CRIMINAL PROCEDURE — STATUTES OF LIMITATIONS — SOUTH AFRICA REMOVES STATUTE OF LIMITATIONS DISTINCTION BETWEEN RAPE AND OTHER SEXUAL OFFENSES. — *Levenstein v. Estate of Frankel* 2018 (8) BCLR 921 (CC).

In the #MeToo era, statutes of limitations bar survivors from accessing legal recourse later in life. Since the publication of a report documenting over 1000 instances of child sexual abuse by priests of the Pennsylvania Catholic Church, U.S. lawyers and legislators have made efforts to remove the time bar from criminal and civil sex abuse suits.[1] The United States is not the only country to deal with statutes of limitations for sex abuse. Recently, in *Levenstein v. Estate of Frankel*,[2] the Constitutional Court of South Africa unanimously held that the twenty-year statute of limitations for sexual offenses other than rape was irrational and arbitrary.[3] This is the right outcome, but removing the statute of limitations may expand the reach of the carceral state. The South African Parliament and other legislatures should consider restorative justice as an alternative to incarceration for all gender-based violence.

The applicants, eight adults of different genders, alleged that Sidney Lewis Frankel sexually assaulted them between 1970 and 1989.[4] They were children "between the ages of 6 and 15" when the alleged conduct occurred.[5] They only came to understand the acts and the "physical, emotional, and psychological trauma" they suffered twenty to forty-five years later, and they accordingly took civil and criminal action.[6] The Director of Public Prosecutions declined to prosecute because section 18 of the Criminal Procedure Act[7] barred prosecution after twenty years.[8]

The applicants challenged the constitutionality of section 18 in the High Court of South Africa, Gauteng Local Division, Johannesburg.[9] The High Court's judgment explained the history of section 18: The law initially established a twenty-year statute of limitations for all crimes except those subject to death sentences (a category that included rape).[10] When the death penalty was later ruled unconstitutional, the law was

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1 *See* Max Mitchell, *Catholic Dioceses See Litigation Uptick in Wake of Grand Jury Sex-Abuse Report*, LEGAL INTELLIGENCER (Dec. 3, 2018, 5:36 PM), https://www.law.com/thelegalintelligencer/2018/12/03/catholic-dioceses-see-litigation-uptick-in-wake-of-grand-jury-sex-abuse-report/ [https://perma.cc/N926-A2UP].

2 2018 (8) BCLR 921 (CC).

3 *Id.* para. 59.

4 *Id.* paras. 5–8.

5 *Id.* para. 3.

6 *Id.* para. 8.

7 Criminal Procedure Act 51 of 1977 § 18.

8 *Levenstein*, 2018 (8) BCLR at para. 3.

9 *Id.* paras. 1, 9.

10 *L. v. Frankel* 2017 (2) SACR 257 (GJ) at paras. 21–23.

amended to exempt rape and other "particularly serious" crimes from the limitation on prosecution.[11] In 2007, Parliament passed the Sexual Offences and Related Matters Act[12] (SORMA), which expanded "the definition of rape [to cover] all . . . sexual penetration."[13] The High Court, persuaded by a report documenting the "delayed disclosure[s]" of child sexual abuse,[14] found "no reason" to differentiate adult victims from child victims.[15] Ruling for the applicants, the High Court found the distinction between rape and other sexual offenses to be "arbitrary and irrational" for the purposes of prescription.[16] Further, the High Court held that section 18 breached "the applicants' rights to human dignity"[17] and "equality."[18] The High Court found that the defendants' rights to a "fair trial" would not be violated by a delayed trial or retrospective remedy because the alleged abuse was criminal when committed and other "fair trial guarantees" existed.[19] The High Court thus declared the section 18 time bar in sexual offense cases invalid, suspended "[t]he declaration of constitutional invalidity . . . [for] 18 months in order to allow Parliament to remedy the constitutional defect," and temporarily amended section 18(f) to eliminate the differentiation between sexual offenses.[20]

The Constitutional Court affirmed.[21] Writing for a unanimous court, Acting Judge Dumisani Zondi found "no rational basis" for the statutory distinction between rape and other sexual offenses.[22] First, the court found that the statute's purpose did not support this distinction. Because section 18 "preclude[d] some survivors of sexual offences from access to criminal legal recourse, while protecting others,"[23] the court conducted a rationality inquiry to determine whether "the means chosen by Parliament . . . [we]re rationally related to the objective it sought to achieve."[24] Parliament's purpose in passing SORMA was to "afford complainants of [*all*] sexual offenses the least traumatising protection the law can provide; introduce measures to enable . . . state [agents] to give effect to the Act; and . . . eradicate the high incidence of sexual offenses."[25] The

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[11] *Id.* para. 23.
[12] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[13] *L.*, 2017 (2) SACR at para. 25.
[14] *Id.* para. 50; *see also id.* paras. 50–51.
[15] *Id.* para. 52.
[16] *Id.* para. 63. "Prescription" is commonly understood as a statute of limitations.
[17] *Id.* para. 76.
[18] *Id.* para. 78.
[19] *Id.* para. 90; *see also id.* paras. 85–86.
[20] *Id.* para. 130.
[21] *Levenstein*, 2018 (8) BCLR at para. 89.
[22] *Id.* para. 59.
[23] *Id.* para. 46.
[24] *Id.* para. 47. The South African Constitution lays out five factors to determine whether an infringement of rights is justified. *See* S. AFR. CONST., 1996 ch. 2 § 36.
[25] *Levenstein*, 2018 (8) BCLR at para. 49 (emphasis added).

court found that "the primary rationale" for differentiating offenses was that some are "more serious than others."[26] The Minister of Justice and Correctional Services, a respondent,[27] conceded that a policy distinguishing sexual offenses could not "pass constitutional muster."[28]

Second, the court found that survivors of sexual assault, like survivors of rape, had valid reasons why they might not report within the statutory period.[29] The court looked to *Van Zijl v. Hoogenhout*,[30] which noted that rape "inherent[ly] . . . render[ed] child survivors unable to report the crime."[31] The *Van Zijl* court found that "[p]rescription penalizes unreasonable inaction[,] not [the] inability to act."[32] The court also cited *Bothma v. Els*,[33] which found that child survivors of rape felt "empowered" to bring claims after "receiv[ing] support."[34] The court extended the reasoning in these opinions to "survivors of all forms of sexual violence though [the earlier decisions were] made in the context of rape."[35]

Third, the court observed that psychological hindrances are a potential feature of all sex crimes. The court found that "self-blame," "secrecy, fear[,] and shame" can prevent the survivor from "appreciating that . . . the perpetrator . . . is responsible."[36] The court noted that a survivor may weigh potential retaliation "from the perpetrator . . . with the possible lack of [police] support" and the small chance of conviction.[37]

Finally, the court found that section 18 "undermines" South Africa's compliance with "international obligations" to "prohibit all gender-based discrimination that . . . impair[s] [women's] fundamental rights and freedoms."[38] For these reasons, the court held that "there is no rational basis" for differentiating rape from other forms of sexual offenses with regard to the twenty-year statute of limitations.[39]

The court explained that prosecuting Frankel for decades-old actions would not violate the constitutional principle against retrospective criminalization of conduct because Frankel "could have been prosecuted for . . . indecent assault . . . at the time [the crime] was committed."[40] The court affirmed the High Court's finding that Frankel's

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[26] *Id.* para. 51.
[27] *Id.* para. 6.
[28] *Id.* para. 49.
[29] *See id.* para. 53.
[30] 2004 (4) SA 427 (SCA).
[31] *Levenstein*, 2018 (8) BCLR at para. 54 (adopting the logic of *Van Zijl*).
[32] *Van Zijl*, 2004 (4) SA at para. 19.
[33] 2010 (2) SA 622 (CC).
[34] *Levenstein*, 2018 (8) BCLR at para. 54 (relying on the findings in *Bothma*).
[35] *Id.*
[36] *Id.* para. 56.
[37] *Id.* para. 57.
[38] *Id.* para. 60.
[39] *Id.* para. 59.
[40] *Id.* para. 65; *see id.* paras. 62–65.

rights to repose and to a fair trial, ostensibly advanced by a statute of limitations, were not violated because the state had "discretion on whether to prosecute based on the cogency and reliability of the evidence," regardless of when the prosecution took place.[41] The court held that the invalidity of section 18 applied retrospectively to cases since April 27, 1994, when the "interim Constitution came into operation."[42] In issuing its remedy, the court stayed the declaration of invalidity of section 18 for twenty-four months to provide Parliament with an opportunity to enact a suitable legal amendment; however, it "read in" interim statutory language that removes the twenty-year prescription for all sexual offenses, which will become final if Parliament fails to enact legislation.[43]

The Constitutional Court rightly removed the differentiation between rape and sexual assault in the statute of limitations. However, the court's decision risks expanding the carceral state by allowing more people to be prosecuted. Restorative justice would mitigate this expansion while addressing the harms in ways that are healing for survivors. The South African Parliament and other legislatures should consider restorative justice as an alternative remedy for gender-based violence.

As the court correctly acknowledged in *Levenstein*, distinctions between forms of sexual offenses are arbitrary and irrational.[44] Sexual violence is best viewed on a continuum,[45] not in a hierarchy.[46] Sexual assault and rape are apples of the same theoretical tree of gender-based violence. The psychological impact[47] is not necessarily correlated with the type of harm a survivor experiences. As Professor Liz Kelly puts it, "[w]ith the important exception of sexual violence which results in death, the degree of impact cannot be simplistically inferred from the form of sexual violence."[48] There are no standard victimhood traits based on the type of harm experienced.[49] Yet, survivors may feel the need to demonstrate the "long-lasting harmfulness of abuse" in order to make their experiences "seem more serious" if they try to hold people "responsible."[50]

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[41] *Id.* para. 64.

[42] *Id.* para. 77.

[43] *Id.* para. 89.

[44] *Id.* para. 59; *see id.* paras. 47–58.

[45] LIZ KELLY, SURVIVING SEXUAL VIOLENCE 74–76 (1987) (explaining that the concept of a "continuum" more effectively conveys the "extent and range of sexual violence" and better captures the "complexity" of victims' experiences, *id.* at 74).

[46] *Id.* at 76.

[47] *See Levenstein*, 2018 (8) BCLR at paras. 56–58.

[48] KELLY, *supra* note 45, at 76.

[49] *See* Sharon Lamb, *Constructing the Victim: Popular Images and Lasting Labels*, *in* NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT 108, 108–09 (Sharon Lamb ed., 1999) (arguing that societal reliance on a single "pathology" of victimhood robs survivors of agency).

[50] *Id.* at 111.

This burden is palpable in a trial by jury.[51] Survivors may not want to be defined by the gravity of their experiences, but they are forced to make their case against societal norms[52] that suggest pressurized sex and coercive sex[53] are "beyond reproach"[54] unless they reach the seriousness associated with rape. *Levenstein* rightfully chips away at these norms.

Though the court properly removed an arbitrary distinction, Parliament should grapple with the potential result of an expanded carceral state. Indeed, the court arguably chose a path reminiscent of the "carceral feminist" theory shaping common legal responses to sexual violence in the United States.[55] Allowing more survivors to come forward has the potential to increase the number of people incarcerated. South Africa's inmate population ranks "ninth [highest] in the world and the highest in Africa," and young men from disadvantaged class and racial backgrounds are predominantly prosecuted for violent crime.[56] Incarceration may not get to the root of the harm[57] and may cause further violence, including sexual violence in prison against those convicted.[58] Gender-based violence, no matter the form, is an enactment of power; Parliament ought to consider a rehabilitative remedy that could heal the harmed party and educate the abusive party about power in order to deter future sexual violence.[59]

To avoid a possible expansion of the carceral state in *Levenstein*'s wake, Parliament could turn to restorative justice as an alternative remedy for sexual offenses. Restorative justice was defined by one of its

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[51] *See, e.g.*, *id.* at 117 (describing an instance where a victim's lawyer was "satisfied that [the child] looked 'good' for the jury" only after "the girl began to cry and was so upset that she could not finish" her testimony at trial).

[52] Darlene Dralus & Jen Shelton, *What is the Subject? Speaking, Silencing, (Self) Censorship*, 14 TULSA STUD. WOMEN'S LITERATURE 19, 20 (1995).

[53] KELLY, *supra* note 45, at 81–82, 84.

[54] NICOLA GAVEY, JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE 7 (2005).

[55] *See* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism*," 18 DIFFERENCES, Fall 2007, at 128, 143 (coining the term "carceral feminism" to refer to "the [feminist] commitment . . . to a law and order agenda and . . . a drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals"); *see also* Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1374–77 (2018) (arguing feminist reforms "produced greater punishment," *id.* at 1377).

[56] *See* Hema Hargovan, *Violence, Victimisation and Parole*, 54 SA CRIME Q., Dec. 2015, at 55.

[57] *See* JACKIE WANG, CARCERAL CAPITALISM 288–91 (2018) (noting that undocumented immigrants and black women are less likely to turn to the criminal justice system because they recognize the institution itself as inherently violent).

[58] *See* SASHA GEAR, CTR. FOR THE STUDY OF VIOLENCE & RECONCILIATION, FEAR, VIOLENCE & SEXUAL VIOLENCE IN A GAUTENG JUVENILE CORRECTIONAL CENTRE FOR MALES 2–4 (2007); LUKAS MUNTINGH, CIVIL SOC'Y PRISON REFORM INITIATIVE, REDUCING PRISON VIOLENCE: IMPLICATIONS FROM THE LITERATURE FOR SOUTH AFRICA 15 (2009).

[59] *Cf.* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 107 (2003) (envisioning "a justice system based on reparation and reconciliation rather than retribution and vengeance" in the United States); Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1615–17 (2014) (suggesting means other than prison for preventing rape).

founders as a process in which "those who have a stake in a specific offense . . . collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."[60] Proponents of restorative justice seek "to make offenders more accountable to their victims, to respond more directly to the psychological and emotional needs of crime victims, and to promote offender rehabilitation."[61] Restorative justice is an informal process that aims to repair the harm done to the survivor, often through three common practices: mediation, family group conferencing, and peacemaking circles.[62] South African courts have used restorative justice for theft and violent crimes,[63] but South Africa has yet to use restorative justice at the sentencing phase for sexual offenses; scholars have called for research on this subject.[64] South African researchers have looked to international practices when evaluating restorative justice policies,[65] so international theories of restorative justice can inform debates among Parliament members and scholars alike on new approaches to sexual offenses.

Restorative justice has its risks. First, no country's implementation of restorative justice has fully realized the goals of the theory.[66] Efforts to employ it often exclude sexual offenses.[67] One concern is that survivors may feel pressured to forgive those who harmed them, which could cause further psychological distress.[68] Survivors may feel revictimized by the restorative process, may be put at risk if power imbalances go unchecked during the mediation, and may be victim-blamed and manipulated.[69]

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[60] HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 (2002).

[61] Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 41 (2011); *see also Levenstein*, 2018 (8) BCLR at para. 55 ("[S]exual violence . . . is by its very nature intentionally designed to produce psychological trauma." (internal quotation marks omitted)).

[62] *See, e.g.*, Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 535–41 (2010).

[63] Ann Skelton & Mike Batley, *Restorative Justice: A Contemporary South African Review*, 21 ACTA CRIMINOLOGICA 37, 40–42 (2008).

[64] *See* Hema Hargovan, *Restorative Approaches to Justice: "Compulsory Compassion" or Victim Empowerment?*, 20 ACTA CRIMINOLOGICA 113, 121–22 (2007). Parliament "is best-suited" to hear restorative justice viewpoints. *Cf. Levenstein*, 2018 (8) BCLR at para. 75.

[65] *See* Skelton & Batley, *supra* note 63, at 37–39.

[66] But the same can be said for the implementation of retributive justice. *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 53, 60 (1999).

[67] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 276B, § 3 (West 2018) (excluding persons charged with a sexual offense from participating in community-based restorative justice programs).

[68] Rebecca Saunders, *Questionable Associations: The Role of Forgiveness in Transitional Justice*, 5 INT'L J. TRANSITIONAL JUST. 119, 138–40 (2011).

[69] Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9, 17 (2006).

A face-to-face interaction with an abuser may be traumatic for survivors, creating "a new burden they did not seek."[70]

Survivors may prefer criminal redress.[71] Some South Africans, for example, critiqued the Truth and Reconciliation Commission's decision to grant amnesty for rape and other crimes during apartheid and sought prosecution and civil redress.[72] Criminal courts "can offer victims the chance to speak, confront those charged with abusing or terrifying them, and perhaps let go of their burdens."[73] In the United States, those who fought to establish gendered harms as serious crimes, and who continue to refine rape law, have reason to view incarceration as a goal.[74]

However, restorative justice has many benefits for addressing sexual offenses. One of SORMA's purposes was to "afford complainants of sexual offences the least traumatising protection the law can provide."[75] A system built on incarceration takes "little interest in the healing process" of survivors.[76] South African society would benefit from a new path that envisions a radical future.[77] Mediation, a form of restorative justice, has been effective for "victims of both petty and more serious crimes, and is now being offered in" various jurisdictions.[78] Mediators center the "concerns and experiences of the person who was harmed," then "focus on the person responsible . . . without disregarding [their] humanity."[79] If survivors voluntarily participate in a mediation, it can be a powerful

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[70] MARTHA MINOW, WHEN SHOULD LAW FORGIVE? (forthcoming 2019) (manuscript at 27) (on file with author).

[71] *But see Levenstein*, 2018 (8) BCLR at para. 58 ("[O]nly one in three rape survivors seek assistance from formal social systems.").

[72] *See* Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT'L L.J. 1, 28 (2019); OUPA MAKHALEMELE, SOUTHERN AFRICA RECONCILIATION PROJECT: KHULUMANI CASE STUDY (2004) https://www.csvr.org.za/dpcs/reconciliation/southernafricareconciliation.pdf [https://perma.cc/DXT2-NUA4].

[73] MINOW, *supra* note 70 (manuscript at 30).

[74] *See* ROBIN WEST, CARING FOR JUSTICE 100–01 (1997); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 436 (2016).

[75] *Levenstein*, 2018 (8) BCLR at para. 49.

[76] Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 459 (2006) (discussing how the "pursuit of public justice," by focusing on "the offender's moral culpability," may "subsume a victim's individual concerns").

[77] Some survivors may feel safer knowing the person who caused them harm is behind bars. Criminal legal redress should thus remain an option. But others may choose restorative justice — a paradigm shift from the carceral status quo. *Cf.* JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY 1 (2009) ("The here and now is a prison house. We must strive . . . to think and feel a *then and there*.").

[78] Mills, *supra* note 76, at 501.

[79] Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not "Transformative Justice." Here's Why.*, THE APPEAL (Feb. 5, 2018), https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645 [https://perma.cc/GPC8-48VN].

remedy.[80] Restorative justice principles support abolishing statutes of limitations for the parties to reconcile on individual timelines.[81]

South Africa should consider restorative justice with an open mind. The *Levenstein* court noted that, in the Gauteng province, "less than half of adult women's reported cases resulted in arrest and only one in seven went to trial," indicating that criminal convictions are unlikely.[82] The criminal system rarely offers closure, whereas survivors who choose to participate in restorative justice "often leave feeling satisfied."[83] There is evidence that restorative justice deters crime better, incapacitates better, and rehabilitates better.[84] Restorative justice has been used in several countries, including Australia, Canada, and New Zealand.[85] Legislators should continue to approach it "slowly and thoughtfully" and not as inherently opposed to "adversarial justice."[86] This survivor-centered method reflects the *Levenstein* court's interest in providing a remedy to all survivors once they are ready to come forward.[87] South Africa can take another significant step forward; apartheid ended with a nationwide restorative justice process, and the nation can find faith in it once again.[88]

Though the Constitutional Court was correct in abolishing section 18's differentiation between rape and other sexual offenses, its decision may expand the carceral state. To mitigate this, the South African Parliament, as an example for legislatures in the United States and elsewhere, should consider restorative justice as an alternate path forward, particularly for violent crimes with racial disparities in enforcement.[89]

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[80] *See* LINDA G. MILLS & BRIANA BAROCAS, AN IN-DEPTH EXAMINATION OF BATTERER INTERVENTION AND ALTERNATIVE TREATMENT APPROACHES FOR DOMESTIC VIOLENCE OFFENDERS 11 (2019), https://www.ncjrs.gov/pdffiles1/nij/grants/252265.pdf [https://perma.cc/X4PP-LNRJ]; *see also* Isobel Yeung, Opinion, *What Happens When Sexual Assault Survivors Sit Down with the Men Who Attacked Them?*, GLAMOUR (Oct. 16, 2018), https://www.glamour.com/story/sexual-assault-survivors-consent-restorative-justice-vice-hbo [https://perma.cc/S894-FEQ5].

[81] Symone Shinton, *Pedophiles Don't Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*, 92 CHI.-KENT L. REV. 317, 335–36 (2017).

[82] *Levenstein*, 2018 (8) BCLR at para. 57 n.44. This puts an onus on Parliament to meet its "duty" to "prohibit all gender-based discrimination." *Id.* para. 60. If "so few have the means to enforce their rights through the courts," restorative justice may be a solution. *Id.* para. 67 (quoting *Fose v. Minister of Safety & Sec.* 1997 (3) SA 786 (CC) at para. 69).

[83] Harris, *supra* note 61, at 44; *see also* Yeung, *supra* note 80.

[84] Braithwaite, *supra* note 66, at 56–69.

[85] Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. WOMEN'S L.J. 53, 97 (2017).

[86] Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1655 (2014).

[87] *See Levenstein*, 2018 (8) BCLR at paras. 52–53.

[88] DAVIS, *supra* note 59, at 114–15; *see also* Dries Velthuizen, *Why South Africa's Tentative Moves Toward Restorative Justice Need Support*, THE CONVERSATION (Jan. 13, 2016, 11:39 PM), https://theconversation.com/why-south-africas-tentative-moves-toward-restorative-justice-need-support-51286 [https://perma.cc/FB8M-K5C5].

[89] *See* Hargovan, *supra* note 56, at 55, 61; Michelle Alexander, Opinion, *Reckoning With Violence*, N.Y. TIMES (Mar. 3, 2019), https://nyti.ms/2VxMR2n [https://perma.cc/4S8S-UCER].