EXPLORING THE ROLE OF PENETRATION IN SEXUAL OFFENCES IN CANADA

by

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ABSTRACT

In 1983, the law of sexual assault in Canada was significantly reformed. Among a number of significant changes, rape was replaced by sexual assault and penetration was not a requirement of any of the sexual assault offences. The purpose of this thesis is to reflect on the role of penetration in Canadian sexual assault law, notwithstanding that it no longer forms part of the definition of sexual offences. In particular, I explore the impact of removing the penetration requirement in Canada, thinking carefully about the consequences of incorporating penetration as a defining element of sexual assault offences. I consider whether penetration is more appropriately considered as a relevant factor in sentencing where judges assess the seriousness of a particular offence. Secondly, through an examination of case law, I investigate judicial narratives about penetration in sentencing decisions, focusing on whether and how judges assess the seriousness of a sexual assault through reference to penetration in sentencing.

Ultimately, I argue that while a penetration-centred model reifies gendered and heterosexist assumptions about sexuality, the Canadian approach to penetration challenges these assumptions and helps to dismantle them. Likewise, the Canadian approach is more effective from a fair labelling perspective at communicating the gravity of the wrongfulness of sexual assault to both offenders and complainants. As such, I contend that it is more appropriate for penetration to be considered at sentencing, rather than being part of the definition of sexual offences, as this allows for greater nuance.

However, I argue that judges, when considering penetration as an aggravating factor at sentencing, must take care not to use penetration as the sole determinant of severity. The present study indicates that the distinctions based on penetration that were removed from the substantive law in 1983 may be recreated at sentencing. As a consequence, it is possible that current sentencing practices in Canada may reproduce "real rape" narratives that undermine the severity of sexual assaults, particularly those that do not involve penile penetration of the vagina or anus. I contend that penetration should be but one aggravating factor that is considered alongside other potential aggravating and mitigating factors.

LAY SUMMARY

In 1983, the law of sexual assault in Canada was significantly reformed. Among a number of significant changes, rape was replaced by sexual assault and penetration was not a requirement of any of the sexual assault offences. In this thesis, I explore the impact of removing the penetration requirement in Canada, thinking carefully about the consequences of incorporating penetration as a defining element of sexual assault offences. Ultimately, I contend that penetration is more appropriately considered as a relevant factor in sentencing, where judges assess the seriousness of a particular offence, than as part of the definition of sexual assault. However, I argue that judges at sentencing, when considering penetration as an aggravating factor, must take care not to use penetration as the sole determinant of severity.

PREFACE

This thesis is original, unpublished, independent work by the author, Shannon Russell.

TABLE OF CONTENTS

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DEDICATION

This thesis is dedicated to Julian, a dear friend gone too soon.

A. INTRODUCTION

In 1983, the law of sexual assault in Canada was significantly reformed, driven by the tireless work of feminist campaigners and scholars. Among a number of significant changes, rape was replaced by sexual assault and penetration was not a requirement of any of the sexual assault offences. Instead, the organizing scheme centred on the degree of physical harm and endangerment to life accompanying the sexual assault. Sections 271-273 of the *Criminal Code* establishes three offences: sexual assault, sexual assault causing bodily harm or with a weapon; and aggravated sexual assault.[1] Whether or not there has been sexual penetration is irrelevant for the purposes of distinguishing between offences.

While there was significant discussion of the 1983 reforms and their impacts from the 1980s to the early 2000s,[2] few scholars have looked critically at the reforms in recent years.[3] The purpose of this thesis is to reflect on the role of penetration in Canadian sexual assault law, notwithstanding that it no longer forms part of the definition of sexual offences in Canada. In particular, I explore the impact of removing the penetration requirement in Canada, thinking carefully about the consequences of incorporating penetration as a defining element of sexual assault offences. I consider whether penetration is more appropriately considered as a relevant factor in sentencing where judges assess the seriousness of a particular offence Secondly, through an examination of case law, I investigate judicial narratives about penetration in

[1] *Criminal Code*, RSC 1985, c C-46, ss 271–273.
[2] See especially Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984); Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: Toronto University Press, 1994); Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 International Journal of Offender Therapy and Comparative Criminology 258–270.
[3] For a notable exception, see Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

sentencing decisions, focusing on whether and how judges assess the seriousness of a sexual assault through reference to penetration in sentencing. Ultimately, I argue that sentencing allows for more nuance in considering penetration. However, I argue that judges, when considering penetration as an aggravating factor, must take care not to use penetration as the sole determinant of severity.

I begin in the first chapter by exploring the reform process through which Canada removed penetration as a defining element of sexual assault. I look closely at feminist campaigning that informed the reforms of 1983 to analyze the aims of the movement and how these contributed to the decision to remove the penetration requirement. In particular, I identify the desire to reframe rape and related offences primarily as crimes of violence rather than crimes of sex; the goal of achieving greater sex equality; and the reduction of invasive cross-examination of complainants at trial as influential factors.[4]

In the second chapter, I discuss the reforms in Canada in a comparative context given that a number of jurisdictions have also substantially reformed their approach to sexual assault law over recent decades. Looking particularly at England & Wales, Scotland and Australia, I draw attention to the fact that Canada is very much an outlier when it comes to the complete removal of penetration as a defining element. While both England & Wales and Scotland have a distinct penile penetration offence as well as a separate general sexual penetration offence,[5] many

[4] *Report on Sexual Assault in Canada*, by Dianne Kinnon (Ottawa: Advisory Council on the Status of Women, 1981).
[5] *Sexual Offences Act 2003* (UK); *Sexual Offences Act 2009* (Scot), ASP 9.

Australian states have a single penetrative offence.[6] As such, penetration continues to play an important role in the definitions of sexual offences outside of Canada.

In the third chapter I develop a framework for understanding penetration in the context of sexual assault law. The purpose of this chapter is to explore how and why penetration came to be so significant in understanding the moral blameworthiness and wrongness of sexual violations in both social and legal contexts. In particular, I note the historical conceptions of sexual assault as being a wrong against men's proprietary interests in women, the social significance attached to penetrative sex and the risks of additional harms including pregnancy, sexually transmitted diseases and other physical injuries.

In the fourth chapter, I draw upon this framework in order to consider the impact of removing the penetration requirement from the substantive law of sexual assault in Canada. I rely on Wendy Larcombe's proposed aims for feminist law reform to sexual assault,[7] particularly the aim to reframe the narrative about sexual violence in a manner that challenges myths and affords greater dignity to victim-survivors.[8] In order to assess the extent to which this aim has been realised in Canada, I discuss the narrative that stems from a penetration-centred approach in other jurisdictions, looking particularly at England & Wales. Exploring the alternative approach in

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[6] *Criminal Law Consolidation Act 1935* (SA), 1935/2252; *Crimes Act 1900* (NSW), 1900/40; *Crimes Act 1958* (Vic), 1958/6231; *Criminal Code Act 1913* (WA), 1913/28; *Crime Acts 1900* (ACT), 1900/40.

[7] Wendy Larcombe, "Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law" (2011) 19:1 Fem Leg Stud 27–45.

[8] I choose to adopt the term victim-survivor because it recognizes the significant variation of experiences of people who have been subjected to sexual assault. While the term "survivor" is often considered a more empowering term than "victim", some people may not (yet) feel that they have survived and thus the term "victim" may resonate more in terms of communicating the wrongfulness of their experience. Moreover, the term "victim-survivor" also recognizes the potential journey from identifying as a "victim" to a "survivor", which may not necessarily be a linear one. However, when referring to other sources, I use the term adopted by the author. When discussing sentencing, I use the term "victim", consistent with the *Criminal Code*.

England & Wales can help to evaluate the approach that has been taken in Canada, and particularly to consider how the removal of the penetration requirement may have shaped understandings about sexual violence as well as normative ideas about sex. In particular, I argue that the Canadian approach is more effective from a fair labelling perspective at communicating the gravity of the wrongfulness of sexual assault to both offenders and complainants. At the same time, I argue that while a penetration-centred model reifies gendered and heterosexist assumptions about sexuality, the Canadian approach to penetration challenges these assumptions and helps to dismantle them.

In drawing these conclusions, I am not necessarily endorsing the physical harm-based model in Canada as an effective organizing scheme. It might be argued that using physical harm to draw distinctions between sexual offences is arbitrary. However, the purpose of this thesis is not to propose a suitable organizing scheme for sexual offences. Perhaps as Jennifer Tempkin suggests, there is no coherent organizing scheme for sexual offences.[9] Instead, I argue that it is more appropriate for penetration to be considered at sentencing, rather than being part of the definition of sexual offences, as this allows for greater nuance. This approach allows penetration to be but one factor impacting the severity of a sexual assault, without centralizing it and thus reproducing androcentric sexual norms.

With that in mind, in my fifth chapter, I look to sentencing decisions in order to explore how the role of penetration is conceptualized by judges. I explore the judicial narratives that sentencing judges rely on in relation to penetration and sexual assault in a small sample of sentencing

[9] Jennifer Tempkin, *Rape and The Legal Process*, 2d ed (Oxford: Oxford University Press, 2002) at 155.

decisions from 2019, with reference to my theoretical framework and earlier discussions. I am concerned less with establishing a causal relationship between sentencing severity and penetration, than with qualitatively analysing what sentencing judges have to say about penetration. Indeed, sentencing involves a complex web of factors that cannot be neatly compartmentalized. I discuss what judges say about penetration and consider whether these narratives reflect ingrained assumptions about penetration and sexuality that the statutory law has tried to move away from.

Ultimately, I find that penile penetration of the vagina or anus are significant and consistent aggravating factors in sentencing. Several jurisdictions within Canada have adopted distinct sentencing ranges and starting points for sexual assaults involving penetration that were drawn on by judges in these cases. However, other forms of penetration, particularly digital penetration and penile-oral penetration were not consistently considered as aggravating. Where a sexual assault did not involve penetration, it was often considered as a mitigating rather than a neutral factor. As such, a hierarchy seemed to emerge that reflected the hierarchy of heterosex. Only sexual assaults that fit a prescribed narrative involving forced penile penetration of the vagina or anus were consistently deemed "serious" assaults, which seems reminiscent of "real rape" narratives. Consequently, the severity of sexual assaults that fell outside of this narrative was reduced, thus trivialising their wrongfulness and harmfulness. Cases that involved high levels of "external" violence provided an exception to this rule.

Overall, I argue that judges should take care not to equate severity with penetration when assessing penetration as an aggravating factor. With that in mind, I suggest that sentencing

ranges or starting points should not be defined by penetration, as this gives penetration a central role that is greater than other aggravating or mitigating factors. Furthermore, I suggest that judges should consider the aggravating potential of other forms of sexual penetration beyond penile penetration of the vagina or anus. These forms of sexual assaults can carry distinct risks that should be acknowledged by judges. Finally, I argue that an absence of potential aggravating factors such as penetration, should be considered neutral factors rather than mitigating. It is important that judges recognize that non-penetrative assaults can be extremely harmful so not to undermine the experience of the victim.

B. HISTORY OF SEXUAL ASSAULT LAW IN CANADA

(1) Law Prior to 1983

Prior to the major reforms in 1983, there were a number of sexual offences under Part IV of the *Criminal Code,* "Sexual Offences, Public Morals and Disorderly Conduct" with penetration and biological sex being two of the key defining elements. Under section 143, the definition of rape involved a man having penile-vaginal sexual intercourse with a woman who was not his wife without her consent, or where consent was obtained through threats, impersonation of her husband or by false and fraudulent representations.[10] Sexual intercourse was defined in the *Criminal Code* as penetration to any degree, regardless of whether ejaculation occurred.[11] Caselaw established that penetration meant penile penetration of the *labia majora or labia minora*.[12] The definition of rape was therefore extremely narrow in focus, requiring the offender to be a man and the complainant, a woman. Other forms of non-consensual penetration, such as penile-anal penetration, digital penetration or penetration with an object were not caught by this offence, but were covered by other offences such as indecent assault.[13] The marital exception also meant that rape could not take place within a marriage.[14]

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[10] *Criminal Code*, RSC 1970, c C-34, s 143 as repealed by *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 6.
[11] *Criminal Code*, RSC 1970, c C-34, s 3(6) as repealed by *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125
[12] *R v Johns*, 1956 CR 153, 20 WWR 92.
[13] *Criminal Code*, RSC 1970, c C-34, ss 149, 156 as repealed by *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 8-9.
[14] *Criminal Code*, RSC 1970, c C-34, s 143 as repealed by *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 6.

In addition to the offence of rape, there were also offences of attempted rape[15] indecent assault against a female person[16] and indecent assault against a male person.[17] Where a sexual assault did not involve penile-vaginal penetration, it may have fallen into one of these categories. Indecent assault was never specifically defined in the *Criminal Code*. However, much like the offence of rape, the indecent assault offences did include a gender requirement in their labelling and *Criminal Code* provisions. Not only was a distinction drawn between male and female complainants, indecent assault against a male person was defined such that only men could be offenders. Indecent assault against a male person also carried a higher maximum sentence of ten years imprisonment compared to five years for indecent assault against a female person.

(2) The Road to Reform

Calls to entirely reform the law of rape and sexual offences in Canada began with the growth of the feminist anti-rape movement across the 1960s and 1970s. The anti-rape movement was connected to the broader women's movement in Canada, which saw women coming together to form interest groups that addressed issues such as reproductive rights and violence against

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[15] *Criminal Code*, RSC 1970, c C-34, s 145 as repealed by *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 6.

[16] *Criminal Code*, RSC 1970, c C-34, s 149 as repealed by *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 8.

149 (1) Every one who indecently assaults a female person is guilty of an indictable offence and liable to imprisonment for five years.

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

[17] *Criminal Code*, RSC 1970, c C-34, s 156 as repealed by *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 9.

156 Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years.

women.[18] From 1972, the anti-rape movement began to coalesce with the establishment of rape crisis centres across the cities of Toronto, Vancouver and Montreal.[19] As well as providing support to victim-survivors, rape crisis centres also conducted research on sexual violence and pressured the government to reform the law.[20] The aims of these efforts were to work towards a complete revamping of the law of rape, to challenge rape myths and to change attitudes towards rape and rape victim-survivors.

The work of rape crisis centres resulted in the establishment of a series of national conventions organized by major rape crisis centres across Canada, starting in the spring of 1975.[21] Notably, the third annual national convention, which took place in 1977, set out a number of key priorities, including a commitment to putting together a plan to seek amendments to the *Criminal Code* in relation to rape and other sexual offences.[22] At the same time, other national women's organizations began to call for rape law reform, most notably the Advisory Council on the Status of Women (ACSW), which agreed in an October 1974 meeting to make evaluating sexual offences under the *Criminal Code* a priority concern.[23]

The growing impetus for change led feminist scholars and activists across both Canada and the US to begin to develop a body of research and literature about rape and sexual assault in an attempt to revise the law. The framing of rape and sexual assault as a tool employed by men to

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[18] Kasinsky, "The Rise and Institutionalization of the Anti-Rape Movement in Canada" in Mary Alice Beyer Gammon, ed, *Violence in Canada* (Toronto: Metheun, 1978).
[19] *Ibid* at 160.
[20] Lorenne MG Clark & Debra J Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977) at 25.
[21] Kasinsky, *supra* note 18.
[22] *Ibid* at 164–165.
[23] *Rationalization of Sexual Offences in the Criminal Code: ACSW recommendations*, by Advisory Council on the Status of Women (Ottawa: Advisory Council on the Status of Women, 1976).

assert their dominance over women as a form of social control by activists like Susan Brownmiller was extremely influential in both the US and Canada.[24] Brownmiller drew attention to the function of rape and sexual assault as tools for keeping women in a permanent state of fear of men in order to control their actions and lifestyles. Conceived this way, sexual violence was more about displaying power through the consumption of female bodies, rather than being about sexual gratification per se.

In the Canadian context, Lorenne Clark and Debra Lewis's *Rape: The Price of Coercive Sexuality* was particularly prominent within the anti-rape movement and later was instrumental in the law reform process.[25] In one of the first empirical evaluations of the law of rape in Canada, Clark & Lewis analyzed all police reports of rape to the Metropolitan Toronto Police Department in the year 1970. As well as providing significant empirical evidence relating to the policing of rape and crime patterns, they also argued forcefully for reform that would recognize the violent nature of rape, as well as changes to policing and courtroom practices.

Drawing upon this body of literature and evidence, the feminist anti-rape movement as a relatively uniform collective voice advanced several key aims for law reform. According to Dianne Kinnon of the ACSW, these aims were threefold: (a) to desexualize the crime of rape and related offences and instead emphasize their violent nature; (b) to encourage greater "sex equality" in the law;[26] and (c) to work towards lower penalties so that judges and juries would be

[24] See Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam Books, 1976).
[25] Clark & Lewis, *supra* note 20.
[26] Note, the language of 'sex equality' was used within this report, and I am quoting directly. However, I am critical of the notion of 'sex' as a biological, objective fact, instead recognizing the social and cultural constructions of sex as well as gender.

more likely to convict.[27] These aims were very much used as a basis for advancing the argument that penetration should be removed as a defining element of any sexual offence, particularly (a) and (b). Both of these aims will be briefly summarized in turn, before considering how they tie into the removal of the penetration requirement.

(a) Desexualising Rape and Related Offences

The broad consensus of the feminist movement in Canada in the 1970s and 1980s was very much that rape and other sexual harms must be conceived as crimes of violence rather than crimes of sex. It was first argued in the US context that rape should not be regarded as a sexual offence but rather as a violation of bodily and sexual autonomy.[28] Drawing upon these perspectives, Clark & Lewis argued that rape and related offences should be recognised as physical attacks on the body, sexual only in that the attack is against a person's sexual organs.[29] From this point of view, rape and related offences were not about sex or sexual gratification but about violence and power. While sexual offences were conceived of as crimes of male desire, Clark & Lewis drew attention to violence, harm and power as the central underpinnings.

For this reason, many feminist scholars and activists sought to desexualize rape and related offences.[30] For example, Clark & Lewis argued that sexual offences should be relabelled as

[27] Kinnon, *supra* note 4 at 43.
[28] Brownmiller, *supra* note 24; Camille E LeGrand, "Rape and Rape Laws: Sexism in Society and Law" (1973) 61:3 California Law Review 919–941 at 941.
[29] Clark & Lewis, *supra* note 20 at 160–170; Brownmiller, *supra* note 24.
[30] See especially Clark & Lewis, *supra* note 20.

offences against the person in order to emphasize their fundamentally violent nature.[31] From their perspective, the term 'sexual offence' masked the reality of the crime as an assault and instead reflected a narrative that sexual desire is the cause of rape, with any harm being purely incidental to sexual gratification. It was their view that, in reality, rape is dangerous, can result in physical or psychological injury and is potentially fatal, thus it should be considered by the law as a form of physical assault. The Law Reform Commission of Canada in its *Report on Sexual Offences* reflected this view.[32] For this reason, the Commission recommended incorporating violence into the very definition of the offence because differences in the level of violence were regarded "not merely of degree but kind".[33] In other words, the level of violence used should represent a qualitative difference between different sexual assaults.

The need to desexualise the law of sexual offences and focus on violence was widely endorsed by women's organizations and feminist scholars.[34] However, it is important to note that while feminist perspectives were presented as an entirely united front, there were some dissenting voices within the feminist movement with regards to desexualizing rape.[35] In particular, Cohen & Backhouse argued that victims experience rape in a qualitatively different manner from physical assaults.[36] Noting the gendered power dynamics and gendered understandings of sexuality that

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[31] *Ibid* at 168–169; *The Web of the Law: A Study of Sexual Offences in the Canadian Criminal Code*, by Marcia H Rioux (Ottawa: Advisory Council on the Status of Women, 1975).
[32] Law Reform Commission of Canada, *Report on Sexual Offences*, Catalogue No. J3 1-28/ 1978 (Ottawa: Minister of Supply and Services Canada, 1978).
[33] *Ibid* at 13.
[34] See e.g. Advisory Council on the Status of Women, *supra* note 23; Rita Gunn & Candice Minch, *Sexual Assault: The Dilemma of Disclosure and the Question of Conviction* (Winnipeg: University of Manitoba Press, 1988); Rioux, *supra* note 31. See also Brownmiller, *supra* note 24.
[35] See Maria Łoś, "The Struggle to Redefine Rape in the Early 1980s" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: Toronto University Press, 1994) 20; *A Feminist Review of Criminal Law*, by Christine Boyle et al, Status of Women Canada (Ottawa: Minister of Supply and Services, 1985).
[36] Leah Cohen & Constance Backhouse, "Desexualizing Rape: A Dissenting View on the Proposed Rape Amendments" (1980) 2:4 Canadian Woman Studies 99–103.

underlie rape, they argued that rape cannot and should not be desexualized. From their point of view, rape derives it distinctiveness from the way in which patriarchal culture defines women according to their sexuality. Writing in *Maclean's* in 1980, they contend that "since our culture generates rape, a peculiar overlap of violence and sex, we don't want to see that reality swept under the rug".[37] Put simply, bolstered with statements from other legal scholars and feminist activists, they did not believe that sexual offences should be defined on the same terms as a physical assault, albeit in a sexual context, which appeared to be the consensus at the time.

(b) Sex Equality

Furthermore, there was a push towards ensuring sex equality in the law, particularly in terms of working towards a gender-neutral approach. In part, this was driven by the *Charter of Rights and Freedoms* coming into force in 1982, with section 15 guaranteeing equal rights due to come into force in 1985.[38] This gave lawmakers an opportunity to ensure that laws were consistent with the equality guarantees. Prior to the 1983 reforms, the definition of rape was such that only men could be perpetrators and only woman could be victim-survivors. Similarly, a distinction was drawn between indecent assault against a female person and indecent assault against a male person. Indeed, scholars such as Clark & Lewis took issue with the fact that (biological) sex was therefore built into the definition of rape and advocated instead for gender-neutrality.[39]

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[37] Leah Cohen & Constance Backhouse, "Putting rape in its (legal) place", *Maclean's* (30 June 1980), online: <https://archive.macleans.ca/article/1980/6/30/putting-rape-in-its-legal-place> at 6.
[38] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[39] Clark & Lewis, *supra* note 20 at 186.

It was argued in the US context as early as the 1970s that gendered definitions of rape and related offences were predicated on, and simultaneously reinforced and legitimated, outdated attitudes about sex.[40] According to Boyle, feminists in Canada similarly regarded the law as being complicit in reflecting and reproducing an ingrained image of men as active initiators of sexual activity, whereas women were merely passive recipients of sex.[41] As Maria Łoś, later pointed out, it was "as if their sexuality predestined them and only them for the fate of rape victims".[42] From this perspective, if women could not be considered legally capable of rape, then the whole notion that women were autonomous sexual persons may be undermined.[43] Women were not considered, in themselves, as fundamentally sexual beings. The law was thus seen to uphold a narrative about sex and sexuality that was largely defined from a male perspective. Although there was not necessarily a widespread social problem of women sexually assaulting men (at least in comparison to male perpetrated assaults of women), some feminists at the time believed that a gender-neutral definition was required in order to ensure sex equality in the law.[44]

Moreover, the old law denied that men could be raped, when as Clark & Lewis noted, in reality it is possible.[45] Boyle later drew attention to the higher maximum sentence for indecent assault against a male person compared to indecent assault against a female person implied that assaults involving male complainants were seen as being more serious by the law than those involving women[46]. In doing so, female complainants were constructed as being less valuable as

[40] LeGrand, *supra* note 28.
[41] Boyle, *supra* note 2 at 27.
[42] Łoś, *supra* note 35 at 34.
[43] See LeGrand, *supra* note 28.
[44] Kinnon, *supra* note 4. See also Christine Boyle, "Sexual Assault and the Feminist Judge" (1985) 16 for a summary.
[45] See Clark & Lewis, *supra* note 20.
[46] Boyle, *supra* note 2.

complainants compared to men. These assumptions draw upon a narrative that women are *supposed* to be penetrated, whilst men are impenetrable.[47] It is also likely that the construction of the law in this way reflected the ingrained homophobia that existed in the time. Some feminist scholars and activists were thus in favour of reforming the law to be more inclusive of men's experiences.[48]

As a consequence, many argued for a gender-neutral approach to defining sexual assault, contending that the basis of sexual assaults should be their violent aspect rather than the biological sex of the perpetrator or the victim.[49] Reforming the law could therefore serve a potential pedagogical function of affirming in the criminal law that men can also be victims of sexual assault.[50] Again, the Law Reform Commission of Canada was in support of this view, contending that gendered distinctions should be removed such that men and women would be equally protected and equally culpable where a sexual assault is committed.[51] Everyone, regardless of gender, should be protected from violations of sexual and bodily autonomy.

Of course, not all feminists agreed with the approach to make the law gender neutral. Some argued that making the law gender-neutral would do nothing to change the reality of the crime of sexual assault as profoundly gendered, it being a tool employed by men to exert their power over women.[52] For example, Sheila McIntyre contended that gender-neutral language obscures the

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[47] See Andrea Dworkin, *Intercourse* (New York: Free Press, 1987).
[48] Kinnon, *supra* note 4. See also Boyle, *supra* note 2 at 17, 27.
[49] Clark & Lewis, *supra* note 20 at 168.
[50] Boyle, *supra* note 2 at 47.
[51] Law Reform Commission of Canada, *supra* note 32; Law Reform Commission of Canada, *Sexual Offences*, Working Paper 22 (Ottawa: Minister of Supply and Services, 1978).
[52] See *An Evaluation of the Sexual Assault Provisions of Bill C-127 Fredericton and Saint John, New Brunswick*, by J & J Research Associates, WD1991-5a (Ottawa: Department of Justice, 1988) at 11.

relationship between sexual violence and systemic inequality.[53] Likewise, in response to changes in Canada, for example, Łoś argued that gender-neutrality in this sphere is in fact an artificial legal construct that obscures the gendered reality of rape.[54] From this perspective, the process of degenderization systematically masks how fear of rape shapes the lives of women in a way that does not affect heterosexual men.[55] In the same vein, Boyle expressed concern that a gender-neutral approach would discourage a gender-specific analysis of sexual assault, particularly by judges.[56] However, Boyle also noted that while gender neutrality could be used to uphold patriarchy, so too could any theoretical model of rape law. In other words, a gendered approach could also be used against women as well. In later work, while recognizing the potential value of a gendered definition, Boyle concluded that gender neutrality is ultimately more appropriate as it removes the need to "predict all the ways in which rape-like sexual violence can be used as reminders to certain groups that they are there for sexual use by others".[57]

(3) The Penetration Requirement

For some, there was a need to remove the penetration requirement in order to realize these aims.[58] There were three primary concerns expressed about the penetration requirement, namely

[53] Sheila McIntyre, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" (2000) 20:3 Canadian Woman Studies 72–83. See also Joan McGregor, "The legal heritage of the crime of rape" in Jennifer M Brown & Sandra L Walklate, eds, *Handbook on Sexual Violence* (London: Routledge, 2011) 69.
[54] Łoś, *supra* note 35.
[55] See also Susan Estrich, *Real Rape* (Cambridge, Mass: Harvard University Press, 1987) at 82.
[56] Christine Boyle, "Sexual Assault and the Feminist Judge" (1985) 1 Canadian Journal of Women and the Law 93–107 at 104–106.
[57] Christine Boyle, "What Makes '"Model"' Sexual Offenses? A Canadian Perspective" (2000) 4:1 Buffalo Criminal Law Review 487–514 at 504.
[58] See, for example, LeGrand, *supra* note 28.

that: (a) it was considered to emphasise the sexual nature of sexual assault whilst minimising its violent and coercive nature;[59] (b) the definition excluded men as potential victims and women as potential perpetrators which amounted to a gendered inequality in the law;[60] (c) it entailed a number of practical issues, including the need to prove penetration took place, and the invasive cross-examination of complainants.[61]

With regards to the sexual nature of the offence, the contention was that the definition of sexual assault should not be focused on penetration but rather on violence. Such a view was also emphatically endorsed by the Law Reform Commission of Canada.[62] Incorporating elements such as penetration could distract from the violent nature of sexual offences by focusing too closely on sex, sexual desire and sexual gratification. As such, it was argued that force or threat of force perpetrated, and harm experienced by the victim that should be used to distinguish between offences rather than the type of sexual violation. While there was little discussion of sexual assaults that are grounded in coercion and manipulation rather than physical force, it seems that feminist scholars and activists wanted to draw attention to the fact that all sexual assaults are intrinsically violent even where physical force has not been used.[63] Other issues like penetration could be a matter for sentencing.

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[59] See Advisory Council on the Status of Women, *supra* note 23; *Background Notes on the Proposed Amendments to the Criminal Code in Respect of Indecent Assault*, by Marcia H Rioux & Joanna L McFadyen (Ottawa: Advisory Council on the Status of Women, 1978) at 16; Judith A Osborne, "Rape Law Reform: The New Cosmetic for Canadian Women" (1984) 4:3 Women & Politics 49–64 at 50, 59. Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, National Action Committee on the Status of Women, "Appendix 'Just-40' Sexual Offences: Crimes of Aggression. A Brief in Response to Bill C-53", Minutes of Proceedings and Evidence, 32-1, Vol 5, No 93 (March 8, 1982).

[60] See Clark & Lewis, *supra* note 20; Alan W Mewett, "Sexual Offences in Canada" (1959) 21 Criminal Law Quarterly 21–36. See also Boyle, *supra* note 2 at 27; Ronald Hinch, "Inconsistencies and Contradictions in Canada's Sexual Assault Law" (1988) 14:3 Canadian Public Policy 282–294 at 286.

[61] Boyle, *supra* note 2 at 27; Boyle, *supra* note 56 at 96; GR Goodman, "Proposed Amendments to the Criminal Code with Respect to Victims of Rape and Related Sexual Offences" (1975) 6:2 Manitoba Law Journal 275–281.

[62] Law Reform Commission of Canada, *supra* note 32 at 14.

[63] Clark & Lewis, *supra* note 20.

In particular, some argued that the definition of sexual offences had to cover a broader range of non-consensual acts in order to recognise that different types of sexual violations could be as serious as penile-vaginal penetration, particularly when accompanied by violence.[64] Indeed, drawing upon her work with sexual assault victims, Lorenne Clark argued that many victims found situations that did not involve penile-vaginal penetration as being at least as, if not more humiliating, embarrassing and frightening, particularly where foreign objects were used.[65] Similarly, Goldsberry contended that the old law did not "reflect the gravity of the crime to the victim" because it focused on the offender's perspective; what the offender did to the victim, not how the victim experienced the assault.[66] Getting rid of the penetration requirement was therefore an important step in defining the law on victims' terms. It was hoped that redefining sexual assault without a penetration requirement would centralize the experience of victims and how they experienced victimization.

Moreover, the LRCC suggested that the removal of the penetration requirement would "represent a step towards greater respect for the equality of the sexes and, in consequence, a more egalitarian concept of law".[67] It hoped that a new, broader framework which did not include penetration in the definition of sexual assault could help to challenge deeply held understandings of sex as involving active male initiators and passive female bodies. The reformed law is, of course, entirely gender-neutral which means that anyone, regardless of sex, can be a perpetrator

[64] See e.g. LeGrand, *supra* note 28.
[65] Evidence from Lorenne Clarke, Canada, Parliament, House of Commons Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, 32-1, Vol 5, No 91 (June 1, 1982) at 13.
[66] *Rape in British Columbia: A Report to The Ministry of Attorney-General*, by Nancy Goldsberry (Victoria, BC: Justice Development Canada, 1979) at 111.
[67] Law Reform Commission of Canada, *supra* note 32 at 14.

or a victim-survivor. Boyle noted that while this did not necessarily address any social problem, at least in the sense of women as perpetrators, it did ensure that the law complied with the *Canadian Charter of Rights and Freedoms*.[68]

Finally, there were also a number of practical concerns about the penetration requirement. The pre-1983 law required proof of penetration, which could be an extremely difficult burden to overcome. When giving evidence to Parliament in relation to Bill C-53, the Quebec Federation of Women argued that proving penetration was one of the biggest hurdles for the police in taking a case forward.[69] Indeed, proving penetration was largely dependent on medical evidence, such that complainants had to undergo invasive forensic examinations within 24 hours of the offence for the purposes of collecting samples that might contain, for example, semen and pubic hair.[70] Not only was this an onerous practical burden on the Crown, it also could be extremely traumatic and revictimizing for the complainant.

Furthermore, given the narrow and specific definition of rape, complainants were often subject to invasive and deeply personal cross-examination about the particularities of the assault.[71] Such questioning could be extremely abusive and degrading.[72] Indeed, according to Clark, being questioned about penetration was the aspect of the criminal justice process that victims found most difficult.[73] Particularly given normative standards of sexual modesty expected of women,

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[68] Boyle, *supra* note 56 at 97.
[69] Evidence from Charlotte Thibault, Quebec Federation of Women, Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence,* 32-1, Vol 5, No 93 (March 12, 1982) at 26.
[70] Clark & Lewis, *supra* note 20 at 44.
[71] Boyle, *supra* note 2 at 27.
[72] Goodman, *supra* note 61.
[73] Clark, *supra* note 64.

questioning related to penetration was often used in a way that was degrading, embarrassing and humiliating to the victim as a means of discrediting her credibility. Women essentially had to admit that penetration tarnished their claim to virginity and chastity. It was hoped that the removal of the penetration requirement would make the trial a more humane experience for victims as there would be no need for them to be subject to lines of questioning based on whether or not penetration actually took place.[74]

[74] Boyle, *supra* note 2 at 46.

(4) Legislative Response

Taking inspiration from a number of US states that had drastically redefined and restructured their sexual assault laws across the 1970s, feminists in Canada sought to broaden the definition of sexual offences. In particular, a so-called "stair-casing" structure was proposed, which would provide for different levels or degrees of sexual assault based on severity.[75] For example, in 1975, Michigan adopted a gender-neutral "criminal sexual conduct" offence with a "stair-casing" structure[76]. Sexual offences were grouped into four degrees, with distinctions drawn according to factors such as injury, use of a weapon as well as whether there had been penetration. A number of other US states took similar approaches, including Delaware, Connecticut and Washington.[77] Drawing upon some preliminary evidence from the US that the changes had resulted in increased reporting and conviction rates,[78] it was hoped that similar changes in Canada could have the same effect.[79]

Various iterations of this stair-casing approach were considered in Canada before eventually reaching the law we have today. Firstly, Bill C-52 was introduced by then Minister of Justice, Ronald Basford in 1978.[80] Bill C-52 proposed a two-tier indecent assault model, namely indecent

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[75] Constance Backhouse & Lorna Schoenroth, "A Comparative Study of Canadian and American Rape Law" (1984) 7:9 Canada-United States Law Journal 173–213 at 210.
[76] Mich Comp Laws Ann § 750.520a-e (Supp 1980).
[77] For a more in-depth discussion, see Backhouse & Schoenroth, *supra* note 75 at 211.
[78] *Law Reform in the Prevention and Treatment of Rape: Preliminary Report*, by Institute for Social Research (Ann Arbor, Mich.: University of Michigan, 1979).
[79] Backhouse & Schoenroth, *supra* note 75 at 212; *Sexual Assault in Canada*, by Ruth M Bray, Social Problems in Canada (Toronto: Guidance Centre, Faculty of Education, University of Toronto, 1980) at 45.
[80] Bill C-52, *An Act to amend the Criminal Code and to amend certain other Acts in relation thereto or in consequence thereof*, 3rd Sess, 30th Parl, 1978.
149 (1) Every one who indecently assaults another person is guilty of an indictable offence and is liable to imprisonment for fourteen years.
(2) An accused who is charged with an offence under subsection (1) or section 149.1 may be convicted if the evidence establishes that the accused did anything to the other person with his or her consent that, but for such

assault and aggravated indecent assault. Much like the old indecent assault offence, the term "indecent" remained undefined. The indecent assault offence ostensibly included any type of non-consensual sexual act, penetration being notably absent from the definition. While the Bill took into account some proposals made by the feminist movement, particularly incorporating violence into the definition, it was criticized for a number of reasons, notably its provisions on consent.[81] There was concern that Bill would have made it possible to infer consent from a lack of resistance and that the credibility of complainants would continue to be undermined.[82] Furthermore, the indecent assault offences were to remain Part IV of the *Criminal Code,* "Sexual Offences, Public Morals and Disorderly Conduct" rather than being reframed as offences against the person, in line with the violence perspective.

With these concerns in mind, Bill C-52 was ultimately never passed. It was replaced by Bill C-53, introduced by then Minister of Justice Jean Chrétien in 1981.[83] Bill C-53 used the language of sexual assault, proposing two offences of sexual assault and aggravated sexual assault, distinguished according to the level of violence and the use of a weapon. These were framed as offences against the person rather than as sexual offences. These offences were gender-neutral

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consent, would have been an indecent assault or an aggravated indecent assault, if such consent was obtained by personating the spouse of the other person or by false and fraudulent representations as to the nature and quality of the act, or was extorted by threats or fear of bodily harm.
149.1 Every one who indecently assaults another person is, where the indecent assault results in severe physical or psychological damage to that other person, guilty of an indictable offence and liable to imprisonment for life.
149.2 For the purposes of sections 149 and 149.1 and without restricting the generality of the term "indecent assault", an indecent assault includes sexual penetration of any bodily orifice.
149.3 No prosecution shall be instituted under section 149 or 149.1 in respect of an offence alleged to have been committed by a person against his or her spouse unless the spouse were living separate and apart at the material time.

[81] Boyle, *supra* note 2 at 28.
[82] Goldsberry, *supra* note 66 at 118–119.
[83] Bill C-53, *An Act to amend the Criminal Code in relation to sexual offences and the protection of young persons and to amend certain other Acts in relation thereto or in consequence thereof*, 1st Sess, 32nd Parl, 1982.

and did not require penetration. However, this was also not passed due to concerns about the sections dealing with young people and the rules on sexual history evidence.[84]

Bill C-127 was later introduced in 1982, which also proceeded with the framing of sexual assaults as assaultive crimes.[85] However, rather than the two-tier structure, Bill C-127 provided for the current three-tier structure with sexual assault, sexual assault with a weapon, threats or causing of bodily harm and aggravated assault, distinguished according to the level of bodily harm and endangerment to life. On August 4, 1982 Bill C-127 was passed as the *Criminal Law Amendment Act*,[86] and came into effect on January 4, 1983, adding the current sexual assault offences into the *Criminal Code*. The old offences of rape, attempted rape, indecent assault against a male person and indecent assault were repealed.

In general, feminist organizations and scholars considered the amendments to be a victory for all women. The general feminist consensus at the time had a significant influence on the law which meant that the changes were welcomed. Of course, the dissenting voices discussed above demonstrate that there was by no means unanimity among feminists and so not everyone welcomed the changes. It should also be noted that while Boyle, amongst a number of other feminist scholars, was generally supportive of the model of sexual assaults as inherently violent, she did not believe that this was actually reflected in the current three-tier model.[87] Given that the distinctions are based on levels of violence external to the actual sexual assault, it fails to

[84] See Boyle, *supra* note 2 at 29.
[85] Bill C-127, *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, 2nd Sess, 32nd Parl, 1982.
[86] SC 1980-81-82-83, c 125.
[87] See Boyle, *supra* note 2 at 95. See also Boyle et al, *supra* note 35.

recognise the sexual assault as violent in and of itself. Whilst she did not directly criticize the removal of the penetration requirement, her concerns draw attention to the fact that the changes were not entirely accepted by the feminist movement.

It was hoped that drastically changing the law would represent an important step towards re-orientating perspectives of sexual violations as fundamentally violent crimes. Indeed, these changes align with a general trend over the past forty years of reforming sexual offences across a number of jurisdictions. That being said, Canada is very much the outlier with respect to removing penetration from the definition of all sexual assault offences when compared to other English Common Law jurisdictions. While many English Common Law jurisdictions enacted their own substantial reforms, few others have gone so far as to detach legal significance from penetration entirely. As such, Canada has not followed the general trend with respect to penetration. Recognizing that the Canadian approach is relatively unique sparks our discussion about the appropriate role of penetration in the law of sexual assault.

C. PENETRATION IN A COMPARATIVE CONTEXT

Indeed, there are a range of different approaches to penetration adopted by comparable jurisdictions. Unlike in Canada, penetration does play a role as a defining and distinguishing element in the law of sexual offences to varying degrees in other English Common Law jurisdictions. For example, in England & Wales, distinctions are drawn between sexual offences according to whether there has been penetration and, if so, the object of penetration. These distinctions are embodied by the four primary sexual offences under the *Sexual Offences Act 2003*: rape; assault by penetration; sexual assault; and causing a person to engage in sexual activity.[88] Whilst sexual assault is defined as non-consensual sexual touching, the offences of rape and assault by penetration specifically require non-consensual penetration. The distinction between rape and assault by penetration is in the object of penetration. Sexual assault by penetration requires sexual penetration of the vagina or anus, whether by a penis, other body part or an object. On the other hand, rape is defined as the non-consensual *penile* penetration of the vagina, anus, or *mouth*.

In some ways, this is reminiscent of the law in Canada prior to 1983, with a distinct offence of 'rape'. However, unlike the previous law in Canada, the current law in England & Wales does not specifically designate the gender of the complainant or offender. It also goes beyond non-consensual penile-vaginal penetration to include penile-anal and penile-oral penetration. It is, however, not entirely gender-neutral given the offence of rape requires that the object of penetration be a penis. Notwithstanding that the perpetrator need not be a man, the perpetrator

[88] *Sexual Offences Act 2003* (UK), ss 1–4.

must have a penis. The distinct assault by penetration offence which encompasses non-penile penetrative assaults is also particular to this system and was not seen under the previous law in Canada.

As such, whether or not there has been sexual penetration, and the object of penetration are considered central for the purposes of delineating between non-consensual sexual conduct, and, at least to some degree, determining the wrongfulness and moral blameworthiness of sexual offenders. One might argue that the law in England & Wales is structured in a hierarchical manner. Each offence is defined in such a way to make it an entire subset of the offence immediately below it in the hierarchy. For example, the offences under section 1 (rape) and section 2 (assault by penetration) are subsets of section 3 (sexual assault) and section 1 is also a subset of section 2. All scenarios that would fall under section 1 as rape would also fit into section 2 as an assault by penetration and section 3 as a sexual assault. Similarly, any assault by penetration would also meet the section 3 definition of sexual assault. The structure is such that it takes one particularly narrowly defined act and separates it from the broader category, which enshrines the idea that there is something innately distinct about penetrative sexual assaults in relation to other sexual assault, and rape in relation to other penetrative sexual assaults. The different labels used for each offence implies that there are innate *differences* between the offences.

Yet, rape and assault by penetration are intended to be equal in severity with both entailing a maximum sentence of life imprisonment,[89] Indeed, in its report on sexual offences, the Home

[89] *Sexual Offences Act 2003* (UK) s 1(4); s 2(4) which provide for a maximum sentence of life imprisonment on conviction on indictment.

Office "recognised that other penetrative assaults could be as serious in their impact on the victim as rape". However, it supported a model that separated the offence of rape from other penetrative assaults.[90] As well as a distinction between the offences based on labelling, sentencing can also vary significantly between these offences notwithstanding that the maximum sentence is the same.

Differences in approaches to sentences these offences can be found in the Definitive Guideline on Sexual Offences issued by the Sentencing Council of England & Wales.[91] Courts have a duty to follow sentencing guidelines, unless doing so would be contrary to the interests of justice.[92] The guideline provides sentencing ranges and a starting point for each offence depending on the levels of harm and culpability. For each offence, there are three category ranges based on the level of harm caused, Categories 1, 2 and 3; and a further two category ranges based on the level of culpability of the offender, Categories A and B. Courts determine the applicable categories by reference only to lists of culpability and harm factors that are provided in the guideline. The guideline then provides a specific starting point and sentencing range for each category, together with a non-exhaustive list of aggravating and mitigating factors that may warrant upward or downward adjustment from the starting point.

[90] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences. Volume 1* (London: Home Office, 2000) at para 2.9.1.
[91] Sentencing Council for England and Wales, "Sexual Offences Definitive Guidelines", (1 April 2014), online: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-offences-definitive-guideline-Web.pdf>.
[92] *Coroners and Justice Act 2009* (UK), s 125(1).

For example, the sentencing range for a Category 3B rape (one with no harm or culpability factors), is four to seven years' custody, with a starting point of five years.[93] On the other hand, the range for Category 3B assaults by penetration is a higher-level community order to four years' custody with a starting point of two years.[94] Moreover, a recent report published by the Sentencing Council documented that the average custodial sentence length for rape was 11 years' custody in 2014-15, compared to 6 years and 3 months' custody for assault by penetration.[95] These practical differences in sentencing together with the fact that they are labelled differently may imply a hierarchy based on the notion that *penile* penetration is more serious than other forms of sexual penetration. The two offences are considered sufficiently distinct so as to warrant separate legal offence with distinct sentencing ranges and starting points.

The difference in severity between penetrative assaults (generally) and non-penetrative assaults is more explicit. Sexual assaults under section 3 carry a lower maximum sentence than rape and assault by penetration of a prison term of six months or a fine or both on summary conviction, or a prison term of 10 years on indictment.[96] Furthermore, the Definitive Guideline suggests that the sentencing range for Category 3B sexual assaults is between a medium level community order and 26 weeks' custody, with a starting point of a high-level community order.[97] Indeed, this mirrors the intention communicated by the Home Office in its report on sexual offences, which

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[93] Sentencing Council for England and Wales, "Sexual Offences Definitive Guidelines for Rape, Sexual Offences Act 2003 s. 1", (1 April 2014), online: <https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/>.
[94] Sentencing Council for England and Wales, "Sexual Offences Definitive Guidelines for Assault by Penetration, Sexual Offences Act 2003 s. 2", (1 April 2014), online: <https://www.sentencingcouncil.org.uk/offences/crown-court/item/assault-by-penetration/>.
[95] *Assessing the implementation of the Sentencing Council's Sexual Offences Definitive Guideline*, by Anna Carline et al (London: Sentencing Council of England and Wales, 2018).
[96] *Sexual Offences Act 2003* (UK), s 3(4).
[97] Sentencing Council for England and Wales, "Sexual Offences Definitive Guidelines for Sexual Assault, Sexual Offences Act 2003 s. 3", (1 April 2014), online: <https://www.sentencingcouncil.org.uk/offences/crown-court/item/sexual-assault/>.

stated that the section 1 and section 2 offences "deal with the most serious types of behaviour" and section 3 covers those outside of that realm of seriousness.[98] However, the Home Office did recognise that situations falling outside of sections 1 and 2 could still constitute serious assaults. As such, the law endorses the notion that penetrative assaults are inherently more serious than non-penetrative assaults, and, where there has been penetration, that the object of penetration is at least significant in terms of the nature of the wrong.

Similar approaches to that taken in England & Wales have also been adopted in Scotland[99] and Northern Ireland.[100] A number of other jurisdictions also rely on penetration in their definitions of sexual offences, but to a lesser degree. For example, a number of Australian states, specifically South Australia,[101] New South Wales,[102] Victoria,[103] Western Australia[104] and the Australian Capital Territory[105] distinguish between penetrative and non-penetrative assaults, but do not draw a further distinction based on the object of penetration. In other words, penetration is considered important when it comes to moral blameworthiness and culpability, but whether penetration is with a penis or something else is not.

It is abundantly clear that penetration continues to play a significant role in definitions of sexual offences in a number of jurisdictions, notwithstanding that it is no longer a defining element in Canada. Clearly, penetration is an extremely salient factor when it comes to legal conceptions of

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[98] Home Office, *supra* note 90 at para 2.14.1.
[99] *Sexual Offences Act 2009* (Scot), ASP 9.
[100] *Sexual Offences Order 2008* (NI).
[101] *Criminal Law Consolidation Act 1935* (SA), 1935/2252, ss 48, 48A and 56 read alongside s 5(1).
[102] *Crimes Act 1900* (NSW), 1900/40, ss 61I–61JA, 61KC–61KD and 61KE–61KF, read alongside ss 61HA–61HC.
[103] *Crimes Act 1958* (Vic), 1958/6231, ss 38–41, read alongside s 35A.
[104] *Criminal Code Act 1913* (WA), 1913/28, ss 323–326 read alongside s 319(1).
[105] *Crimes Act 1900* (ACT), 1900/40, ss 50–54, 57–60.

sexual offences, and so it is important that we think carefully about how and why penetration has come to be so significant in constructions of sexual assault. Doing so enables us to think critically and carefully about the law in Canada, and to reflect on the impact of removing the penetration requirement.

D. THEORIZING PENETRATION

(1) Building a Framework for Understanding Penetration

As we can see from the brief comparative context provided above, the decision in Canada to remove penetration from the definition of all sexual assault offences entirely is somewhat of an outlier. In many ways, we can say that the extent to which different jurisdictions rely on penetration as a defining element exists on a continuum. On one end, we have Canada, which has no penetration requirements for any of the sexual assault offences. On the other, we have England & Wales, which has a distinct penile penetration offence, separate from a more broadly defined sexual penetration offence that does not require *penile* penetration, and then non-penetrative sexual assaults. The difference between these two positions is extremely polarized. The English Common Law jurisdictions discussed above fall somewhere between these poles.

With all that in mind, penetration clearly has been integral to the law of sexual offences across time across these English Common Law jurisdictions. Likewise, penetration has played a significant, albeit evolving role in Canada. It is thus important to reflect on why penetration has been considered so important, at least historically in Canada, in relation to the law of sexual assault. In doing so, we must ask why penetration was afforded legal significance in Canada and why it continues to hold such significance in other jurisdictions today. In order to address this, we need to build a framework for understanding penetration. By theorizing penetration, we can develop a greater understanding of how and why it has shaped the law. Any attempt to theorize penetration needs to begin with a consideration of why significance has been attached to

penetration when delineating sexual offences. As I outline below, we need to consider a number of factors in our exercise of theorizing penetration, including historical and social factors, as well as enhanced risks associated with penetrative assaults compared to non-penetrative assaults.

(2) The Socio-Legal Significance of Penetration

(a) Men's Proprietary Interests in Women

To determine why penetration has been afforded such legal significance, we might begin by considering its evolving role across history in understandings of intercourse as well as sexual assault in terms of men's proprietary interests in women. Indeed, historically, intercourse (narrowly defined as penile-vaginal penetration) has been considered to be of particular importance when it comes to the law of sexual offences, due to concerns about women's virginity and chastity.[106] These concerns were very much connected to the notion of women as being the property of their fathers or husbands. If an unmarried woman was raped, she would be comparably less appealing to potential future husbands given her lack of virginity, which would be an affront to her father.[107] Her value for exchange with a potential husband would be reduced. Similarly, if a married woman was raped, this was seen largely as a violation of the property rights of her husband, centred on the notion of his "property" being devalued.[108]

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[106] Clark & Lewis, *supra* note 20 at 111–132; Constance Backhouse, "Nineteenth-Century Canadian Rape Law 1800-1892" in David H Flaherty, ed, *Essays in the History of Canadian Law v2* (Toronto: University of Toronto Press, 1983) 212.
[107] *Ibid*.
[108] *Ibid*.

Furthermore, there was a real concern that non-consensual sexual assault outside of marriage could result in pregnancy and the birth of "illegitimate" children.[109] Children born of rape would not only be ostracised from society but could bring shame upon the woman and her family. Particularly given that reliable birth control was not widely available to women until the 1970s in Canada, the risk of illegitimate pregnancy was a significant concern. For these reasons, whether or not there had been sexual intercourse would be extremely important given the significant potential social consequences for victim-survivors and their families. Penetration was thus incorporated into the law to reflect these particular concerns, such that rape was seen as a crime against male property. Rather than protecting violations of sexual and bodily autonomy, law was designed to protect the proprietary interests. Rape was considered wrongful because it meant that a man's property was being stolen or damaged. As such, a rape of a woman that caused no economic harm to a man could not be seen as wrongful.

(b) Penetration and the Coital Imperative

Moreover, we might consider that organizing schemes for sexual assault law that centralize penile penetration in their hierarchy reflect the centralization of the penile penetration, particularly penile-vaginal penetration in understandings of heterosex. Indeed, sexuality scholars have found that since the "sexual revolution" of the eighteenth century, sexual norms within the heterosexual context have become increasingly phallocentric, dependent upon a "coital

[109] For a more in-depth discussion of the history of sexual assault law in Canada, see Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900 – 1975* (Toronto: Osgoode Society for Canadian Legal History, 2008).

imperative".[110] The so-called "coital imperative" refers to the widely held belief and practice of penile-vaginal penetration as being definitive of heterosex.[111] A whole range of studies have found that the majority of heterosexual men and women consider the term 'sex' to mean penile-vaginal penetration, and for some penile-anal penetration, rather than a broader array of sexual practices.[112] The coital imperative is seen as so crucial in heterosexual relations that penile-penetration is constructed as normal and necessary.[113] Penile-penetration is natural and grounded in biological and reproduction. As such, the majority of participants across several studies considered a heterosexual relationship without penetration as having a negative reflection on one's sexuality.[114]

These ideas of naturalness and necessity serve to justify this limited definition of sex on the basis that men have a natural desire for penile-vaginal penetrative sex for the purposes of reproduction. The seemingly objective focus on reproduction enables the "coital imperative" to be seen as normal and biologically necessary, existing separate from and prior to cultural

[110] Tim Hitchcock, "Redefining sex in eighteenth-century England" in Kim M McPhillips & Barry Reay, eds, *Sexualities in history: A reader* (New York: Routledge, 2002).
[111] Margaret Jackson, "Sex Research and the Construction of Sexuality: A Tool of Male Supremacy'" (1984) 7:1 Women's Studies International Forum 43–51.
[112] Nicola Gavey, Nicola McPhillips & Virginia Braun, "Interruptus Coitus: Heterosexuals Accounting for Intercourse" (1999) 2:1 Sexualities 35–68; Janet Holland, Caroline Ramazanoglu & Rachel Thomson, "In the Same Boat? The Gendered (In)experience of First Heterosex" in Diane Richardson, ed, *Theorising Heterosexuality: Telling it Straight* (Buckingham: Open University Press, 1996); Susan Kippax et al, "Women Negotiating Heterosex: Implications for AIDS Prevention" (1990) 13:6 Women's Studies International Forum 533–542.
[113] Kathryn McPhillips, Virginia Braun & Nicola Gavey, "Defining (Hetero)Sex: How Imperative is the 'Coital Imperative" (2001) 24:2 Women's Studies International Forum 229–240.
[114] Gavey, McPhillips & Braun, *supra* note 112; Ava D Horowitz & Louise Spicer, "'Having Sex' as a Graded and Hierarchical Construct: A Comparison of Sexual Definitions among Heterosexual and Lesbian Emerging Adults in the U.K." (2013) 50:2 Journal of Sex Research 139–150; Stephanie R Medley-Rath, "'Am I Still a Virgin?': What Counts as Sex in 20 years of Seventeen" (2007) 11:2 Sex Cult 24–38; Zoë D Peterson & Charlene L Muehlenhard, "What Is Sex and Why Does It Matter? A Motivational Approach to Exploring Individuals' Definitions of Sex" (2007) 44:3 Journal of Sex Research 256–268.

norms.[115] Yet, research overwhelmingly shows that in fact sexual norms are not fixed or unchanging but rather evolve over time, space and according to particular socio-cultural context.[116] Indeed, according to Tim Hitchcock, prior to the turn to phallocentrism, sex was conceived as encompassing a much wider range of sexual behaviours, including kissing, mutual fondling and mutual masturbation.[117]

Instead, a social constructivist approach recognizes sexuality as constructed, and thus dependent upon social, cultural and historical factors.[118] When patterns, such as phallocentrism emerge, social constructivists interpret them as contingent upon social and structural processes rather than as biological.[119] From this perspective, there is nothing innate about any particular sexual activity or practice (or combination thereof) that is inherent to sex. Sex is constructed according to temporal, social, historical and cultural contexts, which helps to explain how understandings of sex have evolved and changed.

With that in mind, some scholars in the field of sexuality studies criticize these phallocentric sexual norms for defining heterosexual relations through an androcentric lens.[120] Under the auspices of biology and reproduction, these normative sexual assumptions about heterosex

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[115] Leonore Tiefer, "Sexual Biology and the Symbolism of the Natural" in Mary M Gergen & Sara N David, eds, *Toward a New Psychology of Gender: A Reader* (New York: Routledge, 1997) 363.
[116] See Kerwin Kaye, "Sexual intercourse" in Steven Seidman, Nancy Fischer & Chet Meeks, eds, *Handbook of the New Sexuality Studies* (London: Routledge, 2006) 129 at 130.
[117] Hitchcock, *supra* note 110.
[118] Michel Foucault, *The History of Sexuality: An Introduction* (New York: Vintage Books, 1978).
[119] Leonore Tiefer, *Sex is Not a Natural Act & Other Essays* (San Francisco: Westview Press, 1995); Jeffrey Weeks, *Sexuality and its discontents: Meaning, myths and modern sexualities* (New York: Routledge, 1985).
[120] See especially Gavey, McPhillips & Braun, *supra* note 112; Virginia Braun, Nicola Gavey & Kathryn McPhillips, "The 'Fair Deal'? Unpacking Accounts of Reciprocity in Heterosex" (2003) 6:2 Sexualities 237–261; Panteá Farvid & Virginia Braun, "Casual Sex as "Not a Natural Act' and other Regimes of Truth About Heterosexuality" (2013) 23:3 Feminism and Psychology 359–378.

universalize men's sexual desires and sexual gratification while devaluing women's sexual pleasure.[121] In particular, these perspectives reflect a chronological narrative of heterosex as beginning with an erection (representing male arousal), followed by penile-vaginal penetration and then concluding with ejaculation.[122] In this sense, women are passive recipients of sex rather than active participants. Likewise, other forms of non-penile vaginal penetration seem to fall just one step below penile penetration in the hierarchy of heterosex. According to Jenny Hockey, Angela Meah & Victoria Robinson, sexual activities are ranked hierarchically from light sexual experiences to heavy sexual experiences, with heaviness being a measurement of relativity to penile-vaginal penetration.[123] While penile penetration is afforded the greatest significance, other forms of sexual penetration carry comparatively greater significance compared to non-penetrative sexual practices. As such, penetration of the vagina continues to be centralized in female sexuality, constructing female sexuality as dependent upon penetration.

Importantly, whether or not a woman has an orgasm or derives any sexual pleasure is ancillary or ignored altogether when it comes to understandings of sex and sexuality. Research overwhelmingly finds that heterosexual women report significantly lower rates of regular orgasm than heterosexual men.[124] In addition, the vast majority of women do not reach orgasm through penetrative sexual practices alone. For example, studies have found that women are far more

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[121] Gavey, McPhillips & Braun, *supra* note 112 at 40.
[122] Braun, Gavey & McPhillips, *supra* note 120; HE Randall & ES Byers, "What is Sex? Students' Definitions of Having Sex, Sexual Partner, and Unfaithful Sexual Behaviour" (2003) 12:2 Canadian Journal of Human Sexuality 87–96.
[123] Jenny Hockey, Angela Meah & Victoria Robinson, *Mundane Heterosexualities: From Theory to Practices* (Basingstoke, Hampshire: Palgrave MacMillan, 2007).
[124] Justin R Garcia et al, "Variation in orgasm occurrence by sexual orientation in a sample of US singles" (2014) 11:11 Journal of Sexual Medicine 2645–2652; Lisa D Wade, Emily C Kremer & Jessica Brown, "The Incidental Orgasm: The Presence of Clitoral Knowledge and the Absence of Orgasm for Women" (2005) 42:1 Women & Health 117–138; Edward O Laumann et al, *The social organization of sexuality: Sexual practices in the United States* (Chicago: Chicago University Press, 1994).

likely to report having an orgasm with a partner when their sexual encounters included a wider range of sexual practices.[125] In particular, encounters that included non-penetrative practices, particularly oral and to a lesser extent manual clitoral stimulation, were significantly more likely to result in orgasm. Yet, such practices are seen as preliminary or secondary practices to "real" sex.[126] In this sense, "real sex" and intercourse are seen as synonymous, largely because intercourse is likely to result in orgasm for men.

From this perspective, women are expected to be available for sexual penetration in order to please men, yet their own sexuality and sexual pleasure is entirely absent.[127] Some feminist scholars have argued that these restrictive understandings of penile-vaginal penetration as definitive of sex are responsible for reducing women's access to sexual pleasure and for reinforcing power differentials between men and women.[128] Penile-vaginal penetration may thus be seen as the ultimate expression of heterosexuality, an institution that prescribes and reproduces normative expectations of masculinity and femininity in order to maintain a gender hierarchy.[129]

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[125] David A Frederick et al, "Differences in Orgasm Frequency Among Gay, Lesbian, Bisexual, and Heterosexual Men and Women in a U.S. National Sample" (2018) 47:1 Arch Sex Behav 273–288; Juliet Richters et al, "Sexual practices at last heterosexual encounter and occurrence of orgasm in a national survey" (2006) 43:3 Journal of Sex Research 217–226.
[126] McPhillips, Braun & Gavey, *supra* note 113; Rachel P Maines, *The technology of orgasm: 'Hysteria,' the vibrator, and women's sexual satisfaction* (Baltimore: The John Hopkins University Press, 1999).
[127] Braun, Gavey & McPhillips, *supra* note 120; John Gray, *Mars and Venus in the Bedroom: A Guide to Lasting Romance and Passion* (New York: Harper Collins, 1996).
[128] Farvid & Braun, *supra* note 120.
[129] See R W Connell, *Gender and power: Society, the person, and sexual politics* (Stanford, CA: Stanford University Press, 1987).

Other feminist scholars, most notably Andrea Dworkin, argue that intercourse itself (which she defines specifically as penile-vaginal penetration) is a locus of oppression for women.[130] Intercourse is defined from the perspective of the penetrator (men) and the penetrated (women), carrying connotations of possession and ownership. From this perspective, penile-vaginal penetration is representative of male power and domination over women's bodies. However, Dworkin has been criticized for ignoring that many women actively seek to engage in and derive a range of pleasures from penile-vaginal penetration.[131] Holding that women who engage in penile-vaginal penetrative sex are inherently oppressed removes their agency to make such choices about their sexual lives according to their own desires and choices. It also does not take into account that the roles of the penetrator and the penetrated are not necessarily fixed, and that sexual partners may switch or complicate these roles, across cisgender, heterosexual, queer and trans contexts. In a similar vein, this framework for understanding intercourse also could be seen as shaming women who do choose to have intercourse. Dworkin conceives of women who do so as "collaborators" in a political sense, which some have argued is reminiscent of slut shaming narratives by criticizing women for enjoying sex.[132] Rather than seeing penetrative sex as being inherently oppressive for women, we can instead conceive of the limited definition of sex as penile-vaginal penetration as being oppressive for women.

Furthermore, while the above discussion has largely focused on cisgender heterosexual sexual relations, the "coital imperative" also has implications in the LGBTQ2SIA+ context. Indeed, studies have found that those who identify as LGBTQ2SIA+ typically regard a much wider range

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[130] Dworkin, *supra* note 47.
[131] Kaye, *supra* note 116 at 133; Carole S Vance, *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge, 1984).
[132] See Kaye, *supra* note 116 at 133.

of sexual behaviours as definitive of sex, which may or may not include penetration.[133] Some sexuality scholars have illuminated the fact that the coital imperative is thus predicated on heterosexist assumptions that sex has to involve a penis and a vagina, thus excluding the sexual experiences of LGBTQ2SIA+ individuals.[134] Other sexual behaviours are defined as sexual only through analogy to penile-vaginal penetration because they engage parts of the body and/or sexual sensations that are analogous to penile-vaginal penetration.[135] As such, sexual behaviours that fall outside of the heterosexual hegemony are defined only in relation to penile-vaginal penetration. They fall below heterosexual intercourse in the hierarchy of sexual behaviours. Queer sexualities are thus defined by analogy to heterosexuality and impose normative ideas about sex as requiring an erect penis and some form of penetration to those within the queer community. In doing so, the sexual experiences and practices of queer people are systematically devalued and ignored.[136] As Chrys Ingraham points out, the sexual experiences of LGBTQ2SIA+ people are rendered "irrelevant and illegitimate".[137]

(c) Risk of Additional Harms

It is also important to note that penile penetration carries enhanced risks of transmitting sexually transmitted infections (STIs) and, in the case of penile-vaginal penetration, the unique risk of

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[133] Chris Beasley, Heather Brook & Mary Holmes, *Heterosexuality in theory and practice* (New York: Routledge, 2012); Joseph A Diorio, "Changing Discourse, Learning Sex, and Non-coital Heterosexuality" (2016) 20:4 Sexuality & Culture 841–861; Ursula Goodenough, "The emergence of sex" (2007) 42:4 Zygon 857–872; Horowitz & Spicer, "'Having Sex' as a Graded and Hierarchical Construct", *supra* note 114.
[134] Diorio, *supra* note 133; Medley-Rath, ""Am I Still a Virgin?", *supra* note 114; Cathy Winks & Anne Semans, *The New Good Vibrations Guide to Sex*, 2d ed (San Francisco: Cleis Press, 1997).
[135] Joseph A Diorio, "Sexuality, difference, and the ethics of sex education" (2001) 32:3 Journal of Social Philosophy 277–300.
[136] Winks & Semans, *supra* note 134.
[137] Chrys Ingraham, "Heterosexuality: It's just not natural" in Diane Richardson & Steven Seidman, eds, *Handbook of lesbian and gay studies* (Thousand Oaks, CA: Sage Publications, 2002) 73 at 76.

unwanted or forced pregnancy. Indeed, when making a case for the distinct offence of "rape" in England & Wales, the Home Office in its *Setting the Boundaries* report emphasized that these unique risks give this particular form of sexual assault a distinct character from other sexual assaults.[138] In particular, both STIs and pregnancy can have significant short and long term physical and psychological consequences for sexual assault victim-survivors.

It is important to note from the outset that many sexual acts carry a risk of transmitting STIs. However, that risk is heightened where there has been penile penetration, particularly penile-anal penetration.[139] The contraction of an STI results in physical harms requiring medical treatment which, if left untreated, can be injurious to a person's long-term physical health.[140] STIs also carry social stigma, particularly HIV and AIDS. While it is of course essential STIs are destigmatized, it is quite possible that victim-survivors of sexual assault who contract STIs will face this stigma, and perhaps even internalize it.[141] As such, in addition to being sexually assaulted, victim-survivors who contract STIs face these additional physical injuries and additional stigma.

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[138] Home Office, *supra* note 90 at para 2.8.4.
[139] See Beens Varghese et al, "Reducing the Risk of Sexual HIV Transmission: Quantifying the per-act risk for HIV on the basis of choice of partner, sex act, and condom use" (2002) 29:1 Sexually Transmitted Diseases 38–43.
[140] See Jason V Baker et al, "Untreated HIV Infection and Large and Small Artery Elasticity": (2009) 52:1 Journal of Acquired Immune Deficiency Syndromes 25–31; WL Risser & Jan Risser, "The incidence of pelvic inflammatory disease in untreated women infected with Chlamydia trachomatis: A structured review" (2007) 18:11 International Journal of STD and AIDS 727–731; Noni E MacDonald & Robert Brunham, "The Effects of Undetected and Untreated Sexually Transmitted Diseases: Pelvic Inflammatory Disease and Ectopic Pregnancy in Canada" (1997) 6:2 Canadian Journal of Human Sexuality 161–170.
[141] See Leah East et al, "Stigma and stereotypes: Women and sexually transmitted infections" (2012) 19:1 Collegian 15–21; Josephine Pui-Hing Wong et al, "Risk discourse and sexual stigma: Barriers to STI testing, treatment and care among young heterosexual women in disadvantaged neighbourhoods in Toronto" (2012) 21:2 The Canadian Journal of Human Sexuality 75–89; Roger Davidson & Lesley A Hall, eds, *Sex, sin and suffering: Venereal disease and European society since 1870* (London: Routledge, 2001); Sonia Lawless, Susan Kippax & June Crawford, "Dirty, diseased and undeserving: The positioning of HIV positive women" (1996) 43:9 Social Science & Medicine 1371–1377.

Forced pregnancy as a result of sexual assault results is also an additional intrusion on a person's body and mind, and potentially the rest of their life. In particular, pregnancy involves a substantial additional physical change to the body compared to sexual assaults that do not result in pregnancy. Forced pregnancy results in one of four outcomes: the pregnant person (a) carries the foetus to term with the intention of raising the child; (b) carries the foetus to term with a view to adoption; (c) has a miscarriage; or (d) has an abortion. Regardless of the outcome, every such pregnancy can have a serious physical and/or psychological impact on the pregnant person.[142] In all cases, the victim-survivor has to live with the trauma of being impregnated by the person who assaulted them, which can result in serious long-term mental health struggles. Depending on the outcome of the pregnancy, they will also face substantial changes to their body; the risk of other complications associated with pregnancy or labour; and/or the physical and emotion impacts of having an abortion or a miscarriage.

Furthermore, all forms of penetration, whether penile or not, carry a risk of other physical injuries, such as gynaecological and/or anal injuries.[143] While of course physical injuries are possible in any incident of sexual assault where external violence is used, these risks are specific to penetrative assaults. This, of course, is not an enhanced risk specific to *penile* penetration but rather all forms of sexual penetration.

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[142] For a more in-depth discussion of the physical and psychological impacts of forced pregnancy experienced by sexual assault victim-survivors, see Lauren Hoyson, "Rape is tough enough without having someone kick you from the inside: The case for including pregnancy as substantial bodily injury" (2010) 44:2 Valparaiso University Law Review 565–610.

[143] See Sharon Cowan, "All change or business as usual? Reforming the law of rape in Scotland" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (Abingdon: Routledge, 2010) 154.

E. EVALUATING THE SUBSTANTIVE LAW

(1) Assessing the Impact of Reform

All of these factors: the historical construction of intercourse and rape, the legacy of old rape laws, the risk of pregnancy and STIs and the risk of physical injury, have undoubtedly shaped public perceptions of penetrative assaults, particularly those that involve a penis. As a consequence, these socio-legal and cultural factors have led to a construction of penetration as carrying a symbolic significance that inevitably shape our understanding of sexual assault. Penetration therefore carries a level of social significance, albeit no longer legal significance, in Canada. Non-consensual penetration continues to be constructed within public consciousness as the most serious, morally reprehensible kind of sexual violation, underpinned by a complex web of factors, including those discussed above. As such, it is important to reflect on how the law should interact with these social norms and values.

Indeed, the criminal law is supposed to articulate normative standards of behaviour to guide people's actions and to reflect social disapproval of wrongdoing. It is in some ways guided by social values, and in other ways, guides social values. In other words, we need to reflect on the extent to which the law of sexual assault should be guided by social values that assign significance to penetration, and the extent to which it should be articulating new values about penetration. We must consider how the law *should* interact with the social significance of penetration, in terms of whether it should *reflect* that significance by building penetration into the definition, or *resist* it, as we have done in Canada, by removing penetration from the

definition of sexual assaults. Of course, this involves making a normative judgment, there being no objective way to answer such a question.

Looking at the impact of reform in Canada may help us form that normative judgment. As such, we must think carefully and critically about the impact of removing penetration as a defining element of sexual assault offences in Canada, and whether the reforms have brought about any positive or meaningful change. Such an endeavour requires us to explore the consequences of removing penetration, which we know has social significance, as a defining and distinguishing element of sexual assault. If there has been positive change, this might suggest that resisting the social significance of penetration is an appropriate role of the law, and vice versa.

However, there is not necessarily agreement as to what that impact has been, or how we should measure that impact. In particular, there is still significant division within feminism as to how sexual offences should be defined in the law, particularly in relation to the gender neutrality component of the law. While some scholars argue that the move towards gender neutrality in the law helps to challenge and dismantle gender norms,[144] others are more critical. Particularly within the radical feminist movement in Canada and the US, many have argued that while the move towards desexualization and degenderization reflected the liberal feminist consensus at the time, the approach has come at a cost.[145] In particular, the Canadian approach has been criticized on the basis that changing the labelling of sexual offences and removing the penetration

[144] *Ibid*.
[145] See e.g. Vikki Bell, "Beyond the 'Thorny Question': Feminism, Foucault and the Desexualisation of Rape" (1991) 19:1 International Journal of the Sociology of Law 83–100; Catherine MacKinnon, *Toward a feminist theory of the state* (Cambridge, Mass: Harvard University Press, 1989) c 9.

requirement ignores the particular *sexual* character of sexual assaults while simultaneously doing little to increase reporting and conviction rates.[146]

Of course, there is no single, objective way to assess the impact of the Canadian reforms. One such way could be to look at measurable variables such as reporting rates and attrition rates across the criminal justice process. Indeed, following the 1983 forms, there was an initial surge in reporting rates, though the rate of increase has reduced to a relatively stable point since.[147] It is, however, impossible to say whether this was directly connected to the substantive nature of the reforms, or the fact that the reforms attracted significant national attention. Indeed, in more recent times, the advent of movements such as MeToo may have contributed to an increase in reporting rates from 2016 to 2017 in Canada.[148] As such, this may imply that confidence comes from an increase in frank conversations and increased public attention to sexual violence as a social issue. Likewise, we may look to attrition rates. Recently gathered government statistics indicate that there is still significant attrition across all stages of the Canadian criminal justice process.[149] Overall, only around 12% of sexual assaults reported to the police and deemed "founded", from 2009 to 2014, resulted in a conviction, compared to 23% of physical assaults.[150] Given that the study excludes those reports of sexual assaults that the police deemed

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[146] Łoś, *supra* note 35. See also Damian Warburton, "The Rape of a Label: Why it Would be Wrong to Follow Canada in Having a Single Offence of Unlawful Sexual Assault" (2004) 68:6 Journal of Criminal Law 533–543.
[147] Statistics Canada, *Criminal justice processing of sexual assault cases*, by Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 1994); Tang, "Rape Law Reform in Canada", *supra* note 2; Julian V Roberts & Robert J Gebotys, "Reforming Rape Laws: Effects of Legislative Change in Canada" (1992) 16:5 Law and Human Behavior 555–573.
[148] Statistics Canada, *Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017*, by Cristine Rotenberg & Adam Cotter, Catalogue No 11-001-X (Ottawa: Canadian Centre for Justice Statistics, 2018).
[149] Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, Catalogue No. 85-002-X (Ottawa: Canadian Centre for Justice Statistics, 2017).
[150] *Ibid*.

"unfounded", the actual conviction rate will undoubtedly be lower. As such, in spite of significant legal and social reforms, conviction rates are still low.

However, looking at attrition rates is not necessary the best measure of successful reform. Wendy Larcombe argues that strategies designed to increase convictions may actually work against feminist aims.[151] In particular, aiming specifically to increase convictions can encourage greater use of prosecutorial discretion to ensure that only those deemed most likely to result in a conviction are pursued, which often means only those cases that fit a pre-conceived "real rape" narrative are pursued.[152] Instead, she proposes three alternative feminist aims for law reform, namely changing the legal story of rape by challenging rape myths, improving the experiences of survivors in the criminal justice system and affording greater respect to survivors.

Taking inspiration from Larcombe, I propose to consider the impact of removing the penetration requirement in terms of its socio-pedagogic and symbolic impact. Indeed, it seems relatively uncontroversial to say that the criminal law serves a communicative, pedagogical function by way of the conduct that it criminalizes and the conduct it does not criminalize and how it defines particular offences and defences. The way that we label and define sexual offences can create a narrative about how the law conceives of sexual violence as a broader social issue. Importantly, the narrative that is created by the law is endorsed by the law, meaning that the state is ascribing moral legitimacy to this legal narrative.

[151] Larcombe, "Falling Rape Conviction Rates", *supra* note 7.
[152] On "real rape", see Estrich, *supra* note 55.

The way that penetration is incorporated within the law shapes this legal narrative, thus raising the question of how the removal of the penetration as a defining and distinguishing element of sexual assault has shaped the narrative about sexual violence in Canada. It is thus important to reflect on whether removing the penetration requirement has contributed towards an alternative narrative that better reflects the harm or wrong of sexual assault. In doing so, it is helpful to consider the Canadian perspective in a comparative context. The role that is ascribed to (penile) penetration, whether as a defining element as in jurisdictions such as England & Wales, or as a matter for sentencing as we have in Canada can create a legal and social narrative about sexual violence. In particular, reflecting on the Canadian model in comparison with that used in England & Wales allow for a critical analysis of the appropriate role for penetration in the law of sexual offences.

(2) Penetration as a Legal and Social Narrative

It is important to reflect on the symbolic implications of penetration in terms of the social narrative it constructs. The social, and in some jurisdictions, legal significance attached to penetration in a sexual assault context reveals a lot about how we construct sexual violence and likewise, how we construct consensual sex. Łoś argues that the "social perception of rape necessarily depends on a social construction of sexuality".[153] From this perspective, sexuality is central to the experience of sexual assault because the way that we define sexuality informs that experience. In other words, the way that we conceive of sexuality is intrinsically connected to

[153] Łoś, *supra* note 35 at 32.

how we perceive sexual violations. As sexual assault offences are articulated through the law, the law may therefore be seen as a mediating force.

However, this relationship is not necessarily linear. Instead, there is a complex relationship between the law of sexual assault, perceptions of sexual assault and perceptions of sexuality and sexual norms. Penetration has a particularly important role to play in the construction of sexuality, and so the extent to which sexual assault law centralizes penetration shapes the legal narrative of sexuality. As such, the way that law defines sexual offences, and in particular the organizing scheme adopted, can shape social understandings of sexual violence *and* sexual norms in general. While it is important to remember that there is an obvious distinction between sex and sexual violence - that distinction grounded in consent - these are complex interrelated constructions that are mutually dependant.

On this basis, it may thus be argued that the high level of social disapproval attached to penetrative assaults based on the social significance of penetration reflects their severity, which in turn must be reflected in the law. Indeed, according to Ashworth, "common patterns of thought in society" should be reflected in legal labelling.[154] This logic was advanced in England & Wales to justify a distinct non-consensual penile penetration offence, with the Home Office noting that "rape was clearly understood by the public as an offence that was committed by men on women and on men".[155] From this perspective, the fact that non-consensual penile penetration has this significance attached means that the law needs to designate it as a distinct offence so as

[154] Andrew Ashworth, *Principles of Criminal Law*, 5th ed (Oxford: Oxford University Press, 2006) at 89.
[155] Home Office, *supra* note 90 at para 2.8.4.

to reflect the high level of social disapproval. As a consequence, the impact of the reforms in Canada could be a dilution of this expression of social disapproval.

Certainly, for Gardner & Shute, the social significance of penile penetration is actually central to the wrongfulness of penetrative assaults.[156] They contend that the symbolism of particular offences is often tied to the symbolism of their moral opposites, which in this case is consensual penetration. Suggesting that consensual penetration carries a romanticized notion of a union, they argue that rape, as defined in England & Wales, "is a weapon against its victim which trades on the social meaning of sexual penetration".[157] Whether or not the victim has such a romanticized view of heterosexual intercourse, "it is the social meaning of consensual sexual penetration which the rapist exploits by subverting it".[158] In other words, the romanticized notion of sexual intercourse is being used against victim-survivors in order to objectify them and to show dominance. As such, the particular social significance attached to penetration gives penetrative assaults a particular social meaning that makes the harm for victim-survivors more significant, which in turn should be reflected in the law.

That being said, there seems to be an element of circularity inherent to the argument that the social significance attached to penetration requires a distinct penetration offence, contrary to the Canadian model. The argument is as follows. Non-consensual penetration has been constructed as the most serious type of sexual violation which in turn has resulted in a particular social significance is attached to it. That social significance is thereby used to critique the Canadian

[156] John Gardner & Stephen Shute, "The Wrongness of Rape" in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) 193 at 209–212.
[157] *Ibid* at 211.
[158] *Ibid*.

approach and to argue in favour of incorporating penetration into the definitions of sexual assault offences. Central to the wrong, on that basis, is the social significance. However, it seems unreasonable to take that social significance as being a self-evident justification. Social significance is, of course, a social construct that is dependent upon cultural and temporal conditions.

(3) Social Significance and Sexual Norms

It seems uncontroversial to say that many of these values, that underly the social significance of penetration, are outdated. The centralization of women's virginity and chastity reflect social expectations of women as being defined by men's proprietary interests rather than as persons of their own right. Likewise, as discussed above, the centralization of the penis and penetration in our understandings of sex constructs an androcentric and heterosexist perspective on sexuality. In the same vein, it may be argued that a penetration-centred model of structuring sexual offences, such as that in England & Wales, not only universalises these androcentric and phallocentric sexual norms, it reinforces and legitimises them. Indeed, Catherine MacKinnon argued that "penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality".[159]

As such, a penetration-centred model such as that in England & Wales may serve to reproduce these restrictive narratives about masculinity, femininity and sexuality. By doing so, the penetration-centred model may implicitly endorse and thus sustain social assumptions of a

[159] MacKinnon, *supra* note 145 at 172.

hierarchy of sexual relations, with penile-vaginal penetration in particular being definitive of sex, with other forms of penetration falling comparatively lower in the hierarchy and non-penetrative acts lower still. Moreover, a penetration-based organizing scheme also asserts that much like penile penetration is seen as central to sex, non-consensual penile penetration is central to sexual offences. Penetration is constructed as being the most serious and invasive way that a person can be assaulted, and the penis is constructed as the most significant object of sexual assault.

For these reasons, the penetration model not only reproduces hegemonic narratives about sexuality, it may also entrench an androcentric perspective on sexual violence, which centres sexual offences on the penis and what men do to have sex.[160] Again, women seem noticeably absent from the construction of this definition. It seems inappropriate for the law to unequivocally prescribe what kinds of violations are more traumatic than others based only on whether there has been penetration and if so whether a penis was involved. Determining severity is a more complicated exercise than simply ranking based on penetration. Focusing on penetration as determinant of serious may distract from the wrongfulness of sexual assault and the violation of bodily integrity and sexual autonomy experienced by the victim-survivor. As such, we might say that the Canadian model instead acknowledges that all types of non-consensual sexual acts, regardless of whether or not they were penetrative, are both wrongful and harmful. Considering penetration at sentencing instead can allow for greater nuance by considering the role of penetration alongside a number of other factors.

[160] Since this model defines the offence around penile penetration and not necessarily a perpetrator who identifies wholly or partially as a man, I recognise that perpetrators may be men or people with penises who do not identify as men, or who identity partially as men.

Furthermore, at least in the English context, the offence of rape explicitly excludes the possibility of women and people who do not have penises as perpetrators of the offence. Penetration is defined from the perspective of the offender. It is the offender who penetrates, and the complainant who is penetrated. The offence is therefore not entirely gender-neutral, which raises further questions about how the law can shape normative gendered expectations of sexual behaviours. An explicit exclusion of women and people without penises as potential perpetrators of rape like in England & Wales serves to cast perpetrator and victim-survivor roles according to gender. Women and people without penises are cast in the role of victim-survivors of rape, but never as potential initiators. Only men and people with penises can rape.

Of course, it is possible for women and people without penises to commit other sexual offences, such as assault by penetration. In the case of the offender forcing the victim-survivor to penetrate them, the relevant offence would be causing a person to engage in sexual activity without consent under section 4 of the *Sexual Offences Act 2003*.[161] Nonetheless, these offences carry a different label that some might say is far less stigmatizing than "rape", conveying a sense that they are less serious.[162] In addition, the Definitive Guideline for sentencing sexual offences mandates more benign sentencing practices for these offences.[163] For example, the sentencing range for a Category 3B section 4 offence that involved penetration is a high level to community

[161] *Sexual Offences Act 2003* (UK), s 4.
[162] See e.g. Cowan, *supra* note 143.
[163] See Section C above for an overview of the Definitive Guideline.

order to four years' custody with a starting point of two years' custody.[164] This is significantly lower than the four- to seven-year range and five-year starting point for a Category 3B rape.[165]

As such, a penetration-centred organizing scheme like that in England & Wales may reinforce the narrative that women are passive receivers of (hetero)sex; their bodies and sexualities defined only in relation to men.[166] On the other hand, men are active initiators of sex who actively seek and consume women's bodies. As such, an offence of rape such as that in England & Wales, which emphasises female victimhood and male aggression, reifies the gendered power differentials between men and women that the law is seeking to address. It ingrains an image that women are not perpetrators and therefore not initiators of sex which undermines female sexual agency.[167]

On the other hand, Canada's approach to defining sexual offences is not dependent upon these constructions of normative sexual behaviours. The gender-neutral framework may instead challenge these perspectives on sexuality and in doing so, redefine how the law conceives of sexual assault, and sexual norms more generally. By allowing for anyone, regardless of gender or any other characteristic, to be a victim-survivor or a perpetrator of any level of sexual assault, the law may instead communicate a narrative that these gendered expectations of sexuality,

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[164] Sentencing Council for England and Wales, "Sexual Offences Definitive Guidelines for Causing a person to engage in sexual activity without consent, Sexual Offences Act 2003 s. 4", (1 April 2014), online: <https://www.sentencingcouncil.org.uk/offences/crown-court/item/causing-a-person-to-engage-in-sexual-activity-without-consent/>.
[165] Sentencing Council for England and Wales, *supra* note 93.
[166] See Gavey, McPhillips & Braun, *supra* note 112.
[167] ES Byres & LF Sullivan, "Similar but Different: Men's and Women's Experiences of Sexual Coercion" in Peter B Anderson & Cindy Struckman-Johnson, eds, *Sexually Aggressive Women: Current Perspectives and Controversies* (New York: Guilford Press, 1998) 144.

masculinity and femininity should be dismantled.[168] While the violence-centred approach may well create different issues in terms of narrative, the inclusion of women as potential perpetrators of any level of sexual assault may instead challenge gendered assumptions about sexual violence. Indeed, in the Scottish context, Sharon Cowan argues that including women as potential perpetrators can be seen as a progressive:

> in that it challenges the traditional understanding of rape as premised on active male sexuality preying on the passive bodies of women. Rape, confined to non-consensual penile penetration, can be read as grounded in gendered stereotypes of active/passive male/female sexuality[169]

Nonetheless, some feminist scholars argue that gender *should* be built into the definition of sexual offences in order to reflect their gendered nature.[170] For example, Łoś argues that the inclusion of woman as potential perpetrators creates a legal construct of gender-neutrality that masks the gendered reality of sexual violence and fear of rape that shapes women's lives.[171] As a consequence, Łoś contends that women's subjectivities are called into question in a somewhat paternalistic manner. From this perspective, the change in language not only challenges perceptions of sexual assaults, it also consciously challenges how sexual assaults are experienced

[168] See Cowan, *supra* note 143.
[169] *Ibid* at 159.
[170] Łoś, *supra* note 35; Bell, *supra* note 145; Annabelle Mooney, "When a Woman Needs to be Seen, Heard and Written as a Woman: Rape, Law and an Argument Against Gender Neutral Language" (2006) 19:1 Int J Semiot Law 39–68; Patricia Novotny, "Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?" (2003) 1:3 Seattle Journal for Social Justice 743–756.
[171] Łoś, *supra* note 35 at 33–35.

which may add to women's oppression. In particular, Łoś holds that the law is grounded in elitism by enforcing concepts determined by a small number of feminists on all women.

While it is undoubtedly important to recognize and dismantle the gendered power relations inherent to sexual assault, the definition of sexual offences is arguably not the most effective or most appropriate means of doing so. Instead, it seems more important in this context for the law to articulate new standards about sexuality and sexual agency rather than reflect the hegemonic gendered assumptions about sex, masculinity and femininity that we are trying to dismantle. That is not to say that the law should take an entirely gender-blind approach. Rather, it is to say the law in Canada can *recognize* the gendered power imbalances and normative sexual assumptions intrinsic to sexual assault and use legal labelling to actively challenge those gender constructions.

(4) Queering the Law

Moreover, while penile penetration is not limited to penile-vaginal penetration in most jurisdictions with a penetration-centred model, such as that in England & Wales, the need for a penis as the primary object of sexual assault reflects the centralization of the penis in understandings of sex, with other sexual acts falling lower in the hierarchy. In doing so, the law mirrors the imposition of the "coital imperative" in heterosex across LGBTQ2SIA+ contexts and reproduces exclusive narratives about what constitutes sex.

In particular, a penetration-centred model such as that in England & Wales ensures that those with female-assigned bodies cannot be charged with rape, including where the victim-survivor also has a female-assigned body. Much like the "coital imperative" devalues and trivialises the sexual behaviours of LGBTQ2SIA+ people with female assigned bodies, the law by drawing upon the narrative of the coital imperative, may also do so implicitly. Sexual assaults perpetrated by a person without a penis are also undermined and seen as being inherently less serious than assaults involving penile penetration. Such offenders can only be charged with lesser offences of assault by penetration, sexual assault or causing a person to engage in sexual activity without consent. In other words, the law is affirming a standard that the most serious invasion to a person's sexual autonomy is by forced penile penetration. When an assault is perpetrated by a person without a penis, the assault is seen as less serious which trivialises the experience of the victim-survivor.

It is for this reason that Sharon Cowan has argued in the Scots law context that:

> Equal protection of such women thus supports the argument for either combining all penetrative offences into one rape offence or adopting a system of grading sexual assaults where penetration is an aggravating factor, as the Canadians have done[172]

It may thus be argued that the Canadian model is more effective than a penetration-centred model at dismantling heteronormative understandings of sexuality and offering legal protection to complainants, regardless of their gender or sexuality. In doing so, we are constructing a more inclusive legal narrative that plays a role in challenging and shaping heterosexist assumptions about both consensual sex and sexual violence.

Of course, that is not to say that penetration is not relevant at all, but rather than incorporating it into the definition of sexual assault could create a narrative that reproduces normative gendered and heterosexist perspectives on sex while undermining assaults that do not fit within the penetrative framework. As such, the approach in Canada to consider matters such as penetration at sentencing provides an alternative approach that is more capable of resisting these narratives.

[172] Cowan, *supra* note 143 at 161. I note that penetration is not a statutory aggravating factor, but it is an aggravating factor at common law.

(5) Penetration and Legal Labelling

(a) Fair Labelling of Criminal Offences

Furthermore, when reflecting on the impact of the removal of the penetration requirement on the narrative of sexual assault, it is important to consider the impact from a fair labelling perspective. Fair labelling is a principle in criminal law developed by Andrew Ashworth and Glanville Williams that holds that any given criminal offence must be a fair representation of the offender's wrongful conduct.[173] According to James Chalmers and Fiona Leverick, labelling encompasses both description and differentiation, concerned "with the way in which the range of behaviour that is deemed to be 'criminal' is divided into individual offences *and* the names or shorthand descriptions that are attached to these offences".[174] As such, the description of offences and the means by which they are differentiated need to fairly represent the wrongfulness of particular criminal conduct.

The principle is of particular importance when it comes to drawing distinctions between similar offences. When it comes to sexual assault, this means that the organizing scheme used to differentiate between different types of sexual assault must be such that each individual offence is fair representation of the wrongfulness of the particular conduct that it encompasses. The

[173] Andrew Ashworth, "The Elasticity of Mens Rea" in CFH Tapper, ed, *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth, 1981); Glanville Williams, "Convictions and Fair Labelling" (1983) 42:1 Cambridge Law Journal 85–95.
[174] James Chalmers & Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71:2 Modern Law Review 217–246 at 222.

distinctions between similar offences are therefore supposed to delineate between the nature of the wrongs. In other words, fair labelling requires that:

> Widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the wrongdoing[175]

As such, each distinct offence needs to be defined and labelled in such a way so as to fairly represent the conduct that it encompasses. The purpose of this is to ensure that the nature of the wrongfulness is unequivocally communicated to relevant stakeholders, such as offenders and complainants. From our purposes, fair labelling can help us to reflect on how the changes made to the law have shaped the message that the law communicates to offenders and complainants about the wrongfulness of sexual assault.

Chalmers and Leverick argued that, when reflecting on organizing schemes for distinguishing between offences, we need to unpack what we mean by fairness.[176] How can we delineate offences such that each individual offence is a fair representation of the wrongfulness of the conduct? From the perspective of sexual assault, the question is thus how an organizing scheme that does not include penetration represents individual offences, and whether or not that is fair. However, there is no way to objectively determine what is a "fair" representation of the nature and magnitude of different offences. Rather, different organizing scheme are communicating a normative judgment about sexual offences and their basis inherent to each particular scheme.

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[175] Ashworth, *supra* note 154 at 88.
[176] Chalmers & Leverick, *supra* note 174.

For example, the Canadian scheme communicates a narrative that violence is so important to sexual assaults, that it should be built into the definition, whereas the type of non-consensual act (penetrative or non-penetrative) is not (as) important. It indicates that the level of bodily harm and endangerment to life is central to the wrongful of the conduct. On the other hand, the scheme in England & Wales indicates that penetration, is central to the wrongfulness of the conduct. While we cannot determine objectively whether this is fair (and how its fairness may compare to other models), we can reflect on the narrative that is created by decentralizing penetration in the law. To do this, we need to consider stakeholders to whom we are communicating, particularly offenders and complainants, and how that narrative might be received. In doing so, we can consider exactly what the law is communicating, and whether that accords with what we want the law to communicate.

(b) Communicating Wrongfulness: Complainants and Offenders

In particular, it is important that the model adopted by the law communicates to offenders the wrongfulness of their conduct, including what in particular made their conduct wrongful. Likewise, it needs to encompass the harm felt by complainants, and communicate to complainants how seriously the law regards their experience. Of course, these are by no means separate or mutually exclusive. The harm felt by the victim-survivors shapes the wrongfulness of the conduct that the law needs to communicate to offenders. Simester & Sullivan contend that the law must communicate to the wrongdoer *exactly* what they did wrong, the gravity of their

wrong and why they have been punished.[177] When it comes to penetration, the question is therefore whether penetration should rightfully form part of the equation of determining the nature and severity of different sexual violations that we want to communicate to offenders.

It is important to note from the outset that there is no basis by which to argue that either the Canadian or the English model *inaccurately* or actively *unfairly* represents offenders conduct. There is nothing outlandish about the way in which either jurisdiction has categorized offences from a fair labelling perspective, meaning that there is no explicit violation of the fair labelling principle. That being said, both the Law Reform Commission of Canada[178] and the Law Reform Commission of England & Wales[179] drew upon fair labelling principles to justify the violence-based approach and the penetration-based approach to sexual offences respectively. Clearly it is not accurate to say that fair labelling *requires* either the Canadian approach or the English approach. What we can do is make a value judgment about what we think is fair. This requires us to reflect on how we label and define legal categories, what behaviours fall within each category and whether or not we think that categorization is fair, rather than simply not being unfair or being inaccurate. As such, while different organizing schemes do not necessarily violate the fair labelling principle, we can use fair labelling considerations to consider the jurisprudential impact of different organizing schemes.

For example, in relation to penetration, one might say the social significance attached to non-consensual penile penetration is so particular, that a distinct offence is required to communicate

[177] AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 7th ed (London: Hart Publishing, 2019) c 1.
[178] Law Reform Commission of Canada, *supra* note 32.
[179] Home Office, *supra* note 90.

that social significance to offenders. Since that social significance is so particular to non-consensual penile penetration, the absence of this as a distinct offence in Canada places offender of this type of sexual violation in the same category as other sexual offenders, who have committed sexual offences that do not necessarily carry the same social significance. Not only could this be said to dilute the social disapproval expressed to perpetrators of non-consensual penile penetration, it also could unfairly misrepresent their conduct and stigmatize those deemed 'lesser' offenders.[180] As such, it may be considered unfair to place offenders who have committed non-penetrative sexual assaults in the same category as perpetrators of non-consensual penile penetration, because they would be subject to same level of social disapproval without committing an act of the same social significance. In turn, we may fail to express the social significance of penetration to those who have committed penetrative offences.

It may be similarly argued that the law needs to express the particular significance of penetration in sexual assaults in order to recognize the gravity of the harm experienced by victim-survivors.[181] For this reasons, Cohen & Backhouse argue that the Canadian model undermines the harm and trauma experienced by victim-survivors of penetrative assaults by failing to recognize the distinctness and severity of penetration.[182] This rationale has led some to argue that victim-survivors of non-consensual penile penetration would prefer a distinct offence in order to reflect the particularities and significance of their experience.[183] In other words, proponents of this view regard a hierarchy based on penile penetration as necessary for asserting society's

[180] Chalmers & Leverick, *supra* note 174 at 223; Jeremy Horder, "Rethinking Non-Fatal Offences Against the Person" (1994) 14:3 Oxford Journal of Legal Studies 335–351.
[181] Horder, *supra* note 180 at 351.
[182] Cohen & Backhouse, *supra* note 36.
[183] Wallace D Loh, "What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling" (1981) 37:4 Journal of Social Issues 28–52 at 37.

particular disapproval of the crime of penetrative assaults, particularly those involving penile penetration, in order to represent the experiences of victim-survivors.

Nonetheless, it would not be accurate to say that this accounts for the views of all victim-survivors. There is no single narrative that can represent the voices of all victim-survivors. In fact, particularly around the time of reform, several feminist scholars and women's interest groups argued the opposite, that basing the law narrowly on penetration failed to take into account women's own, broader, definitions of sexual assault.[184] As such, there is by no means a consensus to victim-survivor's perceptions of penetration. There does not appear to be any empirical psychological studies that explore whether victims-survivors consider penetration to be a particularly significant form of sexual assault. That being said, constructing a study that could gather this data reliably with a large enough sample size, would be extremely difficult, and it would be impossible to account for the potential influence of internalized shame about penetration in their narratives.

With that all being said, quite apart from trivializing the experience of victim-survivors of sexual assault and diluting the message of wrongfulness communicated to offenders, the law in Canada may instead emphasize the shared coercive and abusive underlying character of all sexual assaults. In many ways, Canada's approach of moving away from a penetration-centred definition could be more reflective of Liz Kelly's concept of the sexual violence continuum, which recognizes that all forms of sexual violence exist on a continuum.[185] According to Kelly, different acts of sexual violence share the same coercive and abusive underpinnings, making

[184] See Clark & Lewis, *supra* note 20; Goldsberry, *supra* note 66. See also LeGrand, *supra* note 28.
[185] Liz Kelly, *Surviving Sexual Violence* (Cambridge: Polity Press, 1988).

them different *degrees* of the same *kind* of wrong. We certainly see this narrative more entrenched in Canadian law than English law. In doing so, it can send out a more affirmational message to victim-survivors that all types of sexual assaults are taken seriously by the law. Consequently, the law recognizes and reinforces the fact that perpetrators of any kind of sexual assault demonstrate the same disregard for the sexual and bodily autonomy of the person they victimized.

The Canadian approach may therefore be more effective at recognizing that all sexual offences exist on a spectrum with the potential for various factors being taken into account at sentencing. Arguably, this is a more effective way of communicating to both complainants and offenders that the wrongfulness of the assault lies in the offender's invasion of the complainant's sexual and bodily autonomy. In fact, it seems more probable that sentencing will have a more significant impact when it comes to communicating the nature and gravity of their wrongdoing.[186] Rather than being part of the definition of the offence, factors such as penetration and other surrounding circumstances may instead be taken into account at sentencing where it is appropriate. For example, there may be situations where it is entirely appropriate for a harsher sentence to be given to an offender who has committed a penetrative assault than one who has committed a non-penetrative assault. It is possible that there will be differences in terms of potential injuries, whether physical and psychological, and associated trauma. Where these factors are taken into account and explained by the sentencing judge to the offender, this may actually produce an educative benefit for offenders and society more broadly.[187] Of course, this depends entirely on

[186] Chalmers & Leverick, *supra* note 174 at 229.
[187] See *ibid*.

the discretion of the sentencing judge. As to whether this actually pans out in Canada is another question entirely, which I will turn to later in my analysis of sentencing decisions.

(6) Reflecting on Narratives

While penetration carries a particular social significance, incorporating it into the definition of sexual offences carries a number of issues in terms of the narrative it produces about sexual assaults and sexual norms more broadly. By removing the penetration requirement, the law in Canada does not make any assumptions about what kind of non-consensual sexual acts are inherently more or less degrading and invasive on the basis of penetration. Any kind of sexual act, whether it be penile penetration, or a non-penetrative assault could fit under any of the sexual assault offences under the *Criminal Code*. Instead, the level of violence used in the perpetration of the sexual assault is used to determine the offence charged. Inevitably, this creates a very different narrative, one based on bodily harm and life endangerment rather than penetration.

As such, the removal of the penetration requirement in Canada has long term value, notwithstanding, of course, that there are still flaws in the law in Canada. Even if we do not differentiate based on penetration, the gradation scheme we have in Canada based on physical harm is also far from perfect. Indeed, Carol Smart argues that it has not proven to be an effective strategy for increasing conviction rates.[188] Moreover, as briefly discussed already, centralizing bodily harm may detract from offences that do not meet a paradigm understanding of what a

[188] Smart, *supra* note 3 at 46.

violent sexual assault might look like. Indeed, the vast majority of sexual assaults in Canada are charged as simple sexual assaults, with very few charged as sexual assault causing bodily harm or with a weapon or aggravated sexual assault.[189] While I argue that penetration is not an effective organizing scheme and that Canada was right to move away from it, I do not endorse violence as an effective organizing scheme for differentiating between offences either. Perhaps, as Jennifer Tempkin suggests, there is no coherent organizing theme for a gradation scheme of sexual offences.[190]

For now, it suffices to say that the move away from a penetration-centred model has gone some way to reshape the narrative about consensual sex and sexual violence as less grounded in assumptions about sexuality. In particular, the law recognizes the potential seriousness of all forms of sexual violence, regardless of the type of non-consensual sexual act. However, while penetration no longer plays a role in the definitions of sexual assault offences, it can still be taken into account at sentencing. At sentencing, multiple different factors, including penetration, can be taken into consideration. As such, the role of penetration in shaping the severity of a sexual assault can be considered in a more nuanced way than by incorporating it in the definition. Rather than seeing penetration as *the* means by which the wrongness of different kinds of sexual assaults can be distinguished, considering the matter at sentencing can recognize its aggravating potential in a more nuanced manner. In doing so, the potential additional harms associated with penetration can be considered alongside other relevant factors without centralizing penetration as

[189] *Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile*, by Cristine Rotenberg, Catalogue No. 11-001-X (Ottawa: Juristat, 2017); Renate M 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: Toronto University Press, 1994) 157.
[190] Tempkin, *supra* note 9 at 155.

a defining element of sexual assault. These harms can be more clearly articulated by sentencing judges to victims, offenders and society more broadly. Of course, the manner in which penetration is considered by sentencing judges also creates the potential for problematic narratives. As such, I now move on to consider how sentencing judges construct penetration and whether we see these assumptions about penetration and sexuality playing a role at sentencing.

F. SENTENCING SEXUAL ASSAULT

(1) The Law

Sentencing is a complex process that is individualized to the circumstances of each offender and the circumstances of the crime committed. In Canada, a significant degree of discretion is afforded to judges to assess the severity of the offence and the moral culpability of the offender. While judges have considerable discretion, the *Criminal Code* provides guidance as to the purpose of sentencing as well as a number of sentencing principles that must be adhered to. Under section 718 of the *Criminal Code*, the fundamental purpose of sentencing "is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community"[191]

[191] *Criminal Code*, RSC 1985, c C-46, s 718.

Judges are required to consider these principles in order to determine a suitable sentence. In some circumstances, the *Criminal Code* requires judges to give primary consideration to objectives of denunciation and deterrence, including where the victim is a child or a vulnerable person.[192] Furthermore, section 718.1 establishes that the fundamental principle of sentencing is proportionality, such that the sentence must be proportionate to the gravity of the offence and the moral blameworthiness of the offender.[193] Other sentencing principles that the court must take into account include the consideration of aggravating and mitigating factors which may increase or reduce a sentence; and the principle of parity, which requires that a sentence be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, as per section 718.2.[194]

There are some statutory aggravating factors outlined in the *Criminal Code,* including where the offence is motivated by bias, prejudice or hate; where the victim is an intimate partner of the offender; where the victim is under 18; where the offender abused a position of trust or authority and where the offence had a significant impact on the victim. Of course, there are also common law aggravating and mitigating factors which may vary depending on the particular circumstances of the offence and the offender. It should be noted that while some judges distinguish between a neutral factor, or the absence of an aggravating factor, and a mitigating factor, the line between the two is blurry and is not necessarily approached consistently by the courts. The *Criminal Code* also requires that judges have regard for the unique circumstances of

[192] *Criminal Code*, RSC 1985, c C-46, s 718.01–718.04.
[193] *Criminal Code*, RSC 1985, c C-46, s 718.1.
[194] *Criminal Code*, RSC. 1985, c C-46, s 718.2.

Indigenous offenders, and consider all options other than incarceration when sentencing Indigenous offenders.[195]

While a number of common law jurisdictions, including England & Wales have moved towards more authoritative sentencing guidelines,[196] sentencing in Canada remains highly discretionary and unstructured. Canada does not have an independent sentencing body, such as a sentencing council or commission. Moreover, the *Criminal Code* provides no specific guidelines for sentencing sexual assaults other than the maximum sentence available and in some cases, mandatory minimum sentences. The maximum sentence for sexual assault is 10 years imprisonment if prosecuted by indictment, and 14 years imprisonment where the victim is under 16. If the Crown proceeds summarily, the maximum sentence is 18 months' imprisonment, or two years less a day where the complainant is aged under 16. For sexual assault with a weapon, with threats to a third party or that causes bodily harm, the maximum sentence is 14 years imprisonment, or imprisonment for life if the victim is aged under 16. For aggravated sexual assault, which maims, disfigures or endangers the life of the victim, the maximum sentence is imprisonment for life. In addition, the *Criminal Code* prescribes minimum sentences for some, but not all, offences. Where the victim was under 16, sexual assault when prosecuted by indictment has a mandatory minimum of one-year incarceration. For the second and third tiers, there is a mandatory minimum sentence of four, five or seven years depending on the use of

[195] Criminal Code, RSC 1985, c C-46, s 718.2(e). For a detailed discussion of how this provision was meant to respond to the intergenerational impact of colonialism and residential schools on Indigenous persons in Canada, see *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385; *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.
[196] Under section 125(1) of the *Coroners and Justice Act* 2009 (UK), courts are required to follow any relevant sentencing guidelines unless the court is satisfied that doing so would be contrary to the interests of justice. If a sentence is imposed that is outside of the range specified in the relevant sentencing guideline, the court must give reasons for its decision. Definitive Guidelines are issued by the Sentencing Council of England and Wales

firearms, whether there was gang involvement, whether it was a first offence and the age of the victim.

Subject to these statutory principles and prescribed minimum and maximum sentences, sentencing remains fundamentally a discretionary exercise that has been described by the Supreme Court of Canada as "a delicate art" rather than an exact science.[197] That being said, some provinces in Canada have adopted a system of sentencing ranges whereby an appellate court, or trial decisions over time, set out a range within which offences will normally fall.[198] Sentencing ranges are, in essence, "summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives".[199] Other provinces use starting points, whereby sentencing starts from a fixed point that can be adjusted upwards or downwards depending on aggravating or mitigating factors.[200] These sentencing ranges and starting points are not judicially created minimums and maximums but rather common law guidelines from which judges are allowed to depart in appropriate circumstances.[201] It may be that the particular aggravating or mitigating factors of a particular case warrant a sentence that falls outside of the sentencing range or that depart substantially far from the starting point.[202]

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[197] *R v CAM*, 1996 SCC 230 at para 91, [1996] 1 SCR 500. See also *R v LM*, 2008 SCC 31 at para 17, [2008] 2 SCR 163.
[198] For a discussion of sentencing ranges, see *R v Friesen*, 2020 SCC 9, 2020 CarswellMan 122.
[199] *R v Lacasse*, 2015 SCC 64 at para 57, [2015] 3 SCR 1089 (SCC).
[200] See especially *R v Arcand*, 2010 ABCA 363, 2010 CarswellAlta 2364.
[201] *R v McDonnell*, [1997] 1 SCR 948 (SCC) at para 33, 1997 CarswellAlta 213; *R v Nasogaluak*, 2010 SCC 6 at para 44, [2010] 1 SCR 206 (SCC); *R v Wells*, 2000 SCC 10 at para 45, [2000] 1 SCR 207 (SCC).
[202] *R v Nasogaluak*, *supra* note 201 at para 44; *R v Lacasse*, *supra* note 199 at para 58.

Sentencing ranges and starting points are developed by the judicial categorization of an offence based on levels of seriousness. Categories are defined according to particular criteria by appellate courts or, in the absence of appellate authority, by reviewing sentencing decisions of first instance. In some provinces, appellate courts have created categories that are based on, or include, penetration. For example, in Alberta, the Court of Appeal established a distinct "major sexual assault" category.[203]

[203] *R v Arcand*, *supra* note 200; *R v Sandercock*, 1985 ABCA 218, 1985 CarswellAlta 190.

The definition of "major sexual assault" is laid out in *R v Arcand*:

> A sexual assault is a major sexual assault where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus.[204]

It is for the judge to assessment whether or not a particular case amounts to a major sexual assault. While penetration is included within the definition, other forms of sexual assault may also constitute a major sexual assault. If it is determined to be a major sexual assault, a starting point of three years' custody applies, assuming that the offender has no criminal record and is of good character. This approach has been followed in Saskatchewan[205] and the Northwest Territories.[206]

Moreover, in British Columbia, the Court of Appeal has determined that an appropriate sentencing range for sexual assaults involving intercourse is two to six years' incarceration.[207] In Ontario, the appropriate range has been deemed to be between 21 months to four years.[208] Generally across Canada, sentencing ranges vary somewhat but seem to be between 18 months

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[204] *R v Arcand*, *supra* note 200 at para 171.
[205] See *R v WJV*, 1991 CarswellSask 273, 12 W.C.B. (2d) 253; *R v Cappo*, 1993 12 WCB (2d) 253 271, [1993] S.J. No. 571; *R v Whiting*, 2013 SKCA 101.
[206] *R v AJPA*, 2011 NWTCA 2.
[207] *R v BSB*, 2010 BCCA 40; *R v Pouce Coupe*, 2014 BCCA 255; *R v GM*, 2015 BCCA 165.
[208] *R v Thurairajah*, 2008 ONCA 91; *R v Garrett*, 2014 ONCA 734; *R v Smith*, 2011 ONCA 564.

and six years. However, when the Crown proceeds summarily, the sentence must be below 18 months.

It should be noted that the starting point approach established by *Arcand* was recently criticized by the Supreme Court of Canada in *R v Friesen*.[209] The Court made it clear that sentencing ranges and starting points are not binding and that "appellate courts cannot interpret or apply the standard of review to enforce them".[210] It also noted concerns that were raised by the Legal Aid Society of Alberta and the Criminal Trial Lawyers' Association, interveners in the case, about the starting point approach. The interveners suggested that starting point sentencing minimizes the opportunity for judicial discretion and subsequently creates a de facto minimum sentence, particularly where mitigating factors are built into the starting point. While the Supreme Court was clear that it was not deciding the issue in this case, it indicated a willingness to consider these arguments in an appropriate case.

(2) Literature

Few studies have explored the role of penetration in sentencing, though some have briefly addressed the matter, most often quantitatively. Much of the relevant research was conducted between the late 1980s and early 2000s. Paula E. Pasquali examined the sentencing of sexual assault offences over an 18-month period in the Yukon starting January 1, 1988, looking at a range of variables, including whether or not there had been penile penetration of the vagina or

[209] *R v Friesen*, *supra* note 198 at paras 40–41.
[210] *Ibid* at para 37.

anus.[211] Overall, the study found that there was no legal, moral or empirical framework being employed by judges at sentencing, meaning that there was no consistency in factors considered in aggravation or mitigation. Notably, this was prior to reforms to the *Criminal Code* in 1995 which introduced a statutory purpose and principles of sentencing, including statutory aggravating factors.[212]

The study did find that penile-vaginal penetration was often considered an aggravating factor, and conversely that the absence of penetration considered mitigating. In particular, Pasquali noted that judges presumed that a "continuum of violation" existed based on penetration and raised questions as to whether such a continuum exists and if so, whose perspective this should be defined from.[213] More recently, Janice Du Mont, Tania Forte and Robin F. Badgley studied written sentencing decisions from Ontario between 1993 and 2001 that had been forwarded to Quicklaw from the courts. They examined a number of variables including whether or not there had been penile-vaginal or penile-anal penetration.[214] The study found that offenders were 2.5 times more likely to be sentenced to imprisonment in a federal penitentiary where the judges noted that the assault involved penile penetration of the vagina or anus than where it did not. They concluded that the attempt to deemphasize sex in the reforms was not being followed:

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[211] *No Rhyme or Reason: The Sentencing of Sexual Assaults*, by Paula E Pasquali, 35 (Ottawa: Canadian Research Institute for the Advancement of Women, 1995).
[212] Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 35th Parl, 1994-96.
[213] Pasquali, *supra* note 211 at 25.
[214] Janice Du Mont, Tania Forte & Robin F Badgley, "Does the Punishment Fit the Crime? Judicial Sentencing in Adolescent and Adult Sexual Assault Cases" (2008) 27:2 Medicine and Law 477–498.

> [T]he intent of the 1983 *Criminal Code* amendments to de-emphasize the sex in sex offences…intended to reflect the assaultive nature of such crimes is not being acknowledged by a majority of judges in these cases heard in Ontario over the past two decades[215]

In an earlier study that examined hospital and police reported sexual assaults in Toronto and Vancouver in the 1990s, Du Mont et al also found that charges were over nine times more likely to have been filed where the complainant reported a penetrative assault.[216] In cases that ultimately resulted in a conviction, 96% of cases involved penetration. As such, the limited available evidence suggests that penile penetration remains an important consideration for sexual assault at various stages of the criminal justice process, including at sentencing. The present study aims to provide a closer analysis of the judicial discourse about penetration.

(3) The Present Study

In the present study, I examine a sample of reported Canadian sentencing decisions during a 12-month period beginning January 1, 2019 and ending December 31, 2019. The sample is comprised of sentencing decisions for sexual assault, sexual assault causing bodily harm, involving threats of bodily harm or with a weapon, and aggravated sexual assaults that involve penetration as well as a small number of non-penetrative assaults that specifically discussed

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[215] *Ibid* at 492.
[216] Janice Du Mont et al, "Predicting Legal Outcomes from Medicolegal Findings: An Examination of Sexual Assault in Two Jurisdictions" (2000) 1:3 Journal of Women's Health and Law 219–233.

penetration. Using WestlawNext, QuickLaw and CanLII to draw a total of 4 sentencing decisions across Canada between January 1 and December 31, 2019 that included any of the terms: “intercourse”, “penetration”, “coitus”, “penile-vaginal”, “penile-anal”, “fellatio” and “oral sex”. I included the terms “fellatio” and “oral sex” in order to identify cases that involved penile-oral penetration. The decisions included in the sample that did not involve penetration were only those that discussed penetration in some qualitative way, most typically a specific discussion about the fact that the assault did not involve penetration. Decisions involving non-penetrative assaults that did not discuss penetration in some way were excluded.

The sample was restricted to adult victims who were over the relevant age of consent for the particular offence in question. For most offences, the age of consent is 16 years of age, but for certain offences, such as sexual exploitation, the age of consent is 18 years of age. Where a decision involved multiple convictions for sexual assaults against an adult and a person under the age of consent, I analyzed only the comments about the offence involving the adult victim.

All of the decisions involved male offenders. None of the decisions suggested that any offenders identified with a gender other than male. The overwhelming majority of cases involved female victims with only one case involving a male victim. None of the decisions indicated that victims identified with a gender other than male or female.[217]

[217] These observations were made based on the pronouns used for the offender and complainants in the decisions. However, I acknowledge that this may not be an accurate reflection of how the respective offenders and complainants identify.

It is important to state from the outset that this study is not intended to be a broad study of sexual assault sentencing. I recognize that this sample represents only a small snapshot in time and as such it is not meant to represent trends in sentencing generally. Rather, I use the snapshot to paint a picture of how judges, at least in 2019, are conceptualizing penetration and its role as an aggravating factor in sentencing. I subjected the sentencing decisions to a qualitative analysis, using NVivo to analyze and code the data using open coding. I critically analyzed judicial reasoning about penetration, particularly the discussion of aggravating and mitigating factors, references to and comparisons with other similar decisions and the overall analysis that was employed to arrive at the sentence imposed.

The approach of looking at sentencing decisions is a valuable exercise in assessing how sentencing judges assess the severity of offences and particularly the role of penetration in that exercise.[218] There are a number of reasons why it is important to reflect on the narratives created by judges about penetration. Firstly, looking qualitatively at these judgments helps to reveal the assumptions made by the judiciary about how penetration shapes the nature and severity of sexual assaults, if at all. Much like the written law, the judicial narratives of sentencing decisions serve an important communicative function in terms of the nature and severity of the offence that also extends to the victim and the offender.

[218] See Pasquali, *supra* note 211 for a more in-depth discussion of the value of qualitatively analysing sentencing decisions.

Indeed, other researchers have argued that the language used by judges can create meaning which can ultimately shape both law and society.[219] As such, it is possible that these comments and assumptions may play a role in informing public understandings about and attitudes towards sex and sexual violence.[220] While judicial narratives have the power to challenge and dismantle the normative assumptions about sex and sexual violence as discussed above, they also have the potential to reproduce and solidify them. Indeed, Carol Smart draws attention to the fact that judicial legal authority extends to social and cultural knowledge such that their narratives can present as a form of objective truth.[221] In turn, judges have "the capacity to impose and affirm culturally powerful definitions of social reality".[222]

Secondly, sentencing decisions set precedents for the sentencing of future sexual assaults by way of the parity principle.[223] For this reason, the potential impact of judicial narratives extends beyond any individual decision. Sentencing decisions have precedential value for future sentencing practices which means that judicial narratives about penetration are likely to be reproduced over time. For that reason, sentencing decisions are a powerful source of legal discourse that have the potential to reaffirm and reproduce normative understandings of sex and sexual violence, including those related to penetration.

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[219] Brenda Danet, "'Baby' or 'Fetus'? Language and the Construction of Reality in a Manslaughter Trial" (1980) 32:3–4 Semiotica 187–219; Linda Coates, Janet B Bavelas & James Gibson, "Anomalous language in sexual assault trial judgments" (1994) 5:2 Discourse & Society 189–206.
[220] Smart, *supra* note 3.
[221] *Ibid*.
[222] Susan Ehrlich, *Representing Rape: Language and sexual consent*. (New York: Routledge, 2003) at 18.
[223] Criminal Code, RSC. 1985, c C-46, s 718.2.

(4) Findings

In my analysis, four themes emerged as to how judges in these cases discussed penetration. Firstly, penile penetration of the vagina or anus were consistently discussed as aggravating factors, often being used as a basis for justifying a particular sentencing range or starting point. Object penetration was also considered aggravating. Secondly, other forms of penetration were not consistently considered as aggravating, namely digital penetration and penile-oral penetration. While some decisions recognized digital penetration and penile-oral penetration as aggravating, others did not. Thirdly, the fact that a sexual assault did not involve penetration was consistently discussed as placing a sexual assault on the less serious end of the spectrum. Fourthly, the fact that an offender did not wear a condom was also deemed an aggravating factor. Finally, while penetration was often a significant discussion point, in cases that involved "additional" violence beyond that inherent in sexual assault, penetration was subject to less discussion.

(a) Penile penetration of the vagina or anus was a significant aggravating factor

As a general rule, the fact that an assault involved penile penetration, whether vaginal or anal, was consistently considered an aggravating factor by sentencing judges in these cases.[224] While

[224] Most judges who conceived of penetration or "intercourse" as particularly serious specifically listed this as an aggravating factor, others who did not made similar comments in their analysis of the circumstances of the offence, or when discussing the appropriate starting point for an offence. In particular, in Alberta and Saskatchewan, intercourse is a ground by which a sexual assault can be deemed a "major sexual assault", which barring exceptional circumstances, requires a three-year imprisonment starting point. See *R v Sandercock*, *supra* note 203; *R v Arcand*, *supra* note 200; *R v Whiting*, *supra* note 205. Many judges who used penetration to justify the major sexual assault designation did not also list penetration as an aggravating factor, though others did.

some judges used the language of forced penetration,[225] the overwhelming majority held that the fact that the assault involved "intercourse" was aggravating. It was clear that many judges drew on sentencing ranges or starting points that were defined entirely or partially by penile penetration. Cases involving penile penetration in Alberta[226] and Saskatchewan,[227] were deemed "major sexual assaults", leading to a three-year starting point was adopted. Decisions from Ontario[228] and British Columbia[229] drew on sentencing ranges established by appellate courts for sexual assaults involving penile penetration to determine a fit sentence.

There was, however, significant variation in the extent to which judges discussed penetration. Some merely listed the presence of forced penetration as an aggravating factor alongside a number of other aggravating and mitigating factors or in Alberta and Saskatchewan, to designate it as a "major sexual assault", without any further discussion.[230] On the other hand, some judges sought to explain why forced penile penetration is inherently more serious than other sexual assaults, most typically by contending that penile penetration is more violent and invasive.[231] For example, in *R v Walsh*, the judge noted "the serious and violent nature of the offence itself", it

[225] See *R v Owolabi Adejojo*, 2019 QCCQ 1555, 2019 CarswellQue 2416; *R v Bohorquez and Siddiqi*, 2019 ONSC 1643; *R v Ignacio*, 2019 ONSC 2832; *R v GR*, 2019 BCSC 1875; *R v Eric Richard Marshall*, 2019 ONSC 6575; *R v Razak*, 2019 BCSC 1677; *R v Shrivastava*, 2019 ABQB 663; *R v Tazike*, 2019 ONCJ 819; *R v TW*, 2019 ONSC 5596; *R v Walsh*, 2019 ONSC 1286. However, even in these cases, the term "penetration" was often used interchangeably with "intercourse".
[226] *R v Shrivastava*, *supra* note 225.
[227] *R v Werminsky*, 2019 SKQB 78.
[228] See especially *R v Andrews*, 2019 ONSC 436; *R v OKS*, 2019 ONCJ 482.
[229] See especially *R v JM*, 2019 BCPC 235; *R v GR*, *supra* note 225; *R v Razak*, *supra* note 225.
[230] *R v JS*, 2019 ONSC 3086; *R v Lamure*, 2019 ONSC 2144; *R v Solorzano Sanclemente*, 2019 ONSC 695; *R v Tazike*, *supra* note 225; *R v Werminsky*, *supra* note 227; In *R v Sweeney*, 2019 NLSC 199 penile penetration was not specifically listed as an aggravating factor but the judge did briefly comment on the seriousness of an assault involving forced penile penetration at para 36 without further discussion.
[231] *R v GR*, *supra* note 225 at para 40; *R v Pijogge*, 2019 NLSC 12 at para 12; *R v Walsh*, *supra* note 225 at para 41.

being an "act of forced vaginal penetration…at the more serious end of the spectrum and highly aggravating".[232]

In particular, penile-anal penetration was often described as being more violent and invasive than other forms of sexual penetration, including penile-vaginal penetration. For example in *R v Eric Richard Marshall*, anal penetration was discussed in aggravation, with the judge contending that "[s]exual assault by anal penetration is inherently violent, invasive and degrading".[233] Likewise, in *R v RB* discussed above, the judge noted that attempted forced anal penetration was "a further degrading and humiliating feature of RB's crimes".[234] This sentiment was captured quite emphatically in *R v Hartman*, the judge contending that "[t]his was not a kiss. This was not a caress. This was not a touching or a digital penetration. This was a penetration of Ms. D'Aoust's anus by Mr. Hartman's penis[235] The consensus thus seemed to be that forced anal penetration may be more invasive and degrading sexual assault than other forms of forced sexual penetration, including penile-vaginal penetration.

Moreover, the judge in *R v MA*, which involved a series of penetrative assaults, suggested that both penile-anal penetration and object penetration could in fact be a highly serious form of sexual assault:

> The abuse started off with non-consensual vaginal sexual encounters, *escalating to predominantly anal sexual encounters* in spite of that fact that M.A. was obviously

[232] *R v Walsh*, *supra* note 225 at para 41.
[233] *R v Eric Richard Marshall*, *supra* note 225 at para 27.
[234] *R v RB*, 2019 ONCJ 567 at para 76.
[235] *R v Hartman*, 2019 ONCJ 148 at para 49.

> causing K.A. injury, and finally, *escalating to the point where M.A. was using implements* in the context of the sexual encounter[236] [emphasis added]

In this case, penile-anal penetration was considered comparatively more serious than penile-vaginal penetration, and object penetration of the vagina or anus more serious still. It is important to note that the facts of this case were particularly dangerous and violent in nature. The judge noted that the sexual assaults were "particularly egregious, in my view, involving the insertion of a knife into her vagina or anus".[237] The risk of serious injury was thus extremely high. With that in mind, the judge specifically indicated that the object penetration was an additional aggravating factor beyond the penile-anal and penile-vaginal penetration. Without any further cases involving object penetration, it is difficult to draw any further conclusions, particularly given that there can be significant variation with object penetration in terms of the object used.

[236] *R v MA*, 2019 BCSC 1544 at para 20.
[237] *Ibid* at para 52.

(b) Other forms of penetration not consistently aggravating

(i) Digital penetration

Secondly, while penile penetration of the vagina or anus and object penetration were frequently considered in aggravation, digital penetration was not consistently discussed in this way. In a number of cases that involved digital penetration, there was no discussion of digital penetration being an aggravating factor whatsoever.[238] Furthermore, in *R v McCaw*, which involved forced penile-vaginal penetration, when discussing another case involving digital penetration,[239] the judge suggested that it was distinguishable because there had been "only brief digital penetration of the complainant's vagina".[240] Likewise, in *R v Percy*, the judge distinguished another case which involved forced digital penetration and oro-vaginal contact,[241] from the case at bar which involved penile-vaginal penetration, on the basis that it "did not include intercourse".[242]

However, some judges did consider digital penetration to be a serious sexual assault. Digital penetration was described in aggravation as "a more serious sexual offence than other forms of sexual touching, and is significantly invasive"[243], "a serious, major violation of MP's sexual integrity"[244] and "a significant sexual intrusion".[245] This was particular apparent in *R v Sauverwald* which involved forced digital penetration and choking to overcome resistance.[246]

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[238] *R v CCH*, 2019 BCPC 331; *R v Hernandez*, 2019 ONSC 2800; *R v LW*, 2018 ONCJ 399.
[239] *R v Mangal*, 2016 ONCJ 18.
[240] *R v McCaw*, 2019 ONSC 3906 at para 48.
[241] *R v MD*, 2018 ONSC 2792.
[242] *R v Percy*, 2019 NSPC 12 at para 47.
[243] *R v Thakoordeen*, 2019 ONSC 1540 at para 32.
[244] *R v Jensen*, 2019 ABQB 873 at para 11.
[245] *R v Sauverwald*, 2019 ABQB 482 at para 128.
[246] *R v Sauverwald*, *supra* note 245.

The joint recommendation agreed to a global sentence of three years imprisonment for the sexual assault and the choking, holding that the sexual assault was not a "major sexual assault". However, the judge departed from the joint submission and designated the assault as a "major sexual assault" with a three-year start point, in addition to the sentence for the choking. In particular, the judge was clear that it was foreseeable that an assault involving digital penetration "would cause serious psychological or emotional harm".[247] Digital penetration was thus considered an aggravating factor, though the judge stated that it was taken into account to determine the start point of three years imprisonment and so there were "no aggravating factors independent of the circumstances of the offence".[248] Absent any mitigating factors, the judge imposed a three-year imprisonment sentence for the sexual assault, and a two year imprisonment sentence for the choking to be served consecutively.

While digital penetration was likewise considered to be a basis for a sexual assault to be considered a "major sexual assault" in *R v Jensen*, the three-year starting point could not apply because the Crown proceeded summarily. The judge contended that a lesser sentence was more appropriate:

> Although the starting point for a major sexual assault is three years, the fact that this sexual assault was limited to digital penetration, combined with the mitigating factors moves the appropriate sentence to no more than 18 months, as conceded by the Crown in proceeding summarily[249]

[247] *Ibid* at para 128.
[248] *Ibid* at para 129.
[249] *R v Jensen*, *supra* note 244 at para 38.

While the three-year starting point was not available in these circumstances, it might be argued that the judge undermined the harmfulness of digital penetration through their use of language. By using the expression "limited to digital penetration" the implication is thus that digital penetration is on the lower end of severity of major sexual assaults, compared to assaults involving penile penetration. While digital penetration can constitute a major sexual assault, in this case, it was not seen as being as serious as other major sexual assaults. This is consistent with earlier comments made by the judge when analyzing other cases referred to by the Crown that involved penile penetration, "an aggravating factor not present in Mr. Jensen's case".[250]

(ii)Penile-oral penetration

There was also variation in the extent to which forced penile-oral penetration was discussed in aggravation. In fact, judges did not refer to this type of assault as forced penile-oral penetration, instead using the terms "fellatio"[251] or "oral sex".[252] In a number of cases that involved forced penile-oral penetration alongside other forms of penile penetration, the fact that the assault involved forced penile-oral penetration was not discussed in aggravation.[253] This was in spite of the fact that the forced penile-oral penetration components of these sexual assaults were

[250] *Ibid* at para 30. See also paras 29, 31.
[251] *R v Alas*, 2019 NSSC 68; *R v Bohorquez and Siddiqi*, *supra* note 225; *R v Damore*, 2019 ONSC 3761; *R v JM*, *supra* note 229; *R v MA*, *supra* note 236; *R v MB*, 2019 BCPC 2; *R v Milosevic*, 2019 ABQB 199; *R v MJH*, 2019 YKTC 11; *R v OKS*, *supra* note 228; *R v PH*, 2019 NLSC 154; *R v Solorzano Sanclemente*, *supra* note 230; *R v Sauverwald*, *supra* note 245; *R v Werminsky*, *supra* note 227.
[252] See *R v Bohorquez and Siddiqi*, *supra* note 225; *R v Damore*, *supra* note 251; *R v McCaw*, *supra* note 240; *R v Percy*, *supra* note 242; *R v Razak*, *supra* note 225; *R v RDM*, 2019 ONSC 3007; *R v Sweeney*, *supra* note 230; *R v Tazike*, *supra* note 225.
[253] *R v Alas*, *supra* note 251; *R v Cartwright*, 2019 BCSC 820; *R v Hernandez*, *supra* note 238; *R v Percy*, *supra* note 242; *R v Tazike*, *supra* note 225.

extremely invasive violations. For example, in *R v Tazike*, which involved a number of sexual assaults, the judge noted that the offender "appl[ied] pressure during oral sex, and also tying her hands behind her back and forc[ed] oral sex on her so rough that she would gag and vomit".[254] While the judge acknowledged the serious and invasive nature of this, they did not specifically discuss the forced penile-oral penetration as an aggravating factor.

Moreover, in *R v McCaw*, when discussing another case that involved forced penile-oral penetration,[255] the judge suggested that it was "clearly distinguishable from the case at bar, for a number of reasons including the fact that there was no vaginal penetration" in the other case[256] On this basis, the case at bar, which included penile-vaginal penetration, was noted as being more serious. Likewise, in *R v Pijogge*, the judge suggested another case[257] was less serious than the case at bar because the earlier case involved forced penile-oral penetration whereas Mr. Pijogge "actually engaged in intercourse".[258] As such, in these cases forced penile-oral penetration was considered less serious than other forms of penile penetration.

However, there was recognition in other decisions where forced penile-oral penetration was discussed in aggravation. For example, in *R v Sanclemente*, the judge considered the presence of "vaginal intercourse and fellatio" to be an aggravating factor, though there was no further substantive discussion.[259] In *R v Bohorquez and Siddiqi*[260] and *R v Razak*,[261] both of which

[254] *R v Tazike*, *supra* note 225 at para 11.
[255] *R v Gandhi*, 2015 ONCA 660.
[256] *R v McCaw*, *supra* note 240 at para 42.
[257] *R v Winters*, 2018 NLSC 4.
[258] *R v Pijogge*, *supra* note 231 at para 12.
[259] *R v Solorzano Sanclemente*, *supra* note 230 at para 49.
[260] *R v Bohorquez and Siddiqi*, *supra* note 225 at para 97.
[261] *R v Razak*, *supra* note 225 at para 77.

involved multiple sexual assaults, the judges specifically mentioned penile-oral penetration in aggravation. Moreover, in *R v Damore*, the judge suggested that the fact that the offender "required the complainant to perform oral sex on him" was an aggravating factor on the basis that this was contrary to her religious beliefs that she communicated to him.[262] While this is acknowledged, the focus seemed to be more on the disregard for the victim's beliefs rather than forced penile-oral penetration specifically. Finally, in *R v Thakoordeen*, the judge discussed another case, *R v MD*, which involved forced oro-vaginal contact and digital penetration,[263] noting that *MD* was not as serious as other assaults, including those involving "forced fellatio".[264]

(c) Non-penetrative sexual assaults considered less serious

Finally, on several occasions, judges contended that non-penetrative assaults, namely forced oro-vaginal contact[265] and forced sexual touching, were less serious or less intrusive than penetrative sexual assaults.[266] Consistent with earlier findings, judges overwhelmingly employed sexualized language when describing non-penetrative sexual assaults, such as "cunnilingus",[267] "oral sex"[268] and "touching"[269]. It is important to reiterate that I only included decisions for non-penetrative sexual assaults that discussed penetration. As such, it is not possible to generalize this approach

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[262] *R v Damore*, *supra* note 251 at para 73.
[263] *R v MD*, *supra* note 241.
[264] *R v Thakoordeen*, *supra* note 243 at para 27.
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[266] *R v Thakoordeen*, *supra* note 243 at para 27.
[267] See *R v Andrews*, *supra* note 228; *R v Milosevic*, *supra* note 251; *R v Sauverwald*, *supra* note 245; *R v Shrivastava*, *supra* note 225; *R v Thakoordeen*, *supra* note 243; *R v Werminsky*, *supra* note 227.
[268] See *R v Andrews*, *supra* note 228; *R v Cartwright*, *supra* note 253; *R v GR*, *supra* note 225; *R v Hernandez*, *supra* note 238; *R v Pijogge*, *supra* note 231; *R v Thakoordeen*, *supra* note 243.
[269] See *R v Owolabi Adejojo*, *supra* note 225; *R v Andrews*, *supra* note 228; *R v Cartwright*, *supra* note 253; *R v CCH*, *supra* note 238; *R v Hartman*, *supra* note 235; *R v Hernandez*, *supra* note 238; *R v Jensen*, *supra* note 244; *R v Kissner*, 2019 ONSC 4872; *R v McCaw*, *supra* note 240; *R v Milosevic*, *supra* note 251; *R v Natomagan*, 2019 ABQB 943; *R v Pijogge*, *supra* note 231; *R v Solorzano Sanclemente*, *supra* note 230; *R v Shrivastava*, *supra* note 225; *R v Thakoordeen*, *supra* note 243; *R v Werminsky*, *supra* note 227.

to all non-penetrative sexual assaults. However, these decisions may reveal narratives about penetration and seriousness that could play a critical role in terms of the parity principle and precedent.

While a lack of penile penetration or "intercourse" was never explicitly referred to as a mitigating factor, some judges did imply that such assaults were less serious. This was particularly apparent in cases where the offender had attempted to penetrate the victim without their consent but was ultimately unsuccessful. For example, in *R v Andrews*, the offender sexually assaulted the victim, his girlfriend, by attempting to penetrate her while she was asleep and thus unable to consent.[270] He was ultimately unsuccessful when the victim woke up, fought him off and awoke her friend sleeping in another room. The judge noted that "although there was no penetration, either digitally or with his penis", this constituted a sexual assault.[271] As such, the judge felt it necessary to explicitly acknowledge that this was still a completed sexual assault, even in the absence of intercourse.

While the judge accepted that the offender "would have engaged in sexual intercourse if S.M. had not awakened",[272] they suggested that the lack of actual penetration meant this was a less serious sexual assault.[273] When discussing other cases involving unconscious victims, cited by the Crown and the defence, the judge on multiple occasions noted that these sexual assaults were "significantly more serious" than the case at bar because they involved sexual intercourse.[274]

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[270] *R v Andrews*, *supra* note 228.
[271] *Ibid* at para 11.
[272] *R v Andrews*, *supra* note 228.
[273] *Ibid* at paras 59–60.
[274] *Ibid* at paras 41, 49–50, 54.

Likewise, in *R v SCY* the offender committed a number of sexual assaults, including forced penile-vaginal penetration and attempted penile-vaginal penetration that was circumvented when the offender heard a noise and ran off.[275] Only the assaults involving "successful" penetration were discussed in aggravation. Attempted penetration was not cited as an aggravating factor. In fact, while the penetrative assaults were determined to be "major sexual assaults" requiring a three-year starting point, the assaults involving attempted penetration were not classified as such.[276]

That being said, in *R v RB*, the fact that the offender attempted to penetrate the victim's anus without success due to his penis being flaccid was discussed as an aggravating factor by the judge.[277] Specifically, the judge "acknowledge[d] that he did not penetrate SB's anal cavity with his penis but it was not for lack of trying".[278] Consistent with my discussion above, this may be because the sexual assault involved attempted forced *anal* penetration, which in other cases was seen as a particularly serious form of penile penetration. Interestingly, the judge did comment on the fact that this was attempted but unsuccessful penetration. When discussing a case referred to by the defence, *R v MS,* where the offender attempted to penetrate the victim's vagina without her consent but was unsuccessful due to the victim's resistance,[279] the judge distinguished it from the case at hand on the basis that "an act of anal intercourse did not occur because RB's penis was flaccid, not because he was thwarted by SB".[280] It is not clear why this distinction was deemed to be important. Whether the offender in each case had been able to reach an erection or

[275] *R v SCY*, 2019 ABPC 53.
[276] *Ibid* at para 10.
[277] *R v RB*, *supra* note 234.
[278] *Ibid* at para 76.
[279] *R v MS*, 2018 ONCA 706.
[280] *R v RB*, *supra* note 234 at para 58.

been able to overcome the victim with force, they would have been successful in assaulting the victim by penile-vaginal penetration without their consent. Such a distinction seems somewhat trivial and unconnected to the moral blameworthiness of the offender or the harm to the victim. While it is not possible to draw generalizations from a single case, this does raise a potential concern about how seriousness is assessed by judges at sentencing.

Furthermore, in *R v Milosevic*, where the offender forcibly touched the victim while she was only semiconscious due to intoxication, the judge distinguished a number of cases referred to by the Crown, frequently on the basis that those cases involved sexual penetration which was suggested to be more aggravating.[281] While this was considered a "major sexual assault" notwithstanding that there was no penetration, the judge determined that the usual three year start point for such assaults in Alberta did not apply at least in part due to "the nature of the assault", potentially alluding to the lack of "intercourse".[282] Likewise, in *R v McCaw,* which did involve penetration, the judge also distinguished other cases from the one at bar on the basis that they did not involve penetration and therefore were less serious.[283]

Notable observations about the significance of penetration were also made in *R v Natomagan*.[284] In this case, the offender assaulted three victims, starting with the penile-vaginal penetration of a child and then later the forced sexual touching of two adult women. The assault against the first adult victim took place in the context of a robbery and threats of rape. The victim sustained a number of physical injuries including a broken cheekbone. The assault against the second adult

[281] *R v Milosevic*, *supra* note 251 at paras 35–36, 38.
[282] *Ibid* at para 43.
[283] *R v McCaw*, *supra* note 240 at para 49.
[284] *R v Natomagan*, *supra* note 269.

victim involved choking until the victim lost consciousness and the use of a knife. The victim was also physically restrained with tape while being threatened and then left in a public street without clothing on her bottom half. The judge contended that the penetrative assault was more intrusive, whereas the non-penetrative assaults involved greater planning and the use of implements:

> In some respects, the intrusiveness of his sexual behaviours has decreased, from intercourse to sexual touching. However, the overall circumstances in which he has assaulted his victims has become more brazen, with a possibility of planning (possession of tape and boxcutters during his index offences).[285]

The fact that the first assault involved a child victim and penile-vaginal penetration may both have contributed towards the conclusion that this assault was more intrusive than the later assaults. However, there was recognition that the sexual assaults against the adult victims were extremely serious in nature, notwithstanding that there was no penetration.

It is also important to draw attention to *R v Kissner*, which involved sexual assaults against a number of young men, some children and one adult.[286] The judge noted that non-penetrative sexual assaults can be as serious as some penetrative sexual assaults:

> There was no digital or penile penetration. However, where the victim is a male youth, I have difficulty differentiating between a digital penetration of a girl's vagina from the act

[285] *Ibid* at paras 82–83.
[286] *R v Kissner*, *supra* note 269.

> of wrapping one's hand around a boy's penis. The latter act is no less abhorrent than the former[287]

It is not clear whether this comment was in reference to all of the sexual assaults, or just those involving the child victims. However, the fact that there was no penetration was not important at all, even when one of the victims was an adult. It is possible that these comments extend only to the sexual assaults involving children. Indeed, in other sentencing decisions in 2019 that were excluded from the sample because all of the victims were children, judges were overwhelmingly clear that whether or not penetration occurred is not a salient issue when it comes to sexual assaults involving children.[288] However, given the lack of clarity in the judgment, this is by no means conclusive.

(d) Not wearing a condom is an aggravating factor

Forced penile penetration of the vagina or anus where the offender did not use a condom was considered to be an aggravating factor in addition to the forced penile penetration in a number of cases.[289] Judges consistently drew attention to the additional risks of the transmission of STIs and, in the case of penile-vaginal penetration, pregnancy, that the offenders exposed to the victims in such cases. For example, in *R v Ignacio*, the judge was clear that "the victim had the

[287] *Ibid* at para 75.
[288] *R v JM*, *supra* note 229 at para 66; *R v MB*, *supra* note 251 at para 34.
[289] *R v Owolabi Adejojo*, *supra* note 225 at para 120; *R v Bohorquez and Siddiqi*, *supra* note 225 at para 97; *R v BZ*, 2019 ONSC 2375 at para 25; *R v Ignacio*, *supra* note 225 at 23; *R v McCaw*, *supra* note 240 at para 58; *R v Razak*, *supra* note 225 at para 77; *R v Russ*, 2019 BCSC 229 at para 32; *R v Solorzano Sanclemente*, *supra* note 230 at para 49; *R v Shrivastava*, *supra* note 225 at para 45; *R v TW*, *supra* note 225 at para 40.

additional trauma of the fear of becoming pregnant or contracting a sexually transmitted disease".[290]

Moreover, in *R v McCaw*, the judge also suggested that unprotected forced penile-vaginal penetration where the intercourse was not "completed" was less serious.[291] When discussing another case that involved penile-vaginal penetration without ejaculation,[292] the judge distinguished it from the case at bar on the basis that "it seems the offender did not complete the sexual assault to ejaculation inside the complainant".[293] In other words, the judge contended that an assault involving unprotected penile penetration was more serious when the offender ejaculated compared to if the offender did not ejaculate. In the other cases where the offender did not use a condom during penetration but did not ejaculate during penetration, the fact that there was no ejaculation was not explicitly discussed in mitigation.[294] However, the judge in *McCaw* also relied on *R v McKenzie*[295] to support the conclusion that an unprotected assault involving penile-vaginal penetration without ejaculation is less serious than one involving ejaculation.[296]

(e) Intercourse is a less salient factor when there is "external" violence

Finally, penetration appeared to be a less salient factor where the sexual assault in a number of decisions that involved some other form of "additional" violence beyond that intrinsic to sexual

[290] *R v Ignacio*, *supra* note 225 at para 23.
[291] *R v McCaw*, *supra* note 240 at para 47.
[292] *R v DD*, 2015 ONSC 1312.
[293] *R v McCaw*, *supra* note 240 at para 47.
[294] *R v Bohorquez and Siddiqi*, *supra* note 225; *R v Solorzano Sanclemente*, *supra* note 230.
[295] *R v McKenzie*, 2017 ONCA 128, 136 O.R. (3d) 614.
[296] *R v McCaw*, *supra* note 240 at paras 43–45.

assault. This pattern emerged in cases involving sexual assault causing bodily harm, sexual assault with a weapon, aggravated sexual assault, breaking and entering in order to commit a sexual assault and where sexual assault was charged alongside other offences, such as assault and forced confinement. For example, in a number of cases that fell into one of the aforementioned categories, while there had been forced penile penetration of the vagina or anus, penetration was not discussed in aggravation whatsoever.[297] In a handful of other cases, while penile penetration was listed as an aggravating factor, there was less specific discussion about penile penetration as an indicator of seriousness compared to other cases without "additional" violence.[298] As such, it would seem that the presence of "external" violence shifted the focus away from penetration such that the violence became the most salient aggravating factor in sentencing.

Nonetheless, there were some cases involving "additional" violence that included a dedication discussion of penile penetration, most of which connected to the themes discussed above. For example, where these cases involved penile-anal penetration,[299] object penetration[300] or an offender who did not use a condom,[301] there was greater discussion of these particular factors. It may be that this is connected to the observations about these factors being seen as particularly serious such that continue to be discussed by judges even when there is "additional" violence.

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[297] *R v Alas*, *supra* note 251; *R v Damore*, *supra* note 251; *R v MJH*, *supra* note 251; *R v OKS*, *supra* note 228; *R v PH*, *supra* note 251; *R v RWR*, 2019 YKTC 33.
[298] *R v AM*, 2019 ONSC 3253 at para 26; *R v JS*, *supra* note 230 at para 20; *R v Mugabo*, 2019 ONSC 6526 at para 18; *R v Razak*, *supra* note 225 at para 77; *R v RDM*, *supra* note 252 at para 23; *R v SB*, 2019 NBPC 8 at para 38; *R v Tazike*, *supra* note 225 at para 26.
[299] *R v Eric Richard Marshall*, *supra* note 225 at paras 20, 27; *R v RB*, *supra* note 234 at para 76.
[300] *R v SB*, *supra* note 298 at paras 7, 33.
[301] *R v Bohorquez and Siddiqi*, *supra* note 225 at para 97; *R v BZ*, *supra* note 289 at para 25; *R v Razak*, *supra* note 225 at para 77; *R v Russ*, *supra* note 289 at para 32.

(5) Discussion

It was clear from these cases that penetration continues to play a key role at sentencing, consistent with findings in other studies.[302] While I contend that it is more appropriate for matters such as penetration to be considered as an aggravating factor at sentencing than in the definition of the offences, I argue that penetration should not be determinative of seriousness. My findings suggest there is a risk that penetration is being overemphasized in making determinations of seriousness. The narratives that judges create about penetration run the risk of reinforcing and reproducing androcentric and phallocentric sexual norms that we saw with the old *Criminal Code* provisions prior to 1983. In particular, a hierarchy seemed to emerge that is consistent with the hierarchy of heterosex discussed above. The potential consequence of an approach that overemphasizes penetration in determining severity is that the wrongfulness and harmfulness of sexual assaults that do not fit a prescribed narrative – typically sexual assault involving penile penetration without a condom – may be downgraded.

(a) Overemphasis of penetration

While penile penetration was a highly salient factor across the sample of decisions, it was particularly prominent in provinces that have established sentencing ranges and starting points based on penetration. While penile penetration is not the sole determinant of the sentence, it does determine the applicable starting point or range. Penile penetration thus has a more significant role than most other aggravating or mitigating factors, that are used to determine the movement

[302] Pasquali, *supra* note 211; Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15:2 Canadian Journal of Women and the Law 305–341.

from the start point or where in the range the sentence will fall. This raises the concern that the decision to penetration requirement from the substantive law in 1983 is being undermined at sentencing.

Indeed, the Supreme Court in *Friesen* warned judges about the "dangers of defining a sentencing range based on penetration or the specific type of sexual activity at issue" in relation to child victims.[303] A number of concerns were raised, including that defining sentencing ranges or starting points based on penile penetration would contradict the spirit of the *Criminal Code* offences as based on sexual integrity rather than "proprietary-based" distinctions. Importantly, the court suggested that creating a hierarchy of sexual assaults based on penetration trivialises the experiences of sexual assault victims who have not experienced penile penetration. In doing so, the emotional and psychological harm that can result from any form of sexual violence is undermined.[304] Noting that sentencing judges often justify more lenient sentencing for non-penetrative assaults on the basis that they are inherently less harmful, the Court is clear that non-penetrative assaults can, depending on the circumstances, be equally or even more serious and intrusive than those involving penetration.[305]

I argue that the same concerns can be raised in relation to sexual assaults involving adult victims. In particular, the creation of a hierarchy that is defined by penile penetration of the vagina or anus undermines the severity of assaults that do not involve penile-vaginal or penile-anal penetration.

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[303] *R v Friesen*, *supra* note 198 at para 140.
[304] See also *R v McDonnell*, *supra* note 201 at paras 111–115.
[305] See also *R v Stuckless*, 2019 ONCA 504 at paras 68–69; 124–125, 2019 CarswellOnt 9580.

(b) Hierarchy

There was evidence to suggest that a hierarchy based on the type of sexual act emerged in the cases considered in the present study. When discussing penetration, judges often used comparisons between different types of non-consensual sexual acts, whether in the abstract or explicitly with other relevant sentencing decisions being considered.[306] The hierarchy in some ways mirrored the hierarchy of heterosex discussed above,[307] whereby heterosex is defined as intercourse and other forms of sexual activity are secondary or preliminary to intercourse.[308]

Given that penile penetration of the vagina or anus played a significant role in defining sentencing ranges and starting points, it sat at the top of the hierarchy. Some judges also appeared to consider penile-anal penetration and object penetration as being particularly aggravating. While digital penetration and penile-oral penetration were considered aggravating in some decisions, this was not consistent, implying that these forms of sexual assault sit lower on the hierarchy. Finally, in some cases, judges appeared to undermine the wrongfulness of non-penetrative sexual assaults, suggesting that they may be considered at the lower end of the severity scale. The assumptions that may underlie this hierarchy and the respective levels are discussed below.

(i) Penile-anal penetration

[306] See e.g. *R v Bohorquez and Siddiqi*, *supra* note 225 at para 97; *R v Hartman*, *supra* note 235 at para 49; *R v McCaw*, *supra* note 240 at para 48.
[307] Hockey, Meah & Victoria Robinson, *supra* note 123.
[308] See McPhillips, Braun & Gavey, *supra* note 113; Braun, Gavey & McPhillips, *supra* note 120.

It is important to note that sexual assaults involving penile-anal penetration were seen as particularly serious, perhaps even more so than penile-vaginal penetration. However, judges did not seem to discuss the basis of this conclusion. One relevant factor may be that forced penile-anal penetration carries a particularly heightened risk of transmitting a sexual transmitted disease.[309] Penile-anal penetration can also be more painful and more likely to cause physical injury than other forms of sexual penetration, particularly for those victims who have not had anal intercourse before.[310] However, none of these factors are alluded to in any of the decisions.

One may hypothesize that the focus on penile-anal penetration as particularly aggravating has more to do with anal penetration being perceived as "dirty", than the impact on the victim or the severity of the offence.[311] Indeed, penile-anal penetration, as with other forms of sexual practices involving the anus, are often constructed as dirty and unnatural, with penile-vaginal intercourse being the natural or normal way for heterosexual individuals to have intercourse. For example, one study found that women typically perceive penile-anal intercourse, digital anal penetration and oral-anal contact as being highly stigmatized, such that they would not disclose engaging in such practices to others due to a fear of being kink-shamed or slut-shamed.[312] In some ways, this

[309] Rebecca F Baggaley, Richard G White & Marie-Claude Boily, "HIV transmission risk through anal intercourse: systematic review, meta-analysis and implications for HIV prevention" (2010) 39:4 International Journal of Epidemiology 1048–1063; Varghese et al, *supra* note 139.
[310] Debby Herbenick et al, "Pain experienced during vaginal and anal intercourse with other-sex partners: Findings from a nationally representative probability study in the United States" (2015) 12:4 Journal of Sexual Medicine 1040–1051; Aleksandar Stulhofer & Dea Ajduković, "Should we take anodyspareunia seriously? A descriptive analysis of pain during receptive anal intercourse in young heterosexual women" (2011) 37:5 Journal of Sex and Marital Therapy 346–358; Kimberly R McBride, "Heterosexual Women's Anal Sex Attitudes and Motivations: A Focus Group Study" (2019) 56:3 The Journal of Sex Research 367–377.
[311] Jonathan Allan, *Reading from Behind: A Cultural Analysis of the Anus* (Regina, Sask: University of Regina Press, 2016); Kimberly R McBride & J Dennis Fortenberry, "Heterosexual Anal Sexuality and Anal Sex Behaviors: A Review" (2010) 47:2–3 Journal of Sex Research 123–136.
[312] McBride, *supra* note 310.

may reflect the coital imperative discussed above whereby heterosex is defined as penile-*vaginal* intercourse.

Moreover, anal intercourse is widely constructed as being associated with gay men and thus bears the stigma of homophobia.[313] The potential impact of homophobia in the conclusions drawn by the judges in this sample seems particularly apparent with the use of the term "sodomy" to describe penile-anal penetration in some cases.[314] The term of course brings to mind anti-sodomy laws used to criminalize and stigmatize same-sex relations, particularly those between men. Judges thus seem to create a narrative about forced penile-anal penetration that is highly stigmatizing and heterosexist which may reflect the notion that such penetration is seen as the antithesis of heterosex rather than a more nuanced understanding of harm to the victim.

(ii)Digital penetration and penile-oral penetration

Furthermore, while penile-vaginal, penile-anal and object penetration were consistently considered aggravating, penile-oral penetration and digital penetration were not. In some cases judges recognized the potential severity of these forms of sexual assaults, whereas other judges deemed them to be comparatively less invasive. Yet, these forms of sexual assault can still amount to serious sexual assaults with significant physical and/or psychological consequences for victims.

[313] See Allan, *supra* note 311.
[314] *R v Hartman*, *supra* note 235 at para 69; *R v RB*, *supra* note 234 at paras 7, 76.

Indeed, some have argued that forced penile-oral penetration is equivalent to other forms of penile penetration.[315] For example, the UK Home Office report on sexual offences suggested that:

> Forced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration, and we saw no reason why rape should not be defined as penile penetration of the anus, vagina or mouth without consent[316]

It is also worth noting that while the risk of transmission of HIV via penile-oral is very low, some studies report that it is possible for some STIs to be transmitted in this way.[317] These studies suggests that penile-oral contact, particularly where there has been penetration of the mouth is a potential risk factor for the transmission of a number of STIs.

Furthermore, drawing open evidence from a number of organizations that work with victim-survivors of sexual violence, Sharon Cowan argued in relation to Scots law that the defining feature of *any* penetrative assault is penetration regardless of the object of penetration.[318] From this perspective, the fact that penetration does not involve a penis – whether it be digital penetration or object penetration – does not define the wrongfulness of a sexual assault. As such, judges should take care to consider the distinct risks that are connected with all forms of

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[315] See e.g. Home Office, *supra* note 90; *Report on Rape and Other Sexual Offences*, by Scottish Law Commission, SCOT LAW COM No 209 (Edinburgh: Scottish Law Commission, 2007); Cowan, *supra* note 143.
[316] Home Office, *supra* note 90 at para 2.8.5.
[317] David A Hawkins, "Oral Sex and HIV Transmission" (2001) 77:5 Sexually Transmitted Infections 305–308; Sarah Edwards & Chris Carne, "Oral sex and transmission of non-viral STIs" (1998) 74:2 Sexually Transmitted Infections 95–100; Sarah Edwards & Chris Carne, "Oral sex and the transmission of viral STIs" (1998) 74:1 Sexually Transmitted Infections 6–10.
[318] Cowan, *supra* note 143 at 160.

penetration, which may be highly aggravating. While the risks may vary depending on the particular act, the particular aggravating nature of each kind of sexual assault should be addressed. Indeed, to focus too closely on the significance of the penis as the object of the sexual assault risks what Carol Smart referred to as a "celebration of phallocentrism" in relation to the criminal trial.[319]

(iii) Non-penetrative assaults

It should also be noted that in some cases, judges considered non-penetrative sexual assaults as being more benign than those involving penetration. If judges make assumptions that non-penetrative assaults are intrinsically less harmful and thus less serious that other forms of sexual violence, it undermines the seriousness of the sexual assault and the harm to the victim. Yet, non-penetrative assaults can amount to very serious assaults causing significant harm.

For example, non-penetrative sexual assaults that involve forced oro-genital and oro-anal contact can be particularly invasive for a number of reasons. Being the subject of oro-genital and oro-anal sexual contact are risk factors for the transmission of a range of STIs.[320] There is also evidence to suggest that, at least in the context of consensual heterosex, and particularly in casual sexual encounters, some women consider non-penetrative sex such as cunnilingus to be a more intimate sexual act than penile-vaginal intercourse, that consequently is more difficult to

[319] Smart, *supra* note 3 at 35.
[320] Edwards & Carne, *supra* note 317; Edwards & Carne, *supra* note 317; Thomas L Cherpes, Leslie A Meyn & Sharon L Hillier, "Cunnilingus and Vaginal Intercourse Are Risk Factors for Herpes Simplex Virus Type 1 Acquisition in Women" (2005) 32:2 Sexually Transmitted Diseases 84–89.

navigate and negotiate.[321] It is therefore quite probable that forced oro-vaginal contact is experienced as a significantly invasive and degrading sexual assault. Although comparable research outside of the heterosexual context is lacking, one might suppose that since penetrative sex is less definitive of sex, and other practices such as cunnilingus are more significant, forced oro-genital contact may be experienced and understood differently.

To avoid undermining the severity of these non-penetrative assaults and the impact on victim-survivors, it is important that judges do not assume that a lack of penetration is inherently less harmful to victim-survivors than those that involve penetration.

(iv) Condom usage

It is also important to note that the absence of other aggravating factors such as condom usage and ejaculation, are not considered mitigating factors. While the court may legitimately take into account the heightened risk of pregnancy and the contraction of STIs that come with these factors, their absence must amount only to neutral factor. Indeed, this concern was also raised by Gillian Balfour and Janice Du Mont[322] with reference to *R v Tulk*.[323] Balfour and Du Mont drew attention to the fact that the judge commented on the offender's use of a condom which protected the victim from the risks of becoming pregnant or contracting an STI. They noted that the narrative created by the judge was one that presented the offender as reasonable, as if "he was

[321] Gavey, McPhillips & Braun, *supra* note 112 at 54; Lesley Miles, "Women, AIDS, and Power in Heterosexual Sex: A Discourse Analysis" in Mary M Gergen & Sara N David, eds, *Toward a New Psychology of Gender: A Reader* (New York and London: Routledge, 1997) 479.
[322] Gillian Balfour & Janice Du Mont, "Confronting Restorative Justice in Neo-Liberal Times: Legal and Rape Narratives in Conditional Sentencing" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 701.
[323] *R v Tulk*, [2000] OJ No 4315 (Ct Just).

chivalrous in his use of a condom to protect her from disease and pregnancy."[324] It seems more appropriate that these be considered neutral factors rather than mitigating factors celebrating the chivalry of the offender.

The same may be said of ejaculation as an aggravating factor. However, it is important to draw attention to the choice of language used in one case in the study, *R v McCaw*.[325] The fact that an assault involved unprotected forced penile-vaginal penetration and ejaculation was described as "completed intercourse".[326] This choice of language is in many ways reminiscent of the chronology of heterosex as beginning with an erection and ending with ejaculation.[327] Whether intercourse is "completed" depends only on whether or not a man ejaculates. Drawing upon this narrative in the context of sexual assault may serve to reproduce normative gendered expectations about women as passive recipients of sex.[328]

The use of the term "complete" may also indirectly suggest that assaults involving unprotected forced penile penetration are in some way incomplete. Indeed, the judge in *McCaw* distinguished another case from the one at bar, contending that "it seems the offender did not complete the sexual assault to ejaculation inside the complainant".[329] In doing so, the judge may be creating a narrative that this was not a complete assault, but rather one defined by partiality. At least implicitly, this may undermine the severity of sexual assaults that do not involve ejaculation.

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[324] Balfour & Du Mont, *supra* note 322 at 702.
[325] *R v McCaw*, *supra* note 240.
[326] *Ibid*.
[327] See Braun, Gavey & McPhillips, *supra* note 120; Gavey, McPhillips & Braun, *supra* note 112; Randall & Byers, *supra* note 122.
[328] Christine Boyle, *supra* note 2 at 27. See generally Braun, Gavey & McPhillips, *supra* note 120.
[329] *R v McCaw*, *supra* note 240 at para 47.

While this is just one decision and cannot be generalized, it does draw attention to the importance of language in constructing narratives about sexual violence and severity. It seems more appropriate for judges to discuss ejaculation as an aggravating factor based on its distinct risks, such as pregnancy or contracting an STI. Likewise, the fact that an offender does not ejaculate thus should be a neutral rather than a mitigating factor.

(c) Penetration less salient when there is "additional" violence

Only where there were high levels of "external" violence did penetration become a less salient discussion point. In these cases, while penetration was generally mentioned, the extent to which it was actively discussed was less significant compared to those cases that did not involve "external" violence. It may be that in these cases, the level of violence was seen as more defining of the harm faced by the victim than the fact that the sexual assault involved penetration. This may be interpreted as a recognition on the part of judges of sexual assault being seen as a crime of violence rather than a crime of sex, in keeping with the spirit of the *Criminal Code* provisions which focus on the use of violence and level of harm.

(d) Use of sexualized language

Finally, it is important to note that one of the ways that judges downgraded the seriousness of sexual violence was by repeatedly used highly sexualized language to describe particular assaults that seemed more consistent with consensual sexual acts than sexual assaults. Using terms such as intercourse, cunnilingus, fellatio and oral sex downgrades the seriousness of such assaults and distracts from their violent and coercive nature. This was consistent with the findings of a

number of other studies.[330] As Coates, Bavelas and Gibson suggest "[t]he use of erotic or affectionate terms and phrases put the violent acts that were at issue into a framework of normal sexual activity, rather than a framework of assault".[331] The use of such language also seems deeply connected to narratives about penetration. As intercourse carries a particularly limited understanding of penile penetration of the vagina or anus, other forms of sexual assault fell outside its framework and thus were not seen as being particularly serious. Other forms of penetration, including penile-oral and non-penile sexual penetration of the vagina or anus were not consistently considered to be aggravating because they were not "intercourse". It may be more appropriate for judges to move towards language such as forced penile-vaginal, penile-anal and penile-oral penetration, forced oro-genital contact and groping, which recognizes their assaultive nature.

(6) Limitations

Several limitations to this study must be noted. Firstly, my sample is small, and only includes decisions from a one-year period. As such, it is difficult to generalize these findings across a longer time period, although there is no reason to think that 2019 is unique in this regard. Further research involving a larger sample of decisions is therefore warranted. Secondly, this is not a neutral sample. I only included decisions involving non-penetrative assaults that explicitly discussed penetration because these decisions offered the best opportunity to explore how judges construct narratives about penetration. However, by not consulting decisions involving non-

[330] Coates, Bavelas & Gibson, *supra* note 219; Janet Bavelas & Linda Coates, "Is it Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments" (2001) 10:1 Journal of Social Distress and the Homeless 29–40.
[331] Coates, Bavelas & Gibson, *supra* note 219.

penetrative assaults that did not discuss penetration (or rather a lack thereof), it is not surprising that a hierarchy emerged based on penetration.

It should also that a study of sentencing decisions is limited in the sense that it only includes cases that resulted in a conviction. For that reason, it is not possible to determine whether penetration plays any role in decisions about whether charges should be laid or whether convictions are entered. Given that across Canada from 2009 to 2014, 88 per cent of police reported sexual assaults did not result in a conviction,[332] these cases are very much the exception rather than the rule. Despite these limitations, this study offers a close insight into judicial narratives about penetration which may form the basis of future research.

[332] Rotenberg, *supra* note 149.

G. Conclusion

It is evident that penetration has been a fundamental consideration that has shaped the law of sexual assault across a number of jurisdictions, including Canada. The legal significance of penetration derives from the particular social significance that has been attached to penetration. In particular, rape and other sexual offences have historically been constructed as property offences, making "intercourse" a particular affront to women's fathers and husbands.[333] Concerns about women's virginity and the birth of illegitimate children gave sexual assaults involving penile penetration a particular character that was reflected in the law by designating such offences as "rape", the most serious sexual offence. Likewise, the turn towards phallocentric sexual norms has meant that consensual heterosex has been defined as penile-vaginal penetration, and to a lesser extent, penile-anal penetration, with other activities considered to be lower in the hierarchy.[334] Together with the additional risks of penetrative sexual assaults, such as injuries, the transmission of STIs and in the case of penile-vaginal penetration, pregnancy, penetrative assaults have been given a particular moral character that was reflected in the law.

However, across the 1970s and 1980s, some feminist scholars and activists in Canada grew increasingly concerned with the penetration requirement, particularly on the basis that it contributed towards rape and related offences as being considered crimes based on sex rather than violence and power.[335] There was also considerable support for ensuring greater sex equality in the law[336] and to challenge invasive cross examination that came with penetration

[333] See Backhouse, *supra* note 106.
[334] See e.g. Jackson, *supra* note 111; Hockey, Meah & Victoria Robinson, *supra* note 123.
[335] See e.g. Rioux & McFadyen, *supra* note 59.
[336] See generally Clark & Lewis, *supra* note 20.

requirement.[337] It was hoped that the 1983 reforms, which removed penetration as a defining element to sexual offences, would address these concerns. In the first half of this thesis, I therefore sought to analyze the impact of removing the penetration requirement in order to discuss the appropriate role of penetration. Looking closely at legal discourse and narrative, I considered whether penetration is best placed as an element of legal liability or as a matter for sentencing.

Notwithstanding that penetration, particularly penile penetration, carries a social significance, I contend that incorporating penetration within the definition of sexual offences creates a narrative that is reminiscent of the "coital imperative".[338] Reproducing the hierarchy of heterosex into the law of sexual assault implicitly endorses these sexual norms that define women's sexuality through an androcentric lens, and consequently devaluing women's autonomy. Moreover, a penetration-centred approach also devalues the experiences of LGBTQ2SIA+ by adopting a heterosexist understanding of sex.[339] In particular, this model may undermine the seriousness of sexual assaults that fall outside of the "real rape" narrative,[340] particularly sexual assaults perpetrated by a person without a penis.

For these reasons, it seems more appropriate to consider penetration at sentencing rather than incorporating it into the definition of the offence, as is the approach in Canada. Doing so enables the law to recognize the potential additional harms that may come with penetration without conceiving of penetration as central to the nature of sexual assault. The Canadian model is thus

[337] See especially Goodman, *supra* note 61. See also Boyle, *supra* note 2 at 27.
[338] See especially McPhillips, Braun & Gavey, *supra* note 113; Gavey, McPhillips & Braun, *supra* note 112.
[339] See generally Diorio, *supra* note 133; Winks & Semans, *supra* note 134.
[340] Estrich, *supra* note 55.

better placed to resist the androcentric and phallocentric narratives that are embodied by penetration-centred models. Penetration can be considered as an aggravating factor at sentencing if relevant alongside a number of other aggravating and mitigating factors, which allows for greater nuance. Ultimately, this is a more effective way of communicating the wrongfulness of sexual assault to victims and offenders than a penetration-centred model.

In the second half of my thesis, I sought to explore the narratives that judges were creating about penetration at sentencing, particularly in terms of how penetration factored into assessments about severity. Overall, I found that penetration played an important role in assessing the severity of sexual assaults in these cases, particularly given that a number of provinces have adopted distinct sentencing ranges or starting points defined by penile penetration of the vagina or anus. Indeed, penile penetration of the vagina or anus consistently emerged as an aggravating factor, and commanded a thorough discussion by judges.

One of the potential consequences of affording high levels of significance to penile penetration in determining severity at sentencing is the potential that a hierarchy emerges based on the type of physical act. Ultimately, this approach can undermine the seriousness of sexual assaults that are deemed to fall lower on the hierarchy. A number of patterns emerged within this study that are indicative of a hierarchy. In particular, only assaults involving penile penetration of the vagina or anus and object penetration were consistently constructed as aggravating factors, while digital penetration and penile-oral penetration were not. Lastly, the seriousness of sexual assaults that did not involve penetration were often undermined. For this reason, the seriousness of these non-penetrative sexual assaults was often undermined.

As it stands, the present study indicates that the distinctions based on penetration that were removed from the substantive law in 1983 may be recreated at sentencing. As a consequence, it is possible that current sentencing practices in Canada may reproduce "real rape" narratives that undermine the severity of sexual assaults, particularly those that do not involve penile penetration of the vagina or anus. While the sample size was small, the study nonetheless provides some insight into how penetration factors into assessments of severity at sentencing, which may serve as a framework for future research. Indeed, a broader analysis of sentencing decisions with a larger sample size would be worthwhile.

Going forward, it is imperative that judges take care not to overstate the role of penetration as an aggravating factor. While it may be appropriate for penetration to be considered in aggravation, it is not necessarily appropriate to define sentencing ranges and starting points from the perspectives of penetration. This approach that has been adopted in some provinces affords a distinctive role to penetration in determining severity that is greater than other aggravating or mitigating factors. Instead, I contend that penetration should be but one aggravating factor that is considered alongside other potential aggravating and mitigating factors.

Moreover, a wider understanding of penetration should be taken to include all forms of sexual penetration. The particular wrongfulness and harmfulness of any form of penetration should be considered by the courts in aggravation, which may vary depending on the particular act and the circumstances of the assault. Finally, care must be taken not to undermine the severity of non-penetrative sexual assaults, which can still cause significant harm to victim-survivors. As such, a

lack of mitigation must be considered a neutral factor rather than a mitigating one. Incorporating these changes into sentencing practice across Canada is essential for reframing the narrative to one that is more consistent with the spirit of the *Criminal Code* provisions, particularly recognizing that penetration is not inherently connected to seriousness.

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