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Sexual Violence, Intangible Harm, and the Promise of Transformative Remedies

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Sexual Violence, Intangible Harm, and the Promise of Transformative Remedies

Jill C. Engle*

Abstract

This Article describes alternative remedies that survivors of sexual violence can access inside and outside the legal system. It describes the leading restorative justice approaches and recommends one of the newest and most innovative of those—“transformative justice”—to heal the intangible harms of sexual violence. The Article also discusses the intersectional effects of sexual violence on women of color and their communities. It explains the importance of transformative justice’s intersectional approach to redress sexual violence. Transformative justice offers community-based, victim-centric methods that cultivate deep, lasting healing for sexual violence survivors and their communities, with genuine accountability for those who have caused harm. Although transformative justice has developed outside the legal system, its principles and methods are targeted toward the unique, often intangible harms experienced by sexual violence survivors. Therefore, transformative justice remedies should be available alongside and inside the legal system so survivors, their impacted communities, and those who cause harm can benefit from them.

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Table of Contents

INTRODUCTION	1046
I. THE INTANGIBLE HARMS OF SEXUAL VIOLENCE ARE NOT REDRESSED BY TRADITIONAL LEGAL REMEDIES ..	1050
A. <i>Criminal (In)Justice in Sexual Violence Cases</i>	1050
B. <i>Civil Legal Remedies for Sexual Violence Are Inadequate</i>	1057
1. Tort Actions	1057
2. Civil Rights Cases	1060
3. Third Party Lawsuits.....	1062
4. Civil Protective Orders.....	1063
II. FROM RESTORATIVE TO TRANSFORMATIVE JUSTICE.....	1065
A. <i>Restorative Justice</i>	1067
B. <i>Therapeutic Justice</i>	1070
C. <i>Transformative Justice</i>	1072
III. TRANSFORMATIVE LEGAL REMEDIES ADDRESS INTANGIBLE AND INTERSECTIONAL HARMS OF SEXUAL VIOLENCE.....	1075
A. <i>Narrative/Storytelling Methods</i>	1083
B. <i>Artistic/Embodied Methods</i>	1087
CONCLUSION.....	1090

INTRODUCTION

Survivors of sexual violence are reluctant to utilize the criminal justice system,¹ and most sexual assaults go unreported.² The legal system's response to sexual assault

1. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1, 11 (2017).

2. See RACHEL E. MORGAN & GRACE KENA, BUREAU OF JUST. STAT., DOJ, CRIMINAL VICTIMIZATION, 2016: REVISED, 23 (2018), <https://perma.cc/SK74-6F5M> (PDF) (finding that less than 6% of respondents who experienced "rape or sexual assault" reported the victimization to police in 2015 and 2016); Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 293–94 (2020); Tuerkheimer, *supra* note 1 at 28–29; PATRICIA TJADEN & NANCY THOENNES, OFF. OF JUST. PROGRAMS, DOJ, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 33 (2006), <https://perma.cc/BD4A-WTZY> (PDF) (explaining that only

frequently exacerbates victims' trauma, especially those already marginalized by race, gender, and poverty.³ Consider, for example, Recy Taylor, who was abducted during her walk home from church and raped by seven men in Abbeville, Alabama in 1944.⁴ She was twenty-four years old, worked as a sharecropper, and she was Black.⁵ Her sexual assault sparked an investigation by the National Association for the Advancement of Colored People (NAACP) led by Rosa Parks, but Taylor's case was barely prosecuted.⁶ Her attackers, all white men, survived the all-white grand jury process without indictment—despite the confession of one of the men.⁷

The NAACP's work to end the racialized sexual assault of poor, Black women in the South continued, and Taylor's case was a catalyst for the broader Civil Rights Movement.⁸ This was arguably the genesis of intersectional social justice work;⁹ nonetheless, effective legal remedies for victims of sexual violence, particularly for poor women of color, remain elusive.¹⁰ Overall, approximately nine out of every one thousand sexual assault perpetrators are prosecuted in the U.S., and fewer than five out of every one thousand are incarcerated.¹¹ The criminal justice system's anemic response further marginalizes victims who are already subordinated by gender, race, and poverty.

19.1% of female rape victims and 12.9% of male victims reported their rape to the police).

3. See Tuerkheimer, *supra* note 1, at 31.

4. Sewell Chan, *Recy Taylor, Who Fought for Justice After a 1944 Rape, Dies at 97*, N.Y. TIMES (Dec. 29, 2017), <https://perma.cc/DDA8-T7QK>.

5. *Id.*

6. *See id.*

7. *See id.*; DANIELLE L. MCGUIRE, AT THE DARK END OF THE STREET 34–35 (2011).

8. *See* MCGUIRE, *supra* note 7, at 39 (“Because of the campaign for equal justice for Recy Taylor, sexual violence and interracial rape became the battleground upon which African Americans sought to destroy white supremacy and gain personal and political autonomy.”).

9. *Cf. id.* (“[M]any of the African Americans who cut their political teeth defending black women like Recy Taylor who were raped by white men in Alabama in the 1940s brought their experiences and organizational insight to other struggles for dignity and justice in the 1950s and 1960s.”).

10. *See* Jameta Nicole Barlow, *Black Women, The Forgotten Survivors of Sexual Assault*, AM. PSYCH. ASS'N (Feb. 2020), <https://perma.cc/858Q-2TCQ>.

11. *The Criminal Justice System, Statistics, RAPE, ABUSE & INCEST NAT'L NETWORK*, <https://perma.cc/HWY6-6EXM>.

Most victims express a distrust of the criminal justice system, a fear of retaliation by their attacker, and a general pessimism about legal outcomes.¹²

Conversely, remedies rooted in reparative values like harm reduction and accountability can be transformative for sexual violence victims. Black Lives Matter cofounder Patrisse Cullors describes her personal experience with a transformative justice remedy as “[i]ncredibly healing.”¹³ Cullors, aided by a trusted friend with experience in transformative justice facilitation, contacted a former romantic partner who harmed Cullors during a sexual encounter.¹⁴ Their communication about the encounter and its harmful impact on Cullors was “challenging, heart-wrenching, and awkward,” but resulted in deep emotional recovery.¹⁵ The transformative justice dialogue happened completely outside the criminal context—no police, no prosecutor, no defense attorney.¹⁶ Remarkably, Recy Taylor also received a transformative-justice-style remedy. Decades after the attack, Alabama state and local officials apologized for the harm she endured through the legal system’s “failure to prosecute the crimes”—a remedy that Taylor described as making her “feel good” and “proud.”¹⁷

This Article is the first to call for transformative justice remedies for the intangible harms of sexual violence inside and outside the legal system.¹⁸ Some scholars have advocated for

12. See Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 85 (2020).

13. Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1694 (2019).

14. *Id.* at 1693–94.

15. *Id.* at 1694.

16. See *id.*

17. Cynthia Gordy, *The Root: An Apology Comes Late, But with Feeling*, NPR (May 13, 2011, 8:22 AM), <https://perma.cc/F4UZ-VJ4H>.

18. Because they are distinct, the terms “sexual violence” and “sexual assault” are both used throughout this Article. “Sexual assault” is often used to describe an act of “sexual violence,” which spans various acts. It is my intention to be as precise as possible, and other related, but distinct, terms throughout the Article include “sexual abuse,” “rape,” “gender-based violence,” “domestic violence,” “intimate partner violence,” “relationship violence,” and “domestic abuse.”

more effective remedies, including restorative justice, for victims of crimes like sexual violence.¹⁹ Others have argued for using transformative and restorative justice in specific contexts like revenge porn,²⁰ workplace sexual misconduct,²¹ and Title IX cases involving sexual violence in schools.²² Nonetheless, this is the first article to exclusively address transformative justice remedies for the intangible harms of sexual violence writ large. A transformative justice approach can improve the legal and nonlegal responses to sexual violence for all survivors. This Article relies on intersectionality²³ to illuminate how a transformative justice approach can be particularly useful to the women of color who disproportionately experience sexual violence and possess fewer preventative resources.²⁴

Women of color experience sexual violence at rates well above the national average.²⁵ Transformative justice is well

19. See, e.g., Bazelon & Green, *supra* note 2, at 334 (“Restorative justice may offer the best hope of vindicating victims’ rights by providing them with what they need most: validation, acknowledgement, empowerment, reckoning, and accountability. The United States has been slow to embrace restorative justice in any context, and particularly in sexual assault cases”); Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK L. REV. 467, 471–82 (2005); Erin Hodgson, Note, *When Rape Claims Become Contract Disputes: Addressing Contractual Obligations in the Aftermath of Sexual Assault*, 70 RUTGERS U. L. REV. 1201, 1201 (2018).

20. See Ashlee Hamilton, *Is Justice Best Served Cold?: A Transformative Approach to Revenge Porn*, 25 UCLA WOMEN’S L.J. 1, 42 (2018).

21. See Lesley Wexler et al., *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 45 (2019).

22. See Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391, 394 (2021). See generally Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147 (2016).

23. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

24. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

25. See CAL. COAL. AGAINST SEXUAL ASSAULT, ENDING SEXUAL VIOLENCE: AN INTERSECTIONAL APPROACH 9 (2017), <https://perma.cc/SN4X-7MVW> (PDF) (citing Center for Disease Control data showing that Black and Indigenous women experience sexual violence at rates of 21% and 27.5% higher,

suited to address the intangible harms in sexual violence cases where victims experience the multiplicity of marginalization by race, gender, and impoverishment.²⁶ Transformative justice is also useful in the broader context of sexual violence, regardless of the victim's characteristics. Any survivor of sexual violence has experienced harm, and harm reparation is a key principle of transformative justice.²⁷ Remedies rooted in transformative justice present opportunities to redress the unique, complex, and intangible harms caused by sexual violence. This Article considers the challenges in identifying legal remedies for victims of sexual violence as a result of the current system's unpredictable and imprecise responses to victims' intangible harms. It describes how the intangible harms resulting from sexual violence, and the intersectional subordination many victims experience,²⁸ can be addressed by remedies rooted in transformative justice principles. The Article then recommends specific transformative remedies that should be used to redress harms for all survivors of sexual violence, particularly those experiencing multiple forms of marginalization.

I. THE INTANGIBLE HARMS OF SEXUAL VIOLENCE ARE NOT REDRESSED BY TRADITIONAL LEGAL REMEDIES

A. *Criminal (In)Justice in Sexual Violence Cases*

Survivors of sexual violence experience unique harms that do not fit neatly into the boxes our criminal legal system

respectively, than the national average, and that approximately 14% of Latinas experience sexual assault during their lifetimes).

26. See Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality and Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 8 (2019) (“[R]ace and gender discrimination are so intertwined in sexual harassment that finding redress and remedies for women of color under traditional civil rights legal doctrine, which tends to address only one form of discrimination at a time, is extremely challenging.” (citation omitted)).

27. See Madison Lo, *A Domestic Violence Dystopia: Abuse Via the Internet of Things and Remedies Under Current Law*, 109 CALIF. L. REV. 277, 312 (2021) (“Transformative justice is an approach to harm that seeks safety and accountability within and by communities. It gives support and healing for individual incidents of abuse while aiming to transform the conditions and social forces that allow such harms to occur.” (citations omitted)).

28. See Katirai, *supra* note 12, at 85.

developed as available remedies.²⁹ Law enforcement skepticism regarding a victim's factual narrative disincentivizes sexual violence reporting,³⁰ as does the risk of being dismissed as "unharmed" if one does not exhibit physical trauma or declines a retraumatizing medical examination.³¹ Survivors often do not want to describe their experiences to police, who are often ill-equipped to assess the range of complex, often intangible, harms resulting from sexual violence.³² In the criminal system, police operate as gatekeepers who determine which sexual harms are serious enough to warrant government action against the offender.³³

If criminal charges are filed, the victim is entangled in a legal system with limited outcomes, all of which are punitive and dependent on stressful, public experiences that disregard their need to heal.³⁴ Victims will almost certainly encounter a

29. See Wexler et al., *supra* note 21, at 70 ("Many modern restorative justice practices—such as victim-offender mediation—developed in response to criminal wrongdoing and grew out of dissatisfaction with traditional criminal law processes that marginalized the role of victims, focused on punishment instead of transformation, and provided *limited remedies for addressing harm*." (emphasis added)); see also KRISTIN BUMILLER, IN AN ABUSIVE STATE 163–64 (2008) (explaining that "it is not necessarily true that more severe criminal sanctioning [of domestic violence] actually produces harm reduction" and instead calling for "attention not only to the harm of sexual violence but also to the role of government in preventing the full exercise of women's autonomy and freedom").

30. See Morgan Namian, *Hypermasculine Police and Vulnerable Victims: The Detrimental Impact of Police Ideologies on the Rape Reporting Process*, 40 WOMEN'S RTS. L. REP. 80, 82 (2018).

31. See *id.* at 83, 98.

32. See, e.g., Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1833 (2020) ("Interpersonal and intimate harm—rape, sexual assault, child sexual abuse—are another central concern of abolitionist work Police are unlikely to offer any real resources or opportunities for healing. They are likely to make arrests and exercise additional violence in response to calls from Black and brown people" (citation omitted)); Guy Hamilton-Smith, *The Agony & the Ecstasy of #MeToo: The Hidden Costs of Reliance on Carceral Politics*, 49 SW. L. REV. 93, 99 (2020) ("Investigatory failures in police departments stem from a variety of sources, which includes poor training, inadequate staffing amongst sex crimes units, [poor morale amongst sex crime investigators], and manipulating stats to give the appearance of solving more rape offenses than are actually solved." (citation omitted)).

33. See Hamilton-Smith, *supra* note 32, at 96.

34. See AYA GRUBER, *THE FEMINIST WAR ON CRIME* 138–39 (2020) ("Criminal litigation is undoubtedly stressful to victims. From rape exams to

defense attorney using gendered characterizations of the lack of physical evidence of “harm” or about their behavior around the incident, which could result in a plea bargain or acquittal.³⁵ In the punitive criminal system, attorneys and judges are not equipped to redress the multiplicity of harms that victims experience.³⁶ Many victims experience additional harm—known as “retraumatization”—while navigating criminal prosecution of their sexual violence cases.³⁷

These complex, intangible harms are not resolved by existing legal remedies for sex crimes, particularly because these remedies were informed by outdated understandings of victimology and punishment.³⁸ The doctrine of legal harm was first developed by white male British philosopher John Stuart Mill in the 1800s.³⁹ Mill defined harm as a simplistic directive to governments not to proscribe acts that do not have a tangible detrimental impact on another person.⁴⁰ At its roots, the legal harm principle was inherently patriarchal and

subpoenas and cross-examinations, victims endure unpleasant adversarial, and time-consuming processes with the only potential reward being a pound of the offender’s flesh.”).

35. See Alta Viscomi, Comment, *Systemic Accountability & Sexual Assault: The Past and Future of the Criminal Justice System*, 22 RICH. PUB. INT. L. REV. 173, 193–94 (2019) (“Because many rape cases focus on the survivor’s testimony as the only evidence, an effective defense attorney will attempt to undermine the survivor’s credibility and reliability.” (citation omitted)); see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1286 (2009).

36. See Katirai, *supra* note 12, at 89.

37. See *id.* at 84–85 (“It is called retraumatization because for some survivors simply participating in the process can be as painful and damaging as the crime itself.” (citation omitted)); see, e.g., Max Londberg, *Mom Thrown in Jail Twice While Seeking Civil Order from Same County Magistrate. He Resigned*, CINCINNATI ENQUIRER (Sept. 15, 2018, 5:05 PM), <https://perma.cc/7T6F-CH44> (last updated Sept. 17, 2018, 5:40 PM).

38. See Leo T. Sorokin & Jeffrey S. Stein, *Restorative Federal Criminal Procedure*, 119 MICH. L. REV. 1315, 1318 (2021) (reviewing DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019)) (describing Sered’s account of the inadequacy of the criminal justice system to redress victims’ harms and inculcate changed behavior by what she calls the “responsible parties”).

39. See John Stanton-Ife, *The Limits of Law*, STAN. ENCYCLOPEDIA OF PHIL. (Spring 2022), <https://perma.cc/4Z6R-K6JT>.

40. See *id.*

imperialistic. Mills and his followers recognized the harm principle as applicable to people who could act responsibly, excluding not just minor children but also “barbarians”—that is, the entire non-European human race.⁴¹ The harm principle was also shockingly broad, conflating intangible problems like indignities with tangible behavior like physical battery.⁴² Sexual violence, however, is best understood with precision, examining each victim’s experience to discern the harm.⁴³ While the criminal system’s understanding of harm is evolving,⁴⁴ it has a long way to go before it adequately redresses the intangible harms caused by sexual violence.⁴⁵

Criminal remedies are entangled with our punitive system, which is not well-suited to resolve sexual violence due to its “adversarial, two-party system.”⁴⁶ This system inspired the development of criminal sentencing guidelines, which completely ignored the intangible harms of sexual violence and

41. See Sharon Stanley, *John Stuart Mill, Children’s Liberty, and the Unraveling of Autonomy*, 79 REV. POL. 49, 49 (2017).

42. See Jeremy J. Ofseyer, *First Amendment Law: Taking Liberties with John Stuart Mill*, 1999 ANN. SURV. AM. L. 395, 403 (1999) (explaining that the harm principle is “a rather ambiguous and elastic concept” and that the “notion of harm can encompass a wide array of evils, from concrete ones, such as bodily injury and property damage, to more diffuse or intangible ones”).

43. See Bazelon & Green, *supra* note 2, at 293

Sexual assault victims are a diverse group—racially, ethnically, socio-economically, and with respect to sexual identity—and they suffer varied harms because sexual assault encompasses a wide realm of misconduct and victim-offender relationships or lack thereof. Even when victims suffer similar harms and come from similar backgrounds, they often have distinct, though sometimes overlapping, needs and objectives.

44. See I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1593 (2020). Capers also details the harm principle’s patriarchal origins, explaining that “[t]he ‘harm principle,’ traceable to John Stuart Mill’s essay *On Liberty*, posits that the state should deprive someone of liberty only when necessary to prevent harm to others. H.L.A. Hart also embraced this formulation.” *Id.* at 1593 n.175 (citations omitted). For a discussion of how the harm principle has been watered down as to become meaningless and devolved to permit state intervention to police almost any act, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113–16 (1999).

45. See Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 6 (2014).

46. Viscomi, *supra* note 35, at 191.

instead focused exclusively on traditional concepts of harm.⁴⁷ Simply stated, the criminalization of rape and other sexual violence lacked any recognition of the harm's special nature, instead embodying gendered skepticism of victims and their claims.⁴⁸

Beyond the criminal system's ignorance of intangible harm generally, its development devoted little attention to the harms specifically experienced by sexually victimized women of color.⁴⁹ Traditional legal approaches marginalize harms related to lesser-understood experiences, rendering victims of these experiences less likely to receive legal remedies.⁵⁰ The privileged white male experience pervaded the development of harm principles in criminal codes, court findings, and informal

47. See Claire Kebodeaux, *Rape Sentencing: We're All Mad About Brock Turner, But Now What?* 27 KAN. J.L. & PUB. POL'Y 30, 40 (2018) ("It is questionable whether current sentencing structures, which so often culminate in a sentence to jail or prison, are responsive to, and lead to the redressing of, the actual harm, including psychic harm, crimes inflict on communities as a whole." (internal quotations omitted)).

48. See Viscomi, *supra* note 35, at 176–80 (describing the evolution of rape law as rife with misogyny and skepticism of victims, including "the prevailing view . . . that female victims were emotionally disturbed and their alleged assailants were tragic victims of manipulated social beliefs until proven otherwise").

49. See *id.* at 186–87 ("Women of color in the media are often portrayed as promiscuous or hypersexual, perpetuating the idea that women of color cannot be raped because they are willing participants in all sexual activity." (internal quotations omitted)).

50. See Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 13 (2006)

[L]ess politically powerful persons and groups that suffer relatively unrecognized, not well understood, and unarticulated harms, who as a consequence are living out lives that are to varying degrees invisible as well as lesser (including poor people, women, non-whites, and many others), disproportionately suffer the consequences of this tectonic shift in our habits of thought. Put the marginality of the concept of harm in the academic-like critique of law that considers itself in any way political together with the marginality of the harms suffered disproportionately by subordinated groups, and you get a pretty toxic brew. Gendered harms, raced harms, harms of poverty, and so on are marginalized within our understanding of harm, which is itself marginalized within consequentialist approaches to law and its creation and reform, which are themselves marginalized in mainstream legal thought and thoroughly disparaged in progressive thinking. So, for all these reasons, the harms that women disproportionately sustain are at the edges of legal consciousness. (citation omitted).

decisions by advocates and law enforcement officers.⁵¹ Sexual violence survivors, especially poor women of color, are uniquely vulnerable to ongoing, intangible harms.⁵² For example, women, particularly poor women, who experience gender-based violence are more prone to negative health outcomes.⁵³ More so, poor women of color who survive sexual assault face decreased income and employment opportunities, increased risk of losing child custody, increased risk of homelessness, and mental health deterioration.⁵⁴

The intersectional identities and needs of sexual violence victims were likewise absent from the “rape reform” movement of the past forty years—a movement nonetheless fraught with debate and harshly criticized for causing more harm than it resolved.⁵⁵ Rape reform failed because it did not successfully match remedies to harms. Instead, the criminal system needs to acknowledge victims’ preferred remedies and, in some cases, the inadequacy of traditional legal remedies that do not cultivate healing.⁵⁶ Victims need legal spaces in sexual violence

51. See, e.g., Ofseyer, *supra* note 42, at 417; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 244 (1989); Claire Stimpson, *A Feminist Analysis of the Harm Principle: The Financial Element in Fraud*, 38 ALT. L.J. 103, 105 (2013).

52. See Cantalupo, *supra* note 26, at 62 (“Harms arising from unjust social relationships should be a central factor in government law and policy that affects subordinated groups.” (internal quotation omitted)).

53. See Cheryl A. Sutherland et al., *Beyond Bruises and Broken Bones: The Joint Effects of Stress and Injuries on Battered Women’s Health*, 30 AM. J. COMM. PSYCH. 609, 612 (2002) (noting a study indicating “that the effects of abuse remain strong even when controlling for women’s low-income status; low-income ‘abused’ women reported higher stress levels and poorer health outcomes than did the group of low-income ‘nonabused’ women” (citing Kimberly Kay Eby, *Experiences of Abuse and Stress: A Path Model of Their Joint Effects on Women’s Psychological and Physical Health* (1996) (Ph.D. dissertation, Michigan State University) (ProQuest))).

54. See, e.g., Christa Conry, *Forbidden Fruit: Sexual Victimization of Migrant Workers in America’s Farmlands*, 26 HASTINGS WOMEN’S L.J. 121, 130 (2015).

55. See Viscomi, *supra* note 35, at 175–76 (juxtaposing the anti-carceral feminists who criticized the rape reform movement as doing “infinitely more harm than good,” similar to “other hyper-punitive movements,” with reformers who complimented the movement for its “broadened definition of sexual assault, strengthened criminal due process protections for victims,” and other alleged legal successes (internal quotation omitted)).

56. See *id.* at 182–83

cases, literally and figuratively, to relate their perspectives about personal harms.⁵⁷

Sexual assault survivors are empowered by opportunities to articulate what constitutes harm.⁵⁸ The legal and nonlegal professionals encountered by sex crime victims should be equipped to give survivors options for harm-reducing remedies.⁵⁹ Remedies must include acknowledgment of the intangible harms stemming from the evidence-based, trauma-informed practices employed by victim advocates and recognized by a growing number of legal scholars.⁶⁰ For example, in their groundbreaking project studying types of sexual assault harm present in victim impact statements, Professors Jamie Abrams and Amanda Potts described the deep complexity of harm expressed in court by the sexual assault victims of gymnastics doctor Larry Nassar.⁶¹ As explained fully in Part III of this Article, the law should incorporate transformative justice's nonlegal remedies, which are tailored to account for the complex harms of sexual violence, including the intersectional harms of gender, race,

[R]ape victims seek justice in many different ways. While some seek conviction and incarceration, others prefer compensation from the offender or the state, a meaningful opportunity to tell their story to the community or offender, or for the offender to publicly acknowledge and apologize for the harm caused. For people who are victims of sexual violence, justice can manifest in many forms beyond the traditional criminal justice idea of punishment. A 2015 survey by the American Civil Liberties Union found that many survivors' goals did not align with the goals or operation of the criminal justice system. Responses supporting this conclusion fell into three main categories: (1) discontent with a lack of options other than punishment and separation from an abuser, (2) fear of a loss of control within the criminal justice system, and (3) fear of additional trauma from the criminal justice process. (internal quotation omitted).

57. See Capers, *supra* note 44, at 1602–03.

58. See, e.g., *id.* at 1605, 1606 (posing a hypothetical scenario in which Jeffrey Epstein's victims were “empowered to demand account of him and to say themselves what they thought was criminal,” as a way of “reclaim[ing] prosecutorial agency” and “seek[ing] direct criminal recourse to vindicate harms to them”).

59. See Bazelon & Green, *supra* note 2, at 327–28.

60. See, e.g., Katirai, *supra* note 12, at 87–88.

61. See Jamie Abrams & Amanda Potts, *The Language of Harm: What the Nassar Victim Impact Statements Reveal About Abuse and Accountability*, 82 PITT. L. REV. 71, 74 (2020).

and economic marginalization that many survivors experience.⁶²

B. Civil Legal Remedies for Sexual Violence Are Inadequate

Traditional civil legal remedies are imperfect fixes for experiences like sexual violence that are not centered in tangible harms. In torts, for example, the harm principle was based on economic harm in the commercial context.⁶³ Tangible goods and precise dollar amounts are discernable, and items lost or injured are universally relatable. Conversely, lawsuits based on sexual violence involve more complex behavior and less relatable results, therefore creating challenges in quantifying appropriate remedies.⁶⁴ This Subpart discusses the narrow range of remedies available to sexual violence survivors, and the limitations of those remedies, in four major types of civil actions: tort actions, civil rights cases, third-party lawsuits, and civil protective orders.

1. Tort Actions

Civil lawsuits for gender-based violence are important legal tools grounded in the pursuit of justice.⁶⁵ Some advocates and scholars maintain that tort actions are more effective for empowering sexual violence victims and redressing harms than criminal prosecutions.⁶⁶ Nevertheless, sexual violence lawsuits are limited by a remedies infrastructure that assumes the person experiencing the harm, or a fact-finder, can

62. See Richard S. Saver, *Medical Research and Intangible Harm*, 74 U. CIN. L. REV. 941, 986–87 (2006) (“[G]reater flexibility regarding intangible harm claims would make better use of the law’s expressive function to promote the respect-for-persons principle. Often, laws can have symbolic meaning, convey social messages, and influence attitudes and norms in a far more powerful way than the threat of legal sanctions.” (citation omitted)).

63. See Richard A. Epstein, *The Path to The TJ Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 1 (1992).

64. See Wexler et al., *supra* note 21, at 78.

65. See Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FL. ST. U. L. REV. 731, 731 (2007) [hereinafter Goldscheid, *Elusive Equality*]; cf. Martha Chamallas, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 816 (1990).

66. See Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 KAN. L. REV. 695, 695 (2014).

quantify that harm as part of a damages calculation.⁶⁷ The problem is not that emotional suffering caused by sexual violence is impossible to discern.⁶⁸ The specific intangible psychological harms caused by sexual violence, such as depression and Post-Traumatic Stress Disorder (PTSD), are well-documented.⁶⁹ Psychological harm, though, is notoriously difficult to quantify in ways that translate to appropriate financial damages.⁷⁰ Tort actions for sexual violence can also be financially draining and time-consuming.⁷¹ Tort lawsuits are subject to state laws prohibiting claims outside short statutes of limitation and against spouses or intimate partners.⁷² Hiring a private attorney is daunting and expensive—even under contingent fee arrangements, many lawyers require plaintiffs to pay their litigation costs.⁷³ The standards of proof for sexual violence torts favor perpetrators by including requirements like proving a lack of affirmative consent.⁷⁴ Even if a survivor's tort action succeeds, enforcing a

67. See Seidman & Vickers, *supra* note 19, at 481.

68. See, e.g., NICOLE P. YUAN ET AL., NAT'L RES. CTR. ON DOMESTIC VIOLENCE, THE PSYCHOLOGICAL CONSEQUENCES OF SEXUAL TRAUMA 5 (2006), <https://perma.cc/3AK4-7LFZ> (PDF).

69. See *id.*; Hodgson, *supra* note 19, at 1206–07.

70. See, e.g., Scarlett & Weyrick, *supra* note 22, at 413 (“[O]ne is never able to put a price on the trauma and harm [sexual violence] survivors carry . . .”); Goldscheid, *Elusive Equality*, *supra* note 65, at 771.

71. See Hodgson, *supra* note 19, at 1218–19

Filing a claim against a perpetrator may be prohibitively expensive for victims of sexual assault if they are unable to retain an attorney on a contingent fee or reduced rate basis. It may also be a waste of the victim's time and resources to file a lawsuit against a perpetrator who lacks adequate resources to afford to pay any damages awarded. (citations omitted).

72. See Goldscheid, *Elusive Equality*, *supra* note 65, at 743–44.

73. See *supra* note 71 and accompanying text; see also Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 77 (2006) (“[T]raditional legal service programs have been unavailable to rape victims and public funding, such as legal assistance to victim grants, currently may not be used to pursue tort actions.” (citation omitted)); Goldscheid, *Elusive Equality*, *supra* note 65, at 769–70.

74. See Martha Chamallas, *Will Tort Law Have Its MeToo Moment?*, 11 J. TORT L. 39, 52 (2018) [hereinafter Chamallas, *Will Tort Law Have Its MeToo Moment?*]

monetary judgment against the defendant, who may legitimately lack financial resources, can be difficult or impossible.⁷⁵ Finally, while financial compensation is a critical component of intersectional law reform and can address the victim's financial need,⁷⁶ money alone rarely resolves sexual violence's intangible harms.⁷⁷

[A] main obstacle to successful prosecution of a sexual battery or assault tort claim against the offender is application of an outdated and inhospitable doctrine of consent. . . . Additionally, no liability is found in cases of so-called apparent consent, where a person in the position of the defendant reasonably believes that the plaintiff is consenting. These definitions of actual and apparent consent embrace the perpetrator's perspective and make it very difficult for victims of acquaintance rape to prevail. To top it off, for the first time, the Restatement has also taken the position that it is the plaintiff who shoulders the burden of proof to prove her lack of consent, rather than assigning that burden to the defendant as an affirmative defense.

We are at a moment when hundreds of colleges have sought to curb campus rape by changing their disciplinary codes to embrace the concept of "affirmative consent," a concept that places responsibility on individuals who initiate sex to secure the affirmative permission of their partners before engaging in sexual conduct. Even though a new generation of women believe that "only yes means yes," tort law lags behind, finding no violation in many situations that victims would call rape. (citations omitted).

75. See *supra* note 71 and accompanying text; see also Goldscheid, *Elusive Equality*, *supra* note 65, at 768–69.

76. See Goldscheid, *Elusive Equality*, *supra* note 65, at 775

At least one recent study of domestic violence victims confirms what antiessentialist scholars have argued: that when asked about social and structural aspects of domestic and sexual violence, women of color tend to define domestic violence in terms of interlocking economic[,] political[,] and social realities rather than in terms of gender alone. This result is consistent with commentators' observations that the emphasis on gender to the neglect of class and race skewed the "movement" to focus on middle-class, white women. These studies also confirm the importance of concrete and economic remedies and the disconnect between current criminal and civil justice responses and victims' stated needs and concerns. For example, studies confirm women's concern for shelter and financial support. For some, financial need is a "life-defining" circumstance that informed their response to the abuse. . . . Other studies confirm the centrality of concrete resources in improving victims' quality of life and in reducing their vulnerability to future abuse. (citations omitted).

77. See Wexler et al., *supra* note 21, at 77.

2. Civil Rights Cases

Civil rights lawsuits are another important pathway to recovery for many sexual violence victims.⁷⁸ As with torts, the financial remedies available in civil rights actions can help survivors access meaningful treatment and remediate collateral economic consequences—such as academic or career disruption—caused by emotional distress.⁷⁹ Injunctive relief can be useful in civil rights actions for sexual misconduct at work or school, where survivors often desire non-financial remedies like separation from the perpetrator or cultural change in the organization.⁸⁰ The entertainment industry’s Time’s Up movement, for example, encouraged hundreds of victims to file workplace harassment and discrimination claims.⁸¹ Claims stemming from the Time’s Up and the #MeToo movement “opened the floodgates to the modern-day reckoning with sexual and sexist abuse in the workplace.”⁸² Rights-based litigation can catalyze broad, sustainable law and policy reform if it accounts for intersectional harms and centers the voices of the subordinated, rather than perpetuating the myth of the monolithic (white, privileged, cisgender female) victim.⁸³

78. See Conry, *supra* note 54, at 123.

79. See Cantalupo, *supra* note 26, at 41–54 (detailing the commonality of campus and workplace sexual violence, particularly against women of color, and explaining the use of civil rights lawsuits in those contexts); see also Hodgson, *supra* note 19, at 1209.

80. See Wexler et al., *supra* note 21, at 61–64; see also Cantalupo, *supra* note 26, at 69–79 (detailing organizational and cultural steps to “halt[] the erasure of women students of color from the dominant narrative—as well as from our collective images of what sexual harassment in education is, and who experiences its harms”).

81. See Wexler et al., *supra* note 21, at 58.

82. *Id.* at 50.

83. See Goldscheid, *Elusive Equality*, *supra* note 65, at 764–65

As Liz Schneider has argued, rights-based advocacy can be a catalyst for organizing and catalyzing political action. Kimberlé Crenshaw similarly has observed that law reform has served an important cultural role by eliminating symbolic manifestations of racial oppression, even though it has not achieved material equality. Litigation accordingly is most powerful when it complements social activism movements addressing the same issues. Civil rights claims to redress domestic and sexual violence readily can be seen in this context. (citations omitted)

see also Wexler et al., *supra* note 21, at 55 n.50.

Notably, the Title IX movement against campus sexual assault has been led by women of color since the mid-2010s, and has resulted in tremendous cultural change and an increase in legal advocacy for survivors.⁸⁴ Civil rights actions can thus present opportunities for both individual and collective healing from sexual violence.⁸⁵

Civil rights claimants in sexual violence cases nevertheless face challenges like forced arbitration, hobbling nondisclosure agreements, and the risk of defamation lawsuits.⁸⁶ As discussed in Part I.A, engaging with the criminal system can be retraumatizing for survivors, and civil rights actions similarly suffer from being inherently formalistic and adversarial.⁸⁷ In Title IX actions, for example, strict standards of proof present significant barriers to recovery.⁸⁸ Gendered presumptions about how women should behave also impact factual determinations that can end lawsuits and perpetuate structural violence.⁸⁹ For women of color, coming forward with

84. See Cantalupo, *supra* note 26, at 4, 59–63.

85. See Goldscheid, *Elusive Equality*, *supra* note 65, at 735 (introducing “the transformative potential of civil rights remedies from several perspectives: the impact on public and other policies, the potential to change discriminatory attitudes, and the role civil rights claims play as part of a larger social movement”).

86. See, e.g., Wexler et al., *supra* note 21, at 58–59 (describing Time’s Up’s efforts to prevent “contracts that force harassment and discrimination claims into arbitration,” defend against defamation suits brought by those named as perpetrators of misconduct, and “prohibit companies from forcing employees to sign nondisclosure agreements which forbid them from speaking publicly about workplace wrongs” (citations omitted)).

87. See *supra* Part I.A; Katirai, *supra* note 12, at 102–06.

88. See Dana Bolger et al., *A Tale of Two Title IXs: Title IX Reverse Discrimination Law and Its Trans-Substantive Implications for Civil Rights*, 55 U.C. DAVIS L. REV. 743, 749 (2021)

Even as the Supreme Court reaffirmed that sexual harassment violated Title IX’s sex equality guarantee, it established onerous standards for plaintiffs seeking to vindicate their Title IX rights through the law’s implied private right of action. . . . [A] plaintiff who experiences sexual harassment must ordinarily establish that (1) the harassment they experienced was so “severe, pervasive, and objectively offensive” that it effectively denied the plaintiff access to their education; (2) a school official with authority to take corrective action had “actual notice” of the harassment; and (3) the school was “deliberately indifferent” to the misconduct. (citation omitted).

89. See, e.g., Margaret E. Johnson, *Avoiding Harm Otherwise: Reframing Women Employees’ Responses to the Harms of Sexual Harassment*,

a sexual assault claim can be particularly daunting due to cultural barriers and multiple layers of subordination.⁹⁰ Finally, discerning appropriate consequences to redress sexual harms and avoiding disproportionate consequences is an ongoing challenge in civil rights litigation.⁹¹

3. Third-Party Lawsuits

Lawsuits against third parties have been a successful method of harm redress for issues like child sexual abuse, yielding high-profile verdicts against large organizations like the Catholic Church, the Boy Scouts of America, and universities.⁹² The lawsuits against the Pennsylvania State University (“Penn State University”) by Jerry Sandusky’s victims resulted in millions of dollars in settlement payments.⁹³ Third-party lawsuits against large organizations can foster systemic change and provide resources to victims for recovery tools like psychological treatment.⁹⁴ A significant downside, however, is time. Victims must typically wait until completion of all related criminal cases before pursuing third-party lawsuits, a lengthy prospect in many cases.⁹⁵

80 TEMP. L. REV. 743, 796–97 (2007) (describing a court’s “dismiss[al] [of] the relevance of plaintiff’s psychological trauma being exacerbated as a result of reporting the harassment,” and calling for a revamped legal structure for workplace sexual harassment claims that incorporates principles of gender bias and perception of harm by female victims (citations omitted)).

90. See Cantalupo, *supra* note 26, at 33; see also *supra* note 76 and accompanying text.

91. See Wexler et al., *supra* note 21, at 66–68, 84–85.

92. See Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 133 (2013) [hereinafter Chamallas, *Vicarious Liability*].

93. See Des Bieler, *Penn State Settles Lawsuit with Man Claiming Molestation by Jerry Sandusky*, WASH. POST (Jan. 19, 2018), perma.cc/RLM9-HY4Q.

94. *E.g.*, Chamallas, *Vicarious Liability*, *supra* note 92, at 179–81.

95. *Cf.* Sec. & Exch. Comm’n v. Dresser Indus., Inc., 628 F.2d 1368, 1375–76 (D.C. Cir. 1980) (“[T]he strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.”).

Similar pros and cons exist in survivor lawsuits based on federal civil rights actions.⁹⁶ Civil rights lawsuits against third parties are relatively rare, but are nevertheless available under certain federal, state, and local statutes, and may offer sexual violence survivors more transformative remedies along with financial relief.⁹⁷ Title VII allows victims to sue employers for sexual harassment by another employee under a theory of vicarious liability.⁹⁸ Students who experience sexual violence at school can similarly sue their school under Title IX's vicarious liability theory; however, the standard for liability is higher: actual knowledge is required, rather than the constructive notice required in employment cases.⁹⁹ Lawsuits for sexual violence against third-party institutions are becoming more common and more creative in their framing—using a combination of vicarious liability and negligence theories, for example—and a leading torts scholar recently speculated that these suits are likely to increase as a result of the power of #MeToo and similar movements.¹⁰⁰ Nonetheless, it is nearly impossible to prevail against government entities in one of these suits, as demonstrated by one case in which a victim was unable to sue law enforcement for their “refusal to enforce a domestic violence restraining order,” which then resulted in the murder of the victim’s three young daughters.¹⁰¹

4. Civil Protective Orders

Civil protective orders for sexual violence are available in most states, and can provide psychological relief for survivors

96. See, e.g., Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1058–60 (2015).

97. See Goldscheid, *Elusive Equality*, *supra* note 65, at 748, 756–67 (advocating for increased use of civil rights claims against government actors like prisons, as well as individuals who cause sexual harms).

98. See, e.g., Conry, *supra* note 54, at 133.

99. See Silbaugh, *supra* note 96, at 1058–59.

100. See Chamallas, *Will Tort Law Have Its MeToo Moment?*, *supra* note 74, at 53.

101. Jill C. Engle, *Comparing Supreme Court Jurisprudence in Obergefell v. Hodges and Town of Castle Rock v. Gonzales: A Watershed Moment for Due Process Liberty*, 17 GEO. J. GENDER & L. 575, 578 (2016).

with no-contact provisions, as well as collateral relief like housing and workplace protections.¹⁰² Although standards of proof can vary from state to state, the standard required for a restraining order is always lower than the “reasonable doubt” standard required in criminal cases. Moreover, state and local evidentiary rules and protocols in civil protective order cases sometimes provide advantages, both formal and informal, over criminal law. In most states, the violation of a civil protective order is a criminal offense, which can then bolster a survivor’s access to enforcement of the order.¹⁰³ In an ideal scenario, a survivor who seeks a civil protective order has access to the best of both worlds—the civil and criminal legal systems.

Certainly, this scenario is far from common, and seeking a civil protective order may cause additional harm to survivors, especially those who are already marginalized by race, gender, and/or poverty, by exposing them to retraumatization and dampening of their negotiating power.¹⁰⁴ Still, the diversity of injunctive relief available in civil lawsuits lends itself to creative resolutions like apologies and therapeutic interventions for offenders.¹⁰⁵ Civil protective actions are

102. See *Domestic Violence Restraining Orders*, WOMENSLAW.ORG, <https://perma.cc/BH7G-PTC2>.

103. See, e.g., CAL. PENAL CODE § 273.6 (West 2022).

104. See Katirai, *supra* note 12, at 85

[The] risk of retraumatization can have a chilling effect on the participation of survivors in court proceedings, including . . . civil proceedings to establish and maintain orders of protection and custody and child support orders. In the civil context, many survivors may settle for less in mediation or settlement negotiations or opt out of participating in the legal system altogether for fear of being traumatized or dissatisfied, often because of previous experiences. . . . Given the broader inequalities faced by women in poverty and women of color, the chilling effect of retraumatization can have a particularly harmful effect to already disadvantaged, vulnerable, or marginalized populations. (citations omitted).

105. See Bublick, *supra* note 73, at 73–74

Because tort actions are filed by the victim herself, not on behalf of the state, victims control the decisions attendant to litigation, including when and whether to settle or dismiss a case. As such, victims can shape the litigation to meet their personal objectives. . . . [E]ven in the many cases in which victims cannot expect to recover monetary damages, tort suits can aid victims in obtaining non-monetary objectives such as an apology or the assailant’s transfer to a different university, apartment complex, or job. (citations omitted).

better suited than criminal actions for victim-centric, holistic approaches such as “community service that relates to the underlying harm.”¹⁰⁶ Pursuing transformative justice should include incorporation of these effective civil remedies.

II. FROM RESTORATIVE TO TRANSFORMATIVE JUSTICE

The most innovative, therapeutic methods of justice incorporate legal remedies with nonlegal ones, taking a holistic view of victim empowerment that transcends traditional notions of legal recourse.¹⁰⁷ These methods are rooted in the interdisciplinary research and commentary, started decades ago by social and legal advocates, on what was generally referred to as restorative justice.¹⁰⁸ Holistic approaches, which encompass both legal analysis and legal remedies, stress restorative values over retributive values.¹⁰⁹ There is significant data supporting the effectiveness of reparative, therapeutic approaches to help victims of crimes heal in ways that traditional legal remedies do not address.¹¹⁰ These approaches are sometimes conflated as all being aspects of “restorative justice,”¹¹¹ but there are important distinctions

106. Wexler et al., *supra* note 21, at 79 (citation omitted); *see, e.g., id.* (describing football player Ray Rice hosting domestic violence awareness training for young men and making a video about his poor decision-making for the NFL).

107. *See, e.g.,* Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEX. L. REV. 915, 977 (2017) (describing how court-mandated counseling can “build trust and especially community” after traumatic events).

108. *See* Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 948–53 (2019) [hereinafter Cohen, *Moral Restorative Justice*]; *see, e.g.,* CAROL SMART, *FEMINISM AND THE POWER OF LAW* 5 (1989).

109. *See* Cohen, *Moral Restorative Justice*, *supra* note 108, at 951. *But see* BUMILLER, *supra* note 29, at 162–63 (cautioning against seeing restorative justice programs as a panacea for sexual violence legal reform).

110. *See, e.g.,* OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, DOJ, EFFECTIVENESS OF RESTORATIVE JUSTICE PROGRAMS (2017), <https://perma.cc/WUN2-8YT6> (PDF) (outlining a study of the effectiveness of restorative justice programs for juvenile offenders, and concluding that the findings “suggest certain restorative justice programs could reduce future youth delinquency and increase victim satisfaction with the outcome”).

111. *See* Sorokin & Stein, *supra* note 38, at 1318 n.11.

between the strategies, values, and limitations of the movements self-identifying as restorative justice, therapeutic justice/jurisprudence,¹¹² and transformative justice.¹¹³

This Part describes each of these approaches and the ways they cultivate remedies for intangible harms. I ultimately argue that transformative justice is the best approach. Using a community-action-based approach, transformative justice draws upon intersectionality and other gender- and race-based critical legal theories to address the intangible harms of sexual violence related to victims' diverse identities.¹¹⁴ I argue in Part

There are some who believe very strongly that restorative justice is a term that refers to a set of methods or processes for responding to crime. . . . There are others who reject what they see as a rather narrow . . . definition, and they take the position that restorative justice is actually a theory of justice. . . . Still others like to focus on thinking about restorative justice as a set of values. (internal quotation omitted).

Sorokin and Stein also note that “[Danielle] Sered’s discussion of restorative justice, while often focused on processes and methods—like circle dialogues and mutually agreed-upon reparation projects—also highlights larger principles and values.” *Id.* They cite Sered’s explanation of restorative justice’s underlying ideals, specifically that it is, more broadly, “a decision-making process that involves those most directly impacted by a given harm in identifying the pathway toward repair—and then carrying out the actions to get there,” and therefore “requires a fundamental belief in the humanity of those who have been harmed and those who caused harm.” *Id.* (quoting SERED, *supra* note 38, at 135, 139). These ideals are underscored by the idea that restorative justice’s “primary concern [is] with harm rather than with broken rules.” *Id.* (quoting SERED, *supra* note 38, at 138).

112. See, e.g., Ursula Castellano, 49 CONTEMP. SOC. 299, 299–300 (2020) (reviewing KAREN A. SNEDKER, *THERAPEUTIC JUSTICE: CRIME, TREATMENT COURTS, AND MENTAL ILLNESS* (2018)).

113. See Johonna Turner, *Unitive Justice and Re-entry Culture Change: Race, Gender, and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach*, 23 RICH. PUB. INT. L. REV. 267, 270 (2019) [hereinafter Turner, *Race, Gender, and Restorative Justice*]; *id.* at 279

Transformative Justice seeks to provide people who experience violence with immediate safety, long-term healing and reparations; to demand that people who have done harm take accountability for their harmful actions, while holding the possibility for their transformation and humanity; and to mobilize communities to shift the oppressive social and systemic conditions that create the context for violence. (internal quotation omitted).

114. See Kimberlé Crenshaw, *Why Intersectionality Can’t Wait*, WASH. POST (Sept. 24, 2015, 3:00 PM), <https://perma.cc/4H66-9NY3>; Alia E. Dastagir, *What Is Intersectional Feminism? A Look at the Term You May Be Hearing a Lot*, USA TODAY (Jan. 19, 2017, 2:42 PM), <https://perma.cc/5UFY-SC8Z> (last updated Jan. 25, 2017, 8:02 AM).

III that transformative justice offers the best approach for effective remedies for sexual violence, both inside and outside the legal system.

A. Restorative Justice

Of these approaches, restorative justice is the best-known alternative to criminal sanctions and has a limited history of use in cases of sexual assault and other forms of gender-based violence.¹¹⁵ Restorative justice is rooted in principles of accountability and community-building, and aims to provide a platform for crime victims to heal.¹¹⁶ It is both ancient and innovative, being rooted in indigenous cultures but offering positive conflict resolution approaches that are novel to most legal systems.¹¹⁷ Restorative methods include those who cause injuries and community members in reconciliation, and cultivate accountability and harm reduction with methods like apologies and similar dialogues.¹¹⁸ Restorative justice is inherently a relational way of approaching the law—a way of healing harms by integrating the survivor, the wrongdoer, and all the people and communities whose lives they touch.¹¹⁹

Some jurisdictions have integrated restorative justice into the criminal justice system as an alternative to more punitive

115. See Mimi Kim, *Transformative Justice and Restorative Justice: Gender-based Violence and Alternative Visions of Justice in the United States*, 27 INT'L REV. VICTIMOLOGY 162, 169 (2020).

116. See Turner, *Race, Gender, and Restorative Justice*, *supra* note 113, at 269.

117. See Daniel Griffith, *Healing the Harm: The Effectiveness of Restorative Justice in Response to Clergy Abuse*, 17 U. ST. THOMAS L.J. 18, 19–22 (2020).

118. See Cohen, *Moral Restorative Justice*, *supra* note 108, at 891

Restorative justice is a mediative process that invites offenders to directly experience the effects of their crime through conversations with victims (as well as through conversations with family and community members convened into “conferences” or “circles”), and then to deliberate about how to repair such effects through emotional, spiritual, and material reparations. (citation omitted).

119. See Susan L. Brooks, *Re-imagining the Transformative Potential of Therapeutic Jurisprudence and Restorative Justice Using a Relational Paradigm*, 2 INT'L J. RESTORATIVE JUST. 487, 489 (2019) (contrasting restorative justice’s relational ideology that emphasizes “our inherent interconnectedness to one another as humans” with the criminal justice system’s “individualistic rights-based approach”).

remedies.¹²⁰ Its most common use is in the juvenile justice context, but it has also been adopted by some criminal and domestic violence courts.¹²¹ Nonetheless, using restorative justice in sexual violence cases remains rare.¹²² Furthermore, according to many legal scholars and advocates, the entanglement of restorative justice with the formal legal system is problematic because it fails to recognize that relationship violence must be decoupled from state intervention for meaningful remedies to take effect.¹²³

Additionally, the anti-carceral feminist movement has been critical of restorative justice approaches to sexual assault and domestic violence that are controlled by the courts, characterizing them as mere alternatives within a state-run system that is ultimately punitive.¹²⁴ Although the modern violence-against-women system has attempted to use mass incarceration, family separation, and economic disempowerment to prevent gender-based violence, an appreciable decrease in cases has not resulted.¹²⁵ When our

120. See Cohen, *Moral Restorative Justice*, *supra* note 108, at 893 (“[R]estorative justice is . . . increasingly promoted from within state institutions. For example, between 2010 and 2015, fifteen states enacted or updated restorative justice statutes” (citation omitted)).

121. See Kim, *supra* note 115, at 169.

122. See Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT’L L. REV. 377, 378 (2014); see also Bazelon & Green, *supra* note 2, at 297–98. *But see, e.g., id.* at 332–33 (describing one program in Pima County, Arizona that offered some victims of sexual assault “the opportunity to choose a restorative justice alternative” (citation omitted)); Griffith, *supra* note 117, at 37 (describing the extensive use of restorative justice in addressing cases of sexual abuse by the Catholic clergy in the Archdiocese of St. Paul, Minnesota).

123. See Bazelon & Green, *supra* note 2, at 296–98.

124. See *id.* at 300.

125. See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 3–8 (2018) [hereinafter GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*] (questioning whether a decrease in intimate partner violence can be tied to “criminal legal intervention,” particularly when “rates of intimate partner violence dropped less than the overall crime rate”); see also Caroline Bettinger-Lopez, *Introduction: Jessica Lenahan (Gonzales) v. United States: Implementation, Litigation, and Mobilization Strategies*, 21 AM. U. J. GENDER SOC. POL’Y & L. 207, 223 (2012)

[United Nations Special Rapporteur on Violence Against Women, Rashida] Manjoo observed a lack of legally binding federal provisions providing

failed carceral system includes restorative justice as just one of its many legal outcomes, the potential benefits of true restorative justice are eclipsed by the carceral state's ultimate goals of resolving cases by matching outcomes to state-controlled legal claims.¹²⁶ The power dynamics are completely devoid of survivors' needs unless those happen to coincide with the goals of the state in any given case.¹²⁷

As explained in detail in Part III, transformative justice's approaches center survivors' needs, as restorative justice does, but rejects the carceral state altogether. In the words of leading activist and scholar Dr. Mimi Kim, restorative justice and transformative justice are "two trajectories of justice [that are] distinct and yet, in limited situations, are starting to blend as the critical question of law enforcement involvement is brought to center."¹²⁸ Kim's position echoes the aspirations of critical legal theorist Professor Angela P. Harris, who maintains that "transformative justice . . . is an ideal that both restorative justice advocates and anti-subordination theorists can support."¹²⁹ Harris points out that

[r]estorative justice advocates and gender violence advocates have a common interest in identifying and addressing violence committed under the auspices of the family, the state, and the community. Transformative justice has the potential to link these advocates and critical

substantive protection against or prevention of acts of violence against women, which, combined with inadequate implementation of some laws, policies and programmes, has resulted in the continued prevalence of violence against women and the discriminatory treatment of victims, with a particularly detrimental impact on poor, minority and immigrant women. (internal quotations omitted).

126. See Kim, *supra* note 115, at 169–70.

127. See ANGELA Y. DAVIS ET AL., *ABOLITION. FEMINISM. NOW.* 138–39 (2022).

128. Kim, *supra* note 115, at 170.

129. Angela P. Harris, *Beyond the Monster Factory: Gender Violence, Race, and the Liberatory Potential of Restorative Justice*, 25 *BERKELEY J. GENDER L. & JUST.* 199, 200 (2010) [hereinafter Harris, *Beyond the Monster Factory*] (reviewing SUNNY SCHWARTZ WITH DAVID BOODELL, *DREAMS FROM THE MONSTER FACTORY: A TALE OF PRISON, REDEMPTION, AND ONE WOMAN'S FIGHT TO RESTORE JUSTICE TO ALL* (2009)).

scholars in alliances that can work on different scales, but with the same horizon of liberation.¹³⁰

Therefore, making transformative justice remedies for sexual violence survivors available inside the legal system—rather than exclusively outside the system—is the best approach to inculcate systemic reform.

B. *Therapeutic Justice*

Therapeutic justice¹³¹ is a way of understanding the legal system as a series of opportunities to solve problems in ways that are therapeutic, and to specifically avoid ways of solving problems in nontherapeutic ways.¹³² The method was developed by some of the early proponents of problem-solving courts, such as mental health courts and drug courts in the 1990s.¹³³ Therapeutic justice has been recognized as an approach that supports the goals of a variety of actors within the criminal justice system, including victims, defendants, and prosecutors.¹³⁴ Therapeutic justice is inherently interdisciplinary, and draws on approaches from social sciences that have proven to be effective in promoting

130. Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 65 (2011) [hereinafter Harris, *Heteropatriarchy Kills*].

131. The terms “therapeutic justice” and “therapeutic jurisprudence” are often used interchangeably by scholars, courts, and practitioners. For the sake of simplicity, I will use the term “therapeutic justice” exclusively from this point forward in the article, except when directly quoting experts who choose the phrase “therapeutic jurisprudence.”

132. See David Wexler, *Introduction* to THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 3, 3 (Nigel Stobbs et al. eds., 2019) (“[Therapeutic justice] was . . . developed from the insight that the law *itself* was often a facilitating or inhibiting factor in psychological well-being.” (emphasis in original)).

133. See David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIA. L. REV. 979, 979 (1991); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 38 (1999).

134. See, e.g., Carman A. Leone, *U.S. v. Hodge: A Case Study in the Use of the Cognitive Interview as a Means to Promote Therapeutic Jurisprudence in Sexual Assault Cases Under the Uniform Code of Military Justice (UCMJ)*, 74 A.F. L. REV. 201, 228 (2015).

wellbeing while also resolving interpersonal problems.¹³⁵ As explained by one legal commentator, “Although therapeutic jurisprudence originated as a concept geared toward mental health law, it has been applied in several disciplines under the law, including criminal law, tort law and family law.”¹³⁶

The trauma of sexual assault lingers and can prevent victims from effectively continuing their employment, academic, or other life goals.¹³⁷ It can therefore suppress economic success and increase the risk of impoverishment for victims of sexual assault.¹³⁸ When therapeutic remedies are used in sexual assault cases, the victim can regain significant control of their life, which is critical to healing.¹³⁹ Victims can benefit from trauma-informed, holistic, and effective methods of coming to terms with the harm they suffered at the hand of another. In some cases, the defendant is even willing to engage in seeking forgiveness, and early but promising data shows that, in these cases, both parties report increases in happiness and reduction in stress and anxiety.¹⁴⁰

The co-founder of therapeutic justice, David Wexler, describes its key components as “multi-disciplinary methods, incorporation of empirical knowledge, encouragement of broad participation and consultation[,] and aspiration towards a

135. See Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients, and Communities*, 13 CLINICAL L. REV. 213, 214, 216 (2006).

136. Leone, *supra* note 134, at 204 n.15 (citing David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 26 (2008)).

137. See Ilze Slabbert, *Domestic Violence and Poverty: Some Women's Experiences*, 27 RSCH. ON SOC. WORK PRAC. 223, 224 (2017).

138. See Hodgson, *supra* note 19, at 1209–10.

139. See Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 93–94 (2018)

[C]ontrol matters greatly to a survivor's recovery, often reducing symptoms of post-traumatic stress disorder (PTSD). Research has shown that it is present control, rather than past control (understanding why the assault occurred) or future control (controlling whether one will be assaulted again in the future), that furthers recovery most. Professor of psychology Ellen Zurbriggen explained: “Rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over his or her own body. A clearly established principle for recovery from these traumatic experiences is to rebuild trust and to reestablish a sense of control over one's own fate and future.” (citation omitted).

140. Cf. Wexler et al., *supra* note 21, at 87.

broader cultural shift,”¹⁴¹ namely “promoting a culture of psychological wellbeing and real and perceived access to justice as important goals of the law.”¹⁴² Another legal scholar, Susan L. Brooks, cites the opportunity to critically engage with the law relationally as an advantage of therapeutic justice, stating that “legal professionals and others working in the legal system can choose to engage and pursue our roles in ways that affirm this mutuality and connection, or we can act in ways that contribute to greater separation and disconnection.”¹⁴³ Brooks and other scholars have gone so far as to describe therapeutic justice’s potential, when used within systems and communities that also engage in restorative justice, to be “transformative.”¹⁴⁴ The transformative justice movement utilizes many of these same principles, but notably its genesis and its focus are distinctly community-based and sexual violence-focused.

C. *Transformative Justice*

Transformative justice is a related, but distinct, approach that insists on community-based remedies and prevention strategies against violence and abuse.¹⁴⁵ Transformative justice was developed by the group generationFIVE, which advocates for survivors of child sexual abuse and other forms of relationship violence.¹⁴⁶ generationFIVE frames these problems and the necessary responses as structural: trauma inflicted by violence perpetuates collective trauma, which is itself perpetuated by structural violence.¹⁴⁷ Thus, community responses are most appropriate to remedy harms like sexual violence that have collective impacts, even though the harms

141. Brooks, *supra* note 119, at 490.

142. *Id.* at 490–91 (quoting David B. Wexler, Moving Forward on Mainstreaming Therapeutic Jurisprudence (February 2014) (unpublished Discussion Paper No. 15-10), <https://perma.cc/36QP-L8FN> (PDF)).

143. *Id.* at 490.

144. *Id.*

145. See Kim, *supra* note 115, at 168.

146. See *About Us*, GENERATIONFIVE, <https://perma.cc/2TDS-8SDH>; see also Kim, *supra* note 115, at 168.

147. See Harris, *Heteropatriarchy Kills*, *supra* note 130, at 62.

are experienced individually.¹⁴⁸ As explained by Professor Amna Akbar, “generationFIVE builds a picture of the collective work that redressing and preventing child sexual abuse would take and highlights the absolute failure of the criminal legal system in so doing.”¹⁴⁹ Similarly, Dr. Mimi Kim, cofounder of the closely related groups INCITE! (led by women and queer people of color who have experienced violence) and Creative Interventions (an anti-violence collective), explains that “various community-based organizations, taking both formal non-profit organizational status and volunteer, grassroots political forms emerged throughout the first two decades of the new millennium to locate transformative justice efforts in specific, local contexts.”¹⁵⁰

Transformative justice emphasizes the role of the community in responding to sexual violence, and calls for alternatives to criminal sanctions—an affirmatively nonlegal approach with the goal of dismantling the criminal justice system.¹⁵¹ Most programs that offer transformative justice solutions operate wholly outside the legal system, and many operate further on the margins than even traditional nonprofit and nongovernmental organizations.¹⁵² For example, the Bay Area Transformative Justice Collective (BATJC) offers direct services to victims, community support, and practitioner trainings on transformative justice methods, such as apologies and other communication strategies.¹⁵³ The BATJC also conducts a free event called the Transformative Justice Study every other year.¹⁵⁴ The Transformative Justice Study is a

148. *See id.* at 62–63 (“This perspective suggests that communities ravaged by [sexual violence] may need not only material assistance and political empowerment but individual and collective healing before they can be declared transformed.”).

149. Akbar, *supra* note 32, at 1834.

150. Kim, *supra* note 115, at 168 (citation omitted).

151. *See id.*

152. The Bay Area Transformative Justice Collective is one of the largest of these kinds of programs, and advocates for a “world where everyday people can intervene” to prevent sexual violence. *Building Transformative Justice Responses to Child Sexual Abuse*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE, <https://perma.cc/4W8P-JBAR>.

153. *See id.*

154. *Transformative Justice Study*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE, <https://perma.cc/Q73G-TWTD>.

six-session opportunity to learn and practice the skills and values that are critical to the practices of transformative justice and community accountability.¹⁵⁵ As a community-based organization, the BATJC spends significant organizational energy building community bonds through activities like monthly community potluck meals at a church in Oakland.¹⁵⁶

These approaches are entirely outside the legal system, but they nonetheless incorporate concepts that undergird the legal system, including accountability and interdependence.¹⁵⁷ In this sense, transformative justice's extralegal approach can be as effective, if not more effective, at helping victims in the aftermath of crimes like sexual assault.¹⁵⁸ Victim dissatisfaction with the outcomes of sexual assault cases in the criminal legal system is well documented.¹⁵⁹ The BATJC and other transformative justice collectives enable victims to tap into their own unique needs for healing and recovery, which can vary significantly.¹⁶⁰ In a safe environment like the BATJC, a victim is surrounded by neighbors and resources, and can access community resources and cultivate supportive relationships for the future.¹⁶¹ Moreover, harms from sexual violence should be considered something that victims and their proxies (advocates, neighbors, family members, or professionals they interact with) can play a role in mitigating and redressing.¹⁶² Transformative justice incorporates

155. *Id.*

156. *See, e.g.*, Bay Area Transformative Justice Collective, *BATJC March Monthly Potluck*, FACEBOOK, (Mar. 3, 2020), <https://perma.cc/BA96-RMUT>.

157. *See BATJC Values and Practices*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE, <https://perma.cc/4UGV-FYGK>.

158. *See* Sorokin & Stein, *supra* note 38, at 1325.

159. *See, e.g.*, Kebodeaux, *supra* note 47, at 30–31 (discussing how victim advocacy groups circulated a petition, which was signed by over a million people, calling for the ouster of the judge who leniently sentenced Brock Turner after he was convicted of sexual assault).

160. *See* I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2475 (2021) (reviewing AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION ON MASS INCARCERATION* (2020)).

161. *See supra* note 153 and accompanying text.

162. *See* Kim, *supra* note 115, at 170 (“Transformative justice offers a liberatory and emergent vision of justice that asks the everyday person to participate. . . . It renders the intervention of violence and its prevention as

survivors and their proxies into a web of activists to manage the outcomes and the prevention of the harms of sexual violence.

III. TRANSFORMATIVE LEGAL REMEDIES ADDRESS INTANGIBLE AND INTERSECTIONAL HARMS OF SEXUAL VIOLENCE

Because of the legal system's inadequacy in sexual violence cases, transformative justice evolved specifically as an external, nonlegal response.¹⁶³ Survivors should have the option to access transformative justice within legal systems as well.¹⁶⁴ To manifest transformative legal remedies, advocates and policymakers must reassess the notion of harm as it relates to sexual violence and design victim-centric legal remedies for harm reduction.¹⁶⁵ Survivors articulate the remedies they need and, in testimonials years later, the remedies that helped them heal.¹⁶⁶ Sexual violence harms can be difficult to quantify and often are best understood as "intangible harms," which are difficult to pair with existing legal remedies.¹⁶⁷ To address the intangible nature of sexual violence harms, the law should center survivor autonomy,

an everyday democratic act [with] a meaningful role for anyone part of a family, a neighborhood, or a community.").

163. See Sorokin & Stein, *supra* note 38, at 1327 n.36 ("[T]ransformative justice . . . envision[s] a societal response to violence that eradicates carceral institutions." (citation omitted)).

164. See, e.g., Scarlett & Weyrick, *supra* note 22, at 428–39 (arguing for the use of transformative justice in Title IX cases).

165. See Wexler et al., *supra* note 21, at 76–77 (discussing the need for more restorative legal remedies for sexual violence and quoting one survivor who explained: "[Y]ou need to ask them, like 'What else is it that you need from me? How can I help you heal after I've wronged you?' That's the part that's missing." (citation omitted)).

166. See Thusi, *supra* note 160, at 2475 ("Research suggests that crime victims find [restorative and transformative justice programs] more satisfactory than they find the typical criminal legal process." (citation omitted)).

167. See, e.g., Elizabeth Zambrana, *The Social Distinction of "Invisible" Harms: How Recent Developments in the Particular Social Group Standard Fall Short for Victims of Gender-Based Harms Committed by Private Actors*, 36 WOMEN'S RTS. L. REP. 236, 264 (2015) (concluding that current legal standards in immigration asylum cases do not address harms by private actors and are "ill suited to account for the differing experiences of women who suffer gender-based persecution").

recognize sexual violence as a form of gender-based violence, and incorporate harm-reducing responses rooted in feminist and critical race legal theories.¹⁶⁸ Transformative justice is the best of those responses in the sexual violence context, and despite its roots as an exclusively nonlegal approach,¹⁶⁹ its methods offer examples that the legal system should learn from and adopt.

Transformative justice offers a blueprint for reframing our understanding of sexual violence harms, starting, for example, with language like a “person who caused harm” rather than an abuser, offender, or perpetrator.¹⁷⁰ This reframing is part of transformative justice’s “liberatory” approach, which includes entire communities and the ways that harms—like those caused by sexual violence—have directly and indirectly impacted all community members, not just the survivor and the person who caused them harm.¹⁷¹

Legal organizations and individuals who interact with sexual violence survivors should integrate transformative justice’s *nonlegal* remedies.¹⁷² Transformative justice is

168. See Julie Goldscheid, *Gender Neutrality, the Violence Against Women Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 626, 626 n.18 (2014) [hereinafter Goldscheid, *Gender Neutrality*]; see also Tzili Mor, *Feminist Rule of Law Reform and Health Impact of Legal Systems Premised on Women as Communal Gauges of Honor*, 44 U. BALT. L. REV. 237, 301 (2015)

Feminist legal theory questions the conceptualizing of rule of law that favors order premised on status quo of power relations and norms presumed to be a natural, or even inevitable default, a normative standard oft based on presumptions of gender inequality and bias. An effective feminist reform agenda would pair legal analysis with credible research to inform the public and policymakers about the adverse health consequences and human rights violations *and* the critical need for additional reforms. (emphasis in original) (citation omitted).

169. See Sorokin & Stein, *supra* note 38, at 1326–27, 1327 n.36.

170. Kim, *supra* note 115, at 168; see also Goldscheid, *Gender Neutrality*, *supra* note 168, at 628–31.

171. See Ariel Eckblad, *In Pursuit of Fairness: Re-negotiating Embedded Norms & Re-imagining Interest-Based Negotiation*, 26 HARV. NEGOT. L. REV. 1, 13–14 (2020) (describing transformative justice’s “liberatory” approach, which recognizes that harms resulting from violence can best be addressed by taking a non-punitive approach that inquires “what are the needs of the person who has been harmed *and* what social, political, and economic structures led to this harm?” (emphasis in original)).

172. See, e.g., Goldscheid, *Elusive Equality*, *supra* note 65, at 767.

informed by interdisciplinary research in public health, family studies, and the healing arts regarding harm-reducing remedies for survivors.¹⁷³ Connecting these nonlegal remedies to the spaces inhabited by professionals who can help sexual violence survivors navigate the legal system can shrink the law's harm-reducing remedy gaps.¹⁷⁴ Bringing together transformative justice advocates and legal system actors will not be easy. Many transformative justice proponents reject the legal system altogether, insisting that it is rooted in structural violence and that disconnection from the system is intrinsic to transformative justice's success.¹⁷⁵ The legal system does not always offer remedies that truly help victims, and has frequently embodied historic patterns of discrimination against marginalized groups like impoverished women of color.¹⁷⁶ The work of reform, however, should not stall for lack of consensus. The problem of inadequate remedies for sexual violence harms,

173. See, e.g., Donna K. Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 144 (Heather Strang & John Braithwaite eds., 2002) (advocating for an expansive ideology of transformative justice that “is informed by feminist/critical race feminist theory” and understands “the relationship of [domestic abuse] to social inequality”).

174. See, e.g., Wexler et al., *supra* note 21, at 51–52

[Tarana] Burke's vision of #MeToo . . . recognizes the value of addressing the systems and structures that allow harassment and sexual violence to flourish. Such a vision does not preclude individual accountability, but recenters such efforts as part of survivors' agency and healing. Thus, Burke's vision of healing seems to include: creating connections and sharing empathy among survivors; external recognition of victims by the community; discussions of accountability, transparency, and vulnerability by perpetrators; and considerations of how “collectively, to start dismantling these systems that uphold and make space for sexual violence.” (citations omitted).

175. See, e.g., Kim, *supra* note 115, at 168. *But see, e.g.*, Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1643 (2019) (“[E]fforts to reform criminal legal processes in order to attempt to realize idealized visions of justice are doomed to simply further entrench existing injustices *if they are not accompanied by more transformative demands.*” (emphasis added) (citation omitted)).

176. See, e.g., Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 227 (2018) (describing the dangerous trend of over-relying on empirical evidence in family law cases because “uncritically adopting evidence about present conditions without interrogating the role of historical discrimination that continues to disadvantage some families can replicate that discrimination”).

and the constellation of transformative justice remedies, are both large enough to find middle ground.¹⁷⁷

Transformative justice recognizes that remediation of individual harms (such as those caused by sexual violence) cannot be decoupled from harms caused by structural violence, most of which are intersectional.¹⁷⁸ The intersectional problems of poverty and gender-based violence, disproportionately experienced by women of color, are particularly stark. Living in poverty carries blatant tangible disadvantages—less money means fewer options for quality housing, nutritious food, and child-care.¹⁷⁹ The intangible impacts include emotional trauma and a chilling effect on

177. See Akbar, *supra* note 32, at 1844–45

[T]here are different conceptualizations of transformation and disagreements about whether alternative institutions and practices are prefigurative experiments (for anarchists), or stopgap measures until the state takes responsibility (for socialists). But across the ideological spectrum, there is recognition of the need to strengthen bonds of solidarity between communities stripped of connection by our carceral system. Communities must work together to reimagine safety; to care and provide for one another; and to prevent, intervene in, repair, and transform harm in response to all manner of social problems. (citations omitted)

see also Turner, *Race, Gender, and Restorative Justice*, *supra* note 113, at 285–87 (describing the intersections between restorative and transformative justice and the hope they offer for non-carceral remedies as part of “a constellation of alternative strategies and institutions . . . [in] a justice system based on reparation and reconciliation rather than retribution and vengeance” (quoting ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 107 (Greg Ruggiero ed., 2003))).

178. See Eckblad, *supra* note 171, at 15

[S]tructural violence is but another name for the myriad social structures that legitimize and perpetuate inequity. One such structure is the norms that “determine how power, privilege, wealth, and opportunity are distributed.” The two are symbiotic. And, as such, efforts dedicated to redressing the violence embedded in our social structures can be helpful in identifying similarly embedded norms. (citations omitted).

179. See Carlos Jurado, *The Fourth Sector: Creating a For-Profit Social Enterprise Sector to Directly Combat the Lack of Social Mobility in Marginalized Communities*, 13 HASTINGS RACE & POVERTY L.J. 349, 356 (2016)

Decades of disproportionate income inequality have enabled the creation and growth of high poverty neighborhoods that are largely inhabited by people of color. These neighborhoods are faced with social isolation . . . and generally lack access to the private sector, which creates a lack of access to the mainstream economy. (citations omitted).

employment and economic advancement.¹⁸⁰ The dual disadvantages of gender-based violence and impoverishment expose women to extreme vulnerabilities.¹⁸¹ For example, Donna Coker explains the multilayered impacts of gender-based violence on women of color living in poverty, especially Latinx women.¹⁸² Literature abounds on the intersection of these two social problems.¹⁸³ Sadly, though, attempts to reduce both female impoverishment¹⁸⁴ and gender-based violence¹⁸⁵ have failed miserably over the past thirty years. Intersectionality recognizes that sexual assault, as a form of gender-based violence, acts to subordinate women of color in ways that overlap with other disadvantages such as impoverishment.¹⁸⁶ A central problem is the lack of empathy from individual actors and legal systems in relation to these intersectional experiences.¹⁸⁷ Poor women of color who suffer sexual assaults should have legal and extralegal options that address the unique intersection of all these identities—racial and gender subordination, experiences with sexual assault, and the indignity of impoverishment.

Sexual violence legal reform should include an intersectional and holistic view of the nature of gender-based violence as a form of male domination, but depart from former reform movements by recognizing that systemic remedies and responses must include the perspectives of those being

180. *See id.* at 352–53.

181. *See* Slabbert, *supra* note 137, at 224 (“Many battered women never escape their situation, often because they do not have the means.”).

182. *See* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1028 (2000).

183. *See, e.g.*, Geraldine Terry, *Poverty Reduction and Violence Against Women: Exploring Links, Assessing Impact*, 14 DEV. PRACT. 469, 470–73 (2004).

184. *See* Ezra Rosser, *Reclaiming Demographics: Women, Poverty, and the Common Interest in Particular Struggles*, 20 J. GENDER, SOC. POL’Y & L. 767, 769 (2012).

185. *See supra* note 125 and accompanying text.

186. *See, e.g.*, AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION 10, 17 (2020).

187. *See* Cantalupo, *supra* note 26, at 81.

harmed.¹⁸⁸ Female oppression is enmeshed with other structures reliant on male dominance, such as racial and age discrimination, rendering women of color uniquely injured by gender-based violence.¹⁸⁹ The harms experienced by women who are sexually assaulted have historically been met with obtuse consequences by courts. Victims know what remedies would be meaningful and therapeutic to them, but most courts have not been willing to implement those remedies.¹⁹⁰ Legal approaches informed by critical race and feminist legal theory account for these patterns, and those approaches can operate as reforms that eradicate structural oppression.¹⁹¹ There is a need for the legal system, as well as the healthcare system and other systems that sexual assault victims encounter, to embrace extralegal remedies.¹⁹²

188. See Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL'Y 39, 40 (2009)

Domestic violence law and policy reflects the influence of dominance feminism, the brand of feminism in vogue in the late 1970s and 1980s, when state responses to domestic violence mushroomed. Dominance feminism posits that in a male-dominated society, women exist as sexual objects to be exploited by men at their pleasure. Laws, drafted, passed, and interpreted largely by men, have actualized the goal of the dominators—the continued subordination of women. (citations omitted).

189. See Devon Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2227 (2019); Crenshaw, *Mapping the Margins*, *supra* note 24, at 1243.

190. See Kim, *supra* note 115, at 166 (asserting that, instead, the court system “exercised its power by bureaucratically reframing the experience of harm on its own administrative terms, meting out disappointing consequences that lacked the luster of justice”).

191. See, e.g., Crenshaw, *Mapping the Margins*, *supra* note 24, at 1241–45; Jamie Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 723–24 (2010) (explaining that feminist advocacy laid the groundwork for reframing legal harms against women by “making the ‘invisible visible,’ naming and framing violence against women and constructing legal responses to it” (citation omitted)); see also Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 191–92 (1988) (“If feminist legal theory is derived from a feminist method uninformed by critical lesbian experience, the theory will be incomplete.”).

192. See Wexler et al., *supra* note 21, at 48–49

A focus on a singular strategy—such as one rooted in access to litigation and prosecutions—may obscure larger institutional and societal issues. But an approach that tries to bypass that strategy may miss the essential ways in which law structures interactions as well as the roadblocks and

Grassroots programs like the Bay Area's Transformative Justice Collective offer legal and extralegal remedies for sexual violence within their community, which includes many victims who are impoverished women of color.¹⁹³ These programs make up a collection of approaches that enable victims to access remedies that heal their pain and recognize their unique ability to characterize what is required for that healing. These approaches center the victim while simultaneously acknowledging the humanity of the perpetrator—often using terms other than “perpetrator” to describe the individual who caused the harm.¹⁹⁴ And while accountability is often a key component, the inquiry about an appropriate remedy typically begins with the victim's assessment of their own harm and the extent to which they desire accountability—rather than a formulaic list of legal charges and sentences as in the criminal justice system.¹⁹⁵ Some data even shows that poor women of color contact police for help with family and neighborhood problems if they perceive the available remedies as therapeutic.¹⁹⁶ Transformative justice approaches offer viable pathways to mitigating harms for marginalized groups—such as women of color who survive sexual assault and experience poverty—where the legal system fails to adequately redress the harms.¹⁹⁷

protections it offers to survivors, alleged perpetrators, and those found to be wrongdoers.

193. See Deborah M. Weissman, *The Politicization of Domestic Violence*, in *THE POLITICIZATION OF SAFETY* 38 n.2 (Jane Stoeber ed., 2019).

194. See *supra* note 170 and accompanying text.

195. See *supra* note 160 and accompanying text.

196. See Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 *L. & SOC. REV.* 314, 317 (2016).

197. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1791 (1993); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 *CALIF. L. REV.* 1647, 1694–95 (2005) (asserting that legislative advocacy for pro-marriage programs is misplaced because it neglects nonlegal remedies like “college education and high-level vocational training”); Tonya L. Brito et al., *“I Do for My Kids”: Negotiating Race and Racial Inequality in Family Court*, 83 *FORDHAM L. REV.* 3027, 3029 (2015); Tonya L. Brito, *The Welfarization of Family Law*, 48 *U. KAN. L. REV.* 229, 229 (2000) (“[P]oor families are subjected to privacy-invading, cost-conscious welfare regulations that are designed to regulate family life. These rules do not apply to non-welfare families whose relationships are governed by family law

Community accountability is intrinsic to a transformative justice approach. INCITE! describes this approach as “a community-based strategy, rather than a police/prison-based strategy, to address violence within our communities.”¹⁹⁸ INCITE! notes that “community accountability is a process in which a community—a group of friends, a family, a church, a workplace, etc.”—develops accountability strategies that specifically address wrongdoing, including sexual violence, to redress harms in concert with shared community values.¹⁹⁹ Shared responsibility for development and execution of the process is a key part of the community accountability approach. It is not just the survivor and the perpetrator who are impacted—it is the entire group.²⁰⁰ Through each encounter, the entire group is transformed by healing from the harm’s trauma, making it essentially the inverse of structural and intersectional violence: structural, intersectional healing. The shared expectation is that accountability will conform to the community’s values. Methods like these can also prevent acts of sexual violence from recurring.

Transformative justice has the potential to close the gaps that persist in the universe of available legal and nonlegal remedies for survivors of sexual violence.²⁰¹ The positive impact of holistic, restorative methods to help victims of gender-based violence heal is not new, and it is not exclusive to transformative justice. Many gender-based violence statutes, including the Violence Against Women Act (VAWA),²⁰² include provisions for victim counseling.²⁰³ A domestic violence therapy group in Minnesota was the genesis of the “Power and Control Wheel,” a tool that illustrates the dynamics of domestic violence for survivors and those who serve them, including

principles of general application.”); Harris, *Heteropatriarchy Kills*, *supra* note 130, at 38.

198. *Community Accountability*, INCITE!, <https://perma.cc/YFG2-LJZG>.

199. *Id.*; *see also* Thusi, *supra* note 160, at 2480.

200. *See supra* notes 148–149 and accompanying text.

201. *See* Turner, *Race, Gender, and Restorative Justice*, *supra* note 113, at 276.

202. 34 U.S.C. §§ 12291–12514.

203. *See id.* § 12511(b).

lawyers and judges in criminal cases.²⁰⁴ Survivors need to have access to both types of remedies: traditional evidence-based remedies, as well as more innovative nonlegal methods like those utilized in transformative justice communities. Moreover, systems of all sizes should explore cross-fertilization of remedies in both directions: legal and nonlegal. I will discuss two specific examples: narrative/storytelling methods and artistic/embodied methods.

A. Narrative/Storytelling Methods

Narrative and storytelling modalities cultivate healing for those who suffer trauma as a community or individually. Telling their story in their own voice is tremendously powerful for trauma survivors.²⁰⁵ A sexual violence survivor can define, and in some cases redefine, the harm they experienced as they articulate that harm in their own words.²⁰⁶ Survivors choose what to say about how sexual violence affected them, not their oppressor or an expert “healer” who dictates the extent of the harm and what should happen in response.²⁰⁷ Attorney and restorative justice activist Sujata Baglia describes the power of storytelling for sexual violence victims as dependent upon survivor autonomy—“if, when, and how they want to share

204. See *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://perma.cc/6HCS-B4H3>.

205. See Qaisar Khalid Mahmood & Sana Shams, *Digital Storytelling and Self-Healing of Women Survivors of Violence: Evidence from Pakistan*, in *ICT, SOCIETY AND HUMAN BEINGS* 2012, 59–60 (Gunilla Bradley et al. eds., 2012).

206. See, e.g., Wexler et al., *supra* note 21, at 71

Many victims value the chance to tell their own stories. Acknowledgement by the offender—but also from friends, family, and other members of their broader community—confirms their experience. Because women have often not been believed, acknowledgement serves the important purpose of recognizing the truth of their experiences and the consequences of the mistreatment. (citations omitted)

Hannah Brenner, *Beyond Seduction: Lessons Learned About Rape, Politics, and Power from Dominique Strauss-Kahn and Moshe Katsav*, 20 *MICH. J. GENDER & L.* 225, 233 (2013).

207. See *supra* note 160 and accompanying text.

their stories”—and acknowledges the complexity when these remedies are tied to legal systems and linked to services.²⁰⁸

Law professor and Catholic priest Daniel Griffith describes the healing power of storytelling in a case from Nigeria where the victim reported substantial harm reduction after experiencing a restorative justice circle with the man who sexually assaulted her, facilitated by members of their faith community.²⁰⁹ The victim recounting her own story was a crucial part of the process, which culminated in the man kneeling at her feet and apologizing.²¹⁰ This example of storytelling with acknowledgment by the perpetrator is not universal—not every survivor wants to pursue acknowledgment—but it is important to understand it as a component of transformative justice that should be available as one of a variety of remedies.²¹¹ Even without a perpetrator’s acknowledgement, other survivors have successfully used storytelling to help them heal outside the legal system.

In 2021, a journalist published a story in the *New York Times* in which she discussed being raped by a major league baseball player eighteen years prior.²¹² She did not seek legal remedies then, and she does not want them now.²¹³ She explains:

I hope I can help bring about systemic change rather than seek unlikely-to-come justice for one horrible act. I hope that by sharing my experiences, more women will feel comfortable speaking up when something is inappropriate. And I also hope more people working in these spaces will bring change, whether in big ways, as an executive empowered to hire more inclusively, or in small ways,

208. *Sujatha Baliga*, JUST BEGINNINGS COLLABORATIVE, <https://perma.cc/XP9D-JFKE>; see also Johonna Turner, *Keynote Speaker: Truth and Reconciliation in Historical Harm (Slavery, Mass Incarceration, Confederate Monuments, Gender)*, in *Symposium 2019: Restorative Justice*, 23 RICH. PUB. INT. L. REV., no. 2, 2020, at 19, 29.

209. See Griffith, *supra* note 117, at 39–40.

210. See *id.* at 39.

211. See Wexler et al., *supra* note 21, at 73.

212. Kat O’Brien, *I Am Breaking My Silence About the Baseball Player Who Raped Me*, N.Y. TIMES (June 20, 2021), <https://perma.cc/YCN6-VX92>.

213. See *id.*

speaking up when someone jokes that a woman slept her way to a job or a story.²¹⁴

Similarly, in 2016, numerous victims of child sexual abuse by gymnastics coaches told their stories to the *Indianapolis Star* as part of a complex investigative journalism project about sexual abuse and its relationship to the USA Gymnastics community.²¹⁵ These stories were intended to help the victims and other survivors heal while also holding perpetrators of sexual violence accountable outside the legal system.

Nonetheless, it is important to recognize the limitations and the complexity of public disclosure. Storytelling in a less public context, like a community healing circle, might be more therapeutic for a survivor than being profiled in a major newspaper or even using the hashtag #MeToo to disclose her experience on her own social media account. In another *New York Times* opinion piece published the same week as the baseball player story, a reviewer explored the complexity of discussing sexual assault in the context of several books, films, and other recent works.²¹⁶ The author explained that:

These writers are responding not only to consent but to #MeToo and the sorts of knowledge it produced, its rhetoric around violence, its expectations of so-called survivors. Many of these works invoke the waves of op-eds and testimonials that flooded social media, wondering now who such stories served, what forms of real solidarity they created. In “I May Destroy You,” for example, [Michaela] Coel’s character, Arabella, becomes quickly disabused of the hope that she might find comfort by sharing her story online. A wariness of narrative unites many of these accounts—especially a wariness of what Kaba, in her book “We Do This ‘Til We Free Us,” calls “compulsory confession”: the onus to share one’s story of trauma. Angel writes: “MeToo not only valorized women’s speech, but risked making it a duty to a mandatory display of one’s

214. *Id.*

215. See Marisa Kwiatkowski et al., *A Blind Eye to Sex Abuse: How USA Gymnastics Failed to Report Cases*, INDIANAPOLIS STAR (Aug. 4, 2016, 5:11 AM), <https://perma.cc/Q4DE-SEWY> (last updated June 24, 2020, 9:46 AM); see also Wexler et al., *supra* note 21, at 98–99.

216. See Parul Sehgal, *Yes, No, Maybe So: A Generation of Thinkers Grapples with Consent*, N.Y. TIMES (June 21, 2021), <https://perma.cc/L85W-28AN>.

feminist powers of self-realization, one's determination to refuse shame."²¹⁷

The complexity of public disclosure only underscores a key element of transformative justice—that remedies must be developed to incorporate victims' account of harm.

Some global organizations already integrate these remedies as part of their justice structures. For example, Girl Rising, Let Girls Lead, and similar organizations are giving young, poor women of color the power to define what gender equity and recovery from sexual assault should look and sound like through storytelling that often includes their own responses to surviving rape.²¹⁸ A project in the eastern Democratic Republic of Congo, northern Uganda, and Kenya explored the use of “transitional” justice methods, including storytelling, to integrate the experiences of women impacted by poverty and armed-conflict-related sexual violence.²¹⁹ These researchers advocated for “a more holistic approach with greater attention to gendered social and economic structures.”²²⁰ Transitional justice is also gaining some traction in the U.S. as a potential approach for sexual misconduct cases.²²¹

217. *Id.*

218. See Shinjini Das, *I Am Girl Rising*, HUFFINGTON POST (Sept. 8, 2015, 9:03 AM), <https://perma.cc/R3T8-YZUY> (last updated Dec. 6, 2017); Denise Restauri, *What Happens When We Let Girls Lead?*, FORBES (Sept. 18, 2013, 11:46 AM), <https://perma.cc/V8GH-KHRH>.

219. See Lucy Fiske & Rita Shackel, *Gender, Poverty and Violence: Transitional Justice Responses to Converging Processes of Domination of Women in Eastern DRC, Northern Uganda and Kenya*, 51 WOMEN'S STUD. INT'L F. 110, 110 (2015).

220. *Id.*; see *id.*

Gender, poverty and violence readily intersect in women's lives with profound impacts for women, entrenching cycles of violence, disadvantage and disempowerment across women's lives in private and public domains. These effects are exacerbated in situations of armed conflict and in post-conflict societies where women are often targeted for particular types of violence, forced to enter into exploitative or abusive relationships and are routinely under-represented in key political, legal and economic decision-making structures.

221. See Wexler et al., *supra* note 21, at 92 (arguing that transitional justice is analogous to the #MeToo movement and providing insights for improving legal responses to sexual misconduct in the workplace).

B. Artistic/Embodied Methods

There are a growing number of innovative therapeutic methods to address sexual violence that are rooted in embodiment and other artistic expression, such as dance movement therapy²²² and therapeutic yoga.²²³ One of the most established of these methods is a program called “Theatre of the Oppressed.”²²⁴ Brazilian playwright and activist Augusto Boal developed this program to foster dialogue in marginalized and traumatized communities.²²⁵ Boal’s methods include “spect-actor” participation by audience members to create the scenes and dialogue during the performance, cultivating both personal empowerment and social change.²²⁶ Numerous participatory theater programs based on Boal’s methods now exist worldwide, and foster dialogues on a variety of controversial issues to help communities heal.²²⁷ Participatory theater is specifically used to prevent gender-based violence in some Latin American communities, and there is growing enthusiasm about its use to prevent sexual violence in the U.S.²²⁸ There are similar theater productions now telling the stories of women of color healing from sexual violence.²²⁹ These

222. See, e.g., Alexandra Welych-Miller, *Treating the Trauma Within: Dance/Movement Therapy and Survivors of Child Sexual Abuse*, A Literature Review 2 (May 5, 2019) (Capstone thesis, Lesley University), <https://perma.cc/GYB2-WN2C> (PDF).

223. See generally DAVID EMERSON & ELIZABETH HOPPER, *OVERCOMING TRAUMA THROUGH YOGA: RECLAIMING YOUR BODY* (2011).

224. See Aleks Sierz, *Augusto Boal: Brazilian Director and Dramatist Who Believed Theatre Should Be a Force for Radical Change*, THE GUARDIAN (May 5, 2009, 7:01 PM), <https://perma.cc/NQG9-YR62>.

225. See *id.* (describing Boal’s first book of the same title, “which argued that . . . the dramatic arts could be a weapon, turning the spectator into an actor, the oppressed into revolutionaries”).

226. See *id.*

227. See Madeline Brigell, *Participatory Theater and the Prevention of Gender-based Violence*, *ADVOCS.’ F.*, 2010, at 12, 14.

228. See, e.g., M. Candace Christensen, *Using Theatre of the Oppressed to Prevent Sexual Violence on College Campuses*, 14 *TRAUMA, VIOLENCE & ABUSE* 282, 282 (2013) (praising participatory theatre as “a holistic, creative approach [that] is worth investigating” to help prevent sexual assault on American college campuses).

229. See, e.g., Katie Klodowski, “*Cultural Conversations*” 2016 Season Taking Place This Week, *ONWARD ST.* (Feb. 1, 2016, 4:06 AM), perma.cc/W6RS-RLUJ (advertising theater productions at an American

productions remain quite powerful for audience members, even without the full participation methods of Theatre of the Oppressed, and may be more appropriate for some women who experience intersectional harms but are not psychologically ready for the intense trauma response that might result from full engagement in a production.

Nancy Donoval's "Stories 2 Stop Rape" is another performing arts method that has helped sexual violence survivors therapeutically articulate their experienced harms.²³⁰ Donoval, a rape survivor and award-winning storyteller, has developed numerous programs and workshops to help other sexual assault survivors tell their stories.²³¹ Donoval held a workshop called Craft Your Story at Penn State University in April 2015, where she told her own rape story—for which she won a National Story Slam Championship—and invited audience members to "learn how to transform difficult aspects of life into powerful stories."²³² Donoval sought to explain the "elements of effective storytelling," specifically "highlight[ing] the importance of being audience-centered, whether you are telling/writing your story to motivate social change or simply to understand it better for yourself."²³³

A Penn State University interdisciplinary research group has also explored embodied healing modalities for survivors based on their determination of the harms they suffered.²³⁴ The group includes a rural sociologist whose chair is endowed by the United Nations;²³⁵ a human rights and comparative literature scholar who worked in Canada and South Africa

university, including Angèle Kingué's "For the Health of the Spirit," which is based on Kingué's novel about three traumatized women coming together to rebuild their lives).

230. See *Sexual Assault Speaker*, NANCY DONOVAL, <https://perma.cc/7SEK-EKZY>.

231. See *id.*

232. Brochure, Penn State Ctr. for Women Students & Ctr. for Spiritual & Ethical Dev., *Crafting Your Story Workshop* (on file with author).

233. *Id.*

234. See Brochure, Penn State Univ. Rsch., Engagement & Cmty. Healing (REACH), Leadership Initiative on Gender-Based Violence Prevention (on file with author).

235. Mark A. Brennan, *Ph.D.*, PENN ST. COLL. OF AGRIC. SCIS., <https://perma.cc/W7W6-G5YM>.

before joining Penn State University;²³⁶ a feminist philosopher and past interim director of Penn State's Rock Ethics Institute;²³⁷ a psychology professor who researches power and intersectional stereotyping;²³⁸ a child sexual abuse survivor and attorney for survivors;²³⁹ and this author. The group's lead scholar, Dr. Rosemary Jolly, has conducted programs for sexual assault survivors in the United States and other countries using body mapping,²⁴⁰ a therapeutic program that supports healing from trauma through art projects and accompanying group therapy.²⁴¹ Dr. Jolly and Ms. Kiehl also offered the body-mapping therapy to Penn State University student sexual assault survivors.²⁴²

Artistic expression and embodied healing, as well as storytelling and associated narrative methods, are leading examples of extralegal justice approaches for sexual assault survivors. Not all the specific examples discussed above are fully integrated into existing transformative justice programs, but they could be. That potential, in large part, is the salient reason to study examples of therapeutic remedies. What they have in common, with each other and with existing transformative justice remedies, is their survivor-centricity. Nearly all of them were developed in part or wholly by

236. *Rosemary Jolly*, PENN ST. COLL. OF THE LIBERAL ARTS, <https://perma.cc/VZ5W-F7G4>.

237. *Sarah Clark Miller*, PENN ST. COLL. OF THE LIBERAL ARTS, <https://perma.cc/FN9B-RL6Y>.

238. *Theresa Vescio Ph.D.*, PENN ST. COLL. OF THE LIBERAL ARTS, <https://perma.cc/7J54-53CN>.

239. *Courtney Kiehl—Associate Attorney*, PAUL MONES PC, <https://perma.cc/5KML-2GV7>.

240. See DENISE GASTALDO ET AL., BODY-MAP STORYTELLING AS RESEARCH: METHODOLOGICAL CONSIDERATIONS FOR TELLING THE STORIES OF UNDOCUMENTED WORKERS THROUGH BODY MAPPING 5 (2012), <https://perma.cc/N5TN-Q38U> (PDF) (“Body mapping is a way of telling stories, much like totems that contain symbols with different meanings, but whose significance can only be understood in relation to the creator’s overall story and experience.”).

241. See Delaney Dvorak, *Body Mapping Research with Kate Phelps and Delaney Dvorak*, UNIV. OF WIS.—MADISON (Sept. 29, 2021), <https://perma.cc/2T9Q-TSQ7>.

242. See Shelby Kaplan, *Body Mapping Exercise Helps Tell the Story of Sexual Assault and Abuse Survivors*, DAILY COLLEGIAN (Oct. 9, 2017), <https://perma.cc/V26J-HC94>.

survivors themselves.²⁴³ They all center the uniquely traumatic harms of sexual assault and the adjacent need for the survivor to heal on their own unique terms.²⁴⁴ And they all encompass an intersectional approach, either by design or inherently, as projects led, invented by, and/or designed for survivors marginalized by gender, race, poverty, victimization, nationality, and other traits outside of the dominant culture.²⁴⁵

CONCLUSION

At the core of all these remedies, and other transformative remedies for sexual violence, there must be a recognition of the harm experienced by survivors of sexual violence informed by modern, evidence-based principles and best practices. Mitigation of intersectional harms and structural violence should also be incorporated into remedies. Legal systems and actors must acknowledge that, for survivors, redressing harm sometimes includes a rejection of traditional legal options like criminal prosecution. By respecting victims' autonomous decision-making, legal systems can truly give full acknowledgment to what victims of sexual assault deserve: the right to decide what constitutes redress for the harm against their bodies and minds.²⁴⁶

The law should take a transformative justice approach to reconceptualize harm to include intangible harms in the context of sexual violence²⁴⁷ against poor women of color.

243. See *supra* Part III.A–B.

244. See *supra* Part III.A–B.

245. See *supra* Part III.A–B.

246. See, e.g., *healingSPACE*, YWCA NORTHERN N.J., <https://perma.cc/5WXQ-X34S> (“By being at healingSPACE I have a voice, I’m not a victim anymore, I’m a survivor, and I’m someone that can help and can make a difference.”); see also *Sexual Violence*, N.J. STATE POLICE, perma.cc/EM7P-EFC8 (describing the statewide New Jersey system to address sexual violence, which specifies a Sexual Assault Response Team approach including a forensic nurse examiner and special victim advocate who works with each victim).

247. See, e.g., West, *supra* note 50, at 28

[A]t least a part of the not-well-understood part of the harm of rape, and the near-invisible and almost-never-talked-about harm of consensual but unwelcome sex, involves the *invasiveness* of both. . . . My suggestion is that the result of all of this giving over of one’s physical and internal self is not only the fear, the pain, the injury, the displeasure, the boredom, the ennui,

Trauma that results from the physical and mental experiences of poverty and sexual assault is not easily understood, but the law must at least *acknowledge* that trauma, and apply that knowledge to legal remedies. Social science, public health, and the healing arts can help governments, communities, and victims themselves identify the most rational and therapeutic options.²⁴⁸ Those options should not be available only in courthouses and victim shelters, but within communities, including in hospitals, counseling centers, welfare offices, places of worship, recreation centers, and other community gathering places. Indeed, in some U.S. communities, a range of legal and nonlegal remedies are accessible at community-government partnership spaces like Family Justice Centers, many of which employ therapeutic victim-centric procedures.²⁴⁹

Yet, even these modern approaches include pitfalls rooted in the traditional patriarchal reaction to domestic violence, specifically, dictating to the victim what the (male-dominated) system will do to save her.²⁵⁰ Family Justice Centers, for example, have been criticized for their links to religious organizations, and were described by one legal commentator as running a significant risk of cultivating a “tension” between domestic violence survivor autonomy and state intervention.²⁵¹

and the disgust, but a massive, deep, and assaultive annihilation of self.
(emphasis in original) (citations omitted).

248. See, e.g., GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 125, at 121–31 (describing a “balanced policy approach” that includes public health and human rights frameworks).

249. See DOJ, OFF. ON VIOLENCE AGAINST WOMEN, *THE PRESIDENT’S FAMILY JUSTICE CENTER INITIATIVE: BEST PRACTICES 1* (2007), <https://perma.cc/73VK-Z4W4> (PDF). Family Justice Centers, which began in the early 2000s as part of a VAWA-funded Bush Administration initiative, provide a space that is harm-reducing by design. See *id.*

250. See LEIGH GOODMARK, *A TROUBLED MARRIAGE* 3 (2012) [hereinafter GOODMARK, *A TROUBLED MARRIAGE*].

251. Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. WOMEN’S L.J. 189, 189 (2016); see, e.g., GOODMARK, *A TROUBLED MARRIAGE*, *supra* note 250, at 156 (“Intervention by the legal system has harmed rather than helped some women subjected to abuse. Involvement in the legal system can further traumatize women who have already been subjected to abuse.”); *id.* at 158 (“Developing non-legal alternatives for women subjected to abuse could actually improve the system for those women who choose to use it.”).

To implement meaningful reform, we must accept that the current systems are compromised.²⁵² Transformative justice is the direct result of the work that women of color have been doing for decades to address systemic failures.²⁵³ Their work is rooted in the rejection of the mainstream criminal justice paradigm that perpetuates structural violence.²⁵⁴ Government and community advocates who design and staff community-based transformative justice approaches to sexual violence, whether they take the shape of Family Justice Centers or something else, must center the perspectives of survivors and their community members. In the words of rape survivor and award-winning writer Roxanne Gay, who published an anthology of stories by sexual violence survivors in 2018, “[I]t often seems like it is a question of when, not if, a woman will encounter some kind of sexual violence.”²⁵⁵ Gay explains that the hundreds of submissions she received “[gave] voice to how [victims] have suffered, in one way or another, from sexual violence, or how they have been affected by intimate relationships with people who have experienced sexual violence.”²⁵⁶ When our systems, legal and nonlegal, give voice to the nature of those harms, we make space for the work survivors face to recover from harm. Dismantling the trauma of sexual assault is extraordinarily hard work for any survivor.²⁵⁷ The transformative justice movement is also doing extraordinarily hard work that directly impacts survivors and their communities.²⁵⁸ Legal systems large and small should recognize the power of transformative remedies to change what is—at its essence—“rape culture” into a culture of empathic responsiveness to, and prevention of, sexual violence.²⁵⁹

252. See, e.g., DAVIS ET AL., *supra* note 127, at 140.

253. See *id.* at 141.

254. See *supra* Part II.C.

255. ROXANNE GAY, NOT THAT BAD: DISPATCHES FROM RAPE CULTURE xi (2018).

256. *Id.* at x.

257. See Jessica J. Williams, *Black Surrender Within the Ivory Tower*, in TARANA BURKE & BRENÉ BROWN, YOU ARE YOUR BEST SELF: VULNERABILITY, SHAME RESILIENCE, AND THE BLACK EXPERIENCE 170 (2022).

258. See *supra* notes 161–162 and accompanying text.

259. GAY, *supra* note 255, at xi–xii.