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Feminist Legal Theory and #MeToo: Revisiting Tarana Burke's Vision of Empowerment Through Empathy

Penelope Andrews

New York Law School, penelope.andrews@nyls.edu

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FEMINIST LEGAL THEORY AND #METOO: REVISITING TARANA BURKE'S VISION OF EMPOWERMENT THROUGH EMPATHY

by: Penelope E. Andrews*

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I. INTRODUCTION

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.—Carrie Menkel-Meadow¹

Carrie's work in a range of areas has been built on what we in South Africa refer to as "ubuntu," literally translated as "I am only because you are."² Ubuntu signals our human connectedness, generating greater capacity for empathy and positive engagement. Although my and Carrie's paths have crossed in many locations in the United States, especially at the annual meetings of the Law and Society Asso-

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* John Marshall Harlan II Professor of Law and Director of Racial Justice Project, New York Law School. B.A. LL.B. (Natal) LL.M. (Columbia). Let me begin by doing what many of you have done, at the conference in March and in this volume, namely, to honor a scholar whose rich body of work illustrates the best in the American academy, and who has also shone her light brightly elsewhere. It is clear that Carrie Menkel-Meadow has a deep commitment to radical yet pragmatic approaches to legal possibilities and legal change. I am honored to be part of the distinguished guests gathered here. Thank you to the organizers and especially the student members of the *Texas A&M Law Review*.

1. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 163 (2007) [hereinafter Menkel-Meadow, *Restorative Justice*], <https://doi.org/10.1146/annurev.lawsocsci.2.081805.110005>.

2. *Ubuntu* is literally translated as: "I am only because you are." MUNGI NGOMANE, EVERYDAY UBUNTU: LIVING BETTER TOGETHER, THE AFRICAN WAY 14 (2020). The word *ubuntu* is part of the Zulu phrase "*umuntu, ngumuntu, ngabantu*," which literally means that "a person is a person through other persons." *Id.* *Ubuntu* has its roots in humanist African philosophy, where the idea of community is one of the building blocks of society. *See id.* at 14–15. Mungi Ngomane (granddaughter of the late Archbishop Emeritus Desmond Tutu) explains the concept of *ubuntu* in her 2020 book. *See id.* at 13.

ciation, as well as Australia, the most significant for me was the event, *Making Peace with Your Enemy*, that Carrie co-hosted with Jean Sternlight and others at the University of Nevada in 2014.³

The workshop explored the relevance of Nelson Mandela and South Africa's Truth and Reconciliation Commission as a model to resolve what may appear to be an intractable conflict.⁴ South Africa's transition from apartheid, a parliamentary system premised on racism and authoritarianism, to a constitutional democracy, as well as its Truth and Reconciliation Commission, were seen as noteworthy examples of conflict resolution.⁵ In particular, Nelson Mandela's leadership, including his approach centered on dignity and empathy, was seen as an exemplar of possibilities underpinned by hope and forgiveness.⁶ In her contribution, Carrie addressed Mandela's approach as more than a focus on peace, truth, and reconciliation. She recognized Mandela's role in activities and processes that included intense and sustained political action, such as boycotts, strikes, riots, sabotage, and violence (notably the armed struggle).⁷ These activities preceded Mandela's role as a national conciliator and statesman, and in fact shaped his thinking and approach to peace, justice, and reconciliation.⁸ In summary, the Nevada workshop emphasized that the processes of truth and reconciliation are embedded in a comprehensive quest for justice for victims of harm.⁹

Carrie is a radical pragmatist who appreciates that theory must be connected to ethical practices that lead to social justice.¹⁰ I therefore see Carrie's work as engaging with the words of noted American feminist bell hooks (who did not capitalize her name) and her philosophy of radical love. Hooks's intersectional worldview was captured in her 1980 book, *Ain't I a Woman: Black Women and Feminism*.¹¹ Hooks

3. See generally Jean R. Sternlight, Andrea Schneider, Carrie Menkel-Meadow, Robert Mnookin, Richard Goldstone & Penelope Andrews, Transcription, *Making Peace with Your Enemy: Nelson Mandela and His Contributions to Conflict Resolution*, 16 NEV. L.J. 281 (2015) (discussing Nelson Mandela's model of leadership and how it impacted dispute resolution).

4. *Id.* at 284.

5. See generally ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA'S ROAD TO CHANGE* (1996) (discussing the friendships and negotiations that ended apartheid); MICHAEL BATTLE, *RECONCILIATION: THE UBUNTU THEOLOGY OF DESMOND TUTU* (2009) (discussing Tutu's ubuntu theology and how it opposed apartheid in South Africa).

6. See generally NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1st paperback ed. 1995) (1994) (detailing the story of Nelson Mandela's life and his fight for human rights and racial equality).

7. Sternlight et al., *supra* note 3, at 286–87.

8. See *id.* at 285.

9. See *id.* at 285–90.

10. Carrie illustrated this radical pragmatism in her talk about Nelson Mandela and his journey from revolutionary to reconciler. *Id.* at 284–90.

11. See generally BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (2d ed. 2015) (exploring the impact of racism and sexism on the female identity).

noted, “Radical love anchors a new politics. . . . It creates a starting point for every conversation. It recasts the values underpinning every debate.”¹² Recalling the Reverend Martin Luther King Jr.’s declaration that “I have decided to love,” hooks reflected, in one of her most important pieces, on the fact that King “believed that love is ‘ultimately the only answer’ to the problems facing this nation and the entire planet.”¹³ Hooks noted, “I share that belief and the conviction that it is in choosing love, and beginning with love as the ethical foundation for politics, that we are best positioned to transform society in ways that enhance the collective good.”¹⁴ Hooks also admired King for his courage in speaking as much as he did about the transformative power of love in a culture where “such talk is often seen as merely sentimental.”¹⁵ Hooks observed further that, “[i]n progressive political circles, to speak of love is to guarantee that one will be dismissed or considered naive.”¹⁶

It is my purpose to ground this Article in ubuntu and the politics of radical love as applied to the goals of #MeToo and its pursuit of redress for victims of sexual harms. Part II explores the convergences and divergences of #MeToo with feminist campaigns of an earlier era. Part III questions whether a renewed quest for gender equality, largely spawned by a Twitter/social media campaign, may lead to sustainable change built on notions of empathy and restorative justice, which was the vision espoused by Carrie in her work and which influenced Tarana Burke when she founded #MeToo. Part IV examines restorative justice approaches in the South African Truth and Reconciliation Commission as a way to address the harms of sexual violence. I conclude in Part V with possibilities and limitations in the restorative justice approach to redressing these kinds of claims.

II. CONVERGENCES AND DIVERGENCES OF THE #MeToo MOVEMENT WITH EARLIER FEMINIST CAMPAIGNS

I’m, broadly speaking, optimistic, . . . and I’ve lived through a revolution in what women can do. I don’t think it’s a revolution that is fairly distributed and there’d be many women across the world who haven’t been the beneficiaries of that like I have, but I certainly have been. And I’ve seen the world around me change, and so I think there is a possibility, a likelihood actually . . . of further change. I think the difficulty about it is that the kind of change we

12. John Nichols, *Opinion: Bell Hooks and the New Politics of Radical Love*, CAP TIMES (Dec. 19, 2021) (quoting bell hooks), https://captimes.com/opinion/john-nichols/opinion-bell-hooks-and-the-new-politics-of-radical-love/article_34c029bf-8f8d-5e7f-8f60-df2872af3392.html [<https://perma.cc/UJB6-TCVV>].

13. BELL HOOKS, *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 247 (1994).

14. *Id.*

15. *Id.*

16. *Id.*

are now talking about is hard to get done, and it's harder than the sort of practical changes that we've already achieved.—Mary Beard¹⁷

This Part pursues the following questions: How does #MeToo intersect with feminism and feminist goals? What does #MeToo stand for in relation to feminism writ large, and what are the congruences and disconnections with earlier waves of feminism?

It is unquestionable that there are significant connections between #MeToo and earlier waves of feminism for the following reasons. First, the broad demands of the #MeToo movement are not new, but they build on the work of earlier feminists and legal advocates who pushed for gender equality and who demanded an end to violence against women, especially sexual assault, sexual harassment, and other sexual offenses.¹⁸

In most democracies, at least since the 1970s, the influence of feminist legal theory, in tandem with strategic advocacy for women's rights, is apparent.¹⁹ If one scours much of legal scholarship, as well as the statutory and case law in many countries, one sees evidence of this influence.²⁰ Indeed, in the United States, two recent films about Justice Ruth Bader Ginsburg have once again reminded the American public about the late Justice's pioneering work on gender equality, which started early on in her legal career.²¹ Images of the late Justice have also entered the popular imagination with the *Notorious RBG*

17. Don Franzen, *Mary Beard Discusses Women, Power, and #MeToo*, L.A. REV. OF BOOKS (Mar. 5, 2018) <https://lareviewofbooks.org/article/mary-beard-discusses-women-power-and-metoo/> [https://perma.cc/4KF8-7NSS].

18. See, e.g., Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 GEO. J. GENDER & L. 43, 44–47 (2013); see Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 45–52 (1990); see also Caroline Bettinger-López, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19, 19–22 (2008) (discussing Jessica Gonzales and her impact on domestic violence jurisprudence in the United States).

19. See generally LORI COX HAN & CAROLINE HELDMAN, *WOMEN, POWER, AND POLITICS: THE FIGHT FOR GENDER EQUALITY IN THE UNITED STATES* (2018) (focusing on women, gender, and feminism in American politics and analyzing contemporary gender-related issues); THE DISCURSIVE POLITICS OF GENDER EQUALITY: STRETCHING, BENDING AND POLICYMAKING (Emanuela Lombardo et al. eds., 2009) (exploring the dynamics of discursive politics and how it promotes gender equality).

20. See generally CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* (2005) (discussing the theory that sex inequality is a hierarchy that is sexual at its base and merges with the inequalities of race and class); FEMINIST ADVOCACY, FAMILY LAW AND VIOLENCE AGAINST WOMEN: INTERNATIONAL PERSPECTIVES (Mahnaz Afkhami et al. eds., 2019) (discussing how family law leaves women disempowered and vulnerable).

21. See *RBG* (CNN Films 2018); see also *ON THE BASIS OF SEX* (Dreamworks Pictures 2018) (exploring Justice Ginsburg's fight for gender equality when she and her husband undertook a tax case).

moniker in television programs, clothing merchandise, dolls, and beyond.²²

Feminist scholars and advocates have forced the legal system to recognize the discrete experiences of women and to pay attention to the impact of various laws and policies on women.²³ Feminist scholars and advocates have also generated methodologies to transform institutional structures, practices, and systems that serve as obstacles to women's equality.²⁴

But resistance and backlash have consistently plagued the feminist legal project for gender equality despite the many legal advancements.²⁵ Such resistance and backlash are evident when one views the response to the wave of anti-discrimination legislation and court decisions of the 1970s and 1980s, and specifically with the pioneering work on sexual harassment conducted by Catherine MacKinnon and Andrea Dworkin.²⁶ Indeed, the backlash continues to this day, with many states eliminating and several more planning to undercut the gains for reproductive rights incorporated in the Supreme Court's 1974 decision

22. IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG 6–8 (2015).

23. See generally Saskia Wieringa, *Women's Interests and Empowerment: Gender Planning Reconsidered*, 25 DEV. & CHANGE 829 (1994) (discussing how the empowerment approach, which considers culturally specific processes and practices, should be used to carry out gender planning). An interesting example is the annual Women's Budget presented to the South African Parliament in the wake of constitutional democracy in that country. Debbie Budlender, *The Political Economy of Women's Budgets in the South*, 28 WORLD DEV. 1365, 1365 (2000). Coinciding with the annual Budget Speech, the Women's Budget tried to draw attention to the impact of government policies and laws on women. See *id.* at 1365–66.

24. See Katharine T. Bartlett, *Feminist Legal Methods*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 370–93 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (exploring the various methods of feminism, such as asking the “woman question,” feminist practical reasoning, and consciousness-raising); see generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (discussing the themes of sex, gender, and pornography and their impact on life and the law).

25. See SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN x–xiii (1991). See generally Reg Graycar & Jenny Morgan, *Feminist Legal Theory and Understandings of Equality: One Step Forward or Two Steps Back?*, 28 T. JEFFERSON L. REV. 399 (2006) (discussing the rejection of the “tender years” doctrine, the “equal” shares of marital property, and abolishing the provocation doctrine).

26. See generally ANDREA DWORKIN, LETTERS FROM A WAR ZONE (1988) (exploring Andrea Dworkin's essays on sexual harassment and sexual violence against women); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981) (detailing the meaning of pornography and the power of men in pornography); MACKINNON, *supra* note 24 (discussing how sexuality and sexual abuse, gender, and pornography have impacted feminism); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (analyzing how social power and the gender hierarchy shape the social inequality between men and women).

in *Roe v. Wade*,²⁷ which has now been overturned by the Supreme Court in *Dobbs v. Jackson Women's Health*.²⁸

While recognizing there have been significant obstacles, the long view shows that the push for women's equality is largely positive and progressive.²⁹

If one examines the legal systems of a large part of the globe, the impact of women's activism is apparent.³⁰ Feminist jurisprudence has influenced and enriched legal theory, legislation, and case law, transforming many areas of domestic law to accommodate the experiences of women. For example, a review of U.S. criminal law (particularly sexual violence and domestic battery), family law, constitutional law, and tort law reveals the impact of feminist jurisprudence and women's activism.³¹ One particularly positive development in the law is the extent to which feminist scholars and advocates have made significant gains in persuading courts to reframe harms that happen to women as gendered and embedded in inequality.³² In the field of immigration and refugee law, one is particularly struck by how the distinct experiences of women, for example as rape victims in war, are increasingly seen as grounds for political asylum.³³

27. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the constitutional right to personal privacy encompasses abortion).

28. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

29. See generally LYNNE E. FORD, *WOMEN AND POLITICS: THE PURSUIT OF EQUALITY* (4th ed. 2017) (discussing the paradox of gender equality within the context of separate spheres of ideology to understand issues of gender equality).

30. See generally NIAMH REILLY, *WOMEN'S HUMAN RIGHTS: SEEKING GENDER JUSTICE IN A GLOBALIZING AGE* (2009) (exploring the impact of feminism and women's human rights); GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000) (exploring how critical race feminism, critical legal studies, and critical race theory impacts global jurisprudence).

31. See generally FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* (2009) (discussing how female lawyers changed male-shaped law towards equality); JUDITH A. BAER, *WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT* (3d ed. 2002) (discussing how female social arrangements and legal status impacted gender equality).

32. See Martha Chamallas, *Feminist Legal Theory and Tort Law* 17–29 (Ctr. for Interdisc. L. & Pol'y Stud. at the Moritz Coll. of L., Public Law and Legal Theory Working Paper No. 448, 2018); see also Bartlett, *supra* note 24, at 371–72 (describing how asking the “woman question” led the Supreme Court to recognize that the separate spheres doctrine disadvantaged women); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1110–15 (2009) (discussing the pros and cons of courts' civil protective order laws and how those laws can be improved).

33. See Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, 284–93 (2002); see also Fionnuala Ni Aolain, *Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies* 9–10 (Univ. Minn. L. Sch., Legal Studies Research Paper Series No. 09-45, 2009) (discussing PTSD amongst women asylum seekers); Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26

In societies across the globe, women are increasingly active in legal and political spaces, and women's voices are loud and unequivocal.³⁴ The United Nations Beijing Conference on Women in 1995 and its subsequent meetings have enabled organizational spaces for women that cross national boundaries and which have been pursued with significant effectiveness by the liberating possibilities of the internet and social media.³⁵ Women advocates across all sectors of national and global society have energized the discursive spaces in the political, legal, social, and economic realms. They have succeeded in influencing national governmental policy, law, and practice, thereby bringing women's issues from the margins of political and legal discourse to a place where women's concerns and priorities are considered.³⁶

In addition, a talented and influential group of feminist scholars and advocates have emphasized and interrogated the gendered inequities in the processes, policies, and implementation of international law at major international institutions, especially the United Nations and its regional bodies, as well as in regional organizations like the European and African Unions.³⁷ Feminist international law scholars and advocates have demanded that these institutions be more gender-sensitive in their overall operations.³⁸ The field of international law has also been reconceptualized to take account of the male bias in international law and the particularized harm that women encounter.³⁹

GEO. IMMIGR. L.J. 361, 381–89 (2012) (discussing how female genital mutilation is a ground for political asylum in the United Kingdom and the United States).

34. See generally Erika R. George et al., *Recognizing Women's Rights at Work: Health and Women Workers in Global Supply Chains*, 35 BERKELEY J. INT'L L. 1 (2017) (analyzing the occupational safety, health, and international human rights standards facing women working in global supply chains); JOHANNA BOND, *VOICES OF AFRICAN WOMEN: WOMEN'S RIGHTS IN GHANA, UGANDA, AND TANZANIA* (2005) (exploring the plural legal systems of Ghana, Tanzania, and Uganda and how those legal systems affect the legal rights of women); PENELOPE ANDREWS, *FROM CAPE TOWN TO KABUL: RETHINKING STRATEGIES FOR PURSUING WOMEN'S HUMAN RIGHTS* (2012) (exploring gender equality in South Africa and Afghanistan to argue that the formal legal arrangements of South Africa should be emulated in Afghanistan to advance gender equality) [hereinafter ANDREWS, *FROM CAPE TOWN TO KABUL*].

35. See Kathy Brown, *10 Great Ways the Internet Is Empowering Women Around the World*, HUFFPOST (Mar. 6, 2015, 2:51 PM), https://www.huffpost.com/entry/10-great-ways-the-interne_b_6817738?msclkid=2176a682bdf911ec9d3629fe4b72dcd7 (Dec. 6, 2017) [<https://perma.cc/CHY4-GS4W>].

36. See generally ANDREWS, *FROM CAPE TOWN TO KABUL*, *supra* note 34 (exploring gender equality in South Africa and Afghanistan to argue that the formal legal arrangements of South Africa should be emulated in Afghanistan to advance gender equality).

37. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 634–43 (1991).

38. See *id.* at 643.

39. See generally INTERNATIONAL WOMEN'S RIGHTS LAW AND GENDER EQUALITY: MAKING THE LAW WORK FOR WOMEN (Ramona Vijeyarasa ed., 2021) (discussing the areas of male-focused law that fail women to offer examples of domestic laws to advance women's rights).

Although implicit and explicit bias in the law (and wider society) persist, the situation of women, especially amongst discrete groups, including educated, middle class, and affluent women, has improved considerably in the past few decades—a direct result of feminist law reform efforts.⁴⁰

But marginalized and poor women in the affluent countries of the Global North, and disproportionate numbers of women in the Global South, continue to bear the burden of legal, economic, social, and cultural subordination and discrimination, precluding many from living satisfying and dignified lives.⁴¹ If we were to imagine a report card for the situation of the world's most marginalized women, the grade would likely range between a D and an F.

The #MeToo movement therefore serves as a reminder of the law's failure to fundamentally transform the institutionalized and structured ways that women's subordination is reinforced—and how such subordination continues to manifest in widespread violence against women.⁴² Margaret Atwood noted, “The #MeToo movement is a symptom of a broken legal system. All too frequently, women and other sexual-abuse complainants couldn't get a fair hearing through institutions—including corporate structures—so they used a new tool: the internet.”⁴³

Using strategies adopted by earlier generations of women activists, #MeToo brought millions of women out on the streets in highly publicized media campaigns in 2017 and 2018.⁴⁴ In addition, prominent women in American society called attention to the problem of sexual violence, and female politicians bolstered the message of #MeToo in state capitals and Washington, D.C.⁴⁵ For a while, #MeToo was also active on university campuses across the United States, as in prior de-

40. See Franzen, *supra* note 17.

41. See Jinn Winn Chong, *The Politics of the Empowerment of Women: Mapping Enabling Environments Within Narratives of Femininity and Power*, 18 WM. & MARY J. WOMEN & L. 523, 542–56 (2012).

42. Leigh Goodmark, *#MeToo and the Failure of Law*, THE GENDER POL'Y REP. (May 22, 2018), <https://genderpolicyreport.umn.edu/metoo-and-the-failure-of-law/> [<https://perma.cc/HW46-PBAZ>]. See generally Rebecca J. Cook, *Structures of Discrimination*, 28 MACALESTER INT'L 33 (2012) (discussing how gender subordination is rooted in stereotypes, criminal justice, health, and family).

43. Margaret Atwood, *Am I A Bad Feminist?*, GLOBE & MAIL, <https://www.theglobeandmail.com/opinion/am-i-a-bad-feminist/article37591823/> (July 9, 2020) [<https://perma.cc/C4C6-DM6K>].

44. Lauren Gambino, *Thousands to Return to the Streets for Anniversary of Women's March*, GUARDIAN (Jan. 19, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/jan/19/womens-march-washington-whats-next-2018-first-anniversary> [<https://perma.cc/7YKJ-W9X4>].

45. Katie Way, *What Happens When Political Candidates Say #MeToo*, NATION (July 17, 2018), <https://www.thenation.com/article/archive/happens-political-candidates-say-metoo/> [<https://perma.cc/7DZ7-5MSG>].

ades of women's activism.⁴⁶ And like their predecessors in the feminist movement, #MeToo activists have also strategically harnessed shock and outrage to spread the messages of gender equality and anti-violence.⁴⁷

What is somewhat different about the #MeToo movement from prior feminist campaigns is the widespread conscription of social media, as evidenced by the use of the hashtag, and the enlistment of public naming and shaming of the mostly male perpetrators.⁴⁸ Technology and the communication tools of the internet served to accelerate and sharpen the messages of #MeToo, giving the movement unprecedented airtime and publicity.

Consequently, #MeToo has served as a stark reminder that the laws and policies passed in earlier decades to pursue gender equality and stem violence against women were not sufficiently enforced.⁴⁹

The #MeToo movement has demonstrated how, despite laws that outlaw sexual offenses against women and despite some cultural shifts, dominant cultures of patriarchy and paternalism have remained resistant to the kinds of changes that would make those laws effective.⁵⁰ Even though laws and policies have furthered workplace advancement and empowerment for women, exhortations to "lean in" notwithstanding, women's bodies are still seen as objects to be controlled by men—through explicit and implicit manifestations of violence.⁵¹

In summary, #MeToo is a quintessential post-modern, 21st century movement in which female public outrage has electrified a real and virtual global campaign on the internet and elsewhere, crossing geographical boundaries, cultures, and generations.

III. CONSIDERING RESTORATIVE JUSTICE APPROACHES

The narratives of #MeToo aren't always cut-and-dry; they delve into the murky waters of gender, power, and how we, as individuals,

46. Emma Pettit, *The Next Wave of #MeToo: Momentum Is Growing to Take the Movement Further*, CHRON. OF HIGHER EDUC. (Feb. 16, 2020), <https://www.chronicle.com/article/the-next-wave-of-metoo/> [<https://perma.cc/C48D-6VCL>].

47. Jessi Hempel, *The Problem with #MeToo and Viral Outrage*, WIRED (Oct. 18, 2017, 6:40 AM), <https://www.wired.com/story/the-problem-with-me-too-and-viral-outrage/> [<https://perma.cc/WJX7-3AZ6>].

48. See Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html?module=Inline>.

49. See generally BRENDA COSSMAN, *THE NEW SEX WARS: SEXUAL HARM IN THE #METOO ERA* (2021) (examining the law's failure to address sexual harm and critiquing overregulation).

50. See CAROL GILLIGAN & NAOMI SNIDER, *WHY DOES PATRIARCHY PERSIST?* 6–7 (2018).

51. See generally SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 10 (2013) (arguing that people should "lean in" by being ambitious in the pursuit to obtain true equality).

can bring the broader social dynamics of honest reconciliation in line with the past. Restorative justice creates space for people to be unsure. It's a collaborative process, one that, while imperfect, allows people to start somewhere.—Emma Coleman⁵²

As mentioned earlier, #MeToo has loudly and forcefully highlighted the gap between implementation and enforcement of laws meant to benefit and protect women. Their demands spotlighted the law's omissions in this regard. At the same time, the demands of #MeToo included a range of conduct that impacts women's dignity, health, and security.⁵³ The behaviors that #MeToo has focused on are within a spectrum, from offensive but lawful conduct to actions that are violent and unlawful.⁵⁴

This range of conduct, from the offensive to the violent and unlawful, raises the question about appropriate legal responses, and, in particular, the space for restorative justice approaches. Can a campaign for gender equality, largely spawned by social media, lead to sustainable change built on notions of empathy and restorative justice? Empathy and restorative justice influenced the vision that Tarana Burke imagined when she established #MeToo.⁵⁵ In much of her work, Carrie too has provided us with a roadmap for pursuing restorative justice and social justice goals in empathetic ways.⁵⁶

Restorative justice is one method in our toolkit to address the problem of persistent masculinities that result in gender subordination and

52. Emma Coleman, *Restorative Justice for the #MeToo Movement?*, NEW AM. (Feb. 20, 2018), <https://www.newamerica.org/weekly/restorative-justice-metoo-movement/> [<https://perma.cc/LKN4-CZQF>].

53. See Julie Goldscheid, *#MeToo, Sexual Harassment, and Accountability: Considering the Role of Restorative Approaches*, 36 OHIO ST. J. ON DISP. RESOL. 689, 691 n.1 (2021).

54. See *id.* at 700.

55. See TARANA BURKE, UNBOUND: MY STORY OF LIBERATION AND THE BIRTH OF THE ME TOO MOVEMENT 3, 12–13 (2021); see also Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> (emphasizing Tarana Burke helping victims of sexual harassment and assault).

56. See Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 FORDHAM URB. L.J. 1073, 1079–87 (2001); see also Carrie Menkel-Meadow, *Comments to Case 12.2, in Mediating Multiculturally: Culture and the Ethical Mediator*, in MEDIATION ETHICS: CASES & COMMENTARIES 305, 320–27 (Ellen Waldman ed., 2011) (discussing her approach to the hypothetical “Ziba and Ahmed’s Iranian-American Divorce”); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 554–55 (2006) (discussing the study of process pluralism and how it originates from a belief in moral and emotional empathy). See generally Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers: What Difference Does “Gender Difference” Make?*, 18 DISP. RESOL. MAG. 4 (2012) (exploring the differences in dispute resolution processes and their effect on women).

discrimination.⁵⁷ Restorative justice is a way to replace retributive justice where appropriate, particularly regarding the incidents of harm that involve both physical and psychic or emotional violence.⁵⁸

In her work, Carrie examines how restorative justice began as an alternative model of criminal justice by seeking healing and reconciliation for offenders, victims, and the communities in which they reside.⁵⁹ But restorative justice has moved into a larger arena, especially in the international arena, and has become an important vehicle in societies transitioning from authoritarianism to democracy.⁶⁰ South Africa is a good example of the use of such a vehicle in its transition from apartheid to democracy.⁶¹

Restorative justice is the term given to a variety of different practices, including restitution, acknowledgment of wrongdoing, apologies, and recognition of harm and injury. Its essential function is to provide healing and some kind of justice for victims, offenders, and bystanders.⁶² As Emma Coleman noted about restorative justice:

This process, which emphasizes accountability and making amends, seeks to avoid sentencing, instead focusing on bringing victims and offenders together to understand the magnitude of the harm done, the ways in which healing can be achieved, and potential concrete next steps for both parties to take so that they and their community can move forward. At its core, restorative justice attempts to meaningfully shift the balance of power by allowing survivors to define the terms of what justice and closure look like to them.⁶³

Carrie has provided a typology of restorative justice approaches, outlining some foundational concepts.⁶⁴ These concepts include a direct and very personalized participation in a public process of speaking and listening, involving both the perpetrator and the victim. In this

57. See Goldscheid, *supra* note 53, at 715–36; see also Clare McGlynn & Nicole Westmarland, *Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 SOC. & LEGAL STUD. 179, 185–93 (2019) (discussing “kaleidoscopic justice,” which encompasses aspects of restorative justice).

58. See Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, U. ILL. L. REV. 45, 68–89 (2019).

59. Menkel-Meadow, *Restorative Justice*, *supra* note 1, at 161.

60. See generally RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES (Burt Galaway & Joe Hudson eds., 1996) (discussing the theory, research, and practice of restorative justice in the United States, the United Kingdom, Australia, New Zealand, Japan, and Germany); HISTORICAL JUSTICE IN INTERNATIONAL PERSPECTIVE: HOW SOCIETIES ARE TRYING TO RIGHT THE WRONGS OF THE PAST (Manfred Berg & Bernd Schaefer eds., 2009) (discussing the quest for historical justice in an international perspective).

61. See Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155, 1160–67 (2004) [hereinafter Andrews, *Reparations for Apartheid's Victims*].

62. See RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH 13 (Sheila M. Murphy & Michael P. Seng eds., 2015); Menkel-Meadow, *Restorative Justice*, *supra* note 1, at 161.

63. Coleman, *supra* note 52.

64. Menkel-Meadow, *Restorative Justice*, *supra* note 1, at 161.

very personalized (and often public) engagement, there is a narration of what the act of wrongdoing consisted of and the harm or the injury that it caused not just to the victim but also the victim's family and/or loved ones, as well as the wider community.⁶⁵ Part of the process also involves an explanation from the offender as to the details and reason for the harm caused.⁶⁶ Sometimes the perpetrator acknowledges fault and accepts blame to ask for forgiveness from the victim and/or the victim's family or loved ones, and occasionally offers an apology too.⁶⁷ The public iteration of blame and forgiveness is followed by discussions of reparations or restitution, which could include a range of approaches like an apology, financial compensation, or restitution to a community that might involve symbols (statues, museums, public memorials, and/or various naming commitments).⁶⁸

The challenges raised by #MeToo have provided the occasion for consideration of legal methods that may effectively and equitably deal with these challenges, including exploring solutions that honor the needs and desires of victims and survivors.⁶⁹ In particular, the research and scholarship have explored how victims and survivors desire to see accountability and justice unfold for them.⁷⁰ Many have argued that restorative justice, as opposed to traditional punitive approaches, is an empathetic way to approach these questions.⁷¹ This, of course, does not suggest that restorative justice is the panacea for the range of sexual harms perpetrated on victims. As Emma Coleman noted:

65. *Id.* at 10.4.

66. *Id.*

67. See Karina Schumann & Anna Dragotta, *Is Moral Redemption Possible? The Effectiveness of Public Apologies for Sexual Misconduct*, 90 J. EXPERIMENTAL SOC. PSYCH. 1, 1–2 (2020).

68. Andrews, *Reparations for Apartheid's Victims*, *supra* note 61, at 1165.

69. See generally Julie Goldscheid, *Gender Neutrality, the "Violence Against Women" Frame, and Transformative Reform*, 82 UMKC L. REV. 623 (2014) (reviewing the aspirations and limitations of the gender-specific "violence against women" frame and advocating for a contextualized gender-neutral approach); Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39 (2018) (exploring tort law's treatment of claims for domestic violence and sexual assault and the #MeToo movement as a potential solution).

70. See Marie Keenan, Estelle Zinsstag & Ivo Aertsen, *Towards a Better Understanding of Justice*, in RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 276–77 (Estelle Zinsstag & Marie Keenan eds., 2017). See generally JOHN BRAITHWAITE & HEATHER STRANG, RESTORATIVE JUSTICE AND FAMILY VIOLENCE (2002) (exploring multiple essays that discuss restorative justice for gender violence).

71. See Goldscheid, *supra* note 53, at 705–15; see also Coleman, *supra* note 52 (discussing that restorative justice emphasizes accountability and allows survivors to define what justice and closure looks like to them); Lara Bazelon & Aya Gruber, *#MeToo Doesn't Always Have to Mean Prison*, N.Y. TIMES (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/opinion/metoo-doesnt-always-have-to-mean-prison.html> (arguing that restorative justice, rather than harsh criminal punishments, advances victims' interests).

Since the process can be so intensely personal, it arguably isn't the best model for providing public examples on which to build a more just future, like, say, by filing a lawsuit. It requires, at a base level, that offenders want to reflect on their own behavior and engage in reconciliation. . . . Restorative justice also forces survivors to confront their abusers directly in order to chart a course of appropriate justice; that can be a triggering and painful experience, and it shouldn't be done without immense support.⁷²

Theories of restorative justice underpin the processes of truth and reconciliation. Like the pursuit of racial justice, traditional and legal interventions in gender-based violence are often inadequate, as illustrated by #MeToo.⁷³ Lawyers and social justice advocates are thinking creatively about restorative justice approaches, including the meanings and possibilities of justice beyond notions of retribution.⁷⁴ Approaches that allow for the exploration of personal narratives may shape the quest for justice and truth for survivors who have encountered sexual harassment and other forms of sexual violence in discrete and structured ways. This may provide for an engagement with "experiential" or "dialogic" truth.⁷⁵

For many victims of crime, a zero-tolerance approach with broad criminal sanctions and harsh sentences is not a desirable response to the harms that they suffered.⁷⁶ Additionally, an overwhelming number of sexual assault cases never make it to court for a range of reasons, including indifference in the criminal justice system and an incompetence on the part of law enforcement.⁷⁷ This may explain why so many victims of sexual crimes eschew incarceration and other puni-

72. Coleman, *supra* note 52.

73. See Bazelon & Gruber, *supra* note 71; Ellen Ann Donnelly, In Pursuit of Racial Justice: The Politics and Consequences of Racial Disparity Reform in the U.S. Criminal and Juvenile Justice Systems (2015) (Ph.D. dissertation, University of Pennsylvania), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=3475&context=Edissertations> [<https://perma.cc/E9M3-QKTJ>].

74. Susan Abraham, *Through the Lens of Restorative Justice: A Re-Humanizing*, 64 N.Y.L. SCH. L. REV. 11 (2019–2020).

75. An example of this approach is the South African Truth and Reconciliation Commission, which defined four kinds of truths: a factual or forensic truth, a personal or narrative truth, a social or dialogue truth, or a healing or restorative truth. Colin Bundy, *The Beast of the Past: History and the TRC*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 9, 14 (Wilmot James & Linda van de Vijver eds., 2000).

76. Bazelon & Gruber, *supra* note 71.

77. See MELISSA S. MORABITO, LINDA M. WILLIAMS, & APRIL PATTAVINA, DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. 2 (2019), <https://www.ojp.gov/pdffiles1/nij/grants/252689.pdf> [<https://perma.cc/BE6K-Q29F>]; see also ELLEN BUBLICK, CIVIL TORT ACTIONS FILED BY VICTIMS OF SEXUAL ASSAULT: PROMISE AND PERILS 2 (2009) (discussing that appellate level court decisions reflect only a fraction of those adjudicated and filed).

tive measures in favor of a remedy that focuses on healing for the victims and accountability from the perpetrators.⁷⁸

For example, actress Ashley Judd, a prominent #MeToo activist and one of Harvey Weinstein's accusers, although satisfied with his conviction, noted that she would have preferred a restorative justice approach in which Weinstein might have "emotionally come to terms with his wrongs."⁷⁹ She likely echoed the views of those who believed that a restorative justice method was more gratifying and humane than the criminal justice system.⁸⁰

Another challenge, an acute one in societies like the United States, involves philosophical approaches to imprisonment, for example. In her compelling book, *The Feminist War on Crime*, Aya Gruber illustrates how punishment-focused approaches to crime have contributed to the disproportionate number of African-American men, and other men of color, who are disproportionately subject to America's harsh criminal justice system.⁸¹ Gruber argues that the feminist commitment to protect women from domestic violence, rape, and other forms of sexual assault has contributed to mass incarceration. Her compelling argument is that an approach to crime that prioritizes punitive measures like prosecution and incarceration is not the panacea for a pervasive and complex problem.⁸²

Particularly with respect to domestic violence, it is understood that often the victim wants the violence to end, but not necessarily the relationship, especially where parents and children are concerned.⁸³ Prominent social justice advocate and 2019 MacArthur 'Genius' Grant winner sujatha baliga shared in a radio interview after her award that she was sexually abused as a child. But she noted that she "did not want [her] father to be arrested and locked up. [She] didn't want potential immigration consequences for [her] family. . . . [She]

78. See Margaret (Peggy) Maisel, *Have Truth and Reconciliation Commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis of the Past and Formula for the Future*, 20 CARDOZO J. INT'L & COMPAR. L. 143, 152 (2011).

79. Bazelon & Gruber, *supra* note 71.

80. See Laurie S. Kohn, #MeToo, Wrongs Against Women, and Restorative Justice, 28 KAN. J.L. & PUB. POL'Y 561, 577–78, 583 (2019); see also Abraham, *supra* note 74 (concluding that restorative justice makes the justice system more humane and effective).

81. See AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 191–92 (2020).

82. See *id.* at 192, 197–98.

83. See Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES MAG. (Jan. 4, 2013), <https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html>. Of course, there are many situations where women actually do want the violence and the relationship to end, and where protective orders and other criminal justice interventions are appropriate and necessary. In those situations, a restorative justice approach may not just be ineffective, but also counterproductive.

did not want child protective services to become involved and potentially remove [her] from [her] home.”⁸⁴

Restorative justice programs, especially those committed to stemming violence against women and promoting racial justice, are now incorporated into many programs of governmental and non-governmental organizations in the United States and abroad.⁸⁵ The CDC, in its 2017 detailed report, *Preventing Intimate Partner Violence Across the Lifespan*, although not described as a restorative justice approach, advocates one that is community-centered and comprehensive, akin to restorative justice methods.⁸⁶

This is because often victims know each other and have no alternative but to continue to live in the same communities. The burden on victims is particularly fraught because they may come from communities affected by mass incarceration, which breaks apart families and destroys neighborhoods.⁸⁷ Additionally, the incarcerated person frequently has no choice but to return to the community, often hardened by the experience in prison and therefore likely to re-offend. This pattern creates a vicious cycle that is not sustainable for communities in which the victim and perpetrator may reside.⁸⁸

Scholars have pointed to local criminal justice programs that are offering offenders restorative justice alternatives to lengthy prison terms.⁸⁹ One program is the Restorative Justice Project in New York under the auspices of the Center for Court Innovation.⁹⁰ Its focus, through practice, policy, advocacy, and education, emphasizes questions of racial justice and intimate partner violence. Influenced by the Navajo tradition of peacemaking, the Center notes that it utilizes restorative justice in diverse settings,

84. *City Visions: MacArthur ‘Genius’ sujatha baliga on the Promise of Restorative Justice*, KALW: STATE BAY (Dec. 16, 2019), <https://www.kalw.org/show/state-bay/2019-12-16/city-visions-macarthur-genius-sujatha-baliga-on-the-promise-of-restorative-justice> [<https://perma.cc/F3UF-QMLH>]; see also Bazelon & Gruber, *supra* note 71 (quoting sujatha baliga from her interview with KALW).

85. See generally PHYLLIS HOLDITCH NIOLON et al., PREVENTING INTIMATE PARTNER VIOLENCE ACROSS THE LIFESPAN: A TECHNICAL PACKAGE OF PROGRAMS, POLICIES, AND PRACTICE (2017), <https://www.cdc.gov/violenceprevention/pdf/ipv-technical-packages.pdf> [<https://perma.cc/9TSB-EDQC>] (discussing the technical package and its strategies and approaches for preventing intimate partner violence and its consequences).

86. See *id.* at 12–13.

87. See Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUES SCI. & TECH. 46, 48 (2015), <https://issues.org/effects-mass-incarceration-communities-color/?msclkid=e521a707be8e11ecbf490b0537449d88> [<https://perma.cc/F6XC-HADK>].

88. *Id.* at 50.

89. See Kejsi Demaj, *Restorative Justice: The Path to Abolishing the Current Criminal Justice System*, HARV. POL. REV. (Mar. 14, 2022), <https://harvardpolitics.com/restorative-justice-abolition/> [<https://perma.cc/5U9K-8443>].

90. See *Restorative Justice*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/areas-of-focus/restorative-justice> [<https://perma.cc/UT3G-VJRF>].

whether as a referral from courts (handling criminal cases and interpersonal conflicts) or in schools (to build a positive culture and reduce incidents of harm), or in communities. When we work within institutions with histories of structural inequities and systemic oppression, we work to increase the agency of those most impacted by harm, and create empowerment and equity. Regardless of the setting, restorative justice seeks to secure safety through stronger, healthier relationships and communities.⁹¹

The Center's 2019 report, *A National Portrait of Restorative Approaches to Intimate Partner Violence*, is an insightful and useful survey of restorative justice approaches that are currently being applied to intimate partner violence across the United States.⁹²

Another includes an Arizona pilot program that operated between 2004 and 2007 (the federal funding was not sustained).⁹³ The study found a high degree of successful completion of the program by felony and misdemeanor offenders.⁹⁴ It also found that the program resulted in a significant drop in the occurrence of post-traumatic stress disorder in victims.⁹⁵ The victims felt that "having input into punishment was important."⁹⁶

Many advocates and scholars have noted the desirability of increasing these programs, especially since they may result in more meaningful assessments of their overall long-term impact. Additionally, increasing these programs would also make them more available and accessible to victims who are amenable to participation.

As Carrie noted about restorative justice, "When it works most effectively, restorative justice enhances participatory and deliberative democracy and can promote community building, political legitimacy, and the development of new social and legal norms."⁹⁷

IV. LESSONS FROM SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION

This Part examines restorative justice approaches in the South African Truth and Reconciliation Commission as a way to address the harms of sexual violence. Specifically, this Part inquires what lessons one can learn regarding sexual violence and patriarchy from South Africa's Truth and Reconciliation Commission ("TRC") process and why it might be relevant in the context of #MeToo. No two situations

91. *Id.*

92. Amanda Cissner et al., *A National Portrait of Restorative Approaches to Intimate Partner Violence*, CTR. FOR CT. INNOVATION (Nov. 2019), <https://www.courtinnovation.org/publications-RJ-IPV> [<https://perma.cc/Y7VS-533S>].

93. Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1632 (2014).

94. *Id.* at 1654.

95. *Id.* at 1641.

96. *Id.* at 1642.

97. Menkel-Meadow, *Restorative Justice*, *supra* note 1, at 165.

are entirely alike, and gendered harms (often between individuals who are closely connected or related) are often not analogous or comparable to racial harms. The comparative method, however, allows for observation and reflection from a distance.

So why might the TRC, as a model of restorative justice, help address the gendered harms emphasized by #MeToo? A few reasons may be worth exploring. First, the TRC provides a significant model of an official or governmental commitment to explore one avenue by which to attempt to address the problems of sexism and violence against women.

Second, on many levels, the South African TRC provides some hope as a mechanism to confront what may appear to be an intractable problem where resolution appears elusive. The mechanism of a TRC puts in place a commitment to start a journey toward the ultimate goal of healing, which may also include issues of accountability, responsibility, and redress. Carrie noted that “[f]rom the beginning, restorative justice practices were intended to heal at both the individual and group or social level. Attention in both practice and theory was placed on healing those directly affected by a crime or bad act and on institutional and social reform.”⁹⁸

Third, the TRC process helped South Africa begin the process of moving away from a culture of repression toward a culture based on human rights. The symbolism of the process was important, illustrating an approach toward healing and repentance. It gave the victims an opportunity to be heard. It forced bystanders and beneficiaries of racism to confront history and to recognize how the institutions and formal processes of apartheid were conscripted to protect their benefits and white privilege.⁹⁹ The TRC ensured that the documentation that resulted from the process became part of official history and that there could no longer be denial about what had happened in the name of racism. It also provided a sense of healing—or at least the rituals of healing—which would benefit all.

Might this approach benefit survivors of gendered harms? Victims of harm are not monolithic in their responses, and one approach may not satisfy the healing required for all victims or survivors. Context also varies, including the range of conduct the victims experienced and their individual responses.

The possibilities for healing may, however, come about when the truth emerges. Seeking accountability requires truth telling and is the first step toward justice. The disclosure of the truth also starts the pro-

98. *Id.* at 163.

99. See Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 365–68, 385–86 (1999).

cess of disinfecting the societal toxicity that gives rise to the harms generated by cultures of masculinities.¹⁰⁰

Truth and healing may assist in establishing a moral narrative for the moment, or at least, alter behavior and revive faith in the process of restorative justice by redressing harms of sexual violence for the individual victim. Additionally, this may help in confronting the structural or systemic roots of such violence, namely cultural attitudes that spawn masculinities.¹⁰¹

A truth and reconciliation-type mechanism in the United States must be grounded in an intersectional approach for the following reasons.¹⁰² First, race has, and continues to be, a fault line in American life. The shameful history of lynching Black men, for example, is related to spurious allegations by white women, the most notorious being the murder of Emmett Till.¹⁰³ This may account for the relative dearth of prominent Black women featured in the public discourse at the height of the #MeToo movement, despite some prominent Black men, including Bill Cosby, R. Kelly, and Russell Simmons, having been identified as sexual predators.¹⁰⁴

This situation can be analogized to the response to #MeToo in South Africa, where despite the shocking statistics of gender-based violence, the #MeToo movement did not really catch on.¹⁰⁵ The reasons for this are notable because they may have applicability here in

100. See Keenan, Zinsstag & Aertsen, *supra* note 70, at 274–75; see also Alfred Allan & Marietjie M. Allan, *The South African Truth and Reconciliation Commission as a Therapeutic Tool*, 18 BEHAV. SCIS. & L. 459, 462–63 (2000) (discussing the importance of a full truth-telling process for countries with human rights abuses).

101. See Goldscheid, *supra* note 53, at 705–10.

102. See generally Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797 (2021) (discussing the intersectionality theory, the weaknesses of reform efforts, and how #MeToo can be used to reshape law, organizations, and culture); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, YALE L.J.F. (June 18, 2018), <https://www.yalelawjournal.org/forum/what-about-ustoo> [<https://perma.cc/S3MR-BK6L>] (discussing the experiences of women of color in the #MeToo movement and arguing that a reasonable person standard accounting for different intersectional identities should be adopted).

103. Richard Pérez-Peña, *Woman Linked to 1955 Emmett Till Murder Tells Historic Her Claims Were False*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/emmett-till-lynching-carolyn-bryant-donham.html?msclkid=Aff8bdd7bea411ecb79b3bb2a50c679f>.

104. See Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 284 (2007); see also Dahleen Glanton, *Can the #MeToo Movement Free Black Men of the Sexual Predator Stereotype?*, CHI. TRIB. (Dec. 12, 2017, 5:00 AM), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-glanton-metoo-black-men-20171211-story.html> [<https://perma.cc/RD67-3YG4>] (indicating that some powerful African-American men, such as Russell Simmons and John Conyers, were caught in the #MeToo purge).

105. See Martine Kongshaug Wilhelmsen & Heidi Kristiansen, *How Is the #MeToo Campaign Reflected in South Africa?*, SAIH (Feb. 7, 2018), <https://www.saih.no/artikkel/2018/2/the-metoo-campaign-from-a-south-african-point-of-view> [<https://perma.cc/J4FH-QT9U>]. This is not to suggest that there has not been activism around gender

the United States. One reason may be attributed to the issue of race and its central place in South African political and legal culture and in political discourse. The first noteworthy #MeToo disclosure in South Africa was from a White woman who accused a Black man of rape. South Africa's racial past and racial legacy looms large, especially regarding allegations of sexual misconduct against Black men. Like the United States, sexual violence in South Africa has always been racialized, which may be why large numbers of Black women, who make up a majority of the country's population, were reluctant to come out in support of the woman's claim.

The second reason may relate to the "celebrity" status of the accuser and the notion that the voices of high-profile women are prioritized over those of ordinary women, who are often poor and marginalized. This point was raised here in the United States by Tarana Burke, who noted that the risks to poorer women, which may be economic, social, and cultural, outweigh the benefits of speaking out against sexualized violence.¹⁰⁶

The third reason may be linked to the ubiquitous nature of sexual violence in South Africa, which is steeped in deeply masculinist and patriarchal cultures, and the difficulty of generating resistance to such cultures, compared to the organized opposition to racism. Similarly, the struggle for racial justice in the United States, which includes its many iterations since Reconstruction and which are now embodied in #BlackLivesMatter ("BLM"), mostly consisted of support from significant coalitions, including women. In other words, although women across all races, ethnicities, and classes were engaged in the struggle to eradicate racism in the United States, such widespread social support is still elusive despite the efforts of #MeToo.¹⁰⁷

Another reason may be the lack of faith in the police and police services for victims of crime, a legacy of America's (and South Africa's) racist past that persists today.¹⁰⁸ Despite considerable effort

violence in South Africa. It is to raise the question why, in the wake of the revelations in the United States, similar ones would not follow in South Africa. *See id.*

106. *See* Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored.*, WASH. POST (Nov. 9, 2017, 8:04 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/> [<https://perma.cc/2TXW-HFK9>].

107. I am not suggesting that there are not powerful coalitions of women in the eradication of racism. But coalitions of women are opposed to abortion, and coalitions of women support Trump. A lot of our culture is shared between men and women, and women are implicated in reinforcing stereotypes. For example, 53% of white women voted for Trump in 2016, and 62% of those women were non-college-educated women. Franzen, *supra* note 17.

108. *See* Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, CONVERSATION (June 2, 2022), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816?msclkid=25dddb68bea611ec8314aac003b7ba41> [<https://perma.cc/4WM6-DNU T>]; *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN*

and resources committed to improving policing and police services, which has been revived recently in the wake of #BLM, the police have largely failed to respond to community concerns, especially communities of color. For many in the Black community, police services have been unable to discard their historic reputations as hostile and indifferent to community members' needs.¹⁰⁹ Such a situation has dire consequences for female victims of sexual harms.

The final reason that the #MeToo movement might not have generated the same level of public exposure by Black women in South Africa may vest in a particular cultural approach to harms and justice within the community. One could argue that Black women's encounters with the criminal justice system have made them reluctant toward punitive justice, a legacy of South Africa's brutal history.¹¹⁰ For some, the #MeToo movement and its public naming and shaming of perpetrators may feel punitive despite the strategic effectiveness of such an approach. Similar sentiments may echo the experience of African-American women, especially if one revisits the original vision set out by Tarana Burke.¹¹¹

V. CONCLUSION

Much is written about cultures of masculinities, especially the variety that lies at the heart of toxic cultural norms and attitudes toward women.¹¹² Scholars have pointed out how masculinity may transcend class, race, ethnicity, geography, and marital status.¹¹³ Cultures of masculinities have often served to render ineffective laws and policies designed to eliminate discrimination and subjugation of women. Con-

THE AGE OF COLORBLINDNESS 20 (2020) (discussing that control and racial caste systems, like slavery and Jim Crow, have presently birthed another racial caste system: mass incarceration).

109. See Yolonda Wilson, *Why Black Women's Experiences of #MeToo Are Different*, CONVERSATION (June 14, 2018, 6:45 AM), <https://theconversation.com/why-black-womens-experiences-of-metoo-are-different-96091?msclkid=9ad661c8beb211ec99638fd5bfc1990c> [<https://perma.cc/7YG5-WA6F>]; see also Connie Hassett-Walker, *supra* note 107 (describing racially biased policing of African Americans).

110. See Tanya Magaisa, *The Legacy of Racism in South Africa: Institutional Violence by Security Forces Recalls Apartheid Abuses*, HUM. RTS. WATCH (Mar. 9, 2021, 10:32 AM), <https://www.hrw.org/news/2021/03/09/legacy-racism-south-africa> [<https://perma.cc/GFB5-396F>].

111. See Garcia, *supra* note 55.

112. See generally GILLIGAN & SNIDER, *supra* note 50 (exploring what the patriarchy is and why it continues to persist in American society); SpearIt, *Gender Violence in Prison & Hyper-Masculinities in the 'Hood: Cycles of Destructive Masculinity*, 37 J.L. & POL'Y 89 (2011) (discussing gender violence in prison and proposing various solutions to combat gender violence in and outside of prison); Elizabeth Katz, *Judicial Patriarchy and Domestic Violence: A Challenge to the Conventional Family Privacy Narrative*, 21 WM. & MARY J. WOMEN & L. 379 (2015) (re-examining the conventional historical narrative of domestic violence and privacy).

113. See SpearIt, *supra* note 112, at 107–15; see also Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L., GENDER & SOC'Y 201, 208–10 (2008) (discussing what masculinity is and how some masculinities are defined by race and class).

sequently, formal equality exists as an official construct, but gender inequality continues to be reinforced, a testimony to the persistence of masculinist cultures.¹¹⁴

In my prior scholarship on gender equality in South Africa, I identified three components of the cultures of masculinity, the first having its genesis in the system of apartheid, and in particular, the militarization of that system.¹¹⁵ The second component of this masculinist culture was embedded in the masculine culture of political opposition.¹¹⁶

The third component of this masculinist culture in South Africa was a patriarchy rooted in some indigenous and religious institutions, and in indigenous and religious practices that subordinate and disadvantage women in a host of areas, including the custody of children, access to property, and rights to inheritance. That culture also persists today.¹¹⁷

Arguably, the same set of factors may explain the patriarchal and masculinist underpinnings of American society. Overcoming this complex, interweaving masculinist culture requires not only purposive legal interventions, but also the conscription of intensive extra-legal ones that may emanate from vigorous civil society campaigns, and particularly from those conducted by a vigilant women's movement.

Carrie has dedicated her life as a feminist and social justice advocate to pursue the societal conditions for all to live a dignified life. As #MeToo, the latest iteration of feminist struggle, leaves a mark on society, scholars and advocates like Carrie provide inspiration and intellectual guidance.

114. See generally Thomas Wanner & Ben Wadham, *Men and Masculinities in International Development: 'Men-Streaming' Gender and Development?*, 33 DEV. POL'Y REV. 15 (2015) (analyzing the character and progress towards 'men-streaming' of gender equality).

115. Penelope Andrews, *Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values*, 15 MICH. ST. J. INT'L L. 41, 46 (2007).

116. This culture is a by-product of some of the strategies adopted by the national liberation movements in exile, which waged a protracted and clandestine military campaign against the apartheid government. See Catherine Campbell, *Learning to Kill? Masculinity, the Family and Violence in Natal*, 18 J.S. AFR. STUD. 614, 623–25 (1992). In addition to the military campaign conducted in the Black townships of South Africa, these campaigns entailed a certain level of myth creation referencing masculinity to quite a considerable extent. See *id.* at 618–20. The politically respectable “comrade” involved a political identity that personified the identity of a brave man confronting the brutality of the apartheid military and security apparatus. See *id.* at 616–17. The legacy of this culture of violence lingers. See PUMLA DINEO GQOLA, RAPE: A SOUTH AFRICAN NIGHTMARE 1–4, 14–15 (2015).

117. Indeed, a combination of these cultures in South Africa has led Justice Albie Sachs to refer to patriarchy as the only “truly nonracial institution in South Africa.” Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa*, 26 N.C.J. INT'L L. & COM. REG. 693, 695 (2001).

