

THE LIMITS OF THE STATE: FEMINIST PERSPECTIVES ON CARCERAL LOGIC, RESTORATIVE JUSTICE AND SEXUAL VIOLENCE

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INTRODUCTION

The American criminal justice system (CJS) is subject to myriad critiques, nearly all of which conclude that our society still has far too many victims and far too many prisoners. The crime of sexual assault brings special concern, because despite decades of CJS reform, most victims never see their perpetrators held accountable. While there have been considerable efforts to develop alternatives to the CJS, these alternatives have rarely been used in the context of sexual violence. Indeed, there is a clear hesitancy to adopt alternatives that might seem to be too “soft” on sexual violence perpetrators.

This article brings a feminist perspective to this quandary. Bringing law into conversation with feminism is usually fraught, but the authors believe that this lens is imperative if we are to truly address the entrenched problem of sexual violence, which is the quintessential manifestation of misogyny and heteropatriarchy. This article employs feminist critiques of government responses to sexual violence. There are a wide-variety of feminist theories, some of which are in direct conflict with one another. However, the thrust of most feminist interventions, even those that conflict with one another, is to address

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the harms of patriarchy. This is the principle with which this article will examine the American CJS and the proposed alternative, known generally as restorative justice (RJ). This inquiry is designed to answer the question of whether current systems of responding to sexual assault truly address deep-rooted, long-standing patriarchal influences in our society.

This article is divided into four parts. Part I focuses on the prevalence and harm of sexual violence in American society. We begin our feminist critique in Part II, which focuses on the failure of the CJS to adequately address sexual violence. Part III considers feminist critiques of popular restorative justice models. In the conclusion, the authors consider what these critiques of CJS and RJ have in common – namely, what lies beneath concerns about both approaches. Ultimately, we see the CJS/RJ debate as presenting a false dichotomy to feminists, and the authors urge the cultivation of new ideas for addressing sexual violence using feminist principles.

This article is focused on United States, although scholars from other countries are included in the critiques; this article also focuses on *sexual violence* as opposed to domestic violence. To date, most analysis of RJ and gendered violence has focused on domestic violence as opposed to sexual violence.³ While there is significant overlap between domestic violence and sexual assault (some experts believe that victims of domestic violence often experience sexual assault as well),⁴ this article focuses on sexual violence that does *not* arise as part of an intimate partnership. This includes sexual violence committed by acquaintances, strangers, and government officials. This distinction is important because the intimate relationship at the core of domestic violence crimes often raises unique concerns for RJ that are not always implicated in a sexual violence crime (divorce, child custody, and the like).

³ Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1647 (2013).

⁴ Raquel Kennedy Bergen & Elizabeth Barnhill, *Marital Rape: New Research and Directions*, VAWNET APPLIED RES. F. 3 (Feb. 2006), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_MaritalRapeRevised.pdf [<https://perma.cc/A76K-HQMD>].

I. THE CONTINUING CRISIS OF SEXUAL VIOLENCE

Despite feminist strides to have the criminal justice system (CJS) take sexual violence seriously through policy reforms, sexual violence remains both under reported and under prosecuted. In the United States, one in three women and one in six men will experience some form of sexual violence in their lifetime.⁵ In the LGBT community, 44% of lesbians, 61% of bisexual women, 37% of bisexual men, and 26% of gay men have experienced sexual violence.⁶ Almost 50% of transgender individuals are survivors of sexual violence.⁷ These statistics only become more staggering when factoring in race, as people of color experience higher rates of sexual violence than do their white peers.⁸

Sexual violence exacts a significant toll on survivors and society. In the past several decades, hundreds, if not thousands, of articles have been written about the harm of sexual violence from a wide variety of disciplines including psychology, sociology, law, education, gender studies, communication studies and ethnic studies.⁹ Survivors of sexual violence often experience significant psychological and physical trauma, which in turn affects the way that they live and function in our society. Sexual violence also has a significant economic effect in the United States, with one study suggesting that

⁵ Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, NAT'L CTR. FOR INJ. PREVENTION & CONTROL FOR DISEASE CONTROL & PREVENTION 19 (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<https://perma.cc/KLJ2-X2LF>].

⁶ Mikel L. Walters et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation*, NAT'L CTR. FOR INJ. PREVENTION & CONTROL FOR DISEASE CONTROL & PREVENTION 2 (Jan. 2013), https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf [<https://perma.cc/3LFS-QH7S>].

⁷ Sandy E. James et al., *2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents*, TRANSEQUALITY.ORG 15 (Nov. 2017), <http://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-Nov17.pdf> [<https://perma.cc/2ZM3-2XYC>].

⁸ *Id.* at 3; Sharon G. Smith et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010–2012 State Report*, NAT'L CTR. FOR INJ. PREVENTION & CONTROL FOR DISEASE CONTROL & PREVENTION 20–21, 26–28 (Apr. 2017), <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> [<https://perma.cc/2YLA-FHEJ>].

⁹ General search with the term “sexual assault aftermath” on Google Scholar turns up over 16,000 of articles related to the harm of sexual assault.

sexual violence results in a lifetime cost per survivor of \$122,461 and a population economic burden of over \$3 trillion over victims' lifetimes.¹⁰ Feminists often advance the argument that addressing this high rate of sexual violence must be a key strategy in addressing entrenched heteropatriarchy. The challenge is to determine *how* to address sexual violence so that fewer people are victimized. This brings us to the question – *how should offenders be held accountable?* Thus far, the American legal system has prioritized the CJS as the primary mechanism of addressing sexual assault.

Yet for reasons discussed below, sexual assault is less likely to be reported to the police compared to other physical assaults.¹¹ According to one estimation, only 31% of sexual assault cases are reported to police, only 5.7% of sexual assault cases result in an arrest, and only 0.7% of sexual assault cases result in convictions.¹² Under one estimate, fifteen out of sixteen sexual assault survivors in the United States can expect "no significant accountability from the criminal justice system" to address the actions of the perpetrator.¹³ Scholars refer to the discrepancy between the reported incidents of rape, arrests, and convictions as the sexual assault "justice gap"¹⁴ and leads to the perspective that "nothing really changes" concerning conviction and attrition rates.¹⁵ Despite the justice gap, society tells sexual violence survivors that the CJS will provide justice and accountability.

¹⁰ Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTIVE MED. 691, 691 (2017).

¹¹ See Janice Du Mont, Karen-Lee Miller & Terri L. Myhr, *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466, 468 (2003).

¹² Andrew Van Dam, *Less than 1% of rapes lead to felony convictions. At least 89% of victims face emotional and physical consequences*, WASH. POST (Oct. 6, 2018).

¹³ Amy Kasparian, *Justice beyond Bars: Exploring the Restorative Justice Alternatives for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT'L L. REV. 377, 384–385 (2014).

¹⁴ JENNIFER TEMKIN & BARBARA KRAHE, SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE (2008); Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 145 (2012), <https://doi.org/10.1177/1077801212440017> [<https://perma.cc/QQ37-QZVM>].

¹⁵ See generally Kate Cook, *Rape Investigation and Prosecution: Stuck in the Mud?*, 17 J. SEXUAL AGGRESSION 250, 261 (2011) (concluding that "much does indeed remain the same").

II. FEMINIST CRITIQUES OF CARCERAL LOGICS

In response to the high rates of sexual violence and growing concerns about governing through punitive crime control, many academics and activists are critically interrogating what is broadly defined as “carceral feminism” which centers the CJS as the locus of sexual violence intervention. This section explores feminist critiques of mainstream responses to sexual violence using the CJS. We begin by defining and theorizing carceral feminism, and its relationship to the CJS. We then explore common critiques of carceral solutions to sexual violence and their unattended consequences on victim/survivors.

A. *Defining Carceral Feminism*

Carceral feminism is a label that is applied to a particular strand of feminist thought, and the label was developed as part of a growing discourse analyzing the dangers of relying on the state’s punitive power to advance women’s liberation by assuming that increased criminal justice solutions are effective forms of justice for survivors of sexual violence. In this way, certain feminists facilitate, rather than counter, the carcerality controlling arm of the neoliberal state.¹⁶ For carceral feminists, the primary and most efficient solution to ending sexual violence centers on increased policing, tougher laws and prosecution, and imprisonment.¹⁷ While not all feminists agree with carceral feminist approaches, carceral feminism is the most common approach to responding to sexual violence.¹⁸

Carceral feminists believe that criminal punishment serves a symbolic purpose by sending the message that society should take sexual violence seriously.¹⁹ As feminists from the anti-violence

¹⁶ Nancy Whittier, *Carceral and Intersectional Feminism in Congress*, 30 GENDER & SOC’Y 791, 792 (2016).

¹⁷ ELIZABETH BERNSTEIN, BROKERED SUBJECTS: SEX, TRAFFICKING, AND THE POLITICS OF FREEDOM 21–22, 41–42 (2019); KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 5–10 (2009).

¹⁸ BERNSTEIN, *supra* note 17, at 21.

¹⁹ For an example of the symbolic purpose of the law for sexual violence, see generally Nickie D. Phillips & Nicholas Chagnon, “Six Months Is a Joke”: *Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case*, FEM. CRIMINOL. 1 (2018). For the symbolic power of the law in

movement have argued, sexual violence is a primary result of misogyny and gender discrimination, and punishment for perpetrators helps protect women and works towards securing equality under the law and thus in society. In other words, harsher punishments and increased penalties for sexual violence provides victims with justice and sends the message that sexual violence will not be tolerated.²⁰ Yet when safety and protection are defined through state functions, it often works to individualize safety for a few, while increasing control over marginalized communities, particularly people of color, as we discuss in the next section.

B. Carceral Feminism and State Violence

By collaborating with law enforcement, seeking state funding, and framing sexual violence as a crime as well as a social justice issue, carceral feminism helps to strengthen the punitive state and leads to increased violence against marginalized populations.²¹ Scholars such as Beth Richie argue that the collaboration of the feminist anti-violence movement with the increasingly punitive justice system occurs at the expense of poor women of color and sexual minorities. Richie states “while the anti-violence movement is working to improve arrest policies, everyday safety in communities of color is being threatened by more aggressive policing, which has resulted in increased use of force, mass incarceration, and brutality.”²² While often the issue of mass incarceration focuses on men of color, women of color also are disproportionately impacted by penal policies. Black women are arrested at 2.8 times the arrest rate of white women.²³ Overrepresentation of women of color in the justice system has been attributed to war on drugs policies, the war on terrorism, broken

taking discrimination seriously, *see* DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 39–41 (2015).

Nickie D. Phillips & Nicholas Chagnon, “*Six Months Is a Joke*”: *Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case*, *FEM. CRIMINOL.* (2018).

²⁰ SPADE, *supra* note 19, at 39–41; Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 *WASH. U. J. L. & POL’Y* 13, 34 (2011).

²¹ BUMILLER, *supra* note 17, at 1–15.

²² Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 *SIGNS* 1133, 1136 (2000).

²³ Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 *WM. & MARY J. RACE, GENDER, & SOC. JUST.* 39, 58–59 (2017).

windows strategies of policing, and aggressive over-policing of black communities.²⁴ At the same time, social welfare policies have become more punitive by working towards controlling communities through narrow definitions of family, work, and gender roles which can impact access to welfare, child custody or lead to incarceration.²⁵ Once incarcerated, women are not free from violence, but instead can experience more sexual violence from other incarcerated individuals and prison workers, including unwanted strip searches, sexual harassment and sexual assault.²⁶ Even law reform policies intended to help survivors of gender-based violence such as mandatory arrests in cases of domestic violence has disproportionately and negatively impacted women of color.²⁷ Mandatory arrest policies have resulted in an expanded oppressive police presence in many communities, which has led to higher arrest rates of women of color and lesbians compared to white and heterosexual peers, even when the victims initiate the call for police assistance.²⁸

In addition, collaboration with law enforcement to increase prosecution rates of sexual violence ignores the problem of sexual violence perpetrated by police officers, particularly against people with marginalized identities such as women of color, LGBTQ individuals and those living in impoverished communities or engaging in sex work. These offenses include unwarranted strip searches, sexual

²⁴ See generally Spencer K. Beall, "Lock Her Up!" *How Women Have Become the Fastest-Growing Population in the American Carceral State*, 23 BERKELEY J. CRIM. LAW 1 (2018) (exploring the various factors that underlie the dramatic increase in women prisoners).

²⁵ BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 112–118 (2012).

²⁶ Sheryl P. Kubiak et al., *Sexual Misconduct in Prison: What Factors Affect Whether Incarcerated Women Will Report Abuses Committed by Prison Staff?*, 41 L. & HUM. BEHAV. 361, 367–70 (2017); Sheryl Pimlott Kubiak et al., *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, 19 TRAUMA, VIOLENCE, & ABUSE 94, 95 (2018).

²⁷ Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281 (1997) ("[Mandatory arrests] laws typically require police officers to arrest a man who violates an order of protection or whom police have probable cause to believe has committed a criminal offense against an intimate partner.").

²⁸ Michele S. Jacobs, *The Violent State: Black Women's Invisible Struggle against Police Violence*, 24 WM. MARY J. WOMEN L. 39, 89–90 (2017).

harassment, and sexual assault.²⁹ While activists and news reports brought increased attention to the issue of police officer sexual misconduct, the problem higher arrest remains understudied with limited empirical data.³⁰ However, scholarship does suggest that law enforcement sex offenders target the most vulnerable including women of color, transgender and gender-nonconforming people, so as to reduce the risk that their victims will report the misconduct.³¹ One study found 548 reported cases of police officers arrested for sexual misconduct between 2005-2007.³² However, the number of incidents is likely higher as most cases of sexual misconduct are unreported or are dismissed summarily when survivors do report.³³ For marginalized communities, a history of abusive encounters with the CJS leads to a distrust of the system and many communities are seeking alternative remedies.³⁴ From this perspective, an increase in arrest rates and law enforcement involvement has not led to a decrease in sexual assault and instead leads to more violence. Thus, when addressing the issue of sexual violence, we must approach it with intersectionality. Intersectionality is used to denote the ways in which race, class, gender, sexuality and other identities interact and intersect to shape individuals' experiences.³⁵ Thus, sexual violence cannot universalize the experiences of women, but takes into consideration of race, class, gender, and sexuality. In doing so, it is clear that an increase of punitive measures resulting from carceral feminist frameworks has not resulted in social stability and safety but rather increased violence against poor women of color and sexual minorities.

²⁹ ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 183–187 (2017).

³⁰ *Id.* at 109–111; Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 157 (2016).

³¹ Trombadore, *supra* note 30, at 157.

³² Philip Matthew Stinson et al., *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL'Y REV. 665, 673 (2015).

³³ Trombadore, *supra* note 30, at 165–168.

³⁴ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991); *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L. J. 121, 125–126 (2001).

³⁵ See generally Crenshaw, *supra* note 34.

C. *Carceral Feminism and Individualized Justice*

Critics of carceral feminism argue that focusing on punitive measures strays from the broader social justice goals of the anti-violence activists with the feminist movement of the 1970s, and produces an individualized, unequal variant of justice that further punishes marginalized communities rather than protects them.³⁶ Elizabeth Bernstein argues that by working with state actors and law enforcement, social justice goals of true gender liberation are recast as criminal justice problems under the framework of protecting women and girls.³⁷ As the nature of the CJS individualizes acts of violence to focus on individual cases of breaking the law, it often erases structural inequalities such as exploitative economic conditions, sexism and other systemic oppression as causes of violence.³⁸ Thus, criminal justice responses to sexual violence places the blame for violence on individual bad men which justifies a coercive and punitive state reaction, while obscuring the role of structural oppression.³⁹ Aya Gruber argues that while sexual violence is seen as a crime first, the law is ill-equipped to address issues such as acquaintance rape as the underlying causes are rooted in social problems and sexual encounters that do not neatly separate consensual sex and sexual assault.⁴⁰ Similarly, Gurnham argues that rape law simplifies sexual scripts that do not address the complexities of giving consent in which indirect or ambivalent words or actions may lead to both consensual sex or sexual assault as outcomes.⁴¹ While the law often discusses rape as a simple victim/perpetrator framework, this assumes a single identifiable truth rather than multiple and contradictory truths of how the individuals participating understand the sexual interaction. This is not to say that we should blame survivors for their assaults, downplaying the seriousness of rape or take the offender's side. Rather, it is to make

³⁶ See Nancy Whittier, *Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy*, 30 GENDER & SOC'Y 791, 810 (2016).

³⁷ Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEORY & SOC'Y 233, 237 (2012).

³⁸ *Id.* at 235.

³⁹ See BUMILLER, *supra* note 17, at 13–14.

⁴⁰ See Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027, 1030–31 (2016).

⁴¹ David Gurnham, *A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts*, 19 NEW CRIM. L. REV. 141, 148 (2016).

the point that the law simplifies acts of sexual violence that do fail to address the complexities of larger social structures that shape women's experiences of what is consensual sex or rape is.

At the same time, women are told to take on a neoliberal model of risk management to protect themselves from potential rape and then are blamed for not taking necessary precautions when violence does occur, as demonstrated through the widespread acceptance of rape myths. It is well acknowledged that police, prosecutors, and juries who believe rape myths can influence the outcomes of rape cases within all stages of the criminal justice system.⁴² The law, in particular, due to its adversarial nature, supports these assumptions about what constitutes rape by questioning rape survivors' narratives and making their experiences suspect.⁴³ Survivors have often reported feeling that they themselves are on trial, particularly when their character becomes a critical issue in deciding whether the sexual encounter was consensual, a fabrication, or actual rape.⁴⁴ While the inclusion of rape shield laws are designed to "deprive the jury of precisely the type of information that promotes rape myths" scholars argue these laws are often worked around or ignored with few if any consequences for the lawyers who violate them.⁴⁵

Assumptions about who is a victim and what counts as rape intersect with sexual, racial, and class-based stereotypes in which being a "genuine victim" correlates with being a respectable, heterosexual white woman who physically resists the assault.⁴⁶ This leads to sexual assaults against minority women being under-reported, under-investigated, and under-prosecuted, when compared to white victims.⁴⁷ A 2001 study found that prosecutors were 4.5 times more likely to file charges if the victim was white, compared to Black victims.⁴⁸ As Barbara Hudson argues, minority individuals are more

⁴² Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1338 (2010).

⁴³ *Id.*

⁴⁴ *See id.* at 1338.

⁴⁵ Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1599 (2007).

⁴⁶ *See* Gruber, *supra* note 40, at 1030 n.20; Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1089 n.3, 1130–31 (1986) (emphasis added).

⁴⁷ Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. MARY J. WOMEN & L. 39, 76 (2017).

⁴⁸ Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROBS. 206, 224 (2001).

likely to be seen as “suitable enemies” in which they are perceived as criminals first, than as law abiding “ideal victims” within the criminal justice system, preventing them from receiving equal and sympathetic treatment in the criminal justice system.⁴⁹ Issues of racism, sexism, and heterosexism help form ideas about what a “real” rape situation looks like, and who should be considered “real” victims and perpetrators. The widespread belief of rape myths leads to rape victims considering whether they think the police, prosecutors, or juries will believe they were raped before reporting leading to the low report rates.⁵⁰

While relying on the carceral state is often presented as the primary tool for eliminating sexual violence, when survivors use carceral frameworks to respond to sexual violence they face further victimization. By relying exclusively on punitive measures, carceral feminists have failed to produce a fully intersectional approach to sexual violence and instead have applied a “one size fits all” model of justice that individualizes and decontextualizes sexual violence from larger systems of oppression. When addressing sexual violence, we must look beyond criminal justice solutions by focusing on women’s different needs and experiences, otherwise the responding public policy and interventions will be inadequate to meet the needs of women of color, and other marginalized groups.

While carceral feminist approaches to addressing sexual violence seek to provide victims with justice, safety, and accountability, when put into practice, reliance on the CJS often leads to more violence for survivors. Issues of institutional racism, state violence and adherence to rape myths are not issues that can be easily be fixed by CJS reforms or lead to more survivors seeking justice. Yet in responding to the critiques of carceral feminist frameworks, careful consideration must be paid to scholars and activists calling for engagement in alternative systems of justice and accountability for sexual assault. While restorative justice offers a remedy for some of the main problems addressed above, it also comes with its own set of problems and limitations.

⁴⁹ Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J. L. & SOC'Y 237, 243 (1998).

⁵⁰ Orenstein, *supra* note 45, at 1587–88.

III. FEMINIST CRITIQUES OF POPULAR RESTORATIVE JUSTICE MODELS FOR SEXUAL VIOLENCE

Rejecting the use of carceral/punitive logic in response to sexual violence invariably leads to questions about alternative approaches. The primary alternative to adversarial justice, known generally as “restorative justice” (RJ) has emerged from discussions about dispute resolution models that do not rely upon carceral logic. This section explores feminist critiques of the use of RJ in the context of sexual violence. We begin by defining RJ, followed by a brief history of its development in western law. We then explore common feminist concerns about using mainstream RJ models in the context of sexual violence.⁵¹

A. *Defining Restorative Justice*

Restorative justice means more than simply an alternative to the CJS; it is philosophically distinct from the adversarial system altogether. While RJ generally refers to “informal mediation practices”⁵², a wide variety of theories and practices are included under the umbrella term.⁵³ Generally, RJ is a “distinctive approach to wrongdoing”⁵⁴ and refers to a collaborative, non-adversarial response to a legal dispute or crime. It is sometimes closely associated with the concept of “alternative dispute resolution”, which seeks to resolve disputes outside the courtroom, but RJ tends to focus “particularly on repairing the harm done to people and relationships.”⁵⁵

In the context of crime, the United Nations defines RJ as “any process in which the victim and the offender and, where appropriate, any other individuals or community members, affected by a crime, participate together actively in the resolution of matters arising from

⁵¹ We refer to “mainstream” conceptions of restorative justice to explore the most common principles in contemporary RJ literature.

⁵² James Ptacek, *Introduction to RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, ix (James Ptacek ed., 2010).

⁵³ Estelle Zinsstag & Marie Keenan, *Introduction to RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 1*, 3–5 (Estelle Zinsstag & Marie Keenan eds., 2017) (“RJ is a term that is dogged with conceptual ambiguity.”).

⁵⁴ ANALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* 20 (2004).

⁵⁵ Zinsstag & Keenan, *supra* note 53, at 2.

the crime, generally with the help of a facilitator.”⁵⁶ The most well-known RJ programs in the United States are typically operated by the state/government – as an alternative to or diversion from the typical CJS process. There are a wide variety of forms of RJ, including victim-offender mediation/dialogue (VOM/VOD), restorative conferences, and restorative circles.⁵⁷ However, much like the definition of RJ, there are significant variations even within the various types of programs.

Victim-offender mediation (VOM) programs typically use a trained facilitator to act as mediator during a face-to-face meeting between the victim and offender. Prior to meeting, the facilitator(s) require victim and offender participate in one-on-one preparation before the mediation occurs. VOM cases are generally limited to criminal rather than civil cases and often focus on cases where the victim and offender are not involved in an ongoing relationship. Many VOM programs de-emphasize reconciliation, instead focusing on victim healing and offender accountability. Goals of VOM vary and can include developing a plan for restitution and/or providing an opportunity for a victim to ask questions of the offender. Victim-Offender Dialogues (VOD) share many of the same qualities of VOM but are typically implemented in the post-conviction phase of the CJS.⁵⁸

Restorative conferences widen the circle of who is involved in the process to include victim/survivors, offenders *and* members of their communities, as well as relevant professionals for a prepared meeting regarding the offence.⁵⁹ A trained facilitator leads the conference, and all parties involved in the conference discuss the crime and the impact it had on them. The goals of restorative conferences are intended to provide accountability, and an action plan designed to address the

⁵⁶ UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, BASIC PRINCIPLES ON THE USE OF RESTORATIVE JUSTICE PROGRAMMES IN CRIMINAL MATTERS 3 (2002), [www.un.org/en/ecosoc/docs/2002/resolution 2002-12.pdf](http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf) [<https://perma.cc/BLL8-2B9Q>].

⁵⁷ Zinsstag & Keenan, *supra* note 53, at 4–5 (Many traditional indigenous legal practices are sometimes categorized as “restorative justice” but are more often known as “peacemaking” or other indigenous-specific terms. This paper focuses on non-indigenous RJ models.).

⁵⁸ See, e.g., SUSAN L. MILLER, AFTER THE CRIME: THE POWER OF RESTORATIVE JUSTICE DIALOGUES BETWEEN VICTIMS AND VIOLENT OFFENDERS 12–19 (2011).

⁵⁹ LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 90 (2018).

underlying causes of offending behavior and stop possible reoffending.

Restorative circle models also have a broader range of participants, but the methodology differs slightly from conferences. Depending on the nature of the case and participants involved, the circle model is more flexible with less emphasis on formal rules and standards to better meet the needs of participants.⁶⁰ The purpose of the circle or conference is to consider the best ways to make the victim whole and to consider various forms of treatment or reintegration of the offender.⁶¹ In addition, circles offer an opportunity for safe, open conversation to resolve conflict and rebuild relationships between participants.⁶² Restorative circles emphasize input from the community, and decisions are negotiated between those involved. The community helps develop plans to help the victims and prepare behavioral plans for amelioration of the conduct of the offender.

B. History of Restorative Justice in American Law

Ptacek traces the origin of the contemporary restorative justice movement to “social justice movements for civil rights and women’s rights” in the 1960s and 1970s.⁶³ The actual term “restorative justice” emerged from faith-based efforts to effect reconciliation between victims and offenders, often traced to work done by Mark Yantzi with juvenile offenders in Ontario in the mid-1970s.⁶⁴ There has been an explosion of literature about RJ since that time, and numerous American jurisdictions have adopted some form of RJ – most commonly for juvenile justice matters. RJ has also been widely (but not universally) praised by jurists, attorneys, activists, scholars and the like.⁶⁵ Many proponents of RJ point to the failures of the American

⁶⁰ Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 168 (2007).

⁶¹ *Id.*

⁶² JESSICA ASHLEY & PHILLIP STEVENSON, IMPLEMENTING BALANCED AND RESTORATIVE JUSTICE: A GUIDE FOR DEFENSE ATTORNEYS 18–19 (2006), www.icjia.org/assets/pdf/BARJ/BARJdefense.pdf [<https://perma.cc/JME9-A76Z>].

⁶³ James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 5, 7 (James Ptacek ed., 2010).

⁶⁴ *Id.* at 7–8.

⁶⁵ See, e.g., VICTIMS, JUDGES, AND JUVENILE COURT REFORM THROUGH RESTORATIVE JUSTICE, OVC BULLETIN (2000). Chris Longman, MAKING A CASE FOR RESTORATIVE JUSTICE (2017), <https://www.americanbar.org>

adversarial model as a justification for implementing RJ. The approach has been popular. A 2016 study concluded that the majority of states have formally authorized some form of RJ, primarily in the juvenile justice context.⁶⁶

C. Feminist Concerns About Mainstream Restorative Justice Models

Just as there is no consensus among feminists about the utility of carceral logic, there is no consensus among feminists about the utility of RJ in cases of sexual violence. RJ certainly “sounds good” and would seem to be a great alternative to the carceral logic of the CJS. However, much of the early RJ literature is void of any real engagement with feminist principles, such as ending gendered violence.⁶⁷ In this section, we explore three categories of feminist concerns about the use of state-sanctioned restorative justice in cases of sexual violence. In many cases, RJ merely duplicates problems with adversarial justice. In 2004, then-Director of the National Center for Victims of Crime, Susan Herman, concluded that RJ often simply replicates problems that victims face in the CJS.⁶⁸

1. Offender Denial

The problem of offender denial is truly the “fatal flaw” of using RJ for sexual violence cases. Most RJ practices require that there be at least some admission on the part of the offender that they behaved wrongly (even if they do not admit outright to committing sexual violence).⁶⁹ There is no “fact-finding” mechanism in RJ models. Thus, without some form of admission, restorative practices are doomed from the start. RJ models generally presuppose that the offender has

/groups/gpsolo/publications/gpsolo_ereport/2011/october_2011/making_case_restorative_justice/. [https://perma.cc/D7VL-PHUD].

⁶⁶ Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL'Y J. 1, 2 (2016).

⁶⁷ Melanie Randall, *Restorative justice and gendered violence? From vaguely hostile skeptic to cautious convert: Why feminists should critically engage with restorative approaches to law*, 36 DALHOUS. LAW J. 461,466 (2012)

(acknowledging that “the project of achieving gender equality has not been central to restorative justice.”).

⁶⁸ See generally Susan Herman, *Is Restorative Justice Possible Without a Parallel System for Victims?*, CRITICAL ISSUES IN RESTORATIVE JUSTICE 75, 75–84 (Howard Zehr & Barb Toews eds., 2004).

⁶⁹ See Koss, *supra* note 3, at 1624 (noting that RJ programs are “intended for persons who acknowledge perpetration of wrong act.”).

acknowledged responsibility for an offense, meaning that outright, categorical denial will always be a significant barrier to achieving the goals of RJ. In a patriarchal society, many male perpetrators start with the assumption that they are entitled to sexually assault women.⁷⁰ It is not at all clear that existing RJ models have the ability to address that level of misogyny when there is disagreement as to whether the behavior in question is even wrongful.

A second problem related to offender denial includes the potentially coercive actions of the state government to compel a criminal defendant to concede that they have done harm. If RJ is offered as a diversionary opportunity for a criminal defendant in the CJS, important due process and civil liberties questions may arise. The potential leniency offered by a diversionary RJ opportunity may coerce a defendant to admit wrongdoing to avoid lengthy prison sentence.⁷¹ Just as the widespread practice of plea-bargaining has come under scrutiny for coercing innocent people to enter guilty pleas, the use of RJ as a diversionary tactic presents a similar dilemma.

Even if an offender does express some semblance of responsibility, allowing RJ to proceed, there remain serious concerns about its use in the context of sexual violence. RJ programs have often subjected victim/survivors to re-victimization. There are also cogent concerns about whether RJ can truly hold offenders accountable for their crimes.

2. Re-Victimization

Thus, a second category of feminist critique of restorative justice is not a wholesale rejection of the methodology itself, but rather its *specific* application to cases of violent gender-based crimes like sexual violence. In terms of safety for victim/survivors, RJ may actually replicate some of the harms of the CJS. As Ptacek explains bluntly, “restorative practices were not created to deal with crimes of violence against women.”⁷² The primary thrust of this critique is that RJ programs can re-victimize victim/survivors. These critiques typically

⁷⁰ See generally Leana Allen Bouffard, *Exploring the Utility of Entitlement in Understanding Sexual Aggression*, 38 J. CRIM. JUST. 870 (2010) (exploring the connection between patriarchy and male entitlement to commit violence against women).

⁷¹ Analysis of the RESTORE program in Arizona found that sexual assault defendant consent to participate was “100% for misdemeanors and 90% for felonies.” See Koss, *supra* note 3, at 1634.

⁷² Ptacek, *supra* note 63, at 9.

acknowledge that restorative justice has valuable utility in many contexts, including juvenile crime, family law (where violence is not a factor), and probate matters. Those who endorse its use in other contexts, however, often reject applying a restorative model to sexual violence due to concerns about the impact it may have on survivors. In some areas of Canada, for example, there is a moratorium on using any form of RJ for gender-based crimes.⁷³ Several feminist legal scholars have noted that restorative justice systems seem to place greater emphasis on the offender's opportunity for leniency than true reconciliation for victims.⁷⁴ Naylor points out that "[t]he process has been primarily offender-focused."⁷⁵

Some feminist concerns around RJ in this context are similar to concerns that are raised about court-ordered mediation.⁷⁶ Unlike mediation where blame is shared, and the goal is resolving disputes, restorative justice is predicated on an acknowledgment by the offender that a criminal offense has taken place.⁷⁷ Court-ordered mediation has proven to be particularly dangerous in domestic violence cases, where victim/survivors often feel intimidated, coerced, manipulated, and verbally abused by their abusers.⁷⁸ Similar concerns apply to RJ models, which typically require some sort of face-to-face interaction between victim/survivors and their assailants. While the informal nature of many RJ models might be appealing to some victim-survivors who feel intimidated by the style and language of the courtroom, the lack of a formalized structure may actually allow the offender to re-victimize and re-traumatize a survivor through threats (direct or implied) and intimidation.⁷⁹ Some victim advocacy

⁷³ Amanda Nelund, *Policy Conflict: Women's Groups and Institutionalized Restorative Justice*, 26 CRIM. JUSTICE POL'Y REV. 65, 66 (2015) (describing a moratorium in Nova Scotia).

⁷⁴ See, e.g., ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* 150 (2004) (arguing that RJ "insists that true justice must include a robust reaffirmation of the worth of the offender").

⁷⁵ Bronwyn Naylor, *Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways*, 33 UNSW L.J. 662, 666 (2010); see also Ptacek, *supra* note 63, at 20.

⁷⁶ Ptacek, *supra* note 63, at 19.

⁷⁷ See Clare McGlynn et al., *'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice*, 39 J. L. SOC'Y 213, 216 (2012).

⁷⁸ See Lois Presser & Emily Gaarder, *Can Restorative Justice Reduce Battering? Some Preliminary Considerations*, 27 SOC. JUST. 175, 180 (2000).

⁷⁹ See Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9, 17 (2006).

organizations have reported first-hand reports that victim/survivors of gendered violence are re-victimized by the RJ experience.⁸⁰

Even where direct safety and well-being are well protected, RJ models can still marginalize the psychological needs of victim/survivors. While there are few studies on the use of RJ for sexual violence cases in the United States, victims of other types of crimes have reported that their RJ experience was problematic. In one study of a VOM program in the United States, researchers found that the process marginalized victims' interests in several ways.⁸¹ First, victims were often unprepared for the mediation process. Second, victims felt pressured to behave and speak in certain ways. Third, victims sometimes felt intimidated by offenders and/or their families.⁸²

3. Offender Accountability

A third important question raised by feminist critics of RJ for sexual violence cases is simply – does it work? John Braithwaite, one of most cited scholars in the RJ literature, conceptualizes RJ “reintegrative shaming” which creates an opportunity for an offender to return to the community after expressing remorse.⁸³ A typical mediated RJ model does not include incarceration for offenders (with the exception of post-conviction VOD). Thus, we must ask whether RJ can truly transform an offender so that they do not repeat their crimes.

Again, without adequate study of this dynamic for sexual assault cases, we must turn to the literature about RJ in the context of other crimes. It is notoriously difficult to study rates of recidivism in RJ due to problems such as referral bias and lack of a true control group. From the little research that has been done, there is no clear answer as to whether RJ models can or will reduce recidivism.⁸⁴ From a feminist perspective, a sexual offender who repeats his crime after encountering the justice system represents a failure.

⁸⁰ See, e.g., Shiva Nourpanah, *Restorative Justice and Domestic and Sexualized Violence in Nova Scotia*, TRANSITION HOUSE ASSOCIATION OF NOVA SCOTIA (Mar. 8, 2019), <http://thans.ca/restorative-justice-domestic-sexualized-violence-nova-scotia/> [<https://perma.cc/MT9J-8DUV>].

⁸¹ Jung Jin Choi et al., *Patterns of Victim Marginalization in Victim-Offender Mediation: Some Lessons Learned*, 59 CRIME L. SOC. CHANGE 113, 126 (2012).

⁸² *Id.* at 128.

⁸³ Ptacek, *supra* note 63, at 20.

⁸⁴ *Id.* at 21–22.

D. RJ and Sexual Assault: The RESTORE Program

As noted earlier in this Part, because RJ is rarely applied to cases of sexual assault, there is scant literature on its efficacy.⁸⁵ In the United States, the only well-known effort to use restorative justice processes in the context of sexual assault was established in the early 2000s by psychologist Mary Koss.⁸⁶ The RESTORE program, implemented in Pima County, Arizona, operated from 2003-2007.⁸⁷ Koss and her colleagues have published several articles about this groundbreaking effort.⁸⁸ Indeed, the analysis of the RESTORE program constituted the “first peer-reviewed quantitative evaluation of RJ conferencing for adult sexual assault.”⁸⁹

The RESTORE program was directly linked to the CJS in Pima County, and only received referrals from government prosecutors.⁹⁰ Koss describes the program as “a restorative justice (RJ) conferencing program adapted to ... adult misdemeanor and felony sexual assaults.”⁹¹ The ultimate goal of the RESTORE program was to develop, finalize, and implement a “redress plan” for the offender.⁹² Thus, defendants who denied that they had committed sexual violence were not eligible to participate.⁹³ In order to initiate RESTORE in a particular case, there had to be clear victim/survivor consent to the process.⁹⁴

Analysis of RESTORE was based upon “22 cases where both survivor victim and responsible person consented” to the program.⁹⁵

⁸⁵ Koss, *supra* note 3, at 1625 (“Scholarly discourse on RJ for sexual assault has been hindered by a lack of empirical data . . .”).

⁸⁶ *Id.* at 1632 (“The program operated from March, 2003 to August, 2007 . . .”).

⁸⁷ *Id.*

⁸⁸ See, e.g., C. Quince Hopkins, *The Devil is in the Details: Constitutional and Other Legal Challenges Facing Restorative Justice Responses to Sexual Assault Cases*, 50 CRIM. L. BULL. 1 (2014); C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses*, 11 VIOLENCE AGAINST WOMEN 693 (2005); Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218 (James Ptacek ed., 2010).

⁸⁹ Koss, *supra* note 3, at 1623.

⁹⁰ *Id.* at 1632.

⁹¹ *Id.* at 1623.

⁹² *Id.* at 1632.

⁹³ *Id.* at 1634.

⁹⁴ *Id.* at 1627.

⁹⁵ *Id.* at 1633.

The study concluded that more than 90% of participants (including victim/survivors, responsible persons, and other participants) were satisfied with the RESTORE program, and more than 90% would recommend RESTORE to others.⁹⁶ Unfortunately, analysis of racial and ethnic trends in the context of RESTORE was decidedly worrisome. Prosecutors were much more likely to refer white defendants to RESTORE than Black or Hispanic defendants to RESTORE.⁹⁷ This suggests that prejudices inherent with the CJS carried over to the RESTORE program.

As Koss herself acknowledges, there are limitations to the evaluation of RESTORE, including the small sample size of 22 cases.⁹⁸ The program itself was short-lived due to a lack of funding.⁹⁹ While the RESTORE program offers a great deal of insight into how one might structure an RJ response to sexual violence, there are still clear concerns about whether such a program can truly address the weaknesses in the CJS system, particularly since it is so tightly connected to prosecutor referral. It is not clear, for example, how such an RJ model would respond to sexual violence committed by law enforcement or correctional officers.

IV. CONCLUSION

The rise in mass incarceration, the prevalence of sexual violence despite rape law reforms, and the failure to provide justice for most victim/survivors have led to increased interests in alternative forms of justice such as RJ. While RJ offers an opportunity to reframe how we think of crime, justice, and responding to victim/survivors' needs, it can fail to provide victim/survivors with safety or have perpetrators face accountability. Without critically interrogating the ways in which power operates, RJ can reproduce many of the same harms found within the mainstream CJS response. Both systems fail to fully address patriarchal violence or its entanglement with other systems of oppression. These solutions fail to address root causes of violence or inequalities imbedded within state institutions such as legal representation, police forces and services for survivors. In doing so, the solutions to addressing sexual violence are often disconnected to

⁹⁶ *Id.* at 1647.

⁹⁷ *Id.* at 1650.

⁹⁸ *Id.* at 1655.

⁹⁹ *Id.*

the lived realities survivors face both before and after sexual violence occurs.

Perhaps the real problem is not RJ itself, but its connection to state power and control that renders it problematic. Within RJ, the close ties to the CJS (through police officers as facilitators and how safety is defined) reinforces the belief that the state is the only legitimate form of safety, security and justice, while obscuring the violence it produces against marginalized communities. Rather than challenge the problems within CJS, many of the problems have carried over to RJ by assuming all survivors have the same relationship to the state. Some RJ scholars express uneasiness about the shift of RJ entering the criminal justice system, as they believe the state is merely repackaging punitive programs as restorative. They argue the goals of restorative justice do not align with the initiatives of these criminal justice programs that are merely used to supplement punishment while continuing to meet the needs of the state.¹⁰⁰ Similar to how the radical goals of the feminist anti-violence movement led to increased punitive measures often detached from transformative goals through carceral feminism, RJ may be used to broaden the reach of the carceral state under the guise of a gentler form of governance, rather than fully help those impacted by sexual violence.

As advocates and reformers, challenging sexual violence and addressing the needs of victim/survivors, we must engage with critiques of both systems to work towards developing solutions that provide a holistic system of care to those impacted by sexual violence. One avenue to do so is by looking at developments in RJ that seeks to *transform* the culture and institutions that enabled the wrongful behavior to occur rather than simply “restoring” an inequitable status quo.¹⁰¹ Instead of simply restoring, some scholars argue for

¹⁰⁰ See generally Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, 1 CONTEMP. JUST. REV. 47 (1998).

¹⁰¹ Arguments in favor of developing transformative justice include Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 219 (2018); THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES (Ching-In Chen, Jai Dulani, & Leah Lakshmi Piepzna-Samarasinha eds., 2016); Donna Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128 (John Braithwaite & Heather Strang eds., 2002).

“transformative justice” which broadens restorative justice to include analysis of structural inequalities, works to solve the problems within communities and looks beyond the state to address problems of violence. This requires a bottom-up perspective rather than a top-down approach to sexual violence that puts victim/survivors at the center of the justice process rather than at the periphery. Within this framework, justice is not a “one size fits all” model, but a range of restorative options to meet the diverse identities and interests of victims/survivors. By crafting a variety of justice models, we may be able to address the issues within current system of CJS and RJ while increasing opportunities for justice for victims/survivors.