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How Gender-Based Violence Makes Prison Abolition (Un)thinkable: The Role of Narrations and Their Setting

Judith Sürken*

Abstract

Prison abolition is commonly not even found worth debating. However, there are profound feminist criticisms of prison. While some feminists use this to call for prison abolition, feminists aiming for criminal law reforms usually do not. This is a fundamental conflict. But it is barely researched what divides them. This paper proposes that it is different understandings of gendered violence. By scrutinising furthermore how gendered violence is narrated in the example of criminal courts, this paper helps us understand why prisons are commonly deemed inevitable.

When gendered violence is perceived as individual wrongdoing against “ideal victims”, prison can seem compelling. However, structural and intersectional accounts make a debate on prison abolition necessary. In criminal courts, the narration of gendered violence is shaped by exclusion or ignorance of certain aspects, too. It is these restrictions that make prison appear helpful, not prison’s ability to address gendered violence.

Introduction

Many people may understand gender-based violence as an argument against prison abolition. It is a common mindset that prison is crucial for the function of society,¹ as it would retribute and/or prevent wrongdoing. This paper scrutinises how differently gendered violence is conceptualised, and how this impacts the notion of prison abolitionism. By drawing from

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¹ Angela Y. Davis, *Are Prisons Obsolete?* (Open Media Book, Seven Stories Press 2003) 9; see also Joe Sim, *Punishment and Prisons: Power and the Carceral State* (SAGE Publications Ltd 2009) 127ff; Anastasia Chamberlen and Henrique Carvalho, 'The Thrill of the Chase: Punishment, Hostility, and the Prison Crisis' (2018) *Social and Legal Studies* 28 1 and 16 <<https://doi.org/10.1177/0964663918759820>> accessed 9 April 2022; Maeve W. McMahon, *The Persistent Prison? Rethinking Decarceration and Penal Reform* (University of Toronto Press 1992) i.

mainly feminist scholarship from countries of the Global North—especially the USA, Canada, and UK—it is argued that communication about gender-based violence constitutes both obstacle and opportunity for the prison abolition movement.

In doing so, it discusses not gendered violence in general. This paper centres on violence against women and thus, leaves out non-binary people, for example. Even more precisely, it focuses on people who are *assumed* to be women, such as inmates of women's prisons, regardless of what they identify as. Furthermore, it focuses on sexual violence, as it is 'even more than murderers, ... most often cited as evidence that we cannot do without prisons.'²

With regards to the feminist discourse about imprisonment and criminalisation, this paper will show what difference the conceptualisation of gendered violence can make, and how it can be an argument for prison abolition. While some feminists focus on punishment and aim to criminalise violence more and better,³ other feminists want to abolish prison and call for radical alternatives.⁴ As it will be shown, their different strategies can be explained by their different definitions of the very problem of gendered violence they want to solve.

Furthermore, it will be argued that criminal courts use procedures to depict social reality which necessarily lead to a very narrow understanding of such violence, turning prison into a logical answer. However, this picture is far from conclusive, as this work will show.

This research employs a mix of socio-legal and theoretical analysis.⁵ With intersectional legal feminism, 'a specific theoretical perspective'⁶ is used to examine the criminal justice system, drawing on theorists such as Angela Y. Davis and Chloë Taylor. Broader entanglements of law and society are fathomed as well. How does the depiction of gendered violence in criminal courts relate to the notion of prison as inevitable? In considering this question, I discuss Carol Smart's theorising about law in terms of gender and power, among others.

² Chloë Taylor, 'Anti-Carceral Feminism and Sexual Assault—A Defense: A Critique of the Critique of the Critique of Carceral Feminism' (2018) 34 *Social Philosophy Today* 29, 30 ff.

³ For a description of reform efforts see Lise Gotell, 'Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism' in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan 2015) 67, 59ff.

⁴ See Angela Y. Davis (n 1) 107, 112; Chloë Taylor (n 2) 31ff and 41ff.

⁵ For a description of these methods see Laura Lammasniemi, *Law Dissertations: A Step-by-Step Guide* (Routledge 2018) 74ff.

⁶ *ibid* 75.

This paper begins with a discussion of feminist discourse, breaking this analysis down into feminist prison abolition and an analysis of the reasons for the different views held by feminists. In the second section, I analyse how gendered violence is conceptualised in criminal lawsuits, and its impacts on the notion of abolitionism. Finally, the paper concludes with a discussion of how significant the conceptualisation of gendered violence is for the notion of prison abolition.

I. Why some feminists do want prison abolition and others not

Some feminists want to improve punitive responses,⁷ while others want to abolish prisons and implement responses that are not punitive, at least not in the traditional sense.⁸ This part scrutinises where this difference comes from. But first of all: why *are* some feminists in favour of prison abolition?

A. Feminist prison abolition

Some feminists want to abolish prison. This is not a stand-alone demand, but a complex set of strategies. For instance, Angela Y. Davis mentions ‘vehicles for decarceration’, such as transforming schools and making health care more accessible.⁹ Rather than reforms of criminal law, transformation outside the criminal justice system would be required. This is motivated by considerations of prison’s utility.

It is clear that in a certain case, during the time of imprisonment, a perpetrator is incapable of inflicting bodily harm on people outside the prison. However, as the following will show, prison-abolition feminists are pointing to the limits of the protection prison can provide for people who are (potentially) affected by gendered violence—and even more, show how prison makes things worse.

⁷ See e.g. reform efforts depicted in Lise Gotell (n 3).

⁸ See e.g. Angela Y. Davis (n 1).

⁹ *ibid* 108.

First, there is the limited accessibility of the criminal justice system for survivors of sexual violence. Despite law reforms, police reporting rates regarding sexual assault were in Canada below 10 percent ‘in all three victimization surveys between 1993 and 2004.’¹⁰ Even when they are reported, the police discontinues cases of sexual assault because they would be “unfounded” ‘to a far greater extent than any other crime.’¹¹ And out of those cases considered “founded”, ‘only 11 percent have led to a conviction.’¹² In the end, ‘0.3 percent of perpetrators of sexual assault were held accountable and 99.7 percent were not.’¹³

While this suggests a general problem of accessibility, in particular, this is true for many marginalised survivors. So, for example, rape myths prevail and ‘obviously disadvantage certain women more than others’—the “ideal victim” is among others in most regards privileged.¹⁴ Also, ‘[w]omen of colour, poor women, people involved in the sex trade and trans people are reasonably wary of involving the police in cases of gender and sexual violence, because the police themselves are often the main perpetrators of violence against these populations.’¹⁵ This indicates that the problem starts already way before actual court proceedings and factors like their treatment of complainants. Court-related reforms are not sufficient to make the criminal justice system accessible to *all* survivors equally.

Secondly, prison can only address individual perpetrators, not most state violence or underlying problems in society.¹⁶ Instead of addressing ‘conditions that exacerbate ... Black women’s vulnerability to victimization’,¹⁷ punitive strategies even ‘expand ... the reach of state violence.’¹⁸ Also, India Thusi argues that ‘retributivist impulses are inextricably

¹⁰ Holly Johnson, ‘Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault’ in Elizabeth A. Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press 2012) 617; see also Lise Gotell (n 3) 60ff.

¹¹ Holly Johnson (n 10) 627.

¹² *ibid* 633; see also Lise Gotell (n 3) 60ff.

¹³ Holly Johnson (n 10) 632.

¹⁴ Holly Johnson (n 10) 625 and 622ff.

¹⁵ Chloë Taylor, *Foucault, Feminism and Sex Crimes: An Anti-Carceral Analysis* (Routledge 2019) 95; see also Chloë Taylor (n 2) 42; India Thusi, ‘Feminist Scripts for Punishment’ (2021) 134(7) *Harvard Law Review* 2449, 2450.

¹⁶ For state violence see Beth E. Richie, *Arrested Justice: Black Women, Violence, and America’s Prison Nation* (New York University Press 2012) 135; for a critique of individualising harm see e.g. Adrienne Maree Brown, *We Will Not Cancel Us: And Other Dreams of Transformative Justice* (AK Press 2020) 8.

¹⁷ Beth E. Richie (n 16) 140.

¹⁸ India Thusi (n 15) 2451; Chloë Taylor (n 2) 32.

connected with racism, classism, and ableism’ —for example, ‘[t]he very colour of blame is painted on Black faces.’¹⁹

Feminist abolitionists urge for radical alternatives, because prisons would not only be of little help but actually harm people. Prison rape is a serious problem in both men’s and women’s prisons. According to the National Inmate Survey 2008-09 in the US, 4.4% of prison inmates were sexually victimised ‘in the past 12 months or since admission to the facility, if less than 12 months.’²⁰ 2.1% of prison inmates experienced sexual victimisation by other inmates, 2.8% experienced sexual misconduct by staff.²¹ When compared with the rate of sexual victimisation in general population, prison appears as hot spot.²² The National Crime Victimization Survey estimates that in general population 0.16% of persons age 12 or older were raped or sexually assaulted in the US in 2008.²³ This number may look small, but such numbers mean that *over the years* ‘one of every six women [outside prison] has been raped at some time’ in the USA.²⁴ Now, how high would this number be when we all would spent our lives in prison?

Prison rape may be difficult to counter because of prison’s ingrained hierarchy. The subordination of prisoners is enforced on a daily basis, with little opportunity to alter or escape the fundamental structure of prison. This makes it possible that officers use ‘their near total authority to provide or deny goods and privileges to female prisoners to compel them to have sex or, in other cases, to reward them for having done so.’²⁵ Regardless of whether

¹⁹ India Thusi (n 15) 2484; see also Katrin Hohl and Elisabeth A. Stanko, ‘Complaints of Rape and the Criminal Justice System: Fresh Evidence on the Attrition Problem in England and Wales’ (2015) 12(3) *European Journal of Criminology* 324, 336.

²⁰ Allen Beck and others, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09* (Bureau of Justice Statistics 2010) 5. Another study from 2006 even found that every fifth female inmate was sexually victimized by inmates in the last six month, but this might be because the study did not differ between consensual and non-consensual touching of genitals or sex organs among inmates, see Nancy Wolff and others, ‘Sexual Violence Inside Prisons: Rates of Victimization’ (2006) 83(5) *Journal of Urban Health: Bulletin of the New York Academy of Medicine* 835, 841 and 846.

²¹ Allen Beck and others (n 20) 7, table 1.

²² This was already noted in Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton University Press 2016) 137.

²³ Michael R. Rand, *Criminal Victimization, 2008* (Bureau of Justice Statistics Bulletin 2009) 4, table 4.

²⁴ Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey* (National Institute of Justice 2006) iii.

²⁵ Quoted in *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (New York: HumanRights Watch, December 1996), 1 (as cited in Angela Y. Davis (n 1) 78).

victimisation happens through inmates or staff, prisons are places where ‘you cannot escape from your abuser.’²⁶ Thus, imprisonment makes people vulnerable to violence.

Furthermore, (longer) imprisonment may even lead to more rape outside prison.²⁷ Misogyny in prison affects the “outside” through communication and inmates getting free again. And ‘the prison system is the last place you go to learn to respect women.’²⁸ Indeed, even when happening between men, prison rape tends to be deeply entangled with misogyny, because the raped one is seen as a woman.²⁹ Furthermore, ‘the practice of rape ... masculinizes men’.³⁰ In men’s prisons, acting ‘manly’ is rewarded while being “soft’ and more feminine’³¹ is punished, both by prison guards and other inmates.³² Thus, men’s prisons ‘serve ... to reproduce destructive forms of masculinity’³³ and prisons in general reproduce ‘rape culture.’³⁴ So, prison is hardly a persuasive tool to prevent further gendered violence.

It is against this backdrop that Chloë Taylor pointedly notes

it is arguable that anyone concerned with preventing sexual crimes ... should be engaged not so much in putting sex offenders in prisons as in keeping them out of prisons, since prison is one of the most likely places for rape to occur and for a culture of rape to be normalised.³⁵

Obviously, this argument against imprisonment applies even more to people, who did *not* commit sex crimes and especially to survivors of such.

²⁶ Quoted in *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (New York: HumanRights Watch, December 1996), 1 (as cited in Angela Y. Davis (n 1) 78).

²⁷ See also Joe Sim, Book Review (1990) 18(1) *International Journal of the Sociology of Law* 97, 100.

²⁸ Anna Leventhal, ‘The Troubling Message of the Jian Ghomeshi Trial: If You Want the Legal System to Protect You, You Better Be a Good Victim’ (*Toronto Star*, 25 March 2016) <<https://www.thestar.com/opinion/commentary/2016/03/25/the-troubling-message-of-the-jian-ghomeshi-trial.html>> accessed 6 May 2022.

²⁹ Don Sabo and Willie London, ‘Understanding Men in Prison: The Relevance of Gender Studies’ 1992 9(1) *Men’s Studies Review* 4, 6.

³⁰ Christine Helliwell, ‘“It’s Only a Penis”: Rape, Feminism, and Difference’ (2000) 25(3) *Signs* 789, 796.

³¹ Don Sabo, ‘Doing time, Doing Masculinity: Sports and Prison’ in Don Sabo, Terry A. Kupers and Willie London (eds), *Prison Masculinities* (Temple University Press 2001) 64.

³² James W. Messerschmidt, ‘Masculinities, Crime, and Prison’ in Don Sabo, Terry A. Kupers and Willie London (eds), *Prison Masculinities* (Temple University Press 2001) 67.

³³ Don Sabo, Terry A. Kupers and Willie London, ‘Gender and the Politics of Punishment’ in Don Sabo, Terry A. Kupers and Willie London (eds), *Prison Masculinities* (Temple University Press 2001) 4.

³⁴ Sarah Tyson (n 16) 213 following.

³⁵ Chloë Taylor (n 2) 29, 30.

B. Searching for differences

Feminist prison-abolitionism, however, is just *one* movement regarding gendered violence and punishment. There are also undertakings to improve, for example, the situation of female offenders through prison reform.³⁶ Prison reform and prison abolition are not necessarily opposing each other, as the inmate-led project Success Stories shows. It fosters the rehabilitation/transformation of inmates (and thus improves prison) while fostering at the same time a transformation towards a feminist future without prisons.³⁷ Another feminist movement focusses on reforms regarding criminal law: it would too often fail to acknowledge gendered violence as crime,³⁸ and the survivors should be treated in court better and with more respect.³⁹

Now, feminist prison abolitionists and feminist criminal law reformers can both be in favour of prison reforms. And certainly, both of them want to improve on how gender-based violence is tackled. But they choose quite different ways. The former want the criminal justice system to deal with gendered violence better and *more*, while the latter point to the need for strategies which do not rely on punitive responses, at least not in the traditional sense. So, why do they have such different strategies?

1. Prison

Some critique of feminist criminal law reform efforts by prison abolitionists can suggest that their main point of difference is about prison: they call these feminist reform efforts ‘carceral feminism’, criticising a ‘commitment ... to a law and order agenda.’⁴⁰ And at first glance, the

³⁶ Kate De Cou, 'A Gender-wise Prison? Opportunities for, and Limits to, Reform' in Pat Carlen (ed), *Women and Punishment: The Struggle for Justice* (Willan Publishing 2002) 98.

³⁷ Success Stories, 'Our Work' <<https://www.successtoriesprogram.org/ourwork>> accessed 10 March 2022; CNN, 'The Feminist on Cellblock Y' (18 April 2018) <<https://edition.cnn.com/videos/us/2018/04/18/the-feminist-on-cellblock-y-doc-orig.cnn>> accessed 10 March 2022.

³⁸ See e.g. for feminist campaigns in Canada Lise Gotell (n 3) 59; see for a discussion of consent e.g. Lise Gotell (n 3) 62ff; Nancy Levit, 'Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity' in Don Sabo, Terry A. Kupers and Willie London (eds), *Prison Masculinities* (Temple University Press 2001) 94.

³⁹ Lise Gotell (n 3) 59 (about Canadian feminist campaigns); Angela Y. Davis, *Women, Culture & Politics* (first published 1984, Random House 1989) 39 (about antirape movement).

⁴⁰ Elizabeth Bernstein, 'The Sexual Politics of the "New Abolitionism"' (2007) 18 *Differences: A Journal of Feminist Cultural Studies* 128, 143; see also Lise Gotell (n 3) 55 ff.

fact that some feminists seek for greater recognition of gendered violence in terms of criminal law could suggest that they are in favour of prison, 'the dominant mode of punishment.'⁴¹

However, Lise Gotell argues that the imprisonment of perpetrators would not be a goal of these feminist campaigns, by citing the example of Canadian feminist law reform efforts.⁴² Instead, they would try to 'improve the treatment of complainants'⁴³ and challenge 'public perceptions about sexual violence.'⁴⁴ While it is disputed whether the reform efforts had enough 'influence ... on policy' to be blamed for 'law and order' politics,⁴⁵ there is at the time of writing indeed no prominent feminist who argues that the institution of prison or respectively carceral feminism would be good.⁴⁶ Essentially, feminists usually do not talk about how to deal with sex offenders except through increasing punishment.⁴⁷ This shows a 'reli[ance] ... on prisons as a solution.'⁴⁸ Alternative ways of dealing with those who commit gendered violence are usually not part of reform efforts.⁴⁹ So, while reform feminism does not endorse prison, it often presumes prison sentences to be necessary.

There is no big debate about whether prison enforces and fosters gendered violence or not, for example. Rather, some feminists problematise it, while feminist criminal law reformists don't. Their opinions about prisons do not explain why. Rather, they show that there must be another reason for their disparity about what violence to take into account.

2. Law reform and engagement with the state

It might be assumed that criminal law reform efforts and feminist prison abolitionism diverge because the latter would reject engagement with law and the state. And indeed, the efforts of

⁴¹ Angela Y. Davis (n 1) 110.

⁴² Lise Gotell (n 3) 58 and 69.

⁴³ *ibid* 59.

⁴⁴ Rose Corrigan, *Up Against a Wall: Rape Reform and the Failure of Success* (New York University Press 2013) 34; Lise Gotell (n 3) 59 ff.

⁴⁵ Critical Lise Gotell (n 3) 53 ff and 60; (disagreeing) Chloë Taylor (n 2) 39 ff.

⁴⁶ See also Chloë Taylor (n 2) 29, abstract; Anna Terwiel, 'What Is Carceral Feminism?' (2020) 48(4) *Political Theory* 421, 430.

⁴⁷ Chloë Taylor, 'Foucault, Feminism, and Sex Crimes' 2009 24(4) *Hypatia: A Journal of Feminist Philosophy* 1, 5; Lee Lakeman, 'Ending Rape: The Responsibility of the Canadian State' in Nicole Westmarland and Geetanjali Gangoli (eds), *International Approaches to Rape* (Bristol University Press, The Policy Press 2011) 54; Lise Gotell (n 3) 58.

⁴⁸ Sarah Tyson (n 16) 212, referring to Chloë Taylor.

⁴⁹ Chloë Taylor (n 15) 99; Chloë Taylor (n 47) 5; Lee Lakeman, (n 47) 54.

feminist prison abolitionists are quite often not just about a critique of prison but also about a critique of the criminal justice system in general. While the critique of ‘carceral feminism’ appears to be about some feminists and *prisons*, the term is actually used more broadly to criticise ‘a reliance on policing, prosecution, and imprisonment.’⁵⁰

This is not simply a result of an equation of prison sentences, punishment, and criminal courts. Rather, this manifoldness of critique of the ‘carceral’ is the counterpart to the broadness of prison abolition’s aims.⁵¹ Feminist prison abolitionists usually bring alternatives forward which are at the same time alternatives to prison, punishment, and criminal court proceedings: they are often in favour of ‘informal community justice initiatives.’⁵² Such frameworks for accountability are ‘external ... to state institutions and the law’⁵³ and aim not for punishment but, for example, want to ‘address social as well as individual accountability.’⁵⁴ For example, transformative justice is a kind of accountability process which is not punitive in the traditional sense but rather emphasises the need to ‘creat[e] conditions that could prevent future harm.’⁵⁵

Feminist prison abolition can include, for example, a critique of the punitive,⁵⁶ of state institutions, or of the hope that reforms can fix the latter.⁵⁷ This applies to prison as well as to police and criminal courts. Many abolitionists criticise⁵⁸ feminists who try to reform punitive state responses because they oppose the tools which the latter try to reform and rely on.

On the other hand, ‘feminist prison abolitionists generally respect individual survivors’ decision to press criminal charges.’⁵⁹ And even more, their critique seems not to root in a condemnation of law. Anna Terwiel claims that ‘carceral feminism’ critic Chloë Taylor ‘leaves

⁵⁰ Alex Press, ‘#MeToo Must Avoid “Carceral Feminism”’ (*Vox*, 1 February 2018) <<https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism>> accessed 13 May 2022; see also Anna Terwiel (n 46) 421, 424; Chloë Taylor (n 2) 31.

⁵¹ See also Anna Terwiel (n 46) 432.

⁵² *ibid* 421, abstract; see e.g. Chloë Taylor (n 2) 42; descriptive Mimi E. Kim, ‘From Carceral Feminism to Transformative Justice: Women-of-color Feminism and Alternatives to Incarceration’ (2018) 27(3) *Journal of Ethnic & Cultural Diversity in Social Work* 219, 226.

⁵³ Anna Terwiel (n 46) 435.

⁵⁴ Chloë Taylor (n 2) 42.

⁵⁵ Mimi E. Kim (n 52) 227; see also Angela Y. Davis (n 1) 20.

⁵⁶ See also Chloë Taylor (n 2) 42.

⁵⁷ See also Angela Y. Davis, ‘Revolution Today’ (9 October 2017) 52:50-53:22 <<https://www.cccb.org/en/multimedia/videos/angela-davis/227656>> last time accessed 6 September 2021.

⁵⁸ See also Angela Y. Davis (n 57) 52:50-53:30; Sarah Tyson (n 16) 211 ff.

⁵⁹ Anna Terwiel (n 46) 422.

no room for progressive feminist engagements with the law *at all*’ when Taylor argues that prohibition would foster sexual desires.⁶⁰ This ignores that criminal law reform is not just about prohibition.⁶¹ Indeed, Chloë Taylor criticises precisely that feminist engagement with law would have resulted in few if any changes which are *not* an ‘escalation in sentences for sex offenses.’⁶² Furthermore, law is not just criminal law and, as far as I know, Taylor does not argue that engagement with law is per se problematic. However, it is probably true that Chloë Taylor aims for solutions which are not punitive and external to the state.⁶³

Anna Terwiel criticises that by ‘present[ing] a binary choice’ between carceral feminism and transformative justice,⁶⁴ Chloë Taylor ‘obscure[s] that feminist prison abolition may involve not simply an escape from the state but also its capture or transformation.’⁶⁵ And it’s true: abolitionist efforts do not necessarily avoid the state.⁶⁶ Despite the caution of many feminist prison abolitionists towards engagement with law and the state, they do not reject it per se. To the opposite, some abolitionists consider it as a tool to achieve prison abolition. The critique of carceral feminism is predominantly a conflict of goals, not of the means by which these can be achieved—it includes the critique of ‘a drift from the welfare state to the carceral state.’⁶⁷ Should the ‘priorities’ be ‘to punish and shame ... [or to] materially improv[e] ... the lives of all women’?⁶⁸

Furthermore, feminist criminal law reformists and feminist prison-abolitionists might even agree on problems for creating feminist law—such as the ‘presump[tion of law] ... to be neutral.’⁶⁹ So does Carol Smart argue, that ‘precisely’ because feminist engagement with law is so difficult, it is important ‘to challenge such an important signifier of masculine power [i.e. law].’⁷⁰ So, why do some feminists want to reform criminal law while others focus on transformations outside the criminal legal system?

⁶⁰ *ibid* 425, emphasis added.

⁶¹ Lise Gotell (n 3) 59.

⁶² Chloë Taylor (n 2) 39 ff.

⁶³ Chloë Taylor (n 15) 95; Chloë Taylor (n 2) 29ff and 41.

⁶⁴ Anna Terwiel (n 46) abstract, 434.

⁶⁵ *ibid* 423.

⁶⁶ See e.g. Success Stories (n 37); see also Angela Y. Davis (n 1) 107, see also Anna Terwiel (n 46) 20.

⁶⁷ Elizabeth Bernstein (n 40) 143; see also Anna Terwiel (n 46) 425.

⁶⁸ India Thusi (n 15) 2467.

⁶⁹ For problems regarding feminism and law see Carol Smart, *Feminism and the Power of Law* (Sociology of Law and Crime, Routledge 1989) 21.

⁷⁰ *ibid* 2.

3. Penal theory

The difference might be one of penal theory: feminists working on criminal law reform might aim for retribution, while those working on prison abolition might aim for prevention.

Penal theory scrutinises justifications of punishment and is basically divided into two factions. Retributivism argues that 'because the wrongdoer willed a punishable act' they need to be punished and only then.⁷¹ Consequentialism, however, is 'future-oriented'⁷² and argues that whether punishment is justified depends on 'what it produces.'⁷³ Utilitarianism builds on this by arguing that punishment should be based on whether it 'prevent[s] some greater evil',⁷⁴ especially through incapacitating or rehabilitating offenders or deterring future crimes.

Now, this dualism may not neatly fit feminist discussions of criminal justice in cases of gendered violence because feminists of both movements aim also for repairing harm. Restorative justice is a proceeding which, differently to criminal courts, focusses at aspects like restoration and rehabilitation.⁷⁵ This approach is used both 'as a means of re-shaping or re-orientating the conventional criminal justice system' and as an 'alternative' to criminal courts, which avoids imprisonment.⁷⁶ Repairing harm exceeds penal theory: it is often no punishment when punishment is understood as inherently coercive. Processes aiming for the reparation of harm are often external to courts, where participation is usually voluntarily.⁷⁷

Prison abolitionists use consequentialism to argue against prison.⁷⁸ However, their proposed alternatives do not necessarily abandon retributivism. Although related, prison abolition is not the same as the abolition of 'any use of afflictive sanctions'⁷⁹ but includes 'community-

⁷¹ Nicolas Carrier, Justin Piché and Kevin Walby, 'Abolitionism and Decarceration' in Mathieu Deflem (ed), *The Handbook of Social Control* (John Wiley & Sons 2019) 322.

⁷² Barbara Hudson, 'Gender Issues in Penal Policy and Penal Theory' in Pat Carlen (ed), *Women and Punishment: The Struggle for Justice* (Willan Publishing 2002) 24.

⁷³ Nicolas Carrier, Justin Piché and Kevin Walby (n 71) 322.

⁷⁴ *ibid* 322.

⁷⁵ Mimi E. Kim (n 52) 226; Lode Walgrave 'Restorative Justice: An Alternative for Responding to Crime?' in Shlomo Giora Shoham, Ori Beck and Martin Kett (eds), *International Handbook of Penology and Criminal Justice* (Routledge 2008) 623.

⁷⁶ Clare McGlynn, Julia Downes and Nicole Westmarland, 'Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences' in Marie Keenan and Estelle Zinsstag (eds), *Sexual Violence and Restorative Justice: Legal, Social and Therapeutic Dimensions* (Routledge 2017) 1.

⁷⁷ Lode Walgrave (n 75) 622 and 661 ff.

⁷⁸ Nicolas Carrier, Justin Piché and Kevin Walby (n 71) 322, also 327.

⁷⁹ *ibid* 320 ff.

based sanctions.’⁸⁰ Alternatives to criminal courts, such as restorative justice conferences, ‘do impose measures ... to communicate the wrongness of the act.’⁸¹ These sanctions, however, are usually not imposed as an end in itself but focus, for example, at ‘re-educati[on]’ and ‘future safety of victims.’⁸² It is therefore, that Barbara Hudson argues that restorative justice could ‘carry out the traditional functions of criminal justice [including] retribution ... [even] better than formal justice does’:⁸³ it might ‘offer ... a better balance of moral censure and crime reduction.’⁸⁴ However, prison abolitionists do not necessarily aim for retribution in the *traditional* sense of Georg Wilhelm Friedrich Hegel, who understands ‘crime as negation of law and punishment as negation of this negation.’⁸⁵ Prison abolitionists like Chloë Taylor aim not for restoration but for transformation.⁸⁶

Retributivist theory, on the other hand, explains why there are criminalisation efforts while there is—at the time of writing—no prominent feminist who argues that prison would be good.⁸⁷ They think that gendered violence needs to be punished neither because punishment would make a positive impact on the future nor because it would be morally unproblematic. Instead, they think that gendered violence is bad, and *therefore* must be punished. However, feminist efforts to reform criminal law cannot be reduced to retribution. Changing how complainants are treated in criminal courts exceeds discussions about punishment.⁸⁸ When one would try to apply penal theory nevertheless, one could also argue that such reforms are consequentialist, as they aim to prevent revictimisation happening through court proceedings.⁸⁹

While penal theory gives an insight into why some feminists want to abolish prison while others want more criminalisation, it does not fully explain their different strategies. When

⁸⁰ *ibid* 324.

⁸¹ Barbara Hudson, ‘Restorative Justice and Gendered Violence: Diversion or Effective Justice?’ (2002) 42(3) *The British Journal of Criminology* 616, 627 ff.

⁸² *ibid* 627.

⁸³ *ibid* 626.

⁸⁴ *ibid* 629.

⁸⁵ Loosely translating Claus Roxin, *Strafrecht, Allgemeiner Teil Band 1, Grundlagen, der Aufbau der Verbrechenslehre* (4th edn, C. H. Beck 2006) 71.

⁸⁶ Chloë Taylor (n 2) 41; Nicolas Carrier, Justin Piché and Kevin Walby (n 71) 324.

⁸⁷ See also Chloë Taylor (n 2) 29, abstract; Anna Terwiel (n 46) 421, 430.

⁸⁸ For reform efforts see Lise Gotell (n 3) 59.

⁸⁹ Judith Lewis Herman, ‘Justice from the Victim’s Perspective’ (2005) 11(5) *Violence Against Women* 571, 574. For further sources see Caitlin P. Carroll, ‘Accessing Rights and Mitigating Revictimization: The Role of the Victim’s Legal Counsel in the Swedish Criminal Justice System’ (2022) 28(1) *Violence Against Women* 255, 256.

feminists of both movements think that gendered violence is bad, why do not all feminists think that this is a sufficient legitimisation for imprisonment? This is discussed in the following.

4. Gendered violence

The key difference between these movements might be the definition of the very problem they want to solve. While all feminists think that gendered violence is bad, they base their strategies on different understandings of such. First, there is the concept of violence. By aiming to reform law, feminist criminal law reformists adopt the lens of crime: gendered violence becomes an independent action by individuals. Prison-abolition feminism, however, addresses gendered violence also as structural violence, for example, by including a critique of state violence.⁹⁰ This is directly connected with feminist strategy. When gendered violence is seen within the very institution of prison, it is part of the problem of gendered violence, rather than a response to such.

Secondly, efforts to reform criminal law only focus on the perspective of specific survivors. Of course, theoretically, reforms such as broadening the legal understanding of consent make the criminal justice system more accessible for all survivors. But abolitionists point out that, due to discrimination, such efforts do not really improve the situation of many survivors.⁹¹ Those who are especially affected by police violence might not be able to use the criminal justice system to support their situation, no matter to what degree the violence is acknowledged in law and how survivors are treated in court. Also, these reforms do not take into account obstacles such as imprisonment of the survivor⁹² or the privilege of the perpetrator⁹³—the ‘advantages’ a perpetrator has or receives because they belong or seem to belong to certain ‘social groups.’⁹⁴ Indeed, reforming sexual assault law did not lead to rising

⁹⁰ Angela Y. Davis (n 1) 111.

⁹¹ Chloë Taylor (n 15) 95; Chloë Taylor (n 2) 42; India Thusi (n 15) 2450.

⁹² Angela Y. Davis (n 1) 77 ff.

⁹³ For privilege as e.g. famously in the extreme case of Harvey Weinstein see BBC1 London, ‘Weinstein: The Inside Story’ (9 PM, 1 March 2018)

<<https://learningonscreen.ac.uk/ondemand/index.php/prog/10C54B77?bcast=126215524>> accessed 13 November 2020.

⁹⁴ Office of Pluralism and Leadership, ‘Introduction to Power, Privilege, and Social Justice’ (*Dartmouth*) <<https://students.dartmouth.edu/opal/education/introduction-power-privilege-and-social-justice>> accessed 20

rates of police reporting and can even be accompanied by significantly dropping conviction rates.⁹⁵ Thus, efforts by reform feminism focus *de facto* on improving the situation of survivors who are in most regards privileged, fit narratives of “ideal victims”⁹⁶ and experienced rape deemed “real”⁹⁷—thus, especially of those, who already have access to tools of criminal law and want to use them. From a perspective which takes not only *gender*-based discrimination into account this is often not an option.

The difference between feminists trying to reform criminal law and feminist prison abolitionists is the scope of violence they take into account or rather ignore. This is not a coincidence: feminist prison abolitionists were and are especially intersectional feminists.⁹⁸ The term intersectionality was coined by Kimberlé Crenshaw. It points out that thinking about discrimination of women only in terms of *gender* leaves out women who are marginalised in more than one respect as well as the specific experiences of these intersections.⁹⁹ A similar concept criticises ‘gender essentialism’, the assumption that women would be a homogenous group with similar experiences and problems.¹⁰⁰ Many feminist prison abolitionists and carceral feminism critics draw on intersectionality or rather the critique of gender essentialism.¹⁰¹ And it is women of colour, who lead feminist criticisms of criminalisation.¹⁰² The founding of the network INCITE! Women and Trans People of Color Against Violence in 2000¹⁰³ caused ‘once-hegemonic feminist anti-violence demands for criminalisation ... [to lose] ground.’¹⁰⁴ Because taking intersectionality seriously means to ‘change ... existing priorities.’¹⁰⁵

March 2022; see also Allan Johnson, ‘Privilege, Power, Difference, and Us’ in Michael S. Kimmel and Abby L. Ferber (eds), *Privilege: A Reader* (4th edn, Routledge 2017) 73.

⁹⁵ Holly Johnson (n 10) 613ff; for reforms and conviction rates in Germany see Ulrike Lembke, ‘„Vergeblische Gesetzgebung“. Die Reform des Sexualstrafrechts 1997/1998 als Jahrhundertprojekt und ihr Scheitern in und an der sog. Rechtswirklichkeit’ (2014) 1 Zeitschrift für Rechtssoziologie 223, Zusammenfassung.

⁹⁶ Monika Edgren (n 112) 65; Barbara Hudson (n 81) 624ff.; Holly Johnson (n 10) 625 and 622ff.

⁹⁷ Holly Johnson (n 10) 622.

⁹⁸ Chloë Taylor (n 2) 45, Anna Terwiel (n 46) 424 ff; Mimi E. Kim (n 52) 223 ff; India Thusi (n 15) 2449 ff.

⁹⁹ Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1 University of Chicago Legal Forum 139, 140, 166.

¹⁰⁰ Angela P. Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 Stan L Rev 581, 585.

¹⁰¹ Chloë Taylor (n 2) 45, Anna Terwiel (n 46) 424 ff; Mimi E. Kim (n 52) 223 ff; India Thusi (n 15) 2449 ff.

¹⁰² Sarah Tyson (n 16) 216; see for example Angela Y. Davis (n 1).

¹⁰³ INCITE!, ‘Abolition Feminism: Celebrating 20 years of INCITE!’ (28 April 2020) <<https://incite-national.org/2020/04/28/abolition-feminism-celebrating-20-years-of-incite-2/>> accessed 14 March 2022.

¹⁰⁴ Kimberlé Crenshaw (n 99) 225.

¹⁰⁵ India Thusi (n 15) 2484.

The contrasting concepts of reform feminists and feminist prison abolitionists lead to a different view of prison abolition. A narrower definition of gendered violence suggests that prison can indeed improve the situation, at least for in most regards privileged survivors under certain circumstances. Also, prison appears then as an appropriate tool for retribution.

An intersectional understanding that also includes structures of violence, however, highlights that prison abolition would not really change the situation of (potential) survivors of sexual violence for the worse in the overwhelming majority of cases. By far most perpetrators are not reported, sentenced, and imprisoned.¹⁰⁶ On the contrary, as pointed out above, prison abolition would be a direct relief for incarcerated survivors of gendered violence, and remove a place of toxic masculinity and rape culture. Furthermore, imprisoning some individuals does not appear as sufficient retribution, when the problem is seen, for example, in this society.¹⁰⁷ No matter how many offenders are locked up, patriarchy never will be. Thus, processes like transformative justice may be understood as a more appropriate tool for retribution. This understanding of gendered violence makes prison abolition an indispensable debate, both because of consequentialist and retributivist aims. And it points us to the things we can do regarding gendered violence other than engaging in punitive politics.¹⁰⁸

However, prison abolition is inconceivable for most people. So, it may be worth asking how this violence is conceptualised in other contexts besides feminist disputes.

II. Criminal courts

When we ask how criminal law depicts gendered violence, we may first consider the law in statutes and precedents. However, substantial criminal law may only be one of many ways by which criminal courts exclude or ignore certain narratives or aspects of gendered violence. This part looks at tendencies, or rather procedures by which criminal courts draw certain pictures of gendered violence and how this impacts the notion of prison abolition.

¹⁰⁶ Holly Johnson (n 90) 613ff.

¹⁰⁷ See for a discussion of ‘the “dangerous few”’ Nicolas Carrier, Justin Piché and Kevin Walby (n 71) 326.

¹⁰⁸ See e.g. Angela Y. Davis (n 1) 108; (for problems other than not enough imprisonment) Chloë Taylor (n 2) 29, 45.

A. Gendered violence as a crime

The depiction of gendered violence in criminal courts may be heavily influenced by exclusions and ignorance of knowledge, which goes beyond the reduction of gendered violence by substantial law. These processes may construct such violence in a narrow and specific way, making prison abolition inconceivable within the sphere of criminal justice.

1. Unequal or neutral?

As already noted, compared to their frequency, instances of reported and prosecuted gendered-violence cases are very few, and may not equally represent survivors of such violence. Furthermore, certain perspectives are less likely to be taken seriously in court.¹⁰⁹ It is nothing new, that women who were raped are often not believed.¹¹⁰ This is also the case in criminal courts.¹¹¹ For example, when it appears in court that a woman had at least some degree of sexual agency, she is ‘likely not ... seen as vulnerable enough to have been raped.’¹¹² And when a court *does* see her as vulnerable—as “damaged”—she is ‘presented as unable to accurately understand what had happened’, thus not believed.¹¹³ These problems do not start in court. That the police do not further investigate a case can be traced back to a notion of the female survivor as not ‘respectable’ and is ‘significantly more likely’ when the suspect is *white*.¹¹⁴

However, rules of criminal law (no matter which discrimination they may contain) appear by their mostly general formulations to be at least *applied* equally and in every case—may the survivor be very marginalised, the perpetrator very privileged, etc. This belief in equal application may also be held by many judges, as this narrow scope appears to be reality when

¹⁰⁹ Carol Smart (n 69) 164; Olivia Smith, ‘Narratives, Credibility and Adversarial Justice in English and Welsh Rape Trials’ in Ulrika Andersson and others (eds), *Rape Narratives in Motion* (Palgrave Macmillan 2019) 71ff.

¹¹⁰ Nicola Gavey, ‘The Persistence of a Masculine Point of View in Public Narratives About Rape’ in Ulrika Andersson and others (eds), *Rape Narratives in Motion* (Palgrave Macmillan 2019) 249.

¹¹¹ Holly Johnson (n 90) 626 and 634.

¹¹² Nicola Gavey (n 110) 250 (referring to Monika Edgren); Monika Edgren, ‘Conditional Vulnerability: Rape Narratives in Swedish Courts, 1990–2014’ in Ulrika Andersson and others (eds), *Rape Narratives in Motion* (Palgrave Macmillan 2019) 43ff.

¹¹³ Olivia Smith (n 109) 78.

¹¹⁴ Katrin Hohl and Elisabeth A. Stanko (n 19) 336; see for the uneven effects of rape myths also Holly Johnson (n 10) 625ff.

‘textbooks on ... criminology and criminal justice’¹¹⁵ ‘still reinforce the notion that ... [w]hite women are victims, [while w]omen of colour remain invisible.’¹¹⁶ Textbooks imparts such notions both via images and text—for example, ‘women[, African Americans, Hispanics and Native Americans] historically were excluded from “mainstream” criminology *as authors and subjects*.’¹¹⁷

Key to the belief in equal application are the judgements’ claims of neutrality¹¹⁸ and truth.¹¹⁹ Michel Foucault, who is among others a famous prison abolitionist, argued that by ‘claiming scientificity’, science devalues ‘other knowledges’ and claims truth.¹²⁰ Carol Smart employs this analyses on law.¹²¹ Law, too, ‘claims to have the method to establish the truth.’¹²² This includes not only what is lawful and what is not but ‘non-legal issues’¹²³ as well—for instance, by defining what happened when people were harmed. The claim is supported by the notion of law as ‘unified.’¹²⁴ While law is in fact not unified, it appears so because the term ‘law’ is used ‘in the singular.’¹²⁵

Thus, truth claims of criminal law overshadow marginalisation happening in legal practice, allowing constructions of social reality by the criminal justice system to appear neutral.

2. Problems of what’s deemed ‘relevant’ and the focus on punishment

The fact that criminal law only takes certain facts into account is often described as ‘decontextualising.’¹²⁶ But the term ‘decontextualisation’ implies a dichotomy between ‘what

¹¹⁵ Helen M. Eigenberg and Seong min Park, ‘Marginalization and Invisibility of Women of Color: A Content Analysis of Race and Gender Images in Introductory Criminal Justice and Criminology Texts’ (2016) 6(3) *Race and Justice* 257, 258.

¹¹⁶ *ibid* 257.

¹¹⁷ *ibid* 259 with further sources, emphasis added; see also J. Mitchell Miller, Richard A. Wright and Michelle M. Smith, “‘Mostly Male and American’: The Reporting of Women and Crime Scholarship in Introductory Criminology Textbooks’ (2000) 13(3) *The Justice Professional* 233.

¹¹⁸ Carol Smart (n 69) 21.

¹¹⁹ *ibid* 10 ff.

¹²⁰ *ibid* 9; see also Roxani Krystalli, ‘Narrating Violence: Feminist Dilemmas and Approaches’ in Laura J. Shepherd (ed), *Handbook on Gender and Violence* (Edward Elgar Publishing 2019) 173.

¹²¹ Carol Smart (n 69) 9.

¹²² *ibid* 10.

¹²³ *ibid* 13.

¹²⁴ *ibid* 4.

¹²⁵ *ibid* 4.

¹²⁶ See e.g. Wade Mansell, *A Critical Introduction to Law* (4th edn, Routledge 2015) 16; Lise Gotell (n 3) 63.

happened' and its 'contexts.' This division allows to understand 'context' such as misogyny as something merely related, maybe even as irrelevant appendix. But when a man who was rejected by a woman inflicts harm on her, misogyny is *part* of the violence which happened, not something separate. Furthermore, as feminist critics of substantial criminal law show,¹²⁷ the decision about what is taken into account concerns not only 'context' but the very matter of criminal offences. Hence, criminal law is here criticised not for decontextualising, but for what it considers relevant.

The level at which criminal courts decide which facts are relevant goes beyond which aspects of whose life are taken into account. The leading questions are not, for example, what circumstances caused the harm. This is because terms of reference are already broadly defined by the goal internal to criminal courts: to decide whether and how, according to the law, individuals should be sentenced. Its starting point is its solution, i.e., if tools of punishment can be applied, rather than an investigation into the problem itself. Thus, criminal courts depict the latter in a very narrow way.

This punitive purpose of criminal trials is deeply entangled with an 'inherently antagonistic and defensive structure',¹²⁸ which is 'often diametrically opposed to [the wishes and needs of victims].'¹²⁹ Survivors' needs include validation, vindication, an apology, safety, and accountability.¹³⁰

But 'criminal justice processes sideline, silence, disempower, and doubt accounts of rape victimisation.'¹³¹ Judith Lewis Herman—who is among others a clinical professor of psychiatry at Harvard Medical School—argues that 'if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.'¹³² A setting which is about punishment makes a presumption of innocence necessary, when the punishment of innocent people is to be prevented. However, as the quite low

¹²⁷ See e.g. Lise Gotell (n 3) 59.

¹²⁸ Chloë Taylor (n 2) 41.

¹²⁹ Judith Lewis Herman (n 89) 571, 574; see also Anastasia Powell, 'Seeking Informal Justice Online: Vigilantism, Activism, and Resisting a Rape Culture in Cyberspace' in Anastasia Powell, Nicola Henry, and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave MacMillan 2015) 227ff.

¹³⁰ Judith Lewis Herman (n 89) 585-596; see also Anastasia Powell (n 129) 227ff.

¹³¹ Anastasia Powell (n 129) 228.

¹³² Judith Lewis Herman (n 89) 574.

conviction rate suggests,¹³³ it is quite difficult to prove sexual violence.¹³⁴ Regarding no other criminal incident are complainants 'forced to endure the level of skepticism and outright bias that greet women who report sexual assault.'¹³⁵ The legitimization of punishment makes it also necessary to make clear before the violence happens that it may be punished, i.e. to create and apply criminal offences. The application of these criminal offences implies that the survivor's memory, needs and wishes only count as far as they are confirmed by court. Moreover, criminal courts punish people who committed the same offence more or less similarly, restricting opportunities for 'individual' consequences which are considered by survivors as 'more meaningful.'¹³⁶ Because of the problems punitive settings bring with them, 'restorative approaches [may] offer some opportunities to better meet survivors' justice interests.'¹³⁷ The focus on punishment appears often to be the very problem, rather than a useful tool against sexual violence.

3. Individualisation, othering and embodiment

As suggested above, criminal law implies that injustices exist only in terms of individual fault. Structures and societal circumstances cannot be liable, going hand in hand with violence being 'generally understood in law as something that is committed between autonomously acting individuals.'¹³⁸ By putting people away, the criminal justice system implies that *they* are the problem¹³⁹ and contain all the evil.¹⁴⁰ Thus, complex problems are reduced to individual action and responsibility, while structural or institutional violence¹⁴¹ and societal responsibility are essentially undiscussed in criminal courts.

¹³³ Holly Johnson (n 90) 632.

¹³⁴ See regarding rape Chloë Taylor (n 15) 6.

¹³⁵ Holly Johnson (n 90) 626.

¹³⁶ Clare McGlynn, Julia Downes and Nicole Westmarland (n 76) 9.

¹³⁷ Clare McGlynn, Julia Downes and Nicole Westmarland (n 76) 8 ff.

¹³⁸ Vickie Cooper and David Whyte, 'Grenfell, Austerity, and Institutional Violence' (2018) 27(1) *Sociological Research Online* 1, 2 <<https://journals.sagepub.com/doi/abs/10.1177/1360780418800066?journalCode=sroa>> last access 20 January 2021.

¹³⁹ Paraphrasing Rehzi Mahlzahn, 'You Can't Reform That Shit.' (*Talk at the remote Chaos experience #rC3*, 28 December 2020, 5:30 to 6:54 PM Central European Time Zone) <<https://streaming.media.ccc.de/rc3/chaostrawler>> accessed 28 December 2020, 5:30 to 6:54 PM Central European Time Zone.

¹⁴⁰ Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009) 214ff; Lee Lakeman (n 47) 51.

¹⁴¹ See e.g. Vickie Cooper and David Whyte (n 138) 2 and 4.

This allows the punishment of some individuals to appear as a solution. An example: Harvey Weinstein's conduct¹⁴² caused international outrage.¹⁴³ However, it is not enough to imprison him and some others to end sexual violence in the film industry. It is also necessary to deal with the conditions which still fail to prevent or even enable this to happen. But when just convicted sex offenders are the problem, all others, the film industry, and society in general must be good.

This good/evil distinction impacts what kind of response is considered appropriate for sex offenders. The evilness and 'moral abjectness' ascribed to them makes rehabilitation seem pointless and is a crucial legitimization of retribution and penalisation.¹⁴⁴ Because they are assumed to be evil they seem to be inevitably violent—whereby incapacitation and retribution appear to be convincing responses.

However, sexual violence is not embodied by all sex offenders equally. Discrimination plays an important role—for example, as pointed out above, of Black people. By putting forward individualisation and at least to some extent a distinction between good and evil, criminal courts support narratives which make Black mass-incarceration seem convincing. This may be fundamentally different for transformative justice processes, drawing less on good/evil narratives.

That people are understood as the embodiment of a certain trait or role can happen also regarding survivors.¹⁴⁵ Then, those whose assault is known and believed through a judgement are depicted as nothing but victims, while all others are thought not to have survived violence. This is a convenient excuse to avoid thinking about how to create a supporting environment—despite all statistics, it could not have been expected that someone might have such

¹⁴² See e.g. BBC1 London (n 93).

¹⁴³ Maya Salam, 'One Year After #MeToo, Examining a Collective Awakening' (*New York Times*, 5 October 2018) <<https://www.nytimes.com/2018/10/05/us/me-too-movement-women.html?searchResultPosition=7>> accessed 16 March 2022; Vanessa Steinmetz, 'Ein Jahr #MeToo: Was wurde aus ... Harvey Weinstein?' (*Spiegel*, 8 October 2018) <<https://www.spiegel.de/panorama/gesellschaft/ein-jahr-metoo-was-wurde-aus-harvey-weinstein-a-1231827.html>> accessed 16 March 2022.

¹⁴⁴ Loïc Wacquant (n 140) 214; Kristin Bumiller, 'Feminist Collaboration with the State in Response to Sexual Violence: Lessons from the American Experience' in Aili Mari Tripp, Myra Marx Ferree and Christina Ewig (eds), *Gender, Violence, and Human Security: Critical Feminist Perspectives* (New York University Press 2013) 203 ff.

¹⁴⁵ Kristin Bumiller (n 144).

experiences. Survivors in trials, in turn, are expected to be broken and ‘accepting a victimized rather than an empowered identity.’¹⁴⁶

Criminal courts depict gendered violence as a crime of some individuals (when acknowledged at all), facilitating the *othering* of both victim and offender: they are expected to embody the presumed aspects of being a victim/offender to relieve (the rest of) “us” of them. This fosters narratives of gendered violence which hamper facing the problem: violence which is about more than individual behaviour and which is by far not only experienced by the ‘ideal victim’¹⁴⁷ and done by “the other.”

B. Impacts on the notion of prison sentences

So, what do criminal courts have to do with the inconceivability of prison abolition? Obviously, the fact that they inflict imprisonment goes hand in hand with a claim that this would be a proper response to gendered violence. But what role does the depiction of the problem play in this claim?

The criminal justice system narrates gendered violence in a way, which makes punishment and the criminal justice system the logical answer. Instead of asking how gendered violence could be prevented, or what the survivors want and then searching for a solution, criminal courts construct social reality in the form of crimes that are connected with certain forms of punishment.¹⁴⁸ Rather than developing solutions, criminal courts develop depictions of gendered violence that match their toolkit of responses. Within the sphere of the criminal justice system, gendered violence can only be understood in terms of offenders and convictions. By ignoring aspects deemed not relevant for convictions as well as by acquittal and lack of lawsuit problems going beyond this (such as unheard cases or structural problems) are denied. When gendered violence exists only in terms of convicts, criminal courts and punishment seem to be a complete solution. The fact that this violence still exists after all this time can then be explained with the simple reason that not all criminals are yet caught, or that

¹⁴⁶ Barbara Hudson (n 81) 624.

¹⁴⁷ Monika Edgren (n 112) 65; see also Chloë Taylor (n 2) 37.

¹⁴⁸ Wade Mansell (n 126) 16 ff.

they would not be punished enough, turning more policing or higher punishments into the only logical solutions. Differently to tackling gendered violence itself, this punitive 'solutionism'¹⁴⁹ allows rapid results which can be easily shown as evidence of taking gendered violence 'seriously.'¹⁵⁰ However, the proposed methods are more aptly described as reactions than "solutions" and are themselves problematic.¹⁵¹

Also, criminal courts give the impression that prison sentences would be a sufficient way to acknowledge and avenge the seriousness of the harm caused. After all, they are the most severe form of punishment in jurisdictions without the death penalty. That criminal courts punish in fact only quite few offenders and even more not broader causes like patriarchy, is overshadowed by general legal formulations, claims of objectivity and neutrality,¹⁵² and the narration of gendered violence as crime.

Furthermore, the legal construction of the problem of gendered violence makes prison appear to be a compelling tool for prevention. Reducing gendered violence to the conduct of some individuals and denying societal responsibility allows us to think about prevention in terms of the behaviour of some individuals only. And differently to other forms of punishment, such as fines or hours of community service, prison claims to be able to use more kinds of prevention, depending on its configuration.¹⁵³ It may be used not just to discourage others from committing crime, or 'reform offenders'¹⁵⁴ but would also (in jurisdictions without the death penalty) offer by far the most direct "protection" for those not imprisoned.

However, the "protection" promised by prisons means only preventing direct bodily harm which could be caused by those convicted to people outside prison during imprisonment. Prison does not challenge 'the social and economic disadvantage experienced by women and their dependents' which 'caus[es] and [is] created by sexual violence.'¹⁵⁵ It does not challenge

¹⁴⁹ Evgeny Morozov, *To Save Everything, Click Here: Technology, Solutionism, and the Urge to Fix Problems that Don't Exist* (Allen Lane 2013) 5 ff, 9; for a discussion regarding law reform see Carol Smart (n 69) 161, 165.

¹⁵⁰ Anna Terwiel (n 46) 421, 422.

¹⁵¹ For problems of 'punitive state policies' see *ibid* 422, 425.

¹⁵² Regarding legal method see Carol Smart (n 69) 21; see also Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20 *Feminist Legal Studies* 135, 138.

¹⁵³ Regarding different configurations see e.g. Angela Y. Davis (n 1) 49 ff.

¹⁵⁴ Anastasia Chamberlen and Henrique Carvalho (n 1) 2.

¹⁵⁵ Kristin Bumiller (n 144) 205 ff.

the circumstances which make people vulnerable to violence.¹⁵⁶ It does not take into account that imprisonment has (at least also) negative effects on ‘the families of those incarcerated’¹⁵⁷ and may (further) destabilise their communities.¹⁵⁸ This ignorance of aspects beyond “dangerous individuals” is fostered by criminal court proceedings, which focus mainly on the aspect of direct bodily harm and treat it like something that happens out of nothing.

Hence, criminal lawsuits produce a construct of gendered violence which has as its corollary—in jurisdictions without the death penalty—a form of punishment based on locking up certain individuals.

III. Significance of problem conceptualisations

The discussion of feminist scholarship and criminal courts has shown how their conceptualisations of gendered violence impact views of prison. But, does a broader and more profound understanding necessarily lead to the idea of abolitionism? Does it not rather highlight the need for even *more* criminal justice reforms? Certainly, it is possible through reforms to enable police, courts, and prisons to deal with gendered violence in a broader and more adequate way than current practice.

However, an understanding of gendered violence that includes intersectional perspectives and structural problems shakes the hope of sufficient reform.¹⁵⁹ Reforms try to fix errors. But gendered violence in prison appears to be less as an error than it is a *result* of the institution. The same is true for the exclusion of survivor perspectives and broader understandings of gendered violence in criminal courts. However, this does not at all mean that criminal law reforms are pointless. Rather, it shows the need to pursue alternative strategies as well.

¹⁵⁶ See also Chloë Taylor (n 2) 29, 45.

¹⁵⁷ Sarah Tyson (n 16) 215.

¹⁵⁸ Todd R. Clear and others, ‘Coercive mobility and crime: A preliminary examination of concentrated incarceration and social disorganization’ (2003) 20(1) *Justice Quarterly* 33, 55ff.

¹⁵⁹ Hope is implied e.g. by ‘the promise of prison reform’, Anastasia Chamberlen and Henrique Carvalho (n 1) 1; regarding criminal law reform see Asher Flynn, ‘Sexual Violence and Innovative Responses to Justice: Interrupting the “Recognisable” Narrative’ in Anastasia Powell, Nicola Henry, and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave MacMillan 2015) 96; Carol Smart (n 69) 160 ff.

The setting of a discussion makes a crucial difference. Criminal law reformists usually need to accept the narration of gendered violence as a crime and the authority of criminal courts to state what happened and how it should be dealt with it in order to pursue their goals.¹⁶⁰ This leaves out broader understandings of gendered violence and other ways than traditional punishment to deal with it. Prison abolitionists, however, often engage with alternatives to criminal courts and traditional punishment. This allows them to point to the limits and problems of prison.

Conclusion

As this paper has shown, it is certain narratives of gendered violence that make prison seem necessary for prevention or retribution, not prison's ability to address gendered violence. The depiction of gendered violence is crucial, as it can both make prison appear inevitable, and make prison abolition an indispensable debate. While criminal courts draw a picture leading to the former notion, prison-abolition feminism creates a notion leading to the latter. This is because they conceptualise gendered violence by different processes and have different goals.

Criminal courts want to find out if an individual can be punished. Therefore, they examine gendered violence only within a narrow framework of individual action and responsibility, making individual punishments appear a sufficient answer to complex problems. By treating gendered violence as something that happens out of nothing, incapacitating certain individuals appears the most effective form of prevention and sufficient for retribution. Critique of prison or diverging needs of survivors are deemed irrelevant. These legal truth claims can be quite powerful because of the general formulations of the law and because notions of objectivity are attached to court findings.

Prison-abolition feminism, however, draws from the motive of ending gendered violence—including racist and state violence. They conceptualise it through intersectional perspectives and take structural aspects into account. This allows an understanding of the limits of prison sentences, the harm they cause, and how their structures foster gendered violence. Thus,

¹⁶⁰ See also Carol Smart (n 69) 5.

prison reforms appear deficient. And we are cautioned against understanding and taking on gendered violence through the lens of punitive politics.

When it comes to the discussion of the criminal justice system, feminist movements are mostly analysed in terms of their suggested solutions. So, reform feminism is heavily criticised as ‘carceral feminism’¹⁶¹ rather than as, for example, individualising or ‘gender essentialism.’¹⁶² However, inspired by intersectional theory, this work took another approach by turning to the *problem* feminist movements want to solve. This proved to be fruitful because, as other literature indicates,¹⁶³ it is in fact the definition of the problem which leads to different feminist strategies of criminal law reforms and prison abolitionism.

¹⁶¹ See e.g. Elizabeth Bernstein (n 40); Sarah Tyson (n 16) 211 ff; Chloë Taylor (n 2) 29ff; Lise Gotell (n 3) 53.

¹⁶² For gender essentialism see Angela P. Harris (n 100) 585.

¹⁶³ Angela Y. Davis (n 39) 47; Chloë Taylor (n 2) 45; Anna Terwiel (n 46) 424 ff; India Thusi (n 15) 2449 ff.