SURVIVORS' JUSTICE

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Nearly a decade ago, the #MeToo movement surfaced deep failings in our criminal and civil legal systems. But the work of retrofitting these systems to meet the needs of victims remains largely incomplete. To that end, survivors' conceptions of justice are of profound importance for theorists and reformers alike. Centering survivors recasts the virtues of restorative justice processes while clarifying the critical functions ideally served by traditional legal systems. Rather than forsaking reliance on these systems, I argue for their institutional redesign. To anchor this shift, I identify three overarching principles: access, control, and support. I close by reflecting on the promise of justice reimagined.

INTRODUCTION

Trauma has become central to conventional understandings of sexual abuse and its aftermath.[1] But our justice systems, criminal and civil,

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[1] See Bessel A. van der Kolk, The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma 1–2 (2014) ("Trauma, by definition, is unbearable and intolerable. Most rape victims, combat soldiers, and children who have been molested become so upset when they think about what they experienced that they try to push it out of their minds, trying to act as if nothing happened, and move on. It takes tremendous energy to keep functioning while carrying the memory of terror, and the shame of utter weakness and vulnerability.").

remain mostly untouched by this paradigm shift. Much the same can be said of legal discourse surrounding abuse, which has yet to interrogate the idea of trauma, much less its structural features. When trauma does crop up in the legal context, the dominant conception is highly individualistic, deployed to explain—often in pathological terms—ostensibly unusual victim behaviors that deviate from expectations.[2]

This defect is not isolated: across the board, the law abstracts sexual violence from social context.[3] When it comes to trauma, this legal tendency is buttressed by a cultural attraction to neurobiological accounts of phenomena that might otherwise be dismissed.[4] But an individualized, neuroscientific account of trauma is, at best, partial.[5] Trauma cannot be identified by biological markers alone, nor can trauma be theorized without regard for the social hierarchies that shape its experience and its meaning.

Contextualizing sexual trauma, along with the sexual violation that precedes it, opens new ways of thinking about the meaning of justice. Because sexual violence has deep roots in a culture that has long enabled

[2] See, e.g., Deborah Tuerkheimer, Victim, Reconstructed: Sex Crimes Experts and the New Rape Paradigm, 2024 U. Ill. L. Rev. 55, 68–82 [hereinafter Tuerkheimer, Victim, Reconstructed] (critiquing the construct of "rape trauma syndrome" and its evidentiary treatment).

[3] See id. at 78 (explaining that "[w]ith few exceptions, the criminalization of gender violence rests on the faulty premise that context does not matter").

[4] As noted by Bessel van der Kolk, author of the wildly popular *The Body Keeps the Score*, "In the culture right now, if it's based on the brain, it's real . . . . Everything else is woozy stuff." Ellen Barry, She Redefined Trauma. Then Trauma Redefined Her., N.Y. Times (Apr. 25, 2023) (quoting Bessel van der Kolk), https://www.nytimes.com/2023/04/24/health/judith-herman-trauma.html; see Danielle Carr, Tell Me Why It Hurts: How Bessel van der Kolk's Once Controversial Theory of Trauma Became the Dominant Way We Make Sense of Our Lives, N.Y. Mag. (July 31, 2023), https://nymag.com/intelligencer/article/trauma-bessel-van-der-kolk-the-body-keeps-the-score-profile.html. Because *sexual* trauma is particularly unlikely to register as "real," recognition of its neurobiological features has served an important function, enabling survivors to offer tangible evidence of their injury and its impact without needing to contest entrenched views of what counts as harm. See van der Kolk, supra note 1, at 21 ("Since the early 1990s brain-imaging tools have started to show us what actually happens inside the brains of traumatized people. . . . We have learned that trauma is not just an event that took place sometime in the past; it is also the imprint left by that experience on mind, brain, and body.").

[5] See Judith Lewis Herman, Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror 33 (1997) ("Traumatic events overwhelm the ordinary systems of care that give people a sense of control, connection, and meaning."); see also id. at 133 ("The core experiences of psychological trauma are disempowerment and disconnection from others. Recovery, therefore, is based upon the empowerment of the survivor and the creation of new connections.").

it, survivors need meaningful action on the part of the collective to remedy their violation. As psychiatrist Judith Herman writes, where "trauma originates in a fundamental injustice, then full healing must require repair through some measure of justice from the larger community."[6]

Building on this insight, the remainder of this Essay proceeds in three parts. Part I draws on Herman's groundbreaking work to explain how survivors envision justice and why justice matters for healing. Part II applies this framework to restorative justice processes, assessing both their virtues and shortcomings. Part III leverages the discussion of restorative justice in order to offer a novel set of principles for operationalizing survivors' justice within existing legal systems.

I. THE ESSENTIAL COLLECTIVE

How survivors conceptualize justice is seldom the subject of rigorous inquiry. A notable exception is psychiatrist Judith Herman's research, which finds that to move forward, survivors require meaningful action on the part of the community.[7] As Herman shows, the collective plays an essential role in shoring up structural inequalities that enable abuse.[8] For survivors, justice thus requires the community to help redress harm in which it is very much complicit.

This begins with acknowledgement of the wrongful act. In Herman's 2023 study, victims unanimously agreed on the significance of having their experience of violation recognized.[9] Recognition "on a massive scale" requires the broader community—as one woman put it, "We need the authority of the state creating a tribunal where victims' testimony [is] important."[10]

[6] Judith L. Herman, Truth and Repair: How Trauma Survivors Envision Justice 3 (2023). In other words, "[i]f trauma is truly a social problem, and indeed it is, then recovery cannot be simply a private, individual matter." Id.; see also id. at 1 (arguing that "[b]ecause the violence at the source of trauma aims at domination and oppression," recovery must involve the restoration of social power).

[7] See id. Herman's most recent study has particularly significant implications for the redesign of legal institutions, although, to date, few legal scholars have engaged with the work.

[8] See id. at 36 (arguing that members of the community, regardless of whether they witness firsthand the violation, "share in the social responsibility for making things right").

[9] See id. at 78.

[10] Id. at 80.

To this end, communal acknowledgement must extend beyond the acceptance of "bare facts" to a validation of harm.[11] "Some perpetrators seem perfectly willing to admit what they have done but are either unaware or unconcerned that their victims were hurt and blame the victims for complaining," Herman observes.[12] This stance is often reinforced by those to whom the survivor turns for support.[13] What survivors want instead is for "their communities to recognize and respect their suffering and to acknowledge the seriousness of the harm they have endured."[14]

Related to acknowledgment is "moral vindication."[15] Fixing blame for the abuse on the perpetrator (rather than the victim) counters powerful cultural and legal tendencies in the opposite direction.[16] In Herman's study, survivors universally viewed acknowledgement and vindication[17] as necessary conditions for achieving justice.[18]

Justice also requires accountability of a sort that complicates prevailing notions of punishment, the criminal law's standard measure.[19] Most survivors have a nuanced conception of accountability—one meant to "heal[] a damaged relationship, not primarily between victims and offenders but rather between victims and the bystanders in their

[11] As I have previously noted, a credible allegation moves the listener to conclude not just that the abuse happened, but that it matters. Deborah Tuerkheimer, Credible: Why We Doubt Accusers and Protect Abusers 10 (2021) [hereinafter Tuerkheimer, Credible].

[12] Herman, supra note 6, at 81.

[13] See Tuerkheimer, Credible, supra note 11, at 99–104 (describing pervasive practices of allocating fault to victims).

[14] Herman, supra note 6, at 81–82.

[15] Id. at 85. Survivors "want bystanders to take a stand, recognize that a wrong has been done, and unambiguously denounce the crime." Id.

[16] For analysis of the cultural, psychological, and legal forces that cause rampant blame-shifting, see Tuerkheimer, Credible, supra note 11, at 103–29.

[17] Herman, supra note 6, at 85. Survivors were "keenly aware that the crimes [against them] were intended to dishonor and isolate them; they sought, therefore, the restoration of their own honor and the reestablishment of their own connections with the community." Id.

[18] There may of course be survivors who view justice differently and whose healing does not depend on any kind of communal involvement (or who define community in decidedly nonpublic terms).

[19] See Herman, supra note 6, at 110. "Although survivors are so often stereotyped as vengeful and excessively punitive, most of those . . . interviewed seemed remarkably uninterested in punishment," Herman writes, preferring a form of justice "centered more on themselves than on the perpetrator, more on healing than on just deserts." Id. This finding is consistent with earlier research. See Tuerkheimer, Credible, supra note 11, at 215, 218–20 (summarizing relevant research).

communities."[20] Put differently, because gender-based violence can be destructive of power, dignity, and equality, survivors often view punishment as a way for the community to recalibrate, however imperfectly, a wrongful status equilibrium.[21] In this regard, quite apart from any vindictive impulse, punishment can be restorative: restorative of power, dignity, and social worth.[22]

Beyond retribution, restorative mechanisms figure prominently in survivors' visions of accountability and justice. Apology is an example, albeit a confounding one.[23] A genuine expression of remorse can generate a host of therapeutic benefits: apology can "create the possibility of repairing a relationship," "assuage feelings of helpless rage and bitterness," and allow for forgiveness.[24] Yet many of the survivors in Herman's study expressed skepticism of the value of apology, and some considered any expression of remorse simply "another form of manipulation" which could only "add insult to injury."[25]

Lastly, accountability and justice are bound up in amends, which many survivors view in structural terms.[26] In order to heal, victims require change in "the social and cultural factors that increase risk of

[20] Herman, supra note 6, at 131.

[21] See infra notes 127–39 and accompanying text.

[22] For particularly vulnerable victims, a communal expression of solidarity may be even more meaningful. See Herman, supra note 6, at 117 ("When crimes of violence are committed against subordinated or marginalized groups, punishment takes on important symbolic meaning in terms of how victims are valued in the wider community . . . .").

[23] See id. at 93–99.

[24] Id. at 93–94. An added virtue is that apology can re-empower a victim in the wake of gender violence, a quintessential act of disempowerment. "When the offender humbles himself to beg for pardon, the gesture represents a reversal of the power dynamic between victim and offender." Id. at 94. "The power to grant or withhold pardon belongs to the victim," which can help to "restor[e] the victim's dignity and self-respect." Id.

[25] Id. at 98–99.

[26] To be sure, many victims incur steep financial losses "as a result of their traumas, not only in the cost of medical and mental health care but also in lost years and derailed careers," and financial compensation can feel "only right." Id. at 146. But "money is not the main thing that most survivors think of when they try to imagine what would make things right for them." Id. Nor, as a practical matter, are survivors likely to recover monetary damages through a civil suit. See Merle H. Weiner, Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence, 62 Ariz. L. Rev. 957, 960–62 (2020) (showing that most survivors lack access to civil justice and proposing a system of insurance to address the gap); W. Jonathan Cardi & Martha Chamallas, A Negligence Claim for Rape, 101 Tex. L. Rev. 587, 587 (2023) (observing a "glaring disparity between the paltry number of tort claims brought by rape victims and the vast number of sexual assaults committed each year," and offering a doctrinal solution).

offending"[27]—change that does not simply prevent *re*-offense but forestalls abuse in the first instance. Here again, the collective plays an indispensable role in effectuating survivors' visons of justice.

To encapsulate: justice for survivors entails an acknowledgement of the abuse and its wrongfulness, a collective commitment to repair harm, and a much larger reckoning with the cultural preconditions for abuse.

This brings us to the set of practices called restorative justice ("RJ"), which offers much of what survivors are seeking, not least because the criminal justice system so rarely delivers on its promise.

II. CRIMINAL JUSTICE TO RESTORATIVE JUSTICE?

Relatively few sexual assault victims seek criminal justice.[28] Those who do are routinely disappointed. Even in the rare case that ends in a conviction,[29] survivors still may not feel empowered.[30]

Criminal prosecution is an uneasy fit for gender-based violence.[31] Because charges are brought on behalf of the state,[32] a victim's relegation to only the role of a witness may be distinctly detrimental.[33] To be a "cog in something turning," as one domestic violence survivor put it, is to have one's preferences subordinated—yet again, in ways that resonate with the

[27] Herman, supra note 6, at 188.

[28] See Statistics: The Criminal Justice System, Rape, Abuse & Incest Nat'l Network (RAINN) [hereinafter RAINN, Statistics], https://www.rainn.org/statistics/criminal-justice-system (last updated Aug. 28, 2025) (using aggregated government data to estimate that fewer than a third of sexual assault victims report to police); see also Tuerkheimer, Credible, supra note 11, at 28–31 (describing how the "credibility complex" works in advance to keep survivors from coming forward).

[29] See RAINN, Statistics, supra note 28 (noting that "[f]or every 1000 sexual assaults, 50 reports lead to arrests, [and] 28 cases lead to a felony conviction[]," which translates to an estimated 2.8% of all sexual assaults).

[30] See infra notes 119–24 and accompanying text.

[31] This critique is consistent with the observation that "criminal law is, from top to bottom, preoccupied with male concerns and male perspectives." Stephen J. Schulhofer, The Feminist Challenge in Criminal Law, 143 U. Pa. L. Rev. 2151, 2151 (1995); see Victoria Nourse, The "Normal" Successes and Failures of Feminism and the Criminal Law, 75 Chi.-Kent L. Rev. 951, 952–53 (2000).

[32] Herman writes:

> In our system of criminal law, the state, not the victim, is actually considered the injured party, and it is the state, not the victim, that has the exclusive right to take action against a criminal offender. . . . In this conception of justice, the person who is actually harmed has very little part to play in the process. Her role is simply as a witness.

Herman, supra note 6, at 45.

[33] Id.

dynamics of the abuse itself.[34] When the need for empowerment is arguably at its greatest, survivors must navigate a system built to implement someone else's idea of justice.[35] At every phase, from charging to disposition, the prosecutor, not the victim, decides. At the same time, the law imposes "a complex set of rules and bureaucratic procedures that [victims] may not understand and over which they have no control."[36] Together, "[t]he requirements of legal proceedings seem almost perfectly designed to aggravate the symptoms of posttraumatic stress."[37] In order to heal, victims must reestablish and assert the authority to govern their lives. Yet the imperatives of criminal prosecution mean that victims are routinely denied this opportunity.[38]

Against the backdrop of massive criminal justice failures, in recent decades the RJ "movement"[39] has burgeoned,[40] offering a type of justice that more closely resembles what many victims desire. By accepting a

[34] Id.

[35] One domestic violence victim told Herman that survivors who enter the criminal system must "be prepared to throw any illusions about 'justice' [they] might have had out the window." Id.

[36] Id. at 64.

[37] Id. Herman adds, "[I]t is common for victims of sexual violence to speak of their encounters with the justice system as a 'second rape.'" Id. (citing Rebecca Campbell, Sharon M. Wasco, Courtney E. Ahrens, Tracy Sefl & Holly E. Barnes, Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers, 16 J. Interpersonal Violence 1239, 1240 (2001)).

[38] As Herman details,

> Victims need time for recovery; the court sets the timetable for justice, which repeatedly disrupts their lives and is often protracted over many months or years. Victims need an opportunity to tell their stories in their own way; the court requires them to respond on the witness stand to a set of direct questions from the prosecutor and then to endure cross-examination by the defense attorney. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive their experiences in great detail. Victims often fear direct interaction with their perpetrators; the court requires a face-to-face confrontation with the accused.

Id.

[39] For a helpful overview of the movement's origins and current practices, see Sarah Deer & Abigail Barefoot, The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence, 28 Kan. J.L. & Pub. Pol'y 505, 516–19 (2019).

[40] RJ is becoming more common in college disciplinary proceedings involving sexual misconduct. As Herman observes, "[I]nstitutions of higher education seem like ideal [RJ] laboratories," although "even if campus RJ programs are shown to be effective, adapting them to many other institutions and scaling them up to the wider society will still be an enormous challenge." Herman, supra note 6, at 219.

survivor's account as truthful and valid,[41] RJ provides the "potential for vindication of the victim by the moral community that conventional justice so conspicuously lacks."[42] To survivors who yearn for repair, a process deliberately designed to achieve restorative ambitions—indeed expressly named for them—can hold enormous appeal.[43]

One survivor drawn to RJ was Kyra Jones, "a Black artist, screenwriter, and community activist in Chicago."[44] During college, Jones was sexually assaulted.[45] Subsequent interactions with the police, Jones recalled, were "disrespectful," and the criminal justice system—where "no one ever once asked her what she wanted"—felt deeply "alienating."[46] When Jones was raped again several years later (by a different man), she was determined to find another way forward.[47] RJ seemed an attractive alternative, where justice would be "measured by the survivor's healing" rather than hinging "on the question of the offender's fate."[48]

Jones's experience with the process demonstrates how RJ can deliver, at least in part, the justice that survivors often envision. Jones described wanting Malcolm, the offender and a fellow community activist, to "acknowledge what had happened, and she wanted to warn her activist community about the ways he abused his positions of leadership, but she definitely did not want to report him to a criminal justice system that was all too ready to imprison Black men."[49] Jones also wanted Malcolm to understand the harm he had inflicted, "to feel remorse, and to change his attitudes and his behavior so that he wouldn't harm anyone else."[50] If the process worked as it should, RJ would satisfy the desire generally shared by survivors for acknowledgement, vindication, and "reintegration" in the collective.[51]

[41] "There is no fact-finding mechanism in RJ if the truth is disputed. The equivalent of a confession from the offender is required in order to allow the process to unfold." Id. at 114–15.

[42] Id. at 116.

[43] See Tuerkheimer, Credible, supra note 11, at 207–15 (analyzing the promise and pitfalls of restorative justice for survivors).

[44] Herman, supra note 6, at 121–22.

[45] Id. at 121.

[46] Id.

[47] Id. at 121–22.

[48] Id. at 131 (emphasis omitted).

[49] Id. at 122.

[50] Id.

[51] Id. at 132.

Under the guidance of an experienced RJ practitioner,[52] a group of volunteers spent over a year preparing Malcolm and Jones, separately, to participate in a peace circle. Jones's group "helped her to process the trauma and develop her ideas for the kind of amends she wanted"[53]—a valuable elevation of Jones's needs. Jones "recognized that the community had to find a way to reach offenders, but first [the survivors] needed the community to embrace them and relieve them of their own burdens of silencing and shame."[54] By positioning the survivor's healing as paramount, RJ aligns with the justice that many survivors seek.[55]

Throughout the process, Malcolm's group worked with him to "understand the consequences of his actions and what kind of changes might be necessary to repair the harm he had done."[56] When Jones and Malcolm finally met, Malcolm apologized and agreed to a plan for "deep reflection and change."[57] For their part, members of Malcolm's group committed to holding him accountable for his agreements to Jones, as well as to others in their community.[58] In the end, Jones came away from the RJ process, as she put it, "much healthier."[59]

But Jones's story also serves as a cautionary tale. Malcolm continued to assault other women after completing the RJ peace circle,[60] and some survivors "were angry with Jones for her choice not to file a criminal complaint," thinking "Malcolm should have been in prison, where he would have been unable to hurt more women."[61] Jones struggled to reconcile her own positive response to RJ with this obvious failure, but

[52] On the role of the facilitator, Herman writes,

> The stance of the facilitator is not neutral; rather the facilitator represents the moral community in vindicating the person who has been harmed and holding the harm-doer responsible. The challenge for the RJ facilitator is to show respect and empathy for both parties while at the same time representing community disapproval of the harm-doer's actions and insisting on the need for repair.

Id. at 215–16.

[53] Id. at 122.

[54] Id. at 132.

[55] Herman articulates this principle as follows: "[W]hen a person has been harmed, the first duty of the moral community is to support and care for her." Id. at 131.

[56] Id. at 123.

[57] Id.

[58] Id.

[59] Id. at 131.

[60] Id. at 123. As Herman notes, "[T]he RJ movement is still too new to have amassed a convincing track record on preventing recidivism for violent crimes. This leaves survivors in a quandary as they consider taking a chance on RJ." Id. at 127.

[61] Id. at 123 (emphasis omitted).

eventually decided it was "unfair to blame RJ," and that the "responsibility belonged with Malcolm . . . along with an activist community that had gone back to its default habits of valuing Black men over Black women."[62] Jones noted that Malcolm was quickly returned to leadership roles and placed "on a pedestal" where he could "act like nothing ever happened."[63] These developments facilitated Malcolm's ability to prey on less powerful women.[64]

Cast in broader terms, RJ processes are embedded in the very same culture that has long tolerated abuse and protected abusers.[65] Transcending this culture is difficult, if not impossible.[66] Because patriarchy imprints itself on all members of the community,[67] overlooked inequalities are apt to be reproduced to the detriment of the victim.[68] In short, no distribution of justice for survivors can escape cultural distortions.

A considered understanding of RJ prompts this question: Can survivor-centered justice be imported, however imperfectly, into our *formal* systems of accountability?

[62] Id. Herman describes the failure as follows: "[T]he 'moral community' constituted in the ad hoc fashion of restorative justice had not kept its part of the bargain. The shaming of the offender did not come from a deep enough culture of respect for women, and the reintegrative part had not entailed sufficient follow-up or care." Id. at 124.

[63] Id. at 123 (citation omitted).

[64] Id. In hindsight, Jones thought that at minimum "Malcolm should have been permanently banned from leadership positions in any community organization." Id. at 124.

[65] See id. at 118.

[66] As I have cautioned, "Without deliberately attacking the cultural norms that give rise to sexual abuse, restorative justice practices can replicate those norms and the inequalities that sustain them." Tuerkheimer, Credible, supra note 11, at 214.

[67] Sarah Deer warns that one of the potential weaknesses of RJ is "the assumption of some degree of preexisting equality between the parties—and clearly a rape survivor and her perpetrator are at unequal places." Sarah Deer, The Beginning and End of Rape: Confronting Sexual Violence in Native America 124–25 (2015).

[68] "When community norms and beliefs are as divided and contentious as they are at present on matters of gender and power," Herman observes, "it is hard to trust that community-based justice alternatives will be any more effective than the conventional justice system in addressing gender-based violence." Herman, supra note 6, at 124.

III. TOWARD SURVIVORS' JUSTICE

To guide survivor-centered legal reform,[69] I identify three bedrock principles: access, control, and support. Survivors' justice requires operationalizing each of these principles, which I discuss in turn.

A. Access

While survivors have a set of needs that are virtually universal, they seek to meet these needs differently. A basic tenet of survivors' justice is that *all* systems of redress should be available—in reality. Reformers may have their own reasons for preferring certain forms of justice over others, but centering survivors means it is their choice of system that matters.[70]

Over years of practice[71] and decades of research, I have spoken with survivors who wanted criminal justice;[72] survivors who wanted civil justice;[73] and survivors who wanted to bypass formal systems altogether.[74] Some were certain about their desires, while others were profoundly ambivalent. Most saw their options as severely constrained, if not eliminated, for reasons that were unfair and unjust.

Enabling survivors to engage their chosen system of legal redress should be axiomatic. But justice requires dismantling structural disadvantages that currently limit access.[75]

Across systems, one major impediment is pervasive "credibility discounting," which I have previously explained as follows:

> The rule is simple: credibility is meted out too sparingly to women, whether cis or trans, whatever their race or socioeconomic status, their sexual orientation or immigration status. At the same time, the

[69] This last Part focuses on our justice systems—criminal and civil—rather than school or workplace processes for resolving sexual misconduct complaints.

[70] By "choice of system," I have in mind decisions about where (if anywhere) to take the complaint. Decisions related to how that complaint is processed are addressed in the discussion of control. See infra notes 94–115 and accompanying text.

[71] Before entering the academy, I spent five years as a prosecutor in the New York County District Attorney's Office.

[72] For one of many such accounts, see Tuerkheimer, Credible, supra note 11, at 195–98.

[73] See id. at 224–25.

[74] See id. at 171–75.

[75] Members of marginalized groups can face immense barriers to justice whether or not they are victims of abuse.

> intersections are critical—just as there is no female prototype, there is no singular experience of what I call the *credibility discount*.[76]

The credibility discount is distributed as a matter of course throughout the legal system; we see it wherever actors exercise a discretionary function.[77] In the criminal justice setting, for instance, a compelling body of research demonstrates that police and prosecutors routinely, without warrant, prevent survivors from pursuing their complaints.[78] This gatekeeping not only reinforces systemic biases; as a practical matter, it also places justice out of reach for a large swath of victims, especially those who are marginalized.

Access to justice requires the reversal of longstanding system-wide tendencies to distrust, blame, and disregard victims who come forward with sexual assault allegations.[79] More concretely, criminal laws that bake in the credibility discount should be reformed.[80] And on the investigative side, police responses to complaints of sexual assault should be retooled.[81]

When it comes to civil justice, survivors are often confronted with laws that belie the realities of abuse. For instance, consider the operation of strict reporting requirements.[82] In the workplace setting, where Title VII governs an employer's liability, an employee has less than a year—just

[76] Tuerkheimer, Credible, supra note 11, at 9; id. at 10 ("When a woman comes forward with an allegation of abuse, the widespread societal impulse to discount credibility is at its apex. Here, gender, power, sexual entitlement, cultural mythology, and legal protections collide.").

[77] The problem is not confined to police and prosecutors; jurors—real and hypothetical—compound the credibility discount. See Tuerkheimer, Victim, Reconstructed, supra note 2, at 95–96 (discussing research linking prosecutorial charging in sexual assault cases to concerns that jurors will downgrade the accuser's credibility).

[78] See Deborah Tuerkheimer, Incredible Women: Sexual Violence and the Credibility Discount, 166 U. Pa. L. Rev. 1, 27–41 (2017) (describing research on police and prosecutorial treatment of sexual assault allegations); Corey Rayburn Yung, Rape Law Gatekeeping, 58 B.C. L. Rev. 205, 211–30 (2017) (outlining empirical evidence of police handling of rape cases).

[79] See Tuerkheimer, Credible, supra note 11, at 10–11, 103 (identifying distrust, blame, and disregard as three mechanisms for discounting credibility).

[80] See id. at 236–37 (summarizing doctrinal areas in need of reform).

[81] For one model, see Int'l Ass'n of Chiefs of Police, Trauma Informed Sexual Assault Investigation Training Curriculum, https://www.theiacp.org/resources/trauma-informed-sexual-assault-investigation-training-curriculum [https://perma.cc/TDY4-Z8CL] (last visited Oct. 31, 2025) (offering a modular training curriculum for trauma informed sexual assault investigation).

[82] See Tuerkheimer, Credible, supra note 11, at 93 (describing the criminal law's original formalization of a "prompt complaint" requirement).

300 or 180 days, depending on where the complaint is initiated—to file a complaint with the Equal Employment Opportunity Commission; otherwise, the claim is time-barred.[83] But the time period for most employees who have been sexually harassed is even shorter than for other workplace plaintiffs. In two cases from the 1990s, the Supreme Court crafted a defense that requires workers who experience a hostile work environment to behave "reasonably" in response to the harassment.[84] This defense trains the legal focus on the accuser, whose failure to complain in a manner considered timely can spell the demise of her case.[85] Lower courts have deemed unreasonable delays as short as several months and, in one case, merely seventeen days.[86]

The prompt complaint requirement is a de facto bar to justice for survivors since *most* wait to report, if they report at all.[87] Lawyers who specialize in these cases point to multiple reasons why victims tend to delay coming forward. It takes time to process traumatic experiences.[88] Even then, women have a host of reasons to remain silent about their suffering,[89] including justifiable fears about the repercussions of reporting workplace harassment[90]—and most low-wage workers who depend on a paycheck will endure prolonged abuse before finally (if ever) taking action.[91] In sum, prompt complaint requirements—as well as onerous

[83] 42 U.S.C. § 2000e-5(e)(1).

[84] See Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[85] See Deborah L. Brake & Joanna L. Grossman, The Failure of Title VII as a Rights-Claiming System, 86 N.C. L. Rev. 859, 879–81 (2008).

[86] See, e.g., EEOC v. AutoZone, Inc., 692 F. App'x 280, 286 (6th Cir. 2017) (per curiam) ("two to two-and-a-half month delay"); Pinkerton v. Colo. Dep't of Transp., 563 F.3d 1052, 1063–64 (10th Cir. 2009) ("two or two and a half months" delay); Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1289–91 (11th Cir. 2003) (per curiam) (two-and-a-half-month delay); Conatzer v. Med. Pro. Bldg. Servs., Inc., 255 F. Supp. 2d 1259, 1270 (N.D. Okla. 2003) (seventeen-day delay), *aff'd*, 95 F. App'x 276 (10th Cir. 2004).

[87] As one employment law practitioner recounted,

> I frequently have women or men come to me and say, "Look, this terrible thing happened. I've been too scared to come forward, but now that I'm in therapy, I'm in a much better place. I feel like I have the strength to come forward." Then I have to say to them, "You know, you're too late. You would have had a great claim a year ago, but you just waited too long."

See Tuerkheimer, Credible, supra note 11, at 96–97.

[88] See id. at 96.

[89] See id. at 23–36 (discussing how "[t]he credibility complex works in advance to keep sexual abuse accusations from ever surfacing").

[90] See id. at 97.

[91] See id. at 96.

statutes of limitations[92]—dramatically reduce victims' access to civil justice.[93]

Survivors' justice demands structural changes to keep open the possibility of legal redress, whether criminal or civil. But access is only the beginning.

B. Control

The balance of power between crime victims and prosecutors has long been a source of tension.[94] But, as we have seen,[95] special problems arise when victims of gender-based violence are forced to relinquish control over the trajectory of their complaint. The deprivation of authority that defines the role of "complaining witness" can be extremely harmful to survivors.[96]

In a typical conflict, rape victims who file a complaint with the police[97] want prosecutors to pursue a case more aggressively; the prosecutorial failure to do so is experienced as a new act of disempowerment.[98] For example, one survivor told me "that the New York gynecologist who assaulted her while she was pregnant should never have been permitted to plead guilty" to assaulting only one of many victims and avoid incarceration.[99] It magnified her violation, she explained, for the prosecutor to dismiss her complaint along with the complaints of dozens of other women.[100] Another woman whose rapist was allowed to plead

[92] Two states—California and, more recently, New York—have passed laws designed to address this problem. See Barbara Rodriguez, How a New Law Allowed E. Jean Carroll to Seek Justice Against Trump Years Later, 19th News (May 11, 2023, at 10:34 ET), https://19thnews.org/2023/05/e-jean-carroll-trump-new-law-justice-assault-survivors/ [https://perma.cc/SPJ6-S7BJ].

[93] Access is further decreased by limitations on the cause of action for sexual harassment. See Tuerkheimer, Credible, supra note 11, at 121–25, 146–56.

[94] See Paul G. Cassell & Margaret Garvin, Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida, 110 J. Crim. L. & Criminology 99, 102–05 (2020) (providing a brief history of the crime victims' rights movement).

[95] See supra notes 32–38 and accompanying text.

[96] "Accusers who come forward only to be dismissed . . . often describe fallout that is every bit as bad as—or worse than—the abuse itself." Tuerkheimer, Credible, supra note 11, at 175.

[97] See supra note 28 and accompanying text (noting that most sexual assault victims opt not to turn to police).

[98] It is also possible for a victim to want prosecutors to pursue a *less* aggressive course, although this is uncommon in sexual violence cases. In domestic violence cases, this scenario recurs with frequency.

[99] Tuerkheimer, Credible, supra note 11, at 224.

[100] Id.

guilty to a lesser charge without serving time in jail expressly invoked the power differential exacerbated by the state's relegation of her preferences to those of her abuser.[101]

The centrality of control to survivors' justice warrants a shift in the balance of decision-making authority between prosecutors and survivors.[102] Throughout the criminal process, prosecutors make decisions that potentially diverge from the victim's desires—how quickly to move forward, what crimes to charge, which witnesses to involve, whether to negotiate a plea deal, and what sentence to recommend.[103] At each of these stages—charging, plea negotiations, trial-planning, sentencing—a victim's expressed preferences should not only be taken into account, but presumptively pursued.

There are, of course, limits to what this reconfiguration can accomplish. Prosecutorial discretion is bounded by a host of ethical constraints, including a broad duty to "seek justice" on behalf of the state.[104] This justice-seeking mission might initially appear incompatible with centering survivors. But moving survivors from the periphery toward the center of decisional imperatives hardly requires the abandonment of longstanding precepts that undergird public prosecution. Rather, a systemic reckoning with the value of control to abuse victims who so desperately need it recasts the meaning of justice while remaining faithful to the prosecutorial function.

Control must also be reallocated in the civil justice system. On its face, the civil model seems far better suited to advancing victims' decision-making agency since the lawyer's obligations should align with the client's interests.[105] Yet many survivors do not experience the system as empowering. A recurring problem is the use of nondisclosure agreements ("NDAs"). Consider the experience of Rowena Chiu, one of the many women to have accused Harvey Weinstein of sexual abuse. In the late

[101] As a result, rapists "will be emboldened by their power over women," the survivor warned. Id. at 223.

[102] Judges and juries also have control over outcomes that victims lack.

[103] Although each one of these points along the way implicates victims' autonomy, perhaps no decision is more consequential than the final resolution of a case, which can reinscribe powerlessness in ways that may be lasting. See Tuerkheimer, Credible, supra note 11, at 167–70 (describing the criminal justice system's dismissive treatment of Jeffrey Epstein's and R. Kelly's victims).

[104] Criminal Justice Standards for the Prosecution Function § 3-1.2(b) (A.B.A. 2017) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

[105] This assumes that a lawyer has agreed to take the survivor's case. See supra note 26.

1990s, with the help of a lawyer, Chiu entered into an NDA that obligated her to stay silent in exchange for a settlement worth just over $200,000.[106] Chiu later explained that she and a colleague "had wanted to report Harvey to his superiors; instead, [they] were pressured into signing a nondisclosure agreement that prevented [them] from speaking to family and friends, and made it extremely difficult to work with a therapist or a lawyer, or to aid a criminal investigation."[107] After signing the NDA, Chiu spent nearly two decades in what she describes as "'constant fear'—'[f]ear of Harvey's abuse, control and power; that the story would come back to haunt [her]; that [she] would inadvertently slip up on [her] promise to never speak of this.'"[108]

Chiu's story is not unusual.[109] Civil settlements in sexual misconduct cases often result from asymmetries in bargaining power that complicate what it means for a victim to have control over the case. This power imbalance manifests in the routine abuse of NDAs, which has made them a prime target of post-#MeToo reform.[110] At bottom, meaningful survivor control over the civil process is inconsistent with an array of forces and social hierarchies that heighten vulnerability.

[106] See Tuerkheimer, Credible, supra note 11, at 34.

[107] Id. (quoting Rowena Chiu, 'Harvey Weinstein Told Me He Liked Chinese Girls,' N.Y. Times (Oct. 5, 2019), https://www.nytimes.com/2019/10/05/opinion/sunday/harvey-weinstein-rowena-chiu.html).

[108] Id. at 35 (quoting Chiu, supra note 107); see also Elizabeth Wagmeister, In Conversation with Harvey Weinstein's Former Assistant, Rowena Chiu, Who Is Breaking Her NDA for This Interview, Variety (May 21, 2020, at 11:14 PT), https://variety.com/2020/film/news/rowena-chiu-harvey-weinstein-interview-rape-sexual-assault-nda-1234608176/ (describing how the NDA prohibited Chiu from discussing the relevant time period "in any detail" with journalists, lawyers, doctors, therapists, friends, and family, which effectively "locked [her] out of any type of emotional support whatsoever").

[109] See Carrie N. Baker, #MeToo Victory: Biden Signs Law Limiting NDAs and Protecting the Right to Speak Out About Sexual Abuse, Ms. Mag. (Dec. 19, 2022), https://msmagazine.com/2022/12/19/nda-sexual-harassment-assault-women-work/ [https://perma.cc/X99G-ZGSC] ("For years, companies have used NDAs to prevent survivors of sexual harassment and assault from speaking publicly about these incidents."). In recent years, I have heard several unsolicited accounts of survivors who felt coerced by an employer or university into signing an NDA.

[110] See id. (describing state and national reform around NDAs). Laws that prohibit pre-dispute NDAs enjoy the nearly universal support of the plaintiffs' bar. Given the many obstacles to successfully pursuing a sexual abuse claim, however, many victims (and their attorneys) seek to retain the option of signing a confidentiality agreement as part of a settlement. For a discussion of these concerns and state legislative responses to them, see Minna J. Kotkin, Reconsidering Confidential Settlements in the #MeToo Era, 54 U.S.F. L. Rev. 517, 532–35 (2020).

To underscore this point, consider one further example—the practice of abusive pretrial discovery. In sexual harassment cases, the defense is permitted to explore a vast range of topics said to bear on credibility, and the law gives wide latitude to a defendant intent on probing an accuser's past.[111] Plaintiffs' lawyers report that the degrading experience of pretrial discovery (or its prospect) is often enough to pressure survivors to settle or even drop a case.[112] To call this "control" over the process is to overlook the ways that autonomy may be undermined to the point of non-recognition.

Pretrial discovery is often weaponized to dissect intimate aspects of a victim's life. In one case, a teenage restaurant worker alleged she was raped by her thirty-five-year-old supervisor and sued the restaurant for damages.[113] Over objection, the court granted the defendant's discovery request and ordered the victim to divulge a stunning array of personal information:

> Identify all dating or sexual relationships (both consensual and nonconsensual) that you have had, including the dates of each relationship and the names, dates of birth, and current contact information, including addresses and telephone numbers, for each individual with whom you have had a dating or sexual relationship, and as to any physical relationship describe the nature. . . . State whether, prior to you being 16 years old, you have communicated with any individuals over the age of eighteen for the purpose of beginning or continuing a dating or sexual relationship. If so, state the names, dates of birth, and current contact information, including addresses and telephone numbers, for each individual with whom you have such communications as well as the dates of each such communication. . . . State whether you have ever become pregnant and if so, state the dates of the pregnancy. . . . State whether you have ever

[111] Inquiry into a victim's past, sexual and otherwise, is thought to bear not only on whether the abuse occurred, but whether it caused the nonphysical damages alleged. As I have previously observed, "The law's embrace of 'damaged goods' reasoning significantly expands the scope of pretrial discovery in sexual harassment litigation." Tuerkheimer, Credible, supra note 11, at 152.

[112] See id. at 97.

[113] Kroontje v. CKE Rests., Inc., No. 13-cv-04066, 2014 WL 1513895, at *1 (D.S.D. Apr. 16, 2014).

> contracted any sexually transmitted disease and if so, state the date(s) and name(s) of the disease(s).[114]

In another case of invasive pretrial discovery, a lawyer recalled that her client, the plaintiff, "had been prepared to handle unemployment, financial uncertainty, litigation and even cross-examination as to the story she had to tell. She was not willing to be attacked, innuendo-ed and mis-labeled; therefore, she accepted a settlement."[115] Such settlements are less the byproduct of choice or control than a reflection of the legally sanctioned constraints under which survivors operate.

All told, myriad laws and procedures diminish victims' autonomy. Upending these laws and procedures is key to survivor-centered reform.

C. Support

Survivors seek support, moral and material, that means most when it comes from the collective.[116] The criminal justice system is supposed to deliver communal condemnation,[117] and indeed many victims perceive important expressive value in a criminal conviction. As one survivor recounted, her rapist's conviction and jail sentence were "not only an 'acknowledgement from the community that this did happen' . . . but also a way for the collective to say, 'we're so sorry and you shouldn't have been treated this way.'"[118] Criminal punishment was a crucial statement of solidarity from the state, with added importance to a victim whose experiences with police and prosecutors had been, until then, mostly negative.

A criminal disposition conveys information to the survivor—information about her status in the community, her value, and her worth. Think of this as encapsulating a relational idea of justice, one primarily concerned with the relationship between survivor and state as partly mediated by the state's treatment of the offender. This relational lens

[114] Id. at *5–6.

[115] Margaret Moore Jackson, Confronting "Unwelcomeness" from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women, 14 Cardozo J.L. & Gender 61, 76 (2007). The plaintiff "ended the case with a sense of bitter enragement that her former employer had turned her story of righteous whistle-blowing into a tale of a workplace tart who brought trouble onto herself." Id.

[116] See supra notes 7–27 and accompanying text.

[117] When it comes to sexual violence, the system rarely functions as it should. See supra notes 28–38 and accompanying text.

[118] Tuerkheimer, Credible, supra note 11, at 223–24.

highlights why traditional metrics of success—primarily, length of incarceration—matter not for their own sake, but for what they tell the survivor about how the community regards her suffering.

In her memoir, *Know My Name*, Chanel Miller describes Stanford swimmer Brock Turner's sentencing for sexual assault, where he received what amounted to a big break—probation with six months in jail, of which he would serve only half the time.[119] It seemed that any harsher sentence would have unacceptably marred Turner's bright future, which was derived from privileges that included race, education, and athletic prowess. The judge adopted Turner's perspective, Miller says, "leaving me on my side and Brock to be coddled on his."[120] "I finally felt the ground tilting," she adds, "everything sliding to his side."[121] Miller imagined sharing her dismal insight with sexual assault victims everywhere—"A system does not exist for you."[122] Turner's sentence betrayed how little they all counted. "[M]y lost job, my damaged hometown, my small savings account, my stolen pleasures, had all amounted to ninety days in county jail," Miller observes.[123] She had laid bare her suffering, but it was beside the point. Miller writes, "The judge had given Brock something that would never be extended to me: empathy. My pain was never more valuable than his potential."[124]

What this relational inflection on criminal justice makes salient is the significance of *care*. By care, I have in mind concern or regard for the plight of another—what matters to us. As I have explained elsewhere, "[O]ur care is distributed unevenly and predictably: the suffering of an abuser who could face accountability for his misdeeds matters far more than the suffering of his victim. The disparity between inadequate regard for survivors and excessive regard for offenders reflects what I call the care gap."[125] This gap "consists of many asymmetries, which track hierarchies that include gender, race, class, and more. . . . Because care is distributed along lines of power, marginalized accusers are the most readily dismissed."[126]

[119] Chanel Miller, Know My Name: A Memoir 236 (2019).
[120] Id. at 234–35.
[121] Id. at 235.
[122] Id. at 241.
[123] Id.
[124] Id.
[125] Tuerkheimer, Credible, supra note 11, at 135 (emphasis omitted).
[126] Id.

To recap: survivors discern that care is a pivotal component of justice; care, in turn, is viewed in structural terms. A criminal sanction can demonstrate communal concern for what the victim has endured, or it can do just the opposite, devaluing and marking her as unworthy of the collective's support.[127]

This expressive theory of punishment has empirical foundations. A decade ago, Kenworthey Bilz designed a set of experiments to test the effects of punishment on social standing.[128] Study participants were shown edited clips of the movie *The Accused*, which is loosely based on a rape that took place in 1983 in New Bedford, Massachusetts.[129] After viewing the film, participants were presented with one of two outcomes.[130] In the punishment version, the offenders—characterized in the study as one "college boy" and two "townies"—were convicted of rape.[131] The no-punishment version featured the men pleading guilty before trial to a lesser, nonsexual offense.[132] To measure the effects of these outcomes on social standing, participants were then asked to consider how members of the community would rate the victim and the offenders along various dimensions, including the extent to which each was "admired," "valuable," and "respected."[133]

Bilz found that when the offenders were punished, they lost social standing and the victim gained social standing.[134] At the same time, a failure to punish the offenders for rape had the opposite effect: the victim lost social standing and the offenders gained it.[135] This increase in social standing was even greater for the unpunished "college boy" (as compared to the "townie" offender), whose perceived social status was higher from the outset.[136] Bilz concluded that punishment is a communication device that "expresses, and perhaps even alters, the social standing of victims and offenders."[137]

[127] For one influential theoretical account, see Jean Hampton, An Expressive Theory of Retribution, *in* Retributivism and Its Critics 11, 13–15 (Wesley Cragg ed., 1992).

[128] See Kenworthey Bilz, Testing the Expressive Theory of Punishment, 13 J. Empirical Legal Stud. 358, 359 (2016).

[129] Id. at 365.

[130] Id.

[131] Id.

[132] Id.

[133] Id.

[134] Id. at 366.

[135] Id.

[136] Id. at 367.

[137] Id. at 385.

Notably, for the participants in Bilz's study, the conviction of the rapists *itself* counted as punishment that restored a victim's social standing (participants never learned if the rapists received any jail time).[138] Punishment need not entail "hard treatment," Bilz writes. "[L]egislative bodies can 'reprimand' their errant members; nations may face censure for human rights violations; first-time or juvenile offenders may be issued 'warnings' in lieu of fines or incarceration; various employers, religions, and parents might choose to formally rebuke misbehavior rather than deliver actual, material hard treatment."[139] To serve an expressive function, a consequence must be *perceived* by the relevant audiences as punishment, but that perception is invariably subjective.

This insight can translate to the civil realm as well. Survivors who sue for damages seek a kind of accountability that is different from what follows a criminal conviction, but civil justice is also laden with meaning. When victims prevail, they can take satisfaction from the knowledge that their injury *cost* their abuser, or their employer, or both. Apart from materially compensating survivors for what they suffered, a damage award may be even "more important as a public symbol of the perpetrator's guilt," as one plaintiffs' attorney described it.[140] A lawyer who represents many low-wage workers told me that while his clients are grateful for economic relief, the feeling that they have been believed and supported is just as important.[141]

No sanction, criminal or civil, can undo the harm suffered by a victim. But a judgment that impacts the abuser's life may go some way toward returning the survivor to her rightful place in the community.

CONCLUSION

The move to import survivors' justice to traditional legal systems reveals several points of friction. Particularly in the criminal context, an adversarial process premised on the presumption of innocence (and rightly so) may be ill-suited to promote a survivors' agenda. Assigning individual blame can obscure the problem of collective complicity and other structural explanations for abuse. And wherever survivors' justice

[138] Id. at 364.
[139] Id.
[140] See Tuerkheimer, Credible, supra note 11, at 226 (citation omitted).
[141] Id.

departs from more conventional notions of justice, there may be unintended consequences of gender violence exceptionalism.

Despite these tensions, I have argued for reform that centers survivors without abandoning reliance on existing justice systems. By way of advancing this agenda, I have identified a trio of principles—access, control, and support—that should guide reform.

Centering survivors enables us to see existing systems, their flaws and their virtues, anew. Features that might seem inevitable, on deeper inspection, turn out to be contingent. Justice reconceived thereby holds promise, not only for survivors, but for all who existed at the margins when our faulty systems were created.