

Washington University Journal of Law & Policy

Volume 37 *Access to Justice: Mass Incarceration and Masculinity Through a Black Feminist Lens*

January 2011

Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation

Angela P. Harris
University of California, Davis

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Civil Rights and Discrimination Commons](#), [Law and Society Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J. L. & POL'Y 13 (2011),
https://openscholarship.wustl.edu/law_journal_law_policy/vol37/iss1/3

This Essay is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation

Angela P. Harris*

ABSTRACT

*We need an analysis that furthers neither the conservative project of sequestering millions of men of color in accordance with the contemporary dictates of globalized capital and its prison industrial complex, nor the equally conservative project of abandoning poor women of color to a continuum of violence that extends from the sweatshops through the prisons, to shelters, and into bedrooms at home. How do we develop analyses and organizing strategies against violence against women that acknowledge the race of gender and the gender of race?*¹

* Professor of Law, University of California-Davis School of Law (King Hall). My thanks to Leigh Goodmark, Donna Coker, and James Ptacek for including me on a panel at the 2011 National Conference on Restorative Justice in Raleigh, North Dakota, and for the conversations, formal and informal, that ensued. Thank you to SpearIt, whose illuminating remarks on the cycle of destructive masculinity at the 2011 Access to Justice Conference at Washington University-St Louis shaped my thinking, and thank you to the organizers of that important conference, including Adrienne Davis, Annette Appell, and Karen Tokarz. Many thanks to Madhavi Sunder and my new colleagues at U.C. Davis, where I presented a version of this piece at a faculty workshop, and thanks to Randi W. Stebbins and Maria-Caterina LaBarbara, students at Berkeley Law, for their terrific research assistance. A larval version of this Article was first presented as the 2008 Dewey Lecture at the University of Minnesota Law School, and I thank then-Associate Dean Guy-Uriel Charles and the other kind people there who made that lecture possible. My profound thanks to the folks at GenerationFIVE, whose trainings schooled me profoundly on the intricate connections between embodied trauma and political movements, and who introduced me to the notion of transformative justice. Finally, thanks to my friends at UC Berkeley, including especially K.T. Albiston, Amy Kapczynski, Jeff Selbin, Sarah Song, and Charles Weisselberg, for their feedback and suggestions. Mary Louise Frampton deserves special recognition for her insights and her tireless efforts to connect the restorative justice movement to an anti-subordination practice in communities of color.

1. Angela Davis, Keynote Address to Color of Violence Conference, recorded in Charles Brown, *The Color of Violence Against Women* (Oct. 25, 2000), available at <http://csf.colorado.edu/soc/m-fem/2000/msg01004.htm>.

INTRODUCTION

In September, 2011, the American Civil Liberties Union (ACLU) National Prison Project and the Southern California ACLU released a report titled “Cruel and Usual Punishment: How a Savage Gang of Deputies Controls LA County Jails.”² The report describes a jail system completely out of control—rife with corruption, malfeasance, and above all, unchecked violence.

The ACLU alleges that much of the violence is perpetrated by deputies on inmates. One story is illustrative:

The confrontation began because deputies thought Mr. III had called them “gay.” When Mr. III repeatedly denied the accusation, a deputy yelled to a row of pro per inmates—who serve as their own legal representatives—“Y’all pro pers think you can get away with anything. We the 3000 boys.”—a reference to the gang-like group of deputies in Men’s Central Jail. “That shit ends now!” the deputy continued, as Mr. III stood one foot away from a cement wall. Suddenly, the deputy grabbed Mr. III’s head, slamming his face into the wall. Blood poured down, pooling on the ground. Mr. III passed out.

When Mr. III regained consciousness, one deputy was sitting on his back, punching his face and head. Another was kicking Mr. III’s ribs. Although Mr. III was motionless, the deputies yelled, “Stop resisting.” Mr. III pleaded with them to stop. A deputy shot him with pepper spray. Another sunk three Taser probes into his flesh. * * * Mr. III spent two days in the hospital and four days in the jail’s medical unit. The deep cut in his forehead took 35 stitches to close.³

The report also details incidents of inmate-on-inmate violence, alleging that deputies often encourage it. Here is a sample story:

2. SARAH LIEBOWITZ, PETER ELIASBERG, MARGARET WINTER & ESTHER LIM, CRUEL AND USUAL PUNISHMENT: HOW A SAVAGE GANG OF DEPUTIES CONTROLS LA COUNTY JAILS, ACLU (Sept. 2011), www.aclu.org/prisoners-rights/cruel-and-usual-punishment-how-savage-gang-deputies-controls-la-county-jails.

3. *Id.* at 15.

After severely beating inmate Juan Pablo Reyes, deputies placed him in a cell with inmates who would unleash a nightmarish litany of attacks on Reyes, punching, hitting and sexually assaulting him off and on for a day. The cell contained two gang members who likely viewed Reyes as an enemy. Prior to placing Reyes in the cell, deputies had also publicly referred to him as “gay,” and had paraded him naked in front of these inmates. Thus, Reyes said, the inmates proceeded to beat him up for gang-related reasons, because they thought he was gay, or because the deputies’ humiliating behavior gave them license. The inmates began attacking Reyes in the morning. Throughout, deputies ignored Reyes’ pleas and his battered appearance. When night fell, the two inmates began sexually assaulting Reyes. The third inmate in the cell helped mask Reyes’ cries for help by repeatedly flushing the toilet. At one point, Reyes’ cellmates stuck his head in the toilet and flushed while entering him from behind. Reyes lost consciousness several times. Eventually, the two inmates fell asleep, but they resumed their attacks at 5 the next morning. Deputies continued to ignore Reyes’ cries. The cell door opened at 7 a.m., at which point a third gang member entered and tried to beat Reyes. Reyes, however, managed to escape, yelling for help and running to the laundry room where a chaplain found him. At the hospital, Reyes could barely walk. He felt extreme pain in his face and ribs. He had a broken eye socket from when he was attacked by deputies. His buttocks were sore. Rather than receive the necessary surgery on his eye, jail officials released Reyes earlier than he expected from the jail. He could not afford the surgery on his own.⁴

In an article published over ten years ago, I argued that much of the violence perpetrated by the men who commit crimes as well as the men who investigate, arrest, and incarcerate the criminals can be described as “gender violence.”⁵ I began that article with a

4. *Id.* at 16.

5. Angela P. Harris, *Gender Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

description of the sexual assault of Abner Louima by officers of the New York City Police Department, one of whom used a broken broomstick to sodomize Louima and then bragged about it to his fellows.⁶ Louima's rape, I suggested, was a message in one of the many dialects of masculinity, spoken alike by gang members and by "boys in blue."⁷

Over a decade later, the dialect of sexualized violence continues to flourish. The brutal rape of Juan Pablo Reyes, the violence perpetrated in the name of "the 3000 boys," and the circulation of the word "gay"—surely less a sexual identity label than an attribution of failed masculinity and consequential vulnerability to attack—all indicate loyalty to a particular way of being male. Street gangs and "the 3000 boys" may be on opposing teams in the criminal justice system of Los Angeles County, but they understand one another perfectly.

Call it "toxic," or "destructive," masculinity.⁸ Manhood as enacted in these brutal vignettes relies on two negative identities—not being a woman, and not being gay—and violence is the means by which these identities are disavowed. As I have argued, men, individually or in groups, may use violence or the threat of violence as a sword to attack others in the name of their own masculinity, or as a shield to defend themselves against an intolerable threat of being "unmanned."⁹ We are familiar with the use of "gender violence" to mean male violence against women. Defense attorneys and scholars have even coined a term—"homosexual panic"—to describe violent attacks by men in a state of emotional overload on men identified as

6. *Id.* at 778.

7. The reference is to police officers. *Boys in Blue*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=boys%20in%20blue> (last visited Dec. 20, 2011).

8. Therapist Terry Kupers, who works in prison mental health, identifies "toxic masculinity" (or "the need to aggressively compete and dominate others") as rampant among incarcerated men, and notes that its prominence is not just due to the presence of men who perform conventional masculinity, but to the culture of incarceration itself. Terry A. Kupers, *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, 61 J. CLINICAL PSYCHOL. 713, 713 (2005). In his contribution to this Symposium, Spearlt names "destructive masculinity" as an ideological system plaguing poor African American and Latino communities. Spearlt, *Gender Violence in Prison & Hyper-masculinities in the 'Hood: Cycles of Destructive Masculinity*, 37 Wash. U. J.L. & Pol'y 89 (2011).

9. Kupers, *supra* note 8, at 781.

gay or transgender.¹⁰ Less well recognized is the fact that male-on-male violence is also gender violence.

Although destructive masculinity and its prominence in the criminal justice system have seemingly not changed much in the past decade, at least two new developments have taken place. First, scholars and activists committed to ending domestic violence and violence against sexual minorities have become increasingly disenchanted with the criminal justice system, and increasingly aware of its insidious role in the decimation of poor black and brown communities. Meanwhile, racial justice scholars have become increasingly aware of the toll that destructive masculinity takes on those communities. The prospects thus seem better than ever for anti-violence alliances that, in the words of the epigraph to this Article, “acknowledge the race of gender and the gender of race,” while similarly acknowledging the importance of sexuality and class.

Second, in the past decade the “restorative justice” movement has gained traction in the United States. Restorative justice offers a powerful critique of the existing criminal justice system, one that supplements a critical race feminist critique. Its positive program has paid less attention to the dynamics of subordination. However, a small group of advocates has built on the critical insights of restorative justice to develop a vision—dubbed “transformative justice”—that holds promise for the struggle to undermine the mutually reinforcing systems of toxic masculinity and conventional criminal justice.

In Part I, I revisit the concept of gender violence, which I explored in my earlier article, and note its connection to “heteropatriarchy”—a system of subordination that burdens not only women and sexual minorities but also the straight-identified men that it purports to privilege. Understanding this connection, I argue, makes it possible to see how gender violence produces not analogous or even “intersecting” forms of oppression, but an interconnected web that stretches across civil society and the state. This web creates a common interest among women, sexual minorities, racialized

10. See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008) (examining the use of the “gay panic” defense in the courtroom as an offshoot of the law of manslaughter).

minorities, and straight-identified men in eliminating gender violence, as well as potentially making allies of feminist, queer, and race scholars and restorative justice advocates.

In Part II, I describe the central practices and principles of restorative justice, and suggest that restorative justice has something to offer as a critique of these interlocking vectors of gender violence. In return, the insights of anti-subordinationist scholars and activists can provide the restorative justice movement with an analysis of power and privilege that will alert advocates to the need to challenge heteropatriarchy in the state and the family. The resulting vision—which activists have dubbed “transformative justice”—can help academics and advocates rethink our conceptions of what “security” means, and move toward practices that aim to heal rather than those that perpetuate harm.

I. MASCULINITIES, GENDER VIOLENCE, AND HETEROPATRIARCHY: TOWARD AN INTEGRATED APPROACH

A. *Theorizing Masculinities: Heteropatriarchy Defined*

Understanding gender violence requires us to begin with the familiar claim that identity is a social construction. As Simone de Beauvoir put it long ago, “One is not born but rather becomes a woman.”¹¹ Drawing on the disciplines of sociology, anthropology, cultural studies, queer theory, feminist theory, and history, masculinities theorists similarly argue that men are not born but made.¹² The genes and genitalia we are born with, they argue, are less important in shaping and expressing our gender identity than are cultural norms.¹³

11. SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H. M. Parshley trans., 1972) (1949).

12. See Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 672–74 n.7 (2009) (reviewing the masculinities scholarship for a legal audience); see also Nancy E. Dowd, *Asking the Man: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415 (2010); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 201, 211–21 (2008).

13. See Cooper, “*Who’s the Man?*”, *supra* note 12, at 684 (according to masculinities theory, “[i]t is the meaning we choose to make of biological difference that creates our sense of

This assertion reflects masculinity theory's intellectual debt to second-wave feminism. Second-wave feminists distinguished the biological contributions to masculinity and femininity—which are popularly considered fixed, unchangeable, and determined at birth—from the social practices and meanings culturally ascribed to sex, naming the first “sex” and the second “gender.”¹⁴ Masculinity theorists are interested in the gender part. In the social world,

gender”); Dowd, *Asking the Man*, *supra* note 12, at 418 (explaining that a core proposition of masculinities theory is that “masculinity is a social construction, not a biological given”).

14. The sex/gender distinction later proved philosophically troublesome because it rested on the assumption that biology and culture could be neatly separated. To the contrary, the sex/gender distinction is complicated in at least three ways. First, what we call “gender” goes all the way down, so to speak: even our understanding of what our biology is and what it does is colored by our expectations, fantasies, and beliefs about there being only two sexes that are “opposites,” and the stereotypes attached to those sexes. *See generally* JUDITH LORBER, *PARADOXES OF GENDER* (1994). Second, most of what we call “biological” attributes are not actually fixed at birth. Rather, each living entity is a series of complicated and dynamic exchanges between heredity and environment. *See generally* RICHARD C. LEWONTIN, *BIOLOGY AS IDEOLOGY: THE DOCTRINE OF DNA* (1991). Third, as critical race theorists have recognized, labeling a phenomenon or trait as “socially constructed” does not mean that it can be changed at will. *See* Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Saliency of Race to LatCrit Theory*, 10 *LA RAZA L.J.* 57, 99 (1998) (“That race is constructed . . . does not diminish in any way its social power or permanence.”). Misunderstanding this last point can mislead advocates into searching for “immutable traits,” or encourage people to will themselves into or out of a sexual or gender identity. For a recent exploration of the feminist sex/gender distinction in light of transgender and intersex activism, see, e.g., Myra J. Hird, *Gender's Nature: Intersexuality, Transsexualism and the “Sex”/“Gender” Binary*, 1 *FEMINIST THEORY* 347 (2000). For a thoughtful and nuanced discussion of the interplay between structure and agency in homosexual identity, see John P. DeCecco & John P. Elia, *Introduction: A Critique and Synthesis of Biological Essentialism and Social Constructionist Views of Sexuality and Gender*, in *IF YOU SEDUCE A STRAIGHT PERSON, CAN YOU MAKE THEM GAY? ISSUES IN BIOLOGICAL ESSENTIALISM VERSUS SOCIAL CONSTRUCTIONISM IN GAY AND LESBIAN IDENTITIES* (DeCecco & Elia eds., 1993).

More recent accounts of sex/gender identity emphasize that the process by which people come to identify themselves as “male,” “female,” or “other” is similarly the result of complex interactions between inherited capacities and the subject's environment. For example, biologist and transgender activist Julia Serano proposes an “intrinsic inclination” model of human gender and sexual variation. In her view, subconscious sex, gender expression, and sexual orientation are determined independently of one another through a combination of genetic, anatomical, hormonal, environmental, and psychological factors. *See* JULIA SERANO, *WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY* 99 (2007). These “inclinations,” which give rise to a large amount of naturally occurring variation, interact with cultural norms of identity and expression to produce an individual's sense of herself or himself. *See id.* at 223 (“Each of us has a unique experience with gender, one that is influenced by a host of extrinsic factors, such as culture, religion, race, economic class, upbringing, and ability, as well as intrinsic factors including our anatomy, genetic and hormonal makeup, subconscious sex, sexual orientation, and gender expression.”).

masculinity is a product both of individual agency and cultural structures. “Men,” “women,” and people who identify as both, or neither, claim gender identities by the way they dress, walk, and talk. At the same time, they have gender identities ascribed to them under social rules established by institutional practices and cultural beliefs: for example, the rule that people born with penises are always and forever “male.”¹⁵

Scholars often describe this interplay of individual agency and cultural constraint using the metaphor of “performance.”¹⁶ Depending on where we find ourselves geographically and socially, a gender performance might be considered secure or suspect—unproblematic and scarcely notable, or outrageous and upsetting. Moreover, even within the same social context there are multiple ways of performing manhood, womanhood, or something else, and multiple ways of demonstrating to others that you claim (or disclaim) a particular gender identity. There is not always social room for changing one’s perceived sex, but there is often room for changing the sort of man or woman you want to appear to be. From this perspective masculinities theorists argue that sex/gender is not a thing you have, but a thing you do.

A second important tenet of masculinity theory is that although there are many ways of being a man or a woman, they are not all equally socially valued. “Hegemonic” masculinity is what scholars call the privileged style of masculinity in a given historical moment: the most desirable or most proper way of being a man.¹⁷ Some men

15. For a lively discussion of these cultural rules written by a trans woman who objects to the cultural insistence that everyone choose between a “male” and “female” identity, see KATE BORNSTEIN, *GENDER OUTLAW* (1994).

16. The classic analysis of gender identity as performance is JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990). Legal theorists have taken up the basic metaphor of identity as performance with explorations of “working identity,” or how individuals strategize in the workplace and elsewhere to manage stigmatized identities. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2007); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L.J.* 1757, 1793 (2003) (reviewing *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259 (2000); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 *UC DAVIS L. REV.* 853 (2006).

17. See Cooper, “*Who’s the Man?*”, *supra* note 12, at 683–93 (discussing the literature on hegemonic masculinity and the characteristics of hegemonic masculinity).

have better access to hegemonic masculinity than others, depending on their position in various interconnected hierarchies of privilege and oppression. Nevertheless, hegemonic masculinity functions as an ideal that regulates all men.¹⁸

Hegemonic masculinity in the contemporary United States emerges from a set of connected beliefs collectively called “heteropatriarchy.”¹⁹ Heteropatriarchy includes at least five linked assumptions widely taken for granted in Western culture. First is the assumption that every person is born, and thereafter remains for life, either male or female. Second, one’s sex at birth is assumed to determine one’s gender; biology therefore controls one’s social behavior. (This was the proposition that second-wave feminist theorists rejected when they introduced the distinction between “sex” and “gender.”) Third, sex/gender causes males and females to be distinctively and dramatically different along dimensions of

18. “Hegemonic masculinity” thus does not function as a description of how actual men think, act, or behave. Rather, it denotes an impossible ideal to which each man must react—by aspiring to it, rejecting it, making changes to it, playing with it, or imposing its requirements on others. I differ a bit in this regard from Cooper, who, following Michael Kimmel, asserts that some men—those who are white, middle-class, and early middle-aged heterosexual—can fully achieve hegemonic masculinity. See Cooper, “Who’s the Man?”, *supra* note 12, at 689. I would argue that even men with these privileges are aware that their masculinity can be revoked at any time. The movie *Deliverance*, for example, plays with just this idea.

Consider, as well, the “Old Spice Guy.” This character, played by Isaiah Mustafa, is advertised to women as “The Man Your Man Could Smell Like,” and the series of commercials for the deodorant Old Spice featuring him presents, with a wink, the very essence of hegemonic masculinity. See *The Man Your Man Could Smell Like*, YOUTUBE (Feb. 4, 2010), www.youtube.com/watch?v=owGykVbfgUE. The Old Spice Guy—well-built, of apparent African descent, but with a suave European-sounding accent—appears at the beginning of one commercial half-clad outside of a running shower. Then in what appears to be a single take, he is suddenly standing on a boat, offering tickets “to that thing you like” that turn into a handful of diamonds, and he finally is seen sitting on a white horse in a tropical setting. *Id.* He begins by addressing the viewer directly: “Look at your man. Now back to me. Now back at your man. Now back to me. Sadly, he isn’t me. But if he stopped using lady-scented body wash and switched to Old Spice, he could smell like me.” *Id.* The commercial is funny because it pinpoints the nature of conventional masculinity: no actual man can achieve it fully, yet every man, taunted by the example of someone else who is a better man than he, is challenged to strive (and fail) to approximate it.

19. For a classic and thorough examination of heteropatriarchy from a legal perspective, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). My understanding of heteropatriarchy is indebted to Valdes’ account. See also Mary Anne C. Case, *Disaggregating Gender from Sex and Orientation*, 105 YALE L.J. 1 (1995) (focusing on how judges conflate these terms in discrimination cases).

appearance, character, behavior, interests, and innate abilities. Indeed, men and women are popularly said to be so different that they are “opposite” sexes.²⁰ Fourth, because “opposites attract” and sex differences are complementary, sexual and romantic relationships should occur only between men and women, not between people of the same assigned sex. Moreover, opposite-sex couples are best situated to rear children, because the two sexes have different but complementary capacities and skills, and children need to be exposed to both.

These four linked assumptions constitute the “hetero” of heteropatriarchy. The fifth assumption provides the “patriarchy”: though male and female are opposite sexes, they are not quite equal. Masculinity is the privileged sex/gender. In nearly every setting, as feminists have pointed out, masculine characteristics and attributes are considered superior to feminine ones. Little boys are encouraged to distinguish themselves from girls early on, and failure to do so is socially punished.²¹ The political and economic order is largely controlled and shaped by men in societies around the globe; and women are everywhere subjected to rape, sexual harassment, forced pregnancy and forced marriage by men.²² Worldwide, it is better to

20. Consider, for example, the title of a best-selling self-help book: *Men Are From Mars, Women Are From Venus*. JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: THE CLASSIC GUIDE TO UNDERSTANDING THE OPPOSITE SEX* (1992).

21. While young women are permitted to “aspire upwards” to some extent and be “tomboys,” men and boys must stick to a rigid script of gender performance or be subject to ridicule and rejection by their fellows. *See* BARBARA M. NEWMAN AND PHILIP R. NEWMAN, *DEVELOPMENT THROUGH LIFE: A PSYCHOSOCIAL APPROACH* 248 (2009) (“Generally, there is more latitude or flexibility around the behaviors that are viewed as acceptable for young girls than for young boys. Little boys are more frequently stigmatized for acting in what is considered girlish ways, and are more likely to experience peer rejection if their behaviors are deemed gender atypical. As a result, a nonconforming gender preference is more likely to be a source of distress for boys.”).

22. Catharine MacKinnon famously put the argument this way:

Men’s physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.

give birth to a baby boy than a baby girl; economist Amartya Sen has estimated the number of “missing women” who either are not born or who die prematurely because of this preference.²³ Even in the United States, which prides itself on its commitment to human rights, including women’s rights, women lag far behind men on indicators of political and economic power.²⁴

B. Heteropatriarchy and Gender Violence

Heteropatriarchy shapes the two most important rules of hegemonic masculinity: a “real man” is not a woman, and he is not gay. As I have argued previously, one of the greatest contributions of feminism has been to show how much one’s masculine identity depends on disclaiming femininity – “at best by being ‘not a woman,’ at worst by excluding, hurting, denigrating, exploiting, or otherwise abusing actual women.”²⁵ In the contemporary United States, distancing oneself from homosexuality is at least as important. Training in not being “gay” (where “gay” is not really about sexual desire but rather denotes a failed or “spoiled”²⁶ masculine identity), like training in not being female, begins early. For example, researchers studying the social lives of students in middle and high schools have noted that although the kinds of activities that give a boy status and respect vary from school to school, the boys at the bottom of any social totem pole—along with any activities or objects

CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 36 (1987).

23. See Amartya Sen, *More Than 100 Million Women Are Missing*, THE NEW YORK REVIEW OF BOOKS, Dec. 20, 1990, available at <http://www.nybooks.com/articles/1990/dec/20/more-than-100-million-women-are-missing/>.

24. See Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *FORDHAM L. REV.* 2032 (2001) (noting that the United States has relatively few women in its highest governing body, compared to other nations); Darren Rosenblum, *Feminizing Capital*, 6 *BERKELEY BUS. L.J.* 55, 74–75 (2009) (noting the invisibility of women’s labor in economic theory).

25. Harris, *supra* note 5, at 785.

26. Sociologist Erving Goffman pioneered the discussion of identity work when one’s ascribed identity is considered stigmatized or “spoiled.” See generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

associated with them—will reliably be called “gay” and will be ridiculed and disparaged accordingly.²⁷

The need to not be gay, moreover, does not disappear after high school. As literary theorist Eve Sedgwick argues, masculinity is a double bind for men: being a “real man” requires that one secure the love and respect of other men, who hold the ultimate power to affirm one’s masculinity. Yet the activities best designed to confer true masculinity—including participation in sport, the military, and mentoring relationships—involve “just the sort of close, emotionally intense, and frequently physical and sexually charged relationships that subject men to the suspicion that they are homosexual.”²⁸

The result can be, especially for young men unsure of their identities and for older men with few other resources for self-esteem, a profound anxiety. Sociologist Michael Kimmel argues that “men’s fear of other men[] is the animating condition of the dominant definition of masculinity in America . . . the reigning definition of masculinity is a defensive effort to prevent being emasculated.”²⁹ Being judged and found wanting in one’s masculinity is a constant possibility for men; they are constantly under the male gaze of judgment.

Sedgwick identifies two results of the masculine double bind: “[f]irst, the acute *manipulability*, through the fear of one’s own homosexuality, of acculturated men; and second, a reservoir of potential for *violence* caused by the self-ignorance that this regime constitutively enforces.”³⁰ James Gilligan, a psychiatrist on the faculty of Harvard Medical School who directed the provision of psychiatric services to Massachusetts prisons and prison mental hospitals for twenty-five years, links the defense of masculinity with violence, through the psychological experience of “shame.” Although Gilligan acknowledges that violence is multi-causal, shaped by the

27. For a nuanced and insightful qualitative research study of the policing of masculinity in one high school, see C.J. PASCOE, “DUDE, YOU’RE A FAG!”: MASCULINITY AND SEXUALITY IN HIGH SCHOOL (2007).

28. Harris, *supra* note 5, at 787.

29. See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 81, 91 (Paula S. Rothenberg ed., 6th ed. 2004).

30. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 186 (1990).

interaction of biological, psychological, and social determinants as well as individual agency,³¹ at the intra-psychic level Gilligan argues that chronic “shame” is an important proximate cause of violence.³²

Shame, respect, and honor are key words in the production of gender violence. Gilligan notes that in his years doing psychotherapeutic work with violent criminals, “I kept getting the same answer when I asked one man after another why he had assaulted or even killed someone: ‘because he disrespected me.’”³³ He cites a study by David Luckenbill, who analyzed the history of seventy murders that occurred in one California county from 1963–72.³⁴ As Gilligan describes Luckenbill’s findings:

[I]n all cases the murderer had interpreted his violence as the only means by which to save or maintain “face,” and to demonstrate that his character was strong rather than weak, in a situation that he interpreted as casting doubt on that assessment of himself. The opening move that started this process was some behavior by the victim that the perpetrator interpreted as insulting or disparaging to him and that would cause him to “lose face” if he “backed down” rather than

31. JAMES GILLIGAN, PREVENTING VIOLENCE 67 (2001) (“Violence, like all behavior and all disease, is multi-determined, i.e. it is the product of the interaction between a multiplicity of biological, psychological and social causes, or variables (for example, male sex hormones, child abuse, and relative poverty) each of which can be shown to have the effect of increasing or decreasing the frequency and severity of violence, when all the other variables are held constant.”).

32. As Gilligan explains:

I will use these two terms—shame and pride—as generic terms to refer to two whole families of feelings. Synonyms for pride include self-esteem, self-love, self-respect, feelings of self-worth, dignity, and the sense of having maintained one’s honor intact. But pride must be in much shorter supply than shame, because there are literally dozens of synonyms for shame, including feelings of being slighted, insulted, disrespected, dishonored, disgraced, disdained, slandered, treated with contempt, ridiculed, teased, taunted, mocked, rejected, defeated, subjected to indignity or ignominy; feelings of inferiority, inadequacy, incompetency; feelings of being weak, ugly, a failure, “losing face,” being treated as if you were insignificant, unimportant or worthless, or any of the numerous other forms of what psychoanalysts call “narcissistic injuries.”

Id. at 29.

33. *Id.*

34. *Id.* at 68.

responding with violence—even when the victim was only a child who refused to stop crying when ordered to.³⁵

Gilligan adds that a failed masculine gender performance—as in, for example, the suggestion to a straight-identified man that he is really “gay”—threatens shame, confirming Sedgwick’s analysis:

The image or concept of “homosexuality” functions as a kind of universal symbol or equivalent of every form of masculine sexual inadequacy . . . it therefore epitomizes every cause of shame; and . . . there are few self-images that cause patriarchally conditioned men to feel shame more deeply than the perception (by themselves or others) that they might be “gay.” Many men will resort to almost any degree of violence if that is what it takes for them to ward off that perception of themselves.³⁶

If Gilligan is correct, then a man hyper-sensitive to shame will likely respond to any denigration of his gender performance with violence. Moreover, violence is connected with heteropatriarchy in another way: violence itself is culturally perceived as masculine.³⁷ Boys don’t cry, but they do fight. Thus, for men acculturated to hegemonic masculinity, engaging in violence is a sword as well as a shield: it is both a way of defending oneself against shame and a way to affirmatively demonstrate one’s manhood.

C. Gender Violence and the “Cycle of Destructive Masculinity”

In his article in this Symposium, SpearIt argues that impoverished African American and Latino/Latina communities are afflicted by a “cycle of destructive masculinity” that perpetuates gender violence across generations and across space, circulating norms and practices of straight male dominance in and among the street, the home, and

35. *Id.*

36. *Id.*

37. Kristin L. Anderson, *Theorizing Gender in Intimate Partner Violence Research*, 52 *SEX ROLES* 853, 857 (2005) (“The practice of violence, in Western cultures, is perceived as masculine behavior.”).

the prison cellblock.³⁸ Impoverished straight-identified men of color, in his account, are both victims and perpetrators of gender violence. A key site of this violence is in the prison system, where destructive masculinity is not only reflected but is intensified by state action.

The racial effects of our contemporary United States policy of mass incarceration have been well documented and criticized. Not only is the United States the undisputed global leader in mass incarceration,³⁹ but our criminal justice system also disproportionately burdens the brown, black, and poor. Taking the city of Chicago as a case study, Michelle Alexander notes that “[a]bout 90 percent of those sentenced to prison for a drug offense in Illinois are African American,” and that “[t]he total population of black males in Chicago with a felony record (including both current and ex-felons) is equivalent to 55 percent of the black adult male population and an astonishing 80 percent of the adult black male workforce in the Chicago area.”⁴⁰ Nationwide, the Sentencing Project reports that more than 60 percent of the people in prison are now racial and ethnic minorities, and that for black males in their twenties, one in every eight is in prison or jail on any given day.⁴¹ With the rise of what scholars call “crimmigration”—the folding of immigration enforcement into the criminal justice system—undocumented immigrants living in the United States are increasingly shunted into jails and prisons as well, intensifying the burden of the criminal justice system on Latino communities.⁴²

38. See generally, Spearlt, *supra* note 8.

39. The United States holds almost 2.3 million people in prison. China, in second place, only has 1.6 million of its citizens behind bars, and Russia is a very distant third with only 806,000 people in prison. International Centre for Prison Studies, *Entire World—Prison Totals*, ICPS, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Oct. 24, 2011).

40. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 184 (2010).

41. *Racial Disparity*, THE SENTENCING REPORT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Oct. 24, 2011).

42. On the meaning of “crimmigration,” see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 376 (2006) (“Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct. Scholars have labeled this the “criminalization of immigration law.”). On the impact of crimmigration on Latinos, see, e.g., Julia Preston, *Latinos Said to Bear Weight of Deportation Program*, N.Y. TIMES, Oct. 19, 2011, at A16 (describing a report issued by the law schools at University of California–Berkeley and Cardozo finding that Secure Communities, a

The combined effects of mass incarceration on black education, housing, employment, and political voice have led Alexander to describe the current United States criminal justice system as “The New Jim Crow.”⁴³ Alexander joins a chorus of other critics who have condemned the political and social effects of the existing criminal justice system on African American communities in particular.⁴⁴ These critics observe that not only are policing, jail, prison, and probation powerful sites for ideological “race-making”—perpetuating anti-black and anti-Latino stereotypes—but also that contemporary criminal justice policy is economically, politically, and socially devastating for poor black and brown communities.

The criminal justice system is not only a race-making institution, however. It is also a gender-making institution, and destructive masculinity is a key product.⁴⁵ The incorporation of gender violence into the criminal justice system begins with the police. In the United States, policing, like the military, is deeply rooted in ideologies of physical bravery and brotherhood that stem from hegemonic

deportation program backed by the Obama Administration, “has led disproportionately to the removal of Latino immigrants and to arrests by immigration authorities of hundreds of United States citizens”).

43. See ALEXANDER, *THE NEW JIM CROW*, *supra* note 40, at 186–95 (discussing the parallels between the effects of Jim Crow formal racial segregation and the current criminal justice system).

44. For examples of the social science literature criticizing the social, political, and community effects of mass incarceration, see, e.g., *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* (Patillo et al. eds., 2004); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006). For condemnation of mass incarceration’s effects on African Americans in the legal literature, see, e.g., Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043 (2010); Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010). Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381 (2002); Dorothy Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007); Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell’s Interest Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 NW J. L. & SOC. POL’Y 30 (2007); Floyd D. Weatherspoon, *The Mass Incarceration of African American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599 (2007).

45. See Spearlt, *supra* note 8, at 126–31.

masculinity.⁴⁶ Male police officers still dramatically outnumber female officers in most departments around the country;⁴⁷ police training emphasizes the importance of physical strength and the ability to intimidate;⁴⁸ and the number of openly gay male police officers is extremely low.⁴⁹ Policing borrowed from the military a hierarchical institutional structure and a culture of solidarity that has traditionally emphasized notions of homosocial “brotherhood,” making tolerance of homosexuality unthinkable;⁵⁰ hence the report that no police officer in the United States admitted in public to being gay or lesbian until 1981.⁵¹ Moreover, surveys suggest that the resistance of police officers to accepting gay men and lesbians in their ranks continues.⁵²

46. See Harris, *Gender Violence, Race, and Criminal Justice*, *supra* note 5, at 793; DAVID A. SKLANSKY, *DEMOCRACY AND THE POLICE* 150 (2008) (“There is good reason to think that the suppression of homosexuality has played a central role in cementing police solidarity, in part by rendering professional male-male partnerships sexually unthreatening, and in part by helping to shape a whole, hyper-masculinized professional ethos.”).

47. David A. Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIMINAL L. & CRIMINOLOGY 1209, 1219 (2006) (“[T]he proportion of women officers tops out at twenty-five percent, and there are indications that this ceiling may remain in place for the foreseeable future.”).

48. Cooper, “*Who’s the Man?*”, *supra* note 12, at 693–96 (discussing the importance of “command presence” and the intense interest among some officers in bodybuilding).

49. Sklansky, *Not Your Father’s Police Department*, *supra* note 47.

50. The centrality of homosexuality to policing is certainly a staple of popular culture, if not actual police culture. One study found only one gay police officer portrayed in the first three decades of “core cop film police officer portrayals.” Franklin T. Wilson et al., *The Absence of Gay and Lesbian Police Officer Depictions in the First Three Decades of the Core Cop Film Genre: Moving Towards a Cultivation Theory Perspective*, 16 J. CRIM. JUST. & POPULAR CULTURE 27, 33 (2009). This is not surprising given that an important theme in American cop films is the intense homosocial bond between two dissimilar officers. The “buddy film” portrays true love between men by disavowing any hint of homosexuality.

51. DAVID E. BARLOW & MELISSA HICKMAN BARLOW, *POLICE IN A MULTICULTURAL SOCIETY* (2000).

52. See Phillip M. Lyons, Jr. et al., *Texas Police Chiefs’ Attitudes Toward Gay and Lesbian Police Officers*, 11(1) POLICE Q. 102 (2008) (finding that almost half the Texas police chiefs surveyed said that they would have difficulty working with a gay man, while only 27 percent said that they would have no difficulty); Mary Bernstein & Constance Kostelac, *Lavender and Blue: Attitudes About Homosexuality and Behavior Toward Lesbians and Gay Men Among Police Officers*, 18(3) J. CONTEMP. CRIM. JUST. 302 (2002) (finding reluctance on the part of gay and lesbian police officers to come out for fear of job discrimination); *but see* Eric Coleman & Sutham Cheurprakobkit, *Police Hiring and Retention of Sexual Minorities in Georgia and Texas After Lawrence v. Texas*, 37(3) J. CRIM. JUST. 256 (2009) (finding that *Lawrence* has encouraged police departments to retain their gay and lesbian officers, though not to recruit any more).

Frank Rudy Cooper has shown how policing, both in its structure and in the way it is practiced in many American cities, incorporates hegemonic masculinity in often destructive ways. Cooper points out that officers' concern with establishing dominance in any situation and with punishing disrespect sets them up for "masculinity contests."⁵³ When male police officers confront male civilians in such contests, the result may be injury or death.⁵⁴

Incarceration, however, most dramatically incorporates gender violence and the most destructive forms of hegemonic masculinity. Giovanna Shay notes that "the rule of law," as we are accustomed to imagining it, constrains practices in the American criminal justice system only weakly because of the courts' extreme deference to prison administrators, the lack of transparency of prison affairs, and the public's apparent desire that prisoners be out of sight and out of mind.⁵⁵ In this environment, Kim Shayo Buchanan argues, prison administrators create their own rules of governance, incorporating social norms of subordination that divide prisoners to make them more manageable.⁵⁶ Prison officials' use of racial designations to "divide and conquer" groups of inmates is well known.⁵⁷ In addition,

53. Cooper, "Who's the Man?", *supra* note 12, at 674.

54. Cooper explains the situation this way:

The civilian faces a masculinity challenge because the officer's restriction of his freedom is changing him from a presumptively innocent citizen to a suspect. The civilian may be spread-eagled against a wall as peers pass by gawking. Police officers also face a masculinity challenge, however, since, as a matter of both their roles as law enforcers and their senses of self, they cannot stand any challenge to their authority. That is why officers punish disrespect. Certainly, there is some legitimacy to the idea that officer safety requires that they be able to control the movements of dangerous suspects with whom they are actively engaged. However, the more important reason why officers seek complete control of citizens is that their sense of masculine esteem is tied to being shown respect by citizens. When officers feel disrespected, they face a masculinity challenge. Since manhood is demonstrated for other men's approval and the overwhelming majority of both officers and suspects are male, officers may often view the police-civilian encounter as an opportunity to stage a masculinity contest.

Cooper, "Who's the Man?", *supra* note 12, at 699.

55. Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329 (2009).

56. Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 11 (2010) ("[M]any institutions adopt a practice of institutional governance by which guards and administrators often respond to sexual abuse by enforcing the rules of masculinity.").

57. Prisoners turn to gangs to protect themselves, and these gangs are generally organized along racial lines. Corrections personnel are not only mindful of the racialized gang order, but

Buchanan argues, prison officials enforce “the rules of masculinity in their crudest and most violent forms.”⁵⁸ Sexual violence is one of those forms.

As Buchanan observes, the idea that incarcerated men are vulnerable to sexual violence perpetrated by other men is a well-known subject of hilarity in the general culture.⁵⁹ The humor indicates anxiety, but also truth: same-sex rape and other forms of sexual violence do happen to incarcerated men. In accordance with heteropatriarchal norms, gay, bisexual, transgendered, and effeminate men experience dramatically elevated rates of sexual abuse.⁶⁰ But straight-identified men are also vulnerable to violence. For example:

Guards and administrators often require the prisoner to “be a man” by fighting off his assailants. If the prisoner is unable to protect himself, he is often told that he does not deserve their protection because he is “gay.” This practice requires prisoners to prove their manhood by fighting, on pain of rape.⁶¹

Buchanan notes that black men are widely presumed to be the perpetrators of rape in prison and white men the victims.⁶² In fact, research suggests that most victims are men of color.⁶³ And as

incorporate it into their own governance practices. See Philip Goodman, “*It’s Just Black, White, or Hispanic*”: An Observational Study of Racializing Moves in California’s Segregated Prison Reception Centers, 42 L. & SOC’Y REV. 735 (2008) (suggesting that intake personnel at prison reception centers encourage incoming prisoners to identify themselves racially, partly in response to the racialization of gangs inside and outside prison).

58. Buchanan, *supra* note 56, at 8.

59. *Id.* at 2. For an argument that it is time that our society took the rape of men seriously rather than treating it as a joke, see I. Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259 (2011).

60. NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE COMMISSION ELIMINATION REPORT (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>; VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 26 (2007), available at http://uci.corrections.seweb.uci.edu/pdf/Executive_Summary_of_Val_s_PREA_report.pdf (finding that 67 percent of gay, bisexual, and transgender men reported having been sexually assaulted in prison, as compared to 2 percent of straight men).

61. JENNESS ET AL., *supra* note 60, at 23.

62. Buchanan, *supra* note 56, at 64 (“Prison rape is not disproportionately black-on-white. Nonetheless, many people involved in prisons and their administration—prisoners, guards and administrators, Congress, academics and even some human rights advocates—continue to believe that it is.”).

63. *Id.* at 61.

SpearIt points out, the traumatized victims and the perpetrators of gender violence are likely to return to the same communities where they grew up, now at greater risk of traumatizing others.⁶⁴ Violence against women is one predictable consequence of a destructive masculinity that degrades femininity and whose coin is force. Homophobic violence is another. Finally, we may guess that child abuse, including child sexual abuse, is facilitated by the return of sexually abused prisoners to their neighborhoods. SpearIt concludes that through the cycle of destructive masculinity, prison does not simply punish the perpetrators of gender violence; it also facilitates and escalates more gender violence, involving straight-identified men both as victims and as perpetrators.⁶⁵ Therefore, though some gender violence in prison can be traced back to civil society, much is iatrogenic—caused by the very mechanism that purports to stop the violence.

D. Toward an Integrated Approach to Gender Violence

Queer theorists have long identified gender violence as a strategy to maintain heteropatriarchy. Darren Hutchinson makes a representative argument: “[h]omophobic violence . . . executes (or ‘enforces’) the political, social and ideological institution of heterosexism; it punishes non-heterosexual practice, and it aims to prevent future challenges to heteronormativity by employing the threat of violence to attach fear and stigma to nonheterosexual intimacy and desire.”⁶⁶ Feminist scholars similarly see violence against women as a way of keeping all women (and men) compliant with compulsory heterosexuality.⁶⁷ As Elizabeth Schneider has written:

64. See SpearIt, *supra* note 8, at 131–34.

65. *Id.*

66. Darren Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 19 (1999).

67. But see Gwen Hunnicutt, *Varieties of Patriarchy and Violence Against Women: Resurrecting “Patriarchy” as a Theoretical Tool*, 15 VIOLENCE AGAINST WOMEN 553, 559–60 (2009), available at <http://vaw.sagepub.com/content/15/5/553> (pointing out that feminist theories of violence against women have become more nuanced over time, as theorists absorbed the point that violence against women can signal weakness rather than strength).

[H]eterosexual intimate violence is part of a larger system of coercive control and subordination; this system is based on structural gender inequality and has political roots. . . . In the context of intimate violence, the impulse behind feminist legal arguments [is] to redefine the relationship between the personal and the political, to definitively link violence and gender.⁶⁸

These analyses are not wrong, but they have nevertheless laid the groundwork for a dependence on the criminal justice state that has intensified rather than ameliorated gender violence. For instance, in the 1970s and 1980s, feminist advocates challenging rape and domestic violence began to rely heavily on a criminalization strategy, fighting for policies such as mandatory arrests for domestic violence police calls, calling for more rape prosecutions, and developing new kinds of “social frameworks evidence” such as battered women’s syndrome.⁶⁹ In the 1980s, anti-violence advocates representing both women and sexual minorities began to fight for the adoption of, and inclusion in, “hate” or “bias” crime statutes as an equality issue.⁷⁰

68. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 5–6 (2000).

69. See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001) (describing feminist interventions in domestic violence law); KRISTIN BUMILLER, IN AN ABUSIVE STATE 2–5 (2008) (describing the work of feminist advocates from the 1970s on and how grassroots organizations began to be absorbed into government programs); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587–95 (2009) (summarizing feminist interventions in rape law).

70. The Federal Bureau of Investigation (FBI) defines a hate crime as a “criminal offense committed against a person, property, or society which is motivated, in whole or in part, by the offender’s bias against a race, religion, disability, sexual orientation, or ethnicity/national origin.” FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1998: UNIFORM CRIME REPORTS 57 (1999). Some hate crime statutes impose an enhanced penalty when bias is found to be the motivation for any crime; other statutes explicitly delineate and punish crimes of “hate.” The Federal Enhancement Statute defines “hate crime” as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.” 28 U.S.C. § 994 (1994). As one commentator explains, the particular identity categories protected by bias crime enhancement statutes differ among states and localities, but all follow a basic pattern. See Jordan Blair Woods, *Taking the “Hate” Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489 (2008). For historical accounts of the evolution of hate crimes statutes and the social context of the sudden explosion of these statutes in the 1980s, see, e.g., Valerie Jenness & Ryken Grattet, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT

The logic behind this reliance on the criminal justice system is clear: because violence against women and sexual minorities intensifies and legitimizes discrimination against these groups, criminal punishment for the perpetrators of such violence furthers the cause of equal citizenship. Like expressive violence itself, criminal punishment is widely understood to “send a message”⁷¹—the message that women and sexual minorities matter.

17–41 (2001); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564–620 (1998).

In 2009, President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, extending the protections of federal hate crimes law to crimes based on sexual orientation, gender identity, race, religion, gender, national origin, and disability. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, § 4707, 123 Stat. 2190, 2838 (2009). Previously, federal law had only encompassed bias crimes motivated by race, color, religion, and national origin. The change was hailed by many advocates as a victory for sexual minorities. For instance, upon the signing of the bill, National Gay and Lesbian Task Force Executive Director Rea Carey issued this statement:

Laws embody the values of our nation, and through the enactment of this hate crimes law, our country has—once and for all—sent a clear and unequivocal message that it rejects and condemns all forms of hate violence, including crimes motivated by hatred of lesbian, gay, bisexual and transgender people.

Press Release, National Gay and Lesbian Task Force, Task Force: Signing of hate crimes measure is historic (Oct. 28, 2009), available at http://www.thetaskforce.org/press/releases/pr_102809.

Not all formulations of bias crimes require proof of consciously held and articulated hatred for the victim’s identity group in order to sustain a conviction, but the sense that such a mental state exemplifies “bias” has colored much of the discussion about these laws. For instance, this model was one of the obstacles to passing the civil rights provision of the Violence Against Women Act of 1994 (VAWA) which defined crimes of violence against women as sex discrimination. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322 (1994). Opponents objected that the targets of violence against women are often not “fungible” in the same way as the targets of other bias crimes, and, by extension, that perpetrators of violence against women did not hold animus toward “women” in general, but toward a specific individual, meaning that these crimes were not based on bias at all. See Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 765–66 (2001). As Sally Goldfarb points out, however, before being struck down by the Supreme Court, VAWA’s interpretation accepted a wide range of evidence as proof of animus against women, even accepting the analogy between racial and sexual bias crimes. See Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL’Y & L. 251, 262–63 (2003).

71. Of course, what it means to “send a message” is a complicated philosophical and sociological issue, which falls outside the scope of this Article. For reflections on the expressive theory of criminal punishment, see William DeFord, *The Dilemma of Expressive Punishment*, 76 U. COLO. L. REV. 843 (2005); Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591 (1996); see also Dan M. Kahan, *What’s Really Wrong With Shaming*

In the last few years, however, feminist academics and advocates have become increasingly uneasy about their reliance on the criminal justice state. Leigh Goodmark argues that mandatory arrest and no-drop prosecution policies reflect “maternalism,” an advocacy approach that “assumes that women who have been battered are incapable of considering the full range of possibilities and deprives them of the ability to make choices for themselves, based on their own goals, values, beliefs, and understanding of their situations.”⁷² Aya Gruber argues that rape reform has failed to substantially benefit victims, while bolstering a program of state power and control that is antithetical to feminist principles.⁷³ Janet Halley and others similarly argue that feminist alliances with the criminal justice state mark the development of a new feminist strategy—“governance feminism”—that may result in policies and rules that are inconsistent with feminist principles.⁷⁴

Queer theorists, taking a similar critical turn, have criticized hate crimes legislation as a path toward equal citizenship. Jane Spade and Craig Willse argue that “the rhetoric of hate crimes activism isolates specific instances of violence against queer and transgender people, categorizing these as acts of individual prejudice, and obscures an understanding of the systemic, institutional nature of gender and sexuality subordination.”⁷⁵ Leslie Moran argues that “the gay and lesbian demand for law reform feeds a law and order politics of

Sanctions, 84 TEX. L. REV. 2075 (2006) (recanting his arguments for shaming sanctions but elaborating his theory of expressive punishment).

72. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 29 (2009).

73. See Gruber, *supra* note 69, at 652.

74. Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 420 (“[W]e find that American and European feminists, making seemingly symbolic victories in the U.S. Congress, the United Nations, the ICTY, or the Rome Statute negotiations, can put in motion chains of legal causation that—by the time they reach Tel Aviv, Kolkata, or Chicago—can be exceedingly acute, and not always feminist in any intelligible sense.”).

75. Jane Spade and Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38, 39 (2000).

retribution and revenge that may be implicated in the promotion, institutionalization, and legitimization of hate.”⁷⁶

Taking seriously the gender violence inflicted on men in the criminal justice system adds another dimension to these criticisms. Tracing gender violence as it moves through different social sites—the street, the home, the prison—makes it clear that heteropatriarchy kills: not only women and sexual minorities, but men, including those who identify as “straight.” SpearIt’s notion of the cycle of destructive masculinity makes clear as well that gender violence is a race and poverty issue.

Accordingly, anti-violence theorizing and advocacy must take an integrated approach, understanding the interplay of race, sexuality, class, and gender and taking account of the places where, and the means by which, gender violence is perpetuated. “Violence against women” is not distinct from “violence against sexual minorities.” Nor are analyses of the United States as a “prison nation” complete without a reckoning of the toll that gender violence takes on the vulnerable of all sexualities, colors, and genders.

The approach that I am advocating here has been given many names—“intersectionality,” “co-synthesis,” and “multidimensionality,” among others.⁷⁷ At its heart is a theoretical shift of focus from group identities to interlocking practices and beliefs that makes

76. Leslie J. Moran, *The Emotional Dimensions of Lesbian and Gay Demands for Hate Crime Reform*, 49 MCGILL L.J. 925, 925 (2004).

77. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (introducing the concept of intersectionality); see also Suzanne B. Goldberg, *Intersectionality in Theory and Practice*, in *Intersectionality and Beyond: Law, Power and the Politics of Location* 124 (Emily Grabham et al. eds., 2009) (“[Intersectionality theory’s] core insight—that analysis of discrimination based on a single identity trait does not adequately account for intersecting aspects of identity, such as race or sex—has been widely embraced.” (citation omitted)); Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309 (2001) (examining “the relationships among racism, heterosexism, patriarchy, and class oppression utilizing a model I refer to as ‘multidimensionality’”); Athena D. Mutua, *Theorizing Progressive Black Masculinities*, in *Progressive Black Masculinities* 3, 22–24 (Athena D. Mutua ed., 2006) (defining multidimensionality theory); Darren Lenard Hutchinson, “*Gay Rights*” for “*Gay Whites*”? : *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1362–68 (2000) (defining multidimensionality theory in contrast to intersectionality theory); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997).

possible a broader definition of the problem: in this case, the shift from “violence against women” to “gender violence.” Sometimes the technique that Mari Matsuda named “looking to the bottom” can make such a reframing possible.⁷⁸ Thus, even within the “violence against women” frame, scholars have long recognized that women of color tend to be more poorly served by existing institutions and practices, even feminist ones, than white women.⁷⁹ But, as we have seen, the move from violence against women to gender violence makes possible an even more comprehensive mapping of the ways in which heteropatriarchy kills. What might initially look like a dilemma—a choice between women’s safety or racial justice—turns out to be an instance of interest convergence.⁸⁰

This turn to a gender violence analysis—instead of the “violence against *x*” analysis—should not be confused with the project of simply making existing programs “diverse” or “inclusive.” Advocates for women of color experiencing intimate violence, for example, complain about the effort to “include” them in campaigns framed by and for white women.⁸¹ Instead, the task is to develop anti-violence proposals and projects that are responsive to the experiences of differently situated groups from the very beginning. Efforts to pay attention to the race of gender, the gender of race, and the sexuality and class of each may demand new kinds of conversations with different people at the table. The process may not be an easy one, but the potential is great.

78. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 359–60 (1987) (describing the utility of looking to the experiences of the least advantaged).

79. See, e.g., Crenshaw, *supra* note 77, at 1246–49 (describing the problems that women of color, including immigrant women, have in accessing domestic violence services).

80. The late Derrick Bell suggested that progressive social change tends to occur only when it is in the interest of the majority. See DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORMS 49–58 (2004).

81. See INCITE! WOMEN OF COLOR AGAINST VIOLENCE, COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 3 (2006) (“All too often, inclusivity has come to mean that the sexual or domestic violence prevention model, developed largely with the interests of white middle-class women in mind, should simply add a multicultural component.”).

II. FROM RESTORATIVE JUSTICE TO TRANSFORMATIVE JUSTICE: THE CASE OF GENDER VIOLENCE

*[L]onger prison sentences offer no solution to the problem of rape and indeed may simply exacerbate the problem at an individual level by placing the rapist in a masculine culture which reinforces the misogynist fantasies that were part of his behaviour patterns outside the walls.*⁸²

If reliance on the criminal justice system to address violence against women and sexual minorities has reached the end of its usefulness, to where should advocates turn next? Prison abolitionists propose to dismantle the criminal justice system altogether.⁸³ Arguing that not only has mass incarceration taken a terrible toll on black and brown communities, but that prisons do not effectively prevent crime, rehabilitate offenders, provide specific and general deterrence, or hold the guilty accountable, abolitionists conclude that imprisoning people has become an end in itself in our society. From the abolitionist perspective, the criminal justice state is a “prison-industrial complex,” perpetuated by those who benefit financially and/or politically from the business of incarceration.⁸⁴ As a critique of existing practices and institutions, these arguments have considerable force; mainstream policymakers and academics, as well,

82. Joe Sim, Book Review, 18 INT’L J. OF THE SOC. OF L. 97 (1990) (reviewing H. BIANCHI & R. VAN SWAANINGEN, *ABOLITIONISM: TOWARD A NON-REPRESSIVE APPROACH TO CRIME* (1986)).

83. See, e.g., ANGELA Y. DAVIS AND EDUARDO MENDIETA, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISON, AND TORTURE* (2005); Angela Y. Davis, *Racialized Punishment and Prison Abolition*, in TOMMY LEE LOTT AND JOHN P. PITTMAN, *A COMPANION TO AFRICAN AMERICAN PHILOSOPHY* 360 (2003); Dorothy Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007).

The prison abolition movement has a history in Europe as well as in the United States. See, e.g., Stan Cohen, *Introduction*, 10 CRIME, LAW, & SOCIAL CHANGE 3 (1986) (describing abolitionism in Western Europe as a product of “the countercultural politics of the Nineteen Sixties”).

84. Julia Sudbury describes the prison-industrial complex as “an intricate web of relations between state penal institutions, politicians and profit-driven corporations.” Julia Sudbury, *Celling Black Bodies: Black Women in the Global Prison Industrial Complex*, 70 FEMINIST REVIEW 57, 57 (2002); see also GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON INDUSTRIAL COMPLEX (Julia Sudbury ed., 2005); EVE GOLDBERG AND LINDA EVANS, *THE PRISON-INDUSTRIAL COMPLEX AND THE GLOBAL ECONOMY* (1998).

exhibit frustration and even despair at the state of American punishment.⁸⁵ Yet a world without prisons and punishment is unthinkable to many people. Moreover, even those committed to the ultimate goal of abolition may support projects that can help ease the suffering of those caught in the criminal justice system here and now. In this Part, I argue that the restorative justice movement—augmented with a theory of power and privilege—is such a project.

In Part A of this section I describe the restorative justice movement and argue that its critique of conventional criminal justice should be appealing to anti-gender violence advocates. In Part B, I acknowledge the force of feminist and race-aware critiques of the positive restorative justice project, and endorse instead what advocates have called “transformative justice.”⁸⁶ A transformative

85. See, e.g., JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION (2007); JAMES AUSTIN & TONY FABELO, JFA INST., THE DIMINISHING RETURNS OF INCREASED INCARCERATION (2004); LYNN S. BRANHAM, AM. BAR ASS’N, THE USE OF INCARCERATION IN THE UNITED STATES: A LOOK AT THE PRESENT AND THE FUTURE (1992); WILLIAM M. DIMASCIO, SEEKING JUSTICE: CRIME AND PUNISHMENT IN AMERICA (1995); JENNI GAINSBOROUGH & MARC MAUER, SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S (2000); RYAN S. KING ET AL., SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP (2005); PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009); DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME (2007).

86. It is important to acknowledge that this analysis is specific to the situation of gender violence in African American and Latina/o communities in the United States and should not be generalized to all women of color experiencing gender violence. For example, indigenous women in the United States and other white settler societies experience extreme levels of gender violence at the same time as their communities are under racist assault by the state. See generally ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE (2005). Indigenous women are not united, however, in supporting restorative justice practices as a response to gender violence. See Kathleen Daly & Julie Stubbs, FEMINIST ENGAGEMENT WITH RESTORATIVE JUSTICE, 10 THEORETICAL CRIMINOLOGY 9, 20–22 (2006) (describing differences of opinion among indigenous feminists on the value of restorative justice processes for intimate partner violence); Rashmi Goel, *Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At Cross Roads or Cross Purposes?*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 60, 74 (James Ptacek ed., 2010) (finding that, for Aboriginal people, “the diverse goals at issue in sentencing circles operate at cross-purposes in domestic violence cases”); Heather Nancarrow, *Restorative Justice for Domestic and Family Violence: Hopes and Fears of Indigenous and Non-Indigenous Australian Women*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 123, 143 (James Ptacek ed., 2010) (concluding that “[c]urrent models of [restorative justice] do not meet the criteria necessary to fulfill the hopes of Indigenous women in addressing the underlying factors associated with domestic and family violence.”); Julie Stubbs, *Restorative Justice, Gendered Violence, and Indigenous Women*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 103, 115 (James Ptacek ed., 2010)

justice approach acknowledges the reality that given the embeddedness of gender violence in both civil society and the state, true security lies not in “restoration,” but in transformation.

A. *What Is Restorative Justice?*

Carrie Menkel-Meadow notes that the restorative justice movement began in the 1970s as a response to the perception increasingly held by “social workers, progressive criminal treatment professionals (including police officers and prison reformers), some lawyers and judges, psychologists, and community and peace activists” that the existing criminal justice system was broken—that it neither effectively deterred crime nor effectively rehabilitated offenders.⁸⁷ The founders of the restorative justice movement—some working within the criminal justice system and some working outside it—rejected the premise that imposing long periods of incarceration under harsh conditions is an effective response to crime.⁸⁸ They

(concluding that among indigenous people, “some openness to [restorative justice] principles exists, but . . . a prevailing skepticism remains about what that might mean in practice”); *but see* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999) (suggesting that Navajo peacemaking processes may be beneficial for some battered women). The problem is exacerbated in many indigenous communities by the absence of any effective criminal justice enforcement. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006) (describing the failure of law enforcement in Indian country); Rebecca A. Hart, Comment, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185 (2008). For indigenous communities, then, a transformative justice analysis brings with it questions of national sovereignty that are beyond the scope of this Article.

87. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 163 (2007), available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev.lawsocsci.2.081805.110005>.

88. For instance, Howard Zehr, one of the founders of restorative justice, writes:

Will prison teach [the offender] nonviolent patterns of behavior? Hardly. It is more likely to make him even more violent. Will it protect society from him? For a while, perhaps, but eventually he will come out, and he may be worse for the wear. And while there, he may become a danger to fellow inmates.

Will it deter? Whether his imprisonment will discourage others from committing similar crimes is debatable, but it is unlikely to deter him. Indeed, as I have already suggested, he may be more, not less, likely to commit crimes because of the lack of coping skills and the patterns of behavior he will learn in prison. Moreover, the threat of prison will no longer hold such terror for him since he will know he can survive there. Indeed, after twenty years it will be home and he will feel insecure outside.

HOWARD ZEHR, CHANGING LENSES 39 (1990).

sought to make offenders more accountable to their victims, to respond more directly to the psychological and emotional needs of crime victims, and to promote offender rehabilitation.⁸⁹ Their innovation was to sidestep the criminal justice system's emphasis on blame and punishment. Instead, they began to focus on the human connections that were damaged, broken, or absent when crimes were committed.

As Menkel-Meadow notes, “[r]estorative justice was practiced first . . . and theorized later, most eloquently by John Braithwaite.”⁹⁰ Braithwaite's influential first book on restorative justice, *Crime, Shame, and Reintegration*,⁹¹ suggested that the best way to reinforce social norms is not state imposition of violence on offenders—which is fundamentally immoral because it interferes with individual freedom—but rather social shaming, which permits the offender to choose whether or not to accept the judgment of his or her peers.⁹² Braithwaite suggested that those who would punish should instead turn to “reintegrative shaming”: offenders should be encouraged to feel shame about their crimes, but after appropriate rituals of guilt, responsibility, and penance, they should be welcomed back into

89. As Zehr puts it:

Genuine accountability . . . includes an opportunity to understand the human consequences of one's acts, to face up to what one has done and to whom one has done it. But real accountability involves more. Accountability also involves taking responsibility for the results of one's behavior. Offenders must be allowed and encouraged to help decide what will happen to make things right, then to take steps to repair the damage.

Id. at 42.

90. Menkel-Meadow, *supra* note 87, at 163.

91. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

92. As Braithwaite puts it:

Shaming is conceived as a tool to allure and inveigle the citizen to attend to the moral claims of the criminal law, to coax and caress compliance, to reason and remonstrate with him over the harmfulness of his conduct. The citizen is ultimately free to reject these attempts to persuade through social disapproval. . . . A culture impregnated with high moral expectations of its citizens, publicly expressed, will deliver superior crime control compared with a culture which sees control as achievable by inflicting pain on its bad apples.

Id. at 9–10.

society.⁹³ In subsequent books and articles, Braithwaite has become an increasingly enthusiastic proponent of restorative justice, arguing that it is a useful component of theories of responsive regulation, theories of civic republicanism, and theories of transitional justice.⁹⁴

In *Restorative Justice and Civil Society*, Braithwaite and Heather Strang define restorative justice along two dimensions: a process dimension and a values dimension.⁹⁵ In its process dimension, restorative justice includes a number of specific practices that advocates use to supplement—and sometimes replace—the standard jail to courtroom to prison process.⁹⁶ For example, in victim-offender mediation, offenders meet victims face to face, in the presence of trained mediators, and the victim is encouraged to tell his or her story; in response, the offender is encouraged to acknowledge the harm that he or she caused.⁹⁷ Victim-offender mediation may end in a restitution agreement, an apology, neither, or both.⁹⁸

93. Braithwaite argues:

The theory of reintegrative shaming . . . implies that punishment need be no more severe than is required to communicate the degree of community disapproval appropriate to the offense. Punishment should be visible, newsworthy, so that consciences can be moulded by the unambiguous communication of the abhorrence that society extends toward criminal acts.

Id. at 178–79.

94. See, e.g., JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2002); JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1993); *RESTORATIVE JUSTICE AND CIVIL SOCIETY* (Heather Strang & John Braithwaite eds., 2001).

95. John Braithwaite & Heather Strang, *Introduction: Restorative Justice and Civil Society*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 1–2 (Heather Strang & John Braithwaite eds., 2001).

96. See Tony F. Marshall, *Restorative Justice: An Overview*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* 1, 2–8 (Gerry Johnstone ed., 2003) (describing various approaches to restorative justice: as “process,” as “set of distinctive values,” as “application of spiritual teaching to criminal justice,” as “theory of social justice,” and as alternative “lifestyle”).

97. Mark S. Umbreit & Jean Greenwood, *Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue*, U.S. Dept. of Justice, Office of Justice Programs, Office for Victims of Crime (NCJ 176346).

98. Mark Umbreit, one of the experts on victim-offender mediation, focuses on producing restitution agreements. See Umbreit & Greenwood, *supra* note 97, at 7. Other programs based on restorative justice principles work to obtain apologies from offenders. See Martin V. Day & Michael Ross, *The Value of Remorse: How Drivers’ Responses to Police Predict Fines for Speeding*, 35 *LAW & HUM. BEHAV.* 221, 222 (2011).

Family group conferencing is a process in which the offender and victim are each accompanied by friends, family, co-workers, or others who will offer their support.⁹⁹ As in victim-offender mediation, trained facilitators prepare both sides separately before the conference, and facilitate the conference itself.¹⁰⁰ Finally, “circles” of various kinds extend the family group conferencing idea to include community members who may not be directly related to the offender or victim, but who nevertheless have been affected by the crime.¹⁰¹ In circles, whether they are limited to family and friends or not, the emphasis is similarly on direct communication, truth-telling, and accountability: establishing a consensus about the harms done in the past, facilitating an emotional interchange between perpetrator and victim, and forging an agreement about what will be done in the future to address past harms and avoid future ones.¹⁰²

One hallmark of restorative justice processes, as opposed to the traditional criminal process, is its responsiveness to victims’ needs.¹⁰³ As the victims’ rights movement has emphasized, the victims of crime are rendered marginal or irrelevant to the traditional criminal justice process.¹⁰⁴ Many never receive the much-vaunted emotional

99. See Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 529 (2007).

100. *Id.* at 529.

101. *Id.* at 530.

102. *Id.* (noting that for all these practices, the “focus of the encounter nearly always involves naming what happened, identifying its impact, and coming to some common understanding, often including reaching agreement as to how any resultant harm would be repaired”).

103. Note, for example, the order in which these restorative justice advocates list the stakeholders: “[f]rom a restorative perspective, the primary stakeholders are understood to be individual victims and their families, victimized communities, and offenders and their families.” Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 256 (2005).

104. See Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 4 UTAH L. REV. 861, 865 (2007) (the victims’ rights movement emerged because “[v]ictims advocates argued that the criminal justice system had become preoccupied with defendants’ rights to the exclusion of considering the legitimate interests of crime victims”); see also Erin Ann O’Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL’Y 229 (2005) (reviewing controversy among lawyers and scholars about legitimacy of victims’ rights initiatives). As Cassell notes, since the beginning of the victims’ rights movement a number of legislative developments have brought victims into the process:

“closure” that a conviction, a plea, or an execution is said to produce,¹⁰⁵ and are left frustrated, angry, or full of unanswered questions.

In contrast, crime victims who agree to participate in a restorative justice process often leave feeling satisfied.¹⁰⁶ Restorative justice processes address the question, “Why did this happen?”—a question that is often central for crime victims. Many victims report that just being able to confront the perpetrator and get a response to the “why” question greatly eases their feelings of anxiety and anger and helps them move on with their lives.¹⁰⁷ Even when there is no satisfactory answer, victims may experience relief from the ability to safely confront the person who harmed them and to tell the story of their victimization.¹⁰⁸

In a few, perhaps rare, cases, the victim experiences something even more powerful: forgiveness. Restorative justice advocates emphasize that facilitators should not pressure victims to forgive their offenders.¹⁰⁹ Where it does occur, however, crime victims leave the

In 1982, Congress passed the first federal victims’ rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and provided expanded restitution. Since then, Congress has passed several acts that further protected victims’ rights, including the Victims of Crime Act of 1984, the Victims’ Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, and the Victim Rights Clarification Act of 1997. Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.

Cassell, *supra*, at 866.

105. For an exploration of the meaning of “closure” and its prevalence in death penalty discourse, see Jody Lyneé Madeira, “Why Rebottle the Genie?”: *Capitalizing on Closure in Death Penalty Proceedings*, 85 IND. L.J. 1477 (2010).

106. See Umbreit et al., *Restorative Justice*, *supra* note 99, at 533–38 (discussing victim satisfaction results in numerous studies).

107. See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 1 UTAH L. REV. 15, 22 (2003) (“The evidence suggests that victims see emotional reconciliation to be far more important than material or financial reparation.”); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 24 (1999) (noting victim interest in “why” question).

108. See Umbreit et al., *Restorative Justice*, *supra* note 99, at 531 (“[V]ictims frequently report that while restitution was the primary motivator for them to participate in VOM, what they appreciated most about the program was the opportunity to talk with the offender.”).

109. See Umbreit & Greenwood, *Guidelines for Victim-Sensitive Victim-Offender Mediation*, *supra* note 97, at 14 (“Forgiveness may . . . be expressed during the mediation

restorative justice process with a sense that something powerful and transcendent in their lives has occurred.¹¹⁰

The restorative process also differs from the conventional criminal process in its inclusion of persons other than the offender, the victim, and representatives of the state. Chief among these, of course, are the third-party facilitators. “Circle keepers” and other restorative justice facilitators, like mediators, use skills that lawyers, judges, and probation officers are seldom taught, such as how to follow the nuances of interpersonal interaction and how to manage both one’s own and others’ emotions in a dialogic setting.¹¹¹ In addition to facilitators, restorative justice processes often include members of the support systems of both offenders and victims, and sometimes unrelated members of the community who have been touched in some way by the crime.¹¹² This aspect of the restorative justice process lends itself to institutions outside the criminal justice system altogether, such as schools. In the elementary or secondary school context, for instance, “circles” may replace the traditional disciplinary system; students, teachers, and administrators may meet regularly both to build and maintain community and to address and resolve problems before they escalate into a situation requiring punishment.¹¹³

session, but the mediator’s use of the word ‘forgiveness’ may be destructive to the victim. Victims may, for example, feel guilty if they fail to feel forgiving.”)

110. See Strang & Sherman, *supra* note 107, at 23 (“It may be that ‘an experience of forgiveness’ is what assists victims most of all in recovering from their victimization.”).

111. See MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH* 3 (2001) (observing that “most conflicts develop within a larger emotional and relational context characterized by powerful feelings of disrespect, betrayal, and abuse”); see also *BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION* (Daniel Bowling & David A. Hoffman eds., 2003). The thirteen chapters in Bowling and Hoffman’s book explore topics such as the need for mediators to be “centered” and “authentic,” the need for them to possess “emotional intelligence,” and the need to develop a kind of intuition for doing the right thing. *Id.*

112. Umbreit et al., *Restorative Justice*, *supra* note 99, at 529–30.

113. See David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 *YOUTH & SOC’Y* 249 (2001); Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 *HARV. C.R.-C.L. L. REV.* 547 (2009). In the city of Oakland, California, the organization RJOY (Restorative Justice for Oakland Youth) attempts to disrupt the school-to-prison pipeline “by promoting institutional shifts toward restorative approaches that actively engage families, communities, and systems to repair harm and prevent re-offending.” *About Us, Mission*, RJOY <http://www.rjoyoakland.org/about.php> (last visited Dec. 20, 2011).

Finally, restorative justice advocates argue that the adversarial system distances offenders from the victim, from the state, and from their own offenses.¹¹⁴ The vast majority of criminal offenses are settled through plea bargains rather than through trial, and in these cases the offender likely has no contact with the victim at all. Moreover, the offender's encounters with representatives of the state are strategic in nature and generally mediated through a representative of some kind, whether a private attorney, a public defender, or appointed counsel. The offender need never be confronted with the harm that he or she has caused the victim. If the case ends in conviction, incarceration and/or supervision is similarly impersonal. The experience of punishment, as some scholars lament, may be painful and destructive, but it generally has almost nothing to do with the experience of having offended.¹¹⁵ For the person incarcerated, doing time may be easy, hard, or in between, but for reasons that are almost entirely unrelated to the original crime. Traditional criminal justice thus "punishes," but does not promote accountability.

In contrast, restorative justice seeks to engage offenders personally and emotionally with the people they have harmed, or with some surrogate for them. Offenders in a restorative process are pushed to reflect on the harm that they have caused, to acknowledge the experiences of their victims, and are encouraged to try to make it right, if possible.

Braithwaite and Strang argue that restorative justice differs from traditional justice not only from a process perspective, but also in terms of principles and values.¹¹⁶ The restorative justice

114. See GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES* 89 (2002) (discussing factors that encourage offenders to distance themselves from responsibility for their offense); Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 *J.L. & SOC'Y* 237, 249 (1998) ("In the stigmatizing processes of retributive justice, the offender is given more incentives to contest the label than to repent the behaviour; the 'sin' which people try to avoid is as likely to be that of being found out as that of behaving badly.").

115. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 *STAN. L. REV.* 1149 (1990).

116. John Braithwaite, *Principles of Restorative Justice*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 1, 7–13 (Andrew von Hirsch et al. eds., 2003) (identifying list of restorative justice values ordered into three categories: "values that must be honored and enforced as constraints," including "non-domination," "respectful listening," and "equal concern for all stakeholders"; values that should be actively

understanding of crime as harm to human relationships¹¹⁷ suggests that the language of “crime” itself is suspect; the state and the law should not have a monopoly on defining injury.¹¹⁸

Several principles are embedded in this point. First, a focus on human relationships explains the inclusion of friends, family, and community members in the process. It also makes sense of restorative justice’s focus on eliciting emotion-laden exchanges between offenders and victims. Even where the offender and victim are total strangers to one another, the fact of harm has created a relationship, though a purely negative one. Criminal victimization is commonly experienced by the victim as disrespect, a social relation that demands to be made right by a showing of respect.¹¹⁹

Second, and more broadly, the interpersonal significance of harm leads in at least two directions: inward toward psychology and outward toward democracy. At the level of social psychology,

encouraged by participants in any restorative process, such as “[p]revention of further injustice” and “restoration of dignity, compassion, and social support”; and values that should not be explicitly encouraged but may arise spontaneously from a successful restorative justice process, such as forgiveness, apology, and mercy).

117. HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181 (1990) (“[C]rime represents a violation of human relationships.”).

118. Zehr makes this point:

Some would have us avoid the term [crime] altogether. Crime is a result of a legal system which makes arbitrary distinctions between various harms and conflicts. It is an artificial construct which throws into one basket a variety of unrelated behaviors and experiences. It separates them from other harms and violations and thereby obscures the real meaning of the experience.

Id. at 183.

119. In Zehr’s words:

[C]rime represents a violation of human relationships. Crime affects our sense of trust, resulting in feelings of suspicion, of estrangement, sometimes of racism. Frequently it creates walls between friends, loved ones, relatives, and neighbors. Crime affects our relationships with those around us.

Crime also represents a ruptured relationship between the victim and offender. Even if they had no previous relationship, the crime creates a relationship. And that relationship is usually hostile. Left unresolved, that hostile relationship in turn affects the well-being of victim and offender. . . .

Crime then is at its core a violation of a person by another person, a person who himself or herself may be wounded. It is a violation of the just relationship that should exist between individuals.

Id. at 181–82.

restorative justice pays attention to the conventions of human interaction and seeks to meet the emotional needs of participants. At the level of individual psychology, restorative justice, by treating offenders as human beings rather than as “scum” or “garbage,” opens up the possibility of compassionate treatment in a way that conventional criminal justice actively discourages.¹²⁰ Restorative processes assume a fundamental dignity on the part of all participants that fosters a sense of basic social equality.¹²¹ In the conventional criminal justice process, by contrast, dehumanization of the offender by the victim(s) and by state actors is all too common.

Restorative justice processes also promote a robust understanding of democracy. As Braithwaite has argued, civil society is prior to the state in the restorative justice conception of harm; the task of the state when a crime has been committed is not to avenge itself in the name of an abstract “People,” but to ensure that the bonds of civil society are strengthened rather than weakened by its response.¹²² Crime hurts not only individual victims but also represents a tear in the social fabric. From this perspective, members of civil society, in the form of affected members of “the community,” ought to participate directly in the process, rather than by being represented solely by the criminal justice state or the victim. Restorative justice proponents speak of “healing,” “accountability,” and “making things right” rather than of punishment.¹²³ Their vision is of a healthy and vibrant civil society that works alongside, or even instead of, the state to prevent crime and then to address it after the fact. Proponents hope that the

120. Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 11–18 (1997) (exploring racist stereotypes that encourage citizens to dismiss criminals as human “garbage”); ZEHR, CHANGING LENSES, *supra* note 117, at 73–74 (noting that the existing criminal justice process encourages key decisionmakers to deny personal responsibility for outcomes, discourages them “from acknowledging what they have in common with offenders as people,” and distances all participants from pain they are imposing).

121. As Gerry Johnstone puts it, “[R]estorative justice proponents espouse the principle that all participants in the process—including offenders—should be treated in a humane, egalitarian way that values their worth as human beings and respects their right to justice and dignity.” JOHNSTONE, *supra* note 114, at 11.

122. See Braithwaite & Strang, *supra* note 95, at 10 (describing “virtuous circle” in which restorative justice, state authority, and civil society mutually reinforce one another).

123. Howard Zehr, for instance, argues that restorative justice advocates should seek healing for victims, for the relationship between the victim and the offender, for the offender, and for the community. Zehr, *supra* note 117, at 186–88.

participants in a restorative justice process, particularly the victim and members of the community, will come away feeling “empowered”: unafraid, in control of their lives, and better able to affect the relationships and institutions in which they participate. A third implication of replacing “crime” with “harm” raises both dangers and opportunities from the perspective of structurally disadvantaged social groups. The primary danger is that restorative justice processes, especially if driven by an existing criminal justice state, may contribute to what is known as “net-widening.”¹²⁴ If no legally-recognized crime is necessary in order to initiate the process, then restorative justice can serve the purpose of putting even more poor and minority people under the supervision of the state. More and more of the usual suspects will find themselves called to account for increasingly trivial harms.¹²⁵ The opportunity is that replacing “crime” with “harm” makes it possible for a circle or other restorative process to focus on what actually took place, rather than on what could be proved beyond a reasonable doubt. The restorative justice approach also makes possible a complex analysis of harm that does not label the relevant parties as either “offender” or “victim,” but allows for the possibility that some people might be both. Most importantly, replacing “crime” with “harm” has the potential to make visible harms committed by the state itself. We will come back to this point in the section that follows.

As might be guessed, restorative justice advocates and their projects fall along a spectrum from reformist to revolutionary in relation to the existing criminal justice system. Where they have been implemented in the United States, restorative justice processes are typically voluntary and ancillary to the existing system, taking the form of diversionary programs. In their most radical moments,

124. DANIEL W. VAN NESS AND KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 166 (2d ed. 2002) (explaining “net-widening” as the process by which “community-government collaboration result[s] in expanded state controls”).

125. See Sharon Levrant et al., *Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* 417, 418 (Gerry Johnstone ed., 2003) (discussing “net widening” as a possible unintended consequence of restorative justice initiatives); see also John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME AND JUSTICE* 1, 89–91 (1999) (discussing the possibility that restorative justice practice “can widen nets of social control”).

however, restorative justice advocates look forward to the abolition of the criminal justice system as we know it. Menkel-Meadow observes:

At its most aspirational or utopian, restorative justice has been seen as a potentially transformative social practice that could, under the right conditions, obviate the need for harsh criminal punishment and incarceration. In this conception, restorative justice was linked as a social movement to community organizing, criminal justice and prison reform, the civil alternative dispute resolution (ADR) movement, and the peace movement in that it sought alternative processes for different and more humane and tailored outcomes.¹²⁶

There are a number of lively theoretical and empirical debates in and around the field of restorative justice. On the theoretical level, for example, there is the issue of whether restorative justice can be distinguished from certain forms of retributivism.¹²⁷ At the empirical level, the burning question is whether restorative justice actually “works.” Does it prevent future crime, and if so, how? Does it help victims, and how and when should victim satisfaction be measured? Does it shame offenders into feeling remorse and experiencing

126. Menkel-Meadow, *supra* note 87 (citation omitted).

127. As Kathleen Daly has pointed out, most theories of restoration assume, without spelling it out, the value of a retributive moment. Without the attribution of responsibility to the offender and the moral censure of the offender for causing harm, the notion of “restoration” itself loses its bite. See Kathleen Daly, *Restorative Justice: The Real Story*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* 363, 364 (Gerry Johnstone ed., 2003); Kathleen Daly, *Revisiting the Relationship Between Retributive and Restorative Justice*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 33, 34 (Heather Strang & John Braithwaite eds., 2000); see also R.A. Duff, *Restorative Punishment and Punitive Restoration*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT* 382, 382 (Gerry Johnstone ed., 2003) (arguing that “restoration is not only compatible with retribution and punishment, but *requires* it”); Conrad G. Brunk, *Restorative Justice and the Philosophical Theories of Criminal Punishment*, in *THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE* 31 (Michael L. Hadley ed., 2001). See also VAN NESS & STRONG, *supra* note 124, at 43 (“Restorative justice includes principles of accountability and acknowledges that accountability may be painful”); *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* (Andrew von Hirsch et al. eds., 2003). The relationship between restorative justice and retributionism should therefore probably be seen as overlapping rather than antithetical. See Daly, *Restorative Justice: The Real Story*, *supra*, at 371. It is also the case, of course, that the existing criminal justice system is not the pure expression of any single theory; it is a pragmatic institution in which incarceration is supposed to simultaneously implement very different purposes of punishment.

rehabilitation, or only facilitate facile and meaningless “touchy feely” exchanges between offenders and victims? Are apologies or material restitution more likely to make victims feel whole and prevent future offending? And, most fundamentally, what does it mean for a restorative process to “work”—is the goal to make the existing criminal justice system more legitimate and palatable, or to undermine and ultimately end it?¹²⁸ I will not pursue these debates in this Article, as they have been amply addressed elsewhere.¹²⁹ Instead, I want to examine the theory of restorative justice from a critical race feminist perspective.

B. From Restorative Justice to Transformative Justice

There is one obvious pragmatic reason why impoverished black and brown communities scourged by both crime and law enforcement should be receptive to restorative justice practices: they provide an alternative to the unrelenting focus on mass incarceration that has

128. See VAN NESS & STRONG, *supra* note 124, at 155–83, 185–203 (1997). Andrew Ashworth, *Some Doubts About Restorative Justice*, 4 CRIM. L.F. 277 (1993) (identifying number of conceptual and practical doubts); Kathleen Daly, *Mind the Gap: Restorative Justice in Theory and Practice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 219, 234 (Andrew von Hirsch et al. eds., 2003) (“The nirvana story of restorative justice helps us to imagine what is possible, but it should not be used as the benchmark for what is practical and achievable. The nirvana story assumes that people are ready and able to resolve disputes, to repair harms, to feel contrite, and perhaps to forgive others when they may not be ready and able to do any of these things at all. It holds out the promise that these things *should happen most of the time* when research suggests that these things can occur *some of the time*.”); Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, *supra* note 107, at 104–07 (listing objections but ending on decidedly optimistic note); Levrant et al., *supra* note 125, at 417 (listing four “unanticipated consequences of restorative justice: (1) it will serve as a means of getting tough on offenders; (2) it will not be restorative for victims, offenders, or communities; (3) it will be more of a symbolic than a substantive reform; and (4) it will reinforce existing race and class biases besetting the criminal justice system”); Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice,”* 1 UTAH L. REV. 375 (2003) (arguing that restorative justice advocates wish to replace criminal justice system as we know it and therefore are “anti-justice”).

129. For a recent discussion of these and other empirical issues, see, e.g., GORDON BAZEMORE AND MARA SCHIFF, *JUVENILE JUSTICE REFORM AND RESTORATIVE JUSTICE: BUILDING THEORY AND POLICY FROM PRACTICE* (2005); MARGARITA ZERNOVA, *RESTORATIVE JUSTICE: IDEALS AND REALITIES* (2009); DECLAN ROCHE, *ACCOUNTABILITY IN RESTORATIVE JUSTICE* (2003); Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127 (2005); Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167 (2003).

been such a disaster for these communities. And in an ideal world, restorative justice would also be appealing to people of color for positive reasons. I will argue that analyses of privilege and power can deepen the restorative justice project, producing an approach that some activists call “transformative justice.”

Discussions of subordination were largely absent from the early theoretical, policy, and advocacy writings on restorative justice,¹³⁰ with one exception: the issue of violence against women. A thoughtful and passionate feminist literature has emerged on the question of whether restorative justice principles and practices have any application to domestic violence, hate crimes, and sexual offenses.¹³¹ Summarizing much of this debate, Kathleen Daly and Julia Stubbs identify four potential benefits of restorative justice as a response to gender violence: (1) victim voice and participation; (2) victim validation and offender responsibility; (3) a communicative

130. There are two likely reasons for this inattention to power and privilege. First, most of the best-known and influential restorative justice advocates have been white, and race issues may not have been on their radar, may have seemed outside their expertise, or may have thought to have been too divisive in the context of the mission to build a strong and unified movement. The exception is the frequent reference in canonical restorative justice texts to traditional indigenous practices of peacemaking and conflict resolution as models. As Kathleen Daly has noted, however, at least in the United States, Canada, and Great Britain these references to traditional practices have a whiff of romanticism about them, given the economic and political disenfranchisement of most Indian and First Nations peoples in these countries:

With the flexibility of informal justice, practitioners, advocates and members of minority groups may see the potential for introducing culturally sensible and responsive forms of justice. But to say that conferencing *is* an indigenous justice practice (or “has its roots in indigenous justice”) is to re-engage a white-centered view of the world. . . . A good deal of the advocacy literature is of this ilk: white-centered, creaming off and homogenizing of cultural difference and specificity.

Daly, *Restorative Justice: The Real Story*, *supra* note 127.

A second possible reason for inattention to issues of subordination, particularly racial subordination, is that restorative justice theories tend to be rooted in the sociology and philosophy of communitarianism, which also has had very little to say about the fractures of “community” that forms of subordination like racism create. For a pithy critique of civic republicanism in this light, see Kathleen Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988). For a charge that restorative justice is based on sentimental utopianism, see ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* (2004).

131. Examples of this literature include RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN (James Ptacek ed., 2009); Barbara Hudson, *Restorative Justice: The Challenge of Racial and Sexual Violence*, 25 J.L. & SOC’Y 237 (1998); and Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616 (2002).

and flexible environment; and (4) relationship repair (if the victim desires it).¹³² Barbara Hudson agrees that restorative justice promises a dialogue in which the voice of the victim is heard clearly and taken seriously, opening the door for true remorse by the offender.¹³³ In a family conference or circle, the perpetrator of gender violence will not be able to ignore, avoid, or belittle criticism of his actions, and will be forced to give a justifying account not only to the victim, but to third parties. At the same time, restorative justice processes seem well positioned to engage the perpetrator of gender violence in a process that might bring him to genuine change by providing an environment that is supportive rather than traumatizing.

However, feminists see potential dangers as well as benefits in a restorative justice approach to gender violence. First, Kathleen Daly and Julie Stubbs observe that male and female offenders may experience restorative justice processes differently.¹³⁴ Empirical research on restorative justice practices conducted by Daly and others found that female offenders tended to be more defiant, less apologetic, and less compliant with the process generally, and that female victims may be more likely to feel re-victimized or disparaged by the restorative process than are male victims.¹³⁵

Second, and more importantly, feminists worry about the subordination effects of restorative justice when used as a response to sexual and domestic violence.¹³⁶ Daly and Stubbs have identified and summarized these concerns as follows.

A first concern is the victim's physical and emotional safety: "[a]s an informal process, [restorative justice] may put victims at risk of continued violence; it may permit power imbalances to go unchecked and reinforce abusive behaviour."¹³⁷

132. Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9, 18 (2006).

133. Hudson observes that restorative justice theory echoes or draws upon Jurgen Habermas's theory of "communicative morality," which "is in the exposition of views, the listening to accounts of harm, the attempting to justify prejudice, that more progressive moral consensus can be reached." Hudson, *Restorative Justice: The Challenge of Racial and Sexual Violence*, *supra* note 114, at 250.

134. Daly & Stubbs, *supra* note 132, at 15–16.

135. *Id.* at 16.

136. *Id.*

137. *Id.* at 17.

Second, offenders may be able to manipulate the process “to diminish guilt, trivialize the violence, or shift the blame to the victim.”¹³⁸ The concern is that an informal process may be more subject to offender manipulation than is a formal process.¹³⁹

Third, and relatedly, feminists worry that in situations involving domestic violence and some sexual offenses, such as incest, the participants in the conference or circle who are designated supporters of the victim may actually have mixed loyalties, and may challenge or ignore the victim’s account of what happened, minimize the harm, or otherwise manipulate the process.¹⁴⁰

Fourth, feminists worry that the combination of the restorative process, which is geared toward building consensus, and the conventional gendered expectation that women should be placating, compliant, and “nice” may result in undue pressure on female victims of domestic or sexual violence to forgive the offender, accept an insincere apology, agree to preserve a relationship that feels unsafe, or accept a settlement arrangement that leaves the victim unsatisfied.¹⁴¹

Fifth, feminists share the concern with other critics of restorative justice that the process will simply be ineffective and have no impact on the offender’s attitude, beliefs, or future behavior.¹⁴²

Finally, two related concerns go to the expressive function of restorative justice processes for sexual and domestic violence, above and beyond their impact on the victim and the offender. Precisely because its methods are less violent and brutal, and less conventional than traditional criminal justice processes, some feminists fear that restorative justice for domestic and sexual violence may “send a message” that this kind of violence is less important and less harmful than other kinds of violence.¹⁴³ This possibility is heightened by the fact that politically, reformers are most likely to accept restorative justice processes for juvenile offenses and for crimes perceived as

138. *Id.*

139. A classic article expressing this reservation in the context of mediation is Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

140. Daly & Stubbs, *supra* note 132, at 17.

141. Grillo, *The Mediation Alternative*, *supra* note 139, at 1576–77.

142. Daly & Stubbs, *supra* note 132, at 17.

143. *Id.*

“minor,” and least likely to accept restorative justice for crimes like murder.¹⁴⁴

This point connects to the concern that motivated feminists to ally with the criminal justice system in the first place: the sense that violence against women is not taken seriously in our heteropatriarchal society. In one study, for example, when interviewed about a potential restorative justice proposal, women who had experienced intimate violence expressed the concern that their “community”—a term much lauded in restorative justice literature—did not adequately support victims of violence against women.¹⁴⁵ Not only may organizations in civil society lack the financial and person-power resources to provide counseling, training, safe havens, and monitoring of agreements reached through restorative justice processes, particularly considering the prevalence of domestic and sexual violence; but community norms may only weakly support victims, or at worst may reinforce male dominance.¹⁴⁶

Changing the frame from domestic and sexual violence to gender violence more broadly makes the concerns about community norms even more pressing. Consider, for instance, gender violence targeting individuals perceived as gay, lesbian, bisexual, transgender, or intersex (LGBTI). As the continuing and well-publicized debates on same-sex marriage and whether sexual minorities can or should renounce their sexual orientations and live as if straight indicate, LGBTI identity remains highly stigmatized in the general population.

144. See VAN NESS & STRONG, *supra* note 124, at 186–90 (exploring the objection to restorative justice that it will not work with “dangerous” offenders).

145. Pamela Rubin, *A Community of One's Own? When Women Speak to Power About Restorative Justice*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 89–91 (James Ptacek ed., 2010).

146. As Rubin puts it:

Many women were extremely concerned about community attitudes, a lack of understanding of woman abuse and women's criminalization, and a paucity of community competence to administer justice for women. In their view, this could take the form of simple ignorance and indifference to abuse; victim-blaming; partiality toward the abuser; stereotyping based on race, mental disability, sexual orientation, or other personal characteristics; and reflexive condemnation of women in conflict with the law. Many of the aspects of systemic discrimination women described as existing within the justice system were seen as writ large in the broader community.

Id. at 89.

Queer men and women living in impoverished black and brown neighborhoods, moreover, must contend with being a double minority, marginalized in both gay-identified communities and black-and brown-identified communities.¹⁴⁷ It is hard to imagine that most families, friends, and neighborhoods already have the capacity to provide robust social, emotional, and material support for such victims of homophobic gender violence.

Moreover, in some neighborhoods and communities displays of “destructive masculinity” may be condoned, even admired and respected.¹⁴⁸ Restorative justice for gender violence must be assessed in the context of local, regional, and national cultures of hegemonic masculinity—heteropatriarchal subcultures that are changing, if at all, only very slowly and unevenly.

Critical scholar-activists compound these worries about the effectiveness of restorative justice processes and an uncritical reliance on “the community” with a concern about the movement’s comfort with the state. For instance, Andrea Smith criticizes restorative justice proponents:

[N]either [restorative justice] advocates nor critics seem to question the role of the criminal justice system in addressing violence. . . .

The assumption behind this insistence on working with the state is that the U.S. Government (or Canada, Australia, and New Zealand) is essentially a benevolent or neutral democratic institution that can serve peoples’ interests, although they may be marred by instances of racism. Presumably, if we can simply eradicate the racism and the sexism of the state, it can then provide justice for survivors of violence.¹⁴⁹

In contrast, Smith argues that “the nation-state, particularly the United States, is not a bastion of freedom from which ideals are being

147. For explorations of the dilemmas facing queer black people, see, e.g., KEITH BOYKIN, *ONE MORE RIVER TO CROSS: BLACK AND GAY IN AMERICA* (1996); DANGEROUS LIAISONS: BLACKS, GAYS, AND THE STRUGGLE FOR EQUALITY (Eric Brandt ed., 1999).

148. See SpearIt, *supra* note 8.

149. Andrea Smith, *Beyond Restorative Justice*, in Ptacek, *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN*, *supra* note 86, at 264.

eroded through gender and racial violence—gender and racial violence represent the *fulfillment* of the ideals of U.S. democracy.”¹⁵⁰ If this is true, then “[s]imply adding [restorative justice] to the present criminal justice system is likely to further strengthen the criminal justice apparatus, particularly in communities of color that are deemed in need of restoration.”¹⁵¹

Mindful of these critiques, some anti-subordinationist advocates have begun to speak not of restorative justice, but of “transformative justice.”¹⁵² In my understanding, transformative justice begins by embracing two of the basic tenets of restorative justice. First and foremost is the conviction that our current punishment-oriented criminal justice system does not do what it purports to do. It does not effectively rehabilitate, incapacitate, deter, or provide retribution against the offenders. Nor does it effectively make “noncriminals” safer, provide healing or closure for survivors of violence, or improve the neighborhoods and communities that are most victimized by street crime. Rather, as we have seen, the existing criminal justice system functions as a “race- and gender-making” machine, imposing political and economic disabilities on black and brown communities, perpetuating destructive masculinity, and perpetuating racial stereotypes in much the same way as the old system of Jim Crow.

Second, transformative justice accepts the basic restorative justice tenet that “harm,” not “crime,” should be the key concept that triggers intervention. As we have seen, replacement of crime with harm has a number of important theoretical implications: it undermines the state’s monopoly on identifying and naming injury; it draws our attention to the micro level of psychology and the macro level of political and economic structures; and it focuses us on the dignity of victims and offenders alike.

Transformative justice, however, differs from restorative justice in two ways. First, transformative justice advocates place anti-subordination at the center of their work.¹⁵³ Both the values and the

150. *Id.*

151. *Id.* at 266.

152. *Id.*

153. For example, Andrea Smith argues that “sexual/domestic violence within communities of color cannot be addressed seriously without dealing with the larger structures of violence, such as militarism, attacks on immigrants and Indian treaty rights, police brutality, the

process dimensions of restorative justice must be developed and implemented with an eye to the relations of privilege and power that pervade our society. Moreover, in accordance with the insights of critical race feminism, one-dimensional analyses of these relations—like the treatment of violence against women and violence against sexual minorities as distinct though parallel—are insufficient.¹⁵⁴ The aim of transformative justice is to recognize and grapple with the complicated ways in which race, gender, and other modes of domination are mutually entwined. The centrality of transformation means that each incident of personal violence should be understood in a larger context of structural violence.¹⁵⁵

Second, the transformative justice approach keeps front and center the insight that in order to fully realize this aspiration, scholars and advocates cannot rely uncritically on *either* state institutions and practices *or* the traditional practices and institutions of civil society, including the family and “the community.”¹⁵⁶ Restorative justice advocates tend to embrace representatives of the state, the family, and the community as stakeholders along with offenders and victims in the process of identifying harm and making things right.¹⁵⁷

proliferation of prisons, economic neo-colonialism, and institutional racism.” Andrea Smith, *Colors of Violence*, COLORLINES 14–15 (Dec. 15, 2000), *quoted in* Ptacek, *supra* note 86, at 17.

154. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989) (introducing concept of intersectionality); Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431 (2002) (reviewing theoretical work that builds on concept of intersectionality).

155. For a powerful description of structural violence, see Paul Farmer, *On Suffering and Structural Violence: A View from Below*, 125 DAEDALUS 261, 281 (1996).

156. Andrea Smith, for example, argues:

[M]any organizations address violence directed at communities of color—police brutality, racism, economic exploitation, colonialism. Many other organizations address violence against women within communities. But very few organizations address violence on both fronts simultaneously. . . . The challenge women of color face is to combat both personal and state violence.

Smith, *supra* note 131.

157. For example, the “Wagga model” of family group conferencing trains police and probation officers, among others, to conduct conferences. See PAUL McCOLD AND BENJAMIN WACHTEL, *RESTORATIVE POLICING EXPERIMENT: THE BETHLEHEM PENNSYLVANIA POLICE FAMILY GROUP CONFERENCING PROJECT* (May 1998), *available at* <http://www.iirp.edu/pdf/BPD.pdf>.

Transformative justice, however, recognizes that all these stakeholders are embedded in unjust relations of power, including pervasive racism, economic exploitation, xenophobia, and heteropatriarchy.¹⁵⁸

What is the goal of transformative justice? Andrea Smith suggests that if “survivors” of violence rather than “clients” of social service agencies were their organizational base, anti-violence movements would seek to “(1) challenge state violence *and* (2) build communities that would actually provide safety for survivors by challenging the sexism, homophobia, and other forms of oppression that exist within them.”¹⁵⁹ Barbara Hudson describes what feminist and anti-racist advocates might want from an ideal response to racial hate crimes and crimes against women:

[S]trategies that can deal with large numbers of victims and offenders; that can provide protection and redress for victims; that can change social attitudes from tolerance to disapproval; that can inculcate remorse and a desire for change in perpetrators, and that can bring about a rebalancing of power within the crime relationship.¹⁶⁰

Smith’s and Hudson’s visions point to security as a central goal of transformative justice. Conventional criminal justice looks to punishment to establish security: if would-be offenders are effectively deterred and actual offenders are incapacitated through punishment, victims and potential victims will be safe. The restorative justice movement and its concern with redress for victims bring the question of security into sharper focus. As its critics point out, however, restorative justice advocates are too sanguine about the ability of existing support systems, in families and in civil society, to provide real security for victims of gender violence. By questioning both existing state institutions such as the criminal justice system and existing civil society institutions like the family, transformative justice advocates reopen the question, What does safety look like?

158. See Smith, *supra* note 131.

159. Smith, *supra* note 131, at 266.

160. Hudson, *Restorative Justice: The Challenge of Racial and Sexual Violence*, *supra* note 133.

As yet, there are only tentative answers. Some restorative justice advocates speak of peacemaking rather than order as the goal of a good society:

[Peace] requires a community's commitment to respect the rights of its members and to help resolve conflicts among them. It requires that those members respect community interests even when they conflict with their individual interests. It is this context that communities and their members assume responsibility for addressing the underlying social, economic and moral factors that contribute to conflict within the community. "Order," on the other hand, is imposed on the community. It sets external limits on behavior and enforces those limits to minimize overt conflict and to control potentially chaotic factors. . . .

Both order and peace are appropriate means to achieving safety. However, as imposed order increases, personal freedom decreases; hence, peace will be sought in a society that values freedom. Security built primarily on governmentally imposed order is detrimental to a free society, as conditions in police states throughout the world demonstrate. On the other hand, when the community fails to foster peace, it may be necessary for the government to intervene and impose order.¹⁶¹

One precondition of peace is economic security. Some prison abolitionists imagine communities supported by a robust welfare state as the foundation of security. Critical Resistance, for example, describes its positive vision as "the creation of genuinely safe, healthy communities that do not rely on prisons and policing to respond to harm."¹⁶² For Critical Resistance, the "end goal of abolition is to reduce harm in our communities by creating lasting alternatives to punishment and prisons, investing in the things that

161. VAN NESS & STRONG, *supra* note 124, at 35–36.

162. *Our Vision*, CRITICAL RESISTANCE, <http://www.criticalresistance.org/article.php?id=51> (last visited Dec. 20, 2011); *see also* GENERATIONFIVE, TOWARD TRANSFORMATIVE JUSTICE 9–12 (June 2007), *available at* http://www.generationfive.org/downloads/G5_Toward_Transformative_Justice.pdf (explaining why the state should not be a part of a liberatory strategy to end child sexual abuse).

truly build safe communities such as education, housing, and employment, thus eliminating the ‘need’ for the prison industrial complex.”¹⁶³ In addition to adequate education, housing, and employment, environmental justice advocates and public health experts might add that the most disenfranchised neighborhoods need physical and social infrastructures conducive to health, including reduced exposure to toxins, clean and safe buildings in which to live and work, and accessible health care for both mental and physical illness.

Another precondition of meaningful security might be political empowerment. Restorative justice’s circle processes are consonant with community organizing practices that seek political empowerment and leadership capacity-building. As some advocates have noted, the restorative turn also opens the door to a more ambitious, and badly needed project: racial reconciliation. The most disenfranchised minority communities do not only need less incarceration and more jobs and schooling; they need to claim their political and social citizenship.¹⁶⁴ Equal citizenship and a kind of communitarian civic republicanism is often the implied framework of restorative justice. But the project of making that sense of national community real is a transformative one. Philosopher Margaret Urban Walker, for example, argues that restorative justice provides a promising framework for a discussion of reparations for American slavery.¹⁶⁵ This is so, she argues, because restorative justice, properly understood, is transformative: it is not focused on “restoring” a status quo, but rather on building relationships in the direction of “moral adequacy.”¹⁶⁶

163. CRITICAL RESISTANCE, *supra* note 162.

164. See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011).

165. Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377 (2006).

166. As Walker puts it:

I propose that we understand “restoration” in all contexts as normative: “restoration” refers to repairs that move relationships in the direction of *becoming morally adequate*, without assuming a morally adequate status quo ante. Morally adequate relations are ones in which three conditions obtain. In them, people are *confident* that they share some basic standards for the treatment of each other. People are able to *trust* each other to abide by those standards or at least to acknowledge fault if they (or others) do

As Gilligan and others have argued, structural factors, though important, are not the sole cause of violence. Some transformative justice advocates are exploring psychic and interpersonal foundations of meaningful security. In accordance with its mission to end child sexual abuse, GenerationFIVE emphasizes the importance of understanding and addressing trauma and its effects on the body and mind.¹⁶⁷ Its leaders argue that understanding trauma is important on at least two levels. First, it is necessary in order to support the victims of child sexual abuse and to assist in the recovery process.¹⁶⁸ Second, the experience of trauma affects organizing and community building and constrains the scope and pace of social change.¹⁶⁹ In GenerationFIVE's view, moreover, trauma can be not only individual but collective, caused by experiences such as "genocide, displacement, poverty, incarceration, mass sexual violence, or natural disasters."¹⁷⁰ This perspective suggests that communities ravaged by the cycle of destructive masculinity may need not only material

not abide by them. And so, finally, people are entitled to be *hopeful* that unacceptable treatment will not prevail, that unacceptable behavior will not be defended or ignored where it occurs, and that victims will not be abandoned in their reliance on our shared commitment to our standards and to each other.

Id. at 384.

167. The organization defines "trauma" as:

[H]armful experiences that persist long after an immediate threat or abusive experience is over. The impact of trauma can live on in the individual, group or culture for years and even generations. For individuals, trauma is an experience that affects body, mind, emotions, spirit, and our relationships. The impact can establish patterns of reactions based on traumatic experiences from the past, irrespective of whether the present actually reflects the same dangers or not.

These typical reactions such as denial, paralysis, hopelessness, blame, rage, and shame play out in our interpersonal and organizational relationships. They are also present in the responses we may get from the communities and networks in which we live, organize, and work. The better we can identify these responses, the more effective we can be at moving individuals and collectives from less useful traumatic responses toward those that can support personal and political liberation.

GENERATIONFIVE, *supra* note 162, at 23.

168. *Id.*

169. *See id.* ("People's relationships to violence and trauma, whether those relationships are historic or current, individual or collective, help determine what we think is possible, what impact we think we can have in the world, and how much we trust other people.")

170. *Id.*

assistance and political empowerment but individual and collective healing before they can be declared transformed.

These efforts to rethink what we mean by security from a transformative justice perspective bring us back to heteropatriarchy. The feminist and queer campaigns to reconfigure the family and civil society, if extended further, might allow us, finally, to transform police and prisons. For example, as we have seen, destructive masculinity is an insidious presence in policing. But the police mission “to serve and protect” need not be accomplished through force and domination. Scattered attempts to reshape policing along the lines of social work, for instance, deserve more attention and study.¹⁷¹ Similarly, jails and prisons could be modeled along the lines of secure facilities for the treatment of mental illness and substance abuse, with the main mission of providing sanctuary, protection, and support for people who are momentarily out of control. Prisons need not be enormous, centralized, total institutions; as in the original vision of mental illness “deinstitutionalization”; they might be small, local, and scattered throughout a community.¹⁷² Though even in a

171. Such an experiment was undertaken by the New Haven Police Academy in the late 1980s under the direction of Kay Codish and chief of police Nicholas Pastore. Using the slogan “Police others as you have them police you,” Codish sought a diverse police force, reaching out explicitly to racial and sexual minorities who traditionally have not been welcome on police forces. She also emphasized nonviolent management techniques and a broad multicultural education for police recruits, much to the dismay of many who wanted a more “traditional” (read force-oriented and masculinity-driven) training regime. See Nicholas Pastore, *Police Others as You Would Have Them Police You*, 1 RECONSIDER Q. 10 (2000–2001), available at http://www.reconsider.org/quarterly/2000_2001_Winter/PoliceQuarterly.pdf.

172. See, e.g., Matt Boucher, *Turning a Blind (White) Eye in Legislating Mental Health Parity: The Unmet, Overlooked Needs of the Working Poor in Racial and Ethnic Minority Communities*, 19 J. CONTEMP. HEALTH L. & POL’Y 465, 490–92 (2003) (discussing benefits of community-based treatment centers). For an exploration of several federal constitutional sources of the right to community-based treatment for people with mental disabilities, see Bruce A. Arrigo, *The Logic of Identity and the Politics of Justice: Establishing a Right to Community-Based Treatment for the Institutionalized Mentally Disabled*, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (1992). For a general review of the federal constitutional, federal statutory, and state statutory bases for the right to community-based treatment and a search for that right in state constitutions, see Anthony B. Klapper, Comment, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739 (1993); see also Stacy E. Seicshnaydre, Comment, *Community Mental Health Treatment for the Mentally Ill—When Does Less Restrictive Treatment Become a Right?*, 66 TUL. L. REV. 1971 (1992) (history and analysis of federal constitutional and statutory bases of right to community-based treatment). Of course, in order for these facilities to be useful, they must be financially accessible for people without means. See Shane Levesque, *Closing the Door: Mental Illness*,

perfect world there might be people who are incapable of living in the general population without harming others, this group might be much smaller than we think if the determinants of violence we have named have been effectively addressed.

CONCLUSION

The struggle against gender violence brings us back, again, to the fact that heteropatriarchy kills. The dilemma of anti-violence advocates—that relying on criminal justice to punish the perpetrators of violence against women and sexual minorities in the long run perpetuates more gender violence, directed particularly at the most vulnerable and disenfranchised communities—leads in the end to an even more daunting predicament: a struggle against an ideology so deeply rooted in Western society and culture that it seems ineradicable.

Yet feminist and queer movements have already begun the process of transformation, and in a relatively short time. A gender violence analysis brings us more good news: the fight against heteropatriarchy does not make straight men the enemy. The organizations that have planted themselves at the convergence of the struggles against private and state-sponsored gender violence—INCITE! Women of Color Against Violence, Justice Now, Critical Resistance, Sista II Sista, GenerationFIVE, Project Nia, RJOY, Friends Are Reaching Out (FAR Out), the Young Women’s Empowerment Project, Communities Against Rape and Abuse, and many others—have goals that can only be considered utopian. Yet their effort to build a social, political, and economic order that would eliminate gender violence and foster genuine security should inspire.

Moreover, the broad vision and ambitious goals of these groups need not put them at odds with more reformist projects. In practice, the restorative justice movement has focused on modifying the existing criminal justice system, but its practices and values point to a

the Criminal Justice System, and the Need for a Uniform Mental Health Policy, 34 NOVA L. REV. 711, 738 (2010) (emphasizing the need for “timely access to Medicaid and other public benefits for mentally ill offenders”); Lucille D. Wood, *Costs and the Right to Community-Based Treatment*, 16 YALE L. & POL’Y REV. 501 (1998).

much more revolutionary project. Guided by a race-aware feminist analysis, restorative justice theories and practices can serve as a testing ground for exploring what real security looks like and how to get there without brutalizing black and brown communities. Restorative justice advocates and gender violence advocates have a common interest in identifying and addressing violence committed under the auspices of the family, the state, and the community. Transformative justice has the potential to link these advocates and critical scholars in alliances that can work on different scales, but with the same horizon of liberation.