

Volume 25 | Issue 1

Winter 2022

Restorative Justice in Cases of Sexual Harm

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Recommended Citation

Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L. Rev. 1 (2022).

Available at: <https://academicworks.cuny.edu/clr/vol25/iss1/10>

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RESTORATIVE JUSTICE IN CASES OF SEXUAL HARM

Alexa Sardina, Ph.D.[†] & Alissa R. Ackerman, Ph.D.[‡]

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INTRODUCTION

In 1999, both authors of this paper were raped. As a freshman in college, Alexa was raped at knifepoint by a stranger that broke into her

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dorm and hid in the shared bathroom. Alissa was a junior in high school when she was raped by a young man after leaving a house party with him to walk on the beach. Alexa reported her rape to law enforcement and subsequently endured a trial that ended in a guilty verdict and a significant prison sentence for the man who raped her. Alissa never reported her rape and remained silent about her experience for 15 years. Despite their different journeys in the aftermath of sexual violence, the authors' experiences impacted both their lives in significant ways that ultimately led to their career paths as sex crimes experts and restorative justice practitioners.¹ Their individual and collective "survivor scholar" experiences inform this paper.²

Part I summarizes the impacts of the criminal legal system on individuals who have been sexually harmed, explaining under-reporting, police interactions, and case attrition. Part II frames the reasons why post-conviction sex crimes policies such as a registration and community notification are ineffective at reducing rates of sexual offending or addressing the needs of individuals who have experienced sexual harm. Part III explains the root causes of sexually harmful behavior, which range from individual-level to societal influences. Part IV sets the stage for an introduction to restorative justice. The authors focus on the use of restorative justice more broadly, before discussing how restorative justice is different from typical criminal legal options for addressing harmful behavior. The authors then briefly summarize the effectiveness of restorative justice based on the available literature. Part V expands on the authors' individual journeys to restorative justice as sex crimes experts and rape survivors, before addressing the often unmet needs of people

¹ See *Types of Sexual Violence*, RAINN, <https://perma.cc/J4WP-6WU5> (last visited Jan. 23, 2022) ("The term 'sexual violence' is an all-encompassing, non-legal term that refers to crimes like sexual assault, rape, and sexual abuse."). However, throughout this paper the authors use two terms: "sexual violence" and "sexual harm." Sexual harm is a more inclusive term, as some people who have experienced sexual harm do not feel that they have experienced violence. Their experiences are still valid and must be included in conversations. The authors also use sexual harm when speaking about their work. They use the term sexual violence to be consistent with how these acts are referred to in specific research articles.

² The authors define "survivor scholar" as any individual who is both a person who has experienced sexual harm and a researcher who studies sexual harm and/or the people who commit sex crimes. The authors seek to always utilize person first language because it humanizes individuals who have experienced sexual harm and who have perpetrated harm. Person first language allows individuals to choose words for their experiences that suit them. Every effort is made to refrain from using terms like "victim," "survivor," or "perpetrator." The authors have chosen to use the term survivor for themselves, but throughout this article readers will see the terms "individual who experienced sexual harm" and "individual who perpetrated sexual harm." This language can be difficult to accept, but the authors maintain a restorative perspective that values the humanity of all people. The authors believe that no person can be defined by one experience or behavior.

who have also experienced sexual harm. The authors explain the justice needs of people who have perpetrated acts of sexual harm. Part VI focuses exclusively on restorative justice as a tool to use in these instances, including case studies and the limitations of restorative frameworks. Part VII concludes with a renewed hope for a restorative future.

I. THE IMPACT OF THE CRIMINAL LEGAL SYSTEM ON THOSE WHO HAVE BEEN SEXUALLY HARMED

Sexual violence is ubiquitous and impacts millions of people each year.³ It cuts across every demographic, including age, gender, economic status, race, ethnicity, religion, sexual orientation, and education level.⁴ According to the Federal Bureau of Investigation (FBI), a forcible rape occurs in the United States every 3.8 minutes.⁵ Almost 20% of women and 8% of men are sexually abused before the age of 18.⁶ One in four women and one in ten men will experience sexual harm or stalking in their lifespan.⁷ Almost 50% of gender expansive people have experienced sexual harm in their lifetime.⁸ While sexual violence is a pervasive social, legal, and public health issue, research indicates that certain groups are at a greater risk for sexual victimization.⁹ Approximately one in five Black women, and one in seven Hispanic women in the U.S. have experienced

³ PREVENTING SEXUAL VIOLENCE, CTRS. FOR DISEASE CONTROL AND PREVENTION 1 (Feb. 5, 2021), <https://perma.cc/FTM5-R9Y2>; SHARON G. SMITH ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2-3 (Ctrs. for Disease Control & Prevention ed., 2018) (reporting that nearly 52.2 million women (43.6%) have experienced sexual harm in their lifetime, with 4.7% of women experiencing it in the 12 months preceding the survey and that approximately 27.6 million men (24.8%) experienced some form of contact sexual violence in their lifetime, with 3.5% of men experiencing contact sexual violence in the 12 months preceding the survey) [hereinafter *Sexual Violence Survey*].

⁴ See generally *Sexual Violence Survey*, *supra* note 3.

⁵ 2018 *Crime Clock Statistics*, FED. BUREAU OF INVESTIGATION, <https://perma.cc/39YD-ZJ7J> (last visited Jan. 23, 2022).

⁶ Noemi Pereda et al., *The Prevalence of Child Sexual Abuse in Community and Student Samples: A Meta-Analysis*, 29 CLINICAL PSYCH. REV. 328, 334 tbl.4 (2009) (showing that the prevalence of child sexual abuse in the United States was 25.3% for women and 7.5% for men).

⁷ *Sexual Violence Survey*, *supra* note 3, at 7.

⁸ SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 15 (2016) (stating that 47% of transgender respondents had been sexually assaulted at some point in their life and 54% of transgender respondents experienced some form of intimate partner violence (IPV)).

⁹ See Karen McQueen et al., *Sexual Assault: Women's Voices on the Health Impacts of Not Being Believed by Police*, BMC WOMEN'S HEALTH, May 22, 2021, at 1, 1, <https://perma.cc/DM78-HQEH>.

rape at some point in their lives.¹⁰ More than one-quarter of women who identify as American Indian or Alaska Native and one in three women who identify as multiracial report victimization in their lifetime.¹¹ Furthermore, women employed in the military, who live and/or work in underprivileged environments, have a disability, identify as LGBTQ, or are a student are also at a greater risk for sexual assault.¹²

Acts of sexual harm against men do not get the same empirical attention and emphasis as acts involving female victims, which creates a false myth that men cannot be sexually victimized.¹³ Therefore, there are fewer data sources to evaluate the extent of victimization against males. However, 1 in 71 men surveyed report being raped in their lifetime.¹⁴ This figure is significantly underestimated, as men who are sexually harmed often do not disclose or report these experiences due to shame and embarrassment.¹⁵

Secondary Victimization: Underreporting, Police Interactions, and Case Attrition

Despite these alarmingly high rates of sexual violence, there is reason to believe that rates of sexual harm are much higher, as these acts are the least likely to be reported. For example, only about 36% of rapes and 34% of attempted rapes are reported to police.¹⁶ Furthermore, approximately 60% to 70% of adults that experienced childhood sexual abuse never reported the abuse as children, and only a few, approximately 10% to 18%, reported their abuse to officials in their lifetime.¹⁷ Collectively, only a small minority of people will report their experiences to law enforcement.¹⁸

¹⁰ MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL & CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2-3 (2011), <https://perma.cc/ET9Q-5KXM>.

¹¹ BLACK ET AL., *supra* note 10, at 3.

¹² McQueen et al., *supra* note 9, at 1.

¹³ See Scott M. Walfield, "Men Cannot be Raped": Correlates of Male Rape Myth Acceptance, 36 J. INTERPERSONAL VIOLENCE 6391, 6394 (2018).

¹⁴ BLACK ET AL., *supra* note 10, at 1.

¹⁵ See Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. COLL. HEALTH 157, 159-60 (2006).

¹⁶ CALLIE MARIE RENNISON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 1 (2002).

¹⁷ Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?* 11 PSYCH., PUB. POL'Y, & L. 194, 203 (2005).

¹⁸ See Manon Ceelen et al., *Characteristics and Post-Decision Attitudes of Non-Reporting Sexual Violence Victims*, 34 J. INTERPERSONAL VIOLENCE 1961, 1962 (2019); see RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP'T OF JUST., NCJ 255113, CRIMINAL VICTIMIZATION, 2019 8 (2020), <https://perma.cc/UG68-7W6U>.

Underreporting may be the result of many individual and societal variables. Many survivors feel a sense of shame and isolation after their assault.¹⁹ Shame is an emotion that is linked to a person's self-worth and identity.²⁰ Survivors of sexual violence are especially susceptible to shame when compared to people who have experienced nonsexual victimization.²¹ One study found that 75% of women surveyed felt ashamed about themselves after their assault.²² They were also more likely to say that they are ashamed or embarrassed by their victimization when compared to victims of other types of violence.²³ Many people who experience sexual harm also report feeling dirty or disgusted afterwards and sometimes blame themselves.²⁴ Negative emotions, like shame, may not only impact how individuals who have experienced sexual harm feel about themselves, but may also influence how they respond to the crime afterwards.²⁵

People who have experienced sexual harm report that their victimization often begins a lengthy process that involves continuous interactions with various criminal legal professionals, including law enforcement and attorneys.²⁶ Unfortunately, this contact with the criminal

¹⁹ See Candace Feiring & Lynn S. Taska, *The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery*, 10 CHILD MALTREATMENT 337, 345 (2005) (discussing the persistence of abuse-related shame and post-traumatic stress disorder ("PTSD") in survivors of child sexual abuse); see also Sable *supra* note 15, at 159; Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 598 (2005).

²⁰ Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 FEMINIST CRIMINOLOGY 286, 293 (2010); world renowned shame researcher, Dr. Brené Brown defines shame as "the intensely painful feeling or experience of believing that we are flawed and therefore unworthy of love and belonging—something we've experienced, done, or failed to do makes us unworthy of connection." See Brené Brown, *Shame v. Guilt*, BRENÉ BROWN (Jan. 15, 2013), <https://perma.cc/5PQH-5SSB>.

²¹ Weiss, *supra* note 20, at 287.

²² See Maria E. Vidal & Jenny Petrak, *Shame and Adult Sexual Assault: A Study with a Group of Female Survivors Recruited from an East London Population*, 22 SEXUAL & RELATIONSHIP THERAPY 159, 159 (2007).

²³ See Richard B. Felson & Paul-Philippe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67 J. MARRIAGE & FAM. 597, 606 (2005).

²⁴ See Sarah E. Ullman, *Social Reactions, Coping Strategies, and Self-blame Attributions in Adjustment to Sexual Assault*, 20 PSYCH. WOMEN Q. 505, 508 (1996); see also Feiring & Taska, *supra* note 19, at 337, 340.

²⁵ See, e.g., Maureen MacKinley et al., *A Scoping Review of Adult Survivors' Experiences of Shame Following Sexual Abuse in Childhood*, 27 HEALTH & SOC. CARE COMMUNITY 1135, 1140 (2019) (finding that adults who have experienced child sexual abuse and have shame associated with that abuse may experience shame related mental health consequences).

²⁶ See generally Rebecca Campbell, *Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?* 12 VIOLENCE AGAINST WOMEN 1 (2006).

legal system often does more harm than good.²⁷ They often encounter individuals who are skeptical about their claims, diminish their credibility, minimize their experience, are dismissive of them entirely, or are generally insensitive to their experience.²⁸ This phenomenon has been termed “secondary victimization,” or “the second rape,”²⁹ and includes behaviors by criminal legal professionals and others that exacerbate the trauma of rape and other types of sexual harm.³⁰

The fear of secondary victimization may also influence reporting. For example, women who have experienced sexual harm are more likely to report their experience to formal support services when their experience conforms to that of a “real rape” (e.g., they were assaulted by a stranger): when they feel that they will be believed, when they think that the probability for conviction is high, when they have sustained injuries to corroborate their claims of forced intercourse, or if a weapon was used.³¹ These findings align with Alexa’s decision to report. She believed that, because she was assaulted by a stranger at knifepoint, her claims would be undisputable. A study using data from the National Violence Against Women Survey examined the reasons that survivors gave for not reporting acts of sexual harm to the police. The decision to not report was attributed to a belief that the police could not do anything about the crime, fear that they would not be believed, fear of retribution, and feelings of shame and embarrassment.³²

Although many of the reasons given for not reporting experiences of sexual harm are common across most racial groups, research suggests minority women choose not to report for reasons that differ from those of White women. Factors that influence reporting decisions among Black women include economic status, “fear of White racism, degree of adherence to a Black cultural mandate to protect Black [men] from

²⁷ *Id.* at 2.

²⁸ See, e.g., Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. CMTY. PSYCH. 191, 196-97 (2010) (discussing survivors’ concerns that police would not believe their reports of victimization); but see generally ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* ch.5 (Beacon Press 2017).

²⁹ Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Sexual Violence*, 14 VIOLENCE & VICTIMS 261, 261 (1999).

³⁰ *Id.* at 267.

³¹ See Janice Du Mont et al., *The Role of “Real Rape” and “Real Victim” Stereotypes in Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466, 470 (2003).

³² PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUST., *EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY* 33 (2006).

criminal prosecution . . . and prior negative interactions with social service agencies.”³³ Furthermore, in the aftermath of sexual harm, women of color are generally unlikely to seek assistance from predominantly White-run agencies and institutions, including the criminal legal system.³⁴

Not only is sexual harm characterized by low reporting rates, but it is also characterized by high rates of case attrition. Out of every 1,000 sexual assaults committed only 25 individuals accused will end up incarcerated.³⁵ Though this is an estimation based on multiple sources of government data, less than 1% of all rapes and attempted rapes lead to a felony conviction.³⁶ Over the past several decades, there have been numerous legal interventions designed to address the challenges associated with effectively moving cases of sexual harm through the criminal legal system.³⁷ Of all the changes that have been made to address underreporting and case attrition, there has been minimal change as it relates to reporting, charging, prosecuting, or convicting the people that perpetrate sexual harm.³⁸

Underreporting and case attrition are largely attributed to adherence to rape myths by those who have experienced sexual harm *and* various actors that are a part of the criminal legal system.³⁹ Rape myths are

³³ See Patricia A. Washington, *Disclosure Patterns of Black Female Sexual Assault Survivors*, 7 VIOLENCE AGAINST WOMEN 1254, 1257 (2001); see also Shaquita Tillman et al., *Shattering Silence: Exploring Barriers to Disclosure for African American Sexual Assault Survivors*, 11 TRAUMA, VIOLENCE, & ABUSE 59, 64 (2010).

³⁴ See Washington, *supra* note 33, at 1257, 1274.

³⁵ *The Criminal Justice System: Statistics*, RAPE, ABUSE, & INCEST NAT’L NETWORK (RAINN), <https://perma.cc/Q4D3-CYDF> (last visited Jan. 23, 2022) [hereinafter *The Criminal Justice System: Statistics*, RAINN]. For every 1,000 sexual assaults committed, 310 are reported to the police, 50 reports lead to an arrest, 28 cases will lead to a felony conviction, and 25 of individuals will be incarcerated.

³⁶ Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018), <https://perma.cc/H7SV-KNV3>.

³⁷ See Ethan Czuy Levine, *Sexual Scripts and Criminal Statutes: Gender Restrictions, Spousal Allowances, and Victim Accountability After Rape Law Reform*, 24 VIOLENCE AGAINST WOMEN 1, 3-4 (2017). By the 1970s and 1980s, all 50 states passed rape law reform although the efforts “varied considerably in their capacity to protect victims,” especially in reducing the influence of the “real rape” stereotype. These changes included the removal or lessening of requirements around victim resistance and corroboration, changing definitions of rape or supplementing rape statutes with other offenses to address different forms of violence, and a range of admissibility regarding the sexual history of victims. Unfortunately, research suggests that these efforts have only minimally changed reporting, indictment, conviction, or incarceration rates.

³⁸ See Cassia Spohn & Katharine Tellis, *The Criminal Justice System’s Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169, 170 (2012).

³⁹ See Lucy Maddox, *The Impact of Psychological Consequences of Rape on Rape Case Attrition: The Police Perspective*, J. POLICE CRIM. PSYCH. 33, 33-34 (2012); see also Mary C.

commonly held beliefs that can be found in most cultures and are fundamentally gendered. They underscore the reality that sexual violence against women and children is, to an extent, condoned, and normalized.⁴⁰ Examples of common rape myths are “only bad girls get raped”; “any healthy woman can resist a rapist if she really wants to”; “women ask for it”; “women ‘cry rape’ only when they’ve been jilted or have something to cover up”; and “rapists are sex-starved, insane, or both.”⁴¹ Adherence to rape myths results in social and cultural stereotyping and silencing of survivors of sexual harm.⁴² Rape myths may also impact people that experience sexual harm who may blame themselves for not preventing the harm or for not defending themselves.⁴³ In part, this is why Alissa never reported her rape to the police. She had lied to her parents about where she would be that night and had gone for a walk on a secluded beach with a young man she had just met at a party. She could not defend herself against a much bigger and stronger person and believed that she “let her rape happen.” For all these reasons, Alissa remained silent. Her experience of non-reporting is common.⁴⁴

Police play a key gatekeeping role in the progression of cases through the criminal legal system. They decide whether a crime has occurred, the number of resources to dedicate to suspect identification and apprehension, whether to make an arrest, and whether to refer the case to the prosecutor’s office.⁴⁵ It is therefore important to understand the factors that influence police decision-making in cases of sexual harm. As

Anders & F. Scott Christopher, *A Sociological Model of Rape Survivors’ Decisions to Aid in Case Prosecution*, 35 PSYCH. WOMEN Q. 92, 93-94 (2011).

⁴⁰ See Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 PSYCH. WOMEN Q. 133, 135-38 (1994).

⁴¹ See Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 217 (1980).

⁴² For example, researchers have found that many rape survivors may not disclose to anyone if they were under the influence of alcohol or drugs at the time of the offense. They remain hidden survivors often because of self-blame due to perceptions that they are somehow responsible for their victimization because they consumed alcohol or drugs. Additional research indicates that women often do not report their sexual victimization because they do not perceive themselves to be victims of rape. According to one study, only 27% of survivors whose incidents met the legal definition of rape defined themselves as having been raped. Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, 55 J. CLINICAL PSYCH. 3, 22 (1987).

⁴³ See Eliana Suarez & Tahany M. Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010, 2011 (2010).

⁴⁴ In the authors’ experience working with individuals who have been sexually harmed, more than half report that they have not or will not engage formal reporting channels because they fear they will not be believed, they do not think the criminal legal system can or will do anything to help, or they feel shame regarding the sexually harmful experience.

⁴⁵ See Jessica Shaw et al., *The View from Inside the System: How Police Explain Their Response to Sexual Assault*, 58 AM. J. CMTY PSYCH. 446, 446 (2016).

previously mentioned, many survivors choose not to report due to concerns that they will be retraumatized by the police, that they will not be believed, or that not much will come of the case.⁴⁶ These are not baseless concerns. One study found that almost half of those who reported their sexual assault expressed dissatisfaction with the police interview.⁴⁷ Women who have been sexually harmed also report feeling shocked and embarrassed when police officers treated them like they were the problem, were insensitive to the trauma they have experienced, and were insensitive to their personal needs.⁴⁸

Rebecca Campbell, a psychology professor, interviewed rape survivors regarding their interactions with police and found that many survivors felt the questions were distressing and some believed that the questions they were asked implied that they deserved what happened to them.⁴⁹ Another study by Campbell and her colleagues showed that those who experienced sexual harm perpetrated by a non-stranger whose cases were *not* prosecuted and who experienced high levels of secondary victimization had the highest post-traumatic stress disorder (“PTSD”) rates even when compared to those who did not report to the legal system at all.⁵⁰

Evidence suggests that police may not treat all survivors of sexual harm the same, and much of this disparate treatment can be attributed to the adherence of rape myths.⁵¹ Police culture, which is typically masculine and authoritarian, generally facilitates the continued acceptance of rape myths.⁵² Therefore, it is not surprising that for

⁴⁶ See Washington, *supra* note 33, at 1274.

⁴⁷ Laura M. Monroe et al., *The Experience of Sexual Assault: Findings from a Statewide Needs Assessment*, 20 J. INTERPERSONAL VIOLENCE 767, 770 (2005).

⁴⁸ See Jan Jordan, *Will Any Woman do? Police, Gender and Rape Victims*, 25 POLICING: AN INT’L J. POLICE STRATEGIES & MGMT. 319, 329-31 (2002).

⁴⁹ Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors’ Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE & VICTIMS 55, 65-66 (2005).

⁵⁰ Rebecca Campbell et al., *Community Services for Rape Survivors: Enhancing Psychological Well-Being or Increasing Trauma?* 67 J. CONSULTING & CLINICAL PSYCH. 847, 847 (1999).

⁵¹ See Alondra D. Garza & Courtney A. Franklin, *The Effect of Rape Myth Endorsement on Police Response to Sexual Assault Survivors*, 27 VIOLENCE AGAINST WOMEN 552, 554-55 (2020); see also Molly Smith et al., *Rape Myth Adherence Among Campus Law Enforcement Officers*, 43 CRIM. JUST. & BEHAV. 539, 540 (2016); Amy D. Page, *Judging Women and Defining Crime: Police Officers’ Attitudes Toward Women and Rape*, 28 SOCIO. SPECTRUM 389, 394-97 (2008) [hereinafter *Judging Women*] (explaining that police officers with lower levels of educational attainment were more accepting of rape myths whereas officers with higher levels of educational attainment were less likely to endorse rape myths).

⁵² See Amy D. Page, *Behind the Blue Line: Investigating Police Officers’ Attitudes Toward Women and Rape* 22-23, 108 (May 2004) (Ph.D. dissertation, University of Tennessee, Knoxville).

survivors whose assault falls outside of what is considered a “real rape” may not be taken seriously by the police. These include rapes committed against unconscious women, cases when the person is harmed by someone with whom they had a previous intimate relationship, and instances in which the person harmed does not conform to traditional gender roles.⁵³ One study found that police officers who ranked higher on rape myth acceptance were less likely to pursue an investigation when the situation did not fit the “real rape” paradigm.⁵⁴ Furthermore, findings suggest that specialized training on how to handle sexual assault survivors does not influence officers’ adherence to rape myths or the level of blame they attribute to the person who was sexually harmed.⁵⁵

One of the most critical decisions that police make is whether to unfound a case. Unfounding happens when a responding officer does not believe the account of the person that was sexually harmed and, on that basis, decides that it did not occur.⁵⁶ Police officers may, however, make the decision to unfound a case if they believe that a crime has occurred but also believe that the likelihood of arrest and prosecution are low.⁵⁷ When the person who caused the sexual harm was a stranger, the incident was “more likely to be thoroughly investigated by police officers and less likely to be considered unfounded.”⁵⁸ Moreover, there is a significant relationship between the presence of physical injury and the decision to lay charges against an accused individual.⁵⁹

Investigations can also be traumatizing for those who report sexual harm. Police investigators are often looking for gaps in a survivor’s account, parts of the account that do not make sense, and any motivations there may be for giving a false report.⁶⁰ Thus, the ways in which these

⁵³ DEP’T OF JUSTICE, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 7, <https://perma.cc/RL2B-6GE3> (last visited Jan. 23, 2022).

⁵⁴ See *Judging Women*, *supra* note 51, at 393, 396.

⁵⁵ See Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming a Police Officer Sample: Differences Between Police Officers With and Without Special Training*, 39 CRIM. JUST. & BEHAV. 646, 661 (2012).

⁵⁶ DONNA VANDIVER, ET AL., SEX CRIMES AND SEX OFFENDERS 78 (2017).

⁵⁷ Spohn & Tellis, *supra* note 38, at 173.

⁵⁸ Shaw et al., *supra* note 45, at 448.

⁵⁹ See Du Mont et al., *supra* note 31, at 478-79.

⁶⁰ LORI HASKELL & MELANIE RANDALL, DEP’T OF JUST. CANADA, THE IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS 8 (2019), <https://perma.cc/ZVP3-ZYQ9>. Namian writes:

Rape myths are especially resilient because they are particularly susceptible to being re-constructed in different ways that serve the same purpose. To illustrate, current statistics easily debunk the rape is rare myth, but it seems to live on through the complementary belief that false rape accusations are common. So, as the myth that husbands could not rape their wives lost all statutory support, variations on the false

questions are asked can leave people feeling blamed, rather than supported and believed. Research supports the assertion that contact with the police often leads to negative social interactions and which were associated with an increase in symptoms of PTSD.⁶¹

Rape myths may also impact prosecutors' charging decisions, which are often based on legal factors, like the seriousness of the crime, the offender's criminal record, and the strength of the evidence.⁶² However, several studies suggest that the rape myths and the stereotypes that influence the decision-making of police officers also influence the charging decisions of prosecutors.⁶³ As such, few rape cases are prosecuted and without the participation of survivors, prosecuting acts of sexual violence would be largely impossible.⁶⁴ Because so few cases make it to trial, there is little available research regarding the experiences of survivors as witnesses in the courtroom. However, some research has examined how the demands of the trial process affects rape survivors, focusing primarily on the emotional and psychological impact of the practices of courtroom actors.⁶⁵ After experiencing questioning and reporting to the police, a survivor may be fearful about retelling their story during a criminal trial.⁶⁶ Many survivors are particularly concerned that

accusation myth stepped in to uphold the pervasive stereotype that married women are theoretically incapable of being raped.

See, e.g., 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, 99-103 (2018); see generally Bonnie Stabile & Aubrey Grant, *From Rape 'Myths' to Roy Moore: We Can't Continue to Blame Victims*, THE HILL (Nov. 21, 2017, 5:00 PM), <https://perma.cc/L4SU-UWQX>.

⁶¹ Sarah E. Ullman, *Correlates and Consequences of Adult Sexual Assault Disclosure*, 9 J. INTERPERSONAL VIOLENCE 554, 567 (1996).

⁶² Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 L. & HUM. BEHAV. 607, 609-11 (1996).

⁶³ See Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 653 (2001).

⁶⁴ See Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROBS. 206, 220-21 (2001).

⁶⁵ Konradi explains that:

[P]rosecutors may request significant psychological work from rape survivors to sustain the state's case. Producing some emotions to appear victimized, suppressing others to avoid the appearance of defensiveness or vindictiveness, and testifying with a particular emphasis can all involve substituting another reality for one's own. Denying their own reality is stressful for some rape survivors and leads them to feel guilty and angry with themselves. When prosecutors provide little preparation or primarily focus on rape survivors' self-presentations, they can unintentionally contribute to the second assault on and re-victimization of rape survivors.

See AMANDA KONRADI, *TAKING THE STAND: RAPE SURVIVORS AND THE PROSECUTION OF RAPISTS* 78-79 (2007)

⁶⁶ See generally KONRADI, *supra* note 65.

they will endure a traumatic and humiliating trial and still not receive justice. Oftentimes, trials are traumatic not only for the survivor but also for those that support them.⁶⁷ Moreover, when continuances are filed, plea bargains are offered, or when reduced sentences are negotiated, people who have been sexually harmed may feel revictimized.⁶⁸

Given the severity of sexual harm, it is not surprising that survivors not only want to be believed, but they also want the significance of their experience to be recognized.⁶⁹ For many survivors, the need for formal acknowledgement of harm does not translate to a desire for harsh punishments. Survivors are not always interested in the punishment or suffering of the person that harmed them.⁷⁰ Rather, most survivors of sexual harm want to see the person that harmed them take responsibility for their behavior and to see that person “attempt to put things right.”⁷¹ Overall, research with survivors of sexual harm supports the notion that they want “meaningful consequences” for the perpetrators of these harms.⁷²

Alexa’s experience with testifying is similar to the findings mentioned above. After the prosecutor decided to file criminal charges against the man who raped her, Alexa had to recount the night of her rape in great detail many times to the prosecutor and others. Although this is often a part of the witness preparation process, Alexa felt even more anxious and fearful about testifying during the trial. While her doubts about testifying grew, she knew that the case would fall apart if she chose not to participate. During the trial, prior to her testimony, Alexa wanted to run away to avoid being in the courtroom with the man who raped her. During cross-examination, Alexa had to describe her experience again with excruciating detail in front of a courtroom and jury of strangers. Her parents were included on the defense’s witness list and were not allowed in the courtroom. During defense questioning, she felt like her credibility

⁶⁷ See Alissa Ackerman, *The Second Rape*, BEYOND FEAR (Aug. 12, 2020), <https://perma.cc/3BRU-JX83> (“Stacey provides a unique perspective of this process [the trial] and also highlights how trauma due to the rape impacted Alexa’s ability to recall certain events around that time.”).

⁶⁸ Clare McGlynn, *Feminism, Rape and the Search for Justice*, 31 OXFORD J. L. STUD. 825, 834 (2011).

⁶⁹ Clare McGlynn & Nicole Westmarland, *Kaleidoscope Justice: Sexual Violence and Victim-Survivors’ Perceptions of Justice*, 28 SOC. & LEGAL STUD. 179, 188-89 (2019).

⁷⁰ *Id.* at 187. In the authors’ practice, they often work with individuals who have been sexually harmed who are seeking an apology, the ability to ask questions, true accountability, and to ensure the behavior does not happen again.

⁷¹ Shirley Jülich & Fiona Landon, *Achieving Justice Outcomes: Participants of Project Restore’s Restorative Processes*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE 192, 202 (Estelle Zinsstag & Marie Keenan eds., 2017).

⁷² McGlynn & Westmarland, *supra* note 69, at 186.

was attacked and she was further traumatized. Overall, despite the positive outcome of the trial, Alexa was left without a sense of closure or justice that she hoped for.

While pre-conviction criminal legal processes can be traumatizing and ineffective at meeting the needs of those that experience sexual harm, post-conviction sex crimes policies can be equally problematic. In the next section, the authors present a brief history of these policies and document the research on why they are ineffective.

II. A BRIEF HISTORY OF POST-CONVICTION SEX CRIMES POLICIES

Modern day sex crimes policies typically refer to post-conviction policies that were created during the early to mid-1990s after a series of high profile, gruesome offenses were committed against young children by strangers.⁷³ Thus, while these cases constitute only a small fraction of all sex crimes cases, they prompted states and the federal government to enact a new era of laws designed to keep children safe from people who sexually offend.⁷⁴ There was a common belief that remains unsupported by research, but is nonetheless cited by lawmakers and judges, that rates of recidivism among people who sexually offend are “frightening and high.”⁷⁵ In May 1989, Earl Shriner, a man from Tacoma, Washington who

⁷³ Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 50, 55 (Richard G. Wright ed., Springer Publishing Company 2d ed. 2015) (2009).

⁷⁴ *See id.* at 55-58. Several cases spurred lawmakers to enact sweeping legislation targeting individuals who had committed sexual offenses. This was in part because of a moral panic over a few highly publicized cases. Public outcry and fear prompted lawmakers to enact legislation aimed at reducing sexual harm. There is a cyclical nature to sex crimes legislation dating back to at least the 1930s and 40s. For example, the case of Albert Fish, a man who claimed to have abused over 400 children, sparked a change in policing practices and new “habitual sexual offender” laws. *See generally* Juliane Cunha, *Albert Fish, Pedophile and Serial Killer with Over 400 Child Victims*, CASO CRIMINAL (Nov. 10, 2021), <https://perma.cc/83HN-VWLV>; *see also* Lisa Marie Kruse, *Sex offenders, Sexuality, and Social Control: A Case Study in the Social Construction of a Social Problem* 54 (July 13, 2017) (Master’s thesis) (on file with the Eastern Michigan University Digital Commons). In 1950, Paul Tappan wrote about the problematic nature of sex crimes legislation and fallacies about people who commit sexual offenses. His report holds true today, despite public paranoia and moral panic on this topic. *See* PAUL W. TAPPAN, *THE HABITUAL SEX OFFENDER* (1950).

⁷⁵ Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT 495 (2015). Multiple court cases, including *McKune v. Lile*, 536 U.S. 24, 33 (2002) and *Smith v. Doe*, 538 U.S. 84, 93 (2003) cite high rates of recidivism among people who commit sexually offenses. Similarly, lawmakers are on the record citing these statistics. For example, in 1996, U.S. Senator Kay Bailey Hutchison (R-TX) spoke on the senate floor and stated:

We do know several unpleasant facts about sexual predators who prey on children The repeat crime rate for sex offenders is estimated to be as much as ten

was known for prior violent assaults, sexually assaulted and mutilated the genitals of a seven-year-old boy.⁷⁶ Later that year, another man from Washington, Westley Allan Dodd, raped and murdered three boys.⁷⁷ These cases were the catalyst for the Washington State Community Protection Act of 1990, which offered various ways to ensure community safety.⁷⁸ While Washington state lawmakers were focusing their efforts on state policy, another case prompted the implementation of federal legislation.

In 1989, an 11-year-old boy named Jacob Wetterling was kidnapped in St. Joseph, Minnesota and his body was not found until 2016, 27 years later.⁷⁹ After his kidnapping, Jacob's mother, Patty Wetterling, advocated for efforts to create and implement registration policies, both in Minnesota and on the federal level.⁸⁰ This ultimately led to the passage of the Jacob Wetterling Crimes Against Children and Sexually Violent

times higher than the recidivism rate of other criminals. Mr. President, we know that more than 40 percent of convicted sex offenders will repeat their crimes.

Amber Hagerman Child Protection Act of 1996: Hearing on S8638, Before the Comm. On Foreign Rels., 104th Cong. (1996) (statement of Kay Bailey Hutchison). Statements that suggest that people who commit sex offenses have high rates of recidivism appear to have stemmed from an article in *Psychology Today*, a mass market magazine. The article states that “nearly 80% of people who commit sexual offenses who remain untreated will go on to reoffend.” Robert E. Freeman-Longo & R. Wall, *Changing a Lifetime of Sexual Crime*, PSYCH. TODAY, Mar. 1986, at 58.

⁷⁶ See Terry & Ackerman, *supra* note 73, at 55; Associated Press, *Man Gets 131 1/2-Year Term for Sexually Mutilating Boy*, N.Y. TIMES (Mar. 27, 1990), <https://perma.cc/934M-84UD>.

⁷⁷ See Terry & Ackerman, *supra* note 73, at 55; Timothy Egan, *Illusions Are Also Left Dead as Child-Killer Awaits Noose*, N.Y. TIMES, (Dec. 29, 1992), <https://perma.cc/FXX5-9YMT>.

⁷⁸ See Terry & Ackerman, *supra* note 73, at 55. While the Act is mostly known for allowing for the civil commitment of “sexually violent predators,” it also increased sentencing lengths for all sexual offenses, mandated registration with law enforcement upon release from incarceration, authorized law enforcement to notify, on a need-to-know basis that someone on the registry was living in nearby, and required treatment for people who sexually offend and compensation for those who have been sexually harmed. Norm Maleng, *The Community Protection Act and the Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 821, 822 (1992); Washington State’s law, RCW 71.09–Sexually Violent Predators, also known as the Community Protection Act of 1990, included 14 different provisions to protect Washingtonians from the likes of Earl Shriver and Westley Alan Dodd. Through this Act, Washington State became the first in the nation to require community notification. WASHINGTON STATE’S COMMUNITY NOTIFICATION LAW: 15 YEARS OF CHANGE, WASH. ST. INST. PUB. POL’Y (2006), <https://perma.cc/P9UW-L2G4>.

⁷⁹ *About Jacob Wetterling Resource Center*, JACOB WETTERLING RESOURCE CTR., ZERO ABUSE PROJECT, <https://perma.cc/HF2U-JAUQ> (last visited Jan. 23, 2022).

⁸⁰ Richard G. Wright, *An Interview with Patty Wetterling*, in SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS, *supra* note 73, 69-77.

Offender Registration Act in 1994, which required every state to create police registries for all people convicted of sexual offenses.⁸¹

That same year, a seven-year-old girl, Megan Kanka, was lured from her home by a man with two previous convictions for sex crimes against children. He subsequently raped and murdered her.⁸² Megan's parents believed that if they had known the man was living across the street from them, they could have better protected their daughter.⁸³ They advocated for a community notification statute that would require law enforcement agencies to notify the public about people with a sex offense conviction living in the community.⁸⁴ Less than three months after the murder, the state of New Jersey passed "Megan's Law."⁸⁵

In 1996, the Jacob Wetterling Act was amended to include a community notification requirement which required states to enact both registration and community notification policies.⁸⁶ Federal guidelines provided states with the ability to implement these laws in ways each state saw fit.⁸⁷ For example, states could create their own procedures for everything from how they determined risk to who would be subject to public notification.⁸⁸ In the early days of public notification, community members could visit their local police precinct and request a compact disk that included everyone currently on the public registry.⁸⁹ However, by 2003 all states, U.S. territories, and tribal jurisdictions had their own internet registries. With states having broad latitude to decide what types of information to include on their registry sites and little oversight from

⁸¹ See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (1994).

⁸² Terry & Ackerman, *supra* note 73, at 50-65.

⁸³ *Our Mission*, MEGAN NICOLE KANKA FOUND., INC., <https://perma.cc/EY7D-NH79> (last visited Jan. 23, 2022).

⁸⁴ *Id.*

⁸⁵ Megan's Law, N.J. Stat. Ann. §§ 2C:7-1 to 7-11 (West 1999); see *Megan's Law*, DEP'T OF L. & PUB. SAFETY OFF. OF THE ATT'Y GEN., <https://perma.cc/HTV6-7VXG> (last visited Jan. 23, 2022).

⁸⁶ *Legislative History of Federal Sex Offender Registration and Notification*, U.S. DEP'T OF JUST., OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, <https://perma.cc/F888-SKZA> (last visited Jan. 23, 2022).

⁸⁷ Alissa R. Ackerman et al., *Who Are the People in Your Neighborhood? A Descriptive Analysis of Individuals on Public Sex Offender Registries*, 34 INT'L J. L. AND PSYCH., 149, 149-59 (2011) [hereinafter *Who Are the People in Your Neighborhood?*]; *Tracking Sex Offenders: Federal Law, Resources Have Led to Marked Improvement of State Registries, But More Work Is Needed*, U.S. DEP'T OF JUST., NAT'L INST. OF JUST. (Nov. 13, 2020), <https://perma.cc/SAX7-RTG7>; Terry & Ackerman, *supra* note 73, at 50-65.

⁸⁸ Terry & Ackerman, *supra* note 73, at 50-65.

⁸⁹ RICHARD G. ZEVITZ & MARY ANN FARKAS, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., *SEX OFFENDER COMMUNITY NOTIFICATION: ASSESSING THE IMPACT IN WISCONSIN 1*, (2000).

the federal government, there was a lack of uniformity across registry sites.

In an effort to standardize information across individual state registries and because of expanded interest in creating a national public sex crimes registry, the federal government passed the Adam Walsh Child Protection and Safety Act (AWA).⁹⁰ This broad, sweeping legislation created an offense-based classification system, mandated that all people with sex offense convictions be listed on state and national registries, expanded requirements for who must register and for how long, and required retroactive registration of certain individuals.⁹¹ Little research has been conducted to assess the content and makeup of these registries.⁹² However, those studies that have been conducted reveal inconsistencies between published statistics and actual registry content.⁹³ A 2011 study was the first of its kind to look at the content and using data from the majority of state registries.⁹⁴ The study found many inconsistencies both between the published count of people required to register and those who were actually publicly registered between individual states. For example, some states include individuals who are deceased, deported, incarcerated, or otherwise institutionalized, or living out of state, in their state counts. While some states publicly register every person convicted of a sexual offense, others only register those who are considered to be at a moderate to high risk of reoffending.⁹⁵ A series of studies that stemmed from this original 2011 study found similar results.⁹⁶ By 2018, the United States

⁹⁰ See generally Adam Walsh Child Protection and Safety Act of 2006, 34 U.S.C. §§ 20901, 20911 (2006).

⁹¹ See *id.*, §§ 20901-20931.

⁹² *Who Are the People in Your Neighborhood?*, *supra* note 87, at 149.

⁹³ Alissa R. Ackerman et al., *How Many Sex Offenders Really Live Among Us? Adjusted Counts and Population Rates in Five U.S. States*, 35 J. CRIME & JUST., Nov. 2012, at 1, 1 [hereinafter *How Many Sex Offenders Really Live Among Us?*]; Andrew J. Harris et al., *Registered Sex Offenders in the United States: Behind the Numbers*, 60 CRIME & DELINQ. 3, 3 (2014).

⁹⁴ *Who Are the People in Your Neighborhood?*, *supra* note 87, at 151. Ackerman and her colleagues worked with a computer programmer to build a program that would “scrape” all of the publicly available registry data from each state website. They compared the raw count of their database to the most recent count provided by the National Center for Missing and Exploited Children (“NCMEC”) and found that their count represented 66% of the NCMEC count.

⁹⁵ *Who Are the People in Your Neighborhood?*, *supra* note 87, at 155. The study also found differences in the types of information provided on registries.

⁹⁶ See *How Many Sex Offenders Really Live Among Us?*, *supra* note 93, at 8; Harris et al., *supra* note 93, at 11-21; see also Alissa R. Ackerman, *National Estimates of Registered Sex Offenders in the United States. Is Double Counting a Problem?*, 40 AM. J. CRIM. JUST. 75, 80, 83-84 (2014).

was approaching one million people on public registries.⁹⁷ These people and their families are subject to a complex web of ever increasing local, state, and federal policies that make living productive and healthy lives almost impossible.⁹⁸ For example, studies find that local and state residence restrictions relegate people into homelessness.⁹⁹ Other research findings suggest that modern sex crimes policies lead to non-sexual recidivism.¹⁰⁰ Perhaps most importantly, studies consistently report that modern sex crimes policies are ineffective at actually reducing the number of sex crimes that occur.¹⁰¹ This is in part because these policies lead to increased stress and fear among those forced to register, but also

⁹⁷ Andrew J. Harris et al., *States' SORNA Implementation Journeys: Lessons Learned and Policy Implications*, 23 NEW CRIM. L. REV. 315, 317 (2020).

⁹⁸ See Danielle J. S. Bailey, *A Life of Grief: An Exploration of Disenfranchised Grief in Sex Offender Significant Others*, 43 AM. J. CRIM. JUST. 64 *passim* (2018); see also Danielle J. S. Bailey & Lisa L. Sample, *An Examination of a Cycle of Coping with Strain Among Registered Citizens' Families*, 30 CRIM. JUST. STUD. 158 *passim* (2017).

⁹⁹ See Kelly M. Socia et al., "Brothers Under the Bridge": Factors Influencing the Transience of Registered Sex Offenders in Florida, 27 SEXUAL ABUSE: J. RSCH. & TREATMENT 559, 560 (2015); see also Jill S. Levenson et al., *Where for Art Thou? Transient Sex Offenders and Residence Restrictions*, 26 CRIM. JUST. POL'Y REV. 319, 321 (2015); see also Jill S. Levenson, *Hidden Challenges: Sex Offenders Legislated into Homelessness*, 18 J. SOC. WORK 348, 348-63 (2018); see also Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C.J.L. & SOC. JUST. 319, 319 (2016). Residence restrictions prohibit where people with sex offense convictions can live in relation to schools, parks, and daycare centers. These restrictions range from 1000 feet to over 2500 feet. This means that many places that would otherwise be available for people with sex offense convictions to live become unavailable. Some states have created "tent cities" for people with sex offense convictions because there are no other available options for them. See generally UNTOUCHABLE (Blue Lawn Productions 2016) (documenting the homeless encampment in Miami-Dade County, Florida).

¹⁰⁰ Though not generalizable, the Ackerman and Sacks study found that the strain of being on the registry impacted self-reported non-sexual recidivism. Individuals with higher levels of anger and strain were more likely to report drug offenses, property offenses, and other violent offenses. This is consistent with General Strain Theory, which explains that people who are not able to cope with life stresses and strains may be more likely to act out in criminal and delinquent ways. Alissa R. Ackerman & Meghan Sacks, *Can General Strain Theory Be Used to Explain Recidivism Among Registered Sex Offenders?*, 40 J. CRIM. JUST. 187, 188-91 (2012) (noting that the general criminological literature suggests that successful reentry into the community requires stable housing, employment, and pro-social relationships); cf. ADIAH PRICE-TUCKER ET AL., HARV. INST. OF POL. CRIM. JUST. POL'Y GRP., SUCCESSFUL REENTRY: A COMMUNITY-LEVEL ANALYSIS 30 (2019) (highlighting that current sex crimes policies make maintaining stable housing, employment, and pro-social relationships very difficult for people to attain).

¹⁰¹ See Alissa R. Ackerman et al., *Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?*, 29 JUST. Q. 858, 858-87 (2012); cf. J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161, 161 (2011) (explaining that notification may increase recidivism); see Bob Edward Vásquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQ. 175, 188 (2008).

because they create unnecessary obstacles (e.g., impeding employment, housing, and prosocial relationships) that people and their families must endure.¹⁰²

Some proponents of these policies have argued that they were enacted to bring justice to individuals who have experienced sexual harm¹⁰³—that somehow these policies will help survivors to heal. Some lawmakers even propose or support legislation targeting people who commit sex crimes in part because of a specific, highly publicized sexual offense.¹⁰⁴ Yet, little is known about how people who have experienced sexual harm think about current policy and practice, partially due to the fact that there is little available research investigating survivor perspectives.¹⁰⁵ One study that compared people who have experienced sexual victimization with those who had not been sexually victimized found that those who had experienced victimization were more likely to express more positive attitudes about people who commit sex crimes, and were *less supportive* of registration and notification policies than those who have not experienced sexual harm.¹⁰⁶

As with most criminal legal system organizations, institutions, and policies, sex crimes registries disproportionately impact people of color, with Black men more likely to be impacted by current sex crimes policies.¹⁰⁷ This is of particular importance because some research suggests that White people commit more sex crimes than people of other

¹⁰² See Alissa R. Ackerman et al., *The Experiences of Registered Sex Offenders with Internet Offender Registries in Three States*, 52 J. OFFENDER REHAB. 29, 29-45 (2013); see also Keri B. Burchfield & William Mingus, *Not in My Neighborhood: Assessing Registered Sex Offenders' Experiences with Local Social Capital and Social Control*, 35 CRIM. JUST. & BEHAV. 356, 356-74 (2008); see also Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 49-66 (2005); see also Jill S. Levenson & David A. D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIM. JUST. POL'Y. REV. 168, 168-99 (2007); see also Jill S. Levenson et al., *Meghan's Law and its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 591 (2007); see also Cynthia Calkins Mercado et al., *The Impact of Specialized Sex Offender Legislation on Community Reentry*, 20 SEXUAL ABUSE: J. RSCH. & TREATMENT 188, 188 (2008); see also Richard Tewksbury, *Collateral Consequence of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 67-81 (2005).

¹⁰³ See generally Michael Wenzel & Ines Thielmann, *Why We Punish in the Name of Justice: Just Desert Versus Value Restoration and the Role of Social Identity*, 19 SOC. JUST. RSCH. 450 (2006).

¹⁰⁴ Michelle Meloy et al., *The Sponsors of Sex Offender Bills Speak up: Policy Makers' Perceptions of Sex Offenders, Sex Crimes, and Sex Offender Legislation*, 40 CRIM. JUST. & BEHAV. 438, 442-43 (2013).

¹⁰⁵ Suzanne Spoo et al., *Victims' Attitudes Toward Sex Offenders and Sex Offender Legislation*, 62 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 3385, 3388 (2018).

¹⁰⁶ *Id.* at 3395.

¹⁰⁷ Alissa R. Ackerman & Meghan Sacks, *Disproportionate Minority Presence on U.S. Sex Offender Registries*, JUST. POL'Y J., Fall 2018, at 1, 5, <https://perma.cc/HZH6-LNQH>.

racism.¹⁰⁸ A 2018 study by Ackerman and Sacks that examined the number and rate of minorities on U.S. registries found that 72% of people who are forced to register nationally were White, while fewer than 27% of individuals were Black.¹⁰⁹ Jurisdictions in the southern U.S. had the highest percentage of Black people on their registries.¹¹⁰ Black registered citizens comprised less than 5% of people forced to register in twelve jurisdictions, but in each of those jurisdictions the percentage of Black people forced to register was still higher than the percentage of Black people in the state population.¹¹¹

Simple percentages do not provide enough information to explain the extent of disproportionate minority presence, so per capita rates are used to paint a more accurate picture. In every jurisdiction but one, Black people had a higher rate of inclusion on registries.¹¹² The research is clear that post-conviction sex crimes policies place undue burdens on people forced to register, making reintegration into the community extremely difficult. This is exponentially harder for people of color, specifically because of the disparate impacts across criminal legal processes.¹¹³

Post-conviction sex crimes policies are typically used in a “one size fits all” fashion, which improperly consider all offenses and the people who commit them as if they are dangerous and will inevitably reoffend. This causes the public to erroneously conflate sexual offenses committed against children by strangers with all other forms of sexual offending.¹¹⁴ While these kinds of crimes do occur, they are rare.¹¹⁵ Perpetuating the myth that we must protect kids from strangers makes it more difficult to

¹⁰⁸ See JAN M. CHAIKEN & LAURIE ROBINSON, Foreword to LAWRENCE A. GREENFELD, U.S. DEP’T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997), <https://perma.cc/A9RQ-V7CY>.

¹⁰⁹ Ackerman & Sacks, *supra* note 107, at 7-8 (explaining that while the raw count of people on the registry implies that the majority are White, Black individuals are disproportionately impacted). QUICKFACTS UNITED STATES, U.S. CENSUS BUREAU, tbl. (July 1, 2019), <https://perma.cc/9ZQW-WFYZ> (according to the U.S. Census Bureau, Black individuals made up approximately 13.4% of the population in 2019).

¹¹⁰ Ackerman & Sacks, *supra* note 107, at 14.

¹¹¹ *Id.* at 8.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different?: An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL’Y REV. 83, 84-85 (2006) [hereinafter *Are Sex Offenders Different?*]; see also James F. Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, 25 DEVIANT BEHAV. 215, 218 (2004).

¹¹⁵ HOWARD N. SNYDER, U.S. DEP’T. OF JUST., NAT’L CTR. FOR JUV. JUST., NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 13 (2000).

prevent the types of sex crimes that actually do happen on a regular basis, namely crimes between people known to each other: family members, acquaintances, teachers, colleagues, and friends.¹¹⁶ Most importantly, upholding the stranger danger myth denies access to and participation in important conversations and educational opportunities regarding ways to effectively prevent sexual harm.

Another false assumption about registries is that they include all people who have sexually offended and will therefore keep society safe. With almost a million people on registries, this is easy to assume.¹¹⁷ It is important to note that most new sexual offenses are committed by people who are not on registries.¹¹⁸ First, this is because most people who are convicted of a sexual offense do not reoffend.¹¹⁹ Studies consistently find that people who have committed a sexual offense, especially those who have been through treatment, typically do not reoffend.¹²⁰ A recent meta-analysis of treatment programs found that they reduced recidivism by

¹¹⁶ See Richard R. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 CRIM. JUST. STUD. 193, 205 (2006).

¹¹⁷ NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *Map of Registered Sex Offenders in the United States*, (Dec. 4, 2018), <https://perma.cc/TAT5-Y2FX>. Publishing of these statistics no longer occurs publicly by this organization

¹¹⁸ See PATRICK A. LANGAN ET AL., U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 198281, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* 24 (2003).

¹¹⁹ Alissa R. Ackerman & Marshall Burns, *Bad Data: How Government Agencies Distort Statistics on Sex-Crime Recidivism*, 13 JUST. POL'Y J. 1, 6 (2016); ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., *RECIDIVISM OF PRISONERS RELEASED IN 1983* 6 (1989) (finding that only 7.7% of people who committed forcible commit the same offense within three years of release); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCH. 1154, 1158 (2005) (finding that 13.7% of individuals with a previous sex crime conviction were convicted of a new sex crime); ANDREW J. R. HARRIS & R. KARL HANSON, PUB. SAFETY & EMERGENCY PREPAREDNESS CANADA, *SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 2004-03* 11 (2004) (finding that both individuals who had sexually harmed adult and children had low levels of recidivism. Overall recidivism rates were 14%, 20%, and 24% after 5, 10, and 15 years, respectively. Individuals who had been convicted of incest had the lowest recidivism rates which were 6%, 9%, and 13% after 5, 10, and 15 years, respectively); Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Dangerous?*, 3 CRIMINOLOGY & PUB. POL'Y 59, 73 (2003) (finding that only 6.5% of individuals who were convicted of a sex crime were rearrested for a new sex crime within 5 years) [hereinafter *Are Sex Offenders Dangerous?*]; see PATRICK A. LANGAN, ET AL., U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 198281, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* 24 (2003); see *Are Sex Offenders Different?*, *supra* note 114, at 83.

¹²⁰ Hanson & Morton-Bourgon, *supra* note 119, at 1159; HARRIS & HANSON, *supra* note 119; LANGAN ET AL., *supra* note 119; *Are Sex Offenders Dangerous?*, *supra* note 119, at 64, 68; *Are Sex Offenders Different?*, *supra* note 114, at 86.

22%.¹²¹ The second reason for this erroneous assumption lies in reporting patterns and pre-conviction criminal legal processing which funnels out most known offenses. As mentioned, for every 1,000 rapes committed, only 25 people will be convicted.¹²² This translates into similar numbers for inclusion on registries. As such, only a small fraction of people responsible for inflicting sexual harm will ever end up on a registry.

Current post-conviction sex crimes policies and practices were enacted after several highly publicized cases where young, White children were abducted, sexually violated, and murdered by strangers.¹²³ Despite the literature that clearly indicates that the vast majority of people who have sexually harmed will not reoffend, these policies have burgeoned into a vast web of local, state, and federal policies that deny people who have been convicted of sexual offenses the ability to live productive lives in the community. Research has shown that these policies do not reduce sexual violence, that they create more risk than they prevent, that they disproportionately impact people of color, and that people who experience sexual violence are not proponents of these policies. In addition, they only include a small fraction of people responsible for committing acts of sexual harm. Still, post-conviction sex crimes policies remain a popular law enforcement tool.

Criminal legal processes that occur prior to conviction and post-conviction policies for people who have been convicted of sexual offenses both contribute to additional harm for survivors, their families, and broader communities. They often do not meet the justice needs of any person impacted by sexual harm, and have no impact on decreasing rates of sexual harm. One reason for this is that meeting the actual needs of all parties requires individualized or case-by-case practices and procedures that large systems are not amenable to. Another reason is a lack of understanding about the many reasons why sexually harmful or violent behavior occurs in the first place. Section III explains the reasons why sexual harm occurs.

III. THE ETIOLOGY OF SEXUAL HARM

There is no single variable that explains why a person commits acts of sexual harm. It is usually the result of a combination of psychological, developmental, and sometimes biological factors, including an inability to cope with life stressors (e.g., the loss of employment or marital problems), isolation and loneliness, lack of empathy, few or weak

¹²¹ Bitna Kim et al., *Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment*, 17 TRAUMA, VIOLENCE, & ABUSE 105, 109 (2016).

¹²² *The Criminal Justice System: Statistics*, RAINN, *supra* note 35.

¹²³ Terry & Ackerman, *supra* note 73, at 64.

attachments to others, limited social skills, and cognitive distortions (“CDs”).¹²⁴ CDs are a type of automatic thought process that develops and aids in minimizing the seriousness of an offense.¹²⁵

Regardless of the underlying causes of sexual harm, people who perpetrate it make the decision to do so. Sometimes this involves a series of decisions and planning over a long period of time.¹²⁶ Other times, the opportunity arises and the decision is made quickly.¹²⁷ Often people who sexually harm are unaware of the series of decisions that lead to their behavior, but justify it through the use of CDs.¹²⁸ CDs allow a person to minimize or deny the harm done to victims, to minimize the violence used during an offense, to deny responsibility for an offense, and to deny planning it.¹²⁹ There are several CDs that are common among people that commit acts of childhood sexual abuse, including the belief that the abusive behavior is teaching the child about relationships, that the child enjoys it, that the behavior is not harmful, and the belief that the act of abuse is due to mutual interest.¹³⁰

Individuals who commit rape and sexual assault also experience CDs. However, CDs exhibited in these instances often reinforce male superiority, negative views toward women, and adherence to rape myths.¹³¹ For example, during the 1970s, Susan Brownmiller published a

¹²⁴ KAREN J. TERRY, *SEXUAL OFFENSES AND OFFENDERS: THEORY, PRACTICE AND POLICY* 72-73 (2d ed. 2013).

¹²⁵ Tony Ward, *Sexual Offenders' Cognitive Distortions as Implicit Theories*, 5 *AGGRESSION & VIOLENT BEHAV.* 491, 502-03 (2000).

¹²⁶ TERRY, *supra* note 124, at 71-73.

¹²⁷ *Id.*

¹²⁸ See Gene G. Abel et al., *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 *INT'L J. L. & PSYCHIATRY* 89 (1984) (highlighting a few of the common cognitive distortions and “explanations” held by adults who have caused sexual harm to children); see also Marvin B. Scott & Stanford M. Lyman, *Paranoia, Homosexuality, & Game Theory*, 9 *J. HEALTH & SOC. BEHAV. (SPECIAL ISSUE)* 179 *passim* (1968); Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 *AM. SOCIO. REV.* 664, 666-67 (1957).

¹²⁹ See JUDAH OUDSHOORN ET AL., *THE LITTLE BOOK OF RESTORATIVE JUSTICE FOR SEXUAL ABUSE: HOPE THROUGH TRAUMA* 28-29 (2015); see also Gresham M. Sykes & David Matza, *supra* note 128, at 667-68.

¹³⁰ Ward, *supra* note 125, at 493.

¹³¹ Ruth Mann & Clive Hollin, *Self-reported Schemas in Sexual Offenders*, 21 *J. FORENSIC PSYCHIATRY & PSYCH.* 834, 846 (2010); Rebecca J. Milner & Stephen D. Webster, *Identifying Schemas in Child Molesters, Rapists, and Violent Offenders*, 17 *SEXUAL ABUSE: J. RSCH. & TREATMENT* 425, 434 (2005); see Neil M. Malamuth & Lisa M. Brown, *Sexually Aggressive Men's Perceptions of Women's Communications: Testing Three Explanations*, 67 *J. PERSONALITY & SOC. PSYCH.* 699 (1994); see also Devon L. L. Polaschek & Theresa A. Gannon, *The Implicit Theories of Rapists: What Convicted Offenders Tell Us*, 16 *SEXUAL ABUSE:*

book that analyzed rape within cultural and political contexts.¹³² She asserted that acts of sexual harm, specifically the rape of adult women, exemplified men's oppression of them, and that sexual assault was a symptom of a patriarchal society that subjects women and reinforces male supremacy and domination.¹³³ Societal-level variables including social norms that support rape, male superiority, and maintain women's inferiority culminate in negative views toward women and adherence to rape myths.¹³⁴ Men who rape are more likely to condone violence and identify with a hypermasculine identity.¹³⁵ Most rapes are about power, control, and opportunity—not sexual attraction or gratification.¹³⁶ In essence, rape is often used as a means to control and dominate.¹³⁷

Like those who commit acts of childhood sexual abuse, men who commit rape often experience feelings of worthlessness, isolation, feelings of inadequacy, few or weak peer relationships, and difficulty managing aggression.¹³⁸ In combination with psychological, societal, and behavioral factors, childhood trauma and abuse can also play a significant role in the etiology of harmful sexual behavior.¹³⁹ Childhood adversity and trauma are often significant predictors of myriad difficulties in

J. RSCH. & TREATMENT 299, 310-13 (2004); Devon L. L. Polaschek & Tony Ward, *The Implicit Theories of Potential Rapists: What Our Questionnaires Tell Us*, 7 AGGRESSION & VIOLENT BEHAV. 385, 392-99 (2002).

¹³² SUSAN BROWN MILLER, *AGAINST OUR WILL* 15-18 (1975).

¹³³ *Id.*

¹³⁴ Burt, *supra* note 41, at 229.

¹³⁵ Laura S. Abrams, Ben Anderson-Nathe & Jemel Aguilar, *Constructing Masculinities in Juvenile Corrections*, 11 MEN & MASCULINITIES 22, 26 (2008); Dominic J. Parrott & Amos Zeichner, *Effects of Hypermasculinity on Physical Aggression Against Women*, 4 PSYCH. MEN & MASCULINITY 70 (2003); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 785 (2000) (defining hypermasculine identity as an “exaggerated exhibition of physical strength and personal aggression”); R.W. Connell, *Masculinities and Globalization*, 1 MEN & MASCULINITIES 3 (1998); A. Nicholas Groth, Ann Wolbert Burgess, & Lynda Lytle Holmstrom, *Rape: Power, Anger, and Sexuality*, 134 AM. J. PSYCHIATRY 1239, 1240 (1977).

¹³⁶ Groth, et al., *supra* note 135, at 1242.

¹³⁷ *Id.* at 1240.

¹³⁸ Gordon C. Nagayama Hall & Richard Hirschman, *Toward a Theory of Sexual Aggression: A Quadripartite Model*, 59 J. CONSULTING & CLINICAL PSYCH. 662, 665 (1991); see W. L. Marshall, *The Role of Attachments, Intimacy, and Loneliness in the Etiology and Maintenance of Sexual Offending*, 25 SEXUAL & RELATIONSHIP THERAPY 73, 76-77 (2010).

¹³⁹ Ashley F. Jespersen, Martin L. Lalumière & Michael C. Seto, *Sexual Abuse History Among Adult Sex Offenders and Non-Sex Offenders: A Meta-Analysis*, 33 CHILD ABUSE & NEGLECT 179, 188 (2009); Jill S. Levenson & Melissa D. Grady, *The Influence of Childhood Trauma on Sexual Violence and Sexual Deviance in Adulthood*, 22 TRAUMATOLOGY 94, 101 (2016) [hereinafter Levenson & Grady, *The Influence of Childhood Trauma on Sexual Violence and Sexual Deviance in Adulthood*].

adulthood, including sexual harm.¹⁴⁰ In a large-scale study conducted in partnership with the Centers for Disease Control (“CDC”) and Kaiser Permanente, researchers examined the relationship of adverse childhood experiences (“ACEs”) with health outcomes in adulthood. The study found that over 25% of participants had two or more ACEs.¹⁴¹ They found that ACEs, including childhood abuse and neglect among others, were linked to obesity, increased rates of heart attacks and strokes, higher rates of cancer and chronic illnesses, increased risk of mental illnesses, higher rates of substance use and misuse, and higher rates of suicide.¹⁴²

Researchers have also examined the relationship between childhood adversity and criminal behavior. One study has found that incarcerated people were more likely to have had experienced sexual and physical abuse as a child than people who are not incarcerated.¹⁴³ Clearly, not all people who experience childhood sexual abuse become adults that perpetrate acts of sexual harm, but there is a nuanced link between the two. More specifically, researchers have found that men who have offended sexually have higher odds of having experienced childhood sexual abuse, physical abuse, verbal abuse, and emotional abuse than men who have not.¹⁴⁴ Similarly, researchers have found that almost half of men who had sexually offended reported four or more ACEs.¹⁴⁵

There are multiple reasons why people sexually offend that range from the inability to cope with life stressors, to cognitive distortions, poor attachments to others, and childhood trauma. Criminal legal processes do

¹⁴⁰ Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTATIVE MED. 245 *passim* (1998).

¹⁴¹ *Id.* at 251 tbl.3.

¹⁴² *Id.* at 251-54.

¹⁴³ The study found:

Between 6% and 14% of male offenders and between 23% and 37% of female offenders reported they had been physically or sexually abused before 18 A review of 16 studies estimated that for the general adult population 5% to 8% of males and 12% to 17% of females are abused as children.

CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ 172879, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999).

¹⁴⁴ Jill S. Levenson et al., *Adverse Childhood Experiences in the Lives of Male Sex Offenders: Implications for Trauma-Informed Care* 26 SEXUAL ABUSE: J. RSCH. & TREATMENT 1 *passim* (2014) [hereinafter Jill S. Levenson et al., *Adverse Childhood Experiences in the Lives of Male Sex Offenders*]; Levenson & Grady, *The Influence of Childhood Trauma on Sexual Violence and Sexual Deviance in Adulthood*, *supra* note 140, at 94-103; Jill S. Levenson & Kelly M. Socia, *Adverse Childhood Experiences and Arrest Patterns in a Sample of Sexual Offenders*, 31 J. INTERPERSONAL VIOLENCE 1 *passim* (2015); see Wesley G. Jennings et al., *An Empirical Assessment of the Overlap Between Sexual Victimization and Sex Offending*, 58 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1466, 1475 (2014).

¹⁴⁵ See Jill S. Levenson et al., *Adverse Childhood Experiences in the Lives of Male Sex Offenders*, *supra* note 144, at 13.

little to address the underlying factors that lead to sexually harmful behavior. Restorative justice requires that these underlying factors are addressed. It helps individuals who have perpetrated sexual harm to better understand what led to them causing harm in the first place and taking the necessary steps to be fully accountable for their behavior.¹⁴⁶ The remainder of this paper focuses on restorative justice, how it can be used to effectively address acts of sexual harm, and culminates with hopes for a restorative future.

IV. WHAT IS RESTORATIVE JUSTICE?

Restorative justice is a framework for addressing all forms of harm, from simple disagreements to violent crimes.¹⁴⁷ It focuses on the harms caused rather than violations of specific criminal laws or statutes.¹⁴⁸ This is because restorative justice honors that everyone is interconnected from communities to the environment; the main focus is always on healing and doing no further harm. Restorative frameworks offer a myriad of opportunities for acknowledgement, accountability, and harm-reduction.¹⁴⁹ These approaches focus on the ripple effects of harm. When someone is hurt, the hurt is also felt by partners, families, friends, and communities.¹⁵⁰ Restorative approaches are also concerned with the harms and consequences felt by those close to people who have perpetrated harm.¹⁵¹ Restorative practices must remain multi-faceted because the needs of different participants can be in opposition to one another. As such, the approach is participant-driven and survivor-centered.

¹⁴⁶ Cf. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND REVISITED* 42 (2d ed. 2015) (noting that people who have harmed have “an obligation to address the causes of their behavior, but they usually cannot do this alone”). Based on the authors’ experience, the pre-education process helps people who have harmed to develop an understanding of the causes of their behavior and the language to talk about those factors in an accountable and responsible way.

¹⁴⁷ See *id.* Criminal legal processes are concerned with whether a person is guilty of violating a specific criminal statute. This language is not utilized in restorative spaces, as the focus is on the impact of the harm caused. For example, in a criminal legal process someone could be convicted of perpetrating rape if the state could prove beyond a reasonable doubt that a rape had occurred. The adversarial process might focus on the minutiae of the case. In restorative processes the focus remains on the impact of the behavior and the breakdown of relationships. Restorative justice seeks to repair harm, while criminal legal processes seek to affirm guilt.

¹⁴⁸ HOWARD ZEHR & ALI GOHAR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 33-36 (2003).

¹⁴⁹ ZEHR & GOHAR, *supra* note 148 at 83-85.

¹⁵⁰ ZEHR & GOHAR, *supra* note 148 at 18.

¹⁵¹ This is particularly true for people who have committed acts of sexual harm. See generally Bailey, *supra* note 98.

Whenever harm occurs a relationship is broken. This might not be the breakdown of a relationship between two people, it could be the loss of relationship with oneself or the inability to connect in relationship with others.¹⁵² The importance of relationships and healing were centered in the restoration and prevention of harm in historical and ancient traditions, from North American indigenous people, to the Māori in New Zealand, across the African continent, and among Ancient Hebrews.¹⁵³ These traditions were adapted to form the basis of modern restorative justice practices, with little credit to historical indigenous and historical practice.¹⁵⁴

Restorative justice was popularized in the west in the 1970s.¹⁵⁵ Several countries, including Australia, England, Canada, New Zealand, and the U.S., use some form of restorative justice.¹⁵⁶ In the U.S. there was a marked shift toward rehabilitative goals around the 1970s, though rehabilitative and restorative goals are far more popular within the juvenile justice system and with first-time or non-violent offenses.¹⁵⁷ Restorative justice within the formal adult criminal legal system is not popular in the U.S., but programs both pre-charge and post-conviction

¹⁵² See generally BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (1st ed. 2014).

¹⁵³ ZEHR & GOHAR, *supra* note 148 at 2, 3, 10, 17, 45; Julena Jumbe Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa*, N.Y.U. HAUSER GLOBAL LAW SCHOOL PROGRAM (2018), <https://perma.cc/M3AW-C7DP> (discussing the use of restorative practices in various African countries and arguing that restorative justice was practiced on the African continent long before the colonialists arrived and that it should be revived across the continent); Fainos Mangena, *Restorative Justice's Deep Roots in Africa*, 34 S. AFR. J. PHIL. 1, 12 (2015); ALLAN MACRAE & HOWARD ZEHR, *THE LITTLE BOOK OF FAMILY GROUP CONFERENCES, NEW ZEALAND STYLE* (2000) [hereinafter MACRAE & ZEHR]. The principles of restorative justice are deeply rooted in spiritual and indigenous practices. MACRAE & ZEHR, *id.*, discuss how the Family Group Conference model became the norm in New Zealand. Māori youth were disproportionately impacted by the imposition of Western models of retributive justice. Māori leaders noted that in their tradition, when a harm occurred the whole community became involved with the intention of repair. Their voices were heard and in the late 1980s New Zealand moved toward utilized Family Group Conferencing. Finally, the great Jewish philosopher and rabbi known as Maimonides (1138-1204) wrote extensively about the Jewish process of *Teshuva*. See also Alissa Ackerman & Guila Benchimol, *Restorative Justice and Teshuva Following Sexual Misconduct*, JEWISH PHILANTHROPY (Sept. 12, 2018), <https://perma.cc/K5VC-GPSZ>.

¹⁵⁴ ZEHR, *supra* note 146.

¹⁵⁵ *Id.* at 8.

¹⁵⁶ See PATRICIA HUGHES & MARY JANE MOSSMAN, *RE-THINKING ACCESS TO CRIMINAL JUSTICE IN CANADA: A CRITICAL REVIEW OF NEEDS, RESPONSES AND RESTORATIVE JUSTICE INITIATIVES 85-86* (Dep't Justice Can. 2001).

¹⁵⁷ See generally Shelley Johnson Listwan et al., *Cracks in the Penal Harm Movement: Evidence from the Field*, 7 CRIMINOLOGY & PUB. POL'Y 423 (2008); Kent Roach, *Changing Punishment at the Turn of the Century: Restorative Justice on the Rise*, 42 CANADIAN J. CRIMINOLOGY 249 (2000).

exist.¹⁵⁸ Some researchers estimate that formal restorative justice programs are used in at least half of U.S. states.¹⁵⁹

One area where community accountability has proliferated over the last 20 years has been in the non-profit sector and in the transformative justice movement, as they operate outside traditional criminal legal and carceral spaces.¹⁶⁰ They are mostly associated with the prison abolition movement.¹⁶¹ Much of this work has been pioneered by women of color and LGBTQIA+ people.¹⁶² Transformative justice activists see the criminal legal system as responsible for committing acts of violence and harm against marginalized communities and seeks to address individual and community violence *within* the community.¹⁶³ While the transformative justice movement has used community accountability as a

¹⁵⁸ Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION QUARTERLY 235, 236-41 (1999). See generally Russ Immarigeon, *Restorative Justice, Juvenile Offenders, and Crime Victims: A Review of the Literature*, RESTORATIVE JUV. JUST.: REPAIRING THE HARM OF YOUTH CRIME 305 (Gordon Bazemore & Lode Walgrave eds., Criminal Justice Press 1999).

¹⁵⁹ Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL'Y J. 1, 2 (2016); MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE (2011). Common Justice operates the only non-profit pre-charge adult diversion restorative justice program in the U.S, while The Sycamore Tree Project, a faith-based restorative justice program that operates within prisons, is used here in the U.S. and in over 30 other countries. The Sycamore Tree Project was developed by Prison Fellowship International. It has been in existence for over 20 years, with the UK and New Zealand as early adopters. The program brings crime victims into prison settings to meet people who have committed crimes. Using a structured guide, a facilitator leads discussions on a series of topics related to the impact of crime.

¹⁶⁰ Transformative justice (“TJ”) is an abolitionist framework that views systems like prisons, police and others as sites where significant amounts of violence takes place and as systems that were created to be violent to maintain social control. Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.COM, <https://perma.cc/2AHB-SCZM> (last visited Jan. 23, 2022). Some TJ organizations include, INCITE! Women, Trans and Gender Non-Conforming People of Color Against Violence, Generation FIVE, and the Bay Area Transformative Justice Collective (“BATJC”).

¹⁶¹ Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219, 226 (2018); Mimi E. 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 (2021) [hereinafter Kim, *Transformative Justice and Restorative Justice*]. Prison abolition is a term that is used to express opposition to the criminal legal system and to measures that seek to reform and legitimize current crime control measures.

¹⁶² Kim, *Transformative Justice and Restorative Justice*, *supra* note 161, at 162-72.

¹⁶³ See *Community Accountability: Emerging Movements to Transform Violence*, 37 SOC. JUST., no. 4, 2011-2012, at 1, 4-5; Donna K. Coker, *Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 144-46 (Heather Strang & John Braithwaite eds., 2002).

means of harm-reduction and repair since the 1970s, it is primarily focused on transforming communities and systems.¹⁶⁴

While transformative justice is more concerned with transforming communities and systems, restorative justice is focused on the individuals and community members most directly impacted by an act of harm.¹⁶⁵ Restorative processes take on different forms, but they all share similar values of truth-telling, accountability, and the humanity of all people.¹⁶⁶ Restorative processes bring together people who have caused harm, people who have been harmed, and support people and community members with difficult, but often necessary conversations.¹⁶⁷ Restorative justice organizations and practitioners also operate and exist outside of the formal criminal legal system.¹⁶⁸ For example, restorative justice in schools has been popularized, both at the K-12 level and on college campuses in cases of student misconduct.¹⁶⁹ Restorative justice facilitator training programs have also cropped up in an effort to train additional people to respond to harm without involving the criminal legal system.¹⁷⁰ Most recently, a focus on restorative justice in cases of sexual harm has been renewed.¹⁷¹

How Is Restorative Justice Different?

Current criminal legal processes are concerned with the violation of criminal statutes. The violation of a statute is a harm against the state. Therefore, justice requires that the state determine guilt and impose a punishment on the person responsible for the violation. Criminal legal processes center on a series of questions, including: What laws have been

¹⁶⁴ See Mimi E. Kim, *Moving Beyond Critique: Creative Interventions and Reconstructions of Community Accountability*, 37 SOC. JUST., no. 4, 2011-2012, at 14, 17 [hereinafter Kim, *Moving Beyond Critique*] (discussing community accountability measures and transformative justice have been used as harm-reduction in cases of gender-based violence since the 1970s).

¹⁶⁵ See ZEHR, *supra* note 146, at 38.

¹⁶⁶ ZEHR & GOHAR, *supra* note 149, at 13, 22, 27, 37.

¹⁶⁷ *Id.* at 25, 37.

¹⁶⁸ Examples include Common Justice in Brooklyn and the Bronx; Project NIA and the Community Justice for Youth Institute in Chicago; Restorative Justice for Oakland Youth (RJOY) and Community Works in Oakland and San Francisco; the Community Conferencing Center in Baltimore; and the Insight Prison Project in San Quentin, among others.

¹⁶⁹ See generally Belinda Hopkins, *Restorative Justice in Schools*, 17 SUPPORT FOR LEARNING 144 (2003).

¹⁷⁰ Vermont Law School and The University of San Diego Center for Restorative Justice are two such training and certificate programs. See *Restorative Justice Degrees*, VT. L. SCH., <https://perma.cc/MC9E-NM4R> (last visited Jan. 23, 2022); *Restorative Justice*, UNI. OF SAN DIEGO, CTR. FOR RESTORATIVE JUST., <https://perma.cc/RW3Z-XLT5> (last visited Jan. 23, 2022).

¹⁷¹ See Kim, *Moving Beyond Critique*, *supra* note 164, at 14-35 and accompanying note.

broken? Who did it? What do they deserve? There are three main philosophical arguments for current criminal legal processes.¹⁷² The first centers on retribution. From a retributive or *just desserts* perspective, people who violate criminal statutes need to be punished because it is what they deserve.¹⁷³ Deterrence, on the other hand, implies that punishment will either stop an individual from committing another crime or will stop others from doing so.¹⁷⁴ Finally, incapacitation seeks to keep the community safe from dangerous people.¹⁷⁵ All of these notions are centered solely on people who violate the law. There is little—and often no—attention given to people who have been harmed by these law violations. Yet, there is a growing body of literature that critiques system responses to those who have caused harm and those who have been harmed.¹⁷⁶

Restorative justice offers a framework that focuses on all people impacted by harm. This includes people who have perpetrated harmful acts, those who have experienced them, and others who have been impacted by them. It asks a very different series of questions, and as such offers distinctly varied outcomes. For instance, while criminal legal processes are concerned with which criminal statute was violated, restorative processes ask who was harmed. Instead of focusing on who is guilty and what punishment they deserve, restorative processes focus on the needs of the person who has been harmed and who is obliged to meet those needs. Restorative processes achieve justice by involving those affected by a harm in the process to collectively address the specific harm at hand.¹⁷⁷ To make justice more healing, restorative, and transformative, people who have been harmed must be satisfied with the process and people who cause harm must acknowledge their actions.¹⁷⁸ They must fully understand the impact of their behavior and must take steps toward active accountability.¹⁷⁹ Accountability measures to repair harm must also address the reason for the harmful behavior.¹⁸⁰ The final outcome seeks

¹⁷² See generally TERENCE MIETHE & HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE (1st ed. 2005).

¹⁷³ See generally *id.*

¹⁷⁴ See generally *id.*

¹⁷⁵ See generally *id.*

¹⁷⁶ See, e.g., Dale C. Spencer, *Cultural Criminology: An Invitation . . . to What?*, 19 CRITICAL CRIMINOLOGY 197 (2011).

¹⁷⁷ Based on the authors' experience.

¹⁷⁸ Based on the authors' experience. Satisfaction with the restorative process means different things to different clients and is often based on their goals and expectation. Restorative processes require that practitioners seek feedback on the experiences of their clients.

¹⁷⁹ *Id.*

¹⁸⁰ ZEHR, *supra* note 146, at 40-43.

to bring “closure” to both parties and to help them both successfully integrate back into the community.¹⁸¹

False assumptions about restorative justice are that it is soft on crime and does not hold people accountable because it does not punish wrongdoing.¹⁸² Equating accountability with punishment is misguided. Punishment does little to help people who have caused harm fully understand the impact and aftermath of the harm that they have caused. Punishment does not offer opportunities for accountability that are linked to the specific harmful behavior. Finally, punishment does not typically help crime survivors to heal. Restorative justice offers the opportunity for these types of outcomes.

Is Restorative Justice Effective?

Studying the effectiveness of restorative justice proves to be challenging because of a lack of standardization and implementation across practices and programs and because of definitional considerations across research studies.¹⁸³ Yet, it is the very lack of standardization, some argue, that makes restorative justice more effective.¹⁸⁴ No two restorative processes are the same because the needs of parties involved are never identical. This makes measuring and evaluating restorative processes more difficult. In addition, the goals of restorative justice are difficult to operationalize as outcomes measures in scientific studies.¹⁸⁵

To overcome methodological shortcomings, researchers have turned to more robust meta-analyses to measure effectiveness.¹⁸⁶ Meta-analytic

¹⁸¹ ZEHR & GOHAR, *supra* note 148, at 41 (noting how the word “closure” is not always preferable for people who have experienced harm because it suggests that everything can be placed in the past. The word does, however, capture a sense of being able to move forward which is how it is being used here in a restorative justice context.).

¹⁸² See Williamson M. Evers & Vicki E. Alger, *Restorative Justice is Unfair to Students Who Want to Learn*, INDEP. INST. (Sept. 2, 2020), <https://perma.cc/LM2M-CD83> (offering a typical view of the opposition to restorative options which is that restorative practices in schools lead to a culture of leniency and a lack of accountability).

¹⁸³ Daye Gang et al., *A Call for Evaluation of Restorative Justice Programs*, 22 TRAUMA, VIOLENCE, & ABUSE 186, 186-90 (2019).

¹⁸⁴ Based on the authors’ experience as restorative justice practitioners, they have learned that no two restorative justice processes are the same. While all processes follow a set of values and guidelines described elsewhere in this paper, each process focuses on the specific needs of the individual participants in any given process.

¹⁸⁵ Lois Presser & Patricia Van Voorhis, *Values and Evaluation: Assessing Processes and Outcomes of Restorative Justice Programs*, 48 CRIME & DELINQ. 162, 171 (2002); see also Mark S. Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROBATION 52 (1989).

¹⁸⁶ William Bradshaw et al., *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A Meta-analysis*, 24 CONFLICT RESOL. Q. 87, 89 (2006); Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-analysis*, 85 PRISON J. 127, 131 (2005);

reviews tend to find more positive outcomes in restorative processes than in criminal legal processes across various outcome measures.¹⁸⁷ For example, restorative options are more likely to lead to recidivism reduction in both non-violent and violent offenses, and are seen as a cost-effective mechanism for doing so.¹⁸⁸ People who have caused harm and who have engaged in restorative justice are also more likely to comply with formal sanctions.¹⁸⁹ These measurement effects, though positive, are generally small.

Studies on victim satisfaction and restorative justice find that individuals who have been harmed and who had the opportunity to engage in a restorative conference with the person who caused them harm were more satisfied than those who experienced a criminal legal process only.¹⁹⁰ Finally, crime survivors who have engaged in restorative processes may be more prepared to deal with the impacts of trauma.¹⁹¹

Robin J. Wilson et al., *Circles of Support and Accountability: Engaging Community Volunteers in the Management of High-Risk Sexual Offenders*, 46 HOWARD J. 1, 5 (2005).

¹⁸⁷ Restorative justice conferencing (RJC) using face-to-face meetings of offenders and victims: Effects on offender recidivism and victim satisfaction. A systematic review. Studies on the effectiveness of restorative justice have measured satisfaction among people who have been harmed, reduction in repeat offending for violent offenses, ability for people who have been harmed to deal with trauma and post-traumatic stress, and compliance with formal sanctions. People who have been harmed and have participated in restorative justice experience less anxiety about further victimization, less fear of crime overall, and less anger about their specific harm. See generally Caroline M. Angel et al., *Short-Term Effects of Restorative Justice Conferences on Post-Traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomized Controlled Trial*, 10 J. EXP. CRIMINOLOGY 291, 292 (2014); LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 8 (The Smith Institute 2007); Lawrence W. Sherman et al., *Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials*, 1 J. EXPERIMENTAL CRIMINOLOGY 367, 371 (2005) [hereinafter *Four Randomized Controlled Trials*]; HEATHER STRANG ET AL., RESTORATIVE JUSTICE CONFERENCING (RJC) USING FACE-TO-FACE MEETINGS OF OFFENDERS AND VICTIMS: EFFECTS ON OFFENDER RECIDIVISM AND VICTIM SATISFACTION. A SYSTEMATIC REVIEW 5 (David Wilson eds., The Campbell Collaborations 2013).

¹⁸⁸ See generally JAMES BONTA ET AL., SOLICITOR GEN. CANADA, RESTORATIVE JUSTICE: AN EVALUATION OF THE RESTORATIVE RESOLUTIONS PROJECT 29 (1998); James Bonta et al., *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 CONTEMP. JUST. R. 319, 319-38 (2002); Bradshaw, et al., *supra* note 182, at 94; Jeff Latimer et al., *supra* note 186, at 137; William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 164 (2003); Nancy Rodriguez, *Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism*, 53 CRIME & DELINQ. 355, 374-75 (2007); Lawrence W. Sherman et al., *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review* 31 J. QUANTITATIVE CRIMINOLOGY 1, 20 (2015).

¹⁸⁹ SHERMAN & STRANG, *supra* note 187, at 88-89.

¹⁹⁰ Mark S. Umbriet, Robert B. Coates & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 31 (2001).

¹⁹¹ Caroline M. Angel et al., *supra* note 187, at 295-96.

People who experience harm who engage in restorative processes experience decreased in symptoms of post-traumatic stress.¹⁹²

V. THE JOURNEY TO RESTORATIVE JUSTICE FOR CASES OF SEXUAL HARM

The rapes that the authors experienced in 1999 lead them on very different paths. Alexa immediately reported her rape to the police. This began a lengthy process during which Alexa was interviewed several times by law enforcement and prosecutors. Alexa had misgivings about testifying. However, she was often encouraged by those involved with the case to testify to protect the community from the man who raped her. Alexa also testified because she believed that it would help her heal and move on from the experience. Unfortunately, even though the man who raped her was found guilty and received a lengthy sentence, the unusual result did not mitigate the significant impact the criminal legal process had on her mental health and well-being.

Alissa did not tell anyone about her rape. Both the acute and chronic mental health impacts of the assault and the silence were devastating. Still, she remained silent about her rape for 15 years. In 2014, Alissa began opening up about the experience, because as a criminal justice professor and sex crimes expert, she felt like a fraud not owning her experience. Disclosing her rape had additional acute mental health outcomes, including flashbacks and nightmares that returned after many years. One of the first people she disclosed to was Dr. Jill S. Levenson, her colleague and friend who is a therapist who works with both survivors of sexual violence and individuals who have perpetrated it.¹⁹³ In 2016, she asked Alissa if she would be willing to speak to the men in her treatment program as “Alissa, rape survivor.” It was this initial conversation and subsequent work together that led Alissa on a path toward embracing restorative justice. Further conversations with Alexa and the opportunity to participate in vicarious restorative justice process (“VRJ”) sessions brought Alexa to a similar journey.

As sex crimes researchers, survivors, restorative justice participants and restorative justice practitioners, the authors have learned that a holistic approach to addressing harm is necessary if society ultimately seeks to help survivors to heal and to decrease the overall occurrence of sexual harm. Both authors found their most profound moments of healing

¹⁹² See STRANG ET AL., *supra* note 187, at 43-44.

¹⁹³ Dr. Jill S. Levenson is a Professor of Social Work at Barry University in Miami, Florida. She began her career working with survivors of sexual violence. Her therapeutic practice mostly focuses on individual and group therapy with men who have been mandated to treatment after a conviction for a sexual offense.

while engaging in the restorative process as survivors. The next section addresses the often unmet needs of people who have experienced harm and the needs of people who have caused sexual harm. The authors then make the case for restorative justice as a tool to address the needs of all people impacted by sexual harm.

Understanding the Needs of People Who Have Been Sexually Harmed

The impacts of sexual harm are profound. While no two people experience sexual harm or its aftermath in the same way, trauma can significantly impact how survivors connect to others and to the world around them.¹⁹⁴ “Trauma disrupts our relationship with ourselves, our bodies, our minds our very beings. It interrupts our ability to relate to others. Trauma destroys our ability to trust others, to trust our thoughts, or to trust our bodies.”¹⁹⁵ This inability to connect often begins during an initial experience of sexual harm when the person being harmed disconnects, or dissociates, from themselves.¹⁹⁶ Survivors will often discuss how they felt separated from their body or that they watched what happened to them from outside of themselves.¹⁹⁷

When Alexa describes the experience of her rape, she talks about how she was able to focus on items in the room, like the clock or her roommate’s face. In her mind she focused on what she would do after the rape was over. Alissa, on the other hand, remembers that she separated from her body and watched her rape from somewhere above the scene, but counted the waves to stay focused on something other than the rape.¹⁹⁸

People who experience trauma often need to share their stories in their own way, something that is not possible in a traditional criminal

¹⁹⁴ See JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 42-43 (1992).

¹⁹⁵ ALISSA R. ACKERMAN & JILL S. LEVENSON, *HEALING FROM SEXUAL VIOLENCE: THE CASE FOR VICARIOUS RESTORATIVE JUSTICE* 33-34 (2019).

¹⁹⁶ Herman writes:

A rape survivor describes this detached state: “I left my body at that point. I was over next to the bed, watching this happen . . . I disassociated from the helplessness. I was standing next to me and there was just this shell on the bed . . . There was just a feeling of flatness. I was just there. When I repicture the room, I don’t picture it from the bed. I picture it from the side of the bed. That’s where I was watching from.”

HERMAN, *supra* note 194, at 43 (footnote omitted).

¹⁹⁷ The theory of dissociation was first established by Pierre Janet in 1889. Most current ideas about dissociation and PTSD stem from his work.

¹⁹⁸ Other survivors have spoken about similar experiences. For instance, Thordis Elva states she now knows how many seconds there are in two hours because she counted the seconds on her clock during her entire rape. See Thordis Elva & Tom Stranger, *Our Story of Rape and Reconciliation*, TEDWOMEN (2016), <https://perma.cc/D526-QGEY>.

legal process.¹⁹⁹ The criminal legal response to sexual harm is problematic because it often confuses, disappoints, and traumatizes survivors in several ways including the complex rules and procedures of the legal system, the public nature of the legal proceedings, the relegation of a survivor's role in legal proceedings, the requirement to retell the intimate details of the act of sexual harm, the sequestering of witnesses who may be the survivor's friends and family, and defense attorney questioning which may exacerbate the self-blame the survivor is already experiencing.²⁰⁰

One of the country's leading experts on trauma and abuse, Dr. Judith Herman explains that "the wishes and needs of victims are often diametrically opposed to requirements of legal proceedings."²⁰¹ Survivors of sexual harm have many needs that are left unmet by the criminal legal system. Overall, studies with people who have experienced sexual harm suggest that they are more interested in having a voice in the dialogue with criminal legal professionals, recognition, and acknowledgement of harm by the person that perpetrated it, preventing sexual harm in the future, reconnecting with their communities, and in treatment for people who have harmed, rather than punishment.²⁰²

Often survivors enter the criminal legal system as a means of validating their experience.²⁰³ It is critical that survivors are believed, absolved, and vindicated of any wrongdoing or responsibility for what was done to them.²⁰⁴ Many survivors simply seek a voice and empowerment. Some survivors express wanting to be believed and for the perpetrator of the harm to confess.²⁰⁵ However, in most cases, survivors are not able to tell their story in their own words or in their time during court testimony.²⁰⁶ They are restricted by the questions that the prosecutor

¹⁹⁹ See generally Rebecca Campbell et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, 20 VIOLENCE AGAINST WOMEN 607 (2014) (illustrating that the traditional legal system is not designed for this process through research showing that most cases at the six SANE sites never led to criminal prosecution due to high rates of case attrition that begins early in the investigation process). See also Shaw, *supra* note 45, at 454-55 (finding that fewer than 30% of cases are referred for prosecution and that police are less likely to complete an investigation if they believed the victim was becoming uncooperative, incompetent, or weak. These are common presentations of acute and chronic trauma.).

²⁰⁰ See Herman, *supra* note 19, at 574; see also VANDIVER ET AL., *supra* note 56, at 68.

²⁰¹ See Herman, *supra* note 19, at 574.

²⁰² *Id.*

²⁰³ See *id.* at 585.

²⁰⁴ OUDSHOORN ET AL., *supra* note 129, at 27.

²⁰⁵ Herman, *supra* note 19, at 585.

²⁰⁶ *Id.* at 574.

and defense attorneys ask. Thus, their testimony does not accurately represent their stories.

Alexa remembers that part of the reason she was fearful about testifying was the possibility that she would say something that conflicted with her initial report to law enforcement. During the preparation process, she was told that this could be a way that a defense attorney could discredit her during the criminal trial. As such, Alexa still feels that her testimony does not adequately communicate what she experienced the night she was raped.

The ability to reconnect with and tell one's story can also help a person reconnect with their bodies and with other people.²⁰⁷ Bessel van der Kolk explains that traumatic experiences often leave people speechless because they are unable to find words to describe the feelings and sensations that overwhelm their senses when they think about a traumatic experience.²⁰⁸ Finding the right language leads to self-awareness and healing.²⁰⁹ That language often involves metaphors related to the body itself. This is because trauma impacts the mind, body, and spirit.²¹⁰ It can affect every layer of the body, from the cellular and physiological to the psychological.²¹¹ Simply put, the brain remembers what the body tries to forget.²¹²

If someone experiences trauma and does not or cannot take the steps necessary to heal from that trauma, it can overtake their body and their brain.²¹³ Therefore, long after an experience of sexual harm, a person may not feel safe in their own skin. This can result in chronic pain in the body, including chronic pelvic pain, muscle tension, headaches, and other psychosomatic issues.²¹⁴ It can also result in total disconnection and dissociation from the body.²¹⁵ Bessel van der Kolk explains that trauma survivors often become experts in numbing because the body sensations that arise from trauma are often too overwhelming to process.²¹⁶ The

²⁰⁷ See generally VAN DER KOLK, *supra* note 152.

²⁰⁸ See Bessel van der Kolk, *The Neurobiology of Childhood Trauma and Abuse*, 12 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 293, 305 (2003).

²⁰⁹ ACKERMAN & LEVENSON, *supra* note 195, at 39.

²¹⁰ VAN DER KOLK, *supra* note 152, at 66-67.

²¹¹ See HERMAN, *supra* note 194, at 37; Bessel van der Kolk, *Clinical Implications of Neuroscience Research in PTSD*, 1071 ANNALS OF THE N.Y. ACAD. SCI. 277 *passim* (2006).

²¹² ACKERMAN & LEVENSON, *supra* note 195, at 40.

²¹³ VAN DER KOLK, *supra* note 152, at 67.

²¹⁴ VAN DER KOLK, *supra* note 152, at 268; Alissa R. Ackerman & Alexa Sardina, *Beyond Fear: The Sex Crimes Podcast, Bonus Episode: The Things Left Unsaid*, <https://perma.cc/WHX4-F9FC>.

[<https://perma.cc/WHX4-F9FC>] (last visited Jan. 23, 2022).

²¹⁵ VAN DER KOLK, *supra* note 152, at 91.

²¹⁶ *Id.*, at 90-91.

effects of numbing can be seen in both the psychological and behavioral consequences of sexual trauma.²¹⁷

Compared to people who have not experienced sexual harm, those who have are three times more likely to suffer from depression,²¹⁸ but sexual harm can also lead to increased anxiety and even obsessive compulsive disorder (OCD).²¹⁹ Those who have experienced sexual harm are six times more likely to suffer from PTSD, 13 times more likely to abuse alcohol and 26 times more likely to abuse drugs.²²⁰ Just as some people may turn to alcohol or drugs as a way to forget painful memories or to numb feelings of distress and anxiety, or even as a coping mechanism, eating disorders, like anorexia or bulimia, can also be a way to exert control over the body and cope with negative emotions.²²¹

Self-harm is also common among those who have experienced sexual harm.²²² Deliberate self-harm is when people inflict physical harm on themselves, usually in private and without suicidal intentions. Some survivors may use self-harm to cope with difficult or painful feelings.²²³ Common forms of self-harm include biting, cutting, burning, or scratching the skin, and even pulling out hair.²²⁴ Some people may engage in self-harm to numb their pain, feel a release or reclaim a sense of control.²²⁵ Unfortunately, this sense of relief is only temporary and thus the desire to harm oneself resurfaces.²²⁶ This encourages a cycle of self-harm that can cause serious damage, infection and medical issues that can be life-threatening.²²⁷ Lastly, survivors of sexual harm are four times more likely to contemplate suicide.²²⁸

²¹⁷ *Id.*

²¹⁸ VANDIVER ET AL., *supra* note 56, at 75.

²¹⁹ Asaf Caspi et al., *Relationship Between Childhood Sexual Abuse and Obsessive-Compulsive Disorder: Case Control Study*, 45 ISR. J. PSYCHIATRY & RELATED SCI. 177 (2008).

²²⁰ VANDIVER ET AL., *supra* note 56, at 75.

²²¹ Caitlyn Hamilton, *Trauma, Sexual Assault and Eating Disorders*, NAT'L EATING DISORDERS ASS'N, <https://perma.cc/5FNU-2AX7> (last visited Jan. 23, 2022).

²²² Colleen M. Lang & Komal Sharma-Patel, *The Relation Between Childhood Maltreatment and Self-Injury: A Review of the Literature on Conceptualization and Intervention*, 12 TRAUMA, VIOLENCE, & ABUSE 23, 25 (2011) (explaining that self-harm is common among survivors of sexual harm, with the strongest association between self-injury and child sexual abuse); Mireille Cyr et al., *Clinical Correlates and Repetition of Self-Harming Behaviors Among Female Adolescent Victims of Sexual Abuse* 14 J. CHILD SEXUAL ABUSE 49, 51 (2005).

²²³ Lang & Sharma-Patel, *supra* note 222, at 28.

²²⁴ *Self Harm*, RAINN, <https://perma.cc/SZJ5-WJVU> (last visited Jan. 23, 2022) [hereinafter *Self Harm*, RAINN].

²²⁵ *Id.*; van der Kolk, *supra* note 211.

²²⁶ *Self Harm*, RAINN, *supra* note 224.

²²⁷ *Id.*

²²⁸ VANDIVER ET AL., *supra* note 56, at 75.

The authors both speak publicly about their alcohol and drug abuse in the aftermath of rape.²²⁹ Like many other survivors of sexual violence, Alexa struggled with anorexia for many years following her rape. Alissa also struggled with self-harm for many years and attempted suicide twice in the three years following her rape.

People who have unresolved trauma or those who have a diagnosis of PTSD may live in a state of constant hyper-arousal, acute hypervigilance, or complete dissociation from the body.²³⁰ Both the authors, for example, experience hypervigilance and an overly sensitive startle response. Something as loud as fireworks or as quiet as an unexpected whisper can trigger a trauma response in them. With an overactivated trauma response, the brain is less likely to properly interpret cues.²³¹ This may lead to the inability to determine that something could be dangerous or, at the other extreme, that everything is a threat.²³²

Sexual trauma shapes the way one connects with and thinks about themselves and others.²³³ It can impact how one processes emotions and how they behave.²³⁴ Understanding these impacts and the unique ways they are experienced by individual survivors, including helping survivors to understand these impacts in themselves, can aid in the healing process.²³⁵ There are many additional needs that people who experience sexual harm may seek to address.²³⁶ First and foremost, they need to feel safe and secure, both physically and emotionally.²³⁷ This requires consistent and authentic relationships that help survivors regain trust.²³⁸ People rarely lie about experiencing sexual harm and rates of false reports

²²⁹ ACKERMAN & LEVENSON, *supra* note 195.

²³⁰ Jennifer C. Jones. & David H. Barlow, *The Etiology of Posttraumatic Stress Disorder*, 10 CLINICAL PSYCH. REV. 299 *passim* (1990).

²³¹ Gordon H. Bowers & Heidi Sivers, *Cognitive Impact of Traumatic Events*, 10 DEV. & PSYCHOPATHOLOGY 625, 625-26 (1998).

²³² van der Kolk, *supra* note 208, at 293.

²³³ Herman, *supra* note 19.

²³⁴ *Id.*

²³⁵ Based on the authors' experiences as restorative justice facilitators and in prior advocacy work with people who have experienced sexual harm, they have found that helping people to understand how and why their bodies react as they do helps provide context and understanding which ultimately helps in making sense of experiences, decreasing shame, and promoting healing.

²³⁶ OUDSHOORN ET AL., *supra* note 129, at 27-28.

²³⁷ *Id.* It is the authors' practice to promote safety and security at every step of the process by keeping the person who was sexually harmed in control of decision making to the extent that is possible.

²³⁸ Based on the authors' experience, consistent and authentic relationships require that the facilitator be accountable for their actions. Follow through is integral to building trust in facilitator-client relationships.

remain consistently low.²³⁹ As such, when someone discloses sexual harm, they need to be believed, absolved, and vindicated. Like survivors of other crimes, sexual harm survivors often seek acknowledgement of the harm done to them.

The first thing that happens when someone experiences unwanted sexual contact is that they lose control over choices about their body. Giving them the ability to make choices about their healing and about their needs helps them empower themselves and regain a sense of control. Similarly, people who experience sexual harm need to be heard. They need opportunities to share their stories in safe spaces.²⁴⁰ Survivors need to mourn what they have lost and grieve their pain. They often feel the need to express the impacts of the harm directly to the person who harmed them or to others who have committed similar harms.²⁴¹ They might also have questions that only the person who harmed them can answer. Survivors need access to education and support. This might include education around trauma responses and the mental health outcomes of trauma.²⁴² It may include helping survivors gain clarity around why their body responded the way it did during an experience of sexual harm.²⁴³ People who have been sexually harmed need to know that there are different options and choices available to them. Finally, survivors need accountability surrounding unhealthy coping strategies that they have engaged in the aftermath of sexual harm.²⁴⁴

²³⁹ Andre W. E. A. De Zutter et al., *The Prevalence of False Allegations of Rape in the United States from 2006-2010*, 2 J. FORENSIC PSYCH. 2, 5 (2017); David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1331 (2010).

²⁴⁰ De Zutter et al., *supra* note 239. Lisak et al., *supra* note 239.

²⁴¹ OUDSHOORN ET AL., *supra* note at 129, at 3.

²⁴² One personal example is how validating it was for both authors to learn about the neurobiology of trauma to make better sense of their experiences. In particular, reading *The Body Keeps the Score*, *supra* note 152, and *Trauma and Recovery*, *supra* note 194, changed the way the authors thought about their experiences.

²⁴³ OUDSHOORN ET AL., *supra* note 129, at 27. Oudshoorn and colleagues provide the examples of a male survivor experiencing an erection or ejaculation during an assault and of a female survivor experiencing an orgasm while being abused. It has been our experience that education goes beyond these physical explanations. For instance, helping a survivor to understand the freeze response as a completely normal reaction to sexual trauma helps put them at ease. Similarly, explaining how individuals react differently in different situations helps survivors to feel less alone.

²⁴⁴ Based on the authors' experience, naming unhealthy coping mechanisms and engaging conversation with clients who have experienced sexual harm around these coping mechanisms is critical. Ultimately, it is up to the person who was harmed to address any unhealthy coping strategies. Discussions around tools to use and healthy coping strategies can begin the accountability process for those who have been harmed.

Understanding the Needs of People Who Have Perpetrated Sexual Harm

If society is serious about eradicating sexual violence and committed to meeting the needs of people who have experienced sexual harm, then the needs of those that have caused the harm cannot be ignored. Sexually harmful behavior does not exist in a vacuum. The decision to commit a harmful sexual act can stem from individual experiences of harm, the inability to cope with life stressors, and societal-level messages about sexuality and masculinity.²⁴⁵ These variables are not the cause of sexual harm, nor do they excuse or justify such behavior, but they help researchers and practitioners to understand why people engage in these acts.

Addressing harmful sexual behavior is challenging. It requires that the underlying root causes of behavior are appropriately addressed. Providing support to people who have caused sexual harm allows them to engage in the process of unpacking the experiences that led to their behavior. This most often requires treatment providers who specialize in problematic sexual behavior.²⁴⁶ Additionally, many people who perpetrate sexual harm lack empathy for the people they have harmed.²⁴⁷ Creating processes that help them to build empathy can be beneficial. Being fully responsible and accountable for one's behavior helps address these needs and the needs of people who have experienced sexual harm. Restorative justice is one tool that can aid this process, because remaining accountable for the harm someone has caused also allows that person to address the underlying causes of that harm.

Earlier the authors discussed the many needs that must be addressed for people who have experienced sexual harm.²⁴⁸ Many of the needs of people who have caused sexual harm can be met by addressing those needs. For instance, the need for people who have experienced sexual harm to feel heard and safe and secure in doing so may be met by the person who caused the harm to actively listen to the survivor telling their story. The need for accountability can be met by naming the action,

²⁴⁵ Anthony R. Beech & Ian J. Mitchell, *Intimacy Deficits/Attachment Problems in Sexual Offenders: Towards a Neurobiological Explanation*, in 1 THE WILEY HANDBOOK ON THE THEORIES, ASSESSMENT, AND TREATMENT OF SEXUAL OFFENDING 187 (Douglas P. Boer ed., 2016); JILL S. LEVENSON ET AL., *TRAUMA-INFORMED CARE: TRANSFORMING TREATMENT FOR PEOPLE WHO HAVE SEXUALLY ABUSED* 4 (2017); TERRY, *supra* note 124, at 57-58, 67, 106.

²⁴⁶ ACKERMAN & LEVENSON, *supra* note 195, at 68.

²⁴⁷ W.L. Marshall et al., *Empathy in Sex Offenders*, 15 CLINICAL PSYCH. REV. 99, 109 (1995); L.M. Williams & D. Finklehor, *The Characteristics of Incestuous Fathers: A Review of Recent Studies*, in HANDBOOK ON SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 231, 248 (W.L. Marshall, D.R. Laws, & H.E. Barbaree eds., 1990).

²⁴⁸ OUDSHOORN ET AL., *supra* note 129, at 27-28.

accepting responsibility for the harm, taking the steps to understand why they behaved in such a harmful way, and making a commitment to do the hard work necessary to ensure it does not happen again. The need to be believed, absolved, and vindicated can also be addressed by acknowledging what happened without excuses or justifications for the behavior. The need to have a voice and feel empowered can be met by listening, demonstrating remorse, and validating the experience. Finally, the need for information and options can be met by answering any questions the survivor has and sharing the steps one has taken and will continue to take to ensure that their behavior is different in the future. Restorative justice provides the opportunity and the space for all these needs to be addressed in a safe and meaningful way.

As with restorative justice more generally, cases of sexual harm can take many forms. Each case is handled with the same care and values related to authenticity, transparency, honesty, and a common humanity, but no two cases are the same. This is because no two people have the same needs or goals and because similar needs and goals may be addressed in distinctly different ways. It is important to be mindful that restorative justice is not for all people,²⁴⁹ but that most people who engage in the process are satisfied with the results.

In the following section, the authors begin by talking about stepping into restorative justice. They share Alissa's experience of participating in and then co-creating the vicarious restorative justice process ("VRJ") for cases of sexual harm. The authors then share Alexa's experience of participating in a vicarious accountability circle process with Alissa. They go on to discuss the typical forms of restorative justice in cases of sexual harm, including victim-offender conferencing, circle processes, and VRJ. The authors provide a case example of a victim-offender dialogue that Alissa facilitated, including written comments from those participants provided after their restorative justice process. Lastly, the authors share a short case example of a VRJ process.

VI. BUILDING OUR PROFESSIONAL PRACTICE

On a Monday evening in April of 2016, Alissa met a group of men in an encounter that would change all of their lives. The goal of this experience was to help clients in Dr. Levenson's treatment group to build empathy. For this to occur, people must feel safe; and yet these men had every reason to be in fear. Their fear was palpable and valid, especially because of the way society treats people who have committed sexual

²⁴⁹ Mark S. Umbreit et al., *Restorative Justice Dialogue: A Multi-Dimensional, Evidence-Based Practice Theory*, 10 CONTEMP. JUST. REV. 23, 29 (2007).

offenses. Alissa knew she had an opportunity to help the participants gain insight into how their actions may have impacted the people they had harmed simply by approaching them with vulnerability and respect. This, in turn, allowed the men to model that same vulnerability. What Alissa was not prepared for was the healing impacts this experience had on her personally. Here, she describes the experience:

My body was visibly shaking as I took my seat at the front of the room. The door, my escape, was to my right, Jill sat to my left. The men sat in a circle of chairs taking up the rest of the room. I was both terrified and intrigued. This was the first time I was in a room full of people who had committed sexual offenses without the security of my title, Dr. Ackerman. My fear was not because I was seated in a room of men who have perpetrated sexual violence. It was directly related to my promise to be open, authentic and vulnerable. Still, the men were far more terrified than I was. Having never had to sit face-to-face with someone who had experienced sexual violence, I am sure they were expecting my anger and wrath, not my honesty and a common humanity.

At the end of the session, a man who had served 20 years in prison for a violent rape that was very similar to Alissa's asked if he could give her a hug and she immediately hugged him.²⁵⁰ It was such a genuine expression of understanding and healing for them both. The night after this session, Alissa was able to return to the place where she was raped and make peace with it. This would not have happened without the healing dialogue that had occurred just 24 hours prior. Approaching difficult conversations in this fashion allows all parties involved to feel seen and heard. While this experience was not originally envisioned as a restorative justice circle process, that is exactly what it turned out to be. That initial experience in 2016 led to Alissa and Dr. Levenson writing a book on the use of VRJ for cases of sexual harm. It has also led to Alissa's participation in and facilitation of VRJ processes with over 500 people who have been convicted of sexual offenses.

In 2018, Alissa was asked to create an accountability circle for a man who had committed a rape 20 years ago. Alissa asked Alexa if she would be interested in participating and Alexa jumped at the opportunity. Alexa talks about her experience of participating in this circle as profoundly healing, unlike a criminal trial. She says that she had told her story many times, but telling the story in the accountability circle was the most

²⁵⁰ Alissa R. Ackerman, *The Importance of Connection*, TED (Oct. 2018), <https://perma.cc/MF39-ZSFE>.

important time she ever told it because it gave her the opportunity to tell it to the person that needed to hear it the most—a person who had committed rape.²⁵¹ Together, the authors have participated in and facilitated VRJ processes in multiple states.²⁵²

Models of Restorative in Cases of Sexual Harm

Over the last 25 years there has been a push for using restorative justice in cases of sexual harm because it can theoretically address both the justice and healing needs of survivors and people responsible for causing sexual harm.²⁵³ Restorative justice can be used for all forms of sexual harm, from verbal harassment, to childhood sexual abuse and rape.²⁵⁴ The cases the authors most often see in their practice are those involving rape and sexual assault.²⁵⁵

²⁵¹ Alissa Ackerman, *Episode 13: Get Curious*, BEYOND FEAR: THE SEX CRIMES PODCAST (Nov. 11, 2020), <https://perma.cc/2RF8-ZWNG>.

²⁵² The authors have facilitated and/or participated in VRJ processes in California, Florida, Minnesota, and Oregon. The authors have served as restorative justice facilitators in the community, in treatment settings, and in prisons.

²⁵³ See, e.g., Gordon Bazemore & Twila Hugley Earle, *Balance in the Response to Family Violence: Challenging Restorative Principles*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 153, 177 (H. Strang & J. Barithwaite eds.); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999); Kathleen Daly, Professorial Lecture at the School of Criminology and Criminal Justice at Griffith University: Seeking Justice in the 21st Century: The Contested Politics of Race and Gender (Apr. 21, 2005); James Dignan & Michael Cavadino, *Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective*, 4 INT'L REV. VICTIMOLOGY 153 (1996); Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J. L. & SOC'Y 237 (1998); Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616 (2002); Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCH. 1332 (2000); Mary P. Koss et al., *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration: Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435 (2004); Mary P. Koss et al., *Justice Responses to Sexual Assault: Lessons Learned and New Directions*, in UNDOING HARM: INTERNATIONAL PERSPECTIVES ON INTERVENTIONS FOR MEN WHO USE VIOLENCE AGAINST WOMEN 37 (Mona Eliasson ed., 2004); Einat Peled et al., *Choice and Empowerment for Battered Women Who Stay: Toward a Constructivist Model*, 45 NAT'L ASS'N OF SOC. WORKERS, INC. 9 (2000); Laureen Snider, *Feminism, Punishment, and the Potential of Empowerment*, in CRIMINOLOGY AT THE CROSSROADS: FEMINIST READINGS IN CRIME AND JUSTICE 246 (Kathleen Daly & Lisa Maher eds., 1998).

²⁵⁴ Annie Cossins, *Restorative Justice and Child Sex Offenses*, 48 BRIT. J. CRIMINOLOGY 359, 361 (2008). Cossins re-analyzes data from previous studies on child sexual abuse and restorative justice and finds that there is not enough evidence to support restorative justice options in cases where juveniles have committed a sexual offense against another child. In practice, the authors do not use restorative justice with children who have been sexually harmed but do take cases involving adult survivors of child sexual abuse.

²⁵⁵ Based on the authors' experience.

In the authors' practice, most cases involve victim-offender conferencing, which brings the person who was harmed into a safe, face-to-face conversation with the person who caused the harm.²⁵⁶ In some instances one or both people will bring a support person to participate with them in the face-to-face meeting.²⁵⁷ Each person works with a trained facilitator ahead of time to address safety and justice needs, as well as goals for the overall process.²⁵⁸ The facilitator might engage other professionals for assistance in the preparation process.²⁵⁹ For example, a facilitator might suggest that one or both people seek professional counseling services to ensure they are psychologically and mentally prepared for a restorative process.²⁶⁰

Preparation for the person who caused harm might include psychoeducational sessions to help them better understand their behavior and emotions.²⁶¹ Similarly, preparation for the person who has been harmed can include conversations about trauma responses, sessions to practice telling the story, and asking and answering questions to best serve all parties involved in the process.²⁶² Everything is planned to ensure that both people feel safe and supported. Something as simple as a survivor choosing where they will sit in a room prior to a process can make a significant difference.²⁶³ Simply put, by the time the two people come together they are both fully prepared for the conference. Some restorative processes involve one face-to-face meeting, while others will include several sessions over a period of time.²⁶⁴ These decisions are made with participants as part of the decision-making process.

²⁵⁶ See also LORRAINE STUTZMAN AMSTUTZ, *THE LITTLE BOOK OF VICTIM OFFENDER CONFERENCING: BRINGING VICTIMS AND OFFENDERS TOGETHER IN DIALOGUE* 127 (2009); Clare McGlynn et al., *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice, and Consequences*, in *SEXUAL VIOLENCE AND RESTORATIVE JUSTICE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS* (Estelle Zinsstag & Marie Keenan eds., 2016). While others in the field use terminology such as "victim-offender conferencing" or dialogue, the authors have chosen to use "one-one-one conferencing" or dialogue. When referencing the work of others, the authors use language consistent with their work. When the authors discuss their work, they use "one-on-one conferencing."

²⁵⁷ Based on the authors' experience; McGlynn et al., *supra* note 256, at 2.

²⁵⁸ Based on the authors' experience.

²⁵⁹ In some instances, the authors will refer clients for therapeutic or trauma based clinical services prior to engaging in restorative processes. Facilitators, even those with extensive training in trauma, are not licensed therapists.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

Case Example: One-on-One Dialogue

In 2001, while attending a party, Jocelyn²⁶⁵ was raped by Ronnie, an acquaintance who promised to look after her once she had expressed concern that she had had too much to drink. When speaking with Alissa, Jocelyn talked about the physical struggle that ensued between her and Ronnie. When she realized that he would continue to overpower her, she determined that if she just pretended that she liked the experience it would end far sooner than if she continued to fight him off. The next day, Jocelyn confronted Ronnie, who denied all culpability. Almost two decades after her rape, Jocelyn was still dealing with the physical and psychological impacts. In early 2018, she reached out to Alissa to see if restorative justice could be an option for her and Ronnie. She'd been back in touch with him via social media and they both wanted to engage in a restorative conversation. Alissa and Ronnie connected first via email and then by phone. During their first phone conversation, Ronnie acknowledged that he had raped Jocelyn and that he was ready to do whatever needed to be done to bring her healing and closure.

Little pre-education was needed prior to the one-on-one dialogue between Jocelyn and Ronnie. It was clear that Jocelyn had worked through significant layers of her trauma in individual therapy. She understood how the trauma from her rape continued to impact her daily, but therapy alone did not alleviate the trauma symptoms she experienced. With his therapist, Ronnie immediately began the work of processing the shame and guilt he felt for the rape he committed. This is important to point out because the feelings of shame and guilt only surfaced after Jocelyn confronted Ronnie 20 years after the rape. He had stuffed his actions so deep that they did not even cross his mind. This is a typical response the authors see in clients with whom they work.

To ensure that Jocelyn felt safe during the process, she chose the location where the one-on-one dialogue would take place in advance. On the day of the dialogue, Ronnie arrived, followed by Alissa. The two had time to process how Ronnie was feeling about seeing Jocelyn in person for the first time since the rape took place. Alissa reassured Ronnie that a restorative process is designed to bring healing to all parties and that she would not have agreed to bring the two of them together unless she was sure it was safe for them both. When Jocelyn arrived, Ronnie stood up to greet her as a sign of respect. Alissa stood to greet Jocelyn as well and then asked her where she would be most comfortable sitting for this

²⁶⁵ All case examples use pseudonyms when necessary and some facts are edited from actual experiences in order to protect the anonymity and confidentiality of participants.

process. After Jocelyn chose the chair and the exact place in the room where she felt the safest and in control, both Alissa and Ronnie sat down.

Jocelyn and Ronnie exhibited body language that communicated that they were tense and uncomfortable. Nonetheless, Ronnie asked if he could read a letter he had written to Jocelyn to begin the dialogue. Jocelyn agreed and listened intently to Ronnie's admission of rape and full accountability for his actions. As Ronnie spoke, Jocelyn's visceral tension relaxed, and she seemed far more comfortable in her skin. Jocelyn then had the opportunity to share all the ways that this rape had impacted her. She spoke through tears as she described the acute manifestations of trauma in the direct aftermath of the rape, and then detailed the more chronic and insidious impacts on her physical and mental health over time.

The formal dialogue lasted approximately three hours, at which point Jocelyn and Ronnie asked Alissa to leave. There was more they wanted to discuss without the formality of a facilitator. This speaks volumes about the actual dialogue process, as Jocelyn felt safe enough to be alone with the man who raped her years prior.

Here is what Jocelyn noted about the process:²⁶⁶

My RJ experience may have been a little unconventional in that I reached out to the person who sexually assaulted me [u]p until that point, he had been in denial that he had raped me. He apologized right away and we started exchanging messages and preparing for a restorative justice session with Alissa.

As part of our preparation, we were tasked with coming up with agreements about the meeting. After exchanging messages online, we ended up agreeing to talk by phone. It was during one of our phone conversations that he told me had talked to Alissa. He said, "I told her 'I raped Jocelyn.'" It was the first time I had heard those words. I think many survivors have the experience of knowing they were raped and not having anyone be accountable, which is crazy-making. I often felt like I was lost in my thoughts about the rape and was worried that I had somehow made it up. Having him admit that he knew it was rape and say that it happened freed me from the self-doubt I had been experiencing for twenty years.

The work we did to prepare for the restorative justice session and the meeting itself was both intense and powerful. Coming face to face with the person who hurt me all those years ago and hearing

²⁶⁶ ACKERMAN & LEVENSON, *supra* note 195, at 9.

him say he was sorry and be accountable for his actions, shifted things for me. A few months after we had met up for our meeting, I realized that I no longer felt like my identity was tied up in my experience of the rape. He had apologized and demonstrated to me that he was actively making changes in his life. The sting of the encounter (many years ago) had dissipated. There was simply nothing left for my psyche to hold onto or process anymore. The experience had been validated and he had taken responsibility. I was free of the guilt that had been swirling in my head for two decades about all the things I could have or should have done differently. I finally got it. It wasn't my fault.

Ronnie wrote a reflection as well²⁶⁷:

I've been married for 14 incredible years, I have two beautiful children, and I raped someone 20 years ago. Confronting my past sexual transgressions wasn't just about how the survivor would heal or how I dealt with my emotions. It came, and still comes, with an incredible burden that I placed on my wife and children. I'm one of a very large group of males who have committed sexual assault and rape and buried it as deep as I could.

In 2018, three days before the Super Bowl, the survivor reached out to me on Facebook. I knew she was going to reach out at some point because she confronted me about the rape the day after it happened. Back then, I was a typical adolescent male, and like many men in society today, I denied all culpability. As soon as she reached out, I did a little research and quickly realized the impact that I had on her all this time.

I did it, I raped her. It was a fact now. For the next few months, I felt like I was walking around with a jersey that said "rapist" on the back.

After the survivor reached out to me, I knew I had to confront it. I felt compelled to reach out and apologize. There was this utter disgust in my stomach that I could not bury. I didn't know what would happen at that stage, but I couldn't live with myself knowing exactly how she felt and still denying it occurred like I did 20 years ago.

I remember exactly what I was doing when I received that Facebook message. I was at a burrito joint picking up some food for my children and I did everything I could not to show my

²⁶⁷ ACKERMAN & LEVENSON, *supra* note 195, at 9-11.

children my emotions. As soon as I got home, I responded and apologized to the survivor. Later that night my wife came home, and I immediately told her what I had done 20 years before. What she did next was incredible.

She grabbed my face, looked me in the eyes, and said, “I love you.” I cried for a long time and she supported me, despite me having done something as damaging as rape.

Both the survivor and my wife have incredible hearts. They believe in second chances and that good people make mistakes. Absolutely horrific mistakes. Yet, we have to learn from our past transgressions if we are going to try to make a better world.

Within a few weeks, we began working on a target date for a restorative justice session. Now I went from feeling sad and horrible to very scared. What would happen to my children? How would this affect my wife? Forget how I would be affected, there are all other people who have also become victims.

I think some people might not understand what restorative justice means. It’s not necessarily a public outing of the perpetrator. It can absolutely be done in a confidential setting if the survivor chooses it to be that way. Remember, the survivor has total control here on how this goes. I lost that choice when I stole her ability to choose.

I was compelled to make the leap to start this process because I knew what I did was wrong. That’s the first step a perpetrator must do. I didn’t know what would transpire, but I knew I had to focus on doing the right thing. One might ask, “Why didn’t I reach out to her earlier?” I buried it, and I didn’t want to confront it. One thing the survivor said to me was that she was sad that I never reached out AND she was glad that she could do it when she was ready.

This journey isn’t over for us. I still think about the survivor every day, definitely more often than I have in the last 20 years. I still feel like I owe the survivor so much. The restorative justice process is definitely for the survivor, but incredibly it is helping me with my own healing.

I’ve really been focused on doing the right thing. I don’t know what will happen in a year, 10 years, or 20 years, but I do know that there is room for healing and that I can make a difference in society by focusing on doing what’s right.

Another restorative process that can be used in cases of sexual harm is known as a circle process. Here, people with a vested interest in a particular case or issue come together to share their concerns and perspectives.²⁶⁸ Circle processes might involve family members who have come together after the disclosure of sexual harm within the family. It could include a group of friends who did not believe a survivor's disclosure. Similarly, it might involve someone who caused harm, the person they harmed, and a group of support people. In some instances, a restorative process might begin as a one-on-one face-to-face encounter that leads to a larger circle process in time. In a circle process each person is considered an equal. Each person is granted the opportunity to answer questions designed by the facilitator without interruption from other participants. Such a process allows for better listening and understanding.

Finally, VRJ can involve both face-to-face victim-offender conferences and circle processes that allow people to participate in ways that are detached from their own specific cases of harm.²⁶⁹ For instance, a survivor of sexual harm may be interested in participating but has lost contact with or does not know the person who harmed them. The person who caused harm may be unwilling to participate or they may be deceased. People who have committed a sexual offense may want to be accountable for their behavior, but do not know how to reach out to the person they harmed.²⁷⁰ If they have been charged or convicted of a sexual offense, they may be legally prohibited from contacting the person they harmed. VRJ adheres to the same values and frameworks as traditional restorative justice processes; the only difference is that the people participating in the process do not know one another. VRJ can be used in settings that are not ideal for traditional restorative justice.

The restorative justice process with which Alissa initially engaged was a VRJ session that ultimately led to the creation of the VRJ model for healing from sexual violence.²⁷¹ VRJ can be used in institutional settings, as well.²⁷²

²⁶⁸ See generally KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* (2005).

²⁶⁹ Based on the authors' experiences.

²⁷⁰ Based on the authors' experiences. In most instances when the authors engage in restorative processes, they will not reach out to a survivor on behalf of someone who caused harm. Restorative justice should be survivor driven.

²⁷¹ See ACKERMAN & LEVENSON, *supra* note 195, at vii-viii.

²⁷² The authors have participated in and facilitated VRJ sessions in the California prison system with individuals serving life sentences.

Case Example: VRJ

By the time Amelia was 21 she had experienced sexual harm at the hands of multiple people. Her abuse began at the age of eight when she was molested by a close family friend. At 16, Amelia was raped at a party by someone she thought was a friend and at 21 she experienced date rape. The multiple experiences of sexual violence caused significant mental health concerns for Amelia, which were compounded by the way she was dismissed by police when she reported the rape that occurred when she was 16. When Amelia contacted Alissa, she felt broken but was interested in learning more about the restorative justice process. She was considering participating in a restorative process, but under no circumstances did she want to participate with any of the individuals who had perpetrated sexual harm against her. This is when Alissa suggested that VRJ might be a good option.

As one accountability measure offered in some cases, Alissa asks people who have perpetrated sexual harm if they would be willing to give back by participating as proxies in cases where a survivor wants to participate but cannot or will not do so with the person who directly harmed them. Alissa chose Dan, someone who had perpetrated a date rape, to fill this role. As Dan was familiar with the process, there was no pre-conferencing work that needed to be completed with him prior to the circle process.

For Amelia, however, there was significant pre-education that occurred prior to the VRJ process. Amelia had questions about why she had experienced sexual harm on multiple occasions and wanted to better understand trauma responses, including why her body reacted as it did during her experiences of sexual harm and why she continued to experience body triggers. These conversations happened prior to the VRJ session. Amelia decided that she wanted to have the actual process occur in an online format, and that she wanted to have a support person with her throughout the dialogue. As this was a vicarious process, there were few accountability options Amelia could ask for. An additional conversation with Alissa helped her to determine what she was looking to accomplish in the session.

Amelia wanted to hear someone take responsibility for the harm they had caused, including a discussion of the steps they had taken to be accountable. She wanted to know what went through Dan's mind leading up to and during the rape he perpetrated. Finally, she wanted to hear directly from the mouth of someone who had committed an act that was similar to what she experienced explain that what happened to her was not her fault. Each of these goals were accomplished during a two-hour, online VRJ process. In addition, Amelia felt empowered because she was

able to impart some important knowledge to Dan that he had not considered. In follow up, Amelia was satisfied with the process and felt that it contributed to an overall improvement in her mental health and the way she thought about her experience of date rape.

Is Restorative Justice for Sexual Harm Effective?

Studies on the effectiveness for restorative justice in cases of sexual harm have found generally positive results.²⁷³ However, these results are confounded by the fact that full scale evaluation studies have not been undertaken.²⁷⁴ Still, some studies offer promising results. For example, an evaluation of 22 cases that were referred to Project RESTORE, found that participation decreased rates of PTSD in survivors and that survivors who participated in the process were satisfied with the outcome.²⁷⁵

One case study of an adult survivor of childhood sexual abuse and rape by a family member found that the restorative justice process helped her to feel empowered and provided a turning point in her healing process.²⁷⁶ Another study noted that restorative processes are less victimizing for survivors as compared to traditional criminal legal processes.²⁷⁷ One study comparing youth who went through a formal adjudication process with those who went through a restorative process found that those who went through a restorative process had lower rates of re-offending.²⁷⁸ While some studies have addressed one aspect of effectiveness, such as recidivism or victim satisfaction, there remains a dearth of systematic program evaluations to assess the true effectiveness and impact of restorative justice in cases of sexual harm.

Due to the lack of research on its effectiveness, scholars have raised several concerns about restorative processes in cases of sexual harm.²⁷⁹

²⁷³ See Marie Keenan & Estelle Zinsstag, *Restorative Justice and Sexual Offenses: Can "Changing Lenses" Be Appropriate in this Case Too?*, 97 J. CRIMINOLOGY & PENAL REFORM 93, 100 (2014).

²⁷⁴ See Gang et al., *supra* note 182, at 2.

²⁷⁵ See Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1623-60 (2014).

²⁷⁶ See generally Clare McGlynn et al., *'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice*, 39 J. L. & SOC'Y 213 (2012). While the use of restorative justice in cases of sexual violence is controversial, the results of this exploratory study, while tentative, provide an opening to consider the possibilities of restorative justice in cases of sexual violence.

²⁷⁷ See Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 338 (2006).

²⁷⁸ Kathleen Daly et al., *Youth Sex Offending, Recidivism and Restorative Justice: Comparing Court and Conferences Cases*, 26 AUSTL. & N.Z. J. CRIMINOLOGY 241, 255 (2013).

²⁷⁹ See Daly, *supra* note 278, at 350; see also Kathleen Daly & Sarah Curtis-Fawley, *Restorative Justice for Victims of Sexual Assault: Court or Conference?*, in GENDER AND CRIME:

One concern is that restorative justice might be used to restore relationships between people that only ever existed as an opportunity for one person to exploit the other.²⁸⁰ Others argue that harm might be perceived as less serious than it actually is if it is adjudicated outside of a formal criminal legal process.²⁸¹ Still others caution about the misappropriation of the word justice.²⁸² Survivors' needs may include both retributive and restorative factors and many survivors are not concerned about rebuilding a personal relationship with the person who harmed them.²⁸³

Discourse surrounding this topic continues to grow and change. Because the empirical literature remains lacking, claims about restorative justice in cases of sexual harm are either overly positive or incredibly pessimistic.²⁸⁴ As practitioners and researchers, the authors note that restorative justice cannot, and perhaps should not, be the first or only step toward meeting the needs of people impacted by sexual harm, but they see promise in it as a tool for those who are interested. Restorative justice has the potential to fill the needs of all people impacted by sexual harm, but more research is needed to ensure that those needs are met while balancing risk.²⁸⁵

PATTERNS OF VICTIMIZATION AND OFFENDING 230, 334 (Karen Heimer & Candace Kruttschnitt eds., 2006); *see generally* Kathleen Daly & Dannielle Wade, *In-Depth Study of Sexual Assault and Family Violence Cases, Part II: Sibling Sexual Assault, Other Sexual Assault, and Youth-Parent Assault*, S. AUSTL. JUV. JUST. AND CRIM. JUST. RSCH. ON CONFERENCING AND SENT'G (2012); Kathleen Daly et al., *In-Depth Study of Sexual Assault and Family Violence Cases*, S. AUSTL. JUV. JUST. AND CRIM. JUST. RSCH. ON CONFERENCING AND SENT'G (2007); SHIRLEY JULICH ET AL., AN EXPLORATORY STUDY OF RESTORATIVE JUST. AND SEXUAL VIOLENCE (2010); McGlynn et al., *supra* note 277; Clare McGlynn et al., *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences*, in *SEXUAL VIOLENCE AND RESTORATIVE JUSTICE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS* (Marie Keenan & Estelle Zinsstag eds., 2016).

²⁸⁰ *See* Cossins, *supra* note 254, at 365.

²⁸¹ *See* Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates*, 11 *VIOLENCE AGAINST WOMEN* 603, 607-08 (2005).

²⁸² *See* Herman, *supra* note 19, at 597-99 (finding that survivor's views of justice do not fit well into either retributive or restorative justice models).

²⁸³ *See* Herman, *supra* note 19, at 597.

²⁸⁴ *See* ACKERMAN & LEVENSON, *supra* note 195, at 15.

²⁸⁵ *See* Curtis-Fawley & Daly, *supra* note 280, at 632. *See also* Kathleen Daly, *Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins on 'Restorative Justice and Child Sex Offenses'*, 48 *BRIT. J. CRIMINOLOGY* 557, 563 (2008); Kathleen Daly, *Seeking Justice in the 21st Century: Towards an Intersectional Politics of Justice*, 11 *SOCIO. CRIME, L., & DEVIANCE* 3 (2008); Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 *THEORETICAL CRIMINOLOGY* 9, 24 (2006); SHIRLEY JULICH ET AL., *PROJECT RESTORE AN EXPLORATORY STUDY OF RESTORATIVE JUSTICE AND SEXUAL VIOLENCE* (Auckland University 2010); Mary P. Koss, Karen J. Bachar & C. Quince Hopkins, *Restorative Justice for Sexual Violence: Repairing Victims Building Community, and Holding Offend-*

The Limits of Restorative Justice and Sexual Harm

One reason for the burgeoning restorative justice movement in the United States is the systemic racism inherent in the criminal legal system. Disproportionate minority impact often begins in zero-tolerance policies in schools that lead to the school-to-prison pipeline and can be seen throughout every criminal legal policy, process, and practice from police contact to sentencing.²⁸⁶ Scholars who write about restorative justice acknowledge the systemic racism within the criminal legal system.²⁸⁷ Restorative justice practitioners were hopeful that diverting cases away from the criminal legal system could stymie disproportionate minority presence, especially in the juvenile justice system.²⁸⁸

Non-profit organizations that focus on restorative and racial justice are paving the way for better and more equitable ways of addressing harm.²⁸⁹ Still, the insidious impacts of systemic racism and white supremacy are perpetuated in current restorative practices.²⁹⁰

ers Accountable, 989 ANNALS N.Y. ACAD. SCIS. 384 (2003); Mary P. Koss, *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435 (2004); McGlynn, *supra* note 68, at 825; McGlynn et al., *supra* note 275.

²⁸⁶ There is an existing body of literature that focuses on disproportionate presence of Black and Brown people and systemic racism in the United States' criminal legal system. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 16 (2012).

²⁸⁷ Howard Zehr is known as the father of modern restorative justice. His updated and revised *The Little Book on Restorative Justice* acknowledges systemic racism and questions whether we have done enough within the field of restorative justice to not perpetuate the problems we see within the criminal legal system. ZEHR, *supra* note 146, at 14. Similarly, *The Little Book of Restorative Justice for Sexual Abuse* makes a similar acknowledgement. OUDSHOORN ET AL., *supra* note 129, at 5.

²⁸⁸ See TREVOR FRONIUS ET AL., WEST ED JUST. & PREVENTION RSCH. CTR., *RESTORATIVE JUSTICE IN U.S. SCHOOLS: AN UPDATED RESEARCH REVIEW* 9, 19 (2019).

²⁸⁹ Common Justice, based in New York City, and Impact Justice, based in Oakland California, are two such organizations. Common Justice is the only organization to focus on community-based solutions to violent felonies in adult courts using an equity lens to address racial inequities. Their website states, "Racial inequity drives violence. That means that any strategy to advance safety must advance equity as well." *About Common Justice*, COMMON JUST., <https://perma.cc/Y9VK-UCGW> (last visited Jan. 23, 2022). Danielle Sered, the executive director of Common Justice, is the author of *Until We Reckon* which grapples with dealing with violence from an abolitionist perspective. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2021). The Restorative Justice Project at Impact Justice is the only program of its kind to partner with local communities across the country to offer technical assistance and training to address harm using pre-charge diversion programs. *Restorative Justice Project: Partnering with Communities to Address Harm Through Dialogue*, IMPACT JUST., <https://perma.cc/S6YM-5DAH> (last visited Jan. 23, 2022).

²⁹⁰ A new edited book, *Colorizing Restorative Justice: Voicing Our Realities*, was released in 2020. This book highlights the experience of non-White restorative justice practitioners and scholars. The twenty authors collectively and individually call out the contradiction between

Organizations and individuals who practice restorative justice and hold the power to facilitate change do not always represent the marginalized people for whom traditional legal practices cause the most harm.²⁹¹ Acknowledging the problem is not enough. Making restorative justice safe and equitable for all means doing the work necessary to operate with a race-conscious lens.²⁹²

Facilitators must be skilled in their practice, culturally competent, and aware. This remains true for organizations and individuals who focus on restorative justice in cases of sexual harm. Even a narrow restorative justice focus requires facilitators and organizational leaders to be committed to anti-racism. It requires that White practitioners acknowledge White supremacy and their White privilege. Until restorative justice practitioners contend with issues of racism and White supremacy, we limit our ability to make actual change.

Few practitioners or restorative justice programs take cases involving sexual harm. As the movement has grown, there has been a call for more practitioners who have the capacity and expertise to effectively handle this type of caseload. This creates two different concerns. The first concern involves the use of restorative justice in conjunction with the criminal legal system. The second involves the lack of appropriate skills and expertise for facilitators to take on cases of sexual harm.

With newly elected district attorneys in multiple jurisdictions whose platforms involve restorative justice and criminal justice reform, there is renewed hope for change.²⁹³ However, concerns remain that their

restorative practices, the oppressive systems of Western societies created by colonizers by great harm to Indigenous and First Nations People, and White settler colleagues who do not understand these realities. See Sharon Goens-Bradley, *Breaking Racism's Insidious Grip on Restorative Practices: A Call to White Action*, in COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES 37-46 (Edward C. Valandra & Wajbli Wapháha Hokšila eds., 2020). Fania Davis writes that the restorative justice movement risks losing relevance if it does not address racism, systemic racism, and white supremacy. FANIA DAVIS, *THE LITTLE BOOK ON RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND U.S. SOCIAL TRANSFORMATION* 37 (2019).

²⁹¹ SHARON GOENS-BRADLEY, *Breaking Racism's Insidious Grip on Restorative Practices: A Call to White Action*, in COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES, *supra* note 291, at 37-46.

²⁹² *See id.*

²⁹³ See, for example, the elections of Eric Gonzalez in Brooklyn, George Gascón in Los Angeles, Rachael Rollins in Suffolk County, Chesa Boudin in San Francisco, and Larry Krasner in Philadelphia, to name a few. See *Justice 2020: An Action Plan for Brooklyn*, ERIC GONZALEZ, BROOKLYN DIST. ATT'Y'S OFF. (2020), <https://perma.cc/MJS3-RDFT>; George Gascon, *Special Directive 20-14*, L.A. CNTY. DIST. ATT'Y'S OFF. (Dec. 7, 2020), <https://perma.cc/KWK4-LA8M>; *Meet District Attorney Rollins*, SUFFOLK COUNTY DIST. ATT'Y (2019), <https://perma.cc/7E66-EPJ6>; *About the Office*, S.F. DISTRICT ATT'Y, <https://perma.cc/4BYM-N5UX> / (last visited Jan. 23, 2022); Larry Krasner, *Philadelphia DA Larry Krasner's Revolutionary Memo* (Feb. 15, 2018), <https://perma.cc/8QEF-FT26>.

platforms and visions will not actually come to fruition. Similarly, criminal justice reform and diversion options rarely include people who have been convicted of sexual offenses.²⁹⁴ The authors fear that if and when progressive District Attorney offices are willing to use restorative options in cases of sexual offenses, that there will still be a racial component to how decisions are made. Namely, the authors are concerned that White people who have been charged with sexual offenses will be offered restorative justice, but people of color and other marginalized people will still be funneled through the criminal legal process.

As the call for restorative justice in cases of sexual harm increases, there is a critical need for facilitators who have the expertise and experience to take these cases. Simply put, sexual harm cases are different. They require a nuanced understanding of the consequences of sexual trauma, as well as the etiology of sexual offending. The authors are concerned that as the field grows, facilitators will be ill-equipped to take these cases. This will either lead to individuals seeking restorative service having few actual options available to them or facilitators offering services that they are not equipped to offer.

Finally, as Howard Zehr explains, restorative justice is not a panacea.²⁹⁵ There are some people for whom restorative justice will never be the right option.²⁹⁶ This is true both for people who have experienced sexual harm and those who have perpetrated it. People must be ready for the process, and some might not have the capacity with which to do so. We acknowledge that while the literature is clear that most people who sexually harm will not reoffend, there remains a small group of individuals who will continue to cause harm. As a society we have an obligation to protect people from that continued harm. The authors believe that current incarceration practices must be abolished. They also acknowledge that incapacitation may be necessary in some instances.

²⁹⁴ Even the most progressive prosecutorial offices in the nation have limitations to restorative justice when it comes to sex offenses. To illustrate, instead of restorative approaches to sex offenses, the goal in the Brooklyn District Attorney's *Justice 2020* plan is to, "[e]nhance prosecution of cases of gender-based violence, including acquaintance rape and sexual assault cases." ERIC GONZALEZ, BROOKLYN DIST. ATT'Y'S OFF., *supra* note 293, at 35.

²⁹⁵ See ZEHR, *supra* note 146, at 14.

²⁹⁶ Based on the authors' experience. There have been cases where the authors have ceased working with clients who have harmed because they were not progressing in taking true accountability for their behavior. Similarly, some people who have experienced harm will not be ready for a restorative process. Some individuals are oriented toward retributive justice.

VII. TOWARD A RESTORATIVE FUTURE

Current criminal legal processes and post-conviction policies do not address the needs of individuals impacted by sexual harm.²⁹⁷ Overall, survivors do not feel like their justice or healing needs are met and the root causes of sexual harm are not addressed.²⁹⁸ Despite the best of intentions, current approaches do not provide meaningful or helpful outcomes to those directly impacted by sexual harm.²⁹⁹ Furthermore, these efforts have had little effect on preventing future acts of sexual harm.³⁰⁰ Overall, survivors of sexual harm support the notion that they want meaningful outcomes and accountability measures for those who perpetrate harm against them.³⁰¹ Restorative justice offers the potential to meet these needs.

Building a restorative approach that holistically addresses sexual harm requires that it be culturally responsive, trauma-informed, survivor-centered, and evidence-based. Culturally responsive facilitators and programs acknowledge and address their privilege. They understand and value the knowledge and lived experiences of the people with whom they work.³⁰² They recognize and respect that their expertise is not a substitute for listening to the needs of the people they serve.

A trauma-informed approach to restorative justice is imperative for any practice or program related to sexual harm. The consequences of trauma are profound.³⁰³ They impact interactions and experiences in ways that people might not be aware of.³⁰⁴ For restorative processes to be effective, facilitators must utilize trauma-informed principles that address the psychological, neurological, and physical needs of clients. It requires active listening and stellar communication skills. Being trauma-informed means having empathy and compassion for people, even when they have

²⁹⁷ See Campbell, *supra* note 26, at 31; Rachel Kate Bandy, *The Impact of Sex Offender Policies on Victims*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 73, at 358-79.

²⁹⁸ See generally Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCIS. 206 (2006). The article highlights that individuals who have experienced rape feel that their legal needs are not met due to justice system issues such as attrition, retraumatization, and disparate treatment across gender, class, and ethnic lines. Empirical data presented in the article supports each issue and concludes that the current justice options are inadequate.

²⁹⁹ See *id.*

³⁰⁰ See Spohn & Tellis, *supra* note 38, at 170.

³⁰¹ See McGlynn & Westmarland, *supra* note 69, at 186.

³⁰² See Tarana Burke & Brené Brown, *Introduction* to *YOU ARE YOUR BEST THING: VULNERABILITY, SHAME RESILIENCE, AND THE BLACK EXPERIENCE* i, xvii (Tarana Burke & Brené Brown eds., 2021).

³⁰³ See generally VAN DER KOLK, *supra* note 152.

³⁰⁴ See *id.* at 62.

behaved in ways that are antithetical to one's own moral compass and values.

Restorative processes are, by their inherent nature, survivor-centered. This means that the safety needs of the person who has been harmed must be addressed first and must be prioritized throughout the process. This includes simple things including where the survivor will sit, where the process will occur, and who will speak first. It also includes discussions about intended outcomes and accountability measures. Being survivor-centered puts the person who was harmed in the driver's seat. They have control over the timeline of the process and input on all aspects of the process. This does not mean that survivors can engage in behavior that stigmatizes or punishes the person who caused harm. The restorative process is centered on doing no harm. Survivors who engage in this process understand that it must be safe for all parties for it to be effective.

Finally, restorative approaches to sexual harm must be evidence-based. The evidence for restorative justice and sexual harm is limited but growing. The available literature does suggest that people who engage in restorative justice to address sexual harm are satisfied with the process.³⁰⁵ The evidence also suggests that restorative justice reduces rates of reoffending and builds empathy.³⁰⁶ However, as restorative practices in this field grow, it is imperative that practitioners, organizations, and scholars alike make a commitment to evaluate the impact of their programs effectively and honestly across multiple domains, including participant satisfaction, follow through on accountability measures, and rates of reoffending, among other factors

As experts in the field of sexual violence, restorative justice practitioners who specialize in cases of sexual harm, and rape survivors who have navigated restorative processes, the authors of this piece wholeheartedly believe in the possibilities of a restorative approach to sexual harm. This can only happen if everyone has a seat at the table. Instead of an "us vs. them" mentality, we as a society must lean into difficult dialogues, which requires stepping outside of comfort zones. A culturally responsive, trauma-informed, evidence based, and survivor-centered process is possible. A world restored from sexual harm is possible.

³⁰⁵ See Umbreit et al., *supra* note 249, at 39.

³⁰⁶ See SHERMAN & STRANG, *supra* note 187, at 8, 14.