

**The Elusive Pursuit of Justice: Sexual Assault Survivors Speak  
About Redress in the Aftermath of Violence**

Tamera Burnett

A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN  
PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN LAW  
OSGOODE HALL LAW SCHOOL  
YORK UNIVERSITY  
TORONTO, ONTARIO

November 2022

© Tamera Burnett, 2022

## Abstract

The struggle of survivors to obtain justice after they have been sexually assaulted has been a much discussed topic in recent years. Significant attention and resources are being directed towards this issue, making academic research particularly valuable at this time. However, instead of asking how legal processes can theoretically be made better, as is the case in most of the literature on this topic, my focus has been on asking why survivors want to engage in a legal process at all. What do they get from reporting their assaults and does what the legal system offers them respond to what survivors are looking for from justice? This project starts this conversation by asking survivors what they think justice *should be* in the aftermath of a sexual assault.

Using feminist standpoint epistemology and grounded theory, I interviewed sixteen survivors and seven lawyers to explore what justice means for survivors in the aftermath of an assault. From the data, I identified four major themes including: harms and healing, accountability, punishment, and restorative justice. I found that survivors were not satisfied with the justice they could obtain under criminal law. They stated that it was difficult, financially and emotionally, to engage in criminal proceedings that were unlikely to resolve in a way that made them feel as if justice was done. While other forms of legal justice are also available, survivors often found these to be inaccessible as well, or they were unaware of the existence of these alternative options.

The survivors I spoke with imagined an expansive ideal of justice. To most of the women I interviewed with, justice involved the prevention of future violence, something they did not think the legal system was currently equipped to deal with. They were curious, though conflicted, about restorative models, but appreciated their focus on attempting to reform offender behaviour. They also stressed the importance of being supported in their attempts to recover from sexual assault, highlighting that financial compensation was crucial for any survivor to heal.

## **Dedication**

*For all those who have experienced sexual violence, especially those who shared their stories with me. May a better future be born from your struggles and efforts.*

## Acknowledgements

There is no one who deserves more gratitude from me than my supervisor, Janet Mosher. I am entirely confident in saying that she is the Platonic ideal of what a PhD supervisor should be. Kind and gentle, but utterly brilliant and generous with carefully considered advice, Janet has been a key force in shaping both this dissertation and also my growth as an academic. I consider myself exceptionally lucky to have been able to work with such an outstanding woman. Thank you so much!

I recently stumbled across a Tweet claiming that the love language of academics is constructive criticism. I immediately thought of Sonia Lawrence and Lisa Dufraimont, the other members of my supervisory committee. In my entire academic career, I have never had anyone engage with my work so thoroughly and thoughtfully (other than Janet, of course) than these two women. Throughout my dissertation process, they have been quick to offer very attentive reviews of my work and I am endlessly grateful for the time and kindness that they have shown me.

I was also fortunate to have an excellent oral defence committee with Janet Mosher and Sonia Lawrence as representatives from my supervisory committee; Kate Sutherland as chair; Amber Gazso as Outside Member; and Elaine Brooke-Craig as External Examiner. All of them were wonderfully supportive of my work as they probed at my research and engaged me in a very thoughtful conversation about my dissertation. I had been very anxious about my oral defence, but the experience was fantastic and offered me plenty of guidance for future scholarship. Thank you so much for making the defence enjoyable and useful!

I also appreciated the guidance of Ruth Buchanan and Kate Sutherland during my foray into law and literature. I had never thought about combining my love of speculative fiction and legal scholarship, and I am so grateful for your help in my exploration of this new way of understanding legal issues.

I want to thank Shelley Kierstead as well for being a fantastic boss and mentor throughout the years I was a lecturer for Legal Processes. I learned so much about teaching and perhaps more about legal citation than anyone ever wanted to know!

I am also incredibly grateful for the financial support I have received throughout my PhD program. I was fortunate enough to be awarded the Mary Jane Mossman Award, the Ontario Graduate Scholarship, and the Sydney Peck Graduate Law Scholarship throughout my degree.

In the past several years, I was lucky enough to work alongside some brilliant up-and-coming scholars who I am proud to call my friends. I want to give a heartfelt thank you to Odelia Bay, Mandi Gray, Ian Stedman, Giuseppe “Bob” Tarantino, Julie Falck, and Aviv Gaon. All of these people were a joy to work with, from fruitful academic discussions to commiserating about the highs and lows of PhD life. Thank you all so much for enriching my time at York, encouraging me, and just generally being awesome folk!

Finally, there are plenty of people outside of academia who have helped me along this years-long path of scholarship. My friends and family have been constant sources of support and reminders to occasionally surface from beneath the stacks of reading in my office. In particular, I want to thank my absolutely wonderful partner and spouse, Vince. Thank you so much for making sure I actually eat when I get too hyper-focused on work and posting cute little messages of praise and encouragement around the house. I will never stop being grateful that you moved all around the country without complaint as I followed my passion. Without you, I would have never gotten this far, and I love you endlessly for how much you have done to help and inspire me to keep going despite the many challenges life has thrown our way.

# Table of Contents

<b>Abstract.....</b>	<b>ii</b>
<b>Dedication .....</b>	<b>iii</b>
<b>Acknowledgements .....</b>	<b>iv</b>
<b>Table of Contents .....</b>	<b>vi</b>
<b>Chapter 1: Introduction .....</b>	<b>1</b>
1.1    The Justice Needs/Interests of Survivors .....	9
1.2    Dissertation Overview .....	31
<b>Chapter 2: Theoretical Frameworks: Feminism and Intersectionality .....</b>	<b>34</b>
2.1    Introduction.....	34
2.2    Feminist Thought on Sexual Assault .....	34
2.2.1    A Very Brief Definition of Feminism.....	34
2.2.2    The Radical/Liberal Divide.....	35
2.2.3    The Causes of Sexual Assault.....	37
2.2.4    Sex, Gender, and Violence: How Definitions of What/Who Men and Women Are Impact Sexual Assault Theory .....	39
2.3    Intersectionality and Anti-Essentialism .....	45
2.3.1    Critiques Against Carceral Feminism.....	50
2.4    Conclusion .....	53
<b>Chapter 3: Defining Sexual Assault: Statistical Evidence, Legal Definitions, and Formal Processes .....</b>	<b>54</b>
3.1    The Numbers Game: What Do Statistics Reveal About this Offence? .....	55

3.2	Provisions and Jurisprudence: Sexual Assault Under Canadian Law .....	60
3.3	Primer of Canadian Sentencing Law in Sexual Assault Cases .....	65
3.4	Sexual Assault in the Legal System: A Complex Roadmap for Survivors.....	78
3.4.1	The Justice Gap: Attrition Rates for Sexual Assault Cases .....	79
3.4.2	Alternatives to Criminal Trials .....	83
3.4.2.1	Civil Suits.....	83
3.4.2.2	Criminal Injuries Compensation Board .....	90
3.4.2.3	Other Potential Legal Processes.....	92
3.4.2.4	Restorative Justice .....	97
3.4.2.5	Transformative Justice .....	108
3.5	Concluding Thoughts on Statistics, Legal Frameworks, and Sexual Assault .....	113
<b>Chapter 4: Methodology.....</b>		<b>114</b>
4.1	Feminist Standpoint Epistemology.....	114
4.2	Interviews with Lawyers and Survivors: Seeking to Understand a Standpoint.....	120
4.2.1	Reflexivity.....	125
4.2.2	Recruitment Process.....	128
4.2.3	Inclusion and Exclusion Criteria.....	131
4.2.4	Interview Process .....	134
4.2.5	Resulting Sample .....	136
4.3	Coding the Data with Grounded Theory.....	141
4.3.1	Understanding the Coding Process .....	143
4.3.2	Implementing the Coding Process .....	145
4.4	Conclusion .....	148

<b><i>Interlude #1</i></b> .....	<b>149</b>
<b>Chapter 5: Harms and Healing</b> .....	<b>152</b>
5.1 Introduction.....	152
5.2 Harms of Sexual Assault.....	153
5.2.1 Medical Harms.....	153
5.2.2 Financial Harms .....	156
5.2.3 Legal System Trauma .....	158
5.2.4 The Compounding Nature of Harm .....	161
5.3 Categories of Healing .....	165
5.3.1 Agency and Power .....	166
5.3.1.1 Personal Sense of Control.....	166
5.3.1.2 The Necessity of Having Choices.....	169
5.3.1.3 Agency and Process Concerns .....	172
5.3.1.3.1 Timing.....	172
5.3.1.3.2 Independent Legal Advice .....	174
5.3.1.3.3 Trial and Investigative Processes .....	180
5.3.1.4 Ability to Speak Freely and Authentically.....	182
5.3.2 Validation.....	190
5.3.2.1 Validation from the Legal System .....	190
5.3.2.2 Validation from the Offender.....	194
5.3.3 Community and State Support .....	197
5.3.3.1 Community Support.....	197
5.3.3.2 Healthcare .....	199



5.3.4	Compensation .....	202
5.4	Conclusion .....	212
<b><i>Interlude #2</i> .....</b>		<b>214</b>
<b>Chapter 6: Accountability .....</b>		<b>216</b>
6.1	Introduction.....	216
6.2	Accountability Requires Behaviour Change.....	217
6.2.1	Behaviour Change Requires Admission of Responsibility.....	218
6.3	Accountability Requires Education .....	222
6.3.1	Of the Offender .....	222
6.3.2	Of Society .....	226
6.4	Accountability Requires Protection .....	230
6.4.1	Survivor Perceptions of their Own Accountability to Protect Others.....	230
6.4.2	Monitoring the Offender .....	232
6.5	Accountability Requires Social Condemnation .....	237
6.5.1	Public Naming and/or Shaming .....	238
6.6	Conclusion .....	241
<b><i>Interlude #3</i> .....</b>		<b>243</b>
<b>Chapter 7: Punishment and Incarceration.....</b>		<b>245</b>
7.1	Introduction.....	245
7.2	Survivor Perceptions on Punishment and Incarceration .....	246
7.2.1	Incarceration: A Necessary Evil or No Other Option? .....	246
7.2.2	Length of Sentences: Confusion, Dismay, and Outrage .....	252
7.2.3	Punishment and Offender Typologies .....	259

7.2.4	Contending with Anger.....	261
7.3	Beyond Incarceration: Other Forms of Punishment .....	263
7.3.1	Restitution.....	263
7.3.2	Employment Restrictions.....	268
7.4	Conclusion .....	270
<b><i>Interlude #4</i> .....</b>		<b>272</b>
<b>Chapter 8: Restorative Justice.....</b>		<b>274</b>
8.1	Introduction.....	274
8.2	Backlash against Incarceration: The Rise of Prison Abolitionism .....	275
8.3	Survivor Perceptions about Restorative Processes .....	280
8.3.1	Agency: Survivor-led and Emotional Labour Aware .....	281
8.3.2	Accountability and Restorative Justice .....	284
8.3.2.1	The Challenges of Offender Participation .....	284
8.3.2.2	The Dangers of Unequal Power Dynamics.....	289
8.3.3	The Need for Consequences .....	295
8.4	The Complex Nature of Community in Restorative Processes .....	301
8.5	Conclusion .....	310
<b>Chapter 9: Conclusion.....</b>		<b>312</b>
9.1	Summary of Key Findings .....	312
9.2	Next Steps: Some Modest Recommendations .....	319
9.2.1	Improve Offender Education and Rehabilitation Opportunities.....	320
9.2.2	Expand Restorative and Transformative Offerings .....	325
9.2.2.1	Indigenous Perspectives on Restorative Justice.....	330

9.2.3	Increase Access to Compensation.....	337
9.2.4	Provide Comprehensive Support and Coordination for Survivors .....	343
9.3	Future Research Possibilities and Current Contributions .....	345
9.4	Conclusion .....	349
<b>Bibliography .....</b>		<b>352</b>
<b>Appendix: Interview Materials and Documentation .....</b>		<b>405</b>
A.	Interview Guide: Survivors.....	405
B.	Interview Guide: Lawyers .....	413
C.	Recruitment Letter to Lawyers.....	416
D.	Recruitment Letter to Survivors.....	418
E.	Recruitment Flyer .....	420
F.	Consent Form: Survivors.....	421
G.	Consent Form: Lawyers .....	424
H.	Demographic Forms.....	427
I.	Support Services for Sexual Assault Survivors Handout .....	429

## Chapter 1: Introduction

Sexual assault is a serious and prevalent crime in Canada. In fact, it remains the only violent crime in this country for which the rate of victimisation has remained the same or increased since 1999.<sup>1</sup> In 2019, over 940,000 people living in Canada were sexually assaulted.<sup>2</sup> However, only a fraction of these assaults are reported to the police every year and fewer still are brought before the courts.<sup>3</sup> While not every crime is brought to the attention of the state and perfect conviction rates do not exist (nor should they), the disparity between how sexual assault is handled by the criminal courts—from police investigations to convictions—when compared to other violent crimes is troubling.<sup>4</sup> Given that criminal law represents one of the few state-sanctioned methods of achieving legal justice, these discrepancies are concerning for both the individuals affected by this offence and society as a whole. Furthermore, these issues are mirrored in many other areas of the legal system as well.

Law reform and public dialogue about sexual assault law have been sporadic and piecemeal throughout the years.<sup>5</sup> While the bulk of successful legal reform in this area occurred

---

<sup>1</sup> Samuel Perreault, “Criminal Victimization in Canada, 2014” (23 November 2015), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14241-eng.pdf>> at 5 [Perreault]. See also: “Incident-Based Crime Statistics, By Detailed Violations, Canada, Provinces, Territories and Census Metropolitan Areas” (4 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/t1/tb1/en/tv.action?pid=3510017701&pickMembers%5B0%5D=1.16&pickMembers%5B1%5D=2.16>>; Greg Moreau et al, “Police- Reported Crime Statistics in Canada, 2019” (29 October 2020), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00010-eng.htm>> [Moreau 2020].

<sup>2</sup> Adam Cotter, “Criminal Victimization in Canada, 2019” (25 August 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00014-eng.pdf?st=vHYqo7iG>> at 28 [Cotter 2021].

<sup>3</sup> Perreault, *supra* note 1 at 30. See also: Shana Conroy & Adam Cotter, “Self-Reported Sexual Assault in Canada, 2014” (11 July 2017), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>> [Conroy & Cotter]. According to Conroy and Cotter, over 80% of sexual assaults are not reported to the police.

<sup>4</sup> See Chapter 3 for a discussion of comparative statistics between sexual assault and other violent crimes.

<sup>5</sup> Janine Benedet, “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution” (2014-2015) 52 *Alta L Rev* 127; Lise Gotell, “Reassessing the Place of Criminal Law Reform in the

during the 1980s and the 1990s within the criminal system, it was not until the 2010s that this offence once again captured public attention in a very concentrated and sustained manner on both a national and global scale. In 2011, a worldwide movement called “SlutWalk” was born because of an incident in Toronto where a police officer, while speaking about crime prevention and safety to York University students, advised women to avoid “dressing like sluts”.<sup>6</sup> Protest walks were organised with the intent of pushing back against the idea that women are ever responsible for their own sexual assault. Around the same time, a sexual assault case in Winnipeg gained national attention when it became public that Justice Dewar made several inappropriate comments during the trial that implied that the complainant in this case encouraged the crime with her clothing and behaviour.<sup>7</sup> Public outrage ignited in Canada, and the resulting protest movement spilled over to other nations around the world in response.<sup>8</sup>

Shortly after, in 2014, Jian Ghomeshi, a famous Canadian broadcaster, was terminated from his job at the Canadian Broadcasting Corporation and subsequently criminally charged with sexual assault involving some of his female colleagues and other women in the broadcasting

---

Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism” in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 53 [Gotell 2015].

<sup>6</sup> “Toronto ‘Slut Walk’ Takes to City Streets” (3 April 2011), *CBC News*, online:

<<https://www.cbc.ca/news/canada/toronto/toronto-slut-walk-takes-to-city-streets-1.1087854>>.

<sup>7</sup> “Manitoba Judge Rebuked for Sex Assault Remarks” (9 November 2011), *CBC News*, online:

<<https://www.cbc.ca/news/canada/manitoba/manitoba-judge-rebuked-for-sex-assault-remarks-1.1099355>>;

“Canadian Judicial Council Completes its Review of Complaints Made Against Justice Robert Dewar” (9 November 2011), *Canadian Judicial Council*, online: <<https://cjc-ccm.ca/en/news/canadian-judicial-council-completes-its-review-complaints-made-against-justice-robert-dewar>> [CJC Dewar].

<sup>8</sup> Joetta L Carr, “The SlutWalk Movement: A Study in Transnational Feminist Activism” (2018) 4 *Journal of Feminist Scholarship* 24; Kaitlynn Mendes, *SlutWalk: Feminism, Activism and Media* (New York: Palgrave Macmillan, 2015); Jessica Valenti, “Slut Walks and the Future of Feminism” (3 June 2011), *Washington Post*, online: <[https://www.washingtonpost.com/opinions/slutwalks-and-the-future-of-feminism/2011/06/01/AGjB9LIH\\_story.html](https://www.washingtonpost.com/opinions/slutwalks-and-the-future-of-feminism/2011/06/01/AGjB9LIH_story.html)>.

field.<sup>9</sup> This case inundated the Canadian media for months, provoking substantial controversy about the fairness of sexual assault trials for survivors.<sup>10</sup> During the same time period, an unrelated incident involving another Canadian judge came to light. An official complaint was submitted to the Canadian Judicial Council over Justice Camp's use of discriminatory assumptions and language during a sexual assault proceeding and in his written decision.<sup>11</sup> Then, starting in 2015, Mustafa Ururyar was charged and eventually convicted of sexual assault. The complainant in this case, Mandi Gray, engaged in a substantial amount of activism during this time to inform the Canadian public of the difficulties survivors face in sexual assault trials, particularly the psychological and financial costs of the aftermath of rape and pursuit of justice for this crime.<sup>12</sup>

---

<sup>9</sup> For more detail, see: Kevin Donovan, *Secret Life: The Jian Ghomeshi Investigation* (Fredericton: Goose Lane Editions, 2016) [Donovan].

<sup>10</sup> From a feminist perspective, one must acknowledge the power of language in shaping the dialogue about sexual assault. In particular, the words used to describe women who have been sexually assaulted convey important implications about this type of violence. In this dissertation, the terminology I use most frequently to describe those who have experienced sexual assault is "survivor" as this word focuses on the resilience and strength of the person who was hurt. To call someone a "victim," on the other hand, can imply that said person is powerlessness and passive. I will employ this term primarily when referring to sources that use it, such as statistical data, or when survivors refer to themselves this way. "Complainant" is used when discussing court processes to describe the person in a trial who has alleged that the accused has harmed her. For a more fulsome look at the feminist debate over language, please see the following articles: Amy Leisenring, "Confronting 'Victim' Discourses: The Identity Work of Battered Women" (2006) 29:3 *Interaction* 307; Anne McLeer, "Saving the Victim: Recuperating the Language of the Victim and Reassessing Global Feminism" (1998) 13:1 *Hypatia* 41; Norma Jean Profitt, "Battered Women' as 'Victims' and 'Survivors': Creating Space for Resistance" (1996) 13:1 *Canadian Social Work Review* 23; Kaitlin M Boyle & Jody Clay-Warner, "Shameful 'Victims' and Angry 'Survivors': Emotion, Mental Health, and Labelling Sexual Assault" (2018) 33:3 *Violence and Victims* 436; Kaitlin M Boyle & Kimberly B Rogers, "Beyond the Rape 'Victim'-'Survivor' Binary: How Race, Gender, and Identity Processes Interact to Shape Distress" (2020) 35:2 *Sociological Forum* 323.

<sup>11</sup> Alice Wooley et al, "Canadian Judicial Council Complaint RE Justice Camp" (9 November 2015), online: <<http://s3.documentcloud.org/documents/2510250/cjc-complaint-r-camp.pdf>> [CJC Camp].

<sup>12</sup> "Slut or Nut: Diary of a Rape Trial", online: <<https://www.slutornut.ca/>>; Manisha Krishnan, "Women Being Sued for Making Sex Assault Allegations Are Crowdfunding Their Defence" (24 September 2020), *Vice*, online: <<https://www.vice.com/en/article/pkyndm/women-being-sued-for-making-sex-assault-allegations-are-crowdfunding-their-defence>>; Hillary Di Menna, "Lessons in Navigating Rape Culture with Mandi Gray" (17 August 2017), *Torontoist*, online: <<https://torontoist.com/2017/08/lessons-navigating-rape-culture-mandi-gray/>>; Jane Doe, "The 'Rapenomics' of Sexual Assault" (22 March 2017), *Now Magazine*, online: <<https://nowtoronto.com/news/the-rapenomics-of-sexual-assault>>; Alanna Evans, "How Much Does Sexual Assault Cost Survivors? Mandi Gray Did the Math" (21 March 2017), *Flare*, online: <<https://www.flare.com/news/mandi->

In 2017, sexual assault cemented itself as a global conversation with the launch of the hashtag “#MeToo” on Twitter. The Me Too movement was originally started in 2006 by Tarana Burke,<sup>13</sup> but it went viral as a result of a tweet from the actress Alyssa Milano which called on women to tweet #MeToo in order to show the world the magnitude of sexual assault.<sup>14</sup> This dialogue was largely in response to the allegations levied against Harvey Weinstein that year,<sup>15</sup> sparking an international movement aimed at showcasing the realities of sexual assault and working towards a world in which such behaviour would not be tolerated.

Consequently, the struggles of survivors to obtain justice after they have been assaulted has been an important and much discussed topic in recent years,<sup>16</sup> and the state of Canadian sexual assault law and related legal processes is once again being questioned and examined by both governments and the public. Attention and resources are being directed towards this issue,

---

[gray-interview/](#)>; The Canadian Press, “Mandi Gray, York University Reach Settlement in Human Rights Case” (12 December 2016), *CBC News*, online: <<https://www.cbc.ca/news/canada/toronto/yorku-gray-settlement-1.3892705>>; Diana Mehta, “York U Student to Use Mediation to Raise Issues With University Sexual Violence Policy” (9 November 2016), *Global News*, online: <<https://globalnews.ca/news/3057518/york-u-student-to-use-mediation-to-raise-issues-with-university-sexual-violence-policy/>>.

<sup>13</sup> “Tarana Burke: Founder”, *me too*, online: <<https://metoomvmt.org/get-to-know-us/tarana-burke-founder/>>; Sandra E Garcia, “The Woman Who Created #MeToo Long Before Hashtags” (20 October 2017), *The New York Times*, online: <<https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>>.

<sup>14</sup> Alyssa Milano, “If you’re been sexually harassed or assaulted write ‘me too’ as a reply to this tweet” (15 October 2017 at 4:21pm), online: <[https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976)>; Nadja Sayej, “Alyssa Milano on the #MeToo Movement: ‘We’re Not Going to Stand for It Any More’” (1 December 2017), *The Guardian*, online: <<https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse>>.

<sup>15</sup> “Harvey Weinstein Timeline: How the Scandal Unfolded” (29 May 2020), *BBC News*, online: <<https://www.bbc.com/news/entertainment-arts-41594672>>; Jodi Kantor & Megan Twohey, “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades” (5 October 2017), *The New York Times*, online: <<https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>>.

<sup>16</sup> Several other controversies involving sexual assault arose in this time period as well. See: Jane Doe, “Lessons in Rape Culture From the Many Trials of Mandi Gray” (29 July 2017), *Now Toronto*, online: <<https://nowtoronto.com/news/mandi-gray-rape-case/>>; Robyn Doolittle, “Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless” (3 February 2017), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/>> [Doolittle 1]; Robyn Doolittle, “Nova Scotia Judge Under Fire For Claiming ‘A Drunk Can Consent’ in Sex-Assault Case” (23 March 2017), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/national/nova-scotia-judge-taxi-driver-sex-assault-case/article34184036/>>.

making academic research particularly valued and needed at this time. However, there are many directions one can take when trying to unravel the issues surrounding the legal system's treatment of sexual assault. Much of the literature on sexual assault focuses on problems within the investigatory and trial processes of the criminal realm, ignoring other legal domains entirely. I, on the other hand, have long been interested in how survivors feel about the results of their interactions with the legal system, regardless of whether they chose to engage with a civil or criminal process. Instead of asking how the law overall or specific legal processes can be made better, my focus has been on asking why survivors should want to bring their assault to the attention of the legal system at all. What do they get from reporting their assaults and does what the legal system offers respond to what survivors are looking for from justice?

This approach first led me to interrogate the concept of sentencing. Traditionally, sentencing is meant to bring resolution to a criminal case. The court speaks directly to the effects of what happened and what the consequences should be. The complainant is also given an opportunity to speak about the harm that occurred to her outside of the constrictive bounds of examination and cross-examination, and these comments can be considered by the court in determining the sentence. Thus, those impacted by crime are encouraged to bring incidents of violence forward so that repercussions can be levied against those who hurt others, hopefully ensuring that society is safer overall as a consequence of denunciation, deterrence, and in appropriate cases, periods of incapacitation due to incarceration.

Little of the literature on sexual assault deals with the details of sentencing in this area. For my master's thesis, I analysed how aggravating and mitigating factors were being used in



sexual assault decisions.<sup>17</sup> I was inspired by research that showed how sexual assault sentences were often disproportionately lenient in comparison to how these offences should be treated given their levels of violence and I wanted to understand why this was happening.<sup>18</sup> As a result of my work, I discovered that the harms of this offence were often minimised in sentencing decisions, and that rape myths and discriminatory stereotypes were being reinserted into the jurisprudence. My initial response to this problem was to recommend that judges issue harsher sentences. However, there is a large body of literature wherein scholars, particularly racialised authors, have questioned whether incarceration and punitive sentences actually help to minimise future criminal behaviour, especially in a system that dedicates few resources to rehabilitation.<sup>19</sup>

I began to explore different mechanisms of justice, specifically, restorative and transformative justice. Research on the use of restorative sentencing processes in sexual assault cases suggests that these approaches are not a panacea for all of the problems arising in this area of law and there is scant academic literature on the practical realities of transformative justice. While there are many benefits to these alternative approaches to justice, including greater involvement for the survivor, many of the problems that plague the traditional criminal law system are replicated in these novel methods, such as survivors feeling pressured to accept

---

<sup>17</sup> See: Tamera Burnett, *Subtle Expressions of Gender Inequality: Exploring the Application of Aggravating and Mitigating Factors in Sentencing Decisions for Sexual Assault Cases* (LLM Thesis, University of British Columbia, 2014) [unpublished] [Burnett].

<sup>18</sup> Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15 CJWL 305 at 315-316, 327-328 [Du Mont 2003]. "Disproportionately lenient" refers to how low sentences are in comparison to the level of violence that actually occurred. In the *Criminal Code*, sexual assault provisions are related to the severity of violence that occurs during an attack. As Du Mont shows, the vast majority of sexual assaults are under-charged and under-sentenced when one compares the facts of the case to the categories of sexual assault set out in the *Code*, illustrating how the sentencing process contributes to the trivialisation of this offence. See further discussion of this issue in Chapter 3.

<sup>19</sup> See Chapter 8 for a discussion about the efficacy of the criminal law system, particularly as articulated by racialised authors who point to the disproportionately devastating impacts the criminal law system has on marginalised communities, especially in regard to Indigenous Peoples.

solutions that do not address their needs.<sup>20</sup> Furthermore, there are significant gaps in the scholarship on how to ensure that restorative and transformative processes can deal with systemic discrimination, such as sexism or racism, in a way that offers improvement over what already occurs in the traditional legal system.

As I noted above, I realised that the literature tended to focus almost exclusively on sexual assault through a criminal law lens. While there is some discussion of civil trials and sexual assault by scholars, this type of violence is not often identified as something that implicates many areas of the legal system. I was curious about issues such as survivor perspectives on financial compensation and medical needs that were not adequately addressed by looking at civil case law.

Given the paucity of literature in this area, it is impossible to address all of these questions without extensive new empirical research. However, my project aims to start this conversation and help fill a significant gap in the scholarship by asking survivors what they think justice *should be* in the aftermath of a sexual assault. Instead of trying to determine what type of legal process is theoretically better, I want to understand what it is that survivors actually want and/or need when they seek justice through the legal system. What goals do they have in mind when they report their assaults to various authorities, and does the legal system help them achieve these aims?

It should be noted that I use words such as “want”, “need”, “desire” and “interests” interchangeably throughout this dissertation given the fact that survivors themselves often conflated these ideas when I spoke with them, or identified aims differently depending on where

---

<sup>20</sup> This is a repeated theme that will be explored throughout this dissertation.

they were in their pursuit of justice. I am not attempting to delineate which concerns should be considered a want versus a need, but to explore the complicated desires of the women I interviewed and point to some of the commonalities and divergences among their experiences. As such, I do not rank the importance of any of these needs or suggest that all of them must be fulfilled in order for justice to prevail. This dissertation is focused on expanding the dialogue about what justice means to survivors, not finding definitive solutions as to how to incorporate these perspectives into the legal system and balance them with the many other competing interests that arise in sexual assault law. Other scholars also use these terms differently, so it is important to acknowledge the broad meaning I apply to these concepts as a result of my interviews.

Within a feminist framework, the perspectives of women must be at the centre of any analysis of sexual violence.<sup>21</sup> As women are the people most affected by the harms of sexual assault, feminist scholarship must attend to how the legal system can ensure that the diversity of women's needs and interests are being adequately addressed. This is not to suggest that the voices of women, as varied as they are, should be the only ones considered when dealing with sexual assault, but as women's needs and interests are frequently not met by the legal system, they deserve concentrated attention and effort to counteract this problem.

In order to work towards this goal, we must first know *what it is that women want from the legal system*. Thus, for my dissertation I have interviewed women-identified survivors and the lawyers that represent them about what they think justice should look like in the aftermath of

---

<sup>21</sup> Gender and sex are complicated concepts that I address in Chapter 2. In this dissertation, my focus was on women, not because trans, non-binary, or male perspectives are not equally important in this research, but because of limitations in my access to different populations and my ability to draw conclusions from a small sample of people. These choices are discussed in detail in Chapter 4.

a sexual assault, from the processes and outcomes, to how these desires shape(d) their experience of the legal processes they engage(d) in.

### **1.1 The Justice Needs/Interests of Survivors**

I described above the circuitous route I took while developing my research question, and I must now situate how this project fits within the existing scholarship. I found Kristen Luker's "bedraggled daisy" approach to reviewing literature useful in determining how my work fits within what other scholars have done and what unique contributions I am making with my dissertation. Luker points out that scholarship often exists at the intersection of several different topics, forming a diagram that looks like a flower with the subject of your project creating the centre of the plant and the surrounding petals encompassing the various fields that help make sense of the work.<sup>22</sup> Academic questions are rarely so simple that one can look at a single area of literature in order to find an answer. My question deals with several areas of law, feminist theory, critical race theory, sociological and psychological theories, and specific methodological considerations. Trying to canvass all of the academic work available on every facet of my dissertation would not only be an impossible task, but it would prevent me from focusing on the exact question that I want to understand.

In the end, I found the centre of my daisy within the literature discussing the justice needs/interests of survivors, an area that touches on many different topics, but is focused on the perspective of a specific group of people on one aspect of law. In this space, scholars are asking questions about what justice is for survivors of sexual assault not from a theoretical perspective,

---

<sup>22</sup> Kristin Luker, *Salsa Dancing Into the Social Sciences: Research in an Age of Info-Glut* (Cambridge, Massachusetts: Harvard University Press, 2008) at 81-83.

but from a desire to understand and help fulfil the practical needs and wants of women who have been sexually assaulted. As per Clare McGlynn and Nicole Westmarland,

Only when we appreciate, and then act on, how victim-survivors themselves conceptualize justice will we begin to address the failings of current approaches and—most importantly—be able to envision new ways of securing justice.<sup>23</sup>

The law is meant to serve many different people, yet often does not meet the needs of survivors or even understand them. In fact, survivor needs and perspectives are often framed negatively by society and the courts as a way of dismissing or trivialising them. Judith Herman points out that,

[the] victim's passionate indignation is commonly viewed as a disruptive force, disturbing the peace of the community that is called on to redress the victim's wrongs. Sympathy for the victim's plight tends to dissipate quickly, whereas the victim's memory is long. The victim's unrequited demand for justice can easily become an embarrassment to the community. It is so much more convenient if the victim can only be persuaded to "forgive and forget".<sup>24</sup>

It is a rape myth<sup>25</sup> to assume that most women must be lying about being sexually assaulted,<sup>26</sup> but society as a whole is so uncomfortable with the subject that it is easier to ignore and/or

---

<sup>23</sup> Clare McGlynn & Nicole Westmarland, "Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice" (2019) 28:2 Soc & Leg Stud 179 at 180 [McGlynn & Westmarland].

<sup>24</sup> Judith L Herman, "Justice from the Victim's Perspective" (2005) 11:5 Violence Against Women 571 at 576 [Herman].

<sup>25</sup> A rape myth is an incorrect, stereotypical assumption about sexual assault based on inaccurate information and faulty reasoning. Justice L'Heureux-Dubé described rape myths in her dissent in *Seaboyer* as a series of wrongful suppositions that limited what could be considered a true assault based on the parties and circumstances involved:

The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e. who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. (*R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193 [Seaboyer].)

While this was the first modern discussion of the issue in Canadian jurisprudence, the courts have continued to comment on stereotypes and myths in sexual assault trials. For example, the recent case *R v JC*, 2021 ONCA 131 summarises the current legal rules against stereotyping. Leading decisions from Canadian courts have strongly cemented the need to combat the use of rape myths, though the issue "continues to linger in the legal landscape like a fungus" (*R v AE*, 2021 ABCA 172 at para 153). Some common rape myths include the belief that women

trivialise the problem than it is to actually deal with it directly. Thus, when survivors need support and validation, they encounter a system that often exacerbates their trauma and harm and offers few remedies that help in their attempt to obtain justice. As I detail more fully later in this dissertation, the women I interviewed continually stressed that they felt stuck in a legal system that was not intended for their types of problems.

Trials are designed to test the credibility of complainants, but it seems that sexual assault complainants face far harsher scrutiny than victims of other crimes.<sup>27</sup> Herman argues that we do not trust survivors to want anything other than vengeance and we limit their participation and voice in order to dampen the influence of their anger and rage.<sup>28</sup> Yet, as Kathleen Daly explains, survivors generally have a much broader perspective on their assault than what is assumed.<sup>29</sup> The

---

consistently lie about sexual assault or that sexual assaults are always committed by dangerous strangers rather than people known to one another. The function of a rape myth is to minimise and trivialise the offence. Blame is shifted from the perpetrator to the victim, or the assault is reframed as not a crime at all. For more contemporary examples, see: Bonnie Stabile et al, “‘She Lied’: Social Construction, Rape Myth Prevalence in Social Media, and Sexual Assault Policy” (2019) 2:2 *Sexuality, Gender & Policy* 80 [Stabile]; Olivia Smith & Tina Skinner, “How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials” (2017) 26:4 *Soc & Leg Stud* 441 [Smith & Skinner]; Jennifer Koshan, “The Criminalisation of Marital Rape and Law Reform in Canada: A Modest Feminist Success Story in Combatting Marital Rape Myths” in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada* (London: Hart Publishing, 2017) 139 [Koshan]; Eliana Suarez & Tahany M Gadalla, “Stop Blaming the Victim: A Meta-Analysis on Rape Myths” (2010) 25:11 *Journal of Interpersonal Violence* 2010 [Suarez & Gadalla].

<sup>26</sup> Eryn Nicole O’Neal, “‘Victim is Not Credible’: The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants” (2019) 36:1 *Justice Quarterly* 127; Kathryn R Klement et al, “Accusers Lie and Other Myths: Rape Myth Acceptance Predicts Judgments Made About Accusers and Accused Perpetrators in a Rape Case” (2019) 81 *Sex Roles* 16; Dana A Weiser, “Confronting Myths About Sexual Assault: A Feminist Analysis of the False Report Literature” (2017) 66:1 *Family Relations: Interdisciplinary Journal of Applied Family Science* 46; Liz Kelly, “The (In)credible Words of Women: False Allegations in European Rape Research” (2010) 16:12 *Violence Against Women* 1345; Joanne Belknap, “Rape: Too Hard to Report and Too Easy to Discredit Victims” (2010) 16:12 *Violence Against Women* 1335.

<sup>27</sup> Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal/Toronto: McGill-Queen’s University Press, 2018) [Craig 2018]; Holly Johnson, “Why Doesn’t She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police” (2017) 29:1 *CJWL* 36 [Johnson 2017]; David M Tanovich, “Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases” (2013-2014) 45 *Ottawa L Rev* 495 [Tanovich].

<sup>28</sup> Herman, *supra* note 24 at 577. See also: McGlynn & Westmarland, *supra* note 23 at 182.

<sup>29</sup> Kathleen Daly, “Sexual Violence and Victims’ Justice Interests” in Estelle Zinsstag & Marie Keenan, eds, *Sexual Violence and Restorative Justice: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 108 at 109 [Daly 2017].

survivors I spoke with wanted so much more than revenge; they wanted, for example, social changes to make their communities safer and better places for everyone. Consequently, for a fully inclusive justice, the perspectives of survivors must be included in how justice in the context of sexual assault is understood. As Herman suggests, we must “explore the question of what justice might look like if victims were the protagonists, rather than peripheral actors, in the dialectic of criminal law.”<sup>30</sup>

Another important lesson coming from this area of study is that law and justice should not be conflated. Leigh Goodmark, while discussing intimate partner abuse, states that,

...the person defining justice is usually not the person subjected to abuse, but rather an actor within the legal system—a police officer, a prosecutor, an advocate, or a judge—and those individuals define justice in terms of what the legal system has to offer. People subjected to abuse may conceive of justice quite differently, however, in ways that the legal system is not well suited to address.<sup>31</sup>

In order to answer the question of what survivors believe justice should entail, it is important to remember that what is generally conceived of as justice by non-survivors may not be adequate. It is easy from the perspective of a person trained in law, like myself, to limit one’s ideas of what justice should and can include, but these assumptions need to be put aside in order to truly understand what survivors think and want.<sup>32</sup> Justice, after all, is not a concept found in the aether,

---

<sup>30</sup> Herman, *supra* note 24 at 579.

<sup>31</sup> Leigh Goodmark, “‘Law and Justice Are Not Always the Same’: Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse” (2015) 42:3 Fla St U L Rev 707 at 708 [Goodmark 2015].

<sup>32</sup> Robin West argues that lawyers are trained to be “amoralists” and exit law school “as graduates ready to sell their services as a hired gun to the highest bidder, skeptical of either the existence or the objectivity of right and wrong or good and bad”. Though individuals may enter law school with a personal sense of what justice entails, legal education focuses too much on doctrine and theoretical ideas other than those involving students’ social conscience. Consequently, it is exceptionally important as a researcher who has undergone legal training to reorient my mind away from what I have been taught to think about justice and instead listen with an open mind to what survivors think about this subject even though it is not going to mirror what I supposedly “know”. Robin L West, *Teaching Law: Justice, Politics, and the Demands of Professionalism* (Cambridge: Cambridge University Press, 2013) at 43-44.

but is something purposely created based on societal needs.<sup>33</sup> It is not immutable, and should be seen as a living concept that can adapt and change to the needs of the people it is meant to serve.

Herman also delves into this conversation of justice and law in the context of gender-based violence. She argues that,

[t]he wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings. Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience. Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation between a complaining witness and the accused. Indeed, 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.<sup>34</sup>

The legal system, particularly within the criminal law domain, has been designed in such a way as to make it extremely difficult for survivors to navigate and achieve any sense of justice. For example, while there are crucial safeguards built into our system to protect the rights of the accused, this does not mean that survivors must accept a reality where only a few of them will be successful when it comes to obtaining remedies. Instead, what survivors want when it comes to justice must be considered when determining how to improve the various systems that they interact with after an assault. It is entirely possible that the rights of an accused person can be protected and a survivor can have better access to justice in the same system if we approach the problem innovatively. For a legal system to truly serve a diverse and multi-faceted population, it

---

<sup>33</sup> Goodmark 2015, *supra* note 31.

<sup>34</sup> Herman, *supra* note 24 at 574.



must be able to respond to a variety of needs and not simply offer uniform processes and outcomes to everyone, regardless of context.

Understanding justice then requires seeing justice as a complex project that will shift and change depending on the situation and people involved. Every person who engages the legal system will have their own desires, needs, and interests that they are trying to meet. Every sexual assault occurs in different circumstances and must be responded to in a way that respects the actual people involved. Unfortunately, in the current system, justice tends to be seen as “a linear, one-directional process”.<sup>35</sup> When a wrong occurs, the victim must report it to the authorities so that an investigation can be carried out that may (or may not) lead to a criminal trial and potentially a conviction. While there are more legal options than this available, the idea of a criminal trial as the appropriate response to any crime is hegemonic in its powerful hold over our collective consciousness.<sup>36</sup> Most of the women that I interviewed spoke about how they thought the police and criminal courts were their only options in the aftermath of an assault. They did not feel as if they had a choice beyond either reporting or not reporting their assault to police.

Justice through the criminal model is also an all-or-nothing proposition. The conclusion of a trial either ends with a conviction or with no legal response at all. If imprisonment for the offender is not what the survivor wants, then she may not see reporting her assault as necessary or even desirable as incarceration is the often the most expected result of a conviction (though not invariably the outcome).

---

<sup>35</sup> McGlynn & Westmarland, *supra* note 23 at 180.

<sup>36</sup> *Ibid* at 181. See also: Haley Clark, “A Fair Way to Go: Justice for Victim-Survivors of Sexual Violence” in Anastasia Powell et al, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 18 at 19 [Clark 2015].

McGlynn and Westmarland suggest a new definition for justice in the context of sexual assault. They coined the term “kaleidoscopic justice” which is,

...a continually shifting pattern, constantly refracted through new circumstances and understandings. The variety of patterning resonates with victim-survivors’ sense that justice is not linear, but has multiple beginnings and possible endings. Justice is complex, nuanced and a difficult to (pre)determine feeling. Justice is a lived, ongoing and ever-evolving experience and process, rather than an ending or result.<sup>37</sup>

Justice cannot be linear as a survivor’s perspectives and needs will shift as time goes on. Any system of justice must be able to contend with this fluidity rather than simply trying to force all situations into the confines of one model. Furthermore, kaleidoscopic justice goes beyond the individual and embraces a more social conception of justice. It is,

felt through a myriad of often small, cumulative and interconnected events and responses, across families, communities, criminal justice agencies and public or state authorities. A sense of justice may begin to be felt when women begin to experience freedom to live their lives, to regain a sense of power.<sup>38</sup>

From the perspective of a survivor, justice often means more than—or indeed, something other than—the conviction of a single individual; for many, it requires that they be able to feel safe in their community again and to know that others are not at risk as well. This is a multi-faceted justice that includes more than just the survivor and accused. It frames sexual assault as a systemic—not an individual—issue. It is a justice that adapts to the parties involved and the circumstances they find themselves in, understanding that the event did not occur within a cultural vacuum, nor can it be solved with just the application of criminal law. Kaleidoscopic justice does not require every survivor follow the same standard paths currently offered by our legal system. It embraces complexity and plurality in response to sexual assault.

---

<sup>37</sup> *Ibid* at 186.

<sup>38</sup> *Ibid* at 196.

Similar to McGlynn and Westerland, Daly and Robin Holder use the term “sequencing justice” to describe the way that survivors of domestic violence experience justice.<sup>39</sup> They stress that justice cannot be seen as something static:

What women as victims of domestic violence want from criminal justice has long interested researchers and advocates. Yet women’s preferences are often analysed and understood as competing choices, that is, between a substantive outcome *or* procedural justice, between conventional *or* restorative justice, and between private *or* public justice amongst others. The key problem is that evidence on this question is gathered at a single point in time. The desires for justice are more complex, in part, because they unfold over time and in different socio-legal contexts. To understand ‘what women want’ from criminal justice is better captured with a prospective longitudinal design.<sup>40</sup>

A survivor’s sense of what justice is will change over time depending on what goals she has or has not already achieved. What she may want or need right after being assaulted will not be the same as what she wants or needs five years after being harmed. Justice, therefore, is obtained in a series of steps instead of from one, singular process. The content of these steps will change depending on the survivor, as well as the timing and order of when they occur.

Both kaleidoscopic and sequencing justice compel us to rethink the options we offer survivors after being sexually assaulted. But what should justice encompass? This is another contentious debate within the literature as the possibilities of what justice can include are quite broad. Mary Koss argues that it is important to separate out survival needs from the legal needs that a survivor may have.<sup>41</sup> To her, survival needs include issues such as health (physical and

---

<sup>39</sup> Domestic violence and sexual assault, though unique topics, often overlap and share commonalities in the theories and understandings that apply to them. Sexual assault is often part of domestic violence as the primary perpetrators of sexual assault are people that the survivor knows, trusts, and often lives with. Survivors of both types of violence also face many of the same difficulties in having their stories validated and believed by the legal system.

<sup>40</sup> Robyn L Holder & Kathleen Daly, “Sequencing Justice: A Longitudinal Study of Justice Goals of Domestic Violence Victims” (2018) 58 *British Journal of Criminology* 787 at 787 [Holder & Daly].

<sup>41</sup> Mary P Koss, “Restoring Rape Survivors: Justice, Advocacy, and a Call to Action” (2006) 1087 *Annals New York Academy of Science* 206 at 208-209 [Koss 2006].

mental), income, education, and immigration.<sup>42</sup> While these needs are crucial to the survivor, she claims they are not necessarily directly connected to the offender and criminal law cannot respond to them.<sup>43</sup> Daly agrees with this sentiment and points to what she sees as a conflation of justice and therapeutic interests.<sup>44</sup> The well-being of a survivor is an important consideration, but Daly argues that psychological well-being is a different interest than a justice interest.<sup>45</sup> She frames survivors in the legal system as citizens who are protecting or defending their legal rights.<sup>46</sup> These are political and social interests separate from personal feelings. For example, while it is important that the legal system respects individuals and their right to have breaches of the law considered, this does not mean that a legal process will or should make someone feel “good”.

On the other hand, there is also a body of literature speaking specifically on the importance of therapeutic jurisprudence. David Wexler argues that the way that law is applied can have positive or negative therapeutic effects, and, whenever possible, legal actors should endeavour to structure legal processes in a way that contributes to positive psychological and behavioural outcomes.<sup>47</sup> Therapeutic jurisprudence suggests not that the courts become therapists

---

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Kathleen Daly, “Reconceptualizing Sexual Victimization and Justice” in Inge Vanfraechem et al, eds, *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (New York: Routledge, 2014) 378 at 388 [Daly 2014].

<sup>45</sup> Daly uses the concept of justice interests rather than needs as she wishes to signify “a political relationship that victims, as citizens, have in pursuing justice in the aftermath of a crime”. Daly 2017, *supra* note 29 at 114.

<sup>46</sup> Daly 2014, *supra* note 44 at 388; Daly 2017, *ibid.*

<sup>47</sup> David Wexler, “Therapeutic Jurisprudence: An Overview” (2000) 17 *Thomas M Cooley L Rev* 125 at 125-126 [Wexler 2000]; David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Durham: Carolina Academic Press, 1993). See also: Lauren Bennet Cattaneo & Lisa A Goodman, “Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims” (2009) 25:3 *Journal of Interpersonal Violence* 481; Carolyn Copps Hartley, “A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials” (2003) 9:4 *Violence Against Women* 410; Bruce J Winick, “Applying the Law Therapeutically in Domestic Violence Cases” (2000) 69 *UMKC L*

to victims and offenders, but that, when possible, legal processes should be conducted in a manner that recognises the humanity of the individuals involved.<sup>48</sup> Consequently, while “feeling good” is not necessarily an attainable goal, proponents of therapeutic justice believe that the legal system should not unnecessarily cause emotional and psychological distress when other options are available.

Another area of literature that deserves mention is that of procedural justice. Similar to therapeutic jurisprudence, procedural justice looks beyond the outcomes provided by legal processes and considers how the process is conducted and whether it supports the dignity of the people involved.<sup>49</sup> This framework focuses on issues such as participation, respect, and the trustworthiness of decision-makers, and argues that procedures can matter more than outcomes.<sup>50</sup> Some aspects of procedural justice are supported by the justice needs literature, particularly those involving issues such as fairness and participation.

The content of justice within academic literature is still under significant debate, though many of the theorists I cite in this dissertation concur with Daly and Koss’ concerns over including too much in the way of non-legal matters. For the purposes of my work, however, I

---

Rev 33; James McGuire, “Can the Criminal Law Ever Be Therapeutic?” (2000) 18:4 Behavioral Sciences & the Law 413 [McGuire].

<sup>48</sup> *Ibid.* There is much overlap between the literature discussing therapeutic jurisprudence and restorative justice as both methods attempt to resolve legal problems with a greater focus on the human emotions underlying the problems being dealt with. See also: Jessica Traguetto & Tomas de Aquino Guimaraes, “Therapeutic Jurisprudence and Restorative Justice in the United States: The Process of Institutionalisation and the Roles of Judges” (2019) 63:11 International Journal Of Offender Therapy and Comparative Criminology 1971; Elizabeth M Gresson, “Restorative Justice in Criminal Offending: Models, Approaches and Evaluation” (2018) 3 Intl J Therapeutic Juris 1; Elise C Lopez & Mary P Koss, “The RESTORE Program for Sex Crimes: Differentiating Therapeutic Jurisprudence from Restorative Justice with Therapeutic Components” in Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 212.

<sup>49</sup> Lawrence B Solum, “Procedural Justice” (2004-2005) 78 S Cal L Rev 181 [Solum]; Rebecca Hollander-Blumoff & Tom R Tyler, “Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution” (2011) 2011 J Disp Resol 1 [Hollander-Blumoff & Tyler]. See also: Mary Illiadis, *Adversarial Justice and Victims’ Rights: Reconceptualising the Role of Sexual Assault Victims* (Abingdon, Oxon: Routledge, 2020).

<sup>50</sup> *Ibid.*

made the choice not to limit what I would consider to be a reasonable justice interest and instead decided to let survivors define the concept and what it should entail. As I mentioned earlier in this chapter, I wanted to explore the range of what survivors considered important when thinking about justice for themselves, and that meant putting aside my own understandings of what the legal system could or could not provide. I asked survivors in my interviews to think about their perfect ideal of justice as I thought it was important to get a sense of how expansive the concept could be. The question I wanted to answer was what justice looked like for survivors, not how these wants and needs could be understood and operationalised in the system as is. This was a different project than much of what the other justice interests scholars were engaging in.

Another aspect of the justice interests literature deals with the operationalisation of these concepts. One of Daly's primary goals in her work on justice and sexual assault is to try and push scholarship in a direction that would allow academics to talk about and compare how justice interests are impacted by different legal processes.<sup>51</sup> In order to be able to accurately assess whether survivors can obtain a sense of justice, we must have definitions and categories that allow us to interrogate this concept in a more concrete, comparable manner.<sup>52</sup> She points out that victim satisfaction, the measure most often used to determine how a complainant feels about the totality of her legal experience, is a vague and unhelpful concept.<sup>53</sup> If we want to compare different processes, particularly new alternative processes such as restorative forms of justice, we need to know how they differ from more conventional approaches, and how survivors

---

<sup>51</sup> It is important to reiterate that, in Daly's work, justice and legal interests are essentially interchangeable terms.

<sup>52</sup> Daly 2014, *supra* note 44 at 382.

<sup>53</sup> Re-offending is another measure used to assess the utility of a justice process, but this measure does not engage with survivor experiences. Daly 2014, *ibid* at 387. See also: Robyn Holder, "Satisfied? Exploring Victims' Justice Judgements" in Dean Wilson & Stuart Ross, eds, *Crime, Victims and Policy: International Contexts, Local Experiences* (New York: Palgrave Macmillan, 2015) 184.

experience these differences. In order to operationalise measures of justice, the data obtained from these explorations must be set-up in such a way as to be empirically comparable.

As such, Daly has written a number of articles exploring a new framework she created in order to compare justice processes in a more standard manner. She canvassed the international literature in this area, noting that despite concentrated attempts at law reform in the area of sexual assault in several countries, survivors were still reporting dissatisfaction with the legal system and its outcomes.<sup>54</sup> Her research began by exploring alternative forms of justice as a method of potentially improving survivor experiences, but she felt unable to accurately compare the different approaches.<sup>55</sup> From her research into the work other scholars had done in this area, as well as her own, she came up with five major justice interests within the legal system that she used to form a matrix for comparison: participation, voice, validation, vindication, and offender accountability.<sup>56</sup> She defines the first category, participation, as the right to be informed about a case, from the options that a survivor may take, to the progress of the case as it develops, and the ability to make choices when applicable and ask questions.<sup>57</sup> Ideally, survivors should have some ability to shape the remedies in their situation, though how much say they have will depend on the exact justice/legal process chosen.

The second category in Daly's framework is voice. For a survivor to have voice, she must be able to tell her story about what happened to her and the harms that arose from her assault.<sup>58</sup> This is a very common desire for survivors as they want to be able to talk about what happened

---

<sup>54</sup> Daly 2017, *supra* note 29 at 114.

<sup>55</sup> Daly 2014, *supra* note 44 at 386.

<sup>56</sup> *Ibid* at 388. See also: Daly 2017, *supra* note 29 at 113. These interests overlap significantly with those identified in the procedural justice literature.

<sup>57</sup> Daly 2017, *ibid* at 115.

<sup>58</sup> *Ibid* at 116.

to them in their own words without being beholden to the structures imposed on them by the courts. Similarly, validation is the third category. Validation occurs when the survivor's claim of harm is accepted and she is not blamed for what happened to her.<sup>59</sup> While assessing what the actual facts are in a case is an important part of a criminal proceeding, its adversarial nature is part of the reason why survivors find traditional legal processes so challenging. They want others to understand what happened to them and for society to take responsibility for the realities of sexual assault without being under intense pressure to prove their claims beyond a reasonable doubt.

Survivors also want vindication. This is a concept often conceptually tangled with validation as vindication requires the sexual assault be affirmed as wrong by others with some sort of action.<sup>60</sup> This goes beyond mere belief as something must be done publicly to show that sexual assault is unacceptable. In a criminal trial, a conviction and subsequent prison sentence can be a method of vindication. It can also be achieved with reparations or even public pronouncements from authority figures—such as judges—that condemn sexual assault.

Finally, the last category in Daly's framework is accountability. If vindication encompasses broader social condemnation of sexual assault, often through criminal sentencing, accountability looks at what has actually been done on the part of the offender in the wake of his offence.<sup>61</sup> Making this distinction is important as what the law says should happen is not always what actually occurs at the end of a trial. Particularly in the case of sexual assault, offenders are

---

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* at 117-118.

<sup>61</sup> *Ibid* at 119.



reticent to take responsibility for their behaviour.<sup>62</sup> Accountability, therefore, measures what the offender has done to attempt to make-up for the harms that he has caused.

By using these five categories, Daly believes that researchers can more accurately assess the utility of different justice processes and whether or not they improve the experiences of survivors. Since developing this framework, Daly has worked on applying it to different case studies, finding that alternative processes, such as case conferencing and the like, offer many improvements to the experiences of survivors.<sup>63</sup>

Regardless of how broadly they have defined justice, scholars working on this subject have consistently found several common categories of justice concerns in their research. One of the first major studies about justice from a survivor's perspective came from Herman in the US. She was looking at justice from a broader gender-based violence lens, though this includes sexual assault. While she conducted her interviews long before Daly created her justice interest framework, many of the categories overlap. The women that Herman spoke with emphasised the importance of validation, particularly from authority figures.<sup>64</sup> They wanted people to believe them and they thought that support from authority figures such as judges or police officers lent legitimacy to their claims.<sup>65</sup> Connected to validation, women also wanted vindication in the form of society condemning the actions of the offender.<sup>66</sup> Belief needed to be carried forward to action.

---

<sup>62</sup> *Ibid.*

<sup>63</sup> For example: Kathleen Daly & Dannielle Wade, "Sibling Sexual Violence and Victims' Justice Interests: A Comparison of Youth Conferencing and Judicial Sentencing" in Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 143.

<sup>64</sup> Herman, *supra* note 24 at 585.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

Accountability was also important, but a desire for this did not mean that survivors wanted to punish the offender.<sup>67</sup> Instead, the women that Herman talked to wanted the offender to be exposed.<sup>68</sup> In the context of gender-based violence, so much of it occurs in private. By bringing a claim forward, the victim shows her community who the offender really is and ensures that the abuse can no longer be hidden. She exposes a threat and forces the offender into a situation where he may need to take accountability and make amends for his behaviour.<sup>69</sup> Thus, for Herman, the major justice interest of her interviewees was incapacitating the offender so that he could not harm anyone else again.<sup>70</sup> Restoration of the relationship was not generally a goal, and while these women believed rehabilitation was important, they often doubted it would be successful in their situation.<sup>71</sup>

Shortly after Herman's article, Koss released a call to action for reform in the realm of sexual assault law. She canvassed the literature on the subject of justice and sexual assault from three different continents (though she herself works in the US) and identified several overlapping themes.<sup>72</sup> Once again, survivors wanted to tell their story, participate in the process meant to resolve the violation, be able to ask questions and have them answered, observe remorse on the part of the offender, and feel seen and believed by their communities.<sup>73</sup> Her interest in the area stemmed from a desire to understand and advocate for the use of restorative justice, as she also saw that despite law reform in the area, survivors were still not getting what they wanted and

---

<sup>67</sup> *Ibid* at 590.

<sup>68</sup> *Ibid* at 593-94.

<sup>69</sup> *Ibid* at 594.

<sup>70</sup> *Ibid* at 597. Incapacitation does need to be achieved through incarceration. The women I interviewed for this project wanted the offender's behaviour monitored, but recognised that there were a variety of methods that could be applied other than prison, including restraining orders and informal community sanctions.

<sup>71</sup> *Ibid*.

<sup>72</sup> As with Daly, Koss is generally focused on legal justice.

<sup>73</sup> Koss 2006, *supra* note 41 at 209.

needed out of criminal law processes. Koss pushed for an expansion of the options available to survivors and argued that different forms of justice processes for sexual assault could coexist.<sup>74</sup>

Several years later, Haley Clark conducted a series of interviews with survivors in Australia, some who had engaged with the legal system and others who did not.<sup>75</sup> She found that survivors were not unanimous in their expression of justice interests.<sup>76</sup> Different circumstances required unique interventions. However, despite this need for nuance, Clark did find that most survivors wanted increased voice and control over their legal processes.<sup>77</sup> If any reform was to successfully make legal proceedings better for survivors, they needed to be involved in what these reforms would entail, and innovative and flexible strategies needed to be created in order to respond to sexual assault.<sup>78</sup>

In a later article, Clark noted the shock that most survivors felt when discovering how little complainants mattered in a criminal trial.<sup>79</sup> They felt dismissed and ignored given their lack of standing and the limited role they could play in the process. However, despite this lack of control, survivors did want the criminal law system to condemn what had happened to them.<sup>80</sup> As in other studies, they believed the system must recognise sexual assault as something unacceptable. Unfortunately, despite any potential social denunciation, survivors did not feel that the trial process encouraged offenders to take responsibility for what they did, and common court occurrences, such as plea bargains or settlements in civil trials, felt like a dismissal of their

---

<sup>74</sup> *Ibid* at 226.

<sup>75</sup> Haley Clark, “‘What is the Justice System Willing to Offer?’ Understanding Sexual Assault Victim/Survivor Criminal Justice Needs” (2010) 85 *Family Matters* 28 [Clark 2010]; Clark 2015, *supra* note 36.

<sup>76</sup> Clark 2010, *ibid* at 30.

<sup>77</sup> *Ibid* at 33-35.

<sup>78</sup> *Ibid* at 35.

<sup>79</sup> Clark 2015, *supra* note 36 at 21.

<sup>80</sup> *Ibid* at 23.

experience and the full seriousness of the harm that they suffered.<sup>81</sup> Survivors also wanted behavioural change on the part of offenders and thought that counselling and education should be an available remedy.<sup>82</sup>

One particularly interesting finding in Clark's study involved survivor opinions on punishment. Clark found that survivors were mixed when it came to their views on this issue. For those who did want to see the offender suffer a concrete penalty, they worried about the backlash they would receive for this desire. According to Clark,

[survivors] noted that it fed into public misconceptions that they were vengeful and/or deranged. The idea that victim-survivors would be excessively punitive is rarely questioned, yet research does not support the public perception that victim-survivors of sexual violence are particularly vengeful towards perpetrators compared with those who have not been victims.

Furthermore, even though some survivors do desire some form of punishment, Clark found that they wanted fair punishments in line with what was used for other, similar offences.<sup>83</sup>

Consequently, her study showcased how it is important to trust survivors when they speak about their justice interests and not assume that they are all too consumed with a need for vengeance to be able to think clearly about fair redress in their situations.

McGlynn and Westmarland also conducted a series of interviews with survivors in the UK as they were developing their concept of kaleidoscopic justice. They too discovered that survivors embraced both restorative and retributive principles, often at the same time, when it came to responding to the offender who hurt them.<sup>84</sup> Individual justice interests were complex and shifting depending on circumstance. The survivors in their study reported that justice

---

<sup>81</sup> *Ibid* at 24-26.

<sup>82</sup> *Ibid* at 25.

<sup>83</sup> *Ibid* at 29.

<sup>84</sup> McGlynn & Westmarland, *supra* note 23 at 182.

required consequences, though the criminal law system did not always manage to do this in a manner they found satisfactory.<sup>85</sup>

Justice was also about recognition and survivors wanted others to witness the pain that they experienced.<sup>86</sup> Recognition was, to them, about being seen as someone who matters enough that they should be protected and helped by their community. The criminal law system can offer some forms of recognition, but survivors talked about the need for recognition from those close to them as well.<sup>87</sup> Justice was also related to dignity. Many survivors in this study talked about how they felt dehumanised and treated cruelly by the criminal legal system.<sup>88</sup> Not only was their suffering not seen, it was trivialised. Justice, for these survivors, required that the system and society treat them with compassion and respect.

In McGlynn and Westmarland's study, participation was also important. Survivors wanted to be able to tell their story, but also to be able to dialogue with the other actors in the process.<sup>89</sup> In the criminal system, the survivors they interviewed did not feel that they were able to say much and have it heard. In a more optimal system, they would be able to ask questions and make recommendations. One particular interviewee stated that while she thought that the judge was making decisions in her best interest, she was not being consulted on what those interests actually were.<sup>90</sup> The women McGlynn and Westmarland interviewed pushed back against a system that was supposed to bring them justice but did not even bother to ask them

---

<sup>85</sup> *Ibid* at 186.

<sup>86</sup> *Ibid* at 188.

<sup>87</sup> *Ibid* at 188.

<sup>88</sup> *Ibid* at 190.

<sup>89</sup> *Ibid* at 191.

<sup>90</sup> *Ibid*.

what they wanted or needed and was not prepared to take any response to these questions seriously.

Finally, survivors participating in this study saw justice as social connection. According to McGlynn and Westmarland, connectedness is about,

...belonging in society, being recognized, being treated with dignity, having a voice. It is about receiving societal support in the aftermath of trauma, including financial assistance. It is about being recognized. Fundamentally, connectedness as justice is about redressing a victim-survivor's shattered sense of belonging; the justice interests thereby reflecting the harms and impacts of sexual violence.<sup>91</sup>

When someone is sexually assaulted, their sense of humanity can be gravely impacted.<sup>92</sup> They often no longer feel safe within their community and where they live.<sup>93</sup> Furthermore, they are frequently treated with distrust when they talk about what happened to them.<sup>94</sup> A just world, McGlynn and Westmarland suggest, would respond with empathy and take on the responsibility of trying to make a person feel like a valued and protected member of society again.<sup>95</sup> Justice, in this manner, is embodied, "created and sustained by active support in society".<sup>96</sup> Connectedness as justice would go beyond the individual as well and embrace the need for prevention.<sup>97</sup> It would see sexual assault as a social problem, not simply one of individuals, and something that everyone should have a part in preventing and responding to.

---

<sup>91</sup> *Ibid* at 194.

<sup>92</sup> Several of the women I spoke with described feeling as if their very humanity was denied when they were assaulted. Some of their quotes on this subject can be found in Chapter 5.

<sup>93</sup> For example, see: Kayleen A Culbertson, Peter W Vik & Beverly J Kooiman, "The Impact of Sexual Assault, Sexual Assault Perpetrator Type, and Location of Sexual Assault on Ratings of Perceived Safety" (2001) 7:8 *Violence Against Women* 858. A more thorough discussion of the impacts of sexual assault can be found in Chapter 3.

<sup>94</sup> Herman, *supra* note 24. See also: Katherine Lorenz, Stacy Dewald & Rachel Venema, "I Was Worried I Wouldn't Be Believed': Sexual Assault Victims' Perceptions of the Police in the Decision to Not Report" (2021) 36:3 *Violence and Victims* 455.

<sup>95</sup> McGlynn & Westmarland, *supra* note 23 at 194.

<sup>96</sup> *Ibid* at 195.

<sup>97</sup> *Ibid* at 193.

In another study from Australia, several researchers explored the justice perspectives of women with disabilities who had faced violence.<sup>98</sup> Similar to other articles covered in this chapter, these women described a need for voice and validation. However, recognising how much disability impacted their lives was crucial to truly understanding their justice needs and interests in the wake of violence. According to the researchers, "[these] women's perceptions of justice underline how narrow, remote and often irrelevant formal criminal justice responses are in meeting women's justice ideals".<sup>99</sup> Unlike Daly and Koss, these researchers were unable to separate legal justice from survival needs. Almost all of the women that they interviewed stressed how difficult it was to access justice when the criminal law system ignored their disability needs.<sup>100</sup> For many, their abuser was also their caretaker, and while justice from the legal system sometimes resulted in the violence ending (at least temporarily), it was often at the cost of the care that they required.<sup>101</sup> Consequently, without an intersectional understanding of their circumstances and the impact that legal processes could have on their lives, justice was difficult, if not impossible, to obtain.<sup>102</sup>

Like the authors discussed above, I conducted interviews with survivors in order to better understand what justice interests/needs they have in the wake of an assault. Most of the research that has been done so far has taken place in Australia, the UK, and the US. To date, no Canadian data has been produced on this subject and thus I am adding regionally specific data to an area of

---

<sup>98</sup> McCulloch et al, "Justice Perspectives of Women with Disability: An Australian Story" (2021) 27:2 International Review of Victimology 196. In this article, violence most often referred to sexual assault or family violence.

<sup>99</sup> *Ibid* at 197.

<sup>100</sup> *Ibid* at 205.

<sup>101</sup> *Ibid*.

<sup>102</sup> Crenshaw 1991/1989, *infra* note 154.

research that needs more scholarly attention overall, particularly with the recent calls for reform in the area of sexual assault law.

However, while I respect the concerns about the scope of justice that scholars such as Daly and Koss have, I have rejected the idea that survival and therapeutic interests must be—or even can be—separated from an understanding of justice. Instead, I support the much more comprehensive understanding of justice as articulated by McGlynn and Westmarland with their kaleidoscopic description of the concept. The survivors that I interviewed were almost unanimous in their commentary on how justice was a broad concept that required more than just an affirmation of their strict legal rights. Even if a court were to convict and imprison their abuser, if they lost their job as a result of the trauma they experienced because of the sexual assault, they would not feel justice had been served as they were still suffering from the assault in a way that was ignored by the legal system. Justice to the women I spoke with was as much about the support that they needed to help them deal with the harms they experienced as it was about responding to the offender. I agree with Daly that it is important to be clear about the concepts we are talking about, though I am less interested in empirical comparisons of legal processes than I am at exploring what justice means in totality to survivors. Because of this, I decided it was important to capture the full range of opinions and perspectives on justice that survivors have, rather than to try to constrain my interviews to only the justice interests connected to the criminal law system that were identified by Daly.

As such, one of the most important contributions that my dissertation makes to this field is to expand how legal justice is conceptualised in the context of sexual assault. When I began my research, I was primarily focused, like many other scholars, on matters within criminal law. However, in speaking with survivors, I found this to be too limiting an approach. Not only were



survivors accessing different legal processes than I anticipated in pursuit of redress that fit their needs, I discovered that some of the most important things that survivors wanted were not being discussed at all. For example, one finding from my work that differs from most of the other literature is the importance of financial recompense for survivors, particularly through the Criminal Injuries Compensation Board. The importance of a legal entitlement to compensation was a consistent theme throughout my interviews, even if not explicitly stated as such. Thus, the justice that many of the survivors I interviewed sought was not found solely in the realm of criminal law. Instead of trying to limit or constrain what justice interests should be considered, I found it necessary to widen my perspective and listen to how survivors were attempting to find justice in their everyday lives.

Furthermore, much of what I heard from my interviews helped illustrate the need to understand that justice is not the exclusive domain of the law. While the law is often a component of justice, particularly when one considers how much broader legal interests are for survivors outside of just the criminal system, they also have needs that exist outside of the legal system as a whole. It may be easy to dismiss these needs as ones that the legal system does not need to concern itself with. However, the reality is that survivor justice interests are often intertwined. As stated above, the conviction of an offender may mean little if the survivor has lost her job as a result of being assaulted. Though the law cannot solve every social problem, so many of the women that I interviewed told me that the legal system would not address the harms that they suffered and was not willing to listen to them explain what their needs were. They felt that the legal system was a space of limitations and obstacles. Every process was a silo, disconnected from other services and options. While it is impossible for the law to fully address

the harms caused by sexual assault, the survivors I spoke with helped me see how the legal system could do much more to support survivors, even outside of their strict legal interests.

## **1.2 Dissertation Overview**

In this first chapter of my dissertation, I began by outlining the serious nature of sexual assault and situating this particular offence within the context of recent global conversations and protest movements. From this broad overview, I moved to contextualising my research question to show how it responds to an urgent need for more information and understanding on the issue of justice and sexual assault through the diverse and multi-faceted perspectives of survivors. I also identified the primary area of research my dissertation falls within and canvassed the available literature to show how my work constructively adds to this conversation.

Following from the introduction, in Chapter 2, I set out the theoretical foundations of my dissertation, looking at feminist and intersectional theory as they relate to the subject of sexual assault and justice. In Chapter 3, I review other needed contextual information by examining the statistical information on sexual assault in Canada, as well as canvassing the law that governs this offence. Finally, I describe several of the legal processes survivors may choose to pursue in the aftermath of an assault.

In the fourth chapter, I address the methodological foundations of my dissertation, specifically, intersectional feminist standpoint epistemology and grounded theory. I illustrate why both of these methodologies are appropriate to help answer the questions that I am asking. I then detail the construction of my interviews, from the choices I made while preparing my materials to what I learned as I conducted them. To finish, I explain the coding process I applied when sorting through my interview data, and show how I arrived at the four central themes I use in this dissertation: harms and healing, accountability, punishment, and

restorative/transformative justice. These themes are consistent with the findings from other jurisdictions; however, my emphasis on looking at justice as broader than criminal law concerns, extending past even the boundaries of the legal system as a whole shapes the breadth and content of each, particularly the chapter on healing.

My fifth chapter signals the beginning of my analysis of results from my interviews. I start by addressing harms and healing, an aspect of justice that is not always connected to the legal system, but which survivors identified as crucial to any attempt at obtaining justice. I begin by canvassing the harms of sexual assault, then move onto the types of healing that survivors identified as important. This includes a need for agency and power, validation, social support, and compensation. The overall theme of this chapter addresses the imperative to recognise that justice needs are broader than what is currently offered in the legal system, and that survivors want to see more overlap between the various systems survivors access in the aftermath of an assault.

In my sixth chapter, I deal with the concept of accountability, interrogating what it means to survivors. They stressed the importance of needing accountability from the offender, but also described a desire for social accountability from the people in their lives and the institutions in their communities. The central themes of this chapter deal with the need for offender behaviour change, education, protection of the survivor, and social condemnation.

Following this discussion on accountability, I speak to the often related, but also distinct, concept of punishment. In this seventh chapter, I discuss what survivors think about punishment and what purpose it serves in the aftermath of a sexual assault. This involves problematising the concept of imprisonment and exploring the conflicted feelings survivors have on this subject.

Finally, my eighth chapter deals with issues of restorative and transformative justice. Having looked at accountability and punishment, largely within the context of the criminal law system, I explore alternative options and the complex emotions survivors have in regards to some of these innovative approaches. I also discuss the fraught nature of “community”.

In my final chapter, I address some of the potential reforms and changes to the legal system that arise from the interview data that I have collected. Harkening back to the literature review on justice interests from the first chapter, I set out what justice meant to the survivors I spoke with, and detail how their needs and interests can be incorporated into our current legal system, and what sort of radical changes may be needed in order to foster a legal system that better helps survivors obtain justice. Through this, I provide readers with a general summary of the dissertation and point to further areas of research that should be explored. I also highlight some of the limitations of this research, particularly in regard to the scholarship on Indigenous Peoples and restorative justice in Canada.<sup>103</sup>

---

<sup>103</sup> In this dissertation, I will be using the word Indigenous Peoples to refer to the hundreds of politically, culturally, and linguistically distinct groups of First Nations, Métis, and Inuit peoples across Canada. Occasionally Aboriginal will be used as well as it is a recognised legal term. See: Gregory Younging, *Elements of Indigenous Style: A Guide for Writing By and About Indigenous Peoples* (Edmonton: Brush Publishing, 2018) at 62-65.

## **Chapter 2: Theoretical Frameworks: Feminism and Intersectionality**

### **2.1 Introduction**

To explore the question of justice for sexual assault survivors, I use two theoretical frameworks to guide my work: feminism and intersectionality. In this chapter, I outline the philosophical underpinnings of these frameworks, addressing issues such as the differences between sex and gender and how this distinction relates to sexual assault. I will also show how feminist theory is strengthened when discussed in conversation with intersectional theory by illustrating just how complex and diverse the category of women is and what implications this has when researching sexual assault, especially when speaking to survivors directly.

### **2.2 Feminist Thought on Sexual Assault**

#### **2.2.1 A Very Brief Definition of Feminism**

Feminism is “a movement to end sexism, sexist exploitation, and oppression”.<sup>104</sup> It stresses the importance of equality for all people, but identifies women as an oppressed class within society. To use feminist theory means that one must seek to both understand why sex and gender-based discrimination occurs, and to actively work to change this reality. Given issues such as violence against women,<sup>105</sup> pay discrimination and unequal employment opportunities,<sup>106</sup>

---

<sup>104</sup> bell hooks, *Feminism is for Everybody: Passionate Politics* (Cambridge: South End Press, 2000) at 1.

<sup>105</sup> Adam Cotter, “Intimate Partner Violence in Canada, 2018: An Overview” (26 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00003-eng.htm>>; Marie Sinha, “Measuring Violence Against Women: Statistical Treads” (25 February 2013), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf>> at 8.

<sup>106</sup> Melissa Moyser, “Women and Paid Work” (8 March 2017), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14694-eng.pdf>>.

inadequate political representation,<sup>107</sup> and reproductive injustice,<sup>108</sup> full equality for women has yet to be obtained.<sup>109</sup> Consequently, according to Susan Faludi,

Feminism asks the world to recognise at long last that women aren't decorative ornaments, worthy vessels, members of a "special interest" group. They are half... of the population, and just as deserving of rights and opportunities, just as capable of participating in the world's events, as the other half. Feminism's agenda is basic: It asks that women not be forced to 'choose' between public justice and private happiness. It asks that women be free to define themselves—instead of having their identity defined for them, time and again, by their culture and their men.<sup>110</sup>

Feminism, therefore, is about achieving full personhood, both socially and legally. Thus, it is a necessary theoretical framework to use when working through the complexities of sexual assault, a gendered crime that denies women their full autonomy.

### **2.2.2 The Radical/Liberal Divide**

When parsing through feminist thought on sexual assault, one of the major divisions that must be addressed is the radical/liberal divide. There are multiple ways of understanding and embodying feminism, to the extent that it is perhaps more useful to talk about feminisms;<sup>111</sup> however, the radical/liberal distinction is particularly valuable to discuss when dealing with matters potentially engaging state action.

---

<sup>107</sup> Sylvia Bashevkin, *Women, Power, Politics: The Hidden Story of Canada's Unfinished Democracy* (Toronto: Oxford University Press, 2009); Paul Hantiuk, "50% Population, 25% Representation: Why the Parliamentary Gender Gap?" *CBC News*, online: <<http://www.cbc.ca/news2/interactives/women-politics/>>.

<sup>108</sup> Shannon Stettner, Kristen Burnett & Travis Hay, eds, *Abortion: History, Politics, and Reproductive Justice After Morgentaler* (Vancouver: UBC Press, 2017).

<sup>109</sup> There are many other issues of inequality in the world and the intersecting nature of these inequalities will be discussed further below.

<sup>110</sup> Susan Faludi, *Backlash: The Undeclared War Against American Women* (New York: Crown Publishers, 1991) at XXII.

<sup>111</sup> Victoria L Bromley, *Feminisms Matter: Debates, Theories, Activism* (Toronto: University of Toronto Press, 2012) [Bromley].

Liberal feminists believe that gender/sex equality can be achieved within existing legal, political, economic, and social structures.<sup>112</sup> While extensive reforms are needed, they are seen as attainable through methods such as governmental lobbying and legislative changes. Radical feminists, on the other hand, do not think that most social institutions can be salvaged.<sup>113</sup> For them, the changes needed to produce an equitable world are often too extensive to be obtained through legal or other reforms. Instead, they argue that societal institutions need to be completely reimagined, from the legal system, to the ways in which gender norms are conceptualised, to the foundations of socio-economic equality.<sup>114</sup> Furthermore, while liberal feminists have a wary relationship with political and social institutions, radical feminists see the state as an actor who can and often does harm its citizens.<sup>115</sup> For example, the state is the only actor in society that can legally take away a person's liberty. A state can declare war and require its citizens to participate. While the state is capable of many positive actions, the embedded nature of oppressive systems such as patriarchy, economic inequality, and white supremacy often result in state violence that has devastating effects on marginalised members of a community.

During the 1960s-1980s, liberal feminists sought to address the effects of patriarchy, they generally worked through and with the state to both prevent and deal with the aftermath of sexual assault.<sup>116</sup> They lobbied and pushed for changes to criminal law that would protect women from violence. Legal reforms such as the criminalisation of spousal rape were a result of liberal

---

<sup>112</sup> Mary Valentich & James Gripton, "Ideological Perspectives on the Sexual Assault of Women" (1984) 58:3 Social Service Review 448 [Valentich]; Maria Bevacqua, *Rape on the Public Agenda: Feminism and the Politics of Sexual Assault* (Lillington, North Carolina: Northeastern University Press, 2000) [Bevacqua].

<sup>113</sup> *Ibid.*

<sup>114</sup> Catharine A MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8:4 Signs: Journal of Women in Culture and Society 635 [MacKinnon].

<sup>115</sup> *Ibid* at 642.

<sup>116</sup> Valentich, Bevacqua, *supra* note 112.

feminist activism.<sup>117</sup> Radicals, on the other hand, often worked outside of state structures. They did not believe that what they perceived to be increased state violence would be an effective method of addressing the effects of patriarchy, and chose instead to create alternative services and structures within communities that would help women who had been subject to male violence, and to focus attention on the need to eradicate the norms that lead to gender and sex-based violence.<sup>118</sup>

In the context of this dissertation, liberal feminism focuses on improvements to the traditional legal system as a method of trying to secure just outcomes for survivors. Improvements to criminal trial processes and a focus on the leniency and disproportionality of sentencing are potential avenues of liberal reform.<sup>119</sup> Radical feminists, on the other hand, look to alternative justice potentials, such as transformative justice, which build new structures based on different norms than the traditional system. These two different conceptions of how to approach the concept of justice have led to significant divisions in sexual assault law theorising which will be explored in depth in Chapter 8.

### **2.2.3 The Causes of Sexual Assault**

Much of feminist philosophy, regardless of where one sits on the liberal/radical spectrum, shares some foundational beliefs about sexual assault; namely that it is a crime intimately related to power, inequality, and misogyny.<sup>120</sup> According to Catherine MacKinnon, “[to] be rapable, a

---

<sup>117</sup> Maria Los, “The Struggle to Redefine Rape in the Early 1980s” in Julian Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 20 [Los].

<sup>118</sup> MacKinnon, *supra* note 114.

<sup>119</sup> Constance Backhouse, “A Feminist Remedy for Sexual Assault: A Quest for Answers” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 725.

<sup>120</sup> There is some empirical evidence to support this claim. See, for example: A Nicolas Groth, Ann W Burgess & Lynda L Holmstrom, “Rape: Power, Anger, Sexuality” (1977) 134:11 *The American Journal of Psychiatry* 1239;



position which is social, not biological, defines what a woman is.”<sup>121</sup> Sexual assault is not only about a desire for sex, but a violent example of how male dominance is enforced in society. There is no “natural” impulse to rape that drives men to hurt others. Instead, it is a system of power—specifically the patriarchy—that creates a social structure that conditions men to terrorise women and assert power over them.<sup>122</sup>

According to Lorene Clark and Debra Lewis, not only is rape an issue of patriarchy and misogyny, but of capitalism as well. In *Rape: The Price of Coercive Sexuality*, the authors explore how women have been treated as property, both under the law and within social norms.<sup>123</sup> In a system where everything can be purchased and where wealth implies power, women are just one more thing that men can buy in order to prove their dominance.<sup>124</sup> As women have not always been considered people under the law, and to this day are considered less than men, women lack power and are often forced into situations where access to their bodies is sold in order for them to survive. This type of thinking undergirds the idea—one that was formerly enshrined in law—that when a man marries a woman, he then owns his wife’s sexuality, implying that her consent to sex is irrevocable. It is also a factor in cases where men with power over women’s financial futures use their position to coerce sexual favours from unwilling participants. For example, the recent Weinstein scandal and resulting #MeToo movement

---

John Foubert & Johnathon T Newberry, “Effects of Two Versions of an Empathy-Based Rape Prevention Program on Fraternity Men's Survivor Empathy, Attitudes, and Behavioural Intent to Commit Rape or Sexual Assault” (2006) 47:2 *Journal of College Student Development* 133.

<sup>121</sup> MacKinnon, *supra* note 114 at 651.

<sup>122</sup> Gwen Hunnicutt, “Varieties of Patriarchy and Violence Against Women” (2009) 15:5 *Violence Against Women* 553.

<sup>123</sup> Lorene Clark & Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Canadian Scholars Press, 1982).

<sup>124</sup> *Ibid.*

discussed in Chapter 1 show that even relatively powerful women can be trapped by a patriarchal-capitalist approach to sex.

However, there are also scholars who stress the importance of understanding rape in a much more nuanced manner. For example, Beverly McPhail implores researchers and advocates against sexual violence not to limit their understandings of sexual assault to just theories of dominance and power. She outlines a variety of reasons for sexual assault in an attempt to create a more comprehensive (but not exhaustive) model of rape etiology that includes not only issues of power, dominance, and economics, but normative heterosexuality, intersectionality, constructions of masculinity, and embodied sexual practice.<sup>125</sup> She also identifies different types of risk factors, such as psychological, environmental, situational, developmental, and biological, that combine with these theories for further explicative power.<sup>126</sup> Her goal is to show that the causes of rape are complex and deserve a more contextual and situational approach to understanding why this type of violence occurs and what can be done to prevent it.

#### **2.2.4 Sex, Gender, and Violence: How Definitions of What/Who Men and Women Are Impact Sexual Assault Theory**

Intimately connected to these feminist theories on sexual assault are a number of analyses regarding the nature of sex and gender. Much of both feminist and queer theory separates sex

---

<sup>125</sup> Beverly A McPhail, “Feminist Framework Plus: Knitting Feminist Theories of Rape Etiology Into a Comprehensive Model” (2016) 17:3 *Trauma, Violence, & Abuse* 1 at 9 [McPhail]. Another issue to consider is the focus on male perpetrators and female victims taken in most of the available literature on sexual assault, as well as within advocacy groups. While women are often centred in these discussions for good reasons, doing so means that certain people and situations are neglected in analyses of sexual violence. See the following article dealing with sexual assault between women and how the violence against women paradigm does not adequately address these situations: KelleyAnne Malinen, “‘This Was a Sexual Assault’: A Social Worlds Analysis of Paradigm Change in the Interpersonal Violence World” (2014) 37:3 *Symbolic Interactions* 353 [Malinen]. Further discussion of sexual assault involving men, trans, and non-binary people can be found in Chapters 3 and 4.

<sup>126</sup> *Ibid.*

and gender, rejecting the notion that these two concepts are one and the same.<sup>127</sup> Instead, sex is understood as a biological term referring to a person's body. Determining sex requires looking not only at the physical structures of a body (the genitals and secondary sexual characteristics), but also chromosomes and hormones. Most people are classified at birth as either male or female; however, a greater spectrum within these two categories exists as well that is not often recognised.<sup>128</sup> One's biological sex determines certain physical realities,<sup>129</sup> but much of what society considers sex-based differences fall instead under the category of gender.

Gender is a contested term. Much of feminist activism has protested the idea that sex determines traits such as personality, intelligence, or in the context of this dissertation, the supposed biological impulse to rape (which is, instead, a patriarchal social norm). Instead of seeing gender as innate or as reflective of one's sex, gender is a concept that exists in addition to the physical body. Science has challenged the idea that men and women have different brains and opposing ingrained behaviour patterns,<sup>130</sup> so explaining gendered conduct relies on also understanding social norms and pressures.

---

<sup>127</sup> Charlene L Muehlenhard & Zoe D Peterson, "Distinguishing Between Sex and Gender: History, Current Conceptualizations, and Implications" (2011) 64 *Sex Roles* 791.

<sup>128</sup> For example, intersex people have sexual characteristics (physical, hormonal, or chromosomal) that do not match the standard definition of male or female. The existence of intersex people challenges the notion that sex is a binary concept wherein men and women exist in two clearly defined physical categories. See: Julia A Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York: NYU Press, 2012); Ann Fausto-Sterling, "The Five Sexes: Why Male and Female are Not Enough" (1993) 33:2 *The Sciences* 20; Ann Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books: New York, 2000); Stephanie S Turner, "Intersex Identities: Locating New Intersections of Sex and Gender" (1999) 13:4 *Gender and Society* 457.

<sup>129</sup> There are obvious physical differences between the sexes such as the fact one must have a uterus to become pregnant, or that hormonal variations will often affect medication efficacy and safety. However, differences should not be used to imply that men and women are more dissimilar than they are similar, or that sex differences entirely control behaviour and gender expression.

<sup>130</sup> See, for example: Daphna Joela et al, "Sex Beyond the Genitalia: The Human Brain Mosaic" (2015) 112:50 *Proceedings of the National Academy of Sciences of the United States of America* 15468.

As succinctly put by Simone De Beauvoir, “[one] is not born, but rather becomes, a woman.”<sup>131</sup> Society—or at least western society as it applies to white people—expects women to be kind, nurturing figures; they are taught to act in this manner and punished when they do not conform. Men are assumed to be inherently adventurous leaders and are encouraged from birth to emulate these types of behaviour.<sup>132</sup> However, given the existence of confident female CEOs and compassionate male nurses, this type of strict behavioural binary cannot be a simple biological rule.<sup>133</sup> Furthermore, gender roles are something that have been controlled and manipulated by societies at large throughout history (and applied differently depending on other aspects of a person’s identity, such as race, sexuality, or disability).<sup>134</sup> What was acceptable behaviour of men and women a century ago is very different from what is considered appropriate today. Given the frequency with which gender roles have shifted over time—not to mention among different cultures—gender and the behaviours associated with it must be, at least in part, an adaptable phenomenon.

This falsified dichotomy between men and women, according to theorists like Sandra Bem, is harmful. She argues that psychological health is often tied to embracing androgynous characteristics.<sup>135</sup> Men and women should embrace both feminine and masculine behaviours;

---

<sup>131</sup> Simone de Beauvoir, *The Second Sex* (New York: Vintage Books, 1973) at 301.

<sup>132</sup> Much work has been done in sociology, psychology, and child development to understand how socialisation affects the way that people understand and express gender. For an overview, see: Barbara J Risman & Georgiann Davis, “From Sex Roles to Gender Structure” (2013) 61 *Current Sociology Review* 733.

<sup>133</sup> Not to mention a growing number of people who claim not to belong to either side of this binary. Emmie Matsuno & Stephanie L Budge, “Non-binary/Genderqueer Identities: A Critical Review of the Literature” (2017) 9 *Current Sexual Health Reports* 116 [Matsuno]; Christina Richards et al, “Non-binary or Genderqueer Genders” (2015) 28:1 *International Review of Psychiatry* 95 [Richards].

<sup>134</sup> Linda L Lindsey, *Gender Roles: A Sociological Perspective* (New York: Routledge, 2015); Nan Zhu & Lei Chang, “Evolved but Not Fixed: A Life History Account of Gender Roles and Gender Inequality” (2019) 10 *Frontiers in Psychology* 1709.

<sup>135</sup> Sandra L Bem, “The Measurement of Psychological Androgyny” (1974) 42 *Journal of Consulting and Clinical Psychology* 155.

attempting to adhere to only one category of expression is limiting and likely to have negative consequences. Thus, it is unnatural to expect women to be perfect, submissive caretakers.

Women can be just as brash and forward as men, and men can be shy and quiet. To deny people the ability to express themselves as they see fit is unnecessarily constraining and potentially harmful.

Bem's early work, though it challenged the rigid sex/gender binary of the time, also maintained this dichotomy with her use of masculine and feminine categories of behaviour. Later in her life, Bem shifted her analysis and stated that we should allow,

a thousand categories of sex/gender/desire [to] begin to bloom in any and all fluid permeable configurations and, through that very proliferation, that we thereby undo... the privileged status of the two—and only two—that are currently treated as normal and natural.<sup>136</sup>

In the 1960-70s, suggesting that men and women should embrace androgynous behaviour was revolutionary in western society, but understandings of gender and sex changed in the following decades, further undermining the idea that strict masculine and feminine behaviours even exist.

Another influential thinker in the area of gender theory is Judith Butler. The idea that gender is a social construct is often attributed to her, though her actual theory is more sophisticated. To her, gender is not just a social construct, but a social performance.<sup>137</sup> What gender means shifts and changes throughout time based on how people perform gender in their daily lives.<sup>138</sup> This implies that gender is fluid, another challenge to the idea that gender/sex is biologically fixed. However, gender is not something, at least according to Butler, that can be

---

<sup>136</sup> Sandra L Bem, "Dismantling Gender Polarization and Compulsory Heterosexuality: Should We Turn the Volume Down or Up?" (1995) 32:4 *Journal of Sex Research* 329 at 330.

<sup>137</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 2006) [Butler 2006]; Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (New York: Routledge, 2011) [Butler 2011].

<sup>138</sup> *Ibid.*

changed on a whim. A gender performance is the repeated practice of actions that have already been given meaning by society.<sup>139</sup> These actions can be challenged and influenced, but it is not as simple as individuals choosing to behave in certain manners. Performances are interpreted and given meaning by the people who view them. Individuals trying to change the meaning of these performances can have some effect, but it is a slow process that might not result in the outcomes desired by the performer, including backlash and even violence. Thus, while gender is a social construct, Butler does not believe it is an overly malleable concept that can be changed on a day-by-day basis. To reach Bem's world of thousands of genders and sexes would take substantial systemic effort to influence society at large.

These discussions of gender and sex deeply influence any analysis of sexual assault. For example, there are a number of rape myths that attempt to minimise the seriousness of the offence by suggesting that rape is a natural, inevitable occurrence.<sup>140</sup> From this perspective, there is no point in trying to change the behaviour of men as they are merely responding to a biological imperative. However, there is little evidence that men are biologically predisposed to violence and sexual promiscuity.<sup>141</sup> Instead of being a natural consequence of human behaviour, sexual assault is a choice.

---

<sup>139</sup> *Ibid.*

<sup>140</sup> In fact, our socially constructed ideals about gender and gendered behaviour are the foundation of most rape myths. On one hand, sexual assault is seen as a devastating crime. Yet when it occurs, victims are judged credible based on whether they conformed to appropriate gendered behaviour. A chaste woman who was attacked by a stranger has experienced a "true" crime, while a sex worker who is abused by a client cannot have been raped as she already offers sexual services for a fee. See: Stabile, Smith & Skinner, Koshan, Suarez & Gadalla, *supra* note 25; Emilie Buchwald, Pamela R Fletcher & Martha Ross, *Transforming a Rape Culture* (Minneapolis: Milkweed Editions, 2005); Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 CJWL 397 [Randall 2010].

<sup>141</sup> For a thorough critique of the argument that sexual assault is an evolutionary mechanism, see: Cheryl B Travis, ed, *Evolution, Gender, and Rape* (Cambridge: MIT Press, 2003).

Gender also influences the way that women experience sexual assault.<sup>142</sup> A “good” (i.e. a real) victim can only behave within limited parameters or her allegations of abuse are suspect.<sup>143</sup> Certain women, particularly those that are racialised, disabled, and/or sex workers, are seen as inherently less capable of being harmed because of pernicious stereotypes about their identities.<sup>144</sup> Sexual assault can even be a method of enforcing patriarchal norms on women who are seen, as Butler would describe, as deviating from proper feminine performance.<sup>145</sup> This type of weaponised gender enforcement has been explored in the context of domestic violence where women are abused by their husbands for failing to fulfil their “proper” role as the feminine caretaker of the family.<sup>146</sup> Sexual assault has also been used against lesbian and bisexual women as a method of punishing them for their deviant sexuality.<sup>147</sup> Thus, the way that gender is conceptualised in society has important implications for understanding sexual assault.

---

<sup>142</sup> Likewise, as McPhail points out in her sexual assault etiology, the construction of masculinity also impacts men in regard to how and why they commit sexual assault. For example, if gender is a performance, then sexual assault by men against women can be seen as one way of performing masculine gender. McPhail, *supra* note 125 at 6-7. See also: DJ Angelone, Nicole Cantor et al, “Does Sexism Mediate the Gender and Rape Myth Acceptance Relationship?” (2021) 27 *Violence Against Women* 748; Prisca O Obierufu & Oluyinka Ojedokun, “Masculinity as Predictor of Rape-Supportive Attitude among Men” (2019) 64 *Psychological Studies* 41; Aliraza Javaid, “The Unknown Victims: Hegemonic Masculinity, Masculinities, and Male Sexual Victimization” (2017) 22:1 *Sociological Research Online* 28; N Tatiana Masters, “‘My Strength is Not for Hurting’: Men’s Anti-Rape Websites and their Construction of Masculinity and Male Sexuality” (2010) 13:1 *Sexualities* 33; Gerd Bohner, Frank Siebler & Jurgen Schmelcher, “Social Norms and the Likelihood of Raping: Perceived Rape Myth Acceptance of Others Affects Men’s Rape Proclivity” (2006) 32:3 *Personality and Social Psychology Bulletin* 286; Benjamin D Locke & James R Mahalik, “Examining Masculinity Norms, Problem Drinking, and Athletic Involvement as Predictors of Sexual Aggression in College Men” (2005) 52:3 *Journal of Counselling Psychology* 279.

<sup>143</sup> Randall 2010, *supra* note 140.

<sup>144</sup> *Ibid*; Melanie Randall & Elizabeth MacDowell, “Theorizing from Patriarchy: Perpetrators and Intersectional Theory on Domestic Violence” (2013) 16 *J Gender Race & Just* 531 at 544-46.

<sup>145</sup> Butler 2006/2011, *supra* note 137.

<sup>146</sup> Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford: Oxford University Press, 2007); Liz Kelly & Nicole Westmarland, “Naming and Defining ‘Domestic Violence’: Lessons from Research with Violent Men” (2016) 112:1 *Feminist Review* 113.

<sup>147</sup> Ellen Faulkner, “Homophobic Sexist Violence in Canada: Trends in the Experiences of Lesbian and Bisexual Women in Canada” (2006) 25 *Canadian Women Studies* 154.

### 2.3 Intersectionality and Anti-Essentialism

As feminism is a pluralistic movement, one of its greatest challenges has been—and still remains—how to deal with the difficulties of essentialism. Essentialism assumes that “the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts”.<sup>148</sup> Yet individuals have multiple facets to their identity that interact differently with overlapping systems and structures of power. For example, one’s experience of gender (which, as a concept, is already complex and very dependent on the experiences and perspectives of each individual) is deeply impacted by other aspects of one’s identity, such as race, sexuality, or ability. Even within the category of “women”, the experience of sex and gender is fluid and unfixed.

Consequently, feminism can be harmful when the category of “women” is treated as a universal, non-differentiated identity and the full diversity of its members ignored. Using large, easy-to-recognise identity groups can be a powerful political strategy,<sup>149</sup> though doing so risks minimising or erasing how dissimilar the realities of women can be from one another. For example, how a white, urban, middle-class woman experiences the crime of sexual assault and the processes of justice is likely to be quite divergent from the experiences of an impoverished, rural, Indigenous woman. The strategies needed to address the specific problems of these two people likely differ, and if these types of disparities are not directly acknowledged, some women will find that their needs are not being met or even addressed by the feminist movement.

---

<sup>148</sup> Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 Berkeley Women’s LG 16 at 19 [Grillo].

<sup>149</sup> Iris Marion Young, *Inclusion and Democracy* (New York: Oxford University Press, 2002).



The use of essentialism as a critique of feminism gained momentum in the 1980s and 1990s when women from marginalised communities began demanding increased representation within feminist movements.<sup>150</sup> While the problems stemming from essentialism were not new complaints, the rise of the third wave of feminism in this time period centred on bringing issues of diversity to the forefront of feminist dialogues and working to make feminism more inclusive.<sup>151</sup>

These criticisms can also be applied to feminist legal theory. According to Angela Harris, “[to] be fully subversive, the methodology of feminist legal theory should challenge not only law's content but its tendency to privilege the abstract and unitary voice”; a feminism that refuses to acknowledge its own struggles with gender essentialism is unable to do this.<sup>152</sup> When the law is applied without any nuance or understanding of difference, the experiences of actual people are abstracted away. Feminist legal theory seeks to incorporate a gendered perspective into legal analysis, but this must be with the knowledge that gender is not one universal experience. When feminism neglects to do this, women are forced to “choose pieces of [themselves] to present as wholeness”.<sup>153</sup> Instead of being defined by men, women are denied their full identity by other women with more power, ensuring that feminist efforts only undermine certain oppressions, leaving others to flourish unacknowledged and unchallenged.

---

<sup>150</sup> Nancy E Dowd & Michelle S Jacobs, eds, *Feminist Legal Theory: An Anti-Essentialist Reader* (New York: New York University Press, 2003) at 9; Daisy Hernandez & Bushra Rehman, eds, *Colonize This!: Young Women of Colour on Today's Feminism* (Berkeley, CA: Seal Press, 2002); Chandra Talpade Mohanty, *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Durham, NC: Duke University Press, 2003).

<sup>151</sup> For example, see this edited volume by Rebecca Walker who coined the phrase “third wave feminism”: Rebecca Walker, ed, *To Be Real”: Telling the Truth and Changing the Face of Feminism* (New York: Anchor Books, 1995).

<sup>152</sup> Angela P Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stan L Rev* 581 at 585 [Harris 1990].

<sup>153</sup> *Ibid* at 589.

Intersectionality is a theory that challenges the inevitability of essentialism and seeks to ensure that feminism does not neglect the voices and needs of the most marginalised. The term was coined in the 1980s by Kimberlé Crenshaw, a Black American law professor, though the concept has been used by racialised women for many years.<sup>154</sup> Crenshaw's initial work on intersectionality focused on how it is impossible to easily separate the varying parts of people's identities when trying to determine how and why legal discrimination occurs. To explain, she uses the example of a four-way traffic stop:

Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars travelling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in an intersection, her injury could result from sex discrimination or race discrimination.<sup>155</sup>

If a Black woman experiences an incident of discrimination, it is often impossible to differentiate how sexism and racism influenced this treatment. Perhaps issues of class, sexuality, or ability were also implicated. Intersectionality, therefore, insists on seeing individuals as their whole selves, with identities that cannot be broken down into separate pieces when convenient.

However, given the way that law works, this approach to identity and its correspondence with power and oppression is often neglected as it is harder to prove such complex intersections in the courts. Instead, situations are simplified, but this can leave individuals without recourse for the specific form of discrimination that they have experienced. For example, women are

---

<sup>154</sup> See: Kimberlé W Crenshaw, "Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) 43 *Stan L Rev* 1241 [Crenshaw 1991]; Kimberlé W Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *U Chicago Legal F* 139 [Crenshaw 1989]. See also: Angela Y Davis, *Women, Race and Class* (New York: Random House, 1982); Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 1990); Beverly Guy-Sheftall, ed, *Words of Fire: An Anthology of African-American Feminist Thought* (New York: The New Press, 1995).

<sup>155</sup> Crenshaw 1989, *ibid* at 149.

statistically paid less than men for the same amount of work. But if women in a particular company were to challenge their employer about this type of discrimination, how would the courts deal with the fact that while women make less than men, racialised women make less than white women?<sup>156</sup> Addressing only one facet of oppression can hide the full scope of inequities.

Crenshaw also stressed the importance of looking at intersectionality through a structural lens. Different types of oppression can interact, creating a web of barriers and challenges unique to a person's specific circumstances. She argues that,

[intersectional] subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.<sup>157</sup>

As in the example earlier in this chapter, the white, urban, middle-class woman and the rural, impoverished Indigenous woman face entirely different realities when it comes to dealing with sexual assault in their lives. While both belong to the category of “women”, sexual violence will affect each in disparate ways. Marginalised women, for instance, often do not have the same level of access to redress as more privileged women, and also face interconnected and compounding harms based on their marginalised status.<sup>158</sup> Where a white woman may feel comfortable going to the police, an Indigenous woman may fear that the authorities will not

---

<sup>156</sup> Tamara Hudon, “Visible Minority Women” (3 March 2016), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14315-eng.pdf>> at 30. Racialised men are also harmed by the wage gap phenomenon. “Racial Wage Gap” (2017), *The Conference Board of Canada*, online: <<https://www.conferenceboard.ca/hcp/provincial/society/racial-gap.aspx>>; Sheila Block & Grace-Edward Galabuzi, “Canada’s Colour Coded Labour Market” (March 2011), *Policy Alternatives*, online: <<https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2011/03/Colour%20Coded%20Labour%20Market.pdf>>.

<sup>157</sup> Crenshaw 1991, *supra* note 154 at 1249.

<sup>158</sup> For example, see: Michele R Decker, Charvonne N Holliday, et al, “‘You Do Not Think of Me as a Human Being’: Race and Gender Inequities Intersect to Discourage Police Reporting of Violence against Women” (2019) 96 *Journal of Urban Health* 772.

believe her or even harm her because of her Indigenous identity.<sup>159</sup> Recent studies from Patrina Duhaney show that Black women in Canada experience these types of structural oppressions in the context of intimate partner violence.<sup>160</sup> The intersection of racism and sexism in their lives creates a system where reporting the violence that they experience becomes a harrowing ordeal that sometimes results in their own criminalisation.<sup>161</sup>

Implementing an intersectional approach to feminism requires significant and ongoing efforts to deconstruct and challenge perceptions of what is fair and just according to more than a singularly-focused gendered lens.<sup>162</sup> Such an approach is needed if feminism wishes to engage in systemic change that benefits all women, regardless of how they experience sex and gender, or what the other facets of their identity may be. While some essentialism is necessary for any activist group, it must be done consciously by a movement that has fully thought through the implications of their actions. In the end, intersectionality asks that feminists “define complex experiences as closely to their full complexity as possible and that we not ignore voices at the margin”.<sup>163</sup>

---

<sup>159</sup> For example, Indigenous women have reported being arrested themselves when reporting their experiences of intimate partner violence. “Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls Volume 1a” (3 June 2019), *National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <[https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1a-1.pdf](https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf)> at 639 [MMIWG].

<sup>160</sup> Patrina Duhaney, “Criminalized Black Women’s Experiences of Intimate Partner Violence in Canada” (2021) 0:0 *Violence Against Women*. 1 [Duhaney 1]; Patrina Duhaney, “Contextualizing the Experiences of Black Women Arrested for Intimate Partner Violence in Canada” (2021) 0:0 *Journal of Interpersonal Violence* 1 [Duhaney 2].

<sup>161</sup> *Ibid.*

<sup>162</sup> And also with a gendered lens that is capable of seeing the full diversity and complexity of gender.

<sup>163</sup> Grillo, *supra* note 148 at 22. See also: Beth Richie, “Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (Transcript)” (2015) 5 *U Miami Race & Social Justice L Rev* 257.

### 2.3.1 Critiques Against Carceral Feminism

Many intersectional theorists have argued that the mainstream feminist movement has relied too heavily on the state to prevent violence against women and has labelled those who work primarily with the police and courts in an attempt to address gender-based violence as ‘carceral feminists’.<sup>164</sup> These critics argue that instead of reducing harm, the state often enacts further violence against marginalised communities, leaving them in an even worse position than before the state intervened. Much of mainstream feminist activism and reform has focused on liberal conceptions of change which largely ignore the challenges of essentialism and rely on a very individualised conception of rights, ignoring community-level harms.<sup>165</sup> Sherene Razack cautions against this type of approach to law reform as it limits the way that groups and individuals can talk about and conceptualise how violence and discrimination affect them. As she explains, “[when] women and other oppressed groups articulate the problems of our daily lives using the concept of rights and all that it entails, we are consciously or unconsciously squeezing our lived experience into a pre-ordained mould.”<sup>166</sup> The legal system was created by some of the most privileged individuals in society and it is maintained largely by the same group of people. The stories that it tells and understands are not necessarily the stories of marginalised individuals

---

<sup>164</sup> 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 at 220 [Kim 2018]. For additional reading, see: Dianne L Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998) 36 *Osgoode L Rev* 151 [Martin]; Laureen Snider, “Toward Safer Societies: Punishment, Masculinities and Violence Against Women” (1998) 38 *British Journal of Criminology* 1 [Snider]; Elizabeth Bernstein, “Carceral Politics as Gender Justice? The ‘Traffic in Women’ and Neoliberal Circuits of Crime, Sex, and Rights” (2012) 41 *Theoretical Sociology* 233; Elizabeth L Sweet, “Carceral Feminism: Linking the State, Intersectional Bodies, and the Dichotomy of Place” (2016) 6:2 *Dialogues in Human Geography* 202; Kari Lerum & Shari L Dworkin, “Sexual Agency is Not a Problem of Neoliberalism: Feminism, Sexual Justice, and the Carceral Turn” (2015) 73 *Sex Roles* 319. For a related critique: Sarah Lamb, “Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment” (2013) 24:3 *Law and Critique* 229.

<sup>165</sup> Dean Spade, “Their Laws Will Never Make Us Safer: An Introduction” in Ryan Conrad, ed, *Against Equality: Prisons Will Not Protect You* (AE Press, 2012) 1 [Spade 2012a].

<sup>166</sup> Sherene Razack, *Canadian Feminism and the Law: The Women’s Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) at 12.

and their communities, and this leads not only to a system that fails to meet the needs of some of its members, but actively harms them as well.

Women of colour have continually highlighted how many feminist reforms have had unintended consequences. For example, US studies show that mandatory arrest regimes for domestic violence are disproportionately enforced in racialised communities, meaning that racialised men are arrested more frequently than white offenders and tend to receive harsher sentences and repercussions for their behaviour.<sup>167</sup> Racialised women are then put into the position of having to choose whether to protect themselves or their community.<sup>168</sup> If they report their abuser, he will be taken by a racist state that may harm him far beyond the retributive requirements of criminal law. He will be removed from his community, unable to support his family or friends.<sup>169</sup> Additionally, women themselves have been harmed by reforms meant to protect them. For instance, under mandatory arrest regimes, abused women can be arrested if they engage in violent resistance against their partner, the primary aggressor.<sup>170</sup> Instead of helping women flee abuse, these regimes criminalise them, introducing an array of complications

---

<sup>167</sup> Nancy Whittier, “Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy” (2016) 30:5 *Gender and Society* 791 [Whittier]; Barbara Fedders, “Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women’s Movement” (1997) 23 *NYU Rev L & Soc Change* 281 [Fedders]; Jennifer C Nash, “From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory” (2004-2005) 11 *Cardozo Women's LJ* 303 [Nash].

<sup>168</sup> *Ibid.*

<sup>169</sup> For a longer discussion on this topic, see Chapter 8.

<sup>170</sup> Whittier, Fedders, Nash, *supra* note 167. See also: Leana A Bouffard et al, “Gender Differences in Specialization in Intimate Partner Violence: Comparing the Gender Symmetry and Violent Resistance Perspectives” (2008) 25:3 *Justice Quarterly* 570; Lisa R. Muftić et al, “An Exploratory Study of Women Arrested for Intimate Partner Violence: Violent Women or Violent Resistance?” (2007) 22:6 *Journal of Interpersonal Violence* 753; Michael P Johnson, “Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence” (2006) 12:11 *Violence Against Women* 1003. While not much research has been conducted on this issue in the Canadian context, Indigenous women have reported it happening to them. See: MMIWG, *supra* note 159. Several of the lawyers I spoke with also said that this was becoming an increasingly common problem in Canada. For a recent exploration of the experiences of Black women in Canada, see: Duhaney 1, Duhaney 2, *supra* note 160.

into their lives, and undermining their attempts to legally challenge their abusers as now they are seen as equally contributing to (and in some instances, solely responsible for) the violence .<sup>171</sup>

While these criticisms are powerful and deserve serious consideration, it is also important to recognise that liberal feminist responses to violence in the past were often much more nuanced than some contemporary critiques imply. According to Lise Gotell, “achieving harsh punishment for sex offenders was never a principal goal [of the movement] and was... often explicitly disavowed” by liberal feminists during the 1970s-90s.<sup>172</sup> Unfortunately, despite feminist emphasis on prevention and systemic change, legal reforms dealing with sex and gender-based violence resulted in punitive regimes. This was in part a consequence of the rise of neo-liberalism and its emphasis on individual responsibility,<sup>173</sup> but also a lack of acknowledgement of the warnings of more marginalised women. Instead of finding partnerships among other groups of feminists who were trying to create innovative, non-state-based solutions to the problems of sex and gender-based violence, liberal feminists found their reform efforts co-opted by other political movements and interests, resulting in legal changes that satisfied few. Reforms to sexual assault law became too focused on individuals rather than systemic issues of power and privilege. However, despite these issues with state-centric legal reform, Gotell cautions that an,

endorsement of a rigid, anti-carceral stance treats the question of criminalisation as an all-or-nothing affair. The contradictory implications of feminist law reform are ignored, along with the possibilities of progressive engagements with criminal law.<sup>174</sup>

---

<sup>171</sup> *Ibid.*

<sup>172</sup> Gotell 2015, *supra* note 5 at 58. While many feminists were concerned about overly punitive responses, as with any large and diverse group, there was no universal consensus about how to deal with violence. There were also many feminists who did believe that punitive regimes were an important and necessary tool. See: Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland: University of California Press, 2021).

<sup>173</sup> *Ibid* at 60.

<sup>174</sup> *Ibid* at 66. See also: Anna Terwiel, “What is Carceral Feminism?” (2020) 48:4 Political Theory 421.

While criticisms against carceral feminism should be thoughtfully engaged with, there is also value in attempting to understand and improve the system that currently exists. Feminists have won many important victories in terms of legal protections.<sup>175</sup> While none of these accomplishments have succeeded in bringing about total equality for women (and some have caused additional harm to some women), it is unlikely that the traditional criminal law system is going to be fully dismantled in the immediate future, so efforts to improve what exists are necessary. Furthermore, given the diversity of women and their interests, some may have justice needs that still require the traditional system's mechanisms.

## **2.4 Conclusion**

As I have shown in this chapter, understanding sexual assault requires looking at the social constructions underlying this crime. Starting with a feminist lens, I examine the gendered nature of this crime, from who it affects to why and how this type of violence is perpetuated. However, trying to comprehend the full scope of the problem requires looking beyond just sex and gender and acknowledging how the full complexity of people's identities impacts the realities of sexual assault. While women are the most frequent victims of sexual assault, not all women will experience this type of violence in the same way, nor will they have access to the same methods and avenues of redress. Given that my research question involves understanding justice from the perspective of survivors, intersectionality is essential for understanding the diverse experiences and needs of the women that I spoke with.

---

<sup>175</sup> Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge, 2010) 209.



### **Chapter 3: Defining Sexual Assault: Statistical Evidence, Legal Definitions, and Formal Processes**

Sexual assault is a complex social problem. Thus, to give context to the question of what survivors want in terms of justice for this crime, in this chapter I review the statistics and legal frameworks that govern this area. I begin by addressing some of the statistics related to this offence in Canada. By recognising how many people this crime affects and who these people are, it is easier to apprehend the urgency we should feel when approaching issues involving sexual assault.

Also important is the fact that my research has been conducted in a specific legal jurisdiction. While much of the literature I examined in Chapter 1 dealt with international scholarship, in this dissertation, I am looking at sexual assault from a Canadian perspective. As such, in this chapter I review what Canadian law says about sexual assault, from the basic *Criminal Code* provisions that define the offence, to some of the most important jurisprudence that has been crafted throughout the years. From there, I delve into the realm of sentencing and how it pertains to this crime as this is the stage of a criminal law process where consequences, often associated with justice, are applied.<sup>176</sup>

This baseline understanding of sexual assault through the written law, however, does not capture the full scope of what sexual assault looks like in Canada. Consequently, I discuss what it means to report a sexual assault to the police and what the steps are in a criminal trial. I also touch on some of the other legal avenues available to survivors, particularly the use of civil suits and, in Ontario, the (now former) Criminal Injuries Compensation Board, as well as restorative

---

<sup>176</sup> Consequences, and more broadly, feelings of having obtained justice, can arise throughout the different stages (or types) of a legal process as well.

and transformative justice. While this chapter is only a brief overview of these topics, it is meant to give readers enough information to understand the landscape of choices survivors currently have when attempting to obtain justice in the wake of an assault.

### **3.1 The Numbers Game: What Do Statistics Reveal About this Offence?**

According to the General Social Survey (GSS) on Victimization, over 940,000 individuals in Canada were sexually assaulted in 2019<sup>177</sup> This number comes from a survey that asks Canadians to report all incidents of criminal victimisation whether they have informed the police or not. This number is likely an underestimation of how many sexual assaults occur in Canada every year. For example, many individuals do not report their assaults to the police, citing reasons such as believing that the assault was not important enough, a trend that is likely mirrored in the GSS data.<sup>178</sup> There are probably also a number of people who do not recognise what happened to them as a crime<sup>179</sup> and many who do not feel comfortable disclosing such information to a stranger on the phone or typing it into a survey form. Additionally, there are many groups that are difficult to access for the purposes of a survey, such as minors, individuals living in institutions (e.g. prisons or long-term care facilities), and people who do not speak either French or English. Therefore, 940,000 is a conservative estimate of the extent of this crime.

---

<sup>177</sup> Cotter 2021, *supra* note 2. This number represents reports from *all* Canadians (via a large random sample survey conducted by phone and internet surveys) and has not yet been broken down by gender.

<sup>178</sup> Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 613 at 630 [Johnson 2012]; Conroy & Cotter, *supra* note 3 at 18; Cotter 2021, *supra* note 2 at 18-19.

<sup>179</sup> As discussed later in this chapter, the definition of sexual assault in Canada is quite broad, encompassing any unwanted sexual touching; yet this offence is often understood by the general public as unwanted penetration. It is likely that there are survivors who do not view the violence that they endured as a criminal offence, or that it takes them some time to come to this conclusion. See: Cecilia Benoit et al, “Issue Brief: Sexual Violence Against Women in Canada” (December 2015), *Status of Women Canada*, online: <<http://www.swc-cfc.gc.ca/svawc-vcsfc/issue-brief-en.pdf>> [Benoit et al].

When one compares the results of the GSS, however, to how many sexual assaults were reported to the police under the Uniform Crime Reporting (UCR) survey, there is a significant discrepancy. In 2019, only 6 percent of the sexual assaults recorded in the GSS were reported to the police.<sup>180</sup> While most incidents of victimisation (both violent and non-violent) are not brought to the police’s attention, sexual assault is an outlier given the size of the gap. For example, according to the 2018 Survey of Safety in Public and Private Spaces (SSPPS), “5% of women stated that police found out about the most serious incident of sexual assault they experienced, while 26% of women and 33% of men who experienced physical (non-sexual) assault said likewise”.<sup>181</sup> GSS data from 2019 states that even when controlling for a variety of variables, sexual assault reporting rates to the police are about 80% lower when compared to other violent crimes.<sup>182</sup>

Since the advent of the #MeToo movement discussed in Chapter 1, there has been a significant increase in the number of sexual assaults being reported to the police.<sup>183</sup> Whether this increase in reporting will be sustained over time and how sexual assault reporting now compares to other crimes has yet to be determined.<sup>184</sup>

---

<sup>180</sup> Greg Moreau, “Police-Reported Crime Statistics in Canada, 2020” (27 July 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00013-eng.htm>> [Moreau 2021].

<sup>181</sup> Adam Cotter & Laura Savage, “Gender-based Violence and Unwanted Sexual Behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces” (5 December 2019), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>> [Cotter & Savage].

<sup>182</sup> Cotter 2021, *supra* note 2 at 17.

<sup>183</sup> Cristine Rotenberg & Adam Cotter, “Police-Reported Sexual Assaults in Canada Before and After #MeToo, 2016 and 2017” (8 November 2018), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54979-eng.htm>> [Rotenberg & Cotter].

<sup>184</sup> An increase in reporting does not necessarily mean that more sexual assaults are occurring on a yearly basis. This upwards bump in the reporting rate may be caused by a greater number of women deciding to report (either more quickly or at all), or even a change in the way that police are collecting and reporting on sexual assault data. *Ibid.* In regard to how long these increases will last, the latest UCR data saw a drop in the number of sexual assaults reported to the police, though this may be due to the influence of the pandemic making it more difficult for people to access various reporting opportunities. See Moreau 2021, *supra* note 180.

If the sheer number of sexual assaults that occur on a yearly basis was not reason enough to study this offence, what is known about the perpetrators and victims of sexual assault illustrates the highly gendered nature of this crime prompting an even greater need for research and action. In 2017, over 95 percent of the people charged with sexual assault were men, while only 3 percent were women.<sup>185</sup> In GSS data from 2019, women were five times more likely to be a victim of sexual assault than men.<sup>186</sup> This data highlights the fact that sexual assault is a crime committed primarily by men against women and girls. The focus of this dissertation is not meant to imply that male survivors are not deserving of attention and study or that they do not exist in large numbers.<sup>187</sup> However, given the sheer number of women who are affected by sexual assault, as well as how this offence ties into sex and gender-based oppression, I have centred my work on male violence against women.<sup>188</sup> Non-binary and trans people also experience sexual violence, though given the limitations of this project they have not been included in this data set either. This issue is further discussed in Chapter 4.

Moreover, not all groups of women are victimised at the same rate. The more marginalised a woman is, the more likely she is to be sexually assaulted. For example, between

---

<sup>185</sup> Laura Savage, “Female Offenders in Canada, 2017” (10 January 2019), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00001-eng.htm>>. See also: Cristine Rotenberg, “Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile” (3 October 2017), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54866-eng.htm>> [Rotenberg 1].

<sup>186</sup> Cotter 2021, *supra* note 2 at 3.

<sup>187</sup> For example, see: Lara Stemple & Ilan H Meyer, “The Sexual Victimization of Men in America: New Data Challenges Old Assumptions” (2014) 104:6 *American Journal of Public Health* 19; Heather R Hlavka, “Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization” (2016) 20:4 *Men and Masculinities* 482; Marysia Zalewski et al, *Sexual Violence Against Men in Global Politics* (New York: Routledge, 2018); Aliraza Javid, “Out of Place: Sexualities, Sexual Violence, and Heteronormativity” (2018) 39 *Aggression and Violent Behaviour* 83; Charlotte C Petersson & Lars Platin, “Breaking with Norms of Masculinity: Men Making Sense of Their Experience of Sexual Assault” (2019) 47 *Clinical Social Work Journal* 372. Additionally, it is important to note that male survivors are often marginalised because of aspects of their identity such as age or sexuality. An intersectional analysis is necessary to understand sexual assault beyond just sex and gender. See: Cotter & Savage, *supra* note 181.

<sup>188</sup> Though I have chosen to use a violence against women framework, as mentioned in Chapter 2, there are limitations to this approach that are important to consider. See: Malinen, *supra* note 125.

2009 to 2014, around one-third of all sexual assault victims were girls between the ages of 12 and 17 years old, and almost 20 percent were younger than 12.<sup>189</sup> Young girls, due to their vulnerability, particularly within family situations, are a frequent target of older men who commit sexual assault.<sup>190</sup>

Indigenous women and girls face a violent combination of sexism, racism, and colonialism that results in higher victimisation rates.<sup>191</sup> In 2014, the rate of sexual assault victimisation among Indigenous people was three times that of non-Indigenous people, and in 94 percent of these assaults, the victims were women. The most recent GSS data reveals that over one-quarter of Indigenous women have reported experiencing sexual violence as a child which is nearly three times the rate faced by non-Indigenous women.<sup>192</sup> The final report from the National Inquiry into Missing and Murdered Indigenous Women notes that even when accounting for differentiating factors, such as “high-risk lifestyles”, Indigenous women still face a significantly higher risk of sexual violence than non-Indigenous women.<sup>193</sup> According to those interviewed by the Inquiry, “just being Indigenous and female makes you a target”.<sup>194</sup>

---

<sup>189</sup> Rotenberg 1, *supra* note 185.

<sup>190</sup> Between 2009 and 2014, one in five sexual assaults where a charge was laid could meet the criteria to be considered an act of pedophilia. Over half of these assaults were perpetrated by a family member against a related minor. In total, over half of all victims under 13 were sexually assaulted by a family member (and this number holds for both female and male child victims). Rotenberg 1, *ibid*.

<sup>191</sup> Conroy & Cotter, *supra* note 3. See also: Tracy Lindberg, Priscilla Campeau & Maria Campbell, “Indigenous Women and Sexual Assault in Canada” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 87; Shannon Brennan, “Violence Victimization of Aboriginal Women in the Canadian Provinces, 2009” (17 May 2011), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf>>; Loanna Heidinger, “Intimate Partner Violence: Experiences of First Nations, Metis and Inuit Women in Canada, 2018” (19 May 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00007-eng.htm>>.

<sup>192</sup> Samuel Perreault, “Victimization of First Nations People, Metis and Inuit in Canada” (19 July 2022), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00012-eng.htm>>.

<sup>193</sup> MMIWG, *supra* note 159 at 55. This report also points out that the unexamined concept of a “high-risk lifestyle” is steeped in racist assumptions.

<sup>194</sup> *Ibid*.

Other categories<sup>195</sup> of women that are disproportionately affected by sexual violence include those with disabilities,<sup>196</sup> the elderly,<sup>197</sup> immigrants/refugees,<sup>198</sup> and queer women.<sup>199</sup> Research on these categories of women and their experiences with sexual violence is sparse, but what scholars have discovered is that the more vulnerable someone is, the more likely that they will face increased levels of violence, and that this violence is often not brought to the attention of the state.

---

<sup>195</sup> This list is not exhaustive, but merely a sampling of different categories of vulnerability.

<sup>196</sup> See: Janine Benedet & Isabel Grant, "Sexual Assault of Women with Mental Disabilities: A Canadian Perspective" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (Abingdon: Routledge, 2010) 322; Fran Odette, "Sexual Assault and Disabled Women Ten Years After Jane Doe" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 173; Adam Cotter, "Violent Victimization of Women with Disabilities, 2014" (15 March 2018), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54910-eng.htm>>; Talia Meer & Helene Combrinck, "Invisible Intersections: Understanding the Complex Stigmatisation of Women with Intellectual Disabilities in Their Vulnerability to Gender-based Violence" (2015) 29:2 *Agenda* 14; Laura Savage, "Intimate Partner Violence: Experiences of Women with Disabilities, 2018" (26 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00006-eng.htm>>; Cotter 2021, *supra* note 2 at 11.

<sup>197</sup> See: Brian Payne, "Understanding Elder Sexual Abuse and the Criminal Justice System's Response: Comparisons to Elder Physical Abuse" (2010) 27 *Justice Quarterly* 208; Isabel Grant & Janine Benedet, "The Sexual Assault of Older Women: Criminal Justice Responses in Canada" (2016) 62:1 *McGill LJ* 41; Julien Chopin & Eric Beauregard, "Elderly Sexual Abuse: An Examination of the Criminal Event" (2019) 32:6 *Sexual Abuse* 706; Kristen M Budd & Morgan A Liddic, "Incidents of Sexual Violence Against Older Adults: A Comparison Study" (2020) 33:6 *Sex Abuse* 654.

<sup>198</sup> Benoit et al, *supra* note 179 at 19-20; Douglas A Brownridge & Shiva S Halli, "Double Jeopardy? Violence Against Immigrant Women in Canada" (2002) 17:4 *Violence and Victims* 455; Sepali Guruge et al, "Violence against Women: An Exploration of the Physical and Mental Health Treads Among Immigrant and Refugee Women in Canada" (2012) 7 *Nursing Research and Practice* 434592. See also: Shannon Hutcheson & Sarah Lewington, "Navigating the Labyrinth: Policy Barriers to International Students' Reporting of Sexual Assault in Canada and the United States" (2017) 27:1 *Ed 1 Rev* 81.

<sup>199</sup> Queer is an umbrella term encapsulating different gender and sexuality-related identities such as lesbian, gay, bisexual, trans, and non-binary individuals. Little empirical research has been conducted on the violence facing these communities in Canada, but what does exist shows that queer women face higher rates of sexual violence than non-queer women. See: Laura Simpson, "Violent Victimization of Lesbians, Gays, and Bisexuals in Canada, 2014" (31 May 2018), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54923-eng.htm>>; Brianna Jaffray, "Experiences of Violent Victimization and Unwanted Sexual Behaviours Among Gay, Lesbian, Bisexual and Other Sexual Minority People, and the Transgender Population, in Canada, 2018" (9 September 2020), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00009-eng.htm>>; Brianna Jaffray, "Intimate Partner Violence: Experiences of Sexual Minority Women in Canada, 2018" (26 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00005-eng.htm>>.

As noted, the people charged with sexual assault are overwhelmingly men, and these men are often known to the women that they hurt.<sup>200</sup> From 2009 to 2014, 87 percent of the victims included in the UCR-reported cases knew their assailant.<sup>201</sup> In 26 percent of cases, the perpetrator was a casual acquaintance; in 24 percent of cases, he was a non-spousal family member; and in 19 percent of cases the assailant was an intimate partner. This reality has important implications for any research into justice as the legal system tends to assume that survivors and offenders can be easily separated.

### **3.2 Provisions and Jurisprudence: Sexual Assault Under Canadian Law**

To understand how sexual assault is conceptualised under Canadian law, one must start by looking at the *Criminal Code*. The primary provisions dealing with sexual assault are sections 271, 272, and 273. This three-tiered system categorises sexual assaults according to the level of violence perpetrated rather than the sexual nature of the act.<sup>202</sup> Instead of identifying some sexual activity as inherently worse than others, courts are asked to consider the effects of the abuse on the complainant, as well as the choices of the offender. For example, if the offender uses a weapon or threatens the complainant with further harm, these decisions should be seen as increasing the level of violence and thus the seriousness of the offence.

Under section 271, everyone who commits a sexual assault is guilty of either an indictable offence with a maximum period of imprisonment of 10 years or a summary offence

---

<sup>200</sup> Rotenberg 1, *supra* note 185.

<sup>201</sup> *Ibid.*

<sup>202</sup> Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 *International Journal of Offender Therapy and Comparative Criminology* 258 at 260. See also: Los, *supra* note 117; Janine Benedet, "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution" (2014-2015) 52 *Alta L Rev* 127. From a feminist perspective, see: Sheila McIntyre, Christine Boyle, Lee F Lakeman & Elizabeth Sheehy, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" (2000) 20 *Canadian Woman's Studies* 72 at 73-75; Julian Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) [Roberts & Mohr].

with a maximum period of imprisonment not exceeding 18 months.<sup>203</sup> The vast majority of sexual assaults are charged only under this provision—for example, 98 percent of all sexual assaults from 2009 to 2014 were charged primarily under section 271—most of them as summary offences.<sup>204</sup>

Section 272 deals primarily with sexual assaults involving the use of a weapon, threats to a third party other than the complainant, the involvement of more than one perpetrator, and those that result in bodily harm.<sup>205</sup> This provision addresses factors that increase the seriousness of the offence, thus more stringent sentences are available with the ceiling set at 14 years to life depending on which factors were present.<sup>206</sup>

Finally, section 273 is the provision dealing with aggravated sexual assault, meaning any sexual assault where the accused “wounds, maims, disfigures or endangers the life of a complainant”.<sup>207</sup> The sentencing ceiling for this offence is set at life given the severity of the harms caused.<sup>208</sup> All offences under sections 272 and 273 are indictable.

None of these provisions includes a legal definition of sexual assault. To determine what a sexual assault is under the law one must first look at section 265(1)(a) of the *Code*, which states that a person commits an assault when “without the consent of another person, he applies

---

<sup>203</sup> *Criminal Code*, RSC 1985, c C-46, s 271 [*Code*]. Technically all sexual assaults fall under section 271 with section 272 and 273 being charged in addition if necessary.

<sup>204</sup> Cristine Rotenberg, “From Arrest to Conviction: Court Outcomes of Police-Reported Sexual Assaults in Canada, 2009 to 2014” (26 October 2017), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm>> [Rotenberg 2]; Du Mont 2003, *supra* note 18 at 322. Offences under section 271 can be charged as summary or indictable offences and the Crown will generally decide how to proceed.

<sup>205</sup> *Code*, *supra* note 203, s 272.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*, s 273.

<sup>208</sup> *Ibid.*



force intentionally to that other person”.<sup>209</sup> Section 265(2) clarifies that this definition applies to all types of assault, including sexual assault.<sup>210</sup>

Canadian case law states that a sexual assault is committed when there is unwanted touching “of a sexual nature, such that the sexual integrity of the victim is violated”.<sup>211</sup> A court must take an objective approach to determining whether a sexual assault has occurred, asking whether “the sexual or carnal context of the assault [is] visible to a reasonable observer”.<sup>212</sup> The court may consider “the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force” when deliberating on whether an assault was committed.<sup>213</sup> The specific body part that was touched is not determinative of whether a sexual assault occurred, meaning that sexual assault does not require unwanted touching of the genitals.<sup>214</sup> Accordingly, in Canada, sexual assault is constructed to capture a wide array of non-consensual sexualised behaviour.

There are additional parts of the *Code* that provide important constitutive elements of sexual offences. For instance, section 273.1 defines consent as the “voluntary agreement of the complainant to engage in the sexual activity in question”.<sup>215</sup> Consent will not be found if offered by someone other than the complainant; the complainant was incapable of consenting to the

---

<sup>209</sup> *Ibid.*, s 265(1)(a). To be precise, section 265(1) also includes two other methods of committing an assault (involving threats and weapons) that can also apply to sexual assaults. See: *R v Chase*, [1987] 2 SCR 293 at para 4, 45 DLR (4th) 98 [Chase]. However, by far the most common provision used in sexual assault cases is section 265(1)(a).

<sup>210</sup> *Ibid.*, s 265(2).

<sup>211</sup> *Chase*, *supra* note 209 at para 11.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.* at para 9.

<sup>215</sup> *Code*, *supra* note 203, s 273.1(1). This definition of consent applies only to sexual assault provisions, not other offences in the *Code*.

activity; the accused induced the complainant into engaging in sexual activity by abusing a position of trust, power, or authority; the complainant expressed in either words or conduct a lack of agreement; or the complainant withdrew consent to engage in the sexual activity.<sup>216</sup> Nor can consent be obtained if the complainant submitted or did not resist because of the application of force against themselves or another person, threats or fear of threats over violence to themselves or another person, fraud, or the illegal exercise of authority.<sup>217</sup>

While accused persons do have access to a defence of honest but mistaken belief in consent,<sup>218</sup> there must be an air of reality to this claim,<sup>219</sup> and the *Code* delineates a series of situations where such a defence is not applicable.<sup>220</sup> For example, the accused's mistaken belief in consent cannot come from self-induced intoxication or reckless or wilful blindness.<sup>221</sup> Additionally, the accused cannot claim a mistaken belief in consent if he did not take "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting" or if "there was no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct".<sup>222</sup>

For a claim of sexual assault to be established, it must be proven that the accused committed the *actus reus* (the unwanted sexual touching) while also having the necessary *mens rea* (the intention to touch and subjective awareness via knowledge, recklessness or willful

---

<sup>216</sup> *Ibid*, s 273.1(2).

<sup>217</sup> *Ibid*, s 265(3).

<sup>218</sup> *R v Esau*, [1997] 2 SCR 777 at para 79, 88, 148 DLR (4th) 662.

<sup>219</sup> An air of reality is evidence "upon which a properly instructed trier of fact could form a reasonable doubt as to [the accused's] *mens rea*": *R v Ewanchuk*, [1999] 1 SCR 330 at para 56, 169 DLR (4th) 193 [*Ewanchuk*].

<sup>220</sup> *Code*, *supra* note 203, s 273.2.

<sup>221</sup> *Ibid*.

<sup>222</sup> *Ibid*. For a longer discussion of what the requirement of reasonable steps entails, see: Elizabeth Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 483.

blindness of a lack of consent). The Crown has the burden of proving these elements, including the lack of consent on the part of the complainant. Consent is determined with reference to the complainant's subjective state of mind at the time of the impugned contact.<sup>223</sup> The accused's perception of the state of mind of the complainant is not relevant at this stage and is only considered if he brings forward a defence of mistaken belief in consent.<sup>224</sup>

This defence asserts that the accused did not have the *mens rea* needed to be considered guilty of a crime because of a flawed understanding of the situation.<sup>225</sup> In *Ewanchuk*, the court ruled that "in order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question".<sup>226</sup> The court then described three additional considerations when reviewing a defence of mistaken belief in consent. First, the accused cannot rely on his own speculation that the complainant wanted him to touch her if she did not express any desire to this effect.<sup>227</sup> Additionally, "a belief that silence, passivity, or ambiguous conduct constitutes consent is a mistake of law, and provides no defence."<sup>228</sup> Affirmative behaviour of some sort is needed in order to trigger the accused's flawed understanding.

Relatedly, if a complainant does not agree to engage in sexual conduct, the accused cannot claim that this "constituted an invitation to more persistent or aggressive contact".<sup>229</sup> If the complainant has said "no", the accused must wait until he is sure that the complainant has

---

<sup>223</sup> *Ewanchuk*, *supra* note 219 at para 26.

<sup>224</sup> *Ibid* at para 30. Even if the accused is successful with his *mens rea* defence, this does not negate the finding that the complainant did not consent under the *actus reus* part of this offence.

<sup>225</sup> *Pappajohn v The Queen*, [1980] 2 SCR 120 at p 148; 111 DLR (3d) 1.

<sup>226</sup> *Ewanchuk*, *supra* note 219 at para 46.

<sup>227</sup> *Ibid*.

<sup>228</sup> *Ibid* at para 51-52.

<sup>229</sup> *Ibid*.

changed her mind before he begins engaging in further sexual touching.<sup>230</sup> Consequently, *Ewanchuk* requires that an accused be able to show that his mistaken belief in consent arose from behaviours on the part of the complainant that could be misinterpreted and that any misunderstanding on his part cannot be tied to assumptions based on rape myths.

In addition to the three-tiered structure of sexual assault in sections 271 to 273 of the *Code*, there are also provisions that deal with the sexual assault of minors and individuals with disabilities.<sup>231</sup> These particular provisions were created in order to recognise the unique vulnerability of these complainants given their age and/or capacity, and to construct specific legal frameworks to deal with these situations.<sup>232</sup>

### **3.3 Primer of Canadian Sentencing Law in Sexual Assault Cases**

In Canada, consequences for crimes are handled by the state largely within the criminal law system.<sup>233</sup> Should a survivor decide to report her assault to the police and pursue a criminal charge, the options (and outcomes) available to her are framed and constrained by the *Criminal Code*. If her case moves through the various levels of the criminal law system and results in a finding of guilt or a guilty plea, only then is sentencing considered and the offender given a state-

---

<sup>230</sup> *Ibid.*

<sup>231</sup> *Code*, *supra* note 203, s 150.1, s 151, s 152, s 153, and s 153.1.

<sup>232</sup> In the context of sexual assault, there is a contentious debate about how to ensure that individuals who are often targets for sexual violence are protected by the law with the need to respect that these individuals should also be able to make choices about their sexual lives. For a selection of some of these debates, see: Julie Desrosiers, "Raising the Age of Sexual Consent: Renewing Legal Moralism?" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 569; Kate Sutherland, "From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities" (2002-2003) 9 *Wm & Mary J Women & L* 313; Rebekah Moras, "Feminism, Rape Culture, and Intellectual Disability: Incorporating Sexual Self-Advocacy and Sexual Consent Capacity" in Matthew Wappett & Katrina Arndt, eds, *Emerging Perspectives on Disability Studies* (New York: Palgrave Macmillan, 2013) 189; Michael Gill, *Already Doing It: Intellectual Disability and Sexual Agency* (Minneapolis: University of Minnesota Press, 2015).

<sup>233</sup> Other parts of the legal system beyond the criminal law will be discussed later in this chapter.

sanctioned punishment. Accordingly, it is important to review what the law of sentencing is in Canada to fully understand the context behind any conversation of justice and sexual assault.

While sentencing is a very discretionary process compared to other parts of a trial, there are still many standard rules that a judge must follow. First, a judge must look to the *Criminal Code* to see whether there are legislative instructions about how sentencing must be treated for specific offences. In the context of sexual assault, sentencing floors and ceilings are set out in sections 271 to 273 and are dependent on which provision the assault is classified under, as well as what type of concurrent behaviour the offender engaged in while committing the assault. For example, if a weapon is used in the commission of a sexual assault, or the complainant was under the age of 16, there are specific sentencing rules that must be followed.<sup>234</sup>

However, according to research by Janice Du Mont in the early 2000s, sexual assaults were regularly undercharged by the police and the Crown, and consequently under-sentenced by the courts.<sup>235</sup> In her work, Du Mont reviewed the details of several sexual assault cases and determined what the appropriate charge should be as per the *Code*. When she compared her results with what actually happened she discovered that accused individuals were frequently being charged with a lesser offence than what their actions called for. For example, in one case from Du Mont's study, the accused sexually assaulted the complainant multiple times over the course of several days as he held her captive.<sup>236</sup> He threatened both her and her fetus with a knife. He beat the complainant, leaving her with a broken jaw, head injury, multiple contusions

---

<sup>234</sup> *Code*, *supra* note 203, ss 271-273.

<sup>235</sup> Du Mont 2003, *supra* note 18. For other criminal offences, overcharging is the bigger issue. Sexual assault is once again an outlier. See the following for a US-centric discussion of the problem: Kyle Graham, "Overcharging" (2013-2014) 11 Ohio St J Crim 701; H Mitchell Caldwell, "Coercive Plea Bargaining: The Unrecognised Scourge of the Justice System" (2011-2012) 61 Cath UL Rev 63.

<sup>236</sup> Du Mont 2003, *ibid* at 326.

and lacerations, and malnourishment after several days in captivity. Looking at the *Code*, given both the serious violence and bodily harm that occurred, such a case should have been charged under section 273. In the end, however, the perpetrator was charged under section 272.<sup>237</sup> By the time this case reached court, however, the charge had been amended to assault,<sup>238</sup> and the eventual sentence was for less than a year of imprisonment.<sup>239</sup>

If a sexual assault is undercharged, this error has consequences for any potential sentence that may be applied. For example, the maximum sentence under section 272 is capped at 14 years imprisonment,<sup>240</sup> while under section 273, this stretches to life imprisonment.<sup>241</sup> In the example above, by being undercharged, the case was under-sentenced as the judge no longer had access to sentences of incarceration longer than 5 years and possibly less if the charge was classified as a summary offence.<sup>242</sup> While there can be pragmatic reasons for police and prosecutors to select a lesser charge,<sup>243</sup> for some survivors it is likely that this disproportionality is a denial of justice as the harm that occurred to them can be seen as trivialised by the reduced categorisation. Further, given the sheer number of sexual assault convictions that result in

---

<sup>237</sup> *Ibid.*

<sup>238</sup> Specifically, the accused was charged under the lowest level of assault available in the *Code*: section 266. *Ibid.*

<sup>239</sup> *Ibid* at 336. A plea bargain may explain the drastic reduction in charges, but the article did not state whether this is what happened in this situation. Furthermore, a plea bargain resulting in this severe of a reduction in charge and sentence likely does not offer much comfort to the complainant.

<sup>240</sup> *Code, supra* note 203, s 272(2). Technically, a sentence of life imprisonment can be ordered under section 272 if the complainant is under the age of 16 years.

<sup>241</sup> *Ibid*, s 273(2).

<sup>242</sup> *Ibid*, s 266. A judge will only have access to a sentence of up to five years if the assault was charged as an indictable offence. For summary offences, limits for incarceration are much lower. It is unknown whether this offence was charged as summary or indictable; only that the final sentence was for less than a year of imprisonment.

<sup>243</sup> For example, charges may be changed during plea bargains, and sometimes a lesser charge is chosen as it is deemed more likely to succeed at trial. Du Mont 2003, *supra* note 18 at 326-327.

minimal incarceration, survivors may also feel at risk given how quickly their abusers are released from custody.<sup>244</sup>

After considering the base legislative and jurisprudential requirements for sexual assault, a judge will also reflect on the specific details of the offence to determine where within the available range a sentence should fall.<sup>245</sup> Tools such as aggravating and mitigating factors are used to justify why a harsher or more lenient sentence is required. These factors, several outlined in section 718.2 of the *Code*, look at specific actions taken during the offence as well as circumstances of the offence and complainant.<sup>246</sup> For example, it is considered an aggravating factor if the offender assaults an intimate partner or member of either his family or the family of his partner.<sup>247</sup> A breach of trust of this magnitude is something the courts see as increasing the serious nature of the offence and requiring harsher consequences in response. Similarly, it is an aggravating factor to harm a minor, or to abuse any other position of trust or authority beyond familial ties.<sup>248</sup> The list of factors in the *Code* is not exhaustive, and case law provides a plethora of other circumstances to consider. For example, there are no mitigating factors listed in section 718.2(a), though one of the most commonly used ones is whether this is the offender's first offence. A first time offender is given the benefit of the doubt as to whether the deterrent effects of a criminal trial will have a positive effect on him (while, in comparison, an offender who has

---

<sup>244</sup> Most sexual assaults are charged under section 271 which, depending on whether charged as summary or indictable, has much lower sentencing ceilings than the other two provisions. Additionally, many sexual assaults end up categorised as just physical assaults (reducing the available sentencing options even further depending on which provision is picked). Du Mont 2003, *ibid* at 328.

<sup>245</sup> See: *Code*, *supra* note 203, ss 716-751 for all of the varying rules regarding sentencing.

<sup>246</sup> *Ibid*, s 718.2.

<sup>247</sup> *Ibid*, s 718.2(a)(ii).

<sup>248</sup> *Ibid*, s 718.2(a)(ii.1), (iii).

committed multiple crimes is seen as less likely to respond to such an effect).<sup>249</sup> These tools are meant to help individualise the sentencing process, aiding the judge in ensuring that the specific circumstances of the offence and the people involved are reflected in the creation of the sentence.

Unfortunately, my previous research has shown that these tools can be used in ways that promote rape myths and stereotypes,<sup>250</sup> undermining gender equality in the criminal courts.<sup>251</sup> Though examples of prima facie objectionable applications of aggravating or mitigating factors were rare, I still found that the courts struggled to adequately balance their duties towards the state, complainant, and offender. I noted that pertinent aggravating factors were not always applied, and the scope of some mitigating factors was stretched to include sexual offenders inappropriately.

Another factor that the courts must consider is the submission of a victim impact statement (VIS). According to section 722(1) of the *Code*, a complainant may submit a statement detailing the physical and emotional harm that she experienced and may continue to experience as a consequence of the offence, any property damage or economic loss suffered as a result of her injuries, as well as the overall impact of the offence on her life.<sup>252</sup> This statement must be incorporated into the court's consideration of the sentence, and its purpose is to allow the complainant the opportunity to speak about her experiences in her own voice. This is one of the few opportunities during the trial for a complainant to potentially control her story and to feel as

---

<sup>249</sup> Despite being a frequently called upon factor in common law systems, there is some debate over the use of first time offender status as a mitigating factor: Elaine Freer, "First Time Lucky? Exploring Whether First-Time Offenders Should be Sentenced More Leniently" (2013) 77:2 *The Journal of Criminal Law* 163.

<sup>250</sup> Stabile, Smith & Skinner, Koshan, Suarez & Gadalla, *supra* note 25.

<sup>251</sup> Burnett, *supra* note 17.

<sup>252</sup> *Code*, *supra* note 203, s 722(1).



if she is participating largely on her own terms.<sup>253</sup> However, there is much controversy over the efficacy of victim impact statements, and what role they should play in the sentencing process.<sup>254</sup>

One of the central debates is over whether a VIS should be used to impact sentences, provide victims with the opportunity to express their feelings in the court, or some combination of both.<sup>255</sup> While some scholars are concerned about the potential effect of VIS on offender rights,<sup>256</sup> there is also conflicting evidence over the therapeutic benefits of submitting a VIS in sexual assault cases.<sup>257</sup>

For example, despite the fact that a VIS is supposed to allow a complainant to frame her own narrative, she is still under pressure to present herself as an “optimal” victim.<sup>258</sup> Women who do not fit the role of a “proper” victim, often because they are marginalised in some manner, may find that they are harmed rather than benefited by their submission of a VIS.

---

<sup>253</sup> VIS are reviewed and edited by the court before they are read publicly, and survivors face some limitation in what they are allowed to say. Julian V Roberts, “Victim Impact Statements: Lessons Learned and Future Priorities” (7 January 2015), *Department of Justice*, online: <[https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07\\_vic4/p1.html](https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07_vic4/p1.html)>.

<sup>254</sup> For example, the following article details some of the confusion and conflict over the use of VIS in the Canadian context: Marie Manikis, “Victim Impact Statements at Sentencing: Towards a Clearer Understanding of Their Aims” (2015) 65:2 UTLJ 85.

<sup>255</sup> Rhiannon Davies & Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (New York: Routledge, 2021) [Davies & Bartels]; Julian V Roberts & Edna Erez, “Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements” (2004) 10:3 *International Review of Victimology* 223; Paul G Cassell, “In Defence of Victim Impact Statements” (2008-2009) 6 *Ohio St J Crim L* 611 [Cassell]; Janice Du Mont et al, “Social Workers’ Perspectives on the Victim Impact Statements in Cases of Sexual Assault in Canada” (2007) 18:3 *Women & Criminal Justice* 1; Julian V Roberts & Allen Edgar, “Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions” (31 March 2006), *Department of Justice*, online: <[https://justice.gc.ca/eng/rp-pr/cj-jp/victim/rr06\\_vic3/rr06\\_vic3.pdf](https://justice.gc.ca/eng/rp-pr/cj-jp/victim/rr06_vic3/rr06_vic3.pdf)> [Roberts & Edgar].

<sup>256</sup> Cassel, Roberts & Edgar, *ibid.*

<sup>257</sup> Kim ME Lens, Antony Pemberton, Karen Brans, Johan Braeken, Stefan Bogaerts & Esmah Lahlah, “Delivering a Victim Impact Statement: Emotionally Effective or Counter-productive?” (2015) 12:1 *European Journal of Criminology* 17; Karen-Lee Miller, *You Can’t Stop the Bell from Ringing’: Protean, Unpredictable, and Persisting: The Victim Impact Statement in the Context of Sexually Assaulted Women* (PhD Dissertation, University of Toronto, 2015) [unpublished].

<sup>258</sup> Rakhi Ruparelia, “All That Glitters is Not Gold: The False Promise of Victim Impact Statements” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 665.

Rakhi Ruparelia has also identified many ways that a VIS can have unintended harmful effects on marginalised women, from who is informed about this right and supported in making a statement, to the fact that only certain people will feel comfortable and empowered enough to talk about their assault in public.<sup>259</sup> She argues that racialised women in particular have lower trust in the justice system and this will effect whether they feel safe enough to submit something as personal as a VIS, or if they feel that doing so will even have an impact on the court.<sup>260</sup> Additionally, Ruparelia states that, “to succeed victims must not only be articulate but must also be *perceived* as articulate, a status that is selectively accessible given racist and classist stereotypes”.<sup>261</sup> Even though the VIS is supposed to allow for the direct participation of the complainant in the trial, the way it is used often discriminates against the most vulnerable complainants.<sup>262</sup>

There are several additional rules to consider from the *Criminal Code* related to sentencing. Section 718 states that the fundamental purpose of sentencing is to encourage “respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions”.<sup>263</sup> Sentencing, therefore, is not simply a matter of looking in a book and finding the right number to apply. Part of the process requires an analysis of the effects of the crime on

---

<sup>259</sup> *Ibid* at 688.

<sup>260</sup> *Ibid* at 689.

<sup>261</sup> *Ibid* at 690. Ruparelia also notes that a VIS’ impact will be different depending on the race of both the accused and the complainant, pointing to a long history of racism in cases involving white female complainants and Black male offenders. *Ibid* at 679-680.

<sup>262</sup> There is also some debate over whether VIS can be effectively used as tools of feminist law reform given the fact that the information being provided is about harms that should be readily apparent to the courts. While some women may find the process therapeutic, Gillian Balfour and Janice Du Mont question whether VIS add any benefit to the trial process, particularly in light of the pressures on women to describe the impact sexual assault has had on them in a constrained manner. It also creates the perception that sexual assault is an exceptional event and helps to disguise the ways in which ongoing sexual violence impacts so many on a daily basis. See: Gillian Balfour & Janice Du Mont, “‘To This Day She Continues to Struggle with the Terror Imposed Upon Her’: Rape Narratives in Victim Impact Statements” (2018) 28 *Women & Criminal Justice* 43.

<sup>263</sup> *Code, supra* note 203, s 718.

society and how society should respond. Section 718 also lists several objectives of sentencing, including denunciation, deterrence (for both the individual and society at large), separation of the offender from society, rehabilitation, reparations, and the promotion of a sense of a responsibility and acknowledgement of the harm on the part of the offender.<sup>264</sup> Despite the fact that all sentencing principles should be considered equally, in the Canadian system, denunciation, deterrence, and separation receive substantially more attention from judges than aspects such as rehabilitation or reparations.<sup>265</sup>

Separation, however, does not ordinarily last a long time. As stated, most sexual assaults are charged as summary offences, meaning that the period of incarceration will be no more than two years less a day. Most sentences are substantially shorter.<sup>266</sup> Unless an order is given banning the offender from returning to his home community, the survivor will have to deal with his presence and potential anger at her involvement in punishing him.<sup>267</sup>

Denunciation and deterrence are also problematic objectives when it comes to whether they help to make society safer. The aim of denunciation is to signal to society that certain behaviours are unacceptable. According to the courts, “the punishment inflicted for grave crimes should reflect the revulsion felt by the majority of citizens for them”.<sup>268</sup> However, while certain

---

<sup>264</sup> *Ibid.*

<sup>265</sup> Cheryl Marie Webster et al, “The Will to Change: Lessons from Canada’s Successful Decarceration of Youth” (2019) 53:4 *Law & Society Review* 1092; “What We Heard: Transforming Canada’s Criminal Justice System” (March 2018) *Department of Justice*, online: <[https://www.justice.gc.ca/eng/rp-pr/other-autre/tcjs-tsjp/WWH\\_EN.pdf](https://www.justice.gc.ca/eng/rp-pr/other-autre/tcjs-tsjp/WWH_EN.pdf)>; Michael Adorjan & Rose Ricciardelli, “The Last Bastion of Rehabilitation: Contextualising Youth Correctionalism in Canada” (2018) 98:6 *The Prison Journal* 655; Rachel Fayter & Sherry Payne, “The Impact of the Conservative Punishment Agenda on Federally Sentenced Women and Priorities for Social Change” (2017) 26:1 *Journal of Prisoners on Prisons* 10; Anthony Gray, “Mandatory Sentencing Around the World and the Need for Reform” (2017) 20:3 *New Criminal Law Review* 391.

<sup>266</sup> Rotenberg 2, *supra* note 204.

<sup>267</sup> Though rarely used, banishment orders are available under s 732.1(3)(h) of the *Code*. See also: *R v Rowe* (2006), 216 OAC 264, 2006 CanLII 32312.

<sup>268</sup> *R v Oliver*, [1977] 5 WWR 344 at p 346, 1977 CarswellBC 400.

instances of sexual assault are seen as horrific by society, many are not. The *Code* requires sexual assaults be judged based on the severity of the violence that occurred, but stereotypes and discriminatory assumptions have a pernicious influence on the way that this crime is treated by society and the courts. The more an offence conforms to societal expectations of what constitutes a “real” sexual assault (i.e. violent penetration of a “good” victim<sup>269</sup>), the more likely that the courts will respond with a harsh sentence in order to denounce the crime and deter others from engaging in similar behaviour.

*R v Barton*<sup>270</sup>, a case that dealt with the sexual assault and death of Cindy Gladue, an Indigenous woman, illustrates what happens when stereotypes and discriminatory assumptions affect a sexual assault trial. In this case, information relating to Cindy Gladue’s prior sexual activity with the accused was allowed into evidence without being subject to the safeguards required by section 276 of the *Code* to prevent the inclusion of irrelevant or misleading evidence.<sup>271</sup> At the trial level, the accused was acquitted of all charges, including sexual assault, murder, and manslaughter. The case was appealed and eventually heard by the Supreme Court of Canada. The court opened their decision with a strong statement on the problem of discriminatory assumptions about sexual assault complainants:

We live in a time where myths, stereotypes, and sexual violence against women—particularly Indigenous women and sex workers—are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy

---

<sup>269</sup> Randall 2010, *supra* note 140.

<sup>270</sup> 2019 SCC 33.

<sup>271</sup> *Code*, *supra* 203, s 276. This provision prevents evidence about sexual conduct not related to the incident at hand from being used in court unless it fits within a narrow set of criteria. This protection was put into place as evidence of prior sexual conduct was often used to imply that if a survivor consented to sexual acts on one occasion, she was likely to have consented to the same activity again. This is a rape myth the Canadian legal system has rejected.

these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can—and must—do better.<sup>272</sup>

Cindy Gladue, despite being the victim in this situation, was treated as deserving of fewer protections based on the fact that she was an Indigenous sex worker who was seen as contributing to her own harm. Instead of being identified as the complainant or by her name, she was consistently addressed as “Native woman/girl” or as the “prostitute”.<sup>273</sup> According to the court:

Our criminal justice system holds out a promise to all Canadians: everyone is equally entitled to the law’s full protection and to be treated with dignity, humanity, and respect. Ms. Gladue was no exception. She was a mother, a daughter, a friend, and a member of her community. Her life mattered. She was valued. She was important. She was loved. Her status as an Indigenous woman who performed sex work did not change any of that in the slightest. But as these reasons show, the criminal justice system did not deliver on its promise to afford her the law’s full protection, and as a result, it let her down — indeed, it let us all down.<sup>274</sup>

Neither denunciation nor deterrence can work if there are some victims who are not seen as deserving of the full rights and protections that the criminal law provides. Instead, when the criminal law is applied inequitably, certain groups become the target for violence as offenders can rationally believe that they are less likely to be punished for harming vulnerable people who have been betrayed by a system meant to protect everyone.

In their final report, the MMIWG Inquiry was clear about how Indigenous people, particularly women and girls, are directly and actively harmed by the government. They argued that state-perpetuated “colonialism, discrimination, and genocide explains the high rates of

---

<sup>272</sup> *Ibid* at para 1.

<sup>273</sup> *Ibid* at paras 205-207, 213.

<sup>274</sup> *Ibid* at para 210.

violence against Indigenous women, girls, and 2SLGBTQQIA people.”<sup>275</sup> The report stressed that the Canadian government was not adequately responding to the violence Indigenous people face, and, in fact, contributed to worsening and continuing these harms. They stated that an “absolute paradigm shift is required to dismantle colonialism within Canadian society, and from all levels of government and public institutions.”<sup>276</sup> It is difficult for the courts to successfully promote denunciation or deterrence when such large-scale systemic issues of oppression and discrimination undermine these goals.

Additionally, given that most sexual assaults are charged under the least serious *Code* provision as summary offences, even when many should be considered much more harmful, the denunciation accorded to these incidents is low. Not only does this affect the experiences of survivors who must contend with the courts minimising their trauma, it adds to the perception that most sexual assaults are not that serious, undermining the objective of denunciation.

Deterrence is meant to discourage both the specific offender as well as others from committing a crime (or an additional crime).<sup>277</sup> In theory, when someone is convicted, it sends a message to others that there will be punishment should they engage in the same behaviour. While trying to deter people from committing crimes seems appropriate from a common sense perspective, in reality, humans struggle to make judgments about consequences that are in the

---

<sup>275</sup> “Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls Volume 1b” (3 June 2019), *National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <[https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1b.pdf](https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf)> at 174.

<sup>276</sup> *Ibid.*

<sup>277</sup> Specific deterrence is meant to convince an individual offender not to commit a crime given the potential consequences of perpetrating such an offence. General deterrence applies to the public at large as they can see others face consequences for committing crimes and are deterred from doing the same thing themselves lest they incur similar consequences.

future.<sup>278</sup> In order to be optimally effective, punishments must be both known and meted out soon after the criminal behaviour occurs.<sup>279</sup> Given how many sexual assaults go unreported, punishment for the crime is not certain. Furthermore, the length of time criminal proceedings take in Canada ensures that offenders will not be punished in a swift manner, adding to the uncertainty of the process and the diminishment of the effectiveness of deterrence overall.

Finally, there is little evidence that increased sentence severity results in much of a deterrent effect.<sup>280</sup> Harsher sentences, therefore, are likely not an effective way to address the problems in this area.<sup>281</sup> Evidence suggests that there is a “fixed-cost” perspective on the repercussions of being caught for criminal behaviour.<sup>282</sup> People’s capacity to think through consequences stops primarily at the idea of getting caught and punished rather than after

---

<sup>278</sup> Aaron Chalfin & Justin McCrary, “Criminal Deterrence: A Review of the Literature” (2017) 55:1 *Journal of Economic Literature* 5 [Chalfin]. The following article also attests that different circumstances will affect the offender’s perception of probable deterrence, including intoxication, group dynamics, and emotional arousal: Robert Apel & Daniel S Nagin, “Perceptual Deterrence” in Wim Bernasco et al, eds, *The Oxford Handbook of Offender Decision-Making* (New York: Oxford University Press, 2017) 121 at 136-137. For example, some research suggests that membership in a fraternity can affect a person’s proclivity to commit sexual assault: Rita C Seabrook et al, “A Longitudinal Study of Interest and Membership in a Fraternity, Rape Myth Acceptance, and Proclivity to Perpetuate Sexual Assault” (2018) 66:6 *Journal of American College Health* 510.

<sup>279</sup> *Ibid.* Additionally, one must consider how deterrence works in cases where the offender may not identify his behaviour as criminal. For example, the following study found that while men were likely to deny having ever committed rape or be willing to do so, they did admit to engaging in sexually coercive behaviours or being amenable to engaging in them: Sarah R Edwards et al, “Denying Rape But Endorsing Forceful Intercourse: Exploring Differences Among Responders” (2014) 1:4 *Violence and Gender* 188.

<sup>280</sup> Daniel S Nagin, “Deterrent Effects of the Certainty and Severity of Punishment” in Daniel S Nagin et al, eds, *Deterrence, Choice, and Crime: Volume 23* (New York: Routledge, 2018) 157 [Nagin]; Anthony N Doob & Cheryl Marie Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis” (2003) 30 *Crime and Justice* 143 at 145-146 [Doob & Webster]. It is also important to consider what type of consequence is being applied. For example, the following study suggests that concern over being placed on a sex offender registry did not have much effect on offender decision making, but compliance with the rules of being on the registry allowed them to learn more about their behaviour and resulted in a reduction of reoffending: Brooke N Cooley et al, “The Role of Formal Social Control Mechanisms in Deterring Sex Offending as Part of the Desistance Process” (2017) 30:2 *Criminal Justice Studies* 136.

<sup>281</sup> Sentencing severity is not applied equally to all offenders. Those who are racialised, particularly Indigenous men, tend to receive worse sentencing outcomes yet this inequitable treatment has not resulted in a reduction in violence overall. This topic will be discussed further in Chapters 7 and 8 of this dissertation. See, for example: Julian V Roberts & Andrew A Reid, “Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story” (2017) 59:3 *Canadian Journal of Criminology and Criminal Justice* 313 [Roberts & Reid].

<sup>282</sup> Doob & Webster, *supra* note 280.

consideration of a specific punishment.<sup>283</sup> Thus, while the potential of incarceration is a deterrent against crime, there is no evidence that increasing sexual assault sentences will reduce the occurrence of this offence.<sup>284</sup>

While the efficacy of the sentencing principles of denunciation and deterrence is a complex and still much debated topic, recent *Criminal Code* amendments involving both have been passed in order to respond to violence between intimate partners (which can include sexual assault).<sup>285</sup> These amendments were given Royal Assent in 2019 and were meant to respond to the continuing problem of intimate partner violence in Canada. The government noted that there was no one provision in the *Criminal Code* dealing with intimate partner violence, and these new provisions were meant to help standardise how the courts deal with this type of violence by ensuring that legal actors recognise the systemic issues underlying violence between intimate partners.<sup>286</sup> For example, according to section 718.04, when the court is imposing a sentence that involves the abuse of a vulnerable person—specifically noting that this includes Aboriginal and female persons—the primary sentencing objectives to be considered are denunciation and deterrence of the conduct that founds the offence.<sup>287</sup> Similarly, under section 718.201, when imposing a sentence for an offence involving the abuse of an intimate partner, the court must

---

<sup>283</sup> *Ibid.*

<sup>284</sup> There is little research on the effects of deterrence for sexual assault sentencing. What is available tends to come from American scholars and deals with the use of Sex Offender Registries. See: Ronet Bachman, Raymond Paternoster & Sally Ward, “The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault” (1992) 26:2 Law & Soc’y Rev 343; Elizabeth Letourneau, Jill Levenson, Dipankar Bandyopadhyay, Kevin Armstrong & Debajyoti Sinha, “Effects of South Carolina’s Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes” (2010) 37:5 Criminal Justice and Behaviour 537; Jin-Hong Park, Dipankar Bandyopadhyay & Elizabeth Letourneau, “Examining Deterrence of Adult Sex Crimes: A Semi-Parametric Intervention Time Series Approach” (2014) 69 Computational Statistics & Data Analysis 198.

<sup>285</sup> The definition of intimate partners, according to the *Code*, includes current or former spouses, common-law partners, as well as dating partners. *Code*, *supra* note 203, s 2.

<sup>286</sup> “Legislative Background: An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to Other Acts, as Enacted (Bill C-75 in the 42nd Parliament)” (6 September 2019), *Department of Justice*, online: <<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>>.

<sup>287</sup> *Code*, *supra* note 203, s 718.04.



consider the “increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims”.<sup>288</sup> With these two provisions, the government wished to emphasise the importance of acknowledging how both gender and race hugely impact who becomes a victim to these offences. Given that intimate partner violence is charged under specific offences such as assault or sexual assault, the systemic implications of this type of violence can be easily forgotten in the legal system. These new provisions require the criminal law system to consider the vulnerability of specific people, as well as the need to condemn this type of violence.

Additionally, a new provision regarding degrees of punishment was introduced that created new rules involving sexual offences against children,<sup>289</sup> as well as intimate partner violence. Both of these address the claims that these types of offences are treated too leniently by the courts by creating new rules that allow judges to issue harsher sentences. For example, under section 718.3(1)(8), if an accused is convicted of an indictable offence involving intimate partner violence and has been convicted of such an offence before, the court may impose a term of imprisonment that is more than the maximum term provided for the offence in the *Code*.<sup>290</sup>

### **3.4 Sexual Assault in the Legal System: A Complex Roadmap for Survivors**

Having discussed some of the statistics about the frequency and demographics of sexual assault in Canada, as well as the foundational criminal laws that govern how sexual assault law is dealt with in this country, I will now delve into a deeper exploration of what the legal system offers survivors. First, I will address the issue of the “Justice Gap”, otherwise known as the high

---

<sup>288</sup> *Ibid*, s 718.201.

<sup>289</sup> Under s 718.3(1)(7)(a), should an offender have multiple charges regarding the sexual abuse of a child and be found guilty, the sentences given for these offences will be served consecutively. *Ibid*.

<sup>290</sup> *Ibid*, s 718.3(1)(8). This provision also gives details on how much a maximum sentence can be increased based on the original maximum term of imprisonment.

levels of attrition that sexual assault cases have in the criminal law system. Then I will address some of the common legal alternatives to the criminal law, specifically civil suits, the Criminal Injuries Compensation Board, and restorative and transformative justice processes.

### **3.4.1 The Justice Gap: Attrition Rates for Sexual Assault Cases**

According to Johnson, out of every 1000 sexual assaults in Canada, only 33 are reported to the police, 29 are recorded as a crime, 12 have charges laid, 6 are prosecuted, and 3 lead to conviction.<sup>291</sup> Less than one percent of all sexual assaults that occur on a yearly basis result in a conviction.<sup>292</sup> This high rate of attrition for sexual assault offences has been labelled a “justice gap” by scholars.<sup>293</sup> Although not every criminal case will result in a finding that the offender is guilty, the fact that the vast majority of sexual assault cases do not even make it far enough for a judge to consider whether to convict is a failure on the part of the justice system that has greatly disproportionate effects on women. While not all women want the same outcomes when it comes to obtaining justice after being sexually assaulted, the fact remains that the criminal law system is failing to fairly provide survivors with one of the only state-sanctioned forms of justice that they have access to at this time.

Attrition begins when a sexual assault is reported to the police. All complaints must be investigated before being sent to the Crown and many do not proceed. Some refusals to allow a complaint to progress are legitimate. For example, if there is no suspect to charge, a case cannot

---

<sup>291</sup> Johnson 2012, *supra* note 178 at 631.

<sup>292</sup> The conviction rate for sexual assault is quite similar to the conviction rate for assault (55 percent of cases between 2009 to 2014 compared to 59 percent of assault cases in the same time period). However, the sexual assault cases that make it through the trial process are generally only the most serious offences compared to the more varied assortment of severity in the assault case sample. Additionally, the rate of attrition for sexual assault cases is much higher as is the number of cases that are not reported to the justice system. Thus, the conviction figures are not easily comparable. Rotenberg 2, *supra* note 204 at 4.

<sup>293</sup> Jennifer Temkin & Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Portland: Hart Publishing, 2008) at 9 [Temkin].

be brought to trial.<sup>294</sup> In some cases, pre-charge diversion programs are used, particularly when dealing with young offenders. However, not all cases that are rejected by police are based on justifiable reasoning as research on “unfounding” shows. According to Statistics Canada, a sexual assault should be declared unfounded if the police have established that the assault did not actually occur or was not attempted,<sup>295</sup> yet some claims are unfounded because the police do not believe the victim for illegitimate reasons. For example, Jane Doe, a survivor who sued the Toronto Metropolitan police for failing to properly investigate or warn Toronto women about a serial rapist,<sup>296</sup> revealed in her book that the Toronto police decided that prior victims of this predator had not been raped because they had sex toys in their bedroom or because a bowl of chips that was on a bed had not been overturned during the assault.<sup>297</sup> Unfounding in these cases was based on harmful stereotypes about sexual assault victims. In a study by the Department of Justice, researchers found that factors such as whether a sexual assault was committed by someone known to the victim, whether the victim was known to have mental health issues, how much force was used, whether the victim claimed to have stated “no” verbally, and how upset the victim appeared to be all influenced whether the police would found a case.<sup>298</sup> According to the

---

<sup>294</sup> For example, in cases where the suspect is a stranger, an investigation may not produce enough information to allow the police to identify a specific person. This is a common problem in sexual assault reports. Rotenberg 2, *supra* note 204.

<sup>295</sup> Tina Hattem, “Highlights from a Preliminary Study of Police Classification of Sexual Assault” (2007) 14 *Just Research* 32 at 32 [Hattem].

<sup>296</sup> *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487, 160 DLR (4th) 697 (Gen Div).

<sup>297</sup> Jane Doe, *The Story of Jane Doe* (Toronto: Random House Canada, 2003) at 18.

<sup>298</sup> Hattem *supra* note 295 at 32-34. See also: Temkin, *supra* note 293; Lucinda Vandervort, “Lawful Subversion of Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson, Kindrat, and Brown*” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 111; Teresa DuBois, “Police Investigation of Sexual Assault Complaints: How Far Have We Come Since Jane Doe?” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 191; Rachel M Venema, “Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports” (2016) 31:5 *Journal of Interpersonal Violence*

statistics on unfounding from 2002, 16 percent of sexual assaults reported to the police were unfounded, compared to only nine percent of other assaults.<sup>299</sup> From 2009 to 2014, 79 percent of all sexual assaults reported to the police did not proceed to the courts, in comparison to only 61 percent of reported assaults.<sup>300</sup> Thus, discriminatory assumptions about sexual assault victims are unjustly preventing some cases from proceeding through the justice system by inaccurately deeming them unfounded.

Even if the police lay charges against an accused, the Crown must agree that the case has merit, and they may reject it at this point if they have concerns over whether there is a reasonable prospect of conviction. If the Crown decides to prosecute, there are still many areas where attrition can occur throughout the trial process. For example, there is a significant difference between how many sexual assault charges are laid, and the number that proceed to the trial process.<sup>301</sup> Over half of all sexual assaults that could proceed to the courts after charges are laid

---

872; Annelise Mennicke, Delaney Anderson, Karen Oehme & Stephanie Kennedy, “Law Enforcement Officers’ Perception of Rape and Rape Victims: A Multimethod Study” (2014) 29:5 Violence and Victims 814.

<sup>299</sup> Julian Roberts, Holly Johnson & Michelle Grossman, “Trends in Crimes of Sexual Aggression in Canada: An Analysis of Police-Reported and Victimization Statistics” (2003) 2 Int J Comp Crim 18. Statistics Canada stopped releasing data on this issue in 2000 (though has recently started including it in reports once again), but according to research by the Globe and Mail in 2017, 19.34 percent of sexual assault reports were declared unfounded by the police compared to only 10.84 percent of assault cases: Robyn Doolittle, “The Unfounded Effect” (8 December 2017), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/investigations/unfounded-37272-sexual-assault-cases-being-reviewed-402-unfounded-cases-reopened-so-far/article37245525/>>; Doolittle 1, *supra* note 16.

<sup>300</sup> Rotenberg 2, *supra* note 204. Unfounding rates change drastically from jurisdiction to jurisdiction, suggesting that different regions may have better or clearer training on how to deal with these types of cases. See: Doolittle 1, *ibid*; A Blair Crew, “Striking Back: The Viability of a Civil Action Against the Police for the ‘Wrongful Unfounding’ of Reported Rapes” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 211 at 240-242. See also: *Williams v London Police Services Board*, 2019 ONSC 227, a case dealing with a group of plaintiffs claiming that a particular police force is engaging in section 15 Charter violations by not adequately investigating sexual assault cases and unfounding too high a percentage of them.

<sup>301</sup> Rotenberg 2, *ibid*. Full trials are uncommon in the criminal system as most cases are dealt with through plea bargains, but there is still a discrepancy in how many sexual assault cases do not proceed compared to other crimes.

do not; by comparison, only 25 percent of assault cases that are charged are dropped at this time.<sup>302</sup>

The justice system is not a welcoming and easily tolerable environment for most people, and sexual assault victims often report feeling re-victimised by the proceedings.<sup>303</sup> It is not unusual for a complainant to refuse to participate given the stresses and difficulties of a trial.<sup>304</sup> Records applications are a common source of concern for women given the chance that unrelated personal and intimate details of their lives may be exposed in court,<sup>305</sup> cross-examination on victims' sexual history still occurs frequently,<sup>306</sup> and some criminal defence lawyers continue to engage in the practice of "whacking the complainant".<sup>307</sup> While a complainant does not have the power to compel the withdrawal of any charges laid, it can be difficult for a Crown to argue their case if their primary witness does not willingly want to participate anymore.<sup>308</sup> Furthermore, the

---

<sup>302</sup> *Ibid.*

<sup>303</sup> Susan Ehrlich, "Perpetrating—and Resisting—Rape Myths in Trial Discourse" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 389; Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 161; Sue Lees, *Carnal Knowledge: Rape on Trial* (London: Hamish Hamilton, 1996) at 36; Rosella Pisconti, "Juridical Rape and Courtroom Lack of Belief: A Wittgensteinian View on Consent" (2013) 1 Birkbeck L Rev 339.

<sup>304</sup> Temkin, *supra* note 293; Johnson 2012, *supra* note 178.

<sup>305</sup> Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 Alta L Rev 743; Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1 – 278.9 of the Criminal Code" (2008) 20 CJWL 111; Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51:2 Osgoode Hall LJ 427 [Craig 2014].

<sup>306</sup> Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 Akron L Rev 865 [Gotell 2008]; Randall 2010, *supra* note 140; Clare McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 J Crim L 367; Craig 2014, *ibid.*

<sup>307</sup> Whacking the complainant refers to aggressively cross-examining the complainant with the goal of trying to force her to withdraw from the proceedings: Cristin Schmitz, "'Whack' Sex Assault Complainant at Preliminary Inquiry" *The Lawyers Weekly* (27 May 1988) 22. See the following for criticisms of this approach: Craig 2014, *ibid.*; Tanovich, *supra* note 27.

<sup>308</sup> A subpoena can be issued to compel a complainant to testify, but there is a risk that she may recant her testimony or become a hostile witness. The Crown must balance the public interest in the trial with the likelihood of conviction, and a recalcitrant complainant may lead them to withdraw charges.

Crown may withdraw the case or accept a plea bargain at any time if they feel that these decisions are in the public interest.<sup>309</sup>

While many of these obstacles and barriers are a normal part of a criminal law proceeding, sexual assault cases reflect disproportionately high attrition levels that must be addressed. Low success rates result in an “Ouroboros effect”,<sup>310</sup> convincing survivors that there is little point in reporting their assaults or going through with a trial given the challenges and potential harms of such a choice contrasted with the low benefits that they will likely receive.<sup>311</sup> Thus, it is important to recognise that many survivors believe legal justice is unobtainable and the process to getting justice is intolerable.

## **3.4.2 Alternatives to Criminal Trials**

### **3.4.2.1 Civil Suits**

If a criminal trial seems insurmountable or undesirable, survivors have other legal options that they can consider. For instance, they can sue the person who assaulted them directly. In a civil case, the survivor is an actual party in the proceedings, not just a witness. She generally has her own lawyer to argue her claims in court<sup>312</sup> and she is the one who makes choices about what

---

<sup>309</sup> Marie Manikis, “Recognizing Victims’ Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime” (2012) 58:3-4 Crim LQ 411; Joseph Di Luca, “Expedient McJustice or Principled Alternative Dispute Resolution - A Review of Plea Bargaining in Canada” (2005) 50 Crim LQ 14; Simon N Verdun-Jones & Adamira A Tijerino, “Victim Participation in the Plea Negotiation Process: An Idea Whose Time Has Come” (2005) 50 Crim LQ 190.

<sup>310</sup> The “Ouroboros” is an ancient symbol depicting a snake eating its own tail signifying a never-ending cycle that feeds itself. In the example used in text, high attrition rates convince survivors not to report their sexual assaults, leading to increasingly higher attrition rates.

<sup>311</sup> Conroy & Cotter, *supra* note 3; Anna Mehler Paperny, “Why Don’t Women Report Rape? Because Most Get No Justice When They Do” (23 February 2015), *Global News*, online: <<https://globalnews.ca/news/1845136/why-dont-women-report-rape-because-most-get-no-justice-when-they-do/>>.

<sup>312</sup> Individuals in Canada have the right to represent themselves in court. Some choose to do this because of the high costs associated with lawyers that put professional legal help out of reach for many Canadians. In the context of sexual assault, I have not come across any information about survivors pursuing a case without legal representation, but it is a possibility that should be noted. See the following for a broad discussion of self-represented litigants: Jennifer Leitch, “Coming Off the Bench: Self-Represented Litigants, Judges and the Adversarial Process” (2017) 47

direction she wants to take the case based on advice from her lawyer.<sup>313</sup> The question at the centre of a civil suit is whether the defendant has done something to the plaintiff which has harmed her in such a way as to require financial compensation for the damages suffered.<sup>314</sup> As the remedy for this type of question does not deal with the defendant's liberty, the burden of proof is lower. Instead of the plaintiff having to prove her allegations beyond a reasonable doubt, she needs to persuade the judge that it is more likely than not that the allegations are true. Consequently, some see civil cases as easier to win than criminal trials.<sup>315</sup>

However, there are challenges in civil trials that do not exist in the criminal system. In the civil courts, the majority of what a person is trying to prove deals with the damages being claimed. A survivor must be able to say that the offender's actions caused her specific injuries and that these injuries require a certain amount in compensation. Both proving causation between the harm and the damage, as well as quantifying the harms suffered are difficult tasks. For example, while the survivor may claim that being sexually assaulted resulted in deteriorating mental health issues, the court may find the connection between the injuries she is claiming and the perpetrator's attack ambiguous if she was previously diagnosed with depression. The court

---

Advoc Q 309; National Self-Represented Litigants Project, "Self-Represented Litigants in the Courts: How They Are Shaping the Jurisprudence" (13 December 2018), *Slaw*, online: <<http://www.slaw.ca/2018/12/13/self-represented-litigants-in-the-courts-how-they-are-shaping-the-jurisprudence/>>.

<sup>313</sup> In civil court, a plaintiff may feel empowered by the fact that she has more control over the progress of the case, and that a lawyer is working for her: Ronen Perry, "Empowerment and Tort Law" (2009) 76 *Tenn L Rev* 959. See also: Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence" (1993) 25:3 *Ottawa L Rev* 204 [Feldthusen 1993]; Bruce Feldthusen et al, "Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse: An Empirical Study" (2000) 12 *CJWL* 66.

<sup>314</sup> Generally, a civil case will be pursued under tort law. See: Nikki Godden-Rasul, "Retribution, Redress and the Harms of Rape: The Role of Tort Law" in Anastasia Powell et al, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 112 [Godden-Rasul]; Feldthusen 1993, *ibid*; Ellen M Bublick, "Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies" (2006) 59:1 *SMU L Rev* 55.

<sup>315</sup> Cassandra Szklarski, "The Reasons Some Victims of Sexual Assault Choose to Sue in Civil Court" (3 November 2017), *Global News*, online: <<https://globalnews.ca/news/3842846/the-reasons-some-victims-of-sexual-assault-choose-to-sue-in-civil-court/>>.

does not want to hold the defendant responsible for damages he did not cause and a large part of the trial will involve probing at these complex questions of causation and damages. In Ontario, the *Victims' Bill of Rights (OVBR)* creates the presumption that victims of sexual assault suffer emotional distress from the offence making it easier for survivors to prove causation in civil court.<sup>316</sup>

Determining what injuries are worth in terms of compensation is a challenging exercise as well. Pecuniary damages for out-of-pocket expenses such as counselling are simple to calculate if awarded retroactively; the plaintiff needs to submit her receipts to show what she has spent. However, repercussions from the assault may continue over a long period of time and require further treatment, necessitating that the courts determine what costs the survivor is likely to incur as a result of this crime in the future. Future losses can be difficult to calculate,<sup>317</sup> and discrimination often comes into play with assumptions about how certain people—for example, women and/or racialised individuals—may be affected by loss compared to the standard example of a white able-bodied man.<sup>318</sup>

Non-pecuniary damages are awarded for non-monetary losses such as pain and suffering, and these are notoriously contentious and hard to determine.<sup>319</sup> Certain assumptions are used

---

<sup>316</sup> *Victims' Bill of Rights, 1995*, SO 1995, c. 6, s 3(2) [OVBR].

<sup>317</sup> “Economic Losses in Civil Sexual Assault Cases” (March 2021), *Torkin Manes*, online: <<https://www.sexualabuselawyer.ca/resources/publications/details/economic-losses-in-civil-sexual-assault-cases>>.

<sup>318</sup> Elizabeth Adjin-Tettey, “Replicating and Perpetuating Inequalities in Personal Injury Claims through Female-Specific Contingencies” (2003-2004) 49 McGill LJ 309; Martha Chamallas, “Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss” (2004-2005) 38 Loy LA L Rev 1435.

<sup>319</sup> See: Joseph H King Jr, “Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law” (2004) 57 SMUL Rev 163; Stephen D Sugarman, “A Comparative Law Look at Pain and Suffering Awards” (2005-2006) 55 DePaul L Rev 399; Hillel J Bavli, “The Logic of Comparable-Case Guidance in the Determination of Awards for Pain and Suffering and Punitive Damages” (2017) 85 U Cin L Rev 1.



when trying to quantify the harms of an assault,<sup>320</sup> and it can be a distressing and uncomfortable experience for a survivor to hear a court rule on how painful her assault should be regarded as. Additionally, there are caps on non-pecuniary damages that some argue are not nearly substantial enough to recognise the injuries caused by sexual assault.<sup>321</sup> However, the case law on this, at least in Ontario, has been shifting. In 2018, the Ontario Court of Appeal rejected the idea that non-pecuniary damages in sexual assault cases must be modest in situations involving a single attack with no breach of trust as damages are awarded not just for mental and physical injuries, but in recognition of the degrading and humiliating nature of the attack.<sup>322</sup> In *DS v Quesnelle*,<sup>323</sup> the Ontario Superior Court of Justice awarded non-pecuniary damages above the cap to a sexual abuse survivor, stating that in cases of intentional torts, such as ones involving sexual assault, it may be fair in exceptional circumstances to award higher damages.<sup>324</sup>

Choosing to pursue a civil action often requires the parties to participate in a trial. A survivor will have to testify and face cross-examination just as she would in criminal court. Her story will be tested by the defendant and the judge is going to issue a verdict on her claims in a public forum. Furthermore, there are protections the plaintiff would have as a complainant in a criminal trial that do not exist in the civil courts. The *Criminal Code* protects complainants from

---

<sup>320</sup> One of the lawyers I spoke with during my interviews listed several examples. For instance, a sexual assault committed by someone the survivor once trusted is considered more damaging than one perpetrated by a stranger. Likewise, abuse that occurs more than once is seen as worse than a single attack.

<sup>321</sup> The cap for non-pecuniary damages was set at \$100,000 in 1978 in a trilogy of cases heard by the Supreme Court (see: *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229, 83 DLR (3d) 452; *Arnold v Teno*, [1978] 2 SCR 287, 83 DLR (3d) 609; *Thorton v Prince George School District No 57*, [1978] 2 SCR 267, 83 DLR (3d) 480. This cap is adjusted for inflation and currently sits at almost \$400,000. “Non-Pecuniary Damages Upper Limits” (2021), *McKellar*, online: <<https://mckellar.com/statistics>>. See the following for commentary on damages in the context of sexual assault: Loretta P Merrit, “Why Are Damages in Civil Sexual Abuse Cases So Low?” (January 2015), *Torkin Manes*, online: <<https://www.torkinmanes.com/docs/default-source/publications/articles/why-are-damages-in-civil-sexual-abuse-cases-so-low.pdf>>.

<sup>322</sup> *Zando v Ali*, 2018 ONCA 680 at para 19.

<sup>323</sup> 2019 ONSC 3230.

<sup>324</sup> *Ibid* at paras 32 to 42.

unnecessary questioning and disclosure of their prior sexual history and of their third party records.<sup>325</sup> Disclosure in a civil case, however, has no such restrictions, is often very broad,<sup>326</sup> and can include a request from the defendant to undergo a medical examination from a defendant-hired physician.<sup>327</sup> On the other hand, the defendant also has different rights and protections compared to the accused in a criminal trial; he cannot refuse to testify without facing negative consequences.<sup>328</sup>

Many civil cases settle before going to trial. Trials, after all, are costly and public, and the parties involved often want to avoid both of these things. Consequently, settlements are a common and encouraged practice<sup>329</sup> as the parties discuss their positions before heading to court. Conversely, settlements are usually confidential affairs, so if a survivor wants her legal process to be part of the public record, or even if she wants to talk publicly about what happened, a

---

<sup>325</sup> *Code, supra* note 203, s 276, s 278.1-278.97. See also: Lisa Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44:2 Queen’s LJ 316.

<sup>326</sup> In Ontario, all documents relevant to the matters at issue must be disclosed. Given that the plaintiff is often claiming that her physical and mental well-being have been negatively impacted by the defendant’s actions, much of her private documentation such as medical files and even journals can be subject to disclosure. Disclosure rights are not absolute, however, and must be, at times, balanced against the public good. The Supreme Court of Canada emphasised this in *AM v Ryan* when they deemed that mental health service documentation for sexual assault survivors should be judged on a case-by-case basis to determine what exactly needed to be disclosed. In the situation before the court, the majority believed that only partial privilege was necessary to balance the different rights at hand. Instead of determining that an entire class of documentation was exempt from disclosure, the court stated that disclosure should be based on the individual context of the case meaning everything might be excluded, some documents might be excluded, and sometimes editing the documentation would suffice. [1997] 1 SCR 157 at paras 19-21, 35; 143 DLR (4th) 1. L’Heureux-Dubé challenged this majority ruling in her dissent, arguing that partial privilege still allows for the release of private documents, albeit with restrictions, and this can discourage survivors from either pursuing a civil claim or accessing mental health services (at paras 56-57). Partial privilege also does not, according to L’Heureux-Dubé, properly balance the defendant’s right to a fair trial with the plaintiff’s *Charter*-based privacy rights, and there should be more of a burden on the party requesting documents to show that they are relevant to the issues at trial (at para 97).

<sup>327</sup> Discovery has been the subject of many reform conversations in recent years due to how lengthy and expensive the process has become. See the following for an overview of this debate in the US context: John H Beisner, “Discovering a Better Way: The Need for Effective Civil Litigation Reform” (2010) 60 Duke LJ 548.

<sup>328</sup> While a defendant can choose not to testify in a trial, by doing so, he makes it harder to rebut the arguments from the plaintiff who must only prove her claim on a balance of probabilities. He may also be subject to a subpoena and thus be required to testify at the proceedings.

<sup>329</sup> The *Rules of Civil Procedure* in Ontario, for instance, require parties to attempt to broker a settlement before a trial can be scheduled. See: RRO 1990, Reg 194, r 50.

settlement will often not meet these desires.<sup>330</sup> Because the results are kept between the parties, settlements have been accused of leading to the privatisation of certain issues, making it hard for others in a similar position to find adequate legal precedent.<sup>331</sup> Instead of making sure the public is made aware of sexual assault and those who perpetrate it, in a settlement, the crime is once again kept secret and hidden from view. Plaintiffs in a settlement may find themselves bullied into accepting an agreement that does not give them what they need and does not ensure that the defendant takes responsibility for his actions and the resulting harms.<sup>332</sup>

An additional issue with civil trials is that they are exceptionally costly. In a criminal trial, the survivor is not paying for the Crown's services. While she may obtain her own legal representation, this is not a requirement, and all costs associated with the trial are the responsibility of the state or the offender.<sup>333</sup> In a civil trial, the survivor must hire her own representation and there is little available in the way of legal aid for civil disputes.<sup>334</sup> Many of these cases are taken on a contingency fee basis, meaning the lawyer will take their pay from any

---

<sup>330</sup> Jane Gerster, "Should Canada Restrict the Use of Gag Orders in Sexual Abuse Cases?" (24 March 2019), *Global News*, online: <<https://globalnews.ca/news/5080002/sex-assault-nondisclosure-agreements/>>.

<sup>331</sup> Jack B Weinstein, "Some Benefits and Risks of Privatization of Justice Through ADR" (1996) 11 *Ohio St J Disp Resol* 241; Andre R Imbrogno, "Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?" (1998-1999) 14 *Ohio St J Disp Resol* 855; Saul Levmore & Frank Fagan, "Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases" (2018) 103 *Cornell L Rev* 311.

<sup>332</sup> Vasundhara Prasad, "If Anyone is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse through Regulating Non-Disclosure Agreements and Secret Settlements" (2018) 59 *Boston College L Rev* 2507; Maureen A Weston, "Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era" (2021) 2 *U Ill L Rev* 507.

<sup>333</sup> Unlike in civil trials where, if the plaintiff is not successful, the court may require her to pay part or all of the defendant's costs. See the following article for how this impacts the choices people make about proceeding with a civil claim: Erik S Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" 36 *Queen's LJ* 113.

<sup>334</sup> Women in Ontario have access to the Independent Legal Advice program (see Chapter 5) which offers up to four free hours of legal advice to women who have experienced sexual violence. See: "Independent Legal Advice for Sexual Assault Victims", *Ontario Government*, online: <<https://www.ontario.ca/page/independent-legal-advice-sexual-assault-victims>> [ILA]. Some additional funds may be available through Legal Aid Ontario, but they are extremely limited. Similar programs are also offered (or are being piloted) in Alberta, Nova Scotia, Quebec, Newfoundland and Labrador, Prince Edward Island, and the Yukon.

award that the survivor obtains at the end of the trial. However, lawyers generally will not take cases on contingency unless they are fairly certain that they can win at trial.<sup>335</sup> Often cases where a criminal conviction has already been obtained are preferred as these are almost always successful in a civil trial given the fact that a prior conviction generally proves that actionable misconduct has occurred.<sup>336</sup> The *OVBR* also creates the presumption that anyone convicted of a crime is liable for damages to the victim for emotional distress and bodily harm caused by this distress.<sup>337</sup>

Civil trials cost a great deal in part because of the evidence needed to prove both the causation and quantification of damages. The plaintiff generally needs to submit a substantial amount of expert evidence from external authorities—such as doctors and psychologists—that will speak to how the assault actually caused specific harms and what these harms mean for the survivor’s life.<sup>338</sup> This implies that a survivor must pathologise her trauma response in order for it to be considered legitimate in the eyes of the court, and that feeds into the myth that victims should all react in the same manner.<sup>339</sup> This documentation is often costly, and if experts are required to testify to prove the plaintiff’s claims, they need to be compensated for their time as well. The evidence that plaintiffs supply to substantiate the harm that they have suffered is also

---

<sup>335</sup> Christine Rua, “Lawyers for #USTOO: An Analysis of the Challenges Posed by the Contingent Fee System in Tort Cases for Sexual Assault” (2019) 51:2 Colum Hum Rts L Rev 723 at 734-735. Though this article deals with civil trials in the US, it explains how reliance on contingency fees impacts and often harms the potential for civil suits to be used as an effective and useful legal process for sexual assault.

<sup>336</sup> Elizabeth Grace, “Criminal v. Civil: How the Criminal Process Can Impact a Parallel Civil Process” (April 2017), *Lerners*, online: <<https://www.lerners.ca/learn/criminal-v-civil-criminal-process-can-impact-parallel-civil-process/>>.

<sup>337</sup> *OVBR*, *supra* note 316, s 3(1).

<sup>338</sup> Plaintiffs, however, should also be prepared for the defence to use such information to frame them as “crazy” and lacking in credibility: Deirdre M Smith, “The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation” (2009-2010) 31 *Cardozo L Rev* 749.

<sup>339</sup> Though this article speaks about the issue of victim myths within a criminal trial, it applies in civil situations as well: Randall 2010, *supra* note 140.

highly personal and private. As mentioned above, this includes information that would be protected in the criminal courts.

While anyone can bring a civil claim against someone else, the reality is that most people cannot afford to instigate this type of claim, particularly survivors who are seeking financial help in order to access the services they need to recover. While civil proceedings do offer the allure of more control for the survivor, as well as the potential for financial redress, this type of proceeding comes with many challenges and obstacles as well.

### **3.4.2.2 Criminal Injuries Compensation Board**

Across Canada, there are funds set up at the provincial level for victims of crime to access in order to receive some compensation for the harms that they have suffered as a result of the crimes perpetrated against them. In Ontario, this matter was, until recently, controlled by the *Compensation for Victims of Crime Act (CVCA)* which set up the Criminal Injuries Compensation Board (CICB).<sup>340</sup> This legislation was repealed on January 1, 2022.<sup>341</sup> The announcement of major legislative changes to the victims of crime compensation regime occurred after I completed my interviews. As such, I will speak primarily of the *CVCA* throughout this dissertation despite its repeal and replacement. I will further address what is happening to the Criminal Injuries Compensation Board and the substantial reform of the Ontario victims of crime compensation regime in Chapter 9.

Under the *CVCA*, a victim, any person responsible for the victim, and sometimes the victim's dependents in the case of the victim's death, could be awarded financial compensation

---

<sup>340</sup> RSO 1990, Chapter C. 24, s 3 [*CVCA*].

<sup>341</sup> September 30, 2019 was the last date that an application could be made to the CICB.

to recognise the harms that were sustained during the commission of the offence.<sup>342</sup> Generally, there was a limitation period of two years from the date of the offence to make an application to the CICB unless the offence involved sexual violence or violence in the context of an intimate relationship.<sup>343</sup> In these cases, an application could be brought at any time. This is particularly important in the context of these types of crimes as survivors will often need time to process what happened to them and get to a place where they can safely complete an application. Compensation under the *CVCA* was not dependent on a conviction,<sup>344</sup> although if a conviction was obtained, it was taken as conclusive evidence that the offence was committed.<sup>345</sup>

Under the *CVCA*, compensation could be awarded for several reasons, including reasonably incurred expenses (or future incurred expenses) arising because of the crime.<sup>346</sup> Victims could also be compensated for losses caused by the acquisition of a disability that affected the victim's capacity to work, and dependents could be compensated for pecuniary losses caused by the victim's death.<sup>347</sup> As in civil cases, non-pecuniary damages could be awarded for pain and suffering.<sup>348</sup> Compensation could also be awarded to support a child conceived as a result of rape, as well as any other pecuniary losses resulting from the commission of the offence.<sup>349</sup>

Prior to 2019, the maximum award given by the CICB was \$25,000 and most of this award was given in recognition of the survivor's "pain and suffering".<sup>350</sup> The 2019 budget bill<sup>351</sup>

---

<sup>342</sup> *CVCA*, *supra* note 340, s 5.

<sup>343</sup> *Ibid*, s 6.

<sup>344</sup> *Ibid*, s 16.

<sup>345</sup> *Ibid*, s 11.

<sup>346</sup> *Ibid*, s 7(1)(a).

<sup>347</sup> *Ibid*, s 7(1)(b-c).

<sup>348</sup> *Ibid*, s 7(1)(d).

<sup>349</sup> *Ibid*, s 7(1)(e-f).

<sup>350</sup> *Ibid*, s 19(1) as it appeared prior to May 29, 2019.

changed the way compensation was dealt with by the CICB as it was slowly being phased out. From May 29, 2019 to September 30, 2019, the maximum award that could be given was \$30,000 although only \$5000 of this amount could be awarded for pain and suffering.<sup>352</sup> This had the effect of reducing the amount of compensation that survivors could receive as the bulk of their award needed to come through proven expenses that they incurred. As of October 1, 2019, all compensation claims are now dealt with under the Victim Quick Response Program+ that uses an entirely different compensation scheme. I will discuss this new program and its implications for survivors in Chapter 9.

### **3.4.2.3 Other Potential Legal Processes**

Finally, there are a few other ways that survivors can seek legal justice. I do not focus on all of these particular methods in this dissertation, but it is important to recognise that alternatives exist and are important for ensuring that survivors have options when it comes to determining how to respond to an assault.

One legal arena a survivor may turn to is the realm of human rights. In Canada, this would most frequently mean submitting an application to a provincial human rights tribunal.<sup>353</sup> As my research for this dissertation is based in Ontario, I will use this province's tribunal as my primary example.<sup>354</sup> Under human rights law, individuals are protected from discrimination based on a series of enumerated grounds in situations involving housing, employment, the provision of goods and services, contracts, and membership in trade and vocational

---

<sup>351</sup> *Protecting What Matters Most Act (Budget Measures)*, 2019, SO 2019, c. 7, Sched 11, s 2(1-2).

<sup>352</sup> *CVCA*, *supra* note 340, s 19(1), 19(6).

<sup>353</sup> There are also federally applicable human rights laws (the *Charter of Rights and Freedoms* as well as the *Canadian Human Rights Act*). However, in the context of sexual violence in the workplace, provincial human rights codes will often be the appropriate jurisdiction to bring a complaint under.

<sup>354</sup> *Human Rights Tribunal of Ontario*, online: <<https://tribunalsontario.ca/hrto/>>.

associations.<sup>355</sup> In the context of sexual assault, the *Human Rights Code (HRC)* protects everyone from sexual harassment and violence in any situation protected under the *HRC*, though the most frequent type of claim usually involves the workplace.<sup>356</sup> Under the *HRC*, sexual harassment means “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”.<sup>357</sup>

Applications to the Human Rights Tribunal of Ontario (HRTO) will generally first be sent to mediation, but a formal hearing may be called if this does not succeed.<sup>358</sup> If a hearing is called, the applicant must be able to show that it is more likely than not that she suffered discrimination caused by the respondent (who may then attempt to rebut this *prima facie* case). Evidence is required, but there are relaxed standards compared to the court system.<sup>359</sup>

Should the HRTO find that discrimination occurred, the tribunal can order that a monetary payment be made to the survivor,<sup>360</sup> as well as other more systemic, public interest remedies.<sup>361</sup> Financial awards from tribunals are not meant to be particularly large, but they will help deal with any direct costs the survivor has as a cause of the harassment, as well as an

---

<sup>355</sup> *Human Rights Code*, RSO 1990, c H 19, s 1-6 [*HRC*].

<sup>356</sup> *Ibid*, s 7. See also: *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252, 59 DLR (4th) 352.

<sup>357</sup> *Ibid*, s 10. See also: “Identifying Sexual Harassment”, *Ontario Human Rights Commission*, online: <<http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/2-identifying-sexual-harassment>>. Sexual assault and sexual harassment are different in content, but there is overlap between what behaviour is captured by both.

<sup>358</sup> Applicants will be asked if they wish to participate in mediation and they may opt not to do so. The mediation is provided by the Tribunal and parties do not have to pay to participate. Legal counsel is not required. See: “What Do I Need to Know About Mediation?”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/publications-resources/information-sheets-guides/what-do-i-need-know-about-mediation>> [Mediation FAQ].

<sup>359</sup> “Proving Discrimination”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/human-rights-ontario/self-help-materials-and-how-guides/proving-discrimination>>.

<sup>360</sup> As well as non-financial awards that benefit the applicant. In the context of sexual harassment, this may include an order to have the employee who harassed her removed from her working environment.

<sup>361</sup> “What Remedies Are Available to Me at the HRTO?”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/how-guides/what-remedies-are-available-me-hrto>> [Remedies FAQ].



amount to recognise the injury to her dignity and self-respect.<sup>362</sup> The tribunal may also order the workplace to take certain actions to prevent such violence and unacceptable behaviour in the future. For example, they often require the creation of anti-harassment policies and have many resources for how companies can implement one of these.<sup>363</sup> The focus of a tribunal order is often on stopping future incidents of discrimination rather than punishment.<sup>364</sup>

One of the reasons why someone might chose a human rights application over another legal process is that the HRTO is said to be less expensive and less adversarial than a criminal or civil trial.<sup>365</sup> In fact, the Ontario *Human Rights Code* establishes a legal support centre for those who have faced discrimination and are seeking redress to aid in the formation of their applications.<sup>366</sup> As stated above, there are lower evidentiary standards as well, and some believe the monetary awards (particularly given the low costs of an application) end up being more worthwhile than what someone may get in a civil trial.<sup>367</sup> However, little systemic research has been conducted on sexual harassment claims in the human rights context. Bethany Hastie conducted a review of sexual harassment claims in the British Columbia jurisdiction from 2010 to 2016 and found only 18 substantial applications dealing with sexual harassment in the

---

<sup>362</sup> These awards can vary depending on the circumstances of the situation, though the range in case law is from \$12,000 to \$150,000 according to the severity of the harassment. See: Honor M Lay, “Assessing the Damage: Money Awards by the OHRT in Sexual Harassment Cases” (2019) 9:2 W J Legal Stud 1 [Lay]. The Human Rights Legal Centre claims that the average award in sexual harassment cases is \$10,000 to \$40,000. See: “Sexual Harassment and Sexual Violence: Pursuing a Claim at the Human Rights Tribunal of Ontario”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/frequently-asked-questions/sexual-harassment-and-violence>>.

<sup>363</sup> “Preventing and Responding to Sexual Harassment”, *Ontario Human Rights Commission*, online: <<http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/8-preventing-and-responding-sexual-harassment-0>>.

<sup>364</sup> Remedies FAQ, *supra* note 361.

<sup>365</sup> Bethany Hastie, “Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions in 2010-16” (2019) 31:2 Can J Women & L 293 at 294 [Hastie 2019].

<sup>366</sup> HRC, *supra* note 355, s 45.11. *Human Rights Legal Support Center*, online: <<https://www.hrlsc.on.ca/en/home>>. This does not mean that all applicants are given legal representation, but many will receive some aid in how to put together their cases.

<sup>367</sup> Hastie 2019, *supra* note 365.

workplace.<sup>368</sup> While the vast majority of human rights applications are resolved prior to the need for a hearing,<sup>369</sup> this low number does show that human rights processes may not be something survivors know enough about or that they do not think such processes offer them sufficient remedies to the issues that they are facing. Hastie also noted that rape myths appeared in some of the decisions, particularly in regard to the behaviour of the applicant.<sup>370</sup>

There are also issues regarding the assessment of damages in HRTO cases. Even though evidentiary standards are relaxed for claims at an HRTO, an applicant will still need to prove that she suffered compensable injury. While some harms can be simple enough to prove, such as missed days of work, an applicant must also show that she has suffered “injury to dignity, feelings, and self-respect”.<sup>371</sup> This may require her to release private medical documentation, and it places an additional burden on her to prove that she has suffered trauma even after she has already shown that the harassment occurred.<sup>372</sup> Furthermore, survivors are not a monolith and not all of them will be able to bring corroborating evidence to the tribunal about the devastating impact that they have suffered as a result of the harassment.<sup>373</sup> Trauma can be expressed in many ways and by requiring objective proof, the Tribunal will be biased towards applicants who act like “ideal victims”.<sup>374</sup> Despite the benefits that an HRTO application may offer survivors, they are still at risk of facing discriminatory assumptions about sexual assault victims in their attempts to find justice.

---

<sup>368</sup> *Ibid.* See also: Bethany Hastie, “Workplace Sexual Harassment and the ‘Unwelcome’ Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016” (2020) 32:1 Can J Women & L 61 [Hastie 2020].

<sup>369</sup> Mediation FAQ, *supra* note 358.

<sup>370</sup> Hastie 2019, *supra* note 365 at 315-316.

<sup>371</sup> HRC, *supra* note 355, s 45.2.

<sup>372</sup> Lay, *supra* note 362 at 12

<sup>373</sup> *Ibid* at 15.

<sup>374</sup> *Ibid.*

Another potential avenue for redress for sexual assault can come from making a complaint to a professional governing body if the person who assaulted the survivor is a member of one. This comes up most frequently in medical situations. Bringing a complaint to a professional organisation allows a survivor to make the abusive behaviour of the perpetrator public and potentially ensure that he is prevented from hurting others. If, for example, a doctor is found to have sexually assaulted a patient, his license to practice may be restricted, suspended, or even taken away altogether.<sup>375</sup> Some professional regulating bodies will even have funds that victims can apply for to deal with the aftermath of an assault.<sup>376</sup> These processes, however, are often not very transparent, the results are rarely subject to much public scrutiny, and sexual assault complaints are frequently dismissed.<sup>377</sup>

Universities are another place where survivors are attempting to find justice. Though universities are not part of the legal system, many have started creating internal bodies to deal with sexual assault claims. Campus sexual assault has been a controversial topic in both the US and Canada in recent years and there has been significant legal changes to how universities must handle sexual assaults. For example, in 2017, the government of Ontario passed a regulation requiring universities to create sexual assault and harassment education and response policies.<sup>378</sup>

---

<sup>375</sup> “Sexual Abuse Complaints”, *College of Physicians and Surgeons of Ontario*, online: <<https://www.cpsso.on.ca/Public/Services/Complaints/Sexual-Abuse-Complaints>>.

<sup>376</sup> For example: “Funding for Therapy and Counselling”, *College of Physicians and Surgeons of Ontario*, online: <<https://www.cpsso.on.ca/Public/Services/Funding-for-Therapy-and-Counselling>>.

<sup>377</sup> Joan Brockman, “The Research Challenges of Exposing Physicians’ Sexual Misconduct in Canada” (2018) 26 *Critical Criminology* 527 at 530; Sanda Rodgers, “Zero Tolerance Some of the Time? Doctors, Discipline and Sexual Abuse in Ontario” (2007) 15 *Health LJ* 353. See also: Rachel Mendleson et al, “Canada’s Medical Watchdogs Know More About Bad Doctors Than They Are Telling You” (2 May 2018), *The Star*, online: <<https://projects.thestar.com/doctor-discipline/part-2/>>.

<sup>378</sup> *Sexual Violence at Colleges and Universities*, O Reg 131/16 [SVCU].

Some have argued that pushing sexual assault response to universities is privatising an important social problem.<sup>379</sup> After all, universities are not obligated to ensure their sexual assault response processes are transparent and open to the general public. Given the corporatisation of universities, keeping sexual assault statistics on campus private is a good way to protect the university's brand.<sup>380</sup> While the new regulations in Ontario may help ensure that information about how universities deal with these problems is easier to find, there are still no requirements to ensure that the full details of a response are public.

On the other hand, given the struggles survivors face in the legal system, it is understandable that some would look for alternative venues to find some sort of redress after an assault. Given the fact that universities are not legal bodies, it is possible for them to craft unique, innovative methods of response that serve the needs of all of their students without being bogged down by the requirements of criminal trial.<sup>381</sup> The focus could be less on an adversarial process, and more on addressing what the different parties need.

#### **3.4.2.4 Restorative Justice**

When talking about potential legal avenues that survivors may want to explore in the aftermath of a sexual assault, restorative justice has become a popular consideration, even if it is

---

<sup>379</sup> Elizabeth Sheehy & Daphne Gilbert, "Responding to Sexual Assault on Campus: What Can Canadian Universities Learn from US Law and Policy?" in Elizabeth Quinlan et al, eds, *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies for Change* (Waterloo, Ontario: Wilfred Laurier Press, 2017) 291 at 293 [Sheehy & Gilbert].

<sup>380</sup> *Ibid.*

<sup>381</sup> Elizabeth Quinlan, "Institutional Betrayal and Sexual Violence in the Corporate University" in Elizabeth Quinlan et al, eds, *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies for Change* (Waterloo, Ontario: Wildred Laurier Press, 2017) 61 at 67; Elizabeth Sheehy, "Making Universities Safe for Women: Sexual Assault on Campus" in Wayne Antony, Jessica Antony & Les Samuelson, eds, *Power and Resistance: Critical Thinking About Canadian Social Issues*, 6th ed (Black Point, NS: Fernwood, 2017) 260.

not regularly used for this type of offence.<sup>382</sup> As such, I will briefly outline what restorative justice is, as well as some of its benefits and drawbacks in the context of sexual assault. Further discussion on this topic from the perspective of survivors can be found in Chapter 8.

Restorative justice is “an approach to justice that seeks to repair harm by providing an opportunity for those harmed and those who take responsibility for the harm to communicate about and address their needs in the aftermath of a crime”.<sup>383</sup> This is a form of justice that emphasises healing as its central goal and often involves more than just the offender and complainant in the process.<sup>384</sup> According to John Braithwaite, “restorative justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives,... our practice of politics,... [and] the way we do justice in the world”.<sup>385</sup> Restorative approaches require a reimagining of how we conceptualise justice, and a shift towards new practices with different goals.

Unlike the traditional legal system, restorative justice processes are generally not adversarial.<sup>386</sup> All of the involved parties are gathered together—the offender, victim, and community—so that what happened can be discussed and holistic solutions can be proposed and

---

<sup>382</sup> In many restorative justice programs, offences involving violence are excluded due to the serious nature of these crimes and concerns over whether or not these alternative mechanisms are a suitable way of addressing and ending violence.

<sup>383</sup> Restorative Justice” (7 September 2021), *Department of Justice*, online: <<https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html>> [DoJ RJ].

<sup>384</sup> This is not to say that the traditional legal system only focuses on punishment or that it does not support victims of crime, but it is not designed to be non-adversarial or promise the same types of benefits as restorative justice. James Ptacek, “Resisting Co-optation: Three Feminist Challenges to Anti-Violence Work” in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 5 at 6.

<sup>385</sup> John Braithwaite, “Principles of Restorative Justice” in Andrew Von Hirsh et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart, 2003) 1.

<sup>386</sup> Meredith Rossner & David Tait, “Contested Emotions: Adversarial Rituals in Non-Adversarial Justice Procedures” (2011) 37 *Monash UL Rev* 24; Michael S King, “Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice” (2008) 32 *Melb UL Rev* 1096; Arie Freiberg, “Non-Adversarial Approaches to Criminal Justice” (2007) 16:4 *Journal of Judicial Administration* 205.

implemented.<sup>387</sup> Restorative processes have been praised for their inclusion of the victim, particularly in contrast to the way that complainants are marginalised in the conventional legal system.<sup>388</sup> Offenders must take responsibility for the harm that they caused,<sup>389</sup> and this, in theory, helps victims feel as if the pain that they have suffered is valid and not their fault.<sup>390</sup> The process is one of open communication, where parties can talk through their experiences and thoughts in order to determine what should be done to support the offender in rehabilitating himself, and to help the victim and community become whole again.

In Canada, restorative justice is often connected to the traditional legal system, sometimes as a form of diversion or an alternative sentencing process.<sup>391</sup> The legislative

---

<sup>387</sup> Giuseppe Maglione, “Imaging Victims, Offenders and Communities: An Investigation into the Representations of the Crime Stakeholders Within Restorative Justice and their Cultural Context” (2017) 50 *International Journal of Law, Crime and Justice* 22; William R Wood, “Soliciting Community Involvement and Support for Restorative Justice Through Community Service” (2015) 26:2 *Criminal Justice Policy Review* 131; Patrick M Gerkin, “Who Owns This Conflict? The Challenge of Community Involvement in Restorative Justice” (2012) 15:3 *Contemporary Justice Review* 277.

<sup>388</sup> Clare McGlynn, Nicole Westmarland & Nikki Godden, “‘I Just Wanted Him to Hear Me’: Sexual Violence and the Possibilities of Restorative Justice” (2012) 39:2 *Journal of Law and Society* 213 at 219 [McGlynn et al]; Tinneke Van Camp & Jo-Anne Wemmers, “Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice” (2013) 19:2 *International Review of Victimology* 117 [Camp]. However, see the following for a cautionary note about how much better restorative justice is for survivors: Kathleen Daly, “A Tale of Two Studies: Restorative Justice from a Victim's Perspective” in Elizabeth Elliot & Robert M Gordon, eds, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (New York: Routledge, 2005) 153; Jo-Anne Wemmers, “Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice” (2002) 9:1 *International Review of Victimology* 43.

<sup>389</sup> In order to participate in restorative justice, the offender must acknowledge and accept his wrongdoing. During the process, he is encouraged to accept responsibility for his actions openly in front of the survivor and community. According to Daly, to be truly effective, the offender must not just admit to his crimes, but also be held to account so that he changes his behaviour and actively works to help the survivor and community heal: Daly 2017, *supra* note 29 at 118. See also: John Braithwaite & Declan Roche, “Responsibility and Restorative Justice” in Gordon Bazemore & Mara Schiff, eds, *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson Publishing Co, 2001) 63 [Braithwaite & Declan].

<sup>390</sup> Daly 2017, *ibid* at 116; Kathleen Daly & Julie Stubbs, “Feminist Theory, Feminist and Anti-Racist Politics, and Restorative Justice” in Gerry Johnstone & Daniel W Van Ness, eds, *Handbook of Restorative Justice* (New York: Routledge, 2007) 149 at 159 [Daly and Stubbs].

<sup>391</sup> “DoJ RJ, *supra* note 383; “Legislation and Policy” (27 October 2017), *Department of Justice*, online: <<http://www.justice.gc.ca/eng/cj-jp/rj-jr/lp.html>> [DoJ Leg & Pol’y]; Patricia Hughes & Mary Jane Mossman, “Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives” (March 2001), *Department of Justice*, online: <[http://www.justice.gc.ca/eng/rp-pr/cs-j-sjc/jsp-sjp/r03\\_2/r03\\_2.pdf](http://www.justice.gc.ca/eng/rp-pr/cs-j-sjc/jsp-sjp/r03_2/r03_2.pdf)>. Restorative justice does not have to be connected to the state and, in fact, there are many

foundation for this falls under section 717 of the *Criminal Code*.<sup>392</sup> This provision allows for alternative measures to be used when dealing with an alleged offender if the recommended approach is “not inconsistent with the protection of society”.<sup>393</sup> There are several other conditions that must be met, including the offender’s willingness to accept responsibility for the alleged offence.<sup>394</sup> While not every alternative measure used under section 717 of the *Code* fulfills all of the usual components of restorative justice, they represent the state’s attempt to “promote a sense of responsibility in the offender and an acknowledgement of the harm done, without going through the formal court process”.<sup>395</sup>

In restorative justice processes that are connected with the traditional legal system, while community members can have important roles to play, generally a professional with legal or dispute resolution training<sup>396</sup> facilitates and/or controls the proceedings.<sup>397</sup> For the purposes of this dissertation, justice procedures that exist outside of any state apparatus fall under the transformative justice umbrella discussed below. Not all scholars and practitioners separate restorative and transformative categories in this manner, but this division is increasingly

---

who would argue that the state being involved can undermine the overall efficacy of restorative justice: Sarah Deer & Abigail Barefoot, “The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence” (2018) 28:3 *Kansas Journal of Law and Public Policy* 505.

<sup>392</sup> *Code, supra* note 203, s 717.

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ibid.*

<sup>395</sup> DoJ Leg & Pol’y, *supra* note 391.

<sup>396</sup> Susan M Olson & Albert W Dzur, “Revisiting Informal Justice: Restorative Justice and Democratic Professionalism” (2004) 38:1 *Law & Society Review* 139; John Braithwaite, “Restorative Justice and De-Professionalization” (2004) 13:1 *The Good Society* 28.

<sup>397</sup> Many of the organisations that provide restorative processes are considered community-based organisations; however, the state is involved in determining whether or not they recommend these groups and deciding when to forward some of the issues that are reported to them to these community groups.

becoming one of the ways these two often similar, yet distinct approaches to justice are understood.<sup>398</sup>

Given the low number of women who report their sexual assaults to the police and the high rate of attrition of these cases, some suggest a shift towards restorative justice could increase how satisfied survivors are with their ability to obtain justice by giving them an option that seems more tolerable.<sup>399</sup> Proponents of restorative justice claim that one of the central benefits of these processes is the positive impact that they may have on women's mental health. For example, in RESTORE, a community-based restorative justice conferencing program in the US that took sexual assault cases referred to them by the courts,<sup>400</sup> survivors reported lower rates of mental health problems after participating and stated that the idea of "taking back their power" was exceptionally important in making them feel better about the harm that they experienced.<sup>401</sup>

Restorative processes can focus less on fact-finding, thus possibly minimising some of the problems that the adversarial nature of the court system can have on mental health.<sup>402</sup> The aggressive nature of a trial can leave survivors feeling as if their personal worth and credibility is denied.<sup>403</sup> Even if an offender agrees to a plea bargain, admitting to his culpability and

---

<sup>398</sup> Mimi Kim discusses how restorative justice and transformative justice differ in their connections (or lack thereof) to the state. Mimi E Kim, "Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle" (2020) 35:3 *Affilia: Journal of Women and Social Work* 309 [Kim 2020]

<sup>399</sup> McGlynn et al, Camp, *supra* note 388. See also: Heather Strang & Lawrence W Sherman, "Repairing the Harm: Victims and Restorative Justice" (2003) 15:1 *Utah L Rev* 16.

<sup>400</sup> Mary P Koss, "Restorative Justice for Acquaintance Rape and Misdemeanour Sex Crimes" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 218 [Koss 2010]; Mary P Koss, "The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes" (2014) 29:9 *Journal of Interpersonal Violence* 1623 [Koss 2014]. RESTORE was a pilot initiative that ran from 2003 to 2007 in Arizona.

<sup>401</sup> *Ibid.* See also: Julie Stubbs, "Restorative Justice, Gendered Violence, and Indigenous Women" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 103 at 104.

<sup>402</sup> Restorative processes can be implemented at any stage of a criminal law proceeding. The earlier a case is diverted from traditional processes, the more a survivor will avoid the harsher aspects of the adversarial system. DoJ RJ, *supra* note 383.

<sup>403</sup> Clark 2015, *supra* note 36 at 22. See Chapter 5 for more on this topic.



potentially avoiding the need for a full trial, women are still not in control of their stories.<sup>404</sup>

With restorative justice, instead of having their experiences framed by outsiders, they get to help shape the dialogue about their sexual assault. For some survivors, this ability to tell their own story means that they do not have to accept being framed as a helpless victim by the courts, and they are able to tell the offender what has happened to them rather than having their words filtered through a lawyer.<sup>405</sup> This opportunity to be heard is something that survivors have identified as an important part of any justice process in multiple studies.<sup>406</sup>

Restorative processes also require the offender to admit that he engaged in harmful behaviour. In a trial, if an accused is pleading not guilty, it often feels to survivors that he is denying the charges that have been levied against him, thus making her out to be a liar. In a restorative process, on the other hand, a contentious assessment of culpability is not required as, in order to participate, the offender must be prepared to take responsibility by acknowledging that his behaviour was unacceptable and that it hurt people (a more fulsome admission than required for a plea bargain).<sup>407</sup> Survivors, therefore, often find these procedures less traumatic than a regular trial as their experiences are not as contested, and the offender admits to at least some harm being caused.<sup>408</sup> Instead of focusing on the survivor's actions and shifting blame onto her, a restorative process centres on the offender's harmful behaviour and what he needs to do to atone.

---

<sup>404</sup> See Chapter 5 for a fulsome discussion on voice and its importance for survivors.

<sup>405</sup> McGlynn et al, *supra* note 388 at 218.

<sup>406</sup> *Ibid*; Clark 2015, *supra* note 36 at 23.

<sup>407</sup> Melanie Randall, "Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law" (2013) 36 *Dalhousie LJ* 461 at 478 [Randall 2013].

<sup>408</sup> McGlynn et al, *supra* note 388 at 223.

Restorative justice also produces idiosyncratic results that are tailored to individual situations. Options such as restitution, something which is generally unavailable in the traditional criminal law system, are encouraged.<sup>409</sup> What a survivor, an offender, and their community want and need guide the results of the process. Given the fact that survivors are a diverse group of individuals with varying desires, adaptability and specificity can be powerful tools in helping them feel as if they have achieved justice. The criminal system does offer redress beyond incarceration, but prison remains the most likely result of a conviction in cases of sexual assault.<sup>410</sup> An expansion of restorative principles under section 717 could increase the likelihood of other outcomes for sexual assault by encouraging and supporting education, mental health supports, and long-term mentoring of offenders.<sup>411</sup>

While there are benefits to using a restorative process to deal with crimes such as sexual assault, there are also several potential disadvantages. For example, any alternative justice approach must ensure that victims are safe.<sup>412</sup> In the traditional system, once an offender is

---

<sup>409</sup> Restitution is available by applying to various victim compensation funds or through separate civil procedures, but not generally through a criminal trial save in very specific circumstances. See: Godden-Rasul, *supra* note 314; Michelle S Lawrence, “Looking the Gift Horse in the Mouth: An Examination of the Canadian Approach to Criminal Restitution in Cases of Sexual Violence” (2016) 20:2 Can Crim L Rev 209 [Lawrence].

<sup>410</sup> Rotenberg 2, *supra* note 204. 56 percent of sexual assault convictions from 2009 to 2014 resulted in a custodial sentence.

<sup>411</sup> All of which were remedies that many of the survivors I interviewed identified as important outcomes in successful justice processes and most are already possibilities available in the traditional legal system. This topic will be discussed further in later chapters of this dissertation.

<sup>412</sup> Daly and Stubbs, *supra* note 390 at 159; McGlynn et al, *supra* note 388; Julie Stubbs “Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice” in Heather Strang & John Braithwaite, eds, *Restorative Justice and Family Violence* (London: Cambridge University Press, 2002) 42 [Stubbs 2002]. Protections offered by the courts are often inadequate as well, so this is a criticism that does not just apply to alternative approaches to justice. However, it is a consistent criticism about the use of restorative processes in the context of many violent offences. The Dalhousie dentistry scandal in 2014 provides a concrete example of debate over restorative justice in situations involving sexual assault and other gender-based violence. In this situation, male students at the school were using Facebook to make sexually harassing and threatening comments towards their female colleagues and women in general. The university organised a restorative process to deal with the harm that occurred that was heavily debated in the media and among scholars and activists. See: Jennifer Lllewellyn, Amanda Demsey & Jillian Smith, “An Unfamiliar Justice Story: Restorative Justice and Education: Reflections on Dalhousie’s Facebook Incident 2015” (December 2015), *Canadian Centre for Policy Alternatives*, online:

arrested, he may be incarcerated while waiting for the trial to take place. Even if he is not, various terms may be attached to his conditions of release that seek to ensure that he stays away from the woman that he attacked.<sup>413</sup> Restorative processes do not necessarily have these safeguards, so it is imperative that the community take responsibility for protecting survivors from further violence. However, this is not an impossible concern to address. There is no reason that protection orders could not be used for survivors who opt for a restorative process (though their effectiveness is debateable<sup>414</sup>), and the fact that the community tends to be better informed about what has occurred means that the community itself can offer protection through observation (if such a community is available or capable of handling this role).

On that note, it is also important to problematise the concept of community. Community is meant to refer to the people that the offender and survivor live alongside. However, who defines these boundaries? Some criticisms of restorative justice address the problems that arise when a community is biased towards one of the parties in conflict.<sup>415</sup> If the offender is well-liked, what effects will this have on the process? Will the survivor feel that she can speak freely or be treated fairly? What if the parties involved have no community, or come from different

---

<[https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/12/OS121\\_Restorative\\_Justice.pdf](https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/12/OS121_Restorative_Justice.pdf)>; Daniel Del Gobbo, "Lighting a Spark, Playing with Fire: Feminism, Emotions, and the Legal Imagination of Campus Sexual Violence" (2022) 45:1 Dal LJ 1.

<sup>413</sup> Often these attempts at legally-enforced no contact orders do not work and are breached by the abuser. See: Michael D Saxton et al, "Experiences of Intimate Partner Violence Victims with Police and the Justice System in Canada" (2021) 36:3-4 Journal of Interpersonal Violence 1 [Saxon]; Laurie S Kohn, "The False Promise of Custody in Domestic Violence Protection Orders" (2015-2016) 65 DePaul L Rev 1001 [Kohn]; Mia Sheldon & Megan Rowney, "Domestic Violence: When the Law Isn't Enough" (17 February 17 2016), *Global News*, online: <<https://globalnews.ca/news/2522828/domestic-violence-when-the-law-isnt-enough/>>; Susan Magas, "Protection Order Breached 78 Times in Manitoba Domestic Violence Case" (4 December 2015), *CBC News*, online: <<http://www.cbc.ca/news/canada/manitoba/protection-order-breached-78-times-in-manitoba-domestic-violence-case-1.3349793>>.

<sup>414</sup> Saxon, Kohn, *ibid*.

<sup>415</sup> Angela Cameron, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence" (2006) 10:1 Theoretical Criminology 49 [Cameron]; Rashmi Goel, "No Women at the Centre: The Use of the Canadian Sentencing Circles in Domestic Violence Cases" (2000) 15:2 Wis Women's LJ 1293.

communities?<sup>416</sup> Given how central the concept of community often is to these processes, the lack of consensus and certainty on this topic is concerning and potentially disruptive to the potential benefits of these different mechanisms of trying to achieve justice.<sup>417</sup>

There is also a risk that restorative processes could be manipulated by the offender.<sup>418</sup> At the heart of restorative justice is the idea that offenders must take responsibility for the harm that they caused, but how can those running the process be sure that the offender is sincerely participating? No one can force another human to be truthful, learn, or change their behaviour. Additionally, abusers tend to be quite accomplished at professing their remorse and diverting blame from themselves.<sup>419</sup> How can a process be healing if the person who caused the harm does not understand or even wish to understand his own culpability?

There is also the complication of participants having conflicting loyalties.<sup>420</sup> While having the community be involved can lead to positive outcomes where social norms are challenged, you must have a group willing to engage in this type of dialogue. It is not uncommon in sexual assault cases for people to state that they have a hard time believing that the offender committed such a horrible crime.<sup>421</sup> Sexual assault often takes place in private, so the people participating only have the claims of the offender and the survivor to understand what happened. Given how survivors are often not believed in the traditional criminal law system, there is no

---

<sup>416</sup> This point will be further discussed in Chapters 8 and 9, particularly in reference to Indigenous survivors.

<sup>417</sup> The topic of community in restorative justice will be explored in more detail in Chapter 8.

<sup>418</sup> C Quince Hopkins, “Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence” (2012) 35 Harv JL & Gender 311 [Hopkins]; Jung Jin Choi & Margaret Severson, “‘What! What Kind of Apology is This?’: The Nature of Apology in Victim Offender Mediation” (2009) 31:7 Children and Youth Services Review 813 [Choi].

<sup>419</sup> Julie Stubbs, “Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice” (2007) 7 Criminology and Criminal Justice 169 at 177; “Cameron, *supra* note 415 at 57-58.

<sup>420</sup> Daly and Stubbs, *supra* note 390.

<sup>421</sup> Kayleigh Roberts, “The Psychology of Victim Blaming” (5 October 2016), *The Atlantic*, online: <<https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/>>.

guarantee that a restorative process will be better unless there are specific steps taken to ensure that discriminatory and stereotypical assumptions about sexual assault are challenged. For example, the facilitator of the process should be trained to stop and intervene when unfair rape myths are discussed. Processes should also be designed so that female survivors receive equal space to talk without the chilling effect of male aggression. Given how many restorative programs exclude sexual assault, these problems and their solutions require further research. On the other hand, despite these unknowns, restorative processes that involve the community as a whole may have the potential to be powerful educational tools that help break down rape myths and stereotypes.<sup>422</sup>

Restorative processes must ensure that survivors are not pressured into accepting resolutions that do not address or satisfy their needs. In the RESTORE program, survivors were encouraged not to shame the offender as this may impede forward progress, and even put the survivor at risk of additional violence.<sup>423</sup> Restorative advocates are often concerned about framing the offender as a “bad person”, or that lecturing or scolding the offender may provoke defensive reactions.<sup>424</sup> The fact that survivors are encouraged to control their feelings in order to avoid risk is exceptionally problematic from a feminist standpoint. It implies that women are responsible for the violence perpetrated against them, and assumes that they can do something to prevent said violence, taking responsibility away from the offender.

Additionally, survivors should not have to deny their own feelings about the violence that they experienced. If restorative justice is supposed to be positive and empowering for survivors

---

<sup>422</sup> C Quince Hopkins & Mary Koss, “Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses” (2005) 11 *Violence Against Women* 693 at 714-15; Randall 2013, *supra* note 407 at 479.

<sup>423</sup> Koss 2014, *supra* note 400.

<sup>424</sup> *Ibid.*

by allowing them to participate more fully than in a normal trial, there must be room for them to express their negative emotions. Women are often seen as naturally forgiving and compassionate and are pressured to constrain their emotional responses and accept apologies even if they are not ready to do so.<sup>425</sup> While anger and other negative emotions can cause a restorative process to break down if they are not dealt with carefully, that does not imply that they cannot be present at all. A survivor should not be required to protect an offender from the consequences of his actions, and her emotions are part of what he must bear throughout the process. The harm of a sexual assault is much different from that of property damage. The emotions are likely to be more intense, and the way that they must be managed will require a wider acceptance of the role of expressing hurt and trauma. One of the potential benefits of a restorative process is that it could allow for greater emotive expression than the traditional legal system. If the need to remain objective and fact-focused is taken away, emotions and feelings can be understood and acknowledged as important and be given an appropriate amount of space.<sup>426</sup>

Another common criticism of restorative justice is that these processes are private.<sup>427</sup> By not participating in a criminal trial, the open court principle no longer applies and the proceedings and results of a restorative process do not necessarily stretch farther than the home community (of which only a small number of people are probably participating). Thus, these cases do not contribute to the body of precedent. There can be great value in ensuring that cases involving women's equality and sexual violence remain in the court system so that everyone can

---

<sup>425</sup> Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004) at 73 [Acorn]. See also the previous discussion about gendered performance in Chapter 2.

<sup>426</sup> Not only is this of benefit to the survivor, but the offender as well. Instead of having to present a carefully crafted persona to the courts, there is more room in a restorative process for offenders to engage with their feelings without fear of losing their case.

<sup>427</sup> Daly and Stubbs, *supra* note 390; Gotell 2015, *supra* note 5 at 54; Cameron, *supra* note 415 at 57.

reap the benefits of potential victories.<sup>428</sup> Unique fact scenarios or cases that push boundaries help future victims of crime achieve legal justice. However, no survivor should ever be forced to engage in an unwanted criminal process to ensure that future complainants have better jurisprudence available.<sup>429</sup> A running theme throughout this dissertation is the importance of recognising the diverse needs of survivors. While some may want to engage in the public process of a trial, others may feel that no legal justice is better than having to face such an ordeal.

### **3.4.2.5 Transformative Justice**

Transformative justice is an approach to dealing with criminal behaviour that occurs outside of the apparatuses of the state.<sup>430</sup> Instead of bringing problems to the legal system, communities come together to discuss what has happened and work towards fundamentally changing the way that they function so that harmful behaviour does not happen again. These are non-formal, entirely community-led projects with no connection to the traditional legal system. This shift away from the state is a purposeful rejection of carceral politics that tend to seep into state-connected attempts at justice. Critical legal theorists have argued that even though some feminist groups have found limited success working with the state, they eventually become part of the state and beholden to its politics.<sup>431</sup>

---

<sup>428</sup> Gotell 2015, *ibid*.

<sup>429</sup> As important as maintaining good precedent is, there is an equal opportunity that cases going through the courts will not produce useful precedent and instead create problems for future complainants.

<sup>430</sup> Transformative justice has emerged largely from grassroots activism on the part of people of colour and anarchist groups, both communities that seek to deal with criminal issues without involving the police given historical abuses by the state. See: Kim 2020, *supra* note 398; Kim 2018, *supra* note 164; Rebecca Howe, “Community-Led Sexual Violence and Prevention Work: Utilising a Transformative Justice Framework” (2018) 1 *Social Work & Policy Studies: Social Justice, Practice and Theory* 1; Bench Ansfield & Timothy Colman, “Confronting Sexual Assault: Transformative Justice on the Ground in Philadelphia” (2012) 27:1 *Tikkun* 41 [Ansfield]; Esteban Lance Kelly, “Philly Stands Up: Inside the Politics and Poetics of Transformative Justice and Community Accountability in Sexual Assault Situations” (2012) 37:4 *Social Justice* 44.

<sup>431</sup> Kim 2020, *ibid* at 310.

A transformative approach instead “shifts the emphasis from a collective process for holding individuals accountable for their behaviour to individual and collective responsibility for building a community where robust accountability is possible, expected, and likely”.<sup>432</sup>

According to Ejeris Dixon, “[violence] and oppression break community ties and breed fear and mistrust. At its core, the work to create safety is to build meaningful, accountable relationships within our neighbourhoods and communities”.<sup>433</sup> Healing becomes the responsibility of everyone rather than something outsourced to professionals. It is an ongoing process, often without any specific moment of resolution, and the goal is not to banish people from the community.

Transformative justice resists “the culture of disposability that says that people who have done harm are no longer people” and insists on trying to help even those who harm others heal and become better citizens.<sup>434</sup>

The focus of transformative justice is less centred on the specific parties involved in the offence because crimes or anti-social behaviour are seen as representative of systemic problems rather than just individual conflicts.<sup>435</sup> While transformative justice tries to ensure that the people who were involved in the harm achieve an outcome that helps them move past the violence that occurred, that outcome arises from structural changes to how interpersonal relationships within a community work.<sup>436</sup> Everyone in a transformative process is expected to change, not just the

---

<sup>432</sup> Connie Burk, “Think. Re-think: Accountable Communities” in Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011) 265 at 273.

<sup>433</sup> Ejeris Dixon, “Building Community Safety” in Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, CA: AK Press, 2020) 15 at 17.

<sup>434</sup> Kai Cheng Thom, “What to Do When You’ve Been Abusive” in Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, CA: AK Press, 2020) 67 at 75.

<sup>435</sup> Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011) at xvi [RSAH].

<sup>436</sup> *Ibid.*



offender and the victim. In that sense, the people most affected by violence are not left with the burden of trying to recover on their own. Their entire community is dedicated to addressing the wrongs in a holistic and long-term manner. For example, accountability partners are a common tool used in transformative justice, and, as members of the community help the offender reform his behaviour, they too must engage with and learn from difficult questions regarding interpersonal abuse and oppression.<sup>437</sup>

While the academic discussion on this new justice model is still evolving,<sup>438</sup> the criticisms lobbied against restorative justice can be applied here as well. Transformative justice seeks to undermine negative social norms in response to harmful behaviour, but this means that the community must agree that certain behaviours are harmful and deserving of reform. While many of the grassroots groups that have been experimenting with transformative processes identify as having left-wing and/or progressive politics, this does not mean that these communities are immune from the influences of sexism and other forms of oppression. For example, women in various activist communities have reported being sexually assaulted by male members and, despite the commitment their groups profess to have in regard to things such as

---

<sup>437</sup> For example, see: Gaurav Jashnani, RJ Maccani & Alan Grieg, “What Does It Feel Like When Change Finally Comes?: Male Supremacy, Accountability & Transformative Justice” in Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011) 217 [Jashnani].

<sup>438</sup> Transformative theorising and practice from a grassroots level, however, is quite substantial, even for sexual assault: For example, see: Lena Palacios, “‘Ain’t No Justice, It’s Just Us’: Girls Organizing against Sexual and Carceral Violence” in Claudia Mitchell & Carrie Rentschler, eds, *Girlhood and the Politics of Place* (New York: Berghahn Books, 2016) 279; “What About the Rapists: Anarchist Approaches to Crime and Justice” (2014), *Dysophia* (blog), online: <<http://dysophia.org.uk/wp-content/uploads/2014/09/Dys5-WhatAboutTheRapistsWeb2.pdf>>; Ansfield, *supra* note 430; *Philly Stands Up: Practicing Transformative Justice to Confront Sexual Assault Through Community Accountability* (blog), online: <<https://phillystandsup.wordpress.com/>>; Sarah DeYoung, “Transformative Justice Workshop Resources” (26 February 2015), *Barnard Center for Research on Women*, online: <<http://bcrw.barnard.edu/bcrw-blog/transformative-justice-workshop-resources/>>; “Resources for Addressing Harm, Accountability, and Healing”, *Critical Resistance*, online: <<http://criticalresistance.org/resources/addressing-harm-accountability-and-healing/>>.

racial or sexual politics, their allegations are often met with disbelief, suspicion, or violence.<sup>439</sup> Groups such as INCITE! have been vocal about this issue and have released resources such as *The Revolution Starts at Home*<sup>440</sup> to address the prevalence of unnamed and unchallenged abuse within activist communities.<sup>441</sup> While it is a challenge to undermine rape myths and gender inequality in any capacity, there are numerous women already engaging in this work and demanding better from their communities. By addressing the root causes of sexual violence, these efforts are much more likely to bring about long-term positive reforms than incarceration.

Another issue is the fact that transformative justice requires substantial resources and capacity on the part of the community to respond to issues of violence. In the context of sexual assault, many transformative justice guides suggest that the offender be paired with individuals who will help guide him to make better choices.<sup>442</sup> This requires that the community have people who can teach healthier behaviour,<sup>443</sup> and that these people have sufficient time to monitor and interact with the offender. There must also be enough resources and capacity to protect the survivor and ensure that her needs are met, as well as to foster community dialogue about the event so that the community can transform itself. On the other hand, the traditional system offers little to no support to sexual offenders, so the focus on rehabilitation and positive change from transformative justice is a refreshing shift towards a more proactive and holistic response to

---

<sup>439</sup> See: Meiver De la Cruz & Carol Gomez, “Ending Oppression, Building Solidarity, Creating Community Solutions” in Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011) 25 at 25-26.

<sup>440</sup> RSAH, *supra* note 435.

<sup>441</sup> See also: Rachel B Zellars, “‘As If We Were All Struggling Together’: Black Intellectual Traditions and Legacies of Gendered Violence” (2019) 77 *Women's Studies International Forum* 102230.

<sup>442</sup> Jashnani, *supra* note 437.

<sup>443</sup> These community members must understand systemic issues of gender and sex inequality enough to be able to address these issues in both their own and the offender’s lives. This is often a challenge given how frequently abuse occurs even within activist communities.

sexual violence. Research on transformative tools such as circles of accountability shows that these types of interventions result in decreased recidivism rates.<sup>444</sup>

While in theory, transformative processes look as if they may bring about substantial improvements when it comes to violent, harmful behaviour and subsequent needs for justice, they remain largely untested and out of reach of many of the communities that could use them the most. Although these are processes that generally occur outside of state institutions, there is likely value in providing economic and structural supports for community-level justice, and, as Mimi Kim suggests, justice politics are “at a cross roads in which the machinery of carceral buildup and its intrusions into every facet of social life have been momentarily slowed by the set of anti-carceral or abolitionist logics”.<sup>445</sup> Given the attention that sexual assault has been garnering lately, as well as criticisms against traditional courts and prison systems, there is certainly room for a broader discussion about transformative justice and support for its implementation, a topic that will be picked up once again in Chapter 9.

Despite emphasising the differences in restorative and transformative justice in this chapter, in much of the rest of the dissertation, I speak mostly of restorative justice. This is not because I think that delineating the two is not useful, but because I tried to simplify the concept of alternative forms of justice in my interviews. In part, this was because of a lack of familiarity about the nuances of restorative and transformative justice among the survivors I spoke with. They often knew of restorative and sometimes transformative justice through sources like the

---

<sup>444</sup> See: RJ Wilson, F Cortoni & AH McWhinnie, “Circles of Support and Accountability: A Canadian National Replication of Outcome Findings” (2009) 21:4 Sex Abuse 412; Kathryn J Fox, “Circles of Support and Accountability: Qualitative Evaluation” (November 2013), *State of Vermont Department of Corrections*, online: <<http://www.doc.state.vt.us/about/reports/circles-of-support-accountability-final-report/view>>; Hannah Barrie, “No One is Disposable: Towards Feminist Models of Transformative Justice” (2020) 22 *Journal of Law and Society Policy* 65 [Barrie].

<sup>445</sup> Kim 2020, *supra* note 398 at 310.

media. I gave a brief definition of restorative justice during interviews, but I allowed the conversations to develop based on the knowledge and interest of the particular women I was talking with. Despite this confluence of terms, survivors touched on several of the differences between the two processes in their concerns and opinions, even if many of our conversations did merge the two topics.

### **3.5 Concluding Thoughts on Statistics, Legal Frameworks, and Sexual Assault**

As this dissertation seeks to understand what it is that survivors are looking for when it comes to their attempts to find justice after being sexual assaulted, this chapter provided some context to understand that search, first by describing the prevalence and perpetration of sexual assault in gendered terms. Secondly, this chapter outlined the existing legal possibilities available to survivors. By looking at the statistics and legal frameworks for sexual assault in Canada, it is clear that this is a crime that is treated differently than other violent offences. The data on who perpetrates sexual assault and those who are harmed by it reveal deep connections to misogyny and other forms of discrimination. The state's inadequate response to this issue helps to further embed these inequitable behaviours into societal norms. In theory, the Canadian legal system should be able to deal with sexual assault in a fair and non-discriminatory manner as the laws governing this offence are, for the most part, strong and clear. However, despite good legislation and jurisprudence, the actual practice of law continues to harm many survivors who try and access legal remedies, and the options available to them are not sufficiently addressing their justice interests.

## Chapter 4: Methodology

### 4.1 Feminist Standpoint Epistemology

Methodology is “the terrain where philosophy and action meet”.<sup>446</sup> It connects epistemology, a theory of knowledge “about who can know what and under what circumstances knowledge can be developed”,<sup>447</sup> to methods, the techniques used to both gather and analyse information.<sup>448</sup> Thus, in writing about my methodology, I am illustrating that I have designed a project that can create data within a comprehensible framework, in a manner that other scholars will understand and accept as carefully and logically constructed, and that can provide “criteria for judging between competing knowledge claims”.<sup>449</sup> By crafting a well-conceived methodology, I am ensuring that my dissertation contributes to academic knowledge and produces data and analysis that goes beyond mere opinion.

The methodology grounding this project is feminist standpoint epistemology, a theory of knowledge that privileges the perspective of women when talking about their own experiences.<sup>450</sup> Standpoint epistemology “argues that all knowledge is constructed from a

---

<sup>446</sup> Joey Sprague, *Feminist Methodologies for Critical Researchers: Bridging Differences*, 2nd edition (Lanham, Maryland: Rowman & Littlefield, 2016) at 5 [Sprague].

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

<sup>449</sup> Caroline Ramazanoglu & Janet Hollad, *Feminist Methodology: Challenges and Choices* (Thousand Oaks, California: Sage Publications, 2002) at 11 [Ramazanoglu].

<sup>450</sup> *Ibid* at 60-61; Abigail Brooks, “Feminist Standpoint Epistemology: Building Knowledge and Empowerment Through Women’s Lived Experience” in Sharlene Nagy Hesse-Biber & Patricia Lina Leavy, eds, *Feminist Research Practice: A Primer* (Thousand Oaks, California: Sage Publications, 2007) 53 at 55 [Brooks]. Feminist standpoint epistemology rose to prominence largely in the 1980s. Some of the founding academics behind this methodology are: Sandra Harding, “Is Gender a Variable in Conceptions of Rationality: A Survey of Issues” (1982) 36:2-3 *Dialectica* 225–242; Sandra Harding, “Standpoint Theories: Productively Controversial” (2009) 24:4 *Hypatia: A Journal of Feminist Philosophy* 192; Nancy Hartsock, “The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism” in Sandra Harding & Merrill Hintikka, eds, *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and the Philosophy of Science* (Kluwer Academic Publishers: Boston, 1983) 283; Dorothy Smith, “Women’s Perspective as a Radical Critique of Sociology” (1974) 44 *Sociological Inquiry* 7; Dorothy Smith, “From the Margins: Women’s Standpoint as a Method of Inquiry in the Social Sciences” (1997) 1:1 *Gender, Technology and Development* 113.

specific position and that what a knower can see is shaped by the location from which that knower's inquiry begins."<sup>451</sup> Thus, people's identities and positions in society result in varying experiences, and these experiences allow them to develop differing perspectives. As a scholar, it is important to learn from as rich a variety of viewpoints as possible, particularly those that are often excluded from academic frameworks, to hone one's understanding of the world, making it ever more nuanced and reflective of reality. Feminist standpoint epistemology takes the stance that women have unique knowledge that should be considered when conducting research, and that this knowledge is best obtained by speaking with women about their lives.

Standpoint epistemologies can be used to contest hegemonic perspectives as they acknowledge the epistemic authority of socially disadvantaged groups when it comes to knowledge about their own lives. According to Sprague,

Instead of an elite hierarchy controlling and distributing knowledge to the populace, knowledge claims are worked out through dialogue with everyday social actors. Knowledge is not a thing that individuals possess but rather a form of communication and connection, a search for harmony in a community. Rather than opposing rationality to emotionality, emotions such as empathy and attachment become useful guides in asking and answering the thoughtful and important questions.<sup>452</sup>

Thus, this methodology has a political component. Researchers must think about power and how it affects their work. Using standpoint epistemology "prompts us to ask how the distribution of power in a society influences who can be a legitimate creator of knowledge and how their social position influences what kind of knowledge they create."<sup>453</sup> It is not enough to recognise that certain research has not been done; one must question why an area of scholarship has been neglected, what reasons one has for engaging in this research, how one's own power and position

---

<sup>451</sup> Sprague, *supra* note 446 at 46.

<sup>452</sup> *Ibid* at 49.

<sup>453</sup> *Ibid* at 63.

effect the research being conducted, what will be produced at the end of a project, and who will find it valuable. Standpoint epistemology requires researchers to consider the greater utility of their research, particularly from the perspectives of those being studied.<sup>454</sup>

Scholars must also question their role in the creation of knowledge. Feminist standpoint epistemology encourages academics to reconsider and challenge the traditional roles of researcher and research subject. In this approach, research participants are co-producers of knowledge.<sup>455</sup> After all, researchers cannot complete their work without the participation of community members.<sup>456</sup> Instead of being subjects analysed by an expert, research participants are individuals who contribute to the research by working with the researcher. Regardless of my own goals for the research and my beliefs about the subject, it was necessary for me to listen to and consider everything that survivors were telling me. The purpose of this research is, at least in part, to be helpful for survivors and that meant respecting and not dismissing the stories and opinions that were being shared with me, even those that challenged my own assumptions. A researcher should be ready to acknowledge that they are not the sole knowledge holder and creator when using standpoint epistemology.<sup>457</sup> In this dissertation, while collaboration was not ongoing past the interview stage and the writing is filtered through my interpretative lens, it was

---

<sup>454</sup> *Ibid* at 91.

<sup>455</sup> *Ibid* at 68-71. Ramazanoglu, *supra* note 449 at 65.

<sup>456</sup> This may require the researcher to expand their understanding of who is part of the community. This was a challenge I struggled with in my project. As I detail below, I made certain choices about who was included (and excluded) in my interviews. While I had reasons for the selection criteria that I chose, I was also open to the fact that the people I interviewed may disagree with my inclusion/exclusion criteria, or have a different interpretation of how I was defining “women”. While these issues did not arise during my interviews, I was aware of the possibility that I might need to re-evaluate the choices I had made based on what I was learning from the women I was speaking to. Part of understanding the standpoint of a community is being able to recognise when you have not adequately defined or understood the community itself.

<sup>457</sup> This does not necessarily mean that a researcher allows the project to shift and change based on any input from the community. Instead, the researcher must be amenable to listening and changing her own perceptions and desires about the project in light of the participation of community members. This is a methodology founded on dialogue throughout the interview process.

essential that I constantly questioned my own perspectives and whether I was engaging fully with the contributions of the women I spoke with.

Some would argue that taking such an outwardly political approach to research can introduce bias to data collection. Academic scholarship is often conceived of as objective and impartial, but standpoint epistemology argues that this lack of regard for political implications actually introduces distortions and biases in research.<sup>458</sup> No research can be said to come from a “view from nowhere”, so it is important to identify which perspectives are being highlighted (or excluded) to add nuance to the scholarly understanding of a problem.<sup>459</sup> After all, how can one ensure that one’s research is adequately comprehensive, taking enough variables into proper consideration, if certain knowledge has been omitted?

For example, in Canada, charges involving violence against Indigenous women are dropped most frequently when the accused is Indigenous.<sup>460</sup> In order to figure out why this is happening and how best to respond to this issue, researchers must speak with Indigenous women. One can extrapolate likely reasons as to why this phenomenon occurs, but any analysis would be incomplete—and likely erroneous and flawed—without the direct perspectives of Indigenous women who will be able to talk about why they may have refused to participate in police investigations or whether they encountered racist obstacles when trying to report.

---

<sup>458</sup> Ramazanoglu, *supra* note 449 at 65.

<sup>459</sup> Thomas Nagel, *The View from Nowhere* (London: Oxford University Press, 1989). See the following for a sampling of feminist scholarship on objectivity/subjectivity in research: Susan J Hekman, *The Future of Differences: Truth and Method in Feminist Theory* (New York: Wily, 1999); Catharine A MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (New York: Routledge, 1983); Joan Acker et al, “Objectivity and Truth: Problems in Doing Feminist Research” (1984) 6:4 *Women's Studies International Forum* 423.

<sup>460</sup> Katie Scrim, “Aboriginal Victimization in Canada: A Summary of the Literature” (2010), *Statistics Canada*, online: <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/rd3.pdf>> [Scrim].



To explore a topic through the lens of those directly affected, particularly when said viewpoint is often overlooked, allows for more complex and variegated data. By leaving certain perspectives unexamined, research does not adequately reflect the world that scholars are studying, and any results and recommendations resulting from their research will not be optimally effective—and could even be harmful. Thus, to centre women in one's research, as I do in this dissertation, has political implications. However, the purpose in doing so is to begin to rectify past errors in scholarship wherein women's perspectives were left out of research, resulting in incomplete and inaccurate data.

When using feminist standpoint epistemology, it is essential to apply an intersectional lens as well. Researchers must not assume that women constitute a single, universal category. While it is true that women have unique knowledge given the way that social norms shape and constrain expressions of sex and gender (as well other aspects of identity, such as race, ability, or sexuality), there are many categories of women whose experiences and perspectives will differ from one another. Thus, scholars using standpoint epistemology must be careful to clarify exactly who their standpoint refers to and not suggest that their research is more universal than it actually is. I make no claims that my work will be representative of the perspectives of all women as such a task is impossible. What is important, however, is recognising what viewpoints have been left out of the academic literature and working towards including them as often as possible. No one project will be able to do this perfectly, but each additional influx of information will help address the research gap.

In feminist scholarship, the idea of lived experience is a crucial tool for more fully understanding the lives of women. However, it is important to differentiate between taking all knowledge gained from standpoint as objective truth—something that standpoint epistemology

explicitly rejects—and seeing this information as a collection of differing perspectives that add to the layers of understanding that one has about a problem.<sup>461</sup> No singular experience can be considered true for all people, nor are individuals necessarily aware of the full context that their experience occurs in. It is only by looking at a wider array of data that a researcher obtains a more comprehensive understanding of the problem as a whole. Turning individual experiences into broader knowledge of a situation requires careful consideration and analysis. While researchers must respect people’s experiences, data should not be accepted without interrogating it.<sup>462</sup> A scholar’s job, after all, is to evaluate and come to carefully considered conclusions that are supported by a theory of knowledge.

In this dissertation, I must contend with the fact that laypeople often do not have a comprehensive understanding of the legal system. Survivors may be upset by their experiences during the process of taking an assault claim to court based on inaccurate assumptions of what the system could offer them, and they may demand changes and reforms to the law that cannot be implemented in the current system. However, all of this information is valuable. I want to understand how survivors experience a particular part of the legal process, and what they ultimately desire in regards to justice. If survivors want and expect solutions to their problems that are unavailable in the current legal system, then further exploration of what kinds of redress survivors are searching for and why they are unable to achieve their justice goals is needed. With standpoint epistemology, all perspectives have value, but they must be weighed and assessed as to what each adds to the understanding of the problem at hand. It is important to listen carefully

---

<sup>461</sup> Ramazanoglu, *supra* note 449 at 75-78.

<sup>462</sup> Sprague, *supra* note 446 at 61.

and with an open *and* critical mind to the voices of survivors, but also be ready to look at these individual stories within a greater totality of experiences.<sup>463</sup>

#### **4.2 Interviews with Lawyers and Survivors: Seeking to Understand a Standpoint**

The data used in this project was largely obtained via interviews with female survivors. My goal was to uncover something of “the diversity of women’s realities that often lie hidden and unarticulated,” and to acknowledge the expertise that women have in regards to their own experiences.<sup>464</sup> I also spoke with lawyers who represent and/or give legal advice to survivors as a way of understanding more about justice from the perspective of those who work within the system and have a broader, more systemic view of the issues as a whole. I interviewed a few individuals with experience as Crown Attorneys as well. While they do not directly represent survivors, these lawyers do have a unique perspective on sexual assault cases that is valuable for understanding the problems being interrogated in this project. The primary data used in this dissertation comes from my interviews with survivors themselves, and my discussions with lawyers are used to help contextualise this information.

The interviews I conducted were semi-structured, starting with a standard set of questions to guide the conversation, and then allowing interviewees to speak about their experiences

---

<sup>463</sup> In the context of sexual assault, being critical of what a survivor is saying is also important given how many women tend to blame themselves for the violence that someone else perpetrated. It is not that any one person is wrong about their experience. In fact, a survivor’s perspective about what happened to her will often change over time. Individual perspectives are influenced by a variety of factors and a researcher’s job is to look at them in context, finding patterns within a greater whole.

<sup>464</sup> Sharlene Hesse-Biber, “The Practice of In-Depth Interviewing” in Sharlene Hesse-Biber, ed, *The Practice of Feminist Research: A Primer* (Thousand Oaks: Sage Publications, 2013) 111 at 113, 130 [Hesse-Biber]. While my sample is relatively small and I will not be able to speak about women’s experiences universally, I am still adding more data to the literature on this subject, and exploring voices that have not been properly acknowledged in this debate.

without conforming to an exact structure.<sup>465</sup> Feminist interviewing methods encourage research participants to become equal partners in the creation of data.<sup>466</sup> As such, it is important for the interviewer to be adaptable as the interview progresses. There is a balance between sticking to an exact pattern of questions and creating a dialogue where the interviewee can introduce new avenues of potentially useful conversation that were not originally anticipated. My hope for this dissertation was that interviews would be shaped by the mutual desires of me and the participants.

During the course of my interviews, I found that this more conversational approach resulted in far richer data than interviews that stuck closely to my pre-prepared questions. However, I did not have full control over whether an interview would use this dialogue-based approach as it was up to the survivor how much she wanted to talk about or deviate from the questions I asked. While I would probe for additional detail if our conversation on a particular question was short, sometimes the women I spoke with were not comfortable dwelling on the issues being discussed, and others stated that they did not have much to say about certain topics. As an interviewer, it was my role to make the interview itself as comfortable and open as possible, but variations in rapport will always occur. Most of my interviews followed the more conversational approach I was hoping to encourage, but I was not able to achieve this for all of them.<sup>467</sup>

---

<sup>465</sup> Bob Matthews & Liz Ross, *Research Methods: A Practical Guide for the Social Sciences* (Essex: Pearson Education Limited, 2010) at 220 [Matthews & Ross].

<sup>466</sup> *Ibid* at 220-221.

<sup>467</sup> While not every survivor that I spoke with was particularly verbose, no one ended their interview early or told me that they were uncomfortable with the questions. Some individuals are simply more succinct than others, while some appreciated the opportunity to talk about their experiences at length.

I chose to begin my interviews with a series of case scenarios. Rather than immediately asking participants about their personal experiences, I wanted to build-up trust throughout the process. This was to allow the participants to acclimatise to our discussion and to get to know me before they encountered potentially emotionally difficult questions. Additionally, by asking questions about concrete examples of sexual assault and justice, I hoped to help participants think through the rather abstract and difficult to navigate concept of justice outside of the emotionally fraught context of their own situations. This approach was also meant to expand the scope of my data beyond personal experience by asking survivors to situate their beliefs about justice more generally.

The case scenarios were designed to further investigate survivor perspectives on justice by discussing different variables that may influence their opinions on justice. Given that not everyone I spoke to went through the same experiences, and I did not want to ask about the violence that any of the participants experienced, a case scenario was the most appropriate tool for getting at this information. The first scenario dealt with a situation in which a female employee was sexually assaulted by her employer while at work. The abuse escalated over the course of several months, starting with non-consensual kissing and touching, and culminating in non-consensual penetrative intercourse. The employee eventually went to the police and reported the incidents. The employer was charged and submitted a guilty plea before a trial could take place. I asked the survivors to imagine that they were a judge with the power to sentence the offender however they felt was appropriate, regardless of whether that sentence was available in Canadian criminal law. Once they detailed their thoughts on this scenario, I changed the particulars and asked if that altered their answers about sentence. The first change was that the employer did not plead guilty and instead a full trial took place. The second change involved the

employee reporting the abuse earlier, before non-consensual penetrative intercourse occurred. I wanted to explore survivor feelings about issues such as guilty pleas and the ways in which certain types of sexual assaults are seen as more serious than others.

My second scenario was based on a true story that has become popularised via a TED Talk and a book.<sup>468</sup> I gave the survivors a brief overview of the story of Thordis Elva, an Icelandic woman who was sexually assaulted by her boyfriend when she was young. At the time of the attack, she was incapacitated by alcohol and unable to respond or consent. Her boyfriend had non-consensual penetrative intercourse with her for over two hours while she slipped in and out of consciousness. She did not report this incident to the police and the two eventually broke up. Years later, she reached out to him via email to talk about what had happened between them. They communicated this way for eight years until they decided to meet in person. Elva chose to deal with her assault in this manner because she wanted to understand what had happened and to feel as if her abuser actually accepted responsibility for his actions. She wanted to be able to forgive him so that she could move on with her life. In the end, her personalised process made her feel as if she had achieved a just resolution to what had happened to her. Her former boyfriend acknowledged that what he did was wrong, apologised, and seemed genuinely remorseful. He validated her experiences of harm and even supported her in speaking tours about sexual assault where he publicly admitted to what he had done.

This second scenario was meant to speak to the restorative and transformative processes that are becoming an important part of the dialogue surrounding sexual assault and justice. One of the trends that inspired this project was how often the media reports that survivors feel as if

---

<sup>468</sup> See: TED, “Our Story of Rape and Reconciliation” (13 February 2017), online: *YouTube* <<https://www.youtube.com/watch?v=gyPoqFcvt9w>>; Thordis Elva & Tom Stranger, *South of Forgiveness: A True Story of Rape and Responsibility* (New York: Skyhorse Publishing, 2017) [Elva].

the legal system does not offer them adequate paths to justice. Consequently, there has been an increase in discussions about what justice is available outside of the legal system. I knew that I would likely not be able to connect with many individuals who have participated in alternative forms of justice (and I was correct in this assumption as only one person I spoke to had participated in a transformative process), so using a case scenario allowed me to explore survivor perspectives on restorative and transformative justice, and whether they were interested in these processes as a way of obtaining redress for their assault.

As I mentioned in Chapter 3, most of the participants in my interviews had a passing familiarity with the concept of restorative (and sometimes transformative) justice. During a later part of the interview after the case scenarios had been dealt with, I addressed restorative justice directly. I gave a brief definition of the term and asked survivors if they had any questions:

Restorative justice has been gaining traction in public discussions around sexual assault. Restorative justice is a series of different processes that can be used after a criminal act has occurred to help heal the harms caused by the offence. The primary goals of these processes is to try and return the people who were hurt to a similar place to where they were before they were harmed, and also to help the perpetrator change his behaviour so that he no longer causes harm. Restorative processes tend to be cooperative, not adversarial, and usually involve the participation of the perpetrator, the victim(s), and members of the community. While punishment may be part of the process, it is not a key component. Some people claim that restorative resolutions tend to be more positive and satisfying for people hurt by crime. However, in the context of sexual offences, there is concern that there are not sufficient safeguards to ensure that survivors are safe, and that harmful stereotypes and rape myths do not influence the process.<sup>469</sup>

While I go into detail about the complexities of restorative and transformative justice in Chapter 3, I did not want to overwhelm anyone with too many details during the interviews. Instead I focused on the very base components of restorative and transformative processes and used only the term “restorative justice”. I would then use probing questions to seek people’s perspectives

---

<sup>469</sup> Excerpt from my Interview Guide: Survivors as seen in Appendix A.

on issues such as the benefits and pitfalls of processes connected to the state or completely separate from it.

#### **4.2.1 Reflexivity**

Reflexivity is crucial in a feminist interviewing project. In standpoint epistemology, a researcher must try to understand a problem from the perspective of someone else. Even though interviews help researchers obtain information from people with different knowledge, scholars analyse the data and filter information through their own thoughts and perspectives. They are able to apply their wider contextual knowledge to what they hear, but there is always the risk of inserting their personal biases and assumptions into their interpretations. Reflexivity, therefore, requires that one take “a critical look inward and [reflect] on one’s own lived reality and experiences”.<sup>470</sup> How does one’s position as a researcher or one’s own lived experience influence the interpretation of voices that are different from one’s own? To engage with reflexivity means that one must identify the power and privilege one brings to a project, and actively work to ensure that one does not unthinkingly let these personal realities affect the processing or gathering of data.<sup>471</sup> Thus, a researcher must listen carefully and deeply to what an interviewee is saying, looking for places where misinterpretation might occur because of a variance in perspective. While you can never fully ensure that personal assumptions do not inappropriately seep into a project, practising active reflexivity ensures that one is consciously engaging with the issue, thus minimising the effects.

Reflexivity required me to be extremely conscious about the way that I interpreted the language people used in regards to sexual assault. I have worked on issues involving this crime

---

<sup>470</sup> Hesse-Biber, *supra* note 464 at 129.

<sup>471</sup> *Ibid.*



for many years, and I am used to speaking about them using particular terminology. I realised early on in this project that I needed to prevent myself from unthinkingly applying my own definitions of words to those of the survivors that I interviewed without clarifying and making sure that I knew what they meant. Terms such as “restorative justice”, for example, have complex and varying interpretations even within the academic community, and I have chosen specific definitions for this project that did not reflect the common understanding of everyone I spoke with. Additionally, as a trained lawyer, there are many concepts and terms that I use on a regular basis in a different way than most lay people.

For instance, while interviewing, I used general words and phrases such as outcome, sense of justice, results, and sentence when talking about redress. I wanted to see how survivors would speak about their experiences and perspectives without much guidance from me. As can be seen in this dissertation, the concept of accountability was important to women even though I did not ask about it directly in my interviews, and my writing on the subject arises from the words of the people I spoke with rather than any academic literature. It was important that I did not revert to using the legal definitions that I am more comfortable with. The concept of survivor “wants”, “needs”, and “desires” is another area where I am mirroring the language and meanings I heard from the women I interviewed rather than what I have read in the literature or how I understand these terms in light of my academic and legal training.

I used probing, open-ended questions to better understand how each of my interviewees conceptualised various terms, including the very notion of sexual assault itself, and was continually reminding myself throughout the interview and coding process to deeply reflect on the data outside of my personal understandings of this topic. By pushing myself to decentre my

own knowledge, I was able to more effectively explore the thoughts and ideas of those who I wanted to learn from.

Another area where reflexivity was important in writing this dissertation dealt with my shifting opinions and thoughts about the issues that I was exploring. While it is common for scholars to have some idea of what answers their research will yield, it is crucial that personal assumptions or desires about the results of the work not bias the data collected or the interpretation of it. I am passionate about law and sexual assault and have many conflicting feelings about what justice should look like in these situations. However, the point of this project was to explore how survivors perceive this topic. While interviewing, it was not my own thoughts that were important, but those of the people I was speaking with. Thus, it was critical that I did not let my opinions govern how I interacted with my interviewees or the data that I gained from our conversations.

For example, the idea of limiting some of the rights of the accused in a criminal trial came up several times in my interviews, and I quickly noticed how uncomfortable these discussions would make me. As a legally trained individual who specialises in criminal issues, I both understand and support the need for strong rights for the accused in the criminal system. When discussions about limiting these rights arose, I realised I had a tendency to immediately label these conversations as of limited use in my work. Discomfort, however, was one of the emotions that I decided would require me to interrogate my understanding of what I was hearing. My aim for this dissertation was to identify the problems survivors are having with the legal system. By jumping too quickly to whether a survivor's perspective could be transformed into legal reform, I was neglecting to think about what the particular complaint was addressing. Instead of listening and considering, I was unthinkingly applying my own expectations of what

the system could and should do. Reflexivity, therefore, helped me interrogate my research methods and analysis to ensure that I adequately challenged my own biases and was not simply looking to confirm what I thought I already knew.

My use of reflexivity throughout the interview process had a significant impact on my personal opinions about the subject of sexual assault and justice as a whole. When I started this dissertation, I thought my work would be focused on what could be done in the current legal system. I believed in a much more liberal conception of what changes might be necessary to aid survivors in their attempts to obtain justice as I myself was part of this system. As can be seen by the end of this dissertation, however, my conclusions about how to respond to the justice needs of survivors are more radical than I originally imagined. Listening to people with lived experience and pushing aside my own preconceived notions about what was right and possible when it comes to justice allowed me to think more deeply and carefully about the topic and come to novel conclusions I would not have reached without reflexivity.

#### **4.2.2 Recruitment Process**

Recruitment of research participants is often difficult, complicated by the fact that I was working with individuals who have often already had to deal with invasive and painful questions about their experiences. As such, my recruitment process was carefully constructed in collaboration with my supervisory committee to address ethical issues—from the manner in which interviewees were recruited to the way data collection was handled—and was approved by the Human Participants Review Committee of York University.<sup>472</sup>

---

<sup>472</sup> Selected documents from my ethics submission are included in the appendix to this document.

I began my recruitment process by identifying lawyers who may be willing to talk to me and provide information about my research project to their clients who are survivors. To do this, I obtained the list of providers for Ontario's Independent Legal Advice (ILA) program.<sup>473</sup> The ILA program, as discussed more fully in Chapter 5, is an initiative in Ontario that offers four hours of legal advice at no cost to sexual assault survivors before or just after their initial contact with the justice system. Consequently, it was reasonable to assume that some of the lawyers on the list of potential providers were likely to have already worked with survivors and be knowledgeable about sexual assault law. I made inquiries among legal colleagues about who the more experienced individuals on the list were and began reaching out to them.

This method of recruitment is called purposive sampling or looking for individuals with specific experiences or expertise.<sup>474</sup> This is a non-probability type of sampling that will not yield a perfectly randomised sample; however, my project is a qualitative exploration of the opinions and experiences of survivors and thus does not aim to produce statistical data, but to contribute rich and detailed information on an issue that has been largely neglected in academic scholarship. Given that part of my recruitment strategy was to reach survivors through their lawyers, it was important that I connect with lawyers who were likely to have positive and ongoing contact with survivors.

Once I reached out to my initial list of lawyers, I used the snowball method of identifying additional research participants, asking individuals who agreed to talk to me if they knew of

---

<sup>473</sup> The list of providers contained a number of individuals who, while willing to engage in this work, had not yet had a chance to do much of it, so I attempted to find out which lawyers actually had experience with these types of cases.

<sup>474</sup> Ted Palys, "Purposive Sampling" in Lisa M Given, ed, *The Sage Encyclopedia of Qualitative Research Methods Volume 2* (Los Angeles: Sage, 2008) 697 at 697.

anyone else who would be suitable for the project.<sup>475</sup> One possible criticism of my use of purposive and snowball sampling is that the lawyers I recruited are likely to have similar beliefs and values. Specifically, it is likely that the lawyers I spoke with identified as feminist. While I did not exclude those who rejected this moniker from my research, it is important to note that many of the lawyers who work with survivors have feminist-oriented practices.

As my project is grounded in feminist theory, I reject the idea that speaking with feminist lawyers introduces bias into a project that is aimed specifically at uncovering and exploring the neglected voices of women. I am purposefully seeking out a knowledge base that I have not seen adequately reflected in legal academic literature, and I do not believe that legal knowledge should always be—or even can be—truly objective. A feminist theoretical framework—especially an intersectional one—points to the existence of multiple truths.<sup>476</sup> There are a variety of ways of understanding a concept as complex as justice and focusing one’s research on the experiences and perspectives of individuals who have largely been left out of societal conversations on this issue should be one of the primary tasks of responsible research. Rather than introducing bias to the dialogues about legal justice, this project aims to minimise bias by uncovering additional information to consider.

I sent all lawyers that I contacted a recruitment letter via email that explained my project and what I wanted their help with. I asked them if they wanted to be a part of the research themselves as a potential interviewee, and also if they could post my survivor recruitment materials (a letter and flyer<sup>477</sup>) in their offices. While I requested that they bring these materials

---

<sup>475</sup> David L Morgan, “Snowball Sampling” in Lisa M Given, ed, *The Sage Encyclopedia of Qualitative Research Methods Volume 2* (Los Angeles: Sage, 2008) 815 at 815-816.

<sup>476</sup> Bromley, *supra* note 111.

<sup>477</sup> See Appendices C, D, and E.

to the attention of clients who may be interested in my project, this was meant to be the end of their involvement in the recruitment of survivors. Clients who were interested in speaking with me were to contact me directly. I did not inform lawyers about who decided to become part of my project. This was meant to help prevent survivors from feeling pressured by their lawyers to participate in work outside of the scope of their case.

I was contacted by several survivors using this method, and applied the snowball approach once more, asking those who spoke with me to pass on my information to anyone that they thought might be interested. Survivors began to enthusiastically recommend my project to other individuals that they knew as they believed it was an important project and that I was handling the subject with respect and care. Unexpectedly, some survivors posted my recruitment info on social media which resulted in many more individuals that were interested in participating.<sup>478</sup> Up until this point, I had planned on recruiting only from the Toronto area and doing in-person interviews. However, given the interest being generated, I decided to also offer phone interviews to those who lived outside of my geographic area. I had people contact me from as far away as Manitoba and Newfoundland. In the end, however, my sample was composed entirely of individuals from Ontario, most from Toronto, though some from other locales such as Sudbury and Peterborough.<sup>479</sup>

### **4.2.3 Inclusion and Exclusion Criteria**

My inclusion/exclusion criteria for survivors were created to allow me access to as broad a pool of potential perspectives as possible; however, there are some important criteria that I

---

<sup>478</sup> One survivor posted my recruitment information to a private online group for survivors that I did not have access to and this was particularly helpful for my recruitment numbers.

<sup>479</sup> While my data comes from a specific geographic location, it is important to note that criminal law is under federal jurisdiction, so any information gathered still has the potential for national application.

decided to control for. For example, I did not recruit minors<sup>480</sup> given the numerous ethical considerations surrounding their participation. I did include adults who had been assaulted when they were minors. While the perspectives of those who were recently assaulted and those who experienced their assault some time ago may be different, I wanted to capture a diversity of experiences.

I chose to work only with female-identified survivors. While I do not wish to imply that male-identified survivors do not exist or that their issues deserve less scholarly attention, given my sample size, I decided not to include this group in this project. I was concerned that it would be too difficult to recruit sufficient numbers of male participants to ensure that their views were adequately represented in my sample and that I would struggle to anonymise their experiences properly.

It is also important to recognise the complexity in which both gender and sex are understood today.<sup>481</sup> For many, the binary of female and male is not adequate to describe their experiences.<sup>482</sup> However, as with male survivors, I was worried about my ability to recruit individuals who identified as trans or non-binary. Consequently, I decided to ask for female-identified survivors and allow participants to decide whether they fit this description. In the end, everyone I interviewed listed their gender/sex as female or cis female on the demographic form I gave all participants.

Another key piece of my inclusion/exclusion criteria focused on how survivors engage with the legal system. I have interviewed both those who have not reported their assault (though still may) as well as those who have completed their engagement with the legal system.

---

<sup>480</sup> In Canada, anyone under the age of 18.

<sup>481</sup> See Chapter 2.

<sup>482</sup> Matsuno, Richards, *supra* note 133.

Individuals who are currently working through a legal process in regard to their assault were excluded from this study. There are several reasons for this choice. First, there is a slight risk that my research may be subpoenaed by defence counsel, and anything a participant says during the interview could be used to her detriment in a trial. While it is very unlikely that this scenario would occur, by ensuring that no participant was engaged in an active legal process, I further minimised this potential harm.<sup>483</sup> Additionally, legal processes are often emotionally trying for survivors, and placing additional burdens on them to speak about a difficult topic while they must also prepare themselves for the stresses of the legal system may be an unfair burden to ask of people.

I have chosen to include both those who have and have not reported their assault because, while both groups are likely to have had very different experiences that inform their ideas of justice, both perspectives are valuable in understanding survivors' justice needs. Experiential knowledge is, after all, unstable and will change and shift over time and from person to person. I wanted to hear from people with different interactions with the legal system to explore the varied reasonings and experiences that survivors had while navigating their options post-assault. For example, I predicted (and found) that it was common for survivors to decide not to report because they did not feel that justice would have been available to them in the legal system and I wanted to explore why people held this belief. I wanted to know more about why survivors made their choices and whether there were obstacles preventing them from choosing to engage with the legal system.

---

<sup>483</sup> Though the possibility remains for those who may report their assault in the future, it is unlikely that a defence lawyer will find out about a person's past participation in a research project. Additionally, the identifying information about my participants has been destroyed, including the audio files of their interviews.



I was concerned about whether or not I would be able to recruit an adequate number of individuals from both categories and what methods of recruitment I might need to use should I need to find participants with specific types of experience. However, my general recruitment strategy connected me with people with a wide array of experiences and no specific attempts were needed to help me capture additional perspectives.

Within the category of individuals who had completed their engagement with the legal system, I included anyone who had reported their assault to the police or had spoken with a lawyer in advance of reporting, regardless of how the complaint was handled after these initial steps. There is no one singular approach to handling a sexual assault claim and I expected to see a myriad of different results depending on the choices of both the survivor and the legal actors they were engaging with. While some of the individuals I interviewed had participated in a full criminal trial, others sought legal advice then decided not to report their assault to the police, or to apply only to the Criminal Injuries Compensation Board. Some chose to pursue other legal options in the areas of civil matters, employment, and human rights.

My inclusion criteria for lawyers required them to have expertise in sexual assault law and experience in working with survivors. I did not exclude those working outside of the field of criminal law as there are many other avenues that survivors may take in seeking justice within the legal system.<sup>484</sup>

#### **4.2.4 Interview Process**

Interviews generally lasted between sixty to ninety minutes, though some were as long as four hours. Interview participants set the pace and length of our conversations. If the person I

---

<sup>484</sup> For example, I spoke with several lawyers who specialised in civil sexual assault.

was talking to had a lot to say, I did not want to prevent them from telling their story in the manner that they thought best. A common complaint from survivors is that the legal system forces them to alter or constrain their stories to fit within expected legal dialogues. I did not want to contribute to these feelings and several of the survivors expressed that they valued the opportunity to speak candidly about their experiences.

When interviewing lawyers, I generally met them in their offices or conducted the interview by phone. With survivors, on the other hand, I asked them to identify a comfortable and convenient setting for our discussions. I would suggest a public library or café in their neighbourhood depending on how private or public they wanted our conversation to be.<sup>485</sup> In the end, I conducted most of my interviews in various branches of the Toronto Public Library system.

I recorded all of my interviews where I received written permission to do so.<sup>486</sup> I then transcribed this material and destroyed my audio files in accordance with the requirements of the ethics board.<sup>487</sup> I analysed these transcriptions using NVivo, a software designed for dealing with large quantities of qualitative data. For my analysis, I used a modified form of grounded theory that I will discuss below.

---

<sup>485</sup> For some survivors, being in an area with lots of people felt safe, while for others, they were fearful of anyone hearing their stories without the safety of confidentiality. In cases where more privacy was desired, I would often book a private study booth at the Toronto Reference Library.

<sup>486</sup> Participants were asked to consent to recording at the start of the interview. Only one individual did not want to be recorded for safety reasons, though I was allowed to take notes during the interview so her experiences and opinions have been included in this project

<sup>487</sup> While no researcher can fully guarantee the confidentiality of their interviewees, I attempted to make participation in my project as legally safe as possible by identifying individuals only by codes, and deleting my audio files after an anonymised transcript was created so that these files could not be seized for use in any court case.

#### 4.2.5 Resulting Sample

In total, I conducted 23 interviews for this project. Of these interviews, 16 were with survivors, while 7 were with lawyers. At the start of all of my interviews, participants were asked to fill in a demographic survey.<sup>488</sup> These forms were decoupled from participant IDs in order to help protect individuals' identities. However, despite the sensitive nature of both the interview as well as the demographic data, I believed it was necessary for me to collect some information on the diversity of my sample so that I could speak to both its strengths and weaknesses. All participants were told that participation in the demographic part of my interview was completely optional, and they were free to leave any question blank. They were also told that this particular information would not be used in connection with the rest of their interview, but instead to help me comment on the diversity of those who participated in the project. Every individual that I interviewed agreed to fill out the form, and, save for a few questions that survivors wished to skip, the data is mostly complete.

The demographic form was structured to allow participants to use the terminology that they felt most comfortable with. Consequently, instead of using a selection of choices, I left most of the answer fields on the form blank save for income which was given as a series of ranges. There were up to 10 different categories I asked participants to fill out, depending on which group I was interviewing.

All of the individuals that I interviewed were Canadian citizens,<sup>489</sup> and all but one person spoke English as their primary language. Given my sample was based in Ontario and my interview documents were in English, it is not surprising that I did not recruit many

---

<sup>488</sup> See Appendix H.

<sup>489</sup> Though I will note that some of the perpetrators I learned about were not Canadian citizens.

Francophones or Allophones in my sample. However, both citizenship and language are facets of one's identity that may shift perspectives on justice, and it is important to note the limitations of my sample in these areas.

Of the 23 people that I interviewed, 22 of them identified as women. The only man who participated in my research was a lawyer. While I was not looking to interview only female lawyers, it is women who tend to have the most expertise in this area of law.

Another one of the pieces of demographic information that I collected was age. Looking back over the data, this was an area of weakness in my sampling. Survivors ranged from 24 to 38 years old. This was a rather limited range of ages with most participants being in their late-twenties or early-thirties. Snowball sampling can lead to a bias based on who the researcher initially connects with. Thus, when I started my work with survivors of a particular age range, it is understandable that many of the individuals that they gave my information to would be in the same age range. Considering many of the women that I interviewed had taken many years to come to a position of feeling capable of talking so openly about their trauma, it is not surprising that I was less successful in recruiting younger participants who may still be in that process of healing.<sup>490</sup> For older participants, it may be the case that, given my use of lawyers and social media, they were either finished with any trial process they had undergone and were no longer in contact with the lawyers they might have used, or that they do not use social media in the same way as the other women that I interviewed.

While it would have been interesting to see if there were differences in how women of varying age ranges approached the question of justice for sexual assault, this is an exploratory

---

<sup>490</sup> This also implies that while I may only have been talking to women of a specific age range, the range of when they experienced their assault(s) was much broader, with many discussing situations that occurred when they were minors or new adults.

qualitative study. Even were I to have managed to obtain a more diverse range of ages in my sample, I would still not be able to draw any statistically relevant conclusions from my data. As such, while I do note that this was a weakness of my sample, the information gathered from this group of women is still immensely useful.

As discussed in Chapter 2, my theoretical aims for this work are founded in intersectional feminism, and historically race has not received adequate attention from feminist scholars. While my particular sampling methods did not allow me to control exactly who responded to my fliers, I hoped that given my various methods of reaching out to people, I would be able to connect with racialised women.

Of the 16 survivors that participated in this research, 10 identified as either white or Caucasian, though some of these individuals also stated that they were mixed race.<sup>491</sup> Of those that claimed a racialised identity, they described themselves with terms such as Métis, Chinese, Asian, Argentinian, Jewish, Black, Middle Eastern, and mixed. While a sample of 16 can never be perfectly representative, my project captured a mix of different racialised voices.

Sexuality was another piece of demographic information that I asked about. Only 4 of the participants identified as heterosexual. The vast majority of women stated that they were either bisexual or queer. Additionally, around half of the survivors I spoke with identified as disabled. The majority stated that they lived with mental health conditions such as PTSD or anxiety (often as a result of or exacerbated by the harm that they suffered). A few also lived with physical disabilities. As other research has shown, the more vulnerable a person is, the more likely they

---

<sup>491</sup> When I asked participants about their racial/ethnic background, I left the form blank so that they could answer however they thought was most appropriate for their situation. Consequently, the information that I gathered showcased a much more complex idea of identity than would have been represented had I asked individuals to simply pick the most appropriate category out of a list of options.

will become a victim of sexual assault.<sup>492</sup> The fact that those who participated in this study are marginalised in many ways supports these previous findings and emphasises the need for support for survivors.

Interestingly, income levels of my participants were quite spread out, though most fell into the lower income categories. I had expected my sample to be biased towards individuals with enough money to at least consider using the legal system after their assault;<sup>493</sup> however, many of those that worked with lawyers accessed pro bono services.<sup>494</sup> Five individuals made less than \$9999, while only one made more than \$100,000. Each of the remaining categories contained three people.<sup>495</sup>

Education levels also varied quite a bit, though most individuals had either a Bachelors or Masters degree. This bias towards educated participants is something that I expected,<sup>496</sup> though I did anticipate it would have resulted in a higher correlation with income levels.

One other aspect of my sample that was not captured by my demographics form is how informed many, if not most, of the women I talked to were about sexual assault as a social and legal issue. As my demographics form showed, the vast majority of my sample had university degrees and were in their late-twenties and early-thirties. Many of them discussed their involvement with sexual violence activism and the depths of their critical thinking on the issue.

While most claimed not to have a lot of knowledge about how the legal system operated outside

---

<sup>492</sup> See discussion on this topic in Chapter 2.

<sup>493</sup> Especially as part of my recruitment process involved obtaining references from lawyers.

<sup>494</sup> For many, they began by accessing the ILA program which, while of no cost to the survivor, is funded by the government so the participating lawyers are paid for their work. However, many of the lawyers I spoke with stated that they often worked far beyond the four hours funded by the ILA and repeatedly offered some of their services without fees.

<sup>495</sup> The other categories were: \$10,000 - \$29,999; \$30,000 - \$54,999; \$55,000 - \$74,999; and \$75,000 - \$99,999.

<sup>496</sup> I had assumed that those with greater resources, including education, would be more likely to reach out to legal services or to have strong opinions that they wished to share about the legal system.

of their own experiences, I found that overall most of the people I interviewed were educated and engaged with sexual assault as a social issue.

The conversations I had with such an informed group of women were robust. The data I was able to collect was detailed and reflected the work these survivors had put into thinking about their experiences and the social lessons they drew from them. However, this does mean that my research is missing the experiences of women who are less informed or engaged with the issue, or mired in shame and self-blame about being sexually assaulted. Hence, while this dissertation is composed of important, in-depth research, there are voices that I was not able to capture that would add more context and understanding to the issue of justice for survivors of sexual assault.

While I strove to interview a diverse group of women, talking about sexual assault is a difficult process and this might have affected who was willing to speak with me.<sup>497</sup> My recruitment process was also not constructed in such a way as to allow me complete control over who decided to participate in my project. My sample was biased towards survivors who had the time and energy to engage in a project that offered them few tangible benefits.<sup>498</sup> However, qualitative research focuses primarily on “stories and accounts including subjective understandings, feelings, opinions and beliefs.”<sup>499</sup> By its nature, this type of research can never perfectly reflect all facets of a problem; but, when well-constructed, it allows scholars to gain deep and nuanced knowledge about a topic.

---

<sup>497</sup> Women from marginalised communities may not trust or have much interest in speaking with an outsider who comes from a place of relative privilege.

<sup>498</sup> For example, women who have children may not have the time and/or resources to come to an interview, particularly if they are single mothers, even with the help of the honorarium that I offered.

<sup>499</sup> Matthews & Ross, *supra* note 465 at 142.

### 4.3 Coding the Data with Grounded Theory

Grounded theory is a qualitative methodology premised on the idea that theory is constructed inductively by analysing data.<sup>500</sup> Rather than crafting a hypothesis based on an existing theoretical framework, the researcher asks a question, gathers data, and then tries to build a theory from the data collected. When first conceptualised, grounded theory was seen as an atheoretical method.<sup>501</sup> Researchers were meant to approach their data with as few preconceptions as possible, meaning that academics were not required to engage in a thorough review of the literature lest this contaminate their analysis of the data.<sup>502</sup> Theory was meant to emerge from the data without the need for an external framework.

This atheoretical foundation, however, has been challenged over time.<sup>503</sup> Today, grounded theory can be seen as an umbrella term “that includes an entire spectrum of analytical methods”.<sup>504</sup> While the inductive aspects of grounded theory remain popular, particularly the coding strategies that I discuss later in this chapter, many scholars combine grounded theory tools with theoretical frameworks to great effect. Feminist academics, in particular, have had a

---

<sup>500</sup> Matthews and Ross, *ibid* at 399. See also: Kathy Charmaz, “Grounded Theory as an Emergent Method” in Sharlene Hesse-Biber & P Leavy, eds, *Handbook of Emergent Methods* (New York: The Guilford Press, 2008) 155 [Charmaz].

<sup>501</sup> Barney Glaser & Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine, 1967).

<sup>502</sup> For some of the early debate on this topic, see: Barney Glaser, *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (Mill Valley, CA: Sociology Press, 1978).

<sup>503</sup> Even the original creators of this framework engaged in public disagreement over its development. See: Anselm L Strauss & Juliet Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Thousand Oaks, CA: Sage, 1990). Followed up shortly after by a critique from Glaser: Barney Glaser, *Basics of Grounded Theory Analysis* (Mill Valley, CA: Sociology Press, 1992).

<sup>504</sup> Sharlene Hesse-Biber & Hilary Flowers, “Using a Feminist Grounded Theory Approach in Mixed Methods Research” in Antony Bryant & Kathy Charmaz, eds, *The SAGE Handbook of Current Developments in Grounded Theory* (London: SAGE Publications, 2020) 497 at 497-498 [Hesse-Biber & Flowers].



long history of working within a grounded theory framework while still applying feminist principles and understandings to their work.<sup>505</sup>

For example, Sharlene Hesse-Biber and Hilary Flowers argue that grounded theory and feminist research methods complement one another as,

feminist research is aimed at exploring subjugated knowledge, [while] grounded theory serves to elucidate women's concerns and those of other oppressed groups in order to promote social transformation and social change. Grounded theory aligns with feminist research in its attention to raw data (the voices of marginalized populations), commitment to iterative praxis, which allows for the constant reexamination of existing data, and ability to empower research subjects.<sup>506</sup>

Feminist standpoint theory stresses the importance of understanding an issue from the perspectives of those with lived experiences. Grounded theory approaches data analysis by trying to limit the ways in which preconceived notions about what the data should be can overwhelm the process of understanding and organising what has been gathered. Both analytical frameworks can be used to uncover information and understandings that have been overlooked. I found both methods of analysis useful while trying to understand what sexual assault survivors thought about justice, particularly as a feminist lawyer who both benefits from but also struggles to avoid overreliance on my legal training.

---

<sup>505</sup> See, for example: Barbara Keddy, Sharon L Sims & Phyllis Noerager Stern, "Grounded Theory as Feminist Research Methodology" (1996) 23 *Journal of Advanced Nursing* 448; Marilyn Plummer & Lynne E Young, "Grounded Theory and Feminist Inquiry: Revitalizing Links to the Past" (2010) 32:3 *Western Journal of Nursing Research* 305; Mary Allen, "Violence and Voice: Using a Feminist Constructivist Grounded Theory to Explore Women's Resistance to Abuse" (2011) 11:1 *Qualitative Research* 23; Laurel B Watson et al, "How Do Feminist-Identified Women Cope with Discrimination? A Feminist Standpoint and Grounded Theory Study" (2018) 42:3 *Psychology of Women Quarterly* 291.

<sup>506</sup> Hesse-Biber & Flowers, *supra* note 504 at 498-499.

### 4.3.1 Understanding the Coding Process

In grounded theory, data is organised into categories so that it can be easily compared, and from these comparisons, understood in a careful, systemic manner.<sup>507</sup> This process is called coding, and there are three levels of engaging in this process: open, axial, and selection. One of the benefits of using grounded theory in the context of standpoint epistemology is that categories are meant to arise from the data itself. What guides the processing of the interview material are the thoughts and perspectives of the interviewees. While I came into the project with certain questions that I wanted to answer, using grounded theory prompted me to really think about what the data I was looking at was telling me. Instead of immediately looking for information to answer my questions, I started by trying to sort out what the interviews were telling me without reference to what I wanted to hear. When comparing my results with the literature I reviewed in Chapter 1, the categories that I ended up selecting were similar to what other academics have used before me. However, I arrived at them before I had looked at most of this literature.<sup>508</sup> Consequently, I discovered there was significant consistency across the different studies on what survivors want from justice even though all of these studies and research questions differed.

Open coding is the first stage of the process during which a researcher begins to identify themes and categories in the data through deep reading of the available texts.<sup>509</sup> The researcher then classifies data according to broad descriptors that identify both concrete and abstract

---

<sup>507</sup> Matthews & Ross, *supra* note 465 at 400.

<sup>508</sup> I had read deeply and widely on the topic of sexual assault and law before I began this work, so I was not coming into any of this research as a blank slate. I found it interesting, though, that my major themes were so similar to the justice interests literature when I had not engaged with it fully before I started the coding process.

<sup>509</sup> Matthews & Ross, *supra* note 465.

categories.<sup>510</sup> One must avoid construing information too narrowly at this point as the purpose of this process is to explore the possibilities of the data. At this stage, “feelings about imprisonment” was a useful grouping of data as it captured a lot of related information from my data set that I then worked with more deeply at a later stage of the coding process.

In axial coding, the categories that a researcher created in the first level are then related to one another, and further connections and understandings are sought by a more complex analysis of the context and conditions that gave rise to the original categories.<sup>511</sup> This is where constant comparison becomes important, a process wherein the researcher must continually assess and compare data from different segments of the study in order to gain a better understanding of the patterns and trends that are emerging.<sup>512</sup> By going over the data multiple times and becoming more familiar with the material, new connections emerge that can be explored. For example, “feelings about imprisonment” split into more precise categories such as “punitive desires for incarceration” and “desire for separation via incarceration”.

Initial broad overarching topics get organised into more precise, useable subcategories. These subcategories may relate to other subcategories, and this may allow them to be grouped together in a more nuanced manner, or be reconceptualised to reflect deeper understandings of the data.

Axial coding is followed by selection coding, wherein a core category is chosen to which all the other categories are related.<sup>513</sup> As I have rejected the atheoretical aspect of grounded

---

<sup>510</sup> Charmaz, *supra* note 500; Andreas Bohm, “Theoretical Coding: Text Analysis in Grounded Theory” in U Flick, E Kardorff & I Steinke, eds, *A Companion to Qualitative Research* (London: SAGE Publications, 2004) 270 [Bohm].

<sup>511</sup> Bohm, *ibid.*

<sup>512</sup> Matthews and Ross, *supra* note 465 at 403.

<sup>513</sup> *Ibid* at 401.

theory, I did not look for an overarching theory to understand my data. Instead, during this third stage of coding, I situated the categories I had created within the context of the intersectional feminist theoretical framework that I chose to guide my work. Returning to my subcategories about imprisonment, I further organised the data according to how it fits within the theoretical scholarship. For imprisonment issues, this involved looking at how feminist theory deals with issues such as prison reform and abolition.

#### **4.3.2 Implementing the Coding Process**

As I noted in Chapter 1, several similar studies to my own have been conducted on the justice interests of survivors, but I did not use the categories that several of them had arrived at. While I had particular ideas about what I wanted to explore and topics that I tried to focus on during interviews, I wanted to see what themes arose organically from my data set without defaulting to what other scholars had found. In the end, I decided on four central themes that would structure the analysis of my data: harms and healing, accountability, punishment, and restorative justice.

I started my open coding process as I was conducting interviews. I noted down interesting themes that I saw being repeated as I spoke with survivors, and these topics of interest formed some of the first codes that I created to sort my data. While open coding is meant to be broad, not every code I came up with at this stage fit this requirement. In fact, many of the codes I started with were too specific and I needed to work backwards to see what tied certain topics together.

For example, I asked several questions about survivor perspectives on restorative justice as I was curious to hear from those seeking redress what they thought of these types of processes. It quickly became apparent that one of my overarching themes would centre on alternative forms

of justice as the women I spoke with had many opinions on the issue. This theme did not arise from the data as organically as perhaps the proponents of grounded theory originally intended. However, I approached my interviews without expectations for what I would find out. I did not know if this was a topic that would be of interest to survivors, or whether it would be something compelling enough to become a standalone theme. I ended up choosing restorative (and transformative) justice as a central organising code because of the way that the women I interviewed reacted to questions about the subject.

While I was not surprised that alternative forms of justice became an important theme in my dissertation given the fact that I did have specific questions on the topic, I did not anticipate that healing would end up being one of the most important categories that arose from my data. In fact, healing as a category only came together when I looked at several more specific codes that were not broad enough to be useful as a central theme until I realised that they all related to how survivors viewed justice in part as recovery from what had happened to them. Similarly, accountability came together as a theme when I started to see connections between comments on responsibility on the part of different actors and institutions despite the fact that I did not ask questions about this issue directly. Survivors consistently used words such as accountability and responsibility to describe a part of justice that they felt was important to them and I decided this should be reflected as a central theme even though the category was much broader than the offender-focused accountability understood in legal scholarship and practice.

When I began coding on NVIVO, I initially had several more primary codes than I ended up using in the actual dissertation. As mentioned above, the overarching theme of healing took a while to coalesce in my thoughts and was originally spread out in different codes such as “harms” and “financial compensation”. As I looked at my array of granular categories, I started

asking myself why survivors were bringing up certain topics. What was the overarching purpose of something like financial compensation or a desire for choices in their pursuit of justice? This method of questioning the purpose of narrower codes helped me start to see some of the broader connections in my data. It is also why my coding and central themes look similar, but are markedly different from the other literature on this topic. As I discussed in Chapter 1, there is a lot of overlap in the justice interests literature with other areas such as procedural justice. There are specific ways that lawyers will understand concepts that I was trying not to unthinkingly apply in my work. Thus, while I picked up on certain justice needs that echoed what other scholars identified, such as “voice” and “participation”, my organisation of these concepts was much different. For example, what was framed as a procedural right in the literature was an aspect of healing in my dissertation, allowing me to expand the scope and understanding of these justice needs as articulated by survivors.

For some themes, it took a longer period of working with and thinking through the data to understand what exactly was going on and what I wanted to say. Earlier in this chapter, I talked about processing data involving imprisonment. In my dissertation, however, there is no central theme of imprisonment. Instead, I found that much of what I was categorising as incarceration was really about the overarching topics of accountability and punishment. I realised that the institution of prison was not what survivors really wanted to address most of the time, but it was the tool that they often used to talk through their thoughts on a variety of complicated ideas. For instance, prison was frequently the starting point of thinking about how to make offenders take responsibility for what they did or whether people deserved to suffer for hurting others. These were two very different aspects of justice despite initially being connected through the lens of incarceration. It took several iterations of going through my data and finessing my coding to see

exactly what the primary themes of my research actually were and how the data divided between them.

Overlapping topics, however, were a consistent challenge. In some of Daly's work, she argues that the common topics within the justice interests literature need to have clear definitions.<sup>514</sup> However, I continually found that many of the issues that survivors were talking about were intertwined in such a way as to be impossible to fully separate. Instead of creating an artificial division between topics, I noted when this overlap occurred. This is also the reason why some quotes from survivors appear more than once in this dissertation. Their comments would sometimes relate to different issues and could not be separated without losing the meaning of the quote.

#### **4.4 Conclusion**

Methodology is one of the central foundations to any academic project. By using feminist standpoint epistemology and grounded theory, I am showing readers that I have carefully considered how I have accessed the knowledge that I need to answer the questions I have posed with this dissertation. Standpoint and grounded theory are complementary methodologies that helped me centre the voices of survivors at the core of my dissertation, aiding in both the construction of my interview process, as well as my coding of the data that I obtained from these interviews.

---

<sup>514</sup> Daly 2014, *supra* note 44 at 383.

## ***Interlude #1***<sup>515</sup>

*I was so excited to start university. I was living in the dorms for my first year. It was a co-ed floor and everyone got along really well. I felt like such an adult for the first time! Our floor would regularly have get-togethers on the weekend where people would drink, play games, or watch movies. The weekend that it happened was one of those nights. We were watching some stupid slasher flicks, but it had been a long week and I wanted to turn in early for once, so I left the common room long before the night wrapped up.*

*As I headed back to my room, my neighbour was leaving the get-together as well. He and I walked down the hall towards our dorms. We had been friendly so far during those first few months, and he was really cute. He sort of invited himself into my room for a “night cap” which ended up being a bottle of water since I didn’t actually have anything else in my fridge.*

*We were being silly, talking about classes and things and he made a move on me. I shoved him backwards because I was not feeling it that night, plus I hate it when guys start touching you without even asking. Needless to say, my neighbour did not like that and he tried to pin me down on the bed. I kept yelling at him to stop, but since everyone was still in the common room or out, there wasn’t anyone around to hear me. He got his hands under my clothes and told me that I just needed to let go and enjoy things. Eventually I managed to make him fall off the bed and I started kicking him. He screamed at me, but I got him out of the room and locked my door. I sat on my bed and trembled for a long long time. Suddenly I really didn’t feel safe in the dorms and I wasn’t sure what I should do.*

*It got worse really quickly. When I went to the caf for lunch the next day, there was a table of people from my floor who looked at me and started whispering. I guess my neighbour had started talking about our “hook-up” and the rumour mill was already churning. That certainly didn’t help me feel better about everything. Knowing everyone was talking about what happened and it definitely wasn’t my side of things they were hearing...*

*Living in the dorms was hard after that. People kept teasing me about that night with my neighbour and I tried to brush it off. But I just felt... I felt violated and unsafe in the place that was supposed to be my home. I was too scared to use the showers and invested in a lot of dry shampoo that semester.*

*I was also plagued with guilt over the fact that it wasn’t even really that big a deal, right? I mean, it’s not like he actually raped me. He tried, but didn’t manage. I should have been okay. At least that’s what I kept telling myself as my mood got worse and worse. I started to skip classes because I was anxious about leaving my room. Sometimes I missed meals for the same*

---

<sup>515</sup> This interlude and the ones that follow are pieces of fiction inspired by the stories of the survivors that I spoke with. Given the importance of stories in standpoint epistemology, I wanted to be able to showcase longer narratives. However, the stories shared with me by survivors were sensitive, and longer, more detailed excerpts could put the women I interviewed at risk of being identified. Consequently, I have written these fictitious Interludes which deal with many similar issues and situations that I heard about during interviews.



*reason, and even when I made it to the caf, I ate as fast as I possibly could so that I could flee back to my room, behind a locked door. All the new friendships I had started to make fell away as I just didn't want to talk to anyone.*

*I started to buy things online. Shopping gives you endorphins, right? I bought a lot of stuff and spent money I definitely did not have. It got to the point where I was going to have trouble paying for my dorm fees, and, if you don't pay, you get kicked out. Not only did I definitely not have enough money to get my own apartment, the whole idea of trying to find a new place to live left me utterly frozen. I'd have to go out and interact with people and it all felt impossible. I know now that I was definitely having some serious mental health problems, but at the time, I couldn't really see it all as something I could work on and improve. My life was falling apart and there was absolutely nothing I could do to stop it. At least that's what I felt like at the time. I couldn't tell my parents what was happening. What would they think? I didn't have many friends anymore. I was so so frightened.*

*I decided I needed to talk to someone so I decided to arrange a meeting with my residence floor fellow. When the date of our talk finally arrived, I could barely breathe on my way there. I was so panicked and scared about absolutely everything and as soon as my floor fellow started asking me questions, I burst into tears. I told her everything. She was the first person to hear any of it.*

*I am so lucky that she was such a nice and understanding person. She sat and listened and then, even though it was so beyond her job description, she helped me! She got me to apply for an emergency bursary to cover my dorm fees. She got me contact information and sat with me as I called health services and asked for their psych department. She walked me through all the university resources I had access to as a survivor, and helped me get some extensions in my classes so I wouldn't flunk the term. She even argued for and got me a dorm swap so that I could feel safe where I lived again. It's not that she fixed everything, but she helped me stop drowning. She helped me see that something was wrong and that help was available.*

*So when I think about justice, I think a lot about the fact that I didn't care about justice after I was sexually assaulted. It took me so long just to come to grips with what happened. Honestly, I never really thought about my neighbour and what should happen to him. Sure, I wanted him to magically disappear. But I also wanted to disappear. I was just in a very bad place and I needed someone to reach out their hand and drag me out.*

*Justice for me was less about the law and more about being able to live my life—not flunk out of school and get kicked out of the dorms. It was about getting access to a therapist and having accommodations in my classes. Sure, all these years later I wish I could tell my neighbour what a jerk he was and how what he did was so unacceptable. But I'm just happy that I managed to find that one person who helped me through it all. And, honestly, I worry about all the people who don't find that person. Who end up drowning in the mess you get thrown into after being assaulted. How can anyone feel like justice has been served if their entire life has been destroyed? How can we call something a justice system when it doesn't care about whether the*

*survivor can even survive? I just have so many questions about what we as a society think is justice and why it never seems to include making sure people are actually okay.*

## Chapter 5: Harms and Healing

*S10: I would rather be able to work on Toronto Rape Crisis Line and smoke some pot and have some Cheetos and go to bed. That makes me feel like I am having a normal, good life.<sup>516</sup>*

### 5.1 Introduction

When asked about what their justice needs were, the most common answer given by the survivors I spoke with was the ability to move on from what had happened to them. While it is impossible to create a system (legal or otherwise) that will guarantee every survivor the ability to heal and be at peace after experiencing violence, the women that I interviewed told me about systems that did little to support them when they needed help, and that sometimes even actively undermined their attempts to reorient their lives. For many, any pursuit of justice was impossible until they were able to achieve some stability in their lives after being assaulted. For others, healing itself *was* justice and the legal system—including but not limited to the criminal courts—had a role in helping them recover from the violence they experienced.

Thus, in this chapter, I begin by discussing some of the harms caused by sexual assault, including medical, financial, and legal system harms, as well as the compounding nature of trauma. The women I interviewed shared many stories with me about the devastating effects being sexually assaulted had on them, as well as what these harms meant for their ability and desire to interact with the various spheres of the legal system. Having briefly discussed the impacts of sexual assault, I then explore the main areas of healing that survivors spoke of, including a need for agency and power, validation, community and state support, as well as financial compensation.

---

<sup>516</sup> As I am maintaining confidentiality for my interview participants, all of the people I spoke with are identified by a code. Survivors are signified by S followed by a number, while lawyers are represented as an L followed by a number.

## 5.2 Harms of Sexual Assault

### 5.2.1 Medical Harms

As sexual assault is a physical attack, survivors will often have direct and immediate medical concerns to contend with.<sup>517</sup> They may have injuries to their genitals where the sexual attack was focused,<sup>518</sup> and depending on severity, this can lead to long-term reproductive health consequences.<sup>519</sup> Other physical violence also often occurs during these attacks, such as blows to the body or face. For example, S8 experienced permanent hearing loss caused by her assailant during the assault. Additionally, survivors are at risk of contracting an STI<sup>520</sup> or becoming pregnant.<sup>521</sup>

---

<sup>517</sup> Alex Waigandt, “The Impact of Sexual Assault on Physical Health Status” (1990) 3:1 *Journal of Traumatic Stress* 93; Murray B Stein & Elizabeth Barret-Connor, “Sexual Assault and Physical Health: Findings From a Population-Based Study of Older Adults” (2000) 62:6 *Psychosomatic Medicine* 838; Barbara Hedge, “Coping with the Physical Impact of Sexual Assault” in Jenny Patrek & Barbara Hedge, eds, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (New York: John Wiley & Sons, 2002) 205; NF Sugar, DN Fine & LO Eckert, “Physical Injury After Sexual Assault: Findings of a Large Case Series” (2004) 190 *American Journal of Obstetrics and Gynecology* 71; Rebecca Campbell et al, “Gynaecological Health Impact of Sexual Assault” (2006) 29:5 *Research in Nursing and Health* 399; Seree Teerapong et al, “Physical Health Consequences of Sexual Assault Victims” (2009) 92:7 *J Med Assoc Thai* 885; Janice Du Mont et al, “A Comparison of Intimate Partner and Other Sexual Assault Survivors’ Use of Different Types of Specialised Hospital-based Violence Services” (2017) 17:1 *BMC Women's Health* 59; Byron Maltez, et al, “Somatic Symptoms Historically Termed ‘Post-Concussive’ are Common in the Weeks after Sexual Assault but Unrelated to Head Injury” (2017) 81:10 *Biological Psychiatry* S166; Renate R Zilkens et al, “Sexual Assault and General Body Injuries: A Detailed Cross-Sectional Australian Study of 1163 Women” (2017) 279 *Forensic Science International* 112; Kathleen C Basile et al, “Chronic Diseases, Health Conditions, and Other Impacts Associated with Rape Victimization of US Women” (2020) *Journal of Interpersonal Violence*.

<sup>518</sup> Renate R Zilkens, “Genital and Anal Injuries: A Cross-sectional Australian Study of 1266 Women Alleging Recent Sexual Assault” (2017) 275 *Forensic Science International* 195. Additionally, see the following for a criticism of the over-reliance of the legal system on evidence of genital injuries in sexual assault cases: Graeme Walker, “The (In)significance of Genital Injury in Rape and Sexual Assault” (2015) 34 *Journal of Forensic and Legal Medicine* 173.

<sup>519</sup> Pamela M McMahon, et al, “Sexual Violence and Reproductive Health” (2000) 4 *Maternal and Child Health Journal* 121.

<sup>520</sup> Matthew W Reynolds et al, “Epidemiologic Issues of Sexually Transmitted Diseases in Sexual Assault Victims” (2000) 55:1 *Obstetrical & Gynaecological Survey* 51; Arlene C Sena et al, “Sexual Assault and Sexually Transmitted Infections in Adults, Adolescents, and Children” (2015) 61:8 *Clinical Infectious Diseases* S856.

<sup>521</sup> Felicia H Stewart & James Trussell, “Prevention of Pregnancy Resulting From Rape: A Neglected Preventative Health Measure” (2000) 19:4 *American Journal of Preventive Medicine* 228; Anthony Lathrop, “Pregnancy

As a result of sexual assault, most survivors will also experience negative mental health consequences.<sup>522</sup> From the recent SSPPS survey, 96% of Canadian women who had been sexually assaulted suffered through negative emotional impacts.<sup>523</sup> From fear to self-loathing, these emotional and psychological effects are often long-lasting and devastating to survivors' ability to live their lives. Women are frequently diagnosed with depression, anxiety, PTSD, and other related mental health disorders in the wake of an assault, and these illnesses may stay with them for the rest of their lives, impacting future relationships, employment, and general pleasure in life.

While the interviews I conducted did not focus on the impacts of sexual assault, many women, while talking with me, shared the horrific consequences they were dealing with as a result of being assaulted. S8, in addition to the permanent hearing loss mentioned above, suffered from memory loss. Prior to being attacked, S8 thought that recovered memories were a soap opera plot device, but she found herself unable to remember anything but the emotional terror of her attack. All of the details were difficult, if not impossible, to recall. She delayed reporting

---

Resulting from Rape” (2006) 27:1 *Journal of Obstetric, Gynaecologic & Neonatal Nursing* 25; Kathleen C Basile, et al, “Rape-Related Pregnancy and Association with Reproductive Coercion in the US” (2018) 55:6 *American Journal of Preventive Medicine* 770.

<sup>522</sup> For example, see: AW Burgess & LL Holmstrom, “Rape Trauma Syndrome” (1974) 131 *American Journal of Psychiatry* 981; Jenny Petrak, “The Psychological Impact of Sexual Assault” in Jenny Petrak & Barbara Hedge, eds, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (New York: John Wiley & Sons, 2002) 19; Sarah E Ullman & Leanne R Brecklin, “Sexual History and Health-Related Outcomes in a National Sample of Women” (2003) 27:1 *Psychology of Women Quarterly* 46; Sarah E Ullman, et al, “Structural Models of the Relations of Assault Severity, Social Support, Avoidance Coping, Self-Blame, and PTSD Among Sexual Assault Survivors” (2007) 31:1 *Psychology of Women Quarterly* 23; Sarah E Ullman, “Mental Health Services Seeking in Sexual Assault Victims” (2008) 30 *Women & Therapy* 61; Rebecca Campbell, et al, “An Ecological Model of the Impact of Sexual Assault on Women's Mental Health” (2009) 10:3 *Trauma, Violence, & Abuse* 225; Thema Bryant-Davis et al, “From the Margins to the Center: Ethnic Minority Women and the Mental Health Effects of Sexual Assault” (2009) 10:4 *Trauma, Violence, & Abuse* 330; Heidi M Zinzow, “Self-rated Health in Relation to Rape and Mental Health Disorders in a National Sample of College Women” (2011) 59:7 *Journal of American College Health* 588; Emily R Dworkin et al, “Sexual Assault Victimization and Psychopathology: A Review and Meta-analysis” (2017) 56 *Clinical Psychology Review* 65.

<sup>523</sup> Cotter & Savage, *supra* note 181.

specifically because she did not believe that the police would accept her claims given her inability to provide them with the particulars of her attack.

S8 also dealt with feelings of intense fear. She struggled to leave her house except at night when there were fewer people around. She felt disgusted with herself and suffered extremely negative mental health repercussions. S10 also described a lengthy period of dealing with an undiagnosed mental illness:

After I was assaulted, I didn't actually know it was an assault for five years. I was experiencing PTSD symptoms that I didn't know were PTSD.... Immediately after it happened, I joked about it. I thought it was something that every couple goes through. I was 22. I was very naive. When I mentioned it to people, same age as I was, it was that whole idea of like, that's weird, but what are you going to do about it? He's a weird guy. That's just what we would expect from being in a relationship with him.

After 5 years, I was in a new relationship with somebody who's very caring, very kind and I was finally able to talk about this kind of stuff and had somebody saying that's really not okay. They were so understanding and I was having nightmares and starting to have paranoid delusions about them and what they were doing. I would have nightmares about that person I was dating. I remember one time waking up... I would wake up crying and he would just hold me and I would look at him and [ask] "are you who you say you are?" And he would be like, "What is happening? You need to talk to somebody!"

I had a very very very good doctor as well. And she was, "okay, you're not sleeping?" And I was like yeah and I was kind of explaining to her some other things that were happening, that had happened to me and I think she kind of put two and two together and was like, "Just in case, not to make a big deal about it, we've made you an appointment at CAMH."<sup>524</sup> I was like oh, so 6 months from now? "Oh no, we rushed you. It'll be in two weeks. No big deal! I have ties there."

She was amazing and she could tell there was something very wrong. She sent me there and I had a meeting with somebody and they were like, okay, you're suffering from PTSD. And I was like what? Sure, I've experienced this and this, but who hasn't? Well, you need trauma therapy and I was like what? Having blackout panic attacks shouldn't be a daily normal thing?

---

<sup>524</sup> Centre for Addiction and Mental Health in Toronto, Ontario.

S10 struggled to see how she needed help as she felt like most of the people in her life had also experienced similar issues. In fact, many of the women I spoke with knew other women who had been assaulted. They assumed the mental health issues they were experiencing were a normal part of everyone's life (and thus did not require intervention) as they saw many other people coping with the same negative impacts of sexual assault.

Similarly, S14 struggled with PTSD. She suffered from flashbacks and nightmares that had a major impact on her life, and it took time for her to access appropriate medical treatment. After the assault, she attempted to get help through her university, but found that the institution was unsupportive and pressured her to carry on with her studies without any accommodations. She managed to finish her program, but was then hospitalised as a result of her untreated PTSD from the sexual assault. She expressed anger over the fact that she felt that people expected her to quickly “get over” her pain and trauma,<sup>525</sup> and how not dealing with what happened to her resulted in significant problems in her life a few years after the assault.

### **5.2.2 Financial Harms**

Being sexually assaulted costs money.<sup>526</sup> From medical care to missed work, there are a variety of consequences for survivors that have huge impacts on their financial situations. S3

---

<sup>525</sup> Trauma is caused when an individual experiences an event or series of events (including sexual assault) that result in adverse effects in that person's life. Trauma can cause physical and emotional responses which may be long-lasting, and no one person will react the same way to a traumatic event. Trauma also often overwhelms a person's ability to cope with life stressors, and this is often tied to the flight, fight, or freeze reactions that people display after undergoing the traumatic incident. The harms a person suffers from a traumatic event can continue for a significant time after the initial event, and the full impact may not be seen for some time either. “Trauma-Informed Care in Behaviour Health Services” (2014), *US Department of Health and Human Services*, online: <[https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf\\_NBK207201.pdf](https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf)> at 7 [DHHS]. See the following for a discussion of trauma and sexual assault: Lori Haskell & Melanie Randall, “Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know” (1 January 2019), *SSRN*, online: <<https://ssrn.com/abstract=3417763>>.

<sup>526</sup> Lori A Post, “The Rape Tax: Tangible and Intangible Costs of Sexual Violence” (2002) 17:7 *Journal of Interpersonal Violence*, 17 773; Rebecca M Loya, “Rape as an Economic Crime: The Impact of Sexual Violence on

described how being sexually assaulted disrupted her entire career, leading to a lengthy period of economic instability:

I [lost] a lot of money in the process, without even having to hire a lawyer! I was assaulted in November. In September, I had graduated with honours from school, and I had only gone to school after escaping from my abusive relationship and attempting to make a new life for myself. My story is actually ten years in the making at this point. I was in an abusive relationship, I got out, and the day that I got out I was like I'm going to go to school and make a life for myself. So I went to school, graduated with honours, and two months later I was raped and my life got thrown right back in the abyss.

I was just starting a career and making a name, and I was already being very successful, getting a lot of gigs. A lot of people were starting to recommend me and stuff. I had the potential to have a very successful career right out of the gate. And then I got raped and I spent an entire year just being so fucked up. I needed to run out and party several nights a week because I just couldn't handle my thoughts anymore. Drugs were definitely a factor. I just couldn't focus on my life. And I had to cancel a lot of my gigs. I got fired from gigs because I just couldn't hold my shit together. I had a part time job; I had to miss several days because I was just way too messed up to handle myself at work. And it was years before I could hold down a regular job.

After a sexual assault, many survivors will struggle with their employment (another area with legal implications for them to deal with).<sup>527</sup> They will need time off to deal with the medical and legal aspects of what happened to them. They may also suffer from health issues that require them to take leave or result in their termination. For some, they may feel the need to relocate which often means finding a new job, as well as moving costs.

---

Survivors' Employment and Economic Well-Being" (2015) 30:16 *Journal of Interpersonal Violence* 2793; Cora Peterson et al, "Lifetime Economic Burden of Rape Among US Adults" (2017) 52:6 *American Journal of Preventive Medicine* 691.

<sup>527</sup> Robin R Runge, "Employment Rights of Sexual Assault Victims" (2006-2007) 40 *Clearinghouse Rev* 299. See also: Angela M Moe & Myrtle P Bell, "Abject Economics: The Effects of Battering and Violence on Women's Work and Employability" (2004) 10:1 *Violence Against Women* 29; Jennifer E Swanberg, "Domestic Violence and Employment: A Qualitative Study" (2005) 10:1 *Journal of Occupational Health Psychology* 3.



Housing is another area impacted by sexual assault.<sup>528</sup> S9 faced homelessness after being attacked:

When this happened, it... brought forth a lot of mental health issues for me. I already had pre-existing mental health issues, but this just sort of exacerbated it to the point where I almost failed [university]. I lost a scholarship. I couldn't hold a part-time job that year. I had nothing. And I couldn't go to my parents.

Where's the money? What are you do? The university I went to, the housing is a corporation. It's separate. They'll kick you out if you don't pay. So it came to a point where I almost got kicked out.

She was able to speak with a financial aid officer who helped her apply for emergency grants, but disruptions in employment or education will inevitably have an effect on the overall financial health of a survivor. Without a stable income, how is a survivor supposed to support herself and pay for things such as medical care which will help her recover? What happens to the survivors who may never be able to hold steady employment again due to the repercussions of their assault? Financial harms, according to the women I interviewed, were one of the most devastating impacts of this crime.

### **5.2.3 Legal System Trauma**

Many survivors report that they feel retraumatised by their interactions with the legal system (particularly in the realm of criminal law).<sup>529</sup> By reporting an assault to the police, a

---

<sup>528</sup> In Ontario, the *Residential Tenancies Act* allows those who have experienced domestic or sexual violence to end their rental agreements early if staying in the unit puts them at risk of further harm. *Residential Tenancies Act, 2006*, SO 2006, c.17, s 47.1.

<sup>529</sup> Patricia A Cluss et al, "The Rape Victim: Psychological Correlates of Participation in the Legal Process" (1983) 10:3 *Criminal Justice and Behaviour* 342; Rebecca Campbell, "The Community Response to Rape: Victims' Experiences with the Legal, Medical, and Mental Health Systems" (1998) 26:3 *American Journal of Community Psychology* 355; Rebecca Campbell & Sheela Raja, "Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence" (1999) 14:3 *Violence and Victims* 261; Rebecca Campbell et al, "Preventing the 'Second Rape': Rape Survivors' Experiences with Community Service Providers" (2001) 16:12 *Journal of Interpersonal Violence* 1239; Uli Orth, "Secondary Victimization of Crime Victims by Criminal Proceedings" (2002) 15 *Social Justice Research* 313; Rebecca Campbell, "Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?" (2006) 12:1 *Violence*

survivor begins a process that will take a substantial amount of time and personal resources to complete. As S2 described: “We’ve heard so much about people saying that it takes so much courage. It’s not just about the courage; it sucks your energy.” While it would be impossible to make reporting a sexual assault to the police and commencing with any criminal proceeding an effortless process, there are many ways that the system itself causes unnecessary harm to those trying to achieve some form of justice.

For example, criminal trials are often extremely hostile environments for survivors.<sup>530</sup> S5 detailed her experiences in the court room:

Fucking three days of cross. Holy shit! It was brutal, and it was disgusting on so many levels. The defence lawyer absolutely brought up, so many times, oh you were dressed provocatively. And it wasn't as a defence for rape because he can't go that far, but he can point out, numerous times, that I was dressed a certain way.

Despite the fact that rape myths are not supposed to influence the trial process, S5 continually felt that she was being subtly blamed for what happened to her. Some of the women I spoke with expressed feeling that it was very unfair that they had to contend with days of antagonistic and aggressive questioning when the accused was able to opt out of the process himself.<sup>531</sup>

---

Against Women 30; Shana L Maier, “‘I Have Heard Horrible Stories...’: Rape Victim Advocates’ Perceptions of the Revictimization of Rape Victims by the Police and Medical System” (2008) 14:7 *Violence Against Women* 786; Debra Patterson, “The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes” (2011) 26:2 *Journal of Interpersonal Violence* 328.

<sup>530</sup> As discussed in Chapter 2.

<sup>531</sup> According to s 11 of the *Charter of Rights and Freedoms*, people charged with a criminal offence cannot be compelled to be a witness against themselves. While the right against self-incrimination is a hugely important part of our legal system, it can be an extremely frustrating situation to deal with as a survivor. The complainant in a criminal trial generally must give evidence or the case will likely fail. This exposes the survivor to the difficulties of cross-examination where her behaviour is interrogated, while the person she has accused does not have to personally contend with that type of public questioning. This can feel like an inherently inequitable process despite the importance of the right. *Canadian Charter of Rights and Freedoms*, s 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. For some discussion of the complexities of the right against self-incrimination in the context of sexual assault (through the lens of restorative justice), see: Marie Keenan, “Criminal Justice, Restorative Justice, Sexual Violence and the Rule of Law” in Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 44.

Survivors were also harmed by the lack of control that they felt they had during legal processes. The legal system requires things to be done in very specific ways. Certain language must be used and survivors must contort their narratives to fit within a narrow range of acceptability. According to S2,

[it's] like you're getting pulled into a wave and the wave is really big and there's no way you can keep swimming back to shore. The shore being your own safety, home place, whatever it is.

...And you'll eventually make it back to shore, but you can't control when. That's scary. Someone, I can't remember who, said when you go through a trial process, you feel like you don't have control.... But it was more I was worried about... would I drown out there in the waves? Would I be a casualty? Because I cannot predict how I will mentally and physically get through it. I just didn't know. That was the scary part. That was the pull. Meeting [my lawyer]... She gave me the raft. Still on the ocean, but she put me on the raft. That let me still ride out the wave because I wanted to cross the ocean. I know there was a shore. I could always go back, but I knew I needed to cross the ocean.

Deciding to go forward with a legal claim meant throwing herself into a situation that she did not know much about and she could not predict what would happen or what she would need as she progressed. While having access to a lawyer was a help, it was still a scary process with many unknowns and no guarantee of a positive outcome.

S3 and S5 echoed these concerns. S3 noted that reporting meant a survivor needed to hope for reliable and compassionate police officers that genuinely wanted to help. However, she thought it equally likely that a survivor could encounter officers who undermined anyone who came in alleging to having been raped. S5 spoke about struggling with both a judge and Crown who did not adequately protect her during the court process when inappropriate statements were made in court about her or sexual assault in general, and this made her feel “really let down” by the system. Rather than seeing that state institutions were working for the benefit of people who

were using them, survivors felt as if their experiences were based on luck rather than law.<sup>532</sup>

Reporting was an unknown, as likely to harm them as it was to deliver the justice that they had been promised.

Several of the survivors who participated in my interviews, after going through a legal process, doubted whether the effort and associated trauma was worth the result. S3 stated that:

I wish that I could go back in time.... The mental toll that that took on me was not worth it at all. I really wish I could have gone a different way. That I was given different options. The way that things played out is not at all the way that I would have wanted it. Either before or after.

Trying to navigate the legal system and all its multi-faceted aspects is difficult for survivors, many of whom do not have lawyers helping them through the process. They report their assaults to various authorities in good faith, thinking that they are doing what is right. However, the results of their efforts are not always positive, and the choice about reporting or not is fraught with difficulties as both options can result in regret.<sup>533</sup>

#### **5.2.4 The Compounding Nature of Harm**

Before moving onto discussing healing from sexual assault, it is important to acknowledge how the harms of sexual assault often compound one another. A mental health issue can lead to lost employment, which in turn causes problems in regards to other life necessities such as housing. The survivors I spoke with were clear that their post-assault issues

---

<sup>532</sup> This is certainly not a sentiment expressed exclusively by sexual assault survivors. In a study by the Canadian Bar Association, many individuals felt that justice was dependant on the legal professionals involved, so one's ability to access justice was essentially "the luck of the draw". Amanda Dodge, "Access to Justice Metrics Informed by the Voices of Marginalized Community Members" (March 2013), *Canadian Bar Association*, online: <[http://www.cba.org/CBA/cle/PDF/JUST13\\_Paper\\_Dodge.pdf](http://www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf)> at 9.

<sup>533</sup> Marla E Eisenberg et al, "Sexual Assault Reporting and Emotional Distress Among College Female-Identified Victims/Survivors" (2019) 15:4 *Journal of Forensic Nursing* 222; Katherine Lorenz et al, "Qualitative Study of Sexual Assault Survivors' Post-Assault Legal System Experiences" (2019) 20:3 *Journal of Trauma & Disassociation* 263; Carol Anne Marchetti, "Regret and Police Reporting Among Individuals Who Have Experienced Sexual Assault" (2012) 18:1 *Journal of the American Psychiatric Nurses Association* 32.

were linked, making their lives more and more difficult. L2 described just what a devastating and broad effect a sexual assault can have on a woman's life:

The wanting to move on is... We need to find another way of talking about that because it's so serious and that all of these forms of justice—and civil even more so than criminal for many people—doesn't allow you to process the experience in certain ways. Let me tell you what people put on hold. Like I'm not going to have a child until all of this is over. I'm not going to finish... I'm not going to go back to school. The biggest decisions of your life... those are the things they put on hold.

After being sexually assaulted, so many parts of a survivor's life can be negatively impacted. As discussed earlier in this chapter, S3 had to take a step back from developing her career and may never achieve the same things she would have had she not been assaulted. Career changes will have further financial effects that can spiral into other parts of a survivor's life, limiting her life choices.<sup>534</sup>

S2 described sexual assault as a crime with far wider reaching consequences than most other crimes:

The harm after the assault, it crosses so much space and time, more than that one assault. Because the impact with this is so long lasting and affects everything else in life, I want a perpetrator or potential perpetrator to understand that for half an hour or one hour of harm, you will negatively affect someone for years and maybe the rest of their life. That's very key to me. It's not just one hour of harm. You actually impose so many years of harm and that's important. I take the example of a hit and run. There were minor injuries. Just a broken leg. Not badly broken, but still. Broken ankle! There will be at least a year, if not up to three years recovery, for the person. But if it's just a really honest mistake kind of thing, as a driver, you're still held accountable. But the impact of that harm is not as long lasting versus this type of crime.

The traumas that survivors experience cannot be easily fixed with a linear recovery plan. The resultant harms may even get worse over time.

---

<sup>534</sup> S8 noted that one must also consider the role of intersectionality in these situations and how overlapping oppressions compound trauma even more.

The effects of trauma can be hard to recognise, even for the survivor herself.<sup>535</sup> What starts as a rational reaction to violence can develop into a long-term struggle with PTSD as what happened to S10. It was not until years later that she was diagnosed with a mental health issue by her doctor, and she was surprised that what she was feeling was caused by a legitimate health problem that could be treated. It had not occurred to her that her struggles were something she could get help for.

After being assaulted, a survivor's experience of the world may be fundamentally changed, and she can doubt her own interpretations of her life. She may start to subtly change her behaviours in response to her anxieties and fears of being hurt once again. According to the 2018 SSPPS, 57% of women who were sexually assaulted reported at least one change to their behaviour as a result of the offence, most often avoiding people or situations.<sup>536</sup> S12 described the confusion she had about relationships and herself three years after she was assaulted:

I'm still trying to figure out if, in the last two years of my life... I don't want to say this has consumed me. It's a big thing and I kind of wonder to myself sometimes whether or not I have really worked through all of that. What this whole thing really shattered was my sense of trust in other people and myself. My own judgment in situations like that going forward. I second-guess myself and I continue to. It is less than three years since it happened but am I okay? I think I'm okay. I don't know that I'm fully healed from those other things. This has really affected my life. As I'm dating and I'm in this situation again where I'm meeting somebody for the first time and you have to, at some point, kind of take a leap of faith and put yourself in that position. I've only been kind of tested once since that time and it was a fine experience, but in the back of my head when I'm meeting people, I definitely think about this.

The consequences of sexual assault do not confine themselves to interactions between the survivor and the offender. A survivor's sense of safety and self can be hugely impacted, affecting potential intimate relationships, but also friendships and casual interactions. Self-doubt can lead

---

<sup>535</sup> DHHS, *supra* note 525.

<sup>536</sup> Cotter & Savage, *supra* note 181.

to blaming oneself and being suspicious of even once-trusted individuals. These often subtle changes are difficult to see and challenge, yet they can alter a survivor's life in significant ways.

In discussing the negative impacts of sexual assault, I do not wish to imply that recovery is entirely the responsibility of the women who have been harmed. In fact, I hope that this chapter showcases how important the role is that various systems and actors have in helping survivors heal from the trauma of sexual assault. Critics have called into question the atomistic focus of trauma studies, arguing that not only does this result in pressure on individuals to fix themselves,<sup>537</sup> but it also constructs the idea of a traumatised woman.<sup>538</sup> It is crucial when talking about trauma and sexual assault that such a framework not lead to the assumption that women are only their trauma, or that all women experience trauma in the same way.<sup>539</sup> Sexual assault is a very harmful experience that often has lifelong impacts, but every single one of the women that I spoke with was still trying to live their lives as freely and joyously as possible. Though everyone discussed how being assaulted caused them difficulties, they were also complex humans with so much more to their lives than the aftermath of their sexual assault.

The survivors I interviewed believed dealing with the harms caused by this offence should be centred on a collective approach to bettering people's lives. As will be explored in this chapter, that means that women should not have to be responsible for finding and financing the

---

<sup>537</sup> As well as often ignore the systemic factors that cause trauma. See: Rachael D Goodman, "A Liberatory Approach to Trauma Counselling: Decolonizing Our Trauma-Informed Practices" in Rachael D Goodman & Paul C Gorski, eds, *Decolonizing "Multicultural" Counselling through Social Justice* (New York: Springer, 2015).

<sup>538</sup> Emma Tseris, "Trauma and Women's Rights... According to Whom? Decolonizing the Psychological Trauma Narrative" (2015) 25:1 *Feminism & Psychology* 34; Nicola Gavey & Johanna Schmidt, "'Trauma of Rape' Discourse: A Double-Edged Template for Everyday Understandings of the Impact of Rape?" (2011) 17 *Violence Against Women* 433.

<sup>539</sup> *Ibid.*

tools that they need to help themselves heal. Instead, numerous women told me that they wanted to see society reorganised in such a way as to support people who needed all sorts of help.

Furthermore, from an intersectional perspective, it is imperative to recognise the colonial underpinnings of much of trauma discourse, given it is rooted in a very western conception of psychology.<sup>540</sup> Culture can have a huge impact on how someone reacts to a violent and harmful event. This can result in those from marginalised communities being seen as not sufficiently traumatised if they do not act according to the behavioural norms of the majority. Additionally, trauma discussions about marginalised people often neglect to consider the systemic and structural roots of trauma. For example, Indigenous scholars have argued that trauma-related work must be founded in the appropriate cultural context, using models that are centred in Indigenous values and understanding, and ones that purposely confront and deal with the ongoing legacies of colonialism.<sup>541</sup> Trauma arises not just from the sexual assault, but from the colonial structures that serve to oppress and make violence against Indigenous people more likely. Thus, in moving forward with this chapter, harms and healing must be understood on a level broader than just the individual.

### **5.3 Categories of Healing**

One of the most important aspects of justice discussed in my interviews dealt with supporting survivors' healing journeys without undermining their attempts to obtain justice. Not only did survivors need to see the person who hurt them held responsible for the harm done to them (an issue I will explore later in this dissertation), they needed to be able to recover from the assault and heal from the trauma that they experienced.

---

<sup>540</sup> Natalie Clark, "Shock and Awe: Trauma as the New Colonial Frontier" (2016) 5:1 Humanities 14; Renee Linklater, *Decolonizing Trauma Work: Indigenous Stories and Strategies* (Winnipeg: Fernwood Publishing, 2020).

<sup>541</sup> *Ibid.*



Healing encompasses a wide variety of needs and desires. After talking with survivors, I identified four main categories of healing that came up repeatedly throughout my interviews. The first was a survivor's need for agency and power. This included a desire to have some control over what was happening to her in the wake of her assault and a need for actionable choices. Agency was also implicated in process concerns, such as control over the timing of legal processes and the need for independent legal advice. Survivors in my interviews also articulated a need to be able to express themselves freely and authentically, regardless of court structures and rules.

A second category of healing involved the need for validation. Survivors wanted this from both the legal system and the offender. This was followed by a demand for more comprehensive community and state support. Finally, survivors stressed the importance of compensation so that they were able to access the resources that they needed to recover in the aftermath of being assaulted.

### **5.3.1 Agency and Power**

#### **5.3.1.1 Personal Sense of Control**

Several of the survivors I spoke with characterised their experience of sexual assault as a complete loss of control over their autonomy and a denial of their humanity. S2 described her attack as feeling “Like I didn't exist. Like I was a machine. It's like there's no human being. There's no personhood. I do not exist”. To be hurt in such a way, often by a person that they loved and trusted, made many of the survivors I interviewed feel powerless. Consequently, an

important component of healing from trauma that leaves you feeling vulnerable and helpless, I was told, centres on regaining one's agency and sense of control over one's life.<sup>542</sup>

Most of the women I spoke with talked about the need for survivor-led justice processes that allowed the survivor some command over what was happening after she reported. As S15 described,

I think being able to be a part of the process as a victim and having a say in what justice looks like for that scenario is really important. In one way, because you're going to get the justice that you want or there's a higher possibility of getting the justice that you want. In the second way, that you're being included and you're allowed some autonomy in the process. It's not a very nice feeling to have to enter the legal system and be told you have no power yet again. And you have no say over what your role is or what the outcome is or anything like that.

If the experience of sexual assault involves the loss of all control, survivors believed the process of obtaining justice should include opportunities for them to reassert their autonomy.

Unfortunately, most of the women I interviewed did not think that the current legal system allowed for this once they reported their assault, particularly in the criminal courts. For some, knowledge of how little any legal process allowed for their input deterred them from reporting at all.<sup>543</sup> But this was not true for all of the women I spoke to:

S7: I felt like any possible thing that I can do was better than just sitting back and not doing anything.

S6: Cause you're taking your power back.

Reporting their assault to various parts of the legal system was seen as a burden that would further undermine a survivor's autonomy by some, but as a way of asserting some semblance of control by others.

---

<sup>542</sup> DHHS, *supra* note 525.

<sup>543</sup> Johnson 2017, *supra* note 27; Shamus R Khan et al, "I Didn't Want to be 'That Girl': The Social Risks of Labeling, Telling, and Reporting Sexual Assault" (2018) 5 *Sociological Science* 432 [Khan].

Most of the survivors I interviewed believed that the legal system needed to involve the survivor in decision-making and even process design more directly. According to S5, when asked what she would do were she a judge: “I would speak with the victim and ask them, ideally, what do they want from this? What would they hope that would come out of this? And I would take that greatly into consideration.” It is important to note that when survivors described their ideal process as survivor-led, they did not mean that only the survivor was allowed to make decisions and control the entire process. What they wanted was the opportunity to make their opinions on what should happen to the offender heard and respected when possible. They wanted to be active participants in the legal process they were a part of.

The survivors I spoke with acknowledged that women want many different things from legal processes. When discussing the situation in my interview guide inspired by Thordis Elva who resolved the trauma from her sexual assault directly with her rapist,<sup>544</sup> many women responded that they were uncomfortable with her choices (specifically her decision to deal with her rapist outside of the criminal law system and to then include him in her activist efforts). However, they felt it was important to empower survivors to find the healing methods that would work best for them even if they disagreed with some of these choices. S16 reflected:

I think everyone is going to have their own belief on what they think should be done. I personally kind of get it, just because it's kind of similar to my circumstance. So I kind of get that in terms of that being understood that he's acknowledging that what he did was wrong and that's enough for her. I kind of get that. But I think it's a very personal thing and that kind of has to be taken into account too within the criminal justice system in terms of what would make that survivor feel whole again or at least return to some semblance of normalcy.

---

<sup>544</sup> See Chapter 4 for a description of this scenario.

Every survivor, according to the women I spoke with, has a unique set of requirements for healing, so they wanted the systems that they needed to interact with to be set up to acknowledge, if not empower, them to find what works best for their individual needs.

#### **5.3.1.2 The Necessity of Having Choices**

In order for a survivor to feel that she has control over a situation, she needs to have options. However, the choices that actually exist for survivors are often not sufficient to help them achieve a sense of justice. For example, while there are a variety of legal processes that a survivor may pursue, their success is not guaranteed, and even if they are decided in favour of the survivor, she may find that the results do not actually make her feel as if justice has been done. Sometimes she must look outside of the legal system for justice, though this can be a difficult search with few supports. Sometimes the choices a survivor wants to make, whether to engage in a legal process or access medical services, are financially out of reach. For some survivors, any attempt at telling others about the abuse may put them at increased risk from the offender so they keep silent. As I discovered from my interviews, many survivors are not aware of the full range of possibilities available to them, and some find out too late to take advantage of certain types of help or redress. There are many reasons as to why survivors feel limited in how they can respond in the aftermath of a sexual assault, and this was a key area that the survivors I spoke with identified as a problem requiring discussion and solutions.

When talking about the Thordis Elva justice scenario wherein the rapist was not reported to the police, but did publicly take responsibility for his actions, S11 stressed the importance of embracing a plurality of justice paths:

I don't think the justice system is the only answer. For certain it's not the only answer. It's one of many tools. I think my big thing is about having options because if we think about sexual assault and rape and all these things as being about violence and power and

control and not about sex, then the whole thing should like... the whole system should be thwarted by saying let's give the agency back to the person who's been wronged. And whatever justice is going to look like for them, let's try and facilitate that. I mean, within reason, right? But I think there are multiple options out there, including that, and I don't think that just because he didn't have to face justice... I mean, like so what? So maybe somebody else who is charged with sexual assault is like wow, this is unfair that I am going to face criminal consequences which are going to reverberate in my life and he gets to just go talk about his experiences. But there's different things to be said for both of those. He's probably going to experience... in fact actually a lot more criticism and hardship in life (maybe not) by going out there and saying I raped someone.

To her, it was imperative that survivors have access to systems that gave them options to respond to their individual needs. People will be impacted in different ways by sexual assault and what they need to heal and feel as if they have obtained justice will not be the same for every person. Consequently, one of the most critical things that survivors identified as important for healing was a legal system that fostered choices, even the choice to abstain from engaging the law—particularly criminal law—at all. It was not uncommon for the women I interviewed to talk about how much they wanted to avoid reporting their assault to the police, though they still wanted access to certain legal processes such as the CICB or other tribunals.

S4 maintained that survivors should be able to pick processes that work for their own healing needs, regardless of what others thought about said approach:

I do really believe in giving agency back to the victim-survivor, however that looks. It has to be done in a non-judgmental way. Which can be hard sometimes. In some cases I am yes, but this TED Talk example I am urrrggg. I guess it's giving her agency, but I really don't like it. And then I have to deal with that and who am I to... So I think that needs to be addressed.

Agency, not just within our court system, but the community as well. If you come to me, I shouldn't just be "we're going to the crisis centre or we're calling the police!" That's not helpful. So I think we have this culture where we either ignore this issue and I think it all comes out of fear. If we just ignore it, it will be gone. It can't be scary. If we find some sort of formula and some controllable way to deal with it. Oh, you call the police or we go to the crisis centre and everything is fixed. I think there's a lot of aspects, even those of us who hope that we're active, in change, can fall into that trap specifically.

S4 did not like how the Icelandic scenario worked for a variety of reasons, but she also recognised how crucial for healing it was for that survivor to be able to decide for herself how to respond to her rapist. For her, there was no one best approach to how to heal from a sexual assault and the systems dealing with this type of violence needed to embrace a broader range of responses, even those that might not look like traditional avenues to justice or healing.

Trying to find one perfect method of responding to sexual assault is an impossible task given the vast wide array of survivors and their circumstances. Instead, the survivors I interviewed stressed the need for a range of adaptable options so that women could choose between several possibilities and have some control over the process. However, it is also imperative to recognise that options are not truly available if people are not aware that they exist. Many of the women I spoke with were unaware of the variety of legal options they had after they were assaulted. If they chose to report their assault to the police, it was often because they did not know that there were alternatives to a criminal proceeding other than doing nothing.

For example, S11 stated that,

I just thought in my mind because I wasn't educated in this area, I had no idea what other options there were. I had no idea about CICB. I had no idea about civil suits. The first thing that everyone thinks about is the police because that's just the way society is set up. If I had known about other things, even the Human Rights Tribunal... If I had of known, I might not have went that route [reporting to the police].

My whole politics about this is whatever the survivor wants. Whatever avenue is going to be the best for you... The problem with that though is obviously how can you know until you're in it? I thought the criminal trial was going to do something for me, but then it didn't. To have those options out here and more than anything, to be informed about them and have people actually sit down with us and explain the process at the beginning would be so helpful.

S11 reported her assault to the police and took part in a trial that resulted in a conviction.

However, this result did not satisfy her in the way that she expected. It was only after committing

herself to a criminal trial that S11 became aware of what other legal processes were available to her. Furthermore, she did not know what to expect from the criminal trial. Not only did she need information about what options were available, she needed to be given an opportunity to understand what each option truly offered her so that she could pick a path based on what she needed in order to feel as if justice was done. Only once fully informed can survivors make decisions on how to go forward in a way that best supports their need to heal and obtain justice.<sup>545</sup>

### **5.3.1.3 Agency and Process Concerns**

#### **5.3.1.3.1 Timing**

Timing is one area where many of the survivors I spoke with reported feeling a lack of power, often to their detriment. As soon as they were assaulted, several women talked about feeling like they needed to respond as quickly as possible. For some, reporting was the only way to stop the abuse. Others worried about whether anyone would believe them if they did not report the assault as soon as possible as that is what “good” rape victims supposedly do.<sup>546</sup> There are many pressures on survivors about when to report and very little support for them to deal with the issue in their own time when they are ready.

If a survivor reports to the police immediately after being assaulted as is expected, her statement is taken right away, often while she is still dealing with the trauma of the attack and

---

<sup>545</sup> Even if fully informed, it is possible that survivors will still be disappointed in their options and the outcomes they manage to achieve. However, without a proper understanding of what legal processes are available and what each can offer, the potential for disappointment is much more likely.

<sup>546</sup> Emma Sleath & Ray Bull, “Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systemic Review” (2017) 34 *Aggression and Violent Behaviour* 102 [Sleath & Bull]; Randall 2010, *supra* note 140; Regina A Schuller et al, “Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanour, Gender, and Victim Stereotypes” (2010) 13:4 *New Criminal Law Review* 759 [Schuller]; Jennifer L Dunn, *Judging Victims: Why We Stigmatize Survivors and How They Reclaim Respect* (Boulder, Colorado: Lynne Rienner Publishers, 2010) [Dunn].

before she has consulted with a lawyer. Several of the women I spoke with mentioned wishing that they knew that they could access legal help for themselves so that they fully understood the reporting process before they initiated it. For example, S8 talked about how she became entangled in a reporting process that she was not ready for once her employer found out about the assault. Her employer pressured her to make a report to the police, though she was only able to give superficial details about what happened as she was not emotionally ready to talk about the assault in detail and she was suffering memory problems as a result of the trauma. This greatly impacted how her case was handled and impeded her attempts to recover. She strongly emphasised the need for survivors to have control over when they disclose for their own well-being, as well as for the strength and benefit of the case overall.

S13 had similar feelings once she reflected on her situation:

Thinking about my own experience... what I needed in the short-term versus the long-term were different. In the short-term, what I needed, and I might just be a really avoidant personality, but I needed space. I needed to like feel like I could have space away from this person and probably to sort of talk it out a little bit and I don't think I would have gotten those things through the criminal justice system anyways. And it would have taken time. Let's say, I got some sort of restraining order or like the person signed a bond saying stay away from me. That would have taken lots of time and not at all satisfied my immediate need the way like I could by extracting myself from the situation.

Sexual assault is a traumatic experience and most people, when they undergo stressful and harmful events, need time to retreat, deal with their immediate needs, and assess their options. Too much pressure to report quickly and without support means that some will opt not to report at all to protect themselves.<sup>547</sup>

Timing is also an issue throughout legal processes. The courts move slowly and not always predictably. S2 mentioned that she struggled with the timing of judgments:

---

<sup>547</sup> Johnson 2017, *supra* note 27; Khan, *supra* note 543.



I was like, so when do you think the judgment will come in because I need to take time off. Well, given that it's the summer, probably fall. Okay, all right. And then it was next week. I was planning on using that week to recover from trial, and I got the verdict, and then three days later I had to go back to work. There's no way I could take off more time. If I did, I'd have to disclose again.

Court appearances and results will be emotionally exhausting for survivors, regardless of the outcome. The fact that these dates are often changed, usually on short notice, makes it difficult to properly prepare oneself, not to mention the daily disruption to a survivor's life that such complex scheduling can create.<sup>548</sup> The survivors I spoke with stated that they needed predictability and stability when it came to dealing with the legal system, something many agreed was not a need that is currently met. Without being able to anticipate when the legal system would interrupt their lives, survivors were unable to take care of themselves throughout any proceedings.

### **5.3.1.3.2 Independent Legal Advice**

Legal processes are confusing and challenging situations to navigate, yet survivors do not always have access to their own lawyers. For example, complainants in a criminal trial are generally not represented by legal counsel. They may be the victims of the crime, but the Crown is there to represent the State. The complainant is not a party to the proceedings, but a witness that will be called upon by the Crown—save for specific circumstances.<sup>549</sup> This lack of representation and standing in criminal matters is a problem that all of the survivors and lawyers

---

<sup>548</sup> For example, S2 struggled to manage her work schedule. Other survivors may have issues with childcare or education. All of this places additional stress on people who are already dealing with a lot of trauma and chaos in their lives.

<sup>549</sup> Survivors sometimes have standing in criminal trials when it comes to records applications dealing with their private interests, and they may hire their own representation to advocate for them during these applications. However, this system has been called into question in Ontario in two cases where some of the provisions dealing with records applications and the standing of the complainant were deemed unconstitutional. The Supreme Court, however, recently overturned the Ontario decisions and declared that the provisions were constitutional. See: *R v JJ*, 2022 SCC 28.

I spoke with thought was an area requiring immediate attention. L6 described the situation criminal complainants currently find themselves in as one in which “there is a profound disparity in the level of legal service available and it cries out for legal services.”

In 2016, the Ontario government launched a pilot initiative called the Independent Legal Advice (ILA) program.<sup>550</sup> While originally only available in Ottawa, Thunder Bay, and Toronto, the program was made permanent and expanded to the rest of Ontario in 2018. The program offers four hours of legal advice to survivors of sexual assault in order to help them understand their legal options. These four hours do not include representation in any court process. The creation of the ILA was done in recognition of the difficulties survivors face when trying to access legal redress after a sexual assault, particularly in criminal proceedings when they are not generally a party to the proceeding. While an accused often has defence counsel to help prepare him for the court process, the Crown does not represent individual complainants. Complainants receive minimal preparation for a trial, and generally no aid before reporting their assault to the police.

While this program was well-supported among both the lawyers and survivors I spoke with, many also pointed out how four hours was not nearly enough time to help a survivor navigate and understand the legal decisions she must make. Several of the lawyers I spoke to stated that they regularly worked more than the allotted time funded by the government, and substantially more support is needed to ensure that survivors can adequately and effectively cope with the demands of the legal system.

---

<sup>550</sup> ILA, *supra* note 334. As noted earlier, similar programs are also offered in Alberta, Nova Scotia, Quebec, Newfoundland and Labrador, Prince Edward Island, and the Yukon.

S3 summed up many survivor concerns about legal representation when she related her limited experiences with the Crown assigned to her case:

I was assigned a Crown. I was scheduled to meet them about a month ahead of time. And then my meeting with the Crown got delayed. And then my Crown got reassigned. And then my meeting with the new Crown got delayed. There was just a whole bunch of stumbling blocks towards actually meeting my Crown. By the time I actually did meet her, I only had a week to go before my trial. And that was when I got to review my evidence for the first time.

And that was the only time that I really got to ask her anything. Find out how court works. Cause remember, I'm not a legal expert. I'm just a citizen. I have no idea how court is supposed to work. How we're supposed to behave. What questions I'm supposed to ask. The only thing that they told me was my only job was to show up and tell the truth. And then I found out afterwards that I actually had a whole bunch of other things that I should have been doing. But no one told me.

I think that if I had actual proper... someone actually in my corner, then maybe that would have been different...

Survivors often do not have knowledge of the criminal courts and how they work. They assume that their role will be to tell their truth, but they are not trained in what language the court uses or how to keep calm and respond to a skilled defence lawyer while they are cross-examined. They must engage in an intimidating, often traumatic, process without much support, yet legal processes require adequate preparation if a lay person wants to present their case to the best of their abilities. S11 stated that,

As much as I was conscious of the decision I was making, I didn't really comprehend because I had never considered.... I had no idea what that process would entail. I had no idea that it would take three years. I had no idea about anything. I didn't even think about testifying. I just did it because I thought this is the right thing to do.

The women I spoke with argued that if society wants to encourage people to report crimes such as sexual assault, then those who come forward to disclose these violent crimes must be adequately supported throughout the process. Otherwise, survivors may choose not to report at

all given the difficulties associated with reporting, or they may drop-out of the process midway through if the challenges become too much to bear.

While it is crucial for the maintenance of a just legal system that defence counsel be able to mount a vigorous defence of the accused, this does not mean that a complainant must remain unprepared.<sup>551</sup> L6, a lawyer who has done work representing both complainants and accused in sexual assault trials, argued that,

I want the truth to come out, but I want the truth to come out in the best possible way which means in a way that will have the maximum impact on the particular listener who matters. So how do you talk about this to an investigator? How can you be as helpful to the investigator in putting your point across? And I like to joke that this aspect of my legal services is I'm essentially a communications coach. It's critically important. You talk about politicians prep about debates. People aren't telling them to lie about this, lie about that. Everyone knows they are going to get fact checked. It's all about how you present accurate information.

To L6, it does not impinge on an accused's right to a fair trial for the complainant to be taught how to communicate her information in an efficient and clear manner.<sup>552</sup> He (and many other lawyers) believe that the administration of justice is best served when all of the relevant information is presented to the court in a manner that can be understood and used effectively.<sup>553</sup>

L7 echoed these sentiments as well:

The attitudes towards complainants needing or wanting legal advice I hope will change. This whole attitude of you don't need to be prepared just to tell the truth is so deeply flawed. It's the stupidest thing ever. I just told you I spend two days preparing my clients to give evidence at discovery. It just ignores everything we know about memory and about trauma and about stage fright.

Not only is giving evidence in a court a specific skill, survivors are often coping with the harmful repercussions of their assaults which can make it even more difficult to tell their story coherently

---

<sup>551</sup> Craig 2018, *supra* note 27 at 151.

<sup>552</sup> *Ibid* at 157-159.

<sup>553</sup> *Ibid* at 159-161.

to the court. L7 stressed that her clients do not need to be coached so that they can construct a false narrative; they need help figuring out how to describe a traumatic event in a hostile environment, in front of the person who hurt them.

This need for representation starts even before a survivor reports. Going to the police to file a claim also requires preparation. L6 argued that,

I think it's absolutely ridiculous that a complainant walks into a police station, says I've been sexually assaulted... and within minutes, a video recording is going to be on and the investigators are going to say very little if anything to her because they don't want to get accused of coaching. They're going to get that video on as fast as they can and when they put it on, they're going to say it's 2:25 and you came into the station at 2:15 and you waited at the front desk for five minutes and we chatted a little bit about the weather for 5 minutes and now the video's on. Now tell us what you want to tell us. We're not going to tell you anything. You tell us.

That video becomes the crucial vehicle that the defence uses to rip the complainant apart. So let's talk about the equities of the system when a defence lawyer gets that video months before trial, gets a transcript made, goes over it with a fine-tooth comb, maps carefully out a cross-examination designed to shred that statement, and yet the person who's making it has nothing to help them address the issues that the defence lawyer is later going to find and exploit. It is deeply and problematically imbalanced.

Survivors need to know what to expect when they report a sexual assault so that they can give accurate and useful information. They need to know how to present this information in a way that will not be easily undermined by preventable mistakes.

Independent legal advice also ensures that complainants are kept informed about the legal processes that they are a part of. The women I interviewed who did not have their own legal counsel said that they felt disconnected from the various happenings in a criminal trial. For example, when S4 attended the trial of her accused, she had never met the Crown handling the case before. S4 stated that “our name was called and this lady I never met before started talking and I wondered why she was so invested. I did not know what was happening.” While last minute replacements of counsel will always be a possibility, there is no reason as to why a

complainant should start the trial process so uninformed about what is going to happen and who will be leading the prosecution.

The women that I spoke with also talked about how much they struggled to keep informed and how little help they often received with this task from various legal system actors.

S3 stated that,

I asked the police to investigate and they said they would investigate. And the last thing that I had heard was I just got an email that we are investigating the matter, and that was all that I heard for a year up until I got my subpoena. I had no idea that he had been arrested. I had no idea that a plea had been entered. I had no idea of any hearings that had happened in the interim. I actually was very much left out of my own legal process.

Once S3 reported, she felt completely disconnected from the process. She was not kept informed or involved in what was going on, and this was a frustrating and disempowering experience. S1 felt much the same after reporting a sexual assault to her university:<sup>554</sup>

So they said they are going to take this to HR. I'm like, how do I know you are going to take this to HR? Will I get a letter? Will I ever find out? And they were like no. And that's an issue. That in and of itself is an issue that I will never find out what was done or said. Is a huge issue for me. Because if you don't tell me what it is that happened, I'm going to assume nothing [did].

Interview participants stressed that independent legal advice is one of the most important methods of helping survivors feel involved and prepared for any legal process they choose to engage in. One cannot feel in control without understanding what is going on. Counsel is necessary to help survivors understand the process, and also to stand up for them in a system that has so many moving parts that it is easy for an unrepresented person to be feel lost and rudderless. Further, some of the women I interviewed spoke about how their recovery from the trauma of their sexual assault was exacerbated by their feelings of powerlessness navigating the

---

<sup>554</sup> While her situation is not perfectly comparable to that of a complainant in the court system, S1 felt adrift without someone that would ensure she was kept up to date with what was happening and able to advocate for her when needed.

legal system. Having someone to help prepare them for what to expect is also a way of managing their emotional needs and mitigating additional harm when possible.

### **5.3.1.3.3 Trial and Investigative Processes**

The survivors I interviewed felt that the manner in which many legal proceedings, both criminal trials and other types of legal actions, are conducted was needlessly harmful and left them feeling powerless. S4 maintained that the legal system acts “as if you’re not a human involved. Like you’re just evidence.” Survivors expressed a great desire for more respect and compassion from the legal system, especially the criminal courts.<sup>555</sup> According to S2,

Can we change how these things are tried? I know I've said it five times now. I would also emphasise, I have no qualms about my words being questioned. I understand the weight of my words. I am pointing my finger at somebody and that is a big deal. But I am a person. I know I'm credible. My actions in life prove that I am. For all of us who trust the judicial system, question me. Question my narrative. But do not demoralise me. When in doubt, be kind. I don't even expect the defence to be kind. He doesn't need to be kind. But there's a difference... don't be cruel. Why are you demoralising me? What have I done to you? Treat me like a human being. I would love to know, I would love to ask him what if this happens to someone you care about?

Survivors did not suggest that their stories should be accepted without challenge. What the women I spoke with wanted was to be treated as human beings worthy of dignity. They believed it was possible to counter their narratives without framing them as terrible people or treating them with no regard as to the emotional impacts of how they were being spoken to.<sup>556</sup>

For example, survivors questioned the necessity of some of the questions that are posed during cross-examination. Third-party records and past sexual history are both protected

---

<sup>555</sup> In contrast to the supposedly civil, yet often brutal nature of the courts: Elaine Craig, “The Inhospitable Court” (2016) 66:2 UTLJ 197 [Craig 2016].

<sup>556</sup> According to Elaine Craig, aggressive cross-examination is not even the most effective method to use when defending an accused in a sexual assault trial, and many defence lawyers argue that it is possible to use a gentler, kinder method of cross-examination and extract even more information. Craig 2018, *supra* note 27 at 61-63. See also: Tanovich, *supra* note 27.

categories of information, but survivors pointed out that despite court protections for their privacy and against rape myths, defence counsel was often still able to bring up problematic information about the complainant. S3, once she got to trial, discovered that defence counsel had been observing her social media for over a year. Her accounts were locked in private mode and she did not know how the lawyer was able to get access to them. However, the experience of having her personal information that she thought was safe surface during cross-examination was an unpleasant shock that both frightened her and made her feel violated.

While social media posts are not something that individuals should expect to remain private, S3 argued that she would have liked to know in advance that she would be cross-examined on these details. She stated that,

She [the defence lawyer] brought up things that I hadn't thought about for six years and forced me to explain them on the spot. It turned out that the post that she brought up in question was actually me quoting another author. A book that I was reading at the time. I vaguely remembered that the quote did not belong to me, but I had to explain on the spot what that meant. And I think that if the complainant was allowed to review the evidence on both sides... because here I am talking about things that have absolutely nothing to do with the sexual assault and how is that judging whether the sexual assault happened? It made no sense. And it definitely felt like a violation of my own rights. I felt very much like I was coming out of the trial... I felt like I was the criminal. They are treating us like criminals. They should be giving us lawyers.

S3 questioned the relevance of book quotations in the context of her trial. While she did discuss issues of sexual assault and consent on her social media, it was difficult for her to remember the specific posts that the defence was relying on, and they were presented without much context, mostly to showcase S3 as an “activist” and someone who had an agenda. Perhaps posts from years prior can be useful to a case; however, if they are sprung on the complainant and she does not have an opportunity to think about the context of her posts, then is the information defence counsel eliciting really useful? Or does it unfairly prejudice the complainant and make an already



difficult experience even more stressful? Survivors will inevitably be questioned during a trial, but the overarching theme of many of my conversations was that cross-examination often felt like it went far beyond a reasonable attempt to determine the truth, particularly in the way that defence counsel kept complainants feeling off-balance with the surprise use of information that they were not expecting or may not even remember. Not only did this type of questioning result in questionable evidence, it was another way in which survivors were made to feel out of control and vulnerable to criticism that they did not know how to respond to.

#### **5.3.1.4 Ability to Speak Freely and Authentically**

Choice, as illustrated so far in this chapter, is one of the key needs of the survivors I interviewed, and this is particularly true when it comes to their ability to talk about what happened to them. One of the more common complaints from the survivors that I spoke with related to how they felt restricted in how they could talk about their assault, both in the court and in their personal lives. Women often felt constricted by a series of unwritten rules about what is appropriate to say and what could be used against them in any legal proceedings.

The basis of this need is that of simply being heard. Survivors often want to be able to talk about the violence that they have experienced and be acknowledged by others, and the courts are sometimes a place where survivors can achieve this goal.<sup>557</sup> As S2 explained, “to be heard and recorded in an official format/capacity upholds the rights of the victims and protects/helps future victims”. Sexual assault is a disturbing crime and too often it is ignored and neglected due to its complexities and challenges. Survivors want to be able to talk about the realities of what

---

<sup>557</sup> This particular need relates back to the brief discussion on both procedural justice and therapeutic justice in Chapter 1. See: Wexler, McGuire, *supra* note 47; Solum, Hollander-Blumoff & Tyler, *supra* note 49.

happened to them and have people not look away. For example, S11 stressed just how important being able to tell her full story in court was to her healing process:

I'm doing it because I want that opportunity to sit there and have them have to listen to me... Now, four years later, diagnosed with PTSD, never able to sleep, so many problems... a fear of men, not able to go out. All of those things, I want them to sit there and have to listen to that. It's been four years, what have you had to do? Your probation, which was nothing, is done now. You're on the Sex Offenders Registry, so what? You're a Masters student. You're going into business. Just know that the consequences you faced pale in comparison to what the rest of my life is going to be.

S11 needed to have people, particularly her assailant, hear about the repercussions of the sexual assault. She wanted her pain and suffering to be seen and recognised, and telling her story in the court meant that people would be forced to sit and listen.

One of the key parts of feeling heard involves the power to control one's own narrative.

S2 noted that the story she was able to tell in court was not really hers:

I hate the fact that you can't talk back. You can't explain yourself. In every scenario in life, you can always explain yourself. In cross-examination, you cannot. And I hated that. Can we change that? I wasn't arguing with them, but there were times I would tell him, I don't agree with the way you reframed it. I agree with the facts. Maybe that didn't work out very well [for me].

Giving testimony resulted in her narrative being reframed in ways that she did not feel accurately represented what she was trying to say, and she had no opportunity to correct or address the implications drawn out by the defence. Her story had to fit within a structure set by the court, and if she wanted to be heard, she needed to follow a particular set of rules that warped her experience into something she did not think properly reflected her reality.<sup>558</sup>

---

<sup>558</sup> While not about sexual assault, Sibley Slinkard's work on linguistic strategies in *R v Craig*, a trial about a woman who killed her abuser, showcases just how important it is to recognise the way that narratives are shaped and controlled by legal actors. See: Sibley Eden Slinkard, *'She Chose to Get Rid of Him by Murder, Not By Leaving Him': Discursive Constructions of a Battered Women Who Killed in R v Craig* (PhD Dissertation, York University, 2019) [unpublished] at Chapters 4-5.

Survivors are also pressured to be silent when they do not wish to be. When I interviewed S2, she was excited to be able to talk to someone about her experiences in the legal system as the trial in her case had recently finished. For the two years after she reported her assault, she was told to keep quiet about her experiences and what was going on with her legal case.<sup>559</sup> She stated that “you just don’t know what the defence will find out and bring out”, so she tried not to speak about this major aspect of her life with anyone but her therapist (and she noted that she was worried about speaking with her as well given the ability of the defence to apply for access to third-party records).

Limitations on a survivor’s ability to speak also arise when a legal process ends with a confidentiality clause. This type of situation arises in civil settlements frequently and non-disclosure agreements are common.<sup>560</sup> S8 told me that while she considered applying for a CICB award, she decided against it as she was worried that the files were meant to be closed and private. She stressed that being able to talk about her experience with others was an important part of healing for her. Hindrances placed on survivors when telling their own stories can make an already traumatic experience worse, and force individuals to frame their experiences in a way that makes them feel powerless and silenced.<sup>561</sup>

---

<sup>559</sup> S2 hired her own lawyer to guide her through the process of reporting her assault and the accompanying legal proceedings. She did not state whether it was her counsel, the Crown, or both that recommended she keep the details of her assault and resulting legal proceedings to herself.

<sup>560</sup> There is a substantial amount of criticism on the use of non-disclosure agreements in the context of sexual assault: For example, see: Maureen A Weston, “Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #metoo Era” (2021) 2 U III L Rev 507; Victoria Pagan, “The Murder of Knowledge and the Ghosts that Remain: Non-Disclosure Agreements and their Effects” (2021) 27:4 Culture and Organization 1; Vasundhara Prasad, “If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements” (2018) 59:7 Boston College L Rev 2507.

<sup>561</sup> Ruthann Robson, an attorney wrongly diagnosed with terminal cancer, discusses the challenges and pain of deciding whether to engage in a legal proceeding after being hurt. In the end, she decided not to sue her doctors because she would lose control of her story. She would have to frame herself primarily as a damaged woman, and

Another area of contention for survivors deals with their ability to express the full range of their emotions while they navigate the legal system. Survivors are expected to react in a particular manner; they must be upset and sad, but not too angry.<sup>562</sup> They should be emotional, but not so emotional as to make those around them uncomfortable. Their feelings must adhere to a specific narrative. For example, S3 was struck with the realisation that she would not be able to tell the police the full truth of her emotions because she did not feel the way that they expected her to:

When I was talking to the police and they were giving me my options, they said something about if I wanted to investigate and quote unquote "put the bastard in jail", and I remember thinking to myself, well, I don't want to think of him as a bastard because he was actually a friend of mine. I'm not too keen on him experiencing jail time, but if that's my only option, I guess? But I didn't want to express my hesitation because even then I had the feeling that that was going to be used against me. I already cannot express myself the way that I need to.

I'll let that paint a picture, if you will, of what it's like engaging the police, the legal system. You're not actually allowed to express yourself in there. You're not allowed to say what really happened.

A widespread assumption is that a survivor will despise her rapist despite the fact that the vast majority of sexual assaults occur between people who trust and care for one another.<sup>563</sup> Feeling conflicted about how to respond to the accused's betrayal can be taken as a sign that the survivor has made up her allegations.<sup>564</sup> However, there is no correct way to respond to a sexual assault, and the emotions that survivors experience change and may even contradict as they move

---

likely would not be able to discuss her experience at all as a condition of settlement. Her creative nonfiction piece is a powerful exploration of the choices individuals must make when deciding whether the legal system will provide them with adequate remedies after they have been hurt by others. See: Ruthann Robson, "Notes from a Difficult Case" (2013-2014) 50 *Creative Nonfiction* 68.

<sup>562</sup> Sleath & Bull, Schuller, Dunn, *supra* note 546; Randall 2010, *supra* note 140.

<sup>563</sup> Rotenberg 1, *supra* note 185.

<sup>564</sup> Stabile, *supra* note 25; Jennifer Temkin et al, "Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study" (2018) 13:2 *Feminist Criminology* 205; Andrea Quinlan, "Suspect Survivors: Police Investigation Practices in Sexual Assault Cases in Ontario, Canada" (2016) 26:4 *Women & Criminal Justice* 301.

through both their healing process and any resulting legal proceeding. The survivors I spoke with wanted the legal system to recognise that they are all different people and not to assume anything about them because they did not conform to what people expected a rape victim to act like.<sup>565</sup>

Different people cannot be expected to react in the same manner to a sexual assault, and one cannot determine how credible a claim is simply by judging the emotional state of the survivor.

This issue arose in the context of victim impact statements (VIS) as well. A couple of the women I interviewed talked about knowing others who had their statements edited by the court and expressed significant anger and frustration over the fact that even in the part of the criminal trial where their feelings were centred, they were supposed to frame them in a manner palatable to the courts. Writing a “good” VIS meant embodying only certain emotions and opinions and for some that meant that submitting a VIS was not a worthwhile endeavour at all and added to their feelings of dissatisfaction.

S3 noted that her emotional reactions to what happened to her were used in the trial to undermine her credibility:

I was not allowed to have black humour in court. They don't even recognise the concept of black humour. So in trial, the defence lawyer had unearthed a bunch of Facebook posts that I had made (despite my privacy settings), which I also think is a creepy, grey area of legality. Should I have had a lawyer to defend me from that? She found these Facebook posts of mine talking about my upcoming trial, and I was, since the whole Ghomeshi thing was happening at the exact same time and it was everywhere you looked, and since my trial dates were almost perfectly coinciding, I made a couple of jokes on Facebook. "Oh maybe our files were right next to each other in the police office, that would have been funny, huh?" The defence lawyer pulled up those screen shots and was like "hey, it looks like you have an agenda to jump into his spotlight or something". I also went to the police exactly one day after Ghomeshi surrendered himself to police. It was uncanny how

---

<sup>565</sup> Canadian jurisprudence fully supports the premise that sexual assault victims should not be expected to react in any specific manner to their assault. See, for example: *R v DD*, 2000 SCC 4; *R v ARJD*, 2018 SCC 6; *R v JC*, 2021 ONCA 131. However, given the continued existence of appellate decisions about this issue, inaccurate assumptions about survivor behaviour are still a problem in the Canadian court system.

much our cases overlapped. Because I noticed that, that meant that I had an agenda. I was just in the wrong place at the wrong time.

Many people process trauma through humour,<sup>566</sup> but it is very easy for flippant comments to be used to suggest a survivor is not credible. If she can laugh about what happened to her, she could not have been harmed is the implication that some will draw from such an attitude.

S3 also encountered the tactic of suggesting that any survivor that is involved in sexual assault activism or even speaks about sexual assault publicly must be an activist who is using her allegation as a way of furthering her political goals. Many of the women that I spoke with became interested in sexual assault activism after being hurt. Once they experienced this type of crime and the way it is treated by the legal system and society, they felt compelled to use their horrible experience to try and bring about positive change. However, several of the women who talked to me found that this new interest (or sometimes long-standing interest) was used against them. S5 stated that “a big part of the defence was that I’m a consent activist and crusader and this was all for me to gain attention. Gain cred.” This places another limitation on survivor speech as any activism (or perceived activism as in the case of S3) must be balanced against how much harm it could do the individual survivor. They may need to curtail their voice to protect themselves and any legal processes they are participating in.

For some of the women I spoke with, the experience of being able to be open and transparent about what happened to them was important, and survivors cannot always do this when attempting to bring their assault to the legal system. S5 stated,

---

<sup>566</sup> Christopher M Neuenfeldt, *Trama, Humor, and Coping* (PhD Dissertation, University of the Rockies, 2017) [unpublished]; Nicholas H Wagenseller, *The Serious Trauma of Seriousness: The Role of Humor in Working Through Trauma* (MA Thesis, Pacifica Graduate Institute, 2017) [unpublished]; Jacqueline Garrick, “The Humor of Trauma Survivors: Its Application in a Therapeutic Milieu” (2008) 12 *Journal of Aggression, Maltreatment & Trauma* 169.

I've seen people publicly talk about their assault and their rapes on Facebook or in the media, and I think that can be fucking great. If I had been able to talk publicly during the process, I would have. But of course I'm told not to say anything. So now I'm at a point where I can write freely and talk freely, and I will be doing so.

For legal reasons, while the investigation and trial surrounding her assault were occurring, S5 was advised not to talk about it publicly and this bothered her.<sup>567</sup> She processed many things through writing, and was frustrated over losing potentially positive and useful conversations that could result from her reflections on what happened to her.

For survivors, the court system can take away their voice; however, going public with their story may give it back.<sup>568</sup> I speak more about the reasons why survivors sometimes chose to publically name and/or shame the offender in Chapter 6, but I would like to briefly touch on how survivors experience going public with their stories. For some, this could be an exceptionally positive experience that would help them feel validation and support from people around them. However, some of the women I spoke to pointed out that even if it felt like you had greater control over your narrative, once something is released to the public, it can be taken and warped in ways that you cannot prevent. As S6 stated, you lose your power after you finish telling your story. The moment you finish your statement, it is no longer your own. S7 added that,

As soon as a survivor tweets anything, there's also the possibility of backlash, negativity, victim-blaming. So I feel like without the support or the legal system behind the survivor to make a statement that it becomes almost negative for the survivor. The courts give a sense of accountability. A stronger collective sense that this happened. For my

---

<sup>567</sup> Several of the lawyers I spoke with echoed this advice.

<sup>568</sup> The use of social media, in particular, has been a popular method of disclosing and calling to account abusers in a public manner. See: Kristin K Gundersen & Kristen L Zaleski, "Posting the Story of Your Sexual Assault Online: A Phenomenological Study of the Aftermath (2021) 21:5 Feminist Media Studies 840; Ramona Alaggia & Susan Wang, "I Never Told Anyone Until the #metoo Movement': What Can We Learn From Sexual Abuse and Sexual Assault Disclosures Made Through Social Media?" (2020) 103 Child Abuse & Neglect 1; Megan Stubbs-Richardson et al, "Tweeting Rape Culture: Examining Portrayals of Victim Blaming in Discussions of Sexual Assault Cases on Twitter" (2018) 28:1 Feminism & Psychology 90; Anastasia Powell, "Seeking Informal Justice Online" in Anastasia Powell et al, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 218.

experience, whenever society heard that the court was involved, everything kind of died down. I wasn't bringing it to social media. Other people were. It was a disaster and I had no way of navigating it at all.

S2 echoed these sentiments:

I don't know if the public shaming thing... in a way it can take the victim's voice away because people can take it. It's public domain. It's play dough you put out in the middle of the yard. People can just shape it the way that they want. People who are respectful won't do that. So it can be good. But there are disrespectful people out there and we can't keep it from them. It's not ideal, but then, we have nothing left.

Going public with one's story can be a powerful tool, but it is a tool that survivors have limited control over. Not everyone who hears a survivor's story will treat it with respect and kindness. Her story may be changed and reconceptualised by strangers with their own agendas. Many of the women I spoke with pointed to the Ghomeshi trial as a reason as to why they were nervous about the dangers of public reactions to survivor stories.<sup>569</sup> The women in that case were vilified by a public that did not have the necessary context to understand their behaviour.

S6 and S7 stressed that the general public does not necessarily understand how trauma and long-term abuse can lead to behaviour that may seem contradictory or self-sabotaging.<sup>570</sup> In order for survivors to benefit from taking their stories public, you need a society that is ready to hold perpetrators of this type of behaviour to account, and that implies that society has a deep understanding of sexual assault and the long-term harms that it causes. From my conversations, survivors felt that this was possible with smaller, more controlled releases of their information (such as closed social networks), but the risks increased as the information made its way to more people and further outside of a survivor's ability to control.

---

<sup>569</sup> Donovan, *supra* note 9. The public vilification of the complainants in the Ghomeshi trial occurred in spite of the fact that they took their case to court. The survivors I spoke with understood that a criminal trial was certainly not a shield against public controversy, but many did believe that the legitimacy of the courts backing up their claims could minimise the backlash.

<sup>570</sup> Jenny Petrak & Barbara Hedge, eds, *The Trauma of Sexual Assault* (New York: Wiley, 2002).



### 5.3.2 Validation

*Interviewer: What did you want to get out of engaging with the police?*

*S7: I think for the justice system and for society as a whole to recognise how deeply affected the survivor is. And to also understand that it's not just like a clear-cut answer. It's very layered. It's a very complex emotional wound.*

#### 5.3.2.1 Validation from the Legal System

Part of the function of a legal process is to acknowledge that a wrong has been committed. For survivors, having the criminal courts convict the offender who hurt them means that the violence and resulting trauma they experienced are recognised by someone outside of themselves. In legal processes, this validation is given by an authority figure whose decisions have social weight. Having an external party confirm that the sexual assault actually happened and the survivor is telling the truth is a way of witnessing the pain that these women have gone through and showing them that others care about what happened. According to S2,

Once I close the door, it doesn't matter what kind of sentencing it was, or what kind of verdict. You know you can never get that night or that occurrence back, whatever was taken away from you. You can't get it back. You know you want to make sure, aside from that occurrence, you want to make sure you have your dignity and your personhood and your human rights status. Human being status. You have your rights. You want that in place and stronger than before because you know what it's like when it's taken away. ... I would say what I got was just affirmation that I was a human being because I was listened to and that our system is not broken. The laws are in place.

For S2, the fact that the legal system has the power to acknowledge one's humanity is important as sexual assault is a crime that denies a person's autonomy. By stating publicly that an offender committed an unacceptable violent act, the legal system recognises the right of survivors to be safe from such harm. The courts affirm that no individual has the power to deny the humanity of another and this can be a powerful tool for healing.

S2 added that,

I'm glad that ultimately, when we report, it's not up to us. It's up to them as to whether they investigate and lay a charge or not. I like that because it verifies me. And I know it can work either way. But when it is done right... we all bring our stories and it is true, and they can ascertain it is true, and then they should lay the charge. So when that happens, it's stronger than if it was up to me. I don't like that because there's another authority thing that verifies it. And when it goes into court, then it's another thing that verifies it. That's important. It gives it weight. I hate to admit this, but it's just life. I think part of the reason I did try and went through all of that was also because as a woman, sometimes your words don't get heard as well.

There is, however, tension in the need for external validation. On one hand, one's truth is being judged by many other people and sometimes this does not always result in a positive outcome for survivors. But when the laws work well, the courts can give weight and certainty to a survivor's truth. S2 stressed how important she thought this was for women as their voices are not always trusted, particularly in the context of sexual assault.

Several survivors mentioned how powerful it was to have their stories validated and their pain understood in a public setting by a figure that is held in high regard. For example, S11 stated that upon conviction, she felt a great sense of relief:

Hearing that from the judge did give me a sense... because I guess you still feel at every stage of the process, or at least I did, maybe I'm mistaken, maybe I'm crazy. And it wasn't until I got that judgment that I was like okay, it's not me. I'm doing pretty good. I'm standing up for something. I'm trying to protect myself. It's a weird thing, but I kind of got a little bit of confidence. Now I can live my life knowing that this harm was acknowledged, even though it was not acknowledged by him, it was acknowledged by somebody. By society. At least I felt vindicated.

Few survivors are validated by the person who hurt them<sup>571</sup> and there is power in having an authority figure tell the rest of society that you were the injured party and the offender was

---

<sup>571</sup> In the adversarial criminal system, it is not to the benefit of the accused/offender to admit responsibility for the crime if he intends on defending himself against the allegations or appealing the decision. See also: Park Dietz, "Denial and Minimization Among Sex Offenders" (2020) 38:6 Behavioural Sciences & the Law 571 [Dietz]; Sandra

wrong. In the context of a trial, this is often a very public process that the offender must witness as well.

Validation can also come from sources other than the courts. For example, S4 related an experience she had at a CICB hearing:

I accompanied someone to a Criminal Injuries Compensation Board hearing, and they said... the words "I believe you" which didn't happen in this person's court case. But when they said that, she started to cry. That is so important and the civil servant was like you don't have to cry... No, you heard her!

The survivors I spoke with were unfortunately used to people disbelieving them when they talked about being assaulted. Consequently, several of them said that they really appreciated the non-adversarial nature of the CICB. Not only did they not have to contend with harsh cross-examinations, the CICB also offered them monetary awards to help them with the repercussions of the attack. This process was seen as one of the more validating legal options open to survivors, though many complained about how it was not as well-known as it should be. S4 continued,

When I provided support and I heard the civil servant say, "I believe you", I really really liked that. And that gave me a boost. I actually applied [to the CICB myself] after that. I was kinda bummed that I didn't hear [the same thing]. But they didn't argue with me and they gave me more than what I've heard from others.

They believed me. They didn't argue with me. But also, I was like, wow, if it was so easy to just award this to me, why wasn't it so easy to believe me the first time I called the cops? So I got frustrated. And again, university educated, 30-something [me] was really really defensive over young 20-something [me]. That's not cool! If I didn't meet the people that I met, and if I didn't just come into the line of work and environment, which is a direct result of my violence, it makes me angry about that. It makes me mad that there are people who don't know this is an option.

Several survivors mentioned that they did not know that applying to the CICB was a possibility until long after they were hurt. Others echoed S4's sentiment that it felt wrong that one legal process was so gentle and accommodating, while others were so intensely harsh and difficult.

As noted, validation from legal system actors is not something that survivors can always count on, and there are often downsides to seeking it out. S9 questioned "Why go through that whole thing? Who am I proving myself to? I know my truth. Who are you to tell me what my truth is?" The problem of seeking validation from external sources, particularly within an adversarial legal system, is that validation may be denied. Convictions in sexual assault cases are far from guaranteed,<sup>572</sup> and the courts are often a hostile place for survivors.<sup>573</sup> Survivors who want others to support their stories may find it very difficult to cope with something as challenging as cross-examination in criminal or civil trials. S9 did not report her assault:

The reasons why I didn't ever consider it for myself... self-preservation. Not because I didn't want it. Not because I didn't feel like those people deserved it. Had I felt comfortable that there would be at least a friendly face on the other side? Listen, we can't do anything but we understand and we can help, or here's a sheet of paper with resources you can talk to. I probably would have gone through with it and sucked it up and done it, but...

Many of the survivors I interviewed had no faith that they would be able to obtain validation from the legal system. They worried that their belief in themselves and their story would be undermined by reporting with no other accompanying benefit. Choosing to bring one's situation to the attention of the legal system is a careful cost-benefit analysis where survivors must weigh, among many other things, the likelihood they will get validation at all.

---

<sup>572</sup> See Chapter 2 for a discussion of conviction rates and sexual assault. Rotenberg 2, *supra* note 204.

<sup>573</sup> Craig 2016, *supra* note 555; Nicole C McKenna & Kristy Holtfreter, "Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness" (2021) 30:4 *Journal of Aggression, Maltreatment & Trauma* 450 [McKenna]; Karen Bellehumeur, "A Former Crown's Vision for Empowering Survivors of Sexual Violence" (2020) 37 *Windsor Yearbook of Access to Justice* 1 [Bellehumeur].

Not only is it difficult to assess whether a legal process is worth engaging in for the validation aspect, as I mentioned earlier in this chapter, many of the women I talked to were unaware of the various legal options available to them. Most understood that the criminal courts were their only choice. As S4 pointed out, options such as the CICB could be incredibly beneficial for survivors looking for a less adversarial process, but no one can choose an option that they do not know exists.

Above, I quoted S11 and her feelings of relief over the fact that the judge affirmed her story. However, she ended up feeling betrayed by that same judge shortly after:

But the sentence just dialled all that back because as much as I loved that judge, and it was the same judge for sentencing... He was like let's just put you on the same conditions that you had beforehand, even though he'd [the offender] already breached those twice. It was clear that he wasn't going to learn from that.

In part of the trial, she felt that the offence committed was taken seriously, but when it came to practical consequences, the sentence given felt inconsistent. Consequently, while S11 achieved some validation, it was also undermined by the same person providing it. She no longer felt “crazy” for thinking that what happened was wrong, but she questioned how seriously society was taking sexual assault given how the court chose to sentence the offender.

### **5.3.2.2 Validation from the Offender**

Another important source of validation for survivors can come from the offender. While the women I spoke with were skeptical about the likelihood of an offender ever sincerely admitting to and recognising the harm that he caused, almost all of them talked about the fact that it would be a tremendously validating experience if the person who hurt them actually did acknowledge his actions and their consequences. S16 stated that,

I think I would be one of those people that would be happy if they acknowledged the wrong that they did. Even though at this point it's been like 16 years, I would still be happy with them finally coming to terms and acknowledging that that was wrong of [him] and that [he] took advantage of our friendship. All of that kind of stuff. That would be sufficient to me personally.

Even years later, S16 wanted the offender, a person she once cared for deeply, to tell her that he understood what he did was wrong and harmful. The majority of sexual assaults occur between people who know one another<sup>574</sup> and having someone you love deny that they did something selfish and painful can be a trauma in and of itself.<sup>575</sup> Some of the survivors that I interviewed stated that not only was it painful to have their relationship destroyed by the sexual assault, it also caused emotional and psychological harm when the offender denied that he did anything wrong.

By refusing to admit that he engaged in a violent crime, the offender is gaslighting the survivor.<sup>576</sup> He denies her version of reality and undermines her credibility with herself and others. This refusal to accept his actions for what they are creates a situation where the survivor is pressured into thinking the harm is all in her head or that it never happened. S14 was sexually assaulted by a physician when she was receiving care. She reported her abuser to the Ontario College of Physicians, but little came of her complaint. She also applied to their counselling fund for victims of physician abuse, but this claim was denied as well. She told me that,

It would have been nice if he admitted that he had done wrong.... Just admitting that I'm sorry, I've made a mistake would have been extremely helpful in the healing process.

---

<sup>574</sup> Rotenberg 1, *supra* note 185.

<sup>575</sup> Hulda S Bryngeirdottir & Sigridur Halldorsdottir, "Fourteen Main Obstacles on the Journey to Post-Traumatic Growth as Experienced by Female Survivors of Intimate Partner Violence: 'It Was All So Confusing'" (2022) 19:9 International Journal of Environmental Research and Public Health 5377.

<sup>576</sup> Gaslighting is a phenomenon wherein an abuser denies the reality of the victim, making them feel as if they are going "crazy". Paige L Sweet, "The Sociology of Gaslighting" (2019) 84:5 American Sociological Review 851 at 852 [Sweet].

There is documentation from more than one medical professional that something did occur and I'm not making this up. Who the hell would want to spend time doing therapy?

Even though there was concrete physical evidence that something bad had happened to her, the perpetrator denied wrongdoing and the regulatory body refuted that any of her medical issues were caused by inappropriate behaviour on the part of the physician. It would have been helpful for S14's attempts to cope with the aftermath of the assault if she was not continually put in a position where she felt gaslit by the medical professionals who were supposed to care for her health. The doctor who was supposed to treat her medical condition instead assaulted her and caused her additional health problems and the regulatory body that is supposed to ensure that physicians provide quality care to patients rejected what she felt was clear physical evidence that she was abused.

Several survivors also stressed the importance of receiving validation from their community. S4 stated that,

I wish he knew that there are people who believe me. He's just so protected by this community that I ended up leaving. I wish there was some way that he could know that others believe me. That I am not being gaslit. I have my doubts still, but I know what happened. I wish he would know that I know what happened and you're not as protected as you think.

The offender in S4's situation was empowered to lie by those around him, and their community added to S4's confusion and betrayal. The lack of external pressure from the community meant that the offender's version of reality was supported, and this caused S4 to lose not only her relationship with the offender, but with all of the people she was friends with. Validation from the offender, therefore, is not just something nice to hear, but represents an end to the attempt to deny and destroy a survivor's memories and experiences.

### **5.3.3 Community and State Support**

#### **5.3.3.1 Community Support**

For all that this project focuses on legal processes, the survivors I spoke with emphasised the need for support from a variety of other sources in order to heal from the trauma that they endured. As per S2,

On the books, it can be very useful to have the judge give a guilty verdict. But for the rest of my life? It doesn't matter too much. Granted, if there's a guilty verdict now, I could go about my life a little differently. So my exterior life. But once I'm home, whatever that verdict is, out there, I'm still me. I still have to live through it. I still have to recover. I still have to deal with my whole sleeping thing.

While the legal system can offer important benefits to survivors, it represents only a portion of what is needed, and the women I spoke with wanted to see a much more comprehensive response to sexual assault.

Often the first place survivors go for support is not any state-related system, but to their friends and loved ones, particularly when the survivor comes from a community (or communities) that are marginalised.<sup>577</sup> Rather than submit themselves to the challenges and stresses of a system designed to question their claims, survivors will seek out those who they trust. For example, S13 stated that,

My immediate needs for support and ongoing needs for support have mostly been met through finding other people who have experienced violence through those whisper networks or through people who have been more public about their experiences. And that need would not have been met through the criminal justice system not even a revamped one.

For S13, it was other survivors that she thought she could trust as they shared similar traumas, both from the attack and from the aftermath of being disbelieved and victim-blamed. It was a

---

<sup>577</sup> Courtney E Ahrens et al, "Deciding Whom to Tell: Expectations and Outcomes of Rape Survivors' First Disclosures" (2007) 31:1 Psychology of Women Quarterly 38.



common theme in my interviews that women found themselves drawn into survivor communities and activism as a way of finding a safer space to heal, and to challenge the ineffective and uncompassionate responses they faced when trying to recover.<sup>578</sup> Similarly, S10 also found solace through connection with other survivors and trying to help them:

I would rather help support other people and I personally wouldn't be able to do that and be going through my own thing. I would have to constantly focus on myself and my self-care and being able to handle things and figure things out and that doesn't make me feel better. But helping other people through the process, as selfish as it sounds, makes me feel better. I wouldn't be able to do that and be able to be the face of something. It's too much.

Helping others allowed S10 to find respite from her own trauma and encouraged her to fight for change in regard to how sexual assault is viewed and treated within society.

Community, however, is not always a bastion of support. For some survivors, their trauma from the assault was compounded by the actions taken by those they thought would help them recover. I quoted S4 earlier in this chapter talking about how her community sided with the man who hurt her and she eventually had to move elsewhere. Later, once she found a new community with people who believed her and wanted to support her, S4 felt much better equipped to recover from her assault. Her experience illustrates how support can be hard for survivors to obtain even from the people they trust the most.

On the other hand, community supports are not the same as trained professionals. As crucial as it is to have individuals who love and support you, lay people are not therapists and will not always know how best to help. S13 stated that,

---

<sup>578</sup> I do not want to claim that this is a widespread trend among survivors. As I discussed in Chapter 3, my sample was constructed using the snowball method and such a practice can lead to similarity in experiences on the part of participants. In my project, because I recruited individuals through lawyers and then through the women recommended by lawyers, it is likely I was connecting with more informed individuals given their use of the legal system as a way of seeking redress, and their networking among one another.

The other thing that probably would have made a lot of difference is a lot of people, when you tell them about a sexual assault happening, they don't really know what to do with it. I don't know if I believe that society progresses but I'd like to think that there's been some movement on this since I was twenty-one. At the time, I think if somebody had been like wait, this is serious, what are we going to do about it or have you thought about what you want to do about it or do you want to do something about it? I think I felt like people's sort of non-responses were a way of not taking it seriously, though maybe it's also not knowing what to do. If I'd had a good friend who was just.... holy crap. Maybe been willing to talk out some options. That might have made a difference.

Friends and community may seem like a safe harbour at first, but this type of support should not be the only aid that survivors can count on, particularly since so many do not have a group of people around them that is able and willing to help.

### **5.3.3.2 Healthcare**

Another immediate need in the aftermath of sexual assault is healthcare. In the harms section of this chapter, I spoke about the physical and psychological repercussions of sexual assault that often require professional care. Unfortunately, access to healthcare for survivors remains problematic. While Canada does have a public healthcare system, not all medical needs are covered.<sup>579</sup> For example, publicly funded mental health options are very limited and often only available for short-term treatment.<sup>580</sup> Cost was the most concerning healthcare issue for the survivors I talked with. S6 spoke as both a survivor and medical health professional on this issue:

It's so expensive. The personal counsellors, in office, if it's not subsidised, they can charge you like up to \$220 an hour. I'm in the system. I work as an emergency nurse and oftentimes we get mental health patients coming in, even assault survivors, and I feel helpless. Half the time I can't even do anything. Half the time they just ship you home without any counselling unless you're on a Form 1—you're a danger to yourself or

---

<sup>579</sup> Health care in Canada tends to cover most basic services offered at hospitals and through one's primary care physician as well as an assortment of specialist physicians. However, there are plenty of shortfalls in the system, leaving important and sometimes necessary care uncovered. See the following for an overview of how the Canadian healthcare system works: Danielle Martin et al, "Canada's Universal Health-Care System: Achieving its Potential" (2018) 391 *The Lancet* 1718 [Martin].

<sup>580</sup> "The Crisis is Real" (2020), *Centre for Addiction and Mental Health*, online: < <https://www.camh.ca/en/driving-change/the-crisis-is-real>>.

others—and even then we never hear from them. Even as a nurse, I make a good salary, but I feel like I can't even consider therapy because \$220 per hour and the amount of counselling you feel like you would realistically want to have. I feel like I haven't even considered it because of the money. Because like I feel like I don't want to just dip my toes in and not have enough funds to go for counselling. I had counselling before but it was through some free institution and I got in right away. But that's only because I was French and it was a French institution.... So it's either you put all your eggs in one basket with all the money or you have nothing. I feel like money is really important. You can't put a price on pain.

The medical system, particularly in regard to mental health issues, is exceptionally hard to access.<sup>581</sup> The public parts of the system are overloaded, but the private costs are exceptionally difficult to manage, even for those who are well-paid. Plus, as S6 points out, medical care often continues for a long time past when the assault occurred and it is hard to budget for an expense that may stretch out over several years.

S7 added to these concerns about long-term costs:

For a survivor, the amount of money you need is continuous throughout your life. Let's say your anxiety is gone. But for me, I go to school, and my anxiety kicks in. So [now I need] money for unforeseeable expenses... or the documentation to drop a course. Even just the time that it's caused me, for my degree. There's no money worth that. It's just such a domino effect. It affects every single aspect, school's just one of them.

Mental health issues (and often physical issues) can ebb and return over one's life. A survivor may feel fine for a time, but then find themselves in need of therapy once more due to triggering events in their lives.<sup>582</sup> Furthermore, health issues can start to affect other aspects of one's life. Perhaps a survivor will need to miss a lot of work to make appointments or because she is too ill to work for a time. For S7, she struggled with her education and that required her to prove to her school that she was dealing with a health problem. Getting this type of documentation costs

---

<sup>581</sup> Martin, *supra* note 579.

<sup>582</sup> Dealing with the repercussions of trauma is rarely a linear process. See: Rachel Pain, "Seismologies of Emotion: Fear and Activism During Domestic Violence" (2014) 15:2 *Social & Cultural Geography* 127.

money, takes a substantial amount of time, and adds a great deal of stress to a person's life. It can also be difficult to access the right doctors in a reasonable time frame.

Health care reform is an issue many of the survivors I interviewed supported. S16 believed,

Any survivor of sexual assault should just be able to get accessible counselling and services with which those monies [from the CICB] would pay. Most people aren't going to take that money and go on vacation. They're using it to access services for the trauma that they've faced. I think that those services should just be covered and accessible. Because while they exist, they aren't always accessible. We have a sexual assault crisis centre here and the wait list is preposterous. It's ridiculous. In general I think that counselling should be part of our healthcare system because there's a lot of other people who will not report and are just dealing with this trauma that could really well benefit speaking with somebody.

She was frustrated with the fact that some people saw survivors accessing funds for recovery as receiving "free money", as if the assault had not cost them far more than what they received in compensation from agencies such as the CICB. Instead of having to work to find a way to cover these costs, S16 and many of the other survivors I spoke with wanted expanded healthcare services so that no one is denied needed treatment regardless of their reasons for needing it.

On top of cost issues, survivors also highlighted the need for professionals who are trained to deal with survivors and their needs. S2 stressed that her regular counselling sessions were essential to getting her through much of her recovery because she was seeing someone trained to help with her specific problems. She needed someone who understood the effects of sexual assault and knew how to help her. Not all survivors are able to access such care. S6 stated that when she signed up for some free counselling, the person she was dealing with was not a trained professional:

And the girl, I was looking at her LinkedIn and she didn't even have a background in counselling. She was just someone they dropped in and I think she studied Leisure and Activities. And then she had a couple other certifications after the fact.

S6 was aggravated that while it was good to be able to access any counselling, the person she saw did not have any experience or training in how to deal with the serious trauma caused by sexual assault. Other survivors complained about callous medical professionals who did not know how to respond to an emotional survivor who was scared and in need of compassion.

The survivors I interviewed also noted that the medical system is hard to navigate and many did not know what services and supports were available to them. For example, when S15 was a teenager, she was visited by the police after it was suspected she had been the victim of a sexual assault. They did not give her any information about what options were available to her:

I was 14 and he [a police officer] didn't even tell me I could go to the hospital. I was worried for months after that I had an STI or I was pregnant, but I didn't want to go to the hospital because I didn't want to have to report and I wasn't told that I could go and get healthcare and go to counselling without reporting or any of those things which would have been I think really helpful.

She was worried that attempting to access medical services would put her privacy at risk or that she would be denied care if she was not willing to report her assault to the police. Survivors are vulnerable and often not experts in either the legal or medical systems. The women I interviewed emphasised that the services available to survivors need to be more accessible, and those that work in these systems need to be prepared to help survivors navigate the complex network of institutions in a kind and efficient manner.

#### **5.3.4 Compensation**

In an ideal world, survivors would have access to public support services and the role compensation would play in these situations would not be nearly as fraught. However, the women I talked with all underscored how important money is for survivors as it is needed to access many of the services they require in order to recover and heal from the harm that they

have experienced. It costs money to hire legal representation. Therapy is expensive. Missing work<sup>583</sup> and interrupted education result in lost income as well.

The survivors I spoke with were united in the belief that compensation was an important part of healing. While it is true that some survivors are privileged enough that they do not need financial help after their assault, that is not true for the vast majority of women. A sexual assault costs money and survivors should not have to bear that burden alone. Many of the survivors I interviewed thought that the offender should be responsible for paying some of these costs, but everyone agreed that help was required regardless of where it came from. They also stressed that compensation needed to recognise the broad effects of sexual assault. It is not enough to give survivors a bit of money for short-term therapy. A more holistic, long-term approach towards compensation needs to be taken.

Despite the need for money, issues of compensation also brought up complex emotions for survivors. Asking for help is difficult, particularly when finances are involved. Survivors do not always feel deserving of aid. For example, S9, when getting help from a financial aid officer at her university, said she felt quite bad as she was concerned she was taking away money from someone with an “actual” disability. She was worried that other people existed who might need the money more than she did, and thus struggled with feelings of guilt despite trying to avoid homelessness herself. This sentiment was echoed by several other survivors who were anxious about how few resources were available for those impacted by sexual assault and how unfair it would be if they dipped into these wellsprings of support if they could get by without them.

---

<sup>583</sup> A fairly recent amendment to the Ontario *Employment Standards Act* introduces leave for employees who have experienced (or had a child experience) domestic or sexual violence. Only the first five days of these leave are paid. The rest, up to 15 weeks in a calendar year, are unpaid. *Employment Standards Act, 2000*, SO 2000, c. 41, s 49.7.

Sometimes the need for money can bring up other negative emotions. For example, S15 had difficulties trying to convince herself to apply to the CICB. She stated that,

I felt disgusted at myself and what happened. I felt like that was being paid for it or something? I felt like I'd been paid to do that or go through that. It felt really gross to me, so I didn't do it. But now I feel like I have to do it because I need money really badly.

To apply for funds such as those previously available through the CICB, a survivor must publicly discuss what has happened to her and justify her need for financial support to the tribunal. If services such as therapy were available under public healthcare plans, survivors like S15 would not be placed in a situation where they felt as if they were asking to be paid for what happened to them and justifying why compensation was necessary. They could simply access the services that they needed without having to deal with the emotional repercussions of needing to apply for funds.

Issues of money also bring up a lot of public backlash that can add more stress and trauma to the lives of survivors. Survivors worried that the public felt they had a right to comment on the use of any public funds survivors might receive. Some of the women I spoke with were questioned by various people about whether they deserved this money or were using it appropriately. Even if they are not confronted directly by someone, the social discourse is insidious. S9 spoke about the negative view that society has of social welfare programs and how people are overly worried about free riders and cheaters in the system. She argued that the focus should be on the good these programs can do and not on the potential of fraud as “I don't think anyone really wants to fake this shit”. When S4 went to deposit the cheque she received from the CICB, the teller commented on how nice it must be to receive a cheque like this, as if the cheque was just a spontaneous gift of money not connected to a traumatic incident that left the survivor

with significant costs. S4 was frustrated that the money was seen as frivolous when she needed the money to pay for services that she only needed because she was assaulted.

S8 added that society is quick to demonise survivors who try to get compensation after being assaulted.<sup>584</sup> They are seen as greedy and taking advantage of their victim status. The harms that they suffered are minimised and not seen as ones that require money to fix. S8 argued that survivors have bills to pay like everyone else and they deserve to be able to treat themselves kindly as well. While money is not a solution for everything, it can certainly help a survivor survive and thrive in many ways.

One of the questions I asked about compensation during interviews was whether survivors saw money as a form of justice.<sup>585</sup> In response, S11 pointed to the rhetoric around monetary compensation and sexual assault:

[Justice is] not about the money. Obviously, it wasn't primarily for me. I never even considered it until later. But I think that rhetoric comes out from public personalities... this whole fuck you, pay me thing. It's like a hashtag even. That is at least something tangible. That much I agree with. For me it was never about the money. However, now that I'm in the civil suit, I'm thinking like at least that's something tangible. It sounds greedy. I feel greedy about it, but it's like... well no. Damages are based on things like lost income. All these things. The damages aren't willy-nilly given out.

In some ways I can agree it's a tangible thing while "justice", what you get from your criminal trial isn't tangible in that way. So while I disagree that that's what it's all about, it can be one way of getting something out of it and being able to say like okay at least that was acknowledged. My harm was acknowledged in this tangible way.

---

<sup>584</sup> It is very common for female survivors of violent crime to be seen as liars who want money and were never really harmed. This discriminatory assumption is explored in the context of domestic violence survivors in the following article: Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences (2019) 167 *University of Pennsylvania Law Review* 399 at 426. See also: Huijae Yu, "If She Asked for Settlement Money, She Must Not Be a Real Victim": An Interdisciplinary Analysis of the Discourse of Victims and Perpetrators of Sexual Violence" (2022) *Critical Discourse Studies* (online first publication).

<sup>585</sup> Kathleen Daly & Juliet Davis, "Money Justice" (2021) 54:1 *Journal of Criminology* 60; Robyn L Holder & Kathleen Daly, "Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors" (2018) 24:1 *International Review of Victimology* 25.



For S11, money was not justice, but she did think it was something useful and real that survivors could gain access to that would help them obtain justice in other ways.

S13 emphasised that money does not necessarily make anything better, but money is quite useful:

I don't think that's true [that money is justice]. I think it might be true for some people; I don't think it's true for me. I don't think that money would have made me feel better. I was really angry.... I think what would have made me feel better was some sort of recognition that they had done wrong and I think you can have money without that other piece. That said, maybe money makes some people feel better and let's be honest, there are real material costs associated with being assaulted. Like in terms of access to counselling which is not covered by OHIP. If there are ways to get money or if suing someone through civil litigation is a way for someone to feel like you hurt me, I'm going to punish you... I don't think that justice and money are synonymous.

Justice for her and several of the other women I interviewed required that the offender admit that he did something wrong. Making sure that survivors are compensated does not necessarily do anything to ensure that the offender understands the gravity of his actions. In a civil suit, the defendant may be ordered to pay damages, but a fiscal punishment does not require that he sincerely takes responsibility for his actions. Similarly, S16 added that she did not think money was sufficient as justice:

It will perhaps provide some sort of counselling for the injured party, but in reality there's a lot more than counselling that needs to happen. Financial burdens aren't really any form of real accountability on their [offenders'] part or acceptance that what they did was wrong or public vilification of what they've done.

Justice, to survivors, was a much larger concept than compensation, though compensation was often part of it. What a survivor needs cannot always be bought, even though money is necessary to access some of the resources necessary for healing. According to S7, money can pay for tangible issues, but it can never truly fix what has happened:

I feel for the pain you need an infinite amount of money. I feel like in my personal experience the money can never be enough. So I feel that's just it. The money, it helps.... I do feel like survivors need money for the pain and the emotional implications from work and school and whatever to move on. Obviously it's helped me and it would help any survivor, but I just feel like no amount of money is ever going to be able to erase the emotional [fallout]...

The harms from sexual assault are not easily resolved and the pain a person experiences cannot be objectively measured and quantified. The women I spoke with believed providing compensation so that a survivor could function and survive was *the least* that a just society should provide. Compensation was either a precondition to justice or a crucial element of it to the survivors I interviewed. They just did not believe that justice was fulfilled entirely by money.

As discussed in Chapter 3, there are two primary legal processes that sexual assault survivors often use to access financial compensation. The first of these is a civil trial; however, this particular method is often extremely costly and requires a defendant with enough funds to be able to pay any order should the survivor's claim be successful. L6 was rather pessimistic about the utility of civil trials for cases of sexual assault:

Who has that kind of money kicking around that they throw into a lawsuit where any lawyer will tell you it's basically a toss-up and there's no guarantee? Who has a hundred grand to spend on maybe? Throwing around numbers like that, we're talking about disposable income. You're already way into the 1%. So you're disserving the entire community by having those kinds of economic barriers to justice.

L6 cautioned that the cost of the lawsuit itself may exceed the damages a survivor is awarded, and few of his clients have been in a position to pay for such an endeavour. Only a couple of the

women I spoke with had chosen to pursue a civil trial, and for one that was only because she was suing an institution that she felt contributed to the harm.<sup>586</sup>

On the other hand, according to L7, another practitioner who frequently represents sexual assault survivors in civil proceedings,

I have never done a full, contested trial in one of these, believe it or not, and I'm not a bad lawyer! Most of the time they settle... In my early years, they would settle in part because there would always be a fight about whether or not the limitation period had passed and things like that. In more recent years, without any sort of limitation periods and with some other changes in the law, I can usually get the defendant up to a number where it makes sense to my client to take the money and avoid a trial. That's a very personal thing. Everybody has their own expectations and what they're willing to hold out for.

While civil trials can be quite costly, this applies to all the parties involved, so there is often a strong incentive to settle before a costly trial is undertaken. As discussed above, settlements often come with NDAs (and are presumptively protected by settlement privilege regardless)<sup>587</sup> which may undermine a survivor's sense of justice. L7, however, had a much more optimistic take on whether civil claims were worth the effort and resources for women looking for compensation in the aftermath of an attack.

---

<sup>586</sup> Vicarious liability is one of the more common types of civil claims for sexual assault as institutions or professional organisations have insurance regimes that can guarantee a payout to the plaintiff should she succeed at proving her claim. While a survivor may obtain an order for financial compensation from an individual defendant, it is not uncommon for said defendant to default on the judgment due to lack of funds. See: *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 45; *John Doe v Bennett*, 2004 SCC 17. See also: Elizabeth Grace, "Vicarious Liability in Sexual Abuse Cases Lagging in Canada?" (17 September 2019), *Lerners*, online: <<https://lernalpersonalinjury.ca/blogs/vicarious-liability-in-sexual-abuse-cases-lagging-in-canada/>>; Elizabeth Grace, "SCC Won't Hear Case Involving Vicarious Liability for Sex Assault" (7 May 2020), *Lerners*, online: <<https://lernalpersonalinjury.ca/sexual-abuse/scc-wont-hear-case-involving-vicarious-liability-for-sex-assault/>>; Bruce Feldthusen, "Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It" (2007), 22 CJLS 61.

<sup>587</sup> *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37.

The CICB was, at least until recently, the other process that survivors would use to access financial redress. The lawyers I spoke with were quite supportive of the CICB process for their clients. According to L7:

Those people I usually take to the CICB which I find to be very good process. I know it's come under a lot of... it's in the news these days. It's certainly not a perfect process, but in terms of getting people what they tend to want, it's effective in a number of ways. First and foremost, you can get an internal award for therapy. They can get a certificate for therapy within about six to eight weeks of us filing which is great. They can shop around for somebody they click with, and somebody they have some therapeutic bond with. And then after that there is some sort of hearing where we're hearing all about the allegations, but it's much more survivor-centric than the criminal process. The Board's very trauma-informed, and it's the kindest way forward.

For L7, the CICB was a good way of trying to have her client's immediate needs met that were not going to be addressed by the criminal courts. As survivors often need money to access medical treatments, the CICB was an effective avenue for obtaining funds for such things in a timely manner. L7 also mentioned that when clients have access to therapy, it made her job much easier. She stressed the fact that sexual assault is traumatic and working through the legal processes dealing with it will be challenging and often have a detrimental impact on a survivor's mental health. While lawyers should be compassionate, they are not trained therapists. Though some practitioners use trauma-informed lawyering, this is not a replacement for a medical professional and on-going treatment.<sup>588</sup> Financial compensation can help expand the team of people available to help survivors as they attempt to recovery and find redress.

---

<sup>588</sup> McKenna, *supra* note 573; Susan Ayres, "Trauma-Informed Advocacy: Learning to Empathize with Unspeakable Horrors" (2019-2020) 26 *Wm & Mary J Race Gender & Soc* 225; Claudia Peña, "Trauma Abounds: A Case for Trauma-Informed Lawyering" (2019) 26 *UCLA Women's LJ* 7; Sarah Katz & Deeya Haldar, "The Pedagogy of Trauma-Informed Lawyering" (2015-2016) 22 *Clinical L Rev* 358.

Through the CICB, L7 was often able to get her client the funds necessary to access treatment that would make it easier for the survivor to cope with additional, more challenging legal processes in the future:

I also use the CICB in situations where I think that the survivor will not be able to withstand the scrutiny of even a civil case. I have one right now who is very fragile and has been for some time and it's really important to her that she move forward in some way with some sort of legal process. I haven't foreclosed the possibility of a civil suit down the line. The defendants do have money; she could sue them. But she's got to be strong enough. So I said to her let's start with a CICB application. It will help potentially alleviate some of the financial stresses around you and we can reconsider a civil suit a year from now when you've had some real therapy.

L7 saw the CICB as a useful stepping stone a survivor could take in order to prepare for more challenging legal processes later on. Survivors were able to get a sense of what it was like to talk publicly about their assault and the sorts of scrutiny they would be under.

On a similar note, S13 stressed just how important it was for survivors to have an option that did not require them to deal with the man who hurt them directly:

There might be some satisfaction for people in getting money directly from the offender, but being able to go through a process where you're sort of guaranteed that there's no face-to-face interaction with them, or that don't have to fight to prove the validity of your experience to a group of probably really untrained and judges or jurors or whatever. That process sounds the most accessible to me. If I had known about that, maybe I could have filled out some paperwork and gotten money for counselling. That sounds actually manageable whereas the other things sound really big and difficult.

...I think the emotional investment of going through civil or criminal litigation is so significant and in ways that when you're trying to just to take care of yourself and feel okay, the thought of making yourself vulnerable through those processes for me would have felt almost impossible. Whereas, I can fill out paperwork. It feels a little bit safer in a way. But you lose that satisfaction of being like I'm hitting you up for the money. But again, for me, that would have been an okay trade-off.

Sexual assault often leaves survivors in very precarious situations where they simply do not have the capacity to deal with the intense challenges a civil or criminal trial would require. For example, among the survivors I spoke with, some faced homelessness, additional violence, work

and school disruptions, as well as mental health crises. The CICB has, in the past, offered people an option for redress that, while obliging them to delve into what happened to them, did not require them to do it so publicly and was far less adversarial than a civil or criminal trial.<sup>589</sup> They were able to obtain compensation that in some instances allowed them to later be able to pursue additional legal claims. L7 noted that sometimes the legal system needs to meet survivors where they are in their healing process, and that can be accomplished with different options requiring varying levels of capacity on the part of the survivor.

One potential downside to the CICB is that it is not a process that results in accountability on the part of the offender. According to L6:

Criminal Injuries Compensation Board, you can get money fairly easily. It's not very much money. The accountability and validation piece are attenuated there because you're not litigating the events and having somebody say I've heard from both sides and yes this happened. In fact, accused persons don't even need to participate in the CICB thing. It's a hug. It's an unconditional hug and here's some money. If that works, great! But the accountability mechanism is lacking.

The purpose of the CICB is to provide compensation, not to render a definitive judgment on the truth of what happened. On the other hand, there are many survivors who do not want to see the offender punished per se, which tends to come with accountability in other legal processes. The validation from the CICB can be what is most important to a survivor, even if it does not come with the weight of a court judgment. For others, all they want is money they can use to help themselves heal. Regardless of how a survivor perceives the role that compensation plays in their pursuit of justice, it is an important factor in a survivor's pursuit of justice.

---

<sup>589</sup> While hearings in the CICB are usually open to the public, they can be closed for several reasons, including when a public hearing would not be in the interests of the victim of a sexual offence. *CVCA*, *supra* note 340, s 12(b).

## 5.4 Conclusion

According to the women I interviewed, one of the most important things they needed after being assaulted was to be able to heal from the harms and trauma inflicted upon them. For some, the redress they sought most was a return to their normal lives. For others, healing was just one step on their justice journey, necessary to prepare them for harder stages. Regardless of exactly how the women I spoke with conceptualised recovery, it was a critical aspect of justice and one that implicated the legal system substantially more than might initially be expected.

The data I gathered from survivors showed that healing was often intimately tied to feeling as if they had power and agency over themselves. Many spoke of wanting to choose what forms of redress to pursue. This dovetailed into their desire for more options to consider when seeking justice. Most of the women I talked to felt that the legal system offered them little in the way of useful or wanted outcomes and treated them poorly when they attempted any legal process. The criminal courts were the most recognised form of legal redress, and many were frustrated with how little education there was about other legal avenues, such as the CICB. Some of the women I interviewed only learned about these different processes after commencing criminal proceedings they did not really want.

Validation was another significant recovery need among my interviewees. Many (though certainly not all) of the survivors I spoke with wanted people to hear and believe their stories. Several felt retraumatised when they engaged with extremely adversarial legal processes designed to put them under intense scrutiny and suspicion. For some, while they wanted validation, they did not want or did not believe they could withstand the harsh examination of their stories in the civil or criminal courts, leaving them to feel as if they had no legal options for justice.

Finally, my interviews also showed that there is a need to think more broadly about what legal redress can offer survivors. Financial compensation was critical as either a precondition to justice or as justice itself for many of the women I spoke with. While not something commonly associated with the criminal courts, the CICB is a legal tribunal and victims of crime, at least until recently in Ontario, had some legal rights to compensation.<sup>590</sup> Several of the women I interviewed spoke about the importance the CICB had for their recovery and how crucial money was when trying to put their lives back together.

Thus, while healing was not a category highlighted in most of the justice interests literature I reviewed in Chapter 1, it was one of the most important concerns survivors expressed to me while I was conducting research for this dissertation. Further, while it is easy to dismiss healing as something more suited for the medical system than the law, there are many ways where various aspects of the legal system can help or hinder a survivor's recovery process. By thinking of justice more broadly than the strict procedural or legal rights discussed by many other scholars, it is possible to improve survivor attempts to obtain justice after being sexually assaulted.

---

<sup>590</sup> Though I will discuss this issue further in Chapter 9, the repeal of the legislation creating the CICB does leave victims of crime in Ontario without an important statutory right to compensation as the replacement program is not statutorily based and can be changed or even ended at any point by the government.



## ***Interlude #2***

*Look, the details about what happened to me aren't important. Just know that this was a friend of mine. I thought I was safe with him. I obviously wasn't and he made that very clear one night when we were just supposed to be watching a movie together. People say men and women can't just be friends, and I used to believe that was ridiculous. Until that night when my friend decided he wanted way more than I was willing to give. Now I no longer have any idea where I stand on the issue, but I did know that I wanted to do everything in my power to stop it from happening again.*

*First I went to the police. I told them what happened and they said they would look into things. I gave my statement but never heard back from them. I started calling the station and finally someone told me that my complaint was looked into but there wasn't enough evidence to issue a charge against my former friend. I don't know what the hell evidence they were looking for since everything happened inside my house when no one else was around. I guess rape isn't a crime when other people don't see it...*

*It really pissed me off actually. All my life I've been told that if a crime occurs, you go to the police, report it, and they will take care of it. But obviously that's a load of crap. Something very bad happened to me and the cops basically did nothing. How the hell can you hold people who hurt others accountable if the people who are supposed to help you do that aren't bothering to do their jobs?! The police didn't seem concerned by the fact that they were letting a rapist wander about the streets and that he could hurt someone else. My word wasn't good enough when compared to his.*

*Then I heard about this program from a friend where sexual assault survivors could get some free legal advice. I asked around, filed a bunch of paperwork, and then I got to chat with a lawyer for a bit about my options. Since charging the asshole with a criminal offence wasn't happening, I wanted to know what else I could do. Turns out the options all sucked. I could sue the bastard, but I wasn't looking for money. I was looking to make him stop. I guess getting sued can freak someone out, but my lawyer told me I wasn't likely going to win a case like this, and lawyer fees for civil trials were a lot more than I could afford. None of the other usual legal avenues fit my situation and, like I said, I wasn't looking for money. I wanted this dude to be held accountable. I wanted people to know what he did and I wanted to make sure it was impossible for him to do anything like it ever again.*

*In the end, I decided to blast him over social media. I posted about him in all the local city groups I could find, warning others about what he did to me. Since no one else was going to help me, I decided I'd be a one-woman army and try to hold him accountable myself. I did not want to let the issue drop. People needed to know and I wasn't going to let anyone else get hurt just because it was hard to figure out what to do. So I tweeted and hashtagged my heart out for a few weeks and did my best to spread the news.*

*Turns out that was a bad choice on my part. The guy ended up suing me for defamation and libel. Said I was damaging his reputation and that it wasn't fair or true considering the police*

*“investigated” and didn’t see a reason to charge him. I ended up going back to the lawyer I talked to before and I had to settle out of court because I couldn’t afford the legal fees for a full trial. I had to admit I did something wrong and promise never to bring it up again. Speaking of which, you obviously didn’t hear anything about this from me directly. A little bird told you or something.*

*So that’s my story. Got assaulted, wanted to hold the rapist accountable, did all the right things, ended up getting sued and silenced instead. I lost friends, money, time, my mental health... all for nothing really. The whole situation taught me that survivors get treated horribly if they try to seek any sort of justice after being assaulted. You do what you are told to do, but the system doesn’t care and doesn’t help you at all. And if you take matters into your own hands, you’re probably just going to make things worse for yourself. You might say I’m a little bitter about it all, but at least I did get the word out for a bit about someone dangerous. I just tell myself that that has to be worth it. If I helped prevent just one person from getting hurt, then all the pain and crap I went through was worth it.*

## **Chapter 6: Accountability**

### **6.1 Introduction**

Accountability was one of the most frequent desires that survivors identified when asked about what they wanted in the aftermath of their assault. This concept, however, can be amorphous. At its simplest, accountability is an admission of responsibility on the part of a party that has done something wrong to someone else. Among legal scholars, however, it is a concept that is heavily debated and theorised. Given my use of feminist standpoint epistemology and grounded theory, however, I opted not to attempt to define and delineate accountability based on pre-existing literature. Instead, I listened to what survivors were telling me during our interviews and structured this chapter around their ideas and beliefs about responsibility for sexual assault.

I did not ask about accountability directly in my interviews, but the topic was brought up by many survivors of their own accord. Even those who did not use the word accountability—though several did—the idea of someone taking responsibility for their actions came up over and over as something most of the women I spoke with identified as a key component of justice. While this concept overlaps with that of validation as discussed in the previous chapter, my focus in this part of the dissertation is on what it meant to survivors for someone to take responsibility for their actions. Having their pain acknowledged by others was something that helped the women I talked to heal, but they also wanted to see offenders engage in specific behaviours to prove that they understood that what they did was wrong and that they were actively trying to ensure that they never committed such a violent act again. Accountability, according to my interviews, was a mix of admitting to engaging in a wrongful act and committing to change.

The women I spoke with did not apply this concept of accountability to just offenders. They spoke of multiple parties and institutions that they believed were responsible in some manner for condoning sexual violence even though they were not the direct perpetrators. I deemed this a form of social accountability. During my interviews, multiple women stressed that they believed offender accountability was impossible in a world without social accountability. Society itself needed to treat all sexual assault as a serious violation of a person's rights as this would make it clear that such behaviour was unacceptable. Further, some survivors also maintained that every person has a responsibility to prevent and act against sexual violence. By engaging in this form of widespread social accountability, they believed it would be easier for an offender to understand that his behaviour was wrong and that he would be supported in changing in this type of environment. Unlike accountability in most legal scholarship, in this dissertation, it is a layered concept applied by the survivors I interviewed to offenders, society, and even, as I will discuss in this chapter, themselves.

## **6.2 Accountability Requires Behaviour Change**

One of the most important things that the survivors I interviewed wanted in the aftermath of a sexual assault was for the behaviour of the offender to stop. While criminal law does offer a partial response in the form of imprisonment, the survivors that I talked to wanted more than just temporary separation or punishment.<sup>591</sup> They wanted the immediate abuse to end, but they also wanted the offender to never cause similar harm again, either to the survivor in question or anyone else. According to S3, committing sexual assault “doesn't mean you're an absolute monster, but you have to change.”

---

<sup>591</sup> See Chapter 7 for a fulsome discussion on imprisonment.

### 6.2.1 Behaviour Change Requires Admission of Responsibility

For many of my interview participants, accountability necessitates that the offender claim responsibility for his actions. This is seen as the first step in changing one's behaviour as it is impossible to engage in a sincere process of personal reform without first understanding and accepting that one did harm. According to S14,

It would have been nice if he admitted that he had done wrong.... Just admitting that I'm sorry, I've made a mistake would have been extremely helpful in the healing process.

By expressly acknowledging his violence, the offender admits that the survivor's claims are true and that she is not lying or misinterpreting what happened. He is validating her feelings which, as S14 suggests, is beneficial for the survivor's mental health and recovery process,<sup>592</sup> but he is also showing that he understands that what he did is unacceptable. S3 added,

I just wanted him to realise what he had done. He did realise what he did that night, but I also wanted him to realise that there were consequences for what he did, and that he needed to be accountable. Because what he did was technically illegal. He broke the law; he needs to take responsibility. I hated to do that to someone I considered a friend, but I was just like, you know what buddy, you broke the law. That was basically it. I just wanted accountability.

As I mentioned in Chapter 4, the themes that I used to organise my data in this dissertation are not watertight compartments; they sometimes leak into one another. When an offender is accountable for what he has done, he aids the survivor in healing by validating her feelings that she was wronged and hurt. However, accountability comes from his behaviours after this admission of responsibility. He must engage in some sort of action to change himself and make amends for what he has done. For S3, she wanted the offender to face up to the consequences of his actions as that was a way of showing that he was no longer trying to deny

---

<sup>592</sup> As discussed in detail in Chapter 5.

that he had hurt her. Accepting the legal consequences of committing sexual assault was a way for the offender to acknowledge and be accountable for his wrongdoing. The exact form of consequences are an issue of punishment which I will talk about in the next chapter. For survivors, their thoughts on healing, accountability, and punishment are often entangled and sometimes difficult to separate.

Unfortunately, most of the survivors that I spoke with did not feel as if their offenders accepted responsibility for their violence. In fact, most had a rather pessimistic view on whether this aspect of accountability was realistic in the context of sexual assault. S5 argued that,

I had hoped that through this, at some point, that maybe there would be an admission of guilt and accountability and an apology, but that never happened. Of course he had an amazing defence lawyer, so of course that's never going to happen.

When bringing a sexual assault to the attention of the legal system, survivors are entering an adversarial process. As a potential consequence for this crime is incarceration, offenders generally have a strong incentive to deny the allegations and minimise their behaviour.<sup>593</sup> Many of the survivors I interviewed were frustrated with the traditional criminal law process as an offender who refuses to admit guilt was someone that they saw as incapable of being personally accountable for his actions. Men who plead not guilty often make claims that survivors are lying or misunderstanding what happened between the two of them. For some survivors, this feels as if the legal process itself is gaslighting them.<sup>594</sup>

---

<sup>593</sup> I discuss this more at length in Chapter 7. For an exploration of this phenomenon in the context of domestic violence, see: Keith Guzik, "The Forces of Conviction: The Power and Practice of Mandatory Prosecution upon Misdemeanor Domestic Battery Suspects" (2007) 32:1 Law & Social Inquiry 41 [Guzik].

<sup>594</sup> Sweet, *supra* note 576.

This is why some of the survivors I spoke with believed that guilty pleas are an important part of the legal process. S11 argued that guilty pleas are one of the only ways that offenders can take personal responsibility in a criminal trial:

That's why we see it reflected in sentencing. When people guilty plea, they tend to get better sentences. And I think that's for a good reason. I think such a huge part of sexual assault is the acknowledgement of the harm done.... It is having someone sit down with you and say yes, I recognise that I harmed you in this way. So, submitting the guilty plea, while it doesn't necessarily mean that they understand the full realm of what they've done to you, it's at least an acknowledgement of the harm which I think is a huge piece that's usually missing.

However, not all offenders plead guilty because they are trying to be accountable. As several survivors pointed out, sometimes submitting a guilty plea is simply a pragmatic strategy to minimise the consequences one must face.<sup>595</sup> Nor does a guilty plea trigger a chance for the survivor and offender to discuss the violence that occurred and what steps need to be taken by the offender for a survivor to feel that she has achieved a just resolution.

Accountability is not relegated only to the legal realm. As noted earlier, I spoke with survivors about a situation where a man, when confronted by his former partner (Thordis Elva), admitted that he sexually assaulted her and apologised for his actions.<sup>596</sup> Survivors had mixed feelings about this example, but when asked about whether it mattered that the legal system was not involved, there was support for the idea that accountability can be found in many other places than just the courts. According to S16,

I honestly feel like it's okay in this context. He's not getting away scot-free. He's standing in front of all these people declaring he's a rapist. He's putting himself out there and acknowledging it. Facing that, regardless; it's just a different way of facing it.

---

<sup>595</sup> Guzik, *supra* note 593.

<sup>596</sup> See Chapter 3 for a full description of this scenario. Elva, *supra* note 468.

Most of the women I talked with stated that such a situation was quite unique; however, they believed that it was an interesting and valid approach should it work for the individuals involved.<sup>597</sup> The fact that the survivor was able to achieve her goals outside of the legal system did not matter. What was important in the context of accountability was the fact that the offender took responsibility for the harm that he caused. He publicly labelled his behaviour as reprehensible over and over again. He did not shy away from the social backlash that his confessions would cause, and he worked with the survivor to help her achieve the goals she needed to be met in order to heal from and move on from the violence he caused.

Unfortunately, from my discussions with survivors, while personal accountability from the offender was one of the most important things women wanted in response to their assault, it was not something they were able to obtain regardless of whether they used the legal system to respond to their assault or sought accountability through some other avenue. For example, S11 reported her assault to the police and her case was taken to trial and resulted in a conviction.

However, she felt her efforts did not result in actual accountability:

I wanted him to say to my face I know that this was wrong. I will never do it again. And for me to actually believe him because we would set up whatever to make sure that that was going to happen. Unfortunately, I still to this day, despite him finally being found guilty and now being sued, I still don't think he sees it is wrong and I think part of that is... he testified on his own behalf which is rare and he testified basically that it happened. He got up there and basically self-incriminated and admitted to doing what he did....

It's so clear that he did not understand anything. He probably thought like why am I being charged for this? I don't know, maybe that's an extreme example? Because he just seems crazy to me, but in any case, that's what I wanted. Because it's dangerous to hear that testimony and be like wow if you think that way then like you have no problem doing this again to anyone else. The punishment is not really about jail or whatever, or money any of that. It's not even about punishment at all. I don't think it's about punishment. I

---

<sup>597</sup> The survivors I spoke with were adamant that such a process should be fair but that power differentials may very likely make that impossible.



think it's about just acknowledging and not doing it again and finding a way to make that happen....

I don't think that the guilty verdict or the sentence gave me anything at all. I think the main thing that it boils down to is that obviously the victim doesn't... there's no standing in the criminal trial. So there's nothing for me. The justice is for, if there is such a thing as justice, the justice is for the public that is now, in theory, protected from this person from doing it again. Clearly someone who still to this day doesn't think he did anything wrong. Because there's no deterrence, there's no denunciation of conduct. I didn't get a damn thing out of it other than three years of turmoil because I had to testify and I was thinking about it for three years.

S11 felt that she was doing what she was supposed to do after being hurt and reported her assault to the police. However, during the resulting trial, she realised that what she really wanted from the offender was his recognition of the impact of his behaviour and she was not going to get that from this process. It was a frustrating moment for her as she knew that she had achieved what many would be consider an optimal result—a conviction—but her accountability needs were left unresolved.

### **6.3 Accountability Requires Education**

#### **6.3.1 Of the Offender**

For the survivors I spoke with, education of the offender was an essential part of justice as it was what they believed would help someone change his behaviour and accept responsibility for his actions. Without a deliberate attempt to ensure that an offender actually understood the harm of his actions, survivors worried that he would feel like a victim of the system rather than someone who victimises other people. According to S3,

Because if he just goes straight to jail thinking that he's innocent of a crime and he's convicted for something that he never did, then it's not actually going to help him heal himself. It's not going to help him grow. He's only going to become embittered and keep on thinking that he's the victim in a system that's out to get him. If he's thinking he's an innocent victim being persecuted for a crime he never committed, I would want to put in some sort of process in place to help him understand what he did, and why what he did was wrong and harmful. And then send him off to jail so he can go and be sorry for it.

For survivors, education is a key component in actually fostering change, stopping harm, and preventing further violence from occurring. Thus, in order to promote accountability, many of the women I spoke with believed that offenders needed to be given the opportunity to learn and understand their own behaviour and why it was unacceptable.

In particular, this type of education is important because most people do not want to see themselves as bad.<sup>598</sup> S8 maintained that individuals often cannot see how their own behaviour is harmful because that would involve painful personal reflection. She also stressed that rape culture encourages people to victim-blame. Instead of seeing abusive behaviour as the problem, people instead focus on what the victim did to supposedly encourage said behaviour.

What type of education is needed to achieve the goal of teaching the offender what is wrong about how he is acting? For the survivors I interviewed, their suggestions generally fell into two main categories: counselling and social education. Individual counselling was seen as necessary as it would help the offender work on his own issues, some of which probably contributed to his behaviour. Therapy is a process of self-reflection and this is often indispensable in helping people start to recognise how their choices can hurt others. S15 believed that,

...counselling can be really beneficial. Sometimes when someone is forced to go, it's not necessarily going to change the behavior. But I think it's better to try that route. And also then you're fostering a wider culture of solving a problem instead of just locking people up and treating them as subhuman.

---

<sup>598</sup> For example, see the following articles for a discussion on how shame limits the reintegration potential of sex offenders: Christian Perrin et al, “‘It's Sort of Reaffirmed to Me That I'm Not a Monster, I'm Not a Terrible Person’: Sex Offenders' Movements Towards Desistance Via Peer-Support Roles in Prison” (2018) 30:7 *Sexual Abuse* 759; Anne-Marie McAlinden, “The Use of ‘Shame’ with Sexual Offenders” (2005) 45:3 *The British Journal of Criminology* 373; Richard Tewksbury, “Stigmatization of Sex Offenders” (2011) 33:8 *Deviant Behavior* 606 [Tewksbury].

While she pointed out that counselling was not a guarantee that an offender would accept responsibility for his behaviour, it can be a useful process for many. Furthermore, she wanted to see a justice system that focused on fixing problems rather than simply making them go away for a short amount of time.

Rehabilitation was very important to the women I spoke with because they wanted sexual violence to stop permanently; not just for them, but for everyone. In order to help an offender become a law-abiding member of society once again, he needed various forms of education so that he could learn how to live non-violently without harming others. As will be discussed in Chapter 7, most of the survivors I talked to worried that putting offenders in prison and doing little else in response to sexual violence will not effectively address either individual behaviour or the systemic problems underlying this issue. In order for offenders to become better members of society, they need to be given the opportunity to improve themselves. Even if counselling does not work, as happened in some of the situations I was told about in my interviews,<sup>599</sup> there is still a chance for change. As L6 explained, “He needs a session where he's shamed a little bit in front of a mediator, takes some counselling, some sensitivity training, whatever. And frankly, grows up.” While not every attempt to educate an offender will be successful, it is important to recognise that people can and do change, and that counselling may be a way of helping someone mature and grow into a person who can be accountable for his past and future behaviour.

In addition to counselling, several survivors recommended that offenders undergo some form of social education. Social education, in this context, would include teaching on topics such

---

<sup>599</sup> For example, S2 stated that the offender who assaulted her had already been ordered to undergo sexual harassment training after a prior legal engagement with someone else. This did not prevent him from perpetrating further harmful behaviour against S2, but she still believed counselling was an important aspect of education for the offender, even if it did not work for everyone.

as consent, relationships, and gender-based violence. While counselling was seen as a good tool for working on the self, some of my interviewees thought that offenders needed broader exposure to issues such as oppression and equality. For example, S2 suggested that offenders need to learn about:

...inequalities in life and sexism. Ultimately, there's a power dynamic [between men and women] and you're a man.... It comes down to [things like] where are you going to sit on the TTC sometimes. Even teaching that. So next time you go and enthusiastically flirt, be a bit more hands off. Try that. Maybe a foot distance first and see how it goes.

Some of the women I interviewed thought that there was value in discussing how social interaction looks to different people. While some men may be predators, some survivors noted that there are people who may be oblivious as to how their behaviour makes others uncomfortable, and that harm can worsen as an offender does not learn to respect proper boundaries. S1 thought that all offenders should be taught what consent is and how it should be practised in real life. She also believed that basic sexual education is another topic that many require more education on. S16 wanted offenders to learn about the history of women's rights and the realities of sexual violence faced by women.

Sometimes this type of education can come from the survivors themselves. The trial of Larry Nassar,<sup>600</sup> former US gymnastics doctor, was very important to S4's thoughts on this matter. As she watched the scandal unfold, she was struck by what happened when the survivors shared their stories in front of Nassar:

He had to listen to everything. And he cried. I don't know if he cried because he could tell he was in trouble or if he really felt it, but I liked that. Just because their stories were heard, and he was forced to listen to their stories. Because I think perpetrators get to hide within this rape culture and they don't have to be accountable, and he was forced, in this

---

<sup>600</sup> Hadley Freeman, "How was Larry Nassar Able to Abuse So Many Gymnasts for So Long?" (26 January 2018), *The Guardian*, online: <<https://www.theguardian.com/sport/2018/jan/26/larry-nassar-abuse-gymnasts-scandal-culture>>.

closed area, to be held accountable for that. Even if it was just for that time period, but I would hope as a human being it would linger.

To her, a survivor speaking truthfully about her experiences and her pain could be a very effective method of education. The offender would have to face the consequences of his actions in a very real manner where it would be difficult to rationalise the harm away. Rape culture lets abusers excuse their own behaviour. It helps them minimise and ignore the damage that they cause. When a survivor faces them and tells them bluntly what the assault did to her, it becomes harder to escape the consequences of his choices. Even if the impulse to dismiss it is still there, S4's comments on the fact that such painful stories will linger means that such a confrontation will hopefully have long-lasting impact that may later lead to changed behaviour and beliefs. Though these shifts in thinking take time, they are the ultimate goal of any educational attempt. The fact that personal growth is often not a quick endeavour is an understood part of the process. As S11 stated, "people can sit in a course on consent and then go out and continue to rape people. Because there's no perfect solution. [But] maybe a combination of all of those things would be helpful". Education can and should come in many forms for offenders, and through repetition and different methods, it can help offenders learn to change and thus make society a safer place for all.

### **6.3.2 Of Society**

Education, however, does not stop with the offender. As has been discussed multiple times in this dissertation, while offenders must be accountable for their behaviour, they operate within a culture that often supports harmful and violent behaviour. In order to prevent additional sexual violence from occurring, society as a whole must understand and commit to a role in this project as well.

The legal system itself is one of the most important areas where educational reform is necessary. While Canada has some very strong and effective laws on sexual assault, rape myths remain pervasive in the system as a whole.<sup>601</sup> According to L6,

... a residual problem that I still see... is a fear of women by men. The fear being that they will be vindictive so we cannot give control to women in cases of sexual violence because they will be irrational. We still see the Victorian mythology playing out. This very Victorian notion of “Hell hath no fury like a woman scorned” trope that really hasn't been sufficiently unpacked.

That's why you need Crown Attorneys—who of course were historically all men until the 1980s, literally—to run the justice system so that you have this objectivity and dispassion. So that's one area that I think it's still implicitly problematic.

The legal system itself was constructed by men based on patriarchal and oppressive values and society is still steeped in sexist and misogynistic beliefs (not to mention racist, ableist, and other discriminatory assumptions).<sup>602</sup> There have been many attempts to combat the effect of such inequitable presumptions on the legal system over the years. For example, L5 mentioned that,

When I look at my resumé and how many presentations I've been on involving sexual assault, how many panels I've been on. It's really increased in the last few years. So that's a sign that people want that education and I think that's a good thing.

Sexual assault has become a topic of focus within the Canadian legal system in recent years with media attention on discriminatory judicial reasoning<sup>603</sup> and the challenges survivors face when engaging in legal processes.<sup>604</sup> Several public calls have been made for more judicial education on the subject and federal legislation was enacted in May 2021 that requires candidates

---

<sup>601</sup> See Chapters 1 and 3.

<sup>602</sup> See Chapter 2 on feminist theory.

<sup>603</sup> CJC Dewar, *supra* note 7. CJC Camp, *supra* note 11.

<sup>604</sup> A lengthier discussion of recent sexual assault discourse can be found in Chapter 1.

seeking appointment to a provincial superior court to agree to participate in training on sexual assault law and the social context surrounding this crime.<sup>605</sup>

Some of the survivors I spoke with wanted the legal system to be a way of teaching the public at large about sexual assault. S2 wanted to “use sentencing to make people more aware of the damage inflicted” by this crime. She believed that if appropriate sentences were applied consistently, this would help society understand how harmful sexual assault actually is. However, this requires a legal system filled with actors who both understand and can adequately articulate these truths to lay persons outside of the court. It also means court information must be easily obtainable and broadcast so that such lessons have an effective reach.

Many of the survivors I spoke with also called for broader educational attempts aimed at people who may not have any connection (or realise that they have a connection) with sexual assault. Given the number of sexual assaults that occur every year, it is likely that most people are closer to the problem of sexual violence than they realise. S13 explained that greater knowledge among the general public about sexual assault would have made her situation easier to cope with:

And the other thing that probably would have made a lot of difference is a lot of people, when you tell them about a sexual assault happening, they don't really know what to do with it. I like to think that there's been some movement on this since I was twenty-one. I think I felt like people's sort of non-responses were a way of not taking it seriously, though maybe it was also not knowing what to do. If I'd had a good friend who was just.... holy crap. Maybe been willing to talk out some options. That might have made a difference. It almost feels as if the educational piece is just so vast. We have to teach everybody's friends what to do.

---

<sup>605</sup> *Judges Act*, RSC 1985, c J-1, s 3(b). At the same time the *Judges Act* was amended, the *Criminal Code* was as well to require that judges give reasons for decisions on any of the sexual assault provisions. *Code*, *supra* note 203, s 278.98. See also: Ryan Patrick Jones, “Sexual Assault Training Now Required for New Federally Appointed Judges” (7 May 2021), *CBC News*, online: <<https://www.cbc.ca/news/politics/law-training-sexual-assault-1.6017711>>.

Dealing with the aftermath of a sexual assault is difficult, and many of the women I talked with spoke about how they felt they did not have a lot of support among their friends and loved ones. They felt that people avoided addressing the issue and were not sure how to deal with their friends' pain. It was easier to ignore the problem and dismiss it as not their responsibility.

For some of the women I interviewed, this was connected to the fact that people in their community still supported the offender. According to S2,

...because if none of us said anything, then this keeps going on, and then not only does the accused get to impose harm, his environment, his bubble will always keep lifting him [up] and that's not right. In a way, I hope it teaches all the others around him that it's not right. In your everyday actions, be more considerate. And also recognise the space you hold, the impact you have on others in your everyday actions.

Survivors found that they needed to speak directly about their experiences in order to combat the tendency of people to avoid dealing with painful, awkward situations. This, they claimed, is an unfair burden on women who are already hurting. S2 was disappointed about how easy it was for offenders to go on with their life without any pushback from their community. Not only did survivors want the people around them to understand sexual assault more so that they could be better supports, that base understanding was also needed to hold people to account for causing harm as well as preventing future violence.

S4 discussed her experience in giving active-bystander training and detailed how difficult it was to get people to engage with the material in a fruitful and reflective manner. When discussing drinking and consent, S4 said that "No matter how you say it, everyone in that room is going to think that they raped someone. Everyone is going to worry about it. And they would shut down." This is the key social problem that survivors were concerned about during my interviews. Rather than engage with sexual assault as something that even supposedly "good" people can commit, nobody wants to think of themselves or the people they love as capable of



doing bad things to others. It is impossible to hold an offender to account when the society he exists within refuses to learn the same lessons you are demanding that he internalise.

## **6.4 Accountability Requires Protection**

### **6.4.1 Survivor Perceptions of their Own Accountability to Protect Others**

Protection from offenders as a topic may seem like it should belong in the chapter that follows on incarceration and punishment. However, given how much overlap there exists between many of the concepts discussed in this dissertation, it is an issue that also arose in my conversations about accountability. Perhaps one of the most surprising results from my interviews was how strongly survivors felt about their own accountability in protecting others from their abuser.

Many of the survivors I spoke with revealed that their primary reason for reporting their sexual assault was to ensure that others were not harmed. If they remained silent, the offender could go on to commit violence against someone else. S5 explained,

For me, my only concern was I didn't want this to happen to someone else. And I know that that aspect is beyond control. But what I can control is doing everything that is within my power to try and make sure that doesn't happen. So that was my intent, full stop.

While reporting was no guarantee that they would be able to stop the offender from hurting anyone else, it was one of the few things they could do to try and halt any potential harmful behaviour. For some survivors, they felt a sense of personal responsibility and accountability to other women. To be a good person, they believed they needed to do whatever was possible to prevent further harm. S11 stated that,

I think [reporting is] the right thing to do. And honestly, this isn't because I'm selfless by any means, but so much of it was because I was concerned for other people in the building. And I really cared about my students. It's like having [multiple] roommates. These were important people to me and I would have been devastated to find out that it

happened to anyone else. I just felt like this kind of parental relationship because that is kind of the role I was in. I didn't want it to happen to them, so that was a large part of it.

S11 was a residence fellow who was responsible for a number of younger students. Her assault occurred in the dormitory and was committed by men who lived there as well. Thus, her primary objective in reporting was to try and protect the people she lived with. She felt an obligation to do what she could.

Some of the survivors I spoke with struggling with guilt over the fact that they did not report. S13 disclosed that,

A year later, I heard from a mutual friend that [the man who assaulted me] had enrolled in medical school and that is the moment where I most seriously considered, even though over a year had passed, reporting something because this person is going to be given a license to be around unconscious bodies in a position of authority. So I felt, and it still makes me feel kind of crappy saying this now, because I didn't report... I felt like if they did this to someone else, in a similar situation, like there's this vague sense of responsibility that I know is not true. I'm not responsible for what they do. [But maybe I could], through reporting, ring a warning bell. Which is not that this person maybe should never go to medical school, but maybe there should be some sort of intervention? Or maybe they shouldn't. I remember doing some Googling, trying to find out maybe they've assaulted other people and not finding anything. We know a lot of people who do this kind of behaviour do it repeatedly and so how can we make other people safer from them? And I guess I don't know that I would have gotten that through reporting, but I would have felt like there would have been a paper trail or something maybe. Maybe there wouldn't have been. I don't know. It wasn't even on my radar in the immediate aftermath, only when I realised that this person was going to be in a position of authority where they would be around unconscious bodies. Then I was like, holy shit.

While not convinced that reporting would have done anything to ensure that her abuser would have stopped harming others, S13 wondered about the power of a “warning bell”, particularly in light of how many offenders who commit sexual assault are repeat offenders.<sup>606</sup> She understood

---

<sup>606</sup> There are a number of studies that suggest sex offenders tend to commit multiple offences in their life time. See: Rebecca Campbell et al, “Connecting the Dots: Identifying Suspected Serial Sexual Offenders through Forensic DNA Evidence” (2020) 10:3 *Psychology of Violence* 255; John D Foubert et al, “Is Campus Rape Primarily a Serial or a One-Time Problem? Evidence from a Multicampus Study” (2020) 26 *Violence Against Women* 296; David Lisak & Paul M Miller, “Repeat Rape and Multiple Offending Among Undetected Rapists” (2002) 17:1 *Violence*

that it was not her responsibility to stop her offender's actions, but she still felt guilt about her decision not to report. This sense of personal accountability was something that some survivors struggled with as they attempted to navigate their choices. Many survivors do not report because doing so would cause them more harm than any benefit they may receive. Yet several of those I spoke with felt an obligation to potentially harm themselves for the benefit of others. This dichotomy of choices creates a difficult decision matrix.

#### **6.4.2 Monitoring the Offender**

Part of protecting others from harm means monitoring offenders to ensure that they are keeping their promises in regards to behavioural change. By far the most common comment from the survivors I spoke with on maintaining accountability was the need for sex offender registries. To survivors, a registry should prevent sexual assault from being ignored by making an offender's history of violence known to those around him. S8 described it as the application of a Scarlet R(apist) to offenders, letting everyone around them understand the potential risk they may represent.<sup>607</sup> Thus, to those that participated in my research, a registry was both part of offender accountability and social accountability.

In Canada, there are sex offender registries at both the federal and provincial levels, though the monitoring survivors spoke of wanting is far beyond their scope.<sup>608</sup> Sex offender registries are meant to help the police track down potential suspects when a sexual assault has

---

and Victims 73. However, there is substantial controversy over the research involving serial rapists: Glenn Kessler, "Biden's Claim that the 'Average Rapist Rapes About Six Times'" (12 April 2021), *The Washington Post*, online: <<https://www.washingtonpost.com/politics/2021/04/12/bidens-claim-that-average-rapist-rapes-about-six-times/>>.

<sup>607</sup> This is a reference to Nathaniel Hawthorne's *The Scarlet Letter* wherein a character must wear a scarlet letter A on her clothing to signify to the community that she is an adulteress so that those around her can properly shame and shun her for her behaviour.

<sup>608</sup> See, for example: *Sex Offender Information Registration Act*, SC 2004 c 10; *Christopher's Law (Sex Offender Registry)*, 2000, SO 2000, c 1.

occurred in a specific area, and to make it easier to ensure that sex offenders are complying with any section 810 orders that they have received.<sup>609</sup> They are not generally used to actively monitor sex offenders given issues with privacy as well as the resources necessary to do this.

Additionally, in Canada, sex offender registries are not public databases, unlike in some US jurisdictions where they are searchable by all citizens.<sup>610</sup> In areas with public registries, anyone can look and see if there is a registered sex offender in their neighbourhood. This is something several survivors mentioned wanting mirrored in Canada. This particular model was explicitly rejected in Canada based on the need to balance public needs and the privacy rights of offenders.

During my interviews, L6 mentioned another downside to sex offender registries. He argued that,

You can't negotiate sexual assaults now because it's prosecute or don't prosecute. And buddy is going to have a criminal conviction. Is going to be on the sex offender registry for life. He's not going to be able to get near kids in any kind of professional or volunteer capacity. Ever. Why would anybody sign up for that?

While L6 confirms that inclusion on the sex offender registry is something that people feel ashamed about, he notes that the perception of what this inclusion entails can make it more likely for an offender to fight any charge of sexual assault.<sup>611</sup> This may prevent offenders from entering guilty pleas early in the process and thus puts survivors through additional trauma, possibly

---

<sup>609</sup> *Code, supra* note 203, s 810. Section 810 allows the courts to issue a peace bond which requires the named party to comply with certain conditions. In the context of sexual assault, offenders will often be barred from living near areas where minors congregate, or may be banned from being near particular individuals.

<sup>610</sup> Andrew Harris & Rebecca Cudmore, "Community Experience with Public Sex Offender Registries in the United States: A National Survey" (2018) 29:3 *Criminal Justice Policy Review* 258.

<sup>611</sup> There are plenty of very negative consequences associated with being listed on a sex offender registry, and there is a healthy amount of literature on the effects of SORs on offenders. However, that particular discussion is outside the scope of this paper and will not be detailed here. For example, see: Tewksbury *supra* note 598. It should also be noted that sexual offence charges will come up on routine record checks of people working with vulnerable populations as well, so it is not an issue related exclusively to SORs.

preventing them from achieving any form of justice at all. The idea that an offender can be negatively impacted by the consequences of his actions is not something that can be avoided, nor should the legal system protect people from themselves. However, it is important to think about the overall goals of someone who has come forward to report a sexual assault and what the likely results coming out of a particular system will be.

According to S5, registries can be frustrating for survivors as they do not actually do much in the way of monitoring someone's behaviour and providing them with opportunities to change:

But probably something along the lines of... not exactly the sex offender list we have right now in Canada because I think it is completely ineffective. But something along those lines where they have a check-in, not necessarily with police, but with some sort of caseworker who is checking in with them and saying, "what are your thoughts on this and what have you done". And actually given some sort of program to study and do better, and check-in on how they are doing with that. Check in with their community and their support network to see how this person is doing. But that's so involved, it's basically impossible.

As discussed in the section on education above, one cannot expect someone to change without providing them the means necessary to do so. A registry places some restrictions on a person's life, but it does not offer any educational components. Several of the survivors I spoke with envisioned a more active monitoring that would help an offender learn to unpack and challenge his harmful and violent behaviours.

Though it may seem as if probation could be the solution to this issue, the way this type of sentence is structured also fails to fulfil the educational monitoring role desired by the survivors I interviewed. Probation allows an offender to serve all or part of his sentence within

the community under the supervision of a probation officer.<sup>612</sup> Offenders who are on probation are subject to a series of restrictions, such as being on good behaviour and ensuring that the probation office is aware of where they live and work.<sup>613</sup> They may also be ordered to remain within a certain jurisdiction, keep a curfew, refrain from contacting certain people (such as the victims of their crimes), or report to a probation officer.<sup>614</sup> While a probation officer is supposed to monitor the offender's behaviour and help them reintegrate in society, in practice, very little active monitoring is actually done of offenders.<sup>615</sup> In Ontario, home visits and curfew checks are infrequent, and the probation system has been heavily criticised as failing to sure that offenders are not engaging in illegal behaviours.<sup>616</sup> In a Global News investigation, offenders on probation for sexual offences revealed how lax the restrictions they were under were and how easily they could breach their conditions without repercussions. While probation can be a useful tool when used well, it would need to be greatly expanded to meet the demands of the women that I talked to.

For S2, her idea of justice was grounded in the hope that abusers could and would change:

This is what I actually want. I want an island. It would be a temperate climate. Safe. But it is an island. And I would put these people on this island. I would give them all the resources, like solar panels, water filtration systems, stuff to build shelters and stuff. Raw material. I'm going to give you the farming material. You have to make it work. You don't make it work, you die. Every six months, we'll go there and we'll give you a little

---

<sup>612</sup> *Code*, *supra* note 203, s 731.

<sup>613</sup> *Ibid*, s 732.1(2).

<sup>614</sup> *Ibid*, s 732.1(3). There are several other optional orders available depending on what the court feels is needed to help prevent recidivism on the part of the offender.

<sup>615</sup> For example, see the following criticisms of the probation system in Ontario: "Annual Report 2014: Chapter 3, Section 3.01: Adult Community Corrections and Ontario Parole Board" (2014), *Office of the Auditor General of Ontario*, online: <<https://www.auditor.on.ca/en/content/annualreports/arreports/en14/301en14.pdf>>; Leslie Young & caroja12, "Ontario's Probation System 'A Joke', Say Offenders" (9 May 2017), *Global News*, online: <<https://globalnews.ca/news/3429225/ontarios-probation-system-a-joke-say-offenders/>> [Young].

<sup>616</sup> *Ibid*.

assessment. Basically a parole hearing. See if you're good enough to join back to the mainland. It won't be proven by 'I built like five houses this month'. I'll pull all the psychologists in, not just the legal stuff. I don't want to see material gains. Have you grown? That would be my ideal. Because I'm a live and let live person at the end of the day. It's not really up to me what happens to you, but in order to right the balance a little bit, in this world, you don't get to share my resources, the air I breathe, unless you operate with good intentions.

Interviewer: You're a better human.

S2: Yeah, I don't expect you to be perfect. None of us are. But just try. I always argue that if you just try every day in everything you do, you'll be fine. You actually are a good person. Just try. But if you put the efforts in, I need to see that before I let you back in the mainland, because mainland has resources for all of us. It has air conditioning and stuff. You want that? You don't deserve it. You have to earn it. That's my ideal justice. I love that. I always fantasise about it.

Despite being optimistic, S2 still wanted to protect others from abusers until it could be proven<sup>617</sup> that they took their responsibilities to others seriously. Accountability, for S2, involved a period of separation where offenders would prove that they could live among others without harming anyone else. Offenders would be monitored while they learned how to be good citizens. While her recommendation of such total separation may seem extreme, the idea of offenders having to learn how to be good members of society has been implemented in justice systems around the world. One of the most common examples is Bastøy Prison in Norway.<sup>618</sup> In Bastøy, inmates live together on an island. They must work together to make their community function, and they have many freedoms that those who are incarcerated do not usually have. Recidivism rates from those who are incarcerated in this prison are generally low.

---

<sup>617</sup> Though there are many questions raised by how proving one's accountability process was successful would look like in practice.

<sup>618</sup> Erwin James, "The Norwegian Prison Where Inmates are Treated like People" (25 February 2013), *The Guardian*, online: <<https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people>>; Erwin James, "Bastoy: The Norwegian Prison that Works" (4 September 2013), *The Guardian*, online: <<https://www.theguardian.com/society/2013/sep/04/bastoy-norwegian-prison-works>>; Ryan Berger, "Kriminalomsorgen: A Look at the World's Most Humane Prison System in Norway" (10 December 2016), *SSRN*, online: <<https://ssrn.com/abstract=2883512>>.

## 6.5 Accountability Requires Social Condemnation

The need for society to participate in accountability has been a theme within this chapter and dissertation as a whole. Part of the purpose of the legal system is to make clear what behaviour is acceptable in society and what is not. We create laws to deter people from engaging in certain actions, and those that do are held to account in a public legal system so that everyone can see what consequences breaching these rules will incur. In criminal law, one of the purposes of sentencing is that of denunciation.<sup>619</sup> By convicting and sentencing someone, society at large is stating that the act committed was wrong and will not be tolerated.

Unfortunately, social condemnation of sexual assault remains a fraught issue. On one hand, the average person is likely to state that sexual assault is a horrible violent crime that cannot be allowed; on the other, when sexual assaults do occur, rape myths are used to diminish the seriousness of the particular event.<sup>620</sup> In an earlier part of this chapter, I talked about the importance of societal-level education on sexual assault. Several of the survivors I spoke with believed that if the general public had a better understanding of sexual assault, society would be better at condemning of this type of violence which would help promote accountability among offenders.

During my interviews, survivors stressed the importance of having their communities and the people around them both understand and support the condemnation of sexual assault. Sexual assault is often committed in private with only the offender and survivor present. It can be easy to dismiss these situations as misunderstandings between two people that outsiders cannot possibly know the full story about. However, many crimes are committed away from public sight

---

<sup>619</sup> *Code*, supra note 203, s 718.

<sup>620</sup> Stabile, Smith & Skinner, Koshan, Suarez & Gadalla, *supra* note 25.



and are not treated with the same sense of suspicion as sexual assault. For sexual assault to be taken seriously, it cannot simply be dismissed as a private action and all forms of this violence must be seen as unacceptable.

### **6.5.1 Public Naming and/or Shaming**

Survivor use of public naming and/or shaming has been on the rise thanks to movements such as #MeToo and #timesup. After all, if the legal system is failing to offer survivors what they need in the aftermath of a sexual assault, then they may seek other avenues of getting an appropriate resolution to their situation. One way that survivors have been attempting to find accountability outside of the legal system is by turning to social media—or sometimes the traditional media—to tell their story to the public.

There are many reasons why individuals may choose not to report an assault to the police, but still want to hold the person who hurt them to some form of community accountability. According to S4,

I like that stuff kept within the community for safety reasons because I think it does give people, or the victim-survivors, a feeling of being heard. It allows us a chance to have that feeling where we are helping others. Like hey, watch out for this person.

As discussed earlier in this chapter, survivors themselves often feel the need to protect those around them from potential harm. By naming the person who hurt them, they can warn others of the possibility of danger. Furthermore, by engaging in these types of conversations outside of the legal system, a survivor can retain some control over who is involved. While some may prefer to make their statements available to as wide an array of people as possible in public posts on Twitter and other platforms, others will set up “whisper networks” so that the information is

spread around only to the people who may need it the most.<sup>621</sup> Some of the women I spoke with felt safer in situations where their stories were less likely to attract attention from people who would not believe them or may unfairly challenge their experiences. By controlling their own narratives, they hoped to minimise some of the harm that might occur from breaking their silence while still ensuring that they protected others from the person who harmed them.

Support for the option of public naming and/or shaming did not mean that survivors believed this was a better option than the courts. Survivors had several criticisms of the process. S2 explained that,

It's [public shaming] our last resort. I wish it was better. I wish there were better options. It's basically what happens when we keep shouting and shouting and telling all the different people you can disclose to... your union, your employer, whatever. Your medical person. It's not getting anywhere. That's the only reason. The public will listen.

When they can find no one in the legal system to help them, survivors will look for another place to seek what they need from. For some of the women I spoke with, resorting to making their story public represented a failure of the law to adequately respond to this violent crime.

Unfortunately, there can also be serious consequences for survivors who choose to publicly name and/or shame their abuser. S8 stated that she considered adopting a media strategy as part of trying to deal with her assault. However, she did not want to be publicly associated with the man who hurt her, and talking about what he did to her could make it hard for her to get employment in her field in the future. It would put her at risk of violence from the offender's supporters. S8 stressed that there is a power imbalance inherent to sexual assaults, and if one's offender had a lot of social capital, a media strategy could backfire and do great harm to the

---

<sup>621</sup> A whisper network arises in a situation where there is a potential predator within a community and members of this community share this information with each other. The term was used frequently in #MeToo and #timesup discussions about the entertainment industry where female actors would warn others about certain men who were known to sexually harass the women who worked for them.

survivor. Instead of resulting in any form of accountability for the offender, S8 was concerned that she would be blamed for what happened or accused of being a liar if she attempted to name and shame the man who assaulted her outside of the courts.

Another potential risk with publicly naming an abuser is that he may use the law to silence the woman who survived his violence. According to research by Mandi Gray, men are increasingly using civil litigation to both prevent and punish survivors for speaking about what has happened to them.<sup>622</sup> Recently, Steven Galloway, a University of British Columbia professor and Canadian author, brought a defamation suit against over 20 separate women.<sup>623</sup> This group, while it included the one survivor who spoke out directly against him, also contained many women who merely spoke about the issue publicly on social media. In response, 11 of the defendants filed an anti-Strategic Litigation Against Public Participation (SLAPP) application. A SLAPP is a type of law suit brought for the purpose of preventing public discourse on a topic.<sup>624</sup> In this situation, the defendants were arguing that Galloway was using claims of defamation to silence women from talking about sexual assault publicly, even when not necessarily referencing Galloway directly.<sup>625</sup> The threat of a retaliatory lawsuit can prevent survivors from speaking

---

<sup>622</sup> Mandi Gray, *Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence* (PhD Dissertation, York University, 2021) [unpublished] [Gray].

<sup>623</sup> Douglas Quan, “She Accused A University Prof of Sexual Assault. Now He’s Suing for Defamation. Some Fear the ‘Landmark’ Case could have a Chilling Effect” (8 April 2021), *Toronto Star*, online: <<https://www.thestar.com/news/canada/2021/04/08/she-accused-a-university-prof-of-sexual-assault-now-hes-suing-for-defamation-some-fear-the-landmark-case-could-have-a-chilling-effect.html>>.

<sup>624</sup> “Public Participation: Anti-SLAPP”, *Canadian Civil Liberties Association*, online: <<https://ccla.org/focus-areas/public-participation-anti-slapp/>>. In BC, SLAPPs are dealt with under the following legislation: *Protection of Public Participation Act*, SBC 2019, c 3. Ontario also has legislation dealing with SLAPP occurrences: *Courts of Justice Act*, RSO 1990, c C.43, s 137.1.

<sup>625</sup> Gray, *supra* note 622 at 4-5.

about what happened to them, and, in fact, Gray found in her research that women did limit their public dialogue about sexual assault for fear of being sued in this manner.<sup>626</sup>

In December 2021, the British Columbia Supreme Court dismissed the SLAPP case, ruling that the harms Galloway purported to suffer from defamation of his character were serious enough that it was in the public interest to allow them to be adjudicated.<sup>627</sup> While the court did dismiss some of the claims against certain defendants, the decision to proceed has serious implications for the ability of survivors to speak publicly and freely about their abusers and the violence they endured, and to seek accountability outside of the courts.

## **6.6 Conclusion**

Accountability was one of the central issues that the women I interviewed identified as crucial to any attempt to achieve justice. However, it was also one of the most complex requirements as well. For survivors, there was no one way to achieve accountability. Instead, it was something that came from a variety of sources. Accountability from offenders was often high on women's ranking of importance, though the criminal law system was not particularly well-suited to ensuring that offenders took personal responsibility for their actions. While it was a form of accountability to see someone convicted for an assault, most of the survivors I spoke with wanted to know that the offender understood that what he did was wrong and why he should never engage in such behaviour again. This was a level of personal accountability that is difficult to achieve in an adversarial system, particularly given the lack of rehabilitation options offered to those convicted of a crime.

---

<sup>626</sup> *Ibid* at 186

<sup>627</sup> *Galloway v AB*, 2021 BCSC 2344 at para 787.

Accountability was also a social issue according to the women I spoke with. If we wish for offenders to change their behaviour, it follows that society itself has a responsibility to aid in this endeavour. Accountability in this sense requires all individuals to recognise their role in the prevention and reduction of sexual violence, from legal actors to people who may think they have no personal connection to sexual assault. For the survivors I interviewed, accountability was about being responsible for protecting one another and working together to create a safer, better world.

### ***Interlude #3***

*I was sexually abused by my father when I was a little girl. It happened for years and he managed to keep it secret from even my mom. The abuse only stopped when I fled my house as a teen to get away from him. I was homeless off and on, couch surfing at friends' places and staying at a local youth shelter, but at least I was safe from him.*

*I didn't do anything about my abuse for years. I was too busy trying to survive and dig myself out of the hole that my father had dug for me. But as I got older and my life got more stable, I started to think about my past. Then I got pregnant and that seemed to trigger this intense need to deal with the issue. To deal with him and the hurt that I still carried with me.*

*There's a saying that time heals all wounds, but it has been over 25 years since my father molested me and I still want him to suffer. I don't care that he's old. I don't care whether prison does anything useful or positive. I've been in therapy for years at this point and I am still so angry. I have no guilt in saying that I want my pound of flesh.*

*It's hard to admit to this. So many people around me preach forgiveness. They tell me that I can only heal if I release all of my anger and rage. That my father is old and liable to die soon anyway. My mother says that the past is the past and we must embrace a better future. She says her grandchildren deserve to know their grandparents. The only way that will happen is if I am dead.*

*People don't like the way I talk about what happened to me and how I feel about it. They expect that I will be sad and weepy, need sympathy and compassion. They want to be able to fix things for me. To make it all better and let everyone move on. But there is no moving on from a betrayal this deep. I will never get over this pain.*

*I fantasise about hurting my father. I dream about being able to inflict on him just a small bit of the pain he tortured me with. I've thought about what beating him up would feel like. That as an old man, he'd be helpless against my wrath. These are not pretty thoughts. I don't talk about them much because I am certain that people will assume I'm crazy and deranged. I even had a hard time discussing them in therapy, but I eventually found someone who I trusted enough to admit these thoughts to. She doesn't tell me that I need to let all my negative feelings go as if that's even possible.*

*There is a difference between action and thought. I think very bad things, but I would never go out and do them. I have to be an example for my kid. I can't let her learn that violence is inevitable. But I also can't teach her that people are allowed to hurt you. It is a tough balance and I don't know exactly how I will explain this all to her as she gets older. But I know that the actions I take now will speak louder than whatever words I come up with.*

*I've been talking to a lawyer. Even though it has been years, I can still report my father and have him charged with a variety of sexual offences. I can still force him to stand trial for what he did to me. My lawyer has advised me that it is a risky choice to make. Historical assaults are always*

*harder to prove and people will have sympathy for a man in his late seventies. It's difficult to sentence an elderly person to the harshness of prison. But I don't care. I don't want to be the bigger person. I want my father to suffer. I want him to be punished. I want him to sit in a lonely prison cell for the last of his days and die without his freedom.*

*Maybe I'm not a good person, but I don't really care that much about what others think of me. They didn't live through what I have lived through. They haven't had to learn how to survive with so much grief and rage and despair. Even though reporting my father and taking him to court is going to open many wounds, I think that's what I need to do to be able to move on.*

## Chapter 7: Punishment and Incarceration

### 7.1 Introduction

Punishment is, at its simplest, the intentional application of a negative consequence after a wrongful behaviour has occurred.<sup>628</sup> While punishment and accountability were often intertwined in my conversations with survivors, accountability in the context of this dissertation is focused on the offender and society as a whole taking responsibility for harmful norms and changing their behaviour. Punishment, on the other hand, was focused on ensuring that the offender suffered because of the harm that he chose to cause. An offender can be accountable by accepting the consequences of his actions, but punishment in specific focuses on what the negative consequence of his choices should be and what these penalties are supposed to do. The survivors I spoke with were mainly focused on incarceration as the primary form of punishment they considered for offenders, thus thoughts on imprisonment form the core of this chapter. However, it is important to note that incarceration is not inherent to nor is it the only aspect of punishment, though the two are often conflated.<sup>629</sup>

The survivors I interviewed expressed significant conflict in their opinions—both individually and collectively when compared to one another—about punishment and incarceration. While many desired the implementation of some sort of punitive element in a sentence, they also questioned whether this was a fair response to have, and whether incarceration was a useful approach to take when responding to sexual assault. Many of the

---

<sup>628</sup> Punishment is an exceptionally broad area of literature that has occupied scholars for centuries. As this dissertation is focused on the opinions of survivors, an overview of academic thought on the topic is not necessary. However, for a brief introduction to the topic, see: Antony Duff & Zachary Hoskins, “Legal Punishment” (2017), *Stanford Encyclopaedia of Philosophy*, online: <<https://plato.stanford.edu/entries/legal-punishment/>>.

<sup>629</sup> Lisa Kerr, “How the Prison is a Black Box in Punishment Theory” (2019) 69:1 UTLJ 85; Lucia Zedner, “Penal Subversions: When is a Punishment Not Punishment, Who Decides and On What Grounds?” (2016) 20:1 *Theoretical Criminology* 3 at 5-6.



women I interviewed felt uncomfortable with imprisonment and this even led some to dismiss the use of criminal law altogether because they did not want to be the cause of someone going to prison.

Even though survivors were uncertain about the utility and fairness of incarceration, most had strong feelings about the way that the law dealt with the sentencing of offenders. If they had to take the system as it was, they expressed frustration over what they saw as lenient sentences and unfair rules that they believed excused or at least minimised the harm of the offender's actions. In this chapter, I explore these sometimes contradictory opinions in order to show how complex and multi-faceted survivor justice ideals in this area are.

## **7.2 Survivor Perceptions on Punishment and Incarceration**

### **7.2.1 Incarceration: A Necessary Evil or No Other Option?**

Punishment in the Canadian criminal justice system often takes the form of incarceration. While this is not the only punishment that the legal system can assign in the context of sexual assault, it is probably the first that people think about when someone breaks the law. It is what people are taught to expect to happen when a crime is committed, particularly when that crime is violent. Consequently, it was unsurprising that most of the survivors I interviewed saw incarceration as the expected result of a successful criminal process.

The women I spoke with varied widely in their thoughts about punishment and incarceration, many feeling quite conflicted and uncertain about their views. For example, S4 stated that,

Politically I should say I am anti the prison system in general. Which I am, I think. But then there are these things. I want them to go to the moon. I don't even want to deal with these guys. I can't answer the prison sentence thing. I don't know what would be fair. I would say go to the moon... I'm not savvy enough to give a well thought-out, logical answer. I'm just like, "No, go away! Just leave us alone!"

Personal desires were sometimes difficult to separate from political beliefs. For some women, what they believed was best for both them and society as a whole was in conflict with their emotional response to the harm that had been done to them. It was a challenge to articulate their thoughts when they wanted contradictory actions.

Some women believed that prison was a necessary and deserved punishment for those who commit sexual assault. Not only was this important to signify to society and the offender himself that sexual assault is a serious crime that will not be tolerated, but it was necessary, according to S1, to ensure that the offender had an adequate amount of time to learn and change his behaviour. In this way, incarceration was intertwined with accountability. A forced and unwanted period of separation in an institution where the offender has limited options for entertainment provides a chance for education and reflection as well as being a negative consequence. For S5, this separation was especially important for offenders who were hesitant to take responsibility for their behaviour, particularly repeat offenders.

S16 believed,

...that there needs to be some sort of punishment for it... I think it's because I feel it's something that they should be living with for a while because of what they've done to the survivor—they [the survivor] are going to be living with it for a while. It should have a lasting effect on him as well.

If a survivor must contend with the harms caused by sexual assault, some considered it fitting that the offender suffers in some way as well. While stopping any further harm to the survivor and society is important, this need for at least some equity in pain has an alluring appeal to people who have been hurt. S9 explained that right after her attack, she needed safety and security, but as time passed, she came to the conclusion that she wanted her offender to face some sort of punishment for what he did. S5 added that these desires for some sort of punitive

measure are more likely to occur when an offender refuses to admit responsibility for the assault. When someone hurts you, then refuses to acknowledge the pain that he caused or help mitigate any further damage, then the desire for him to face a negative consequence can become even stronger as the harm against the survivor is prolonged.

Interestingly, as often as the survivors I spoke with talked about the need for prison sentences upon conviction, they almost immediately began to discuss their concerns with incarceration as well. The following conversation fragments with S2 illustrate this common conflict:

There's got to be some jail time.

I'm undecided on jail time.

Definitely. I'm undecided about jail time. So I'll leave it at that. Because... that type of mindset, I don't know if jail time would really effect long term change in that person. I think it would be person dependent. And frankly, it's a lot of resources going to our jail. [...] Partly now I realise because I don't know what the jail experience is like, so I can't tell.

Prison is so often presented as the only appropriate result for violent crime that it is the immediate response people think about when they are contemplating justice. Yet when the survivors I interviewed began to unpack their feelings on the matter as they spoke with me, they were not always sure that incarceration was what they wanted as a response to their assault.

According to S10,

I feel like just because of working in places and understanding abuse cycles and things and understanding that this is a mounting issue that becomes worse, I would definitely want to see some kind of punishment. [For] me as a person it gets weirdly complicated because I don't know if I agree with jail as a punishment because I think that jail is awful. Is this actually working? Is this effective? There needs to be immediate consequences in my mind so jail time because of the system that we have now, it seems like the most immediate way of punishment.

Survivors had many questions about what a prison sentence was actually like, as well as whether there was evidence that prison sentences were effective in preventing future sexual assaults. Even those who had been through a criminal process were often confused about what was supposed to happen once a conviction was secured, and whether their options offered them anything useful or fulfilling. For example, S3 believed that,

Not everyone needs punishment per se as long as they're willing to look at what they did, look at the other person, and grow. Learn to be better people. I believe that everyone has the capability to hurt anyone else and to be a good person. We all have that dichotomy in us. I think that punishment should only be reserved for people who do it consistently, like in cases of abuse or abuse of power.

Punishment, for S3, was merely one tool that could be used in an attempt to deal with the aftermath of an assault. If it was deemed necessary to achieve the aims of what the survivor and society were trying to achieve, then it should be used.

Lawyers also spoke about the ambivalence they often saw from survivors towards incarceration. L2 reflected on the fact that almost none of her clients ever asked her about the potential jail sentence an offender might receive. Instead, her clients were most interested in whether a conviction was likely. According to L7,

I've been doing this for about 16 years. I don't think I've ever had somebody come to me and say I just really want him to go to jail. That's not something I've ever heard which is not to say it's not possible. It's just doesn't tend to be what I hear. I think people go to the criminal system because they've heard all their lives that if something bad happens to you, call the police. They get sucked into that system before they really understand that they had any options otherwise, or what they're signing up for.

While there is certainly a desire for accountability and sometimes for some form of punishment on top of that, most of the survivors I spoke with were not very passionate about the need for incarceration in particular. What the majority wanted was a response from the legal system that was effective at ensuring their safety as well as the safety of others, and they

recognised that prison would not always provide this. S12 stated “I know it doesn’t help to just throw people in jail. I am very conscious of the fact that when he leaves, he might turn crazy and that really scares me”. Incarceration would separate the offender from the rest of society for a time, but it offered no guarantee that he would change his behaviour. In fact, S12 was concerned that prison would make an offender’s behaviour worse and put her and others in even more danger. She believed that a punishment that only creates further harm is not acceptable justice for any survivor.

Some survivors were also explicitly against the use of prisons for political and ethical reasons. For example, S10 talked about having a prison abolitionist perspective, but also not having any alternative response to pursue within the criminal law system. If she wanted any of the benefits of bringing her case to the criminal system, she had to accept that incarceration was a likely result of conviction. This lack of options creates a situation where survivors may feel there is no reason at all to bring their assault to the attention of the legal system if a “successful” response is something they find abhorrent or harmful. This conflict was highlighted by S3 when she recounted some of her experiences with the criminal process:

I really wish I could have gone a different way. That I was given different options. The way that things played out is not at all the way that I would have wanted it. Either before or after. I never wanted him to go to jail. I just wanted him to be accountable in some way. But jail was never part of my vision for it.

Desiring accountability more than punishment was a common theme among the survivors I spoke with. They wanted validation of the harms that they had experienced and for the offender to take responsibility for his actions. They wanted to know that he understood how harmful his actions were and that he would never engage in such detestable behaviour again. While some survivors wanted the offender to suffer because of his choices, the primary need of many of the

women I spoke with was for the harm to stop, both for them and for others. For some, prison was a useful tool to prevent the accused from hurting anyone as he was forcibly separated from others. The fact that prison was an unpleasant consequence was of only secondary or no importance to several of the women I interviewed. Punishment was not their goal, but a secondary effect of trying to prevent further violence.

Even some of the lawyers I spoke with, all of whom represented survivors as part of their practice, expressed concern over the utility of incarceration as a response to sexual assault. For example, L4, a criminal lawyer argued:

I'm a prison abolitionist... Prison doesn't work. It's stupid and counterproductive. It only makes things worse. So I have to wear both of my hats at the same time and I only have one head.

Sexual assault is a societal issue. It's a gender issue. It's a patriarchal system issue. It's not a legal issue necessarily so the idea that the only response that we have come up with to combat sexual assault, besides blaming women, is to put people in jail is just a failure of all imagination. It's a failure of all logical thinking and it's dumb. It's a societal issue and we need to tackle it on a societal level.

I do think that there needs to be a criminal system, but it's not an ideal system.

I think that a lot of people who sexually assault women have experienced violence and trauma themselves. Certainly any solution to violence against women is going to start with men.

She straddled a difficult line between working in a system that she believed was necessary, but did not provide her clients with the results that they really needed or wanted. Incarceration was an option, but the lack of variety in responses damaged the criminal system's ability to address the harms of sexual assault both proactively and reactively. L8 had similar thoughts on this topic:

I'm not necessarily a big supporter of putting people [in] jail. I'm not a "for the prison system" type. I truly believe in human rights values, and I believe that if we had a true human rights framework for sexual assault, there could be better frameworks available for remedies, as well as people taking accountability.

Right now, I think people don't want to take accountability because of what outcome they face out of the accountability mechanism. So obviously you'll make every effort to not go to jail.

L8 also did not believe in the utility of prison sentences as they hindered attempts to get accountability from offenders. If a person is given the choice of admitting responsibility for his behaviour and likely having to go to jail for doing so, then it is rational to deny any allegations of assault to avoid such a harsh punishment.

### **7.2.2 Length of Sentences: Confusion, Dismay, and Outrage**

The majority of sexual assaults are charged as summary offences under section 271 and thus receive prison sentences of under a year (if a sentence of imprisonment is ordered at all).<sup>630</sup> While survivors struggled with the question of whether or not they believed that prisons were the right response to sexual assault, they had much stronger feelings about the state of sentencing in Canada.<sup>631</sup> Given that imprisonment is the primary available response to sexual assault, survivors were upset about how this punishment is applied. For example, S11 went through a criminal trial and was disappointed despite the fact that she believed she received a “good” result:

I have a lot of feelings about sentencing in particular because the sentence [in my case] was nothing. House arrest for 4 months and then probation. And probation with the same conditions as before he was even convicted. I think it's done now. What did I get out of that? It was way too much work/emotional labour to really get nothing. Four months house arrest. He could still go to school, work, grocery store... whatever. It basically meant he had a curfew which he had breached multiple times. So great.

Survivors consistently expressed dismay over the fact that what they had learned from their own experiences, from the experiences of friends, as well as what they saw in the media showed them

---

<sup>630</sup> Rotenberg 2, *supra* note 204.

<sup>631</sup> Even some of the women who had doubts about the utility, efficacy, and fairness of prison ended up talking about the need for harsher sentences.

that sexual assault cases were not subject to the harsh sentences they believed were appropriate.<sup>632</sup>

Interview participants largely preferred a sentence length of years for sexual assault cases. When considering what an appropriate sentence would be for the scenario I created involving an employer assaulting an employee, S9 stated that,

And I'd say at least, for that particular crime, I'd say at least a two or three-year prison sentence. In terms of like a two or three-year sentence in jail, I honestly just came up with that number, but it seems like you could go to prison for three years for a lot of other things that may, in my opinion, be less severe, like a motor vehicle accident. I don't know. People used to be incarcerated for a lot less, but that's why I think specifically at least two or three years just because I think that's a good chunk of time out of someone's life. It's long enough to reflect on your behaviour. It's long enough to kind of suffer the consequences because your livelihood is severely restricted. And like two to three years, maybe I'm just saying that because I'm 28, but like two to three years, I think that's a minimum for me because I still think that's a good chunk of someone's time. That's enough for someone to save up a lot of money to buy a car or something. Or if they have nieces or nephews or children, they could miss out on a lot. So for me, it would have to be enough time for them to be like because of my behaviour I missed out on this much of my life because I don't think people like this have much empathy. So you kind of have to do it through... if you don't do this or if you don't refrain from doing that then this happens to you. I'm not going to do it because I'm going to lose out on X number of years or extra percentage of my life. And a year just seems to me doesn't seem like that long. Anything less than that doesn't seem like that long or that much of an inconvenience.

S9 focused on the idea that a sentence needs to be prolonged enough to have an impact on an offender. It has to provide a punishment that is more than trivial in order to encourage the

---

<sup>632</sup> While this dissertation is centred on survivor perspectives, it is a well-known phenomenon that the general public often thinks criminal sentencing is too lenient regardless of whether there is any evidence that such a belief is empirically true. I do not wish to imply that every opinion that I showcase must be fulfilled for survivor-centric justice to be fulfilled. As I highlight in this chapter, even the women I interviewed felt conflicted about their thoughts and feelings about incarceration. See: Brandon Sparks, "Attitudes Toward the Punishment of Juvenile and Adult Sexual Offenders in Canada: The Roles of Sentencing Goals and Criminal Justice Motivations" (2021) 2 *Journal of Child Sexual Abuse* 125; Ryan Coulling & Matthew S Johnson, "The Criminal Justice System on Trial: Shaming, Outrage, and Gendered Tensions in Public Responses to the Jian Ghomeshi Verdict" (2018) 14:2 *Crime, Media, Culture: An International Journal* 311; Kimberly N Varma & Voula Marinos, "Three Decades of Public Attitudes Research on Crime and Punishment in Canada" (2013) 55:4 *Can J Corr* 549; Julian V Roberts, Nicole Crutcher, Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings" (2007) 49:1 *Can J Corr* 75; Julian V Roberts & Loretta J Stalans, eds, *Public Opinion, Crime, and Criminal Justice* (New York: Routledge, 2000).



offender to reflect on his actions and change his behaviour. She believed that an appropriate amount of time that would ensure the offender feels the negative consequences of his actions should be at least a few years long.

Other survivors argued that sentences should reflect the amount of harm that was caused. S6 maintained that sentences should be at least five years because “the person that was assaulted has to live with that for the rest of their lives. It’s the same as being murdered because it’s like your soul’s been murdered”. Similarly, S3 believed that,

If this were a murder case, people would generally be very supportive of a severe sentence. And when someone commits a sexual assault... that is basically a murder of the soul and it irreparably changes someone's life. It basically takes their life away from them, so it's very similar in a lot of ways to an actual murder. And that's why I think that sort of offence does deserve as severe a punishment as murder would.

S10 recommended that sentences should be treated more like those in manslaughter cases with lengths of ten to fifteen years. Finally, S9 argued that,

Can we recognise this [sexual assault] is a real crime? Can we recognise that it's a problem and that it exists and that it requires punishment and that it really hurts people? It really damages people and it requires punishment.

I want the justice system to recognise that this is a crime that requires punishment and not just some bullshit 3-month or year or whatever. Actual punishment. If you rape someone, you go to jail for 10 years or a good chunk of your life. You lose a good chunk of your life because you decided to do this to someone.

If that's the approach that we're taking with everything else, why should this be different? Why? Because it involves women?...

I want punishment. Like I said, I know there's a pattern with these types of people and I don't want to generalise but I will. In my case, they have very similar characteristics. They're really egotistical. They think the world is theirs to take. Entitled as hell. Unless there is this fear of I'm going to lose a good chunk of my life, they don't give a shit about me. They have no empathy.

The focus for these survivors was on the punitive element of incarceration. If a survivor has to deal with the repercussions of the assault for years, then they believed it is only fair that

the offender experience a serious deprivation as well, one that goes far beyond what is typically available in the criminal courts.<sup>633</sup> Additionally, these survivors felt that harsher sentences would signify that the criminal courts were taking sexual assault seriously. Only a lengthy period of incarceration would deter offenders from committing such a violent act.<sup>634</sup>

S1, on the other hand, suggested that sentences needed to be more indeterminate. She stated that “I think when you look at other ways of recovery, when you look at addicts and stuff like that, we don't say this is a 30 day treatment. It's like we'll tell you when you can leave. I kinda see it like that”. To her, length of incarceration and associated punishments was not something that the courts could accurately predict as it would depend on how the offender responded. Instead of issuing a definite sentence, S1 believed that incarceration should be seen as a period of treatment that would extend as long as was necessary for the offender to prove that he had changed and would not harm others anymore.

One common theme raised by the women I spoke with was that the complainant should have increased input in the sentence itself. In criminal cases, a complainant can submit (and often will read aloud) a victim impact statement (VIS) during sentencing that will, theoretically, have an impact on the decision given by the judge.<sup>635</sup> In a VIS, the complainant is allowed to talk about the harm that she suffered as a result of the offence in her own words. While victim impact statements may be useful in a therapeutic sense as they allow survivors to tell their story in court

---

<sup>633</sup> Life sentences are available for aggravated sexual assaults in some circumstances, but this is reserved for extremely violent assaults with significant bodily harm. *Code, supra* note 203, s 273.

<sup>634</sup> An interesting piece of data to consider given that the research on deterrence does not necessarily support such a conclusion. Nagin, Doob & Webster, *supra* note 280.

<sup>635</sup> See Chapters 3 and 5 for a discussion on how victim impact statements are not necessarily seen as a useful or therapeutic tool by many. Davies, *supra* note 255.

for everyone to hear, it is often difficult for lay people to see how these statements actually affect sentences. According to L3,

We do a victim impact statement and the victims say their lives are ruined, but we don't have expert evidence on that in criminal cases typically because the focus is not really on the harm done. It's on the crime not the effect.

Survivors in my interviews wanted to be a part of the process of crafting a sentence, though they did not demand that they be the sole arbiters of what should happen to the offender. The women I spoke with wanted to be able to tell the court what they thought was needed in their particular case. They wanted to see the courts actively taking their pain into account when crafting a sentence. Being involved would also help them understand why someone was given a particular sentence. In the current system, the court's written reasons are not always very long or detailed. Consequently, the women I talked with often felt confused about how a judge arrived at the given sentence, and whether anything they said mattered at all in the judge's reasoning.

Sentence severity as related to the type of sexual violation was another area that women expressed frustrations about during my interviews. As discussed in Chapter 4, survivors were given a scenario involving an employer assaulting an employee and asked about what sentence they would apply in that situation. I then changed a couple of the details of the scenario and asked whether these differences changed the survivor's perspective on what an appropriate response should be. The first modification was shifting the facts from penetrative sexual assault to non-penetrative sexual assault. The second was having the offender submit a guilty plea instead of insisting on a full trial.

In Chapter 3, I explained how sexual assaults can be classified under three different provisions and a sexual assault where there is non-consensual penetration of the genitals is often seen as more serious than one where someone is non-consensually touched over their clothing.

Survivors, however, did not necessarily see the change between penetrative to non-penetrative assault in the employer scenario as a shift in severity. For S9, while she contemplated lowering the sentence, she also suggested that the fact that the abuse stopped earlier in the changed scenario did not mean that additional abuse was not possible or planned by the employer. Some survivors suggested that the courts should not reward offenders for stopping the abuse because they were caught or to see them as less of a potential threat to others. S3 added that,

That is still a very traumatising attack. I've had those sorts of attacks on myself as well without any sort of penetrative assault, and they hurt almost as badly as the ones that were penetrative assaults. I would leave that in the complainant's hands to tell us how that affected them.

While it may seem obvious that some sexual assaults are more severe than others, the survivors I spoke to did not agree on exactly what made a sexual assault more or less harmful, and having their pain classified as lesser by the courts was an additional injury that made them doubt the court's ability to adequately deal with cases of sexual assault.

Guilty pleas are a common mitigating factor in sentencing as, if the offender submits a guilty plea early in the process, he does not force the complainant to partake in a trial and the associated difficulties of being a witness who will be vigorously cross-examined. Pleading guilty is also often seen as a way of being accountable for one's actions. Some survivors, however, did not believe that such behaviour required a lessening of sentence when I changed the employer scenario to include a guilty plea. S7 stated, "No, because his actions are still wrong. It doesn't change what he did. And it doesn't change the impact it has on the victim". For her, the focus needed to be on the harm that occurred during the assault. Taking responsibility for his actions was what the offender should be doing, and mitigating his sentence for doing the right thing did not feel just to S7. S9 went further and stated,

The person who immediately pleads guilty is a person to me who's probably just a coward. Not a coward, but more scared of the consequences than this other individual. I don't think it has much to do with how much empathy they have. I think it has more to do with pride. I think it has more to do with how scared they are of consequences. So I don't really care.

A guilty plea is not always an admission that an offender accepts and understands what he did was wrong. An offender may have many reasons for submitting a guilty plea that have nothing to do with making the complainant's life easier, or showing her that he feels sorry for his actions. For some survivors, no behaviour on the part of the offender should result in a lesser sentence because he was the cause of the harm in the first place. For them, just because he avoids making the process less painful, does not mean that he deserves to be treated kindly as he already made the choice to commit violence against someone else.

However, sentencing is a very difficult part of the legal process.<sup>636</sup> There are a multitude of considerations that judges must include in their reasoning, from the purposes of the sentence itself, to how the sentence remains proportional in the system overall. The perspective of survivors is just one of the many viewpoints that judges must acknowledge, though the widespread dissatisfaction that the women I interviewed reported feeling signifies that something is amiss in how sexual assault sentences are handled by the courts and understood by the public. While the interviews I conducted do not provide an exact blueprint for how sexual assault sentences should be carried out, they provide useful information as to why survivors feel frustrated, as well as how difficult this aspect of the legal process can be to understand as a non-legal actor.

---

<sup>636</sup> See Chapter 3 for a discussion on the complexities of sentencing.

### 7.2.3 Punishment and Offender Typologies

One particular issue that arose in several of my interviews was the idea that individual offenders may require different types of consequences for their behaviour. While a fulsome review of the literature in this area is beyond the scope of this project, there is extensive research on the issue of offender typologies within the field of criminology that explores the utility of differentiating categories of offenders within the criminal law system.<sup>637</sup> This area of scholarship explores why offenders make the choice to sexually assault others, and tries to determine what interventions are necessary to prevent such behaviour.<sup>638</sup> There are currently still many unanswered questions in this field about how to do this effectively, but it is an active area of research. The interviews for these projects show that offender typologies are possibly a fruitful area for discussion as survivors themselves saw important differences between the men who assaulted them.

For example, S15 spoke about being assaulted several times by different men. One assault was committed by two strangers who abducted her specifically for the purpose of sexual assault. S15 felt strongly that these individuals needed to be incarcerated in order to protect the community. She did not believe that individuals who could commit such deliberate and

---

<sup>637</sup> For example, the following is a small selection of articles about offender typologies, often from a sexual assault perspective: Gina Robertiello & Karen J Terry, “Can We Profile Sex Offenders? A Review of Sex Offender Typologies” (2007) 12:5 *Aggression and Violent Behaviour* 508; James M Byrne & Albert R Roberts, “New Directions in Offender Typology Design, Development, and Implementation: Can We Balance Risk, Treatment and Control?” (2007) 12:5 *Aggression and Violent Behaviour* 483; Vivian B Lord, Boyd Davis & Peyton Mason, “Stance-Shifting in Language Used by Sex Offenders: Five Case Studies” (2008) 14:4 *Psychology, Crime & Law* 357; Douglas Routh, Zachary Hamilton & Christopher M Campbell, “Informing the Understudied R: Exploring and Advancing Typological Research” (2019) 36:1 *Justice Quarterly* 161; Michelle L Wojcik & Bonnie S Fisher, “Overview of Adult Sexual Offender Typologies” in William T O’Donohue & Paul A Schewe, eds, *Handbook of Sexual Assault and Sexual Assault Prevention* (Switzerland: Springer, 2019); Rachel Lovell et al, “Offending Histories and Typologies of Suspected Sexual Offenders Identified Via Untested Sexual Assault Kits” (2020) 47:4 *Criminal Justice and Behaviour* 470.

<sup>638</sup> A very concise review of scholarship on offender typology is available in: McPhail, *supra* note 125 at 315-316, 324.

calculated acts were likely to be rehabilitated, and prison was the only solution she could think of that would ensure that they did not harm anyone else. For her, prison was not just a punishment, but a way of preventing these men from continuing to engage in violent behaviour. S15 was also assaulted by a former boyfriend, and, in contrast, she believed that it was likely he would be able to change his behaviour. She stressed that some people can be taught to understand how their actions are harmful, mentioning, for example, youth and lack of experience as potential factors to consider when determining whether someone had the capacity to change.<sup>639</sup>

S2 echoed these concerns, noting that she believed some offenders were unaware of how their behaviour affected others, believing themselves to be acting in an appropriate manner.<sup>640</sup>

She stated that,

It will depend on the particular person. Hopefully there are different categories of therapy that you can go into. I want to add in the piece about inequality and sexism. It's like, why do you not push yourself on to somebody? There's the odd time that someone really thought—it wasn't from a whole deep intent thing—I must get you. I've seen those where it only got down to a very enthusiastic level of flirting. You can tell it was just pure enthusiasm. They just forgot.

Thus, it is important to consider the offender's reasons for acting the way that he did. His beliefs and reasoning will have an effect on what an appropriate response is. For example, other survivors mentioned the need to consider whether an offender had committed multiple assaults as a crucial factor in determining likelihood of change.<sup>641</sup> A young man learning boundaries still commits a terrible wrong when engaging in sexual assault, but how the legal system responds to him in order to deal with the aftermath of the violence is likely to differ than what a serial rapist requires.

---

<sup>639</sup> Both of these are considered mitigating factors by the courts.

<sup>640</sup> Rape culture teaches men that it is socially acceptable to ignore the boundaries set by women in their pursuit of sexual conquest. Stabile, Smith & Skinner, Koshan, Suarez & Gadalla, *supra* note 25.

<sup>641</sup> This is considered an aggravating factor in sentencing, in contrast to the preceding section on mitigating factors.

Not all survivors, however, supported the belief that certain offenders were more capable of shifting their behaviour. According to S9, “there is a very specific type of person who commits these acts. I don't believe they feel empathy. I don't believe they want to feel empathy and I don't believe that they care about how I feel.” This perspective leads to the uncomfortable question of whether some people are irredeemable leaving incarceration as the only method of trying to prevent them from causing additional harm. For as bleak and pessimistic as the women I spoke with could get, most agreed that the vast majority of people, even those who have committed a sexual assault, should not be seen as a lost cause, and putting them in prison forever was not a good method of dealing with them.<sup>642</sup>

#### **7.2.4 Contending with Anger**

Before moving onto other forms of punishment, it is important to address the emotional dimension of punishment from a survivor's perspective. There is no uniform set of reactions to sexual assault, but many survivors undergo waves of intense emotions, often including rage and anger.<sup>643</sup> They have been hurt and it is a very human reaction to want to lash out and project that pain onto others. The legal system, however, does not provide a lot of space for this type of anger. As has already been discussed in this dissertation, survivors are treated as witnesses in a criminal process and are under pressure to present their experiences in a steady and emotionally constrained manner when talking to the court.<sup>644</sup> It is presumed that they will be upset, but not

---

<sup>642</sup> Some of the survivors I interviewed noted that sexual violence still occurs in prisons as well, so prison should not be seen as a foolproof way of stopping all harm, even if an offender is never released.

<sup>643</sup> See: Barry Krakow et al, “Sleep Disorder, Depression and Suicidality in Female Sexual Assault Survivors” (2000) 21:4 *The Journal of Crisis Intervention and Suicide Prevention* 163; Fiona Mason & Zoe Lodrick, “Psychological Consequences of Sexual Assault” (2013) 27:1 *Clinical Obstetrics & Gynaecology* 27.

<sup>644</sup> See Chapter 5 for additional discussion of this topic. Specifically, Craig 2018, *supra* note 27.



too upset or it will impinge on the functioning of the legal process they are engaged in. They are expected to be in control of themselves and to act according to the rules of the stoic court.

During my interviews, I asked survivors to imagine a world in which they could respond to an offender's assault with any action they saw fit. While this prompted many discussions about sentence lengths and novel approaches, it would be remiss of me to not talk about the fact that some survivors admitted one of their first impulses was violence. I heard several fantasies about wanting to physically harm the offender by hitting him with a bat or other instrument just so that he understood what it was like to suffer and be in pain. Some survivors described revenge fantasies that tied back to the details of their assault. According to L1,

One client of mine would want him behind bars forever and be like, he's so dangerous; he should not see the light of day ever. She's so angry. And I can give you an example of what kind of clients think like that because this was an intimate relationship. Not only did he violate her, he also talked about violating her minor child. So of course she's like he is dangerous. He was in this intimate relationship with me where he not only harmed me, he harmed my child. I can understand why she's saying that. I can completely agree with her that that's how you feel and that's the right kind of feeling. That might not happen, but that's the right feeling in that circumstance.

By bringing up the concept of anger and revenge fantasies, I do not mean to suggest that the legal system should adopt a system of corporal punishments.<sup>645</sup> In fact, most of the survivors who talked about their violent feelings also noted that they knew that these were emotions they could not and would not act upon. However, I do not think that a discussion about justice through the eyes of survivors can ignore the way that these strong, negative emotions can influence someone's experience of a legal process and the end result. If a survivor is mired in

---

<sup>645</sup> Some people have, however, attempted to defend the use of corporal punishment in modern states. This is not a reform that I support: Graeme R Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* (New York: Harrow and Heston, 1995); Peter Moskos, *In Defense of Flogging* (New York: Basic Books: 2013).

revenge fantasies, is it possible for her to feel that justice is done when a trial usually results in a short period of imprisonment (if even that)?

Elsewhere in this dissertation I discussed the need for survivors to have access to supports such as their own legal counsel and counselling services.<sup>646</sup> By ensuring that survivors have connections to people who can help them navigate the complexities of the legal system and their own emotional responses, it is likely that their experiences and perspectives on justice will shift.<sup>647</sup> Sexual assault is often a devastating experience, and it is understandable that those who are hurt in this manner will need help recovering from the aftermath of the crime. The fact that some survivors feel intense anger and want the offender to suffer is something that the legal system needs to address directly because it will impact how a person views the legal system itself. It is unrealistic to assume that all complainants will be able to embody the expected level (and type) of emotions that the courts demand. Further, complainants, who are lay people and not used to the courts, should not be punished for not being able to emulate how professional legal actors conduct themselves. Survivors need some sort of outlet for their feelings and a guide to help them deal with their emotions during the difficulties of a legal process without judgment or shame.

### **7.3 Beyond Incarceration: Other Forms of Punishment**

#### **7.3.1 Restitution**

In Chapter 5, I discussed at length how survivors saw financial support as an essential part of healing and justice after a sexual assault. The topic of restitution also came up in the context of punishment. Where should the money that survivors need come from? In the system

---

<sup>646</sup> As discussed in Chapter 5.

<sup>647</sup> This harkens back to the concept of sequencing justice which I highlighted in Chapter 1. Sequencing justice is the idea that justice interests shift over time as a survivor's life changes. Holder & Daly, *supra* note 40.

that existed at the time of my interviews, that money most frequently came from sources such as the CICB<sup>648</sup> or from civil trials against those involved in the violence.<sup>649</sup> There has been some conversation about the ability of the criminal courts to ease the financial burden faced by complainants in sexual assault cases as well. For example, restitution recently came up in the case of *R v Ururyar* wherein the trial judge ordered the offender to pay restitution to the complainant, an unusual order in sexual assault sentencing.<sup>650</sup> While the criminal courts have the ability to order restitution from offenders, it is not an order that judges use frequently, nor does it cover all potential financial claims that a survivor may want to make.<sup>651</sup> For the most part, it is expected that survivors will pursue a claim within the civil courts for financial damages against the man who abused her.

Survivors that I spoke with had mixed opinions about the use of restitution as punishment. For some, the money was not just personally helpful, but they felt that it made the offender suffer a concrete loss that he could understand. As S3 states, “he gets to suffer a punishment and you get reparation all in one go”. Thus, restitution can serve a dual purpose. Furthermore, S12 argued that a lack of restitution on the part of offenders was another way for them to deny their own accountability and force society to deal with the financial consequences of their crime.

---

<sup>648</sup> As mentioned in Chapter 3, despite being such a popular option among the survivors I spoke with, the CICB is no longer available. Its replacement and the devastating impacts this has caused will be discussed in Chapter 9.

<sup>649</sup> See Chapter 3 for more information on both the CICB and civil trials.

<sup>650</sup> See: *R v Ururyar*, 2017 ONSC 4428 at para 5. The conviction of the trial court was overturned on appeal, making this order from the trial judge moot. While the appeal decision did not touch on whether the restitution order was a valid application of law, the *Criminal Code* does set out rules for the courts to order restitution in criminal cases.

See: *Code*, *supra* note 203, ss737.1-741.2.

<sup>651</sup> Lawrence, *supra* note 409.

However, many of the survivors I spoke with were also concerned about the inequitable impact that applying punitive financial consequences to offenders could have. According to S1,

I'm going to use [one of the men who hurt me] as an example. I don't know him extraordinarily well, but I know his parents are well off and his parents are lawyers in Toronto. Is his parent's money going to solve his problems? No, they're probably going to go, you idiot, you don't get your allowance this week. Something stupid like that....

But I'd hate to see somebody who... had been sexually abused as a kid and they were paying their way through college, working three jobs, having a really hard life, then this happened to them. Well, this situation [their decision to sexually assault someone] happened I should say. And I was like yeah, pay me a thousand dollars and they couldn't afford it and paying \$1000 means that they now will be homeless. That's not what I want either.

Financial consequences can have drastically different effects on offenders depending on their life circumstances. For some offenders, it will be easy to pay any order of restitution and move on from the situation without much long-term impact. For others, restitution orders may have an exceptionally deleterious effect on their lives and the lives of those they care for. It is inherently unfair to punish some offenders more than others. It also creates the potential of criminalising certain offenders even further if they are unable to pay the ordered restitution and additional legal actions are taken against them.<sup>652</sup> For many of the survivors who participated in my interviews, this was not justice.

S11 recommended a more individualised approach be taken in regard to any potential restitution. She suggested that the specific circumstances of the offender would need to be taken into consideration so that any order of restitution could be crafted to respond to “who they are and what would be instructive for them. Something that would be severe enough that they won't do it again.” This type of individualised approach creates an issue involving proportionality as it

---

<sup>652</sup> See: Traci R Burch, “Fixing the Broken System of Financial Sanctions” (2011) 10:3 *Criminology & Public Policy* 539; Laura Appleman, “Nickel and Dime Into Incarceration: Cash-Register Justice in the Criminal System” (2016) 57:5 *Boston College Law Review* 1483.

means offenders will be treated differently for the same crime.<sup>653</sup> This situation also brings up the question of whether it is fair to the complainants in these cases. A survivor is not able to choose the person who attacks her. By allowing restitution orders to be different, some survivors would benefit more than others, another unfair situation.

The issue of fairness also came up in systemic arguments regarding restitution. S4 discussed how she knew everyone paid into a fund for victims of crime, and as necessary as those funds were, she felt uncomfortable with the fact that everyone was responsible for fixing the harms caused by those who broke the law. Similarly, S14 talked about how the offender in her situation was a doctor, yet money for medical expenses arising from physician abuse comes from their regulatory body.<sup>654</sup> She argued that she did not “think it's fair that another physician who is a complete sweetheart... part of their contribution is going toward my therapy when it's actually that individual that performed the assault.” While funds were necessary, some survivors felt that allowing them to come from individuals or institutions other than the offender felt inadequate. The responsibility and the consequences of the sexual assault were not truly felt by the person who caused the violence.

On the other hand, for some of the women I spoke with, any value in an order of restitution from the offender was not as attractive as the less combative nature of processes such as the CICB. In legal actions, one must prove that harm has occurred, what that harm is worth,

---

<sup>653</sup> According to the *Criminal Code*, “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”. *Code, supra* note 203, s 718.1. For more of a theoretical overview of proportionality in sentencing, see: Joel Goh, “Proportionality - An Unattainable Ideal in the Criminal Justice System” (2013) 2 *Manchester Rev L Crime & Ethics* 41; Morris J Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28 *Oxford J Legal Stud* 57. For an example of the complexity of proportionality in sexual assault cases, see: Janine Benedet, “Sentencing for Sexual Offences against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences” (2018-2019) 44 *Queen's LJ* 284.

<sup>654</sup> A survivor can always sue an individual doctor in civil court for damages, but professional regulatory bodies generally have insurance which, in the event that she is successful in her claims, will make it much easier for a survivor to obtain any financial remedy the courts grant.

and then be cross-examined on one's claims. The thought of having to quantify their harms during a criminal or civil trial was not something that all survivors felt prepared to attempt. S4 explained that the freedom to apply for something like the CICB was important as the offender may not even be informed about the process, making it a safer and sometimes easier experience for survivors. According to S13, as I highlighted in Chapter 5, avoiding a face-to-face interaction with the offender was something she thought a lot of survivors would appreciate, and the CICB seemed the most "manageable whereas the other things sound really big and difficult".

Punishment and accountability were not always crucial considerations for survivors when compared to their ability to access funds that would help them deal with the expenses they incurred as a result of the abuse they were subjected to. As discussed in Chapter 5, financial compensation is often a form of justice, or, at the very least, a precondition to justice for those trying to recover from a sexual assault.

It is also important to acknowledge the unique costs of the criminal courts for survivors. In a civil trial, a plaintiff can ask for costs to be awarded, potentially helping her to recoup some of the expenses of bringing the defendant to court.<sup>655</sup> However, as the complainant in a criminal trial is not a party, but a witness, she has no ability to ask for costs. Throughout my interviews, all survivors stressed the need for legal representation for women engaging in a criminal process. However, this is an expensive burden for many and there is little financial aid for such representation available.<sup>656</sup> S3 and S4 brought up the need for cost awards in criminal trials as a

---

<sup>655</sup> However, costs are not guaranteed, and there will always be additional expenses associated with the process that will not be covered by any cost award. In general, a civil trial is a very expensive undertaking for a plaintiff and is often only worthwhile if the defendant has enough money to pay for damages and costs.

<sup>656</sup> As discussed in both Chapters 3 and 5, while the Independent Legal Advice program exists in Ontario (and similar programs in several other provinces), it only covers four hours of legal aid and anything else survivors will

way of making the process more equitable for survivors without burdening the state to supply these funds. However, this assumes that the offender is in a position to pay for such legal costs, and that the survivor would be able to retain counsel with nothing but the hope of a potential cost award (as additional damages are not part of a criminal trial).<sup>657</sup> The issue of restitution is complex. While some survivors supported its use as a form of punishment, most were concerned about inequitable application of such orders, as well as stable and efficient access to financial resources for sexual assault survivors.

### **7.3.2 Employment Restrictions**

Another area of punishment that arose in my conversations with survivors concerned the offender's employment opportunities. As noted earlier, one of the scenarios I opened my interviews with dealt with an employer who sexually assaulted one of his employees. This resonated with several of the women I spoke with as they too had been harmed by someone in their working lives.

In my scenario, the employer engaged in an escalating pattern of unwanted sexual behaviour towards his employee despite her attempts to communicate her lack of consent with him. I asked my interview participants what they would do if they had complete power to sentence this offender in any way that would make them feel as if justice was served. Several of them targeted the fact that the offender was in a position of power over his employees.

According to S1,

I almost want to say his restaurant has to be in some sort of blind trust. Like he can't focus on that; it's not his anymore. I don't know for what period of time... until he is deemed able to not offend again. It's hard to say what that looks like, right? Are you

---

need to pay for themselves. The help obtained through the ILA program cannot include in-court representation either.

<sup>657</sup> This is an issue in civil trials as well, though at least some lawyers will take civil cases on contingency.

going to put him in a scenario where.... I don't want it to be like someone has to be baited in order to see whether this guy is trustworthy or not. But if that means that he can never go back to the restaurant, then so be it. Eventually, maybe it's handed down to another family member or something like that.

To her, the offender's actions required a significant loss on his part in order for justice to be done. She believed that this offender needed a punitive consequence to deter him from using his power in such an unfair manner again. This type of response goes far beyond what the Canadian criminal courts could impose in a sexual assault case. S7 and S8 also advocated for mandatory restrictions on employment as necessary for ensuring deterrence in the workforce, though the survivors I spoke with struggled to define what these restrictions should be.

One of the primary recommendations I heard was that the offender must disclose his actions in the workforce so that employers and fellow employees were warned about his behaviour. S12 stressed the importance of deliberately and publicly labelling the action so that other potential victims could see what had occurred and realise that they were not alone. She believed that men who were outed as abusers in the workplace took on the burden of the stigma of their actions while also warning others of potential risk. S15 suggested that some people simply do not deserve to have certain kinds of jobs, particularly those where they are in power over others, after committing such a violent act. For her, an adequate punishment would be to disentitle them to such opportunities. Once again, the intertwining of accountability and punishment can be seen as the women I talked to spoke of protecting others, but also making sure the offender suffered negative consequences for his behaviour.

During my interviews, survivors also expressed concern over how to address the more systemic aspects of sexual violence through punishment. Dealing with a single offender can



erase the participation of the institutions and individuals that enabled him to commit harm within the workforce. For S9, addressing sexual assault meant dealing with a variety of larger issues:

What I would want to see... would be that whole company gets shut down because of the problem. Or to allow somebody to come in like a social worker and completely change that work environment because that to me is the issue. Allowing those kind of actions to perpetuate and again... those things are typically allowed to go on by the environment that is created. I would want to come in and somehow change it so that there would be either somebody who is like a social worker and understands the dynamics of power... put a female identifying person in a position of power or several of them. Make sure that they completely revamp the structure of the place. I mean that would be, in a beautiful ideal world, that's what I would want.

Every sexual assault occurs within a specific context affected by other actors. What about one particular workforce led to a situation where one person was able to assault another? How can the business be changed to ensure that everyone is safer? Punishing the offender may provide some deterrence, but true change will require substantially more effort. What happens, as S15 cautions, when one abuser is fired, but another ends up taking his place? Where does the original offender go and what prevents him from harming someone else at his next place of employment? Once again, survivors pointed to the need for social accountability, this time from employers, combined with punishment for institutions that did not protect its employees from sexual violence.

#### **7.4 Conclusion**

Punishment, particularly incarceration, was a contentious issue among survivors. Some wanted to see offenders suffer as they had suffered, but almost all of the women I spoke with questioned what the purposes of incarceration and punishment as a whole were. Furthermore, data from these interviews shows that there is a substantial disconnect between what Canadian law suggests should happen after a sexual assault and what survivors themselves wanted. Canadian sentencing law requires that offenders who commit similar crimes be treated

similarly.<sup>658</sup> Survivors, on the other hand, wanted to see cases treated more contextually and focused more on the harm caused to the complainant. They felt that sentences, as they saw them today, did not properly take into account their feelings and opinions on the matter. Given the large divide in how sentencing law is structured in comparison to how survivors feel, how should something as complicated as a sentence be approached? The issue goes far beyond simply deciding how many years in jail (if any) are sufficient. According to L1,

What do we mean by punishment? How are we saying that four months or four years is okay for everyone? Whatever that duration that we are thinking about is not necessarily [sufficient] as every survivor has a different intention about what the outcome should be. Every perpetrator also should be punished according to what is happening in their lives. What is a suitable reform system? What do they need? What are we trying to accomplish with this person, as a society?

Survivors wanted to see a system with options. While not all believed that punishment was a particularly useful tool in combatting and responding to sexual assault, they argued that the current system offered them little other than incarceration as the final result in a criminal trial and shut them out of any decision-making in this area. Instead, they wanted to see a system that consulted survivors on what consequences were necessary in the aftermath of a sexual assault, and was ready to respond in a variety of ways depending on what the parties involved needed.

---

<sup>658</sup> *Code, supra* note 203, s 718.1.

## ***Interlude #4***

*I am so glad you asked about restorative justice! I have a lot of feelings about the topic and haven't had much of an outlet for them.*

*I guess to start it helps to tell you a bit of my story to give you some context about where I am coming from. I grew up in Calgary, got a degree, and then found a job in Ontario. I had never really spent any time outside of my home province and suddenly I'm in Kitchener and I know absolutely no one! It was such a huge change and at first I was really lonely. I went to some employee events, but wasn't making any friends.*

*Also, I had been a major athlete all my life and had just been going to the gym since I moved. To be honest, it was super boring working out on my own and I started looking for some rec leagues. I found a co-ed one for soccer and my entire life changed for the better! I found my people. In fact, I would say I found my family in Kitchener. Over the next couple years, some of my team changed, but we had a solid core group that was super tight.*

*Everything was great until this one night when we were out celebrating a recent weekend tournament with a few other teams. There was a lot of drinking. Maybe too much. But we did this all the time together and in the end everyone took a cab home and was safe. I didn't think I had anything to be frightened of...*

*Well, that night one of the men on our team, Adam, decided to flirt with me. I wasn't interested and brushed him off, but he was pretty persistent. I didn't want to be too mean because he was part of the team, you know? And well-liked at that. Maybe I should have been clearer or more forceful? Or maybe I should have been more careful with my drinks... I don't know. But you can probably guess where this is going.*

*I started feeling a bit woozy that evening and I decided it was time to head home. I went out to the parking lot to call an Uber and Adam followed me. To be honest, most of what followed is really fuzzy. He sort of pushed me towards his car. I know I didn't want any of what was happening, but I didn't feel very connected to reality. He assaulted me in the backseat and I remember... I don't remember much to be honest. He drove me home eventually and I just went to my bedroom and fell asleep for a long long time.*

*Afterwards, I was really conflicted. The team was my family, and Adam had been around for several years at this point. Longer than me. He was... well he seemed like a good guy before that weekend. He didn't even really bother me after the whole thing in the parking lot. But it still felt so so wrong. I felt like my insides were all tied up in knots and I didn't know how to respond. I ended up talking about it with some of the other women on the team. I just didn't know what to do, though I didn't want to hurt the team or end up distanced from this place that was so important to me. The others I spoke to were concerned as well. There were a few who thought Adam was terrible and needed to be punished and exposed. Others wondered whether it could all be blamed on alcohol and whether anyone was really hurt. And I questioned myself as well. Was I hurt? What did I want? Whose fault was it?*

*Someone brought up the idea of restorative justice and I had never heard of it. I went to Google (as one does) and the Wiki description sounded really promising. I didn't want to get police involved or anything like that. But having our team come together and talk about what had happened and set some sort of boundaries and try to move on together sounded like it would... like it would be good for all of us.*

*Except as good as it all sounded, none of us had any idea of how to go about doing it. Again, we turned to good old Google and didn't get very far. There are a lot of people talking about restorative justice online, but we had a hard time finding actual resources about it. Lots of blog posts, but nothing that seemed to fit our situation. There was no one we could go to and ask for help. I mean, some sources pointed to churches or community groups, but none of what we saw really felt like it worked for the team. We weren't religious. We weren't a close knit community that all lived together. It was complicated. We just wanted to hire, like, a mediator person to come and sort it all out for us. Help guide us through a process. But that person didn't exist.*

*In the end we tried to muddle through something ourselves, but it was hard and I don't think we managed to make anything better. Lines were definitely drawn between Adam's side and my side, even though I didn't even want sides! We wanted to set up this thing called an accountability pod, but lots of the men on the team thought it was absolutely ridiculous and we didn't really have anyone who wanted to be in the pod. There was a lot of fighting and hurt feelings which was not what I wanted at all. I knew things wouldn't be sunshine and rainbows, but I wanted to achieve something productive, you know?*

*In the end, I ended up leaving the team with several other women. We made a new team together, but I still lost a lot of friends, and the conflict spread within the rec soccer community overall. Since most of my social connections were there, it really hurt. Some people, mostly women, had my back. But others? Others thought I just wanted attention or that I regretted my "bad" choices. They rallied behind Adam and said I was just a liar. I had talked about my mixed up feelings and how badly affected by the alcohol I was, and that just made it easier for everyone to dog pile on me.*

*For almost two years, it felt like I was living in nightmare. I diversified my friend groups a bit. I hang out a lot more with women now and I hate that I just can't trust men very much. Not only did Adam hurt me, but so many other men were awful after it happened. I really liked the idea of restorative justice because I wanted to move forward in my life without having to give up the people and spaces I loved so much. But without any help and support, I am pretty sure I just made things worse. I kind of wish I had never said anything. It would have sucked, but probably not as much as what ended up happening. I think this is why so many women who are sexually assaulted refuse to come forward. There's just no good options and so little support.*

## Chapter 8: Restorative Justice

### 8.1 Introduction

One of the overarching themes of this dissertation has been the dissatisfaction the survivors I spoke with had in regard to the traditional legal system and its attempts to provide redress for sexual assault. This, as discussed in Chapter 1, is an issue that has become part of public discourse as well, and the search for something better often leads to conversations about restorative and transformative justice. I introduced these topics in Chapter 3, but will briefly outline them again. Both restorative and transformative justice focus on healing the harms done by a crime and thus tend to be less concerned about punishment and more about fostering systemic changes that help the victim, offender, and their overall community move beyond what happened. There are many ways that restorative and transformative justice can be operationalised, but one of the primary differences between the two is the nature of their relationship to the state. In Canada, restorative justice is often connected to the criminal law system and represents an attempt to incorporate more rehabilitative and non-adversarial components to dealing with criminal offences.<sup>659</sup> Transformative justice tends to be used in communities that do not wish to involve the state, and has its roots in anarchist, Black, and other racialised communities.

Given the increasing attention these types of processes have attracted, I wanted to ask survivors about their perspectives on these approaches and whether they would have wanted access to such mechanisms. As with almost all of the discussions I had with survivors, the answer to this question was complicated and varied. I also problematise some aspects of these

---

<sup>659</sup> As noted in Chapter 2, not all restorative justice processes are connected with the state, but as many of them are, it is a helpful distinguishing feature from transformative justice.

non-traditional forms of justice, including the concept of community involvement. To start, however, I introduce the concept of prison abolitionism and discuss why it is that so many individuals are turning away from the traditional legal system and looking for different options.

## **8.2 Backlash against Incarceration: The Rise of Prison Abolitionism**

Sentencing is meant to reflect a variety of objectives. However, as detailed in Chapter 7, the carceral aspects of sentencing tend to receive more attention from the courts and legislature, while objectives such as rehabilitation are often neglected.<sup>660</sup> Consequently, a number of legal scholars and activists, particularly those who use an intersectional lens in their work, reject this harshly punitive approach to crime. Many of these theorists are prison abolitionists who call for the elimination of incarceration as a legitimate tool of the state.

According to Angela Davis and others, incarceration does little to address why individuals offend, and contributes to further criminal behaviour by marginalising offenders and making it more difficult for them to reintegrate into society after their release.<sup>661</sup> Prisons extend the harm caused by criminal behaviour. As discussed previously, while these institutions may, for a period of time, separate offenders from those that they have injured and prevent harm to

---

<sup>660</sup> The courts cannot order rehabilitative sentences that are not available. While rehabilitation is one of the primary purposes of sentencing, judges are not in charge of corrections policy. The legislature controls how correctional services work and would need to intervene to create new rehabilitative options.

<sup>661</sup> Kim 2020, *supra* note 398; Beth E Richie et al, “Colluding With and Resisting the State: Organizing Against Gender Violence in the US” (2021) 16:3 *Feminist Criminology* 247 [Richie]; Beth E Richie, “Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice” (2015) 5 *University of Miami Race & Social Justice L Rev* 257; Angela Davis, *Are Prisons Obsolete* (New York: Seven Stories Press, 2003) [Davis]; Angela P Harris, “Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation” (2011) 37 *Wash UJL & Pol’y* 13[Harris 2011]; INCITE!, eds, *Colour of Violence: The INCITE Anthology* (New York: South End Press, 2006); Eric A Stanley & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland: AK Press, 2015); Dean Spade, “The Only Way to End Racialised Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's 'Masculinity as Prison'” (2012) 3 *Cal L Rev* 4 [Spade 2012b]; Dean Spade, “Intersectional Resistance and Law Reform,” (2013) 38:4 *Signs: Journal of Women in Culture and Society* 1031; Spade 2012a, *supra* note 165; Mariame Kaba & Kelly Hayes, “A Jailbreak of the Imagination: Seeing Prisons for What They Are and Demanding Transformation” (3 May 2018), *Truthout*, online: <<https://truthout.org/articles/a-jailbreak-of-the-imagination-seeing-prisons-for-what-they-are-and-demanding-transformation/>> [Kaba].

others, incarceration generally does little to ensure that they will lead productive, positive lives once their sentence is over. Nor does incarceration necessarily help those who were harmed by offenders.<sup>662</sup> The reasons why an offender has engaged in criminal behaviour are rarely addressed, meaning said behaviour may continue or even get worse given the often life-long repercussions of being incarcerated.<sup>663</sup>

Evidence suggests that instead of preventing future violence and healing communities, incarceration hurts all those implicated in crime, including the offender, victim, and third parties, particularly those who are marginalised.<sup>664</sup> After all, prison attempts to solve social problems by taking people out of society, contributing to “the disposal of vast numbers of human beings, the breaking down of families, and the shattering of communities.”<sup>665</sup> Any person who lacks resources and social power will be more heavily impacted by interactions with the justice system.<sup>666</sup> Whether it is because they do not have the financial stability to hire a lawyer and pay for an adequate amount of time to prepare their case, or because they will exit prison and be unable to leverage their social networks to obtain employment, the more oppression one faces, the greater the harm will be after interacting with the legal system. While everyone is supposed

---

<sup>662</sup> While some survivors may feel that their abuser must be incarcerated in order for them to feel as if they have obtained legal justice, others may not want the offender to be imprisoned at all, or have different needs that are not addressed by having their abuser sent to prison.

<sup>663</sup> Kim, Richie, David, Harris 2011, Spade 2012b, Kaba, *supra* note 661.

<sup>664</sup> See, for example: Todd Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Communities Worse* (New York: Oxford University Press, 2007).

<sup>665</sup> Maya Schenwar, *Locked Down, Locked Out: Why Prison Doesn't Work and How We Can Do Better* (Oakland, CA: Berett-Koehler Publishers, 2014) at 4 [Schenwar].

<sup>666</sup> These impacts are felt particularly harshly by racialised people. See: Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness* (New York, New Press, 2010); Akwatu Khenti, “The Canadian War on Drugs: Structural Violence and Unequal Treatment of Black Canadians” (2014) 25:2 *International Journal of Drug Policy* 190; Roberts & Reid, *supra* note 281; Shelley G Marshall, “Canadian Drug Policy and the Reproduction of Indigenous Inequities” (2015) 6:1 *The International Indigenous Policy Journal* 7. See also: Liat Ben-Moshe, Chris Chapman & Allison C Carey, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave MacMillan, 2014) [Ben-Moshe].

to be treated equally by the law, the reality is that the law has drastically different effects on people's lives depending on their power and privilege.<sup>667</sup>

Prison abolitionists also criticise the way that crime is constructed by society. Law is a human creation that we use to promote communal living. We consciously and deliberately decide what behaviour to label as unacceptable and what breaches of these norms should entail.<sup>668</sup>

While there is widespread social agreement over the fact that violent crimes such as murder or sexual assault are wrong and should be seen as intolerable, not all crime is as obviously harmful. For example, personal possession and use of many intoxicants is criminalised regardless of the fact that there is little evidence that these substances cause any more harm than legal intoxicants.<sup>669</sup> Furthermore, laws are often applied in a disproportionate manner, affecting certain groups of people, such as those who are racialised, substantially more than others.<sup>670</sup> According to prison abolitionists, all of these problems arise because of choices that society has made based on oppressive understandings of the world that must be challenged and undermined. After all, laws and the way they are applied are social constructs that can be changed in order to better serve society as a whole. Issues such as racism, sexism, and other discriminatory assumptions do not have to be inherent parts of the law, and, in fact, the legal system should be changed in order to confront and get rid of these inequitable realities. Prison abolitionism addresses some of these

---

<sup>667</sup> For example, see: Crenshaw 1989/1991, *supra* note 154; Sherene Razack, "What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence" (1994) 19:4 *Signs* 894 [Razack].

<sup>668</sup> Spade 2012a, *supra* note 165 at 8-9.

<sup>669</sup> See, for example: Paula Mallea, *The War on Drugs: A Failed Experiment* (Toronto: Dundurn, 2014).

<sup>670</sup> For example, see: Akwasi Owusu-Bempah, Maria Jung M, Firdaous Sbaï et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2021) *Race and Justice* (online first publication); Akwasi Owusu-Bempah & Alex Luscombe, "Race, Cannabis and the Canadian War on Drugs: An Examination of Cannabis Arrest Data by Race in Five Cities" (2021) 91 *International Journal of Drug Policy* 102937; Evelyn M Maeder & Susan Yamamoto, "Investigating Race Salience, Defendant Race, and Victim Race Effects on Mock Juror Decision-Making in Canada" (2019) 36:5 *Justice Quarterly* 929; Vicki Chartrand, "Unsettled Times: Indigenous Incarceration and the Links Between Colonialism and the Penitentiary in Canada" (2019) 61:3 *Can J Corr* 67.



problems by critiquing the carceral system and its connections to discrimination, arguing that there are better ways of addressing crime without so much unnecessary and unjust harm.

In the context of sexual assault, Dean Spade adds that sexual violence is such a common offence that it does not make sense to send individuals to prison for engaging in this type of criminal behaviour.<sup>671</sup> He does not imply that sexual offences are insignificant or that it is pointless to struggle against such a pervasive and normalised occurrence. Instead he argues that the prison system relies on a “fantasy of monstrous strangers” that we mistakenly believe we can separate from good society so that they do no more harm.<sup>672</sup> Most sexual offenders are known to the people that they hurt. They are family members and friends that live with and are important to many survivors. They do not always look like monsters or what society assumes bad men should be. Most are not even known to the justice system. Even those that are put in prison tend to receive short sentences where rehabilitation opportunities are few. Almost all convicted sexual offenders will eventually re-enter society after being housed in a place where violence is common and they are dehumanised.<sup>673</sup> Thus, if the justice system is meant to protect society and change behaviour, it must do more than rely on a punishment that contributes minimally or not at all to these goals.

Relatedly, it is important to address the sexual violence faced by offenders who are incarcerated. According to Angela Harris, the prison system perpetuates a cycle of gender-based violence by ensuring that offenders are placed in a space where violence—particularly sexualised

---

<sup>671</sup> Spade 2012a, *supra* note 165 at 4.

<sup>672</sup> *Ibid* at 5.

<sup>673</sup> Kim 2020, Richie, David, Harris, Spade 2012b, Kaba, *supra* note 661.

violence—is normalised.<sup>674</sup> Rather than addressing the causes of sexual assault, when offenders are incarcerated in the current system, they are exposed to harmful ideologies and experiences regarding gender and sexuality. Prisons help entrench problematic lessons about power and domination rather than challenge them.<sup>675</sup> They are environments where cruelty and selfishness are cultivated. As a result, many male offenders become victims of sexual violence themselves.<sup>676</sup> While those who believe in “an eye for an eye” approach to punishment may think that a sexual offender being assaulted in the same manner as his victim is a just response to his crime, those who support prison abolitionism ask whether this type of retaliation accomplishes anything of value. Does inflicting suffering on the offender help survivors feel better? Does it make a survivor safer, particularly knowing that many will interact with their abusers again? Does sexual abuse teach offenders to stop hurting others, and even if it does, does this type of punishment impart its lessons without causing lasting harm?

Prison abolitionists believe that there are better ways to deal with the repercussions of anti-social behaviour that will allow society to target the root causes of crime. Instead of allowing ourselves to indulge in retributive impulses, options that create real change by addressing inequality and oppression should be explored. After all, to prison abolitionists, a

---

<sup>674</sup> Harris 2011, *supra* note 661 at 38; Joseph H Michalski, “Status Hierarchies and Hegemonic Masculinity: A General Theory of Prison Violence” (2017) 57:1 *The British Journal of Criminology* 40; Rosemary Ricciardelli, Katharina Maier & Kelly Hannah-Moffat, “Strategic Masculinities: Vulnerabilities, Risk and the Production of Prison Masculinities” (2015) 19:4 *Theoretical Criminology* 491; Jennifer Anne Sloan, *Masculinities and the Adult Male Prison Experience* (London: Palgrave Macmillan, 2016).

<sup>675</sup> Rose Ricciardelli, *Surviving Incarceration: Inside Canadian Prisons* (Waterloo, Ontario: Wilfred Laurier University Press, 2014); Ben-Moshe, *supra* note 666; *ibid*.

<sup>676</sup> Michael Singer, *Prison Rape: An American Institution* (Santa Barbara, CA: Praeger, 2013); Gabriel Arkles, “Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm” (2013-2014) 17 *NYU J Legis & Pub Pol’y* 801; “No Escape: Male Rape in US Prisons” (2001), *Human Rights Watch*, online: <<https://www.hrw.org/reports/2001/prison/report.html>>.

society that is fair and just is one in which crime does not thrive.<sup>677</sup> To create such a world, resources and attention need to be directed at the prevention of crime rather than just responses after it has already occurred.<sup>678</sup> However, given the fact that crime and anti-social behaviour still happen, methods of dealing with these actions must exist, and prison abolitionists advocate for approaches that do more than lock the offender away for a period of time. For many, this means a turn towards restorative and transformative justice processes as their focus is on fixing the underlying causes of criminal behaviour and trying to help both the victim and offender heal and move forward with their lives in a positive way.

### **8.3 Survivor Perceptions about Restorative Processes**

As I mentioned in Chapter 3, while I think there are important distinctions between restorative and transformative justice, I did not use both of these terms in my interviews for ease of comprehension and conversation. That does not mean that survivors did not touch on issues involving state-connected versus community-based justice mechanisms. For example, the Thordis Elva scenario, under the definitions of this paper, should be seen as a transformative process, although I covered it under the restorative umbrella. As such, though I speak mostly of restorative justice in this chapter, this is meant to be reflective of how I spoke about these issues in my interviews. I will at times point out when transformative ideals slipped into my conversations with survivors (particularly as some of the women I spoke with talked about transformative justice explicitly). Additionally, there is a lot of overlap between restorative and transformative justice in many of the topics covered in this chapter. I will separate these two

---

<sup>677</sup> Davis, *supra* note 661; Schenwar, *supra* note 665.

<sup>678</sup> Spade 2012a, *supra* note 165 at 9-10.

concepts more clearly in the next chapter when I recommend reforms based on what I have learned from my interviews with survivors.

### **8.3.1 Agency: Survivor-led and Emotional Labour Aware**

Given how disempowered survivors reported feeling in traditional criminal proceedings,<sup>679</sup> it is understandable that one of the most important changes they wanted to see from restorative processes was an increased ability to assert agency over their experiences. The women I spoke with stressed the need for restorative processes to be survivor-led as well as very cognisant of the labour—particularly emotional labour—that survivors were expected to put into these situations.

Being survivor-led does not imply that survivors should control all aspects of a restorative process, but that their opinions and desires influence the development of these new justice mechanisms. For example, S6 argued that survivors should be included in “policy-making instead of just having people that never went through it on the panels and discussion groups”. The survivors I interviewed did not feel that the legal system fairly considered their needs, and they wanted access to justice processes that were capable of responding to their unique realities and situations.

Unfortunately, many of the women I spoke with expressed doubt over whether they would be accorded adequate attention and respect even in these supposedly better, more just processes. S15, after being assaulted, participated in a course on justice issues, including restorative possibilities. From her observations, she believed that restorative processes,

[need] to be more centred on the victim and less than the offender. I found in my restorative justice course there was... I didn't witness any restorative justice type thing,

---

<sup>679</sup> See Chapter 5 for additional commentary from survivors on their difficult experiences with the legal system.

but there's a lot of don't judge the perpetrator. It was more centred on the offender than the victim and the victim was just a token. The victims matter, but do they really matter throughout? I don't know how successful the processes that we have set up right now actually are. I don't even have an answer for myself. You have to consult a whole bunch of victims to run a restorative justice program that's actually beneficial. It has to be flexible.

S15 wanted to see a justice mechanism that centred the person who was harmed instead of the offender. She was worried that in attempting to avoid shaming the offender and focusing on his needs, survivors were once again pushed to the side. To be better than the traditional legal system, S15 and others wanted to see alternative justice processes accord the survivor's needs as much attention and concern as the offender's.

As such, survivors wanted more control over telling their stories in these processes. In Chapter 5, I discussed how many of the survivors in this study wanted the freedom to speak without the pressures of making their stories conform to the unwritten standard of formality and professionalism appropriate for the courts. This openness of expression is a much touted benefit of restorative processes, as well as the fact that these proceedings are meant to be non-adversarial.<sup>680</sup> Harsh cross-examinations are not needed as the offender has already admitted to committing the offence and survivors do not have to worry that the way they speak will be picked apart under the scrutiny of a defence lawyer. S16 described her ideal restorative process as one that,

should be argument free. I think the survivor should be able to voice exactly how she feels, exactly how she perceived the event without being attacked for sharing how she feels, how it's affected her, without having to defend any of that. And just being able to explain what she needs to explain and say what she needs to say.

---

<sup>680</sup> For example, see: Daly 2017, *supra* note 29 at 116; Goodmark, *supra* note 31 at 728; McGlynn et al, *supra* note 388 at 185.

It was very important to the women who took part in these interviews that they have the opportunity to tell their truths as they saw them. While this may mean that those participating may feel uncomfortable, particularly the offender, many of the survivors I interviewed stressed how important they thought controlling their own narrative was for their ability to move on from what happened.

For example, S11 stated that she wanted,

...the chance to be heard. Telling it from my perspective. Telling it in my way. If I could just sit and talk about it candidly and get emotional or not get emotional or whatever... I think that would be transformative in and of itself to have him hear it and then also to have him say out loud yes, this is what happened and maybe I didn't see it the same way at the time but now that you're explaining it to me, I understand. And let's work together and it should be a two-way street. I'm looking for solutions.

S11 and several others acknowledged that the process of healing is usually difficult for all involved, and they did not want to feel as if they were responsible for making this process easier for anyone. As discussed in Chapter 7, while multiple survivors thought about wanting to inflict cruelty on the offender, these thoughts were generally fleeting, and most simply wanted to heal the damage that was done to them. Many of the women in this study had, at least at one time, loved the person who hurt them. They knew what they had to say was going to be hard for the offender to listen to, but most saw it as a necessary type of pain for the offender to understand and internalise what he had done. While they did not want to unnecessarily complicate the process or to deliberately cause more harm, the women I spoke with emphasised that speaking truthfully and sincerely would help the survivor, the offender, and everyone else that may be listening.

While the power to yield their voice as they see fit is important, so too is the need to be able to withdraw and set boundaries. Regardless of the structure of the process, restoration is

difficult, emotional work. Not all survivors have the capacity or desire to participate in something that requires so much from them. As S10 wryly observed,

In my mind, I just have to be the change I want to see in the world. But at the same time, I'm tired! I don't want to be that change. I want to go home and eat some chocolate and just think the world's a nice place.

Particularly in the context of a justice process, where healing includes multiple people, survivors told me that they needed the option to not expend more time and energy on a conflict that they were not responsible for. According to S11, “[it] shouldn't be my problem. I shouldn't have to be keeping you [the offender] accountable”.

In a restorative approach, survivors are participating in a process that is also meant to benefit the offender, but not everyone is willing (or has the capacity) to work for the good of someone who hurt them. While, in theory, the community participants in the process should be helping to shift norms and enable the offender to understand and change his behaviour, survivors worried about how this work would likely fall to them or other survivors. As powerful as these alternative processes may be, the survivors I spoke with emphasised that it should never be seen as the responsibility of the person who was hurt to participate in a restorative process, regardless of what others may think is best for a given situation. If women should not be obligated to report their assault to a legal authority, the women I spoke with also believed that they should not be compelled to participate in a restorative process they wanted no part of.

### **8.3.2 Accountability and Restorative Justice**

#### **8.3.2.1 The Challenges of Offender Participation**

Of the concerns involving accountability, the primary issue for survivors was whether anyone could guarantee that an offender was honestly and willingly participating in a restorative

process.<sup>681</sup> According to S5, “the main issues with those frameworks [restorative/transformativ]e<sup>682</sup> is that, at least in my mind, they require the willingness of the accused to participate. And that to me is where those systems fall down.” An offender must admit responsibility for his wrongdoing before participating in a restorative process. This can be a challenge in a world where rape culture thrives. Offenders may feel as if their behaviour is not something worth admitting guilt over,<sup>683</sup> or they may be afraid of the potential legal consequences of admitting guilt. S15 also pointed out that,

I think a lot of time when you're doing it as part of the criminal court system, it's really hard to know if the perpetrator is taking part because they genuinely are remorseful and want to learn or if they're doing it because their charges are going to be dropped.

There are a multitude of reasons that an offender may wish to participate in a restorative process, and not all of them are related to an honest desire to change themselves. For example, S9 stated that,

I think that sometimes even if you're talking about a case where the other person does feel remorse, there's still a part of me that's like you just feel guilty and that's inherently selfish. You just feel bad because you feel guilty, but not because... you got caught not because you care about... not because the thought of harming me hurts you. Because then you wouldn't have done it to begin with.

S9's concerns were echoed by several of the interview participants in this project. What does it mean to participate with sincerity? Can an offender ever truly redeem themselves to the satisfaction of the person that he harmed? Even though offenders must accept responsibility for their actions and understand how they were wrong before participating in a restorative process,

---

<sup>681</sup> Acorn, *supra* note 425; Hopkins, *supra* note 418, Choi, *supra* note 418.

<sup>682</sup> S5 spoke of both restorative and transformative processes as she was familiar with the two approaches.

<sup>683</sup> Dietz, *supra* note 571; Nicholas J Blagden et al, “‘No-One in the World Would Ever Wanna Speak to Me Again’: An Interpretative Phenomenological Analysis into Convicted Sexual Offenders’ Accounts and Experiences of Maintaining and Leaving Denial” (2011) 17:7 Psychology, Crime & Law 563.



the women I talked to did not feel that they could trust that the offender was truly embracing his own accountability.

For some of those who participated in my interviews, this concern over offender participation was not merely theoretical. For example, S10 stated that one of her partners was very manipulative and while “I thought he was a nice person, so I thought it was worth my time to explain this to him. Turns out it wasn’t”. She attempted to broach the issue of the assault her partner committed against her (outside of any formal process), and she felt that in the end this effort went to waste as he was not prepared to listen or change his behaviour. Rather than take responsibility for his actions, this offender consistently tried to justify his behaviour and dismiss the harm that S10 had suffered by being assaulted by him.

S2 spoke of a similar situation. In her circumstance, her abuser had already been through a legal process related to sexual offending, yet this had not deterred him from acting inappropriately towards her and other employees. According to S2,

...in my head, knowing him, now knowing his criminal history, I really don't have hope that he's going to change in his lifetime. It will probably deter him. He'll make sure he doesn't get caught again. Not so much that he wouldn't try to do it again.

For S2’s situation, a restorative process would likely be useless as this offender had already proven that even serious legal interventions<sup>684</sup> were not prompting him to change his behaviour. If anything, there was concern and experience on the part of both these survivors that a manipulative offender could use a restorative process to imply that he understood what he did was wrong, while inflicting more trauma on his victims and learning how to better disguise his behaviour in order to avoid future repercussions.

---

<sup>684</sup> Prior to assaulting S2, this offender had been taken to the Ontario Human Rights Tribunal and found to have committed sexual harassment against other female colleagues. S2 did not know the details of what remedies were ordered, but she did believe it involved a monetary fine and employment repercussions of some sort.

Another point brought up by some of the women I interviewed was the need to avoid making participation in a restorative process into something that would reward the perpetrator. This is not to suggest that an offender should not benefit from a restorative process, but survivors argued that the incentive for offenders should not be solely about advantages and validation. As S7 warned, restorative justice can be used to give “the accuser a chance to take power again. To be in the spotlight. To do whatever they have to do for their own benefit.” Given the prevalence of rape myths and stereotypes in society, there is a danger that an offender can shape the restorative narrative in a discriminatory and harmful manner that minimises his actions and harm. There is also the potential for the focus to be overly concentrated on the offender for being a good person by admitting fault. The women I talked with said validation should be a part of restorative processes for the offender, but the line between that and fawning could be difficult to navigate. In the Icelandic scenario, some survivors were quite concerned that while the rapist admitted publicly to his crimes, he was receiving a lot of positive attention that many survivors do not. Men who learn and change after committing such terrible harms are role models in a sense, but not heroes. S10 argued that offenders should “go live [their lives] and don’t be a piece of crap” without any expectation of additional benefits or commendations for being a better human.

Some survivors pointed out that despite misgivings about certain types of offenders, there were advantages to engaging in restorative processes for some perpetrators who might not otherwise come to a point of being able to acknowledge their harm. In Chapter 6, I quoted S3 talking about her concerns about sending an offender convinced of his innocence to prison as it was unlikely that his time spent incarcerated would lead to anything other than anger and bitterness. Even if an offender is trying to avoid responsibility, a restorative process could be

more effective in trying to educate men about sexual violence than the traditional adversarial system that requires men to deny and reframe their behaviours as justified or normal. A restorative process, at the very least, attempts to directly teach offenders about how their behaviour was wrong and harmful whereas the traditional court system is not centred on this type of education. While not all offenders will benefit from such attempts, S3 stressed that an imperfect process can still be valuable.

S2 pointed to specific groups of offenders who would most likely be best served by a flexible restorative approach:

In [my] case, I don't know if restorative justice would, with this person, help get what I want, which is to truly learn from what you've done and actually how you've impacted others with your varying degrees of harm. However, I think there are some people out there who are possible with making that growth. It could be an age thing. I'm generalising here. Say someone who's like 16-18. There's a chance that if you give them that space and a lot of structure, the role models, the support, all the necessary ingredients. Give them a year intensely with those people and give them continuous support throughout the three years, whatever. There's hope. I think that person can grow. If you catch them just when it's that enthusiastic whatever, there's a chance. And coupled with you kinda do it in a supportive way so that they know that they are not just being judged. But like, hey, let's all do this together because as a community, we all just want to be better, right?

The man who harmed S2, as discussed above, had already been through a human rights process and seemed unable to accept that his actions were violent and harmful. However, younger offenders may benefit from an approach that seeks to help them change with adequate supports.<sup>685</sup> If the end goal is to allow survivors to feel as if they have obtained justice, for many,

---

<sup>685</sup> Restorative processes are often used in situations involving young offenders for this reason. See: Lisa Mary Armstrong, "Is Restorative Justice an Effective Approach in Responding to Children and Young People Who Sexually Harm?" (2021) 10:4 *Laws* 86; Mary Louise Frampton, "Finding Common Ground in Restorative Justice: Transforming Our Juvenile Justice Systems" (2018) 22 *UC Davis J Jov L & Pol'y* 101; Jeff Bouffard, Maisha Cooper & Kathleen Bergseth, "The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders" (2017) 14:4 *Youth Violence and Juvenile Justice* 465; Adam Crawford & Tim Newburn, eds, *Youth Offending and Restorative Justice* (London: Willan, 2003).

that requires the prevention of future violence, and there are offenders that they believed were capable of learning from a restorative process in a concrete and constructive manner.

### **8.3.2.2 The Dangers of Unequal Power Dynamics**

As discussed in Chapter 2, many scholars believe rape is more than just a physical attack: it is an abuse of power.<sup>686</sup> The influence of sexism and a variety of other discriminatory assumptions structure the relationship between an offender and survivor. For example, the more marginalised a person is, the more likely they will be a target for sexual violence.<sup>687</sup> Rape myths show how the harms of sexual assault are trivialised and seen as an inevitable part of biological reality.<sup>688</sup> Sexual assault as an offence is mired in a toxic set of assumptions and oppressive power dynamics between perpetrator and victim. As such, even if a restorative process is supposed to be a more positive experience than a traditional court process, S7 worries that “[no] matter how you spin it, there's still this sense, this essence that the accuser still has the power over the woman”. The toxic power dynamics that led to the sexual assault do not disappear just because a restorative process is undertaken. These dynamics must be deliberately addressed and deconstructed.

S7 stressed that power should be understood as extremely broad, encompassing “economic, emotional, [and] spiritual” components. A toxic power dynamic can affect multiple parts of a person’s life. It is a problem that goes beyond stating men have power over women and requires one to look at how, where, and to what effect that power is exercised, including more than just gender and sex in the analysis.

---

<sup>686</sup> MacKinnon, *supra* note 114. But see also: McPhail, *supra* note 125.

<sup>687</sup> See Chapter 2 for a more in-depth discussion on who tends to be the target of sexual violence, as well as who the perpetrators tend to be.

<sup>688</sup> Stabile, Smith & Skinner, Koshan, Suarez & Gadalla, *supra* note 25.

These toxic dynamics can impact more than the offender in a restorative process. For example, S16 warned that,

I definitely think that all of these gender stereotypes and the gender inequality would come into play, but that's just because a lot of it is subconscious. I mean a lot of the people that would be leading the restorative justice are probably male. So that bias probably comes into play.

The community involved in a restorative process is not immune to inequitable beliefs and assumptions about sexual assault. Even those who strive to be as fair and understanding as possible may subconsciously adhere to problematic assumptions about this offence and the relationship between the perpetrator and survivor. The women I spoke with emphasised the need to recognise that power dynamics can arise in a variety of ways in a restorative process and must be deliberately and actively watched for. The assumption should be that rape myths and toxic power dynamics are as likely to impact an alternative process as a traditional legal proceeding unless they are addressed directly.

For example, L1 spoke about what she has seen happen in restorative processes in an international context:

Do I agree that there could be another way of accessing justice? Yes. At this point, I feel like too many people are talking about it, but too many people have also not seen what I have seen. How it plays out [internationally], and the type of cruelty that can happen in the process. I've seen a lot of cases where, and it still happens in the States as well, where the people in that council would say, "okay, if you were having this relationship for this long, where he was also raping you, why don't you just get married?"

L1 saw individuals in power put pressure on survivors to accept the offender into their lives permanently. Rather than see the assault as a violation, it was seen as a normal part of a relationship, only problematic because the offender and survivor were not married. While it might be tempting to suggest that such things do not happen in Canada, plenty of empirical

evidence suggests that our legal system and society in general are not free from regressive attitudes about sexual assault.<sup>689</sup>

S10 spoke of an experience that, while not part of an official restorative process, highlights another problem involving power dynamics within community-based justice processes. After she was sexually assaulted, the offender,

was constantly trying to give me this apology letter and I was like no, this isn't about you. You don't get to feel better about this. And so he would email me. I blocked his email. He got other people to email me. I blocked their email. He got a friend of his who's still a mutual friend to hand me a handwritten letter which I immediately threw out in front of him and said do not give me anything that was written by him.

The offender wanted to apologise, but in attempting to do so, ignored S10's clearly expressed desire to halt all communications. His consistent attempts to bypass her wishes, using friends and acquaintances to force her into contact with him, were an example of the way that offenders can leverage their power against survivors. Because the offender in this case wanted to deal with his guilt, he felt it acceptable to harass the person he harmed and he was able to convince others that his needs took priority over hers.

According to S13,

I'm not really good with specifics, but the thing that I always come back to is a process that foregrounds the autonomy of the person who experienced the violence and being able to shape their participation in it. Also, I think a restorative system that would respect ... particular boundaries. Because sometimes I feel like restorative systems melt into, okay we go through this process and that's it. That person is just re-welcomed in the community just like they were before. But I also feel like a system would have a way of respecting particular boundaries that might need to be put around that person's participation. That might just be out of safeguarding the safety of other people's participation in that space, even if they don't come out of a desire to punish.

---

<sup>689</sup> For example, see: Ruthy Lazar, "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada" (2010) 22:2 CJWL 329.

S13 emphasised the importance of respecting the boundaries that survivors may need from the offender and their community after an assault. She brought up questions about how a process should be structured so that everyone involved feels safe while still accomplishing the goal of healing. She noted that consequences were a natural part of a restorative process, even though they were not intended as punishments. For a survivor to heal, she might not want to have anything to do with the offender again. Healing does not require that the relationship between the offender and survivor return to what it once was. It is very likely that relationship was influenced by toxic power dynamics in the first place and returning to something harmful would not be a good example of justice. Women such as S10 wanted to be able to say that they no longer desired any relationship with the offender without pressure from either him or community members.

Additionally, not every survivor will be able to participate in an open discussion with their abuser. This is often a barrier for women reporting sexual assaults in the traditional legal system.<sup>690</sup> While the standard ideal of restorative justice usually entails face-to-face meetings, this is an area that may need to be adapted in the context of sexual assault.<sup>691</sup> S10 stated that,

because a lot of the time people will have to face their abuser over and over again and it's a huge sense of tension and anxiety. So I don't know if having that person there is any more helpful. To me it seems like kind of a little bit of a sideshow.

S1 added,

For me personally, right after it happened, I was in so much pain... I hated them so much and thinking about seeing their face made me feel sick. Being in the same room as them would have been impossible. I was scared to go to school. I was scared to run into them.

---

<sup>690</sup> Katie Crowe, "Sexual Assault and Testimony: Articulation of/as Violence" (2019) 15:2 Law, Culture and the Humanities 401; Leah Roberston, "The Disruption of COVID-19: How a Virtual World Creates Opportunity for Improvement in the Criminal Justice System's Treatment of Complainants of Sexual Violence" (2021), *Schulich Law Scholars*, online: <<https://digitalcommons.schulichlaw.dal.ca/lawpostpandemic/4/>>.

<sup>691</sup> Mediation FAQ, *supra* note 358.

A restorative process that works is one that respects the fact that not all survivors may be comfortable having a direct dialogue with the man who assaulted them. Time may help a survivor heal enough so that such a personal interaction is possible, but there should be multiple options available.

Consequently, restorative processes that offer some distance will be important to explore, particularly for survivors who still fear the offender. According to S14,

Say somebody was repeatedly assaulted over and over and over again. I wouldn't want to see that individual face-to-face. I don't ever want to see [my abuser] again. At all. I don't want to see his face. So like a mediation where it's face-to-face? [No.] But a written apology would be sufficient. Coming from a victim's perspective, sitting together at a table and meeting would not be beneficial.

For S14, restorative justice is something that could be accomplished “on paper”. Letters and statements could be exchanged, giving the survivor both the distance and time to respond to the offender’s contributions. For some, the immediate nature of a face-to-face meeting might be too onerous to handle, but getting a chance to sit with their thoughts and compile responses may be a workable solution. S15 added,

I've read a couple of things that were interesting where you can do restorative justice without actually being present if you're the victim. So you could have a victim advocate attend instead of you which I think is a really good option.

She believed that instead of requiring the survivor to attend and/or advocate for herself, a third party could be a representative for the survivor. This ensures that a survivor can express what she needs to without engaging in a process that may be too harmful for her, or one that exposes her to further manipulation on the part of her offender. Additionally, this advocate could be someone



trained to deal with complex situations of violence such as sexual assault, offering helpful education and guidance to the offender and those involved.

Another issue involving power inequities brought up by survivors was the need for sufficient education to support restorative processes. For example, S13 suggested that “[everyone should] have done an intensive 12 hour session on what sexual assault is, what it looks like, how different people respond to it, and just a really intensive [lesson] for everybody unpacking that as a start”. This idea of making sure the individuals involved in restorative processes have some education on the unique nature of sexual assault is one that came up over and over in my discussions with survivors. For people to be able to address a systemic harm, they must first adequately understand why this type of behaviour occurs, what makes it so harmful, and how it can manifest in a justice process in ways that may be difficult to recognise at first glance.

While restorative processes can be powerful avenues of healing and forgiveness, this does not mean that every person who participates in one will have the same reactions. Nor does it mean that every participant will need the same things. It is expected that there may be conflict between the needs of the survivor and offender, and the inherent power held by the offender should not be allowed to sway the process in his favour.

S10 brought up another important issue which involved the way power dynamics would affect more than just the woman directly hurt by the offender. When considering the Icelandic scenario, she questioned,

the inherent power dynamic of having a male voice, let alone somebody who had the propensity for violence, even if they have whatever it is reconciled within themselves, what had allowed them to perpetrate it. Automatically, I'm like woah, can the female identifying, feminine people in that workshop then feel open enough to voice what they genuinely want to say then with that person in the room?

If restorative justice often includes other individuals from the community, it is probable that other survivors will be part of some of these processes. They deserve to be able to participate in a process that is designed to mitigate harmful power dynamics as well.<sup>692</sup>

### **8.3.3 The Need for Consequences**

Punishment is not the overriding goal or focus of restorative justice.<sup>693</sup> This does not mean, however, that consequences cannot be part of these processes and some of the survivors I interviewed grappled with this topic. For example, Thordis Elva, the Icelandic woman who crafted her own justice process,<sup>694</sup> did not include punishment in her conception of justice. Survivors, as I have noted throughout this dissertation, had very mixed opinions about her scenario.<sup>695</sup> According to S7,

For me, I think the two aspects of punishment and justice go hand in hand because of how the accuser [in the Icelandic scenario] just gave a public statement. For me, that's not enough because a public statement with the accuser, it doesn't help the victim in any way. He's just giving himself a mirage. He's trying to save his face and his image. And again, for me, where's the justice for the victim in that?

S7 was concerned that a restorative process without punishment was merely a tool used by an abuser to protect himself from consequences. Additionally, while she respected Elva's choice to attain justice for herself in this manner, S7 did not believe that most survivors would gain

---

<sup>692</sup> I have addressed toxic power dynamics in regard to sex and gender in this section, but it is crucial that other factors, such as race, sexuality, and ability, be included in these analyses as well when putting together justice mechanisms.

<sup>693</sup> This is not to suggest that punishment is never part of a restorative process. However, many of the advocates of both restorative and transformative justice are also critics of the prison system in general and the way in which punishment is used often causes additional problems (as discussed in Chapter 7). See, for example: Mimi E Kim, "Transformative Justice and Restorative Justice: Gender-based Violence and Alternative Visions of Justice in the United States" (2021) 27:2 *International Review of Victimology* 162. See also: Kim 2020, Richie, David, Harris 2011, Spade 2012b, Kaba, *supra* note 661.

<sup>694</sup> Elva, *supra* note 468.

<sup>695</sup> I wish to note once again that the Thordis Elva scenario falls under the transformative justice umbrella in this dissertation despite the fact that I did not differentiate it in my interviews.

anything from a similar process. She was not convinced that words from an offender were meaningful without additional action being taken.

On the other hand, several participants did not share these concerns. According to S3, when asked about her feelings on the fact that restorative justice does not necessarily involve a traditional legal punishment, she stated,

I have no feelings towards that [a lack of legal punishment] because I don't think that the justice system—I don't even want to call it a justice system; it's just the legal system—I don't think the legal system effectively addresses sexual assault so the fact that he didn't have to go through that, I'm okay with that. It doesn't bother me at all. Some people do need a legal form of accountability, but it's not effective or appropriate in all cases. I'm totally fine with that outcome.

For some of the survivors I spoke with, punishment was a tool that could be useful, but it should be assessed on a case-by-case basis. In particular, it was S3's distrust of the legal system that made her feel more open to a restorative process in hopes that it might better respond to survivor needs. Further, as shown in Chapter 7, the women who participated in my research had very ambivalent and conflicted views on punishment overall, so it is not surprising that these complicated feelings carried over to alternative approaches to justice as well.

Most of the women I interviewed argued that a variety of different options should be available to survivors depending on their specific needs and desires. For example, S11 suggested that restorative processes should be,

structured in a way that... somebody, in theory, would sit there and say we could do donations or we could do this. Whatever the options are. Doing something productive to help them [the offender] acknowledge what they did and repay for that. I think that would be good. Because I probably would have just said to him, I don't want to see you go to jail. That's what I said before sentencing, when the probation officer called me. I said I don't want you to throw the book at him... I would just like to see a variety of different options about what we could do and then work together to figure out what the best situation, circumstance would be.

For some survivors, making the offender's behaviour known throughout the community was a crucial need. In the traditional criminal system, the open court principle helps to make public the violence that occurred.<sup>696</sup> In fact, a common criticism of restorative justice is that it is a privatised process and the information does not necessarily get released beyond the individuals who are directly involved.<sup>697</sup> On the other hand, some survivors questioned just how efficient the open court principle actually is for informing women about dangerous men. When discussing the Icelandic case where the offender never had to interact with the legal system, but did end up being quite public about his past behaviour, S1 stated that,

Realistically, him going on tour is almost as bad because his name's out there. If you Google him, this is his history now, right? He can't keep this from people. If he went to court, he could very well get off scot-free, or do 40 hours of community service or pay a fine or whatever, right? And get off from that. Cause it doesn't always make the news.

In the courts, unless a guilty plea is entered, an offender is not required to profess his own guilt. Even if a sexual assault case makes it all the way to court, there are thousands of trials that do not attract media attention. The court is open in the sense that information is available to those who search for it, but the purpose of the open court principle is not to operate as a warning system for individuals. While restorative processes may not always inform the greater public, if community participants are involved, those most likely to be harmed will hopefully learn about what occurred and who must now be held accountable, though this is dependant entirely on the structure that the restorative process takes. Further, just because there is currently no system within restorative processes for recording and making public the violence that is being dealt

---

<sup>696</sup> The open court principle ensures that information about the resolution of legal cases that go to trial is available; this does not mean, however, that most people regularly follow the results of criminal trials.

<sup>697</sup> Amy J Cohen, "Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States" (2019-2020) 104 *Minn L Rev* 889; Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014).

with, that does not mean that such a system cannot be created. In the end, the survivors that I interviewed wanted to make sure that the person who hurt them had to face the challenges of having his behaviour known by others in his community regardless of how this was actually accomplished.

Public knowledge of the offender was seen as a necessity partly because survivors believed that offenders should be monitored due to their violent behaviour.<sup>698</sup> If the goal of restorative justice was healing and behaviour change, then the offender needed to be held accountable outside of the structures of the restorative process. According to S11, this would include some sort of monitoring by a third party:

...the community or a mediator or whatever is keeping them accountable and then keeping me apprised of what's happening to ensure that. I liked the concept of a probation officer that was in theory checking on this person to ensure that they were complying with conditions. But if it was like the same kind of idea but checking on someone to ensure that they're like... if schooling was involved or whatever they have to do. Somebody's checking on them to do that, I think that would be good.

The purpose of this monitoring would not be about disrupting the offender's life negatively, but empowering him to learn how to change his behaviour. For S11 and several others, the type of monitoring offered by the traditional legal system was too focused on punitive aspects. They wanted to see monitoring that included opportunities for learning and reform. Despite how angry many of the survivors were at the men who had hurt them, they wanted the offender to have the support he needed to change and not be a danger to others (even if the survivor did not want to be part of this process herself).

---

<sup>698</sup> This was also a major theme in Chapter 6.

S11 also brought up the point that even if she was not a part of the offender's attempts to change, she wanted to be kept apprised of how he was doing and whether the community felt that he was meeting expectations. Within the traditional legal system, the complainant has little right to information about the offender once he is released from prison. But for many of the survivors I spoke with, justice is dependent on knowing that the offender is no longer a danger to others, and that he is at least trying to make amends for the harm that he has caused.

Some women believed that part of these attempts at behavioural change should include reparations to the community. These can come in many forms, but exist to ensure that the offender is giving back positively to the people that he hurt. According to S14, community service may be a useful tool, as long as the offender was not working with children or other vulnerable people. She believed that having to learn to give selflessly to others may help someone develop their empathy, as well as be exposed to positive role models.<sup>699</sup>

The survivors I spoke with were cognisant of the fact that not all offenders are going to be able to reintegrate with their community, and not all survivors are going to come to a point where they feel safe with the offender in their community. In her work life, S10 decided to completely cut off a man who had once been welcoming and helpful to her when he harassed and abused other women:

As soon as I found out about what happened, I was like screw him and I cut him off of every social media that I had him on. What happened though was that he was kicked out of clubs. He was banned. He was not allowed to enter them.

My wish would be that that would have happened when first it had been discovered. Because basically he made it so that the women that he was hurting didn't feel

---

<sup>699</sup> Neema Trivedi-Bateman & Emma L Crook, "The Optimal Application of Empathy Interventions to Reduce Antisocial Behaviour and Crime: A Review of the Literature", online: (2021) Psychology, Crime & Law <<https://www.tandfonline.com/doi/full/10.1080/1068316X.2021.1962870>>.

comfortable coming into [the workplace], and they left [the profession] and they were brilliant performers who were so competitive and so good at what they did.

As mentioned by S13 earlier, it is important to respect the boundaries that the women who are harmed by sexual assault must set to protect themselves. When someone abuses others, one of the natural consequences of this behaviour can be that the offender loses access to some of the spaces he once inhabited. Acceptance in any community is dependent on respecting certain norms, and those who cause deliberate and unnecessary harms to others may find themselves excluded and exiled.

One final note on consequences goes back to the idea that restorative justice is meant to centre on healing, not punishment. Consequences in restorative justice are meant to help provoke change, not merely to punish. S5 cautioned against excessive need for punishment and vengeance:

I know somebody who had sexually assaulted two people at the same party and was called in on it by both victims. And did a lot of fucking work to fix things. And still does a lot of work. And the community wanted nothing to do with it. Just ousted him and his wife completely. And refused to hear anything years later. What he did was super fucked up. And he's not explaining that away. But the community is just "we want nothing to do with you. Nothing at all." And, on the one hand, I understand that because, as a victim... I mean, I don't know. I'd have to see. I want nothing to do with the person who violated me, but I don't know how I'd feel if he came...

Interviewer: It's one of the struggles of... if all people who do bad things are monsters. No one wants to admit to being a monster.

S5: Precisely. And that's one of the huge issues around it, and the only way that people are actually going to change is if they themselves have a support system and they have love and they have people who will support them through the fucking hard work that it is to change your behaviours and to recognise that you have been a monster. Which doesn't mean you have to continue to be.

For S5, even if a survivor does not want to have contact with an offender, this does not mean he should be permanently ostracised from his entire community, especially if he has worked on

changing his behaviour so that he does not harm others again. She worried that those who were abandoned by everyone around them would be unable to learn and become better people. While it is expected that some relationships will be lost when someone engages in violence of this nature, S5 believed that treating people as irredeemable monsters was cruel and ineffective at promoting positive change. Negative consequences are inevitable in response to sexual assault, but a restorative process, she stressed, must still be centred on healing.

#### **8.4 The Complex Nature of Community in Restorative Processes**

*S1: There's so many factors that play into it, it's not just about time and money and energy, but the willingness and the cooperation of the bigger community at large. I wanted to take these two guys [her abusers] as an example, right? If they are surrounded by other assholes then they think this is okay. They can go through all the therapy that they want, but if they don't have the right supports in place...*

The concept of community first came up in my interviews as I gave a brief definition of restorative justice to the participants which included the idea that community involvement was often a crucial part of such processes. This prompted many questions from participants about what exactly this meant in practice. The concept of community is a fluctuating term with the potential for multiple, competing definitions.<sup>700</sup> Individuals belong to many groups, and it may not be clear which group is the appropriate one to include in a justice process. Whose community should be included? Who gets to choose? According to L1,

Because if you say it should be community-based, great, what does that mean? For me? I'm a [racialised<sup>701</sup>] woman. A lawyer, a mother, a [soccer player]. What is my community? Sometimes I feel like I belong to a lot of places and sometimes I feel like I belong nowhere. I just belong to my little house.

---

<sup>700</sup> Giuseppe Maglione, "Communities at Large: An Archaeological Analysis of the 'Community' Within Restorative Justice Policy and Laws" (2017) 25 *Critical Criminology* 453; Won Kyung Chang, "When My Community Met the Other: Competing Concepts of 'Community' in Restorative Justice" (2017) 32:3 *CJLS* 371; Fernanda Fonseca Rosenblatt, *The Role of Community in Restorative Justice* (London: Routledge, 2016).

<sup>701</sup> Specific details of L1's identity have been changed to protect her identity.



Almost all of my interview participants wanted to know more about what the community in a restorative process would look like, and this is a question I struggled to answer as the guidance given by the literature on this topic is sparse. Oftentimes, research will point to Indigenous communities, but neglect to discuss how the lessons from these situations can be applied to different situations, particularly those outside of these cultural or social contexts.<sup>702</sup>

For some survivors, however, the question of who constitutes the relevant community seems more obvious on the surface as their assault occurred within the context of a defined group, and that affects both what they wanted to achieve in terms of justice, as well as how they experienced the aftermath of the attack. Loss was a common theme for these participants.

According to S3,

me and my rapist were both part of a [hobby group] and I was one [of the] central people in this community. After the attack, I couldn't go back. It was too painful for me. And he also didn't go back for whatever reasons are his own. Which for some reason were not brought up, not talked about, not regarded as suspicious? It caused a rift in the community. It would have been really nice if we all could have gotten together, me and him and the community, so that rift could be repaired. Or at least we could bring ourselves to a place where we could move on from it. I lost an entire circle of friends because of that. They all supported me, but it was just too painful for me to go back.

Not only was S3 harmed by the attack itself, but she ended up losing her community and a base of potential support because of the associations this community now held for her. A space that once felt safe, while not openly hostile, became fraught with traumatic memories. Interestingly, S3 mentions that the community did not actively attempt to involve themselves in the conflict between S3 and the man who assaulted her. While she felt supported, there was no push to determine whether the community itself could have a role to play in addressing this violence or

---

<sup>702</sup> See Chapter 9 for a longer discussion about the relationship between Indigenous peoples and restorative justice.

preventing future incidents. After all, S3 stressed that “[when] someone violates another person, they are hurting a community... because they are taking that person out of the community”. Sexual assault is not simply a private act, but one that has rippling effects throughout a larger group of people. Everyone can suffer from the fallout caused by direct violence perpetrated against one person.

Similarly, S5 was harmed within the confines of a specific group of people. She considered trying to address this violence within her community, but realised that she was essentially on her own in terms of trying to craft and complete any sort of justice process. Even though her community regularly has “conversations about how consent incidents or violations can be dealt with in restorative justice frameworks”, there was “no organisation, no framework within our community” to handle such situations. S5 believed that some sort of restorative/transformativ<sup>703</sup> process would have best addressed the harm caused by her abuser, but had no real way of trying to access or create such a process. Even in a community where restorative/transformativ options were known and discussed, the practical realities were still limited. No structure had been created that could allow this group to actualise their alternative justice desires. Thus, even if the issue of who the community is can be determined, there remain many barriers to productive community participation.

Another concern arising from these interviews was over whether community involvement could be harmful to survivors. For some, this was a fear that prevented them from even attempting to access any restorative justice process. For example, S8 was concerned that the man who assaulted her was so powerful and well-respected within his community that she did not

---

<sup>703</sup> S5 spoke of both restorative and transformativ processes in her interview and was comfortable differentiating them.

think it was likely that anyone would believe her, a woman with far less social capital than her abuser. While she could identify the people who would need to be included, she worried that it was a futile process that would cause her further hurt via victim blaming and social condemnation.

Some of the survivors in this project experienced this type of backlash and were actively harmed by their communities that refused to take the violence seriously. According to S4,

I was so so hurt by my community. I just felt so betrayed. And whenever I talked about any violence that I'd experienced, there was a joke. There were a couple friends. We were both friends with the same guy. And he said, "Oh, I heard that you had to have sex right after birth, and it was pretty much rape. Haahaahaa!" I guess that was the first time it was ever named as such in a weird way, and I just kinda went I guess that was fine.

S4 shared a friend group with her abuser, and the violence that happened was not something this friend group was willing to acknowledge or condemn. As she explained, reactions from her friends began with jokes, pushing her to trivialise the violence she experienced. When she pushed back, her friends became more outwardly aggressive in an attempt to deny the violence of the abuser:

And then everyone sided against me: I'm crazy, I'm making up lies, he's very likeable. Just all the people who just turned on me, and even the people who said, "hey, call me if anything happens", and the people I did call, they stopped returning my calls or didn't believe me. I felt so absolutely betrayed by that community.

Instead of support, S4's community caused her additional trauma. Rather than accepting that a person they cared for was capable of violence, they tried to force the victim of said violence to be silent about what she had experienced which added to the harm that she suffered and did nothing to prevent future violence on the part of the abuser. In fact, by trivialising what had occurred to S4, others within the group learned that such violence was likely to be accepted as normal, empowering additional abusers and silencing other potential victims.

Given how contentious most forms of gender-based violence are in society and the myths that are so prevalent about this type of violence, it is likely these divisions would be common in any potential community-based justice process.<sup>704</sup> Among the challenges of including community members is that a process must be able to handle an array of norms and beliefs, some of which may not be progressive or survivor-friendly. According to L2,

it is also completely possible that you'd have... two divergent views expressed in the same community. The right result is different for different people or different men. I find that it's a conversation that needs to happen in a very concrete way and it rarely is.

Bringing the community into the process does not guarantee that it is survivor-friendly. In fact, survivor goals may be hindered by community members with different ideas about how conflicts should be addressed. This implies that survivors and their allies are obligated to expend more time and energy trying to educate their communities about the harms of sexual assault, as well as argue for their specific needs in a justice process. According to S10,

Just getting the community to the point of saying we've fucked up is a task in and of itself. Especially when that messing up brings in money. And then we have to have 75 conversations with people who are like yeah but [the accused is] a nice guy.

The other problem too is that a lot of the people that fight against [survivor-focused justice] are like this is just the way [the industry] is and if you don't like this way of operating then you're in the wrong business.

S10 was in the difficult position of being hurt within her work environment, and people profited off the systems and structures in place that allowed this abuse to happen. For people who were unaffected by the violence, it was a struggle to convince them that sexual assault was a real

---

<sup>704</sup> Arthur Romano & Rochelle Arms Almengor, "'It's Deeper Than That!' Restorative Justice and the Challenge of Racial Reflexivity in White-led Schools" (2021) *Urban Education* (online first publication); John Winslade, "Can Restorative Justice Promote Social Justice" (2019) 22:3 *Contemporary Justice Review* 280; Diana Carpenter Emling, *Institutional Racism and Restorative Justice: Oppression and Privilege in America* (New York: Routledge, 2019).

problem that needed to be addressed. S10 stressed that this type of violence was harming her industry, pushing promising individuals out, but the topic remains particularly contentious in her community.

S13 encountered similar problems in the university system. The problem of sexual violence in the postsecondary environment has been a much debated topic in recent years,<sup>705</sup> but several participants in this project spoke about how much they struggled to deal with their abuse within their school communities. When speaking about an assault that happened to someone else within her program and the subsequent return of the man who committed the assault, S13 stated,

But even having conversations around [the fact that] he's been readmitted... Some people are he should fully be able to come back and participate in campus space and then other people not comfortable with it. And then it really quickly develops into nasty accusations. All sorts of accusations. People being accused of being supporters of the criminal justice system and really carceral because they're asking questions about how this person's participation in common space might impact other people particularly while the person they assaulted it still a student at the university. It's like there's no space to actually... a lot of it is littered with personal relationships.

In this situation, the community was in turmoil, causing even more difficulties for the survivors in that space. Thus, communities are not necessarily a bastion of support for survivors, nor are they a space in which they always feel comfortable attempting to obtain justice.

Once issues surrounding norms and beliefs are sorted out, communities in restorative processes must agree on and then implement a response. This is another stage of the process where groups struggle given a lack of both resources and useful models for successful structures. The traditional criminal law system focuses on a finding of guilt, but rarely goes much beyond this conclusion; the system is not designed to engage in systemic changes. What should a community participating in a restorative process be expected to accomplish? According to S4,

---

<sup>705</sup> *SVCU, supra* note 378; Sheehy & Gilbert, *supra* note 379.

So what is that community going to do? What are we going to promise each other that we're going to do to say yes, we're admitting this happens, even if it's sad and ugly and no one wants to think of this? It's happening, and maybe we shouldn't be so scared to talk about it. Well, I always think that. What is the community doing? Everyone works together to figure out what that looks like. Meaning do we have more resources, do we have more designated safe places? What are we changing in our workplaces, law-wise, and how are we enforcing these laws?

For the survivors I spoke with, the goal for these processes must go beyond merely listening and witnessing. While both are important aspects of justice, a key component of restorative justice is the idea of healing those involved. This requires behavioural changes that need both community support and resources to achieve. What should these goals and behaviour shifts look like? From the perspective of survivors, this can vary. For some, they want nothing to do with their assailant anymore. Some wish to shun the abuser and to have him face serious social consequences for his behaviour. Others want the community not to expel him, but to help him change.

Perhaps unsurprisingly, given all of these concerns and experiences, survivors stressed the importance of ensuring that they had power to define what community should mean in any potential justice process. The reasons for wanting this ability are many, but one in particular stood out in this grouping of interviews. According to S11,

I don't know how it would work pragmatically. What community members that you'd have? But I remember thinking even in the criminal trial that it was... I hated that his family wasn't there. I didn't want to put them through that necessarily, and to this day I don't know if he ever even told them. I'm assuming eventually he had to, but to not have his family or any of his loved ones or anything that he cares or who cares about him be there to see it. That bugged me. All of my friends have to know about this. My family has to deal with this. And you get to just pretend this isn't happening in your other life? You're charged with this crime, and then you have this outside life that you try to keep as separate as possible. So I would like in theory for that to happen. I think it would be good.

While there is always a risk that those close to the accused will deny any violent behaviour, for some survivors, this risk is worth taking on given the fact that those who love the offender must

know about his wrongful actions if they are to help create a space where he cannot deny his own culpability and will be supported in trying to change and make amends. While there are certainly survivors who would prefer to keep their justice processes quite private, there are also many who want to make sure that the perpetrator cannot hide his behaviour, particularly from the people he interacts with on a daily basis.

The difference for many survivors between a restorative option and the traditional court system is often about control. When it comes to the definition of community, survivors want the power to name all those involved in the violence, not just the person who committed the sexual assault, but those that enabled such incidents or added to the harm incurred by the survivor. As S1 detailed,

I want my teachers to be held accountable too... I'd want the Dean to sit in to see how much this hurt me. And people who make decisions about policy to understand. It would be a really long process.

... community needs to be involved, but what do we mean when we say community? [Are the perpetrator's] parents going to be invited to this table? Are my parents going to be invited to this table? Are my classmates? What do we say when we say community is going to be involved? Because for me, I want policy makers, I would want school's upper people there. I would want [the men who hurt me] probably, some of [their] friends, probably [their] parents. I want some of my classmates. I wouldn't want my parents. I do and I don't want my parents.

One aspect of justice is social accountability. For people to be able to change their communities, the community must be exposed to the harmful actions being done by certain members. The survivors I spoke with wanted to make sure that their story is not merely public, but that it reaches the right people who have the power to help push for systemic changes. This included both people who supported them and would help push for transformation, but also the people that helped cause the harms and needed to be shown how they were complicit in violence.

This can be especially important in the context of sexual assaults that occur within an institution. For S1, she was a university student who was hurt by another student, and her school was not prepared to respond to this sort of violence. She wanted to include the people responsible for policies that caused her additional harm, something that cannot be done in a traditional criminal trial. Community inclusion can offer survivors significant benefits that they often do not have access to in the legal system, and many of those that participated in these interviews desired a process that allowed for the involvement of a broader array of people.

S5 was one of the few interviewees in this project who participated in a transformative process. After experiencing a consent violation<sup>706</sup> at an event she attended, she wrote publicly about what had happened and how she felt. This provoked a wider community discussion about consent and sexual ethics where community norms were challenged and shifted, and people were held accountable for their behaviour. At no point was the state involved and the entire conversation was a community-based attempt to police harmful behaviour on the part of its members. In fact, the person who hurt S5 was “ousted from the community for quite a while” after it was recognised that he had a pattern of violating people’s consent, then apologising without changing his behaviour. This dialogue was complex and lengthy, but did result in actual changes within the community. According to S5, she was surprised and pleased by the process, stating that she realised “wow, this can actually work”.

S5’s consent violation happened outside of her local geographic community as she had travelled to this event. She described it as a complex situation as what she wanted and what the community hosting the event wanted were not necessarily the same things. It was difficult to

---

<sup>706</sup> This is a term used by the interviewee to describe a situation that she did not deem sexual assault, but took place in a sexualised context and was highly disturbing to her.



manage these conflicting needs given her status as a temporary member in that space. This once again shows just how complex the nature of community can be. How should restorative/transformational processes be structured in light of the often mobile nature of people's interactions with one another? While S5 was visiting a place far from her home during this transformational process, even within local communities people cycle in and out, and this shifting nature adds additional difficulties to determining the appropriate group of people to involve.

## **8.5 Conclusion**

As criticisms of the traditional legal system increase, people are turning to restorative/transformational justice processes as a potential solution to some of the challenges and obstacles they face when trying to find redress to sexual assault. The survivors I spoke with, however, were conflicted on the utility of these alternative methods of trying to obtain justice. On one hand, many of the women I interviewed stressed just how important it was to them that justice involved more than just incarceration. They were interested in the focus on healing and systemic change in restorative offerings as they wanted to focus on stopping sexual violence in general, and they wanted support in trying to move on and heal from the trauma of being assaulted.

However, even if survivors were interested in novel approaches to justice, they remained skeptical of how restorative processes would work in practice. They were concerned about duplicating their experiences in the traditional legal system unless these alternative processes were survivor-led and involved individuals who were very cognizant of the power dynamics inherent in sexual violence. This issue brought about a lot of unease when survivors considered the inclusion of community as they did not want to see the offender gain power over a process because the people involved did not understand why his behaviour was a problem. They also

worried about how a restorative process could ensure that the perpetrator would be held accountable. They believed that even though the focus of these processes was healing and change, consequences were still something offenders needed to contend with. Survivors argued that offenders needed supervision and support, and sometimes they would need to deal with unpleasant restrictions or consequences as a cause of their own behaviour. Healing, after all, is often not easy or comfortable for anyone.

What was most important to survivors was that restorative processes were a choice. They wanted those hurt by sexual assault to have a wide array of options for redress, but they also stressed that these different approaches should not be seen as better or worse than the traditional system. No survivor should be pressured into taking one approach over another. The legal system (and related systems) should be flexible and adaptable enough for survivors to be able to choose what works best for their circumstances.

## Chapter 9: Conclusion

### 9.1 Summary of Key Findings

I began this dissertation by highlighting some of the recent public dialogues about sexual assault and arguing that, despite the multitude of conversations and protests surrounding this issue, sexual assault survivors continue to feel that the legal system is failing them in their pursuit of justice. Rather than question trial processes and how they could be improved, I was curious about why survivors turned to the legal system at all. Consequently, I conducted a series of interviews to better understand what justice means to those who have been sexually assaulted and what sorts of redress they are seeking in the aftermath of violence.

In order to answer my question, I formulated a project using feminist standpoint epistemology. Given the gendered nature of sexual assault and the limitations of my research, I decided to focus on women-identified survivors. I felt it necessary to speak directly with the people implicated in my research question. In order to understand the justice needs of survivors, it was imperative that their particular standpoint be centred.

After working with my data through the lessons of grounded theory, I identified four central themes that I used to structure this dissertation: harms and healing, accountability, punishment, and restorative justice. In the first, survivors discussed how healing from a sexual assault was not only part of justice, but often necessary before they were able to engage with any legal aspects of justice.<sup>707</sup> While some scholars have argued that explorations of legal justice should be limited to mostly procedural issues, so much of what I heard from survivors required

---

<sup>707</sup> See, for example, Robin West's examination and critique of the content of legal justice: Robin West, "Re-Imagining Justice" (2003) 14 *Yale LJ & Feminism* 333; Robin West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Burlington, VT: Ashgate, 2003).

me to reject such a premise if I was to fully embrace my methodology of standpoint epistemology.

Healing had several components and some accorded with the more procedural rights discussed in the justice interest literature that I reviewed in Chapter 1. Survivors spoke about how important it was to regain a sense of agency and power in the aftermath of an assault. As sexual assault is a crime that denies someone their full autonomy, healing from such an offence often requires that a survivor be able to act based on her own needs. This necessitates that she also have choices available and be able to manage her actions on her own timeline. Survivors highlighted that the current legal system often undermines these needs, throwing them into situations that they have little control over, and ones that deny them the full ability to speak their own truths given the legal system's strict adherence to rules and formalised behavioural norms.

Survivors also stressed that validation was part of healing. They wanted to be believed by the people around them. Many of them wanted others to witness their pain and assure them that it was caused by unacceptable behaviour. This applied to friends and family, but also to actors within the legal system. While much of the legal system is adversarial in nature, the women I talked to wanted to feel respected during situations such as cross-examination. They wanted to be able to tell their stories and not be belittled, even if they were challenged. Many women also brought up how justice requires some sort of validation from the offender, though most thought that such a scenario was unlikely. However, in their ideal reality, they wanted the offender to recognise the pain that he caused and to take responsibility for his actions by admitting to his wrongs.

Another aspect of healing that survivors identified was the need for community and state support. This included access to necessary healthcare such as therapy and counselling. It also

required that society as a whole become better at responding to sexual assault. Survivors spoke of a desire for spaces where they could talk about their experiences and not fear being victim-blamed. Survivors wanted to live in a world where they had easy-to-access resources available to them that would help them recover and supportive individuals that did not derail their attempts to get better.

The last healing need that survivors highlighted was that of compensation. Sexual assault often results in expenditures that a survivor would not have had otherwise. Whether it be for medical care or because they need to move, survivors have costs that they must deal with. Many of the women I interviewed talked about how these financial burdens were exceptionally difficult to handle, particularly as they were recovering from their assault. For many of the survivors I talked with, the CICB was their preferred method of compensation. They liked that they were able to apply to the government for help without necessarily having to involve the offender or engage in a long, drawn-out legal affair. While some felt that getting the money directly from the offender would feel appropriate, several worried that this would have differing impacts on offenders depending on their financial stability.

The chapter on healing ended up being one of the longest in this dissertation, showcasing just how important this concept is to survivors. While some of the literature on therapeutic justice and procedural justice also supports the conclusion that justice goes beyond the outcomes that can be provided by the legal system and incorporates how people feel and are treated, my dissertation pushes the concept further. Healing involves outcomes, feelings, as well as material realities. Even a well-designed process that treats a survivor with respect will not necessarily provide her with a sense of justice if her life remains in shambles after being attacked and she has no way of trying to make things better for herself.

The second theme that arose from my interview data dealt with survivor perceptions regarding accountability. For survivors, accountability was tied deeply to the need for an offender to admit to his wrongs and change his behaviour. They wanted to see that the person who hurt them was taking steps to ensure that he would not hurt anyone again in the same manner. This, they believed, required offenders to take responsibility for their actions. Someone who cannot admit to the wrong that he committed would not be able to understand what about his behaviour needed to change. To that end, survivors identified education as another important aspect of accountability. If an offender was prepared to change, then he should have access to resources to help him achieve this. Survivors expressed dismay over the lack of resources available for perpetrators, though also acknowledged that not all offenders would benefit from educational opportunities even if they were available.

Aside from the offender, survivors also pointed out that social accountability was important, and people needed to be responsible to one another when it comes to reducing and preventing sexual violence. Social accountability requires everyone to have a better understanding of sexual assault in order to prevent such offences from occurring, or from making survivors' situations worse with reactions such as victim-blaming. Further, if an offender has any hope of successfully changing his behaviour, the community that surrounds him needs to foster a space where such reform is possible.

Another part of accountability for survivors was connected to the idea of protection. Survivors wanted to know that they, as well as society as a whole, were safe from an offender's potential future wrongdoing. They understood that this was often accomplished via imprisonment, but noted that sexual assault offenders were rarely imprisoned for long and would eventually return to their communities. As such, survivors wanted there to be some sort of

monitoring available in hopes that this would reduce recidivism rates. Many women identified sex offender registries as a possible method. The women I spoke with wanted sex offenders to have to check in with someone actually trained in responding to sexual assault and behaviour modification. They wanted offenders to be subject to educational plans and have to prove their willingness to change and avoid situations that could lead to criminal actions.

One particularly interesting finding was that survivors often included themselves in their perceptions of accountability. I heard from several women that they felt compelled to report their assault because they worried that if they did not then the offender may harm someone else. Even if they did not want to engage in a legal process for themselves, several did so because they felt responsible for trying to protect others.

Survivors noted that if they were unable to find accountability through traditional means, some of them would make use of public naming and/or shaming to deal with the offender, posting about their assault online and ensuring that other people knew what happened and could react to the offender accordingly. However, while talking about their stories so openly was sometimes the only available tool for a survivor, several worried about how the court of public opinion was fickle and impossible to control. A survivor could be hurt by her attempt to enforce some sort of accountability in this manner.

The third theme from my interview data dealt with survivor perceptions around punishment. To be accountable, an offender must admit that he has done something wrong and this often results in some form of negative consequences. While punishment is not always needed for accountability, it is something that people often consider when thinking of justice. Interestingly, this was the area in which I found the most variety in opinions. Survivors struggled with their thoughts on punishment. For some, they felt it was a necessary part of responding to

an offence, but for others, they questioned the purpose and utility. In particular, most of the women I spoke with associated imprisonment with punishment and were extremely conflicted about their opinions on the matter. Many voiced concerns over whether incarceration helped to address sexual assault, made the problem worse, or merely delayed offenders from further wrongdoing.

Survivors were mostly united in being upset about how incarceration is used and applied. In a system that relies on imprisonment as one of the central ways of punishing offenders, survivors were frustrated with how short sexual assault sentences tend to be. They compared sexual assault sentences to those for offences such as murder, talking about how the impacts of sexual assault are so devastating that they should be seen as requiring a substantially harsher response than what current precedent provides. The women I interviewed also questioned how the criminal law system should respond to the fact that there are different types of offenders, and punishment that works for one person may not work for another, even if the crimes are similar.

Another major concern in this area was the anger that survivors felt about their experiences. Several women mentioned having violent revenge fantasies. Though they did not actually wish to hurt the offender, they struggled with these intense feelings and felt that they were not able to express them without others thinking poorly of them. They wanted space to be able to talk about the rage and oftentimes violent reactions they had without people assuming that they were being hysterical or incapable of a measured, rational response to how to treat the offender. Anger also made the topic of punishment difficult as sometimes they desired punishment as vengeance, but many felt uncomfortable with their own wishes.

Finally, survivors talked about forms of punishment other than incarceration. Some suggested restitution and discussed how financial impacts could be a punishment. However, once



again, several women were concerned that financial punishments would not be equally felt among offenders, or that if offenders were punished more based on their financial means, if the money went to survivors, it meant survivors would be penalised if they were hurt by a poor offender. Another suggestion was to implement employment restrictions on offenders, particularly those who used their position of authority to harm employees. Punishment in these types of cases could prevent the offender from engaging in some types of work as a consequence of their choices.

The last of the central themes from my interviews involved the topic of restorative justice. Conversations about prison reform and abolition are on the rise, and many of the women I interviewed were aware of these concepts. While not all of the survivors I spoke with were amenable to using a restorative approach in their situation, they believed that alternative options such as these should be available. Many had concerns and stressed that restorative processes should be designed in such a way as to respond to the unique realities of sexual assault. Several noted that the processes should be survivor-led, tying back to the need for agency they felt was missing from more conventional legal proceedings. They stressed that while some survivors may want to be heavily involved in restorative mechanisms, others may wish to take a more reserved approach, or not bother with such an attempt at all.

Survivors were also concerned about ensuring accountability in a restorative approach. They worried about how to determine whether an offender was being honest about accepting responsibility for his behaviour, or whether he was playing along because he thought he would benefit more from an alternative process than a traditional criminal proceeding. They also pointed out that sexual violence often means that unequal power dynamics will be at play between the survivor and the offender and that these processes needed to be deliberately

structured to prevent offenders from using their power to further harm the survivor. Many women also noted that restorative processes would often need to have some sort of consequence attached to them. As important as talking through the assault and hearing offenders take responsibility were, several survivors stressed that offenders needed to be obligated to change and sometimes this could only be done through the use of negative consequences that forced them to do certain things.

Finally, the topic of community in alternative processes came up multiple times as survivors questioned who their community was and who they trusted to be involved in such a process. Some worried that the community may support the offender instead of the survivor, and others did not believe there was enough of a cohesive community to be able to address the issue productively in their situations.

## **9.2 Next Steps: Some Modest Recommendations**

Throughout this dissertation, I have highlighted the perspectives and experiences of survivors as they navigate their path to justice after being assaulted. While it was never my intent to create a definitive and exhaustive reform platform based on what I learned, it would be remiss of me to avoid recognising some of the possible changes that could be implemented based on the conversations I had in my interviews. There are many different types of reform that could be undertaken to improve survivor experiences of justice, from an extremely radical tearing down of the entire system, to more targeted, liberal changes that would make the current legal system less harmful for survivors. In this section, it is these latter changes I am focusing on. Though there is always a risk in working within a problematic system founded on discriminatory ideals,<sup>708</sup> I

---

<sup>708</sup> Kim 2020, *supra* note 398.

believe that it is possible to make the legal system better even if these reforms do not result in a perfect system. Additionally, the recommendations I make do not impinge on fair trial rights or any other interests of accused persons. While they are comparatively minor changes compared to some of the more radical recommendations made by abolitionists, they would make a substantial difference in the lives of women who have been sexually assaulted and would be a step towards the creation of a more equitable legal system.

### **9.2.1 Improve Offender Education and Rehabilitation Opportunities**

If behaviour change on the part of the offender is one of the most important things that survivors believe is needed for offender accountability, then offenders should have access to appropriate educational options in order to learn how to stop engaging in harmful actions. Education can be a crucial part of encouraging accountability on the part of a perpetrator of violence. While offenders that go through a criminal trial hear about how their behaviour is unacceptable, this is not always sufficient to generate life-long changes.<sup>709</sup> Consequently, the survivors I spoke with believed that, regardless of how a sexual assault is dealt with, those who commit sex offences should have educational options available to help them.<sup>710</sup>

In the current system, once an offender is given a sentence of imprisonment, he has, in theory, access to rehabilitative programs offered in both the federal and provincial prison systems.<sup>711</sup> Both levels of government provide specific programs for sex offenders. For example,

---

<sup>709</sup> As discussed in Chapter 3, very few criminal cases proceed through to a trial so this further limits the potential educational effect desired by survivors.

<sup>710</sup> Sexual assault perpetrators are not a monolith; consequently, different forms of education will be necessary depending on the individual and circumstances involved. A more in-depth discussion of the difference between offenders can be found in Chapter 7.

<sup>711</sup> Any offender given a sentence of imprisonment of 2 years less a day will be incarcerated in the provincial prison system, while those with sentences of 2 years or over will spend that time in a federal prison. Given the vast majority of sexual assaults are charged as summary offences (Rotenberg 2, *supra* note 204), most offenders—in fact,

at the federal level, the Correctional Service of Canada (CSC) offers four programs targeted at sex offenders: high-intensity, moderate intensity, maintenance, and a special program for Inuit men.<sup>712</sup> In these programs, the CSC aims to help offenders understand the impact of sexual violence on survivors, unpack the offender's beliefs about sexual violence, manage their behaviour through understanding their emotions and risk factors, as well as introduce them to the foundations of healthy relationships and coping strategies.<sup>713</sup> Many of the provinces offer similar opportunities. These programs are delivered via a combination of individual and group therapy, with the length depending on which program the offender enrolls in. Offenders may also have access to mental health services outside of the rehabilitative programs offered by the CSC, and these may include some sex offence-specific treatment as well.<sup>714</sup> Once an offender is released, there are private psychologists and therapists who offer sex offender treatment, though such services are generally expensive. There are also programs such as Circles of Support and Accountability (CoSA) that exist to support offenders once they have finished their sentences.<sup>715</sup>

There are three primary issues with the sex offender treatment that is currently available within or adjacent to the legal system. The first involves how accessible any of these programs actually are for offenders. The Canadian prison system is overburdened and often does not meet

---

somewhere in the realm of 90%—will have access only to provincial programs. See: Mark E Olver & L Maaiké, “Canadian Content, Context, Current Practices, and Controversies in Sexual Violence Risk Assessment”, online: (2018) 13 *Sexual Offender Treatment* <<http://www.sexual-offender-treatment.org/169.html>> [Olver].

<sup>712</sup> “National Sex Offender Programs, (24 April 2014), *Correctional Service Canada*, online: <<https://www.csc-scc.gc.ca/correctional-process/002001-2008-eng.shtml>>.

<sup>713</sup> *Ibid.*

<sup>714</sup> Olver, *supra* note 711.

<sup>715</sup> A CoSA is a group of both volunteers and professionals whose purpose is to support a sex offender's reintegration with society, helping him to develop new skills and coping mechanisms that will assist him in stopping future violent and harmful behaviour. See: *CoSA Canada*, online: <<http://cosacanada.com/>>; Robin J Wilson et al, “Circles of Support & Accountability: An Evaluation of the Pilot Project in South-Central Ontario” (May 2005), *Correctional Service Canada*, online: <[https://www.csc-scc.gc.ca/research/092/r168\\_e.pdf](https://www.csc-scc.gc.ca/research/092/r168_e.pdf)>. For a feminist perspective on CoSAs, see also: Barrie, *supra* note 444.

the basic needs of inmates, particularly in regards to rehabilitation.<sup>716</sup> While many different programs are available for offenders, they are often obtainable only at certain institutions. For example, in the federal system, the high-intensity sex offender program is offered at only four prisons in the country.<sup>717</sup> There are many reasons why a prisoner may not be able to access these location-specific programs. Perhaps they wish to stay close to their communities and the programs are offered in areas of the country too far away.<sup>718</sup> Many of these programs have wait-lists, and prisons themselves are often overcrowded, thus transfers are not always available.<sup>719</sup> Some offenders need access to a variety of programs and supports, not all of which are offered in the same place. Most critically, offenders do not control where they are incarcerated. Corrections Services is in charge of making decisions about where offenders will be housed, and while proximity to programs and family are important considerations, inmates have very little input on

---

<sup>716</sup> “2019-2020 Annual Report Office of the Correctional Investigator” (26 June 2020), *The Correctional Investigator Canada*, online: <<https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20192020-eng.pdf>>; “Overcoming Barriers to Reintegration: An Investigation of Federal Community Correctional Centres” (2014), *The Correctional Investigator Canada*, online: <<https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20141008-eng.pdf>>; Justin Ling, “Canada’s Prisons are Failing” (12 August 2019), *The Canadian Bar Association*, online: <<https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/canada-s-prisons-are-failing>> [Ling]; Patrick White, “Canada’s Investment in Prison System Isn’t Bringing Results, Watchdog Reports” (25 April 2019), *The Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/article-canadas-investment-in-prison-system-model-isnt-bringing-results/>>.

<sup>717</sup> Sidney Cohen, “Nunavut Man Denied Parole, Wait-Listed for Sex Offender Treatment” (25 November 2019), *CBC News*, online: <<https://www.cbc.ca/news/canada/north/dangerous-offender-iqaluit-mental-health-parole-1.5370493>> [Cohen].

<sup>718</sup> Keeping close to one’s community can be important for incarcerated offenders, particularly if they have family ties they wish to maintain. See: Beatrix Lockwood & Nicole Lewis, “The Long Journey to Visit a Family Member” (18 December 2019), *The Marshall Project*, online: <<https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison>>; Bernadette Rabuy & Daniel Kopf, “Separation by Bars and Miles: Visitation in State Prisons” (20 October 2015), *Prison Policy Initiative*, online: <<https://www.prisonpolicy.org/reports/prisonvisits.html>>. In Canada, this problem is particularly pronounced for Indigenous people who are often incarcerated far from their home communities and have little access to culturally appropriate resources. See: Ryan Beardy, “Family Matters: Home is at the Heart of the Indigenous Prison Crisis” (30 October 2020), *The Globe and Mail*, online: <<https://www.theglobeandmail.com/opinion/article-family-matters-home-is-at-the-heart-of-the-indigenous-prison-crisis/>>.

<sup>719</sup> Ling, *supra* note 716.

these decisions. There are also serious problems regarding program access at provincial levels. Not all provinces offer robust rehabilitative opportunities or sex-offender specific treatment.<sup>720</sup>

Difficulties arise in the realm of risk assessments as well. Different programs are recommended for offenders depending on how at risk of reoffending they are deemed to be. However, are these risk assessments accurate?<sup>721</sup> Given how prevalent rape myths are within the justice system, it is fair to assume that such issues exist within the corrections system as well. If offenders are not being assigned the appropriate level of treatment, what implications does this have for the outcomes of the programs? Furthermore, do offenders who are deemed low-risk have adequate access to education and counselling as well? A full exploration of risk assessments and their potential issues is outside the scope of this dissertation, but it is important to note that there remain many unanswered questions in the literature and data on this topic.

The second major issue with these treatment options is determining whether they are effective or not. Looking at the academic literature, there is no clear answer as to how useful these sex offender treatment programs are in terms of preventing further violence. Most studies suggest that recidivism rates for offenders who participate in sex offender treatment are lower than for those that do not, but there is substantial disagreement over how valid this data is or whether or not the reductions are sufficient.<sup>722</sup>

---

<sup>720</sup> Cohen, *supra* note 717.

<sup>721</sup> For example, in one recent study, researchers determined that there are several different risk assessment tools in use across Canada, meaning that offenders will receive different treatment for similar crimes depending on where in the country they reside. See: Guy Bourgon et al, "Offender Risk Assessment Practices Vary Across Canada" (2018) 60:2 *Canadian Journal of Criminology and Criminal Justice* 167.

<sup>722</sup> Jan Looman et al, "Recidivism Among Treated Sexual Offenders and Matched Controls: Data from the Regional Treatment Centre (Ontario)" (2000) 15:3 *Journal of Interpersonal Violence* 279; R Karl Hanson et al, "Evaluating Community Sex Offender Treatment Programs: A 12-Year Follow-up of 724 Offenders" (2004) 36:2 *Canadian Journal of Behavioural Science* 87; Mark E Olver et al, "Outcome Evaluation of High-Intensity Inpatient Sex Offender Treatment Program" (2009) 24:3 *Journal of Interpersonal Violence* 522; Jeffrey Abracen et al, "Recidivism Among Treated Sexual Offenders and Comparison Subjects: Recent Outcome Data from the Regional

There are many difficulties for anyone trying to assemble accurate data on recidivism rates in this area. One problem that arises in the Canadian context is data collection between different jurisdictions and levels of government. It is challenging for any researcher to accurately combine different streams of data and know for sure that an offender has not reoffended in another jurisdiction. Someone who may seem like an example of effective rehabilitation may have committed a sexual assault in another province that was not properly captured depending on how the data of each individual province (and/or the federal CSC) was reported.

One final issue to address is access to treatment post-incarceration. While maintenance treatment<sup>723</sup> is theoretically available when an offender is in prison, opportunities for treatment post-incarceration are scarce unless an offender is willing *and* capable of paying for private treatment. Professional therapy in Ontario is expensive, and publicly funded options are both limited and difficult to obtain.<sup>724</sup> Programs such as CoSA do offer an alternative to the medical system and there is some evidence that they help reduce recidivism.<sup>725</sup> Once again, however, an offender must choose to engage with a CoSA group of his own accord, which also means that there must be CoSA supports in his community and that he is aware that they exist.

---

Treatment Centre (Ontario) High-Intensity Sex Offender Treatment Programme” (2011) 17:2 *Journal of Sexual Aggression* 142; Mark E Olver et al, “Sex Offender Treatment Outcome, Actuarial Risk, and the Aging Sex Offender in Canadian Corrections: A Long-Term Follow-up” (2012) 25:4 *Sexual Abuse: A Journal of Research and Treatment* 396; Bitna Kim et al, “Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment” (2016) 17:1 *Trauma, Violence & Abuse* 105. It is also important to point out from an intersectional perspective that there is limited research on culturally appropriate sex offender treatment.

<sup>723</sup> Maintenance treatment is aimed at offenders who have undergone an educational or counselling program and would like additional support in order to help them uphold their behavioural changes.

<sup>724</sup> “Physician Psychotherapy Unavailable to Ninety-Seven Percent of People with Urgent Mental Health Needs in Ontario” (11 March 2020), *IC/ES*, online: <<https://www.ices.on.ca/Newsroom/News-Releases/2020/Physician-psychotherapy-unavailable-to-ninety-seven-percent-of-people-with-urgent-mental-health>>.

<sup>725</sup> Barrie, *supra* note 444. See also: Robin J Wilson et al, “Circles of Support & Accountability: A Canadian National Replication of Outcome Findings” (2009) 24:4 *Sex Abuse* 412; Martin Clark et al, “Circles of Support and Accountability for Sex Offenders: A Systemic Review of Outcomes (2017) 29:5 *Sex Abuse* 446; Miriam N Bohmert et al, “Evaluating Restorative Justice Circles of Support and Accountability: Can Social Support Overcome Structural Barriers?” (2018) 62:3 *International Journal of Offender Therapy and Comparative Criminology* 739.

Overall, the educational and rehabilitative opportunities available to sex offenders are not nearly substantial or effective enough to do what the survivors I interviewed wanted them to do. The majority of the women that I talked to wanted offenders to change. They acknowledged that people who commit sexual violence remain part of society and thus needed the chance to learn how to stop engaging in violent and harmful behaviours. In order to do this, more robust educational and rehabilitative options need to be offered and encouraged both inside and outside of prisons.

### **9.2.2 Expand Restorative and Transformative Offerings**

Despite the controversies surrounding the use of restorative and transformative processes in situations involving gender-based violence, most of the women I spoke with felt that these options should exist and be accessible. As discussed in the previous chapter, many restorative programs do not include cases involving sexual assault due to the complexity of navigating these types of situations. However, there are some examples of restorative processes, such as the former RESTORE program in the US, that could be used as a model in Canada.<sup>726</sup> More funding and resources should be dedicated to researching and establishing restorative processes, something that both the provincial and federal governments have committed to doing in recent years.<sup>727</sup> Additionally, better efforts should be made at making victims of crime aware of restorative opportunities.

In Chapter 8, I discussed how alternative justice processes can exist both inside and outside of the state's control. While it is easy to see how governments have a responsibility for

---

<sup>726</sup> Koss 2014, *supra* note 400.

<sup>727</sup> "Increasing the Use of Restorative Justice in Criminal Matters in Canada- Baseline Report" (24 November 2020), *Public Safety Canada*, online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2020-resjus-jusrep/index-en.aspx>>; "Restorative Justice" (7 July 2021), *Government of Canada*, online: <<https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html>>.



processes that are enacted within the legal system, there is still room for government support of non-state connected processes. As I noted earlier, justice mechanisms that exist outside the state are often labelled transformative efforts, and while they may be quite informal, it is possible for the state and society overall to support and encourage such attempts. For example, Leigh Goodmark suggests that it is important for community-based justice forums to exist in many spaces.<sup>728</sup> She points to churches and community centres as places with deep local connections that are not necessarily associated with the legal system.<sup>729</sup> This creates a place where people who may be wary of police and the courts can go when they have a conflict, and encourages social accountability rather than just legal accountability.<sup>730</sup>

Mimi Kim also talks about the ways in which transformative processes develop most often in subaltern spaces, far outside state-centric institutions.<sup>731</sup> She explains that,

the criteria for funding and legitimacy in today's neoliberal nonprofit and state-driven landscape collide with the politics and practices of transformative justice. Transformative justice remains locally driven, anti-state, and anti-institutional; therein lies its strength—and its possible limitations.<sup>732</sup>

While I advocate for increased funding for community-based spaces and processes, Kim would challenge whether this is possible given the radical and dynamic nature of transformative justice groups, or whether such attempts would result in a co-optation of the politics and promises of this form of justice. I think many of the challenges she identifies are legitimate, but I would still support state funding if the government remained largely uninvolved in the actual

---

<sup>728</sup> Goodmark 2015, *supra* note 31 at 734.

<sup>729</sup> *Ibid.*

<sup>730</sup> *Ibid* at 737.

<sup>731</sup> Kim 2020, *supra* note 398 at 319.

<sup>732</sup> *Ibid.*

implementation and running of such spaces, keeping the subaltern character of these more informal organisations of community intact.

I envision that these community-based spaces would not be filled with legal actors, but with individuals who already work in these organisations who would be trained in the realities of sexual assault, from how trauma can affect people, to how to protect and support vulnerable individuals during a justice process. Given the concern over the meaning and availability of community that I addressed in Chapter 8, the pod system of accountability could be used. Mia Mingus describes accountability pods as networks of people who support each other when violence occurs, whether they are the survivors, aggressors, or other community members.<sup>733</sup> When an incident like a sexual assault happens, multiple pods can be created to support different people.<sup>734</sup> For example, there can be a pod created out of people that the survivor knows and trusts or that have experience in dealing with these types of situations and can help the survivor deal with the repercussions of the assault. Instead of trying to navigate the confusing system of resources that she needs alone, there is a team that can work together to make the experience less isolating and difficult.

It is also important for the aggressor to have a pod as well as he needs to be surrounded by people who are willing to hold him to account for his behaviour and to help him learn and change.<sup>735</sup> These accountability pods take the nebulous idea of community and purposely create relationships meant to help the people involved heal and recover from what happened. Even if the parties involved are not part of a tight-knit community, an accountability pod process helps

---

<sup>733</sup> Mia Mingus, “Pods and Pod-Mapping Worksheet” in Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, California: AK Press, 2020) 119 at 119.

<sup>734</sup> *Ibid* at 121.

<sup>735</sup> *Ibid*.

*create* connections and fosters a sense of community between people.<sup>736</sup> While obviously these are more informal processes, outside of the legal system, governments can still help support these types of justice mechanisms with funding and support for the community-based organisations that host them.

For example, the Ontario provincial government recently gave funding to several women's organisations to look into and report on alternative justice models for sexual assault. In 2020, WomenatthecentrE,<sup>737</sup> one of the non-profits involved in this project, released a report on their findings entitled *Declarations of Truth*. In it, they detailed a comprehensive transformative justice approach based on the accountability pod model. In this regime, there would be a survivor support team and an accountability support team for the offender.<sup>738</sup> The survivor support team would include one survivor, a trained community support member, and at least one other person, and their role would be to emotionally support the survivor, as well as help her with practical matters.<sup>739</sup> This team would also help the survivor craft a Justice and Accountability Statement (JAS) which would outline what the survivor needs from the offender.<sup>740</sup> For example, a JAS might require the offender to inform others about his actions, he may need to stay away from the survivor and the spaces she often frequents, and/or he may need to commit to some form of education.<sup>741</sup> The survivor would also write a Personal Transformation Statement which would outline what she needs for her recovery.<sup>742</sup>

---

<sup>736</sup> *Ibid* at 124.

<sup>737</sup> WomenatthecentrE, online: <<https://www.womenatthecentre.com/>>.

<sup>738</sup> "Declarations of the Truth" (July 2020), WomenatthecentrE, online: <<https://www.womenatthecentre.com/initiatives/declarations-of-truth>> at 178.

<sup>739</sup> *Ibid*.

<sup>740</sup> *Ibid* at 179.

<sup>741</sup> *Ibid*.

<sup>742</sup> *Ibid*.

The Accountability Support Team would include a survivor, trained community support member, and a transformed aggressor.<sup>743</sup> This team would help the offender respond to the survivor's JAS with both emotional and practical support.<sup>744</sup> The team would also be a model for better behaviour that the offender could learn from.<sup>745</sup>

The report notes that there is no specific timeframe for how long one of these transformative processes should take.<sup>746</sup> What is important is that the survivor is able to guide the process to get what she needs, and that the offender is also given the opportunity to learn and change. Additionally, WomenatthecentrE envisioned creating a physical space where people would have a comfortable and safe environment to work on their processes and meet with teams.<sup>747</sup> Overall, the report was a detailed and workable plan for supporting transformative processes in cases involving sexual assault while still remaining largely outside of state control.<sup>748</sup>

Though I have stressed that these transformative projects should remain largely out of the state's control, the government should exert some oversight into which organisations are granted funding. For example, WomenatthecentrE's pilot program is a carefully designed attempt at providing justice mechanisms based on best practices that they have gathered from others doing this type of work. While volunteers are heavily involved in the process, trained community

---

<sup>743</sup> A transformed aggressor is someone who themselves was once a perpetrator of violence and went through a transformative process. *Ibid* at 178.

<sup>744</sup> *Ibid* at 180.

<sup>745</sup> *Ibid*.

<sup>746</sup> *Ibid*. The writers of *Declarations of Truth* estimate that most processes would take between six months to two years.

<sup>747</sup> *Ibid* at 189.

<sup>748</sup> WomenatthecentrE is moving forward with their Transformative Justice Initiative and are currently developing an online platform to aid women who have experienced violence navigate and understand transformative processes. They remain committed to creating a physical transformative justice centre as well. "Transformative Justice Initiative" (2021), *WomenatthecentrE*, online: <<https://www.womenatthecentre.com/initiatives/transformative-justice-initiative/>>.

support members are also part of the teams and they will have had education on sexual assault, as well as dispute resolution and harm reduction. Institutions such as churches could, as I have suggested above, be another powerful arena for community-based justice, but they must first show that they are prepared to offer well-structured programs that are not founded on rape myths and other inequitable philosophies. Funding should not be given to organisations that cannot illustrate how their program will function and be of benefit to both survivors and offenders.

### **9.2.2.1 Indigenous Perspectives on Restorative Justice**

Given the intersectional approach of my research, I would be remiss if I did not address the connection that is often made between Indigenous Peoples and restorative justice.<sup>749</sup> While acknowledging the Indigenous origins of some of these processes is important, the conversation must go further. Simply stating that Indigenous Peoples were once the founders of these traditions not only portrays them as people who existed in the past, but often excludes them from the theorising and practice of these processes today.<sup>750</sup> If restorative justice is to be seen as part of Indigenous traditions, it must be discussed as such from *both* a historical and contemporary perspective, particularly given the fact that Indigenous legal practices based on restorative principles are still actively being used today.<sup>751</sup>

---

<sup>749</sup> Many restorative processes, including those explicitly labelled Indigenous, are founded in colonial understandings of the process. See: Daly and Stubbs, *supra* note at 390; Chris Cunneen, “What Are The Implications of Restorative Justice’s Use of Indigenous Traditions?” in Howard Zehr & Barb Toews, eds, *Critical Issues in Restorative Justice* (New York: Criminal Justice Press, 2004) 341; Juan Marcellus Tauri, “Restorative Justice as a Colonial Project in the Disempowerment of Indigenous Peoples” in Theo Gavrielides, ed, *Routledge International Handbook of Restorative Justice* (London: Routledge, 2018) 342; Harry Blagg & Thalia Anthony, “Restorative Justice or Indigenous Justice?” in Harry Blagg & Thalia Anthony, eds, *Decolonising Criminology* (London: Palgrave Macmillan, 2019) 133; Cameron, *supra* note 415.

<sup>750</sup> Emily Snyder, Val Napoleon, & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48 UBC L Rev 593 at 594-595 [Synder].

<sup>751</sup> *Ibid.*

When Indigenous people are excluded from the dialogues on restorative justice, they become essentialised in these narratives. Restorative justice becomes the only acceptable method of dealing with crime in Indigenous communities.<sup>752</sup> However, whether a desire for restorative justice is prevalent in Indigenous communities (of which there are many with vastly differing legal traditions), there must be a contextual approach to applying these procedures. Just because a woman is Indigenous should not imply that she must be against imprisonment as a potential punishment for the man who sexually assaulted her. Many Indigenous women are hurt by men outside of their communities.<sup>753</sup> What benefit does restorative justice give an Indigenous woman when a non-Indigenous man outside of what she considers her community sexually assaults her? What reason does she have to commit to a process that will probably change her situation very little? Are there structures that can be used to ensure that her race and gender are properly considered in these procedures?

A truly intersectional feminist approach to ensuring that Indigenous women are able to obtain justice after being sexually assaulted would involve letting them take leadership over developing justice mechanisms that work for them and supporting these efforts.<sup>754</sup> An Indigenous woman who lives in a small Indigenous community may feel that the best resolution

---

<sup>752</sup> *Ibid* at 595. Synder et al caution against the way that “culture can be ‘hijacked’ by those in authority to create or replicate the status quo”. Accordingly, any conversation about culture and justice must be grounded in an understanding of power and oppression. While restorative justice is certainly not the primary method of sentencing in Canada, it dominates some aspects of academic theory, often from non-Indigenous scholars, as a solution to many of the problems facing Indigenous people within the justice system.

<sup>753</sup> For example, when the data from the Missing and Murdered women files is examined, around 50 percent of the victims did not know or barely knew the person who killed them: “Murdered and Missing Indigenous Women in Canada” (13 November 2015), *Toronto Star*, online: [http://misc.thestar.com/pdfs/Toronto\\_Star\\_MMIW\\_Analysis\\_2015.pdf](http://misc.thestar.com/pdfs/Toronto_Star_MMIW_Analysis_2015.pdf).

<sup>754</sup> Indigenous women are experienced leaders in responding to violence in their communities. They need to be respected as experts in their field and given the support and resources they need to affect the change that they have been trying to create. See: MMIWG, *supra* note 159; John Borrows, “Aboriginal and Treaty Rights and Violence Against Women” (2013) 50:3 Osgoode Hall LJ 699 [Borrows].

after being sexually assaulted would be to help the offender change without banishing him from his home as his presence is still important to her. According to research from Statistics Canada, charges involving violence against Indigenous women are dropped most frequently when the accused is Indigenous.<sup>755</sup> There are many probable reasons as to why this may be the case,<sup>756</sup> but there is a great need recognise that Indigenous women are the ones best able to identify what it is they need after they are harmed. In this particular example, does a woman withdraw her complaint or stop participating in an investigation because she still loves the man who hurt her, because she feels as if she has no choice as her attacker brings in the majority of the family income, or because the community is pressuring her to forgive? Is she trapped between deciding what is best for her or for her community?<sup>757</sup> According to L2, during training for dealing with domestic violence in Indigenous communities she learned there was no specific solution that all Indigenous women desired. Instead,

what women were saying is we call the cops and then the next day he's released back in the community and the immense frustration with that. And in other places, immense frustration with there not being a healing process where you have intensive services to bring family [back together].

What choice would Indigenous women make if they had properly funded options designed to support their needs, and if the legal system was designed to deal with crime in a more intersectional manner? Survivor needs are best dealt with by offering a variety of solutions, rather than imposing an overarching standard of justice that may exclude or even harm some victims.

---

<sup>755</sup> Scrim, *supra* note 460.

<sup>756</sup> The police may take intra-level violence among Indigenous people less seriously, or the community may be hesitant to allow one of their own to be imprisoned by a racist and colonialist state.

<sup>757</sup> Daly and Stubbs, *supra* note 390.

Speaking directly with Indigenous people and looking at Indigenous traditions surrounding sexual assault shows that historical Indigenous responses to this type of offence are far more complex and nuanced than modern narratives often recognise, including actions such as corporal punishment, banishment, or even death.<sup>758</sup> While there was an emphasis on trying to heal the community, a variety of different responses could be considered appropriate depending on the situation. According to Emily Synder et al, it is imperative that legal theorising on responses to sexual violence not cast past Indigenous realities as free from gender-based violence as this type of harm did occur, and Indigenous people had methods of dealing with these situations that could provide valuable lessons today.<sup>759</sup> Romanticising Indigenous traditions does a disservice to their real historical knowledge, as well the work that Indigenous Peoples have done to take these traditions and adapt them to today's realities. Thus, when it comes to alternative justice, it is crucial that "[Indigenous] law and restorative justice... not be conflated."<sup>760</sup> To really understand the full breadth of what Indigenous laws and legal orders have to say about dealing with sexual violence, one must look beyond a single answer. More importantly, Indigenous lawmakers and scholars, particularly women,<sup>761</sup> should be the ones

---

<sup>758</sup> Sarah Deer, *The Beginning and the End of Rape: Confronting Sexual Violence in Native America* (Minneapolis: University of Minnesota, 2015) at 21 [Deer].

<sup>759</sup> Synder, *supra* note 750; Cameron, *supra* note 415 at 53.

<sup>760</sup> Synder, *ibid* at 599.

<sup>761</sup> It is crucial to centre women in these discussions as Indigenous communities are not free from the influences of gender inequality. As Razack argues, "culture, community, and colonialization can be used to compete with and ultimately prevail over gender-based harm", leaving women's needs and perspectives marginalised from both inside and outside their communities. See: Razack, *supra* note 667. This concern was echoed by one lawyer who drew on her own non-Indigenous cultural experiences where colonialism introduced specific forms of sexism in her culture that led to the exclusion of women from traditional leadership positions. This is something that has also occurred in Canadian Indigenous communities, leaving women feeling inadequately represented even in their own communities. See also: Snyder, *supra* note 750. However, while acknowledging difficulties within Indigenous communities is important, there also needs to be more pressure on the Canadian state to recognise and respect the sovereignty of Indigenous Peoples. For example, the Native Women's Association of Canada (NWAC) recently released a plan to address violence against Indigenous women that is separate from the one the federal government is releasing. While NWAC was supposed to be involved in the design of the federal plan, they withdrew their support after finding



guiding the development of legal traditions in this area.<sup>762</sup> Non-Indigenous people should not be leading these efforts but listening and offering support and resources when appropriate.

Furthermore, restorative justice, the type that operates within the Canadian state, is part of a colonial system. According to Val Napoleon et al, “the rhetoric of restorative justice usually obscures forms of local law”.<sup>763</sup> Often, these new, alternative approaches to justice are created and controlled by a settler government. According to Aaron Mills, Indigenous laws and legal orders are rooted in a completely different set of assumptions and ideals than Canadian laws.<sup>764</sup> He argues that “[one] can’t simply translate law across distinct constitutional contexts and expect it to retain its integrity and thus its functionality”.<sup>765</sup> Thus, any conversation about restorative justice and Indigenous people must address the issue of sovereignty and Indigenous rights to

---

themselves “shut out of the major decision-making processes” and “subjected to lateral violence and hostility”. “NWAC Loses Confidence in Government, Walks Away From 'Toxic, Dysfunctional' NAP Process to Put Families-Not Politics-First; Announces Own Action Plan: Our Calls, Our Actions” (1 June 2021), *Native Women's Association of Canada*, online: <<https://www.globenewswire.com/en/news-release/2021/06/01/2239800/0/en/NWAC-Loses-Confidence-in-Government-Walks-Away-From-Toxic-Dysfunctional-NAP-Process-to-Put-Families-Not-Politics-First-Announces-Own-Action-Plan-Our-Calls-Our-Actions.html>>; “NWAC Action Plan: Our Calls, Our Actions”, (June 2021), *Native Women's Association of Canada*, online: <<https://www.nwac.ca/wp-content/uploads/2021/06/NWAC-action-plan-FULL-ALL-EDITS.pdf>>.

<sup>762</sup> Jeffery G Hewitt, “Indigenous Restorative Justice: Approaches, Meaning & Possibility” (2016) 67 UNB LJ 313; Jarem Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice: Studies from Hollow Water, the Iona Community, and Plum Village* (London: Jessica Kingsley Publishers, 2009) [Sawatsky]; Jane Dickson-Gilmore & Carol LaPrairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) [Dickson-Gilmore]. See also, MMIWG, *supra* note 159.

<sup>763</sup> Val Napoleon, Angela Cameron, Colette Arcand & Dahti Scott, “Where is the Law in Restorative Justice?” in Yale D Belanger, ed, *Aboriginal Self-Government in Canada - Current Trends and Issues* (Saskatchewan: Purich Publishing, 2008) 348 at 4 [Napoleon].

<sup>764</sup> Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847 at 862-866. Mills argues that liberal constitutional states like Canada imagine themselves as freestanding entities. The constitutional tree exists somehow on its own. Indigenous laws and legal orders, however, are trees that are rooted into the earth. Interconnections between the tree and other entities are part of life and must be acknowledged and respected. The tree cannot be understood outside of its component parts and the relationships it has with other entities.

<sup>765</sup> *Ibid* at 854-855. While the liberal constitutional tree and Indigenous tree both co-exist, they are separate entities. Their roots grow in different soil and you cannot simply graft a branch from one to the other. Laws and legal orders founded on certain contexts require those contexts in order to operate in an understandable manner.

self-governance.<sup>766</sup> How can a settler state impose what is supposedly an Indigenous tradition on Indigenous Peoples? What nuances and wisdom are lost when Indigenous Peoples are excluded from the design of these systems? Only by letting Indigenous Peoples control the development of justice processes in their communities can restorative justice be said to be an Indigenous tradition rather than a co-opted one.<sup>767</sup>

Finally, if restorative justice has its roots in Indigenous traditions, what happens when we strip the Indigeneity away from it in order to apply these processes to different groups of people? While there are valuable lessons to learn from Indigenous examples of restorative justice,<sup>768</sup> how do we adapt these processes to situations where a close-knit community does not exist or norms of social cooperation differ?<sup>769</sup> While there are processes such as RESTORE, the academic literature has not adequately addressed these cultural/community concerns when it comes to

---

<sup>766</sup> Borrows, *supra* note 754.

<sup>767</sup> There are Indigenous communities that are deeply involved in the development and implementation of restorative/transformati ve justice programs for their people (see: Sawatsky, Dickson-Gilmore, *supra* note 762; “Indigenous Justice Program” (23 August 2021), *Government of Canada*, online: <<https://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html>>). There are many important lessons academics can draw from these specific examples that have not yet been fully incorporated within the literature on this subject. Too often the discussion of Indigenous perspectives on restorative justice remains vague and non-specific, focusing on the theoretical potentials rather than grounding itself in the actual work currently being done. Much of this scholarship is written by non-Indigenous individuals as well. See: Snyder, *supra* note 750; Napoleon, *supra* note 673; Deer, *supra* note 758.

<sup>768</sup> Hollow Water is an Anishinaabe community in Manitoba where almost every member of the town was impacted by generational sexual abuse. Instead of relying on the prison system to deal with the offenders, the community crafted a town-wide healing process and sentencing circle to try and deal with the issues in Hollow Water in a more systemic manner, without exiling the perpetrators of violence. See: “The Four Circles of Hollow Water” (1997), *Public Safety Canada*, online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/fr-crcls-hllw-wtr/fr-crcls-hllw-wtr-eng.pdf>>; Katherine Beaty Chiste, “The Origins of Modern Restorative Justice: Five Examples from the English-Speaking World” (2013) 46:1 UBC L Rev 33; Megan Stephens, “Lessons from the Front Lines in Canada’s Restorative Justice Experiment: The Experience of Sentencing Judges” (2007) 33:1 Queen’s LJ 19; T Lajeunesse, *Community Holistic Circle Healing, in Hollow Water Manitoba: An Evaluation* (Ottawa: Solicitor General of Canada, 1996); Joe Couture, Ted Parker, Ruth Couture & Patti Laboucane, “A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process” (2001), *Public Safety Canada*, online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cst-bnft-hllw-wtr/cst-bnft-hllw-wtr-eng.pdf>>.

<sup>769</sup> Indigenous groups must not be universalised. There is no one Indigenous approach to law, and culturally specific processes must be created among Indigenous communities. See: Meagan Berlin, “Restorative Justice Practices for Aboriginal Offenders: Developing an Expectation-led Definition for Reform” (2016) 21 Appeal 3 at 5.

restorative justice. These alternative forms of justice tend to be highly contextual and particular. Processes must respond to specific situations and groups of people. As stated by one of the lawyers that I spoke with, “there is a long history of people engaging with [restorative justice], so there's a lot of organic knowledge which is transferred from one generation to another”. Exploring the often very specific cultural underpinnings of these methods of justice is a crucial part of understanding why they may or may not work in a given situation, and how to implement them more successfully. This requires significantly more research on the part of academics and policy-makers to more concretely grasp the nuances of how these justice processes have worked both historically and currently.

One final point to consider is the fact that the survivors in this study did not bring up Indigenous issues. In fact, survivor conceptions of restorative justice did not often match what is generally considered to be an Indigenous model.<sup>770</sup> Most of the women I spoke with focused on individual processes such as mediation and case conferencing, or saw community involvement as an act of witnessing rather than participating. Given the sheer amount of focus that Indigenous restorative traditions receive in the academic literature in Canada, it is interesting to note that this was not an issue that the individuals I interviewed felt compelled to talk about. In fact, most participants lacked much in-depth familiarity with the concepts of restorative justice, let alone with the complicated cultural nuances surrounding the issue. From an intersectional perspective, there needs to be substantially more public education and engagement on this subject in order for a well-informed discussion to occur.

---

<sup>770</sup> A common Canadian example of an Indigenous model would be a sentencing circle. This structure was introduced to survivors during questioning, but was not generally commented on.

### 9.2.3 Increase Access to Compensation

One of the most consistent comments I heard from survivors was the importance of financial support in the wake of a sexual assault. Almost every woman I spoke with talked about the significant monetary repercussions they suffered after being attacked, from the costs of therapy to the loss of income from missed days of work. Simply put, being sexually assaulted costs money that a survivor would not have needed to spend otherwise, and many struggle to pay for these expenses. Perhaps unsurprisingly then, the CICB was a popular program among the women I interviewed. The tribunal allowed them to apply for needed funds without also requiring an expensive, adversarial process. Unfortunately, just as I was finishing my interviews, the Ontario government announced that they were going to replace the CICB with a different compensation regime called the Victim Quick Response Program+ (VQRP+).<sup>771</sup>

The VQRP+ represents a massive shift in how compensation for victims of crime is handled in Ontario and the significant reforms to this regime are meant, according to the Conservative government, to address some of the long-standing issues with the CICB.<sup>772</sup> The CICB was an important and popular legal entitlement, though it was forced to consistently deal with a larger number of cases than it had the capacity to address, leading to significant delays in processing claims.<sup>773</sup> During the worst years, the tribunal could take up to 3 years to address and

---

<sup>771</sup> “Victim Quick Response Program +” (11 October 2019), *Ministry of the Attorney General*, online: <<https://www.attorneygeneral.jus.gov.on.ca/english/ovss/vqrp.php>> [VQRP+].

<sup>772</sup> In 2007, the Ombudsman of Ontario released a report on issues within the CICB. See: Andre Marin, “Adding Insult to Injury: Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board” (February 2007), *Ombudsman Ontario*, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2007/adding-insult-to-injury>> [Ombudsman Ontario]. See also: Melanie Randall & Craig Brown, “Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State” (2004) 30 *Queen's LJ* 311.

<sup>773</sup> *Ombudsman Ontario, ibid.*

resolve a claim,<sup>774</sup> though more recently, applications tended to be resolved within twelve months and emergency medical funding was also available when needed.<sup>775</sup> Delays on the part of the tribunal could be partially explained by the fact that claims involving an on-going criminal proceeding could not be finalised until the criminal process was finished.<sup>776</sup> However, most of the CICB's troubles were attributed to a lack of adequate funding, leaving the tribunal with too few staff and resources for the sheer quantity of need that it was trying to fulfil.<sup>777</sup>

As a result of a scathing report from the Ombudsman of Ontario in 2007, funding for the CICB was increased, and a second program, the Victim Quick Response Program (VQRP)<sup>778</sup> was created to help victims of crime with immediate expenses.<sup>779</sup> However, calls for reform and increased funding of the CICB continued over the years.<sup>780</sup>

Rather than an expansion of the compensation opportunities available to victims of crime, the introduction of the VQRP+ represents a significant diminishment of available resources. The VQRP already provided immediate, although limited, financial assistance for victims of crime, and the VQRP+ does little to address the magnitude of what the CICB offered. The government stated that the VQRP+ would respond to victim needs swiftly and with fewer bureaucratic delays, but many interest groups were quick to criticise the new program.<sup>781</sup>

---

<sup>774</sup> Omar Ha-Redeye, "Victims' Rights from CICB to VQRP+" (7 October 2019), *Canadian Lawyer*, online: <<https://www.canadianlawyermag.com/news/opinion/victims-rights-from-cicb-to-vqrp/306130>> [Ha-Redeye].

<sup>775</sup> "Social Justice Tribunals Ontario 2017-2018 Annual Report" (2019), *Tribunals Ontario*, online: <<https://www.tribunalsontario.ca/documents/sjto/2017-18%20Annual%20Report.html>> [CICB Annual Report].

<sup>776</sup> Given the significant delays in case resolution in Ontario, this often meant long waits for victims of crime.

<sup>777</sup> Ombudsman Ontario, *supra* note 772.

<sup>778</sup> Note that the VQRP program is not the same as the VQRP+. The VQRP existed parallel to the CICB.

<sup>779</sup> Ha-Redeye, *supra* note 774.

<sup>780</sup> *Ibid.*

<sup>781</sup> Julie Ireton, "Rape Crisis Centres Call on Attorney General to Reverse Cuts" (19 November 2019), *CBC News*, online: <<https://www.cbc.ca/news/canada/ottawa/rape-crisis-centres-ontario-demand-action-end-cuts-victim-services-1.5363891>> [Ireton]; Zosia Bielski, "Ontario Government Criticized for Change to Compensation for Sexual Violence Victims" (10 December 2019), *The Globe and Mail*, online:

One of the most significant changes was that this new program drastically limited the amount of money available to individuals, as well as what that money could be awarded for. Under the CICB, victims of crime were eligible to receive up to \$25,000 and most of the awards given were in recognition of the pain and suffering experienced by the victim of crime.<sup>782</sup> For example, in 2017/2018, compensation for pain and suffering amounted to over 90 percent (or 33 million dollars) of the funds awarded by the CICB.<sup>783</sup> Under the VQRP+, however, pain and suffering awards are no longer permissible. Instead, the focus is on immediate essential needs that can be easily identified, such as short-term counselling.<sup>784</sup> However, in another difference, while the CICB also covered counselling claims, the VQRP+ caps the amount a victim of crime can claim for these services at \$1000.<sup>785</sup> Given these changes, the amount of money that survivors can claim under the new regime is substantially less than what was available under the CICB and the awards are restricted to a narrow range of services and expenses.

---

<<https://www.theglobeandmail.com/canada/article-ontario-government-criticized-for-change-to-compensation-for-sexual/>>; Luke Hendry, “Victims Left Short by New Program: Critics” (12 September 2019), *The Intelligencer*, online: <<https://www.intelligencer.ca/news/local-news/victims-left-short-by-new-program-critics>>; David Shellnutt, “Targeting Victims of Crime: Doug Ford Does Away with the Criminal Injuries Compensation Board” (15 April 2019), *The Biking Lawyer LLP*, online: <<https://www.thebikinglawyer.ca/post/2019/04/14/attacking-victims-of-crime-the-ontario-conservative-government-does-away-with-the-crimina>>; Shiva Bakhtiary, “Ontario’s Victim Compensation Bill Will Hurt Those It’s Designed to Help” (7 February 2020), *The Canadian Bar Association*, online: <<https://www.cba.org/Sections/Criminal-Justice/Articles/2020/Ontario-s-victim-compensation>>; Alyshah Hasham, “Ontario Budget Cuts Millions in Compensation to Victims of Violent Crime, Advocates Say” (20 April 2019), *Toronto Star*, online: <<https://www.thestar.com/news/gta/2019/04/18/ontario-budget-cuts-millions-in-compensation-to-victims-of-violent-crime-advocates-say.html>>; David Rockne Corrigan, “What this Progressive Conservative Police Change Could Mean for Victim of Violent Crime” (27 May 2019), *TVO*, online: <<https://www.tvo.org/article/what-this-progressive-conservative-policy-change-could-mean-for-victims-of-violent-crime>>.

<sup>782</sup> CVCA, *supra* note 340, s 19(1) as it appeared prior to May 29, 2019.

<sup>783</sup> CICB Annual Report, *supra* note 775.

<sup>784</sup> VQRP+, *supra* note 771.

<sup>785</sup> Counselling awards are limited to \$1000 which is supposed to pay for around ten sessions. Not only is this a very limited course of treatment, the average cost for a session of private therapy in Ontario can be over \$200 an hour if one is working with a psychologist.

Under this new regime, a crime generally has to be reported to the police before a person can make a claim to the VQRP+, though in some cases reporting to other victim service agencies will suffice.<sup>786</sup> In my interviews, many survivors stated that the fact that they were not required to report their assault in order to access funds from the CICB was incredibly influential in their decision-making process. Survivors are very aware of how difficult police investigations and criminal trials tend to be, but they may still want some form of external validation of the pain they have experienced. Furthermore, many survivors need money to cover the expenses that they have incurred from their assault, and civil trials are often too expensive or risky to rely on, on top of the fact that they reintroduce the adversarial element to the process. The CICB was seen as a gentler process with tangible benefits to the women I interviewed.

VQRP+ requires survivors not only to report their assault, but to do so quickly, sometimes within 45-90 days of the crime having occurred depending on the funding being applied for, something that many women find difficult or impossible to do.<sup>787</sup> According to the government, VQRP+ funds are meant to provide immediate, short-term help to victims of crime, thus the limited deadlines.<sup>788</sup> However, the VQRP program already existed in conjunction with the CICB, making this an unnecessary reform that causes additional harm to survivors of sexual assault. Several of the survivors I spoke with applied to the CICB months or even years after their assault.<sup>789</sup> For some, it was because they did not learn about the existence of the CICB for a

---

<sup>786</sup> These can include emergency service providers or community service providers, common examples of which include sexual assault centres, domestic violence shelters, and hospitals. VQRP+, *supra* note 771.

<sup>787</sup> *Ibid.*

<sup>788</sup> This essentially excludes victims of historical sexual assault, often children who take years to come to a point where they can address the abuse that they suffered. See: Ireton, *supra* note 781.

<sup>789</sup> The limitation period for applying to the CICB was two years after the crime, though reforms in 2016 removed limitation periods for crimes involving sexual violence. Creating shorter limitation periods for the VQRP+ goes against the legislative trend towards eliminating these timelines for sexual assault.

long time. For others, they were not emotionally prepared to confront the realities of their assault.

These new time limits will have devastating impacts on more marginalised women. Women experiencing violence may not be able to safely apply for such a program until they have escaped their abuser. Migrant women new to Canada may not know much about the options that they have yet, or there may be language barriers preventing some women from accessing information about the program. Under the CICB, there were no time limitations for bringing a forward a sexual assault claim,<sup>790</sup> so women were able to access needed funds without being beholden to an arbitrary schedule. By introducing an extremely limited time period in which to make claims, the VQRP+ decreases the number of people eligible for this help without any regard as to why they may be delayed in making a claim and offering no alternatives to those who exceed the time limits. While the timeframes to process VQRP+ claims are supposed to be much faster, with the goal of getting funds to victims within days of application, the CICB could have offered faster response times as well if properly funded.

The VQRP+ is also just a program, not a statutorily-based tribunal like the CICB was. There is no governing legislation for it, making it extremely easy for the government to change the rules or eliminate the program entirely without the oversight of the legislature. This essentially removes the statutory basis for victim compensation in Ontario. Further, as there is no governing legislation and associated regulations, it makes it difficult to determine what the program actually covers. Even on the official provincial webpage for the program, individuals are told to contact their local VQRP+ service provider for more details about the supports

---

<sup>790</sup> A limitation period of 2 years did exist for sexual assault claims at the tribunal, but this was eliminated in 2016.



available under the program, and many of these organisations have limited and/or conflicting information about what the VQRP+ covers.<sup>791</sup>

One potential benefit of the VQRP+ is that it is an entirely administrative program. The CICB was a quasi-judicial body and victims of crime were required to submit substantial amounts of evidence to prove that they suffered harms from the commission of an offence. In-person hearings were sometimes required to help the board assess claims. The CICB had been criticised for this model as it not only placed an additional burden on victims of crime, but it also increased the time it took the board to assess a claim as the evidence needed to be reviewed and evaluated.<sup>792</sup> While survivors may find it easier to submit a claim under the VQRP+, the lack of supporting evidence or an impartial adjudicator is one way that the lower compensation amounts can be justified. Additionally, a large portion of CICB claims were dealt with via documentary hearings. It remains to be seen whether the supposed benefits of the administrative model will actually result in many positive changes for victims of crime.

Given what I have learned from my interactions with survivors as well as the government's claims of concern about how sexual assault is handled in Ontario, I believe it is extremely important that the mandate and scope of the CICB be resurrected. The proper way to address the issues faced by this tribunal was with additional funding and resources, not by limiting what compensation victims of crime have access to. If the government wishes to help

---

<sup>791</sup> This was a problem that I encountered while trying to research the VQRP+ program for this dissertation. The information available online through official sources is sparse, which is particularly problematic given the fact that the program started not long before the start of the global COVID pandemic, making online research a very important tool for information gathering.

<sup>792</sup> Ombudsman Ontario, *supra* note 772.

survivors as they are currently claiming is an important policy goal for them,<sup>793</sup> then they must increase the resources available to them, not diminish them.

#### **9.2.4 Provide Comprehensive Support and Coordination for Survivors**

Another key theme emerging from my interviews was how difficult the legal system is to navigate for survivors, particularly in light of how little connection there is between the various services and supports survivors need to access, both inside and outside the legal system. Many of the lessons that can be drawn from this dissertation stress the need for comprehensive, accessible services and supports. Survivors access a great number of services as they recover from being assaulted, and their needs are broader than what can be offered in a criminal or civil court, or through statutory compensation schemes and administrative tribunals. All of the different institutions offering support need to be structured in such a way as to allow survivors to flow through the services that they need as they require them. According to L6:

My own view about structural reform is that we need to take a page out of best delivery of public healthcare. You walk into an ER or you walk into a doctor's office and the first thing they do is assess what you actually need. And then they deliver the service tailored to the need. We kind of do it in just a ridiculous way, in terms of public delivery. You want to come forward with sexual assault allegations? Okay, we got the criminal justice system. That or basically nothing. You're on your own. You walk into an ER. We've seen you. You want open heart surgery? But doc, I got a stubbed toe! But all we do is open heart surgery! Do you want it or not?

While the medical system is certainly not flawless when dealing with survivors, the concept of assessing a survivor's needs and guiding her in the appropriate direction is an important one to

---

<sup>793</sup> For example, see: “Better Access to Justice for Ontario Victims of Sexual Assault, Intimate Partner Violence and Those Who Have Experienced Workplace Sexual Harassment” (26 July 2022), *Government of Canada*, online: <<https://www.canada.ca/en/departement-justice/news/2022/07/better-access-to-justice-for-ontario-victims-of-sexual-assault-intimate-partner-violence-and-those-who-have-experienced-workplace-sexual-harassment.html>>; “Ontario Strengthening Supports for Postsecondary Students Reporting Sexual Violence or Harassment” (16 September 2021), *Government of Ontario*, online: <<https://news.ontario.ca/en/release/1000812/ontario-strengthening-supports-for-postsecondary-students-reporting-sexual-violence-or-harassment>>; “Ontario Supporting Victims of Crime” (8 November 2021), *Government of Ontario*, online: <<https://news.ontario.ca/en/release/1001127/ontario-supporting-victims-of-crime>>.

consider when thinking about reforming support structures. Many options need to be available to fit individual needs, and no one should be denied necessary care because of cost or ignorance of their existence.

Models for this type of wrap-around service approach already exist among many community and/or emergency service providers. For example, the Barbra Schlifer Commemorative Clinic<sup>794</sup> in Toronto and Luke's Place<sup>795</sup> in Oshawa are both primarily legal agencies that help survivors access a variety of services in the aftermath of violence. While neither place can provide every single service a survivor needs, their staff are highly trained in knowing what supports are available even outside of their institution and how survivors can access them.

Part of ensuring that survivors can obtain justice means creating opportunities for them to become informed about their choices. The ILA is a good example of an important program that helps survivors understand and navigate their options in the aftermath of an assault. Most of the lawyers I spoke to who took on ILA cases told me that they spent a significant amount of their time simply walking their clients through the various options available, what they entailed, and how likely the case at hand was to succeed. While it may sound like a simple, obvious suggestion, given the number of survivors I spoke with who were unaware of the various choices available to them, it is incredibly important that survivors have easy access to information about all existing resources and services. While almost everyone can identify the potential use of criminal law against an offender, victim compensation agencies, employment protections, and different legal challenges were not as widely known or understood by the women I spoke with,

---

<sup>794</sup> *Barbra Schlifer Commemorative Clinic*, online: <<https://www.schliferclinic.com/>>.

<sup>795</sup> *Luke's Place*, online: <<https://lukesplace.ca/>>.

and several wished that they had been informed of different options than the ones that they ended up taking.<sup>796</sup>

The survivors I interviewed stressed that this type of information needed to go beyond criminal law and even beyond the legal system itself. They thought that lawyers should be aware of and ready to refer survivors to other sources of aid and healing as needed. They wanted different services to stop acting as silos as it prevented survivors from accessing needed resources and information in a timely manner. An ideal system for the women I spoke with was one that embraced interconnectivity and communication to facilitate a comprehensive response to a survivor's needs. While no professional will be an expert in another's field, communication between different systems is important. The use of social workers could be a good way of facilitating survivor needs across a variety of systems without expecting, for example, lawyers to fully understand the complexities of the medical system.

### **9.3 Future Research Possibilities and Current Contributions**

As outlined in Chapter 1, the literature surrounding the justice needs and interests of survivors is still being developed, and additional research is needed. There is no way to fix the problems with the legal system and sexual assault law without addressing what it is that survivors want to achieve when they access a legal process, and to do that properly requires

---

<sup>796</sup> For example, one legal process that I have mentioned a few times in this dissertation, but have not explored in depth is human rights claims. While not the most common choice for survivors, human rights claims have been brought up in several conversations about sexual assault lately as a way of trying to improve the experience of survivors through less adversarial and harsh processes such as criminal trials. For example, the Women's Legal Education and Action Fund (LEAF) advocates for the use of a human rights framework in their latest report on technology facilitated gender-based violence (much of which can be classified as sexual harassment). See: Cynthia Khoo, "Deplatforming Misogyny: Report on Platform Liability for Technology-Facilitated Gender-Based Violence" (2021), *Women's Legal Education and Action Fund*, online: <<https://www.leaf.ca/wp-content/uploads/2021/04/Full-Report-Deplatforming-Misogyny.pdf>>. This is a sentiment echoed in the Final Report from the National Inquiry into Missing and Murdered Indigenous Women and Girls when dealing with the violence, including sexual violence, faced by Indigenous women and girls. MMIWG, *supra* note 159 at 181.

listening and talking to survivors themselves. This dissertation is meant to help start filling the gaps that exist in this area, particularly in Canada, where little justice interests work has been done from the perspectives of survivors.

However, no dissertation tells the full story about a topic, and there are a few areas I did not cover that deserve additional focus. For instance, given the intersectional aspirations of my work, it is imperative that future research looks into the justice needs of a broader array of people. While my sample was fairly diverse for the number of individuals that I spoke to and the limitations that I set, it was still a relatively small sample. I can point to many commonalities in the needs and desires of the survivors that I talked to, but women as a group are not a monolith and future researchers should be careful to assess different perspectives.

For example, as I discussed in Chapter 4, given certain methodological considerations, I was not able to have a fully diverse sample in regard to sex and gender variances. Future research needs to be conducted on the justice needs of anyone not falling under the umbrella of woman-identified survivor, including actively seeking out the perspectives of both trans men and women, cis men, and non-binary individuals. Race is another area that I believe requires additional probing. In particular, only one person in my interviews identified as Indigenous, and given the levels of violence that Indigenous people face, as well as the way that Indigenous methods of justice are discussed in relation to sexual assault, it is vital that research includes Indigenous people.

The divide between rural and urban areas is another factor I was not able to look at deeply. People's lives differ dramatically based on where they live and the communities that they are part of. It is important not to assume that the justice needs of someone in a larger centre like

Toronto, where I did most of my interviews, will match those of someone in a smaller, more rural area.

Another area of research that was outside the scope of this dissertation, but that greatly interested the survivors I spoke with, was the need for a better understanding of how to encourage the rehabilitation of sex offenders, as well as the need to provide adequate resources for such a task. One of the primary justice needs of survivors, both from my research as well as what others have done internationally, is to ensure that offenders do not commit sexual assault again. As I outlined in earlier in this chapter, rehabilitation programs are limited in Canada, and the subject remains exceptionally under-researched. Survivors stressed that they wanted there to be opportunities and resources available for offenders to learn how to change their behaviour. Most felt that it was important to give people a chance to rehabilitate themselves rather than languish in prison, but did not feel that it was possible in the current legal system.

While no academic work can be fully comprehensive, I believe this dissertation provides a significant contribution to the literature on the justice needs of survivors. It is the only Canadian data on this subject thus far, and while many of my findings complement and expand upon those in other countries, it is always important to explore the idiosyncratic differences that arise because of different legal systems.

I also founded this project on standpoint epistemology and tried to highlight the voices of survivors as much as possible. As such, this dissertation features lengthy interview quotes that provide a deep and rich qualitative exploration of the subject that goes far beyond what most of the literature in this area was able to do.

Most importantly, because of my use of standpoint epistemology, my work has a much broader definition of justice than other scholarship on this topic. The survivors I spoke with did

not limit their comments and thoughts to just the criminal law, nor even only to the legal matters of their situations. In order to fully understand their justice needs, I tried to respect this broader approach as much as possible when compiling my results. Consequently, this dissertation takes a much more expansive view of justice than would typically be taken by legal scholars. Instead of trying to fit what survivors were telling me into categories of legal interests that I already understood, I allowed the concept of justice to grow. While not every vision of justice I explored in this paper can be, or even should be, turned into concrete law reform, it is important to think broadly and imaginatively about what people want the legal system to be instead of trying to fit their dreams into what exists.

In taking such an expansive approach to justice and thinking deeply on the topic, I began to critically assess what I thought of as legal justice as well. It was easy for me to see how criminal or civil trials fit within the legal regime and how survivor justice needs were implicated in these processes. However, these are only two legal processes in a system that offers a significant array of options. Survivors touched on human rights applications, university regulations, and professional regulatory agencies, all of which are directly part of the legal system, or are governed by pieces of legislation providing survivors with certain types of redress. One of the most important aspects of justice that I uncovered was the need for a legal entitlement to financial compensation. I wrote extensively in Chapter 5 about how important it was for survivors to have access to money to heal. For some, having the appropriate funds to recover from the violence they endured was a crucial part of justice, even without considering other legal remedies. I did not see financial compensation brought up in any detail as a legal entitlement in other scholarly literature, despite the fact that there was, at least until recently, a statutory basis to recompense for victims of crime in Ontario. Given how much survivors emphasised the

importance of monetary supports as essential to recovery from sexual assault, I believe this highlights a significant missing piece in the current literature.

#### **9.4 Conclusion**

When I started this project, I was focused on the legal aspects of justice. I struggled to reconcile my thoughts about the way that sexual assault was mishandled in the traditional criminal courts with the knowledge that a carceral system is not necessarily one that solves many of the problems I was observing. I was also frustrated with the focus on restorative and transformative justice processes in the media and among colleagues as if these new approaches could be a panacea for all of the faults plaguing how the law deals with sexual assault. As I worked on formulating a research question to structure my work around, I realised that I needed to talk with survivors to get a sense of what it is they wanted from the nebulous concept of justice before I could answer any of my other questions.

Over and over I heard from women that all aspects of the legal system were failing them. Few believed that they could achieve any sense of justice given their limited choices and the frustrating lack of connections between services and resources that they encountered. I heard about ineffective Crowns, cruel cross-examinations, clueless universities, indifferent regulatory agencies, inaccessible medical treatments, and hostile work environments. It became clear to me that justice was something that reached far beyond what criminal law could offer and that the answers to my queries were much broader than I originally anticipated.

Justice, as I learned through my interviews, is an expansive concept. It is more than harsh penal sentences and better police investigatory practices, two of the more common recommendations when it comes to improving the experience of survivors in the criminal system. Instead, I found myself going back to McGlynn and Westmarland's "kaleidoscopic



justice”.<sup>797</sup> They described justice as a “lived, ongoing and ever-evolving experience and process, rather than an ending or result”.<sup>798</sup> As I listened to survivors I realised justice was not a singular goal that they were searching for that could be achieved through one process. Even those who engaged with the legal system in various capacities and were successful found themselves feeling unexpectedly hollow and unsatisfied. Justice required the interaction of multiple systems over the course of a long, undefined period of time. The siloing of many services, legal processes included, from other areas hurts survivors.

Kim speaks of the current time as a “moment of hegemonic rupture and a fleeting opportunity for radical change”.<sup>799</sup> Discourse about the harms of the carceral state are achieving critical mass, people are demanding change in regards to sexual assault, and there is a great deal of energy being directed towards drastic transformations to the way that we live our lives and interact with one another. While the suggestions that I have made in this chapter are perhaps more connected to the neoliberal state than would be advocated by Kim, I believe she is correct in stating that the legal system and the way humans deal with interpersonal violence has reached a point where progressive disruption is possible.

However, as a scholar who is legally trained, I cannot dismiss the importance of reforming the system that exists. Despite the many faults of the legal system that survivors identified in my interviews, they also pointed to a number of positive interactions and compassionate and helpful legal actors who changed their lives. My research has shown me how important it is to push for change in as many different ways as possible to serve the great diversity of needs that survivors have after being assaulted. I believe it is possible to support the

---

<sup>797</sup> McGlynn & Westmarland, *supra* note 23 at 186.

<sup>798</sup> *Ibid.*

<sup>799</sup> Kim 2020, *supra* note at 323.

subaltern spaces where transformative justice often exists, while also trying to improve the traditional legal system by embracing restorative principles and philosophies.

Most importantly, I hope that this dissertation shows the power of listening to those most affected by issues before attempting reform and change. Speaking with survivors often made me angry at systems seemingly designed without consideration of the needs of actual human beings. Yet despite the painful stories, I am ending this project with hope for a better future. The stories that women shared with me were ones of grief and sorrow, but they also illustrated just how resourceful, resilient, creative, intelligent, kind, and strong these women are in spite of the harms that they have experienced, both from being assaulted and from the indifference of the systems meant to help them. They helped me broaden my understanding of justice beyond just the law and uncovered spaces for disruption that I had not considered before. My goal with this dissertation has been to highlight survivor experiences and wisdom to show the failures of the legal system when dealing with sexual assault, but also to underline the places where reform, both radical and liberal, can fundamentally alter and improve access to the kaleidoscopic realities of justice for survivors.

## **Bibliography**

### **LEGISLATION**

*Canadian Charter of Rights and Freedoms*, s 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

*Christopher's Law (Sex Offender Registry)*, 2000, SO 2000, c 1.

*Compensation for Victims of Crime Act*, RSO 1990, Chapter C. 24.

*Courts of Justice Act*, RSO 1990, c C.43.

*Criminal Code*, RSC 1985, c C-46.

*Employment Standards Act*, 2000, SO 2000, c. 41.

*Human Rights Code*, RSO 1990, c H 19.

*Judges Act*, RSC 1985, c J-1.

*Protecting What Matters Most Act (Budget Measures)*, 2019, SO 2019, c. 7, Sched 11.

*Protection of Public Participation Act*, SBC 2019, c 3.

*Residential Tenancies Act, 2006*, SO 2006, c.17.

*Rules of Civil Procedure*, RRO 1990, Reg 194.

*Sex Offender Information Registration Act*, SC 2004 c 10.

*Sexual Violence at Colleges and Universities*, O Reg 131/16.

*Victims' Bill of Rights*, 1995, SO 1995, c. 6.

### **JURISPRUDENCE**

*AM v Ryan*, [1997] 1 SCR 157, 35; 143 DLR (4th) 1.

*Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229, 83 DLR (3d) 452.

*Arnold v Teno*, [1978] 2 SCR 287, 83 DLR (3d) 609.

*Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 45.

*Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487, 160 DLR (4th) 697 (Gen Div).

*DS v Quesnelle*, 2019 ONSC 3230.

*Galloway v AB*, 2021 BCSC 2344.

*Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252, 59 DLR (4th) 352.

*John Doe v Bennet*, 2004 SCC 17.

*Pappajohn v The Queen*, [1980] 2 SCR 120; 111 DLR (3d) 1.

*R v AE*, 2021 ABCA 172.

*R v ARJD*, 2018 SCC 6.

*R v Barton*, 2019 SCC 33.

*R v Chase*, [1987] 2 SCR 293, 45 DLR (4th) 98.

*R v DD*, 2000 SCC 4.

*R v Esau*, [1997] 2 SCR 777, 88, 148 DLR (4th) 662.

*R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193.

*R v JC*, 2021 ONCA 131.

*R v JJ*, 2022 SCC 28.

*R v Oliver*, [1977] 5 WWR 344, 1977 CarswellBC 400.

*R v Rowe* (2006), 216 OAC 264, 2006 CanLII 32312.

*R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193.

*R v Smith*, 2013 ONSC 1825.

*R v Ururyar*, 2017 ONSC 4428.

*Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37.

*Thorton v Prince George School District No 57*, [1978] 2 SCR 267, 83 DLR (3d) 480.

*Williams v London Police Services Board*, 2019 ONSC 227.

*Zando v Ali*, 2018 ONCA 680.

## SECONDARY MATERIAL: MONOGRAPHS

Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness* (New York, New Press, 2010).

Acorn, Annalise. *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004).

Bashevkin, Sylvia. *Women, Power, Politics: The Hidden Story of Canada's Unfinished Democracy* (Toronto: Oxford University Press, 2009).

Ben-Moshe, Liat, Chris Chapman & Allison C Carey. *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave MacMillan, 2014).

Bevacqua, Maria. *Rape on the Public Agenda: Feminism and the Politics of Sexual Assault* (Lillington, North Carolina: Northeastern University Press, 2000).

Bromley, Victoria L. *Feminisms Matter: Debates, Theories, Activism* (Toronto: University of Toronto Press, 2012).

Buchwald, Emilie, Pamela R Fletcher & Martha Ross. *Transforming a Rape Culture* (Minneapolis: Milkweed Editions, 2005).

Burnett, Tamera. *Subtle Expressions of Gender Inequality: Exploring the Application of Aggravating and Mitigating Factors in Sentencing Decisions for Sexual Assault Cases* (LLM Thesis, University of British Columbia, 2014) [unpublished].

Butler, Judith. *Bodies That Matter: On the Discursive Limits of Sex* (New York: Routledge, 2011).

———. *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 2006).

Clark, Loreen & Debra Lewis. *Rape: The Price of Coercive Sexuality* (Toronto: Canadian Scholars Press, 1982).

Clear, Todd. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Communities Worse* (New York: Oxford University Press, 2007).

Collins, Patricia Hills. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of*

- Empowerment* (New York: Routledge, 1990).
- Craig, Elaine. *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal/Toronto: McGill-Queen's University Press, 2018).
- Crawford, Adam & Tim Newburn. eds, *Youth Offending and Restorative Justice* (London: Willan, 2003).
- de Beauvoir, Simone. *The Second Sex* (New York: Vintage Books, 1973).
- Davies, Rhiannon & Lorana Bartels. *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (New York: Routledge, 2021).
- Davis, Angela. *Are Prisons Obsolete* (New York: Seven Stories Press, 2003).
- . *Women, Race and Class* (New York: Random House, 1982).
- Deer, Sarah. *The Beginning and the End of Rape: Confronting Sexual Violence in Native America* (Minneapolis: University of Minnesota, 2015).
- Dickson-Gilmore, Jane & Carol LaPrairie. *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005).
- Doe, Jane. *The Story of Jane Doe* (Toronto: Random House Canada, 2003).
- Donovan, Kevin. *Secret Life: The Jian Ghomeshi Investigation* (Fredericton: Goose Lane Editions, 2016).
- Dowd, Nancy E & Michelle S Jacobs, eds. *Feminist Legal Theory: An Anti-Essentialist Reader* (New York: New York University Press, 2003).
- Dunn, Jennifer L. *Judging Victims: Why We Stigmatize Survivors and How They Reclaim Respect* (Boulder, Colorado: Lynne Rienner Publishers, 2010).
- Elliot, Elizabeth M. *Security with Care: Restorative Justice and Healthy Societies* (Black Point: Fernwood Publishing, 2011).
- Elva, Thordis & Tom Stranger. *South of Forgiveness: A True Story of Rape and Responsibility* (New York: Skyhorse Publishing, 2017).
- Emling, Diana Carpenter. *Institutional Racism and Restorative Justice: Oppression and Privilege in America* (New York: Routledge, 2019).
- Faludi, Susan. *Backlash: The Undeclared War Against American Women* (New York: Crown

- Publishers, 1991).
- Farrow, Trevor CW. *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014).
- Fausto-Sterling, Ann. *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books: New York, 2000).
- Gill, Michael. *Already Doing It: Intellectual Disability and Sexual Agency* (Minneapolis: University of Minnesota Press, 2015).
- Glaser, Barney. *Basics of Grounded Theory Analysis* (Mill Valley, CA: Sociology Press, 1992).
- . *Theoretical Sensitivity: Advances in the Methodology of Grounded Theory* (Mill Valley, CA: Sociology Press, 1978).
- Glaser, Barney & Anselm Strauss. *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine, 1967).
- Gray, Mandi. *Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence* (PhD Dissertation, York University, 2021) [unpublished].
- Greenberg, Julia A. *Intersexuality and the Law: Why Sex Matters* (New York: NYU Press, 2012).
- Gruber, Aya. *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland: University of California Press, 2021).
- Guy-Sheftall, Beverly ed. *Words of Fire: An Anthology of African-American Feminist Thought* (New York: The New Press, 1995).
- Hekman, Susan J. *The Future of Differences: Truth and Method in Feminist Theory* (New York: Wily, 1999).
- Hernandez, Daisy & Bushra Rehman, eds. *Colonize This!: Young Women of Colour on Today's Feminism* (Berkeley, CA: Seal Press, 2002).
- hooks, bell. *Feminism is for Everybody: Passionate Politics* (Cambridge: South End Press, 2000).
- Illiadis, Mary. *Adversarial Justice and Victims' Rights: Reconceptualising the Role of Sexual Assault Victims* (Abingdon, Oxon: Routledge, 2020).
- INCITE!, eds. *Colour of Violence: The INCITE Anthology* (New York: South End Press, 2006).

- Lajeunesse, T. *Community Holistic Circle Healing in Hollow Water Manitoba: An Evaluation* (Ottawa: Solicitor General of Canada, 1996).
- Lees, Sue. *Carnal Knowledge: Rape on Trial* (London: Hamish Hamilton, 1996).
- Lindsey, Linda L. *Gender Roles: A Sociological Perspective* (New York: Routledge, 2015).
- Linklater, Renee. *Decolonizing Trauma Work: Indigenous Stories and Strategies* (Winnipeg: Fernwood Publishing, 2020).
- Luker, Kristin. *Salsa Dancing Into the Social Sciences: Research in an Age of Info-Glut* (Cambridge, Massachusetts: Harvard University Press, 2008).
- MacKinnon, Catharine A. *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* (New York: Routledge, 1983).
- Mallea, Paula. *The War on Drugs: A Failed Experiment* (Toronto: Dundurn, 2014).
- Matthews, Bob & Liz Ross. *Research Methods: A Practical Guide for the Social Sciences* (Essex: Pearson Education Limited, 2010).
- Mendes, Kaitlynn. *SlutWalk: Feminism, Activism and Media* (New York: Palgrave Macmillan, 2015).
- Miller, Karen-lee. 'You Can't Stop the Bell from Ringing': *Protean, Unpredictable, and Persisting: The Victim Impact Statement in the Context of Sexually Assaulted Women* (PhD Dissertation, University of Toronto, 2015) [unpublished].
- Mohanty, Chandra Talpade. *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Durham, NC: Duke University Press, 2003).
- Moskos, Peter. *In Defense of Flogging* (New York: Basic Books: 2013).
- Nagel, Thomas. *The View from Nowhere* (London: Oxford University Press, 1989).
- Neuenfeldt, Christopher M. *Trauma, Humor, and Coping* (PhD Dissertation, University of the Rockies, 2017) [unpublished].
- Newman, Graeme R. *Just and Painful: A Case for the Corporal Punishment of Criminals* (New York: Harrow and Heston, 1995).
- Petrak, Jenny & Barbara Hedge, eds. *The Trauma of Sexual Assault* (New York: Wiley, 2002).
- Ramazanoglu, Caroline & Janet Hollad. *Feminist Methodology: Challenges and Choices* (Thousand Oaks, California: Sage Publications, 2002).



- Razack, Sherene. *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991).
- Riccaiardelli, Rose. *Surviving Incarceration: Inside Canadian Prisons* (Waterloo, Ontario: Wilfred Laurier University Press, 2014).
- Roberts, Julian V & Loretta J Stalans. eds, *Public Opinion, Crime, and Criminal Justice* (New York: Routledge, 2000).
- Rosenblatt, Fernanda Fonseca. *The Role of Community in Restorative Justice* (London: Routledge, 2016).
- Sawatsky, Jarem. *The Ethic of Traditional Communities and the Spirit of Healing Justice: Studies from Hollow Water, the Iona Community, and Plum Village* (London: Jessica Kingsley Publishers, 2009).
- Schenwar, Maya. *Locked Down, Locked Out: Why Prison Doesn't Work and How We Can Do Better* (Oakland, CA: Berett-Koehler Publishers, 2014).
- Singer, Michael. *Prison Rape: An American Institution* (Santa Barbara, CA: Praeger, 2013).
- Slinkard, Sibley Eden. 'She Chose to Get Rid of Him by Murder, Not By Leaving Him': *Discursive Constructions of a Battered Women Who Killed in R v Craig* (PhD Dissertation, York University, 2019) [unpublished].
- Sloan, Jennifer Anne. *Masculinities and the Adult Male Prison Experience* (London: Palgrave Macmillan, 2016).
- Smart, Carol. *Feminism and the Power of Law* (London: Routledge, 1989).
- Sprague, Joey. *Feminist Methodologies for Critical Researchers: Bridging Differences, 2nd edition* (Lanham, Maryland: Rowman & Littlefield, 2016).
- Stanley, Eric A & Nat Smith. eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Oakland: AK Press, 2015).
- Stark, Evan. *Coercive Control: How Men Entrap Women in Personal Life* (Oxford: Oxford University Press, 2007).
- Stettner, Shannon, Kristen Burnett & Travis Hay, eds. *Abortion: History, Politics, and Reproductive Justice After Morgentaler* (Vancouver: UBC Press, 2017).
- Strauss, Anselm L & Juliet Corbin. *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Thousand Oaks, CA: Sage, 1990).

- Temkin, Jennifer & Barbara Krahé. *Sexual Assault and the Justice Gap: A Question of Attitude* (Portland: Hart Publishing, 2008).
- Travis, Cheryl B. ed, *Evolution, Gender, and Rape* (Cambridge: MIT Press, 2003).
- Wagenseller, Nicolas H. *The Serious Trauma of Seriousness: The Role of Humor in Working Through Trauma* (MA Thesis, Pacifica Graduate Institute, 2017) [unpublished].
- Walker, Rebecca, ed. *“To Be Real” : Telling the Truth and Changing the Face of Feminism* (New York: Anchor Books, 1995).
- West, Robin L. *Teaching Law: Justice, Politics, and the Demands of Professionalism* (Cambridge: Cambridge University Press, 2013).
- . *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Burlington, VT: Ashgate, 2003).
- Wexler, David. *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Durham: Carolina Academic Press, 1993).
- Young, Iris Marion. *Inclusion and Democracy* (New York: Oxford University Press, 2002).
- Younging, Gregory. *Elements of Indigenous Style: A Guide for Writing By and About Indigenous Peoples* (Edmonton: Brush Publishing, 2018).
- Zalewski, Marysia, et al. *Sexual Violence Against Men in Global Politics* (New York: Routledge, 2018).

## **SECONDARY MATERIAL: ARTICLES**

- Abracen, Jeffrey, et al. “Recidivism Among Treated Sexual Offenders and Comparison Subjects: Recent Outcome Data from the Regional Treatment Centre (Ontario) High-Intensity Sex Offender Treatment Programme” (2011) 17:2 *Journal of Sexual Aggression* 142.
- Acker, Joan, et al. “Objectivity and Truth: Problems in Doing Feminist Research” (1984) 6:4 *Women's Studies International Forum* 423.
- Adjin-Tettey, Elizabeth. “Replicating and Perpetuating Inequalities in Personal Injury Claims through Female-Specific Contingencies” (2003-2004) 49 *McGill LJ* 309.
- Adorjan, Michael & Rose Ricciardelli. “The Last Bastion of Rehabilitation: Contextualising Youth Correctionalism in Canada” (2018) 98:6 *The Prison Journal* 655.
- Ahrens, Courtney, et al. “Deciding Whom to Tell: Expectations and Outcomes of Rape

- Survivors' First Disclosures" (2007) 31:1 *Psychology of Women Quarterly* 38.
- Alaggia, Ramona & Susan Wang. "“I Never Told Anyone Until the #metoo Movement’: What Can We Learn From Sexual Abuse and Sexual Assault Disclosures Made Through Social Media?” (2020) 103 *Child Abuse & Neglect* 1.
- Allen, Mary. "Violence and Voice: Using a Feminist Constructivist Grounded Theory to Explore Women's Resistance to Abuse" (2011) 11:1 *Qualitative Research* 23.
- Amirault, Joanna & Eric Beaugard. "The Impact of Aggravating and Mitigating Factors on the Sentence Severity of Sex Offenders: An Exploration and Comparison of Differences Between Offending Groups" (2014) 25:1 *Criminal Justice Policy Review* 78.
- Angelone, DJ, Nicole Cantor et al. "Does Sexism Mediate the Gender and Rape Myth Acceptance Relationship?" (2021) 27 *Violence Against Women* 748.
- Ansfield, Bench & Timothy Colman. "Confronting Sexual Assault: Transformative Justice on the Ground in Philadelphia" (2012) 27:1 *Tikkun* 41.
- Apel, Robert & Daniel S Nagin. "Perceptual Deterrence" in Wim Bernasco et al, eds, *The Oxford Handbook of Offender Decision-Making* (New York: Oxford University Press, 2017) 121.
- Appleman, Laura. "Nickel and Dimed Into Incarceration: Cash-Register Justice in the Criminal System" (2016) 57:5 *Boston College Law Review* 1483.
- Arkles, Gabriel. "Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm" (2013-2014) 17 *NYU J Legis & Pub Pol’y* 801.
- Armstrong, Lisa Mary. "Is Restorative Justice an Effective Approach in Responding to Children and Young People Who Sexually Harm?" (2021) 10:4 *Laws* 86.
- Ayres, Susan. "Trauma-Informed Advocacy: Learning to Empathize with Unspeakable Horrors" (2019-2020) 26 *Wm & Mary J Race Gender & Soc* 225.
- Bachman, Ronet, Raymond Paternoster & Sally Ward. "The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault" (1992) 26:2 *Law & Soc’y Rev* 343.
- Backhouse, Constance. "A Feminist Remedy for Sexual Assault: A Quest for Answers" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 725.
- Balfour, Gillian & Janice Du Mont. "“To This Day She Continues to Struggle with the Terror

- Imposed Upon Her’: Rape Narratives in Victim Impact Statements” (2018) 28 *Women & Criminal Justice* 43.
- Barnow, Blyth. “Isolation Cannot Heal Isolation” in Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, CA: AK Press, 2020) 43.
- Barrie, Hannah. “No One is Disposable: Towards Feminist Models of Transformative Justice” (2020) 22 *Journal of Law and Society Policy* 65.
- Basile, Kathleen C, Sharon G Smith, Jieru Chen, et al. “Chronic Diseases, Health Conditions, and Other Impacts Associated with Rape Victimization of US Women” (2020) *Journal of Interpersonal Violence*.
- Basile, Kathleen C, Sharon G Smith, Yang Liu, et al. “Rape-Related Pregnancy and Association with Reproductive Coercion in the US” (2018) 55:6 *American Journal of Preventive Medicine* 770.
- Bavli, Hillel J. “The Logic of Comparable-Case Guidance in the Determination of Awards for Pain and Suffering and Punitive Damages” (2017) 85 *U Cin L Rev* 1.
- Beaty Chiste, Katherine. “The Origins of Modern Restorative Justice: Five Examples from the English-Speaking World” (2013) 46:1 *UBC L Rev* 33.
- Beisner, John H. “Discovering a Better Way: The Need for Effective Civil Litigation Reform” (2010) 60 *Duke LJ* 548.
- Belknap, Joanne. “Rape: Too Hard to Report and Too Easy to Discredit Victims” (2010) 16:12 *Violence Against Women* 1335.
- Bellehumeur, Karen. “A Former Crown’s Vision for Empowering Survivors of Sexual Violence” (2020) 37 *Windsor Yearbook of Access to Justice* 1.
- Bem, Sandra L. “Dismantling Gender Polarization and Compulsory Heterosexuality: Should We Turn the Volume Down or Up?” (1995) 32:4 *Journal of Sex Research* 329 at 330.
- . “The Measurement of Psychological Androgyny” (1974) 42 *Journal of Consulting and Clinical Psychology* 155.
- Benedet, Janine. “Sentencing for Sexual Offences against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences” (2018-2019) 44 *Queen's LJ* 284.
- . “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution” (2014-2015) 52 *Alta L Rev* 127.

- Benedet, Janine & Isabel Grant. "Sexual Assault of Women with Mental Disabilities: A Canadian Perspective" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (Abingdon: Routledge, 2010) 322.
- Berlin, Meagan. "Restorative Justice Practices for Aboriginal Offenders: Developing an Expectation-led Definition for Reform" (2016) 21 Appeal 3.
- Bernstein, Elizabeth. "Carceral Politics as Gender Justice? The 'Traffic in Women' and Neoliberal Circuits of Crime, Sex, and Rights" (2012) 41 Theoretical Sociology 233.
- Blagden, Nicholas J, et al. "'No-One in the World Would Ever Wanna Speak to Me Again': An Interpretative Phenomenological Analysis into Convicted Sexual Offenders' Accounts and Experiences of Maintaining and Leaving Denial" (2011) 17:7 Psychology, Crime & Law 563.
- Blagg, Harry & Thalia Anthony. "Restorative Justice or Indigenous Justice?" in Harry Blagg & Thalia Anthony, eds, *Decolonising Criminology* (London: Palgrave Macmillan, 2019) 133.
- Bohm, Andreas. "Theoretical Coding: Text Analysis in Grounded Theory" in U Flick, E Kardorff & I Steinke, eds, *A Companion to Qualitative Research* (London: SAGE Publications, 2004) 270.
- Bohmert, Miriam N, et al. "Evaluating Restorative Justice Circles of Support and Accountability: Can Social Support Overcome Structural Barriers?" (2018) 62:3 International Journal of Offender Therapy and Comparative Criminology 739.
- Bohner, Gerd, Frank Siebler & Jurgen Schmelcher. "Social Norms and the Likelihood of Raping: Perceived Rape Myth Acceptance of Others Affects Men's Rape Proclivity" (2006) 32:3 Personality and Social Psychology Bulletin 286.
- Borrows, John. "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50:3 Osgoode Hall LJ 699 at 701-703.
- Bouffard, Jeff, Maisha Cooper & Kathleen Bergseth. "The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders" (2017) 14:4 Youth Violence and Juvenile Justice 465.
- Bouffard, Leana, et al. "Gender Differences in Specialization in Intimate Partner Violence: Comparing the Gender Symmetry and Violent Resistance Perspectives" (2008) 25:3 Justice Quarterly 570.
- Bourgon, Guy, et al. "Offender Risk Assessment Practices Vary Across Canada" (2018) 60:2 Canadian Journal of Criminology and Criminal Justice 167.

- Boyle, Kaitlin M & Jody Clay-Warner. "Shameful 'Victims' and Angry 'Survivors': Emotion, Mental Health, and Labelling Sexual Assault" (2018) 33:3 *Violence and Victims* 436.
- Boyle, Kaitlin M & Kimberly B Rogers. "Beyond the Rape 'Victim'-'Survivor' Binary: How Race, Gender, and Identity Processes Interact to Shape Distress" (2020) 35:2 *Sociological Forum* 323.
- Braithwaite, John. "Restorative Justice and De-Professionalization" (2004) 13:1 *The Good Society* 28.
- . "Principles of Restorative Justice" in Andrew Von Hirsh et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart, 2003) 1.
- Braithwaite, John & Declan Roche. "Responsibility and Restorative Justice" in Gordon Bazemore & Mara Schiff, eds, *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson Publishing Co, 2001) 63.
- Brockman, Joan. "The Research Challenges of Exposing Physicians' Sexual Misconduct in Canada" (2018) 26 *Critical Criminology* 527.
- Brooks, Abigail. "Feminist Standpoint Epistemology: Building Knowledge and Empowerment Through Women's Lived Experience" in Sharlene Nagy Hesse-Biber & Patricia Lina Leavy, eds, *Feminist Research Practice: A Primer* (Thousand Oaks, California: Sage Publications, 2007) 53.
- Brownridge, Douglas A & Shiva S Halli. "Double Jeopardy? Violence Against Immigrant Women in Canada" (2002) 17:4 *Violence and Victims* 455.
- Bryant-Davis, Thema, et al. "From the Margins to the Center: Ethnic Minority Women and the Mental Health Effects of Sexual Assault" (2009) 10:4 *Trauma, Violence, & Abuse* 330.
- Bryngeirdottir, Hulda S & Sigridur Halldorsdottir. "Fourteen Main Obstacles on the Journey to Post-Traumatic Growth as Experienced by Female Survivors of Intimate Partner Violence: 'It Was All So Confusing'" (2022) 19:9 *International Journal of Environmental Research and Public Health* 5377.
- Bublick, Ellen M. "Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies" (2006) 59:1 *SMU L Rev* 55.
- Budd, Kristen M & Morgan A Liddic. "Incidents of Sexual Violence Against Older Adults: A Comparison Study" (2020) 33:6 *Sex Abuse* 654.
- Burch, Traci R. "Fixing the Broken System of Financial Sanctions" (2011) 10:3 *Criminology &*

Public Policy 539.

- Burgess, AW & LL Holmstrom. "Rape Trauma Syndrome" (1974) 131 *American Journal of Psychiatry* 981.
- Burk, Connie. "Think. Re-think: Accountable Communities" in Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011) 265.
- Byrne, James M & Albert R Roberts. "New Directions in Offender Typology Design, Development, and Implementation: Can We Balance Risk, Treatment and Control?" (2007) 12:5 *Aggression and Violent Behaviour* 483.
- Caldwell, H Mitchell. "Coercive Plea Bargaining: The Unrecognised Scourge of the Justice System" (2011-2012) 61 *Cath UL Rev* 63.
- Cameron, Angela. "Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence" (2006) 10:1 *Theoretical Criminology* 1362.
- Campbell, Rebecca. "Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?" (2006) 12:1 *Violence Against Women* 30.
- . "The Community Response to Rape: Victims' Experiences with the Legal, Medical, and Mental Health Systems" (1998) 26:3 *American Journal of Community Psychology* 355.
- Campbell, Rebecca, Hannah Feeney, Rachel Goodman-Williams, et al. "Connecting the Dots: Identifying Suspected Serial Sexual Offenders through Forensic DNA Evidence" (2020) 10:3 *Psychology of Violence* 255.
- Campbell, Rebecca, Emily Dworkin & Giannina Cabral. "An Ecological Model of the Impact of Sexual Assault on Women's Mental Health" (2009) 10:3 *Trauma, Violence, & Abuse* 225.
- Campbell, Rebecca, Lauren F Lichty, Marisa Sturza, et al. "Gynaecological Health Impact of Sexual Assault" (2006) 29:5 *Research in Nursing and Health* 399.
- Campbell, Rebecca, Sharon M Wasco, Courtney E Ahrens, et al. "Preventing the 'Second Rape': Rape Survivors' Experiences with Community Service Providers" (2001) 16:12 *Journal of Interpersonal Violence* 1239.
- Campbell, Rebecca & Sheela Raja. "Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence" (1999) 14:3 *Violence and Victims* 261.

- Carr, Joetta L. "The SlutWalk Movement: A Study in Transnational Feminist Activism" (2018) 4 Journal of Feminist Scholarship 24.
- Cassell, Paul G. "In Defence of Victim Impact Statements" (2008-2009) 6 Ohio St J Crim L 611.
- Cattaneo, Lauren Bennet & Lisa A Goodman. "Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims" (2009) 25:3 Journal of Interpersonal Violence 481.
- Chalfin, Aaron & Justin McCrary. "Criminal Deterrence: A Review of the Literature" (2017) 55:1 Journal of Economic Literature 5.
- Chamallas, Martha. "Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss" (2004-2005) 38 Loy LA L Rev 1435.
- Chang, Won Kyung. "When My Community Met the Other: Competing Concepts of 'Community' in Restorative Justice" (2017) 32:3 CJLS 371.
- Charmaz, Kathy. "Grounded Theory as an Emergent Method" in Sharlene Hesse-Biber & P Leavy, eds, *Handbook of Emergent Methods* (New York: The Guilford Press, 2008) 155.
- Chartrand, Vicki. "Unsettled Times: Indigenous Incarceration and the Links Between Colonialism and the Penitentiary in Canada" (2019) 61:3 Can J Corr 67.
- Chen, Ching-In, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha. eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011).
- Choi, Jung Jin & Margaret Severson. "'What! What Kind of Apology is This?': The Nature of Apology in Victim Offender Mediation" (2009) 31:7 Children and Youth Services Review 813.
- Chopin, Julien & Eric Beauregard. "Elderly Sexual Abuse: An Examination of the Criminal Event" (2019) 32:6 Sexual Abuse 706.
- Clark, Haley. "A Fair Way to Go: Justice for Victim-Survivors of Sexual Violence" in Anastasia Powell et al, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 18.
- . "'What is the Justice System Willing to Offer?' Understanding Sexual Assault 'Victim/Survivor' Criminal Justice Needs" (2010) 85 Family Matters 28.
- Clark, Martin, et al. "Circles of Support and Accountability for Sex Offenders: A Systemic Review of Outcomes" (2017) 29:5 Sex Abuse 446.



- Clark, Natalie. "Shock and Awe: Trauma as the New Colonial Frontier" (2016) 5:1 *Humanities* 14.
- Cluss, Patricia, et al. "The Rape Victim: Psychological Correlates of Participation in the Legal Process" (1983) 10:3 *Criminal Justice and Behaviour* 342.
- Cohen, Amy J. "Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States" (2019-2020) 104 *Minn L Rev* 889.
- Cooley, Brooke N, et al. "The Role of Formal Social Control Mechanisms in Deterring Sex Offending as Part of the Desistance Process" (2017) 30:2 *Criminal Justice Studies* 136.
- Coulling, Ryan & Matthew s Johnson. "The Criminal Justice System on Trial: Shaming, Outrage, and Gendered Tensions in Public Responses to the Jian Ghomeshi Verdict" (2018) 14:2 *Crime, Media, Culture: An International Journal* 311.
- Craig, Elaine. "The Inhospitable Court" (2016) 66:2 *UTLJ* 197.
- . "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51:2 *Osgoode Hall LJ* 427.
- Crenshaw, Kimberlé W. "Intersectionality, Identity Politics, and Violence against Women of Colour" (1991) 43 *Stan L Rev* 1241.
- . "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *U Chicago Legal F* 139.
- Crew, Blair A. "Striking Back: The Viability of a Civil Action Against the Police for the 'Wrongful Unfounding' of Reported Rapes" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 211.
- Crowe, Katie. "Sexual Assault and Testimony: Articulation of/as Violence" (2019) 15:2 *Law, Culture and the Humanities* 401.
- Culbertson, Kayleen A, Peter W Vik & Beverly J Kooiman. "The Impact of Sexual Assault, Sexual Assault Perpetrator Type, and Location of Sexual Assault on Ratings of Perceived Safety. Violence Against Women" (2001) 7:8 *Violence Against Women* 858.
- Cunneen, Chris. "What Are The Implications of Restorative Justice's Use of Indigenous Traditions?" in Howard Zehr & Barb Toews, eds, *Critical Issues in Restorative Justice* (New York: Criminal Justice Press, 2004) 341.
- Daly, Kathleen. "Sexual Violence and Victims' Justice Interests" in Estelle Zinsstag & Marie

- Keenan, eds, *Sexual Violence and Restorative Justice: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 108.
- . “Reconceptualizing Sexual Victimization and Justice” in Inge Vanfraechem et al, eds, *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (New York: Routledge, 2014) 378.
- . “A Tale of Two Studies: Restorative Justice from a Victim’s Perspective” in Elizabeth Elliot & Robert M Gordon, eds, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (New York: Routledge, 2005) 153.
- Daly, Kathleen & Juliet Davis. “Money Justice” (2021) 54:1 *Journal of Criminology* 60.
- Daly, Kathleen & Julie Stubbs. “Feminist Theory, Feminist and Anti-Racist Politics, and Restorative Justice” in Gerry Johnstone & Daniel W Van Ness, eds, *Handbook of Restorative Justice* (New York: Routledge, 2007) 149.
- Daly, Kathleen & Dannielle Wade. “Sibling Sexual Violence and Victims’ Justice Interests: A Comparison of Youth Conferencing and Judicial Sentencing” in Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 143.
- Decker, Michelle R, Charvonne N Holliday, et al. ““You Do Not Think of Me as a Human Being’: Race and Gender Inequities Intersect to Discourage Police Reporting of Violence against Women” (2019) 96 *Journal of Urban Health* 772.
- Deer, Sarah & Abigail Barefoot. “The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence” (2018) 28:3 *Kansas Journal of Law and Public Policy* 505.
- Del Gobbo, Daniel. “Lighting a Spark, Playing with Fire: Feminism, Emotions, and the Legal Imagination of Campus Sexual Violence” (2022) 45:1 *Dal LJ* 1.
- De la Cruz, Meiver & Carol Gomez. “Ending Oppression, Building Solidarity, Creating Community Solutions” in Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011) 25.
- Desrosiers, Julie. “Raising the Age of Sexual Consent: Renewing Legal Moralism?” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 569.
- Dietz, Park. “Denial and Minimization Among Sex Offenders” (2020) 38:6 *Behavioural Sciences & the Law* 571.

- Di Luca, Joseph. "Expedient McJustice or Principled Alternative Dispute Resolution - A Review of Plea Bargaining in Canada" (2005) 50 *Crim LQ* 14.
- Dixon, Ejeris. "Building Community Safety" in Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, CA: AK Press, 2020) 15.
- Doob, Anthony N & Cheryl Marie Webster. "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 *Crime and Justice* 143.
- DuBois, Teresa. "Police Investigation of Sexual Assault Complaints: How Far Have We Come Since Jane Doe?" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 191.
- Dufraimont, Lisa. "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44:2 *Queen's LJ* 316.
- Duhaney, Patrina. "Contextualizing the Experiences of Black Women Arrested for Intimate Partner Violence in Canada" (2021) 0:0 *Journal of Interpersonal Violence* 1.
- . "Criminalized Black Women's Experiences of Intimate Partner Violence in Canada" (2021) 0:0 *Violence Against Women*. 1.
- Du Mont, Janice. "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15 *CJWL* 305.
- Du Mont, Janice, Maryan Woldeyohannes, Sheila Macdonald, et al. "A Comparison of Intimate Partner and Other Sexual Assault Survivors' Use of Different Types of Specialised Hospital-based Violence Services" (2017) 17:1 *BMC Women's Health* 59.
- Du Mont, Janice, Karen-Lee Miller & Deborah White. "Social Workers' Perspectives on the Victim Impact Statements in Cases of Sexual Assault in Canada" (2007) 18:3 *Women & Criminal Justice* 1.
- Dworkin, Emily R, et al. "Sexual Assault Victimization and Psychopathology: A Review and Meta-analysis" (2017) 56 *Clinical Psychology Review* 65.
- Edwards, Sarah R, et al. "Denying Rape But Endorsing Forceful Intercourse: Exploring Differences Among Responders" (2014) 1:4 *Violence and Gender* 188.
- Ehrlich, Susan. "Perpetrating—and Resisting—Rape Myths in Trial Discourse" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 389.
- Eisenberg, Marla E, et al. "Sexual Assault Reporting and Emotional Distress Among College

- Female-Identified Victims/Survivors” (2019) 15:4 *Journal of Forensic Nursing* 222.
- Epstein, Deborah & Lisa A Goodman. “Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences (2019) 167 *U Pa L Rev* 399.
- Faulkner, Ellen. “Homophobic Sexist Violence in Canada: Trends in the Experiences of Lesbian and Bisexual Women in Canada” (2006) 25 *Canadian Women Studies* 154.
- Fausto-Sterling, Ann. “The Five Sexes: Why Male and Female are Not Enough” (1993) 33:2 *The Sciences* 20.
- Fayter, Rachel & Sherry Payne. “The Impact of the Conservative Punishment Agenda on Federally Sentenced Women and Priorities for Social Change” (2017) 26:1 *Journal of Prisoners on Prisons* 10.
- Fedders, Barbara. “Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women’s Movement” (1997) 23 *NYU Rev L & Soc Change* 281.
- Feldthusen, Bruce. “Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It” (2007), 22 *CJLS* 61.
- . “The Civil Action for Sexual Battery: Therapeutic Jurisprudence” (1993) 25:3 *Ottawa L Rev* 204.
- Feldthusen, Bruce, et al. “Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse: An Empirical Study” (2000), 12 *CJWL* 66.
- Fish, Morris J. “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28 *Oxford J Legal Stud* 57.
- Foubert, John, Angela Clark-Taylor & Andrew F Wall. “Is Campus Rape Primarily a Serial or a One-Time Problem? Evidence from a Multicampus Study” (2020) 26 *Violence Against Women* 296.
- Foubert, John & Johnathon T Newberry. “Effects of Two Versions of an Empathy-Based Rape Prevention Program on Fraternity Men’s Survivor Empathy, Attitudes, and Behavioural Intent to Commit Rape or Sexual Assault” (2006) 47:2 *Journal of College Student Development* 133.
- Frampton, Mary Louise. “Finding Common Ground in Restorative Justice: Transforming Our Juvenile Justice Systems” (2018) 22 *UC Davis J Jov L & Pol’y* 101.
- Freer, Elaine. “First Time Lucky? Exploring Whether First-Time Offenders Should be Sentenced More Leniently” (2013) 77:2 *The Journal of Criminal Law* 163.

- Freiberg, Arie. "Non-Adversarial Approaches to Criminal Justice" (2007) 16:4 *Journal of Judicial Administration* 205.
- Garrick, Jacqueline. "The Humor of Trauma Survivors: Its Application in a Therapeutic Milieu" (2008) 12 *Journal of Aggression, Maltreatment & Trauma* 169.
- Gavey, Nicola & Johanna Schmidt. "'Trauma of Rape' Discourse: A Double-Edged Template for Everyday Understandings of the Impact of Rape?" (2011) 17 *Violence Against Women* 433.
- Gerkin, Patrick M. "Who Owns This Conflict? The Challenge of Community Involvement in Restorative Justice" (2012) 15:3 *Contemporary Justice Review* 277.
- Godden-Rasul, Nikki. "Retribution, Redress and the Harms of Rape: The Role of Tort Law" in Anastasia Powell et al, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 112.
- Goel, Rashmi. "No Women at the Centre: The Use of the Canadian Sentencing Circles in Domestic Violence Cases" (2000) 15:2 *Wis Women's LJ* 1293.
- Goh, Joel. "Proportionality - An Unattainable Ideal in the Criminal Justice System" (2013) 2 *Manchester Rev L Crime & Ethics* 41.
- Goodman, Rachael D. "A Liberatory Approach to Trauma Counselling: Decolonizing Our Trauma-Informed Practices" in Rachael D Goodman & Paul C Gorski, eds, *Decolonizing "Multicultural" Counselling through Social Justice* (New York: Springer, 2015) 55.
- Goodmark, Leigh. "'Law and Justice Are Not Always the Same': Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse" (2015) 42:3 *Fla St U L Rev* 707.
- Gotell, Lise. "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 & Asher Flynn, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 53.
- . "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge, 2010) 209.
- . "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 *Akron L Rev* 865.
- . "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records:

- The Continued Permeability of Subsections 278.1 – 278.9 of the Criminal Code” (2008) 20 CJWL 111.
- . “When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006) 43 Alta L Rev 743.
- Graham, Kyle. “Overcharging” (2013-2014) 11 Ohio St J Crim 701.
- Grant, Isabel & Janine Benedet. “The Sexual Assault of Older Women: Criminal Justice Responses in Canada” (2016) 62:1 McGill LJ 41.
- Gray, Anthony. “Mandatory Sentencing Around the World and the Need for Reform” (2017) 20:3 New Criminal Law Review 391.
- Gresson, Elizabeth M. “Restorative Justice in Criminal Offending: Models, Approaches and Evaluation” (2018) 3 Intl J Therapeutic Juris 1.
- Grillo, Trina. “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 Berkeley Women’s LG 16
- Groth, A Nicolas, Ann W Burgess & Lynda L Holmstrom. “Rape: Power, Anger, Sexuality” (1977) 134:11 The American Journal of Psychiatry 1239.
- Gundersen, Kristin K & Kristen L Zaleski. “Posting the Story of Your Sexual Assault Online: A Phenomenological Study of the Aftermath (2021) 21:5 Feminist Media Studies 840.
- Guruge, Sepali, et al. “Violence against Women: An Exploration of the Physical and Mental Health Trends Among Immigrant and Refugee Women in Canada” (2012) 7 Nursing Research and Practice 434592.
- Guzik, Keith. “The Forces of Conviction: The Power and Practice of Mandatory Prosecution upon Misdemeanor Domestic Battery Suspects” (2007) 32:1 Law & Social Inquiry 41.
- Hanson, R Karl, et al. “Evaluating Community Sex Offender Treatment Programs: A 12-Year Follow-up of 724 Offenders” (2004) 36:2 Canadian Journal of Behavioural Science 87.
- Harding, Sandra. “Standpoint Theories: Productively Controversial” (2009) 24:4 Hypatia: A Journal of Feminist Philosophy 192.
- . “Is Gender a Variable in Conceptions of Rationality: A Survey of Issues” (1982) 36:2-3 Dialectica 225.
- Harris, Andrew & Rebecca Cudmore. “Community Experience with Public Sex Offender Registries in the United States: A National Survey” (2018) 29:3 Criminal Justice Policy Review 258.

- Harris, Angela P. "Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation" (2011) 37 Wash UJL & Pol'y 13.
- . "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan L Rev 581.
- Hartley, Carolyn Copps. "A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials" (2003) 9:4 Violence Against Women 410.
- Hastie, Bethany. "Workplace Sexual Harassment and the "Unwelcome" Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016" (2020) 32:1 Can J Women & L 61.
- . "Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions in 2010-16" (2019) 31:2 Can J Women & L 293.
- Hartsock, Nancy. "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in Sandra Harding & Merrill Hintikka, eds, *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and the Philosophy of Science* (Kluwer Academic Publishers: Boston, 1983) 283.
- Hedge, Barbara, "Coping with the Physical Impact of Sexual Assault" in Jenny Patrek & Barbara Hedge, eds, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (New York: John Wiley & Sons, 2002) 205.
- Herman, Judith L. "Justice from the Victim's Perspective" (2005) 11:5 Violence Against Women 571.
- Hesse-Biber, Sharlene. "The Practice of In-Depth Interviewing" in Sharlene Hesse-Biber, ed, *The Practice of Feminist Research: A Primer* (Thousand Oaks: Sage Publications, 2013) 111.
- Hesse-Biber, Sharlene & Hilary Flowers. "Using a Feminist Grounded Theory Approach in Mixed Methods Research" in Antony Bryant & Kathy Charmaz, eds, *The SAGE Handbook of Current Developments in Grounded Theory* (London: SAGE Publications, 2020) 497.
- Hewitt, Jeffery G. "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNB LJ 313.
- Hlavka, Heather R. "Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization" (2016) 20:4 Men and Masculinities 482.
- Holder, Robyn L & Kathleen Daly. "Sequencing Justice: A Longitudinal Study of Justice Goals of Domestic Violence Victims" (2018) 58 British Journal of Criminology 787.

- . “Recognition, Reconnection, and Renewal: The Meaning of Money to Sexual Assault Survivors” (2018) 24:1 *International Review of Victimology* 25.
- Holder, Robyn. “Satisfied? Exploring Victims’ Justice Judgements” in Dean Wilson & Stuart Ross, eds, *Crime, Victims and Policy: International Contexts, Local Experiences* (New York: Palgrave Macmillan, 2015) 184.
- Hollander-Blumoff, Rebecca & Tom R Tyler. “Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution” (2011) 2011 *J Disp Resol* 1.
- Hopkins, C Quince. “Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence” (2012) 35 *Harv JL & Gender* 311.
- Hopkins, Quince C & Mary Koss. “Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses” (2005) 11 *Violence Against Women* 693.
- Howe, Rebecca. “Community-Led Sexual Violence and Prevention Work: Utilising a Transformative Justice Framework” (2018) 1 *Social Work & Policy Studies: Social Justice, Practice and Theory* 1.
- Hunnicut, Gwen. “Varieties of Patriarchy and Violence Against Women” (2009) 15:5 *Violence Against Women* 553.
- Hutcheson, Shannon & Sarah Lewington. “Navigating the Labyrinth: Policy Barriers to International Students’ Reporting of Sexual Assault in Canada and the United States” (2017) 27:1 *Ed I Rev* 81.
- Hattem, Tina. “Highlights from a Preliminary Study of Police Classification of Sexual Assault” (2007) 14 *Just Research* 32.
- Imbrogno, Andre R. “Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?” (1998-1999) 14 *Ohio St J Disp Resol* 855.
- Jashnani, Gaurav, RJ Maccani & Alan Grieg. “What Does It Feel Like When Change Finally Comes?: Male Supremacy, Accountability & Transformative Justice” in Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, eds, *The Revolution Starts at Home: Confronting Intimate Violence Within Activist Communities* (Brooklyn: South End Press, 2011) 217.
- Javaid, Aliraza. “Out of Place: Sexualities, Sexual Violence, and Heteronormativity” (2018) 39 *Aggression and Violent Behaviour* 83.
- . “The Unknown Victims: Hegemonic Masculinity, Masculinities, and Male



- Sexual Victimization” (2017) 22:1 Sociological Research Online 28.
- Joela, Daphna, et al. “Sex Beyond the Genitalia: The Human Brain Mosaic” (2015) 112:50 Proceedings of the National Academy of Sciences of the United States of America 15468.
- Johnson, Holly. “Why Doesn’t She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police” (2017) 29:1 CJWL 36.
- . “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 613.
- Johnson, Michael P. “Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence” (2006) 12:11 Violence Against Women 1003.
- Katz, Sarah & Deeya Haldar. “The Pedagogy of Trauma-Informed Lawyering” (2015-2016) 22 Clinical L Rev 358.
- Keddy, Barbara, Sharon L Sims & Phyllis Noerager Stern. “Grounded Theory as Feminist Research Methodology” (1996) 23 Journal of Advanced Nursing 448.
- Keenan, Marie. “Criminal Justice, Restorative Justice, Sexual Violence and the Rule of Law” in Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 44.
- Kelly, Esteban Lance. “Philly Stands Up: Inside the Politics and Poetics of Transformative Justice and Community Accountability in Sexual Assault Situations” (2012) 37:4 Social Justice 44.
- Kelly, Liz. “The (In)credible Words of Women: False Allegations in European Rape Research” (2010) 16:12 Violence Against Women 1345.
- Kelly, Liz & Nicole Westmarland. “Naming and Defining ‘Domestic Violence’: Lessons from Research with Violent Men” (2016) 112:1 Feminist Review 113.
- Kerr, Lisa. “How the Prison is a Black Box in Punishment Theory” (2019) 69:1 UTLJ 85.
- Khan, Shamus R, et al. “‘I Didn’t Want to be ‘That Girl’: The Social Risks of Labeling, Telling, and Reporting Sexual Assault” (2018) 5 Sociological Science 432.
- Khenti, Akwatu. “The Canadian War on Drugs: Structural Violence and Unequal Treatment of Black Canadians” (2014) 25:2 International Journal of Drug Policy 190.
- Kim, Bitna, et al. “Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment” (2016) 17:1 Trauma, Violence & Abuse 105.

- Kim, Mimi E. "Transformative Justice and Restorative Justice: Gender-based Violence and Alternative Visions of Justice in the United States" (2021) 27:2 *International Review of Victimology* 162.
- . "Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle" (2020) 35:3 *Affilia: Journal of Women and Social Work* 309.
- . "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.
- King Jr, Joseph H. "Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law" (2004) 57 *SMUL Rev* 163.
- King, Michael S. "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" (2008) 32 *Melb UL Rev* 1096.
- Klement, Kathryn R, et al. "Accusers Lie and Other Myths: Rape Myth Acceptance Predicts Judgments Made About Accusers and Accused Perpetrators in a Rape Case" (2019) 81 *Sex Roles* 16.
- Knutsen, Erik S. "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" 36 *Queen's LJ* 113.
- Kohn, Laurie S. "The False Promise of Custody in Domestic Violence Protection Orders" (2015-2016) 65 *DePaul L Rev* 1001.
- Koshan, Jennifer. "The Criminalisation of Marital Rape and Law Reform in Canada: A Modest Feminist Success Story in Combatting Marital Rape Myths" in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada* (London: Hart Publishing, 2017) 139.
- Koss, Mary P. "The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes" (2014) 29:9 *Journal of Interpersonal Violence* 1623.
- . "Restorative Justice for Acquaintance Rape and Misdemeanour Sex Crimes" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 218.
- . "Restoring Rape Survivors: Justice, Advocacy, and a Call to Action" (2006) 1087 *Annals New York Academy of Science* 206.
- Krakow, Barry, et al. "Sleep Disorder, Depression and Suicidality in Female Sexual Assault

- Survivors” (2000) 21:4 *The Journal of Crisis Intervention and Suicide Prevention* 163.
- Lamble, Sarah. “Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment” (2013) 24:3 *Law and Critique* 229.
- Lazar, Ruthy. “Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada” (2010) 22:2 *CJWL* 329.
- Lathrop, Anthony. “Pregnancy Resulting from Rape” (2006) 27:1 *Journal of Obstetric, Gynaecologic & Neonatal Nursing* 25.
- Lawrence, Michelle S. “Looking the Gift Horse in the Mouth: An Examination of the Canadian Approach to Criminal Restitution in Cases of Sexual Violence” (2016) 20:2 *Can Crim L Rev* 209.
- Lay, Honor M. “Assessing the Damage: Money Awards by the OHRT in Sexual Harassment Cases” (2019) 9:2 *W J Legal Stud* 1.
- Leisenring, Amy. “Confronting ‘Victim’ Discourses: The Identity Work of Battered Women” (2006) 29:3 *Interaction* 307.
- Leitch, Jennifer. “Coming Off the Bench: Self-Represented Litigants, Judges and the Adversarial Process” (2017) 47 *Advoc Q* 309.
- Lens, Kim ME, Antony Pemberton, Karen Brans, Johan Braeken, Stefan Bogaerts & Esmah Lahlah. “Delivering a Victim Impact Statement: Emotionally Effective or Counter-productive? (2015) 12:1 *European Journal of Criminology* 17.
- Lerum, Kari & Shari L Dworkin. “Sexual Agency is Not a Problem of Neoliberalism: Feminism, Sexual Justice, and the Carceral Turn” (2015) 73 *Sex Roles* 319.
- Letourneau, Elizabeth, Jill Levenson, Dipankar Bandyopadhyay, Kevin Armstrong & Debajyoti Sinha. “Effects of South Carolina’s Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes” (2010) 37:5 *Criminal Justice and Behaviour* 537.
- Levmore, Saul & Frank Fagan. “Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases” (2018) 103 *Cornell L Rev* 311.
- Lindberg, Tracy, Priscilla Campeau & Maria Campbell. “Indigenous Women and Sexual Assault in Canada” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 87.
- Lisak, David & Paul M Miller. “Repeat Rape and Multiple Offending Among Undetected Rapists” (2002) 17:1 *Violence and Victims* 73.

- Locke, Benjamin D & James R Mahalik. "Examining Masculinity Norms, Problem Drinking, and Athletic Involvement as Predictors of Sexual Aggression in College Men" (2005) 52:3 *Journal of Counselling Psychology* 279.
- Looman, Jan, et al. "Recidivism Among Treated Sexual Offenders and Matched Controls: Data from the Regional Treatment Centre (Ontario)" (2000) 15:3 *Journal of Interpersonal Violence* 279.
- Lopez, Elise C & Mary P Koss. "The RESTORE Program for Sex Crimes: Differentiating Therapeutic Jurisprudence from Restorative Justice with Therapeutic Components" in Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (London: Routledge, 2017) 212.
- Lord, Vivian B, Boyd Davis & Peyton Mason. "Stance-Shifting in Language Used by Sex Offenders: Five Case Studies" (2008) 14:4 *Psychology, Crime & Law* 357.
- Lorenz, Katherine, Stacy Dewald & Rachel Venema. "‘I Was Worried I Wouldn’t Be Believed’: Sexual Assault Victims’ Perceptions of the Police in the Decision to Not Report" (2021) 36:3 *Violence and Victims* 455.
- Lorenz, Katherine, et al. "Qualitative Study of Sexual Assault Survivors’ Post-Assault Legal System Experiences" (2019) 20:3 *Journal of Trauma & Disassociation* 263.
- Los, Maria. "The Struggle to Redefine Rape in the Early 1980s" in Julian Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 20.
- Lovell, Rachel, et al. "Offending Histories and Typologies of Suspected Sexual Offenders Identified Via Untested Sexual Assault Kits" (2020) 47:4 *Criminal Justice and Behaviour* 470.
- Loya, Rebecca M. "Rape as an Economic Crime: The Impact of Sexual Violence on Survivors’ Employment and Economic Well-Being" (2015) 30:16 *Journal of Interpersonal Violence* 2793.
- Lussier, Patrick & Jeff Mathesius. "Not in My Backyard: Public Sex Offender Registries and Public Notification Laws" (2019) 61:1 *Canadian Journal of Criminology and Criminal Justice* 105.
- MacKinnon, Catharine A. "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8:4 *Signs: Journal of Women in Culture and Society* 635.
- Maeder, Evelyn M & Susan Yamamoto. "Investigating Race Salience, Defendant Race, and Victim Race Effects on Mock Juror Decision-Making in Canada" (2019) 36:5 *Justice Quarterly* 929.

- Maier, Shana L. "‘I Have Heard Horrible Stories...’: Rape Victim Advocates’ Perceptions of the Revictimization of Rape Victims by the Police and Medical System" (2008) 14:7 *Violence Against Women* 786.
- Maglione, Giuseppe. "Imaging Victims, Offenders and Communities: An Investigation into the Representations of the Crime Stakeholders Within Restorative Justice and their Cultural Context" (2017) 50 *International Journal of Law, Crime and Justice* 22.
- . "Communities at Large: An Archaeological Analysis of the ‘Community’ Within Restorative Justice Policy and Laws" (2017) 25 *Critical Criminology* 453.
- Malinen, KelleyAnne. "‘This Was a Sexual Assault’: A Social Worlds Analysis of Paradigm Change in the Interpersonal Violence World" (2014) 37:3 *Symbolic Interactions* 353.
- Maltez, Byron, et al. "Somatic Symptoms Historically Termed ‘Post-Concussive’ are Common in the Weeks after Sexual Assault but Unrelated to Head Injury" (2017) 81:10 *Biological Psychiatry* S166.
- Manikis, Marie. "Victim Impact Statements at Sentencing: Towards a Clearer Understanding of Their Aims" (2015) 65:2 *UTLJ* 85.
- . "Recognizing Victims’ Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime" (2012) 58:3-4 *Crim LQ* 411.
- Marchetti, Carol Anne. "Regret and Police Reporting Among Individuals Who Have Experienced Sexual Assault" (2012) 18:1 *Journal of the American Psychiatric Nurses Association* 32.
- Marshall, Shelley G. "Canadian Drug Policy and the Reproduction of Indigenous Inequities" (2015) 6:1 *The International Indigenous Policy Journal* 7.
- Martin, Danielle, et al. "Canada’s Universal Health-Care System: Achieving its Potential" (2018) 391 *The Lancet* 1718.
- Martin, Dianne L. "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 *Osgoode L Rev* 151.
- Mason, Fiona & Zoe Lodrick. "Psychological Consequences of Sexual Assault" (2013) 27:1 *Clinical Obstetrics & Gynaecology* 27.
- Masters, N Tatiana. "‘My Strength is Not for Hurting’: Men’s Anti-Rape Websites and their Construction of Masculinity and Male Sexuality" (2010) 13:1 *Sexualities* 33.
- Matsuno, Emmie & Stephanie L Budge. "Non-binary/Genderqueer Identities: A Critical Review

- of the Literature” (2017) 9 *Current Sexual Health Reports* 116.
- McAlinden, Anne-Marie. “The Use of ‘Shame’ with Sexual Offenders” (2005) 45:3 *The British Journal of Criminology* 373.
- McCulloch, Jude, et al. “Justice Perspectives of Women with Disability: An Australian Story” (2021) 27:2 *International Review of Victimology* 196.
- McGlynn, Clare. “Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence” (2017) 81 *J Crim L* 367.
- McGlynn, Clare & Nicole Westmarland. “Kaleidoscopic Justice: Sexual Violence and Victim-Survivors’ Perceptions of Justice” (2019) 28:2 *Soc & Leg Stud* 179.
- McGlynn, Clare, Nicole Westmarland & Nikki Godden. “‘I Just Wanted Him to Hear Me’: Sexual Violence and the Possibilities of Restorative Justice” (2012) 39:2 *Journal of Law and Society* 213.
- McGuire, James. “Can the Criminal Law Ever Be Therapeutic?” (2000) 18:4 *Behavioral Sciences & the Law* 413.
- McIntyre, Sheila, Christine Boyle, Lee F Lakeman & Elizabeth Sheehy. “Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law” (2000) 20 *Canadian Woman’s Studies* 72.
- McKenna, Nicole C & Kristy Holtfreter. “Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness” (2021) 30:4 *Journal of Aggression, Maltreatment & Trauma* 450.
- McLeer, Anne. “Saving the Victim: Recuperating the Language of the Victim and Reassessing Global Feminism” (1998) 13:1 *Hypatia* 41.
- McMahon, Pamela M, et al. “Sexual Violence and Reproductive Health” (2000) 4 *Maternal and Child Health Journal* 121.
- McPhail, Beverly A. “Feminist Framework Plus: Knitting Feminist Theories of Rape Etiology Into a Comprehensive Model” (2016) 17:3 *Trauma, Violence, & Abuse* 1.
- Meer, Talia & Helene Combrinck. “Invisible Intersections: Understanding the Complex Stigmatisation of Women with Intellectual Disabilities in Their Vulnerability to Gender-based Violence” (2015) 29:2 *Agenda* 14.
- Mennicke, Annelise, Delaney Anderson, Karen Oehme & Stephanie Kennedy. “Law Enforcement Officers’ Perception of Rape and Rape Victims: A Multimethod Study” (2014) 29:5 *Violence and Victims* 814.

- Michalski, Joseph H. "Status Hierarchies and Hegemonic Masculinity: A General Theory of Prison Violence" (2017) 57:1 *The British Journal of Criminology* 40.
- Mills, Aaron. "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 *McGill LJ* 847.
- Mingus, Mia. "Pods and Pod-Mapping Worksheet" in Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, California: AK Press, 2020) 119.
- Moe, Angela M & Myrtle P Bell. "Abject Economics: The Effects of Battering and Violence on Women's Work and Employability" (2004) 10:1 *Violence Against Women* 29.
- Moras, Rebekah. "Feminism, Rape Culture, and Intellectual Disability: Incorporating Sexual Self-Advocacy and Sexual Consent Capacity" in Matthew Wappett & Katrina Arndt, eds, *Emerging Perspectives on Disability Studies* (New York: Palgrave Macmillan, 2013) 189.
- Morgan, David L. "Snowball Sampling" in Lisa M Given, ed, *The Sage Encyclopedia of Qualitative Research Methods Volume 2* (Los Angeles: Sage, 2008) 815.
- Muehlenhard, Charlene L & Zoe D Peterson. "Distinguishing Between Sex and Gender: History, Current Conceptualizations, and Implications" (2011) 64 *Sex Roles* 791.
- Muftić, Lisa R, et al. "An Exploratory Study of Women Arrested for Intimate Partner Violence: Violent Women or Violent Resistance?" (2007) 22:6 *Journal of Interpersonal Violence* 753.
- Nagin, Daniel S. "Deterrent Effects of the Certainty and Severity of Punishment" in Daniel S Nagin et al, eds, *Deterrence, Choice, and Crime: Volume 23* (New York: Routledge, 2018) 157.
- Napoleon, Val, Angela Cameron, Colette Arcand & Dahti Scott. "Where is the Law in Restorative Justice?" in Yale D Belanger, ed, *Aboriginal Self-Government in Canada - Current Trends and Issues* (Saskatchewan: Purich Publishing, 2008) 348.
- Nash, Jennifer C. "From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory" (2004-2005) 11 *Cardozo Women's LJ* 303.
- O'Neal, Eryn Nicole. "'Victim is Not Credible': The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants" (2019) 36:1 *Justice Quarterly* 127.
- Obierufu, Prisca O & Oluyinka Ojedokun. "Masculinity as Predictor of Rape-Supportive Attitude among Men" (2019) 64 *Psychological Studies* 41.

- Odette, Fran. "Sexual Assault and Disabled Women Ten Years After Jane Doe" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 173.
- Olson, Susan M & Albert W Dzur. "Revisiting Informal Justice: Restorative Justice and Democratic Professionalism" (2004) 38:1 *Law & Society Review* 139.
- Olver, Mark E, Terry P Nicholaichuk, Dequiang Gu, et al. "Sex Offender Treatment Outcome, Actuarial Risk, and the Aging Sex Offender in Canadian Corrections: A Long-Term Follow-up" (2013) 25:4 *Sexual Abuse: A Journal of Research and Treatment* 396.
- Olver, Mark E, Stephen CP Wong & Terry P Nicholaichuk. "Outcome Evaluation of High-Intensity Inpatient Sex Offender Treatment Program" (2009) 24:3 *Journal of Interpersonal Violence* 522.
- Orth, Uli. "Secondary Victimization of Crime Victims by Criminal Proceedings" (2002) 15 *Social Justice Research* 313.
- Owusu-Bempah, Akwasi, Maria Jung M, Firdaous Sbaï, et al. "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2021) *Race and Justice* (online first publication).
- Owusu-Bempah, Akwasi & Alex Luscombe. "Race, Cannabis and the Canadian War on Drugs: An Examination of Cannabis Arrest Data by Race in Five Cities" (2021) 91 *International Journal of Drug Policy* 102937.
- Pagan, Victoria. "The Murder of Knowledge and the Ghosts that Remain: Non-Disclosure Agreements and their Effects" (2021) 27:4 *Culture and Organization* 1.
- Pain, Rachel. "Seismologies of Emotion: Fear and Activism During Domestic Violence" (2014) 15:2 *Social & Cultural Geography* 127.
- Palacios, Lena. "'Ain't No Justice, It's Just Us': Girls Organizing against Sexual and Carceral Violence" in Claudia Mitchell & Carrie Rentschler, eds, *Girlhood and the Politics of Place* (New York: Berghahn Books, 2016) 279.
- Palys, Ted. "Purposive Sampling" in Lisa M Given, ed, *The Sage Encyclopedia of Qualitative Research Methods Volume 2* (Los Angeles: Sage, 2008) 697.
- Park, Jin-Hong, Dipankar Bandyopadhyay & Elizabeth Letourneuc. "Examining Deterrence of Adult Sex Crimes: A Semi-Parametric Intervention Time Series Approach" (2014) 69 *Computational Statistics & Data Analysis* 198.
- Patterson, Debra. "The Linkage Between Secondary Victimization by Law Enforcement and



- Rape Case Outcomes” (2011) 26:2 *Journal of Interpersonal Violence* 328.
- Payne, Brian. “Understanding Elder Sexual Abuse and the Criminal Justice System’s Response: Comparisons to Elder Physical Abuse” (2010) 27 *Justice Quarterly* 208.
- Peña, Claudia. “Trauma Abounds: A Case for Trauma-Informed Lawyering” (2019) 26 *UCLA Women’s LJ* 7.
- Perrin, Christian, et al. “‘It’s Sort of Reaffirmed to Me That I’m Not a Monster, I’m Not a Terrible Person’: Sex Offenders’ Movements Towards Desistance Via Peer-Support Roles in Prison” (2018) 30:7 *Sexual Abuse* 759.
- Perry, Ronen. “Empowerment and Tort Law” (2009) 76 *Tenn L Rev* 959.
- Peterson, Cora, et al. “Lifetime Economic Burden of Rape Among US Adults” (2017) 52:6 *American Journal of Preventive Medicine* 691.
- Petersson, Charlotte C & Lars Platin. “Breaking with Norms of Masculinity: Men Making Sense of Their Experience of Sexual Assault” (2019) 47 *Clinical Social Work Journal* 372.
- Petrak, Jenny. “The Psychological Impact of Sexual Assault” in Jenny Petrak & Barbara Hedge, eds, *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (New York: John Wiley & Sons, 2002) 19.
- Pisconti, Rosella. “Juridical Rape and Courtroom Lack of Belief: A Wittgensteinian View on Consent” (2013) 1 *Birkbeck L Rev* 339.
- Plummer, Marilyn & Lynne E Young. “Grounded Theory and Feminist Inquiry: Revitalizing Links to the Past” (2010) 32:3 *Western Journal of Nursing Research* 305.
- Post, Lori A. “The Rape Tax: Tangible and Intangible Costs of Sexual Violence” (2002) 17:7 *Journal of Interpersonal Violence* 773.
- Powell, Anastasia. “Seeking Informal Justice Online” in Anastasia Powell et al, eds, *Rape Justice: Beyond the Criminal Law* (New York: Palgrave Macmillan, 2015) 218.
- Prasad, Vasundhara. “If Anyone is Listening, # MeToo: Breaking the Culture of Silence around Sexual Abuse through Regulating Non-Disclosure Agreements and Secret Settlements” (2018) 59 *Boston College L Rev* 2507.
- Profitt, Norma Jean. “‘Battered Women as ‘Victims’ and ‘Survivors’: Creating Space for Resistance” (1996) 13:1 *Canadian Social Work Review* 23.
- Ptacek, James. “Resisting Co-optation: Three Feminist Challenges to Anti-Violence Work” in

- James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 5.
- Quinlan, Andrea. "Suspect Survivors: Police Investigation Practices in Sexual Assault Cases in Ontario, Canada" (2016) 26:4 *Women & Criminal Justice* 301.
- Quinlan, Elizabeth. "Institutional Betrayal and Sexual Violence in the Corporate University" in Elizabeth Quinlan et al, eds, *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies for Change* (Waterloo, Ontario: Wildred Laurier Press, 2017) 61.
- Randall, Melanie. "Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law" (2013) 36 *Dalhousie LJ* 461.
- . "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 *CJWL* 397.
- Randall, Melanie & Elizabeth MacDowell. "Theorizing from Patriarchy: Perpetrators and Intersectional Theory on Domestic Violence" (2013) 16 *J Gender Race & Just* 531.
- Randall, Melanie & Craig Brown. "Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State" (2004) 30 *Queen's LJ* 311.
- Razack, Sherene. "What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence" (1994) 19:4 *Signs* 894.
- Reynolds, Matthew W, et al. "Epidemiologic Issues of Sexually Transmitted Diseases in Sexual Assault Victims" (2000) 55:1 *Obstetrical & Gynaecological Survey* 51.
- Ricciardelli, Rosemary, Katharina Maier & Kelly Hannah-Moffat. "Strategic Masculinities: Vulnerabilities, Risk and the Production of Prison Masculinities" (2015) 19:4 *Theoretical Criminology* 491.
- Richards, Christina, et al. "Non-binary or Genderqueer Genders" (2015) 28:1 *International Review of Psychiatry* 95.
- Richie, Beth. "Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (Transcript)" (2015) 5 *U Miami Race & Social Justice L Rev* 257.
- Richie, Beth E, et al. "Colluding With and Resisting the State: Organizing Against Gender Violence in the US" (2021) 16:3 *Feminist Criminology* 247.
- Risman, Barbara J & Georgiann Davis. "From Sex Roles to Gender Structure" (2013) 61 *Current*

Sociology Review 733.

Robertiello, Gina & Karen J Terry. "Can We Profile Sex Offenders? A Review of Sex Offender Typologies" (2007) 12:5 *Aggression and Violent Behaviour* 508.

Roberts, Julian V & Andrew A Reid. "Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story" (2017) 59:3 *Canadian Journal of Criminology and Criminal Justice* 313.

Roberts, Julian V, Nicole Crutcher, Paul Verbrugge. "Public Attitudes to Sentencing in Canada: Exploring Recent Findings" (2007) 49:1 *Can J Corr* 75.

Roberts, Julian V & Edna Erez. "Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements" (2004) 10:3 *International Review of Victimology* 223.

Roberts, Julian, Holly Johnson & Michelle Grossman. "Trends in Crimes of Sexual Aggression in Canada: An Analysis of Police-Reported and Victimization Statistics" (2003) 2 *Int J Comp Crim* 18.

Roberts, Julian & Renate Mohr, eds. *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994).

Robson, Ruthann. "Notes from a Difficult Case" (2013-2014) 50 *Creative Nonfiction* 68.

Rodgers, Sanda. "Zero Tolerance Some of the Time? Doctors, Discipline and Sexual Abuse in Ontario" (2007) 15 *Health LJ* 353.

Romano, Arthur & Rochelle Arms Almengor. "It's Deeper Than That!" Restorative Justice and the Challenge of Racial Reflexivity in White-led Schools", online: (2021) *Urban Education* <<https://journals.sagepub.com/doi/abs/10.1177/0042085921998419>>.

Rossner, Meredith & David Tait. "Contested Emotions: Adversarial Rituals in Non-Adversarial Justice Procedures" (2011) 37 *Monash UL Rev* 24.

Routh, Douglas, Zachary Hamilton & Christopher M Campbell. "Informing the Understudied R: Exploring and Advancing Typological Research" (2019) 36:1 *Justice Quarterly* 161.

Rua, Christine. "Lawyers for #USTOO: An Analysis of the Challenges Posed by the Contingent Fee System in Tort Cases for Sexual Assault" (2019) 51:2 *Colum Hum Rts L Rev* 723.

Runge, Robin R. "Employment Rights of Sexual Assault Victims" (2006-2007) 40 *Clearinghouse Rev* 299.

Ruparelia, Rakhi. "All That Glitters is Not Gold: The False Promise of Victim Impact

- Statements” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 665.
- Saxton, Michael D, et al. “Experiences of Intimate Partner Violence Victims with Police and the Justice System in Canada” (2021) 36:3-4 *Journal of Interpersonal Violence* 1.
- Schneider, Sandra L, et al. “Understanding Denial in Sexual Offenders: A Review of Cognitive and Motivational Processes to Avoid Responsibility” (2004) 5:1 *Trauma, Violence, & Abuse* 3.
- Schuller, Regina A, et al. “Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanour, Gender, and Victim Stereotypes” (2010) 13:4 *New Criminal Law Review* 759.
- Seabrook, Rita C, et al. “A Longitudinal Study of Interest and Membership in a Fraternity, Rape Myth Acceptance, and Proclivity to Perpetuate Sexual Assault” (2018) 66:6 *Journal of American College Health* 510.
- Sena, Arlene C, et al. “Sexual Assault and Sexually Transmitted Infections in Adults, Adolescents, and Children” (2015) 61:8 *Clinical Infectious Diseases* S856.
- Sheehy, Elizabeth. “Making Universities Safe for Women: Sexual Assault on Campus” in Wayne Antony, Jessica Antony & Les Samuelson, eds, *Power and Resistance: Critical Thinking About Canadian Social Issues, 6th ed* (Black Point, NS: Fernwood, 2017) 260.
- . “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 483.
- Sheehy, Elizabeth & Daphne Gilbert. “Responding to Sexual Assault on Campus: What Can Canadian Universities Learn from US Law and Policy?” in Elizabeth Quinlan et al, eds, *Sexual Violence at Canadian Universities: Activism, Institutional Responses, and Strategies for Change* (Waterloo, Ontario: Wilfred Laurier Press, 2017) 291.
- Sleath, Emma & Ray Bull. “Police Perceptions of Rape Victims and the Impact on Case Decision Making: A Systemic Review” (2017) 34 *Aggression and Violent Behaviour* 102.
- Smith, Deirdre M. “The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation” (2009-2010) 31 *Cardozo L Rev* 749.
- Smith, Dorothy. “From the Margins: Women’s Standpoint as a Method of Inquiry in the Social Sciences” (1997) 1:1 *Gender, Technology and Development* 113.
- . “Women’s Perspective as a Radical Critique of Sociology” (1974) 44 *Sociological*

Inquiry 7.

- Smith, Olivia & Tina Skinner. "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26:4 Soc & Leg Stud 441.
- Snider, Lauren. "Toward Safer Societies: Punishment, Masculinities and Violence Against Women" (1998) 38 British Journal of Criminology 1.
- Snyder, Emily, Val Napoleon, & John Borrows. "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48 UBC L Rev 593.
- Solum, Lawrence B. "Procedural Justice" (2004-2005) 78 S Cal L Rev 181.
- Spade, Dean. "Intersectional Resistance and Law Reform," (2013) 38:4 Signs: Journal of Women in Culture and Society 1031.
- . "Their Laws Will Never Make Us Safer: An Introduction" in Ryan Conrad, ed, *Against Equality: Prisons Will Not Protect You* (AE Press, 2012) 1.
- . "The Only Way to End Racialised Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's 'Masculinity as Prison'" (2012) 3 Cal L Rev 184.
- Sparks, Brandon. "Attitudes Toward the Punishment of Juvenile and Adult Sexual Offenders in Canada: The Roles of Sentencing Goals and Criminal Justice Motivations" (2021) 2 Journal of Child Sexual Abuse 125.
- Stabile, Bonnie, et al. "'She Lied': Social Construction, Rape Myth Prevalence in Social Media, and Sexual Assault Policy" (2019) 2:2 Sexuality, Gender & Policy 80.
- Stein, Murray B & Elizabeth Barret-Connor. "Sexual Assault and Physical Health: Findings From a Population-Based Study of Older Adults" (2000) 62:6 Psychosomatic Medicine 838.
- Stemple, Lara & Ilan H Meyer. "The Sexual Victimization of Men in America: New Data Challenges Old Assumptions" (2014) 104:6 American Journal of Public Health 19.
- Stephens, Megan. "Lessons from the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges" (2007) 33:1 Queen's LJ 19.
- Stewart, Felicia H & James Trussell. "Prevention of Pregnancy Resulting From Rape: A Neglected Preventative Health Measure" (2000) 19:4 American Journal of Preventive Medicine 228.
- Strang, Heather & Lawrence W Sherman. "Repairing the Harm: Victims and Restorative Justice" (2003) 15:1 Utah L Rev 16.

- Stubbs, Julie. "Restorative Justice, Gendered Violence, and Indigenous Women" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 103.
- . "Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice" (2007) 7 *Criminology and Criminal Justice* 169.
- . "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice" in Heather Strang & John Braithwaite, eds, *Restorative Justice and Family Violence* (London: Cambridge University Press, 2002) 42.
- Stubbs-Richardson, Megan, et al. "Tweeting Rape Culture: Examining Portrayals of Victim Blaming in Discussions of Sexual Assault Cases on Twitter" (2018) 28:1 *Feminism & Psychology* 90.
- Suarez, Eliana & Tahany M Gadalla. "Stop Blaming the Victim: A Meta-Analysis on Rape Myths" (2010) 25:11 *Journal of Interpersonal Violence* 2010.
- Sugar, NF, DN Fine & LO Eckert. "Physical Injury After Sexual Assault: Findings of a Large Case Series" (2004) 190 *American Journal of Obstetrics and Gynecology* 71.
- Sugarman, Stephen D. "A Comparative Law Look at Pain and Suffering Awards" (2005-2006) 55 *DePaul L Rev* 399.
- Sutherland, Kate. "From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities" (2002-2003) 9 *Wm & Mary J Women & L* 313.
- Swanberg, Jennifer E. "Domestic Violence and Employment: A Qualitative Study" (2005) 10:1 *Journal of Occupational Health Psychology* 3.
- Sweet, Elizabeth L. "Carceral Feminism: Linking the State, Intersectional Bodies, and the Dichotomy of Place" (2016) 6:2 *Dialogues in Human Geography* 202.
- Sweet, Paige L. "The Sociology of Gaslighting" (2019) 84:5 *American Sociological Review* 851.
- Tang, Kwong-leung. "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 *International Journal of Offender Therapy and Comparative Criminology* 258.
- Tanovich, David M. "Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013-2014) 45 *Ottawa L Rev* 495.
- Tauri, Juan Marcellus. "Restorative Justice as a Colonial Project in the Disempowerment of

- Indigenous Peoples” in Theo Gavrielides, ed, *Routledge International Handbook of Restorative Justice* (London: Routledge, 2018) 342.
- Teerapong, Seree, et al. “Physical Health Consequences of Sexual Assault Victims” (2009) 92:7 *J Med Assoc Thai* 885.
- Temkin, Jennifer, et al. “Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study” (2018) 13:2 *Feminist Criminology* 205.
- Terwiel, Anna. “What is Carceral Feminism?” (2020) 48:4 *Political Theory* 421.
- Tewksbury, Richard. “Stigmatization of Sex Offenders” (2011) 33:8 *Deviant Behavior* 606.
- Thom, Kai Cheng. “What to Do When You’ve Been Abusive” in Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (Chico, CA: AK Press, 2020) 67.
- Traguetto, Jessica & Tomas de Aquino Guimaraes. “Therapeutic Jurisprudence and Restorative Justice in the United States: The Process of Institutionalisation and the Roles of Judges” (2019) 63:11 *International Journal Of Offender Therapy and Comparative Criminology* 1971.
- Tseris, Emma. “Trauma and Women’s Rights... According to Whom? Decolonizing the Psychological Trauma Narrative” (2015) 25:1 *Feminism & Psychology* 34.
- Turner, Stephanie S. “Intersex Identities: Locating New Intersections of Sex and Gender” (1999) 13:4 *Gender and Society* 457.
- Ullman, Sarah E. “Mental Health Services Seeking in Sexual Assault Victims” (2008) 30 *Women & Therapy* 61.
- Ullman, Sarah E, Stephanie M Townsend, Henrietta H Filipas, et al. “Structural Models of the Relations of Assault Severity, Social Support, Avoidance Coping, Self-Blame, and PTSD Among Sexual Assault Survivors” (2007) 31:1 *Psychology of Women Quarterly* 23.
- Ullman, Sarah E & Leanne R Brecklin. “Sexual History and Health-Related Outcomes in a National Sample of Women” (2003) 27:1 *Psychology of Women Quarterly* 46.
- Valentich, Mary & James Gripton. “Ideological Perspectives on the Sexual Assault of Women” (1984) 58:3 *Social Service Review* 448.
- Van Camp, Tinneke & Jo-Anne Wemmers. “Victim Satisfaction with Restorative Justice: More than Simply Procedural Justice” (2013) 19:2 *International Review of Victimology* 117.
- Vandervort, Lucinda. “Lawful Subversion of Criminal Justice Process? Judicial, Prosecutorial,

- and Police Discretion in Edmondson, Kindrat, and Brown” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 111.
- Varma, Kimberly N & Voula Marinos. “Three Decades of Public Attitudes Research on Crime and Punishment in Canada” (2013) 55:4 *Can J Corr* 549.
- Venema, Rachel M. “Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports” (2016) 31:5 *Journal of Interpersonal Violence* 872.
- Verdun-Jones, Simon N & Adamira A Tijerino. “Victim Participation in the Plea Negotiation Process: An Idea Whose Time Has Come” (2005) 50 *Crim LQ* 190.
- Waigandt, Alex. “The Impact of Sexual Assault on Physical Health Status” (1990) 3:1 *Journal of Traumatic Stress* 93.
- Walker, Graeme. “The (In)significance of Genital Injury in Rape and Sexual Assault” (2015) 34 *Journal of Forensic and Legal Medicine* 173.
- Watson, Laurel B, et al. “How Do Feminist-Identified Women Cope with Discrimination? A Feminist Standpoint and Grounded Theory Study” (2018) 42:3 *Psychology of Women Quarterly* 291.
- Webster, Cheryl Marie, et al. “The Will to Change: Lessons from Canada’s Successful Decarceration of Youth” (2019) 53:4 *Law & Society Review* 1092.
- Weinstein, Jack B. “Some Benefits and Risks of Privatization of Justice Through ADR” (1996) 11 *Ohio St J Disp Resol* 241.
- Weiser, Dana A. “Confronting Myths About Sexual Assault: A Feminist Analysis of the False Report Literature” (2017) 66:1 *Family Relations: Interdisciplinary Journal of Applied Family Science* 46.
- Wemmers, Jo-Anne. “Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice” (2002) 9:1 *International Review of Victimology* 43.
- West, Robin “Re-Imagining Justice” (2003) 14 *Yale LJ & Feminism* 333.
- Weston, Maureen A. “Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era” (2021) 2 *U Ill L Rev* 507.
- Wexler, David. “Therapeutic Jurisprudence: An Overview” (2000) 17 *Thomas M Cooley L Rev* 125.
- Whittier, Nancy. “Carceral and Intersectional Feminism in Congress: The Violence Against



- Women Act, Discourse, and Policy (2016) 30:5 Gender and Society 791.
- Wilson, Robin J, et al. "Circles of Support & Accountability: A Canadian National Replication of Outcome Findings" (2009) 24:4 Sex Abuse 412.
- Wilson, RJ, F Cortoni & AH McWhinnie. "Circles of Support and Accountability: A Canadian National Replication of Outcome Findings" (2009) 21:4 Sex Abuse 412.
- Winick, Bruce J. "Applying the Law Therapeutically in Domestic Violence Cases" (2000) 69 UMKC L Rev 33.
- Winslade, John. "Can Restorative Justice Promote Social Justice" (2019) 22:3 Contemporary Justice Review 280.
- Wojcik, Michelle L & Bonnie S Fisher. "Overview of Adult Sexual Offender Typologies" in William T O'Donohue & Paul A Schewe, eds, *Handbook of Sexual Assault and Sexual Assault Prevention* (Switzerland: Springer, 2019) 241.
- Wood, William R. "Soliciting Community Involvement and Support for Restorative Justice Through Community Service" (2015) 26:2 Criminal Justice Policy Review 131.
- Yu, Huijae. "'If She Asked for Settlement Money, She Must Not Be a Real Victim': An Interdisciplinary Analysis of the Discourse of Victims and Perpetrators of Sexual Violence" (2022) *Critical Discourse Studies* (online first publication).
- Zedner, Lucia. "Penal Subversions: When is a Punishment Not Punishment, Who Decides and On What Grounds?" (2016) 20:1 Theoretical Criminology 3.
- Zellars, Rachel B. "'As If We Were All Struggling Together': Black Intellectual Traditions and Legacies of Gendered Violence" (2019) 77 *Women's Studies International Forum* 102230.
- Zilkens, Renate R. "Genital and Anal Injuries: A Cross-sectional Australian Study of 1266 Women Alleging Recent Sexual Assault" (2017) 275 *Forensic Science International* 195.
- Zilkens, Renate R, et al. "Sexual Assault and General Body Injuries: A Detailed Cross-Sectional Australian Study of 1163 Women" (2017) 279 *Forensic Science International* 112.
- Zinzow, Heidi. "Self-rated Health in Relation to Rape and Mental Health Disorders in a National Sample of College Women" (2011) 59:7 *Journal of American College Health* 588.
- Zhu, Nan & Lei Chang. "Evolved but Not Fixed: A Life History Account of Gender Roles and Gender Inequality" (2019) 10 *Frontiers in Psychology* 1709.

## SECONDARY MATERIAL: OTHER

- “2019-2020 Annual Report Office of the Correctional Investigator” (26 June 2020), *The Correctional Investigator Canada*, online: <<https://www.ocibec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20192020-eng.pdf>>.
- “Annual Report 2014: Chapter 3, Section 3.01: Adult Community Corrections and Ontario Parole Board” (2014), *Office of the Auditor General of Ontario*, online: <<https://www.auditor.on.ca/en/content/annualreports/arreports/en14/301en14.pdf>>
- “Better Access to Justice for Ontario Victims of Sexual Assault, Intimate Partner Violence and Those Who Have Experienced Workplace Sexual Harassment” (26 July 2022), *Government of Canada*, online: <<https://www.canada.ca/en/departement-justice/news/2022/07/better-access-to-justice-for-ontario-victims-of-sexual-assault-intimate-partner-violence-and-those-who-have-experienced-workplace-sexual-harassment.html>>.
- “Canadian Judicial Council Completes its Review of Complaints Made Against Justice Robert Dewar” (9 November 2011), *Canadian Judicial Council*, online: <<https://cjc-ccm.ca/en/news/canadian-judicial-council-completes-its-review-complaints-made-against-justice-robert-dewar>>.
- “Declarations of the Truth” (July 2020), *Womenatthecentre*, online: <<https://www.womenatthecentre.com/initiatives/declarations-of-truth>>.
- “Economic Losses in Civil Sexual Assault Cases” (March 2021), *Torkin Manes*, online: <<https://www.sexualabuselawyer.ca/resources/publications/details/economic-losses-in-civil-sexual-assault-cases>>.
- “Funding for Therapy and Counselling”, *College of Physicians and Surgeons of Ontario*, online: <<https://www.cpso.on.ca/Public/Services/Funding-for-Therapy-and-Counselling>>.
- “Harvey Weinstein Timeline: How the Scandal Unfolded” (29 May 2020), *BBC News*, online: <<https://www.bbc.com/news/entertainment-arts-41594672>>.
- “Incident-Based Crime Statistics, By Detailed Violations, Canada, Provinces, Territories and Census Metropolitan Areas” (4 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510017701&pickMembers%5B0%5D=1.16&pickMembers%5B1%5D=2.16>>.
- “Increasing the Use of Restorative Justice in Criminal Matters in Canada- Baseline Report” (24 November 2020), *Public Safety Canada*, online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2020-resjus-jusrep/index-en.aspx>>.
- “Independent Legal Advice for Sexual Assault Victims”, *Ontario Government*, online:

- <<https://www.ontario.ca/page/independent-legal-advice-sexual-assault-victims>>.
- “Indigenous Justice Program” (23 August 2021), *Government of Canada*, online: <<https://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html>>.
- “Identifying Sexual Harassment”, *Ontario Human Rights Commission*, online: <<http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/2-identifying-sexual-harassment>>.
- “Legislation and Policy” (27 October 2017), *Department of Justice*, online: <<http://www.justice.gc.ca/eng/cj-jp/rj-jr/lp.html>>.
- “Legislative Background: An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to Other Acts, as Enacted (Bill C-75 in the 42nd Parliament)” (6 September 2019), *Department of Justice*, online: <<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>>.
- “Manitoba Judge Rebuked for Sex Assault Remarks” (9 November 2011), *CBC News*, online: <<https://www.cbc.ca/news/canada/manitoba/manitoba-judge-rebuked-for-sex-assault-remarks-1.1099355>>.
- “Murdered and Missing Indigenous Women in Canada” (13 November 2015), *Toronto Star*, online: <[http://misc.thestar.com/pdfs/Toronto\\_Star\\_MMIW\\_Analysis\\_2015.pdf](http://misc.thestar.com/pdfs/Toronto_Star_MMIW_Analysis_2015.pdf)>.
- “National Sex Offender Programs, (24 April 2014), *Correctional Service Canada*, online: <<https://www.csc-scc.gc.ca/correctional-process/002001-2008-eng.shtml>>.
- “No Escape: Male Rape in US Prisons” (2001), *Human Rights Watch*, online: <<https://www.hrw.org/reports/2001/prison/report.html>>.
- “Non-Pecuniary Damages Upper Limits” (2021), *McKellar*, online: <<https://mckellar.com/statistics>>.
- “NWAC Action Plan: Our Calls, Our Actions”, (June 2021), *Native Women’s Association of Canada*, online: <<https://www.nwac.ca/wp-content/uploads/2021/06/NWAC-action-plan-FULL-ALL-EDITS.pdf>>.
- “NWAC Loses Confidence in Government, Walks Away From ‘Toxic, Dysfunctional’ NAP Process to Put Families-Not Politics-First; Announces Own Action Plan: Our Calls, Our Actions” (1 June 2021), *Native Women’s Association of Canada*, online: <<https://www.globenewswire.com/en/news-release/2021/06/01/2239800/0/en/NWAC-Loses-Confidence-in-Government-Walks-Away-From-Toxic-Dysfunctional-NAP-Process-to-Put-Families-Not-Politics-First-Announces-Own-Action-Plan-Our-Calls-Our-Actions.html>>.

- “Ontario Supporting Victims of Crime” (8 November 2021), *Government of Ontario*, online: <<https://news.ontario.ca/en/release/1001127/ontario-supporting-victims-of-crime>>.
- “Ontario Strengthening Supports for Postsecondary Students Reporting Sexual Violence or Harassment” (16 September 2021), *Government of Ontario*, online: <<https://news.ontario.ca/en/release/1000812/ontario-strengthening-supports-for-postsecondary-students-reporting-sexual-violence-or-harassment>>.
- “Overcoming Barriers to Reintegration: An Investigation of Federal Community Correctional Centres” (2014), *The Correctional Investigator Canada*, online: <<https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20141008-eng.pdf>>.
- “Physician Psychotherapy Unavailable to Ninety-Seven Percent of People with Urgent Mental Health Needs in Ontario” (11 March 2020), *IC/ES*, online: <<https://www.ices.on.ca/Newsroom/News-Releases/2020/Physician-psychotherapy-unavailable-to-ninety-seven-percent-of-people-with-urgent-mental-health>>.
- “Preventing and Responding to Sexual Harassment”, *Ontario Human Rights Commission*, online: <<http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/8-preventing-and-responding-sexual-harassment-0>>.
- “Proving Discrimination”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/human-rights-ontario/self-help-materials-and-how-guides/proving-discrimination>>.
- “Public Participation: Anti-SLAPP”, *Canadian Civil Liberties Association*, online: <<https://ccla.org/focus-areas/public-participation-anti-slapp/>>.
- “Racial Wage Gap” (2017), *The Conference Board of Canada*, online: <<https://www.conferenceboard.ca/hcp/provincial/society/racial-gap.aspx>>.
- “Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls Volume 1a” (3 June 2019), *National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <[https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1a-1.pdf](https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf)>.
- “Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls Volume 1b” (3 June 2019), *National Inquiry into Missing and Murdered Indigenous Women and Girls*, online: <[https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1b.pdf](https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf)>.
- “Resources for Addressing Harm, Accountability, and Healing”, *Critical Resistance*, online: <<http://criticalresistance.org/resources/addressing-harm-accountability-and-healing/>>.

- “Restorative Justice” (7 September 2021), *Department of Justice*, online: <<https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html>>.
- “Restorative Justice in Canada: What Victims Should Know” (March 2011), *Canadian Resource Centre for Victims of Crime*, online: <<http://www.rjlillooet.ca/documents/restjust.pdf>>.
- “Sexual Abuse Complaints”, *College of Physicians and Surgeons of Ontario*, online: <<https://www.cpso.on.ca/Public/Services/Complaints/Sexual-Abuse-Complaints>>.
- “Sexual Harassment and Sexual Violence: Pursuing a Claim at the Human Rights Tribunal of Ontario”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/frequently-asked-questions/sexual-harassment-and-violence>>.
- “Slut or Nut: Diary of a Rape Trial”, online: <<https://www.slutornut.ca/>>.
- “Social Justice Tribunals Ontario 2017-2018 Annual Report” (2019), *Tribunals Ontario*, online: <<https://www.tribunalsontario.ca/documents/sjto/2017-18%20Annual%20Report.html>>.
- “Tarana Burke: Founder”, *me too*, online: <<https://metoomvmt.org/get-to-know-us/tarana-burke-founder/>>.
- “The Crisis is Real” (2020), *Centre for Addiction and Mental Health*, online: <<https://www.camh.ca/en/driving-change/the-crisis-is-real>>.
- “The Four Circles of Hollow Water” (1997), *Public Safety Canada*, online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/fr-crcls-hllw-wtr/fr-crcls-hllw-wtr-eng.pdf>>.
- “Toronto ‘Slut Walk’ Takes to City Streets” (3 April 2011), *CBC News*, online: <<https://www.cbc.ca/news/canada/toronto/toronto-slut-walk-takes-to-city-streets-1.1087854>>.
- “Transformative Justice Initiative” (2021), *WomenatthecentrE*, online: <<https://www.womenatthecentre.com/initiatives/transformative-justice-initiative/>>.
- “Trauma-Informed Care in Behaviour Health Services” (2014), *US Department of Health and Human Services*, online: <[https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf\\_NBK207201.pdf](https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf)>.
- “Victim Quick Response Program +” (11 October 2019), *Ministry of the Attorney General*, online: <<https://www.attorneygeneral.jus.gov.on.ca/english/ovss/vqrp.php>>.
- “What About the Rapists: Anarchist Approaches to Crime and Justice” (2014), *Dysophia* (blog),

online: <<http://dysophia.org.uk/wp-content/uploads/2014/09/Dys5-WhatAboutTheRapistsWeb2.pdf>>.

“What Do I Need to Know About Mediation?”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/publications-resources/information-sheets-guides/what-do-i-need-know-about-mediation>>.

“What Remedies Are Available to Me at the HRTTO?”, *Human Rights Legal Support Centre*, online: <<https://www.hrlsc.on.ca/en/how-guides/what-remedies-are-available-me-hrto>>.

“What We Heard: Transforming Canada’s Criminal Justice System” (March 2018), *Department of Justice*, online: <[https://www.justice.gc.ca/eng/rp-pr/other-autre/tcjs-tsjp/WWH\\_EN.pdf](https://www.justice.gc.ca/eng/rp-pr/other-autre/tcjs-tsjp/WWH_EN.pdf)>.

Bakhtiary, Shiva. “Ontario’s Victim Compensation Bill Will Hurt Those It’s Designed to Help” (7 February 2020), *The Canadian Bar Association*, online: <<https://www.cba.org/Sections/Criminal-Justice/Articles/2020/Ontario-s-victim-compensation>>.

*Barbra Schlifer Commemorative Clinic*, online: <<https://www.schliferclinic.com/>>.

Beardy, Ryan. “Family Matters: Home is at the Heart of the Indigenous Prison Crisis” (30 October 2020), *The Globe and Mail*, online: <<https://www.theglobeandmail.com/opinion/article-family-matters-home-is-at-the-heart-of-the-indigenous-prison-crisis/>>.

Benoit, Cecilia, et al, “Issue Brief: Sexual Violence Against Women in Canada” (December 2015), *Status of Women Canada*, online: <<http://www.swc-cfc.gc.ca/svawc-vcscf/issue-brief-en.pdf>>.

Berger, Ryan. “Kriminalomsorgen: A Look at the World’s Most Humane Prison System in Norway” (10 December 2016), *SSRN*, online: <<https://ssrn.com/abstract=2883512>>.

Bielski, Zosia. “Ontario Government Criticized for Change to Compensation for Sexual Violence Victims” (10 December 2019), *The Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/article-ontario-government-criticized-for-change-to-compensation-for-sexual/>>.

Block, Sheila & Grace-Edward Galabuzi. “Canada’s Colour Coded Labour Market” (March 2011), *Policy Alternatives*, online: <<https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2011/03/Colour%20Coded%20Labour%20Market.pdf>>.

Brennan, Shannon. “Violence Victimization of Aboriginal Women in the Canadian Provinces,

- 2009” (17 May 2011), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf>>.
- Cohen, Sidney. “Nunavut Man Denied Parole, Wait-Listed for Sex Offender Treatment” (25 November 2019), *CBC News*, online: <<https://www.cbc.ca/news/canada/north/dangerous-offender-igaluit-mental-health-parole-1.5370493>>.
- Conroy, Shauna & Adam Cotter. “Self-Reported Sexual Assault in Canada, 2014” (11 July 2017), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>>.
- Corrigan, David Rockne. “What this Progressive Conservative Police Change Could Mean for Victim of Violent Crime” (27 May 2019), *TVO*, online: <<https://www.tvo.org/article/what-this-progressive-conservative-policy-change-could-mean-for-victims-of-violent-crime>>.
- CoSA Canada, online: <<http://cosacanada.com/>>.
- Cotter, Adam. “Criminal Victimization in Canada, 2019” (25 August 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00014-eng.pdf?st=vHYqo7iG>>.
- . “Intimate Partner Violence in Canada, 2018: An Overview” (26 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00003-eng.htm>>.
- . “Violent Victimization of Women with Disabilities, 2014” (15 March 2018), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54910-eng.htm>>.
- Cotter, Adam & Laura Savage. “Gender-based Violence and Unwanted Sexual Behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces” (5 December 2019), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm>>.
- Couture, Joe, Ted Parker, Ruth Couture & Patti Laboucane. “A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process” (2001), *Public Safety Canada*, online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cst-bnft-hllw-wtr/cst-bnft-hllw-wtr-eng.pdf>>.
- DeYoung, Sarah. “Transformative Justice Workshop Resources” (26 February 2015), *Barnard Center for Research on Women*, online: <<http://bcrw.barnard.edu/bcrw-blog/transformative-justice-workshop-resources/>>.
- Di Menna, Hillary. “Lessons in Navigating Rape Culture with Mandi Gray” (17 August 2017),

- Torontoist*, online: <<https://torontoist.com/2017/08/lessons-navigating-rape-culture-mandi-gray/>>.
- Dodge, Amanda. “Access to Justice Metrics Informed by the Voices of Marginalized Community Members” (March 2013), *Canadian Bar Association*, online: <[http://www.cba.org/CBA/cle/PDF/JUST13\\_Paper\\_Dodge.pdf](http://www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf)>.
- Doe, Jane. “Lessons in Rape Culture From the Many Trials of Mandi Gray” (29 July 2017), *Now Toronto*, online: <<https://nowtoronto.com/news/mandi-gray-rape-case/>>.
- . “The ‘Rapenomics’ of Sexual Assault” (22 March 2017), *Now Magazine*, online: <<https://nowtoronto.com/news/the-rapenomics-of-sexual-assault>>.
- Doolittle, Robyn. “The Unfounded Effect” (8 December 2017), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/investigations/unfounded-37272-sexual-assault-cases-being-reviewed-402-unfounded-cases-reopened-so-far/article37245525/>>.
- . “Nova Scotia Judge Under Fire For Claiming ‘A Drunk Can Consent’ in Sex-Assault Case” (23 March 2017), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/national/nova-scotia-judge-taxi-driver-sex-assault-case/article34184036/>>.
- . “Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless” (3 February 2017), *Globe and Mail*, online: <<https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/>>.
- Duff, Antony & Zachary Hoskins. “Legal Punishment” (2017), *Stanford Encyclopaedia of Philosophy*, online: <<https://plato.stanford.edu/entries/legal-punishment/>>.
- Evans, Alanna. “How Much Does Sexual Assault Cost Survivors? Mandi Gray Did the Math” (21 March 2017), *Flare*, online: <<https://www.flare.com/news/mandi-gray-interview/>>.
- Fox, Kathryn J. “Circles of Support and Accountability: Qualitative Evaluation” (November 2013), *State of Vermont Department of Corrections*, online: <<http://www.doc.state.vt.us/about/reports/circles-of-support-accountability-final-report/view>>.
- Freeman, Hadley. “How was Larry Nassar Able to Abuse So Many Gymnasts for So Long?” (26 January 2018), *The Guardian*, online: <<https://www.theguardian.com/sport/2018/jan/26/larry-nassar-abuse-gymnasts-scandal-culture>>.
- Garcia, Sandra E. “The Woman Who Created #MeToo Long Before Hashtags” (20 October



- 2017), *The New York Times*, online: <<https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>>.
- Gerster, Jane. “Should Canada Restrict the Use of Gag Orders in Sexual Abuse Cases?” (24 March 2019), *Global News*, online: <<https://globalnews.ca/news/5080002/sex-assault-nondisclosure-agreements/>>.
- Grace, Elizabeth. “SCC Won’t Hear Case Involving Vicarious Liability for Sex Assault” (7 May 2020), *Lerners*, online: <<https://lernalpersonalinjury.ca/sexual-abuse/scc-wont-hear-case-involving-vicarious-liability-for-sex-assault/>>.
- . “Vicarious Liability in Sexual Abuse Cases Lagging in Canada?” (17 September 2019), *Lerners*, online: <<https://lernalpersonalinjury.ca/blogs/vicarious-liability-in-sexual-abuse-cases-lagging-in-canada/>>.
- . “Criminal v. Civil: How the Criminal Process Can Impact a Parallel Civil Process” (April 2017), *Lerners*, online: <<https://www.lernal.ca/lernx/criminal-v-civil-criminal-process-can-impact-parallel-civil-process/>>.
- Hantiunk, Paul. “50% Population, 25% Representation: Why the Parliamentary Gender Gap?” *CBC News*, online: <<http://www.cbc.ca/news2/interactives/women-politics/>>.
- Ha-Redeye, Omar. “Victims’ Rights from CICB to VQRP+” (7 October 2019), *Canadian Lawyer*, online: <<https://www.canadianlawyermag.com/news/opinion/victims-rights-from-cicb-to-vqrp/306130>>.
- Hasham, Alyshah. “Ontario Budget Cuts Millions in Compensation to Victims of Violent Crime, Advocates Say” (20 April 2019), *Toronto Star*, online: <<https://www.thestar.com/news/gta/2019/04/18/ontario-budget-cuts-millions-in-compensation-to-victims-of-violent-crime-advocates-say.html>>.
- Haskell, Lori & Melanie Randall. “Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know” (1 January 2019), *SSRN*, online: <<https://ssrn.com/abstract=3417763>>.
- Heidinger, Loanna. “Intimate Partner Violence: Experiences of First Nations, Metis and Inuit Women in Canada, 2018” (19 May 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00007-eng.htm>>.
- Hendry, Luke. “Victims Left Short by New Program: Critics” (12 September 2019), *The Intelligencer*, online: <<https://www.intelligencer.ca/news/local-news/victims-left-short-by-new-program-critics>>.
- Hudon, Tamara. “Visible Minority Women” (3 March 2016), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14315-eng.pdf>>.

Hughes, Patricia & Mary Jane Mossman. “Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives” (March 2001), *Department of Justice*, online: <[http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03\\_2/rr03\\_2.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_2/rr03_2.pdf)>.

*Human Rights Legal Support Center*, online: <<https://www.hrlsc.on.ca/en/home>>.

*Human Rights Tribunal of Ontario*, online: <<https://tribunalsontario.ca/hrto/>>.

Ireton, Julie. “Rape Crisis Centres Call on Attorney General to Reverse Cuts” (19 November 2019), *CBC News*, online: <<https://www.cbc.ca/news/canada/ottawa/rape-crisis-centres-ontario-demand-action-end-cuts-victim-services-1.5363891>>.

Jaffray, Brianna. “Intimate Partner Violence: Experiences of Sexual Minority Women in Canada, 2018” (26 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00005-eng.htm>>.

———. “Experiences of Violent Victimization and Unwanted Sexual Behaviours Among Gay, Lesbian, Bisexual and Other Sexual Minority People, and the Transgender Population, in Canada, 2018” (9 September 2020), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00009-eng.htm>>.

James, Erwin. “Bastoy: The Norwegian Prison that Works” (4 September 2013), *The Guardian*, online: <<https://www.theguardian.com/society/2013/sep/04/bastoy-norwegian-prison-works>>.

———. “The Norwegian Prison Where Inmates are Treated like People” (25 February 2013), *The Guardian*, online: <<https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people>>.

Jones, Ryan Patrick. “Sexual Assault Training Now Required for New Federally Appointed Judges” (7 May 2021), *CBC News*, online: <<https://www.cbc.ca/news/politics/law-training-sexual-assault-1.6017711>>.

Kaba, Mariame & Kelly Hayes. “A Jailbreak of the Imagination: Seeing Prisons for What They Are and Demanding Transformation” (3 May 2018), *Truthout*, online: <<https://truthout.org/articles/a-jailbreak-of-the-imagination-seeing-prisons-for-what-they-are-and-demanding-transformation/>>.

Kantor, Jodi & Megan Twohey. “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades” (5 October 2017), *The New York Times*, online: <<https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>>.

- Kessler, Glenn. “Biden’s Claim that the ‘Average Rapist Rapes About Six Times’” (12 April 2021), *The Washington Post*, online: <https://www.washingtonpost.com/politics/2021/04/12/bidens-claim-that-average-rapist-rapes-about-six-times/>.
- Khoo, Cynthia. “Deplatforming Misogyny: Report on Platform Liability for Technology-Facilitated Gender-Based Violence” (2021), *Women’s Legal Education and Action Fund*, online: <https://www.leaf.ca/wp-content/uploads/2021/04/Full-Report-Deplatforming-Misogyny.pdf>.
- Krishnan, Manisha. “Women Being Sued for Making Sex Assault Allegations Are Crowdfunding Their Defence” (24 September 2020), *Vice*, online: <https://www.vice.com/en/article/pkyndm/women-being-sued-for-making-sex-assault-allegations-are-crowdfunding-their-defence>.
- Ling, Justin. “Canada’s Prisons are Failing” (12 August 2019), *The Canadian Bar Association*, online: <https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/canada-s-prisons-are-failing>.
- Llewellyn, Jennifer, Amanda Demsey, & Jillian Smith. “An Unfamiliar Justice Story: Restorative Justice and Education: Reflections on Dalhousie’s Facebook Incident 2015” (December 2015), *Canadian Centre for Policy Alternatives*, online: [https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/12/OS121\\_Restorative\\_Justice.pdf](https://policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/12/OS121_Restorative_Justice.pdf).
- Lockwood, Beatrix & Nicole Lewis. “The Long Journey to Visit a Family Member” (18 December 2019), *The Marshall Project*, online: <https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison>.
- Luke’s Place*, online: <https://lukesplace.ca/>.
- Magas, Susan. “Protection Order Breached 78 Times in Manitoba Domestic Violence Case” (4 December 2015), *CBC News*, online: <http://www.cbc.ca/news/canada/manitoba/protection-order-breached-78-times-in-manitoba-domestic-violence-case-1.3349793>.
- Marin, Andre. “Adding Insult to Injury: Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board” (February 2007), *Ombudsman Ontario*, online: <https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2007/adding-insult-to-injury>.
- Mehta, Diana. “York U Student to Use Mediation to Raise Issues With University Sexual

- Violence Policy” (9 November 2016), *Global News*, online: [<https://globalnews.ca/news/3057518/york-u-student-to-use-mediation-to-raise-issues-with-university-sexual-violence-policy/>](https://globalnews.ca/news/3057518/york-u-student-to-use-mediation-to-raise-issues-with-university-sexual-violence-policy/).
- Mendleson, Rachel, et al. “Canada’s Medical Watchdogs Know More About Bad Doctors Than They Are Telling You” (2 May 2018), *The Star*, online: [<https://projects.thestar.com/doctor-discipline/part-2/>](https://projects.thestar.com/doctor-discipline/part-2/).
- Merrit, Loretta P. “Why Are Damages in Civil Sexual Abuse Cases So Low?” (January 2015), *Torkin Manes*, online: <https://www.torkinmanes.com/docs/default-source/publications/articles/why-are-damages-in-civil-sexual-abuse-cases-so-low.pdf>>.
- Milano, Alyssa. “If you’re been sexually harassed or assaulted write ‘me too’ as a reply to this tweet” (15 October 2017 at 4:21pm), online: [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976)>.
- Moreau, Greg. “Police-Reported Crime Statistics in Canada, 2020” (27 July 2021), *Statistics Canada*, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00013-eng.htm>>.
- Moreau, Greg, et al. “Police- Reported Crime Statistics in Canada, 2019” (29 October 2020), *Statistics Canada*, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00010-eng.htm>>.
- Moyser, Melissa. “Women and Paid Work” (8 March 2017), *Statistics Canada*, online: <http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14694-eng.pdf>>.
- National Self-Represented Litigants Project, “Self-Represented Litigants in the Courts: How They Are Shaping the Jurisprudence” (13 December 2018), *Slaw*, online: <http://www.slaw.ca/2018/12/13/self-represented-litigants-in-the-courts-how-they-are-shaping-the-jurisprudence/>>.
- Olver, Mark E & L Maaiké. “Canadian Content, Context, Current Practices, and Controversies in Sexual Violence Risk Assessment”, online: (2018) 13 Sexual Offender Treatment <http://www.sexual-offender-treatment.org/169.html> >.
- Paperny, Anna Mehler. “Why Don’t Women Report Rape? Because Most Get No Justice When They Do” (23 February 2015), *Global News*, online: <https://globalnews.ca/news/1845136/why-dont-women-report-rape-because-most-get-no-justice-when-they-do/>>.
- Perreault, Samuel. “Victimization of First Nations People, Metis and Inuit in Canada” (19 July 2022), *Statistics Canada*, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00012-eng.htm>>.

- . “Criminal Victimization in Canada, 2014” (23 November 2015), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14241-eng.pdf>>.
- Philly Stands Up: Practicing Transformative Justice to Confront Sexual Assault Through Community Accountability* (blog), online: <<https://phillystandsup.wordpress.com/>>.
- Quan, Douglas. “She Accused A University Prof of Sexual Assault. Now He’s Suing for Defamation. Some Fear the ‘Landmark’ Case could have a Chilling Effect” (8 April 2021), *Toronto Star*, online: <<https://www.thestar.com/news/canada/2021/04/08/she-accused-a-university-prof-of-sexual-assault-now-hes-suing-for-defamation-some-fear-the-landmark-case-could-have-a-chilling-effect.html>>.
- Rabuy, Bernadette & Daniel Kopf. “Separation by Bars and Miles: Visitation in State Prisons” (20 October 2015), *Prison Policy Initiative*, online: <<https://www.prisonpolicy.org/reports/prisonvisits.html>>.
- Roberts, Julian V. “Victim Impact Statements: Lessons Learned and Future Priorities” (7 January 2015), *Department of Justice*, online: <[https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07\\_vic4/p1.html](https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr07_vic4/p1.html)>.
- Roberts, Julian V & Allen Edgar. “Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions” (31 March 2006), *Department of Justice*, online: <[https://justice.gc.ca/eng/rp-pr/cj-jp/victim/rr06\\_vic3/rr06\\_vic3.pdf](https://justice.gc.ca/eng/rp-pr/cj-jp/victim/rr06_vic3/rr06_vic3.pdf)>.
- Roberts, Kayleigh. “The Psychology of Victim Blaming” (5 October 2016), *The Atlantic*, online: <<https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/>>.
- Robertson, Leah. “The Disruption of COVID-19: How a Virtual World Creates Opportunity for Improvement in the Criminal Justice System’s Treatment of Complainants of Sexual Violence” (2021), *Schulich Law Scholars*, online: <<https://digitalcommons.schulichlaw.dal.ca/lawpostpandemic/4/>>.
- Rotenberg, Cristine. “From Arrest to Conviction: Court Outcomes of Police-Reported Sexual Assaults in Canada, 2009 to 2014” (26 October 2017), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm>>.
- . “Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile” (3 October 2017), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54866-eng.htm>>.
- Rotenberg, Cristine & Adam Cotter. “Police-Reported Sexual Assaults in Canada Before and After #MeToo, 2016 and 2017” (8 November 2018), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54979-eng.htm>>.

- Savage, Laura. “Intimate Partner Violence: Experiences of Women with Disabilities, 2018” (26 April 2021), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00006-eng.htm>>.
- . “Female Offenders in Canada, 2017” (10 January 2019), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00001-eng.htm>>.
- Sayej, Nadja. “Alyssa Milano on the #MeToo Movement: ‘We’re Not Going to Stand for It Any More’” (1 December 2017), *The Guardian*, online: <<https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse>>.
- Schmitz, Cristen. “‘Whack’ Sex Assault Complainant at Preliminary Inquiry” *The Lawyers Weekly* (27 May 1988) 22.
- Scrim, Katie. “Aboriginal Victimization in Canada: A Summary of the Literature” (2010), *Statistics Canada*, online: <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd3-rr3/rd3.pdf>>.
- Sheldon, Mia & Megan Rowney. “Domestic Violence: When the Law Isn’t Enough” (17 February 2016), *Global News*, online: <<https://globalnews.ca/news/2522828/domestic-violence-when-the-law-isnt-enough/>>.
- Shellnutt, David. “Targeting Victims of Crime: Doug Ford Does Away with the Criminal Injuries Compensation Board” (15 April 2019), *The Biking Lawyer LLP*, online: <<https://www.thebikinglawyer.ca/post/2019/04/14/attacking-victims-of-crime-the-ontario-conservative-government-does-away-with-the-crimina>>.
- Simpson, Laura. “Violent Victimization of Lesbians, Gays, and Bisexuals in Canada, 2014” (31 May 2018), *Statistics Canada*, online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54923-eng.htm>>.
- Sinha, Marie. “Measuring Violence Against Women: Statistical Trends” (25 February 2013), *Statistics Canada*, online: <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf>>.
- Szklarski, Cassandra. “The Reasons Some Victims of Sexual Assault Choose to Sue in Civil Court” (3 November 2017), *Global News*, online: <<https://globalnews.ca/news/3842846/the-reasons-some-victims-of-sexual-assault-choose-to-sue-in-civil-court/>>.
- TED, “Our Story of Rape and Reconciliation” (13 February 2017), online: *YouTube* <<https://www.youtube.com/watch?v=gyPoqFcvt9w>>.

The Canadian Press, “Mandi Gray, York University Reach Settlement in Human Rights Case” (12 December 2016), *CBC News*, online: <<https://www.cbc.ca/news/canada/toronto/yorku-gray-settlement-1.3892705>>.

Trivedi-Bateman, Neema & Emma L Crook. “The Optimal Application of Empathy Interventions to Reduce Antisocial Behaviour and Crime: A Review of the Literature”, online: (2021) *Psychology, Crime & Law* <<https://www.tandfonline.com/doi/full/10.1080/1068316X.2021.1962870>>.

Valenti, Jessica. “Slut Walks and the Future of Feminism” (3 June 2011), *Washington Post*, online: <[https://www.washingtonpost.com/opinions/slutwalks-and-the-future-of-feminism/2011/06/01/AGjB9LIH\\_story.html](https://www.washingtonpost.com/opinions/slutwalks-and-the-future-of-feminism/2011/06/01/AGjB9LIH_story.html)>.

White, Patrick. “Canada’s Investment in Prison System Isn’t Bringing Results, Watchdog Reports” (25 April 2019), *The Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/article-canadas-investment-in-prison-system-model-isnt-bringing-results/>>.

Wilson, Robin J, et al. “Circles of Support & Accountability: An Evaluation of the Pilot Project in South-Central Ontario” (May 2005), *Correctional Service Canada*, online: <[https://www.csc-scc.gc.ca/research/092/r168\\_e.pdf](https://www.csc-scc.gc.ca/research/092/r168_e.pdf)>.

*WomenatthecentrE*, online: <<https://www.womenatthecentre.com/>>.

Wooley, Alice, et al. “Canadian Judicial Council Complaint RE Justice Camp” (9 November 2015), online: <<http://s3.documentcloud.org/documents/2510250/cjc-complaint-r-camp.pdf>>.

Young, Leslie & caroja12. “Ontario’s Probation System ‘A Joke,’ Say Offenders” (9 May 2017), *Global News*, online: <<https://globalnews.ca/news/3429225/ontarios-probation-system-a-joke-say-offenders/>>

## Appendix: Interview Materials and Documentation

### A. Interview Guide: Survivors

#### Introductory Questions for Survivors

1. Begin with introductions and conversation about project
2. Provide consent and demographic forms
  - a. Start with consent document. Discuss main issues outlined on form, particularly the fact that participants can stop at any time or refuse to answer any questions during the interview or on the demographic forms
  - b. Discuss any questions participants may have about either document
3. Outline structure of interview – Begins with general case scenarios and moves into more direct questions about participant experiences and opinions
  - a. Reiterate that participants may choose to stop at any time or not answer questions that they do not wish to respond to

#### Case Scenarios (For all participants)

1. ***NB: Warn participants that case scenarios include short descriptions of sexual violence***  
*Scenario: An employer sexually assaults a female employee multiple times over the course of several months, beginning by forcefully kissing her, groping her over and then under her clothing, and culminating in non-consensual penetrative intercourse. He threatens to fire her if she resists or reports him. After several months, she goes to the police and he is charged and prosecuted. He submits a guilty plea to the courts.*



- a. In your ideal world, if you were a judge, what sentence would you give the offender? You are not restricted to using only the current laws on sexual assault. You may apply any sentence you deem just.
    - i. What are your reasons for choosing this sentence?
    - ii. Do you think the sentence(s) that you've described offer(s) satisfactory justice for the survivor?
      1. What about from the perpetrator's viewpoint?
      2. What about the concerns of society as a whole?
      3. If you have identified differences in how these groups perceive justice, are these differences reconcilable?
  - b. Next, we're going to talk about how you might change your hypothetical sentence depending on the facts of the case.
    - i. Would your sentence change if the perpetrator did not plead guilty and instead a full trial took place? If so, how?
    - ii. Would your sentence change if the perpetrator did not engage in non-consensual penetrative intercourse with the survivor? The scenario would still entail non-consensual kissing and groping both over and under clothing.
2. *Recently, a woman from Iceland went public about how she dealt with the repercussions of a sexual assault committed by her boyfriend when she was a minor. It was a singular occurrence that happened while she was incapacitated by alcohol, unable to respond. She remembers him taking her home and having penetrative sex with her body for two hours while she was not fully conscious. She did not report her abuser to the police and*

*instead corresponded with him for eight years, then met him in person to discuss the assault. Her purpose in doing this was to understand what happened, to feel as if her abuser had accepted responsibility for his actions, and to forgive him so that she could move past this part of her life. In the end, she felt as if she had reached a just conclusion for her trauma as the perpetrator acknowledged that what he did was wrong, apologised and seemed genuinely remorseful and horrified by his actions, and validated her experiences of harm.*

- a. How do you feel about this woman's version of justice for sexual assault? Do you think that you would find such a process satisfactory? Why or why not?
  - b. What do you think about the fact that the perpetrator in this case never had to interact with the justice system?
    - i. How important is punishment to your conception of satisfactory justice for sexual assault?
    - ii. What form should punishment take?
3. There are many things that survivors will consider when deciding whether or not to report a sexual assault to the police. Some of these things might point towards reporting, others in the opposite direction. What were the various push and pull factors that you considered when deciding whether or not to report?
- a. Probe: For example, did you consider any of the following?
    - i. The experience of the trial process
    - ii. The outcomes/sentences available or likely to be applied
    - iii. The costs, both emotional and financial
4. Were there other avenues of justice that you considered pursuing or decided to pursue?

- a. *Confirm whether aware of, considered, or pursued a civil action or CICB claim*
- b. *If participant engaged in a Human Rights complaint or a non-legal avenue of justice, probe for details about these offences, why they were chosen, and whether they contributed to a sense of justice.*

### **Questions for Survivors Who Have Engaged with the Criminal Justice System**

1. Can you describe how extensive your interactions with the criminal justice system have been? In other words, how did they start and where did they end?
  - a. Why did your interactions with the justice system stop?
    - i. Probe: Was it because of the end of a trial, your complaint was unfounded by the police, you decided to stop participating, or a guilty plea was entered, etc...
  - b. If you chose to stop participating, why?
2. Thinking back to when you first engaged with the criminal justice system, what were your aims/objectives? What harms were you trying to address? (Probe: Incarceration of the offender, public support, money, therapeutic benefits, opportunity to tell story, have experience validated, etc...)
  - a. Were you able to achieve any of these aims and/or adequately address the harms that you experienced?
  - b. If what you expected/desired from engaging with the criminal justice system did not occur, what happened instead?
  - c. What were the results of your engagement with the criminal justice system? Where these results satisfactory to you? Why or why not?

- d. Did anything remain unaddressed after your engagement with the criminal justice system?
3. If one of your friends was considering engaging the criminal justice system after being sexually assaulted, would you encourage them to take this route given your experiences? Why or why not?

**Questions for Survivors Who Have Pursued a Civil Claim or Been to a Criminal Injuries Compensation Board**

1. What were the various factors that led you to pursue a civil claim/CICB hearing instead of or in conjunction with a criminal complaint?
2. What was the outcome of your participation in a civil claim and/or CICB process?
3. Did your civil claim contribute to your sense of whether justice had been achieved after sexual assault? Why or why not?
4. Does your CICB award contribute to your sense of whether justice has been achieved after a sexual assault? Why or why not?
  - a. Probe: How do you feel about the fact that the perpetrator does not provide the compensation in the CICB regime?
5. *If participant has commenced a civil trial or CICB hearing, as well as a criminal trial:*
  - a. How did your civil claim/CICB hearing compare in terms of processes and results to the criminal trial?
  - b. Do you feel you have achieved satisfactory justice with the combination of these approaches? Why or why not?

## **Questions for Survivors Who Have Not Pursued a Civil Claim or Been to a Criminal Injuries Compensation Board**

1. You mentioned earlier in the interview that you had contemplated but decided not to pursue civil or Criminal Injuries Compensation Board claims. Can you tell me what factors weighed in your decision?
  - a. Probe: If all obstacles such as financial ability were removed, would you pursue these types of claim? Why or why not?
2. You mentioned earlier in the interview that you were not aware of the options of pursuing civil or Criminal Injuries Compensation Board claims. Had you known, would you have considered either of these options? Why or why not?
3. Do you think that civil claims with the potential for damage awards contribute to justice in cases of sexual assault? Why or why not?
4. Do you think that a CICB award is a just outcome after a sexual assault? Why or why not?
  - a. Probe: How do you feel about the fact that the perpetrator does not provide the compensation?

## **Possibilities for Justice (for all participants)**

1. *Restorative justice has been gaining traction in public discussions around sexual assault. Restorative justice is a series of different processes that can be used after a criminal act has occurred to help heal the harms caused by the offence. The primary goals of these processes is to try and return the people who were hurt to a similar place to where they were before they were harmed, and also to help the perpetrator change his behaviour so*

*that he no longer causes harm. Restorative processes tend to be cooperative, not adversarial, and usually involve the participation of the perpetrator, the victim(s), and members of the community. While punishment may be part of the process, it is not a key component. Some people claim that restorative resolutions tend to be more positive and satisfying for people hurt by crime. However, in the context of sexual offences, there is concern that there are not sufficient safeguards to ensure that survivors are safe, and that harmful stereotypes and rape myths do not influence the process.*

- a. *Probe:* Do you have any questions about restorative justice?
  - b. Were processes like this available to you when you were considering how to proceed after being sexually assaulted, would you have preferred having this option to a traditional criminal trial? Why or why not?
  - c. *If no:* Are there cases where restorative justice could be an adequate option for sexual assault? If so, what types of sexual assault cases would you feel could be appropriately dealt with in a restorative process?
  - d. *If yes:* Are there cases where restorative justice would not be an adequate option for sexual assault? If so, what types of sexual assault cases do you feel could not be appropriately dealt with in a restorative process?
  - e. *All:* Are there components/elements that must be in place for a restorative process for sexual assault to take place?
    - i. *Probe:* Legal advice, specialised safety mechanisms, survivor support structures, etc...
2. Are there other paths to justice for survivors *outside* the legal system? (Probe: If none, mention public shaming and accountability circles)

- a. What are your opinions on obtaining justice outside the legal system, without police or court intervention?
3. Do you have any concluding thoughts on the form and content of justice for sexual assault survivors?

**Conclusion (for all participants)**

1. Is there anything else that you would like to add to this conversation that we have not discussed yet?
2. Do you have any recommendations for improving the format of these interviews?
3. MAKE SURE TO DISBURSE HONOURARIUM

## **B. Interview Guide: Lawyers**

1. *Begin with introductions and conversation about project.*
2. *Provide consent and demographic forms*
  - a. *Start with consent document. Discuss main issues outlined on form.*
  - b. *Discuss any questions participants may have about either document.*
3. Can you talk a bit about the work that you do with survivors of sexual assault?
4. How often do survivors come to see you and then decide not to report to police or not to proceed with charges? No doubt there are a number of factors that women consider in making these decisions; from your experience, what are the factors that weigh heavily in women's decisions not to engage—or not to continue their engagement—with the criminal justice system?
  - a. In your conversations with women, are there factors that you raise because you think they are important so that women can make an informed decision? Does the final outcome—the potential for a conviction and the likely sentence—play an important role in survivor's decision-making?
5. Do you discuss legal options other than criminal trials available to survivors such as bringing a civil claim against the perpetrator or applying for funds through the Criminal Injuries Compensation Board? What are your thoughts on these options?
6. Sentences for sexual assault are often more lenient than what both case law and legislation require. Yet at the same time, empirical research on sentencing suggests that harsher sentences do little to prevent future crime, so it's not clear that pushing for harsher sentences is necessarily the best strategy. What are your thoughts about sentencing in cases of sexual assault?



7. *Restorative justice has been gaining traction in public discussions around sexual assault. Restorative justice is a series of different processes that can be used after a criminal act has occurred to help heal the harms caused by the offence. The primary goals of these processes is to try and return the people who were hurt to a similar place to where they were before they were harmed, and also to help the perpetrator change his behaviour so that he no longer causes harm. Restorative processes tend to be cooperative, not adversarial, and usually involve the participation of the perpetrator, the victim(s), and members of the community. While punishment may be part of the process, it is not a key component. Some people claim that restorative resolutions tend to be more positive and satisfying for people hurt by crime. However, in the context of sexual offences, there is concern that there are not sufficient safeguards to ensure that survivors are safe, and that harmful stereotypes and rape myths do not influence the process.*

- a. *Probe: Do you have any questions about restorative justice?*
- b. Have you seen and/or participated in these processes for sexual assault cases?
- c. If so, do you have any sense of whether the complainants felt that restorative justice resulted in a satisfactory outcome?
- d. What reasons did complainants have for opting for these processes?
- e. What are your opinions on the use of restorative justice for sexual assault cases?

Would you recommend such a process to a client? Why or why not?

8. From your experience and conversations with survivors, what do you think “justice” looks like for survivors? Is the criminal justice system—or any part of our legal system—currently able to deliver this form of justice? Is the legal system the place we should be looking for survivor-centred justice?

9. Is there anything else that you would like to add to this conversation that we have not discussed yet?

10. Do you have any recommendations for improving the format of these interviews?

## C. Recruitment Letter to Lawyers

### *Request for Participation in a Research Study*

#### **“Understanding Justice for Sexual Assault Survivors”**

Hello,

My name is Tamera Burnett and I am a PhD candidate at Osgoode Hall Law School working under the supervision of Professor Janet Mosher. I am conducting a study on the perspectives of woman-identified survivors on legal justice in the context of sexual assault. I am requesting your help in connecting with women to interview, and also potentially being part of the research yourself.

My project asks what survivors think that justice in the legal system should look like for sexual assault cases. There are a number of studies on how the courts should treat offenders, but the voices of women who have experienced this type of harm are often absent from research on this topic. What do survivors hope to achieve when reporting an assault? What are their thoughts on the available processes and outcomes for obtaining legal justice? My study aims to ensure that women are heard and that their experiences and stories are incorporated in our understandings of this crime and of how the legal system should deal with it.

I am looking to connect with women who have been sexually assaulted and who have either not engaged with the legal system or have finished their legal proceedings, whether these are in the form of a police investigation, criminal trial, civil claim, Criminal Injury Compensation Board hearing, or some combination of processes. Women who are currently working their way through a legal process in regards to their assault are excluded from this study.

I am asking you to help raise awareness of my project among your clients. I have attached both a flyer and a letter to this email discussing my project and asking for volunteers. I would appreciate it if you could post the flyer and letter in your waiting room, and give the letter to any client you think may be interested in participating. If they wish to participate, they can contact me with questions or to set up an interview. I would like to assure you that this study has been reviewed and received ethics clearance through the York University Research Ethics Committee. I would also be interested in talking with you about your experiences working with survivors and your opinions on legal justice for sexual assault. This interview would take between 60-90 minutes at the time and location of your convenience.

I have attached electronic copies of both the letter and flyer associated with this project. I can also mail hard copies to you if that is preferred. If so, please email me to confirm your mailing address and I will send you an envelope of materials. I will follow-up with you in a couple weeks to ensure that you have received this email, and to ask if you have any questions. I am reachable at EMAIL, as well as NUMBER.

Thank you for your help.

Sincerely,

Tamera Burnett

## D. Recruitment Letter to Survivors

### *Request for Participation in a Research Study*

#### **“Understanding Justice for Sexual Assault Survivors”**

Hello,

My name is Tamera Burnett and I am a PhD candidate at Osgoode Hall Law School working under the supervision of Professor Janet Mosher. I am conducting a study on the perspectives of woman-identified survivors on legal justice in the context of sexual assault. I am requesting your help in connecting with women to interview, and also potentially being part of the research yourself.

My project asks what survivors think that justice in the legal system should look like for sexual assault cases. There are a number of studies on how the courts should treat offenders, but the voices of women who have experienced this type of harm are often absent from research on this topic. What do survivors hope to achieve when reporting an assault? What are their thoughts on the available processes and outcomes for obtaining legal justice? My study aims to ensure that women are heard and that their experiences and stories are incorporated in our understandings of this crime and of how the legal system should deal with it.

I am looking to connect with women who have been sexually assaulted and who have either not engaged with the legal system or have finished their legal proceedings, whether these are in the form of a police investigation, criminal trial, civil claim, Criminal Injury Compensation Board hearing, or some combination of processes. Women who are currently working their way through a legal process in regards to their assault are excluded from this study.

I am asking you to help raise awareness of my project among your clients. I have attached both a flyer and a letter to this email discussing my project and asking for volunteers. I would appreciate it if you could post the flyer and letter in your waiting room, and give the letter to any client you think may be interested in participating. If they wish to participate, they can contact me with questions or to set up an interview. I would like to assure you that this study has been reviewed and received ethics clearance through the York University Research Ethics Committee. I would also be interested in talking with you about your experiences working with survivors and your opinions on legal justice for sexual assault. This interview would take between 60-90 minutes at the time and location of your convenience.

I have attached electronic copies of both the letter and flyer associated with this project. I can also mail hard copies to you if that is preferred. If so, please email me to confirm your mailing address and I will send you an envelope of materials. I will follow-up with you in a couple weeks to ensure that you have received this email, and to ask if you have any questions. I am reachable at EMAIL, as well as NUMBER.

Thank you for your help.

Sincerely,

Tamera Burnett

## **Volunteers Needed for Research Study on *Understanding Justice for Sexual Assault Survivors***

*If you are a woman-identified sexual assault survivor, at least 18 years of age, and not currently engaged with the legal system in regards to your assault, you are invited to participate in a research study about justice and sexual assault.*

- There is very little research about what sexual assault survivors want and need from legal proceedings dealing with sexual assault. Although there are a number of studies on how the courts should treat offenders, the voices of women who have experienced this type of harm are often absent. What do survivors hope to achieve when reporting an assault? What are their thoughts on the available processes and outcomes for obtaining legal justice? My study aims to make sure that women are heard and that their experiences and stories are incorporated in our understandings of this crime and any reforms that may lead to better outcomes for survivors.
- I am looking to connect with adult women who have either not engaged with the legal system or have concluded their legal proceedings, whether these are in the form of a police investigation, criminal trial, civil claim, Criminal Injury Compensation Board hearing, or some combination of processes.
- Participation involves taking part in a 60-90 minute interview with the researcher to talk about your experiences and opinions on sexual assault and justice at the time and location of your convenience. A \$40 honorarium will be provided to all participants and confidentiality will be respected.

If interested, please contact Tamera Burnett, PhD Candidate at York University, for more information or to schedule an interview at EMAIL or NUMBER.

Questions can also be posed to the supervisor of this project, Professor Janet Mosher, at EMAIL or NUMBER.

*This study has been approved by York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process or about your rights as a participant in the study, you may contact the Senior Manager and Policy Advisor for the Office of Research Ethics at ore@yorku.ca or 416-736-5914.*

## F. Consent Form: Survivors

### Consent Form

Date: Summer and Fall 2018

Study Name: *Understanding Justice for Sexual Assault Survivors*

Researcher: Tamera Burnett, PhD Candidate, Osgoode Hall Law School

Purpose: The purpose of this study is to better understand what sexual assault survivors think justice should look like in the legal system for the harms that they have experienced. For this project, I will be speaking with women-identified survivors, as well as with lawyers who represent sexual assault survivors. Specifically, I will be asking questions about what survivors believe they need to achieve satisfactory justice after being assaulted, including whether the processes and outcomes in the legal system available respond to survivor interests and what alternatives survivors think would better help them obtain justice. The data from this project will become part of my dissertation and may be used in subsequent academic publications as well.

What your participation would require: During an interview, you will be asked to answer a series of questions about your opinions on justice in the context of sexual assault. You will not be asked to talk about your assault. The interview will focus on how the legal system deals with cases of sexual violence, specifically what results survivors want from engaging in these processes. Some of the questions will ask your opinions on whether available sentencing processes and their resulting outcomes seem fair to you. This interview should take no longer than 60-90 minutes, and you will receive \$40 to recognize your time and effort.

Risks of Participating: The interview may bring up memories about your assault and the legal processes you may have participated in. While you will not be asked to give details about your assault, speaking about sexual assault may cause emotional distress. A list of counselling options will be made available if you feel the need to speak with someone as a result of your participation in this project, and you may withdraw from the interview at any time.

Benefits of Participating: There is a lack of research on how survivors perceive justice after a sexual assault and your participation will help fill this knowledge gap and inform reform efforts so that such attempts reflect the needs and desires of survivors.

Voluntary Participation: Your participation in this research is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not impact your relationship with the researcher, York University, or any other individual or group associated with the research now or in the future.

Withdrawal: You may stop participating in the study at any time, for any reason, if you so decide. You are not obligated to answer any of the questions asked. Your choice to stop



participating will not impact your relationship with researcher, York University, or any other individual or group associated with the research now or in the future. In the event that you withdraw completely from the study, all associated data collected will be immediately destroyed wherever possible.

If you decide to stop participating, you will still be eligible to receive the honorarium for agreeing to be in the project.

Confidentiality: Confidentiality will be provided to the fullest extent possible by law. All information you supply during the research will be held in confidence and your name and identifying information will not appear in any report or publication of the research.

With your permission, the interview will be digitally recorded. The recordings will be stored on encrypted hard drives that will be kept in secure, locked locations, accessible only by the researcher. Transcriptions will be made from the recordings within a month of their creation, and the original recordings destroyed. The transcriptions will not include your real name or other identifying information. They will be stored indefinitely on separate encrypted hard drives in a secure location, accessible only by the researcher. The transcriptions will be kept indefinitely for future research.

If you would prefer that the session not be recorded, notes will be taken by hand and stored in the same manner as electronic transcriptions.

Questions about the Research:

If you have questions about this project or your role in the research, do not hesitate to contact me by email at EMAIL or by phone at NUMBER. You can also contact my PhD supervisor, Professor Janet Mosher, by phoning NUMBER or emailing EMAIL.

This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, you may contact the Senior Manager and Policy Advisor for the Office of Research Ethics at York University by telephone at 416-736-5914 or by at e-mail at ore@yorku.ca.

Legal Rights and Signatures:

I, \_\_\_\_\_, consent to participate in the project *Understanding Justice for Sexual Assault Survivors* conducted by Tamera Burnett. I have understood the nature of this project and wish to participate. I agree that non-identifying information that I provide may be used in publications arising from this research project. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Consent to Participate

Participant \_\_\_\_\_ Date \_\_\_\_\_

Consent to the Recording of the Interview

Participant \_\_\_\_\_ Date \_\_\_\_\_

## G. Consent Form: Lawyers

### Consent Form

Date: Summer and Fall 2018

Study Name: *Understanding Justice for Sexual Assault Survivors*

Researcher: Tamera Burnett, PhD Candidate, Osgoode Hall Law School

Purpose: The purpose of this study is to better understand what sexual assault survivors think justice should look like in the legal system for the harms that they have experienced. For this project, I will be speaking with women-identified survivors, as well as with lawyers who represent sexual assault survivors. Specifically, I will be asking questions about what survivors believe they need to achieve satisfactory justice after being assaulted, from whether the processes and outcomes in the legal system available respond to survivor interests to what alternatives survivors can imagine would better help them obtain justice. The data from this project will become part of my dissertation and may be used in subsequent academic publications as well.

What your participation would require: During an interview, you will be asked to answer a series of questions about your opinions on justice in the context of sexual assault. You will not be asked to talk about specific clients. The interview will focus on how the legal system deals with cases of sexual violence, specifically what results survivors want from engaging in these processes. Some of the questions will ask about your opinions on whether available sentencing processes and their resulting outcomes feel fair to you.

This interview should take no longer than 60-90 minutes.

Risks of Participating: Some participants may be concerned that being a part of this project may have negative effects on their employment. However, no names or identifying information will be included in any final written work resulting from this research.

Benefits of Participating: There is a lack of research on how survivors perceive justice after a sexual assault and your participation will help fill this knowledge gap and inform reform efforts in the future.

Voluntary Participation: Your participation in the research is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not impact your relationship with the researcher, York University, or any other individual or group associated with the research now or in the future.

Withdrawal: You may stop participating in the study at any time, for any reason, if you so decide. You are not obligated to answer any of the questions asked. Your choice to stop participating will not impact your relationship with the researcher, York University, or any other individual or group associated with the research now or in the future. In the event that you

withdraw completely from the study, all associated data collected will be immediately destroyed wherever possible.

Confidentiality: Confidentiality will be provided to the fullest extent possible by law. All information you supply during the research will be held in confidence, and your name and identifying information will not appear in any report or publication of the research.

With your permission, the interview will be digitally recorded. The recordings will be stored on encrypted hard drives that will be kept in secure, locked locations, accessible only by me. Transcriptions will be made from the recordings within a month of their creation, and the original recordings destroyed. The transcriptions will not include your real name or other identifying information. They will be stored indefinitely on separate encrypted hard drives in a secure location, accessible only by me. The transcriptions will be kept indefinitely for future research.

If you would prefer not to have the session recorded, notes will be taken by hand and stored in the same manner as the electronic transcriptions.

Questions About the Research:

If you have questions about this project or your role in the research, do not hesitate to contact me by email at EMAIL or by phone at NUMBER. You can also contact my PhD supervisor, Professor Janet Mosher, by phoning NUMBER or emailing EMAIL.

This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, you may contact the Senior Manager and Policy Advisor for the Office of Research Ethics at York University by telephone at 416-736-5914 or e-mail at ore@yorku.ca.

Legal Rights and Signatures:

I, \_\_\_\_\_, consent to participate in the project *Understanding Justice for Sexual Assault Survivors* conducted by Tamera Burnett. I have understood the nature of this project and wish to participate. I agree that non-identifying information that I provide may be used in publications arising from this research project. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Consent to Participate

Participant \_\_\_\_\_ Date \_\_\_\_\_

Consent to the Recording of the Interview

Participant \_\_\_\_\_ Date \_\_\_\_\_

**H. Demographic Forms**

Participant Code: \_\_\_\_\_

**Demographic Survey for Interview Participants**

Study Name: *Understanding Justice for Sexual Assault Survivors*  
Researcher: Tamera Burnett, PhD Candidate, Osgoode Hall Law School

Please fill out the following form, self-identifying however you feel most comfortable. As with all data involved in this study, your information will remain confidential and you will not be identified by this information in any resulting report. You may also choose not to answer any question.

1. Sex/Gender: \_\_\_\_\_
2. Age: \_\_\_\_\_
3. Race/Ethnicity: \_\_\_\_\_
4. Sexuality: \_\_\_\_\_
5. Disability: \_\_\_\_\_
6. Citizen/Immigration Status: \_\_\_\_\_
7. Primary Language(s): \_\_\_\_\_
8. Education (highest attained): \_\_\_\_\_
9. Income (please circle):
  - a. <\$9999
  - b. \$10,000 - \$29,999
  - c. \$30,000 - \$54,999
  - d. \$55,000 - \$74,999
  - e. \$75,000 - \$99,999
  - f. >\$100,000

\*\*\*\*\*

Participant Code: \_\_\_\_\_

**Demographic Survey for Interviews with Lawyers**

Study Name: *Understanding Justice for Sexual Assault Survivors*  
Researcher: Tamera Burnett, PhD Candidate, Osgoode Hall Law School

Please fill out the following form, self-identifying however you feel most comfortable. As with all data involved in this study, your information will remain confidential and you will not be identified by this information in any resulting report. You may also choose not to answer any question.

1. Sex/Gender: \_\_\_\_\_

2. Age: \_\_\_\_\_
3. Race/Ethnicity: \_\_\_\_\_

## **I. Support Services for Sexual Assault Survivors Handout**

### **Toronto Support Services for Sexual Assault Survivors**

#### Toronto Rape Crisis Centre/Multicultural Women Against Rape

TRCC/MWAR is a grassroots, women-run collective working towards a violence-free world by providing anti-oppressive, feminist peer support to survivors of sexual violence through support, education, and activism.

- 24/hour Support Hotline: 416-597-8808 or [crisis@trccmwar.ca](mailto:crisis@trccmwar.ca)
- General Contact Info: 416-597-1171 or [info@trccmwar.ca](mailto:info@trccmwar.ca),
- Services: Counselling (free and confidential), Court Support, Support Groups, Advocacy, 24 Hour Crisis Line
- More information at: <http://trccmwar.ca/>

#### Assaulted Women's Help Line

The Assaulted Women's Helpline offers a 24-hour telephone and TTY crisis line to all women who have experienced abuse. They provide counselling, emotional support, information, and referrals.

- Telephone: 416-863-0511, toll-free in Ontario at 1-866-863-0511, or text #SAFE (#7233) on Bell/Rogers/Fido/Telus mobiles
  - o Available 24 hours a day
- More information at: <http://www.awhl.org/>

#### Sexual Assault & Domestic Violence Care Centre at the Women's College Hospital

The **Sexual Assault/Domestic Violence Care Centre** is available 24 hours a day, seven days a week. It is a comprehensive service that assists women, men, and trans people who are victims/survivors of sexual assault and domestic/intimate partner violence.

- Telephone: 416-323-6040
- Address: 76 Grenville St, Toronto, Ontario, M5S 1B2
- More information at <http://www.womenscolleghospital.ca/programs/program116.html>

#### Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Clinic offers legal representation, professional counselling and multilingual interpretation to women who have experienced abuse. They are a centre by, for and about women.

- Telephone: 416-323-9149
- Email: [mail@schliferclinic.com](mailto:mail@schliferclinic.com)
- Address: 489 College St, Suite 503, Toronto, Ontario, M6G 1A5



- More information at <http://www.schliferclinic.com>

### Toronto Women's Shelters

There are many agencies and shelters within the Toronto area that are able to provide you with a safe and secure environment. Below is a list of shelters and their phone numbers.

Alternately you can dial 311 to be transferred to Central Intake or you can call them directly at 416-397-5637 or toll free within the GTA at 1-877-338-3398. Service is available 24 hours a day, 7 days a week.

- Anduhyaun Emergency Women's Shelter – 416-920-1492, ext 221
- North York Women's Shelter – 416-638-7335 (general inquiries) or 416-635-9630 (emergency)
- Ernestine's Women Shelter – 416-743-1733 (general inquiries) or 416-746-3701, press 0 (emergency)
- Nellies – 416-461-8903 (general inquiries) or 416-461-1084 (emergency)
- Interval House – 416-924-1411 (general inquiries) or 416-924-1491 (emergency)
- Redwood Shelter – 416- 533-9372 (general inquiries) or 416-533-8538 (emergency)