WHEN THE PSYCHE IS THE CRIME SCENE: THE CRIMINAL LEGAL SYSTEM'S
FAILURE TO MEANINGFULLY RESPOND TO CRIMES OF SEXUAL VIOLENCE

A Thesis
submitted to the Faculty of the
Graduate School of Arts and Sciences
of Georgetown University
in partial fulfillment of the requirements for the
degree of
Master of Arts
in Philosophy

By

Stefanie E. Mundhenk, B.A.

Washington, DC
April 15, 2020

Copyright 2020 by Stefanie E. Mundhenk
All Rights Reserved

The research and writing of this thesis
is dedicated to
the Jane Does of Baylor University whose tenacity inspires me;
Théophe Love, who helped me dare to dream of a world without prisons;
And the countless friends and family members who supported me along the way.

TABLE OF CONTENTS

Chapter 1. Introduction	1
Chapter 2. Why the Criminal Legal System Fails Many Sexually Wronged Individuals	3
Chapter 3. The Criminal Legal System Harms Those Who Suffer Sexual Wrongdoing	18
Chapter 4. Hermeneutical Justice – Remaking One’s Self Via Restorative Justice	31
Chapter 5. Conclusion.....	48
References.....	51

CHAPTER 1. INTRODUCTION

Consider a couple who is in college. Their relationship is relatively new, but they've had sex before. She invites him over to her dorm room to do homework. He expects sex, but she has to study for her exams. While sitting next to each other on the bed, he leans over and kisses her, and tries to escalate the sexual nature of the interaction. She kisses him back but laughs and says, "I can't have sex. I have to study;" in her mind she is unambiguously turning him down. He expresses disappointment and she turns back to her study materials, but about an hour later, he kisses her again and his hands drift to the button on her jeans. He believes that he's just letting her know that he's interested and sees nothing wrong with continuing to press; after all, she can say no again if she wants to. Her mind races and she knows that because she's rejected him before – an hour ago – a second rejection would hurt his feelings, but she is really stressed about exams. By this point her shirt is over her head and she's on autopilot. She never really decides one way or the other – everything is just moving too quickly. She feels miffed because of her prior expression that she didn't want to have sex, but at this point, it's more trouble than it's worth to stop him and soothe him when he gets upset about it. At the same time, he interprets her not stopping him as her having changed her mind and being willing to have sex, which he feels entitled to. They have sex. She's quiet afterwards. Something in their relationship changes that day. He thinks she's overreacting. She's angry and feels wronged¹ but can't quite articulate what it is about the situation that makes her feel that way.

¹ There are at least three necessary distinctions when discussing whether or not sexual behavior is appropriate. First, an individual could suffer harm in a sexual interaction without there being an instance of wrongdoing. For example, perhaps someone who has previously suffered a sexual assault finds a position or movement particularly triggering on the spot and neither party has anticipated it. The individual may suffer psychological harm, but there is not culpability on the part of either party. Second, sexual wrongdoing can be perpetrated without it rising to the level of rape. For example, perhaps a person nags a partner about sex until the partner ultimately acquiesces because they feel bad. The partner who nags has wronged the acquiescing partner, and harm may result. And finally, there is rape, which is clearly an act of wrongdoing that undeniably results in harm. This paper is primarily dedicated to exploring the second category

Such scenarios are common, but do not fit neatly into the criminal legal system's definition of what constitutes rape. Because of this, they are routinely brushed aside. However, scenarios like this are legitimate instances of sexual wrongdoing that require redress. In this paper, I will be discussing what happens when sexual interactions involve wrongdoing but are not currently recognized as rape by the criminal legal system. I'll call this category of sexual interactions "gray area sexual interactions." I will then explore why the criminal legal system fails to recognize this huge swathe of sexual wrongdoing as criminal.

Even if the criminal legal system does recognize a case of gray area sexual interaction, the wronged individual is rendered a mere pawn in the prosecutor's pursuit of incarcerating the wrongdoer. Being a pawn in the criminal legal system continues the objectification of the person wronged begun by the assault, so instead of providing redress, the carceral mechanisms of the criminal legal system actually harm both the wronged party and the wrongdoer.²

In contrast, restorative justice can help a wronged individual reassert their subjectivity to the one who initially objectified them. So, I will offer restorative justice as a viable alternative to our current criminal legal regime because it seeks to support those wronged by sexual violence as they heal, in addition to rehabilitating those who perpetuate sexual wrongdoing, thereby protecting the public safety and helping to make real change.

² Throughout this paper I will refer to the person who experiences sexual wrongdoing as the "wronged" party or individual. The terms "victim" and "survivor" are loaded and many oppose their use. See Hillary Holland Lorenzo, *Don't Call Me a 'Survivor'*, HUFFINGTON POST, <https://www.huffpost.com/entry/im-not-a-survivor> (last visited April 7, 2020); Christie Spudowski, *I Was Abused, But Don't You Dare Call Me a Victim*, THOUGHT CATALOG, <https://thoughtcatalog.com/christie-spudowski/2014/06/i-was-abused-but-dont-you-dare-call-me-a-victim/> (last visited April 7, 2020). Similarly, I will refer to people who perpetrate an act of sexual wrongdoing as "wrongdoers" or "people who commit sexual wrongdoing." Commonly used terms like "perpetrator" or "offender" are dehumanizing. Humanizing sexual wrongdoing is important because it centers wrongdoers' capacity for growth and change and reminds society that sexual wrongdoing is pervasive; it is not only "monsters" who commit sexual wrongdoing. This is addressed in more detail later.

CHAPTER 2. WHY THE CRIMINAL LEGAL SYSTEM FAILS MANY SEXUALLY WRONGED INDIVIDUALS

In 2018, only 24.9% of individuals who had been raped or sexually assaulted reported it to the police.³ There are many valid reasons for non-report: completing a medical “rape kit” is traumatic and can be unbearable in the wake of a devastating personal attack; some just want to move on and fear that participating in a potential trial would be re-traumatizing; some are from communities that have been harmed by law enforcement and don’t trust police or prosecutors; some believe that they are to blame for what has happened to them and cannot move past resulting feelings of shame; and some fear retaliation. While all of these very real concerns contribute to the extremely high non-reporting rate, in fact, the majority of cases involving sexual wrongdoing fall through the cracks of the criminal legal system for reasons that are not commonly noted.

First, current statutes are inaptly based on a “consent,” model of sex,⁴ which, as in the example with the college couple above, makes it difficult to deduce when sexual wrongdoing has occurred and could be a cause of the low report rate.

Second, because the statutory scheme fails to capture the way sexual encounters actually occur,⁵ the criminal legal system is only capable of recognizing two categories of sexual intercourse: forcible rape and “not rape.”⁶ This results in the elimination of core category of

³ Rachel E. Morgan and Barbara A. Oudekerk, *Criminal Victimization, 2018*, BUREAU OF JUSTICE STATISTICS at 8, <https://www.bjs.gov/content/pub/pdf/cv18.pdf> (Sept. 2019).

⁴ See Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. Rev., 480, Appendix A https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199273 (June 19, 2018) listing the sexual assault statutes of all 50 states.

⁵ See [Quill] Rebecca Kukla, *That’s What She Said: The Language of Sexual Negotiation*, 129 ETHICS at 76 (2018), arguing that a consent model “flattens the communicative terrain” by “represent[ing] all expressions of desires as requests, for which agreement or refusal is the appropriate possible uptake.” But, initiating conversations about potential sexual encounters frequently takes other forms such “articulat[ing] a fantasy, suggesting a possibility that I think might please the other person, probing to find out how the other person feels about an activity or role, or seeking help in exploring how I feel about it.” None of these maps cleanly onto the request-and-acquiescence framework of a consent model.

⁶ See, e.g., *Sex Offenses and Offenders*, BUREAU OF JUSTICE STATISTICS at 10, <https://bjs.gov/content/pub/pdf/SOO.PDF> (Feb. 1997). Figure 11, like other figures in this document, tracks “forcible rape” and then lumps “other sex offenses” into a single category.

intercourse that is on a more nuanced spectrum of common sexual interactions, which can be thought of as “gray area sexual interactions.”

Finally, the obscuring of the existence of gray area sexual interactions like the example with the college couple makes it difficult for individuals to recognize them as instances of sexual wrongdoing, which can affect whether or not the wronged individuals report those acts as criminal. Those who do report and make it to the trial phase still often see the person who wronged them acquitted because so-called factfinders – a judge or jury – often project their own binary view of sexual norms. This low conviction rate then perpetuates the cycle of non-reporting.

A. “The Con in Consent”⁷

The issue of how to define rape has been the source of much debate.⁸ In this way, rape is a particularly unique crime. For example, there is a common understanding of what a crime like “theft” is and what evidence might be needed to prove that someone took something that didn’t belong to them - such as an item found in the possession of someone who did not own it or have permission to possess it. But with rape, the criminal legal system falters. Until the 1990s, the requirement of physical force was a component of most rape statutes.⁹ Now, most jurisdictions define rape in terms of whether the accuser consented or refused.¹⁰ What counts as “enough consent” varies by jurisdiction. Some jurisdictions describe consent as “active,” meaning that consent can be withdrawn partway through sexual activity, but some require the acquittal of persons accused of rape if consent was ever present at all.¹¹ “Affirmative consent” jurisdictions

⁷ Koshka Duff, *Feminism Against Crime Control: On Sexual Subordination and State Apologism*, HISTORICALMATERIALISM.ORG, <http://www.historicalmaterialism.org/articles/feminism-against-crime-control> (last visited Mar. 11, 2020).

⁸ Ian Urbina, *The Challenge of Defining Rape*, THE NEW YORK TIMES, <https://www.nytimes.com/2014/10/12/sunday-review/being-clear-about-rape.html> (Oct. 11, 2014).

⁹ Matthew Lyon, *No Means No: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 288 (2004).

¹⁰ See Jasmine E. Harris, *supra* note 4.

¹¹ See *Id.* (listing the sexual assault statutes of all 50 states).

hold that the presence of “no” is not necessary to prove rape; other jurisdictions require evidence that there was a clear and unambiguous refusal in order to convict.¹²

But proving whether or not consent ever existed in the first place is not easy. So-called “rape kits”¹³ cannot conclusively prove whether or not someone agreed to engage in sexual activity; they can only indicate whether or not sexual activity occurred. The existence of kinks like consensual non-consent means that video or audio recordings of refusal are not able to conclusively prove that an interaction was against someone’s will.¹⁴ The same would be true on the rare occasion that there was an eyewitness to the encounter. Even records of conversations about sex, such as text messages, are only moderately useful as they may reflect only a part of a discussion about sexual activity.

Couching rape in terms of consent is also problematic because it bakes sexism into the criminal legal system. Whether a statute delineates consent as active, affirmative, neither, or both, discussions of consent are fundamentally about whether the an individual will permit the requester to do something to them.¹⁵ And given distorted social norms, discussions of consent often implicitly assume that the person who places a request is a man and the one who must acquiesce or refuse is a woman.¹⁶ Deciding whether behavior is or isn’t rape based on the presence or absence of consent, then, often calls into question women’s behavior. As a result, factfinders – judges and

¹² *Affirmative Consent Laws (Yes Means Yes) State By State*, AFFIRMATIVECONSENT.COM, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/> (last visited Apr. 7, 2020).

¹³ An arguably more accurate term would be “intercourse kits.”

¹⁴ See, e.g., Ed Balint, *Texas Man Acquitted in Jackson Truck Stop Rape*, THE ALLIANCE REVIEW, <https://www.the-review.com/news/20181011/texas-man-acquitted-in-jackson-truck-stop-rape> (Oct. 11, 2018), where a man was acquitted of raping a woman despite an audio recording of the sexual interaction that included her saying “no,” repeatedly; Alanna Vagianos, *Video Shows Former NBA Player Acquitted of Rape Pulling Half-Naked Accuser Back to Motel*, HUFFINGTON POST, https://www.huffpost.com/entry/mateen-cleaves-rape-accuser-video_n_5d6411a5e4b01d7b529365ec (Aug. 26, 2019), where an individual was acquitted of rape despite a security camera showing footage of him pulling his accuser back into his hotel room while she yelled “help me.”

¹⁵ Joan McGregor, *Why When She Says No She Doesn’t Mean Maybe and Doesn’t Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law*, 2 LEGAL THEORY 175 at 196 (1996).

¹⁶ Michelle Anderson, *Negotiating Sex*, 41 S. CAL. L. REV 101 (2005).

juries – are often asked to evaluate whether or not women have effectively communicated their lack of a desire to engage in sexual behavior, which means that women’s actions and behavior regarding sexual activity is called into question in a way that men’s behavior typically is not. This is the very essence of rape culture, which “treats rape as a problem to be solved through improving the behavior of potential rape victims (who are presumed, in this logic, to be women), rather than improving the behavior of potential rapists (who are presumed to be men).”¹⁷ It thus becomes women’s burden to avoid dressing in ways or engaging in behaviors that might in any way communicate consent to sexual activity.

Additionally, using the consent model to evaluate whether a certain sexual interaction is an instance of wrongdoing is both under and over-inclusive. That is to say, there are sexual interactions that are clearly ethical that the consent model prohibits, and there are unethical sexual interactions where consent arguably exists, but where state and federal law offer no condemnation. For example, acquiescing to a sexual interaction merely because you lost a bet and the other person has claimed it as their “prize” is problematic because one should feel free to back out of sex at any point, and should not be obligated by a prior promise. Yet, this situation is acceptable under a consent model. Consider a situation where one individual knows that sex will cause the other extreme and undesired discomfort or pain, but initiates anyway because they know that the other is the kind of person who will acquiesce merely because they feel bad saying no. This is problematic because one should not take advantage of other people, but again, this scenario is acceptable under a consent model.

When considering the myriad of sexual scenarios that are instances of wrongdoing despite the fact that apparent consent exists, it seems arbitrary that the ones singled out for statutory

¹⁷ Amanda Taub, *Rape Culture Isn’t a Myth. It’s Real, and It’s Dangerous*, VOX.COM, <https://www.vox.com/2014/12/15/7371737/rape-culture-definition> (Dec. 15, 2014).

condemnation are those where minors acquiesce to intercourse with other individuals who are above a certain age. The law aptly recognizes that this situation is still an instance of wrongdoing despite the presence of consent, but seemingly ignores scenarios like those entailed above that are also instances of wrongdoing despite the presence of consent. Statutory rape statutes, to which consent is not a defense, seem to inadvertently concede that consent is not always the right bright-line.

There are also numerous sexual interactions that involve no wrongdoing where no clear-cut moment of consent exists. This can happen when both individuals have a mutual understanding or expectation for what is going to take place. For example, consider a situation where two individuals in a long-distance relationship send risqué text messages fantasizing about what they'd like to do when they next meet, and they develop a shared vision of that encounter. When they are finally together, both take steps to engage in that shared vision, but there is no designated individual who requests and no designated individual who acquiesces to that actual episode of intercourse. For all intents and purposes, they have not given explicit and direct consent. In fact, the legal field and certain jurisdictions remain divided as to whether such fantasizing indicates consent to the actual intercourse or is a separate sexual act to which consent could be given but should not be relied upon in determining consent for the actual episode of intercourse.¹⁸

This jurisdictional divide is not an indication that one side has it right and the other has it wrong. Rather, the ambiguity reflects that we are using the wrong bright-line to decide whether a sexual interaction is an instance of wrongdoing. The appropriate question for ascertaining whether or not a sexual interaction involves an instance of wrongdoing is not, "Was there a presence or lack of consent?" Instead, the murkiness of sexual encounters reveals a need for a kind of "sexual

¹⁸ See, e.g., *United States v. Alkhabaz*, 104 F.3d 1492 (1997).

negotiation” that a consent model neither requires or articulates.¹⁹ Such sexual negotiation should include “active collaborative discussion about what would be fun to do” and would include “conversations about limits, constraints, and exit conditions” in addition to fantasies, suggestions of what could provide mutual pleasure, or explorations of how one or both parties feels about certain sexual activities.²⁰ Thus, the appropriate question for ascertaining whether an instance of sexual interaction involves wrongdoing is not whether there has been an identifiable request and acquiescence. Instead, it is akin to, “Is there quality negotiation, mutual exploration, and collaboration?” So, while sex requires, at a minimum, ongoing willing participation from both parties, consent is not the right bright-line to evaluate whether or not that is happening.

A consent model is not only just not good enough – it is actively harmful because it perpetuates miscommunication, which means that some sexual misconduct is either punished too harshly or not at all. The criminal legal system’s reliance on a consent model means that the very foundation of how we deal with sex crimes is skewed. Because our statutes don’t properly conceptualize mutually agreed upon sex, trying to match up morally problematic sexual situations with elements of statutes is like trying to fit a round peg into a square hole. We need a better model.

While fully detailing a new model is beyond the scope of this paper, legislatures should consider re-writing rape statutes and basing them on signs of sexual negotiation or mutual collaboration, rather than signs of consent.²¹

B. “Gray Area” Sexual Interactions

Sexual interactions are on a nuanced spectrum. On one end of the spectrum is behavior that is already condemned by statute, and most likely to be condemned by the criminal legal system

¹⁹ [Quill] Rebecca Kukla, *supra* note 5, at 76.

²⁰ *Id.*

²¹ Such a reform would be heavily case-law dependent because it would require judges to decide what counts as a sign of mutual collaboration.

– forcible rape, sexual interactions marked by clear and unambiguous power imbalances or threats of force, and statutory rape of minors.²² On the other end is behavior that is marked by mutual collaboration and enjoyment. In the middle is a murky mess of sexual interactions that the criminal legal system doesn’t quite know what to do with – primarily because real-life sexual interactions are as varied and unique as the people participating in them, and far murkier than the consent model would have us believe. This statutory failure to accurately capture the speech mechanism in play in sexual interactions has led to the criminal legal system effectively dividing the spectrum down the middle and crudely sweeping the middle-of-the-road situations to either the ‘clearly condemned’ side or the ‘clearly acceptable’ side, inevitably getting it wrong quite frequently on both ends – either a rape charge is pursued when it shouldn’t be, or a person who’s been wronged sexually is unable to obtain any sort of aid or redress from the community because the interaction is falsely deemed consensual.

This results in the legal elimination of an entire realm of intercourse that contains some of our most common sexual interactions, but for which “rape” does not seem the most accurate descriptor, especially considering that what is and is not rape is a legal determination based on statutes that follow the consent model.²³ In what follows, I will be discussing “gray area sexual interactions,”²⁴ or sexual interactions that involve wrongdoing but are not currently recognized as rape by the criminal legal system. To be clear, these gray area interactions are “gray” in that they do not fit into the black and white narrative that the criminal legal system perpetuates as to what is sexual wrongdoing (i.e. forcible rape), not gray in that it is questionable whether or not they are actually wrong. When discussing statistics about sexual assault, I will use the word “rape” to refer

²² See, e.g., Jasmine E. Harris, *supra* note 4..

²³ *Id.*

²⁴ For an example of gray area sexual interaction, consider the example of the college couple *supra*, pg. 1.

to what has been reported as rape under a consent model. Because current statistics do not recognize the division between rape and gray area sexual interactions, some gray area sexual interactions, but not all, may be included in these reports of rape.

Studies based on a consent model of what is or isn't rape have reflected that up to 80% of rapes are perpetrated by someone that the wronged person knows or has a personal connection with.²⁵ 75% of those who have been raped in total never even report.²⁶ 87% of rapes that are reported do not end in a conviction.²⁷ It is not unreasonable to conclude that there is significant overlap between these three categories. That is, it is safe to say that those who have been sexually wronged by someone they know or have a personal connection with generally do not report, and even if they do report, their cases generally do not end in a conviction. First, I want to explore why those sexually wronged, but not in a physically forcible and overtly violent manner, by someone they know or have a personal connection with, generally do not report, thereby short-circuiting the ability of the criminal legal system to respond to that wrongdoing. Second, I want to explore why convictions are still rare even if a gray area sexual interaction case makes it to trial.

1. Why Gray Area Sexual Interactions are Not Reported

As mentioned above, gray area sexual interactions are not commonly reported as instances of sexual wrongdoing. Why not? In addition to the fact that society generally takes its cues for what is communicable as a wrong from what the criminal legal system categorizes as a crime, I want to explore the idea that a certain sort of presumptive trust that people feel compelled to bestow upon individuals they interact with keeps them, at least temporarily, from seeing people they know

²⁵ Sofi Sinozich and Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (Dec. 2014).

²⁶ Rachel E. Morgan and Barbara A. Ouderkerk, *Criminal Victimization, 2018*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/pub/pdf/cv18.pdf> (Sept. 2019).

²⁷ *Perpetrators of Sexual Violence: Statistics*, RAINN.ORG, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Mar. 11, 2020).

as violating that trust when those people commit sexual wrongdoing via gray area sexual interactions. This can have numerous catastrophic effects including the shattering of this baseline level of trust and the subsequent inability to articulate what has happened, which prevents those wronged in this way from reporting what has happened. Even if individuals wronged via gray area sexual interactions one day find the ability to articulate what has happened to them as sexual wrongdoing, the delay in reporting makes it nearly impossible to receive redress via the criminal legal system.

Margaret Walker writes on a phenomenon called “default trust.” Default trust is the “unreflective and often nonspecific expectation that...others may be relied upon to behave in an acceptable and unthreatening manner.”²⁸ This is not a robust and active trust, nor is it an earned trust. Rather, it is merely a default assumption that people “will behave as they should.”²⁹ It is a “practical outlook of ease, comfort, or complacency that relies on the good or tolerable behavior of others.”³⁰ Most fundamentally, it is an assumption that the people we know and interact with won’t actively wrong us, even if we have not yet raised the question of whether or not they are actually trustworthy in a more solid sense. To function within the world, we often have to rely on default trust, and many times - indeed, if it is functioning as it should - we don’t notice when we rely on it. Every time we meet with a professor during their office hours, have an appointment with our family dentist, take an Uber, or study with a classmate in our dorm room, we exercise default trust. The mere ability to properly function within our communities is predicated on this ability to

²⁸ Margaret Walker, *MORAL DAMAGE AND MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* at 84 (2006).

²⁹ *Id.*

³⁰ *Id.* at 85.

“enjoy a substantial amount of unreflective unconcern...not because one believes one is utterly protected, but because one believes one knows what to expect and from whom to expect it.”³¹

Gray area sexual interactions can profoundly disrupt default trust because they happen without individuals ever seriously recognizing and accepting that they are at risk. Even in default individuals “make [themselves] vulnerable to others by basing [their] actions on [others’] anticipated behavior and so exposing [themselves] to...danger...if they do not perform as trusted. But in so relying, individuals do not always view themselves as in a risky situation.”³² Statistics reveal that the majority of sexual wrongdoing is perpetrated by someone the wronged individual has likely presumed will not hurt them,³³ and as a result, the risk of this kind of sexual wrongdoing is rarely perceived.

In addition to being unable to perceive the risk, those who experience this kind of sexual wrongdoing struggle to label it afterwards. The inability to label gray area sexual interaction as sexual wrongdoing is because there is a “lacuna where the name of a distinctive social experience should be” and is therefore an instance of what Miranda Fricker calls “hermeneutical injustice.”³⁴ Hermeneutical injustice occurs when an individual’s significant social experience is omitted or obfuscated from the collective understanding, leaving an individual unable to “render an experience intelligible” either to themselves or someone else.³⁵ In addition to ruining the general epistemic confidence of the individual, hermeneutical injustice isolates individuals who have experienced gray area sexual interaction from their communities and prevents them from reporting. This excludes them from being able to actively seek redress through the criminal legal system

³¹ *Id.* at 84.

³² *Id.* at 78.

³³ *Perpetrators of Sexual Violence: Statistics*, *supra* note 28.

³⁴ Miranda Fricker, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING at 150 (2007).

³⁵ *Id.* at 155.

Even prior to labeling what has happened as wrongdoing— indeed, even if those who have been wronged by gray area sexual interaction never recognize that it is – the effects of the violation can still begin to take root. A lack of labeling is not a lack of trauma; those wronged by gray area sexual interaction can still feel the harm. And until they are able to name what they are feeling, they are likely to blame themselves and revise their policy of trust post-wrongdoing, assuming “responsibility for the betrayal and tak[ing] it to signal some fault or excessive optimism” within themselves to compensate or account for the trauma they’ve experienced.³⁶ Susan Brison explains this phenomenon when she writes, “it can be less painful to believe that you did something blameworthy than it is to think that you live in a world where you can be attacked at any time, in any place, simply because you are a woman.”³⁷ When hermeneutical injustice prevents those who have experienced sexual wrongdoing via gray area sexual interactions from labeling what has happened, it leaves only two ‘logical’ explanations: either we have acted in a risky manner and brought some sort of wrongdoing on ourselves, or nothing bad has really happened and we are just making a big to-do over nothing.

When someone experiences a violation of default trust, they may question and revise their policies of trust.³⁸ This can lead an individual to realize that while they may have never bestowed upon an acquaintance any sort of robust trust, they at least presumed they would act as they ought to. In revising their policies of trust, individuals can pinpoint who it is that makes them feel uneasy even if they cannot articulate why. A resentment can build against this person, but, more often, a sort of shame is felt because an individual may not be able to articulate what the person has done

³⁶ Karen Jones, *Trust and Terror*, in *MORAL PSYCHOLOGY: FEMINIST ETHICS AND SOCIAL THEORY* 3, 9 (Peggy DesAutels & Margaret Urban Walker eds. 2004).

³⁷ Susan Brison, *AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF* at 12 (2002). While Brison is writing about a brutal stranger rape, given what we know about the disruption of default trust, her words are applicable to gray area sexual interactions as well.

³⁸ Karen Jones, *supra* note 37.

to deserve their resentment.³⁹ As a result, they may reason that the real culprit is default trust. This conclusion may result in the individual's self-exclusion from large zones of social life because they no longer have "the ease of default trust that others routinely enjoy, and specific areas of social interaction may require them to be wary or extremely cautious" post-wrongdoing.⁴⁰ Because sexual wrongdoing creates "environments or conditions where a usually operating default position of trust has been shattered," a gray area sexual interaction can be particularly damaging in that the zones of default trust that are shattered include those in which interactions with acquaintances occur.⁴¹ Friends, roommates, coworkers, bosses, spiritual leaders, veterinarians, teachers, coaches, and many others fall within that zone of shattered default trust and so those wronged by gray area sexual interaction come to live in a world that is marked by perceived danger, especially in places of former comfort where they ought to feel most safe. This subsuming fear often paralyzes those wronged by gray area sexual interaction, causing them to find even going to work or school post-wrongdoing a nearly impossible task.

This is why those wronged by gray area sexual intercourse do not frequently come forward, and why it takes them so long to come forward if they do. When this presumptive default trust of acquaintances comes together with hermeneutical injustice regarding gray area sexual interactions, it can prevent those who have experienced sexual wrongdoing via a gray area sexual interaction from quickly labeling what has happened to them.

Because those wronged by gray area sexual interaction are trapped in the chains of hermeneutical injustice, it often takes something more to help them realize what has happened. This catalyst can come in many forms. For some, it's an article or a story one reads that names the

³⁹ See Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286, 287 (2010).

⁴⁰ Margaret Walker, *supra* note 29 at 87.

⁴¹ *Id.*

wrongdoing and causes them to realize that they've experienced that too. For others, a counselor draws the truth out. It is only when this 'something more' happens that we can begin to use certain words to describe the situation and begin to think about reporting.

By the time the unease over the situation becomes so overpowering that wronged individuals go looking for 'something more' to explain what they have suffered and finally find an explanation that causes the world that they have been conditioned to accept since birth to crumble, all evidence except their say-so is often gone. There is no immediate recognition of what has happened. There is no prompt report – significant time has likely passed. There is no rape kit. Memories of the exact play-by-play of the incident might be fuzzy, erased, or masked due to trauma.⁴² In this way, the hermeneutical injustice suffered by individuals who have been wronged by gray area sexual interaction results from and results in erasure of their stories. Because their stories deviate from the expected norms of how a “typical rape victim” reacts, those who have been wronged by gray area sexual interaction are often disbelieved, and thus those who have wronged them are rarely held accountable.

2. Even When Gray Area Sexual Interactions are Reported, Convictions are Rare

Katherine Jenkins argues that widely accepted, inaccurate perceptions concerning sexual wrongdoing are a prime example of hermeneutical injustice.⁴³ Examples of such myths include the idea that behavior is not sexual wrongdoing unless it is a battle involving physical force and resistance, that sexual wrongdoing cannot occur in intimate relationships, or that an individual invites sexual wrongdoing by dressing or behaving in a certain way.”⁴⁴ Consent-based statutes

⁴² See, e.g., Deryn Strange and Melanie K. T. Takarangi, *Memory Distortion for Traumatic Events: The Role of Mental Imagery*, 6 FRONTIERS IN PSYCHIATRY 27, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4337233/> (23 Feb. 2015).

⁴³ Katherine Jenkins, *Rape Myths and Domestic Abuse Myths as Hermeneutical Injustices*, 37 J. OF APPLIED PHILOSOPHY 191, 192 (2017).

⁴⁴ *Id.*

themselves are a codified inaccurate perception concerning sexual wrongdoing. Andrea Dworkin writes that sexual wrongdoing is not always committed by “psychopaths or deviants from our social norms.”⁴⁵ In fact, sexual wrongdoing is committed by “exemplars of our social norms.”⁴⁶

Research has shown that those who subscribe to beliefs or myths about sexual wrongdoing, such as the belief that male sexual persistence or aggression is normal and acceptable are more likely to sexually wrong others.⁴⁷ Moreover, those who subscribe to these myths are less likely to recognize aberrant sexual behavior as wrongdoing, whether it is their own behavior or someone else’s.

And this means that even if a case involving a gray area sexual interaction makes it to trial, factfinders – the judge or jury – may see their own actions, assumptions, social norms, and experiences reflected in the individual on trial, perhaps more so than in any other variety of case. Many may have either been the initiator of a gray area sexual interaction and still see it as a situation involving no wrongdoing. Likewise, many may have been the non-initiator and haven’t come to terms with the wrongdoing that was done to them. Brison writes that “even those who are able to acknowledge the existence of [sexual wrongdoing] try to protect themselves from the realization that the world in which it occurs is their world and so they find it hard to identify with the victim . . . [lest] their illusions about their own safety and control over their own lives . . . begin

⁴⁵ Andrea Dworkin, *OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* at 45-46 (1976).

⁴⁶ *Id.*

⁴⁷ Katherine Jenkins, *supra* note 22, writing that when people accept rape myths, the “outcome is that many people acquire an operative concept of rape or of domestic abuse that is deeply problematic, inappropriately excluding certain situations by definition from counting as rape” or instances of sexual wrongdoing. S.S. Hinck & R.W. Thomas, *Rape Myth Acceptance in College Students: How Far Have We Come?*, 40 *Sex Roles*, 815, 816 (1999), where a study found that an individual’s propensity to sexually wrong an acquaintance was “significantly related not only to their acceptance of rape myths and of traditional ideas about male and female sexuality, but also to their belief that male sexual aggression is normal.” This normalization leads to men who report engaging in “sexually assaultive, abusive, or coercive behavior in order to procure sexual intercourse” still being unable to identify their own behavior as unethical. Andrea Dworkin, *OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* at 45-46 (1976), writing that rape is “no excess, no aberration, no accident, no mistake – it embodies sexuality as the culture defines it.”

to crumble.”⁴⁸ To find an act of gray area sexual interaction reprehensible is to acknowledge the extent to which it permeates the world, including the lives of yourself and your loved ones. Members of the jury who are unwilling to come to terms with this will acquit.

As I explained, sexual wrongdoing can be perpetrated with the wrongdoer being completely unaware of having done anything harmful. This doesn’t make the wrongdoer innocent or excuse their behavior – at some point, an adult individual becomes responsible for their personal failures that cause them to wrong others, including ignorance. Growing up in a society that encourages them to oppress others in ways that the oppressed will passively accept or not be able to recognize or counteract makes unlearning these behaviors more difficult, but no less necessary.

But, we frequently use depersonalizing language such as ‘monsters’ or ‘predators’ to talk about those who commit sexual wrongdoing.⁴⁹ Those few who are convicted of rape– especially if they are persons of color and of low socioeconomic status – are frequently sentenced to decades in prison, presumed irredeemable, and thus they deserve to be locked away in a cage for much of their life. Even among prison populations, individuals convicted of sexual misconduct are often at the bottom of hierarchies, subjected to extremely hostile treatment, and commonly put in solitary confinement for their own safety.⁵⁰ Prisoner survival guides even address those convicted of sex crimes specifically, giving advice on how to avoid being raped themselves.⁵¹ Additionally, it is not uncommon to see people expressing all the egregious things they hope will happen to a person who has committed sexual wrongdoing, which may be an attempt to rationalize their own sexual

⁴⁸ Susan Brison, *supra* note 38, at 9.

⁴⁹ See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587 (2009).

⁵⁰ See David Patrick Connor & Richard Tewksbury, *Examining Prison Wardens’ Perceptions of Inmates Incarcerated for Sex*, ACA.ORG, http://www.aca.org/aca_prod_imis/Docs/Corrections%20Today/ResearchNotes/ResearchNotes_July2013.pdf; Chantal van den Berg, Karin Beijersbergen, et. al, *Sex Offenders in Prison: Are They Socially Isolated?*, 30 SEXUAL ABUSE 828-845, <https://journals.sagepub.com/doi/full/10.1177/1079063217700884> (Apr. 4, 2017).

⁵¹ *Surviving Prison as a Sex Offender*, ZOUKIS CONSULTING GROUP, <http://www.prisonerresource.com/prison-survival-guide/special-tactics/how-sex-offenders-survive/> (last visited March 13, 2020).

wrongdoing.⁵² But when we largely paint those who commit sexual wrongdoing “as ‘monsters’ and ‘predators,’ we elide over the realities of sexual harms by ‘paint[ing] a picture of a criminal that look[s] nothing like the average college date rapist.’⁵³ If we consider those who commit sexual wrongdoing to be ‘monsters’ or ‘predators’ or the worst of the worst, then we will not recognize the prevalence of sexual wrongdoing in our routine sexual interactions. In this way, the criminal legal system fails to recognize sexual wrongdoing as both reviled and routine, which “submerge[s] the bulk of sexual harms in our society”⁵⁴ by largely ignoring gray area sexual interactions.

CHAPTER 3. THE CRIMINAL LEGAL SYSTEM HARMS THOSE WHO SUFFER SEXUAL WRONGDOING

The criminal legal system harms those who report sexual wrongdoing in at least two ways. First, those who recognize that they have sexually wronged often look to the criminal legal system for a response. Because the criminal legal system holds itself out as being the entity that will respond to norm violations, the failure to respond inflicts harm on those who have been sexually wronged while simultaneously holding them back from healing. Second, should an individual wronged by gray area sexual interaction be one of the few whose cases even just get picked up by a prosecutor, the retraumatizing process of testifying against the wrongdoer in an adversarial

⁵² “The only way it could be a better story was if they rammed a few of those dildos where the sun don’t shine...He deserves to live his life with everyone hating him [and] wanting to beat and torture him.” Jennifer Martin Jensen, Comment to *Brock Turner Released from Jail, Instantly Beaten by Flash Mob*, GOD (Sept. 2, 2016, 3:43pm), <https://www.facebook.com/TheGoodLordAbove/posts/17724879661> 72232. “Please...do yourself and the world a favor...just kill yourself...I [would] rather him [be] dead than alive.” Crystal, Comment to *Brock Turner Released from Jail, Instantly Beaten by Flash Mob*, GOD (Sept. 2, 2016, 3:12pm), <https://www.facebook.com/TheGoodLordAbove/posts/17724879661>. “Someone should [have] rape[d] him in jail...or beat his...ass...[Those who rape] should all be locked up in prison the rest of their lives. The victims will be tortured the rest of their lives, so should the perverts.” Viviana Munoz, Comment to *Brock Turner Released from Jail, Instantly Beaten by Flash Mob*, GOD (Sept. 2, 2016, 3:24pm), <https://www.facebook.com/TheGoodLordAbove/posts/17724879661>. “Should have [taken] his dick off and beat him with it.” Jessica Marie Gustafson, Comment to *Brock Turner Released from Jail, Instantly Beaten by Flash Mob*, GOD (Sept. 2, 2016, 3:28pm), <https://www.facebook.com/TheGoodLordAbove/posts/17724879661>.

⁵³ Guy Hamilton-Smith, *The Agony and the Ecstasy of #MeToo: The Hidden Costs of Reliance on Carceral Politics*, 49 SW. U. L. REV. at 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3427857&download=yes (2020).

⁵⁴ *Id.*

system harms the reporting individual. This is compounded by the fact that the response that the criminal legal system offers via a conviction is not even the sort that actually redresses the original wrong.

A. Failure to Respond to Gray Area Sexual Interactions Harms Those Who Report.

In the United States, our implicit societal agreements have been codified into laws, the violation of which will sometimes subject one to proceedings in the criminal legal system. The criminal legal system carries out certain proceedings in response to formal reports of alleged violations and, if an individual is convicted of breaking a law, they will be subjected to various sanctions including monetary fines, community service, probation and other forms of monitoring by the government, and incarceration. Thus, the criminal legal system holds itself out as the arbiter of wrongs or harms and the entity that will provide an appropriate response to such wrongs.⁵⁵

But very few of those wronged by sexual violence will see the person who wronged them convicted and sanctioned to one or more of the above.⁵⁶ When millions of Americans are on the receiving end of sexual wrongdoing each year, a lack of response has devastating effects on the population as a whole.⁵⁷

When individuals in positions of authority fail those who have been sexually wronged by refusing to take any action, it can further traumatize them and compound the suffering of the

⁵⁵ See, e.g. *Home Page*, THE DEPARTMENT OF JUSTICE, <https://www.justice.gov/about> (last visited April 8, 2020) (stating that their mission is “to enforce the law and...to ensure public safety...[and] to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans”).

⁵⁶ Of the 230 individuals who report their rape out of every 1,000 rapes, only 46 of those reports will lead to an arrest. Of those 46 who are arrested, only nine of those reports will make their way to a prosecutor’s desk. And while approximately five of those cases will lead to a felony conviction either via a guilty plea or trial, the literature is unclear on what percentage of those cases actually go to trial and whether the cases where a felony charge doesn’t stick primarily lead to misdemeanor charges and subsequent pleas or trials versus a dismissal of the charges. So, it is unclear exactly how many of those who are sexually wronged end up in a jury trial, but it is up to nine out of every thousand. And in reality, only between five to nine out of every thousand will see the person who wronged them convicted and sanctioned. *The Criminal Justice System: Statistics*, RAINN.ORG, <https://www.rainn.org/statistics/criminal-justice-system> (last visited April 9, 2020).

⁵⁷ *Victims of Sexual Violence*, RAINN.ORG, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited April 8, 2020).

original wrong by isolating them from society.⁵⁸ Margaret Walker argues that those who have been wronged often look for

both reaffirmation of standards and affirmation that one's value and membership are recognized. When these responses are not forthcoming, the victim's situation is worse than unaddressed, it is aggravated. If the...authority to whom the victim looks for validation and vindication ignores the victim, challenges the victim's credibility, [or] treats the victim's complaint as of little import...the victim will feel abandoned and isolated. That abandonment...can be humiliating [and]...can precipitate anger, grief, fear, terror, or despair, the same commonplace feelings that victims are liable to experience due to the original injury or wrong.⁵⁹

When a violation occurs, the wronged individual deserves assurance that the wrongdoing matters, and the assailant deserves “unequivocal expression of society’s negative judgment.”⁶⁰

Unfortunately, this does not always happen. Walker notes that “the application of what appear to be quite general norms... are in fact selective with respect to whom and what they protect.”⁶¹ This truth is played out in the aftermath of sexual wrongdoing. Forcible stranger rape is sensationalized and litters newspapers while the glossing over of gray area sexual interaction is pervasive in television shows and movies. As a result, the prevalence of gray area sexual interaction is minimized, and those who report it are frequently disbelieved and dismissed. This “cast[s] doubt on the authority of norms,” and “authoritatively [and] implicitly marks those [individuals] as outside the norm’s protective cover,” making them outcasts.⁶² Walker calls this “normative abandonment.”⁶³

Normative abandonment has devastating consequences for those wronged by gray area sexual interaction. Multiple studies have found that “negative social support is consistently

⁵⁸ Margaret Walker, *supra* note 29, at 19-20.

⁵⁹ *Id.*

⁶⁰ *Id.* at 9.

⁶¹ *Id.* at 31.

⁶² *Id.* at 32.

⁶³ *Id.* at 20.

associated” with “both the onset and severity of PTSD symptoms” in survivors of traumatic events.⁶⁴ While those wronged by sexual violence may have other means of social support like family or friends, social support from authority figures seems to be a kind of support that matters because it “conveys the message that one is taken care of and is a member of a group whose task is in part the protection of its members.”⁶⁵ Moreover, those wronged by gray area sexual interaction are likely to not have that alternative social support. Typically the sort of traumas that “mobilize positive social support are ‘visually distressing, unambiguous, collectively shared and...often attribute heroic characteristics to the victim.’”⁶⁶ In contrast, “traumatic events that elicit negative responses are often unseen and unshared, ambiguous in their acceptability, and associated with stigma and shame, as is often the case with sexual assault.”⁶⁷ Due to the fact that gray area sexual interaction is rarely recognized to be sexual wrongdoing even by those suffering from it, those wronged are unlikely to receive alternative social support. The unlikelihood of alternative support makes support by the criminal legal system all the more impactful.

The nature of the criminal legal system’s failure of those who have experienced sexual wrongdoing is shockingly similar to the original wrong: ultimately, it is another assault on default trust, and can be even more devastating than the first. When someone who has experienced gray area sexual interaction is finally able to break out of the silence of hermeneutical injustice and articulate that they have been sexually wronged, they may expect that society, via law enforcement officials, will denounce the person who has wronged them and provide redress. They may come to find that a shred of their default trust remains: trust in the authorities to respond when societal

⁶⁴ Anthony Charuvastara and Marylene Cloitre, *Social Bonds and Posttraumatic Stress Disorder*, 59 ANNUAL REVIEW OF PSYCHOLOGY 301, 307, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2722782/> (last visited Apr. 9, 2020).

⁶⁵ Margaret Walker, *supra* note 29, at 19-20.

⁶⁶ Anthony Charuvastara and Marylene Cloitre, *supra* note 65.

⁶⁷ *Id.*

norms have been violated. This shred of default trust can buoy the wronged person to make a report as a final effort to sustain or prove right that fledgling default trust in at least one aspect of the world. When the criminal legal system yet fails them, it can shatter what remains of default trust, or the “morally essential trust that there are recognized, shared rules by which we live and which we can count on to protect and guide us.”⁶⁸ As a result, those wronged by gray area sexual interaction who make a report can experience an aftermath similar to the aftermath of the original assault, only to a greater extent because there is no one left to report this wrong to, and no fledgling of default trust to resuscitate. Society often takes a lack of law enforcement action as proof that someone who says they have experienced sexual wrongdoing is at the very least exaggerating, if not lying altogether. Thus, those who suffer sexual wrongdoing via gray area sexual interaction take a terribly skewed double or nothing wager: either they walk away from reporting and accept having lost the majority of their default trust via being sexually wronged, or they report and risk the total loss of their default trust and becoming ousted from their communities as a liar.

B. If the Criminal Legal System Does Respond, the Trial Process Itself Harms Those Who Report.

Those who have been sexually wronged “frequently report that their encounters with the police, district attorneys, and courtroom personnel were more traumatic” than the original wrong.⁶⁹ Here I want to consider the ways in which the criminal legal system harms those affected by sexual wrongdoing whose cases make it to trial.

When individuals who report sexual wrongdoing go to trial, they are typically confronted by lawyers representing the accused at two intervals during the process: the preliminary hearing and the trial itself. Preliminary hearings occur before the trial. At these hearings, the prosecutor

⁶⁸ Margaret Walker, *supra* note 29, at 20.

⁶⁹ Carol Bohmer, *Judicial Attitudes toward Rape Victims*, 57 JUDICATURE 303, [https://heinonline.org/HOL/LandingPage?handle=hein.journals/judica57&div=86&id=&page=\(1973-1974\)](https://heinonline.org/HOL/LandingPage?handle=hein.journals/judica57&div=86&id=&page=(1973-1974)).

must establish that there is probable cause to believe that the crime actually occurred. Defense attorneys typically do not try to win these hearings because probable cause is such a low standard and dismissals are rare. Instead, they use the preliminary hearing as a way to gather as many facts as humanly possible, have a look at the cards the prosecutor is holding, and lock the person who claims to have been wronged into testifying a certain way. Since the hearing is conducted with the reporting person under oath, once they testify in a certain way at a preliminary hearing, they cannot contradict their initial statement in a later trial since they will again be under oath. Questions at preliminary hearings are numerous and varied as there is no jury to prevent from hearing facts that are ‘bad’ for the defense.

Alice Sebold is a writer who was raped at knifepoint as a freshman in college. She “experienced the preliminary hearing as a hostile battle”⁷⁰ between herself and the defense lawyer who was there to “destroy” her.⁷¹ Questions included whether she had had anything to drink, anything to smoke, or any cigarettes. She writes, “The tone of his voice was condemning, as if I had been a bad little girl and told a lie.”⁷² He then attacked her vision, asking about her glasses, laying the groundwork for the idea that she might not be able to identify the man who raped her.⁷³ He asked what she had been wearing, and whether her cardigan was one that pulled on or buttoned up the front, insinuating, she believed, that it had been her fault for provoking the attack.⁷⁴ He then asked about whether the man had kissed her.⁷⁵ She writes:

He was good, sweaty lip, bad mustache, and all. He went, with a keen, deft precision, right to my heart. The kissing hurts still. The fact that it was only under my rapist's orders that I kissed back often seems not to matter. The intimacy of it stings. Since then I've always thought that under *rape* in the dictionary it should tell the truth. It is not just forcible

⁷⁰ Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination*, 53 AM. CRIM. L. REV. 255, 279 (2016).

⁷¹ Alice Sebold, *LUCKY* at 128 (1999).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

intercourse; rape means to inhabit and destroy everything...His tone, since questioning my vision, had changed. There was now not even a trace of respect in it. Seeing that he had not yet gotten the best of me, he had switched into a sort of hateful over-drive. I felt threatened by him. Even though, by all measures, I was safe in that courtroom and surrounded by professionals, I was afraid.⁷⁶

The initial confrontation between the defense lawyer and the reporting individual can be deeply destabilizing, trigger flashbacks to the initial trauma, and cause the individual to question whether their trauma is even worthy of redress.⁷⁷ Individuals wronged by sexual violence frequently report that their encounters with the criminal legal system were more traumatic than the rape incident itself.⁷⁸ Implications inherent in certain questions can lead the reporting individual to believe that what happened to them is their fault and doubt their memory, their truthfulness, and their perceptions. These harms repeat themselves at trial in much the same fashion. Chanel Miller, the victim in the so-called Stanford Swimmer Rape Case, refers to the ordeal of the legal process, in particular the trial, for at least half of her victim impact statement, giving it just as much time as her address of the rape itself. She writes:

I had no power, I had no voice, I was defenseless. My memory loss [was] used against me. My testimony was weak, was incomplete, and I was made to believe that perhaps, *I am not enough* to win this. His attorney constantly reminded the jury, the only one we can believe is Brock, because she doesn't remember. That helplessness was traumatizing. Instead of taking time to heal, I was taking time to recall the night in excruciating detail, in order to prepare for the attorney's questions that would be invasive, aggressive, and designed to steer me off course, to contradict myself, my sister, phrased in ways to manipulate my answers. Instead of his attorney saying, Did you notice any abrasions? He said, You didn't notice any abrasions, right? This was a game of strategy, as if I could be tricked out of my own worth. The sexual assault had been so clear, but instead, here I was at the trial, [being] pummeled [with]...narrowed, pointed questions that dissected my personal life, love life, past life, family life, inane questions, accumulating trivial details to try and find an excuse

⁷⁶ *Id.*

⁷⁷ See, e.g., P.A. Resick, *The Trauma of Rape and the Criminal Justice System*, 9 JUST. SYS. J. 52 (1984); T.M. Massaro, *Experts, Psychology, Credibility, and Rape; The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985); J.V. Becker, L.J. Skinner, G.G. Abel, J. Howell, and K. Bruce, *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 106 (1982); B.S. Griffin and C.J. Griffin, *Victims in Rape Confrontation*, 6 VICTIMOLOGY 59 (1981); M.J. Walker and S.L. Brodsky, *Sexual Assault; The Victim and the Rapist*, Massachusetts, Lexington Books (1976); *Forcible Rape; The Crime, the Victim, and the Offender*, New York, Columbia Univ. Press (D. Chappell, R. Geis, and G. Geis eds. 1977).

⁷⁸ Carol Bohmer, *supra* note 70.

for this guy who had me half naked before even bothering to ask for my name. After a physical assault, I was assaulted with questions designed to attack me, to say see, her facts don't line up, she's out of her mind, she's practically an alcoholic, she probably wanted to hook up.⁷⁹

Cross examination doesn't just inadvertently happen to call into question the knowledge, memory, and character of a witness - it is actually *designed* to do so in furtherance of zealous advocacy for the lawyer's client. Skilled defense lawyers, in protection of their client's constitutional rights to the presumption of innocence, due process, and confrontation of their accusers intentionally exploit the messiness of both memory and truth. Abbe Smith writes that:

The ability to perceive, recall, and recount is required of any witness at trial. But the trauma of a sexual assault can compromise these abilities...The pull of a terrible memory competes with a desire to turn away. Fear, anger, distress, and shame challenge the ability to remember. Getting close to the memory means reliving it; distancing oneself is easier...This is what defense lawyers mean to exploit: the challenges, vagaries, and uncertainties of memory itself.⁸⁰

One might raise the objection that the way wronged individuals are treated on cross examination is not as much a critique of the criminal legal system writ large as an ineffective solution to sex crimes as it is merely a critique of the role of cross examination. If we can point to cross examination of reporting individuals as the main problem, couldn't we just eliminate it altogether, or adequately modify it so that it doesn't feel like a war, but a ferreting out of the truth?

In short, the answer is no. Before stripping an individual of their liberty, the Constitution requires either that the individual stipulate their guilt regarding the alleged crime, or that the government prove that the individual in question is guilty "beyond a reasonable doubt." Reasonable doubts that may keep a jury from convicting someone can include the credibility of the complaining witness being called into question via exploring the inadequacies of their memory

⁷⁹ Katie J.M. Baker, Here's the Powerful Letter the Stanford Victim Read to Her Attacker, BUZZFEED, <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra> (June 3, 2016).

⁸⁰ Abbe Smith, *supra* note 71.

or their truthfulness. It is therefore a defense attorney's duty to call the credibility of the complainant into question. Defense attorneys are bound by the Model Rules of Professional Conduct to provide zealous advocacy for their client. Moreover, the Sixth Amendment right to counsel involves the right to vigorously cross examine the government's witnesses on behalf of the accused. The Supreme Court has decided that this is permissible, even ideal, because "[o]ur interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth."⁸¹ The criminal justice system is inherently adversarial.⁸²

Effective defense attorneys recognize that perception of the truth is "malleable" and that the human tendency to "package" truth in a way that the audience will understand it can be used to the defendant's advantage.⁸³ A reporting individual's packaging of truth in multiple ways for a variety of audiences can be made, by a skilled attorney, to look as though the story is changing, and it is not truthful at all. For example, perhaps someone who really has experienced sexual wrongdoing tells their friends in detail what occurred but offers their parents only a brief summation of what happened, glossing over the details. These different ways of telling the story can often be made to look inconsistent, as if they are changing their story. A skilled defense attorney can use this tactic to convince the jury that the reporting individual has ulterior motives, thus making more likely the possibility that the accused is innocent. "It is the lawyer's job to bend what purports to be the truth to the lawyer's own purpose," namely, zealous and effective representation of the accused.⁸⁴ To that end, lawyers might also "exploit cultural understandings

⁸¹ *United States v. Wade*, 388 U.S. 218, 258 (1967).

⁸² *See, e.g., Coy v. Iowa*, 487 U.S. 1012 (1988), where the Supreme Court held that a privacy screen between a child victim and the man who allegedly assaulted her would deprive the person on trial of his Sixth Amendment right to confrontation. If accommodations like this cannot be made, it is clear that modifying cross examination or trial procedure is not a viable solution to these issues.

⁸³ Abbe Smith, *supra* note 71, at 281.

⁸⁴ *Id.*

and misunderstandings about sex.”⁸⁵ “Exploiting prejudice is part of advocacy” because “the ability to persuade sometimes relies on an underlying ability to recognize and play off biases and stereotypes.”⁸⁶ Thus, defense attorneys have the lawful and ethical *duty* to exploit and further phenomena like rape culture in the name of protecting the Constitutional rights of their clients. The criminal legal system not only reflects existing social biases and stereotypes, but also perpetuates those biases and stereotypes.

In more than one way, a trial is precisely antithetical⁸⁷ to the needs of those who have been wronged in the aftermath of their trauma. Traumatized individuals need to have a semblance of power and control over their own lives in order to mitigate the effects that they suffer.⁸⁸ They need control over their narrative:⁸⁹ the ability to share their story when and how and with whom they want to.⁹⁰ They also need to be able to limit their exposure to situations that may cause flashbacks or re-traumatization.⁹¹

In contrast, the process of a trial removes power and control⁹² from traumatized individuals. The rules that govern the process are often complex and not explained to them. While the accused has the right to a representative, the reporting individual has no such right. Prosecutors are

⁸⁵ *Id.* at 283.

⁸⁶ *Id.* at 284. *See also*, Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Robin Walker Sterling, *Raising Race*, THE CHAMPION (April 2011); Isaac Chotiner, *A Harvard Law School Professor Defends His Decision to Represent Harvey Weinstein*, THE NEW YORKER (Mar. 7, 2019); Jelani Cobb, *R. Kelly and the Complexities of Race in the #MeToo Era*, THE NEW YORKER (Jan. 11, 2019).

⁸⁷ Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 574, <https://journals.sagepub.com/doi/pdf/10.1177/1077801205274450> (May 2005) (“Indeed, if one set out intentionally to design a system for *provoking* symptoms of traumatic stress, it might look very much like a court of law.”).

⁸⁸ *Id.*

⁸⁹ Mary Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 JOURNAL OF INTERPERSONAL VIOLENCE 1623, 1627 (“Survivor victims say that they desire a justice process that validates their status as legitimate victims, focuses on the offender’s behavior and not on theirs, provides a forum to voice the harm done to them, accords them influence over decisions about their case, and incorporates their input into the consequences imposed.”).

⁹⁰ Judith Lewis Herman, *supra* note 88.

⁹¹ *Id.*

⁹² A system that ultimately provides either incarceration of the convicted or nothing at all offers no control for those wronged. So, wronged individuals tend to regain control the only way they know how: by blaming themselves or pretending that what happened wasn’t all that bad. This perpetuates harmful narratives of rape culture.

perceived as representing the reporting individual, but they do not; they represent the interests of the jurisdiction charging the individual in question with a crime.⁹³ Thus, courts only hear from wronged parties in a small sliver of cases when prosecutors deduce them to be useful and expeditious as a means to whatever the government's priorities may be. In a sense, the stories of the wronged are inconsequential to the criminal legal system because individuals can be convicted of crimes without a reporting individual's testimony, and their testimony in no way ensures a conviction. But if those stories are deemed useful, then those who have been wronged become merely a means to the end of proving that the accused has harmed society and should be punished. Those who do not wish to testify may be compelled via a court order to testify regardless of their desire, under punishment of imprisonment.⁹⁴ Brison writes that the primary violation in an act of human-inflicted trauma is that those who have been wronged are "reduced to mere objects by their tormentors; their subjectivity is rendered useless and viewed as worthless."⁹⁵ The criminal legal system commits the same crime.

If they do testify, wronged individuals are not permitted control over their narrative. Instead, their story is extracted from them through a series of questions and answers on direct examination by the prosecutor, and the jury's consideration of their story is subject to various rules governing the admission of evidence. The narrative may be interrupted countless times by lawyers objecting to a violation of one of these rules. The deconstruction of their stories via cross examination by the defense attorney reduces their narrative to a series of yes or no answers, and

⁹³ See, e.g., Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=964742 (Feb. 23, 2007) (prosecutors should warn complaining witnesses, especially in rape and domestic violence cases, that the prosecutor is not their personal representative).

⁹⁴ Samantha Michaels, *Courts Are Jailing Victims of Sexual Assault*, MOTHER JONES, <https://www.motherjones.com/politics/2016/10/why-are-women-thrown-jail-after-theyre-raped-or-assaulted/> (Oct. 31, 2016).

⁹⁵ Susan Brison, *supra* note 38, at 40.

such public challenges to their credibility and character can impart incredible shame and self-doubt in one's capacity as a knower. The sheer degradation of the wronged individual necessary for effective cross examination in defense of the accused is enhanced by the fact that it occurs in the presence of the person who has allegedly committed wrongdoing, whom the wronged party likely fears confronting. Also present may be many other tangible reminders of the wronged individual's trauma, including the clothes they were wearing, fluid samples, photographs, and other evidence from the scene. During closing arguments, the wronged party's story is wrested from their hands and molded by attorneys, neither of them acting solely in that individual's interest. When the jury listens to the wronged person's testimony, they do not listen as empathetic community members. Instead, they are specifically instructed to listen with an ear bent towards deciding whether or not the accused's behavior falls within a certain series of elements, which would require a conviction. The need for a narrative to be factually credible and grounded in evidence takes precedence over the wronged individual's need to make sense of what has happened to them. The reporting individual's story is thus relegated to a sterilized series of events; something "as close to a snapshot as possible – a story unmediated and unchanging – from the perspective of a detached, objective observer."⁹⁶

C. The Carceral Mechanism is Not the Right Kind of Response.

Reporting individuals often feel depressed after a trial is over.⁹⁷ If the assailant is acquitted, the reporting individual may experience the harms associated with a community failure to respond.⁹⁸ But surprisingly, even a conviction of the assailant is followed by this depression as well.⁹⁹ Society trains individuals to see the criminal legal system as a source of redress, and a

⁹⁶ *Id.* at 109.

⁹⁷ Patricia Resick *supra* note 78.

⁹⁸ *Id.*

⁹⁹ *Id.*

conviction as a sign that the system has provided that redress. So, many naturally expect that the mental havoc of sexual wrongdoing will cease when their assailant is behind bars and are devastated to discover that the anxiety, fear, nightmares, flashbacks, and bouts of fury that are inherent in PTSD still remain even after a “successful” prosecution.¹⁰⁰ That their assailant has been incarcerated rarely results in a sense of healing for the wronged,¹⁰¹ especially given the traumatic road they had to travel to procure that result.

While incarceration is often seen as an indication that the community sides with the wronged individual, I posit that it does not result in healing for the wronged individual because it is not the right *kind* of response. It is not the right kind of response because it does not actually foster repair of the wrongdoing that has been inflicted; furthermore, harm is actually inflicted *en route* to that response.

In “Moral Damage and Moral Repair,” Margaret Walker tells the story of a woman who resorts to vigilante justice because “given the brutal, terrorizing, and humiliating violence she has endured, no other way has been available to reclaim her equilibrium, her safety, her dignity, and the recognition of her loss, pain, and blamelessness.”¹⁰² Providing survivors with the “validation, voice, and vindication” they desperately need is crucial to serve “justice in an ancient and enduring sense” that puts “individuals in right relationship with each other and communities as a whole into a sustainable order of reciprocal expectations by which their members measure what is owed to each other.”¹⁰³

¹⁰⁰ *Id.*

¹⁰¹ Yasmeen Qureshi, *Aly Raisman on Larry Nassar Assault: Sometimes People Forget I’m Still Coping With It*, Yahoo News, https://news.yahoo.com/aly-raisman-larry-nassar-assault-sometimes-people-forget-im-still-coping-141037789.html?soc_src=community&soc_trk=tw (Feb 19, 2019).

¹⁰² Margaret Walker, *supra* note 29, at 5.

¹⁰³ *Id.* at 5-6.

If the criminal legal system is not an appropriate vehicle for moral repair of the damage done when one member of a community sexually wrongs another, how might we go about appropriately responding to the trauma of those wronged while serving the ideals of community safety and cohesion and holding those who wrong others accountable for their actions?

Because the adversarial system by its very nature fails so egregiously with respect to what wronged individuals need in order to heal, wronged individuals should have other methods by which society can hear their narrative, scaffold their recovery, and provide the resources they need to heal.

CHAPTER 4. HERMENEUTICAL JUSTICE – REMAKING ONE’S SELF VIA RESTORATIVE JUSTICE

In the preceding chapters, I critiqued the ways in which the criminal legal system fails to meet the needs of individuals who have experienced sexual wrongdoing. In what follows, I’ll discuss what a quality response to sexual wrongdoing looks like. The research and literature on restorative justice as a whole is robust. Rather than attempting to summarize it here in depth, I will instead primarily focus on one restorative justice program in particular, Project RESTORE, because it is one of the only programs to attempt to apply restorative justice principles to sex crimes specifically.

“Restorative justice” is a broad term that refers to a method of dealing with crime that “excludes processes that weigh evidence and deliberate fault.” Instead, the emphasis is on helping wrongdoers to “appreciate the consequences of their actions and the impact that they have had on their victims,”¹⁰⁴ and permitting wronged individuals to “make decisions about how their case proceeds, to express how the wrongdoing affected them, to experience acknowledgement of the

¹⁰⁴ Anne-Marie McAlinden, *The Use of Shame With Sexual Offenders*, 45 BRIT. J. CRIMINAL. 373, 375, https://www-jstor-org.proxy.library.georgetown.edu/stable/23639325?seq=1#metadata_info_tab_contents (Jan. 2005).

wrongful act imposed on them, and to individualize the accountability that is imposed.”¹⁰⁵ Restorative justice can also involve the community in “affirm[ing]...the norm violation and condemn[ing]...the wrongdoer’s acts.”¹⁰⁶ And, restorative justice assumes that desistance from future offending is facilitated by supporting the wrongdoer’s reintegration into the community.¹⁰⁷ Overall, restorative justice recognizes that the parties involved in the conflict should have active involvement in its resolution.¹⁰⁸ In a restorative justice program, the focus is able to be more aptly on the recovery of the wronged individual and repair of the wrongdoing. Because of this, restorative justice permits a wronged individual’s narrative to become more than a mere rehearsal of factual details called forth at the behest of the carceral-minded. Instead, it can become a path to healing.

Brison theorizes that trauma causes a psychic split from the body.¹⁰⁹ If this is true, then those who have experienced trauma must mend that split in order to heal. Post-Traumatic Stress Disorder, even mild versions of it, is fundamentally about feeling in danger or on high alert even when one is physically safe.¹¹⁰ After a traumatic event, then, many wronged individuals experience conflicts between their physical realities (that they are safe) and their metaphysical selves (which say they are in danger).

¹⁰⁵ Mary P. Koss, *supra* note 90, at 1624.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNATIONAL LAW REVIEW 30-54 (2015).

¹⁰⁹ Susan Brison, *supra* note 38, at 59 (“I had a different relationship with my body. My body was now perceived as an enemy, having betrayed my newfound trust . . . My mental state (typically, depression) felt physiological, like lead in my veins, while my physical state (frequently, incapacitation by fear and anxiety) was the incarnation of a cognitive and emotional paralysis resulting from shattered assumptions about my safety in the world . . . The autonomy-undermining symptoms of PTSD reconfigure the survivor’s will, rendering involuntary many responses that were once under voluntary control. Intrusive memories are triggered by things reminiscent of the traumatic event and carry a strong, sometimes overwhelming, emotional charge. Not only is one’s response to items that would startle anyone heightened, but one has an involuntary startle response to things that formerly provoked no reaction or a subtler, still voluntary one.”).

¹¹⁰ *Id.*

The adversarial criminal legal system fails so egregiously with respect to sex crimes in part because it focuses overtly on the physical¹¹¹ self and evidence of physical injuries. This is why many of those wronged by gray area sexual interaction, where physical trauma and resulting evidence are slight and reactions are delayed, have their concerns unaddressed by the criminal legal system despite having real mental and emotional trauma.¹¹² In contrast, restorative justice focuses primarily on the metaphysical self, and can mend not only the psychic split caused by trauma, but also the split between the wronged individual and society.

Additionally, restorative justice permits a wronged individual's narrative to become more than a mere rehearsal of factual details called forth at the behest of the carceral-minded. This is key to wronged individuals' healing. When a wronged individual has the opportunity to turn their traumatic memories into a narrative with a before and an after, they are then able to weave that narrative into the overarching story of their life. This can help them wrap their minds around or make sense of what has happened to them, and thereby see a path forward into the "after" part of the narrative.

If being unable to label the wrong that was done is termed "hermeneutical injustice," then the act of creating a narrative about the trauma can be termed "hermeneutical justice." In creating a narrative about the wrong that was done to them, individuals have to make certain choices – they

¹¹¹ Patricia A. Frazier and Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW AND HUMAN BEHAVIOR 607, 624-625, <https://www-jstor-org.proxy.library.georgetown.edu/stable/pdf/1394322.pdf?refreqid=excelsior%3A0ebf3eeea632d5b5ffc82f6257687299> (Suspects are more likely to be charged with the victim is injured. Cases are more likely to be prosecuted when they involve more severe assaults and include injuries, more evidence, and strangers).

¹¹² Admittedly, Brison reports that she "found it healing to give [her] testimony in public and have it confirmed by the police, the prosecutor, [her] lawyer, and ultimately the jury who found [her] assailant guilty of rape and attempted murder." Brison, *supra* note 38, at 54. But it is important to note that her case took place in France and involved significant physical trauma that was overwhelmingly visible. Moreover, her rape involved a stranger overtly attempting to kill her, which removes her from the typical pool of victims referred to when I speak of gray area sexual interaction.

decide how much to tell, whom to tell it to, when to tell it to them, and what order they tell it in.¹¹³ This gives a wronged individual an opportunity to exercise control over the incident. In creating the narrative, they “gain control over the occurrence of intrusive memories.”¹¹⁴ In contrast, the criminal legal system cannot offer the same amount of control and often re-traumatizes the individual instead of helping them to control flashbacks or intrusive memories.

When a wronged individual gets the opportunity to share the narrative they have developed with understanding and empathetic listeners who respond appropriately then they can begin to regain their footing and develop the default trust that they previously lost as a result of the wrongdoing. An audience that can actively listen to the narrative of the wronged individual can help that person “piece together themselves as a subject again, gaining control over the fragments of their prior objectification.”¹¹⁵ This “aspect of remaking a self in the aftermath of trauma highlights the dependency of the self on others and helps to explain why it is so difficult for [those wronged] to recover” when the ones who bear witness to their trauma are police officers, lawyers, and jury members who are less interested in the individual qua subject, but merely consider them as a means to the end of punishing the accused.¹¹⁶

In addition to healing through narrative, many individuals who have been sexually wronged find healing through the person who wronged them being held accountable.¹¹⁷ The criminal legal system harms individuals who have been sexually wronged precisely because there is no accountability. Indeed, the retributive nature of the criminal legal system makes real accountability

¹¹³ *Id.* at 115.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 51.

¹¹⁶ *Id.*

¹¹⁷ *See, e.g.,* Margaret Walker, *supra* note 29, at 9.

impossible. In contrast, restorative justice focuses entirely on accountability of the wrongdoer and healing of the wronged individual.

A. Retribution Inhibits Accountability

The criminal legal system today approaches crime as rule-breaking that requires retribution instead of viewing it as wrongdoing that requires active repair. Those who commit legal infractions may be sent to prison, separated from everyone they have ever loved for months or even years. When they get out of prison, they will be hard-pressed to find someone who will rent them an apartment¹¹⁸ or give them a job¹¹⁹ and may end up homeless.¹²⁰ They will often be prohibited from receiving government aid of any kind, including loans to continue their education.¹²¹ They may be without the support of family or friends or community. Many will have spent time in solitary confinement and have resulting mental health issues.¹²² Many will have been severely beaten or sexually assaulted themselves, either by other inmates or by guards.¹²³ Those convicted of sex crimes may be required to register on a public database for the rest of their lives.

Often, the threat of retribution paired with the shame and stigma of being a sex offender disincentivizes those accused of sexual wrongdoing from admitting or acknowledging the wrongdoing that they have committed.¹²⁴ Instead, they resort to outright denying that they have

¹¹⁸ Lucius Couloute, *Nowhere To Go: Homelessness Among Formerly Incarcerated People*, PRISONPOLICY.ORG, <https://www.prisonpolicy.org/reports/housing.html> (Aug. 2018).

¹¹⁹ Lucius Couloute and Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISONPOLICY.ORG, <https://www.prisonpolicy.org/reports/outofwork.html> (July 2018).

¹²⁰ Lucius Couloute, *supra* note 119.

¹²¹ *Students With Criminal Convictions Have Limited Eligibility for Federal Student Aid*, STUDENTAID.GOV, <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions> (last visited April 13, 2020).

¹²² Keramet Reiter, Joseph Ventura, and Justin Strong et. al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017-2018*, 110 AM. J. PUBLIC HEALTH S56, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6987940/pdf/AJPH.2019.305375.pdf> (2020).

¹²³ Dave Gilson, *What We Know About Violence in America's Prisons*, MOTHERJONES.COM, <https://www.motherjones.com/politics/2016/06/attacks-and-assaults-behind-bars-cca-private-prisons/> (July/Aug. 2016).

¹²⁴ Anne-Marie McAlinden, *Restorative Justice as a Response to Sexual Offending – Addressing the Failings of Current Punitive Approaches*, SEXUAL-OFFENDER-TREATMENT.ORG, http://www.sexual-offender-treatment.org/1-2008_03.html (last visited April 13, 2020).

violated any rule or law - not necessarily from a desire to skirt responsibility for wrongdoing, but out of desperation to avoid the harshness of prison. There is rarely any benefit to immediately admitting otherwise.¹²⁵ It is likely that the first words they speak in a courtroom will be “not guilty.” Even afterwards there will be little to no acknowledgment of their wrongdoing. More than 90% of the time, a plea deal will be accepted¹²⁶ and the prosecutor will ask the accused to waive their right to trial in exchange for a punishment lighter than the maximum possible penalty. Because of sentencing statutes, they will often be asked to admit guilt to a crime that is either less severe than or different from the crime they actually committed. When the individual goes before a judge to plead guilty, they will be told by their lawyer what to admit to and what to hold back. The plea colloquy will often take place in a courtroom that doesn’t contain the wronged individual, the families, or members of the community. Instead, the accused will be surrounded by individuals who have no personal connection to the crime whatsoever.

If the case is one of the cases that progresses to a trial instead of a plea deal, the defendant will probably not testify. Trials consist of an entity of the state attempting to convince a panel of strangers that an infraction has occurred. The panel returns a finding of “guilty” if the infraction has occurred, and “not guilty” if the infraction has not occurred. If the individual is found guilty, then a punishment is meted out to re-assert the authority of the state.¹²⁷ And then “you go to prison, where virtually no one talks to you about your crime.”¹²⁸ There will be no apology or answering of the survivor’s questions. Most jurisdictions even have laws prohibiting victims of crime and those who have perpetrated the crime from communicating with one another.

¹²⁵ Excluding in the carceral context of provisions like “acceptance of responsibility” in the federal criminal legal system which can reduce a prison sentence.

¹²⁶ Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, THEOUTLINE.COM, <https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=bnts3u46> (Aug. 7, 2017).

¹²⁷ While some states have jury sentencing, in almost all states, a judge can override a jury’s recommended sentence.

¹²⁸ Danielle Sered, *UNTIL WE RECKON* at 91 (2019).

We raise individuals to believe that this is “justice” – that justice looks like an authority forcing a transgressor to serve a sentence in prison for their wrongful behavior.¹²⁹ But those who have been wronged frequently reach the end of the carceral process and find out that incarcerating the person who wronged them has not healed their wounds.¹³⁰ This is because incarceration of the transgressor does nothing to actively repair the wrong. It “requires only that people sustain the suffering imposed for their transgression. It is passive...It requires neither agency nor dignity, nor does it require work.”¹³¹ While prison is a harsh punishment, it is not the kind of thing that requires an individual to own up to what they have done, answer for the pain they have caused, come face to face with people who have suffered because of their actions and choices, and resolve not to commit the same wrongdoing in the future.¹³² In fact, recidivism rates show that if anything, time spent in prison makes it statistically more likely that the individual will commit even greater harm in the future.¹³³ So, incarcerating someone undermines public safety and fails to meet the needs of the person who was wronged, even worsening their state.¹³⁴

There are certain amends that can be made by the wrongdoer to help the wronged individual find closure and healing, but incarceration precludes those things from being done. This is not accountability, and it provides little to no healing for survivors who need and deserve it. Retribution is not a satisfactory substitute for accountability on the part of the transgressor, or healing on the part of the survivor.

¹²⁹ Angela Y. Davis, ARE PRISONS OBSOLETE? at 9-10 (2003) (“[T]he prison is considered an inevitable and permanent feature of our social lives. . . . In most circles prison abolition is simply unthinkable and implausible. Prison abolitionists are dismissed as utopians and idealists whose ideas are at best unrealistic and impracticable, and, at worst, mystifying and foolish.

¹³⁰ Patricia Resick, *supra* note 78, at 58.

¹³¹ Danielle Sered, *supra* note 129, at 91.

¹³² *Id.*

¹³³ Kim Steven Hunt, Matthew J. Iaconetti, Kevin T. Maass, *Recidivism Among Federal Violent Offenders*, UNITED STATES SENTENCING COMMISSION at 3, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf (Jan. 2019).

¹³⁴ Danielle Sered, *supra* note 129, at 66.

B. Restorative Justice: Viewing Crime as Wrongdoing that Requires Repair

In contrast to the current carceral system, restorative justice treats commission of a violent crime as an instance where someone has been wronged, and thus is deserving of the responsible person making efforts to repair that wrong. Because there is no focus on or fear of retribution, there is space for accountability to take place. Accountability requires the acknowledgment of responsibility for one's actions and the impact of those actions on others, as well as the expression of genuine remorse, taking actions to repair the wrong (to the degree possible), and refraining from committing similar wrongdoing in the future.¹³⁵ As I explained, the carceral system entails the opposite of each of these elements, but each is inherent in the ideal restorative justice program.

In the United States, restorative justice programs have typically operated as diversionary alternatives to typical prosecution, meaning that an individual is funneled away from being prosecuted in the typical manner. An Arizona program, Project RESTORE¹³⁶ (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience), began in 2004 and was the first project to successfully apply restorative justice principles to sex crimes.¹³⁷ RESTORE was limited to “first time offenders, acquaintance rapes, and non-penetrative offenses with minimal force” perpetrated against victims of 18 years or older.¹³⁸ It was only available as an alternative to the traditional criminal legal system when both the wrongdoer and the wronged individual, after consultation with free legal counsel, voluntarily decided to participate.¹³⁹

In the event that a wronged individual sees the value in restorative justice but cannot bring themselves to meet face to face with the person who has wronged them, successful victim-offender

¹³⁵ Danielle Sered, *supra* note 129, at 96.

¹³⁶ While the literature on restorative justice is robust, I will spend most of this section talking about RESTORE because it is one of the only programs to apply restorative justice principles to sex crimes specifically.

¹³⁷ Amy Kasparian, *supra* note 109, at 377.

¹³⁸ *Id.* at 396.

¹³⁹ Mary P. Koss, *supra* note 90, at 1627.

mediation has taken place with the presence of a “surrogate victim,” or an individual that has been wronged in a similar way.¹⁴⁰ When a surrogate is involved, the wronged individual can still be involved, but has more freedom to choose the extent of that involvement.¹⁴¹ Wronged individuals have the choice to refrain from involvement altogether, or they can meet with the surrogate, give them a statement that they’d like them to read to the wrongdoer, and tell them what reparation might look like for them.¹⁴² Perhaps the most beneficial aspect of restorative justice is that it is flexible in a way that the court system isn’t. If at any point a wronged individual has a problem with a specific aspect of the program based on their experience, professionals from a variety of different areas are available to re-create parts of the program based on the wronged individual’s needs.

A key component of most restorative justice programs is the “victim-offender” conference. Such a conference provides the opportunity for wronged individuals to meet with the persons who have wronged them so that, with the help of trained mediators, they can let the wrongdoer know how the wrongdoing affected them.¹⁴³ Wronged individuals can also ask the questions they need in order to continue the healing process of composing a narrative about what happened.¹⁴⁴ In some instances, wronged individuals might procure a meaningful and sincere apology from the wrongdoer. Rules that prevent the re-traumatization of survivors and “excessive verbal shaming

¹⁴⁰ *A Conversation With Dr. Alissa Ackerman About Restorative Justice With Sexual Abusers*, <https://safersocietypress.org/ssp15-a-conversation-with-dr-alissa-ackerman-about-vicarious-restorative-justice-with-sexual-abusers/> (Sept. 2018).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Mark S. Umbreit, and Jean Greenwood, *Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue*, OFFICE FOR VICTIMS OF CRIME at 1, https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf (Apr. 2000).

¹⁴⁴ *Id.*

of [wrongdoers] that might elicit dangerous or counter-productive anger and aggression” govern the proceedings.¹⁴⁵

Another key component of restorative justice programs is a “redress agreement,” where a wronged individual gets to craft a plan of repair that has personal significance to them. For example, a wronged individual may specify a type of community service they’d like the wrongdoer to engage in, ask for contributions to charity in their name, or ask for payments of expenses for things like therapy.¹⁴⁶ While restorative justice processes “don’t allow agreements that are harmful or degrading to the [wrongdoer]” and don’t condone activities that “replicate[] the suffering caused by violent crime,” broad creativity can be employed in designing redress plans that are significant to each wronged individual.¹⁴⁷

For example, Danielle Sered, the founder of a restorative justice program for violent offenders in Brooklyn, writes about a redress plan crafted by a person who was attacked on a train.¹⁴⁸ The wronged individual expressed that she had found herself unable to ride the train ever since the attack, and that one of the hardest parts of the aftermath was the fact that her thoughts were constantly fixated on the person who had wronged her.¹⁴⁹ So, in her redress plan, she requested and the wrongdoer accepted, a plan that required the wrongdoer to refrain from taking trains for a year.¹⁵⁰ The wrongdoer was also required to keep a “daily journal in which she reflected about how the wronged individual must have felt each day following the attack:

At first her entries were short and even a little trite: “I think she felt angry.” And “I think she felt mad.” But after having to write these reflections day after day, finally something clicked: “I bet she felt so tired of waking up angry. I bet she was so frustrated that everything changed because of me, because of something she didn’t even do, something

¹⁴⁵ Mary P. Koss, *supra* note 90, at 1627.

¹⁴⁶ *Id.* at 1631.

¹⁴⁷ Danielle Sered, *supra* note 129, at 95-96.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

she didn't even choose, something that wasn't meant for her. I bet she felt so sad because she didn't know if that feeling would ever go away. I bet she hated me for causing her that pain. I bet she hated hating me too."¹⁵¹

Staying off of the trains required this person, in some small way, to recognize what the person she had wronged had gone through:

She had to spend two or three times as long getting to places. When her friends all hopped on the subway, she had to decide between making up a fake excuse or telling them the real reason she couldn't ride with them. She had to consider getting on the train, then imagine the possible consequence of doing so (the risk she would be terminated from the program and sentenced to a prison term), then would feel an overwhelming sense of panic and wait for the bus to come. And of course, these are all things [the wronged individual] had been doing for a year as a result of the trauma [the wrongdoer] caused her.¹⁵²

After this redress plan was implemented, the wronged individual's PTSD symptoms subsided.¹⁵³

For wronged individuals to have the opportunity to define what repair looks like is an especially significant part of restorative justice. Whereas going through the criminal legal system usually wrests control from the wronged individual and places it in the hands of authority figures who are detached from the original wrong, restorative justice aims to take that control and put it back in the hands of the wronged individual. Every wronged individual is different, and so the act of repair will look somewhat different to each of them; each will find different things more conducive to their healing. Because of this, they should have power over what that repair looks like. Restorative justice gives wronged individuals a chance to have a hand in determining the reparation that needs to take place for them to feel like a subject again. This makes it less likely that the process will inadvertently re-traumatize them.¹⁵⁴ By crafting plans of redress with specific

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 97.

¹⁵⁴ Susan Brison, *supra* note 38, at 68 ("The undoing of the self in trauma involves a radical disruption of memory, a severing of past from present, and, typically, an inability to envision a future. And yet trauma survivors often eventually find ways to reconstruct themselves and carry on with reconfigured lives. Working through, or remastering, traumatic memory (in the case of human-inflicted trauma) involves a shift from being the object or medium of someone else's (the perpetrator's) speech (or other expressive behavior) to being the subject of one's own. The act of bearing witness to the trauma facilitates this shift, not only by transforming traumatic memory into a

actions that are meaningful to them, and seeing those who have wronged them held to their promise to do those actions and refrain from further wrongdoing, wronged individuals may begin to be able to rebuild their default trust in the world and in their fellow human beings. Many wronged individuals express that ensuring others' safety from those who have wronged them is extremely important to them.¹⁵⁵ To the extent that they can contribute to bringing about that reality, they regain the control over the situation that they so desperately need and deserve.

In return for the individual's initial acknowledgement of responsibility, completion of the restorative justice program, and refrainment from committing wrongdoing in the future, the wrongdoer often avoids the risk of prison or probation and keeps the crime off of their record. This facilitates their reintegration into the community by making it far easier for them to obtain jobs, continue education, and secure housing. Any failure to complete a restorative justice program results in their case being diverted back to the carceral system and prosecuted as it typically would be.¹⁵⁶

Many find it hard to believe that wronged individuals would consent to going through restorative justice and find it even harder to believe that wrongdoers would admit to the wrong they've committed. However, the evidence demonstrates that this is not as far-fetched as one would think. During the course of program RESTORE, 66 cases – both felonies and misdemeanors¹⁵⁷ - were referred by prosecutors.¹⁵⁸ 63% of wronged individuals who were asked

narrative that can then be worked into the survivor's sense of self and view of the world, but also by reintegrating the survivor into a community, reestablishing connections essential to selfhood.”).

¹⁵⁵ Andrea Warner Stidman, Claire Burke Draucker, and Donna S. Martsolf, *Altruism in Survivors of Sexual Violence: The Typology of Helping Others*, 18 J. AM. PSYCHIATR. NURSES ASSOC. 146, 150-151 (2012).

¹⁵⁶ Mary P. Koss, *supra* note 90, at 1632.

¹⁵⁷ The felonies comprised cases of rape, while the misdemeanors involved crimes like indecent exposure. I will spend most of my time discussing the rape cases, but some of the statistics are based on both categories taken together.

¹⁵⁸ Mary P. Koss, *supra* note 90, at 1633.

consented to go through the program.¹⁵⁹ The majority of those who declined cited the desire to go through the standard criminal legal system or the desire to sue in civil court instead.¹⁶⁰ Others cited a “lost desire for any form of criminal justice or the belief that too much time had passed.”¹⁶¹ 90% of wrongdoers who had the option opted to go through the program instead of through conventional prosecution.¹⁶²

Admittedly, some wrongdoers will refuse to go through a restorative justice program because they maintain that they have done nothing wrong. It is worth noting that some concerns inherent in the carceral system regarding admitting fault do not necessarily dissipate with the addition of a restorative justice diversion program. For example, there may be concerns that admitting to one’s crimes in front of multiple experts and witnesses will affect the individual negatively should they fail to complete the program or fail to abstain from re-offending. Will these statements and their attempt to participate in a restorative justice program be used against them in later prosecutions? It is unclear in the literature whether there is any measure of confidentiality regarding statements issued in a restorative justice program. If these statements can be used against the responsible parties upon their failure to complete the program, it may not be the case that wrongdoers who decline to participate in restorative justice programs do so because they didn’t want to acknowledge the wrong they have wrought and amend it. Instead, it may be that they are still, above all, seeking to avoid the harsh punitiveness of the carceral system and the lifelong ramifications of a conviction or spending time in prison. The harms that the carceral system causes can cast a long shadow, even over restorative justice practices. This is a further indictment of the carceral system and is not a reason to avoid implementing restorative justice practices. While

¹⁵⁹ *Id.* at 1634.

¹⁶⁰ *Id.* at 1627.

¹⁶¹ *Id.* at 1634.

¹⁶² *Id.*

RESTORE rejected wrongdoers who initially denied responsibility based on safety concerns, “it is an empirical question whether preparation time could have moved them to a point where they could have participated constructively in a conference.”¹⁶³ The initial denial that the criminal legal system requires from defendants who hope to avoid harsh and long-lasting retribution is such a constant in society, and is specifically trained into those who may have been involved in the carceral system for nonsexual offenses in the past, that it affects whether they feel like they can admit their wrongdoings without wagering years of their lives to do so.

Among the cases where individuals accepted responsibility and consented to participate in RESTORE, 66% of those who had perpetrated rape (and many more of those who had been charged with misdemeanors) were able to complete the program.¹⁶⁴ Two thirds of those who didn’t complete RESTORE were terminated for “noncompliance related to alcoholism, financial distress, or homelessness.”¹⁶⁵ Additionally, one responsible person recanted responsibility, and there was one re-arrest. But, the sole re-arrest wasn’t for rape. It was an elderly person arrested for indecent exposure who was “beginning to show symptoms suggestive of dementia.”¹⁶⁶

This is where many would contrast the overall success of restorative justice programs like RESTORE with what we know about the criminogenic nature of prisons, and the research that shows those who go to prison are more likely to end up in prison again. However, it is important to note that recidivism rates for sex crimes are notoriously hard to measure precisely because the clearance rates, or number of reports resulting in an arrest, for rape cases are so low. So, while we know that those with a sex offense conviction are more likely to recidivate for non-sex-related offenses than they are for sex offenses, we have no accurate way to discern the number of people

¹⁶³ *Id.* at 1649.

¹⁶⁴ *Id.* at 1654.

¹⁶⁵ *Id.* at 1647.

¹⁶⁶ *Id.*

who have raped, many of which avoid the criminal legal system altogether, and ultimately rape again. This makes it difficult to come up with concrete numbers regarding recidivism rates.¹⁶⁷

However, there are other ways to quantify the success of programs like RESTORE. For example, the RESTORE study found that 75% of cases that were retained in the criminal justice system during this time were “closed without any consequences” for the responsible party.¹⁶⁸ Only 34% of those who committed rape and went through RESTORE failed to complete the entire program.¹⁶⁹ Those who failed to complete the entire program were diverted back to the carceral system for prosecution, making the RESTORE case clearance rate much higher than the clearance rate for comparable cases in the criminal justice system.

Overall, the RESTORE program was a success. At least 90% of participants – both responsible persons and wronged individuals – “were satisfied with their preparation, the conference, and the redress plan,” “felt “safe, listened to, supported, treated fairly, [and] treated with respect,” and “would recommend RESTORE to others.”¹⁷⁰ In contrast, traditional court systems reap satisfaction rates of about 30%.¹⁷¹ Far from being re-traumatized, the most satisfied parties involved in RESTORE were wronged individuals who attended the conference.¹⁷² There were “no physical safety issues before, during, or after the conferences.”¹⁷³ There was admittedly one isolated instance of verbal abuse of a wronged individual, but it was stopped by a facilitator mid-stream. While it is impossible to predict with 100% accuracy whether or not emotional harm will come to a wronged individual, the structure of a program like RESTORE is successful at

¹⁶⁷ Roger Przybylsk, *Chapter 5: Adult Sex Offender Recidivism*, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE, https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html (last visited April 14, 2020).

¹⁶⁸ *Id.* at 1634.

¹⁶⁹ *Id.* at 1654.

¹⁷⁰ *Id.*

¹⁷¹ Danielle Sered, *supra* note 129, at 143

¹⁷² Mary P. Koss, *supra* note 90 at 1654.

¹⁷³ Mary P. Koss, *supra* note 90, at 1641.

minimizing those instances. When contrasting RESTORE with the criminal legal system, it is significant to note that no wronged individual who went through RESTORE felt blamed, and that all wronged individuals “strongly agreed that taking back their power was a major reason to select RESTORE over other justice options.”¹⁷⁴

93% of wronged individuals expressed that they chose to participate in RESTORE “to make the [wrongdoer] accountable.”¹⁷⁵ And, 100% of wrongdoers expressed that they chose to participate in RESTORE in order to “tak[e] direct responsibility for making things right.”¹⁷⁶ Additionally, at least 95% of wrongdoers indicated that “apologizing to the person [they wronged] was a major reason” for opting into RESTORE.¹⁷⁷ At the end of RESTORE, wronged individuals did not necessarily feel that they had put the experience behind them, but the data did not reflect why they felt that way. For example, it may not be an issue with restorative justice itself but may be that some wronged individuals “feel that closure...is...not likely with any justice model ...because the impact of rape is life-changing and lifelong.”¹⁷⁸

To be sure, there are drawbacks to the way that many restorative justice programs have heretofore operated, as some of the failures of the carceral system have bled over into the restorative justice realm. For example, 77% of responsible persons and 88% of wronged individuals involved in RESTORE were white.¹⁷⁹ The lack of diversion of black wrongdoers reflects the propensity of the criminal legal system to punish black individuals most harshly.¹⁸⁰ The absence of black wronged individuals reflects the propensity of the criminal legal system to

¹⁷⁴ *Id.* at 1652.

¹⁷⁵ *Id.* at 1642.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1637.

¹⁷⁹ *Id.* at 1652.

¹⁸⁰ Erica Y. King, *Black Men Get Longer Prison Sentences Than White Men for the Same Crime: Study*, ABC NEWS, <https://abcnews.go.com/Politics/black-men-sentenced-time-white-men-crime-study/story?id=51203491> (Nov. 2017)

ignore crime perpetrated against black individuals.¹⁸¹ Issues like this are present in restorative justice programs precisely because they have operated as diversionary alternatives to the carceral system, with the control over diversion resting in the hands of prosecutors, who are susceptible to bias.

Prosecutors have also tended to divert cases which they do not feel would otherwise result in a conviction. 57% of rape cases that were diverted to RESTORE involved friends or romantic partners – even more included mere acquaintances.¹⁸² This substantiates an argument made earlier – that if 70% of rapes are perpetrated by someone that the wronged individual knows or has a personal connection with and 87% of rapes that are reported do not end in the wrongdoer being found guilty, then it is extremely likely that in jurisdictions where restorative justice options do not exist, these cases – the cases resulting from gray area sexual interaction – are the ones abandoned. This makes the development of effective restorative justice programs for crimes of sexual assault all the more crucial and all the more beneficial. Even those who do not buy into the wholesale use of restorative justice programs for cases typically pursued by the criminal legal system could at least support them as an option when the only alternative is nothing. But, for those who could dare to imagine a world in which healing would not need to involve the criminal legal system at all, my argument goes one step further. Because restorative justice programs do not require evidence that meets the burden of proof and do not end in lifelong punishments such as prison or sex offense registration, “diversion”¹⁸³ could happen before the case enters the criminal

¹⁸¹ Cara Kelly, *Analysis: Cyntoia Brown, R. Kelly and the Refusal to Recognize Black and Brown Female Victims*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2019/01/11/cyntoia-brown-r-kelly-and-refusal-recognize-black-female-victims/2542845002/> (Jan. 11, 2019).

¹⁸² Mary P. Koss, *supra* note 90, at 1637.

¹⁸³ If gray area sexual interaction commonly goes unreported in the first place, how are we to divert wrongdoers from the criminal legal system and offer restorative justice to both them and the wronged individual when they never become involved with the criminal legal system to begin with? It all starts at the beginning. Typically, a report to the police marks the beginning of a dispute, and it is considered the primary indication that something has gone wrong in a sexual interaction, but this doesn’t have to be the case. Recall Kukla’s discussion of sexual negotiation: if mutually

justice system. That is, restorative justice does not have to be an additional option to the criminal legal system. For cases involving gray area sexual interaction, it could come to replace the system entirely.

CHAPTER 5. CONCLUSION

Gray area sexual interactions often go unaddressed by the criminal legal system. This is due, in part, to the fact that current statutes are based on a consent model of sex rather than an invitation model. This statutory failure to accurately capture the speech mechanism in play leads to the criminal legal system only being able to recognize and respond to extremes on the sexual interaction spectrum while largely ignoring gray area sexual interactions. Those wronged by gray area sexual interactions are marginalized by hermeneutical injustice, or the inability to articulate what has happened to them. This makes the fallout no less severe while also contributing to a lack of ability to report, which prevents the criminal legal system from responding to the wrongdoing. Even when individuals can report gray area sexual interaction, a jury may see fail to see that it is an instance of wrongdoing, and therefore will likely acquit.

The failure of the criminal legal system to provide redress not only shatters any remaining default trust that the wronged individual possesses, but it also directly contributes to the

desired sex is a “dialogical activity that expresses both partners’ positive agency” then by the time intercourse takes place, there has been robust communication between partners. Even if one enjoyed it more than the other, or saw themselves as the ‘giver,’ all parties involved likely come away with not only a positive experience, but also a similar narrative as to what occurred. On the other end of the spectrum – say a case of forcible stranger rape – it is rather obvious to both parties that this is just not a case of mutually desired intercourse. Not only is the wronged individual able to clearly and quickly label what has occurred (because they do not suffer from the hermeneutical injustice that accompanies gray area sexual interaction), but the wrongdoer arguably understands what they are doing as well. In both of these scenarios, there is some semblance of an agreed-upon narrative as to what took place. In contrast, in the gray area sexual interaction category, narratives are frequently different. Recall the example of the college couple. The wrongdoer may not recognize that they have committed an act of wrongdoing. Instead, they may come away with the impression that things were fine and they “got laid.” The wronged individual may come away feeling unsettled even if they can’t label the variety of wrongdoing just yet. Whether this difference in narratives is discovered by a school’s Title IX office, by a therapist for one party, or ultimately by a police report, a differing testimonial narrative as to what actually occurred is the red flashing light that indicates a restorative justice solution needs to be implemented – to rehabilitate the wrongdoer, to give community recognition to the trauma of the wronged party, and to aid in healing.

development of PTSD in those who have been sexually wronged. And even if the authorities *do* respond, the redress offered is merely carceral. Trials wrest power and control from those who have been wronged, who are often used as pawns in advancing the government's goals. Wronged individuals who testify have doubt cast on their credibility and character, and are re-traumatized as they face their assailant and their memories. Studies show that individuals who have experienced sexual wrongdoing heal primarily through being able to form narratives about what has happened. The criminal legal system cannot provide this, but restorative justice can.

When individuals accusing R. Kelly of sexual wrongdoing spoke out about what they wanted to see happen to him, "they never used the words jail or prison. They wished for him healing, that he face and own the harm he's caused."¹⁸⁴ While this is not the view of every individual who has been sexually wronged, those who have been sexually wronged are also not a retributive monolith who unequivocally want the person who has wronged them to end up in prison.¹⁸⁵

While here I am primarily articulating restorative justice as a solution to fill the gap left by the carceral system's non-prosecution of gray area sexual interaction, it is worth considering that a retribution-centered system of incarceration is a poor fit for most, or even all cases, of violent crime.¹⁸⁶ 95%¹⁸⁷ of individuals who go into prisons will come out, and today they come out without having been rehabilitated, and with an increased risk of committing more crime. If our response to

¹⁸⁴ Dream Hampton, *R. Kelly's Accusers Deserve Justice. But What Should that Look Like?* TIME MAGAZINE, <https://time.com/5545827/r-kelly-justice-dream-hampton/> (March 6, 2019).

¹⁸⁵ Lara Bazelon and Bruce A. Green, *Victims' Rights from a Restorative Perspective*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3493956, 17 OHIO ST. J. CRIM. L. at 28 (Nov. 26, 2019); Kathryn Castell, Julia Wolfe & Mai Nguyen, *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Sept. 21, 2018), <https://projects.fivethirtyeight.com/sexual-assault-victims/>.

¹⁸⁶ See Michelle Alexander, *Reckoning With Violence*, The New York Times, <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> (March 3, 2019).

¹⁸⁷ Timothy Hughes and Doris James Wilson, *Reentry Trends in the U.S.*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/reentry/reentry.cfm> (last visited April 14, 2020).

crime isn't making our communities safer, but is instead causing further harm and destruction, all while preventing accountability, it is worth rethinking why we have that response at all.

REFERENCES

- Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination*, 53 AM. CRIM. L. REV. 255 (2016).
- Alanna Vagianos, *Video Shows Former NBA Player Acquitted of Rape Pulling Half-Naked Accuser Back to Motel*, HUFFINGTON POST, https://www.huffpost.com/entry/mateen-cleaves-rape-accuser-video_n_5d6411a5e4b01d7b529365ec (Aug. 26, 2019).
- Alice Sebold, LUCKY (1999).
- Amanda Taub, *Rape Culture Isn't a Myth. It's Real, and It's Dangerous*, VOX.COM, <https://www.vox.com/2014/12/15/7371737/rape-culture-definition> (Dec. 15, 2014).
- Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNATIONAL LAW REVIEW 30-54 (2015).
- Andrea Dworkin, OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS (1976).
- Andrea Warner Stidman, Claire Burke Draucker, and Donna S. Martsolf, *Altruism in Survivors of Sexual Violence: The Typology of Helping Others*, 18 J. AM. PSYCHIATR. NURSES ASSOC. 146 (2012).
- Angela Y. Davis, ARE PRISONS OBSOLETE? (2003).
- Anne-Marie McAlinden, *Restorative Justice as a Response to Sexual Offending – Addressing the Failings of Current Punitive Approaches*, SEXUAL-OFFENDER-TREATMENT.ORG, http://www.sexual-offender-treatment.org/1-2008_03.html.
- Anne-Marie McAlinden, *The Use of Shame With Sexual Offenders*, 45 BRIT. J. CRIMINAL. 373 https://www-jstor.org.proxy.library.georgetown.edu/stable/23639325?seq=1#metad ata_info_tab_contents.
- Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995).
- Anthony Charuvastara and Marylene Cloitre, *Social Bonds and Posttraumatic Stress Disorder*, 59 ANNUAL REVIEW OF PSYCHOLOGY 301 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2722782/>
- Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009).
- B.S. Griffin and C.J. Griffin, *Victims in Rape Confrontation*, 6 Victimology 59 (1981).
- Cara Kelly, *Analysis: Cyntoia Brown, R. Kelly and the Refusal to Recognize Black and Brown Female Victims*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2019/01/11/cyntoia-brown-r-kelly-and-refusal-recognize-black-female-victims/2542845002/> (Jan. 11, 2019).
- Carol Bohmer, *Judicial Attitudes toward Rape Victims*, 57 JUDICATURE 303 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/judica57&div=86&id=&page=> (1973-1974).
- Chantal van den Berg, Karin Beijersbergen, et. al, *Sex Offenders in Prison: Are They Socially Isolated?*, 30 SEXUAL ABUSE 828 <https://journals.sagepub.com/doi/full/10.1177/1079063217700884> (Apr. 4, 2017).
- Danielle Sered, UNTIL WE RECKON (2019).
- Dave Gilson, *What We Know About Violence in America's Prisons*, MOTHERJONES.COM, <https://www.motherjones.com/politics/2016/06/attacks-and-assaults-behind-bars-cca-private-prisons/> (July/Aug. 2016).
- David Patrick Connor & Richard Tewksbury, *Examining Prison Wardens' Perceptions of*

- Inmates Incarcerated for Sex*, ACA.ORG, http://www.aca.org/aca_prod_imis/Docs/Corrections%20Today/ResearchNotes/ResearchNotes_July2013.pdf;
- Deryn Strange and Melanie K. T. Takarangi, *Memory Distortion for Traumatic Events: The Role of Mental Imagery*, 6 FRONTIERS IN PSYCHIATRY 2, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4337233/> (23 Feb. 2015).
- Dream Hampton, *R. Kelly's Accusers Deserve Justice. But What Should that Look Like?* TIME MAGAZINE, <https://time.com/5545827/r-kelly-justice-dream-hampton/> (March 6, 2019).
- Ed Balint, *Texas Man Acquitted in Jackson Truck Stop Rape*, THE ALLIANCE REVIEW, <https://www.the-review.com/news/20181011/texas-man-acquitted-in-jackson-truck-stop-rape> (Oct. 11, 2018).
- Erica Y. King, *Black Men Get Longer Prison Sentences Than White Men for the Same Crime: Study*, ABC NEWS, <https://abcnews.go.com/Politics/black-men-sentenced-time-white-men-crime-study/story?id=51203491> (Nov. 2017).
- Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, THEOUTLINE.COM, <https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=bnts3u46> (Aug. 7, 2017).
- Ian Urbina, *The Challenge of Defining Rape*, THE NEW YORK TIMES, <https://www.nytimes.com/2014/10/12/sunday-review/being-clear-about-rape.html> (Oct. 11, 2014).
- Isaac Chotiner, *A Harvard Law School Professor Defends His Decision to Represent Harvey Weinstein*, THE NEW YORKER (Mar. 7, 2019).
- Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. Rev., 480, Appendix A https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199273 (June 19, 2018).
- Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=964742 (Feb. 23, 2007).
- Jelani Cobb, *R. Kelly and the Complexities of Race in the #MeToo Era*, THE NEW YORKER (Jan. 11, 2019).
- Joan McGregor, *Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law*, 2 LEGAL THEORY 175 (1996).
- Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 574, <https://journals.sagepub.com/doi/pdf/10.1177/1077801205274450> (May 2005).
- J.V. Becker, L.J. Skinner, G.G. Abel, J. Howell, and K. Bruce, *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 106 (1982).
- Karen Jones, *Trust and Terror*, in MORAL PSYCHOLOGY: FEMINIST ETHICS AND SOCIAL THEORY 3 (Peggy DesAutels & Margaret Urban Walker eds. 2004).
- Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286 (2010).
- Katherine Jenkins, *Rape Myths and Domestic Abuse Myths as Hermeneutical Injustices*, 37 J. OF APPLIED PHILOSOPHY 191 (2017).
- Kathryn Castell, Julia Wolfe & Mai Nguyen, *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Sept. 21, 2018), <https://projects.fivethirtyeight.com/sexual-assault-victims/>.
- Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*,

- BUZZFEED, <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-standford-victim-read-to-her-ra> (June 3, 2016).
- Keramet Reiter, Joseph Ventura, and Justin Strong et. al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017-2018*, 110 AM. J. PUBLIC HEALTH S56, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6987940/pdf/AJPH.2019.305375.pdf> (2020).
- Koshka Duff, *Feminism Against Crime Control: On Sexual Subordination and State Apologism*, HISTORICALMATERIALISM.ORG, <http://www.historicalmaterialism.org/articles/feminism-against-crime-control>.
- Kim Steven Hunt, Matthew J. Iaconetti, Kevin T. Maass, *Recidivism Among Federal Violent Offenders*, UNITED STATES SENTENCING COMMISSION https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf (Jan. 2019).
- Lara Bazelon and Bruce A. Green, *Victims' Rights from a Restorative Perspective*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3493956, 17 OHIO ST. J. CRIM. L. (Nov. 26, 2019).
- Lucius Couloute, *Nowhere To Go: Homelessness Among Formerly Incarcerated People*, PRISONPOLICY.ORG, <https://www.prisonpolicy.org/reports/housing.html> (Aug. 2018).
- Lucius Couloute and Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISONPOLICY.ORG, <https://www.prisonpolicy.org/reports/outofwork.html> (July 2018).
- Margaret Walker, *MORAL DAMAGE AND MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* (2006).
- Mark S. Umbreit, and Jean Greenwood, *Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue*, OFFICE FOR VICTIMS OF CRIME https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf (Apr. 2000).
- Mary Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 JOURNAL OF INTERPERSONAL VIOLENCE 1623.
- Matthew Lyon, *No Means No: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277 (2004).
- Michelle Alexander, *Reckoning With Violence*, The New York Times, <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> (March 3, 2019).
- Michelle Anderson, *Negotiating Sex*, 41 S. CAL. L. REV 101 (2005).
- Miranda Fricker, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007).
- M.J. Walker and S.L. Brodsky, *Sexual Assault; The Victim and the Rapist*, Massachusetts, Lexington Books (1976).
- P.A. Resick, *The Trauma of Rape and the Criminal Justice System*, 9 JUST. SYS. J. 52 (1984).
- Patricia A. Frazier and Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW AND HUMAN BEHAVIOR 607, 624-625, <https://www-jstor-org.proxy.library.georgetown.edu/stable/pdf/1394322.pdf?refreqid=excelsior%3A0ebf3ee632d5b5ffc82f6257687299>.
- [Quill] R. Kukla, *That's What She Said: The Language of Sexual Negotiation*, 129 ETHICS

- (2018).
- Rachel E. Morgan and Barbara A. Oudekerk, *Criminal Victimization, 2018*, BUREAU OF JUSTICE STATISTICS <https://www.bjs.gov/content/pub/pdf/cv18.pdf> (Sept. 2019).
- Robin Walker Sterling, *Raising Race*, THE CHAMPION (April 2011).
- Roger Przybylsk, *Chapter 5: Adult Sex Offender Recidivism*, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE, https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html (last visited April 14, 2020).
- Samantha Michaels, *Courts Are Jailing Victims of Sexual Assault*, MOTHER JONES, <https://www.motherjones.com/politics/2016/10/why-are-women-thrown-jail-after-theyre-raped-or-assaulted/> (Oct. 31, 2016).
- Sofi Sinozich and Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> (Dec. 2014).
- Susan Brison, *AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF* at 12 (2002).
- Timothy Hughes and Doris James Wilson, *Reentry Trends in the U.S.*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/reentry/reentry.cfm>.
- T.M. Massaro, *Experts, Psychology, Credibility, and Rape; The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985).
- Yasmeen Qureshi, *Aly Raisman on Larry Nassar Assault: Sometimes People Forget I'm Still Coping With It*, Yahoo News, https://news.yahoo.com/aly-raisman-larry-nassar-assault-sometimes-people-forget-im-still-coping-141037789.html?soc_src=community&soc_trk=tw (Feb 19, 2019).
- Affirmative Consent Laws (Yes Means Yes) State By State*, AFFIRMATIVECONSENT.COM, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/>.
- A Conversation With Dr. Alissa Ackerman About Restorative Justice With Sexual Abusers*, <https://safersocietypress.org/ssp15-a-conversation-with-dr-alissa-ackerman-about-vicarious-restorative-justice-with-sexual-abusers/> (Sept. 2018).
- Coy v. Iowa*, 487 U.S. 1012 (1988).
- Forcible Rape: The Crime, the Victim, and the Offender*, New York, Columbia Univ. Press (D. Chappell, R. Geis, and G. Geis eds. 1977).
- Home Page*, THE DEPARTMENT OF JUSTICE, <https://www.justice.gov/about>.
- Perpetrators of Sexual Violence: Statistics*, RAINN.ORG, <https://www.rainn.org/statistics/perpetrators-sexual-violence>.
- Sex Offenses and Offenders*, BUREAU OF JUSTICE STATISTICS <https://bjs.gov/content/pub/pdf/SOO.PDF> (Feb. 1997).
- Students With Criminal Convictions Have Limited Eligibility for Federal Student Aid*, STUDENTAID.GOV, <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions>.
- Surviving Prison as a Sex Offender*, ZOUKIS CONSULTING GROUP, <http://www.prisonerresource.com/prison-survival-guide/special-tactics/how-sex-offenders-survive/>.
- United States v. Alkhabaz*, 104 F.3d 1492 (1997).
- United States v. Wade*, 388 U.S. 218, 258 (1967).
- Victims of Sexual Violence*, RAINN.ORG, <https://www.rainn.org/statistics/victims-sexual-violence>.