SUCCUMBING TO THE SIREN SONG: RAPE MYTHS IN SEXUAL OFFENDER SENTENCING IN B.C.

by

Elizabeth Ann Welch

B.A., McGill University, 2006
LL.B., Dalhousie University, 2009

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Abstract

Sexual violence is characterized by inequality: it is a gendered crime whose perpetrators frequently escape criminal responsibility. The inequality of sexual violence has been masked and perpetuated by rape myths about ‘real’ sexual assault embedded in the law. Feminist reformers have struggled to have the law eliminate rape myths and recognize sexual offences as gendered violence; this struggle continues.

In this thesis the author explores the judicial expression of rape myths in a sample of recent B.C. sentencing decisions. She analyzes two aspects of the cases, doctrine and discourse, to ascertain whether judges reproduced discriminatory beliefs about sexual violence in their interpretations of law or their narratives.

The thesis found that courts expressed rape myths in some recent sentencing cases. Rape myths appeared in constructions of violence that turned on penetration, the notion of the dangerous stranger, and definitions of violence that excluded coercion, manipulation, and exploitation. They also appeared when judges used terms that were more appropriate for narratives of sex or romance than sexual violence. Rape myths underpinned courts’ use of sexual history evidence, findings that survivors ‘consented’ to offences, and failures to seriously consider harm to ‘risky’ survivors. They also propped up the doctrines that ‘good’ offenders and intoxicated offenders are less blameworthy or dangerous, and informed language that obscured offender agency and responsibility, including the frequent use of terms that expressed doubt about legal findings of guilt.
The author speculates the enduring influence of rape myths appeared not because of judges’ intention to discriminate but the neoliberal approach that guides legal thinking. Informed by notions of rationality and risk, courts ignored the inequality of sexual violence, particularly gender inequality. With inequality and vulnerability erased from consideration, the line between consensual sex and violence blurred, most conspicuously in sexual offences against adolescents and women perceived as taking undue risks. Therefore, this thesis suggests that the law should be cognizant of the unequal and gendered nature of sexual violence by situating it in its social context, an approach that will ultimately help to promote equality within the law.
Preface

This dissertation is original, unpublished, independent work by the author, Elizabeth Ann Welch.
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I. Introduction

Sexual violence is a unique crime: it is prevalent, committed by men against women and girls, and largely unaddressed by the criminal justice system. All of these aspects of sexual violence manifest its underlying character as a crime of inequality. This inequality has been perpetuated and masked by rape myths that tell a story of sexual violence as natural, not harmful, and the fault of women and children rather than the men who commit it. Portrayed in social and legal discourse as ‘commonsense,’ rape myths also tell us that sexual violence is a lot like sex, marred by misunderstanding or an excess of testosterone. Feminist reformers have struggled to have the law recognize that sexual violence is not sex but violence, and gendered violence at that; ultimately, however, this project is unfinished.

To contribute to the existing knowledge about the use of rape myths in the law, I crafted a research project to explore the judicial expression of rape myths in sentencing. In this thesis, I analyze sentencing decisions for two purposes: to ascertain whether judges reproduced or constructed discriminatory and gendered beliefs about sexual violence in their interpretations of legal doctrine and whether judges used discriminatory constructions of sexual violence in their narratives of facts.

Drawing on the works of other feminist researchers, I found that judges used a neoliberal\(^1\) approach while explaining their decisions for sentencing sexual

\(^{1}\) By neoliberalism, I refer to the theory in which market logic and ethics, such as the principles of individual risk, responsibility, and rationality, are applied beyond the marketplace to non-economic institutions and discourses, including legal ones: Lise Gotell, “Rethinking Affirmative Consent in
offenders. In accordance with this paradigm, judges largely ignored the unequal nature of sexual violence, in particular, its gendered character and use as a tool of oppression of women and girls. Using this lens, judges also sometimes blurred the line between consensual sex and violence, depicting sexual violence as bad sex, just as the rape myths endorse.

But before I explain the approach I take in this thesis as well as my findings, I wish to illustrate the problem: the gendered violence of sexual violence in Canada and the rape myths that justify it.

A. Sexual Violence as Inequality

Sexual violence is a crime of inequality, committed almost entirely by men against women and girls.\(^2\) Men commit sexual assault with frightening regularity, and they frequently escape punishment for it.

Specifically, nearly all of those charged by police for sexual offences are men. Women account for 86 percent of survivors.\(^3\) Statistics Canada’s 2013 Violence Against Women Survey found that “[w]omen were eleven times more likely than men to be a victim of sexual offences”.\(^4\)

The gendered nature of sexual violence intersects with other forms of inequality and vulnerability. For example, 58 percent of survivors of sexual offences

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\(^2\) Throughout this thesis, when I use the term ‘women,’ I mean both women and girls.


\(^4\) Sinha, supra note 3 at 8.
are under the age of 18. Among children, gender inequality makes girls the most vulnerable; however, adult men also victimize boys, especially young boys, who account for 30 percent of survivors under 12 years old. As Catharine A. MacKinnon succinctly observed, “[m]en do this to women and to girls, boys, and other men, in that order. Women hardly ever do this to men.”

Aboriginal women are also vulnerable to violent crime, including sexual violence, and are more often injured by crime than non-Aboriginal women. The high numbers of missing and murdered Aboriginal women bear out this tragic fact. Women in prostitution, who are disproportionately Aboriginal, also face extremely high rates of violence.

Although its prevalence is not actually known due to underreporting, we do know that sexual violence is commonplace. Canadian studies have variously found that one quarter of female university students will experience rape or attempted rape while at school, nearly 40 percent of women have been sexually assaulted since they turned 16, and three percent of adult women are sexually assaulted every year.

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8 Johnson, “Statistical Trends”, supra note 3 at 39; See also Razack, supra note 7.
9 Johnson, “Limits”, supra note 3 at 615.
Sexual assault is part of the larger problem of violence against women, a larger category of crime that is “the everyday menu of our criminal courts.”¹¹ Despite their commonality, the bulk of sexual offences do not make it before the courts; fewer still result in criminal liability.

Reporting rates for sexual violence are very low. Victimization surveys, which likely underestimate the incidence of sexual violence, reveal that fewer than one out of every ten sexual assaults comes to the attention of police.¹² Survivors do not report for many personal reasons; however, contributing to these reasons are myths that blame and shame women for sexual violence as well as the prevalence of violence against them, so that women fear they will not be believed or taken seriously by police, their families, and their communities, and fear that offenders or others will retaliate against them.¹³

Compounding the problem of low reporting is the high rates at which police unfound or dismiss complaints of sexual offences and the low rates at which courts convict. In 1977, Lorenne Clark and Debra Lewis discovered a “highly selective process of elimination” in their watershed study, finding that “[o]nly a fraction of all rapes are reported; only a fraction of reported rapes are classified as founded; only a fraction of founded cases lead to an arrest; and only a fraction of suspects arrested are convicted.”¹⁴

These problems continue today. Holly Johnson has recently confirmed that high rates of attrition for sexual offences exist in every phase of the criminal justice system.\(^{15}\) As she details, for a sexual assault to result in conviction, a long chain of events must transpire. First, a report must be made to police, a very rare occurrence. For the complaint to go forward, police must make a record, investigate, and determine the complaint is legitimate, or ‘founded’: police records and statistics show this occurs less often for sexual assault than for most other crimes, perhaps 85 percent of the time.\(^{16}\) To pursue a founded complaint, police must lay a charge, which they do in less than fifty percent of founded sexual assault complaints. After that, Crown counsel must prosecute; they do this in half of sexual assault complaints where charges are laid. Once prosecuted, half of accused are convicted of sexual assault. Given the huge number of unreported sexual assaults and the attrition within the criminal justice system, nearly all occurrences are filtered out: according to Johnson, 99.7 percent do not lead to criminal conviction.\(^{17}\)

In nearly every case, offenders escape criminal responsibility; or, in the words of MacKinnon, “[t]he atrocity is de jure illegal but de facto permitted.”\(^{18}\) Although much of the low rates arise from non-reporting, the current situation nonetheless “amounts to impunity for sexually violent men in Canada.”\(^{19}\)

\(^{15}\)Johnson, “Limits”, supra note 3.

\(^{16}\)Johnson chose this “conservative estimate” based on varying data which overall suggested sexual assaults are “unfounded” to a far greater extent than any other crime”, including other assaults: ibid at 627–632; For another source of information on clearance and charging rates, see: Sinha, supra note 3 at 100–103.


\(^{18}\)MacKinnon, “Reflections”, supra note 6 at 1303.

\(^{19}\)Johnson, “Limits”, supra note 3 at 633.
“justice gap”, more aptly described as a “chasm”,20 between the reality of sexual violence and criminal recognition and responsibility is not just bad luck;21 it is a reflection of the systemic inequality and oppression of women, including the silencing of their complaints and fears.

Sexual violence is an act of gender inequality that is made possible by wider, societal inequality:

Rape is an act of dominance over women that works systemically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.22

Gender inequality enables both the prevalence of men’s sexual violence against women and the failure of the criminal justice system to hold offenders accountable: inequality makes women victims of violent men and of injustice. Sexual violence must therefore be recognized as not merely the isolated actions of individual offenders, but the systemic actions of a patriarchal society. Sexually violent men are supported by ideologies and institutions that empower them and marginalize women, and this is why they can “attack women and get away with it.”23

Sexual assault operates as “a mechanism of terror to control women”.24 To be terrorized, all women do not need to be sexually assaulted; to know that to be raped is a part of feminine identity is enough. Through language and narratives of sexual violence, women are socialized from an early age into their gender role as victims:

22 MacKinnon, “Reflections”, supra note 6 at 1302 [footnote omitted].
24 MacKinnon, “Reflections”, supra note 6 at 1302.
Women are trained to be rape victims. To simply learn the word “rape” is to take instruction in the power relationship between males and females. To talk about rape, even with nervous laughter, is to acknowledge a woman’s special victim status. We hear the whispers when we are children: girls get raped. Not boys. The message becomes clear. Rape has something to do with our sex. Rape is something awful that happens to females: it is the dark at the top of the stairs, the undefinable abyss that is just around the corner, and unless we watch our step it might become our destiny.\(^\text{25}\)

As a part of their gendered identity, women learn to see themselves as victims of sexual violence, to fear sexual violence in their daily lives, to attempt to avoid it, and to take the blame for it, based on social norms about appropriate feminine chaste and risk-averse behaviour.\(^\text{26}\) In all these lessons, women most fundamentally learn of their inequality: sexual violence “remind[s] women who has power over them and keep[s] them solidly in their places.”\(^\text{27}\)

As I explore, sexual violence and the law’s failure to address it have been accomplished in part through our “deeply engrained societal attitudes that hold women responsible for sexual assault and absolve men of wrongdoing”.\(^\text{28}\) These attitudes are based on gender roles, or appropriate behaviour for men and women in heterosexual interactions that largely dictate dominance and aggression in men and passivity and subordination in women.\(^\text{29}\) In the context of sexual violence, they are known as rape myths. These ‘commonsense’ beliefs and perceptions continue to be widely held among the public and influence the willingness of men to be sexually


\(^{27}\) Clark & Lewis, *supra* note 14 at 28.

\(^{28}\) Johnson, “Limits”, *supra* note 3 at 622.

violent, of women to engage the justice system for help, and of individuals to believe complaints of sexual violence. Rape myths have been adopted and reproduced by legislators, judges, and lawyers within legal doctrine and discourse; as a result, the law has rationalized and legitimated sexual violence and shielded offenders from sanction, one social institution among many enabling sexual violence. The expression of rape myths has been both tempered by reforms and modified in tone by the emerging neoliberal paradigm. The expression of rape myths has decreased and has become subtler and less centred on feminine virtue. However, as feminist scholars have shown, the myths and their rationales continue in the law, indicating the need for further reforms.

B. Rape Myths in the Criminal Justice System

Rape myths are made up of a cluster of ‘commonsense’ beliefs about sexual assault that ignore coercion and forced submission, minimize offender responsibility, and promote blame and distrust of survivors. Ultimately, rape myths dismiss sexual violence as simply a form of sex. As I discuss in more detail in what follows, they draw on ideas about gender, race, class, disability, and other dominant notions of who has worth and who does not. Rape myths perpetuate and justify a crime of inequality based on prejudice.

30 Johnson, “Limits”, supra note 3 at 622–624; Temkin & Krahé, supra note 20 at 33–38, 41; Similarly, international studies have demonstrate that lower status of women is correlated with higher rates of sexual violence. They also demonstrate the impact that sexual violence has on making women more fearful in their daily lives. See Carrie L Yodanis, “Gender Inequality, Violence Against Women, and Fear A Cross-National Test of the Feminist Theory of Violence Against Women” (2004) 19:6 J Interpers Violence 655.

31 I refer to the legal reforms from the 1970s to 1990s, the most important being the reforms of the early 1980s. See Chapter II, Section C for a discussion of the reforms.
At their most basic, rape myths tell us what counts as a ‘real’ sexual assault: when a stranger uses violence or threats to rape a woman who physically resists, and as a result of the attack suffers physical harm. According to rape myths, if something falls short of this ideal, it is not a crime.\textsuperscript{32} This larger myth is made up of multiple beliefs that deny the violence of most sexual offences. In what follows, I discuss ten specific aspects of rape myths L’Heureux-Dubé J. identified at the Supreme Court of Canada\textsuperscript{33} and which other feminist scholars have also explored.

Two beliefs relate to the perpetrator. First, he is a stranger to the survivor, “who leaps out of the bushes to attack his victim and later leaves her”,\textsuperscript{34} on the basis that men cannot and do not rape friends, family members, or acquaintances.\textsuperscript{35} Secondly, the perpetrator is either mentally ill or evil,\textsuperscript{36} “consumed with lust, and totally unable to control his animal passions.”\textsuperscript{37} Typically, he is also racialized or Aboriginal, unemployed or poor, and unmarried; he is not a white middle-class professional with a wife and kids.\textsuperscript{38}

At the core of rape myths is disbelief of the survivor. As a part of this, L’Heureux-Dubé J. identified the long-standing dichotomy between the Madonna

\begin{footnotes}
\item[32] Temkin & Krahé, supra note 20 at 31–32.
\item[33] R. v. Seaboyer, supra note 26, L’Heureux-Dubé J, dissenting.
\item[34] Ibid at para 151.
\item[35] Ibid at para 149.
\item[36] Ibid at para 151.
\item[37] Clark & Lewis, supra note 14 at 134.
\item[38] See e.g. Ibid at 143–144; Constance Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada (Toronto: Published for Osgoode Society by Women’s Press, 1991) at 98 [Petticoats and Prejudice]; Patricia Marshall, "Sexual Assault, the Charter and Sentencing Reform" (1988) 63 CR-ART 216 at 220–222; Temkin & Krahé, supra note 20 at 47; Constance Backhouse, Carnal Crimes: Sexual Assault Law in Canada, 1900-1975 (Toronto: Published for the Osgoode Society for Canadian Legal History by Irwin Law, 2008) at 90, 246–247 [Carnal Crimes]; Josephine L Savarese, "Doing No Violence to the Sentence Imposed: Racialized Sex Worker Complainants, Racialized Offenders, and the Feminization of the Homo Sacer in Two Sexual Assault Cases” (2010) 22 CJWL 365 at 381–384.
\end{footnotes}
and the whore. To fit into the archetypal and therefore believable complainant, “the Madonna”, survivors of sexual assault must be respectable in every sense.\(^{39}\) They must conform to notions of proper feminine behaviour, particularly the requirements for chaste, sober, and risk-adverse conduct. Ideally, they should also be white and middle-class.\(^{40}\) No woman can meet the impossible standards held up as the ideal, which is the point of a norm meant to police women’s behaviour and blame them for men’s violence. By failing to meet an impossible ideal, all women can be relegated to the status of whores. As explained by Susan Brownmiller, survivors can then be blamed because they “ask for” sexual violence by seductive or careless behaviour.\(^{41}\)

According to L’Heureux-Dubé J., rape myths also tell us that women will violently resist sexual assault, and when they do, they can prevent it. Therefore, when there is no evidence of resistance, claims of rape are likely to be false. Women make false claims because they are “fickle and full of spite”: they allege rape against men they have had consensual sex with to be spiteful or to avoid punishment; and they allege it against men they have not had sex with because they fantasize about rape.\(^{42}\) At their most basic, these beliefs are premised on “the cherished male assumption that female persons tend to lie.”\(^{43}\)

\(^{41}\) Brownmiller, supra note 25 at 311–313.
\(^{42}\) \textit{R. v. Seaboyer}, supra note 26 at paras 147, 151, L’Heureux-Dubé J., dissenting.
\(^{43}\) Brownmiller, \textit{supra} note 25 at 369.
Underlying the related notions that women both want to be raped and cannot be raped against their will is the cultural construction of normal heterosexual activity consisting of men aggressively seducing or overpowering women who passively accept and privately want to be ‘taken.’ When women want sexual assault and men are supposed to act on sexual aggression, forced sexual touching is not harmful but enjoyable; certainly it is not violence.44

L’Heureux-Dubé J. also identified two ideas about reporting. First, women are seen as “emotional”; therefore, when reporting, women who are not lying will be hysterical. Secondly, rape myths dictate two mutually exclusive requirements of women: to be too ashamed to report, or to be too hysterical to not report.45 However, generally, to be believed, rape myths expect women “to report the assault to the police immediately and to be visibly upset and emotional about the experience.”46

Our society claims to see rape as a horrific crime requiring swift and severe justice but this condemnation only follows when sexual violence meets the stereotypical dictates of ‘real’ rape. Therefore, although we as a society claim to despise and abjure sexual violence, in reality, we seldom do.47 More frequently, we see sexual assault as a clumsy and failed attempt at normal heterosexual seduction that women invite, and which women misrepresent as rape “in postcoital spite.”48 These sexual assaults are “dismissed with a knowing wink as a natural

44 *Ibid* at 311–313.
46 Temkin & Krahé, *supra* note 20 at 32.
47 Clark & Lewis, *supra* note 14 at 23–24.
48 Brownmiller, *supra* note 25 at 313.
consequences of the sexual game in which man pursues and woman is pursued.” In essence, we blur the lines between sex and sexual violence, often seeing them as one and the same.

Rape myths are not only based on misogynist ideas of women and heteronormativity, they are also wrong, given what is known about sexual violence. Rather than stranger attacks being the norm, in most cases, sexual violence occurs between acquaintances, friends, and family. As well, survivors often do not physically resist. Perpetrators, nearly always men, usually have a size advantage over women and children; offenders may overpower survivors such that they cannot actively resist, and furthermore survivors often have realistic fears that resistance will result in greater harm. As well, perpetrators often have the advantage of experience and socialization: women have been socialized to be passive and gentle rather than aggressive but men have not. The patriarchy has specifically endowed men with power and authority over women and children and has socialized them to use it; their power and authority can be used to force sexual contact without violence or apparent resistance.

Consequently, survivors are often not physically injured. Police reports show that most sexual offences are forced sexual touching, and offences that cause

49 Clark & Lewis, supra note 14 at 24.
50 Sinha, supra note 3 at 30.
51 Brownmiller, supra note 25 at 360–361; See also Backhouse, Carnal Crimes, supra note 38 at 290; Paula E Pasquali, No Rhyme or Reason: The Sentencing of Sexual Assault (Ottawa: Canadian Research Institute for the Advancement of Women, 1995) at 27; Temkin & Krahé, supra note 20 at 31–32.
53 Temkin & Krahé, supra note 20 at 31–32.
survivors serious bodily harm or involve weapons are less frequent.\textsuperscript{54} Even so, one must consider this data with some skepticism, due to significant concerns with both reporting and police under-classifying sexual offences based on harm.\textsuperscript{55}

It is possible that sexual assault is more violent that we appreciate. As the personal accounts of acquaintance rape in Jody Raphael’s book \textit{Rape is Rape}\textsuperscript{56} make clear, although acquaintance rape is often portrayed as arising from misunderstandings about consent rather than violence, sexual assaults by acquaintances are often very violent and cause physical injury. Perhaps, by using masculinist definitions of consent, violence and harm, or understanding sexual violence from the perspective of offenders, we dismiss this.\textsuperscript{57} There is no doubt that all sexual offences are indeed violent and harmful; however, the degree of violence and physical harm on average may be less clear.

Also contrary to the myths, there is no one typical response to sexual violence: survivors may be distraught or calm and numb.\textsuperscript{58} Some survivors also do not report immediately, and, as we have seen, the majority of survivors do not report at all, accounting for a large amount of the justice gap.\textsuperscript{59}

Yet rape myths persist. As identified by Jennifer Temkin and Barbara Krahé, rape myths construct a fictional ‘real’ rape that is “not only descriptive, specifying

\textsuperscript{57} See e.g. Ehrlich, \textit{supra} note 29 at 121–148.
\textsuperscript{58} Temkin & Krahé, \textit{supra} note 20 at 32–33.
\textsuperscript{59} Clark & Lewis, \textit{supra} note 14 at 90–91; Sinha, \textit{supra} note 3 at 94–97; Johnson, “Statistical Trends”, \textit{supra} note 3 at 57–58; Johnson, “Limits”, \textit{supra} note 3 at 626–627.
the characteristics of a typical rape, but *prescriptive* in that all too often it lays down the criteria a case must meet in order to be judged to qualify as rape.”\(^{60}\) When a sexual assault diverges from the common understanding of a ‘real’ rape, people are less inclined to believe it occurred or that it amounts to a crime.\(^{61}\)

The criminal justice system is not immune from this thinking: rape myths have influenced police and legal decision-making, and specifically as I examine, sentencing of sexual offenders. The law of sexual offences and sentencing has, in the past, reproduced and constructed rape myths in legal doctrine and discourse, classifying sexual violence as harmless, normal sex. My question is whether that continues today in sentencing.

**C. Description of Thesis**

Sexual violence against women continues to be prevalent and largely outside the auspices of the criminal justice system. As I explain below, other feminist scholars have demonstrated that rape myths historically guided the development of the law of sexual offences. My project is to determine if they continue to influence sentencing of sexual offenders in B.C., considered in light of the past use of myths in the law and the previous work of feminist scholars.

This thesis is divided into eight parts. In Chapter I, I introduce the problem of sexual violence and its gendered character, and the use of rape myths in the criminal justice system. I also outline my research objective and findings. Next, in Chapter II, I explain the history and evolution of sexual offence law and sentencing law in

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\(^{60}\) Temkin & Krahé, *supra* note 20 at 32 [emphasis in original].

Canada, specifically how rape myths have been embedded in the law and how feminist advocates have sought to eliminate their use. I focus on sentencing prior to the major legal reforms to provide a point of comparison for recent cases; I also highlight relevant feminist literature on rape myths to identify current concerns. Chapter III contains an explanation of my conceptual framework, based on a feminist approach and the theory of law as discourse, as well as my methodology. My analyses of the case sample are found in Chapters IV to VI. Finally, in Chapter VII, I discuss overarching themes and how rape myths have adapted since the 1970s, and I outline my concluding thoughts in Chapter VIII.

Research Objective and Approach

As a woman and a feminist, I am concerned about inequality within sexual assault law. I am particularly interested in the use of rape myths in sentencing, a site that, as noted by Christine Boyle, can “reveal the most about the reality of the law on sexual assault.”

My project is to determine whether courts currently use myths about sexual violence when sentencing sexual offenders. As I discuss in more detail in Chapter II, feminist scholars have demonstrated that, despite legislative reforms and judicial re-conceptualizations of consent, rape myths continue to influence sexual assault trials, sometimes in a modified form that reflects neoliberal expectations of feminine risk-avoidance and individual rationality and responsibility. Whether rape myths

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62 Christine Boyle, Sexual Assault (Toronto: Carswell, 1984) at 171 [footnote omitted].

inform current sentencing decisions, particularly in B.C., is unclear because this aspect of judicial decision-making has attracted less attention from feminist scholars.

To understand whether B.C. courts currently use myths about sexual violence when sentencing sexual offenders, I analyze both doctrine and discourse. This distinction is somewhat artificial: as I explore in Chapter III, the law, made up of institutional language, is discourse.\(^\text{64}\) However, this distinction clarifies my two purposes for analyzing the cases: how judges apply the law in terms of relevance and aggravating and mitigating factors, and what stories judges tell about sexual violence based on their language.

As I explore in this thesis, legal doctrine and discourse are not objective, neutral or universal; they are partial and situated in the experiences and perspectives of lawmakers. Through their voices and pens they have ingrained the structural vulnerability of women to sexual violence and the prejudice of dominant cultural norms and social institutions into the law.\(^\text{65}\) Because judges are situated within our broader culture and within the criminal justice system, their intention to discriminate is not necessary for them to express rape myths in doctrine or


discourse. Rape myths in sentencing judgments signify their power and prevalence rather than the intention of judges to repeat them.\textsuperscript{66}

I have not studied the entirety of the law of sexual offences; of necessity, I have studied a small piece: recent B.C. sentencing cases. I analyze a two-year sample, cases from 2011 and 2012, to add to the existing feminist scholarship on the continued presence of rape myths in the law. I analyze these cases in the context of the history of sexual offence and sentencing law, with a focus on sentencing prior to the 1980s \textit{Criminal Code}\textsuperscript{67} reforms, to consider overarching themes and continuing concerns.

I do not seek to determine the proportion of cases that reflect rape myths; rather, I focus on identifying themes and even exceptional examples. I contend that inequality perpetuated by courts is problematic if it occurs at all, so it is unnecessary to establish any specific percentage as a required minimum.

I also did not set out to study sentencing outcomes. As I explain in more detail in Chapter II, my decision is based on feminist concerns about the harm and discrimination the criminal justice system perpetrates, particularly through incarceration. Like other feminist researchers, I am concerned about the discrimination against Aboriginal, racialized, and poor offenders in sentencing generally\textsuperscript{68} as well as the criminal justice system’s failure to show it can rehabilitate

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\textsuperscript{67} \textit{Criminal Code}, RSC 1985, c C-46.

offenders.\textsuperscript{69} I have also been persuaded that harsher penalties operate as a barrier to conviction,\textsuperscript{70} and conviction is something I consider important to promote offender responsibility and justice for survivors. In this thesis, I do not suggest offenders should be given longer sentences; rather I suggest sentencing decisions should be free of rape myths and should appreciate the context of inequality that fosters sexual violence. In short, sentencing should be fair to both offenders and survivors.

\textit{Findings}

In the past and now, there is a tendency among judges to view some sexual offences as sex. This tendency is revealed in courts’ reluctance to convict sexual offenders and the way they sentence convicted offenders, my topic. Like others studying sentencing, my analysis of B.C. cases from the 1970s and 2011 and 2012 shows that courts treat and portray some crimes of sexual violence as not that serious, the offender not that blameworthy, or the survivor not that harmed, based on rape myths. Still infecting our notion of ‘commonsense’ and our legal understanding of harm and blame, the myths have proven tenacious and difficult to ferret out and eliminate.

Feminist reformers have fought to eliminate prejudicial tropes from the law and to have the law recognize sexual offences as violence, not sex; however, the


\textsuperscript{70} Boyle, \textit{supra note} 62 at 12, 14; Janet Lynn Drysdale, \textit{Rape and the Law in Ontario, 1892-1930} (LL.M., York University, 1988) [unpublished] at 5–12; Smart, \textit{Feminism, supra note} 29 at 45; See also Clayton C Ruby, Gerald J Chan & Nader R Hasan, \textit{Sentencing}, 8th ed (Markham, Ont: LexisNexis Canada, 2012), sec 1.28, 1.31 [high conviction rates not harsh sentences deter crime].
influence of the myths and the notion of sexual violence as a form of (bad) sex remain. They peep out from behind the language of non-violence, risk, intoxication, and ‘good’ offenders. But as feminist advocates have long argued, sexual violence is not just bad sex, not for survivors and not for women in general.

I speculate that rape myths are difficult to eliminate in part because the paradigm of the law is largely a liberal one. That is, sexual crimes are treated as individual acts isolated from larger social structures, including those that create or maintain inequalities and vulnerabilities. This approach does not right inequalities. It also does not eliminate gender norms that men are aggressive, sex-seeking, barely under control Casanovas and women are passive and coy sexualized objects who cannot be trusted to communicate their wants and desires.

In the case sample, I found rape myths. They were most conspicuous in sexual offences by men against adolescents who were strangers to them or bare acquaintances. In these cases, I saw judges portray sex offences as technically illegal but not truly harmful because survivors ‘agreed’ or ‘consented’ and offenders did not use ‘violence’ or ‘force.’ In some cases, judges accepted the vulnerability of adolescents that makes consent impossible as a matter of law but not of fact; they therefore glossed over offenders’ exploitation and portrayed survivors as less harmed by offences they had ‘asked for.’ In these cases, they left the inequality of sexual violence and its violent character largely unstated and therefore, unexamined. With supposed agreement and no overt physical violence, the law considered this a grey area between sex and harmful sexual violence.
The court’s different approach to considering harm to survivors was also discernible in some cases of particularly vulnerable women taking ‘risks.’ Specifically, it is noteworthy that in three cases of sexual assaults against women in prostitution, courts determined survivors were not seriously harmed, had recovered well from their trauma, or had improved their lives since the assault, findings not typically made for other survivors. In another case about ‘risk,’ a judge scolded a single mother subjected to a sexualized workplace for not avoiding sexual assault by her boss, which apparently she should have seen coming. Like adolescents who associated with predatory men, perhaps courts saw these women as willfully running the risk of sexual violence.

The myths were also visible in portrayals of offenders as fundamentally ‘good.’ Based on stereotypes, courts mitigated sentences of men with families, jobs, and churches. Ultimately, this thinking reinforced myths about what rapists look like and whether the conduct of otherwise good men amounts to sexual violence, not sex. It also reinforced the social privilege of certain men.

In some cases in the sample, courts used sexual history and other evidence that sexualized survivors and painted offenders as good men not prone to sexual violence. As well, in mitigation or to situate offences in relation to other cases, courts characterized offences as non-violent, mistakes, or not predatory based on myths. They joined offenders (and psychologists) in blaming violence on intoxication rather than offender agency, seeing sexual violence as something that happens when men lose control, not when they are controlling and dominating.
someone else. Courts placed less emphasis on harm to the survivor than on the offender’s circumstances, and sometimes omitted harm from the discussion entirely.

I do not debate the doctrine that offenders guilty of the same crime can have different levels of blameworthiness; however, it is a problem if blameworthiness turns on prejudicial and sexist assumptions.

The myths that were evident in doctrine were reinforced by discourse, which followed similar themes. In some cases, judges described acts of sexual violence using language that expressed consent, mutuality, and eroticism. They also used language for sexual violence that was neutral and vague, using broad and commonplace terms for touching without positive or negative connotations. These terms hid the forceful, violent, and unilateral nature of sexual offences. In some cases, courts obscured the agency of offenders with grammar that removed offenders from crimes or made the actor unclear, sometimes making sexually assaultive acts appear to occur spontaneously. In some judicial language, causes were discursively portrayed as outside of offenders, blaming violence on intoxication. Courts also regularly used terms that undermined findings of guilt, casting doubt and suspicion on survivors. Ultimately, legal discourse suggested the question: was it really just bad sex?

Cases that looked the least like the stereotypical ‘real’ sexual assault were where myths tended to crop up. In the most undeniably violent and horrific cases, judges readily recognized violence and harm. It was in the less obviously violent cases that courts used rape myths. It appears, then, in sentencing cases, feminist reforms have failed to ensure courts recognize the gender of sexual violence and all
sexual offences as harmful and blameworthy violence, and most clearly have failed to protect especially vulnerable women from rape myths.

I do not suggest courts intentionally relied on rape myths: they are pervasive in our culture and the law and, raised to the level of commonsense, often go unnoticed. Judges do not construct and narrate offences as a solitary venture. However, I suggest that judicial inattention to gender inequality, the context of sexual violence, played a role in enabling myths to continue and enabling courts to portray some sexual violence as like consensual sex.

D. A Note on Language

My thesis is focused on both doctrine and discourse; as a result, language is important. I tried to be thoughtful about the language I use. I wish to explain certain word choices, specifically my use of ‘rape’ and ‘survivor.’

The term rape no longer has a specific meaning in the law: with the reforms of the 1980s, the offence of rape was abolished in favour of sexual assault, which criminalizes all nonconsensual sexual touching. However, the meaning of ‘rape’ in common parlance remains the same: it still usefully expresses a particular type of sexual assault. As well, the word rape is powerful. Its use can be a political choice for feminists scholars\(^71\) to capture “an important shared social understanding of the meaning and impact of rape for women”, a meaning which may have been lost in the gender-neutral term ‘sexual assault.’\(^72\) Moreover, it more accurately describes the force and violence of nonconsensual vaginal and anal penetration than ‘intercourse’


\(^72\) Johnson, “Limits”, supra note 3 at 621.
or ‘penetration’, an issue I discuss in my analysis. Therefore, I have chosen to use it in this thesis.

I have also chosen to call individuals who have experienced sexual violence ‘survivors.’ I use this word instead of the more common term ‘victim,’ which is the correct term pursuant to the Criminal Code.73 I have followed others in questioning the label ‘victim’ because it can be disempowering, rendering individuals as passive (and stereotypically feminized) objects worthy of pity and even scorn. In contrast, the term ‘survivor’ has been embraced for its connotations of resilience and resistance.74 I also question the term victim because of its appropriation by the victims’ rights movement, which I discuss in more detail in Chapter II. Within this movement, ‘victim’ has come to convey the understanding of crime as atomistic and isolated occurrences, rather than the feminist conception of crime as contextual and based on socially constructed vulnerability and marginalization.75

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73 Criminal Code, supra note 67, s 722(4).
74 Ruparelia, supra note 40 at 670–671.
II. Context

In this chapter, I consider the law both past and present to explore the expression of rape myths and ongoing concerns about their use in the law. As I explain below, the law has throughout history told a particular story about sexual violence. This story is premised on the gender inequality that underlies sexual violence, which denies the female experience in favour of a masculine point of view: it sees survivors, the harm they suffer, and perpetrators’ culpability from the privileged perspective of those who benefitted from gender inequality. From this vantage point, sexual violence was harmful if it harmed male interests. Lawmakers protected their male interests by encoding a narrow understanding of ‘real’ sexual violence into the law.

With the women’s movement, rape myths and the injustice perpetrated by the law against survivors came to be recognized. Feminist advocates pushed for legal reforms, and were in part successful. Due to their efforts, the law has lost its blatant discrimination; however, feminist scholars have argued that the continuing unequal position of women and currency of rape myths have limited how judges interpret the reforms, influencing the law in both doctrine and discourse.

A. Sexual Assault Law of the Past

The gender inequality that characterizes sexual violence has also characterized the law. As I explore, a survivor who reported sexual violence had her “victimization measured against the current rape mythologies” by police, lawyers,
and judges. Myths were formalized in the substantive law of sexual offences as well as the particular evidentiary rules that governed sexual offence trials. These laws “made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her ‘morality’ or ‘character.’” Myths shaped how professionals in the criminal justice system expected a ‘real’ rape, a ‘real’ complainant, and a ‘real’ perpetrator to look; as a result, with any deviation from the script, survivors were less likely to be believed and have their assaults recognized by the law.

As Boyle pointed out, until recently, the law was drafted and interpreted almost entirely by men; therefore, it was inevitable that the law reflected their perspectives and experiences. As men, lawmakers could readily identify with male family members of survivors and even accused men, but not female survivors. As a result, the law evolved to protect the interests of survivors’ family members, men with rights over women’s sexuality and reproduction, and the interests of men accused of sexual offences, seen as easy victims of false charges of sexual assault but not of other crimes. The law did not develop to protect women and children from sexual violence.

Substantive Law: Sexual Offences to Protect Male Interests

The substantive law of sexual offences was premised largely on the status of female sexuality and reproduction as the property of men. The law’s primary

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77 Ibid, para 175.
78 Ibid, paras 146-173.
79 Boyle, supra note 62 at 4.
80 Ibid at 5-6; See also Brownmiller, supra note 25 at 17-30; Clark & Lewis, supra note 14 at 111-120.
concern with male interests is evident in the past substantive offences whose focal points were penetration and chastity; when these were perceived to be absent, actions were not criminal or were considered less serious offences.

In 1800, Upper Canada adopted English criminal law in its entirety. This included the offence of rape, which was left undefined until 1892. When it was defined, it was limited to a male having nonconsensual sexual intercourse with a woman not his wife; this definition remained in the law until the 1980s. The *Criminal Code* also criminalized attempts to commit rape, an offence that was often relied on when it was difficult to prove the necessary elements of rape or when juries or judges were simply unwilling to convict for rape.

Since its adoption of the criminal law from England, Canada has also criminalized the offence commonly known as statutory rape, initially called “carnal knowledge” of an underage girl. The age of consent was raised over time: from 10 years old, to 12, then to 14, and then, in some circumstances, to 16 or even 18. However, as discussed by Boyle, protection of girls over 14 was only historically provided to those who were “chaste.” The *Criminal Code* also ostensibly outlawed sexual intercourse with women with mental disabilities, as well as “seduction” of

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83 Backhouse, “Nineteenth-Century”, supra note 65 at 206, 208; Drysdale, supra note 70 at 10–11, 151–152.

84 Boyle, supra note 62 at 18; Backhouse, “Nineteenth-Century”, supra note 65 at 201–202.

85 Boyle, supra note 62 at 18–19; Backhouse, “Nineteenth-Century”, supra note 65 at 204, 206–207, 209–211.

86 Boyle, supra note 62 at 18–20 citing *Criminal Code*, SC 1920, c 43, ss 8, 17.
young women and girls in certain relationships of subordinance with the offender or on the promise of marriage.\textsuperscript{87} The offence “indecent assault of a female” was applied to sexual violence when there was no proof of penetration and the offence of buggery and “indecent assault of a male” when a male was victimized.\textsuperscript{88}

Although specific offences were delineated, what offence police, judges, and juries would charge and convict a perpetrator of, a rare occurrence,\textsuperscript{89} varied based on discriminatory evidentiary rules and judgments about offenders’ and survivors’ characters and conduct: as found by Janet Lynn Drysdale, crimes that were factually “indistinguishable ended in different verdicts, for rape, attempted rape, indecent assault and even common assault.”\textsuperscript{90}

Fundamentally, the notion of the harm of sexual violence rested on male property interests. Most offences centred on sexual intercourse, or vaginal penetration by a penis. The law therefore criminalized unsanctioned access to female reproductive capacity rather than violence as experienced by survivors.\textsuperscript{91} Seduction offences and certain exploitation of youth offences often explicitly applied to ‘chaste’ complainants only, and therefore, complainants with future marital value:\textsuperscript{92} other women were seen as “fair game” for men, with no real harm arising from their assault.\textsuperscript{93} As well, no offence prohibited sexual violence between spouses:

\begin{itemize}
  \item \textsuperscript{87} \textit{Ibid} at 20–24.
  \item \textsuperscript{88} \textit{Ibid} at 16–17.
  \item \textsuperscript{89} \textit{Ibid} at 14; Drysdale, \textit{supra} note 70 at 7; See generally Clark & Lewis, \textit{supra} note 14.
  \item \textsuperscript{90} Drysdale, \textit{supra} note 70 at 151–152.
  \item \textsuperscript{91} Boyle, \textit{supra} note 62 at 11–12, 27; Nancy Goldsberry, \textit{Rape in British Columbia: A Report to the Ministry of the Attorney-General} (Victoria, BC: Ministry of the Attorney-General, 1979) at 111–112; Pasquali, \textit{supra} note 51 at 25–26.
  \item \textsuperscript{92} Boyle, \textit{supra} note 62 at 18–20, 24–25; Clark & Lewis, \textit{supra} note 14 at 115–120.
  \item \textsuperscript{93} Janine Benedet, “The Age of Innocence: A Cautious Defense of Raising the Age of Consent in Canadian Sexual Assault Law” (2010) 13:4 New Criminal Law Review: An International and
\end{itemize}
the law did not recognize assaults by husbands against their wives because male interests were not harmed.94

**Distrust and the Exceptional Evidentiary Requirements in Sexual Offence Trials**

Evidentiary laws further limited the sort of women and children the law was prepared to believe and protect, based on male lawmakers’ fears of convicting innocent men of false rape claims. According to lawmakers, complainants of sexual violence were to be distrusted.95 Their suspicion was reflected in the use of sexual history evidence against complainants, as well as the explicit requirements for evidence of corroboration and immediate complaint and the implicit requirement for evidence of physical resistance.

Distrust is obvious in the statements of some judges and jurists. For example, according to English judge Baron Huddleston, most rape complaints were fabrications women concocted “for the purpose of shielding their own shame”, “extorting money” or “getting their expenses paid and a trip to the assize town”, or simply for “no conceivable motive whatever.”96 Similarly, J.A. Wigmore attributed women’s predilection to falsely allege rape to their “inherent defects” and “diseased derangements or abnormal instincts”, among other psychological infirmities.97

Children were equally untrustworthy, with jurists opining that it was commonsense

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94 Boyle, supra note 62 at 8; Clark & Lewis, supra note 14 at 120–121.
95 R. v. Seaboyer, supra note 26 at para 175, L’Heureux-Dubé J, dissenting.
96 James Crankshaw, *The Criminal Code of Canada and the Canada Evidence Act, 1893: with an extra appendix containing the Extradition Act, the Extradition convention with the United States, the Fugitive Offenders’ Act and the House of Commons debates on the code and an analytical index* (Montreal: Whiteford & Théoret, 1894) at 189.
that children were prone to “glibness, mistakenness, suggestibility, [and] proclivity to grasp for reward and to seek notoriety”.  

Based on distrust of women and child complainants, legislatures and judges concocted unique procedural rules for sexual offence trials, all aimed at dismissing complaints and acquitting men. As a result, the laws against sexual offences were rarely enforced.

Among the most powerful of these tactics was defence counsel’s use of sexual history evidence to discredit survivors. Sexual history was considered relevant to consent and to the survivor’s credibility. As stated by L’Heureux-Dubé J., “women who had consensual sex outside of marriage were thought, in essence, to have a dual propensity to consent to sexual relations at large and to lie.”  

Although judges had some discretion to limit “degrading” questioning to undermine a complainant’s credibility, their hands were tied on the issue of consent, a material issue. The questions of defence counsel were often degrading; some defence counsel developed tactics to generally “hurl as much dirt as possible” at complainants to intimidate them against pursuing claims or to make them appear unbelievable.

These tactics were often successful, as evidenced in the 1917 gang rape case chronicled by Constance Backhouse in her history of Canadian sexual assault law.

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98 Backhouse, *Carnal Crimes*, supra note 38 at 173; See also Boyle, *supra* note 62 at 161.
103 For example, asking complainants is they were prostitutes: *Ibid* at para 231.
Based on the (likely false) evidence that the 14-year-old survivor had previously engaged in mutual masturbation with her boyfriend, the judge dismissed the charge and characterized the complainant as too disreputable to deserve the law’s protection:

She has shown a lewd and lascivious disposition by offering herself to prostitution and showing by her manners that she could not be put on the same footing with pure women for the protection of whom the law has been framed.106

With the use of sexual history evidence and the expectations for chasteness, women and even girls with any sexual experience (consensual or not) were essentially unrapeable.107 Even sexually inexperienced women were not immune because the notion of chastity included general ideas of respectability beyond sex. As Backhouse found, questions or allegations intended to paint the survivor as disreputable could include that she consumed alcohol or lived in a poor neighbourhood, for example.108

The general distrust of complainants was also apparent in two evidentiary rules unique to sexual offences: recent complaint and corroboration. Contrary to the general evidentiary rule against prior consistent statements, in sexual offence trials Crown counsel were required to submit evidence that the survivor immediately reported the offence in order to rebut the presumption she was lying. Based on the myth ‘real’ survivors would complain at “the first reasonable opportunity”, if they

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106 Backhouse, *Carnal Crimes, supra* note 38 at 77 citing *Rex v. Fiola* (1918), 29 CCC 125, 41 D.L.R. 73 at 128, 130 (Q Ct SP) [cite to CCC].
107 *Ibid*.
delayed, evidence of complaint was inadmissible and judges and juries had to make an adverse inference about the survivor’s credibility.\textsuperscript{109}

Similarly, the law required corroboration of complaints. Again contrary to the general common law rule, uncorroborated testimony was insufficient for conviction of “sexual intercourse with the feeble-minded”, seduction, incest, and other offences. For sexual offences for which it was not required, its absence gave rise to a judicial duty to warn juries about the dangers of relying on such testimony.\textsuperscript{110}

Although often an unstated requirement, survivors of sexual offences typically had to demonstrate they resisted violent attacks by evidence of their physical injuries. This standard, a gloss to the Criminal Code, was often set high, with bruises, cuts, and even fractured bones seen as part and parcel of consensual intercourse because men were entitled to use force to get women to submit and women would resist to feign chastity.\textsuperscript{111} Resistance requirements could operate particularly stringently in cases of working class or impoverished women, with forensic medical specialists asserting, “[w]omen of the lower classes are accustomed to rough play”.\textsuperscript{112}

The law developed informed by masculinist and discriminatory notions of women’s and children’s value and credibility, and, according to men, what constituted force, violence, and consent in sexual activity. Judges protected men


\textsuperscript{110} \textit{Ibid} at 15–16, 49, 155–158; \textit{R. v. Seaboyer, supra} note 26 at para 180, L’Heureux-Dubé J, dissenting.

\textsuperscript{111} Backhouse, \textit{Carnal Crimes, supra} note 38 at 147, 290–291.

\textsuperscript{112} \textit{Ibid} at 40 citing J. Dixon Mann, \textit{Forensic Medicine and Toxicology,} 2d ed (London: Charles Griffing, 1898) at 102.
from legal responsibility for their violence and tried survivors, not offenders, for their purported misdeeds.\textsuperscript{113}

\textbf{B. The Past Approach to Sentencing Sexual Offenders}

Historically, Canada legislated draconian penalties for sexual offenders. However, judges and juries infrequently meted them out: courts convicted rarely and when they did they shielded offenders from the harshest punishments. As in the determination of guilt or innocence, rape myths and other forms of prejudice influenced judges and juries when they sentenced offenders, which I explore below.

\textit{The History of Sentencing for Sexual Offences in Canada}

Canada’s past sanctions for sexual offenders, in keeping with the English law before it, were brutal. However, few sexual offenders were subjected to these penalties, whose harshness arguably contributed to low conviction rates.

The death penalty was the punishment for rape for nearly all of English history.\textsuperscript{114} It was adopted by Upper Canada in 1800 as the sole punishment for rape and carnal knowledge of a girl under ten years old.\textsuperscript{115} In 1873, the law was amended to add imprisonment, from anywhere from seven years to life, as an alternative to the death penalty for these offences, and in 1877, carnal knowledge of a girl became

\begin{itemize}
\item \textsuperscript{113} Clark & Lewis, supra note 14 at 24; See also MacFarlane, Q.C., supra note 81 at 49.
\item \textsuperscript{114} MacFarlane, Q.C., supra note 81 at 13.
\item \textsuperscript{115} Backhouse, “Nineteenth-Century”, supra note 65 at 201–204, 207; See also Boyle, supra note 62 at 11–12.
\end{itemize}
a non-capital offence.\textsuperscript{116} Rape, however, remained a capital offence until 1954, when life imprisonment and whipping became the maximum penalties.\textsuperscript{117}

Although the death penalty was prescribed for rapists for a long time, “few if any rapists have ever been hanged”\textsuperscript{118} in Canada because the executive branch of government, which had to approve executions, nearly always commuted sentences. No offenders convicted of rape have been executed in the Canadas since the middle of the nineteenth century,\textsuperscript{119} possibly since the union of Upper and Lower Canada in 1841.\textsuperscript{120} Once the law gave judges the option of sentencing offenders to imprisonment in 1873, convicts were spared from having to apply for clemency; immediately after imprisonment became an option, courts rarely if ever sentenced rapists to death.\textsuperscript{121} Nor did they sentence many to life: on average, courts imposed sentences of between seven and ten years.\textsuperscript{122}

Beginning in 1892, whipping was an available penalty for incest, indecent assault, and carnal knowledge of girls under certain ages. It was added as punishment for attempted rape in 1920 and rape in 1921.\textsuperscript{123} Initially, whipping was

\begin{footnotes}
\footnotetext{116}{Backhouse, “Nineteenth-Century”, supra note 65 at 207–211; Boyle, supra note 62 at 11–13.}
\footnotetext{117}{Backhouse, “Feminist Remedy”, supra note 69 at 731; Boyle, supra note 62 at 13; See also Carolyn Strange, \textit{The Politics of Punishment: The Death Penalty in Canada, 1867-1976}, Canadian Legal History Project Working Paper Series 92-10 (Winnipeg: Faculty of Law, University of Manitoba, 1992) at 4–5.}
\footnotetext{118}{C W Topping, “The Death Penalty in Canada” (1952) 284 Annals of the American Academy of Political and Social Science 147 at 148; See also Backhouse, “Nineteenth-Century”, supra note 65 at 211.}
\footnotetext{119}{Backhouse, \textit{Petticoats and Prejudice}, supra note 38 at 98; Strange, \textit{supra} note 117 at 4–5; The idea that no rapists have ever been hanged in Canada post-Dominion is supported by the statement that Louis Riel was the only offender convicted of anything other than murder, in his case, treason, to be executed in Canada: Kenneth B Leyton-Brown, \textit{The Practice of Execution in Canada} (Vancouver: UBC Press, 2010) at 12, 157.}
\footnotetext{120}{Backhouse, “Feminist Remedy”, supra note 69 at 728.}
\footnotetext{121}{Drysdale, \textit{supra} note 70 at 50.}
\footnotetext{122}{Backhouse, “Nineteenth-Century”, \textit{supra} note 65 at 225–226; See also Drysdale, \textit{supra} note 70 at 152–162.}
\footnotetext{123}{Backhouse, “Feminist Remedy”, \textit{supra} note 69 at 729–730; Drysdale, \textit{supra} note 70 at 51–53; See also Boyle, \textit{supra} note 62 at 13.}
\end{footnotes}
frequently ordered and carried out, with judges imposing five to 30 lashes. It became less popular over time, until it was abolished in 1972.

In 1948, Parliament introduced indeterminate sentences for individuals convicted of certain sexual offences who could, according to psychiatric evidence, be labeled as “criminal sexual psychopaths.” The year before, it introduced the designation of “habitual offender” for other, nonsexual, offences. The two categories were later collapsed into the “dangerous offender” classification.

As I discussed earlier in this chapter, the laws did not apply as evenly as the legislation would suggest, with many men escaping conviction based on discriminatory rape myths; thus, although punishments were draconian, they were rarely (and unevenly) imposed. Canadian judges followed the example of their English peers, convicting offenders of lesser offences or acquitting them altogether to temper the harshness of penalties, and in particular, the death penalty. Consequently, the harsh approach of the legislature in the sentences it prescribed could be interpreted not as a deterrent to crime, but "as a deterrent to convictions."

124 Backhouse, "Feminist Remedy", supra note 69 at 730; Backhouse, Carnal Crimes, supra note 38 at 281, 428–429.
125 Boyle, supra note 62 at 13 citing Criminal Law Amendment Act, SC 1972, c 13, s 70 [Criminal Law Amendment Act 1972].
127 See generally MacFarlane, Q.C., supra note 81 at 13–65; Backhouse, Carnal Crimes, supra note 38.
128 Drysdale, supra note 70 at 11–13, 41; MacFarlane, Q.C., supra note 81 at 13 (footnote 38); Backhouse, “Nineteenth-Century”, supra note 65 at 211.
129 Boyle, supra note 62 at 12; See also Smart, Feminism, supra note 29 at 45.
Rape Myths in Sentencing in the Past

The myths that prevented convictions also shaped what judges and juries perceived as appropriate punishment. Although punishments were often severe, they were not imposed uniformly; like criminal liability, punishment depended on assessments of the survivor’s value and credibility as well as the blameworthiness of the offender and the seriousness of the offence. Offenders who were convicted may have suffered from falling on the wrong side of myths, sacrifices to the law’s illusion of treating sexual violence seriously; others benefitted from myths that portrayed them as normal or good men, survivors as unchaste, and their offences as closer to acceptable seduction.

Although rape myths impacted sentencing, sentences for convicted offenders were often lengthy. Drysdale found that in the late nineteenth and early twentieth century prison sentences for rape were frequently long or coupled with whipping; sentences were shorter for attempted rape and indecent assault.\footnote{Drysdale, \textit{supra} note 70 at 152–153, 161–162.} Backhouse, studying twentieth century cases, similarly found a wide range of sentences, with an average of between five and ten years for rape. For other sexual offences, courts often ordered shorter terms of incarceration, suspended sentences, or fines.\footnote{Backhouse, \textit{Carnal Crimes, supra} note 38 at 281; See also Backhouse, “Feminist Remedy”, \textit{supra} note 69 at 729.}

Much like today, judges weighed factors about the offence and offender to fashion a fit sentence. In doing so, they often expressed myths about sexual violence based on notions of gender, sexuality, class, and race. Drysdale found that judges in Ontario in 1892 to 1930 took a hard line towards men who had offended against
young girls, particularly in cases of incest. She found that courts treated crimes against less ‘innocent’ survivors less seriously: judges sometimes used evidence of survivors’ “inculpatory” conduct to mitigate sentence length. In this vein, Backhouse cited a 1928 B.C. Court of Appeal case in which the court reduced the life sentences of two teenagers convicted of rape to three years “due to the ‘thoroughly immoral’ background of the seventeen-year-old complainant.”

Judges also considered offenders’ characters and social standing, demonstrating narrow ideas about ‘real’ rapists. Drysdale found judges reduced sentences on the basis of good character evidence, for example, evidence that the offender was a good husband or was respected in the community. Backhouse also found that judges were lenient with employed, middle-class offenders from “respectable” families, more frequently giving them suspended sentences and fines. Conversely, poor and indigent offenders did not fare well in sentencing, and nor did Black and Aboriginal offenders. For example, Drysdale found a case where a Black offender was sentenced to death at a time when the penalty was rarely ordered. As noted by Backhouse, racism was the whole motivation behind Canada’s retention of the death penalty: it was thought to be necessary to deter assaults of white women by Black men.

Sentencing of sexual offenders has historically been severe. This seems inconsistent with low rates of conviction; however, harsh penalties made judges and
juries resistant to convict. Offenders who were convicted may have been scapegoats for the broader problem of sexual violence, with courts treating those who fit the prototype of the ideal rapist or whose survivor fit the notion of the ideal victim more harshly, often along racist lines. Arguably, these problems have continued. To consider the extent to which rape myths persisted, I examine sentencing in the 1970s in more detail, before considering the major legal reforms and ongoing feminist concerns.

**Sentencing Prior to the 1982 Reforms**

Sentencing in the 1970s remained the same as it had been in the decades prior: the *Criminal Code* prescribed the same penalties and judges ordered similar sentences and considered similar factors as they had before. As I explore in what follows, judges in some sentencing cases considered factors whose relevance and importance were grounded in rape myths, viewing offenders and survivors in light of their compliance with heterosexual gender norms such as the chastity and worth of survivors and the goodness of offenders.

The sexual offence laws in Canada did not change greatly between the beginning of the nineteenth century and the 1970s. In particular, the offence of rape was substantially the same as it had been in Canada’s first *Criminal Code* in 1892. Although the *Criminal Law Amendment Act* abolished corporal punishment in

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138 Boyle, supra note 62 at 12, 14; Drysdale, supra note 70 at 5–12; See also Smart, *Feminism*, supra note 29 at 45.

139 Martin, supra note 68 at 160, 163–164; Ruparelia, supra note 40 at 684–686; Drysdale, supra note 70 at 152.

140 Boyle, supra note 62 at 13 citing *Criminal Code*, SC 1892, c 29, s 266(1).
1972,\textsuperscript{141} by then it was rarely ordered.\textsuperscript{142} Sentences looked much the same as they had before.\textsuperscript{143}

In the 1970s, the most serious penalty, life imprisonment, was only available for rape and sexual intercourse with a woman under the age of 14, with 14 operating as the age of consent. Most other sexual offences attracted maximum sentences of two or five years.\textsuperscript{144} Parliament had not prescribed minimum sentences for sexual offences but had given judges discretion to impose sentences as they saw fit.\textsuperscript{145} Indeed, fines, discharges, probation, suspended sentences and even restitution orders were available,\textsuperscript{146} although restitution orders were rare.\textsuperscript{147}

According to Nancy Goldsberry, the sentences B.C. judges imposed in the 1970s ran the gamut of possibilities. She found that, in B.C. in 1973, slightly less than half of all offenders convicted of sexual offences were given fines or suspended sentences, usually with probation; 38 percent were sentenced to provincial terms of imprisonment, or less than two years; and 18 percent were given federal sentences between two and 14 years in a penitentiary.\textsuperscript{148}

The type of sentence courts ordered might well have followed from prejudice and myths, which influenced the construction of the seriousness of offences and the blameworthiness of offenders and survivors in law and legal

\textsuperscript{141} Ibid citing Criminal Law Amendment Act 1972, supra note 125, s 70.
\textsuperscript{142} Backhouse, Carnal Crimes, supra note 38 at 281, 428–429; Backhouse, “Feminist Remedy”, supra note 69 at 730.
\textsuperscript{143} Exceptions were the introduction of indefinite sentences: Backhouse, “Feminist Remedy”, supra note 69 at 730–731; and increases in some maximum penalties: Backhouse, Carnal Crimes, supra note 38 at 430–431.
\textsuperscript{144} Criminal Code 1970, supra note 82, ss 144, 145, 146(1), 146(2), 148, 149, 150(2), 151, 152, 153, 156, 157.
\textsuperscript{145} Ibid, s 645(1)&(2).
\textsuperscript{146} Ibid, ss 646(1)&(2), 662.1(1), & 663(1)&(2).
\textsuperscript{147} Backhouse, Carnal Crimes, supra note 38 at 281–282.
\textsuperscript{148} Goldsberry, supra note 91 at 109.
discourse. The use of myths in sentencing was apparent in Boyle’s study in the early 1980s as well as my own research on sentencing cases from B.C. courts in the 1970s.

Boyle conducted a significant study of sexism within sexual assault law. As a part of her research, she examined sentencing decisions prior to the 1982 legislative reforms, focusing on judicial identification and weighing of aggravating and mitigating factors. Contrary to other studies, she found that judges regularly considered harm to survivors in general or harm to the specific survivor. However, she also found that judges sometimes considered the survivor’s character in sentencing, meaning that they considered offences against women who were sexually experienced or who socialized and consumed alcohol with men less blameworthy. She also confirmed that courts found sexual offences against acquaintances less blameworthy than offences against strangers.

In my own study of sentencing decisions from B.C. courts in the 1970s, I too found that courts sometimes relied on rape myths in sentencing and reviewing sentences for sexual offenders. In many cases, courts decried sexual offences as reprehensible and expressed empathy for survivors; however, the level of opprobrium in some cases appeared to be based on rape myths.

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149 Boyle, supra note 62 at v, 172 citing Bill C-127, 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; 1st Sess, 32nd Parl, 1982, SC 1980-81-82-83, c 125.

150 Ibid at 175–177.

151 I analyzed 50 sentencing cases, which were largely Court of Appeal cases, from Quicklaw and Westlaw. I searched for cases with the terms “rape”, “sexual intercourse”, “carnal knowledge”, “indecent assault”, “gross indecency”, and “incest”, including variations of those words, e.g., “indecently assault”, within the same paragraph as “sentence”. I compared my results against the list of cases from B.C. in the 1970s provided by Constance Backhouse on her website, http://www.constancebackhouse.ca/fileadmin/final_cases/final_cases.html.
Unlike Boyle in her study, I found that courts sometimes failed to note the impact of offences on survivors.\textsuperscript{152} For example, the court failed to mention the harm the young survivor in \textit{R. v. E.J.B.} suffered, even though this was the second time her stepfather had been before the courts for sexually abusing her.\textsuperscript{153} In only a few cases did courts note that survivors suffered psychological trauma, a type of harm they generally only considered in cases where survivors were young and ‘chaste.’\textsuperscript{154} Courts also failed to consider physical harm, in some cases even when survivors appeared to have suffered significant physical injury.\textsuperscript{155} This can be seen in \textit{R. v. Commodore}: the offender attempted to rape the survivor after he and a group of men beat her to the ground and left her nearly unconscious;\textsuperscript{156} although the court noted the offender badly beat her, it did not consider whether she suffered physical or psychological harm as an aggravating factor or a factor that indicated the need for a more serious sentence.

In some cases in the 1970 case sample, judgments suggested that survivors contributed to offences or were less harmed by them, subtly shaming or blaming survivors. This occurred most flagrantly in the case of a 16-year-old male survivor of indecent assault: the trial judge determined that he was a “practicing homosexual”, and therefore implied that, as a result, he was less harmed than the other survivors of the offender’s assaults.\textsuperscript{157} Since the court perceived that the

\textsuperscript{156} \textit{R. v. Commodore}, [1979] BCJ 664 at paras 2-5, 7-8 (QL)(CA).
survivor failed to adhere to norms of male sexuality, it apparently did not consider it to be a particularly harmful crime against him.

In other cases, courts appear to have used survivors’ transgressions against the norms of female sexuality to undermine survivors’ experiences of harm. For example, in one case, the court described the 13-year-old survivor as not a virgin and as participating with “enthusiasm” in the sexual offence she was unable to consent to.\(^\text{158}\) In another case, the court emphasized that the survivor was “intimate” with the offender’s roommate, and, like the offender, socialized at the Yale Hotel, a “rough place”, with members of a motorcycle gang.\(^\text{159}\) Although I did not find, as other researchers have, cases in which judges explicitly mitigated sentences due to the survivors’ behaviour,\(^\text{160}\) I did find that judges sometimes sexualized survivors to suggest they were not harmed by sexual violence or they precipitated sexual attacks.

Although courts often recognized sexual offences as violent, they failed to consistently do so in cases against girls below the age of consent. Judge sometimes characterized these offences as non-violent or failed to identify offenders’ abuses of authority and dependence.\(^\text{161}\)

Judges also expressed notions about offenders that revealed rape myths.

Courts portrayed respectable middle-class offenders as non-violent or good candidates for rehabilitation, often using evidence of a good family background,

\(^{159}\) R. v. D.P.S., supra note 155 at para 1. See also R. v. Miner, [1979] BCJ 533 at para 4 (QL)(CA) [the court noted the survivor, attacked on a date, was a divorced women with four children] and R. v. Commodore, supra note 156 at para 2 [the survivor was a woman in a parked car with a young man].
\(^{160}\) Boyle, supra note 62 at 176–177; Marshall, supra note 38 at 222–223, 230–233; Drysdale, supra note 70 at 162–163.
marriage, and fatherhood as mitigating factors or suggestive of the need for lenience. In R. v. D.P.S. the court used the offender’s improved manners in prison, namely his “work habits, personal hygiene and attitude towards staff”, as indicative of his potential for rehabilitation, and on this basis, reduced his sentence for repeatedly raping and beating a woman as a party with another man by three years. This rationale demonstrates a belief that sexual violence is a vice of lower class men; when committed by professional or middle-class men, or even men with good hygiene and manners, sexual violence is an aberration that will not re-occur. While a commitment to public service and charity may very well speak to good character and likelihood of rehabilitation, it is unclear how “work-habits”, “hygiene”, or stable employment reflects an offender’s future risk.

Similarly, in other cases, judges attributed sexual violence to offenders’ marital problems or difficulties relating to women, finding that such offenders posed no or low future risk. For example, in R. v. B.F.D., the pre-sentence report explained the offender’s sexual offences against two girls, aged eight and ten, on the bases that the offender was sexually “unsophisticated” and sexually frustrated as a consequence of his wife’s poor health. The reviewing court varied the sentence on fresh evidence from the doctor counselling the offender and his wife that he “had improved particularly in the sexual sphere” (as well as on evidence that his sentence

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164 See Chapter I, Section B.
jeopardized his career in the armed forces), relying on the myths that women are responsible for men’s sexual assaults for denying them something that men ‘need’ and that sexual violence is simply a failure to control sexual urges, even in the case of sexual offences against children.

On the other hand, judges characterized some offenders as ‘abnormal,’ and therefore dangerous, including a man with an untreatable mental illness and homosexual men. This thinking is the other side of the same coin that does not recognize the sexually violent tendencies of professional and middle-class men.

... In the past, Canadian laws provided harsh penalties for sexual offenders, including the ultimate penalty, death. However, due to low conviction rates, few offenders were punished, and when they were they frequently escaped the harshest punishments. Offenders did not get this benefit equally: rape myths influenced sentencing, historically and into the 1980s. Courts showed lenience to offenders who met masculine ideals and treated racialized or marginalized offenders more harshly, as scapegoats for other men’s crimes. Courts pushed survivors and their harms to the margins of decisions, considering them inconsistently and making them relatively unimportant compared to offenders. The discrimination of the law was not invisible, however, and soon became the subject of considerable feminist advocacy.

166 See generally Smart, Feminism, supra note 29 at 30–31.
C. The Current Law of Sexual Assault

Starting in the 1970s, feminist advocates fought for legal change. Although divisions in feminist advocacy efforts arose, most efforts were directed at amending the law to eliminate reliance on prejudicial rape myths and recognize sexual offences as a form of gendered violence. As I explain in the following section, the reforms that ensued have, over time, been re-interpreted according to a neoliberal ethos. The result has been a sexual assault law that recognizes bodily integrity but obscures the gender inequality of sexual violence. Feminist scholars, researching the impact of the reforms, have argued that myths continue to influence the doctrine of consent and the relevance of evidence of sexual history, corroboration, and recent complaint, ultimately reproducing inequality and prejudice.

Advocacy, Amendments, and Resistance

Feminist advocates identified rape myths within the law and advocated for reform, and had a significant influence on the law of sexual assault beginning in the 1970s. However, the feminist attempt to contextualize sexual violence against women and children was not entirely successful. Although Parliament cited the right to equality in its amendments to remodel the law of sexual consent, feminist scholars have argued that judicial interpretation and application of the reformed law has constrained the reach of the amendments, such that many of the myths continue in the law.

Despite the different branches of feminism that see the world and the nature of women’s subjugation in different terms, feminist advocacy against sexual violence
was largely unified. Women’s anti-violence advocates understood rape as a form of gender inequality and recognized the law’s important role in maintaining this inequality. Feminist writers and scholars, including Brownmiller and MacKinnon, expressed these ideas persuasively. Clark and Lewis uncovered the discriminatory effects the myths had in Canadian policing and prosecutions in their seminal book *Rape: The Price of Coercive Sexuality*. At the same time, rape crisis centres and transition houses were providing women with safe havens while also creating a means to collect the stories of survivors of sexual violence. With their personal experiences, survivors revealed the myths used against them by the criminal justice system to justify violence.

Starting in the 1970s, the law of sexual offences was reformed in response to feminist advocacy. Parliament attempted to restrict the use of sexual history evidence in 1976 by requiring *in camera* hearings to determine its admissibility. This attempt to protect complainants failed because of judicial interpretation: the judiciary responded by making complainants compellable at *in camera* hearings and

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169 Divisions in theory and practice did arise and were more prominent in other areas, including pornography and prostitution. See e.g. Kathryn Abrams, “Sex Wars Redux: Agency and Coercion in Feminist Legal Theory” (1995) 95 Colum L Rev 304; Catharine A MacKinnon, “Trafficking, Prostitution, and Inequality” (2011) 46:2 Harv CR-CLL Rev 271; Also important was the criticisms of women of colour that mainstream feminism ignored their interests and perspectives and essentialized woman as a white privileged woman. These scholars highlight the need for an intersectional approach and a re-orientation of feminist analysis centred on women of colour and other marginalized women. See e.g. Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) 10 Berkeley Women’s LJ 16; Angela P Harris, “Race and Essentialism in Feminist Legal Theory” (1989) 42 Stan L Rev 581.


173 McIntyre, *supra* note 23 at 72.

174 Backhouse, *Carnal Crimes, supra* note 38 at 5.
their testimony on their sexual history a material issue, allowing defendants to bring
evidence to contradict them. At the same time, judges sometimes also interpreted
Parliament’s repeal of the provision mandating a warning about uncorroborated
testimony in a limited way, finding that the common law requirement for
corroboration in sexual offences still applied.175

Under pressure from feminist advocates, now bolstered by the constitutional
right to equality guaranteed by the Canadian Charter of Rights and Freedoms176 and
the need to amend existing laws before the equality provision came into effect,177
Parliament returned to the drafting table. In 1983, it made significant amendments
to the laws of sexual violence in Bill C-127.178 It coalesced the offences of rape,
attempted rape, indecent assault, and sexual intercourse with mentally disabled
women into the three-tiered offence of sexual assault.179 This reform substantially
transformed the law. Sexual offences were no longer gendered and penetration was
dethroned as the central issue in favour of a focus on additional violence. The law
now categorized sexual assault into three increasing levels of seriousness, with
more violence representing a more serious offence. Significantly, the reforms also

175 Boyle, supra note 62 at 133–136, 155–156; R. v. Seaboyer, supra note 26 at paras 183-192,
176 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to
the Canada Act 1982 (UK), 1982, c 11, s 15 [Charter].
178 Bill C-127, supra note 149.
179 Boyle, supra note 62 at 45–46; Gillian Balfour & Janice Du Mont, “Confronting Restorative Justice
in Neo-Liberal Times: Legal and Rape Narratives in Conditional Sentencing” in Elizabeth A Sheehy,
ed, Sexual Assault in Canada: Law, Legal Practice and Women’s Activism (Ottawa: University of Ottawa
Press, 2012) 701 at 705; Backhouse, Carnal Crimes, supra note 38 at 299 (endnote 2).
eliminated a husband’s immunity from prosecution for the sexual assault of his wife.\textsuperscript{180}

In Bill C-127 Parliament eliminated the corroboration requirement and the rule of recent complaint and barred the use of sexual reputation evidence and evidence about the complainant’s past sexual history with anyone other than the accused, except in specific circumstances.\textsuperscript{181}

Once again, the reforms to sexual history evidence were unsuccessful, this time because the Supreme Court of Canada ruled them unconstitutional under the \textit{Charter}.\textsuperscript{182} In \textit{R. v. Seaboyer}, the majority of the Supreme Court of Canada upheld the bar on sexual reputation evidence but determined that the limits on evidence of prior sexual activity was contrary to accused’s \textit{Charter} rights to adduce evidence relevant to full answer and defence.\textsuperscript{183} However, feminist reformers had an ally in L’Heureux-Dubé J., who would have upheld the amendment: in her dissenting judgment she identified the purported relevance of sexual history evidence as based on rape myths and, therefore, prejudicial and nearly always irrelevant.\textsuperscript{184}

The majority’s ruling was a blow to those who advocated for equality in the law of sexual violence. Recognizing the failure of the amendments to generate real change in an area that was so key to women’s disillusionment with the justice system, feminist lobbying increased.\textsuperscript{185}

\textsuperscript{180} Boyle, \textit{supra} note 62 at 45–47.
\textsuperscript{182} \textit{Charter}, \textit{supra} note 176, ss 7, 11(d).
\textsuperscript{183} \textit{R. v. Seaboyer}, \textit{supra} note 26, McLachlin J., majority.
\textsuperscript{184} \textit{Ibid} at paras 210–238, L’Heureux-Dubé J., dissenting.
In 1992 in Bill C-49, Parliament codified the limitations on sexual history evidence provided by the majority of the Supreme Court, limitations that were determined not to entrench on an accused’s rights. In the same bill, and with the help of feminist advocates, Parliament defined consent as the voluntary agreement to engage in the sexual activity in question, and introduced the requirement that an accused seeking to rely on a belief in consent have taken “reasonable steps” to ascertain consent.\textsuperscript{186} The feminist approach was to eliminate discrimination in judicial application of the law:

The feminist strategy underlying the Bill was to amend the substantive law of sexual assault to define consent and non-consent so as to narrow the range of "evidence" legally capable of being "relevant" to the determination of innocence or guilt, and then to require judges to subject that narrowed residual pool of relevancy determinations to a broader range of constitutional considerations than had been applied by the Seaboyer majority.\textsuperscript{187}

Legislators and feminist reformers therefore tried to promote change in the procedural law with substantive law amendments. As well, they made women’s equality rights explicit in the preambles to the amendments to encourage judges to interpret the laws in the spirit they were passed.\textsuperscript{188}

Criminal defence lawyers circumvented the new restrictions on sexual history evidence by demanding disclosure of complainants’ confidential documents from third parties – schools, child protection agencies, counsellors, psychologists, crisis centres, and any other person or entity holding records about complainants, including their personal diaries – to achieve the same ends. In 1995, the Supreme

\textsuperscript{186} Balfour & Du Mont, supra note 179 at 705 citing Bill C-49, An Act to Amend the Criminal Code (sexual assault), 3rd Sess, 34th Parl, 1992, SC 1992, c 38; Vandervort, supra note 185 at 411–412.
\textsuperscript{187} McIntyre, supra note 23 at 76.
\textsuperscript{188} Ibid; Gotell, “Disappearance”, supra note 75 at 130–131; Vandervort, supra note 185 at 412 (footnote 22) citing Bill C-49, supra note 186, pmbl.
Court of Canada allowed but limited this practice through a two-step screening process. In response, Parliament legislated a more rigorous process to further limit the disclosure of third-party documents in 1997. The Supreme Court of Canada upheld Parliament’s regime as consistent with sections 7 and 11(d) of the Charter; however, as I discuss later, feminist scholars argue that the Supreme Court has weakened this regime by its interpretation of what the statute permits.

Within the amendments, Parliament included equality as one of the stated goals of the reforms: with feminist prodding, Parliament attempted to redress some of the inequality that the law had perpetrated against survivors in the past and also acknowledge the inequality of sexual offences themselves, in the prevalence of violence against women and children. The judiciary has also recognized that discrimination was part and parcel of the law historically: the cases R. v. Seaboyer, R. v. Osolin and R. v. Ewanchuk are milestones in the Supreme Court of Canada’s evolving recognition of the legal system’s reliance on rape myths.

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192 R. v. Seaboyer, supra note 26 at paras 193-195, L’Heureux-Dubé J., dissenting; Gotell, “Rethinking Consent”, supra note 1 at 877; Vandervort, supra note 185 at 412 citing Bill C-49, supra note 186, pmbl.
193 Vandervort, supra note 185 at 414–436.
In particular, in these cases L’Heureux-Dubé J. compellingly described and denounced the use of rape myths within the law.

However, equality has been elusive. Resistors to the reforms have relied on widespread cultural norms and discourses that belittle sexual violence against women to frame the reforms as attacks by feminists on men and the ‘commonsense’ rules of heterosexual interaction. Parliament and the courts have gone back and forth on what the right to equality and the rights of the accused require in the context of sexual assault. On this foundation the current law of sexual offences was interpreted and built.

The Current Law of Sexual Offences

The current law is largely based on a consent framework; sexual assault and other offences, including those against children and adolescents, are premised on the notion that subjective agreement to sexual touching is required for it to be legal. Free and voluntary consent can be undermined by force and duress and individuals can be incapable of consent due to relative powerlessness. As well, the Criminal Code restricts the use of evidence whose relevance has traditionally been based on prejudicial reasoning.

As it now stands, most types of sexual violence are prohibited under the rubric of sexual assault. Sexual assault is constituted by a “sexual touching without consent”, which falls into three levels of seriousness depending on the level of

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197 See e.g. Joanne Wright, “Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk” (2001) 16 CJLS 173; McIntyre, supra note 23.

198 McIntyre, supra note 23 at 75–78, 81; Gotell, “Disappearance”, supra note 75 at 133–139.

violence used or the level of harm the offender caused the survivor.\footnote{For a discussion of the violence or injury required to establish the actus reus of the different levels of sexual assault, see Boyle, \textit{supra} note 62 at 93–100; Du Mont, \textit{supra} note 55 at 318–319 (footnotes 83–88).} The first level is sexual assault I, nonconsensual sexual touching without significant physical harm to the survivor.\footnote{\textit{Criminal Code, supra} note 67, s 271. Sexual assault is understood with reference to assault, s 265.} Sexual assault II is established when the offender uses a weapon or threatens a third party, or is party to the offence with another person, or causes the survivor bodily harm,\footnote{\textit{Ibid}, s 272(1).} generally defined as harm that is not “transient or trifling in nature.”\footnote{Boyle, \textit{supra} note 62 at 95; Du Mont, \textit{supra} note 55 at 318–319 (footnote 85).} Sexual assault III, known as aggravated sexual assault, is committed when the offender “wounds, maims, disfigures or endangers the life of the” survivor.\footnote{\textit{Ibid}, s 155(1).}

Sexual assault is not the only sexual offence. Incest continues to criminalize sexual intercourse between certain blood relatives.\footnote{\textit{Ibid}, ss 151 [sexual interference], 152 [invitation to sexual touching].} Sexual activity with children and adolescents under the age of consent is also criminal: sexual interference and invitation to sexual touching make it a crime to touch someone under the age of 16 with a sexual purpose or to invite or counsel a person under 16 to sexual touch someone;\footnote{\textit{Ibid}, ss 153(1) [sexual exploitation], 153(2) [definition of “young person”].} sexual interference criminalizes anyone in a position of trust, authority or dependence who engages in sexual touching or invites sexual touching of a person under 18 but older than 16 years old.\footnote{\textit{Ibid}, s 273(1).} As well, sexual exploitation of a person with a disability by someone in a position of trust, authority, or dependence
is an offence.\textsuperscript{208} Of course, offences against children and individuals with disabilities may also constitute sexual assault if the survivors do not have the capacity to consent.\textsuperscript{209} With regard to children and adolescents, the \textit{Criminal Code} specifically provides that consent is no defence to a charge of sexual assault, sexual interference, and invitation to sexual touching if the complainant is less than 16 years old.\textsuperscript{210} Capacity to consent for women with mental disabilities is a much more complicated and problematic assessment in the law.\textsuperscript{211}

Fundamentally, the law of sexual assault in Canada is a regime of nonconsent. Defined in the \textit{Criminal Code} as "voluntary agreement",\textsuperscript{212} the Supreme Court of Canada has expanded on its earlier interpretations of consent at common law to determine what consent means pursuant to the \textit{Criminal Code}. The result is the doctrine of "affirmative consent".\textsuperscript{213}

In \textit{R. v. Ewanchuk}, the Supreme Court of Canada held that nonconsent is "determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred".\textsuperscript{214} A complainant's claim of nonconsent will be judged as part of the assessment of her credibility, and the accused can raise a reasonable doubt about whether the complainant consented in

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\textsuperscript{208} \textit{Ibid}, s 153.1(1). \\
\textsuperscript{209} \textit{Ibid}, s 273.1(2)(b). \\
\textsuperscript{210} \textit{Ibid}, s 150.1(1). \\
\textsuperscript{211} See generally Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 McGill LJ 243 ["Consent"]; Janine Benedet & Isabel Grant, "A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law" (2011) 43 Ottawa L Rev 1 ["Situational"]. \\
\textsuperscript{212} \textit{Criminal Code}, supra note 67, s. 273.1(1). \\
\end{flushright}
her mind based on her words and conduct. However, if the judge accepts her evidence that she did not consent, the accused cannot argue implied consent.\textsuperscript{215} To prove the accused mistakenly but honestly believed she consented, he must prove that he believed that the complainant, by words or actions, affirmatively communicated consent. He cannot speculate about what she was thinking but failed to express.\textsuperscript{216} According to the \textit{Criminal Code}, he must also demonstrate that he took reasonable steps to determine if the complainant was consenting.\textsuperscript{217}

According to the \textit{Criminal Code}, consent must be voluntary. It cannot be obtained or is vitiated in certain situations: these include when "the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority",\textsuperscript{218} and when consent is given under duress, fear of force, threats, fraud, or the exercise of authority.\textsuperscript{219}

The scope of the voluntariness requirement has remained unclear; in some cases, it has been limited. Major J.'s majority judgment in \textit{R. v. Ewanchuk} gave it a restricted scope, liming it to situations when the complainant "believed herself to have only two choices: to comply or to be harmed."\textsuperscript{220} More recently, however, the Supreme Court of Canada upheld\textsuperscript{221} the Ontario Court of Appeal decision in \textit{R. v. Stender} that duress was sufficient to make consent involuntary, in that case because the offender threatened to disseminate sexually explicit photographs of the

\textsuperscript{215} \textit{Ibid} at para 29-31.
\textsuperscript{216} \textit{Ibid} at para 45-47.
\textsuperscript{217} \textit{Criminal Code, supra} note 67, s 273.2(b).
\textsuperscript{218} \textit{Ibid}, s. 273.1(2)(c).
\textsuperscript{219} \textit{Ibid}, s. 265(3); \textit{R. v. Ewanchuk, supra} note 196 at para 36.
\textsuperscript{220} \textit{R. v. Ewanchuk, supra} note 196 at para 39.
\textsuperscript{221} \textit{R. v. Stender, 2005 SCC 36, [2005] 1 SCR 914.}
survivor.\textsuperscript{222} This decision suggests a greater recognition that coercion undermines voluntary consent.

As well, on their face, procedural reforms have attempted to make the trial process fairer and less traumatic for survivors by restricting the admission of evidence whose relevance is based on rape myths. Sections 274 and 275 of the \textit{Criminal Code} dictate that corroboration is no longer required and the rule of recent complaint has been “abrogated”. Section 277 bars the admission of sexual reputation evidence for attacks on credibility and 276 restricts the use of sexual history evidence used for the twin myths, that the complainant is more likely to have consented or is less worthy of belief, stating that sexual history evidence can only be adduced about a specific and relevant incident that has substantially greater probative value than prejudicial effect. To determine this, the \textit{Criminal Code} directs judges to consider the interests of justice, the need to eliminate discrimination and encourage reporting of sexual offences, and complainants’ privacy rights and personal dignity, among other factors. Similarly, sections 278.1 to 278.8 outline the two-step process for disclosure of complainants’ private records to the judge and for production to the accused.

However, the law of affirmative consent does not reach its potential in its application. As feminist scholars have argued, conviction for sexual offences continues to be difficult: courts do not always take an expansive approach to

\textsuperscript{222} \textit{R. v. D.G.S.} (2004), 72 OR (3d) 223, 2004 CanLII7198 (Ont CA). Note that it is not entirely clear on the facts that the survivor communicated agreement, voluntary or not, in any event; however, the court appeared to find that she did.
voluntary consent nor apply the requirements in the *Criminal Code*,\textsuperscript{223} for example, the requirement for reasonable steps, which the Supreme Court of Canada failed to apply in *R. v. Ewanchuk*,\textsuperscript{224}.

As well, as argued by Lise Gotell, the strength of procedural limitations have been restricted by the interpretations of the Supreme Court of Canada. The Court has asserted the importance of judicial discretion, weakening the application of the sections’ requirements that judges consider the structural context of “equality rights and the dignity of complaints; the sway of discriminatory myths; and the impact on reporting rates”, contrary to the intention of the reforms.\textsuperscript{225} These interpretations have been fueled by anti-feminist backlash from the criminal defence bar and other groups.\textsuperscript{226} I explore these issues in more detail below.

**The Undoing of Feminist Gains in Sexual Assault Law**

The feminist project to contextualize sexual offences within systemic inequality has been transformed by neoliberalism into an atomistic and decontextualized approach. This approach may ignore structural inequality, but it does not eradicate it; nor does it eliminate the myths that perpetuate inequality. Analyzing how judges apply the law of consent and the law of evidence in sexual offence trials, feminist scholars have found that modified versions of rape myths filtered through neoliberalism continue to surface in determinations of guilt or


\textsuperscript{224} Gotell, “Disappearance”, *supra* note 75 at 145–146; McIntyre, *supra* note 23 at 77.


\textsuperscript{226} *Ibid* at 131; See generally McIntyre, *supra* note 23; Wright, *supra* note 197.
innocence and procedural applications. Feminist scholars argue that the current law does entirely or adequately protect women and children from coercive or unwanted sexual touching or from prejudice in courtrooms.

Important feminist reforms in law and policy were undermined by a shifting political ethos. While feminist battles were being won, the philosophy of governance moved away from a social welfare paradigm, which recognizes structural inequalities and group belonging, to neoliberalism, which focuses on individual responsibility and rationality.\textsuperscript{227} The rise of the law and order agenda followed, a common occurrence when “governments seek to respond to anxieties produced in a context of rapid socio-economic transformation and declining social supports.”\textsuperscript{228} Because of this shifting ethos, feminist advocates’ attempts to make changes beyond the law, such as improvements to social welfare programs, were less successful than their calls for legal reform that could be seen as overlapping with the law and order movement.\textsuperscript{229}

Together, the neoliberal approach and law and order agenda undermined the work of feminist reformers to contextualize sexual violence as an aspect of structural gender inequality. They reoriented sexual violence from a social issue into a matter for the criminal justice system alone. Women’s advocacy groups were relegated to the fringe and defunded, and ‘victims’ rights,’ understood in a contextual vacuum, replaced feminist concerns in political consciousness.\textsuperscript{230}

\textsuperscript{227} Gotell, “Disappearance”, \textit{supra} note 75 at 128–130; McIntyre, \textit{supra} note 23 at 72–73, 81; Comack & Peter, \textit{supra} note 63 at 284–285.
\textsuperscript{228} Gotell, “Disappearance”, \textit{supra} note 75 at 129.
\textsuperscript{229} \textit{Ibid} at 128–130; McIntyre, \textit{supra} note 23 at 72–73, 81.
\textsuperscript{230} Gotell, “Disappearance”, \textit{supra} note 75 at 128–133, 144; See also McIntyre, \textit{supra} note 23 at 81.
These political and policy changes have influenced the legal doctrine of consent. Although feminist advocates managed to reform legislation so that it was more appreciative of the gendered context of sexual violence, this insight was made to fit a “criminal legal framework defined by individual responsibility and punishment.” Because the reforms altered the statement of the law but not the structural inequalities underlying it, their influence has been circumscribed.

As well, legal reforms were interpreted by a largely elite judiciary made up of people who, like us all, understand language through their own experiences and perspectives. Together with the doctrine of precedent, which virtually guarantees judicial obstruction of transformational legal reforms, reforms have not been entirely successful. Judges do not typically characterize sexual violence as a gendered crime; nor do they rely on feminist understandings to apply the law. Instead, the judiciary has interpreted the purpose of the law of sexual offences to protect individual physical integrity, autonomy and dignity, rights that can be understood outside of structural inequality.

The law interpreted through neoliberalism frames violence in transactional terms of individual rationality and responsibility. Within this ideology, individual

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231 Gotell, “Disappearance”, supra note 75 at 133.
232 Ibid at 144; McIntyre, supra note 23 at 74–75, 78–79, 81.
233 Snider, supra note 68 at 94–95.
234 Gotell, “Rethinking Consent”, supra note 1 at 877.
235 See generally Gotell, “Disappearance”, supra note 75; Gotell, “Rethinking Consent”, supra note 1; Wright, supra note 197; See e.g. R. v. Ewanchuk, supra note 196 at para 28.
women are expected to avoid risk, with expectations shifted from notions of morality to caution.236

However, cultural norms continue to promulgate distinct gender roles for men and women. Gender norms blend with neoliberal understandings of sexual assault in the law, forming modified gender expectations: men are now predominantly expected to manage sexual risk and women to avoid it.237 These expectations may work in concert with the older norms of masculine aggression and feminine passivity in heterosexual interaction, and therefore legitimize consent that arises from coercion, based on the cultural understanding of “seduction.”238

Based on neoliberal ideas of autonomy and rationality, courts may perceive survivors as failing “to practice the appropriate self-restraint” to avoid risk of harm.239 Yet structural inequality persists, and for women, avoiding risk is not easy. As noted by Gotell, because of the prevalence and pervasiveness of sexual violence, activities that put women at risk of sexual violence are innumerable and often unavoidable in daily life. Under a decontextualized, gender-neutral interpretation of the law, how gender, poverty, race and other sources of oppression limit women’s ability to avoid harm are irrelevant; lacking the tools to understand social forces that constrain women’s actions,240 judges may “responsibleize” survivors for “flirting with risk.”241 They may also disbelieve complainants who do not live up to exacting

237 Gotell, “Rethinking Consent”, supra note 1 at 879.
238 Wright, supra note 197 at 200.
239 Balfour & Du Mont, supra note 179 at 716.
241 Ibid at 880.
standards of the rational, risk-adverse, and consistent but also ordinary complainant.\textsuperscript{242}

Attributing responsibility to survivors can be most egregious in the cases of vulnerable women who, due to structural constraints and inequalities, are habitually unable to avoid significant risk. Aboriginal women and women involved in prostitution are among those deemed 'high risk.'\textsuperscript{243} Sherene H. Razack identified this phenomenon in the trial for Pamela George’s murder. For Pamela George, prostitution and Aboriginality worked together to create a “permanent personal characteristic”\textsuperscript{244} of risk that was used to blame her for her death.\textsuperscript{245} The ‘choice’ to take risks may be equated with consent to sexual activity or used to suggest that women are agents in the violence committed against them.\textsuperscript{246}

Because of its atomistic focus, the law transforms sexual offenders and survivors into de-gendered and de-contextualized equals, and acts of sexual violence into isolated crimes rather than systemic acts of inequality. This ignores

\textsuperscript{242} Gotell, “Disappearance”, \textit{supra} note 75 at 148–153; Gotell, “Rethinking Consent”, \textit{supra} note 1 at 872–882; Comack & Peter, \textit{supra} note 63 at 298–304.
\textsuperscript{243} Police regularly label women and adolescents “high risk,” particularly those involved in prostitution or substance abuse. See e.g. Stephanie Ip, “Man charged with confinement, sexual assault; Investigation continues”, \textit{The Province} (25 July 2013) A15; “Two Alberta men charged with child prostitution”, \textit{Kamloops Daily News} (23 February 2013) A7; Tim Petruk, “Highway of Tears probe: Did this man kill again and again in Kamloops?”, \textit{Kamloops This Week} (26 September 2012) 1; Katie Derosa, “Dead woman reportedly had vanished; She was in her early 20s and lived a ‘high-risk’ lifestyle, police say”, \textit{Times-Colonist} (15 June 2011) A3; “Man charged with assaulting woman”, \textit{Edmonton Journal} (22 January 2009) B4; Andrew Seymour & Neco Cockburn, “Police set for ‘long haul’ to solve homicide; Investigators can’t rule out random attack in death of woman who led ‘high-risk’ lifestyle”, \textit{The Ottawa Citizen} (6 June 2008) F1; “Warning issued over sex offender”, \textit{Calgary Herald} (12 June 2007) B7.
\textsuperscript{244} Razack, \textit{supra} note 7 at 127.
\textsuperscript{245} \textit{Ibid} at 124.
\textsuperscript{246} Gotell, “Tracking Decisions”, \textit{supra} note 189 at 880–893; Razack, \textit{supra} note 7 at 124–129; Gotell, “Disappearance”, \textit{supra} note 75 at 148–153.
rather than combats sexual inequality within the law because, as stated by MacKinnon, “[a]utonomy in sex cannot exist without sex equality.”

*Consent: Myths in Legal Application and Judicial Narrative*

The Supreme Court of Canada’s interpretation of consent appears to provide a robust definition; however, the application of the legal definition of nonconsent in individual cases has been more ambivalent. Feminist scholars have argued that rape myths continue to influence the interpretation of consent by trial judges and appeal courts.

In her study, Gotell found that judges have developed a doctrine of consent that often challenges traditional notions of male sexual aggression and entitlement but they less often apply this increasingly high standard when complainants fail to avoid sexual risks or are unable to present as rational and consistent in their behaviour and testimony. As demonstrated in this and other studies, the consent framework has had the least benefit for vulnerable women, those seen as ‘unchaste’ or ‘risky.’

For example, Janine Benedet and Isabel Grant in “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief” found myths about women with mental disabilities, that they are both “hypersexual” and “asexual,” have influenced legal determinations of consent and capacity to consent in cases of sexual assault against them. Relying on evidence of complainants’ past sexual activity or flirtatious behaviour, courts found reasonable

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249 Benedet & Grant, “Consent”, *supra* note 211 at 251–253.
doubt about nonconsent when women did not verbalize nonconsent or actively resist, acts that may be particularly difficult for women with mental disabilities.\footnote{Ibid at 262–269.}

Elaine Craig discovered that despite the Supreme Court’s statement in \textit{R. v. Ewanchuk}, implied consent continues to undermine the evolving doctrine of consent, and is often successfully used in lower court cases of sexual violence against spouses and intimate partners. She found cases where complainants had not consented but courts allowed the defence of mistaken belief in consent because of evidence of past ‘rough sex’ play or allegations that nonconsensual sexual touching was a part of the accused’s emotionally-driven attempts to win over a partner who had left or cheated.\footnote{Craig, “After Ewanchuk”, \textit{supra} note 223 at 259, 262–268.}

Benedet also examined the frailties of judicial interpretation and application of consent in “The Age of Innocence” in the cases of underage complainants. She determined that the focus on age of consent distracted from a proper analysis of nonconsent. In the cases she studied, age of consent failed to protect particularly vulnerable girls and young women; the doctrine of consent also failed them, as courts ignored the violent or coercive sexual behaviour of older men and power imbalances between accused men and survivors that foreclosed consent, apparently forgetting the meaning of consent once the complainant’s age was no longer a statutory bar to sexual activity.\footnote{Benedet, “Age of Innocence”, \textit{supra} note 93 at 679–687.}

Capacity to consent, a necessary condition for consent, has caused problems for vulnerable women by its uneven application due to rape myths. In “The Sexual
Assault of Intoxicated Women", Benedet’s study revealed that judges are disinclined to find that women lack capacity to consent if they became intoxicated willingly, unless they were sleeping or unconscious, reserving incapacity for women who did not knowingly or voluntary become intoxicated. The courts therefore conflated a decision to drink alcohol or use drugs with consent to sexual activity.  

Benedet and Grant also found the legal application of capacity to consent wanting in the cases of women with mental disabilities, specifically that it was rarely considered and when it was, it was a blanket determination of incapacity for the survivor rather than specific to the context of the assault at bar.  

Developing this position, they argue that capacity to consent should only be considered when there is no evidence of nonconsent, and when it is, a situational approach to capacity to consent to the individual person at the time in that context should be used to protect women with mental disabilities from exploitation and sexual abuse while also promoting their sexual autonomy.  

Scholars have also assessed sexual assault trial decisions for the language judges use to describe sexual violence. Linda Coates and her colleagues discovered that legal reforms have had a limited effect on the language judges use to express and construct sexual violence in the law. They found that judges obscured and normalized sexual coercion through language. Judges used language that characterized sexual violence as non-violent and described it with little detail.  

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254 Benedet & Grant, "Consent", supra note 211 at 269–274.
255 Benedet & Grant, "Situational", supra note 211 at 18–27.
256 Coates, Beavin Bavelas & Gibson, supra note 64 at 194, 196–197, 201.
some cases, courts used positive sexual terms suggesting mutual participation or affection to describe acts of sexual violence, such as ‘sexual intercourse’ and ‘fondle,’257 even in cases of sexual abuse of children by family members.258 Courts’ grammar choices, euphemisms, and lack of detail often made sexual assaults appear to have no agents, removing focus from the responsibility of offenders.259

Coates et al. attributed judicial language choices to the limitation of two opposing “repertoires” for sex and sexual assault: one of consensual sex and one of stranger rape. Without the language to appropriately describe acquaintance sexual assault, legal discourse favoured a view of it as consensual and erotic.260 This language confuses and likens sexual assault with positive sexual activity while undermining legal findings of survivors’ nonconsent.261

**An Unequal Balance: The Use of Discriminatory Evidence**

Feminist scholars have also studied the interpretation and application of the procedural rules enacted to foreclose evidence that relies on discriminatory reasoning. They have found that evidence of delayed disclosure, corroboration, and sexual history, and confidential records continue to be used to suggest that complainants have motives to lie or are unreliable, relying on myths of women as fickle, emotional, and vengeful.

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258 Bavelas & Coates, *supra* note 257 at 38.
259 Coates, Beavin Bavelas & Gibson, *supra* note 64 at 196–197; See also Bavelas & Coates, *supra* note 257 at 30–32.
260 Coates, Beavin Bavelas & Gibson, *supra* note 64 at 197–198, 204.
For example, in “The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence”, Craig found that courts continue to use evidence of delayed disclosure to undermine complainants’ credibility in sexual assault cases.262 Elizabeth Sheehy has also demonstrated that evidence of corroboration, recent complaint, and sexual history continues to be adduced to support the medically unsound theory that complainants’ memories of sexual assault are made up, the result of False Memory Syndrome.263 Sheehy showed that this theory is used to justify suspicion of complainants who do not immediately complain of sexual assault or who have histories of prior sexual abuse.264

Feminist scholars have found that sexual history evidence and confidential third-party documents continue to be disclosed and relied upon in sexual assault trials. The use of this evidence has been studied extensively by Gotell, who has illustrated that courts continue to order disclosure and production of complainants’ confidential records and sexual history evidence for the purpose of attacking their credibility. This follows from the Supreme Court’s narrowing of considerations of equality to privacy rights alone, limiting the interests of survivors to avoiding humiliation rather than being free from structural inequality and discrimination before the law.265 The narrow protection of privacy is reduced further when women fall below ‘ideal’ victim standards: vulnerable women with significant institutional

264 Ibid at 167–173.
backgrounds are sexualized and presented as hysterical and unreliable to justify disclosure.266

Benedet and Grant found that women with mental disabilities were also more likely to have the procedural reforms circumvented, the consequence of the intersection of discrimination based on gender and disability. In addition to the unique challenges women with mental disabilities faced in participating in the trial process, they also had myths about their unreliability and hypersexuality used against them, sometimes as a part of inquiries into capacity to consent or testify. On these bases, courts required corroborating evidence and, without reference to Criminal Code procedures, allowed the disclosure of sexual history evidence and private records.267

Craig also found that courts regularly allowed sexual history evidence to be adduced in cases of sexual violence by intimate partners to support defences of mistaken belief in consent.268

Although the law of sexual offences has changed considerably, courts have not interpreted and applied the reformed doctrine of consent and law of evidence in a way that eliminates the use of myths in courts. Rather than maintain the law’s contextual understanding of sexual assault as envisioned by feminist reforms, judges have understood the law outside of the framework of structural inequality,

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268 Craig, “After Ewanchuk”, supra note 223 at 259–262.
applying the law mechanically. As a result, the law has been less able to eliminate myths that remain current in society.

The literature shows that rape myths continue to play a role in trials, particularly against women and adolescents facing intersecting inequalities. I now turn to the law of sentencing, where the use of myths has been less thoroughly addressed by reforms or studied by scholars.

D. The Current Approach to Sentencing Sexual Offenders

In this section, I consider the current approach to sentencing offenders. In the 1990s Parliament introduced reforms to clarify the principles judges must consider in sentencing offenders, including sexual offenders; these principles now explicitly include considerations of restorative justice. A second set of reforms in the last decade has restricted the availability of conditional sentences of imprisonment and introduced mandatory minimum penalties, including for some sexual offences. Notwithstanding these changes, judges continue to have discretion in sentencing, in both approach and outcome, and weigh aggravating and mitigating circumstances in much the same way they always have.

The feminist approach to sentencing, particularly incarceration, has not been uniform. While most recognize the inequality, prejudice, and violence within the criminal justice system, their response is split: some see the criminal justice system as a necessary tool to protect women from violence; others dismiss it as unable to achieve equality and instead look to grassroots supports to protect women and children. Whatever their view, feminist advocates have been less influential in shaping sentencing law than the substantive law of sexual assault.
I take the approach of feminist researchers who see the value in working within the law to improve it, a position I explain in more detail below. I therefore join in the small number of feminist researchers looking at the current sentencing of sexual offenders in Canada. Like those studying convictions and acquittals as well as procedural applications, these researchers have found threads of rape myths in sexual offender sentencing, in Victim Impact Statements, interpretations of aggravating and mitigating factors, and narratives of sexual violence. However, feminist research on sentencing is limited and deserves further development, which I hope to do in this thesis.

**The Law of Sentencing**

In 1995, Parliament amended the law of sentencing. The Code now elucidates the principles judges must strive for with each sentence. Although putting greater emphasis on restorative justice, particularly for Aboriginal offenders, the principles remained much the same; consequently, the approach of judges in sentencing sexual offenders also continues to rely on common law constructions of aggravating and mitigating factors. Judges retain discretion in sentencing sexual offenders, and in many cases, can choose between a variety of sentencing options, based on their interpretation of the offender’s blameworthiness and the offence’s seriousness. However, more recent reforms have limited alternatives to imprisonment and imposed minimums for some offences, limiting judicial discretion.

Prior to 1995, the main goals of sentencing in Canada were both utilitarian and retributive, aiming to deter and prevent crime as well as express society’s
collective revulsion.²⁶⁹ In 1995 Parliament legislated a regime of sentencing,²⁷⁰ which was, in many respects, a codification of the common law approach.²⁷¹ To this, however, Parliament added a restorative focus to balance “objectives of denunciation with reparation to victims and communities.”²⁷²

The current approach requires judges to balance several principles to arrive at a just sentence. The principles are enumerated in section 718 of the Criminal Code, and include denunciation, deterrence, separation, rehabilitation, reparation for harm, and promotion of responsibility. The principle that offenders should not be incarcerated when other available sanctions are reasonable in the circumstances was a significant part of the 1995 reforms.²⁷³ This principle, codified in section 718.2(e) of the Criminal Code, is a particularly important consideration in sentencing Aboriginal offenders, for whom courts must consider background and contextual factors, namely the legacy of colonialism and residential schools, as well as available community-based sentences.²⁷⁴

Courts must also be cognizant of the principle of proportionality: the “sentence must be proportionate to the gravity of the offence and the degree of

²⁶⁹ Ruby, Chan & Hasan, supra note 70, sec 1.12.
²⁷¹ Ruby, Chan & Hasan, supra note 70, sec 1.13–1.15.
²⁷² Balfour & Du Mont, supra note 179 at 709 [footnote omitted]; See also Ruby, Chan & Hasan, supra note 70, sec 1.15.
²⁷³ Balfour & Du Mont, supra note 179 at 708–709.
responsibility of the offender."²⁷⁵ Courts must give this principle precedence over all others.²⁷⁶

To fashion a proportionate sentence, courts must consider and weigh the aggravating and mitigating circumstances in each case.²⁷⁷ The Criminal Code requires that courts consider some factors as aggravating: namely, evidence that offenders, in committing the offence, abused their spouse, abused a person under 18 years old, abused a position of trust or authority, or had a significant impact on the survivor.²⁷⁸

Courts have typically construed other circumstances as either aggravating or mitigating, whether in sexual or other offences. For all offences, courts generally consider excessive violence, the use of weapons, and premeditation as aggravating;²⁷⁹ conversely, courts count impulsivity and outside factors that are seen to contribute to offending, like addiction or intoxication, in mitigation.²⁸⁰

Courts also assess the criminal histories of offenders, considering a criminal record, particularly for similar offences, as aggravating²⁸¹ and a lack of a criminal record as mitigating.²⁸² Generally courts treat good backgrounds,²⁸³ or extra-legal consequences such as disgrace or loss of employment as mitigating factors.²⁸⁴

Courts often treat guilty pleas, expressions of remorse, a change of attitude, efforts

²⁷⁵ Criminal Code, supra note 67, s 718.1.
²⁷⁶ Ruby, Chan & Hasan, supra note 70, sec 2.5–2.6; See also Manson, supra note 274 at 84–86.
²⁷⁷ Ruby, Chan & Hasan, supra note 70, sec 2.7–2.9.
²⁷⁸ Criminal Code, supra note 67, s 718.2(a).
²⁷⁹ Ruby, Chan & Hasan, supra note 70, sec 5.4–5.5, 5.140–5.143, 23.312, 23.315, 23.344.
²⁸¹ Ibid, sec 8.2–8.11, 8.85–8.90, 23.314–23.320, 23.337. This factor must also now be considered aggravating pursuant to the Criminal Code, supra note 67, s 724(3)(e).
²⁸³ Ibid, sec 5.90, 23.306.
at rehabilitation, and willingness to get treatment as mitigating; however courts
generally do not penalize offenders for not pleading guilty, and will not usually treat
this as an aggravating factor.285

Although sentencing is an individual process, courts must adhere to the
principle of parity: there should be no unjustified disparity in the sentences of
offenders who committed like offences in like circumstances.286 As a result, courts
often look to the sentences ordered in prior, similar cases. Courts must also ensure
that sentences meet the totality principle, that is, the sentence does not outstrip the
offender’s responsibility, a consideration that often arises when an offender is
sentenced for multiple sentences to run consecutively.287

The procedural approach to sentencing is largely at the discretion of the trial
court. The strict rules of evidence do not apply: evidence that would otherwise be
inadmissible during the trial portion can be admitted at sentencing as long as it is
both reliable and credible.288

Findings of fact for sentencing are based on information disclosed at trial and
during sentencing as well as agreed facts.289 Many convictions result from guilty
pleas: in these cases, offenders admit to the minimum facts necessary to support a
conviction.290 For sentencing, contested facts must be established on a balance of

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286 Ibid, sec 2.24–2.28, 2.33; Manson, supra note 274 at 92–93 citing Criminal Code, supra note 67, s
718.2(b).
287 Ruby, Chan & Hasan, supra note 70, sec 2.62–2.66; Manson, supra note 274 at 102 citing Criminal
Code, supra note 67, s 718.2(c).
288 Ruby, Chan & Hasan, supra note 70, sec 3.7–3.8, 3.147–3.151; Manson, supra note 274 at 163–166;
Criminal Code, supra note 67, ss 723–724, 726.1.
289 Ruby, Chan & Hasan, supra note 70, sec 3.148 citing Criminal Code, supra note 67, s 724(1);
Manson, supra note 274 at 162, 172.
290 Ruby, Chan & Hasan, supra note 70, sec 3.13.
probabilities, except aggravating factors, which the Crown must prove beyond a reasonable doubt.\textsuperscript{291}

Fundamentally, sentencing is discretionary. Although legislation outlines guiding principles, judges are still given discretion to determine sentences from a wide range of possibilities.\textsuperscript{292} Their discretion will not be interfered with lightly, as courts of appeal will only “intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.”\textsuperscript{293}

In accordance with the wide discretion granted in sentencing, available sanctions for sexual offences cover a wide range. Sexual assault I is a hybrid offence: when prosecuted on indictment, it has a maximum sentence of ten years imprisonment and, when the survivor is under 16 years old, a minimum sentence of one year; on summary conviction it carries a maximum sentence of 18 months and a minimum of 90 days if the survivor is under 16 years old.\textsuperscript{294} Both sexual assault II and III are indictable offences: sexual assault causing bodily harm has a maximum of 14 years imprisonment and aggravated sexual assault has a maximum of life imprisonment. Both carry five-year minimums when the survivor is under 16 years old and specific minimums when a firearm is used in the offence.\textsuperscript{295}

Sexual interference, invitation to sexual touching, and sexual exploitation are all hybrid offences and carry the same penalty as sexual assault I.\textsuperscript{296} Incest is a more

\textsuperscript{291} Ibid, sec 3.138--1.139, 3.145; Manson, supra note 274 at 172--173; Criminal Code, supra note 67, s 724(3).
\textsuperscript{292} Manson, supra note 274 at 56--61, 80.
\textsuperscript{293} R. v. M.(C.A.), [1996] 1 SCR 500, 105 CCC (3d) 327 at 565 [cited to SCR], cited in Ruby, Chan & Hasan, supra note 70, sec 4.5 [footnote omitted].
\textsuperscript{294} Criminal Code, supra note 67, s 271.
\textsuperscript{295} Ibid, ss 272(2), 273(2).
\textsuperscript{296} Ibid, ss 151, 152, 153(1.1).
serious crime: it is an indictable offence that, when committed against someone under 16, carries a minimum of five years and a maximum of 14 years imprisonment.297

As well, Long Term Offender designations (as well as Dangerous Offender designations) can be made for offenders who have been convicted of a sexual offence in order to prevent further crime.298 An offender can be found a long-term offender if a prison sentence of two years or more is appropriate, “there is a substantial risk” he will reoffend, and “there is a reasonable possibility of eventual control of the risk in the community.”299 Offenders can also be designated as dangerous offenders:300 this category is reserved for offenders the court does not reasonably believe can be rehabilitated.301

Clearly, there is a wide scope among sentences available for sexual offenders. Courts can order incarceration for nearly any amount of time. In some cases, judges can order imprisonment to be served in multiple ways, including as conditional sentences, which are served in the community,302 and as intermittent sentences for terms of 90 days or less.303 As well, alternatives to incarceration are sometimes available, typically for offences considered less serious: absolute or conditional

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297 Ibid, s 155(2).
298 Ruby, Chan & Hasan, supra note 70, sec 17.1–17.3, 17.68.
299 Criminal Code, supra note 67, s 753.1(1).
300 Ibid, s 753.
301 Ruby, Chan & Hasan, supra note 70, sec 17.73.
302 Criminal Code, supra note 67, s 742.1
303 Ibid, s 732(1) [when the offender is sentenced to imprisonment for less than two years, has no minimum sentence, and sexual assault is not proceeded by way of indictment (a recent amendment limiting its application)].
These different forms of punishment relate to the belief that imprisonment should be a “sanction of last resort”.307

However, the more recent reforms to sentencing in 2012 have restricted the discretion of judges to order alternative sentences, requiring judges to order incarceration more often.308 These reforms introduced mandatory minimum sentences for the three levels of sexual assault and incest when committed against survivors under 16 years old and increased the length of existing mandatory minimums for offences specific to children and youth.309 At the same time, amendments also restricted the availability of conditional sentences. First introduced in 1996 as a part of the sentence reforms that promoted reparation and restorative justice in tandem with denunciation and deterrence, conditional sentences were initially available to offenders sentenced to less than two years.310

However, the 2012 amendments limited their availability to sexual offenders who are convicted on summary conviction,311 to reduce their perceived overuse in serious violent offences, including sexual assault.312

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304 Ibid, s 730(1) [when there is no minimum penalty prescribed and the maximum sentence is not 14 years or life imprisonment].
305 Ibid, s 731(1)&(2) [in lieu of imprisonment where no minimum sentence is dictated, when the offender is sentenced to two years’ imprisonment or less, or when the offender is given a discharge].
306 Ibid, s 738(1).
308 Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, 1st Sess, 41st Parl, 2011-12 (assented to 13 March 2012), SC 2012, c 1.
309 Laura Barnett et al, Legislative Summary: Bill C-10: An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, Legislative Summary (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2011) at 26–30.
310 Balfour & Du Mont, supra note 179 at 709; Ruby, Chan & Hasan, supra note 70, sec 15.1–15.19.
311 Ruby, Chan & Hasan, supra note 70, sec 15.4–15.5 citing Bill C-10, supra note 308, c 34.
312 Barnett et al, supra note 309 at 59–60.
The prior and more recent amendments exhibit a tension between different beliefs in the value of incarceration. Historically, incarceration has been believed to deter and rehabilitate offenders while also protecting the community through separation; however, these ideas have been subject to significant debate and critique,\(^{313}\) including from some feminist scholars.

**Divergent Feminist Approaches and Overarching Concerns**

Unlike the substantive law of sexual offences, the current model of sentencing has not been shaped significantly by feminist scholarship; feminist scholars have generally paid less attention to sentencing.\(^{314}\) However, as I discuss in what follows, there are nonetheless two camps. As a part of feminist demands for the law to recognize sexual offences as serious, feminist advocacy has implicitly, and in some cases explicitly, supported longer sentences. More recently, some feminist scholars have questioned this approach, believing that more incarceration will not ultimately lead us where we want to go: a society without sexual violence.\(^{315}\) Although I share their concerns, I nonetheless think that the study of sexual offender sentencing is worthwhile: below, I explain my belief that the criminal justice system is necessary for the protection of women and that feminist analysis is critical to pushing the system towards an approach that enhances equality.

Feminist advocates who sought legal reforms aimed to contextualize sexual offending as well as have it recognized as a serious violent crime; however,

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\(^{313}\) See generally Ruby, Chan & Hasan, *supra* note 70 at 13.4–13.7; Manson, *supra* note 274 at 43–49; Backhouse, “Feminist Remedy”, *supra* note 69 at 733–735.

\(^{314}\) Backhouse, “Feminist Remedy”, *supra* note 69 at 728; Balfour & Du Mont, *supra* note 179 at 724.

\(^{315}\) Backhouse, *Carnal Crimes, supra* note 38 at 728.
neoliberalism removed the focus from context in favour of individual rationality and responsibility. Under this understanding, it became more appropriate to punish and penalize individual offenders harshly for their criminal behaviour. As a result, feminist discourse that called for more serious punishment to reflect the seriousness of sexual offences had the most political traction; these statements were co-opted by the law and order movement to increase the power and reach of the criminal justice system.316

When the audible voices for reform were calling for longer and harsher sentences, feminist advocacy split into two directions. Some continued to work for reforms within the law of sexual assault, “making a virtue out of the necessity of working within an oppressive system”317 to make the law equitable and remove the discriminatory barriers to convictions of sexual offenders. As a part of this, some pushed for longer sentences to reflect the seriousness of sexual violence.318 They sought to right the injustice the law had perpetrated against women and children by ignoring sexual violence and absolving offenders.319

Other feminist scholars have actively resisted the idea that the recognition of the seriousness of sexual violence must entail harsher punishment.320 Some, such as Clark and Lewis, recognized the historical connection between draconian penalties and low conviction rates so argued for lower sentences to increase convictions and therefore accountability.321 Others more fundamentally questioned the unlikely

317 Martin, supra note 68 at 157.
318 Ibid at 166.
320 Martin, supra note 68 at 158–159.
321 Clark & Lewis, supra note 14 at 57; Backhouse, “Feminist Remedy”, supra note 69 at 732–733.
alliance between the law and order movement and feminism and interrogated the purpose of the criminal justice system and incarceration, ultimately decrying the perverse and discriminatory effects the move towards criminalization has had.\textsuperscript{322} They posit that, fundamentally, a greater recognition of the seriousness of sexual violence does not eliminate bias within the criminal justice system or the punishment that it doles out because the status quo power structure remains undisturbed.\textsuperscript{323} As stated by Laureen Snider, “[t]o the extent that feminism succeeds in extending punishment, it widens the net of social control over those men and women who are vulnerable to arrest and incarceration because of their class, ethnicity, race or gender.”\textsuperscript{324}

Moreover, feminist scholars have found that the emergence of the victims’ rights movement has not benefited survivors of sexual violence: victims’ rights are understood in a neoliberal and individualist lens, not a feminist one, rendering context as well as gender and other inequalities invisible and meaningless.\textsuperscript{325} Many survivors of sexual violence do not fit the idealized image of real victims under this model because it reproduces gendered, racial, class, and other discriminatory stereotypes in its notion of who a worthy victim is.\textsuperscript{326} Because of the negative consequences of criminal and state intervention on women’s lives, felt most deeply by Aboriginal, racialized and impoverished women, feminist advocates have also questioned the use of police and the criminal justice system ahead of community

\textsuperscript{322} See e.g. Snider, supra note 68; Martin, supra note 68; Backhouse, “Feminist Remedy”, supra note 69.
\textsuperscript{323} Martin, supra note 68 at 160–161.
\textsuperscript{324} Snider, supra note 68 at 77.
\textsuperscript{325} Gotell, ”Disappearance”, supra note 75 at 1326; Ruparelia, supra note 40 at 666–670.
\textsuperscript{326} Martin, supra note 68 at 157–158; Ruparelia, supra note 40 at 675, 686–687.
resources, which they argue may better support women and keep them safe.\textsuperscript{327} For example, this approach is taken by INCITE!, a movement of women of colour who seek to end violence but also to keep the racist policies and practices of the state out of women’s lives.\textsuperscript{328}

Incarceration causes a great deal of concern and disagreement within feminist scholarship. Many feminist scholars are deeply troubled by the discrimination against disadvantaged, Aboriginal, racialized, and poor offenders evident in sentencing.\textsuperscript{329} Feminist scholars are concerned about the hyper-masculine gender identities and inhumanity fostered within the prison system, which may incline offenders towards violence rather than rehabilitation.\textsuperscript{330} If sexual violence is a product of a “culture of misogyny”, the rationale and ethics of scapegoating and punishing individual offenders, often themselves survivors of sexual violence, abuse, and discrimination, must be critically examined.\textsuperscript{331} Feminist scholars are concerned that, to teach non-violence, the violence of incarceration can never be effective.\textsuperscript{332} Most basically, Snider warns that, “[f]eminism, a movement rooted in amelioration and empowerment, should look carefully before embracing policies which have historically offered little of either.”\textsuperscript{333}

\begin{footnotesize}
\begin{enumerate}
\item Snider, \textit{supra} note 68 at 85–91; Martin, \textit{supra} note 68 at 185–188.
\item Snider, \textit{supra} note 68 at 86–87; Martin, \textit{supra} note 68 at 152–153, 162–164, 171; See also Nancy A Wonders, “Determinate Sentencing: A Feminist and Postmodern Story” (1996) 13 Just Q 611 [how determinate sentencing reproduces inequalities and discrimination while purporting to be fair].
\item Backhouse, “Feminist Remedy”, \textit{supra} note 69 at 733–735; Backhouse, \textit{Carnal Crimes, supra} note 38 at 282; Snider, \textit{supra} note 68 at 87.
\item Backhouse, “Feminist Remedy”, \textit{supra} note 69 at 737.
\item Martin, \textit{supra} note 68 at 164; Snider, \textit{supra} note 68 at 77, 82.
\item Snider, \textit{supra} note 68 at 77.
\end{enumerate}
\end{footnotesize}
These concerns are pressing for feminist scholars. Nonetheless, I do not think they should prevent feminist legal scholarship on sentencing. Although the larger criminal justice and penal systems need reform, this need is not specific to sexual offences. Due to low reporting rates and high attrition rates, sexual offenders are not over-represented in the system. Moreover, feminist scholars must necessarily grapple with the need to protect women and children from sexual violence: grassroots support is crucial, but the criminal justice system has a significant role to play in protecting women and children from violence. Feminist scholarship can reveal whether the criminal justice system is playing its role in a way promotes equality, not discrimination, for both offenders and survivors.334

In spite of the discrimination and violence within the law in general and the criminal justice system in particular, some scholars continue to seek to promote equality through the law, including the sentencing of sexual offenders. I join in this effort.

I now leave behind these broad concerns to turn to a review of some of the specific issues that feminist scholars have identified in the sentencing of sexual offenders.

*Sentencing of Sexual Offenders: The Law and Feminist Research*

Feminist scholarship has been less robust in the area of sentencing. However, some scholars have studied aspects of sexual offender sentencing to determine the

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334 For feminist scholars who argue for the need for further research in sentencing without contributing to the law and order paradigm, see e.g. Gotell, “Disappearance”, *supra* note 75 at 133; Balfour & Du Mont, *supra* note 179 at 723–724; See also Emma Cunliffe & Angela Cameron, “Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice” (2007) 19 CJWL 2; Ruparelia, *supra* note 40.
impact of reforms and the continuing presence of rape myths. I explore some of the studies relevant to my thesis to review the research that has been done and to draw on these analyses in my own work. They provide a base for my research: to determine if B.C. courts currently evince myth-based reasoning in their application of doctrine and discourse.

**Victim Impact Statements**

Victim Impact Statements, a recent addition to the sentencing process, provide an opportunity for victims of crime to tell the court, in their own words, about the impact of the offence on them. According to section 722(1) of the *Criminal Code*, courts “shall consider” Victim Impact Statements created in the proper form as a source of information about the harm of the offence. Although victims may describe the harm they suffered, they cannot express recommendations for length of sentence unless they recommend lenience.\(^{335}\)

In the sense that they provide survivors with a voice in sentencing proceedings, Victim Impact Statements are supposed to ameliorate their experiences within the criminal justice system. However, as Rakhi Ruparelia argued in “All That Glitters Is Not Gold: The False Promise of Victim Impact Statements”, this supposed success of the victims’ rights movement has had perverse and unequal effects for survivors of sexual violence, a consequence that is unsurprising given the lack of feminist and anti-racist influence in the victims’ rights

\(^{335}\) Ruby, Chan & Hasan, *supra* note 70, sec 19.6–19.7, 19.20–19.32; Manson, *supra* note 274 at 195–196 citing *R. v. Gabriel* (1999), 137 CCC (3d) 1, 26 CR (5th) 364 at 382-89 (Ont SC) [cited to CR].
movement. Instead, she found that Victim Impact Statements were underused by survivors of sexual violence and, when they were used, they functioned to perpetuate systemic sexism and racism by their reliance on perceptions of worthiness and eloquence of survivors grounded in rape myths that devalue and discredit “non-ideal victims”, particularly Aboriginal, racialized, and poor survivors.

Judicial Characterizations of Offences: Aggravating and Mitigating Factors and their Impact on Outcomes

To achieve proportionality, judges identify circumstances that make an offence more or less grave and an offender more or less responsible. Typically, judges explicitly identify aggravating and mitigating circumstances. However, they may also imply aggravating and mitigating factors: in written sentencing judgments, judges may simply comment about the offence or the offender or choose words, terms or grammatical constructions that convey views of harm and wrong.

Feminist scholars have found that the circumstances judges identify, apply and weigh sometimes reveal rape myths. A finding of guilt, as it turns out, does not prevent bias against survivors: as stated by Patricia Marshall, “[i]n cases where an assaulter has been found guilty, clear evidence that a crime took place is no guarantee that the judge understood either the nature of the crime or its impact on

336 Ruparelia, supra note 40 at 666–667.
337 Ibid at 687–692.
338 Criminal Code, supra note 67, s 718.1.
the victim.” Feminist scholars have also linked the use of rape myths to sentence outcomes.

Marshall conducted research on sentencing decisions from the early 1980s. In her sample, she found that judges failed to characterize sexual assaults as inherently violent and coercive and used the supposed absence of violence in mitigation. Judges minimized offenders’ responsibility by portraying offences as mistakes or out-of-character acts, particularly in cases of middle-class offenders who were seen as good candidates for rehabilitation. Judges blamed survivors for provocation for being seductive, and offender’s wives for duress for failing to fulfill offender’s sexual ‘needs’, citing these as mitigating factors.

In the early 1990s, Paula E. Pasquali analyzed all sexual assault sentencing cases from Yukon courts for an 18-month period in 1988 and 1989. In these cases, she found that judges often ignored survivors entirely or failed to understand the impact of sexual violence on them: only once did a court consider the impact on the survivor aggravating; courts typically determined there was no evidence of lasting harm to the survivor. Pasquali also found that judges regularly relied on evidentiary gaps together with their own assumptions about sexual violence in mitigation, for example, determining that there was no evidence of violence because a survivor did not resist, and generally used problematic reasoning about

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339 Marshall, supra note 38 at 219.
340 Ibid at 220–221, 223.
341 Ibid at 220–222.
342 Pasquali, supra note 51 at 4.
343 Ibid at 42–49.
344 Ibid at 22, 27.
violence, harm, and responsibility. A significant part of this was the construction of offender responsibility. Judges considered it mitigating if offenders had respectable backgrounds or high statuses in the community, finding them less likely to reoffend, and attributed sexual offences to intoxication, questionable presumptions made in the absence of any evidence.

In 1994, two works about sexual offender sentencing were published in one book. Renate M. Mohr, in “Sexual Assault Sentencing: Leaving Justice to Individual Conscience”, looked at court of appeal judgments relating to sexual offenders from 1983 to 1991. She examined the disparity in sentencing approaches among courts of appeal in Canada and the influence of the three levels of sexual assault on the lengths of sentence ordered. She found that offenders were frequently convicted of a less serious offence than the facts supported. Of particular relevance to my work, she found that courts often failed to consider any factors related to survivors and gave offenders significantly longer sentences when they sexually assaulted strangers, compared to those who assaulted acquaintances.

In the same book, Teressa Nahanee focused on sentencing of Inuit offenders in “Sexual Assault of Inuit Females: A Comment on ‘Cultural Bias’”. She critiqued the discrimination evident in some sentencing decisions that implied that sexual assault is less harmful to Inuit females because of the stereotype that they become sexual at

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345 Ibid at 23–41.
346 Ibid at 31.
348 Ibid at 164–167.
349 Ibid at 171–176.
350 Ibid at 178–181.
a young age and their sexual assault is an aspect of Inuit culture. This “cultural defence” as well as the use of intoxication as a mitigating factor resulted in lighter sentences, a sentencing pattern that she argued infringes Inuit females’ equality rights.

Ronit Dinovitzer has also studied the relationship between aggravating and mitigating factors and sentence outcomes. Her research centred on the interaction between the judicial perceptions of mental illness and sentence length. In her regression analysis of sexual assault I cases from August 1992 to August 1993 from the Canadian Sentencing Digest, she found that judges imposed longer sentences when they perceived that offenders had a mental illness and used force in the offence. When both factors were present, they operated in aggravation. This finding revealed dissonance between what judges said they were doing, relying on mental disorder as a mitigating factor, and what they actually did. Using labeling theory, she found that these offenders were discursively characterized as outside the realm of “normal” offenders and instead as “dangerous offenders”, even though they were not legally categorized as such pursuant to the Criminal Code.

Janice Du Mont and her colleagues have conducted a number of studies on Ontario sexual assault sentencing decisions dating from 1993 to 2001 on the relationship between myths about sexual violence in sentencing factors and

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352 Ibid at 196–199.
354 Ibid at 160–164.
355 Ibid at 165–167.
356 Ibid at 164–165 citing Criminal Code, supra note 67, s 753.
sentence outcome. The first two studies empirically evaluated the correlation between offence seriousness and sentence outcomes. In 2003, in “Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination”, Du Mont found that charges and convictions did not consistently reflect the seriousness of the sexual assault as dictated by the three levels in the Criminal Code, with some offenders charged and convicted of lesser offences. She also found that factors going to the offence's seriousness, such as harm suffered by the survivor, played a lesser role than factors about the offender in sentencing.\textsuperscript{357} She worried that judicial “discretion is influenced not only by legal considerations but also by social influences such as the adherence to rape myths.”\textsuperscript{358}

Du Mont, Tania Forte and Robin F. Badgley, pursued this line of inquiry further in 2008 in “Does The Punishment Fit The Crime? Judicial Sentencing in Adolescent and Adult Sexual Assault Cases”. They looked at judicial consideration of factors relating to the seriousness of the offence where offenders were sentenced to imprisonment.\textsuperscript{359} They found factors reflecting the offence's gravity that supported stereotypical views about sexual assault – vaginal or anal rape and use of a weapon – correlated with federal, and therefore longer, prison sentences; no other factors reflecting offence seriousness were linked with prison sentences.\textsuperscript{360}

In 2012, Du Mont and Gillian Balfour studied conditional sentences for sexual offenders, asking whether judges ordered them on the basis of rape myths.\textsuperscript{361}

\textsuperscript{357} Du Mont, supra note 55 at 326–329.
\textsuperscript{358} Ibid at 329 [footnote omitted].
\textsuperscript{360} Ibid at 491–494.
\textsuperscript{361} Balfour & Du Mont, supra note 179 at 710.
Considering whether rape myths “appeared to play a role in framing” the legal and rape narratives in conditional sentencing judgments, they found judges used reasoning based on rape myths modified to reflect neoliberalism. Judges rendered survivors invisible and used discourse that highlighted survivors’ responsibility for their own risk-taking and protection. As well, courts justified conditional sentences based on the circumstances of the offender, which often demonstrated masculinist beliefs about the worthiness of men based on the idealization of breadwinners and business owners, for whom incarceration was inappropriate and their risk in the community manageable.

Benedet has also analyzed sentencing decisions, specifically, ancillary orders. In “A Victim-Centred Evaluation of the Federal Sex Offender Registry”, she assessed the judicial interpretation of exceptions from the registration requirements under the Sex Offender Information Registration Act, exceptions that had been recently eliminated to make registration of sex offenders mandatory. She determined that decisions on applications for judicial exception revealed the “persistence of problematic assumptions about what a ‘real’ sex offender looks like.” In the case law, she found the development, and then limiting, of the “predatory stranger model.” Using this model, courts excepted perpetrators who committed offences against their spouses or against

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362 Ibid at 711.
363 Ibid at 712–717.
364 Ibid at 717–722.
365 Formerly Criminal Code, supra note 67, s. 490.012(4).
366 Sex Offender Information Registration Act, SC 2004, c 10.
acquaintances, were middle-class or professionals, or were generally perceived to not be "predatory."\textsuperscript{369}

\textit{Discursive Analysis: Attributions in Judicial Constructions}

The sentencing of sexual offenders has also attracted discursive analysis. As I discussed above, studies have looked at whether judicial language in trial decisions reflects stereotypes or biases. Similar studies have been conducted on sentencing decisions, assessing whether language choices are correlated with sentence outcome.

Coates, often with her colleagues, has studied the language of judges and sentence length. In her 1997 study of B.C. sentencing decisions from 1986 to 1994 entitled "Causal Attributions in Sexual Assault Trial Judgments", Coates used an empirical methodology to correlate judicial language of "causal attributions" to the length of sentences.\textsuperscript{370} She discovered that judges often depicted the causes of sexual offences as non-violent, including psychological or sexual, decontextualized from offences, and arising from an external circumstance rather than something within the offender’s control.\textsuperscript{371} She also found that nonviolent attributions, and all three attributions together, correlated with shorter sentences.\textsuperscript{372}

With Allan Wade, Coates elaborated on this topic in 2004. In sexual assault trial and sentencing judgments from British Columbia and the Yukon from 1986 to 1993, they found that judges described violence in mutual and erotic language and

\textsuperscript{369} Ibid at 449–462.
\textsuperscript{371} Ibid at 289.
\textsuperscript{372} Ibid at 290–291, 293.
commonly attributed sexual offences to “psychological theories and concepts”, most usually alcohol and drug addiction or sexual dissatisfaction and deviance. These causal explanations “were psychologizing attributions; that is, they functioned to conceal violence or reduce the offender’s responsibility.” As a result, judges recommended offenders receive counselling for psychological issues other than their propensity to commit sexual violence.

E. Incomplete Knowledge

In sexual offence law and sentencing, discriminatory myths have found their way into both legal doctrine and language. They can be seen in both the law as interpreted and applied and the narratives and attributions in judicial discourse. Feminist-inspired reforms have eliminated rape myths in formal statements of the law; however, recent scholarship has demonstrated that myths and discrimination continue within the law’s application.

Although a significant amount of research has been conducted on sexual offender sentencing, the state of knowledge is incomplete. Specifically, no contemporary research has been conducted on B.C. sentencing decisions generally to determine if rape myths continue to surface. Most analyses focus on trial decisions, including procedural applications and acquittals/convictions. Although some scholars have looked at sentencing, including Du Mont, Coates, and their colleagues, their research is limited. The most comprehensive studies, looking at sentencing as a whole for the purpose of identifying myths, is dated, studying cases

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373 Coates & Wade, supra note 66 at 8–18.
374 Ibid at 10.
375 Ibid at 18.
in the 1970s, 1980s and 1990s, during the time Parliament was reforming the
*Criminal Code* and the Supreme Court of Canada was actively interpreting and
shaping reforms. These studies are also often limited jurisdictionally, with the most
recent studies on case law in the later 1990s to present addressing only Ontario
cases or confined to particular aspects of sentencing or sentence outcomes. The
existing literature is illuminating about the use of myths in sentencing, but it is far
from comprehensive.

I will build on the existing knowledge that suggests that discriminatory
myths continue to be used in sentencing to contribute to the scholarship in a critical
area of feminist concern. In 2011, Balfour and Du Mont called on feminist
researchers to further study the use of rape myths in sentencing, to ensure that
feminist scholars participate in shaping the meaning of “harm and reparation.”

My ability to meet Balfour and Du Mont’s challenge is necessarily limited: I cannot
study all aspects of sentencing in this thesis. Methodology is dictated in part by the
distinct objectives of each study, to which I now turn.

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376 Balfour & Du Mont, *supra* note 179 at 724.
III. Conceptual Approach and Methodology

I devote this chapter to explaining my methodology. To determine whether myths inform current B.C. sexual assault sentencing decisions, I take a feminist approach. My approach is grounded in feminist theory that identifies the role law and legal discourse have in creating and reproducing mythologies about gender, sexuality, and ultimately, sexual violence. I analyze a sample of recent cases from B.C. sexual offender sentencing decisions to see how sentencing judgments may reflect or perpetuate discriminatory ideas, and in particular whether judges blur the line between sexual violence and consensual sex. I ascertain the presence of prejudicial assumptions or beliefs within legal doctrine, including judicial determinations of the admissibility and relevance of evidence, aggravating and mitigating factors, and sentencing objectives. This work can be understood as primarily doctrinal. I also conduct non-doctrinal research that consists of feminist discourse analysis. Using this method, I examine the narrative judges tell about sexual assault to determine the presence of sexist assumptions including the use of rape myths. Although these two approaches overlap in many ways, thinking about them as distinct has helped me structure my methodology.

A. Conceptual Framework

My framework draws on a feminist approach to sexual violence. I also understand legal discourse as shaping the perceived reality of sexual assault and reproducing or creating discrimination. Although I have mentioned these
conceptualizations of sexual violence and discourse already, I now discuss them in more depth, to frame my approach.

A Feminist Approach to Sexual Violence

Taking a feminist approach, I understand sexual violence as an expression of systemic gender inequality. This approach sees the basis of sexual violence as not grounded in biology but based on the social construction of gender within a particular cultural and historical context.\(^{377}\) I adopt MacKinnon’s conception of sexual violence as acts of “sex inequality”\(^ {378}\) enabled by the “erotization of subordination and dominance” of women based on cultural norms of femininity and masculinity\(^ {379}\) and by institutions that oppress women and ignore violence against them.\(^ {380}\)

Although women are the primary targets of sexual violence, their experiences are not universal. Aboriginality, race, class, sexual orientation, physical and mental ability, and involvement in prostitution are circumstances that make women more vulnerable to and shape their experiences of sexual violence.\(^ {381}\) They also affect their experiences of the criminal justice system in the discrimination they face from myths designating them as less credible or the harms against them less opprobrious.\(^ {382}\) Because inequalities are related to and reinforce one another, they

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\(^{379}\) *Ibid* at 265.

\(^{380}\) McIntyre, *supra* note 23 at 78–79; See e.g. Backhouse, *Carnal Crimes*, *supra* note 38; Boyle, *supra* note 62.

\(^{381}\) Kimberle Crenshaw, “Race, Gender, and Sexual Harassment” (1991) 65 S Cal L Rev 1467 at 1468.

\(^{382}\) McIntyre, *supra* note 23 at 78; See e.g. Benedet & Grant, “Consent”, *supra* note 211 at 251–253; Backhouse, *Carnal Crimes*, *supra* note 38; Crenshaw, *supra* note 381 at 1469–1472; Razack, *supra* note 7; Ruparelia, *supra* note 40 at 672–687, 689–692.
cannot be considered in isolation from one another;\textsuperscript{383} therefore, an intersectional approach is necessary to ensure that all women’s experiences are considered.\textsuperscript{384}

Although sexual violence has a fundamentally gendered character, it does not follow that sexual assault against men and children holds no interest for feminist analysis. Gender norms dictate roles for men and children as well as women. Male gender norms come to the fore in homophobia, since, as stated by Trina Grillo, \textit{“[h]omophobia enforces sexism by making people pay a heavy price for departing from socialized gender roles.”}\textsuperscript{385} Therefore, cases of sexual violence against men and boys, although less common, can also reveal discriminatory notions about gender and sexuality.\textsuperscript{386} As well, sexual offences against children, even young children, have the potential to reflect rape myths about sexual assault.\textsuperscript{387}

\begin{quote}
\textit{The Law as Discourse: A Powerful Voice}
\end{quote}

\begin{quote}
\textit{Discourse and the Law}
\end{quote}

Michel Foucault’s concept of “discourse” expresses the idea that our perception of reality is “mediated through language.”\textsuperscript{388} Discourse denotes language situated within a cultural, historical, and institutional context, contexts that provide “frameworks which structure what can be experienced or the meaning that experience can encompass, and thereby influence what can be said, thought and

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\item\textsuperscript{383} Grillo, supra note 169 at 17–21, 27.
\item\textsuperscript{384} Crenshaw, supra note 381 at 1474–1475.
\item\textsuperscript{385} Grillo, supra note 169 at 27.
\item\textsuperscript{386} See generally Caroline Ramazanoglu & Janet Holland, \textit{Feminist Methodology: Challenges and Choices} (London: Sage, 2002) at 147.
\item\textsuperscript{387} See e.g. “Exactly what the judge said to the convicted sex offender”, \textit{The Vancouver Sun} (1 December 1989) A17 [in an unreported sentencing hearing in 1989, the judge characterized the three-year old survivor as “sexually aggressive”].
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Discourse in institutional contexts is powerful because it presents a situated and contingent truth as a universal truth, to become accepted as fact or commonsense within society. Discourse therefore works to dictate social norms, including standards of expected behaviour and behaviour requiring sanction or deterrence.

Law is discourse. Law is produced and disseminated through specialized institutional language: legal knowledge can be understood as "embodied, habituated expertise in legal discourse." Like other forms of discourse, legal discourse governs who speaks, what is said, what amounts to knowledge, and the meaning of words. Within these power structures, courts adjudicate the legal “truth”, creating a version of what occurred between the parties. Legal institutions then enforce the “truth” through sanctions or orders. As a result, legal discourse influences cultural norms.

Although presented as a universal, neutral truth, the law is situated and partial. It often reflects dominant cultural assumptions and biases. As Coates and Wade suggest, because of its pervasive and invisible power in shaping perceptions of reality, intention is not necessary to reproduce discrimination through discourse:

Our view is that it is not essential to take up an ideological position to produce and reproduce social injustices. The simple act of participating in
everyday, taken-for-granted discursive practices, such as those we have documented here, directly and indirectly reproduces social injustices...397

Absent malicious intent, judicial discourse can reproduce and construct discrimination because it comes from within an institution and a society with histories of inequality. Nor do judges construct a case in law and discourse alone: they are informed and rely on the discourse of existing case law, lawyers, and witnesses, also situated and partial.398 Placing rape myths in the criminal justice system within greater society, L'Heureux-Dubé J. reminded us, “[t]his baggage belongs to us all.”399

Legal discourse has reproduced and maintained gender inequality. Susan Ehrlich has described this inequality as the “androcentric and sexist assumptions that typically masquerade as ‘objective’ truths” within the law.400 Sexist assumptions find their way into sexual offence cases when judges rely on pervasive and discriminatory cultural norms about gender and sexuality to interpret and apply the law,401 including the procedural rules, interpretations of consent, and requirements of forceful resistance grounded in the presumed low credibility of survivors,402 and when judges construct narratives of sexual violence that, for example, normalize or conceal coercion and violence.403

397 Coates & Wade, supra note 66 at 26.
398 Coates, Beavin Bavelas & Gibson, supra note 64 at 189; For an in-depth analysis on how a judge constructs an offence, infanticide, from a trial record in its institutional context from a feminist perspective, see generally: Emma Cunliffe, “(This Is Not a) Story: Using Court Records to Explore Judicial Narratives in R v Kathleen Folbigg” (2007) 27 Austl Feminist LJ 71.
399 R. v. Seaboyer, supra note 26 at para 153, L'Heureux-Dubé J, dissenting [emphasis in original].
400 Ehrlich, supra note 29 at 9.
401 Pether, supra note 64 at 54–55, 67–68.
402 See Chapter II.
403 See e.g. Coates & Wade, supra note 66 at 7; Pether, supra note 64 at 79–86.
Carol Smart has examined how legal discourse constructs gender identities, in being both “gendered” and “a gendering strategy.” According to Smart, legal discourse creates gender identities by distinguishing and dichotomizing abstract ideas of woman from man, as well as certain women, like “bad mothers”, from other women. Law then coaxes women into the identities legal discourse has created. In time, these gendered identities or norms become “self-evident and matters of common sense.”

The power of law to reproduce and create gendered identities is within both legal doctrine and narrative. Judges extend the law's power beyond laws and legal interpretation to encompass cultural knowledge by relying on legal discourse: as Smart noted, “the judge does not remove his wig when he passes comment on, for example, issues of sexual morality in rape cases. He retains the authority drawn from legal scholarship and the ‘truth’ of law, but he applies it to non-legal issues.” Similarly, Ehrlich identifies the duality of law’s power in both “the enactment of rules and the imposition of punishments” and “the capacity to impose and affirm culturally powerful definitions of social reality.” Therefore, legal doctrine and legal narrative are two important sites for feminist legal research.

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405 Ibid at 34–39.
406 Ibid at 37.
407 Ibid at 39.
408 Smart, Feminism, supra note 29 at 13.
409 Ehrlich, supra note 29 at 18.
410 Ibid at 19.
Sentencing Decisions as a Source of Legal Discourse

Sentencing decisions, like trial judgments, are important sources of legal discourse. Each decision is an expression of judicial interpretation of the law at the time of the decision, as well as a construction of what occurred, the facts.

Given the precedential nature of sentencing, written sentencing decisions have significant value in common law systems. Although judges have discretion to determine fit sentences within a range of possibilities, sentencing is precedent driven to promote parity among cases. By analogizing to past cases, lawyers and judges rely on written sentencing decisions to craft sentences for similar offences and similar offenders. Sentencing decisions therefore guide future dispositions of sexual assault cases, together constituting the body of case law on sexual offender sentencing as well as representing an important source of legal discourse on sexual violence. For this reason, sentencing is also a site likely to reproduce rape myths from the past into the future.

Within sentencing decisions, judges interpret and apply the law in a number of ways, all of which may rely on myths about sexual assault. Judges interpret and apply procedural law, including what evidence is considered relevant and relied upon, as well as the substantive law of sentencing, determining what constitutes aggravating and mitigating factors and what principles of sentencing are paramount in each case, based on the offender, offence, and impact on the survivor. These

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411 Coates, Beavin Bavelas & Gibson, supra note 64 at 189.
412 Coates & Wade, supra note 66 at 4, 7; Coates, supra note 370 at 281; Du Mont, Forte & Badgley, supra note 359 at 485–486.
413 Manson, supra note 274 at 57–61, 80–81.
414 Ibid at 92.
415 Ibid at 94; Du Mont, Forte & Badgley, supra note 359 at 486.
416 Coates, supra note 370 at 281; Du Mont, Forte & Badgley, supra note 359 at 494–495.
features are also present, in modified ways, in appellate judgments. Studying these aspects of sexual offender sentencing cases will allow me to assess whether they foster inequality within the law.

Sentencing decisions also contain narratives about sexual violence that form the factual basis for sentencing. Within narratives, discriminatory ideas may be expressed through stereotypical images and norms as well as word choice and grammatical constructions. Judicial language can subtly convey ideas about the nature of offences, responsibility, and harm:

Accounts are not objective or impartial reflections of events; rather, they must be treated as representations of events that vary in accuracy. Such fundamental constructs as the nature of the events (e.g. violent versus sexual), the cause of events (e.g. deliberate versus accidental), the character of the offender (e.g. good versus bad), and the character of the victim (e.g. passive versus active) are constructed within the account of the crime.

Judicial narratives are part of legal discourse, and so like interpretations and applications of the law, are partial and situated expressions of sexual violence that can promote inequality by depicting sexual offences in discriminatory ways.

**B. Methodology**

Relying on these conceptualizations of legal discourse, I have constructed a methodology that includes two frameworks for analysis. To interrogate legal discourse in sentencing decisions for rape myths about the credibility and blame of survivors, the blameworthiness of offenders, and other notions of what sexual assault is and is not, I examine both legal doctrine and narrative. Although these categories overlap when law and narrative are woven together, this division helps

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417 See generally Chapter II.
418 Coates & Wade, supra note 66 at 7.
me to identify my two purposes in reading the cases: as a source of law and as a source of judicial narrative. I therefore follow both doctrinal and non-doctrinal research methods.

**Doctrinal: An Expansive Approach**

My doctrinal method analyzes the cases as a source of law. The purpose of this method is “to describe a body of law and how it applies”, including the development “of judicial reasoning”.419 In particular, I examine two doctrinal aspects of sentencing within the cases: procedural law, including the evidence admitted, considered relevant, and relied upon; and substantive law, including aggravating and mitigating factors and sentencing principles.

My doctrinal methodology is qualitative: it is a subjective task that requires synthesis, interpretation and contextual analysis.420 I primarily rely on inductive reasoning, a doctrinal tool that works from the level of individual cases to identify principles and themes among them.421

I take an expansive approach to my doctrinal method. Unlike traditional doctrinal research, I do not focus on finding a statement of the law; rather, I am interested in the law as it is interpreted and applied by judges, regardless of *stare decisis* and precedent. Although I am cognizant of the important distinctions between the institutional roles of appellate and trial courts,422 my project seeks to

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provide illumination on the law as both apply it; therefore, I have analyzed trial and appellate decisions alike.

According to Gotell, who has used a similar methodology, moving away from rigid conceptions of doctrinal analysis can enable researchers to better understand the law. Because each written decision is an expression of judicial interpretation of the law at the time of the decision, an analysis of a group of cases can reveal how one aspect of the law is being interpreted and applied. A similar methodology allows me to assess whether mythologies about sexual violence inform judicial interpretation of legal doctrine within sentencing and appellate decisions.

The framework for my doctrinal analysis is informed by feminist theories of legal discourse and will be based on feminist legal methods. In particular, to interrogate the statements of legal doctrine in sentencing cases for rape myths, I rely on two of the feminist legal methods described by Katharine T. Bartlett: asking “the woman question” and feminist practical reasoning. These methods direct me to interrogate legal doctrine’s claims of truth by considering whether the law is discriminatory in application or consequence. Asking the woman question exposes biases within doctrine by asking how law may exclude the perspectives or experiences of women or other marginalized groups or reflect embedded assumptions about gender and sexuality that subordinate or exclude. Using this

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423 Coates, Beavin Bavelas & Gibson, supra note 64 at 189.
426 Ibid at 843.
method, I pose questions such as “[w]hose point of view do these assumptions reflect? Whose interests are invisible or peripheral?”427

The method of feminist practical reasoning questions the doctrine of relevance428 by analyzing whose interests it advances.429 It works to promote legal reasoning that is contextual rather than abstract and to include perspectives of marginalized and excluded groups,430 on the basis that there is not one universal perspective but competing perspectives.431 It also helps to unmask the operation of privilege that favours certain groups. Using feminist practical reasoning, I use a contextual method to be attentive “to certain forms of injustice that otherwise go unnoticed and unaddressed”432 in a neoliberal approach.

Using this method, I determine whether judges use myths in their interpretation and construction of doctrine in sentencing. Comparing my findings to previous scholarship, I also assess whether rape myths have changed over time.

Non-Doctrinal: Feminist Discourse Analysis

Since gender discrimination can be found in both doctrine and narrative, I also analyze judicial narratives. Specifically, I assess sentencing decisions for unequal or discriminatory constructions of sexual violence using feminist discourse analysis, a non-doctrinal approach.

Although it examines legal texts like doctrinal research, a discourse analysis does not seek to determine the law. A critical discourse analysis, similar to

427 Ibid at 848.
428 Ibid at 836–837.
429 Ibid at 856–857.
430 Ibid at 850–851.
431 Ibid at 857.
432 Ibid at 863.
qualitative content analysis, looks at language to “identify meaning behind the words of judicial and legislative text. It is a way of deconstructing text rather than reading and synthesising meaning from the text.”  

This aspect of my project can therefore be seen in another light: doctrinal research for a non-doctrinal purpose.

Discourse analysis is inherently qualitative because it is “aimed at understanding how human expression articulates social order, begin[ning] by picking apart the order that is presented to us as common sense.”

To analyze judicial narratives for rape mythologies, I adapt Ehrlich’s framework of “unpacking the discourse of law” to analyze the language in sentencing cases to “understand the way that gendered meanings are constructed and reproduced in discourse”. Together with the approach and insights of Coates and her colleagues, I assess how judicial discourse about sexual violence reproduces or constructs gendered identities and “dominant narratives” about sexual assault through the accounts of sexual assault that are told. My analysis of language includes looking at both grammar and expressions that betray worldviews or notions of ‘commonsense’. Within this framework, grammatical constructions are “ideologically important” choices that can express notions about gender, sexuality, and sexual violence. For example, I am attentive to words that minimize the offender’s actions, obscure violence or coercion or survivor resistance, or shift

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433 Hutchinson & Duncan, supra note 420 at 118.
435 Ehrlich, supra note 29 at 28.
436 Coates, Beavin Bavelas & Gibson, supra note 64; Coates, supra note 370; Coates & Wade, supra note 66.
437 Ehrlich, supra note 29 at 28–29.
438 Ibid at 39.
439 Ibid.
responsibility to the survivor.\textsuperscript{440} I am also cognizant of the broader conceptualizations of sexual assault revealed in judicial discourse, including language that suggests female sexuality is “whimsical or capricious”,\textsuperscript{441} force is normal or inherent in consensual heterosexuality,\textsuperscript{442} sexual assault arises from natural gender miscommunication,\textsuperscript{443} and sexual assault is akin to consensual and normal sex.\textsuperscript{444}

With this method of deconstructing judicial discourse, I identify whether judges convey sexual assault myths in their narratives of sexual violence.

\textit{Limitations}

Building on prior scholarship, my thesis will add to awareness about the law as it operates within judicial decision-making and contribute to knowledge about the state of equality in sexual assault law.\textsuperscript{445} As I reviewed in Chapter II, many feminist scholars are involved in the work of assessing whether gender inequality continues in the law of sexual assault and, in particular, whether rape myths continue to be used in law and legal discourse. Their research provides an excellent basis for my analysis, but does not answer my research question: whether B.C. judges currently rely on sexual assault myths when sentencing sexual offenders.

My methodological choices limit the conclusions I can make. I will not analyze whether there is a correlation between judicial use of myths in legal

\textsuperscript{440} Ibid at 36–61; Coates & Wade, supra note 66 at 7; See also Coates, Beavin Bavelas & Gibson, supra note 64; Coates, supra note 370.
\textsuperscript{441} Smart, Feminism, supra note 29 at 31.
\textsuperscript{442} Pether, supra note 64 at 67–68.
\textsuperscript{443} Ehrlich, supra note 29 at 121–148.
\textsuperscript{444} Coates, Beavin Bavelas & Gibson, supra note 64.
doctrine or discourse and sentence outcomes. My decision to not study this question is related, in part, to my reluctance to be seen as advocating for harsher sentences for sexual offenders. As I discussed in Chapter II, I have been influenced by the concerns of some feminist scholars about imprisonment; on the other hand, I also believe that incarceration serves an important purpose: namely, the separation of violent offenders from the community, to protect women and children from violent men. The criminal justice system reproduces inequality and is too focused on individual responsibility to the detriment of contextual understandings of gendered violence, but I believe there is value of working within the system to improve it, mainly because the system is necessary for the protection and safety of communities. Nonetheless, because of these issues, I have determined to not assess sentence outcomes.

I also do not look beyond sentencing decisions to determine the sources of rape myths in judicial reasoning, to see “how a judge constructs a coherent account of the case and the events ... from the mass of contradictory and fragmentary information accumulated within the court record”. My thesis is also unable to provide insight into the subjectivities, or “embodied experiences” of the survivors within my cases, experiences that “cannot be accessed through an examination of the judgments”. These objectives are all worthwhile, but ones I do not pursue here.

446 Cunliffe, supra note 398 at 74.
447 Cunliffe & Cameron, supra note 334 at 14.
448 Ibid at 15.
**Gathering the Case Sample**

According to Lee Epstein and Gary King, a sound methodology must identify specific objectives and “follow some general rules to arrive there – or at least arrive there with some known degree of confidence.”\(^{449}\) A significant part of this process is ensuring that the information on which the study is based is capable of supporting the “descriptive inference” or conclusion the researcher wants to make about a larger category of individuals or phenomena.\(^{450}\) To allow readers and scholars to “evaluate the research and its conclusions”,\(^{451}\) a researcher should explain how she selected her data, because this process can “influence the outcomes” of the research.\(^{452}\)

In my case, I wish to make conclusions about whether B.C. judges currently use rape myths in their interpretation of legal doctrine and expression of narrative when sentencing offenders. Although I rely on secondary research to inform my analysis,\(^{453}\) my primary source of data is sentencing decisions. These cases, recently reported sexual offender sentencing decisions from B.C., make up my case sample. However, there are many decisions that I made in selecting the cases to ensure I have a “defined and justified sample”.\(^{454}\)

I have drawn the case sample from sentencing cases by B.C. courts in 2011 and 2012\(^{455}\) for offenders convicted of all three levels of sexual assault.\(^{456}\) To gather

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\(^{449}\) Epstein & King, *supra* note 445 at 19.

\(^{450}\) *Ibid* at 29–34.

\(^{451}\) *Ibid* at 42.

\(^{452}\) *Ibid* at 44.

\(^{453}\) See the advice about legal research given in Dobinson & Johns, *supra* note 419 at 22–32 to gather legislation, jurisprudence, and case commentaries for contextual and analytical purposes.

\(^{454}\) *Ibid* at 34–36.

\(^{455}\) Specifically, January 1, 2011 to January 1, 2013, searched from CanLII on June 6, 2013.
these cases, I searched for all cases containing the words “sentence” and “sexual assault.” I also searched for sentencing cases of offenders guilty of sexual offences against children and adolescents.457 I did not include cases of offenders who committed what amounts to sexual offences but are guilty of non-sexual crimes: from my review, in those cases, analyses are scrubbed free of considerations about sexual violence and are, therefore, unhelpful for this thesis.458

I limited myself to looking at sentencing cases. I discarded applications for dangerous offender designations on the basis that they have a dissimilar focus from sentencing decisions, primarily looking at offenders’ patterns of criminal conduct over their lifetimes. However, I included cases that couple sentencing decisions with applications for long-term offender designations because of their focus on the offence presently before the court.

Because the sample consists of reported sentencing decisions, my study only looks at a very small portion of sexual assaults in B.C. Only a small percentage of sexual offences result in convictions459 and, of these convictions, only some result in

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456 Criminal Code, supra note 67, ss 271, 272, 273. I also included historical cases in which the offender was guilty of a crime that would now be categorized as sexual assault.
457 Ibid, ss 151, 152, 153(1), 155(1). I searched for these by looking for cases with the terms “sexual interference”, “sexual touching”, “sexual exploitation” or “incest” within the same case as the word “sentencing.”
458 For example, I excluded R. v. D.A.R., 2011 BCPC 500 (available on CanLII) from my case sample. The offender pleaded guilty to unlawful confinement, assault causing bodily harm, and threatening of his intimate partner; however, the facts reveal that as a part of his assault causing bodily harm he forced his penis into the survivor's mouth and repeatedly anally raped her. However, the court did not directly consider the sexual nature of his offence in determining a fit sentence, stating at para 19: “There are sexual aspects to putting his penis in her mouth and to anal intercourse and those acts would constitute violations of the sexual integrity of L. but I must sentence Mr. R. for assault causing bodily harm, not for sexual assault causing bodily harm.” I also excluded R. v. B.S., 2012 BCCA 36 (available on CanLII), from my sample because it did not provide sufficient information for analysis.
459 Johnson, “Limits”, supra note 3 at 632. See Chapter I, Section A.
reported sentencing decisions.460 Thus, by design, the case sample is made up of exceptional cases. Nonetheless, it allows me to make the conclusions I seek to make. Although my research is unable to address the greater phenomena and consequences of sexual violence, my research is informative about whether B.C. judges use myths about sexual assault when sentencing sexual offenders.

IV. Case Sample Characteristics: Gendered Violence and Missing Pieces

The cases in the sample reflected the nature of sexual offences: gendered and violent. Although their existence was based on their exceptionality, they confirmed what feminist scholars have been saying about sexual violence. However, there is much about sexual violence, and its legal construction, that these cases do not reveal.

From my approach I gathered a case sample made up of 66 cases, 11 of which are appeals and the rest trial-level sentencing decisions. They address 62 discrete cases, with four cases including both sentencing and appeal decisions.461 Slightly more than half of offenders had their guilt established by conviction. In these cases, judges most often relied on their findings of fact from convictions, typically either quoting from or summarizing their earlier findings of fact. In a few cases, judges had to determine the facts for sentencing following a guilty verdict from a jury. In these cases, judges proceeded to determine the facts of the offence with little disagreement from counsel. Similarly, guilty pleas, made by nearly half of offenders, did not often result in disagreements about the facts.

Within the sample, the gendered nature of sexual violence was obvious. Every offender was male and nearly all were adults. Every adult survivor, except one, was a woman. The majority of survivors were under 18 years old,462 and most of these were girls. However, structural inequalities other than gender and age were

461 Of the 62 cases, there are 65 offenders and 96 survivors. The sample only includes offenders guilty of sexual offences and survivors of sexual offences other than child pornography.
462 Criminal Code, supra note 67, s 718.2(a)(ii.1) dictates that courts consider it aggravating that the offender victimized someone under the age of 18. As a result, I use this age to determine whether survivors are youths or adults.
not as apparent because these sentencing judgments omitted most personal characteristics about offenders and survivors.

Judges typically did not record offenders’ race or ethnicity. They made two exceptions: they identified offenders who were immigrants when chronicling offender’s lives; and they identified Aboriginal offenders by reference to *Gladue* Reports submitted pursuant to section 718.2(e) of the *Criminal Code*. Beyond these exceptions, courts did not note race and ethnicity; therefore, any role the offender’s race may have played in the proceedings is unascertainable.

Judges only recorded survivors’ gender, age, and relationship (if any) to offenders. Information about survivors’ race or ethnicity was almost entirely absent from cases, except in cases in which courts identified survivors as Aboriginal, which they often did indirectly. Judges typically also omitted other vulnerabilities or inequalities: in a few cases, judges noted a survivor’s drug addiction, history of sexual abuse, or involvement in prostitution; however, it seems likely that judges omitted these and other circumstances and identities, such as social class, sexuality, and disability, more often than not. Written judgments also disregarded survivors’ presentation and appearance, including clothing, speech, and mannerisms during assaults and at court. Together, these identities, circumstances, and traits may have influenced how judges understood and constructed offences and the harm survivors suffered, in accordance with rape myths based on dominant notions about gender, race, sexuality, and class.464

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463 *R. v. Gladue*, *supra* note 274.
I hypothesize that judges did not include this information in part to be non-discriminatory. This approach reflects a formal idea of equality: treating everyone the same, regardless of circumstance. However, Gotell acerbically described the problems with this approach as “the universalizing pretences of justice, whereby racial [and other] power relations are excised from judicial pronouncements, thus reinforcing law’s claim to objectivity.”\textsuperscript{465} The blinders of a formal equality approach do not guarantee that discrimination and systemic inequality are eliminated from the criminal justice system;\textsuperscript{466} rather they obscure their presence. Race and gender, as well as other forms of inequalities, are instead “hidden beneath the individualized gaze of the criminal law.”\textsuperscript{467}

The absence of information about offenders and survivors makes a fulsome intersectional analysis impossible: without knowing how judges perceived offenders’ and survivors’ race, Aboriginality, ability, sexuality, class, and so on, I cannot analyze how these factors influenced constructions within the criminal justice system. Nonetheless, I proceeded with the information available.

I was struck by how violent the sexual offences committed in the case sample were.\textsuperscript{468} Although most offenders were convicted of sexual assault I and sexual

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\textsuperscript{465} Gotell, “Disappearance”, \textit{supra} note 75 at 135.
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\textsuperscript{466} McIntyre, \textit{supra} note 23 at 78.
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\textsuperscript{467} Gotell, “Disappearance”, \textit{supra} note 75 at 135.
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\textsuperscript{468} In some cases, the violence of the offence was not reflected in the charge at conviction. Although I did not set out to study whether offenders were charged or convicted of offences less serious than the crimes they committed on the facts, it did appear that this occurred at least in a couple of cases, consistent with what Du Mont found among Ontario cases: Du Mont, \textit{supra} note 55. See e.g. \textit{R. v. Kane}, 2011 BCSC 345 at paras 2-3 (available on CanLII) [convicted of sexual assault I when he caused a swollen abrasion on the survivor’s head]; \textit{R. v. Alasti}, 2011 BCSC 824 at para 5 (available on CanLII) [convicted of sexual assault I when he caused vaginal injuries to the survivor]; \textit{R. v. Williams}, 2011
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interference, not the more serious offences of sexual assault II and III, many cases detailed sickening levels of violence or abuse. Offences against children or adolescents often covered countless acts of sexual assault, in one case possibly over a thousand, over months or years. Offences against adult women, usually consisting of a single assault, were characterized by violence, force and degradation, frequently beyond what is typically considered inherent in sexual assault. Of the most vicious crimes, accounting for some of the sexual assault level II and III cases, one offender bit off the survivor’s entire nose; one repeatedly strangled the survivor into unconsciousness, among other acts of violence; and another padlocked the survivor to a bed, beat her with his fists and the handles of knives, and attempted to burn her with a butane torch. Often, the most violent sexual assaults against adult women occurred within intimate relationships.

Perhaps sexual violence is even more horrific than we realize. As I discussed in Chapter II, Raphael presented a portrait of acquaintance rape that dispels the common perception that it is not violent. She revealed instead that perpetrators of so called ‘date rape’ often use significant violence and cause serious harm to

BCCA 194 at para 1 (available on CanLII) [convicted of sexual assault I when he caused vaginal injuries to the survivor]; R. v. Allen, 2012 BCSC 215 (available on CanLII) [R. v. Allen (SC)], rev’d 2012 BCCA 377 (available on CanLII) [R. v. Allen (CA)] [convicted of sexual assault I when he had been a party to the offence with another person].

Discussion

469 Sexual assault II and III, invitation to sexual touching, sexual exploitation, and incest were also represented but less common.


474 Ibid; R. v. Gonzalez-Hernandez, supra note 471; R. v. R.L.W., 2011 BCSC 1363 (available on CanLII); R. v. R.N.A., 2012 BCSC 1527 (available on CanLII). However, one case was significantly different than the other domestic cases. It was an HIV failure to disclose case involving two women with whom the offender was in intimate relationships: R. v. A.T.R., 2011 BCPC 283 (available on CanLII).
survivors.\textsuperscript{475} Perhaps we are likewise underestimating the violence and harm of all sexual offences, based on a gendered perspective that minimizes male violence and discounts the female experience of terror and injury.

However, I do not believe the misperception of violence and harm entirely accounts for the extreme violence within many cases in the sample. Although I have no doubt that sexual offences are more violent than Canadian society generally appreciates them to be, I suspect that the case sample over-represents the most violent and injurious cases. Reporting rates are low and attrition rates within the criminal justice system are high, and both are influenced by rape myths that sexual offences that do not involve weapons or result in injury are illegitimate or unbelievable. Given the filtering process, it appears likely that less obviously violent offences, cases without weapons, confinement, threats, and resistance,\textsuperscript{476} are more likely to go unreported and be “discounted and rendered invisible by the criminal justice system and the mainstream culture more generally”\textsuperscript{477}.

\textsuperscript{475} Raphael, \textit{supra} note 56.
\textsuperscript{476} Johnson, "Limits", \textit{supra} note 3 at 626–634; Du Mont, \textit{supra} note 55 at 311–314, 326–327. See generally Chapter II, Sections A & B.
\textsuperscript{477} Ehrlich, \textit{supra} note 29 at 38.
V. Doctrinal Analysis

In general, courts constructed sexual assault as a violent, blameworthy, and harmful crime. However, as I explore in my doctrinal analysis, they also abstracted and isolated sexual violence from inequality by erasing the unequal power between survivors and offenders. Assisted by their individualistic focus, in some cases courts interpreted and applied legal doctrine based on gendered and discriminatory assumptions about sexual violence to characterize sexual violence as similar to consensual sex. Rape myths were apparent within the three doctrinal aspects of cases I considered, and were most clear in cases of adolescent and other ‘risky’ survivors.

When considering the principles of sentencing courts took a contextual view of offenders’ circumstances but did not similarly consider the circumstances of survivors. As a result, they did not see women as vulnerable to sexual violence or generally relate specific vulnerability to inequality.478

Judges did not regularly assess the relevance or fairness of sexual history evidence in sentencing. As a result, they risked sexualizing survivors or forced them to address discriminatory questioning, such as whether they seduced other men prior to the offence or were seen masturbating by the offender.479

478 One example is that courts inconsistently considered the Aboriginal heritage of survivors, including whether it made them uniquely vulnerable or harmed by offences: see e.g. R. v. D.B.V., 2011 BCSC 1350 (available on CanLII); R. v. F.A.B., 2012 BCPC 362 (available on CanLII); R. v. S.D.D., supra note 470.
In their construction of the seriousness of offences and blameworthiness of offenders, courts typically considered sexual crimes to be violent; however, in some cases, courts characterized offences as not violent or threatening, or even as ‘mistakes’ or acts of poor judgment. In these cases, courts blurred the line between consensual sex and sexual violence, often ignoring evidence of explicit violence to do so.\footnote{See e.g. \textit{R. v. B.L.}, 2011 BCPC 254 at para 13 (available on CanLII); \textit{R. v. Kane}, supra note 468 at para 14-15, 34 (available on CanLII); \textit{R. v. K.L.L.}, 2012 BCPC 273 at para 25 (available on CanLII); \textit{R. v. S.D.D.}, supra note 470 at paras 2, 31; \textit{R. v. S.W.N.}, 2012 BCPC 436 at para 21 (available on CanLII); \textit{R. v. T.G.D.}, 2012 BCPC 397 at para 37 (available on CanLII); \textit{R. v. T.J.H.}, 2012 BCPC 115 at 10 (available on CanLII); \textit{R. v. Visscher}, 2012 BCCA 290 at para 36 (available on CanLII), rev’g \textit{R. v. R.W.V.}, 2011 BCPC 471 (available on CanLII).} Similarly, courts sometimes determined offences were not ‘predatory’ based on assumptions that offenders who assault acquaintances, do not stalk victims, or do not plan offences are less dangerous.\footnote{See e.g. \textit{R. v. A.S.B.}, 2012 BCPC 412 at paras 25-26 (available on CanLII); \textit{R. v. Billyboy}, 2011 BCSC 366 at para 6 (available on CanLII); \textit{R. v. K.L.L.}, supra note 480 at para 25; \textit{R. v. Reis}, 2011 BCSC 319 at para 48 (available on CanLII); \textit{R. v. Yusuf}, 2011 BCSC 626 at para 33 (available on CanLII).}

Based on the common law doctrine that evidence of ‘good’ character is mitigating, courts assumed offenders with families, jobs, or church affiliations were less blameworthy or suffered more professional and reputational consequences from convictions than other offenders.\footnote{See e.g. \textit{R. v. A.J.L.}, 2012 BCPC 420 at para 39 (available on CanLII); \textit{R. v. B.L.}, supra note 480 at para 7; \textit{R. v. Malik}, 2012 BCSC 502 at para 44 (available on CanLII); \textit{R. v. R.V.C.}, 2012 BCPC 502 at para 35 (available on CanLII); \textit{R. v. Semchuk}, 2011 BCSC 1553 at para 12 (available on CanLII); \textit{R. v. Yusuf}, supra note 481 at para 35.} As well, judges also assumed intoxication caused or contributed to offenders’ acts of violence, finding alcohol or drug abuse mitigating and indicative of offenders’ rehabilitation potential.\footnote{See e.g. \textit{R. v. Allard}, 2011 BCSC 915 at paras 18, 20 (available on CanLII); \textit{R. v. Allen} (SC), supra note 468 at paras 39, 45; \textit{R. v. R.N.A.}, supra note 474 at para 45; \textit{R. v. R.V.C.}, supra note 482 at para 40; \textit{R. v. Wright}, 2011 BCPC 350 at para 44 (available on CanLII).} In some cases,
judges also considered offenders’ misogyny as contributing to offences, a promising development.484

In assessing offences, courts did not always seriously consider harm to survivors.485 Courts tended to place less emphasis on harm when they also portrayed survivors as engaging in risky behaviour or consenting to offences. Most clearly, courts failed to seriously consider harm of adolescent survivors of offences by strangers and acquaintances.486 Courts also interpreted the harm suffered by women in prostitution differently than they tended to interpret other survivors’ harm, determining survivors had not suffered significant harm, had recovered, or had, in part, left prostitution because of the offence.487

Rape myths were most apparent in courts’ failure to consider harm; however, they also arose in courts’ use of sexual history evidence, failure to consider context, and construction of aggravating and mitigating circumstances.

Rape myths seem particularly entrenched against adolescents. As argued by Benedet in “The Age of Innocence”, this may be a symptom of the increase in the age of consent at a time when the wider culture continues to sexualize adolescents. Benedet found that ‘commonsense’ assumptions about adolescent sexuality were used to successfully defend sexual violence against vulnerable adolescents who appeared older than their age, socialized with grown men, and drank alcohol.488

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484 See e.g. R. v. Elbasani, 2012 BCPC 211 at paras 86-87 (available on CanLII); R. v. Gonzales, 2011 BCPC 353 at para 45 (available on CanLII); R. v. Reis, supra note 481 at paras 31-33, 51, 59 (available on CanLII).

485 See e.g. R. v. B.L., supra note 480; R. v. S.W.N., supra note 480.


focusing on age, judges portrayed sexual violence against adolescents as “technical”
sexual assaults while ignoring offenders’ exploitation of glaring power
imbalances.489

In the case sample, courts relied on similar reasoning: they sexualized
adolescent survivors by determining that they agreed to offences they could not
legally consent to or by subtly portraying them as incautious while leaving the
consequences to them unconsidered.490 Courts did not take this approach in cases of
offences by family members against adolescents; there, courts recognized the
inequality and coercion of family members or caregivers forcing sexual contact on
youths,491 perhaps due to the clear application of abuse of trust, dependence, and
power, aggravating under the Criminal Code, to family relationships.492 Courts did
not as clearly identify similar concerns in cases of adolescents assaulted by people
outside their families and vulnerable women: here, the law’s historical
preoccupation with morality and current focus on ‘risk’, and its ignorance of
structural inequality and power imbalances, was most evident.

Although judges sometimes used rape myths, it does not necessarily follow
that they intended to discriminate. As I explored in Chapters I and II, rape myths
have become ‘commonsense’ through language, culture, and common law, so their
use can be unintentional and unnoticed. Judges do not construct offences alone, but
within the context of legal institutional discourse and in the face of the language of

490 See e.g. R. v. Allen (SC), supra note 468; R. v. Gonzales, supra note 484; R. v. Hamade, supra note 486; R. v. S.D.R., supra note 486.
491 See e.g. R. v. C.K.B., 2012 BCPC 482 (available on CanLII); R. v. P.M.A., 2012 BCPC 159 (available on
CanLII); R. v. S.S.E., 2012 BCSC 1223 (available on CanLII); R. v. W., supra note 479.
492 Criminal Code, supra note 67, s 718.2(a)(iii).
witnesses and counsel. I speculate that judges’ reasoning, despite their best intentions, evinced myths because they did not situate sexual violence in its context of gender inequality.

A. The Principles of Sentencing: An Asymmetrical Approach to Context and Vulnerability

Courts universally considered the contextual factors that brought offenders before the courts. This focus arose from the sentencing principles that courts tailor sentences to “the degree of responsibility of the offender”\(^{493}\) and also determine the appropriate purposes for sentencing a particular offender, such as denunciation, deterrence, and rehabilitation.\(^{494}\) Context has particular importance when courts sentence Aboriginal offenders: although courts must consider “all available sanctions other than imprisonment that are reasonable in the circumstances” for all offenders, they must pay “particular attention to the circumstances of aboriginal offenders”,\(^{495}\) including the legacy of colonialism and residential schools. As a consequence, a large proportion of most decisions in the case sample was dedicated to considering the contextual circumstances of offenders.

Legislators and judges have not paid the same attention to context when considering survivors. Although courts considered it aggravating if offenders committed offences against a vulnerable person, courts inconsistently identified vulnerability, and when they did, they infrequently related vulnerability to

\(^{493}\) Ibid, s 718.1. 
\(^{494}\) Ibid, s 718. 
\(^{495}\) Ibid, s 718.2(e). This requirement has been considered by the Supreme Court of Canada R. v. Gladue, supra note 274 and R. v. Ipeelee, supra note 274.
inequality, particularly gender inequality; instead it was presented as circumstantial and transient.

As required by the *Criminal Code*, courts typically identified children and adolescents as vulnerable as an aggravating factor. This rule did not apply to women: despite clear evidence that women are uniquely targeted for sexual violence, neither Parliament nor courts identified women generally as vulnerable.

However, although courts did not construct women as vulnerable to violence, they did sometimes note that they needed protection from violence: in a few cases, courts identified the protection of women from violence or from the specific offender as a principle of sentencing; courts variously stated that “[a]ll women – all people, for that matter, but women in particular – must be able to feel safe in a taxicab”; that women are often fearful for their safety so sexual assaults of women when they were on public streets in daylight, where they would feel safe, were particularly blameworthy; that “[s]ociety does not tolerate domestic abuse, let alone domestic sexual abuse, nor the abuse of women generally...”; and that a perpetrator needed to be rehabilitated to learn meaningful respect for “female human dignity and autonomy”.

With these statements, judges alluded to the need to protect women from violence but failed to then consider why women in particular need protection. They did not discuss the prevalence of sexual violence by men against women, the

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496 *Criminal Code, supra* note 67, s 718.2(1)(i.i).
497 *R. v. Malik, supra* note 482 at para 43 [emphasis in original].
gendered impacts of sexual assault on survivors, or the criminal justice system’s history of discriminating against survivors of sexual violence. Judgments portrayed the vulnerability of women in a vacuum, and in relation to a specific offender or a specific situation (e.g., being intoxicated in a taxi, being in public, being undressed and alone with a message therapist), without relating it to the vulnerability from simply being a woman. Similarly, courts identified women in prostitution, a young woman living in a rooming house who was ill, and a woman addicted to drugs as vulnerable but did not relate their vulnerability to gender or other forms of inequality like poverty; vulnerabilities were simply there, again suggesting an individualized or transient circumstance.

Courts inconsistently recognized the vulnerability of Aboriginal women and children. In one case the court did recognize it, R. v. R.V.C., the judge used the prevalence of violence against Aboriginal women, as a part of the legacy of residential schools, to understand the sexual offence in the remote community. The judge stated “the sentence has to make it clear that violence, especially forms of sexual violence against aboriginal women, is unacceptable.” Similarly, in R. v. Williams, the Court of Appeal agreed with the sentencing judge’s approach to

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501 See e.g., R. v. Malik, supra note 482 at para 43; R. v. Elbasani, supra note 484 at paras 86-87, 95; R. v. Alasti, supra note 468 at paras 39-40.
502 R. v. Kane, supra note 468 at paras 39, 41; R. v. Preuschoff, 2012 BCPC 73 at paras 4, 8, 11 (available on CanLII); R. v. Yusuf, supra note 481 at para 34.
504 R. v. Reis, supra note 481 at para 51.
505 R. v. Klassen, 2012 BCCA 405 at paras 11, 18-21 (available on CanLII) is an exception. Although the court did not explicitly consider the vulnerability of the survivors, prostituted girls in Columbia and Cambodia, in relation to their gender, it did put it in the context of their youth and economic and social marginalization as well as the failure of the legal institutions in Columbia and Cambodia to protect them.
506 R. v. R.V.C., supra note 482 at para 38.
consider the need to protect Aboriginal children from abuse and deter violence in the Aboriginal community.\textsuperscript{507}

However, in other cases in which both offenders and survivors were Aboriginal, courts considered the Aboriginal background of the offender without mentioning whether the survivor was particularly vulnerable or suffered particular harm because she was Aboriginal. This absence seemed glaring in light of the court’s fairly consistent recognition of the intergenerational nature of sexual abuse in regards to offenders. For example, in \textit{R. v. S.D.D.}, the court considered the Aboriginal offender’s own sexual abuse to understand his culpability and determine the appropriate sentencing goals;\textsuperscript{508} however, the judge did not discuss that the offender’s targets, his young niece and nephew, were also Aboriginal children who would now grow up with the trauma of sexual abuse, continuing the cycle.

I am not the first researcher to find that judges do not consider gender inequality in sexual offence cases.\textsuperscript{509} It is not surprising, given that courts have interpreted sexual assault law using neoliberal, “transactional” logic rather than a feminist approach.\textsuperscript{510} However, it is problematic because sentencing is phase of the trial process where context and social interests can be considered. Instead, the typical approach of courts is blind to the reality of sexual violence, the extent of the survivor’s vulnerability and harm, and ultimately the nature of the offender’s crime; it renders inequalities invisible and fails to challenge them, perpetuating the

\textsuperscript{507} \textit{R. v. Williams}, \textit{supra} note 468 at paras 5, 9. See also \textit{R. v. K.L.L.}, \textit{supra} note 480 at para 32.
\textsuperscript{508} \textit{R. v. S.D.D.}, \textit{supra} note 470 at paras 66, 70.
\textsuperscript{509} See Gotell, “Disappearance”, \textit{supra} note 75.
\textsuperscript{510} See generally Comack & Peter, \textit{supra} note 63 at 284–286; Balfour & Du Mont, \textit{supra} note 179 at 706–707; Gotell, “Rethinking Consent”, \textit{supra} note 1 at 872–882.
neoliberal notion that they have no relevance to our response to sexual violence. This blindness was most apparent in cases of violence against Aboriginal women and children because of its clear imbalance. While courts should continue to consider the affects of colonialism, racism, abuse and neglect suffered by offenders, they should extend these considerations, as well as recognition of gender and other types of inequalities, to survivors to understand the crime and its impact on them.

B. The Relevance and Fairness of Sexual History Evidence

Within the case sample, courts consistently admitted and relied upon similar types of evidence to sentence sexual offenders. In the face of broad discretion to admit evidence that does not meet the strict rules in the trial phase together with the duty to hear all relevant information, at sentencing courts have adopted a standard practice. This standard approach does not seem to include considerations of fairness from the perspective of the survivor. Although judges have an overarching discretion to reject evidence that is more prejudicial than relevant, they generally only considered fairness from the perspective of the offender. Perhaps as a result, they often considered sexual history evidence.

Due to legal reforms, judge must weigh the relevance and probative value of sexual history evidence during the trial phase: to be adduced, sexual history evidence must be relevant and its probative value must not be substantially outweighed by its prejudicial effect. When it is adduced, it cannot be used for the

511 Ruby, Chan & Hasan, supra note 70, sec 3.7–3.8, 3.147–3.151; Manson, supra note 274 at 163–166; Criminal Code, supra note 67, ss 723–724, 726.1.
512 However, this is usually conceived of in terms of prejudice to the offender, not the survivor. Manson, supra note 274 at 188, 196.
513 Ibid at 164–203.
twin myths: to suggest the complainant “is more likely to have consented to the sexual activity that forms the subject-matter of the charge” or “is less worthy of belief.”\textsuperscript{514} Similarly, sexual reputation evidence cannot be used to challenge a complainant’s credibility.\textsuperscript{515} As I discussed in Chapter II, these reforms were enacted to reduce judicial reliance on rape myths and to encourage survivors to report crimes and participate in the criminal justice process.

In the case sample, judges did not appear to consider these sections or the goals behind them when sentencing sexual offenders. As a result, courts did not interrogate the relevance of sexual history or reputation evidence; nor did they further the goals of the sections to eliminate bias and encourage survivor participation.

A number of offenders submitted sexual history evidence or suggested survivors were promiscuous to imply survivors ‘consented’ to offences. Courts nearly always rejected offenders’ attempts to use this reasoning, and often used allegations of seduction or blame in aggravation rather than in mitigation as offenders intended.\textsuperscript{516} However, typically judges did not suggest that information purportedly showing that survivors were at fault was irrelevant or unfair. As a result, decisions recorded information that clearly evoked myths of ‘impure’ survivors, in the words of Gotell, “reducing [the survivor] to a sexualized body, the unchaste seductress whose ‘no’ must mean ‘yes’ and whose story is rendered

\textsuperscript{514} Criminal Code, supra note 67, s 276(1)&(2).
\textsuperscript{515} Ibid, s 277.
\textsuperscript{516} See e.g. R. v. A.J.L., supra note 482 at paras 5, 12, 19, 44; R. v. W.S., 2012 BCPC 310 at paras 13-14 (available on CanLII).
unreliable by her emphatic sexuality.” As well, by admitting discriminatory allegations, courts forced survivors to address them, undermining the law’s goal to encourage complainants to report and participate.

In *R. v. Kontzamanis*, the offender submitted sexual history evidence within the trial phase of the proceedings. Quoting the trial judge, the offender’s defence was that the survivor, an 18-year-old woman who was a resident of the offender’s rooming house and was sick at the time of the offence, seduced him after having sex with three other men:

He says that Ms. M. started flirting with various tenants and ultimately three separate tenants took turns going into her bedroom. After the third tenant came out of the bedroom, he testified that Ms. M. came out wearing only her underpants. He says she subsequently took him into her bedroom where consensual sex occurred.

The offender was entitled to raise a claim of consent at trial, and therefore, allege she “seduced” him; however, it is not clear why the trial judge allowed him to adduce evidence that implied the survivor engaged in sexual activity with three men beforehand when its sole purpose was to suggest that she was promiscuous and therefore likely to have consented. Although the jury and trial judge did not believe his story, it was before the court and something the survivor had to refute in her testimony (she testified that she could not remember the night at all).

Most often in the sample, sexual history or reputation evidence was adduced during the sentencing portion of trials after offenders had pleaded guilty. Offenders alleged child survivors had been sexually active or sexual abused prior to offences

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517 Gotell, “Disappearance”, *supra* note 75 at 135 [citation omitted].
519 *Ibid*.
520 *Ibid*. 
or had enjoyed the abuse, in an effort to deflect blame. For example, in *R. v. W.*, when listing the aggravating factors, the judge noted the offender's moral blameworthiness was high “as he continues to blame the victim for the relationship starting and refers constantly in the two reports, filed on his behalf, to an episode where he found her masturbating in front of a webcam, which J.W. repeatedly denied in her evidence.”\(^{521}\) The offender presented this information to suggest his 13-year-old stepdaughter enticed him or consented to his sexual abuse, and therefore he was less blameworthy or in need of sanction. Although the judge determined that the offender’s blame of his stepdaughter J.W. was aggravating, J.W. had to “repeatedly” deny this discriminatory allegation.

In *R. v. Allen*, the court repeated evidence about the sexual history of the 14-year-old boy survivor, K.R. Intended to demonstrate his vulnerability, the evidence also sexualized him and presented him as ‘asking for it.’ In the case, two offenders, in addition to possessing child pornography, sexually assaulted and exposed K.R. to the HIV virus they both carried after meeting him over the Internet. In its narrative of the offence, the trial court detailed K.R.’s apparent interest in sexual activity with the offenders.\(^{522}\) As a part of the discussion of K.R.’s vulnerability to sexual predators, the court repeated information that K.R. had sexual experiences before and after the offence:

Before his encounter with Mr. Allen, K.R. claimed in a chat room he was 14 years old and sexually inexperienced. Later K.R. admitted to multiple sexual encounters with adult males he met on the Internet. After his encounter

\(^{521}\) *R. v. W.*, *supra* note 479 at para 32. The introduction of this sexual history evidence was not discussed on appeal: *R. v. Worthington*, *supra* note 479.

\(^{522}\) *R. v. Allen (SC)*, *supra* note 468 at para 16.
with Mr. Allen, K.R. re-registered on the adult chat site using the username "hotfordaddy".523

The Court of Appeal, in reviewing the decision and ultimately increasing the sentence, also mentioned that K.R. was not a virgin and continued to use the same adult chat site after the offence, without evincing any concern about the use of a adolescent’s sexual history evidence,524 what was actually evidence of other sexual assaults against a boy who was not old enough to consent.

In only one case in the sample did a judge expressly consider the admissibility of sexual history and character evidence about the survivor. In R. v. C.K.B., Cohen J. characterized seven of the nine letters of support, submitted as a part of a joint submission, as blaming the 13-year-old survivor for the offence her stepfather committed against her by suggesting she seduced him. The judge found that the letters showed the offender had the support of people who blame children for sexual assault525 and that they “should not have been presented to the court.”526

My findings echo analyses of the trial proceedings and procedural applications that find that courts continue to use evidence of past sexual activity or abuse and general sexual character or flirtatiousness.527 In sentencing, this evidence may have some value: an offender’s blame of the survivor indicates that he has no remorse or insight, and a history of sexual experience or abuse can show the survivor’s vulnerability. However, these goals could be met without specific and

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523 Ibid at para 28.
524 R. v. Allen (CA) supra note 468 at para 17.
526 Ibid at para 22.
detailed information about a survivor’s sexual history or general statements about her sexual morality. When this evidence is admitted, courts risk sexualizing survivors based on rape myths about sexual purity and suggesting sexual offences against them are less opprobrious. Using this evidence, courts also undermined the goals of the reforms to promote equality, protect survivors from re-victimization, and encourage reporting.\textsuperscript{528} If courts consider sexual history or character evidence relevant to show the offender’s lack of remorse or the survivor’s vulnerability, it should be admitted and handled in a sophisticated way, one that is mindful of equality concerns to reduce the risks of prejudice and re-victimization.

\textbf{C. The Interpretation and Application of Aggravating and Mitigating Factors}

Although judges stated that sexual offences were serious and violent, their interpretation and application of doctrine revealed a more ambivalent view. Their ambivalence evokes the old pattern of decrying sexual offences as horrific and serious while failing to classify all sexual offences as ‘real.’ As I explain in this section, courts failed to consistently apply legal doctrine, specifically considerations of blameworthiness and seriousness, in a way that recognized sexual offences as violence, not sex, and appreciated the gendered and unequal character of sexual violence.

Typically, courts considered sexual offences to be violent; however, in some cases, these statements seemed hollow, as courts distinguished between the offence before them and other, truly violent cases, based on rape myths. Courts rationalized violence as male loss of control rather than an exercise and abuse of unequal power.

\textsuperscript{528} Gotell, “Privacy”, \textit{supra} note 527, paras 18, 54–57.
Although courts considered misogyny as a cause of offences in some cases, they did so with also reflecting on the context of gender inequality and rape myths.

Similarly, gendered myths about harm surfaced in judicial constructions of blameworthiness and future risk that turned on whether offenders assaulted acquaintances or strangers or whether they were considered ‘good’ men in terms of having jobs, families, and churches. Nor did courts consistently consider harm to survivors fully, most often when survivors were adolescents or vulnerable women. In cases where courts placed little or no emphasis on harm, they also depicted survivors as taking unnecessary (and de-contextualized) risks, such as being in a vulnerable situation by being involved in prostitution, or as ‘consenting’ to offences; as a result, these offences were constructed as similar to consensual sexual touching.

**Portrayals of Violence**

As the court stated in *R. v. Allard*, “[t]he severity of the sexual assault must be considered in light of both parameters, the violence used to force compliance and the nature of the sexual acts forced upon the victim.”\(^{529}\) These two factors, violence and the nature of the sexual acts, were both considered and ultimately measured by judges to determine the seriousness of sexual offences. In some cases, these factors were informed by sexist and gendered assumptions about force and harm.

In considering the nature of the sexual touching, some courts continued to use penetration as the benchmark for a serious sexual offence. As well, judges sometimes minimized the violence of sexual offences: they characterized sexual

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\(^{529}\) *R. v. Allard, supra* note 483 at para 16.
offences as non-violent despite evidence to the contrary, likened offences to ‘mistakes’ or technical assaults, and held that ‘opportunistic’ or spontaneous offences were less harmful or likely to re-occur than ‘predatory’ or planned offences.

Penetration

Courts generally characterized offences involving penetration, either vaginal or anal, as the most serious. Sometimes they explicitly used penetration as a barometer of the offence’s seriousness in order to establish the range of appropriate sentences: in these cases, they considered non-penetrative assaults to be less serious and distinguishable on that basis, an approach used in offences against adult women530 as well as children and adolescents.531

Another approach was to consider penetration as an aggravating factor. The B.C. Court of Appeal endorsed this approach in R. v. Worthington. The court cautioned against over-emphasizing penetration or using penetration as the “measure of the offence”, a possible relic of the past when rape required proof of penetration. Instead, the court suggested penetration could be used as an aggravating factor, but the absence of penetration should not be mitigating or mean the offence is less serious.532 Courts within the case sample sometimes followed this approach.533

Offences involving vaginal and anal rape are serious and horrific; however, penetration should not be the standard of seriousness in sexual offences. By

530 See e.g. R. v. Malik, supra note 482 at paras 34-38.
531 See e.g. R. v. C.K.B., supra note 491 at paras 44-46, 56-57; R. v. T.G.D., supra note 480 at paras 25-30, 37.
532 R. v. Worthington, supra note 479 at paras 41-45.
533 R. v. Alkenbrack, 2011 BCPC 424 at para 52 (available on CanLII); R. v. C.K.B., supra note 491 at para 75 [considered it both in assessing the range of sentences and as an aggravating factor].
abolishing rape and creating the crime of sexual assault, Parliament removed the focus on vaginal penetration. In doing so, the law moved away from the idea “that the value of a woman lies not in how she views the injury, but in the value of her vagina.”\textsuperscript{534} However, even assuming that penetration is aggravating is perpetuating this stereotypical view. By not questioning what makes penetration especially blameworthy or harmful, courts adopt a male perspective of sex and sexual violence, a view that adheres to rape myths and fails to consider the harm and violation as experienced by the survivor.\textsuperscript{535}

\textit{Minimizing Violence and Coercion}

Given the categorization of sexual assault based on the level of violence, judges nearly always described and considered the violence used by perpetrators in the sample. In most cases, judges were careful to characterize sexual assault, including sexual assault I, as inherently violent, in keeping with the \textit{Criminal Code} conception of nonconsensual sexual touching as assault;\textsuperscript{536} however, in other cases, judges portrayed some sexual offences as not truly violent.

I found some courts considered violence as something that offenders committed in addition to sexual assault, meaning the use of extreme violence, torture, or weapons. Courts were more likely to ignore other types of violence, such as violence not causing significant bodily harm, threats, force used to restrain but not injure, unequal size and strength, and abuse or manipulation of power, authority and fear. By ignoring these types of violence, and overlooking that sexual violence is

\textsuperscript{534} Goldsberry, supra note 91 at 111.
\textsuperscript{535} Pasquali, supra note 51 at 25–26; Boyle, supra note 62 at 177–178, 180.
\textsuperscript{536} Criminal Code, supra note 67, s 265(2).
itself a demonstration and act of violence,\textsuperscript{537} courts in these cases used a masculine and sexist conception of violence.\textsuperscript{538}

In some cases, courts ignored overt acts of violence to characterize offences as non-violent. For example, the judge minimized the offender’s force and threats to subdue the survivor in \textit{R. v. Kane}. The offender had paid S.J. to perform fellatio on him, then slammed her head against the wall of the alley, robbed her of the money he had paid, forced off her pants, removed the condom, and vaginally raped her, telling her not to scream. During the sexual assault, he gave S.J. a “quarter-sized abrasion” on her head, which swelled and caused her pain.\textsuperscript{539} Yet, in determining the appropriate sentencing principles and comparing the case to others, the judge said, “there were no overt threats of violence. There was no use of a weapon. The violence outside of the sexual assault itself was limited.”\textsuperscript{540} Rather than focusing on the violence the offender had committed, the judge focused on what was absent, repeatedly mentioning that the offender did not threaten to kill S.J.\textsuperscript{541} Even though the offender smashed S.J.’s head into a wall and told her to be quiet, these acts fell outside the legal conception of serious violence in sexual assault in this case.

In \textit{R. v. Visscher}, the court minimized the violence of the sexual assault. The trial judge determined the offender had thrown the survivor onto her bed, then pinned her down and groped her under her pajamas for 45 minutes to an hour, causing her significant bruising. Throughout, she struggled and pleaded with him to

\textsuperscript{537} MacKinnon, “Equality Approach”, supra note 52 at 268–269; Pasquali, supra note 51 at 27; Marshall, supra note 38 at 220.
\textsuperscript{538} Pether, supra note 64 at 67–68.
\textsuperscript{539} \textit{R. v. Kane}, supra note 468 at para 2.
\textsuperscript{540} Ibid at para 34.
\textsuperscript{541} Ibid at paras 3, 14-15.
stop, eventually persuading him to leave.\textsuperscript{542} However, in its review of the sentence, the Court of Appeal stated that the offender “ceased [the assault] when asked” by the survivor,\textsuperscript{543} in direct contradiction to the stated facts. The court’s characterization ignored the offender’s continuing sexual violence despite the survivor’s pleas to stop, instead evoking a picture of a request and polite cessation.

Similarly, in a number of cases, judges mitigated sentences or distinguished case law on the basis that there was ‘no force’, ‘no threats’ or ‘no violence’ in offences, ignoring that the offences themselves were forceful, threatening, and violent from the perspective of the survivors.\textsuperscript{544} Courts devalued the inherently violent nature of sexual assault most obviously in a few cases in the sample in which they characterized offences as ‘mistakes’, ‘assumptions of consent,’ or ‘poor judgment’. These terms “disguise[d] the severity of the violation”\textsuperscript{545} and transformed sexual assault from an act of violence into an unreciprocated sexual advance, treating sex and sexual violence as more similar than different.

One example is \textit{R. v. B.L.} The offender, an employer, sexually assaulted his female employee in his office while she was picking up her pay cheque: he grabbed her waist and, while trying to kiss her, pushed his hand underneath her shirt and bra and groped her breasts. He then tried to undo her pants, touching her groin as


\textsuperscript{543} \textit{R. v. Visscher}, supra note 480 at para 36.


\textsuperscript{545} \textit{Marshall}, supra note 38 at 220.
he did so. The judge characterized this assault as a “mistake” based on an “erroneous and unlawful assumption of consent”.

In another case, R. v. T.J.H., the judge characterized the offender’s persistent sexual touching of the survivor while she protested “no” repeatedly this way:

If I were to characterize it, I would say he was perhaps a little, maybe, obsessed. He believed perhaps that he loved the complainant and that she is, and he said she was, beautiful, and he could not stop thinking about that. So he found himself in the opportunity or in the circumstances where he could not control his impulses and he, I suppose one might say, tried to see if he could get away with it, and he could not. It was not going to work because the complainant was engaged to another person and she was not welcoming to Mr. H.’s advances.

The judge directly identified the sexual assault as arising from the offender’s failure to control his urges based on his love of the beautiful survivor. The offender’s brain injury could explain the judge’s generous (to the offender) characterization of the sexual assault; however, it does not explain the judge’s reliance on rape myths about beauty and desire causing a man to lose control.

In R. v. A.S.B., the offender, a 33-year-old man, pleaded guilty to sexually assaulting his 17-year-old neighbour and family friend. After inviting her into his house, he tried to give her alcohol, kissed her, touched her face and breasts, showed her pornography, and offered her money in exchange for a sex act. She fled in fear. The judge described the offence as “a fundamental error in judgment”, where the offender “showed no judgment or restraint.”

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546 R. v. B.L., supra note 480 at para 1.
547 Ibid at para 13.
549 Ibid at para 10.
550 Ibid at paras 64-65.
552 Ibid at para 26.
Likewise, in *R. v. Hamade*, the court characterized the offence as "a single communication that was made by someone exercising extremely poor judgment"\(^{553}\) and "a single incident ...[where] he acted in an immature manner, in a manner that demonstrated somewhat of a lack of understanding on a moral basis of the difference between right and wrong".\(^ {554}\) The offender, a 28-year-old student teacher, had asked a 15-year-old student from his school in an online conversation "to lift up her shirt and expose her breasts. He then asked her to meet at the Apollo gym parking lot so they could engage in an act of oral sex."\(^ {555}\) The court apparently further excused his "poor judgment" because it happened early in the morning and on the Internet.\(^ {556}\)

Similarly, in *R. v. S.W.N.*, when sentencing the offender for sexually assaulting his young daughter on at least two occasions, the court called the offence "a huge mistake",\(^ {557}\) and found that there were "no suggestions of violence or threats".\(^ {558}\)

The idea that sexual assault is a mistake caused by an assumption of consent or poor self-control belies the violence and harm that sexual assault causes and the agency of offenders. It accords with the script of normal men seeking to seduce passive women, with sexual offences resulting when a reasonable man misdirects his normal sexual aggression towards a woman (or even child) who was incidentally

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\(^{553}\) *R. v. Hamade, supra* note 486 at para 12.
\(^{554}\) *Ibid* at para 16.
\(^{555}\) *Ibid* at para 4.
\(^{556}\) *Ibid* at para 18.
\(^{557}\) *R. v. S.W.N., supra* note 480 at para 75.
\(^{558}\) *Ibid* at para 21.
and unexpectedly unwelcoming, or what Smart called “the deep-seated notions of natural male sexual need and female sexual capriciousness.”

When courts minimize offences because offenders assumed consent, they evoke the doctrine of implied consent that was supposed to have been definitively eliminated by the Supreme Court of Canada in *R. v. Ewanchuk*. Implied consent, according to Joanne Wright, “encourages the view that women are always passively open to sexual interactions, that they do not have to be consulted before a sexual approach is made.” Implied consent also presupposes that women are likely to consent “in the most unlikely circumstances.” With implied consent, women must say no or resist, and do so without any stereotypical feminine ambiguity. This woeful view of what consent means, as Lucinda Vandervort observes, fundamentally undermines the ability of the law to protect women from sexually assaultive touching:

> The "'no' means 'no'” standard places the onus on the targeted individual to protest and offers no protection for bodily integrity, human dignity, or privacy until an assault is threatened or already in progress. That type of protection is not meaningful in the intimate social contexts in which acquaintances and family members are typically assaulted. It is too little and too late.

If women must say ‘no,’ they must accept some initial sexual touching to say ‘no’ to; therefore, some nonconsensual sexual touching becomes an acceptable sexual advance. Similar thinking seems to operate in the cases in which sexual assault is

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559 Smart, *Feminism*, supra note 29 at 35.
561 Wright, *supra* note 197 at 198.
562 Smart, *Feminism*, supra note 29 at 31; See also Wright, *supra* note 197 at 198.
564 Ehrlich, *supra* note 29 at 133–134.
565 Vandervort, *supra* note 185 at 404.
thought to be a mistake. Although the law did not imply the survivor’s consent, as offenders were convicted, it did trivialize it, portraying it as a legal formality that can be understandably forgotten by a well-meaning offender. Invasive and frightening sexual assault is then transformed into a failed romantic overture.

*Technical Sexual Assaults and Judicial Misinterpretation of “Consent”*

The *Criminal Code* establishes 16 as the age of consent: children under this age lack the legal capacity to consent, and so any sexual touching of them amounts to sexual assault. Nonetheless, the ‘consent’ of children and adolescents played a role in sentencing: some judges remarked on survivors’ conduct in a way that suggested they agreed to sexual activity, distinguished cases on the basis of agreement, or considered consent as a mitigating factor. This approach was not universal or even typical, but the exceptions are worth considering for what they say about the judicial construction of sexual violence, namely, the persistence of a view that erases the vulnerability of adolescents and paints sexual violence against them as more like sex than violence or abuse.

In *R. v. Gonzales*, the judge determined that a severely intoxicated 14-year-old, C.H., agreed to sex with the 40-year-old offender, stating that it was not proven beyond a reasonable doubt the survivor was too intoxicated to consent or that she subjectively did not agree. After making these findings, the judge stated that C.H. was “legally incapable of giving her consent” due to her age, so sexual assault was

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established. The judge offered no explanation why the survivor’s subjective agreement and intoxication were considered and described first, before her age. Although her age and intoxication were used as aggravating factors, the finding that she consented suggests the offender is less blameworthy because his offence was not really violent, or not a ‘real’ rape. It also ignores the vast inequality between the offender and survivor that the offender exploited in preying upon C.H.

Likewise, in R. v. Allen, the Court of Appeal determined the sentence ordered by the trial judge was unfit and substituted a longer sentence, a decision the judges must have felt strongly about given that they issued their judgment after the offender had died. However, the court suggested it could be mitigating or indicate a lower sentence range if the underage survivor agreed to the sexual touching:

Counsel for Mr. Allen pointed out that the boy consented to a “three-way” and was not lured, in the sense of being tricked, to come to Mr. Allen’s apartment. Counsel did not press this as a mitigating factor. He took the position that there are cases of non-consent where the behaviour is much worse. This submission would have had some force if the Crown was contending for a much higher sentence, but it is not.

Although the boy’s supposed agreement was not used as a mitigating factor, the Court of Appeal suggested that it could have been if the Crown had sought a longer

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568 Ibid at para 14.
569 Ibid at para 56. However, Benedet has questioned Crown practice to allege age before nonconsent. Her concerns are that this approach may also give the impression that the offence is a “technical” sexual assault because the Crown did not alleged nonconsent, the defence of mistake of age has been applied in a way that fails to protect particularly vulnerable adolescents, and reliance on age does not encourage the judiciary to develop a robust conception of consent. Similar concerns arise in this case, even though the court did not begin with age: this case reflects her argument that the doctrine of consent is “impoverished” because it ignores the offender’s predatory behaviour of exploiting a clear power inequality and the survivor’s vulnerability based on gender, age, and intoxication: Benedet, “Age of Innocence”, supra note 93 at 678–682.
570 The Court’s determination to substitute a longer sentence was to denounce and deter not only his sexual assault of the survivor but also his possession of child pornography, described by the Court of Appeal as falling on the severe end of the spectrum and including depictions of torture of babies that may have caused their deaths: R. v. Allen (CA), supra note 468 at paras 61–66.
571 Ibid at para 67.
sentence: on this view, tricking an adolescent is wrong, but exploiting his vulnerability less so.

Courts did not always consider the supposed agreement of adolescents mitigating or suggestive of a less violent offence. In *R. v. Nelson*, the sentencing case of Allen’s co-offender, the provincial court judge appeared to reject the idea that the survivor’s apparent complicity was mitigating, instead citing the *Criminal Code* that it is no defence that the survivor consented because he was simply unable to consent.572 Similarly, in *R. v. C.K.B.*, the court rejected the offender’s allegation that the 13-year-old survivor, his stepdaughter, was responsible for his abuse, stating “[t]o be clear, even if there were evidence that the complainant had made any sort of advances toward the defendant, this would likely not be accepted as a mitigating factor as the defendant is the adult of the pair, not the complainant.”573 In these cases, judges resisted the conception of sexual offences against ‘willing’ children as less serious or non-violent; however, this view was not universal.

When courts attribute sexual willingness to children and adolescents who, by legal definition, are unable to consent, courts imply that sexual assault of them is only technically a crime, a “statutory” assault. Ultimately, they suggest these acts are not real sexual assaults.574 Suggestions of consent obscure the inequality between adults and adolescents that makes consent impossible, power imbalances that the law is supposed to recognize in the age of consent, the criminalization of sexual

574 Benedet, "Age of Innocence", *supra* note 93 at 678.
contact with children, and the doctrine of consent generally. In relying on evidence of ‘agreement,’ courts adopt the point of view of the offender: the law sees a willing child or adolescent while ignoring the child’s inability or fear to do otherwise than submit to an adult’s power, manipulation, and coercion. This failure of the law of consent is amplified, and its prejudices laid bare, in cases of particularly vulnerable adolescents who can be sexualized because they look or act in ways outside what society constructs as appropriate for children. In sentencing, an underage survivor’s apparent willingness should not be mitigating because it indicates nothing as much as the survivor’s vulnerability.

The idea of adolescent agreement to sexual assault also evokes the false equivalence of consent and survivor resistance, based on the rape myth that ‘real’ survivors can and always do resist to the utmost. The requirement for resistance is gendered because it rests on masculine notions of what a virtuous survivor would do. Pasquali identified judges requiring resistance in her review of Yukon cases in the 1980s when she found that some judges understood force in relation to visible efforts of the survivor to resist. She pointed out the fallacy of this gendered assumption of force, noting that:

There are many reasons why a victim does or does not demonstrate what others define as “active resistance.” Active resistance can and often does prolong the assault and/or result in greater physical injury to the victim. To link the presence of absence of threats with resistance on the part of the victim is to disregard her attempts to minimize the harm done to her.

577 Ibid at 685.
578 Pether, supra note 64 at 67–68, 79.
579 Pasquali, supra note 51 at 27.
Assuming that children and adolescents who appear to not resist are consenting to sexual touching makes an unwarranted leap from passivity to consent. Similarly, it may also conflate conditioning of a youth to sexual abuse to consent of the child. Fundamentally, it ignores the greater power, influence and strength the offender can exert to make the child or adolescent appear to submit as well as the physical danger that resistance provokes.

The facts in *R. v. D.C.E.* illustrate that survivors may not resist but this does not amount to consent. The offender beat his stepson repeatedly to force him to submit to sexual abuse before resorting to coercion and duress to get the survivor to ‘agree,’ showing that an individual’s will can be overborne by either physical force or manipulation but neither amounts to consent, something the court appreciated in that case. When the law fails to recognize coercion and manipulation in addition to force, it ignores the experiences of survivors and minimizes their assaults.

*Predatory or Opportunistic Offences*

Judges often characterized offences and offenders as ‘opportunistic’ (less blameworthy) or ‘predatory’ (more blameworthy). The meanings assigned to these two terms varied and often overlapped, as did the relation of these characterizations to offender blameworthiness and dangerousness. However, judges limited the category of predatory offences to sexual assaults looking most like the stereotypical ideas of a ‘real’ rape, with the requirements that the offender stalk and sexually assault a stranger and plan his attack in advance. This category excludes most

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offences, including offences against acquaintances and strangers the offender happens into; it is also based on a stereotypical view of which offenders are the most dangerous.

Judges sometimes characterized exceptionally violent attacks as opportunistic simply because the survivor was not a stranger to the offender. This characterization is apparent in *R. v. Reis*: the offender sexually assaulted a woman he met earlier that day. He brought her to his house, and once there, assaulted her in a degrading and vicious manner, using a baseball bat and sword, among other weapons, to sexually assault and confine her in his house. The judge suggested the offence was not predatory because it did not look like “stalking rapes or stranger rapes.”\(^581\)

It appears that their prior acquaintance and the survivor's willingness to go with the offender to his house were the judge's reasons for not seeing the offence as predatory.

In some cases, the distinction between ‘predatory’ and ‘opportunistic’ appears to be based on planning and forethought. Under this construction, even stalking and stranger rapes can also be called opportunistic if they were committed on the spur of the moment. That was the case in *R. v. Billyboy*: the offender saw the survivor at 7-11 late at night, then followed her until he grabbed her from behind and dragged her into a park where he threatened to beat her and sexually assaulted her. The judge said the offence was “unplanned and to some extent opportunistic” apparently in part because it was a “chance encounter” at the convenience store.\(^582\)

Similarly, the court called a taxi driver’s sexual assault of his intoxicated 17-year-old

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\(^581\) *R. v. Reis, supra* note 481 at para 48.

\(^582\) *R. v. Billyboy, supra* note 481 at para 6.
passenger in his home where he had brought her “opportunistic, rather than predatory or pre-planned”, presumably because the offender did not plan for the survivor to get into his taxi. In another case, the court characterized the offence of a man who sexually assaulted and beat a woman in prostitution as “spontaneous and not planned” to lessen the aggravating nature of his offence, perhaps because the offender expected she would continue to consent.

In some cases, courts also characterized offences against children as not predatory. For example, in *R. v. K.L.L.*, the offender’s sexual interference of two sleeping girls, aged 9 and 10, on separate occasions was characterized by the Crown “as opportunistic as opposed to predatory” as a mitigating factor. In *R. v. Hamade*, the court did not consider the offence of sexual exploitation for inviting, counseling, or inciting a young person to touch him for a sexual purpose, arising from an online communication in which the offender asked a 15-year-old girl to expose her breasts and meet him in a parking lot for oral sex, ‘predatory’ or even ‘opportunistic’ because it was unlikely that the survivor would have been able to sneak out and meet him at night in any event.

Grooming was considered predatory, however, as shown in the court’s nuanced approach in *R. v D.B.D.* The offender sexually assaulted an 11-year-old boy in his condominium complex on two separate occasions, after he had “insinuated himself into that boy’s and then others’ activities by offering to ‘help out’”. He also

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585 For an example that was considered predatory, see *R. v. F.A.B.*, supra note 478 at para 11.
587 *R. v. Hamade*, supra note 486 at paras 11, 18.
masturbated in front of a number of boys and possessed child pornography. The court found that “although his behaviour may be described as opportunistic, there is also a predatory aspect to it which involved a non-sexual form of grooming”, ultimately finding it to be aggravating that the offender put himself in a position to commit the offences.

As a general rule in sentencing, a crime that is premeditated attracts more blame in sentencing, and spontaneous crimes less, based on the idea that offenders who plan are more dangerous because they are more skilled and more blameworthy because they have had time to consider their actions. The court in R. v. DaPonte, a case within the sample, clearly applied this doctrine. The offender broke into his friends’ house at night to assault their 12-year-old daughter at knife point, biking over to her home and bringing a mask and tools to break her bedroom window to do so. The court considered his premeditation aggravating.

Although premeditation may be an appropriate aggravating factor in other offences, such as robbery or murder, it does not seem to adequately capture the blameworthiness and harm of sexual offences. As Pasquali asked,

Is the offender who apparently assaults on impulse and takes advantage of some situation which arises any less dangerous than one who plans his assault in advance? It is hard to imagine that any sexual assault victim, or any potential victim, would find comfort in the knowledge that an offender’s acts of sexual violence are spontaneous or random.

An offender who sees an intoxicated girl alone in his taxi, a woman in prostitution, a child alone with him, or a sleeping individual as an opportunity for sexual violence is

589 Ibid at para 23.
592 Pasquali, supra note 51 at 29.
just as dangerous as one who sets out to attack in advance. The consequences of an impulse to commit sexual violence do not seem all the different than the consequences of a plan commit sexual violence.

The distinction between ‘predatory’ and ‘opportunistic’ also suggests that the rarer stranger sexual assaults are more dangerous and insidious than the majority of sexual assaults, which are committed against acquaintances and family members. As Brownmiller commented, “rape is a crime of opportunity and opportunity knocks most frequently in a familiar milieu.” By construing the majority of sexual assaults as less violent than stereotypical ‘predatory’ rape, courts ignore the reality of sexual assault and excuse, in part, male sexual assault of women and children known to them.

Characterizing sexual offences as opportunistic also portrays women and children as sexual objects, whose mere presence signals opportunities for or invitations to sexual activity. Vandervort, in expressing the value of Canada’s affirmative standard of consent, touches on this by commenting that, “participation in the mundane activities of everyday life – even just living and breathing – is often alleged to be conduct that is ‘seductive,’ that invites sexual touching”. The portrayal of survivors as creating opportunities for sexual violence internalizes the point of view of the offender that objectivizes and fetishizes women and children rather than seeing them as people.

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593 Sinha, supra note 3 at 30.
594 Brownmiller, supra note 25 at 349.
595 Vandervort, supra note 185 at 405 [emphasis in original].
To combat the “predatory stranger model” in judicial assessments of exception applications from the federal sex offender registry, Benedet suggested courts characterize the offence based on the offender’s exploitation or abuse of the survivor’s vulnerability.\footnote{Benedet, “Registry”, supra note 368 at 453–456.} Exploitation and abuse of vulnerability are more useful concepts because they place the assessment of the risk offenders pose, the shamefulness of their crimes, and the harm they cause within the social and structural context of their offences, gender and other sources of inequality and disempowerment. Rather than ignoring the reality of sexual violence, this approach would be based on it, and removes focus from the false distinction between ‘predatory’ and ‘opportunistic,’ recognizing that sexual offences are both.

\textit{Relationships and Stranger Danger}

Judges regularly considered the relationship between offenders and survivors. Together or independent from descriptions of offences as predatory, judges often found it aggravating when the offender was a stranger to the survivor. They typically also, as required by the \textit{Criminal Code}, found it aggravating when the offender offended against his spouse or someone he was in a position of trust or authority over.\footnote{\textit{Criminal Code}, supra note 67, s 718.2(a)(ii)&(iii).} Thus, while the law has moved towards recognizing the harm of sexual offences against family members and spouses, courts in some decisions continued to evoke the myth of the dangerous stranger.

When judges considered it aggravating that the offender attacked a stranger they seemed to focus on the randomness of the assault, the innocence of the
unknown survivor, and the expectation of safety in public places. For example, in *R. v. Pratt*, the court found it aggravating that the offender was a stranger to the survivor; while doing so, the court highlighted the innocence of survivors of stranger attacks, stating: “this was an attack on a stranger. These were two people who did not know each other. The complainant was going about her life in a totally correct and proper way and she ended up being horribly victimized.”\(^598\) Likewise, in *R. v. Elbasani*, the judge considered it aggravating that the offender sexually assaulted a stranger, focusing on the “unprovoked and random” nature of the attack.\(^599\)

In other cases, although not necessarily stated to be an aggravating factor, the offender’s attack of a stranger appeared to affect the judge’s understanding of the seriousness of the crime. This can be seen in *R. v. Billyboy*, where the judge, also emphasizing the survivor’s blamelessness, stated: “In this case we have particular serious offences, involving a violent sexual assault on an innocent stranger in the downtown community very near law enforcement agencies and this very court house.”\(^600\)

Like the distinction between ‘predatory’ and ‘opportunistic’ offences, understanding assaults by strangers as particularly serious is based on the myth of ‘real’ rapists. Seemingly contrary to the *Criminal Code’s* direction to judges to treat offences against intimate partners and abuses of familial trust as aggravating,\(^601\) these cases suggest that it is more blameworthy or causes more harm to attack a

\(^{598}\) *R. v. Pratt*, 2011 BCPC 382 at para 28 (available on CanLII).
\(^{599}\) *R. v. Elbasani*, supra note 484 at paras 86-87.
\(^{600}\) *R. v. Billyboy*, supra note 481 at para 18.
\(^{601}\) *Criminal Code*, supra note 67, s 718.2(a).
stranger. This assumption is gendered, based on long history of law ignoring or condoning offences by men against family members or intimate partners.\textsuperscript{602} According to this view, only strangers pose a threat to women, not the men they know and live with. It ignores the experiences of survivors of intimate partner, family, or acquaintance sexual assault, who may suffer unique psychological trauma in part due to the lack of social recognition and support.\textsuperscript{603} It also ignores the particular vulnerabilities that arise within intimate or family relationships.\textsuperscript{604} As pointed out by Benedet, such thinking also (falsely) assumes that men who sexually assault intimate partners or family members do not pose a risk to other women.\textsuperscript{605}

The emphasis in some cases on the innocence of survivors, or how they did not provoke offenders, is also worth pointing out. It seems to suggest that survivors who knew their assaulters may not be innocent or may have provoked violence, hinting at the idea that some women ‘ask’ for sexual assault.

\textit{Causes of Offences and Treatment}

In the majority of cases in the sample, judges relied on psychological and psychiatric assessments to learn about offenders’ motivations, future risk of offending, and likelihood of rehabilitation. From these reports courts gleaned ‘causes’ for offences. In this section I argue that both experts and courts frequently saw intoxication and addiction as causing offences. Less frequently, they considered

\textsuperscript{602} See Chapter II, Section B & Chapter III, Section A.  
\textsuperscript{604} See generally Johnson, “Statistical Trends”, \textit{supra} note 3 at 38–43, 64–67; Sinha, \textit{supra} note 3 at 52–65; Vandervort, \textit{supra} note 185 at 404–405.  
\textsuperscript{605} Benedet, “Registry”, \textit{supra} note 368 at 452.
misogyny as a contributing factor to offences; however, when they did, courts did not situate misogyny within structural inequality.

By far, the most common treatable ‘cause’ of sexual offences in the sample was alcohol or drug use. In many cases, judges appeared to accept that offenders committed offences because they were intoxicated, not because they acted violently by choice. When courts saw intoxication as the cause of the offence, they typically treated it as a mitigating factor, evidencing the offender’s lessened moral blameworthiness. Courts also often counted offenders’ expressed willingness to undergo addiction treatment as mitigating and indicative of rehabilitative potential.

One example is *R. v. Allard*, concerning an offender who sexually assaulted and choked a woman with whom he had been socializing at a pub. In describing the circumstances of the offender, the court said he had “a significant and persistent problem with alcohol” and he became “confrontational and aggressive” when intoxicated. Although the court considered it aggravating that the offender deliberately decided to drink contrary to a term of his recognizance from a previous conviction, it also considered his intoxication within three separate mitigating factors: it was mitigating that he “committed the offence while highly intoxicated”; acknowledged his alcoholism and need for treatment; and was amendable to counselling for alcohol abuse, as well as anger management and sexual violence. The court considered the offender’s continued risk to the public squarely in terms of his alcohol abuse, stating that “the public will continue to be at risk on his release.

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608 *Ibid* at para 18.
unless Mr. Allard learns to control his use of alcohol and his temper”,609 and ordering probation terms that reflected this concern.610

The cases in the sample are peppered with legal interpretations that attribute sexual violence to intoxication and link rehabilitation to alcohol or drug counseling. Intoxication was mitigating in R. v. R.N.A., where the court stated that the offender needed treatment because his “past offending and violent behaviour is largely tied to his problems with substance abuse.”611 The court considered the offender’s addiction to crystal meth as well as his desire to continue drug treatment as mitigating of his sexual assault of a 14-year-old boy and possession of child pornography in R. v. Allen.612 In R. v. R.V.C., the court determined it was mitigating that the offender had been sober since the offence and had taken counselling to address his alcoholism,613 with the judge stating, when discussing the aim of the sentence, “[m]ost of all, I have to recognize that your risk to re-offend has an awful lot to do with your consumption of alcohol.”614 Similarly, in R. v. Lindstrom, the court found it aggravating that the offender persisted in drinking and taking drugs, but mitigating that he was adjudged to be low risk if sober, and that he had attended church and abstained from alcohol since the offence.615 As well, in R. v. Wright, the

609 Ibid at para 20.
611 R. v. R.N.A., supra note 474 at para 45.
612 R. v. Allen (SC), supra note 468 at paras 39, 45. The Court of Appeal considered it an error that the trial judge accorded rehabilitation the same weight as denunciation and deterrence as a sentencing objective, contrary to the Criminal Code, supra note 67, s 718.01 requirement that denunciation and deterrence be the primary aims of sentencing for offences involving abuse of someone under 18 years old: R. v. Allen (CA), supra note 468 at paras 49-52, 60-66.
613 R. v. R.V.C., supra note 482 at para 35.
614 Ibid at para 40.
court held that it was mitigating that the offender showed "insight into the need to address his alcohol abuse" and had abstained from drinking since the offence.\textsuperscript{616}

Attributing sexual violence to intoxication reflects assumptions about responsibility that are embedded in the law of sexual assault. In the case sample, judges did not substantiate these widely held presumptions: they did not cite evidence that intoxication causes sexual violence or alcohol or drug treatment reduces offending; instead, they relied on psychological reports and ‘commonsense’ that linked offences to intoxication, without discussing causality.

These assumptions have been questioned before. Pasquali criticized the beliefs that offenders would not commit sexual offences but for alcohol or drugs and that alcohol or drug treatment rehabilitates sexual offenders, preventing re-offence.\textsuperscript{617} Coates and Wade pointed out that the suggestion that offenders are good men who were victims of the unintended effects of alcohol “cannot explain why the majority of men do not assault someone in sexualized ways after they use alcohol or drugs.”\textsuperscript{618}

Intoxication and violence might be linked, but intoxication is unlikely to cause violence. Statistics on domestic violence demonstrate this:

\begin{quote}
It is clear that alcohol use is highly correlated with spousal violence but alcohol abuse cannot be said to be a direct cause of violence. Alcohol abusers tend to have other risk factors for violence, such as low occupational status and attitudes approving of violence against women. When income and alcohol are considered together with the presence of
\end{quote}

\textsuperscript{616} R. v. Wright, supra note 483 at para 107.

\textsuperscript{617} Pasquali, supra note 51 at 31, 55–56.

\textsuperscript{618} Coates & Wade, supra note 66 at 11.
controlling and psychologically abusive behaviours, the latter predominates over alcohol as the most important risk factor for spousal assault.619

This research suggests that although alcohol may be a risk factor for domestic violence, it is one among other, more significant and co-existing risk factors, including attitudes approving of violence against women. Focus on alcohol obscures the influence of structural inequalities in violence against women. It also obscures the direct role misogynistic views have: more than alcohol abuse or any other variable, research has found that spousal violence correlates with “[m]ale attitudes and beliefs in the rightness of control over female partners”.620

However, in the case sample, judges did not generally consider that violence is about gender inequality and offenders’ beliefs in the right of men to dominate women and children. Instead they relied on the presumed link between intoxication or addiction and violence. Although a number of cases explicitly characterized offenders as directly responsible for their sexual offences in spite of their intoxication,621 the doubtful but commonsense idea that intoxication causes sexual offending was a theme throughout many cases. Intoxication may reflect a lesser intent to cause harm or reduced moral responsibility. Equally, intoxication may be a smokescreen, a tool violent men use to reduce their inhibitions to commit violence against women,622 or, like violence against women, a display of masculinity.623

Intoxication may be relevant, but courts should challenge their assumptions and be thoughtful about the role intoxication should play in sentencing.

619 Johnson, “Statistical Trends”, supra note 3 at 41 [citations omitted].
620 Holly Johnson, “Contrasting Views of the Role of Alcohol in Cases of Wife Assault” (2001) 16:1 J Interpers Violence 54 at 68 [“Role of Alcohol”].
621 See e.g. R. v. K.L.L., supra note 480 at paras 19, 22-23.
622 Pasquali, supra note 51 at 31–32.
623 Johnson, “Role of Alcohol”, supra note 620 at 69.
That said, in some cases, courts did consider the misogyny of offenders, using information offenders devalued women as aggravating or evidence of higher risk to reoffend. For example, in *R. v. Gonzales*, the author of the psychological profile found that the offender’s repeated sexual assaults against young intoxicated women and girls were related to “underlying negative beliefs about girls/women” and “distorted beliefs about his own entitlements in sexual relations.” On this basis he was rated as a moderate-high risk to reoffend, a factor the judge used in aggravation. Similarly, although the judges in *R. v. Reis* and *R. v. Elbasani* focused on intoxication as a causative factor, they also hinted that the offenders devalued women and believed that violence against them was acceptable, and that these factors heightened the moral blameworthiness of their offences.

Although considerations of misogyny were not regular features in the case sample that they appeared at all could show that some judges (and perhaps psychologists) understand sexual violence as gendered. Boyle suggested that misogynistic motivation should be considered as akin to psychological disorder so that offenders can be given appropriate treatment during incarceration before they are released into the public to act on their hatred again. I agree: courts should denounce misogyny and be cognizant of the need for treatment on this issue. However, they should also situate misogyny in the context of gender inequality to reflect the gendered nature of sexual violence and its prevalence in the law.

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624 *R. v. Gonzales*, *supra* note 484 at para 45.
625 Ibid at paras 46, 56.
626 *R. v. Reis*, *supra* note 481 at paras 31-33, 51, 59; *R. v. Elbasani*, *supra* note 484 at paras 86-87.
627 Boyle, *supra* note 62 at 174–175.
**Good Offenders**

At common law, evidence of an offender’s good reputation is considered relevant because “[a] good background indicates that the offence was out of character and that, therefore, the offender’s attitude is such that he is not likely to be involved in crime in the future.” Typically, this factor will operate in mitigation, possibly in two ways: the offender is seen as less likely to reoffend and also to suffer “the shame and disgrace” that could only befall a person of good reputation, which “should be treated as a partial punishment in itself.”

This doctrine was applied throughout the case sample. In their decisions, courts, if supported by the evidence, highlighted the offender’s good standing in the community, stable job, support from family and friends, or church involvement. Courts regularly considered this evidence mitigating. They also considered the consequences that ‘good’ offenders experienced from their offences, including loss of good social standing or employment, mitigating or lessening the need for criminal sanction.

Evidence that the offender is otherwise a good man is relevant to sentencing for all offences, not only sexual crimes. Some rationales are unproblematic: an offender’s commitment to public service, community, and charity may show he is deserving of the benefit of the doubt and that he is unlikely to commit crimes in the future. However, in the context of sexual offences, these assumptions should be scrutinized to ensure they are not propped up by rape myths. In the case sample, ‘good’ character evidence and the myth of the ‘real’ rapist overlapped in the idea

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628 Ruby, Chan & Hasan, supra note 70, sec 5.90 [footnote omitted].
629 Ibid, sec 5.235 [footnote omitted].
that a family man, professional, or member of a church was unlikely to commit
sexual violence. In what follows, I claim these assumptions are unfounded. Arguably,
the reverse is true: power and position can facilitate sexual violence as well as
prevent detection and criminal liability.

In some cases, courts used evidence that the offender was a caring spouse or
father in mitigation without explaining how the offence was related to the offender’s
family or familial devotion. For instance, in *R. v. Yusuf*, the offender committed
sexual assault causing bodily harm against a woman in prostitution. In their letters
of support, his family stated that he was a “good father and family man, working
hard to support his family and to instil good values and the importance of education
in his children.”630 The court cited these “glowing letters of support” in mitigation.631
It did not explain how being a good father or valuing education related to
committing sexual violence against vulnerable women. Similarly, in *R. v. R.V.C.*, the
offender had sexually assaulted a sleeping young woman who was (apparently) his
friend. The court found it mitigating that at the time of sentencing the offender was
employed and a “family man now who understands his responsibilities to his
family.”632 How the offender’s employment or acceptance of responsibility for his
family had any bearing on his sexual assault of a friend is unclear; for instance, the
court did not state that he offended because he did not have a job or was an
irresponsible father.

631 *Ibid* at para 35.
Faith and religious involvement were also considerations in some cases in the case sample.\textsuperscript{633} Its clearest use was in \textit{R. v. W.S.} There, the offender sexually abused his stepdaughter H.T. for two years, beginning when she was 11 years old and only stopping when she disclosed the sexual assaults.\textsuperscript{634} The court considered the offender's extensive grooming of H.T. aggravating, which included that he relied on their shared religious faith to coerce her, telling her "that the Bible said that girls should get married when they are 11 to 13 year[s] old",\textsuperscript{635} and "if you tell anyone I'll kill you. The devil tried to destroy us."\textsuperscript{636} In apparent contradiction, however, the court, without comment, considered reference letters from pastors and friends that stated the offender was "actively involved in the church community" during the time he was sexually abusing H.T. and that at the time of sentencing he "wished to reunite with his faith family and that he is most unlikely to reoffend in the future."\textsuperscript{637} The court ignored how the offender abused the moral authority he gained from his faith and church affiliation to facilitate and justify his sexual abuse; rather than suggesting he is a good man, this spoke to the tools he continued to have to exploit children. In considering the opinions of his family and community that his faith would ensure he did not re-offend, the court also ignored that the church community was unaware of or failed to stop the offender's sexual abuse. Nor did the

\textsuperscript{633} See e.g. \textit{R. v. Lindstrom}, supra note 615 at para 56; \textit{R. v. Malik}, supra note 482 at para 11.
\textsuperscript{634} \textit{R. v. W.S.}, supra note 516 at para 11.
\textsuperscript{635} \textit{Ibid} at para 13.
\textsuperscript{636} \textit{Ibid} at para 14.
\textsuperscript{637} \textit{Ibid} at para 50.
court question how the church community could ensure that this would not be the case in the future.638

Courts also considered professional success and or extra-legal consequences as mitigating. In two cases, courts considered the reputations, achievements, and professional losses of educators significantly mitigating, even though the offenders had committed sexual violence against their students. In *R. v. Semchuk*, the offender was convicted of sexually assaulting his Grade 3 student and track and field pupil, S.F., in the 1986 to 1987 school year: he had rubbed her back and shoulders and then her breasts with his hands after she ran a race at school.639 The sentencing decision was disproportionately given over to the shadow the offence (and other complaints that did not result in conviction) had cast on the offender’s glowing record:

I turn now to the circumstances of the offender. Mr. Semchuk is 59 years old. He spent his entire career of close to 30 years teaching elementary school students in Grades 3 to 5. He was, by all accounts, an exceptionally talented and effective teacher who cared passionately about his students and brought out the best in them. All of the complainants at the trial, including S.F., acknowledged that Mr. Semchuk was a very good teacher.

Mr. Semchuk was born and raised in Port Alberni and spent his life in that area, teaching until the complaints leading to his conviction came to light in April 2008. He has not taught at all since then, and moved out of the community immediately following the allegations. He retired from teaching officially in October 2008. He now lives in Qualicum Beach. Mr. Semchuk returns to Port Alberni only to visit his mother, who is elderly and in poor health, and to visit his brother and his brother’s family.

Mr. Semchuk took early retirement because he was no longer receiving any pay as a teacher after July 2008. He was, at that point in his career, three years short of a full pension. Because he had to take early retirement, Mr.

638 *Ibid* at para 108. For similar concerns about community support in the context of sentencing circles, see Cunliffe & Cameron, *supra* note 334 at 25.
639 *R. v. Semchuk*, *supra* note 482 at paras 3-4.
Semchuk receives a pension of $2,300 per month rather than $3,000 per month, which would have been his entitlement had he completed a further three years of teaching.

It is not an exaggeration to say that teaching was Mr. Semchuk’s life and his reason for being. The charges at trial received a great deal of publicity in Port Alberni, which is a small community. Mr. Semchuk has experienced the stigma that rightly attaches to charges of this kind. He has also watched his parents, although his father is now recently deceased, and his brother and his brother’s family bear the shame caused by the charges and conviction. Mr. Semchuk has withdrawn from social contact with all but his closest friends and his family. I accept that the trial and conviction have had a profound effect on him.\textsuperscript{640}

The court presented the offender as an exceptional teacher, whose talents and dedication could not be denied even by the survivor and other complainants, and who was crushed by the loss of his career and forced abandonment of his community. The court did not explain its contradictory finding that he was a good teacher but also sexually assaulted a student: that is not something a good teacher does. Nor did the court directly link the offender’s loss of teaching career, as well as the losses to his pension, with his breach of trust of that position.\textsuperscript{641}

As well, the court related every one of the four mitigating factors it enumerated in its judgment to the offender’s professional and reputational consequences:

The mitigating factors in this case (many of which relate to a form of punishment or consequence apart from anything that this Court could impose), are as follows. First, Mr. Semchuk has lost his employment and a significant portion of his pension, a consequence that he will experience for the rest of his life. Second, he has lost his social and professional standing in a small community and has had to move away from the town he spent his life in. Third, he now faces disciplinary proceedings from the College of

\textsuperscript{640} \textit{Ibid} at paras 5-8.
\textsuperscript{641} Parenthetically, I think it is curious that the court did not mention that the offender benefitted from the many years that passed between his offence and charges: he held onto his community reputation and career teaching children, as well as contributed to his pension, for longer that he should have.
Teachers. Fourth, he has experienced the intense publicity and stigma associated with the charges and the trial and conviction over the past three years.\footnote{\textit{R. v. Semchuk, supra} note 482 at para 12.}

The court considered the professional consequences of sexually assaulting a student, as well loss of community standing, as mitigating factors. In contrast, the court paid less attention to the impact on the survivor, dedicating only one paragraph to her “embarrassment” and subsequent introversion and poor self-esteem.\footnote{\textit{Ibid} at para 13.} In balance, a ‘good’ teacher appeared to be the victim of his community’s rejection and his professional losses; in this light, criminal sanctions were excessive.\footnote{The court ordered a suspended sentence and probation: \textit{Ibid} at para 18.}

The court in \textit{R. v. Hamade} took a similar approach. Throughout the judgment, the court characterized the 28-year-old student teacher’s sexual exploitation of a 15-year-old student as an isolated incident of poor judgment.\footnote{\textit{R. v. Hamade, supra} note 486 at paras 11-13, 16, 18.}

The accused has suffered greatly as a result of his arrest. It has been submitted by defence counsel he was within three months of completing his degree from the University of British Columbia. He was a former quarterback at W. J. Mouat high school with the Abbotsford Air Force in the B.C. Junior Football League and played at the University of British Columbia as well, and he had a promising career ahead of him at one point as a teacher. After his arrest, his picture was on the front page of the Vancouver Province and this has obviously caused not only him but his family a great deal of embarrassment in the community, and it has certainly undermined his ability to find suitable employment. He has abandoned his pursuit of a career as an educator, and defence counsel has emphasized that this was a single communication that was made by someone exercising extremely poor judgment.
He has now, despite his arrest, commenced full time and is regularly engaged in employment, the shipping department, which is a vocation that is probably below his intellectual abilities and not really in keeping with the amount of formal education that he has achieved. As counsel has pointed out, he never did engage in any sexual assault or touching whatsoever of the complainant, and as I have observed, a lot of things would have had to come into place for such a thing to happen.\textsuperscript{646}

The court portrayed the offender as a promising young professional suffering undue and even unfair consequences to his career, without apparently considering the risk he might present to the students he would be instructing if he did pursue teaching.

The myth that good men are not dangerous continued to impact sentencing. Others before me have found that courts commonly used this reasoning when sentencing sexual offenders.\textsuperscript{647} Courts have more readily excused white middle-class offenders from responsibility, and ultimately in some cases, incarceration,\textsuperscript{648} by seeing offences as "a single instance and 'out of character'"\textsuperscript{649} and offenders as more manageable risks to the public, risks necessary to enable productive, employed offenders to contribute to the economy and community.\textsuperscript{650} As noted by Marshall, the assumption that men of certain classes or professions do not commit sexual offences is baseless: "Men who rape are to be found in all social, educational and professional categories."\textsuperscript{651}

By making this assumption about 'good' offenders, the law is ignoring what is known about sexual violence: that it is committed in private. By design, community

\textsuperscript{646} Ibid at paras 12-13.
\textsuperscript{647} Backhouse, \textit{Carnal Crimes}, supra note 38 at 281, 293–294; Balfour & Du Mont, \textit{supra} note 179 at 717–722; Benedet, "Registry", \textit{supra} note 368 at 456–458; Drysdale, \textit{supra} note 70 at 165–166; Pasquali, \textit{supra} note 51 at 35–36; Marshall, \textit{supra} note 38 at 221–222.
\textsuperscript{648} Balfour & Du Mont, \textit{supra} note 179 at 719–722; Backhouse, \textit{Carnal Crimes}, \textit{supra} note 38 at 281.
\textsuperscript{649} Marshall, \textit{supra} note 38 at 222.
\textsuperscript{650} Balfour & Du Mont, \textit{supra} note 179 at 717–720.
\textsuperscript{651} Marshall, \textit{supra} note 38 at 222.
reputation or professional status will not generally reflect the offender’s sexual violence, because the offender will try to keep his violence a secret from others. Although the limited value of character evidence in sexual offences was recognized as a matter of commonsense, but not law, by the Supreme Court of Canada in *R. v. Profit*, it did not appear to be considered in the cases in the case sample.

This assumption also ignores that good reputation and community and professional activities afford offenders the opportunity to get access to individuals to sexually assault and to manipulate them into silence. Sexual violence is an abuse of power and inequality, committed by men empowered by cultural and social institutions to dominate women and children. Social power has not made men harmless; it has made them dangerous:

While each sexual abuser may imagine he is operating alone, his power to abuse as well as its abuse are part of the social order keeping all women in our structurally debased place. No man on his own, without the overt or implicit collusion of others and without ideological and institutional backing gets into a position to successfully attack women and get away with it. The individual rapist, batterer or woman-killer is supported by the hierarchies that allow him the extra power and status to exercise abusive or exploitive control over his unequals and to enforce his desires, by the same hierarchies that keep her vulnerable to attack because she is economically, politically and legally disempowered and socially devalued.

Although the offenders in the sample have been found guilty, and therefore not “gotten away with it”, some nonetheless benefitted from their institutional and social privilege in sentencing. This facet of the gender (and race and class) bias in the law ignores or privileges the abuses of male authority, such as professional

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653 This proposition has been argued to apply to sentencing as well as trials: Manson, *supra* note 274 at 132.
654 McIntyre, *supra* note 23 at 78–79.
authority, that is given unequally to certain men by patriarchy, and is therefore unequally in their power to abuse to commit sexual violence.655

This is not to say courts failed to consider abuse of power and dependence as aggravating factors: they regularly did in the context of offences by caregivers and spouses,656 as well as the two cases of educators.657 However, courts offset abuse of power with evidence of ‘good’ character, loss of employment, and public disgrace, giving the impression that they considered abuse of trust or authority in a limited and atomistic way.658

R. v. Greenhalgh provides a more nuanced approach to the balance between the mitigating effects of good reputation and professional standing and abuse of trust and authority to commit sexual violence. There, the offender committed sexual assault and breach of trust by abusing his authority as a Border Services Officer. The court considered the offender’s professional, reputational, and family consequences, including his corresponding financial losses, as mitigating factors;659 however, the court appears to have tempered the mitigating effect of these factors when it cited a case that held that, in breach of trust crimes, most offenders are able to “adduce abundant good character evidence” because their good characters enabled them to achieve the position of trust that they abused, and in turn, they may more greatly

656 See e.g. R. v. T.G.D., supra note 480 at para 33; R. v. P.M.A., supra note 491 at para 17; R. v. F.A.B., supra note 478 at paras 26, 28; R. v. C.K.B., supra note 491 at para 75.
658 See e.g. R. v. S.W.N., supra note 480 at paras 17-22; R. v. Hamade, supra note 486 at paras 6, 12-13; R. v. Semchuk, supra note 482 at para 12. See also R. v. B.L., supra note 480, where the court considered many reference letters regarding the offender’s success in his small business and community standing but did not consider his sexual assault of his employee as aggravated by his position of authority over her.
experience shame and disgrace, but “these consequences are not to be over-emphasized” in sentencing.660

Similar reasoning should apply in some cases of sexual offences to recognize that ‘good’ men commit sexual crimes, and may have unique opportunities to do so and to escape detection and sanction. Pasquali pointed out that survivors face more difficulty reporting on men who have abused their unequal influence and power to commit sexual offences precisely because of their reputations and social standing; therefore, courts should limit the degree to which the ‘goodness’ of offenders and the consequences they suffer act in mitigation. This consideration could play a particularly important role in cases of offenders who victimize children who, as Pasquali noted, often rely on a “presumption of trustworthiness” to gain access to and silence children.661 If the law wished to challenge the dominance of men that enables them to commit sexual violence without detection and punishment, it would reject these factors as bases for mitigating blame for abuse of trust or authority in sexual violence or would ensure it does not give these factors undue weight.

**Different Understandings of Harm to Survivors**

The *Criminal Code* mandates that judges consider “evidence that the offence had a significant impact on the victim” as an aggravating factor.662 Like Boyle in her study of sexual offence sentencing decisions prior to the reforms,663 I found that judges considered the harm offenders caused survivors in the majority of cases. In

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660 Greenhalgh (SC), supra note 659 at para 53.
661 Pasquali, supra note 51 at 35–36.
662 *Criminal Code, supra note 67, s 718.2(a)(ii.1).*
663 Boyle, supra note 62 at 176.
many cases, it was a primary consideration. However, like other authors, I also found courts typically apportioned the harm suffered by survivors significantly less space in judgments than other factors, especially those relating to offenders. In this sense, survivors were relatively invisible, and the cases left the overall impression of survivors’ harm as less important than other factors.664

When courts considered harm, they relied on particular evidence of the harm to the survivor when it was available, from Victim Impact Statements, or in their absence, testimony, statements to the Crown, or Pre-Sentence Reports.665 As well, in some cases judges recognized the trauma that sexual assault survivors experience generally.666 However, without evidence of harm, the consequences of the offence on the survivor played a minimal role in sentencing.667

However, in some cases, courts barely considered harm or did not mention it at all.668 In some cases where courts gave harm to survivors little or no consideration in judgments, they also appeared to subtly suggest survivors contributed to assaults. These lacunae were most clear in cases where judges suggested that adolescent survivors agreed to sexual touching.669 Courts also failed to seriously consider harm to survivors, or determined that survivors had not

664 See e.g. Pasquali, supra note 51 at 42–50; Balfour & Du Mont, supra note 179 at 7.12–7.16.
666 See e.g. R. v. D.B.D., supra note 588 at paras 9, 24-25.
667 See e.g. R. v. Alkenbrack, supra note 533 at para 14.
668 R. v. D.C.E., supra note 580; R. v. Dariani, supra note 473 [the Court of Appeal only noted that the survivor was traumatized and listed the physical injuries she suffered]; R. v. S.W.N., supra note 480.
suffered long-term or serious psychological harm, when they were women who could be seen as taking risks.\(^{670}\)

The judge in \textit{R. v. Allen} did not seriously consider the impact of the offence on the 14-year-old survivor, K.R. The court did not accept his verbal Victim Impact Statement to Crown counsel, but instead discussed the circumstances of his report of the offence, finally noting that, “[i]t is obvious this 14-year-old boy was impacted by the actions of Mr. Allen and Mr. Nelson. K.R. has engaged in self-harming, but he indicates it is unrelated to the matter before this Court.”\(^{671}\) The court then discussed K.R.’s sexual history evidence, namely that he was not a virgin and continued to speak to adult men on the Internet chat room where he met the two offenders, to show that he was “vulnerable prey”.\(^{672}\) The court did not list harm to K.R. as an aggravating factor.

In contrast, the court in \textit{R. v. Nelson}, dealing with Allen’s co-offender in the joint sexual assault of K.R., cited K.R.’s “significant psychological harm” as an aggravating factor: the court stated that the offence and its aftermath were a “nightmare” for him, and that he consequently had to undergo repeated tests for HIV, suffered a mood disorder, and faced family problems.\(^{673}\)

In \textit{R. v. Hamade}, discussed in the previous section, the 28-year-old offender was guilty of sexually exploiting a 15-year-old girl, a student of the school that employed him as a student teacher. The judge described the survivor as having a


\(^{671}\) \textit{R. v. Allen (SC)}, supra note 468 at para 27.

\(^{672}\) \textit{Ibid} at paras 28-29.

“schoolgirl crush” on the offender, and suggested that she agreed to some of the offender’s sexual requests, such as exposing her breasts and engaging in “role playing” (something that was not explained).⁶⁷⁴ Although the court said it considered the impact of the sexual offence on the survivor, all it mentioned was that she “was understandably traumatized and eventually transferred to another school.”⁶⁷⁵ In contrast, the judge dedicated two paragraphs to the consequences of the offence on the offender, as I discussed above, stating that he “has suffered greatly”, having lost his job, given up his career as an educator, and experienced embarrassment.⁶⁷⁶ In this case, the consequences for the offender appear to play a much larger role than the impact on the young survivor, who was additionally portrayed as somewhat complicit in the offence.

Similarly, in R. v. S.D.R., the court did not appear to seriously consider harm to the 13-year-old Aboriginal male survivor, with the court also suggesting doubt that the survivor was not in some way complicit in the offence by describing the sexual assaults as “the allegations” and apparently considering the defendant’s statement that the survivor had initiated the offence.⁶⁷⁷

In R. v. Gonzales, the court did not discuss harm to the survivor at all. This case, which I discussed previously, arose when a 40-year-old man raped a 14-year-old girl. The court did not find the survivor’s testimony that she did not consent while she was heavily intoxicated proved nonconsent, emphasizing her history of alcohol-induced blackouts and intoxication before and during the sexual assault.

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⁶⁷⁴ R. v. Hamade, supra note 486 at paras 4, 11.
⁶⁷⁵ Ibid at paras 6, 21.
⁶⁷⁶ Ibid at paras 12-13.
⁶⁷⁷ R. v. S.D.R., supra note 486 at paras 5-6.
The court did not mention harm to the survivor in the judgment beyond noting, in aggravation, that the offender lacked empathy for the harm he caused the survivor.\textsuperscript{678} At no point did the court explain what that harm was, leaving the impression that the offence had no real impact on her.

We are also left with the impression of the survivor as both sexualized and an alcoholic. Sadly, this construction is nothing new. In fact, it is a regular portrait of sexually assaulted Aboriginal girls. A description of how Aboriginal girls have been portrayed in the law can be found in Tracey Lindberg, Priscilla Campeau, and Maria Campbell’s indigenous analysis of a case where three men gave a 12-year-old girl from the Yellowquill First Nation alcohol and then raped and sexually assaulted her.\textsuperscript{679} Placing the case in its historical context of racism, colonization, and misogyny against Aboriginal women, they revealed how the court’s determination of the relevance of the survivor’s past sexual abuse and portrayal of her as drunk and willing dehumanized her:

this is the sexualization of a child and the dehumanization of a person. It strikes us that we are not just talking about physical acts/assaults. We are talking about her legal evisceration. A person who testifies about the brutality that was perpetrated on her/him is one of the bravest people we can imagine; sitting there in the courtroom while she is legally constructed as a drunken, potentially willing, and definitively sexual being is unbelievable brutish. Additionally, she is brutally constructed as a sexualized adult woman. Her childhood is discarded on the courtroom steps, previous incidents of sexual assault are detailed, shaming her and making her act of bravery an act that must have been diminished by the revelation about previous sexual assault(s).\textsuperscript{680}

\textsuperscript{678} R. v. Gonzales, supra note 484 at para 56.
\textsuperscript{679} Lindberg, Campeau & Campbell, supra note 464 at 90–91.
\textsuperscript{680} Ibid at 93.
A similar critique could be leveled here. The court transformed an adolescent girl raped by an adult man into a sexualized adult woman by making her intoxication and supposed willingness relevant to sentencing beyond what was necessary to establish her as extremely vulnerable. Relying on Razack’s insight that those who inhabit “degenerate spaces” are racialized to “naturalize” the violence committed against them,\textsuperscript{681} I suggest the survivor, whose ancestry was left unrecorded, was racialized by the criminal justice system into the stereotypical drunken and promiscuous Aboriginal girl. Her racialization made the harm against her seem natural and ultimately unimportant.

Courts also differently approached the harm of adult survivors they presented as taking risks. In some cases of adult survivors, judges discussed harm to find that the survivor had not been significantly impacted or had recovered. This happened, to varying degrees, in the three cases of rape of adult women in prostitution,\textsuperscript{682} women who, as discussed by Razack, are often racialized and seen of as occupying spaces of violence and degeneracy.\textsuperscript{683} Courts were respectful but, by comparison, they seemed to consider their harm as somehow different than that of other survivors.

In \textit{R. v. Yusuf}, the offender committed sexual assault causing bodily harm when he pinned the survivor underneath him and punched her in the face, knocking

\textsuperscript{681} Razack, \textit{supra} note 7 at 116–117.

\textsuperscript{682} This was not the approach taken in a case about sexual offences against multiple young prostituted girls in Colombia and Cambodia. There the trial court and appeal court both rejected the offender’s claim that the survivors were not vulnerable and were less harmed by his offences because they were already involved in prostitution. The Court of Appeal specifically rejected the offender’s submission that the trial judge overemphasized the vulnerability of the survivors as an aggravating factor in sentencing: \textit{R. v. Klassen}, \textit{supra} note 505 at paras 11, 18–21.

\textsuperscript{683} Razack, \textit{supra} note 7 at 93–94, 116–117.
her unconscious while he raped her. Based on her testimony at trial and in the absence of a Victim Impact Statement, the judge determined that she “suffered short term physical injuries” but “[h]er evidence did not suggest that she suffered lasting emotional trauma caused by the assault." The judge said she did not mean to “minimize what occurred” but to distinguish impact on the survivor from “other cases where the violence is more severe.”

The offence in *R. v. Kane*, a sexual assault where the offender punched a woman in the face, robbed her of the money he paid her, and raped her, was found to have positive consequences for the survivor, S.J. The court stated that although the assault was an attack on a vulnerable person’s physical and psychological integrity, S.J. had stated that she remade her life because of the assault, leaving behind her addictions. The court stated that, “[i]nsofar as it is possible to recover from a sexual assault, she had done well.”

In *R. v. Preuschoff*, the court found that the survivor continued to be psychologically traumatized by the sexual assault, where the offender had tied her to his bed and raped her while she was asleep, as well as the 10-year delay in identifying and charging the offender. Although the court detailed her psychological trauma from the offence, it also noted that she “made some very positive changes in her life. She is now a married mother who has overcome her addictions.” The court did not link this statement to the offence, but coupling the discussion of the serious trauma the offender caused her with a discussion of her subsequent

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684 *R. v Yusuf*, *supra* note 481 at para 12.
changing her life could suggest the offence may have had some positive consequences for her, at least in part.

In another case, the adult survivor was explicitly portrayed as reaping the consequences of the risks she took. In R. v. B.L., the offender sexually assaulted T.F., his employee, in his office. In sentencing the offender, the court failed to consider the harm the offence caused T.F.; instead, the court obliquely mentioned that she delayed making a criminal complaint, was unemployed for three months, was “quite distraught after the incident”, 687 and the offender pleaded guilty after T.F.’s friend had testified about the impact of the offence on her. 688 However, the court also suggested the offence was partly the survivor’s doing: it reiterated counsel’s comments that the “atmosphere of sexuality” that existed in the workplace before the offence including that T.F. was subjected to discussions of sex, horseplay, and buttocks-slapping, were things she “might well have regarded as harbingers to be heeded.” 689 In repeating this suggestion, the court blames the survivor for failing to avoid the assault by continuing to be subjected to possibly harassing behaviour: the court implied that because she put up with it, she invited the sexual assault; perhaps then any harm she suffered was not necessary to seriously consider. The court ignored the contextual factors that left the survivor with few options but to remain, with or without “harbingers”: as noted in the judgment, she was a single mother

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687 R. v. B.L., supra note 480 at para 3.  
688 Ibid at para 5.  
689 Ibid at para 11.
who remained unemployed for three months after the offender sexually assaulted her.\textsuperscript{690}

These cases reflect Gotell’s concern that, in law, “[c]oncepts of risk are deployed to construct and demarcate revised boundaries of good and bad victimhood.”\textsuperscript{691} Applied to sentencing cases, even when offenders are guilty, survivors may be seen as incautious or “flirting with risk.”\textsuperscript{692} The idea of risk-taking fits with what Ruparelia calls the “situational requirement” of ideal victimhood: the survivor must be sexually assaulted while “carrying out a respectable task in a location where she cannot be blamed for being”.\textsuperscript{693} It appears that in these cases courts perceived both adolescent and adult survivors as taking risks, doing disreputable things, or inhabiting “degenerate spaces”, to borrow from Razack\textsuperscript{694} – being young and in the company of adult men, engaging in prostitution, or working in a sexualized workplace – and therefore somewhat complicit in sexual assaults. In the case sample, it seems that notions of risk or agreement, replacing considerations of vulnerability and exploitation, led to courts disregarding survivors’ harm.

D. Feminist Considerations

Discriminatory ideas about sexual violence, based on sexist, classist, racist and other dominant prejudices, appeared in recent B.C. sexual offender sentencing decisions. I found these ideas within courts’ interpretations and applications of legal doctrine: in some cases, courts characterized sexual offences as less violent, less

\textsuperscript{690} \textit{Ibid} at paras 3, 24.
\textsuperscript{691} Gotell, “Rethinking Consent”, \textit{supra} note 1 at 879.
\textsuperscript{692} \textit{Ibid} at 880.
\textsuperscript{693} Ruparelia, \textit{supra} note 40 at 673.
\textsuperscript{694} Razack, \textit{supra} note 7.
harmful, and less the fault of offenders based on prejudicial and gendered ideas about violence in sexual activity, ‘good’ offenders, intoxication, and ‘risky’ survivors.

I observed a pattern of courts confusing sexual violence with sex. It was particularly apparent in cases against adolescent and adult survivors who could be understood as taking risks and therefore ‘consenting’ to offences. It was also apparent in courts’ failure to recognize and consider the gendered and unequal nature of sexual violence: courts mitigated the sentences of offenders who were ‘good’, who committed crimes that were ‘not predatory’, who assaulted acquaintances, and who were thought to have momentarily lost control due to intoxication. Although these myths were not prevalent in the majority of cases, that they appeared at all, and with some frequency, is an indictment of the system that is supposed to achieve justice and foster equality.

I do not mean to give the impression that there are no justifiable distinctions among the seriousness of sexual offences and the blameworthiness of sexual offenders. I question the legitimacy of some mitigating factors that are premised on rape myths, not the legitimacy of all mitigating factors. Some mitigating factors address inequality and the social reality of sexual violence. When courts look at the offender’s background, including the circumstances he was raised in, and whether he was himself a survivor of sexual abuse, neglect or other violence, they are considering how he may have learned to abuse or exploit others and the cyclical nature of violence. These histories are sadly common among Aboriginal offenders who suffer from the legacies of colonialism and residential schools. Courts rightly consider these factors as mitigating the offender’s blameworthiness on the rationale
that offenders are products of the society they live in and, therefore, society in
general must also bear some responsibility for sexual violence.\textsuperscript{695} This analysis is
not neoliberal or even liberal, but based on a contextual consideration of violence.
For many offenders, particularly those who are Aboriginal or racialized or were
raised in poverty and neglect, these factors also speak to the offender’s experiences
of inequality, oppression, and alienation, factors courts should consider not only to
be egalitarian and to contextualize sexual violence, but also to be compassionate.\textsuperscript{696}

As well, courts in the case sample regularly considered guilty pleas,
expressions of remorse, and demonstrations of insight and empathy for survivors as
mitigating. These factors are not based on rape myths. A guilty plea spares the
survivor from testifying and shows the offender accepts responsibility for his crime.
Insight and empathy similarly suggest the offender is gaining an understanding of
the harm he caused, pointing towards rehabilitation.\textsuperscript{697} Similarly, courts in the
sample considered it mitigating if offenders had support from their families or
communities in rehabilitation; however, courts should ensure support is not blind
but based on a recognition of the offender’s responsibility as well as role of
supporters in creating an environment free of violence and engendering
responsibility in offenders.\textsuperscript{698}

\textsuperscript{695} Manson, \textit{supra} note 274 at 145–147.
\textsuperscript{696} For feminist considerations about the inequalities perpetuated by the justice system, see Chapter
I, Section C & Chapter II, Sections B & D.
\textsuperscript{697} Manson, \textit{supra} note 274 at 133, 138.
\textsuperscript{698} In some cases, judges questioned the support offered by families and communities, noting that
they had supported offenders in the past but their support had not stopped the offences, perhaps
because the families had protected offenders more than supported them: \textit{R. v. C.K.B.}, \textit{supra} note 491
at para 26; \textit{R. v. Elbasani}, \textit{supra} note 484 at para 84; \textit{R. v. Pratt}, \textit{supra} note 598 at para 41.
From the case sample, *R. v. Alkenbrack* provides a good example of a court identifying mitigating factors to situate the offender’s crime within his tragic upbringing and desire for change. The court considered the impact of the legacy of colonialism on the Aboriginal offender as well as his childhood of physical abuse, neglect, exposure to hard drugs and drug-related violence, and repeated removal into foster care.\(^{699}\) The court also considered the offender’s remorse and interest in treatment, including that he immediately told his mother he had done something wrong and he did not want to be a “rapist.” When enumerating the mitigating factors, the courts considered the offender’s guilty plea, youth, remorse, and lack of criminal record.\(^{700}\) When citing the unique circumstances the offender faced as a young Aboriginal man, the court stated: “He comes from generations of grinding poverty, violence, and neglect. His life is characterized by instability, ineffective and indifferent parenting, little if any education, exposure to substance abuse, trauma, and dislocation from his own culture and extended family.”\(^{701}\) To me, these considerations properly reflect the socially situated nature of violence and the inequality that fosters it.

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\(^{699}\) *R. v. Alkenbrack*, *supra* note 533 at paras 14-35.  
\(^{700}\) *Ibid* at para 51.  
\(^{701}\) *Ibid* at para 60.
VI. Discourse Analysis

Legal discourse, like doctrine, can create and reproduce rape myths in the law. Informed by the work of Ehrlich and Coates and her colleagues, in this chapter I analyze the case sample for gendered identities and dominant social scripts about sexual assault to ascertain whether judges expressed rape myths in their narratives.702

Looking for grammatical constructions that betrayed gendered assumptions, I found that judges commonly used words that denote mutuality and imply eroticism to describe acts of sexual violence; these constructions concealed the violence of the crime, equated it with regular sexuality, and suggested the survivor consented despite legal findings of nonconsent.703 I found grammatical constructions, what Ehrlich identified as “agentless passives”, “unaccusative constructions” and nominalizations, which omitted or obscured the agents of acts of sexual violence.704 I also found constructions that presented survivors as co-agents or the agents of actions.705 With these discursive tactics, courts portrayed sexual violence as something that simply happens, almost inevitably, or something the survivor and offender both do. They minimized the offender’s responsibility and the survivor’s harm, and ultimately reproduced gendered and discriminatory beliefs about sexual assault in legal discourse.706

702 Ehrlich, supra note 29 at 13–35; Coates, Beavin Bavelas & Gibson, supra note 64 at 189–190; Coates, supra note 370 at 281–284; Bavelas & Coates, supra note 257 at 29–30; Coates & Wade, supra note 66 at 3–4.
704 Ehrlich, supra note 29 at 47–53; See also Coates, Beavin Bavelas & Gibson, supra note 64 at 196–197, 202.
705 Ehrlich, supra note 29 at 43–47; Coates, Beavin Bavelas & Gibson, supra note 64 at 202–203.
706 Ehrlich, supra note 29 at 60–61.
I also analyzed cases for broader expressions of norms about sexuality, cognizant of the findings of other scholars that female sexuality is constructed as “whimsical or capricious”, sexual assault results from female miscommunication, force occurs in normal consensual heterosexuality, and sexual assault is akin to consensual sex. Because the case sample primarily consisted of sexual offences against children and adolescents and especially vicious sexual assaults against women, I believe judges were moved away from the tropes and language of consensual sex toward language of stranger sexual assault. Nonetheless, confusion was still apparent. Courts often characterized offences as non-violent, particularly offences against adolescents. In many cases, courts linked the cause of offences to something external to the offender, including intoxication and ‘risky’ survivors; sexual assault was therefore portrayed as the arising when men lose control (rather when they are exerting it). Finally, judges used terms throughout judgments – accused, complainant, and defendant – that undermined legal findings of offenders’ guilt and cast suspicion on survivors.

Often, the discourse judges used reinforced legal doctrine that evoked rape myths. Like doctrinal interpretation and application, gendered discourse reproduced the same ideas: some sexual assaults as non-violent, offenders as not wholly responsible, and survivors as complicit in offences, ultimately, leaving

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707 Smart, Feminism, supra note 29 at 31.
708 Ehrlich, supra note 29 at 121–148.
709 Pether, supra note 64 at 67–68.
710 Coates, Beavin Bavelas & Gibson, supra note 64.
711 See ibid at 197–198.
unequal and prejudicial social constructions of gender and sexual assault undisputed.\textsuperscript{712}

By analyzing judicial language, I do not intend to demonize judges. Judges are immersed in social and legal discourse that portrays some sexual violence as less serious than others. In many cases, I found judges resisted such portrayals; nonetheless, they did surface, often subtly. Given how pervasive and powerful these constructions of sexual assault are, I suspect they can only be eliminated with deliberate and conscious attention.

\textbf{A. The Contributions of Offenders to Narrative: Survivor Blaming}

Before I move on to judicial discourse, I note judges did not construct the narratives in sexual assault decisions alone. In particular, judges allowed offenders to partially construct narratives. Although judges frequently put forward opposing narratives about offences, they also reproduced or repeated statements by offenders from testimony, Pre-Sentence Reports or Psychological Assessments, and submissions of defence counsel.\textsuperscript{713}

This practice was most apparent when offenders suggested they were less morally culpable by making allegations about survivors’ sexual history or suggesting survivors seduced them. For instance, one offender stated that his underage stepdaughter was “sexually aggressive”, enjoyed the sexual assaults and had orgasms during the assaults, offensive and prejudicial allegations the court repeated.

\textsuperscript{712} Ehrlich, \textit{supra} note 29 at 61.

\textsuperscript{713} For information on how judicial narratives are constructed, see generally Ehrlich, \textit{supra} note 29 [the discourse of the accused in his testimony and its impacts]; Cunliffe, \textit{supra} note 398 [the construction of judicial narratives from the court record].
in the judgment.\textsuperscript{714} Another judgment detailed the offender's shock that the sleeping survivor was not receptive to his advances and his belief that he was not at fault because “there was more to the situation than the Court” knew, hinting at flirtatious behaviour on her part.\textsuperscript{715}

Sometimes, discriminatory and gendered ideas that judges reproduced came from defence counsel: in \textit{R. v. Nelson}, defence counsel argued that the court should consider that the survivor, a 14-year-old boy, “made himself available to engage in this sexual adventure.”\textsuperscript{716}

Apparently, some offenders and defence counsel continue to think that discriminatory ideas based on rape myths amount to relevant and persuasive evidence for sentencing. Judges often censured offenders for survivor-blaming statements, but not always. These statements need to be opposed, in courtrooms and in judicial discourse within case narratives: as Shelia McIntyre and her contributors argued, “[p]lainly, we need to contest the conflation of an accused’s right to a vigorous defence with the right to a wilfully discriminatory and/or rule-flouting defence.”\textsuperscript{717}

\textbf{B. Narratives of Offences}

In my discourse analysis, I found the language judges chose to narrate offences frequently confused sexual offences with sex; they used erotic, affectionate or mutual terms to describe violent acts, making offences appear non-violent and

\textsuperscript{714} \textit{R. v. W.S.}, supra note 516 at paras 13-14, 34-36.
\textsuperscript{715} \textit{R. v. Lindstrom}, supra note 615 at para 44.
\textsuperscript{716} \textit{R. v. Nelson}, supra note 572 at para 73.
\textsuperscript{717} McIntyre, supra note 23 at 79.
even welcomed. Judgments also often erased offenders from the picture: in narratives, sexual offences appeared to happen without the offender acting, diffusing his responsibility for the offence. I explore these issues in turn below.

**Eroticization and Minimization of Sexual Violence**

In some cases in the sample, judges characterized offences as essentially non-violent. They accomplished this through doctrine, but also discourse, with judges using “language [that] suggested that when someone sexually assaults another person, this behavior is not violent.”718 In analyzing word choices, I found that courts used erotic and affectionate language as well as neutral language that simply described physical acts without positive or negative connotation. Courts less frequently described offences employing words that denoted violence or unilateral force.719

Within the case sample, courts frequently used the term ‘intercourse’ or even ‘sexual intercourse’ to describe anal and vaginal rape. These terms were used in cases of rape of adult women720 and children and adolescents.721 Judges also described rape as ‘sex,’ such as in *R. v. S.D.D.*, in which the court described the offender’s repeated anal rape of his young niece and nephew as “anal sex” as well as

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718 Coates, Beavin Bavelas & Gibson, *supra* note 64 at 194.
719 This was similar to the divisions found in Bavelas & Coates, *supra* note 257.
“anal intercourse”. Similarly, in *R. v. Reis*, the judge described the offender’s violent rape of the survivor while threatening her with a sword and a baseball bat as “having vaginal and anal sex with her”.

In some cases, judges modified words like ‘intercourse’ and ‘oral sex’ with ‘forced.’ Judges used terms of force less frequently in cases of sexual abuse against children: they simply described sexual assault using language of consensual sex without any reference to violence.

Conversely, the term ‘rape’ rarely appeared in the case sample. The rare cases in which judges described the offence at bar as rape include *R. v. Dariani* when the Court of Appeal quoted the trial judge, and in *R. v. P.M.A.* and *R. v. L. et al.* ‘Rape’ was also used when judges quoted offenders’ own words, including their threats to survivors, indicating that offenders’ language identified the forceful and unilateral nature of their acts even when legal discourse did not.

Courts frequently used the term ‘fondle’ to describe sexually assaultive touching. Similarly, they often used ‘oral sex’ and ‘fellatio,’ sometimes with the

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723 *R. v. Reis*, supra note 481 at para 11.
724 See e.g. *R. v. C.K.B.*, supra note 491 at paras 8, 12; *R. v. R.M.D.*, supra note 721 at para 7.
728 See e.g. *R. v. Allen* (SC), supra note 468 at para 36; *R. v. Allen* (CA), supra note 468 at para 10; *R. v. Alkenbrack*, supra note 533 at paras 7-8, 10; *R. v. R.L.W.*, supra note 474 at paras 19, 23.
adjective 'forced', to describe the offender forcing his penis into the survivor’s mouth or forcing his mouth onto the survivor’s genitals.\textsuperscript{730}

Courts also used words that connote the idea of a sexual advance to describe sexual offences, including “importunings”,\textsuperscript{731} “dalliance”,\textsuperscript{732} “liberties” and “advance”.\textsuperscript{733} In particular, as I previously discussed, in a few cases judges characterized offences as mistakes or unreciprocated sexual come-ons.\textsuperscript{734}

The use of sexual language to describe sexual offences is harmful because it fails to convey the violence in sexual offences in the law. As Janet Bavelas and Coates explained, the difference between the two is often one of mutuality versus unilateral force. Using words like ‘intercourse’ and ‘fondle’ to describe sexual violence implies that the act was not forced but reciprocal and even pleasurable. These words undermine legal findings of nonconsent and present sexual violence as welcomed, blurring the lines between sexual violence and consensual sex:

Only when the acts are mutually consensual should they be described in sexual terms, because these terms inevitably connote mutuality and consent. If the same term is used to describe both consensual and nonconsensual acts, then a crucial distinction in the law has been obscured. In the law and in the complainant’s experience, sexual assault is unilateral. An assault is accomplished by physical force, threat, or abuse of power. In an assault, one person uses the body of another, who thereby loses control over the most intimate access to his or her body. One person imposes his or


\textsuperscript{731} R. v. Visscher, supra note 480 at para 33.

\textsuperscript{732} R. v. Hamade, supra note 486 at para 11.

\textsuperscript{733} R. v. Lindstrom, supra note 615 at paras 43-44, 54, 69; see also R. v. T.J.H., supra note 480 at paras 2, 10.

\textsuperscript{734} R. v. T.J.H., supra note 480 at paras 2, 10; R. v. S.W.N., supra note 480 at para 75; R. v. Hamade, supra note 486 at paras 11-13.
her will and body upon another and violates that person’s right to control access to his or her body.\textsuperscript{735}

As Bavelas and Coates explained, the word ‘intercourse’ denotes a positive, consensual, and mutual act, not an act of violence imposed by one person on another. Similarly, the word ‘fondle’ conveys ideas of mutuality and even love and affection,\textsuperscript{736} based on its primary dictionary definition to “touch or stroke lovingly; caress”\textsuperscript{737} and its etymological origins as a derivation of the word ‘fond’, as in to “treat with fondness”.\textsuperscript{738} Just as ‘boxing’ conveys none of the violence of ‘beating’ and ‘donation’ suggests a positive giving where ‘robbery’ expresses force and threats, sexual terms like ‘fondle’ fail to convey the violence and harm of sexual assault.\textsuperscript{739}

According to Bavelas and Coates, when words that express mutuality and pleasure are used, it is “harder to visualize that they were unwanted violations. The language used does not just euphemize; it actively misleads and misdirects.”\textsuperscript{740} Equating sexual assault with mutually desired sex, at best, transforms sexual violence into perhaps ‘inappropriate’ or unreciprocated sexual acts\textsuperscript{741} or, at worst, expresses the myth that women want to be raped and enjoy being dominated because of their inherent subordinate sexuality.\textsuperscript{742}

\textsuperscript{735} Bavelas & Coates, supra note 257 at 31.
\textsuperscript{736} Ibid.
\textsuperscript{737} Canadian Oxford Dictionary, 2nd ed (Canada: Oxford University Press, 2004), sv “fondle”. However, the second definition of “fondle” is to “sexually molest (a person) by touching etc.” Its third definition is to “touch (a person’s genitals) erotically.”
\textsuperscript{738} The Oxford English Dictionary Online (Oxford University Press, 2013), sv “fondle”.
\textsuperscript{739} Bavelas & Coates, supra note 257 at 30–31.
\textsuperscript{740} Ibid at 38.
\textsuperscript{741} Ibid.
\textsuperscript{742} Brownmiller, supra note 25 at 309–316. See Chapter I, Section B.
Language that equates sexual violence with consensual sexual and affectionate acts presents sexual assault from the offender’s point of view. It presumes offenders’ motives are sexual, rather than violent or based on dominance, and then privileges this point of view while denying survivors’ experiences of force and harm. It sexualizes survivors and sexual violence, risking turning sentencing judgments into “pornographic vignettes.”

Other than the word ‘intercourse,’ judges most often used neutral words to describe acts of sexual assault in the case sample. In their narratives, they described what the offender did to particular body parts of the survivor without any connotation, positive or negative. Bavelas and Coates called these “physical descriptions.” In the case sample, they included ‘penetration’, which was sometimes used in the case sample instead of or in addition to ‘intercourse.’ They also included neutral verbs such as ‘touch’ and ‘place’.

For example, the judge’s description of the sexual assault in *R. v. Lindstrom*, which the offender committed after unlawfully entering the survivor’s house at 2:30 in the morning through an unlocked door, used mutual and neutral terms:

The Defendant went upstairs to W.B.’s bedroom, saw her sleeping naked on the bed and, while still clothed, *limbed* into bed beside her. He began *kissing and fondling* W.B. and *inserted* his fingers into her vagina. W.B. awoke and told the Defendant to leave. The Defendant replied "I thought we were

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743 Bavelas & Coates, supra note 257 at 31–32.
745 Bavelas & Coates, supra note 257 at 34–35.
partying”. He did not immediately depart but did so after a few minutes saying to W.B. “don’t tell” on his way out.\footnote{R. v. Lindstrom, supra note 615 at para 16 [emphasis added].}

The language used could just as easily describe a consensual sexual encounter: he “limbed” into bed, “kissing and fondling” her. He “inserted his fingers”. These terms do not capture the violence or harm of what the offender did. They also failed to portray the survivor’s perspective, likely of shock and fear at finding the offender in her home and bed sexually assaulting her in the middle of the night.

Similarly, the narrative of the taxi driver’s assault of an intoxicated young woman in \textit{R. v. Singh} used neutral descriptors:

Mr. Singh did not take the complainant where he was instructed and had agreed. Instead, he took her to his basement suite where he brought her to his bedroom, \textit{put her} on his bed, and \textit{placed his penis} in her mouth. He then took her to her boyfriend’s home. The event lasted about an hour in total. The complainant was incapable of consenting due to a gross level of intoxication and did not consent to engage in sex with the taxi driver.\footnote{R. v. Singh, supra note 500 at para 2 [emphasis added].}

The terms ‘put’ and ‘place’ are neutral, suggesting no violence or force.

These words do not suggest mutuality and consent, but they also do not capture violence, force, and harm. Or, in the words of the Court of Appeal describing the offender’s sexual abuse of his stepdaughter in \textit{R. v. Worthington}, “[t]he rather clinical descriptions of the behaviour which is admitted, to some degree, mask the forbidden nature of Mr. Worthington’s actions, and his admitted knowledge, from the beginning, that his behaviour was wrong.”\footnote{R. v. Worthington, supra note 479 at para 41.}

Judges’ positive and neutral language does not necessarily suggest they approve of sexual violence. At the same time that they used sexual or neutral terms
to narrate sexual offences, judges often also conveyed their denunciation of offenders’ actions. For example, the judge in *R. v. R.M.D.* used neutral and sexual language to describe the offender’s sexual abuse of his daughter and stepdaughter, but in discussing the principles of sentencing the judge said the offender abused his parental trust “in a perverse way in appalling acts of selfishness.” Likewise, the judge called T.G.D.’s sexual abuse of his three children “grossly horrific conduct.”

By analyzing judicial language, I do not mean to imply that judges intentionally choose problematic language in preference to other possible constructions. Judges are situated in cultures and institutions, influenced by social and legal discourse around sexual violence. As articulated by Coates, Bavelas, and James Gibson, in legal discourse, only two interpretive repertoires are commonly used, which “are limited to and therefore juxtapose stranger rape and consensual sex.” Judges often end up using the terms for consensual sex, “[b]y default and for lack of a well-developed repertoire for non-stranger rape”. They do not use these terms necessarily through a desire to discriminate.

Furthermore, judges may choose to avoid detailed and violent language based on understandable concerns. As discussed by Bavelas and Coates, sexualized language is “familiar, available, and convenient” as well as “euphemistic.” On the other hand, language of violence and force is “more awkward, unfamiliar, and graphic”. Familiar sexual euphemisms “may be simply easier to bear” because

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752 Coates, Beavin Bavelas & Gibson, *supra* note 64 at 197.
753 *Ibid*.
754 Bavelas & Coates, *supra* note 257 at 38.
they do not force the writer or reader to visualize awful acts of violence.\textsuperscript{755} I also
struggled with language, trying to determine which words to use without being
unduly graphic. However, sanitizing violence with language of sex and affection
denies the survivor’s experience, obscuring her “courage in surviving it”, and
ultimately re-victimizes her. Although it may be natural to wish to avoid
contemplating the awfulness of cases, this tendency will not help the law to
understand and express the reality of sexual violence.\textsuperscript{756}

\textit{Agency: Invisible Offenders and Survivor Co-Agents}

In the case sample, judges used grammatical constructions that clouded
offenders’ agency in descriptions of sexually violent acts. According to Ehrlich,
offender agency can be made vague by “agentless passives”, such as passive
phrasings where verbs have no agents, and “unaccusative constructions”, such as
nominalizations in which acts of violence are made into nouns like ‘the sexual
activity’, ‘the penetration,’ and so on, again with no agent.\textsuperscript{757} Together, they render
the offender’s actions “as spontaneous sexual events, as happenings that have taken
their natural course without any particular cause or agent.”\textsuperscript{758} Similarly, offender
agency can be transferred to survivors by depictions of survivors as agents who
performed sexual acts or of sexual violence as mutual acts.\textsuperscript{759} Just as Ehrlich found
examples in a university sexual assault case, and Coates and her colleagues found

\textsuperscript{755} \textit{Ibid} at 39.  
\textsuperscript{756} \textit{Ibid}.  
\textsuperscript{757} Ehrlich, \textit{supra} note 29 at 47–53.  
\textsuperscript{758} \textit{Ibid} at 50.  
\textsuperscript{759} \textit{Ibid} at 43–47.
examples in their analysis of sexual assault cases in the past, I found examples of courts diffusing offender agency with language in the sample of recent B.C. sentencing cases.

Although not common, in a number of cases judges used passive phrasing and nominalizations that obscured offenders’ agency. Sometimes judges used this language exclusively; sometimes they used it in tandem with more direct phrasing.

In Chapter V, I discussed the case R. v. S.D.R., specifically that the court did not consider harm to the young survivor in its analysis while at the same time suggesting he might have participated in the offence. The narrative of the offence provides an example of where the court used agentless passives, which depicted acts and circumstances as happening without a clear actor:

In any event, the complainant’s pants were down, his underwear was pulled down slightly, and his penis was showing. The Crown says that there was also touching that occurred on that occasion.

In this excerpt, the offender has disappeared. There is no agent of the crime; rather, objects, like the survivor’s pants, seem to be acting on their own. Who pulled down the survivor’s pants and underwear and exposed his penis and who sexually touched whom is unclear; based on this construction, the survivor, a 13-year-old boy, is just as plausible an agent as the offender.

Judges used constructions that obscured offender agency most clearly in cases dealing with child and adolescent sexual abuse. Although courts used direct language to describe grooming by offenders, they nominalized acts of sexual abuse.

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760 Coates, Beavin Bavelas & Gibson, supra note 64 at 196–197, 202–203.
761 Ehrlich, supra note 29 at 47.
762 R. v. S.D.R., supra note 486 at para 6 [emphasis added].
violence: ‘the assaults’ or ‘the activities’ ‘occurred’ or ‘took place’, or ‘escalated to’ or ‘involved’ acts, without reference to the offender as an agent. In this way, narratives isolated crimes from offenders. For example, the judge in *R. v. S.S.E.* described the offender’s sexual assault of his stepdaughter, starting when she was 12 years old and lasting until she was 17, in this way:

> The sexual assaults on S.S. started, as I said, when she was around 12. The activities progressed from caressing to digital penetrations to oral sex to vaginal and anal intercourse. Mr. E. maintained control over S.S. by repeatedly suggesting that if she disclosed what was going on she would lose her relationship with her mother and her younger sister would, as had S.S., lose her relationship with her birth father.

The court used direct language when stating the offender “maintained control” over S.S., but used nominalizations and agentless phrasing (as well as terms of consensual sex) to describe the offender’s acts of sexual assault. As a result, the sexual abuse seems to occur of its own accord.

Similarly, in *R. v. W.S.*, after directly identifying the offender as sexually assaulting the survivor, H.T., the judge described the specific acts of sexual violence without any reference to the offender:

> The assaults began as fondling, proceeded to include oral sex and eventually sexual intercourse. The assaults occurred frequently and did not cease until H.T.’s disclosure.

Once again, the offender’s assaultive actions are nominalized so that they appear to occur unbidden, in absence of the offender.

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763 See e.g. *R. v. S.D.D.*, *supra* note 470 at para 2 [including “the sexual assaults consisted most commonly of anal intercourse”, “anal intercourse took place” and “sexual assaults described by S. most frequently consisted of anal intercourse”]; *R. v. R.M.D.*, *supra* note 721 at para 7 [“the events in question began” and “[t]he activity progressed to sexual touching, to stroking his penis, and to actual sexual intercourse.”].

764 *R. v. S.S.E.*, *supra* note 491 at para 9 [emphasis added].

765 *R. v. W.S.*, *supra* note 516 at para 12 [emphasis added]. Again, the court used active language to describe the offender’s acts of grooming.
Judges also sometimes employed language that obscured offender agency to describe the injuries offenders caused survivors. Coates et al. made similar observations, including that judges described survivors as having “sustained some bruises” or referred to “medical evidence” rather than directly describing offenders as causing survivors’ injuries.\footnote{Coates, Beavin Bavelas & Gibson, supra note 64 at 197, 203.} Within the case sample, similar descriptions were not infrequent: in some cases, courts described some or all of the survivor’s injuries without directly identifying the cause, the offender.\footnote{R. v. R.N.A., supra note 474 at para 9 [“S. was found to have sustained injuries consisting of...”]; R. v. Dariani, supra note 473 at para 9 [“Her injuries included...”]; R. v. D.B.V., supra note 478 at paras 10-11 [the survivor’s injuries are described in terms of how she was found, bleeding]; R. v. Pratt, supra note 598 at para 15 [“A number of injuries were noted...”]; R. v. Williams, supra note 468 at para 1 [“he was found to have...”]; R. v. Hamade, supra note 486 at para 6 [“the victim was understandably traumatized...”]; R. v. Kane, supra note 468 at para 2 [“On examination at the hospital there was found to be...”]; R. v. R.L.W., supra note 474 at para 25 [“The nurse who examined Ms. N and observed the following injuries...”].} One example is \textit{R. v. Wheeler}. After the court described the horrific sexual assault the offender committed using direct language, it stated that the survivor “was badly bruised, her voice box was damaged, she had soft tissue injuries and her hair was pulled out of her head in clumps”,\footnote{R. v. Wheeler, supra note 472 at para 6.} the court did not with its language directly attribute her injuries to the offender’s actions.

Within the sample, offender agency was also minimized by grammatical constructions that presented the survivor as an agent or as a co-agent: in some cases courts depicted survivors as initiating or performing sexual acts or sexual acts as mutual. For example, the child survivor in \textit{R. v. R.M.D.} was briefly portrayed as the agent of her father’s sexual violence when the judge wrote, “D. testified that she had
intercourse eight or nine times with her father.” This example is unusual, however. Survivors were made agents more often when judges described survivors as ‘performing’ ‘oral sex’ or ‘fellatio’ on offenders, although these acts were often also described as being forced. It seems that judges wanted to avoid the awkward and more graphic description of the offender thrusting his penis into the survivor’s mouth or forcing her to suck it, phrasings that were infrequently used. However, the language judges more frequently used, while sanitized, made survivors agents in acts of sexual violence against them, which they often also expressed in consensual terms.

Even after conviction, when judicial discourse minimizes the role of the offender in his own crime, it diminishes his blameworthiness in the social and legal construction of sexual violence. This discourse impacts how readers interpret offences: when faced with language that obscures agency of sexual violence, readers see offenders as less culpable and survivors’ harm as more trivial. It also affects the law: by obscuring agency, legal discourse ultimately constructs and validates a privileged idea of masculine sexuality that countenances violence within the law.

Causes of Offences: Intoxication and Risk

As I discussed in Chapter V, judicial application and interpretation of doctrine in some cases considered offender responsibility and rehabilitation potential based on perceived causes of offences. As I consider here, this

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771 See e.g. R. v. Rao and MacFadden, supra note 665 at para 7.
772 Ehrlich, supra note 29 at 40, 60–61.
interpretation of doctrine was reinforced by judicial discourse. In some cases within the sample, judges used discourse that attributed the cause of offences to something outside offenders’ direct responsibility. In what follows, I discuss two of these external causes: intoxication and ‘risky’ survivors.

_Intoxication_

As I discussed in my doctrinal analysis, judges frequently found intoxication as a factor in offences for the purpose of sentencing. Intoxication was also discursively linked to offending in the language judges used to describe assaults or offenders’ circumstances. Echoing the findings of Coates and Wade, in the case sample judicial narratives suggested offenders who committed sexual offences while intoxicated were more accountable for drinking alcohol or using drugs than for willful sexual violence by their focus on intoxication and addiction counselling.773

One example can be seen in _R. v. R.N.A._, a case where the offender violently sexually assaulted and threatened his intimate partner. Based on the psychologist’s report that linked the offender’s substance abuse to his offending,774 the court expressed concern about the offender’s continuing risk for violence because he had not put his substance abuse “behind him”.775 In delivering the sentence, the judge spoke of the need to deter R.N.A. from committing violence against women, stating, although he was intoxicated at the time and has no memory of the event, what he does know is that he becomes violent, obviously here exceedingly violent, when intoxicated and it must be brought home to him that he

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773 Coates & Wade, _supra_ note 66 at 10–11.
775 _Ibid_ at para 38.
cannot put himself in situations where his violence will erupt and cause harm.\textsuperscript{776}

The judge’s language externalized the offence from the offender, suggesting that his primary fault was becoming intoxicated, which put him in a situation of risk: when he drinks, the offender’s “violence”, not the offender, erupts and causes harm.

Similarly, in \textit{R. v. Visscher}, the Court of Appeal found that the trial judge had not given enough weight to the goal of rehabilitation in fashioning the offender’s sentence. The Court of Appeal directly linked the offender’s rehabilitation from being a repeat sexual offender to his alcoholism and Post Traumatic Stress Disorder, finding that the trial judge had not recognized that he was taking steps to rehabilitate himself by getting treatment for his alcoholism and PTSD. In the two paragraphs the court discussed the offender’s attempts to rehabilitate himself, the court did not mention sexual violence, suggesting he was not guilty of sexual assault but of intoxication.\textsuperscript{777}

In other cases, judges resisted linking the offender’s responsibility to his intoxication in their discourse. This can be seen in \textit{R. v. R.L.W.}:

\begin{quote}
In my opinion, notwithstanding his state of intoxication, R.L.W. knew was he was doing and went ahead and did it without any consideration of the lasting impact it would have on the woman who had once loved him or upon the children who had been used and abused during the course of the production of child pornography.\textsuperscript{778}
\end{quote}

The judge described the offender as highly morally blameworthy because he chose to commit his crimes, regardless of his intoxication.

\begin{footnotes}
\item[776] \textit{Ibid} at para 51.
\item[777] \textit{R. v. Visscher}, supra note 480 at paras 31-32.
\item[778] \textit{R. v. R.L.W.}, supra note 474 at para 130.
\end{footnotes}
When judges used language that linked sexual violence to alcohol or drug use, they reinforced legal findings that intoxicated offenders were less morally blameworthy for their offences. Together discourse and doctrine minimized offender responsibility for sexual violence and expressed a view that sexual violence is caused by men ‘losing control’ from alcohol and drugs, not by men acting on their own will,\footnote{Coates & Wade, supra note 66 at 10–11.} emboldened by gender inequality, norms of masculine aggression, and the near impunity of sexual offenders.

*Risky Survivors*

Overlapping with cases in which judges failed to consider harm to survivors, in some cases, judicial discourse portrayed survivors as causative factors in offences. In some cases, this appears to be related to the perception of survivors as ‘risky.’

Within a normative standard of rationality and risk aversion, some women will be perceived as failing to live up to that ideal. A woman may be perceived as “risky” if she “avoids personal responsibility for sexual safety” or “places herself within and occupies a space of risk.”\footnote{Gotell, “Rethinking Consent”, supra note 1 at 882.} Notions like this can be expressed with language that portrays survivors as “catalysts that incite” sexual violence.\footnote{Coates & Wade, supra note 66 at 24.} From here it is a short leap to constructing survivors as posing a risk to offenders rather than the reverse.\footnote{Gotell, “Rethinking Consent”, supra note 1 at 882–897; Coates & Wade, supra note 66 at 24.}
In the case sample, I found language that painted adolescent survivors as risky and causing offences. One example is *R. v. Gonzales*. As I discussed in my doctrinal analysis, nearly the entire narrative of the offence revolved around the 14-year-old survivor's alcohol abuse, which we learn has landed her in the “drunk tank” numerous times, and her intoxication in the company of the offender and other adults.\(^{783}\) In the same manner, the court in *R. v. Allen* portrayed K.R. as risky by the court’s portrayal of the boy as sexually aggressive by reproducing his statement to the offender that “he was up for anything” and his question about which offender “had the bigger ‘dick’”,\(^{784}\) as well as stating that, after being assaulted by the offenders, K.R. “re-registered on the adult chat site using the username ‘hotfordaddy’.”\(^{785}\)

In these narratives, courts portrayed adolescent survivors as risky to adult men. Although the courts identified both survivors as vulnerable and in need of protection, they put greater emphasis on their incaution and risk-taking, emphasis that could imply that survivors constituted a risk to offenders by the threat they posed to rational sexual expectations.\(^{786}\)

Within the case sample an adult survivor was portrayed as risky in *R. v. Yusuf*. The offender’s family, in letters to the court that were referenced in the judgment, painted the survivor as other or different from them. They state that the offence, a sexual assault of a woman in prostitution, was out of character in part

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\(^{783}\) *R. v. Gonzales*, *supra* note 484 at paras 6-11.

\(^{784}\) *R. v. Allen (SC)*, *supra* note 468 at para 16.

\(^{785}\) *Ibid* at para 28.

\(^{786}\) Gotell, “Rethinking Consent”, *supra* note 1 at 884–893.
because the offender was not known “to associate with prostitutes.” Beyond the suggestion that the problematic aspect of the offender’s behaviour was associating with the survivor rather than sexually assaulting her, the submission implied that she is other than him; he is a good man with no prior record whereas she is the real criminal who presents a risk to offender and his family. This sentiment was not the court’s but the court reproduced it, tapping into the idea of the survivor, not the offender, as risky and dangerous.

Coates and Wade made a similar observation in their analysis of a case about a teacher who sexually abused two students. There, the children were presented as posing the risk for sexual violence, in their words as “incit[ing] overwhelming emotions or drives in the perpetrator, which in turn compel him to act violently.” Rather than presenting the crime from the perspective of the child survivors, the court took the offender’s view of the children as posing a risk to him, that they will be too irresistible to his violent sexual desires, forcing him to act. When such language is used, offenders are presented as less blameworthy because they were led astray by sexualized children or dangerous women.

C. Undermining Findings of Guilt

Within the case sample, judges frequently used language that undermined offenders’ guilt. In spite of offenders’ convictions or guilty pleas, judges frequently referred to the offender as ‘the accused’ and sometimes ‘the defendant’, and

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788 Coates & Wade, supra note 66 at 24.
789 Ibid.
survivors as ‘complainants.’ These terms are inappropriate given the offender’s guilt under law and the purpose of the decision: to sentence him for his crime. As noted by Coates et al., with these terms, the judge “alludes indirectly to the presumption of innocence and calls into question the validity of the conviction.” The implied doubt about offenders’ guilt and the distrust of survivors contained in the term ‘complainant’ in this context could be particularly prejudicial in the context of sexual offences, given the long tradition of disbelieving and vilifying survivors on the basis of myths grounded in gender, race, class and other biases. As noted by Ruparelia, sexual assault survivors are “distinguished from ‘real’ victims, whether or not a conviction has been entered.” Courts’ continued use of these terms after conviction suggests a difference between ‘real’ victims and sexual assault survivors and evokes rape myths by constructing perpetrators as not quite responsible and survivors as not entirely believable.

... Rapeme myths that confuse some acts of sexual violence with sex were apparent in judicial discourse in the case sample. Judges used narratives and language that concealed violence and perpetrator responsibility and painted survivors as contributing to sexual assaults. In using this language, courts did not convey the

791 Coates & Wade, supra note 66 at 20.
792 See Chapters I & II.
793 Ruparelia, supra note 40 at 675.
violence and harm of sexual violence and the responsibility of offenders; instead they portrayed it as normal, even erotic and reciprocal, and not entirely the fault of offenders. Rather than blaming men for the violence they commit, in some cases courts used language that attributed violence to intoxication or to survivors, based on discriminatory notions of risk-taking and the sexualization of adolescents. As in doctrine, these constructions most clearly arose in cases of adolescents.

The language of courts in the case sample reveals that feminist reforms have not entirely succeeded. Reforms have failed to make legal discourse show the gender and inequality in sexual violence and challenge the notion that some sexual offences are not dissimilar from sex.
VII. Discussion

My doctrinal and discursive analyses illustrate that judges did not situate sexual violence within gender inequality. As a result, rape myths from the past echoed in recent cases. Informed by a neoliberal lens as well as feminist-inspired legal reforms, current rape myths are modified iterations of historical rape myths. Nonetheless, the theme that some sexual violence is akin to sex endured, cropping up most plainly in cases of particularly vulnerable survivors, including adolescents.

Themes: Sex and Context-Blindness

Woven through the case sample was the idea that there is a grey area between sexual violence and sex. With courts suggesting survivors had taken undue risks, this theme appeared most clearly in cases of offences against survivors with intersecting inequalities, particularly adolescent survivors. In a variety of ways, courts interpreted doctrine and used discourse to suggest offences were akin to consensual sex, were not violent, were mistakes, or did not cause significant harm.

In a number of cases, judges made findings of facts that adolescents consented to offences by acquaintances or strangers. Although judges recognized that adolescents could not legally consent due to their age as required by the Criminal Code, they used agreement in sentencing to distinguish offences from ‘real’ violence. In these cases, courts paid lip-service to the inequalities and power imbalances that make consent between adolescents and adult offenders impossible, while simultaneously failing to express the blameworthiness of exploiting the vulnerabilities of youth and gender. Judges failed to identify that offenders did not

need to use explicit physical force because of survivors’ vulnerabilities, instead implying that exploitation of vulnerability and inequality is less harmful or blameworthy than physical force. Courts did not take this approach in all cases of adolescent survivors, namely cases of sexual violence within families: courts typically described the offences of fathers, stepfathers and uncles against adolescents as nonconsensual, forceful, and harmful, even if they did sometimes also suggest they were non-violent.

With these legal and discursive constructions, courts sometimes depicted sexual offences as technical crimes; consequently, they interpreted offenders as less blameworthy. Courts also suggested that ‘statutory’ sexual offences do not cause significant harm by omitting consideration of harm to young survivors as an aggravating factor or omitting consideration of harm at all. As well, courts appeared to partially blame adolescent survivors for offences by providing details in narratives that sexualized them, discursively presenting them as posing a risk to offenders, rather than the reverse.\(^\text{795}\)

Similarly, in the cases against adult women taking risks or occupying dangerous spaces, courts interpreted their harm differently than they did for other survivors. While courts were respectful, they to varying degrees suggested sexual violence had less of a serious impact on women in prostitution or encouraged them

to improve their lives. These interpretations of harm stand in contrast to those courts typically made in regard to other survivors.

Because of their neoliberal approach, judges were less able to recognize inequalities based on gender, Aboriginality, race, class, sexuality, and even youth. In some cases, courts ignored or obscured the coercion and violence faced by survivors by presuming them to be acting freely and without restraint, a tactic that made their actions appear illogical and risky, for example, questioning why a single mother remained in a job where she was subjected to behaviour that could amount to sexual harassment.

Although courts designated some classes of survivors as vulnerable or in special need of protection, they did not recognize all forms of vulnerability, particularly gender. Courts recognized that youth, relationships of trust and authority, and spousal relationships cause vulnerability, based on the Criminal Code requirements that these factors be considered aggravating. However, even when they cited the need to protect women from violence as a consideration in sentencing, courts did not identify women as vulnerable to violence from men; for women, vulnerability was situational, not a permanent state caused by their gender. Courts recognized specific women alone with offenders they did not know as vulnerable, including women in prostitution, women in taxis, and women alone with a massage therapist, but not women as a whole. Moreover, in these cases,

797 R. v. B.L., supra note 480 at para 11.
798 Criminal Code, supra note 67, s 718.2(a).
799 See e.g., R. v. Malik, supra note 482 at para 43; R. v. Elbasani, supra note 484 at paras 86-87, 95; R. v. Alasti, supra note 468 at paras 39-40.
vulnerability seemed rote: courts did not scrutinize the structural forces that made these survivors vulnerable, which were created by inequality, exploited by violent offenders, and affected the harm survivors suffered; instead they treated it as an isolated fact of the case. It was particularly glaring in cases of Aboriginal offenders and survivors when courts considered offenders’ contextual factors but ignored the vulnerability of survivors.

Reinforcing doctrine, judicial discourse blurred the line between sex and sexual violence. Often, judges narrated and described sexual crimes using terms of affection and eroticism. With the words they chose, courts suggested offenders and survivors mutually participated in erotic or affectionate acts. Language obscured the presence and agency of offenders in crimes or linked offences to causes outside the offender, such as intoxication or the ‘risk’ posed by survivors. These constructions did not describe violent crimes but sexual encounters. Directly evoking rape myths, courts also suggested some doubt about the claims of survivors by using legal terms designated in cases of unproven charges, such as ‘complainant’ and ‘accused.’

Appearing throughout the case sample, these discursive themes suggest reforms have not changed the law’s perception of sexual violence as sex rather than violence, particularly in cases against adolescents and especially vulnerable women.

The case sample shows that reforms to eradicate rape myths have had the least benefit for survivors facing intersectional inequalities. As I discussed in Chapter II, other feminist researchers made similar findings: women with mental
disabilities, adolescent girls, Aboriginal women, women with institutional records or psychological treatment histories, and women in intimate relationships continue to face myths at court. However, the myths against vulnerable survivors are changing.

The Adaptation of Rape Myths

Rape myths surfaced in B.C. sentencing decisions in the 1970s and in 2011 and 2012. To my eyes, the myths in the 1970s cases were more explicit, more obviously based on old-fashioned conceptions of morality and gender roles. Within the recent case sample, the myths were subtler: morality judgments were less obvious, and gender less rigidly constructed. Although they have not eliminated rape myths in the law, legal reforms starting in the 1980s appear to have influenced judges. I also speculate that an increasingly entrenched neoliberal approach has made the myths less obvious, obfuscating them in the reasoning of rationality and risk, making them harder to spot. Rape myths are also less obvious in sentencing judgments than trial decisions because the criminal justice system has validated the conduct at issue as a crime.

In the 1970s case sample, judges considered offenders and survivors in light of their compliance with gender norms. In some cases, courts directly recorded whether or not the survivor was a virgin, with this factor influencing the offence as

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800 Benedet & Grant, “Evidentiary Issues”, supra note 267; Benedet & Grant, “Situational”, supra note 211.
801 Benedet, “Age of Innocence”, supra note 93.
802 Razack, supra note 7.
charged and convicted and, often, the judicial construction of the survivor’s harm. \textsuperscript{805}

Courts also considered the sexuality of offenders and survivors as relevant to sentencing, pathologizing survivors or offenders and understanding crimes and harms through a lens of homophobia. \textsuperscript{806}

In the recent case sample, the approach to sexual morality was different. Courts did not so directly focus on virginity or sexual identification. However, perceptions of survivors’ chastity or sexual curiosity seemed to fuel the equation of risky sexual behaviour with consent and the presumption that offences caused little harm to survivors. \textsuperscript{807} In both time frames, courts constructed some adolescents as sexualized and consenting to offences.

Similarly, in both the 1970s and recently, courts depicted some offences as non-violent. In some 1970s cases, judge characterized offences against young and adolescent girls as not violent or failed to identify offenders’ abuses of authority and dependence. \textsuperscript{808} In 2011 and 2012 cases, courts also distinguished some offences from other ‘violent’ cases, saying offenders did not use violence or minimizing the violence they committed. \textsuperscript{809}

The notion of ‘good’ offenders, not directly addressed in reforms more focused on the treatment and construction of survivors, continued from the 1970s to recent cases. In the 1970s case sample, judges portrayed ‘good’ offenders as less

\textsuperscript{805} See e.g. R. v. B.A.K., \textit{supra} note 158 at paras 1, 3, 22; R. v. Crockett, \textit{supra} note 154 at para 4.

\textsuperscript{806} R. v. Palmer, \textit{supra} note 157 at para 7.


\textsuperscript{808} See e.g. R. v. LeBlanc, \textit{supra} note 161 at para 3; R. v. B.A.K., \textit{supra} note 158 at para 22.

likely to reoffend and more deserving of lenience and compassion, with goodness based on a respectable upbringing or family status, and manners, hygiene, and work ethic. At the same time, courts also constructed offences as not the sole fault of offenders, linking crimes to offenders’ sexual dissatisfaction or inability to relate to women.

Similar thinking was evident in recent sentencing cases: judges considered ‘good’ offenders as better candidates for rehabilitation or less likely to re-offend. However, courts constructed goodness somewhat more narrowly, now largely basing it on steady employment or professional reputation as well as marital or parental status. Unlike in the 1970s, courts did not directly attribute offending to the fault of women in offenders’ lives in recent cases; instead, they more often assumed that inebriation caused men to be sexually violent and mitigated sentences on that basis. What remained constant was courts’ failure to consistently highlight offender agency and recognize the unique opportunities certain men have to offend, escape detection, and be treated leniently when convicted. Male privilege, buoyed middle-class privilege, remained intact despite reforms.

Discourse in the recent case sample also revealed that rape myths continue in how judges construct offences in language: courts portrayed sexual violence as

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813 See e.g., R. v. B.F.D., supra note 165 at paras 2-3, 11; R. v. Edelman, supra note 162 at para 2.

814 See e.g., R. v. Malik, supra note 482 at paras 9-14, 44; R. v. Yusuf, supra note 481 at paras 10-11, 35; R. v. Semchuk supra note 482 at paras 5-8, 12.

815 See e.g., R. v. Allard, supra note 483 at paras 4, 8, 18; R. v. R.N.A., supra note 474 at para 45; R. v. Wright, supra note 483 at para 107.
wanted by survivors with terms suggesting sex and intimacy, and as incited by alcohol or survivors rather than offenders. Judicial discourse evoked the myth of the unbelievable woman when courts referred to survivors as ‘complainants’ and offenders as ‘accused’ after complaints had been validated in the law. While I did not conduct a discourse analysis of the 1970s case sample, the themes within the recent cases nonetheless illustrate that rape myths continue today.

The case sample lends weight to the feminist identification of the neoliberal influence on courts’ approach to sexual violence. Within the sample, courts almost entirely ignored the gendered character and inequality of sexual offences. Because the individualistic and formal equality lens of neoliberalism did not eliminate pre-conceived notions about gender, sex, and sexual violence embedded within the law and larger society, rape myths continued in both doctrine and discourse. However, neoliberalism appeared to modify rape myths: I speculate the importance of individual autonomy in the law helped moderate discrimination, such as the requirement for chastity in women and heterosexuality in men, and the fiction that men commit sexual violence when they are denied sexual release from wives and girlfriends.

Rape myths within the case samples were likely also tempered by the phase of the process. In the past, evidence that focused entirely on the complainants’ conduct and character predominated at trial. Feminist scholars argue this focus continues, in how courts scrutinize and parse the actions of complainants to determine consent and capacity to consent instead of addressing the predatory
actions of accused men.\textsuperscript{816} Therefore, the trial phase provides more opportunity for myths about survivors. In contrast, sentencing decisions focus primarily on the offender to understand his blameworthiness, which creates space for rape myths about offenders. Indeed, most often, when myths surfaced in cases, I found they revolved around offenders and why they committed offences.

That offenders have been legally determined to be guilty also moderated myths: they could only go so far. Because courts had legitimated survivors’ complaints as valid, survivors were more or less believable but they are all, on some level, believable; offenders were more or less dangerous or blameworthy but are still criminally at fault; and offences were more or less serious or violent but are all nonetheless criminal. In the case sample, made up of rare cases where legal convictions followed violence, it makes sense that myths were restricted in scope and a matter of degree.

Finally, rape myths were less evident in sentencing due to the women’s movement and the resulting reforms in the 1980s. Legal reforms helped refocus the law away from chastity and gender norms. As a result of feminist advocacy, courts usually identified sexual violence as inherently violent, as well as a violation of individual bodily autonomy and integrity. However, the reforms have not been entirely successful. In the case sample, courts continued to fail to recognize all forms of sexual violence as violence, including violence commonly used in sexual offences, for example, coercion and abuse of unequal power. The reforms also failed to make courts recognize the context of sexual violence: gender inequality.

\textsuperscript{816} Benedet & Grant, “Consent”, \textit{supra} note 211 at 263–266, 282, 288; Benedet, “Intoxicated Women”, \textit{supra} note 253 at 459, 461.
VIII. Conclusion

Historically, legislators and judges minimized and denied sexual violence using rape myths. In doctrine and discourse, the law normalized a prevalent crime men commit against women and children, legitimizing some forms of sexual violence as acceptable sexual coercion based on gender norms that expect men to aggressively seduce women who want to be ‘taken’. Rape myths that held women and children responsible for the violence men committed against them created a fictional portrait of sexual violence within the law.

Substantive and procedural laws developed to reflect the perspectives of elite men, who viewed women and children as weak, corrupt, and not worthy of belief. On prejudices based on gender, age, race, and class, rape myths were given expression in substantive offences that barred actions against husbands or required chastity in survivors, and evidentiary rules that allowed or required evidence of the complainant’s sexual history, corroboration, and immediate complaint. These rules operated to justify incidents of sexual violence.

At the same time that legislators and judges enacted rape myths within the law, harsh penalties like the death penalty gave the impression that Canada took sexual violence seriously. However, like substantive laws and evidentiary rules, harsh sentences may have impeded convictions.

When feminist researchers identified the prejudice of the law and the gap between the rates of sexual violence and criminal conviction, they advocated for change. Reforms came in the 1970s, 1980s, and 1990s; however, despite changes to substantive and procedural laws, current feminist research shows that rape myths
continue in judicial reasoning. I chose to study sentencing because it is a site of informal and discretionary judicial decision-making as well as an area little studied by feminist researchers, making it ripe for analysis.

Sexual offender sentencing cases from B.C. in 2011 and 2012 confirmed the feminist construction of sexual offences as violence: the facts of cases revealed violence and degradation, coercion, force, manipulation, and abuse of power. The facts of cases did not show sexual offence as sex gone wrong or as bad sex, but as offenders exploiting their physical power, familial or professional authority, and male privilege against women, adolescents, and children. The case sample also confirmed the feminist characterization of sexual violence as gender inequality. While the cases left some power imbalances, barriers, and prejudice unstated, they provided enough detail to illustrate that women and adolescents facing intersectional inequalities are uniquely vulnerable to sexual violence.

However, the case sample also confirmed the law’s continuing ignorance of the gender of sexual violence. In the sample, B.C. courts resisted feminist attempts to contextualize sexual offences as gendered; courts rarely considered sexual offences in terms of their structural context. Instead, courts adopted a view of sexual violence based on individuality and autonomy. Therefore, in doctrine and discourse, survivors and offenders seemed isolated from the greater social world and offences seemed random and infrequent. This inaccurate portrayal of sexual violence also fueled courts’ continuing reliance on rape myths.
Rape Myths In Sentencing Today

The case sample illustrated that survivors continue to be vulnerable to rape myths during sentencing. By ignoring inequality, courts did not combat the discriminatory presumptions embedded in legal doctrine and discourse. Although courts were typically respectful of survivors and condemnatory of sexual offences, rape myths surfaced in constructions of harm, blameworthiness, and violence. Within the sample was the notion that some sexual offences are more like sex than violence, suggesting offences fell in a grey area between consensual sex and the stereotypical ‘real’ rape, and were consequently less serious, less dangerous, and less harmful. It was most apparent in cases of survivors facing intersectional vulnerabilities, especially in cases of adolescent survivors who were assaulted by acquaintances or strangers.

These myths are not new. They draw on historical myths that many types of sexual violence are wanted sex. Blame of survivors, minimizing harm, and pardoning offenders has become less obvious over time; however, as illustrated by the case sample, it has continued.

In the past, judges used survivors’ ‘inculpatory’ conduct to mitigate sentence length because survivors not meeting the chaste, white, middle-class ideal (and indeed many of those too) were seen as less worthy of belief and protection. This myth existed historically and continued up to the reforms: Backhouse and Drysdale found judicial discounting of harm against survivors of ‘ill-repute’; Boyle found cases where judges determined that it was less blameworthy to commit violence

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817 Backhouse, *Carnal Crimes, supra* note 38 at 426; Drysdale, *supra* note 70 at 162–163.
against women who drank alcohol with men; and I found that B.C. courts in the 1970s sometimes suggested survivors were to blame by sexualizing them while failing to consider their harm.

In some recent cases, myths continued, apparent in doctrine within principles of sentencing that ignored the vulnerability of women, use of sexual history evidence, and interpretations of violence, causality, harm, and ‘good’ offenders. Rape myths were also embedded within discourse in narratives that depicted violence as mutual and erotic, obscured offender agency, and portrayed survivors as sexual and incautious.

Decisions blended notions of morality and risk to subtly normalize violence and censure survivors, most clearly in cases of adolescents and survivors who took risks or occupied “degenerate spaces”. In these cases, courts portrayed survivors as sexualized and courting harm: the drunken girl, the sexually curious boy, the women in prostitution, and the woman going along with a sexualized work atmosphere. In other cases, courts sexualized survivors and portrayed them as ‘asking for’ by citing sexual history or reputation evidence, often disclosed by offenders to show the survivor ‘consented’ to offences. Using these myths, courts applied doctrine in a way that validated the point of view of offenders that survivors were complicit in offences.

Courts more frequently considered harm to survivors than in the past, a requirement of the Criminal Code, but they did not do this across the board. At the

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818 Boyle, supra note 62 at 175–177.
819 See generally Razack, supra note 7.
820 Criminal Code, supra note 67, s 718.2(a)(iii.1).
same time that courts constructed survivors as inciting offences, they interpreted
their harm unusually or failed to consider it at all, even while recognizing survivors
as vulnerable. Although it is possible some adolescents and vulnerable women were
not traumatized by offences or were harmed less than other survivors, it seems
more likely that courts were less able to recognize their harm within lives of ‘risk’ or
to see it as exacerbated, not lessened, by their vulnerability.

Judicial language also undermined the credibility of survivors with the terms
‘complainant’, ‘accused’ and ‘defendant’ despite convictions or guilty pleas. With
these words, courts suggested offenders could be innocent.

The theme that sexual offences were, in some cases, more akin to consensual
sex was reproduced in how judges constructed offences. In some cases, judges
downplayed direct violence, force, or threats evident in the facts. They also
categorized some offences as non-violent based on stereotypical notions of violence.
The most obvious of these cases were when judges found that survivors consented
to offences, in spite of their legal incapacity to do so, based on their youth and
therefore vulnerability in relation to the offender.

Drawing on myths about real rape being committed by strangers, courts
characterized some offences as opportunistic and some as predatory, a distinction
seemingly based on prior acquaintance or pre-planning. This distinction as well as
the interpretation that stranger offences were especially serious ignored the reality
of sexual violence based of rape myths.

In some cases, courts used doctrine and discourse to construct offences as
‘mistakes’ or ‘advances.’ By downplaying sexual violence as a ‘mistake’, courts
breathed life into the myth that sexual violence is a miscommunication between men and women, committed by well-meaning men trying to form a romantic connection. These constructions reinforced the gender norm of males as sexually aggressive and women as passive. It also placed the onus on women to resist or respond and trivialized sexual assaultive touching.

Judicial discourse that conveyed ideas of mutuality and eroticism rather than violence and force reinforced the idea of sexual violence as wanted sex. Using erotic and affectionate language as well as neutral language, terms like ‘intercourse,’ ‘sex,’ ‘oral sex,’ and ‘fondle,’ to describe sexual violence confused it with consensual sex, blurring the legal distinction between the two. By using these terms, courts also legitimized and prioritized the perspectives of offenders while denying the perspectives and experiences of survivors of force, fear, and loss of control. As I discussed, judges may have used this language to sanitize offences, making the facts easier to bear; however, it misrepresented the horrific nature of sexual violence within the law.

When courts characterized sexual offences as violent, they were also portrayed as committed by men acting individually and irrationally. Courts presumed that intoxication caused sexual violence, isolating offences from social influences like inequality. Although courts sometimes considered offenders’ misogyny, they did not identify inequality as causing and contributing to sexual violence. Attributing crimes to intoxication rather than offenders’ choices to be violent had a similar effect as denying the violence of offences: it reframed offences as not inherently and essentially violent and refocused agency outside offenders.
Courts also obscured offenders’ agency by grammar. In some cases, the language judges used made offences appear to occur on their own, without the direct involvement or agency of offenders. Using passive voice and nominalizations, courts sometimes removed offenders from narratives of their crimes. As well, sometimes courts presented survivors as co-agents to sexual offences.

Within the case sample was the myth that ‘good’ men are not real sexual offenders. Courts saw employed, family, church-involved, and reputable men as less blameworthy, more amenable to rehabilitation, suffering greater consequences from criminal conviction, and less likely to reoffend. As argued by Balfour and Du Mont, these offenders are more often deemed to be manageable in the community and worth the risk to the public for the contributions they make to society. Poor men, racialized men, or single men, men not making the contributions expected under the white middle-class ideal, can perhaps be scapegoated as less likely to change their stripes and less worth the risk to the community. Courts ignored the power imbalances that uniquely positioned men to abuse their positions and statuses to find targets for offences, to coerce or manipulate survivors into silence, and to escape punishment. Courts did not question the relevance of evidence of ‘goodness’ to offenders’ blameworthiness, or to the recognition of harm, insight, or empathy for survivors they or their communities or families showed.

I caution my findings do not speak to judges’ intention to discriminate. Typically, I observed that judges were respectful of survivors and careful in their constructions of sexual offences as violent and harmful. Nonetheless, intention is not

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821 Balfour & Du Mont, supra note 179 at 718–722.
necessary to reproduce rape myths. Like all of us, judges are steeped in an unequal society, socialized into gender roles, and exposed to ‘commonsense’ stories about rape and sexual violence. Judges are also situated within a legal institution with a long history of constructing sexual violence according to rape myths. These influences are not only powerful, but also invisible.

Unfinished Reforms

The goals of the feminist intervention in the law beginning in the 1970s were substantive equality and the elimination of rape myths. That these goals have yet to be achieved suggests reforms have not been entirely successful. By tracking the law’s use of rape myths up until now, we see that they are less explicit and perhaps less common; we also see that they have sometimes changed guises, from chastity and morality to rationality and caution; in other senses, we see that they have changed little, if at all.

While acknowledging that prejudice continues, some feminist scholars see the law’s potential to promote women’s equality. Vandervort argues Canada’s law of affirmative consent is sufficiently robust to safeguard the sexual autonomy and self-determination of women. She argues that the continuous use of stereotypical beliefs about survivors and misunderstandings of the law by police, prosecutors and judges contribute to the failure of the law to reach its potential.\textsuperscript{822} Wright holds a similar view, finding the problem not with the law but with dominant social beliefs and attitudes that act as “an obstacle to realizing the social benefits of a revised sexual

\textsuperscript{822} Vandervort, \textit{supra} note 185 at 438–442.
assault law.”823 She argues the law can be transformed with the redefinition of consent, in both legal and social narratives, “to empower women and men to create new sexual scripts that are not limited by the faults of the old one.”824

Although the law of affirmative consent is undercut by social norms, including the currency of rape myths in wider culture, the problem is arguably more fundamental. Liberalism and neoliberalism individualizes sexual offences, rendering them as isolated events between offenders and survivors. This perspective ignores the reality of sexual violence: it ignores the contextual restraints that make actions or circumstances of survivors unavoidable or necessary, instead portraying them as risky, and it ignores the social power and privilege of offenders and the prevalence of their violence, instead portraying offences as arising from illogicality or loss of control. As discussed by Gotell, “[v]ulnerability is reconstructed as a failure of responsibility and women who occupy spaces of risk become reframed as sexual threats, thereby legitimizing and normalizing deviations from responsibilized masculine sexual subjectivity.”825 As a result, women facing intersectional inequalities are less likely to find reforms have transformed the law: as my study and others before it have illustrated, reforms have had less influence on the experiences of the most vulnerable women in the criminal justice system.826

McIntyre and her contributors persuasively identified the problem with the formal equality approach to sexual violence:

823 Wright, supra note 197 at 201.
824 Ibid at 203.
825 Gotell, “Rethinking Consent”, supra note 1 at 898.
826 See e.g. Benedet & Grant, “Consent”, supra note 211; Benedet, “Age of Innocence”, supra note 93; Gotell, “Tracking Decisions”, supra note 189.
Gender neutral language and rules only obscure gender specific problems and, particularly the linkages between sexualized violence, systemic social inequality and the systemically unequal treatment of rape survivors in and by law. De-sexing legal language and rules does not de-sex the context in which sexual violence occurs, is (infrequently) reported and is legally processed; nor does it de-sex the "common sense" or subjective premises underlying relevancy determinations. Finally, the (hetero)sexist, racist, ablist and classist biases and stereotypes about "women" as a class or about particular constituencies of women that distort the fact finding process are not "irrational" biases curable with a little education once exposed to light. They are the predictable outcomes of systemically institutionalized relations of domination which rationalize expropriations in a variety of forms, including sexual.827

Essentially, reforms that treat all individuals alike do not combat the reality of sexual violence and the structural inequality that enables it; nor do they oust discriminatory presumptions embedded in legal doctrine and discourse, as well as public consciousness, which result from institutional-and ideologically-supported inequality.

Dismantling inequality in society may be necessary to truly address inequality in the law, but a more preliminary step would simply be for the law to recognize its existence and influence. When inequality is not a consideration in interpreting and applying the doctrine of consent, the restrictions on sexual history evidence, the seriousness of offences, or offenders’ blameworthiness, equality is not likely to emerge.

To achieve a sexual assault law based on equality rather than rape myths, equality must be considered. According to the L’Heureux-Dubé J., the law must be cognizant of the gender inequality underlying sexual violence and the law.828 My findings point to the same conclusion. One way of doing this would be to ensure that

827 McIntyre, supra note 23 at 78.
828 L’Heureux-Dubé, supra note 11 at 4.
judges are cognizant of inequality in how they interpret and apply doctrine and the discourse they use.

I have considered in a preliminary fashion factors that would recognize gender and other forms of inequality, or what I consider to be a feminist approach to sentencing. A fulsome analysis of the best factors for an equality analysis and what legal reforms would be necessary to ensure courts consistently considered these factors in sentencing are beyond the scope of this thesis; perhaps this is an area for further research. That said, I suggest this approach would reject factors that rely on rape myths for their relevance and rationale. Instead it would focus on inequality and vulnerability as experienced by both survivors and offenders.

To assess the seriousness of the offence, courts consider a number of factors, among them violence and whether the offender was predatory. Relying on Benedet's and Grant's works on the doctrine of consent in the context of adolescents and women with cognitive disabilities, I suggest courts should consider the vulnerability of the survivor relative to the power of the offender and the offender’s exploitation of the survivor's vulnerability. Using this sort of analysis, courts would meaningfully consider factors relating to inequality and vulnerability: gender; age; positions of authority, trust or dependence, including within families, workplaces, and schools; incapacity; disability; Aboriginality; and so on.829

By considering inequalities and vulnerabilities when addressing force, violence, and whether survivors ‘agreed’, courts could more readily recognize

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829 Benedet, “Age of Innocence”, supra note 93 at 680–687; Benedet, “Registry”, supra note 368 at 453–456; Benedet & Grant, “Consent”, supra note 211 at 284–286; See also Benedet & Grant, “Situational”, supra note 211.
coercion, manipulation, and power relationships that make survivors, particularly adolescent survivors, feel that they cannot say no or resist, helping courts resist equating physical passivity or conditioning with consent. Courts could also identify the blameworthiness of exploiting vulnerability and consider the cumulative harm to survivors vulnerable to abuse and violence. For example, in considering gender, class, and racial inequality in a case of sexual violence against a woman in prostitution, courts could see the offender's sexualization and objectification of poor and Aboriginal or racialized women, helping them identify the survivor’s vulnerability, but also the violent and exploitative nature of the offender's crime and the cumulative harm to women who experience frequent and serious violence. Courts could recognize the perpetrator’s offence against a woman in prostitution as reproducing inequality: a part of what keeps her vulnerable, marginalized, and unequal, and constructs her as an appropriate target for male sexual violence.

Courts should not stop looking at the level of violence offenders commit, but should broaden their understanding of violence to coercion, manipulation, and exploitation. As suggested by others, rather than comparing offences to a stereotypical rape, a better approach would be to consider the violence and harm as experienced by the survivor, including fear, humiliation, loss of trust, physical injury, and psychological trauma.830

To recognize the prevalence of sexual violence across society, an analysis cognizant of gender inequality would also limit the relevance of factors in sexual offender sentencing such as an offender’s professional standing, educational

830 See generally Boyle, supra note 62 at 180; Pasquali, supra note 51 at 25, 27; Goldsberry, supra note 91 at 111.
attainment, family status, community reputation, or church allegiance, beyond the positive support family, friends, and community offer in rehabilitation. Further, courts would challenge the support offered, ensuring that individuals, institutions, and communities supporting the offender considered whether they played a role in facilitating the circumstances within which the offender committed sexual violence or in failing to support the survivor. An equality analysis would also question the link between intoxication and abuse, and consider whether alcohol or drugs were causative agents or rather excuses for the offender to act on his belief he could dominant and control women.

Of course, some factors should be mitigating. I argued at the end of Chapter V that courts should continue to consider factors that situate the offender in a social world that normalizes and justifies violence to ensure they do not blame the individual entirely for society's sexism. They should also consider the offender's own experiences of inequality and subordination, including the legacy of colonialism and experiences of sexual abuse, to assess how the offender learned to commit violence.

A feminist analysis would also require judges to critically examine the language they use to narrate sexual violence. Courts would question whether their language reflects the offender's or the survivor's perception of the crime. Courts would ensure language describing sexual assault conveyed that it was forceful, violent, and frightening, and committed solely by the offender. Using this approach, judges would refrain from using language that eroticized offences, sexualized survivors, or painted the offender's motivations as intimacy or affection. They would
question whether survivors appeared relatively unimportant or seemed to incite offences in their written decisions. They would also ensure that the terms they use to identify offenders and survivors reflect the legal finding of guilt and validation of the survivor's complaint.

A judicial commitment to equality in doctrine and discourse does not require courts to order longer or harsher sentences for sexual offenders. In fact, a consideration of equality factors may suggest the need for greater lenience and mercy: when the linkages between sexual violence and inequality are recognized, the responsibility and complicity of social institutions and the discrimination certain offenders face may become apparent. Considered in the context of inequality, sexual violence is not an offence committed entirely by the offender, but an offence supported by larger forces. Individual responsibility is a pillar of our criminal justice system; however, gender inequality is a larger problem for which we are all responsible.

If sexual violence is contextualized as an expression of gender inequality, maybe courts will rid themselves of the tendency to see some acts of violence as sex and to rely on rape myths altogether. Once it has eliminated discrimination and inequality within legal doctrine and discourse, the law will be better placed to use its powerful voice to challenge social stereotypes about sexual violence and women and to promote women’s equality in Canadian society.
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LEGISLATION

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