10 TRINITY C.L. REV. 44, 44-45 (2007).

transfers from whites to blacks.”²⁴⁶ The proposals for large-scale redistributive transfers aim to reduce substantial socio-economic inequalities between races in a way that achieves redistributive justice.²⁴⁷ Similarly, non-monetary reparations such as access to health care and education, as well as collective reparations, can summon the spirit of socio-economic justice. For example, Peru began its process of reparations by giving victims access to its public health care system, as well as initiating hundreds of development-like collective reparations programs in the villages hardest hit by the conflict.²⁴⁸ Similarly, Germany granted victims of the Holocaust access to collective reparations along with individual compensation.²⁴⁹

The funding for these types of reparation measures usually comes from state coffers, which in turn come from taxes paid by citizens who are not legally liable for a human rights violation.²⁵⁰ Thus, the transfer of public monies begins to look more like a policy of redistribution. Furthermore, empirical studies, including those I have conducted, have begun to reveal how the intended beneficiaries of reparations programs often desire reparations that will help them cope with everyday necessities.²⁵¹ This marks a change from studies having a more narrow focus on repairing the actual harm that victims suffer from the human rights violation that qualifies them for reparations: torture, disappearance, or extrajudicial killing. They demand this practical assistance to respond to the hardship of poverty. Truth commissions, directly engaged with these constituencies, often end up making recommendations for measures to attend to the everyday needs of victims, which add to the confusion about the aim of reparations. Moreover, lump sums or access to general public services are completely disconnected from an individualized assessment of a victim’s damages and thus appear like a form of distributive justice instead of corrective justice.²⁵² Some scholars challenge the idea that providing these types of public goods should be considered as reparations because they arise out of

246. Kyle D. Logue, *The Jurisprudence of Slavery Reparations: Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1320 (2004). Logue points out that most scholarship on slavery reparations focuses on corrective justice while he argues for a distributive justice approach. *Id.* at 1323. See also Charles J. Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 279, 307 (2003) (arguing that financial remedies, such as the creation of business funds to aid African-Americans and broad-ranging educational, housing, and health care initiatives, might overcome individual remedy difficulties and assist in combating racial inequality).

247. Due to its broader nature, this type of justice might be more controversial, according to Brophy. See *infra* note 258.

248. Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141, 162-63 (2007) [hereinafter Laplante, *Indivisibility*].

249. See ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 5-12 (2000).

250. See generally Alexander Segovia, *Financing Reparations Programs: Reflections from International Experience*, in *THE HANDBOOK OF REPARATIONS* 650 (Pablo De Greiff ed., 2006) (discussing the financing of reparations programs in transitional societies).

251. Laplante, *Indivisibility*, *supra* note 248, at 141.

252. See Rodrigo Uprimny Yepes, *Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice*, 27 NETH. Q. HUM. RTS. 625, 634 (2009).

independent obligations found in human rights law, in particular those enshrined in the International Covenant on Economic, Social and Cultural Rights.²⁵³

Some truth commissions include an analysis of violations of economic, social, and cultural rights, and propose socio-economic reparations that respond to these types of rights violations.²⁵⁴ This approach helps to lessen the confusion by showing how development-like measures are in fact a form of reparation. Dr. Rama Mani adopts this view of distributive justice, arguing that it contains a critical dimension of reparative justice when applied in post-conflict settings.²⁵⁵ This perspective is in accordance with a new line of writing in transitional justice which links the field of sustainable peacebuilding—which promotes “the twin objectives of preserving ‘negative peace’ (absence of physical violence) and building ‘positive peace’ (presence of social justice)[–with] alleviation, if not elimination, of the underlying causes of conflict.”²⁵⁶ Thus, the holistic and comprehensive approach of peacebuilding initiatives includes a focus on the “security, legal, political, economic, structural, cultural and psychosocial conditions necessary to promote a culture of peace in place of a culture of violence.”²⁵⁷

The justice continuum of repair model should guide how we think about and understand the role of reparations in transitional justice. In practice, this model would assure quality control of the design and implementation of reparation programs. Understanding the justice aims of reparations and what they are supposed to achieve at a theoretical level offers a critical starting point for choosing the right approaches to creating sound reparation policy.²⁵⁸ The process of implementation can be constantly checked against theoretical guideposts to assure the achievement of promised goals, thus satisfying the expectations of beneficiaries. Finally, a theoretical framework allows for proper evaluation of whether a reparation program met its proposed purpose. That said, practical recommendations for implementation must accompany theoretical frameworks to be useful. Thus, the next Part will offer recommendations for a methodological

253. I have written more extensively on this debate in an earlier article. See Laplante, *Indivisibility*, *supra* note 248, at 149–51. See generally International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

254. For example, the East Timor truth commission included an analysis of economic, cultural, and social rights in their final report. For discussion, see Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework*, 2 INT’L J. TRANSITIONAL JUS. 331 (2008).

255. RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* 8–9 (2002).

256. Lambourne, *supra* note 89, at 28–48.

257. *Id.*

258. Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 836 (2006) (“[I]t is important to explore the goals of reparations in order to understand what we want reparations to accomplish. Understanding the goals will allow us to assess which reparations plan best meets the goals and to order the reparation plans according to that priority.”).

approach to assure that the design of a reparation program is more apt to embrace the pluralistic justice aims of reparations.

IV. Implementing a Plural Approach to Reparations

The justice continuum of repair as a theoretical framework raises questions about practical application in the real world of transitional justice. In particular, the individualized, pluralistic approach to reparations could meet reasonable objections. Skeptics may point out the impossibility of accommodating every justice need, especially when victims make unreasonable demands.

Indeed, it would be misleading to claim that the pluralistic approach will lead to a perfect reparation experience. Rather, any national attempt to redress a past of widespread human rights abuses will face many challenges, especially given political, economic, and social constraints. It will never be absolutely perfect to attain full repair simply due to the large number of victims, the limited budget, and the competing government obligations. The justice continuum of repair thus operates within the reality that full justice will never be perfectly attained. As recognized by Galanter,

[w]e cannot avoid the necessity of rationing remedy. Remedies use up resources—money, organization, and not least the limited supply of attention. Even if resources are also expanding, every expenditure involves corresponding opportunity costs. And justice is not the only thing we want. Few would argue that the lowest-priority claim for justice should enjoy a lexical priority over every other goal. Some grievances can be addressed, but not all grievances.²⁵⁹

Nonetheless, in accepting the reality described by Galanter, it is important not then to declare that “anything goes.” Just any old repair will not be just repair. Countries transitioning from conflict to peace may not simply ignore or negotiate away the rights and claims of victims. Rather, we need to promote the creation of guidelines and methodology to assure as much as possible that the interests and well-being of the beneficiaries are protected.

In the following sections, I argue that a process of participation and diversification of reparations will at least allow a closer approximation of the felt justice needs of victims in a way that is mindful of the justice continuum of repair.²⁶⁰ Thus, while I would agree that it is not possible to meet every demand made by victims, I argue that certain methodology will better enable governments to maximize the chance of a higher level of satisfaction among victims. The following section offers some suggested guidelines on how the justice continuum of repair framework may guide the implementation of reparations in a way that maximizes satisfaction, at the

259. Galanter, *supra* note 105, at 8.

260. The Rule of Law Report advises that “[s]trong public information and communication strategies are essential to manage public and victim expectations and to advance credibility and transparency.” Rule of Law Report, *supra* note 27, § 51.

same time that it serves as a limiting principle to minimize unreasonableness.

A. Comprehensive Approaches to Reparations

A reparation strategy will more likely than not satisfy victims' felt justice needs if it diversifies reparation measures. A comprehensive reparation policy would include an array of measures including, but not limited to: compensation (monetary sums), rehabilitation (forms of medical, psychological, social, and legal assistance for victims), and satisfaction (measures such as public apologies, guarantees of non-repetition, and institutional and legal reform). These are standards already adopted by various international human rights courts.²⁶¹

In the case of *García Lucero et al. v. Chile*, the Inter-American Court of Human Rights evaluated an administrative reparation program applying this concept of comprehensiveness.²⁶² Significantly, the entire case revolved around the idea that "comprehensive" should be integrated with the other criteria set forth by the Basic Principles criteria, namely whether reparations are appropriate, effective, prompt, and adequate.²⁶³ The court followed the principle of *restitutio in integrum*, which recognizes that a full repair may require a full scope of measures to put the victim back in the position he or she would have been in absent the violation.²⁶⁴ Along these lines, U.N. Special Rapporteur Pablo de Greiff has also offered a theory of reparations that includes the notion of "complexity" and "internal coherence" to reflect that there are many distinct ways to achieve full repair.²⁶⁵

261. See, e.g., Gabriella Citroni, *Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts*, 5 INTER-AM. & EUR. HUM. RTS. J. 49 (2012); Gerald L. Neuman, *Bi-Level Remedies for Human Rights Violations*, 55 HARV. INT'L L.J. 323 (2014).

262. The Inter-American Court of Human Rights explained:

Reparation must be adequate, effective and comprehensive. States parties are reminded that in the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them.

García Lucero et al. v. Chile, Preliminary Objection, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶ 188 (Aug. 28, 2013) (citing U.N. Committee Against Torture, General Comment No. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Implementation of Article 14 by States Parties, ¶ 6, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012)).

263. See *id.*

264. *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 154, ¶ 136 (Sept. 26, 2006). The court explained:

Redressing the damage caused by the breach of an international duty requires, as far as possible, *restitutio in integrum*, which means restoring the situation to that prior to the violation. Should this be impossible, it is for the international court to establish a series of measures aimed not only at ensuring respect for the violated rights, but also at redressing the consequences of the breach and ordering the payment of compensation for the damage suffered. *Id.*

265. Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, in THE HANDBOOK OF REPARATIONS 1, 10-11 (Pablo de Greiff ed., 2006).

Similarly, the United Nations Office of the High Commissioner of Human Rights promotes this principle, instructing that “[t]he combination of different kinds of benefits is what the term *complexity* seeks to capture. A reparations programme is more complex if it distributes benefits of more distinct types, and in more distinct ways, than its alternatives.”²⁶⁶

With the concept of comprehensiveness in mind, governments should begin any reparation project by assessing the multiple justice aims of repair held by victims. This information can then aid administrators in selecting modalities that best match the felt justice needs of the full range of potential beneficiaries. Victims would choose among a variety of reparation measures—sometimes opting for all of them. At the same time, if a program offers an array of reparations it may achieve what the Office of the United Nations High Commissioner for Human Rights terms “completeness,” in that it strives to reach all victims to assure that they are beneficiaries of the program.²⁶⁷

A comprehensive program could still lead to feelings of unfairness if it contravenes the principle of equality before the law. Thus, the process of implementing reparations must be as procedurally fair and equal as possible, giving all potential beneficiaries access to the procedure and modalities of reparations. This criterion recognizes that while the results of reparation packages may not be exactly the same for all beneficiaries, the process should be as similar as possible. That said, the principle of equality still requires baseline substantive criteria to assure fairness, such as consideration of the gravity of the harm suffered. It will never be as precise as an individualized court proceeding, but if clear criteria is at least established, the awarding of reparations will be more systematic and fair. Moreover, as long as this process involves the victims themselves and they are kept fully informed, there is more likely to be fuller acceptance of the overall program.

A pluralist approach necessarily means different results for different intended beneficiaries.²⁶⁸ Despite the immediate appearance of unequal treatment that this proposal suggests, a pluralist approach actually accepts a differentiation in treatment—it individualizes justice.²⁶⁹ It is rare that

266. Office of the U.N. High Comm’r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations programmes*, 22, U.N. Doc. HR/PUB/08/1 (2008).

267. *Id.* at 15. The Office of the United Nations High Commissioner for Human Rights stated:

Whatever benefits a reparations programme ends up distributing and for whatever violations, its aim is to ensure that every victim actually receives the benefits, although not necessarily at the same level or of the same kind. If this is achieved, the programme is complete. Completeness refers to the ability of a programme to reach every victim, i.e., turn every victim into a beneficiary. *Id.*

268. Woodman, *supra* note 80, at 160 (“By definition a plural state law provides for different norms to be applied to different persons in the same situation. Stated baldly thus, the objection is inadequate. Every body of law distinguishes between different categories of persons for the purpose of determining which norms should apply to them.”).

269. The idea of individualizing justice has already been considered with relation to defendants in criminal trials. See, e.g., MARIE-CLAIRE FOBLETS & ALISON DUNDES RENTELN,

every victim will want the same exact remedy. Perfect uniformity in programming—for example, the same exact package for every victim—may even be seen as unfair.²⁷⁰ Consider, for example, a victim who did not suffer any physical harm and does not need medical aid as much as she wants symbolic recognition of her violated right. Alternatively, a victim who owns their own home but needs psychological counseling will not be satisfied with a package of housing without medical aid that includes mental health services.

Moreover, omitting certain types of reparations could leave individual victims who belong to certain distinguishable classes to feel unrepaired. For example, victims in Cambodia who practice Buddhism see criminal trials, such as those involving the former leaders of the Khmer Rouge, as a waste of resources given that the defendants will reincarnate; instead, they want an array of memorials recognizing the dead and the wrong caused to them.²⁷¹ Many Bosnians express a desire for reparations that were not included as a part of that country's transition; in fact, the transition rested more squarely on prosecutions conducted by the International Tribunal for the former Yugoslavia.²⁷² This observation contrasts with many victims in Peru and Guatemala who campaign for trials as a way to meet their needs for repair.²⁷³

Even if complete repair will never be possible in light of the incommensurability problem, a comprehensive approach will be more likely to be perceived as adequate redress if it responds to the felt justice needs of victims.²⁷⁴ At close range, aspiring to the goal of full justice might seem to

MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENSE (2009); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996).

270. Mégret, *supra* note 91, at 26 (stating that “there may be something inherently unfair about imposing a unitary law in a very diverse society”).

271. Conversation with Cathy J. Schlund-Vials, Associate Professor of English and Asian American Studies, University of Connecticut (Mar. 14, 2013). See also CATHY J. SCHLUND-VIALS, WAR, GENOCIDE AND JUSTICE: CAMBODIAN AMERICAN MEMORY WORK 46–49, 57–58 (2012). See generally Kate Yesberg, *Assessing Justice Through Victim Participation at the Khmer Rouge Tribunal*, 40 VICTORIA U. WELLINGTON L. REV. 555, 565 (2009). The Extraordinary Chambers in the Court of Cambodia (ECCC) allows victims not only to lay complaints, be called as witnesses, and file for reparations, but it also allows them to join as civil parties to the trial with the same participatory rights as the accused. See Victims Participation, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/victims-support/participation> (last visited Oct. 29, 2015).

272. Conversations with Patrice McMahon, Associate Professor of Political Science, University of Nebraska-Lincoln, in Boston, Mass. (June 2, 2013).

273. I base this claim on my own interviews with victims in both countries. Wilson observes that South Africans felt that the lack of criminal justice due to amnesties “violated local understandings of justice.” Richard A. Wilson, *Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights*, 41 CURRENT ANTHROPOLOGY 75, 84 (2000).

274. As discussed *supra* note 264, the Inter-American Court of Human Rights has adapted to the difficulty of calculating damages when restitution is not possible or practicable by taking the approach of *restitutio in integrum*, which consists of a variety of modalities to approximate “making a victim whole” and restoring the “status quo ante.” These plans might include restitution, compensation, mental and physical rehabilita-

require impartial, imperfect justice. Only from a bird's eye view can the full spectrum of justice aims be understood as the best way to maximize full satisfaction of victims. The fairness of this approach, however, will depend on clear criteria and procedures, as will be discussed in the next section.

B. Activating the Justice Continuum of Repair Through Participation

Although Galanter set the stage for bringing an individualized plural account to the concepts of injury and remedy, he does not address a key concern: how will a legal process faithfully extract this information from the perceptions of victims? This Article proposes a participatory process as the best way to activate the pluralist approach to reparations. The local dialogue with the government over how to fulfill the general norm of the right to reparation must determine the *content* of this right in a way that embraces local understandings of repair. Victims and survivors should be consulted on their ideas of appropriate, effective, and prompt reparations, which will help identify the theory that underlies these victim-centered understandings of redress.²⁷⁵

Arguably, the shortcomings of transitional justice projects are due in part to the failure to create a more participatory role for victims. I count myself among a growing number of scholars who have argued that there is a link between a participatory policy and the success of transitional justice processes.²⁷⁶ Certainly the idea of victim participation is not all that radical; rather, it is just plain common sense. In an ordinary civil suit, a plaintiff would have the opportunity to provide testimony and evidence to prove his or her pain and suffering, which ultimately could influence how he or

tion, satisfaction, and guarantees of non-repetition. See Basic Principles, *supra* note 16, at 7–9 (outlining the goals of restitution and compensation as remedies for human rights violations). Although monetary reparations are recognized as a remedy for human rights violations, there are few instances where victims have actually received any money. See Roht-Arriaza, *Reparations Decisions*, *supra* note 100, at 157–58. See generally Antkowiak, *supra* note 49.

275. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 323 (1987).

276. *Id.* at 325 (writing on historic wrongs of slavery, colonization, and Japanese internment in the United States). Rather than relying on abstract analysis, Matsuda emphasizes the need to allow victims to define remedies. She points out that

[t]he technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge. *Id.*

See also LISA YARWOOD, *WOMEN AND TRANSITIONAL JUSTICE: THE EXPERIENCE OF WOMEN AS PARTICIPANTS* (2014); Stephen Pearson & Anna Triponel, *What Do You Think Should Happen—Public Participation in Transitional Justice*, 22 PACE INT'L L. REV. 103 (2010); Waterhouse, *supra* note 67, at 270 (arguing that instituting participation at the initial stages of a transitional justice project will elevate the victims' status, better ensuring their participation throughout the process as stakeholders invested in the process as well as its outcomes).

she recovers through court ordered damages.²⁷⁷ Yet, as already explained, administrative programs strive to streamline the reparation process in the name of efficiency to compensate large classes of victims, often resulting in a depersonalized process that sidelines the victim in the calculation of benefits.

While it is true that truth commissions, which also operate as government agencies, usually take a participatory approach through the reception of testimonies and interviews, it is not the case that this policy automatically carries over to the other government agencies charged with implementing some variation of these general recommendations.²⁷⁸ Moreover, truth commissions often develop their recommendations based on the input of victims, but there is no guarantee that the government will faithfully implement these recommendations. As an illustration, the Peruvian agency that implements the national reparation law—which adopted parts of the recommendations made by Peru’s truth commission—claimed to have a seat at the table reserved for victim representatives.²⁷⁹ Yet leaders of victim-survivor groups confirmed that they did not receive an invitation to participate in the implementation process.²⁸⁰ Thus, despite the seeming logic of participation, it is not a guaranteed aspect of government work.

Despite this tendency to ignore victims during implementation, a plural approach to reparation depends on participatory-based procedures to honor as well as manage differing normative visions of repair. On this point, Berman argues for the development of a set of principles to guide the design of procedural mechanisms, institutions, and practices that manage without eliminating hybridity and plural voices.²⁸¹ He argues that “such a pluralist approach would aim to create or preserve spaces where normative conflicts can be constructively addressed and opportunities for contestation can be retained.”²⁸² Although Berman makes his recommendation with reference to the negotiation between states at the international level, it still applies to the decentralized pluralism that I am proposing. In essence, both Berman and I recognize that a well thought out and quality procedure better ensures plurality.

277. Despite this “participation” of victims, even tort law may be somewhat limited in the types of remedies it will award. Renteln argues that pluralism and cultural relativism should play a role in ordinary court proceedings of a suit in tort. Alison Dundes Renteln, *The Influence of Culture on the Determination of Damages: How Cultural Relativism Affects the Analysis of Trauma*, in *LEGAL PRACTICE AND CULTURAL DIVERSITY* 199, 199 (Ralph Grillo et al. eds., 2009).

278. *But see* Bosire, *supra* note 65, at 79 (describing how the truth commission in the Democratic Republic of the Congo did not adequately include the participation of victims, but instead was the product of consultations among elites during peace negotiations).

279. Laplante, *Negotiating Reparations*, *supra* note 107, at 218.

280. *Id.* at 239, 241.

281. Berman, *Global Legal Pluralism*, *supra* note 18, at 1179.

282. *Id.* Similarly, Martha Minow and Joseph William Singer espouse upon the relevance of plural values, and the plural method it inspires, to allow more people “to participate in the creation and re-creation of desirable shared worlds.” Minow & Singer, *supra* note 91, at 909. They argue that the plural view is “more inclusive, more democratic, more educative, more persuasive, and we believe, more true.” *Id.* at 920.

To implement the participatory approach, legislation establishing reparation programs should mandate this approach. Consistent with the plural account of reparations, however, I advise against mandating a one-size-fits-all recommendation on how to design this participatory policy.²⁸³ Instead, a plural account would require that localized considerations shape such an approach. That said, existing localized participatory processes might lend guidance. For example, Latin American countries may refer to their extensive experience with *presupuesto participativo* (participatory budget) processes that institutionalize a decentralized community level decision-making process for allocating local funds.²⁸⁴

As an illustration of how this arrangement might work in a transitional justice setting, a government could opt first to establish a registry of victims to help identify who will be eligible for reparations. Part of that process could include sustained dialogue and focus groups with representatives of the victims to identify their felt justice needs, which would then help direct the design of reparations. The government may even solicit information from each victim as they register.

Understandably, technocrats may shy away from a pluralist approach that requires a participatory process because, simply put, it is harder to do. They may view a pluralistic, participatory approach as “messy” and imperfect with no clear *ex ante* guidelines for resolving all potential cases.²⁸⁵ Certainly, participatory processes can challenge an administrator’s tendency to apply universal norms for the sake of efficiently implementing government policy.²⁸⁶ Inclusive dialogue processes do not guarantee an

283. Susan Thomson & Rosemary Nagy, *Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda’s Gacaca Courts*, 5 INT’L J. TRANSITIONAL JUST. 11, 11 (2011) (noting that the field of transitional justice has only recently started to pay attention to “more localized, traditional mechanisms as a corrective to the shortcomings of internationalized, ‘one-size-fits-all’ approaches”).

284. See generally JOSH LERNER, EVERYONE COUNTS: COULD “PARTICIPATORY BUDGETING” CHANGE DEMOCRACY? (2014); ANDREW SELEE & ENRIQUE PERUZZOTTI, PARTICIPATORY INNOVATION AND REPRESENTATIVE DEMOCRACY IN LATIN AMERICA (2009); DECENTRALIZATION, GOVERNANCE, AND THE NEW PLANNING FOR LOCAL-LEVEL DEVELOPMENT (Walter B. Stöhr et al. eds., 2001).

285. Martha Minow and Joseph William Singer acknowledge that the plural method “may seem difficult and messy, and may lack the tone of confidence that accompanies a method touted for producing ‘the right answer. . . .’” Minow & Singer, *supra* note 91, at 909. See also Berman, *Global Legal Pluralism*, *supra* note 18, at 1236. Berman explains:

The messiness of hybridity also means that it is impossible to provide answers *ex ante* regarding occasions when pluralism should be honored and occasions when it should be trumped. As noted throughout, such line drawing questions can be exceedingly difficult, and every person or community will draw the line a bit differently depending on political interests and normative commitments. Moreover, any answer is inevitably both “local” and transient, because it will immediately be contested by other communities. Indeed, part of the reality of pluralism is that no answer is ever final or followed by all. *Id.*

286. Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, 26 POL. & L. ANTHROPOLOGY REV. 55, 68 (2003) (discussing the incentives human rights bodies have to develop, apply, and implement universal standards in light of the difficulties of particularized approaches accounting for cultural relativism).

easy fix; rather, they require an investment in training of government officials as well as sufficient time for engaging with victim-survivors.

In arbitrating conflicting views among victims or managing unreasonable demands, these processes will need to include professional mediators. Governments may also need to invest in building the capacity of victims and their representatives to engage in this dialogue.²⁸⁷ These victim associations are often under-resourced and disorganized, and experience debilitating interpersonal conflict, thus hindering representatives' ability to communicate concerns effectively. Without building the capacity of victims, the very purpose of participation is frustrated.²⁸⁸

Moreover, governments should consider enlisting teams of anthropologists and other similarly trained professionals to conduct sustained, qualitative assessments of local demands. This would include going to the communities where victims reside to engage in sustained dialogue and observation. Many national truth commissions include staff with these types of researchers; a government may then choose to transfer these same teams to the government agency charged with the implementation of reparations to facilitate the participatory process. Importantly, involving professionals like anthropologists who employ an ethnographic methodology also builds in an assurance of ongoing evaluation of whether reparation programs actually meet victim felt justice needs, and could thus be considered adequate, appropriate, and effective. This method is already being used by extractive companies to develop remedial programs.²⁸⁹

Participation would allow the government to engage in an educational process that would help manage expectations, educate victims regarding the parameters of reparations, and facilitate other dialogue that will inform beneficiaries and prevent future misunderstandings. As I have argued elsewhere, a quality process of negotiation with beneficiaries will often create the space necessary for compromises that reality requires given multiple demands, budget constraints, and other factors that will make full repair difficult, if not impossible.²⁹⁰ In situations where victim-survivors were

287. Lisa J. Laplante & Miryam Rivera, *The Peruvian Truth Commission's Mental Health Reparations: Empowering Survivors of Political Violence to Impact the Public Health Policy*, 9 HARV. HEALTH AND HUM. RTS. INT'L J. 137, 154-55 (2006).

288. Such was the case in Guatemala, where the victims' groups experienced a high level of infighting that broke down the reparation distribution process. See Cristián Correa et al., *Reparations and Victim Participation: A Look at the Truth Commission Experience*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 4 (Carla Ferstman et al. eds., 2009), <http://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Participation-2009-English.pdf>; Laura Arriaza & Naomi Roht-Arriaza, *Social Reconstruction as a Local Process*, 2 INT'L J. TRANSITIONAL JUST. 152, 162 (2008). It is important to recognize and plan for the potential challenges of a participatory approach. A procedural approach may privilege some victims over others and result in paralysis, as well as allow the state to offload its responsibility onto victims when things do not work well. Within a world of scarce resources, victim representatives may seek to rebuild their organizational patronage networks. I thank Naomi Roht-Arriaza for raising this issue.

289. Interview with Angela Bayer, Assistant Professor in the Division of Infectious Diseases, Department of Medicine, UCLA, in Lima, Peru (Oct. 17, 2012).

290. See Laplante, *Negotiating Reparations*, *supra* note 107.

listened to, treated with respect, and allowed to influence the development of policy, they evidenced a high degree of satisfaction even if the resulting reparations fell short of their initial demands.²⁹¹

This commitment to respectful engagement with victims also requires that beneficiaries be given adequate explanations regarding the decision-making process and results.²⁹² For example, governments may need to explain to victim groups the reason why they need to attend to the “needs of the bottom,” such as those who are elderly and infirm.²⁹³ In Peru, the majority of victims accepted a “needs of the bottom” arrangement because ongoing consultation by the truth commission allowed a discourse on why this policy made sense.²⁹⁴ When incorporated into these deliberations, most victims do not find this on-the-face discrimination to be problematic. Through a carefully planned, inclusive process of negotiation, beneficiaries will have a sense of fairness and acceptance of any necessary compromise in the content of reparation measures.

All of this preparation may seem like extra work that would require a high level of institutional commitment. This short term, up-front investment, however, will better guarantee long term success of reparation programs, as well as contribute to the fulfillment of the different justice aims—in particular, restorative and civic justice which emphasize process and participation.²⁹⁵ On this point, the U.N. Rule of Law Report recognizes that “most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out.”²⁹⁶ This approach will also better assure the quality and legitimacy of any reparation program.²⁹⁷ Beneficiary satisfaction will rise as

291. *Id.* See also Bernadette Atuahene, *The Importance of Conversation in Transitional Justice: A Study of Land Restitution in South Africa*, 39 L. & SOC. INQUIRY 902 (2014) (concluding that the dominant procedural justice findings about fairness are relevant in the transitional justice context, and determining through empirical research that beneficiaries of land restitution found the outcomes more fair if they were able to sustain conversations with commissioners without communication break-down).

292. Berman’s emphasis on the social good of procedures managing plurality also requires an explanation of deference to one norm over another. See PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 10 (2012). Similarly, Minow and Singer regard the duty to treat people with dignity as a minimum bar. See Minow & Singer, *supra* note 91, at 919–20. This

requires giving adequate reasons for conduct that affects them and if morality is based on arguments, those arguments must be worked out in enough detail to justify one choice over others. . . . [T]he very goal of treating people with humanity and dignity requires that we not erase them, that we not deny their perspective, their interests, their reality, their legitimate values. See *id.*

293. See Matsuda, *supra* note 275, at 397.

294. See Laplante, *Negotiating Reparations*, *supra* note 107, at 239.

295. The importance of a participatory approach has begun to earn more currency, and more authors are advocating for recognizing the importance of involving victims in the design and implementation of reparations and transitional justice processes generally. See, e.g., Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25, 29 (2003); Ramji-Nogales, *supra* note 21; Waterhouse, *supra* note 67, at 258.

296. See Rule of Law Report, *supra* note 27, § 16.

297. Sam Garkawe writes on South Africa’s transitional justice experience and argues that “no accountability mechanism can be described as valid and just unless it gains a

programming involves them in the process, thus satisfying the U.N. Basic Principles standards.²⁹⁸ For this reason, the Inter-American Commission on Human Rights has placed great emphasis on a transparent consultation process in its Principal Guidelines for a Comprehensive Reparation Policy, which addresses Colombia's 2006 Justice and Peace Law.²⁹⁹

Even after implementing a mandated participatory approach to reparations, a government may still face legal challenges. This reality is due in part to the fact that full reparation in these settings is never possible given the large number of victims and limited resources. I would argue, however, that a state could provide evidence of a mandated, quality-driven, participatory policy to demonstrate that it took reasonable steps to assure an adequate, effective, prompt, and appropriate program. Such policy may even count as presumption in favor of the government in such litigation.

C. Developing a Bottom-up Taxonomy of Reparation Standards

As the growing number of national experiences are synthesized, we can start to flesh out the taxonomy of common reparation modalities that correspond with the different justice aims held by victims across localities, cultures, and nationalities. This data may be collected through "deterritorialized ethnography" to elucidate best practices as well as standards for adequate, appropriate, and effective reparations through the eyes of victims.³⁰⁰

When administrative reparation programs strive to capture the view of repair through the eyes of victims, they will not only design more appropriate programming, but also contribute to the global effort to systematize answers to the question, "what are reparations?"³⁰¹ Brophy, writing in 2003, noted that scholars were "remarkably silent" on defining what constituted reparations and that there was "little systematic effort to define

reasonable level of approval and acceptance from such victims." Sam Garkawe, *The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?*, 27 MELB. U. L. REV. 335, 335 (2003).

298. Similarly, the U.N. Rule of Law Report recognizes that "most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out." Rule of Law Report, *supra* note 27, § 16.

299. See Principal Guidelines for a Comprehensive Reparation Policy, Inter-Am. Comm'n H.R., OEA/SER/L/V/11.131, doc. 1 ¶¶ 4, 13 (2008).

300. Merry explains that "deterritorialized ethnography" responds to [t]he challenge . . . to study placeless phenomena in a place, to find small interstices in global processes in which critical decisions are made, to track the information flows that constitute global discourses, and to mark the points at which competing discourses intersect in the myriad links between global and local conceptions and institutions.

SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE* 29 (2006). See also Franz von Benda-Beckmann, *supra* note 92, at 41-42 (calling for further discussion between anthropologists and lawyers). I agree with this position and would even propose that it be institutionalized as a part of an administrative reparation program so that anthropologists, or individuals trained in ethnographic, qualitative research methods are involved in working with local populations to survey felt justice needs.

301. For a discussion of the difficulties in defining reparations, see Alfred L. Brophy, *Reparation Models*, 22 WINDSOR Y.B. ACCESS JUST. 71, 72-73 (2003).

them.”³⁰² I would argue that his observation still rings true today. Even if there has been progress and more interest in the topic of reparations, it is still a largely understudied area of transitional justice.

That said, the process of defining reparations and developing taxonomies of what constitutes adequate, appropriate, and effective reparations must depend on the input of victims. Studying and cataloguing the various reparation programs in different countries has already begun to reveal common patterns in victims’ demands for repair, even across localities. These evolving standards would provide safeguards against unreasonableness, both on the part of government administrators as well as victims. These benchmarks would reveal when governments are falling short of their obligations to assure the victims’ full satisfaction with the right to reparations. In turn, this classification process will create a limiting principle that will prevent victims-survivors from “asking for the world.” Objective standards gleaned from across country-specific experiences will establish the outer limits of reparations and a check against victims’ misunderstandings of the proper reach of reparations. An objective standard grounded in human rights norms would also prevent a plural approach from being “repressive, violent and/or profoundly illiberal.”³⁰³

For example, this objective criterion would create a bright line rule against considering the desire for violent revenge against an alleged perpetrator as reparation. The participatory process would communicate these standards, informing and educating victim-survivors about the nature and purpose of reparations.³⁰⁴ Government officials would be able to reject safely demands that fall far beyond the commonly accepted notions of reparations, without breaching their international obligations to provide adequate, effective, and appropriate reparations.

Conclusion

The justice continuum of repair arises out of an expanded view of pluralism that integrates an individualized view of justice.³⁰⁵ At its core, this plural view leads to the conclusion that there is no unified theory of justice that trumps all other competing theories. Coherency of theory comes from rejecting the quest for one superior theory. Discussing this point in his recent book *The Idea of Justice*, Amartya Sen contests what he calls the “transcendental institutionalism” of “mainstream” philosophy, which strives for one unifying principle for understanding justice.³⁰⁶ He

302. *Id.* at 73.

303. BERMAN, *supra* note 292, at 10.

304. Along these lines, Berman shares the value of adequate procedures as tools for gathering information and channeling—even taming—normative conflict when multiple actors come together in a shared space. Berman, *Global Legal Pluralism*, *supra* note 18, at 1166.

305. “[A] broad theory of justice that makes room for non-congruent considerations *within* the body of that broad theory need not thereby make itself incoherent, or unmanageable, or useless.” SEN, *supra* note 100, at 397.

306. *Id.* at 7.

insists that instead “[t]here are genuinely plural, and sometimes conflicting, general concerns that bear on our understanding of justice.”³⁰⁷ Sen reminds us that even if it is impossible to find a common premise to assess the truth or superiority of different theoretical concepts of justice, it is still possible to agree when a state of affairs is unjust, and that certain steps should be taken to remedy it—even if through diversified approaches to justice as determined by local meanings and concepts.³⁰⁸

Along these lines, the justice continuum of repair proposed in this Article is designed to be flexible and adaptable, and is offered as a template to encourage more discussion about how we might best articulate the theoretical foundations of reparations in transitional justice settings in order to assure a more responsive, thoughtful, and effective path to repair. The development of such theoretical frameworks signals a new stage in the maturation of the transitional justice field in relation to the realm of reparations. As the field of transitional justice matures, it stands at a critical stage in preserving its own legitimacy as a valid approach to post-conflict recovery. We need to consider the theories that best serve the interests of the intended beneficiaries of reparation programs. A more coherent theory can help to avoid the mistakes of yesterday, and assure the sustainability and legitimacy of the field in general as we move forward.

The proposed justice continuum of repair offers government agents, victims and their advocates, and third-party evaluators (including researchers, scholars, and human rights monitors and judges) a “common conceptual scheme” to determine whether repair can be considered “just.”³⁰⁹ Measuring adequacy, appropriateness, and effectiveness will depend greatly on victims’ perception that their needs have been satisfied. Thus, honoring local variation in reparation programs is not only more practical, but also normatively preferable.³¹⁰

Even, however, if advocating a plural approach to human rights with an emphasis on victim participation presents a better approach to reparation design, it is without doubt a more challenging policy. Advocates of pluralism often seem all too ready to label this preferred approach as “messy.”³¹¹ I take issue with that view, because it reveals a pluralist still

307. *Id.* at 57.

308. *Id.* at 399.

309. Jeremy Waldron, *Public Reason and “Justification” in the Courtroom*, 1 J.L. PHIL. & CULTURE 107, 112 (2007).

310. Mégret argues that there is a rights-based case for legal pluralism. See Mégret, *supra* note 91, at 7.

311. Berman falls into this trap, describing legal pluralism as a “messy world, where official, quasi-official, and unofficial norms are pursued by multiple communities controlling various means of coercive and persuasive authority” Berman, *Pluralist Approach*, *supra* note 91, at 303. Martha Minow and Joseph William Singer acknowledge that the plural method “may seem difficult and messy, and may lack the tone of confidence that accompanies a method touted for producing ‘the right answer’” Minow & Singer, *supra* note 91, at 909. Pluralism may be seen as “frustrating, messy, and obstructive” to general progress, modernization, and nation-building which appear to require a unified legal system. Merry, *Legal Pluralism*, *supra* note 92, at 871. Griffiths viewed the intent of legal pluralism as breaking “the stranglehold of the idea that what

stuck in a universalist's box: judging relativism as dirty, unkempt, or somehow abnormal. Instead, if we recognize that plural is in fact constitutive of the whole human rights system, we may discover new adjectives to ascribe to this process, among which would figure the term "just."³¹²

law is, is a single, unified, and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such conception requires it to look." Griffiths, *supra* note 92, at 4-5.

312. Minow and Singer do seek to redeem the "messiness" label in their essay responding to Ronald Dworkin's recent exposition in *Justice for Hedgehogs*: "... we find the messier variety of plural truths more in keeping with lived experience, more attuned to the transparency and inclusiveness of debates over the good and the right, and more likely to reach the variety of human beings that such debates are meant to affect." Minow & Singer, *supra* note 91, at 903. Moufee would perhaps choose the adjective "democratic." She writes:

For a radical and plural democracy . . . pluralism is not merely a *fact*, something that we must bear grudgingly or try to reduce, but rather an axiological principle, that is, something constitutive *at the conceptual level* of the very nature of modern democracy and that we should celebrate and enhance. This is why the pluralism that I am advocating gives a positive status to differences and recuses the objectives of unanimity and homogeneity which are always revealed as fictitious and based on acts of exclusion.

Chantal Moufee, *Democracy and Pluralism: A Critique of the Rationalist Approach*, 16 CARDOZO L. REV. 1533, 1535 (1995) (emphasis in original).