

**Reimagining Sexual Assault Law in Canada: A Feminist, Trauma-informed Approach to Restorative Justice**

by

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LL.B, Universidade Federal de Pernambuco, 2016

A Thesis Submitted in Partial Fulfillment of the  
Requirements for the Degree of

MASTER OF LAW

in the Faculty of Graduate Studies

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University of Victoria

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*We acknowledge and respect the lək̓ʷəŋən peoples on whose traditional territory the university stands and the Songhees, Esquimalt and WSÁNEĆ peoples whose historical relationships with the land continue to this day.*

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## Abstract

Every person should have the right to live their life free of violence. However, women and girls in Canada experience sexual assault at disproportionate rates. Systemic violence against them remains commonplace. The crime of sexual assault is gendered, underreported and born disproportionately by communities who face multiple barriers to justice, such as Black, Indigenous and immigrant women, women of colour and women with disabilities. Race, ethnicity, Indigeneity, gender, social location, sexual identity, geography, age and ability, for example, are aspects of one's identity that prevent many groups of people from accessing justice through the criminal justice system. The criminal justice system also perpetuates systemic barriers to justice and most often will further the trauma, harm and inequities among those who engage with it. For all their dimensions and their impacts on peoples lives, sexual assault cases deserve to be treated with care not only throughout the criminal justice system but beyond it. However, myths and stereotypes about women and sexual assault still play a substantive role in the criminal justice system in Canada, despite years of substantive repeals and change. Decades of law reforms did not make a real difference in how victim-survivors of sexual assault experience the criminal justice system. The criminal justice system fails and has been historically failing victim-survivors of sexual assault. Further, a justice response for victim-survivors of sexual assault does not align with carceral punitivism. Rethinking appropriate responses to sexual assault cases and alternatives to the criminal justice system has become a necessity. The appropriateness of restorative justice in cases of gendered violence, including sexual assault, is controversial. The critiques of using restorative justice in the context of sexual assault in Canada are substantial, especially from the perspective of some feminists and Indigenous-focused scholars. Through feminist and trauma-informed lenses, that are intersectional, decolonial and anti-carceral at their roots, a restorative justice theory and practice for sexual assault cases is possible and can eliminate and/or mitigate the risks associated with restorative justice processes in cases of gendered violence. A reimagined restorative justice provides a viable and transformative path to justice for those who choose this approach to justice and offers a degree of hope, particularly for victim-survivors who face multiple and intersecting barriers to justice.

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## Acknowledgements

Coming to Canada, meeting so many brilliant people on the way and writing this thesis changed my life in ways that cannot be put into words. I would like to start by expressing my sincere appreciation and gratitude to my supervisory committee - Professor Gillian Calder (supervisor) and Dr. Annalee Lepp (co-supervisor). I would like to recognize the invaluable support, guidance and thorough feedbacks that they both provided me through this journey. Their time, dedication and unvaluable insights helped me make this thesis possible. I would like to particularly thank Professor Gillian Calder for taking me under her supervision on such short notice with a kind and open heart. I would like to acknowledge my appreciation for my former supervisor, Dr. Michelle Lawrence, who supported me since the beginning, helped me shape my research, encouraged and supported me to pursue further graduate education. I will always be grateful for her support. In addition, I am deeply grateful to have had the pleasure to take classes and learn from so many bright women along the way such as Dr. Rebecca Johnson and Dr. Sara Ramshaw. You both inspire me so much as academics and as human beings. I would like to offer my special thanks to all University of Victoria (UVic) staff, librarians, professors, researchers and everyone who assisted me during my research and made UVic be such an exciting place to be. To my LL.M and Ph.D. colleagues, who became my friends, my deepest gratitude. Not only we (un)learned so many things together, but we connected, shared and supported each other throughout the graduate work in ways that I will forever be grateful for. I would like to extend my gratitude to my dearest friend and colleague, Vitor Galvão, who took his time to review, comment and give me feedback on this thesis. Further, my special appreciation goes out to Sam Fazio, Emilie, Ava and Laura – and all victim-survivors of sexual assault - who so bravely shared their stories publicly. Their courage in speaking up not only for themselves but to all victim-survivors of sexual assault was invaluable. Finally, I acknowledge that this thesis would not be possible without the unconditional love and support of my family and friends who made this journey be happier, lighter and more enjoyable. A special thanks to my mother Mercia, my sister Isabela and my partner Dartangnan, who were and always are my biggest cheerleaders in everything I do. To my dad Angelo (*in memory*) who always loved and cared for our family my deepest gratitude. I truly appreciate all of you and I feel lucky to have you in my life.

## Dedication

This work is dedicated to all peoples who experienced sexual violence.

stay strong through your pain  
grow flowers from it  
you have helped me  
grow flowers out of mine so  
bloom beautifully  
dangerously  
loudly  
bloom softly  
however you need  
just bloom

- *to the reader*<sup>1</sup>

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<sup>1</sup> Rupi Kaur, *Milk and Honey* (Andrews McMeel Publishing, 2014) at 147. Milk and honey is a collection of poetry and prose about survival. Rupi Kaur is a poet, artist, and performer, and her work touches on love, loss, trauma, healing, femininity and migration.

## CHAPTER 1 – INTRODUCTION: GENDER-BASED VIOLENCE AGAINST WOMEN IN CANADA

I wasn't allowed to talk about anything. I was, really, just being silenced by the court system, and by police, and lawyers and everyone. I think it's been almost three years since it happened, and it still affects me pretty much every day. I've had public, crazy panic attacks, like just from being in the dark. And it's just like an overload of feelings like I'm back there even though I'm not. Him pushing me down, like into a crouching position in the corner of the stall, and shoving his penis down my throat. And I just remember crying and, like, pushing with my hands against his legs trying to get him away from me, but he was a lot stronger, and I couldn't get away. And then he was raping me. [I remember] Being so scared — then I just remember, really, looking down, and I saw like all my blood, like everywhere. They [doctors] had to sew back together my vagina, because it had incisions. I think it was 6 inches inside of my vagina, there was a really deep cut, and then the outside was split as well, so... yes, they had to do an emergency surgery because I was losing way too much blood, and I was getting really scared. They said I could have died if they didn't do it right then. This terrible thing happened to me, but I just had to keep fighting to prove that it actually happened. They [police] kept asking me what I was wearing and stuff. I was just so infuriated. I just remember yelling back at them like... I should have been able to walk into the club naked and not have someone touch me. At the hospital, the specialist and everything said they had seen a lot of sexual assaults, and that has never happened before; there has never been an incision inside or outside of someone's vagina after being assaulted. I think that is a pretty clear sign that, obviously, that could not have been consensual. But the defence's side tried to just say that the rapist's penis was too big. He had two charges of sexual assault, and it got significantly worse with the second one [referring to self]. Saying that he was a low risk to re-offend just makes no sense to me. I think it just shows that it's OK to assault people because, like, the worst that's going to happen is you're just going to have to go sit in a detention centre for two weeks. Some of them [other survivors] saying that they never told anyone and that just reading my one post on Facebook or whatever made them go home and tell their mom or like go and tell their best friend, that just seems like insane, that just like something that happened to me can inspire someone to do something so incredible for themselves. That is the part that fuels me, but when I am reading [their stories], I just cannot believe that anyone else has to through this as well, and that makes me sad. I don't feel like I can confidently tell anyone to go report it to the police because it's been such a terrible process. With my case, I don't know how many witnesses there were, but there was maybe like 10. And so much evidence and blood and everything. But there was pretty much no repercussions for what he did. I don't think it sends a

good message out to anybody. And I think for other survivors, to them it's like well, why would they do anything if they're going to get treated like this?<sup>2</sup>

Every person should have the right to live their life free of violence. However, women<sup>3</sup> and girls, such as 17-year-old Sam Fazio, experience sexual violence<sup>4</sup> at disproportionate rates. This means that because of their gender, gender expression or even perceived gender by others, women and girls are and historically have been targets of violence. Sam Fazio's story, like many other sexual assault<sup>5</sup> stories, showcases the reality faced by most victim-survivors<sup>6</sup> of sexual assault in Canada. On the one hand, victim-survivors can report their assault to police and eventually face a criminal justice system<sup>7</sup> that very likely will retraumatize them in so many ways. On the other hand, the only other option available to them is to do nothing. However, those stories, for all their dimensions

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<sup>2</sup> Sam Fazio was 17 years-old when she was violently sexually assaulted by a 16-year-old boy she knew at a school dance in Vancouver. Fazio was rushed to the hospital and into emergency surgery to stem massive bleeding from deep cuts in and around her vagina. The specialists could not believe that rape was the cause of the injuries and the police were convinced the boy had used a sharp weapon. She could not walk for weeks after the attack, but that was just the beginning of her struggles through the traumatic experience. Her attacker was deemed to be at low risk to re-offend and was sentenced to sit in a detention centre for two weeks. As the victim-survivor of a sexual assault and a minor at the time, her identity could have remained secret. Instead, Fazio took the extraordinary step of going to court to ask that the publication ban on her identity be lifted. I have chosen her case to exemplify in this thesis the failure of the criminal justice system to meet the expectations of justice of victim-survivors of sexual assault in a process that often further harm and often retraumatizes them. See more at: Ioanna Roumeliotis, "'And then he was raping me': Victim goes public about shocking attack to reveal justice system flaws" (02 March 2019), online: *CBC News* <[www.cbc.ca/news/canada/national-sam-fazio-metoo-assault-justice-system-1.5037881](http://www.cbc.ca/news/canada/national-sam-fazio-metoo-assault-justice-system-1.5037881)> [perma.cc/BS8V-SXFG].

<sup>3</sup> In this study, when I use the terms "women," and "woman," I am inclusive of people who were assigned the sex female at birth and transgender women. Similarly, I use the terms "men" and "man" to refer to those people who were assigned the sex male at birth and transgender men. However, while discussing gendered violence and sexual assault in the context of this thesis, I am also inclusive of gender non-conforming individuals, non-binary people and 2SLGBTQIA (two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual) people, who are also at higher risk of sexual assault and gendered violence. Given that gender, perceived gender, and sexual identity affects peoples' experiences in complex and particular ways, when I am addressing specific concerns of 2SLGBTQIA, gender non-conforming and non-binary people, I will be specific.

<sup>4</sup> To ground this work, I define sexual violence as any non-consensual, unwanted actual, attempted, or threatened act or behaviour, that is carried out through sexual means or by targeting a person's sex, sexual identity, or gender identity or expression, and it may or may not involve physical contact. See more at: "Sexualized Violence Prevention and Response Policy" (2021), online (pdf): *University of Victoria* <[www.uvic.ca/universitysecretary/assets/docs/policies/GV0245.pdf](http://www.uvic.ca/universitysecretary/assets/docs/policies/GV0245.pdf)> [perma.cc/S3VH-YQF9] at 3 [Sexualized Violence Prevention and Response Policy – 2021].

<sup>5</sup> Among all types of sexual violence, this study will focus particularly on sexual assault, given that it is one of the most gendered violent crimes prone to high levels of underreporting and low case retention in the Canadian criminal justice system. See more at: 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: Statistics Canada, 26 October 2017) [Rotenberg, "Court outcomes of police-reported sexual assaults in Canada"].

<sup>6</sup> For the purpose of this research, I have opted to use the term "victim-survivor" to refer to the person who has been sexually assaulted. However, the best response is to allow the person who has been sexually assaulted to decide what term, if any, best defines their experience.

<sup>7</sup> When I talk about the criminal justice system and/or legal system in general, I refer to western criminal justice system and justice models used in western democracies, such as Canada. When I address Indigenous justice models, laws and legal orders I will be specific.

and impacts on peoples lives, deserve to be treated with care not only throughout the criminal justice system but beyond it. In this thesis, I propose a new way to think about appropriate responses to sexual assault in Canada. The need to find alternative paths to justice for sexual assault victim-survivors, led me to rethink restorative justice processes through feminist, trauma-informed lenses, lenses that must be decolonial, intersectional<sup>8</sup> and anti-carceral at their foundations. I suggest that this new way to think about restorative justice for sexual assault has the potential to be truly transformative and provide more supports to victim-survivors of sexual assault on their path to justice.

## **1.1 Context and Background**

The genesis of this thesis started in the Northeast of Brazil, in my hometown Recife, within the context of my family history. With no access to basic education, an orthodox religious background and coming from a low-income family, my grandfather ended up having twenty-two children – thirteen from his first marriage (his first wife died giving birth to the thirteenth baby), eight from the second marriage, including my mother, and he also raised his brother’s son as his own. I grew up surrounded by love and laughter in our always growing and changing family. However, since I was really young, I started to realize that within my family context, women and girls had very different roles compared to men and boys. On weekends, for example, while many of my uncles would go have a drink at a bar with friends, my aunts, and girl-cousins, especially the older ones, would stay at home taking care of the children, cooking and cleaning. It was as if the men deserved a break, and the women did not.

I have a blurred memory of one day from childhood, maybe from when I was five or six years old, of one of my aunts arriving at my grandparents’ house crying and very nervous. Years later, I found out that on that day she was fleeing from her violent household. She told the family that when her husband got drunk, he would become aggressive, break things at home and become physically and psychologically violent towards her and their two daughters. Years later, I also learned that, for years, he rejected his younger daughter, accusing my aunt of having cheated on

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<sup>8</sup> Kimberlé Crenshaw coined the term “intersectionality” to deal with the fact that many social justice problems like racism and sexism are often overlapping, creating multiple levels of social injustice. See more at: Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 *Stan L Rev* 1241–1299 at 1265 [Crenshaw, “Mapping the Margins”].

him – which was not true – and which created a very unhealthy and toxic environment in their household.

When I was a teenager, one of my cousins, who was at the time probably eight or nine years old, told her mother (my aunt) that their neighbour – an older man – asked her to take off her shirt and let him touch her - while she was playing at his house. Instantly, as a kid, she felt something was not right, and she ran back to her house to her mom, where she disclosed what happened. My aunt was terrified but decided not to tell her husband - my cousin's dad - because she feared that he would do “something stupid” against the neighbour. As my aunt was putting pressure on her husband, they moved to a different neighbourhood only a few weeks after the incident, on the false pretence that the house “did not have good air circulation”.

I remember hearing these stories as a child, and thinking that none of that was fair. I could not understand why we – women and girls – faced such unequal and disrespectful societal treatment and were often silenced. From a really young age, I learned that “for my own safety,” I should not walk outside at night by myself in my hometown, I should avoid passing by certain places alone and I must always be vigilant and alert everywhere I went. As I grew up, I started to understand that acts of violence against women and girls were not constricted to my “social bubble” of family and friends, hometown or even home country. Rather they were part of the systemic problem of gendered violence against women and girls prevalent all around the world. I also learned that different groups of people, because of their social location, positionality and privilege, experienced gendered violence and sexual assault in diverse ways.

Despite what one might think in reading this selective and incomplete segment of my family's history, however, it is important to assert that I was lucky and privileged growing up, especially as compared to the majority of the population of Brazil. My mother, through work and investing in her own education, was able to break the poverty cycle and together with my father, who grew up under completely different circumstances than her, was able to provide my sister and me the opportunity to have a different life than most of my cousins had. We were raised in a safe and nurturing household, where my parents always prioritized our education over other things. We were offered the opportunity to study in great schools growing up and they always encouraged us to pursue further education and to become independent individuals. That opportunity was not available to most of my aunts, uncles and cousins, nor to my grandparents. To this date, most of my twenty-one uncles and aunts live in low-income households and some of them have struggled

with substance abuse at some point in their lives. From my standpoint, I also came to learn that privilege does not protect women and girls from sexual assault.

I approach this thesis from the perspective of an immigrant woman of colour,<sup>9</sup> Latin-American, middle-class and able-bodied individual who does not truly understand the challenges faced by Indigenous and Black women, women with disabilities and gender non-conforming individuals. In this thesis, I am not attempting to speak for them. Rather, I engage with intersectional feminisms, the criminal justice system and restorative justice practices paying attention to my own perspective, world-view and experiences. By honouring my past and trying to write a different – more equitable and inclusive - story for the future, I hope, through my work, to offer an innovative justice option for victim-survivors, offenders and communities, particularly in the context of sexual assault against women and girls in Canada, where I currently live and work. My intention is to theorize a new path for those who choose this justice approach, and in the process, to underline the importance of access to justice and meaningful social change for women and girls in Canada today.

## **1.2 An Overview of Sexual Violence and Sexual Assault Against Women and Girls**

Sam Fazio’s experience of sexual assault, my aunt’s experience of intimate partner violence, my cousin’s experience of child sexual abuse and my own experience witnessing systemic violence against women and girls are not isolated. Rather, they remain commonplace and are condoned in Canada and around the world.<sup>10</sup> According to the World Health Organization (WHO), approximately 736 million – 1 in 3 women - throughout the world are subjected to physical or sexual violence by an intimate partner or sexual violence from a non-partner at some point in their

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<sup>9</sup> I was born and raised in Brazil and I have now moved “permanently” to Canada. My geographical location has influenced on how I locate myself in the context of this thesis. When I used to live in Brazil, as a white presenting person on that context, the colour of my skin has not made my life more difficult, and I had experienced white privilege all my life. Once I came to Canada, other layers and identity “markers” were added to my identity as a person, such as “immigrant women,” “Latin-American women,” “women of colour” who speaks “English as a second language” and is now a “visible minority,” for example. In Canada, unfortunately, I have already experienced discriminatory treatment (on few occasions) because of those added identity markers, what did not happen to me when I used to live in Brazil. I am continually deepening my learning about those issues and I have chosen to identify myself in the context of this thesis as an immigrant woman of colour because of those reasons.

<sup>10</sup> Claire L’Heureux-Dubé, “Foreword: Still Punished for Being Female” in *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, ed by Elizabeth A Sheehy (Ottawa: University of Ottawa Press, 2012) at 2.

lifetime, a number that has remained largely unchanged over the past decade.<sup>11</sup> An estimated 15 million adolescent girls worldwide, aged 15 to 19 years, have experienced sexual assault.<sup>12</sup>

Sexual violence is a significant global public health concern rooted in gender-based discrimination, gender inequality, gendered social norms and gender stereotypes that perpetuate such violence. In other words, sexual violence is gendered at its roots. Historically, women have been and continue to be overrepresented as victim-survivors of sexual violence. And, particular groups of women in Canada are even more vulnerable to sexual violence, such as Indigenous women, Black women, women of colour, 2SLGBTQQIA<sup>13</sup> people, women with disabilities and mental health issues, institutionalized women and women who are unemployed or have low incomes.<sup>14</sup> In addition, individuals who have had certain experiences, such as childhood abuse and homelessness, also are at a higher risk of sexual assault,<sup>15</sup> highlighting the multiple layers of oppression experienced by certain communities. These data showcase the role of intersectionality in shaping the prevalence of sexual violence among some groups of women and girls. In other words, race, gender, sexual orientation, social location and ability, for example, play a significant role in determining the “who” is more vulnerable to sexual violence in Canada.

Although the causes and degrees of gendered and intersectional inequalities vary, sexual violence is understood as an all-encompassing, non-legal term that is used more commonly to refer to systemic sexual violence and can include: sexual abuse, sexual assault, sexual exploitation, voyeurism, indecent or sexualized exposure, sexual harassment, incest, degrading sexual imagery, trafficking, non-consensual kissing, grabbing, caressing, fondling, unwanted sexual touching, oral, anal, or vaginal penetration and stalking.<sup>16</sup> The WHO defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments, or advances, or acts to traffic, or

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<sup>11</sup> World Health Organization, “Devastatingly pervasive: 1 in 3 women globally experience violence” (09 March 2021), online: <[www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence](http://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence)> [perma.cc/3ACL-63MH]

<sup>12</sup> United Nations Women, “Facts and figures: Ending violence against women” (March 2021), online: <[www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures](http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures)> [perma.cc/848E-DFZ]

<sup>13</sup> Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual people.

<sup>14</sup> Susan McDonald, Andrea Wobick & Janet Graham, “Bill C-46: Records Applications Post-Mills, A Caselaw Review” (2004), online (pdf): *Department of Justice Canada* <[www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06\\_vic2/rr06\\_vic2.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/rr06_vic2.pdf)> [perma.cc/C2TS-QSZH] at 15.

<sup>15</sup> Sylvia Novac, “Family Violence and Homelessness: A Review of the Literature – Literature Review” (2006), online: *Government of Canada: Public Health Agency of Canada* <[www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/family-violence/homelessness-review-literature/review-literature.html](http://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/family-violence/homelessness-review-literature/review-literature.html)> [perma.cc/39KK-LXNR].

<sup>16</sup> Government of Ontario, “Sexual violence” (March 8, 2021), online: <[www.ontario.ca/page/sexual-violence](http://www.ontario.ca/page/sexual-violence)> [perma.cc/S3UW-TM5B].

otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”<sup>17</sup> It is common that the term “sexual violence” is used interchangeably with the term “sexual assault,” but the latter, even though it is considered a type of sexual violence, is not inclusive. For a conduct to be considered sexual assault, it needs to be codified under s. 265<sup>18</sup> of the *Criminal Code*.

Since the outbreak of COVID-19<sup>19</sup> in March 2020 (up until the time of writing), all types of violence against women and girls, particularly domestic violence, have intensified,<sup>20</sup> a phenomenon that is being called “the shadow pandemic.”<sup>21</sup> The Ending Violence Association of Canada in collaboration with Anova, conducted a national survey to understand the impacts of COVID-19 on gender-based violence service provision in Canada called “Pandemic meets Pandemic: Understanding the Impacts of COVID-19 on Gender-Based Violence Services and Survivors in Canada.”<sup>22</sup> From May 18 to July 20, 2020, 376 staff and volunteers in the gender-based violence (GBV) sector responded to a survey about the impact of COVID-19 on services, the impact of COVID-19 on victim-survivors, the impact of COVID-19 on their own mental health and wellbeing and what concerned them moving forward. Approximately 46% of GBV staff and volunteers reported changes in the prevalence and severity of violence experienced by victim-survivors, with 82% of these workers noting increases in both prevalence and severity.<sup>23</sup> Gender-

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<sup>17</sup> “World report on violence and health: summary” (2002) at 150, online (pdf): *World Health Organization (Geneva)* <[www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/summary\\_en.pdf](http://www.who.int/violence_injury_prevention/violence/world_report/en/summary_en.pdf)> [perma.cc/MDP2-PKR8]

<sup>18</sup> *Criminal Code*, RSC 1970, c. C-34, s. 265 [*Criminal Code*].

<sup>19</sup> Coronavirus disease (COVID-19) is an infectious disease caused by a coronavirus. Most people infected with the COVID-19 virus will experience mild to moderate respiratory illness and recover without requiring special treatment. The World Health Organization declared the outbreak a Public Health Emergency of International Concern on 30 January 2020, and a pandemic on 11 March 2020. At the time of this study, the COVID-19 pandemic is still ongoing and its massive impacts worldwide continue to the date. See more at: World Health Organization, “Rolling updates on coronavirus disease (COVID-19)” (31 July 2020), online: <[www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen](http://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen)> [perma.cc/VHR3-9YQV]

<sup>20</sup> Government of Canada, “The shadow pandemic: combatting violence against women and girls in the COVID-19 crisis” (23 November 2020), online: <[www.international.gc.ca/world-monde/stories-histoires/2020/shadow-pandemic\\_pandemie-ombre.aspx?lang=eng](http://www.international.gc.ca/world-monde/stories-histoires/2020/shadow-pandemic_pandemie-ombre.aspx?lang=eng)> [perma.cc/DW6C-JQ8B] [The shadow pandemic]

<sup>21</sup> During health emergencies, such as the COVID-19 pandemic, violence against women tends to increase. Whilst data are scarce, reports from across the world, including China, the United Kingdom, the United States of America, and other countries suggest a significant increase in domestic violence cases related to the COVID-19 pandemic. Reports from other countries suggest a reduction in survivors seeking services due to a combination of lockdown measures and not wanting to attend health services for fear of infection. See more at: The shadow pandemic, *supra* note 20.

<sup>22</sup> Erin Whitmore & AnnaLise Trudell, “Pandemic meets Pandemic: Understanding the Impacts of COVID-19 on Gender-Based Violence Services and Survivors in Canada” (2020), online (pdf): *Ending Violence Association of Canada & Anova* <[endingviolencecanada.org/wp-content/uploads/2020/08/FINAL.pdf](http://endingviolencecanada.org/wp-content/uploads/2020/08/FINAL.pdf)> [perma.cc/YU32-L4EL]

<sup>23</sup> *Ibid* at 9.

based violence, including sexual violence, has increased in severity and volume because of the COVID-19 pandemic.<sup>24</sup> In the words of the Government of Canada, the COVID-19 pandemic exposed gender-based violence around the world, in the following terms:

On a larger level, the pandemic is bringing attention to the issue of gender-based violence in many countries. Wood notes that this problem is neither new - nor entirely unexpected. Gender-based violence surges in such situations because ‘the risk factors are exacerbated,’ and this unprecedented crisis brings unprecedented challenges.<sup>25</sup>

In this context, the COVID-19 pandemic laid bare a problem that was already prevalent on a worldwide scale: violence against women and girls. Since the COVID-19 pandemic started, for example, sexual assault centres and domestic violence shelters across Canada reported changes in demands for services that are alarming.<sup>26</sup> Finding equitable means to address the processes that support sexual assault victim-survivors, particularly in a shadow pandemic, is a necessity.

When rethinking appropriate responses to sexual assault cases and alternatives to the criminal justice system, it is important to acknowledge that not all people in Canada are equally likely to experience the criminal justice system as a safe and inclusive institution. Race, ethnicity, Indigeneity, gender, class, sexuality, geography, age and ability, for example, are aspects of one’s identity that prevent many groups of people from accessing justice through the criminal justice system. The criminal justice system perpetuates systemic barriers to justice against Black, Indigenous and immigrant women, women of colour and women with disabilities and most often will further the trauma, harm and inequities experienced by those groups.

Sexual assault, as an inherently gendered crime, is prone to high levels of underreporting and low case retention in the Canadian criminal justice system.<sup>27</sup> Beyond the low reporting rates, allegations of sexual assault are very difficult to prosecute in the criminal justice system. For the most part, this is because of the private nature of the offence, the applicable rules of evidence law<sup>28</sup> and the myths and stereotypes about women and sexual assault that continue to be perpetuated during criminal trials, issues that will be explored further in Chapter 2. Questions about a victim’s

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<sup>24</sup> *Ibid* at 25.

<sup>25</sup> The shadow pandemic, *supra* note 20.

<sup>26</sup> Erin Whitmore, “Brief on Canadian Response the COVID-19 Pandemic” (2020), online (pdf): *Ending Violence Association of Canada* <endingviolencecanada.org/wp-content/uploads/2020/07/EVA-Canada-Brief\_COVID-Response.pdf> [perma.cc/NFF8-BH7B]

<sup>27</sup> Rotenberg, “Court outcomes of police-reported sexual assaults in Canada,” *supra* note 5 at 4.

<sup>28</sup> Hamish Stewart, *Evidence: a Canadian casebook*, 4<sup>th</sup> ed (Toronto, ON: Emond Publishing, 2016) at 3.

sexual history,<sup>29</sup> the consumption of alcohol or other drugs,<sup>30</sup> the difficulty of proving in practice the difference between forced and consensual sexual activity,<sup>31</sup> are all examples of how proving guilt beyond a reasonable doubt in court is a difficult standard to achieve in sexual assault cases in Canada.

Sexual assault will also inevitably involve an experience of trauma. For victim-survivors of sexual violence, it is common for them to experience immediate and long-term impacts on their lives, such as emotional impacts (fear, anger, humiliation, shame, sadness, depression, anxiety, phobia), cognitive impacts (disbelief, shock, memory loss), somatic/physical impacts (muscle tension, headaches, numbness, insomnia, pregnancy, infections, sexually transmitted diseases) and behavioural impacts (restlessness, inability to concentrate, crying, shaking, tension).<sup>32</sup> Victim-survivors' trauma is not limited to the experience of the crime itself, but is also inflicted by the legal process that follow. Sexual assault victim-survivors have too often experienced the criminal justice system as a place that often retraumatizes and harms them.<sup>33</sup> In her critical study on sexual assault law in Canada, legal scholar Elaine Craig asserts that,

Numerous studies have concluded that, despite progressive law reforms aimed at protecting witnesses in sexual assault cases, for many, the impact of testifying as a sexual assault complainant remains traumatizing and harmful. This problematic circumstance is compounded by the horrific reality that, in some cases, women are forced to perform this potentially traumatic role in the criminal justice process. Criminal offences, including sexual assault, are prosecuted in the name and interests of the public, not the survivor, and so just as there is no right to require that one's attacker be prosecuted, neither is there a right to refuse to participate as witnesses if the Crown does decide to prosecute.<sup>34</sup>

Building on this work, and the extensive studies done on sexual assault law in Canada, I argue that trauma is inherent not only to victim-survivors' experiences of sexual assault, but also to practitioners working with sexual assault victim-survivors, such as anti-violence workers, counsellors, police and legal professionals, as well as offenders themselves. The criminal justice

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<sup>29</sup> *R. v. Goldfinch*, 2019 SCC 38 [Goldfinch].

<sup>30</sup> *R. v. J.A.*, 2011 SCC 28 at para 49 [J.A.].

<sup>31</sup> *R. v. Seaboyer; R. v. Gayme*, [1991] 2 SCR 577 [Seaboyer].

<sup>32</sup> Canada, Department of Justice. *Health Impacts of Violent Victimization on Women and their Children*, Cat. No. J2-377/2013E-PDF (Ottawa, 2012) at 12 [Health Impacts of Violent Victimization on Women and their Children].

<sup>33</sup> *Ibid* at 6.

<sup>34</sup> Elaine Craig, *Putting trials on trial: sexual assault and the failure of the legal profession* (Montreal: McGill-Queen's University Press, 2018) at 4.

system still does not fully understand victim-survivors' responses to sexual assault, which contributes to ongoing severe deficiencies in how the criminal justice system processes sexual assault cases.<sup>35</sup>

As described by Sam Fazio in her interview: "Saying that he was a low risk to re-offend just makes no sense to me. I think it just shows that it's OK to assault people because, like, the worst that's going to happen is you're just going to have to go sit in a detention centre for two weeks."<sup>36</sup> When outcomes of criminal trials do not fulfil victim-survivors' expectations of justice, such as what happened in Fazio's case, there is a perceived leniency in the punishment of offenders. However, I argue that, in a country where the majority of sexual assaults are not reported to police, and for those that are reported, only 1 in 10 lead to a criminal conviction,<sup>37</sup> directing energy toward getting more "victim-survivor satisfaction" by implementing changes within the system could feel counterintuitive.

I argue in this study that a justice response to victim-survivors of sexual assault does not align with carceral punitivism. Justice for many victim-survivors of sexual assault is hard to achieve in the formal criminal justice system. Legal proceedings in their current form may, in fact, be "diametrically opposed" to justice.<sup>38</sup> Accordingly, as this thesis was being edited for submission, a report delivered to the Canadian government to guide the implementation of a "National Action Plan on Violence Against Women and Gender-Based Violence" (NAP on VAW/GBV) was released to the public in mid-June 2021.<sup>39</sup> Among the report's recommendations, it highlights that responses to violence should prioritize a transformative and restorative justice approach, rather than one that is carceral or punitive.<sup>40</sup> It also asserts that restorative justice offers a collective forum that elevates the voices of the survivors, recognizes the impact of violence on communities, and allows the person who caused harm to understand the impact more fully. Further, unlike the retributive criminal justice system, the aim is restoration, rehabilitation and the healthy reintegration of all parties back into the community.<sup>41</sup> This thesis stands in line with the

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<sup>35</sup> *Ibid* at 6.

<sup>36</sup> Roumeliotis, *supra* note 2.

<sup>37</sup> Rotenberg, "Court outcomes of police-reported sexual assaults in Canada," *supra* note 5 at 3.

<sup>38</sup> Anastasia Powell, "Seeking rape justice: Formal and informal responses to sexual violence through technosocial counter-publics" (2015) 19:4 *Theor. Criminol.* 571–588 at 581.

<sup>39</sup> Canada, *A Report to Guide the Implementation of a National Action Plan on Violence Against Women and Gender-Based Violence* (Ottawa: Women's Shelters Canada, April 30, 2021), by Amanda Dale, Krys Maki & Rotbah Nitia [NAP on VAW/GBV Report].

<sup>40</sup> *Ibid* at 51.

<sup>41</sup> *Ibid* at 118.

recommendations of the report, and I too assert that there is a great need for responses, such as a transformational and restorative justice approach, that are not punitive, stigmatizing or disempowering.<sup>42</sup> I take up the call for the exploration of innovative paths to justice beginning with a consideration of restorative justice.

Restorative justice is most commonly understood as an approach to dispute resolution, a process that focuses on addressing the harm, needs and obligations caused by wrongdoing in order to heal and put things as right as possible.<sup>43</sup> The Department of Justice in Canada asserts that:

For victims, restorative justice offers individuals a meaningful voice in the process and serves several crucial human needs, including the need to be consulted and the need to be understood. In some cases, the victim may also experience satisfaction from playing a part in preventing future criminal behaviour and from receiving reparation. For offenders, the process can be therapeutic as they take responsibility for their actions and take steps to repair the harm. For community members, the process serves to humanize the criminal justice system and reduce fear of crime by providing more accurate information about offenders and crime in general. Restorative justice also provides community members with a voice in the criminal justice process. Restorative justice has been described as an empowering experience for all participants in the triad.<sup>44</sup>

There are also some strong critiques of restorative justice in cases of sexual assault, especially from feminist and Indigenous scholars, as well as scholars focused on Indigenous women's issues, which are going to be explored in Chapter 4. In this thesis, I propose to offer another way to think about restorative justice, through a perspective that combines feminist, trauma-informed, intersectional, anti-carceral and decolonial lenses and one that aims to address in a transformative way how Canadian law could deal with those who have experienced sexual assault once the law becomes a part of their lives.

I contend that a model of feminist, trauma-informed restorative justice for sexual assault cases in Canada must meet the following criteria:<sup>45</sup> a) feminist: by being aware of gender inequalities and multiple barriers to justice faced by diverse groups of people; by being victim-survivor-centred, flexible and designed according to the uniqueness, needs and goals of each

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<sup>42</sup> *Ibid* at 181.

<sup>43</sup> Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002) at 37 [Zehr, "The Little Book of Restorative Justice"].

<sup>44</sup> Canada, Department of Justice, *The Effects of Restorative Justice Programming: A Review of the Empirical*, by Jeff Latimer & Steven Kleinknecht, RR2000-16e (Ottawa: 01 January 2000) at 6.

<sup>45</sup> In Chapter 4, I discuss in depth each of these criteria I propose for a feminist, trauma-informed restorative justice theory and practice for sexual assault cases.

victim-survivor in particular while paying due attention to systemic oppressions; b) intersectional: by having awareness of how intersecting factors impact a person's experience of sexual assault; by taking action towards a more equitable response to sexual assault; c) decolonial: by promoting collective efforts to rebuild respectful relationships and communities towards reconciliation; d) trauma-informed: by aiming to create trauma precautions that reduce harm and provide positive supports for all people; and e) anti-carceral: by supporting restorative justice practices within the criminal justice system or outside it, where it is entirely a community-based response, to amplify access to justice of victim-survivors of sexual assault.

In this thesis, however, I will frame my approach as a feminist, trauma-informed theory of restorative justice for sexual assault cases. Notwithstanding, when I refer to a feminist practice of restorative justice in cases of sexual assault, I mean a theory that has intersectional and anti-carceral lenses at its foundations. When I refer to trauma-informed practice of restorative justice, I refer to a practice in sexual assault cases that must be inherently decolonial. In the context of calls for the exploration of innovative paths to justice, I focus this thesis on a justice response that aims to be transformative of the restorative justice responses to sexual assault in Canada.

### **1.3 Chapter Overview**

This introductory chapter is divided in two parts. In the first part, I provide an overview of the sexual violence and sexual assault realities in the Canadian context. I argue that sexual assault is gendered, underreported and born disproportionately by communities who face multiple barriers to justice. Given that carceral punitivism does not align with appropriate responses to sexual assault cases, I propose a different way to think about restorative justice in sexual assault cases in Canada: through feminist, intersectional, trauma-informed, anti-carceral and decolonial lenses. In the second part, I provide a chapter overview, present the research questions and gaps in the literature I aim to address and explain why I chose to focus on sexual assault committed by men against women, as well as the terminology and language choices used in this study.

In Chapter 2, I briefly survey the landscape of sexual assault, examining the history of sexual assault law and law reforms, consent law and statistical data on sexual assault in Canada. I also discuss the myths and stereotypes about women and sexual assault that are perpetuated in the Canadian criminal justice system. Given the limitations of the criminal justice system in addressing

satisfactorily the needs, harms and obligations that emerge in the aftermath of sexual assault, I assert that a justice response that may be part of the legal system or lie beyond it is needed.

In Chapter 3, I discuss my theoretical framework. I examine feminist legal theory, intersectionality, colonization and anti-carceral feminisms. I also posit that sexual assault is a traumatic experience of violence, and that understanding trauma should be integral to any response to sexual assault in Canada today. I argue that an appropriate response to gendered violence, such as sexual assault, must be feminist, trauma-informed, intersectional, anti-carceral and decolonial.

In Chapter 4, I introduce the fundamental concepts of restorative justice, explore the critiques of restorative justice in cases of sexual assault, especially from feminist scholars and scholars focused on Indigenous women's issues, and highlight the most commonly identified risks of restorative justice practices for sexual assault cases in the Canadian context. Finally, I argue that through feminist and trauma-informed lenses, that are intersectional, decolonial and anti-carceral at their roots, a restorative justice theory and practice for sexual assault cases is possible, can eliminate and/or mitigate the risks of restorative justice for gendered violence and offers a viable and transformative path to justice for victim-survivors of sexual assault who choose to pursue this route.

In Chapter 5, I identify the strengths of this study and I point out that the argument contained in this thesis is aligned with the recommendations contained in the "National Action Plan on Violence Against Women and Gender-Based Violence," which was released in mid-June 2021 in Canada, while this thesis was being edited for submission. I also address the limitations of this work and provide some suggestions for further research in the fields of sexualized violence as well as restorative and transformative approaches to gender-based violence. I end with my concluding thoughts.

#### **1.4 Research Questions and Gaps in The Literature This Study Aims to Fulfil**

To date, there is very little literature that considers practices of restorative justice for cases of sexual assault in Canada that are centered in feminisms that are intersectional and anti-carceral at their roots, and are focused on trauma-informed and decolonial responses to sexual assault. Given this gap in the literature, I have chosen to focus on a feminist, trauma-informed approach, that is intersectional, decolonial and anti-carceral at its foundations, to address some of those gaps.

With these considerations in mind, and paying attention to existing critiques, I seek to study restorative justice as a diversionary and/or complementary form of justice that improves outcomes for victim-survivors, offenders and communities affected by sexual assault. I am particularly interested in examining the “best practices” that can diminish the risks and amplify the benefits of restorative justice for sexual assault cases in a way that keeps victim-survivors and their needs central to the process and outcomes and can potentially be a transformative experience for all of those who choose this approach to justice. I situate this work in the interplay between feminist legal theory and critical research methods.

Considering the need to investigate innovative and transformative justice responses to cases of sexual assault, this study proposes to answer the following questions:

1. How is the Canadian criminal justice system still failing victim-survivors of sexual assault, despite decades of law reform? What are the impacts of myths and stereotypes on reporting, prosecuting and court outcomes of sexual assault cases?
2. What does it mean to be feminist, trauma-informed, intersectional, decolonial and anti-carceral in the context of sexual assault in Canada?
3. How can a feminist, trauma-informed practice of restorative justice in response to sexual assault cases be a transformative experience for all of those who choose this path to justice?

## **1.5 Why Research Sexual Assault Only Committed by Men Against Women?**

Sexual assault affects a large proportion of the population – with the majority of those directly experiencing such violence being women.<sup>46</sup> This study focuses on sexual assault committed against women because, while anyone could be a victim-survivor of sexual assault and/or a sexual assault offender, historically, women have been and continue to be overrepresented as victim-survivors of sexual violence and sexual assault.

In 2014, of all self-reported sexual assault incidents in Canada, the vast majority (87%) were committed against women. More specifically, women reported approximately 555,000

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<sup>46</sup> Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No. 85-002-X (Ottawa, Statistics Canada, 11 July 2017) at 3.

incidents of sexual assault in 2014, in comparison to the 80,000 incidents reported by men.<sup>47</sup> The large majority (94%) of sexual assault incidents were perpetrated by a man.<sup>48</sup> Among police-reported sexual assault rates, between 2009 and 2014, the statistics were similar: “regardless of time period, and as has been the case historically, the vast majority of victims of police-reported sexual assault were women or girls (89%).”<sup>49</sup> And nearly all (98%) persons charged by police with sexual assault were men.<sup>50</sup>

In 2016 and 2017, the police-reported sexual assaults in Canada also indicated that the age and sex profiles of victim-survivors were similar: young women and girls under 25 years old continued to experience the highest rates of police-reported sexual assault, accounting for over half of victim-survivors.<sup>51</sup> According to this survey, regardless of the time period, the vast majority of victim-survivors of police-reported sexual assault were women or girls (89%).

People of all identities and sexual orientations can experience sexual assault. People of all identities and sexual orientations can perpetrate sexual assault. Sexual assault is never justifiable. However, taking a closer look at the statistical data and findings in the surveys analyzed in this section and further in this thesis, sexual assaults committed by men against women are by far the most prevalent form of sexual violence.

Because sexual assault is a consequence of systemic gendered violence perpetrated against women, rooted in interconnecting systems and structures of power that produce intersecting forms of privilege and oppression shaped by colonialism, racism, homophobia, ableism, patriarchy, transphobia, queer antagonism, transgender antagonism, bisexual antagonism, and/or any other form of discrimination,<sup>52</sup> I chose to focus this study on sexual assault committed against women given that it reflects the reality that sexual violence is gendered.

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<sup>47</sup> *Ibid.*

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

<sup>49</sup> In 2016 and 2017, data from police services covered 99% of the population of Canada. Incidents were based on Uniform Crime Reporting (URC) microdata for pre- and post- #MeToo periods as defined by that study and did not match data from CANSIM tables as these capture annual aggregate-based data. See more at: Statistics Canada, *Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017*, by Cristine Rotenberg & Adam Cotter, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 8 November 2018).

<sup>50</sup> Between 2009 and 2014, data from police services covered 99% of the population of Canada. Incidents were based on pooled URC micro-data for each individual year and will not match data from CANSIM tables as these capture aggregate-based data. See more at: Statistics Canada, *Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile*, by Cristine Rotenberg, Catalogue no. 85-002-X (Ottawa: Statistics Canada, 3 October 2017) at 20 [Rotenberg, “Police-reported sexual assaults in Canada”].

<sup>51</sup> *Ibid.*

<sup>51</sup> Rotenberg & Cotter, *supra* note 49 at 3.

<sup>52</sup> Sexualized Violence Prevention and Response Policy – 2021, *supra* note 4 at 2.

## 1.6 Terminology and Language Choices

I argue that there are philosophical differences between the use of the terms “victim” and “survivor” of sexual assault or sexual violence. On the one hand, police, law enforcement and the criminal justice system often use the term victim to refer to someone that has experienced violence and crime. The use of victim terminology is criticized, especially by the anti-violence sector, because of the various ways it stigmatizes, disempowers and negatively labels someone’s experience.<sup>53</sup> According to legal scholar Melanie Randall, the images and associations that the “victim” category conjures may collide with the ways in which many women cope with traumatic experiences of sexual intrusion, which might involve either minimizing the experience or blaming themselves to some extent, if not entirely, for what occurred.<sup>54</sup> In this context, psychology and criminology scholar Jo-Anne Wemmers asserts the following:

A woman who labels herself as a victim of sexual violence faces social costs. Society tends to devalue someone identified as a victim because of the associated negative connotations of suffering and sacrifice. Some people, especially victims of sexual assault, prefer instead the term survivor, which is widely considered to be a more positive label. [...] The process of labelling a person as a victim and assigning him or her the role of victim can be described as a communication process between the victim and representatives of society. It is also important to appreciate that interpreting an experience as victimization is subjective. According to Christie, victims and victimizations exhibiting specific characteristics are considered ideal by society at large and are more readily granted the full and legitimate status of being a victim. Sexual assault is particularly associated with numerous myths and stereotypes, such as real or legitimate rape versus less legitimate or - worse - invited rape.<sup>55</sup>

Even though the term victim is commonly used to refer to someone who has experienced crime, its use in the context of sexual assault is often criticized for negatively labeling and/or stigmatizing people who were sexually assaulted.

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<sup>53</sup> “Victim or Survivor: Terminology from Investigation Through Prosecution” (accessed 30 June 2021), online (pdf): *SAKI Sexual Assault Kit Initiative* <[sakittastage.rti.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf](http://sakittastage.rti.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf)> [perma.cc/2ZRU-TZ9C] at 2 [SAKI Sexual Assault Kit Initiative].

<sup>54</sup> Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22 *Can J Women & L* 397 398–433 at 407-408 [Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’”].

<sup>55</sup> *Judging Victims: Restorative choices for victims of sexual violence*, by Jo-Anne Wemmers, *Victims of Crime Research Digest 2017 - Issue 10*, Catalogue No. J12-3E-PDF (Ottawa: Department of Justice, 2017) at 12.

On the other hand, the term survivor is commonly used by the anti-violence sector, usually to refer to a person that is going through or has gone through their healing process. The term survivor is also used when discussing the short- and long-term effects of sexual violence.<sup>56</sup> Restorative justice practitioner Taryn Burgar asserts that there has been a push in the anti-violence sector, which includes sexual assault centres, transition house programs and feminist organisations, to refer to victims of sexual assault as “survivors,” as being referred to as a “victim” can add to feelings of disempowerment after a sexual assault.<sup>57</sup> Burgar also claims:

‘Sexual assault survivor’ is now often used in place of ‘sexual assault victim’ when referring to an individual who has been sexually assaulted. The gradual shift in terminology from victim to survivor was motivated by the fact that the term survivor denotes a sense of newfound power and strength in recovery. An issue with declaring survivor as the default label, though, is that not everyone who has been sexually assaulted finds that the word survivor accurately encaptures their individual experience. Although the difference between survivor versus victim can appear inconsequential on the surface, the labels and categories that society assigns hold immense significance.<sup>58</sup>

Survivor is the term preferred by the anti-violence sector to refer to someone who experienced sexual assault. However, the switch from victim to survivor is also criticized because sometimes the term victim could also serve as a status that provides validation of one’s experience under the criminal justice system and certain rights under the law. Kate Harding, for example, who was sexually assaulted when she was 17 years old posits:

What’s wrong with being a victim? Obviously, becoming a victim is undesirable. We don’t wish for bad things beyond our control to come along and interfere with our plans. But once the bad thing has happened, why are we so allergic to using the simplest, most accurate language to describe the condition of being post–bad thing? I had been violated without being in fear for my life, ergo I was far more accurately termed a ‘victim’ than a ‘survivor.’ That part was simple enough. The complicated part was that many other people who had been raped preferred survivor and found victim actively insulting.<sup>59</sup>

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<sup>56</sup> SAKI Sexual Assault Kit Initiative, *supra* note 53 at 1.

<sup>57</sup> Taryn Burgar, *Restorative Justice and Sexual Assault: Canadian Practitioner Experiences* (Master of Arts, University of Victoria, 2018) [unpublished] at 18.

<sup>58</sup> Kathryn Augustine, “The difference between ‘victim’ and ‘survivor’” (13 May 2019), online: *The Daily Northwestern* <[dailynorthwestern.com/2019/05/13/lateststories/augustine-the-difference-between-victim-and-survivor/](http://dailynorthwestern.com/2019/05/13/lateststories/augustine-the-difference-between-victim-and-survivor/)> [perma.cc/9BEK-T9FQ].

<sup>59</sup> Kate Harding, “I’ve been told I’m a survivor, not a victim. But what’s wrong with being a victim?” (27 February 2020), online: <[time.com/5789032/victim-survivor-sexual-assault/](http://time.com/5789032/victim-survivor-sexual-assault/)> [perma.cc/LL22-7MFV]

There are people who prefer to be described as a victim when discussing their sexual assault, such as Harding, as they do not feel like a survivor of sexual assault; they feel as though they have been victimized and that must be recognized by others.<sup>60</sup> In this regard, Wemmers asserts:

To become a survivor, one must first suffer victimization. As soon as an individual defines the event as a crime, she or he seeks recognition and validation from others, and this becomes an important part of the recovery process. Being a victim is not a permanent state, however, and it is only after recognition of the victimization that recovery begins.<sup>61</sup>

In this study, I argue that the best response is to allow the person who has been sexually assaulted to decide what term, if any, best defines their experience. For the purpose of this research, however, I have opted to use the term “victim-survivor” to refer to the person who has been sexually assaulted. When discussing the criminal justice system and jurisprudence, I might also use the term “complainant” to refer to victim-survivors of sexual assault, and the terms “accused,” “offender,” and “perpetrator” to refer to the person who committed the sexual assault.

The term “sexual assault” has been chosen in this thesis over “rape.” Rape has not been listed as a criminal offence in the *Criminal Code* since amendments made in 1983. In the past, the term “rape” was used in the context where a man was always the perpetrator, and the woman was always the victim. Currently, Canadian criminal law has enacted a broad definition of sexual assault that will be explored further in the next chapter.

### **1.7 Appropriate Justice Response for Sexual Assault Victim-Survivors: Feminist, Trauma-Informed Restorative Justice Approach**

Sam Fazio was only 17 years-old when she was sexually assaulted at a school dance in Vancouver, Canada. Fazio did not get the justice response she expected from the criminal justice system. In her words:

With my case, I don’t know how many witnesses there were, but there was maybe like 10. And so much evidence and blood and everything. But there was pretty much no repercussions for what he did. I don’t think it sends a good message out to anybody.

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<sup>60</sup> Burgar, *supra* note 57 at 20.

<sup>61</sup> Wemmers, *supra* note 55 at 12.

And I think for other survivors, to them it's like well, why would they do anything if they're going to get treated like this?<sup>62</sup>

Currently, as mentioned in the beginning of this chapter, victim-survivors of sexual assault in Canada have basically two options: 1) report their assault to police and eventually face a criminal justice system that very likely will retraumatize and harm them in so many ways; or 2) do nothing. In order to propose a transformative approach to restorative justice practices for sexual assault cases, I rely primarily on secondary sources and first-person narratives (victim-survivors' stories) and I examine the extensive literature on sexual violence, sexual assault and restorative justice in Canada. I explore aspects of law, legal practice and jurisprudence on sexual assault cases and engage with sexual assault reports, restorative justice materials and critiques of sexualized violence.

In the next chapter, I survey the landscape by analysing the main sexual assault law reforms and developments in Canada in the last decades and explore how the myths and stereotypes about women and sexual assault are still prevalent in the criminal justice system, despite the rape shield provisions. In the remaining chapters of this study, I explore the issues of intersectionality, colonialism, anti-carceral practices and the role of trauma and trauma-informed practices in cases of sexualized violence. Finally, I propose another way to think about restorative justice in relation to sexual assault in Canadian law through feminist and trauma-informed lenses.

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<sup>62</sup> Roumeliotis, *supra* note 2.

## CHAPTER 2 – SURVEYING THE LANDSCAPE: SEXUAL ASSAULT LAW AND PRACTICE IN CANADA

Finding a viable and transformative response to sexual assault cases is central to improving access to justice for victim-survivors, offenders and communities affected by sexual assault. I argue that a feminist, trauma-informed practice of restorative justice, one that is intersectional, anti-carceral, and decolonial at its foundation might be an appropriate justice option. To begin to make this argument, I briefly survey the landscape of the sexual assault realities in the context of the Canadian criminal justice system. In this chapter, I examine sexual assault law reform in Canada, including relevant jurisprudence, consent, sexual assault statistics on prosecution and defence of sexual assault, and provide an analysis of the relevance of intersectional identities. I do not provide a complete history of the development of sexual assault laws in Canada but rather focus on developments that are most relevant to this study. I assert that given the limitations of the criminal justice system in addressing satisfactorily the needs, harms and obligations that emerge in the aftermath of sexual assault, a transformed restorative justice practice can provide a valuable terrain where a feminist, intersectional, trauma-informed, anti-carceral, decolonial approach to dealing with sexual assault is possible.

### 2.1 Sexual Assault: A Brief Overview of the History of the Provision, Law and Legal Practice in Canada

Over the years, an important success of women's movements and feminists' endeavours in Canada has been bringing the significant problem of violence against women into public awareness and popular discourse.<sup>63</sup> Since the *Canadian Charter of Rights and Freedoms* was enacted in 1982, sexual assault law in Canada has undergone significant changes.<sup>64</sup> Although the *Charter* may not have figured prominently in this initial stage of the law's transformation, it has played an important role in subsequent developments.<sup>65</sup> In 1982, for example, the *Criminal Code* included the offence

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<sup>63</sup> Melanie Randall, Jennifer Koshan & Patricia Nyaundi, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford: Hart Publishing) at 3.

<sup>64</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24) [the *Charter*].

<sup>65</sup> Martha Shaffer, "The Impact of the Charter on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Môme Chose" (2012) 57: Article 15 SCLR 337-354 at 339.

of “rape,”<sup>66</sup> which was defined as sexual intercourse committed by a man against a woman – who was not his wife - without consent.<sup>67</sup> That meant that crimes of sexual assault were gender specific<sup>68</sup> and men were immune from the criminal consequences of sexually assaulting their wives. Prior to 1983, victim-survivors were also required to make a timely complaint following the incident to be believed<sup>69</sup> and their sexual history could also be used to question credibility and to imply that the sexual activity was consensual. Further, a conviction required corroboration by a third person.<sup>70</sup>

In 1983, however, feminist engagement with criminal law to constrain the influence of rape myths<sup>71</sup> gained momentum with the enactment of Bill C-127. Sociology scholar Gillian Balfour and psychology scholar Janice Du Mont asserted that at that time, Canadian feminist initiatives included provision of core funding for rape crisis centres, commissioning the largest-ever national telephone survey on violence against women and the creation of the Canadian Panel on Violence Against Women (1993).<sup>72</sup> Balfour and Du Mont also claim that in the legal context, feminist lawyers, scholars and activists, such as Martha R. Burt, argued that institutional responses by the state to sexual violence had been framed by rape mythologies drawn from a wider patriarchal culture.<sup>73</sup> Bill C-127 introduced sexual assault reforms that replaced the category of rape in the

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<sup>66</sup> *Criminal Code*, *supra* note 18 at s. 143.

Rape

143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,

- (a) without her consent, or
- (b) with her consent if the consent
  - (i) is extorted by threats or fear of bodily harm,
  - (ii) is obtained by personating her husband, or
  - (iii) is obtained by false and fraudulent representations as to the nature and quality of the act. 1953-54, c. 51, s. 135.

<sup>67</sup> “Consent is the legal dividing line between wanted and unwanted sexual contact. As such, it is a critically important legal term of art. Yet despite statutory attempts to delineate its boundaries, its meaning is elusive, complex and inextricably bound up with social attitudes and expectations about sexual and gender relationships. In the absence of consent, voluntarily and freely given, sexual contact is criminal. This is the case regardless of the nature of the relationship between the parties.” See more at: Melanie Randall, “The Treatment of Consent in Canadian Sexual Assault Law” (October 2011), online (pdf): *The Equality Effect* <[theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Canada-MR.pdf](http://theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Canada-MR.pdf)> [perma.cc/LJ4K-WN2Z] at 1 [Randall, “The Treatment of Consent in Canadian Sexual Assault Law”]

<sup>68</sup> *Ibid* at 13.

<sup>69</sup> Conroy & Cotter, *supra* note 46 at 6.

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

<sup>71</sup> Gillian Balfour & Janice Du Mont, “Confronting Restorative Justice: in Neo-Liberal Times: Legal and Rape Narratives in Conditional Sentencing” in *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, ed by Elizabeth A Sheehy (Ottawa: University of Ottawa Press, 2012) ch 27 701-724 at 705.

<sup>72</sup> *Ibid* at 704.

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

*Criminal Code* for three categories of sexual assault offences: sexual assault, sexual assault with a weapon or threatened violence and aggravated sexual assault, ss. 271, 272 and 273 of the *Criminal Code*. The justification for this change was set out in a Statistics Canada study in 2003:

In Bill C-127, the crimes of rape and indecent assault were replaced. The aim of the new structure was to reduce the stigma associated with reporting sexual assault by focusing on the violent rather than the sexual nature of the offence, as well as to create a gender-neutral definition. The new legislation also eliminated spousal immunity and restricted the admissibility of evidence about the complainant's prior sexual history.<sup>74</sup>

In this sense, Bill C-127 abolished the offence of rape and replaced it with the offences of sexual assault. The *Criminal Code* currently does not provide a definition of sexual assault, but in 1987, the Supreme Court of Canada ("SCC"), in *R. v. Chase*,<sup>75</sup> interpreted that an assault of a sexual nature, viewed objectively, is one that violated the sexual integrity of the victim, capturing all non-consensual sexual activity ranging from fondling to penetration.<sup>76</sup>

Some of the issues involved in the developments of sexual assault law in the Canadian context such as admissibility at trial of victim's sexual history,<sup>77</sup> consumption of alcohol or other drugs,<sup>78</sup> difficulty of proving in practice the difference between forced and consensual sexual activity<sup>79</sup> found their way to the SCC. This paved the way for the critical decision in *R. v. Seaboyer*<sup>80</sup> when in 1992 the SCC reviewed the question of whether evidence about the complainant's sexual history, offered by the defence, should be excluded on the basis that its prejudicial effect outweighed its probative value on the question of whether the complainant was truthful or not. At common law, a trial judge has the power to exclude otherwise admissible evidence on the ground that its prejudicial effect exceeds its probative value.<sup>81</sup> The background in *R. v. Seaboyer* is that the accused was charged with the sexual assault of a woman with whom he had been drinking in a bar. At the preliminary inquiry, the judge refused to allow the accused to cross-examine the complainant on her sexual conduct on prior occasions. The defence contended

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<sup>74</sup> Statistics Canada, *Sexual offences in Canada, 2003*, by Rebecca Kong et al, Catalogue no. 85-002-XIE, Articles and reports: 85-002-X20030068425 (Ottawa: Statistics Canada, July 25, 2003), Archived.

<sup>75</sup> *R. v. Chase*, [1987] 2 SCR 293 at para 11.

<sup>76</sup> Conroy & Cotter, *supra* note 46 at 6.

<sup>77</sup> Goldfinch, *supra* note 29 at para 1.

<sup>78</sup> J.A., *supra* note 30.

<sup>79</sup> Seaboyer, *supra* note 31.

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

<sup>81</sup> Stewart, *supra* note 28 at 95.

that he should have been permitted to cross-examine her on other acts of sexual intercourse, which may have caused bruises and other aspects of the complainant's condition, which the Crown had put in evidence. The defence argued that such evidence was relevant to consent since it might provide other explanations for the physical evidence tendered by the Crown in support of the use of force against the complainant. The defence was trying to suggest that prior sexual conduct was evidence that the complainant was actually the aggressor in this case, not a nonconsenting complainant.

In *R. v. Seaboyer*, the SCC was required to examine the constitutionality of ss. 276 and 277 of the *Criminal Code*, known then as the "rape shield" provisions.<sup>82</sup> The term "rape-shield" has been criticized on the ground that the provisions are not, in fact, "a shield"; they do not prevent the harm from happening. Instead, these rules were designed to shield a complainant from the rigours of cross-examination at trial. More specifically, these two sections were enacted to restrict the right of the defence at trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on other occasions.<sup>83</sup> Sections 276 and 277 of the *Criminal Code* posit that evidence that the complainant has engaged in prior sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or is less worthy of belief. The primary purpose of the enactment of the rape-shield provisions was to alter old common law rules, which permitted evidence of the victim-survivors' past sexual conduct, which was of little probative value and was likely to mislead the jury.<sup>84</sup>

The judgments of Justice McLachlin J. and Justice L'Heureux-Dubé J. in *R. v. Seaboyer* are relevant to whether evidence about the complainant's sexual history, offered by the defence, should be excluded on the basis that its prejudicial effect outweighs its probative value. Justice McLachlin J. (as she then was), for the majority, concluded the following:

My conclusion is that one of the sections in issue, s. 276, offends the *Charter*. While its purpose - the abolition of outmoded, sexist-based use of sexual conduct evidence - is laudable, its effect goes beyond what is required or justified by that purpose. At the same time, striking down s. 276 does not imply reversion to the old common law rules,

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<sup>82</sup> *Criminal Code*, *supra* note 18 at ss. 276 and 277.

<sup>83</sup> Stewart, *supra* note 28 at 96.

<sup>84</sup> *Ibid* at 99.

which permitted evidence of the complainant's sexual conduct even though it might have no probative value to the issues on the case and, on the contrary, might mislead the jury. Instead, relying on the basic principles that actuate our law of evidence, the Courts must seek a middle way that offers the maximum protection to the complainant compatible with the maintenance of the accused's fundamental right to a fair trial.<sup>85</sup>

Justice L'Heureux-Dubé, dissenting, asserted the following:

Absolutely pivotal to an understanding of the nature and purpose of the provisions and constitutional questions at issue in this case is the realization of how widespread the stereotypes and myths about rape are, notwithstanding their inaccuracy. Whatever the test of relevance, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. The content of any relevancy decision will be filled by the particular Judge's experience, common sense or logic. This area of the law has been particularly prone to the utilization of stereotype and myth. Once the mythical bases of relevancy determinations in this area are revealed, the irrelevance of most evidence of prior sexual history is clear. Nevertheless, Parliament has provided broad avenues for its admissibility in the setting out of the exceptions to the general rule in s. 276. Moreover, all evidence of the complainant's previous sexual history with the accused is *prima facie* admissible under those provisions. Evidence that is excluded by these provisions is simply, in a myth- and stereotype-free decision-making context, irrelevant. The literature and case law in this area abound with examples of the supposed relevant evidence that is excluded by s. 276. For the most part, however, the 'relevant' evidence provided in these examples is, on a principled inquiry, irrelevant; any semblance of relevance depends in large measure upon acceptance of stereotype about women and rape. One hesitates to construct an argument around the speculative scenarios offered. Many of the scenarios are pure fantasy and have absolutely no grounding in life or experience.<sup>86</sup>

In summary, the SCC concluded that s. 276 offended the *Charter*, and suggested guidelines for the reception and use of sexual conduct evidence.<sup>87</sup> This decision showcases how the Canadian

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<sup>85</sup> Seaboyer, *supra* note 31 at para 2.

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

<sup>87</sup> Guidelines at Seaboyer, *supra* note 31 at para 106:

"I would summarize the applicable principles as follows:

1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:

- (a) more likely to have consented to the sexual conduct at issue in the trial;
- (b) less worthy of belief as a witness.

2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant, where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence.

By way of illustration only, and not by way of limitation, the following are examples of admissible evidence:

criminal justice system admitted irrelevant evidence of the complainant's sexual history and reasserted embedded mythical and stereotypical assumptions about women and sexual assault. In response, Parliament passed Bill C-49 in 1992.<sup>88</sup> Bill C-49 codified the rape shield provisions that met the Court's demand for judicial discretion with regard to consideration of evidence of the complainant's sexual history.<sup>89</sup> Balfour and Du Mont claim that subsequently to Bill C-49, "defense lawyers continued to challenge the constitutionality of the revised rape shield statute, oftentimes doing an 'end run' around restrictions on sexual history evidence by using third-party and confidential records of therapists or counsellors."<sup>90</sup> In other words, despite the enactment of Bill C-49, irrelevant evidence of complainant's sexual assault history was still being admitted at trial after the enactment of Bill C-49.

Throughout the years, there have also been developments in sexual assault law in Canada regarding consent. Bill C-49 codified a legal definition of consent along with the reasonable steps to be taken to ascertain consent to sex.<sup>91</sup> Randall asserts that one of the most significant achievements of feminist law reform in the area of sexual assault is the shift to an affirmative consent standard in Canadian criminal law pertaining to sexual assault, and, in particular the establishment of the "reasonable steps" provision.<sup>92</sup> Randall points out that,

This provision places an onus on an accused who raises a consent defence to a sexual assault charge, to adduce evidence to demonstrate what reasonable steps were taken to

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(A) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;

(B) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant;

(C) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused believed that the complainant was consenting to the act charged (without laying down absolute rules, normally one would expect some proximity in time between the conduct that is alleged to have given rise to an honest belief and the conduct charged);

(D) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness;

(E) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.

3. Before evidence of consensual sexual conduct on the part of the victim is received, it must be established on a *voir dire* (which may be held in camera) by affidavit or the testimony of the accused or third parties, that the proposed use of the evidence of other sexual conduct is legitimate."

4. Where evidence that the complainant has engaged in sexual conduct on other occasions is admitted in a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit.

<sup>88</sup> Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38.

<sup>89</sup> Balfour & Du Mont, *supra* note 71 at 705.

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

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

<sup>92</sup> Randall, "The Treatment of Consent in Canadian Sexual Assault Law," *supra* note 67 at 17.

ascertain that the complainant was consenting to the conduct which is the subject of the criminal charge. Without this evidence before the Court, which the trier of fact must find persuasive in order to allow the defence, the accused can not claim that he ‘honestly but mistakenly’ believed that the complainant consented to the sexual touching which is the subject of the charge.<sup>93</sup>

The *Criminal Code* defines consent in s. 273.1(1) as the voluntary agreement of the complainant to engage in the sexual activity in question. It means that consent is required for “each and every sexual act,” at the time it occurs, with the particular person involved, and that consent may be revoked at any time.<sup>94</sup> Subsection 273.1(2) sets out specific situations where there is no consent in law; and where no consent is obtained:

**Where belief in consent not a defence**

**273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused’s belief arose from
  - (i) the accused’s self-induced intoxication,
  - (ii) the accused’s recklessness or wilful blindness, or
  - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- (c) there is no evidence that the complainant’s voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

In other words, section 273.2 limits the scope of the defence of honest belief in consent to sexual activity by providing that the defence is not available where the accused’s belief arose from the accused’s self-induced intoxication, or where the accused’s belief arose from the accused’s recklessness or willful blindness or where the accused failed to take reasonable steps to ascertain whether the complainant was consenting.<sup>95</sup>

In 1999, *R. v. Ewanchuk*<sup>96</sup> was the most prominent case in Canadian jurisprudence for clarifying legal interpretations of consent and addressing myths and stereotypes about women and sexual assault:

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<sup>93</sup> *Ibid.*

<sup>94</sup> Ontario, “Legislative Summary of Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act” by Lyne Casavant et al, Publication No. 42-1-C51-E at 15 (Ottawa: Library of Parliament, 2018) [Legislative Summary of Bill C-51]

<sup>95</sup> Canada, Department of Justice, *A Definition of Consent to Sexual Activity* (Ottawa: January 7, 2015).

<sup>96</sup> *R. v. Ewanchuk*, 1999 SCC 711 [Ewanchuk].

Whether or not consent was, in fact, given in a particular case is judged subjectively from the complainant's point of view at the time the touching was occurring. As the Supreme Court explained in *R. v. Ewanchuk*, in the context of sexual assault, "consent" means that the complainant in her mind wanted the sexual touching to take place.' This is the physical element, or *actus reus*, of the offence. Canadian criminal law also requires the Crown to prove that the accused intended to commit a crime; that is to say, that the accused had a guilty mind. In the case of sexual assault, the accused must have intended to do sexual acts in question without the complainant's consent. This is the mental element of an offence, or the *mens rea*. Accused persons may argue in defence that they had an honest but mistaken belief that the complainant consented to the sexual acts in question. However, the Code specifies that this defence will not apply to accused persons who believed the complainant consented as a result of their own self-induced intoxication, recklessness, wilful blindness, or failure to take reasonable steps to find out whether the complainant consented.<sup>97</sup>

In *R. v. Ewanchuk*, the issue at trial was to whether consent had been provided. Ewanchuk<sup>98</sup> was accused of sexually assaulting a seventeen-year-old woman half his age and half his size.<sup>99</sup> In this case, as the intimacy of the touching between complainant and accused escalated, the complainant said "no" three times. Each time the accused immediately stopped, but then resumed sexual contact. The trial judge found that the complainant was afraid that any resistance would cause him to become violent throughout the encounter and did not consent, in her mind, to the sexual touching. However, since she did not communicate her fear, the accused was acquitted based on the defence of implied consent.

In *R. v. Ewanchuk*, the trial judge accepted the complainant's testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as 'implied consent'. The Court of Appeal upheld that acquittal: McClung J.A. concluded that the facts underlying the finding of implied consent established the accused's lack of intent to commit assault. Noting that the complainant did not present herself "in a bonnet and crinolines,"<sup>100</sup> he found the accused's advances "far less criminal than hormonal."<sup>101</sup>

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<sup>97</sup> Legislative Summary of Bill C-51, *supra* note 94.

<sup>98</sup> The accused and complainant met in his van in order to complete a job interview. The accused then invited the complainant to see some of his work, which was in a trailer hitched to the van. Upon entering the trailer, he closed the door behind them in a way that made her think he had locked it. The complainant said that she became afraid at this point. See more at Ewanchuk, *supra* note 96 at paras 1-4.

<sup>99</sup> Constance Backhouse, "The Chilly Climate for Women Judges: Reflections on the Backlash from the Ewanchuk Case" (2003) 15:1 CJWL 167-93 at 168 [Backhouse, "The Chilly Climate for Women Judges"].

<sup>100</sup> Ewanchuk, *supra* note 96 at para 88.

<sup>101</sup> *Ibid* at para 92.

The Chief Justice Fraser C.J., dissenting, found that the trial judge erred in law in equating non-disclosure with “implied consent,” and his conclusion that the Crown had not proven lack of consent was based on a fundamental misunderstanding of the meaning of “consent.” The Crown appealed.

Nonetheless, the SCC asserted that there is no defence of implied consent to sexual assault in Canadian law. Legal historian Constance Backhouse claimed that the public furor that accompanied the release of Justice L’Heureux-Dubé J.’s SCC decision in *R. v. Ewanchuk* in 1999 was both extreme and unprecedented.<sup>102</sup> At the SCC, Justice L’Heureux-Dubé, asserted in her reasons:

This case was not about consent, since none was given. It is about myths and stereotypes. The trial judge believed the complainant but gave no legal effect to his conclusion that she submitted to sexual activity out of fear that the accused would apply force to her. Section 265(3) states that no consent is obtained where the complainant ‘submits or does not resist’ by reason of the application of force, threats, or fear of the application of force. Major J. unduly restricted the application of s. 265(3) to cases where the complainant chooses ‘to participate in, or ostensibly consent to, the touching in question.’ It should also apply where the complainant is silent or passive in such situations.<sup>103</sup>

The application of s. 265(3) requires an entirely subjective test. If a complainant subjectively felt fear, that must lead to a legal finding of absence of consent. Although the trial judge found the complainant credible, he did not take ‘no’ to mean she did not consent. Rather, he concluded that she implicitly consented and the Crown failed to prove lack of consent. This conclusion was a fundamental error derived from mythical assumptions that when a woman says ‘no,’ she is really saying ‘yes,’ ‘try again,’ or ‘persuade me.’ It denies women’s sexual autonomy and implies that women are in a state of constant consent to sexual activity.<sup>104</sup>

On appeal, McClung J.A. compounded that error by relying on myths and stereotypes about sexual assault. His comments reinforced the myth that a complainant who is not of ‘good’ moral character is less worthy of belief, invited the sexual assault, or signaled probable consent because of her sexual experience. By using inappropriate language such as ‘romantic’ to describe the assault, he minimized the importance of the accused’s conduct and the reality of sexual aggression against women. Complainants should be able to rely on a system free from myths and stereotypes about sexual assault, and a judiciary whose impartiality is not compromised by biased assumptions. [...] It is part of the role of this Court to denounce this kind of language, unfortunately

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<sup>102</sup> Backhouse, “The Chilly Climate for Women Judges,” *supra* note 99 at 167.

<sup>103</sup> Ewanchuk, *supra* note 96 at para 82-86.

<sup>104</sup> *Ibid* at paras 85-86.

still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.<sup>105</sup>

The SCC allowed the Crown's appeal, registered a conviction and sent the matter back to the trial judge for sentencing.

According to Backhouse, Justice L'Heureux-Dubé's decision seems to have inspired McClung J. to fury.<sup>106</sup> Backhouse argues as follows:

In what has been described as an 'unprecedented and unparalleled personal attack,' McClung J. published an open letter in the *National Post* in which he attacked L'Heureux-Dubé J. for 'feminist bias' and a 'graceless slide into personal invective.' In a breathtakingly illogical assertion, he wagered that her 'personal convictions... delivered again from her judicial chair' could be responsible for the 'disparate (and growing) number of male suicides being reported in the Province of Quebec.' This letter eventually resulted in a written reprimand against McClung J. from the Canadian Judicial Council.<sup>107</sup>

Regarding this case, Backhouse asserts that press articles deflected the responsibility away from Ewanchuk for the crime of sexual assault, blamed the victim and resorted to reciting the very myths and stereotypes that the SCC had ruled were no longer applicable to Canadian law.<sup>108</sup> Further, the newspapers at that time also published voluminous, relentless personal attacks on L'Heureux-Dubé J., who was explicitly derided as a feminist.<sup>109</sup> In other words, the media coverage at *R. v. Ewanchuk* reproduced the same myths and stereotypes that the SCC had ruled were no longer applicable. Backhouse asserts further that L'Heureux-Dubé J.'s *Ewanchuk* decision was lambasted as dead wrong by some and the gold standard in sexual assault jurisprudence by others, and that no other SCC Justice had ever been so publicly vilified and positively extolled at the same time.<sup>110</sup>

In summary, *R. v. Ewanchuk* is a pivotal case for defining that there is no defence of "implied consent" to sexual assault. This case is also the authority for the discussion about myths and stereotypes about women and sexual assault in the prosecution of sexual assault in Canada. Those myths and stereotypes are still present in the criminal justice system to this day, despite law reforms and rape shield provisions. A different approach to sexual assault is necessary and I

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<sup>105</sup> *Ibid* at para 88-102.

<sup>106</sup> Backhouse, "The Chilly Climate for Women Judges," *supra* note 99 at 171.

<sup>107</sup> *Ibid* at 171.

<sup>108</sup> *Ibid* at 172.

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

<sup>110</sup> Constance Backhouse, *Claire L'Heureux-Dubé: A Life*, Law and society series (Vancouver: UBC Press, 2017) at 19.

maintain that a transformed way to think about restorative justice for sexual assault cases, through feminist and trauma-informed lenses, has the potential to offer the much-needed alternative path to justice for victim-survivors of sexual assault.

Throughout the years, there have been many sexual assault law reform initiatives in Canada, many of them the result of feminist advocacy, including the ones discussed above such as the criminalization of marital rape with Bill C-127, limitations on admissibility at trial of victim-survivor's sexual history<sup>111</sup> and clarifications of legal interpretations of consent.<sup>112</sup> It is undeniable that decades of feminist legal activism successfully challenged pernicious strategies that exploit women's sexual histories, opposed a criminal justice system steeped in myths and stereotypes about sexual assault and addressed some of the gendered inequalities, particularly in the context of sexual assault.

In this study, however, I argue that incarceration as a promoter of safety and retribution as the only means to “punish” the wrongdoing in cases of sexual assault in Canada does not align with an adequate response to gendered violence. In establishing improved criminal justice system responses to gendered violence, Randall asserts:

Developing better and more humane ways of understanding and responding to the social problem of violence against women and children has animated several decades of feminist scholarship and activism. Indeed, directly flowing from feminist legal and social advocacy, significant victories have been achieved in establishing improved criminal justice system responses to gendered violence. To name just a few, these include: reform to sexual assault law, evidentiary protections to guard against the excesses of traditional victim blaming techniques and rape myths, mandatory charging and prosecution in domestic violence cases, the development of specialized domestic violence courts, and enhanced civil remedies such as restraining orders for domestic violence. Yet these victories, important as they are, can arguably be characterized as tinkering around the edges of legal system that remains profoundly unresponsive to the needs of women who are harmed by sexual and physical violence.<sup>113</sup>

Year after year, despite the many sexual assault law reforms in Canada, the retributive logic of the criminal justice system showcases its inability to address satisfactorily the needs, harms and obligations that emerge in the aftermath of sexual violence. The criminal justice system is not able

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<sup>111</sup> Goldfinch, *supra* note 29 at para 1.

<sup>112</sup> Seaboyer, *supra* note 31.

<sup>113</sup> Melanie Randall, “Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law” (2013) 36:2 Dal LJ 461-499 at 463 [Randall, “Restorative Justice and Gendered Violence?”].

to process sexual assault cases in a way that protects and empowers victim-survivors and causes no harm. Further, a huge filtering process exists<sup>114</sup> and sexual violence remains both underreported and under-prosecuted in the Canadian context.<sup>115</sup> Victim-survivors continue to express dissatisfaction with how police and courts handle their cases and with their experience of the trial process,<sup>116</sup> and most victim-survivors never see their perpetrators held accountable.<sup>117</sup> In the following section, I explore and analyze statistics regarding the realities of sexual assault in Canada, including statistics pertaining to women who face multiple barriers to justice, in order to understand if the solution to these issues may be part of the legal system or lie beyond it. Further, in Chapter 3, I examine more closely the intersectional issues related to women and sexual assault.

## **2.2 Statistical Data on Sexual Assault in Canada**

In order to analyse the extent and prevalence of sexual assault cases in Canada, I start this section by exploring aspects of intersectionality and sexual assault and analyzing racialized data to better understand the multiple barriers to justice experienced by certain groups of people, particularly in the context of sexual assault cases. Further, I explore the most recent statistical data on the reporting, prosecution and conviction rates of sexual assault cases in order to highlight some of the issues faced by victim-survivors of sexual assault within the criminal justice system and to showcase why a transformed way to think about restorative justice for sexual assault cases is necessary today.

### **2.2.1 Intersectional and Racialized Data on Sexual Assault Cases**

As pointed out in Chapter 1, and will be analyzed more fully in Chapter 3, certain groups of people are at a higher risk of sexual assault in Canada. A survey on gender-based violence and unwanted

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<sup>114</sup> *Ibid* at 468.

<sup>115</sup> Sarah Deer, “The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence” (2019) 28:3 *Kan JL & Pub Pol’y* 505–526 at 514.

<sup>116</sup> Kathleen Daly, “Conventional and innovative justice responses to sexual violence” (2011) ACSSA Issues No. 12 (Melbourne: Australian Centre for the Study of Sexual Assault) 1-35 at 1 [Daly, “Conventional and innovative justice responses to sexual violence”].

<sup>117</sup> Deer, *supra* note 115 at 505.

sexual behaviour conducted in 2018 in Canada,<sup>118</sup> for example, found that individuals who identify with more than one sexual minority<sup>119</sup> group were among the most likely to be the target of gender-based violence.<sup>120</sup> Nearly two-thirds (62%) of 2SLGBTQQIA people living with a disability experienced inappropriate sexual behaviour in 2018, and by comparison, this was the case for 43% of 2SLGBTQQIA people with no disability, 33% of those with a disability who were not 2SLGBTQQIA and 20% of non-2SLGBTQQIA individuals who had no disability.<sup>121</sup>

According to a survey conducted in 2014 on the victimization of Indigenous peoples in Canada, Indigenous peoples (58 incidents per 1,000 people) were almost three times more likely than their non-Indigenous counterparts (20 per 1,000) to experience sexual assault.<sup>122</sup> Further, Indigenous women were found to be at greater risk than non-Indigenous women of being subjected to physical or sexual assault by their spouse or common-law partner, including in the Territories.<sup>123</sup> When considering all physical and sexual assault - that is, violence committed by intimate partners and violence committed by other perpetrators - just under one-third (31%) of women designated as visible minorities,<sup>124</sup> stated that they had been physically or sexually assaulted at least once since the age of 15.<sup>125</sup> This compares with almost half (49%) of non-racialized women. These data also indicate that even though Indigenous women are at greater risk of sexual assault, their report rates are lower than their non-Indigenous counterparts.

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<sup>118</sup> Results were based on responses from more than 43,000 Canadians living in the ten provinces, who were each assigned a weight so as to be representative of the entire Canadian population 15 years of age and older. Data from Yukon, the Northwest Territories, and Nunavut were not included. If the survey were repeated many times, then 95% of the time (or 19 times out of 20), the confidence interval would cover the true population value. See more at: Statistics Canada, *Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces*, by Adam Cotter & Laura Savage, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 5 December 2019).

<sup>119</sup> The term sexual minority or sexual minorities was used in the context of the cited report to refer to those who stated their sexual orientation was anything other than heterosexual. See Cotter & Savage, *supra* note 118 at 5.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> Statistically significant differences were determined in this survey using 95% confidence intervals. See more at: Statistics Canada, *Victimization of Aboriginal people in Canada, 2014*, by Jillian Boyce, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 28 June 2016) at 6.

<sup>123</sup> *Ibid* at 13.

<sup>124</sup> Based on the definition of visible minority according to the *Employment Equity Act*, this category includes First Nations, Métis, and Inuit (Indigenous) women. In some places in the cited report, the non-visible minority population was further separated into Indigenous women and non-Indigenous women. See more at: Statistics Canada, *Intimate partner violence: Experiences of visible minority women in Canada, 2018*, by Adam Cotter, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 19 May 2021).

<sup>125</sup> *Ibid.*

Further, regarding women with disabilities, a DisAbled Women’s Network of Canada (DAWN-RAFH) study comparing the rates of instances of sexual and physical assault among women with and women without disabilities found that women with disabilities were four times more likely to have experienced a sexual assault than women without disabilities.<sup>126</sup> Further, the study found that women with disabilities experience sexual violence in particular ways such as violations of privacy, restraint, strip searches, and solitary confinement that replicate the trauma of sexual assault, sexual assault by staff and other inmates/residents of institutions, forced abortion and forced sterilization.<sup>127</sup>

Additionally, regarding immigrant women, the resource guide of the “Immigrant Women’s Project: Safety of Immigrant, Refugee, and Non-Status Women” asserts that:

Women who face multiple forms of discrimination, such as Aboriginal women, women of colour, immigrant women, lesbians, disabled women, young girls and older women, are at a higher risk of violence. Further, these women have a more difficult time accessing services. For example, ‘less than two-thirds of shelters for abused women report being accessible to women with disabilities.’ Also, there is a complex set of issues, attitudes, barriers and gaps in service that make immigrant and racialized women uniquely vulnerable when faced by domestic violence. Only 57 percent of Canadian shelters offered services that are sensitive to cultural differences. Further, women who have difficulty speaking the official language where they live face enormous barriers in accessing services and dealing with the justice system.<sup>128</sup>

What all these data showcase is that, for different and multiple reasons, such as language barriers and cultural differences, immigrant women are at a higher risk of experiencing violence and face more barriers to access services than non-immigrant women. Further, these data showcase that alongside immigrant women, 2SLGBTQQIA individuals, Indigenous women, women of colour and women with disabilities experience multiple barriers to justice and further obstacles to access services and to operate safely within the criminal justice system.

It is important to note that there is a dearth of statistical data on sexual assault in Canada which take intersectionality into account, particularly data on the intersections of race, sexual

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<sup>126</sup> “Fact Sheet on Women with Disabilities and Violence” (accessed 20 June 2021), online: *DAWN Canada* <[www.dawncanada.net/issues/women-with-disabilities-and-violence/](http://www.dawncanada.net/issues/women-with-disabilities-and-violence/)> [perma.cc/59U4-UT2T]

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

<sup>128</sup> “Immigrant Women’s Project: Safety of Immigrant, Refugee, and Non-Status Women” (accessed 20 June 2021) at 15, online (pdf): *Ending Violence Association of BC, MOSAIC, & Vancouver & Lower Mainland Multicultural Family Support Services Society* <[womenslegalcentre.ca/wp-content/uploads/2020/10/module-1-safety-of-immigrant-women.pdf](http://womenslegalcentre.ca/wp-content/uploads/2020/10/module-1-safety-of-immigrant-women.pdf)> [perma.cc/3NRA-AYU8]

orientation, immigration status, and other aspects of a persons' identity that put them at higher risk of sexual assault. These communities may have experiences with policing and the judicial system itself that are discriminatory, racist and sexist, for example, that impacts directly reporting rates. In Chapter 3, I explore in greater detail the intersectional factors of sexual assault in the Canadian context.

## 2.2.2 Prosecution and Court Outcomes of Sexual Assault Cases

When compared with physical assaults, sexual assault cases were less likely to proceed to the courts after being reported to police: while three-quarters (75%) of physical assaults proceeded to court after police charges were laid, only half (49%) of sexual assaults did.<sup>129</sup> Of incidents heard in the justice system, sexual assaults were marginally less likely than physical assaults to result in a conviction (55% versus 59%), but if convicted, they were far more likely to result in a custodial sentence (56% versus 36%).<sup>130</sup> Not only are sexual assault cases less likely to proceed to court after being reported to police but also are less likely to result in a conviction in the Canadian criminal justice system.

Additionally, the more time that passed between the sexual assault and when it was reported to police, the less likely the charge would proceed to court or result in a conviction.<sup>131</sup> While over half (53%) of sexual assaults reported to police on the same day they took place proceeded from police charge to court, only one in five (19%) that were reported over one year after the crime took place went to court.<sup>132</sup> Of cases that went to court, conviction rates were higher for sexual assaults that were reported to police on the day of the crime (56%) than for those

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<sup>129</sup> In that report, 'going to court' was used as a simplified term for a criminal incident reported by police between 2009 and 2014 where a charge was laid and resulted in a case completed in court (i.e., a verdict was rendered) between 2009/2010 and 2014/2015. Due to the unavailability of data, cases that went to superior courts in certain provinces were not counted as having gone to court. This is estimated to account for at most 2% of sexual assaults and less than 1% of physical assaults. In addition, police-reported sexual assaults in the latter years of study (e.g., 2013 and 2014) must have led to a court case that was completed by the end of 2014/2015 in order to be counted as having gone to court. Cases that were still in progress as of the end of 2014/2015 would not be counted as having gone to court since they had not yet been completed. As such, the threshold for 'going to court' is quite high and requires that an accused person completed the court process and that a final decision was rendered within the constraints of the reference period. This would exclude accused persons who went to court for a brief time without completing a formal case, such as for a preliminary inquiry that resulted in an interim decision. See more at Rotenberg, "Court outcomes of police-reported sexual assaults in Canada," *supra* note 5 at 5.

<sup>130</sup> *Ibid* at 30.

<sup>131</sup> *Ibid* at 3.

<sup>132</sup> *Ibid*.

reported over one year after they took place (43%).<sup>133</sup> These data highlight a particular aspect of sexual assault cases: even though it is not uncommon for victim-survivors of sexual violence to delay reporting to police, family and friends,<sup>134</sup> the more time that has passed between the crime and the reporting date, the less likely the case is to proceed to court or result in conviction.

Of sexual assaults where a charge was laid by police, the majority (87%) of victim-survivors knew their assailant;<sup>135</sup> most commonly as a casual acquaintance, a family member or an intimate partner. Victim-survivors sexually assaulted by someone they knew were far less likely than those victimized by a stranger to see their assailant go to court after a charge was laid (47% versus 64%).<sup>136</sup> In cases where the accused was a member of the victim-survivor's family, attrition was notably higher, with only one in three (36%) charged incidents proceeding to court.<sup>137</sup> However, for the minority that went to court, conviction and sentencing outcomes were among the harshest if the victim-survivor was related to their assailant.<sup>138</sup> In other words, the offender was often known to their victims, debunking the common assumption that people are most likely sexually assaulted by a stranger. However, sexual assault committed by strangers were found more likely to proceed to court. All these factors combined highlight some of the issues that make sexual assault such an underreported crime and one that is hard to prosecute in the criminal justice system.

### 2.2.3 Underreported Rates of Sexual Assault

Over a six-year period between 2009 and 2014, victim-survivors of sexual assault reported to police 117,238 cases where sexual assault was the most serious violation in the incident.<sup>139</sup> An accused was identified in three in five (59%) sexual assault incidents reported by police; less than half (43%) of sexual assault incidents resulted in a charge being laid; of these, half (49%) proceeded to court; of which just over half (55%) led to a conviction; of which just over half (56%) were sentenced to incarceration.<sup>140</sup> These data showcase that only about 1 in 5 (21%) sexual assault

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<sup>133</sup> *Ibid.*

<sup>134</sup> Bri Lee, Jonathan Crowe & Rachel Burgin. "Delays in reporting alleged rapes are common - even years later. This isn't a barrier to justice" (1 March 2021), online: *The Conversation* <[theconversation.com/delays-in-reporting-alleged-rapes-are-common-even-years-later-this-isnt-a-barrier-to-justice-156201](https://theconversation.com/delays-in-reporting-alleged-rapes-are-common-even-years-later-this-isnt-a-barrier-to-justice-156201)> [perma.cc/98TA-QK3Q]

<sup>135</sup> Rotenberg, "Court outcomes of police-reported sexual assaults in Canada," *supra* note 5 at 18.

<sup>136</sup> *Ibid* at 3.

<sup>137</sup> *Ibid.*

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

<sup>139</sup> Rotenberg, "Police-reported sexual assaults in Canada," *supra* note 50 at 6.

<sup>140</sup> Rotenberg, "Court outcomes of police-reported sexual assaults in Canada," *supra* note 5 at 10.

cases reported to police proceed to court. As well, only about 1 in 10 (12%) sexual assaults reported by police led to a criminal conviction, and 7% resulted in a carceral sentence.<sup>141</sup> In 2019, a Statistics Canada study showcased that there were more than 30,900 police-reported sexual assaults in the reporting year, representing a 7% higher rate than in 2018.<sup>142</sup>

Nevertheless, there is a huge discrepancy in the numbers of sexual assault cases reported to police, as mentioned above, and the numbers of self-reported sexual assaults in Canada. According to the General Social Survey (GSS) data on self-reported sexual assault,<sup>143</sup> there were 22 incidents of sexual assault for every 1,000 Canadians aged 15 and older in 2014.<sup>144</sup> This represented approximately 636,000 self-reported incidents of sexual assault. A comparison of the numbers of self-reported sexual assaults in 2014 (636,000) and the police-reported sexual assault in 2019 (30,900) clearly highlights the underreporting of sexual assault.

The #MeToo movement<sup>145</sup> is credited with impacting the numbers of sexual assault cases reported to the police, not only in the United States (U.S.) but also in Canada.<sup>146</sup> According to the most recent data reported by police to the Uniform Crime Reporting (UCR) Survey after the #MeToo movement, there were 23,834 victim-survivors of founded sexual assaults in 2017 in Canada. This number translated to a rate of 65.5 victim-survivors of sexual assault per 100,000 population, a 13% increase from the previous year (58.0 per 100,000 population).<sup>147</sup> However, even with increased reported sexual assault cases after the emergence of the #MeToo movement, those numbers do not reflect the reality of sexual assault in Canada. It is known that the number of sexual assaults reported by police is likely a massive underestimation of the true extent of sexual assault, as these types of offences often go underreported.<sup>148</sup>

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<sup>141</sup> *Ibid* at 3.

<sup>142</sup> Statistics Canada, *Police-reported crime statistics in Canada, 2019*, by Greg Moreau, Brianna Jaffray & Amelia Armstrong, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 29 October 2020).

<sup>143</sup> In this regard, the Incident-based Uniform Crime Reporting (UCR) Survey is used by Statistics Canada for police-reported data, and the General Social Survey (GSS) on Canadians' Safety (Victimization) is used by Statistics Canada for self-reported data.

<sup>144</sup> Conroy & Cotter, *supra* note 46 at 3.

<sup>145</sup> In 2017, there was a number of high-profile cases involving prominent figures and celebrities primarily in the United States accused of sexual assault or misconduct that received widespread media attention. Many people worldwide started disclosing their own experiences with sexual assault on social media, and a social media campaign called #MeToo that went viral in October of 2017.

<sup>146</sup> Rotenberg & Cotter, *supra* note 49 at 5.

<sup>147</sup> *Ibid* at 4.

<sup>148</sup> *Ibid*.

The numbers alone, while startling, also do not capture the substantive impact of sexual assault. Looking carefully at the #MeToo movement makes other dimensions of sexual assault law visible. Statistics of self-reported sexual assault in Canada demonstrate, for example, that victim-survivors of sexual assaults did not report to police for the following reasons: the crime was minor and it was not worth taking the time to report (71%), the incident was a private or personal matter, and it was handled informally (67%), and that no one was harmed during the incident (63%).<sup>149</sup> According to the same source, there is also a significant number of victim-survivors who stated that they did not report the incident because of a perceived lack of evidence (43%). The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes,<sup>150</sup> which also could discourage victim-survivors from coming forward to report the assault suffered, especially for victim-survivors who experience multiple barriers to justice as exemplified in the section above on intersectional and racialized data. That is especially true for Indigenous, Black and immigrant women, women of colour and women with disabilities in the Canadian context.

Regardless of the reasons described by victim-survivors for not reporting sexual assault, such as fear of being blamed and judged, for example, I argue that the criminal justice system, with its adversarial nature, represents another barrier for victim-survivors: the legal system's ideal image of a "real sexual assault" still remains. It is a scenario that commonly involves clear marks of injury that strongly suggest a lack of consent, and circumstances where the victim reports the sexual assault right away to police and had not been drinking or using drugs at the time of the incident, for example. Further, women still have to prove that they did not "provoke" the attack in any way. Myths and stereotypes about women and sexual assault still play a significant role in the criminal justice system in Canada, despite repeal of the rape shield provisions. As a result, some of the reasons why most victim-survivors do not report sexual assault are:

The internalization of shame, guilt, or stigma, a perception that they will be blamed, revictimized, dismissed, not believed, or treated disrespectfully, or a broader sense of societal normalization of inappropriate or unwanted sexual behaviour are key contributors to victims' underreporting of sexual assault to police.<sup>151</sup>

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<sup>149</sup> Conroy & Cotter, *supra* note 46 at 17.

<sup>150</sup> Stewart, *supra* note 28 at 114.

<sup>151</sup> Cotter & Savage, *supra* note 118 at 20.

Each of these reasons show us why gendered crimes, such as sexual assault, have unique characteristics that make it be a very difficult crime for victim-survivors to report and, additionally, a complex crime to prosecute under the criminal justice system and its adversarial logic.

Women do not report sexual assault to police for many reasons, including not being believed, being treated disrespectfully in court and being dismissed by the judicial system. Each person responds differently after being victimized by a traumatic event, especially after a sexual crime. Some women report the crime immediately, some within days, some within months or even years, but most of them never report it. The criminal justice system is not able to process sexual assault cases in a way that protects and empowers victim-survivors and causes no harm. The fact that the criminal justice system often revictimizes victim-survivors contributes largely to the underreported rates of sexual assaults in Canada.

All that being said, these statistics highlight that sexual assault is one of the most gendered crimes and is prone to high levels of underreporting and low case retention in the Canadian criminal justice system.<sup>152</sup> In Canada, a higher risk of sexual assault was noted among those who were women, young, Indigenous, single, 2SLGBTQQIA, and individuals with disabilities and mental health issues, institutionalized women and women who are unemployed or have low incomes.<sup>153</sup> In this thesis, I argue that the failure of the Canadian criminal justice system to deal in a satisfactory way with sexual assault, especially regarding women who experience multiple barriers to justice, leads to a search for alternative forms of justice, such as restorative justice. There is a call for the exploration of innovative paths to justice. Before exploring restorative justice, however, I discuss in the next section the prevalence and impacts of myths and stereotypes about women and sexual assault that are perpetuated by the criminal justice system in Canada.

### **2.3 Myths and Stereotypes About Women and Sexual Assault in The Canadian Criminal Justice System**

In this study, I argue that the low rates of reported sexual offences are intrinsically associated with “sexual assault culture” and myths and stereotypes about women and sexual assault. Sexual assault culture is connected to explicit or implied behaviours that silence or normalize sexual assault

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<sup>152</sup> Rotenberg, “Court outcomes of police-reported sexual assaults in Canada,” *supra* note 5.

<sup>153</sup> McDonald, Wobick & Graham, *supra* note 14 at 15.

against women.<sup>154</sup> As the term culture suggests, sexual assault culture is linked to the way in which people live socially, to social practices, and to the way in which people understand their relationship with each other in a social context.<sup>155</sup> Sexual assault culture refers to those deep-rooted practices, rules and values of normalizing sexual violence against women, seeing women as objects, and making them natural subjects of sexual violence.<sup>156</sup> In this sense, sexual assault culture triggers victim-blaming, connivance, and omission as well as neglect of the victim-survivors.<sup>157</sup> Myths and stereotypes about women and sexual assault, according to L'Heureux-Dubé J., divorce the law from contemporary knowledge because they have more to do with fiction and generalization than with reality; they are irrational, non-scientific narratives used by human beings to explain what they do not fully understand.<sup>158</sup> Also referring to myths and stereotypes, Randall asserts the following:

They are, therefore, incompatible with the truth-seeking function of the legal system. Myths and stereotypes are both pervasive and difficult to recognize because of their cultural and collective origins (Spencer, 1985). We acquire myths and stereotypes the same way we learn other attitudes and behavior from our families, our colleagues, our cultural heritage in the form of the arts and literature, the media, jokes, music, rock videos, and advertisements (Burt, 1991). They are therefore deeply embedded in our unconscious, even while they inform our conscious reasoning processes. According to Simone de Beauvoir 'It is the collective, sociocultural aspect of myths which make them so hard to be seized or defined. They haunt our collective consciousness without ever appearing before us in tangible form' (de Beauvoir, 1976, p. 242). Myths and stereotypes are usually generated by those who dominate the political, social, and economic structures of any given society. They are therefore a powerful tool for maintaining the status quo because they are often so firmly entrenched in the collective cultural conscience that even the victims of the stereotypes are apt to believe in them and to accept responsibility for their victimization.<sup>159</sup>

In other words, myths and stereotypes about women and sexual assault could be perceived as consequences of a sexist culture that permeates society, known as false cultural beliefs that tend to excuse perpetrators and blame victims-survivors for the sexual violence suffered, such as “who

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<sup>154</sup> Tyler J. Buller, “Fighting Rape Culture with Noncorroboration Instructions” (2017) 53:1 Tulsa LJ 1 at 24.

<sup>155</sup> Mary Graw Leary, “Affirmatively Replacing Rape Culture with Consent Culture” (2016) 49:1 Texas Tech L Rev 1 at 37.

<sup>156</sup> Carmen Hein de Campos et al, “Rape Culture or Anti-Rape Culture” (2017) 13:3 Revista Direito GV 981-1006 at 989.

<sup>157</sup> Aya Gruber, “Anti-Rape Culture” (2016) 64:4 U Kan L Rev 1027-1053 at 1049.

<sup>158</sup> Claire L'Heureux-Dubé, “Beyond the Myths: Equality, Impartiality, and Justice” (2001) 10:1 J Soc Distress Homeless 87-104 at 89 [L'Heureux-Dubé, “Beyond the Myths: Equality, Impartiality, and Justice”].

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

she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed.”<sup>160</sup> Overall, myths and stereotypes about women and sexual assault support the belief that women are responsible for sexual violence for not behaving “properly,” for drinking,<sup>161</sup> wearing “provocative” clothes<sup>162</sup> or even walking alone on the street in certain places considered inappropriate.<sup>163</sup> Every person should have the right to be who they are and to be wherever they want to be without being sexually assaulted or fear being sexually assaulted. Justice L’Heureux-Dubé describes some examples of myths and stereotypes regarding sexual assault that the SCC has recognized and highlighted in cases, in the following terms:

The following are just a few examples of myths and stereotypes that the Supreme Court of Canada has recognized and highlighted in cases such as *R. v. A.G.* (2000), *R. v. Ewanchuk* (1999), *R. v. W. [G.]* (1999), *R. v. Esau* (1997), *R. v. Osolin* (1993), and *R. v. Seaboyer* (1991), as having skewed the law’s treatment of sexual assault claimants:

- that the rapist is always a stranger, never a friend or relative (for a thorough examination of the way this myth affects the criminal process in the United States, see Simon, 1999);
- that women are less reliable and credible as witnesses if they have had prior sexual relations;
- that women are more likely to have consented to sexual advances if they have had sexual relations in the past;
- that a woman will always struggle to defend her honor;
- that women are “more emotional” than males so unless they become hysterical, nothing must have happened;
- that women mean “yes” even when they say “no”;
- that women deserve to be raped on account of their conduct, dress, and demeanour;
- that women fantasize about rape and therefore fabricate reports of sexual activity even though nothing happened.<sup>164</sup>

Courts are not free from perpetuating myths and stereotypes of sexual assault, constituting another barrier to justice for sexual assault victim-survivors. Allegations of sexual assault are difficult to prosecute in the Canadian criminal justice system because of the private nature of the offence, applicable rules of evidence and myths and stereotypes about sexual assault that are embedded in

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<sup>160</sup> Seaboyer, *supra* note 31 at para 46.

<sup>161</sup> J.A., *supra* note 30.

<sup>162</sup> Ewanchuk, *supra* note 96 at para 88.

<sup>163</sup> Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims,’” *supra* note 54 at 409.

<sup>164</sup> L’Heureux-Dubé, “Beyond the Myths: Equality, Impartiality, and Justice,” *supra* note 158 at 89-90.

society and in the criminal justice system. “Evidence” is used here to refer to information that is offered by a party at trial as a means of establishing the party’s claims.<sup>165</sup> The law of evidence governs how the existence of a fact may be proven in court proceedings. Particularly in criminal proceedings, the rules of evidence are derived from case law in Canadian jurisprudence and are established to ensure the relevance and reliability of evidence to prove the material issues. In other words, the main objective of the law of evidence is to provide substantiation of the facts as alleged.

Section 11(d) of the *Charter* states that any person charged with an offence has the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal. The standard of proof beyond a reasonable doubt is part of the foundation of the Canadian judicial system and is intrinsically connected to the presumption of innocence. The latter is also codified in s. 6 of the *Criminal Code*, according to the excerpt below:

**Presumption of innocence**

**6 (1)** Where an enactment creates an offence and authorizes a punishment to be imposed in respect of that offence,

**(a)** a person shall be deemed not to be guilty of the offence until he is convicted or discharged under section 730 of the offence; and

**(b)** a person who is convicted or discharged under section 730 of the offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.

In criminal cases, the prosecution bears the burden of proving the accused guilty beyond a reasonable doubt, which is a cornerstone of criminal procedure in the common law world,<sup>166</sup> and if it does not happen, the Crown has failed its job, and the accused is acquitted. The jury does not need to be absolutely sure of guilt, but the jury must be satisfied that the accused is more than just “probably” guilty.<sup>167</sup> In other words, more than probability is required but less than absolute certainty. In criminal proceedings, juries must understand the concept of what constitutes “proof beyond a reasonable doubt.” This high standard of proof is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence.<sup>168</sup> The jury’s final decision must be made based upon evidence or the lack thereof and cannot be based on sympathy or prejudice.<sup>169</sup> A reasonable doubt must not be imaginary or

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<sup>165</sup> Stewart, *supra* note 28 at 3.

<sup>166</sup> *Ibid* at 849.

<sup>167</sup> *Ibid* at 850.

<sup>168</sup> *Ibid* at 852.

<sup>169</sup> *R. v. Lifchus*, [1997] 3 SCR 320 at para 31.

frivolous but instead must be based on reason and common sense.<sup>170</sup> In the next sections, I explore particular aspects of evidence law and sexual assault to showcase the inability of the criminal justice system to avoid the influence of myths and stereotypes in the prosecution of sexual assault cases.

### **2.3.1 The Criminal Justice System Is Not Set Up to Believe Victim-Survivors of Sexual Assault**

In this section, I use the facts in *R. v. Goldfinch*<sup>171</sup> as an example to understand how the standard of proof beyond a reasonable doubt can be standard really difficult to achieve in sexual assault cases. The criminal justice system is not set up to believe victim-survivors and in cases where the only two witnesses are most often the accused and the complainant, with little or no other evidence on what happened, proving that the accused is guilty beyond a reasonable doubt can be extremely difficult. In *R. v. Goldfinch*, in 2019, the accused and the complainant dated and lived together, after which they engaged in a “friends with benefits” relationship.<sup>172</sup> The complainant went to the accused’s house and alleged that after she said she did not want to have sex, the accused dragged her into his bedroom, struck her, and had intercourse with her. It was a case, like so many in this area of law, where the only two witnesses are the accused and the victim-survivor, and where the burdens of proof make believing her story very hard. At the accused’s trial for sexual assault, he requested a *voir dire* – a hearing to determine a question of law, including the admissibility of evidence – to determine if evidence that the accused and the complainant were “friends with benefits” was admissible under s. 276 of the *Criminal Code*. The provision asserts as follows:

#### **Evidence of complainant’s sexual activity**

**276 (1)** In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

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<sup>170</sup> Stewart, *supra* note 28 at 851-852.

<sup>171</sup> Goldfinch, *supra* note 29 at paras 6-13.

<sup>172</sup> Goldfinch sought to tender evidence that at the time of the alleged sexual assault, he and the complainant maintained a “friends with benefits” relationship that involved occasional sex. On its face, this evidence could potentially be used to support the first of the twin myths — the myth that because the complainant consented to have sex with Mr. Goldfinch in the past, she was more likely to have consented to the sexual activity forming the subject-matter of the sexual assault charge. See more at: Goldfinch, *supra* note 29 at paras 105-106.

- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief. [...]

The outcome of the *voir dire* in *R. v. Goldfinch* was that the sexual history between the complainant and accused was admitted to suggest that the complainant most likely consented because she had done so in the past. The trial judge found that the evidence of their sexual history was admissible, and the jury found the accused not guilty of sexual assault. At the SCC, Justice Karakatsanis J. (Abella, Gascon and Martin JJ. concurring) determined that:

Historically, no limits were placed on the defence's ability to adduce evidence of a complainant's prior sexual activities. Such evidence was routinely used to malign 'the character of the complainant, distort the trial process, and undermine the ability of the criminal justice system to effectively and fairly try sexual allegations' (*R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71 (Ont. C.A.), at para. 79). Subjecting the complainant to humiliating or prolonged examination and exploiting assumptions about 'communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure' was commonplace (D. M. Tanovich, 'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013-2014), 45 *Ottawa L. Rev.* 495, at pp. 498-99).<sup>3</sup> These tactics shifted the focus away from the accused and essentially put the complainant on trial. [...]. Indeed, having found that the 'friends with benefits' evidence was not relevant to an issue at trial, it follows that it has no probative value. The evidence was relevant only to suggest that the complainant was more likely to have consented because she had done so in the past. Thus the evidence went only to the twin myths which, as Gonthier J. held in *Darrach*, are 'not probative of consent or credibility and can severely distort the trial process.'<sup>173</sup>

In *R. v. Goldfinch*, a new trial was ordered on the basis that it was a legal error for the trial judge to admit the sexual activity evidence under s. 276(2). Cases like *R. v. Goldfinch* point to the importance of reimagining how we prosecute sexual assault law in Canada mostly because, as mentioned above, the criminal justice system is not set up to believe victim-survivors of sexual assault and the standard of proof beyond a reasonable doubt might be too hard to meet in sexual assault cases where victim-survivors and offenders are the only witnesses. Further, *R. v. Goldfinch* represents a clear example of how myths and stereotypes, such as the myth that because a woman has said yes in the past, she was more likely to say yes again, are systemically embedded in the criminal justice system.

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<sup>173</sup> *Goldfinch*, *supra* note 29 at paras 33, 70.

The idea that women lie about being sexually assaulted is a prevalent myth.<sup>174</sup> The number of false reports for sexual assault is very low, and estimates for the percentage of false reports begin to converge between 2 and 8% of sexual assault cases reported to police.<sup>175</sup> Another common myth is the stereotype of the perpetrator as a stranger who leaps out of the bushes and attacks his victim and later abruptly leaves her.<sup>176</sup> Statistics already cited in this study show that offenders are often a partner, family member, friend, acquaintance or neighbour, rather than a stranger. Regarding myths and stereotypes about women and sexual assault, Stewart asserts the following:

This list of stereotypical conceptions about women and sexual assault is by no means exhaustive. Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly. This mythology finds its way into the decisions of the police regarding their ‘founded’/ ‘unfounded’ categorization, operates in the mind of the Crown when deciding whether or not to prosecute, influences a judge’s or juror’s perception of guilt or innocence of the accused and the ‘goodness’ or ‘badness’ of the victim, and finally, has carved out a niche in both the evidentiary and substantive law governing the trial of matter.<sup>177</sup>

The myths and stereotypes about women and sexual assault cited here are not exhaustive; rather they showcase how those myths and stereotypes are embedded in all aspects of our lives.

*R. v. Ghomeshi* (2016)<sup>178</sup> represents a case in Canadian jurisprudence that reaffirms some of the reasons why women do not report sexual assault to police. At the time of the events (2002 to 2003), the accused was the host of a CBC (Canadian Broadcasting Corporation) television show. When the complainants came forward in 2014, he was the host of Q, a flagship CBC radio show, and well-known in the arts and entertainment community. The accused was charged with five criminal offences related to four separate events involving three different complainants. Regarding *R. v. Ghomeshi*, sociologists Ryan Coulling and Matthew S. Johnston asserted:

Once Ghomeshi’s defence attorney, Marie Henein, intensively cross-examined the complainants in court, positions on the case grew unstable as some media outlets started to scorn his accusers (Blatchford, 2016). These divisions intensified in public

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<sup>174</sup> Stewart, *supra* note 28 at 115.

<sup>175</sup> Kimberly A. Lonsway, Joanne Archambault & David Lisak, “False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault” 3:1 at 2, online (pdf): *American Prosecutors Research Institute* <evawintl.org/wp-content/uploads/FalseReports-Movingbeyondtheissue.pdf> [perma.cc/P24X-KFUH] at 2.

<sup>176</sup> Stewart, *supra* note 28 at 114.

<sup>177</sup> *Ibid* at 116.

<sup>178</sup> *R. v. Ghomeshi*, 2016 ONCJ 155 at para 8-11 [Ghomeshi].

discourse as well as our own social networks and communities: people either believed the testimonies of the survivors and viewed their coming forward as an act of courage against all forms of patriarchal violence and rule, or they believed that Ghomeshi was a victim of revenge-seeking women, and/or that the allegations were false on account of the evidence (or lack thereof) that was presented in court. On March 24, 2016, the judge acquitted Ghomeshi on all five charges because he did not consider the complainants to be credible. In his decision, the judge described the first complainant's testimony as having 'suffered irreparable damage' due to inconsistencies in her memories of events; he felt the second complainant had 'consciously suppress[ed] relevant and material information' which indicated 'a wilful carelessness with the truth', while the third complainant 'was clearly 'playing chicken' with the justice system' because she 'was prepared to tell half the truth for as long as she thought she might get away with it' (*CBC News*, 2016). Many members of the public found these comments to be worded in an offensive and victim-blaming manner, while other legal experts saw them as demonstrative of the need to separate ideas of legal guilt from moral guilt when trying to determine the consistency of testimony and possibility of reasonable doubt. On May 11, 2016, Ghomeshi signed a peace bond with the courts and apologized to the remaining complainant, a former CBC employee, for what he characterized as 'sexually inappropriate' (but not criminal) behaviour (Perkel and Mehta, 2016), which resulted in the Crown dropping the final charge of sexual assault.<sup>179</sup>

Ghomeshi was found not guilty of all charges because "it was impossible to determine, with any acceptable degree of certainty or comfort, what was true and what was false" and "evidence failed to prove allegations beyond a reasonable doubt."<sup>180</sup> Additionally, in *R. v. Ghomeshi*, the adversarial criminal justice system saw the women alleging assault come to be labelled as "losers" who succumbed to the defence's accusations of distrust and fabrication - accusations that, because they lost, must have been true.<sup>181</sup>

Cases like *R. v. Ghomeshi*, *R. v. Seaboyer* and *R. v. Goldfinch* demonstrate that there is a need to reimagine how the criminal justice system responds to sexual assault cases. The idea that a "real" sexual assault victim-survivor always reports the crime immediately is a myth and there is no connection between the veracity of the report and the time when it was made. In many sexual assault cases, the victim-survivor is the only witness available, other than the accused, to provide the facts. There is also a daunting practical difficulty of proving in practice the difference between forced and consensual sexual activity. Given that myths and stereotypes are so embedded in our

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<sup>179</sup> Ryan Coulling & Matthew S. Johnston, "The criminal justice system on trial: Shaming, outrage, and gendered tensions in public responses to the Jian Ghomeshi verdict" (2018) 14:2 *Crime Media Culture* 311–331 at 312-313.

<sup>180</sup> Ghomeshi, *supra* note 178.

<sup>181</sup> Coulling & S. Johnston, *supra* note 179 at 319.

collective consciousness, the prosecution of sexual assault in Canada is a task that is practically unattainable.

### **2.3.2 Barriers to Justice for Victim-Survivors of Sexual Assault at Trial**

Testifying in a criminal proceeding as a sexual assault complainant will always be difficult, mostly because of the trial's adversarial nature. The complainant would have to revisit one of the most challenging and horrifying moments of their life, telling in a very detailed and graphic way their story of violation and violence in front of various strangers inside the courtroom. Legal scholar Elaine Craig's work is important in this respect. Craig pinpoints how lawyers and judges contribute to the trauma of the trial<sup>182</sup> and argues that prolonged and brutal attacks against the complainant in the cross-examination process are an ongoing practice, despite the rape shield provisions.<sup>183</sup> Craig cites many recent cases where the stereotype-infused questions and the myths and stereotypes about women and sexual assault remain present in recent cross-examinations conducted by experienced defence lawyers, even after the rape-shield provisions were enacted.<sup>184</sup> Craig also claims that aggressive techniques of cross-examination, where the defence lawyers "go for the jugular,"<sup>185</sup> are praised for being ferocious and acting at all costs towards the acquittal of their client are ineffective, counterproductive and may cause problematic and unnecessary harm to the complainants.<sup>186</sup>

The criminal justice system, in its adversarial form, is incapable of adequately responding to sexual assault cases because the patriarchal, ableist, racist and sexist structures of the legal system will always undermine the balanced ideals of equality and integrity that the justice system is supposed to protect.<sup>187</sup> The criminal justice system perpetuates systemic barriers to justice to certain groups, which are founded in collective biases regarding age, race, gender, ability and sexual orientation, for example. Those barriers leave some people more vulnerable not only to experiencing sexual assault at higher rates but also to experiencing the criminal justice system as an unsafe and exclusionary institution. Further, an engagement with the law within the sexual

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<sup>182</sup> Craig, *supra* note 34 at 7.

<sup>183</sup> *Ibid* at 51.

<sup>184</sup> *Ibid* at 43.

<sup>185</sup> *Ibid* at 64.

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

<sup>187</sup> *Ibid* at 319-320.

assault context will always inherently be a traumatic experience for most people. There is a need for a different and transformed way of holding people accused of sexual assault to account.

As showcased in this chapter, progressive law reforms have not succeeded in preventing criminal defence practices that unfairly and unjustly traumatize sexual assault complainants.<sup>188</sup> The specificities of sexual assault cases make it a very difficult crime to prosecute in the Canadian criminal law system, helping to explain why the conviction rate is so low and how sexual assault has complex dimensions uniquely discriminatory, especially against women who experience multiple barriers to justice.

It is on the basis of this worrisome and distressing data that this study emerged. The failure of the Canadian criminal justice system in dealing with sexual assault cases in a way that promotes justice and equality for victim-survivors leads to a search for alternative forms of justice. This study aims to propose a different and transformed approach to justice for sexual assault cases through feminist and trauma-informed lenses integrated in restorative justice practices. There is a call for the exploration of innovative paths to justice, and I am focusing this thesis on a justice response that may be part of the legal system or lie beyond it: a transformed approach to restorative justice for sexual assault in Canada, one that is feminist, trauma-informed, intersectional, decolonial and anti-carceral at its foundations. In the next chapter, I develop a theoretical framework for my argument.

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<sup>188</sup> *Ibid* at 227.

## CHAPTER 3 – THEORETICAL FRAMEWORK: A FEMINIST, TRAUMA-INFORMED RESTORATIVE JUSTICE APPROACH FOR SEXUAL ASSAULT CASES

In order to reimagine restorative justice practices for sexual assault cases through feminist, trauma-informed lenses it is important to determine first the theoretical framework I am developing in this thesis and the unique lenses of my research. In this chapter, I explore feminist legal theory's engagement with intersectional, decolonial and anti-carceral feminisms. I also examine the role of trauma and trauma-informed practices within the context of sexual assault cases. Understanding trauma is fundamental to any response to sexual assault in Canada today and I argue that a transformative approach to restorative justice not only must be trauma-informed but also feminist, intersectional, decolonial and anti-carceral at its foundations in order to be an appropriate justice response to sexual assault cases. Finally, I assert how an intersectional, decolonial and anti-carceral theoretical framework for a feminist, trauma-informed approach to restorative justice is a necessary development in sexual assault law today and maintain that advancing this practice of restorative justice for sexual assault cases can be a viable and appropriate response to cases of sexual assault in Canada.

### 3.1 Introduction on Feminist Legal Theory and Critique

Feminist legal theory manifests through writing and speaking about “law” and “women” in an effort to promote and improve understanding of justice.<sup>189</sup> Law and gender scholar Genevieve Painter defines feminist legal theory as a set of ideas, appearing as truth claims, critiques and/or advocacy messages.<sup>190</sup> It is an activity engaged in by thinkers inside and outside academia and is an intellectual and political movement.<sup>191</sup> Painter describes the evolution of feminist legal theory as follows:

In its life span, it has gone through several evolutions to produce a plural, complex, and fractured body of thought and practice. [...] Developments in feminist legal theory have emerged through engagement with problems connected to inequalities, as experienced by individuals and communities at the hands of people, corporations, or the state. The

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<sup>189</sup> Genevieve R. Painter, *Feminist Legal Theory*, 2<sup>nd</sup> ed by James D. Wright (Oxford: Elsevier, 2015) 918-925 at 918.

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

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

problem-driven impetus of feminist legal theory contributes to its present-day heterogeneity. It also explains how a ‘field’ of feminist legal theory survives, despite the enduring debates about pillar concepts like ‘woman’ or ‘equality’ and resistance to the normalizing and disciplining effects of definition. The separation line between feminism and feminist legal theory is porous. While feminist legal theory takes law as a primary focus, the whole field of feminist studies regularly engages legal issues because the state is central to feminism’s reformist agenda.<sup>192</sup>

There are a wide variety of feminist legal theories with plural and complex bodies of thought and practice, such as Painter described. The conversation between law and feminism is essential in order to address the issues of sexual assault, which is linked to systemic sexism, racism, misogyny and heteropatriarchy.<sup>193</sup> Feminist legal critique typically starts from the position that understanding material, structural and ideological conditions require attention to sex and gender and their interactions with other axes of differentiation.<sup>194</sup>

According to law and critical race theory scholar Angela P. Harris, many feminist legal theorists have historically relied on gender essentialism, which is the notion that a unitary, “essential” women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.<sup>195</sup> Moreover, as described by Harris, the result of this tendency toward gender essentialism was that not only were some voices silenced in order to privilege others, but also that the voices that were silenced turn out to be the same voices silenced by mainstream legal thought.<sup>196</sup> I argue that Harris’ claims, mentioned above, from an article published in 1990, are still valid today and even though feminist legal theory has made and continues to make progress away from gender essentialism, the issue persists to this date. More recently in 2019, gender, literature and critical race theorist Barbara Tomlinson provided a brief and yet extremely relevant overview of the development of intersectional thinking about women from the 1970s to the present:

Since its inception in the nineteenth century, the intersectional thinking of women of color was frequently ignored. In the 1970s and 1980s, Black feminists and other feminist scholars of color vigorously argued that categories such as gender, race, and class are not stable and discrete but, rather, variable and changing constellations that

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<sup>192</sup> *Ibid.*

<sup>193</sup> Deer, *supra* note 115 at 505.

<sup>194</sup> Painter, *supra* note 189 at 918.

<sup>195</sup> Angela P. Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42:3 *Stanford Law Review* 581–616 at 585.

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

are interrelated, co-constitutive, and simultaneous. By the 1980s and 1990s their arguments insisting on the heterogeneity of social difference created a dramatically successful intervention in feminist studies. This moment provoked a shock and sense of loss for many white feminists: they were forced to abandon illusions of the wholeness and homogeneity of the category ‘woman,’ its primacy as a social category, and the centrality of white women as representatives of feminism. I argue that significant traces of this moment of loss remain, that this intervention is still being resisted at the scene of argument through the specific claims and rhetorics of scholarly texts.<sup>197</sup>

In other words, Tomlinson argues, and I agree, that up to this point feminist studies systematically forecloses inquiries into the nature of its own historical reliance on deployments of racial power and hierarchy, of privileging colorblind solutions to colorbound problems.<sup>198</sup> Tomlinson claims further that:

Exactly because they see themselves as on the side of social justice, feminists may fail to see how their own practices of reading and writing serve as discursive technologies of power, framed in terms of the colonial matrix of knowledge and allegiances to hegemony-seeking disciplines. Under such circumstances, specific rhetorical strategies can serve as potent tools of dominance, infusing the reading situation with strategies of racial subordination that go unremarked because they are authorized by tradition and convention.<sup>199</sup>

I argue that feminist bodies of thought and practice are not free of structural and systemic biases and may perpetuate injustices against certain groups, silencing the voices of Indigenous, Black and immigrant women, women with disabilities, women of colour and 2SLGBTQIA peoples in the Canadian context, for example.

This thesis aims to address three interrelated tendencies in white feminist legal scholarship identified by Kline in 1989 that persist to this date: the tendency to overlook racial identity when considering the impact of an issue on women, the tendency to define issues in ways that more significantly address the experiences of white women than the experiences of women of colour, and the tendency to over-simplify the sites of women’s oppression.<sup>200</sup> As such, I argue that any appropriate remedy for sexual assault cases must be inherently feminist, trauma-informed, intersectional, decolonial and anti-carceral at its foundation. Further, I argue for a feminist, trauma-

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<sup>197</sup> Barbara Tomlinson, *Seeing Race Again: Countering Colorblindness across the Disciplines*, ed by et al Kimberlé Williams Crenshaw (Berkeley: University of California Press, 2019) at 180-181.

<sup>198</sup> *Ibid* at 181.

<sup>199</sup> *Ibid* at 180.

<sup>200</sup> Marlee Kline, “Race, Racism, and Feminist Legal Theory” (1989) 12 Harv Women’s LJ 115–150 at 121.

informed practice of restorative justice that considers the multiple barriers to justice faced by some individuals and groups and provides a more equitable and appropriate path for individuals impacted by sexual assault.

There is now a growing body of research that supports restorative justice for serious and violent crimes, including sexual assault.<sup>201</sup> As discussed in Chapter 2, the criminal justice system can be especially difficult for victim-survivors of sexual assault and many of them report dissatisfaction with criminal justice processes.<sup>202</sup> While the criminal justice system often does not satisfactorily address victim-survivors harms and needs in the aftermath of a sexual assault, a feminist, trauma-informed practice of restorative justice can do that while allowing victim-survivors to control restorative processes while paying due attention to the structural inequities of gender-based crime. In the next section, I begin to advance the argument for feminist, trauma-informed restorative justice for sexual assault cases by exploring aspects of intersectionality and colonialism in the Canadian context.

### **3.2 Intersectionality and Colonialism Within the Sexual Assault Context**

When discussing sexual assault, as I have done thus far in this thesis, it is essential to note that there are significant differences in how violence disproportionately affects some groups to the detriment of others. The combination of multiple barriers to justice, such as race, gender, Indigeneity, ability and other identity categories, for example, is relevant to understanding the overlapping forces that impact peoples' experiences of sexual assault. As discussed in Chapter 2, when discussing sexual assault and intersectionality, it is crucial to understand that not all peoples in Canada are equally likely to be victim-survivors of sexual assault or to experience the criminal justice system as a safe and inclusive institution. Individuals such as Indigenous, Black and immigrant women, women with disabilities and women of colour, for example, carry a "double-burden" because they are discriminated against on the basis of their gender and further on the basis of other aspects of their identity, that makes them face multiple barriers to access justice within the criminal justice system.

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<sup>201</sup> Estelle Zinsstag & Marie Keenan, *Restorative responses to sexual violence: legal, social and therapeutic dimensions* (New York, NY: Routledge, 2017) at 6.

<sup>202</sup> *Ibid.*

In the U.S. context, American critical race feminist activist and legal scholar Kimberlé Crenshaw coined the term “intersectionality” to address the fact that many social justice problems like racism and sexism are often overlapping, creating multiple levels of social injustice.<sup>203</sup> Crenshaw asserts that “discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions, and sometimes from all of them.”<sup>204</sup> In other words, it is crucial to recognize that many women live at the intersection of more than two identity categories, such as disabled Black women,<sup>205</sup> Indigenous sex workers,<sup>206</sup> 2SLGBTQQIA sex workers,<sup>207</sup> transgender women of colour,<sup>208</sup> for example, which means they experience multiple axes of discrimination that put them at higher risk of violence and raises the barriers for them to access justice.

In her ground-breaking work, Crenshaw reasserts that her focus on the intersections of race and gender highlights the need to account for multiple categories of identity when considering how the social world is constructed.<sup>209</sup> In this regard, Crenshaw claims that political intersectionality can sometimes add an intersectional disempowerment layer,

The concept of political intersectionality highlights the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas. The need to split one’s political energies between two sometimes opposing political agendas is a dimension of intersectional disempowerment that men of color and white women seldom confront. Indeed, their specific raced and gendered experiences, although intersectional, often define as well as confine the interests of the entire group. For example, racism as experienced by people of color who are of a particular gender - male - tends to determine the parameters of antiracist strategies, just as sexism as experienced by women who are of a particular race-white-tends to ground the women’s movement. The problem is not simply that both discourses fail

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<sup>203</sup> Crenshaw, “Mapping the Margins,” *supra* note 8 at 1244.

<sup>204</sup> Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1989:1 U Chicago Legal F 139–167 Article 8 at 149 [Crenshaw, “Demarginalizing the Intersection of Race and Sex”].

<sup>205</sup> Laurie S. Alphonse, “I am ME: Reflections on race, disability and identity” (accessed 23 June 2021), online: *DAWN Canada* <[www.dawncanada.net/issues/iamme/](http://www.dawncanada.net/issues/iamme/)> [perma.cc/BM8S-RTYR]

<sup>206</sup> Lara Purvis, Chris Bruckert & Frédérique Chabot, “The Toolkit: Ottawa area sex workers speak out”, online (pdf): *POWER - Prostitutes of Ottawa/Gatineau Work Educate and Resist* <[www.powerottawa.ca/wp-content/uploads/2019/03/POWER\\_Report\\_TheToolkit.pdf](http://www.powerottawa.ca/wp-content/uploads/2019/03/POWER_Report_TheToolkit.pdf)> [perma.cc/FL55-2F4E] at 16.

<sup>207</sup> *Ibid.*

<sup>208</sup> Al Donato, “Trans Canadians of Colour Face Increased Violence: National Research” (11 October 2020), online: *HuffPost Canada* <[www.huffingtonpost.ca/entry/trans-racism-canada-survey\\_ca\\_5faacb00c5b67c3259b36c0b](http://www.huffingtonpost.ca/entry/trans-racism-canada-survey_ca_5faacb00c5b67c3259b36c0b)> [perma.cc/RZ5S-6SDM]

<sup>209</sup> Crenshaw, “Mapping the Margins,” *supra* note 8 at 1245.

women of color by not acknowledging the ‘additional’ burden of patriarchy or of racism, but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experienced by men of color, and sexism in ways not always parallel to experiences of white women, dominant conceptions of antiracism and feminism are limited, even on their own terms.<sup>210</sup>

With respect to intersectional disempowerment, the experiences of white women in Canada, as mentioned above, tends to be the focus of the women’s movement, despite the fact that their experiences differ from the experiences of diverse groups of women such as Indigenous, Black and women of colour, for example.

In the realm of sexual assault, different aspects of a person’s identity and social location, such as age, race, gender, ability, and sexual orientation, can leave some people more vulnerable to experiencing sexual assault than others or prevent them from experiencing the criminal justice system as a safe and inclusive institution. This assertion is supported by alarming data from the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG)<sup>211</sup> in Canada, which stated as follows:

Other than murder, statistics also reveal how Indigenous women consistently experience higher rates and more severe forms of physical assault and robbery than other groups in Canada. Sexual violence is a huge problem in all its forms: Indigenous women are sexually assaulted three times more often than non-Indigenous women, and most of the women and children trafficked in Canada are Indigenous. According to researchers Cherry Kingsley and Melanie Mark, in some communities, sexually exploited Indigenous children and youth make up more than 90% of the visible sex trade, even where Indigenous people make up less than 10% of the population. The majority of Indigenous women who are later sexually exploited or trafficked were sexually abused at an early age, making them easy targets for traffickers who prey on this vulnerability and count on society’s turning a blind eye.<sup>212</sup>

Indigenous women, then, are at higher risk of sexual violence, including sexual assault, than non-Indigenous women. Also, the criminal justice system repeatedly perpetuates systemic barriers to justice and most often will further the trauma, harm and inequities within those groups.

According to the MMIWG report, intersectionality examines more than a single identity marker and includes a broader understanding of simultaneous interactions between different

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<sup>210</sup> *Ibid* at 1252.

<sup>211</sup> Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: desLibris, 2019) [Final Report into MMIWG, vol 1a] at 55.

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

aspects of a person's social location.<sup>213</sup> The MMIWG report asserts that 2SLGBTQQIA peoples, for example, encounter discrimination, stigmatization and traumatic experiences of violence at disproportionately higher rates than their non-2SLGBTQQIA counterparts, and these experiences are motivated by intolerance, fear, or hatred of the person's gender identity, sexual orientation and/or gender expression in every social context: homes, schools, communities, religious and spiritual centers, public spaces and health institutions.<sup>214</sup> In addition to Indigenous and 2SLGBTQQIA peoples, Black and immigrant women, women of colour and women with disabilities, for example, are also more vulnerable to sexual assault in Canada<sup>215</sup> because those groups often experience multiple sites of discrimination, such as – and not limited to – lack of political power, white supremacy mindset, inequalities based on sex, race and disability, stereotyping and prejudice and historical reasons, for example.<sup>216</sup>

Rather than using a single-strand analysis of sexual orientation, gender, race or class, intersectionality challenges policy makers and program developers to consider the interplay of race, ethnicity, Indigeneity, gender, class, sexuality, geography, age and ability, as well as how these intersections ground systems of oppression and, ultimately, target Indigenous women, girls, and 2SLGBTQQIA people.<sup>217</sup> And to incorporate a strong intersectional analysis to the problem of sexual assault is exactly what I wish to achieve by advancing the argument of feminist, trauma-informed restorative justice practice for sexual assault cases.

In this thesis, as mentioned above, I argue that a feminist, trauma-informed approach to restorative justice for sexual assault needs to be foundationally intersectional. In other words, if restorative justice is to provide an adequate response to sexual assault, its processes and remedies must address intersectionality in a feminist and trauma-informed way, taking into account intersectional aspects of people's identity and experiences. For example, research shows that Black women specifically avoid reporting and discussing sexual assault with others because of their experience that their claims of assault are not taken seriously, a historical problem that persists today.<sup>218</sup> Legal scholar Linda Adeniji asserts that when a Black victim-survivor of sexual assault

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<sup>213</sup> *Ibid* at 103.

<sup>214</sup> Final Report into MMIWG, vol 1a, *supra* note 211 at 56.

<sup>215</sup> Carol Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" (2011) 1:1 JCRI at 1.

<sup>216</sup> *Ibid* at 30-31.

<sup>217</sup> Final Report into MMIWG, vol 1a, *supra* note 211 at 103-104.

<sup>218</sup> Roxanne Donovan & Michelle Williams, "Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors," 25 *Women & Therapy* 95, 96 (2002) at 96.

pursues legal action in the courts, juries are less likely to believe the defendant is guilty.<sup>219</sup> Adeniji claims further that this is due in part to the stereotype of Black women as more likely to consent to sex or being more sexually experienced, and therefore less likely to be harmed by sexual assault or violence, that fosters the belief that Black women are “unrapable.”<sup>220</sup>

That being said, the discrediting of Black, Indigenous, immigrant, women with disabilities and women of colour, for example, is the consequence of a complex intersection of a gendered, racist and disability-based system, one that constructs rules appropriate for “good” and “bad” women, racialized codes that produce understandings that define the allegedly essential nature of those groups – Indigenous, Black and immigrant women and women of colour – and creates specific vulnerabilities to violence among women with disabilities. An intersectional analysis tries to promote a more nuanced understanding of how the combination of different identities not only increases the likelihood of experiencing sexual violence, as is the case for Indigenous women who also work in the sex industry,<sup>221</sup> for example, but also creates distinct experiences at different intersections of identity and social location. This thesis emerged in a context where intersectional lenses for addressing sexual assault in Canada is an urgent necessity today.

When white feminisms overlook how white supremacy and dominance impacts Black, Indigenous, immigrant, women of colour, and women with disabilities, it misrecognizes those groups’ experiences.<sup>222</sup> Legal scholar Costas Douzinas asserts that misrecognition places people in an inferior position and, as a form of oppression, becomes the basis for wider maltreatment.<sup>223</sup> Usually, the misrecognized person internalizes their distorted image and descends to self-loathing and shame. The racialized person is seen as a second-class person who does not enjoy the dignity and respect that universalistic liberal law recognizes in all persons.<sup>224</sup> By making an analogy with philosopher and gender theorist Judith Butler’s arguments, people of diverse identities are “abject,” a term used to refer to the designation of those “unlivable” and “uninhabitable” zones of social life, which are nevertheless densely populated by those who do not enjoy the status of the

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<sup>219</sup> Linda Adeniji, “The Unrapeable Black Woman: How the Lack of Legal Protection Through the Centuries Promoted the Tradition of Unreported Sexual Assaults” (2015) SSRN Scholarly Paper at 4.

<sup>220</sup> *Ibid.*

<sup>221</sup> Purvis, Bruckert & Chabot, *supra* note 206 at 16.

<sup>222</sup> Katherine Wing, *Critical Race Feminism: A Reader* (New York: New York University Press, 2003) at 7.

<sup>223</sup> Costas Douzinas, “Identity, Recognition, Rights or What Can Hegel Teach Us about Human Rights?” (2002) *J.Law & Soc* 379-405 at 383.

<sup>224</sup> *Ibid* at 394.

subject.<sup>225</sup> To be Black, Indigenous, immigrant, women of colour or have a disability most often is to belong nowhere.<sup>226</sup>

Concerning the sexual assault of Black, Indigenous and women of colour, race and gender converge; however, the concerns of minority women fall into the void between concerns about white women's issues and concerns about racism.<sup>227</sup> Many critical race feminists argue that liberal feminist theory has been able to see the analogies between racism and sexism but has been unable to develop a framework that encompasses both.<sup>228</sup>

### 3.2.1 Inherent Connection Between Colonialism, Sexual Assault and Systemic Oppressions

When discussing sexual violence, it is also crucial to recognize the inherent connection between colonialism and all forms of violence, especially sexual violence. The colonization process in Canada is genocidal at its roots. According to the final report of the Truth and Reconciliation Commission of Canada (TRC), states that engaged in cultural genocide set out to destroy the political and social institutions of the targeted group, and that was what happened among Indigenous nations in Canada.<sup>229</sup> Settlers are assumed to be vested with the proper authority in making decisions,<sup>230</sup> and how they think and act are assumed to be the only vehicle or mechanisms by which legitimate actions are first imagined and then instantiated.<sup>231</sup> Settlers benefit from the colonial project and worked to undermine Indigenous peoples' relationships to the land, language, religion, family relations, educational practices, morality and social custom.<sup>232</sup>

Slavery in Canada predates the arrival of colonizers, with some Indigenous peoples enslaving prisoners taken in war, for example.<sup>233</sup> However, Europeans brought a different kind of

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<sup>225</sup> Judith Butler, "Bodies that matter" in *Bodies that matter: on the discursive limits of "sex"* (New York: Routledge, 1993) at 3.

<sup>226</sup> Douzinas, *supra* note 223 at 405.

<sup>227</sup> Crenshaw, "Mapping the Margins," *supra* note 8 at 1260.

<sup>228</sup> Jacinth Herbert, "Otherness" and the Black Woman (1989) 3 C.J.W.L. 269-279 at 276.

<sup>229</sup> *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada* (Ottawa: 2015) [Final report of the TRC] at 1.

<sup>230</sup> Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110:2 South Atlantic Quarterly 329-346 at 332.

<sup>231</sup> *Ibid.*

<sup>232</sup> Final report of the TRC, *supra* note 229 at 48.

<sup>233</sup> Matthew McRae, "The story of slavery in Canadian history: It happened here, too," (Accessed 11 June 2021), online: *Canadian Museum for Human Rights* <[humanrights.ca/story/the-story-of-slavery-in-canadian-history](http://humanrights.ca/story/the-story-of-slavery-in-canadian-history)> [perma.cc/TV22-AH9A].

slavery to North America, where colonizers saw enslaved people less as human beings and more as property that could be bought and sold.<sup>234</sup> Under colonial slavery in Canada, Indigenous and Black people were dispossessed of their bodies; simultaneously, the distinction between a slave as a commodity and a slave as a human person with volition collapsed.<sup>235</sup> The majority of slaves were not considered worthy, and their materiality was understood as something that did not matter.<sup>236</sup> By making an analogy with Foucault's arguments,<sup>237</sup> "Blackness" and "Indigeneity" acted as micro-mechanisms of power that came to represent and constitute the interest of settlers and the Crown. In other words, Black and Indigenous bodies' only purpose was to serve the Crown's interests in producing wealth. Those power-mechanisms enabled liberal capitalism because the state created the conditions under which exploitation could take the form of exchange and provide the conditions for free trade in markets and capitalist production.<sup>238</sup> In this process, Indigenous and Black peoples were dispossessed of their means of livelihood and had their freedoms constrained. For example, diminishing Indigenous traditions, subjugating Indigenous bodies and taking over Indigenous lands were – and are – the tools used by colonizers to make Indigenous peoples internalize self-hatred, inscribing hierarchy and domination on their colonized bodies.

Under the institutions of slavery and colonialism, sexual violence was also used as a tool of domination in the U.S. and in Canada.<sup>239</sup> Legal scholar Madelyn C. Squire asserts that the shift for white woman from sinful and sexual to the virtuous lady occurred simultaneously with the mass exploitation of enslaved Black women.<sup>240</sup> Racism was not the sole cause of the many cruel and sadistic acts of violence against enslaved Black women:<sup>241</sup> "the deep hatred of woman that had been embedded in the white colonizer's psyche by patriarchal ideology and anti-woman religious teachings both motivated and sanctioned white male brutality against Black women."<sup>242</sup>

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<sup>234</sup> *Ibid.*

<sup>235</sup> Brenna Bhandar, "Dis-assembling legal form: ownership and the racial body" in *New Critical Legal Thinking: law and the political* (London: Routledge, 2012) ch 6 112-127 at 112.

<sup>236</sup> Butler, *supra* note 225 at 3.

<sup>237</sup> Michel Foucault, "Two: 14 January 1976" in *Society must be defended: lectures at the Collège de France, 1975-76*, 1st ed (New York: Picador, 2003) at 32.

<sup>238</sup> Stephen Gill & A. Claire Cutler, eds, *New constitutionalism and world order* (Cambridge, United Kingdom; New York, NY: Cambridge University Press, 2014) at 127.

<sup>239</sup> Andrea Smith, "Not an Indian Tradition: The Sexual Colonization of Native Peoples" (2003) 18:2 *Hypatia* at 71.

<sup>240</sup> Madelyn C. Squire, "Discovering Our Connections: Reflections on Race, Gender and the other Tales of Difference" (1993) 23:3 *Golden Gate U L Rev* 795–816 at 811.

<sup>241</sup> *Ibid.*

<sup>242</sup> Bell Hooks, *Ain't I A Woman* 39-41 (1981), cited in Squire, *supra* note 240 at 811.

While white colonizers upheld a white supremacist ideology of “self-righteous sexual morality,” they readily labeled Blacks as sexually immoral beings who needed to be controlled.<sup>243</sup>

Moreover, history and theological studies scholar Andrea Smith asserts that because Black women were seen as the property of their slave owners, their sexual assault at the hands of these men did not “count.”<sup>244</sup> Slave owners also used sexual assault to reproduce an exploitable labour force because the children of Black and Indigenous slave women inherited their slave status.<sup>245</sup>

Law and gender scholar Susan Sage Heinzelman and legal scholar Zipporah Batshaw Wiseman asserted the following regarding Black women’s experience of sexual assault under the colonial slavery:

For example, the paradigm experience of rape for black women has historically involved the white employer in the kitchen or bedroom as much as the strange black man in the bushes. During slavery, the sexual abuse of black women by white men was commonplace. Even after emancipation, the majority of working black women were domestic servants for white families, a job which made them uniquely vulnerable to sexual harassment and rape. Moreover, as a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime. Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature. In contrast to the partial or at least formal protection white women had against sexual brutalization, black women frequently had no legal protection whatsoever. ‘Rape,’ in this sense, was something that only happened to white women; what happened to black women was simply life.<sup>246</sup>

During slavery, Black women were seen as embodying “female evil” and “sexual lust,”<sup>247</sup> and their sexual assault was not considered a crime. The devaluation of Black womanhood was aggravated by their sexual exploitation during slavery, and this legacy continues today.<sup>248</sup>

English and American literature scholar Toni Irving claims that law constructs an image of the Black woman’s body that frames sexual violence as merely an extension of Black women’s “normal” sexual practices, and this logic is also applicable in the Canadian context. Since the beginning of transatlantic slavery, Black women have been marked as sexually deviant, indecent,

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<sup>243</sup> Squire, *supra* note 240 at 811.

<sup>244</sup> Smith, *supra* note 239 at 71.

<sup>245</sup> Smith, *supra* note 239 at 78.

<sup>246</sup> Susan Sage Heinzelman & Zipporah Batshaw Wiseman, *Representing women: law, literature, and feminism* (Durham, N.C: Duke University Press, 1994) at 118.

<sup>247</sup> Squire, *supra* note 240 at 811.

<sup>248</sup> Toni Irving, “Decoding Black Women: Policing Practices and Rape Prosecution on the Streets of Philadelphia” (2008) 20:2 NWSA Journal 100–120 at 112.

vulgar and easy. Such stereotypes of the hypersexual Black woman continue to erase the sexual assault of Black women, diminish their rights and place them outside of the narrative frames that legitimate entitlement<sup>249</sup> to access justice. These arguments illustrate how gender violence functions as a tool of racism and colonialism among women of colour in general.

Regarding Indigenous women, early colonial writings described them as “Indian princesses” - fetching, proud and virtuous.<sup>250</sup> Resistance to colonization led to the conceptualization of the idea of Indigenous women being “dirty, lewd, uncivilized and sexually deviant.”<sup>251</sup> Similar to Black women, Indigenous women were also viewed as inherent subjects of sexual violence marked by their “sexual perversity.”<sup>252</sup> Under settler colonialism logic in Canada, sexual violence does not affect Indigenous men and women in the same way.<sup>253</sup> When an Indigenous woman is sexually assaulted, the sexual assault is not just an attack on her identity as a woman but also on her identity as Indigenous.<sup>254</sup> In this context, the issues of colonial, race and gender oppression cannot be separated,<sup>255</sup> especially when discussing sexual violence in Canada. Colonialism remains an ongoing process, shaping structural inequalities and systemic oppressions to this date. The search for a response to sexual assault that is intersectional and decolonial at its roots is a necessity and understandings of colonial slavery, settler colonialism, ongoing colonialism and intersectionality are essential when rethinking appropriate feminist, trauma-informed responses to sexual assault in Canada.

In the U.S. context, Crenshaw suggests that a single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise privileged members of a group.<sup>256</sup> In other words, Crenshaw explains that in race discrimination cases, discrimination tends to be viewed with reference to sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women. This focus on the most privileged group members marginalizes those who

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<sup>249</sup> *Ibid* at 109.

<sup>250</sup> Native Women’s Association of Canada, “Fact Sheet: Root Causes of Violence Against Aboriginal Women and the Impact of Colonization” (accessed 2 July 2021), online (pdf): <[www.nwac.ca/wp-content/uploads/2015/05/Fact\\_Sheet\\_Root\\_Causes\\_of\\_Violence\\_Against\\_Aboriginal\\_Women.pdf](http://www.nwac.ca/wp-content/uploads/2015/05/Fact_Sheet_Root_Causes_of_Violence_Against_Aboriginal_Women.pdf)> [perma.cc/BVU4-27H5]

<sup>251</sup> *Ibid.*

<sup>252</sup> Smith, *supra* note 239 at 73.

<sup>253</sup> *Ibid* at 71.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> Crenshaw, “Demarginalizing the Intersection of Race and Sex,” *supra* note 204 at 140.

are multiply burdened, and obscures claims that cannot be understood as resulting from discrete sources of discrimination.<sup>257</sup> These insights can be applied to the Canadian context when rethinking the use of a transformative practice of restorative justice for sexual assault cases involving Indigenous, Black and immigrant women, women of colour and women with disabilities, for example. Crenshaw also asserts that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon.<sup>258</sup> Intersectional understandings, thus, reflect a recognition that oppression at the personal and structural levels creates a societal hierarchy and that this requires policy tailored to the needs of those who experience discrimination.<sup>259</sup>

With these considerations in mind, the theoretical model that I bring to the issues raised in Chapter 2 regarding the criminal justice system and sexual assault cases is one that is feminist and trauma-informed, in which intersectional, decolonial, and anti-carceral approaches are foundational. I will use this theoretical framework to promote a more nuanced understanding of how the combination of different identities not only increases the likelihood of experiencing sexual assault but also creates distinct perceptions at different intersections of identity and social location. Intersectional lenses have already been used by some courts and tribunals in Canada to determine whether discrimination has occurred.<sup>260</sup> In some cases, legal practitioners analyze intersectionality by considering the effect of the existence of multiple grounds of discrimination. In others, legal practitioners tend to revert to a sequential analysis of each ground in isolation.<sup>261</sup>

I argue, however, that even though some tribunals and courts are recognizing an increasing need for an intersectional analysis,<sup>262</sup> the criminal justice system in Canada has not been able to incorporate an intersectional lens, especially in sexual assault cases. The goal of this study is to examine alternative paths to justice in the area of sexual assault, such as restorative justice, that uses intersectional lenses to better acknowledge the differences among peoples and promotes justice responses to sexual assault are tailored to the needs of those who experience discrimination.

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<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> Final Report into MMIWG, vol 1a, *supra* note 211 at 104.

<sup>260</sup> Canada, *The move towards an intersectional approach*, Ontario Human Rights Commission (Ottawa: October 9, 2001) at 14.

<sup>261</sup> *Ibid* at 20.

<sup>262</sup> *Ibid.*

In the next section, I explore aspects of the anti-carceral theoretical framework I am proposing in order to transform restorative justice for cases of sexual assault in Canada.

### 3.3 Anti-Carceral Feminisms and Sexual Assault

The criminal justice system is based on the promise that it will protect peoples and communities by apprehending offenders and meting out “appropriate” measures of punishment.<sup>263</sup> As Martin asserts:

A corollary to this promise is that when the criminal justice system fails to keep citizens safe (which is inevitable) and fails to satisfy the need for recognition of the wrong done (increasingly common), the system can be, and indeed must be, reformed so that it will mete out more retribution, and thereby provide more security and an enhanced sense that justice was done.<sup>264</sup>

As discussed in Chapter 2, since the 1980s, feminist engagement with criminal law gained momentum to constrain the influence of rape myths. Since then, feminist actors and activists working within the Canadian criminal justice system have been trying to adapt its proceedings and standards to better address sexual assault through sexual assault law reforms. However, despite feminist strides to reform the criminal justice system, sexual assault remains both underreported and under-prosecuted.<sup>265</sup> And, victim-survivors continue to express dissatisfaction with how the police and courts handle their cases and with their experience of the trial process.<sup>266</sup> Most victim-survivors never see their perpetrators held accountable.<sup>267</sup> In this context, I argue that there is a need to rethink and question the appropriateness of the criminal justice system as a justice response to sexual assault. In rethinking the retribution logic in the Canadian context, legal scholar Dianne L. Martin asserts:

Feminist analysis has catalogued many of the failures of the criminal justice system, but it is not enough to identify the false promises of universality, equality, and effectiveness. The insidious promise of deterrence as a promoter of safety and

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<sup>263</sup> Dianne L. Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998) 36:1 Osgoode Hall L J 151 at 159.

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

<sup>265</sup> Deer, *supra* note 115 at 514.

<sup>266</sup> Daly, “Conventional and innovative justice responses to sexual violence,” *supra* note 116 at 1.

<sup>267</sup> Deer, *supra* note 115 at 505.

retribution as the only means to public acknowledgement of a wrong must also be exposed, both in theory and in practice, particularly if the early goal of transforming abusive institutions is to have any chance of success. New models for measuring the effectiveness of interventions are needed, as are new approaches to the harm that patriarchy does to us all. When violence is perpetrated and perpetuated, and trust is abused, there is a clear need for an intervention that provides safety and restores peace.<sup>268</sup>

I argue, in this context, that those reforms should not be seen as a triumph for women: putting the criminal justice system as the central focus to advance women's liberation fails to meet the varied justice needs of victim-survivors of sexual assault. While there have been various efforts to develop alternatives to the criminal justice system, these alternatives have rarely been used in the context of sexual assault because there is a hesitancy to adopt alternatives that might seem to be too "soft" on sexual violence perpetrators.<sup>269</sup> Regarding the functions of criminal law, criminology scholars Anastasia Powell and Asher Flynn and socio-legal scholar Nicola Henry argue the following:

It is perhaps a reflection of this core expressive function of the criminal law that for many victim-survivors, feminist scholars and activists, justice in response to sexual violence has been pursued with specific reference to criminal convictions and carceral punishment. Nonetheless, there is growing acknowledgement that such measures and understandings of justice are considerably narrow and frequently fail to meet the varied justice needs of victim-survivors of sexual violence. [...] Furthermore, as Judith Herman notes, many of the processes of the criminal trial 'ritual' are antithetical to justice from the victim's perspective. At a time when victim-survivors require the opportunity to be heard, believed and regain control over their narrative, the criminal trial frequently silences, doubts and disinherits victims and renders them to the role of mere 'witnesses.' In light of such critiques, it is important to problematize the domination of criminal law in the imaginative space of justice.<sup>270</sup>

Even though not all feminists agree with carceral feminist approaches, they are the most common approaches to responding to sexual assault<sup>271</sup> and the most common anti-violence sector approach. Harris asserts that the logic behind reliance on the criminal justice system is clear: because violence against women and sexual minorities intensifies and legitimizes discrimination against these groups, criminal punishment for the perpetrators of such violence furthers the cause of equal

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<sup>268</sup> Martin, *supra* note 263 at 184.

<sup>269</sup> Deer, *supra* note 115 at 505.

<sup>270</sup> Anastasia Powell, Nicola Henry & Asher Flynn, *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan: 2015) at 6.

<sup>271</sup> Deer, *supra* note 115 at 509.

citizenship.<sup>272</sup> Harris points out that “like expressive violence itself, criminal punishment is widely understood to “send a message” - the message that women and sexual minorities matter.”<sup>273</sup> Further, Harris asserts the following:

In the last few years, however, feminist academics and advocates have become increasingly uneasy about their reliance on the criminal justice state. Leigh Goodmark argues that mandatory arrest and no-drop prosecution policies reflect ‘maternalism,’ an advocacy approach that ‘assumes that women who have been battered are incapable of considering the full range of possibilities and deprives them of the ability to make choices for themselves, based on their own goals, values, beliefs, and understanding of their situations.’ Aya Gruber argues that rape reform has failed to substantially benefit victims while bolstering a program of state power and control that is antithetical to feminist principles. Janet Halley and others similarly argue that feminist alliances with the criminal justice state mark the development of a new feminist strategy – ‘governance feminism’- that may result in policies and rules that are inconsistent with feminist principles.<sup>274</sup>

In this study, I argue that carceral feminisms are not likely to yield fully constructive outcomes for victim-survivors of sexual assault. As has frequently been described, women’s experiences of reporting sexual assault to police and their subjection to victim-blaming cross-examinations in criminal trials are often even more traumatizing than the sexual assault itself.<sup>275</sup> To understand the fundamental problems with carceral approaches, philosophy and gender studies scholar Chloe Taylor cites the work of psychiatry scholar Judith Herman:

Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures... Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative.<sup>276</sup>

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<sup>272</sup> Angela P. Harris, “Heteropatriarchy kills: challenging gender violence in a prison nation” (2011) 37 Wash U JL & Pol’y 13–65 at 34.

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

<sup>274</sup> *Ibid* at 35.

<sup>275</sup> Chloe Taylor, Foucault, *Feminism and Sex Crimes: An Anti-Carceral Analysis* (New York: Routledge Taylor & Francis, 2019) at 99.

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

Furthermore, the dangers of locking up large numbers of violent sex offenders in institutions that are steeped in cultures of masculinist excess need to be reconsidered as well.<sup>277</sup> A feminist strategy to eliminate sexual assault should not support prisons that are dehumanizing, racist, homophobic and inherently violent themselves while disproportionately housing the poor, the mentally ill and members of racially subordinated communities.<sup>278</sup>

Putting incarceration in perspective, Backhouse asserts the following:

I suspect that, at its core, much of our historic commitment to prisons has been based on what penologists describe as the principle of ‘retribution’ or ‘vengeance.’ This is what we hear endlessly from media interviews with family and friends of victims of crime, who criticize what they perceive to be lenient prison sentences. ‘An eye for an eye,’ and so forth. The legitimacy of vengeance is rarely contested, but should feminists be so confident of its value? It may have historic origins that run centuries deep, but is it truly an ‘innate’ and ‘immutable’ need? Can we imagine a world in which feminists critique the social construction of this emotion called ‘vengeance’? Is vengeance something feminists should work to reduce? Conversely, are ‘compassion’ and ‘hope’ human feelings feminists should prefer? Do victims’ rights and offenders’ needs always have to be lined up on opposite sides?<sup>279</sup>

The state doles out punishment, which often results in violence against the perpetrator within the penal system, such as exemplified by the large number of women and men who are sexually assaulted in prisons.<sup>280</sup> There is also the issue of overincarceration of some communities in Canada more than others, especially of Indigenous peoples. Canada has a relatively low rate of incarceration compared to the U.S. and the size of Canada’s federal prison population has increased modestly in the past decade.<sup>281</sup> However, the Indigenous prison population has risen by almost 40%, while the non-Indigenous prison population has risen by just over 2%.<sup>282</sup> This showcases that the criminal justice system targets specific groups and communities in Canada, and that an

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<sup>277</sup> Constance Backhouse, “A Feminist Remedy for Sexual Assault: A Quest for Answers” in *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, ed by Elizabeth A Sheehy (Ottawa: University of Ottawa Press, 2012) ch 28 725-739 at 733 [Backhouse, “A Feminist Remedy for Sexual Assault”]

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid* at 735.

<sup>280</sup> Elizabeth L. Sweet, “Carceral feminism: Linking the state, intersectional bodies, and the dichotomy of place” (2016) 6:2 *Dialogues in Human Geography* 202–205 at 202.

<sup>281</sup> Akwasi Owusu-Bempah et al, “Years of life lost to incarceration: inequities between Aboriginal and non-Aboriginal Canadians” (2014) 14 *BMC Public Health* at 1.

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

Indigenous person in Canada can expect to lose considerably more life-years to incarceration than a non-Indigenous person.<sup>283</sup>

The symbolic and instrumental purpose of criminal law is the state's vindication of harms, and ideally, an affirmation of behaviours considered right and wrong in society.<sup>284</sup> The response to violence is thus more violence, although now it is violence enacted by the state as punishment which by its nature is meant to hurt.<sup>285</sup> Rejecting carceral/punitive logic in response to sexual violence invariably leads to questions about alternative approaches.<sup>286</sup> It leads to a search for justice responses that are equipped to deal with gendered violence in a way that treats victim-survivors of sexual assault with the respect and care they deserve, that promotes accountability of offenders in a meaningful way and that provides access to justice for all peoples impacted by sexual assault. To be inherently anti-carceral, however, restorative justice options should be developed in conjunction with and separate from the criminal justice system to amplify and accommodate victim-survivors' choices and provide better outcomes for society as a whole. In this context, I argue for a justice response that may be part of the legal system or lie beyond it: a feminist, trauma-informed practice of restorative justice for sexual assault cases. Further, this response needs to be anti-carceral at its roots and contingent on the adoption of feminist, intersectional, trauma-informed and decolonial lenses. The trauma-informed approach to restorative justice for cases of sexual assault is the focus of the following sections.

### **3.4 Trauma-Informed Practices for Sexual Assault Cases: Trauma and its Neurobiology**

Understanding trauma is integral to any approach to sexual assault reforms in Canada today. Before discussing what a feminist, trauma-informed approach could bring to this area of law, it is important to understand what trauma is. Most commonly, trauma is a term used to describe the challenging emotional consequences that living through a distressing event can have for an individual.<sup>287</sup> A traumatic event is one in which a person experiences something that is frightening

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<sup>283</sup> *Ibid* at 4.

<sup>284</sup> Kathleen Daly, *Sexual Assault and Restorative Justice* (Canberra: Australian National University, 2001) at 1 [Daly, "Sexual Assault and Restorative Justice"].

<sup>285</sup> Sweet, *supra* note 280 at 203.

<sup>286</sup> Deer, *supra* note 115 at 516.

<sup>287</sup> The Centre for Addiction and Mental Health (CAMH) is Canada's largest mental health teaching hospital and one of the world's leading research centres in its field. CAMH is fully affiliated with the University of Toronto and is a Pan American Health Organization/World Health Organization Collaborating Centre. See more at: Centre for

and overwhelming, and that entails a sense of loss of control.<sup>288</sup> Examples of traumatic events could be a sudden death of a loved one, discovering a life-threatening illness, experience of violence and/or abuse, accidents, sudden job loss and so on. The trauma-informed toolkit, which was developed by the Government of Manitoba, Department of Health Living and Health Canada's First Nations and Inuit Health Branch, asserts the following regarding a traumatic experience:

A traumatic event involves a single experience, or enduring repeated or multiple experiences, that completely overwhelm the individual's ability to cope or integrate the ideas and emotions involved in that experience. Recent research has revealed that psychological emotional trauma can result from such common occurrences as an auto accident, sudden job loss, relationship loss, a humiliating or deeply disappointing circumstance, the discovery of a life-threatening illness or disabling condition, or other similar situations. Traumatizing events can take a serious emotional toll on those involved, even if the event did not cause physical damage. This can have a profound impact on the individual's identity, resulting in negative effects in mind, body, soul and spirit.<sup>289</sup>

Trauma can cause physical, emotional, spiritual - and further - impacts on one's life and identity. Psychological trauma affects the health of people, families and communities across Canada and is a major public health issue.<sup>290</sup> Traumatic events can cause terror, intense fear, horror, helplessness and physical stress reactions.<sup>291</sup> When thoughts and memories of the traumatic event do not go away or get worse, they may lead to posttraumatic stress disorder (PTSD), which can seriously disrupt a person's ability to regulate their emotions and maintain healthy relationships.<sup>292</sup> In experiences of extreme threat, such as sexual assault or torture, it can feel like a threat to one's ability to survive.<sup>293</sup>

It is not the event that determines whether something is traumatic to someone, but the individual experience. Trauma is a fundamentally subjective event: what is traumatic for one

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Addiction and Mental Health (CAMH), "Trauma" (accessed 11 June 2021) online: <[www.camh.ca/en/health-info/mental-illness-and-addiction-index/trauma](http://www.camh.ca/en/health-info/mental-illness-and-addiction-index/trauma)> [perma.cc/XW5W-KV59].

<sup>288</sup> Canada, Department of Justice, *The Impact of Trauma on Adult Sexual Assault Victims*, by Lori Haskell & Melanie Randall, Catalogue No. J4-92/2019E-PDF (Ottawa: 2019) 1-42 at 12 [Haskell & Randall, "The Impact of Trauma on Adult Sexual Assault Victims"].

<sup>289</sup> Trauma-informed: The Trauma Toolkit - A resource for service organizations and providers to deliver services that are trauma-informed (Klinic Community Health Centre, 2013) at 9 [Trauma-informed: The Trauma Toolkit].

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*

<sup>292</sup> Lori Haskell & Melanie Randall, "Disrupted Attachments: A Social Context Complex Trauma Framework and the Lives of Aboriginal Peoples in Canada" (2009) *J. Aborig. Health*, 48-99 at 63-64 [Haskell & Randall, "Disrupted Attachments"].

<sup>293</sup> Haskell & Randall, "The Impact of Trauma on Adult Sexual Assault Victims," *supra* note 288 at 12.

person might not be traumatic for another.<sup>294</sup> The neurobiology of trauma studies how the body's reaction to traumatic events sets up a number of changes in the brain.<sup>295</sup> When we face fear and threat, for example, the limbic system<sup>296</sup> acts as our internal alarm,<sup>297</sup> and our bodies react automatically.<sup>298</sup> These reflexive reactions include, but are not limited to, fight, flight or freeze responses.<sup>299</sup> After the crisis is over, the body eliminates the stress hormones, and the body goes back to normal. Psychology scholars Kimberly A. Lonsway, Christopher Wilson and James W. Hopper, together with Sergeant Joanne Archambault, founder and chief executive officer for End Violence Against Women International (EVAWI), assert that in traumatic situations, however:

The limbic system is primed to remain on alert. With an alarm system stuck on 'high,' people impacted by trauma startle easier, have trouble accurately reading faces and social cues, have difficulty sleeping, and tend to avoid situations that increase stress. Since lots of everyday problems increase stress, at least in the short term, problems pile up. Avoidance of difficulties and the emotional pain that accompanies them can lead to phobias and other psychological disorders.<sup>300</sup>

In other words, when a threat to physical survival is imminent, the human brain, unless specifically trained to do otherwise, will switch to an "automatic response" (unconsciously subcortical dominance) and the defence responses of fight, flight or freeze.<sup>301</sup> The defence circuitry dominates brain functioning once activated. This means that responses to trauma are involuntary and often largely unconscious.<sup>302</sup> Extreme responses to traumatic situations, such as sexual assault, can include dissociation, tonic immobility (temporary paralysis) and collapsed immobility (e.g., fainting).<sup>303</sup> Given the relationship between trauma and crime, understanding trauma is essential for improving the of law in Canada today, not only for the benefit of people who experienced

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<sup>294</sup> Christopher Wilson et al, "Understanding the Neurobiology of Trauma and Implications for Interviewing Victims" (2016) at 4, online (pdf): *Office on Violence Against Women, U.S. Department of Justice* <[www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/The%20Neurobiology%20of%20trauma%20and%20interviewing%20victims.pdf](http://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/The%20Neurobiology%20of%20trauma%20and%20interviewing%20victims.pdf)> [perma.cc/YU2W-R3LB] at 4.

<sup>295</sup> *Ibid.*

<sup>296</sup> The limbic system is the part of the brain involved in our behavioural and emotional responses, especially when it comes to behaviours we need for survival: feeding, reproduction and caring for our young, and fight or flight responses. See more at: The limbic system (accessed 27 June 2021), online: <[qbi.uq.edu.au/brain/brain-anatomy/limbic-system](http://qbi.uq.edu.au/brain/brain-anatomy/limbic-system)> [perma.cc/QT73-G228].

<sup>297</sup> Trauma- informed: The Trauma Toolkit, *supra* note 289 at 69.

<sup>298</sup> *Ibid.*

<sup>299</sup> Haskell & Randall, "Disrupted Attachments," *supra* note 292 at 61.

<sup>300</sup> Trauma- informed: The Trauma Toolkit, *supra* note 289 at 69.

<sup>301</sup> Haskell & Randall, "The Impact of Trauma on Adult Sexual Assault Victims," *supra* note 288 at 12.

<sup>302</sup> *Ibid* at 13.

<sup>303</sup> *Ibid* at 15.

trauma from the sexual assault, but also to practitioners who work with trauma and offenders, who might also be impacted by traumatic experiences themselves.

### 3.4.1 The Trauma of Sexual Assault

Sexual assault will inevitably be an experience of trauma, and trauma has a neurobiological impact – that is, it affects our brains and our nervous systems.<sup>304</sup> When a victim-survivor is under threat, and their stress response is activated, they temporarily lose executive functioning; this impairs not only planning and decision making but also affects the brain’s capacity to organize experience into logical sequences.<sup>305</sup> Further, talking to police about what happened (revisiting traumatic events) and testifying as a sexual assault complainant in a sexual assault trial can also be retraumatizing for victim-survivors of sexual assault.

For practitioners working with sexual assault victim-survivors, such as anti-violence workers, counsellors, police and legal professionals, for example, working with trauma can be a traumatic experience *per se*, leading to secondary traumatization and vicarious traumatization.<sup>306</sup> Secondary traumatic stress is the direct result of hearing emotionally shocking material from clients; and vicarious traumatization is the process through which the trauma-worker’s inner experience is negatively transformed as a result of empathic engagement with clients’ traumatic material.<sup>307</sup> Criminology and restorative justice scholar Elizabeth M. Elliott also asserts that researchers, such as psychologist Alan Leschied, acknowledge that a significant risk of adult offending is related to childhood factors such as family violence, where the child is either the direct victim or a witness to violence from a caregiver.<sup>308</sup> Elliott points out that exposure to violence as a witness or recipient has been found to increase the risk for young adult criminal activity:<sup>309</sup>

The results of these studies confirm what most attentive criminal justice professionals already know – that people who have been repeatedly harmed often take on the role of the harm-doer (Falshaw 2005). The criminal justice proclivity to strictly delineate the

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<sup>304</sup> *Ibid* at 8.

<sup>305</sup> *Ibid* at 14.

<sup>306</sup> Julie Canfield, “Secondary Traumatization, Burnout, and Vicarious Traumatization” (2005) 75(2), *Smith College Studies in Social Work*, 81-101 at 82.

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

<sup>308</sup> Elizabeth M. Elliott, *Security, with care: restorative justice and healthy societies* (Halifax and Winnipeg: Fernwood Publishing, 2011) at 181.

<sup>309</sup> *Ibid*.

roles of victim and offender seems to be an institutional and conceptual convenience rather than a reflection of actual experiences. [...] Perhaps more to the point, the interventions of so-called correctional systems are predicated on the basis that offenders are somehow different than non-offenders, and consequently these interventions target behaviour on the surface of the criminal role.<sup>310</sup>

People who experienced trauma at any point in their lives, especially in their childhood, are at a higher risk to adult offending.

Given that traumatic experiences are common not only among victim-survivors of sexual violence but also among practitioners working with sexual assault and offenders themselves, it is essential to understand the neurobiology of trauma in sexual assault cases. Wilson, Lonsway, Archambault and Hopper assert the following important aspects regarding trauma and sexual assault: a) victim-survivors often do not get to choose between fight or flight: without the ability to think logically and analyze options rationally, what may appear to be an “easy” escape route (for example, when the perpetrator goes to the bathroom) might not be as easy as it seems (the part of the brain that would do that work for the victim is most likely impaired by the traumatic response); b) sexual assault victims are also often asked why they did not “fight back”: the offender often “play nice” to avoid indicating they represent a threat, and it activates victim-survivor attachment circuitry (allows every person to connect emotionally with other human beings). The activation of this attachment circuitry both creates confusion in the brain and suppresses victim-survivors defence circuitry; c) dissociation is a coping mechanism that involves the brain “disconnecting” from the circuitry that keeps us aware of what is happening inside our bodies (when the brain does not perceive any way to escape a threat, dissociation is a way of disconnecting from this experience); d) tonic immobility means that some victim-survivors will describe being unable to move, talk or cry out during the assault, even though they were aware of what was happening to their body; e) collapsed immobility is often described as “playing possum,” which erroneously suggests a conscious choice that is not actually available to the person at the time and describes a reflexive response that is not under the person’s conscious control.<sup>311</sup>

Psychiatry and clinical psychology scholar Lori Haskell and legal scholar Melanie Randall assert the following regarding the impact of trauma on victim-survivors of sexual assault’s decision-making:

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<sup>310</sup> *Ibid* at 182.

<sup>311</sup> Wilson et al, *supra* note 294 at 16-18.

These alterations in decision-making and strategizing capacities help explain why asking a victim to account for the decisions she made around a traumatic sexual assault is not a reasonable request; it can be perceived and experienced as victim-blaming. Most people who have experienced a traumatic, overwhelming event are not knowledgeable about the complex brain and body alterations that they experienced. They may not be able to explain even to themselves their own often confusing and counterintuitive behaviours at the time of the event or immediately afterwards.<sup>312</sup>

In other words, it is not always reasonable to expect the victim-survivor of sexual assault to explain with clarity and reason, for example, their decision-making choices at the time of the assault, let alone give a detailed and specific description of what happened, given their brain and body functions were impacted by the traumatic experience.

In a 2017 exposé conducted by the *Globe and Mail*, the investigative team heard the stories of 36 victim-survivors on “what is like to report a sexual assault” in Canada, including Emilie’s story.<sup>313</sup> Emilie reported a sexual assault at the Laurentian University’s student residence in Sudbury, Ontario. “By the time I got to the dorms, I was pretty inebriated,” she said. Emilie was waiting for her friend to come to sign her into the residence building when a man, whom Emilie had never met, introduced himself and put his arms around her:

‘Then everything starts to get hazy,’ Emilie says. ‘One minute I’m with my friends, and I was kind of blacking out, having little black-out parts, and the next minute I’m in a strange room with strange people, and I don’t know what I’m doing, and I don’t know what’s going on around me, and I’m scared.’ Emilie realized she was in a stranger’s dorm room, on his couch, naked, with two guys. One was penetrating her. Emilie says she asked him to stop. She said ‘no.’ When he didn’t, she eventually went along with it, hoping it would end sooner. The sergeant wrote in her notes that Emilie said she felt like she was having an out-of-body experience. When the man finished, Emilie started to cry. He asked her: ‘Are you crying?’ the officer noted. Emilie was embarrassed and said no but couldn’t stop. He asked her again, and again she denied it. One of the men then led Emilie downstairs to her friend’s room, although she told the sergeant she has no memory of this. At that point, a friend called Emilie a cab and she went home. (Emilie says the sergeant later told her that the second male had attempted to have sex with her but could not sustain an erection. The sergeant also told Emilie that she had had sex with this male in a stairwell at some point in the night, although Emilie has no recollection of this.) When she woke up the next morning, she says she felt sore and nauseous. She checked herself for bruises but didn’t see anything.

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<sup>312</sup> Haskell & Randall, “The Impact of Trauma on Adult Sexual Assault Victims,” *supra* note 288 at 14.

<sup>313</sup> Robyn Doolittle, “Unfounded: What it’s like to report a sexual assault” (17 March 2017), online: *The Globe and Mail* <[www.theglobeandmail.com/news/investigations/what-its-like-to-report-a-sexual-assault-36-people-share-their-stories/article34338353/#12](http://www.theglobeandmail.com/news/investigations/what-its-like-to-report-a-sexual-assault-36-people-share-their-stories/article34338353/#12)> [perma.cc/CD93-6FN5]

She says she didn't go to the hospital, because she was still struggling to make sense of the night before.<sup>314</sup>

When describing her sexual assault to police, Emilie mentioned she “felt like she was having an out-of-body experience,” which could be classified as a dissociative response to trauma. Dissociation describes the process of the brain protecting itself from overwhelming stimulus by splitting some aspect of the experience away from consciousness.<sup>315</sup> Regarding dissociative responses, Haskell and Randall posit:

Dissociated people report a sense of being detached from themselves and their emotions. They often have the perception of things as unreal and report being unable to make sense of what is going on. Dissociation can be automatic for people who were traumatized earlier in life. Victims describe their experience as feeling like being on autopilot. Others report trance states, feeling in a fog or in a dream, and that they don't feel their bodies.<sup>316</sup>

I argue that trauma and law are intrinsically interconnected. Sexual assault victim-survivors have too often experienced the criminal justice system as a place that retraumatizes and even harms them.<sup>317</sup> Society at large and the criminal justice system, in particular, still do not fully understand victim-survivors reactions to sexual assault, which contributes to ongoing severe deficiencies in how the criminal justice system processes sexual assault cases.<sup>318</sup> The range of ways in which women might cope with the effects and trauma of sexual violation remains, for the most part, largely misunderstood within the legal system.<sup>319</sup> Emilie's allegation, for example, was closed by police as “unfounded,” and there were no charges laid. Emilie waited for about two months after her assault to contact police: “[the sergeant] told me, straight up, ‘These guys don't look like sexual predators – do you want me to close the case? There's not a whole lot more you can do,’” Emilie recalled.

It is also essential to understand the relationship between trauma and memory in the context of sexual assault. Memories of traumatic events such as a sexual assault can be fragmentary. It can be difficult for victims to recall many details of a sexual assault in a complete or linear way.<sup>320</sup>

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<sup>314</sup> *Ibid.*

<sup>315</sup> Haskell & Randall, “The Impact of Trauma on Adult Sexual Assault Victims,” *supra* note 288 at 15.

<sup>316</sup> *Ibid* at 16.

<sup>317</sup> *Ibid* at 6.

<sup>318</sup> *Ibid.*

<sup>319</sup> Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims,’” *supra* note 54 at 425.

<sup>320</sup> Haskell & Randall, “The Impact of Trauma on Adult Sexual Assault Victims,” *supra* note 288 at 20.

Regarding memory recollection of a sexual assault and how police dealt with it, there is Ava's story:

Ava, an 18-year-old student at Western University, told the detective she and her friends had tickets to a keg party near campus the night before. She was already pretty drunk by the time they arrived around 10:30 p.m., and things only became more fuzzy as the night wore on. The last clear memory she has is of watching a beer pong drinking game outside with her friends and then heading downstairs to use the washroom. The next thing she knew, she was making out with a stranger. That part was consensual, she told the detective. But what happened next was not. 'I don't remember much, but I remember being on the ground. He was over top of me. My clothes were off. I kept saying, 'You're hurting me. Stop. You're hurting me.' He said something like 'I don't wanna hurt you, baby,'" Ava said. The man ignored her. Then a group of four or five guys with camera phones started taking pictures. Ava's voice caught as she arrived at this part in the story. She says the man on top of her ran off. Two women from the party found Ava sobbing, she said. It took Ava about eight minutes to run through a synopsis of the night. Det. Gambriel spent the rest of the interview questioning her about how it was that she was able to remember some parts of the night, but not others. He never returned to actual alleged rape itself. 'I've been doing this, Ava, for 22 years,' Det. Gambriel said. 'Whether people are intoxicated, or whether it's drugs, or whether it's a combination of both, it's not a sudden loss of memory and then a sudden regaining of the memory. It's a gradual and a gradual. So I don't know how you can block out one specific aspect of the night but remember the rest.' In fact, the detective is wrong, said Lori Haskell, a clinical psychologist who specializes in the neurobiology of trauma and sexual assault. Ava's account of having patchy memories of the night is consistent with both how trauma can impact memory and the effects of alcohol. [...] Ava had gone into the interview wanting the man arrested and charged. By the time she left, she wanted nothing to do with the police. 'The interview was another traumatic event for me. It gutted me. I felt so violated. I think one of the first things I said to my dad was, 'I don't want to talk to them again,'" Ava told *The Globe*. 'Going into it, I felt like I trusted the police. I had no reason not to trust the process.' Four weeks later, the case was dismissed as an unfounded allegation, meaning the detective did not believe Ava was a victim of a crime.<sup>321</sup>

According to Haskell and Randall, some elements of traumatic memories are actually more acutely remembered than others (enhanced memories) because they are etched more deeply in our memories precisely because they are traumatic and overwhelming to us.<sup>322</sup> They also assert that it is neither realistic nor rational to expect victims of sexual assault to recall all aspects of their

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<sup>321</sup> Doolittle, *supra* note 313.

<sup>322</sup> Haskell & Randall, "The Impact of Trauma on Adult Sexual Assault Victims," *supra* note 288 at 22.

traumatic experiences with detailed accuracy from start to finish because that is not how the brain works when the defence circuitry has kicked in.<sup>323</sup>

Ava's patchy memories of what happened to her, as described above, is consistent with both how trauma can impact memory and the effects of alcohol. The detective who said, "I don't know how you can block out one specific aspect of the night but remember the rest," did not understand the impacts that trauma could have on the brain and in memory. Regarding the criminal justice system and the neurobiology of trauma, Haskell and Randall assert the following:

It is helpful for those in the criminal justice system to understand the defence circuitry and the neurobiology of trauma in order to understand the range of reactions victims might exhibit in threatening circumstances, such as being sexually violated or attacked. We have all heard victims say things like, 'I just froze,' or 'I was just lying there until it ended,' or 'I didn't know what to do, I didn't feel like I could do anything.' To understand the effects of trauma, it is necessary to grasp the fundamentals of the brain's defence circuitry – how it protects itself – and the crucial role this circuitry plays in shaping victim responses to, and coping with, traumatic events, both at the time they occur, and in recalling and narrating them later.<sup>324</sup>

Ava's experience of reporting sexual assault and not being believed by law enforcement reinforces the importance of trauma-informed lenses not only in the criminal justice system but also in any appropriate response to sexualized violence. In addition to the victim-survivors' traumatic experiences, practitioners who work with trauma, such as anti-violence workers, counsellors, police and legal professionals, and also offenders might have experienced violence and trauma themselves at any point in their lives. Not understanding the impact of trauma in the context of sexual assault cases has caused – and continuously causes – further harm and even retraumatizes victim-survivors, communities, offenders and practitioners.

In other words, understanding the neurobiology of trauma and how trauma changes the brain and impacts people's lives is an essential step towards an appropriate response to sexual assault in Canada. As was described in Chapters 1 and 2, there are also important gendered differences and inequalities connected to the prevalence and impact of sexual assault, that require even more critically trauma-informed responses. A feminist, trauma-informed approach to restorative justice aims to create trauma precautions that reduce harm and provide positive supports for all people.

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<sup>323</sup> *Ibid* at 23.

<sup>324</sup> *Ibid* at 12.

### 3.4.2 Trauma-Informed Approach to Restorative Justice

The fields of neuroscience, trauma and the brain are evolving and developing at rapid rates, and there has been a recognition in a variety of contexts that a trauma-informed approach to working with people is an essential part of effective policy, practice and institutional organization.<sup>325</sup> In terms of law, the idea that legal responses and, in particular, the criminal justice system should be trauma-informed is relatively new and, as a result, underdeveloped.<sup>326</sup> I argue that the criminal justice system has demonstrated its inability to process sexual assault cases in a way that protects and empowers victim-survivors and causes no further harm, especially by not being trauma-informed. For example, before her legal career, Jill Taylor was a registered nurse for 14 years. Taylor asserts that as a lawyer, she discovered that judicial processes and systems often ignore the wellbeing of the people they are meant to serve. Taylor realized a different skillset was needed for dealing with traumatized individuals other than what is typical for lawyers and paralegals and found in the humanities the skillset of communication, observation and empathy.<sup>327</sup> Trauma-informed knowledge is an essential requirement for engaging with individuals within and outside the criminal justice system.

Nevertheless, what does a trauma-informed approach mean? What does it mean to be trauma-informed in the context of restorative justice practices for cases of sexual assault in Canada? To be “informed about trauma” means understanding the role that violence and victimization play in the lives of those who have experienced trauma and allows for more holistic and integrative services.<sup>328</sup> In other words, a trauma-informed approach begins from an acknowledgment of the extent of traumatic experiences among human beings and an understanding of how trauma responses affect people’s lives, capacities and abilities to cope with life’s challenges.<sup>329</sup> In the context of sexualized violence, the trauma of sexual assault is heightened

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<sup>325</sup> Lori Haskell & Melanie Randall, “Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping” (2013) *The Dalhousie Law Journal* 501 at 504-505 [Haskell & Randall, “Trauma-Informed Approaches to Law”].

<sup>326</sup> *Ibid* at 505.

<sup>327</sup> Jill Taylor, “Why does the legal system retraumatize victims? Trauma-informed care is needed” (14 August 2020), online: *Canadian Lawyer Magazine* <[www.canadianlawyermag.com/news/opinion/why-does-the-legal-system-retraumatize-victims-trauma-informed-care-is-needed/332403](http://www.canadianlawyermag.com/news/opinion/why-does-the-legal-system-retraumatize-victims-trauma-informed-care-is-needed/332403)> [perma.cc/8A2R-CRGF]

<sup>328</sup> Trauma-informed: The Trauma Toolkit, *supra* note 289 at 74.

<sup>329</sup> Haskell & Randall, “Trauma-Informed Approaches to Law,” *supra* note 325 at 505.

for many women by the interlocking experience of societal traumas such as racism, sexism, ableism and poverty.<sup>330</sup> Trauma-informed work recognize that experiences and effects of violence are strongly linked to gender and culture.<sup>331</sup> According to Maxine Harris, expert in senior Housing and Healthcare, and clinical psychologist and trauma scholar Roger D. Fallot, to be trauma-informed means two very specific yet different things:

First, to be trauma-informed means to know the history of past and current abuse in the life of the consumer with whom one is working. Such information allows for more holistic and integrated treatment planning. But second, and more important for this volume, to be trauma-informed means to understand the role that violence and victimization play in the lives of most consumers of mental health and substance abuse services and to use that understanding to design service systems that accommodate the vulnerabilities of trauma survivors and allow services to be delivered in a way that will facilitate consumer participation in treatment.<sup>332</sup>

To be trauma-informed, we need to consider the past and current experiences of people, their social location, along the lines of gender, race and Indigeneity, for example, and their reactions and attitudes based on their experience with violence, victimization and trauma. Trauma-informed care, which is common in healthcare and humanities practices, is based on minimizing the potential for harm and retraumatization and on enhancing safety, control and resilience for all persons involved with systems or programs.<sup>333</sup> Randall claims that to be trauma-informed in the context of sexual assault means focusing on the frequent misunderstandings surrounding victim-survivors' responses and reactions. Randall states:

Acceptable reactions to sexual violence are thereby constricted to certain acceptable and predictable coping mechanisms, capturing only a limited range of women's coping strategies. These legal misunderstandings surrounding victim responses and reactions not only negatively affect credibility assessments but also, more fundamentally, inevitably compromise justice for women who are victims of sexual assault and/or childhood sexual abuse. To this extent, these women are an indictment of the criminal justice system's inability to process sexual assault cases in a manner that is fair not

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<sup>330</sup> Thema Bryant-Davis, Heewoon Chung & Shaquita Tillman, "From the Margins to The Center: Ethnic Minority Women and the Mental Health Effects of Sexual Assault" (2009) 10:4 Trauma, Violence, & Abuse at 1.

<sup>331</sup> Canada, Public Health Agency of Canada, "Trauma and violence-informed approaches to policy and practice" (Ottawa: 2018), online: <[www.canada.ca/en/public-health/services/publications/health-risks-safety/trauma-violence-informed-approaches-policy-practice.html](http://www.canada.ca/en/public-health/services/publications/health-risks-safety/trauma-violence-informed-approaches-policy-practice.html)> [perma.cc/62EY-E5GM] [Trauma and violence-informed approaches to policy and practice]

<sup>332</sup> Maxine Harris & Roger D. Fallot, "Envisioning a Trauma-Informed Service System: A Vital Paradigm Shift" (2001) New Directions for Mental Health Services, No. 89 at 4.

<sup>333</sup> Trauma and violence-informed approaches to policy and practice, *supra* note 331.

only to the rights of the accused but also to the rights of women who are cast into the role of victim witnesses.<sup>334</sup>

There is a call for justice responses to sexual assault that are trauma-informed. As mentioned above, other than victim-survivors, practitioners that work with sexual assault are also exposed to trauma in their day-to-day work. Legal scholar Colin James maintains that professionals exposed to descriptions, images or recordings of their client's trauma can develop harmful secondary or indirect effects, which in some cases produce symptoms of posttraumatic stress disorder (PTSD).<sup>335</sup> Psychology scholar Judith Daylen, legal scholar Wendy van Tongeren Harvey and clinical psychology scholar Dennis O'Toole assert that effective navigation of the complex legal system terrain requires not only knowledge of that system, how it works, and who the main players are, but it also requires that you be emotionally and psychologically equipped for the journey.<sup>336</sup> This assertion is valid not only for victim-survivors but also for offenders, practitioners that work with the trauma of sexual assault, judges, decision makers, lawyers and legal professionals, for example. To become trauma-informed is to safely and effectively work on cases of trauma.

In terms of the trauma-informed approach in relation to those who work with victim-survivors of sexual assault, such as anti-violence workers, counsellors, police and legal professionals, for example, Métis-Cree legal scholar Myrna McCallum's work focuses on trauma-informed lawyering. McCallum discusses the trauma experienced by practitioners who work with trauma in the following terms:

I would say if you have a personal history of unresolved or unhealed traumas, that increases your risk for becoming affected by the traumas of others, and these traumas can be anything - it could be a motor vehicle accident, it could be abuse, it could be intimate partner violence, it could be childhood neglect, it could be your parents got a horrible divorce and you were caught up in their custody battle and it was traumatizing, it could be bankruptcy, could be the death of a loved one, it could be anything. If you haven't dealt with that, let that go, your risk increases. And it gets even worse if you are in a job where you are repeatedly exposed to traumatizing information or people who are highly, highly traumatized and they show up in that way on a regular basis. What makes it even worse is if you work in an organization where there's no recognition for vicarious trauma, like not in any meaningful way. [...] Build strategies within your organization to reflect vicarious trauma and the risks of it for your

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<sup>334</sup> Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims,'" *supra* note 54 at 427.

<sup>335</sup> Colin James, "Towards trauma-informed legal practice: a review" (2020) 27:2 *The Australian and New Zealand Association of Psychiatry, Psychology and Law* at 1.

<sup>336</sup> Judith Daylen, Wendy van Tongeren Harvey & Dennis O'Toole, *Trauma, Trials, and Transformation: Guiding Sexual Assault Victims through the Legal System and Beyond* (Irwin Law, 2006) at 29.

employees, and you need to practice it, like, if not on a daily basis and a weekly basis, to make time for your mental health and that should be incorporated into your work week. That is what I believe we need to be able to talk about it. I think reflecting the risks of vicarious trauma within our organizations is one way that we start to cut through the stigmas associated with mental health issues.<sup>337</sup>

Practitioners who work directly with trauma might feel the effects of trauma themselves through second-hand exposure to experiences of violence and suffering. They can even experience the same health impacts as those who have experience violence first hand, such as depression, emotional exhaustion and anxiety, sleep disturbances and intrusive thoughts that trigger responses to external events, some of which may seem harmless to others.<sup>338</sup> McCallum asserts that becoming a trauma-informed lawyer will, among other things, challenge you to critically reflect on your personal behaviors, beliefs and biases; call on you to positively transform the way you approach advocacy; guide your practice to avoid doing further harm to others; and ask that you commit to remaining open to learn new and old knowledge you did not know you needed before beginning your career.<sup>339</sup> I argue that McCallum's insights are particularly valuable and also applicable to trauma-informed work in general in cases of sexual assault. I argue that in order to implement a feminist, trauma-informed approach to restorative justice for cases of sexual assault, we need to understand trauma, violence and its impacts on peoples lives and behaviours; to create emotionally and physically safe environments; to foster opportunities for choice, collaboration, and connection; and to provide a strengths-based and capacity building approach to support one's coping and resilience.<sup>340</sup>

Restorative justice is an approach to dispute resolution that focuses on addressing the harm, needs and obligations caused by crime while engaging - voluntarily - all who have a stake in the offence. The foundation of restorative justice processes is the belief that crime is more than a violation of the law but is also a violation of people, communities and relationships. However, restorative justice is more than responding to harm or crime in a different way; it is a way of interacting with each other and paying attention to needs arising from structural and systemic

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<sup>337</sup> Myrna McCallum, "The Harm We Allow: A Call to Action from the Court to Become Trauma-Informed" (3 September 2020), online (podcast): *The Trauma-Informed Lawyer* <[thetraumainformedlawyer.simplecast.com/episodes/the-harm-we-allow-a-call-to-action-from-the-court-to-become-trauma-informed/transcript](http://thetraumainformedlawyer.simplecast.com/episodes/the-harm-we-allow-a-call-to-action-from-the-court-to-become-trauma-informed/transcript)> [perma.cc/TC39-KZVZ].

<sup>338</sup> Trauma and violence-informed approaches to policy and practice, *supra* note 331.

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

injustices.<sup>341</sup> I argue that the flexibility, creativity and sensibility of restorative justice processes, rather than the traditional criminal justice system, are aspects of restorative justice practices that make it a valuable terrain where a feminist, trauma-informed approach to dealing with sexual assault, which must be inherently intersectional, anti-carceral, decolonial, is possible and has the potential for improving access to justice.

In Chapter 2, I argued how the criminal justice system fails to deal in a satisfactory way with sexual assault cases in a way that promotes justice and equality for victim-survivors and showcased how that failure leads to a search for alternative forms of justice. In this chapter, I developed the theoretical framework that will serve as the foundation of the unique theory I am proposing for restorative justice in cases of sexual assault in Canada. That theory is a feminist, trauma-informed practice of restorative justice for sexual assault cases, one that is intersectional, decolonial and anti-carceral at its foundation. In Chapter 4, I apply this theoretical lens to the issues identified that make sexual assault law an area of law that rarely offers justice to victim-survivors. I describe restorative justice and take up its central concerns. I then argue for a reimagined and transformative approach to restorative justice in practice, one that shows how a feminist, trauma-informed approach could make the way in which sexual assault is prosecuted in Canada more accessible and just for victim-survivors, their families, their supporters and others who work in criminal law.

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<sup>341</sup> Alana Abramson, *Transformative Possibilities: A journey through tertiary restorative justice education* (Unpublished doctoral dissertation, Simon Fraser University, 2016) [unpublished].

## CHAPTER 4 – REIMAGINING RESTORATIVE JUSTICE IN THE CONTEXT OF SEXUAL ASSAULT LAW IN CANADA

I begin this chapter by reasserting that although the criminal justice system often does not satisfactorily address victim-survivors harms, needs and obligations that emerge in the aftermath of sexual assault, a practice of restorative justice that is feminist, trauma-informed can do that. I frame my innovative contribution as a feminist, trauma-informed theory of restorative justice for sexual assault cases. When I refer to a feminist practice of restorative justice for sexual assault, I mean a theory that has intersectional and anti-carceral lenses at its foundation. When I refer to a trauma-informed practice of restorative justice, I refer to practice in sexual assault cases that must be inherently decolonial. I build on principles of transformative<sup>342</sup> and restorative justice, proposing a reimagined approach to restorative justice for sexual assault cases. I introduce an innovative and transformative path to justice for victim-survivors of sexual assault and all those working in this area of law. In this final chapter, I build on the principles of restorative justice and address its critiques, particularly the concerns raised by many with respect to restorative justice in the context of sexual assault. I conclude by offering a realm of hope, particularly for victim-survivors who face multiple and intersecting barriers to justice.

### 4.1 Restorative Justice as a Path Forward

Restorative justice might be understood as a harms-based approach to wrongdoing in which the individuals impacted by the offence, rather than solely the state or the system, address the harms

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<sup>342</sup> Transformative Justice (TJ) is a political framework and approach for responding to violence, harm and abuse. At its most basic, it seeks to respond to violence without creating more violence and/or engaging in harm reduction to lessen the violence. Put differently, TJ aims to transform the conditions that enabled the harm, at the same time as facilitating repair for the harm, by cultivating accountability, healing, resilience and safety for all. TJ works from the assumption that ending sexual violence can only be possible if root causes, such as misogyny, white supremacy, ableism, heterosexism, cis-sexism, poverty, and trauma are addressed. Unlike TJ, which is just beginning to gain more widespread understanding, Restorative Justice is a method of harm response that already has some mainstream recognition. In fact, Restorative Justice processes are sometimes offered as an alternative to punitive or carceral responses in the criminal justice system. Restorative Justice also has history and applications far beyond the criminal justice system and can be used to repair harm at the community level. See more at: Understanding Transformative Justice and Restorative justice (accessed 28 June 2021), online: <[www.sace.ca/learn/transformative-restorative-justice/](http://www.sace.ca/learn/transformative-restorative-justice/)> [perma.cc/MJ7M-5BVY]

in a supportive, facilitated environment. Restorative justice<sup>343</sup> emerged in the 1970s as an effort to correct some of the weaknesses of the western legal system while building on its strengths.<sup>344</sup> In the 1970s, there was an increasing understanding within the social sciences that criminal behaviour was, in large part, a result of adverse social conditions. At the same time, there was a movement among prisoners' advocates and academics to protect the rights of offenders, to restrict the use of incarceration and to improve the conditions within institutions.<sup>345</sup> Moreover, movements away from adversarial litigation grew, demands on the justice system to offer a more substantive voice and to provide a more formalized role for victim-survivors in the criminal justice process gained force and processes like mediation, arbitration and negotiation became more common in civil and family law.<sup>346</sup> In other words, restorative justice emerged in a context where the criminal justice system started to be perceived as an inadequate response to crime, victimization and the needs of and obligations to victim-survivors in the aftermath of a crime.

In this context, the first recognized case of restorative justice in Canada was documented in Elmira, Ontario, in 1974:<sup>347</sup>

In 1974, two intoxicated teenagers embarked on a destructive rampage damaging numerous properties in the quiet town of Elmira, Ontario. Ordinarily, the prospect of prison lay ahead. But a pair of young probation officers had other ideas. They asked the presiding judge, rather than prison, what if the youths actually met their victims face to face? This, they suggested, would allow the youths to apologize directly to the victims and pay for damages. The judge agreed, the subsequent meetings profoundly impacted both the teenagers and their victims, and Victim Offender Reconciliation Program (VORP) was born.<sup>348</sup>

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<sup>343</sup> Angela Cameron loosely categorizes restorative models as either western restorative justice (restorative justice theory in western democracies such as the United States, Canada, New Zealand, Australia, the UK and Europe) or Aboriginal justice (linked to the larger project of Aboriginal peoples' self-government and self-determination). This study will focus mainly on non-Indigenous restorative justice models, particularly in the Canadian context. However, later in this chapter, it will draw critiques from Indigenous scholars and scholars focused on Indigenous women's issues regarding the use of restorative justice for sexual assault cases. See more at Angela Cameron, "Stopping the violence: Canadian feminist debates on restorative justice and intimate violence" (2006) 10:1 *Theoretical Criminology* 49–66 at 50-51 [Cameron, "Stopping the violence"].

<sup>344</sup> Howard Zehr, "Restorative Justice? What's that?" (accessed 11 June 2021), online: *Zehr Institute* <zehr-institute.org/what-is-rj/%3E.> [perma.cc/S99P-8M5U].

<sup>345</sup> Latimer & Kleinknecht, *supra* note 44 at 5.

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

<sup>347</sup> Restorative Justice Program of the Sunshine Coast, "History of Restorative Justice" (accessed 11 June 2021), online: <www.rjpsc.ca/history-of-restorative-justice.html> [perma.cc/F2WT-NZ6L]

<sup>348</sup> Community Justice Initiatives, "The Elmira Story: CJI's Beginning" (accessed 11 June 2021), online: <cjiwr.com/the-elmira-case-story/> [perma.cc/TR3N-G5Y7].

The Elmira case marked the beginning of the restorative justice movement within the Canadian justice system.<sup>349</sup> Rather than focusing on whether offenders will receive the punishment that they deserve, restorative justice focuses on repairing the harm of crime and engaging individuals and community members in the process.<sup>350</sup>

As I have argued thus far, the Canadian criminal justice system fails in dealing in a satisfactory way with sexual assault, especially with respect to women who experience multiple barriers to justice, such as Indigenous women, Black women, immigrant women, women of colour, and women with a disability in Canada. In light of these failures, I argue for alternative forms of justice that not only improve outcomes for victim-survivors but for offenders and communities affected by sexual assault. My starting point is restorative justice. Aspects of restorative justice practices make it a valuable terrain where a feminist, trauma-informed approach to dealing with sexual assault is possible. At the same time, its limitations raise questions about whether it is or can be the remedy that survivor-victims of sexual assault need.

In this final chapter, then, I apply the theoretical lens developed in Chapter 3 to the problem of sexual assault developed in Chapter 2. I discuss the diversionary justice process of restorative justice, including its limitations in the context of sexual assault, to argue for a new practice – a different and transformed way to reimagine restorative justice for cases of sexual assault – one that is both intersectional in its ambit, and forward-looking in its scope. By forward-looking, I mean a feminist and innovative practice of restorative justice for sexual assault cases that offers a realm of hope, particularly for victim-survivors who face multiple and intersecting barriers to justice. To do that, I first engage with restorative justice law and policy in Canada. Second, I introduce the fundamental concepts of restorative justice, explore the critiques of restorative justice for sexual assault, especially from feminist scholars, Indigenous scholars and scholars focused on Indigenous women’s issues. Finally, I take up the concerns of the many that argue against using restorative justice in the context of sexual assault, to argue that it can and should work, particularly if reimaged through transformative lenses.

## **4.2 Restorative Justice in Canada: Law and Policy**

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<sup>349</sup> *Ibid.*

<sup>350</sup> Zehr, “The Little Book of Restorative Justice,” *supra* note 43 at 17-18.

Restorative justice is part of the Canadian criminal justice system, and there are restorative justice measures supported through federal legislation, policy and program responses.<sup>351</sup> Section 717 of the *Criminal Code*<sup>352</sup> sets where alternative measures of sentencing are provided. It posits that alternative measures may be used to deal with a person alleged to have committed an offence. Section 717 provides as follows:

**717 (1)** Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

**(a)** the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;

**(b)** the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;

**(c)** the person, having been informed of the alternative measures, fully and freely consents to participate therein;

**(d)** the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;

**(e)** the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

**(f)** there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and

**(g)** the prosecution of the offence is not in any way barred at law.

Those alternative measures, which might be based on restorative justice in some instances, enable adults and organizations to take responsibility for offences in certain circumstances without going through judicial proceedings.<sup>353</sup> Although the *Criminal Code* does not explicitly include the term "restorative justice," it recognizes that where it is not inconsistent with the protection of society and certain conditions are met, Crown counsel can exercise discretion to deal with persons who are alleged to have committed offences through the use of measures that are alternatives to judicial proceedings and conventional prosecutions.<sup>354</sup> Addressing an offender's conduct through

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<sup>351</sup> Canada, Department of Justice, "Restorative Justice - Legislation and Policy" (27 October 2017), online: <[www.justice.gc.ca/eng/cj-jp/rj-jr/lp.html](http://www.justice.gc.ca/eng/cj-jp/rj-jr/lp.html)> [perma.cc/MX5G-45UH] [Legislation and Policy].

<sup>352</sup> *Criminal Code*, *supra* note 18 at s. 717.

<sup>353</sup> Canada, Public Prosecution Service of Canada Deskbook: 3.8 Alternative Measures (Ottawa: March 1, 2014, Catalogue No. J79-2/2014E-PDF) [Public Prosecution Service of Canada Deskbook] at 6.

<sup>354</sup> *Ibid* at 3.

measures outside of the traditional court process is commonly known as “diversion” and includes the following options:

For the purposes of s. 717(1)(a) of the *Criminal Code*, the range of acceptable measures that can form part of an alternative measures program authorized by the Attorney General of Canada can include community service, restitution or compensation in cash or services, mediation, referrals to specialized programs for counselling, treatment or education, (for example, life skills, drug or alcohol treatment, anger management), referrals to community, aboriginal or youth justice committees, victim-offender reconciliation programs and similar measures aimed at restorative justice, a letter of apology or essay, and other reasonable alternatives or measures that are consistent with the objectives and criteria in this directive. For greater certainty, a federal prosecutor can also refer an offender to an appropriate alternative measure that is part of a program authorized by a province or territory in accordance with s. 717(1)(a).

(...) The use of alternative measures can occur before or after a charge is laid. This directive generally applies after a charge has been laid and the file has been forwarded to Crown counsel, except in regions where pre-charge screening takes place, where it will apply both pre-charge and post-charge.<sup>355</sup>

In this sense, section 717 of the *Criminal Code* enables the use of restorative justice practices as a diversion under certain circumstances.

With respect to general principles of alternative measures, the Public Prosecution Service of Canada, in its 2014 to 2016 Deskbook, asserted the following:

Crown counsel should adopt a principled but flexible approach in determining whether alternative measures are appropriate in a given case. Alternative measures will generally be most suitable for offenders with no record, who have committed less serious offences and are unlikely to reoffend.

The purpose of alternative measures is to promote a sense of responsibility in the offender and an acknowledgment of the harm done, and to satisfy the important objectives of public safety, deterrence, denunciation, rehabilitation, and reparation to victims and the community, without going through the formal court process. Crown counsel should consider alternative measures where the successful completion of the alternative measure can achieve the objectives of the prosecution.

(...) As indicated above, this directive is directed at less serious offences. The following factors are relevant in determining the seriousness of an offence:

- whether the matter would proceed summarily;
- whether a minimum punishment is prescribed;

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<sup>355</sup> Public Prosecution Service of Canada Deskbook, *supra* note 353 at 4.

- whether the offence usually results in a sentence of imprisonment;
- whether a conditional sentence is available;
- the impact on the victim(s), including the potential or actual harm to the victims(s) or to society in general;
- the views of the enforcement agency or the investigative body;
- relevant aggravating factors set out in s. 718.2, and for organizations in s. 718.21 of the *Criminal Code*, as well as similar factors in other federal statutes.<sup>356</sup>

Even with the authorization for alternative measures in place in the *Criminal Code*, they are deemed “more suitable,” according to the Public Prosecution Service of Canada, for offenders with no record, who have committed less serious offences and are unlikely to reoffend. In this sense, Crown Counsel, exercising discretion and on a case-to-case basis, might consider restorative justice for violent cases such as sexual assault in Canada “less suitable.”

Section 718 of the *Criminal Code*, where purpose and principles of sentencing are asserted, incorporates restorative elements in their sentencing principles that include (e) that sentencing should provide reparations for harm done to victims or the community; and in (f) that a sentence should promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or the community. The *Youth Criminal Justice Act* (YCJA)<sup>357</sup> also includes provisions in accordance with restorative justice principles and practices, even though it does not explicitly reference restorative justice.<sup>358</sup> In s. 3(1)(a) – where Canadian policy with respect to young persons are posited - determines that the youth criminal justice system is intended to protect the public by holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person, promoting the rehabilitation and reintegration of young persons who have committed offences, and supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour.

Section 5 of the YCJA also posits that extrajudicial measures should be designed to (a) provide an effective and timely response to offending behaviour outside the bounds of judicial measures; (b) encourage young persons to acknowledge and repair the harm caused to the victim and the community; (c) encourage families of young persons — including extended families where

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<sup>356</sup> *Ibid* at 4.

<sup>357</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1 [YCJA]

<sup>358</sup> Burgar, *supra* note 57 at 14.

appropriate — and the community to become involved in the design and implementation of those measures; (d) provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation, and (e) respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence. Those determinations are in accordance with restorative justice principles and practices.

Furthermore, section 19 of the YCJA asserts that conferences may be convened.<sup>359</sup> Those conferences may take on a restorative format where the young person could be held accountable for an offence by making reparation to the victim.<sup>360</sup> Section 42 of the YCJA provides the courts with many restorative sentencing options such as personal service to the victim, community service and probation orders that include victim-offender mediation.<sup>361</sup>

Both the *Canadian Victims Bill of Rights Act*, section 6(b)<sup>362</sup> and the *Corrections and Conditional Release Act*, section 26.1(1),<sup>363</sup> specifically mention restorative justice while determining that every victim has the right to information about the services and programs available to them, including restorative justice programs, upon request. A challenge that emerges from this right to information upon request is the fact that if victim-survivors have never heard of restorative justice previously, they would never inquire about it.<sup>364</sup> That could constitute, *per se*, one of the barriers to full and unrestricted access to participation in restorative justice practices.

Manitoba is the first province in Canada to pass legislation specific to restorative justice. Bill-60, *The Restorative Justice Act*,<sup>365</sup> was introduced to support the development and use of restorative justice programs in Manitoba. In s. 4, Bill-60 authorizes the Department of Justice to develop restorative justice programs that fit within the parameters of s. 717 of the *Criminal Code* or s. 10 of the *Youth Criminal Justice Act*.<sup>366</sup> This section provides new opportunities for restorative justice programs to be implemented in Manitoba, representing an innovative path to

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<sup>359</sup> YCJA, *supra* note 357.

<sup>360</sup> Canada, Office of the Federal Ombudsman for Victims of Crime, *Restorative Justice: Getting fair outcomes for victims in Canada's criminal justice system*, Catalogue no. J84-5/3-2017E-PDF (Ottawa: November 2017) at 10 [Office of the Federal Ombudsman for Victims of Crime].

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

<sup>362</sup> *Canadian Victims Bill of Rights*, S.C. 2015, c. 13.

<sup>363</sup> *Corrections and Conditional Release Act*, S.C. 1992, c. 20

<sup>364</sup> Office of the Federal Ombudsman for Victims of Crime, *supra* note 360 at 1-2.

<sup>365</sup> Bill-60, *The Restorative Justice Act*, 3rd Sess, 40th Leg, Manitoba, 2014.

<sup>366</sup> Zachary T. Courtemanche, "The Restorative Justice Act: An Enhancement to Justice in Manitoba? (2015) 38:2 Man LJ 1–16 at 8.

deliver restorative justice, increase community safety and improve access to justice for victim-survivors of crime, offenders and communities.

The Departments of Justice Canada and Public Safety Canada,<sup>367</sup> following adoption by the United Nations of a resolution on the Declaration of Basic Principles, on the use of Restorative Justice Programmes in Criminal Matters in 2002, created two documents to guide restorative justice work in Canada: Values and Principles of Restorative Justice in Criminal Matters,<sup>368</sup> and Restorative Justice Program Guidelines for Criminal Matters.<sup>369</sup> The latter determines, for example, that restorative justice can be used in cases involving young persons and adults, first-time offenders, and repeat offenders, and crimes ranging from minor to serious, and establishes guidelines for restorative justice practice, for selecting and training restorative justice facilitators, for developing and operating restorative justice programs, and aspirational guidelines.<sup>370</sup>

With all those considerations in mind, there is strong support, in practice and in the literature, that restorative justice can be applied to a wide range of crimes, including violent crimes, committed by a juvenile or adult offender against an individual victim or a group.<sup>371</sup> However, even with restorative justice measures being supported through federal legislation and policy in Canada, most restorative justice programs do not use restorative justice approaches to sexualized violence, such as sexual assault.<sup>372</sup> In this next part of the chapter, I examine what restorative justice is and whether restorative justice can or should be used in sexual assault cases. I argue that to address the needs of victim-survivors of sexual assault, restorative justice itself must be reimagined with principled attention to feminist, trauma-informed, decolonial, anti-carceral and intersectional work and practice.

### 4.3 Restorative Justice Concepts

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<sup>367</sup> Legislation and Policy, *supra* note 351.

<sup>368</sup> Department of Justice Canada, “Values and Principles of Restorative Justice in Criminal Matters,” online (pdf): <[www.iirp.edu/pdf/RJValues-DOJCan.pdf](http://www.iirp.edu/pdf/RJValues-DOJCan.pdf)> [perma.cc/7RPC-4QS3]

<sup>369</sup> Canada, Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice and Public Safety, *Principles and Guidelines for Restorative Justice Practice in Criminal Matters*, Doc 831-221 (St. John’s, Newfoundland and Labrador: 15-16 November 2018) [Principles and Guidelines for Restorative Justice].

<sup>370</sup> *Ibid.*

<sup>371</sup> Tinneke Van Camp & Jo-Anne Wemmers, “Victim satisfaction with restorative justice: More than simply procedural justice” (2013) 19:2 *International Review of Victimology* 117–143.

<sup>372</sup> Canada, Public Safety and Emergency Preparedness Canada, *Evaluation of the Collaborative Justice Project: A Restorative Justice Program for Serious Crime 2005-02*, by Tanya Ruge, Catalogue No. PS3-1/2005-2E-PDF.

The concept of restorative justice is fluid and dynamic.<sup>373</sup> According to Randall, despite the fact that restorative justice principles have had a discernible impact on various legal systems, there is still no clear-cut or comprehensive definition of what restorative justice means in theory or what a model looks like in practice.<sup>374</sup> In defining restorative justice, criminology and restorative justice scholar Elizabeth M. Elliott and psychology scholar Robert M. Gordon assert that restorative justice has been seen both as a guiding philosophy for the practices of making and keeping peace in communities and as a set of practices that provoke philosophical reflection about the meaning of key concepts such as ‘justice’ itself.<sup>375</sup> Law and restorative justice scholar Jennifer J. Llewellyn et al. asserts that to a considerable degree, restorative justice is a rebellious act of creative imagination which has animated community activists and justice professionals around the world to seek better ways of doing justice.<sup>376</sup> In this context, I argue that restorative justice does not have an exact definition, nor does the practice benefit from a formal definition.<sup>377</sup>

Restorative justice emerged in the context of the denunciation of the harmful effects of incarceration and punishment, the rediscovery of the victim-survivor of crime, and the need to heal and bring together a ruptured community and crumbling traditional institutions.<sup>378</sup> In this regard, legal scholar Angela Cameron asserts that a defining characteristic of restorative justice is an elemental opposition to incarceration as a response to most criminal activity.<sup>379</sup> When violence is perpetrated and perpetuated, and trust is abused, justice for people facing multiple burdens to fair treatment demands an intervention that provides safety and restores peace.<sup>380</sup>

The principles of restorative justice, thus, are based on respect, dialogue, compassion and inclusivity. At the foundation of restorative justice processes is the belief that crime is more than a violation of the law but is also a violation of people, communities and relationships.<sup>381</sup> In a

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<sup>373</sup> Zehr, “The Little Book of Restorative Justice,” *supra* note 43 at 36.

<sup>374</sup> Randall, “Restorative Justice and Gendered Violence?,” *supra* note 113 at 471.

<sup>375</sup> Elizabeth Elliott & Robert M. Gordon, *New Directions in Restorative Justice: Issues, practice, evaluation*, 2011th ed (New York, NY: Routledge) at xii.

<sup>376</sup> Jennifer J. Llewellyn et al, “Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation” (2013) 36:2 Dalhousie Law Journal 281-316 at 284.

<sup>377</sup> Most commonly, restorative justice is understood as an approach to dispute resolution, process, justice theory, conceptualization that focuses on addressing the harm, needs and obligations caused by wrongdoing in order to heal and put things as right as possible. See more at Zehr, “The Little Book of Restorative Justice,” *supra* note 43 at 37.

<sup>378</sup> Faget 1997 at Van Camp & Wemmers, *supra* note 371.

<sup>379</sup> Angela Jane Cameron, *Restoring Women: Community and Legal Responses to Violence Against Women in Opposite Sex Intimate Relationships* University of Victoria, 2012) [unpublished] at 3.

<sup>380</sup> Martin, *supra* note 263 at 184.

<sup>381</sup> Zehr, “The Little Book of Restorative Justice,” *supra* note 43 at 19.

similar vein, history, criminology and restorative justice scholar Howard Zehr and legal and restorative justice scholar Harry Mika assert that crime harms victim-survivors and communities; those relationships affected by crime must be addressed in order to be restored.<sup>382</sup> In other words, restorative justice is less concerned with the punishment of offenders *per se* and more with effective accountability, encouraging offenders to repair the harm caused and to tackle the roots of the causes of the offence.

Restorative processes are usually community-based, informal, dialogical, participatory and egalitarian - in many respects, the opposite of hierarchical, formal and adversarial criminal justice system.<sup>383</sup> Restorative justice is focused on respect and accountability while opening up space for victim-survivors, offenders and community voices to be heard during the process. Randall asserts that put broadly, restorative justice is organized around the normative values of respect, peacefulness and responsibility, and at the procedural or operational level, it involves some kind of encounter developed to repair and transform.<sup>384</sup> It is a way to rethink the limitations of our current carceral system.

Many victim-survivors of crime experience that their needs for such things as information, vindication, restitution, and empowerment are not fully realized in the criminal justice system, and many who participate in the criminal justice system do not feel that their needs were fully met;<sup>385</sup> and that that is especially true for victim-survivors of sexual assault in Canada, as showcased in Chapter 2. Randall claims that offering another viable choice and option as a remedy to women who have experienced domestic or sexual assault is a welcome development in the face of a traditional legal system that radically disempowers, marginalizes and too often pathologizes victims of gendered violence.<sup>386</sup> Hence, I agree with Randall, who also argues that restorative justice can address some of these needs and limitations of the criminal justice system in Canada. Regarding the criminal justice system, Elliott asserts:

Criminal courts are designed to prosecute crimes, not heal harms. Criminal justice professionals trained in an adversarial culture may not be able to easily accommodate RJ philosophy and practices; there is no concern that the criminal justice system might

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<sup>382</sup> Howard Zehr & Harry Mika, "Fundamental Concepts in Restorative Justice" (1998) *Contemporary Justice Review*, vol. 1.

<sup>383</sup> Llewellyn et al, *supra* note 376 at 284.

<sup>384</sup> Randall, "Restorative Justice and Gendered Violence?", *supra* note 113 at 471.

<sup>385</sup> Zehr, "The Little Book of Restorative Justice," *supra* note 43 at 3.

<sup>386</sup> Randall, "Restorative Justice and Gendered Violence?", *supra* note 113 at 494.

be co-opted by restorative justice. In spite of this, however, examples of successful criminal justice and RJ partnerships exist, where the integrity of RJ values and processes is respected.<sup>387</sup>

I argue that the criminal justice system, with its carceral logic and adversarial nature does not align with an appropriate response to sexual assault, and that a transformed way to think about restorative justice opens that possibility.

Restorative justice might be a justice option for cases of sexual assault, moving away from the adversarial nature of the criminal justice system that is offender-centred, towards a more victim-survivor-centred practice. In this study, I argue for a new practice of restorative justice, one that is both feminist and trauma-informed. With attention to those who argue for an anti-carceral lens, I maintain that restorative justice can occur within the criminal justice system or outside it, where it is entirely a community-based response. Restorative justice options should be developed in conjunction with and separate from the criminal justice system to amplify and accommodate victim-survivors' choices and provide better outcomes for society as a whole. Restorative justice within and outside the criminal justice system is particularly necessary when rethinking the way Canada addresses sexual assault. Further, the proposed argument of a reimagined practice of restorative justice for sexual assault through feminist and trauma-informed lenses, if compared to traditional restorative justice models, has the potential to eliminate and/or mitigate the risks and concerns usually associated to restorative justice approaches to gendered violence.

Restorative justice goals are noble and the potential transformative but concerns still linger about whether and if this form of alternative justice works equally across different kinds of crime. Even with restorative justice measures being part of the justice system in Canada, most restorative justice programs do not deal with gendered crimes such as sexual assault. There are only a few programs in Canada that use restorative justice practices for sexual assault cases.<sup>388</sup> It is also very challenging to find information about what happens when adult or youth cases of sexual violence go to restorative justice conferences.<sup>389</sup> There are even fewer programs that pay attention to the critical issues of intersectionality that I have argued are so critical to a feminist approach to justice. In terms of the potential of restorative justice for sexual assault, for example, participants on a survey conducted by the Office of the Federal Ombudsman for Victims of Crime in 2017 shared

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<sup>387</sup> Elliott, *supra* note 308 at 99.

<sup>388</sup> Burgar, *supra* note 57 at 37.

<sup>389</sup> Daly, "Conventional and innovative justice responses to sexual violence," *supra* note 116 at 5.

their perspectives regarding restorative justice and fair outcomes for victim-survivors in Canada's criminal justice system and indicated the following:

- Some would like to see RJ as a process occurring in parallel to the criminal justice system. In that model, victims would potentially have a choice about participating in a RJ process instead of going through the formal criminal justice system – even in cases of gender-based violence and sexual violence. The rationale provided for such a model was that the current criminal justice system is not working for victims, and we therefore need to have something else in place for victims from the outset – from the time where police meet with the victim and onwards.
- “What we are talking about is a more relational system. If we can't move the monolith of the criminal justice system, we need to have something that works around that monolith to take a victim-centred approach until the monolith can change.”
- Views are divergent regarding whether RJ should be used for serious crimes against persons. Those with concerns cited safety, coercion, intimidation and the dynamics of power imbalance in domestic and sexual violence cases. Others cited potential benefits such as research which demonstrated lower recidivism rates amongst those who committed serious crimes and participated in RJ.
- Some advocates and certain communities of Indigenous women do not believe that RJ is appropriate for dealing with sexual and domestic violence. It is believed that RJ sets back the work that has been done to bring public attention and punishment to sexual and domestic violence by privatizing them. It's felt that this, coupled with gender-based power imbalances within Indigenous communities (developed as a result of the colonization process), may lead to further suffering for women.
- It cannot be a one-size-fits-all approach. It needs to be studied and significantly adapted for certain populations – such as children, older adults or Indigenous victims. It may be discouraged altogether in some of these cases in order to reduce further harm.<sup>390</sup>

From those findings, it is clear that an alternative to the criminal justice system is required. Further, participants' views differed on whether restorative justice should be used for serious crimes against persons, and among the concerns cited, participants mentioned safety, coercion, intimidation and the dynamics of power imbalance in domestic and sexual violence cases.

I argue that a transformed way to think about restorative justice can be beneficial not only for victim-survivors of sexual assault but to offenders and communities. However, restorative justice for sexual assault cannot be understood as a *panacea*. It can work and be a transformative experience in some cases, and it might not be adequate in different contexts. To be truly transformative, this voluntary process needs to take into consideration privilege, identity,

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<sup>390</sup> Office of the Federal Ombudsman for Victims of Crime, *supra* note 360 at 6.

diversities of experience and positionality. In the following sections, I explore the critiques of restorative justice in the context of sexual assault, especially from feminist scholars, Indigenous scholars and scholars focused on Indigenous women's issues perspectives. Further, I will apply my theoretical lenses to those critiques and assert that a feminist, trauma-informed approach to restorative justice for cases of sexual assault in Canada, which must be intersectional, anti-carceral and decolonial at its foundations, can be a transformative way to provide access to justice for victim-survivors, offenders and communities.

#### **4.4 Restorative Justice in the Context of Sexual Assault and Gendered-Violence**

The appropriateness of restorative justice in cases of gendered violence, including sexual assault, is controversial. The benefits of restorative justice practices for sexual violence and sexual assault are usually highlighted by the failure of established formal criminal justice to provide effective remedies for victim-survivors of sexual violence and the greater potential of restorative justice for providing satisfactory outcomes in more cases.<sup>391</sup> The drawbacks of restorative justice for cases of sexual assault are often connected with the arguments of improbability of reaching an agreed outcome when the perspectives of offender and victim-survivor are likely to be widely separate, safety of victim-survivors, perpetuation of power-imbalanced relationships and that these offences are so serious and so frequent that the most robust form of justice available should be used against them.<sup>392</sup>

I argue that the practical and theoretical potential of restorative justice for sexual assault is inherently connected with notions of justice and understandings of power. What is perceived as a just and appropriate response to sexual violence? What do victim-survivors of sexual violence expect and need in the aftermath of crime? How does justice shift when the crime at issue is fundamentally a gendered crime? What does justice require? The concept of what justice is and what would constitute a just outcome can differ from individual to individual and is usually connected with the idea of meeting needs, treating all beings as equal and worthy and seeking the transformation of relationships between people and the environment.<sup>393</sup> In a study about sexual

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<sup>391</sup> Barbara Hudson, "Restorative Justice and Gendered Violence: Diversion or Effective Justice?" (2002) 42:3 *Brit J Crim* 616–634 at 621.

<sup>392</sup> *Ibid* at 622.

<sup>393</sup> Abramson, *supra* note 341.

violence victim-survivors' perception of justice, legal scholar Clare McGlynn and sociology and criminology scholar Nicole Westmarland point out that often victim-survivors understand justice as a constantly shifting pattern; justice as refracted through new experiences or understandings; justice as an ever-evolving, nuanced and lived experience. They called this perception of justice "kaleidoscopic justice" which they describe as follows:

Kaleidoscopic justice, therefore, has a broader notion of social justice, beyond the individual 'case' or experience of victim-survivors, at its heart. It is about envisioning a world free of violence against women. Justice, therefore, is not the preserve of the conventional criminal justice system or the state, vital though these responses are for all forms of sexual violence. It is not only about convicting an individual offender, but also about preventing attacks on victim-survivors' sisters, mothers, daughters and friends. Justice, here, is a 'collective, rather than individual, pursuit'. Justice is also felt through a myriad of often small, cumulative and interconnected events and responses, across families, communities, criminal justice agencies and public or state authorities. A sense of justice may begin to be felt when women begin to experience freedom to live their lives, to regain a sense of power. This collective, societal vision of justice resonates with experiences of justice in societies in transition (Burns and Daly, 2014), as well as with ideas of transformative justice where Angela Harris states that 'each incidence of personal violence should be understood in a larger context of structural violence' (Harris, 2011: 38).<sup>394</sup>

I argue that justice must be perceived as a fluid concept particularly when viewed from the sexual assault victim-survivor perspective. What seems just for one person might not fulfill another person's expectations of justice; it will depend on aspects of a person's experience, positionality, privilege and identity. In this context, the criminal justice system should not be the only place available for victim-survivors of sexual assault to "pursue justice" and alternative ways such as restorative justice should also be a viable option. McGlynn and Westmarland also assert that studies of victim-survivor perspectives have moved beyond a punishment-focused approach to justice, with some identifying 'accountability' of offenders as a key theme.<sup>395</sup>

As mentioned above, there is a lack of readily available empirical evidence on restorative justice practices in sexual assault cases in Canada and restorative justice is rarely applied to sexual violence cases. In 2018, Burgar identified only three main programs established in Canada that specifically address sexual assault using restorative justice or have been influenced by the practice

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<sup>394</sup> Clare McGlynn & Nicole Westmarland, "Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice" (2019) 28:2 SAGE Publications 179–201 at 196.

<sup>395</sup> *Ibid* at 186.

of restorative justice: 1) the Revive Program, which is a part of Community Justice Initiatives in Kitchener, Ontario; 2) the Community Reintegration Project run by Mennonite Central Committee with support from the Correctional Services of Canada, and 3) the Hollow Water Community Holistic Circle Healing Program, that is specific to the Hollow Water Indigenous community.<sup>396</sup> Since then, some other restorative justice programs have started to use restorative justice for gendered crimes, such as sexual assault, or even started research programs related the topic<sup>397</sup> but still to limited extent. I have identified, for example, that the Restorative Justice Victoria,<sup>398</sup> on their 2019 Annual Report, exhibited that only 4 out of 80 cases referred to the organization were related to sexualized violence in 2019.<sup>399</sup> However, they did not identify any sexual violence cases in their prior reports of 2018, 2017 and 2016. This showcases that the use of restorative justice for sexual violence cases remains limited and unlikely to happen.

Several other countries<sup>400</sup> are exploring options for developing guides or standards to assist practitioners in assessing risk and applying restorative justice in interpersonal violence and sexual assault cases,<sup>401</sup> but there are only a few places in the world where restorative justice is routinely used for sexual assault.<sup>402</sup> In New Zealand, for example, Project Restore - NZ<sup>403</sup> offers a world class, home-grown, survivor centred restorative justice approach to “putting things right” when

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<sup>396</sup> Burgar, *supra* note 57 at 37.

<sup>397</sup> Victoria Sexual Assault Centre, for example, has taken the lead on a project funded by the Vancouver Foundation called “Transforming Justice, Healing Communities: Creating Alternative Responses to Sexualized Violence.” Their focus on transformative justice (TJ) offers community-informed alternatives for healing and accountability, centering relationship building, safety, and skill development to effectively prevent and respond to sexualized violence. See more at: Inclusive services update, online (pdf): *Victoria Sexual Assault Centre* <vsac.ca/wp-content/uploads/2021/03/DM-Holiday-2020-Newsletter.pdf> [perma.cc/LN3E-AFNP]

<sup>398</sup> A non-profit, community-based organization that provides restorative justice services in the Greater Victoria Area, British Columbia, Canada, online: <www.rjvictoria.com/> [perma.cc/WR2U-5ZAK].

<sup>399</sup> Annual Report – Restorative Justice Victoria, 2019, online (pdf): <www.rjvictoria.com/wp-content/uploads/2020/10/2019-Annual-Report.pdf> [perma.cc/E4C7-PTVM] at 12 [Annual Report – Restorative Justice Victoria, 2019].

<sup>400</sup> For example, the RESTORE program, in the state of Arizona, in the United States of America was a restorative justice conferencing program adapted to prosecutor-referred adult misdemeanor and felony sexual assaults. It was based on 22 cases where both victim-survivor and responsible person consented to RESTORE. Regarding the RESTORE program, Koss asserts that the findings of the study demonstrate that a conferencing program like RESTORE is feasible, can be conducted safely, achieves acceptable levels of satisfaction, and attains many of the envisioned outcomes; however, the broader conversation about restorative justice for sexual assault is all too often about whether it should be done at all and not about how to do it. See more at: Mary P. Koss, “The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes” 29:9 *Journal of Interpersonal Violence* 1623–1660 at 1623 and 1655.

<sup>401</sup> Office of the Federal Ombudsman for Victims of Crime, *supra* note 360 at 3.

<sup>402</sup> Kathleen Daly, “Setting the Record Strait and a Radical Change: A Reply to Annie Cossins on ‘Restorative Justice and Child Sex Offences’” (2008) 48:4 *Brit J Crim* 557–566 at 558.

<sup>403</sup> Project Restore, “Restorative Justice following sexual violence” (accessed 11 June 2021), online: <www.projectrestore.nz/> [perma.cc/FD2V-RWNA].

sexual harm has occurred. Their “three-legged stool” model consists of an experienced restorative justice facilitator who has an in-depth understanding of the dynamics of sexual violence and two specialists – a survivor specialist and a harmful behaviour specialist – who have an in-depth understanding of restorative justice and work within the sexual violence sector with survivors and the person who has caused the harm.<sup>404</sup> Canada developed its guidelines for developing and operating restorative justice programs in criminal matters, which were meant to encourage good practice and provide a basis for restorative justice programs and practitioners to assess how their practice aligns with the principles.<sup>405</sup> As mentioned in Chapter 1, the “National Action Plan on Violence Against Women and Gender-Based Violence,” which was released to the public in June 2021, also recommends transformative and restorative justice approaches to gendered-based violence. However, restorative justice is not routinely used to deal with sexual assault in Canada at present. In the following section, I examine the most common critiques of the use of restorative justice in cases of sexual assault produced by feminist scholars, Indigenous scholars and scholars focused on Indigenous women’s issues.

#### **4.4.1 Feminist Perspectives and Critiques on The Appropriateness of Restorative Justice for Gendered Violence**

As discussed above, restorative justice is rarely used in the context of gendered violence. Criminology scholar Kathleen Daly and psychology scholar Sarah Curtis-Fawley assert that one reason that gendered violence is commonly off the restorative justice agenda is that academic feminists and victim advocates have made compelling arguments against it, responding to the call of restorative justice for gendered violence cases with skepticism, concern and cautious interest.<sup>406</sup> Daly and Curtis-Fawley claim that many feminists such as Busch, Coker, Goel, Hooper and Busch, Lewis, Dobash, Dobash, and Cavanagh and Stubbs,<sup>407</sup> for example, identified concerns regarding the use of restorative justice for gendered violence. The following are the most prominent:

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<sup>404</sup> *Ibid.*

<sup>405</sup> Principles and Guidelines for Restorative Justice, *supra* note 369.

<sup>406</sup> Sarah Curtis-Fawley & Kathleen Daly, “Gendered Violence and Restorative Justice: The Views of Victim Advocates” 11:5 Violence Against Women (May 2005) 603–638 at 604 and 607.

<sup>407</sup> *Ibid* at 607.

- Informal processes risk revictimizing victims (vis-à-vis power imbalances between victim and offender) or jeopardizing their safety.
- Restorative justice will appear to be a so-called soft option or what Coker (1999, p. 85) terms cheap justice to offenders and society.
- Serious offenses such as gendered violence ought to be treated seriously (i.e., adjudicated in criminal court), not diverted from court to an alternative process.
- Restorative justice may reprivatize gendered violence in ways that are harmful to women.
- Restorative justice has theoretical weaknesses, including its assumptions of a distant state and sufficient community opposition to domestic violence, and an undertheorization of the nature of domestic violence. Restorative justice may also require additional state resources to adequately support victims and offenders.<sup>408</sup>

In addition to those concerns, the anti-violence sector, including organizations that support victim-survivors and advocate for their rights, is sometimes reluctant and has reservations about the use of restorative justice practices for sexual assault cases.<sup>409</sup> The limitations and risks that anti-violence advocates have identified include: safety (emotional and physical) of victim-survivors;<sup>410</sup> lack of support;<sup>411</sup> offender-centered practices;<sup>412</sup> power imbalances;<sup>413</sup> lack of specialized training of restorative justice practitioners in the particularities of sexual assault; revictimization;<sup>414</sup> lack of voluntariness;<sup>415</sup> the fact that the informal process may jeopardize the actual safety of the survivors;<sup>416</sup> insufficient information and preparation;<sup>417</sup> and that diverting cases of sexual violence from the court system might serve to diminish the apparent seriousness of the crime by demonstrating what might be perceived as a lenient or “soft option” to the punishment of offenders, for example.<sup>418</sup>

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<sup>408</sup> *Ibid* at 607-608.

<sup>409</sup> Deer, *supra* note 115 at 519.

<sup>410</sup> Francesca Marsh & Nadia M. Wager, “Restorative justice in cases of sexual violence: Exploring the views of the public and survivors” (2015) 62:4 *Probation Journal* 336–356 at 340.

<sup>411</sup> Wemmers, *supra* note 55 at 12.

<sup>412</sup> Shanna Grant-Warmald, Alan Edwards & Jessica Rourke, *Coursepack: Collaboration and Capacity Building in Victim Services and Restorative Justice* (Restorative Justice Victoria, 2018).

<sup>413</sup> Marian Liebmann, *Restorative Justice: How It Works* (London and Philadelphia: Jessica Kingsley Publishers, 2007) at 291.

<sup>414</sup> Zinsstag & Keenan, *supra* note 201 at 5.

<sup>415</sup> Marsh & Wager, *supra* note 410 at 340-341.

<sup>416</sup> *Ibid* at 337.

<sup>417</sup> Grant-Warmald, Edwards & Rourke, *supra* note 412.

<sup>418</sup> Marsh & Wager, *supra* note 410 at 340.

Most of the feminist literature against the use of restorative justice for gendered violence cases focuses on intimate partner violence.<sup>419</sup> In a 2001 Australian study, Daly asserts that the critique of perpetuating risk comes largely from the partner violence literature, which draws on studies of mediation in divorce cases, where there has been a history of partner violence, to show that abusive men control women in ways that others may not recognize.<sup>420</sup> Daly posits further that there could be the risk of excessive pressure on victim-survivors, where they may not be able to advocate effectively on their own behalf or even be pressured to accept certain outcomes, such as an apology, even if they feel it is inappropriate or insincere.<sup>421</sup>

Victim-survivors may also be used in a process that is centred on helping offenders<sup>422</sup> through focusing on rehabilitation and reducing recidivism, for example, rather than focusing on victim-survivors needs. In this context, restorative justice might put victim-survivors at risk of continued violence,<sup>423</sup> especially in cases where other factors, such as poverty, racism and sexism, for example, can play an important role in furthering the violence in some contexts. Acknowledging the complexities and approaches of restorative and transformative justice, the NAP on VAW/GBV Report posits the following:

It is impossible to ignore the criticisms that the process may be unsafe, subjecting survivors to further victimization, the possible cooptation by the legal system, which may result in unsatisfactory treatment not unlike that the adversarial system. Restorative justice requires the offender to admit responsibility before a conference. This is a challenge in dealing with sexual violence, which is associated with high rates of denial. There are remaining concerns that a non-criminal process could entrench public perceptions that VAW/GBV is not a serious crime, underscored by the fact that in a restorative process, survivors must be willing to engage face-to-face with the person who harmed them. Additionally, in order to implement a restorative process safely, it requires significant investments. Half measures would not meet the standard contemplated here.<sup>424</sup>

Even though this report supports restorative and transformative justice approaches to gendered based violence, it reasserts the importance of significant investments, given the particular nature of sexual violence cases.

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<sup>419</sup> Kathleen Daly, “Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” (2006) 46:2 *Brit J Crim* 334–356 at 337.

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*

<sup>423</sup> *Ibid.*

<sup>424</sup> NAP on VAW/GBV Report, *supra* note 39 at 119.

According to psychology scholar Mary P. Koss, scholarly work on restorative justice for sexual assault has been predominantly conceptual and has been hindered by a lack of empirical data<sup>425</sup> on its use and effectiveness. Concerns about the potential to reduce gender-based power dynamics, function safely, and sufficient accountability for wrongdoing have also been raised by many scholars such as Cossins, Herman, Hudson, Matsui and Stubbs, as identified by Koss.<sup>426</sup>

The challenge for victim-survivors of using restorative justice for sexual assault is that the power-imbalanced relationships established between victim-survivor and offender, an inherent characteristic of sexual crimes, could cause extra harm to victim-survivors, even risking retraumatization. As psychology scholar Nadia M. Wager and Francesca Marsh point out:

The specific issues raised in relation to the imbalance of power include the potential for revictimizing the survivor by: a) pressurising him/her into conference participation, reaching/accepting an unsatisfactory agreement (Coker, 2002; Schroeder, 2005, cited in Pali and Madsen, 2011), responding to the offender with forgiveness (Koss, 2006), and/or the offender being forced into offering an insincere apology (McNevin, 2010); or b) that offenders will use the opportunity to manipulate the survivor and further endorse the survivors' engagement in self-blame. Additionally, there is concern that the dynamics within conferencing which are ordinarily assumed to promote positive change in both parties (e.g. the telling of the harm done and igniting of empathy for the victim), may not be effective in the case of sexual assault. Some argue that sex offenders may experience inappropriate excitement on hearing their victim tell of the distress, which might reinforce their pro-offending attitudes (Rubin, 2003) rather than promote feelings of empathy and remorse. This might be most likely when the RJ system has been developed on the basis of the offenders' needs (Mika et al., 2002).<sup>427</sup>

The perpetuation of power imbalanced relationships and retraumatization of victim-survivors is an important risk of restorative justice for sexual violence cases identified by feminist scholars such as Hudson.<sup>428</sup>

Further, there is no consensus among feminists about the utility of carceral logic, and there is no consensus about the utility of restorative justice in cases of sexual violence.<sup>429</sup> Indigenous law scholar Sarah Deer asserts, for example, that many feminists have argued that the use of state-sanctioned restorative justice in cases of sexual violence could merely duplicate the problems

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<sup>425</sup> Koss, *supra* note 400 at 1625.

<sup>426</sup> *Ibid.*

<sup>427</sup> Marsh & Wager, *supra* note 410 at 340-341.

<sup>428</sup> Barbara Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence" (1998) 25:2 *Journal of Law and Society* 237-256 at 248.

<sup>429</sup> *Ibid.*

identified in adversarial justice.<sup>430</sup> Also, the use of restorative justice for sexual assault victim-survivors could compromise safety and perpetuate power-imbalanced dynamics.<sup>431</sup> In this context, diverting sexual assault cases from the criminal justice system might diminish the crime's apparent seriousness by demonstrating what might be perceived as a lenient or "soft option" to the punishment of offenders,<sup>432</sup> aligning with carceral feminism ideals. There is fear that offenders may use an informal process to diminish guilt, trivialize the violence or shift the blame to a victim-survivor, which is more likely to be minimized in a formal (court) process.<sup>433</sup> In other words, under this carceral logic, harsher punishments and increased penalties for sexual violence are assumed to provide victims with justice and sends the message that sexual violence will not be tolerated.<sup>434</sup>

The rush to dialogue or too many preparatory meetings can also represent a potential risk for victim-survivors.<sup>435</sup> Because of the high caseloads, superficial training or even sparse resources, criminal justice and criminology scholar Shanna Grant-Warmald, restorative justice practitioner Alan Edwards and psychology and restorative justice practitioner Jessica Rourke maintain that there could be a tendency to quickly move through the preparatory phase to the restorative justice dialogue.<sup>436</sup> Also, burdening a victim-survivor with too many unnecessary meetings can further contribute to revictimization. Grant-Warmald, Edwards and Rourke also point out the concern about what happens if the offender does not fulfill the agreement terms.<sup>437</sup>

As posited by Wemmers, when victim-survivors react to their victimization in ways that do not meet society's expectations, they risk disapproval.<sup>438</sup> This includes instances when victim-survivors of sexual violence choose restorative justice rather than conventional criminal justice. In this context, Wemmers asserts that another obstacle of restorative justice for sexual violence victim-survivors is that they often have to deal not only with victimization but also with the a) insensitive, b) unsupportive, and/or c) judgmental reactions of others.<sup>439</sup> In this context, external pressures might impact victim-survivors choice to engage or not with restorative justice programs.

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<sup>430</sup> Deer, *supra* note 115 at 519.

<sup>431</sup> Marsh & Wager, *supra* note 410 at 340.

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid* at 337.

<sup>434</sup> Deer, *supra* note 115 at 510.

<sup>435</sup> Grant-Warmald, Edwards & Rourke, *supra* note 412.

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

<sup>437</sup> *Ibid.*

<sup>438</sup> Wemmers, *supra* note 55 at 12.

<sup>439</sup> *Ibid.*

Replicating criminal justice system oppressions, retraumatization, rush to dialogue, “too lenient” option for sexual assault offenders and judgment of others are the most common critiques of feminist non-Indigenous restorative justice practices for sexual assault. In this section, I have explored the most common feminist perspectives and critiques on the appropriateness of restorative justice for gendered violence. Advancing the argument of restorative justice for sexual assault through feminist and trauma-informed lenses aims to eliminate and/or minimize those risks. I explain how this theory addresses those risks in the following sections of this Chapter. However, scholarly literature also showcases challenges particularly faced by Indigenous women in the Canadian context, which will be discussed in the next section.

#### **4.4.2 Critiques of Restorative Justice for Gender-Based Violence faced by Indigenous Women**

Another critique of restorative justice for cases of gender-based violence is that certain restorative justice practices do not take into account the complex historical, economic, and political contexts of gendered violence perpetrated against women, especially Indigenous women.<sup>440</sup> Scholars focused on issues facing Indigenous women, such as Balfour<sup>441</sup> and Cameron,<sup>442</sup> assert that restorative justice for cases of sexual assault has to take an intersectional approach; otherwise, it could further marginalize Indigenous women. In this regard, aside from general feminist concerns discussed above, Cameron points out specific culturally focused critiques to restorative justice for gendered crimes as they relate to Indigenous women.<sup>443</sup> In these terms, Cameron writes:

First, feminists are critical of western RJ constructions of culture, pointing out that these understandings ignore the contemporary realities of other intersecting oppressions such as gender, sexual orientation or class (Nightingale, 1991; Nahanee, 1994; Depew, 1996; LaRoque, 1997; LaPrairie, 1998; McGillivray and Comaskey, 1999; MacDonald, 2001).

[...] Second, some Aboriginal women argue that current western RJ and Aboriginal justice models are male-centred and culturally inappropriate. Historically, Aboriginal women had a substantial cultural role in laws, legal orders and justice practices;

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<sup>440</sup> Gillian Balfour, “Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women” (2008) 3:2 *Feminist Criminology* 101–120 at 109.

<sup>441</sup> *Ibid* at 109.

<sup>442</sup> Cameron, “Stopping the violence,” *supra* note 343 at 57.

<sup>443</sup> *Ibid*.

western RJ models such as judicially convened sentencing circles ignore this, despite their claiming to be ‘traditional.’

[...] Third, there is considerable debate among Aboriginal women regarding how ‘tradition’ should be understood and applied in Aboriginal justice models. Some Aboriginal feminists question the authenticity of Aboriginal justice models, even when conceived of and run by Aboriginal communities themselves. Their concerns arise when particular models, practices or theories do not afford Aboriginal women respect, stature or a leadership role, or when Aboriginal justice practices fail physically to protect victims from abusers (LaRoque, 1997; Aboriginal Women’s Action Network, 2001; MacDonald, 2001; Ryan and Calliou, 2002).<sup>444</sup>

Restorative justice that does not recognize Indigenous legal orders and is not culturally appropriate for Indigenous communities has the potential to further harm Indigenous women, especially in the context of sexual assault.

However, Indigenous laws, like all other forms of law, are not neutral; they too can be heavily influenced by dominant social norms<sup>445</sup> such as racism and sexism. Gender, race and Indigeneity, for example, might perpetuate the overlapping layers of marginalization in restorative justice practices, which can further oppress women who experience multiple barriers to justice.

Between October and December 2018, the National Inquiry into Missing and Murdered Indigenous Women and Girls hosted four Guided Dialogues to identify best practices and solutions to increase safety, improve well-being and safeguard the rights of Indigenous women, girls, and 2SLGBTQQA people in Canada.<sup>446</sup> Across all four sessions, there was strong support for restorative justice programs, particularly models grounded in traditional Indigenous approaches to law and justice.<sup>447</sup> Participants argued that culturally grounded restorative justice programs could be more effective in fostering a sense of accountability in offenders, addressing root causes of violence to reduce recidivism, and supporting healing for survivors, offenders and their surrounding families and community.<sup>448</sup> Some of the arguments regarding restorative justice were reproduced in the report, such as the following:

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<sup>444</sup> *Ibid* at 53-54.

<sup>445</sup> Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 UBC L Rev 593 at 605.

<sup>446</sup> Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (Ottawa: desLibris, 2019) [Final Report into MMIWG, vol 1b] at 83.

<sup>447</sup> *Ibid* at 160.

<sup>448</sup> *Ibid*.

‘He won’t feel any shame in front of the judge/jury. But in front of the community, there is more accountability. A youth hearing their impact on people because of their vandalism is more impactful than going to court.’ (2SLGBTQQA Perspectives)

Nonetheless, some participants suggested that survivors of violence should be entitled to choose between different approaches to justice proceedings, informed by the specific context and the survivors’ needs.

‘Restorative justice was good for some [youth], but not for all situations. A young woman was raped, but the family of the boy who did it, [wanted restorative justice] instead of jail time. But the young woman ended up being re-victimized. The girl didn’t have a lot of family support, but the boy had a big family and even the Elders who were there were related to him.... Victims should have a choice in what justice options they want. Jail time, criminalization isn’t what everyone wants.’ (2SLGBTQQA Perspectives)

‘[I am] hesitant to say they are always the best solution, because they work different in different communities, with different levels of success.’ (Métis Perspectives)

Participants in the 2SLGBTQQA Perspectives session called for increased funding and training for 2SLGBTQQA-specific restorative justice programs. Such programs need to be inclusive and safe, reflecting diverse understandings of gender, and equipped to address 2SLGBTQQA perspectives.<sup>449</sup>

Some of these comments make clear that even though there was strong support for restorative justice programs in the four Guided Dialogues in the MMIWG report, there were also concerns. These concerns included revictimization of victim-survivors, with attention to diversities of experience, positionality, privilege and identity.

In the context of domestic violence within the Navajo Nation, legal scholar Donna Coker asserted that some advocates believed that with appropriate safeguards and training, peacemaking processes that are said to be derived from Indigenous justice models and have some similarities with restorative justice processes - might be appropriate for some women.<sup>450</sup> Others believed that either because of changes in Navajo culture or the inherent power imbalance between batterer and victim, peacemaking could not be reformed to meet the needs of battered women, in the context of gendered violence.<sup>451</sup> Coker believes that it is critical that we continue to demand that the state

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<sup>449</sup> *Ibid.*

<sup>450</sup> There are several features of Navajo Peacemaking that distinguish it both from typical restorative justice practices as well as from programmes such as family group conferencing (Australia and New Zealand) or sentencing circles (Canada) that operate exclusively or primarily with Indigenous persons or within Indigenous communities, including women’s meaningful access to the political process and Peacemaking deliberately incorporating cultural tools and normative judgments, unlike typical restorative justice, for example. See more at: Donna Coker, “Restorative justice, Navajo Peacemaking and domestic violence” (2006) 10:1 *Theoretical Criminology* 67–85 at 76.

<sup>451</sup> *Ibid.*

provide resources.<sup>452</sup> However, Coker asserts that to regain a community organizing approach - seems exactly right.<sup>453</sup>

Sociology and Indigenous studies scholar Emily Snyder, Indigenous legal scholars Val Napoleon and John Borrows point out the danger of viewing the “Indigenous” past as non-violent and non-sexist.<sup>454</sup> They argue that this view overlooks the lessons Indigenous peoples can learn and have learned through time when they confronted gendered violence in their societies.<sup>455</sup> According to the authors, sexism is a major social problem in Indigenous communities today (as with other communities), and violence against Indigenous women does not only come from settler violence but is also perpetuated internally.<sup>456</sup> They contend that it is possible to work with the idea that colonialism has negatively affected gender norms and is reliant on gendered violence without necessarily claiming that gender relations prior to contact were perfect.<sup>457</sup> Snyder, Napoleon and Borrows argue further that the assumption that balanced and complementary roles were assigned to men and women in the First Nations context is dangerous. These views can lead to a romanticization of the past, wherein gendered conflict and violence are erased.<sup>458</sup> Indigenous laws were not perfect and gendered violence in Indigenous societies prior to contact was sometimes very significant.<sup>459</sup> Gendered power dynamics also operated in the context of Indigenous communities prior to the imposition of settler colonialism. Systemic racism and sexism play out in state law. And that is no different in the restorative justice context. Thus, it is vital to keep in mind that Indigenous legal orders can be influenced by sexist ideologies and can be a site for reproducing power dynamics in ways that discipline gendered legal subjects.<sup>460</sup>

Particularly in the restorative justice context, Napoleon et al., also identify that: a) most restorative justice programs in Canada are not run autonomously by an Indigenous group; b) most government-sanctioned restorative justice programs, even those that deal with non-Indigenous clients, acknowledge or claim roots in pan-Indigenous concepts of justice or law; meanwhile, they are completely unrelated to the local Indigenous peoples, ignoring the laws and legal orders of the

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<sup>452</sup> *Ibid* at 80.

<sup>453</sup> *Ibid*.

<sup>454</sup> Snyder, Napoleon & Borrows, *supra* note 445 at 596.

<sup>455</sup> *Ibid* at 597.

<sup>456</sup> *Ibid* at 603.

<sup>457</sup> *Ibid* at 610.

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

<sup>459</sup> *Ibid* at 597.

<sup>460</sup> *Ibid* at 605.

Indigenous peoples where they function; and c) while Indigenous and restorative justice initiatives are obviously considered to be about justice, they generally say nothing about Indigenous legal orders and law.<sup>461</sup> Those critiques are inherently connected with the lack of Indigenous self-government within the restorative justice context and the lack of restorative justice programs conceived and run autonomously by Indigenous communities within Indigenous justice models and show that the appropriateness of restorative justice for domestic and sexual violence within Indigenous contexts should be grounded in a more adequate theorization of the intersection of culture and gender in post-colonial societies.<sup>462</sup>

#### 4.4.3 Reimagined Restorative Justice Approach for Sexual Assault Cases

What the critique in the previous sections shows is that, on the one hand, for many victim-survivors, feminist scholars and activists, justice in response to sexual violence has been pursued with specific reference to criminal convictions and carceral punishment.<sup>463</sup> There is resistance in the use of restorative justice for cases of sexual assault mainly because of fear of retraumatization and perpetuation of systemic violence, especially in regards to communities who already experience multiple barriers to justice. Restorative justice can be seen as a too soft and/or lenient option for offenders that reproduces power-imbalanced relationships of sexual violence.

On the other hand, from the perspective of Indigenous scholars, such as Napoleon and Coker, and those centring Indigenous women in their analysis, such as Balfour and Cameron, most feminist, Indigenous and critical race scholars are uncertain as to the potential of restorative justice practices to address the root causes of gendered violence, such as poverty and community norms that legitimize male violence toward women.<sup>464</sup> Nonetheless, there is growing acknowledgement that criminal law measures and understandings of justice are too narrow and frequently fail to meet the varied justice needs of victim-survivors of sexual violence.<sup>465</sup>

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<sup>461</sup> Val Napoleon et al, “Where is the law in restorative justice?” (accessed 2 July 2021), online (pdf): <[www.cerp.gouv.qc.ca/fileadmin/Fichiers\\_clients/Documents\\_deposes\\_a\\_la\\_Commission/P-263.pdf](http://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-263.pdf)> [perma.cc/U88U-DT5G] at 3.

<sup>462</sup> Cameron, “Stopping the violence,” *supra* note 343 at 60.

<sup>463</sup> Powell, Henry & Flynn, *supra* note 270 at 6.

<sup>464</sup> Balfour, *supra* note 437.

<sup>465</sup> Powell, Henry & Flynn, *supra* note 270 at 6.

In Chapter 2, I showcased how myths and stereotypes about women and sexual assault are systemically embedded in the criminal justice system, despite law reforms and rape shield provisions. I argued, for example, that in 1992, evidence about the complainant’s sexual history, offered by the defence, was admitted in *R. v. Seaboyer*<sup>466</sup> to support an inference that, by reason of the sexual nature of that activity, the complainant was more likely to have consented to the sexual activity that forms the subject-matter of the charge; or is less worthy of belief, reasserting embedded mythical and stereotypical assumptions about women and sexual assault. I argued that in 2019, an argument of a “friends with benefits” relationship was used in *R. v. Goldfinch*<sup>467</sup> to imply the myth that because the complainant consented to have sex with Mr. Goldfinch in the past, she was more likely to have consented to the sexual activity forming the subject-matter of the sexual assault charge, contributing to the systemic revictimization of victim-survivors of violence.<sup>468</sup> I also examined that, in 2016, *R. v. Ghomeshi*<sup>469</sup> case reaffirmed the myth that women lie about being sexually assaulted, and how difficult it is to get a sexual assault conviction in cases where the accused is well-known by the public. As mentioned above, the complainants alleging sexual assault in *R. v. Ghomeshi* were not believed and were labelled as losers who succumbed to the defence’s accusations of distrust and fabrication - accusations that, because they lost, must have been true.<sup>470</sup> Finally, I asserted that the standard of proof beyond a reasonable doubt is a real challenge in sexual offence cases, especially in cases where the only two witnesses are most often the accused and the complainant, with little or no other evidence on what happened, and in a criminal justice system that is not set up to believe the complainant.

In the light of the failures of the criminal justice system in dealing with sexual assault cases in a way that promotes justice and equality for all sexual assault victim-survivors, is not set up to believe them, often dismisses and disrespects complainants and is embedded with myths and stereotypes that further harm and traumatize victim-survivors, this study emerged to propose a different and transformed approach to restorative justice for sexual assault cases through feminist and trauma-informed lenses. I argue that another viable choice and remedy for sexual assault is a necessary development in Canada.

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<sup>466</sup> Seaboyer, *supra* note 31 at para 85.

<sup>467</sup> Goldfinch, *supra* note 29 at para 15.

<sup>468</sup> L’Heureux-Dubé, “Beyond the Myths: Equality, Impartiality, and Justice,” *supra* note 158 at 88.

<sup>469</sup> Ghomeshi, *supra* note 178.

<sup>470</sup> Coulling & S. Johnston, *supra* note 179 at 319.

However, I recognize the critiques of using restorative justice in the context of sexual assault in Canada are thick. My goal in the previous sections was to highlight the main concerns identified by feminists and Indigenous-focused scholars in order to engage with a transformative approach to restorative justice. My work proposes a new way to think about restorative justice in the context of sexual violence in Canada, one that builds on the principles of restorative and transformative justice and addresses its critiques, offering a realm of hope, particularly for victim-survivors who face multiple and intersecting barriers to justice. In the following sections, I analyze the potential benefits of this transformative way to think about restorative justice for cases of sexual assault in Canada through feminist, intersectional, trauma-informed, anti-carceral and decolonial lenses.

#### **4.5 Feminist, Trauma-Informed Practice of Restorative Justice for Sexual Assault Cases: A Path Forward**

There is ever-increasing evidence demonstrating the various benefits of restorative justice, including positive changes in the physical, emotional and psychological well-being of all parties involved.<sup>471</sup> I argue that when restorative justice is practiced through feminist, trauma-informed lenses, which are intersectional, anti-carceral, and decolonial at their foundations, it has the potential to be a transformative experience for all participants in cases of sexual assault. This reimagined restorative justice aims to keep victim-survivors and their needs central to the process and outcomes while also addressing the needs of offenders and communities. It does not lose sight, however, of systemic oppressions. Further, I argue that a feminist, trauma-informed restorative justice approach to sexual assault can promote and improve access to justice on a case-by-case basis.

The theoretical framework I am proposing in this thesis has the potential to eliminate and/or mitigate the most common risks and concerns usually associated to restorative justice approaches to gendered violence. I maintain that most of the limitations, risks and concerns can be eliminated and/or mitigated given that a feminist, trauma-informed restorative justice approach to sexual assault is victim-survivor-centred, flexible and designed according to the uniqueness, needs and goals of each victim-survivor in particular, while paying due attention to the structural inequities

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<sup>471</sup> Grant-Warmald, Edwards & Rourke, *supra* note 412.

of gender-based crime. In the following sections, I explore the benefits commonly attributed to restorative justice practices in general, and I articulate how the theoretical framework I am proposing addresses the main critiques against restorative justice for sexual assault cases through feminist, trauma-informed, intersectional, anti-carceral and decolonial lenses, offering a reimagined path to justice to victim-survivors, offenders and communities.

I argue for a model of feminist, trauma-informed restorative justice for sexual assault cases that: a) is flexible and designed to meet the needs and towards the desired outcomes of the individuals involved; b) where the goals of victim-survivors are the central focus of the process; c) is procedurally just;<sup>472</sup> d) where voices are valued, and choices are honoured irrespective of the restorative outcome; e) facilitators, practitioners and all restorative justice workers are trained in gender-based violence, trauma-informed and culturally safe practices and in the particular aspects and issues of sexual assault; f) preparation is thorough and in person meetings are only scheduled if the safety of victim-survivors is assessed and cleared beforehand; g) takes into consideration multiple barriers of justice faced by certain groups, being intersectional and decolonial in its roots; and h) is developed and practiced within and outside the criminal justice system to amplify access to justice of victim-survivors of sexual assault.

Through the theoretical lenses I bring to this discussion, a feminist, trauma-informed restorative justice practice for sexual assault cases does not need to involve face-to-face meetings of victim-survivors and offenders and victim-survivors can be represented by others, for example. In these terms, I agree with Daly who asserts that restorative processes can also be used for victim-survivors when, for example, an offender has not been identified.<sup>473</sup> Further, as identified by art therapist Marian Liebmann, there are occasions when letters, videos and meetings have been important opportunities for victim-survivors to feel empowered and able to put events behind them in restorative justice processes.<sup>474</sup> It can also help to negotiate future relationships if the parties are likely to come across each other in other situations,<sup>475</sup> such as when it involves family relationships. I argue that all of these contexts and possibilities need to be considered when contemplating the uses of restorative justice in responding to gendered harms through feminist and trauma-informed lenses.

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<sup>472</sup> Van Camp & Wemmers, *supra* note 371 at 117.

<sup>473</sup> Daly, "Sexual Assault and Restorative Justice," *supra* note 284 at 17.

<sup>474</sup> Liebmann, *supra* note 413 at 296.

<sup>475</sup> *Ibid.*

#### 4.5.1 Feminist, Trauma-Informed Responses to Sexual Assault Do Not Support Carceral Systems

In Chapter 2, I argued that despite feminist strides to reform the criminal justice system, sexual violence remains both underreported and under-prosecuted.<sup>476</sup> And, victim-survivors continue to express dissatisfaction with how the police and courts handle their cases and with their experience of the trial process.<sup>477</sup> Finally, I asserted that the rejection of the carceral system leads to the search for alternative approaches and that my answer to this issue is a transformed way to think about restorative justice in the context of sexual violence in Canada. I maintain that policing and carceral punishment do not align with feminist strategies to end sexual violence against women or to bring justice to women who have already been sexually assaulted. An alternative to the criminal justice system is required and I am arguing that feminist, trauma-informed restorative justice for sexual assault cases should be a viable and transformative option.

Carceral feminism has not decreased violence against women, but it has added the inescapable prospect of sexual assault of incarcerated perpetrators and immigrants in detention centers around the world.<sup>478</sup> Rather than protecting women, “tough on crime” policies usually have expanded the hold of the punishment apparatus over racially and economically marginalized people of all genders.<sup>479</sup> Under the carceral logic, to take violence against women seriously is often connected to the idea of harsher punishments for perpetrators. The criminal justice system punishes acts of violence, such as sexual assault, with more violence, but this time it is enacted by the state. Carceral feminism also works under the assumption that individuals are responsible for violence and that we need to fix those individuals.<sup>480</sup>

On the theoretical or philosophical level, retribution and restoration are not the polar opposites that are often assumed.<sup>481</sup> Daly has also been critical of this contrast, with measured and careful critiques. Daly asserts that the juxtaposition of “retributive and restorative justice” is nonsense, and its use should cease. Daly argues:

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<sup>476</sup> Deer, *supra* note 115 at 505.

<sup>477</sup> Daly, “Conventional and innovative justice responses to sexual violence,” *supra* note 116 at 1.

<sup>478</sup> Sweet, *supra* note 280 at 203.

<sup>479</sup> Anna Terwiel, “What Is Carceral Feminism?” (2019) SAGE Political Theory 1–22 at 2.

<sup>480</sup> Sweet, *supra* note 280 at 203.

<sup>481</sup> Zehr, “The Little Book of Restorative Justice,” *supra* note 43 at 58.

First, retributive justice, as a coherent system or type of justice, does not exist. What people are referring to, in fact, is conventional criminal justice, which has many aims and purposes, some of which are contradictory. Retribution is just one aim. Others are rehabilitation, general and special deterrence, and incapacitation. The standard mechanisms of conventional criminal justice are criminal prosecution, adjudication and trial, and sentencing; but others include victim impact statements. To call the whole set of practices and outcomes of conventional criminal justice ‘retributive’ or ‘retributive justice’ (or ‘punitive justice,’ as some also say) is also a nonsense because many cases reported to the police do not result in arrest or prosecution. Second, restorative justice, as a coherent system or type of justice, does not exist. Any comparison of conventional criminal justice mechanisms with other mechanisms, such as RJ, must acknowledge that the latter is concerned with justice practices only after a person has admitted to an offense.<sup>482</sup>

I argue that the opposition between restorative justice and retributive justice does not benefit victim-survivors of crime, nor should it be perpetuated.

Even though highlighting contrasting characteristics of retributive and restorative justice illuminate some important elements differentiating them, it is also misleading and hides important similarities and areas of collaboration.<sup>483</sup> According to Zehr,

Real-world justice might also best be viewed as a continuum. On the one end is the Western legal or criminal justice system model. Its strengths – such as the encouragement of human rights – are substantial. Yet it has some glaring weakness. At the other end is the restorative alternative. It, too, has limits, at least as is currently conceived and practiced. A realistic goal, perhaps, is to move as far as we can toward a process that is restorative. In some cases or situations, we may not be able to move very far. In others, we may achieve processes and outcomes that are truly restorative. In between will be many cases and situations where both systems must be utilized, and justice is only partly restorative.<sup>484</sup>

In both retributive and restorative approaches, the goal is to vindicate through reciprocity by evening the score.<sup>485</sup> Retributive theorists offer that pain will vindicate, but in practice, that is often counterproductive for victim-survivor, offender and communities.<sup>486</sup> Van Camp and Wemmers argue that on the one hand, some researchers claim that restorative justice can and should replace

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<sup>482</sup> Kathleen Daly, “What is Restorative Justice? Fresh Answers to a Vexed Question” (2016) 11:1 *Victims & Offenders* 9–29 at 15.

<sup>483</sup> Zehr, “The Little Book of Restorative Justice,” *supra* note 43 at 58.

<sup>484</sup> *Ibid* at 60.

<sup>485</sup> *Ibid* at 58.

<sup>486</sup> *Ibid* at 59.

the retributive criminal justice system entirely or at least replace its focus on punishment.<sup>487</sup> On the other hand, they argue, there are others who insist that the restorative model can only complement the criminal justice system or operate as a default system with the conventional judicial proceedings functioning as a backup system.<sup>488</sup>

I argue that having the criminal justice system as the only option for victim-survivors of sexual assault is not enough and that abolishing the criminal justice system should be the primary goal of a feminist response to sexual assault in Canada. As asserted by Backhouse, looking forward, feminists should not support prisons and should continue to explore restorative justice options.<sup>489</sup> However, abolishing the criminal justice system is a more radical process and it should be the long-term goal of feminist responses to sexual assault. In the meantime, I argue that an alternative path, one that can be available right now and one that has the potential to overcome and/or mitigate the main risks identified against restorative justice for gendered violence should be encouraged: feminist, trauma-informed restorative justice approach for sexual assault cases, one that is intersectional, decolonial and anti-carceral at its foundation.

To be available for as many people as possible, a feminist, trauma-informed restorative justice practice for sexual assault cases should be used within the criminal justice system, as a diversionary practice, and outside it, where it is entirely a community-based response. Being available as a community-based response is particularly relevant when rethinking the way Canada addresses sexual assault. Many victim-survivors do not want any involvement with the criminal justice system. Further, not all peoples in Canada are equally likely to experience the criminal justice system as a safe and inclusive institution, as previously discussed in this research. Most victim-survivors never report, and they assault are most commonly not brought to light to the criminal justice system.<sup>490</sup> When victim-survivors do not want any involvement with the criminal justice system, the current scenario is that they do not have any other recourse that offers an adequate and satisfactory justice response. A community-based response of feminist, trauma-informed restorative justice, one that is anti-carceral in its roots, has the potential to benefit especially communities who experience multiple barriers to justice that otherwise would not engage with the criminal justice system, and be truly transformative and promote access to justice.

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<sup>487</sup> Van Camp & Wemmers, *supra* note 371 at 119.

<sup>488</sup> *Ibid.*

<sup>489</sup> Backhouse, "A Feminist Remedy for Sexual Assault," *supra* note 277 at 725.

<sup>490</sup> Deer, *supra* note 115 at 505.

Those goals can be achieved, for example, by learning from and engaging with local communities and their needs, building relationships of trust and respect, focusing not only in responding to but in preventing sexual violence, and offering alternatives for offenders to take accountability.

In this context, I argue that a file can be referred to restorative justice at any time after an offence is committed: when the offence is not reported to police (community referral usually); pre-charge by Crown (offence reported, charges may or may not be laid); post-charge as a diversion; post-charge; pre-trial; at the same time as a trial as a separate stream (not affecting the prosecution); post-trial; pre-sentencing; post-sentencing; during incarceration; pre-release; and post-release. There are many ways to engage with restorative justice and various procedural models that can be incorporated in a feminist, trauma-informed practice of restorative justice for sexual assault cases, such as victim-offender mediation and/or dialogue, community conferences, family group conferencing, victim-offender encounters,<sup>491</sup> healing circles and Indigenous-based restorative justice models,<sup>492</sup> for example, which should be defined according to the necessities and goals of each case in particular. There can be preparatory meetings, dialogue with the offender and follow-up meetings with all parties involved, for example.

I contend that a feminist, trauma-informed practice of restorative justice should be developed in conjunction with and separate from the criminal justice system to amplify and accommodate victim-survivors' choices and provide better outcomes for society as a whole. I believe that through a feminist, trauma-informed practice of restorative justice, one that is available within and outside the criminal justice system, the problem of underreporting of sexual assault can be mitigated because not only the criminal justice system option would be available for victim-survivors but a community-based response, completely independent, would too. In other words, a viable, safe and appropriate justice response would be available for victim-survivors in the community as well as within the legal system, amplifying victim-survivors' choices and broadening routes to access justice.

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<sup>491</sup> Van Camp & Wemmers, *supra* note 371 at 118.

<sup>492</sup> Jeffery G. Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (Paper delivered at the CIAJ's 2015 Annual Conference in Saskatoon entitled "Aboriginal Peoples and Law: "We Are All Here to Stay") [unpublished] 313-335 at 323.

#### 4.5.2 Justice and Equality for Women Who Face Multiple Barriers to Justice Through Feminist, Trauma-Informed Restorative Justice Practices

In Chapters 2 and 3, I argued that the criminal justice system perpetuates structural and systemic barriers to justice for certain groups, which are founded in collective biases regarding age, race, gender, ability, immigration status and sexual orientation, for example. I argued that the issues of colonial, race, and gender oppression could not be separated,<sup>493</sup> especially when discussing sexual violence in Canada. Women who experience multiple barriers to justice, including Black, Indigenous and immigrant women, women of colour and women with a disability in Canada are still overrepresented as victim-survivors of sexual assault. And ongoing colonialism is embedded in all aspects of Canadian society, including legal, economic, political and social systems, and its intergenerational impacts are prevalent to this date. The criminal justice system in Canada has proved to be linked to systemic sexism, racism, misogyny and heteropatriarchy, especially in the context of sexual assault. To overcome those barriers to justice, I support that a feminist, trauma-informed approach to restorative justice for sexual assault cases, and its adaptability, flexibility and intersectional foundation, represents a path to justice where decolonial and intersectional practices in the sexual assault realm can be implemented to recognize, for example, diversities of experience, positionality, privilege and identity.

According to the final report of the Truth and Reconciliation Commission of Canada, colonialism remains an ongoing process, shaping both the structure and the quality of the relationship between settlers and Indigenous peoples.<sup>494</sup> I argue that a transformative approach to restorative justice for cases of sexual assault in Canada has to be decolonial and intersectional. There has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes and action to change behaviour.<sup>495</sup> Further, we need to acknowledge colonization as a process that is still ongoing in Canada. Indigenous peoples' experiences in Canada, for example, are continuously traumatic, which contributes to higher levels of sexual violence among those groups.<sup>496</sup> Haskell and Randall assert that:

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<sup>493</sup> Smith, *supra* note 239 at 71.

<sup>494</sup> Final report of the TRC, *supra* note 229 at 45.

<sup>495</sup> *Ibid* at 7-8.

<sup>496</sup> Haskell & Randall, "Disrupted Attachments," *supra* note 292 at 81.

These ongoing traumatic events relate to: the loss of culture, language and identity related to forced assimilation policies; the loss of land and disruption of traditional forms of governance; the decades of incarceration of Aboriginal children in state-run residential schools and its impact on many generations; the high levels of child sexual abuse, sexual assault and domestic violence in many Aboriginal communities; and the epidemics of alcohol and substance abuse also facing so many Aboriginal communities. All of these factors have had, and continue to have, profound effects on the health and well-being of the peoples of Canada's First Nations. Moreover, they are compounded by a widespread social denial about these traumatic events and an evasion of a sense of social responsibility for effecting the kind of political, social and economic change required to remedy this situation.<sup>497</sup>

A feminist, trauma-informed practice of restorative justice for cases of sexual assault presents as even more necessary in a decolonial context.

If we are taking action towards reconciliation, not only should we recognize the colonial past but also the colonial present<sup>498</sup> and its current implications on people's lives. Every step towards a feminist, trauma-informed, intersectional, decolonial and anti-carceral practice of restorative justice for cases of sexual assault in Canada needs to have reconciliation as foundational to establishing and maintaining respectful relationships between Indigenous and non-Indigenous peoples. In the following sections, I engage with a decolonial and intersectional approach to restorative justice for sexual assault, starting with the "Calls for Justice" identified in the MMIWG report,<sup>499</sup> and moving to the 94 "Calls to Action" identified in the Truth and Reconciliation Commission of Canada final report.<sup>500</sup>

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<sup>497</sup> *Ibid* at 50.

<sup>498</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minnesota Scholarship: 2014), ch 4 Seeing Red: Reconciliation and Resentment at 125.

<sup>499</sup> "The Calls for Justice arise from international and domestic human and Indigenous rights laws, including the Charter, the Constitution, and the Honour of the Crown. As such, Canada has a legal obligation to fully implement these Calls for Justice and to ensure Indigenous women, girls, and 2SLGBTQQIA people live in dignity. We demand a world within which First Nations, Inuit, and Métis families can raise their children with the same safety, security, and human rights that non-Indigenous families do, along with full respect for the Indigenous and human rights of First Nations, Inuit, and Métis families." See more at: Final Report into MMIWG, vol 1b, *supra* note 446 at 53.

<sup>500</sup> "To redress the legacy of residential schools and advance reconciliation, in its final report the Truth and Reconciliation Commission of Canada called on governments, educational and religious institutions, civil society groups and all Canadians to take action on the 94 Calls to Action it identified. On December 15, 2015, the Prime Minister reiterated the Government of Canada's commitment to implement the recommendations of the commission." See more at: Government of Canada, Truth and Reconciliation Commission of Canada, "*Delivering on Truth and Reconciliation Commission Calls to Action*" (05 September 2019), online: <[www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801](http://www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801)> [perma.cc/3FR4-98R6] [Delivering on Truth and Reconciliation Commission Calls to Action].

#### 4.5.2.1 Calls to Action and Calls to Justice Towards a Feminist, Trauma-Informed Practice of Restorative Justice for Sexual Assault Cases

The Calls for Justice in the MMIWG report, even though they have been mandated to provide recommendations, are legal imperatives – they are not optional.<sup>501</sup> They emerged in a context where human rights and Indigenous rights abuses and violations committed and condoned by the Canadian state represent genocide against Indigenous women, girls and 2SLGBTQQIA people.<sup>502</sup> The MMIWG report asserts that the fulfillment of the Calls for Justice requires a decolonizing approach, in the following terms:

Decolonizing approaches involve recognizing inherent rights through the principle that Indigenous Peoples have the right to govern themselves in relation to matters that are internal to their communities; integral to their unique cultures, identities, traditions, languages, and institutions; and with respect to their special relationship to their resources, which many witnesses described as their relatives. Our approach honours and respects Indigenous values, philosophies, and knowledge systems. It is a strengths-based approach, focusing on the resilience and expertise of individuals and communities themselves.<sup>503</sup>

I argue that a decolonizing approach to restorative justice for sexual assault in Canada aims to resist and undo the forces of colonialism and to recognize Indigenous agency and legal orders.<sup>504</sup> In practical ways, I identified calls to justice connected to decolonization and intersectionality, which are as follows:

##### **We call on all Canadians to:**

**15.2** Decolonize by learning the true history of Canada and Indigenous history in your local area. Learn about and celebrate Indigenous Peoples' history, cultures, pride, and diversity, acknowledging the land you live on and its importance to local Indigenous communities, both historically and today.<sup>505</sup>

##### **Calls for Justice for All Governments: Justice**

**5.24** We call upon the federal government to amend data collection and intake-screening processes to gather distinctions-based and intersectional data about Indigenous women, girls, and 2SLGBTQQIA people.<sup>506</sup>

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<sup>501</sup> Final Report into MMIWG, vol 1b, *supra* note 446 at 54.

<sup>502</sup> *Ibid* at 53.

<sup>503</sup> *Ibid* at 57.

<sup>504</sup> *Ibid* at 56.

<sup>505</sup> *Ibid* at 85.

<sup>506</sup> *Ibid* at 72.

## **Calls for Media and Social Influencers**

**6.1** We call upon all media, news corporations and outlets, and, in particular, government funded corporations and outlets; media unions, associations, and guilds; academic institutions teaching journalism or media courses; governments that fund such corporations, outlets, and academic institutions; and journalists, reporters, bloggers, film producers, writers, musicians, music producers, and, more generally, people working in the entertainment industry to take decolonizing approaches to their work and publications in order to educate all Canadians about Indigenous women, girls, and 2SLGBTQQIA people. More specifically, this includes the following:

- i. Ensure authentic and appropriate representation of Indigenous women, girls, and 2SLGBTQQIA people, inclusive of diverse Indigenous cultural backgrounds, in order to address negative and discriminatory stereotypes.
- ii. Support Indigenous people sharing their stories, from their perspectives, free of bias, discrimination, and false assumptions, and in a trauma-informed and culturally sensitive way.
- iii. Increase the number of Indigenous people in broadcasting, television, and radio, and in journalist, reporter, producer, and executive positions in the entertainment industry, including, and not limited to, by:
  - providing educational and training opportunities aimed at Indigenous inclusion; and
  - providing scholarships and grants aimed at Indigenous inclusion in media, film, and music industry-related fields of study.
- iv. Take proactive steps to break down the stereotypes that hypersexualize and demean Indigenous women, girls, and 2SLGBTQQIA people, and to end practices that perpetuate myths that Indigenous women are more sexually available and “less worthy” than non-Indigenous women because of their race or background.<sup>507</sup>

The call to justice 15.2, for example, invited all Canadians to decolonize by learning the true history of Canada and Indigenous histories in their local area and by celebrating Indigenous peoples, history and culture. The Calls for Justice may vary depending on the person, the profession and the institutions called upon, but in the context of feminist, trauma-informed restorative justice for sexual assault in Canada, my goal is to ensure those calls become guidelines towards decolonization and awareness of how intersecting factors impact a person’s experience with sexual assault within restorative justice practices.

The TRC Calls to Action are intended to redress the legacy of residential schools and advance the process of Canadian reconciliation.<sup>508</sup> The TRC Commission defines reconciliation as an ongoing process of establishing and maintaining respectful relationships.<sup>509</sup> Further, it asserts:

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<sup>507</sup> *Ibid* at 73-74.

<sup>508</sup> Delivering on Truth and Reconciliation Commission Calls to Action, *supra* note 500 at 1.

<sup>509</sup> Final report of the TRC, *supra* note 229 at 16.

Reconciliation must become a way of life. It will take many years to repair damaged trust and relationships in Aboriginal communities and between Aboriginal and non-Aboriginal peoples. Reconciliation not only requires apologies, reparations, the relearning of Canada's national history, and public commemoration, but also needs real social, political, and economic change. Ongoing public education and dialogue are essential to reconciliation. Governments, churches, educational institutions, and Canadians from all walks of life are responsible for taking action on reconciliation in concrete ways, working collaboratively with Aboriginal peoples. Reconciliation begins with each and every one of us.<sup>510</sup>

A transformative approach to restorative justice for sexual assault needs to work toward reconciliation through ongoing public education and dialogue. The TRC also includes calls that can be interpreted as aiming to advance decolonial and intersectional approaches within the legal system. There are actions, for example, that require all law students and lawyers to engage with cultural competency training regarding Indigenous peoples. According to the TRC Commission report,

27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.<sup>511</sup>

For lawyers and law students to engage with decolonial practices might be to engage with decolonial, antiracist and intercultural training. Those Calls for Justice in the MMIWG report and the Calls to Action in the TRC Commission report showcase practical ways in which we can all engage with decolonial and intersectional approaches.

In the context of feminist, trauma-informed restorative justice for sexual assault, it might mean, for example, ensuring practitioners are well versed in intercultural competency, conflict

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<sup>510</sup> *Ibid* at 184-185.

<sup>511</sup> Delivering on Truth and Reconciliation Commission Calls to Action, *supra* note 500 at 3.

resolution, human rights, decolonial processes and antiracism practices, and drawing on or supporting organizations that are committed to eliminating the multiple barriers to justice associated with sexual assault. Further, specifically within Indigenous people's contexts, it might mean to recognize their laws and legal orders, self-government, restorative justice programs run autonomously by Indigenous communities and to understand that the appropriateness of restorative justice for domestic and sexual violence within Indigenous contexts should be grounded in a more adequate theorization of the intersection of culture and gender in post-colonial societies,<sup>512</sup> as previously discussed in this research.

The analysis of racial and ethnic trends in the context of RESTORE - a restorative justice conferencing program adapted to prosecutor-referred adult misdemeanor and felony sexual assaults in Arizona that evaluated 22 cases - was worrisome and highlighted the importance of intersectionality in the context of restorative justice for sexual assault cases. Koss realized that prosecutors were much more likely to refer white defendants to RESTORE than Black or Hispanic defendants and this suggests that prejudices inherent with the criminal justice system, such as racism, carried over to the RESTORE program.<sup>513</sup> Even though this was an U.S. example, I argue that it showcases and highlights the importance of feminist, trauma-informed lenses that are inherently intersectional, decolonial and anti-carceral of restorative justice for sexual assault, an argument that is applicable within the Canadian context.

I maintain that in order to rethink restorative justice for cases of sexual assault in Canada through decolonial and intersectional lenses, we can start by acting upon the Calls to Action and the Calls for Justice. We need to decolonize by learning the true history of Canada and Indigenous histories. We also must break stereotypes that only reinforce the multiple barriers to justice associated with sexual assault in Canada, such as Indigeneity, race and sexual orientation, recognizing that those barriers prevent many victim-survivors from accessing justice.

Decolonial practices of restorative justice for sexual assault in Canada are informed by collective efforts to rebuild decolonized relationships and communities. In this regard, peace and conflict studies scholar Polly Walker asserts that a decolonizing approach to dispute resolution would involve: a) respect and understanding of Indigenous worldviews that have been marginalized through colonization; and b) acknowledgement of Indigenous approaches to conflict

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<sup>512</sup> Cameron, "Stopping the violence," *supra* note 343 at 60.

<sup>513</sup> Koss, *supra* note 400 at 1650.

resolution as a body of knowledge that predates Western conflict resolution.<sup>514</sup> In other words, to build decolonial relationships, we must also take into account intersectionality and how different aspects of a person's experience, positionality, privilege and identity influence their relationship with law and the criminal justice system and work toward reconciliation.

Feminist, trauma-informed restorative justice practices and models must be shaped on a case-to-case basis in order to adapt their proceedings according to the individual needs of victim-survivors of sexual assault, while paying due attention to systemic oppressions. It means that feminist, trauma-informed restorative justice for cases of sexual assault could even be discouraged altogether in some of these cases in order to reduce further harm. Recognizing the violence of ongoing colonialism and engaging in anti-colonial and antiracist actions is critical when making an argument for Indigenous and non-Indigenous restorative justice for cases of sexual assault. Creating a legitimate post-colonial relationship means abandoning notions of European cultural superiority and adopting a mutually respectful stance along the lines of gender, race and Indigeneity, as well as recognizing and acknowledging Indigenous communities' laws and legal orders on these very questions. Finally, I argue that increased funding and training regarding decolonial and antiracist practices, gendered sexualized violence, conflict resolution, human rights, 2SLGBTQQA perspectives and intercultural competency are a necessary component of a feminist, trauma-informed practice of restorative justice for sexual assault, one that must be adapted for different communities and also be culturally safe.

#### **4.5.3 Feminist, Trauma-Informed Approach to Restorative Justice to Prevent Retraumatization, Power Imbalances and Increase Safety in Gendered-Violence Cases**

A feminist, trauma-informed restorative justice response to sexual assault has the potential to avoid retraumatization, revictimization and power imbalances while increasing safety in gender-based violence cases. Feminist, trauma-informed restorative justice practice for sexual assault should have a number of procedural safeguards that aim to ensure the physical and emotional safety of all participants and to avoid any potential revictimization,<sup>515</sup> including, for example, having

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<sup>514</sup> Polly Walker, "Decolonizing Conflict Resolution: Addressing the Ontological Violence of Westernization" (2004) 28:3 & 4 *The American Indian Quarterly* 527–549 at 531.

<sup>515</sup> Zinsstag & Keenan, *supra* note 201 at 5.

counsellors available, for all parties involved throughout the process, that are trauma-informed and trained on power imbalances and gendered violence. Restorative justice facilitators for sexual assault must also be trained to be trauma-informed, be knowledgeable about community resources to whom they can refer clients and go through the restorative justice process at an appropriate, ethical pace.<sup>516</sup> Further, they need to be very well versed into the dynamics of gender-based crimes to prevent power imbalanced relationships. Marsh and Wager assert, and I agree with them, that cases of sexual assault may require even more extensive preparation and follow-up support of the victim-survivor, offender and their families, more specialist training of the facilitators and would benefit by access to services of experts in both sexual victimization and sexual offending.<sup>517</sup> If all restorative justice professionals, such as practitioners, facilitators and counsellors are trauma-informed and also trained in gendered violence and particularities of sexual assault, they can address timely and adequately any attempts by offenders to blame or manipulate the victim-survivor.<sup>518</sup>

There has been little empirical research by feminist scholars that have investigated the place of trauma and psychological harm in the work of sexual assault services or feminist practitioners.<sup>519</sup> Regarding the impacts of trauma on victim-survivors' response, memories and recall, Wilson, Lonsway, Archambault, and Hopper indicate the following: a) a sexual assault victim is typically operating from the position where the defense circuitry is in control of their responses; b) the ability to give an account of the incident will be impaired, because of the impacts of trauma on the brain, and without an understanding of the neurobiology of trauma, an account that is not linear or "incomplete" might be viewed as inconsistent, inaccurate or unreliable; c) if you don't know anything about dissociation, tonic immobility, or collapsed immobility, for example, you might wonder why a victim did not resist the assault – and question whether the sexual acts were consensual; similarly, if you don't understand other impacts trauma has on the brain and memory, you might question why the victim can't remember what seems like basic or crucial details about the assault and it will not make sense to you when a victim is able to tell you a great deal about the initial moments of the sexual assault, but very little about "what happened

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<sup>516</sup> Grant-Warmald, Edwards & Rourke, *supra* note 412.

<sup>517</sup> Marsh & Wager, *supra* note 410 at 341.

<sup>518</sup> *Ibid.*

<sup>519</sup> Suzanne Egan, *Putting Feminism to Work: Theorising Sexual Violence, Trauma and Subjectivity* (Palgrave Macmillan) at 96.

next.”<sup>520</sup> In other words, I assert that the criminal justice system is not a trauma-informed institution and very often does not understand the role of trauma in the context of sexual assault cases. That makes the criminal justice system retraumatize, revictimize and even harm further victim-survivors of sexual assault at trials. Restorative justice for sexual assault cases through feminist and trauma-informed lenses, however, is knowledgeable of trauma and its impacts and is also centred and designed around the victim-survivor, preventing retraumatization and power imbalances during the process.

The MMIWG report also recognizes the importance of incorporating trauma knowledge into all solution-based and service-oriented policies, procedures and practices in order to implement the Calls for Justice. The report also includes many Calls for Justice that incorporate trauma-informed practices in their recommendations, such as:

**3.3** We call upon all governments to fully support First Nations, Inuit, and Métis communities to call on Elders, Grandmothers, and other Knowledge Keepers to establish community-based trauma-informed programs for survivors of trauma and violence.<sup>521</sup>

**5.5** We call upon all governments to fund the provision of policing services within Indigenous communities in northern and remote areas in a manner that ensures that those services meet the safety and justice needs of the communities and that the quality of policing services is equitable to that provided to non-Indigenous Canadians. This must include but is not limited to the following measures:

iii. Capacity must be developed in investigative tools and techniques for the investigation of sexualized violence, including but not limited to tools for the collection of physical evidence, such as sexual assault kits, and specialized and trauma-informed questioning techniques.<sup>522</sup>

**6.1** We call upon all media, news corporations and outlets, and, in particular, government funded corporations and outlets; media unions, associations, and guilds; academic institutions teaching journalism or media courses; governments that fund such corporations, outlets, and academic institutions; and journalists, reporters, bloggers, film producers, writers, musicians, music producers, and, more generally, people working in the entertainment industry to take decolonizing approaches to their work and publications in order to educate all Canadians about Indigenous women, girls, and 2SLGBTQQIA people. More specifically, this includes the following:

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<sup>520</sup> Wilson et al, *supra* note 294 at 34.

<sup>521</sup> Final Report into MMIWG, vol 1b, *supra* note 446 at 180.

<sup>522</sup> *Ibid* at 183.

ii. Support Indigenous people sharing their stories, from their perspectives, free of bias, discrimination, and false assumptions, and in a trauma-informed and culturally sensitive way.<sup>523</sup>

**9.2** We call upon all actors in the justice system, including police services, to build respectful working relationships with Indigenous Peoples by knowing, understanding, and respecting the people they are serving. Initiatives and actions should include, but are not limited to, the following measures:

iv. Undertake training and education of all staff and officers so that they understand and implement culturally appropriate and trauma-informed practices, especially when dealing with families of missing and murdered Indigenous women, girls, and 2SLGBTQQIA people.<sup>524</sup>

**14.8** We call upon Correctional Service Canada to ensure its correctional facilities and programs recognize the distinct needs of Indigenous offenders when designing and implementing programming for First Nations, Inuit, and Métis women. Correctional Service Canada must use culturally safe, distinctions-based, and trauma-informed models of care, adapted to the needs of Indigenous women, girls, and 2SLGBTQQIA people.<sup>525</sup>

**17.8** We call upon all governments, in partnership with Métis communities, organizations, and individuals, to design mandatory, ongoing cultural competency training for public servants (including staff working in policing, justice, education, health care, social work, and government) in areas such as trauma-informed care, cultural safety training, antiracism training, and understanding of Métis culture and history.<sup>526</sup>

**18.18** We call upon all governments and service providers to educate service providers on the realities of 2SLGBTQQIA people and their distinctive needs, and to provide mandatory cultural competency training for all social service providers, including Indigenous studies, cultural awareness training, trauma-informed care, anti-oppression training, and training on 2SLGBTQQIA inclusion within an Indigenous context (including an understanding of 2SLGBTQQIA identities and Indigenous understandings of gender and sexual orientation). 2SLGBTQQIA people must be involved in the design and delivery of this training.<sup>527</sup>

Understanding the impacts trauma has on the brain, including responses that are involuntary and often largely unconscious, can improve responses to sexual assault in Canada.

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<sup>523</sup> *Ibid* at 187.

<sup>524</sup> *Ibid* at 190.

<sup>525</sup> *Ibid* at 197.

<sup>526</sup> *Ibid* at 211.

<sup>527</sup> *Ibid* at 216.

Traumatic experiences, such as sexual assault, can change victim-survivors' lives at deep subjective levels. Hence, I argue that a feminist, trauma-informed restorative justice response in cases of sexual assault has the potential to address concerns such as revictimization, retraumatization and power imbalances, which are commonly raised against restorative justice for gendered crimes.

Preparatory meetings are key because this is where needs, impacts, accountability and concerns are brought to light. In this regard, specialized training of restorative justice practitioners in the particularities of sexual assault, gendered violence, intersectionality and decolonial practices, as discussed above, helps to avoid power imbalances<sup>528</sup> and revictimization of victim-survivors in the process.<sup>529</sup> Further, through feminist and trauma-informed lenses, restorative justice approaches to sexual assault preserves human dignity and prevents violation of human rights, even in cases that end up with different outcomes than expected.

In restorative justice processes in general, victims-survivors of sexual violence have the opportunity to ask the offender questions, tell them about the impact the offence had in their lives, how it affected them and express their feelings, emotions and concerns. Responsibility and accountability are crucial in a restorative process. In restorative justice processes, offenders can learn about the people they harmed and the consequences of their actions, explore and address the root causes of their behaviour, access services and supports, actively work to address their harmful actions and positively contribute to their community. As asserted by Zehr, restorative justice is not primarily about forgiveness and reconciliation, even though they both could happen in the context of restorative justice,<sup>530</sup> but about addressing needs, repairing harms, and taking accountability. In other words, forgiveness is never the primary goal of the restorative justice process. In the context of sexual assault, restorative justice offers the opportunity for victim-survivors to take back control and be heard (validation of their experience), which often does not happen in the criminal justice system.

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<sup>528</sup> Liebmann, *supra* note 413 at 291.

<sup>529</sup> Zinsstag & Keenan, *supra* note 201 at 5.

<sup>530</sup> Zehr, "The Little Book of Restorative Justice," *supra* note 43 at 8.

Laura,<sup>531</sup> who was sexually abused by her former stepfather for long periods of her childhood, explained how the restorative justice system enabled her to meet him years later and receive an apology, in the following terms:

When [my former stepfather] came in, we didn't make eye contact at first. He seemed weak that day - he looked a lot older, and he seemed like half the man he had been before. I asked him why he abused me. He said he picked me because I was the youngest sibling and therefore the easiest to manipulate. He said he didn't choose [to form a relationship with] my mum so he could get to us children, it just happened. I also asked him if he understood that my anorexia was caused by what he'd done to me. He told me he'd deliberately blanked it out, so he didn't have to admit to himself that it was his fault. It was really important to me to let him know that while he'd affected the first 30 years of my life, I wasn't going to let him ruin the next 30. He got very emotional and had to leave the room - he said he couldn't understand why I'd want to forgive him. I told him it was because I didn't want to carry around what he'd done to me anymore. I'd moved on, and forgiving him was for me, not for him. I wanted an apology, and I got one. An apology is one word, but it's a massive thing. I'm not as angry anymore - that's lifted. And hearing him say that it was all his fault was massive. I didn't believe that until I heard it from him, and no-one else would have been able to convince me. Without restorative justice I'd have struggled to move on with my life. I also had the chance to say goodbye to him, which was what I wanted.<sup>532</sup>

Having the opportunity to meet her offender in a safe and controlled environment enabled Laura to ask questions, be heard and not let her life be ruined any longer. One can say that through restorative justice, Laura got the answers that she was waiting for so many years. Some losses are non-compensable but acknowledging what happened and letting the victim-survivor lead their own recovery path can have a powerful effect on people's lives. It is well known from studies of victim-survivors of gendered violence, especially sexual violence, that most victim-survivors want to describe what the offender did and how it affected them.<sup>533</sup> That was made clear in Laura's story when she mentioned, "I asked him why he abused me" and "It was really important to me to let him know that while he'd affected the first 30 years of my life, I wasn't going to let him ruin the next 30," for example. Telling one's story of victimization is often not possible in a criminal justice

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<sup>531</sup> Laura - who has waived her right to anonymity - is able to recall the three-hour restorative justice meeting in detail. Since the meeting, Laura says "a weight has been lifted" off her shoulders. See more at: Adam Eley, "Restorative justice: 'How I got an apology from my abuser'" (22 October 2015), online: <[www.bbc.com/news/uk-34571936](http://www.bbc.com/news/uk-34571936)> [perma.cc/7RPY-UXMJ]

<sup>532</sup> *Ibid.*

<sup>533</sup> Marsh & Wager, *supra* note 410 at 342.

system process, and if cases go to trial and defendants elect not to testify, they cannot be confronted.<sup>534</sup>

In general restorative justice practices, victim-survivors can regain a sense of control and empowerment, gain information, receive acknowledgement and validation, and help decide the outcome.<sup>535</sup> No restorative justice meeting should proceed if there is trepidation about physical or emotional safety.<sup>536</sup> In Laura's case, for example, every detail was worked out in advance: the probation service was constantly in touch with her community mental health nurse; they made sure that she had appointments with them the days before and after the meeting; and she was prepared thoroughly, including access to psychological support, to ensure her safety in every step of the process.<sup>537</sup> Even though Laura's case is an example of the general practice of restorative justice, I argue that it has elements of the theoretical framework of feminist, trauma-informed restorative justice for sexual assault I am proposing in this thesis. Elements such as thorough preparation of victim-survivor before the meeting, access to mental health nurse, psychological support and attention to safety throughout the process in Laura's case align with the feminist, trauma-informed practice of restorative justice for sexual assault I am advocating for in this research.

Through feminist, trauma-informed lenses, restorative justice can be a transformative remedy to address systemic gendered violence because understanding the roots and causes of gendered violence is central to this theoretical framework. In feminist, trauma-informed practices of restorative justice for sexual assault cases, victim-survivors and their needs will always be the central focus of the process and victim-survivor safety will always be prioritized over batterer rehabilitation.<sup>538</sup> Victim-survivors should never be treated as a means to an end, such as to rehabilitate the offender or address the offender's needs first.<sup>539</sup> A feminist, trauma-informed approach to restorative justice for sexual assault cases also encourages accountability of offenders, and rather than being soft on crime, it requires the offender to behave more responsibly by making amends to the victim-survivor and community.<sup>540</sup> By having feminist and trauma-informed lenses to restorative justice for sexual assault, the proposed argument also differs from general restorative

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<sup>534</sup> *Ibid* at 353.

<sup>535</sup> Grant-Warmald, Edwards & Rourke, *supra* note 412.

<sup>536</sup> *Ibid*.

<sup>537</sup> Eley, *supra* note 531.

<sup>538</sup> Coker, *supra* note 450 at 67.

<sup>539</sup> Grant-Warmald, Edwards & Rourke, *supra* note 412.

<sup>540</sup> Is restorative justice "soft on crime?" (accessed 11 June 2021), online: *Restorative Justice Victoria* <[www.rjvictoria.com/ufaqs/7-is-restorative-justice-soft-on-crime/](http://www.rjvictoria.com/ufaqs/7-is-restorative-justice-soft-on-crime/)> [perma.cc/LSP4-TVGX].

justice practices because it allows victim-survivors of sexual violence to have the opportunity to tell their stories and be heard in a safe and controlled environment that is aware of trauma-informed, culturally safe, antiracist and not-ableist practices, aware of colonialism and its ongoing impacts and also recognizes the differences of identity, positionality and privilege and adapt its proceedings accordingly.

Feminist and trauma-informed practice of restorative justice for sexual assault is also inherently a strengths-based perspective that recognizes post-traumatic growth.<sup>541</sup> Working from a strengths-based perspective is part of the process of relationship and trust-building: a trauma-informed perspective that views trauma as an injury shifts the paradigm away from “sickness” to “impact” and moves the conversation away from “What is wrong with you?” to “What has happened to you?”.<sup>542</sup> That is particularly important in the context of sexual assault, given that victim-survivors very often experience self-blame, shame and humiliation, for example.<sup>543</sup>

In terms of post-traumatic growth:

The research suggests that between 30 and 70% of individuals who experienced trauma also report positive change and growth coming out of the traumatic experience (Joseph & Butler, 2010). Post-traumatic growth is defined as the ‘experience of individuals whose development, at least in some areas, has surpassed what was present before the struggle with crises occurred. The individual has not only survived, but has experienced changes that are viewed as important, and that go beyond the status quo’ (Tedeschi & Calhoun, 2004). Individuals have described profound changes in their view of ‘relationships, how they view themselves and their philosophy of life’ (Joseph & Linley, 2006).<sup>544</sup>

In this context, not only can feminist, trauma-informed restorative justice process for sexual assault in Canada diminish retraumatization and increase safety of victim-survivors but it can also open up space for personal growth.

A feminist, trauma-informed approach is open to genuine collaboration between all parties involved. It makes sure victim-survivors of sexual assault will choose where, how and when they will engage with the restorative justice process, setting up priority goals and how the process will unfold to better fulfil their particular expectations of justice. This flexibility, co-design and control

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<sup>541</sup> Trauma- informed: The Trauma Toolkit, *supra* note 289 at 106.

<sup>542</sup> *Ibid.*

<sup>543</sup> Health Impacts of Violent Victimization on Women and their Children, *supra* note 32 at 12.

<sup>544</sup> Trauma- informed: The Trauma Toolkit, *supra* note 289 at 108.

offered by feminist, trauma-informed restorative justice processes to victim-survivors of sexual assault can be extremely valuable for victim-survivors who choose to pursue this route to justice. Restorative justice practices are about victim-survivors being heard and respected, offenders being held accountable and taking responsibility for the harm done and communities being supported and offered the opportunity to heal. Restorative justice through feminist and trauma-informed lenses offers a different approach that can be moulded to the needs of the individual victim-survivors and is aware of intersecting forms of oppression. Suitability for restorative justice for cases of sexual assault should be evaluated on a case-by-case basis, and participation must be voluntary for all persons involved.

Nevertheless, a feminist, trauma-informed, decolonial, intersectional and anti-carceral approach to restorative justice for sexual assault cases has the following benefits: a) justice and equality for women who face multiple barriers to justice in the Canadian context; b) awareness of the ongoing harms of settler colonialism and racism that impact peoples' lives in Canada and their access to justice; c) understanding of intersectional layers that make not all peoples equally likely to be victim-survivors of sexual violence or to experience the criminal justice system as a safe and inclusive institution; d) understanding of the neurobiology of trauma and how trauma changes the brain and impacts people's lives, particularly in the context of gendered crime, with the goal of creating trauma-informed precautions that reduce harm and provide positive supports for all people; and e) awareness that a feminist strategy to eliminate sexual assault should not support prisons that are dehumanizing, racist, homophobic, and inherently violent themselves while disproportionately housing the poor, the mentally ill and members of racially subordinated communities.<sup>545</sup>

A transformed way to think about restorative justice emerges in a context where women, transgender people and gender non-conforming people experience sexualized violence at disproportionately higher rates.<sup>546</sup> Further, it emerges from the fact that the current criminal justice system, with its carceral logic, is not an adequate response to sexual assault victimization, leading to the call for its abolition. However, abolishing the criminal justice system altogether demands greater and radical systemic change. I am hoping that through this thesis, a transformed way to

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<sup>545</sup> Backhouse, "A Feminist Remedy for Sexual Assault," *supra* note 277 at 733.

<sup>546</sup> Statistics Canada, *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018*, by Brianna Jaffray, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 9 September 2020).

think about restorative justice for cases of sexual assault through feminist, trauma-informed intersectional, anti-carceral and decolonial lenses can offer a realm of hope, particularly for victim-survivors who face multiple and intersecting barriers to justice. There is much work, training, and (un)learning that is needed to put this into effect. However, the goal is to offer a better way of offering justice to victim-survivors of sexual assault in Canada.

## CHAPTER 5 – CONCLUSION: A PATH FORWARD

In this thesis, I have argued that the crime of sexual assault is gendered, underreported and born disproportionately by communities who face multiple barriers to justice, especially by Black, Indigenous and immigrant women, women of colour and women with disabilities. I have claimed that myths and stereotypes about women and sexual assault still play a substantial role in the criminal justice system in Canada, despite decades of advocacy and legal reform. Further, I maintained that victim-survivors continue to express dissatisfaction with how the police and courts handle their cases and with their experience of the trial process.<sup>547</sup> I claimed that years of law reforms did not make a real difference on how victim-survivors of sexual assault experience the criminal justice system, and the criminal justice system fails and has been historically failing victim-survivors of sexual assault. I examined feminist legal theory and critique, intersectionality, colonization and anti-carceral feminisms and trauma-informed practices. I concluded that carceral punitivism does not align with appropriate responses to sexual assault cases, which led me to search for alternative forms of justice, such as restorative justice. I explored fundamental concepts of restorative justice and addressed the main critiques of restorative justice in cases of sexual assault, especially from feminist scholars and scholars focused on Indigenous women's issues. In the light of those issues, I proposed a different way to think about restorative justice in sexual assault cases in Canada, one that offers a viable and transformative path to justice for victim-survivors of sexual assault who choose to pursue this route while eliminating and/or mitigating the risks of restorative justice for gendered violence. I proposed a practice of restorative justice that is feminist, trauma-informed, intersectional, decolonial, and anti-carceral at its foundation. In this chapter, I address the strengths and limitations of this study and explore how future research can take this work forward.

### 5.1 Strengths of this Study

This research offers a unique contribution to the fields of sexualized violence, sexual assault, restorative and transformative justice. Despite many arguments and critiques against the use of restorative justice approaches to respond to gendered violence cases, the proposed framework to

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<sup>547</sup> Daly, "Conventional and innovative justice responses to sexual violence," *supra* note 116 at 1.

think about restorative justice through a perspective that combines feminist, trauma-informed, intersectional, anti-carceral and decolonial lenses has the potential to eliminating and/or mitigate the risks while addressing in a transformative way how Canadian law deals with those who have experienced sexual assault once the law becomes a part of their lives.

As noted in Chapter 1, as this thesis was being edited for submission, a report delivered to the federal government of Canada to guide the implementation of a “National Action Plan on Violence Against Women and Gender-Based Violence” (NAP on VAW/GBV) was released to the public in mid-June 2021.<sup>548</sup> This report asserts that responses to violence should prioritize a transformative and restorative justice approach, rather than one that is carceral or punitive,<sup>549</sup> which is in line with the arguments I have made throughout this thesis. Among the report’s recommendations and insights, I highlight briefly the ones that are most relevant to this study:

Using restorative and transformative justice approaches will better help heal individuals and communities than the punitive and carceral structures currently used when harm occurs.<sup>550</sup>

**Recommendations in the Prevention Pillar will:**

- Be grassroots- and community-focused
- Emphasize transformative and restorative justice centred on decision-making by the person who has been harmed.
- Seek to rehabilitate and engage people who have caused harm
- Include men and boys in violence prevention work with a recognition that not all men and boys experience patriarchy and privilege in the same ways. Recognizing multiple masculinities and the experiences of BIPOC men and boys, LGBTQI2S+ men, men with disabilities and other intersecting identities.
- Address root causes of violence
- Recognize that GBV/VAW is rooted in the cyclical and mutually dependent relationship between historically entrenched inequality, resulting in the perpetuation of unequal relations and poor living conditions, compounded by layers of marginalization, (i.e., patriarchy, colonization, a racialized labour market, pre-migration experiences of war and natural disasters, segregation, and devaluation due to disability)—have resulted in higher rates of violence
- Acknowledge the power of language (e.g., recognize that labels can become identities and that people should always be given space to self-identify).
- Focusing on prevention strategies rather than reactionary strategies to addressing violence, particularly moving away from carceral models.<sup>551</sup>

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<sup>548</sup> NAP on VAW/GBV Report, *supra* note 39.

<sup>549</sup> *Ibid* at 51.

<sup>550</sup> *Ibid* at 43.

<sup>551</sup> *Ibid* at 175.

There may be backlash from feminists supporting carceral approaches if we do not clearly define transformative and restorative justice and be clear about when the justice system will be involved and when non-traditional methods of addressing harm should be used. Additionally, there are circumstances in which transformative and restorative justice practices can be integrated within the court system. Although this can be convoluted, it can also be used in a way that benefits the person who experienced harm, depending on what they want. This is an area for further exploration and discussion.<sup>552</sup>

Further, our recommendations take a transformational and restorative justice approach and recognize that there is a great need for responses that are not punitive, stigmatizing, or disempowering, especially for youth.<sup>553</sup>

This thesis' arguments and proposed framework of feminist, trauma-informed approach to restorative justice for sexual assault cases, one that is intersectional, decolonial and anti-carceral at its foundation, aligns with the recommendations of the "National Action Plan on Violence Against Women and Gender-Based Violence" for prioritization of restorative and transformative justice responses to gender-based violence, such as sexual assault. As showcased above, this is one of the strengths of this thesis.

Another strength is that this thesis stands in line with the recommendations of the report when arguing that, depending on the circumstances, transformative and restorative justice practices can be integrated within the court system. I have argued that abolishing the criminal justice system should be the primary goal of a feminist response to sexual assault in Canada, given that a justice response for victim-survivors of sexual assault does not align with carceral punitivism. However, I have also argued that abolishing the criminal justice system is a more radical process and it should be the long-term goal of feminist responses to sexual assault. In the light of this long-term goal, I wanted to promote an alternative path, one that can be available right now and one that has the potential to overcome and/or mitigate the main risks identified against restorative justice for gendered violence. I argued that this alternative path should be encouraged: a feminist and trauma-informed practice of restorative justice for sexual assault cases, one that is intersectional, decolonial and anti-carceral. That is a further strength of this thesis. However, in order to promote this transformed practice of restorative justice in the context of sexual assault today, feminist and trauma-informed practices should be encouraged within (restorative justice responses that are

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<sup>552</sup> *Ibid* at 179.

<sup>553</sup> *Ibid* at 181.

embedded in the criminal justice system – necessary for now) and outside the criminal justice system, where it can be truly transformative as a community-based response.

The last but probably the most important strength of this thesis is that it encourages choice and supports access to information about restorative and transformative justice. While it is important to be aware of and knowledgeable about the potential of revictimization and power imbalances in restorative justice approaches to sexualized violence, it is very important to avoid disempowering victim-survivors by making choices for them or by not giving them a choice at all with respect to restorative justice.<sup>554</sup> Wemmers asserts, and I agree, that restorative justice options should remain flexible and accessible at any stage of the criminal justice process; further, considering the impact of trauma on learning and memory, it may be best to provide information about restorative justice to sexual assault victim-survivors multiple times, at various stages in the process.<sup>555</sup> I go beyond Wemmers' arguments by saying that a feminist, trauma-informed practice of restorative justice for sexual assault cases not only should remain flexible and accessible at any stage of the criminal justice process but also even when victim-survivors of sexual violence do not want to engage with the criminal justice system at all. In this case, their engagement with restorative justice processes would happen independently of the criminal justice system as a community-based response.

I argue that restorative justice in the context of sexual assault can and should work, particularly if reimagined through transformative lenses. Restorative justice goals are noble and the potential transformative, and I believe that through the transformed lenses I am proposing in this thesis, it offers a viable and transformative path to justice for victim-survivors of sexual assault who choose to pursue this route. I aim to offer an innovative justice option for victim-survivors, offenders and communities, particularly in the context of sexual assault against women and girls in Canada.

## **5.2 Limitations of this Thesis and Suggestions for Future Research**

This work has its limitations. There is also so much potential for future research in the realm of restorative and transformative justice approaches for sexualized violence.

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<sup>554</sup> Wemmers, *supra* note 55 at 15.

<sup>555</sup> *Ibid.*

The first limitation identified is methodological, since I relied primarily on secondary sources, first-person narratives and existing literature on sexual violence, sexual assault and restorative justice in Canada. I also relied on aspects of law, legal practice and jurisprudence in sexual assault cases. However, legal research in the field of sexual assault is limited in scope, given that it is based primarily on reported case law. The crime of sexual assault, as mentioned before, is mostly underreported and under-prosecuted in the Canadian context, which constitutes, *per se*, the first limitation of this thesis. Further, regarding the first-person narratives cited here, I was not part of the data collecting process nor in the establishment of the methods for the qualitative research conducted. Considering those limitations, I suggest future research conduct primary research, such as complementary qualitative research, for example. It would be valuable to determine in practice particulars of the proposed argument of restorative justice for sexual assault through feminist and trauma-informed lenses. Future research will also require a careful setting out of what a feminist and trauma-informed approach to restorative justice for sexual assault cases would offer. Talking to victim-survivors, offenders, communities, restorative justice practitioners, and practitioners working with sexual assault victim-survivors, such as anti-violence workers, counsellors, police and legal professionals, is essential not only to test the proposed argument in practice but to source further data in the realm of appropriate responses to sexualized violence. Future research could also engage with specific aspects of what does restorative justice offer – conceptually and practically – that the criminal justice system does not, such as community engagement and offender accountability, for example.

The second limitation identified was regarding intersectional data on sexual assault that engages with experiences of different groups, identities, social location, positionality and privilege. Even though I have included Indigenous, Black and immigrant women, women of colour and women with disabilities in my intersectional analysis, this list does not cover the particular experiences with sexual assault of sex workers, 2SLGBTQQIA people, institutionalized women and women with low incomes or unhoused women, for example. Further, even though I have touched on those issues in Chapter 3, this list does not cover the experiences of all groups of people who live at the intersection of two or more than two identity factors what makes them experience multiple axes of discrimination that put them at higher risk of violence and raises the barriers for them to access justice. In this regard, future research could examine more extensively intersectional experiences with sexual assault, while paying due attention to systemic oppressions.

Particularly in the context of Indigenous peoples in Canada, future research should aim to resist and undo the forces of colonialism and to recognize Indigenous agency and legal orders. Future research might also examine with more depth intercultural competency, conflict resolution, human rights and antiracism practices in the context of sexualized violence.

In addition, when I addressed *R. v. Ghomeshi*, for example, I did not explore aspects of sexual assault in the workplace, where power-imbalanced aspect of sexual assault and harassment is heightened. In this sense, the third limitation of this work is that it did not address in specific - yet very important - areas where aspects of sexualized violence have a particular nature such as in relation to employment relationships or even concerning aspects of immigration law, refugee, out of status or undocumented people, for example. According to the NAP on VAW/GBV Report, gender-based violence extends beyond sexual assault and physical violence in the home to also include economic, emotional, and psychological abuse, violence in the form of female genital mutilation and dowry- and honour-based violence, harassment in places of employment and schooling, human trafficking, mechanisms of control less prevalent in heteronormative contexts, such as HIV-related abuse, and more.<sup>556</sup> Future research on justice responses to sexualized violence could engage with multiple areas of knowledge and fields in order to address sexualized violence in those contexts too.

The fourth, and last, limitation identified in this work was the lack of data available on restorative justice organizations and centres in Canada that currently use the restorative justice approach to address sexual assault cases. I found that some restorative justice organizations are dealing with sexual violence cases, such as Restorative Justice Victoria - BC,<sup>557</sup> but the extent of its use Canada-wide and their procedural models remain unknown. Further research could be conducted to collect data on restorative justice models that are already being used - not only in Canada but in restorative and transformative approaches to sexualized violence around the world – so we could learn from different jurisdictions and improve access to justice for victim-survivors of sexualized violence in Canada.

### 5.3 Concluding Thoughts

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<sup>556</sup> NAP on VAW/GBV Report, *supra* note 39 at 239.

<sup>557</sup> Annual Report – Restorative Justice Victoria, 2019, *supra* note 399.

Nothing should be worse than being sexually assaulted. In this thesis, I cited Sam Fazio's story to showcase the reality faced by most victim-survivors of sexual assault in Canada. The criminal justice system further harms and traumatizes victim-survivors of sexual assault and often does not fulfil their expectations of justice, such as happened in Sam Fazio's case. "I don't feel like I can confidently tell anyone to go report it to the police because it's been such a terrible process,"<sup>558</sup> said Sam Fazio. Punitive action and carceral responses have been the standard answer, but in order to change existing power dynamics, new approaches are needed.<sup>559</sup> The reality is that sexual assault cases and gender-based violence demand transformation of all ongoing work in the community and beyond - in terms of language, power dynamics, punitive approaches, ableist systems, trauma-informed care, and more.<sup>560</sup> In order to produce new results, new perspectives should be developed. The search for a path forward, led me to reimagine restorative justice processes through feminist, trauma-informed lenses that must be decolonial, intersectional and anti-carceral at their foundations so it can have the potential to be truly transformative and help victim-survivors of sexual assault on their path to justice.

I am not saying here that restorative and transformative justice approaches will work for every case of sexual assault and gendered-based violence. If I was to sum the argument for why restorative justice practices should be adopted as an alternative approach to sexual assault cases, the most important word for it would be "choice" to engage with it. Openness to rethink the problem and willingness to explore different possibilities to address the condoned issue of sexualized violence are necessary.

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<sup>558</sup> Roumeliotis, *supra* note 2.

<sup>559</sup> NAP on VAW/GBV Report, *supra* note 39 at 34.

<sup>560</sup> *Ibid* at 34.

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