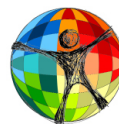


Countering Disbelief in Sexual Assault Laws

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ABSTRACT

The criminal justice system is often viewed as the venue to address the problem of sexual violence against women—a problem that is a key source of oppression worldwide. The goal of this paper is to examine the ways in which the criminal justice system could be improved and supplemented to eliminate the manifestation of myths hindering access to justice for survivors of sexual violence, while maintaining the fundamental values of due process. In particular, this paper focuses on the myth that women and girls tend to lie about sexual violence. Taking a comparative and interdisciplinary approach focused on Canada and Malawi, this paper examines the historical development of that myth, and its prevalence at each stage of the criminal process from police reports to sentencing. The core argument made in this paper is that access to justice for survivors of sexual violence could be significantly improved by implementing interdisciplinary strategies and holistic solutions, such as police and judicial trainings, and specialized service centers to counter the harmful and historical effects of myths in the criminal justice system.

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Introduction

The law can be a powerful tool to provide justice within a community, a country, or internationally. But what happens if the law was not developed with the intent of protecting certain populations from specific crimes?

In this paper, I explore how the development of the criminal law's handling of sexual violence cases has been historically based on discriminatory myths. Specifically, I will look to the treatment of sexual violence in Malawi and Canada as case studies. While these two countries are at very different developmental stages, they share criminal law origins. I intend to show that the criminal law has developed in a way that has embedded the myth that women and girls tend to lie in cases of sexual violence into Canadian sexual assault laws, rendering the criminal courts unfit to properly administer justice in such cases. I will then propose interdisciplinary and holistic strategies to counter the effect of myths in the criminal justice system in order to promote access to justice for women and girls.

The Severity and Magnitude of Sexual Violence

Sexual violence is a significant problem in terms of both its global magnitude and the severity of its consequences. While sexual violence can affect anyone, women and girls are at the greatest risk. This is true on a global level and national level, in developed countries such as Canada, and developing countries such as Malawi. In the following section, the significance of the problem of sexual violence will be explored, particularly as it applies to women and girls in Malawi and Canada.

Prevalence of Sexual Violence

Sexual violence is a global problem, particularly for women and girls. It is a problem rooted in power imbalances and structural inequality between men and women.¹ A UN Women

¹ Report of the Secretary-General, In-Depth Study on all Forms of Violence Against Women, UNGA, 61st session, Supp No 60(a), UN Doc A/61/50 and Corr. 1 (2006) at 14.

report states that violence against women is a pandemic affecting all countries, including countries recognized in various areas of progressiveness.² Although factors such as race, socio-economic status, age, sexual orientation, disability, nationality, religion and culture may shape how any instance of violence manifests against a woman, the threat of violence is a reality for all women from every walk of life.³ Sexual violence is particularly a massive international problem with 1 in 3 women experiencing sexual violence globally.⁴ The systemic domination of women is pervasive across the boundaries of nations, and the resulting widespread occurrence of sexual violence is a product of this.

In Malawi, women and girls suffer from sexual violence at alarming rates. One out of five females in Malawi has reported experiencing at least one incident of sexual abuse before the age of 18 years, most of whom have experienced multiple incidence of sexual abuse. Even among those who tell someone about their incident of sexual abuse, very few receive professional services. Further, less than half of all Malawians aged 13-24 years know of a place to seek help.⁵ In Blantyre, one of the major cities in Malawi, there were 417 cases of sexual violence reported to the local One Stop Centre (OSC) in 2015.⁶ The OSC noted many of these cases did not go to court and most parents or guardians of child victims were not satisfied with the police or the court.⁷ It has also been noted that barriers for victims of sexual violence in rural areas are magnified when it comes to reporting or to following through with a reported case of sexual violence. Although sexual violence is widespread in Malawi, access to justice for survivors of sexual violence this crime is not.

² United-Nations Entity for Gender Equality and the Empowerment of Women, *Women and Sustainable Development Goals*, UN Women, (2016) [UN Women] at 12.

³ *Report of the Secretary-General*, *supra* note 1 at 27.

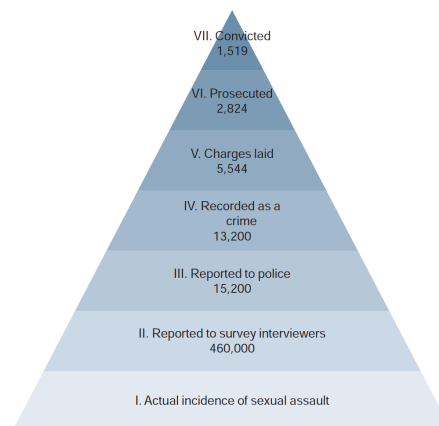
⁴ UN Women, *supra* note 2 at 12.

⁵ Ministry of Gender, Children, Disability and Social Welfare of the Republic of Malawi, United Nations Children's Fund, The Center for Social Research at the University of Malawi, and the Centers for Disease Control and Prevention, *Violence against Children and Young Women in Malawi: Findings from a National Survey, 2013*, Lilongwe, Malawi: Government of Malawi, 2014 at 22.

⁶ John Matumba, One Stop Centre Child Protection Officer (02 June 2017) Annual Statistics.

⁷ *Ibid.*

In Canada, women and girls also suffer from sexual violence at a similarly high rate. While the statistics are beginning to be much more comprehensive, it remains unclear how many cases of sexual violence occur in Canada each year because it is estimated that only 6% of incidents are reported to the police.⁸ In 2011, 21,800 cases of sexual assaults were reported to police in Canada.⁹ Additionally, 70-80% of reported survivors of sexual violence are female, and 94% of the perpetrators are male.¹⁰ The high rate of incidents of sexual violence, and the high rate of attrition of such cases in the criminal justice system show that sexual violence is a significant problem in Canada.



Attrition Pyramid 2004¹¹

⁸ Sexual Assault Statistics in Canada, (03 November, 2017), SexualAssault.ca < <https://www.sexassault.ca/statistics.htm> >

⁹ Alberta Government, *Best Practices for Investigating and Prosecuting Sexual Assault* (2013) at 5.

¹⁰ House of Commons, Standing Committee on the Status of Women, *Taking Action to End Violence Against Young Women and Girls in Canada: Report of the Standing Committee on the Status of Women* (March 2017) at 4 (Chair: Marilyn Gladu) AND Sexual Assault Statistics in Canada, (03 November, 2017), SexualAssault.ca < <https://www.sexassault.ca/statistics.htm> >

¹¹ Holly Johnson, "Limits of a criminal justice response: Trends in police and court processing of sexual assault" in Elizabeth A. Sheehy, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa, 2012) 613 at 631.

Gravity of Sexual Violence

Sexual violence is a particularly violent crime in terms of its' physical and psychological impacts. Survivors of sexual violence may experience physical injuries, unwanted pregnancies, sexually transmitted infections, and physical manifestations of anxiety.¹² Survivors of sexual violence are also especially prone to experiencing trauma. This trauma can result in severe mental health issues such as Post-Traumatic Stress Disorder, including flashbacks and triggers.¹³ They might also experience depression, anxiety, dissociation, disrupted sleep patterns, and more frequent feelings of fear. They are at a higher risk of self-harming tendencies, eating disorders, addiction and alcoholism.¹⁴ As a result, survivors may see themselves suffer in their personal and professional lives and relationships. It is particularly the trauma and psychological impacts that make these sorts of crimes so uniquely harmful.

A Tool of Oppression

The prevalence and gravity of sexual violence crimes requires significant attention given their uniquely oppressive nature. As put by the journalist Sally Armstrong:

Rape has always been a silent crime. The victim doesn't want to admit what happened to her lest she be dismissed or rejected. The rest of the world would either prefer to believe rape doesn't happen or stick to the foolish idea that silence is the best response.¹⁵

The shame and discomfort associated with discussions about sexual violence have allowed this crime to remain an effective tool of oppression. It has served to reinforce the historical gender roles

¹² Student Society of McGill University, *Our Turn, A National Student-Led Action Plan to End Campus Sexual Violence* (2017) at 14

¹³ Student Society of McGill University, *supra* note 11 at 14; Alberta Government, *supra* note 8 at 94.

¹⁴ *Ibid.*

¹⁵ Sally Armstrong, *The Ascent of Women: Our Turn, our way – a remarkable story of wonderful change* (Toronto: Random House Canada, a division of Random House Limited, 2013) at 22-23.

and imbalance of power in society through the physical manifestation of male dominance and female subordination.

From wars to the workplace, sexual violence has been used as an effective tool of oppression. In armed conflict, women have been systematically subjected to rape as a way to inflict injury and destroy a community's sense of identity and culture. Soldiers in the Bosnian, Rwandan, and Congolese wars have all systemically used this tactic to spread HIV, and to "plant a seed" into women of the opposing culture who would then be rejected by their families and communities.¹⁶ The Nazis in World War II also capitalized on the silence and shame associated with sexual abuse to exert their dominance.¹⁷

In a very different, but equally as oppressive context, sexual violence has served to maintain an imbalance of power in the workplace. Time Magazine's Person of the Year 2017 issue highlights how women from some of the lowest to the highest paying jobs share the common experience of sexual violence and harassment in the workplace.¹⁸ These shared experiences are systemically oppressive because they limit women's upward mobility and ability to gain more power. In both the contexts of war and the workplace, sexual violence has been an effective tool to subjugate women and ensure male dominance.

The devastating physical, psychological, and economic consequences of sexual violence on women has prevented them from achieving the level of power that men have enjoyed throughout history. The oppressive nature of the crime of sexual violence is a monumental problem that needs to be unpacked and addressed.

Origins of Injustice

The Canadian criminal justice system is inherently unfit to properly administer justice in cases of sexual violence against women and girls. A brief examination of the development of the

¹⁶ *Armstrong*, *supra* note 14 at 43.

¹⁷ *Ibid* at 46-47.

¹⁸ Eliana Dockterman, Haley Sweetland Edwards & Stephanie Zackarek, "Time Person of the Year 2017: The Silence Breakers" (06 December 2017) online: Time < <http://time.com/time-person-of-the-year-2017-silence-breakers/> >.

law regarding sexual assault brings to light the underlying myths informing Canadian sexual assault laws. I will specifically focus on the myth that women and girls who report sexual assault are more likely to be lying than individuals reporting other crimes in order to demonstrate the unfitness of the criminal law.

Development of the Law and the Myth

The laws created to handle cases of sexual violence were developed by men and for men and are thus inherently patriarchal. The earliest laws of the Anglo-Saxon system surrounding sexual violence, namely rape, were in essence for the purpose of protecting and respecting male property. Under ancient Hebrew law, if a man raped a virgin both the man and the woman were sentenced to death. The woman was sentenced to death because it was assumed that unless she had screamed loud enough for someone to come rescue her, she was complicit. The man was sentenced to death because he had “humbled his neighbour’s wife.”¹⁹ These rules make clear that punishment had little to do with the harm caused to the woman as opposed to the harm caused to whatever man owned her.

As early as the twelfth century we can see trends in British law placing the burden of evidentiary proof onto the victim. Victims of rape were expected to immediately bring forward their complaint of rape with their injuries still clearly visible.²⁰ The female complainant would then have to have her body examined by four law-abiding women who would determine whether she was still a virgin. If she was no longer, the trial could proceed, if it was found that she was still a virgin, she herself would be placed in custody.²¹

The patriarchal development of ancient and medieval laws set the foundation for the development of myths and stereotypes in sexual assault law, but it was the works of Sir Matthew Hale that cemented into law the distrust of women.

¹⁹ Bruce A. MacFarlane, “Historical Development of the Offence of Rape” in Wood and Peck, *100 years of the criminal code in Canada: essays commemorating the century of the Canadian criminal code* (Manitoba, 1993) at 2.

²⁰ *Ibid* at 6-7.

²¹ *Ibid* at 7.

It is true rape is most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.²²

This myth has remained a foundational piece of the development of sexual assault law and was adopted by countries that find their legal roots in British law. Although in nineteenth century England, there was an attempt on the part of Parliament to remove evidentiary and procedural impediments to conviction that had accumulated over past centuries, the courts simultaneously constructed evidentiary and procedural rules to protect men against false accusations of rape, particularly by refocusing trials onto the reliability and background of the complainant.²³ The underlying suspicion and distrust of women continued.

Understanding the Myth of Untruthful Claims

The origins of the law on sexual assault were misinformed and have thus created unreasonable and inaccurate expectations when it comes to survivors of sexual violence. The concept of an “ideal victim” or in other words, the victim that the law has come to expect through its development, has enhanced the sense of disbelief and suspicion of females reporting sexual violence.

Because the law on sexual violence has developed from a male perspective, stereotypes about the ideal victim and how she should react if she truly had been sexually assaulted are completely inaccurate. Survivors whose profiles depart from the image of an “ideal victim” include married women, sex workers, women with low socio-economic status, racialized women, and women who have been sexually assaulted in the past.²⁴ Additionally, highly sexualized women, promiscuous women,

²² MacFarland, *supra* note 18 at 50-51; Katie M. Edwards, Jessica A. Turchik, Christina M. Dardis, Nicole Reynolds & Christine A. Gidyez, “Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change” (2011) Springer Science + Business Media, LLC at 768.

²³ MacFarland, *supra* note 18 at 49.

²⁴ Melanie Randall, Sexual Assault Law, Credibility, and Ideal Victims: Consent, Resistance, and Victim Blaming, 22 Can. J. Women & L. (2010) at 409-411 [Randall].

women who are intoxicated or use drugs, and women who engage in “high risk” lifestyles are often deemed less credible.²⁵ Historical patriarchal values have ensured that only the “ideal victims” of sexual assault are recognized as deserving of credibility.

Myths in Malawi

Malawian laws today demonstrate how the explicit adoption of British myths resulted in the inherent ineptitude in administering justice in cases of sexual violence. While it may be true that Malawi’s constitution and international obligations highlight the rights of women to be free from discrimination and inequality, in reality, patriarchal norms and values prevail when it comes to protection against sexual violence in the criminal law.

The most explicit example of such inherited discriminatory laws is the Corroboration Rule. This rule is a practice that requires judges to warn themselves of the “danger” of convicting an accused rapist solely based on the testimony of the woman. Corroborative evidence is defined as any independent evidence over and above the complainant’s testimony that confirms that a crime was committed and connects the accused to the crime.²⁶ For example, the rule requires that women and girls obtain a medical examination to prove whether or not penetration occurred. The explicit assumptions underlying the Corroboration Rule in Malawi are traced back to the original British notion that women and girls tend to fabricate allegations of sexual violence, and therefore their evidence should be treated with special caution. This notion and extra burden are not applied to any other criminal offense and has the discriminatory effect of leading to impunity for sexual violence. It sends the message to accused persons and other would-be perpetrators that the requirement for corroboration makes it difficult to convict, which has the effect of perpetuating further sexual violence.”²⁷

²⁵ *Randall*, *supra* note 24 at 414.

²⁶ Equality Effect, “160 Girls Malawi: Legal Protection Against Defilement – Challenging the Corroboration Rule in Sexual Assault Cases” at 2.

²⁷ *Ibid.*

Throughout my time in Malawi speaking with those involved at various stages of the criminal proceedings of sexual violence, it became clear that the patriarchal structure of the criminal justice system compounded this lack of justice for survivors. There is a sense of doubt exacerbated by a feeling of unimportance associated with complaints of sexual violence. It appears widely understood that corruption, low access to transportation, and stigma are all factors that prevent women from reporting, or having their cases followed up before even getting to the point of being in court. Women and girls are not believed or taken seriously in Malawi, and this is apparent at all stages of the criminal justice system.

The Corroboration Rule in Malawi is a clear demonstration of how a direct application of the explicitly patriarchal myth that women and girls lie about sexual violence prevents women from achieving justice when it comes to sexual violence.

Myths in Canada

Like Malawi, Canada originally inherited the Corroboration Rule, making it explicit that judges take additional precautions when a woman or girl claims that a man sexually assaulted her. One of the first Canadian criminal law textbooks published in 1835 adopted a modified version of Hale's statement:

[...] rape is a most detestable crime ... it must be remembered that it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent [...] ²⁸

The Canadian courts adopted this concept in their decisions by imposing high standards of proof similar to those imposed in 18th century England.²⁹ Women were considered underdeveloped and their testimony under oath alone was not sufficient to be trusted for a conviction.³⁰ The Corroboration Rule required that a

²⁸ MacFarland, *supra* note 18 at 68; W.C. Keele, "Provincial Justice" (1835) (Toronto: U.C. Gazette Office, 1st ed), at p. 375.

²⁹ MacFarland, *supra* note 18 at 68.

³⁰ Tang, Kwong-leung, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) *International Journal of Offender Therapy and Comparative Criminology* 258-270 at 259.

judge caution the jury about the dangers of conviction on uncorroborated evidence. It wasn't until 1976 that this Rule was abolished in Canada through amendments to the criminal code.³¹ However, despite an elimination of one de jure common law rule, the manifestation of this myth continued to permeate Canadian law.

As the law in Canada continued to develop, the assumption that women tend to lie about sexual violence remained present, although less explicitly than before. This can be seen in the handling of sexual violence cases by the courts, and by police officers. Although the myth no longer de jure impacts women in Canada, de facto, it still prevents women from being treated equally.

The Courts

Criminal courts have inadequately provided de facto equality for women when it comes to sexual violence in Canada. Women and girls have been systemically denied justice due to various myths and stereotypes permeating the Canadian criminal courts. Despite a gradual elimination of such myths and stereotypes through case law and legislation, the low conviction rates in proportion to the prevalence of sexual violence has reinforced Canadian society's disbelief of women reporting sexual violence. This view has been acknowledged in case law, notably in the dissent of Justice L'Heureux-Dubé in *R v Seaboyer*:

The common law has always viewed victims of sexual assault with suspicion and distrust. As a result, unique evidentiary rules were developed. The complainant in a sexual assault trial was treated unlike any other. In the case of sexual offences, the common law "enshrined" prevailing mythology and stereotype by formulating rules that made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her "morality" or "character".³²

Since approximately 1983, Canadian criminal law has seen some significant improvements when it comes to countering

³¹ *MacFarland*, *supra* note 18 at 72.

³² *R v Seaboyer*, 1991 SCR 2 [L'Heureux-Dubé] at 665.

myths that reinforce the disbelief of women in cases of sexual violence. Bill C-127 created a three-tiered structure of sexual assault to replace the ambiguous crime of “rape” and distinguish varying levels of violence.³³ The law’s interpretation of consent has also shifted significantly demanding affirmative consent, and limiting the defense of mistaken belief in consent.³⁴ In 1992, the Criminal Code was further amended to prevent the inappropriate use of past sexual history to discredit a complainant of sexual violence.³⁵ Despite these *de jure* improvements for women’s equality in the law, the *de facto* reality is that women and girls still face a higher level of scrutiny and disbelief when it comes to their credibility and truthfulness regarding sexual violence.

In the criminal courts today, the myth that women and girls tend to lie in cases of sexual violence persists, although somewhat less explicitly. The criminal justice system is based on the presumption of innocence and places great importance on an accused’s Charter right to liberty³⁶. Because a person’s liberty is at risk, the onus in all criminal cases is on the Crown to prove “beyond a reasonable doubt” that the accused person committed the crime. In practice, this means that a person who is determined “not-guilty” by a criminal court might not necessarily be innocent. For years many myths and stereotypes in cases of sexual violence have raised reasonable doubts about victims’ credibility resulting in a not-guilty verdict for persons who may have committed acts of sexual violence. In the public eye, however, findings of not-guilty may have had the effect of reinforcing the notion that women and girls tend to lie about sexual violence.

Cross-examination by defence counsel is another modern way that the myth regarding the untrustworthiness of women and girls enters the criminal courts. Although Justice McLachlin took the opportunity in *R v Mills* to prohibit the “whacking” of a complainant of sexual violence through the use of stereotypes by defence lawyers in 1999, survivors still note that they are made to feel like liars when being examined by defence lawyers. Mandi

³³ *Randall*, *supra* note 23 at 40.1

³⁴ *Ibid* at 401-402; *Seaboyer*, *supra* note 31; and *Criminal Code*, RSC 1985, c C-46 s 273.2.

³⁵ *Randall*, *supra* note 23 at 402.

³⁶ Canadian Charter of Rights and Freedoms, s 7 & 11, Part I of the *Constitution Act*, 1892, being Schedule B to the *Canada Act 1892 (UK)*, 1982, c11.

Gray, a survivor of sexual violence undergoing a criminal proceeding for her allegations against a fellow York University student stated of her experience:

The line of questioning was just so out of date in terms of where I thought we were at in the Canadian legal system [...] [w]e report, we agree to be witnesses, we take off time from work – and then we go through the trauma of testifying only to be told that we're liars.³⁷

The heightened zeal and the attacks on a survivor's credibility that are particular to sexual assault trials contribute to the re-victimization of survivors. Sexual violence survivors often do not react in ways that are stereotypically assumed of them. There are many ways that a survivor of sexual violence may react or present themselves. Sometimes survivors reporting their experience might be laughing with friends, while others may be immobilized and crying.³⁸ The varying outward responses and the public and justice system's perception of them are inherently linked with our still limited understanding of the various psychological responses that survivors have to the trauma of sexual violence.³⁹ When survivors then go to court and have their statements about extremely personal matters scrutinized and doubted by people who are essentially strangers, they are at a high risk of re-victimization. Defence counsel often tries to capitalize on any uncommon or misunderstood reactions as a way to undermine the survivor's credibility and minimize the harm they have suffered.⁴⁰ This in turn contributes to survivors' perceived dishonesty.

Survivors are also left vulnerable to being perceived through a stereotypical lens by judges. Trial judge are in a position to determine whether or not they believe that a witness' testimony is credible. One of the most recent and well-known cases of a judge allowing biases to affect his judgement regarding the credibility of a witness is Justice Robin Camp's behaviour in

³⁷ Laura Fraser, "Jian Ghomeshi Trial: Complainant in Different Case Recounts 'Trauma of Testifying'" (14 February 2016), CBC News, online: < <http://www.cbc.ca/news/canada/toronto/ghomeshi-mandi-gray-1.3446672> >.

³⁸ Alberta Government, *supra* note 8 at 113.

³⁹ *Ibid.*

⁴⁰ Rakhi Ruparelia, "All That Glitters Is Not Gold: The False Promise of Victim Impact Statements" in Elizabeth A. Sheehy, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa, 2012) 665 at 690.

the trial of *R v Wagar* in 2015. In this trial, Justice Camp made remarks implying that the only reason the complainant would not have demonstrated resistance, other than if she was consenting, was so that she could get the accused in trouble.⁴¹ He further questioned why the complainant didn't just sink her bottom down into the sink basin so that the accused couldn't penetrate her, and why she couldn't just keep her knees together, or skew her pelvis slightly to avoid him.⁴² Justice Camp's remarks and behaviour throughout the trial of an alleged sexual assault against a poor, homeless woman struggling with drug and alcohol addiction,⁴³ is a clear demonstration of how judges can have an innate tendency to presume untruthfulness in complainants of sexual assault. Although Justice Camp's behaviour led to his removal from judicial office, it is important to recognize that if these biases can make their way into judicial decisions as explicitly as in the *Wagar* trial, it is reasonable to infer that such biases and adherence to myths regarding the credibility of female survivors of sexual violence are prevalent in other judges.

In recent years, the media has highlighted the presence of bias at the sentencing stage of sexual assault trials. In 2017, in Kingston Ontario, a hockey player attending Queen's University was convicted of common assault. He was originally charged with sexual assault and forcible confinement for having forced a young woman at a party into a reclining position and attempting to kiss her while fondling and groping her. The survivor accepted the guilty plea to common assault so that she would not have to face trial and the possibility of being disbelieved. At the sentencing stage, the white male judge presiding over the case, Justice Letourneau, agreed to wait until after the offender completed a 4-month internship before imposing an 88-day sentence of intermittent jail time on weekends with two years of probation. Offenders of sexual assaults have the potential to be sentenced for up to ten years of imprisonment, depending on various factors. The judge justified the lenient and delayed sentence with statements such as "I played extremely high-end hockey and I

⁴¹ Canadian Judicial Council, *In the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council* (2016) at para 112.

⁴² Canadian Judicial Council, *supra* note 40 at 135.

⁴³ *Ibid* at 132.

know the mob mentality that can exist in that atmosphere [. . .] you will almost certainly never put yourself in this situation again".⁴⁴ This case demonstrates the ways in which survivors of sexual violence are precluded from achieving justice for fear of disbelief and re-victimization in the criminal courts, while perpetrators of sexual violence are accorded undeserved confidence.

In order to communicate to a sentencing judge the harm inflicted on a victim of crime, the *Criminal Code* has created the option to submit and orally present a Victim Impact Statement (VIS) after a conviction but prior to sentencing.⁴⁵ The purpose of the VIS is "to inform a decision-maker of any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects on the victim"⁴⁶ The effect of the VIS is meant to provide the victim with a public voice in addition to improving the victim's satisfaction with the criminal justice system.⁴⁷ Although some survivors have reported a therapeutic value to this opportunity to participate, VIS do not rectify the harm done by myths regarding survivors' credibility. In fact, they can contribute to the negative outcomes of myths by reinforcing the weight given to characteristics of "ideal victims" at such an important stage of the criminal trial. Racialized and Aboriginal victims may be deemed less worthy of consideration, and may not evoke the same response from a judge as a white victim, or someone who fits better into the conception of an "ideal victim."⁴⁸ As stated by Ruparelia, "a sentence should reflect a defendant's culpability, not the relative worth of the victim".⁴⁹ Even at the stage of sentencing, once an offender has been convicted and found guilty, it is clear that the distrust of women and girls can still persist

⁴⁴ Manisha Krishnan, "A Hockey Player's Assault Sentence Was Postponed So It Wouldn't Hurt His Internship" (01 September 2017), Vice, online < https://www.vice.com/en_ca/article/qvv5zv/a-hockey-players-assault-sentence-was-postponed-so-it-wouldnt-hurt-his-internship >

⁴⁵ Johnson, *supra* note 10 at 634.

⁴⁶ Andrew Ashworth, "Victim impact statements and sentencing" (1993) Crim.L.R. 498 at 499; Johnson, *supra* note 10 at 634.

⁴⁷ Ashworth, *supra* note 45 at 499; Ruparelia, *supra* note 39 at 667.

⁴⁸ Ruparelia, *supra* note 39 at 667.

⁴⁹ Ruparelia, *supra* note 39 at 696.

in the criminal courts and have an impact on a woman's access to justice.

Police

The criminal justice system has not only failed survivors in the court room, the myth gets implemented long before these cases even go to court. The rate of unfounded cases of sexual assault compared to the rate of unfounded cases of any other type demonstrates this clearly. Police officers have the important responsibility of gathering, evaluating, and processing information or evidence to determine whether there is sufficient evidence to lay a charge.⁵⁰ In the case of *Jane Doe v. Toronto Commissioners of Police*, Justice MacFarland condemned the use of and reliance on rape myths and stereotypes by the Toronto Police Services.⁵¹ This decision first highlighted the high rate of unfounded cases of sexual assault compared to any other criminal cases.

Unfortunately, since this important case it has been repeatedly brought to light that police investigations of sexual assault continue to rely heavily on the assumption that women are more likely to lie about sexual assault than individuals reporting any other crime.⁵² The following table demonstrates the difference between unfounded cases of sexual assault across Ontario compared to all other criminal cases between 2003 and 2007.

⁵⁰ Alberta Government, *supra* note 8 at 27-28.

⁵¹ *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al.*, (1998) 39 OR (3d).; Teresa Dubois, "Police Investigations of Sexual Assault Complaints: How Far Have We Come Since *Jane Doe*?" in Elizabeth A. Sheehy, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa, 2012) 191 at 191.

⁵² Dubois, *supra* note 50 at 193; Robyn Doolittle, "The Unfounded Effect" (08 December 2017), *The Globe and Mail*, online: <
<https://www.theglobeandmail.com/news/investigations/unfounded-37272-sexual-assault-cases-being-reviewed-402-unfounded-cases-reopened-so-far/article37245525/> >

Jurisdiction		Sexual Assault		Other Crimes		
London	1,613 541	Total Reports "Unfounded"	33.54%		Statistics not provided	
Ottawa	2,314 720	Total Reports "Unfounded"	31.11%	239,957 6,390	Total Reports "Unfounded"	2.66%
Ontario (OPP)	9,990 3,013	Total Reports "Unfounded"	30.16%	750,800 85,801	Total Reports "Unfounded"	11.43%
Hamilton	2,151 476	Total Reports "Unfounded"	22.13%	175,162 3,054	Total Reports "Unfounded"	1.74%
Peel Region	2,697 541	Total Reports "Unfounded"	20.06%	230,525 4,923	Total Reports "Unfounded"	2.14%
Toronto	12,879 990	Total Reports "Unfounded"	7.69%	999,826 7,331	Total Reports "Unfounded"	0.73%
Windsor	572 11	Total Reports "Unfounded"	1.92%	204,003 648	Total Reports "Unfounded"	0.32%

*Number of Total and Unfounded Reports of Sexual Assault vs
Other Crimes Between 2003 - 2007⁵³*

In 2017, as a result of a brave young woman's participation in an investigation conducted by the Globe and Mail, once again the unacceptably disproportionate rate of unfounded sexual assault cases in comparison to other criminal cases was brought to light. This investigation revealed that 19.39 percent, or 1 in 5 sexual assault reports are classified as "unfounded", meaning they are dismissed as baseless. That adds up to approximately 5,000 cases of sexual assault being dismissed annually across the country. This rate is nearly twice as high as the 10.84 percent of physical assault cases deemed

⁵³ *Dubois, supra* note 50 at 197.

“unfounded” annually.⁵⁴ In summing up her experience reporting her case to the police, Ava stated:

Going into it, I felt like I trusted the police [...] I had no reason not to trust the process. [Looking back] I started to put it together that I wasn’t necessarily being believed [...] It was like the floor opened up underneath me. I felt like I was sinking.⁵⁵

Another way in which police investigations can often fail survivors of sexual violence is when there is a disconnect between police officers and health care providers. Although medical evidence is no longer required in sexual assault trials in the same way that it is in Malawi to corroborate the offence, survivors of sexual violence may undertake a medical examination, often referred to as a “rape kit” to be used as evidence if a criminal trial takes place.⁵⁶ However, there can be important disconnects between these medical collections of evidence and their admissibility to police investigations.

For example, after going for a drink at a bar, a woman in Magog, Quebec went to the hospital where she was told that she had been poisoned by a date-rape drug. The following day when she went to report the incident to the police, she was informed that nothing could be done for her because no blood sample had been taken. To be taken seriously, she would have had to have a police officer accompany her to the hospital to have her blood sampled, and then supervise the transportation of the sample.⁵⁷ The woman stated that she felt frustrated that the hospital staff and police had not taken her seriously.

⁵⁴ Robyn Doolittle, “Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless” (03 February 2017), The Globe and Mail, online: < <https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/> >

⁵⁵ Robyn Doolittle, “Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless” (03 February 2017), The Globe and Mail, online: < <https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/> >

⁵⁶ Alberta Government, *supra* note 8 at 46-47.

⁵⁷ Marie-Hélène Rousseau, “Magog woman slams authorities for not taking suspected date-rape drugging incident seriously” (28 September 2017) CBC News, online: < <http://www.cbc.ca/news/canada/montreal/quebec-woman-drugged-magog-bar-1.4309829> >

Ava's experience, the Globe and Mail Investigation and the Magog date-rape story all highlight how the problem brought up in the *Jane Doe* case regarding the disproportionate disbelief of women in police investigations of sexual assault compared to any other case is still a significant barrier to survivors accessing justice across Canada.

The manifestation of the myth that women and girls tend to lie about sexual violence is exacerbated for women at the intersection of various minority demographics including women of colour, migrant women, trans women, disabled women, sex workers, Indigenous women, and all women that deviate from the "ideal victim" prototype.⁵⁸ Whether or not someone is going to be believed is based on highly subjective impressions that can be implicitly informed by stereotypes and myths.⁵⁹ Ruparelia states *"the general threat that dominant society feels from marginalized groups makes racialized people unsympathetic and a group to be feared rather than protected."*⁶⁰ Additionally, in Canada, although Indigenous women are five times more likely to be sexually assaulted, they are also significantly less likely to report an incident of sexual violence due to a lack in confidence in the criminal justice system that has historically discriminated against them, and is founded on different values.⁶¹

In Canada, the criminal law has developed in many ways to improve women and girl survivors' access to justice in cases of sexual violence. Case law and policy reform have made great *de jure* strides in eliminating the explicit uses of the myth that women and girls tend to lie when it comes to sexual violence. However, it is clear that the criminal justice system in Canada is *de facto* still wrought with this myth at every step of a sexual violence complaint. Perhaps the criminal justice system, given its patriarchal history, is not equipped to adequately ensure justice for women and girl survivors of sexual violence. Nevertheless, I believe that there are steps that can be taken to counter the

⁵⁸ International Commission of Jurists, "Women's Access to Justice for Gender-Based Violence – A Practitioner's Guide" (Switzerland, 2016) at 24-25.

⁵⁹ Natasha Bakht, "What's in a Face? Demeanor Evidence in the Sexual Assault Context" in Elizabeth A. Sheehy, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa, 2012) 591 at 599-600.

⁶⁰ Ruparelia, *supra* note 39 at 672

⁶¹ *Ibid* at 689-690; Alberta Government, *supra* note 8 at 126.

prevalence and manifestation of this myth in the criminal courts through education and training, and through interdisciplinary and holistic extrajudicial supplementation.

Moving Forward

Within the Courts

Before losing hope for the potential of the criminal justice system's ability to ensure justice for female survivors of sexual violence, I propose a few changes that can be made without affecting due process within the courts. I believe that training and education, particularly for police officers and judges, can go a long way to help counter the biases that lead to the disbelief and distrust of female survivors of sexual violence. Furthermore, I believe that increasing representation of those discriminated against by the law in these professions will also contribute to the diversity in perspectives needed to counter the historically and inherently patriarchal system in place.

In my view, the first step that should be taken to improve the criminal justice system is to address the risk of implicit and explicit biases in judges and police officers through adequate training. Justice Camp, for example was required to undergo intensive training to help him better understand the social context of judging. The training he underwent was a specific program to develop the skills to interrogate and reconsider one's own beliefs and adapt to the contextual changes in society and in courts that occur all the time.⁶² This type of training complemented with gender sensitivity training can be very effective when implemented as an ongoing process of self-reflection.⁶³ The inquiry indicated that although Justice Camp's mistakes and biases were significant enough to sufficiently call into question his ability to remain a judge, his understanding and ability to identify myths seeping into reasoning regarding cases of sexual violence improved drastically.⁶⁴ Ideally, this training could help to address judges' behaviour and lines of reasoning from the beginning of a trial to sentencing.

⁶² *Canadian Judicial Council*, *supra* note 40 at paras 299-300.

⁶³ *Ibid* at paras 300 & 314.

⁶⁴ *Ibid*.

Police Training

Police officers could also benefit from conducting internal reviews of their practices and training programs to better address the prevalence of inherent assumptions that women and girls tend to lie about sexual violence. The CEDAW Committee has recommended establishing specialized gender units within law enforcement, penal, and prosecution systems.⁶⁵ In Kenya, the Equality Effect has created a specialized police investigation procedure to ensure that their sexual assault investigations treat the survivors with respect and dignity. The training, which focuses on developing the skills needed to investigate sexual violence cases against girls, has proven to be extremely successful.

Furthermore, in Canada, after the *Jane Doe* case, when looking at rates of unfounded cases of sexual assault versus any other type of case, the Toronto Police Department showed significantly better numbers than neighbouring police stations.⁶⁶ This can be attributed to the steps taken following the decision in the case.⁶⁷ Now, following the “Unfounded” investigation by the *Globe and Mail*, police stations across the country are conducting internal reviews into how they conduct their sexual assault investigations. A clinical psychologist, who has helped provide training to police units across the country, has noted that the police receiving the training are very motivated to make the systemic changes needed.⁶⁸

Training for both police officers and judges should be conducted with a ‘trauma-informed’ approach to help understand the brain’s response to the overwhelming fear often experienced in instances of sexual violence.⁶⁹ This type of training will help police officers and judges to understand for example why a complainant may have frozen and not fought back, or why a complainant is not able to recount an incident of sexual violence in chronological order.⁷⁰ When officials of the criminal justice system can be trained and informed about the unique realities of

⁶⁵ *International Commission of Jurists*, *supra* note 56 at 172-173.

⁶⁶ *Johnson*, *supra* note 10 at 634.

⁶⁷ *Ibid.*

⁶⁸ *Doolittle*, *supra* note 53.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

sexual violence, they will be less likely to act on assumptions based in myths about women and girls' credibility.

In addition to proper training, another important way to counter the distrust in women and girls' credibility in cases of sexual violence is to diversify the officials in the criminal justice system. While addressing the General Assembly, the Special Rapporteur on the independence of judges and lawyers noted:

For various reasons, whether historical, cultural, biological, social or religious, women's experiences differ from those of men, and for this reason women can bring different perspectives or approaches to adjudication, while fighting against gender stereotypes. Consequently, a diverse judiciary will ensure a more balanced and impartial perspective on matters before the courts, eliminating barriers that have prevented some judges from addressing certain issues fairly. This reasoning is equally applicable to the matter of encouraging the representation of other underrepresented "groups", like ethnic, racial or sexual minorities, among others.⁷¹

I wholeheartedly agree with this reasoning. Even with training, it is important to include as many perspectives as possible. Further, the perspectives of those who may be most at risk should be prioritized in order to continue to develop and shape the criminal justice system in a way that is effective and just. Although the criminal justice system is founded in the disbelief of women reporting sexual violence, I believe that increasing representation of women and minority groups in police forces and the judiciary—in addition to providing training that addresses myths and biases—can improve survivors' access to justice without hindering due process.

Extra-Legal Supplementation

In addition to the strategies that I have recommended to improve the criminal justice systems ability to adequately administer justice in cases of sexual violence, I propose that the criminal justice system be supplemented by extra-legal holistic measures to eliminate the manifestation of myths. In my view, this

⁷¹ *International Commission of Jurists*, *supra* note 56 at 95.

supplementation should be interdisciplinary and should target a culture shift through education, in addition to providing survivors with a holistic service point, and continuously ensuring communication between all stakeholders through interdisciplinary workshops.

Education

The first thing that needs to be done to counter sexual violence and to ensure that women and girls are believed when they come forward about these crimes is to educate the population. Rape myths need to be debunked, and boys and girls need to grow up learning what a consensual relationship really means. Schools are a place where children are immersed in contingencies, confusion, and contradictions relating to the development of their gender roles.⁷² Public education campaigns are important because they can help to change societal norms, organizational practices, community attitudes and behaviours of potential offenders.⁷³ What's more, is that I think these sorts of educational campaigns should be included in early educational curriculums and should take an intersectional approach to reflect the lived realities of individuals at varying demographic intersections.

One-Stop-Centers

Survivors of sexual violence also need a concrete support system created by and for them to help them navigate their options for moving forward and healing after a sexual assault. What this paper has highlighted is that a survivor of sexual violence has to go through many steps and many people, and they must be believed at each stage to be able to move forward. Because of historical myths, and a lack of training to understand what is truly a 'normal' reaction to sexual violence, the opportunity for survivors to fall through the cracks and be disbelieved are very high. This is why we see such a high rate of

⁷² Nelson, Joseph Derrick, Stahl, Garth & Wallace, Derron 2015 'Race, class and gender in boys' education: repositioning intersectionality theory' *Culture, Society and Masculinities*, vol. 7, no. 2, pp. 171-187 at 172.

⁷³ Celia Benoit, Leah Shumka, Rachel Phillips, Mary Clare Kennedy & Lynne Belle-Isle, "Issue Brief: Sexual Violence Against Women in Canada" (Canada: Federal-Provincial-Territorial Senior Officials for the Status of Women, 2015) at 31.

attrition of cases. Through my research, and my experience in Malawi I have come to believe that a key problem in our criminal justice system is a lack of a holistic and interdisciplinary approach to these cases.

In Malawi, there is a One Stop Center for survivors of sexual violence. This center is a place where comprehensive services are provided to children, women and men who are survivors of physical and sexual gender-based violence. The center provides and coordinates all the necessary services for those reporting an incident of gender-based violence. There are medical staff to provide the required examinations and treatments, there are social workers, counselling services, police officers, and they are hoping to soon include legal services as well. Providing all of these services in one place helps to reduce secondary victimization because survivors do not have to recount the horrific incidents to different service providers.

A similar approach has been taken in Alberta. The Association of Alberta Sexual Assault services coordinates agencies that provide sexual assault services within local communities.⁷⁴ Alberta has also developed Specialized Sexual Assault Response Teams (SARTs) consisting of specialized nurses or physicians who can examine and treat victims of sexual assault, and who are trained to properly gather evidence if a survivors wishes to report to police.⁷⁵ Some of these nurses have even officially become Sexual Assault Nurse Examiners through an international examination.⁷⁶ In Alberta, it has been found that such agencies have been able to supplement the criminal justice system in a way that provides survivors with a coordinated and complete response to their report including access to trained police officers, trained medical assistance, emotional and therapeutic support, and an informed Crown prosecutor.⁷⁷

In addition to holistic service centers, professionals and stakeholders involved in cases of sexual violence should ensure regular communication to better coordinate and collaborate. In Malawi, the Equality Effect partnered with Women and the Law

⁷⁴ Association of Alberta Sexual Assault Services (AASAS) "About Us", online: < <https://aasas.ca/about-us/> >

⁷⁵ Alberta Government, *supra* note 8 at 20-21.

⁷⁶ *Ibid* at 21.

⁷⁷ *Ibid* at 24.

in Southern Africa to host an interdisciplinary workshop regarding the Corroboration rule and access to justice for Survivors of sexual violence. This workshop gathered various stakeholders including medical professionals, scholars, police investigators, prosecutors, judges, lawyers, psychologists, and the One Stop Center employees to discuss the barriers for survivors of sexual violence in accessing justice. The results of gathering many people with differing professional perspectives and experiences allowed each participant to reflect on how their position fits into the greater context. After one afternoon together, these professionals felt confident that they had developed a better understanding of how they can make a difference in their day to day tasks to improve access to justice for survivors of sexual violence. I strongly believe that interdisciplinary and holistic workshops such as this one could continue to benefit survivors of sexual violence in Malawi, and in Canada, by helping to harmonize services in a way that will better allow survivors to navigate this complex and myth-imbued system.

Providing comprehensive and holistic services has been recognized as a necessary step to ensure equality for women. The UN General Assembly has called on States to develop “systems and mechanisms that will ensure a comprehensive, multidisciplinary, coordinated, systematic and sustained response to violence against women”.⁷⁸ There is a strong need for services to help survivors navigate the legal system without fear of re-traumatization. The CEDAW Committee has endorsed the role of “one-stop centres” as a way of reducing the complexity and the number of steps typically required to access justice in a criminal law system.⁷⁹ I believe that by supplementing the criminal justice system with such interdisciplinary service centers and interdisciplinary workshops, survivors of sexual violence will be better supported in navigating the criminal justice system.

Measuring Success

Finally, it is important to gather statistics and create systems of measurement to better understand sexual violence. There is still a long way to go to increase support and adequately provide justice to survivors of sexual violence. Because of the high attrition rate of cases of sexual violence, as we implement

⁷⁸ *International Commission of Jurists*, *supra* note 56 at 159.

⁷⁹ *Ibid* at 162.

strategies to tackle these problems, it will be extremely important to recognize the intricacies in trends. In order to do so, it is important to be able to measure improvement and to be able to assess where the barriers to improvement are. As stated by Barber, *“Human rights organisations have a problem – they have a difficult time demonstrating that their efforts make a direct contribution to the situations they are working to improve.”*⁸⁰ For this reason, it is important for countries to collect accurate statistics about the prevalence of sexual violence and of any improvements so that we can continue to better understand the ways in which the criminal justice system discriminates against women and girls, and to create the best strategies for improvement.

Conclusion

Sexual violence is a uniquely oppressive crime that remains prevalent in Malawi, Canada and around the world. An examination of the historical and current manifestations of patriarchy in sexual violence laws draws attention to the inadequacy of the criminal courts to properly administer justice in cases of sexual violence. Women and girls are disbelieved at every stage of the criminal justice system. In searching for solutions, it may seem necessary to look beyond the criminal justice system; however, I have not yet lost hope in the potential of our laws to improve. Amelioration of our criminal justice system requires acknowledging that the laws we have are not neutral. It is possible for Canada to take an interdisciplinary and holistic approach to improving and supplementing the criminal justice system to counter the discriminatory myths that prevent survivors of sexual violence from accessing justice.

⁸⁰ Catherine Corey Barber, “Advocacy beyond litigation: Examining Russian NGO efforts on implementation of European Court of Human Rights Judgments”, (2011) *The International Journal of Human Rights* 16:3 at 411.

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