

# **Let's Talk About Sexual Assault**

## A Feminist Exploration of the Relationship Between Legal and Experiential Discourses

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## Abstract

This thesis challenges the tendency within feminist legal thought to imagine a sharp division between law and lived experience, and specifically between feminist methods that engage legal discourse and those that invoke grassroots narratives grounded in experience. In order to better elucidate the relationship between legal and experiential discourses, the author compares recent legal discourse on sexual assault—focusing on two Supreme Court of Canada decisions—with women’s own accounts of sexual violence, as presented in mainstream news media in the wake of the 2014 Jian Ghomeshi story. The findings, examined through the lens of feminist scholarship, support a view of legal and experiential discourses on sexual violence as deeply intertwined and mutually constitutive. While law shapes accounts of firsthand experience, experiential accounts also hold the potential to shape, or “reform,” the law. This understanding suggests a different vision of the nature and process of law reform.

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# Table of Contents

<b>Abstract</b> .....	<b>ii</b>
<b>Acknowledgements</b> .....	<b>iii</b>
<b>Table of Contents</b> .....	<b>iv</b>
<b>CHAPTER ONE: INTRODUCTION</b> .....	<b>1</b>
A Note About Terminology .....	5
Feminist Critiques of Law Reform .....	8
Alternative Foundations .....	15
The Discursive Construction of Experience.....	22
My Claim.....	30
Overview and Summary of Chapters .....	32
<b>CHAPTER TWO: THE LEGAL DISCOURSE</b> .....	<b>35</b>
<b>INTRODUCTION: Law and Experience</b> .....	<b>35</b>
<b>PART I: Overview of Reforms</b> .....	<b>39</b>
Actus Reus .....	41
Mens Rea.....	46
Evidentiary Issues.....	49
Summary of Reforms.....	52
<b>PART II: <i>Ewanchuk</i> and <i>JA</i></b> .....	<b>53</b>
<b>A. The Cases</b> .....	<b>54</b>
<i>R v Ewanchuk</i> : Subjective Consent and Rape Myths .....	54
<i>R v JA</i> : Advance Consent .....	57
<b>B. Law and Experience in <i>Ewanchuk</i> and <i>JA</i></b> .....	<b>60</b>
Meta-Discourse: Law’s Self-Image .....	61
Discourse: Power Struggles and the Shifting Meaning of Consent .....	69
<b>Chapter Summary</b> .....	<b>76</b>
<b>CHAPTER THREE: THE SURVIVOR MEDIA DISCOURSE</b> .....	<b>78</b>
<b>Part I: The Ghomeshi Story</b> .....	<b>81</b>
<b>Part II: The Survivor Discourse</b> .....	<b>85</b>
Consciousness-raising.....	87
“Why Didn’t You Call the Police?”: Survivors and the Justice System .....	89
Alternatives to Law: Justice through Storytelling .....	101
“ <i>What Happened to me?</i> ”: Constructions of Sexual Violence.....	113
<b>Chapter Summary</b> .....	<b>122</b>
<b>CHAPTER FOUR: CONCLUSION</b> .....	<b>124</b>
<b>Feminist Conceptions of Law Reform</b> .....	<b>124</b>
<b>Survivor Narratives as Law Reform</b> .....	<b>129</b>
Reinforcing New Legal Norms .....	130
Transforming Legal Meanings .....	135
<b>Conclusion</b> .....	<b>140</b>
<b>References</b> .....	<b>143</b>

## CHAPTER ONE: INTRODUCTION

The recent allegations against former CBC radio host Jian Ghomeshi catalyzed an exceptional moment of public discourse on sexual assault in Canada. Following public revelations from several women who described being attacked by Ghomeshi, many others were compelled to come forward with accounts of sexual assault in their own lives. A tide of survivor<sup>1</sup> narratives soon flooded Canadian public and social media with messages about the prevalence of sexual assault, the challenges of seeking redress through the criminal justice system, and the importance of “breaking the silence.” The emerging stories affirmed concerns expressed by feminist lawyers and legal scholars about the persistence of gendered sexual violence in the wake of feminist-influenced criminal law reforms. They also aligned with feminist methods that cast doubt on legal solutions to sexual violence and emphasize the narration of personal experience as a tool for critical consciousness-raising. Did they, then, constitute a grassroots alternative to sexual assault law reform?

Feminist critiques of feminist-influenced sexual assault law reforms point to a dilemma about method that runs deep within feminism and other critical movements. While the power of law to shape cultural norms and change material lives makes it an important site for feminist intervention, feminism loses its critical bite when it tries to speak through dominant patriarchal institutions. In the words of Audre Lord, “the master’s tools will never dismantle the master’s house.”<sup>2</sup> As Carol Smart articulates, the issue is one “that all radical political movements face, namely the problem of challenging a form of power without accepting its own *terms of reference*

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<sup>1</sup> I use this term with some reservation to refer to people who have been subject to sexual assault or other forms of  
<sup>2</sup> Audre Lorde, “The Master’s Tools Will Never Dismantle the Master’s House” in *Sister Outsider* (Crossing Press, 1984) (arguing that white feminists were replicating patriarchal oppressions by ignoring how the lives and experiences of black women differed from those of white women).

and hence losing the battle before it has begun.”<sup>3</sup> The solution proposed by Smart and others has been for feminism to establish independent “terms of reference” that will enable feminists to challenge law from an external vantage point.<sup>4</sup> For this purpose, feminists have often turned to the kinds of firsthand accounts of violence and oppression that have recently emerged in Canadian public media discourse. The result has been an imagined dichotomy between “insider” law reform and “outsider” grassroots feminism, with the latter often grounded in subjective accounts of experience.<sup>5</sup>

And yet, feminist scholars influenced by ideas rooted in postmodernism, hermeneutics, and the philosophy of language have claimed that the search for “outside” locations, in which accounts of gendered violence are independent of law, is misleading. They have persuasively argued that experiential narratives are inevitably shaped by powerful social discourses such as law. So, the “outside” is not really outside at all.<sup>6</sup>

Some have rejected such theories as suggesting that accounts of personal experience are irredeemably constructed by the dominant social norms embedded in law, and therefore hold no

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<sup>3</sup> Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 5 (emphasis added). See also Katharine T Bartlett, “Feminist Legal Methods” (1989) 103 Harv L Rev 829 at 830-831.

<sup>4</sup> Smart, *ibid.*

<sup>5</sup> The role of experiential accounts in feminism is illustrated by the feminist practice of consciousness-raising, discussed further in Chapter Three. Feminists have also played an important role in the critical scholarly movement known as “outsider jurisprudence” or “narrative jurisprudence”, wherein the personal narratives of women and minorities serve as a means of critiquing the legal system. See for example: Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1994); Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991); Ruthann Robson, *Sappho Goes to Law School* (New York: Columbia University Press, 1998).

<sup>6</sup> See for example: Joan W Scott, “Experience” in Judith Butler & Joan W Scott, eds, *Feminists Theorize the Political* (New York: Routledge, 1992); Sharon Marcus, “Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention” in Judith Butler & Joan W Scott, eds, *Feminists Theorize the Political* (New York: Routledge, 1992); Linda Alcoff & Laura Gray, “Survivor Discourse: Transgression or Recuperation?” (1993) 18:2 Signs 260. Although not writing from a postmodern perspective, Catherine MacKinnon has similarly argued that women’s sexuality is wholly constructed by male power, which is institutionalized by the state (though as a lawyer and activist she has been involved in several high profile law reform campaigns). See: Catharine A MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence” (1983) 8:4 Signs 635; Catherine A MacKinnon, “Feminism, Marxism, Method, and the State: An Agenda for Theory,” (1982) 7:3 Signs 515.

potential for genuine resistance to them.<sup>7</sup> Others have found room for resistance by reverting to a view of feminist experiential accounts as standing outside of law, even while acknowledging the law's power to construct experience.<sup>8</sup> The result is a vision of experiential accounts as either beholden to legal discourse or radically independent from it.<sup>9</sup>

In this thesis, I aim to better elucidate the relationship between law and lived experience, and specifically between legal discourse and feminist experiential narratives. Drawing upon insights about discourse already present within feminist scholarship, I challenge the tendency to imagine a sharp division between law and lived experience. At the same time, I argue that theories of discursive construction ought to be understood as proceeding in both directions—from legal discourse to experiential narratives, but also from experiential narratives to legal discourse. I demonstrate this by comparing a form of legal discourse on sexual assault—the judicial discourse of the Supreme Court of Canada—with what might be considered an “outsider” feminist discourse<sup>10</sup>—the personal narratives of survivors, as presented in mainstream news media in the wake of the Ghomeshi case.<sup>11</sup> My claim is that these two discourses are distinct but mutually constitutive. So, while law shapes accounts of firsthand experience,

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<sup>7</sup> West, *supra* note 5 at 19-23.

<sup>8</sup> Carol Smart, for example, argues that law holds the power to define women's sexuality, while at the same time proposing that feminism can “construct an alternative reality to the version which is manifested in legal discourse.” *Supra* note 3 at 160. In the same vein, Lise Gotell recognizes law's power to construct sexuality (see for example “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R. v J.A.” (2012) 24 Can J Women & L 359). However, she portrays feminist stories and messages about sexual violence as extra-legal tactics for resisting legal power in “Third-Wave Anti-rape Activism on Neoliberal Terrain: the Garneau Sisterhood” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) [Gotell, Garneau].

<sup>9</sup> Michel Foucault describes these two poles with respect to sexuality. On one end the view of law as repressing sexuality leads to the “promise of a ‘liberation’”. On the other, the view of law as constituting sexuality leads to the conclusion “you are always already trapped.” Michel Foucault, *The History of Sexuality, Volume 1* (New York: Vintage Books, 1990) at 83 [Foucault, History of Sexuality].

<sup>10</sup> For an explanation of why I view these narratives as part of a feminist discourse, see *The Role of Experiential Narratives*.

<sup>11</sup> It is important to acknowledge that the survivor narratives I examine are heavily filtered through mainstream news media outlets with their own agendas. See Chapter Three for a more detailed discussion of the media sources I chose to use for this project and why.

experiential accounts also shape, or “reform,” the law. This way of understanding the relationship between legal and experiential discourses complicates, without collapsing, the outsider-critique versus insider-reform dichotomy that continues to haunt feminist thought. The notion that legal and experiential discourses are mutually constitutive also suggests a different vision of the nature and process of law reform, one that finds roots in feminist ideas about legal change, but applies them in a new way.

I hasten to clarify that I do not seek to establish a causal relationship between the survivor narratives I am examining and Canadian legal doctrine on sexual assault. I obviously cannot demonstrate that the survivor discourse surrounding Ghomeshi has led to particular, discrete changes to sexual assault law in Canada, given that the law has barely had time to react (and that the post-Ghomeshi case law is outside the scope of my research). Nor do I intend to prove that recent judicial discourse on sexual assault directly influenced how survivors characterized their experiences in the post-Ghomeshi media discourse. Rather, I aim to highlight certain correlations, as well as certain differences, between the two discourses I examine, and to illustrate how these support a more general theory about the relationship between legal and experiential discourses.

In this introductory chapter, I outline my thesis and introduce the literature I will draw from to make my argument. I begin by discussing feminist critiques of sexual assault law reform in Canada, and showing how they relate to more general concerns about the use of law as a feminist tool. I then examine how such concerns tend to presume a dichotomy between legal and grassroots feminist strategies for addressing sexual violence. I show how this dichotomy has been conceptualized in terms of knowledge and discourse, with legal discourse standing in opposition to experiential narratives such as those published in the mainstream media



surrounding the Ghomeshi case. I go on to describe how insights about the nature of language have led feminists to recognize law's discursive power to produce subjects and construct experience, presenting a challenge to the inside/outside dichotomy set up in some feminist scholarship. Drawing upon those insights, I argue that just as legal discourse shapes experiential narratives, so may experiential narratives shape legal discourse. Finally, I outline the chapters to follow.

### **A Note About Terminology**

I pause here to clarify my use of certain key terms that recur throughout this thesis. First, let me address the scope of “law” in this project, by identifying the sources of law with which I am working. My focus in this thesis is on formal state law as expressed in Canadian legislation and case law. This is not to dismiss the many other sources of law—e.g. indigenous, religious, customary, etc.—identified by legal pluralists and others; it simply reflects my methodology in this particular and necessarily limited project. At the same time, my analysis of formal law places significant weight on how the law is interpreted and applied by legal institutions and individual decision-makers in practical contexts—what has been referred to as the “law in action.”

I turn now to “feminism,” a term that is difficult to define given the great diversity of thought it now encompasses, and the contestation that often arises over who and what ought to be labeled “feminist.” In speaking of “feminism,” I do not intend to suggest a singular movement that speaks as one voice, though I do posit a movement that shares certain common concerns about how gender operates in society. I include under this umbrella the many strands of feminism (sometimes referred to as “feminisms”) that have taken root in academic and activist communities genuinely engaged in championing gender equality.

That said, at given points in my thesis I do use the term “feminist” to describe specific people, theories, and actions that advance particular feminisms at particular times—feminisms that sometimes differ or oppose each other. Thus, I refer to feminist-influenced law reforms but also to feminist critiques of those reforms;<sup>12</sup> I talk about feminists who point to experience as a raw source of truth (e.g. Robin West), feminists who underscore experience’s discursive construction (e.g. Joan Scott), and feminists who seem to advance aspects of both these positions (e.g. Carol Smart). I do so out of an understanding that the “feminist” label encompasses these differing points of view. At the same time, I operate upon the premise that there are certain principles that have become historically established as central, if not essential, to feminism broadly conceived—most notably, for my purposes, the foregrounding of lived experience. Lastly, I should note that as a work of feminist legal scholarship, this thesis tends to refer most often to the work of other feminist legal scholars (as opposed to feminist community activists, or feminist scholars in other disciplines).

Let me next address the phrase “sexual violence,” which I use as a broad umbrella term for various forms of non-consensual sexual behaviour, including sexual assault, sexual harassment, and sexual abuse. I use “sexual violence” rather than “sexual assault” for a number of reasons. First, given that my thesis investigates the genesis and shifting meaning of “sexual assault” as a crime, I need a different term to denote the social phenomenon that this crime seeks to address (though my argument will ultimately erode this distinction). Second, as noted in Chapter Three, the mainstream media discourse surrounding Ghomeshi tended to group sexual assault, sexual harassment, and sexual abuse as related aspects of a more general phenomenon of “sexual violence” or “violence against women.” Maintaining a broader focus on “sexual violence” allows me to incorporate and examine this discourse in full, without artificially

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<sup>12</sup> In some cases, this may reflect the work of the same feminists operating at different times.

severing the parts that do not refer specifically to “sexual assault.” This does not mean that my use of “sexual violence” accords in all regards with how the term was used in the post-Ghomeshi mainstream media. Most importantly, while many reporters and commentators equated “violence” with physical force,<sup>13</sup> the crux of my definition rests on consent. Here I agree with pro-BDSM advocates who view consenting partners who willingly participate in acts that cause physical pain or injury for the sake of pleasure as engaged in sex, not violence.<sup>14</sup> On the other hand, non-consensual sexual activities are understood as violent regardless of whether they involve physical pain or injury. Indeed, as the legal definition of sexual assault in Canada underscores, the violation lies in the lack of consent itself.

Finally, I must qualify my use of the term “survivor” to refer to a person who has experienced sexual violence. Feminists and others have increasingly used this term as a replacement for “victim,” in an effort to avoid portraying women as passive and helpless objects of misfortune.<sup>15</sup> “Survivor” rightfully, in my view, emphasizes women’s and others’ capacity to overcome the negative effects of sexual violence and move on with life. However, the term may

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<sup>13</sup> According to CBC Executive Heather Conway, the decision to fire Ghomeshi was justified by evidence that he had caused physical injury to a woman, regardless of consent. In her view, this evidence moved the issue “out of the realm of sex entirely and into an issue of violence against women.” “Jian Ghomeshi investigation defended by CBC”, *CBC News* (7 Nov 2014), online: <[www.cbc.ca/news/canada/jian-ghomeshi-investigation-defended-by-cbc-1.2827969](http://www.cbc.ca/news/canada/jian-ghomeshi-investigation-defended-by-cbc-1.2827969)>. Several media reports also described the complaints against Ghomeshi as allegations of physical violence without consent, implying that the question of violence is separate from consent. See for example: “Jian Ghomeshi to plead not guilty to sex assault, choking charges”, *CBC News* (26 Nov 2014), online <[www.cbc.ca/news/canada/jian-ghomeshi-to-plead-not-guilty-to-sex-assault-choking-charges-1.2850661](http://www.cbc.ca/news/canada/jian-ghomeshi-to-plead-not-guilty-to-sex-assault-choking-charges-1.2850661)> [CBC, Nov 26]; “Sexual assault calls rise after high profile stories”, *CBC News* (14 Nov 2014), online: <[www.cbc.ca/news/canada/edmonton/sexual-assault-calls-rise-after-high-profile-stories-1.2835842](http://www.cbc.ca/news/canada/edmonton/sexual-assault-calls-rise-after-high-profile-stories-1.2835842)> [Calls rise, Nov 14]; Margaret Wentz, “Ghomeshi-gate: A bad day for everyone”, *The Globe and Mail* (28 Oct 2014, updated 31 Oct 2014) online, <[www.theglobeandmail.com/globe-debate/ghomeshi-gate-a-bad-day-for-everyone/article21331661/](http://www.theglobeandmail.com/globe-debate/ghomeshi-gate-a-bad-day-for-everyone/article21331661/)>.

<sup>14</sup> Andrea Zanin authored a *Globe and Mail* article from this perspective shortly after the Ghomeshi story broke: Andrea Zanin, “In healthy, consensual BDSM, saying ‘yes’ is just the beginning”, *The Globe and Mail* (28 Oct 2014), online: <[www.theglobeandmail.com/life/relationships/in-healthy-consensual-bdsm-saying-yes-is-just-the-beginning/article21352358/](http://www.theglobeandmail.com/life/relationships/in-healthy-consensual-bdsm-saying-yes-is-just-the-beginning/article21352358/)>. See also: Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014).

<sup>15</sup> For a more in-depth discussion of problems with the “victim” label, see Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22:2 *Canadian Journal of Women and the Law/Revue Femmes et Droit* 397 at 407-408.

also perpetuate the notion that sexual violence is necessarily a traumatic, extra-ordinary, and indeed, life threatening event—something to be “survived,” like a war or an earthquake. In this way, it fails to acknowledge the ubiquity—indeed, the normalcy—of sexual violence in the lives of many.<sup>16</sup> Nevertheless, “survivor” strikes me as the least problematic word available to briefly denote a person who has experienced sexual violence, and thus I use it in this thesis with acknowledged reservation.

Having offered an account of my use of key terms, I now turn to the first major section of this introductory chapter, which addresses feminist critiques of law reform.

### **Feminist Critiques of Law Reform**

In Canada, feminist efforts to combat the patriarchal norms embedded in rape law led to a number of legal reforms.<sup>17</sup> Overall, the principle underlying the law has shifted from protecting men’s proprietary interests in women’s bodies to promoting the sexual autonomy of both partners. Whereas it used to be that only a man could rape a woman via “sexual intercourse,”<sup>18</sup> gender neutral statutory language now allows for the possibility that any person can commit a variety of forms of sexual assault against any other.<sup>19</sup> Furthermore, legislative reforms have rejected spousal immunity for sexual violence,<sup>20</sup> required that reasonable steps be taken to ascertain consent,<sup>21</sup> and prohibited inferences of consent or a lack of complainant credibility

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<sup>16</sup> As Randall notes, the same problem arises with the term “victim”.

<sup>17</sup> See Chapter Two for a more detailed overview of these reforms.

<sup>18</sup> *Criminal Code*, RSC, 1970, c C-34, s 143 [*Criminal Code*, 1970].

<sup>19</sup> *Criminal Code*, RSC, 1985, c C-46, s 265 [*Criminal Code*].

<sup>20</sup> *Criminal Code*, *ibid*, as amended by *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980-81-82-83, c 125, s 19 [Bill C-127].

<sup>21</sup> *Criminal Code*, *supra* note 19 at s 273.2(b), as amended by *An Act to amend the Criminal Code (sexual assault)* SC 1992, c 38, s 1 [Bill C-49].

based on patriarchal stereotypes about female sexuality.<sup>22</sup>

The sweeping nature of these changes is a significant achievement. And yet, legal scholars and practitioners point out that these reforms have not deeply transformed oppressive gender norms, which continue to have major negative effects on women's material lives.<sup>23</sup> For many, the limited effectiveness of sexual assault law reforms bear out a longstanding worry: the danger of relying on the legal system—a key enabler of patriarchy—to resolve gender oppression. One of the groundbreaking proponents of this view was Carol Smart, who, in her 1989 book *Feminism and the Power of Law*, urged feminists to “de-centre law”,<sup>24</sup> arguing that “we should not make the mistake that law can provide the solution to the oppression that it celebrates and sustains.”<sup>25</sup> Smart worried that efforts to fix overtly discriminatory laws might give a false impression of feminist legal victory and thereby bolster the validity of the underlying system.<sup>26</sup> As Mary Heath and Ngaire Naffine put it, “law reform is an affirmation of the law and the liberal story about the state.”<sup>27</sup> Engaging in law reform thus means giving up, at least temporarily, the ability to critique law as an institution that perpetuates social hierarchies and entrenches gender inequality.

Feminist wariness of the legal system stems from the critical insight that law's purported objectivity actually serves to legitimize dominant viewpoints that consistently discount the experiences of women and other marginalized groups. As Katharine Bartlett explains:

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<sup>22</sup> *Criminal Code*, *supra* note 19 at s 276, added by Bill C-127, *supra* note 20 at s 19 and later amended by Bill C-49, *supra* note 21 at s 2.

<sup>23</sup> Such claims are made by a number of Canadian feminists in a recent book: Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012).

<sup>24</sup> Smart, *supra* note 3 at 5.

<sup>25</sup> *Ibid* at 49.

<sup>26</sup> *Ibid*.

<sup>27</sup> Mary Heath & Ngaire Naffine, “Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law Reform” (1994) 3 *Austl Feminist LJ* 30 at 31. See also Lise Gotell, “The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-liberal Sexual Citizenship” in Dorothy E Chunn, Susan B Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007) at 149 [Gotell, Discursive Disappearance].

“Feminists' substantive analyses of legal decisionmaking have revealed to them that so-called neutral means of deciding cases tend to mask, not eliminate, political and social considerations from legal decisionmaking.”<sup>28</sup> Breaking this down, there are two particular problems that hinder law’s capacity to effect transformative social change: the tenacity of dominant social norms that inform practical interpretations of law, and “the criteria for legal validity and legitimacy”<sup>29</sup> that structure legal discourse itself. I will draw from feminist critiques of sexual assault law to illustrate each one.

Feminist lawyers and legal scholars in Canada point to a clear gap between the law of sexual assault on the books and the law in action.<sup>30</sup> In the words of Holly Johnson, “simply eliminating the formal expression of bias in the law has not made a real difference in the treatment of sexually assaulted women throughout the justice system.”<sup>31</sup> The problem, as articulated by Smart, is that “once enacted, legislation is in the hands of individuals and agencies far removed from the values and politics of the women’s movement.”<sup>32</sup> The decision-makers who interpret and apply Canada’s reformed sexual assault laws do not necessarily espouse the feminist perspective that, along with other values and interests, influenced the laws’ construction. Instead, as will be demonstrated in Chapters Two and Three, they may rely upon “common sense” assumptions that tend to reflect the very sexist beliefs that proponents of the reforms were trying to discard. Consequently, social norms that serve to discredit sexual assault

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<sup>28</sup> Bartlett, *supra* note 3 at 862.

<sup>29</sup> *Ibid* at 878.

<sup>30</sup> As feminist lawyer Pamela Cross explained regarding sexual assault trials in a media interview shortly after the Ghomeshi case broke, “there’s what’s allowable in law and what can happen in a courtroom and they’re two different things.” Interview of Pamela Cross (27 Nov 2014) on *Metro Morning*, CBC Radio, Toronto, CBC Player, online: <[www.cbc.ca/player/News/Canada/Toronto/Audio/ID/2618023242/](http://www.cbc.ca/player/News/Canada/Toronto/Audio/ID/2618023242/)> [Cross interview].

<sup>31</sup> Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) at 614.

<sup>32</sup> Smart, *supra* note 3 at 164.

survivors, minimize sexual violence, and assume implied consent continue to influence the decisions of police, lawyers, and judges, despite their explicit rejection in legal doctrine.<sup>33</sup>

At a deeper level, feminist legal scholars have argued that the very logic of law rests on a paradigm that prioritizes individual autonomy and rationality while failing to recognize the social, relational and affective dimensions of life.<sup>34</sup> Thus, while sexual assault law reforms have eliminated the law's most overt endorsements of the traditional heterosexual seduction script, wherein naturally aggressive men court and possess naturally submissive women,<sup>35</sup> they have not transformed its underlying vision of sexual relationships. As Nicola Lacey observes, the law continues to define sexual assault in abstract, cognitive terms—consent and belief in consent—while largely ignoring the “embodied and affective aspects” of the experience.<sup>36</sup> Sexuality, moreover, remains transactional rather than relational, as the emphasis on consent demonstrates. One partner sets the terms of the sexual offer; the other only chooses to accept those terms or not. The reformed law merely includes women in the class of autonomous, sexual rights-bearing individuals entitled to steer their sexual selves as they choose within certain parameters<sup>37</sup> (or of neo-liberal, risk-managing subjects who can take precautions to ensure that the parameters are properly enforced).<sup>38</sup>

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<sup>33</sup> Johnson, *supra* note 29; Karen Busby, “Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24:2 Canadian Journal of Women and the Law/Revue Femmes et Droit 328 at 331 (regarding spousal sexual assault in Canada); Heath & Naffine, *supra* note 27 at 34 (in the Australian context).

<sup>34</sup> For an in-depth treatment of this topic, see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011). Regarding sexual assault specifically, see Nicola Lacey, “Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law” (1998) 11 Can J L and Jurisprudence 47 [Lacey, Unspeakable Subjects].

<sup>35</sup> Lacey, *ibid* at 49, 51; Ngaire Naffine, “Possession: Erotic Love in the Law of Rape” (1994) 57 Mod L Rev 10 [Naffine, Possession]; Patricia Novotny, “Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?” (2002) 1:3 Seattle Journal for Social Justice at 748.

<sup>36</sup> Lacey, Unspeakable Subjects, *supra* note 34 at 60.

<sup>37</sup> Naffine, Possession, *supra* note 35 at 25-26; Lacey, *ibid* at 53-54 (arguing that the modern ideal of sexual autonomy retains a property-based logic founded on the right of each individual to own his or her body).

<sup>38</sup> Lise Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R. v J.A.” (2012) 24 Can J Women & L 359 at 366 [Gotell, Governing Heterosexuality].

Legal recognition of women's sexual autonomy is, of course, important. However, as a number of scholars have pointed out, gender-neutral laws that strive for formal equality by emphasizing individual autonomy obscure and thereby depoliticize the *socially* gendered reality of sexual violence.<sup>39</sup> At the same time, because women constitute the bulk of complainants in sexual assault cases, they get stuck in the role of the merely reactive consent-giver or withholder. Women's newfound autonomy thus translates into little more than the right to say no to sex proposed by a man— a mere recoding of the traditional stereotype of female submissiveness. As Lise Gotell argues, citing the work of Carol Pateman, “the very language of consent works to reinscribe the rape script. It hails women into law by constituting them as reactive and passive.”<sup>40</sup> In this way, the robust consent standard that has developed in Canadian law covertly re-inscribes traditional gender roles and continues to legitimate male sexual dominance, within prescribed limits. Gotell also illustrates how the discourse of affirmative consent in Canada serves as a neoliberal governance tactic, by placing the burden on individuals to manage their own sexual risk and thereby downplaying social responsibility for the problem.<sup>41</sup>

### *Critiques of Criminal Justice*

Some feminist legal scholars have extended critiques of law's liberal/neoliberal paradigm to question the compatibility of feminist thought with the values underlying the criminal justice system in particular. One of the early critics of feminist engagements with criminal law in

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<sup>39</sup> *Ibid* at 385; Heath & Naffine, *supra* note 27 at 51; Annabelle Mooney, “When a Woman Needs to Be Seen, Heard and Written as a Woman: Rape, Law and an Argument Against Gender Neutral Language” (2006) 19:1 International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique 39.

<sup>40</sup> Gotell, Governing Heterosexuality, *supra* note 38 at 372. Lacey makes a similar point in *Unspeakable Subjects*, *supra* note 34 at 60.

<sup>41</sup> Gotell, Governing Heterosexuality, *supra* note 38 at 365-366.



Canada was Dianne Martin, who wrote about the issue in the late 1990s.<sup>42</sup> Martin was dismayed by the increasing convergence of feminist advocacy with the law and order agenda of the political Right, a concern that bears repeating in today's political climate. She saw feminist discourses being appropriated by non-feminist political and commercial interests. At the same time, feminists were complicit in "making a virtue out of the necessity of working within an oppressive system."<sup>43</sup> While early second wave feminist activism was critical of the legal system, Martin observed a rapid shift in feminist strategy from critiquing the patriarchal norms embedded in law to increasing the efficacy and severity of the criminal justice system in convicting and punishing individual sexual offenders.<sup>44</sup> Consequently, a major strand of feminist advocacy became aligned with a criminal justice "retribution ethic," whereby moral scapegoating serves to maintain the legitimacy of the justice system without actually increasing community safety.<sup>45</sup>

According to Martin, the criminal justice system is "anything but transformative and given the individualistic retribution ethic at its core, it probably cannot be. This is the dark irony at the core of feminist criminal law reform efforts."<sup>46</sup> This skeptical stance towards criminal justice has grown amongst contemporary feminist legal scholars. American scholar and former public defender Aya Gruber has written extensively from this perspective, describing the fraught alliance between feminist law reformers and advocates and the criminal justice system today in terms strikingly similar to Martin, over a decade ago.<sup>47</sup> In Canada, Meagan Johnston has

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<sup>42</sup> Dianne L Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall L J 188.

<sup>43</sup> *Ibid* at 157.

<sup>44</sup> *Ibid* at 166.

<sup>45</sup> *Ibid* at 159-160.

<sup>46</sup> *Ibid* at 155.

<sup>47</sup> Aya Gruber, "A 'Neo-Feminist' Assessment of Rape and Domestic Violence Law Reform" (2012) 15 Journal of Gender, Race and Justice 583; Aya Gruber, "Rape, Feminism, and the War on Crime" (2009) 84:4 Washington Law Review 581 [Gruber, 2009]; Aya Gruber, "The Feminist War on Crime" (2007) 92 Iowa Law Review 741.

recently argued that “[t]o collaborate with or complement the criminal justice system presumes its validity, and indeed further legitimates it. To work with the criminal justice system reinforces the law’s power to criminalize people and to issue moral sanctions.”<sup>48</sup> Regarding sexual assault and rape law in North America, contemporary critics have claimed that the sweeping reforms pursued so zealously by second wave feminists have contributed to the disproportionate criminalization of racialized men,<sup>49</sup> the diminishment of female legal and sexual agency,<sup>50</sup> and the scapegoating of a widespread social problem onto a handful of sexual deviants.<sup>51</sup> Some have used the disparaging term “carceral feminism” to critique punitive uses of law for purportedly feminist purposes.<sup>52</sup>

Even accepting that the criminal justice system might have a role to play in some cases of sexual violence, its failure to help many survivors in practice is well documented. Despite significant institutional initiatives such as no-drop policies for prosecutors dealing with sexual assault charges and the establishment of specialized domestic violence courts, sexual assault continues to be vastly underreported and under-prosecuted.<sup>53</sup> Survivors who do participate in the

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<sup>48</sup>Meagan Johnston, “Sisterhood Will Get Ya: Anti-rape Activism and the Criminal Justice System” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) at 291.

<sup>49</sup> Bennett Capers, “The Unintentional Rapist” (2009) 87 Wash U L Rev 1345 at 1367; Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Durham: Duke University Press, 2009) at 9-10. See also Gruber, 2009, *supra* note 47.

<sup>50</sup> Aya Gruber, “Neofeminism” (2013) 50 Houston LR 1325 at 1356, 1366 [Gruber, Neofeminism, 2013]; Katherine M Franke, “Theorizing Yes: An Essay on Feminism, Law, and Desire” (2001) 101 Colum L Rev 181.

<sup>51</sup> Randall, *supra* note 15 at 406-407.

<sup>52</sup> Elizabeth Bernstein, “Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns” (2010) 36:1 Signs (Chic) 45; Janet Halley, “Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict” (2008) 9 Melb J Int’l L 78 at 79; Elizabeth Bernstein, “The Sexual Politics of the ‘New Abolitionism’” (2007) 18:3 Differences: Journal of Feminist Cultural Studies 128 at 143.

<sup>53</sup> Johnson, *supra* note 31 at 631. See also Shannon Brennan & Andrea Taylor-Butts, “Sexual Assault in Canada 2004 and 2007” (2008) Canadian Centre for Justice Statistics, Statistics Canada, at 8-11, online: <<http://www.statcan.gc.ca/pub/85f0033m/85f0033m2008019-eng.pdf>>.

criminal process often find it traumatizing and re-victimizing.<sup>54</sup> And, at the end of the day, convictions are relatively rare.<sup>55</sup> State-sponsored punishment can also be unhelpful or even detrimental to women who share significant familial, emotional, financial and/or community ties with their assailants.<sup>56</sup>

In comparison to Smart's general critique of law reform, Martin and Gruber's critiques focus more specifically on the path feminist criminal law reform has taken in North American justice systems, and the strange bedfellows picked up along the way. Nevertheless, underlying both critiques is the notion that the way law (or recent North American criminal law) operates is fundamentally antithetical to feminism. According to these thinkers, even when engaged to achieve explicitly feminist goals, the legal system has a tendency to perpetuate the prevailing social norms and hierarchies that feminists seek to challenge. Consequently, when feminists try to work inside that system, they sacrifice the critical stance that grounds feminist theory and politics in the first place. As Smart puts it, "in accepting law's terms in order to challenge law, feminism always concedes too much."<sup>57</sup> In order to resist law's hegemony and maintain its own integrity, feminism must therefore establish an alternative foundation—its own way of knowing and speaking.

## **Alternative Foundations**

Skepticism about the transformative potential of law has compelled some feminist legal scholars and activists to emphasize the importance of working outside of, and with a critical stance towards, the legal system. The idea has been to establish an independent theoretical

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<sup>54</sup> Lee Madigan & Nancy C Gamble, *The Second Rape: Society's Continued Betrayal of the Victim*, reprint ed (New York: Macmillan Pub Co, 1991). The survivor narratives examined in Chapter Three speak to the continued difficulties faced by survivors who participate in the criminal justice system.

<sup>55</sup> Johnson, *supra* note 31.

<sup>56</sup> Martin, *supra* note 42 at 184-185; Gruber, Neofeminism, 2013, *supra* note 50 at 1374-75.

<sup>57</sup> Smart, *supra* note 3 at 5.

framework that can present a challenge to legal understandings. Thus Smart wanted to “build a new way of seeing”<sup>58</sup> by creating “a greater space for feminism as a form of knowledge which has until now been continuously disqualified by law”<sup>59</sup> and by “acknowledg[ing] the power of feminism to construct an alternative reality to the version which is manifested in legal discourse.”<sup>60</sup> Often, the aim has been to root that “alternative reality” in women’s lived experience. As Robin West observes, “it is feminism’s most crucial insight that *our experience* must be primary.”<sup>61</sup> The narration of personal experiences of oppression, including experiences of sexual violence, has thus proved crucial to feminist projects. Before looking further into the role of experiential narratives in feminism, however, I want to emphasize that they are often framed as part of a strategy to critique law from the outside—a strategy that rests upon a presumed dichotomy between law and legal discourse on the one hand, and experience and personal narratives (a kind of grassroots feminist discourse) on the other.

I do not wish to suggest that feminist strategizing itself falls neatly along these dichotomized lines. Feminist legal scholars and activists often express openness to strategic and pragmatic engagements with law even while they remain critical of legal institutions overall. As Lacey argues: “The development of alternative, resistant discourses is certainly a central project of feminism, but its political impetus must also lead feminists to engage with currently powerful discourses and institutions.”<sup>62</sup> Mari Matsuda makes a similar point in discussing the “multiple

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<sup>58</sup> *Ibid* at 1.

<sup>59</sup> *Ibid* at 3.

<sup>60</sup> *Ibid* at 160.

<sup>61</sup> West, *supra* note 5 at 217. Bartlett similarly describes feminism as “a movement which grounds its claims to truth in experience.” *Supra* note 3 at 847.

<sup>62</sup> Nicola Lacey, “Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?” in Alan Norrie, ed, *Closure or Critique: New Directions in Legal Theory* (Edinburgh: Edinburgh University Press, 1993) at 186.

consciousness” required to vindicate marginalized experiences.<sup>63</sup>

There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.' There are times to stand inside the courtroom and say 'this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.'

Even Smart acknowledges that feminism cannot simply ignore the law, given the latter’s normative power.<sup>64</sup> Indeed, the majority of thinkers in the field seem to find themselves somewhere in between the two extremes of eschewing legal solutions absolutely and pursuing them zealously. The most salient challenge for contemporary legal feminists may, then, be more aptly characterized as determining precisely when and how to engage with law, rather than whether to engage with it at all.

My point is not that feminists are polarized on the issue of whether to work within law or to pursue grassroots strategies grounded in lived experience, though we are to some degree. Rather, it is that even the most nuanced positions are formulated *in relation to* an imagined dichotomy between legal and grassroots approaches. Feminists position themselves in complicated ways around these perceived poles, but they rarely question the dichotomized construction of the poles themselves. My interest lies here, in the imagined framework within which feminists think and act.

Current interest in theories of “carceral feminism”<sup>65</sup> and “governance feminism,”<sup>66</sup> which turn a critical eye to feminist engagements with law and the state (as well as other governmental institutions), attests to the persistence of this imagined divide between legal and

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<sup>63</sup> Mari J Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1992) 14 *Women’s Rts L Rep* 297 at 298.

<sup>64</sup> Smart, *supra* note 3 at 49.

<sup>65</sup> See note 52.

<sup>66</sup> Janet Halley, one of the founders of this field of study, defines “governance feminism” as “the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power.” See Janet Halley et al, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism” (2006) 29 *Harv JL & Gender* 335.

non-legal approaches. Some recent Canadian feminist legal scholarship on sexual assault also draws a clear line between grassroots, feminist activism and law-centered tactics. For instance, in her 2012 article “Sisterhood Will Get Ya: Anti-rape Activism and the Criminal Justice System,” Meagan Johnston reads the actions of the Garneau Sisterhood—an Edmonton citizens’ group that conducted a postering and media campaign to counter the threat of a serial rapist in the neighborhood— as an alternative legal order to the criminal justice system.<sup>67</sup> Johnston compares the Sisterhood’s actions to the grassroots anti-rape activism of second wave feminists.<sup>68</sup> Although she acknowledges that the Sisterhood participated in criminal justice to some extent,<sup>69</sup> she ultimately claims that the Sisterhood’s tactics, just like those of the second wavers, “take place outside of the criminal justice system.”<sup>70</sup> As an example, Johnston explains how the Sisterhood encouraged people to define rape for themselves. In her view, “these subjective and multiple ‘tellings’ of rape explode the silencing inherent in the criminal justice system’s attempts to set out a singular and comprehensive definition of rape.”<sup>71</sup> In other words, women’s accounts of their own experiences serve as a form of resistance to “objective” legal discourse.

Gotell supports Johnston’s characterization of the Garneau Sisterhood’s activities in her 2012 article, “Third-Wave Anti-rape Activism on Neoliberal Terrain: The Garneau Sisterhood.” For Gotell, the Sisterhood represents a “revival of grassroots feminism that engages in direct action and decentres the state”<sup>72</sup> and “demonstrates the strategic importance of extra-legal

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<sup>67</sup> Johnston, *supra* note 48. Although Johnston conceives of the Sisterhood’s actions as a “legal” order of sorts (drawing upon legal pluralism), she nevertheless views this order as external to the established legal system.

<sup>68</sup> *Ibid* at 268.

<sup>69</sup> *Ibid* at 273.

<sup>70</sup> *Ibid* at 284.

<sup>71</sup> *Ibid* at 282.

<sup>72</sup> Gotell, Garneau, *supra* note 8 at 258.

feminist struggles”.<sup>73</sup> Gotell posits that given the recent decline in national feminist organizing and funding, “this might [...] be a time for feminists to explore the creative possibilities of new strategies and tactics that challenge the centrality of law reform and expand the terrain of the extra-legal.”<sup>74</sup> Underlying these claims is a clear division between legal and grassroots feminist methods.

### *The Role of Experiential Narratives*

The contrast Johnston draws between the Garneau Sisterhood’s approach to defining rape and the criminal law’s definition illustrates how the dichotomy between legal and grassroots feminist methods is often conceptualized in terms of language or discourse, with the law’s “objective” account of reality standing in opposition to women’s “subjective and multiple ‘tellings’.” Indeed, feminists have often looked to subjective experiential accounts as the ground from which to mount a critical challenge to law, particularly through the practice of consciousness-raising.<sup>75</sup> As I discuss further in Chapter Three, the firsthand accounts of sexual violence given in the wake of Ghomeshi, which were in some cases widely publicized (albeit through the filter of media outlets with their own agendas),<sup>76</sup> may be read as a contemporary instance of this phenomenon. Although not all of the survivors who spoke out in mainstream media explicitly labeled themselves or their actions as feminist, I identify their stories as broadly constituting a grassroots feminist discourse, because they draw from personal experience to consciously expose gendered violence that has, in most cases, not been effectively addressed by formal institutions. Many survivors also explicitly cited, as reasons for coming forward, the need to expose and fight gendered violence, discredit rape myths, support other survivors, and/or

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<sup>73</sup> *Ibid* at 245.

<sup>74</sup> *Ibid* at 244.

<sup>75</sup> See note 5.

<sup>76</sup> See Chapter Three for a more detailed discussion of the media sources I chose to examine and why.

challenge the legal system's effectiveness in dealing with sexual assault. The survivor storytelling surrounding Ghomeshi can thus be read as contributing to the feminist project of developing alternative discourses that challenge those found in law.

The emphasis on discourse within feminist theory owes a great deal to the influence of Foucault, who posits a close relationship between discourse, knowledge, and power. Foucault argues that power both reflects and produces localized discourses of knowledge.<sup>77</sup> As Smart helpfully explains, "he is interested in discovering how certain discourses claim to speak the truth and thus can exercise power in a society that values this notion of truth."<sup>78</sup> This suggests that the power of law depends upon its validation of certain ways of speaking and knowing, and its corresponding "ability to disqualify other knowledges and experiences."<sup>79</sup> In order to resist legal power, feminism must therefore authorize different ways of speaking and knowing. Narrated personal experience has played a key role in this endeavor by providing both an alternative feminist epistemology grounded in experience, and an alternative discourse constituted by experience's narration. I elaborate upon each of these elements below.

Turning to subjective experience as an alternative source of knowledge has enabled some feminists to challenge law's claim to truth through objectivity. Although dealing with history rather than law, Joan W. Scott expresses the point well:<sup>80</sup>

Part of the project of some feminist history has been to unmask all claims to objectivity as an ideological cover for masculine bias by pointing out the shortcomings, incompleteness, and exclusiveness of "mainstream" history. [...] But how authorize the new knowledge if the possibility of all historical objectivity has been questioned? By appealing to experience, which in this usage connotes both reality and its subjective apprehension.

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<sup>77</sup> Michel Foucault, "Two Lectures" in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (New York: Pantheon Books, 1980) at 93-94.

<sup>78</sup> Smart, *supra* note 3 at 9.

<sup>79</sup> *Ibid* at 11.

<sup>80</sup> Scott, *supra* note 6 at 30.



In this way, experience comes to stand for the real, raw, undeniable truth of women's lives. Witnessing that reality and recognizing it as something at least partially shared with other women holds the key to feminist knowledge and power. In West's words, "the capacity to hear and trust one's self, and specifically one's pain, as true testimony to one's injury and hence to a societal injustice is a central and effective strategy of consciousness-raising and eventual empowerment of traditionally disempowered peoples."<sup>81</sup>

Of course, as West argues, the capacity to recognize experiences of oppression depends on being able to name them as such. This presents a challenge because<sup>82</sup>

[a]n injury uniquely sustained by a disempowered group will lack a name, a history, and in general a linguistic reality. Consequently, the victim as well as the perpetrator will transform the pain into something else, such as, for example, punishment, or flattery, or transcendence, or unconscious pleasure.

Since a lack of available language leads to the denial of harm and injustice, West urges women to "give voice to the hurting self",<sup>83</sup> emphasizing "the self-validating, self-creating, and self-verifying connection between word and experience."<sup>84</sup> According to this account, women must come up with new language (i.e. discourse) to represent a previously unacknowledged aspect of reality. The more they recognize and assert the truth of that representation, the more they will come to power.

West's vision, and that of other like-minded second wavers has raised critiques from feminists concerned about gender essentialism—the presumption that women share a common experience of oppression based on gender, when in fact women's experiences vary a great deal

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<sup>81</sup> West, *supra* note 5 at 22.

<sup>82</sup> *Ibid* at 183-184.

<sup>83</sup> *Ibid* at 184.

<sup>84</sup> *Ibid* at 199.

depending on other social factors such as race, class, and sexual orientation.<sup>85</sup> Some have rightly pointed out the tendency for notions of “women’s experience” to refer primarily to the experiences of privileged white women, while excluding others.<sup>86</sup> This is an important critique. However, it is not the focus of my thesis, nor does it decrease the relevance of my argument. In my view, the anti-essentialism of the third wave has complicated, but not thwarted the mobilization of experiential narratives as a form of feminist resistance to law. While personal narratives are increasingly used to express the diversity and individuality of women’s experiences of oppression, they remain highly relevant as a feminist method, as shown by Johnston and Gotell’s accounts of the Garneau sisterhood, and the third wave consciousness-raising that manifested around the Ghomeshi case.<sup>87</sup> My interest lies in a different critique, raised largely by postmodern-influenced feminists. It is to this critique that I now turn.

### **The Discursive Construction of Experience**

Feminists have compellingly employed personal narratives to voice experiences of oppression that the law fails to recognize. In this way, they have established an alternative epistemology and discourse grounded in lived experience. And yet, there is much scholarship to suggest that experience is not a pure ground for resistance to legal power. Specifically, thinking around the relationship between language and experience casts doubt upon the independence of experiential accounts from the legal discourse that they purport to challenge. This relationship has been explored in overlapping ways by thinkers variously associated with hermeneutics, law and language, postmodernism, and feminism. While a comprehensive survey of any one of these

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<sup>85</sup> Angela P Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42:3 *Stanford Law Review* 581 at 585-590.

<sup>86</sup> *Ibid.* See also: Audre Lorde, “Age, Race, Class, and Sex” in *Sister Outsider* (Crossing Press, 1984); Bell Hooks, *Feminist Theory: From Margin to Center* (Boston: South End Press, 1984); Elizabeth V Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988).

<sup>87</sup> See **Consciousness-raising** in Chapter Three.

literatures is beyond the scope of this thesis, they are of interest to my project to the extent that they all grapple with a common issue: the manner and extent to which language (or discourse) shapes our apprehension of reality.

The feminist turn to experiential narratives as a source of truth can invite a view of language as merely referential—nothing more than a system for denoting an independent, pre-existing reality. Experiences of sexual violence are seen as an under-recognized or actively stifled aspect of this reality. By articulating them, survivors “break the silence” and challenge the validity, or at least the completeness, of dominant accounts of reality, such as those offered by legal discourse. As Joan Scott explains, the appeal to experience thus operates as “a corrective to oversights resulting from inaccurate or incomplete vision.”<sup>88</sup> Moreover, experience serves “as uncontested evidence and as an originary point of explanation,” such that experiential narratives cannot be “anything but a reflection of the real.”<sup>89</sup>

Yet experiential accounts of sexual violence depend at least in part on the language of law to convey meaning. They bank on the legal weight of “rape” and “sexual assault.”<sup>90</sup> As Smart observes, “[r]ape is already in the legal domain.”<sup>91</sup> To the extent that the legal discourse around sexual crimes forms the linguistic platform for survivor storytelling, it shapes the experiences described. It is worth noting, for instance, that some of the incidents recently brought to light as long-silenced stories of sexual assault may not have met the legal test for the crime as it was defined at the time the incidents took place.<sup>92</sup> It is only following the elimination

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<sup>88</sup> Scott, *supra* note 6 at 24.

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

<sup>90</sup> Dennis Klinck notes that law modifies the meaning of all stories to which it relates by giving them “an added dimension, a new significance.” *The Word of the Law* (Ottawa: Carleton University Press, 1992) at 293.

<sup>91</sup> Smart, *supra* note 3 at 49. Vanessa Munro similarly states: “Rape, as a crime, inevitably involves a legal aspect.” “Legal Feminism and Foucault - A Critique of the Expulsion of Law” (2001) 28 *JL & Soc’y* 546 at 565.

<sup>92</sup> See Chapter Two for an overview of recent changes to the law of sexual assault in Canada.

of the spousal immunity doctrine in 1983<sup>93</sup> that a woman can legally accuse her husband of sexual assault. Only after the introduction of an affirmative consent standard in 1992<sup>94</sup> does the law deem her silent acquiescence to unwanted sex with her high school boyfriend a sexual assault.<sup>95</sup> By sanctioning a new, highly charged name for these events, the law transforms their meaning.

Our stories, and the underlying experiences they relate, are inevitably shaped by the language we have available to tell them. The idea finds compelling expression in the field of modern hermeneutics, of which Frederich Schleiermacher was a founding scholar. Although writing in a different time and disciplinary context, Schleiermacher helpfully articulates: “The individual is determined in his thought by the (common) language and can think only the thoughts which already have their designation in his language.”<sup>96</sup> More recently, Scott writes that “[s]ince discourse is by definition shared, experience is collective as well as individual.”<sup>97</sup> Language, then, does not merely refer to reality but actively shapes it. And, in the case of sexual violence, that language draws heavily from law.

In his book, *The Word of the Law*, Dennis Klinck describes this view of language as “linguistic relativity” or “linguistic relativism.”<sup>98</sup> He provides a number of examples of thinkers who have advanced some version of this theory. Thus American linguist Benjamin Lee Whorf described language as “an agreement that holds throughout our speech community” whose

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<sup>93</sup> See note 20.

<sup>94</sup> See note 21.

<sup>95</sup> Women may have such incidents in terms of “rape” or “sexual assault” in the past, but without the sanction of law, their descriptions would be less likely to be socially understood or accepted.

<sup>96</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism and Other Writings* (Cambridge: Cambridge University Press, 1998) at 8.

<sup>97</sup> Scott, *supra* note 6 at 34.

<sup>98</sup> Klinck, *supra* note 90 at 12, 14.

“terms are absolutely obligatory;”<sup>99</sup> while Hans-Georg Gadamer (another hermeneuticist) observed that “[w]e can only think in a language.”<sup>100</sup> Klinck explains that Foucault took the point a step further by examining how particular discourses operate to structure thought within a given language. As expressed by Michael Shapiro: “Persons do not simply express their individual thoughts in words; they enter the flow of language, and particular discursive practices which contain preconceived ways of thinking”.<sup>101</sup> These insights have led most contemporary feminist thinkers to acknowledge that the social discourses in which we are immersed influence, at least to some degree, the way we perceive and represent experience.

Postmodern feminists in particular have applied the above ideas (especially Foucault’s notion of discourse) to challenge the unreflective invocation of personal narratives as generators of truth within feminism. Scott, for instance, argues that by appealing to experiential accounts as direct windows on reality, “[q]uestions about the constructed nature of experience, about how subjects are constituted as different in the first place, and about how one’s vision is structured—about language (or discourse) and history—are left aside.”<sup>102</sup> In this way, the appeal to experience as truth replicates the very hegemonies it seeks to resist by asserting a privileged claim to apolitical knowledge.<sup>103</sup> In their article about rape survivor narratives, Linda Alcoff and Laura Gray direct this critique specifically towards consciousness-raising practices, wherein “individuals narratives are related as if they were not narratives but simple reports, thus

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<sup>99</sup> Benjamin Lee Whorf, “Science and Linguistics” in SI Hayakawa, *Language in Action* (New York: Harcourt, Brace and Co, 1941) at 312, cited in Klinck, *ibid* at 15.

<sup>100</sup> Hans-Georg Gadamer, *Philosophical Hermeneutics*, trans and ed by David E Linge (Berkeley: University of California Press, 1977) at 6, cited in Klinck, *supra* note 90 at 11.

<sup>101</sup> Michael J Shapiro, *Language and Political Understanding: The Politics of Discursive Practices* (New Haven: Yale University Press, 1981) at 144, cited in Klinck, *supra* note 90 at 18.

<sup>102</sup> Scott, *supra* note 6 at 25.

<sup>103</sup> *Ibid* at 26-27; Mary E Hawkesworth, “Knowers, Knowing, Known: Feminist Theory and Claims of Truth” (1989) 14:3 *Signs* 533 at 544-546. Marcus, *supra* note 6 at 386.

obscuring the way in which all experience is itself discursively mediated.”<sup>104</sup> Sharon Marcus takes the point even further in “Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention”, arguing that rape should not be understood as a fact of life at all, but rather as a cultural script or language that defines women as passive victims. Marcus links this view explicitly to theories of linguistic relativism.<sup>105</sup>

We are used to thinking of language as a tool which we preexist and can manipulate, but both feminist and poststructuralist theories have persuasively contended that we only come to exist through our emergence into a preexistent language, into a social set of meanings which scripts us but does not exhaustively determine our selves.

Marcus’ comment exemplifies how contemporary postmodern feminists have appropriated longstanding insights about the nature of language to critique or at least complicate the feminist turn to experience.

Feminist legal scholars point to law in particular as an important vehicle through which the social scripts Marcus refers to are authorized and mobilized.<sup>106</sup> This has led to critical analyses of “the productive and discursive effects of law.”<sup>107</sup> For instance, importing Marcus’ theory into a legal context, Gotell argues that “judicial decisions on sexual assault operate as a gendering strategy, creating gendered subjectivities and privileged and devalued subject positions, rather than merely acting on pre-existing, *a priori* subjects.”<sup>108</sup> As I discussed earlier in this Chapter (see **Feminist Critiques of Law Reform**), Gotell draws on this understanding to show how the contemporary legal discourse around sexual assault continues to construct women as sexually reactive rather than proactive, and also makes them responsible for protecting

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<sup>104</sup> Alcoff & Gray, *supra* note 6 at 283.

<sup>105</sup> Marcus, *supra* note 6 at 391.

<sup>106</sup> Vanessa Munro, for instance, emphasizes the extent to which the “constructive aspects of social power” identified by Foucault “originate from and are manifest within the normative expectations encapsulated within prevailing legal doctrines.” *Supra* note 91 at 564.

<sup>107</sup> Gotell, Governing Heterosexuality, *supra* note 38 at 371.

<sup>108</sup> Gotell, Discursive Disappearance, *supra* note 27 at 134.

themselves against sexual violence. Legal discourse, then, wields particular power in shaping gendered interpretations of experience.

At the same time, acknowledging the power of legal discourse to construct experience has enabled feminist and other critical legal scholars to challenge prevalent understandings of the social world. Indeed, theories of discursive construction have served as a powerful critical tool for feminists in general, allowing them to expose gender differences, and the gendered sexual violence that follows from them, as changeable social constructions rather than fixed realities. Marcus, for instance, argues that understanding rape as a cultural script rather than a consequence of men's superior physical strength denies that women are "inherently rapable", and instead empowers them to prevent rape by disrupting the script.<sup>109</sup> In other words, we can more radically resist gender oppression if we view it as a function of language and culture, rather than a metaphysical reality.

### *The Problem of Unspeakability*

Where can our resistance originate, though, if our experiences and stories are themselves a product of dominant social discourses such as law? From what basis can we begin to think and speak differently, if "[d]iscourses structure what it is possible to say"?<sup>110</sup> As Schleiermacher observes, individual voices are always constrained by the common language that allows us to make ourselves intelligible to others.<sup>111</sup> That common language is infused with cultural meanings that reflect dominant ways of seeing the world. Consequently, the words and phrases we must use to speak intelligibly are intelligible precisely because they reflect, at a deeply ingrained level, the very modes of thought that we seek to challenge. This presents a serious

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<sup>109</sup> Marcus, *supra* note 6 at 387.

<sup>110</sup> Alcoff & Gray, *supra* note 6 at 265 (explaining Foucault's theory of discourse).

<sup>111</sup> Schleiermacher, *supra* note 96 at 8-9.

problem for those who wish to effect meaningful social change.

Lacey refers to this as the problem of “unspeakable subjects.”<sup>112</sup> She argues that the inadequacy of sexual assault law stems at least in part from its unquestioned commitment to mind-body dualism and its concomitant failure to recognize the embodied values of sexuality.<sup>113</sup> But because mind-body dualism is so deeply ingrained in Western thought, and in the structure of criminal law (as reflected in the *actus reus/mens rea* split), our language replicates that dualism constantly even as we try to say something different.<sup>114</sup>

Ian Leader-Elliott and Ngaire Naffine make a similar argument about how norms of heterosexual interaction have created a “problem of intelligibility” for women trying to express their sexual preferences.<sup>115</sup> Historically, a woman who answered a sexual proposal with an enthusiastic “yes” (or initiated it herself!) was not modest and virtuous, and thus not deserving of legal protection. However, because a woman was expected to resist even when she truly wished to participate, her “no” was not taken seriously. Leader-Elliott and Naffine argue that the problem persists under the modern autonomy-based notion of sexual assault, where an explicit “no” is still often discounted in practice, while the presumption that a woman now feels empowered to say “no” often leads to the equation of silence with consent (despite the doctrine of affirmative consent).<sup>116</sup> They state:<sup>117</sup>

The vocabulary of seduction and romance, which was based explicitly on sexual inequality, was actually very rich and this may partly account for its staying power. What rape law reformers have failed to do is invent a similarly rich vocabulary to reflect modern sexualities where the parties are taken to be sexual equals.

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<sup>112</sup> Lacey, *Unspeakable Subjects*, *supra* note 34.

<sup>113</sup> *Ibid* at 50.

<sup>114</sup> *Ibid* at 55-56, 58.

<sup>115</sup> Ian Leader-Elliott & Ngaire Naffine, “Wittgenstein, Rape Law and the Language Games of Consent” (2000) 26 *Monash U L Rev* 48 at 60-61 [Leader-Elliott & Naffine, *Language Games*].

<sup>116</sup> *Ibid* at 69-70.

<sup>117</sup> *Ibid* at 70.



The difficulty, according to Smart, is that those who challenge the traditional seduction script “put themselves outside the Logos. Quite literally, they cannot be comprehended, they appear to be talking nonsense, they can be disqualified.”<sup>118</sup>

This is not to say that sexual violations are never acknowledged or taken seriously, but rather that they are acknowledged only when they fit a narrow (though slowly broadening) social script.<sup>119</sup> Alcott and Gray note that as a result, certain kinds of survivor stories—such as those involving husbands, boyfriends and fathers—have often been dismissed as “mad or untrue, or [...] inconceivable”.<sup>120</sup> Some stories have also been dismissed because those telling them do fit the traditional image of a rape victim: sex workers, Aboriginal women, and other racialized women all come to mind.<sup>121</sup> The point is that certain ideas about sexuality and sexual victimization are so ubiquitous that it is difficult to challenge them in a socially comprehensible way.

The problem of unspeakability has led some feminists to characterize postmodern theories that deny the existence of a reality independent of discourse as a threat to feminist politics and a reinforcement of the status quo.<sup>122</sup> They argue that understanding sexual violence and other experiences of oppression as mere constructs of legal power leaves no foundation for resistance to that power. However, as I argue below, this view overstates the linguistic determinism of the theories at issue and ignores the multi-directional nature of discursive construction. So, while the notion that dominant discourses frame our very thoughts and expressions presents the specter of social paralysis, the danger is overblown. This is because we are not only the products of discourse, but also its producers.

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<sup>118</sup> Smart, *supra* note 3 at 43.

<sup>119</sup> See Randall, *supra* note 15.

<sup>120</sup> Alcott & Gray, *supra* note 6 at 266.

<sup>121</sup> Randall, *supra* note 15 at 410-411.

<sup>122</sup> West, *supra* note 5 at 19-23; Bartlett, *supra* note 3 at 879; Hawkesworth, *supra* note 103 at 557.

## My Claim

It is possible to acknowledge that language shapes or constrains thought without claiming that it determines thought entirely. Indeed, Klinck notes that many language theorists (including himself) have settled on this position.<sup>123</sup> Schleiermacher also espouses this view. According to him, individual utterances depend on common meanings, but are not exhausted by them. On the contrary, just as common meanings shape individual uses of language, so do individual uses shape common meanings—the hermeneutic circle.<sup>124</sup> In the same way, feminist scholars such as Scott, Marcus, and Gotell do not assert that our understanding of the world is wholly determined by dominant social (legal) discourses. We can, of course, think outside of the cultural scripts handed down to us; indeed, this is precisely what Marcus urges us to do. Furthermore, when we succeed, we do more than simply fill in the gaps in legal accounts of the world; we challenge the authority of those accounts as a whole. Thus communications scholar Karlyn Kohrs Campbell describes second wave consciousness-raising as “violating the structure of reality.”<sup>125</sup>

Scott explains that understanding experience as

a discursive event is not to introduce a new form of linguistic determinism, nor to deprive subjects of agency. It is to refuse a separation between "experience" and language and to insist instead on the productive quality of discourse. Subjects are constituted discursively, but there are conflicts among discursive systems, contradictions within anyone of them, multiple meanings possible for the concepts they deploy.<sup>126</sup>

This understanding of discourse as diffuse and fractured bears the imprint of Foucault, who warns that “we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a

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<sup>123</sup> Klinck, *supra* note 90 at 24.

<sup>124</sup> Schleiermacher, *supra* note 96 at 24.

<sup>125</sup> Karlyn Kohrs Campbell, “The Rhetoric of Women's Liberation: An Oxymoron” (1973) 59:1 *Quarterly Journal of Speech* 74, cited in Stacey K Sowards & Valerie R Renegar, “The Rhetorical Functions of Consciousness-Raising in Third Wave Feminism” (2004) 55:4 *Communication Studies* 535 at 541.

<sup>126</sup> Scott, *supra* note 6 at 34.

multiplicity of discursive elements that can come into play in various strategies.”<sup>127</sup> In Klinck’s words, “[l]anguage is not static.”<sup>128</sup> Lawyers and judges do not own the words they employ. Those words can be picked up and used in new ways that generate new meanings. As an example, Alcoff and Gray point to the coining of the phrase “husband rapist”:<sup>129</sup>

Given that such terms as “husband” have historically been defined as the man to whom a woman has given unconditional sexual access, the term “husband rapist” will necessarily transform our previous understandings of the terms “husband” and “rapist,” which in turn will affect how we understand “wife,” “woman,” “sexuality,” “heterosexuality,” and even “man.

In the past, “husband rapist” may have been unintelligible. To some people in some places, it may still be. However, its continued use over time has “the effect of calling into question rules of the dominant discourse for forming statements about whether a rape occurred and how to distinguish rape from sex.”<sup>130</sup> A helpful way of understanding this phenomenon is through Ludwig Wittgenstein’s insight that the meaning of language comes from its use.<sup>131</sup> As the term “rape” is used more and more often to describe non-consensual sex within marriage (or within intimate relationships, or in private, or without explicit consent, etc.), its meaning shifts to include such interactions, which were once not considered “rape” at all.

Discursive construction, then, does not simply proceed from the top down, but operates in multiple directions. Survivor stories are more than mere products of a dominant legal discourse; they are active producers of meaning in their own right. Just as legal discourse shapes them, they respond to and shape legal discourse. This allows feminists “to both deconstruct *and construct* knowledge,” as Bartlett urges we must.<sup>132</sup>

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<sup>127</sup> Foucault, *History of Sexuality*, *supra* note 9 at 100.

<sup>128</sup> Klinck, *supra* note 90 at 21.

<sup>129</sup> Alcoff & Gray, *supra* note 6 at 268.

<sup>130</sup> *Ibid.*

<sup>131</sup> Ludwig Wittgenstein, *Philosophical Investigations*, 2<sup>nd</sup> ed, trans by GEM Anscombe (Oxford: Basil Blackwell, 1958) at §43.

<sup>132</sup> Bartlett, *supra* note 3 at 880, emphasis in original.

This, of course, does not mean that all discourses have equal prominence and power. Conveying meanings that resist or trouble dominant, state-backed understandings, remains a serious challenge, and the very attempt will be met with hostility by those interested in maintaining the status quo. The hermeneutic circle I am describing is, in this sense, lopsided. In discussing the historical lack of recognition of women as autonomous sexual subjects, Naffine notes that “[t]he incompleteness of the eclipse of female subjectivity, the woman who wriggled beneath the oppressive form of possessive sex with a man, the woman who spoke up, was *both recognised and feared*.”<sup>133</sup> The point, for my purposes however is that she was recognised.

## **Overview and Summary of Chapters**

In this introduction, I have outlined a tension between two important feminist insights. The first is that dominant, legally sanctioned discourses can be effectively challenged by voicing firsthand experiences of gender oppression. The second is that our perception and expression of experience are inevitably constrained by dominant discourses to begin with. The first insight tends to reinforce an imagined dichotomy between feminist accounts of firsthand experience and legal discourse, while the second tends to collapse experiential narratives into legal discourse. In response to this tension, I aim in this thesis to better elucidate the relationship between feminist experiential accounts and legal discourse. I contend that rather than being dichotomized or collapsed, they are in fact mutually constitutive. Moreover, I argue that the role of experiential narratives in constituting law amounts to a kind of law reform.

Working within the context of the Ghomeshi case, I argue that the feminist discourse arising out of publicized survivor narratives and the legal discourse of judicial decisions on sexual assault are inextricably linked. The relationship, moreover, is active and bi-directional.

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<sup>133</sup> Naffine, *Possession*, *supra* note 35 at 18, emphasis added.

While the judicial discourse surrounding sexual assault shapes the perspectives and possibilities of survivor narratives, there remains a residue of agency and originality in the voices of survivors that promises to transform legal discourse in turn. In this way, narratives that seem to occupy a critical position outside of the law actually effect a kind of law reform.

I begin, in Chapter Two, by investigating Canadian legal discourse on sexual assault. Drawing upon recent legislative reforms and the surrounding judicial discourse, I show that, while law has often dismissed the experiences of women, these exclusions are not permanent or absolute. In fact, feminist discourses grounded in women's experiences have influenced law in important, though incomplete, ways. As I demonstrate, the judicial discourse around sexual assault often projects a view of law as a constant and objective authority on experience. This self-presentation downplays law's dynamic and mutable character, and its corresponding receptiveness to differing experiential accounts. However, there are moments within the judicial discourse where the veil of law's objective authority is lifted. I also highlight aspects of the discourse that display an active struggle between competing accounts of experience.

I go on, in Chapter Three, to examine the feminist discourse arising from survivor narratives publicized in the mainstream media surrounding Ghomeshi. Here I show how the accounts of survivors challenge legal responses to sexual violence but also draw upon law's discursive power. In the news articles I examine, survivors use firsthand experience to critique the law's treatment of sexual violence (though some continue to place stock in the legal system). Many also present themselves as engaged in a grassroots feminist movement to challenge dominant discourses around sexual violence through firsthand accounts of experience. However, as I illustrate, survivors also use legally grounded language to make their narratives intelligible and salient. Moreover, their interpretations of their own experiences accord with changes in

legal discourse that have grown out of recent legislative reforms. I suggest that these changes may have influenced or supported particular constructions of sexual experience amongst survivors.

Finally, in Chapter Four, I consider how the experiential accounts of survivors might be seen to shape legal discourse in turn. I argue that survivor narratives can be read as effecting legal change both by reinforcing fledgling legal norms and by re-contextualizing aspects of legal discourse. Drawing upon broad conceptions of “law reform” in feminist and other legal literature, I contend that these processes are helpfully understood as kinds of law reform.

## CHAPTER TWO: THE LEGAL DISCOURSE

In this Chapter, I turn to the “legal discourse” component of my research. Following a brief introduction, the Chapter has two parts: 1) an overview of key legislative and jurisprudential developments in Canadian sexual assault law from the early 1980s to the present; and 2) a critical discourse analysis of two Supreme Court of Canada (SCC) decisions on sexual assault rendered during this period—*R v Ewanchuk* (1999)<sup>134</sup> and *R v JA* (2011)<sup>135</sup>. Due to space constraints, I omit discussion of law reforms related to the defence of extreme intoxication and the disclosure of complainant records in Part I, choosing instead to focus on issues of consent. The cases discussed in Part II also centre around consent. They were selected based on their significance to the recent history of sexual assault law reform, their connection to the issues in the Ghomeshi case, and their relatively broad public exposure via the receipt of media attention. The historical overview in Part I allows me to situate my analysis in Part II within the broader trajectory of sexual assault law reform. Drawing on the themes raised in Chapter One, I use this material to explore law’s relationship to language and experience, and thereby to feminist experiential narratives such as those publicized in the wake of the Ghomeshi story. In order to help frame my analysis, I begin with some general remarks about law’s orientation to experience.

### INTRODUCTION: Law and Experience

A common concern ties together the myriad feminist critiques of sexual assault law: namely, that the law fails to adequately account for lived experience. As discussed in Chapter One, the privilege accorded to firsthand experience is one of feminism’s central tenets.<sup>136</sup> The

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<sup>134</sup> *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*].

<sup>135</sup> *R v JA*, 2011 SCC 28 [*JA*].

<sup>136</sup> See **Alternative Foundations** in Chapter One at note 61.

imagined dichotomy between legal and grassroots feminist methods within the literature rests on this principle. Law, however, clearly does account for experience in a number of ways. Firstly, judicial discourse in the common law tradition is grounded in the factual—i.e. experiential—context of cases. Judges must respond to the experiences of the parties and witnesses directly before them as told through their own testimony. Secondly, in appealing to legal precedent, as well as “common sense,” judges apply principles derived from past experiential contexts. These principles represent interpretations of experience that have crystalized into norms over time. The hearing of cases and the application of principles or norms thus reflect two important levels at which law incorporates experience; I return to them below. In addition, judges must also be mindful of new and unanticipated cases to which their decisions may apply. They are thus called to account for past, present and future experience (and faced with the burden of resolving the tensions between them).

Legislatures also account for experience, to the extent that the laws they pass are grounded in empirical research, or at least imagined truths about the social world. Like judges, they also have to consider potential future situations to which the laws they craft may apply. Even when legislation responds to political advocacy rather than policy analysis, these lobbies are themselves often supported by experiential data of some kind. Feminist law reform advocacy, with its professed grounding in the experiences of women, exemplifies the point.

What is it then that leads us to view law as alienated from lived experience?

I suggest that the answer lies in two interconnected problems, the first being *how* law accounts for experience. While legal norms and judgments are formed on the basis of experiential insights, law does not generally accord an inherent truth-value to subjective experience itself. Instead, it abstracts objective truths from subjective experience, and thereby lends authority to certain



subjective accounts. It is law that holds the reins of truth in this process. Moreover, in order to maintain its claim to authority through objectivity, law tends to elide its relationship to subjective experience, portraying itself as a neutral repository of social truths, rather than an institution that continually chooses between competing experiential accounts.

The second problem is a consequence of the first. By upholding some accounts of experience as objective truths, law inevitably dismisses others as merely subjective and therefore not authoritative. Thus law tends to privilege certain accounts of experience over others. Feminist literature has emphasized how this has worked against women in the context of sexual assault. As Sharon Marcus observes, “rape trials consolidate men’s subjective accounts into objective ‘norms of truth’ and deprive women’s subjective accounts of cognitive value[.]”<sup>137</sup> She and others have shown how these “objective ‘norms of truth’” in turn constitute a powerful social discourse that shapes the perception of further experience.<sup>138</sup>

Law’s norms are not static, however. To the contrary, the discourse in which legal norms are embedded is subject to constant transformation by those who engage with it. As I elaborate upon in Chapters Three and Four, articulations of experience can replicate but also reclaim and ultimately transform the very discourses that shape them. And, as the legislative reforms around sexual assault show, these transformations can eventually gain enough currency to become formally entrenched as new legal norms. Gotell notes that “feminist law reform campaigns were able to imprint sexual assault provisions with resistant discourses”.<sup>139</sup> In other words, they reformed law through alternative accounts of experience.

Just as law is not static, it is also not monolithic. Drawing from Foucault, Munro

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<sup>137</sup> Marcus, *supra* note 6 at 387. Marcus makes this point in the form of a rhetorical question, however I have expressed it as a declarative statement for clarity.

<sup>138</sup> *Ibid* at 388-390; Gotell, *Governing Heterosexuality*, *supra* note 38 at 371; Lacey, *Unspeakable Subjects*, *supra* note 34 at 50-51.

<sup>139</sup> Gotell, *Discursive Disappearance*, *supra* note 27 at 131.

describes law “as a process that condenses and aggregates a variety of discursive power strategies within a centralized site.”<sup>140</sup> It is, in Gotell’s words, “a disunified field, marked by contradictions and conditions that both enable and constrain.”<sup>141</sup> The norms established in law are never absolute or uncontested. Indeed, as I show below, even the law’s claim to objective truth itself does not go entirely unchallenged within judicial discourse.

These responses do not fully resolve the problems I have articulated. While new legal norms may validate previously marginalized experiences, they still do so only under the presumption of law’s interpretive authority. And, by validating some experiences, law inevitably marginalizes others, sometimes in unanticipated ways. Thus, even when legal norms incorporate feminist insights derived from experience, the very entrenchment of those norms threatens to exclude a whole other set of experiences that do not fit the narrative of the day. This may be part of the reason why feminists have sought to affirm experiential narratives as authoritative in their own right. Nevertheless, I emphasize law’s dynamic and heterogeneous character as a reminder that law does retain the possibility of reformation in light of new (or newly heard) experiential accounts; it perpetually (albeit slowly and unevenly) answers the call to experience. Indeed, I argue that law is more responsive to experience than it generally wishes to let on.

With these reflections in mind, I now take a closer look at the legislative reforms and accompanying judicial discourse surrounding sexual assault in Canada. In what follows, I hope to show how the law of sexual assault has been reformed to accommodate some feminist accounts of experience, but in a way that remains incomplete, contested, and always subject to further reform.

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<sup>140</sup> Munro, *supra* note 91 at 563.

<sup>141</sup> Gotell, *Discursive Disappearance*, *supra* note 27 at 133.

## PART I: Overview of Reforms

My exploration of Canadian sexual assault law begins at a key moment in the history of feminist-influenced reforms: the overhaul of the *Criminal Code* rape provisions and the introduction of the contemporary scheme for sexual assault through the coming into force of Bill C-127 in 1983.<sup>142</sup> The Bill's enactment resulted from contested efforts on the part of feminist reformers in the context of changing socio-political norms, and followed a series of earlier feminist initiatives. I leave this history to others in order to focus on the more recent trajectory of the law, starting from this pivotal legislative shift.<sup>143</sup> I do, however, include the 1980 SCC case of *R v Pappajohn*<sup>144</sup>, as it sets out important aspects of the *mens rea* of sexual assault that were codified in Bill C-127 and discussed extensively in the jurisprudence of the following decades.

The enactment of Bill C-127 in 1983 and the legislative reforms that followed in 1992 through Bill C-49<sup>145</sup>, as well as the SCC jurisprudence that developed around these reforms, significantly altered the landscape of Canadian sexual assault law in a manner largely responsive to feminist concerns. Prior to 1983, most unwanted sexual contact fell under one of two categories in the *Criminal Code*: rape or indecent assault. Both were listed as “sexual offences” under Part IV of the *Criminal Code*, entitled “Sexual Offences, Public Morals, and Disorderly Conduct”.<sup>146</sup> Rape could only be committed by a man against a woman who was not his wife.<sup>147</sup> Indecent assault, which covered non-consensual sexual acts other than intercourse, did not

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<sup>142</sup> *Supra* note 20.

<sup>143</sup> For more on the history of feminist sexual assault law reform, see: Maria Los, “The Struggle to Redefine Rape in the Early 1980s” in Julian V Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Buffalo: University of Toronto Press, 1994); Sheila McIntyre et al, “Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law” (2000) 20:3 Canadian Woman Studies 72.

<sup>144</sup> *R v Pappajohn*, [1980] 2 SCR 120 [*Pappajohn*].

<sup>145</sup> *Supra* note 21.

<sup>146</sup> *Criminal Code*, 1970, *supra* note 18 at ss 143; 149.

<sup>147</sup> *Ibid* at s 143.

explicitly have to be perpetrated by a man against a woman, and was in fact subject to a lesser punishment when the victim was female.<sup>148</sup>

Bill 127 replaced the crimes of rape and indecent assault with a three-tiered scheme of gender-neutral “sexual assault” offences. The new provisions advanced a formal equality agenda by recognizing non-consensual sexual contact as a crime regardless of the gender of the victim or the perpetrator.<sup>149</sup> They were incorporated within the general assault provisions of Part VIII of the *Criminal Code*—“Offences Against the Person and Reputation”—indicating a changed view of non-consensual sex from a violation of sexuality morality to an act of interpersonal violence that happens to be sexualized.<sup>150</sup> The immunity of spouses from prosecution was explicitly eliminated.<sup>151</sup> In the 1995 SCC case of *R v Park*, Justice L’Heureux Dubé identified the change from rape to sexual assault as reflective of an evolving perception of the purpose of the offence.<sup>152</sup> She noted that while the criminalization of rape once served to protect men’s proprietary interests in women—as evidenced by the spousal immunity restriction—and later to protect women from physical injury, “the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in.”<sup>153</sup> Sexual autonomy, and the autonomy of women in particular, thus became the touchstone value of sexual assault.

Three elements of the law of sexual assault serve to illustrate the shift in framing of the offence from 1983 onwards: *actus reus*, *mens rea*, and evidentiary issues. While the separation

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<sup>148</sup> *Ibid* at ss 149; 156.

<sup>149</sup> McIntyre et al, *supra* note 143 at 74.

<sup>150</sup> *Criminal Code*, *supra* note 19 at ss 265, 267, 268, as amended by Bill C-127, *supra* note 20 at s 19; McIntyre, *Ibid* at 74.

<sup>151</sup> See note 20.

<sup>152</sup> *R v Park*, [1995] 2 SCR 836 at paras 41-42 [*Park*].

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

of these elements is undoubtedly artificial, I believe they provide a useful schematic for understanding the various strands of case law and statutory reforms during this period.

## **Actus Reus**

The 1987 SCC case of *R v Chase* held that the *actus reus* of sexual assault is different from that of the former rape and indecent assault offences.<sup>154</sup> As clarified in *R v Ewanchuk*, it requires proof of three elements: 1) touching, 2) of a sexual nature; 3) without consent.<sup>155</sup> While rape required a particular physical act involving particular body parts, the Court in *Chase* rejected a bright-line, anatomy-based definition of what makes an assault “sexual,” opting instead for a more holistic contextual analysis. The Court described sexual assault as an assault “committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.”<sup>156</sup> It thereby recognized the importance of the complainant’s perspective of the encounter, though the test remained objective. Although not related directly to consent, I include this aspect of the law due to its relevance to the Ghomeshi case. Many of the allegations against Ghomeshi related to incidents that did not involve non-consensual touching of sexual (or normally sexualized) anatomy, but physical acts of aggression that would seem to amount to simple assault were it not for their sexualized context. Without the context-sensitive approach to the meaning of “sexual” established in *Chase*, these incidents might not have met the test for sexual assault. The inclusion of such acts under the rubric of the offence reflects its shift in rationale from controlling sexual access to women, to preserving sexual autonomy and integrity.

The law’s newfound emphasis on sexual autonomy, and its associated shift towards the complainant’s perspective, appears most significantly, however, in the development of the law

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<sup>154</sup> *R v Chase*, [1987] 2 SCR 293 at para 9 [*Chase*].

<sup>155</sup> *Ewanchuk*, *supra* note 134 at para 25.

<sup>156</sup> *Chase*, *supra* note 154 at para 11.

around consent. Prior to 1983, the definition of rape included situations where consent was obtained via threats, fear, or “false and fraudulent representations as to the nature and quality of the act.”<sup>157</sup> Bill C-127 eliminated the latter wording in favor of a simple reference to “fraud,”<sup>158</sup> a change that was later interpreted as broadening the scope of the provision (I discuss this case law further below). The Bill also added “the exercise of authority” as an additional ground vitiating consent.<sup>159</sup> These amendments respond to feminist insights by expanding recognition of coercive contextual factors that may limit the capacity to make meaningful sexual choices.

The introduction of Bill C-49 in 1992 added further explicit restrictions on consent, for instance where the complainant is incapable of consenting, or expresses a lack of agreement “by words or conduct” to engage, or to continue to engage, in the activity.<sup>160</sup> The traditional seduction script according to which a woman’s silence or “no” could be read as “yes” or “not yet” was thereby formally rejected.<sup>161</sup> Bill C-49 also articulated, for the first time, a positive definition of consent as “the voluntary agreement of the complainant to engage in the sexual activity in question.”<sup>162</sup> Another important provision mandated that a person must take “reasonable steps” to ascertain consent—I deal with this below under **Mens Rea**.

Unlike Bill C-127, Bill C-49 bore traces of a more radical feminist agenda that sought to realize not merely formal but substantive gender equality. For instance, a preamble was included that explicitly framed the Bill as a response to “the prevalence of sexual assault against women and children”, acknowledged “the unique character of the offence of sexual assault”, specifically referenced the section 15 *Charter* right to equality<sup>163</sup>, and recognized that sexual history

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<sup>157</sup>*Criminal Code*, 1970, *supra* note 18 at s 143.

<sup>158</sup> Bill C-127, *supra* note 20 at s 19, adding s 244(3), later renumbered s 265(3)(c).

<sup>159</sup> *Ibid.*

<sup>160</sup> Bill C-49, *supra* note 21 at s 1, adding s 273.1 (2).

<sup>161</sup> Leader-Elliott & Naffine, *Language Games*, *supra* note 115.

<sup>162</sup> Bill C-49, *supra* note 21 at s 1, adding s 273.1(1).

<sup>163</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 15.

evidence is “rarely relevant” and “inherently prejudicial” in sexual assault trials.<sup>164</sup> In addition to articulating a detailed and robust standard of consent, the Bill laid out a revised scheme for the admissibility and use of sexual history evidence—a point to which I return below under

### **Evidentiary Issues.**

The SCC furthered the revised understanding of consent established in Bill C-49 in the brief 1994 case of *R v MLM*, by rejecting the notion that the Crown must prove some form of resistance on the part of the complainant in order to establish a lack of consent.<sup>165</sup> Passivity, in other words, could not be equated with consent—another challenge to the traditional seduction model. In combination with the changes implemented through Bill C-49, this decision once again promised to bolster the sexual autonomy of women, by supporting their capacity to intelligibly express sexual choices, and rejecting norms that cast them as sexually passive and in need of persuasion.

The above reforms were consolidated in the landmark 1999 SCC case of *R v Ewanchuk*.<sup>166</sup> Interestingly, what made this case groundbreaking was the Court’s clarification of a point that had ostensibly always been part of the law, namely the subjective test for consent. Rejecting the lower courts’ determination of “implied consent” based on inferences drawn from the complainant’s behaviour, the Court in *Ewanchuk* stressed that consent in the *actus reus* refers only to the complainant’s inner thoughts, and not her outward words or actions.<sup>167</sup> The accused’s perspective, rather than being determinative of consent itself, relates only to the question of

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<sup>164</sup> Bill C-49, *supra* note 21, preamble. For an account of the role of feminist women’s groups in the development of the Bill, see Sheila McIntyre, “Redefining Reformism: The Consultations That Shaped Bill C-49” in Julian V Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Buffalo: University of Toronto Press, 1994).

<sup>165</sup> *R v MLM*, [1994] 2 SCR 3 at para 2.

<sup>166</sup> *Supra* note 134.

<sup>167</sup> *Ewanchuk*, *supra* note 134 at paras 26-27, 32.

honest but mistaken belief in consent at the *mens rea* stage.<sup>168</sup> By drawing a clear distinction between these two lines of inquiry, the Court avoided conflation of the complainant's perspective with that of the accused, ensuring that due weight is given to the complainant's actual subjective experience of the encounter.

Twelve years after *Ewanchuk*, the SCC once again refined the meaning of consent in another key case: *R v. JA*.<sup>169</sup> In this case, a long-term couple with an interest in kinky sex had an encounter during which the complainant was rendered unconscious. In a 6-3 decision, a majority of the SCC found that a person cannot give advance consent to sexual acts performed while he or she is unconscious because the law defines consent as conscious and ongoing.<sup>170</sup> The dissent would have allowed the encounter, interpreting consent as more akin to a revocable transaction.<sup>171</sup> The split in the Court mirrored a heated debate amongst feminist and other interested legal scholars, raising difficult questions about the best way to balance concerns about sexual exploitation with the desire to promote sexual agency.<sup>172</sup>

One last aspect of consent in the *actus reus* pertains to cases of deception or fraud, many of which have involved accused who fails to disclose their HIV positive status prior to sexual activity. In *R v Cuerrier*<sup>173</sup>, a majority of the SCC interpreted the simplification of the fraud provision under Bill 127 as broadening the scope of fraud vitiating sexual consent. The majority found that in order to establish fraud, the Crown must prove that a dishonest act exposed the complainant to a "significant risk of serious bodily harm."<sup>174</sup> Failure to disclose one's HIV positive status could meet that test where the complainant would not have consented to sexual intercourse

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<sup>168</sup> *Ibid* at para 30.

<sup>169</sup> *Supra* note 135.

<sup>170</sup> *JA*, *supra* note 135 at para 3.

<sup>171</sup> *Ibid* at para 69.

<sup>172</sup> See: Gotell, *Governing Heterosexuality*, *supra* note 38; Busby, *supra* note 33; Khan, *supra* note 14 at 252-270; David M Tanovich, "Criminalizing Sex at the Margins" (2010) 74 *Criminal Reports* 86.

<sup>173</sup> *R v Cuerrier*, [1998] SCJ No 64 [*Cuerrier*].

<sup>174</sup> *Ibid* at para 128.



otherwise.<sup>175</sup> Justice L’Heureux-Dubé, while concurring in the result, argued that the test should have been whether the dishonest act deprived the complainant of the ability to exercise her physical autonomy, regardless of the harm or risk of harm that resulted—an even stricter standard for consent.<sup>176</sup> The finding in *Cuerrier* was affirmed in the high profile 2012 case of *R v Mabior*<sup>177</sup>, wherein the Court specified that the failure to disclose HIV positive status would vitiate consent when there was a “realistic possibility of transmission.”<sup>178</sup> In *Cuerrier* and *Mabior*, the Court explicitly tried to strike a balance between upholding women’s autonomy via a robust consent standard and avoiding overextension of the criminal law (as well as uncertainty). That this was conceived as a zero sum game, however, is telling of law’s limits. In particular, the Court in *Mabior*’s apparent desire to rectify the gender prejudice that once supported a lax consent standard caused it to lose sight of other compelling contextual factors that also speak to the interests of women—namely, the stigmatization and criminalization of people with HIV.<sup>179</sup>

The issue of deception and consent came up most recently in *R v Hutchinson*<sup>180</sup>, a 2014 SCC case involving an accused who poked holes in the condoms he was using without his partner’s knowledge. A narrow majority held that condom use bore upon the “conditions and qualities” of the act that could—and, in this case, did—give rise to fraud vitiating consent under s 265(3)(c) of the *Criminal Code*.<sup>181</sup> The concurring judges would have characterized condom

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<sup>175</sup> *Ibid* at paras 128-130.

<sup>176</sup> *Ibid* at para 16.

<sup>177</sup> *R v Mabior*, 2012 SCC 47.

<sup>178</sup> *Ibid* at para 4.

<sup>179</sup> While the law has tended to view women almost exclusively as victims of sexual assault (because most sexual offences are perpetrated by men), the gender dynamics are decidedly different when sexual assault arises out of non-disclosure of disease. The Court is certainly cognizant of this, and yet it fails to address how contemporary notions of equality and autonomy speak to the interests of accused HIV-positive women, or to acknowledge how the different contexts in which non-disclosure occurs may influence how such values ought to play out.

<sup>180</sup> *R v Hutchinson*, 2014 SCC 19.

<sup>181</sup> *Ibid* at paras 55, 71.

use as part of the “sexual activity in question” under s 273.1(1). In their view, having to show that dishonesty regarding condom use resulted in a significant risk of serious bodily harm would undermine the complainant’s right to control precisely how she was touched, and thereby undermine her sexual autonomy.<sup>182</sup> While the Court was unanimous in finding that the accused’s actions amounted to sexual assault, at issue were the broader implications of how consent is defined, again with a focus on the competing concerns of sexual autonomy and restraint on the criminal law.

## **Mens Rea**

Like the *actus reus*, the *mens rea* of sexual assault has undergone a gradual re-orientation towards a new understanding of consent that seeks to better protect women’s sexual autonomy. As a crime built on assault, the *mens rea* is subjective. Although prior to the change from rape to sexual assault, the SCC’s analysis in the 1980 case of *R v Pappajohn* also remains relevant as confirming a subjective *mens rea* for rape and exploring what that meant.<sup>183</sup> In *Pappajohn*, the Court considered when the defence of mistake of fact—in the case of rape or sexual assault, a mistaken belief in consent—could be raised to negate criminal intent. The majority found that in order for the judge to put the defence to the jury, there has to be some evidence to support the notion that the accused honestly though mistakenly believed the complainant was consenting.<sup>184</sup> For the defence to be made out, the accused’s belief need only be honest and not reasonable, though the latter would provide strong evidence of the former.<sup>185</sup> Bill C-127 codified these

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<sup>182</sup> *Ibid* at para 91.

<sup>183</sup> *Supra* note 144.

<sup>184</sup> *Pappajohn*, *supra* note 144 at para 88. As clarified in *R v Robertson*, [1987] SCJ No 33 [*Robertson*], this test places no more than an evidentiary burden on the accused. Once the defence is successfully raised, the onus is on the Crown to prove beyond a reasonable doubt that the accused knew that, or was reckless or willfully blind to the fact that the complainant was not consenting. This finding was affirmed in *R v Osolin*, [1993] SCJ No 135 [*Osolin*].

<sup>185</sup> This was only mentioned in passing by the majority (para 83), but was underscored by the dissent (paras 45-60), and came to be identified as part of the ratio of the case in future jurisprudence.

findings.<sup>186</sup> However, the correct application of the defence of honest but mistaken belief in consent remained a contested issue at the SCC throughout the 1980s and 1990s.

The case law reveals a protracted struggle to define the circumstances under which the defence of mistaken belief in consent can appropriately be raised. The majority in *Pappajohn* found that the defence has no air of reality where the accused says consent was clearly expressed and the complainant denies having given any such indication.<sup>187</sup> However this finding was altered in *Park*, where the Court determined that the defence can still be made out if the two versions of events can be coherently spliced together.<sup>188</sup> The majority in *Pappajohn* also asserted that there has to be some evidence from sources beyond the accused to support the defence,<sup>189</sup> a finding that was later retracted in *R v Osolin*.<sup>190</sup> In *Park*, the Court added that the assertion of an honest but mistaken belief in consent is implied by an accused's assertion of actual consent, and that the defence has no air of reality where it contradicts other aspects of the accused's testimony.<sup>191</sup>

Underlying these abstract and technical deliberations looms the difficult question of what circumstantial factors can lend credence to an honest belief in consent. *Pappajohn* clearly establishes that the accused's honest belief in consent need not be reasonable.<sup>192</sup> Yet, given the impossibility of knowing what was actually in the accused's mind at the time of the alleged assault, judges have to look to the surrounding circumstances to find some objective evidence for an honest belief, at which point sexist social norms about the meaning of consent—often referred

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<sup>186</sup> *Robertson*, *supra* note 184 at paras 37-39; Bill C-127, *supra* note 20 at s 19, adding s 244(4), later renumbered s 265(4).

<sup>187</sup> *Pappajohn*, *supra* note 144 at para 98.

<sup>188</sup> *Park*, *supra* note 152 at para 25.

<sup>189</sup> *Pappajohn*, *supra* note 144 at para 97. This was followed in *R v Reddick*, [1991] SCJ No 39.

<sup>190</sup> The Court in *Osolin* found that evidence from other sources was not necessarily required, though a mere assertion of honest but mistaken belief on the part of the accused would not suffice. *Osolin*, *supra* note 184 at paras 208-209. This was affirmed in *Park*, *supra* note 152 at para 20.

<sup>191</sup> *Park*, *supra* note 152 at paras 17; 29.

<sup>192</sup> See note 185.

to as “rape myths”—may come into play. The problem, as Joanne Wright puts it, is that “rape myths are a kind of common sense.”<sup>193</sup> Consequently, factors that have no actual bearing on the complainant’s subjective agreement to participate in sexual activity, such as her dress or behaviour prior to the assault, may nevertheless ground an honest belief in consent through the application of sexist inferences.

This problem was attenuated somewhat by Bill C-49’s introduction of legislated restrictions on consent in 1992 (see *Actus Reus* above). As underscored in *Ewanchuk*, these restrictions precluded certain pervasive sexist beliefs—such as the notion that “no” means “yes”—from grounding a defence of mistaken belief in consent, by defining them as mistakes of law.<sup>194</sup> Bill C-49 also added an important direct restriction on the defence by requiring the accused to have taken “reasonable steps [...] to ascertain that the complainant was consenting” prior to relying on it.<sup>195</sup> This provision effectively legislated an affirmative consent standard in Canadian sexual assault law. However, the “reasonable steps” requirement did not receive much attention in the SCC jurisprudence until the late 1990s, possibly due to the lag time between when alleged crimes occurred and when the cases came before the Court.<sup>196</sup>

In the meantime, Justice L’Heureux Dubé made some remarks in *Park* (1995) that strongly urged a shift towards affirmative consent within the common law. She warned that by focusing on the accused’s perception of whether non-consent was communicated, “the current common law approach to consent may perpetuate social stereotypes that have historically victimized women and undermined their equal right to bodily integrity and human dignity.”<sup>197</sup> In

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<sup>193</sup> Joanne Wright, “Consent and Sexual Violence in Canadian Public Discourse: Reflections on *Ewanchuk*” (2001) 16 Can JL & Soc 173 at 185.

<sup>194</sup> Bill C-49, *supra* note 21 at s 1, adding s 273.1 (2); *Ewanchuk*, *supra* note 134 at paras 50-51.

<sup>195</sup> Bill C-49, *supra* note 21 at s 1, adding s.273.2(b).

<sup>196</sup> For instance, the events in *Osolin* and *Park* occurred prior to the enactment of Bill C-49, so the reasonable steps requirement did not yet apply, even though the SCC decisions were rendered well after 1992.

<sup>197</sup> *Park*, *supra* note 152 at para 38.

her view, “the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying ‘no’, but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying ‘yes’.”<sup>198</sup> Interestingly, other members of the Court specifically declined to sign on to this part of Justice L’Heureux Dubé’s reasons, despite the fact that several years had passed since the reasonable steps requirement was enacted.

The push for a common law affirmative consent standard was eventually taken up by the Court in *Ewanchuk*, triggering what Gotell describes as a shift in focus “away from the behaviour of complainants and towards heightened judicial interrogation of the defendant’s actions in securing agreement.”<sup>199</sup> In *Ewanchuk*, the Court found that in order to negate *mens rea*, an honest belief that the complainant was subjectively consenting, or that she had not said “no,” was not enough. The accused had to show an honest belief that the complainant had positively communicated consent.<sup>200</sup> This significantly limited the honest but mistaken belief defence, signaling the law’s progression towards a new model of consent wherein the complainant’s sexual autonomy takes priority over the accused’s unchecked subjective perceptions. As I demonstrate in the next chapter, the move towards an affirmative consent standard is reflected in the survivor discourse surrounding the Ghomeshi case.

## **Evidentiary Issues**

Alongside changes to the elements of the offence, legal efforts to promote women’s sexual autonomy also involved a number of reforms to the rules of evidence in sexual assault

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<sup>198</sup> *Ibid.*, at para 39.

<sup>199</sup> Gotell, Discursive Disappearance, *supra* note 27 at 147.

<sup>200</sup> *Ewanchuk*, *supra* note 134 at para 46.

trials. Through these changes, rape myths that were once perpetuated in law were formally renounced, though not without much contestation over where to draw the line.

Bill C-127 abolished a number of evidentiary rules and practices based on such myths. The requirement for corroborating evidence with respect to a number of sexual offences was repealed, and judges were explicitly barred from warning juries about the dangers of relying on a female complainant's uncorroborated testimony,<sup>201</sup> a practice that had been required under the *Criminal Code* until 1976.<sup>202</sup> Consequently, women's accounts of sexual assault were no longer formally discredited by law. Bill C-127 also abrogated the common law doctrine of recent complaint, whereby an adverse inference regarding the complainant's credibility was drawn if she was not shown to have complained of the attack in a timely manner.<sup>203</sup> Of particular import was the introduction of new provisions restricting the admissibility of sexual history evidence (s 276) and prohibiting the use of sexual reputation evidence to challenge complainant credibility (s 277)—the so-called “rape shield provisions.”<sup>204</sup> These provisions attacked the “twin myths” that a complainant's sexual past makes her either (1) more likely to have consented to the sexual activity at issue, or (2) less credible as a witness.<sup>205</sup> They were eventually subject to a *Charter* challenge in the 1991 case of *R v Seaboyer*.<sup>206</sup>

The Court in *Seaboyer* upheld s 277, but a narrow majority struck s 276 down as violating ss 7 and 11(d) of the *Charter*. The majority found that s 276 had the potential to exclude relevant evidence, the probative value of which was not substantially outweighed by its prejudicial effect. In their view, the blanket exclusion of sexual history evidence, subject to

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<sup>201</sup> Bill C-127, *supra* note 20 at: s 5, repealing s 139; and s 19, adding s 246.4, later renumbered s 274.

<sup>202</sup> *Criminal Code*, 1970, *supra* note 18 at s 142, repealed by *Criminal Law Amendment Act*, SC 1974-75-76, c 93, s 8.

<sup>203</sup> Bill C-127, *supra* note 20 at s 19, adding s 246.5, later renumbered s 275.

<sup>204</sup> *Ibid.*, adding ss 246.6 and 246.7, later renumbered ss 276 and 277.

<sup>205</sup> *R v Seaboyer*, [1991] 2 SCR 577 at para 23 [*Seaboyer*].

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

certain pigeon-hole exceptions, was overbroad, given that the real legislative objective was to bar the misuse of such evidence for illegitimate purposes.<sup>207</sup> In lieu of s 276, the majority set out guidelines for the admissibility and use of sexual history evidence.<sup>208</sup> These were later codified, with some modification, in the 1992 amendments introduced via Bill C-49.<sup>209</sup> Justice L'Heureux-Dubé, supported by Justice Gonthier, rendered an impassioned dissent in *Seaboyer*, embarking upon an extensive discussion of how rape myths pervade all levels of the justice system, and warning against the dangers of leaving decisions about relevance to the discretion of judges given this reality. She also insisted that all evidence excluded by s 276 was actually irrelevant once such myths were properly rejected.<sup>210</sup> While the influence of feminist discourses can be seen in both the majority and the dissent, Justice L'Heureux-Dubé actually challenges the objectivity and impartiality of legal decision-makers in light of women's experiences with the justice system. As I discuss in Part II, she makes a similar move in *Ewanchuk*.

The finding in *Seaboyer* led to the implementation of a revised scheme for the admissibility and use of sexual history evidence through Bill C-49.<sup>211</sup> The new provisions set out a detailed two-step procedure for the admission of sexual history evidence, as well as a modified legal test. While the new test is more flexible, allowing for the potential admission of sexual history evidence in a broader range of circumstances, judges are now required to consider a number of enumerated factors, including the need to encourage sexual assault reporting, eliminate the operation of “discriminatory belief or bias” in fact-finding, and protect the complainant's dignity and privacy.<sup>212</sup> A provision was also added to explicitly bar the use of

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<sup>207</sup> *Ibid* at paras 48-49, 75, 79.

<sup>208</sup> *Ibid* at para 101.

<sup>209</sup> Bill C-49, *supra* note 21 at s 2, amending s 276.

<sup>210</sup> *Seaboyer*, *supra* note 205 at para 210.

<sup>211</sup> *Supra* note 209.

<sup>212</sup> Bill C-49, *supra* note 21 at s 2, amending s 276 at s 276(3).

sexual history evidence to draw improper inferences based on the twin myths.<sup>213</sup> The latter provision, as well as various procedural aspects of s 276, were upheld as constitutional in the 2000 case of *R v Darrach*.<sup>214</sup>

## Summary of Reforms

Overall, the statutory reforms and surrounding case law described in this Part point towards a revised sexual script wherein women's sexual autonomy is foregrounded. The script centres around a new conception of consent that draws from feminist discourse—itsself grounded in women's experience—to reject sexist social norms perpetuated by previous law. Some of the changes also directly bolster women's experiential accounts, by affirming the legal significance and presumed credibility of the complainant's testimony in sexual assault trials. These reforms thereby take strides to better account for women's experiences at the two levels described in the introduction to this chapter.

At the same time, the shift in legal discourse around consent (and sexually assault generally) has not been instantaneous, unanimous, complete, or deeply transformative of gender norms. Legislative reforms such as the reasonable steps requirement took years to find their way into the jurisprudence. While some judges have pushed for more radical change (most notably, Justice L'Heureux Dubé), others have shown reluctance to let go of old norms. Sometimes, the direction of progress has simply been unclear (*JA* and *Mabior* stand out as examples). And, as discussed in Chapter One, the new discourse that has emerged has its own serious flaws and limitations. These problems point to the failures of sexual assault law reform. However, they also demonstrate law's flexibility and heterogeneity—traits that enable its continued response to new, and sometimes conflicting, accounts of experience.

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<sup>213</sup> *Ibid* at s 276(1).

<sup>214</sup> *R v Darrach*, [2000] 2 SCR 443.



## PART II: *Ewanchuk* and *JA*

In Part I, I mapped out the major consent-related developments to the law of sexual assault, from the implementation of Bill C-127 in 1983 to the present. In this Part, I zoom in on two landmark SCC cases—*R v Ewanchuk*<sup>215</sup> and *R v JA*<sup>216</sup>—in order to more closely examine the judicial discourse around consent and sexual assault. After providing brief case summaries, I begin my analysis by considering how the justices in these cases consider sexual assault law’s relationship to experience through a kind of judicial meta-discourse. I have already noted that the law around sexual assault incorporates feminist experiential insights. Here I show how the Court tends to appropriate these insights without acknowledging their source in particular, subjective, and contested accounts of firsthand experience. As I illustrate, however, there are some instances in which the law is depicted as responding dynamically to competing accounts of experience, rather than merely carrying forward the wisdom of the ages. Moving from meta-discourse to discourse, I next turn my attention to the shifting meaning of consent within *Ewanchuk* and *JA*. Here I show how, at the micro-level, subtle variations in the way justices speak of consent reflect both a struggle between traditional and newly sanctioned norms around sexual assault, and differing views of law’s relationship to experience—views that mirror those reflected in the meta-discourse. I also illustrate the power of small differences in wording to significantly alter legal meanings—a key point for the argument I make in Chapter Three.

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<sup>215</sup> *Supra* note 134.

<sup>216</sup> *Supra* note 135.

## A. The Cases

### ***R v Ewanchuk: Subjective Consent and Rape Myths***

The accused in *Ewanchuk* initiated a series of escalating sexual activities with the complainant while interviewing her for a job, in his van and attached trailer. She went along with some initial massaging, but said “no” on three occasions as the touching escalated. On each occasion, the accused stopped what he was doing momentarily, but soon initiated further sexual advances. He repeatedly assured the complainant that he was a “nice guy,” as evidenced by his stopping, and that she should not be afraid. Throughout the encounter, the complainant remained still and silent out of fear that her resistance would worsen the situation. She admitted to the accused that she was scared, but told him that she trusted him when he asked, out of fear that a truthful answer would provoke him. Eventually, the complainant said she had to go and the accused let her out of his trailer.<sup>217</sup>

At trial, the judge found that the complainant was a credible witness. He accepted her testimony that the accused’s sexual advances were unwanted, and that she submitted to him to the extent that she did out of fear. However, he found that because she failed to communicate her state of mind to the accused—she was purposely trying to convey comfort and confidence as a defensive strategy—the Crown had failed to prove an absence of consent beyond a reasonable doubt.<sup>218</sup> The trial judge also accepted that the complainant had said “no” three times, but found that the accused had appropriately stopped what he was doing on each occasion.<sup>219</sup> The accused’s acquittal was upheld by a majority of the Alberta Court of Appeal. In his infamous decision, Justice McClung found that consent was a question of fact that could not be judged

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<sup>217</sup> For a summary of the facts, see: *Ewanchuk*, *supra* note 134 at paras 2-11; *R v Ewanchuk*, 1998 ABCA 52 at para 2 [*Ewanchuk CA*].

<sup>218</sup> *Ewanchuk*, *supra* note 134 at paras 15-17; *Ewanchuk CA*, *supra* note 217.

<sup>219</sup> *Ewanchuk CA*, *supra* note 217 at para 2.

solely upon the complainant’s subjective feelings, and that the complainant’s actions had provided evidence of “implied consent”—what he found to be a distinct defence from the *mens rea* defence of honest but mistaken belief in consent.<sup>220</sup>

In his decision, Justice McClung made a number of inflammatory comments that were subject to criticism both from the SCC and some members of the public for minimizing the seriousness of sexual assault and perpetuating rape myths.<sup>221</sup> Most noted was his observation that the complainant “did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines”,<sup>222</sup> which implied that her dress and previous sexual experience had some bearing upon the issue of consent. By referring to the accused’s “romantic intentions”,<sup>223</sup> “clumsy passes”,<sup>224</sup> and questionable “stature in the pantheon of chivalric behavior”,<sup>225</sup> Justice McClung also cast the incident as falling within the realm of normal, if poorly executed, heterosexual courtship. His conclusion made this view apparent: “Ewanchuk’s advances to the complainant were far less criminal than hormonal. In a less litigious age going too far in the boyfriend’s car was better dealt with on site—a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee.”<sup>226</sup>

In her dissent, Chief Justice Fraser pointed out a number of legal errors made by the trial judge regarding the meaning of consent in the law of sexual assault. She asserted that the test for consent is indeed subjective, and rejected the notion that a lack of overt resistance on the complainant’s part could amount to “implied consent.”<sup>227</sup> Chief Justice Fraser also found that the trial judge had erred by requiring an objective assessment of fear vitiating consent under s

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<sup>220</sup> *Ibid* at paras 3-9.

<sup>221</sup> Wright, *supra* note 193.

<sup>222</sup> *Ewanchuk CA*, *supra* note 217 at para 4.

<sup>223</sup> *Ibid* at para 8.

<sup>224</sup> *Ibid* at para 5.

<sup>225</sup> *Ibid* at para 11.

<sup>226</sup> *Ibid* at para 21.

<sup>227</sup> *Ibid* at paras 49-50.

265(3)(b) of the *Criminal Code*,<sup>228</sup> and by failing to give legal effect to the complainant’s multiple, clearly expressed “no”s, which clearly negated consent (if there was any to begin with) under s 273.1(2).<sup>229</sup> Contrary to the majority, she did not find that the accused had fulfilled his obligation in response to the complainant’s explicit objections by stopping what he was doing momentarily, only to proceed with further sexual activity moments later.<sup>230</sup>

The SCC sided with Chief Justice Fraser, finding that there is no defence of “implied consent” in Canadian sexual assault law.<sup>231</sup> Writing for the majority, Justice Major put confusion to rest by concisely reviewing and clarifying the legal elements of sexual assault, with a clear distinction drawn between the *actus reus* and the *mens rea* of the offence. With respect to the *actus reus*, Justice Major affirmed that the test for consent is purely subjective—to be determined solely by the complainant’s internal state of mind—as is the test for fear vitiating consent.<sup>232</sup> While the trier of fact may consider objective evidence in assessing the complainant’s credibility on the issue of consent, the only relevant question is whether she was consenting in her own mind.<sup>233</sup> Regarding the *mens rea*, the accused has to prove that he honestly believed that the complainant had positively communicated consent in order to negate criminal intent—an affirmative consent standard.<sup>234</sup> The accused, moreover, cannot not rely upon an honest belief that was contrary to s 273.1(2) of the *Code*, such as a belief that passivity meant consent or that “no” actually meant “yes.” That would be a mistake of law.<sup>235</sup> Finally, Justice Major affirmed

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<sup>228</sup> *Ibid* at paras 74-76.

<sup>229</sup> *Ibid* at paras 92-93.

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

<sup>231</sup> *Ewanchuk*, supra note 134 at para 31.

<sup>232</sup> *Ibid* at para 27.

<sup>233</sup> *Ibid* at para 29.

<sup>234</sup> *Ibid* at para 46.

<sup>235</sup> *Ibid* at para 51.

Chief Justice Fraser’s finding that once the complainant said no, the accused was required to clearly re-establish consent before proceeding with further sexual contact.<sup>236</sup>

Justice L’Heureux-Dubé penned separate concurring reasons, with Justice Gonthier in support. While she largely agreed with the majority, her judgment took a notably different tone, situating the case within the broader context of violence against women, women’s equality rights, and the ongoing effort to eradicate rape myths from Canadian law. Then Justice McLachlin authored a second, brief, minority decision, agreeing with both of the other two decisions and condemning the “stereotypical assumptions” of the lower courts.<sup>237</sup>

### **R v JA: Advance Consent**

The criminal charges against JA arose from a sexual encounter that took place within a tumultuous long-term relationship marked by both domestic violence and kinky sex. On the evening in question, JA strangled<sup>238</sup> his partner KD to heighten sexual pleasure—a practice known in the kink context as erotic asphyxiation. KD lost consciousness as a result, at which point JA tied her up and began penetrating her anally with a dildo. The couple continued with other sexual activities after KD regained consciousness. KD later reported the incident to the police, in the midst of arguments with JA over their son. She gave a videotaped statement stating that she did not consent to the encounter. However, at trial, she changed her position, affirming that the encounter was consensual and cooperating with the defense. She was the sole witness in

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<sup>236</sup> *Ibid* at para 52.

<sup>237</sup> *Ibid* at para 103.

<sup>238</sup> The courts use the term “choking” rather than “strangling”. However, the incident is more accurately described as strangling, as it involves external constriction of the neck that impedes both oxygen and blood flow to the brain. Choking occurs when there is an obstruction inside the throat that blocks the airway but not blood flow to the brain. Stephan Stapczynski, “Strangulation Injuries” (2010) 31 *Emergency Medicine Reports: The Practical Journal for Emergency Physicians* 193 at 194, cited in Busby, *supra* note 33 at 338.

the case.<sup>239</sup>

Crown counsel showed the videotaped statement in court but ultimately abandoned the motion to have it formally admitted into evidence. Instead, he argued, amongst other things, that KD could not legally provide advance consent to the sexual activities that took place while she was unconscious. The trial judge agreed. She also found that the complainant had not actually agreed to the anal penetration at any time.<sup>240</sup>

The majority of the Court of Appeal reversed the trial judge's decision, finding that the Crown had not shown beyond a reasonable doubt that KD did not consent to the anal penetration, and that advance consent to sexual activity while unconscious was a legal possibility.<sup>241</sup> With respect to the latter issue, the majority found that "[t]he only state of mind ever experienced by the person is that of consent."<sup>242</sup> The dissenting judge disagreed only with the majority's conclusion on advance consent. She found that according to *Ewanchuk* and other sexual assault jurisprudence, consent must be contemporaneous with the relevant sexual activity.<sup>243</sup> In order to give effect to the legal requirement that consent can be revoked at any time, consent must be understood as an "ongoing state of mind" that ends once a person is rendered unconscious.<sup>244</sup> Both the majority and the dissent appealed to the value of individual autonomy in support of their conclusions.<sup>245</sup>

The only issue before the SCC was whether the law recognizes advance consent to sexual activity that will take place while a person is unconscious. In a decision authored by Chief Justice McLachlin, the majority found that "Parliament requires ongoing, conscious consent to

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<sup>239</sup> *R v JA*, 2008 ONCJ 195 at paras 2-7 [*JA* Prov Ct]

<sup>240</sup> *Ibid* at para 45.

<sup>241</sup> *R v JA*, 2010 ONCA 226 [*JA* CA].

<sup>242</sup> *Ibid* at para 77.

<sup>243</sup> *Ibid* at para 117.

<sup>244</sup> *Ibid* at para 123.

<sup>245</sup> *Ibid* at paras 87; 137.

ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.”<sup>246</sup> The Crown’s appeal was allowed on this basis, and the accused’s conviction restored. The majority interpreted the law as contemplating “a present, ongoing conception of consent, rather than advance consent to a suite of activities.”<sup>247</sup> Support for this interpretation was found in statutory and jurisprudential language that describes consent as directed towards a specific sexual activity (s 273.1(1); s 273.1(2)(d)), at the time it occurs (s 273.2; *Ewanchuk*). In addition, the majority emphasized that an unconscious person cannot revoke consent at any time, as required by section 273.1(2)(e).<sup>248</sup>

The dissenting justices would have upheld KD’s (purported) prior consent to sexual activities that took place while she was unconscious as legally effective, and thereby dismissed the Crown’s appeal. In contrast to the majority’s interpretation of consent as an ongoing state of mind, the dissent understood consent as an agreement that is given at a discrete point-in-time and remains operative until revoked. The dissent emphasized that sexual autonomy includes not only the right to say “no” to sexual activity” but also the right to say “yes.”<sup>249</sup> The criminalization of mild displays of affection while one partner in a couple is asleep—the “sleeping spouse” problem—was also invoked as a policy reason for rejecting the majority’s conception of consent.<sup>250</sup>

In addition to the advance consent argument, Crown counsel at trial also took the position that KD could not legally consent to the bodily harm caused by the strangling<sup>251</sup>—an issue of

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<sup>246</sup> *JA*, *supra* note 135 at para 3.

<sup>247</sup> *Ibid* at para 39.

<sup>248</sup> *Ibid* at para 40.

<sup>249</sup> *Ibid* at para 114.

<sup>250</sup> *Ibid* at para 74.

<sup>251</sup> *JA*, Prov Ct, *supra* 239 at para 12.

relevance to the Ghomeshi case given the many allegations of beating and strangling made against him. The trial judge found there was insufficient evidence to show that JA's actions constituted bodily harm sufficient to vitiate consent, and the Court of Appeal dismissed the issue as irrelevant given the scope of the indictment, such that it was not before the SCC. Nevertheless, the Court explicitly left the door open for the issue of bodily harm vitiating consent to be addressed in a future case, which could turn out to be Ghomeshi.<sup>252</sup>

## B. Law and Experience in *Ewanchuk and JA*

I have noted how the reformed law of sexual assault accounts for women's experiences of sexual violence at two levels: 1) by attributing explicit legal significance and default credibility to the subjective experience of particular complainants as narrated through their testimony in court; and 2) by incorporating insights derived from the experiences of survivors more broadly as interpreted through feminist theorizing. I have also discussed some noted problems with law's way of accounting for experience, namely that it is both hegemonic and opaque. Experience is interpreted and authorized *by* law, rather than being recognized as authoritative on its own terms. Moreover, law tends to distance itself from the experience that underpins it. In this section, I show how these problems manifest within the judicial meta-discourse and discourse of *Ewanchuk* and *JA*. However, I also illustrate moments that counter these trends, revealing law as more cognizant of, and openly linked to, the experiences upon which it draws.

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<sup>252</sup> *JA*, *supra* note 135 at paras 78, 85. Note, though, that the same issue regarding the scope of the indictment that arose in *JA* may also arise in the Ghomeshi case. In *JA*, the Court of Appeal held that the Crown could not argue that consent was vitiated by bodily harm because the accused was not formally charged with sexual assault causing bodily harm. However, if bodily harm is interpreted as relevant to consent, a charge of sexual assault seems sufficient to raise the issue.



## Meta-Discourse: Law's Self-Image

I begin by looking at how justices depict the nature and source of sexual assault law itself. Through this examination of the judicial meta-discourse, I show how experiential insights that have only recently (and with much contestation) gained traction in law are smoothly absorbed into longstanding legal tradition, as if they were always welcomed there. In this way, law maintains an image of itself as a constant, objective authority on the social world, rather than an institution that tends to consolidate the dominant social narratives of the day. At the same time, as I also show, there are moments in the meta-discourse where judicial voices take a more critical stance with respect to law. These moments expose the myth of law's autonomous objectivity, and demonstrate its receptiveness to other social discourses.

### *Ewanchuk: Faithful Adherence to the Common Law*

The majority reasons in *Ewanchuk* exemplify the judicial tendency to affirm law's objective authority while downplaying the relevance of underlying subjective accounts. Throughout the decision, Justice Major's focus lies squarely on articulating the correct legal doctrine for sexual assault, without concern for the experiences that inform it. Despite the clear effect of recent feminist-influenced reforms, he roots this doctrine not in feminist discourse but in the much older traditions of the English common law, explaining the underlying rationale for the offence of sexual assault as follows:<sup>253</sup>

The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120

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<sup>253</sup> *Ewanchuk*, *supra* note 134 at para 28.

Although this passage supports a law that purports to enhance women's sexual autonomy, Justice Major's explanation is de-gendered, de-sexualized, and lacking any mention of subjective (not to mention affective) experience. Ironically, the only gendered reference speaks to the rights of "man," and comes from the citation of a legal treatise written at a time when women were excluded from the realm of legal subjectivity altogether.

Justice Major takes a similar approach in his characterization of the particular *Criminal Code* provisions on sexual assault that were enacted in 1983 and 1992, ignoring the social and political context that led to their implementation. For instance, he refers to the consent-vitiating factors enumerated in s 265(3) as codifying "the longstanding common law rule that consent given under fear and duress is ineffective."<sup>254</sup> He goes on to characterize the definition of consent added to the *Criminal Code* in 1992 (s 273.1(1)), as "consistent with the common law," which he describes as requiring the affirmative communication of consent.<sup>255</sup> The suggestion that this has always been the case, and the minimization of the legislated definition's substantive effect, is intriguing given that an affirmative consent standard was not invoked or applied in the SCC jurisprudence prior to *Park* in 1995 (and even then only by Justice L'Heureux-Dubé).<sup>256</sup> Also intriguing is Justice Major's appeal to "common sense" in finding that once a person has said "no," consent must be clearly re-established prior to the initiation of further sexual contact.<sup>257</sup> It was "common sense," after all, that led the lower courts to the opposite conclusion.

Overall, the tone of Justice Major's decision suggests a faithful adherence to the common law as an institution that has and continues to provide fair and objective evaluations of sexual assault cases. Feminist insights derived from women's experience are folded seamlessly into the

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<sup>254</sup> *Ibid* at para 36.

<sup>255</sup> *Ibid* at para 47.

<sup>256</sup> See note 197.

<sup>257</sup> *Ewanchuk*, *supra* note 134 at para 52.

broader story of law as a source of truth and justice, obscuring law's past failure to take these insights seriously.

The decision concludes as follows:<sup>258</sup>

Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise but are of profound importance to the community's sense of safety and justice. The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.

This ending note demonstrates the conscious projection of a “neutral” stance characteristic of legal liberalism. Thus, while the majority decision importantly rejects Justice McClung's (and the trial judge's) reliance on sexist assumptions, it nevertheless upholds his claim to apolitical judicial objectivity.<sup>259</sup> As feminist legal scholar Hester Lessard observes, although Justice Major does not condone the lower courts' stereotypical reasoning, he maintains the fiction that courts as an institution are engaged in “the impartial application of neutral legal rules and doctrines which are definitionally separate from social and political relations,” and thereby “preserves the structures and interpretive spaces which those stereotypes have typically inhabited.”<sup>260</sup> By focusing on the lower courts' legal errors while “politely overlook[ing]” the rape myths that gave rise to them,<sup>261</sup> his decision perpetuates the notion that the legal system works as it should—it works to correct occasional mistakes, to foster liberal ideals, and to ensure that justice prevails at the end of the day. This affirmation of the “liberal story”<sup>262</sup> of law ignores the law's innate

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<sup>258</sup> *Ibid* at para 66.

<sup>259</sup> Justice McClung, for example, stated in his decision: “In the search for proof of guilt, sloganeering such as ‘No means No!’, ‘Zero Tolerance!’, and ‘Take back the night!’ which, while they marshall desired social ideals, are no safe substitute for the orderly and objective judicial application of Canada's criminal statutes.” *Ewanchuk, CA, supra* note 217 at para 12.

<sup>260</sup> Hester Lessard, “Farce or Tragedy?: Judicial Backlash and Justice McClung” (1999) 10:3 *Constitutional Forum / Forum constitutionnel* 65 at 71.

<sup>261</sup> *Ibid* at 68.

<sup>262</sup> Heath & Naffine, *supra* note 27 at 31.

tendency to privilege some experiential accounts over others, and the dangers this presents for currently marginalized narratives.

*JA: Deference to Parliament*

While Justice Major upholds the objective authority of the common law, the majority in *JA* places its faith in the legislative process. In this way, Chief Justice McLachlin also bolsters law's ultimate authority, though she comes closer to recognizing its experiential roots. On the one hand, Chief Justice McLachlin offers a number of policy reasons against allowing advance consent to sexuality activity while unconscious that are clearly rooted in feminist insights derived from experience. For instance, she notes that allowing advance consent leaves the unconscious partner vulnerable to exploitation,<sup>263</sup> that the sleeping spouse argument is premised upon a problematic relationship-based distinction that has been explicitly rejected in sexual assault law,<sup>264</sup> and that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant."<sup>265</sup> Finally, she points out that even though it "may seem unrealistic" at times, the concept of ongoing, conscious consent established in Canadian law "has proved of great value in combating the stereotypes that historically have surrounded consent to sexual relations and undermined the law's ability to address the crime of sexual assault."<sup>266</sup> Through these remarks, and the latter comment in particular, Chief Justice McLachlin depicts the current law of sexual assault as having developed in response to very pragmatic concerns arising from women's experience.

And yet, Chief Justice McLachlin avoids making any reference to gender equality (let

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<sup>263</sup> *JA*, *supra* note 135 at paras 60-61.

<sup>264</sup> *Ibid* at para 64.

<sup>265</sup> *Ibid* at para 63. The juxtaposition of "mild" and "profound" here suggests continued ambivalence regarding the relevance of subjective experiences of sexual assault to their objective definition. I am indebted to Sonia Lawrence for facilitating this insight.

<sup>266</sup> *Ibid* at para 65.

alone feminism), preferring instead to emphasize judicial deference to Parliament as the impetus for her decision. Throughout her reasons, she repeatedly ascribes responsibility to Parliament for implementing the robust concept of consent she describes. Most telling are the closing words of her decision, where she finds that it would be “inappropriate for this Court to carve out exceptions when they undermine Parliament’s choice. In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.”<sup>267</sup> As Gotell observes, this decision is “caught up in a rhetoric of judicial deference.”<sup>268</sup> Not unlike Justice Major’s decision in *Ewanchuk*, it “simultaneously incorporates feminist insights regarding sexual autonomy and choice, while disavowing any identification with feminism and its systemic critical analysis.”<sup>269</sup> Although Chief Justice McLachlin validates insights derived from women’s subjective experience, she buries the source of those insights, focusing instead on law’s abstract authority.

### *A Critical Rupture*

In one sense, it seems inevitable that judicial discourse will shore up the law. No matter what they say, judges speak in law’s name and thereby affirm its authority. Similarly, the power of judges to assess the credibility of witnesses arises from the structure of the trial process itself. At the level of meta-discourse, however, judges depict the law in different ways. Often, they uphold law’s narrative of objective authority over experience, as the above examples demonstrate. However, they may also choose to challenge this narrative as a façade, exposing the

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<sup>267</sup> *Ibid* at para 65.

<sup>268</sup> Gotell, *Governing Heterosexuality*, *supra* note 38 at 383.

<sup>269</sup> *Ibid*.

subjective experiential accounts that lie underneath. Justice L'Heureux-Dubé's concurrence in *Ewanchuk* realizes this critical possibility.<sup>270</sup>

Justice L'Heureux-Dubé's reasons, although generally in agreement with the majority, reflect a fundamentally different approach. In contrast to Justice Major's legalistic introduction, Justice L'Heureux-Dubé opens with statistics demonstrating the pervasiveness of violence against women. For her, this case is not primarily about articulating the correct legal doctrine (which may or may not incorporate feminist experiential insights); it is about the appropriate legal response to a pressing social problem that is illustrated by widespread experience. Unlike the majority, Justice L'Heureux-Dubé does not hesitate to attribute this problem to gender inequality. As she rightfully emphasizes, sexual violence is not only a violation of human dignity and human rights, but of women's *Charter*-protected right to equality.<sup>271</sup> Law, moreover, is not a neutral arbiter, seamlessly carrying forward the wisdom of the past; it is a reflection of dominant social mores, and a dynamic site of political contestation.

Justice L'Heureux-Dubé's extensive description of international legal efforts to eradicate gender discrimination underscores this view. For instance, she cites several passages from the *Convention on the Elimination of All Forms of Discrimination against Women* ("*Convention*"),<sup>272</sup> placing particular emphasis on the call for State Parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>273</sup> For Justice L'Heureux-Dubé, Canada's international commitments form an important background to the

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<sup>270</sup> As mentioned in **Part I: Overview of Reforms**, her dissent in *Seaboyer* takes a similar tone. Indeed, Justice L'Heureux-Dubé was well-known for her critical dissents.

<sup>271</sup> *Ewanchuk*, *supra* note 134 at para 69.

<sup>272</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 17 July 1980, Can TS 1982 No 31 (entered into force on 3 Sept 1981).

<sup>273</sup> *Ibid*, art 2(f), cited in *Ewanchuk*, *supra* note 134 at para 70.

*Criminal Code* amendments implemented domestically in 1983 and 1992.<sup>274</sup> In contrast to Justice Major’s portrayal of the amendments as merely codifying the well-established tenets of the common law, Justice L’Heureux-Dubé frames them as actively intervening to disrupt this tradition by eradicating the gender discrimination *already present* in Canadian (and other) legal institutions. Far from fair and objective, she presents Canadian law as a site and source of entrenched social inequality. As noted in her citation of Renner et al:<sup>275</sup>

[T]he law and legal doctrines concerning sexual assault have acted as the principle [*sic*] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and gender-blind is not defensible.

In contrast to Justice Major’s reasons, which distance the law from social, cultural and political norms, Justice L’Heureux-Dubé shows how they are intimately connected. The linkage is evident in the above-cited *Convention* passage, which groups formal “laws” and informal “customs and practices” as part of the same continuum. In this way, Justice L’Heureux-Dubé connects the legal errors made by the lower courts in *Ewanchuk* to the sexist social norms that caused them. She demonstrates that what judges such as Justice McClung take to be objective, “common sense” standards for sexual behavior are in fact grounded in culturally pervasive beliefs that fundamentally denigrate women. In her words: “This case is not about consent, since none was given. It is about myths and stereotypes.”<sup>276</sup>

While strongly critiquing law’s perpetuation of discriminatory norms, Justice L’Heureux-Dubé also draws upon the law’s power to eradicate them, and thereby joins Justice Major in bolstering law’s authority. Unlike him, however, she offers a vision of law as dynamic—as

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<sup>274</sup> *Ewanchuk*, *supra* note 134 at para 74.

<sup>275</sup> KE Renner, C Alksnis and L Park “The Standard of Social Justice as a Research Process” (1997) 38:2 *Can Psychology* 91 at 100, cited in *Ewanchuk*, *supra* note 134 at para 96 (emphasis added by Justice L’Heureux Dubé).

<sup>276</sup> *Ewanchuk*, *supra* note 134 at para 82.

something that changes, and that must change, in response to knowledge gleaned from experience. She states:<sup>277</sup>

The *Code* was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.

Justice L'Heureux Dubé is concerned about ignoring the law, but it is not her first or only concern. For her, the current law is worth upholding not merely by virtue of being law, but because it better accounts for women's experience. Moreover, by explicitly acknowledging that the law of the past was problematic, Justice L'Heureux Dubé leaves room for the possibility that the current law may also be in need of major revisions in light of other experiential accounts.

While both Justice Major's majority and Justice L'Heureux Dubé's concurrence in *Ewanchuk* uphold the legislative reforms to the law of sexual assault, they do so in significantly different ways. What makes Justice L'Heureux-Dubé so unique is her willingness to make the feminist roots of the new law explicit—as shown by the many references to feminist legal scholars in her reasons. In this way, she refuses to maintain the purported dichotomy between objective legal discourse and subjective experiential accounts. As a consequence of her reasons in *Ewanchuk*, Justice L'Heureux-Dubé was accused of harbouring political bias by a number of public commentators, lawyers, and even judicial colleagues (most notably Justice McClung), who displayed strong resistance to the new sexual script that was ultimately vindicated in *Ewanchuk*.<sup>278</sup> It must be remembered, however, that the Court actually acted unanimously to uphold the new laws. Justice L'Heureux-Dubé simply denied the myth that these laws were

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<sup>277</sup> *Ibid* at para 95.

<sup>278</sup> Wright, *supra* note 193.



rooted in a refined understanding of objective truth, rather than a specific political discourse derived from subjective experience.

### **Discourse: Power Struggles and the Shifting Meaning of Consent**

In *Ewanchuk*, we see how law “constitutes a kind of institutionalized and formalized site of power struggles.”<sup>279</sup> As alternative accounts of sexual experience gain social traction, norms that were once an accepted part of legal reasoning become prohibited “myths and stereotypes.” Despite the formal abolition of such norms through statutory reforms, however, they continue to appear in legal reasoning many years after the fact (and still do, especially at the trial court level)<sup>280</sup>. As Victoria Nourse observes: “Old norms do not die; they are resurrected in empty spaces, deliberate ambiguities, and new rhetorics.”<sup>281</sup> Newly sanctioned norms must therefore be continually reasserted against traditionally dominant ones in a struggle of discourses.

The concurrence of then Justice McLachlin in *Ewanchuk* offers some interesting food for thought in this regard. In her very brief reasons, Justice McLachlin expresses her agreement with Justice Major but also with Justice L’Heureux Dubé. In particular, she explicitly rejects the sexist norms invoked by the lower courts, culminating in the following remark: “Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law.”<sup>282</sup> This statement is notably ambiguous. Is Justice McLachlin simply reiterating that the stereotypical assumptions in question have already been abolished in law, or is she actively abolishing them through her own present words? If law is conceived as a process of discursive struggle, perhaps the answer is both.

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<sup>279</sup> Smart, *supra* note 3 at 138.

<sup>280</sup> Busby, *supra* note 33 at 331 (on the ongoing operation of rape myths in spousal sexual assault cases); Susan Ehrlich, “Perpetuating—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).

<sup>281</sup> Victoria Nourse, “The Normal Success and Failures of Feminism and the Criminal Law” (1999) 75 *Chi-Kent L Rev* 951 at 952.

<sup>282</sup> *Ewanchuk*, *supra* note 134 at para 103.

Just like Justice McLachlin, Justice L'Heureux-Dubé affirms the new norms of feminist-influenced sexual assault law via discursive repetition, but on a much broader scale. Her discussion of “myths and stereotypes” does not start in *Ewanchuk*: she establishes this discourse many years prior, leaving a trail of precedents from *Seaboyer*, to *Osolin*, to *Park*, which she then cites in *Ewanchuk*.<sup>283</sup> She also makes sure to cite her judicial colleagues whenever they use similar language, thereby further legitimizing the place of this new discourse in law.<sup>284</sup>

Law, then, does not operate as a constant and uniform authority over experience, but rather as a dynamic process wherein different social discourses vie for dominance. We can see how this competition between discourses plays out at the micro level by examining the shifting meaning of consent within *Ewanchuk* and *JA*. As Jennifer Nedelsky observes, “[t]he way consent is defined will inevitably shape whose story the law validates, and thus whom the law protects.”<sup>285</sup> Here, the cases reveal how traditionally dominant norms of sexual assault that marginalize women’s experiences re-emerge in recent judicial discourse through a separation of legal and factual consent. While some justices draw out this distinction, others preserve a single meaning of consent as the complainant’s subjective experience. In this way, the discursive struggle between traditional and newly sanctioned norms within the case law connects back to different views of law’s relationship to experience, or “fact.”

#### *Ewanchuk: “Ostensible Consent”*

In *Ewanchuk*, the majority of the Court of Appeal tries to shield the traditional seduction script from the scrutiny of reformed laws by framing the trial judge’s determination of “implied

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<sup>283</sup> *Ewanchuk*, *supra* note 134 at paras 68, 75, 82, 94-95, citing: *Seaboyer*, *supra* note 205; *Osolin*, *supra* note 184; *Park*, *supra* note 152.

<sup>284</sup> *Ewanchuk*, *supra* note 134 at paras 69, 75, 94.

<sup>285</sup> Nedelsky, *supra* note 34 at 219.

consent” as a finding of fact. The majority’s interpretation of consent “in fact” casts the reformed legal meaning of consent—whereby the complainant’s subjective experience of agreement takes priority over patriarchal interpretations of her behaviour—as at odds with reality. By denying the trial judge’s understanding of consent as a reversible error of law, the SCC reasserts the authority of the reformed meaning of consent, but does not necessarily dispel the notion that it stands in opposition to a more common sense meaning.

In fact, Justice Major perpetuates that notion. In assessing the effect of the complainant’s fear, for instance, he explicitly separates the legal meaning of consent—the complainant’s subjective experience—from its factual meaning, whereby the old norms of sexual assault are retained. Consider, for instance, the following passage:<sup>286</sup>

...even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. The *Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant’s ostensible consent or participation.

Here Justice Major posits two separate meanings for consent: one referring to the complainant’s actual or “ostensible” agreement, the other to the legal effect of that agreement. Where, though, does this first conception of consent come from? How can the complainant said to be “ostensibl[y] consenting” when she is not consenting according to her own subjective experience, which is the legal standard for consent? The answer is that she is thought to be consenting according to prevailing social norms—the very norms that the lower courts rely upon to find that she consented in fact. In Justice Major’s formulation, however, the newly reformed legal meaning of consent trumps the common sense factual meaning by “deem[ing] an absence of consent.” This move rejects rape myths, but does so by upholding the law’s authority, rather than the authority of the complainant’s experiential account.

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<sup>286</sup> *Ewanchuk*, *supra* note 134 at para 36.

Justice Major repeats this operation a few paragraphs later: “If a complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent.”<sup>287</sup> Arguably, the whole point of the law’s denial of consent in this circumstance is to validate the complainant’s subjective experience of non-willingness. And yet, she is portrayed as “agreeing,” only to be saved by a law that renders her agreement void. This semantic move may seem trifling, however it reflects Alcoff and Gray’s concern about the potential for survivor narratives to be recuperated by dominant discourses. They write: “We need to [...] create spaces where survivors are authorized to be both witnesses and experts, both reporters of experience and theorists of experience.”<sup>288</sup> By referring to law as interpreting the complainant’s experience, rather than affirming her own account of it, Justice Major closes that space.

Justice L’Heureux-Dubé, on the other hand, avoids depicting legal consent as a trump on factual consent. With respect to the complainant’s fear, she states: “The trial judge gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her.”<sup>289</sup> By using the word “submitted,” Justice L’Heureux-Dubé avoids stating that the complainant consented in fact and thereby preserves a single meaning of consent. Justice L’Heureux-Dubé reiterates this wording again while raising a challenge to Justice Major’s assessment of the fear issue.<sup>290</sup>

...in my view, Major J. unduly restricts the application of s. 265(3) to instances where the complainant chooses “to participate in, or ostensibly consent to, the touching in question” [...] Section 265(3) applies to cases where the “complainant submits or does not resist” (emphasis added) by reason of the application of force, threats or fear of the application of force, fraud or the

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<sup>287</sup> *Ibid* at para 39.

<sup>288</sup> Alcoff & Gray, *supra* note 6 at 282.

<sup>289</sup> *Ewanchuk*, *supra* note 134 at para 84.

<sup>290</sup> *Ibid* at para 86.

exercise of authority. Therefore, that section should also apply to cases where the complainant is silent or passive in response to such situations.

Rather than describing s 265(3) as vitiating the complainant's factual consent, Justice L'Heureux-Dubé portrays the provision as recognizing that consent does not happen in circumstances of fear.<sup>291</sup>

*JA: Legal "Nullification" of Consent in Fact*

A similar tension between emphasizing and dissolving the law/fact distinction with respect to consent appears in *JA*, this time reflected in the differing interpretations of Chief Justice McLachlin's majority reasons and Justice Fish's dissent. By framing the question at issue as "whether an unconscious person can qualify as consenting under Parliament's definition", Chief Justice McLachlin posits a single meaning of consent in both law and fact.<sup>292</sup> Moreover, she ties the definition of consent to the complainant's actual experience of agreement: "[T]he absence of consent is established if the complainant was not experiencing the state of mind of consent while the sexual activity was occurring."<sup>293</sup> Because it is impossible to be actually experiencing (or communicating) a sense of agreement while unconscious, there can be no consent to sexual activity at this point, she reasons.<sup>294</sup> In addition to foregrounding the complainant's subjective experience, Chief Justice McLachlin links her interpretation of consent to broader concerns about sexual exploitation, which in turn stem from feminist insights derived from women's experiences (though she does not make the feminist source of her concerns explicit).<sup>295</sup>

While Chief Justice McLachlin fuses the legal and factual meaning of consent as both

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<sup>291</sup> The dissent in *Hutchinson*, *supra* note 180, applies a similar logic with respect to fraud.

<sup>292</sup> *JA*, *supra* note 135 at para 33.

<sup>293</sup> *Ibid* at para 45.

<sup>294</sup> *Ibid* at paras 44-48.

<sup>295</sup> *Ibid* at paras 60-65.

pointing to subjective experience, Justice Fish (speaking for the dissent) separates them. For him, the question is not whether there was true consent, but whether “KD’s consent in fact was not a valid consent in law”,<sup>296</sup> or, more generally, “whether unconsciousness *alone* is sufficient to nullify consent.”<sup>297</sup> Rather than considering whether KD’s prior agreement to sexual activities accords with the actual meaning of consent, Justice Fish’s reasons are premised on the understanding that consent was clearly and freely given by KD at a particular point in time. A finding of non-consent in the circumstances is thereby framed as a policy-based exception at odds with the uncontroverted “facts” of the case.

In her critique of the dissent in *JA*, Gotell argues that “[p]lacing emphasis on the moment of ‘agreement/acquiescence’ in a sexual transaction allows for the excision of context, including constraints on this complainant’s agency.”<sup>298</sup> In this way, Justice Fish’s notion of factual consent may fail to account for the complainant’s subjective experience of willingness. Even accepting a transactional model of consent, however, the “fact” of KD’s “yes,” is heavily constructed by the case itself.<sup>299</sup> The evidence on consent as recorded by the trial decision does not actually indicate that KD affirmatively agreed to, or even turned her mind to the act of anal penetration at any time before it occurred. Indeed, the trial judge found that she had not consented to the anal penetration. The majority of the Court of Appeal reversed this decision because, in their view, the Crown had not shown beyond a reasonable doubt that KD did not consent to the anal penetration. Due to the nature of the appeal, this finding was not in issue at the SCC. Such a record hardly demonstrates that KD said “yes in fact,” a premise that Justice Fish repeatedly

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<sup>296</sup> *Ibid* at para 108.

<sup>297</sup> *Ibid* at para 131.

<sup>298</sup> Gotell, *Governing Heterosexuality*, *supra* note 38 at 369.

<sup>299</sup> Gotell also makes this observation (*ibid* at 378). For an excellent account of how the legal process can operate to reconstruct the facts of a sexual assault case, using the example of a 2004 American rape case, see Susan Ehrlich, “Text Trajectories, Legal Discourse and Gendered Inequalities” (2012) 3:1 *Applied Linguistics Review* 47.

relies upon.

From what I have said so far, the majority in *JA* appears to better account for the subjective experience of the complainant than the dissent. On another reading, however, the dissent actually listens to KD in a way that the majority does not, by allowing her to interpret her own experience of consent. Whatever happened on the night in question, KD herself testified that the experience was consensual.<sup>300</sup> As Justice Fish emphasizes, “[h]er subjective consent *was established through her own testimony.*”<sup>301</sup> By imposing a different interpretation of consent upon her, the majority treats her as a mere reporter of experience rather than a theorist, just as Justice Major did in *Ewanchuk*. In the majority’s view, KD’s testimony provides the raw data of experience that the law must then interpret to determine if there was consent, regardless of what the complainant herself believes. The dissent, on the other hand, takes her assertion of consent at face value.

Some have argued that the dissent’s approach ignores the broader context in which KD says she consented. As both Gotell and Karen Busby note, the accused in this case had a significant history of convictions for domestic violence, such that the sentencing judge cast KD as a battered woman.<sup>302</sup> The trial judge, moreover, characterized the defence’s cross-examination of KD as “a typical cross-examination of a recanting complainant in a domestic matter.”<sup>303</sup> These observations importantly seek to account for the well-documented experiences of women in abusive relationships—namely, the challenges they face in standing up to their partners.<sup>304</sup> Yet such theories, while grounded in feminist concerns, may also operate in ways

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<sup>300</sup> It should be noted that KD did have some credibility problems that led the trial judge to disbelieve some aspects of her testimony. My analysis here, however, focuses on how her testimony was treated even on the assumption that it was truthful.

<sup>301</sup> *JA*, *supra* note 135 at para 127 (emphasis in original).

<sup>302</sup> Gotell, *Governing Heterosexuality*, *supra* note 38 at 370-371, 386; Busby, *supra* note 33 at paras 336-337.

<sup>303</sup> *JA*, Prov Ct, *supra* note 239 at para 8.

<sup>304</sup> See Lenore E Walker, *The Battered Woman Syndrome* (New York: Springer Publishing Company, 2000).

that pathologize, stereotype, and disempower women.<sup>305</sup> As Ummni Khan points out in her analysis of the *JA* case, “the profile of the battered woman is also premised on the notion that women lie.”<sup>306</sup> Consequently, interpreting KD’s testimony in light of a “battered woman” theory may not only discredit her own account, but also perpetuate stereotypes that discount women’s voices generally. Hence the dissent’s insistence that sexual autonomy includes women’s right to say both “no” and “yes.”<sup>307</sup>

The different readings of *JA* I have just offered reveal an important tension between validating experiential narratives at the level of the individual complainant versus at the level of more generalized feminist insights. In *JA*, the majority affirms observations about the contextual constraints on consent that are broadly grounded in women’s experiences, but ignores the complainant’s own account of *her* experience. This shows how the consolidation of experiential narratives into legal norms incurs the inevitable cost of excluding other stories that do not fit the newly sanctioned norms, however progressive they may be.

## Chapter Summary

In this chapter, I have attempted to illustrate how law is constituted by competing accounts of experience. In the context of sexual assault, feminist insights derived from women’s experiential narratives have worked their way into legal norms through law reform efforts, but must still struggle against traditional understandings of sexual assault that marginalize women’s experiences. Moreover, the grounding of these norms in subjective experience is often eclipsed by law’s claim to authority through objectivity. Nevertheless, there are moments in the legal

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<sup>305</sup> Elizabeth M Schneider, *Battered Women and Feminist Lawmaking* (Harrisonburg: Yale University Press, 2008); Elizabeth A Sheehy, Julie Stubbs & Julia Tolmie, “Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations” (1992) 16:6 Criminal Law Review 387.

<sup>306</sup> Khan, *supra* note 14 at 262.

<sup>307</sup> *JA*, *supra* note 135 at para 114.



discourse where the imprint of subjective experiential accounts becomes visible. The shifting meaning of consent in *Ewanchuk* and *JA* serves to illustrate the struggle between traditional and reformed conceptions of sexual assault within judicial discourse, and to show how the perceived relationship between law and experience plays into that struggle. In the next two chapters, I draw on these insights to show how the survivor narratives publicized in the wake of the Ghomeshi story may influence legal discourse, even as they are shaped by it in powerful ways.

## CHAPTER THREE: THE SURVIVOR MEDIA DISCOURSE

In Chapter Two, I reviewed and examined Canadian legal discourse on sexual assault from the time of the 1983 *Criminal Code* reforms onwards. In addition to an overarching review of the legislation and case law during this period, I offered a detailed discursive analysis of two particularly salient cases. In Chapter Three, I switch focus from the recent legal discourse on sexual assault to the survivor discourse surrounding the 2014 Jian Ghomeshi story, as represented in mainstream news media coverage. My research comprises print and web news articles, as well as TV and radio segments posted or archived on news websites, that mention Ghomeshi, and were publicized within three months of the day the Ghomeshi story broke (October 27, 2014). I focus specifically on coverage from four sources: CBC, Toronto Star, The Globe and Mail, and National Post. I chose to include both of Canada's national newspapers and the CBC in order to reflect the national character of the discourse at issue and to cover different political perspectives. I included the Toronto Star because of its connection to the Ghomeshi story—Star journalists broke the story and offered the most detailed coverage—and because it has the highest readership in Canada.

After giving a brief overview of events in the Ghomeshi story as reported by the above news outlets, I go on to examine the media discourse surrounding the story, with a focus on survivor narratives. I look at the accounts of both those involved directly with Ghomeshi, and those who came forward in the wake of the story with their own experiences of sexual violence. My main interest lies in accounts of sexual assault, however I also include incidents labeled in the media as “sexual harassment” or “abuse,” both because they often involve non-consensual touching that could fall under the legal definition of sexual assault, and because they are tied together within the media discourse as part of a broader dialogue about sexual violence. While

there were some men who spoke out about their experiences, women made up the vast majority of survivors in the media discourse. In my analysis, I focus on women's accounts of sexual violence so as to capture the specifically gendered dimension of the discourse, which was often cast as a conversation about violence against women.

I frame this project around the Ghomeshi case for a number of reasons: it defines a particular, limited set of survivor narratives that would otherwise be difficult to scope; highlights the timeliness of the issue; and offers a hook to readers who are familiar with the story, which made national headlines for months. However, the particular circumstances of the case may also distract readers from the broader themes I wish to discuss. While fascinating, my primary interest is not Ghomeshi himself, or even the people and institutions surrounding him, but rather the wave of survivor discourse that arose in the wake of his story. Admittedly, a significant part of that discourse came from people who had been involved with Ghomeshi; I look at their stories, though, not as stories about Ghomeshi *per se*, but about sexual violence. That said, I obviously cannot excise these accounts from their context in the world of professional Canadian (and particularly Torontonians) media, a factor that limits the representativeness of my findings. Moreover, I must acknowledge that Ghomeshi and his survivors garnered media attention at the expense of others who may have had even more important stories to tell about sexual violence. I would suggest, though, that the Ghomeshi case serves as an interesting point of reference precisely because it generated such an intense, protracted and widespread public response.

Looking only at experiential accounts published (or broadcast) via formal news media presents another methodological difficulty. The national conversation about sexual violence that was invigorated by Ghomeshi did not just take place in news media; it happened in blogs and social media sites, at sexual assault centres and counseling offices, and around water coolers and

kitchen tables. The accounts submitted and selected for publication in the news outlets I have chosen represent a small and carefully edited fraction of what was said.<sup>308</sup> Moreover, to the extent that all media institutions carry inherent biases, these stories promise to reflect them. The published stories also likely represent a relatively privileged echelon of survivors. Indeed, many of the survivor stories in the media, especially those with names attached, came from people in positions of relative power and privilege—such as Air Force Captain and actor Lucy DeCoutere, lawyer and author Reva Seth, and, in a prominent story not involving Ghomeshi, former politician Sheila Copps. It is worth noting that these women are all able-bodied, heterosexual, cis-gendered, and well-established in high-earning careers. Other survivors featured in news stories were less high profile than the above individuals but exhibited many of the same characteristics of privilege. Undoubtedly, their social position facilitated their ability to come forward publicly, both by increasing their access to news media platforms and decreasing their vulnerability to various forms of stigmatization attendant upon disclosing a sexual assault.<sup>309</sup>

Again, though, I think it is worthwhile to examine these narratives for the very reason that they were so widely circulated, whatever the exclusions that resulted. The broad readership of the news outlets I have chosen to examine makes them a powerful public influence and a

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<sup>308</sup> Although heavily edited, I nevertheless refer to these accounts as “narratives” because they do offer significant pieces of the stories of survivors in their own words.

<sup>309</sup> DeCoutere and Seth both readily acknowledged this, describing a sense of responsibility to come forward due to the relatively minor impacts such a public revelation would have for them. Said DeCoutere: “My story [...] it’s a little upsetting but it’s not traumatic. I wasn’t terribly hurt by him, and if the women who are talking about this won’t come forward with their names, they’re obviously feeling like they’ll be targeted in some way and that their lives will be impacted negatively.” Interview of Lucy DeCoutere by Anna Maria Tremonti (30 Oct 2014) on *The Current*, CBC Radio, “Lucy DeCoutere speaks out about Jian Ghomeshi: ‘From smooching to smacking... there was no build up’”, CBC Player, online: <[www.cbc.ca/radio/thecurrent/lucy-decoutere-james-risen-and-brenda-hardiman-1.2907307/lucy-decoutere-speaks-out-about-jian-ghomeshi-from-smooching-to-smacking-there-was-no-build-up-1.2907316](http://www.cbc.ca/radio/thecurrent/lucy-decoutere-james-risen-and-brenda-hardiman-1.2907307/lucy-decoutere-speaks-out-about-jian-ghomeshi-from-smooching-to-smacking-there-was-no-build-up-1.2907316)> [DeCoutere interview by Tremonti]. Seth conveyed a similar sentiment, noting the relative immunity afforded to her by her personal and professional life: “I feel that while it is exceedingly difficult to publicly put your name forward and open yourself up to all of the accompanying criticism, if you are in the position that you can do so without fearing the ramifications in terms of your family, marriage, personal or professional trauma, then you should do it.” Reva Seth, “Why I Can’t Remain Silent About What Jian Did to Me”, *Huffington Post Canada* (30 Oct 2014) online: <[www.huffingtonpost.ca/reva-seth/reva-seth-jian-ghomeshi\\_b\\_6077296.html](http://www.huffingtonpost.ca/reva-seth/reva-seth-jian-ghomeshi_b_6077296.html)> [Seth, Oct 30].

useful if imperfect window on public discourse. The decision to focus on mainstream news media is also admittedly pragmatic. Unlike private conversations and social media accounts, news stories are readily accessible the public. Moreover, they do not raise the sampling and scoping problems that would undoubtedly result from trying to incorporate a broader range of sources, allowing me to do a more focused qualitative analysis.

## Part I: The Ghomeshi Story

Let me begin by offering a brief chronology of events.<sup>310</sup> On October 26, 2014, the CBC fired Jian Ghomeshi, the charismatic star of the popular radio show *Q*. A slew of allegations of sexual assault and harassment published in the media shortly thereafter decimated Ghomeshi's reputation, paved the way for multiple criminal charges against him, and started a "national conversation" about sexual violence.

On the day he was fired, after threatening to sue his former employer (the lawsuit was filed the next day but later withdrawn)<sup>311</sup>, Ghomeshi published a detailed Facebook post claiming that he had been unjustly terminated due to "unsavoury" but consensual sexual activities in his private life, which he likened to "forms of BDSM." He attributed his termination to "a campaign of false allegations pursued by a jilted ex girlfriend and a freelance writer," and proclaimed that "[s]exual preferences are a human right."<sup>312</sup>

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<sup>310</sup> For a useful overview, see Erika Tucker, "Timeline: Jian Ghomeshi charged in sex assault scandal", *Global News* (3 Dec 2014, updated 12 May 2015) online: <[globalnews.ca/news/1647091/timeline-sex-assault-allegations-arise-after-cbc-fires-jian-ghomeshi/](http://globalnews.ca/news/1647091/timeline-sex-assault-allegations-arise-after-cbc-fires-jian-ghomeshi/)>.

<sup>311</sup> Alysha Hasham, "Jian Ghomeshi files \$55M lawsuit against CBC", *Toronto Star* (27 Oct 2014) online: <[www.thestar.com/news/gta/2014/10/27/jian\\_ghomeshi\\_files\\_55m\\_lawsuit\\_against\\_cbc.html](http://www.thestar.com/news/gta/2014/10/27/jian_ghomeshi_files_55m_lawsuit_against_cbc.html)>; Kevin Donovan, "Jian Ghomeshi drops \$55M CBC lawsuit", *Toronto Star* (25 Nov 2014) online: <[www.thestar.com/news/gta/2014/11/25/ghomeshi\\_drops\\_55m\\_cbc\\_lawsuit.html](http://www.thestar.com/news/gta/2014/11/25/ghomeshi_drops_55m_cbc_lawsuit.html)>.

<sup>312</sup> "Jian Ghomeshi's full Facebook post: 'a campaign of false allegations' at fault", *Toronto Star* (27 Oct 2014) online: <[www.thestar.com/news/gta/2014/10/27/jian\\_ghomeshis\\_full\\_facebook\\_post\\_a\\_campaign\\_of\\_false\\_allegations\\_at\\_fault.html](http://www.thestar.com/news/gta/2014/10/27/jian_ghomeshis_full_facebook_post_a_campaign_of_false_allegations_at_fault.html)>.

That evening, the Toronto Star went public with allegations of sexual assault made anonymously by three women, who said that Ghomeshi had non-consensually hit them, bit them, choked them, obstructed their breathing, and verbally abused them in the course of sexual encounters.<sup>313</sup> Their stories suggested a pattern of manipulative behaviour whereby Ghomeshi would charm a woman, falsely reassure her that his enthusiasm for rough sex was mere fantasy and would not be enacted non-consensually, and then gaslight<sup>314</sup> her following an instance of assault. The Star article also presented allegations of sexual harassment from a former colleague of Ghomeshi's at CBC, who later revealed herself to be Kathryn Borel.<sup>315</sup> None of the women had filed complaints with the police, nor did they wish to identify themselves publicly, citing fears of retaliation, online abuse, and negative career impacts.

Many more survivors came forward in the days and weeks to follow. On October 29, the Star published another story that presented allegations against Ghomeshi from a total of eight women (including the four from the paper's initial story).<sup>316</sup> This time, one of the women identified herself as Canadian Air Force Captain and *Trailer Park Boys* actor Lucy DeCoutere. The following morning, DeCoutere was interviewed by CBC host Anna Maria Tremonti on *The Current*;<sup>317</sup> that afternoon, lawyer and author Reva Seth shared her story of sexual assault via the Huffington Post, bringing Ghomeshi's total number of accusers to nine.<sup>318</sup> One of the

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<sup>313</sup> Kevin Donovan & Jesse Brown, "CBC fires Jian Ghomeshi over sex allegations", *Toronto Star* (26 Oct 2014) online: <[www.thestar.com/news/canada/2014/10/26/cbc\\_fires\\_jian\\_ghomeshi\\_over\\_sex\\_allegations.html](http://www.thestar.com/news/canada/2014/10/26/cbc_fires_jian_ghomeshi_over_sex_allegations.html)> [Donovan & Brown, Oct 26].

<sup>314</sup> Gaslighting refers to a form of psychological manipulation whereby victims are made to doubt their recollection or perception of abuse. The term was coined by the 1938 play *Gas Light* by Patrick Hamilton and subsequent film adaptations.

<sup>315</sup> Erika Tucker, "Ex-CBC staffer Kathryn Borel identifies herself in Ghomeshi allegations", *Global News* (3 Dec 2014) online: <[globalnews.ca/news/1705732/kathryn-borel-says-shes-the-ex-staffer-ghomeshi-wanted-to-hate-f/](http://globalnews.ca/news/1705732/kathryn-borel-says-shes-the-ex-staffer-ghomeshi-wanted-to-hate-f/)>.

<sup>316</sup> Kevin Donovan & Jesse Brown, "Jian Ghomeshi: 8 women accuse former CBC host of violence, sexual abuse or harassment", *Toronto Star* (29 Oct 2014) online: <[www.thestar.com/news/gta/2014/10/29/jian\\_ghomeshi\\_8\\_women\\_accuse\\_former\\_cbc\\_host\\_of\\_violence\\_sexual\\_abuse\\_or\\_harassment.html](http://www.thestar.com/news/gta/2014/10/29/jian_ghomeshi_8_women_accuse_former_cbc_host_of_violence_sexual_abuse_or_harassment.html)> [Donovan & Brown, Oct 29].

<sup>317</sup> Decoutere interview by Tremonti, *supra* note 309.

<sup>318</sup> Seth, Oct 30, *supra* note 309.

anonymous women, who I will refer to as “B,” participated in a number of interviews broadcast by the CBC on October 29, October 30, November 3<sup>rd</sup>, and November 26<sup>th</sup>.<sup>319</sup> Another, whom I will call “C” was interviewed by the CBC on October 30.<sup>320</sup> On November 5, a man named Jim Hounslow added himself to the list of survivors, claiming that Ghomeshi had non-consensually fondled his genitals when they worked together on student council at York University.<sup>321</sup>

Ghomeshi was the subject of a Fifth Estate episode aired on November 28, which included an interview of another anonymous woman whom I will call “D”.<sup>322</sup> By that date, the Star had heard from 19 women—15 alleging abuse by Ghomeshi, two alleging sexual harassment, and two claiming they were inappropriately contacted and/or touched—as well as two men alleging non-consensual sexual touching.<sup>323</sup> The allegations dated from 2001 to 2014.<sup>324</sup> Ghomeshi’s only response came through a Facebook post on October 30, in which he stated his intention “to meet these allegations directly” and not to speak further in the media.<sup>325</sup>

Initially, none of those making allegations in the media filed a police complaint, without

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<sup>319</sup> Interview of “B” (29 Oct 2014) on *As It Happens*, CBC Radio, “Jian Ghomeshi allegedly attacked another woman more than 10 years ago”, CBC Player, online: <[www.cbc.ca/news/arts/jian-ghomeshi-allegedly-attacked-another-woman-more-than-10-years-ago-1.2817582](http://www.cbc.ca/news/arts/jian-ghomeshi-allegedly-attacked-another-woman-more-than-10-years-ago-1.2817582)> [B interview, Oct 29]; Interview of “B” (30 Oct 2014) on *The National*, CBC News, “RAW: alleged victim says Jian Ghomeshi hit her”, CBC Player, online: <<http://www.cbc.ca/player/News/ID/2579193175/>> [B interview, Oct 30]; Interview of “B” (3 Nov 2014) on *As It Happens*, CBC Radio, CBC Player, online: <[www.cbc.ca/player/Radio/As+It+Happens/ID/2585648581/](http://www.cbc.ca/player/Radio/As+It+Happens/ID/2585648581/)> [B interview, Nov 3]; Interview of “B” (26 Nov 2014) on *The National*, CBC News, “Jian Ghomeshi charged”, CBC Player, online: <[www.cbc.ca/player/News/TV%20Shows/The%20National/Canada/ID/2617361033/](http://www.cbc.ca/player/News/TV%20Shows/The%20National/Canada/ID/2617361033/)> [B interview, Nov 26].

<sup>320</sup> Interview of “C” (30 Oct 2014) on *Information Moncton Morning*, CBC Radio, Moncton, “Jian Ghomeshi allegedly beat, choked N.B. woman with belt”, CBC Player, online: <[www.cbc.ca/player/Embedded-Only/News/ID/2617315239/](http://www.cbc.ca/player/Embedded-Only/News/ID/2617315239/)> [C interview, Oct 30].

<sup>321</sup> Kevin Donovan & Alyshah Hasham, “Former York University student alleges Ghomeshi fondled him”, *Toronto Star* (4 Nov 2014) online: <[www.thestar.com/news/canada/2014/11/04/ghomeshi\\_was\\_focus\\_of\\_complaints\\_during\\_york\\_student\\_days.html](http://www.thestar.com/news/canada/2014/11/04/ghomeshi_was_focus_of_complaints_during_york_student_days.html)>

<sup>322</sup> “The Unmaking of Jian Ghomeshi”, *The Fifth Estate* (28 Nov 2014) CBC Television, CBC Player, online: <[www.cbc.ca/player/Shows/Shows/the+fifth+estate/Season+40/ID/2619940777/](http://www.cbc.ca/player/Shows/Shows/the+fifth+estate/Season+40/ID/2619940777/)> [The Unmaking].

<sup>323</sup> Kevin Donovan, “Jian Ghomeshi did not ask for consent, accusers say”, *Toronto Star* (28 Nov 2014) online: <[www.thestar.com/news/gta/2014/11/28/jian\\_ghomeshi\\_did\\_not\\_ask\\_for\\_consent\\_accusers\\_say.html](http://www.thestar.com/news/gta/2014/11/28/jian_ghomeshi_did_not_ask_for_consent_accusers_say.html)> [Donovan, Nov 28].

<sup>324</sup> *Ibid.*

<sup>325</sup> “Jian Ghomeshi allegedly attacked actress Lucy DeCoutere on 2003 date”, *CBC News* (30 Oct 2014) online: <[www.cbc.ca/news/jian-ghomeshi-allegedly-attacked-actress-lucy-decoutere-on-2003-date-1.2817806](http://www.cbc.ca/news/jian-ghomeshi-allegedly-attacked-actress-lucy-decoutere-on-2003-date-1.2817806)>.

which the Toronto police refused to investigate. However, by October 31, the police had launched a criminal investigation in response to complaints against Ghomeshi made by two women, including DeCoutere.<sup>326</sup> A third woman came forward soon after.<sup>327</sup>

On November 26, exactly one month after being fired from his job, Ghomeshi turned himself in to the police and was charged with four counts of sexual assault and one count of overcoming resistance through choking.<sup>328</sup> On January 8, 2015, three new sexual assault charges were laid against him.<sup>329</sup> Two of the charges were dropped on May 12, 2015.<sup>330</sup> According to Ghomeshi's lawyer Marie Heinein, at the time of writing Ghomeshi intends to plead not guilty to all charges.<sup>331</sup>

While initially centered on the actions of one man, the Ghomeshi case quickly opened up a much broader public dialogue. On October 30, Star reporter and survivor Antonia Zerbisias and Montreal Gazette reporter and survivor Sue Montgomery co-created the hashtag #BeenRapedNeverReported on Twitter for all survivors of sexual assault to share their stories. The hashtag went viral, with nearly 20,000 hits in the first 24 hours.<sup>332</sup> In the weeks to come,

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<sup>326</sup> "Toronto police investigating Jian Ghomeshi allegations", *CBC News* (31 Oct 2014, updated 1 Nov 2014) online: <<http://www.cbc.ca/news/canada/toronto-police-investigating-jian-ghomeshi-allegations-1.2820337>>.

<sup>327</sup> Kevin Donovan, Alyshah Hasham & Tamara Khandaker, "Police investigation of Jian Ghomeshi widens as third woman comes forward", *Toronto Star* (1 Nov 2104) online: <[www.thestar.com/news/crime/2014/11/01/three\\_women\\_contact\\_police\\_with\\_allegations\\_against\\_jian\\_ghomeshi.html](http://www.thestar.com/news/crime/2014/11/01/three_women_contact_police_with_allegations_against_jian_ghomeshi.html)>.

<sup>328</sup> James Armstrong, "Jian Ghomeshi charged with 4 counts of sexual assault, will plead not guilty", *Global News* (26 Nov 2014), online: <[globalnews.ca/news/1693322/jian-ghomeshi-charged-with-sexual-assault/](http://globalnews.ca/news/1693322/jian-ghomeshi-charged-with-sexual-assault/)>.

<sup>329</sup> David Shum, "Former CBC host Jian Ghomeshi faces three new sex assault charges", *Global News* (8 Jan 2015), online <[globalnews.ca/news/1761995/jian-ghomeshi-trial-date-to-be-set-at-toronto-court-appearance-today/](http://globalnews.ca/news/1761995/jian-ghomeshi-trial-date-to-be-set-at-toronto-court-appearance-today/)>.

<sup>330</sup> Alyshah Hasham, "Two sexual assault charges dropped against Jian Ghomeshi; others stand", *Toronto Star* (12 May 2015) online: <[www.thestar.com/news/crime/2015/05/12/two-sexual-assault-charges-dropped-against-jian-ghomeshi.html](http://www.thestar.com/news/crime/2015/05/12/two-sexual-assault-charges-dropped-against-jian-ghomeshi.html)>.

<sup>331</sup> Kevin Donovan & Alysha Hasham, "Jian Ghomeshi now charged with sexually assaulting six women", *Toronto Star* (8 Jan 2015) online: <[www.thestar.com/news/crime/2015/01/08/jian\\_ghomeshi\\_trial\\_date\\_to\\_be\\_set\\_today.html](http://www.thestar.com/news/crime/2015/01/08/jian_ghomeshi_trial_date_to_be_set_today.html)>.

<sup>332</sup> Isabel Teotonio, "Women find power in BeenRapedNeverReported hashtag", *Toronto Star* (5 Nov 2014) online: <[www.thestar.com/life/2014/11/05/women\\_find\\_power\\_in\\_beenrapedneverreported\\_hashtag.html](http://www.thestar.com/life/2014/11/05/women_find_power_in_beenrapedneverreported_hashtag.html)> [Teotonio, Nov 5]; "BeenRapedNeverReported sheds light on survivor stories", *CBC News* (31 Oct 2014) online: <[www.cbc.ca/news/canada/montreal/beenrapedneverreported-sheds-light-on-survivor-stories-1.2820328](http://www.cbc.ca/news/canada/montreal/beenrapedneverreported-sheds-light-on-survivor-stories-1.2820328)> [CBC, Oct 31].



several Canadian sexual assault centres reported experiencing a spike in the number of clients calling in for services,<sup>333</sup> and the issue of sexual violence came to dominate news headlines.

## Part II: The Survivor Discourse

Having briefly recounted how the Ghomeshi story unfolded, I go on, in this Part, to examine the survivor discourse represented within mainstream news media coverage of the story. This discourse calls for analysis at four levels. First, there are the stories of sexually violent incidents themselves. These accounts provide insight into how survivors constructed their experiences in ways that both reflect and resist legal scripts. Survivors who spoke out in the media, however, did not simply recite a series of events that transpired to constitute a particular instance of sexual violence. In fact, many gave scant if any details about the violence itself. Often, they focused instead on the aftermath, describing their own reactions and those of others both within and outside the legal system. This second level of discourse, to the extent that it demonstrates the failures of law to adequately address sexual violence, raises implicit challenges to law's claim to justice.

In addition to describing both sexual violence and its aftermath, survivors also commented on the meaning of their experiences. Thus, while critiques of law were sometimes implied by the stories recounted, they were also raised explicitly as survivors interpreted their experiences in light of the developing news story and surrounding public discourse. In the same

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<sup>333</sup> Calls rise, Nov 14, *supra* note 13; "Calls to sexual assault centre up after Jian Ghomeshi allegations", *CBC News* (4 Nov 2104) online: <[www.cbc.ca/news/canada/saskatoon/calls-to-sexual-assault-centre-up-after-jian-ghomeshi-allegations-1.2822425](http://www.cbc.ca/news/canada/saskatoon/calls-to-sexual-assault-centre-up-after-jian-ghomeshi-allegations-1.2822425)>; Adam Carter, "Jian Ghomeshi allegations lead to rise of local sex assault reports", *CBC News* (13 Nov 2014, updated 15 Nov 2014) online: <[www.cbc.ca/news/canada/hamilton/news/jian-ghomeshi-allegations-lead-to-rise-of-local-sex-assault-reports-1.2834426](http://www.cbc.ca/news/canada/hamilton/news/jian-ghomeshi-allegations-lead-to-rise-of-local-sex-assault-reports-1.2834426)> [Carter, Nov 13]; Teghan Beaudette, "Sex assault reports up at Winnipeg counselling centre," *CBC News* (19 Nov 2014) online: <[www.cbc.ca/news/canada/manitoba/sex-assault-reports-up-at-winnipeg-counselling-centre-1.2838163](http://www.cbc.ca/news/canada/manitoba/sex-assault-reports-up-at-winnipeg-counselling-centre-1.2838163)> [Beaudette, Nov 19].

way, survivors not only participated in consciousness-raising (in the modern sense—see **Consciousness-raising** below), but consciously characterized what they were doing as such. By discussing and interpreting the very discourse in which they were engaging, survivor narratives became meta-narratives about their own meaning, similar to the judicial meta-discourse discussed in Chapter Two. These meta-narratives represent a third level of discourse. Finally, as discussed in Chapter One, there was the phenomenon of widespread, public storytelling itself—a fourth level.

My analysis begins at this fourth level, with a brief discussion of the phenomenon of consciousness-raising. In Chapter One, I depicted the post-Ghomeshi survivor discourse as a contemporary iteration of this longstanding feminist practice, wherein experiential narratives serve as the basis for constructing an alternative feminist epistemology and discourse. Here I elaborate upon and justify this view. Then, following the schema of Chapter One, I investigate how the narratives of survivors considered, both implicitly (second level) and explicitly (third level), the role of the law, and the criminal justice system in particular, in addressing sexual violence. This inquiry reveals that many survivors supported feminist critiques of sexual assault law reform by exposing the ongoing failure of the legal system through their accounts, though some also viewed criminal justice as at least part of the solution to sexual violence. Focusing on the third level of discourse, I go on to show how survivors conceptualized their stories as part of a grassroots feminist movement grounded in the “truth” of experience, and serving to counter the silencing effects of law. Finally, I turn my attention to the first level of discourse, examining how the experiential accounts of survivors drew from legal discourse, and correlated with recent legal reforms, despite their apparent positioning outside of law.

## Consciousness-raising

In the week after the Ghomeshi story broke, Amanda Dale—a long-time feminist advocate and Executive Director of the Barbra Schlifer Clinic<sup>334</sup>—referred to the public response to the story as a moment of “collective consciousness-raising.”<sup>335</sup> In doing so, she tied the Ghomeshi moment to a much older feminist phenomenon: the second wave practice of consciousness-raising, wherein women met in small groups to relate personal experiences and thereby to discover and articulate the threads of gender-based oppression running through their lives. This practice exemplifies the turn to experiential narratives as a ground for feminist knowledge and discourse. Kathie Sarachild, one of the first proponents of feminist consciousness-raising in late 1960s America, described it as “going to the people—women themselves, and going to experience for theory and strategy.”<sup>336</sup> Sarachild also stated that “new knowledge is the source of consciousness-raising’s strength and power.”<sup>337</sup> In 1973, rhetoric scholar Karlyn Kohrs Campbell characterized consciousness-raising as an “affirmation of the affective, of the validity of personal experience”.<sup>338</sup> Twenty years later, Robin West affirmed: “We [women] have learned through consciousness-raising to trust our experiences. We have learned to give meaning to those experiences, and to validate the meanings they teach.”<sup>339</sup>

Like the consciousness-raising sessions of the late 1960s and early 1970s, the firsthand accounts of sexual violence publicized by mainstream Canadian news media in the wake of Ghomeshi emphasized the discovery of personal “truths,” the cultivation of solidarity, and a

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<sup>334</sup> This Toronto clinic offers legal, counseling and interpretation services to women who have experienced violence, often in the context of abusive relationships.

<sup>335</sup> Sarah Boesveld, “The Speed of Activism” *National Post* (1 Nov 2014) (ProQuest) [Boesveld, Nov 1].

<sup>336</sup> Kathie Sarachild, “Consciousness Raising: A Radical Weapon” in *Feminist Revolution* (New Paltz: Redstockings, 1975) at 135.

<sup>337</sup> *Ibid.*

<sup>338</sup> Karly Kohrs Campbell, “The Rhetoric of Women's Liberation: An Oxymoron” (1973) 59:1 *Quarterly Journal of Speech* 74 at 79.

<sup>339</sup> West, *supra* note 5 at 230.

collective shift towards a more lucid understanding of the reality of violence against women. However, the survivor discourse in the media surrounding Ghomeshi was less explicitly political, and far more widespread than the small gatherings of the second wave. In their article “The Rhetorical Functions of Consciousness-Raising in Third Wave Feminism,” communication scholars Stacy Sowards and Valerie Renegar identify these characteristics as reflective of how third wave feminists have adapted consciousness-raising practices to fit a new cultural and political context.<sup>340</sup> They claim that while “personal stories continue to play an important role in helping people recognize that their experiences of oppression or discrimination are not isolated,” they are now often published for a wide audience, rather than being told in small groups.<sup>341</sup> According to Sowards and Renegar, third-wave feminist consciousness-raising also differs from its predecessor by being less explicitly oriented towards building a social movement; instead, third-wave consciousness-raising “creates space for sharing experiences, reading stories, and developing a critical perspective”, without necessarily demanding particular, concrete follow-up actions.<sup>342</sup> This accords with the strong value survivors in the post-Ghomeshi media placed on speaking out as an end in itself (see **Alternatives to Law: Justice Through Storytelling** below). Thus, I argue that the post-Ghomeshi survivor discourse may be broadly read as a form of third wave consciousness-raising, whereby women’s named experiences of sexual violence provided an avenue for challenging dominant social discourses, including law. As I discuss in the next section, that challenge was often directed towards the criminal justice system in particular.

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<sup>340</sup> *Supra* note 125.

<sup>341</sup> *Ibid* at 541.

<sup>342</sup> *Ibid* at 549.

## “Why Didn’t You Call the Police?”: Survivors and the Justice System

As the allegations against Ghomeshi surfaced, many commentators in news and social media questioned why those who had been attacked did not call the police.<sup>343</sup> Some of these comments seemed to be grounded in naïve assumptions about the fairness and effectiveness of the criminal law process. However, even among those sympathetic to the difficulties faced by survivors within the legal system, there remained a persisting faith in law as the primary source of justice. CBC reporter Wendy Mesley captured the essence of this view when she asked a panel of survivors from Quebec (not involved with Ghomeshi), who had started the twitter hashtag #BeenRapedNeverReported and had already discussed their reasons for not going to the police: “You’re not pressing charges, so what’s the concrete outcome?”<sup>344</sup> While Mesley’s question may not have reflected her own belief that a criminal conviction is the only meaningful remedy to a sexual assault, it at least showed the perceived salience of this notion to the public.

Criminal lawyer Chris Murphy’s message of support to survivors also displayed an unwavering faith in the legal system. In a Toronto Star article, Murphy recounted telling a past client not to report a sexual assault based on his opinion that the case would likely result in an acquittal.<sup>345</sup> Upon reflection in light of the Ghomeshi story, he described feeling wracked with remorse: “I now realize I’ve been wrong. Julie [the client, given a fake name] had been raped; she, herself, knew that to an absolute certainty. I should never have presumed that Julie would be satisfied, or empowered, only if a judge or jury concluded beyond a reasonable doubt that her

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<sup>343</sup> Interview of Sue Montgomery, Alexa Conradi, & Vanessa Pilon by Wendy Mesley (4 Dec 2014) on *The National*, CBC News, “Why women don’t report sexual assault”, CBC Player, online: <[www.cbc.ca/player/News/TV+Shows/The+National/ID/2626913327/](http://www.cbc.ca/player/News/TV+Shows/The+National/ID/2626913327/)> [Mesley interview].

<sup>344</sup> *Ibid.*

<sup>345</sup> Chris Murphy, “A defence lawyer’s advice to his daughters, after Ghomeshi”, *Toronto Star* (8 Nov 2014) online: <[www.thestar.com/opinion/commentary/2014/11/08/a\\_defence\\_lawyers\\_advice\\_to\\_his\\_daughters\\_after\\_jian\\_ghomeshi.html](http://www.thestar.com/opinion/commentary/2014/11/08/a_defence_lawyers_advice_to_his_daughters_after_jian_ghomeshi.html)>.

offender was guilty.”<sup>346</sup> While this sounds like an affirmation of the feminist impulse to turn away from law as an answer to sexual violence, Murphy drew the opposite conclusion. He vowed that if one of his daughters was sexually assaulted he would not only advise her to report to police, but instill in her a sense of pride in the Canadian justice system which is “not perfect [...] but likely the best the world has ever known”, even while warning her that the process would be “drawn out and extremely difficult”, and would likely both taint her character and acquit her accuser.<sup>347</sup>

Murphy’s unshaken confidence in the criminal law to do justice stands in contrast to feminist lawyer Pamela Cross’s comment in a CBC interview that she “would think long and hard before reporting a sexual assault to the police because of what would follow for me in that process.”<sup>348</sup> Indeed, in response to the types of views expressed above, a major thread of the media discourse turned towards the challenges of addressing sexual violence through the justice system. Survivors within the discourse drew on their own experiences to expose the system’s deep flaws in processing sexual assault cases. It was on this basis that freelance writer Denise Balkissoon explained her decision to tell her own story of assault (albeit not sexual assault): “I am writing it now because of those asking why shamed CBC host Jian Ghomeshi’s alleged victims didn’t call the police. It’s because it’s essentially useless, and thoroughly disappointing.”<sup>349</sup> Balkissoon recounted calling the police and having them charge her then-boyfriend, only to be told later that they had not taken pictures of her injuries because she had been drinking.

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<sup>346</sup> *Ibid.*

<sup>347</sup> *Ibid.*

<sup>348</sup> Cross interview, *supra* note 30.

<sup>349</sup> Denise Balkissoon, “Violence against women isn’t some secret we’ve just uncovered”, *The Globe and Mail* (7 Nov 2014) (ProQuest) [Balkissoon, Nov 7].

Other survivors gave similar accounts of attempting to seek justice through legal channels only to be disappointed. Their stories affirm feminist critiques of how the law fails in practice due to the stereotypical assumptions of police officers, lawyers, and ultimately, judges.<sup>350</sup> In some of the stories I looked at, such beliefs led to a refusal on the part of the police to lay charges. Sheila Copps, for example, recounted going to police after being raped over 30 years ago (around the time of the first set of major legal reforms). They told her that a conviction was unlikely because she knew the perpetrator, and merely warned him to stay away.<sup>351</sup> In another historic rape case, an officer did nothing other than to tell a twelve-year-old survivor, whom I will call “E”, “I’m sorry this happened to you.”<sup>352</sup> More recently, Danielle Da Silva described feeling “infantalized” by police when she finally decided to report a previous incident of sexual violence. “It felt like I don’t matter, they weren’t taking me seriously, I felt like I wasn’t being believed”, said Da Silva. Her case was ultimately dismissed.<sup>353</sup>

Where charges were laid, many survivors recounted negative experiences with police and court processes. “H”, an anonymous Concordia student who accused three McGill football players of assaulting her in 2011, told the *National Post* that her lawyers “didn’t listen to what I wanted at all.”<sup>354</sup> She recalled completing a rape kit only to have it rendered inadmissible as evidence because of a paperwork mistake on the part of police, and being misinformed about the need to preserve her clothing as evidence. Not having access to the accused’s version of events

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<sup>350</sup> See note 33.

<sup>351</sup> “Sheila Copps: I was raped and sexually assaulted” *CBC Hamilton* (10 Nov 2014, updated 12 Nov, 2014) online: <[www.cbc.ca/news/canada/hamilton/news/sheila-copps-i-was-raped-and-sexually-assaulted-1.2830561](http://www.cbc.ca/news/canada/hamilton/news/sheila-copps-i-was-raped-and-sexually-assaulted-1.2830561)> [Copps, Nov 10].

<sup>352</sup> Rosie DiManno, “Don’t let star factor distract us from rape’s reality: DiManno”, *Toronto Star* (30 Nov 2014) online: [www.thestar.com/news/gta/2014/11/30/dont\\_let\\_star\\_factor\\_distract\\_us\\_from\\_rapes\\_reality\\_dimanno.html](http://www.thestar.com/news/gta/2014/11/30/dont_let_star_factor_distract_us_from_rapes_reality_dimanno.html). [DiManno, Nov 30].

<sup>353</sup> “Police process horrible, sexual assault survivor says”, *CBC News* (7 Nov 2014) online: <[www.cbc.ca/news/canada/toronto/police-process-horrible-sexual-assault-survivor-says-1.2828557](http://www.cbc.ca/news/canada/toronto/police-process-horrible-sexual-assault-survivor-says-1.2828557)> [CBC, Nov 7].

<sup>354</sup> Monique Muise, “Stacked against victims; Seeking justice after sex assault can be uphill battle”, *National Post* (29 Nov 2014) (LexisNexis Academic).

also led her to feel alienated by the process: “I actually didn’t feel a part of anything that was going on. It is the accused against the state and I just become [sic] a witness.”<sup>355</sup> In another case, an anonymous Star reader who I will call “F” set out a detailed missive warning others about her experience as a complainant in the courtroom. In addition to illustrating the emotional and psychological burden of testifying as a complainant, F pointed explicitly to the gap between the law on the books and the law in action:<sup>356</sup>

your nightmares about what may happen in the courtroom will come true [...] You will indirectly be called a liar, over and over again. Your sexual history will be brought forth despite the Rape Shield law, because the defense will find an indirect way to do so. [...] In the end, it is likely the justice system will fail you, and you will wonder why you ever agreed to come forward to begin with.

These stories illustrate how the legal system affirms its own authority to define events over and above that of survivors, and thereby fails to give them a sense of justice.

Many survivors pointed to the types of experiences described above as a reason not to go the police in the first place (in addition to other reasons). “[I]n the end, you come out of it worse off” said an anonymous Member of Parliament whom I will call “G,” explaining her decision not to report an alleged sexual assault by a colleague to police.<sup>357</sup> “It’s not easy to go to police, and even if you do, there’s no guarantee that the police will treat you humanely, or that you will get to the courts and be treated humanely, or that anything will happen”, opined Antonia Zerbisias.<sup>358</sup> In a similar vein, B initially predicted that police would discredit her account of being abused by Ghomeshi, though she did ultimately make a police report. She contrasted her

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<sup>355</sup> *Ibid.*

<sup>356</sup> Rosie DiManno, “For sex assault victims, going public is just the beginning: DiManno”, *Toronto Star* (2 Nov 2014) online: <[www.thestar.com/news/gta/2014/11/02/for\\_sex\\_assault\\_victims\\_going\\_public\\_is\\_just\\_the\\_beginning\\_dimanno.html](http://www.thestar.com/news/gta/2014/11/02/for_sex_assault_victims_going_public_is_just_the_beginning_dimanno.html)> [DiManno, Nov 2].

<sup>357</sup> Tasha Kheiriddin, “What justice demands”, *National Post* (27 Nov 2014) (Factiva).

<sup>358</sup> Jacques Gallant, “Twitter conversation about unreported rape goes global”, *Toronto Star* (31 Oct 2014) online: <[www.thestar.com/news/crime/2014/10/31/twitter\\_conversation\\_about\\_unreported\\_rape\\_goes\\_global.html](http://www.thestar.com/news/crime/2014/10/31/twitter_conversation_about_unreported_rape_goes_global.html)> [Gallant, Oct 31].



scenario to a domestic violence complaint, which, in her view, police would be more likely to take “at face value”—a curious comment given historic and ongoing resistance to the very idea of domestic violence as a crime, as demonstrated by Balkissoon’s story.<sup>359</sup> Most skeptical of all were those who had “insider” knowledge of the criminal justice system. Reva Seth explained that, “as a lawyer, I’m well aware that the scenario was just a ‘he said/she said’ situation. [...] I, as a woman who had had a drink or two, shared a joint, had gone to his house willingly and had a sexual past, would be eviscerated.”<sup>360</sup> Seth also cited a general desire to keep the police out of her life.<sup>361</sup>

In addition to concerns that legal recourse would be both onerous and ineffective—law’s failure to do justice in practice—many survivors noted that they were not actually interested in seeing their attacker formally punished. These remarks can be read along the same lines as Martin and others’ critique of the “retribution ethic” of criminal law.<sup>362</sup> “I’m really not motivated by [...] finding that person in jail, or them being punished in a particular way. I’d like to be able to say what happened, explain the effects, and then hear an apology and a recognition,” said Alexa Conradi, in response to Mesley’s question about pressing charges.<sup>363</sup> Co-panelist Sue Montgomery echoed this view: “That’s all I wanted too, I just wanted a recognition of what he

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<sup>359</sup> B interview, Oct 30, *supra* note 319. B’s point may not have been so much that it is easy to make a domestic violence complaint, but rather that it is difficult to make a complaint against a person whom she referred to as a “TV personality.” She may also have been responding to active efforts on the part of feminists (sometimes backed by governments) to emphasize the severity of domestic violence in order to change social and legal attitudes.

<sup>360</sup> Seth, Oct 30, *supra* note 309.

<sup>361</sup> *Ibid.*

<sup>362</sup> Martin, *supra* note 42.

<sup>363</sup> Mesley interview, *supra* note 343.

did and for him to apologize.”<sup>364</sup> G too expressed a desire for an apology, and not a prosecution.<sup>365</sup>

Although not speaking of criminal justice, Kathryn Borel also eschewed punitive responses to Ghomeshi’s sexual harassment: “I had no intention to sue, or to get him fired, or even to have him reprimanded. I just needed him to stop.”<sup>366</sup> Journalist Leah McLaren gave similar reasons for not filing a formal complaint against a colleague who inappropriately touched her at a party: “It bugged me, but did I think he deserved to be frog-marched out of the building with his belongings in a cardboard box? That seemed a bit extreme. And so I kept my mouth shut.”<sup>367</sup> McLaren did finally confront her colleague in the wake of the Ghomeshi story, after he wrote an article decrying sexism in the media, and received a sincere apology in response. As a result, she described feeling “remarkably better—like anvil-off-my-chest better.”<sup>368</sup>

According to these remarks, criminal justice and other legal or quasi-legal processes were not perceived to offer the outcome most sought after by survivors: meaningful recognition and apology for the harm suffered. Moreover, the majority of survivors were not interested in the kind of retribution and punishment that tends to be a focus of criminal law in particular. Of course, these are not the only aims of the criminal justice system. Preventing perpetrators from doing further harm is also an important goal (whether achieved in practice or not)—one of particular salience in the context of Ghomeshi, given the serial nature of the accusations against

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<sup>364</sup> *Ibid.*

<sup>365</sup> Josh Wingrove, “NDP MP details abuse allegation, calls for probe”, *The Globe and Mail* (25 Nov 2014) online: <[www.theglobeandmail.com/news/politics/ndp-mp-details-abuse-allegation-calls-for-probe/article21787508/](http://www.theglobeandmail.com/news/politics/ndp-mp-details-abuse-allegation-calls-for-probe/article21787508/)> [Wingrove, Nov 25].

<sup>366</sup> Kathryn Borel, “Jian Ghomeshi harassed me on the job. Why did our radio station look the other way?”, *The Guardian* (2 Dec 2014) online: <[www.theguardian.com/commentisfree/2014/dec/02/-sp-jian-ghomeshi-sexual-harassment-cbc-ignored](http://www.theguardian.com/commentisfree/2014/dec/02/-sp-jian-ghomeshi-sexual-harassment-cbc-ignored)> [Borel, Dec 2].

<sup>367</sup> Leah McLaren, “Women shouldn’t have to wait years for sexual offenders to apologize”. *The Globe and Mail* (7 Nov 2014) online: <[www.theglobeandmail.com/news/national/women-shouldnt-have-to-wait-years-for-sexual-offenders-to-apologize/article21511954/](http://www.theglobeandmail.com/news/national/women-shouldnt-have-to-wait-years-for-sexual-offenders-to-apologize/article21511954/)> [McLaren, Nov 7].

<sup>368</sup> *Ibid.*

him. However, the prevention of harm—either at the level of individual perpetrators, or in a more general sense—was not frequently invoked as a sought after outcome by survivors in the discourse I examined (though the desire to eradicate sexual violence generally was certainly implied by calls to end gender inequality and “rape culture.”) When it was, criminal law was not seen as the answer. Borel’s comment about “need[ing] him to stop” speaks to a concern about prevention of further harm, but given that she was facing harassment at work, she went to her union to try to stop Ghomeshi, not the police.<sup>369</sup> To the extent that survivors of sexual assault pointed to harm prevention as a goal, they identified speaking out publicly, or delivering warnings within female social networks, as adequate solutions.<sup>370</sup>

The mixture of dissatisfaction, distrust, and lack of interest in the police and the legal system displayed in the above accounts accords with feminist critiques of law as an answer to sexual violence. Following the grassroots impetus of feminist scholarship and activism, these survivors draw on firsthand accounts of experience to challenge the claim that law does justice, by showing how it fails, both in practice and in theory, to do justice for them.

Despite all of the acknowledged problems with the system, however, some survivors did turn to law as at least part of the solution to sexual violence. Reflecting a liberal feminist mindset, some took their negative experiences as indicative of the need to improve the system, rather than reject it outright. Da Silva, for instance, asserted that survivors need legal

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<sup>369</sup> Borel, Dec 2, *supra* note 366.

<sup>370</sup> Seth explained that she didn’t feel it was worth reporting Ghomeshi because “[m]ost of my girlfriends had a story about an uncomfortable, sleazy, angry or even scary encounter with a guy. No one really did anything other than avoid them and tell their girlfriends to also stay away.” Seth, Oct 30, *supra* note 309. Decoutere stated: “I know no man will ever hurt me again after speaking out”. Boesveld, Nov 1, *supra* note 335. When asked why she came forward about her experience with Ghomeshi in the media, C stated: “I want other women to be aware of his behaviour. I want other women to not fall for his manipulations like I did [...] If women coming out with their stories can help other women in the future not fall into this trap, that’s what I want.” C interview, Oct 30, *supra* note 320.

resources,<sup>371</sup> while F ended her letter by proclaiming that “[a]ssault against women will be given free rein until changes are made to statutory law.”<sup>372</sup> The latter comment is particularly interesting, given the extensive changes that *have already* been made to statutory law, without eradicating the problematic dynamic of sexual assault trials. F’s knowledge of sexual assault law reform in Canada is unclear, however her comment serves as an important reminder that many survivors are likely unfamiliar with this history, even if they are well acquainted with the legal system. Legislative reforms that are not reflected in the daily operation of law may thus fail to register in terms of social experience—though they may nevertheless shape experience indirectly through their influence on broader social discourses, as I discuss later in this chapter (see “**What Happened to me?**”: **Constructions of Sexual Violence**).

While some survivors who were let down by the legal system proposed to improve it, the consciousness-raising discourse surrounding Ghomeshi actually encouraged others to report to police.<sup>373</sup> “Jessica,”<sup>374</sup> for instance, explained her decision to report as based on a newfound solidarity with other survivors: “It made me realize that I might not be the only person who has been victimized by him — and if that’s the case, then I’m making someone else stand alone,” she said. “I feel like I should be advocating for women’s rights and ending violence. I shouldn’t be ashamed and I shouldn’t feel guilty anymore.”<sup>375</sup> Interestingly, like many of the women above, Jessica initially identified not wanting to ruin her attacker’s reputation or career as a reason for not reporting to police. In light of Ghomeshi, however, she came to realize that “I’ve had to live

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<sup>371</sup> CBC, Nov 7, *supra* note 353.

<sup>372</sup> DiManno, Nov 2, *supra* note 356.

<sup>373</sup> It may also have influenced police response, given the public scrutiny the police were under. Indeed, shortly following the breaking of the Ghomeshi story, then police Chief Bill Blair stated: “I know there’s been quite a bit of discussion about how difficult [coming forward] is, and we acknowledge how difficult it is. And it’s one of the reasons we remain so committed to providing the support that victims need.” CBC, Nov 7, *supra* note 353.

<sup>374</sup> A fake name used in the relevant news article.

<sup>375</sup> Carter, Nov 13, *supra* note 333.

with this for eight years. This guy took something from me.”<sup>376</sup> Novelist and survivor Daria Salamon drew a similar link between personal empowerment and the will to seek criminal justice: “By not coming forward, by not pressing charges, I ensured that I remained a victim.”<sup>377</sup> These comments reflect a view of feminist consciousness and activism as calling for, rather than opposing, the involvement of police.

In addition to Jessica, we know that a handful of Ghomeshi’s survivors also reported previous assaults to the police after telling their stories in the media and/or hearing those of others. Two of them—DeCoutere and B—filed criminal complaints after giving media interviews; they both spoke out again publicly to recount their positive experiences with police (Jessica reported a more mixed experience).<sup>378</sup> In B’s case, the decision to report came after an initial interview with CBC, at the end of which she reflected, “I wish there was some way that I could press charges against him now.”<sup>379</sup> In a later interview, B described being persuaded to report after learning there was no limitation period for sexual assault: “And then I thought, ‘I can do this’. And I felt I had to do this.”<sup>380</sup> The tone of B’s comments strikes a similar chord to Jessica, suggesting a sense of budding personal strength and solidarity leading to a police report.<sup>381</sup> At the same time, the phrase “had to” indicates that B may also have felt a sense of duty to report. B ultimately recounted: “The police treated me with the utmost respect and care...It was a lot easier than I thought.”<sup>382</sup> A few days later, DeCoutere added that she “felt

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<sup>376</sup> *Ibid.*

<sup>377</sup> Daria Salamon, “‘They climbed into my bed ...’: Novelist Daria Salamon breaks her silence about two men having ‘a little meet-the-teacher fun’”, *The Globe and Mail* (1 Nov 2014) (ProQuest) [Salamon, Nov 1].

<sup>378</sup> Natalie Alcoba, “DeCoutere praises police attitude; Ghomeshi probe”, *National Post* (7 Nov 2014) (ProQuest). [Alcoba, Nov 7]; B interview, Nov 3, *supra* note 319.

<sup>379</sup> B interview, Oct 29, *supra* note 319.

<sup>380</sup> B interview, Nov 3, *supra* note 319.

<sup>381</sup> The act of speaking out itself may have contributed to this sense of empowerment. As Alcott & Gray state: “The act of speaking out in and of itself transforms power relations and subjectivities, or the very way in which we experience and define ourselves.” *Supra* note 6 at 260.

<sup>382</sup> B interview, Nov 3, *supra* note 319.

heard and validated” by the police, and noted that “[t]hose considering coming forward should know that it was a safe place.”<sup>383</sup> Once again, rather than serving as an alternative to engaging with law, feminist consciousness-raising for these women actually culminated in making a formal complaint.

The association of feminist discourse and police reporting outlined above may appear to exemplify the kinds of problematic feminist engagements with the criminal justice system that have been subject to extensive critique.<sup>384</sup> Certainly, criminal justice and other forms of individual punishment were touted by some media commentators, and at least one survivor, as crucial to addressing sexual violence.<sup>385</sup> While the accounts of the women above (those who filed police reports) appear to fall into the same camp, a more nuanced examination of their remarks suggests that retribution was not their primary motive. As B put it, “I’m not fixated on the outcome. It’s more that I need to go there and tell them the facts and give them my truth. And the fact that they are willing to hear me, it’s validating. It’s giving me a voice.”<sup>386</sup> Recall

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<sup>383</sup> Alcoba, Nov 7, *supra* note 378. Some commentators attributed these positive police experiences to the relatively privileged treatment accorded to Ghomeshi’s survivors in particular. Such treatment may be due both to the attention garnered by the star’s high profile, and the fact that his accusers were all “educated and employed,” as the Toronto Star hastened to mention (Donovan & Brown, Oct 26, *supra* note 313). Feminist activist Steph Guthrie, for example, claimed to have observed a number of cases since the Ghomeshi story broke where survivors were treated “like garbage” by those they had come forward to. Interview of Roxane Gay, Steph Guthrie & Septembre Anderson by Brent Bambury (26 Dec 2014) on *Day 6*, CBC Radio, “Was 2014 a good year for women?”, CBC Player, online: <[www.cbc.ca/player/Radio/Day+6/ID/2644284744/](http://www.cbc.ca/player/Radio/Day+6/ID/2644284744/)>. In the same vein, E commented in her letter to the Star: “Perhaps if I had been raped by Ghomeshi...I would have gotten some other response than, ‘I’m sorry that happened to you,’ and that was said to me by a female officer. I was 12 years old. Why did I not matter?” DiManno, Nov 30, *supra* note 352.

<sup>384</sup> See **Critiques of Criminal Justice** in Chapter One.

<sup>385</sup> One anonymous survivor who was instrumental in bringing forward the allegations against Ghomeshi stated: “I’m thrilled and glad he is going to be in the hands of the justice system.” Kevin Donovan, Tim Almenciak & Mary Ormsby, “Jian Ghomeshi now in ‘the hands of the justice system’”, *Toronto Star* (26 Nov 2014) online: <[www.thestar.com/news/crime/2014/11/26/ghomeshi\\_now\\_in\\_the\\_hands\\_of\\_the\\_justice\\_system.html](http://www.thestar.com/news/crime/2014/11/26/ghomeshi_now_in_the_hands_of_the_justice_system.html)>. Some media commentators also emphasized the need for a tough legal response to perpetrators. See for example, Erin Andersson, “Why we can’t let the conversation about sexual violence fade away”, *The Globe and Mail* (11 Dec 2014) online: <[www.theglobeandmail.com/life/relationships/why-we-cant-let-the-conversation-of-sexual-violence-fade-away/article22048547/](http://www.theglobeandmail.com/life/relationships/why-we-cant-let-the-conversation-of-sexual-violence-fade-away/article22048547/)>.

<sup>386</sup> B interview, Nov 26, *supra* note 319. In the same vein, Chris Murphy’s main point in his article seemed to be to validate the experiences of survivors by encouraging them to come forward. *Supra* note 345.

also Jessica's comment about not wanting other survivors to "stand alone."<sup>387</sup> According to these and other similar accounts, the pressing of charges acted not as a path to retribution, but as a kind of truth claim on the part of survivors. Survivors who went to police may thus have treated the criminal justice system as more of a platform for taking a stand against gendered violence (and thereby supporting other survivors) than a central resolution to it. Nevertheless, in doing so, they accepted (whether knowingly or not) the consequences of engaging a system targeted towards individual punishment, and tending to perpetuate social inequities, as discussed in Chapter One.

While some survivors did turn to law to address sexual violence, most disagreed with the narrow characterization of such violence that law tends to perpetuate. In line with feminist critiques of the liberal and neoliberal tendencies of recent judicial discourse,<sup>388</sup> survivors widely challenged the notion of sexual assault as a problem of individual, or even institutional, deviance. A great deal of commentary in the media pointed to either Ghomeshi himself,<sup>389</sup> or the "toxic" celebrity culture at the struggling CBC<sup>390</sup> as the root of what went wrong. Survivors, however, almost all cast the problem more broadly. "I think if you go to most large institutions, you will find sexual harassment, and you will find abuses of power [...] I think it's a systemic problem that exists in most large institutions including the CBC," opined Borel.<sup>391</sup> In telling her story, Copps similarly debunked the notion that sexual assault and harassment is a problem

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<sup>387</sup> *Supra* note 375.

<sup>388</sup> See **Feminist Critiques of Law Reform** in Chapter One.

<sup>389</sup> See for example: Margaret Wente, "The distorted reality of 'Big Ears Teddy'", *The Globe and Mail* (1 Nov 2014) (ProQuest); "Printmaker makes point with Jian Ghomeshi shirt", *CBC News* (7 Nov 2014) online: <[www.cbc.ca/news/canada/saskatoon/printmaker-makes-point-with-jian-ghomeshi-shirt-1.2826989](http://www.cbc.ca/news/canada/saskatoon/printmaker-makes-point-with-jian-ghomeshi-shirt-1.2826989)>.

<sup>390</sup> See for example: Linden MacIntyre, "Why I Left the CBC And Its Toxic Atmosphere", *Huffington Post Blog* (22 Nov 2014, updated 22 Jan 2015) online: <[www.huffingtonpost.ca/linden-macintyre/ghomeshi-cbc-macintyre\\_b\\_6204668.html](http://www.huffingtonpost.ca/linden-macintyre/ghomeshi-cbc-macintyre_b_6204668.html)>; Rosemary Westwood, "Ghomeshi's gone, but toxic host culture likely alive and well at CBC", *Metro News* (16 April 2015) online: <[www.metronews.ca/views/2015/04/16/ghomeshis-gone-but-toxic-host-culture-likely-alive-and-well-at-cbc.html](http://www.metronews.ca/views/2015/04/16/ghomeshis-gone-but-toxic-host-culture-likely-alive-and-well-at-cbc.html)>.

<sup>391</sup> Interview of Kathryn Borel (2 Dec 2014) on *As It Happens*, CBC Radio, "Former 'Q' producer Kathryn Borel adds name to workplace allegations against Jian Ghomeshi", CBC Player, online: <[www.cbc.ca/player/Radio/ID/2623309123/](http://www.cbc.ca/player/Radio/ID/2623309123/)>.

specific to federal politics: “It’s not a parliamentary problem, it’s a society problem”, she said.<sup>392</sup> Indeed, there was general agreement amongst survivors that the issue went beyond any particular place or institution. As Balkissoon put it, “this broken system is not the CBC, or journalism, or Canada – but the whole world.”<sup>393</sup>

The public outpouring of survivor stories itself challenged the notion of sexual violence as an isolated phenomenon—a point that some survivors emphasized. “The facts tell us, and what we’ve seen in the last couple weeks, is that almost everyone you know has had this experience,” observed survivor Karen Freedman.<sup>394</sup> Quebec TV host Vanessa Pilon similarly underscored the ubiquity of the issue. When her co-host claimed that Pilon was the first person he knew who had been sexually assaulted, she recounted informing him: “I don’t think I’m the first...I’m just the first person you know about.”<sup>395</sup> The revelation that sexual violence is not a rare but a regular occurrence serves to debunk the “liberal story” of law reform as having achieved gender equality.<sup>396</sup> As Quebec Federation of Women president Alexa Conradi observed, “people are realizing ‘we can’t have equality if this many women have been assaulted in our lives’.”<sup>397</sup> For Conradi, this realization represented the true “watershed moment” of the Ghomeshi story.<sup>398</sup>

Insistence on the social and cultural dimensions of sexual violence in the survivor discourse surrounding Ghomeshi raises a challenge to the law’s focus on individual perpetrators.

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<sup>392</sup> Richard J Brennan & Rob Ferguson, “‘All of a sudden he jumped me’: Sheila Copps on fellow MPP’s sexual assault”, *Toronto Star* (10 Nov 2014) online: <[www.thestar.com/news/canada/2014/11/10/premier\\_kathleen\\_wynne\\_sees\\_hope\\_in\\_sheila\\_copps\\_willingness\\_to\\_step\\_forward.html](http://www.thestar.com/news/canada/2014/11/10/premier_kathleen_wynne_sees_hope_in_sheila_copps_willingness_to_step_forward.html)> [Brennan & Ferguson, Nov 10].

<sup>393</sup> Balkissoon, Nov 7, *supra* note 349.

<sup>394</sup> Teghan Beaudette, “Manitoba university pens how-to guide for helping sexual assault victims”, *CBC News* (20 Nov 2014) online: <[www.cbc.ca/news/canada/manitoba/manitoba-university-pens-how-to-guide-for-helping-sexual-assault-victims-1.2839188](http://www.cbc.ca/news/canada/manitoba/manitoba-university-pens-how-to-guide-for-helping-sexual-assault-victims-1.2839188)>.

<sup>395</sup> Mesley interview, *supra* note 343.

<sup>396</sup> Heath & Naffine, *supra* note 27.

<sup>397</sup> Mesley interview, *supra* note 343.

<sup>398</sup> *Ibid.*



Although some survivors (and other commentators) pointed to specific aspects of the legal system as at least part of the problem, sexual violence was more widely described as a matter of culture—or, to use the words of Reva Seth, Daphne Simone, and Marlo Boux, “rape culture.”<sup>399</sup> This phrase, along with “violence against women”—used by Seth, DeCoutere, Balkissoon and many others<sup>400</sup>—suggests a pervasive socio-cultural phenomenon, rather than a problem of a few bad apples or a few technical legal issues. These terms also challenge the gender-neutral judicial discourse on sexual assault (recall that the crime of rape, unlike sexual assault, referred specifically to a male attacking a female). By speaking of “rape” and “violence against women”, survivors insisted that gender in fact lies at the heart of the issue of sexual assault. I elaborate on this point in Chapter Four.

### **Alternatives to Law: Justice through Storytelling**

The survivor discourse surrounding Ghomeshi challenged the adequacy of legal approaches to sexual violence at the level of both theory and practice. While some survivors viewed law as a necessary, or even empowering part of the equation, most agreed that legal avenues would not suffice to address the problem. What other solutions did survivors propose? Some advocated for better education or professional training. As Montgomery stated, “we need to train people about what constitutes a consensual, respectful relationship.”<sup>401</sup> An important step towards realizing this aspiration came through Ontario Premier Kathleen Wynne’s implementation of a new sex education curriculum in Ontario beginning in September 2015, with an emphasis on consent.<sup>402</sup>

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<sup>399</sup> Seth, Oct 30, *supra* note 309; Teotonio, Nov 5, *supra* note 332.

<sup>400</sup> Seth, Oct 30, *supra* note 309; CBC, Nov 26, *supra* note 13; Balkissoon, Nov 7, *supra* note 349.

<sup>401</sup> Mesley interview, *supra* note 343.

<sup>402</sup> Ashley Casanady, “Read Ontario’s new sex ed curriculum for yourself”, *National Post* (23 Feb 2015) online: <[news.nationalpost.com/news/canada/read-ontarios-new-sex-ed-curriculum-for-yourself](http://news.nationalpost.com/news/canada/read-ontarios-new-sex-ed-curriculum-for-yourself)>.

For many survivors, however, the best hope lay in the very kind of public discussion in which they were already participating. “Having this conversation can help build a public understanding of the complexity around these issues”, said Seth, speaking meta-narratively.<sup>403</sup> “There has to be a way to change perceptions, and talking loudly and publicly about it is probably the most impactful,” added Daphne Simone.<sup>404</sup> Others, such as Copps, placed the emphasis more specifically on survivors going public with their stories: “If people don’t sort of talk about things that happen to them and expose them, then they’re never going to change.”<sup>405</sup>

Some espoused the importance of speaking out alongside the use of legal mechanisms, or even through them, as the examples of survivors who went to police in the previous section show. DeCoutere, for instance, encouraged survivors to “share”<sup>406</sup> and stated her hope “that victims’ voices continue to be heard”,<sup>407</sup> while also reassuring those thinking of reporting to police that it was a “safe place.”<sup>408</sup> In discussing her experience with police in a CBC interview, B similarly hoped “that other women who have a story will come forward because it’s not as horrible as they’re expecting,” without indicating that women should come forward to the police, or to the media, specifically.<sup>409</sup> With respect to sexual harassment, Copps emphasized the need for formal mechanisms to resolve cases on Parliament Hill, in addition to more survivors coming forward.<sup>410</sup> In a similar vein, Liberal MPP Daiene Vernile noted that the *Occupational Health and Safety Act*<sup>411</sup> exists to protect against sexual harassment, but also acknowledged that people “need to know that it’s OK [...] to step forward and I’m really glad that we’re now having this

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<sup>403</sup> Seth, Oct 30, *supra* note 309.

<sup>404</sup> Teotonio, Nov 5, *supra* note 332.

<sup>405</sup> Copps, Nov 10, *supra* note 351.

<sup>406</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>407</sup> CBC, Nov 26, *supra* note 13.

<sup>408</sup> Alcoba, Nov 7, *supra* note 378.

<sup>409</sup> B interview, Nov 3, *supra* note 319.

<sup>410</sup> Brennan & Ferguson, Nov 10, *supra* note 392.

<sup>411</sup> *Occupational Health and Safety Act*, RSO 1990, c O.1.

conversation.”<sup>412</sup> While the legal mechanisms in place to address sexual harassment do not raise the same set of concerns as those of the criminal law, these comments nevertheless suggest that survivor-driven consciousness-raising should work together with at least some legal processes to create change.

For others, however, speaking out was characterized as an alternative to the legal system. As survivor Holly Bausman observed, “*instead of police*, women are also turning to social media to share their stories.”<sup>413</sup> Survivor Marlo Boux’s comments are especially germane in this regard:<sup>414</sup>

I feel like my justice and my healing will come through being able to lend a voice to this [...] And if it empowers another survivor, of any gender in any way, if it makes someone feel like they’re not alone, adds positively to a conversation or enlightens someone who’s thinking about rape culture differently, for me that is justice. That is healing.

By framing her own storytelling as an alternative path to “justice,” Boux reiterates the feminist turn towards experiential accounts as an independent foundation from which to address gendered sexual violence. Another example of this comes from Simone:<sup>415</sup>

Putting our survival stories out there can only continue to invoke stigma if we continue to fear negative repercussion, so I strongly believe that a big part of the battle right now is to take the risk, lay our truths on the table, and hope that in doing so we can chip away at the ignorance surrounding rape-culture.

In this account, the revelation of hidden “truths” offers the key to social change.

Many of the meta-narrative comments made by other survivors expressed similar views.

Centered around themes of “silence” and “voice,” “speaking out,” and “being heard,” this meta-

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<sup>412</sup> “Daiene Vernile says she was sexually harassed during media years”, *CBC News* (5 Nov 2014) online: <[www.cbc.ca/news/canada/kitchener-waterloo/daiene-vernile-says-she-was-sexually-harassed-during-media-years-1.2824818](http://www.cbc.ca/news/canada/kitchener-waterloo/daiene-vernile-says-she-was-sexually-harassed-during-media-years-1.2824818)>.

<sup>413</sup> Beaudette, Nov 19, *supra* note 333 (emphasis added).

<sup>414</sup> Teotonio, Nov 5, *supra* note 332.

<sup>415</sup> *Ibid.*

discourse reflected feminist understandings of experiential narratives as a source of buried knowledge that must be brought to light in order to expose injustice and resist dominant cultural messages.

One of the themes that emerged in this meta-discourse was the difficulty of “breaking the silence” about sexual violence. Survivors pointed to two interconnected obstacles in this regard. First, there is the need to recognize and name the serious harms that one has experienced—to “give voice to the hurting self.”<sup>416</sup> Second, there is the need for survivor stories to be meaningfully heard by the broader public. As Robin West observes, these two phenomena are related:<sup>417</sup>

Before we can convince others of the seriousness of the injuries we sustain, we must first convince ourselves, and so long as others are unconvinced, to some extent, we will be as well. This is a circle that must be broken, not inhabited.

Holly Johnson makes a similar point in the more recent literature:<sup>418</sup>

Reactions from others in the woman’s social world contain both explicit and implicit messages about how to make sense of what happened. These reactions have a direct impact on her ability to interpret the experience as a violent act for which she is not responsible.

The reasons given by many survivors for initially staying silent point to these two interrelated problems.

With respect to the internal recognition issue, many survivors described having initially downplayed what happened to them, chalking it up to “some bad experience,”<sup>419</sup> or “personal misjudgment [by the perpetrator]”.<sup>420</sup> “I was really trying to normalize it,” said DeCoutere, explaining why she did not say anything after Ghomeshi attacked her, or leave his house right

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<sup>416</sup> West, *supra* note 5 at 184.

<sup>417</sup> *Ibid* at 185.

<sup>418</sup> Johnson, *supra* note 31 at 622.

<sup>419</sup> B interview, Oct 29, *supra* note 319.

<sup>420</sup> Brennan & Ferguson, Nov 10, *supra* note 319.

away.<sup>421</sup> She and several other women involved with Ghomeshi even agreed to go out with him again after an initial attack, while C actually spent the night at his house.<sup>422</sup> Although Seth reacted angrily to Ghomeshi's attack and did not agree to see him again, her account can also be read as minimizing her experience in some respects. For instance, in the course of explaining why she did not report Ghomeshi to police, she reflected that she "hadn't been raped"—even though Ghomeshi penetrated her with his fingers against her will.<sup>423</sup> This comment demonstrates the persistence of traditional understandings of sexual violence; despite the change from rape to sexual assault and the accompanying recognition that a serious sexual violation need not involve penile penetration, Seth, a lawyer, continued to measure her experience by the old standard. Seth also noted that most of her female friends had had a bad experience with a man, and did nothing other than to warn others about him, illustrating how survivors can influence each other's reactions.<sup>424</sup>

Other common reasons given for staying silent included feelings of self-blame and self-doubt on the part of survivors for getting into a vulnerable situation, or failing to clearly assert themselves. "You feel very embarrassed, and like you put yourself in that situation, and therefore why are you complaining," explained D, interviewed anonymously by the CBC, tearfully.<sup>425</sup> Kathryn Borel, who waited over a month after the Ghomeshi story broke to attach her name to allegations of sexual harassment against the Canadian star, explained that, "like a lot of women, I worried that I had somehow brought Ghomeshi's unrelenting advances upon myself."<sup>426</sup> Even after going public, Borel described having "this fear that I wasn't right, that I

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<sup>421</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>422</sup> *Ibid*; C interview, Oct 30, *supra* note 320.

<sup>423</sup> Seth, Oct 30, *supra* note 309.

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

<sup>425</sup> The Unmaking, *supra* note 322.

<sup>426</sup> Borel, Dec 2, *supra* note 366.

wasn't trusting my experiences."<sup>427</sup> Similarly, in discussing her decision to reveal multiple experiences of sexual assault (unrelated to Ghomeshi) via the twitter hashtag #BeenRapedNeverReported, Vanessa Pilon stated that for many years "I thought maybe it was my fault, and maybe I wasn't too clear [...] that I did not give consent."<sup>428</sup>

The above accounts show how survivors' internal interpretations of sexual violence often accord with the minimization, normalization, and victim-blaming perpetuated by dominant social discourses, including the law (especially pre-reform but still post-reform), lending support to West and Johnson's theory. As author Venetia Black astutely observed in a *Globe and Mail* article about her own experiences of sexual assault (unrelated to Ghomeshi): "Some of us have been conditioned to believe this kind of violence is normal."<sup>429</sup> Such conditioning may also arise from perpetrators themselves. For example, B and many others explained their reactions to Ghomeshi in part by his own attempts to normalize his behaviour. "As soon as he was done [the assault] he was nice, and friendly, and normal again," explained C.<sup>430</sup> DeCoutere gave a similar account: "I didn't say anything about what had happened, and neither did he. And it was...it was like nothing."<sup>431</sup>

In some cases, survivors perceived what had happened to them as serious, despite the minimizing efforts of the perpetrator(s) or others. However, they remained silent due to the second problem noted above—that of public reception. As Seth reminded her readers, even if a survivor views her own experience as a serious harm, she will nevertheless face "the accusation

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<sup>427</sup> "Jian Ghomeshi harassment accuser", *The National* (2 Dec 2014) CBC News, CBC Player, online: <[www.cbc.ca/player/Embedded-Only/News/ID/2623533671/](http://www.cbc.ca/player/Embedded-Only/News/ID/2623533671/)>.

<sup>428</sup> Mesley interview, *supra* note 343.

<sup>429</sup> Venetia Black, "As a sexual assault survivor, I know what it's like to keep silent", *The Globe and Mail* (16 Nov 2014, updated 17 Nov 2014) online: <[www.theglobeandmail.com/life/facts-and-arguments/its-a-predators-world/article21594805/](http://www.theglobeandmail.com/life/facts-and-arguments/its-a-predators-world/article21594805/)> [Black, Nov 16].

<sup>430</sup> C interview, Oct 30, *supra* note 320.

<sup>431</sup> DeCoutere interview by Tremonti, *supra* note 309.

that it wasn't that bad."<sup>432</sup> Indeed, many survivors expressed fears that others would judge, blame, and ultimately not believe them.

In the narratives I reviewed, those "others" often included legal decision-makers, as Daria Salamon's Globe and Mail article about her experience of sexual assault shows. In the article, Salamon reflects upon her decision not to report two men who broke into her apartment and fondled her in bed shortly after she moved to a small town to start a new job as a teacher.<sup>433</sup> Although she initially thought she would report the incident—despite the men's attempts to downplay it as "having a little meet-the-teacher fun"—she soon realized that these men were well known in the community, and friends with the RCMP: "I would be doubted, questioned and slandered by people who would support them. I didn't want to subject myself to further attacks."<sup>434</sup> In the same vein, Seth explained that

even if I had wanted to do something, as a lawyer, I'm well aware that the scenario was just a 'he said/she said' situation. I was aware that I, as a woman who had had a drink or two, shared a joint, had gone to his house willingly and had a sexual past, would be eviscerated. Cultural frameworks on this are powerful.<sup>435</sup>

DeCoutere's view was strikingly similar. In explaining why she didn't report to the police initially, she stated: "I put myself in that position where I was in his place, a person whom I didn't know very well. So, I know enough to know that there would be so many holes in my story".<sup>436</sup> Regardless of whether they blamed themselves, then, survivors expressed an understanding that blame would be placed upon them through the legal process. Hence the oft-cited concern of re-victimization. As Bausman put it: "I had already given myself enough self-

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<sup>432</sup> Seth, Oct 30, *supra* note 309.

<sup>433</sup> Salamon, Nov 1, *supra* note 377.

<sup>434</sup> *Ibid.*

<sup>435</sup> Seth, Oct 30, *supra* note 309.

<sup>436</sup> DeCoutere interview by Tremonti, *supra* note 309.

blame that I didn't want to have to go through it with somebody else.”<sup>437</sup> Survivors thus attributed their silence to the prediction that neither the general public nor the law would recognize their experiences as actual sexual assaults.

How did survivors in the post-Ghomeshi discourse overcome the above silencing forces? Most notably, by finding strength in numbers. As the early days of the Ghomeshi story show, a critical mass of survivor stories was needed to create both a more receptive public climate, and a sense of solidarity through which survivors could re-interpret their experiences internally. While the CBC's decision to fire Ghomeshi may have lent some initial credibility to the accusations that followed, many people on social media still began by siding with Ghomeshi—or at least reserved judgment one way or another. Prominent public figures such as Sheila Copps (who later went public with her own experiences of sexual assault) and Elizabeth May defended him on Twitter.<sup>438</sup> Ghomeshi's Facebook post proved initially compelling, even after the Toronto Star published allegations by four women later that evening. However, as the allegations multiplied over the next week, suggesting a signature pattern of behaviour on Ghomeshi's part, and two of the women publicly identified themselves, their accounts became increasingly difficult to deny. The more survivors came forward, the more credible they became.

The mounting allegations struck some survivors as an opportunity for newfound recognition in the eyes of the public. Speaking of her encounters with Ghomeshi in a CBC interview, B explained that “when this came to light a few days ago it almost, it...gave me permission to speak and I thought ‘maybe someone will listen to me now’ cause I don't think if I

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<sup>437</sup> Beaudette, Nov 19, *supra* note 333.

<sup>438</sup> Brennan & Ferguson, Nov 10, *supra* note 392; “Elizabeth May Takes Back Tweets About Jian Ghomeshi (UPDATED)”, *Huffington Post* (27 Oct 2014, updated 28 Oct 2014) online: <[www.huffingtonpost.ca/2014/10/27/elizabeth-may-jian-ghomeshi\\_n\\_6056924.html](http://www.huffingtonpost.ca/2014/10/27/elizabeth-may-jian-ghomeshi_n_6056924.html)>.



had said anything back then that anyone would care.”<sup>439</sup> In another interview the following week, B explained how knowledge of other, similar stories also changed her perception of her own experience: “It didn’t feel so much like it was my fault,” she explained.<sup>440</sup> The proliferation of survivor narratives thus led B to see her own experience in a new light, and ultimately to contribute to the growing survivor discourse.

The capacity for one story to empower another soon became a dominant meta-theme of the survivor discourse. For many, the moment presented not only an opportunity to tell their own stories, but a chance to help others to do the same. As Decoutere put it: “Every woman who comes forward paves the way for the next”.<sup>441</sup> Indeed, many survivors cited the desire to support others in coming forward as a key factor in their decision to speak out. Recall, for instance, Jessica’s comment: “It made me realize that I might not be the only person who has been victimized by him—and if that’s the case, then I’m making someone else stand alone”.<sup>442</sup> Or consider the following remark from Calgary artist and survivor Mandy Stobo: “I thought even if it helps one person say out loud something that’s happened to them and it lets them breathe for a minute, it’s worth it.”<sup>443</sup> In a CBC interview, Bausman addressed survivors directly: “I want every girl who’s ever gone through it to know that: You can overcome it and there is help out there. [...] It’s not your fault. Quit blaming yourself. Talk to someone. Get it out and forgive yourself.”<sup>444</sup> The above comments reveal a motivation on the part of survivors not just to support others emotionally, but specifically to encourage them to further “break the silence” by

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<sup>439</sup> B interview, Oct 29, *supra* note 319.

<sup>440</sup> B interview, Nov 3, *supra* note 319.

<sup>441</sup> “Jian Ghomeshi case: Ex-CBC employee among complainants in new sex assault charges”, *CBC News* (8 Jan 2015) online: <[www.cbc.ca/news/canada/toronto/jian-ghomeshi-case-ex-cbc-employee-among-complainants-in-new-sex-assault-charges-1.2893723](http://www.cbc.ca/news/canada/toronto/jian-ghomeshi-case-ex-cbc-employee-among-complainants-in-new-sex-assault-charges-1.2893723)>.

<sup>442</sup> Carter, Nov 13, *supra* note 333.

<sup>443</sup> Manisha Krishnan, “How Ghomeshi scandal sparked global dialogue on rape”, *Toronto Star* (26 Nov 2014) online: <[www.thestar.com/news/gta/2014/11/26/how\\_ghomeshi\\_scandal\\_sparked\\_global\\_dialogue\\_on\\_rape.html](http://www.thestar.com/news/gta/2014/11/26/how_ghomeshi_scandal_sparked_global_dialogue_on_rape.html)>.

<sup>444</sup> Beaudette, Nov 19, *supra* note 333.

telling their own stories. Note, for instance, Bausman’s incitement to “[t]alk to someone” and “[g]et it out,” as part of a process of self-forgiveness. Or the fact that, in Stobo’s view, being able to “breathe for a minute” came as a result of speaking “out loud.” This was a movement specifically about voice.

In addition to personal empowerment of both self and others, the act of speaking out was also linked to broader social change. Here, the feminist undertones of the discourse came to the surface. “I feel like I should be advocating for women’s rights and ending violence. I shouldn’t be ashamed and I shouldn’t feel guilty anymore”, said Jessica.<sup>445</sup> In a similar vein, DeCoutere reflected: “It’s made me just think a lot about where women sit in society...and how it’s not a comfortable sofa at the moment.”<sup>446</sup> Antonia Zerbisias’ use of the language “sisters [...] rising up” to describe the post-Ghameshi survivor discourse also cast a political light on events, conjuring classic images of feminist solidarity.<sup>447</sup>

### *Affective Discourse*

The meta-narratives described above point to a sense of building feminist solidarity through storytelling that seeks to counter the silencing effects of law and other dominant social discourses. However, the language of the narratives themselves also indicates how they might be read as constituting a movement of discursive resistance to law. Not only did survivors recognize and name experiences that had previously been silenced by law (and other social discourses), they did so in ways that challenged the “the criteria for legal validity and legitimacy”<sup>448</sup> that frame legal discourse itself—that is, by emphasizing the primary significance

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<sup>445</sup> Carter, Nov 13, *supra* note 333.

<sup>446</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>447</sup> Teotonio, Nov 5, *supra* note 332.

<sup>448</sup> Bartlett, *supra* note 3 at 878.

of feelings. Thus survivors described experiences of “shame”<sup>449</sup> and “embarrassment”<sup>450</sup>, “fear”<sup>451</sup> and “shock.”<sup>452</sup> They described feeling “stupid”<sup>453</sup> and “worthless.”<sup>454</sup> In response to Ghomeshi’s claim that the incidents underlying the allegations against him amounted to consensual BDSM, DeCoutere objected: “It was not a kink thing. I know that because it didn’t feel sexy.”<sup>455</sup> True to the heart of feminist theory, felt experience was thereby affirmed as an authoritative source of knowledge.

Nor was this source of knowledge limited to the negative. Just as survivors conveyed the bad feelings associated with sexual violence and silencing, they also described positive feelings that resulted from telling their stories. Speaking out was thus identified as a source of healing. “Voicing my perspective of what happened and how I felt allows feelings of shame to dissipate and diminish, allows healing to occur”, said Salamon.<sup>456</sup> In a similar vein, speaking out on Twitter helped Sarah Baker, a registered nurse from Vancouver, to eradicate feelings of “shame and responsibility”; after going public, she described feeling “good” and “strong.”<sup>457</sup> Said survivor Marlo Boux: “I feel like my justice and my healing will come through being able to lend a voice to this”.<sup>458</sup>

In her article ““Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law,” Nicola Lacey argues that sexual assault law remains inadequate precisely

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<sup>449</sup> See for example: Black, Nov 16, *supra* note 429; Salamon, Nov 1, *supra* note 377; Mesley interview, *supra* note 343; Teotonio, Nov 5, *supra* note 332; Carter, Nov 13, *supra* note 333.

<sup>450</sup> See for example: B interview, Oct 29, *supra* note 319; D’s comments in *The Unmaking*, *supra* note 322; Teotonio, Nov 5, *supra* note 332.

<sup>451</sup> See for example: Black, Nov 16, *supra* note 429; Teotonio, Nov 5, *supra* note 332.

<sup>452</sup> See for example: DeCoutere interview by Tremonti, *supra* note 309; B interview, Oct 29, *ibid*; C interview, Oct 30, *supra* note 320; Donovan & Brown, Oct 29, *supra* note 316.

<sup>453</sup> Teotonio, Nov 5, *supra* note 332, quoting Sarah Baker.

<sup>454</sup> Beaudette, Nov 19, *supra* note 333, quoting Holly Bausman.

<sup>455</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>456</sup> Salamon, Nov 1, *supra* note 377.

<sup>457</sup> Teotonio, Nov 5, *supra* note 332.

<sup>458</sup> *Ibid*.

because it ignores the “embodied and affective aspects”<sup>459</sup> of experience, leading to an “impoverished conception of the value of sexuality.”<sup>460</sup> While the law emphasizes the value of sexual autonomy,

[i]deas of self-expression, connection, intimacy, relationship—those things which surely underpin contemporary understandings of what is valuable about sexuality—are absent. Conversely, violation of trust, infliction of shame and humiliation, objectification and exploitation find no expression in the legal framework, albeit that they surface with increasing insistence in argument at the sentencing stage.<sup>461</sup>

In the current Canadian context, Lacey’s statement is an exaggeration. Violation of trust and exploitation, for instance, now form essential elements of certain sexual offences,<sup>462</sup> while the exercise of authority is relevant to determinations of consent in sexual assault.<sup>463</sup> In addition to these acknowledgments of the significance of relational dynamics, affective experience also bears upon the law in various ways. For instance, feelings of remorse on the part of an accused can play a significant role in sentencing, as can victim impact statements, which may relay the feelings of victims in the wake of a crime. With respect to sexual assault, the subjective fear of the complainant may demonstrate a lack of consent under s 265(3)(b) of the *Criminal Code*. Moreover, as discussed in Chapter Two, relational and affective experience arguably inform the very doctrine of sexual assault (and other) law.

Nevertheless, Lacey’s point still holds to the extent that the touchstone values of sexual assault law continue to be articulated in terms of autonomy, and not relationship or affect. While felt experience may underlie the development of legal doctrine in this area, this affective

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<sup>459</sup> Lacey, *Unspeakable Subjects*, *supra* note 34 at 60.

<sup>460</sup> *Ibid* at 57.

<sup>461</sup> *Ibid* at 54.

<sup>462</sup> *Criminal Code*, *supra* note 19 at ss 153, 153.1.

<sup>463</sup> *Ibid* at s 265(3)(d).

underpinning is not explicitly acknowledged as something that guides, or ought to guide, legal decision-making. Nor do the affective experiences of the parties in a given case explicitly inform the legal analysis in a general sense; rather feelings are treated as facts, relevant only in specific, prescribed ways. Thus, in examining the matter of consent, sexual assault law considers whether the complainant feared the application of force by the accused, as demonstrated through the presentation of evidence,<sup>464</sup> but dismisses other aspects of her felt experience of the encounter as legally irrelevant. By bringing these affective dimensions of sexual experience to the fore, the experiential accounts of survivors in the media coverage surrounding Ghomeshi offer an alternative mode of understanding to the law's focus on consent.

Collectively drawing from their felt experience to name the harms of sexual violence allowed survivors in the post-Ghomeshi media to counter legal and other social discourses that threatened to silence them. Their stories, and the way they told them, exposed the failures of the legal system to adequately address sexual violence, both on an individual and a systemic level. In this way, the survivor narratives that were sparked by the Ghomeshi story may be read as a grassroots feminist discourse that critiques law from an outside perspective. This discourse offers an alternative way of addressing the problem of sexual violence—speaking out about personal, affective experiences—that raises critical challenges to law.

### **“What Happened to me?”: Constructions of Sexual Violence**

In the above section, I described how survivor storytelling in the post-Ghomeshi media appears—and often presents itself—as independently founded in experience, and resisting legal and other dominant social discourses. However, this characterization ignores the ways in which the narratives at issue draw from legal meanings. In this section, I argue that the post-Ghomeshi

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<sup>464</sup> *Criminal Code, supra* note 19 s 265(3)(b).

survivor discourse actually correlates with the legal discourse examined in Chapter Two in a number of ways. In particular, I note how survivors redefined their experiences of sexual violence using legally grounded concepts such as “crime”, “assault” and “consent,” and how their redefinitions parallel changes in the meaning of these concepts within the legal discourse.

Survivors in the post-Ghomeshi media sometimes characterized their stories as instances of experience-based truth-telling. But how did these truths emerge, and why at this particular moment? As discussed in Chapter One, some feminist scholars have long critiqued the notion that personal narratives simply report the hidden “truth” of experience, arguing that this ignores “the manifold ways in which all human experiences [...] are mediated by theoretical presuppositions embedded in language and culture.”<sup>465</sup> In other words, language, or discourse, does not just provide a tool for describing the “truth” of experience; it provides a theory for organizing and making sense of experience. Moreover, the theories on offer in various discourses have particular social purposes and effects. As Alcoff and Gray put it, “[e]xperience is not ‘pre-theoretical’” but “always already political.”<sup>466</sup>

What’s interesting about the survivor stories that emerged around the Ghomeshi case is the way in which they explicitly re-theorized experience and thereby redefined past events. The initial theory for many survivors—whether internalized or externally imposed—was one that minimized, normalized and/or blamed the survivor herself for an instance of sexual violence, often leading her to stay silent. The new theory that survivors ascribed to in their publicized narratives, however, cast the episode as a serious wrong for which they were not to blame. In some cases, this understanding was made explicit. Salamon, for instance, described “[b]eing

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<sup>465</sup> Hawkesworth, *supra* note 103 at 544.

<sup>466</sup> Alcoff & Gray, *supra* note 6 at 283.

allowed to say that something terrible happened to me”.<sup>467</sup> In other cases, the severity of the event being recounted was implied by its recitation within a conversation centered on sexual violence.

What impelled this theoretical, or discursive, shift? What gave B “permission to speak”?<sup>468</sup> Why was Salamon now “allowed to say” her terrible experience? The most obvious answer, and the one given by both B and Salamon, attributes the change to the building momentum of the survivor discourse itself<sup>469</sup>—a discourse that can be read as offering feminist theories for the interpretation of sexual experience. I do not seek to deny the power of that discourse, but rather to show how it draws upon legal discourse to make itself both intelligible and powerful. Not only that, but the shift in experiential theorizing that appeared within the survivor discourse bears noticeable parallels to the shifts that have taken place in recent legal discourse on sexual assault.

Survivors who spoke out in the media surrounding Ghomeshi found themselves in the process of realizing and conveying new understandings of the pervasiveness and seriousness of sexual violence by re-interpreting experiences that they or others had previously downplayed. In order to do so, however, they needed language with social traction. They needed to make the wrongs they were trying to name intelligible—both to themselves and to the broader public—and for this, they turned to law. A crime, after all, is generally understood as a serious wrong, at least conceptually. “There was no need – or space – to go into the gory details or name names. It was enough, it seemed, to just name the crime”, asserted survivor Sue Montgomery.<sup>470</sup> Although Montgomery was referring specifically to survivor discourse on Twitter, the point holds for

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<sup>467</sup> Salamon, Nov 1, *supra* note 377.

<sup>468</sup> See note 439.

<sup>469</sup> B interview, Oct 29, *supra* note 319; Salamon, Nov 1, *supra* note 377.

<sup>470</sup> Sue Montgomery, “Hashtag unleashes outpouring of rage”, *National Post* (29 Nov 2014) (LexisNexis Academic).

mainstream media narratives as well. In her Globe and Mail article, Salamon equates telling her story with “[f]orcing those men to acknowledge that breaking into a young woman's apartment in the middle of the night, waking her up, trapping her there against her will, groping at her, is not having a little fun. It is assault.”<sup>471</sup> In these examples, when survivors named their experiences of sexual violence, they named them as crimes. It is also interesting to note DeCoutere’s remark in a Global News interview that she looked up the legal definition of sexual assault shortly after coming forward with her story.<sup>472</sup> Although DeCoutere did not elaborate, interviewer Laura Brown asked her how she was doing personally in light of this legal revelation. Both DeCoutere’s research and Brown’s question indicate the perceived power of the law in interpreting and defining experiences of sexual violence.<sup>473</sup>

Survivors also harnessed the power of legal discourse by focusing upon the legally central issue of consent. While the concept of “consent” may not seem as intrinsically legal as “crime” or “assault,” I argue that the term itself was used repeatedly by survivors at least in part to import the gravity of law.<sup>474</sup> There are, after all, plenty of other ways to talk about experiences of sexual violence that do not rely upon the language of consent—such as through the affective language discussed in the previous section. In focusing on consent, survivors were undoubtedly prompted by Ghomeshi’s insistence that his sexual interactions were all consensual, and the resultant focus on consent within the media discourse. B for instance described being “infuriated” by Ghomeshi’s claim to have acted consensually, “because there was nothing to prepare me for this, nothing, there was no talk [...] it came out of nowhere.”<sup>475</sup> “There was

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<sup>471</sup> Salamon, Nov 1, *supra* note 377.

<sup>472</sup> Interview of Lucy DeCoutere by Laura Brown (30 Oct 2014) Global News, “Extended: Lucy DeCoutere on encounters with Jian Ghomeshi”, online: <[globalnews.ca/video/1646258/extended-lucy-decoutere-on-encounters-with-jian-ghomeshi](http://globalnews.ca/video/1646258/extended-lucy-decoutere-on-encounters-with-jian-ghomeshi)>.

<sup>473</sup> *Ibid.*

<sup>474</sup> I wish to thank Professor Sonia Lawrence for helping me to articulate this insight.

<sup>475</sup> B interview, Oct 29, *supra* note 319.



absolutely nothing consensual about what happened to me,” asserted another anonymous Ghomeshi survivor.<sup>476</sup> G similarly described having sex with “no explicit consent” (her case was unrelated to Ghomeshi), a seeming reference to the affirmative consent standard established in Canadian law.<sup>477</sup>

Although not using the term “consent,” DeCoutere invoked consent-like language in a noteworthy way in response to Ghomeshi’s attempt to portray himself as a victim of sexual persecution due to his interest in BDSM: “I don’t really think anybody cares what Jian does in his own bedroom, unless he’s hurting people...who don’t want to be hurt.”<sup>478</sup> The addition of “who don’t want to be hurt” is interesting, as it signals an acknowledgment of the ultimate primacy of an autonomy-focused “want” over the more feeling-loaded “hurt” in describing the wrong at issue. Rather than relying upon “hurt” to express the wrong of sexual violence in an embodied, affective register, Decoutere reduces the meaning of the term to mere physical injury, the wrong of which depends entirely on whether it was “wanted.” Along with the other examples above, this suggests that, despite their frequent emphasis on feelings, survivors still found themselves compelled to engage in modes of (legal) discourse that prioritize autonomy over embodied experience in order to be heard.

Given the inclination in feminist scholarship and activism to view survivor narratives as constituting a feminist discourse that stands outside of law, and the self-presentation of many narratives as such, the reliance of these narratives on legal concepts such as “crime,” “assault,” and “consent,” is noteworthy in itself. Even more interesting is the way in which changes to the meanings of these concepts within legal discourse correlate with how they were used by survivors to define their experiences. Consider, for instance, how the legal meaning of consent

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<sup>476</sup> Donovan & Brown, Oct 29, *supra* note 316.

<sup>477</sup> Wingrove, Nov 25, *supra* note 365.

<sup>478</sup> DeCoutere interview by Tremonti, *supra* note 309.

has shifted from “no means no”—where a person might be excused for having an honest but mistaken belief in consent in the absence of verbal or physical resistance—to a standard of “only yes means yes.”<sup>479</sup> As Gotell observes, this move towards affirmative consent “reveal[s] a marked expansion of the range of situations that are seen to constitute legitimate or real ‘sexual assault’.”<sup>480</sup> Not only can this be seen in the courts, it is also evident in the post-Ghameshi media discourse, wherein survivors expressed an increased willingness to name, and in many cases reinterpret, encounters to which they had passively acquiesced as instances of sexual assault. G, for example recounted having “sex with no explicit consent” after her colleague grabbed her on her way out of his hotel room and she “froze.”<sup>481</sup> “It was late, I was tired... It makes you unable to think really fast, losing control of how to react”, she explained.<sup>482</sup> In this account, G projected an understanding of assault as based upon an affirmative consent standard. Not only did she reject the equation of passivity with consent, she also rationalized her passive reaction.

The narratives of other survivors also debunked the still culturally prevalent assumption that women will (and should) actively resist unwanted sexual advances. Unlike G, however, many women expressed surprise and/or dismay at their acquiescence in the moment. Acknowledging that she did not say anything after Ghameshi choked and slapped her, DeCoutere observed, “I felt like if I left right away it would be impolite... which is crazy.”<sup>483</sup> She went on to exclaim: “I’m so puzzled as to why my reaction was so non-reactive.”<sup>484</sup> Several others violated by Ghameshi gave similar descriptions of their reactions. “I just allowed it to happen. I didn't know what else I was supposed to do,” said C.<sup>485</sup> In the same vein, journalist Jan

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<sup>479</sup> See **Part I: Overview of Reforms** in Chapter Two.

<sup>480</sup> Gotell, *Discursive Disappearance*, *supra* note 27 at 146.

<sup>481</sup> Wingrove, Nov 25, *supra* note 365.

<sup>482</sup> *Ibid.*

<sup>483</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>484</sup> *Ibid.*

<sup>485</sup> C interview, Oct 30, *supra* note 320.

Wong described reacting passively when a doctor touched her inappropriately as a teenager, and again as an adult when sexually harassed by a colleague: “Like so many of Ghomeshi’s dates, I was stunned into silence.”<sup>486</sup> And, speaking of being groped by a drunken colleague at a work function, Leah McLaren reflected: “For years, as most women do, I’ve racked my brain to figure out why I failed to react in that moment.”<sup>487</sup>

The bewilderment of these women at their own reactions illustrates Leader-Elliot and Naffine’s critique of the new autonomy-centered model of sexual assault as supporting “an underlying fiction [...] that women are now capable of engaging actively, articulately and meaningfully in sex, of making their ‘positive state of mind’ manifest, and that this is how sex in fact takes place.”<sup>488</sup> Indeed, DeCoutere and Wong both take pains to portray themselves as assertive and outgoing women, making their passivity in the moment all the more surprising to them. “[I’m] fairly sassy...and yet this shut me up,” noted DeCoutere.<sup>489</sup> Wong recalled: “I had covered Tiananmen Square, fought off a kidnapping by Chinese plainclothes police and invaded a Hells Angels convention in Toronto.” And yet she did not stand up to her editor when he started rubbing her legs under the table.<sup>490</sup> The difficulty these women experienced in actively resisting sexual assault and harassment was clearly at odds with their own self-image.

To the extent that the above women expressed consternation at their failure to object to unwanted sexual activity, they displayed their continued internalization of social norms about consent and sexual assault that the law has formally discarded. At the same time, by publicly naming experiences that do not accord with common views of sexual violence as violations, they

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<sup>486</sup> This comment was made in reference to the first incident. Jan Wong, “WONG: Ending long silence around sexual assault”, *Halifax Chronicle-Herald* (3 Nov 2014, updated 4 Nov 2014) online: <[thechronicleherald.ca/opinion/1248497-wong-ending-long-silence-around-sexual-assault](http://thechronicleherald.ca/opinion/1248497-wong-ending-long-silence-around-sexual-assault)> [Wong, Nov 3].

<sup>487</sup> McLaren, Nov 7, *supra* note 367.

<sup>488</sup> Leader-Elliot & Naffine, *Language Games*, *supra* note 115 at 69.

<sup>489</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>490</sup> Wong, Nov 3, *supra* note 486.

also affirmed the need to rethink those views. Indeed, these narratives show survivors in the process of reviewing, rethinking, and ultimately redefining their past experiences in ways that align with changes in the legal discourse around sexual assault. For example, while DeCoutere expressed bafflement at her non-reactiveness, she also normalized it, noting, “this is something that I think is probably familiar to folks who are in a shocked situation like that where a man has been aggressive to them”.<sup>491</sup> When asked in an interview, “Did you struggle?”, B similarly defended herself: “No...I was in shock [...] There was no conversation...about...anything...he didn’t ask me if I like to be hit.”<sup>492</sup> Through this response, B turned the focus away from her lack of resistance and back to Ghomeshi’s failure to obtain affirmative consent.

Indeed, many of the women who made allegations against Ghomeshi pointed to his failure to satisfy the communicative demands of consent, often referring to a lack of discussion before the activity in question: “He did not ask if I was into it. It was never a question”, said DeCoutere.<sup>493</sup> Another anonymous woman recalled her experience as follows: “After a few drinks we went back to his room where he proceeded to literally throw me on his bed, no buildup, no conversation, and started biting, pulling my hair and biting me all over.”<sup>494</sup> In one case, C recounted being told by Ghomeshi: “I tend to get a little aggressive, don’t let it scare you,” before he attacked her on a subsequent date.<sup>495</sup> She did not consider such a general warning sufficient to constitute consent: “And so when he was violent with me without any talk of it ahead of time at his house, I didn’t see it coming.”<sup>496</sup> In line with shifts in the legal discourse, the above statements imply that Ghomeshi ought to have sought affirmative

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<sup>491</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>492</sup> B interview, Oct 29, *supra* note 319.

<sup>493</sup> Donovan & Brown, Oct 29, *supra* note 316.

<sup>494</sup> Donovan, Nov 28, *supra* note 323.

<sup>495</sup> C interview, Oct 30, *supra* note 320.

<sup>496</sup> *Ibid.*

expressions of consent at the time of the activity he was initiating. B's response to the question, "Why did he stop?" illustrates the general sentiment: "Why did he start, is my question. Why did he start without asking?"<sup>497</sup>

An objection may be raised that the above-described expectations regarding consent were tied to the unusual nature of the sexual conduct at issue. In DeCoutere's words: "Adults don't slap each other across the face unless there's an agreement, [...] unless there's a conversation."<sup>498</sup> Because acts like hitting and choking do not fit within the normal repertoire of heterosexual intimacy, especially in the early stages of a relationship, and presumably also because they carry a risk of physical injury, they may be seen to call for a much more careful prior negotiation of consent (if they can be consented to at all—see the *JA* case summarized in Chapter Two). Indeed, some of B's remarks suggest that her expectation of affirmative consent may have related only to certain kinds of activities: "I guess you could say I consented to him pulling my hair because I didn't protest, but the punching no, not at all."<sup>499</sup> Despite her earlier assertion that one should not "start without asking," implied here is the view that resistance may be required to claim a lack of consent, at least in the context of some activities. It is therefore hard to generalize the views about consent expressed by Ghomeshi's survivors. Nevertheless, the accounts of Wong, McLaren, G and many others demonstrate a more general tendency on the part of survivors who spoke out in the post-Ghomeshi media to measure sexual encounters by an affirmative consent standard.

To be clear, I am not claiming that sexual assault law reforms directly caused survivors to re-interpret their experiences. Most survivors did not explicitly refer to the law on the books in the published narratives I examined (DeCoutere being an exception), and some even showed

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<sup>497</sup> B interview, Oct 29, *supra* note 319.

<sup>498</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>499</sup> B interview, Oct 30, *supra* note 319.

their ignorance of recent reforms (see **“Why Didn’t You Call the Police?”: Survivors and the Justice System**). What I am claiming is that survivors used legal terms to articulate alternative interpretations of their experiences in the wake of a discursive shift around those terms (albeit with a significant lag time from when those shifts first occurred). This change in meaning within the legal discourse, brought about through legislative reforms, may have supported some survivors to understand previous experiences differently, and/or to convey the harm of those experiences in a socially intelligible way. In this way, legal discourse may be read as shaping the experiential accounts of at least some survivors.

That, however, is only half of the story. The narratives of survivors also hold the potential to shape the meaning of law. This may occur in part through formal legal processes. Just as the legislative and jurisprudential shifts in the law of sexual assault described in Chapter Two were influenced by feminist discourses grounded in women’s lived experiences, so might new waves of feminist experiential narratives lead to further statutory reforms, or shifts in the case law. Of course, as noted in Chapter One, it is still too early to determine the influence of the survivor discourse surrounding Ghomeshi (if any) on Canadian sexual assault law in this sense. However, as I explore in the next and final chapter, survivor narratives can also be read as fostering legal change in less formal ways, through their discursive power.

## Chapter Summary

The multiple allegations of sexual violence made against well-known CBC radio host Jian Ghomeshi captured the Canadian public’s attention, sparking a torrent of survivor storytelling in mainstream media and other forums. This public and widespread movement can be read as a third wave iteration of the more intimate and overtly political consciousness-raising practices of second wave feminism. While some survivors who spoke out in the media exhibited

a positive or hopeful attitude towards the legal system, many critiqued it through appeals to firsthand experience. Survivors also portrayed their own storytelling as part of a grassroots movement to break the silence around sexual violence and thereby to challenge prevailing social norms—norms often thought to be perpetuated by the legal system. At the same time, a closer look at the survivor narratives surrounding Ghomeshi shows that they drew upon legally grounded terms and concepts, and did so in ways that match recent changes in legal discourse. This points to the influence of law on the construction of sexual experience.

## CHAPTER FOUR: CONCLUSION

I have set out in this thesis to explore the relationship between law and lived experience, through the lens of discourse. Specifically, I have compared legal discourse on sexual assault to women's own accounts of sexual violence. In the struggle to address the dilemmas posed by feminist engagements with law, feminist thinkers have too easily imagined these two phenomena as separate and oppositional. Where the connection between them has been acknowledged, the focus has been on how law constructs experience, which has sometimes been interpreted as denying the possibility of resistance to the status quo. However, I argue that feminist insights ought to lead us to a more nuanced understanding of the relationship between law and experience—that, while sometimes seeming to present a polarized choice of methods in the struggle for gender equality, law and experience are actually deeply intertwined, constituting each other through the circular flow of discourse. While legal discourse constructs our experience and the stories we tell about it, we should not underestimate the power of experiential narratives to construct law in turn. I have suggested that the capacity for such narratives to shape the law can be reckoned as a kind of law reform. I conclude this thesis by expanding upon this atypical vision of law reform, first generally, and then in relation to the survivor narratives surrounding the Ghomeshi case. In doing so, I hope to show the relevance of my argument to feminist legal theory as it stands today. I begin with a brief discussion of feminist conceptions of law reform.

### Feminist Conceptions of Law Reform

Feminist legal scholars, concerned as they are with the mixed consequences of efforts to improve women's lives through law, have made a significant contribution to the law reform



literature of the past half-century.<sup>500</sup> As illustrated in Chapter One, this literature has extensively canvassed the practical and theoretical dangers of feminist law reform efforts, while also acknowledging the strategic importance of engaging with law in some circumstances. However, feminist and other critical legal scholars have not offered much clarity on the notion of “law reform” itself, often implicitly taking the term to denote institutionally implemented (and generally legislative) changes to legal doctrine, even while arguing for greater attention to legal processes and outcomes outside of the formal realm.

Part of the problem is equivocation around the term itself; a number of feminist scholars offer expansive conceptions of law reform that include social and political change, while also arguing that law reform alone is insufficient without these broader change processes. For example, in “Evaluating Law Reform”, Susan Armstrong describes progressive conceptions of law reform as acknowledging its social and political character, but goes on to discuss feminist law reform in the narrow, traditional terms of formal state processes that culminate in new legislation.<sup>501</sup> In “Law Reform: What’s in it for Women?” Reg Graycar and Jenny Morgan also seem to flip between broad and narrow meanings of law reform.<sup>502</sup> They begin by noting that “there is a wide range of legal change processes that we might broadly describe as ‘law reform’,”<sup>503</sup> and describe various socially grounded approaches to law reform even within the formal agencies they study. However, they ultimately conclude that “changes to laws can only ever constitute a small part of any profound social change,”<sup>504</sup> suggesting a traditionally narrow view of law reform as confined to formal written law. Margaret Davies avoids the equivocation

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<sup>500</sup> For an overview of feminist law reform literature, see Susan M Armstrong, “Is Feminist Law Reform Flawed? Abstentionists & Sceptics” (2004) 20 *Austl Feminist LJ* 43.

<sup>501</sup> Susan M Armstrong, “Evaluating law reform” (2006) 10 *U W Sydney L Rev* 157.

<sup>502</sup> Reg Graycar & Jenny Morgan, “Law Reform: What’s in It for Women” (2005) 23 *Windsor YB Access Just* 393.

<sup>503</sup> *Ibid* at 394.

<sup>504</sup> *Ibid* at 395.

problem by describing “legal change” as something broader than mere “law reform”, to which she presumably ascribes a similarly traditional meaning.<sup>505</sup>

A useful articulation of the two meanings of law reform (or “legal change”) at work here can be found in a 1977 article cited by Armstrong, wherein Robert Samek argues for a model of “social law reform” in contrast to what he describes as the traditional model of “legal law reform.”<sup>506</sup> Samek explains that the latter model stems from a positivist concept of law as referring to formal written rules.<sup>507</sup> Legal law reform focuses upon changes to this kind of law, which occur primarily through legislation—“the *legal method par excellence* of law reform”<sup>508</sup>—and occasionally the courts. It seeks to fix technical and purportedly apolitical issues within law, without questioning the larger framework in which the legal order operates.<sup>509</sup> Social law reform, on the other hand, begins with “dissatisfaction with a social practice which may raise doubts about the humanity, justice or efficiency of the established legal system.”<sup>510</sup> It may be initiated by any concerned citizen,<sup>511</sup> and may proceed not only via legislation but also through methods such as “political action, moral suasion, economic measures, psychological treatment, education, and community planning”.<sup>512</sup> Most importantly, social law reform focuses primarily upon social, rather than legal change.<sup>513</sup>

The murkiness around the meaning of “law reform” in much of the critical literature (Samek being an exception) may relate back to the problem of unspeakability discussed in Chapter One; scholars seeking to promote an expanded understanding of “law reform” must at

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<sup>505</sup> Margaret Davies, “Legal Theory and Law Reform” (2003) 28 *Alternative LJ* 168.

<sup>506</sup> RA Samek, “A Case for Social Law Reform” (1977) 55 *Can Bar Rev* 409.

<sup>507</sup> *Ibid* at 411.

<sup>508</sup> *Ibid* at 416, emphasis in original.

<sup>509</sup> *Ibid* at 412.

<sup>510</sup> *Ibid* at 413.

<sup>511</sup> *Ibid* at 413-414.

<sup>512</sup> *Ibid* at 417.

<sup>513</sup> *Ibid* at 410.

least partially retain the term's traditional, narrower meaning in order to remain intelligible. The continued force of this traditional meaning in feminist considerations of law reform is apparent when one examines some of the most common conclusions reached: 1) that law reform alone is insufficient to achieve feminist aims without broader social change;<sup>514</sup> and 2) that feminists must remain open to strategic legal actions while maintaining a critical stance towards law as an institution that tends to perpetuate social inequalities.<sup>515</sup> These propositions assume that broader social change and criticism of law, respectively, are distinct from the process of law reform itself. This accords with the assumed separation between legal and grassroots approaches in much feminist thought.

Nevertheless, broader models of law reform, often resembling Samek's model of social law reform, do appear within the literature. These models tend to emphasize three related themes. The first is that the process of law reform ought to include new conceptualizations of the meaning of law. As an example, Graycar and Morgan point with approval to Professor Roderick MacDonald's leadership as founding chair of the Law Commission of Canada ("LCC").<sup>516</sup> MacDonald envisioned the pursuit of "new approaches to law and new concepts of law" as a key part of the LCC's law reform work.<sup>517</sup> In her discussion of approaches to law reform within critical legal theory, Davies similarly notes: "It is possible to think of legal change as transformational of the values and ideology of law and of the very understanding of what law is".<sup>518</sup> According to this view, law reform (or for Davies, "legal change") should not simply take place within the existing framework of law but should challenge the framework itself.

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<sup>514</sup> See for example: Graycar & Morgan, *supra* note 502; Davies, *supra* note 505.

<sup>515</sup> See **Alternative Foundations** in Chapter One.

<sup>516</sup> Graycar & Morgan, *supra* note 502 at 400.

<sup>517</sup> Roderick A MacDonald, "Law Reform and its Agencies" (2000) 79 Can Bar Rev 99 at 115.

<sup>518</sup> Davies, *supra* note 505 at 171.

On what basis, however, should such challenges be raised? The answer lies in the second theme: that law reform should respond to social realities rather than focusing upon law's internal logic. Thus, MacDonald described the LCC in its early years as "taking social experience rather than legal categories as a way of framing issues to study".<sup>519</sup> In a similar vein, Graycar and Morgan describe how Australia's Victorian Law Reform Commission approached the reform of the law around defences to homicide by considering how the defences were actually being raised in practice.<sup>520</sup> These examples show how lived experience may serve as the ground from which to reimagine and reconstruct law. Here, the focus of law reform shifts from legal to social change, reflecting Samek's view that "[g]enuine law reform *is* social reform."<sup>521</sup> While not going so far as to equate legal and social change, Davies describes the recognition of "the interdependence of law and social and cultural norms" as an important aspect of critical legal theory.<sup>522</sup> She attributes a similar view to legal pluralism, according to which "legal reform cannot be conceptualised simply as something taking place 'inside' law, while social change takes place 'outside' law."<sup>523</sup> This point is essential to my own vision of law reform. Once we recognize the link between legal and social change, the dichotomy we imagine between law reform and grassroots, experience-based feminist methods begins to break down.

The third theme emerging from the literature furthers my vision of law reform by framing the connection between legal and social change in terms of discourse. The idea, already touched upon in the previous chapters of this thesis, is that law holds the most promise for feminism and other critical movements as a powerful social discourse wherein gendered norms are both

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<sup>519</sup> MacDonald, *supra* note 517 at 105.

<sup>520</sup> Graycar & Morgan, *supra* note 502 at 401-402.

<sup>521</sup> Samek, *supra* note 506 at 412, emphasis in original.

<sup>522</sup> Davies, *supra* note 505 at 171.

<sup>523</sup> *Ibid.*

contested and mobilized.<sup>524</sup> As Armstrong notes, “[f]eminist law reform has attempted to disrupt the symbolic dimensions of law” and has emphasized the importance of “struggles over meaning in law”.<sup>525</sup> Just as traditional notions of law reform stem from a positivistic view of law, this idea depends upon an understanding of law as a dynamic and multi-faceted site of discursive struggle.

The three themes I have just described outline the contours of feminist and other critical attempts to understand law reform as something broader than the implementation of new legislation, or doctrinal changes to the common law. If we take these insights seriously, we should not continue to equate law reform with institutionalized processes that are sharply divided from the social world. This is not to deny that legal institutions play a role in law reform and thereby shape its character, but rather to point out that broader social and political, and specifically discursive, phenomena also play a crucial role in the process of legal change. Importantly for my project, this includes feminist experiential narratives such as those published in the mainstream media surrounding the Ghomeshi case. In what follows, I aim to apply the broad vision of law reform sketched out above to the Ghomeshi case, exploring the potential discursive influence of the survivor narratives that emerged in the case’s wake on the law of sexual assault in Canada.

## Survivor Narratives as Law Reform

In Chapter Three, I demonstrated how the survivor discourse surrounding Ghomeshi correlates with recent legal discourse around sexual assault. Although I did not purport to show that the law caused survivors to construct or reconstruct their experiences of sexual violence in a

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<sup>524</sup> Davies, *supra* note 505 at 170. Davies rightly attributes this insight to Carol Smart, though it should be noted that Smart distinguishes engagements with legal discourse from law reform, which for her means changes to legal doctrine.

<sup>525</sup> Armstrong, *supra* note 501 at 167. See also Graycar & Morgan, *supra* note 502 at 395.

particular way, I did suggest that it may have encouraged or supported them in doing so. However, I have yet to illuminate the second, crucial, half of the equation, whereby survivor narratives can be read as supporting changes to law. In what follows, I show how these narratives hold the potential to effect legal change in two ways: first, by reinforcing new discourses that have only begun to take root amongst legal decision-makers in the wake of feminist-influenced reforms; and second, by re-contextualizing legally grounded terms and thereby transforming their meaning. In these ways, I argue, the survivor stories publicized in the wake of Ghomeshi contribute to the process of law reform.

### **Reinforcing New Legal Norms**

In discussing how legal categories create habits of thought, Klinck poses the following question: “can the legislature, by fiat, change the language and thus the way people perceive?”<sup>526</sup> The story of sexual assault law reform in Canada suggests not. As I have repeatedly noted, one of the major feminist critiques of the statutory and common law reforms has been their failure to change persisting social stereotypes, which continue to infiltrate legal argument and judicial decision-making, as well as police responses, in many cases. Thus, the law of sexual assault bears a tension between formally discarded but still active social norms, and the new sexual script set by feminist-influenced statutory reforms.

This same tug-of-war can be seen in the media discourse surrounding the Ghomeshi case. While survivors generally asserted an affirmative consent standard and debunked common myths about sexual violence, Ghomeshi and his lawyers, along with some reporters and media commentators, advanced a very different understanding of consent. Although Ghomeshi did not give a detailed public response to any of the allegations made against him, his steadfast

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<sup>526</sup> Klinck, *supra* note 90 at 31.

insistence to his employer, his fans (via Facebook), and presumably soon to a judge in criminal proceedings, that all of his sexual activities were consensual can only be reconciled with the accounts of his accusers via a view of consent as consistent with passive acquiescence to acts of physical aggression. Ghomeshi, not unlike the majority of the Court of Appeal in *Ewanchuk*, also dismissed the perspective of his sexual partners as irrelevant to the question of consent. A piece of email correspondence between him and a woman he was involved with in 2012 provides a telling illustration of his attitude. When she accused him of physically abusing her after a date, he responded by asserting in an email that she had consented and that “it IS about sex [...] it WAS...”<sup>527</sup> It seems that in his view, her perspective was not part of the equation.

The responses of Ghomeshi’s lawyers to inquiries from the Toronto Star and CBC before the allegations against him went public also support a view of consent that feminist law reformers have tried to eradicate. For instance, lawyer Neil Rabinovitch’s suggestion to the Star that consent could be demonstrated via emails and text messages reflects, at best, a view that ignores the legal requirement for ongoing, revocable agreement to sexual activity established in *JA*, and, at worst, assumes that participation in a flirtatious or sexually explicit correspondence implies consent to whatever sexual activities actually follow.<sup>528</sup> In a late November media appearance on CBC, Eric Guttardi, a defence lawyer not involved in the Ghomeshi case, validated this line of reasoning.<sup>529</sup>

Ghomeshi’s attempt to prove the consensual nature of his sexual activities to CBC via emails, photos and text messages prior to being fired indicates a similarly problematic logic.<sup>530</sup>

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<sup>527</sup> Donovan & Brown, Oct 29, *supra* note 316.

<sup>528</sup> Donovan & Brown, Oct 26, *supra* note 313.

<sup>529</sup> Interview with Eric Guttardi (26 Nov 2014) CBC News, “Ghomeshi to Plead Not Guilty”, CBC Player, online: <[www.cbc.ca/player/Embedded-Only/News/ID/2617315239/](http://www.cbc.ca/player/Embedded-Only/News/ID/2617315239/)>.

<sup>530</sup> James Bradshaw & Greg McArthur, “Behind the CBC’s decision to fire Jian Ghomeshi”, *The Globe and Mail* (31 Oct 2014) (ProQuest).

Interestingly, as reported by the Star, the initial group of women who came forward with allegations against Ghomeshi claimed that they did not report the incidents to police in part due to a fear that their willing participation in correspondence discussing sexual fantasies would indeed be used as evidence of actual consent to the activities discussed.<sup>531</sup> Despite the formal impermissibility of such an inference at law, both the parties and Ghomeshi's lawyers clearly felt that such an argument would prove legally effective, indicating the continued disparity between the law on the books and the law as it actually operates in people's lives.

Some of the media coverage surrounding Ghomeshi also reflected lingering notions about consent that have been discarded by formal law, such as the idea that a complainant must say "no" or resist in some way in order to demonstrate a lack of consent, or that signs of physical injury are important to establish non-consent. For instance, in a radio interview, a CBC host asked C, a woman who was beaten on the head and back by Ghomeshi, "Did it ever cross your mind to tell him to stop?" (Though she later also asked whether consent had explicitly been asked for or given).<sup>532</sup> In another interview, B was asked: "Did you struggle?"<sup>533</sup> The interviewer then asked whether B's friend had seen any physical signs of the beating.<sup>534</sup> Host Anna Maria Tremonti posed a similar question to DeCoutere, asking whether she had any physical signs of injury following her interaction with Ghomeshi.<sup>535</sup> A CBC story summarizing the latter two interviews then made a point of noting that "Both women told CBC they did not ask Ghomeshi to stop."<sup>536</sup> Arguably, these journalists were just doing their job by asking tough questions that a skeptical public would want to know. However, the very fact that such questions

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<sup>531</sup> Donovan & Brown, Oct 26, *supra* note 313.

<sup>532</sup> C interview, Oct 30, *supra* note 320.

<sup>533</sup> B interview, Oct 29, *supra* note 319.

<sup>534</sup> *Ibid.*

<sup>535</sup> DeCoutere interview by Tremonti, *supra* note 309.

<sup>536</sup> "Jian Ghomeshi allegations investigated by police", *The National* (1 Nov 2014), CBC News, CBC Player, online: <[www.cbc.ca/player/News/Arts+and+Entertainment/ID/2582918135/](http://www.cbc.ca/player/News/Arts+and+Entertainment/ID/2582918135/)>.



seemed both relevant and appropriate suggests that the idea of affirmative consent has yet to fully permeate the public consciousness.

If Samek is right, as I think he is, that genuine law reform must change not just the formal written law but the law in action, and more fundamentally, the social ills that the law seeks to address, then it is clear that sexual assault law reform in Canada remains incomplete. Significant changes have been made to the text of the *Criminal Code*, but as Samek notes, this does not guarantee a correspondingly significant change in social life,<sup>537</sup> for “legislation as a vehicle for social change [...] can only be achieved with the co-operation of judges and other legal officials, and of the citizen.”<sup>538</sup> Thus far we have seen only limited and uneven change in the way sexual assault cases are actually treated by legal institutions and actors, parties, and society generally. The problem is that the new norms reflected in the statutory reforms have yet to be fully *socially* internalized, and are therefore hindered from alleviating the *social problem* of sexual violence.

Here is where the survivor narratives come in. By reinforcing a paradigm based on affirmative consent, and debunking a variety of related myths about sexual violence, these narratives affirm newly sanctioned norms around sexual violence, and thereby assist in their social internalization. In doing so, they lend force to one side of the discursive contest through which law operates. Just as Justice L’Heureux-Dubé and (Chief) Justice McLachlin contribute to the process of sexual assault law reform by reiterating feminist-influenced understandings of sexual violence in their decisions (see Chapter Two), so do the survivors who came forward in the wake of Ghomeshi contribute by affirming these norms and pushing for their broader social acceptance. Social acceptance, after all, is crucial in order to bring about change in the law as it actually operates in people’s daily lives. Furthermore, by debunking the liberal notion that the

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<sup>537</sup> Samek, *supra* note 506 at 415.

<sup>538</sup> *Ibid* at 417-418.

sexual realm is now an equal playing field wherein women are fully empowered to assert themselves, the survivor narratives surrounding Ghomeshi support judicial discourses—such as Justice L’Heureux-Dubé’s concurrence in *Ewanchuk*—that acknowledge the social and gendered dimensions of sexual violence. In this way, survivor discourse takes the law up on its most progressive promise.

Breaking this argument down, there are a number of ways to understand the survivor narratives surrounding Ghomeshi as part of the process of law reform. First, given that the law operates through language—i.e. through the declaration, circulation, and interpretation of words<sup>539</sup>—public amplification of particular threads of legal discourse may itself be read as a legal act. Secondly, the experiential narratives of survivors may lend legitimacy and authority to the statutory reforms in the eyes of the public, by showing that they accord with the lived experience of at least some members of the social group that they are intended to benefit.<sup>540</sup> This may be enough to convince some people that the norms reflected in the new legislation ought to be taken seriously. In this way, survivor narratives may support public acceptance of statutory changes to sexual assault law and thereby enable the law to be more effective in practice.

Ultimately, the discursive influence of survivor narratives promises to influence the law in action, by helping to shift the views of legal actors and participants in the legal system, as well as by altering social behaviour. Imagine how the Ghomeshi case may have played out differently if the requirement for affirmative, ongoing consent was taken seriously by legal professionals and the broader public. Would Ghomeshi’s lawyers have thought they could persuasively argue that photos and text messages were compelling evidence of consent? Would the women he attacked have been so reluctant to come forward for fear of such an argument?

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<sup>539</sup> See Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford: Stanford Law Books, 2014).

<sup>540</sup> Of course, this depends on the perceived credibility and authority of those who speak out, which, as I noted at the beginning of Chapter Three, may well depend upon their relative social privilege.

Would Ghomeshi himself have thought twice before interpreting (outwardly, at least) his own actions as consensual? Would he have possibly even acted differently to begin with?

### **Transforming Legal Meanings**

The capacity for survivor narratives to reinforce new norms that have yet to fully permeate legal (and, correlatively, social) discourse shows its active role in shaping law, and thereby in effectuating a kind of law reform. However, survivor stories may also import meanings into law that are not already seeded in formal legal doctrine. This results from the characteristics of language discussed in Chapter One—namely from the capacity of different voices to put words to use in different ways, and thereby to reshape common meanings even while drawing upon them.<sup>541</sup> Here I offer one example of how the experiential narratives of survivors promise to transform legal meaning in this way—through the use of the term “rape culture.”

Despite the eradication of “rape” from Canadian criminal law in 1983,<sup>542</sup> it has not disappeared from feminist discourses, or social discourses more generally. Within the survivor narratives surrounding Ghomeshi, the terms “rape” and “rape culture” were used with particular frequency.<sup>543</sup> In one sense, this demonstrates the limit of the law’s power to construct experience. The reformed *Criminal Code* may strive for gender neutrality by framing incidents of sexual violence as sexual assault, but survivors, in many cases, still called it rape. Of course, this choice of words also draws upon the power of legal discourse, in that the significance of “rape” owes a great deal to historical (in Canada) and current (in the United States and

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<sup>541</sup> See **My Claim** in Chapter One.

<sup>542</sup> See **Part I: Overview of Reforms** in Chapter Two.

<sup>543</sup> See for example: “Why women don’t report sexual assault”, *The National* (4 Dec 2014) CBC News, CBC Player, online: <[www.cbc.ca/player/News/TV+Shows/The+National/ID/2626913327/](http://www.cbc.ca/player/News/TV+Shows/The+National/ID/2626913327/)>; Carter, Nov 13, *supra* note 333; Seth, Oct 30, *supra* note 309; CBC, Oct 31, *supra* note 332; Teotonio, Nov 5, *supra* note 332.

elsewhere) law. However, as I will argue, the use of “rape” by survivors who came forward in the wake of Ghomeshi did not merely reflect established legal meanings; it re-contextualized them in such a way as to challenge both traditional and emerging legal norms around sexual violence.

Historically in Canada, “rape” denoted a crime that was specifically gendered.<sup>544</sup> In many parts of the world, it still does. By using this term to describe their experiences, survivors who spoke out in the media surrounding Ghomeshi affirmed, whether intentionally or not, a gendered understanding of sexual violence in response to a legal discourse that, in Gotell’s words, “separates the problem of sexual violence from gendered power relationships.”<sup>545</sup> In this way, they challenged the current impetus in sexual assault law towards decontextualized gender neutrality.<sup>546</sup> At the same time, survivors who described their experiences in terms of “rape” were not merely reverting to a more traditional understanding of sexual violence. This was evident from their insistence upon an affirmative consent standard, and their rejection of cultural norms that played a major role in the operation of past rape law.<sup>547</sup> Survivors thus invoked a traditional legal conception of sexual violence as gendered that challenges current sexual assault discourse, while at the same time rejecting associated traditional ideas about sexual violence. Their re-contextualization of “rape” in this way moves the term beyond both its historical meaning and the current meaning of “sexual assault.”

The use of “rape culture” advances an even more fundamental challenge to legal understandings, both past and present, by framing sexual violence as a phenomenon that extends

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<sup>544</sup> Rape could only be committed by a man against a woman via “sexual intercourse.” *Criminal Code*, 1970, *supra* note 18 at s 143.

<sup>545</sup> Gotell, *Governing Heterosexuality*, *supra* note 38 at 385.

<sup>546</sup> See **Feminist Critiques of Law Reform** in Chapter One.

<sup>547</sup> For instance, the comments of Sue Montgomery, Alexa Conradi, and Venetia Black all rejected the notion that sexual violence is usually perpetrated by scary strangers, rather than family and friends: Gallant, Oct 31, *supra* note 358; Mesley interview, *supra* note 343; Black, Nov 16, *supra* note 429. In her story, Jessica described coming to reject her former belief that rape only happens to “bad women.” (Carter, Nov 13, *supra* note 333).

beyond any individual perpetrator or any particular act. As I noted in Chapter One, Alcoff and Gray explain how persistent use of the term “husband rapist” changed the very meaning of “rape”.<sup>548</sup> Here I propose that the phrase “rape culture”, a part of the survivor discourse around Ghomeshi, holds to the potential to alter the meaning of both “rape” and “sexual assault” in the same manner. While rape law in Canada asked whether a particular physical act occurred in particular circumstances, and sexual assault law focuses on the question of consent within a particular encounter, survivors and others concerned with “rape culture” identify sexual violence as part of a continuum of misogynistic attitudes and behaviours. Rape in this formulation no longer refers only to a particular episode of violence perpetrated by an individual; it now refers to the much broader social problem of gender inequality. And, to the extent that rape is used as a substitute for, or interchangeably with, “sexual assault”, the latter also takes on this broadened meaning.

The use of “rape culture” by survivors and their allies offers a fresh discursive resource for law, one that might provoke law reform in several ways. First, to the extent that this phrase gains currency in broader social discourse, it may attach new connotations to terms already present in formal, written law. It might thereby reform the law in a very direct sense by changing the meanings of the words that constitute it. Similarly, the discussion around “rape culture” may change the discourse that judges and lawmakers can draw from in a socially intelligible or persuasive way moving forward, and thereby reform law’s future course.

A Toronto Star article by Heather Mallick, published in November 2014, helps to illustrate these possibilities.<sup>549</sup> In the article, Mallick discusses the recent trend whereby men

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<sup>548</sup> See **My Claim** in Chapter One at note 128.

<sup>549</sup> Heather Mallick, “Sick new trend of trying to humiliate female T.V. reporters”, *Toronto Star* (14 Nov 2014) online:

interrupt female reporters to yell a misogynistic slur into their microphones while they are live on air. Referring to a particular incident directed at fellow journalist Tonya Birkbeck, Mallick describes the perpetrator as having “assaulted her with these words.”<sup>550</sup> Although Mallick does not refer to “sexual assault” specifically, she draws the link fairly clearly, likening the phenomenon of men encouraging and celebrating these instances online as a “virtual gang rape”, and describing Birkbeck’s reaction of initial paralysis followed by self-blame as typical of “how women often react when assaulted.”<sup>551</sup> Mallick concludes: “Women used to stay silent. Then came #jianghmeshi, then came #BeenRapedNeverReported and now this.”<sup>552</sup> Mallick’s association of misogynistic verbal attacks with instances of rape and sexual assault illustrates how the concept of “rape culture” could broaden the scope of behaviour plausibly considered to fall within the meaning of “rape” and “sexual assault” as those concepts are broadly understood. Such a shift in social discourse might in turn facilitate or spur judicial stretching of the concept of sexual assault to include behaviour that is currently excluded from the purview of the offence.

Of course, courts have yet to start prosecuting men who yell misogynistic slurs on camera for sexual assault. Nor would broadening the scope of activity criminalized under the offence of sexual assault necessarily be a desired outcome from a feminist perspective. However, “rape culture” discourse also presents other possibilities for effecting law reform. Most importantly, the phrase presents a challenge to the very ideology of the law as focused on individual acts rather than the social conditions that underlie them. It thereby contributes to the process of law reform along the lines of the first theme discussed above, by re-conceptualizing law’s entire framework. While this may not change the inevitable focus upon individual cases within the

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<[www.thestar.com/news/gta/2014/11/14/mallick\\_sick\\_new\\_trend\\_of\\_trying\\_to\\_humiliate\\_female\\_tv\\_reporters.htm](http://www.thestar.com/news/gta/2014/11/14/mallick_sick_new_trend_of_trying_to_humiliate_female_tv_reporters.htm)>

<sup>550</sup> *Ibid.*

<sup>551</sup> *Ibid.*

<sup>552</sup> *Ibid.*

criminal justice system, it might at least push judges and other legal actors to reconceive the principle underlying the law of sexual assault as one grounded in gender equality rather than, or in addition to, individual autonomy. It may also encourage legal approaches to sexual violence less focused on criminalization.

Indeed, there is some recent indication that the discourse around “rape culture” has had just these effects, albeit not in the judicial sphere. I am thinking here of Ontario premier Kathleen Wynne’s action plan to stop sexual violence and harassment, launched in March 2015. In addition to changes to legislation, this plan includes a multimedia campaign to change social norms, changes to the sex education curriculum, training for front-line workers, increased funding for sexual assault crisis centres, and the provision of free legal advice to survivors<sup>553</sup>—strategies that illustrate the process of law reform in the broader, social sense outlined above. In December 2014, Wynne stated that this plan would be accelerated in response to the survivors who came forward in the wake of the Ghomeshi case.<sup>554</sup> When she announced the plan to the public the following March, she stated:<sup>555</sup>

At its core, this is a plan to change behaviour and challenge social norms, through initiatives like the awareness campaign that you just saw. That’s because the problem of sexual violence and harassment is rooted in deeply held beliefs about women, men, power and inequality. This is not a simple isolated cause. Sexual violence is rooted in misogyny, which is deeply ingrained in our culture, often in unconscious or subtle ways.

This speech is premised upon the notion of “rape culture” that survivor and other feminist voices surrounding the Ghomeshi case helped bring to the fore of public discourse. While Wynne may

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<sup>553</sup> “Kathleen Wynne vows to end sexual violence, harassment in Ontario”, *CBC News* (6 Mar 2015) online: <[www.cbc.ca/news/canada/toronto/kathleen-wynne-vows-to-end-sexual-violence-harassment-in-ontario-1.2984313](http://www.cbc.ca/news/canada/toronto/kathleen-wynne-vows-to-end-sexual-violence-harassment-in-ontario-1.2984313)>.

<sup>554</sup> *Ibid.*

<sup>555</sup> “Kathleen Wynne says sexual violence is rooted in misogyny”, *The Globe and Mail* (Video) (6 Mar 2015) online: <[www.theglobeandmail.com/news/news-video/video-kathleen-wynne-says-sexual-violence-is-rooted-in-misogyny/article23335197/](http://www.theglobeandmail.com/news/news-video/video-kathleen-wynne-says-sexual-violence-is-rooted-in-misogyny/article23335197/)>.

have already understood sexual violence as a cultural problem of gender inequality, the entrance of “rape culture” discourse into mainstream media undoubtedly assisted in preparing the public to hear her speak in these terms, and may well have influenced her decision to do so.<sup>556</sup>

It may be pragmatically more difficult for judges to move beyond an individualized view of sexual violence, given that criminal adjudication necessarily proceeds on a case-by-case basis. Nevertheless, one can imagine how the concept of “rape culture,” should it gain sufficient traction, might steer the courts towards an approach to sexual assault that ascribes greater and more explicit significance to the operation of gendered power dynamics within individual sexual interactions. Indeed, Justice L’Heureux-Dubé’s concurrence in *Ewanchuk* offers a powerful, though now somewhat dated, example of how this view might be taken up by the bench. One wonders if a judicial discourse in the register of this exceptional judgment might, through the persistence of feminist experiential narratives, someday become the norm.

## Conclusion

In this thesis, I have sought to challenge an imagined dichotomy that has framed and continues to frame much feminist legal theory. The dichotomy is between methods that rely upon the institutionalized power of law to achieve feminist aims, and grassroots feminist strategies that turn to firsthand accounts of lived experience as a way to resist dominant and oppressive norms perpetuated in legal discourse. Feminists have taken a number of more or less nuanced positions in relation to this dichotomy—and have often recognized the need to participate in both methods to some extent—however, they have not paid much critical attention to the dichotomy itself. This

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<sup>556</sup>Interestingly, Wynne also referred to one of the verbal attacks that Mallick was writing about in support of her plan. James Armstrong, “Social media, politicians, react to FHRITP trend”, *Global News* (13 May 2015, updated 23 June 2015) online: <[globalnews.ca/news/1996429/social-media-politicians-react-to-fhritp-trend/](http://globalnews.ca/news/1996429/social-media-politicians-react-to-fhritp-trend/)>.



is what I have tried to do—to reimagine the relationship between legal and grassroots feminist discourses as interconnected, rather than oppositional (or collapsed).

The question remains: what purpose does this reimagining serve? Perhaps the dichotomy I am so bent on breaking down is actually very important, or at least useful, for feminists. Certainly, it reflects important insights derived from the experience of those who have worked or participated in the legal system. Perhaps it also creates a necessary space for feminist politics and theory—a space wherein we can remain deeply critical of legal institutions; a space where those who have been let down by the justice system can have their voices heard and validated. Nor do I wish to deny, on a practical level, that some strategies really do involve much more direct and potentially compromising engagement with legal institutions and actors than others.

And yet, as others before me have recognized, the critical impetus of feminism must also be turned upon itself. Feminists have urged that, in order to progress towards a more equal society, law must not only be reformed in the traditional sense but radically and continually reconceptualized. In the same way, we must be willing to question and reimagine our own foundational frameworks. We must disrupt our own habits of mind, including the habit of viewing legal and grassroots feminist methods as sharply divided. This vision has a purpose but it also has a limit. It can trap us into thinking that our experience holds the key to a kind of transcendent and privileged truth, or, alternatively (when the dichotomy is collapsed), that we are hopelessly beholden to the powers that be. In either case, we cut off our capacity to understand and articulate our lived experience in new and different ways, and thereby to change the legal framework in and through which we live. In the context of a society where, despite our sustained and vigorous efforts, sexual violence remains pervasive, and survivors remain largely unable to access justice, the stakes of that failure of imagination are high. In challenging the

dichotomizing tendencies within feminist thought, I hope to offer an alternative way of conceptualizing feminist projects, one that contributes to the renewal of our critical imagination, and affirms the power of the stories we tell to change our lives through law.

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