

**GLOBAL CARCERAL FEMINISM  
AND DOMESTIC VIOLENCE:  
WHAT THE WEST CAN LEARN FROM  
RECONCILIATION IN UGANDA**

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ABSTRACT

*Around the world, policies and laws emphasizing criminal justice have dominated domestic violence interventions for decades. In the United States, certain feminist advocates worked with state actors to develop a primarily criminal justice response to domestic violence. Western influence in the international human rights movement has spread this approach around the world, leading it to become the key means of addressing violence against women. However, critics argue that the overreliance on the criminal justice system is a key failure of the anti-domestic-violence movement, with some referring to the strain of feminism promoting prosecution as “carceral feminism.” The carceral approach is increasingly criticized for failing to help and sometimes causing outright harm to its supposed beneficiaries. In place of carceral policies, advocates have begun to push for community-based restorative and transformative justice alternatives to prosecution. This Article examines Uganda’s use of reconciliation, a restorative justice mechanism, to respond to and prevent domestic violence. Uganda’s approach is an instructive example because, unlike the subjects of other case studies, it is a state-sanctioned, nationwide mechanism intentionally made available to all domestic violence victims. Reconciliation in Uganda gives advocates an opening to meet the expressed needs of victims of domestic violence, as well as to effect normative change. This is important not just in Uganda, but beyond its borders. Western countries, many of which have already seen restorative justice experiments occur on a smaller scale, can take note of the possibilities available with widespread restorative justice mechanisms. Whereas historically the international rights movement has spread ideas and concepts from the West to the rest of the world, the potential of restorative justice indicates that at least in some cases, justice would be better served by reversing the flow of ideas.*

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## INTRODUCTION

Conversations about violence against women have recently been invigorated around the globe by the #MeToo movement.<sup>1</sup> The revelations of the movement have led to swift commercial or criminal judgment for some,<sup>2</sup> but also to questions about what kind of justice is appropriate,<sup>3</sup> mirroring a much longer conversation that has been going on with respect to domestic vio-

<sup>1</sup> See Louise Burke, *The #MeToo Shockwave: How the Movement has Reverberated Around the World*, TELEGRAPH, Mar. 9, 2018 [https://perma.cc/G6F6-9QZC].

<sup>2</sup> See, e.g., *id.*; Will Hobson, *Larry Nassar, Former USA Gymnastics Doctor, Sentenced to 40–175 Years for Sex Crimes*, WASH. POST, Jan. 24, 2018 [https://perma.cc/L6YB-UZFG].

<sup>3</sup> In addition to the numerous news articles about the movement and the conversations dominating social media during the rise of the movement, questions about what to do in light of #MeToo have also been raised in academic conferences and documentaries. See, e.g., *Righting Carceral Feminism's Wrongs in a #MeToo Era*, OPEN SOCIETY FOUND. (Mar. 6, 2018), https://www.opensocietyfoundations.org/events/righting-carceral-feminism-s-wrongs-metoo-era [https://perma.cc/QZ4A-TDH6]; *#MeToo, Now What?* (PBS

lence.<sup>4</sup> As with domestic violence, some countries embrace a carceral approach, seeking to address harassment and gender-based violence with criminalization.<sup>5</sup>

Carceral feminism, which treats the various forms of gender-based violence as criminal justice concerns,<sup>6</sup> has been criticized by other feminist advocates for ignoring the violence that the state and its criminal justice system inflicts upon marginalized women: those who are poor, Black, brown, transgender, LGBTQ+, or otherwise outside the mainstream.<sup>7</sup> Such critiques may not all use the term “carceral feminism,”<sup>8</sup> but they all raise similar concerns

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television broadcast Feb. 2, 2018), <https://www.pbs.org/show/metoo-now-what> [<https://perma.cc/E3NJ-759C>].

<sup>4</sup> The term “domestic violence” is contested. Though historically domestic violence was conceptualized as physical violence committed by a husband against his wife, understanding of the term has broadened over time. It now encompasses verbal, emotional, physical, and financial abuse and permits a person of any gender to be victim or aggressor. Other terms, such as “spousal abuse,” “intimate partner violence,” and “family violence” have been suggested to compensate for perceived inadequacies in the term; however, I find each to be inadequate for the discussion in this Article.

In this Article, I use the term “domestic violence” because I seek to encompass abuse between more than just intimate partners and find “family violence” to be too broad. Both spousal abuse and intimate partner abuse exclude other important forms of violence that take advantage of similar inequalities in domestic life. Some of the most vivid examples of such violence around the world, including in Uganda, are of violence at the hands of in-laws. See discussion *infra* Part II.A. See generally Martin Rew et al., *Violence Between Female In-Laws in India*, 14 J. INT’L WOMEN’S STUD. 147 (2013) (discussing the shortcomings of policy to address violence committed by Indian mothers-in-law against their daughters-in-law). Family violence, on the other hand, is overbroad in that it would also encapsulate child abuse, removing the important focus on the phenomenon of violence against women in the home. See Laurie Naranch, *Naming and Framing the Issues: Demanding Full Citizenship For Women*, in FEMINISTS NEGOTIATE THE STATE 21, 26–27 (Cynthia R. Daniels ed., 1997). In using the term “domestic violence,” I refer to any form of verbal, emotional, physical, or financial abuse against others based on the household relationship, whether as a spouse, intimate partner, close relative, or otherwise integrated member of the household like domestic workers.

Additionally, though domestic violence can be reciprocal and complex, the vast majority of victims are women. See *The Facts on Domestic Abuse*, S.F. DOMESTIC VIOLENCE CONSORTIUM (Sept. 24, 2018), [http://www.dvpartners.org/index.php?option=com\\_content&view=article&id=48&Itemid=58](http://www.dvpartners.org/index.php?option=com_content&view=article&id=48&Itemid=58) [<https://perma.cc/REW7-UUL5>]; *Human Rights Violation*, UNITE TO END VIOLENCE AGAINST WOMEN, <http://www.un.org/en/women/endviolence/situation.shtml> [<https://perma.cc/J55T-RMQD>] (stating that “[s]exual violence in conflict is a serious, present-day atrocity affecting millions of people, primarily women and girls”). As such, in discussing the economic and societal conditions that enable domestic violence, I discuss those conditions that systematically disempower women and make them vulnerable to such abuse.

<sup>5</sup> See Alex Press, *#MeToo Must Avoid “Carceral Feminism,”* VOX (Feb. 1, 2018), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> [<https://perma.cc/Y6FB-3VW9>].

<sup>6</sup> *Id.* The term “carceral feminism” was first coined by Elizabeth Bernstein to describe the “law and order agenda” of feminist antitrafficking advocates. *Id.*; Elizabeth Bernstein, *The Sexual Politics of the “New Abolition,”* 18 DIFFERENCES 128, 137, 143 (2007).

<sup>7</sup> See discussion *infra* Part I.A.3.

<sup>8</sup> Law professor and gender violence scholar Leigh Goodmark, for example, criticizes “dominance feminism,” which emphasizes women as victims in promoting criminal justice policies. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique*

about the criminal justice system, and they are not new. Indeed, Kimberlé Crenshaw's groundbreaking article on intersectionality discussed some of these same issues when it was published in 1991.<sup>9</sup> As carceral approaches to domestic violence continue to garner criticism, some activists have begun to advocate for community-based alternatives to prosecution.<sup>10</sup> In the United States, restorative justice approaches to family and intimate partner violence are increasingly put forward as better alternatives for parties in domestic violence disputes. Some, however, view these alternatives with a great deal of skepticism, concerned that they would be not only ineffective, but also dangerous for disempowered victims.<sup>11</sup>

Carceral feminism developed global reach by traveling the highways of international human rights advocacy. International women's rights activists pushed for state involvement in domestic violence by focusing on legislation, criminalization, and prosecution.<sup>12</sup> In countries where customary norms still hold tremendous power, many activists and development actors initially

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*of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 4–5 (2009) [hereinafter Goodmark, *Autonomy Feminism*].

<sup>9</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

<sup>10</sup> See Leigh Goodmark, "Law and Justice are Not Always the Same": *Creating Community-Based Justice Forums for People Subject to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 707–10 (2015) [hereinafter Goodmark, *Law and Justice*].

<sup>11</sup> The appropriate label for a person who has experienced domestic violence abuse is also contested. Anti-violence advocates devote considerable time weighing whether to use terms such as "victim," "survivor," "victim/survivor," or "person who has experienced violence." See, e.g., *The Language We Use*, WOMEN AGAINST ABUSE, <http://www.womenagainstabuse.org/education-resources/the-language-we-use> [<https://perma.cc/SA9H-XXUT>]; *Key Terms and Phrases*, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases> [<https://perma.cc/W532-FQKW>]; PARTNERS FOR PREVENTION, REPLICATING THE UN MULTI-COUNTRY STUDY ON MEN AND VIOLENCE: UNDERSTANDING WHY SOME MEN USE VIOLENCE AGAINST WOMEN AND HOW WE CAN PREVENT IT: PREFERRED TERMINOLOGY 3 (2013), [http://www.partners4prevention.org/sites/default/files/preferred\\_terminology\\_final.pdf](http://www.partners4prevention.org/sites/default/files/preferred_terminology_final.pdf) [<https://perma.cc/C4UY-YJX5>]. Many object to the term "victim" because it conveys a notion of weakness and implies that the violence is unidirectional. From this viewpoint, the "victim" is an object against whom violence is done. See Michael Papendick & Gerd Bohner, "Passive Victim—Strong Survivor"? *Perceived Meaning of Labels Applied to Women Who Were Raped*, 12 PLoS ONE 1, 3 (2017). This is particularly problematic not only because it denies agency to the person being labeled "victim," but also because it contributes to a limited archetype of the domestic violence victim: in particular, one who does not fight back. Leigh Goodmark, *When is a Battered Woman not a Battered Woman? When She Fights Back*, 20 YALE J. L. FEMINISM 75, 83 (2008). In the United States, this has also translated to a racialized, heteronormative identity. Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1081–86 (2005); see also discussion *infra* Part I.A.3. While the term "survivor" is supposed to convey a more positive and empowered vision of the person who has experienced violence, see Papendick & Bohner, *supra* note 11, at 16–17, it implies that the harm being experienced has concluded, or the effects from past harm have dissipated and recovery is complete. I choose to use "victim" in this Article, though I acknowledge the term's problematic aspects, because it more accurately reflects, in my view, the timing of the abuse with respect to the initiation of reconciliation or a formal complaint, and the language used by the Ugandan legal system.

<sup>12</sup> See discussion *infra* Part I.A.2.

argued for destruction of those norms.<sup>13</sup> They presumed state law and institutions to be better suited for ensuring equality and women's rights, as opposed to customary structures, which historically exhibited male preference in most aspects of life. However, as it became clear that customary institutions would not disappear, that the state was not the savior some had hoped it would be, and as more local voices were given space to be heard, international advocates became more willing to engage with custom.<sup>14</sup> Unlike the Western institutions wielding influence in the international system, state governments in sub-Saharan Africa were never willing to completely abandon custom, with many even constitutionally acknowledging a place for custom in their legal systems.<sup>15</sup> Uganda's own constitution acknowledges custom<sup>16</sup> and also promotes "reconciliation," which I argue reflects a traditional justice approach, in its justice system.<sup>17</sup> Still, the international human rights system looks to formal state mechanisms to address violence against women.

Both the United States and Uganda have, in some ways, perpetuated hierarchies of power and failed to empower (or, in some cases, actively disempowered) more vulnerable women.<sup>18</sup> Women in marginalized communities have experiences that are not adequately considered by the educated, elite feminists allying themselves with state institutions. Critics thus suggest community-based mechanisms, typically in the form of restorative justice, as an alternative.

This Article seeks to expand discussions of community-based alternatives to prosecution in domestic violence cases by considering them in a comparative context. Specifically, it looks at the use of reconciliation in Uganda as an instructive example. Uganda offers an especially useful case study because the country has a nationwide policy of considering reconciliation as an option for resolving domestic violence disputes. Yet there is no

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<sup>13</sup> Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries*, 41 HARV. INT'L L.J. 381, 391–93 (2000).

<sup>14</sup> The question of how to recognize customary law while also promoting human rights in sub-Saharan Africa is now the topic of much discussion among scholars and practitioners. See generally, e.g., *id.*; MARIANNA BICCHIERI & ANABEL AYALA, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, LEGAL PLURALISM, WOMEN'S LAND RIGHTS, AND GENDER EQUALITY IN MOZAMBIQUE: HARMONIZING STATUTORY AND CUSTOMARY LAW (2017) (discussing how to harmonize Mozambique's customary law and statutory law to promote justice and equality); Tamar Ezer, *Forging a Path for Women's Rights in Customary Law*, 27 HASTINGS WOMEN'S L.J. 65 (2016) (discussing how customary law might be used in a manner that promotes women's rights). This topic has relevance outside of sub-Saharan Africa as well. See generally, e.g., CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES (Deborah Isser ed., 2011) (exploring the relationship between customary justice systems and post-conflict stability and rule of law).

<sup>15</sup> Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOBAL L. STUD. 87, 96–100 (2011).

<sup>16</sup> UGANDA CONST. arts. 2, 237, 246.

<sup>17</sup> UGANDA CONST. art. 126.

<sup>18</sup> See discussion *infra* Parts I.A.1, II.B.

systematic data on how reconciliation is implemented in Uganda in domestic violence situations. Using a mix of qualitative interviews<sup>19</sup> and desk research, I performed a preliminary analysis of how reconciliation functions in the context of domestic violence disputes in Uganda.

Uganda is also useful as a case study because of how salient the criticisms of community-based alternatives are with respect to reconciliation. Upon hearing about the practice, some advocates' immediate reaction is concern.<sup>20</sup> Reconciliation is being attempted in communities where norms that disempower women are long-standing, historically resistant to change, and govern communities that are generally homogenous tribally or ethnically.<sup>21</sup> The concerns about how effective it will be in light of these characteristics are valid. In this context, a justice solution that lacks the coercive power of the state can be frightening. But the fact that such an approach can better provide justice for women, even in these circumstances, suggests that these types of solutions are viable, system-wide alternatives to prosecution, rather than boutique options possible only in certain communities.

By examining the critiques of carceral feminism and the use of community-based alternatives to address domestic violence in the context of the post-colonial African narrative, this Article takes a novel approach that significantly adds to the conversation about using non-criminal justice approaches to combat domestic violence. In Part I of this Article, I provide a brief overview of the rise of carceral feminism in the United States and internationally and lay out the arguments for and against the use of criminal justice versus community-based alternatives. In Part II, I provide an overview of domestic violence in Uganda as well as the current legal framework and interventions available for addressing it. In Part III, I analyze the bene-

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<sup>19</sup> During the summer of 2015, I performed seventy-four semi-structured qualitative interviews with respondents in Uganda. I received approval from the University of South Carolina Institutional Review Board prior to conducting the interviews. Fifty-six of the respondents were interviewed in their professional capacity as justice system actors or professionals who were conversant with the justice system due to the nature of their employment. The remaining eighteen respondents were either litigants or parties to a reconciliation. Some interviewees agreed to provide information provided that they not be cited directly. A number of other respondents requested confidentiality. In my citations to these confidential interviews, I have used pseudonyms and removed any other identifying information. Some of the respondents also requested that their job titles remain ambiguous, which I have respected. With the exception of name changes, all information included in my citations accurately describes the interviewee and the interview, albeit with less detail than would normally be included.

<sup>20</sup> In fact, I had a similar reaction when I first learned about reconciliation. As I began hearing about how often it was utilized in cases of domestic violence, I was concerned that women would be denied justice. It seemed a perfect opportunity for women to be coerced into accepting agreements that would not adequately provide relief by facilitators who were biased and interested only in preserving family unity over women's rights. After significant research and time spent considering the practice, I have come to realize that although there are negative outcomes, reconciliation provides an important means of accessing justice for women. However, there are legitimate drawbacks and concerns relating to reconciliation, which are discussed *infra* Part III.B.

<sup>21</sup> Ndulo, *supra* note 15, at 88–89.

fits and drawbacks of using either the criminal justice system or reconciliation in Uganda, which look very similar to those raised in parallel conversations in the United States. In Part IV, I consider whether reconciliation is a viable alternative and what that means for its use outside of Uganda. Preliminary qualitative and quantitative data suggest that certain community-based approaches are creating positive normative change in Uganda. I argue that despite their drawbacks, these community-based alternatives play an important role in addressing domestic violence, most importantly because they are best positioned to chip away at the community-based structures that currently disempower women and make them vulnerable to gender-based violence.

## I. CARCERAL POLICIES AND COMMUNITY-BASED ALTERNATIVES

### A. *Carceral Policies in the United States and Internationally*

Globally, women's movements have relied on the state, typically through criminal justice policies, to fight domestic violence. In the United States, the feminist alliance with the criminal justice system gained steam in the 1970s and '80s. On the international scale, because states are the main actors in the international system, the human rights movement also embraced the state as protector of rights, including women's right to be free from violence. Driven heavily by Western donors and a Western-specific viewpoint, the international women's rights movement also advocated heavily for criminal justice measures to fight against domestic violence.

#### 1. *United States*

Efforts in the United States to combat domestic violence using legal institutions have roots reaching back to before the nation's founding. The Massachusetts Bay and Plymouth Colonies passed laws against wife beating in the seventeenth century,<sup>22</sup> and, though they were not often successful, women in Massachusetts were able to petition for divorce upon grounds of cruelty (at least in combination with other grounds for divorce, such as adultery or neglect of family).<sup>23</sup> Over the years, activists continued to push for legal protection against domestic violence while state laws addressed domestic violence in a variety of ways. In the 1800s, some new laws meted out punishment to domestic abusers, while other laws permitted violence provided that it was not egregious.<sup>24</sup> By 1920, wife beating was illegal in every

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<sup>22</sup> Elizabeth Felter, *A History of the State's Response to Domestic Violence in the United States*, in *FEMINISTS NEGOTIATE THE STATE*, *supra* note 4, at 5, 8–9.

<sup>23</sup> ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 23 (1987).

<sup>24</sup> Felter, *supra* note 22, at 9–10.

state.<sup>25</sup> Still, through the early twentieth century, when faced with domestic violence complaints, legal institutions and actors appeared to focus on maintaining the family unit and sometimes questioned whether the woman's own behavior may have caused the violence.<sup>26</sup> Perhaps it is no surprise, then, that the activists who were successful in pushing for anti-domestic violence measures were successful precisely because they did not threaten the family unit or challenge existing power structures.<sup>27</sup>

The 1970s saw the rise of the battered women's movement, which focused on challenging the gender inequality that created permissive conditions for domestic violence and providing services to women in abusive relationships.<sup>28</sup> The movement sought to change society's view of domestic violence from a private matter to a more "politically relevant" public one.<sup>29</sup> A major point of advocacy focused on the need for the state to acknowledge, address, and intervene in cases of domestic violence, though what that intervention should look like was still uncertain. Discussions of inequalities of power became more common as the feminist movement brought these issues to the fore. Feminists also pushed for shelters and the provision of services for women experiencing abuse, understanding that economic disempowerment needed to be overcome for women to exit violent relationships.<sup>30</sup> Though the number of shelters grew during this time, as did the overall support for them, this service-oriented approach gained very little traction with governments.<sup>31</sup>

Also beginning in the 1970s, several high-profile cases highlighted the non-responsiveness of the police force to domestic violence incidents and sparked a systemic change in police response.<sup>32</sup> Perhaps the most well-known of these cases is *Thurman v. City of Torrington*,<sup>33</sup> which resulted in a \$2.3 million judgment against police (which was ultimately settled for \$1.9 million) for their negligence in failing to protect Thurman from her husband, whom police knew to be abusive.<sup>34</sup> Because of these and other legal developments, police departments across the United States began to implement stronger anti-domestic violence policies, ultimately leading to policies requiring mandatory response and mandatory arrest.<sup>35</sup>

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<sup>25</sup> Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996).

<sup>26</sup> Felter, *supra* note 22, at 10.

<sup>27</sup> *Id.* (describing Pleck's argument).

<sup>28</sup> *Id.* at 14–15.

<sup>29</sup> Laurie Naranch, *Naming and Framing the Issues: Demanding Full Citizenship for Women*, in FEMINISTS NEGOTIATE THE STATE, *supra* note 4, at 21, 30.

<sup>30</sup> Felter, *supra* note 22, at 15–16.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> Anne Sparks, *Feminists Negotiate the Executive Branch: The Policing of Male Violence*, in FEMINISTS NEGOTIATE THE STATE, *supra* note 4, at 35, 41–42.

<sup>33</sup> 595 F. Supp. 1521, 1524 (D. Conn. 1984).

<sup>34</sup> Goodmark, *Autonomy Feminism*, *supra* note 8, at 2; Hanna, *supra* note 25, at 1858.

<sup>35</sup> Goodmark, *Autonomy Feminism*, *supra* note 8, at 2.

Further cementing the relationship with criminal justice was the Violence Against Women Act (VAWA), which, after much back and forth in Congress, finally passed as part of the Crime Bills.<sup>36</sup> VAWA tied federal funding to the adoption of pro- or mandatory-arrest policies, which encouraged all fifty states to adopt such policies.<sup>37</sup>

In addition to pro-arrest policies, states have also embraced pro-prosecution policies. Such policies, including no-drop prosecution, victimless prosecution, and mandatory victim participation policies, justified an asserted public interest in pursuing domestic violence prosecution even when women experiencing abuse shy away from it.<sup>38</sup> Prosecution is seen as a mechanism that will protect women and send a message of zero-tolerance for domestic violence.<sup>39</sup>

While feminist advocates quickly came to rely on and work within the criminal justice system, they also continued to emphasize alleviating the economic pressures that kept women in abusive relationships and providing safe spaces such as shelters.<sup>40</sup> From a women's rights perspective, criminal justice was not an ideal route because it shifted focus away from the harm being done to the woman to the harm being done against the state.<sup>41</sup> Nevertheless, it quickly became the dominant approach for addressing domestic violence.

## 2. *Internationally*

The international human rights network has served as a high-speed conduit of carceral feminism. In order to bring women's rights issues to the attention of the broader international human rights community, women's rights activists focused on physical harms committed against women, which typically corresponded with a state criminal justice response. However, perhaps because rights experts, rather than government officials, are involved in the drafting, international human rights documents also continue to raise the need for states to engage in other activities as well. Such activities include changing norms, providing shelter, and working with non-state institutions to address domestic violence. Still, the emphasis continues to be on the state and criminal justice.

In the 1980s and 1990s, international women's rights activists focused on physical harms against women and criminal justice interventions in order to gain greater attention from the international community. To create global

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<sup>36</sup> Rachelle Brooks, *Feminists Negotiate the Legislative Branch: The Violence Against Women Act*, in *FEMINISTS NEGOTIATE THE STATE*, *supra* note 4, at 65, 73–74.

<sup>37</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322 § 40231, 108 Stat. 1796, § 40231; Goodmark, *Autonomy Feminism*, *supra* note 8, at 9–10.

<sup>38</sup> Hanna, *supra* note 25, at 1860–68.

<sup>39</sup> *Id.* at 1865, 1870.

<sup>40</sup> Sparks, *supra* note 32, at 47.

<sup>41</sup> *Id.*

change, they pursued a goal similar to that of the battered women's movement in the United States: to bring rights abuses experienced by women out of the private domain and into the public sphere and, consequently, within the responsibility of states. Alice Miller, writing about her experience as an advocate, explains that violence against women became the major international issue in women's rights, even at the expense of other important issues, such as achieving substantive equality.<sup>42</sup> Violence—in particular sexual violence—made women's rights issues salient to mainstream rights advocates at the time for several reasons. Violence is a particularly apparent rights violation;<sup>43</sup> that is, physical harm is more easily understood as a rights violation than the rights violations created by economic subordination. In addition, the issue of violence against women was couched in a narrative that placed women in non-threatening roles that would not upend traditional gender relations.<sup>44</sup> Miller argues that what truly made this approach successful was that it fit with the traditional human rights paradigm of the 1980s in which state violations were understood to occur when acts were committed against a person's physical integrity.<sup>45</sup>

Even still, key women's rights documents were careful to include other aspects of women's subordination and to reference these various factors' connections to domestic violence. In a treaty and related documents, the language of international human rights invokes not just criminal justice when asserting states' obligations with respect to domestic violence, but also obligations to provide protection against violence and support for women seeking to exit violent relationships.<sup>46</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not make explicit mention of violence against women,<sup>47</sup> but later treaty documents clarify that the treaty does require states to combat it. In 1989, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) issued its general recommendation number 12, stating that states must act to protect

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<sup>42</sup> Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights*, 7 HEALTH & HUM. RTS. 17, 17–18 (2004).

<sup>43</sup> See *id.* at 21.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 23.

<sup>46</sup> See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, 11th Sess., General Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38 (Feb. 1, 1992) (clarifying states' responsibilities to protect against gender based violence via criminal and non-criminal mechanisms); U.N. General Assembly, Declaration on the Elimination of Violence Against Women, art. 4, U.N. Doc A/RES/48/104 (Dec. 20, 1993) (detailing states' obligations with respect to eliminating violence against women, including providing assistance to women and children subjected to violence); Economic and Social Council, Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, ¶¶ 137–41, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994).

<sup>47</sup> See The Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

women from violence, including family violence.<sup>48</sup> The CEDAW Committee issued a more comprehensive recommendation on violence against women in 1992.<sup>49</sup> The 1992 recommendation acknowledges that both traditional attitudes about gender and economic dependence deprive women of the ability to leave family violence.<sup>50</sup> It asks states to provide criminal and civil remedies; remove honor as an affirmative defense in cases of violence against a female family member; provide protective, counseling, and rehabilitation services for victims; establish rehabilitation programs for perpetrators of domestic violence; and provide support services for families in cases of incest or sexual abuse.<sup>51</sup>

The 1995 Beijing Platform, notable because it was adopted unanimously by 189 countries at the Fourth World Conference on Women in Beijing and is considered a watershed in the global women's rights movement,<sup>52</sup> highlights violence against women as one of twelve critical areas of concern.<sup>53</sup> In furtherance of the project to end violence against women, it calls on states to "[e]nact and/or reinforce penal, civil, labour and administrative sanctions . . . to punish and redress the wrongs done to women and girls who are subjected to any form of violence" and to "[a]dopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders."<sup>54</sup> The platform also calls on governments to take measures to protect women subjected to violence, and to take measures to "modify the social and cultural patterns of conduct of men and women" and eliminate "practices based on the idea of the inferiority or superiority of either of the sexes."<sup>55</sup>

Regardless of the emphasis on prevention and modification of harmful norms, criminalization became the focus of the movement. Rights actors, in seeking to assign state responsibility to protect women from domestic violence, tended to focus on the failure of states to prosecute.<sup>56</sup> Despite careful language about improving social and cultural practices, counteracting discriminatory norms, and providing protection and support, several other key

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<sup>48</sup> U.N. Comm. on the Elimination of Discrimination Against Women, 8th Sess., General Recommendation No. 12: Violence Against Women, ¶ 1, U.N. Doc. A/44/38 (1989).

<sup>49</sup> U.N. Comm. on the Elimination of Discrimination Against Women, 11th Sess., General Recommendation No. 19: Violence Against Women, ¶ 1, U.N. Doc. A/47/38 (Feb. 1, 1992).

<sup>50</sup> *Id.* ¶ 23.

<sup>51</sup> *Id.* ¶ 24(r).

<sup>52</sup> See Rachel Bogelstein, *Beijing at Twenty: Evaluating Progress for the World's Women*, COUNCIL ON FOREIGN RELATIONS (Dec. 1, 2015), <https://www.cfr.org/blog/beijing-twenty-evaluating-progress-worlds-women> [https://perma.cc/L3M2-D2SQ].

<sup>53</sup> Fourth Conference on Women, *Beijing Declaration & Platform for Action*, ¶ 44, U.N. Doc. A/CONF/177/20 (Sept. 15, 1995).

<sup>54</sup> *Id.* at 80, § 124(c)–(d).

<sup>55</sup> *Id.* at 81, § 124(k).

<sup>56</sup> See Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36, 43 (1993).

U.N. documents pertaining to domestic violence, including the first model framework for domestic violence legislation, still emphasize criminal justice.<sup>57</sup>

Though some activists have begun to place greater emphasis on non-prosecutorial methods of stopping domestic violence,<sup>58</sup> there remains a general preference for justice interventions led by the state rather than the community. In sub-Saharan Africa, where customary law is still significant in many countries, rights actors have expressed anxiety about how customary law might be used to the detriment of women, and may, in fact, encourage violence against them. This is not unfounded, as a number of customary norms do create unequal and discriminatory conditions for women. Indeed, in a number of responses to African States Parties, various human rights treaty bodies have expressed concern over the persistence of customary institutions and norms as perpetrators of harmful discriminatory norms and practices.<sup>59</sup> In the eyes of many activists, state-led criminal justice remains a safer alternative.

### 3. *Criticisms of Carceral Policies*

A major critique leveled against the use of criminalization as a key means of combating domestic violence is that while the criminal justice system may protect and enhance the welfare of women who are privileged, it imposes harms on marginalized women. In at least some cases, the beneficiaries of carceral policies are more likely to be women who draw benefits from the state's emphasis on monogamy and the institution of heterosexual marriage.<sup>60</sup> Such women are often privileged in terms of race and class. Under carceral domestic violence policies, marginalized women suffer. Such policies increase the policing of communities of color, increase the risk of women facing family law interventions such as losing custody of their children, and put marginalized groups of women, such as those in the LGBTQ+ community, at risk of heightened harassment and abuse from police.<sup>61</sup>

While the state is often the target of reform-minded activism because it can implement widespread legal change, critics argue that it remains a patriarchal entity with no interest in the type of transformative change required to

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<sup>57</sup> Tara Urs, *Coercive Feminism*, 46 COLUM. HUM. RTS. L. REV. 85, 102–03 (2014).

<sup>58</sup> See, e.g., BRIAN HEILMAN ET AL., BEYOND BORDERS ET AL., WHOSE JUSTICE, WHOSE ALTERNATIVE? 3 (2016) [<https://perma.cc/BXB2-975B>].

<sup>59</sup> See, e.g., Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶¶ 191–92, U.N. Doc. A/59/38 (2004) (discussing Equatorial Guinea); Rep. of the Comm. on the Elimination of Racial Discrimination, ¶ 295, U.N. Doc. A/60/18 (2005) (discussing Nigeria); Rep. of the Human Rights Comm., ¶ 78(21), U.N. Doc. A/58/40 (2002) (discussing Togo).

<sup>60</sup> Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEORY & SOC'Y 233, 246–47 (2012). Using the anti-trafficking movement as a case study, Bernstein critiques carceral agendas in feminist advocacy. *Id.*

<sup>61</sup> Goodmark, *Law and Justice*, *supra* note 10, at 720.

truly undercut domestic violence.<sup>62</sup> The emphasis on criminal justice maintains focus on the individual: the crime is a discrete crime against an individual woman and the remedy applies to her situation alone. The criminal justice approach is also accompanied by the state's relative neglect of programs that could empower women who are in abusive relationships<sup>63</sup> and ultimately fails to transform the societal power structures that permit violence against women.

For example, the state, in choosing to spend money on prosecution and incarceration, also chooses not to spend money on adequately supporting women so that they may exit abusive relationships. Many women in abusive relationships are unable to leave for economic reasons, and critics argue that programs providing economic and social support for abused women would be better able to protect these women.<sup>64</sup> In the United States, however, with the promotion of criminal justice programs, economic empowerment has been given short shrift. Welfare reform legislation signed by President Clinton two years after the passage of VAWA essentially “stripped away an economic safety net that allowed survivors to flee abusive relationships.”<sup>65</sup> The act, entitled the Personal Responsibility and Work Opportunity Reconciliation Act, introduced new welfare requirements—including mandates that recipients seek child support, stay in school, and get a job—that can be difficult to meet for abused women, who face danger when seeking child support and sabotage at the hands of their abusers when attempting to attend school or gain employment.<sup>66</sup> To respond to these issues, a later amendment to the Act introduced the Family Violence Option, which offered a waiver of the new welfare requirements if domestic violence prevented compliance.<sup>67</sup> Though many states adopted this option, it has not been implemented in a manner that has effectively responded to the needs of women facing domestic violence.<sup>68</sup>

In addition, the incarceration of the perpetrator does not change patterns of domestic abuse in society, and may even increase the abuse suffered on an individual level. In the model of incarceration-as-remedy, the characteristics of male-female relationships in a patriarchal society remain unaltered. Incarceration does not impact the broader problem of gender inequality, and existing societal power structures persist.<sup>69</sup> If anything, such power struc-

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<sup>62</sup> Rachele Brooks et al., *Feminist Strategies: The Terms of Negotiation*, in FEMINISTS NEGOTIATE THE STATE, *supra* note 4, at 83–84.

<sup>63</sup> Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014) [<https://perma.cc/M37L-K484>]; Miller, *supra* note 42, at 27–28.

<sup>64</sup> Law, *supra* note 63.

<sup>65</sup> *Id.*

<sup>66</sup> MICHELLE L. MELOY & SUSAN L. MILLER, *THE VICTIMIZATION OF WOMEN: LAW, POLICIES, AND POLITICS* 118–19 (2011).

<sup>67</sup> *Id.* at 120.

<sup>68</sup> *Id.* at 120–22.

<sup>69</sup> The state as provider of justice has been characterized as a form of neoliberalism. Bernstein argues that neoliberalism helped introduce carcerality to feminist movement, moving it away from more economic and social concerns. Bernstein, *supra* note 60, at

tures are reinforced.<sup>70</sup> In both the United States and Uganda, poorer women are more likely to suffer from partner violence.<sup>71</sup> Perversely, the economic strain caused by incarceration can, in turn, increase risks for domestic violence in poorer areas.<sup>72</sup>

To benefit from the criminal justice system, women are often forced to fit into accepted narratives. Passivity is an important part of these narratives.<sup>73</sup> Though the battered women's movement sought to upend gender inequality, it also contributed to the construction of the "battered woman" identity: a vulnerable and passive woman.<sup>74</sup> Further, in the United States, the unfortunate reality is that women who are low-income, non-white, or queer are often excluded from this ideal image of a victim.<sup>75</sup>

Women who do look like the battered woman stereotype are often ignored when they express a preference for an alternative to prosecution because, according to the battered women syndrome theory, they may be incapable of making such a choice due to their "learned helplessness."<sup>76</sup> This notion of learned helplessness supports the creation of no-drop and mandatory participation policies. From a social work perspective, the danger of carceral feminism is that it prevents social workers from seeing women as agents who can participate in the movement to fight against domestic violence.<sup>77?</sup>

Women who do not fit the ideal battered woman type are less able to demand justice.<sup>78</sup> These are women who are more likely to fight back and are

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235. Interestingly, at least one theorist considers neoliberalism as a "remasculinization of the state." *Id.* at 238 (describing Wacquant's theorization). Thus, relying on criminalization to protect women in domestic violence situations becomes a potentially patriarchal endeavor. On the other hand, at least one proponent of prosecution has argued that, if done correctly, prosecution in domestic violence cases can change the character of a state into a more feminist one. Michelle Madden Dempsey, *Toward a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean?*, 70 *MOD. L. REV.* 908, 922–25 (2007).

<sup>70</sup> Bernstein, *supra* note 60, at 239.

<sup>71</sup> Donna Coker & Ahjane D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 *U. MIAMI RACE & SOC. JUST. L. REV.* 585, 610–11 (2015) [hereinafter Coker & Macquoid, *Opposing Hyper-Incarceration*]; UGANDA BUREAU OF STATISTICS, 2016 UGANDA DEMOGRAPHIC AND HEALTH SURVEY 54 (2018) [<https://perma.cc/4N9M-4Z9P>] [hereinafter UGANDA BUREAU OF STATISTICS, UGANDA DEMOGRAPHIC AND HEALTH SURVEY].

<sup>72</sup> Coker & Macquoid, *Opposing Hyper-Incarceration*, *supra* note 71, at 598, 610–11.

<sup>73</sup> Morrison, *supra* note 11, at 1084–85; Leigh Goodmark, *When is a Battered Woman not a Battered Woman? When She Fights Back*, 20 *YALE J. L. FEMINISM* 75, 82–85 (2008) [hereinafter Goodmark, *When is a Battered Woman*].

<sup>74</sup> Goodmark, *When is a Battered Woman*, *supra* note 73, at 82–84.

<sup>75</sup> Morrison, *supra* note 11, at 1082–83; Goodmark, *When is a Battered Woman*, *supra* note 73, at 85–92.

<sup>76</sup> Hanna, *supra* note 25, at 1883–84.

<sup>77</sup> See Elizabeth Sweet, *Carceral Feminism: Linking the State, Intersectional Bodies, and the Dichotomy of Place*, 6 *DIALOGUES IN HUM. GEOGRAPHY* 202, 203 (2016).

<sup>78</sup> They find themselves struggling to access justice in multiple ways, including obtaining civil protection orders and finding support from social workers or the criminal

thus less likely to be viewed as credible by prosecutors and juries.<sup>79</sup> Sometimes such women are arrested as a result of mandatory arrest laws, which require police to make an arrest after receiving a domestic violence call. In cases where the identity of the abuser is not clear to the responding officers, sometimes because the abused doesn't fit their image of a "victim," officers make dual arrests.<sup>80</sup> Women who fight back against their abusers have been subject to arrest, even when "stand your ground" laws and self-defense theories should have been available to them.<sup>81</sup>

Additionally, in an adversarial system of justice, victims of domestic violence often cannot testify in a way that is meaningful to them.<sup>82</sup> Rules of evidence and prosecutorial strategies set limits on admissible testimony, preventing women from fully telling their stories in court.<sup>83</sup> Though storytelling is, admittedly, not a goal of the adversarial system, it is often an important part of the resolution process for victims of crimes.

Still, the use of the criminal justice system is deemed valuable because some women do want their batterers to face prosecution, and activists do find benefits to the state getting involved. For example, though they found it problematic, many women of color did advocate for the passage of VAWA.<sup>84</sup> One reason was the act's expressive value: despite the negative consequences caused by increased policing and arrest, VAWA sent a message that domestic violence was a national issue that should not be swept under the rug.<sup>85</sup> A state's choice to prosecute domestic violence cases has similar expressive value. In addition, even as some women do not find justice in the prosecution and incarceration of their abusers, some women do. Arrest is also sometimes the only way to remove an extremely dangerous abuser, and for some, justice arrives only after a criminal sentence is handed down.

Fortunately, alternatives to prosecution do not need to take the place of prosecution; they can function as an additional option for victims, rather

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justice system. *See id.*; Goodmark, *When is a Battered Woman*, *supra* note 73; Morrison, *supra* note 11, at 1082–85.

<sup>79</sup> Goodmark, *When is a Battered Woman*, *supra* note 73, at 92–112.

<sup>80</sup> Law, *supra* note 63.

<sup>81</sup> MS. FOUND. FOR WOMEN, SAFETY & JUSTICE FOR ALL: EXAMINING THE RELATIONSHIP BETWEEN THE WOMEN'S ANTI-VIOLENCE MOVEMENT AND THE CRIMINAL LEGAL SYSTEM 13 (2003) [<https://perma.cc/5RQE-T9TQ>]; *see also* Christine Hauser, *Florida Woman Whose "Stand Your Ground" Defense was Rejected is Released*, N.Y. TIMES (Feb. 7, 2017) [<https://perma.cc/V2JP-CA7P>] (detailing the notorious example of a Florida woman who fired a warning shot at her abusive husband, stood trial, and initially had her "stand your ground" defense rejected).

<sup>82</sup> Goodmark, *Law and Justice*, *supra* note 10, at 715. This criticism does not apply to the inquisitorial styles of justice found in some civil law countries like France, where parties are usually afforded the opportunity to tell their stories without being directed by the questions of a direct or cross examination.

<sup>83</sup> *Id.* at 715–16.

<sup>84</sup> Miriam Zoila Pérez, *Seven Important Facts About the Violence Against Women Act at 20*, COLORLINES (Sept. 12, 2014), <https://www.colorlines.com/articles/seven-important-facts-about-violence-against-women-act-20> [<https://perma.cc/ULF9-ECX7>].

<sup>85</sup> *Id.*

than as a substitute for state-led criminal justice. Offering community-based alternatives as *meaningful* alternatives requires the elimination of certain carceral policies that force arrest and prosecution in direct contravention of the victim's express wishes.

### B. Restorative Justice and Community-Based Alternatives

Activist critics of carceral policies have implemented community-based alternatives to prosecution as a means of providing justice for those who find none in the formal system. Though alternatives to prosecution may be more common in the form of traditional justice outside the West, they are also gaining traction in countries like the United States. Restorative justice theory drives many of these new alternatives to prosecution. Though these restorative options seek to provide more holistic solutions that will benefit the victim and hopefully change the perpetrator's behavior, there are drawbacks to relying on restorative justice. Some theorists have thus put forth the concept of transformative justice, which is designed to maintain the benefits of restorative justice while overcoming the drawbacks. Still, both forms of justice must work hard to overcome existing community and family biases that may exist.

#### 1. International Roots

Restorative justice is the driving force behind a growing number of alternative justice initiatives around the world. Popularly used for cases of juvenile justice,<sup>86</sup> it has also been utilized to respond to a range of other crimes, including domestic violence and murder.<sup>87</sup> At least since the 1990s, restorative justice has been seriously proposed by scholars as an alternative to using criminal justice in cases of gender-based violence.<sup>88</sup>

Restorative justice practices and theories in the West often draw inspiration from "traditional" forms of justice seen in local indigenous populations and throughout sub-Saharan Africa and Asia. In 1989, for example, to respond to juvenile crime, New Zealand adapted family group conferences from Maori justice practices.<sup>89</sup> New Zealand's approach has served as a model for other restorative justice mechanisms in the West.<sup>90</sup> In addition,

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<sup>86</sup> Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616, 618 (2002).

<sup>87</sup> See, e.g., Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES MAG., Jan. 4, 2013 [<https://perma.cc/4AF7-RJWU>] (describing a family's forgiveness after domestic violence and murder).

<sup>88</sup> John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, in JUST BOYS DOING BUSINESS: MEN, MASCULINITY AND CRIME 189 (Tim Newburn & Elizabeth A. Stanko eds., 1994).

<sup>89</sup> *Id.* at 192–93.

<sup>90</sup> SUJATHA BALIGA ET AL., *Impact Justice et al., Restorative Community Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program*

scholars have suggested that restorative justice mechanisms reflect lessons from Navajo Peacemaking,<sup>91</sup> transitional justice truth commissions,<sup>92</sup> and Rwanda's *Gacaca* courts, among other sources.<sup>93</sup>

However, it is not accurate to claim that restorative justice theory is entirely drawn from non-Western sources. Modern restorative justice mechanisms incorporate elements of various versions of "traditional" justice, but they also are developed to respond to existing needs and values, and thus incorporate other—sometimes Western or formal—elements.<sup>94</sup>

Though it can take different forms, restorative justice commonly involves the coming together of the victim, the offender, and, in many cases, the community, to review the harm committed and come to a resolution.<sup>95</sup> This usually involves an apology and some act of repentance by the offender.<sup>96</sup> Common methods of achieving this "coming together" are mediation, conferencing, and peace or sentencing circles.<sup>97</sup> Importantly, restorative justice mechanisms do not need to be diametrically opposed to the formal criminal justice system.<sup>98</sup> Indeed, retributive elements may be present in the agreement reached during a restorative justice exercise.<sup>99</sup> In addition, restorative justice does not need to replace the formal criminal justice system. The two can work together, with restorative justice offered as an alternative backed up by the possibility of prosecution if it is unsuccessful.<sup>100</sup>

Some theorists have suggested that instead of "restorative justice," activists should conceptualize a form of "transformative justice." Transformative justice seeks to go a step further and cultivate community actors who can proactively intervene in and work to stop domestic violence.<sup>101</sup> This requires training community members to identify and respond appropriately to situations of domestic violence,<sup>102</sup> and may work in conjunction with restorative justice practices.<sup>103</sup> If implemented successfully, the effect could be to

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in Alameda County 3 (2017) [<https://perma.cc/2KZK-AP9T>] (describing a program adopted in California that borrowed methods from New Zealand's Family Group Counseling model); Joan Pennell & Gale Buford, *Family Group Decision Making: Protecting Women and Children*, 79 CHILD WELFARE 131, 137 (2000) (describing a program adopted in Newfoundland and Labrador, Canada based on New Zealand's model).

<sup>91</sup> Donna Coker, *Restorative Justice, Navajo Peacemaking and Domestic Violence*, 10 THEORETICAL CRIMINOLOGY 67, 69–73 (2006).

<sup>92</sup> Goodmark, *Law and Justice*, *supra* note 10, at 708–09.

<sup>93</sup> *Id.* at 709.

<sup>94</sup> Kathleen Daly, *Restorative Justice: The Real Story*, 4 PUNISHMENT & SOC'Y 55, 63–64 (2002).

<sup>95</sup> Goodmark, *Law and Justice*, *supra* note 10, at 722–23.

<sup>96</sup> *Id.* at 722.

<sup>97</sup> *Id.* at 722–23.

<sup>98</sup> Daly, *supra* note 94, at 59–60.

<sup>99</sup> Tullis, *supra* note 87.

<sup>100</sup> Braithwaite & Daly, *supra* note 88, at 201.

<sup>101</sup> Goodmark, *Law and Justice*, *supra* note 10, at 725.

<sup>102</sup> *Id.* at 725–26.

<sup>103</sup> Donna Coker and Ahjane Macquoid argue that while transformative justice mechanisms may have aspects that look like restorative justice—the bringing together of community members and interested parties, the reaching of an agreement with the goal of

transform a community from one that implicitly or explicitly permits violence to one that will prevent it.

## 2. *In the United States*

Today, there are multiple organizations in the United States advocating for or offering restorative justice options in cases of domestic violence. Such options include the Restorative Justice Project (“RJP”)<sup>104</sup> and Creative Interventions in California<sup>105</sup> and the Domestic Violence Restorative Circles (“DVRC”) Program in Minnesota.<sup>106</sup> Each takes a different approach to community-based restorative justice programming.

RJP offers assistance to communities implementing restorative justice mechanisms in juvenile justice cases, which include intimate partner violence in the form of teen dating violence.<sup>107</sup> The organization supports restorative community conferencing and circle processes, both of which involve meetings among the victim, offender, and supporters or community members, though the exact manner of facilitation differs between the two.<sup>108</sup> RJP is currently seeking to develop a model specifically for intimate partner and sexual violence.<sup>109</sup>

DVRC deviates from the model of having offenders and victims interact with each other, instead offering support circles for victims and separate transition circles<sup>110</sup> for offenders.<sup>111</sup> Participation is not mandatory for both parties; victims may refuse a support circle even as their abusers participate in the program.<sup>112</sup> Circles are made up of volunteers as well as “support

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rehabilitating the abuser and bringing justice to the victim—the two have fundamentally different theoretical underpinnings. Donna Coker & Ahjane Macquoid, *Alternatives to U.S. Responses to Intimate Partner Violence*, in *COMPARATIVE PERSPECTIVES ON GENDER VIOLENCE: LESSONS FROM EFFORTS WORLDWIDE* 169, 174–75 (Rashmi Goel & Leigh Goodmark eds., 2015). While this may be true, the idea of transformation can be applied to already existing restorative justice mechanisms. For example, in Uganda, as discussed in Section II.C.2, *infra*, one NGO has worked to turn the system of reconciliation, which is restorative, into something more transformative, by engaging in exactly this type of training of community members.

<sup>104</sup> *The Restorative Justice Project*, IMPACT JUSTICE, <https://impactjustice.org/impact/restorative-justice> [https://perma.cc/69JC-A6WW] [hereinafter *Restorative Justice Project*].

<sup>105</sup> *About*, CREATIVE INTERVENTIONS, <http://www.creative-interventions.org/about> [https://perma.cc/2FTB-HSKJ].

<sup>106</sup> *Domestic Violence Restorative Circles*, MEN AS PEACEMAKERS, <http://www.menaspeacemakers.org/dvrc> [https://perma.cc/4SRU-G859] [hereinafter *Domestic Violence Restorative Circles*].

<sup>107</sup> *Restorative Justice Project*, *supra* note 104; BALIGA ET AL., *supra* note 90, at 5.

<sup>108</sup> BALIGA ET AL., *supra* note 90, at 3–5, 15 n.27.

<sup>109</sup> *Restorative Justice Project*, *supra* note 104.

<sup>110</sup> The term “transition circle” is what is currently used on the program website. *Domestic Violence Restorative Circles*, *supra* note 106. Others have referred to it as a “sentencing circle.” Emily Gaardner, *Lessons From a Restorative Circles Initiative for Intimate Partner Violence*, 3 *RESTORATIVE JUST.* 342, 347 (2015)

<sup>111</sup> *Domestic Violence Restorative Circles*, *supra* note 106.

<sup>112</sup> Gaardner, *supra* note 110, at 350.

persons” designated by the victim or offender, if they are available.<sup>113</sup> The transition circles are designed to promote accountability while also connecting the offender to support that may lead to behavioral change.<sup>114</sup> These circles work in conjunction with criminal justice mechanisms; for example, a sentencing recommendation for an offender will become, after a judge’s approval, part of the official court record.<sup>115</sup>

Creative Interventions operates as a resource center. The organization has published a toolkit that provides a model for “community-based interventions”<sup>116</sup> and developed the Storytelling and Organizing Project (STOP).<sup>117</sup> STOP is a community project that allows people to share their stories about taking steps to end interpersonal violence and encourages the further sharing of those stories to encourage community-based interventions.<sup>118</sup> STOP has been cited as a form of transformative justice because it enables communities to intervene in cases of domestic violence.<sup>119</sup>

### 3. Criticisms

Both restorative and transformative justice have their attendant concerns. The relative strength of the community means it can unduly influence the other parties involved. If the community facilitates violence, a key concern is that it will overrun the victim’s needs. In addition, some fear that the offender’s presence will prevent the victim from truly acting for himself or herself. To administer justice, restorative justice must allow victims to have voice and agency.<sup>120</sup> They may still prefer criminal justice because of the expressive value it provides; it sends the message that the state does not condone domestic violence. If the state steps aside, some also fear that it will also return to neglecting domestic violence altogether.

In restorative justice mechanisms, the community plays an important role, and thus has the potential to either promote or hinder the cessation of violence. The community is presented as a potential member that can ensure long-term compliance by the perpetrator.<sup>121</sup> On the other hand, the community can be complicit in the domestic violence. A community’s failure to act in response to manifest situations of violence is tantamount to condoning the

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<sup>113</sup> *Id.*

<sup>114</sup> *Domestic Violence Restorative Circles*, *supra* note 106.

<sup>115</sup> Gaardner, *supra* note 110, at 348.

<sup>116</sup> *Toolkit*, CREATIVE INTERVENTIONS, <http://www.creative-interventions.org/tools/toolkit> [https://perma.cc/4JYL-GQ5U3].

<sup>117</sup> *Welcome to the Storytelling & Organizing Project*, <http://www.stopviolenceeveryday.org/stop-2> [https://perma.cc/RR5E-NYF8].

<sup>118</sup> *Stories*, CREATIVE INTERVENTIONS, <http://www.creative-interventions.org/stories> [https://perma.cc/2JBX-VHQQ].

<sup>119</sup> Goodmark, *Law and Justice*, *supra* note 10, at 725–26.

<sup>120</sup> *Id.* at 727–29; HEILMAN ET AL., *supra* note 58, at 5.

<sup>121</sup> Julie Stubbs, *Domestic Violence & Women’s Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42, 52 (Heather Strang & John Braithwaite eds., 2002).

violence.<sup>122</sup> In addition, by perpetuating the gender inequalities and structures that permit violence, the community enables it.<sup>123</sup> The process of restorative justice may not change the overall inequality and patriarchy that permits domestic violence.<sup>124</sup> Accordingly, using a restorative justice approach requires acknowledging that the community may not support the victim in the best way. In such conditions, restorative justice may fail to be transformative and might reinforce patriarchal structures just as much as, if not more than, the state.

Transformative justice seeks to mitigate the problem of the resistant community, but transforming community norms is a difficult task when community members have a strongly held mindset shaped by longstanding, interrelated societal norms that impact many aspects of life. Until the community becomes more feminist or victim-centered, community-based structures may undermine women, particularly marginalized women, just as much as the formal criminal justice system.

In addition, models that involve the coming together of the victim, the offender, and community stakeholders can put the victim at the lowest end of a deeply rooted power hierarchy. It is the nature of domestic violence for offenders to have control over the victims, and a face-to-face conference steps right into the unequal power dynamic.<sup>125</sup> The presence of the offender and community members may create a heightened pressure for the victim to reconcile, even if the victim is not ready to do so.<sup>126</sup> Thus, as with prosecution, decision-making that involves both the community and offender can just as easily lead to a result that is not in the victim's best interest or even what the victim desires.

Furthermore, if these community-based mechanisms pick up steam and the state is increasingly out of the picture, domestic violence runs the risk of becoming a private matter once more. Before domestic violence fell under the purview of the criminal justice system, it was not uncommon for community or religious leaders to "mediate" disputes between couples, and try to keep the family together. In the past, this meant that "moderate chastisement" was acceptable and that certain behaviors on the part of the wife were seen to encourage wife beating.<sup>127</sup> Without the accountability mechanisms that function against state institutions, these alternative justice mechanisms could begin promoting norms that actually further disempower women. Any functioning alternative to prosecution would thus need to account for these potential missteps and provide insurance against such backsliding.

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<sup>122</sup> *Id.* at 52–53.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 54.

<sup>125</sup> *Id.* at 57.

<sup>126</sup> *Id.*

<sup>127</sup> Felter, *supra* note 22, at 9–10.

## II. DOMESTIC VIOLENCE IN UGANDA

### A. *An Overview of Domestic Violence in Uganda*

Domestic violence, particularly domestic violence committed against women, continues to be a major issue in Uganda. Recent survey data reveal that physical, emotional, and sexual violence against a spouse or partner continues to be a significant problem.<sup>128</sup> However, these data present only a partial picture. Data presented do not explicitly discuss same-sex relationships, which are still extremely taboo in Uganda.<sup>129</sup> In addition, economic violence, violence against widows, violence against domestic workers, and violence in cohabitation relationships, which are not discussed in the recent survey data, are also significant phenomena in Uganda.<sup>130</sup>

Responding to the 2016 Uganda Demographic and Health Survey, significant percentages of men and women reported experiencing physical, emotional, or sexual violence from a recent spouse or partner, with women experiencing it at higher rates. Fifty-six percent of ever-married women and forty-four percent of ever-married men reported experiencing violence by their current or most recent spouse or partner.<sup>131</sup>

When the data are disaggregated according to type of violence experienced, sex-based differences become stark. Women are much more likely than men to experience physical and sexual violence from a current or recent spouse or partner. Forty-four percent of women reported experiencing physical violence, versus twenty-one percent of men.<sup>132</sup> Additionally, only six percent of women are reported to have ever initiated such physical violence, as opposed to responding to violence already being committed against them with violence.<sup>133</sup> Twenty-two percent of men, on the other hand, are reported to have ever initiated such physical violence.<sup>134</sup> Though this number is high, it is a significant improvement over the previous data from 2011, which reported that forty-one percent of men initiated physical violence against a spouse or partner.<sup>135</sup> Twenty-five percent of women reported experiencing sexual violence versus only nine percent of men.<sup>136</sup> There is less of a differ-

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<sup>128</sup> UGANDA BUREAU OF STATISTICS, UGANDA DEMOGRAPHIC AND HEALTH SURVEY, *supra* note 71, at 313–22.

<sup>129</sup> *Ugandan LGBT Community Celebrates Gay Pride Despite Nation's Taboo*, CBC NEWS (Aug. 8, 2015), <https://www.cbc.ca/news/world/ugandan-lgbt-community-celebrates-gay-pride-despite-nation-s-taboo-1.3184440> [<https://perma.cc/6B93-69ED>].

<sup>130</sup> See discussion *infra*, text accompanying footnotes 147–62.

<sup>131</sup> UGANDA BUREAU OF STATISTICS, UGANDA DEMOGRAPHIC AND HEALTH SURVEY, *supra* note 71, at 313.

<sup>132</sup> *Id.* at 319.

<sup>133</sup> *Id.* at 322. The “initiation of physical violence” metric measures the percentage of those who commit physical violence against a current or most recent spouse/partner when that recent spouse/partner was not already committing physical violence against them. *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 319.

ence with respect to emotional violence, which forty-one percent of women and thirty-six percent of men reported experiencing.<sup>137</sup>

Unfortunately, the survey also reports that the majority of men and women do not seek help to stop physical or sexual violence at the hands of a spouse or partner. Only thirty-three percent of women and thirty percent of men seek help.<sup>138</sup> Wealthier and more educated women are *less* likely to engage in help-seeking.<sup>139</sup> For both men and women experiencing these forms of violence, the family is the most accessed source of help.<sup>140</sup> The majority of help-seeking women (56.9%) sought family assistance.<sup>141</sup> Only 16.4% went to the police, 0.6% to a lawyer, and 1.6% to a social work organization.<sup>142</sup> Help-seeking men appear to be more willing to go to the police. Of men seeking help for physical or sexual violence, 39.9% sought out their own family for help and 23.1% sought out the police.<sup>143</sup> Only 1.5% went to a lawyer and 1.4% to a social work organization.<sup>144</sup> The tradition of resolving disputes within the family group remains strong with respect to domestic violence.

The data are revealing with respect to certain forms of domestic violence, but they do not capture the full array of domestic violence in the country,<sup>145</sup> especially with respect to women. Notably, the survey did not ask about economic violence, which is more likely to affect women because of their relative lack of economic power. Advocates have reported that economic violence cases, which typically take the form of a failure to provide for the basic needs of a partner and shared children, are among the most common cases they see.<sup>146</sup> Failure to provide by a male partner can be devastating in a country where men are the primary breadwinners.

Other types of economic violence are also perpetrated against women. In the Busoga region in eastern Uganda, which is reported to register the

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 322.

<sup>139</sup> *Id.* at 323.

<sup>140</sup> *Id.* at 364.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

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

<sup>145</sup> In addition to sexual and physical violence, the survey also seeks to measure rates of marital control and being in fear of a spouse or partner in its domestic violence module. *Id.* at 313. In other modules, it tracks indicators that may provide insight as to other types of domestic violence experienced by women, such as men and women's relative power in making decisions about the household or family planning, who controls a woman's earnings, and who owns property, but it does not directly assess to what degree women experience levels of other types of domestic violence. *Id.* at 115, 275–81.

<sup>146</sup> Interview with Stella Biwaga, Program Manager, FIDA Uganda, in Kampala, Uganda (June 23, 2015); Interview with Victor Kumakech, Manager, Justice Centers, in Lira, Uganda (June 29, 2015); Interview with Dorah Mafabi, Head of Mission, Avocats Sans Frontieres Uganda, in Kampala, Uganda (July 1, 2015); Interview with Judith Nakalembe, Coordinator, Kamuli Gender Based Violence Center and Legal Officer, UWONET, in Kamuli, Uganda (July 8, 2015).

highest number of domestic violence complaints in the country,<sup>147</sup> the loss of property rights is very common. The coordinator of the Kamuli Gender Based Violence Center has reported that while multiple women in the region will work on the land to grow crops, it is common practice for men to sell off the crops during the harvest without consulting their partners, and then evict them.<sup>148</sup> Many of these women are only in cohabiting relationships and thus cannot assert rights to the land after they have been evicted.<sup>149</sup> These women, who shouldered the burden of working the land, are then left without the fruit of their labor or access to the property.

Widows also experience domestic violence, especially when land is at play. Although widows have a legal entitlement to occupy their deceased husbands' residential holdings and inherit a portion of the remaining intestate estate,<sup>150</sup> the practice of widow eviction still occurs.<sup>151</sup> The practice is itself a form of economic abuse under Ugandan law, because it is a "deprivation of all or any economic or financial resources to which the victim is entitled."<sup>152</sup> However, it is also sometimes accompanied by other forms of violence. A study in Mukono, Uganda revealed that in-laws engage in a range of violent acts to push widows off the land, including verbal threats, physical violence, and sometimes even murder.<sup>153</sup> One magistrate noted that she had often seen criminal accusations made against widows in order to get them arrested and kept in pre-trial detention while the in-laws seized their property and reallocated it.<sup>154</sup>

Domestic workers, who are often young girls, are also at high risk of experiencing various forms of domestic violence. The definition of domestic violence in the Domestic Violence Act extends to domestic workers,<sup>155</sup> though whether these domestic workers are able to find any relief given their

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<sup>147</sup> Interview with Judith Nakalembe, *supra* note 146.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Succession Act §§ 26–29, Second Schedule ¶(1)–(4) (1906) (Uganda).

<sup>151</sup> Skype Interview with Portia, former Magistrate in Uganda (June 3, 2015); Interview with Charmian, female court user, in Lira, Uganda (June 30, 2015) (describing her own experience losing access to land after the death of her husband); Interview with Ongwen Okello, Chairperson Local Council III Court, in Lira, Uganda (June 30, 2015); Interview with Judith Nakalembe, *supra* note 146; HUMAN RIGHTS WATCH, JUST DIE QUIETLY: DOMESTIC VIOLENCE & WOMEN'S VULNERABILITY TO HIV IN UGANDA 37–38 (2003) [<https://perma.cc/EEY7-AY5H>].

<sup>152</sup> Domestic Violence Act § 2 (2010) (Uganda).

<sup>153</sup> INT'L JUSTICE MISSION, PROPERTY GRABBING FROM UGANDAN WIDOWS AND THE JUSTICE SYSTEM 11 (2014) [<https://perma.cc/PT6G-FRZR>].

<sup>154</sup> SKYPE INTERVIEW WITH PORTIA, *supra* note 151.

<sup>155</sup> The domestic work relationship is included among the "domestic relationships" in which certain acts are considered to be domestic violence and subject to punishment accordingly. Specifically, the definition of domestic relationship includes, *inter alia*, "a relationship similar to a family relationship or a relationship in a domestic setting that exists or existed between a victim and a perpetrator and includes a relationship where— . . . (d) the victim is employed by the perpetrator as a domestic worker or house servant and the victim does or does not reside with the perpetrator." Domestic Violence Act §§ 3(1)(d), 4(1)–(2) (2010) (Uganda).

circumstances is questionable. Domestic workers are those who work for households other than their own. These relationships are typically informal and lack contracts. Domestic work is largely a feminized sector, though there are some men and boys who perform domestic work.<sup>156</sup> Forty-four percent of domestic workers in Uganda are reported to be below the age of eighteen.<sup>157</sup> These child domestic workers are at especially heightened risk of physical, sexual, and emotional abuse.<sup>158</sup> They often live in the households in which they work, are away from their families, and are isolated from the community.<sup>159</sup> They are thus extremely vulnerable to exploitation and are less likely to be visible to anyone seeking to provide aid or collect information.<sup>160</sup>

Domestic violence in Uganda is thus significant among intimate partners, but also within other household relationships. Though both men and women in Uganda are subject to such violence, women continue to suffer from heightened risk and rates of domestic violence due to their relative disempowerment.

### III. FACTORS CONTRIBUTING TO WOMEN'S VULNERABILITY TO DOMESTIC VIOLENCE

A number of economic, cultural, and social factors create conditions that make women vulnerable to domestic violence. As in the United States, a woman's economic disempowerment stunts her ability to be free from domestic violence. In Uganda, where land is perhaps the most important resource, a lack of land rights severely disempowers women. In addition, cultural practices such as bride price and child marriage contribute to women's relative inequality and vulnerability to violence. They also contribute to societal norms that find violence against women justifiable in certain circumstances.

Women endure many forms of violence because their economic dependence makes leaving untenable.<sup>161</sup> One of the biggest economic problems for women is their relative lack of access to land. Land is a key resource for Ugandans, many of whom continue to depend on it for basic subsistence.<sup>162</sup>

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<sup>156</sup> See IDAY, A SURVEY ON YOUNG & CHILD DOMESTIC WORKERS IN UGANDA 2 (2015) [<https://perma.cc/9NAY-4VJ8>].

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 10–11.

<sup>159</sup> *Id.* at 10.

<sup>160</sup> *Id.*

<sup>161</sup> HUMAN RIGHTS WATCH, *supra* note 151, at 36–37.

<sup>162</sup> In a 2016/2017 survey, 42.7% of households reported subsistence farming as their major source of income. UGANDA BUREAU OF STATISTICS, 2016/17 UGANDA NATIONAL HOUSEHOLD SURVEY 104 (2017), [http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/UNHS\\_VI\\_2017\\_Version\\_I\\_%2027th\\_September\\_2017.pdf](http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/UNHS_VI_2017_Version_I_%2027th_September_2017.pdf) [<https://perma.cc/NL6D-PB3J>].

Rural women increasingly shoulder the burden of agricultural work.<sup>163</sup> However, women continue to have unequal access to land under statutory and customary law.

Uganda's statutes grant women some rights to land, but those rights continue to be inferior to those of men and reflect discriminatory traditional practices. The Succession Act, in particular, includes provisions that were found to be unconstitutionally discriminatory by Uganda's Constitutional Court, but it has yet to be amended.<sup>164</sup> Among these provisions is one that entitles a widow the right to occupy residential holdings left by her deceased husband up until she remarries.<sup>165</sup> Widowers are given the same occupation rights, but are not subjected to such a termination event. Though this provision is technically null and void due to the Constitutional Court decision, it is a reflection of existing practice based on a deeply-held notion in customary law that women are not true members of a clan. Under this view, a widow cannot own family land, because if she remarried an "outside man," the land would no longer remain with the clan.<sup>166</sup>

Another Succession Act provision that remains on the books, despite a finding of unconstitutionality, limits a widow's share of her deceased husband's estate to fifteen percent, with the remainder allotted to lineal descendants, dependent relatives, and the customary heir.<sup>167</sup> If there are no lineal descendants, she is entitled to fifty percent of the intestate estate.<sup>168</sup> If there are no lineal descendants and no dependent relatives, she is entitled to ninety-nine percent of the estate.<sup>169</sup> Notably, this provision on intestate succession provides only for the distribution of the male estate, making no reference to a female estate, and underscores the traditional notion that anything belonging to a woman belongs to her husband as well.

Though inadequate, the rights granted by statutory law should improve women's economic circumstances, but those rights are sometimes ignored in favor of customary practices. Ugandan law recognizes four different types of land tenure,<sup>170</sup> but customary tenure is by far the most significant. Approximately eighty percent of land is held under customary tenure,<sup>171</sup> where customary norms still hold significant power. While the Land Act provides that decisions with respect to land held under customary tenure must be made in

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<sup>163</sup> FORUM FOR WOMEN IN DEMOCRACY, GENDER POLICY BRIEF FOR UGANDA'S AGRICULTURAL SECTOR 6–7 (2013).

<sup>164</sup> *See generally Law and Advocacy for Women in Uganda v. Att'y Gen.*, Constitutional Petitions Nos. 13/05 & 05/06 (Const. Ct. Uganda 2007) (finding provisions of the Succession Act to be unconstitutional).

<sup>165</sup> Succession Act § 8(1), Second Schedule ¶1(1)–(4) (1906) (Uganda).

<sup>166</sup> Interview with Ongwen Okello, *supra* note 151.

<sup>167</sup> Succession Act § 27(1)(a) (1906) (Uganda).

<sup>168</sup> *Id.* § 27(2).

<sup>169</sup> *Id.* § 27(3).

<sup>170</sup> UGANDA CONST. art. 237(3); Land Act § 2 (Uganda).

<sup>171</sup> Leslie Hannay, *Women's Land Rights in Uganda*, LANDESA (July 23, 2014), <https://www.landes.org/wp-content/uploads/LandWise-Guide-Womens-land-rights-in-Uganda.pdf> [<https://perma.cc/5Q2T-NQX7>].

accordance with custom, it also limits the application of discriminatory custom.<sup>172</sup> Among the decisions that are rendered null and void are those that would deny women rights of ownership or use of customary land.<sup>173</sup> However, violations of women's statutory property rights in favor of customary norms or practices are not uncommon.<sup>174</sup>

Under customary law, ownership and inheritance of land are generally available only to men.<sup>175</sup> Daughters are generally denied rights to inheritance, while the eldest son is expected to inherit any property.<sup>176</sup> In the absence of sons, other male relatives are given preference over daughters.<sup>177</sup> A daughter is presumed to gain access to land when she marries, and if she does not marry, it is her brother's responsibility to provide for her, sometimes by giving her a small plot of land to cultivate. If a decedent leaves surviving sons who are minors, customary law does permit a widow to manage and use her deceased husband's property in trust for her sons.<sup>178</sup> The collection of norms is thus designed to anticipate women's needs, though women's rights remain inferior to men's. However, as the practice of land grabbing from women demonstrates, the already limited protections offered to women are often ignored.

Other practices, such as the practice of bride price, also contribute to a lack of equality within marriage, which in turn makes wives vulnerable to domestic violence. Some customary marriage rites require the prospective groom (or his family) to pay a bride price to the prospective bride's family.<sup>179</sup> Though this practice may have had positive aspects historically, such as bringing together two families and demonstrating appreciation for the soon-to-be wife, it also contributes to the view of women as chattel.<sup>180</sup> As the property of her husband, a woman can be beaten.<sup>181</sup> In addition, because she

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<sup>172</sup> Land Act § 27 (Uganda).

<sup>173</sup> *Id.* Section 27 of the Land Act provides, in part, that, "a decision which denies women or children or persons with a disability access to ownership, occupation or use of any land or imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void." Article 33 of Uganda's Constitution lays out "Rights of women," and provides, *inter alia*, that, "(1) [w]omen shall be accorded full and equal dignity with men," and "(4) women shall have the right to equal treatment with men." UGANDA CONST. art. 33.

<sup>174</sup> MINISTRY OF LANDS, HOUS., AND URBAN DEV., THE UGANDA NATIONAL LAND POLICY 3 (2013), <http://extwprlegs1.fao.org/docs/pdf/uga163420.pdf> [<https://perma.cc/8VH3-K6RV>] [hereinafter Uganda National Land Policy].

<sup>175</sup> *Id.* at 3.

<sup>176</sup> Florence Asiimwe & Owen Crankshaw, *The Impact of Customary Laws on Inheritance: A Case Study of Widows in Urban Uganda*, 3 J. L. & CONFLICT RESOL. 7, 8 (2011).

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

<sup>178</sup> *Id.*

<sup>179</sup> Gill Hague et al., *Bride-Price and its Links to Domestic Violence and Poverty in Uganda: A Participatory Action Research Study*, 34 WOMEN'S STUD. INT'L F. 550, 551 (2011).

<sup>180</sup> *Id.* at 555.

<sup>181</sup> *Id.* at 557.

is seen as property, she is not able to own her own property,<sup>182</sup> regardless of what the law says. This contributes to the ongoing property rights violations and economic disempowerment of women.

In some cases, the bride price requirement has inadvertently led to the increase in what are technically cohabitation relationships, to the detriment of women's economic security. As the demands for bride price become increasingly high,<sup>183</sup> young men who find themselves struggling to pay may respond by delaying payment while essentially living as married.<sup>184</sup> Though this issue is framed as harmful to the men seeking marriage, it also has negative consequences for the women entering cohabitation relationships. These men and women are living as if they were married, but lack the key measure of a customary marriage.<sup>185</sup> Without a marriage recognized by statutory or customary law, the end of a relationship leaves the woman unable to assert even the limited rights she might have received under customary law. This is yet another pathway to economic disadvantage and increased vulnerability to domestic violence.

Bride price also contributes to the phenomenon of child marriage, which persists despite the fact that age of marriage is constitutionally set at eighteen years.<sup>186</sup> Pursuant to this practice, young girls often find themselves married to older men, sometimes because older men are better able to pay bride price.<sup>187</sup> In such relationships, the young girls lack any bargaining power with their older husbands. Girls who marry young are reportedly more likely to experience violence and to believe that violence against them is justified.<sup>188</sup>

In addition, some forms of domestic violence are simply and directly supported by social norms. Survey data has shown that physical violence in the form of "wife beating," specifically, is considered justified in certain circumstances by a large percentage of the population. The Uganda Demographic and Health survey asked respondents whether a husband is justified in hitting or beating his wife for any of the following reasons: (1) the wife neglects her children, (2) the wife goes out without telling her husband, (3)

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<sup>182</sup> Jacqueline Asimwe, *Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses*, 4 YALE HUM. RTS. & DEV. L.J. 171, 174 (2001). In numerous conversations I have had with various respondents from East Africa over the past thirteen years, the phrase "property cannot own property" has been a recurring one, to indicate that women, as property, cannot be deemed to own land or marital property.

<sup>183</sup> Hague, *supra* note 179, at 558.

<sup>184</sup> Margaret Oguli Oumo, *Bride Price and Violence Against Women: The Case of Uganda*, Presented at the International Conference on Bride Price and Development, Kampala, Uganda § 2.0 (Feb. 18, 2004).

<sup>185</sup> Hague, *supra* note 179, at 555 (noting that bride price can act as a certificate of customary marriage).

<sup>186</sup> UGANDA CONST. art. 31(1).

<sup>187</sup> See Oumo, *supra* note 184, at § 2.0.

<sup>188</sup> JOY FOR CHILDREN UGANDA, CHILD, EARLY, AND FORCED MARRIAGE IN UGANDA 8, submitted in response to the Note Verbale on Human Rights Council on "Child, Early, and Forced Marriage," U.N. Doc. A/HRC/Res/24/23 (2013).

the wife burns the food, (4) the wife argues with her husband, and (5) the wife refuses to have sex with her husband.<sup>189</sup> Forty-nine percent of women and forty-nine percent of men aged fifteen to forty-nine agreed that any of these reasons justified wife beating,<sup>190</sup> with varying percentages of each agreeing with specific justifications only.<sup>191</sup> Though these percentages are high, there is a positive trend: the number of men and women agreeing with justifications for wife beating has declined over time.<sup>192</sup>

The overall lack of land rights, along with practices like bride price and child marriage that perpetuate women's inequality and disempowerment, are only some of the factors that contribute to the prevalence of domestic violence. This discussion does not purport to present an exhaustive explanation of why domestic violence occurs in Uganda. What it reveals, however, is that both statutory law and persistent custom must be addressed to improve women's status and better position them to fight back against domestic violence.

#### IV. LEGAL FRAMEWORK

Uganda's Constitution and Domestic Violence Act are the key documents providing rights to women in the context of domestic violence. Both internal and external voices are reflected in these documents. During the drafting of the 1995 Constitution, Constituent Assembly members raised the issue of domestic violence as one that their constituents felt needed to be addressed by the state.<sup>193</sup> However, notably, none of the delegates suggested that it be directly addressed in the Constitution.<sup>194</sup> The influence of past and current intervention by external actors can be seen in the use of the state as primary actor and the primary role of criminal justice in the state's intervention. Domestic and traditional influences can be seen in the Domestic Violence Act's promotion of reconciliation, which resembles traditional forms of justice, alongside prosecution as an intervention.

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<sup>189</sup> UGANDA BUREAU OF STATISTICS, UGANDA DEMOGRAPHIC AND HEALTH SURVEY, *supra* note 71, at 280.

<sup>190</sup> *Id.* at 280–81.

<sup>191</sup> In order of decreasing agreement, the following percentages of women and men, aged fifteen to forty-nine, agreed with the justifications as follows: wife neglecting her children (thirty-nine percent of women and twenty-eight percent of men); wife went out without telling her husband (thirty percent of women and twenty-two percent of men); wife argues with her husband (twenty-six percent of women and twenty-three percent of men); wife refuses sexual intercourse (eighteen percent of women and twelve percent of men); and wife burns the food (fourteen percent of women and seven percent of men). *Id.* at 281.

<sup>192</sup> *Id.* at 280–81.

<sup>193</sup> Jamil Ddamulira Mujuzi, *The Ugandan Domestic Violence Act: The Drafting History and Challenges to its Implementation*, 28 INT'L J.L. POL'Y & FAM. 257, 258–59 (2014).

<sup>194</sup> *Id.*

While Uganda's Constitution does not specifically address domestic violence, it does include rather significant language with respect to women's rights. In terms of equality, women are given, *inter alia*, equal rights "in marriage, during marriage, and at its dissolution,"<sup>195</sup> and "full and equal dignity of the person with men."<sup>196</sup> In addition, the Constitution both requires the state to "provide the facilities and opportunities necessary to enhance the welfare of women,"<sup>197</sup> and prohibits any "laws, cultures, customs or traditions which are against the dignity, welfare or interest of women."<sup>198</sup>

Uganda's Domestic Violence Act, enacted in 2010, criminalizes acts of domestic violence committed by a person in a domestic relationship.<sup>199</sup> Both "domestic violence" and "domestic relationship" are broadly defined terms. Domestic violence includes, among other things, acts or omissions which harm the health, safety, and well-being of the victim and which cause physical abuse; sexual abuse; emotional, verbal, and psychological abuse; and economic abuse.<sup>200</sup> Each of these forms of abuse is further defined in the Act itself.<sup>201</sup> Economic abuse, one of the most common, includes "deprivation of all or any economic or financial resources to which the victim is entitled . . . including . . . household necessities for the victim and his or her children."<sup>202</sup> Domestic relationships include relationships in which the parties are married; the parties are family members; the parties share a residence; the victim is employed by the perpetrator as a domestic worker or house servant but the parties do not share a residence; the perpetrator is *employed by*, but does not share a residence with, the victim; and the characteristics are such that a court determines it to be a domestic relationship.<sup>203</sup>

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<sup>195</sup> UGANDA CONST. art. 31.

<sup>196</sup> *Id.* art. 33(1).

<sup>197</sup> *Id.* art. 33(2).

<sup>198</sup> *Id.* art. 32(2).

<sup>199</sup> Domestic Violence Act § 4(2) (2010) (Uganda).

<sup>200</sup> *Id.* § 2. The complete definition of the term is as follows:

“‘[D]omestic violence’ constitutes any act or omission of a perpetrator which—

- (a) harms, injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse;
- (b) harasses, harms, injures or endangers the victim with a view to coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security;
- (c) has the effect of threatening the victim or any person related to the victim by any conduct mentioned in paragraph (a) or (b); or
- (d) otherwise injures or causes harm, whether physical or mental, to the victim.

*Id.* The terms “physical abuse,” “sexual abuse,” “emotional, verbal and psychological abuse,” and “economic abuse” are further defined in the Act, as is the term “harass.” *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* § 3(1).

Ugandan law endorses two main paths to justice in cases of domestic violence: justice through the courts and restorative justice via reconciliation or mediation. Local council courts, magistrate courts, and Family and Children Courts are all granted jurisdiction to hear cases involving domestic violence, though not all involve carceral justice. Criminal jurisdiction is exercised by the magistrate courts, which may order fines or imprisonment. Reconciliation is also available in both criminal and civil cases of domestic violence. It may be ordered by the local council courts, encouraged by other justice system actors, or undertaken by the parties of their own volition. Thus, the court system is entangled in both forms of justice.

### 1. *Using the Court System*

Jurisdiction to hear domestic violence matters is granted to local council courts,<sup>204</sup> magistrate courts,<sup>205</sup> and Family and Children Courts,<sup>206</sup> each of which is empowered by statute. The magistrate courts and Family and Children Courts look more or less like what one would expect of a formal court in the West. Magistrate courts exercise extensive original jurisdiction in civil<sup>207</sup> and criminal<sup>208</sup> proceedings, including over some matters governed by customary law. Magistrates also preside over Family and Children Courts, which are granted jurisdiction to govern over matters relating to family law.<sup>209</sup>

Local council courts are a different type of institution. These courts are located at the village, parish, town, division, and sub-county levels.<sup>210</sup> The statute creating them gives them jurisdiction over a range of matters, including some civil matters governed by customary law.<sup>211</sup> Accordingly, due to both geographic and cultural proximity, these courts are typically more accessible for would-be court users than magistrate courts. Local council courts reflect a more traditional form of justice to most users and observers.

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<sup>204</sup> *Id.* § 6.

<sup>205</sup> *Id.* § 9(1). There are three levels of magistrate courts: Magistrate Grade I, Magistrate Grade II, and Chief Magistrate. Magistrate Courts Act, Cap. 16 § 4 (1971) (Uganda). Each level of magistrate court is given jurisdiction over domestic violence cases. Domestic Violence Act § 9 (2010) (Uganda).

<sup>206</sup> *Id.* § 2.

<sup>207</sup> Magistrates Courts Act, Cap. 16 § 207 (1971) (Uganda). "A chief magistrate shall have jurisdiction where the value of the subject matter in dispute does not exceed five million shillings and shall have unlimited jurisdiction in disputes relating to conversion, damage to property or trespass." *Id.* § 207(1). All lower ranked magistrates have reduced civil subject matter jurisdiction. *Id.* § 207(1). In addition, a chief magistrate and Magistrate Grade I have unlimited jurisdiction where the cause is governed by civil customary law, regardless of the value of the disputed subject matter. *See id.* § 207(2).

<sup>208</sup> *Id.* § 161. A chief magistrate has jurisdiction over any crime except for those which are punishable by death. *Id.* All lower ranked magistrates have reduced criminal subject matter jurisdiction. *Id.*

<sup>209</sup> Children Act, Cap. 59 § 13(2) (1997) (Uganda).

<sup>210</sup> Local Council Courts Act § 3 (2006).

<sup>211</sup> *Id.* § 10.

They are rooted in the community, where community members and court members usually hail from the same tribe, speak the same language, and understand the same customary law.<sup>212</sup> Likely in an effort to combat many of the gendered aspects of customary and other local norms, two of the five sitting committee members must be female, and of the roles of chairperson and vice-chairperson, one must be male and one must be female.<sup>213</sup>

Complaints of domestic violence may be filed with local council courts or the police.<sup>214</sup> When a complaint is filed with the local council court, the local council court can usually hear the matter,<sup>215</sup> although it is required to refer the matter to the police or the local magistrate court in cases when the perpetrator is a repeat offender, the local council court feels that the victim is at risk of further harm at the hands of the perpetrator, or the local council court feels the violence is such that it requires the attention of the police and the magistrate court.<sup>216</sup> Police who receive complaints are instructed to provide assistance, including assuring victims' well-being, ensuring that victims undergo any necessary medical exams and receive treatment, and informing victims of their right to apply for relief or file a criminal complaint.<sup>217</sup>

Local council courts are ordered to treat cases of domestic violence as urgent and must hear the cases within forty-eight hours of the filing of the complaint.<sup>218</sup> The Domestic Violence Act appears to recognize the important position of local council courts in that it adds an additional positive obligation on the court to take action if any of its members is aware of domestic violence occurring in the community. If a member of the local council court "has reason to believe" that an act of domestic violence has occurred in his or her jurisdiction, and a complaint has not been filed, he or she must request an investigation by a Social and Probation Welfare officer.<sup>219</sup>

Following through with a domestic violence complaint can lead to a range of outcomes. Local council courts are authorized to make any of the following orders: declaration, caution, apology, counseling, community service, fine, compensation, reconciliation, restitution, or attachment and sale.<sup>220</sup> Both magistrate courts sitting in civil session and Family and Chil-

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<sup>212</sup> Members of the local council courts must be residents of the court's jurisdictional area and know both English and the local language. *Id.* § 5. As residents of the same geographic area over which they have jurisdiction, it is a relatively safe assumption that members of the local council courts are members of the tribe over whom they have jurisdiction and are well aware of its customary norms. Interview respondents also expressed an understanding that local council court members were members of the local tribe and understood its customs. *See, e.g.*, Interview with Dionyza, court user, in Kampala, Uganda (July 3, 2015); Interview with Emma Ssali, Lecturer, in Kampala, Uganda (July 6, 2015); Interview with Nerissa, farmer, in Kamuli, Uganda (July 8, 2015).

<sup>213</sup> Local Council Courts Act § 4, 6(2), Third Schedule (2006) (Uganda).

<sup>214</sup> Domestic Violence Act § 6(1) (2010) (Uganda).

<sup>215</sup> *Id.* § 6(2).

<sup>216</sup> *Id.* § 6(6).

<sup>217</sup> *Id.* § 7.

<sup>218</sup> *Id.* § 6(10).

<sup>219</sup> *Id.* § 6(9).

<sup>220</sup> *Id.* § 6(5).

dren Courts are empowered to issue protection orders.<sup>221</sup> Additionally, in criminal session, perpetrators of violence are subject not only to fines, but also to potential imprisonment of up to two years.<sup>222</sup> In some criminal cases asserting failure to provide, magistrates have opted to order payment to the victim rather than issue a fine to be collected by the court.<sup>223</sup> Reconciliation remains an option in any of these courts or outside of court altogether.

## 2. *Opting for Reconciliation*

Reconciliation is not a new concept in Uganda. It was present in legal documents preceding the Domestic Violence Act and bears similarities to forms of traditional justice in the country. Much like traditional justice, reconciliation is decentralized; there is no systematic, national approach to implementing reconciliation. Importantly, this decentralization creates opportunity for actors to innovate with the hope of creating meaningful change for women.

Reconciliation processes in Uganda's legal system are neither new nor limited to domestic violence cases. Reconciliation is provided for in the Constitution, which reads, "[i]n adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, . . . [promote] reconciliation between the parties."<sup>224</sup> The Domestic Violence Act explicitly recognizes reconciliation as a potential outcome of domestic violence cases heard by the local council courts.<sup>225</sup> However, even prior to the passage of the Act, reconciliation was an option for domestic violence victims.<sup>226</sup> The concept of reconciliation is also significant in the context of peacemaking in Uganda. In 2007, in an effort to end the long-running conflict in northern Uganda, the government and the Lord's Resistance Army signed an Agreement on Accountability and Reconciliation.<sup>227</sup> The Agreement's preamble refers to both the customary processes and Constitutional language promoting reconciliation.<sup>228</sup>

Though the term "reconciliation" is not used in conjunction with customary law in the Constitution or in the Domestic Violence Act, there are some apparent connections between the two. Throughout my interviews, respondents described common core characteristics of reconciliation processes. The process of reconciliation involves the abuser and the abused coming together and something of value (whether money, a promise, or

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<sup>221</sup> *Id.* § 17.

<sup>222</sup> *Id.* § 4(2).

<sup>223</sup> Skype Interview with Portia, *supra* note 151.

<sup>224</sup> UGANDA CONST. art. 126(2)(d).

<sup>225</sup> Domestic Violence Act § 6(5)(g) (2010) (Uganda).

<sup>226</sup> HUM. RTS. WATCH, *supra* note 151, at 42, 55, 57.

<sup>227</sup> Permanent Rep. of Uganda to the U.N., Letter dated July 16, 2007 from the Permanent Rep. of Uganda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2007/435 (July 17, 2007).

<sup>228</sup> *Id.* at 1–2.

some other significant item) being offered to the abused. Many approaches to reconciliation involve inviting third party community members to participate in the process, although it is not required. Such inclusion of the community signals the community's interest in the resolution of the issue. All of these are also characteristics of traditional justice both in Uganda<sup>229</sup> and throughout sub-Saharan Africa.<sup>230</sup>

In addition, much like traditional justice arising out of custom, reconciliation is not centralized and is subject to variation. A key characteristic of custom is that it develops in the manner needed by the community it serves. In Uganda, with fifty-nine different ethnic groups, rituals of reconciliation persist in significant ways, but not uniformly.<sup>231</sup> Rituals of justice and reconciliation can be quite particular to each clan group, but across groups there is a common theme of community-based reconciliation.<sup>232</sup> Given the differences among clans, women's rights advocates, and religious leaders, it is not surprising that there does not appear to be a uniform system of reconciliation. Variation can be observed in terms of how it occurs, what promises are made, and how and when those promises are enforced. The specific operational parameters of reconciliation also seem to vary depending on who is facilitating it.

The terminology varies among advocates. Some use the terms "reconciliation" and "mediation" interchangeably when discussing the process in the criminal justice context. Others use "reconciliation" when the process is conducted after engaging with the criminal justice system and "mediation" when the criminal justice system has been avoided altogether. In this Article, I use the term reconciliation to refer to both instances, as there appears to be no substantive difference between the two in the context of domestic violence.

Parties have engaged in reconciliation to resolve a range of criminal domestic violence issues. The use of reconciliation to resolve lack of financial support is a common example.<sup>233</sup> But reconciliation is also used as an alternative to the court process in cases of physical abuse, even when the abuser has already perpetrated extremely severe acts of violence against the

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<sup>229</sup> Joanna R. Quinn, *What of Reconciliation? Traditional Mechanisms of Acknowledgment in Uganda*, in RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 174, 188–89 (Joanna R. Quinn ed., 2009); Skype Interview with Volumnia, Magistrate in Uganda (May 19, 2015); Interview with Titania, legal services provider, in Uganda (July 7, 2015).

<sup>230</sup> PENAL REFORM INT'L, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS 21–22 (2001) [<https://perma.cc/PTQ9-8S4D>].

<sup>231</sup> Quinn, *supra* note 229, at 188–89.

<sup>232</sup> *Id.*

<sup>233</sup> Failure to provide can be a criminal or civil matter, for which reconciliation or mediation, respectively, is possible. Interview with Lucetta, Magistrate Grade II, in Kampala, Uganda (July 2, 2015).

victim.<sup>234</sup> One magistrate recounted the story of a woman who appeared before her asking for reconciliation. Her husband did not permit her to use contraception, and she had experienced two miscarriages as a result of the severity of her husband's beatings.<sup>235</sup> "To the shock of everyone in court, she said, 'I would not send him to prison.' This was a woman with broken hands and everything."<sup>236</sup> However, her husband was the breadwinner, and she was fearful for her children's future without him.<sup>237</sup> Incarceration would not have yielded justice for this woman.

One common trait across reconciliation practices is the inclusion of third parties, typically community and family members, with the expectation that their presence will add weight to the reconciliation. Women seeking reconciliation sometimes request the presence of traditional or community leaders because they feel the backing of such leaders will strengthen the resolution.<sup>238</sup> Several advocates have stated that they prefer to include family members and important community members in the reconciliation.<sup>239</sup> The hope is that once community or family members are included in the process, they will become invested in the success of the outcome and can act as watchdogs to ensure compliance.<sup>240</sup> For example, in cases of physical abuse, a reconciliation agreement typically includes an agreement that the offender will refrain from committing further acts of physical violence. The third parties can serve as a social check and intervene if they see abuse reoccurring. Advocates facilitating the reconciliation also hope that after making an agreement in the presence of respected community members, the abuser will at least feel a greater sense of obligation to comply.<sup>241</sup>

Reconciliation in domestic violence cases can be initiated as an option in a number of ways. If a complaint is filed with the police, any of the state attorneys, prosecutors, or police can encourage the parties to engage in reconciliation.<sup>242</sup> If a victim reaches out to an advocate for assistance, some-

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<sup>234</sup> *Id.*; Skype Interview with Portia, *supra* note 151; Interview with Mopsa, officer at an anti-violence organization, in Kampala, Uganda (July 2, 2015). These and other interviewees expressed concern about the use of reconciliation in cases of severe abuse, but agreed that a woman's request for reconciliation should in most cases be respected, as it may be a better option than incarceration.

<sup>235</sup> Skype Interview with Portia, *supra* note 151.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Interview with Stella Biwaga, *supra* note 146.

<sup>239</sup> *See, e.g.*, Interview with Titania, *supra* note 229; Interview with Stella Biwaga, *supra* note 146. When the reconciliation is being conducted by the local council courts, it is already being attended by respected community members.

<sup>240</sup> Interview with Stella Biwaga, *supra* note 146.

<sup>241</sup> Interview with Titania, *supra* note 229.

<sup>242</sup> Interview with Desdemona, a State Attorney, in eastern Uganda (July 7, 2015); Interview with Cressida, a State Attorney, in Uganda (July 1, 2015); Interview with Judith Nakalembe, *supra* note 146. One magistrate stated that while she does not outright tell parties to consider reconciliation, she often mentions that it is an option that is available to them, and only proceeds with reconciliation if they affirmatively ask for it. Interview with Hippolyta, a magistrate, in Uganda (June 26, 2015). Another respondent noted that some courts have a reconciliation office, and persons in that office may look through

times the advocate suggests reconciliation as a non-court alternative.<sup>243</sup> Local council courts may order reconciliation after hearing a domestic violence matter.<sup>244</sup> Sometimes the parties decide on their own to engage in reconciliation.<sup>245</sup> This can happen even after court processes have commenced.<sup>246</sup>

In any criminal case, the victim may choose to reconcile with the perpetrator during the course of the hearing. The victim notifies the judicial officer or the prosecutor and, absent some countervailing reason, the reconciliation moves forward.<sup>247</sup> In some cases the parties will have already come to an informal agreement, requiring only approval by the judicial officer. The parties then may be asked to provide a statement to the police, prosecutor, and/or presiding magistrate or other judicial official in order to close the complaint and case.<sup>248</sup> In other cases, the judicial officers may be more involved in facilitating the agreement. Family or community members may be invited to attend the meetings with the court.<sup>249</sup> In either case, a judge or magistrate is also given leeway to combine reconciliation with sentencing strategies such as ordering a suspended sentence.<sup>250</sup>

Members of local council courts have noted that when they engage in reconciliation, they speak with the two parties involved and sometimes bring in additional family members.<sup>251</sup> The local council committee members are usually considered the most respected members of the community, thus, in a manner of speaking, they are already serving as third party community members. Some local council courts are willing to address some cases of physical domestic violence in reconciliation,<sup>252</sup> but others will immediately refer such cases to other actors such as the police or women's rights advocates.<sup>253</sup> The way a reconciliation is facilitated may vary by local council and may reflect local norms. One local council member offered the following outline: the parties are asked questions, all present discuss what happened, an apology is usually offered, and an agreement is made between the pri-

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the files and reach out to parties whose dispute seems suitable for a reconciliation. Interview with Hermia, a legal services attorney, in Kampala, Uganda (July 1, 2015).

<sup>243</sup> Skype interview with Goneril, Attorney in Uganda (May 21, 2015); Interview with Viktor Kumakech, Manager, Justice Centres, in Lira, Uganda (June 29, 2015); Interview with Emanuel Ochieng, Legal Officer/Coordinator, MIFUMI, in Barara, Uganda (July 3, 2015); Interview with Judith Nakalembe, *supra* note 146.

<sup>244</sup> Local Council Courts Act § 13(a) (2006) (Uganda).

<sup>245</sup> Interview with Cressida, *supra* note 242; Interview with Hippolyta, *supra* note 242.

<sup>246</sup> Interview with Desdemona, *supra* note 242; Interview with Hippolyta, *supra* note 242.

<sup>247</sup> Interview with Desdemona, *supra* note 242.

<sup>248</sup> *Id.*; Interview with Cressida, *supra* note 242.

<sup>249</sup> Interview with Timandra, State Attorney, in Kampala, Uganda (June 25, 2015).

<sup>250</sup> Skype Interview with Portia, *supra* note 151; Interview with Lychorinda, Magistrate, in Kampala, Uganda (July 3, 2015).

<sup>251</sup> Interview with Simon Kurya, Busobo Local Council Member, in Kamuli, Uganda (July 8, 2015).

<sup>252</sup> Interview with Ongwen Okello, *supra* note 151.

<sup>253</sup> Interview with Judith Nakalembe, *supra* note 146; Interview with Alisat Nalongo Ssembuyi, Bwaise Local Council Member, in Kampala, Uganda (July 3, 2015).

mary parties and witnessed by the third parties.<sup>254</sup> Still, the weight of certain community norms varies. Several justice system actors have expressed doubt that local council courts could be fair to women in these types of disputes, asserting that these courts are too mired in existing community structures to be unbiased and just.<sup>255</sup>

The Catholic Church has also entered into the work of reconciliation, producing a counseling model meant to be used by various stakeholders, whether or not they are members of the church. Working together with the United Nations Economic, Social, and Cultural Organization (UNESCO), the Justice and Peace Department of the Archdiocese of Kampala released a model for counseling in the context of domestic violence.<sup>256</sup> The model draws from many of the elements seen in the formalized reconciliation processes used in the aftermath of conflict in the African continent.<sup>257</sup> The process is broken down into eight steps: truth telling, acknowledgment of the violence, repentance, reflection on religious and cultural beliefs relating to gender, a review of the couple's history, forgiveness, a promise of non-recurrence, and a follow up.<sup>258</sup> The model is meant to be flexible and is open to incorporating religious and customary rituals, as appropriate.<sup>259</sup> It sets out various referral pathways, including one that operates through the traditional clan model, in which the victim of domestic violence first visits the appropriate clan member to raise the issue.<sup>260</sup> This model is meant to be more than just responsive; it is designed to be preventive as well.<sup>261</sup> The model incorporates a "community dialogue" component, which facilitates issue-focused dialogue among a variety of community members in numerous locations, including schools and meeting places.<sup>262</sup> The goal is to create normative change through outreach and discussion.<sup>263</sup>

Some domestic violence advocates have implemented similar strategies in order to change norms and create important behavioral change, with the ultimate goal of reducing the overall incidence and acceptance of domestic violence. The Centre for Domestic Violence Prevention (CEDOVIP) has

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<sup>254</sup> Interview with Nalogono Ssembuyi, *supra* note 253.

<sup>255</sup> Interview with David Oyo, Legal Officer, Justice Centres Uganda—Lira, in Lira, Uganda (June 29, 2015); Interview with Thaliard, Court Registrar, in Uganda (June 29, 2015); Interview with Iras, Chief Magistrate, in Uganda (July 3, 2015).

<sup>256</sup> See generally JUSTICE & PEACE DEP'T FOR THE ARCHDIOCESE OF KAMPALA, CURBING DOMESTIC VIOLENCE: A MODEL FOR CULTURALLY SENSITIVE COUNSELING IN CENTRAL UGANDA (2014) [<https://perma.cc/8PUV-956X>] (providing a model for counseling in the context of domestic violence).

<sup>257</sup> *Id.* at 40 ("As a basis, the culturally sensitive counseling approach to curb domestic violence uses a model of reconciliation process known on the African continent to address conflicts and sustain peace.").

<sup>258</sup> *Id.* at 23.

<sup>259</sup> *Id.* at 42.

<sup>260</sup> *Id.* at 66–67.

<sup>261</sup> *Id.* at 24.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 25.

both developed guidelines for facilitators of reconciliation processes<sup>264</sup> and worked with local organizations to implement a “community mobilisation intervention” entitled SASA!, which aims to change norms permitting gender-based violence.<sup>265</sup> In its training materials, CEDOVIP encourages facilitators of reconciliation to avoid harmful mediation practices and instead engage in “responsibility meetings.”<sup>266</sup> CEDOVIP encourages facilitators to acknowledge that violence is the responsibility of the abuser, rather than the victim, and to take steps to avoid endangering victims of violence.<sup>267</sup> The SASA! intervention is designed to change community norms.

The SASA! intervention, created by Raising Voices and implemented by CEDOVIP,<sup>268</sup> begins by cultivating community activists, who are “regular men and women interested in issues relating to violence,” to think about the consequences of gendered power structures and how to foster positive change.<sup>269</sup> It also uses several outreach strategies to empower the community activists to begin these same conversations with others in their communities.<sup>270</sup> In addition to engaging with “regular” community members, the intervention involves training relevant officials such as police officers, local government leaders, and cultural leaders.<sup>271</sup> The goal is to create community-wide change.

The SASA! intervention on its own is not a form of reconciliation. However, it has been used in conjunction with reconciliation techniques to provide a more holistic form of justice for those experiencing domestic violence, creating what I term a “reconciliation plus” approach. Such an approach involves the implantation of an additional intervention to work concurrently with reconciliation processes, with the goal of creating community-level change.

Uganda Women’s Network (UWONET), for example, has partnered with CEDOVIP and others to facilitate community dialogues while also facilitating reconciliation.<sup>272</sup> Through these efforts, UWONET and its partners have cultivated community change agents to provide support to community

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<sup>264</sup> HEILMAN, *supra* note 58, at 16.

<sup>265</sup> Tanya Abramsky et al., *The Impact of SASA!, A Community Mobilisation Intervention, on Women’s Experiences of Intimate Partner Violence: Secondary Findings from a Cluster Randomised Trial in Kampala, Uganda*, 70 J. EPIDEMIOLOGY & CMTY. HEALTH 818, 819 (2016).

<sup>266</sup> HEILMAN, *supra* note 58, at 16.

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

<sup>268</sup> SASA! Success, CTR. FOR DOMESTIC VIOLENCE PROT, <http://www.cedovip.org/index.php/sasa-success> [<https://perma.cc/UQ4R-W5WB>].

<sup>269</sup> Abramsky et al., *supra* note 265, at 819.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> UGANDA WOMEN’S NETWORK, ANNUAL REPORT 2014 28 (2014) [<https://perma.cc/SJ5C-KADV>] (describing the program implementation and noting that UWONET worked with national and community level partners); UGANDA WOMEN’S NETWORK, ANNUAL REPORT 2016 13 n.3 (2016) (specifying CEDOVIP as one of the implementing partners).

members who are experiencing forms of gender-based violence.<sup>273</sup> In Kamuli, one location where the CEDOVIP/UWONET partnership operates, the coordinator of the Gender Based Violence Centre has stated that community change agents are now extremely important partners in the prevention of domestic violence.<sup>274</sup> Beyond engaging the larger community in conversations about gender-based violence, these change agents have also had pointed conversations with households in which they observe domestic violence and have referred men and women experiencing domestic violence to the Centre.<sup>275</sup> In addition, the training of local council members and police officers has helped reduce the bias for custom over a woman's well-being.<sup>276</sup> Accordingly, local council members and police officers are referring a greater number of domestic violence complaints to the Centre, rather than sending women back home.<sup>277</sup> In addition, the presence of local "duty bearers" who have eyes in the community has permitted the organization to follow up with at least some couples who have engaged in reconciliation.<sup>278</sup> However, the fates of some "reconciled" parties remain unknown as there is no reasonable method of tracking every couple.<sup>279</sup>

The Uganda Association of Women Lawyers (FIDA Uganda) also engages in "reconciliation plus." Acknowledging that community norms that discriminate against women can be difficult to overcome in any type of conference, advocates with FIDA Uganda decided to preemptively tackle the issue by meeting with leaders of tribes, such as the Karomojong and the Acholi, outside of the context of reconciliation. In collaboration with the customary leaders, FIDA Uganda attorneys drafted a set of customary norms applicable to each group. This set of norms is used in reconciliation discussions within each community, with two important benefits. First, leaders and community members can be held accountable to each of the listed norms, including those protective norms that are sometimes subjugated in favor of norms justifying harm against women. Second, the list adds clarity to negotiations, which is particularly helpful when norms are contested outright.<sup>280</sup>

Not all advocates who have engaged in reconciliation are able to engage in these "reconciliation plus" efforts. Attorneys who do not have the support of an organization focused on improving women's rights are unlikely to have integrated programmatic efforts as part of their work, and individual attorneys' offices lack the resources to engage in widespread community interventions to supplement reconciliation efforts. It is likely that many cases of reconciliation are simple negotiations. Thus, to the extent the efforts of

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<sup>273</sup> UGANDA WOMEN'S NETWORK, ANNUAL REPORT 2014, *supra* note 272, at 28–29.

<sup>274</sup> Interview with Judith Nakalembe, *supra* note 146.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Interview with Stella Biwaga, *supra* note 146.

organizations such as UWONET and FIDA Uganda are evaluated as successful, it is not an indication of widespread success as of yet.

Evaluating the effectiveness of specific reconciliation efforts is very difficult. Actors who have facilitated or observed reconciliation have reported not knowing what happened to the parties after the completion of reconciliation.<sup>281</sup> Victims are asked to provide follow up, but do not always do so. Many times they are never seen again, which means only that they have not made a second complaint in the same location. Possible outcomes in such a scenario include a successful reconciliation leading to a decrease in or complete termination of abuse, repeat abuse with complaints filed elsewhere, repeat abuse with the victim choosing not to complain again for any number of reasons, and repeat abuse leading to the death of the victim. Every advocate who supported reconciliation was also able to provide stories of clients whose reconciliations failed, leading to harmful results.<sup>282</sup>

Reconciliation can be implemented by various justice system (or justice-system-adjacent) actors, and can involve varying levels of norm negotiation at the community level. Though there are a number of common characteristics to reconciliation across the board, some organizations have added their own unique elements into the process, with the goal of encouraging community-wide norm change. The decentralized nature of reconciliation allows for the experimentation required to create these approaches and hopefully to uncover those approaches that are more likely to create meaningful positive change.

#### V. STATE VERSUS COMMUNITY-BASED JUSTICE IN UGANDA

Statutory law and customary law in sub-Saharan Africa are in a constant state of tension—particularly in the areas of marriage, succession, and land—leading to no small amount of hand-wringing for policy makers, activists, and scholars. Both the state and customary law have disempowered women in significant ways. Locally, advocates understand the need to work within both systems, but there is still a strong preference among many women's rights advocates, particularly those from the international community, for working with the state.

Women suffer at the hands of the post-colonial state. Marriage laws have long treated women unequally and reform efforts are usually delayed. Economic empowerment and personal freedom are tied heavily to property rights, which are not easily accessible to women, despite the state of the law. Sometimes state law worsens women's situations. For example, formal state

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<sup>281</sup> Interview with Mopsa, *supra* note 234; Interview with Cressida, *supra* note 242. In other interviews, respondents answered my questions about effectiveness with pure speculation, which I excluded from my analysis.

<sup>282</sup> See, e.g., Interview with Judith Nakalembe, *supra* note 146; Interview with Hermia, *supra* note 242.

structures that implemented titling in the aftermath of independence often removed what protections women had under customary law to access land.<sup>283</sup> In the case of domestic violence, imprisoning male perpetrators often leaves women without any protection for themselves or their children. The economic oppression of women perpetuated by the state becomes even more extreme when their partners are also imprisoned.

Women's rights activists also have a difficult relationship with customary legal systems and traditional forms of justice. Informal, traditional, or religious dispute resolution systems may be far more legitimate to certain populations of women. To reach and advocate for all women, activists must be willing to engage with customary systems of law. However, at the same time, these informal systems, across the board, tend to favor men at the expense of women. Custom has historically disempowered women, making their access to wealth dependent on the men to whom they are connected. In order for reconciliation to be a successful source of relief for victims, this predisposition must be undone and the community must be brought on board with empowering women and preventing domestic violence.

## VI. THE DRAW OF RECONCILIATION

Reconciliation compares favorably to the state criminal justice system for a wide variety of reasons. Many of these reasons mirror the arguments made against carceral feminism in the United States. First, the criminal justice system is not effective at changing the experience of women or resolving domestic violence incidents. Second, many women reject the formal court system due to problems of access and lack of legitimacy. Third, the state, though still considered by many activists to be the best source of rights for women against discriminatory customary norms, has entrenched discrimination against women and the inequality of women in a number of ways, some of which continue to facilitate the perpetuation of violence against women.

Advocates and judicial officers alike acknowledge the shortcomings of using the court system to stop domestic violence. When a woman files a complaint of physical abuse and refuses reconciliation, her abuser will be arrested. Uganda's prisons are overcrowded<sup>284</sup> and the courts overworked. Case backlog is identified as one of the top problems plaguing the Ugandan judiciary.<sup>285</sup> Magistrate courts, the courts responsible for hearing domestic

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<sup>283</sup> Aparna Polavarapu, *Reconciling Indigenous and Women's Land Rights in Sub-Saharan Africa*, 42 GA. J. INT'L & COMP. L. 93, 98–99 (2013) [hereinafter Polavarapu, *Reconciling Land Rights*].

<sup>284</sup> WORLD BANK, UGANDA LEGAL AND JUDICIAL SECTOR STUDY REPORT 32 (2009) [<https://perma.cc/D7CL-8CHV>]; Interview with Autolucus, a government official, in Kampala, Uganda (July 10, 2015).

<sup>285</sup> A 2009 study named case backlog as one of the most serious problems facing the judiciary. WORLD BANK, *supra* note 284. In 2015, I interviewed twenty-two attorneys

violence cases, sitting as either magistrate courts or Family and Children Courts, suffer the greatest backlog.<sup>286</sup> The reality is that the abuser may not have a day in court for a long time. During that time, if the abused is dependent on the abuser, which is often the case when the abused is a woman, the abused and her children go without her partner's income, resulting in a decreased ability to buy food or pay school fees. Even in cases of severe physical abuse, women have asked for reconciliation over incarceration, because the loss of the breadwinner causes even greater harm.<sup>287</sup> Many women also face social pressure from in-laws or clan members to avoid using formal court processes to deal with abuse.<sup>288</sup>

Court processes are long and subject to corruption, leading to a lack of faith in the system. Some have to travel long distances to get to the nearest magistrate's court<sup>289</sup> and they are not necessarily granted a hearing. Repeat adjournments are a common problem,<sup>290</sup> forcing many court users to wait multiple days before having their cases heard and extending the time that must be sacrificed to use the court system. A party must be willing to give up a significant amount of time and other resources simply to go through the court process. Language creates another barrier. The language of the courts is English, and due to anti-corruption rules preventing magistrates from being posted in their home region, magistrates do not often speak the language

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(including state attorneys and legal service providers), eight government officials, fifteen judicial officers (various types of professional judges), five local council members, and four researchers or other experts on the justice sector, and each one agreed that case backlog was a significant problem. As of December 2015, the judiciary was reported to have 114,807 cases pending, twenty percent of which qualified as "backlog." Michael Odeng, *Ottafire Pledges to Reduce Case Backlog*, NEW VISION (Nov. 12, 2016) [<https://perma.cc/ZZY8-N9FU>]. As of January 31, 2018, over 155,400 cases were reported as pending. Ephraim Kasozi, *More Than 150,000 Cases Still Unresolved in Courts – Report*, DAILY MONITOR (Mar. 30, 2017) <http://www.monitor.co.ug/News/National/-150000---cases---courts---report/688334-3870082-fgp703/index.html> [<https://perma.cc/GTC2-N4SF>].

<sup>286</sup> The 2016 National Court Case Census reported that at the time of its data collection, the Supreme Court had 26 pending cases in backlog, the Court of Appeal had 1,339 pending cases in backlog, the high courts had 10,632 cases in backlog, and the magistrates courts had 14,836 cases in backlog (11,472 in the chief magistrate courts, 2,747 in magistrate grade I courts, and 617 in magistrate grade II courts). JUDICIARY OF UGANDA, THE REPORT OF THE JUDICIARY NATIONAL COURT CASE CENSUS 2016 13, 14, 17, 36, 82, 137 (2016).

<sup>287</sup> Skype interview with Portia, *supra* note 151; Interview with Dorah Mafabi, *supra* note 146.

<sup>288</sup> Interview with Timandra, *supra* note 229; Interview with Dorah Mafabi, *supra* note 146; Interview with Andromache, State Prosecutor, in Kampala, Uganda (July 2, 2015).

<sup>289</sup> Interview with Sam Wairagala, Advisor (M&E), Justice, Law, and Order Sector Secretariat, in Kampala, Uganda (June 24, 2015).

<sup>290</sup> Many respondents suggested that adjournments frequently occurred because key persons—opposing counsel, witnesses, or magistrates—were absent on the day of the hearing. Skype Interview with Volumnia, *supra* note 229; Skype interview with Goneril, *supra* note 242; Interview with Viktor Kumakech, *supra* note 242; Interview with Samuel Kaali, Principal Legal Officer, Judicial Service Commission—Kampala, in Kampala, Uganda (June 24, 2015); Interview with Maria Busuulwa, Senior Legal Associate, Foundation for Human Rights Initiative, in Nsimbya, Uganda (June 25, 2015).

of the local community.<sup>291</sup> In addition, corruption is a widespread issue in the Ugandan justice system.<sup>292</sup> In a corrupt justice system, usually the party that can afford to pay the bigger bribe obtains the favorable outcome. These factors all lead to a lack of trust in the system. Twenty-nine percent of Ugandans surveyed trusted the justice system.<sup>293</sup>

Even if a woman navigates all these obstacles and the criminal case is finally heard, she may not experience relief. If her abuser is sentenced to imprisonment, she continues to suffer from problems relating to loss of family income and sustained social pressure. In cases that involve a failure to provide, courts in criminal session sometimes order payment of funds to the victim instead of ordering a fine to be paid to the state.<sup>294</sup> However, if that payment is not made, the enforcement option is typically incarceration.<sup>295</sup>

Though the emphasis of this Article is on carceral forms of justice, it is worth noting that available non-carceral options suffer from similar drawbacks, including a lack of meaningful relief. For example, in a civil case, if the abuse involves a lack of financial maintenance, the court can order the abuser to pay maintenance, but enforcement remains a significant problem. In the face of such orders, many men disappear or simply refuse to pay.<sup>296</sup> If a man disappears, the woman seeking enforcement will have to expend resources to find him. To fight against a simple refusal to pay, a woman will have to revisit the court and go through execution proceedings to obtain a final decree.<sup>297</sup> Court bailiffs can assist with execution, but persons seeking execution may find themselves paying bailiffs' fees if the judgment debtor cannot be found, if the judgment is inadequate to cover the bailiffs' fees, or if the judgment debtor does not possess sufficient property to cover the execution amount.<sup>298</sup> Strategies such as garnishing wages are ineffective against the many men whose employment is informal.<sup>299</sup> If a judgment debtor cannot pay or has money that remains hidden, another option is sending the debtor to civil prison.<sup>300</sup> However, the creditor, in this example the woman seeking to enforce maintenance payments, must pay a daily rate to keep the debtor in

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<sup>291</sup> Interview with Viktor Kumakech, *supra* note 242. Nearly every professional I interviewed agreed that the language barrier presented a serious obstacle in the magistrate courts.

<sup>292</sup> In a 2015 survey, thirty-eight percent of public service users in Uganda reported paying a bribe. TRANSPARENCY INT'L, PEOPLE AND CORRUPTION: AFRICA SURVEY 2015 14 (2015). Of these, thirty-one to forty-five percent paid bribes to the police and another thirty-one to forty-five percent reported paying bribes to the courts in some form. *Id.* at 20. In addition, every professional I interviewed except one agreed that corruption was a widespread problem in the Ugandan judiciary.

<sup>293</sup> Interview with Sam Wairagala, *supra* note 289.

<sup>294</sup> Skype Interview with Portia, *supra* note 151.

<sup>295</sup> *Id.*

<sup>296</sup> Interview with Stella Biwaga, *supra* note 146.

<sup>297</sup> Skype interview with Portia, *supra* note 151.

<sup>298</sup> Court Bailiffs Rules, R. 14(iv) (2012) (Uganda).

<sup>299</sup> Interview with Stella Biwaga, *supra* note 146; Skype Interview with Portia, *supra* note 151.

<sup>300</sup> Skype Interview with Portia, *supra* note 151.

civil prison.<sup>301</sup> Thus, full pursuit of judgment enforcement may lead to a greater financial loss than living without maintenance payments.

Throughout sub-Saharan Africa, women have mixed views of formal courts and state laws. While some women do seek the relief provided by the formal court and criminal justice systems, any judgment may not be accepted by the community.<sup>302</sup> In addition, they risk a loss of reputation for going outside the community.<sup>303</sup> For some women, the formal criminal justice system is not a viable option because of these effects.<sup>304</sup>

Uganda's traditional justice mechanisms prioritize differently from formal courts. Such mechanisms emphasize healing and harmony, which means thinking about how to help the victim, the offender, and, ultimately, the community.<sup>305</sup> Such mechanisms may be more palatable to those women who simply want the violence to stop and to be able to support themselves or their children. Many women know that leaving their partners would be worse than staying, and they are simply trying to make a bad situation more bearable. Leaving a marriage puts women and their children at risk of economic and social poverty, a rather damning situation in a clan-focused society.<sup>306</sup>

In addition, Ugandan government officials in the center refuse to make the kinds of changes that will truly change the position of women in society. Although the state guarantees equality and empowerment for women in its Constitution, and the judiciary has issued some landmark judgments to overturn discriminatory laws, Uganda's political branches struggle to address the key issues preventing women's empowerment.

While Uganda is willing to pass laws such as the Domestic Violence Act and the Prohibition of Female Genital Mutilation Act,<sup>307</sup> which address discrete instances of violence against women, the Ugandan parliament has failed to pass laws that remove the most significant obstacles to women's empowerment. For example, the Parliament has repeatedly refused to enact versions of what is now called the Marriage and Divorce Bill, which would provide rights to cohabiting couples and require that bride price not be treated as a prerequisite to marriage.<sup>308</sup> Each of these provisions has the po-

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<sup>301</sup> *Id.*

<sup>302</sup> Polavarapu, *Reconciling Land Rights*, *supra* note 283, at 109–110.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> Quinn, *supra* note 229, at 25–26.

<sup>306</sup> HUM. RTS. WATCH, *supra* note 151, at 36. My own interviews in 2015 support this assertion as well.

<sup>307</sup> Domestic Violence Act § 2 (Uganda) (2010); Prohibition of Female Genital Mutilation Act (Act No. 5/2010) (Uganda).

<sup>308</sup> UGANDA WOMEN'S NETWORK, *THE MARRIAGE AND DIVORCE BILL: WHAT IS AT PLAY?* 1–3 (Apr. 2013) [<https://perma.cc/PP9N-6EED>]. A particularly controversial provision sought to prohibit the demand for refund of bride price upon the breakdown of a marriage, but this issue was resolved in 2015 by the Ugandan Supreme Court, which ruled that the practice of demanding bride price was unconstitutional. *MIFUMI & Ors v. Attorney-General*, 2015 UGSC 13 (Uganda).

tential, if truly incorporated into the social fabric, to empower women. Yet each of these provisions has also been extremely controversial. In 2006, after the bill was rejected once more by Parliament, drafters removed provisions relating to Muslim marriages in an attempt to make the bill more palatable.<sup>309</sup> The effect was to remove protections for women in Islamic law marriages from the bill. In 2017, in an attempt to save the Marriage and Divorce Bill again, the cohabitation provisions were removed.<sup>310</sup> A separate Cohabitation Bill, setting cohabiting couples' rights to property and children, is reportedly being drafted.<sup>311</sup> However, given the controversy over including rights for cohabiting couples in the Marriage and Divorce Bill, a Cohabitation Bill's chances of enactment are likely very low.

Women are left behind by Uganda's failure to offer full recognition to all forms of marriage. The prevalence of cohabitation in Uganda is particularly problematic. These unmarried women lack the economic protections given to those in formal marriages, including maintenance and inheritance rights.<sup>312</sup> Without these rights upon the dissolution of the relationship, these women also suffer economic disempowerment and are vulnerable to violence.

The predominantly male ownership of land is also a reflection of Parliament's failure to fully empower women. A major obstacle for women's access to land is the lack of meaningful inheritance rights for women. Widows' ability to inherit from their deceased husbands' estates is limited by the Succession Act.<sup>313</sup> To the extent women are granted inheritance rights under law, those rights are often subverted in favor of norms favoring men.<sup>314</sup> Land rights are essential economic rights in Uganda. Without adequate access to land, many women remain economically disempowered and more vulnerable to violence.

State interventions in Uganda face shortcomings similar to those seen in the United States' approach to domestic violence. Prosecution is an option that seems best suited to a small subset of women: women who more likely than not live in urban (or less rural) areas, have resources, and are of a high enough socioeconomic status that leaving a relationship would not be devastating to their own or their children's well-being. Women living in communities where customary norms hold greater power than statutory law are more likely to prefer traditional forms of justice. Many women are simply seeking alternatives that will allow them to preserve the family relationship. Women without wealth cannot afford the consequences of state-sponsored carceral

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<sup>309</sup> URN, *Activists Renew Demand for Marriage and Divorce Bill*, OBSERVER (Aug. 16, 2016) [<https://perma.cc/NC9V-LZCD>].

<sup>310</sup> *Law on Property Sharing in Cohabiting Couples in Final Stages*, INDEP. (Apr. 19, 2018) [<https://perma.cc/R5ZD-9K2H>].

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*; Skype Interview with Perdita, *supra* note 288.

<sup>313</sup> *See supra* Part II.B.

<sup>314</sup> *See supra* Part II.B.

justice. While incarceration seems like an expressive, hard line response to domestic violence, it is inadequate when the state continues to maintain, rather than dismantle, key structures of inequality.

## VII. THE FEAR OF USING RECONCILIATION

Despite concerns about state law and state institutions, many advocates are reluctant to embrace non-state institutions and mechanisms. This reluctance relates to the patriarchal norms in which these traditional systems are steeped and that permit domestic violence to flourish. Traditional norms have resisted many of the changes advocated by women's rights advocates and state law. Additionally, even if an abuser agrees to the victim's desired outcome, it is not always easy to ensure follow-through. When reconciliation is complete, victims are immediately back within the vicinity of their abusers and possibly at risk of retaliation in the form of physical violence. Positive changes using state law and courts can be transformational because they impact the entire nation. The impact of reconciliation programs conducted by community-based institutions, on the other hand, will be initially limited to the geographic reach of said institutions.

Uganda's system of reconciliation is particularly alarming to some domestic violence advocates because they view it as reinforcing patriarchal power structures. Human Rights Watch criticized the Ugandan government for encouraging reconciliation by arguing that, "[b]y emphasizing the reconciliation of husband and wife in domestic violence cases, the state supports a social structure that stresses women's subjugation in marriage and effectively silences battered wives."<sup>315</sup> Reconciliation in Uganda is a system that potentially denies justice for women. The fear is that, at least in some cases, reconciliation might not empower women; instead, reconciliation could force women to communicate with and potentially be manipulated by their abusers as they are trying to obtain justice. In such a scenario, a victim may be prevented from adequately telling her story, communicating her grievances, or seeking the remedy she desires. Instead, she may be coerced into agreeing to a resolution that does not bring her relief.

In Uganda, the additional concern is that reconciliation utilizes traditional justice mechanisms and thus risks the imposition of historical norms that subordinate women. When local arbiters of customary law are permitted or expected to be part of a reconciliation, some fear that they will not embrace norms of non-violence and equality in marital or intimate relationships, but instead will encourage actors to remain in line with traditional gender norms.<sup>316</sup> For a woman, that might mean staying in a relationship and remaining subservient to her husband, as long as the violence is not consid-

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<sup>315</sup> HUM. RTS. WATCH, *supra* note 151, at 42.

<sup>316</sup> Interview with Stella Biwaga, *supra* note 146; Interview with Thaliard, *supra* note 255.

ered to be too bad. Inviting customary leaders to participate in the reconciliation may also cause victims of violence to feel pressure and discomfort. Local leaders can be useful in a reconciliation because they may sway reluctant family members into supporting the victim. However, such influence can travel in either direction. Those leaders can just as easily pressure the victim into accepting a resolution in which she remains unsatisfied and is potentially subject to further abuse. The presence of other community members, even if they are not leaders, may have similar effect. The community is sometimes the most powerful force in the room, with the potential to cow both the abuser and the victim. A resistant community may thus prove harmful to the victim.

Even if resistant community members somehow agree to a reconciliation agreement that supports the victim, perhaps due to the presence of an advocate, it is difficult to tell whether the community will support or uphold that decision after the reconciliation process is over. The success of a reconciliation depends not just on the two key parties agreeing to and abiding by the terms, but also upon the community maintaining a watchful eye on the parties and protecting against future violence. Thus, the community's desire to prevent and end domestic violence must be real in order for reconciliation to be successful.

This is especially true when considered in light of the accountability mechanisms in place for reconciliation. Reconciliation often relies on community involvement, which in turn requires renegotiating customary norms. Customary structures may be viewed with suspicion because they are not held accountable the way a state is. The state faces democratic accountability—at least in theory—in the form of elections, and international accountability, which is exercised via diplomacy. Theoretically, customary or community institutions are similarly accountable to the community, including all individuals who are seeking to end domestic violence. But in reality, if the predominant norms call for ignoring or facilitating domestic violence, then an individual victim has little ability to leverage the accountability that custom owes her. Where ethnic group and tribal membership and the social and kin networks derived therefrom provide some of the only social and economic capital available to non-elite, non-wealthy, non-urban individuals, voting with one's feet is often not an option.<sup>317</sup> Customary norms and community institutions are also supposed to be accountable to the state and the Constitution. However, many unconstitutional customary norms survive despite contrary Constitutional protections. Something additional must happen to enforce those protections in customary institutions. Until normative change begins to occur, reconciliation may not have any meaningful positive effect.

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<sup>317</sup> When available, the power of “exit” is a meaningful option available to those unhappy with collective community norms. Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 919–20 (1996).

VIII. RECONCILIATION: A REASONABLE ALTERNATIVE TO PROSECUTION  
IN DOMESTIC VIOLENCE?

The reconciliation mechanism in Uganda is imperfect, but it is free of many of the drawbacks that accompany use of the state's criminal justice system and provides an alternative that, if continued and improved upon, could create needed normative change. Within the country, the flexibility of reconciliation allows advocates to experiment with various interventions to improve outcomes for the parties, with the potential to change the social conditions permitting domestic violence. Uganda's use of reconciliation is useful as a case study for other countries as well. As a state-endorsed community-based restorative (or transformative) justice initiative that is deeply rooted, nationwide, and frequently utilized to resolve domestic violence disputes, reconciliation serves as an instructive example of how community-based alternatives can yield better results in the national context.

A. *In Uganda*

Concerns regarding the use of reconciliation to resolve domestic violence disputes are well founded, but these concerns are eclipsed by the benefits that accrue when reconciliation is well implemented. In Uganda, relying on the community and community institutions can backfire, especially with deep-rooted and gendered customary norms influencing community response. However, advocates have achieved and continue working toward successful anti-domestic violence outcomes by pairing the reconciliation mechanism with norm changing interventions. These successful outcomes have the potential to slowly alter related customary norms, and eventually lead to changes in women's economic and social position with the community. Thus, reconciliation can be more than restorative in nature. When paired with other interventions, it has the potential to be transformative.

Some normative change has already occurred in Uganda, in the form of the state acknowledging its obligation to combat domestic violence. Through the international human rights network, governments around the world have accepted some level of responsibility for protecting against domestic violence. Unfortunately, the adopted norm criminalizes domestic violence. Certainly, criminalization has been controversial in some places, but it is a relatively easy stance to adopt for states. It results in expansion of state power while keeping intact structures of inequality. Perhaps the hope was that, domestically, criminalization would lead to deterrence and ultimately change norms, but despite the coercive force of state law, domestic violence remains a significant problem in Uganda.

There are two main problems connected to the carceral approach that reconciliation could work to redress. First, criminalization of domestic violence does not alter those structures contributing to women's disempowerment. Second, to the extent that laws on the books do seek to empower

women, many of these laws are inadequate or simply ignored in favor of customary norms. However, offering reconciliation as a justice option can provide a resolution that is more palatable to the women seeking it and would promote the emergence of new norms empowering women and stigmatizing domestic violence.

Activists have a reasonable fear of using reconciliation because of existing norms. Customary norms that contribute to women's relative vulnerability to domestic violence persist because they are deep-seated and not easily shaken loose. Bride price continues as a practice because it is considered such an important cultural part of a marriage. Widow eviction is common in some regions because communities are unwilling to recognize a woman's rights to property, even when the law requires that they do so. Land grabbing behaviors are sometimes justified by certain existing customary norms, but the choice to ignore other protective customary norms also likely has something to do with growing economic constraints and the value of land.

Notwithstanding the ongoing support for these harmful practices, community and customary spaces can be ideal for debating and pushing for norm change. These are spaces in which norm negotiation is meant to occur. Those who are dissatisfied with certain norms or, more often, are dissatisfied with the relative weights accorded competing norms when resolving a dispute can contest those norms before customary institutions. In fact, it is understood that this type of contestation is what allows customary law to be flexible and adaptive.

The success of such contestation for women's rights is not guaranteed and depends on how willing norm leaders are to make changes that will alter power structures. For example, women's rights advocates have been helping women fight for land rights in customary institutions throughout sub-Saharan Africa. In some cases, women have been successfully able to argue for favorable outcomes based on the norm of fairness and Constitutional equality guarantees.<sup>318</sup> However, in others, traditional institutions refused to give women access to land, in spite of those arguments, because they could not accept such a normative change.<sup>319</sup>

Using reconciliation in conjunction with other interventions, advocates have been able to create some positive change. Organized actors, acting as norm entrepreneurs,<sup>320</sup> have already begun to work with local community

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<sup>318</sup> Aninka Claassens & Sindiso Mnisi, *Rural Women Redefining Land Rights in the Context of Living Customary Law*, 25 S. AFR. J. ON HUM. RTS. 491, 493–502 (2009).

<sup>319</sup> *Id.*

<sup>320</sup> A number of community members may feel dissatisfaction about some of the norms that govern community behavior. Norm entrepreneurs “can exploit widespread dissatisfaction with existing norms by (a) signaling their own commitment to change, (b) creating conditions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial.” Sunstein, *supra* note 317, at 929. In the context of this Article, the community members feeling dissatisfaction are those who are challenging norms pertaining to domestic violence and women's role in

members to engage in this type of norm creation. The work of CEDOVIP and UWONET provides an example of such a transformative intervention. Through the community dialogue intervention, they have begun disseminating conversations outward into the community about the negative consequences of power differentials and why domestic violence should be opposed. Through their support of reconciliation, they are engaging in the same conversation with parties affected by domestic violence, as well as with family and community members. CEDOVIP has engaged in some initial evaluations of its interventions, with encouraging results. A 2014 study, using qualitative and quantitative methods to measure the impact of interventions implemented between 2008 and 2012, found decreased acceptance of physical violence in relationships and increased support for women seeking help.<sup>321</sup> Though not all the quantitative results were statistically significant, they are supported by the qualitative data.<sup>322</sup> A later study found that all types of intimate partner violence decreased in intervention areas.<sup>323</sup>

Both the informal and state systems are important in creating norm change. By taking advantage of the norm negotiation that is characteristic of decision-making in customary institutions, advocates can push leaders to give added weight to more positive customary and national norms. For example, in cases relating to economic violence, activists can and do use longstanding community norms prioritizing the care of children to remind the parties and the community of parental obligations.<sup>324</sup> Advocates also attribute some of their success in reconciliation to their ability to discuss Ugandan values in light of the Constitution, the Domestic Violence Act, and the decisions of the higher courts.<sup>325</sup> Injecting external norms into a customary norm negotiation is not always effective because the external norms can be rejected as illegitimate, but when combined with arguments relating to custom, especially general customary principles relating to fairness and family well-being, it can be successful. Outside of Uganda, successful normative change has occurred at the community level by informal women's rights institutions refusing to validate justifications for violence.<sup>326</sup> As a result, norms justifying violence lost their force.

As small changes begin to be made within the constellation of community norms, they can begin the process of changing the overall framework of

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the community. The norm entrepreneurs are those who are engaging with these women, representing them, and working hard to change community perceptions of how these women should be treated.

<sup>321</sup> Tanya Abramsky et al., *Findings From the SASA! Study: A Cluster Randomized Trial to Assess the Impact of a Violence and HIV Prevention Programme in Kampala, Uganda*, 12 *BMC MED.* 9, 12, 15 (2014).

<sup>322</sup> *Id.* at 12, 15.

<sup>323</sup> Abramsky, *supra* note 265, at 821.

<sup>324</sup> Interview with Stella Biwaga, *supra* note 146; Interview with Titania, *supra* note 229.

<sup>325</sup> Interview with Titania, *supra* note 229; Interview with Judith Nakalembe, *supra* note 146.

<sup>326</sup> Goodmark, *Law and Justice*, *supra* note 10, at 745.

norms to something more positive for women. As a norm becomes increasingly remembered and more heavily weighted, it becomes more effective against other norms that would undermine it. There is some legitimate criticism that if this is indeed happening, it is too slow a change. However, the state's political branches have proven equally resistant to making these same changes, even when pushed by the judicial branch.

Ultimately, because reconciliation offers a more legitimate way in the eyes of the community to get at many of the factors contributing to women's vulnerability to domestic violence, it should continue to be offered as an alternative. To cultivate more successful outcomes, further initiatives to convert restorative justice work into transformative justice should be supported. Additionally, even with a reconciliation option, the formal state system must continue to play a substantive role in fighting domestic violence. Advocates should continue to push for legislative and judicial change, which can provide important support to reconciliation. State criminal justice alternatives must also be maintained for women who are failed by reconciliation or for whom reconciliation is not an acceptable form of justice. The use of reconciliation as a community-based alternative or addition to prosecution should be pursued, evaluated, and improved upon.

#### IX. THE SIGNIFICANCE OF THE UGANDAN EXPERIENCE IN OTHER CONTEXTS

Reconciliation in Uganda is a useful case study because it is a restorative justice mechanism already stitched into the fabric of Ugandan society and used specifically for domestic violence. Restorative justice mechanisms in sub-Saharan Africa and other cultures have already been the subject of study in the West, including with respect to potential application to domestic violence in the United States.<sup>327</sup> However, the mechanisms studied have either been geographically limited or were created primarily to address harms other than domestic violence.<sup>328</sup> The Ugandan context is particularly relevant

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<sup>327</sup> *Id.* at 709–710.

<sup>328</sup> In her 2015 article, Leigh Goodmark reviews some of the key contributors arguing for the use of restorative justice mechanisms to address domestic violence in the United States. *Id.* These arguments draw from mechanisms that have been geographically limited to sub-national units, such as the Navajo and Native Hawaiian approaches to justice, or from mechanisms that are designed to address national post-conflict justice more generally, such as *Gacaca* in Rwanda or truth and reconciliation commissions in countries like Sierra Leone. *Id.* The latter examples, though they are national mechanisms, focus on gender-based violence as part of a larger jurisdictional focus on crimes pertaining to widespread, large-scale conflict. *Id.* Goodmark also discusses the *Nari Adalats* in India, which come closer to the Uganda example. *Id.* at 733 n.159. These are informal women's courts, used to address domestic violence and other women's rights issues, that are slowly spreading throughout India. *Id.* However, they are still somewhat limited in comparison to reconciliation in Uganda. The development and use of *Nari Adalats* remain a grass-roots effort that is not integrated with the justice system, is focused in rural areas, and exists in only eleven (out of twenty-nine) states in India. Sessa Kethineni et al., *Combat-*

because it demonstrates a nation's intentional endeavor to use reconciliation to respond to domestic violence.

Though the customary norms that permit domestic violence in Uganda are not exactly the same as those that permit violence in the United States, they share a general theme: undermining women's economic empowerment. Where victims of domestic violence lack adequate state support to leave abusive relationships, community networks can fill in gaps left by the state. Certainly, this would look different in the United States than it would in Uganda. In Uganda, there is a strong community based on tribes. In many areas of the country, people continue to live near their ethnic groups, which have historically lived under customary norms that provided for the success of the group and the well-being of group members. Though the United States presents a different social structure, the community-based approach applied there could seek to utilize existing communities and develop them to provide support and justice for women. These communities may be ethnic communities, but they could also be communities built around other commonalities, such as geography or religious affiliation.

It is possible that reconciliation works in Uganda only because it is operating in a society that is quite familiar with these norms of justice. Advocates in Uganda are able to use existing notions of norm negotiation to obtain good results in reconciliation. The resolutions may be considered legitimate because they resulted from a style of justice that is more acceptable in some communities than the adversarial justice found in Uganda's formal courts. In countries where the adversarial or inquisitorial forms of criminal justice are more accurate reflections of cultural expectations of justice delivery, developing a strong, system-wide restorative justice mechanism may take more work and convincing. Still, it is not impossible. For many American women, the criminal justice system adds to, rather than alleviates, the harms caused by domestic violence.<sup>329</sup> Activists in the United States have already been exploring restorative justice alternatives to prosecution. Restorative justice experiments are cropping up because they respond to an existing need and desire across the United States. Still, these experiments are limited in number and the criminal justice paradigm remains dominant.

Uganda's use of reconciliation demonstrates how community-based alternatives, though flawed, can supplement state activity. Critics are concerned that reconciliation is not designed to help women. Human Rights Watch has asserted that the Ugandan government, because it endorses reconciliation, supports discriminatory social structures.<sup>330</sup> Further, at least one of the reasons that reconciliation is gaining support among government actors

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*ing Violence Against Women in India: Nari Adalats and Gender-Based Justice*, 26 *WOMEN & CRIM. J.* 281, 282, 286 (2016).

<sup>329</sup> *Ms. FOUND.*, *supra* note 81, at 3–4.

<sup>330</sup> *HUM. RTS. WATCH*, *supra* note 151, at 42.

is that it is viewed as a viable means of reducing case backlog.<sup>331</sup> Despite the compromised reasons for its implementation, however, the use of reconciliation has served to fill in the gaps that state law cannot help but leave open. Though Ugandan reconciliation suffers from a number of drawbacks—many which might well match those of non-state alternatives in the United States—the Ugandan experience demonstrates that reconciliation can still lead to positive outcomes for individual women and has the potential for larger-scale change. This is especially heartening in a country where the customary norms quite openly and strongly promote structures that permit domestic violence. Even where societal roles are extremely gendered, where women are expected by everyone around them to have fewer rights in marriage, and where accessing marital property is an extremely difficult endeavor, reconciliation has started to make inroads toward positive change for women. A community-based approach in the United States might similarly change local norms about domestic violence intervention and prevention. Uganda provides valuable information about how such national alternatives might work to create change in the face of community resistance even as the state continues to struggle with the empowerment of women more broadly.

#### CONCLUSION

Community-based justice mechanisms, in the form of restorative or transformative justice, have been increasingly promoted as viable alternatives to prosecution in response to domestic violence and other forms of gender-based violence. The case of reconciliation in Uganda reveals that in spite of the very real drawbacks and concerns associated with such forms of justice, it can also create an opening for normative change that does not occur when feminists rely solely on criminal justice and the formal legal system. While restorative justice advocates have looked at examples of restorative justice being used to address domestic violence in local communities, or at the national level with respect to other issues such as large-scale conflict, the Ugandan case offers something more. Uganda's use of reconciliation is sanctioned by state law, is built into the infrastructure while remaining extremely flexible, is national, and is available for domestic violence disputes.

Still, this consideration of reconciliation is preliminary. Further assessment requires additional data relating to, *inter alia*, the experiences of men, women, and communities during and after the reconciliation; the types of norm negotiation that are more likely to lead to positive results; the community's continuing views on domestic violence over time; and, perhaps most importantly, the level of compliance with the agreements reached during reconciliation. This will yield information about how parties feel about the pro-

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<sup>331</sup> Interview with Hippolyta, *supra* note 242; Interview with Thaliard, *supra* note 255.

cess, whether they are treated fairly and with respect, whether reconciliation is actually changing community views on domestic violence, what kinds of reconciliation and norm negotiation are having lasting effects, and whether the results are effective. Widespread, systematic data collection, both qualitative and quantitative, is required. However, after a preliminary analysis, the case of Uganda reveals that, even in spite of its flaws, even in the face of deep-seated community resistance to granting women more meaningful rights, community-based alternatives to prosecution can more effectively respond to the needs of victims and even push normative change.

As a secondary matter, giving greater attention to and taking lessons from Uganda's approach to justice may cause internationally focused actors to pause and consider their assumptions. In rule of law, development, and human rights work, there has been a tendency to export Western ideas, institutions, and concepts to the rest of the world. More recently, there has been tremendous pushback against this predisposition, but it is a difficult habit to break, especially as Western voices continue to dominate conversations in these fields. However, the growth of restorative justice in the West has shown that the opposite trend can take hold. These restorative justice mechanisms draw inspiration from traditional forms of restorative justice found in Native American, African, and Asian communities. This discourse around domestic violence interventions is witnessing this reversal of the flow of ideas. Whereas in the 1980s and 1990s, criminal justice interventions were developed in the West and pushed to the rest of the world, these interventions have been facing increasing criticism, and advocates have begun calling for the availability of community-based, non-prosecution alternatives. Traditional justice mechanisms are now in a position to influence those same Western donor and international communities that initially pushed them aside. Though Western ideas have historically influenced justice system reform in developing countries, it seems that at least in some cases, justice is better served when the flow of ideas is reversed.