

**SUBTLE EXPRESSIONS OF GENDER INEQUALITY: EXPLORING THE  
APPLICATION OF AGGRAVATING AND MITIGATING FACTORS IN SENTENCING  
DECISIONS FOR SEXUAL ASSAULT OFFENCES**

by

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## **Abstract**

Sexual assault is a serious and prevalent crime in Canada, and the legal responses addressing this phenomenon represent a failure to truly understand its causes and harms. From the justice system's first interactions with those affected by sexual assault to the highest levels of appeal, the legal system has shown an inability to conceptualise this offence as a systemic issue of oppression that is deeply connected to equality rights. This failure is well-illustrated in the sentencing decisions resulting from these cases: they are unpredictable, often justified using a variety of rape myths that diminish the effects of the crime, and encourage society to view sexual assault as a far less serious offence than it truly is.

The academic literature on this topic, however, is sparse. This thesis fills part of that gap by exploring the use of aggravating and mitigating factors in sexual assault cases through a feminist lens. These factors prompt the courts to either increase or decrease sentences. They are meant to humanise and contextualise the sentencing process; however, their use is negatively influenced by rape myths and stereotypical assumptions about gender and the crime of sexual assault. In order to demonstrate the validity of this claim, a case law survey was prepared to qualitatively investigate contemporary jurisprudence from Ontario. The results of this research showed that aggravating factors were not consistently used when relevant, and often applied in a manner that minimised the harms suffered by the complainant. Mitigating factors, on the other hand, were used to disproportionately favour the offender by justifying or excusing his criminal behaviour. While some decisions showed that aggravating and mitigating factors can be used in a manner that challenges systemic issues of gender discrimination, this capacity for progressive change was largely ignored.

## **Preface**

This thesis is the original, unpublished, and independent work of the author.

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## **Dedication**

To my endlessly patient partner, Vince, who followed me across the country without complaint, cooked me countless meals when I was too absorbed in writing to leave my desk, and was always ready to listen when I needed to talk about law-related ideas and frustrations.

## Chapter 1: Introduction

Sexual assault is a serious and prevalent crime in Canada, and the legal responses addressing this phenomenon represent a failure to truly understand its causes and harms. From the justice system's first interactions with those affected by sexual assault to the highest levels of appeal, the legal system has shown an inability to conceptualise this offence as a systemic issue of oppression that is deeply connected to equality rights. This failure is well-illustrated in the sentencing decisions resulting from these cases: they are unpredictable, often justified using a variety of rape myths that diminish the effects of the crime, and encourage society to view sexual assault as a far less serious offence than it truly is.

Despite the problems in this area, the academic literature on this topic is under-theorised. A series of reports on sentencing for sexual assault offences was released during the 1990s that commented on issues such as proportionality, judicial language, and the use of rape myths in legal interpretation.<sup>1</sup> However, little has been done to update this work in the past two decades, leaving a substantial gap in feminist legal analysis.

In this thesis, I fill some of these scholarly voids by demonstrating how the justice system's impoverished understanding of sexual assault continues to lead to a breakdown in sentencing theory for these cases. As a full review of sentencing faults for sexual assault offences is far too large a task for a graduate thesis, I focus on only part of this problem: the issue of aggravating and mitigating factors. Specifically, I claim that aggravating and mitigating factors are being used in a manner that reflects discriminatory and stereotypical assumptions about

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<sup>1</sup> For example, see: Julian V Roberts, *Sexual Assault Legislation in Canada: An Evaluation: Sentencing Patterns in Cases of Sexual Assault* (Ottawa: Department of Justice, 1991); Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994); and Paula P Pasquali, *No 35 – No Rhyme or Reason: The Sentencing of Sexual Assaults* (Ottawa: Canadian Research Institute for the Advancement of Women, 1995).

gender and the crime of sexual assault, and that these assumptions unjustly disadvantage female complainants on the basis of their gender. Given the fact that sentencing is focused on the offender, systemic concerns involving complainants are often left out of the process, and this absence can allow harmful and inequitable considerations to influence decisions. Thus, even though sexual assault law went through a series of reforms to ensure that gender discrimination was not affecting the operation of the law on this subject, these attempts are undermined by the discretionary and often overlooked area of sentencing.

## **1.1 Research Objectives**

The objective of this thesis is to provide an overview of the current practices involving the application of aggravating and mitigating factors in sexual assault cases. The specific questions and topics that will be addressed are:

1. How are aggravating and mitigating factors being used in sexual assault offences in Ontario, and does their application reflect discriminatory beliefs about this form of gender-based violence?
2. What feminist critiques and analyses can be applied to the contemporary usage of these sentencing tools for sexual assault offences?
3. What is a more appropriate framework for the use of aggravating and mitigating factors that takes into consideration an equality analysis?

## **1.2 Hypothesis**

Given the discriminatory assumptions plaguing other aspects of sexual assault law, my project was designed with the assumption that these oppressive beliefs are being replicated in the area of sentencing. As the sentencing process is an understudied and highly discretionary process, it is easy for rape myths to be perpetuated without much oversight. As such, I predicted

that I would find both subtle and outright expressions of oppressive and inequitable beliefs being expressed in sentencing decisions. Furthermore, aggravating and mitigating factors represent a particularly troublesome part of the sentencing process given both their importance in decisions, as well as the fact that they allow a court to frame case facts in a way that can minimise and trivialise the harms of sexual assault and the culpability of the offender. Thus, my thesis is aimed at reviewing a number of sentencing decisions through a feminist lens to unpack and critique instances of systemic gender inequality, as well as to construct better interpretations that balance the need to protect the offender from the harsh power of the state with the need to respond seriously to an example of widespread gender violence.

### **1.3 Methodology**

My thesis involves a balance of doctrinal research and normative analysis, and I will apply several different methodologies to my work. The first draws on feminist legal theory to help me uncover and focus on the gendered aspects of law. According to Catharine MacKinnon, the legal system is constructed around masculine values and understandings, and this leaves the needs of women neglected or actively harmed.<sup>2</sup> As such, those working in law must deconstruct the parts of the legal system that promote discrimination. In the realm of sexual assault law, a crime that is disproportionately perpetuated against women, feminist legal theory helps scholars make systemic reform recommendations with a better understanding of what is needed to address the oppressive causes underlying the offence, particularly those caused by the legal system itself.

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<sup>2</sup> Catharine A MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence” (1983) 8 Signs 635 at 655-656.

The bulk of my research consists of a case survey of 147 sentencing decisions from Ontario between the years of 2011 and 2013. I drew on other qualitative projects to help me construct a set of methodologies to gather data in a reliable, manageable, and useable manner.<sup>3</sup>

After I gathered this data, I used my normative framework to guide my interpretation of the information. This project is qualitative as the data I am working with is textual. Consequently, I applied critical discourse analysis to challenge the embedded inequitable assumptions in sentencing law. Critical discourse analysis explores how language is used to create social realities, and it is a powerful tool to use when analysing court material that is meant to reflect what society believes is right and wrong. Additionally, I drew on some aspects of grounded theory to code my data.

## **1.4 Chapter Overview**

### **1.4.1 Chapter 2: Defining my Normative Framework: An Introduction to Feminism and Sexual Assault**

The first chapter of my thesis is dedicated to providing readers with an overview of the theoretical framework that I use to structure my research. My project is not simply a descriptive survey of sentencing for sexual assault offences as I critique the law and make recommendations based on a set of normative analyses. I begin this section by surveying statistics about the occurrence of sexual assault in Canada. This includes a discussion of the wide gap between reported assaults and convictions. I then examine feminist understandings of rape, addressing the social causes of this crime that are founded in oppression and gender inequality. Finally, I review the current legal provisions dealing with sexual assault in Canada. I briefly explore the history

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<sup>3</sup> See chapter four for an in-depth description of these projects and the methodologies that I drew from them.

behind the development of these laws throughout the 1980s and 1990s, particularly through the lens of feminist law reform advocacy. I then address the results of this tumultuous time period, deconstructing and explaining how sexual assault provisions are interpreted and applied by the courts.

#### **1.4.2 Chapter 3: Sentencing Sexual Assault Cases: An Introduction to Sentencing Theory and Practice in Canada**

In order to understand the work that I have done, readers will need some knowledge of sentencing theory. This section is not a comprehensive review of the subject; however, I cover some of the basic principles arising in this area that apply to my research. Specifically, I address the history of the 1996 sentencing reforms, and how these changes have shaped the way that sentencing is conducted in Canada. I also touch on the justifications and principles behind sentencing, as well as some of the tools that judges use to assist them in their decisions. Finally, I review the theory and jurisprudence on aggravating and mitigating factors.

#### **1.4.3 Chapter 4: Methodologies: Explaining my Process**

This chapter describes in detail the methodologies that I applied in this project. I describe how I pre-emptively considered the possible weaknesses in my approach, and how I matched the needs of my project with appropriate methodologies. Thus, I strive to show that my findings, while not empirically perfect, reveal important truths about deficiencies within the Canadian legal system.

#### **1.4.4 Chapters 5 and 6: Results of the Case Law Survey**

Chapters five and six comprise the bulk of my thesis as they review the results of my case law survey. In these two sections, I discuss what I have uncovered in terms of the contemporary

use of aggravating and mitigating factors in Ontario. My focus is on exploring and unpacking the discriminatory assumptions subtly embedded in decisions that perpetuate gender inequality.

My chapter on aggravation concentrates on the problematic way that certain factors are underutilised even when applicable, while my comments on mitigation focus on the tendency of judges to overemphasise mitigating factors in a decision or to use them inappropriately to diminish the culpability of the offender. I conclude with some general observations and concerns about the use of these two tools as a whole.

#### **1.4.5 Chapter 7: Recommendations for Reform**

In the final chapter of my thesis, I address some of the institutional changes that will be necessary to reform the way that aggravating and mitigating factors are currently being applied. While chapters five and six go into detail about how the factors themselves can be reinterpreted to better foster gender equality, this chapter discusses how feminist legal advocates can work to implement these more equitable interpretations. I focus on the possibilities offered by legislative reform, policy and regulatory changes, as well as judicial education, commenting on the strengths and weaknesses of each approach. I also briefly discuss whether traditional custodial sentencing is an ethical system for feminists to support at all.

#### **1.5 Conclusion**

This chapter provided an overview of my research questions and central thesis regarding the use of aggravating and mitigating factors in sexual assault cases. It operates as a guide for the overall project, detailing what each successive chapter will contain.



## **Chapter 2: Defining my Normative Framework: An Introduction to Feminism and Sexual Assault**

Analysing the use of aggravating and mitigating factors in sexual assault cases touches on a wide range of legal knowledge. When looked at broadly, the focus is on criminal law, but from a narrower perspective, the project deals with sentencing and offences. Within sentencing, only two specific tools are being studied (aggravating and mitigating factors), and only in the context of one offence (sexual assault). These issues of substantive law are explored through a normative framework (feminism) that offers specific understandings about sexual assault and the law's interaction with this crime. Thus, in order to properly situate and contextualise my topic, this thesis begins with a brief overview of feminism and the substantive law that readers need to be familiar with in order to understand this project.

### **2.1 Feminism: A Movement of Theory and Practice**

Before exploring feminist legal theory, it is helpful to start by asking the question, what is feminism? After all, feminism is often maligned and misconstrued as a movement dedicated to the hatred of men and the superiority of women.<sup>4</sup> Consequently, it is important to rebut the myths and misconceptions about this normative framework to ensure that readers are exposed to an accurate definition that focuses on issues such as rights and equality.

According to the Merriam Webster dictionary, feminism is a theory of “the political economic, and social equality of the sexes”, as well as any “organised activity in support of

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<sup>4</sup> For example, see: Susan Faludi, *Backlash: The Undeclared War Against American Women* (New York: Crown Publishers, 1991).

women's rights and interests".<sup>5</sup> Even this most simple and accessible definition of feminism blends both theory and practice into one framework. To be feminist means that one must believe that all genders should be treated equally, but that this equality is not yet a reality. Thus, feminism as a theory seeks to understand why gender inequality occurs, and why gender is so often a focal point for oppression and discrimination. To answer these questions leads one to contemplate how these inequities can be resolved, so feminist theory leads directly to feminist action. This two-part definition combats the claims that feminism is either made up of ivory-tower theorists who are unconnected to the "real" world, or overly excitable, hysterical women who protest at the merest perceived slight.<sup>6</sup> Instead, feminism is a carefully theorised area of scholarship that leads to organised and well-crafted activism.

However, this simple dictionary definition does not capture the full scope of what the movement is trying to do as it focuses too much on the end results being worked for, and not enough on why feminism is necessary for society. bell hooks provides a better definition by stating that feminism is "a movement to end sexism, sexist exploitation, and oppression".<sup>7</sup> By

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<sup>5</sup> "feminism" Merriam Webster, online: Encyclopedia Britannica <<http://www.merriam-webster.com/dictionary/feminism>>.

<sup>6</sup> Heather Ruth Wishik, "To Question Everything: The Inquiries of Feminist Jurisprudence" in D Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* (Philadelphia, Temple University Press: 1993) 22 at 25; Clare Dalton, "Where We Stand: Observations on the Situation of Feminist Legal Thought" in D Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* (Philadelphia, Temple University Press: 1993) 32 at 32; Martha Albertson, "Feminist Legal Theory" (2005) 13 AM UJ Gender Soc Pol'y & L 13 at 14.

<sup>7</sup> bell hooks, *Feminism is for Everybody: Passionate Politics* (Cambridge: South End Press, 2000) at p1. It is important to note that while hooks uses the term "sex", I use the phrase "gender inequality" to describe oppression and discrimination faced by women as it is the accepted term used by most academics. Often gender and sex are used interchangeably, but the two terms do have distinctly different meanings. Gender describes the socially constructed roles that people take on in society that accord with either supposedly feminine or masculine traits while sex describes a person's biological characteristics. Both are important lenses to view the crime of sexual assault through, and this paper is talking specifically about sexual assault perpetuated against individuals whose sex and gender is described as female. It should also be noted that in the context of law, equality guarantees are generally framed as sex equality guarantees. Thus, the terminology in this paper will sometimes shift depending on what is being described, though gender remains the primary term to accord with the standard language used by scholars in this field.

identifying these three issues as the root of what feminism is combatting, hooks ensures that the movement is constructed to respond to systemic problems that everyone in society has the power to affect. While male domination is an essential and significant reason as to why gender inequity exists, gender inequality hurts everyone in society, and everyone, regardless of their gender, helps to perpetuate discrimination in some manner.<sup>8</sup>

Feminism, however, has historically been – and largely remains – a women’s movement. Women constitute over fifty percent of the world’s population, but are often treated as a minority group. In a world where the dominant norms have largely been defined by men, women have been “othered” and subject to oppression because of their difference for generations.<sup>9</sup> In response to this mistreatment and discrimination, women have risen up and protested the way that their identities have been circumscribed by society. According to Faludi:

Feminism asks the world to recognise at long last that women aren’t decorative ornaments, worthy vessels, members of a “special interest” group. They are half... of the [US] population, and just as deserving of rights and opportunities, just as capable of participating in the world’s events, as the other half. Feminism’s agenda is basic: It asks that women not be forced to ‘choose’ between public justice and private happiness. It asks that women be free to define themselves – instead of having their identity defined for them, time and again, by their culture and their men.<sup>10</sup>

While feminism will benefit everyone, it is women who often have the most to gain as it is their very personhood and identities that have been denied.<sup>11</sup> Feminism, therefore, is a way of demanding access to political and social power, and the right to determine and control our own lives.

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<sup>8</sup> *Ibid* at IX.

<sup>9</sup> *Supra* note 2 at 636.

<sup>10</sup> *Supra* note 4 at XXII.

<sup>11</sup> For example, in Canada, women were not considered full persons under the law until the Persons case was heard in 1929. This decision was issued less than a century ago. See: *Edwards v Canada (Attorney General)*, [1930] AC 124, 1929 UKPC 86.

## 2.2 Feminist Legal Theory

Feminist legal studies solidified as an area of research in the 1970s.<sup>12</sup> Its birth followed closely after the dramatic rise in the number of female law students in the 1960s, and the theoretical framework owes much of its beginnings to the critical legal studies movement as well as second wave feminism.<sup>13</sup> While critical legal studies had been the dominant voice to criticise the oppressive foundations of the legal system, it was a movement that often ghettoised women, and neglected to pursue gender concerns in any meaningful way.<sup>14</sup> It presented a new and more progressive method of looking at and possibly doing law, but one that did not engage deeply with concerns about gender equality. Feminist legal theory, therefore, sought to apply feminist perspectives and critiques to law, an area that had been largely insulated from such discussions, particularly from an internal perspective. For example, scholars have long challenged the idea that the law is neutral and objective, but feminist legal theory allowed women to talk about and unpack the ways in which the law is often socially coded as masculine, and how this framing of the law has been used to disguise and hide gender oppression.<sup>15</sup> Feminist legal theory also pushed scholars to talk about more than the effect of single cases or pieces of legislation, and started a conversation about how law as a system was embedded with discriminatory assumptions about gender that served to perpetuate these ideals in society at large.

## 2.3 Exploring Sexual Assault through Theory and Law

One of the central reasons that I am using feminism as a normative lens is that sexual assault is a crime tightly linked with issues of oppression and gender inequality. The statistics

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<sup>12</sup> D Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* (Philadelphia, Temple University Press: 1993) at XV

<sup>13</sup> *Ibid* at XVII.

<sup>14</sup> *Ibid*.

<sup>15</sup> Katharine T Bartlett, “Feminist Legal Methods” (1990) 103 Harvard L Rev 829 at 837. A more in-depth discussion of this concept can be found in chapter four of this thesis starting on page 45.

about the incident rates of this offence reveal that it is gendered crime. In 2007, only 3 percent of those charged by the police with a sexual assault offence were women, but 86 percent of the victims of sexual assault were female.<sup>16</sup> It is a disturbing trend to see how this one offence is committed almost exclusively by men against women and girls.<sup>17</sup>

Sexual assault is also severely underreported. In 2004, about 460,000 women reported being sexually assaulted in a crime victimization survey, yet only 8 percent of these women reported the crime to the police.<sup>18</sup> The General Social Survey on Victimization indicates that reporting rates for sexual assault are substantially lower when compared to other violent crimes, and that reporting rates declined for this offence from the late nineties to the early 2000s.<sup>19</sup> Sexual assault remains an outlier among violent crimes as one that individuals do not want to report, often for fear of the stigma that is associated with being a victim, particularly one that has to be a witness in the criminal justice system.<sup>20</sup> Even though reporting a sexual assault to the police is the only way that women can obtain state-level justice, the harms of going through this process can be too high for many women to bear, ensuring that many sexual assaults are not even brought to the attention of the legal system.

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<sup>16</sup> Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 613 at 613.

<sup>17</sup> In 2007, 58% of sexual assault victims were under the age of 18, and children under 12 accounted for 25% of this number. 81% of these underage victims were female. Shannon Brennan and Andrea Taylor-Butts, "Sexual Assault in Canada in 2004 and 2007" *Canadian Centre for Justice Statistics Profile Series* (December 2008), online: <<http://www.statcan.gc.ca/pub/85f0033m/85f0033m2008019-eng.pdf>> at 13.

<sup>18</sup> Maire Gannon & Karen Mihorean, "Criminal Victimization in Canada, 2004" *Juristat: Canadian Centre for Justice Statistics* (November 2005), online: Statistics Canada – Catalogue no 85-002-XPE, Vol 25, no 7 <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2005007-eng.pdf>> at 25.

<sup>19</sup> Tina Hatten, "Highlights from a Preliminary Study of Police Classification of Sexual Assault", (2007) 14 *Just Research* 32 at 32. To put this conversation in context, according to a Statistics Canada publication, reporting rates in 2004 for robbery and physical assault were 47% and 40% respectively, much higher than reporting rates for sexual assault. *Supra* note 17 at 8.

<sup>20</sup> *Supra* note 16 at 614.

In response to these realities, sexual assault has been studied in depth by feminist scholars, both from inside and outside of the legal field. One of their central goals has been to explain why sexual assault happens, and how the offence is a mirror of gender inequality and sexism in society. Many feminists have argued that sexual assault is a crime about power rather than sex. According to MacKinnon, “[to] be rapable, a position which is social, not biological, defines what a woman is”.<sup>21</sup> If being female is a social construct that is created and used by men to secure power, then sexual assault is one way of enforcing this artificial gender division and asserting social dominance. Some may protest this idea, stating that men do not use sexual assault as tool of organised oppression, and that sexual assault is the fault of a few bad individuals who society should condemn. Feminist conceptions of rape culture, however, help further explain MacKinnon’s position.

The term rape culture recognises the way in which society is constructed to “[condone] physical and emotional terrorism against women” in such a way as to delegitimise the harms caused by sexual assault and to frame violence as inevitable.<sup>22</sup> For example, rape culture is reflected in our criminal justice system in how victims of the crime are (mis)treated and presumed to have been at least partially responsible for their sexual assault. Furthermore, harms to the accused are centered, leading to unjust case results and the minimisation of the societal and individual harms of the crime. Thus, while sexual assault is technically considered an egregious breach of the law, this is only a shallow understanding of how the law treats this crime. In reality, many sexual assaults are dismissed as not particularly damaging, victims are judged based on a series of stereotypical assumptions that are meant to reflect their worthiness as

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<sup>21</sup> *Supra* note 2 at 651.

<sup>22</sup> Emilie Buchwald, Pamela Fletcher & Martha Roth, eds, *Transforming a Rape Culture*, revised ed (Minneapolis: Milkweed Editions, 2005) at xi.

a victim, and the entire issue is framed as an unfortunate reality that women just have to accept will always happen.<sup>23</sup> Sexual assault, therefore, is a gendered crime that is tightly linked with oppression and gender inequality. According to feminist theory, it is a crime that causes a systemic violation of women's rights, and one that society is not yet taking seriously.

Feminist theoretical work on sexual assault has led to several areas of legal activism, including substantial efforts at law reform. Sexual assault laws were revised in 1983 in order to improve reporting rates and decrease attrition rates by addressing discriminatory and sexist attitudes about female victims of the offence, and improving rules regarding evidence and jury instructions.<sup>24</sup> The offence was also de-gendered in order to comply with the new norms of equality as introduced by the *Charter of Rights and Freedoms*, and the violence of the act was emphasised rather than the sexual nature of the crime.<sup>25</sup> Demands for reform continued throughout the 1990s, resulting in changes to areas such as the third party records process, and the creation of an affirmative consent standard.<sup>26</sup> However, work in this area has stalled in recent years despite governmental focus on criminal law. Gotell suggests that this shift signifies a move away from an era of law reform that saw sexual assault as an example of systemic gender inequality to a neo-liberal era where the problem is individualised and understood as a personal issue of responsibility and self-protection.<sup>27</sup> Consequently, the application of sexual assault law

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<sup>23</sup> See three case examples discussed in detail in the following article: Lucinda Vandervort, "Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson, Kindrat, and Brown*" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 111.

<sup>24</sup> *Supra* note 16 at 614.

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

<sup>26</sup> Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge, 2010) 209 at 210-214.

<sup>27</sup> *Ibid* at 221.

has remained largely unchanged for the past two decades, and problematic and harmful interpretations are still being applied.

### **2.3.1 The Laws Governing Sexual Assault in Canada**

Now that this paper has looked at how sexual assault is understood within society and through a feminist lens, it is helpful to see the crime as it is constructed under the law. While this project is looking specifically at sentencing, the structure of the offence influences how the case will be constructed, and what facts will become relevant for sentencing.

The central provisions dealing with sexual assault in Canada are sections 271, 272, and 273 of the *Criminal Code*. These provisions create a three-tier structure for dealing with sexual assault that separates the offence into different categories of harm. The lowest tier of the offence comes from section 271, and it states that everyone who commits a sexual assault is guilty of either an indictable offence with a maximum period of imprisonment of ten years, or a summary conviction with a maximum period of imprisonment not exceeding 18 months.<sup>28</sup> Almost all sexual assaults are charged under this provision, and many of them as summary offences.<sup>29</sup>

Section 272 of the *Code* deals with sexual assaults that are committed with the use of or threat of use of a weapon, threats to cause bodily harm to a person other than the complainant, actual bodily harm caused to the complainant, or for parties to the offence.<sup>30</sup> Section 273 of the *Code* deals with aggravated sexual assaults where offenders wound, main, disfigure, or endanger the life of the complainant.<sup>31</sup> These provisions can only be proceeded with on indictment, the sentencing maximums have been increased, and certain mandatory sentences are applied when

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<sup>28</sup> *Criminal Code*, RSC 1985, c C-46, s271.

<sup>29</sup> Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15 CJWL 305 at 322.

<sup>30</sup> *Supra* note 28 at s272.

<sup>31</sup> *Ibid* at s273.



the offender engages in additional culpable behaviour, such as using a firearm, or the victim is under 16 years of age.<sup>32</sup>

Thus, the criminal law recognises that the offence of sexual assault can take many forms, and that there are certain actions that, when conducted concurrent to the offence, increase the culpability of the offender. However, these provisions do not answer the question of what sexual assault actually is. According to section 265(1)(a) of the *Code*, a person commits an assault when “without the consent of another person, he applies force intentionally to that other person”, and section 265(2) states that this definition applies to all sexual assaults as well.<sup>33</sup>

This definition is applied to the specific context of sexual assault in *R. v. Chase* where the court stated that a sexual assault is one that is committed “in circumstances of a sexual nature, such that the sexual integrity of the victim is violated”.<sup>34</sup> The test applied to determine whether a *sexual* assault has occurred is framed objectively, and asks whether “viewed in light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?”<sup>35</sup> According to the court, “the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant” in determining whether a sexual assault occurred.<sup>36</sup> The specific body part touched is not determinative, and a sexual assault does not require touching of the genitals.<sup>37</sup>

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<sup>32</sup> *Ibid* at s272.

<sup>33</sup> *Ibid* at s265(1)(a). Note that s265(1)(b-c) also discusses threats of assault and use of weapons, but in the context of sexual assault, we are most interested in s265(1)(a).

<sup>34</sup> *R v Chase*, [1987] 2 SCR 293 at para 11.

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

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at para 9.

Furthermore, the intent of the accused in committing the act can be a relevant issue to consider, but is also not determinative of whether a sexual assault occurred.<sup>38</sup>

A sexual assault, as defined by Canadian law, is a very broad type of offence that goes past the common definition of rape as forced penetration. Canadian law targets all non-consensual sexual touching and sees this behaviour as harmful enough to warrant criminal sanction under the same offence as rape. This moves the interpretation of the offence away from the idea that it is merely about unwanted sex, and instead focuses on the violence that occurred. Thus, the seriousness of an offence increases proportionally to the violence that is enacted on the victim, rather than on the sexual acts performed.

Section 273.1 defines the meaning of consent for the purpose of sexual assault, and states that this must include the “voluntary agreement of the complainant to engage in the sexual activity in question”.<sup>39</sup> Furthermore, no consent will be obtained if the consent was offered by someone other than the complainant; the complainant was incapable of consenting to the activity; the accused induced the complainant into engaging by abusing a position of trust, power, or authority; the complainant expressed in either words or conduct a lack of agreement; or the complainant withdrew consent to engage in the sexual activity.<sup>40</sup> Finally, consent cannot be obtained if the complainant submitted or did not resist because of the application of force against themselves or another person, threats or fear of threats over violence to themselves or another person, fraud, or the illegal exercise of authority.<sup>41</sup> Consent is determined with reference

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<sup>38</sup> *Ibid* at para 11.

<sup>39</sup> *Supra* note 28 at s273.1(1).

<sup>40</sup> *Ibid* at s273.1(2).

<sup>41</sup> *Ibid* at s265(3).

to the complainant's subjective state of mind at the time of the impugned contact.<sup>42</sup> While accused persons do have access to a defence of honest but mistaken belief in consent,<sup>43</sup> there must be an air of reality to this claim,<sup>44</sup> and the defence cannot be founded on either self-induced intoxication, or reckless or willful blindness to the complainant's communications.<sup>45</sup>

An accused must also prove that he took reasonable steps, in the circumstances, to ensure that consent was obtained from the complainant.<sup>46</sup> According to *R. v. Ewanchuk*, reasonable steps must include affirmative communication, by words or conduct, from the complainant regarding the sexual activity in question, and "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law".<sup>47</sup> Furthermore, an accused "cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact".<sup>48</sup>

In addition to the three-tiered structure of sexual assault in sections 271 to 273 of the *Code*, there are also provisions that deal with the sexual assault of minors and individuals with disabilities.<sup>49</sup> These particular provisions were created in order to recognise the unique vulnerability of certain complainants, and to construct specific legal frameworks to deal with these situations.

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<sup>42</sup> *R v Ewanchuk*, [1999] 1 SCR 330 at para 26.

<sup>43</sup> *R v Esau*, [1997] 2 SCR 777 at para 79, 88.

<sup>44</sup> An air of reality is evidence "upon which a properly instructed trier of fact could form a reasonable doubt as to [the accused's] *mens rea*". *Supra* note 42 at para 56.

<sup>45</sup> *Supra* note 28 at s273.2(a).

<sup>46</sup> *Ibid* at s273.2(b). For a longer discussion of what the requirement of reasonable steps entails, see: Elizabeth Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 483.

<sup>47</sup> *Supra* note 42 at para 51.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Supra* note 28 at s150.1, s151, s152, s153, and s153.1.

The legal framework created to deal with sexual assault in Canada, therefore, has been carefully crafted to be able to respond to an offence that can be conducted in many ways, and one where vulnerability and violence must be acknowledged and dealt with carefully. The efforts of feminist law reformers can be seen in several areas of sexual assault law, but the law as written is unfortunately not always the law that is applied in practice.

### **2.3.2 Attrition Rates of Sexual Assault Cases**

While the actual laws on sexual assault in Canada are constructed in such a way that could allow for strong, feminist interpretations, high attrition rates show that the realities of an average sexual assault case fall short of the hopes of the feminist reformers. Attrition rates refer to the number of cases that are abandoned throughout the criminal law process. Out of every 1000 sexual assaults in Canada, only 33 are reported to the police, 29 are recorded as a crime, 12 have charges laid, 6 are prosecuted, and 3 lead to conviction.<sup>50</sup> Holly Johnson has estimated that less than one percent of all sexual assaults that occur on a yearly basis end in conviction. This high level of attrition has been called a “justice gap” by scholars who are concerned about the fact that there is such an extraordinarily low success rate in the courts for sexual assault cases that are reported.<sup>51</sup> While not every case will proceed all the way to conviction, it is a failure of the justice system when the vast majority of cases do not even make it far enough for a judge to consider whether or not to convict.

Attrition becomes a problem as soon as a sexual assault is reported to the police, as they operate as gatekeepers to the rest of the criminal justice system. A complaint must first be investigated by the police before it can move further along in the process. However, as the

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<sup>50</sup> *Supra* note 16 at 631.

<sup>51</sup> Jennifer Temkin & Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Portland: Hart Publishing, 2008) at 9.

statistics reveal, many reports do not proceed. In some cases, a refusal to allow a complaint to progress is legitimate. For example, sometimes there is no identified suspect to charge, so the file becomes dormant or closed. However, complications and problems arise when looking at the concept of unfounding. According to Statistics Canada, a sexual assault should be declared unfounded if the police have established that the assault did not actually occur or was not attempted.<sup>52</sup> Some claims, however, become unfounded simply because the victim is not believed. For example, Jane Doe, a Canadian feminist activist, sued the Toronto Metropolitan police for their negligence in investigating and warning women in a Toronto neighbourhood about a serial rapist.<sup>53</sup> In her book about her experience as a complainant in a sexual assault investigation and trial, she spoke about how the police decided that previous victims had not been raped because they had sex toys in their bedroom, or because a bowl of chips that was on a bed had not been overturned during the assault.<sup>54</sup> Unfounding in these cases had nothing to do with legitimate investigatory conclusions, but instead was based on stereotypes and assumptions about sexual assault victims. In a study by the Department of Justice, the researchers found that factors such as whether a sexual assault was committed by someone known to the victim, whether the victim was known to have mental health issues, how much force was used, whether the victim claimed to have stated no verbally, and how upset the victim appeared to be all influenced whether the police considered a case founded.<sup>55</sup> This study suggests that police investigations in Canada are heavily influenced by discriminatory assumptions about sexual

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<sup>52</sup> *Supra* note 19 at 32.

<sup>53</sup> *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487, 160 DLR (4th) 697, 126 CCC (3d) 12, OJ No 2681 (Gen Div).

<sup>54</sup> Jane Doe, *The Story of Jane Doe* (Toronto: Random House Canada, 2003) at 18.

<sup>55</sup> *Supra* note 19 at 32-34.

assault and female victims, and that these stereotypes are having a real effect on whether cases are allowed to proceed further at a very early stage in the criminal justice process.

If the police decide to lay charges against an accused, then the Crown must agree to carry those charges forward. If the Crown decides that the case has merit, there are then many areas where attrition can occur throughout the trial process. The justice system is not an easy environment for most laypeople to deal with, and sexual assault victims have reported that they often feel re-victimized by the legal process.<sup>56</sup> There are many different steps within a trial that may cause a victim to withdraw her complaint or to refuse to participate. Records applications have been a consistent worry for many women who are uncomfortable with having unrelated personal and intimate details of their lives exposed in court,<sup>57</sup> trials still carry the possibility of cross examination on victims' sexual history in an attempt to paint them as unworthy,<sup>58</sup> and certain schools of criminal defence lawyering advocate "whacking the complainant" emotionally so that she will be unable to complete her testimony.<sup>59</sup> Furthermore, the Crown is also capable of withdrawing the case or accepting a plea bargain if they feel at any time that these decisions are in the interests of justice. Finally, if the complainant can manage to get through the various stages of the criminal trial, there is no guarantee that a conviction will be issued.

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<sup>56</sup> Susan Ehrlich, "Perpetrating – and Resisting – Rape Myths in Trial Discourse" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 389 at 389.

<sup>57</sup> Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 *Alberta Law Review* 743 and Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1 – 278.9 of the Criminal Code" (2008) 20 *Canadian Journal of Women and the Law* 111.

<sup>58</sup> Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 *Akron L Rev* 865 and Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance and Victim Blaming," (2010) 22 *CJWL* 397.

<sup>59</sup> As discussed in an interview with criminal defence lawyer Michael Edelson: Cristin Schmitz, "'Whack' sex assault complainant at preliminary inquiry" *The Lawyers Weekly* (27 May 1988) 22. See also: Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51(2) *Osgoode Hall LJ* 427.

While many of these obstacles and barriers are a normal part of the criminal justice process, the fact remains that sexual assault cases are experiencing disproportionately high attrition levels that must be addressed. In the context of this thesis, given the problems associated with sexual assault cases at the investigative and trial levels, it is reasonable to assume that there are discriminatory issues embedded in the sentencing process as well.

## **2.4 Conclusion**

This chapter provided a basic introduction to the main areas of feminist law and theory that are being used in this paper. Starting with an exploration of the normative framework underlying this thesis, feminist legal theory is used to guide the research being conducted, and to structure my understanding of the data. I then outline important facts about sexual assault, both as a social phenomenon as interpreted by feminist theorists, as well as a specific offence within the *Criminal Code*. While not all of this information is directly relevant to the process of sentencing, it is presented here to show how sexual assault is an offence influenced by significant discriminatory beliefs throughout all stages of the criminal justice process.

## **Chapter 3: Sentencing Sexual Assault Offences: An Introduction to Sentencing Theory and Practice in Canada**

The previous chapter outlined some of the basic concepts underlying both feminist legal theory and sexual assault in order to provide a theoretical and contextual foundation for this project. This chapter adds to this foundation by exploring Canadian sentencing law, touching on the significant changes brought about by the 1996 reforms, briefly reviewing how judges craft their decisions, and exploring the focus of this thesis: aggravating and mitigating factors. Additionally, the use of a feminist perspective in this field will be justified by explaining how it contributes to filling research gaps in the academic literature.

### **3.1 Contextualising Sentencing in Canada: The 1996 Reforms**

Any discussion about sentencing in Canada must start by acknowledging the importance of the 1996 sentencing reforms. These reforms introduced Part XXIII of the *Criminal Code*, a new section that dealt specifically with sentencing. The objectives of this reform were to “provide a consistent framework of policy and process in sentencing matters; to implement a system of sentencing policy and process approved by Parliament; and to increase public accessibility to the law respecting sentencing”.<sup>60</sup> These objectives were meant to help ensure that sentencing would become a more rigorous, predictable process where well-grounded common law theories and principles were codified and implemented equally across Canada. Provisions in the *Code* clearly articulated the principles and purposes of sentencing, and new regimes for tools such as fines, probation, and sentencing alternatives (such as conditional sentencing) were also created to give clarity and instruction to Canadian judges.

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<sup>60</sup> David Daubney & Gordon Parry, “An Overview of Bill C-41 (The Sentencing Reform Act)” in Julian Roberts V & David P Cole. eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31 at 33.



Another important change brought about by the 1996 reforms was a rise in the use of alternative sentencing approaches. According to section 718.2(e), “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders”.<sup>61</sup> This provision has inspired many within the criminal justice system to start thinking about and experimenting with innovative sentencing mechanisms. However, even though these alternative approaches are becoming more and more common, most trials still conclude with the use of traditional sentencing methods. Additionally, the use of alternative sentencing, particularly restorative processes, for issues involving gender-based violence is still contentious within the legal field, and many feminist theorists have stated that courts must be cautious about the use of alternative approaches when these methods are embedded in a society that has not yet dealt with the realities of gender inequality.<sup>62</sup> Thus, while I recognise the wide array of work that has been done in sentencing in recent years, my project addresses issues within traditional sentencing.

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<sup>61</sup> *Supra* note 28 at s718.2(e).

<sup>62</sup> For example, see any of the following articles that discuss this debate of gender-based violence and restorative justice: Elizabeth Adjin-Tettey, “Sentencing Aboriginal Offenders: Balancing Offenders’ Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples” (2007) 19 CJWL 179; Gillian Balfour and Janice Du Mont, “Confronting Restorative Justice in Neo-liberal Times: Legal and Rape Narratives in Conditional Sentencing” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) 701; Angela Cameron, “Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective” (2006) 18 CJWL 479; Loretta Frederick & Kristine C Lizdas, “The Role of Restorative Justice in the Battered Women’s Movement” in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 39; Rashmi Goel, “Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At Cross Roads or Cross Purposes?” in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 60; Rashmi Goel, “No Women at the Centre: The Use of the Canadian Sentencing Circle in Domestic Violence Cases” (2000) 15 Wis Women’s LJ 293; Quince C Hopkins, Mary P Koss & Karen J Bachar, “Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities” (2004) 23 St Louis U Pub L Rev 289; Laurie S Kohn, “What’s So Funny About Peace, Love, and Understanding?: Restorative Justice as a New Paradigm for Domestic Violence Intervention” (2010) 40 Seton Hall L Rev 517; Pamela Rubin, “A Community of One’s Own? When Women Speak to Power About Restorative Justice” in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 79; Julie Stubbs, “Restorative Justice, Gendered Violence, and Indigenous Women” in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 103; Julie Stubbs, “Relations of Domination and Subordination: Challenges for Restorative Justice in

Before discussing sentencing basics, it should be noted that the field of sentencing has not remained static since the passage of Bill C-41, and that a new period of reform began in 2006 with the election of the Conservative Party of Canada (CPC) to a majority government. One of the CPC's central promises during the 2006 election was to implement a "tough on crime" agenda, and an important aspect of this platform plank was to instigate "serious time for serious crimes".<sup>63</sup> While the 1996 reforms stressed non-incarcerative options, this new era promoted a return to harsher sentences and the restriction of non-prison alternatives. Mandatory minimums became a preferred sentencing tool despite concern from many in the legal profession, and rehabilitation was deemphasised in order to concentrate on punishment and "just deserts".<sup>64</sup> In the context of sexual assault, mandatory minimums were applied to some sexual offences, and conditional sentences were removed as options for others. Little attention, however, was paid to the content of decisions during this new era of reform, leaving rape myths in trial discourses to remain unchallenged.

### **3.2 A Brief Backgrounder on Sentencing**

The changes arising out of the 1996 reforms have since coalesced into a series of tools, instructions, and rules that judges must consider when issuing sentences. When beginning to deliberate on a case, a judge will first look to the provisions in the *Criminal Code* dealing with the offence in question as they often contain information on sentencing that has been set by the

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Responding to Domestic Violence" (2010) 33 UNSWLJ 970; Julie Stubbs, "Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice" (2007) 7 Criminology & Criminal Justice 169.

<sup>63</sup> "Stand Up for Canada: Conservative Party of Canada Federal Election Platform 2006" *CBC* (2006), online: CBC Canada Votes 2006 <[http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative\\_platform20060113.pdf](http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf)> at p 22.

<sup>64</sup> For example, see this Canadian Bar Association Press release and included materials on their response to mandatory minimums: "CBA says recent Ontario Court decision highlights concerns with mandatory minimum sentences" *The Canadian Bar Association* (16 February 2012), online: <[http://www.cba.org/CBA/News/2012\\_Releases/2012-02-16-c10-minimums-eng.aspx](http://www.cba.org/CBA/News/2012_Releases/2012-02-16-c10-minimums-eng.aspx)>.

legislature. In the case of sexual assault, sections 271 to 273 outline the maximum sentences available, as well as mandatory minimums for when certain types of behaviour occur concurrent to the offence, such as the use of firearms, or when the victim is under 16.<sup>65</sup> The sections of the *Code* dealing with youth and people with disabilities also have their own sentencing instructions to reflect the nature of these particular offences.<sup>66</sup>

Continuing on in determination of sentence, judges will look at what has occurred in other similar cases. Some jurisdictions use a range approach where judges look at the spread of average sentences applied to an offence in their jurisdiction and then use these parameters to determine an appropriate sentence for their case.<sup>67</sup> Other jurisdictions use a starting point approach where the Court of Appeal sets a standard sentence for individual offences based on the gravity of the offence in question, collective court experiences, comparisons to other cases, social views and policies on this specific category of crime, as well as relevant sentencing principles and objectives.<sup>68</sup> Lower courts will then adjust these starting points depending on the facts of a specific case.<sup>69</sup> For cases involving sexual assault, Ontario, a range based jurisdiction, defines the range for a major sexual assault sentence as being somewhere between two to five years,<sup>70</sup> while in Alberta, a starting point jurisdiction, a major sexual assault sentence starts at three years.<sup>71</sup>

After looking at the legislative requirements and the average sentence lengths for an offence, a judge must individualise the decision. The first stage of this process is to look at

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<sup>65</sup> *Supra* note 28 at ss271-273.

<sup>66</sup> *Ibid* at ss151-153.1.

<sup>67</sup> *R v Arcand*, 2010 ABCA 363 at para 104-105.

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

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

<sup>70</sup> *R v LM*, 2011 ONCJ 387 at para 40.

<sup>71</sup> *Supra* note 67 at para 440.

section 718, the provision in the *Code* listing the purposes of sentencing. This provision states that the fundamental purpose of sentencing is to contribute “to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions” according to a series of listed objectives.<sup>72</sup> These objectives include denunciation, deterrence (for both the individual and society at large), separation of the offender from society when necessary, rehabilitation, provision of reparations, and the promotion of a sense of responsibility and acknowledgement of the harm caused by the offender.<sup>73</sup> All of these objectives are of equal relevance in a sentencing decision, but depending on the specific context of the case in question, certain ones may be more important to emphasise.<sup>74</sup> For cases of sexual assault, particularly assaults involving minors, denunciation and deterrence are important objectives.<sup>75</sup>

Alongside the overarching concerns brought up by section 718, a judge must also consider the principle of proportionality. According to section 718.1 of the *Code*, a “sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”.<sup>76</sup> Not only is this principle embedded in the *Criminal Code*, it has been recognised as required by the *Charter of Rights and Freedoms* as well.<sup>77</sup> To determine whether a sentence is proportional, a judge will re-evaluate the average sentences attached to the offence in question and compare them to the facts of the case. A judge will also consider information relating to the elements of the offence, the offender’s conduct (particularly as it relates to his/her moral

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<sup>72</sup> *Supra* note 28 at s718.

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

<sup>74</sup> *R v Nasogaluak*, 2010 SCC 6, 1 SCR 206 at para 43.

<sup>75</sup> This statement came up in many of the cases in my sample. For example, see: *R v Butt*, 2012 ONSC 4326 at para 18; *R v GB*, 2012 ONSC 6572 at para 42; and *R v Olawale*, 2013 ONSC 4458 at para 38.

<sup>76</sup> *Supra* note 28 at s718.1.

<sup>77</sup> *Supra* note 74 at para 41. In *R v Nasogoluk*, the court states that section 12, the right to be free from cruel or unusual treatment or punishment, requires the proper implementation of proportionality in sentencing.

culpability), and the specific aspects of the offender's background that may increase or decrease the offender's personal responsibility for the crime. This is the stage at which the consideration of aggravating and mitigating factors occurs. Aggravating and mitigating factors are discussed in section 718.2 of the *Code*, and they help judges decide whether a sentence should be harsher or more lenient than the norm in any given case.<sup>78</sup> Judges must also consider other sentencing principles such as parity,<sup>79</sup> totality,<sup>80</sup> and restraint.<sup>81</sup> Using all of this information, sentencing principles, other jurisprudence, and specific facts from the case, a judge will determine the exact sentence that should be applied.

As can be seen, sentencing is a very complicated and fact-specific process. While there are many rules and principles to follow, they have been constructed in such a way as to ensure that sentencing remains an individualised process that is focused on the specific offender. Even the methodology that judges use to determine a sentence is adaptable and difficult to discuss concretely. The malleability of sentencing is meant to ensure that the process remains fair for individuals and that the heavy power of the state is not allowed to be misused. However, it also makes the area of sentencing susceptible to being influenced by systemic issues of oppression. By focusing so much on the offender, the needs of society and victims can be forgotten or inadequately considered. This potential for embedded inequality is the focus of this paper, and this project will explore how gender discrimination has been allowed to flourish under the current sentencing regime, specifically through the use of aggravating and mitigating factors.

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<sup>78</sup> *Supra* note 28 at s718.2 and Julian V Roberts, ed, *Mitigation and Aggravation at Sentencing* (Cambridge: Cambridge University Press, 2011) at 1.

<sup>79</sup> *Ibid* at s718.2b.

<sup>80</sup> *Ibid* at s718.2c.

<sup>81</sup> *Ibid* at s718.2d and e.

### 3.3 Justifying the Application of a Feminist Analysis in Sentencing

Feminist theory is particularly useful in the context of this paper as the process of sentencing is largely offender-focused, making it easy to ignore or forget gender equality issues. Despite the importance of treating each case as unique and individual, sentencing decisions must also reflect broader social concerns, and a feminist analysis helps guide sentencing judges in finding an appropriate balance between these competing interests.

Furthermore, there is a significant lack of literature on sentencing through a feminist lens. This paper discusses this absence in the specific context of sexual assault later in this chapter, but it is important to recognise that the progressive work done on sentencing has been largely focused on offender rights. There is room to explore this important area of law from a different perspective without undermining important offender-related work, and the research that I am conducting fills part of this gap.

A feminist lens allows us to understand and explore sentencing as the stage in which the “pain and suffering [of the victim] become facts that must be weighed” by the courts.<sup>82</sup> Even though the offence has already been detailed throughout the trial, sentencing is when the court has a chance to state exactly how bad society thinks the crime actually was. A judge’s decision can, therefore, have important effects for both law and society. Using feminism to explore these consequences is important for uncovering the gendered aspects of these decisions, and then improving them by imbuing the sentencing process with equality values.

According to the work done by Paula Pasquali in the early 1990s, most research done by academics and policy analysts at the time showed that sentencing decisions for sexual assault

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<sup>82</sup> Renate Mohr, “Sexual Assault Sentencing: Leaving Justice to Individual Conscience” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 157 at 158; Christine Boyle, *Sexual Assault* (Toronto: Carswell Company Ltd, 1984) at 171.

offences reflected a lack of understanding and empathy towards victims.<sup>83</sup> While there has not been a follow-up study on this topic recently, there are many academic articles that show that both the actors and institutions of the criminal justice system are still mired in discriminatory assumptions and beliefs about women and the crime of sexual assault.<sup>84</sup> Thus, it seems likely that sentencing judges would not be immune to these problems, and a conversation about how to improve sentencing according to equality principles is a valuable exercise.

Sentencing can also have significant effects on the experiences of complainants. For example, sentencing decisions “may either validate or invalidate the victim’s experience of violation”.<sup>85</sup> While it is not the court’s job to focus entirely on the needs of the victim, a feminist analysis does require that the court not actively harm the victim when this can be avoided. A feminist sentencing analysis would seek to understand the harms caused by the offence, and to properly incorporate these harms into the balancing of factors that goes into determining a proper sentence. Furthermore, a feminist decision would be written in such a way that does not minimise or trivialise the victim’s experiences even if the end result is a decision of which the complainant may not approve. Pasquali emphasises that judges who publicly denounce the conduct of offenders and recognise the harms done to victims can create a safer, less harmful court experience for complainants that avoids re-victimising them.<sup>86</sup>

Additionally, due to the prevalence of guilty pleas, the only interaction a case may have with the court system is through sentencing.<sup>87</sup> Fewer complainants are subjected to the trial process when guilty pleas are submitted early, but the facts identified by the sentencing judge

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<sup>83</sup> Pasquali, *supra* note 1 at 1.

<sup>84</sup> See chapter 2, starting on page 10, for a more in-depth discussion of this issue.

<sup>85</sup> Pasquali, *supra* note 1 at 1.

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

<sup>87</sup> Boyle, *supra* note 82 at 171; Mohr, *supra* note 82 at 158.

will then become the only official legal narrative of the case, making it particularly important that feminist considerations of gender equality are directly inserted into this process.

### **3.4 A Closer Look at Aggravating and Mitigating Factors**

Having addressed sentencing as a whole, it is now time to explore the specific focus of this paper: aggravating and mitigating factors. These factors are tools used by judges to help them justify imposing harsher or more lenient sentences on offenders. The factors themselves are drawn from case facts relating to the circumstances of the offence and offender. They are designed to re-focus the sentencing process on case specific concerns after judges have considered the broader issues of sentencing objectives and principles.<sup>88</sup>

The basic rules regarding aggravating and mitigating factors are set out in section 718.2 of the *Code*. According to subsection (a) of this provision, the *Code* recognises that sentences “should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender”.<sup>89</sup> The *Code* then gives a non-exhaustive list of aggravating factors including such facts as the offence was motivated by hate, the victim of the offence was the intimate partner of the offender, the victim was a minor, the offender abused a position of trust and authority in committing the offence, the offence had significant impact on the victim (including both health and finances), the offence was committed for the benefit of a criminal organisation, or the offence was related to an act of terror.

While the *Code* identifies aggravating and mitigating factors as part of the sentencing process, it says little about either of these tools. Aggravating factors are given some attention by section 718.2; however, this list represents only a small portion of the factors that have been

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<sup>88</sup> Allan Manson et al, eds, *Sentencing and Penal Policy in Canada: Cases, Materials, and Commentary*, 2d ed (Toronto: Emond Montgomery Publications Limited, 2008) at 117.

<sup>89</sup> *Supra* note 28 at s718.2(a).



identified in the common law. Furthermore, the *Code* gives no explanation as to why these specific factors were singled out for legislative attention. The *Code* explicitly states that they are only examples, and there is no information that suggests that they are the worst aggravating factors, or that these particular aggravating factors should be treated more seriously than others. In terms of mitigating factors, other than affirming that they exist, the legislation is entirely silent. Furthermore, nothing in the legislation gives any instruction to judges on how these factors are supposed to influence the quantum of sentence.

To understand these factors in more depth, one must turn to the common law. According to the jurisprudence, aggravating and mitigating factors are facts that deal with the gravity of the offence in relation to the offender's culpability and the harm that was caused, as well as how the offender's character and conduct relate to the sentencing objectives relevant to the case at hand.<sup>90</sup> This scope is incredibly broad in order to allow the courts to respond to the many different factors that may arise in typical cases. However, there is a core set of both aggravating and mitigating factors that are used in most criminal cases, many of which I will review in chapters five and six.

Given the scarcity of guidance on the use of these factors, there are several ways that they can be misused that should be discussed in the context of this thesis. One example of misapplication occurs when aggravating factors are overlooked. As I will detail in chapter five, it is not uncommon for certain factors to be left out of a sentencing decision even when the facts of a case support their application.<sup>91</sup> From a feminist perspective, this can be problematic as it frames the sentencing of the case around only the needs of the offender and creates the

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<sup>90</sup> *Supra* note 88 at 118.

<sup>91</sup> For example, victim impact and use of violence are aggravating factors that should have been applied in many of my cases, but did not appear in most of my case sample. See chapter five for more analysis on this problem.

possibility of unjust sentences that do not properly reflect the harm done to the victim and society. Particularly in sexual assault cases, where the harms of the crime are consistently minimised already, this imbalance entrenches the negative influence of rape myths.

Another problem with the use of these factors occurs when an aggravating factor is misrepresented as a mitigating factor. For example, an offender with a prior criminal record is treated as a first time offender because his previous offence was not related to sexual assault.<sup>92</sup> This misapplication stems from the societal belief that sexual assault is not a very damaging offence and consequently there is social reluctance over “ruining” an offender’s life for a crime that is not seen as truly harmful. Such misuse biases the sentencing process towards the offender, leading to sentencing results that unfairly disadvantage the complainant.

A third problem with these factors is when a neutral factor is presented as mitigating. Neutral factors are those that are not meant to directly affect sentence, but judges include them for contextual detail. For example, in chapter six, I discuss the difficulties courts are having when dealing with substance abuse.<sup>93</sup> There are times when substance abuse can be used as a health-related mitigating factor for offenders, but in cases of sexual assault, where there is research to suggest that intoxicants are used to excuse anti-social behaviour, mitigation should be rare and very carefully delineated.<sup>94</sup> Neutral factors can be important for a judge to use to fully understand a case, but even though these facts are important, they should not be labelled as either aggravating or mitigating without appropriate reasoning. As the case law suggests, unwarranted mitigation is the problem that arises most often in sexual assault cases due to the prevailing

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<sup>92</sup> Refer to chapter six, page 91 for a more in-depth discussion of this example.

<sup>93</sup> Refer to chapter six, page 126 for more detail on this issue.

<sup>94</sup> *Ibid.*

effects of gender inequality, and this misapplication results in decisions that unfairly favour the offender to the detriment of the complainant and society.

Finally, there are decisions that use the absence of an aggravating factor as mitigating. For example, the use of excessive violence during a sexual assault is considered aggravating because this fact implies that the complainant suffered injuries over and above what is considered typical for a sexual assault. However, in my case sample, a lack of violence was sometimes used as a mitigating factor.<sup>95</sup> This implies that an offender should be treated more leniently because he did not harm the complainant as much as he could have. The aggravation in cases with excessive violence looks at violence over and above the inherent violence of the offence. Thus, it does not make sense to mitigate for an offence that remains harmful even without the addition of further violence. For many aggravating factors, their absence implies that the offence remained within normal ranges of whatever the factors were measuring. Mitigation should not be awarded because the offender did not behave as badly as he could have, but because something about his actions or background necessitates a shift towards the lesser end of the sentencing spectrum.

From a feminist perspective, it is often women that are harmed by these improper applications, both directly as complainants and as a class. Sentencing is not meant to reflect only the offender's needs, yet the misuse of aggravating and mitigating factors shows how sentencing decisions can become weighted in his favour. All factors should be used when they are relevant, but in sexual assault cases, the courts must actively consider how rape myths and stereotypes are

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<sup>95</sup> See chapter six, page 123 for more explanation about this example.

influencing the construction of their decisions, and allowing these common errors to seep into the jurisprudence.

Despite being an important part of the sentencing process, aggravating and mitigating factors are an understudied part of criminal law. While Parliament emphasised their importance during the 1996 reforms, little guidance was given to the courts or scholars in regards to what this importance should mean or how these factors should be treated. As such, aggravating and mitigating factors “represent a truly enigmatic aspect of the sentencing process in that they are always present, [but] rarely discussed”, and they lack a coherent theory underlying their use.<sup>96</sup> While they are referenced in almost every sentencing case, courts do not often offer in-depth analyses of these factors.<sup>97</sup> Thus, even though they have not been thoroughly explored in either the jurisprudence or academic literature, the courts seem to consider them fairly well understood, leaving open the possibility that there could be unidentified problems with their application.

Furthermore, despite there being a solid core of factors that are largely accepted by the justice system, there does not seem to be consensus on exactly how these factors should affect an offender’s actual sentence, how to weigh them against one another, or how they may need to be treated in different types of offences. Certain factors are considered especially important, such as the lack of a prior record, and while this means that significant mitigation is often awarded if this fact is present, there is no standard guideline for what that mitigation should be, or how this factor should be weighed against other significant factors.<sup>98</sup> According to Ashford, “the role of

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<sup>96</sup> *Supra* note 88 at 117-118.

<sup>97</sup> *Ibid* at 117.

<sup>98</sup> In my case sample, one judge went into detail about how the absence of a prior record should be used to reduce a sentence by a third of the standard time, but this approach was not repeated in any of the other 146 cases. In fact, most judges do not comment at all on the quantitative effects of these factors. See: *R v P(H)*, 2013 ONCJ 179 at para 14.

aggravating and mitigating factors is therefore left largely without structure, unbridled and untamed, a tendency that undermines the rationale of sentencing guidelines in providing common starting points and shared standards”.<sup>99</sup> Their application is overly individualised and unstructured, and this allows for more systemic concerns to arise.

### **3.5 Canvassing the Literature on Sentencing in Sexual Assault Cases**

Given the fact that both sentencing and sexual assault are underdeveloped academic topics, what has been written on these combined subjects? A brief review of the literature shows that the available research on these combined subjects in Canada is sparse.<sup>100</sup> Most of what has been written was produced during the 1990s in response to the significant legislative reforms that were occurring in the area of sexual assault at the time. After this burst of publishing, the topic was neglected for many years. The following is a brief, chronological review of the primary academic literature produced in this specific area of law.

The first major books on this topic were published in the early 1990s. In this period, scholars were using the strong, feminist theories being developed about the offence of sexual assault to address sentencing. These texts were part of an explosion of research and law reform on sexual assault, and were published at a time when there was much broader public interest in addressing the problematic issues involving this offence.

In 1991, Julian Roberts authored a report on sexual assault sentencing patterns for the Department of Justice.<sup>101</sup> This expansive project presented an overview of how sentencing in sexual assault was being carried out at the time, including empirical research on the number and

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<sup>99</sup> Andrew Ashworth, “Re-evaluating the justifications for aggravation and mitigation at sentencing” in Julian Roberts, ed, *Mitigation and Aggravation at Sentencing* (Cambridge: Cambridge University Press, 2011) 21 at 21.

<sup>100</sup> While there is some international research available on this topic, this literature review is focused specifically on the Canadian context as my research question and thesis are domestic in scope.

<sup>101</sup> Roberts, *supra* note 1.

types of charges being utilised. Roberts noted that there had been a steady increase in reporting of sexual assaults, though these crimes were more likely to be classified as lower, less serious offences in the post-1983 reform area.<sup>102</sup> Over 95% of the sexual assaults reported to the police in his study were charged under section 271. While 60-80% of convictions for sexual assault resulted in a sentence of incarceration, sentencing results for this offence varied across Canada.<sup>103</sup>

Additionally, Roberts looked at public perceptions of sentencing for sexual assault cases. He discovered that there was a belief among the public of leniency in sexual assault sentencing, and that there was still significant confusion among laypeople over the definition of sexual assault.<sup>104</sup> Finally, he considered proposals for change in this area, and explored future directions for research and reform. Specifically, he advocated for the use of sentencing guidelines, and for a clearer definition of sexual assault under section 271.<sup>105</sup>

Paula Pasquali produced a similar project in 1995 that analysed sentences given to sexual offenders in the Yukon between 1989 and 1990.<sup>106</sup> Unlike Roberts, Pasquali looked at what factors judges took into consideration in their decisions, how judges responded to the needs and concerns of victims, and how judges understood the systemic issues underlying sexual assault. One of her most important discoveries was that there was no evidence of “any coherent legal, moral or empirical framework” being used by judges to determine sentence.<sup>107</sup> She linked this problem to the fact that aggravating and mitigating factors were not being used with any

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<sup>102</sup> *Ibid* at xiii-xiv.

<sup>103</sup> *Ibid* at xv.

<sup>104</sup> *Ibid* at xiv.

<sup>105</sup> *Ibid* at 82.

<sup>106</sup> Pasquali, *supra* note 1.

<sup>107</sup> *Ibid* at V.

consistency even in similar cases.<sup>108</sup> For example, according to Pasquali, some factors, such as breach of trust, were only used in around half of the cases that they should have been applied in.<sup>109</sup> Pasquali also found that judges were much more likely to cite mitigating factors than aggravating factors in their decisions, and she identified several equality-related problems with the common mitigating factors being applied.<sup>110</sup>

In 1994, Renate Mohr also published an article on sentencing in sexual assault.<sup>111</sup> While she added to the jurisprudential analyses conducted by Roberts and Pasquali, Mohr engaged with her cases on a more theoretical level. She discussed the danger of leaving the full interpretation of such an important area of law to individual judges without a comprehensive legislative framework to guide them.<sup>112</sup> She argued that several approaches had been constructed to deal with sentencing for this offence by judges in different jurisdictions, and also that oppressive beliefs about women were influencing the sentencing process.<sup>113</sup> Like Roberts, she suggested that sentencing guidelines would be an appropriate reform to ensure consistency and fairness for all participants in sentencing.<sup>114</sup>

Together, the work of Roberts, Pasquali, and Mohr provide a very substantive review of how sentencing in sexual assault cases took place in the late 1980s to early 1990s, and also how feminist legal theorists were reacting to the trends uncovered in this area of law. This was a period of substantial feminist legal activism, and the body of literature on sexual assault was expanding extensively. Despite being written before the 1996 sentencing reforms, all three called

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid* at V.

<sup>110</sup> *Ibid* at V-VI.

<sup>111</sup> Mohr, *supra* note 82.

<sup>112</sup> *Ibid* at 157.

<sup>113</sup> *Ibid* at 182.

<sup>114</sup> *Ibid* at 181-183.

for greater oversight over the sentencing process, as well as expanded instruction and regulations for judges in order to promote more consistent and equitable decisions. The 1996 reforms did address these issues on a broad, system-wide level, but the literature on sentencing for sexual assault offences in Canada went dormant for around a decade, and little commentary was offered about the effects of the reforms on these types of cases.

When scholarly articles began to be released on this topic again, they picked up on the systemic analyses being conducted by academics during the 1990s. However, better access to decisions and related information due to technological improvements meant that these new surveys were able to better explore systemic issues, and many of the questions and concerns brought up ten years previous were addressed once again to determine whether or not the burst of feminist legal activism in the 1990s had had any lasting effects on the sentencing process.

Janice Du Mont wrote one of the first pieces to re-evaluate sentencing and sexual assault law in 2003.<sup>115</sup> In this piece, Du Mont explored how the three-tier system of sexual assault charges had been implemented in Canada. She conducted an empirical study looking at charging and conviction rates of sexual assault cases, and showed that not only were sexual assault cases being undercharged<sup>116</sup> at the police level, but that charges at conviction tended to be even

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<sup>115</sup> *Supra* note 29.

<sup>116</sup> Undercharging occurs when police charge an offender under an inappropriate provision that does not properly take into consideration the facts of the offence. For example, if a complainant was beaten during a sexual assault, then the appropriate charge would be under either section 272 or 273 as both provisions deal with sexual assaults that cause bodily harm. However, in Du Mont's work, she discovered that it was common for violent sexual assaults to be charged under section 271 despite the fact that this provision represents the lowest level of sexual assault and is not meant to deal with situations involving additional physical violence. Undercharging is a problem because it frames a case inappropriately right from the start of the criminal justice process, and this will have considerable repercussions for a case. In the context of sentencing, an undercharge can limit the available sentences. *Ibid* at 325-326.



lower.<sup>117</sup> By showing how undercharging begins with police investigations, she illustrated how sentencing results are already compromised because of problems in earlier parts of the process.

Du Mont wrote another relevant article on sentencing and sexual assault with Forte and Badgley in 2008.<sup>118</sup> In this piece, the authors conducted the first Canadian study focusing on whether judges take into consideration factors that reflect the seriousness of a sexual assault, and how these factors are expressed in relation to the severity of the imposed sentence.<sup>119</sup> According to their results, cases that were seen as “true” sexual assaults – ones that involved violent penetration – were more likely to receive longer sentences.<sup>120</sup> This discovery was contrary to the sexual assault reforms of the 1980s that emphasised that all sexual assaults were inherently harmful, even those that did not conform to the social definition of rape. Consequently, this article highlights that stereotypes about what should constitute a sexual assault are still pervasive in the criminal justice system decades after the original reforms, and that these beliefs are still negatively influencing how the law on sentencing is developing.

Finally, Rudin’s piece on Indigenous offenders and sentencing in sexual assault cases is the most recent contribution to the literature in this area, and the only piece written during the Conservative era of sentencing reform.<sup>121</sup> This particular piece engages with the starting point sentencing regime used in Alberta, and critiques the Court of Appeal’s incomplete consideration of relevant sentencing factors such as proportionality.<sup>122</sup> However, the central focus of this piece

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

<sup>118</sup> Janice Du Mont, Tania Forte & Robin F Badgley, “Does the Punishment Fit the Crime?: Judicial Sentencing in Adolescent and Adult Sexual Assault Cases” (2008) 27 *Med and L* 477.

<sup>119</sup> *Ibid* at 478.

<sup>120</sup> *Ibid* at 491-492.

<sup>121</sup> Jonathon Rudin, “Eyes Wide Shut: The Alberta Court of Appeal’s Decision in *R v Arcand* and Aboriginal Offenders” (2010-2011) 48 *Alta L Rev* 987.

<sup>122</sup> *Ibid* at 995.

is how this sentencing regime affects Aboriginal *offenders*. Rudin says little about complainants, including how sentencing of these cases affects Aboriginal victims.

While the above articles do not represent the sum total of scholarship on sentencing in sexual assault, they are the most relevant pieces in relation to my research. Together they form a foundation for my study on aggravating and mitigating factors, allowing me to understand how the law in this area has developed, and what gender equality problems have persisted throughout time. Furthermore, given the paucity of research that I have discovered in this area, my research will be adding to an important, but neglected subject.

### **3.6 Returning to the Project's Theoretical Foundation: Why Study the Sentencing of Sexual Assault Offences?**

According to former Justice L'Heureux-Dubé of the Supreme Court of Canada, “sexual assault is not like any other crime”.<sup>123</sup> Feminist theorists believe that this is because the crime is intimately linked to gender-based discrimination and understood through a lens of problematic and harmful rape myths. For example, sexual assault victims are placed under heavy scrutiny when they bring a case forward. To be a perfect victim, they must have been chaste before the assault, been attacked by a stranger, fought back as hard as they could, and have suffered severe physical and emotional injuries.<sup>124</sup> Good victims report their assaults to the police immediately, and are appropriately emotionally distraught or else they will be suspected of making the assault up.<sup>125</sup> Unchaste women, on the other hand, are seen as unreliable witnesses, and they are questioned about how they could be harmed by an activity that they have willingly engaged in

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<sup>123</sup> *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 648.

<sup>124</sup> *Ibid* at 622.

<sup>125</sup> *Ibid*; Claire L'Heureux-Dubé, “Beyond the Myths: Equality, Impartiality, and Justice” (2001) 10 J Social Distress and Homeless 89 at 89.

before.<sup>126</sup> Thus, most women are seen as at least partially responsible for their assault because of their behaviour or dress, and it is commonly believed that many women lie about being assaulted simply because they want attention or they regret having consented to sexual intercourse.<sup>127</sup>

Under this scheme of rape myths, it is all but impossible for a woman to be a good victim, and if she fails to prove her worthiness in this matter, she immediately becomes suspect and blameworthy.<sup>128</sup> These stereotypes diminish the justice system's opinion of the gravity of the offence and the moral blameworthiness of an offender, resulting in unjust decisions.

The persistence of rape myths was first recognised by the courts in cases such as *R. v. Seaboyer*. In her dissent, Justice L'Heureux-Dubé outlined many of the rape myths listed above, heavily critiquing the way that sexual assault cases were being handled by the justice system.<sup>129</sup> She brought to light a number of examples of discrimination and gender inequality in court decisions, encouraging feminist legal reform in Canada.<sup>130</sup> However, despite her work and that of many activists, rape myths still persist today. Du Mont, for example, touches on some of the stereotypical assumptions judges continue to rely on when crafting sentencing decisions,<sup>131</sup> and contemporary scholars have explored the intersection of racism and gender discrimination in the perpetuation of rape myths.<sup>132</sup>

In order to address the problems caused by a reliance on stereotypes and discrimination, courts must incorporate a section 15 analysis from the *Charter of Rights and Freedoms* in their

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<sup>126</sup> L'Heureux-Dubé, *ibid* at 89.

<sup>127</sup> *Ibid.*

<sup>128</sup> For further examples of this phenomenon, see: *Supra* note 23.

<sup>129</sup> *Supra* note 123 at p 643.

<sup>130</sup> Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004).

<sup>131</sup> *Supra* note 118 at 491-494.

<sup>132</sup> For example, see Natasha Bakht, "What's in a Face? Demeanour Evidence in the Sexual Assault Context" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 591.

sentencing decisions.<sup>133</sup> Section 15 states that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination”, and sex is listed as one of the specific, enumerated grounds.<sup>134</sup> Consequently, gender equality should be reflected in all Canadian law, and every legal analysis, including sentencing decisions, should take into account how gender oppression influences the perpetuation of crime.

The lack of a gender analysis has been particularly problematic in the area of sexual assault law. According to Justice Cory in *R. v. Osolin*, sexual assault “is an assault upon human dignity and constitutes a denial of any concept of equality for women”.<sup>135</sup> To ignore an equality analysis in these cases, therefore, perpetuates extremely harmful gender stereotypes, and ensures that the legal system inadequately responds to gender-based violence. An equality analysis is necessary because sexual assault is more than an offence against an individual, but a systemic crime that perpetuates and maintains gender inequality.<sup>136</sup> Sexual assault not only demeans and injures individual women, but also ensures that women as a collective group are disempowered and disrespected on a societal level.

A recent study of Canadian jurisprudence by Emma Cunliffe shows that the Supreme Court has drawn on equality principles in sexual assault cases in the past, but that in recent years they have stepped back from applying a *Charter*-based analysis.<sup>137</sup> Consequently, the legal tools and precedents for equality in sexual assault cases exist, but stereotypical assumptions about the

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<sup>133</sup> *Canadian Charter of Rights and Freedoms*, s15, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>134</sup> *Ibid.*

<sup>135</sup> *R v Osolin*, [1999] 1 SCR 330 at para 69.

<sup>136</sup> Sheila Martin, “Some Constitutional Considerations on Sexual Violence Against Women” (1994) 32 *Alta L Rev* 535 at 8-10 (LexisNexis).

<sup>137</sup> Emma Cunliffe, “Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?” (2012) 57 *SCLR* 295 at 300-301.

offence still remain rooted in our justice system.<sup>138</sup> Feminist lawyers and academics must bring equality back into conversations about the development of criminal law, particularly for sentencing. It is, after all, an area of the law that is reflective of social and legal values; therefore, it is essential to ensure that *Charter*-based equality values influence its growth.

In the context of sentencing, aggravating and mitigating factors are an important tool for implementing this equality analysis. While these factors can be used to perpetuate rape myths, they can also be applied in a way that recognises the inequitable power imbalances that govern sexual assault offences.<sup>139</sup>

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<sup>138</sup> *Ibid* at 301.

<sup>139</sup> *Supra* note 88 at 132.

## Chapter 4: Methodologies: Explaining my Research Process

This chapter is a review of the central methodologies that I will be using in this thesis. It provides structure to my project, as well as assurance that the research I am conducting has been conceptualised clearly and precisely, and that it relies on sound, academic methods that produce reliable results. The three main methodologies that I will address are feminist methodologies, qualitative research involving case surveys, and textual analysis.

### 4.1 Feminist Methodologies

There are two main reasons for using feminist methodology in a scholarly piece. The first is to ensure that one does not recreate inequitable power relations by using inappropriate methods.<sup>140</sup> Subverting the *status quo* requires that scholars understand how the current system came to be, and what actions are necessary to undermine problematic institutions and social structures. Defining feminist methodologies is also a way of showing others that this scholarship is legitimate.<sup>141</sup> To apply structure to research is to show that the work has been done with care and rigour. This pre-emptively responds to any critique that feminist work is reactionary and badly constructed, and helps other scholars understand the purpose and strengths of the research.

To begin any conversation about feminist methodologies, it helps to talk about how feminists think about the gathering of knowledge. Much of feminist scholarship is based on the theory of deconstruction which seeks “to expose the social construction of beliefs concerning truth, knowledge, power, the self, and language that serve to legitimize existing structures of

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<sup>140</sup> *Supra* note 15 at 831.

<sup>141</sup> *Ibid.*

dominance in contemporary Western culture”.<sup>142</sup> Thus, according to a deconstructivist, society is created and maintained by the individuals within it. To understand why social behaviours happen and how they can be changed, we must understand how they were created in the first place. For feminists, this involves unpacking how gender-based power hierarchies have been structured and perpetuated in society, and challenging the perception that such social constructions are objectively true. For legal scholars, one must understand how the history of law has been shaped primarily for and by men, and how this structure has caused systemic harm to women.<sup>143</sup>

One of the most important tools that feminist scholars use to apply deconstruction in their work is “the woman question”.<sup>144</sup> The woman question requires feminist legal theorists to deliberately seek out and include in their work the voices and experiences of women that may be absent in legal dialogues. By actively pursuing marginalised perspectives, this method “[identifies] the gender implications of rules and practices which might otherwise appear to be neutral and objective”.<sup>145</sup> Thus, by understanding the law and its effects in a more holistic, equitable manner, scholars can craft law reform recommendations that do not perpetuate gender inequality.

In my thesis, the woman question is applied to sentencing decisions. Given the fact that sentencing is a highly individualised process, how are the voices of female sexual assault complainants heard and represented in these cases? Aggravating and mitigating factors are supposed to reflect an understanding and regard for the harm done to the victim, but is this done

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<sup>142</sup> D Kelly Weisberg, “Feminist Legal Methods Introduction”, D Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* (Philadelphia, Temple University Press: 1993) 529 at 532.

<sup>143</sup> Lucinda M Finley, “Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning” in D Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* (Philadelphia, Temple University Press: 1993) 517 at 517.

<sup>144</sup> *Supra* note 15 at 837.

<sup>145</sup> *Ibid.*

in a compassionate and effective manner? Is reform needed in this area in order to better incorporate equality values in the process? Barlett's question, therefore, has guided my research as I look for answers to these problems.

## **4.2 Qualitative Research Involving Large Case Surveys**

The bulk of my project relies on empirical research methodologies. While I work with some quantitative data, the majority of my research focuses on qualitative data obtained from sentencing decisions. Thus, it is important to talk about the methodologies used in qualitative research, and how these methods have shaped my research.

Qualitative research is work that focuses primarily on “stories and accounts including subjective understandings, feelings, opinions and beliefs”.<sup>146</sup> It is often defined as research that is primarily non-numerical, capturing information that may be textual or verbal.<sup>147</sup> Legal research is often qualitative as “many aspects of the law are contingent on context, and need to be interpreted and analysed for meaning”.<sup>148</sup> Studying law is not as simple as opening a book of legislation, finding the right provision, and applying it correctly. Instead, the law is often ambiguous. It must be adapted to new circumstances in order to be used effectively in society. Legal methodologies allow scholars to answer questions about how and why the law is structured the way that it is by exploring the context around how the law operates and is applied.

This thesis asks whether judges are using aggravating and mitigating factors in a manner that reflects the operation of discriminatory and oppressive beliefs about gender and the crime of sexual assault. Answering this question requires a qualitative exploration of case law, so I

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<sup>146</sup> Bob Matthews and Liz Ross, *Research Methods: A Practical Guide for the Social Sciences* (Essex: Pearson Education Limited, 2010) at 142.

<sup>147</sup> *Ibid.*

<sup>148</sup> Terry Hutchison and Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17 Deakin L Rev 83 at 116.



determined that a substantial case survey was required. According to Gotell, “examining [all] available decisions provides an important analytic strategy for assessing the consequences of law reforms”.<sup>149</sup> Rather than rely on a traditional doctrinal study that would show how the law *should* be applied, looking at a variety of decisions reveals a lot about the actual application of doctrine. By looking beyond just cases with precedential value, a wider case study can see all decisions as having “equal significance as terrain for charting the implications of legislatively enacted provisions”.<sup>150</sup> Given that there is not a lot of specific doctrine on applying aggravating and mitigating factors in sexual assault cases, by looking at ordinary, everyday decisions, I was able to uncover a great deal about how these factors are being applied in this specific part of the sentencing process.

In regards to constructing my case law survey, I started by considering the scale of my research. While my research question asks how aggravating and mitigating factors are being used in general, I realised that I would be unable to meaningfully canvass decisions from across Canada and would need to apply limitations to my work to ensure that it remained manageable.

The first variable that I narrowed was time period. I decided to review three years of decisions from the jurisdiction of Ontario (2011 to 2013). To review too short a time period creates the possibility of drawing conclusions that may not be supported by the jurisprudence at large. Individual decisions can be influenced by a variety of factors, and it is not impossible that there may be a cluster of unusual decisions within a particular year that could skew my data. Consequently, I wanted to make sure that I looked at a sufficiently broad period of time to ensure that my research did not reflect only short-term trends.

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<sup>149</sup> Gotell 2008, *supra* note 57 at 114.

<sup>150</sup> *Ibid.*

I chose the jurisdiction of Ontario for several reasons. It has the largest population of all the provinces in Canada and is likely to have the largest number of cases for me to review. It is also a province with a significant number of both rural and urban courts, and a large number of visible minority Canadians, offering the potential for diversity in my data.

My case search was conducted using both CanLII and QuickLaw. By using two legal databases, I balanced the need to find as many reported cases as possible with the need to avoid duplicating an excessive amount of work.<sup>151</sup> As my case survey is focused on very contemporary decisions, using CanLII is not a detriment as it is now updated as consistently as the for-profit databases.

Choosing proper search terms and documenting them is an important part of ensuring that one's work is transparent and accountable.<sup>152</sup> In my work, the most effective strategy was to keep my searches very broad. I used the terms "sentence AND 'sexual assault'" to cast a wide net over the available cases that were relevant.<sup>153</sup> This search string produced 147 useable cases, and less than 100 irrelevant results. By using such general search terms, I avoided eliminating relevant cases from my results without encountering an excess of unusable cases.

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<sup>151</sup> Kaiser-Derrick discussed in detail why she chose her specific case databases to canvass, as well as how her research began to exhibit diminishing returns after a point, and this discussion was helpful to me when justifying my own research limitation choices. See: Elspeth Kaiser-Derrick, *Listening to What the Criminal Justice System Hears and the Stories it Tells: Judicial Sentencing Discourses About the Victimization and Criminalisation of Aboriginal Women* (LLM Thesis, University of British Columbia, 2012) [unpublished] at 15-20.

<sup>152</sup> Ian Dobinson and Francis Johns, "Qualitative Legal Research", Mike McConville and Wing Hong Chui, eds, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 16 at 19.

<sup>153</sup> In creating my search process, I drew on the experiences of Kaiser-Derrick and Williams who both carefully detailed how they constructed their search strings, and how their precise searching allowed them to build a useful sample. Williams used a very broad strategy for her Boolean searches, preferring to weed out irrelevant cases herself rather than potentially exclude cases before she was able to assess them personally. See: *Supra* note 151 at 16-18 and Toni Williams, "Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference Does it Make?" in Emily Grabham et al, eds, *Intersectionality and Beyond: Law, Power, and the Politics of Location* (New York: Routledge-Cavendish, 2009) 79 at 103.

In order to draw comparisons in my data, my cases must be similar. For example, I identified cases involving sexual assault as a result of fraud (particularly in regards to the transmission of HIV and other STIs) as a type of fact scenario that must be excluded from my project given the different doctrinal understandings of this offence and the divergent effects that these differences may have on the application of aggravating and mitigating factors. Other case types that I excluded dealt with dangerous offender and related applications, as well as cases being decided using the *Youth Criminal Justice Act*.

All the cases I surveyed dealt with sections 151, 271, 272, or 273 of the *Criminal Code*. While there are additional sexual offence provisions in the *Code*, I focused on these four provisions to maintain cohesion and consistency in my research. This narrowing of my scope will be reflected in the generalisations and recommendations that I make as my work addresses only a portion of the sexual assaults being dealt with by the court system. However, it should be noted that these provisions founded almost all of the charges in the cases I found through my search, and few cases were excluded based on the charges laid.

An additional limitation of my survey is that I only included cases where the offender was a man and where the victim was either an adult woman or minor of either gender. Usually studies involving sexual offences look at either adults or minors because of the different ways that these two categories of complainants are treated. However, in my sample, I noticed that minors were not being treated much differently than adults. Offenders who assaulted minors were being charged under both sections 151 and 271, though one of these charges would be

dropped in order to comply with the *Kienapple* principle.<sup>154</sup> Despite the different offence analysis required by section 151, the four sexual assault provisions that I canvassed were not treated much differently from one another. Cases involving underage victims would mention factors such as age and position of trust, but otherwise, the same harmful stereotypes rooted in rape myths were applied regardless of the age of the complainant.

I included a few male minors as it was not uncommon for them to be co-complainants with female children, and the types of power dynamics faced by children were quite similar regardless of gender. Upon completion of my case research, I excluded very few cases on the basis of the gender of either the offender or the complainant. My results matched the common statistics on this crime as the vast majority of victims were female and the offenders were almost exclusively male.

Finally, when doing a case survey, it is important to recognise how the generalisations from the research are limited based on the scope of the cases being surveyed. After all, no case survey is fully comprehensive. While I am trying to capture as many cases as possible by canvassing two legal databases, it is probable that I will not find every single sentencing decision in the time period that I am studying. Decisions of significance are often uploaded to electronic databases, but there are an undetermined number of cases that can only be accessed through transcripts ordered from the courts, a costly and difficult process that often requires a court order.<sup>155</sup> Consequently, my data will not offer definitive answers as to exactly how aggravating and mitigating factors are being applied in Ontario. Instead, I am dealing with trends, and even

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<sup>154</sup> The *Kienapple* principle is meant to protect against multiple convictions for a single criminal act. See: *Kienapple v. R.*, [1975] 1 SCR 729 at p 751.

<sup>155</sup> Williams, *supra* note 153 at 103.

though I do not have perfect data, I can make valid and significant observations based on the information that I gather.<sup>156</sup>

### 4.3 Textual Analysis

Now that I have addressed the construction of my case law survey, I will talk about how I analysed the data that I obtained from it. To begin, I will discuss the use of discourse analysis, followed by an explanation of the coding process.

Discourse analysis is a methodology that looks at texts, both written and spoken, to understand how language is involved in the construction of social realities.<sup>157</sup> It relies on social constructivist theory, and assumes that reality is created, therefore not objectively true.<sup>158</sup> Thus, a scholar using this methodology sees texts as a reflection of the way society is currently reacting to certain situations, but these reactions are dynamic. Critical discourse analysts challenge hegemonic power structures and demystify dominant norms by capitalising on this dynamism, and pushing for more equitable interpretations.<sup>159</sup>

Critical discourse analysis can be used in law as this is an area where discourse is used to create significant social meanings and practices. The law is a tool that is constantly changing and adapting to social needs, but critical discourse scholars recognise that it is also a tool of the powerful that can be used to silence the marginalised in order to confirm the social standing of the most privileged.<sup>160</sup> The law, therefore, is not something that is “found”, but is reasoned, and should be the product of modern democratic processes.

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<sup>156</sup> *Ibid* at 89.

<sup>157</sup> *Supra* note 146 at 391.

<sup>158</sup> *Ibid*.

<sup>159</sup> Susan Erhlich, *Representing Rape: Language and Sexual Consent* (New York: Routledge, 2001) at 35.

<sup>160</sup> Peta Boughton, “Jurisprudence: Discourse Analysis of the Law” (1999) 3 S Cross UL Rev 136 at 142.

In my work, I apply critical discourse analysis to sentencing decisions in order to better understand the discourses being used when aggravating and mitigating factors are applied. In this area, there are specific legal discourses arising out of legislation and jurisprudence that should be used by judges when rendering judgement on cases. However, despite attempts to embed feminist concerns in the law of sexual assault, discriminatory discourses about the offence from outside the law are still being applied in legal situations. In completing this project, I identified where these transgressions were occurring, and what reforms are necessary to ensure that a more feminist interpretation of sentencing factors can become the dominant discourse instead.

To organise my data, I used aspects of grounded theory, a qualitative methodology that views social research as atheoretical.<sup>161</sup> This particular claim has been rejected by many within the academic community, though some still find other parts of methodology useful.<sup>162</sup> Given the fact that I am using a theoretical framework, I too must reject this aspect of grounded theory, but its coding scheme remains a valuable tool for my research.

In grounded theory, data must be coded, a process of organising information into categories so that it can be easily compared and referred to.<sup>163</sup> In this methodology, there are three types of coding: open, axial, and selection. Open coding is the first stage of the process during which a researcher identifies themes and categories in the data and assigns them names.<sup>164</sup> In axial coding, these codes are then related to one another, and in selection coding, a core category is chosen to which all the other categories are related.<sup>165</sup> As I rejected the idea of constructing a theory out of my data, the latter two methods of coding were altered to work for

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<sup>161</sup> *Supra* note 146 at 399.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid* at 400.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid* at 401.

my project. I engaged in secondary and tertiary readings to ensure that I selected enough categories for coding, that they became more and more refined as I worked through the data, that my categories fit within my existing theoretical framework, and that any cases of exception were noted and compared to the rest of the data. Thus, even though my coding is not identical to grounded theory, it is still relational, and relies on reviewing the data multiple times. In grounded theory, this is called constant comparison, a process by which a researcher continually compares data from different segments of the study in order to gain a better understanding of the patterns and trends that are emerging.<sup>166</sup> Kaiser-Derrick's work on the sentencing of Aboriginal women was a useful guide to me as she also used a very iterative process that involved several readings of her material and refinements of her coding categories.<sup>167</sup> The different coding categories that I used in this project arose out of the rape myths and gender-based stereotypes discussed in the feminist literature on sexual assault, as well as general sentencing theory.

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<sup>166</sup> *Ibid* at 403.

<sup>167</sup> *Supra* note 151 at 14-20.

## Chapter 5: Results of the Case Law Survey: Aggravating Factors

In the next two chapters, I will discuss the results of implementing the methodologies I outlined earlier. The present chapter will answer the question of how Ontario judges are currently using aggravating factors for sexual assault offences, and the subsequent chapter will answer the same question for mitigating factors.

As discussed in chapter three, aggravating factors are those that lead a court to increase punishment for an offence. To warrant aggravation, an offence must have been particularly severe because of issues such as the complainant's vulnerability or the offender's behaviour. Given the discriminatory assumptions associated with sexual assault, however, I predicted that aggravating factors would not be used consistently despite their applicability.<sup>168</sup> My survey proved this hypothesis correct. While many different aggravating factors were used in my sample, I noticed that a number of the cases did not apply all of the relevant factors, or diminished the importance of aggravating factors in comparison to mitigating factors. This chapter explores the information that I gathered on individual aggravating factors, discussing both what I discovered about how the courts are applying them, as well as how they could be used in a way that better promotes gender equality in the sentencing process.

### 5.1 Complainant-Related Aggravating Factors

Complainant-related aggravating factors are those that deal with the circumstances of the victim, such as whether she was a minor or otherwise vulnerable. These factors also highlight the negative consequences suffered by the complainant that compel the court to issue harsher punishments in order to meet sentencing principles and objectives.

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<sup>168</sup> This was a problem that Pasquali noted in her research as her case survey showed that judges neglected to apply factors such as breach of trust in many sexual assault cases despite applicability. Pasquali, *supra* note 1 at 21.



### 5.1.1 Youthful Complainants

Of all of the complainant-related aggravating factors in my sample, those acknowledging underage victims were the most common, coming up in 81 of my 147 cases. This aggravating factor is meant to recognise the vulnerability that youthfulness may confer on a complainant. Not only are minors often preyed upon by those wishing to abuse them, their youthful psychology and lack of experience make it so that any attempt on the part of an adult to negotiate sexual activity with them would be inherently inequitable. Consequently, Canadian law is designed to attempt to protect young people from sexual predation.<sup>169</sup>

When sentencing, judges are required to take into consideration the laws regarding youth and sexual activity. According to section 718.2(a)(ii.1), an offence perpetrated against a person under the age of eighteen is an aggravating factor.<sup>170</sup> In most of the cases that used this factor, the judge would either cite the *Code* or the complainant's age with the assumption that this was enough detail to justify the aggravation.

Only nine of the cases that I surveyed compared the age of the complainant to the age of the offender.<sup>171</sup> For example, in *R. v. C.L.*, the judge stated that there was “a wide age difference between the complainant and the appellant... [as] the complainant was but 15 years of age, while the appellant was 50 years old”.<sup>172</sup> In *R. v. R.E.L.*, the judge pointed out that the 19 year old offender was fairly young himself, but that there was a huge 14 year age disparity between the

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<sup>169</sup> The age at which a person may legally consent to sexual activity in Canada is sixteen, and individuals accused of sexually assaulting complainants under the age of sixteen cannot use the alleged consent of the complainant as a defence (save for close in age exceptions). *Supra* note 28 at s150.1.

<sup>170</sup> *Ibid* at s718.2(a)(ii).

<sup>171</sup> *R v Charles*, 2011 ONCJ 3 at para 14; *R v Boudreau*, 2012 ONCJ 322 at para 57; *R v MAJ*, 2012 ONSC 6415 at para 107; *R v CL*, 2013 ONSC 277 at para 84; *R v DV*, 2013 ONSC 1275 at para 9; *R v REL*, 2013 ONSC 7904 at para 36; *R v Tavares*, 2013 ONCJ 381 at para 46; *R v JM*, [2013] OJ No 5893 at para 21; and *R v Basit*, 2011 ONCJ 445 at para 5-6.

<sup>172</sup> *CL*, *ibid* at para 84.

offender and the victim.<sup>173</sup> By comparing the ages of the offender and the complainant, these decisions better contextualise the vulnerability of the victim. When the gap between the two parties is not very wide, the level of exploitation may be lessened. However, the bigger the gap, the less likely it is that the complainant and offender were peers. While assaults against minors are aggravating inherently, by explicitly addressing the aggravating details of the case, the decision provides a clearer and stronger denunciation of the conduct of the offender.

Additionally, only a handful of decisions addressed the age of the complainant in relation to the seriousness of the aggravation. For example, in *R. v. Snider*, the judge stated that as the complainant was not even three years old, “her extreme youth [made] the crime particularly heinous”.<sup>174</sup> In *R. v. Calle*, the fact that the complainant was only eight years old was deemed acutely aggravating.<sup>175</sup>

Judges may avoid making comments on the seriousness of the offence in relation to the youthfulness of the complainant for fear of treating some offences as less bad than others simply because the complainant is older. For example, in *R. v. C.H.*, defence counsel suggested that the complainant was older than other victims in similar case law, and that this was an important fact to consider when sentencing.<sup>176</sup> The Crown responded by arguing that assaults against minors are all harmful, and while the nature of the harms experienced by victims of varying ages may be different, devastating effects can occur to complainants no matter how old they are.<sup>177</sup> While it is important to ensure that all sexual assaults are treated as inherently serious and violent, the courts should be able to recognise that assaults against particularly young children are especially

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<sup>173</sup> *REL*, *supra* note 171 at para 36.

<sup>174</sup> *R v Snider*, 2011 ONCJ 306 at para 13.

<sup>175</sup> *R v Calle*, 2011 ONSC 7037 at para 39.

<sup>176</sup> *R v CH*, 2012 ONSC 3352 at para 55.

<sup>177</sup> *Ibid.*

aggravating. After all, the younger a child is, the more likely her body will be physically harmed by the abuse and violence of a sexual assault. The Crown in *C.H.* was right that the youthfulness of a complainant should never be used to diminish the seriousness of the offence, but that judges should be able to adapt the level of aggravation when appropriate.

### **5.1.2 Vulnerability of the Complainant**

Another major aggravating factor relates to the vulnerability of the complainant. Like the aggravating factor of age, vulnerability is meant to ensure that offenders who prey on victims who are often unable to protect themselves are sentenced appropriately.

#### **5.1.2.1 Vulnerability and Age**

In this survey, three main types of vulnerability were recognised by the courts, and the largest of these categories dealt with the age of the complainant.<sup>178</sup> While the overlap with the previous section on assaults against minors is high, vulnerability dealt with a wider range of age-related issues. For example, vulnerability was applied to cases involving elderly complainants.<sup>179</sup> Though the courts did not give much explanation as to why older complainants are considered vulnerable, this factor can be used to recognise the isolation and physical frailties of these victims.<sup>180</sup> Such vulnerability can be recognised under section 718.2(a)(iii.1); however, this is a relatively new provision that did not appear in this sample.<sup>181</sup>

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<sup>178</sup> Seventeen different cases addressed this factor.

<sup>179</sup> *R v Anderson*, 2011 ONSC 5551 at para 24; *R v Anderson*, 2012 ONCA 373 at para 55; *R v S(S)*, 2012 ONCJ 482 at para 15.

<sup>180</sup> The sexual abuse of elderly women is another under-researched topic in sexual assault literature. See the following article for more details about this specific, often unrecognised crime: Brian Payne, “Understanding Elder Sexual Abuse and the Criminal Justice System’s Response: Comparisons to Elder Physical Abuse” (2010) 27 Justice Quarterly 208.

<sup>181</sup> *Supra* note 28 at s718.2(a)(iii.1).

### 5.1.2.2 Vulnerability and Family Circumstances

Vulnerability was also often tied to the complainant's family circumstances. In six cases, the courts stated that family instability (as caused by circumstances such as divorce or medical emergencies) made minors vulnerable to predation. In these situations, the adults of a family are often absent or preoccupied, making the children more likely to seek out and respond positively to attention from others. For example, in *R. v. J.T.*, the children were raised by their severely impoverished single mother who had to choose between working and ensuring that her children had adequate supervision.<sup>182</sup> Her inability to afford childcare meant that the offender was able to insert himself into the children's lives to abuse them as he presented himself as a trustworthy adult who could care for the children in their mother's absence. In *R. v. P.(H)*., the offender targeted the complainants right after their father died of cancer when the adults in the family were distracted by emotional turmoil.<sup>183</sup> Furthermore, the offender was the children's uncle, thus he was intimately familiar with their struggles and knew that the chances of the abuse being noticed or reported at this time were low.<sup>184</sup> Offenders who target victims for sexual abuse specifically because they are struggling through a difficult time deserve to have their sentences aggravated in order to deter such selfish and harmful behaviour.

Minors who are separated from their biological family are also vulnerable. For example in *R. v. Smith*, the complainant had been in 22 foster homes before her placement with the offender, and she believed that she was finally in a safe and stable home when Smith sexually assaulted her.<sup>185</sup> Similarly, in *R. v. S.M.*, the complainant was in a foster home and felt that if she

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<sup>182</sup> *R v JT*, 2011 ONSC 1141 at para 36.

<sup>183</sup> *Supra* note 98 at para 136.

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

<sup>185</sup> *R v Smith*, 2013 ONSC 1825 at para 36.

reported her abuse, she and her siblings would be separated and put into different homes.<sup>186</sup>

Children in foster care depend on their guardians to take care of them, and the risk of being placed in a home that is worse can cause minors to fear reporting their abuse. Additionally, foster parents are being trusted by their communities to take care of very vulnerable individuals. Taking advantage of youth in these circumstances is a horrific breach of this trust that harms the youth who was abused, as well as society's confidence in this necessary system.

Vulnerability as related to family instability is a factor that appears in sexual assaults committed almost exclusively by men<sup>187</sup> against mostly young girls who are often related to the offender. When this offence is committed within families, it is generally hidden from public view, and reports are easy to dismiss as exaggerations by children. The trend of disbelieving victims remains prevalent regardless of the age of the complainant, and with children, they often have no other option but to remain connected to their abuser, particularly given the increased vulnerability that they are experiencing due to their family instability. Aggravation allows the courts to show offenders that choosing to target vulnerable victims will incur additional punishment as this type of behaviour will no longer be excused.

#### **5.1.2.3 Disability, Health, and Vulnerability**

Another category of vulnerability acknowledges the risks to which complainants with disabilities are subject. Individuals who are physically and/or psychologically impaired are susceptible to abuse given the fact that they are often isolated, dependent on others, and sometimes unable to communicate effectively. For example, in *R. v. T.(D.)*, the complainant used a wheelchair due to her cerebral palsy, was visually, hearing, and speech impaired, and suffered

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<sup>186</sup> *R v SM*, 2011 ONSC 6762 at page 9.

<sup>187</sup> In the three years of cases that I canvassed to create my sample, a female co-offender appeared only once.

from severe cognitive difficulties that made it, according to the court, “hard to imagine a more vulnerable victim”.<sup>188</sup> Furthermore, the offender in this case was her uncle, adding an additional aspect of vulnerability to this case, and negating any possible consent claims from the offender. While it is important to recognise that individuals with disabilities should have autonomy over their own sexual experiences, it is equally important to acknowledge that predators target victims because of their difficulties, and because offenders believe that their abuse of disabled individuals will be unchallenged or undiscovered. Those who abuse individuals struggling with severe health issues deserve harsher sentences, and this type of deterrent is necessary to help protect and acknowledge the marginalisation of disabled victims – particularly women who face very high rates of sexual abuse.<sup>189</sup>

### 5.1.3 Victim Impact

Given the current statutory support for victim impact statements, one would presume that victim impact is a significant aggravating factor.<sup>190</sup> However, the use of victim impact information in sentencing is inconsistent. While most decisions in my sample included a victim impact section, victim impact was used as aggravating in only 67 of the surveyed cases. This amounts to just over 45% of the sample. When this factor was last studied in the early 1990s by

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<sup>188</sup> *R v T(D)*, 2011 ONCJ 545 at para 12.

<sup>189</sup> For further discussion on the sexual abuse of disabled women, see the following articles: Janine Benedet & Isabel Grant, “Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases” (2012) 50 Osgoode Hall LJ 1; Janine Benedet & Isabel Grant, “A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law” (2011) 43 U Ottawa L & Tech J 1; Janine Benedet & Isabel Grant, “Sexual Assault of Women with Mental Disabilities: A Canadian Perspective” in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (Abingdon: Routledge, 2010) 322; Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52 McGill LJ 243; Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007) 52 McGill LJ 515, and Fran Odette, “Sexual Assault and Disabled Women Ten Years After Jane Doe” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) 173 at 173.

<sup>190</sup> According to section 722 of the *Criminal Code*, a complainant may submit a victim impact statement to the court, and the court must consider this statement when drafting an appropriate sentence. See: *Supra* note 28 at s722.

Pasquali, she noted that fewer than 50% of her surveyed cases even mentioned victim impact.<sup>191</sup>

Thus, while there has been significant improvement in ensuring that victim impact is at least mentioned in contemporary sentencing decisions, the factor does not seem to be adequately affecting actual sentences.

In the context of sexual assault, acknowledging victim impact ensures that the harms of the offence are recognised. When an actual person talks about the injuries that she has suffered because of the offender's actions, it is harder to dismiss the fact that sexual assault is an incredibly damaging crime, and it gives voice to a victim who has been made to feel powerless. To omit victim impact from aggravating consideration, therefore, contributes to silencing victims, and undermines gender equality in the sentencing process.

In my survey, I identified several types of victim impact used by the courts. One of the most common concerned the psychological impact of sexual assaults on victims. The Supreme Court in *R. v. McCraw* stated that:

the psychological trauma suffered by rape victims has been well documented. It involves symptoms of depression, sleeplessness, a sense of defilement, the loss of sexual desire, fear and distrust of others, strong feelings of guilt, shame and loss of self esteem. It is a crime committed against women which has a dramatic, traumatic impact.<sup>192</sup>

Some of the worst harms of sexual assault affect a victim's mental well-being for years after the offence, and women face unique issues given the gendered nature of this crime. For example, because sexual assault is so persuasive and trivialised, victims often fear being attacked again, and suffer from severe anxiety in regards to their safety. In *R. v. Hilan*, the complainant was

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<sup>191</sup> *Supra* note 1 at 43.

<sup>192</sup> *R v McCraw*, [1991] 3 SCR 72 at p 83.

terrified of using public transit as she was assaulted while riding the bus.<sup>193</sup> The assault made her seriously contemplate changing her behaviour to avoid partaking in a very normal activity. Like many victims, this complainant was prepared to limit her ability to live freely in order to protect herself from further trauma because a stranger thought it was acceptable to sexually attack her in a public space causing her significant emotional distress.

The courts also consider it aggravating if the complainant no longer feels able to intimately trust another person. In *R. v. C.C.I.*, the complainant reported that “she developed a fear of men and loss of trust” that made her question her ability to participate in future loving relationships.<sup>194</sup> Her assault, therefore, had lasting impacts that drastically affected her adult life. Similarly, the courts recognised as aggravating psychological effects on minor complainants. In *R. v. G.J.*, the judge stated that the offender “stole the innocence of [the complainant’s] youth and she is scarred”.<sup>195</sup> When minors are attacked, they are forcibly introduced to adult activities and concerns at a young age, and this denies them the ability to sexually mature at their own pace. These emotional consequences are not easy to overcome, and they can cause negative effects throughout a complainant’s life.

Victim impact was also used to acknowledge the physical injuries caused by the assault. For example, the complainant in *M.A.J.* became pregnant and underwent an abortion because of her abuse.<sup>196</sup> Both pregnancy and abortion are significant medical issues that can seriously affect a person’s body, and neither are undertaken lightly. Other physical injuries can also have lasting impact on the victim. For example, in *R. v. Anderson*, the complainant was stabbed and slashed

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<sup>193</sup> *R v Hilan*, [2013] OJ No. 6183 at para 32.

<sup>194</sup> *R v CCI*, 2012 ONSC 3509 at para 29.

<sup>195</sup> *R v GJ*, 2013 ONSC 2431 at para 24.

<sup>196</sup> *MAJ*, *supra* note 171 at para 20.



multiple times with a knife in her abdomen and face.<sup>197</sup> These physical harms were considered aggravating on top of the inherent harms of the offence due to the long time it took her to recover and the permanent disfigurement and disability that she was left with.

Finally, the courts can also acknowledge the financial impacts of sexual assault. In *R. v. Snider*, the parents of the young complainant spent a substantial sum of money to obtain mental health care for their daughter.<sup>198</sup> While in Canada, the immediate physical damages caused by sexual assault will be covered under national healthcare, long-term mental healthcare is often the responsibility of the complainant. Additionally, the complainant may have to miss work or school, and both of these can cause serious financial difficulties. In *R. v. Zhao*, due to the severe emotional trauma suffered by the complainant, she lost two years of schooling.<sup>199</sup> Given the price of tuition in Canada, this type of disruption could cost a complainant thousands of dollars if she failed her classes, as well as substantially delay a complainant's life plans. Acknowledging the financial harms of a sexual assault is a way for the courts to undermine the myth that this offence is not that injurious. While some psychological effects of the crime are accepted without much argument, the monetary costs of these harms should be a regular consideration in sentencing decisions. Such acknowledgement not only provides a more accurate understanding of how the victim was impacted by this crime, but it recognises that there are concrete expenses associated with recovery from these assaults.

Victim impact, therefore, is an important aggravating factor, but despite increased statutory attention, there has been little improvement in its use since the early 1990s. Some would argue that victim impact statements are only meant to be therapeutic opportunities for

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<sup>197</sup> *Anderson* 2011, *supra* note 179 at para 24.

<sup>198</sup> *Supra* note 174 at para 13.

<sup>199</sup> *R v Zhao*, [2013] OJ No 6105 at p3.

victims to express their feelings openly during the trial process.<sup>200</sup> However, the harms that were identified by the courts above are not comprised of simply hurt feelings. Sexual assault is an offence where long-term consequences are common and often devastating, and these injuries should have an effect on sentencing results.

In this sample, it was common for a portion of the victim impact statement to be included in a decision as background information, but not to be mentioned as an aggravating factor. For example, in *R. v. Correa*, the court commented that the complainant's victim impact statement revealed her to be "a very troubled young woman who indicated that she has been seriously impacted by this event", suffering from effects such as post-traumatic stress disorder, anxiety, panic attacks, and drug addiction.<sup>201</sup> Despite these serious consequences, the judge also stated that it was "impossible for [him] to determine if all of these challenges which she faced have flowed strictly from [the offender's] actions".<sup>202</sup> The judge admitted that regardless of the exact causes of complainant's struggles, the sexual assault was probably a significant factor, but he did not use victim impact to aggravate the sentence.<sup>203</sup> While it can be contentious to take victim impact statements involving health effects as truth without adequate proof, to dismiss the claims of complainants so easily undermines the potential of victim impact to forward gender equality. If a victim is brave enough to talk about the personal effects of her assault in public, then the courts should respond to these comments seriously, requesting more information if needed. Considering that fewer than fifty percent of cases in this sample used victim impact as an

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<sup>200</sup> Rakhi Ruparelia, "All That Glitters is Not Gold: The False Promise of Victim Impact Statements" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 665 at 687.

<sup>201</sup> *R v Correa*, 2011 ONCJ 409 at para 19.

<sup>202</sup> *Ibid* at para 20.

<sup>203</sup> *Ibid* at para 21.

aggravating factor, there is still much more work to be done in ensuring that this factor is used in a fair and equitable manner.

#### 5.1.4 Assaults Against One's Spouse

According to section 718.2(a)(ii) of the *Code*, an assault against one's spouse or common law partner is mandatorily aggravating.<sup>204</sup> However, given the rates of sexual violence in domestic relationships, it was surprising to see this particular aggravating factor used in only eight cases.<sup>205</sup> As I gathered no evidence to suggest that judges were simply ignoring the mandatory elements of this factor, its absence can probably be explained by the fact that my sample was largely comprised of minor complainants. Although the underrepresentation of adult complainants in my sample raises many questions, the information that I did find was that judges are recognising this factor in most cases where it is warranted.

Five of my cases dealt with traditional applications of section 718.2(a)(ii). Most decisions simply referenced the existence of domestic abuse,<sup>206</sup> though a couple made some mention of the systemic realities of these situations.<sup>207</sup>

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<sup>204</sup> *Supra* note 28 at s718.2(a)(ii).

<sup>205</sup> According to research from Statistics Canada, around half of all Canadian women have experienced at least one incident of physical or sexual violence in their lives, and the person committing this violence for 25% of Canadian women is a spouse/intimate partner (See: "Assessing Violence Against Women: A Statistical Profile" *Federal-Provincial-Territorial Ministers Responsible for the Status of Women* (2002), online: <http://www.uregina.ca/resolve/PDFs/Assessing%20Violence.pdf> at p 10). While this data is from 1993, there has been no further statistical research on lifetime abuse. In a more recent study, of the 19 million Canadians with a spouse/intimate partner in 2009, 6% reported being abused by this partner in the preceding five years (See: "Family Violence in Canada: A Statistical Profile" *Canadian Centre for Justice Statistics* (January 2011), online: Statistics Canada Catalogue no. 85-224-X <<http://www.statcan.gc.ca/pub/85-224-x/85-224-x2010000-eng.pdf>> at p 8). This report also stated that 17% of Canadians who had contact with former spouses in the preceding five years had been abused by them (see page 9). Additional information about the prevalence of spousal sexual assault and its treatment by the courts can be found in the following articles: Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law: Honest but Mistaken Beliefs" (2006-2008) 32 *Man LJ* 144 and Ruthy Lazar, "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada" (2010) 22 *CJWL* 329.

<sup>206</sup> *R v Smith*, 2011 ONCA 564 at para 90; *R v H(R)*, 2012 ONCJ 674 at para 11; and *R v DS*, 2013 ONCA 244 at para 9.

One of the questions that I wanted to answer with this survey was whether or not this aggravating factor gave enough protection to all long-term couples. The definition of spouse and common law partner in Ontario require that intimate partners be either legally married or living together in a conjugal relationship for at least three years.<sup>208</sup> However, there are many individuals in long-term committed relationships who live apart and do not fall under these legal definitions. A plain reading of section 718.2(a)(ii) seems to exclude these relationships from the application of a mandatory aggravating factor even though they are quite similar to the types of relationships listed in the *Code*.

There is some evidence to suggest that judges are addressing this problem. In three cases, the parties in question did not meet the legal definitions of spouse as required by section 718.2(a)(ii), but aggravation was applied anyway. In *R. v. Evans*, the court recognised that the parties were involved in “a long term on and off again relationship” that did not qualify them as spouses or common law partners, but that should be seen as a lasting intimate relationship.<sup>209</sup> Similarly, in *R. v. W.R.*, the court stated that the long-term relationship of the parties did not qualify under section 718.2(a)(ii), but that “the purpose of the section is to recognise the seriousness of offences committed in the context of relationships”, and that the parties were “clearly in an intimate relationship of consideration duration”.<sup>210</sup> Consequently, these two cases prove that there is at least some jurisprudential support for an expansion of which complainants are covered under section 718.2(a)(ii) to recognise the diversity of relationships that occur in contemporary society. A couple may be prevented from or choose not to cohabitate for many

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<sup>207</sup> *R v NT*, 2011 ONCA 114 at para 25; *R v TO*, 2013 ONSC 6037 at para 7.

<sup>208</sup> *Ontario Family Act*, RSO 1990, c F3 at s29a.

<sup>209</sup> *R v Evans*, 2012 ONSC 5801 at para 47.

<sup>210</sup> *R v WR*, 2012 ONSC 3935 at para 19.

reasons, but their relationship can reach high levels of intimacy and expose the parties to some of the same vulnerabilities that traditional spouses and common law partners are subject to. Thus, this expansion of recognition extends needed protections to particularly marginalised and vulnerable women.

The last case involving this factor dealt with recently separated spouses. In *R. v. L.M.*, the Crown argued that section 718.2(a)(ii) should be interpreted to include former spouses and common law partners, and the judge agreed, stating that it is common for domestic abuse to continue past the dissolution of a relationship, and that it would be “incongruous that an offence against a spouse/common law partner on the day before separation would be considered statutorily aggravating, and the same offence the day after separation would not”.<sup>211</sup>

Relationships, particularly ones involving domestic abuse, often take time to dissolve. Even when the spouses are apart, their connections to one another are often not severed completely, and abuse may continue. Thus, section 718.2(a)(ii) must apply for some amount of time after a relationship breaks down in order to protect women and acknowledge the gendered aspects of this type of situation.

There are not enough sexual assault cases dealing with the aggravating factor of assaulting one’s spouse to draw any definitive conclusions; however, the case law from this sample shows that the factor is being adapted to the realities of contemporary society. Spousal rape was only recognised as a crime in the 1980s, and the courts still struggle to understand the complexities of sexual assaults committed by individuals who are in a relationship with one another. To acknowledge that violence on the part of an intimate partner is especially violating

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<sup>211</sup> *Supra* note 70 at para 25.

and harmful represents at least a partial dismantlement of the rape myths that have governed these cases for so long, and offers protection to women who are the most frequent victims of this type of abuse.

### **5.1.5 Offences Involving the Violation of the Complainant's Privacy**

One of the more recently developed complainant-related aggravating factors focuses on the harm done to a complainant when the offender also violates her privacy in connection to the sexual assault. While this type of aggravating factor was used in only five of the cases that I surveyed, it is likely that this factor will become more relevant given the ubiquity of smartphones and other handheld devices with visual recording capabilities.

In both *R. v. P.S.* and *R. v. J.J.P.*, the use of photographs in conjunction with a sexual assault was considered aggravating.<sup>212</sup> In *P.S.*, the court deemed it aggravating that the offender threatened to release sexualised photos of the complainant when she was attempting to end the relationship.<sup>213</sup> In *J.J.P.*, the fact that the offender accessed the complainant's email without consent to steal sexualised photos was also seen as aggravating.<sup>214</sup> Exposing to others the personal, intimate moments of a person without her consent can be a very traumatizing experience and this harm is magnified when combined with sexual abuse. Such a threat is an attempt on the part of the offender to prevent the complainant from reporting her abuse to the authorities. Furthermore, in contemporary society, it is increasingly easy for an offender to indelibly disseminate photographs depicting the complainant's sexual conduct as a "rebuttal" to her claims of abuse. Given that one prevalent rape myth is that women who are sexually active

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<sup>212</sup> *R v PS*, [2013] OJ No 3574 at para 26; *R v JJP*, 2012 ONCJ 699 at para 72-79.

<sup>213</sup> *PS*, *ibid* at para 26.

<sup>214</sup> *JJP*, *supra* note 212 at para 72-79.

cannot be raped, it is unsurprising that victims remain silent in order to avoid public scrutiny and condemnation.

Similarly, two cases addressed the issue of video recordings. In *R. v. Moroz*, the offender made a video of himself and the minor complainant (bringing in issues involving child pornography as well) with the offender's young son in the background.<sup>215</sup> Not only was it considered aggravating to make a recording of the complainant's abuse, the fact that it was conducted in front of another person added to the trauma and harm of the incident.<sup>216</sup> In *R. v. Ryan*, the offender videotaped the complainant's assault in order to control, degrade, and humiliate her.<sup>217</sup> The court stated that:

[we] live in a digital age where information may be uploaded to the Internet in a matter of seconds and thereafter its use and distribution will be beyond the control of any party. In the case of a sexual assault, the potential for such a video to be uploaded means that a victim may be revictimized countless times as the video is downloaded in the future.<sup>218</sup>

Even though there may not be evidence that a video (or conversely a photo) has been released, the fact that such a recording exists represents a potential for further harm. Not only is the complainant harmed by the sexual assault and the recording of this abuse, if the video or photo is released, the complainant will never be free from reminders and potential negative consequences of the offence. Thus, it is appropriate that infringing on the complainant's privacy, a threat used mostly against women, is considered aggravating, and this factor should become a standard consideration in sexual assault cases involving privacy violations.

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<sup>215</sup> *R v Moroz*, 2013 ONSC 3130 at para 25, 42.

<sup>216</sup> *Ibid* at para 42. The fact that the additional party was a minor was also considered aggravating because the offender was exposing an underage person to sexually inappropriate imagery.

<sup>217</sup> *R v Ryan*, 2013 ONSC 158 at para 28.

<sup>218</sup> *Ibid* at para 30.

### 5.1.6 Offences Resulting in Pregnancy, STIs, or the Risk Thereof

In three of the cases sampled in this survey, the court identified unwanted pregnancy as an aggravating factor. In both *R. v. C.C.* and *R v M.A.J.*, the court stated that the complainant becoming pregnant against her will was aggravating.<sup>219</sup> In *C.C.*, the fact that the complainant had to undergo an abortion because of this unwanted pregnancy was seen as aggravating as well.<sup>220</sup> Both of these cases support the fact that there are unique harms that can be caused by sexual assault that dramatically affect the physical and mental health of female complainants who are assaulted by male offenders. These ongoing effects were spoken of in greater detail in *R. v. Smith*.<sup>221</sup> In this case, the complainant's pregnancy traumatically changed her life, resulting in her being sent to a home for unwed mothers, instigating a long episode of serious depression, and causing harmful impacts for both her children and her grandchildren.<sup>222</sup> The court was very clear in recognising that pregnancy as a result of trauma can cause a lifetime of issues for both the victim and her family, and that these are harms unique to sexual assault and female complainants.

Unfortunately, the court in *Smith* determined that the forced pregnancy endured by the complainant was not an aggravating factor as the offender did not become aware of this consequence until years later.<sup>223</sup> This decision is illogical and inequitable. The harm of an unwanted pregnancy would have remained even if the offender knew what had occurred. To suggest otherwise seems to imply that if the offender had known, the consequences could have

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<sup>219</sup> *R v CC*, 2013 ONSC 654 at para 44; *MAJ*, *supra* note 171 at para 83 (though in this case, the Crown did not definitively prove that the offender was the cause of the pregnancy, so this fact could not, in the end, be seen as aggravating).

<sup>220</sup> *CC*, *ibid* at para 44.

<sup>221</sup> *Supra* note 185.

<sup>222</sup> *Ibid* at para 35.

<sup>223</sup> *Ibid* at para 42.



been avoided as he may have tried to take responsibility for the complainant and her child.

However, the pregnancy was still the result of a criminal assault, and these harms cannot be mitigated after the fact by the offender.

Recognising the harms actually caused by sexual assault is important for ensuring that the unique gender inequities embedded in this part of criminal law are acknowledged; however, the courts must do more than simply note when harms occur and acknowledge when risks of harm are increased because of the actions of the offender. In eight of the cases surveyed, the courts stated that sexual assaults committed without protection should be considered aggravating.<sup>224</sup> Part of the harm of sexual assault is not knowing what long term effects will be caused by the attack. Complainants must endure significant anxiety waiting to find out whether their health will be negatively impacted, and avoiding STIs and pregnancy after unprotected sex is a matter of luck. Thus, using aggravation is a way of recognising these specific harms suffered by women that are an inevitable result of sexual assault.

## **5.2 Offence-Related Aggravating Factors**

The next category of aggravating factors deals with the circumstances of the offence, and whether how the crime was committed should increase sentence.

### **5.2.1 Location of Sexual Assault**

People often feel safest in their homes, and breaches of this safety can be devastating. Thus, a sexual assault committed in a complainant's dwelling is treated as aggravating. Fourteen of the cases in this sample used this factor, and almost all of them dealt with offences within the complainant's home or in the dwelling of another family member. Several judges emphasised the

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<sup>224</sup> *Supra* note 70 at para 33; *MAJ*, *supra* note 171 at para 20; *R v ME*, 2012 ONSC 1078 at para 83; *S(S)*, *supra* note 179 at para 15; *R v Casilimas*, 2013 ONCJ 211 at para 8; *R v VA*, [2013] OJ No 4518 at para 13; *JM*, *supra* note 171 at para 21; and *R v L(B)*, 2012 ONCJ 592 at para 68.

idea that personal homes are meant to be places where individuals feel safe from the rest of the world. In *R. v. Corbiere*, the court stated that:

The targeting of the victim in her own home is a significant aggravating factor exacerbating the trauma and impact on the victim. The home is a protective haven; a place where we should all expect to feel safe. The actions of the offender have destroyed the victim's sense of security in her home and have left her feeling unsafe everywhere.<sup>225</sup>

As women are often preyed upon because of their sex, and already frequently do not feel fully safe in their homes, increasing sentences when what safety they do feel has been destroyed is an important part of acknowledging the gendered aspects of these harms.

While recognising the serious effects caused by an assault committed in a complainant's home is important, it is problematic that the law only protects private spaces. To have the sanctuary of one's home disrupted is devastating, but so is the diminishing of feeling safe in public spaces. In *R. v. Hilan*, the complainant was assaulted on public transit and became incredibly fearful of using this public service.<sup>226</sup> While there are certain risks inherent in being in public spaces, there should be some recognition of the right of citizens to feel safe outside of their homes. Women are already often expected to change their behaviour in public to avoid sexualised violence, thus it should be considered aggravating to sexually assault complainants in public spaces where everyone should feel safe. By looking at space through a feminist lens, therefore, the rationale behind the original factor can be expanded in a way that incorporates gendered issues in sentencing.

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<sup>225</sup> *R v Corbiere*, 2012 ONSC 2405 at para 44.

<sup>226</sup> *Supra* note 193 at para 32.

### 5.2.2 Nature of the Offence

Nature of the offence refers to sexual touching of a particularly intrusive or wounding nature. While all sexual assaults should be considered harmful, this aggravating factor recognises that cruel and dangerous choices on the part of the offender increase the trauma suffered by the complainant. Over 50 cases referenced this factor, all of them including a brief description of the sexual contact that occurred, such as whether or not there was kissing, sexual touching of the genitals, digital penetration, oral sex, penile-vaginal intercourse, or anal sex. Additional factors that were mentioned included whether the acts were particularly violent, as well as whether the offence was the result of escalating sexual violence against the complainant.

One problem that came up several times in my sample was the blurring of the line between neutral and mitigating treatment for this factor. In some of the cases, the nature of the offence was brought up not to prove that there were aggravating circumstances, but to suggest that the offence was lower on the scale of severity. For example, in *R. v. Palacios*, the court stated that:

there [was] no suggestion of either penetration and or fellatio. There [was] also no suggestion of actual physical or verbal violence perpetrated on the victims. Further, at no time were the victims told not to disclose the sexual abuse for fear of violence or retribution.<sup>227</sup>

Similarly, in *R. v. Snider*, the court stated that:

Some aggravating features common to these offences are not present in this one. No digital penetration of M.G. was established and no force or collateral violence was used beyond that inherent in the crime. There was no corrupting influences imposed on M.G. as a result of this act, that is no bribes or drugs or other items were used to persuade her to participate.<sup>228</sup>

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<sup>227</sup> *R v Palacios*, 2012 ONCJ 195 at para 80.

<sup>228</sup> *Supra* note 174 at para 9.

While it is important to contextualise a case properly in the jurisprudence, judges must not use this factor to inappropriately mitigate sentences. Sexual assaults are inherently harmful, no matter how they are conducted, and suggesting that offenders who commit less intrusive assaults should gain the benefit of mitigation trivialises the damaging effects of the crime. As can be seen in both *Palacios* and *Snider*, the corruption of this factor shifts the focus of the judgement off the effects of the crime and instead focuses on how it could have been worse. This type of reasoning perpetuates the myth that many sexual assaults result in inconsequential effects for the victims, and only specific circumstances (when strangers force innocent women to have vaginal intercourse, resulting in grave physical injuries) deserve significant sentences. Thus, this inappropriate mitigation mischaracterises cases, and embeds inequitable assumptions and analyses in the jurisprudence.

### 5.2.3 Use of Violence

Sexual assault is an inherently violent crime,<sup>229</sup> but violence over and above what is expected from a “typical” assault can be considered aggravating. However, the courts have difficulty in deciding what counts as excessive violence in sexual assault cases. In several of the cases in this survey, it was clear that the violence that occurred was excessive given the substantial injuries suffered by the complainant. In *R. v. Anderson*, the complainant was brutally beaten and stabbed<sup>230</sup>, while in *R. v. J.T.*, the minor complainant was choked and suffocated as the offender raped her.<sup>231</sup> Less severe harms from violence should be recognised as well. In *R. v. L.M.*, the court stated that the physical force used by the offender to restrain the victim caused

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<sup>229</sup> *MAJ*, *supra* note 171 at para 109; *R v Lewis*, 2013 ONSC 3181 at p 6.

<sup>230</sup> *Anderson* 2011, *supra* note 179 at para 24.

<sup>231</sup> *Supra* note 182 at para 36.

the complainant harm (scratches and bruising) that were not part of the physical and psychological harms associated with sexual assault.<sup>232</sup>

Unfortunately, given the research by Du Mont discussed in chapter three, it is likely that this particular aggravating factor is underused.<sup>233</sup> After all, this factor appeared in only 14 of the cases in this survey despite the fact that many of the fact scenarios showed evidence of excessive violence.<sup>234</sup> This absence relates to the fact that the courts are not always in agreement on what excessive violence is, or sentencing judges may assume that the aggravating nature of the violence was incorporated into other parts of sentencing. However, feminist advocates have repeatedly argued that the violence of sexual assault is not adequately recognised by the justice system.<sup>235</sup> Applying aggravation to cases where excessive violence occurs is a method of undermining the rape myths that suggest that sexual assault is not a truly harmful crime, and prevents said violence from being ignored or trivialised in a decision.

#### **5.2.4 Verbal Abuse Used During Offence**

Verbal violence that accompanies sexual assault is also aggravating. This factor recognises that psychological harm can be quite damaging, and the inherent violence of sexual assault can be increased depending on how the offender treats the complainant. Verbal violence is often also gendered. The language used by offenders in these attacks is misogynistic and designed to attack the complainant *as a woman*. Thus, even though verbal abuse is present in

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<sup>232</sup> *Supra* note 70 at para 29.

<sup>233</sup> *Supra* note 29 and 118. According to the research presented in these two articles, sexual assault cases are often undercharged, implying that the violence of the offence is often greater than what the provisions the offender was charged under reflect. Additionally, judges still struggle with acknowledging violence in sexual assault cases unless it fits within a narrow range of stereotypes.

<sup>234</sup> Most of the offenders in this sample, including several for whom excessive violence was used as an aggravating factor in their case, were convicted under section 271, the only one of the three central sexual assault provisions that does not address physical harm. This finding supports Du Mont's research on how undercharging is a significant problem in the justice system. *Ibid.*

<sup>235</sup> *Ibid.*

many different types of offences, in sexual assault cases, it is connected directly to equality and must be identified as such. The following section looks at the different categories of verbal violence used in my sample.

The first category deals with generic threats. In these cases, the offender tells the complainant that some non-specific harm may come to them. For example, in *R. v. K.J.M.*, the offender threatened his victim that if she told others about what had happened, “something very bad would happen”.<sup>236</sup> While specific threats are frightening, this type of open-ended menace is terrifying because the complainant does not know what sort of punishment or reaction to expect from the offender. Instead, she is left to worry about what could happen to her, and whether the non-specific harm is enough to make her want to report the assault anyway (contributing to the low reporting rates for sexual assault). Consequently, despite the fact that this type of threat is one of the least graphic, it is still frightening and should be considered seriously aggravating.

Ongoing verbal abuse is also common. In these types of cases, the offender seeks to harm the complainant by insulting her and trying to undermine her self-worth. Ongoing verbal abuse is often part of long-term domestic violence.<sup>237</sup> It constitutes an attempt to assert power and domination over a victim. If the victim is verbally abused enough, she may not feel capable or worthy of trying to escape the abuse or report the crime. This type of verbal abuse is often connected to the use of misogynistic slurs, and she will be told that she deserves this treatment or that she caused the offender to act this way. Thus, even though this type of verbal abuse does not necessarily contain graphic threats of violence, it can be incredibly harmful, and it perpetuates damaging gender stereotypes.

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<sup>236</sup> *R v KJM*, 2013 ONSC 1430 at para 19.

<sup>237</sup> *NT*, *supra* note 207 at para 25.

The third category of verbal abuse involves threats of exposure where the offender tries to control the complainant by telling her that if she does not obey, he will let others know that the complainant has been engaging in “bad” behaviour of some sort. For example, in *R. v. Blake*, the offender threatened to tell the complainant’s mother that she was skipping school if she told anyone about her abuse.<sup>238</sup> The offender wanted the complainant to believe that she would be punished if she reported her assault in order to keep his crime a secret. In *R. v. Tavares* and *R. v. P.S.*, the offenders used the threat of making public sexual photographs of the complainants as a way of keeping their victims quiet.<sup>239</sup> In these cases, offenders relied on the complainant’s fear that the release of the photos would hurt her more than ignoring the fact that she was assaulted. Releasing private images could be exceptionally damaging to one’s social reputation, and male abusers can claim that the sexual relations were consensual, and that the victim is simply regretful. Once the photos are released, they are impossible to contain, and it is likely that the complainant will be judged for having supposedly put herself in this situation. This type of threat is likely to become more and more common with the proliferation of handheld recording technology, and in order to deter this type of behaviour, the courts must treat these scenarios as aggravating to help denounce this particularly gendered harm.

The fourth category of verbal abuse involves threats of physical violence. In these cases the offender threatens to hurt either the complainant or someone that the complainant loves if she does not obey the offender’s orders. The complainant is then in the position of deciding whether or not she should risk further harm by resisting. When a loved one is threatened, the complainant will feel solely responsible for their safety, resulting in a very powerful type of abusive

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<sup>238</sup> *R v Blake*, 2013 ONSC 6310 at p 11.

<sup>239</sup> *Tavares*, *supra* note 171 at para 151; *PS*, *supra* note 212 at para 26.

control.<sup>240</sup> Given the powerlessness that complainants often feel during a sexual assault, choosing between protecting themselves and protecting others may be the only decision they feel that they can make, even though it is not a decision at all. These threats exploit the social expectation that women feel to protect others, especially their children. This type of verbal violence is much easier to recognise as violence, but it did not appear that frequently in my sample. This may mean that there were only a few cases in my surveyed years featuring threats of violence as a factor, although given how frequent this sort of speech accompanies violent crime, there is likely room for awareness building among judges.

Finally, the last category of verbal abuse is the use of death threats. Like the prior category, this is a very recognisable type of verbal abuse. Death threats are also a particularly serious form of abuse as they imply that the offender is willing not just to harm the complainant, but also to kill her. To take a complainant's life is the ultimate form of control, and many people will do whatever an assailant desires in order to avoid death. Death threats are also common in situations involving domestic abuse, and may be part of escalating gendered violence against a complainant.

Verbal abuse comes in many forms, but its presence in an assault can represent a significant increase in the harm suffered by the complainant and, in sexual assault cases, it is almost always related to issues of gender equality. Not only is the victim going to be frightened of facing additional violence, threats further take away her power and autonomy, leaving her feeling even more helpless. While threats involving specific claims of future violence are recognised by the courts, more work needs to be done to acknowledge the less explicit types of

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<sup>240</sup> *R v Alton*, 2012 ONSC 5500 at para 47; *Supra* note 194 at para 29.



threats that may seem, at first glance, to not be that injurious, but nonetheless have serious gendered implications.

### 5.2.5 Offence Involved Grooming

Offenders who groom minors in preparation for an illegal sexual relationship will receive aggravated sentences, and this particular scenario was identified 18 times in my case survey.

Grooming refers to when an adult introduces inappropriate sexual behaviour to a minor in an attempt to present it as acceptable and desired conduct. For example, the court in *R. v. C.C.I* stated that child pornography was shown to the complainant to “suggest such deviant behaviour was acceptable in order to ‘sexualise or groom her to be receptive to sexual encounters’”.<sup>241</sup> By showing a minor sexualised images or involving them in sexualised actions that they normally would not be exposed to at their age, an offender is trying to create a situation where his exploitation is normalised and seen as acceptable behaviour. Common types of grooming can include showing an underage complainant pornography<sup>242</sup>, coercing a minor to help the offender create child pornography<sup>243</sup>, acting inappropriately sexual with the complainant<sup>244</sup>, bribing the complainant with material goods or money in order to convince them to engage in inappropriate conduct<sup>245</sup>, and engaging in sexual behaviour meant to prepare the complaint for further abuse<sup>246</sup>.

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<sup>241</sup> *CCI*, *ibid* at para 29.

<sup>242</sup> *Ibid*; *R v DM*, 2011 ONSC 3183 at para 72; *R v SB*, 2011 ONSC 5010 at para 72; *R v DM*, 2012 ONCA 520 at para 17.

<sup>243</sup> *Supra* note 176 at para 55; *MAJ*, *supra* note 171 at para 85; *supra* note 98 at para 16.

<sup>244</sup> *R v Miller*, 2013 ONSC 7327 at para 34 (offender arranged to spend private time with the complainants); *R v Y*, 2012 ONSC 3066 at p 14-15 (offender left sexually provocative notes for the complainants, as well as made frequent sexual comments to the two in person); *MAJ*, *supra* note 171 at para 111 (offender made claims that the minor complainant was his girlfriend); and *R v St Michael*, 2011 ONSC 449 at para 21 (offender also made complainant believe that she was his girlfriend).

<sup>245</sup> *JM*, *supra* note 171 at para 21; *VA*, *supra* note 224 at para 13; *Y*, *ibid* at p 14-15.

<sup>246</sup> *DM* 2011, *supra* note 242 at para 72 and *DM* 2012, *supra* note 242 at para 17 (carrot inserted into complainant’s vagina); as well as: *SB*, *supra* note 242 at para 72 (bondage used on complainant).

Grooming is a powerful aggravating factor that recognises the fact that offenders frequently take substantial time and effort to prepare their victims, and that sexual assault is often not a crime of opportunity. An offender who spends so much time trying to set up an assault cannot be dismissed as someone who made a mistake or an understandable error in judgement. After all, an offender who grooms a child is a deliberate criminal who privileges his needs above all others, and his sentence must reflect this active choice to break the law and violently harm another person. Recognising grooming as an aggravating factor also combats harmful constructions of male desires and sexuality that have been normalised in society.

Grooming as an aggravating factor appeared infrequently in this sample even though the vast majority of cases dealt with underage complainants, and many of these cases could have supported the application of this factor. If the courts fail to see the grooming aspects of cases, then this avoidance must be explored. The likely reasons for this oversight are that the factor is either forgotten or the sentencing judge does not believe that it applies in the case at hand. Either way, its absence shows that there is a need to educate judges more completely about grooming.

Grooming as a factor is intended to be used in cases dealing with underage complainants. However, grooming is also about escalating behaviour in a way that forces a complainant into accepting the offender's abuse. This tactic of trying to normalise unwanted sexualised behaviour is often used by adult men against adult women as well. While the process is different, there is value in recognising this type of inappropriate persistence between adults as an aggravating factor. If the facts of a case show that an offender repeatedly refused to respect a complainant's denial of consent, a feminist approach to sentencing would require that this behaviour be treated as aggravating as well.

### 5.2.6 Offence Conducted in the Presence of Children

If children are present during a sexual offence, aggravation can be applied. This factor can be used when the children are in the same room as the violence taking place,<sup>247</sup> but it is also relevant when the children are simply in the same house.<sup>248</sup> Considering these scenarios as aggravating is meant to recognise several different consequences arising from this behaviour. The first is the trauma that the children could be put through as a cause of seeing the offender assault the complainant (who is most likely their mother). In *R. v. L.M.*, a case that dealt with an assault conducted directly in front of an infant and in the same house as a toddler, the court stated that it “matters little to the finding of an aggravating circumstance that the child may have been too young to appreciate what was going on”, but that a child might “have been exposed to what I surmise would have been a very traumatizing tableau of violence”.<sup>249</sup> Consequently, the courts acknowledge that this type of violence is inherently harmful to children, and that even if the harm was not actualised in a particular case, an aggravating factor should still be applied for the risk that the offender created in possibly traumatizing uninvolved minors.

The factor also recognises the harms that such behaviour can have on the complainant. In *R. v. Thomas*, the court stated that by sexually assaulting the complainant in front of her children the offender was taking advantage of the fact that the complainant would likely do whatever she could to ensure that her children did not become involved, and thus she was more likely to submit without fighting back.<sup>250</sup> Not only is the complainant harmed by the assault, she

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<sup>247</sup> *H(R)*, *supra* note 206 at para 28; *R v Thomas*, 2011 ONSC 4050 at para 35; *supra* note 70 at para 31.

<sup>248</sup> *LM*, *ibid*; *supra* note 238 at p 10.

<sup>249</sup> *LM*, *ibid*.

<sup>250</sup> *Thomas*, *supra* note 247 at para 35.

experiences greater fear and emotional trauma because she is worrying for her children and is unable to even try and protect herself.

Sexually assaulting a complainant in front of others can be a way for the offender to dominate the complainant more than just sexually. In *R. v. H.(R.)*, the court stated that the offender “humiliated and degraded his spouse by exerting his power over her and forcing her to have anal sex while their children slept in the same room”.<sup>251</sup> The assault, therefore, was about more than just sexual intercourse. It was a way of punishing and diminishing the female victim, of making her feel unsafe, terrorised, and weak, and of destroying her capacity to resist.

While only five cases in my sample used the fact that an assault occurred in front of children as an aggravating factor, it is an important one to discuss in a feminist exploration of sentencing. Many feminists believe that rape is about power.<sup>252</sup> Thus, it is important to recognise as aggravating any actions that the offender undertakes to emphasise gendered dominance. By directly identifying when offenders are taking more than *sexual* gratification from their victims, sentencing courts will contribute to a more nuanced and realistic understanding of sexual assault that acknowledges its deep connections to male privilege.

### **5.2.7 Unconscious Complainant**

Labelling sexual assaults against unconscious complainants as aggravating has been a controversial conversation in the justice system. According to Elizabeth Sheehy, female complainants who are assaulted when unconscious are often deemed complicit in their own

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<sup>251</sup> *H(R)*, *supra* note 206 at para 28.

<sup>252</sup> *Supra* note 2 at 651.

abuse because they dared to become intoxicated or even sleep near men.<sup>253</sup> While cases such as *R. v. J.A.* have emphasised the fact that consent ends at the point of unconsciousness, Canadian courts have been slow to fully implement this rule.<sup>254</sup> Thus, it is encouraging from a feminist standpoint to see at least a few cases in this sample deal with this issue directly and without victim blaming. However, given the low number of cases that used this factor and the high rate of intoxication in relation to sexual assault, this is likely another aggravating factor that is not applied nearly as often as it should be.

In total, six cases declared that sexually assaulting an unconscious victim was aggravating. Some of the victims in these cases were sleeping when the assaults occurred,<sup>255</sup> while others were intoxicated or incapacitated for other reasons.<sup>256</sup> In the most in-depth decision on this issue, the court stated that it was important to recognise that just because a complainant was asleep does not mean that the offence was less serious or violent, and that the absence of additional acts of violence should not be considered mitigating.<sup>257</sup> According to that particular judge, unconscious complainants are often assaulted when they think that they are safe, so rather than being mitigating, this sort of behaviour should be seen as aggravating.<sup>258</sup> Furthermore, the fact that a complainant does not necessarily remember what happened to them is not a benefit. Instead of being comforted by their lack of knowledge of their assault, many complainants will suffer greatly from not knowing what happened to them, and from feeling powerless and

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<sup>253</sup> Elizabeth Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) 483 at 483-484.

<sup>254</sup> *R v JA*, 2011 SCC 28; 2 SCR 440; *Ibid* at 535-540.

<sup>255</sup> *Supra* note 238 at p 10.

<sup>256</sup> *R v JS*, 2011 ONSC 1743 at para 33; *supra* note 201 at para 21; *R v Laz-Martinez*, 2011 ONCJ 115 at para 34; and *Casilimas*, *supra* note 224 at para 8.

<sup>257</sup> *Laz-Martinez*, *ibid* at para 35.

<sup>258</sup> *Ibid* at para 34.

incapable of protecting themselves in the future. To assault an unconscious person is to harm someone who is incredibly vulnerable. A woman who wakes up having been used so violently by another person may never feel properly safe again, and this harm deserves aggravation.

### **5.3 Offender-Related Aggravating Factors**

The last class of aggravating factors that I will address in this chapter relate to the offender. They address issues such as the relationship he had with the complainant, as well as any anti-social behaviour he engaged in before, during, and after the offence.

#### **5.3.1 Offender Was in a Position of Trust/Authority**

Given the fact that most of the complainants in my sample were minors, it was not surprising that abuse of trust and authority appeared in over 80 cases. An offender who is in a position of trust is someone that the complainant either relies on or has faith in.<sup>259</sup> This type of relationship often imposes a duty of care on the party in the dominant position, namely the offender.<sup>260</sup> In over 50 of the cases in this sample, the offender was a family member of the complainant. Thus, this factor recognises the expectation that family members protect and care for other family. For example, when a parent or an older relative sexually abuses a younger relative, they are breaching a socially and morally applied contract, and this aggravating factor acknowledges not only the heinousness of the offender's actions, but also the increased harm a complainant will suffer when someone that is supposed to love and care for them chooses to hurt and use them instead. Many of the offenders who breached their position of trust were either fathers or acting as fathers to the complainants, but uncles, grandfathers, cousins, and brothers were also identified in the sample.

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<sup>259</sup> *R v Audet*, [1996] 2 SCR 171 at p 35.

<sup>260</sup> *R v L(DB)* (1995), 25 OR (3d) 649; 101 CCC (3d) 406; 43 CR (4th) 252.

The actions of relatives, particularly parents, who sexually abused children were spoken of quite harshly by the courts. For example, in *R. v. C.H.*, the court stated that a sexual assault against a child was “the most egregious breach of trust that a parent can perpetuate on a child”.<sup>261</sup> In *R. v. Z.(S.)*, the breach of trust involved a grandfather and his two grandchildren, and this behaviour was also described as “egregious and appalling”.<sup>262</sup> Finally, in *R. v. R.S.*, a case dealing with a father/step-father abusing three young boys, the court stated that it was “hard to conceive of a more egregious violation of a position of trust”.<sup>263</sup> Sexual assaults perpetrated by family members, therefore, are treated as extremely aggravating.

Breaches of trust arise in other situations as well. In 11 of the cases, the offender was a close friend of the family. Much like family members, friends of the family are often deeply trusted by the complainant and her family, and are assumed to be acting in good faith towards their friends. While they do not necessarily have the same access to the complainant as family members often do, close friends are generally welcome in the complainant’s home, and will spend a lot of time with the complainant and her family.<sup>264</sup> A breach of trust with these individuals is incredibly hurtful as the complainant and her family voluntarily developed a relationship with them. For example, in *R. v. Brodofskie*, the offender used his relationship with the complainants’ father to get close to them, and then used this relationship to pressure the complainants into not telling their parents about the sexual abuse.<sup>265</sup> In *R. v. Blake*, the offender hired the complainant, the daughter of a family friend, to babysit his children, and then began to sexually assault her when she was working for him, even though she should have been able “to

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<sup>261</sup> *Supra* note 176 at para 61.

<sup>262</sup> *R v Z(S)*, 2011 ONCJ 868 at p 21-22.

<sup>263</sup> *R v RS*, 2013 ONSC 4088 at para 17.

<sup>264</sup> *R v B(N)*, 2011 ONCJ 183 at para 119.

<sup>265</sup> *R v Brodofskie*, 2012 ONSC 1889 at para 11.

expect a full measure of security and safety in the Blake home instead of sexual violation at the hands of Mr. Blake”.<sup>266</sup>

In the *Blake* decision, the victim was the babysitter; however, babysitters can also be abusers as well. Those that sexually assault children in their care should receive aggravated sentences as they may not be relatives, but they are people that parents trust enough to supervise young children. In *R. v. Snider*, the courts stated that offenders who sexually assault the children they are caring for commit a particularly high level breach that requires an elevated need for denunciation.<sup>267</sup> After all, babysitters are hired to protect children when parents cannot do this themselves, and they provide a necessary service in society. Parents should not be afraid that carefully chosen childcare providers are going to abuse their children.

Trust relationships can also arise with religious leaders. People trust religious leaders with deep and personal issues. For example, in *R. v. Boudreau*, the offender was a parish priest who was a “role model, a trusted friend, confidante and mentor” to the people in his community.<sup>268</sup> In *R. v. Miller*, the court stated that “abuse by a priest is particularly egregious” because of the strong influence these men have on families and communities as spiritual leaders.<sup>269</sup> Given that religious figures are supposed to be authorities on moral behaviour, sexual abuse from these individuals can be confusing and incomprehensible to victims, resulting in lifelong emotional and spiritual suffering.

While abuse from Christian religious authorities is well-known, abuse from other cultural religious leaders can also be construed as aggravating. In *R. v. Jackpine*, the offender was an

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<sup>266</sup> *Supra* note 238 at p 108.

<sup>267</sup> *Supra* note 174 at para 9.

<sup>268</sup> *Boudreau*, *supra* note 171 at para 57.

<sup>269</sup> *Miller*, *supra* note 244 at para 24.



Aboriginal healer that abused a complainant who came to him for spiritual and health-related matters.<sup>270</sup> Like the priests mentioned earlier, Jackpine's community trusted him to care for and guide individuals in need of spiritual aid. When individuals with these types of responsibilities hurt those who come to them, the court rightfully responds with a harsher sentence.

Finally, employers and employees can also be in relationships of trust or authority. In *R. v. J.J.P.*, the court recognised that there was a substantial power imbalance between the complainant and the offender who was her boss.<sup>271</sup> Not only was the complainant subordinate to him, she needed her job to support her children, and was in a very financially vulnerable position.<sup>272</sup> Similarly, in *R. v. Racco*, the complainant was also reliant on the offender for her employment as well as accommodation.<sup>273</sup> These two cases show how the inequitable realities of the workforce can result in unsafe and abusive situations for female complainants whose bosses make inappropriate sexual advances towards them. Given the feminization of poverty and the diminished statistical likelihood of women being in management positions, the issue of employment and relationships of authority is important to recognise in sentencing decisions as exploitive and predatory behaviour that should be considered aggravating.

Position of trust is used frequently by the courts, and often with strong, feminist reasoning. However, despite its frequent use, there is room for the courts to think more deeply about how this factor could apply to adult complainants in situations that extend beyond employment. One interesting case from this sample was *R. v. Mir* where the offender was a cab driver and the complainant was his passenger. The court stated that this sexual assault involved a

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<sup>270</sup> *R v Jackpine*, 2012 ONSC 158 at para 36.

<sup>271</sup> *JJP*, *supra* note 212 at para 59.

<sup>272</sup> *Ibid* at para 59-60.

<sup>273</sup> *R v Racco*, 2013 ONSC 1517 at para 68, 101. The situation in *R. v. Racco* was an abuse of authority, not trust.

serious breach of trust because the complainant was relying on the offender to do his job and safely bring her home.<sup>274</sup> Even though the relationship was brief, the trust was founded on the idea that individuals should not have to fear that they will be hurt by someone with whom they are engaging in a common business transaction with. *Mir* is a feminist decision as it helps to recognise the dangers that women face in the public sphere. To state so clearly that individuals have a right to be safe when doing something as mundane as catching a cab, and that a relationship of trust opens up when this business transaction is entered into ensures that the law focuses on the offender's unacceptable breach of behaviour, and allows women to be full citizens. This type of reasoning should be applied to other cases where women are hurt and abused by people offering services, especially when these services take place in private. Thus, while there is obviously a need to protect minors, it is also important to recognise that breaches of trust do not stop when a person turns eighteen, and we should expect more from fellow citizens in their engagements with other adults.

### **5.3.2 Offender Has a Prior Criminal Record**

An offender's prior criminal record will generally be considered aggravating. Like its mitigating counterpart, this factor is one that the courts are usually comfortable using, and it appeared 28 times in this sample. However, how aggravating a prior record will be often depends on the type of offence that the offender was previously convicted of.

In this sample, many judges included at least some brief information on what the offender's previous conviction was for. Convictions that involved personal injury offences, particularly previous sexual offences, tended to be treated more harshly, though this was

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<sup>274</sup> *R v Mir*, [2012] OJ No 6438 at para 2 and 15.

contentious. For example, in *R. v. Woodward*, the court identified the offender's previous crimes as theft and fraud, and discussed what this type of criminal background meant for a sexual assault offence.<sup>275</sup> In the end, the trial judge treated the offender's prior fraudulent conduct as aggravating because the sexual assault he perpetuated required a high level of fraudulent conduct: the offender met the underage complainant online and tried to convince her to have sex with him by promising her large sums of cash.<sup>276</sup> All of his interactions with her were based on lies he specifically manufactured to coerce the complainant into submitting to his sexual desires. The offender appealed based on the application of this factor, stating that it was incorrect for the trial judge to compare "the calculated deceit required to perpetuate a money fraud with the social acumen required to engage someone in sexually explicit conversation".<sup>277</sup> Upon review, the appeal court decided that the comparison was appropriate as the offender's history of criminal behaviour was similar to the behaviour he used to abuse the complainant. This was not a situation in which the offender lied about a few details. Instead, this offender constructed an elaborate story about his identity, and even arranged to prove to the complainant that he had access to large sums of money. As offender had repeatedly engaged in fraudulent behaviour to obtain things that he desired, it was appropriate to apply an aggravating factor in this case.

Thus, applying this aggravating factor is a highly contextual process. While sentencing is offender-focused, this does not mean that a judge should favour his needs over those of the complainant or society. As can be seen in *Woodward*, previous criminal behaviour often represents a pattern of conduct that escalates over time. Just because the previous conduct does not, on the surface, relate to sexual assault, does not mean that the offender has not shown a

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<sup>275</sup> *R v Woodward*, 2011 ONCA 610 at para 49.

<sup>276</sup> *Ibid* at para 10.

<sup>277</sup> *Ibid* at para 51.

pattern of lawless or misogynistic behaviour. Furthermore, this aggravating factor is meant to recognise that a previous offender has already had the opportunity to react to the deterrent effects of the criminal justice process. Prior criminal conduct should not be easily dismissed even if the offender's previous convictions seem unrelated to sexual assault, and the courts should carefully assess whether a prior record could have gendered implications.

### **5.3.3 Offender Represents a Continuing Risk to Society or Has Limited Rehabilitation Prospects**

Determining whether an offender represents a continuing risk to society or whether he has limited rehabilitation prospects is a difficult, political, and discretionary process. When assessing whether an offender is going to be a continuing risk to society, the judges in this sample tended to look at whether the offender had insight into the wrongfulness of his conduct, as well as the results of any official risk assessments. A lack of insight into the harms caused by the offence was generally taken as a strong indicator that the offender could reoffend. For example, in *R. v. Y.*, the offender was deemed to be a continuing risk as he did not consider any sexual behaviour other than penile-vaginal intercourse to be criminal.<sup>278</sup> A lack of insight can also be implied by how little responsibility the offender takes for his actions. For example, in *R. v. S.B.*, the court stated that:

It is concerning, although it is also indicative of his need for treatment, that [the offender] minimizes his responsibility for his actions against the two boys. He points to his severe childhood experiences as contributing to the person he was at 30. As stated in the Presentence Report but without there being any corroboration of this, he also points to his adult roommate as being a bad influence on him and a triggering cause for his criminal actions. I conclude from this that while [the

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<sup>278</sup> *Y*, *supra* note 244 at para 15.

offender] takes responsibility for his actions, at the same time he is very willing to deflect part of that responsibility onto others.<sup>279</sup>

While the actions underlying the offence were seen as wrong, the offender refused to acknowledge how he was responsible. Instead he tried to justify and excuse his behaviour based on the actions of others. Even if difficult life circumstances can be used as mitigating factors, an offender must still recognise that he was the one to engage in criminal conduct. If he cannot see how he is ultimately responsible for his own choices, then he may be likely to offend again.

When lack of insight occurs in a case dealing with a sexual offence, the aggravating effect should be increased. After all, when an offender damages property, it can often be replaced or repaired. However, the harms resulting from sexual offences are long-lasting, and thus it is important to react decisively to prevent further harm. An offender who refuses to acknowledge the wrongness of his actions is putting others at significant risk, and this risk should be mitigated by a sentence that responds to his lack of insight.<sup>280</sup> Furthermore, allowing an offender to dodge responsibility upholds the myth of uncontrollable male desire, a belief that leads to a fatalistic acceptance of the inevitability of sexual assault. Instead of expecting men to regulate their behaviour, women are expected to live in a world where sexual assault is an ever-present possibility. Thus, sexual offenders cannot be allowed to diminish their own culpability, and sentencing must react to this proof of continuing risk with aggravation.

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<sup>279</sup> *SB*, *supra* note 242 at para 32.

<sup>280</sup> Aggravating a sentence based on the offender's lack of insight has been applied in Ontario before. In *R. v. J.A.*, the court noted that the offender's pre-sentence report revealed that he had little insight into the wrongness of his actions, and that he continually engaged in problematic justifications for his behaviour. Furthermore, attempts at rehabilitation had been unsuccessful, and the offender refused to participate in any future programming. The offender was given a lengthy sentence in recognition of the fact that he did not show any signs of understanding why his conduct was unacceptable, nor was he willing to attempt to change his behaviour to ensure that he did not commit the same criminal assaults once again. See: *R v JA*, 2008 ONCJ 624.

Risk assessments are another method of determining whether an offender is a continuing risk to society. These reports are often prepared by professionals from the justice or medical systems, and they utilise a series of different tests to try and objectively determine how likely an offender is to reoffend. However, the courts do not always take risk assessments at face value. In *R. v. Simard*, a pre-sentence report and sexual behaviours assessment was submitted to the courts, but the judge gave little weight to these items as the authors of these pieces were not aware of the full context of the charges that the offender was facing.<sup>281</sup> As pointed out by this judge, expert testimony may be very useful, but depending on how it has been constructed, it may not suit the needs of the court.

Despite the issues raised by relying on risk assessments, the courts tend to consider refusals to comply with the process as a sign that the offender may be a continuing risk. For example, in *S.B.*, the offender refused to undergo phallometric testing, and the court believed that this decision showed that the offender was “unwilling to allow the assessment to be based on the fullest possible information about his mental state”.<sup>282</sup> By refusing to participate, the offender was seen as undermining his own treatment. According to this opinion, if he was truly committed to getting better, then he would submit to all available tools and treatment. While a sentencing analysis should be more nuanced, if an offender refuses to participate in certain processes without explanation this fact should be considered during sentencing.

#### **5.3.4 Continued Anti-Social Behaviour on Behalf of the Offender Post-Offence**

Anti-social behaviour committed by the offender after an offence is considered aggravating, such as when an offender breaches conditions applied to him as he waits for his

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<sup>281</sup> *R v Simard*, 2013 ONSC 6561 at para 9.

<sup>282</sup> *SB*, *supra* note 242 at para 30.

trial. This factor responds to offenders who have a continuing disregard for the law as this shows that they have not committed themselves to becoming better citizens even when they are under greater scrutiny.

In cases involving sexual assault, the breaches that tend to result in aggravation are ones where the offender either harms the complainant further, or puts potential victims in danger. For example, in *R. v. L.M.*, the offender had already been subject to conditions that required him to refrain from being near the complainant or communicating with her when he breached these orders to commit the sexual assault against her.<sup>283</sup> This continued anti-social behaviour must be considered aggravating as the offender was undermining the justice system's attempt to protect the complainant from escalating abuse. Women are frequently subject to violence at the hands of men, and an important tool for keeping women safe is a court order requiring abusers to halt all contact with their victims. Thus, if an offender breaches these orders, the court must apply substantial aggravation to properly deter and denounce this behaviour.

The courts also react strongly when dealing with offenders who engage in anti-social behaviour that could provoke them to commit further offences or endanger new victims. For example, in *R. v. Moroz*, the offender failed to comply with a court order to avoid contact with all children, and to refrain from viewing additional pornography.<sup>284</sup> According to the judge:

This flagrant possession of additional child pornography is even more telling of the accused's propensity to reoffend when we appreciate that this accused was involved for the first time with the criminal justice system, spent a month in custody before his release on a recognizance, and still was not able to avoid both the possession of child pornography and contact with young children.<sup>285</sup>

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<sup>283</sup> *Supra* note 70 at para 32.

<sup>284</sup> *Supra* note 215 at para 23.

<sup>285</sup> *Ibid* at para 24.

Thus, an offender who continues to engage in problematic sexual behaviour shows the court that he cannot be trusted, and that he is an ongoing threat to potential victims. The process of being charged by the police and experiencing the initial stages of a trial is a chance for an offender to rethink his actions and constrain his behaviour. Those who cannot or will not control their inappropriate sexual conduct should be seen as a dangerous risk to society – particularly women – for they are continually placing their own sexual desires above the safety of their victims.

### **5.3.5 Offender Helped to Intoxicate Complainant**

One aggravating factor which was not that common in this sample, but which should be addressed more frequently, is when the offender deliberately helps to intoxicate the complainant in order to facilitate his abuse. Research shows that alcohol is quite frequently a factor in sexual assaults, and it is not uncommon for it to be used as a tool by the offender to secure compliance from the complainant.<sup>286</sup> For example, in *R. v. C.H.*, the offender:

plied [the complainant] with alcohol to ensure that she submitted to him, and he made the alcohol more palatable so she would drink faster. [The offender] also turned the abuse into a game by using both a drinking game and the dice game in an effort to make it seem fun or perhaps permissible to a 12 year old.<sup>287</sup>

Intoxicants can be used as a form of bribery to convince a complainant to submit, capitalize on addictions suffered by the victim, or to make them more amenable to inappropriate sexual behaviour on behalf of the offender. In *R. v. Boudreau*, the offender continually supplied alcohol to the complainants in order to inure himself to them, and to soothe their distraught feelings

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<sup>286</sup> Emily Finch & Vanessa E Munro, "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16 Social and Legal Studies 591 at 595. This phenomenon can be seen in the following cases: *R v LY*, 2011 ONSC 693 at p 3; *Boudreau*, *supra* note 171 at para 57; *supra* note 176 at para 55; *S(S)*, *supra* note 179 at para 15.

<sup>287</sup> *R v CH*, *ibid* at para 55.



about his conduct.<sup>288</sup> Alcohol was, in this case, a tool of grooming used against minor complainants to undermine their capacity to protest.

Alcohol is known for lowering inhibitions, but also for incapacitating complainants. According to Sheehy, intoxicants are a common factor in cases involving unconscious complainants, and these types of attacks often feature some level of coercion on the part of offenders.<sup>289</sup> Furthermore, Sheehy's research suggests that female complainants who are assaulted when intoxicated are blamed for their attacks. To undermine this rape myth, the courts must actively work against this sexist assumption and be more rigorous in their analysis of offender behaviour in regards to intoxicants. To deliberately participate in the intoxication of the complainant shows that the offender is not only callous to the complainant's health and welfare, but also that he planned and strategized his offence. This type of behaviour is too frequently dismissed as acceptable mischief and adult fun, but evidence suggests that it is common predatory conduct used by men.<sup>290</sup> While it may be hard to prove intent, the courts cannot ignore the equality concerns raised by this factor just because it may be difficult to implement.

#### **5.4 Concluding Thoughts on Aggravating Factors**

The results of my case survey show that feminist interpretations of criminal law are slowly making their way into Canadian jurisprudence. However, these factors are still too often being used in a manner that undermines gender equality and minimises the seriousness of sexual assault. The most significant issue raised by my findings is the continued underutilisation of

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<sup>288</sup> *Boudreau, supra* note 171 at para 57.

<sup>289</sup> *Supra* note 46 at 485-486.

<sup>290</sup> Leanne R Brecklin & Sarah E Ullman, "The Roles of Victim and Offence Substance Use in Sexual Assault Outcomes" (2010) 25 *Journal of Interpersonal Violence* 1503 at 1516. See also chapter six starting at page 126 for a more in-depth exploration of the use of intoxicants by sexual assault offenders, and how this fact should affect sentencing.

aggravating factors even when they are applicable. This problem was first identified by Pasquali during the early 1990s when she discovered that the courts were not consistently using relevant sentencing factors.<sup>291</sup> Despite the changes brought about by the 1996 sentencing reforms that codified the use of aggravating and mitigating factors, contemporary decisions are still repeating this error of law, resulting in unbalanced and unfair decisions.

From a feminist perspective, improper use of aggravating factors in sexual assault cases leads to sentencing decisions that are weighted in favour of the offender rather than being balanced with the needs of the complainant and society. Female victims are already discriminated against throughout the entire criminal justice process, and erasing or diminishing their voices and needs in sentencing decisions embeds these discriminatory trends further. Proper use of aggravating factors allows the courts to call attention to the harms caused by sexual assault, both to the complainant and to women as a whole, and to diminish the societal influences of rape myths. Thus, these factors represent an opportunity to insert more nuanced understandings of gender equality in sentencing, a part of criminal law that can have profound implications for how the rest of society understands the harms of an offence. While no sentence should be dominated by the needs of the complainant, her experiences and reactions deserve to be considered as much as those of the offender, and proper use of aggravating factors is one of the most important ways that this balance can be achieved.

Misuse of aggravating factors in this survey was largely caused by the influence of rape myths. While errors of judgement in the courts are impossible to fully prevent, the issues identified in this paper reflect deeply rooted sexist assumptions that must be addressed.

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<sup>291</sup> *Pasquali*, supra note 1 at 21.

Aggravating factors were not included in these decisions because the harms of sexual assault are not always acknowledged and the violence of this offence is consistently diminished.

Furthermore, systemic examples of oppressive and harmful male behaviour were rarely identified directly, and the idea that sexual assault can be an example of poor judgement by good men still persists. The underutilisation of aggravating factors supports these discriminatory understandings of sexual assault, and allows the gendered aspects of this crime to remain unchallenged. A feminist approach, therefore, strives to discuss societal level issues even in the individualistic sentencing process, and refuses to allow the offender to become the only focus of a decision.

Throughout this chapter, I have sought to identify the often subtle expressions of discrimination prevalent in the application of aggravating factors and to suggest more nuanced and feminist uses of these tools that would actively counteract rape myths and stereotypes. Recognising when sentences must be aggravated represents only half of this part of the sentencing process, though, so the next chapter will discuss mitigating and neutral factors.

## **Chapter 6: Results of the Case Law Survey: Mitigating and Neutral Factors**

In the previous chapter, I began a review of my case survey by exploring how aggravating factors were being used by judges in sexual assault cases. This chapter is a continuation of this discussion with a focus on mitigating and neutral factors, as well as my observations and conclusions on the study as a whole.

Mitigating factors are used when an offender's behaviour or personal circumstances lead the court to believe that he deserves a more lenient sentence. Use of these factors is not meant to diminish the harms of the crime that occurred, but to allow the criminal justice system to humanise and individualise the process. These factors ensure that the substantial powers of the state do not overwhelm the specific needs of the offender. However, this balance can be damaged by inappropriate use of mitigating factors. In sexual assault cases, problems arise when rape myths and societal bias against complainants create a tendency to privilege the offender's needs and perspectives. As discussed earlier in this paper, sexual assault is a crime that is consistently trivialised by society, and responses to it from the criminal justice system are heavily influenced by discriminatory assumptions about the offence and its victims. Consequently, the behaviour of offenders is often excused or seen as less severe or blameworthy than it should be, and mitigating factors are a primary method of expressing these inequitable analyses.

In my case survey, I focused on how mitigating factors are being used in a manner that perpetuates rape myths. This chapter explores some of these discriminatory applications, many of them rather subtle. These discussions are not meant to suggest that mitigating factors should not be used, but to recommend that more care and critical thought must be applied to them.

## **6.1 Offender-Related Mitigating Factors**

The first category of mitigating factors that I will address relates to the offender and his conduct. Depending on the offender's choices, as well as his personal background, a court may choose to apply a more lenient or lesser sentence in order to take into account these details.

### **6.1.1 Offender Has No Previous Criminal Record**

One of the strongest mitigating factors available to judges addresses whether an offender has committed a crime before. The logic behind this factor is that if an offender has not experienced being investigated and prosecuted by the justice system before, there is a good chance that this process will encourage him to reform his behaviour.<sup>292</sup> Thus, while some punishment must still be applied, courts limit the severity in order to have minimal effects on the offender's ability to lead a responsible and crime-free life later on. However, there are many complications when using this factor in the context of sexual assault cases that require the courts to take a more nuanced approach.

No prior record was one of the most common factors used by the courts in this sample, appearing in around 80 cases. In 58 of these decisions, the court stated that the offender had no prior record with no additional comment as to how that affected the sentence. Over 20 of the surveyed cases delved deeper into the reasons as to why this factor was applied, and these short descriptions of the judges' reasoning are very useful in unpacking how this mitigating factor is being used. In *R. v. Nelson*, the court identified Nelson as a first time offender, but also noted that he had been involved in another incident (not sexual assault) involving a young woman who refused his advances, and that this behaviour could be seen as an "escalation of a problem

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<sup>292</sup> *Supra* note 88 at 120.

attitude towards women”.<sup>293</sup> This reasoning acknowledges that a lack of formal previous charges does not imply that an offender has not engaged in questionable and sexist behaviour before. Obviously, the fact that he has not experienced the process of a criminal charge should still matter when considering sentence; however, his status as a first time offender should not be taken as proof of a lifetime of morally upright behaviour.<sup>294</sup> Thus, before the courts assume that an absence of a criminal record implies that this is new behaviour for the offender, they should seek to confirm this with other types of evidence first.

However, in saying this, it is also important to address how a more contextual and detailed analysis of this factor can lead to inappropriate results. For example, in *R. v. G.J.*, the offender had a previous conviction for a sexual offence, but had not been charged with a similar crime for over forty years.<sup>295</sup> The court stated that it did not consider the previous conviction of sexual assault as the details of that case were not before the court.<sup>296</sup> Thus, the court decided to treat G.J. as a first time offender because of the long gap between his offences, as well as his history of good character.<sup>297</sup> In *Nelson*, character evidence was used to show that a lack of a prior record does not mean that the offender has lived a perfectly pro-social life. In *G.J.*, on the other hand, additional context was used to directly undermine the intent of the factor. While long gaps in offending should be considered, they do not erase the fact that the offender has a criminal record. Furthermore, even if the details were scant in this case, the court should not have dismissed this previous offence. Had G.J. been convicted for something unrelated to sexual

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<sup>293</sup> *R v Nelson*, 2012 ONSC 4248 at para 33.

<sup>294</sup> For example, see: *R v CD*, 2012 ONCA 696 at para 21. The court stated that the offender had no previous criminal record and had “led an exemplary life” without really exploring what that meant in the context of his offence.

<sup>295</sup> *GJ*, *supra* note 195 at para 28.

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

assault, this reasoning would have been stronger, but to dismiss a previous conviction for a sexual assault offence does not make sense. If the court felt that it needed more insight into this previous offence, it should have sought further evidence. Additionally, even with the gap, this previous conviction shows that the offender has already had the benefit of experiencing the criminal justice system. To treat G.J. as a first time offender trivialises the seriousness of sexual assault and suggests that his first offence was not deserving of significant condemnation. Furthermore, this decision entrenches the rape myth about how good men who have “understandable” lapses in judgement do not need to be severely punished (particularly as in this case, the offender was allowed to make this mistake more than once). In cases where there are previous convictions for sexual offences, these convictions should always be treated as aggravating rather than dismissed and warped into an unnecessary and harmful mitigating factor.

While none of the cases in this sample were as problematic as *G.J.*, several others were troubling. There were examples of offenders whose previous convictions were ignored because they were not seen as directly related to sexual assault. For example, in *R. v. L.M.*, the court stated that the offender had a record, but “not for violent offences, and certainly not for a sexual offence”.<sup>298</sup> This mitigating factor was not meant to be understood as only a lack of a prior criminal record involving the offence in question. Instead, it is meant to recognise an absence of *any* recorded anti-social behaviour, so the courts should not dismiss previous records that are not violent, particularly without explaining what this previous record was for, why it is not relevant, and why the offender deserves to be treated as a first time offender. The court in *R. v. Smith* went even farther in distorting this mitigating factor when it was noted that the offender had a prior

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<sup>298</sup> *LM*, *supra* note 70 at para 24.

conviction for assault, but otherwise “appeared to be a law-abiding member of the community”.<sup>299</sup> This type of rationale turns first time offender status into not frequent offender status. The designation of first time offender is used to address offenders who have *never* interacted with the justice system. To trivialise previous convictions, particularly convictions for violent offences, undermines its purpose and fails to deter anti-social behaviour. In the context of sexual assault, unanalysed dismissal of prior anti-social conduct enables escalation of criminal behaviour on the part of an offender, and this social allowance can lead to crimes that have a devastating impact on women.

Additionally, despite this factor’s importance, the courts should not hesitate to question whether it always deserves a strong application. In *R. v. Basit*, the court stated that “in cases of sexual interference with child complainants,... the Court of Appeal has directed that denunciation and deterrence are primary considerations, notwithstanding that the defence is a youth offender without previous record”.<sup>300</sup> Thus, even though this case would normally be significantly mitigated given the offender’s characteristics, the sentencing judge noted that sexual crimes against minors are incredibly harmful, and a lack of a prior record will not necessarily offer much mitigation.

### **6.1.2 Offender’s Employment Status**

An offender’s positive employment record is meant to represent several different things: a pro-social attitude, the ability to be a productive member of the community, and an example of good character evidence. While all of these facts are important, their application in sexual assault cases can be problematic given how infrequently this factor is unpacked and more deeply

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<sup>299</sup> *Smith* 2011, *supra* note 206 at para 46.

<sup>300</sup> *Basit*, *supra* note 171 at para 22.



understood in the context of the offence. In this section, I will review some of the trends in the approximately 40 cases that used this factor yet failed to see how it can hide predatory action on the part of the offender.

To begin, it is helpful to look at one of the more balanced decisions in this sample: *R. v. C.C.I.* In this case, the court recognised that the offender had maintained a pro-social life by both volunteering and working, but also explained that “often those who commit such deplorable, deviant, self-gratifying sexual acts upon children present as trustworthy and respectable”.<sup>301</sup> While employment can be a sign that an offender can be rehabilitated, it could also have been a tool that the offender used to commit his crimes. An active mentor to children may be using his access to vulnerable minors in order to harm them, and a respected business man may be using his influence to silence his victims. For example, in *R. v. Smith*, the court carefully detailed the offender’s strong employment and volunteer history, framing him as a devoted community member.<sup>302</sup> However, the court did not contrast these details with the fact that the offender had sexually assaulted his minor foster daughter, causing her to become pregnant. His substantial reputation was part of what allowed him to care for very vulnerable children, yet he abused this privilege. The fact that the rest of the community benefited from his care pales in comparison to the harm that he caused a young woman and her child. Thus, evidence of employment must be judged as mitigating or not depending on context. The effects of the factor may be diminished or cancelled out completely if the employment record of the offender helped him perpetuate his offence.

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<sup>301</sup> *CCI*, *supra* note 194 at para 30.

<sup>302</sup> *Supra* note 185 at para 43.

This factor is also used to recognise and mitigate the harmful effects that sentences can have on an offender's actual job or job prospects. For example, in *R. v. H.(R.)*, the offender was employed as a long distance truck driver, and being criminally charged was affecting his ability to enter the United States for work.<sup>303</sup> The court decided that this was a mitigating consideration as harmful career effects are their own form of punishment. However, how does one weigh these detriments against the actions that the offender chose to undertake? In this particular case, the offender violently abused his spouse multiple times, including an incident of forced anal sex in front of their sleeping children.<sup>304</sup> Unlike an offender who may commit theft because they are in need of something they cannot access, there is no justification for this violent behaviour. The offender willfully assaulted his spouse and should have known what the consequences could be if his actions were reported. The offender's pro-social behaviour of having a full-time job did nothing to prevent his anti-social behaviour against his wife. In the context of sexual assault, being employed does not seem to be a limiting influence on whether an offender sexually abuses anyone, so this factor should not be weighted that heavily.

### **6.1.3 Offender is of a Good Character/Has Community Support**

Evidence of an offender's good character is supposed to give insight into whether or not criminal behaviour is "normal" for the offender. If an offender is generally considered to be a decent, law-abiding person, then he may receive mitigating benefit for behaviour that seems out of character and potentially non-repeatable. Similarly, community support is used when there are individuals who are willing to believe in the offender's ability to become a good citizen and wish to support him in achieving these behavioural changes. Evidence for both of these factors,

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<sup>303</sup> *H(R)*, *supra* note 206 at para 22.

<sup>304</sup> *Ibid* at para 5.

however, is largely subjective and tends to come from unreliable sources. “Good” people can still engage in harmful behaviour without it being an aberration that deserves to be treated as a mistake and, furthermore, their communities may not be able to prevent such conduct.

Particularly in the context of sexual assault where so much blame is already shifted off of the offender to the complainant, inappropriate use of good character evidence and community support can trivialise the offence and the harm done to female victims in order to protect male offenders from the consequences of their actions. Over 30 cases in this sample used good character evidence to lessen sentences, while over 40 identified community support as mitigating.

One issue with these factors relates to who is providing the evidence. The people who offer character references and support are usually close to the offender. They may be loved ones, friends, or co-workers, but regardless, they know the offender well enough to potentially be biased in his favour. While most people do try to speak honestly and openly about the offender during the trial process, if their interactions were positive, how can they speak accurately of the offender’s criminal behaviours, particularly about a crime that tends to occur outside of the public eye? Are they even going to believe that the person they love and trust was capable of hurting someone in such a vicious manner, and will they be willing to adequately respond to future behavioural issues? For example, in *R. v. T.M.B.*, the offender received strong character references from his wife and his two older sisters despite the fact that he abused his granddaughter.<sup>305</sup> In *R. v. Evans*, the judge noted that the offender’s family was shocked by the offender’s behaviour, not comprehending how the son that they saw as well-liked could have

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<sup>305</sup> *R v TMB*, 2013 ONSC 4019 at para 34.

committed such brutal acts.<sup>306</sup> The judge cautioned against the utility of this type of statement, stating that sexual assaults are often committed in private, and outsiders to the offence are not exposed to this conduct.<sup>307</sup> Thus, familial support can be undermined by the fact that the family's image of the offender is not one of a person who would engage in such behaviour. Support for the offender is only positive when it ensures that the offender will more easily meet certain sentencing goals. The support must not only provide compassion and community for the offender, but challenge his choices and attitudes that could lead to reoffending. This requires that the people offering the support fully understand and accept that the offender has engaged in harmful actions, even if they usually see him as a good person. Given the fact that sexual assault victims are often disbelieved or blamed for their own assaults, this critical reflection on good character and community support is necessary to undermine rape myths that justify and excuse harmful male sexual behaviour.

Furthermore, these factors can strongly benefit the most privileged of offenders. The middle class offender who works a white collar job and is a good community member is much more likely to be considered “good” than the offender who has already been in trouble with the law, is impoverished, or undereducated. Society is much more likely to label the behaviour of the former offender as an unfortunate mistake rather than a sign of actual bad character. For example, in *R. v. Smith*, a case involving an offender who sexually assaulted his foster daughter multiple times resulting in pregnancy and the birth of a child, the court stated that “[there was] nothing to suggest that Mr. Smith [had] been anything but a contributing member of our

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<sup>306</sup> *R v Evans*, 2012 ONSC 5801 at para 58.

<sup>307</sup> *Ibid.*

society”.<sup>308</sup> His friends and loved ones submitted “glowing” letters of support for him, including one that suggested that “the wiser and matured [offender] of today can’t fathom why he allowed this to happen”, and that his actions were “inconsistent with his character, his natural instinct to protect those in his care”.<sup>309</sup> According to his character references, the offender was not a person who would normally engage in such abhorrent actions, and he suffered from a lapse of judgement that he would have tried to correct if he had only known of the consequences. The fact that his reputation in the community was so strong meant that those around him were unwilling to offer anything other than justifications and excuses for his behaviour even though he admitted to breaching a serious relationship of trust with both the victim and the community. To mitigate his sentence based on his extensive community service and overall kindness ignores how these realities allowed him to abuse the victim in secret, and that his overall good character and community support did nothing to prevent his actions. Mitigating evidence relying on the perspectives of those close to the offender, therefore, can be a negative influence on the sentencing process that further embeds discriminatory assumptions in decisions and strengthens rape myths that justify sexual assault as an “understandable” mistake.

#### **6.1.4 Age of the Offender**

Mitigating a sentence based on the age of an offender is meant to recognise the unique challenges and realities faced by individuals at the different ends of the maturity spectrum. However, what are the guidelines about applying this factor, and are there special considerations to take into account when dealing with sexual assault cases? The following section will look at

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<sup>308</sup> *Supra* note 185 at para 43.

<sup>309</sup> *Ibid* at para 44.

how courts have currently been applying age-related factors, and suggest that much better guidelines need to be implemented to instruct judges when considering these types of facts.

#### **6.1.4.1 Youthful Offenders**

To mitigate based on youth is to suggest that an offender deserves some leniency for his lack of maturity and potential to grow into a law-abiding member of society. However, when dealing with sexual assault cases, this reasoning too often shifts into framing the crime as one of youthful indiscretion. Instead of being about encouraging the rehabilitation of a young man, the factor becomes a justification for his behaviour. It is a rape myth to assume that sexual assault is *ever* an acceptable behaviour, and even young individuals should be socialised into understanding that this violation is morally and criminally wrong. Suggesting that sexual offences are normal occurrences causes significant harm to women and excuses male criminal behaviour. Thus, mitigation for youthfulness must be carefully controlled in order to counteract these discriminatory presumptions.

The main technical challenge in determining mitigation based on youthfulness is exactly how old an offender can be to qualify. After all, just because a person has turned eighteen, does not mean that he will immediately have the same maturity and decision making skills as someone older. For example, in both *R. v. J.W.*<sup>310</sup> and *R. v. Knelsen*<sup>311</sup>, the offenders were under 20 years old when they committed their crimes. However, in *R. v. N.M.*, the offender was 27 years old and still received mitigation based on his age.<sup>312</sup> At 27 years old, many individuals are finished post-secondary education, have gotten married, own houses, and have started their adult careers. At 18 and 19 years old, an offender may still be struggling with understanding

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<sup>310</sup> *R v JW*, 2013 ONSC 1712 at para 78.

<sup>311</sup> *R v Knelsen*, 2013 ONCJ 157 at para 22.

<sup>312</sup> *R v NM*, 2011 ONSC 1136 at para 23.

boundaries and acceptable behaviour, a fact that does not excuse their actions, but does sometimes help to explain the risks that younger offenders may take. An offender who is almost a decade past the age of majority has had plenty of time to learn about adult social norms, as well as his own needs and limitations. In regards to sexual assault, an offender who is almost 30 should generally not be able to claim that he is inexperienced with sexual norms and responsibilities. Youthfulness is a trait that should only be attributed to offenders who are, at most, a couple of years older than 18. This limitation represents a short period of time wherein the legal system is willing to transition offenders into full adult responsibility.

#### **6.1.4.2 Mature Offenders**

Similar to youthful offenders, the courts often acknowledge the unique challenges faced by offenders at the opposite end of the age spectrum. The needs of elderly offenders may not be properly met in prison, and the deterrent effects of a sentence that exceeds the expected lifespan of a person are questionable. Thus, for some offenders, it is necessary to mitigate their sentence because of their age to ensure that the sentence is fair and just.

However, what is the acceptable age at which an offender becomes old enough to qualify for this mitigating factor? Most of the cases in this sample dealt with offenders who were in their seventies. The youngest was 62<sup>313</sup>, yet an offender who was 61 was said to be too young for mitigation to apply.<sup>314</sup> While it is difficult to set one particular age that should be used given the different health concerns that older offenders may have, there should be some consensus on an average age at which this mitigating factor becomes relevant.

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<sup>313</sup> *R v Jorda*, [2011] OJ No 5784 at para 5.

<sup>314</sup> *Supra* note 264 at para 32.

Ensuring that this factor is applied in a well-thought out manner is important because of the high number of historical sexual assault charges that come through the courts. Most historical sexual assaults are committed against minors. When a complainant is underage, her ability to report is often curtailed by the adults around her, and given that most offenders are close relatives, they are frequently able to prevent complainants from reporting abuse in a timely manner. Thus, it is not uncommon for minor complainants to delay reporting until they reach adulthood, and this can be years after the offence was committed. Consequently, it is crucial for the promotion of gender equality in sentencing that mature offenders do not have their sentences mitigated automatically. An offender in his sixties who is in good health can often live for another 20 or so years, and sexual assault sentences rarely exceed 10 years – tending to average between three and seven years depending on the severity of the assault. Offenders who are in the early stages of their elderly years are generally not facing the equivalent of a “life sentence”, especially with early release. Applying mitigation without a gender-aware analysis weakens the justice system’s response to this common scenario, and suggests to complainants that coming forward may not be worth the emotional burdens that undergoing a trial will require. This contributes to the underreporting of sexual assault, and inadequately responds to systemic male abuse.

#### **6.1.5 Offender Expressed Remorse and Accepted Responsibility for Offence**

Some of the weightiest mitigating factors involve remorse and acceptance of responsibility on the part of the offender. One example of this behaviour is when an offender pleads guilty. When he willingly gives up his right to a full trial this not only saves time and resources, but it also spares the complainant from having to testify and be cross-examined on the traumatic details of her sexual assault.



Consequently, pleading guilty is treated as significantly mitigating; however, how much mitigation is appropriate? Several cases in this sample stated that the reduction should relate to when the offender pled guilty. For example, the courts acknowledged that offenders who plead after the examination for discovery,<sup>315</sup> only one week before the trial date and on the day of the preliminary inquiry,<sup>316</sup> and after the preliminary inquiry<sup>317</sup> deserved less mitigation than those who pled soon after they were charged. Depending on when a plea is offered, several stages of the trial process may have already been completed, and the complainant may have had to expose herself to some cross-examination. In sexual assault cases, much of the mitigating potential of this factor comes from the fact that that victim is spared an unnecessary emotionally traumatising experience, so it follows that late pleas should receive less mitigation.

Other remorseful actions on the part of the offender appeared as factors in over 30 cases. One of the complications with this type of factor is whether or not the court can actually ascertain the offender's sincerity. For example, in *R. v. S.B.*, the court stated that while the offender was remorseful and accepted responsibility for his actions against the two young complainants, he also tried to deflect his responsibility, blaming the people who abused him as a child, as well as the bad influence of his roommate.<sup>318</sup> Particularly in sexual assault cases, where blame against the offender is often diminished or excused, it is important for the courts to carefully consider whether an offender is being truly accountable for his actions. If the remorse is qualified by an avoidance of responsibility, then the mitigation applied to the case should be lessened or discarded.

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<sup>315</sup> *Miller, supra* note 244 at para 34.

<sup>316</sup> *L(B), supra* note 224 at para 62.

<sup>317</sup> *Brodofskie, supra* note 265 at para 13.

<sup>318</sup> *SB, supra* note 242 at para 32.

Another example of remorse that can be problematic is the use of apology. This type of behaviour can harm rather than help the victim. Victims are often told that they must forgive before they can move on with their lives, and while this may be true for some people, it should not be taken as a universal rule. The therapeutic effects of apologies are largely undocumented, and even when they do offer solace to a victim, we are not entirely sure why.<sup>319</sup> However, the strong social narrative of forgiveness may place victims, particularly women, in a position where they are pressured to forgive before they are ready to do so. In reality, an apology is the offender's story, and thus, it reflects his needs, understandings, and assumptions rather than those of the complainant. It is a process that can leave little room for the victim to participate and reply, and may contribute to her feelings of powerlessness. Not all apologies are problematic, but the process can allow the offender to reframe the offence, suggesting that the victim's behaviour was contributory to his conduct, particularly in situations dealing with sexual abuse. After all, it is well-documented that abusers often use apologies to neutralise the harm that they have caused, and to force their victims to forgive them and move on without consequences.<sup>320</sup>

An apology that can help the victim is one in which the offender very directly accepts responsibility for his behaviour, and where he tries to empathise with the pain that he has caused. A harmful apology, on the other hand, accepts responsibility with reservations. The behaviour is justified, centering the offender's experiences rather than the complainant's. An offender who is charismatic and a good speaker can produce an apology that, on the surface, sounds sincere, but fails to include any meaningful benefit for the victim. For example, the offender in *R. v. Smith* expressed great sympathy for the struggles of the complainant, and wished that he could have

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<sup>319</sup> Cheryl Reghr and Thomas Guthiel, "Apology, Justice, and Trauma Recovery" (2002) 30 J AM Acad Psychiatry Law 425 at 427.

<sup>320</sup> Stubbs 2007, *supra* note 62 at 177.

done something to help her over the years.<sup>321</sup> His character references stressed that these comments implied that Smith was a good person who wanted to correct the problems that he caused. However, the case was one of historical sexual assault, and Smith could have come forward about raping his foster daughter years earlier. His apology was more about framing himself as a contrite person who wanted to “do the right thing” than it was about actually helping his victim recover from the violence he put her through.

If apologies are to be considered mitigating, the courts must recognise the problematic issues they invoke in cases involving gendered violence. In all of the cases that labelled apologies as mitigating, the descriptions and analyses of the factor were brief.<sup>322</sup> Little or no mention of how the complainants received the apology was included, and apologies were described as sincere with no explanation as to why. While it is important to ensure that sentencing decisions do not balloon in length, given the way that apologies can be used to harm women, they cannot be taken at face value.

#### **6.1.6 Offender Represents a Low Risk to Society**

Offenders can prove to the courts that they are good candidates for rehabilitation by showing interest in changing their behaviour. Those who are particularly proactive about finding and enrolling in rehabilitative programs deserve mitigation for their attempts to address some of the issues that drove them to commit their offence.

Judges who wish to apply this factor should detail exactly what the offender is doing to rehabilitate himself. Simply being dedicated to the possibility should not be enough to incur

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<sup>321</sup> *Supra* note 185 at para 43. It should be noted that apology was not used as a mitigating factor in this case. However, no other case contained clear details on the contents of an apology so details from *Smith* were used as an example of how apologies can be harmful.

<sup>322</sup> *R v JS*, 2011 ONSC 4765 at para 41; *Brodofskie*, *supra* note 265 at para 13; and *supra* note 281 para 8.

significant mitigation. Furthermore, the rehabilitation attempts should be related to the offender's charges for sexual assault. For example, if the offender's case involved abuse of intoxicants, then substance abuse counselling is a rehabilitative choice that could go towards earning the application of this factor.<sup>323</sup> Courts should also assess whether the offender is committed to his rehabilitation, and whether it is likely to help him change his behaviour. For example, in *R. v. K.J.M.*, the court recognised that the offender would receive little benefit from any counselling for sexual deviancy because he was not taking responsibility for committing the offences.<sup>324</sup> If offenders refuse to be accountable for their actions, counselling may not be effective in helping them become better citizens. While counselling might be beneficial for them at *some* point in the future, at the time of sentencing, their commitment and willingness to better themselves is lacking and should not lead to mitigation.

Offenders will also be assessed according to the level of continuing risk that they represent to society. Offenders whose violence seems to be related only to one time occurrences are still guilty of a terrible crime, but they may be unlikely to commit said offence again. In comparison to those offenders for whom there is evidence that they will offend again, it is reasonable to offer mitigation to those whose criminal behaviour is likely over.

Additionally, part of the sentencing process involves a risk assessment – a supposedly empirical process that uses various psychological techniques to determine how likely the offender is to repeat his harmful behaviour. In cases of sexual assault, phallometric testing is often used, a test that attempts to measure penile response to various sexual stimuli.<sup>325</sup>

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<sup>323</sup> *R v JT*, 2011 ONSC 7275 at para 65.

<sup>324</sup> *Supra* note 236 at para 20.

<sup>325</sup> John Matthew Fabien, "The Risky Business of Conducting Risk Assessments For Those Already Civilly Committed as Sexually Violent Predators" (2005-2006) 32 Wm Mitchell L Rv 81 at 136.

Phallometric testing is meant to determine whether or not the offender shows a sexual response to deviant sexual stimuli, including stimuli dealing with the age and consent of possible victims. The accuracy of this test, however, is highly controversial. Some data suggest that phallometric results are not reliable, and that the scores obtained from sexual offenders do not differ enough from non-offending men to be of use.<sup>326</sup> While much of the concern over this test has been in regards to the possibility of false positives, from a feminist perspective, there should also be concern over false negatives. According to some researchers, individuals undergoing the test can influence their results by fantasizing about images or actions unrelated to the ones that they are being shown for the test.<sup>327</sup> Thus, it is difficult to be certain whether the exam is producing an accurate picture of the offender's sexual preferences.

In *R. v. Boudreau*, the offender assaulted two young boys, but the court stated that his risk assessment did not show that he was a pedophile, so he was not an ongoing risk to society.<sup>328</sup> Even if he did not meet the medical definition of pedophilia, this does not mean that Boudreau was inherently a low-risk offender. Perhaps it was not the age of the complainants, but their vulnerability, the power he had over them, or their accessibility that prompted him to commit multiple counts of sexual assault. Regardless, he committed several sexual assaults against young children, and then did not admit to this criminal conduct until years later. Phallometric testing was not an appropriate tool to analyse why the offender acted in this manner as the answer seems to be more complex than just whether or not he was a pedophile. This type of assessment, therefore, should not play much of a role in sentencing. Not only are the data unreliable, but the

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<sup>326</sup> WL Marshall, "Psychological Evaluation in Sexual Offence Cases" (1995-1996) 21 Queen's LJ 499 at 506.

<sup>327</sup> N McConaghy, "Science and the Mismanagement of Rapists and Paedophiles" (1997) 4 Psychiatry, Psychology & L 109 at 111.

<sup>328</sup> *Boudreau*, *supra* note 171 at para 58.

information that it reveals says little about the offender's actual risk potential, and focuses too much on whether the offender has a medical problem, and not enough on the way that destructive male behaviour is normalised and excused in society.

The *Boudreau* decision also revealed other issues concerning the application of risk assessment in sexual assault cases. In their decision, the court stated that as there was no repetition of his conduct, the offender's behaviour represented a "gross error in judgement", thus, he was deemed to be a low risk to society.<sup>329</sup> This type of analysis frames sexual assault as a regretful mistake. In this case, the offender was a priest and his victims were young boys from his parish. The offender was in a position of trust, and would have known what the consequences would be if his behaviour was reported. Additionally, there was a year between the abuse of the first and second complainant, so the offender had plenty of time to reflect and decide that his conduct was unacceptable.<sup>330</sup>

Even if Boudreau was no longer a risk to society, given that a substantial amount of time had passed between the offences and the trial, the explanation offered by the court about his risk level was unacceptable. Framing a sexual assault as just a crime of opportunity suggests that it is reasonable to expect that sometimes offenders will spontaneously act upon a chance to commit sexual assault, and that this behaviour is less serious and less likely to be repeated than the behaviour of serial rapists. This is an invalid comparison as there are offenders who are fixated on one victim who will never assault again, and offenders who take continual advantage of the effects of intoxication while partying to commit their crimes. While the first offender is guilty of planning, the second one should not be dismissed as low risk because they were engaging in so-

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<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

called crimes of opportunity. These categories of planned and unplanned are not as simplistic as suggested, and the courts must delve deeper into the offender's regular behaviour before they assess risk in this manner.

#### **6.1.7 Personal Hardship of the Offender**

Sometimes sentences will be mitigated to acknowledge the personal hardship that the offender has experienced because of the crime as this can represent an additional form of punishment. The most common example of personal suffering in this sample was the experience of strict bail terms or extended wait times in custody before the end of a trial. While acknowledging infringements on the offender's liberty is important, the courts should not mitigate for challenges that the offender encounters because of the sexual assault. For example, in *R. v. A.H.*, the offender's bail conditions required him to live outside of the family home as his victims resided there as well.<sup>331</sup> While finding alternative accommodation was a difficulty for this offender, this was not a detriment caused by the justice system, but by his abusive conduct towards his granddaughters. His victims needed to be protected, and his own choices led to his expulsion from his family home. On the other hand, in *R. v. K.J.M.*, the offender voluntarily surrendered himself into custody so that his family could remain in the family home, and this show of compassion and self-sacrifice is more easily seen as a factor that could be granted mitigating status.<sup>332</sup> While the offender's suffering was a cause of his own behaviour, in this case, he willingly accepted incarceration in order to benefit his family when he could have fought for a different, more harmful option.

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<sup>331</sup> *R v AH*, 2013 ONSC 6846 at para 25.

<sup>332</sup> *Supra* note 236 at para 20.

Another category of personal suffering involves effects on the offender's employment. It is not unusual for individuals with a criminal record to experience problems in regards to their employment, and some offenders may not be able to continue their chosen career after being convicted of sexual assault. While forced career changes are unpleasant and sometimes extremely damaging to an offender, they should not result in automatic mitigation. For example, in *R. v. Boudreau*, the court recognised as mitigating the fact that the offender had to resign his position with the church after being convicted of sexually assaulting some of the children in his parish.<sup>333</sup> A priest owes a high level of trust to the people to whom he is offering spiritual guidance. His breach of this trust left him with no other option but to resign and enter a different occupation where this bond was not required. Furthermore, as Boudreau's situation illustrates, sometimes a career change is necessary to ensure that an offender no longer has access to victims, particularly when the victims are vulnerable minors.

A similar argument could be made about the facts in *R. v. H.(R.)*. In this case, the offender was a long distance truck driver whose criminal record rendered him unable to enter the United States.<sup>334</sup> Given that the offender relied on being able to cross the border easily in order to complete his job, he should have protected this ability. Any criminal charge can halt a person's right to cross the border, let alone a serious personal injury offence. Again, this was a consequence that was predictable, but the offender chose to sexually assault his wife anyway.

Instead of offering mitigation to all offenders who find that their career paths have been forcibly changed, mitigation should be offered to offenders who cannot access adequate employment anymore. Impoverishment should be recognised by the courts, but having to leave

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<sup>333</sup> *Boudreau*, *supra* note 171 at para 58.

<sup>334</sup> *H(R)*, *supra* note 206 at para 22.



one's chosen profession because of one's criminal behaviour is an expected consequence of committing a sexual assault, and a reasonable aspect of one's punishment.

Harm to an offender's reputation has also been used as a mitigating factor. Given the stigma of sexual assault, offenders may lose the respect of their communities, causing harm to both their personal and professional reputation. However, it does not make sense to protect offenders from this type of damage. Sexual assault is an inexcusable crime, and the response from society *should* involve condemnation. Any reputational damage that the offender suffers is a predictable consequence of his behaviour.

This logic, however, is not always followed by the courts. In *R. v. C.H.*, the court stated that it was mitigating that the offender "suffered greatly from these charges and [had] lost most of his contacts in the community in spite of [a] publication ban on these proceedings".<sup>335</sup> A publication ban is meant to protect the identity of the victim, not the offender. It is her reputation and safety that a publication ban is meant to aid, and generally, an adult offender has no right to the same protections. The fact that the offender's identity was disclosed was problematic only in the sense that his identity may have revealed information about his victim. As trial processes are meant to be open, his conviction for sexual assault should be a matter of public record, and mitigating his sentence was shielding him from the expected aftermath of his choices. In sexual assault cases, this is another example of the courts excusing male violence against women, and refocusing discussions of harm on that of the offender rather than the complainant.

An over-emphasis on reputational harms can also introduce further discriminatory assumptions into the sentencing process. For example, in *R. v. Smith*, the court stated that the

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<sup>335</sup> *CH*, *supra* note 176 at para 51.

offender, “unlike many offenders who do not have a good reputation to lose”, was a man of good character who had previously held an “unblemished standing amongst his peers”.<sup>336</sup> The loss of his reputation would “dictate as much general deterrence and denunciation as could ever be achieved by any term of incarceration”.<sup>337</sup> This statement presumes that some offenders should receive their own special form of mitigation. Mitigating factors cannot be used to protect privileged offenders from the consequences of their actions since this supports the myth that the mistake of a “good” offender should not ruin his entire life as it was probably a one-time lapse in judgement. Reputational damage is not more injurious because an offender is seen as a good person, and it is appropriate that he suffer appropriate condemnation for his behaviour.

## **6.2 Offence-Related Mitigating Factors**

Offence-related mitigating factors are those that relate to the facts surrounding the actual offence and how it was committed. The central theme of this section critiques how the courts are currently using mitigating factors to benefit offenders who have not engaged in aggravating behaviour. The opposite of aggravation should not be mitigation. Harm has still occurred, important laws were breached, and the offender must *deserve* mitigation.

### **6.2.1 Historical Sexual Assaults**

Dealing with historical sexual assaults is a complicated and difficult process. While the severity of a crime does not diminish in time, the people involved do change and move on with their lives. Thus, the courts often struggle with how to deal with offenders who committed an offence in the past, but have lived a pro-social life in the meantime. According to *R. v. B.(N.)*, “[while] the antiquity of the offence is not usually a mitigating factor, an offender may be

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<sup>336</sup> *Supra* note 185 at para 49.

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

entitled to a somewhat reduced sentence if the historical nature of the offence is not due to his involvement in a delay in reporting (for example by threats), and if he has led an exemplary life during the intervening years and demonstrates genuine remorse”.<sup>338</sup> Additionally, the court in *R. v. G.J.* stated that while the “age of the offence is irrelevant to sentencing in terms of the gravity of the offence and to general deterrence,” the passage of time “reflects on individual deterrence and prospects for rehabilitation”.<sup>339</sup> Thus, while a sexual assault should never be seen as a less serious crime because it happened in the past, the offender may no longer be the same person, and may no longer represent the same type of risk to the community. Furthermore, treating an offender who has spent years creating a life for himself the same as an offender who has just committed the crime may not be beneficial for rehabilitation. However, this singular focus on the offender’s actions after the offence supplants a deeper analysis of this factor.

The first problem with this analysis is that courts often state that an offender has not reoffended for a lengthy period of time without evidence to support this claim. After all, there are plenty of cases where a single complainant has reported her sexual assault years later, causing many other victims to report as well. In the context of this sample, most historical sexual assaults were perpetrated against vulnerable children, victims that are often under a lot of pressure to remain silent. Furthermore, many offenders abuse multiple victims, so it is problematic to make definitive statements about their supposed lack of other offences. While they may not have been charged for anything else by the criminal justice system, research on sexual assault suggests that the courts should not be so quick to assume that this means that an offender has been perfectly

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<sup>338</sup> *B(N)*, *supra* note 264 at para 20.

<sup>339</sup> *Supra* note 195 at para 27.

law-abiding. At most, all that can be said is that there is no evidence of other offending, which is a neutral consideration.

Secondly, by applying a mitigating factor in these cases, the court system is rewarding offenders whose victims were not capable of coming forward at the time of their assault. There are many reasons why a complainant may not report her assault right away, from shame and fear, to threats from the offender. Given the low reporting rates for sexual assault, setting up a system where an offender may receive a significantly lower sentence if a complainant delays reporting the offence encourages victims to remain silent.

Finally, a truly pro-social and reformed offender would have reported the crime himself. Instead of laying the burden of reporting on the complainant, a person who has already been traumatised by the offender's actions, the justice system should instead question why the offender thought it acceptable to carry on with his life without addressing and making up for the pain and suffering he caused. Any supposedly rehabilitated life that the offender had was only available to him because he refused to accept responsibility for his actions and allowed the victim to suffer in silence.

### **6.2.2 Single Offence**

Mitigation for committing a single offence seems to mirror aggravation for committing multiple offences; however, the logic used to justify aggravation is not present in the supposedly mitigating context. Multiple offences are considered aggravating because they cause increased harm, and they require the offender to engage in criminal behaviour more than once, generally implying that the offender has had time to reflect on his actions, but continued with them anyway. A single breach of the law is the baseline of criminal behaviour and offenders should not be rewarded for breaking the law without some mitigating rationale. However, in seven of

the cases in this sample, the courts stated that the fact that the offender only assaulted the complainant once was mitigating. In most of these cases, the reasoning was that single offences were seen as less harmful and often less violent than repeated instances of abuse. Judges described the offences in these cases as “single and quite transitory”,<sup>340</sup> “isolated and exceptional”,<sup>341</sup> “brief and isolated”,<sup>342</sup> and “opportunistic rather than pre-meditated”.<sup>343</sup> The harms suffered by the victims were framed as minor given their one time occurrence, particularly if the violence of the offence was seen as limited as well.<sup>344</sup>

While judges will have to engage in some weighing of the harms done to a complainant in order to contextualise the case, this weighing is not as simple as looking at how many times an offence was committed. For example, in *R. v. Anderson*, the complainant, an older woman, was viciously raped and stabbed.<sup>345</sup> This was an example of a single offence that was incredibly violent and it is impossible to frame it as mitigating because it occurred only once. Any factor applied to the number of times that the offence was committed, therefore, should remain under the aggravating umbrella in order to avoid suggesting that singular incidents of sexual assault are inherently less violent.

### 6.2.3 Lack of Violence

Another similarly problematic mitigating factor is when the courts assume that an offender should be rewarded for being less violent than he could have been. As stated above, judges do weigh the harmfulness of an offence against others, but this is not meant to imply that

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<sup>340</sup> *R v G(D)*, 2011 ONCJ 116 at para 29.

<sup>341</sup> *R v T(D)*, 2011 ONCJ 106 at para 35.

<sup>342</sup> *NM*, *supra* note 312 at para 25.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Supra* note 340 at para 29; *Butt*, *supra* note 75 at para 18; *supra* note 219 at para 46; *R v CR*, 2012 ONSC 2498 at para 25.

<sup>345</sup> *Anderson* 2011, *supra* note 179 at para 24.

sexual assaults that are lower on the spectrum of violence should receive mitigation. Mitigation is meant to respond to an aspect of a case that implies that an offender deserves leniency, and choosing to be less violent still means that he committed an unnecessary, yet deeply harmful crime. Weighing of harms must be done to determine where a case fits within the jurisprudence, but mitigation should not apply.

Another issue that arises out of attempts to rank violence is the tendency to forget that it is the context surrounding a sexual assault and the unique realities of the complainant that determine exactly how intrusive and harmful an assault actually was. To apply a standard hierarchy of violence enforces the idea that “true” rape (or forced penetration) is always the most violent and harmful of sexual assaults. The *Code*, however, was changed in 1983 to avoid making this inappropriate distinction. According to the Ontario Court of Appeal, “trial judges must not overly focus on the act of penetration, when the harm done results not from the nature of the acts themselves, but from the abuse within a relationship of trust”.<sup>346</sup> For example, in *R. v. T.(D.)*, the court described a sexual assault committed by a father against his daughter as “serious and disturbing, [but] involved no digital penetration and ended immediately when he thought she was awakening”.<sup>347</sup> A father who touches his daughter sexually does not deserve mitigation from the courts because he did not hurt her more than he already did. The harms and injuries that the daughter will suffer are likely quite traumatic even if her case seemed to be less physically violent. Thus, to mitigate based on this factor perpetuates the myth that some sexual assaults are not truly injurious and do not deserve significant condemnation from the courts.

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<sup>346</sup> *PS*, *supra* note 212 at para 28.

<sup>347</sup> *R v T(D)*, 2011 ONCJ 106 at para 35.

### 6.3 Neutral Factors

While the focus of this paper is on aggravating and mitigating factors, it is important to acknowledge this related category of sentencing facts. Neutral factors are not meant to affect sentence. They are important details that a judge feels should be noted, but they add only additional context. However, are neutral factors actually being treated neutrally in sexual assault cases? According to the research drawn from this sample, the courts still struggle with them, and this lack of clarity and consistency raises important equality concerns.

#### 6.3.1 Lack of Remorse

Remorse is currently one of the most controversial factors in sentencing. As a mitigating factor, remorse is a strong, well-accepted principle. However, a lack of remorse on the part of the offender tends to cause the courts trouble as technically this fact cannot be used as an aggravating factor except in exceptional circumstances.<sup>348</sup>

A lack of remorse was used as aggravating, or at least implied to be somewhat aggravating, in several cases in this sample and this confusion over its application shows that the law may be changing on this issue.<sup>349</sup> While it is important to respect that offenders have the right to not self-incriminate and appeal processes may depend on the offender maintaining his innocence, the system is still flexible enough to allow sentences to be aggravated in specific circumstances. In the context of sexual assault, there are many cases where consent is not in question. For example, in cases involving minors, the issue may be that the offender denies that he knew the complainant was underage, not that the sexual activity occurred. Remorse could be expressed over the harm done to the complainant without damaging the offender's defence.

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<sup>348</sup> *R v Hawkins*, 2011 NSCA 7 at para 33.

<sup>349</sup> For example, see: *Supra* note 201 at para 22; *R v Larochelle*, 2011 ONCJ 339 at para 31; *R v SD*, 2012 ONSC 6633 at para 72; *JJP*, *supra* note 212 at para 82; *R v J(B)*, 2011 ONCJ 373 at para 15.

Furthermore, sexual assault cases tend to be emotionally fraught, and if the offender acts callously during the trial process rather than remorsefully, this may be another reason to accord aggravation. Even if he maintains his innocence, an offender should not engage in cruelty towards the complainant.

Overall, this is an area of sentencing that is confused and incoherent. Attempting to solve these problems is outside the scope of this paper, but my research suggests that aggravation for a lack of remorse could be beneficial in some sexual assault cases, and trying to sort out the complications in this area represents an avenue for future academic work.

### **6.3.2 Substance Abuse and Intoxication**

Substance abuse on the part of the offender is another factor that the courts are struggling to use in an effective, well-rationalised, and predictable manner. Intoxication can actually be a mitigating factor if the offender was not fully in control of his actions.<sup>350</sup> However, in the context of sexual assault, this application is controversial because of the relationship between intoxication and this crime. After all, intoxication is a factor in a large number of sexual assault cases, with some surveys suggesting that over fifty percent of these cases involve some level of inebriation.<sup>351</sup> Psychological research suggests that intoxication is a tool used by offenders to aid them in committing sexual assault.<sup>352</sup> As alcohol can make individuals less inhibited, both the victim and perpetrator are seen as engaging in what seems like normal behaviour. However, men who are intoxicated report higher levels of sexual arousal, and are more willing to believe in rape

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<sup>350</sup> *Supra* note 88 at 122.

<sup>351</sup> *Supra* note 290 at 1504; *Supra* note 286 at 592; Isabel Grant, “Second Chances: Bill C-72 and the Charter” (1995) 33 Osgoode Hall LJ 379 at 12 at 30 [Quicklaw].

<sup>352</sup> Brecklin & Ullman, *ibid* at 1516; Finch, *ibid* at 595; and Grant, *ibid* at 76.



myths such as the idea that a woman who leads a man on deserves to be sexually assaulted.<sup>353</sup> According to another survey, perpetrators of sexual assault who used alcohol as a tactic were more likely to hold harmful views of women, have personality types associated with nonclinical psychopathy, exhibit anti-social behaviour, and have substance abuse problems.<sup>354</sup> Additional research shows that perpetrators who were intoxicated were more likely to blame their actions on the intoxication.<sup>355</sup> Rather than take responsibility for what had occurred, these men were attempting to claim that they were not bad people, and would normally never act in this manner. They reject their own moral culpability, and are believed because of the effects of alcohol. Intoxication, therefore, becomes an excuse for men to act on anti-social, sexist behaviours.

In my sample of cases, intoxication and substance abuse were not treated consistently by the courts, possibly owing to the controversies and lack of consensus on this issue in criminal law.<sup>356</sup> Several cases categorized intoxication on the part of the offender as aggravating<sup>357</sup>, but others used evidence of substance abuse as a mitigating factor.<sup>358</sup> The trends that could be found in the few cases that discussed intoxication in the sentencing context were that addiction problems on the part of the offender tended to be viewed as a health issue that could be classified as mitigating depending on the circumstances, while simple intoxication was more likely to be classified as aggravating. Offenders who were receiving treatment for their addictions also

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<sup>353</sup> Antonia Abbey et al, "Attitudinal, Experiential, and Situational Predictors of Sexual Assault Perpetration" (2001) 16 *Journal of Interpersonal Violence* 784 at 785.

<sup>354</sup> Antonia Abbey & Angela J Jacques-Tiura, "Sexual Assault Perpetrators' Tactics: Associations With Their Personal Characteristics and Aspects of the Incident" (2011) 26 *Journal of Interpersonal Violence* 2866 at 2881.

<sup>355</sup> *Supra* note 353 at 798.

<sup>356</sup> See *R. v. Daviault*, [1994] 3 SCR 63; Grant, *supra* note 351; and *supra* note 28 at s33.1.

<sup>357</sup> For example, see *R v AFB*, 2013 ONSC 3311 at para 34.

<sup>358</sup> For example, see *WR*, *supra* note 210 at para 18.

received some mitigation. There remained cases, however, where substance abuse was just seen as a neutral factor that did not directly affect sentence.

Given the complexity of intoxication as it relates to both health and culpability issues, there is no one rule that can be applied in all cases. However, research on the prevalence of intoxication and substance abuse among male offenders of sexual assault suggests that courts should be more willing to aggravate sentences in cases where intoxication was a factor. If substance abuse is an issue, instead of mitigating for this reason, courts should instead frame this discussion about treatment of the problem. Offenders who sincerely wish to change their behaviour and are willing to commit to certain programmes while carrying out their sentences may receive some mitigation for this choice, but the focus should be on ensuring that the sentence allows for treatment. After all, while addiction is a serious health issue, it is one that can put other people at risk, and though the courts must recognise that an offender may not be in full control of his behaviour, it would be detrimental to the goals of public safety not to acknowledge the danger that an offender with serious addiction issues can be to women and other vulnerable complainants. Thus, ignoring the gender inequality issues that are so prevalent in these types of cases keeps women at risk. Without appropriately calling out and punishing this type of behaviour, the justice system enables the abuse of women either by ignoring or excusing these actions. Even though intoxication and substance abuse analyses can be complex, they should not automatically be relegated to the category of neutral.

#### **6.4 Concluding Thoughts on Mitigating Factors**

Similar to my results for aggravating factors, the data that I gathered on mitigating factors revealed a mix of both feminist and sexist interpretations. While aggravating factors were underutilised, the courts seemed much more at ease applying mitigating factors. Using these

factors when appropriate is not problematic, but my case survey showed that many applications were founded on rape myths and discriminatory beliefs about gender and sexual assault. The primary myths supported by these inappropriate uses of mitigating factors involved the justification of sexually abusive behaviour by men. As discussed in chapter five, the harms of sexual assault are continually trivialised by the justice system, and this problem is perpetuated in sentencing by not using aggravating factors when appropriate. A disproportionate focus on the needs of the offender when discussing mitigating factors adds to the diminishment of this offence. While sentencing is meant to be an individualised process that responds to the needs of each offender, this does not mean that sentencing should be allowed to become unbalanced, and both types of factors must be considered equally when the courts are constructing their decisions.

When applying mitigating factors, the courts must avoid interpretations that suggest that the offender made a foolish error. There are many legitimate reasons to mitigate a sentence, but sexual assault sentences should never be lessened because it was a “crime of opportunity”. As this paper has argued, the causes of sexual assault are tightly connected to male privilege which renders violent male behaviour as normalised and acceptable. To counteract these harmful assumptions, the courts must recognise that sexual assault is a choice that offenders make, and their mitigation analyses must deal with these myths directly. Sexual offenders do not have to be viewed as evil or incapable of rehabilitation, but they cannot be treated more leniently just because of the offence that they committed.

## **6.5 Concluding Thoughts on the Case Law Survey**

My predictions regarding the likelihood of aggravating and mitigating factors being used in discriminatory ways have been borne out by the results detailed in these last two chapters. I have spent a large part of this thesis critiquing individual factors, so I will conclude this section

with some holistic comments. Before I begin, however, I will briefly discuss some of the limitations of this study and its results.

### **6.5.1 Limitations and Future Questions**

Empirical research involving such a discretionary part of the trial process is never going to produce “perfect” answers. Consequently, while I discuss my results in broad terms, I must emphasise that my research covers only a small segment of the available data on sentencing. I chose to focus on Ontario for a number of reasons,<sup>359</sup> but even though criminal law is supposed to be applied in a standardised manner across Canada, it is likely that there are regional variations and outlier examples from other provinces. A fuller picture of the state of sentencing would canvass much more data than could be the focus of a single thesis, but my results do reveal troubling trends in the province of Ontario.

One of my goals with this research was to produce a feminist piece of academic scholarship that did not ignore the fact that gender issues within the law are affected by a wide array of other factors. After all, there is no universal “woman”, and I wanted to conduct my research with the intention of making these intersectional complications visible. Unfortunately, the data that I used for my research did not provide the information needed to make these details clear. Sentencing decisions are not perfect repositories of information about a case. For the most part, a judge will deal only with the facts that s/he thinks are essential, and since issues such as race or sexuality are not commonly thought of as relevant, cases remain silent on these topics. Thus, in the context of this thesis, I was unable to explore a fully intersectional analysis of sentencing for sexual offences in any depth.

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<sup>359</sup> See chapter 4 starting on page 47 for details on how I constructed my case survey.

It should also be noted that while this thesis is about sentencing, it does not comment on actual sentence lengths. The point of this project was to qualitatively explore the application of certain sentencing tools, and while the end results of sentencing are implicated by this discussion, an in-depth analysis of them is outside of the scope of this paper.

Finally, this paper created as many questions for future research as it answers. By exploring aggravating and mitigating factors, I discovered a paucity of research on issues such as neutral factors, risk assessments, privacy, and many other subjects. As this is an area where so little research has been done, there are plenty of ideas to stimulate my future work and the work of other scholars.

### **6.5.2 General Lessons About Aggravating and Mitigating Factors**

Having discussed some of the limitations of this survey, I will end this chapter with a few comments on some of the general issues arising out of my data. For example, a theme throughout this project has been the fact that aggravating and mitigating factors should not be treated as items to simply check off a list. While it is true that sometimes their application can be straightforward, the courts should give some commentary about how specific case facts relate to the use of these factors. Not only does this help to expand and inform the jurisprudence, it would also aid in preventing inaccurate or discriminatory applications, as well as make any problematic applications visible to others. Overbloating decisions with information is a legitimate concern, but even a couple of lines about why a factor is being applied makes clear the gender discrimination taking place in many of these cases.

Similarly, if a factor applies in a case, it should be mentioned. I noted several times in the past two chapters that there were factors that could be applied in sentencing decisions, but were

being left out.<sup>360</sup> While it is likely that some judges assumed that these factors were being dealt with in other parts of their decisions, detailing all of the aggravating and mitigating factors in a case is a way of illustrating relevant equality issues in a publicly accessible way. There is no rule in sentencing that each factor must be accompanied by a specific adjustment in the final sentence, so there is no harm in including all relevant factors to be clear about the harms and nuances of a case, particularly when these factors give the courts the opportunity to directly confront sexist assumptions.

Finally, the most important lesson from this case survey is that discrimination in criminal law is often very subtle. While there are still examples of explicit forms of oppressive language and analysis, much of what was troubling relied on supposedly “common sense” understandings of the offence that were mired in discriminatory assumptions. Unpacking these decisions and calling the courts to account is a challenging process, and achieving systemic change is the topic of the final chapter of this thesis.

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<sup>360</sup> For example, uncontroversial factors such as aggravating for the presence of multiple victims did not appear nearly as often as they should have given the facts of these cases.

## **Chapter 7: Recommendations for Reform**

In the previous two chapters, I reviewed and critiqued the results of my case survey on the use of mitigating and aggravating factors in sentencing decisions for sexual assault offences. While discussing this topic, I suggested many ways in which different factors could be interpreted in a more nuanced and equality promoting manner. However, how can these suggestions be implemented on a systemic level? In this final substantive chapter of my thesis, I discuss some of the institutional changes needed to improve the application of aggravating and mitigating factors. Reform, I suggest, must come from a variety of avenues, and I explore several possibilities in this chapter including legislative reforms, policy and regulatory changes, and judicial education. Before I can discuss any of these topics in detail, though, I must address a contentious part of the sentencing debate: the value and efficacy of traditional sentencing.

### **7.1 The Elephant in the Room: The Ethics of Custodial Sentencing and the Need for a Feminist Remedy for Sexual Assault**

Throughout this paper, I have argued that aggravating and mitigating factors are being used in a manner that perpetuates rape myths and gender-based inequality. While I do not talk about actual sentences, suggesting that decisions are influenced by stereotypes and inaccurate assumptions about women and sexual assault, my arguments can be taken as an implicit call for harsher and lengthier punishments. However, proposing that any criminal law reform should result in increased incarceration is a controversial claim that many, including fellow feminists, would protest. Thus, it is important to address the so-called “elephant in the room”, and discuss some of the issues and challenges associated with the use of custodial sentencing.

According to Constance Backhouse, the feminist movement has done an enormous amount of work on understanding the legal realities of sexual assault, but we have failed to

address a very basic but important question: what is a feminist remedy for sexual assault?<sup>361</sup> The movement is very divided on this issue, with some calling for harsher penalties to emphasise deterrence and denunciation, while others call for lower sentences either because they believe that this will help lead to more convictions, or because they reject the prison system entirely.<sup>362</sup> Because of these divisions and lack of focus, sentencing has been a neglected topic, and Backhouse calls on the feminist community to engage with this difficult issue in order to respond coherently to an important part of the criminal process.

Many of Backhouse's concerns about incarceration are borne out of the work done by prison abolitionists – activists who believe in the need to end the use of prisons in the criminal justice system. According to the research done by these scholars, prisons are ineffective tools for promoting sentencing objectives such as deterrence and denunciation as they are institutions founded in cruelty and oppression.<sup>363</sup> After all, prison populations are disproportionately drawn from racialised and impoverished populations, and these already marginalised individuals are then subjected to increased violence once they are within prison walls, including sexual violence.<sup>364</sup>

According to Angela Harris, the prison system perpetuates a cycle of gender-based violence by ensuring that offenders are placed in a space where violence, particularly sexualised violence, is normalised.<sup>365</sup> To rely on custodial sentences means supporting a system that does

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<sup>361</sup> Constance Backhouse, "A Feminist Remedy for Sexual Assault: A Quest for Answers" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, (Ottawa: University of Ottawa Press, 2012) 725 at 733.

<sup>362</sup> *Ibid* at 732-733.

<sup>363</sup> *Ibid* at 733.

<sup>364</sup> *Ibid* at 733-734; Angela P Harris, "Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation" (2011) 37 Wash UJL & Pol'y 13 at 27.

<sup>365</sup> Harris, *ibid* at 38.



little to address the systemic or individual causes of gender-based violence, and shows a lack of concern on the part of feminists for the oppression being actualised throughout the prison system. In the view of abolitionist scholars, there is little to no utility in exploring how custodial sentences can be reformed as the prison system is inherently dehumanising and oppressive. Instead, alternative approaches that are more holistic and centered on healing should be created and implemented. Thus, even though sexual assault is a devastating crime that continues to be trivialised within the justice system as well as broader society, advocating for a solution requiring the use of a system entrenched in discrimination and oppression is not one that all feminists would agree with.

On the other hand, what alternatives are there when it comes to providing deterrence and punishment for violent crimes? It is easy to suggest that a more effective method of eliminating sexual assault would be to concentrate on undermining societal beliefs that support and encourage the perpetuation of this crime. If gender equality can be achieved, it is likely that sexual assault rates will plummet as all human autonomy, including women's, will be more respected. While I do not wish to suggest that such a goal is unworthy of attention and effort, this type of widespread social change will take generations to implement. Not all reform attempts will perfectly address the systemic foundations of sexual assault, so smaller short-term changes can be important tools as well. The justice system may be a tiny part of the problem, but dealing with challenges in this area will contribute to the fight against gender inequality overall.

In terms of sentencing, there are many options available for practitioners and theorists to discuss that do not involve incarceration. Restorative justice offers processes that attempt to heal the offender, complainant, and community rather than just issue punishments and enforce separation from society. However, as I mentioned in chapter three, there are many reasons why

restorative justice approaches and other non-traditional legal responses to crime are problematic for an offence that is fundamentally an expression of gender inequality.<sup>366</sup> Thus, it is important that traditional sentencing still be studied and improved upon, and this paper engages with the sentencing process in this manner even though punishments such as incarceration are fraught with issues of discrimination and inequity.

One of the first issues that should be considered when attempting to reform sentencing, therefore, is to figure out what a feminist remedy to sexual assault should be. While this paper does implicitly favour increasing sentences, the fact remains that custodial sentencing is not a particularly effective or just tool. In many ways, custodial sentencing, given its connection to violence and oppression, contradicts many feminist values and goals. Consequently, in order to better understand how to improve sentencing in sexual assault cases, more research and theorising about criminal punishments needs to be conducted. This particular topic is far beyond the scope of this paper, but for researchers going forward, it is certainly one of the fundamental issues underlying any discussion of sentencing for sexual assault offences. Until this question is answered and workable alternatives to custodial sentencing are proposed, scholars must deal with the system that exists, thus, the rest of this chapter will discuss recommendations involving the processes and institutions that are currently available in Canada.

## **7.2 Feminist Sentencing in the Traditional Regime**

The bulk of this chapter is dedicated to exploring how sentencing can be reformed in order to accord with principles of gender equality. However, before these avenues of change are

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<sup>366</sup> See chapter three, pages 23 to 24 for a brief discussion of how restorative justice can be problematic for cases involving issues of gender inequality.

discussed, it is important to outline what feminist sentencing should look like within the conventional sentencing regime.

To begin, judges do not need to become experts in feminist legal theory to understand the basic issues underlying sexual assault law. Having a general idea of the social context surrounding the offence and being aware of issues such as underreporting and rape myths are essential knowledge for all legal professionals who deal with these cases, and this knowledge can be conveyed in an accessible and efficient manner.

Using this information, judges can begin to make decisions with a more nuanced and complex understanding of the offence. A feminist approach to sentencing will not privilege the complainant over the offender. Instead, it reinserts complainant perspectives and needs into the process so that they can be considered fairly alongside the other differing needs and perspectives that influence sentencing. Feminist sentencing applies systemic analyses as well, looking at how singular offences are representations of greater societal issues. As sexual assault is a crime borne of male domination, sentences must be carefully crafted to address this fact without applying undue harshness to individual offenders.

Finally, if feminist scholars ask the “women question” when doing research, then judges should ask the “equality question” when determining sentences. As discussed in chapter three, all Canadian law must accord with the principles of the constitution, and this includes the *Charter of Rights and Freedoms*.<sup>367</sup> Thus, equality guarantees must apply to sentencing law. When crafting a decision, judges should ask themselves whether their work furthers gender equality. Does their decision engage with the discriminatory beliefs that disproportionately affect female sexual

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<sup>367</sup> See chapter three, pages 41-43 for a description of how the *Charter of Rights and Freedoms* should affect sentencing.

assault victims, and are they actively seeking to dismantle these rape myths? What systemic problems are implicated by the case that they are working with, and how can this decision address these problems in fair and just manner for all Canadians? To produce a feminist sentencing decision, therefore, judges must challenge themselves to think critically about the assumptions that they are using to understand the cases before them, and to replace problematic beliefs with ones that are guided by gender equality principles.

Applying the equality question will help the courts dismantle discriminatory influences on sentencing decisions. For example, feminist decisions will not use aggravating and mitigating factors to privilege male offenders. The two types of factors will be balanced with one another, and the problems of underuse or overemphasis will be issues that judges consistently look for in their work. Focus will be placed on ensuring that mitigating factors do not normalise violent male behaviour, and the gendered harms of sexual assault will be recognised with the appropriate application of aggravating factors. Judges will still have the discretion to craft an appropriate sentence, but they will approach this task with the knowledge of how sexual assault has been minimised and trivialised by the justice system. Thus, any upwards shifts in sentencing ranges will be to correct past injustice.

In order to get to a point where judges across Canada are capable of implementing the equality question in the sentencing process, substantial reforms are needed to provide them with the information necessary to craft decisions that properly incorporate equality values. The rest of this chapter will discuss several different methods of enacting these reforms.

### **7.3 Legislative Reform**

Legislative reform is often one of the first possibilities that reformists consider when attempting to bring about change in the justice system. After all, the *Criminal Code* governs

most of the rules on criminal matters including aggravating and mitigating factors.

Unfortunately, in the context of this project, legislative reform is not likely to be an effective method of reform given the blunt nature of legislative provisions.

### **7.3.1 Expanding Section 718.2(a): Including Additional Factors**

Section 718.2(a) of the *Code* does not say much regarding the use of aggravating and mitigating factors. A short selection of aggravating factors are listed, but otherwise the *Code* states only that a sentence must be increased or decreased depending on what aggravating and mitigating factors are applicable. Thus, one possible reform would be to expand this particular section of the *Code* to include more details about this process.

Part of this expansion could be the inclusion of additional aggravating and mitigating factors. While the provision already lists several factors that are relevant to judges dealing with sexual assault, an expanded section could ensure that other common types of aggravating factors are not left out. For example, while my survey showed that some courts applied aggravation in cases where the offender did not use sexual protection (thereby exposing or causing the complainant to contract an STI or become pregnant), this was not a regularly used factor.<sup>368</sup> Given the severe harms that a lack of protection can cause the complainant, this factor is one that should be considered more often, and including it in the *Code* could ensure that it is not forgotten.

Mitigating factors could also be written into the *Code*. The results of my survey showed that many courts were using mitigating factors inappropriately, either applying them when they were not relevant or creating new factors founded in discriminatory assumptions. By offering

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<sup>368</sup> See chapter five, page 70 for more detail on this factor.

more *Code*-based instruction on what acceptable mitigating factors actually are, this expanded provision could help prevent the proliferation of inappropriate mitigating factors in sexual assault cases.

One problem with expanding section 718.2(a) is that it assumes that judges are not already aware of the aggravating and mitigating factors not listed in the *Code*. The cases in my sample showed that judges were using a wide set of standard factors, so it is likely that the problem is not that judges do not know what factors should be used, but that systemic discrimination corrupts their application. Adding more factors, then, will not provide judges with new information.

Additionally, there are limits to how much information can be included in the *Code*. Most of the issues involving sexual assault are specific to this offence, and the *Criminal Code* does not usually list offence-specific applications in section 718.2(a). This could be solved by adding aggravating and mitigating factors to the sexual assault provisions directly. However, many of the critiques and application issues that I addressed in chapters five and six are too complex to be unpacked in a single provision, so any *Code* reform would only be addressing some of the more surface level problems involving the use of aggravating and mitigating factors in sexual assault cases.

### **7.3.2 Recognising the Equality Promoting Potential of Section 718.2(a)(i)**

According to section 718.2(a)(i), sentences must be aggravated when there is “evidence that the offence was motivated by bias, prejudice, or hate based on” a number of enumerated characteristics, including sex.<sup>369</sup> This provision is not generally used in the sexual assault

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<sup>369</sup> *Supra* note 28 at s718.2(a)(i).

context, though it has the potential to insert equality concerns directly into the sentencing process. This paper has argued that there is a substantial amount of evidence to suggest that sexual assault is an offence deeply connected to gender oppression, and that failure to recognise this fact is allowing sentences to be unfairly influenced by harmful stereotypes. Thus, a systemic analysis of sexual assault supports the use of an aggravating factor that sees this crime as one motivated by bias, prejudice, and hate towards women.

Sentencing is meant to balance both the gravity of the offence with the moral blameworthiness of the offender, so using the hate provision to address more systemic concerns is appropriate. While this factor would be heavily weighted towards what society needs, there are plenty of mitigating factors that concentrate on the offender and ensure that decisions do not become unbalanced. Furthermore, by using section 718.2(a)(i), judges would not be able to ignore or dismiss the necessity of engaging in an equality analysis in sexual assault cases, leading to greater levels of equality overall.

How effective would such a reform actually be? It is very difficult to prove that an offence is motivated by hatred towards a specific group, and it is doubtful that the courts would be willing to apply this provision in the context of all sexual assaults unless there was specific evidence to suggest this type of motive.<sup>370</sup> Furthermore, if the provision does not apply to all sexual assaults, this suggests that only some cases involve gender equality, and that those that do not deserve less aggravation. Thus, rather than being a tool for the furtherance of gender

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<sup>370</sup> According to the courts, “there must be proof beyond a reasonable doubt that the offence was motivated by one of the listed factors. The objective of that sub-section is to impose increased penalties on those who offend because of their beliefs, but not to impose such penalties for merely holding the beliefs” (*R v Wright*, 2002 ABCA 170 at para 10).

equality, the use of this provision could contribute to the false hierarchies applied to sexual assault that frame certain assaults as trivial.

If the hate provision is too difficult to apply, then perhaps a better solution would be to include an aggravating factor related to sexual assault in the *Code*. Any crime involving the violation of a person's sexual dignity could be considered aggravating. By emphasising this type of harm as particularly injurious, judges could not as easily rely on rape myths.

On the other hand, such an inclusion is likely to cause backlash regarding special treatment for the crime of sexual assault. Some will critique the need for an aggravating factor for sex crimes when sexual assault offences are already designed to deal with the sexual aspect of the crime. Others will probably argue that sexual violence is not inherently worse than other types of physical violence. Regardless of any attempt on the part of feminist advocates to explain that sexual violence is different in that it is treated less seriously by society, trying to get lawmakers to pass this law and judges to implement it would be a difficult task. While the legal system seems at least somewhat comfortable with recognising that sexual assault produces unique harms and that some of these harms can be recognised as aggravating, trying to get sexual crimes acknowledged as inherently aggravating is not going to be a politically popular recommendation.

### **7.3.3 Crafting New Legislation to Address Sentencing for Sexual Assault Offences**

Given the difficulties in dealing with sexual assault in general sentencing reform, it may be useful to consider implementing offence-specific legislation. With this solution, the *Criminal Code* would not be unnecessarily bloated, and law makers could design sentencing rules that respond to the particular needs of these offences. A separate piece of legislation could be filled



with adequate detail about the unique considerations required in sexual assault cases, as well as the more common factors that should be applied when dealing with this offence.

Unfortunately, the creation of offence-specific sentencing legislation is problematic in many ways. One argument against this reform is that sexual assault is not the only crime deserving specific legislative attention. After all, while sexual assault is an offence with a unique set of systemic issues, it is certainly not the only offence that causes judges to struggle with social context. Introducing a flurry of new legislation may only serve to complicate the sentencing process without guaranteeing that the new legislation would be effective.

Additionally, the social context information that is so crucial to informing the use of aggravating and mitigating factors in sexual assault cases is not usually included in legislation. When reading an actual piece of law, the rules are not often supplemented with commentary on how they should be implemented. That type of information is generally left to other types of documents such as textbooks, annotated codes, journal articles, and other educational material. Simply adding expanded lists of factors with a warning to incorporate gender equality standards is not likely to encourage the nuanced shifts in application required to effect actual change on this topic.

#### **7.3.4 Implementation of Additional Mandatory Minimums for Sexual Assault**

In an earlier part of this chapter, I acknowledged that critiquing the use of aggravating and mitigating factors tends to lead to the conclusion that sentences for sexual assault offences need to be increased. If a solution is to be found in the traditional, custodial sentencing regime, the most effective reform may involve altering the actual sentences available for sexual assault rather than trying to reform the way aggravating and mitigating factors are applied. For example,

mandatory minimums were recently required for sexual assault offences involving minors,<sup>371</sup> and these mandatory minimums could be applied to all sexual assault offences to create an adequate sentence floor for the crime.

Mandatory minimums, however, are a very contentious topic within sentencing law. They infringe on the discretion that judges have to craft sentences fit for each unique case, and a standard sentencing floor could, theoretically, result in unjust sentences if a judge believes that the facts of a case require a lower sentence. To get past these constraints, judges have been known to apply longer non-incarcerative sentences,<sup>372</sup> or sometimes prosecutorial discretion is used to charge hybrid offences as summary in order to access lower sentencing ranges. Thus, mandatory minimums may minimise the severity of sentences as the courts attempt to avoid assigning sentences that they deem unfair.

Furthermore, applying a mandatory minimum to sexual assault cases does nothing to encourage the courts to engage in an equality analysis. Aggravating and mitigating factors represent an important opportunity for the court to unpack and discuss the gender equality aspects of a case. Applying a mandatory minimum *may* cause sentences to increase; however, problematic applications that embed rape myths in the jurisprudence will persist. The foundational problems plaguing this area of law will remain uncontested, and sentencing issues will continue, albeit in possibly different forms.

#### **7.4 Policy and Regulatory Reform**

If legislative reform is not an effective avenue for change, another potential area to explore is that of policy and regulatory reform. Instead of changing the *Code*, supportive

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<sup>371</sup> *Supra* note 28 at s271, 272(2)(a.2), and 273(2)(a.2).

<sup>372</sup> It should be noted, however, that most sexual assault provisions now disallow the use of conditional sentencing. See: *Ibid* at s742.1.

documents could be prepared to supplement the legislation. This would give judges access to a much larger bank of information to understand the law that they are applying, and, as long as this information is well organised and categorised, finding the relevant information, even for offence-specific issues, should not represent a burdensome addition to the sentencing process.

#### **7.4.1 Guidelines for Writing Sentencing Decisions**

One relatively simple, but important recommendation for sentencing reform would be to provide a standardized guideline for sentencing decisions. While many judges format their decisions in a similar manner, there are still many different ways that the information in these decisions is presented. As a researcher, it can be hard to compare cases, and sometimes it is almost impossible to identify what tools a judge is using and how they are using them. In the context of aggravating and mitigating factors, there were cases that mentioned the factors all throughout the decision instead of clustering them together. This forces anyone wishing to understand how these factors were used to carefully read the entire decision to find each individual factor, a task that can get quite complicated given the vague applications that are sometimes used. For example, in this sample, some judges would mention the possibility of using certain factors in a case without being definitive about whether or not they were actually applying them. Confusion about where to find these factors and how they were applied makes it difficult for other judges to interpret jurisprudence when they are crafting decisions.

A more standardised format for sentencing decisions would ensure that information about these factors is traceable and comprehensible. More organised decisions would also make the logic underlying a judge's comments easier to understand, and may even help judges better structure their thoughts when determining sentence.

A standard decision would start with an overview of the exact charges that the offender was convicted of. Too many cases describe these charges as sexual offences without detailing the actual provisions that were used in the trial. While one can find this information, this requires searching for an additional case. To save time and ensure that information about the different sexual offences remains distinct, all charges should be listed at the start of a sentencing decision.

Following a description of the charges, a brief review of the case facts should be provided. Again, while this information is available in other formats, fewer resources will be spent trying to track down needed information if it is provided initially. The case facts should highlight the details that are relevant for sentencing in a clear and concise manner.

The next section should deal with background information about the offender, as well as any pre-sentencing reports that were written. Any issues with discrepancies in this information should be mentioned, but the weighing of issues will be done in a latter part of the decision. Following this background information, judges should discuss the impact that the offence has had on the victim as well, including any relevant comments from the victim impact statement.

Judges should then move onto the substantive portion of the decision where the actual sentence is considered. Generally, this discussion will start with a brief description of the positions of the Crown and defence. This will be followed by an overview of the relevant law brought forward by these parties, and any other cases that should be considered and compared to the case at hand.

After this foundational work has been completed, the judge can then turn to aggravating and mitigating factors. This part of the decision deserves its own section given the often numerous issues that a judge must consider when applying these tools. The two types of factors should be separated, and clear decisions will list each factor individually rather than lumping

them together. While not all factors will require a substantial explanation, judges should strive to include some commentary for all factors that they apply.

Finally, decisions should conclude with a section that brings together all of the points previously touched on to determine a specific sentence that is clearly stated. Concepts such as proportionality, totality, and restraint should be applied, and it should be clear why a judge is applying a particular sentence.

While it may seem as if this recommendation is obvious or unconnected to the problems discussed in this thesis, having decisions follow a logical, clear, and predictable format ensures that judges are applying the law in a rational and easy to follow manner, and this allows others to canvass decisions more efficiently. As I was conducting my research for this thesis, one of my biggest challenges was figuring out where the information I needed was contained in a decision, and whether or not it was presented in a way that was comparable to other cases. I encountered some cases that I could not include in my sample because the decision was not clear in regards to how the judge was applying factors, and this means that valuable precedential material was lost. In 1987, the Canadian Sentencing Commission stated that there was a lack of systematic information about sentencing, and this problem remains true today.<sup>373</sup> By making information in sentencing decisions easier to access, it is more likely that this information will be collected, analysed, and published for widespread use. Such a reform makes it easier for judges to determine precedent, but it also helps others to challenge what is going on in the courts. Thus, better information not only helps judges craft better decisions, it also holds the courts to greater account.

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<sup>373</sup> Anthony N Doob, “The Unfinished Work of the Canadian Sentencing Commission” (2011) 53 Can J Crim & Criminal Justice 279 at 281.

In the context of sexual assault, this type of clarity is especially important when trying to uncover whether or not a decision has been impacted by subtle discriminatory beliefs. While I did encounter many examples of explicit gender inequality being portrayed in decisions, most of the problems I identified were far less obvious. For example, instead of blaming a victim outwardly, their victim impact statement might have just been ignored, or the harm they suffered minimised. When decisions are scattered and disorganised, it can be harder to tease out systemic problems. Consequently, a well-crafted decision structured by a standardized format can help legal professionals address the gender inequality embedded in the sentencing process, and improve sentencing decisions overall.

#### **7.4.2 Bringing Back the Law and Sentencing Commissions of Canada**

To ensure that a complex subject such as sentencing is reviewed and analysed on a regular basis, the Canadian legal system needs an institution that is responsible for these tasks. Two such organisations existed in Canada in the past. The first was the Law Reform Commission of Canada (LRCC), originally created in 1971. It was responsible for systematically reviewing Canadian law with the intent of providing recommendations for legal reform. As an independent body, they provided much needed oversight to the development of law in Canada, and were able to focus on the overall growth and development of law in a much more comprehensive way than either the legislature or the courts were capable of.

The second institution was the Canadian Sentencing Commission (CSC) established in the 1980s. Much like the LRCC, the CSC was dedicated to reviewing and critiquing the state of sentencing law. It was dismantled after they released a major report in 1987 that recommended significant changes to the sentencing process, many of which still have not been implemented today.

Law reform commissions provide an important service as they assess the law in a thorough and impartial manner. They have more time and resources to dedicate to the review of law than any individual judge, and thus can provide insight to areas mired in difficulties and tension. In the context of aggravating and mitigating factors, a dedicated body with multiple members could conduct research far beyond what individual researchers can accomplish on how these factors are being used, and what reforms are needed.

### **7.4.3 Implementing Standardised Sentencing Guidelines**

In an earlier part of this chapter, I discussed several legislative changes that could be made to the *Criminal Code*, but suggested that most of them would not provide judges with the information needed to understand how to apply aggravating and mitigating factors in complicated situations. Legislative codes, after all, are not usually that detailed when it comes to the discretionary aspects of application, and trying to insert offence-specific details could result in an overabundance of information being added to the legislation. The information that could actually help judges understand and apply aggravating and mitigating factors in their cases would be better presented in a set of guidelines. As discussed above, the re-creation of a commission dedicated to the study and review of law, particularly sentencing law, would provide a skilled institution that was capable of writing these types of guidelines.

One essential part of a guideline on sentencing would be a detailed list of the more common aggravating and mitigating factors. For example, Sweden has a set of guidelines that provides a catalogue of the different aggravating and mitigating factors available in that country as well as some discussion of what these factors entail.<sup>374</sup> While no list will be exhaustive,

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<sup>374</sup> Roberts, *supra* note 78 at xiv.

having an expanded set of common factors that judges can refer to could prevent factors from being forgotten during the sentencing process. In my sample, there were several factors that I discovered were not always applied even if the facts of the case supported their use. For example, two fairly uncontroversial aggravating factors recognising the existence of multiple victims or multiple offences were often left out of decisions despite the fact that they clearly should have been applied. Sentencing will never be as simple as running down a checklist, but having documents that judges can refer to will allow them to double check their own decisions, and help prevent certain factors from being overlooked.

Alongside any potential list, these guidelines should include a section describing and explaining the use of individual factors. While many of the factors may seem self-explanatory, there are situations in which factors may have to be applied differently than what is considered the norm for this use. If there is a guideline that concisely identifies the reasoning behind the use of a factor, and explores some of the complex situations that it can be applied to, judges will be more capable of dealing with their own complicated cases. In the context of sexual assault, such a guideline should explain why certain factors must be carefully considered when being used for decisions dealing with this offence. These guidelines could include brief notes about why sexual assault is a crime that requires special attention, and point out some of the common pitfalls in applying aggravating and mitigating factors for these offences.

Finally, these guidelines must contain information on how to weigh these factors against one another in order to come to a final decision. Information on how to do this is currently lacking in both the legislation and other assorted legal literature. As the research underlying this thesis shows, there are many ways that aggravating and mitigating factors are being misapplied



in the context of sexual assault cases, and having guidance about how they should be balanced in a decision would address some of these application issues.

## **7.5 Reform via Judicial Education**

While many methods of reform will be needed to improve the way aggravating and mitigating factors are used in sexual assault cases, judicial education will be a necessary component. It is through the use of judicial education that reforms such as standardised sentencing guidelines and specific policy guidelines will be implemented. Education of this sort is especially important for judges at the provincial and superior court levels as they are responsible for cases involving a wide array of different areas of law. As sexual assault is a small part of the massive body of criminal law, it is not surprising that judges may struggle to remain informed about not only the substantive law, but also the social context required to understand sexual assault as a crime related to gender inequality.

Education programmes for judges are generally arranged by the courts themselves, or by external organisations such as the National Judicial Institute (NJI). The NJI is an independent, non-profit organisation that educates judges on substantive law and social context. They are responsible for the majority of all education programmes for judges across the country.<sup>375</sup> During the completion of my J.D., I worked for this organisation, putting together written resources and training material on sexual assault law. In doing this work, I learned a great deal about the need for judicial education, and how to frame lessons about sexual assault law in a way that was useable and trusted by Canadian judges. While creating educational material for judges is a difficult task, the feedback this organisation received was largely positive, and judges were

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<sup>375</sup> “The NJI’s Leadership in Judicial Education” *National Judicial Institute*, online: <<https://www.nji-inm.ca/nji/inm/a-propos-about/index.cfm>>.

grateful to have a space where they could work on difficult legal questions without feeling like they were going to be judged or ill thought of for trying to learn.

Even though judges are not required to participate in continuing education, most appreciate the chance to expand their knowledge of the law, and many take advantage of these programmes. However, the non-mandatory nature of these training sessions is a significant weakness of this type of reform. Many different education programmes are offered every year, but judges have busy schedules. A programme on how to apply a small section of the sentencing process in sexual assault cases may not be seen as necessary or efficient by time-strapped judges, especially superior court judges for whom sexual assault constitutes a very small part of their caseload. This means that the advertising behind this type of programme must be carefully designed to emphasise the importance and utility of the subject. It may also be more successful if it was part of a larger workshop dealing with other situations that require a more nuanced approach to the use of aggravating and mitigating factors.

Judicial education encompasses more than workshops and conferences. Institutions such as the NJI release written materials, and a concise document on the topic of aggravating and mitigating factors as used in sexual assault cases could reach a large number of decision makers without the requirement of seminar attendance.

Another factor to consider is that while judges are generally open to engaging in continuing education about the law, given that they are supposed to be neutral arbiters, they can be hesitant to sign up for programmes that appear biased or politically contentious. Thus, an openly feminist session on sentencing for sexual assault offences may not draw as many participants as a session that is framed as being about the social context surrounding sexual assault and the process of sentencing. While teaching law, particularly sexual assault law, is an

inherently political act,<sup>376</sup> as individuals seeking reform to bring about gender equality, it is a crucial skill to be able to frame our recommendations and knowledge in a way that is palatable and acceptable to more moderate or conservative individuals such as the average judge. Legal reform is best achieved through a variety of different methods, and more radical and progressive conversations about sexual assault may be very effective in other situations. However, when approaching those on the bench, it is best to couch one's lessons in language that the court understands. Relying on human rights language and emphasising that the law's development must accord with constitutional values allows feminists to advocate for reform in a way that is more likely to be listened to by a broad part of the judiciary.

Overall, judicial education is not going to radically change the way law is applied and interpreted on the bench without aid from additional reforms. However, this type of work is an important part of legal advocacy as it helps judges understand and properly implement other legal improvements. In the context of sentencing for sexual assault offences, well-designed judicial education programmes and written materials may be one of the most effective ways to reach judges on some of the more nuanced and complicated points regarding this area of law. Thus, despite the fact that judicial education is a long-term and fairly conservative method of reform, it remains a valuable avenue to explore when attempting to embed equality principles in sentencing.

Before moving on from this topic, it is also important to note that judges are not the only legal actors for whom educational reform is required. Sexual assault law training – both in law school and continuing legal education – would ensure that those acting as Crown and defence are

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<sup>376</sup> Rosemary Cairns Way & Daphne Gilbert, "Teaching Sexual Assault: The Education of Canadian Law Students" (2009-2010) 28 Canadian Women's Studies 67 at 69.

better prepared to handle the complexities of these cases. As these two parties produce their own recommendations on what aggravating and mitigating factors are relevant in a case, education targeted at them would help prevent discriminatory applications from being presented to judges as options, as well as ensuring that important facts and submissions incorporating gender equality perspectives are not left out.

## **7.6 Conclusion**

Given that sentencing for sexual assault offences is a difficult part of the trial process being applied to an offence mired in discriminatory and problematic beliefs and assumptions, reforming it will not be a simple task. It will likely take several different approaches to start to change the ways that aggravating and mitigating factors are applied in these cases. This chapter looks at what could be done within the criminal justice system by different legal actors. By exploring the possibilities offered by legislative reform, policy and regulatory changes, and judicial education, an assortment of smaller improvements could lead to broader, more systemic shifts in how the law is applied. The work may be challenging and take a long time, but it is necessary to create a more just, equitable sentencing regime that does not contribute to the oppression of women.

## Chapter 8: Conclusion

I began conceptualising this thesis when I discovered a lack of academic research on sentencing for sexual assault cases. Despite the fact that sexual assault law and sentencing law are both heavily theorised topics, information on the two together is a neglected subject representing a significant gap in the available literature. Thus, I decided to begin to address this deficiency by investigating the equality problems arising out of the use of aggravating and mitigating factors.

Aggravating and mitigating factors are also an under-studied part of criminal law. They represent an attempt by judges to categorise facts from a case into those that should increase or decrease sentence. Consequently, they not only serve the practical function of helping judges determine actual sentences, but they also directly identify the moral complexities of a case. Details about the offender's personal circumstances and motivations are meant to humanise the process, while particulars about the gravity of the offence and its effects on the victim balance a decision by ensuring that societal concerns are not forgotten. Both types of factors are equally as important in promoting sentencing decisions that are nuanced and careful responses to complex social problems involving specific individuals.

I decided to study the application of these two types of factors in the context of sexual assault cases as I was concerned that this was an area of law often negatively influenced by discriminatory assumptions about women and the crime of sexual assault. The only previous academic research I found looking at the use of sentencing factors revealed that judges were being swayed by rape myths and stereotypes.<sup>377</sup> However, the cases that this research was based

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<sup>377</sup> Pasquali, *supra* note 1 at V.

on were from the late 1980s, and no contemporary review of sentencing factors had been conducted since. Thus, I completed a new case survey to explore how these sentencing factors were being used in the current era.

The results of my case survey revealed that the use of aggravating and mitigating factors was being negatively affected by rape myths. In my sample, aggravating factors were not consistently used when relevant, and were also often applied in a manner that diminished or trivialised the harms suffered by the complainant. Mitigating factors, on the other hand, were employed to disproportionately favour the offender by justifying or excusing his criminal behaviour. While some decisions used aggravating and mitigating factors in a manner that challenged systemic issues of gender discrimination, this capacity for progressive change was largely ignored. Additionally, the influence of rape myths was often subtle. Some problematic applications were easy to recognise, but most required a more nuanced analysis. Thus, change must come not only from an expanded discussion of how a feminist analysis reveals important shifts in how to apply aggravating and mitigating factors in sexual assault cases, but also from legislative reform, policy and regulatory changes, and judicial education that would challenge judges to apply these factors more critically, and improve the court's accountability. By ensuring that equality-centric understandings of sentencing law are embedded in the legal system at an institutional level, sexist assumptions can be challenged and reframed to prevent discrimination against female complainants in sexual assault cases.

## **8.1 Chapter by Chapter Review**

I began my thesis with a chapter describing my normative framework. Feminism, though a respected and well-grounded academic framework, is often misunderstood. Thus, I wanted to begin by dispelling common misunderstandings of this theory. I emphasised the fact that feminist

theory has both practical and theoretical components, and that it offers unique approaches to doing law, allowing scholars to engage in new critiques and analyses that focus on ensuring that the law is just and fair for everyone.

Having discussed the theoretical underpinnings of my research, I moved onto exploring the realm of sentencing law. I reviewed some of the basics of how this particular area of criminal law operates, and contextualised this information with the different eras of development that sentencing has undergone. I then argued why feminist legal theory should be applied to the field of sentencing, focusing on the need to ensure that proper balance is maintained in sentencing by embedding equality analyses in the process.

My next chapter detailed the methodologies that I applied while doing my research. I touched on feminist methods, and then went into greater detail on how I constructed my qualitative case survey and interpreted my data.

Chapters five and six were dedicated to reviewing the results of my case survey. I started by discussing the problems that I uncovered with the application of aggravating factors. The central theme of this first chapter explored why aggravating factors were consistently underused despite applicability, as well as how their underuse was influenced by rape myths that trivialised the harms of the offence. I then moved on to discuss my results involving mitigating factors, focusing on the fact that these factors often received a disproportionate amount of attention in comparison to aggravating factors, and that this imbalance was caused by discriminatory beliefs supporting the normalisation of harmful male sexual conduct.

Finally, I ended this paper with a discussion about how to work towards undermining these problematic applications. I addressed the possibilities offered by judicial education, legislative reform, and policy and regulatory shifts, and came to the conclusion that policy and

regulatory changes would likely be the most successful type of reform if paired with judicial education.

## **8.2 Final Thoughts**

While this thesis addresses a significant gap in the literature on sentencing for sexual assault cases, there is still much work that can be done in this field. Data from other provinces would enrich our knowledge about the use of these factors, and also offer more insight into both positive and negative applications. Information about other aspects of the sentencing process would add further context to our knowledge about sentencing factors, as well as reveal additional areas in need of an equality analysis. Studies of individual factors could be performed, and research conducted on sentencing results through a feminist lens would also be useful to gain a fuller understanding of the entire process.

Even though this thesis does not answer every question about sentencing for sexual assault cases, it does show that there are significant problems involving the perpetuation of rape myths through the sentencing process, and these discriminatory applications deserve further attention and research from the legal community. Only by understanding how the system furthers gender inequality will scholars, practitioners, and activists be able to address these problems and ensure that the justice system offers fairness and justice to all individuals, including female sexual assault complainants.



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