

# Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations

Margaret Urban Walker\*

## ABSTRACT<sup>1</sup>

Gender justice in reparations for women requires that entrenched oppression or disadvantage suffered by women does not result in women being deprived of recognition as victims and of access to full and effective reparation. An idea has taken hold in both policy and academic inquiry that gender-just reparations should be ‘transformative’ rather than (merely) corrective or restorative. I question the most ambitiously transformative aims that seek to make reparations into an instrument of society-wide structural change. I suggest that this conception not only overreaches practically and politically but that it threatens to bypass or aims to displace reparative justice as a distinct and distinctly victim-centered imperative. In doing so, it demotes the importance of recognizing individual victims themselves, whose status as bearers of rights and subjects of justice depends crucially on their standing to claim accountability and repair for violations to their individual persons.

**KEYWORDS:** reparations, reparative justice, gender justice, transformative justice, victims

## INTRODUCTION

Attention in recent decades to human rights violations suffered by women and the right of women to just repair constitutes a sea change in transitional and postconflict justice. The distinctive problems of effective reparations for women and other systematically disadvantaged groups have come into focus in theory and, to some extent, in practice.<sup>2</sup> Gender roles, norms and stereotypes can affect the recognition

\* Donald J. Schuenke Chair in Philosophy, Marquette University, Milwaukee, WI. Email: [margaret.walker@marquette.edu](mailto:margaret.walker@marquette.edu)

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- 2 See, Colleen Duggan and Adila Abusharaf, ‘Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice,’ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006); Ruth Rubio-Marín, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006); Ruth Rubio-Marín and Pablo de Greiff, ‘Women and Reparations,’ *International Journal of Transitional Justice* 1(3) (2007): 318–337; Valérie Couillard, ‘The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual

and proper identification of violations of women's rights. Inattention to gendered constraints and vulnerabilities can obscure the harms that women endure as a result of violations and can hamper good design and effective implementation of reparations for women. The central challenge is to make sure that entrenched oppression, marginality or disadvantage does not result in members of disadvantaged groups being deprived of recognition as victims and access to full and effective reparation.<sup>3</sup>

In tandem with this concern, a new and rhetorically powerful idea has taken hold in both policy and academic inquiry into gender justice in reparation. It is the idea that gender-just reparations should be 'transformative' rather than (merely) corrective or restorative. The concern is that a traditional philosophical and legal standard of justice in reparations, 'restoring the status quo ante,' can be perverse in the case of women (and other systemically disadvantaged groups). Reparations guided by the aim of restoring the victim to her condition prior to the violation might only recreate or reinforce conditions of powerlessness, inequality or insecurity. In its most ambitious version, the call for transformative reparations insists that reparations instead must aim at the reconstruction of economic, social and political relations that oppress women and that are often among the causes of women's exposure to the violations they have suffered.<sup>4</sup>

In this article, I challenge the most ambitious versions of the transformative reparations idea that insist that reparations be a means of structural transformation of patriarchal and other oppressive social orders. The idea of 'transformation' is vague. As I demonstrate below, it is used in different ways in different contexts or sometimes in more than one way in the same context or document. Pleas for transformative reparations can refer to reparations carefully designed to evade, contest or subvert patriarchal norms that disempower or disadvantage women. I argue that this approach is indeed a requirement on reparations as part of a human rights framework premised on *nondiscrimination* on the basis of gender and other socially weighted differences. The nondiscrimination requirement sets a high bar, indeed an aspirational standard, for gender-just reparations. Arguments for transformative

Violence,' *International Journal of Transitional Justice* 1(3) (2007): 444–453; Ruth Rubio-Marín, ed., *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (New York: Cambridge University Press, 2009); Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective,' in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman, Mariana Goetz and Alan Stephens (Leiden: Brill, 2009).

3 The requirement of 'full and effective reparation' is affirmed by UN General Assembly, '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,' UN Doc. A/RES/60/147 (21 March 2006), art. IX, para. 18 [hereinafter 'Basic Principles']. I follow art. III, para. 8 of the Basic Principles, which defines 'victims' as persons who individually or collectively have suffered harm through acts or omissions that are gross violations of human rights law or serious violation of international humanitarian law; immediate families and dependents of the 'direct' victim; and persons who have suffered harm in intervening to assist.

4 See especially, Couillard, supra n 2; Saris and Lofts, supra n 2; Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice,' *International Journal of Transitional Justice* 2(3) (2008): 266–291; Ruth Rubio-Marín, 'The Gender of Reparations in Transitional Societies,' in Rubio-Marín, 2009, supra n 2; Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment,' *Human Rights Quarterly* 33(4) (2011): 1062–1091.

reparations, however, hold that reparations should aim, either in addition or as an alternative, to undertake structural changes that contribute to dismantling sex oppression and inequality. It is the latter *structurally transformative* requirement on reparations that I question in this article.

The structurally transformative conception has been criticized on grounds of practical realism and political feasibility.<sup>5</sup> I go beyond this to argue against the most ambitiously transformative aims, not only due to practical and political limits, but because this agenda threatens to bypass or displace reparative justice as a distinct and distinctly victim-centered ideal in favor of a different kind of justice agenda. In doing so, it threatens to efface or to demote in importance concrete forms of relief and support for individual victims as ‘merely’ remedial or restorative, and so to demote the importance of recognizing individual victims themselves whose status as bearers of rights and subjects of justice depends crucially on their standing to claim accountability and repair for violations to their individual persons. It is exactly this due recognition that reparative justice uniquely demands. Yet it is currently the case that ‘most victims of gross violations of human rights and serious violations of international humanitarian law still do not receive any reparation.’<sup>6</sup> If reparative justice matters, claims that its victim-centered requirements are inferior to, or of negligible importance compared to, the pursuit of systemic and structural change should not go unchallenged.

My argument engages conceptual and practical as well as moral and political considerations. In the first section below, I sample the rapid spread and embodiment of versions of this multivalent idea of ‘transformation’ in both policy statements and academic literature, exhibiting the ambiguity in calls for transformative reparations, sorting the less from the more demanding versions. In the second section, I look at a false dilemma used widely to promote the idea of transformative reparations by a misleading contrast with a narrow understanding of reparations as seeking to restore the *status quo ante* of the victim. The dilemma is false because the emerging internationally normed practice of reparations has already transcended the latter idea. The multifaceted and expressive nature of the practice reveals the distinctive role of reparative justice in practice. In the third section, I underscore briefly that nondiscrimination is a very demanding and complex requirement for gender-just reparations. It is challenging to provide meaningful direct relief to women who have suffered violations and in doing so to support their own understandings of agency and well-being while consistently avoiding sex discrimination and resisting gender hierarchies. It is often more than can be realistically accomplished even without attempting societal transformation. In conclusion, I summarize the varied reasons why it remains urgent to hold to the uniquely victim-centered ideal of reparative justice. I do not reject the aspiration for transitional

- 5 Lars Waldorf, ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,’ *Social & Legal Studies* 21(2) (2012): 171–186. For a sobering political analysis of obstacles to transitional change, see, Pádraig McAuliffe, ‘Structural Causes of Conflict and the Superficiality of Transition,’ in *Theorizing Transitional Justice*, ed. Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotondi (Farnham: Ashgate, 2015).
- 6 Pablo de Greiff, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence,’ UN Doc. A/69/518 (14 October 2014), para. 81.

justice as a whole to be robustly transformative, but that is not my concern in this article.<sup>7</sup> Fundamental social and economic, as well as political, transformation might be a proper goal of transitional justice, but it does not follow that reparations are the (or even a) mechanism through which to pursue that goal.

### WHEN ARE REPARATIONS TRANSFORMATIVE?

Many pitfalls in securing gender-just reparations for women are now well understood.<sup>8</sup> Reparations recommendations and actual programs may fail to attend to wrongs women suffer, recognize their seriousness or see them as apt for reparation (e.g., belated attention to sexual violence towards women). Gender norms and social structures premised on male dominance can create distinctive consequences and multiply harms for women or limit their ability to recover from those harms (e.g., the spiral of social and economic losses that can result from the social stigma of sexual victimization). Reparations programs may fail to design forms of reparations that are meaningful or useful for women given women's particular gendered social positions and their resulting needs and vulnerabilities (e.g., monetary payments to women who lack legal standing to control bank accounts or the social standing to make independent financial decisions). Finally, women may also be thwarted by gendered practical and social impediments in making reparations claims or accessing or enjoying the benefits that result from successful claims (e.g., obstacles of mobility, literacy, care responsibilities and vulnerability to social stigmas). In addition, the importance of 'intersectionality,' the forms gender disadvantage takes in interacting with other systemic social disadvantage, rooted in age, economic position, marital status, ethnicity, indigeneity or other factors, is also recognized, if not always adequately appreciated, in theory and practice. Colleen Duggan says, 'women are often doubly or even triply marginalized when it comes to post-conflict reparations schemes.'<sup>9</sup>

All of these challenges require at least an unrelenting commitment to avoiding gender bias, discrimination and blindness to intersectionality, especially in designing and implementing massive administrative reparations programs. Morocco's Equity and

7 On making transitional justice transformative, or enlarging its goals to include just and stable peace and reconciliation, see, Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002); Louise Arbour, 'Economic and Social Justice for Societies in Transition,' *International Law and Politics* 40(1) (2007): 1–27; Lisa Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,' *International Journal of Transitional Justice* 2(3) (2008): 331–355; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence,' *International Journal of Transitional Justice* 3(1) (2009): 28–48; Lauren Marie Balasco, 'The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice,' *Journal of Human Rights* 12(2) (2013): 198–216; Dustin Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,' *International Journal of Transitional Justice* 9(1) (2015): 150–169; and Jennifer Llewellyn and Daniel Philpott, eds., *Restorative Justice, Reconciliation, and Peacebuilding* (New York: Oxford University Press, 2014). On gender in postconflict peacebuilding, see, Dyan Mazurana and Keith Proctor, 'Gender, Conflict and Peace,' World Peace Foundation Occasional Paper (15 October 2013).

8 For detailed discussion and numerous examples, see, the six cases studies in Rubio-Marín, 2006, supra n 2; Fionnuala Ní Aoláin and Catherine Turner, 'Gender, Truth and Transition,' *UCLA Women's Law Journal* 16(2) (2007): 229–279; Rubio-Marín, 2009, supra n 2; Rashida Manjoo, 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences,' UN Doc. A/HRC/14/22 (23 April 2010).

9 Colleen Duggan, 'Foreword,' in Rubio-Marín, 2006, supra n 2 at 17. On intersectionality, see, Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women,' *International Journal of Transitional Justice* 1(3) (2007): 338–354.

Reconciliation Commission apportioned benefits among family members of deceased victims in ways that departed from Morocco's gender-biased inheritance law, resisting established gender hierarchy.<sup>10</sup> South Africa, on the other hand, fixed a flat gender-neutral sum to be given to each beneficiary of reparations, ignoring the differential impact of violence on rural women, poor women or women left to provide for multiple dependents.<sup>11</sup> In these ways, conventional individual monetary reparations can be more or less gender-sensitive and gender-just. Yet a more ambitious view has gained prominence in both academic and policy thinking: reparations for women (and for other individuals subject to systemic disadvantage) should be or aspire to be *transformative* rather than merely corrective or restorative.<sup>12</sup>

The structurally transformative agenda appears in the 2007 Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (hereafter Nairobi Declaration) as the claim that, 'Reparation must go above and beyond the immediate reasons and consequences of the Crimes and Violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives.'<sup>13</sup> Special Rapporteur Rashida Manjoo asserts that reparations for women should subvert rather than reinforce preexisting structural inequalities and suggests material benefits could be 'transformative' in helping women pursue 'autonomy-enhancing life-projects.'<sup>14</sup> A 2012 UN Women policy brief asserts:

In order to achieve their maximum potential for advancing gender justice, reparations programmes must be both targeted and transformative: targeted in that priority should be given to specific vulnerable or in-need groups, and transformative in that they should aim to redress underlying inequalities.<sup>15</sup>

UN Women points to the modality of institutional reform as a form of reparations that might directly address discriminatory laws and policies and harmonize reparations with structural and development initiatives aiming at social transformation.<sup>16</sup>

The UN Committee on the Elimination of Discrimination against Women calls for transitional justice mechanisms to 'secure a transformative change in women's lives.'<sup>17</sup> Its 2013 General Recommendation No. 30 states:

10 Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (New York: Routledge, 2011).

11 Beth Goldblatt, 'Evaluating the Gender Content of Reparations: Lessons from South Africa,' in Rubio-Marín, 2006, *supra* n 2.

12 Ruth Rubio-Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Repression,' in Rubio-Marín, 2009, *supra* n 2.

13 'Nairobi Principles on Women and Girls' Right to a Remedy and Reparation,' [http://www.redress.org/downloads/publications/Nairobi Principles on Women and Girls.pdf](http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf) (accessed 9 October 2015), 3H.

14 Manjoo, *supra* n 8 at paras. 31, 54.

15 UN Women, 'A Window of Opportunity: Making Transitional Justice Work for Women,' October 2012, <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06B-Making-Transitional-Justice-Work-for-Women.pdf> (accessed 9 October 2015), 18.

16 *Ibid.*

17 Committee on the Elimination of Discrimination against Women (CEDAW), 'General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations,' UN Doc. CEDAW/C/GC/30 (1 November 2013), para. 77.

Rather than re-establishing the situation that existed before the violations of women's rights, reparations measures should seek to transform the structural inequalities which led to the violations of women's rights, respond to women's specific needs and prevent their re-occurrence.<sup>18</sup>

In a 2014 Guidance Note on reparation for sexual violence, the UN secretary-general endorses 'fair assessment' of harms suffered and 'equal access' to benefits.<sup>19</sup> Principle 4 of the Note also asserts that, 'Reparations should strive to be transformative, including in design, implementation, and impact,' while acknowledging that reparations 'alone cannot transform the root causes of conflict-related sexual violence or the structural conditions that made such violence possible.'<sup>20</sup> Special Rapporteur Pablo de Greiff labels as 'transformative' approaches to reparations that 'tackle, and to the extent possible, subvert' existing patterns of inequality and discrimination; reparations programs 'should not contribute to the entrenchment of these factors.'<sup>21</sup> At the same time, De Greiff stresses the primacy of measures that 'distribute a direct benefit to victims themselves.'<sup>22</sup>

The language of transformation is also found in academic writings on reparations for women. Ruth Rubio-Marín emphasizes 'the transformative potential of reparations . . . to subvert, instead of reinforce, preexisting structural gender inequalities and thereby to contribute, however minimally, to the consolidation of more inclusive democratic regimes.'<sup>23</sup> Rubio-Marín contrasts the 'transformative' dimensions of reparations with the 'corrective' dimension of a backward-looking remedy that aims to restore the victim's condition to what it was prior to the wrongdoing. She also consistently cautions that 'the program should never neglect that its most important immediate goal is to help victims cope with the effects of violence in their present lives.'<sup>24</sup> Duggan and Adila Abusharaf urge policy makers to 'take advantage of opportunities to redefine the social norms that have fostered sexual violence and underscore the importance of structural change.'<sup>25</sup> At the same time, they caution that it is 'unrealistic' to expect reparations alone to 'build active citizenship, lasting democracy, and sustainable human development.'<sup>26</sup>

Valerie Couillard, however, endorses the Nairobi Declaration's 'innovative' emphasis on 'transformative' reparations that 'imply remodelling society with a view to eliminate the pre-existing structural inequalities that have led to or encouraged violence against women' as well as empowering women through participation in the reparations and postconflict process.<sup>27</sup> Anne Saris and Katherine Lofts argue that 'reparation

18 Ibid., para. 79.

19 UN, 'Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence,' June 2014, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf> (accessed 10 October 2015), 4–5.

20 Ibid., 8.

21 De Greiff, *supra* n 6 at para. 72.

22 Ibid., para. 21.

23 Rubio-Marín, *supra* n 4 at 66.

24 Ibid., 107.

25 Duggan and Abusharaf, *supra* n 2 at 635.

26 Ibid., 644.

27 Couillard, *supra* n 2 at 450–451.

policies that are relevant and meaningful for women must challenge and change the gender status quo.<sup>28</sup> Since ‘classic’ models of restitution and compensation do not address preexisting inequalities and injustices, ‘the concept of reparation must be expanded, giving greater scope to questions of distributional justice usually thought to be the domain of development.’<sup>29</sup> Saris and Lofts somewhat grudgingly concede the need to retain the ‘remedial aim’ of reparations; they acknowledge the objection that development initiatives do not recognize harmed individuals specifically. In response, they propose that development and redistribution can be ‘linked’ to reparations by emphasizing the ‘symbolic’ aspects of recognition and engaging victims in participation throughout the reparations process.<sup>30</sup> Unlike the both–and approach of Saris and Lofts, Zinaida Miller’s critique of transitional justice for neglecting socioeconomic issues seems to reject reparative compensation itself as ‘strikingly narrow’ redistribution that fails to ‘dramatically alter the balance of power’ or to support ‘solidarity among a broader sector of a country’s economically oppressed.’<sup>31</sup> Seen in this light, material reparations are a failed instance of redistributive justice that undermine a more important project of social restructuring and future conflict prevention.

Arguments for transformative reparations differ on what is considered transformative and on whether transformative reparations are meant to augment or replace restorative ones. Some arguments for transformative reparations emphasize the possibility of exploiting opportunities to confront oppressive gender norms in the design and delivery of reparations but still make primary the needs of the individual victims of specific rights abuses. Rubio-Marín is a strong advocate of transformative reparations, ranging from nondiscrimination and subversion of sexist or patriarchal norms in designing programs to focusing on potentially empowering interventions, such as educational and vocational opportunities, skills training and microcredit that enhance women’s autonomy, as well as legal and institutional reforms such as education campaigns on women’s rights, gender-sensitive training for army and police forces, changes to nondiscriminatory ownership and inheritance rules and constitutional reforms that affect women’s status.<sup>32</sup> At the same time, she repeatedly cautions that privileging transformative measures over more remedial ones ‘betrays victims’ because underlying structures of gendered inequality and violence do not ‘change fast enough and in ways that are concrete enough’ to benefit victims.<sup>33</sup> Duggan and Ruth Jacobson, addressing reparations for victims of sexual violence, propose not only

28 Saris and Lofts, *supra* n 2 at 95.

29 *Ibid.*, 81.

30 *Ibid.*, 91–92.

31 Miller, *supra* n 4 at 284.

32 Rubio-Marín, *supra* n 4; Rubio-Marín, *supra* n 12. Rubio-Marín and Clara Sandoval seem to set a more stringent standard for transformative reparations in their analysis of the otherwise robustly gender-sensitive reparations judgment of the Inter-American Court of Human Rights in the 2009 ‘*Cotton Field*’ *v. Mexico* case involving abduction, sexual violation and murder of several women by nonstate actors. Although the reparations ordered include monetary and memorial measures as well as institutional reforms and special trainings that target sexual violence, the authors conclude that the Court failed to honor ‘the only reparation request with transformative potential’: that Mexico adopt a ‘public policy to guarantee that cases of violence against women would be prevented and investigated, the alleged perpetrators prosecuted, punished, and the victims redressed.’ It seems here that not all substantial policy interventions qualify as truly transformative. See, Rubio-Marín and Sandoval, *supra* n 4 at 1088–1089.

33 Rubio-Marín, *supra* n 12 at 398–399.

material compensation, rehabilitative services and symbolic recognition, but also the transformative potential of legal measures as guarantees of nonrepetition.<sup>34</sup> Three prime areas for legal reform in their view are legalized access to safe abortion, reform of property and inheritance laws and criminalization of gender-based violence against women and children.<sup>35</sup> But they warn that collective or structural measures that provide communal goods ‘do not grant individualized recognition that is a fundamental element of the concept of reparations.’<sup>36</sup>

Other arguments for transformative reparations either make only a grudging concession to the focus on individual repair or view that focus as inadequate or pointless compared to a society-wide project of redistribution and structural reform. It is notable, however, that these arguments for the superiority of transformative reparations deal entirely in generalities rather than providing specific proposals. Couillard asks reparations to address ‘structural inequalities that negatively shape women’s and girls’ lives,’ seeking ‘a wholesale transformation of society.’<sup>37</sup> Saris and Lofts want reparations to address ‘systemic roots of violence and injustice’ by dealing with distributional issues linked to ‘reconstruction, redistribution, and development’ to ‘change the gender status quo.’<sup>38</sup> Miller, within a general criticism that transitional justice excludes ‘economic inequality, structural violence, redistribution and development,’ sees reparations as lame and misplaced redistribution.<sup>39</sup> Policy documents, too, tend to remain in the realm of generalities, using the language of transformation to blanket both gender-sensitive interventions and wider social and structural change.

My argument is primarily addressed to those who promote wider structural transformation as a *superior* objective to individually targeted reparations, but it also seeks to remind us what is at stake in moving the focus of reparations away from the needs and dignity of the individual victim.

#### A FALSE DILEMMA: CORRECTIVE VERSUS TRANSFORMATIVE REPARATIONS

Despite the important differences just noted, there is a strongly similar pattern of argument (or at least a pattern of contrasts) that supports the claim that reparations, in the case of women and other systematically or historically disadvantaged groups, must be transformative. The argument or contrast is that the ‘traditional’ or ‘standard’ view of reparations is the backward-looking view that reparations seek to return the wronged party to his or her position prior to wrongdoing or to the state he or she would likely be in had the wrong not occurred. The victim of wrong is to be

34 Colleen Duggan and Ruth Jacobson, ‘Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation,’ in Rubio-Marín, 2009, *supra* n 2.

35 *Ibid.*

36 *Ibid.*, 145.

37 Couillard, *supra* n 2 at 445, 451.

38 Saris and Lofts, *supra* n 2 at 81, 87, 94.

39 Miller, *supra* n 4 at 266. The view of reparations as inadequate or failed redistribution appears elsewhere. See, Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia, PA: University of Pennsylvania Press, 2007) and Sarah Maddison, *Conflict Transformation and Reconciliation: Multi-Level Challenges in Deeply Divided Societies* (New York: Routledge, 2016).



restored (or the situation ‘corrected’) by the return of lost goods or by compensation that is proportionate to the victim’s losses and suffering. But in the case of women (or other members of disadvantaged groups) this principle of reverting the victim to the original situation that obtained (or would have obtained) means returning the victim to a state of unjust disadvantage. Therefore, reparations as a kind of justice cannot be merely corrective, but must be transformative.<sup>40</sup>

It is true that reparations for women, as for other systemically disadvantaged, marginalized, persecuted or oppressed groups, pose a challenge to the idea that the justice principle guiding reparations is simply to restore the victim to her or his prior condition. Further, the idea of corrective justice that restores the victim to a prior state is premised on the assumption that violations are the exceptions to a normative order, and so can be remedied case by case so as to reiterate governing norms and the entitlement of harmed individuals to correction.<sup>41</sup> Reparations in current practice, however, come into play where violations have been massive or systemic, bringing the nature of the normative order (or weakness or lack thereof) into question, and often where those who have suffered the gravest wrongs in significant numbers are not (or not securely) recognized as possessing the standing to enjoy the rights and protection of their state or the recognition within their society as worthy of respect and protection. The current internationally recognized practice of reparations responds precisely to widespread violations and the damage and contempt visited on classes of victims in ways that call the political order itself into question.

The current practice of reparations for individuals who have suffered human rights abuses is a relatively recent and novel creation.<sup>42</sup> The UN’s Basic Principles

40 Couillard, *supra* n 2 at 451, describes the ‘conventional’ idea of reparations as reversion to the *status quo ante*, opposing this to ‘a wholesale transformation of society.’ Saris and Lofts, *supra* n 2 at 81 and 89, contrast ‘classical models of reparation’ with an ‘expanded’ model that ‘addresses pre-existing inequalities and injustices that enable the violations to occur’ and contrast a focus on individual harms with ‘an important opportunity to address pressing distributional issues.’ Rubio-Marín, *supra* n 4, sets the corrective framework in contrast to a view of reparations as a political project, but Rubio-Marín, *supra* n 12, opposes corrective to transformative; Manjoo, *supra* n 8 at para. 31, contrasts ‘returning them to where they were before the individual instance of violence’ with aspiring to ‘subvert, instead of reinforce, pre-existing structural inequality.’ CEDAW, *supra* n 17 at para. 39, contrasts ‘reestablishing the situation that existed before the violations of women’s rights’ with seeking ‘to transform the structural inequalities that led to the violations.’

41 The origins of this idea trace to Aristotle (*Nicomachean Ethics*, Book 5) who supposes a judge who will correct the unjust results of a discrete transaction by restoring to the victim of injustice what has been wrongfully lost. On the ill fit of this idea to massive violations as well as systemic and historical injustice, see, William Bradford, ‘Beyond Reparations: Justice as Indigenism,’ *Human Rights Review* 6(3) (2005): 5–79; Pablo de Greiff, ‘Justice and Reparations,’ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006); Margaret Urban Walker, ‘Making Reparations Possible: Theorizing Reparative Justice,’ in *Theorizing Transitional Justice*, ed. Claudio Coradetti, Nir Eiskovits and Jack Volpe Rotondi (Farnham: Ashgate, 2015); and David C. Gray, ‘Extraordinary Justice,’ *Alabama Law Review* 62(1) (2010): 55–109.

42 On the novelty of this practice that requires redress of individuals by states, see, Richard Falk, ‘Reparations, International Law, and Global Justice: A New Frontier,’ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006) and Stephanie Wolfe, *The Politics of Reparations and Apologies* (Dordrecht: Springer, 2014). On the generally recognized post-World War II German precedent, see, Wolfe, *supra* n 42, and Ariel Colonomos and Andrea Armstrong, ‘German Reparations to the Jews after World War Two: A Turning Point in the History of Reparations,’ in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006). For comparison

distills 25 years of evolving deliberation rooted in practical experience.<sup>43</sup> A variety of sources have shaped the practice: actually implemented programs of reparations; recommendations for reparations by truth commissions; decisions by international courts; reparations by private entities; reparations demands and proposals by nongovernmental and victim advocacy groups; domestic and international legal actions and academic scholarship. As such, the current conception is a result of diverse tests and struggles in legal, social and political arenas at local, national and international levels. It might be viewed as the result of a set of experiments in progress to discover what constitutes and signifies justice in repair of massive and grave wrongs for victims, their representatives and their communities. This political practice of reparations has already left behind the ‘traditional’ or ‘standard’ legal understanding of corrective justice as a singular act of restitution or proportionate compensation for wrongful harm that restores the victim to the *status quo ante* within a given order. Thus, the ‘corrective versus transformative’ argument constructs a false dilemma. The current practice of reparations is itself *already* an alternative in practice to the corrective justice conception.

A striking feature of reparations to individuals as currently conceived is the multi-form character of the measures recognized and advocated. Section IX of the Basic Principles recognizes five broad modalities of reparative measures: restitution, compensation, rehabilitation, satisfaction and guarantees of nonrepetition. Each of these categories in turn allows diverse reparative measures. Most varied of all is the category of ‘satisfaction,’ comprising diverse measures that address victims’ needs for protection and public recognition as well as relief of suffering. Measures include the pursuit of truth, recovery of the remains of loved ones, official restoration of reputation, public apology and commemoration. Nonrepetition includes varied reforms and policies concerning the military, judiciary and other professions, including human rights training and codes of conduct. Current practice thus recognizes multiple modes of repair in different registers – material, monetary, moral, symbolic and institutional. This multiform approach suggests the importance of addressing diverse and mutually aggravating aspects of harm and indignity caused by serious violations. It exemplifies the multiple and mutually supporting forms of dignifying redress and repair that individuals (and in some cases groups) are due as repair for such violations. It does not aim at restoring a deficient status, but rather at affirming the equal dignity and rights of those who have previously been denied this status.

Nothing in the practice forecloses attention to economic and social rights violations. If reparations programs have in fact tended to privilege violations of civil and political rights, that failure can be set right by attention to distinct serious social and economic violations such as acts of dispossession, destruction or discrimination.<sup>44</sup> Current practice expressly allows for collective as well as individualized reparations,

with norms of responsibility between states, see, Dinah Shelton, ‘Righting Wrongs: Reparations in the Articles on State Responsibility,’ *American Journal of International Law* 96(4) (2002): 833–856.

43 Basic Principles.

44 Evelyne Schmid and Aoife Nolan point to increased emphasis recently on economic and social rights violations by truth commissions (in Peru, Sierra Leone, Timor-Leste and Kenya), while usefully untangling a series of confluences that can obscure the differences between attention to these violations and a focus on general structural inequality or historical marginalization. See their “‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice,” *International Journal of Transitional Justice* 8(3) (2014): 362–382.

both material and symbolic, either as benefits distributed to a group targeted collectively or as benefits whose nature is to be accessed in common, such as a memorial or medical facility. Public apologies, funding for educational or commemorative activities or monetary compensation paid to an injured group collectively are all recognized forms of collective reparations. Relevant modes of reparation are thus extraordinarily diverse. While the standard legal formula about ‘restoring the *status quo ante*’ persists in reparations discussions, current practice treats restitution and compensation as particular *modalities* rather than as the essence or defining principle of reparations. The need for multiple interactions in diverse dimensions to provide victims with even a limited experience of justice is a lesson of several decades of thought and practice.

Although it is not guaranteed that current practice will yield to a consistent and unified normative theory, such theories of reparative justice suggested by this practice are emerging and have some similar features. First, these accounts are *political* rather than *juridical*. Reparations are seen as one facet of a transitional project that signals and models a break with a past political order and a commitment to a different schedule of moral and political values, including respect for individuals’ rights and equality as citizens, institutionalized transparency and accountability and the rule of law.<sup>45</sup> Second, many of these accounts emphasize the *meanings* these measures must have for victims to be effective as reparations. As Pamina Firchow and Roger Mac Ginty put it: ‘The success or failure of reparations programs often depends on “optics” and “acoustics”: how are these schemes perceived and managed?’<sup>46</sup> Where gross wrongs have visited dreadful harms, part of what makes reparations effective is what reparations demonstrate and communicate to victims and to their societies about the recognition of wrong, responsibility, the standing of victims as rights-bearing citizens and in many cases about group membership and the standing of groups. Often remarked, this essential *expressive* or *communicative* function of

45 Relevant theoretical work includes Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge: Polity Press, 2002); John Torpey, ed., *Politics and the Past: On Repairing Historical Injustices* (Lanham, MD: Rowman & Littlefield, 2003); Naomi Roht-Arriaza, ‘Reparations Decisions and Dilemmas,’ *Hastings International and Comparative Law Review* 27(2) (2004): 157–219; Pablo de Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006); Eric K. Yamamoto, Sandra Hye Yun Kim and Abigail M. Holden, ‘American Reparations Theory and Practice at the Crossroads,’ *California Western Law Review* 44(1) (2007): 1–85; Jon Miller and Rahul Kumar, eds., *Reparations: Interdisciplinary Inquiries* (New York: Oxford University Press, 2007); Max du Plessis and Stephen Peté, eds., *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Cambridge: Intersentia, 2007); Ernesto Verdeja, ‘A Normative Theory of Reparations in Transitional Democracies,’ in *Genocide’s Aftermath: Responsibility and Repair*, ed. Claudia Card and Armen T. Marsobian (Malden, MA: Blackwell, 2007); Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Dordrecht: Springer, 2009); Barbara Rose Johnston and Susan Slyomovics, eds., *Waging War, Making Peace: Reparations and Human Rights* (Walnut Creek, CA: Left Coast Press, 2009); Rubio-Marín, 2009, *supra* n 2; Margaret Urban Walker, *What Is Reparative Justice?* (Milwaukee, WI: Marquette University Press, 2010); Gray, *supra* n 41; Pablo de Greiff, ‘Theorizing Transitional Justice,’ in *Transitional Justice, Nomos LI*, ed. Melissa S. Williams, Rosemary Nagy and Jon Elster (New York: New York University Press, 2012); Wolfe, *supra* n 42; and Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Basingstoke: Palgrave Macmillan, 2014).

46 Pamina Firchow and Roger Mac Ginty, ‘Reparations and Peacebuilding: Issues and Controversies,’ *Human Rights Review* 14(3) (2013): 233.

reparations measures is barely theorized.<sup>47</sup> Yet this function explains why material measures alone are usually insufficient and require a certain framing to be acceptable, and why perceived failures of inclusion, acknowledgment, attention and responsiveness in a reparations process in themselves can provoke outrage and leave bitterness and suspicion.<sup>48</sup> Reparations are intended not only to provide something of concrete use and fitting value but, in doing so, to ‘say’ something definitively to victims and their society about why this performance is owed specifically to victims as a matter of justice. This is not, however, to set ‘expressive’ functions of reparations in contrast to material, monetary or concretely practical forms of reparations, much less to suggest that symbolism is (or could be) ‘added on’ to specific benefits. It is rather that these concrete and material vehicles of reparations must themselves cohere with and credibly demonstrate the message of recognition, responsibility and intent to do justice. These communications in turn can be credible only because they are embodied in a variety of concrete measures, benefits and gestures. While reparative actions such as official apologies make the reparative message verbally explicit (and in fact are assessed precisely for their adequacy in doing this), all measures of reparation must at least be consistent with a message that recognizes, respects and vindicates victims as subjects of justice in their own right.<sup>49</sup>

This returns us to the tension in proposals for transformative reparations. Reparative power inheres in measures that victims experience as credibly addressing the violations they suffered and the ensuing harms they experienced, and in

- 47 For a detailed account, 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*, ed. Alice MacLachlan and Allen Speight (Dordrecht: Springer, 2013). Matiangai V.S. Sirleaf, ‘Beyond Truth and Punishment in Transitional Justice,’ *Virginia Journal of International Law* 54(2) (2014): 234, says that reparations ‘send signals to victims, and to society more generally, that the successor regime is committed to respecting victims’ and fellow citizens’ rights.’ Cristián Correa, Julie Guillerot and Lisa Magarell, ‘Reparations and Victim Participation: A Look at the Truth Commission Experience,’ in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman, Mariana Goetz and Alan Stephens (Leiden: Brill, 2009), 388, claim that, ‘Essentially, reparations constitute a message to victims from the rest of society, recognizing that victims belong and expressing solidarity in the face of unjust suffering.’ Rubio-Marín, supra n 4 at 114, speaks of reparations as a ‘system of symbols’ of commitment to a system of rights and the recognition of victims’ equality. J. Angelo Corlett, ‘Reparations to Native Americans?’ in *War Crimes and Collective Wrongdoing: A Reader*, ed. Aleksandar Jokic (Oxford: Blackwell Publishers, 2001), 237, specifically attributes to reparations an ‘expressive’ function, including disavowal of the wrong and of the wrongdoer, sending ‘messages to citizens . . . which seek to build and strengthen social solidarity toward justice and fairness.’ See also, Claire Moon, ‘“Who’ll Pay Reparations on My Soul?” Compensation, Social Control and Social Suffering,’ *Social and Legal Studies* 21(2) (2012): 187–199; Hamber, supra n 45; and Gray, supra n 41.
- 48 Berber Bevernage, *History, Memory, and State-Sponsored Violence: Time and Justice* (New York: Routledge, 2012) and Moon, supra n 47, analyze struggles over the nature of the message sent by reparations in the case of the Mothers of the Plaza de Mayo. On this case, see also, Hamber, supra n 45. Mark Osiel shows how reparations can migrate from material to symbolic or the reverse in context in ‘“Transitional Justice” in Israel/Palestine? Symbolism and Materialism in Reparations for Mass Violence,’ *Ethics & International Affairs*, 20 January 2015, <http://www.ethicsandinternationalaffairs.org/2015/transitional-justice-in-israel-palestine-symbolism-and-materialism-in-reparations-for-mass-violence/> (accessed 10 October 2015).
- 49 Public political apologies, when studied for their reparative impact or failure, can illuminate reparative communication generally. A good recent set of studies is Mihaela Mihai and Mathias Thaler, eds., *On the Uses and Abuses of Political Apologies* (Basingstoke: Palgrave Macmillan, 2014).

demonstrating their status as citizens to whom responsible parties are accountable. Legal and institutional reforms, social reconstruction and economic development, however necessary or valuable to society or to disadvantaged populations as a whole and however appropriate to the broader transitional agenda, do not necessarily provide direct relief or satisfaction to victims. Where they do not, it is questionable to consider them reparations or to assume they have reparative power on their own. The point is not a new one in theory or observation. Naomi Roht-Arriaza noted a decade ago the pitfall in community development projects as reparations when ‘victims, bystanders, and even, at times, perpetrators’ benefit (and when others might benefit more than victims do).<sup>50</sup> The problem is evident as well with legal, institutional and structural economic reforms that are society-wide. We should not ignore the possible reparative effects of legal and policy change for survivors who fear revictimization for themselves or their loved ones.<sup>51</sup> Nor should we dismiss the satisfaction that victims might take from knowing that their victimization served as ‘an engine of change’ in society.<sup>52</sup> These reparative impacts, however, are clearly less certain than those of benefits effectively delivered directly and uniquely to victims. Although the reparations category of guarantees of nonrepetition through legal and institutional reform has possibly ‘the greatest potential for transforming gender relations,’ it is doubtful that these measures can claim to fulfill the victim-centered demands of reparative justice independently, rather than in concert with, reparations measures that deliver goods, material or symbolic, individual or collective, to victims.<sup>53</sup> Duggan and Jacobson recognize the risk of losing the ‘normative distinctiveness’ of reparations in broadening the concept, and so suggest the need for ‘bridging legal, humanitarian, and development strategies.’<sup>54</sup> Rubio-Marín, too, stresses that wider social change must go ‘hand in hand’ with ‘palliative and compensatory mechanisms.’<sup>55</sup>

The point is not solely theoretical. Development, reconstruction or redistribution initiatives that are not directed or addressed specifically to victims will fail precisely to send the message that victims specifically are due repair in response to their particular injuries as a matter of justice. Lisa Laplante, who advocates for a broader approach to reparations that encompasses distributive and preventive aims, nonetheless reports that Peru’s Integral Reparations Plan created confusion and resentment for victims by mixing reparations and development in ways that benefit nonvictims.<sup>56</sup> Similar observations come from South Africa and Guatemala.<sup>57</sup> Victims see the difference.

50 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*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 130. De Greiff, *supra* n 6, also observes that some collective measures lose reparative capacity when they deliver benefits to victims and nonvictims alike.

51 Duggan and Jacobson, *supra* n 34.

52 Rubio-Marín, *supra* n 4 at 117.

53 *Ibid.*, 117.

54 Duggan and Jacobson, *supra* n 34 at 161.

55 Rubio-Marín, *supra* n 4 at 70.

56 Lisa Laplante, ‘On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development,’ *Yale Human Rights and Development Journal* 10(1) (2007): 141–177. On the same point in the Peruvian case, see, Julie Guillerot, ‘Linking Gender and Reparations in Peru: A Failed Opportunity,’ in Rubio-Marín, 2006, *supra* n 2.

57 On South Africa, see, Goldblatt, *supra* n 11; on Guatemala, see, Correa, Guillerot and Magarell, *supra* n 47.

### NONDISCRIMINATION AS A DEMANDING ASPIRATIONAL IDEAL

My argument is that reparations should be designed above all to *recognize, relieve and support* individual victims (and in some cases victimized groups) with respect to the specific violations they have endured and the lives they want to rebuild. The highest priority for gender-just reparations is to secure accountability to women precisely as individuals whose humanity and dignity require just redress. This means freeing reparations efforts, as far as possible, from subservience to social or customary norms and practices that render harms to women invisible or confine reparations measures in ways that reinforce the subordination or disadvantage of women. Advocates of the transformative approach in its more demanding version, however, argue that measures aimed at direct relief and support of victims are not enough and need to be supplemented, or even supplanted, by initiatives aimed at structural change, economic development or redistribution. Is making effective redress for individual victims the core of reparations setting the bar too low? Saris and Lofts, advocates of structurally transformative reparations, refer to ‘remedial’ reparations as ‘an excuse for being unambitious’ and as ‘superficial “Band-Aid” solutions to deep-running injustices.’<sup>58</sup>

Nondiscrimination in reparations is a powerful and demanding requirement precisely in contexts where victims are socially disadvantaged or oppressed, especially where it is understood that reparations measures be designed in ways that avoid capture by or conformity to the very norms and practices that subordinate, disadvantage or marginalize them. In the case of women, reparations need to avoid assuming women’s inferior or subordinate positions or reinforcing existing deficits in women’s legal, political, social or economic agency, to the extent possible. South Africa’s gender-neutral payment of a modest flat sum to all victims failed to recognize (among other things) the likelihood that many female victims lose a ‘breadwinner’ and are often faced with support of multiple dependents, thus requiring greater support.<sup>59</sup> Peru’s scheme ranked rape at the bottom of a scale of violations because it was not seen as entailing interruption of a life project or loss of ability to generate income, ignoring the profound economic and social effects of stigmatization and rejection by partners and communities.<sup>60</sup> Lack of attention to women’s situations, systemic gender differences or intersectionality thwarts full and effective reparations for women.

Freeing reparations efforts for women completely from the stamp and traces of patriarchal norms and practices, however, is difficult and may not be consistently possible while serving the goal of reparative justice to provide direct benefit and relief to victims. Concessions to the socially produced vulnerability of victims may be necessary to ensure their access to reparations benefits. The 2014 UN Guidance Note on sexual violence, for example, endorses both nondiscrimination and transformative reparations while at the same time stressing cultural sensitivity, ensuring that ‘victims can participate in ways that are acceptable to their culture and religion.’<sup>61</sup> Given the pervasiveness of patriarchal norms in many if not most cultures and religions, reconciling respect for culture with nondiscrimination is no

58 Saris and Lofts, *supra* n 2 at 91.

59 Goldblatt, *supra* n 11 at 67.

60 Guillerot, *supra* n 56.

61 UN, *supra* n 19 at 11.

straightforward task and will often entail compromises either in the interests of victims or due to their own culturally informed commitments and preferences. Reparations that are meaningful to women may not reflect emancipatory, much less feminist, priorities, and women are not guaranteed to favor reparations interventions that aim to address their subordination as women rather than their disadvantage as members of class, ethnic, national, religious or indigenous groups. In the area of sexual and gender-based violence, the need for confidentiality to avoid stigma, ostracism, rejection and persecution for victims is now universally accepted as crucial in reparations design even though these protections are needed in important part because of profoundly patriarchal societal beliefs and practices. Defending the welfare, safety and social integration of victims in the actual gendered circumstances of their lives necessarily trumps the opportunity to confront patriarchy. Nor are interventions carefully designed to enhance women's autonomy guaranteed to produce the intended effects, as interventions can be captured by resilient patriarchal norms.<sup>62</sup>

Gender justice as nondiscrimination in reparations sets a very high bar not always fully attainable. But ultimately the question I have tried to pose is not at what height the bar for effective reparations is set, but relative to *which kind of justice aims* the bar is set. Reparative justice aims to address victims of gross abuses, providing recognition, relief and support of victims; its focus on addressing and redressing unjust losses and harms to individuals is its defining feature. If the bar is set instead with respect to solutions to deep-running injustices, then what is targeted for repair are societies or their socioeconomic and political structures rather than particular victims, who become at best something less than the central priority and at worst serve instrumentally as emblems or symptoms of the real or important problem. It is worrisome that concrete direct relief for victims, little achieved in practice, should be slighted in theory by the claim or the implication that relief of victims is of negligible value or impact.<sup>63</sup>

### CONCLUSION: INDIVIDUAL RELIEF, REPAIR AND SUPPORT OF VICTIMS MATTERS, IF VICTIMS DO

I suggest that the more ambitious versions of the transformative conception overreach in seeking to make reparations into an instrument of pervasive social change where this is usually neither feasible nor necessarily responsive to women victims who often desperately need direct and immediate relief, support and opportunities to assert agency and rebuild lives they value. Conceptually, the most aggressive

62 Development studies offer some cautionary findings about interventions intended to be empowering for women. Some research in Bangladesh finds, for example, that microcredit was valued by some of the poorest women because it allowed them to work from home, avoiding the social stigma of violating *purdah* constraints, thus reinforcing the legitimacy of female seclusion as a demonstration of honor. On this and related research, see, Serene J. Khader, 'Empowerment through Self-Subordination?: Microcredit and Women's Agency,' in *Poverty, Agency, and Human Rights*, ed. Diana T. Meyers (New York: Oxford University Press, 2014). On the emancipatory potential for women of microcredit as reparations, see, Anita Bernstein, 'Tort Theory, Microfinance, and Gender Equality Convergent in Pecuniary Reparations,' in Rubio-Marin, 2009, *supra* n 2.

63 An unsettling example of this is found in Mani, *supra* n 7, who goes beyond arguing that reparative justice for victims is outweighed by distributive concerns to arguing aggressively against recognizing the distinction between victims and perpetrators.

transformative agenda elides the distinctive aims of reparative justice into social or distributive justice generally, losing the focus on acknowledging and redressing harms to victims that is the distinguishing work of reparative justice. Practically, this means that reparations measures that attempt large-scale social changes may at best only weakly or indirectly aid victims of specific abuses. Pervasive structures of male domination are in any case maintained and redundantly reinforced by interlocking social, economic, legal, cultural and psychological structures that are unlikely to yield to singular interventions such as reparations. Morally, if transformative objectives are seen as more important than ‘merely remedial’ ones, or if direct remedies to victims are seen as somehow poor and meager without larger structural change (which might or might not provide direct benefits to victims), the resulting ‘reparations’ (should they occur) may bypass or instrumentalize harmed individuals and groups by treating them as symptoms of a more serious or important justice issue. Politically, in an environment in which reparations programs largely exist only as recommendations on paper or where implementation is disappointing and fragmentary, loading reparations with an agenda of social-structural transformation might make them even less politically viable than they already are, at victims’ expense.

All of these considerations – conceptual, practical, political and moral – take on force in light of the severe and ongoing deficit of reparations that actually obtains. Postconflict or postauthoritarian societies often fail to take the opportunity to minister to the acute suffering they have committed, caused or allowed. They fail to offer relief and redress or to provide options and some degree of choice to victims of political violence. Despite some significant early programs in Chile and Argentina (won through persistent legal and political actions), reparations programs often languish or fall far short of what has been sought or recommended. Priscilla Hayner notes in the case of truth commissions’ recommendations for reparations that most governments ‘responded slowly or with tepid interest’ and programs, if created, were ‘more limited in size and reach’ than sought.<sup>64</sup> Ruben Carranza of the International Center for Transitional Justice notes:

Reparations are arguably the most victim-centered of the various approaches to fighting impunity; but in recent years, most of the international resources meant for transitional justice and peacebuilding has gone to operating war crime tribunals, occasionally to truth commissions, certainly to reintegrating ex-combatants, but seldom, if ever, to directly benefit victims of human rights violations.<sup>65</sup>

The 2014 report on reparations of the UN special rapporteur on the promotion of truth, justice, reparation and guarantees of nonrecurrence says, ‘This implementation gap is of scandalous proportions.’<sup>66</sup> There is deep irony in promoting a transformative agenda for reparations when most victims go begging for the most

64 Hayner, *supra* n 10 at 163.

65 Ruben Carranza, ‘The Right to Reparations in Situations of Poverty,’ International Center for Transitional Justice Briefing (September 2009), 4.

66 De Greiff, *supra* n 6 at para. 81.



elementary forms of direct relief.<sup>67</sup> Direct supportive interventions are capable of saving and changing people's lives. Reparations that empower harmed individuals – that provide resources, skills or opportunities directly to victims, allowing for enriched choices and sustainable projects – are not only materially valuable but are expressively apt in showing concern for the powerlessness of victimization by supporting renewed or new exercises of agency and choice.<sup>68</sup>

None of what I have argued concerning the pitfalls of aiming for robust transformation by means of reparations programs denies that transitional justice properly has transformative aims. How transitional measures can or do work and whether and when they can be transformative remain open questions that may not have a generalizable context-free answer.<sup>69</sup> Nor do I rule out the possibility that victims could themselves prefer a transformative social justice agenda to receiving reparations. In cases of extreme destitution and precarious life chances or in contexts where victimization is wholesale within a population – and perhaps most so when these come together – the forms of justice that focus on individual desert (of punishment or repair) might simply seem too meager to be top priorities. Understanding victims' priorities and perceptions of justice requires extensive consultation and participation

67 Correa, Guillerot and Magarell, supra n 47, discuss a variety of cases in which reparations processes dwindle or stall. Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: US Institute of Peace, 2010) tabulate the occurrence of transitional mechanisms. Although only monetary reparations are included, the overview reveals a substantial gap between the implementation of reparations and other transitional measures. Hayner, supra n 10, tabulates reparations following truth commission recommendations showing uneven results; see her discussion of cases on pages 163–181. Wolfe, supra n 42, tabulates redress movements internationally, but close inspection reveals that few of these involve specific or material assistance to victims, as opposed to investigations and apologies. On the gap between South Africa's vaunted Truth and Reconciliation Commission and what victims got, see, Hamber, supra n 45; David Backer, 'Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa,' *International Journal of Transitional Justice* 4(3) (2010): 443–456; and Charles Villa-Vicencio, 'Pursuing Inclusive Reparations: Living between Promise and Non-Delivery,' in Llewellyn and Philpott, supra n 7. See also, Carranza, supra n 65; De Greiff, supra n 6.

68 'Empowerment' is as pliable a concept as transformation. Here, I refer to the enhancement of the choices and efficacy of individuals. See, Elisabeth Porter, 'Rethinking Women's Empowerment,' *Journal of Peacebuilding and Development* 8(1) (2013): 1–14, on multiple meanings of women's empowerment.

69 Some critical assessments of transitional potential include Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,' *Journal of Law and Society* 34(4) (2007): 411–440; Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice,' *Human Rights Quarterly* 30(1) (2008): 95–118; Laurel Fletcher and Harvey M. Weinstein, with Jamie Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective,' *Human Rights Quarterly* 31(1) (2009): 163–220; Olsen, Payne and Reiter, supra n 67; Rosalind Shaw and Lars Waldorf, with Pierre Hazan, eds., *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010); Oskar N.T. Thoms, James Ron and Roland Paris, 'State-Level Effects of Transitional Justice: What Do We Know?' *International Journal of Transitional Justice* 4(3) (2010): 329–354; Kimberly Theidon, *Intimate Enemies: Violence and Reconciliation in Peru* (Philadelphia, PA: University of Pennsylvania Press, 2013); and McAuliffe, supra n 5. See, John Braithwaite, 'Partial Truth and Reconciliation in the *Longue Durée*,' *Contemporary Social Science: Journal of the Academy of Social Sciences* 6(1) (2011): 129–146, on South Pacific contexts that challenge transitional justice assumptions and John Braithwaite, 'Traditional Justice,' in Llewellyn and Philpott, supra n 7, on the western nature of transitional justice categories. Sirleaf, supra n 47, looks at truth commissions and trials in several African contexts, arguing that different contextual conditions determine impact.

of victims in defining, designing and implementing a reparations process.<sup>70</sup> Survey studies reveal diverse victim priorities, but they usually include desires for perpetrator accountability and concrete support for victims, although not ranked in a consistent way across cases.<sup>71</sup> Victims of gross violations could prefer in a given case to see social-structural change instead of redress for previous harms, but there is a very important reason neither to assume nor promote this. It is precisely in the case of those who belong to historically oppressed, persecuted or marginalized groups that the standing to demand accountability for severe disregard and mistreatment of *their individual persons* is paramount. This is a fundamental test of whether their civic and moral personhood, grossly disregarded in the extreme violations they endured, will be affirmed to them and to society meaningfully in the aftermath. Affirming and demonstrating their civic and moral standing, not in addition to but rather *through* the effective delivery of concrete measures of repair that victims value, is what reparative justice demands and what reparations can and must do.

Reparations ideally model and promise full respect and recognition of those whose rights and humanity have been disregarded. But reparations alone cannot on their own secure the civic and human respect, equality, inclusion and accountability under the rule of law that is at the heart of transitional justice. This is a reason to recognize the importance of holistic or integrated approaches to transitional justice that join individually weak or partial measures together to give fuller scope to justice in its varied meanings; or, if you like, it is a reason to advance transformative goals for transitional justice as a whole. But it remains important to recognize that reparative justice, the only transitional justice dimension that directly and primarily addresses victims, is a part of that whole and a condition of just transformation. Without it, the repair of wrongs and harms suffered by victims is not seen as a primary and sufficient claim of justice. Without it, victims are, as they apparently for the most part continue to be, not quite important enough to command justice in their own right.

70 On the importance of participation to substantive reparations outcomes, see, Correa, Guillerot and Magarell, *supra* n 47; David Taylor, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?' Impunity Watch Discussion Paper, April 2014, [http://www.impunitywatch.org/docs/IW\\_Discussion\\_Paper\\_Victim\\_Participation1.pdf](http://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf) (accessed 10 October 2015). On the idea that participation itself has reparative meaning in empowering victims, see, Kelli Muddell, 'Limitations and Opportunities of Reparations for Women's Empowerment,' International Center for Transitional Justice Briefing (September 2009); Correa, Guillerot and Magarell, *supra* n 47; Maria Suchkova, 'The Importance of a Participatory Reparations Process and Its Relationship to the Principles of Reparation,' University of Essex Transitional Justice Network, Reparations Unit, Briefing Paper No. 5 (2011); Mazurana and Proctor, *supra* n 7; and Taylor, *ibid*.

71 Some studies are: International Center for Transitional Justice, '*To Walk Freely with a Wide Heart*': A Study of the Needs and Aspirations for Reparative Justice of Victims of Conflict-Related Abuses in Nepal (2014); Simon Robins, '*To Live as Other Kenyans Do*': A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations' (New York: International Center for Transitional Justice, 2011); Dyan Mazurana, Teddy Atim, Ariane Brunet and Helen Kezie-Nwoha, *Making Gender-Just Remedy and Reparation Possible: Upholding the Rights of Women and Girls in the Greater North of Uganda* (Kampala: Isis Women's International Cross Cultural Exchange and Feinstein International Center, Tufts University, 2013); Phuong N. Pham and Patrick Vinck, *Fragile Peace, Elusive Justice: Population-Based Survey on Perceptions and Attitudes about Security and Justice in Abidjan, Côte d'Ivoire* (Cambridge, MA: Harvard Humanitarian Initiative, Harvard School of Public Health and Brigham and Women's Hospital, 2014); and Theidon, *supra* n 69, on Peru.