

NORMALIZING VIOLENCE: TRANSITIONAL JUSTICE AND THE GUJARAT RIOTS

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*How does it feel to be Indian Muslim? To be constantly told by rabid elements that your real home is across the border?*¹

In February and March of 2001, the Vishwa Hindu Parishad (VHP—World Hindu Council), a religious-based organization set up to mobilize “the Hindu masses,” sounded the drum roll of the Ram Mandir (Ram Temple) movement. The primary objective of the movement is to construct a temple on the very spot in Ayodhya where the mobs of the Hindu Right tore apart a sixteenth century mosque with their bare hands in December 1992. The VHP declared that the mosque stood precisely on the spot where “God” was born and determined to carry out its objective of constructing the temple in pursuit of the broader mission of the Hindu Right, the establishment of a Hindu state for a nation consisting primarily of Hindus.² In preparation for the event, their foot soldiers visited the site of the now cordoned off area to pay respects and prepare for the *bhumipuja* (grand prayer). While some of these participants were returning from the site by train, allegedly shouting god chants, (“*hail ‘ram rajya’*”—Hail to the Rule of Lord Ram) and anti-Muslim slogans (“*Muslims Bharat chodo!*”—Muslims leave India!), their bogey was purportedly set alight by mobs of

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¹ DEV (Applause Entertainment, Udbhav Dreamzone 2004).

² K.C. Sudarshan, the former appointed leader (*sarsanghachalak*) of the Rashtriya Swayamsevak Sangh (RSS) (Association of Nationalist Volunteers), the ideological component of the Hindu Right, stated that every citizen in India is a Hindu, for Hinduism is a way of life and not a religion. “As the people living in France are called French, those in Russia Russians, those living in Hindustan should be called Hindus.” *Every citizen of India is a Hindu: Sudarshan*, REDIFF ON THE NET, Apr. 6, 2002, <http://www.rediff.com/news/2002/apr/06rss.htm>.

Muslims as the train moved through Godhra station in Gujarat.³ The carnage that followed left fifty-eight Hindus dead. This event ignited the second catastrophic event—the slaughter of over two thousand Muslims throughout the state of Gujarat both within sight of the state’s law enforcement officers, who simply stood by as witnesses to the massacre, and, in some cases, with the active support of state officials.⁴

Dev, a Bollywood film directed by reputed filmmaker Govind Nihalani, depicts the isolation of the Indian Muslim in the post-Gujarat scenario where even secularists turned partisan, rendering the country’s law and order machinery into a force capable of the most horrifying violence. At the center of the power game are two police officers—Dev Pratap Singh, (Amitabh Bachchan) and Tejinder Khosla (Om Puri). Although the film is located in Bombay, it serves as a metaphor for what happened in the Gujarat riots in 2002. Dev, the Joint Commissioner of Police, is a proud and seasoned police officer representing the liberal subject with complete faith in the supremacy of law. Dev is the conscience of the film, and has a tough time comprehending the real politics behind the riots. He is initially simply disgusted, and refuses to see how the majoritarianism of the Hindus has turned into a process of gradual disentanglement and marginalisation of the Muslims. His “neutral” stance and fence-sitting political ideology persists

³ Rama Lakshmi, *Mob Attacks Indian Train*, WASH. POST, Feb. 28, 2002, at A13.

⁴ See also PEOPLE’S UNION FOR CIVIL LIBERTIES, AN INTERIM REPORT TO THE NATIONAL HUMAN RIGHTS COMMISSION (2002), <http://www.pucl.org/Topics/Religion-communalism/2002/gujarat-nhrc-submission.htm> [hereinafter PUCL INTERIM REPORT] (discussing how some residents of Sama appealed to the Councillor of their region for assistance, but the Councillor claimed he could not do anything). The Councillor

ranted at length about the unpatriotic and criminal nature of the Muslim community (such as for instance their habit of abducting Hindu girls), and dwelt on the desirability of Muslims going and living in “their own areas.” He also produced a list which, he explained, showed the voting patterns . . . in the most recent assembly bye-election, and how Muslim localities had voted against the BJP. On being repeatedly asked whether he could assure that there would be no further violence in the area, he replied that he could not do so, and one of his associates explained that what had happened that day (Feb. 28th) was “only a sample,” and that it was best to be prepared for what would follow the next day.

Id. at annexure 2; see also *Police: Criminals in Uniform*, COMMUNALISM COMBAT, Mar.-Apr. 2002, <http://www.sabrang.com/cc/archive/2002/marapril/police.htm>; Concerned Citizen’s Tribunal—Gujarat 2002, *Annexure 9: Police Dereliction of Duty*, 1 CRIME AGAINST HUMANITY: AN INQUIRY INTO THE VIOLENCE IN GUJARAT 225 (2002), available at <http://www.sabrang.com/tribunal/tribunal1.pdf> [hereinafter CRIME AGAINST HUMANITY].

throughout the film, until he is attacked by a young Muslim, Farhan (Fardeen Khan), an unemployed law graduate who holds Dev responsible for his father's death. Farhan's father, Ali Saheb, was accidentally shot and killed by the police during a march protesting police injustices against the Muslim community. Ali Saheb infused Farhan with ideas of patriotism, non-violence, and faith in the democratic process and rule of law, which are the very same liberal values to which Dev subscribes, but the violent death of his father leaves Farhan emotionally orphaned and disillusioned. He chooses the path of violence and joins forces with a corrupt and ambitious politician, Lati, with the intent to kill Dev.

Unlike Dev, who goes through a process of gradual realization of the enormity of the politics behind the isolation of minorities in India, Tejinder represents a one-dimensional, almost villainous communalization. He is a boorish communal cop who throws shocking lines into the film's narrative. "They're all terrorists," claims Tejinder, who lives by his communal convictions until the very end, including at the moment of his suicide.⁵

The untangling of the complex ideological tension between the films main protagonists is set against a subtext—Bollywood's mandatory romantic interlude. A rather infantile love story unfolds during the time of the communal riots, where Farhan's attachment to the young Muslim woman next door, Aaliya (Kareena Kapoor), is celebrated through furtive glances thrown at one another from a terrace. Aaliya's role is modeled on Zaheera Sheikh, a key eyewitness in the real life Vadodara's *Best Bakery Case* being fought through the courts in India, which has become emblematic of the destruction and killings that took place in the Gujarat riots.⁶ In what constitutes perhaps a climactic moment in the film, Aaliya, at the behest of Dev, comes forward before the police commission to expose the powerful rioters. She steps forward to reveal the names of the politicians and police officers who encouraged the rapes and murders of hundreds of Muslims, including members of her own family and friends. Aaliya's testimony represents a moment of complex subjectivity. It is not expressed exclusively through the lens of victimization, nor as a free agent exercising her freedom to complain about the violation of her individual rights. She is aware that her act is condemned by members of her own community who are convinced that no justice can be secured from a Hindu dominated structure, process, and state, and that justice can only be attained through

⁵ DEV, *supra* note 1.

⁶ See *infra* Section VII.

violent revenge. At the same time, members of the Hindu Right, including the chief minister of the state (mimicking the real life staunch Hindu nationalist Chief Minister of Gujarat, Narendra Singh Modi), seek to characterize her accusations, as well as Dev's efforts to bring the truth before a commission of inquiry, as further examples of appeasement of the minorities and a failure to recognize that the riots were simply an expression of anger on the part of Hindus against decades of oppression by the Muslim minority. Aaliya's complex subjectivity is constituted in and through the discourses of Hindu majoritarianism and Muslim religious identity.

The film ends with Farhan assuming his lawyerly robes to complete Dev's task of securing justice for the battered Muslim community. But Dev himself is killed by his lifelong friend Tejinder, who is unable to comprehend Dev's defense of these "traitors" and "foreigners" whose holy land lies outside of India, and whose loyalties are always suspect. Dev's murder exposes how transitional justice does not find a neat and tidy resolution in and through the establishment of a commission of inquiry and an emphasis on prosecutions. The legal, political, and religious discourses of the Hindu Right that constitute the space, location, and subjectivity of Aaliya and the entire Muslim community remain unaddressed, and continue to proliferate even after such inquiries are brought to a close.

Dev becomes the point of departure for my discussion of the large-scale riots that took place in Gujarat, a western state in India, in 2002.⁷ My discussion of the riots illustrates how transitional justice cannot be limited simply to a focus on the victim subject and repair through the criminal justice process. It is about how the past informs the present and the future, and how discursive practices can themselves produce the large-scale traumas of the sort that took place in Gujarat.

Transitional justice is a term that generally refers to justice that is provided to individuals or groups during a period of transition, which usually takes the form of prosecuting perpetrators for gross human rights violations and obtaining redress for the victims of horrific crimes.⁸ Historically, these mechanisms have been set up in societies that are ostensibly in transition, such as from military to democratic rule, as in

⁷ For continuous update on the progress of the prosecutions and other issues related to the Gujarat riots, see The Gujarat Riots Homepage, <http://www.rediff.com/news/godhra.htm> (last visited Jan. 18, 2006).

⁸ See Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2544 (1991); David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43 (1999).

Chile, or from apartheid to democratic rule, as in South Africa. In such instances, mechanisms such as truth commissions or prosecutions, as well as other forms of legal accountability and institutional reform, are set up to bring about some form of acknowledgment of the harm done—redress as well as closure. While the primary focus of transitional justice on “gross human rights violations” in the form of killings, disappearances, custodial torture, and abductions/illegal imprisonment is important, it remains “caught up in a liberal, legalistic, and state-oriented approach, despite the failures of such an approach to address the most important sources of human rights violations and anti-democratic power.”⁹ What this focus leaves out is how the institutional arrangements and structures may be deeply implicated in the production of the violation or the harm in the first place. It tends to draw clear straight lines between guilt and innocence, leaving a sense that the very state responsible for the violent ruptures is able to reincarnate and bring about reconciliation and repair. It achieves this by interpreting “suffering, violence, and moral violation” through a clear set of moral or legal rules in a way that enables “the identification and punishment of specific—individual or collective—perpetrators, while simultaneously protecting oneself against any implication in the violation.”¹⁰

This Article focuses on how the Gujarat riots in the post-colonial context of India appear to fall outside the traditional assumptions and framework of transitional justice. The Article moves beyond such traditional assumptions, critically examining how injustices are normalized by demonstrating how the violence against the Muslim community, and Muslim women in particular, was partly a product of the legal, political, and religious discursive practices of the Hindu Right. The story of the Gujarat riots and subsequent efforts to address the harms and injuries through prosecution and apology does not pay attention to the institutional and discursive mechanisms within a democratic polity that can produce moments of extreme violence, moments that cannot be written off as aberrational and deviant. This Article endeavors to expose how the Gujarat riots of 2002 cannot be addressed exclusively within a prosecutorial or reparations framework that seeks to prosecute individual wrongdoers who carried out such atrocities and provide compensation to those who suffered. It exposes how the riots were a logical product or outcome of a discursive

⁹ Vasuki Nessiah & Alan Keenan, *Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles*, in *FROM THE MARGINS OF GLOBALIZATION: CRITICAL PERSPECTIVES ON HUMAN RIGHTS* 261, 281 (Neve Gordon ed., 2004).

¹⁰ *Id.* at 286.

strategy pursued partly in and through liberal rights discourse and not in opposition to such rights.

This Article focuses on at least two discursive shifts in the strategy of the Hindu Right. The first is the pursuit of equality rights discourse to advance its majoritarian agenda in ways that seem highly logical, persuasive, and have come to constitute part of common sense. The second is to cast Muslims as constantly appeased, fomenting the ire of Hindus within the nation. The Muslim is depicted as dangerous, alien, and lustful—an alien “other” from whom the honor and integrity of Hindu women must be protected. Gujarat symbolizes the culmination of a strategy that justifies retribution for the oppression and violence inflicted by the Muslim minority on the Hindu majority, including its women, as an act of self-defense on behalf of Hindu women as well as the Hindu nation.

The ability to use rights discourse to pursue a deeply ideological agenda exposes how a project conceived in terms of progress and emancipation has a dark side which is not addressed within traditional transitional justice frameworks of redress. At the same time, the so-called “extraordinary violence” that took place within the context of Gujarat, resulting in the large scale massacre of Muslims and rapes of Muslim women, comes to be situated within the enabling conditions of normalized violence, including the historical predicament of Muslim minorities in India, the ideologies of Hindu majoritarianism built into dominant ideas of the nation-state, and the assumptions about women’s roles in the normative family and the cause of the nation. While the focus on individual prosecutions and accountability is important, my concern is with the broader discursive framework that normalizes extraordinary violence and its common sense appeal.

I. THE CONTEXT: HINDU MAJORITARIANISM

The Hindu Right is a contemporary right-wing religious and nationalist movement that is dedicated to the ideology of *Hindutva*—the establishment of India as a Hindu State. It is a political ideology completely distinct and separate from Hinduism, the religion, though the Hindu Right has been quite successful in its efforts to blur this distinction. The Hindu Right refers to the main organizations and political parties in the current phase of Hindu communalism in India—namely, the *Bharatiya Janata Party* (BJP—Indian People’s Party), the political wing of the Hindu Right,¹¹ the *Rashtriya Swayamsevak Sangh* (RSS—Association of National

¹¹ The BJP led the national coalition government between 1999 and 2004.

Volunteers), which is the main ideological component of the movement,¹² and the *Vishwa Hindu Parishad* (VHP—World Hindu Council), the promoter of the religious ideology of the party.¹³ The VHP was established and trained by the RSS. Its top leaders are all members of the RSS, and many are also members of the BJP. Other smaller bodies include the militant and virulently anti-Muslim *Shiv Sena* (SS—"foot soldiers of Lord Shiva") and the *Bajrang Dal* (BD—Hanuman Squad). The BD, the official youth wing of the VHP, was established in the mid-1980s. The BD is deployed primarily for vendettas and in what one scholar describes as "tit-for-tat situations."¹⁴

The basic precepts of the ideology of the Hindu Right are that Muslims and Christians are to be considered suspect because, unlike Hindus, their holy lands lie outside of India.¹⁵ Even though they share the

¹² The RSS was founded in 1925. It has small training units, *shakhas*, operating throughout the country. These units hold ideological and combat training sessions on a daily basis. The training is a blend of physical exercises, martial arts, speeches and tales, songs and theatre, games, and organized sports. Each effort replicates the same message and sense of purpose in a different medium. They also run schools, leisure centers, cultural organizations, welfare societies, tribal and slum-level educational projects, and audio and video stations. They control temple networks, associations of priests, and *sadhus* (holy men), and, as in the case of Gujarat, they sometimes rule over states. For a detailed analysis of the RSS, its ideology, history, politics, and leadership, see DES RAJ GOYAL, *RASHTRIYA SWAYAMSEWAK SANGH* (2000); PRALAY KUNUNGO, *RSS'S TRYST WITH POLITICS: FROM HEDGEWAR TO SARVARKAR* (2002); Ainslie T. Embree, *The Function of the Rashtriya Swayamsevak Sangh: To Define the Hindu Nation*, in *THE FUNDAMENTALISM PROJECT: ACCOUNTING FOR FUNDAMENTALISMS* 617 (Martin E. Marty & R. Scott Appleby eds., 1991).

¹³ The creation of the VHP in 1964 was founded at the behest of the RSS, with the intention of infusing the politics of *Hindutva* with a specifically religious vision. Unlike the RSS, which had functioned as an elite organization, the VHP was intended to popularize *Hindutva* identity among "the masses." This phase of populism has been characterized by increasingly extreme and violent anti-Muslim rhetoric, which, in the contemporary period, has been repeatedly (and successfully) defended in the courts as an exercise of the right to free speech. For more on communalism, see BIPAN CHANDRA, *COMMUNALISM IN MODERN INDIA* (1984); GYANENDRA PANDEY, *THE CONSTRUCTION OF COMMUNALISM IN COLONIAL NORTH INDIA* (1990); *AFTER COLONIALISM: IMPERIAL HISTORIES AND POSTCOLONIAL DISPLACEMENTS* (Gyan Prakash ed., 1994).

¹⁴ Tanika Sarkar, *Semiotics of Terror: Muslim Children and Women in Hindu Rashtra*, 26 *ECON. AND POL. WKLY.* 2872, 2874 (2002).

¹⁵ The Hindu Right has its basis in revivalist and nationalist movements of the nineteenth century, which sought to revitalize Hindu culture as a strategy for resisting colonialism. As it developed through the twentieth century, it began to take on its distinctively right-wing, anti-minority stance, particularly in the 1920's with the publication of Vinayak Damodar Savarkar's *Who is A Hindu?*, and the founding of the RSS. See PANDEY, *supra* note 13, at 210. Sarvarkar developed the idea of *Hindutva*, a communal

same “Fatherland,” India, their allegiances are often questioned on the grounds that they have their religious fealties in foreign lands. Thus, the Hindu Right and the political philosophy of *Hindutva* are antagonistic to difference. Madhav Sadashiv Golwalkar, who led the RSS from 1940-1973, for example, stated:

[A]ll those . . . can have no place in the national life, unless they abandon their differences, and completely merge themselves in the National Race. So long, however, as they maintain their racial, religious and cultural differences, they cannot but be only foreigners [T]he strangers have to acknowledge the National religion as the State religion and in every other respect inseparably merge in the National community.¹⁶

A central paradoxical strategy of the Hindu Right is to install religion and culture as primary attributes of nationalism and national identity and, at the same time, deploy the discourse of secularism, free

discourse, which seeks to constitute Hindu subjects to understand the fractured society in a particular way. As Basu and others have stated: “[a]t the heart of *Hindutva* lies the myth of a continuous thousand-year old struggle of Hindus against Muslims as the structuring principle of Indian History. Both communities are assumed to have been homogenous blocks—of Hindu patriots, heroically resisting invariably tyrannical, ‘foreign’ Muslim rulers.” TAPAN BASU ET AL, *KHAKI SHORTS, SAFFRON FLAGS: A CRITIQUE OF THE HINDU RIGHT* 2 (1993); CHETAN BHATT, *HINDU NATIONALISM: ORIGINS, IDEOLOGIES AND MODERN MYTHS* (2001) (arguing that, while the *Hindutva* movement has been of relatively recent origin, the Hindu nationalist political and ideological processes have been in formation since the nineteenth century and continue to impact on contemporary politics); *see also* *CONTESTING THE NATION: RELIGION, COMMUNITY AND THE POLITICS OF DEMOCRACY IN INDIA* (David Ludden ed., 1996); *THE SANGH PARIVAR* (Christophe Jaffrelot ed., 2005); Paul Brass, *The Gujarat Pogrom of 2002*, *CONTEMPORARY CONFLICTS: GUJARAT*, <http://conconflicts.ssrc.org/gujarat/brass/> (last visited Mar. 23, 2006) (stating that the BJP party signature rally is of support for Hindu political unity, at the expense of disenfranchising Muslims and Christians by supporting violent outbreaks against both groups).

¹⁶ MADHAV SADASHIV GOLWALKAR, *WE OR OUR NATIONHOOD DEFINED* 53-54 (4th ed. 1947). Golwalkar was very clear that there was no place for religious minorities who failed to assimilate: they must

los[e] . . . their separate existence . . . to merge themselves in the national race [T]hey must cease to be foreigners, or may stay in the country, wholly subordinated to the Hindu Nation, claiming nothing, deserving no privileges, far less any preferential treatment—not even citizen’s rights.

Id. 55-56. The Hindu Nation was thus constituted in the writings of Golwalkar through an attack on the very legitimacy of religious minorities, and on a denial of any protection of minority rights within the Hindu Nation.

speech, and equality to pursue what is in fact an anti-secular agenda—that is, the establishment of a Hindu State. The Hindu Right works in and through the discourse of rights, including secularism, equality, and free speech, to pursue its religious and cultural vision. This vision is consistent with and corresponds to the ideology of *Hindutva*—the casting of the Muslim “other” as intolerant, suspect in terms of his loyalty to the nation, and a threat to the security of the Hindu majority and the Indian nation. This strategy reflects how the Hindu Right is engaged in a discursive struggle in which they are attempting to establish their vision of *Hindutva* as ideologically dominant. Through their collective efforts, they are seeking to naturalize the ideas of *Hindutva* by making these ideas as a part of the “common sense” of an increasingly large segment of Hindu society.

The Hindu Right has sought to promote and spread this communalized discourse to an increasingly large segment of Hindu society, through legal, political, and religious discourse.¹⁷ *Hindutva* is a call to unite against religious minorities; at best it is a call to assimilate these minorities into the ostensibly more tolerant fabric of Hinduism, and in its more radical form, it is a call to simply destroy them. In either mode, *Hindutva* is an attack on the rights, and indeed, on the very legitimacy of religious minorities. As a call to assimilate or otherwise undermine the very identity and integrity of minority communities, it is based on a total disregard and lack of respect for other religious groups.¹⁸

¹⁷ The Hindu Right has continued to use *Hindutva* to attack the legitimacy of minority rights. *Hindutva* continues to mean the assimilation of all minorities into the majoritarian way of life. The concept of *Hindutva* retains its oppositional meaning: that is, it continues to be constituted largely in relation to that which it opposes—Muslims and Christians. For the ideologues of the Hindu Right, it is this effort to assimilate minorities back into the folds of Hinduism that has given *Hindutva* its political character. The current phase of popularizing the agenda of the Hindu Right through the VHP has not fundamentally changed this political attack, but rather simply popularized it through the invocation of religious discourse.

¹⁸ Unfortunately, even the Indian Supreme Court has failed to recognize this political deployment of the term, which can only be seen as promoting enmity, disharmony, and often hatred between religious groups. It has simply collapsed *Hindutva* with Hinduness and as a description of the way of life for people living on the Indian subcontinent. Prabhoo v. Prabhakar, A. I. R. 1996 S. C. 1113. For a full discussion of the case and its implications on the meaning of secularism in India, see BRENDA COSSMAN & RATNA KAPUR, *SECULARISM’S LAST SIGH? Hindutva AND THE (MIS)RULE OF LAW* (2001).

II. THE GUJARAT RIOTS: EXTREME POLITICAL VIOLENCE OR ORDINARY COMMON SENSE

In light of the ideological context and discussion of the politics of *Hindutva*, the riots in Gujarat cannot be understood simply within the confines of the notions of “gross human rights violations” or acts of extreme political violence on which transitional justice claims are based. The relationship of the riots with the prevailing notions of Muslims as outsiders, an understanding constructed in and through political as well as legal discourse, has simply become a part of common sense.

A central tool in producing such narratives includes the revising of educational texts in the state-run schools.¹⁹ The willingness to perpetrate such extreme violence against Muslim neighbors was partly nurtured through a conscious campaign to rewrite the educational curriculum through the standpoint of *Hindutva*. The former Minister for Human Resource Development, Murli Manohar Joshi, was a former regional leader of the RSS. During his tenure between 1999 and 2004, he sought to incorporate Vedic mathematics and astrology into the national educational curriculum. At the state level, textbooks in Gujarat taught of Nazi Germany by criticizing “German nationalism not for genocide, war, pogroms, and book-burning, but merely for a false superiority complex” and conspicuously left out any mention of the Holocaust.²⁰ Also, students were encouraged to view minority religious groups as foreigners, intent on colonizing India, who needed to be resisted.²¹

¹⁹ Anna Bigelow, *Hulladiya Hanuman: The Return or the End of History?*, CONTEMPORARY CONFLICTS: GUJARAT, <http://conconflicts.ssrc.org/gujarat/biglow/> (last visited Apr. 23, 2006).

²⁰ See, e.g., Siddhartha Deb, *Textbook Troubles*, BOSTON GLOBE, June 10, 2003, at D1, available at <http://www.countercurrents.org/comm-deb100603.htm>; see also Golwalkar, *supra* note 16, at 43 (“German race pride has now become the topic of the day. To keep up the purity of the Race and its culture, Germany shocked the world by her purging the country of the semitic Races—the Jews. Race pride at its highest has been manifested here. Germany has shown how well nigh impossible it is for Races and cultures, having differences going to the root, to be assimilated into one united whole, a good lesson for us in Hindusthan to learn and profit by.”).

²¹ See also HUMAN RIGHTS WATCH, “WE HAVE NO ORDERS TO SAVE YOU”: STATE PARTICIPATION AND COMPLICITY IN COMMUNAL VIOLENCE IN GUJARAT, 14:3 (2002) 43, available at <http://hrw.org/reports/2002/india/gujarat.pdf> [hereinafter WE HAVE NO ORDERS TO SAVE YOU] (stating that the goal of the RSS was to introduce anti-minority propaganda onto the streets and inside the classrooms); Smita Narula, *Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India*, 16 HARV. HUM. RTS. J. 41 (2003)

The prevailing narrative of Hindus as victims who were expressing their suppressed anger persists in the statements of the Hindu Right in the post-Gujarat scenario. The Chief Minister of Gujarat, Narendra Modi, a hardcore member of the RSS, worked with the VHP, the religious wing of the Hindu Right, to frame the February riots as an understandable expression of the anger of Hindus in response to the Godhra killings. The Godhra incident was cast as the murder of Hindu martyrs by Muslim rioters and terrorists.²² For Modi, the response to the Godhra killings was completely understandable. He stated that the killings in Gujarat were nothing more than a Newtonian law in action, a view that is founded on the belief that Muslims do not belong to India, in much the same way as Hitler thought the Jews did not belong in Germany and as white supremacists believe that non-whites do not have a right to live in countries ruled by whites.²³ In a press interview, Hareshbhai Bhat, the vice-president of the BD and one of the architects of the BD in the 1980s in Gujarat, expressed his belief that “[t]here was no rioting. This was just an expression of the way the majority community has felt Most of the shops and establishment burned down do not belong to Hindus. People wanted their revenge for Godhra and they got it.”²⁴ The Chief Minister added that, “[i]t wasn’t merely a communal riot, but something like a mass agitation. There was already great anger against terrorism and anti-national activity. The Godhra episode symbolized that.”²⁵ While condemning the massacre, the

[hereinafter *Overlooked Danger*] (analyzing the implications of the ‘communalization’ of India’s educational system by the Hindu Right).

²² Modi is a *pracharak*, or regional leader within the RSS hierarchy. This position requires him to be celibate, without any ties of family or job, and immerse himself totally in the work of organizing, teaching, and disseminating the values of the Hindu Right. It is life dedicated to spreading the message of hate. Sarkar, *supra* note 14, at 2875.

²³ ISLAMIC HUMAN RIGHTS COMMISSION, GUJARAT: ONGOING GENOCIDE 28 (2002), available at <http://www.ihrc.org.uk/file/02nov15gujaratongoinggenocide.pdf>; SMITA NARULA, HUMAN RIGHTS WATCH, COMPOUNDING INJUSTICE: THE GOVERNMENT’S FAILURE TO REDRESS MASSACRES IN GUJARAT, 15 INDIA 12 (2003), available at <http://www.hrw.org/reports/2003/india0703/India0703full.pdf>; Rajdeep Sardesai, Op-Ed., *Did the media ransack shops, take lives, Mr. Modi?*, INDIAN EXPRESS, Mar. 7, 2002, <http://www.indianexpress.com/ie20020307/op1.html>.

²⁴ *Shabana flays RSS leaders*, HINDU, May 3, 2002, <http://www.hinduonnet.com/2002/05/03/stories/2002050307121100.htm>; A.G. Noorani, *Playing out a farce?*, HINDUSTAN TIMES, March 19, 2002, at 12.

²⁵ Abdul Gafoor Noorani, *Modi and His Visa*, FRONTLINE, Mar. 12-25, 2005, at 42, 50, available at <http://www.hinduonnet.com/fline/fl2208/stories/20050422000704700.htm>; see also V. Shankar Aiyar & Uday Mahurkar, *It Wasn’t Merely a Communal Riot, it was*

RSS also stated that the violent aftermath of Godhra was a “natural reaction.”²⁶ The RSS further pointed out in its all-Indian general council resolution that Muslims’ “real safety lies in the goodwill of the majority.”²⁷ Even the then Prime Minister endorsed this position, stating at the National Executive Committee meeting of the BJP in Goa that the massacres in Gujarat were a direct fall-out of the Godhra killings. He asked: “Who lit the fire? How did the fire spread?”²⁸ Thus the killing of the Hindus in the train at Godhra was projected as a very calculated and premeditated action on the part of the Muslim community in Gujarat and served as a reminder to the insecurity of Hindus within their own country.

The casting of the Hindus who were killed in Godhra as martyrs, and the Muslims as terrorists and rioters, was played out in several responses to the riots by both the State and the central government. Modi ordered that the victims of Godhra, the Hindus, be awarded twice the amount of compensation than the Muslims who had been slaughtered in the subsequent rioting were awarded.²⁹ Secondly, although over 2000 Muslims were killed in the state, over sixty Muslims were arrested under the Prevention of Terrorism Act of 2002.³⁰ Not a single Hindu was arrested or

Like a Mass Agitation, Interview with Narendra Modi, INDIA TODAY, Mar. 18, 2002, <http://www.bjpguj.org/interviews/itwas.htm>.

²⁶ 2 CRIME AGAINST HUMANITY, *supra* note 4, at 60 (2002).

²⁷ *Id.*; *So kind of the RSS!*, HINDUSTAN TIMES, Mar. 19, 2002, www.india-ewsbehindnews.com/mycgi/aianewsagency/editorials/article/1_17_28/2681.html; Pradeep Kaushal, *RSS's Latest: To Earn Goodwill, Condemn Attacks on Hindus*, INDIAN EXPRESS Mar. 28, 2002, www.indianexpress.com/ie20020328/top2.html.

²⁸ Atal Bihari Vajpayee, “*Who are These People Accusing Us, India was Secular Even Before Muslims and Christians*,” INDIAN EXPRESS, Apr. 24, 2002, http://www.indianexpress.com/full_story.php?content_id=1402.

²⁹ 2 CRIME AGAINST HUMANITY, *supra* note 26, at 77; *see also* GENOCIDE IN GUJARAT: THE SANGH PARIVAR, NARENDRA MODI, AND THE GUJARAT GOVERNMENT 8 (2005), *available at* www.coalitionagainstgenocide.org/reports/2005/cag.02mar20005.modi.pdf.

³⁰ HUMAN RIGHTS WATCH, DISCOURAGING DISSENT: INTIMIDATION AND HARASSMENT OF WITNESSES, HUMAN RIGHTS ACTIVISTS, AND LAWYERS PURSUING ACCOUNTABILITY FOR THE 2002 COMMUNAL VIOLENCE IN GUJARAT 4-5 (2004), *available at* <http://hrw.org/backgrounder/asia/india/gujarat/>; WE HAVE NO ORDERS TO SAVE YOU, *supra* note 21, at 50-51. The Prevention of Terrorism Act (POTA) was repealed by the newly elected United Progressive Alliance (UPA) coalition in 2004 and replaced by the Unlawful Activities (Prevention) Amendment Act, 2004 (UAPA). The repeal of POTA does away with some of bail and confessions provisions that had the effect of eroding the personal liberties of the accused as well as violating the rights to due process. However, the provisions dealing with the definition of terrorist acts, banning of terrorist organizations, and interception of

detained under these provisions.³¹ They were primarily detained under provisions of the Indian Penal Code (IPC), where their rights to due process and a fair trial were assured.³² Indeed, the Godhra killings were used as an opportunity for the government to rush through the renewal of the Prevention of Terrorism Ordinance, which was due to expire in April, 2002. The fact that only Muslims were arrested under its provisions in the context of the Gujarat riots speaks to the concerns that many human rights and civil liberties groups expressed during the debates on introducing such legislation—that it would be used against minorities and other groups that the government does not like or wants to eliminate.³³ In the prevailing climate of that elusive and ill-defined “war on terror,” the Hindu Right had at hand the rhetoric and justification for enacting such legislation in the name of the security of the nation and protection of the citizens (Hindus) from the dangerous “others” (Muslims).

III. TRANSITIONAL JUSTICE AND THE LIBERAL RESPONSE

There has been intensive documentation of the violence and abuse that took place during the Gujarat carnage.³⁴ These reports suggest that the death toll resulting from the riots was as high as 2,000. In addition, the Indian government estimates that 98,000 more became refugees living in

electronic communication are all retained under the UAPA of 2004. A specially constituted Review Committee is to sift through the cases filed under the POTA, identify those where trials should continue as if the act existed, and drop charges in all cases where there is evidence of the misuse of POTA. PEOPLES UNION FOR DEMOCRATIC RIGHTS, *OBSESSIVE PURSUIT* (2004) at 4 available at <http://www.pudr.org/pages/ObssessivePursuit.pdf>. For more on the antecedents of POTA and the impact of its provisions, see Jayanth K. Krishnan, *India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 LAW & INEQ. J. 265 (2004) (analyzing the key legislative elements of POTA and its impact on the rights of those who have been arrested or tried under its provisions); Manas Mohapatra, *Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. CRIM. L. & CRIMINOLOGY 315 (2004).

³¹ Editorial, *On the Ground in Gujarat*, THE HINDU, Oct. 26, 2003, <http://www.hindu.com/2003/10/26/stories/2003102600081400.htm>.

³² PUCL INTERIM REPORT, *supra* note 4, at ch. 4 *The situation in and around Vadodara* (stating that, while Muslims were arrested under more severe legal provisions, Hindus were generally arrested under more innocuous sections, such as violating curfew timings).

³³ *Overlooked Danger*, *supra* note 21, at 58.

³⁴ See, e.g., WE HAVE NO ORDERS TO SAVE YOU, *supra* note 21; see generally PUCL INTERIM REPORT, *supra* note 4.

relief camps run by NGOs,³⁵ although NGO reports put the refugee numbers at 150,000.³⁶ These refugees fear returning to their homes, knowing that they are members of a despised minority group.³⁷

Several mechanisms have been set up to try and secure justice for the Muslims and specifically the women who experienced horrific violence during the Gujarat riots. The primary mechanism established to inquire into the Godhra incident and Gujarat riots, is the “fast track” court. The clear emphasis is on prosecution and conviction of those involved in the violence and to demonstrate in the most visible way that action is being taken by the State. However, in one of the first cases to be decided by the court, *The Best Bakery Case*, which arose out of the killing of fourteen people on the nights of March 1 and 2, 2002, in a building named Best Bakery, the court acquitted all of the twenty-one accused.³⁸ Many of the key eyewitnesses turned hostile, refusing to repeat testimony that they had previously given to the police for fear that they would be subjected to reprisals.³⁹ Subsequently, the National Human Rights Commission (NHRC) successfully appealed to the Supreme Court to set aside the orders of acquittal and secure a retrial of the case outside of Gujarat.⁴⁰

The second mechanism established by the government to investigate into the Godhra incident, as well as subsequently into the massacres that took place during the Gujarat riots, and to place its recommendations before Parliament, is the Nanavati Commission.⁴¹ The

³⁵ WE HAVE NO ORDERS TO SAVE YOU, *supra* note 21, at 6.

³⁶ CENTER FOR THE ADVANCED STUDY OF INDIA, DOING BUSINESS IN INDIA: POLITICAL, SOCIAL AND CULTURAL OVERVIEW: IDEOLOGY, POLITICS AND REFORM—THE NATIONAL DEMOCRATIC ALLIANCE IN INDIAN POLITICS, 1999-2004, at 2 (2004), *available at* http://www.sas.upenn.edu/casi/publications/DBI/DBI_2004.pdf.

³⁷ WE HAVE NO ORDERS TO SAVE YOU, *supra* note 21, at 59; Jill McGivering, *Gujarat's Muslims Live in Terror*, BBC NEWS, May 9, 2002, http://news.bbc.co.uk/2/hi/south_asia/1977246.stm.

³⁸ *State v. Baria, (Best Bakery Case)* No. 248/2002 (Gujarat Fast Track Ct. June 27, 2003), *available at* <http://www.sabrang.com/cjp/best/vadjudgement.pdf>. The acquittals were subsequently upheld by the Gujarat High Court.

³⁹ *Id.*

⁴⁰ *See Human Rights Commission v. State of Gujarat, Special Leave Petition (Criminal) of 2003 (India 2003)*, *available at* <http://www.ielrc.org/content/c0302.pdf>; *Sheikh v. State of Gujarat*, (2004) 4 S. C. C. 158.

⁴¹ Commissions of Inquiry are set up under the terms of the Commissions of Inquiry Act, No. 60 of 1952. On March 6, 2002, the Nanavati Commission was constituted

Commission has yet to submit its report to Parliament. The establishment of commissions of inquiry is a part of a long tradition in India of investigating events that are catastrophic and demand redress.⁴² Such commissions have not tended to provide justice in a substantive sense.⁴³ As Upendra Baxi has stated, “momentarily distressed regimes have used this mechanism, with some success in order to provide the appearance of a short term rule of law oriented state action, which in the long term divests victims of any semblance of effective redress.”⁴⁴ The scope of this commission’s terms of reference was initially limited to investigating the “Godhra incident,” but was subsequently expanded to include an investigation into the acts of senior state government officials relating to the Godhra train carnage and the 2002 Gujarat pogroms against Muslims.

The National Human Rights Commission (NHRC) has also played a role by publishing a report of its findings on the Gujarat riots and intervening at the level of the Supreme Court to challenge the ineptitude and inertia on the part of the Gujarat state government in pursuing criminal prosecutions.⁴⁵

by the Government of India, led at that time by the BJP, to conduct an investigation into the riots that took place in Gujarat in 2002. The commission has received over 3000 affidavits from riot victims, which have included allegations that the police and government machinery were involved in provoking the riots. Narula, *supra* note 23, at 26-27.

⁴² A recent famous example is the report of the Nanavati Commission on the 1984 anti-Sikh riots submitted to the government in February 2004, concluding its inquiry into the riots that erupted following the assassination of the former Prime Minister, Indira Gandhi, where hundreds of Sikhs were slaughtered in what was characterized as an act of retaliation for the assassination. The Commission suggested that a number of sitting members of parliament belonging to the Congress Party, the part led by Mrs. Gandhi, were involved in orchestrating the riots and made recommendations regarding compensation to the victim’s family. See *Nanavati Commision Report of 1984 Anti-Sikh Riots Submitted*, Hindu, Feb. 10, 2005, <http://www.hinduonnet.com/2005/02/10/stories/2005021005880900.htm>.

⁴³ Shrimovee Ghosh & Tarunabh Khaita, Human Rights Violations: A Comparison of the NHRC and the Commission [sic] of Enquiries, *Alternative Law Forum*, <http://www.altlawforum.org/Resources/lexlib/moifloppy> (last visited Mar. 27, 2006).

⁴⁴ *Id.* (quoting Quoting Upendra Baxi).

⁴⁵ The National Human Rights Commission (NHRC) has strongly condemned the Gujarat government for its failure to deliver justice to the riot victims. National Human Rights Commission, New Delhi, India, Case Details of File Number: 1150/6/2001-2002, <http://nhrc.nic.in/> (search for 1150/6/2001-2002 under “Status of a Complaint Filed”). For more information about the various interventions by the NHRC in the Gujarat riot cases see generally Homepage of the National Human Rights Commission, New Delhi, India, <http://www.nhrc.nic.in> (last visited Apr. 18, 2006); see also Human Rights Commission v. State of Gujarat, Special Leave Petition (Criminal) of 2003 (India 2003),

Several non-government initiatives were also set up to investigate into the riots. This included a specific initiative to investigate the gendered nature of the violence inflicted during the course of the Gujarat riots. The panel report of the International Initiative for Justice (IIJ) was prepared with the objective of securing justice for women harmed during the riots, guaranteeing their basic rights to citizenship, as well as ensuring that democracy provided security to all.⁴⁶ The panelists drew attention to the fact that the sexual violence and killings of Muslim women constituted genocide as increasingly recognized and defined in international law and jurisprudence.⁴⁷ The report also declared that *Hindutva* was a genocidal

<http://www.ielrc.org/content/c0302.pdf> (where the NHRC petitioned the Supreme Court for a retrial and transfer of the *Best Bakery Case*). The NHRC is an autonomous statutory body constituted under the Protection of Human Rights Act, 1993. It has the same powers as a civil court to call witness, record evidence, compel production of documents, requisition relevant public documents, and issue commissions for the examination of witnesses and documents. The findings of the NHRC are not legally binding.

⁴⁶ INTERNATIONAL INITIATIVE FOR JUSTICE, THREATENED EXISTENCE: A FEMINIST ANALYSIS OF THE GENOCIDE IN GUJARAT 7 (2003) *available at* <http://www.onlinevolunteers.org/gujarat/reports/iiig/2003/fullreport.pdf> [hereinafter IIJ]. The panelists included Sunila Abeysekara, Director of Inform, Colombo, Sri Lanka; Rhonda Copelon, Professor of Law, City University of New York, Director, International Women's Human Rights Law Clinic; Annisa Helie, Women Living Under Muslim Law, UK; Gabriela Mischkowski, historian and co-founder of Medica Modiale, Germany; Nira Yuval-Davis, Professor of Gender and Ethnic Studies at the University of Greenwich, UK; Uma Chakravarti, feminist historian, Delhi University; Vahida Nainar, Researcher of International Law, board member, Women's Initiative for Gender Justice, Netherlands, board member, Women's Research and Action Group, Bombay; Farah Naqvi, co-founder of *Nirantar*, and independent writer and consultant on issues of women, democracy and development; and Meera Vellayudan, Institute for Environmental and Social Concerns, Coimbatore. The panel was constituted to address the issue of gender violence in Gujarat in the context of the following:

*An understanding of sexual violence against women and how this can be effectively addressed by a legal system not equipped to deal with crimes of this nature and scale.

*The historical context of the Indian subcontinent, where divisions along religious community and caste lines, along with the rise of Hindu fundamentalism, have led to immense violence, intolerance and divisiveness.

*The globalised representation of the "Muslim" as a terrorist worldwide and the alliances and attacks that this has fostered over the various Muslim communities all over the world.

Id. at 5.

⁴⁷ *Id.* at 87-88; see Elements Annex of the Rome Statute of the International Criminal Court art. 6(b) n.3, PCNICC/2000/I/Add.2 & PCNICC/2000/Add.2 (July 17, 1998);

project and that sexual violence against Muslims was integral to this project.⁴⁸ At the same time the report acknowledged that reparations and justice in such a complex context would be difficult to secure, though recognition of the State's failure to prevent the massacres was nevertheless important. As the report pointed out, the Gujarat government has been careful not to use the word "reparation," but rather "assistance," "aid," and "relief," thus absolving it of any sense of entitlement or accountability to the affected citizen.⁴⁹ The recommendations focused primarily on the international and legal mechanisms that needed to be applied to establish that the Gujarat riots constituted genocide and crimes against humanity and that the harms experienced by women had to be specifically addressed.⁵⁰ The panelists also emphasized that justice for Muslim women had to be addressed separately from the justice to be secured for the community as a whole.

Another major independent non-governmental mechanism was the Concerned Citizen's Tribunal, consisting of eight eminent members from the country and constituted in consultation with a large number of groups within Gujarat and across the country.⁵¹ The Tribunal's report acknowledged the particularly horrific nature of the sexual violence perpetrated against the Muslim community during the Gujarat riots.⁵² It

see also Prosecutor v. Kovac, et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment (June 12, 2002), *available at* <http://files.findlaw.com/news.findlaw.com/hdocs/docs/icty/kunarajdgmnt22201.pdf>; Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998), *available at* <http://69.94.111.53/default.htm> (follow "Status of Cases" hyperlink; then follow "AKAYESU, Jean Paul (ICTR-96-4)" hyperlink under "Completed Cases"); Prosecutor v. Delalic, Case No. IT-96-21-A (Feb. 20, 2001); Prosecutor v. Furundzija, Case No. 3 IT-95-17/1-T (Dec. 10, 1998), *available at* <http://www.worldlii.org/int/cases/ICTY/1998/3.html>.

⁴⁸ *Id.*, *supra* note 46, at 111.

⁴⁹ *Id.* at 72.

⁵⁰ *Id.* at 117-20.

⁵¹ 1 CRIME AGAINST HUMANITY, *supra* note 4, at 7. The members of the Tribunal included VR Krishna Iyer and P.B. Sawant, both retired Justices of the Supreme Court of India; Hosbet Suresh, retired judge of the Bombay High Court; Aruna Roy, Magasaysay Award winner for community leadership; K.G. Kannabiran, senior counsel in the Karnataka High court; K.S. Subramaniam, the former Director General of Police; Ghanshyam Shah, Professor of Political Science at Jawaharlal Nehru University, New Delhi; Tanika Sarkar, Professor of History, Jawaharlal Nehru University. *Id.*

⁵² 2 CRIME AGAINST HUMANITY, *supra* note 4, at 38-43.

stated that rape was used in the riots as an instrument for the “subjugation and humiliation” of a community.⁵³ The Tribunal noted:

[a] chilling technique, absent in pogroms unleashed hitherto but very much in evidence this time in a large number of cases, was the deliberate destruction of evidence. Barring a few, in most instances of sexual violence, the women victims were stripped and paraded naked, then gang-raped, and thereafter quartered and burnt beyond recognition.⁵⁴

The Tribunal documents many of these cases in graphic detail, asserting that such violence in “post-independent, democratic and secular India” is shocking and demands justice as well as reparations.⁵⁵

The Tribunal recommended that the central government enact legislation to “implement the Genocide Convention, which India has signed and ratified, and must use these measures to prosecute and punish all those who participated in the planning and the execution of murder, sexual violence, theft, and destruction in the state of Gujarat during the communal carnage.”⁵⁶ The Tribunal also found that the state-sponsored crimes committed in Gujarat amounted to genocide and crimes against humanity.⁵⁷ It recommended that the Chief Minister Narendra Modi and his ministerial colleagues be prosecuted under the relevant provisions of the IPC, POTA of 2002, and the Unlawful Activities Act of 2001.⁵⁸ It further recommended that the activities of the VHP and BD be curtailed and possibly banned for disturbing the law and order of a democratic country such as India.⁵⁹ It also proposed that a reparations tribunal for victims be established to provide

⁵³ *Id.* at 38; see also *Gujarat Muslim Women “Rape Victims,”* BBC NEWS, Apr. 16, 2002, http://news.bbc.co.uk/2/hi/south_asia/1933521.stm.

⁵⁴ 2 CRIME AGAINST HUMANITY, *supra* note 4, at 38.

⁵⁵ *Id.* at 43.

⁵⁶ *Id.* at 169.

⁵⁷ *Id.* at 153. The current Congress-led coalition government has begun work on drafting a comprehensive law against communal violence. The Prevention of Genocide and Crimes Against Humanity Act of 2004 is being drafted by jurists and human rights activists and may include provisions for investigations by a central agency, prosecution by special courts, and uniform compensations to victims.

⁵⁸ *Id.* at 162. These recommendations were submitted prior to the repeal of POTA.

⁵⁹ *Id.* at 54.

compensation for the loss every individual suffered during the violence, including the impact of sexual assaults on women and their families.⁶⁰

More specifically, on the issue of gender, the Tribunal recommended some long term measures, including expanding the definition of rape. In situations of mass rapes and gang rapes, as occurred in Gujarat, it would be impossible to collect evidence and to apprehend the rapists. In such situations the Tribunal recommended that the onus of proof in all such cases of mass and gang rapes rest on the accused and not the victims.⁶¹ The testimony of witnesses in cases where women have been burnt or killed would be given considerable weight and the concept of justice in such cases would be widened.⁶² According to the Tribunal, justice meant not simply “punishment of those found guilty of the crime, but also . . . reparation for the women who suffered physical and mental injuries, since such assaults further curtail women’s rights to be a part of mainstream social life, besides inflicting a damning long term impact on the coming generation.”⁶³ The failure to protect the basic human rights of these citizens placed an obligation on the state to provide them with reparations. In addition, since all individual women were not in a position to register their complaints, the Tribunal recommended that reparations be provided to all women of the affected community.⁶⁴

IV. LIMITS OF TRANSITIONAL JUSTICE AND THE VICTIM SUBJECT

The trouble with each of the initiatives generated to provide transitional justice to the victims, especially women, is that they tend to focus on the victimization of women and the community. These initiatives focus almost exclusively on providing redress through the mechanisms of international legal instruments dealing with genocide as well as prosecutions under the criminal law at the domestic level. These efforts, although important, tend to negate the broader discursive practices of the Hindu Right and the history of *Hindutva* in constructing subjectivities as well as producing the violence unleashed in Gujarat.

⁶⁰ *Id.* at 171.

⁶¹ *Id.* at 177.

⁶² *Id.*

⁶³ *Id.* at 178.

⁶⁴ *Id.*

Although these mechanisms provide important forums for victims to give voice to the harms inflicted on them and form the basis for a historical record of the violence, it is not evident that they have addressed the broader discursive context in which the violence took place, which has constituted the Muslim as the perpetrator and the Hindu as a victim. In particular, the treatment of women in *Hindutva* politics is an extremely complex one and cannot be reduced either to simply vicious or barbaric behavior or understood within the confines of a system of justice focused on individual human rights violations. It needs to be understood within the context of the ideology of the Hindu Right.

There is no doubt that women were subjected to extraordinary violence during the Gujarat riots. During the course of the riots, there were innumerable reports of rapes and mutilations of women.⁶⁵ Many women were gang-raped by public officers and rioters before being burned alive.⁶⁶ Even the police physically, verbally, and sexually abused women, paraded them through the streets, and beat them.⁶⁷ Many of the survivors of these rapes and tortures testified before the Nanavati Commission of Inquiry set up to investigate into the riots.

⁶⁵ *Id.* at 39-43, 177-78; IJJ, *supra* note 46; SYEDA HAMEED ET. AL., HOW HAS THE GUJARAT MASSACRE AFFECTED MINORITY WOMEN: THE SURVIVORS SPEAK (2002), available at <http://www.msu.edu/~swamyraj/guj/survivorsspeak.htm> (documenting the harms and injuries inflicted on women, and concluding that crimes against women, in both urban and rural areas, were grossly underreported and under-recorded by the police); CPI(M) and AIDWA on Violence in Gujarat, PUCL BULL., Apr. 2002, <http://www.pucl.org/Topics/Religion-communalism/2002/gujarat-cpm.htm> (Apr. 2002).

⁶⁶ WE HAVE NO ORDERS TO SAVE YOU, *supra* note 21, at 16, 27-29; see also Hameed et al., *supra* note 65; IJJ, *supra* note 46.

⁶⁷ PUCL INTERIM REPORT, *supra* note 4, at 6: ("In Bahaar colony of Ajwa Road, women went out to request the police to set up a police point as tension had been increasing in the face of violence. The police refused to listen to the women and in fact, *laathi* (baton) charged to force them into their homes. At Rain Basera, Machchipith, under Karelbag Police Station, several women were assaulted by the police during "combing operations." Four policemen entered the *basti* (poor neighborhood) at around 3:00 pm on March 16, 2002 and started beating them indiscriminately—Sairaben Shaikh, Faridabanu Shaikh, Hamidabibi Pathan all aged between 30 and 45 were among those who were beaten so badly that their wounds are still visible. Faridabibi [sic] was hit on her chest by a *laathi*, and Hamidabibi in her pubic region. In Bahaar colony, women were pulled out of their homes by dragging them by their breasts. Even 18 year old girls were not spared—they were threatened with swords and sticks by the police. Rukiabibi, a 70 year old woman in Kasamala Kabristan, who went out to prevent the police from taking away her young son, was hit by the *laathi* so hard that her head split open.").

The nature of the violence inflicted on women in Gujarat seemed to be particularly brutal and sadistic. As Flavia Agnes, a leading feminist activist who testified before the Nanavati Commission of Inquiry in June 2002, stated, the “scale and extent of atrocities perpetrated upon innocent Muslim women during the recent violence[] far exceeds any reported sexual crime during any previous riots in the country in the post-independence period.”⁶⁸ Martha Nussbaum argues that the complete incineration even of the body can be explained in terms of the feminist conception of “objectification.”⁶⁹ Nussbaum borrows from the account of misogynistic disgust sketched by Andrea Dworkin in her book, *Intercourse*, as well as in Nussbaum’s own book, *Hiding from Humanity*.⁷⁰ She argues:

Objectification is treating as a mere thing what is really not a thing. It has multiple aspects, including the denial of autonomy and subjectivity and the ideas of ownership, fungibility (one is just like the others), and violability (it’s all right to break the thing up or abuse it). . . . In the domain of human relations . . . sinister connections begin to be woven among these different aspects. At the heart of all of them, I would argue, is the idea of *instrumentality*: a thing, unlike a person, is an instrument or means to the ends of persons; it is not an end in itself. The objectification of women is primarily a denial that women are ends in themselves. It is because one has already made that denial, at some level of one’s awareness, that it becomes so easy to deny women autonomy, to deny that their subjective experience matters, and, even, to begin to ignore qualitative differences between one and another, as pornography so easily does.⁷¹

Nussbaum uses this account to present a more universal thesis about psychological dynamics that are widespread in gender relations. In

⁶⁸ Flavia Agnes, *Experts from the Perspective Affidavit on Sexual Violence*, in OF LOFTY CLAIMS AND MUFFLED VOICES 71 (Flavia Agnes ed., 2002).

⁶⁹ Martha Nussbaum, *Body of the Nation: Why women were mutilated in Gujarat*, BOSTON REV.: A POLITICAL AND LITERARY FORUM, Summer 2004, 33, 33, available at <http://www.bostonreview.net/BR29.3/nussbaum.html> [hereinafter, Nussbaum, *Body of the Nation*]; ANDREA DWORKIN, *INTERCOURSE* (1987).

⁷⁰ MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* (2004) (elaborating on this thesis of the presence of disgust and shame in law and its impact on women); see also MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999).

⁷¹ Nussbaum, *Body of the Nation*, *supra* note 69, at 34-35.

Gujarat, she explains, they took a “particularly anxious and aggressive form in this concrete political context.”⁷² This instrumentalist analysis is used to explain why women are burned, raped, abused, and killed, that is, why they are violable. In the Gujarat riots, the Muslim female body represented the recalcitrant part of the nation that was yet to be dominated by Hindu male power. Although one response to domination might have been to abduct women and use them for procreation of the Hindu species, when viewed as instruments, their bodies could also be, and indeed were, used in horrific ways to satisfy the desire for power, honor, and security.

Nussbaum concludes that Muslim women in the Gujarat riots were victims of extreme violence and that the assault on the Muslim community as a whole constituted genocide. As she argues, the centrality of rape in the riots, usually followed by murder, was evidence of the intent to destroy the Muslim minority community in all of the ways specified under Article 2 of the U.N. Convention on Genocide.⁷³ She argues that the riots signaled a fundamental breakdown of the rule of law and promoted hate and fear. She relies on the recommendations of the Concerned Citizens’ Tribunal for the trial and punishment of the main offenders as a mechanism for reconciliation, democratic consolidation, and restoration of faith in the law. She asserts that the politics of difference and the pluralism of Indian society must be restored, and can only be grounded in traditional notions of citizenship, equality, and rights.⁷⁴

Tanika Sarkar, a leading Indian historian, was one of many individuals and social activists who investigated the events that took place in Gujarat. She drew particular attention to the harm inflicted upon women, arguing that the preoccupation with destroying women’s sexual organs

⁷² *Id.* at 34.

⁷³ The Convention defines genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, available at http://www.unhchr.ch/html/menu3/b/p_genoci.htm.

⁷⁴ Martha Nussbaum, *Genocide in Gujarat: The International Community Looks Away*, DISSENT MAG., Summer 2003, at 15.

revealed “a dark sexual obsession about allegedly ultra-virile Muslim male bodies and over-fertile Muslim female ones, that inspire[s] and sustain[s] the figures of paranoia and revenge.”⁷⁵ The incitement to violence, which was in evidence in the some of the literature discovered in the riot-torn areas, represented an anxiety about (Hindu) male sexuality, and the treatment of women resulting in acts of sadism that seemed to go beyond mere revenge.⁷⁶

Sarkar argues that the violence cannot be explained merely in terms of a collapse of state machinery, but rather by the

[p]enetration of state and grass roots institutions—from police to hospitals—by the Sangh parivar (family of the Hindu Right). When talking of Gujarat events, it is very common to use terms like the failure of the Modi government, the weakness of the state, or the limits of the BJP-led coalition at the centre. I would strongly insist that, on the contrary, the Modi government as well as the Sangh as a whole, have been spectacularly successful in their agenda. What is happening in Gujarat is not a mark of weakness or inadequacy but a sign of the strength of the Sangh parivar, its firmness of resolve, its ideological consistency.⁷⁷

According to Sarkar’s analysis, the initiatives of the Tribunal, the arguments based on the objectification and victimization of women, and a focus on reparation tend to miss the broader ideological agenda and discursive elements of the Hindu Right that have gone into constituting the subjectivities of both the majority and minority, including the subjectivity of Muslim women. Sarkar does not simply emphasize the incineration of the Muslim women’s body. She argues that bodies, houses, shrines, and mosques disappeared overnight. In their place, roads were laid, and Hindu temples were built where Muslim homes used to be. Complete identities were erased. In the relief camps for those rendered homeless by the riots or too scared to return, they had “neither documents nor identification papers of any sort to prove that they ever had property, jobs, bank balances, land, families, Indian citizenship.”⁷⁸

⁷⁵ Sarkar, *supra* note 11, at 2874.

⁷⁶ *Id.* at 2875.

⁷⁷ *Id.* at 2872.

⁷⁸ *Id.* at 2873.

Sarkar goes on to provide an explanation that is ideologically consistent with the goals and concerns of *Hindutva*. It is a concern about the increasing fertility rates of Muslims, of the uncontrolled breeding, and the imminent outnumbering of the Hindu majority.⁷⁹ Such myths and doubts fed the riots and the specific attacks on women and children and have become a part of common sense thinking. The violence, in other words, was not aberrational. It was justified on the basis of a discursive strategy that has come to constitute the Muslims as unacceptable, as foreigners, and as oppressors of the majority community.⁸⁰

The layers of meaning are completely lost in a focus on the victim subject, an emphasis on prosecution, and an instrumentalist analysis of Muslim women. These layers of meaning also remain unaddressed in the recommendations of the tribunals and panels set up to provide transitional justice for the women and the Muslim community. A reassertion of the values of liberty, equality, and secularism fails to appreciate how these very values have been used to pursue the ideology of *Hindutva* and assimilative politics that strip the Muslim of his or her cultural and religious identity. Even the broader analysis of the IJJ, which addresses the context within which the Gujarat riots took place and the role of women in the ideology of *Hindutva*, ends up describing *Hindutva* as a genocidal force, and thus once again situates the project outside of the very liberal values that actually helped to constitute the project.

A response that attends to the injuries inflicted on Muslim women exclusively through the lens of victimization, objectification, prosecution, and reparation does not address how the attack on Muslim women constitutes a central element in the discourse and ideology of the Hindu Right. An instrumental analysis fails to take into account the problems with victimization rhetoric and the gender and cultural essentialism it produces.⁸¹ The analysis ignores the complex understanding of the ways in which women's lives and experiences are mediated by religion and the history of the colonial encounter, amongst many other factors. Nor does it address the ways in which liberal rights discourse has produced and reinforced specific subjectivities in the hands of the Hindu Right, rather than serve emancipatory political goals. The analysis and the recommendations do not assist in achieving the stated goal of transnational justice—contributing to

⁷⁹ *Id.* at 2875.

⁸⁰ See *supra* Section II.

⁸¹ RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 95-136 (2005).

an alleviation or elimination of the violence experienced by Muslim women, *together* with Muslim men. Indeed, it may be missing the point altogether.

V. GENDERED SUBJECTS AND THE DISCOURSE OF THE HINDU RIGHT

The discursive strategies of the Hindu Right constitute women's subjectivities in ways that are consistent with their vision of *Hindutva*. Indeed, women have become a site of contest in the struggle to redefine Indian identity. *Hindutva's* discourse on women seeks to rearticulate women's identities as wives and mothers, and casts women's issues within a revivalist and familial discourse that seeks to restore women to the position of respect in their roles as wives and mothers that they are alleged to have enjoyed in the mythical, golden age of Hindu society. It is an identity imbued with the rhetoric of tradition and culture, but which is thoroughly modern, responding to contemporary social and economic demands placed on women.

It is important to recognize at the outset that the Hindu Right does not speak with a single voice on the issue of women and equality rights. Some of the more orthodox elements within the RSS-VHP-BJP have adopted a reactionary position on women and the family, calling, for example, for a return to the laws of Manu, a restoration of polygamy, and the glorification of *sati*.⁸² These views, however, are not representative of the position of the Hindu Right as a whole on the question of women's issues. The women's wings of the Hindu Right organizations—such as the *Rashtra Sevika Samiti* (National Corps of Women Volunteers) and the *Mahila Morcha* (Women's Front) of the BJP—have all articulated more moderate positions, denouncing discrimination against women and promoting equality.⁸³ The BJP has similarly increasingly adopted positions formally denouncing atrocities against women, and promoting women's equality. The Hindu Right does not speak with a single and homogenous voice on the question of women, but rather is characterized by diverse and conflicting positions.

⁸² See Manini Chatterjee, *Saffron Extremism*, FRONTLINE, Jan. 16-29, 1993, at 5 (discussing how the *sants* and *sadhus* ("saints" and "holy men") within the Sangh Parivar are calling for a restoration of Hindu polygamy).

⁸³ See Tanika Sarkar, *The Woman as Communal Subject: Rashtrasevika Samiti and Ram Janmabhoomi Movement*, 26 ECON. & POL. WKLY. 2057 (1991); see also Amrita Basu, *Women's Activism and the Vicissitudes of Hindu Nationalism*, 10 J. WOMEN'S HIST. 110 (1999).

The more moderate position promoting women's equality that is increasingly visible within the Hindu Right is one that does not fundamentally challenge women's traditional roles as wives and mothers. It is a discourse that plays an increasingly important role in the discursive struggles of the Hindu Right, not only in its assault on minority rights, but also in its efforts to forge a new identity for Hindu women as well as Hindu men.

The Hindu Right's official position on women is filled with commitments to equality.⁸⁴ The BJP in particular pledges itself to restore to women the position of equality with men that the Indian tradition proposed and accepted.⁸⁵ The discourse of equality is fused with a more revivalist discourse that seeks to reclaim a glorious and ancient past. The objective of equality becomes the restoration of women to the position that they ostensibly enjoyed in this "golden age." But the meaning of their commitment to women's "equality with men" is unclear. In a telling statement, the BJP asserts "[m]en and women are equal but they are not the same."⁸⁶ With a single stroke, the BJP both invokes the discourse of women's equality and at the same time undermines any real entitlement to it by stating that women are different. If women and men are equal, at the same time as women and men are not the same, then equality cannot mean sameness and equal treatment. The question of what equality does mean in this context remains unanswered.

The answer to this riddle of equality lies in a deeper exploration of the BJP's policies and statements on women. It is within these policies and statements that we can begin to see more clearly the way in which women are to be treated, the position of "equality" to which they are to be restored,

⁸⁴ See e.g., the BJP's introductory remark in the "Empowerment of Women" section of Chapter 10 of its Election Manifesto, which states:

It is not enough to talk about removing discrimination against women and establishing gender equality. We need to create new mechanisms for the social, political and economic advancement of women as also to generate social awareness on gender issues. One such mechanism is empowerment, including empowerment through enactment of laws.

BJP, ELECTION MANIFESTO Ch. 10, available at <http://www.bjp.org/manifest/chap10.htm> (last visited Jan. 20, 2005); see also BJP, ELECTION MANIFESTO: OUR SOCIAL PHILOSOPHY Ch. 9, available at <http://www.bjp.org/manifest/chap9.htm> (last visited Jan. 20, 2006).

⁸⁵ Ratna Kapur and Brenda Cossman, *Women and Hindutva*, 5 WOMEN AGAINST FUNDAMENTALISM 42 (1994), available at <http://waf.gn.apc.org/j5p42.htm>.

⁸⁶ *Id.*

and the understanding of equality that underlies this policy. The BJP policy on women often focuses on the roles in the family that have traditionally been allocated to women according to the sexual division of labor. For example, the BJP policy focuses on women's healthcare, including maternal and natal care, female feticide, smokeless stoves, and sanitation facilities for poor, rural, and slum women.⁸⁷ Policies that reinforce women's role in the family as mothers and wives are supported as part of women's equality rights. In so doing, the Hindu Right reinforces the assumption of natural and essential differences between women and men. Women are mothers and wives—they are *matri shakti* (the power of the Mother)—they are different, and these differences must be honored and protected.

Equality, in the hands of the Hindu Right, remains an elusive, but enormously useful, concept. It is, on the one hand, consistently deployed as equal treatment to attack the rights of religious minorities. But, in the context of gender, such consistency seems to evaporate. Two very different models of equality are simultaneously deployed in the Hindu Right's political rhetoric on women. In the context of Hindu women, equality for women is understood as harmony in diversity. Hindu women need not be treated the same as men in order to be treated equally. Rather, they need only be treated with respect, and with due recognition of the "natural" differences between the sexes. Within this model, there is a celebration of difference and a quest for harmony. But, in the context of minority women, the two models of equality converge. There is an insistence that all women be treated the same—that Muslim women be treated the same as Hindu women. The equality rights of minority women are framed within the *Hindutva* discourse of secularism and formal equality—wherein all religious communities must be treated the same, and in turn, wherein all women within different religious communities must also all be treated the same. Here, there is no talk of harmony, nor celebration of difference, only a quest for assimilation and sameness.

While both Hindu and Muslim women are constituted through this discourse, they are differently located in relation to it. Hindu women are to be restored to the position of respect they enjoyed within their own culture. Muslim women, however, must be restored to the position of respect enjoyed by Hindu women before they were degraded by the influence of

⁸⁷ Shankar Agarwal, *A Grand Show in Women's Empowerment*, ORGANISER, Dec. 25, 2005, at 23, available at <http://www.organiser.org/dynamic/modules.php?name=Content&pa=showpage&pid=109&page=23>; see also *Check Female Foeticide, Expand Girl Child Education*: Advani, OUTLOOK INDIA.COM, Dec. 3, 2005, http://www.outlookindia.com/pti_news.asp?id=339322 (calling on women to adopt the mission of "small family-literate family-happy family").

and conversion to Islam. The phenomenon that led to the downfall of women is ultimately identified as the same: the invasion of India by foreign (Muslim) influences. One VHP advertisement rather blatantly states: "Women lost all their glory and liberty in the dark period of history when India was invaded by barbarians."⁸⁸ The revivalist discourse attempts to restore all women to the position they enjoyed prior to the invasion of, and resulting downfall of, Hindu culture. The unstated reference point is the Muslim invasion of Hindu culture. At the core of this revivalism is a highly communalized discourse, deployed to promote anti-Muslim sentiment. In this respect, the gendered discourses of *Hindutva* can be seen as part and parcel of the Hindu Right's assault on minority communities. The problems that women face in contemporary society can be blamed on a fall from grace—but blame for this fall from grace can be and is placed on Muslims.

The extent to which BJP policy supports women in their familial roles can be seen in a number of statements by its members on women's issues. Dr. Murli Manohar Joshi, former education minister and a member of the RSS, discussing the Beijing Women's Conference in 1995, stated:

In India, social relationships and institutions are patterned in such a manner that an evolving structure of balanced social amity is created. The family is an important institution. It is only through a happy family that an aware society is born. In this society woman has an important role to play. She is not merely a domestic community. At all times she has made an overall contribution to the growth of the social order. Right from the vedic period the Indian woman has made a sincere effort to keep the home protected. The family has fallen apart in the West and has created a society where all relationships are founded on selfishness. The growth of the single parent family in the West is a direct outcome of this.⁸⁹

⁸⁸ Ammu Joseph & Kalpana Sharma, *Between the Lines: Women's Issues in English Language Newspapers*, 26 ECON. & POL. WKLY. WS-75, WS-80 (1991) (citing a VHP advertisement that appeared in THE INDIAN EXPRESS) (internal quotation not cited in original); see also PAOLA BACCHETTA, GENDER IN THE HINDU NATION: RSS WOMEN AS IDEOLOGUES 100 (2004) (discussing how the RSS "depicts Muslim males as the eternal enemies of the Hindu 'community,'" and considers "that all Muslim males are anti-national, and that they disrespect and violate femininity"); Sarkar, *supra* note 11, at 2873; Satish Nandgaonkar, *VHP Serves Them Cocktail of Karate and Culture*, MUMBAI NEWSLINE, Nov. 13, 2002, <http://cities.expressindia.com/fullstory.php?newsid=35015>.

⁸⁹ Murli Manohar Joshi, *Women's Liberation: The Indian Way*, ORGANISER, Dec. 24, 1995, available at <http://bjp.org/major/mmj-wlib.html>.

Issues such as free sex, artificial insemination, or lesbianism raised at the meeting are considered antithetical to Indian womanhood—defined in and through women’s natural roles as mothers and wives. Free sex, artificial insemination, and lesbianism undermine these roles; thus, they cannot be supported. Such issues also deflected attention from what should have been the main focus of the conference—that is, gender discrimination.⁹⁰

The BJP policy on women also includes issues of women’s education and employment—issues that seem to bring women out from within the narrow confines of the family. The BJP has identified women’s socio-economic dependence as a main cause of women’s oppression and, accordingly, the party supports programs designed to improve their socio-economic status, including increased employment opportunities, particularly in areas that suit women most.⁹¹ Women’s illiteracy is also seen to contribute to this poor status, and must therefore be eliminated through improved access to education.⁹² Yet the support for women’s socio-economic independence or education does not disrupt women’s role in the family—as mothers and wives—which remains the cornerstone of the BJP approach to restoring women to the position of equality reserved for them in Indian tradition.⁹³

There is increasing evidence of the extent to which the traditional discourse of women as *matri shakti* (the power of “the mother”) infuses BJP policies. Indeed, it is this image of *matri shakti* that can be seen to underlie the very understanding of women’s equality. Man and woman will remain the two wheels of the chariot of the family and of the nation.⁹⁴ Equality does not mean treating women the same as men. Rather, equality becomes an affirmation of the difference between women and men. The BJP

⁹⁰ *Id.*

⁹¹ AMRITA BASU, UNRISD OCCASIONAL PAPER 5: WOMEN, POLITICAL PARTIES AND SOCIAL MOVEMENTS IN SOUTH ASIA 24 (2005). Examples of the type of employment encouraged by the BJP for women included nursing, teaching, part-time work, and employment in the service sector.

⁹² See BJP, ELECTION MANIFESTO: NARI SHAKT, *supra* note 84, Ch. 10, available at <http://www.bjp.org/manifes/chap10.htm> (Point seventeen of the Manifesto identifies a goal of creating “functional literacy programmes for women who have been denied access to education”).

⁹³ Tanika Sarkar, *Heroic Women, Mother Goddesses: Family and Organisation in Hindutva Politics*, in WOMEN AND THE HINDU RIGHT: A COLLECTION OF ESSAYS 181, 209-14 (Tanika Sarkar & Urvashi Butalia eds., 1997).

⁹⁴ BACCHETTA, *supra* note 88, at 1-60.

approach to equality within the context of women, initially somewhat elusive, begins to emerge. The very meaning of the concept of equality begins to shift away from sameness and equal treatment towards diversity and differential treatment.

This harmony in diversity approach is also very different from a substantive approach to equality. It has little to do with the systemic or historic disadvantage of women. While there are overtones of historic disadvantage in the discourse of restoring women to the position they once occupied in the golden age of Hindu culture, the vision of the Hindu Right is very different from the one contemplated by substantive equality. Within this vision, "historic oppression" refers only to the oppression and degeneration of Hindu society at the hands of foreign (Muslim) invaders. There is virtually no attention to systemic or historic disadvantage or discrimination against women within Hindu culture. There is no recognition of gender as a socially constructed category, but simply an affirmation and celebration of natural and essential differences.

This general discourse on equality and women constitutes the subjectivities of women, both in the majority as well as minority religious communities. Women's issues are being framed within (a) a revivalist discourse that seeks to restore women to the position of honor and respect they enjoyed in a reconstructed and mythical "Golden Age," and (b) a dominant familial discourse, through which women's identities and roles as wives and mothers within the family are being reinscribed. It is an approach to equality that underlies the Hindu Right's appropriation of these women's issues—an approach that emphasizes women's differences in relation to men, but women's sameness in relation to all other women.

VI. VIOLENCE AGAINST WOMEN AND COMPLEX SUBJECTS

While these subjectivities are constituted in a number of areas, it is the issue of violence against women that illustrates most vividly how the focus of transitional justice on "victims" and prosecutions may not necessarily produce the repair and reconciliation that it ostensibly seeks to bring about.

Violence against women has become a prominent issue within the Hindu Right.⁹⁵ To the extent that the manifestos of the BJP have addressed issues of concern to women, violence against women is always condemned.⁹⁶ The BJP policy document for women stresses the need for

⁹⁵ BJP, ELECTION MANIFESTO, *supra* note 84, items 18-25.

⁹⁶ *Id.* item 24.

inducting more women into the police force to deal specifically with cases of atrocities against women.⁹⁷

The Hindu Right's appropriation of the issue of violence against women should not be seen as a wholesale adoption of the framework within which the women's movement has understood this violence. In stark contrast to the secular women's movement's emphasis on women's rights and men's violence, the Hindu Right has framed the issue of violence against women within the broader political and cultural discourses of *Hindutva*. It is a discursive strategy that involves, firstly, the communalization of sexual violence, through which responsibility for violence against women is seen to lie within the Muslim community, specifically with Muslim men. A second, related move is the justification for the violence inflicted on Muslims by the majority community as an expression of Hindu anger against the appeasement of Muslims, in defense of Hindu women and the Hindu nation.

The recognition of sexual violence within the public sphere is framed within a communal discourse. The perpetrators of sexual violence are constructed as the Muslim "other." Sexual violence is thereby seen as that which (Hindu) women experience at the hands of Muslim men. The rape of Hindu women by Muslim men during communal riots is highlighted.⁹⁸ The rape of Hindu women by "Muslim fundamentalists," for example, is a recurrent theme in RSS literature, and often provides the rationale for providing Hindu women with RSS-style physical training.⁹⁹

⁹⁷ *Id.*

⁹⁸ See Pradip Dutta et. al, *Understanding Communal Violence: The Nizamuddin Riots*, 25 ECON. & POL. WKLY. 2487 (1990); see also EMBODIED VIOLENCE: COMMUNALISING WOMEN'S SEXUALITY IN SOUTH ASIA (Kumari Jayawardena & Malathi De Alwis eds., 1996).

⁹⁹ For a general discussion on the role of women in the RSS as well as the specific focus on the physical training of women, see Sarkar, *supra* note 83. See also BACCHETTA, *supra* note 88; see also Rashtra Sevika Samiti: A Resume of Activities, <http://www.hindubooks.org/rssw/ch1.htm>. The RSS women's affiliate, Rashtra Sevika Samiti, was set up in 1936 to organize Hindu women. Rashtra Sevika emphasizes physical training, on the principle that strong Hindu women produce a strong Hindu nation. See also Kalyani Devika Menon, *We will Become Jijabai: Historical Tales of Hindu Nationalist Women in India*, 64 J. ASIAN STUD. 103 (2005) (discussing how Jijabai, the mother of the seventeenth century Hindu king, Shivaji, has become the icon of Hindu nationalism, who the Samiti women deify. She is cast as a mother worthy of emulation, who fought bravely for the Hindu nation through her son, Shivaji, by inculcating into him values about strength, patriotism, and ideology. Jijabai serves as a role model for Hindu women, facilitating the cultural and political renaissance of a Hindu nation by breeding and molding strong sons); *Focus on Women's Roles at Mausiji's Celebrations*, INDIA ABROAD, Sept. 23, 2005, at C5; *Report: National Convention of Rashtra Sevika Samiti: A Study in Organization, Discipline and Dedication*, ORGANISER, Dec. 11-18 2005, at 9, available at

This construction of the Muslim "other" as the perpetrator of sexual violence fits all too neatly with the stereotype of Muslim men as lustful that has long been part of the discourse of *Hindutva*. As Sarkar has observed, "[f]rom Sarvarkar's formative writing on Muslim rule in India, the stereotype of an eternally lustful male with evil designs on Hindu women has been reiterated and made a part of a historical common sense."¹⁰⁰

This communalization of sexual violence operates simultaneously to reinforce the demonization of the Muslim community, while deflecting attention away from sexual violence within the Hindu community.¹⁰¹ The violence that women may experience within the public sphere can thereby be addressed with demands for harsher penalties for the perpetrators, without threatening the patriarchal authority of Hindu males. The call for harsh penalties becomes in effect a call for the punishment of Muslim men who have dishonored Hindu women, and, by implication, the Hindu community.

Within this communalized discourse of sexual violence, the harm associated with rape becomes the harm to the community. Rape is understood not as a violation of an individual woman's right to bodily autonomy, but rather, in a more traditional and patriarchal discourse, as a violation of a woman's honor. This honor is in turn closely associated with a family's honor, and the honor of the broader community. As Amrita Basu has observed, "[t]he BJP has made the raped Hindu woman symbolic of the victimization of the entire Hindu community."¹⁰² This communal discourse further provides women within the Hindu Right with a legitimate focus for their personal and political anger about sexual violence. As Sarkar suggests, "[t]he hindu [sic] woman is given an externalized enemy to focus on that

<http://www.organiser.org/dynamic/modules.php?name=Content&pa=showpage&pid=108&page=9>. For a detailed study on the ideology that produces the militant Hindu female nationalist, see Paola Bacchetta, *Militant Hindu Nationalist Women Reimagine Themselves: Notes on Mechanisms of Expansion/Adjustment*, 10 J. WOMEN'S HIST. 125 (1999).

¹⁰⁰ Tanika Sarkar, *The Women of the Hindutva Brigade*, 25 BULL. CONCERNED ASIAN SCHOLARS, Oct.-Dec. 1993, at 16.

¹⁰¹ BACCHETTA, *supra* note 88, at 80 (arguing that "the violence internal to the regime (the self-hatred, the misogyny, the aggressivity and violence which would otherwise run afoul between Hindu males, and between them and Hindu women) is projected onto 'the Muslims'").

¹⁰² Amrita Basu, *Feminism Inverted: The Real Women and Gendered Imagery of Hindu Nationalism*, BULL. CONCERNED ASIAN SCHOLARS, Oct.-Dec., 1993, at 25-29.

helps obliterate and displace personal and immediate experiences of oppression within the family.”¹⁰³

While the condemnation of violence against women is shared by the secular women’s movement and the women’s wing of the Hindu Right, the underlying understandings are very different. Within the secular women’s movement, violence against women is an issue of individual women’s rights—the right to be free from violence, the right to life, and the right to equality, both substantive and formal. Within the Hindu Right, the denunciation of violence against women is far removed from the discourse of formal or substantive equality for women. Ending violence against women has nothing to do with treating women the same as men. Nor does it have much to do with the historic and systemic oppression of women. While there are overtones of historic disadvantage within this discourse, it is clearly a very different vision than that contemplated within a substantive model of equality. In the revivalist discourse of the Hindu Right, “historic oppression” refers to the oppression and degeneration of Hindu society overall, including the position of respect and honor enjoyed by Hindu women, at the hands of foreign (Muslim) invaders. Overcoming this historic disadvantage means restoring women to the pedestal of respect and honor that was rightfully theirs in the golden age. It is a vision of equality that celebrates their harmonious difference.

At the same time, the gender discourse of the Hindu Right seeks to reconstitute women as strong. A strong Hindu woman becomes essential to a strong Hindu society, particularly since women are responsible for breeding and grooming the next generation, with appropriate values, discipline, and culture. And yet, the very discursive framework ensures that women’s strength does not challenge or undermine their position within the family. Women’s strength is located and contained within the confines of the family—their strength is intended to serve the higher cause of the family and through it, the higher cause of the community and the nation.

A second, related discursive move is the justification for the infliction of violence on women in the minority community. Anti-Muslim violence is legitimized in the name of securing the Hindu nation and protecting the Hindu honor by protecting Hindu women.¹⁰⁴ In this process, emphasis is placed on the construction of Hindu masculinity. Early ideologues, such as V.D. Sarvarkar, condemned Hindu men as too weak to

¹⁰³ Sarkar, *supra* note 100, at 23.

¹⁰⁴ Dibyesh Anand, *The Violence of Security: Hindu Nationalism and the Politics of Representing ‘the Muslim’ as a Danger*, 94 ROUND TABLE 203, 206 (2005).

challenge the Muslim, and in fact argued that the Hindu male's effeminacy permitted Muslim atrocities against Hindus.¹⁰⁵ The transformation of the Hindu male from a weak, effeminate man into a virile militant warrior became a central plank in the *Hindutva* project at the beginning of the twentieth century.¹⁰⁶ As Paola Bacchetta argues, in the context of Hindu nationalism the Hindu male came to be cast as virile and militaristic. The unacceptable Hindu male was sexually promiscuous, materialist, westernized, and effeminate.¹⁰⁷ In his macho and more militant incarnation, he had to be heterosexual, even though he might be celibate in order to commit himself to the nation.¹⁰⁸ All other sexual identities within the nation came to be categorized as non-Hindu, primarily as Muslim, or as foreign (namely "western") contaminants.

The construction of Hindu masculinity must be located within the broader agenda of the Hindu Right, which is to either force Muslims to "assimilate" or to be exterminated from India. Madhav Sadashiv Golwalkar, the second *Sarsanghchalak*, or supreme leader, of the RSS, stated that:

[T]he non-Hindu people in Hindustan must either adopt the Hindu culture and language, must learn to respect and hold in reverence Hindu religion, must entertain no idea but those of the glorification of the Hindu race and culture, i.e., they must . . . cease to be foreigners, or may stay in the country, wholly subordinated to the Hindu Nation, claiming nothing, deserving no privileges, far less any preferential treatment—not even citizen's rights.¹⁰⁹

Indira Chowdhury and Charu Gupta have demonstrated how the creation of an image of "effete" Hindu manhood during the colonial period and the nationalist incarnation of Hindu masculinity as strong and virile was

¹⁰⁵ Purshottam Agarwal, *Surat, Savarkar, and Draupadi: Legitimizing Rape as a Political Weapon*, in WOMEN AND THE HINDU RIGHT: A COLLECTION OF ESSAYS (Tanika Sarkar & Urvishi Butalia eds., 1995).

¹⁰⁶ See generally CHARU GUPTA, SEXUALITY, OBSCENITY, COMMUNITY: WOMEN, MUSLIMS, AND THE HINDU PUBLIC IN COLONIAL INDIA 230-35 (2002).

¹⁰⁷ Paola Bacchetta, *When the (Hindu) Nation Exiles its Queers*, SOCIAL TEXT, Winter 1999, at 141, 150 [hereinafter Bacchetta, *When the (Hindu) Nation Exiles its Queers*]; see also BACCHETTA, *supra* note 88, at 99-100.

¹⁰⁸ *Id.* at 143.

¹⁰⁹ Golwalkar, *supra* note 15, at 56.

an important transformation in the construction of male subjectivity.¹¹⁰ The construction of this virile figure was partly produced by the specter of Muslims as proliferating at a rapid rate to the point where the very survival of the Hindu race was at stake. Women were called upon to restore the manhood of the Hindus by producing strong sons.¹¹¹ There were increasing verbal attacks on the Muslim “other,” especially on their sexual life and preferences, including the practices of the Prophet and Allah, as perverse and constituting part of the essence of Islam that was a threat to all Hindus.¹¹²

There was a simultaneous fear over the procreative capacity of Muslim women, and the aggressive lust of the Muslim male, who would abduct and rape Hindu women. Hindu-owned newspapers began to carry an increasing number of reports of abduction and violation of Hindu women after the 1920s.¹¹³ Hindu women were instructed to protect their chastity and, in the process, the honor of the community. Women’s mobility was to be curtailed and the Hindu male was urged to become more aggressive and kill the enemy. Violence based on retribution was advocated in the work of V.D. Savarkar in his *Six Glorious Epochs of Indian History*.¹¹⁴ In this work, Muslims are cast as enemies and traitors intent on the destruction of the Hindu State and the establishment of Muslim domination throughout the

¹¹⁰ INDIRA CHOWDHURY, *THE FRAIL HERO AND THE VIRILE HISTORY: GENDER AND THE POLITICS OF CULTURE IN COLONIAL BENGAL* (1998); CHARU GUPTA, *SEXUALITY, OBSCENITY, COMMUNITY: WOMEN, MUSLIMS, AND THE HINDU PUBLIC IN COLONIAL INDIA* (2001).

¹¹¹ One reason for the establishment of the Rashtra Sevik Samiti had to do with the assumption that Hindu men had been too weak to defend Hindu woman. As Menon states:

Several members of the Samiti asserted that the existence of violence against women today testifies to the fact that men cannot defend women effectively and that women must learn to defend themselves not only by increasing their physical strength but also by ensuring that they help promote the right values in their families and change the nature of society.

Menon, *supra* note 99, at 109.

¹¹² BHAGWAN JOSH, *STRUGGLE FOR HEGEMONY IN INDIA, 1920-47: THE COLONIAL STATE, THE LEFT AND THE NATIONALIST MOVEMENT* 218 (1994); see also GUPTA, *supra* note 110, at 246-47 (illustrating how the sexual life of the Prophet Muhammad was addressed in abusive and degrading terms).

¹¹³ GUPTA, *supra* note 110, at 247-56.

¹¹⁴ VINAYAK DAMODAR SAVARKAR, *THE SIX GLORIOUS EPOCHS OF INDIAN HISTORY* (1971).

country.¹¹⁵ The Hindu male must rise against the threat and demonstrate his manhood and masculinity. Hindu men must abandon the image of effeminacy and chivalry, and begin the process of legitimate retribution to defend the honor and dignity of Hindu women and the Hindu nation.

What is evident from this discourse is that the discussions on equality and violence against women are not necessarily progressive in nature. While transitional justice is directed at pursuing rights in ways that will bring resolution and repair to victims of atrocious violence, it ignores how groups with less progressive agendas have appropriated and deployed rights discourse in ways that have set the framework and context for the emergence of such violence. The Hindu Right has been quite successful in articulating its political agenda within the language of secularism and equality, at the same time as its vision undermines much of the prevailing understandings of these concepts. With regard to women, the Hindu Right has articulated women's issues within the language of rights, while simultaneously attempting to reinscribe women's traditional roles within the family. At the same time, it is casting the Muslim as a threat, existing outside the values of liberal democracy—opposed to the principles of equality and secularism. The threat is manifested in terms of the sexual violence and rape of Hindu women perpetrated by Muslim men. Retributive violence against the Muslim community is justified because Muslims do not deserve due process or human rights protections, as they stand in opposition to these very protections. Furthermore, Hindu men are justified in avenging the honor of their women. The rights discourse combined with familial discourse cast the violence as a normalized and natural outcome. The Hindu Right is pursuing a political agenda diametrically opposed to the agendas of progressive social and political movements, yet it has appropriated their languages and is operating with the language of rights.

VII. THE LAYERING OF THE SUBJECT POSITION: *THE BEST BAKERY CASE*

In light of the above analysis, this Article examines how the judiciary has dealt with the harms committed during the Gujarat riots, including the way in which Muslim women are addressed in this tragedy through a discussion of the *Best Bakery Case*.¹¹⁶ The case arose from the killing of fourteen people on the night of March 1, 2002, in the Best Bakery

¹¹⁵ *Id.* at 143-44.

¹¹⁶ *State v. Baria, (Best Bakery Case)* No. 248/2002 (Gujarat Fast Track Ct. June 27, 2003), available at <http://www.sabrang.com/cjp/best/vadjudgement.pdf>.

building situated in the Hanuman Tekri area of Vadodara, Gujarat. The Trial Court acquitted all twenty-one accused after all the eyewitnesses and many other key witnesses, turned hostile before the court, fearing reprisal if they dared repeat the statements they had earlier made to the police.¹¹⁷ The judgment stated that it was proven beyond doubt that a “violent mob had attacked the bakery and that the lives of 14 persons were lost . . . but the prosecution has not led any acceptable legal evidence to prove that the accused . . . had committed any such offences.”¹¹⁸ The judgment was critical of the police delay in registering the first information reports of victims, not investigating the incident properly, and harassing innocent people. National and international newspapers reported that key witnesses in the case had lied in court out of fear for their lives as they had been given death threats.

Among those key witnesses who turned hostile was Zaheera Sheikh, the daughter of the bakery owner. She is described in one paper as “the 19 year-old with vulnerable eyes and schoolgirl plaits.”¹¹⁹ According to her original testimony to the police and the NHRC, 500 people armed with petrol bombs had attacked the bakery. She also accused the BJP and other party politicians of threatening and harassing them into withdrawing their testimony. Zaheera Sheikh was heralded by non-governmental organizations and human rights groups seeking “justice” in Gujarat as a “star attraction,” an anti-establishment heroine, lionized for “taking on” the system.

Subsequently, the NHRC requested that the Supreme Court set aside the order of acquittal.¹²⁰ The Supreme Court ordered a re-trial of the case, offering hope that the injuries and harms inflicted on the community would be addressed. Zaheera Sheikh decided to return as the State’s witness to give evidence in the retrial. The Gujarat government also sought a retrial of the case and the police registered a case against a BJP legislator for

¹¹⁷ *Id.* at 11; Meena Menon, *A Test Case in More Ways than One*, HINDU, Mar. 3, 2001 <http://www.hindu.com/2005/01/03/stories/2005010303341300.htm> (“in the trial at Vadodara, out of the 73 witnesses who deposed, 37 turned hostile”).

¹¹⁸ *State v. Baria, (Best Bakery Case)* No. 248/2002 (Gujarat Fast Track Ct. June 27, 2003), at 9, available at <http://www.sabrang.com/cjp/best/vadjudgement.pdf>.

¹¹⁹ Ashish Khetan, *The Buying of Zaheera Sheikh*, TEHELKA: THE PEOPLE’S PAPER, Jan. 1, 2005, http://www.tehelka.com/story_main10.asp?filename=ts010105The_Buying.asp.

¹²⁰ National Human Rights Commission, NHRC Moves the Supreme Court in Best Bakery Case, <http://nhrc.nic.in/dispatch.asp?fno=561> (last visited Mar. 23, 2006).

intimidating the witnesses of the incident. The Gujarat government admitted that there were lapses on the part of the police in registering and recording the first information report in the case, and on the part of the prosecution in recording the evidence of witnesses.

In November 2004, Zaheera Sheikh once again retracted her statement. She stated that the original judgment passed by the Gujarat trial court was correct.¹²¹ She claimed that all the statements she made were due to pressure exerted by her activist lawyer, Teesta Setalvad, who worked with the non-governmental organization, Citizens for Peace and Justice.¹²² In an instant the Gujarat government, who had earlier portrayed Zaheera as a liar, offered her complete state protection and special care and treatment.¹²³ For Zaheera, the pursuit of justice by the non-governmental organization could not bring an end to the communal discourse, the majoritarian politics, and constant representation of the Muslim as the "enemy" and "traitor." She was ultimately forced to choose between her identity as a Muslim, an outsider, and the vulnerable place accorded to a Muslim woman in a Hindu dominated state, or to align with the Hindu community in order to ensure her safety and right to life. Her alignment with the Hindu Right ultimately exposes the tension between the assimilative gestures on which justice can be secured, and the exclusive impact of liberal democratic politics and the rule of law.

In the context of Zaheera Sheikh, the woman was reduced to a victim by all sides of the debate. She was transformed into a victim by the non-governmental organization pursuing justice seeking solutions—at the time of the riots as well as when she turned hostile. Even after she turned hostile, the social justice groups continued to cast Zaheera as a mere victim, a pawn, whose right to justice has to nevertheless be pursued if the Muslim community was ever to find faith in the Indian body politic, the legal process, and as citizens of the country. They sought to rescue and rehabilitate her, and restore the faith of the Muslims in the rule of law. At the same time, the non-governmental organization also felt the need to

¹²¹ Dionne Bunsha, *Zahira's Somersault*, FRONTLINE, Nov. 20- Dec. 3, 2004, at 40-41, available at <http://www.frontlineonnet.com/fl2124/stories/20041203003304000.htm>.

¹²² This is the same NGO that initiated the Concerned Citizens' Tribunal.

¹²³ *Zaheera is under Vadodara Police Protection: Commissioner*, REDIFF ON THE NET, Nov. 4, 2004, <http://in.rediff.com/news/2004/nov/04best.htm>; see also *'Zaheera got Rs 18 lakh to recant,'* REDIFF ON THE NET, Dec. 23, 2004, <http://in.rediff.com/news/2004/dec/22best.htm>.

present their “neutral” (read secular) credentials, to prove they were not aligning with the Muslim community against the Hindus. They argued that they were also involved in the process of providing justice to the families of those killed in the Godhra train carnage. Yet this position utterly fails to address the broader discursive context within which the real Zaheera Sheikh has to live and survive.

The riots were cast as an aberration by the Hindu Right and Zaheera as a victim of vicious anti-Hindu hate propaganda. She was represented initially as a liar and enemy by the Hindu Rights, but subsequently as a victim of Muslim-run organizations and anti-Hindu advocates. As long as she remained allied to the Hindu majority, her security was assured. On December 24, 2004, Zaheera was ousted from the Muslim community on the grounds that she was lying constantly. This decision received the endorsement of the Muslim personal law board.¹²⁴ She finally came to be rendered as a traitor to the Muslim community and ostracized from her religious community. In August 2005, Zaheera was indicted by a Supreme Court-appointed committee “as a ‘self-condemned liar’ falling to ‘inducements’ by ‘certain persons’ to give ‘inconsistent’ statements during the trial of the case.”¹²⁵ In February 2006, nine people were convicted of murder in a retrial of the case by the Sessions Court in Mumbai.¹²⁶ In March 2006, the Supreme Court convicted and sentenced Zaheera to one year in prison for perjury.¹²⁷ The end result reflects the paradox, where a Muslim woman who was a victim of the Gujarat riots, finds herself incarcerated. While a commonly told story of transitional justice and the rule of law can only lead to such an end, it misses out entirely on the broader discursive narrative, which includes the role of Hindu majoritarianism’.¹²⁸

¹²⁴ *Majlis-e-Shura declares Zaheera an outcast*, REDIFF ON THE NET, Dec. 24, 2004, <http://in.rediff.com/news/2004/dec/24best.htm>.

¹²⁵ *Zaheera Sheik a ‘self condemned liar’: SC panel*, EXPRESS INDIA, Aug. 30, 2005, <http://www.expressindia.com/fullstory.php?newsid=53608>.

¹²⁶ *Best Bakery Case: 9 accused convicted*, REDIFF ON THE NET, Feb. 24, 2006, <http://in.rediff.com/news/2006/feb/24gujarat.htm>.

¹²⁷ *Lying in court: 1-year jail for Zaheera*, REDIFF ON THE NET, Mar. 8, 2006, <http://in.rediff.com/news/2006/mar/08godhra.htm>.

¹²⁸ *Supreme Court Panel Calls Zahira a Liar*, REDIFF ON THE NET, Aug. 29, 2005, <http://www.rediff.com/news/2005/aug/29best.htm>.

VIII. CONCLUSIONS

It is imperative that the story of the Gujarat riots is not reduced to one of mere victimization. Such a linear and monochromatic analysis evades the discursive struggle that has been taking place both within as well as outside of the legal arena over who constitutes the authentic Indian subject, the location of women within that struggle, and representation of the "other" in liberal rights discourse as invariably different—someone who must either be tamed or assimilated through some form of cultural strip. Refusal to conform is either treated as an immutable condition or, as in the case of the discourse of the Hindu Right, cast as "other," foreign, and threatening, such that incarceration and even elimination are justifiable in the interests of the security of the nation or to protect liberal democracy and the rule of law from that which has no regard for it and threatens to destroy it.

This is not to suggest that the Hindu Right has been a strong advocate of the democratic process. Indeed, Gowalkar, second chief of the RSS and main ideological exponent of the Hindu Rights politics, had a particular disdain for democracy. However, when India gained independence and adopted a Constitution based on adult universal franchise, regardless of religion, gender, caste, and class, such positions were muted. In the contemporary period the BJP formulated a strategy for engaging with rights discourse. Its agenda is not being pursued in opposition to the constitutional principles of secularism and equality, but rather in and through them. The Muslim is thus constructed as utterly "other" or outsider, who must either assimilate or be incarcerated or annihilated if he fails to conform. Both responses are justified; the former in and through liberal rights discourse of equality which emphasizes sameness, and the latter by casting the Muslim as existing outside the norms of liberal democracy and values, and hence needing to be contained or even eliminated.¹²⁹ This general sentiment of Hindus as oppressed is then often followed by increasingly brutal rhetoric that calls on Hindus to fight back against these Muslim oppressors and often expressly calls for violent confrontation. A rights approach is pursued alongside the promotion of a militant *Hindutva* and a militaristic nationalism by the RSS, together with

¹²⁹ Ileana Porras, *On Terrorism: Reflections on Violence and the Outlaw*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 308 (Karen Engles & Dan Danielson eds., 1994) ("The rhetorical transformation of terrorists into frightening alien outlaws suggest a justification for repression by the state . . ."); see also *id.* at 294 (examining the literature on terrorism and how the Muslim/Arab "other" comes to be constituted and rendered as a threat and as existing outside of liberal democracy).

the popularization of *Hindutva* by the VHP amongst exploited social groups.

The various forums set up to examine the bloody riots that took place in Gujarat in 2002 and to investigate claims that the police and political machinery played a critical role in permitting the unleashing of horrendous violence on the Muslim minority community are functioning with complete fealty to the norms and tenets of the liberal notions of justice and resolution. The ultimate function of initiatives such as the Nanavati Commission is to report on its findings, and it will be for the government to decide if any action is to be taken on these findings. There is no doubt that the Commission and comparable forums provide an important space where victims can voice their grievances and receive powerful forms of redress for those who have experienced such horrific carnage. They serve as forms of repair to the damage inflicted on the psyche of the minority community in India. However, the layering and complexity of the subjects, as discussed in the earlier sections or as depicted in *Dev*, are absent. What the structures of transitional justice do not address are the normative aspects of these struggles. They deal with immediate justice and facts, but do not consider the broader discursive context in which the issues of communalism and majoritarianism have emerged. It is a history that defines the Muslim as an alien (so how can they be victims?), as oppressing the majority (read Hindu) community (so how can they claim to be persecuted?), and as threatening to the security of the nation-state and liberal democracy (and hence not entitled to the same protections and notions of justice that apply to the liberal subject).

This brings me back to the story of Zaheera Sheikh and the Gujarat riots. By situating her almost exclusively as a victim, as the social justice groups and non-governmental organizations did, merely addresses the immediate, individual harm or injury she suffered or experienced. But it fails to engage with this broader discursive construction of Muslim and Hindu subjectivity in the discourse of the Hindu Right and how these subjectivities have come to be embedded in law. The dynamics of transitional justice in Gujarat cannot be limited to the violence that erupted during those few days in March 2002. It needs to consider much more: the discursive contest that produced this kind of violence and the subjectivities of the different communities. It must broaden its lens of inquiry to understand how ordinary common sense is linked to the extraordinary infliction of political violence. The riots were not simply a vicious expression of uncivilized hoards. It was indeed an expression that was produced as a result of the successful discursive battle waged by the Hindu Right, partly in and through law.

Neither the terms of the commission nor the court cases address the role of rights discourse in producing this event. This Article's argument is that we need to engage with the goals of transnational justice and rights claims differently—in ways that are constantly disruptive. The intention is not to create more uncertainty, nervousness, or anxiety, but to ensure that complacency or surrender to the haughty claims of rights and justice do not become the substitute for a transformative politics and an alternative political vision.

Transitional justice focuses on gross human rights violations, rather than the everyday, ordinary forms of violence. As a result, it not only distorts and individualizes the abuse, it tends to treat it as an aberration, as outside the terms of liberalism and liberal rights. It also limits the range of victims and those who are accountable. As discussed in this Article, this limited understanding of transitional justice masks the deeper ideological and discursive practices that have produced the context within which the so-called gross violations take place. For example, by focusing on the killings, abuses, and disappearances in the Commission of Inquiry, the structural and ideological factors that have produced the victimhood of Muslim minorities in India remain unaddressed. A focus on individual acts of human rights abuse cannot capture this broader canvas.¹³⁰ It does not address the structures and relations of power that sustain both routine and extraordinary forms of violence—that is, how there is a relationship between ordinary and extraordinary forms of political violence.¹³¹ There is no pressure to find political alternatives, but focus merely on the guilt or innocence of the different parties involved. Such commissions of inquiry need to go beyond this simple formula to address the issue of victimization against the broader ideological context.

Even courts need to move beyond their limited focus on the individual rights violations to address the broader systemic and ideological context that enables the production of extraordinary violence. The Gujarat riots need to be located in the context of the enabling conditions of *Hindutva* and its anti-Muslim ideology. The ideologies of majoritarianism, as well as the colonial legacies that drove an arbitrary wedge between these communities, have increasingly defined the meanings of equality, secularism, and the right to free speech in India. Justice for victims must move well beyond the liberal, legalistic, victim-focused, and state-oriented approach.

¹³⁰ Nessiah & Keenan, *supra* note 9, at 272-81.

¹³¹ *Id.* at 275.

Coming back to the discussion of *Dev* with which this Article began, a legalistic and state oriented strategy fails to offer redress, though the community representatives, including Farhan and Aaliya, want very much to believe that in the end, justice will be done. Yet, the film itself was subject to the very discursive practices that this Article addressed in the context of the Gujarat riots. The film was protested in the Gujarat at the moment of its general release. One resident from a small town in Gujarat filed a case against Nihalani, the director, for making a film that threatened to ignite communal clashes between two communities. The complainant requested an injunction against the screening of the film in any part of the country, "either by himself, through his agents or distributors; or even on television."¹³² According to the complainant, there were many dialogues and scenes in *Dev* that would hurt the feelings of Hindus as well as Muslims. Some of these dialogues and scenes were so sensitive that they could do great harm to the faith and respect for their respective religions. The fact that the film was challenged in the state that was still under the stewardship of Narendra Modi was not a coincidence.

After the defeat of the Hindu Right wing led government in May 2004, the suit was dropped before the court heard arguments and the present government granted permission to screen the film on January 26, 2005, India's National Republic Day, on the state-run television channel. It was hailed by human rights and social justice groups as a move to restore liberal democracy. And yet, Zaheera lingers in jail, the entire Muslim community is reminded of the injustices of 2002, and the ideological edifice of the Hindu Right remains intact.

¹³² Haresh Pandya, *Govind Nihalani's Dev in Trouble*, REDIFF ON THE NET, June 16, 2004, <http://in.rediff.com/movies/2004/jun/16dev.htm>.

