

# Creating a Hybrid Restorative System to Address Sexual Assault: A Comparative Study of the United States and European Criminal Justice Systems

Leah Rae Sparkman, University of Arkansas at Monticello

Field of Study: Criminal Justice

*The current nature of how the United States handles sexual assault does not work for every case. Essentially, our criminal justice system has a one size fits all approach to all sexual assault cases (Joyce-Wojitas & Keenan, 2016). While imprisoning and punishing violent and repeat sexual assault perpetrators is certainly more than reasonable, there are cases that warrant more. Punishment centric systems inflict harm on the survivor while simultaneously ignoring any effort to reform the perpetrator into a better, functioning citizen- warranting further reformation. This paper seeks for the solution to be an adversarial-restorative hybrid system in the case of non-violent, non-repeat offenders. Adding restorative measures to create a hybrid system will function as a cushion to the process, complementing punitive measures. There are many benefits to restorative justice that this paper will explore, including mitigating revictimization and lowering recidivism rates with education. These benefits are known because European nations such as the United Kingdom and Belgium have implemented restorative systems to address sexual assault (as well as many other crimes). The conclusions in this paper will be determined by comparatively exploring these European nations systems in contrast to the United States' system. Using European models' strengths and failures as guidance, this paper seeks to identify a structure of restorative justice that can be implemented into the United States to address sexual assault.*

*Keywords: Restorative; Justice; Europe; United States; Survivor; Victim; Adversarial; Punitive; Sexual Assault; Perpetrator; System; Rehabilitation; Hybrid*

## 1 Introduction

Addressing sexual assault in society is often complex, especially when it comes to the criminal justice system. The solution for sexual assault cases in the U.S. court system is to have a prosecutor and a defense, similar to every other crime addressed in the American justice system. According to the U.S. Rape, Abuse & Incest National Network (2018) a person is sexually assaulted every 98 seconds in America alone. This means every minute and a half someone's life is changed and impacted significantly. The trauma people experience is often compounded in the court system, leading to revictimization of the survivor. While the current system has merit in some areas, there are other proposals different than just a purely punitive system. In juxtaposition to the current adversarial only system, there is an alternative of rehabilitation through restorative justice. Restorative justice is unique because it does not just address the actions taken (retribution style) but it addresses the emotional, physical, and traumatic harm imposed upon the victim-survivor. A focus on rehabilitation for both the victim-survivor and perpetrator would have long-term impact on society, as restorative justice focuses on individuals, targets the issues that brought them to this place in their lives, and helps fix the problem while making sure both



can properly, healthily transition back into everyday life. Essentially, it allows for the perpetrator to get the help they need (provided they are not repeat offenders), which affords the victim-survivor agency and choice in the restorative process. This research is pivotal to implement restorative justice in the United States that will benefit the community, victim-survivor, and the perpetrator. The purpose of this paper is to identify the feasibility and challenges of implementing a hybrid system in the United States, while finding what could pragmatically be adapted long term.

Introducing this idea into United States would mean creating a hybrid adversarial-restorative system similar to that in the United Kingdom and Belgium. These nations have all successfully implemented portions of restorative justice into their current systems, using it to tackle the issue of sexual assault. Multiple countries are being utilized to create a more diverse narrative of what restorative justice could look like for the United States. The data and studies in this paper suggest this will balance out the adversarial nature, which is an important part of confronting significant harms to the victim-survivor such as revictimization. This paper will explore how similar aspects of the United Kingdom and Belgium's restorative systems could be adapted into the United States criminal justice system.

## 2 Adversarial System of the United States

The United States court system is adversarial in nature, meaning there is a defense and prosecution that argue the case and evidence in court (Joyce-Wojtas & Keenan, 2016). A major problem that has been discussed in the past three decades is how this type of system's nature makes the survivor-victim feel in the process (Joyce-Wojtas & Keenan, 2016). The researchers explain that the survivor-victims can feel revictimized by the system and placed on the outside as if they are unimportant to the entirety of the process, used as a witness and then done with the court after the case is concluded (Joyce-Wojtas & Keenan, 2016). Revictimization takes away the agency and control from the victim-survivor (Kebodeaux, 2017). This is impactful because the situation of sexual assault took away agency and choice, and the court system is having similar effects psychologically. They are also forced to face the perpetrator and people in the court in a less constructive, stressful manner.

Cases of sexual assault often come with sentencing that is not equal to the crime. In 2016, Brock Turner sexually assaulted an unconscious girl at a party and two people witnessed the heinous crime (Kebodeaux, 2017). The court decision was to find Turner guilty of three counts of sexual assault, a ruling that should result in years of prison sentencing (Kebodeaux, 2017). In Turner's case, the judge decided to allow Turner's lawyer to persuade him that Turner only deserved 6 months in prison with attached probation measures (Kebodeaux, 2017). California attempted to fix this outrage with a new law that required a minimum sentence in the cases of an unconscious person being sexually assaulted. Minimum sentences, while a good effort to remedy the problem, are not lasting solutions to the problem and do not provide agency to the victim-survivor (Kebodeaux, 2017).

The term criminal justice is often associated with punishment-centric mentalities in the United States. People often want retribution for criminal actions, which is valid and good



in society. Retribution allows for the satisfaction of a penalty towards the criminal in question, due to the wrongful actions that are chosen (Joyce-Wojtas & Keenan, 2016). In sexual assault cases, however, people have often experienced dissatisfaction in the fact that nothing further than retribution is accomplished for society (Kebodeaux, 2017). This dissatisfaction comes from a lack of integrating more rehabilitative measures into the criminal justice system. This source explains that not one pure retribution or restorative system is the answer, but one must unite both premises to get the most optimal outcomes (Joyce-Wojtas & Keenan, 2016).

### 3 Restorative Justice: Methods and Benefits

In juxtaposition to the current adversarial only system, there is an alternative of rehabilitation through restorative justice. Restorative justice is inherently education and rehabilitative, using these techniques to better the society itself. Considering there is a significant amount of added pressures and stress on the victim-survivor, this would be a way to alleviate that burden (Kebodeaux, 2017). Focusing on rehabilitation for both the victim-survivor and perpetrator has long-term effects on the greater society. It focuses on individuals, targeting the trauma of sexual assault rather than treating it as an insignificant part of the process. This addresses the assault assertively, while making sure both perpetrator and survivor can properly, healthily transition back into everyday life (Naylor, 2010). Now, in the United States this system would be a hybrid adversarial-restorative system. This would function by having a trial in order to establish appropriate measures of justice by punishment or restoration. There would still be a time frame of serving time in a punishment facility, yet there will now be added restoration programs. These opportunities of restoration include but are not limited to community service, mediation, and learning initiatives. Setting up a hybrid system in this way is optimal, considering restorative options only work for specific cases so both are warranted. Repeat and violent offenders would not be offered the same opportunity as someone that has only committed one offense and qualifies (Naylor, 2010). This is to maintain safety and security of the perpetrator, victim, and community around them.

### 4 Addressing Revictimization

Victim-survivors had repeatedly expressed that they would like the community to condemn the actions taken against them. Yet, paired with this should be more agency and choice. A choice is important psychologically because the victim-survivor was not given choice in the actions taken against them. Naylor (2010) states the argument that victimization is common and unnecessary in the process of purely adversarial, retributive justice. Suggestions to start this are conversations with the officials, training of how to handle uniquely sexual assault cases, and vetting of the cases that can handle restorative justice (Naylor 2010). Naylor (2010) further suggests a group of people hired to take on these cases be constructed as an addition to the current system and policies. This will create a support system for the victim-survivor while offering the perpetrator a chance at reconciliation.

A concept that does provide agency to the survivor and redemption through the community is restorative justice. Restorative justice is unique because it does not just address the



actions taken (retribution style) but it addresses the emotional, physical, and traumatic harm imposed upon the victim-survivor (Kebodeaux, 2017). Of course, there is still a measure of who could qualify for this- leaving out the most violent repeat offenders from qualifying for the victim-survivors safety (Kebodeaux, 2017). Recall that Brock Turner is a good example of someone who could qualify for the mix of restorative and retributive justice, given the nature of his offense. It inherently requires the perpetrator to become accountable for the harms they have done, remedying them by giving back to the broader community (Kebodeaux, 2017). This helps them to come to terms with the complicated, harmful, destructive situation they created. Once they complete the rehabilitation process, perpetrators can then help future offenders in their own process (Kebodeaux, 2017).

## 5 Stigma of Sexual Assault

Often, rape that is not seen as violent and “real” is not taken as seriously by those in the United States criminal justice system (Bouhours & Daly, 2010). This stigma that only violent sexual assault can be taken seriously is counterintuitive to the functionality of the system. It creates a dichotomy between “real rape” and “not real rape,” meaning that any other non-violent rape is not taken seriously (Bouhours & Daly, 2010). These terms are not meant to delegitimize rape, but to show how societies’ dichotomous framework is inherently delegitimizing. Hypothetically, the form of restorative justice that this paper is advocating for could work to address this issue. Specifically, since non-violent, non-repeat sexual assault cases are being addressed, it would give back a voice to those who suffer from the “not real” rapes (Bouhours & Daly, 2010). By allowing restorative justice to target this specific base of people, society could address the stigma and deconstruct the destructive narrative.

## 6 Challenges of Implementation in the United States

In the United States there is a stigma against restorative justice because of the highly punitive “tough on crime” culture (Beale, 2003). Restorative justice in the United States has not been implemented on a large scale partially due to this idea. Research has identified these three areas as key challenges of implement: “(1) the market driven media, (2) a political system that rewards... ‘the crime card’ and (3) emphasis on sentencing principles that are difficult to square with restorative justice practices” (Beale, 2003). The market driven media is said to sensationalize the stories and create a biased narrative. Instead of just presenting facts, the American media relies on clickbait and emotional appeal to gain consumer interest (Beale, 2003). Clickbait is a distracting, often untruthful representation of the content in an article, news source, etc. intending to get views rather than promote quality journalism. Further, playing “the crime card” also ensures that the perception towards the potential perpetrator is that they committed a mistake and should only pay for it punitively (Beale, 2003). This perpetuation of punitive being the only type of criminal justice solution in America makes it difficult culturally to make a switch. Therefore, this research is focusing on a step-by-step process in implementation to avoid shocking the system. Addressing sexual assault first is a way to gradually shift towards more initiatives of restorative justice long term.



## 7 European Models of Restorative Justice: Challenges and Benefits

European nations that are part of the European Union have supranational directives to implement restorative justice (European Union Article 12, 2012). Member states have access to guidance and resources to achieve this idea in their justice systems. Regardless of these standards, nations have individual ways of implementing restorative justice to help address sexual assault (Keenan, O’Nolan & Zinsstag, 2016). This makes the nature of their systems vastly different from one another-warranting a comparative analysis. In this paper the analysis provided will show how different nations have attempted to address the “justice gap” of sexual assault (Keenan, O’Nolan & Zinsstag, 2016). Similarly, this means the federal and state governments in the United States would have to work closely together to accomplish initiatives similar to the EU restorative initiatives.

### 7.1 United Kingdom Model

Restorative justice in the United Kingdom has components of European Union directives as well as initiatives on the national level. The reinstatement of restorative justice in the UK came to fruition around 2013 when thirty million in revenue was allocated for the programs (Hoyle & Rosenblatt, 2015). In 2015, the Ministry of Justice came out with a restorative justice plan with three prongs: “equal access, awareness/understanding and good quality restorative justice” (Hoyle & Rosenblatt, 2015). One of the most significant portions of this is the victim’s code that claims to guarantee a survivor’s fair treatment in the process as well as access to resources (Hoyle & Rosenblatt, 2015). This means that these policies and funding keep the European Union and the United Kingdom both accountable to restorative justice initiatives.

These policies help victims of sexual assault have access to appropriate resources needed to heal after their trauma. For example, an important factor in ensuring the survivors well-being is access to approach mental healthcare. Sexual Assault Centers have been established in the United Kingdom in order to address these needs along with the restorative initiatives (Cybulska, 2007). These centers provide “a dedicated secure facility integrated with hospital services; availability of forensic examination 24 hours a day, within four hours of disclosure; facilities for non-police referrals; crisis workers to support the victim; immediate aftercare such as emergency contraception and prophylaxis against infections; follow-up services, including screening for STIs; and psychosocial support” at no cost to the individual (Cybulska, 2007). This helps alleviate concerns of those that are in proximity to the state-run centers for victims of sexual assault.

The United Kingdom has also had significant challenges of accessibility in the implementation of restorative justice in the past. Many of the Sexual Assault Referral Centers do not exist in rural areas (Cybulska, 2007). The centers that currently exist are wonderful, optimal care centers, however there is simply not enough of them. This leads to the fact that those whom do not live in the city are left behind in avid mental healthcare. This defeats the “equal access” prong of restorative justice initiatives of the United Kingdom, considering the access to resources is limited by geographical proximity



(Cybulska, 2007). They would have to fix this in order to further provide accessibility and gain the most benefits.

Another complication is that direct reparations, while optimal, were not always a tangible possibility (Hoyle & Rosenblatt, 2015). Research found that monetary reparations were not necessarily even fulfilled to the extent they were promised (Hoyle & Rosenblatt, 2015). This means that something intangible like restorative reparations were even harder to measure in face-to-face mediations (Hoyle & Rosenblatt, 2015). Restorative reparations (in contrast to monetary reparations) are mediation sessions between the perpetrator and survivor. Instead of being genuine and productive they often even saw the mediator, if it was a police officer, coercing an apology out of the perpetrator (Hoyle & Rosenblatt, 2015). Overall, one of the biggest problems that individuals identified about the United Kingdom's system of restorative justice was the role of police officers in affairs (Hoyle & Rosenblatt, 2015). They felt as though police officers overstepped and showed a significant bias to the victim-survivor rather than treat the process equally for both involved (Hoyle & Rosenblatt, 2015). This is not productive to restorative justice and in-fact the opposite of what the idea seeks to achieve. Considering the restorative justice model is three portions (the survivor, the perpetrator and the community) and these interactions failed all three. A mediator must not be formally tied to the system in order to remain productive in the process and gain long term benefits of mediation for all three parties.

Importantly, literature on the UK's system shows a massive disconnect in the policy written and the implementation. Policy in this case would not warrant significant reformation in text but in the practicality of application. This is a significant delineation when it comes to the future of restorative justice in the UK. Implementation is a fixable concept, especially when research has identified the current systems shortcomings to address sexual assault. The attention to weakness should be a way to improve implementation of the three core values established (equal access, awareness/understanding and good quality) for restorative justice in the EU. This can include an expansion of the centers for victims of sexual assault to receive the mental healthcare needed to heal from their trauma. This model has positives and negatives to the process used, and this will all be considered when evaluating how to deduct the best model moving forward.

## 7.2 Belgium Model

Belgium's model of restorative justice seeks to promote not just punishment, but accountability. Research was done to evaluate several prisons that implemented the country's standards of restorative justice while measuring efficiency (Stamatakis & Vandeviver, 2012). The measurements tested were as follows: "1. Prisoners are accountable for the impact of their crimes and they are willing to have personal encounters with victims; 2. Prisoners feel remorseful and they would like to apologize to their victims; 3. Prisoners consider important to build a relationship with victims and community outside prison and they are 'sympathetic' to engaging in (direct or indirect) reparative activities;" (Stamatakis & Vandeviver, 2012). This study was more focused on implementation of the policies themselves rather than how the policies were constructed and written. The research outcome proved a significant link between prisoners that participated actively and positive results long-term such as better reintegration, less recidivism, etc. (Stamatakis &



Vandeviver, 2012). They also found under the Belgium model that people who accepted responsibility for their crime, which most did to a significant extent, were more understood by the victim and community (Stamatakis & Vandeviver, 2012). The research showed that people were more understanding of the perpetrator because of their willingness to move forward, educate themselves on their wrongdoings as well as help the community (Stamatakis & Vandeviver, 2012). This allows perpetrators to reintegrate while given those under the Belgium restorative justice model and provides closure to survivors.

### 7.3 Comparative Results

Pushing towards restorative justice in the United States can get the victim-survivor the care and help they need. This is important because the current punitive system unfortunately comes with harms of additional victim blaming and shaming. In the United Kingdom's restorative approach to sexual assault, the victim-survivors needs are placed in high regard. The United Kingdom's care centers allow for them to be a support system for the victim-survivor's mental and physical health. This is something that is currently lacking within the United States system. Encouraging local-level organizations to open with state funding to address sexual assault would greatly help to pay more attention to the survivors' needs. This is important and is warranted in the United States, considering a mass amount of the population (1 every 98 seconds) is a victim-survivor of an act of sexual violence (RAINN, 2019).

Further, the United States currently has a problem with what is perceived as "legitimate" rape or sexual assault. This is a problem with stigma that can be addressed with restorative justice. Instead of having a highly adversarial punishment-based system, restoration would have more focus. If restoration is applied to sexual assault, it often shifts people's perception on the matter. This is a fact because the nature of restorative justice is highly community based. The victim-survivor and the perpetrator are being educated as well as working with the community around them. Society is then able to be shaped to perceive sexual assault as a trauma that must be healed, not ignored and silenced under the punitive-only framework. This shift is happening in the United Kingdom and Belgium (where restorative justice initiatives have been implemented). Therefore, having the United States shift towards more restoration is a push towards de-stigmatization of assault.

The United States could also learn from other systems' mistakes, such as the United Kingdom's choices for mediation. Particularly, they chose to have police officers frequently mediate the interactions between the victim-survivor and the perpetrator. Now, this is a conflict of interest because the police officer has been seen to take the side of the survivor in these interactions in the UK. This is not productive for getting optimal mediation results; therefore, the United States could make a slight change. While the mediation model of the UK could otherwise be adopted, the United States system should have licensed therapists to conduct these meetings. The rationale behind this is that a third party, non-affiliated individual is able to make the best, unbiased choices for both parties involved in the exchange. The basic underlying problem for the United Kingdoms' model is not the model at all, but application. Most of the literature on the UK's restorative justice initiatives say that the policy is well-written and efficient but there must be a follow-through with the



application. The United States model could take into account that there should be extra dedication on how to optimize implementation.

The Belgium model is relatively successful in helping to rehabilitate perpetrators back into their communities and broader society. The research above is indicative that as long as the prisoners actively engage in the process, the results will be positive. In the United States model there must be a push for active participation both in and outside of the prison. This participation is necessary to get long term results that benefit the victim-survivor, perpetrator and society.

## 8 Future Research

In order to optimize an approach to restorative justice for cases of sexual assault in the United States, more research is warranted. In the future, this paper will be expanded to include other European nations, such as Norway, in the comparative methodology. This will help to evaluate more benefits and challenges that other nations have faced in the implementation of restorative programs to tackle sexual assault. Further, this will allow better conclusions to be made on the steps the United States should take to optimize their restorative justice options in addressing sexual assault.

Further research should also be conducted on the feasibility and construction of possible policies to pass in the United States on restorative justice. This is significant considering the purpose of this research is to find the best way to reform the United States' purely punitive system into more of a hybrid punitive-restorative system. Doing further research on tangible policy initiatives will allow for more concrete change to take place. This helps the functionality overall of the research be less theoretical and more practical in nature.

## 9 Conclusion

In this paper, the research identified has shown how incredibly important it is to promote an incremental change in the United States criminal justice system. This is important to ensure that restorative justice is properly implemented while avoiding a shock to the system/society. Instead of doing a complete overhaul of the punitive system in the United States, hypo-testing on one crime as a microcosm will be accomplished. Importantly, this is the whole premise of the paper, focusing only on the crime of sexual assault in the case of non-violent, non-repeat offenders having access to restorative options. This would allow for an adjustment period to optimize any further policies on restorative justice.

Restorative justice in the case of sexual assault is shown to be healing for the perpetrator, survivor and the community around them. This paper has identified benefits to the systems of the United Kingdom and Belgium that could be obtained if the United States implemented similar initiatives of restoration. These include ideas of Sexual Assault Centers, mediation, community service, etc. The overall purpose of the restorative justice initiatives is to promote learning through community efforts and education. This shift of a more humanistic-approach in issues as pressing as sexual assault are pivotal in maintaining a productive, functioning society. Every nation concerned about their citizens' well-being





should consider restorative measures, and it is long past time for the United States to shift their policies in the current justice system.

## 10 References

Beale, S. S. (2003). Still tough on crime-prospects for restorative justice in the United States. *Utah L. Rev.*, 413.

Dale, G. (2008). Challenging the evaluation of Norwegian restorative justice experiences. *British Journal of Community Justice*, 6(2).

Daly, K., & Bouhours, B. (2010). Rape and attrition in the legal process: A comparative analysis of five countries. *Crime and justice*, 39(1), 565-650.

Hoyle, C., & Rosenblatt, F. F. (2016). Looking back to the future: Threats to the success of restorative justice in the United Kingdom. *Victims & Offenders*, 11(1), 30-49.

Joyce-Wojtas, N., & Keenan, M. (2016). Is restorative justice for sexual crime compatible with various criminal justice systems? *Contemporary Justice Review*, 43-68.

Kebodeaux, C. (2017). Rape sentencing: We're all mad about Brock Turner, but now what? *Kansas Journal of Law and Public Policy*, 27(1), 30-47.

Keenan, M., Zinsstag, E., & O'Nolan, C. (2016). Sexual violence and restorative practices in Belgium, Ireland and Norway: a thematic analysis of country variations. *Restorative Justice*, 4(1), 86-114.

Naylor, B. (2010). Effective justice for victims of sexual assault: Taking up the debate on alternative pathways. *Monash University Law Research*, 33(3), 1-24.

Stamatakis, N., & Vandeviver, C. (2013). Restorative justice in Belgian prisons: the results of an empirical research. *Crime, law and social change*, 59(1), 79-111.

