An Absence of Accountability

Inga N. Laurent*

 Transitional justice (TJ) is emerging as the prevailing method for addressing large-scale societal conflicts—be they post-war or a response to entrenched structural injustice.[1] *While TJ has more commonly been associated with countries facing "periods of rupture,"*[2] *typically in the form of a civil war,*[3]

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 [1] Kirsten Ainley, *Evaluating the Evaluators: Transitional Justice and the Contest of Values*, 11 INT'L J. TRANSITIONAL JUST. 421, 422 (2017) (citing Makau Mutua, *What Is the Future of Transitional Justice?*, 9 INT'L J. TRANSITIONAL JUST. 1, 1 (2015)); Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"*, 3 INT'L J. TRANSITIONAL JUST. 5, 7 (2009); KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 17 (2011); Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 87 (2003) [hereinafter Teitel, *Transitional Justice Genealogy*].

 [2] Sophie Rigney, *The Hopes and Discontents of Indigenous-Settler Reconciliation*, 11 INT'L J. TRANSITIONAL JUST. 359, 360 (2017).

 [3] *See, e.g.*, Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (July 12, 1999) [hereinafter Lomé Peace Agreement]; Agreement on a Firm and Lasting Peace, U.N. Doc. S/1997/114 (Annex II), 37 (Feb. 7, 1997); Peace Agreement Between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement of Democracy in Liberia and the Political Parties, U.N. Doc. S/2003/850 (Annex), 1 (Aug. 29, 2003); Mexico Agreements, U.N. Doc. S/23130 (Annex), 2 (Oct. 9, 1991).

military dictatorship,[4] or genocide,[5] TJ may prove effectual in responding to "Steady-State" (SS) violence[6]—defined as when "contemporary conditions of persistent conflict . . . [create] a normalized law of violence."[7] SS countries such as Northern Ireland,[8] Canada,[9] Aotearoa New Zealand,[10] and Australia have used or have proposed using TJ mechanisms.[11] Now considered an essential part of peacebuilding praxis, TJ is increasingly commonplace.[12] Scholar Makau Mutua poetically contends that "in many circles, transitional justice has become an article of faith as a catalyst for reclaiming societies in political and social imbalance and dysfunction."[13] Several "phases"[14] of TJ exist that have used a variety of tools to effectuate societal stabilization; however, truth and reconciliation commissions (TRCs) are the primary mechanism for practical

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[4] *See, e.g.*, Supreme Decree No. 1040, Comisión Nacional Sobre Prisón Politica y Tortura [National Commission on Political Imprisonment and Torture], Sept. 26, 2003 (Chile); Decree No. 187/83, Comisión Nacional sobre la Desaparición de Personas [Argentina's National Commission on the Disappeared], Dec. 15, 1983 (Arg.); Supreme Decree No. 19241, Comisión Nacional de Investigación de Desaparecidos [National Commission for Investigation for Forced Disappearances], Oct. 28, 1982 (Bol.).

[5] *See, e.g.*, Law No. 03/99, Rwanda's National Unity and Reconciliation Commission Establishing the National Unity and Reconciliation Commission, Mar. 12, 1999 (Rwanda), https://www.refworld.org/docid/3ae6b59a18.html.

[6] Rigney, *supra* note 2, at 368; *see also* Teitel, *Transitional Justice Genealogy*, *supra* note 1, at 70.

[7] Teitel, *Transitional Justice Genealogy*, *supra* note 1, at 70.

[8] *See* Malcolm Brabant, *Northern Ireland Troubles Truth Commission Is Opening Old Wounds*, PBS: NEWS HOUR (June 26, 2021, 4:29 PM), https://www.pbs.org/newshour/show/northern-ireland-troubles-truth-commission-is-opening-old-wounds.

[9] *See Truth and Reconciliation Commission of Canada*, NAT'L CTR. FOR TRUTH & RECONCILIATION, https://nctr.ca/about/history-of-the-trc/truth-and-reconciliation-commission-of-canada (last visited Sept. 24, 2023).

[10] *See* Christine Chaumeau, *New Zealand Leads the Way on Reparations for Indigenous People*, JUSTICEINFO.NET (June 28, 2021), https://www.justiceinfo.net/en/79224-new-zealand-leads-way-reparations-indigenous-people.html.

[11] *Id.*; *About Yoorrook*, YOORROOK JUST. COMM'N, https://yoorrookjusticecommission.org.au/overview (last visited Sept. 25, 2023); Harry Hobbs, *Victoria's Truth-Telling Commission: To Move Forward, We Need to Answer for the Legacies of Colonisation*, THE CONVERSATION, (Mar. 9, 2021 1:12 AM), https://theconversation.com/victorias-truth-telling-commission-to-move-forward-we-need-to-answer-for-the-legacies-of-colonisation-156746.

[12] Pamina Firchow, *Do Reparations Repair Relationships? Setting the Stage for Reconciliation in Colombia*, 11 INT'L J. TRANSITIONAL JUST. 315, 315 (2017).

[13] Makau Mutua, *What Is the Future of Transitional Justice?*, 9 INT'L J. TRANSITIONAL JUST. 1, 1 (2015).

[14] Teitel, *Transitional Justice Genealogy*, *supra* note 1, at 69.

application.[15] *TRCs are evolving as experimental laboratories that establish theoretical concepts of peacebuilding.*[16]

The aims of TRCs are laudable and worthy of persistent pursuit—seeking increased democratization[17] and citizen empowerment,[18] acknowledging the atrocities survivor/victims (S/Vs) suffered,[19] addressing the needs borne of S/Vs,[20] preserving an official historical record of atrocities, and attempting to right those past injustices[21]—even while some questions regarding their overall efficacy remain.[22] In the past, TRCs have struggled to successfully move from truth-telling to reconciliation.[23] Recommendations frequently are left unfulfilled[24] and the healing promoted by the process never fully arises. Justice again denied. Though truth is a necessary precursor for reconciliation, truth alone cannot produce it.[25] TRCs have also become "hostage to configurations

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[15] *See, e.g.*, *Truth Commission Digital Collection*, U.S. INST. OF PEACE (Mar. 16, 2011) [hereinafter *Truth Commission Collection*], https://www.usip.org/publications/2011/03/truth-commission-digital-collection. Approximately thirty-five national truth commissions have taken place since the 1970s.

[16] *See* John Braithwaite, *Accountability and Responsibility Through Restorative Justice, in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 33, 34 (Michael W. Dowdle ed., 2006).

[17] Eric Brahm, *Uncovering the Truth: Examining Truth Commission Success and Impact*, 8 INT'L STUD. PERSP. 16, 24 (2007); Oskar N.T. Thoms et al., *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* 26 (Univ. of Ottawa Ctr. for Int'l Pol'y Stud., Working Paper No. 1, 2008).

[18] INT'L CTR. FOR TRANSITIONAL JUST., TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION 9 (Eduardo Gonzáles & Howard Varney eds., 2013) ("Truth commissions should protect, acknowledge, and empower victims and survivors.").

[19] Neil Kritz, *Policy Implications of Empirical Research on Transitional Justice, in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 13, 13 (Hugo Van Der Merwe et al. eds., 2009). Kritz identifies four objectives that transitional justice aims to achieve—"the first is to determine the truth by establishing a record of human rights abuses." *Id.*

[20] Alfred Allan, *Truth and Reconciliation: A Psycholegal Perspective*, 5 ETHNICITY & HEALTH 191, 199 (2000).

[21] Kritz, *supra* note 19, at 13.

[22] Firchow, *supra* note 12, at 316.

[23] *See, e.g.*, Archbishop Desmond Tutu, *Tutu: 'Unfinished Business' of the TRC's Healing*, MAIL & GUARDIAN (Apr. 24, 2014), https://mg.co.za/article/2014-04-24-unfinished-business-of-the-trc-healing.

[24] Héctor Centeno Martín et al., *Explaining the Timeliness of Implementation of Truth Commission Recommendations*, 59 J. PEACE RSCH. 710, 717 tbl.II (2022).

[25] Inga N. Laurent, *Addressing the Toll of Truth Telling*, 88 BROOK. L. REV. 1073, 1081, 1087; Brandon Hamber et al., *"Telling It Like It Is . . .": Understanding the Truth and Reconciliation Commission from the Perspective of Survivors*, 26 PSYCH. SOC'Y 18, 18 (2000)

of political power that condition the terms of peace agreements, underscore the legitimacy of incoming regimes[,] and perform a nation-building function."[26]

Thus, TRCs have both the potential for ushering in new, generative paradigms for society's collective existence, liberation, and conversely the potential to legitimize state power—explicit and implicit laws, policies, practices, and persistent power imbalances—that created and/or sustained the conditions for mass discrimination and dehumanization.

So how should fractured societies create and refine effective TJ models, specifically TRC processes? How might they best create pathways for individual and collective accountability capable of recognizing and responding to a vast range of differing "modalities of violence"[27] and "form[s] of structured dispossession"[28] from the obvious to the insidious? Can TJ mechanisms successfully widen the web of accountability for individuals, communities, states, and institutions while providing iterative accountability as well? Is it possible to create processes that provide generative, productive, dialogic exchanges that would enable appropriate reconciliation through transfers of knowledge, resources, and power?

This Article addresses some of those questions. While previous scholarship, of others and this author, has examined the discursive limitations and challenges of truth collection,[29] this Article focuses on the process of moving from truth to reconciliation, with an eye toward enhancing accountability. Part I delves further into the phases of TJ as identified by Ruti Teitel's Transitional Justice Genealogy. Part II discusses the theoretical conceptions of accountability and the importance of deliberative accountability in fostering democratic societies. Part III explores accountability jurisprudence and praxis, focusing on the importance of embedded, established, and emergent accountability mechanisms. Finally, Part IV concludes with conceptual frameworks of accountability.

("For survivors the relationships between the concepts is not linear, that is truth does not automatically lead to reconciliation.").

[26] Claire Moon, *Narrating Political Reconciliation: Truth and Reconciliation in South Africa*, 15 SOC. & LEGAL STUD. 257, 258 (2006) [hereinafter Moon, *Narrating Political Reconciliation*].

[27] Fresh Air, *Law Professor Unearths Cases of Racial Violence from the Jim Crow Era*, NPR (Sept. 27, 2022, 1:24 PM), https://www.npr.org/2022/09/27/1125350542/law-professor-unearths-cases-of-racial-violence-from-the-jim-crow-era.

[28] GLEN SEAN COULTHARD, RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION 7 (2014).

[29] *See, e.g.*, Moon, *Narrating Political Reconciliation, supra* note 26, at 258; Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 DIACRITICS 33, 37 (2002); COULTHARD, *supra* note 28, at 22; PATCHEN MARKELL, BOUND BY RECOGNITION 2 (2003).

INTRODUCTION

"Soon come" is a ubiquitous, amorphous, Jamaican phrase with myriad meanings. The statement could suggest the imminent arrival of a person or an object like a document, or it could suggest the promise of an intended arrival, one that never fully materializes.[30] Transitional justice (TJ) can emulate this fluid Jamaican phrase. TJ's evolution has no doubt positively revolutionized the way states respond to protracted conflict, but its promise remains unrealized. Perhaps this is most evidenced in truth and reconciliation commissions (TRCs)— one practical mechanism of enacting TJ theory. If the goals of TRCs were solely measured by the breadth of their investigative capacities, these endeavors would be an astounding success.[31] Although collecting once-suppressed narratives is an integral component of the peacebuilding process, as the name implies, TRCs inherently require something more, namely, the move from truth to and through reconciliation. Many TRCs clear the first stage of procuring repressed truths admirably only to stall on the foothills of reconciliation— heralded healing regulated indefinitely to "soon come" status.

Archbishop Desmond Tutu, chair of the South African Truth and Reconciliation Commission (SATRC), acknowledged the harm that results when TRCs fail to move beyond their truth-gathering functions and fail to achieve the curative recommendations painstakingly drafted by commissions:

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[30] I completed my Fulbright in Kingston, Jamaica, in 2017, and there are still some documents and official forms, which I am assured will "soon come."

[31] *See, e.g.*, *Register of Reconciliation*, TRUTH & RECONCILIATION COMM'N OF S. AFR. https://www.justice.gov.za/trc/ror/index.htm (last visited Sept. 25, 2023); *Truth Commission: South Africa*, U.S. INST. OF PEACE (Dec. 1, 1995), https://www.usip.org/publications/1995/12/truth-commission-south-africa#:~:text=The%20TRC%20took%20the%20testimony,commission%20received%207%2C112%20amnesty%20applications (stating the South Africa Truth and Reconciliation Commission interviewed around 21,000 victims, received 7,112 amnesty applications, and launched a register of reconciliation during its tenure); *Truth and Reconciliation Commission of Canada*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525 (Sept. 29, 2022); COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, NUNCA MÁS [NATIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS, NEVER AGAIN] pt. VI. (1984) (Arg.), http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_282.htm (explaining the National Commission on the Disappeared prepared approximately 7,380 files over a period of nine months, comprising depositions from relatives of the disappeared, S/V testimony, and statements from members of the security forces).

The commission was a beginning, not an end. It united South Africans around a common fire for the first time in history to hear the stories of our past, so that we could begin to understand each other—and ourselves—and take forward the job of developing the compassionate and just society for which so many had suffered and laid down their lives.

The tardy and limited payments of reparations to victims of human rights violations eroded the very dignity that the commission sought to build. The fact that the government did not prosecute those who failed to apply for amnesty undermined those who did. The proposal of a once-off wealth tax as a vehicle for those who had benefited from the past to contribute to the future was stillborn.

To use a medical analogy, the soul of apartheid South Africa was on its deathbed, fundamentally crippled, shot through with the cancers of immorality and inequity, and financially bankrupt. In the 1990s a new superintendent took over the hospital. South Africans dared to dream of a miraculous recovery. The superintendent appointed a matron, on a contract basis, to blow some momentum into the recovery process.

The commission succeeded in its mandate to stabilise the patient sufficiently to move it out of intensive care into a general ward. But then the government decided further treatment was unnecessary.

Our soul remains profoundly troubled. The symptoms are all around us.[32]

This acknowledgment—from the preeminent figure of a process globally upheld as the "paradigmatic moment" that ushered in the modern restorative alternative to TJ tribunals—should not be overlooked. The "politics of reconciliation [or] contest between the imperatives of the real and a desire for the imaginary" has received increased attention over the past decade.[33] As the great Archbishop Tutu called for action, scholar, Claire Moon, warns that the therapeutic ethos of reconciliation is, at its core, "a radically new mode of state legitimation"[34]—a dangerous prospect if no further guarantees of corrective action are promised. Indeed, other national TRC

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[32] Tutu, *supra* note 23.

[33] Moon, *Narrating Political Reconciliation*, *supra* note 26, at 269; *see also* COULTHARD, *supra* note 28, at 106.

[34] Claire Moon, *Healing Past Violence: Traumatic Assumptions and Therapeutic Interventions in War and Reconciliation*, 8 J. HUM. RTS. 71, 86 (2009) [hereinafter Moon, *Healing Past Violence*].

projects have met the same fate as the SATRC. At the end of the Canadian Truth and Reconciliation Commission (CTRC), the Commission created ninety-four calls to action for the government, and six years later, the government completed only eleven.[35] Of the approximately seven hundred recommendations proposed in ten Latin American truth commissions, researchers found only 38.67 percent implemented.[36] Currently, the data collected post-TRC appears to show processes that acknowledge the violence committed and promise to "close the violent chapter" in the nation's history, but the ten Latin American truth commissions fail to achieve success addressing the more difficult recommendations urging the eradication of persistent root causes of conflict.[37]

Reconciliation in light of conflict is imperative for societal advancement. Shoring up TJ jurisprudence and praxis, especially within TRCs, is necessary as TJ is "increasingly commonplace,"[38] and is now considered an essential part of peacebuilding.[39] Scholar, Makau Mutua, poetically contends that "[i]n many circles, transitional justice has become an article of faith as a catalyst for reclaiming societies in political and social imbalance and dysfunction."[40] Recent TJ processes highlight this trend. From May 2018 to 2022, an independent government agency of Taiwan investigated the actions of the Kuomintang with the aim of providing public access to political archives, removing authoritarian symbols, preserving sites where injustices had occurred, and redressing injustices, among other goals.[41]

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[35] EVA JEWELL & IAN MOSBY, YELLOWHEAD INST., CALLS TO ACTION ACCOUNTABILITY: A 2021 STATUS UPDATE ON RECONCILIATION 4, 6 (2021).

[36] Martín et al., *supra* note 24, at 717 tbl.II.

[37] *See id.*

[38] Ainley, *supra* note 1, at 422; *see* Mutua, *supra* note 13, at 1; Bell, *supra* note 1, at 6; SIKKINK, *supra* note 1, at 13–14; RUTI G. TEITEL, HUMANITY'S LAW 15 (2011).

[39] Firchow, *supra* note 12, at 318; *see also* Ainley, *supra* note 1, at 422 (citing Mutua, *supra* note 13, at 1); Bell, *supra* note 1, at 9; SIKKINK, *supra* note 1, at 27; Martín et al., *supra* note 24, at 712 ("Transitional justice is 'increasingly accepted as an important element of post-conflict peacebuilding.' In fact, there is a longstanding interest in how to most effectively time and sequence transitional justice, driven largely by a desire to better maximize the peace promoting impact of such measures in societies beset by violence and repression." (citations omitted)).

[40] Mutua, *supra* note 13, at 1.

[41] Act on Promoting Transitional Justice, FAWUBU FAGUI ZILIAOKU, art. 2 (2022) (Taiwan); *see also* Peng Wan-hsin & Jonathan Chin, *Transitional Justice Group Head Picked*, TAIPEI TIMES (Mar. 28, 2018), https://www.taipeitimes.com/News/front/archives/2018/03/28/2003690180; Government to Carry on Goals of Transitional Justice Commission Following May 30

Additionally, more countries are adopting and integrating components of TJ piecemeal, hoping to address long-term, persistent problems often referred to as "historical injustice."[42] In an effort to advance reconciliation in Colombia, where "[e]very sixth Colombian is now officially classified as a victim of war,"[43] the country adopted an ambitious Victims' Law, focusing on restitution to address past wrongs.[44] On September 30, 2020, California established a Reparations Task Force[45] to propose "concrete restitution to Black citizens to address the enduring economic effects of slavery and racism."[46] Currently, the task force is considering $350,000 in reparations for American Descendants of Slavery (ADOS).[47]

Though questions and frustrations regarding their overall efficacy remain, TJ processes continue evolving as experimental laboratories. In particular, TRCs are practical expressions, bringing to life the varied theoretical concepts aimed at fostering accountability and reconciliation in an attempt to ultimately enrich democracy.[48]

TRCs also have the capacity to usher in new paradigms for society's collective existence and liberation and have become a primary

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Dissolution, EXEC. YUAN (May 26, 2022) (Taiwan), https://english.ey.gov.tw/Page/61BF20C3E89B856/422578a0-6256-4763-b505-2290c7a6d6e4; Sean Lin, *Lawmakers Pass Transitional Justice Act*, TAIPEI TIMES (Dec. 6, 2017), https://www.taipeitimes.com/News/front/archives/2017/12/06/2003683504.

[42] *See, e.g.*, ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 30 (2000).

[43] Firchow, *supra* note 12, at 319.

[44] *Id.* ("Law 1448, as well as several other laws, decrees[,] and judicial rulings form part of Colombia's policies regarding direct and indirect (displaced) victims of different armed actors since the internal war began over 50 years ago. Law 1448 explicitly lists reconciliation and peace as its central aims and declares itself founded on the principles of transitional justice. It also specifically lists the goal of reparations in national and local reconciliation.").

[45] Off. of the Att'y Gen., *Reparations Task Force Members*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/ab3121/members (last visited Sept. 25, 2023). California Assembly Bill 3121 created the task force to study and make recommendations on potential reparations for African Americans to address. *Id.*

[46] Kurtis Lee, *California Panel Sizes Up Reparations for Black Citizens*, N.Y. TIMES, https://www.nytimes.com/2022/12/01/business/economy/california-black-reparations.html (June 20, 2023).

[47] Associated Press & Rep. for Am., *Reparations Panel Deliberates on Compensation for Black Californians*, THE GUARDIAN (Dec. 15, 2022, 12:56 PM), https://www.theguardian.com/us-news/2022/dec/15/california-reparations-taskforce-financial-compensation.

[48] Braithwaite, *supra* note 16, at 50.

mechanism for practical TJ application.[49] Their reconciliatory aims are laudable and worth persistent pursuit: seeking increased democratization[50] citizen empowerment,[51] acknowledging the atrocities survivors/victims (S/Vs) suffered,[52] addressing the needs borne of S/Vs,[53] preserving those wrongs by compiling them in an official historical record, and attempting to right those past injustices.[54] TRCs are also "hostage to configurations of political power that condition the terms of peace agreements, underscore the legitimacy of incoming regimes[,] and perform a nation-building function."[55] In sum, these processes also have the potential to relegitimize state power without adequately addressing or altering systemic wrongdoing and failing to eliminate the conditions—explicit and implicit laws, policies, practices, and persistent power-imbalances—that allowed discrimination and dehumanization to fester in the first place. Thus, refining TJ praxis will be an ongoing and important endeavor.

Although scholars, talking past each other,[56] currently find it difficult to conceptually define and identify indicators of success across

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[49] *See, e.g.*, *Truth Commission Collection*, *supra* note 15. *See infra* note 74.

[50] *See* Brahm, *supra* note 17, at 24; Thoms et al., *supra* note 17, at 15.

[51] INT'L CTR. FOR TRANSITIONAL JUST., *supra* note 18, at 9.

[52] *See* Kritz, *supra* note 19, at 13.

[53] Allan, *supra* note 20, at 199.

[54] *See* Kritz, *supra* note 19, at 13.

[55] Moon, *Narrating Political Reconciliation*, *supra* note 26, at 258.

[56] Ainley provides an extensive overview of the vastly different conclusions scholars have reached regarding transitional justice effectiveness:

> This lack of agreement on what TJ means is prevalent in both the general and case-based literature. Recent large-n studies exemplify the disagreements. Hunjoon Kim and Kathryn Sikkink, for instance, map the effects of human rights prosecutions and truth and reconciliation commissions (TRCs) on human rights protections and on deterrence of atrocity crimes (both of which they show to be positively correlated to the existence of TJ mechanisms). This contrasts with Jack Snyder and Leslie Vinjamuri, who focus on TJ as a conflict resolution technique and suggest that amnesties are better able to guarantee durable peace than trials (in addition arguing that war crimes trials do little to deter atrocity crimes). Similarly, Geoff Dancy and Eric Wiebelhaus-Brahm are concerned with the impact of TJ, in this case TRCs, upon peace, arguing that truth commissions are associated with an increased risk of the resumption of conflict. Tricia Olsen, Leigh Payne and Andrew Reiter have a different conception again, seeing TJ as a potential contributor to democracy and human rights, but not measuring its effects upon peace. They conclude that single TJ mechanisms do not have significant positive effects on human rights or democracy (indeed, TRCs used alone can have negative effects on human rights) and instead find that only combinations of mechanisms, including amnesties, have a positive impact.

TJ and TRCs,[57] Christine Bell argues that some of the confusion arises because TJ is rooted in multiple conflicting concepts.[58]   These concepts involve (1) "an ongoing battle against impunity rooted in human rights discourse," (2) "a set of conflict resolution techniques related to constitution making," and (3) "a tool for international state building in the aftermath of mass atrocity."[59]   These concepts relate to the multiple theories of justice embedded—retributive, restorative, and transformative—that signify the distinct, historical periods that have defined the different arcs of TJ evolution.[60]

Ruti Teitel's *Transitional Justice Genealogy* structures these arcs into three distinct phases.[61]   The origin of modern TJ ("Phase 1") can be traced back to World War I.[62]   Symbolized by the Nuremberg Trials, Phase 1 is primarily identified through its retributive nature.[63] Typically, under a dominant retributivist ethos, justice is achieved via authoritative legal institutions—in particular, international tribunals—with trials representing the gold standard.[64]   The shorthand moniker for retributive justice is "just desserts," signifying that justice is righted when a person responsible for causing harm ("responsible party" or "RP") receives proportionate punishment.[65]

The post-Cold War period ("Phase 2")—marked by democratic transitions, globalization, and modernization—is largely characterized "by an acceleration in conflict resolution and a persistent discourse of

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See Ainley, *supra* note 1, at 423–24 (footnotes omitted).

[57]   *See id.* at 423 ("[W]hat the field's goals are and should be, and whether and when the practice is 'good' (an extension of human rights discourse, or necessary to democratization or peace), 'bad' (imperialist, hegemonic, impunity serving or promoting dangerous legal exceptionalism) or a value-neutral tool with which both 'good' and 'bad' goals can be pursued." (citing Bell, *supra* note 1, at 13)).

[58]   Bell, *supra* note 1, at 13.

[59]   *Id.*

[60]   Ainley, *supra* note 1, at 427 (citing Teitel, *Transitional Justice Genealogy, supra* note 1, at 69).

[61]   Teitel, *Transitional Justice Genealogy, supra* note 1, at 69 n.5 ("The use of the term 'phases' here should be considered primarily as a heuristic, to help understand the periodization of the various political and legal periods.   This is not to say that there are acoustic separations dividing these phases.   Indeed, there are overlaps among the three phases proposed here.").

[62]   *Id.* at 70.

[63]   *See id.*

[64]   Ainley, *supra* note 1, at 427.

[65]   *Id.* at 429.

justice throughout law and society."[66]   TJ moved away from the international tribunal model towards alternatives, hybridizing legal and societal responses to protracted conflict.[67]   This ended the targeted approach to justice that had focused on individual retributive accountability, shifting the paradigm to communitarian conceptions of accountability—principally through truth commissions.[68]   Thus, "law as conventionally understood . . . almost disappeared, the alternative model was said to have universal applications and claimed general diffusion around the world. . . . [which had] significant juridical and political implications."[69] Under this contemporary phase, TJ primarily relies on discourse as a matter of seeking humanitarian justice and is most associated with restorative justice (RJ).[70]   RJ is concerned "with how to put a situation right when . . . relationships have been harmed[,]" focusing on the needs and obligations created as a result of wrongdoing.[71]

Phase 3—or the "steady-state" (SS) phase of TJ—marks two moves. First, TJ becomes the international norm rather than the exception, and second, RJ, though still present, becomes augmented through the inclusion of transformative justice ("TFJ") conceptions.[72]

Though RJ and TFJ are frequently viewed as interchangeable, each one's ultimate aims are distinct.[73]   Frustrated with RJ's limitations—primarily its inability to address root causes of wrongdoing[74]—TFJ practitioners began altering restorative techniques to attack prevalent sociopolitical and economic issues.[75] TFJ builds on RJ principles and moves beyond them, questioning why societal ills persist, critically assessing how injustices become structuralized, and asking who benefits from and aids in upholding structures of oppression.[76]

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[66] Teitel, *Transitional Justice Genealogy, supra* note 1, at 70.

[67] *Id.* at 78.

[68] *Id.* at 80.

[69] *Id.* at 82–83.

[70] *See* Ainley, *supra* note 1, at 428.

[71] *Id.* at 427–28.

[72] *See* Teitel, *Transitional Justice Genealogy, supra* note 1, at 89.

[73] Anthony J. Nocella II, *An Overview of the History and Theory of Transformative Justice*, 6 PEACE & CONFLICT REV. 1, 4 (2011).

[74] For example, RJ does not address the structural and social inequities that produce conflict.

[75] Nocella, *supra* note 73, at 4.

[76] *See id.*

Whereas RJ typically coexists alongside retributivist criminal legal system structures, TFJ explicitly opposes complicity with "systems of domination."[77] TFJ is mission-oriented on the aspiration of eradicating societal and institutional structures that aid, participate in, and support ongoing harm for marginalized communities.[78] TFJ rejects the "top-down imposition of external legal frameworks or institutional templates, [striving for] a more bottom-up understanding and analysis of the lives and needs of populations."[79] The implications of TFJ are intriguing, considering nations dealing with consequences of civil war, authoritarian regimes, and genocide—the atrocities typically associated with TJ—can partially mirror the reality marginalized communities exist within daily. Often, marginalized communities have had to create extra-state means of keeping themselves safe from express and implicit forms of historically present injustices with scant resources.[80] People who have been pushed to surviving on the margins hold much wisdom for the international community to draw from when conceptualizing justice.

Although the three phases of TJ are presented categorically, each one fuses into one another, overlapping. They can rightly be described as more cyclical than linear.[81] Thus, arguably, TJ is best effectuated by embracing its evolution in its entirety via appropriately combined

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[77] *See id.*

[78] Ainley, *supra* note 1, at 428.

[79] *Id.* at 430 (citing Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 INT'L J. TRANSITIONAL JUST. 339, 340 (2014)).

[80] "Historical injustice" is a term frequently used to describe states where past injustices in a nation's history remain unaddressed—namely, legacies of slavery, colonization, and restitution for property lost during WWII. *See* BARKAN, *supra* note 42, at X–XI, 3. But classifying wrongdoing as "historical" inherently limits the TJ mechanisms available to living S/Vs who still feel the impact of the past wrongdoing and experience a continuity of violence in the present. Increasingly, scholars have begun calling for a reconsideration of the ontological status of the past, rejecting the notion that the "past" is absent from the present. Rather, an understanding of the past as something that is living and persists in the present (i.e., the "presence paradigm") moves beyond mere historical chronology—and into an understanding of how lived experiences are shaped by previous events and, in turn, how historical narratives are amended and revised based on those lived experiences. Thus, where "historical injustice" implies an absence of the past in the present, "historically present injustice" acknowledges how the past still lives with us. For a broad discussion of the presence paradigm, see Berber Bevernage, *Time, Presence, and Historical Injustice*, 47 HIST. & THEORY 149, 150–52 (2008).

[81] *See* Teitel, *Transitional Justice Genealogy*, *supra* note 1, at 69.

practices capable of corresponding with its varied conceptions of justice.

Accountability is the thread that runs consistently through each conception of justice and thus is this Article's starting place for developing those practices. To narrow all that TJ scholarship has to offer, this Article argues that the measure of TJ will result from its ability to foster mixed and multilevel deliberative accountability. It builds on the wealth of current scholarship that mainly focuses on retributive and quasi-restorative accountability mechanisms, enlarging the field by integrating emergent RJ and TFJ praxis.

Part I delves further into the phases of TJ along with their accompanying notions of justice as identified by Teitel's *Transitional Justice Genealogy*.[82] Part II discusses the theoretical concepts of accountability within the restorative justice context and the importance of deliberative accountability in fostering democracy. Part III explores accountability jurisprudence and praxis, focusing on the importance of embedding mixed and multilevel established and emergent mechanisms. Finally, Part IV concludes with conceptual frameworks for summarizing the material presented.

Additional core tenants that guide this work include the understanding that the reconciliation praxis is experimental. No single path to reconciliation exists, and no attempt is categorically successful or unsuccessful. Reconciliation is an arduous and ongoing journey. People—those who have resisted oppression, attempts at eradication, and dehumanization—hold the keys to society's collective, positive societal transformation. The practices of the marginalized—used to keep themselves and their communities safe—should be recognized and formally integrated into TJ theory and praxis.

I.   AN EXPLORATION OF PHASES—THE BENEFITS AND LIMITATIONS OF
RETRIBUTIVE, RESTORATIVE, AND TRANSFORMATIVE JUSTICE
CONCEPTIONS

Teitel's *Transitional Justice Genealogy* discusses the three phases of justice and their resultant primary conceptions of justice—retributive, restorative, and transformative.[83] They produce corresponding legal and quasi-legal responses for confronting mass victimization.[84] Teitel's

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[82]   *See id.*

[83]   *Id.* at 69–70.

[84]   *Id.* at 69.

analysis also reveals "a close relationship between the type of justice pursued and the relevant limiting political conditions."[85]   Because every conflict is unique, replete with its own complex set of political conditions, an exploration of the benefits and limitations generally associated with each phase can be helpful in determining the future of TJ.   Notably, one consistent throughline—accountability—emerges across all phases and notions of justice.   Therefore, the remaining sections of this Article apply accountability jurisprudence and praxis to elucidate new ways forward.

A.   *Phase 1: Tracing the Legacy of Retributive Justice Throughout Modern History*

Teitel traces back the origins of TJ to World War I (WWI); however, TJ became "understood as both extraordinary and international" at the conclusion of World War II (WWII).[86] During this period, proliferation of international criminal justice responses to mass atrocities came to the fore, namely through establishing international administration of post-war justice.[87] In lieu of national justice utilization for punishing individuals who had committed war crimes, international law mechanisms became the principal program for accountability.[88]   The Nuremberg and Tokyo Tribunals, both Allied-run, reflect this shift most noticeably.[89]   The trials and subsequent punishment of German and Japanese citizens who had committed war crimes "demonstrated that accountability was not only desirable, but also feasible."[90]

"[I]nternational prosecution for war crimes was [exceedingly] rare" prior to these tribunals.[91]   But the German government's collapse, its post-WWI failure to hold national trials capable of deterring future human rights violations,[92] and the Allied achievement of a "total victory" all ushered in the development of international law

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[85]   *Id.*

[86]   *Id.* at 70.

[87]   *See* Teitel, *Transitional Justice Genealogy, supra* note 1, at 70.

[88]   *Id.* at 73 ("[A] striking innovation at the time was the turn to international criminal law and the extension of its applicability beyond the state to the individual.").

[89]   *Id.* at 70; *see* RACHEL KERR & EIRIN MOBEKK, PEACE & JUSTICE: SEEKING ACCOUNTABILITY AFTER WAR 18–28 (2007).

[90]   *See* KERR & MOBEKK, *supra* note 89, at 18.

[91]   *See id.* at 19.

[92]   *See* Teitel, *Transitional Justice Genealogy, supra* note 1, at 72–73.

as the normative framework for addressing war crimes.[93] The international trial—as a retributive justice mechanism—remains an integral component of TJ today.[94]

The conclusion of the Cold War necessitated TJ's revival, as governments around the world were left fractured.[95] For example, many South and Central American countries' continual strife and conflict is partially attributable to the withdrawal of superpower-supported guerrilla forces.[96] At this time, TJ returned to the fore, and the legacy of the post-WWII tribunals became the genesis of the ad hoc tribunals of the 1990s—the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994—and the establishment of the International Criminal Court (ICC) in 2002.[97]

The ICC is the first permanent international court with the capacity to adjudicate individuals under a theory of universal jurisdiction, meaning the permissible prosecution of an individual outside their home country for the most severe violations of international law—that is, genocide, crimes against humanity, war crimes, and crimes of aggression.[98] The underlying rationale for these tribunals and the founding of the ICC personifies the shift from national to international legal mechanisms to proclaim the solidification of the rule of law[99] and the notion of justice as a "non-negotiable element of sustainable peace-building."[100]

Although the retributive mechanism of international trials resurfaced,[101] strict adherence to Phase I principles waned in light of the changing world, especially regarding modernization and

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[93]   *See* KERR & MOBEKK, *supra* note 89, at 19.

[94]   *See* Elmar G.M. 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 217, 221–24 (Uwe Ewald & Ksenija Turković eds., 2006).

[95]   Teitel, *Transitional Justice Genealogy, supra* note 1, at 70.

[96]   *Id.* at 71.

[97]   *See* KERR & MOBEKK, *supra* note 89, at 19, 22, 25; *see also* Teitel, *Transitional Justice Genealogy, supra* note 1, at 70, 90.

[98]   Weitekamp et al., *supra* note 94, at 221; *see also* INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 9 (2020).

[99]   *See* Teitel, *Transitional Justice Genealogy, supra* note 1, at 73.

[100]   KERR & MOBEKK, *supra* note 89, at 30.

[101]   *See* Teitel, *Transitional Justice Genealogy, supra* note 1, at 71.

globalization.[102] International trials, though still a tool, saw less use; however, international legal norms provided aspirational guidance.[103]

The challenges associated with solely retributivist conceptions of justice, largely expressed through trials, surfaced in a myriad of ways— including retroactivity questions, compromised judiciaries, and too much prosecutorial discretion.[104]

A host of accountability issues also arose. Because trials dole out responsibility to individuals, they cannot effectively address administrative, communal, or political accountability.[105] Because of the subsidiary nature of international criminal courts, they are restricted only to proceeding on cases in which a clear lack of will or ability to prosecute arises under a national context.[106] Ultimately, this reality created a relatively small pool of individuals who could be held accountable, frustrating justice's overarching aims.[107] This issue came into focus during Slobodan Milosevic's trial at the ICTY, in which he suggested that "the court [was] part of an international effort to turn him into a symbolic scapegoat for a tragic war."[108] The limits of the international retributivist model create the potential for trials to expand beyond their traditional legal parameters—becoming overly politicized spaces.[109] Or, as Hannah Arendt wrote after observing Adolf Eichmann's trial in Jerusalem for war crimes and crimes against humanity against the Jewish people, "It was history that, as far as the prosecution was concerned, stood in the center of the trial."[110]

An additional theoretical problem arises under a dominant retributive ethos. Conceptually, isolating and harshly punishing RPs— without much mitigative reference to political and social contexts that authorized violence—is symptomatically cyclical.[111] The response to

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[102] *See id.* at 76.

[103] *See id.*

[104] *Id.* at 76–77.

[105] Weitekamp et al., *supra* note 94, at 222.

[106] *Id.*; INT'L CRIM. CT., *supra* note 98, at 11 ("The ICC does not replace national criminal justice systems; rather, it complements them. It can investigate and, where warranted, prosecute and try individuals only if the State concerned does not, cannot or is unwilling to do so genuinely.").

[107] *See* Weitekamp et al., *supra* note 94, at 222.

[108] Daphne Eviatar, *The Show Trial: A Larger Justice?*, N.Y. TIMES (July 20, 2002), https://www.nytimes.com/2002/07/20/books/the-show-trial-a-larger-justice.html.

[109] *Id.*

[110] *Id.* (quoting Hannah Arendt's critique of Adolf Eichmann's 1961 trial).

[111] Weitekamp et al., *supra* note 94, at 222.

harm done is to impose more harm to demonstrate that harmful behavior is unacceptable. Thus, evaluating all state-subsystems and the "underlying aspects of a violent state conflict that dragged a country into a protracted state of conflict"[112] is imperative for transformation.[113]

One final issue challenge for retributivist-centered TJ is the fact that tribunals by their very nature are short-term, top-down processes that cannot meaningfully create the space for consideration of the "social, cultural[,] and historical characteristics of the conflict[,]"[114] heightening the risk of protracted or recurrent conflict.

There is no denying that accountability is a precursor to reconciliation. Without it, the objective of reparative community functioning is nearly impossible. It is true that under this model, it can certainly be delivered via a court's judgment. Those punishments can be seen as "purifying rituals which wash away the sequels of a horrendous past."[115] But the combination of limitations and irregularities associated with strictly using the retributivist mechanism of trials was not enough. It fissured the legitimacy equated with rebuilding the rule of law, ultimately causing countries to relinquish trials as the primary mechanism for justice in favor of alternatives for truth-seeking and accountability.[116]

B. *Phase II: Restorative Conception of Justice and its Benefits and Limitations*

To remediate the problems of the "partial, distorted perspective of the historically broader bipolar conflict" that emerged from the fallout of the Cold War transition, Phase II's purpose shifted to

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[112] *Id.*

[113] For a discussion on the societal, legal, and psychological factors that contribute to wrongdoing, see CHRISTOPHER R. BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND 159–89 (rev. ed. 2017). Browning critically reflects on the polarizing impact that "atrocity by policy" and conditioning people "to respect and defer to authority" have on "ordinary men." *Id.* at 161, 189. In these situations, wrongdoing is not the product of "frenzy, bitterness, and frustration," but instead is carried out through "calculation" that is authorized by policies which objectify "the enemy" and remove them from spheres of moral obligation. *Id.* at 161–62. The broader implication of Browning's work is that prosecuting "ordinary men" (i.e., RPs), without reforming the societal and political systems that shaped wrongdoing in the first place, will only perpetuate harm and guarantee its reoccurrence into the future. *Id.*

[114] Weitekamp et al., *supra* note 94, at 223.

[115] *Id.*

[116] Teitel, *Transitional Justice Genealogy, supra* note 1, at 77.

building more nuanced constructions of truth.[117] TJ moved from solely legalistic methods toward alternative, hybrid law and society strategies, primarily under a restorative model of justice.[118] Thus, trials and tribunals were traded for truth commissions and TRCs.[119] The first well-known use of a truth commission is Argentina's "Nunca Mas," which produced its report in 1984, detailing the crimes committed by the outgoing military dictatorship.[120] But it was South Africa that popularized the TRC investigatory model as a response to human rights violations perpetrated during the apartheid period.[121] TRCs are now the norm rather than the exception, as they have grown in international support.[122]

The primary benefit of TRCs is their capacity to transcend individual accountability through the provision of large-scale investigation and revision of historical narratives that are inclusive of the suffering endured during a conflict.[123] TRCs and trials have the similar goal of deterrence, but their processes for achievement of that goal are distinct.[124] Restorative models of justice concentrate less on RP punitive accountability, "in favor of a more communitarian conception" of accountability, which includes RP norm realignment.[125]

Albert Dzur, an RJ theorist, argues there is a "democratic logic of restorative justice[,]"[126] which calls for expanding solutions that rely solely on punitive mechanisms for societal deterrence and correction of wrongdoing. Dzur sees crime as a societal responsibility, which "disperses rather than centralizes authority, responsibility, and accountability for decisions."[127] Dzur builds on restorative theorist Nils Christie's conception that wrongs, in essence, belong to the people

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[117] *Id.* at 78.

[118] *Id.*

[119] *See id.* at 77.

[120] Piere-Louis Le Goff, *Nunca Más: Human Rights and Transitional Justice in Latin America*, *in* MODERN LATIN AMERICA (8th ed. 2014), https://library.brown.edu/create/modernlatinamerica/chapters/chapter-10-chile/moments-in-chilean-history/nunca-mas/.

[121] Teitel, *Transitional Justice Genealogy, supra* note 1, at 78.

[122] *Id.*

[123] *Id.* at 79.

[124] *Id.*

[125] *Id.* at 80.

[126] Albert W. Dzur, *Restorative Justice and Democracy: Fostering Public Accountability for Criminal Justice*, 14 CONTEMP. JUST. REV. 367, 369 (2011).

[127] *Id.*

who are most affected by them—namely, the person causing the harm, the S/V, and close community members. To repair the harm caused requires those parties' active involvement. This would result in fashioning the most appropriate corrective action.[128]

Additionally, wrongdoings are innately tied to context, including the quality of individual's environments and social networks or lack thereof.[129] Both theorists assert that wrongdoing arises in response to the fragmenting of relationships between individuals.[130] The increasingly scant opportunities for interaction, communication, generative action, and collaboration in modern society ultimately produce conflict.[131] Specifically, because of this lack of knowledge and interaction between individuals, the state subsumes the conflict, stepping in to serve as a proxy, managing those interactions when they become fraught.[132] But this strips individuals and communities of the will, agency, or knowledge to address conflict, leading to mass-scale abdication.[133]

Born partially from the restorative theory delineated above, TRCs use dialogic processes for uncovering truth as a means of advocating for "[a] jurisprudence of forgiveness and reconciliation,"[134] integrating extra-legal normative discourse.[135] Relatedly, Moon identifies two therapeutic "truisms" that have emerged since TRCs first began gaining momentum.[136] The first is that post-conflict societies "are 'traumatized' and require therapeutic management if conflict is to be ameliorated."[137] The second is that the state is responsible for

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[128] Inga N. Laurent, *From Retribution to Restoration: Implementing Nationwide Restorative Justice Initiatives—Lessons from Jamaica*, 42 FORDHAM INT'L L.J. 1095, 1105 (2019) ("Nils Christie, a prolific writer on restorative tradition, theorized on the importance of conflict ownership, surmising that conflicts belong to those directly affected by them: victims, offenders, and the community.").

[129] Dzur, *supra* note 126, at 370.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See id.* at 371.

[134] Teitel, *Transitional Justice Genealogy*, *supra* note 1, at 81–82 (footnote omitted) ("The truth and reconciliation project incorporated much of its normative discourse from outside the law, specifically from ethics, medicine, and theology.").

[135] *Id.* at 81.

[136] Moon, *Healing Past Violence*, *supra* note 34, at 72.

[137] *Id.*

"attend[ing] to the psychiatric health of its citizens and the nation as a whole."[138] These can arguably be addressed by restorative practices.

Inherent within RJ resides the possibility of deep forms of accountability that require a RP to not only retrospectively account but also find ways to move toward reconciliation through forward-focused reparative action. But capability does not equate to fulfillment. Adequate intention, implementation, facilitation, and follow-up in programs lessen the potential for deep accountability, replacing it with a shallow version. This outcome occurred during the SATRC. The potential for deeper accountability was traded for shallow forms of accountability—amnesty in exchange for a public accounting of harms committed.[139] Though truth-telling is the requisite first step for repairing harm, it cannot be the only step. Amnesty in exchange for truth is an insufficiently shallow form of accountability. Although the goal of this narrow form of accounting was generative—attempting to usher in a new, united political identity and the preservation of peace—it ultimately proved insubstantial.[140] Nevertheless, retrospectively, people see some problematic aspects to the engendered feelings of forced reconciliation.[141] TRCs overly focused on engaging communities in dialogic models that primarily feature shallower forms of accountability can fail to bring about reconciliation and healing. While Phase II marked the initial recognition of solely legal limitations,[142] Phase III recognized the RJ limitations for addressing structural deficiencies and forms of accountability that were insubstantial.[143]

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[138] *Id.*

[139] *See* Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 16–22 (S. Afr.); Mamdani, *supra* note 29, at 33.

[140] *See* Teitel, *Transitional Justice Genealogy, supra* note 1, at 81; Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 SOC. JUST. 47, 57 (2001) ("A new political identity was constructed [through the SATRC's hearings], that of 'national victim.' In this way, individual suffering was brought into a public space to be shared by all . . . .").

[141] Paul Muldoon, *Reconciliation and Political Legitimacy: The Old Australia and the New South Africa*, 49 AUSTRALIAN J. POL. & HIST. 182, 193 (2003) ("[T]he Commission forced the reconciliation process within the confines of the life history of the individual.").

[142] Teitel, *Transitional Justice Genealogy, supra* note 1, at 82.

[143] *Id.* at 90–91.

C. *Phase III: Transformative Justice Emerges*

The present and third phase of TJ—defined by a period of proliferation and normalization—is "steady-state transitional justice."[144] Whereas TJ to this point has mostly been associated with post-conflict atrocity, the contemporarily approach   is increasingly used in a wide variety of settings, including "ordinary times[,] [w]ar in a time of peace, political fragmentation, weak states, small wars, and steady conflict."[145] Today's TJ does not eradicate previous phases but rather builds on them, integrating past notions of justice and mechanisms.[146] Phase I, in its reliance on legalistic perspectives,[147] is represented in the creation of the permanent ICC,[148] symbolizing "the entrenchment of the Nuremberg Model."[149] Phase II is represented through TRC proliferation, which grapples with how to heal traumatized nations, using peace and reconciliation praxes.[150]

Although Teitel, writing in 2003, did not use the terminology "transformative justice" to expressly classify Phase III, as its formation and labeling was in its naissance,[151] the descriptors of this new phase mirror TFJ principles.[152] TFJ—the most ambitious of the three notions of justice —grows beyond its RJ roots to tackle the sociopolitical issues and the economic injustices embedded within conflict.[153] Through resolving individual conflict, RJ seeks to address communal conflict, which can be seen in the following narrative. A S/V (cashier of a store that was robbed) and a RP (a fourteen-year-old boy) confer to discuss the causes and conditions underlying the RP's decision to commit the robbery and the ripple effects of harm.[154] But TFJ seeks to provide nuanced context to the larger, underlying issues. For example, expanding the scenario, the author informs the readers that the fourteen-year-old boy is queer, was kicked out of his home by a homophobic father, and committed the robbery because he was

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[144] *Id.* at 89.

[145] *Id.* at 90 (footnote omitted).

[146] *Id.* at 81–82.

[147] *See* Ainley, *supra* note 1, at 427.

[148] *See* Teitel, *Transitional Justice Genealogy, supra* note 1, at 91.

[149] *Id.* at 90.

[150] *Id.* at 77.

[151] *See* Nocella, *supra* note 73, at 4.

[152] *See* Ainley, *supra* note 1147, at 427.

[153] Nocella, *supra* note 73, at 4.

[154] *Id.*

starving.[155] TFJ, like RJ, works to repair the harm and understand the underlying causes of it, but TFJ is not just committed to solutions for the S/V and the fourteen-year-old boy. The prerogative must include addressing homophobic attitudes and aggression as well as the structural inequities that allow homelessness to persist more generally.[156]

Where RJ advocates are typically conjoined in some way with the current criminal legal system, often receiving referrals of cases adequate for diversion, TFJ is "explicitly opposed to helping someone get arrested, imprisoned, fired from their job, repressed, or oppressed."[157] Its goal is liberatory—to transform and improve every individual and every structure, eradicate systems of oppression, and create an equitable future.[158] Translated for TRCs, TFJ's goals would loom large, suggesting the possibility for trauma healing and reforming marginalizing systems and structures, especially in regard to wealth and power.[159]

The TFJ framework could hold important potential for TJ programs because its recognition that investigating and transforming the state requires bottom-up action. This perspective moves beyond the limitations of the Phase I and II mechanisms by creating a framework for a real reckoning, requiring the state and complicit members of society and institutions to account for their role in maintaining structural injustice and to unite in becoming responsible for collective, productive transformation.[160] TFJ works to remove conceptions of "an enemy," arguing that "everyone needs to be involved in a voluntary safe constructive critical dialogue where people take accountability, responsibility, and the initiative to heal."[161]

TFJ encompasses lofty aims. Achieving those aims will likely bring positive outcomes; however, not all in society are desirous or capable of engaging in equitable restructuring to eradicate or ease the protracted conflict arising from those ills. Until individuals are ready to collectively ascribe to new strictures—elevating the development of thriving societies for all—inclusion of restorative and retributivist

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[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See id.*; Ainley, *supra* note 1, at 427.

[159] *See* Ainley, *supra* note 1, at 430.

[160] *See id.* at 428.

[161] Nocella, *supra* note 73, at 6.

notions of justice may be necessary. Those who actively seek to continue causing harm may not be able to be safely integrated into TFJ frameworks. Thus, fractured communities likely need diverse mechanisms grounded in these various conceptions of justice, allowing for appropriate diversion in the effort to realize progress.

II.   THE MISSING PIECE—ACCOUNTABILITY

Accountability transcends ideology and has near-universal acceptance.[162] Due to near ubiquitous acceptance of accountability, embedding mechanisms of accountability into TJ can provide a cohesive orienting point, potentially even across disparate ideals and notions. As the terminology surrounding the word has become fungible, clarifying the origin and its essential attributes proves important.[163]

A.   *An Accountability Overview*

1.   Origins and Applicability

The classic and narrowest sense of the word, accountability, derives its meaning from ancient Athens.[164] Public officials were expected to report to the city's citizens multiple times a year, justifying their decisions by giving a public accounting of their actions and underlying rationales.[165] Immediately, the link between this classic form of accountability and today's truth-telling is glaring—the RP makes a public confession, describing the wrongs committed. Often this retelling is accompanied by an enhanced rationale describing the conditions leading up to, subsequent actions following, and the

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[162]   Dzur, *supra* note 126, at 368 ("Like many effective social movements in American history, such as the abolition, suffrage, progressive, and civil rights movements, restorative justice is an amalgamation of a number of ideologically diverse elements. The victims' rights movement, pushing for a greater voice for victims and their families in criminal justice proceedings, is one important member. Related to this is a more libertarian component, seeking to shrink state involvement and to gain reparations for victims rather than mere punishment for offenders. From a different tradition come those who wish to diminish the pain and suffering of victims and offenders alike, and who seek a more peaceful mode of handling social conflicts. Still others are attracted by the practical possibilities of a new way of thinking . . . .").

[163]   *See* DECLAN ROCHE, ACCOUNTABILITY IN RESTORATIVE JUSTICE 25, 41–43 (Per-Olof Wikström et al. eds., 2003).

[164]   *Id.* at 43 n.16; Braithwaite, *supra* note 16, at 44.

[165]   ROCHE, *supra* note 163, at 43 n.16; *see also* Braithwaite, *supra* note 16, at 44.

wrongdoing.[166] This is one of the reasons dialogic exchanges or victim-offender dialogues (VOD) can be so meaningful for S/Vs; namely, they provide information that would otherwise be impossible to access.[167]

S/Vs often have a deeply held desire to understand why [the wrongdoing occurred] and what has happened since.[168] This holds true for those who are S/Vs themselves and even extends to the surviving family members of deceased victims. In truth, RPs hold answers to questions that nobody else can provide. Therefore, sometimes RPs can become an integral part of the healing process, providing answers to questions that S/Vs so desperately crave to have answered. Sometimes, a RP's desire to atone, to be subject to that inquiry process, and to be responsible to sit in the discomfort of hearing about the effect of their actions on another can be the catalyst for new beginnings.[169]

Abundant agreement exists regarding the importance of a RP taking accountability in response to harmful action caused.[170] At its core, accountability implies compliance with external standards or experience of appropriate consequences when a breach of those standards occurs.[171] This theory is easily reduced and recognizable in the axiom "one should be held accountable for their actions."[172] Regarding institutions, organizations, and governments, another layer of accountability is said to apply, which concerns the methods used to control actions, typically through various checks and balances.[173]

2. Values of Accountability

Accountability has numerous values, such as promoting transparency and enhancing legitimacy.[174] It promotes transparency through making the implicit precisely stated, augmenting decision-

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[166] *See generally* HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002) [hereinafter ZEHR, LITTLE BOOK].

[167] *See id.* at 14.

[168] *See id.*

[169] *See* HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 47–49 (25th anniversary ed. 2015) [hereinafter ZEHR, CHANGING LENSES].

[170] *See generally* ROCHE, *supra* note 163; ZEHR, LITTLE BOOK, *supra* note 166; ZEHR, CHANGING LENSES, *supra* note 169; Braithwaite, *supra* note 16.

[171] ROCHE, *supra* note 163, at 41–42.

[172] *Id.* at 42.

[173] *See id.*

[174] *See id.* at 46–48.

making due to the anticipation of scrutiny.[175] The prospect of a close review by others can deter people from making harmful or ill-conceived decisions and choices.[176] Moreover, when problematic action inevitably occurs, the accountability process frequently reveals abuses or clears up miscommunications, leading to enhanced corrective action via punitive, reparative, and transformative tools.[177]

Accountability can also cause actors to consider a variety of perspectives regarding a particular course of action. Anticipating how various segments of society and constituents may view a decision can have a "prophylactic effect."[178] Accountability might also enhance legitimacy.[179] For example, legal institutions enjoy some measure of validity due to their express process of rationale articulation through published decision-making processes and court sessions that are open to the public.[180] Exposure of process and modes of thought increases the capacity for trust among citizenries.

In TJ settings, accountability serves an even higher function. Effectively holding those who have caused harm accountable is imperative for new regimes or those state actors promising change to show that justice can and will be done under their watch, thereby affirming the move toward adherence to rule-of-law procedures and democratic principles.[181] Increasing transparency and legitimacy during times of transition is crucial to stabilization and growth.

Additionally, individuals know "[a]ccountability mechanisms are . . . important because they tend to shore up legal and social controls that are preventative, and tend to support the hypothesis of deterrence."[182] Accountability mechanisms "are also designed to be preventative through enhancing commonly shared values and through deterrence."[183]

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[175] *See id.* at 46.

[176] *See id.*

[177] *See* ROCHE, *supra* note 163, at 46.

[178] *Id.* at 47.

[179] *Id.* at 48.

[180] *Id.*

[181] Weitekamp et al., *supra* note 94, at 219.

[182] M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 25 (1996).

[183] *Id.* at 26.

3.   The Link Between Responsibility and Accountability

Unlike accountability, which concerns "being answerable to give a public account of some thing[,]" responsibility is an obligation to complete something.[184] Responsibility carries an implicit imperative to fulfill an obligation, whether in the public or private realm.[185] Accordingly, not every responsibility leads to accountability. For example, teenagers may be responsible for keeping their bedrooms tidy, but there is no requirement to account for fastidiousness in a public manner.[186] When responsibility requires moving beyond the realm of private into the public sphere, accountability is born.[187] Accountability is the outward expression of responsibility. Fulfilling obligations is the foundation for trust. Without responsibility, trust breaks down, and functionality becomes impaired. Therefore, fair processes for accounting when obligations have not been upheld becomes essential for moving forward so that responsibilities can be recommitted to or allocated. The fusion of responsibility and accountability is a potent combination.

Accountability processes can also divest and redistribute power appropriately by spreading assignable components of responsibility, such as when an auditor reports on a company's overall financial picture but had no active role in decisions affecting the company's financial performance.[188] This diffusion creates opportunities to better address the S/V and societal needs created in response to a wrongdoing, effectively widening the possibility of those who can take ownership over reparative action. People who did not actively commit harm can take agency over curative measures.

Intentionally-designed programs, especially those restorative in nature, foster enhanced responsibility by embedding dimensions of public accountability in the processes they create.[189] In the context of TJ, an absence of these processes can increase the risk of additional or future harm. Consider, for example, Glen Coulthard's discussion of former Canadian Prime Minister, Stephen Harper, who made an official apology to S/Vs of the residential school system.[190] Though

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184   Braithwaite, *supra* note 16, at 34.

185   *See id.* at 43.

186   *Id.* at 44.

187   *See id.* at 34.

188   *Id.* at 44.

189   *Id.* at 45.

190   *See* COULTHARD, *supra* note 28, at 105–06.

initially received as a positive "first step" toward reconciliation in Canada, the moment was ultimately short lived, as Harper claimed Canada had "no history of colonialism" at a G20 summit in Pennsylvania.[191] In response, the national chief of the Assembly of First Nations publicly addressed Harper's moment of "selective amnesia:" "The future cannot be built without due regard to the past, without reconciling the incredible harm and injustice with a genuine commitment to move forward in truth and respect."[192]

What first appeared to be the beginning of government accountability ended as a moment of passive responsibility (i.e., holding the old Canada responsible for past wrongs) driven by "overcoming a 'sad chapter' in [human being's] shared history."[193] Ultimately, to address this passivity, S/Vs separately negotiated for the creation of the Canadian Truth and Reconciliation Commission as part of a class action lawsuit.[194]

B. *Accountability Form and Function*

1. Vertical and Horizontal Accountability

The United States Institute for Peace (USIP), in its Guiding Principles for Stabilization and Reconstruction, calls for both horizontal accountability, meaning states and institutions supervise the actions of one another, and vertical accountability, indicating citizens oversee the actions of the state and institutions.[195] To promote horizontal accountability, USIP encourages the separation of powers.[196] In TJ scenarios, horizontal accountability inclusion is encouraged broadly, for example, embedding horizontal

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[191] *See id.*; David Ljunggren, *Every G20 Nation Wants to Be Canada, Insists PM*, REUTERS (Sept. 25, 2009, 7:48 PM), https://www.reuters.com/article/columns-us-g20-canada-advantages/every-g20-nation-wants-to-be-canada-insists-pm-idUSTRE58P05Z20090926.

[192] COULTHARD, *supra* note 28, at 106 (citing Stephen Hui, *Shawn Atleo Criticizes Stephen Harper over "No History of Colonialism" Remark*, THE GA. STRAIGHT (Oct. 2, 2009, 11:08 AM), https://www.straight.com/blogra/shawn-atleo-criticizes-stephen-harper-over-no-history-colonialism-remark).

[193] *Id.* at 125.

[194] Indian Residential Schools Settlement Agreement, Schedule "N" (2006), https://www.residentialschoolsettlement.ca/settlement.html.

[195] *See* U.S. INST. OF PEACE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION § 7.7.6 (2009) [hereinafter GUIDING PRINCIPLES], https://www.usip.org/sites/default/files/guiding_principles_full.pdf.

[196] *Id.* § 7.7.7.

accountability mechanisms in a new constitution or alongside mechanisms for government checks and balances.[197]   Additionally, USIP suggests enhancing citizen and media managing, analyzing, and consulting on new laws; providing alternative viewpoints; undertaking investigative reporting; and monitoring branches of government.[198] Finally, it suggests increasing inclusion in budget formulation and tracking of expenditures, and establishing watchdog functions and organizations.[199]

Restorative theorists similarly call for mixed methods of accountability. Braithwaite advocates in the following way: "The more separated public and private powers there are in a polity, the richer the checking of one guardian by many other guardians can be."[200] Urging the republican vision of separation of powers, Braithwaite argues that restorative mechanisms need to have checks by rule of law and vice versa.[201]

2.   Active v. Passive Responsibility

Think about the difference between a person's taking accountability for a harm versus holding someone accountable. Passive responsibility requires an external actor to hold someone else

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[197] *Id.* § 7.7.8. Examples of horizontal accountability include:
- Internal accountability through supervision, internal reviews of actions, code(s) of conduct, disciplinary systems, and performance reviews.
- Executive accountability by the head of state, ministries, national justice advisory boards, or coordinating bodies through command authority, setting of basic policies, budget management, and power to investigate claims of abuse.
- Legislative accountability by the parliament or parliamentary oversight bodies through hearings, budget approval, enacting laws, and visiting and inspecting facilities.
- Judicial accountability by courts through adjudicating cases brought against justice actors, protecting human rights, monitoring the powers of justice officials, assessing constitutionality, providing remedies, and inspecting police or prison facilities.
- Accountability by independent bodies (e.g., an ombudsman, national human rights institutions, audit offices, inspectors general) that receive complaints, raise awareness of human rights, investigate claims of failures and abuses, and ensure proper use of public funds and compliance with policy.

Id.

[198] *Id.* § 7.7.9.

[199] *Id.*

[200] Braithwaite, *supra* note 16, at 40.

[201] *Id.*

responsible for their actions; it implies the RP needs another to best monitor and judge their accountability—or worse, coerce accountability, which in essence is antithetical to the concepts underlying the terminology.[202] Traditionally, Western justice systems have relied on passive responsibility, which places retrospective blame on RPs.[203] Conventional criminal legal solutions revolve around the idea of eventual acquittal once proportional punishment for a particular wrong has been meted out.[204] RJ distinguishes between forms of active and passive responsibility, favoring the former.[205] Active responsibility prospectively obliges actors to reparative functions in future outcomes, subsequently creating space for righting prior wrongs and changing the underlying circumstances that gave rise to them initially.[206] Active responsibility is seen as virtuous because a person who has caused harm decides to take responsibility for that action.[207] Furthermore, as mentioned earlier, one of the most promising reasons for integration of widely active accountability models is transcendence of solely individual accountability.[208] People who caused no harm can also be actively responsible for creating more stable and just societies, interrupting violence and harmful practices. As restorative scholar John Braithwaite says, "[o]ne can be actively responsible for righting a wrong in the future without being causally responsible for the wrong in the past."[209]

This collective accountability "nurtures future democratic participation."[210] Dzur personifies this theory by example of a Scandinavian physician who advocated for a change in the way doctors approach bullying, to view it through the lens of a social problem, one requiring collective action.[211] The physician created new systems for fostering a bystander intervention approach.[212] When bullying became

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[202] *Id.* at 42.

[203] *See id.*

[204] *Id.* at 43.

[205] *Id.* at 42; MARK BOVENS, THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANISATIONS 26 (1998).

[206] Braithwaite, *supra* note 16, at 42.

[207] *Id.* at 34–35.

[208] *See* Braithwaite, *supra* note 16, at 33–51.

[209] Braithwaite, *supra* note 16, at 42.

[210] *Id.* at 44.

[211] Dzur, *supra* note 126, at 369.

[212] *Id.* (citing Perri Klass, *At Last, Facing Down Bullies (and Their Enablers)*, N.Y. TIMES (June 8, 2009), https://www.nytimes.com/2009/06/09/health/09klas.html)

classified as a social offense, meaningful interventions focused on changing the perception of victims, offenders, and especially bystanders, equipping people with the agency to intercede and the tools to do so.[213] The solution to bullying is implicitly a social one. Therefore, the physician proposed creating a whole-school approach, which involves physicians, peers, students, teachers, and administrators.[214] School-wide forums addressing bullying create the space and will to collectively share responsibility and resources for solving the bullying epidemic.[215]

Fostering schema that encourage active responsibility is "democratically rich" in comparison with conventional justice processes that rely on passive accountability and only involve an individual RP.[216] Plausibly, the need for enhancing mechanisms that strengthen democratic ideals is imperative within TJ settings wherein the potential risks regarding destabilization are particularly high as new or transitioning governments navigate from violent conflict to reconstruction.[217] In SS societies, the need also exists. Research indicates a sharp decline in US public engagement regarding political and social problems.[218] Dzur argues that "[o]ur current working stock of social capital" regarding societally developed norms, shared ideologies, and stories, which emerge from joint engagement, is dangerously low due to the lack of positive cultural pressures for participation of this kind.[219]

How do individuals and communities affected by atrocity and its aftermath or those within a nation still suffering under historically present injustice navigate among the nation's diverse, multi-

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("Consider a recent story from the New York Times on how to stop school bullying. The author, a pediatrician, reports on an innovative approach in Scandinavia that focuses on getting bystanders to stand up to bullies, protect potential victims, and communicate with teachers and principals. Though at root this new approach appears to stress social organization and collective responsiveness vs. medical treatment, Klass nevertheless concludes that the problem of bullying is a 'pediatric issue.' School doctors should communicate more with children, ask directly about their experiences in school, such as what they do at recess and, where necessary, to report any potential problems to the principal.").

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] Braithwaite, *supra* note 16, at 43.

[217] KERR & MOBEKK, *supra* note 89, at 8.

[218] Dzur, *supra* note 126, at 374.

[219] *Id.*

dimensional citizenry—many of whom have suffered immensely—to cohesively move forward together? How does the world "build a shared future from a divided past?"[220] Democracy is the current prevailing answer. Ideally, democracy is designed to provide systemized methods for managing diverse opinions, ideologies, and cultures without recourse to violence.[221] When working optimally, democracy is the exercise whereby varied stakeholders negotiate structures to manage differences cooperatively.[222]

Although democracy is the current prevailing answer, it is important to acknowledge that this system of governance has yet to operate ideally. Indigenous scholars critique the belief that liberal democracies are seen as the desirable endpoint for TJ despite the reality that a liberal democracy fails to function effectively for most marginalized citizens.[223] Many SS democracies fail to "reckon with their own problematic pasts"[224]—the destructive legacies of slavery, colonialism, and discrimination. Thus, it is imperative to consider whether liberal democracies should be the organizing theory of governance when such ills have occurred under its watch.[225]

Although this critique resonates as true, for the purposes of this Article, democracy is the current aspiration. Nevertheless, it should be acknowledged that democratic governance is aspirational and capable of far superior construction and outcomes. These improvements will only be realized when diverse stakeholders are imbedded into the negotiation, maintenance, and evaluation of alignment with its ideals. Reflecting this sentiment, the *Handbook on Reconciliation After Violent Conflict* by the International Institute for Democracy and Electoral Assistance (IDEA) declares: "[Democracy] may not be perfect, but in an imperfect world it is the best option available. As universal human rights become increasingly accepted as the core principles of governance, democracy becomes more and more clearly the most

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[220] Desmond Tutu, *Foreword* to INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 4 (David Bloomfield et al. eds., 2003).

[221] *Id.* at 10.

[222] *Id.*

[223] *Id.* For further discussion on the liberal underpinnings of transitional justice, see generally Ruti Teitel, *Transitional Justice as Liberal Narrative, in* OUT OF AND INTO AUTHORITARIAN LAW 3 (András Sajó ed., 2002).

[224] Jennifer Balint et al., *Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach*, 8 INT'L J. TRANSITIONAL JUST. 194, 195 (2014).

[225] *See generally id.* ("[T]ransitional justice has not adequately accounted for past colonial harms and their ongoing effects.").

effective way of implementing those principles—equality, representation, participation, [and] accountability . . . ."[226]

Structured, dialogic negotiating among various stakeholders used to design new systems or improve them can improve base levels of trust through the adherence to and the creation, monitoring, and evaluation of those structures. Small success can lead to bigger success, restabilizing and building cooperative, improved relationships societally.

Embedded accountability creates "a democratic logic . . . that disperses rather than centralizes authority, responsibility, and accountability for decisions."[227] Consider an example that portrays the effect of this reengagement among a group of middle school students in a community where a majority of people's income is below the poverty threshold.[228] A group of students—the "Bathroom Busters"— decided to improve the abhorrent condition of the school's bathrooms through organizing.[229] These students bypassed the "neglectful and inefficient school bureaucracy" and created effective communication channels to obtain the necessary supplies for painting over graffiti, installing a mural, replacing absent stall doors, and restocking necessary supplies.[230]

The community closest to the problem took ownership of the issue rather than resorting to calls for increasing punitive measures by involving administrators or law enforcement.[231] The students accepted responsibility of a problem that negatively affected their environment rather than abdicating agency and waiting for external forces to solve it for them.[232] They were not the RPs, but they found ways to meaningfully intervene, tackling the issue, while forging strong communal bonds and augmenting their agency and ability to accomplish change.[233] They transformed their situation rather than merely correcting it.

If the goal is societal transformation, widening the circle of accountability is crucial. In the collective defining of "what

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[226] INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *supra* note 220, at 10.

[227] Dzur, *supra* note 126, at 369 (emphasis omitted).

[228] *Id.* at 370.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] Dzur, *supra* note 126, at 370.

responsibility for that injustice should mean[,]" transformation becomes possible.[234]

C.   *Deliberative Accountability—Widen the Circle*

"The idea is that we can keep widening the circle of accountability; at each step there are extra people with extra capacities to prevent a recurrence of injustice and to right the wrongs of past injustice."

— John Braithwaite[235]

Enhancing active responsibility creates the potential for preventive rather than reactive justice, reducing the need for retrospective accountability.[236]   Accordingly, "the predominant structural form" used by RJ and TFJ is dialogical circles wherein participants deliberate over the full context of unearthed harms, needs, and obligations to ultimately create a forward-focused plan of deliberative accountability.[237]   In an individual conflict, this deliberative accountability occurs in a process wherein those with a direct stake in the injustice collaboratively identify the harms caused, the needs that now exist in light of those harms, and the obligations now required to commence the healing process.[238]

The cycle of individual accountability begins when a RP takes responsibility by providing an account of the wrong done and expresses openness to curative behavior.[239] The next step occurs when the S/V and community members accept the RP's account and collaboratively plan the actions correspondent with taking sufficient responsibility.[240]   Stakeholders are also permitted to reject bids for reconciliation when responsibility regarding the degree of the wrongdoing or the proposed repair is insufficient.[241] At this point, new deliberations can occur in this "participatory process for fostering responsibility."[242]

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[234] Braithwaite, *supra* note 16, at 43.

[235] *Id.* at 41.

[236] *Id.* at 35.

[237] *Id.* at 36.

[238] *Id.* at 35.

[239] *Id.* at 45.

[240] Braithwaite, *supra* note 16, at 45.

[241] *Id.* at 46.

[242] *Id.* at 45.

Ideally, this individual problem becomes a communal problem, expanding the circle to include micro- and macro-community members.[243]   Micro-communities include those individuals in communities of care who are closest to us.[244]   This includes family members and close friends—those most likely to have deep knowledge of an individual and thus a fuller understanding of a RP or S/V.[245] Macro-community members are typically defined through geography or membership, such as neighbors, fellow church members, colleagues, or classmates.[246]

Deliberative accountability values "repairing, renewing, and creating social networks."[247] Wrongdoing's consequences affect S/Vs and RPs themselves but also others indirectly, too. Widening the circle, by inviting the extended micro- and macro-community affected, creates more invested stakeholders and resources for problem solving.[248] For example, family members, close friends, or fellow churchgoers might step in to assist a RP in their attempt to repair the harm caused to a S/V.[249] Because a prior relationship that predates the wrongdoing has already been established, a RP can be supported by members of micro- and macro-communities who are invested in the RP's success. Imagine the many generative ways a RP's family members might assist and intervene. They can simultaneously hold space to love and respect the RP while also providing support so the individual can atone for the harms caused.   Through taking meaningful accountability, RPs now have a productive pathway back toward the community. They have a way to realign themselves with the norms and values asserted through a dialogic process by learning of and meeting the needs they created.

Deliberative accountability is productive, moving society past the dualistic thinking that traps people into seeing survivors as damaged and RPs as irredeemable. Breaking cycles that inculcate us-versus-them paradigms, which can lead to further violence and continued

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[243] Paul McCold, *Restorative Justice and the Role of Community, in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 90–92 (Burt Galaway & Joe Hudson eds., 1996).

[244] *Id.* at 91.

[245] *Id.*

[246] *Id.*

[247] Dzur, *supra* note 126, at 376.

[248] *See* McCold, *supra* note 243, at 91–93.

[249] Braithwaite, *supra* note 16, at 42.

discriminatory and oppressive practices, is generally meritorious and indispensable in TJ scenarios.[250]

Another potential value arising from communal accountability is consciousness-raising. Often one will hear the lament that society knew something bad was going to happen, but society did not do anything about it. There is a host of valid reasons people abdicate responsibility and neglect to intervene, the largest detractor being the state's subsuming of responsibility for crime. Micro- and macro-communities can also implicitly and explicitly condone harmful, degrading, or even dehumanizing stereotypes, signaling the ratification of harmful behavior toward others.

Engaging communities in dialogic processes creates the opportunity to unearth the influences underlying the choices of a RP. The dialogic process can elucidate micro- and macro-community norms and values and existing gaps in resources or community responses that were part of the underlying conditions affecting an offender's choices.[251] Communities must recognize their contributing role in conflict. Engagement allows a community to become more knowledgeable and skillful about the causes and methods for violence intervention, including creating structures of support and the social norms that actively reduce dehumanization and discrimination that pave the way for violence.[252]

Finally, multiple layers of support can be meted out to S/Vs with deliberative accountability. Figure 1 exemplifies this concept, which portrays the widening of circles for accountability.[253]

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[250] For a general discussion on how "othering" contributes to acts of violence, see BROWNING, *supra* note 113, at 162, 184.

[251] CREATIVE INTERVENTIONS, CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE, at S2-6 (2020).

[252] *Id.*

[253] Braithwaite, *supra* note 16, at 42.

Figure 1[254]
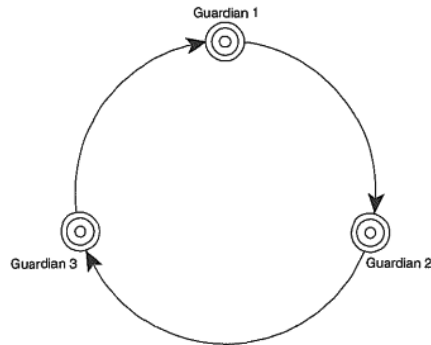
A larger circle of accountability increases the buy-in, authority, and resource pool for reparative action. In describing this concept, Braithwaite provides an example. He explains that sometimes in conferences with business regulatory agencies, processes would break down when a causally responsible corporate actor refused to take accountability, instead taking a chance on litigation.[255] But when the circle widened to include the causally responsible supervisor of the RP, sometimes a positive shift occurred.[256] At times, this was unsuccessful; however, Braithwaite recounts a time the circle widened even further, to the chairperson of the board, and it paid off well.[257] He explains that appealing to the chairperson's "sense of moral responsibility" shifted the entire conversation.[258] Ultimately the chairperson fired the CEO, participated in an agreement that paid generous compensation to victims of the harm, and enacted new compliance measures to avoid recurrence of the problem.[259] Widening the circle in this scenario created outcomes that had previously become unavailable. This shift included reactive and proscriptive measures that prevented future harm from occurring.

Mechanisms that encourage generative collective agency— models that do not alienate stakeholders from "participating in the

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[254] *Id.* at 42 fig.2.2.

[255] *Id.* at 41.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] Braithwaite, *supra* note 16, at 41.

critical process of supporting . . . . [and] accountability"[260]—create transformative possibility. Ultimately societies shift when people reengage in citizen action, societal empowerment, and civil responsibility.[261] Truth-telling processes become such a vital part of building strong societies because they can reorient individuals toward new shared narratives that emerge via public accounting. When communities have more components of the story to create a united understanding of past events, moving forward fairly becomes possible. After a truth-telling process of the TRC ends, the tough work of committing to individual and societal transformation begins. The more hands-on deck willing to accept responsibility for ensuring that transformation occurs, the more likely the transformation will become sustainable. Individual, interpersonal, community, and national-level accountability are all necessary for transforming entrenched societal ills.[262]

III. ACCOUNTABILITY PRAXIS—ESTABLISHED AND EMERGENT MECHANISMS

Well-established accountability mechanisms already exist— especially those fostering retributivist notions of justice—primarily represented through tribunals. Restorative or at least partly restorative notions of justice have been reflected in TRCs whereby S/Vs and RPs engage in public truth-telling. TFJ ethos is percolating, seeping its way into the literature and finding its foothold in TJ models.[263] Thus, this Part briefly gives an overview of, but primarily focuses on, programs integrating TFJ deliberative accountability mechanisms.

Additionally, several mechanisms transcend one particular justice typology, depending on their deployment. For example, reparations can be a retributive tool when a RP is forced to repay a S/V for harm the RP caused, and reparations can also serve restorative and transformative ends. When a dialogue between a S/V and a RP occurs and deliberative accountability is taken to right the wrongs caused, fulfilled reparations can be a catalyst for restoring relationships. If states, communities, and beneficiaries of harm collectively agree to the

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[260] Alisa Bierria et al., *Taking Risks: Implementing Grassroots Community Accountability Strategies*, *in* THE REVOLUTION STARTS AT HOME: CONFRONTING PARTNER ABUSE IN ACTIVIST COMMUNITIES 64, 64 (Ching-In Chen et al. eds., AK Press 2016) (2011).

[261] *See* Dzur, *supra* note 126, at 369.

[262] *See* Weitekamp et al., *supra* note 94, at 220.

[263] *See* Ainley, *supra* note 1, at 428.

reallocation of resources in accordance with the principles of equity, this form of reparations could represent a transformative ethos.

This encouragement to foster mixed methodologies of accountability is not meant to overlook the challenges that exist for programs providing complementarity.[264] Nevertheless, it may be that the promise of lasting peace is at its strongest when tailored to respond more precisely to the divergent needs for accountability borne of the conflict that created it.[265] Individuals—S/Vs in their healing journeys, each community member in their trust levels, and RPs in their levels of capacity for accountability—will be in vastly distinct places on the road to reconciliation. For example, RPs—directly and indirectly, as beneficiaries or bystanders of harm—will possess varying ability to meaningfully engage in truth-telling processes and in their commitment to societal advancement. Thus, for those RPs and the people they have harmed, accountability mechanisms will have to be designed responsively.

Violent, protracted conflict produce an inordinate amount of RPs—"men and women, state and non-state actors, local and foreign individuals and organizations, generals and foot soldiers."[266] Beneficiaries of conflict—who do not directly engage in violent practices but indirectly profit from it—and bystanders, whose complicity stems from inaction, also cause harm.[267] Without mixed or multilevel accountability, people are in danger of repeating the frequently cited TJ critique of impunity.[268] Much of the current TJ literature regarding efforts to address post- and protracted conflict surmises that its success thus far is in holding the most egregious actors

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[264] KERR & MOBEKK, *supra* note 89, at 80–81.

[265] *See* ZEHR, CHANGING LENSES, *supra* note 169, at 20–21; INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *supra* note 220, at 4.

[266] Luc Huyse, *Offenders, in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK, *supra* note 220, at 67.

[267] *See id.*; Moon, *Narrating Political Reconciliation, supra* note 26, at 261.

[268] *See* Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System,* 12 B.U. INT'L L.J. 321, 343–45 (1994); Mamdani, *supra* note 29, at 34; Henrique Furtado, *On Demons and Dreamers: Violence, Silence and the Politics of Impunity in the Brazilian Truth Commission,* 48 SEC. DIALOGUE 316, 316–17 (2017).

responsible in a hierarchy of RPs.[269] It has yet to lead to societal recalibration and lasting positive transformation.[270]

Intentionality in the selection of complementary processes, which center on a need assessment of primary, secondary, tertiary, short- and long-term needs, combined with the iterative accountability for the creation, maintenance, and course correction necessary for those processes, is imperative. Unfortunately, some actors stand to gain from conflict.[271] Thus, developing mechanisms capable of interrupting active harm, creating pathways back for those who have caused harm but are ready to repair, and increasing deliberative accountability for a wide circle of actors require a comprehensive response plan which pulls in established and emergent accountability mechanisms.[272]

TJ models and TRCs that do not carve out the space for similarly flexible, responsive mechanisms risk re-traumatizing S/Vs and ultimately damaging societal progress.[273]   Rather than viewing mechanisms as contradictory, mixed approaches should be seen as providing multiple, feasible roads to reconciliation.[274] M. Cherif Bassiouni urges that mechanisms need not be taken as wholesale but rather a portion used and combined with others, as no single formula can apply to all types of conflict to achieve all desired outcomes.[275] This mode of thinking is increasingly gaining steam. Recent scholarly work on TJ posits that "[o]n the road to post-conflict justice, it is of equal value to explore the new territory of restorative justice practices . . .

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[269] *See, e.g,* Teitel, *supra* note 1, at 73, 90 (explaining TJ can "hold a regime's leadership accountable").

[270] *See, e.g.,* Katherine M. Franke, *Gendered Subjects of Transitional Justice,* 15 COLUM. J. GENDER & L. 813, 820 (2006) ("[T]ribunals have to settle for a minority of cases that can be used to establish important precedent, identify important kingpins or masterminds of the violence, or, in many cases, whomever they can get their hands on."); Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission,* 52 J. INT'L AFFS. 647, 665–66 (1999) (emphasizing the need for more than a prosecutorial approach to prevent recurreces of abuse).

[271] GUIDING PRINCIPLES, *supra* note 195, § 1.0.

[272] *Id.*

[273] Karen Brounéus, *Truth Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts,* 39 SEC. DIALOGUE 55, 57 (2008); David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?,* 6 INT'L STUD. REV. 355, 355–56 (2004).

[274] *See* Bassiouni, *supra* note 182, at 23.

[275] *Id.*

[alongside] complementary character of restorative and retributive mechanisms."[276]

This sentiment is emerging in the intentional choices of modern TRC design. Sierra Leone set up various mechanisms to address injustice including a TRC, a tribunal (The Special Court for Sierra Leone), a reparations program, and informal and traditional mechanisms that included "community-level restorative justice processes and customary law" in the wake of the country's brutal civil war that raged from 1991 to 2002.[277] TJ efforts in Sierra Leone are largely regarded as successful according to indicators of their post-bellum recovery.[278] Similarly, Timor-Leste used a variety of responses, including "a blend for mechanisms that form an integrated response."[279] Thus, the framework for the mixed use of tribunals and truth commissions already exists.

Outside TJ scenarios, activists are expressing assent with this principle as well, noting that a one-size-fits-all approach is an improper, unrealistic, and disrespectful way to approach an accountability process.[280] Success in TRCs requires a marriage between established and emergent mechanisms for increasing accountability. Lived experiences of marginalized people—who have managed to keep each other safe when the state has continually failed to do so or has actively participated in the creation and maintenance of policies prolonging

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[276] Weitekamp et al., *supra* note 94, at 227.

[277] Ainley, *supra* note 1, at 425–26.

[278] Ainley summarizes:

> The Sierra Leonean case is held up by many commentators as an example of TJ success, and certainly various country indicators suggest it has recovered surprisingly robustly after a devastating war. In 2012, the US described Sierra Leone as 'one of the most stable countries in a volatile region.' Compared to other sub-Saharan states, the growth rate of the Sierra Leonean economy was extremely healthy from the end of the war until the Ebola crisis in 2014, and the country's GDP growth is now back on track following the Ebola-related decline. As well as a strengthening economy, Sierra Leone also shows signs of having a strong polity. The 2007 presidential elections saw the country's first peaceful handover of power from the ruling party to the opposition and took place without the presence of UN peacekeepers.

Id. at 426 (footnotes omitted); *see also* Kirsten Ainley, *Evaluating the Success of Transitional Justice in Sierra Leone and Beyond, in* EVALUATING TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACEBUILDING IN POST-CONFLICT SIERRA LEONE 241, 241 (Kirsten Ainley et al. eds., 2015).

[279] Weitekamp et al., *supra* note 94, at 223.

[280] Bierria et al., *supra* note 260, at 64.

their discrimination—inform these experimental and evolving mechanisms.

Bassiouni summarizes this idea succinctly: "In the final analysis, whichever . . . combination of mechanism is chosen, it is chosen to achieve . . . justice, and, wherever possible, reconciliation, and ultimately, peace."[281]   As long as the fundamental principles of accountability enumerated below are considered, any composition of TJ has capacity for success: 1) the cessation of the conflict[,] 2) prevention of future conflicts, 3) deterrence of future conflicts, 4) society and victims' rehabilitation, and 5) reconciliation between the different peoples and groups within society.[282]   These incorporate distinct and overlapping notions of justice, including retributive, restorative, and transformative, and can be expressed through a variety of established and emergent mechanisms.

A.   *Established Mechanisms of Accountability*

Neil Kritz[283] and Bassiouni,[284] who view accountability as the "antithesis of impunity," created compendiums of accountability mechanisms.[285] For consistency with the ideals presented within, this Article classifies these according to retributive, restorative, and transformative notions of justice. But it should again be noted that many mechanisms transcend simplistic classification.

1.   Retributive Accountability Mechanisms

Retributive accountability mechanisms within TJ are the most entrenched.[286]   They are forms of accountability, oriented toward deterrence and rule-of-law proliferation.[287]   Criminal trials are the lodestar of retributive accountability, including international, national, and hybrid prosecutions.[288]   These models, however, are neither scalable nor desirable for all RPs in mass conflicts. Use of them must be selective or risk destabilizing societies, as too many criminal

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[281]   Bassiouni, *supra* note 182, at 23.

[282]   *Id.* at 23–24.

[283]   Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 128 (1996).

[284]   Bassiouni, *supra* note 182, at 18–19.

[285]   *Id.* at 18. The author classifies these accountability mechanisms into three categories: representing truth, justice, and redress. *Id.*

[286]   *See* Teitel, *supra* note 1, at 73; Ainley, *supra* note 1, at 427, 431–33.

[287]   Ainley, *supra* note 1, at 432.

[288]   *See* Kritz, *supra* note 283, at 128–29; Bassiouni, *supra* note 182, at 19–21.

trials would prove socio-politically and economically untenable.[289] Closely connected to the trial are international and national investigatory commissions charged with assessing criminality and broader fact-finding missions that can potentially serve to support future prosecutions.[290]

Non-criminal sanctions, known as purges or lustration, are one of the largest mechanisms used in TJ.[291] The Czech Republic, Lithuania, Germany, France, El Salvador, and many others have used lustration to remove individuals from positions held during former regimes, barring those individuals from holding future positions of authority.[292] This mechanism will continue to dominate TJ, as it is effective for processing a voluminous number of RPs.[293] Additionally, lustration is often seen as helping foster the state goal of stabilization by augmenting the certainty and credibility in new or shifting institutional regimes.[294] Purges typically operate punitively but could effectuate restorative or transformative ends through deliberative accountability mechanisms. Giving power away, as opposed to power merely being stripped away, implicates moral outcomes that support curative aims.[295]

Litigation has also allowed S/Vs and their heirs to sue, enabling the attainment of civil remedies against individuals, institutions, and governments.[296] For example, the CTRC was created by the largest class action settlement in Canada's history, which was spearheaded by S/Vs of the residential school system.[297] More recently, the Canadian government and 325 First Nations reached an approximately $2 billion settlement for the loss of language and culture that the residential school system's legacy caused.[298] Descendants, relatives, and estates of the Stolen Generations in Australia successfully brought a class action suit that guarantees their right to compensation within the country's

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[289] Kritz, *supra* note 283, at 138–39.

[290] Bassiouni, *supra* note 182, at 20.

[291] Kritz, *supra* note 283, at 139; Bassiouni, *supra* note 182, at 21–22.

[292] Kritz, *supra* note 283, at 139; Bassiouni, *supra* note 182, at 21–22.

[293] Kritz, *supra* note 283, at 140.

[294] *Id.*

[295] *See* Bassiouni, *supra* note 182, at 21.

[296] *Id.* at 22.

[297] GOV'T CAN., *supra* note 31; *see also* Indian Residential Schools Settlement Agreement, *supra* note 194.

[298] Ian Austen, *Canada Settles $2 Billion Suit over 'Cultural Genocide' at Residential Schools*, N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/2023/01/21/canada-indigenous-settlement.html.

national redress scheme.[299]   In the United States, states have begun expanding their statutes of limitations or creating temporary "lookback windows" to allow S/Vs of childhood sex abuse to file civil suits against the Catholic Church.[300]   As evidenced by the preceding list, multiple viable retributivist mechanisms for deployment exist within a mixed system of accountability.

2.   *"Partly"* Restorative Accountability Mechanisms

Truth commissions (TCs) and TRCs are typically time-limited endeavors, charged with investigating human rights atrocities to produce an official history of those abuses and provide recommendations to interrupt the recurrence of a similar conflict.[301] They have investigative powers to examine wide ranges of abuses committed by individuals, the military, institutions, in addition to state and non-state actors.[302]   The principle methodologies for undertaking this investigation are the use of outreach, statement taking, research, data processing, public hearings, emotional support, final reports, and in a few cases, follow-up.[303]

Unlike tribunals, these commissions are extra-legal and lack formal enforcement authority of rule-of-law structures.[304]   Historical commissions are an offshoot of TCs/TRCs that solely investigate past abuses with an eye toward correcting the historical record but that

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[299] Michael Park, *$50 Million for Families of NT Stolen Generations*, SBS: NITV, https://www.sbs.com.au/nitv/nitv-news/article/50-million-for-families-of-nt-stolen-generations/qh5opz6v3 (Oct. 12, 2022, 12:10 PM).

[300] *See, e.g.*, Nigel Duara, *Sex Abuse Suits Pouring in as State's Catholic Leaders Seek Relief from Highest Court*, CALMATTERS, https://calmatters.org/justice/2022/05/catholic-sex-abuse-claims (June 21, 2022); David Hammer, *Louisiana's New Child Sexual Abuse Law Surprises Advocates, Legislators*, 4WWL, https://www.wwltv.com/article/news/investigations/louisianas-new-child-sexual-abuse-law-surprises-advocates-legislators/289-6663a3c0-e38e-42bf-b1d9-f06c961bfe26 (June 15, 2021, 6:45 PM); Kate Lisa, *Look-Back Window for Adult Sex-Abuse Survivors Starts Thursday in New York*, SPECTRUM NEWS: STATE OF POL. (Nov. 21, 2022, 8:37 PM), https://nystateofpolitics.com/state-of-politics/new-york/politics/2022/11/22/lawmakers—sex-abuse-survivors-prep-for-start-of-1-year-lookback-window.

[301] KERR & MOBEKK, *supra* note 89, at 129; *see also* Bassiouni, *supra* note 182, at 20–21; Kritz, *supra* note 283, at 141.

[302] KERR & MOBEKK, *supra* note 89, at 129; Bassiouni, *supra* note 182, at 20–21; Kritz, *supra* note 283, at 141.

[303] Mark Freeman & Priscilla B. Hayner, *Truth-Telling, in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK, *supra* note 220, at 133–35.

[304] KERR & MOBEKK, *supra* note 89, at 129.

proceed without expectation of an influence on existing government policies.[305] By acknowledging facts, these bodies not only collect and correct a record of what occurred but also disseminate and educate the wider populace about this new record.[306] Rwanda's National Unity and Reconciliation Commission ("NURC"), for example, took its investigation beyond human rights violations during genocide by building a historical narrative focused on the effects of colonialism.[307]

Historical commissions also use a number of reparative interventions aimed at addressing wrongdoing that occurred in the distant past.[308] These interventions include symbolic acts, rituals, and official apologies[309]—such as the apologies made by Pope Francis[310] and the former prime minister of Canada to the S/Vs of the residential school system.[311]

Other mechanisms have also adopted restorative aims, including removing monuments, erecting memorials, and changing street and building names, as seen recently in the Taiwan TRC.[312] Yet these reparative interventions should be approached cautiously and understood within the political contexts through which they emerged.

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[305] *Id.* at 128–29.

[306] Bassiouni, *supra* note 182, at 20; Kritz, *supra* note 283, at 143–44.

[307] Jean Baptiste Habyalimana, *Foreword* to DÉOGRATIAS BYANAFASHE ET AL., HISTORY OF RWANDA: FROM THE BEGINNING TO THE END OF THE TWENTIETH CENTURY, at xxv–xxvi (2016).

[308] Gerry Johnstone & Joel Quirk, *Repairing Historical Wrongs*, 21 SOC. & LEGAL STUD. 155, 156 (2012); JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL JUSTICE, at vii (2002).

[309] Brandon Hamber, *Healing*, *in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK, *supra* note 220, at 85 ("Memories of the past can be housed in symbols such as monuments, museums and plaques, and peace parks or sites of dignified burial can be useful places where the bereaved can remember their loved ones. The ideals, rights and aspirations of those who suffered can also be advanced by acknowledging their contribution to the birth of a new society through official statements, or naming official places, streets or buildings after them.").

[310] *See* Scott Neuman, *The Pope's Apology in Canada Was Historic, but for Some Indigenous People, Not Enough*, NPR, https://www.npr.org/2022/07/25/1113498723/pope-francis-apology-canada-residential-schools-indigenous-children (July 25, 2022, 7:10 PM).

[311] *See* Stephen Harper, Prime Minister of Can., Statement of Apology to Former Students of Indian Residential Schools (June 11, 2008), https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655.

[312] *See* Michael Forsythe, *Taiwan Turns Light on 1947 Slaughter by Chiang Kai-shek's Troops*, N.Y. TIMES (July 14, 2015), https://www.nytimes.com/2015/07/15/world/asia/taiwan-turns-light-on-1947-slaughter-by-chiang-kai-sheks-troops.html.

Too often national reparative interventions serve political strategies, such as state legitimization over the needs of S/Vs, which can threaten the intervention's goals and cause the public to doubt the intervention's authenticity.[313]

Fully restorative interventions, classified according to the Wachtel and McCold Typology and pictured in Figure 2, rest on principles that encourage dialogic exchanges—the sharing of the inner-subjective worlds—to develop a fuller picture of all stakeholders, including the causes and conditions underlying the choices of a RP.[314]

Figure 2[315]

TRCs provide a forum for collective new truths to emerge and forward-focused intentionality for healing and can provide a host of powerful psychological and social benefits.[316] To achieve optimal success, TRCs should emphasize programs encompassing attributes akin to those

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[313]   *See* COULTHARD, *supra* note 28, at 105–06.

[314]   Audrey L. Barrett, *The Structure of Dialogue: Exploring Habermas' Discourse Theory to Explain the "Magic" and Potential of Restorative Justice Processes*, 36 DALHOUSIE L.J. 335, 354–55 (2013).

[315]   Paul McCold & Ted Wachtel, *In Pursuit of Paradigm: A Theory of Restorative Justice*, RESTORATIVE PRAC. EFORUM (Int'l Inst. for Restorative Prac., Bethlehem, Pa.), Aug. 12, 2003, at 3 fig.3, https://www.iirp.edu/images/pdf/paradigm.pdf.

[316]   ZEHR, LITTLE BOOK, *supra* note 166, at 13; Boris Cyrulnik, *Narrative Resilience: Neurological and Psychotherapeutic Reflections, in* MULTISYSTEMIC RESILIENCE: ADAPTATION AND TRANSFORMATION IN CONTEXTS OF CHANGE 100, 106–07 (Michael Ungar ed., 2021); Dan P. McAdams & Kate C. McLean, *Narrative Identity*, 22 CURRENT DIRECTIONS PSYCH. SCI. 233, 235 (2013). There is also developing research that evaluates the limitations of these quasi-restorative models. *See* Allan, *supra* note 20, at 199–200; Mendeloff*, supra* note 273, at 375–76; Brounéus, *supra* note 273, at 57–58; *see also* KERR & MOBEKK, *supra* note 89, at 128–29.

within the fully restorative context, as they are more likely to increase democratization.[317]

B. *Emergent Mechanisms for Accountability*

TFJ praxis is an excellent learning ground from which to pull successful mechanisms and practices. The TFJ movement was born from the necessity to develop community-based approaches to ending interpersonal violence because no other viable, nonharmful solutions existed for those communities.[318] When victims of violence continued to find limitations, invested advocates used their experience and knowledge to foster community transfer of information and to "equip everyday people to confront, challenge[,] and overcome violence."[319] Instead of relying outwardly on systems that continue to perpetrate harmful outcomes, TFJ recognizes the individual and collective agency and responsibility for solving problems that plague us.[320] Perhaps most importantly, TFJ emphasizes that "communities hold great potential in their ability to challenge violence and also for using meaning, connection and resources as part of the solution to violence."[321]

In a similar vein, scholars and practitioners already proposed reconceptualizing TJ by culling insight from "settler colonial theory."[322] In sum, the ideas revolve around connecting TJ goals to combat the historically present injustices of Indigenous People, who continue to suffer under structural injustice.[323] Though not yet complete, processes such as the CTRC and the Australian National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families are initiatives reflective of this ethos.[324]

These movements, though birthed from protracted conflict persistent in SS democracies, can be a North Star for "post-conflict" states. The inequitable, deleterious, persistent under-resourcing, along with the massive failures of governments to protect all their people and resultant victimization, is present in both post- and protracted SS conflict. TRCs stand to gain innovative mechanisms and guidance by learning from marginalized communities and Indigenous

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[317] *See* Dzur, *supra* note 126, at 367; Braithwaite, *supra* note 16, at 34.

[318] CREATIVE INTERVENTIONS, *supra* note 251, at P-2.

[319] *Id.*

[320] *Id.* at S2-6.

[321] *Id.*

[322] Balint et al., *supra* note 224, at 196.

[323] *Id.* at 195.

[324] *Id.* at 195–96.

People combating settler-colonialism, who have aptly maneuvered the impediments that seek to discriminate, assimilate, and eradicate. TFJ practitioners have continually pushed against limitations to usher in visionary possibilities. They do so while disenfranchised, suffering the effects of posttraumatic stress, and under-resourced. They also at times must struggle in confronting those who have succumbed to internalizing dehumanizing information.[325] TJ practitioners, architects, and scholars have an abundant amount to observe from this nimble, resourceful movement, which has placed accountability at its forefront.

C. *Enhanced Accountability*

In sum, "accountability [within the TFJ movement] is the ability to recognize, end[,] and take responsibility for violence."[326] Significantly, in the TFJ context, accountability exchanges the punitive version of the word for one focused on connection, care, responsibility, and change.[327] Although people typically think of accountability in terms of the individual, communal accountability is inextricably linked to individual achievement.[328] Communities take responsibility for helping RPs through the deliberative accountability of formulating and providing support for follow-through on an agreed process for repairing harm. Communities can also be responsible for investigating their own roles in "ignoring, minimizing or even encouraging violence."[329]

The *Creative Interventions Toolkit*—a free, liberatory, comprehensive toolkit—views accountability as actions along continuums of time and depth.[330] Accountability is conceptualized as

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[325] *See* CREATIVE INTERVENTIONS, *supra* note 251, at S5-52.

[326] *Id.* at S4F-2.

[327] *Id.*

[328] *Id.*

[329] *Id.* at S2-6.

[330] *Id.* at 4F-4 to 4F-5. Time continuum includes:
- Stop using violence.
- Slow down and listen to understand how our actions have impacted those around us.
- Take action to repair the harm that our actions have caused others.
- Identify and try out new ways of thinking and behaving.
- Get support and encouragement for our efforts and successes.
- Taking accountability or accountability is also a long-term and life-long process. We might:
- Grow our confidence to face our imperatives and turn away from patterns that harm others (and ultimately ourselves).
- Grow our ability to feel our emotions without acting them out.

a staircase (although it also recognizes that progression can be non-linear) in which people progress through the steps Figure 3 lists.[331]

- Practice and promote behaviors that honor ourselves and others.
- Humbly support others around us to do the same.
- Learn from and move beyond mistakes and set-backs.
- Practice self-awareness and self-reflection to build mutually support-ive and enjoy-able relationships.

CREATIVE INTERVENTIONS, *supra* note 251, at 4F-4. Depth continuum includes:
- Being confronted at all, even just once about the violence that was done.
- Experiencing and understanding that violence has natural negative consequences . . . .
- Stopping or reducing violence—even if doing so is a response to social pressures from friends or community, or to a threat of losing relationships due to continued use of violence—and not because of deep change.
- Listening to the person who was harmed talk about their experience of violence—without being defensive, interrupting or reacting against this story.
- Acknowledging the reality of the experience for the person who was harmed—even if this is not at all what was intended.
- Acknowledging that the use of violence was ultimately a choice—not something caused by someone else.
- Expressing sincere apology, taking responsibility, and showing care to the person who was harmed.
- Giving financial repairs (or reparations) to the person harmed.
- Giving other significant repairs, perhaps in the form of service, re-placement or property or so on, to the person harmed.
- Agreeing and taking every step possible to assure that these harms will not be committed again.
- Knowing and agreeing that any future acts of harm will result in certain negative consequences.
- Telling others about one's own uses of violence to show that taking accountability can be an act of honor and courage.
- Making it one's own choice, commitment and goal to address root causes of violence, to learn new skills, and to deeply transform vio-lent behaviors.
- Showing actual changes in thinking and behavior in good times.
- Showing actual changes to thinking and behavior in hard and stress-ful times.
- Supporting others who have used or are using violence to take steps to take accountability.

Id. at 4F-4 to 4F-5.

[331] *Id.* at 4F-6.

Figure 3[332]

1.   Intertwined Individual and Communal Accountability

"Everything worthwhile is done with other people."

— Mariama Kaba[333]

TFJ contends that individual accountability is a misnomer because reparative work cannot be completed in isolation. It is expressed only in and through relationship to others, making community a vital piece of the puzzle.[334] Research continually finds that restorative approaches co-targeting beneficial outcomes for S/Vs and community decreases wrongful behavior.[335]

RJ and TFJ practitioners have painstakingly—through much trial and error and course correction—refined processes and deduced principles for augmenting accountability. These refinements are adaptable and can be embedded into TRC processes. In certain cases, they already have been. The integration of localized accountability practices sometimes appears during TJ periods, such as the Gacaca

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[332] *Id.*

[333] Eve L. Ewing, *Mariame Kaba: Everything Worthwhile Is Done with Other People*, ADI MAG. (Fall 2019), https://adimagazine.com/articles/mariame-kaba-everything-worthwhile-is-done-with-other-people/

[334] *See* Bierria et al., *supra* note 260, at 64; CREATIVE INTERVENTIONS, *supra* note 251, at S4F-2; MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 4 (Naomi Murakawa ed., 2021).

[335] *See* LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 12 (2007); Kay Pranis, *Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations, in* RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 287, 289 (Gordon Bazemore & Mara Schiff eds., 2001).

Courts of Rwanda, although rarely.[336] Traditional informal justice mechanisms[337] have been largely ignored due to the attitudes of formal systems' actors failing to recognize the value such mechanisms bring.[338] Recent scholarship has leveled fierce critique at this practice of exclusion.[339] Rosaland Shaw and Lars Waldorf, for example, explain this troubling dynamic:

> [I]nteractions with ordinary civilians tend to be limited to top-down outreach or sensitization processes such as work-shops and information sessions. And while survivors of violence are increasingly surveyed about their priorities for justice, there is not always agreement as to how surveys should be conducted, interpreted, and translated into practice. Survivors are in any case unlikely to get what they ask for if it contradicts international legal norms.[340]

TRCs could be strengthened by the integration of these refined accountability principles and mechanisms. Countless hours have been spent and hundreds of pages have been drafted by organizations seeking to memorialize the praxis of TFJ theory. Creative Interventions (CI) created a toolkit, which is one such anthology, capturing these pioneering ideas at work.[341] These programs and the expertise of practitioners within them should be acknowledged and referenced and the practitioners consulted and compensated, should TJ seek to incorporate these principles into existing TJ and TRC structures.

One example ripe for integration is Community Accountability Plans or Community Accountability Processes (CAPS), which create holistic, regenerative grassroots frameworks for accountability.[342] In restorative circles, CAPS are known as dialogic circles, frequently referred to as victim-offender dialogues, which produce a contract with

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[336] KERR & MOBEKK, *supra* note 89, at 151–71.

[337] *Id.* at 151.

[338] *Id.* at 162.

[339] Rosemary Nagy, *Settler Witnessing at the Truth and Reconciliation Commission of Canada*, 21 HUM. RTS. REV. 219, 220 (2020); *see generally* COLORIZING RESTORATIVE JUSTICE (Edward Valandra & Waŋbli Wapȟáha Hokšíla eds., 2020).

[340] Rosalind Shaw & Lars Waldorf, *Introduction* to LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 4 (Rosalind Shaw et al. eds., 2010).

[341] CREATIVE INTERVENTIONS, *supra* note 251, at S1-2.

[342] *Cap Framework*, HOOD HUGGERS INT'L, https://www.hoodhuggers.com/cap-framework (last visited Sept. 27, 2023); Bierria et al., *supra* note 260, at 64–79; CREATIVE INTERVENTIONS, *supra* note 251, at S4F-2.

agreed-upon, express terms of repair.[343] In K-12 schools, restorative processes model CAPS as reentry circles.[344] CAPS in TFJ are dynamic, complex community action plans, which stay responsive to what is unfolding.[345]   This flexible approach maintains its parameters, ensuring the safety and integrity of all participants.[346]   CAPS are powerful because not only do they strive for individual accountability but also for the transformation of an entire community and culture. Their aim is to alter hegemonic narratives that better align with marginalized realities.[347]

Clarity in CAPS is the key—society cannot rely on amorphous or elusive concepts about atonement and reintegration. Well-articulated CAPS ensure the RP, community, and S/V are all aware of the analysis and demands embedded in the plan.[348] Additionally, bringing in help from the RP's circle shifts everyone to a forward-focused model[349] that moves past rumination on prior wrongs without a generative plan.[350] Holding space for the possibility of reintegration based on individuals making a commitment to realign themselves with expressly agreed-upon community norms and values helps hold everyone accountable to the process.[351]   The switching of modes from passive to involved

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[343] U.N. OFF. ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 17–18   (2006), https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Pr ogrammes.pdf.

[344] *See, e.g.*, SANTA CLARA CNTY. OFF. OF EDUC., RESTORATIVE PRACTICES: A TOOLKIT FOR   EDUCATORS   15   (2022),   https://fromdiaperstodiamonds.com/wp-content/uploads/2022/08/RP-a-Toolkit-for-Educators-June-2022-Santa-Clara-sccoe.org_.pdf.

[345] Bierria et al., *supra* note 260, at 64; CREATIVE INTERVENTIONS, *supra* note 251, at S2-2, S2-7 to S2-8.

[346] Bierria et al., *supra* note 260, at 64; CREATIVE INTERVENTIONS, *supra* note 251, at S2-10.

[347] Bierria et al., *supra* note 260, at 68–69.

[348] *See* Bierria et al., *supra* note 260, at 64–79; CREATIVE INTERVENTIONS, *supra* note 251, at S4F-2.

[349] Jennifer J. Llewellyn et al., *Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation*, 36 DALHOUSIE L.J. 281, 304 (2013) ("A restorative approach is oriented towards the future, to understanding what has happened in order to understand what needs to happen to address the past with a view to creating conditions for restored relationships in the future. In this respect it stands in contrast to the backward gaze of retributive justice which seeks to establish blameworthiness in order to 'even the score' by ensuring accountability (often through punishment) for past wrongs.").

[350] Bierria et al., *supra* note 260, at 64–69.

[351] *Id.* at 67.

helps the community feel stability—grounded in a planning process—which identifies specific steps for the societal reintegration of a RP. This "chance at redemption," rather than a forever-stigmatized approach,[352] provides an adjustment period antithetical to the "on/off" switch that has sometimes accompanied TRC processes wherein once a truth was spoken, an expectation of forgiveness pervaded.[353] Additionally, "[d]etermining the specific thing that the group is demanding from the aggressor pushes the group to be accountable to its own process."[354] Thus "commitment to follow through is built [around] other stakeholders in the circle."[355]

It is far too easy for society to be outraged by suboptimal, harmful behavior yet feel completely helpless in its abdication of any responsibility for intervention or alteration. This is akin to being in an unhealthy state of anger and dissatisfaction with no productive outlet.[356] Integrating deliberative accountability mechanisms provides opportunities for agency and for communities to deepen their understanding and conceptualization of their problems. It also provides engagement in problem solving.[357] These mechanisms make it possible to emerge from the mode of learned helplessness that states have imposed and activate individual's potential for ownership for the care and safety of one another and ourselves.

To concretize this theory, consider a story from Communities Against Rape and Abuse (CARA), a collective of women of color.[358] Two women told Kevin, an alternative punk music community member, that Lou sexually assaulted them, another popular member of the community.[359] One survivor confronted Lou.[360] Originally, Lou apologized, but then he quickly recanted, justifying his actions.[361] Kevin, who grew increasingly frustrated with Lou's lack of accountability, alongside the larger implications of sexual violence

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[352] *Id.*

[353] Moon, *Healing Past Violence*, *supra* note 34, at 81, 84.

[354] Bierria et al., *supra* note 260, at 67.

[355] Braithwaite, *supra* note 16, at 38.

[356] Bierria et al., *supra* note 260, at 64–65.

[357] Tali Gal, *'The Conflict is Ours': Community Involvement in Restorative Justice*, 19 CONTEMP. JUST. REV. 289, 291 (2016); Elizabeth Beck, *Transforming Communities: Restorative Justice as a Community Building Strategy*, 20 J. CMTY. PRAC. 380, 382, 387 (2012).

[358] Bierria et al., *supra* note 260, at 64.

[359] *Id.* at 73.

[360] *Id.*

[361] *Id.*

within the music community generally, began meeting with other stakeholders to form a collective.[362]

This group reflected on the survivor's experiences and on the ways their own conduct supported a culture of sanctifying behavior, like glamorizing the massive amount of drinking occurring at Lou's parties.[363] Through a long and grueling course of behaviors and course correction, the group attempted to hold Lou accountable to raise consciousness about sexual violence.[364] The group's members produced a powerful document written by the survivors, which defined sexual violence and addressed issues of consent and victim blaming.[365] Using a mix of statistics and analysis, they prepared themselves for facilitating workshops on safety and accountability, and they challenged the criminal legal system's effectiveness for victims.[366] They undertook all these actions while keeping in accordance with the values of S/V's self-determination to decide whether to be engaged at some points or shielded from others.[367]

None of this was easy. The group experienced intense frustration and exhaustion and had to change course to focus on community building, education, and prevention rather than expending energy to try to force Lou to take individual accountability.[368] But the group's members rose to the challenge "with the faith that they could transform their music community to reach a set of values that were consistent with being fun, sexy, liberatory and explicitly anti-rape and anti-oppression."[369]

2.   Embedded Iterative Accountability Mechanisms

People cannot hold others accountable without first holding themselves accountable. To effectuate change, people need to see models exemplifying functional new ways of operating.[370] Without ways to monitor decision-makers, individuals risk merely "transferring, rather than reducing, the risk of poor decision-making."[371] Iterative

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[362] *Id.*

[363] *Id.*

[364] Bierria et al., *supra* note 260, at 73.

[365] *Id.*

[366] *Id.*

[367] *Id.* at 74.

[368] *Id.*

[369] *Id.*

[370] ROCHE, *supra* note 163163, at 56.

[371] *Id.*

accountability can be established through reciprocal accountability whereby A checks B and vice versa or recursive accountability whereby A accounts to B who accounts to C who accounts to A again.[372] TRC processes should embed mechanisms that encourage participant monitoring. Iterative accountability is implemented in TFJ spaces. The following examples elucidate both the problem regarding the absence of and solutions for the integration of iterative accountability.

A quick and effective tool to encourage iterative accountability is adopting an ethos of humility and signaling an openness for constructive feedback. CI portrays this throughout its toolkit, as multiple mentions acknowledge this is communal and invite participants to build on the work already done.[373] It frequently seeks and invites feedback on its work to improve its quality, with an express invitation to "build upon [CI's] collective work."[374]

Other effective tools could include an internal audit or express acknowledgment. For example, CI created an anti-oppression policy, requiring signatures as a symbolic commitment to the principles of anti-oppression that guide its work.[375]

The following story from CARA reflects a problem resulting from the lack of iterative accountability and solutions for overcoming it. Someone in a local chapter of a national organizing group who had a history of ongoing abuse sexually assaulted Marisol—a young Chicana activist who worked in this same organization—while attending an out-of-town conference.[376] She organized an emergency meeting and demanded that the RP be ejected from the position of power, but the organization's leadership only discussed the behavior without any follow-up or consequences.[377] This was also not the first time the group tried to seek accountability, but no one took its demands seriously in the past, and no follow-up occurred.[378]

Marisol—along with other young Chicanas—crafted a clear accountability plan for the RP and the organization and confronted the organization's leadership about the general problems of sexual violence and the RP's behavior specifically.[379] The collective also

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[372] *Id.* at 57.

[373] CREATIVE INTERVENTIONS, *supra* note 251, at P-6 to P-7.

[374] *Id.* at P-6.

[375] *Id.* at S5-37 to S5-39.

[376] Bierria et al., *supra* note 260, at 75.

[377] *Id.*

[378] *Id.* at 76.

[379] *Id.*

recognized the criminal system's problematic nature and the issue of using isolation as a predominantly punitive response.[380] The collective proved powerful and successful; the RP was removed from leadership, and the organization sponsored trainings on sexual violence on a national level.[381] Additionally, the RP engaged in culturally specific counseling to address issues of power and control due to friends and family's support.[382] This group was heavily integrated into all facets of the RP's life, so it garnered credibility and could thus become more compassionate.[383]

This example portrays the reality that progressive, well-meaning individuals and organizations can engage in and foster harmful attitudes and behaviors. Non-governmental organizations and government partners who facilitate TRCs are not immune from bias. With attention and care, organizations can prevail by embedding iterative accountability in the ways society continues to push externally against structures of injustice, attempting to dismantle them. Ensuring alignment of shared principles and values makes iterative accountability an easier task. Another tool—social accountability audits—could also foster iterative accountability.

D. *Social Accountability Audits*

Improving functions of government, systems, and procedures necessitates social accountability. TJ models should consider taking their cues from programs advancing social accountability. Additionally, TRCs can integrate this tool as a form of iterative accountability, ensuring satisfaction with the stated aims of a program.

The National Unity and Reconciliation Commission of Rwanda (NURC)—a body created by parliamentary law in 1999 with the aim of promoting unity after genocide devastated communities across the country—has a robust method for assessing the status of Rwanda's reconciliation.[384] The Rwanda Reconciliation Barometer[385] is designed

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[380] *Id.*

[381] *Id.*

[382] Bierria et al., *supra* note 260, at 76.

[383] *Id.*

[384] Nat'l Unity & Reconciliation Comm'n, *NURC Background*, REPUBLIC OF RWANDA, http://197.243.22.137/nurc7/index.php?id=83 (last visited Sept. 27, 2023).

[385] NAT'L UNITY & RECONCILIATION COMM'N, RWANDA RECONCILIATION BAROMETER 2020   (2021), https://www.rwandainthenetherlands.gov.rw/fileadmin/user_upload/Netherlands_ user_upload/Documents/Updates/RWANDA_RECONCILIATION_BAROMETER_ 2020__N.pdf.

to measure the successes of a wide latitude of partners, including government, business, media, civil society, and development partners, in bringing about social unity through a hearty national survey.[386] Using quantitative and qualitative approaches, its purposes are two-fold: (1) "[i]ndicate the current status of reconciliation in Rwanda, through citizens views and experiences;" and (2) "[i]dentify the reconciliation favorable factors and challenges, and suggest necessary recommendations for a way forward."[387]

The reach of the study is quite extensive: More than 12,600 households from all 416 sectors composing the country—chosen via probability sampling techniques—participated, providing crucial data for analysis regarding the six pillars of the NURC.[388] The six pillars include (1) "understanding the past, the present[,] and envisioning the future of Rwanda[;]" (2) "citizenship, identity, and responsibility[;]" (3) "political culture [and] governance[;]" (4) "security and well-being[;]" (5) "justice, fairness[,] and rights[;]" and (6) "social cohesion[.]"[389]

On the basis of the last survey, the NURC made recommendations urging the recognition of reconciliation as an ongoing fundamental journey. This implies the government is responsible, if not more so, than the citizens are for providing leadership in this area—especially regarding the continuation of successful programs, such as Ndi Umunyarwanda, while continuing to devise additional new programs to combat obstacles blocking reconciliation.[390]

Emanating from a different but relevant area, corpora social responsibility also holds promise. Author, Sasha Courville, considers case studies of social certification systems/social auditing "using the lenses of accountability, ownership, trust, and reflexivity."[391] Ultimately, Courville concludes that well-formulated processes conducted alongside stakeholder engagement aid legitimate governance processes.[392]

South Africa is another country to have initiated enhanced social accountability, creating the National Evaluation System (NES), which

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[386] *Id.* at 5.

[387] *Id.*

[388] *Id.* at x.

[389] *Id.* at 17 tbl.4.

[390] *Id.* at 155–57.

[391] Sasha Courville, *Social Accountability Audits: Challenging or Defending Democratic Governance?*, 25 LAW & POL'Y. 269, 269 (2003).

[392] *Id.*

is tasked with "improving accountability, generating knowledges (learning), improving performance[,] and bettering decision-making."[393] The "overarching considerations" of the NES urge active stakeholder involvement for enhancing accountability in governance.[394]   One stated goal is that "the promotion of social accountability is part of community empowerment and reeducation of social exclusion."[395] This mechanism provides a way to extend citizen engagement beyond elections, which fosters the iterative nature of a process that "is helpful for understanding what role social accountability initiatives play in addressing service-delivery challenges and the need to ensure citizen action and state action have complementary effects."[396] Figure 4 captures this conception.

Figure 4[397]
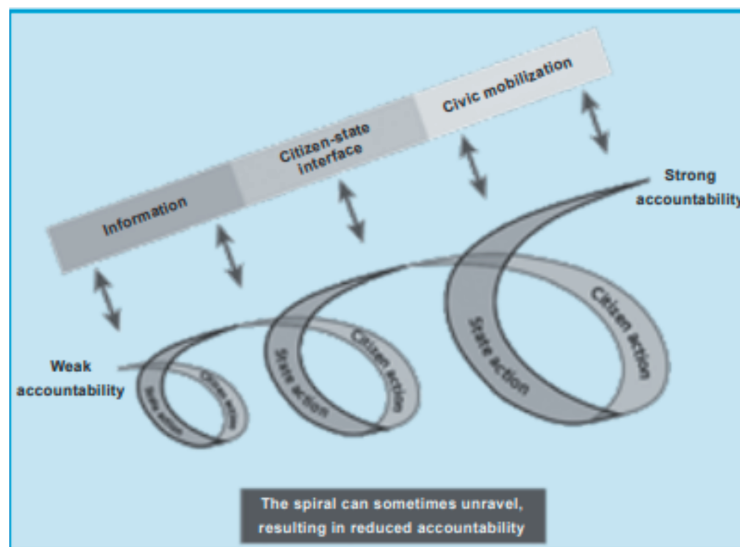
Because post- and protracted conflict attempts at reconciliation occur within the context of the very states that allowed violence, discrimination, atrocity, and degradation to be wrought, it is imperative that the voices of those who suffered under those conditions are heard and take

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[393] Kevin Foster et al., *Evaluation and Participation: Opportunities for Learning and Accountability, in* NAVIGATING ACCOUNTABILITY AND COLLABORATION IN LOCAL GOVERNANCE 62, 64 (2017).

[394] *See id.*

[395] *Id.* at 65.

[396] *Id.*

[397] HELENE GRANDVOINNET ET AL., OPENING THE BLACK BOX: THE CONTEXTUAL DRIVERS OF SOCIAL ACCOUNTABILITY 8 fig.O.2 (2015).

the lead. Additionally, TJ and TRCs must seek to move beyond simply listening and augment agency for underrepresented communities.

E.   *Citizen Engagement and Power Building*

"[O]ne of the most effective ways of deepening the furrows of democratic responsibility for justice is to resource and empower organizations in civil society to improve on the state's capabilities to assure accountability for justice failures."

— John Braithwaite[398]

Although many organizations are advocating and building the power of the citizenry, Namati in Sierra Leone is one of the grassroots organizations that rapidly and successfully built a sustainable infrastructure to put power into the hands of the people.[399] The organization, founded by Vivek Maru, originates in helping to create a community paralegal program in Sierra Leone, as it emerged from its devastating civil war.[400] At the time, there were fewer than a hundred lawyers in the country—mostly in the capital.[401] Thus, the need for legal services was inordinately high. Namati was born from the work in Sierra Leone, expanding on the momentum of the successes in that program. Indeed, the World Bank recognized the program "managed to squeeze justice out of a broken system: stopping a schoolmaster from beating children; negotiating child support payments from a derelict father; [and] persuading the water authority to repair a well."[402]

The organization recognizes the agency and aptitude of people who have suffered some of the greatest injustices of this century. It invests in shoring up natural leaders from within those communities and equipping them as community paralegals.[403] Namati decided that "[r]ather than treating affected people like victims requiring an expert service . . . community paralegals build power among the people with whom they work."[404] The concept is a way to help purposely

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[398]   Braithwaite, *supra* note 16, at 49.

[399]   *See Who We Are*, Namati, https://namati.org/who-we-are (last visited Sept. 27, 2023).

[400]   *See id.*

[401]   *Id.*

[402]   *Id.*

[403]   *See Grassroots Legal Empowerment*, Namati, https://namati.org/what-we-do/grassroots-legal-empowerment (last visited Sept. 27, 2023).

[404]   *Id.*

disenfranchised communities "understand, use, and shape the law."[405] They are given a wide range of tools for the purposes of informing, organizing, advocating, and litigating.[406]

F.   *Grounded Through Shared Political Theory*

TJ and TRCs are proxies for *rebuilding* fractured systems of governance, making them inherently political endeavors.[407] In an analysis of TJ, Kirsten Ainley pointedly summarizes this reality: "Judgements of the successes, failures[,] and impacts of TJ are part of [the] political practice—assessments affects the kinds of TJ programmes which will be implemented in [the] future. As politics is fundamentally about negotiating values and interests."[408] She urges that the aim then should not be to select the "right" value but to assess these values to help appraise the appropriateness of certain TJ programs.[409]

Ainley also recognizes the difficulty of this acknowledgement, explaining that most programs claim neutrality regarding political value.[410] But she counters, noting that TJ programs by their very nature "cannot avoid privileging some value orientations, despite [their] tendency to 'replace political debate with technical expertise'" and that "evaluation is characterized by comparison to normative ideals."[411] Additionally, because TJ's purpose is essentially to help stabilize and *rebuild* legitimate structures of power as countries emerge from the heavy toll of conflict, the endeavor is innately political.[412] Embracing that reality is crucial to avoid the biases that come with an air of neutrality.[413]

One of CARA's guiding principles in its work with sexual violence victims is to ensure that everyone in the "accountability-seeking group" uses the same political analysis of sexual violence.[414] Individuals engaging in sexual violence prevention work bring distinct definitions

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[405] Peter Chapman, *The Legal Empowerment Movement and Its Implications*, 87 FORDHAM L. REV. ONLINE 183, 185 (2019).

[406] *See Grassroots Legal Empowerment, supra* note 403403.

[407] *See* Ainley, *supra* note 1, at 422.

[408] *Id.*

[409] *Id.*

[410] *See id.* at 424.

[411] *Id.* at 424, 427.

[412] *Id.* at 424.

[413] *See* Ainley, *supra* note 1, at 424.

[414] Bierria et al., *supra* note 260, at 66.

of words like "rape," "consent," and "credibility;" these workers can have different assumptions about "rape as a manifestation of oppression."[415] To achieve longevity and a realization of collective aims, a united framework for consistency in discussions and accountability plans is imperative.

For example, CARA's shared political analysis of sexual violence allows it to anticipate moves to dodge accountability, such as demanding that a survivor prove assault, based on a cultural orientation, which doubts the credibility of women generally.[416] Similarly, CI's toolkit embeds stories, a keyword glossary, and extensive introductory materials to ensure clarity and alignment with the expressed values of their model.[417] To advance TJ and TRC's capacity, agreement and express acknowledgment of the theoretical or political underpinnings that guide the work of any process is a useful mechanism for iterative accountability.

IV. CONCEPTUAL ACCOUNTABILITY FRAMEWORKS

Reconciliation—addressing past legacies of violence by repairing fragile and fractured interconnectedness—is possible. Between truth (the acknowledgement) and reconciliation (repaired relationships) sits immensely difficult work. Reconciliation requires "creating trust and understanding between former enemies."[418] *Rebuilding* a society at a minimum necessitates functional working relationships based on accountability, thus allowing commitments to be fulfilled. Fashioning a thriving society demands generative working relationships based on trust.   Constructing communities requires shared norms and expectations for which individuals are mutually accountable, along with the agency to proactively intervene—nudging behavior back toward those shared norms—and to productively respond when those norms are violated.

The temptation to push toward reconciliation, while ignoring or downplaying persistent root causes of conflict, in the hopes of holding onto a sense of security, is misguided. The world can improve as people develop symbiotic, core ideals and fair structures capable of fostering them. The will to collectively improve is crucial to creating flourishing societies, as is agreement on and understanding of individual and collective roles and responsibilities. Accountability

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[415] *Id.*

[416] *Id.* at 66–67.

[417] CREATIVE INTERVENTIONS, *supra* note 251, at S1-2 to S1-44, S5-2 to S5-37.

[418] Weitekamp et al., *supra* note 94, at 220.

mechanisms that continually redirect society and remind individuals of that shared vision are vital.

Lastly, evaluative tools are indispensable technologies of accountability. They provide methods for assessing those aims, along with procedures for improving preventative, proactive, and productive interventions. TJ models should embrace mixed modalities of accountability mechanisms, steeped in various notions of justice from all phases of its evolution and genealogy, as each phase comes with its characteristic benefits and limitations.

Retributive, restorative, and transformative notions of justice all contain essential conceptions for collective forward motion after or in the midst of protracted conflict. Additionally, TJ models should incorporate multiple mechanisms of accountability capable of particularized responsiveness regarding a RP's wrongdoing and a RP's level of desire to meaningfully engage in corrective and reparative action. Though this Article would argue that retributive mechanisms are least productive due to the cyclical patterns of reinforcing violence—harming those who have harmed to show harm is wrong merely augments the comprehensive harm committed—this Article acknowledges that some RPs absolutely refuse to take, or are incapable of taking, accountability for their actions and their consequences. Additionally, this Article recognizes that some perpetrators of egregious violence may be seen as irredeemable in the community's eyes, necessitating punitive sanctions. Thus, the energy needed to be expended to align those scenarios for deliberative accountability is arguably better spent elsewhere unless and until a change of circumstances bears revisiting. Some wrongdoers simply require isolation. Recognizing the vast degrees of harms, the committee requires a range of justice responses that correspond to that harm. Thus, TJ models should commit to incorporating a variety of mechanisms grounded in distinct theoretical notions of justice, as shown in Figure 5.

Figure 5

Furthermore, an assessment of the types of individual and collective responses necessary to counter harmful conduct, along with consideration of the mixed accountability mechanisms that would aid societies, is best left to those who will be program participants. TJ models should reflect the needs of the people the models serve, according to the people's conceptions concerning the retrospective and prospective means of accountability necessary for justice. Just as each community should have the right and responsibility to determine the most effective model, each TJ scenario should be distinct.

Finally, this Article returns to its primary topic—namely, TRCs. Conceptually, TRCs could be housed under either restorative or transformative accountability mechanisms.[419] In response to the idea that reconciliation does not simply follow truth, TRCs should consider imagining new ways of capturing this reality. TRCs could rebrand themselves to be aligned more directly with the ideal that reconciliation requires accountability. TRCs could include various dialogic processes designed to move a country toward increased deliberative accountability and thus enhanced democratization. Community accountability plans that respond to the truths revealed in public testimonials, victim-offender dialogues, or healing circles could enhance communication, cooperation, and societal cohesion. Again,

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[419] *See* discussion *supra* Part III.

the assessment and selection of mechanisms should rest in the hands of those who will feel the effects of those selected processes.

Because names are sacred and because language shapes people's conceptions and the possibilities of individuals' realities, TRCs that adopt a framework of embedded accountability could more aptly be labeled as Truth, Accountability, and Reconciliation Commissions ("TARCs"). On one end of a spectrum, endeavors that seek to correct the historical record through truth collection would remain truth commissions. On the other end, moving along the continuum in accordance with increased accountability mechanisms and initiatives is where TARCs now sit, shown by Figure 6.

One additional point bears discussion. Many critical scholars recognized the importance of acknowledging that many societies were never just towards marginalized populations, and thus *reconciling* with that lived reality is ill-advised. Importantly, Taiaiake Alfred asks, "[W]hat good is reconciliation if reconciliation just means [N]ative [P]eople reconciling themselves to colonialism[?]"[420] The polarity of views between Indigenous Peoples and settlers,[421] or between many people of color and those who proclaim the slogan "Make America Great Again" personifies this divisive tension of competing versions of the past. Consequently, stakeholders should also discuss whether "reconciliation" is the most fitting terminology for their truth commission. Alternatives to the term "reconciliation" could include words such as conciliation or conviviality; thus, if deemed appropriate, a TRC could become referenced as a "TACC." Figure 6 captures these conceptual shifts.

Figure 6

[420] Metis Calgary, *Dr. Taiaike Alfred Presentation*, YOUTUBE, at 36:16 (Oct. 1, 2014), https://www.youtube.com/watch?v=xQ6k2Rm5ZZQ# t=29.

[421] Weitekamp et al., *supra* note 94, at 220.

CONCLUSION

TJ and TRCs are now entrenched in the lexicon of responsive models for stabilization—and ultimately justice and peace. These models rest on sound theoretical underpinnings and on anecdotal and experiential success. Nevertheless, they should be viewed as experimental. Society is responsible for imagining ways to improve these processes. Acknowledging, praising, and learning from Indigenous and underrepresented communities, which have found meaningful ways of safeguarding and building up one another, hold promise for significantly improving TJ and TRCs. S/Vs and their advocates have already laid the essential groundwork. TJ scholars, practitioners, and supporters owe it to the people they serve to integrate an effective TFJ praxis so that all human beings might thrive.