CHALLENGES OF WOMEN'S EQUALITY IN THE COURTS

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I. INTRODUCTION

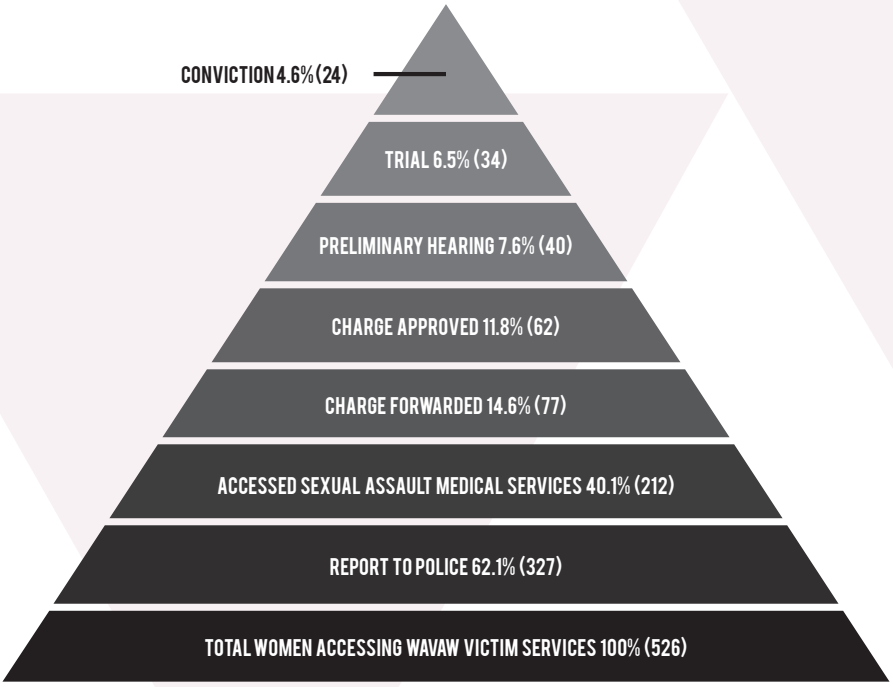
FOREWORD

Despite the difficulties it is extremely exhilarating and rewarding in a way to help a woman through this and see her make a change from victim to survivor. It is also so important that we're here to provide this – I'd hate to go through it alone and no one should ever have to. It is also most discouraging to finally get a change to educate some of these institutional-types, and then after all your effort and overcoming your terror, to have them ask their typical questions; like "did you bomb Red Hot Video?"

-A rape crisis worker on working with police, 1988

In 1988 Lisa S. Price wrote in "Women's Interest: Feminist Activism and Institutional Change" for WAVAW. The whole point of this publication was to document the nuances of rape crisis workers in the feminist movement who were working with law enforcement and the criminal justice system. The publication was built on the herstory of WAVAW's early days of choosing to engage, educate, and shift attitudes inside of these institutions in order to support women after experiences of sexualized violence. The decisions to work alongside of systems, which have had a hand in the oppression of women and were not created with women's interests in mind, were not taken lightly. WAVAW incorporated the imperative to advocate for women into the foundations of the organization and its constitution. Rather than accepting the dangerous realities of women's lives in a rape culture, the founding mothers worked under the assumption that this was not the way things were supposed to be; they knew ordinary people could shift society.

In celebrating our thirtieth anniversary, WAVAW reflects on our ongoing commitment to hold women at the center of all our work. This includes continuing to advocate, educate, and speak out and demand that those that are inside the criminal justice system acknowledge privilege and incorporate an understanding of systemic inequality. We continue to hear stories from women that they don't feel the criminal justice system reflects justice after sexualized violence. In order to reach out to people in positions of authority and advocate



successfully, certain types of credibility are required. In the face of the ongoing struggle of the feminist movement to earn legitimacy within a patriarchal context, standard research is often used to back up women's experiential knowledge. Yet, Status of Women Canada's research mandate was annihilated, leaving a 20 year gap in research on violence against women in this country.

Due to a lack of funding for research on women's experiences before the court in the past 20 years, WAVAW decided to capture the stories of our own clients. In tracking the experiences of women navigating systems, from the initial connection with the medical system through to the end of their time with the courts, we noticed that the realities of women achieving justice after a sexual assault had not altered since the 1990s.

This led us to further investigate this trend. This paper allowed us to examine how to agitate for change so that we can continue to create a world where perhaps one day women will achieve the justice they seek after a sexual assault through the systems we are working to shift. In 2012, WAVAW applied to the University of Alberta with Rhyannon O'Heron to collaborate on this research. O'Heron's expertise as a law student allowed us to interview Crown Counsel and integrate important legal arguments alongside WAVAW's feminist principles.

It is our hope that this paper will inspire you to imagine new possibilities and generate momentum for change; however you can, so that one day we can create a society free from violence where justice is an everyday reality.

LEAD-UP TO THE PAPER

We have become so desensitized by representations in the media and the rape culture that surrounds us to the realities of sexual assault, but the truth is that 1 out of

every 3 women has already or will experience sexual assault during their lifetimes. Sexual assault is not something that just happens and you get on with life and you forget… it interrupts and changes our world view. Safety has to be redefined, we carry the shame of the violence that was enacted upon us, and the implications can be so significant that women end their lives.

Imagine the devastation when you are told by a system that purports to deliver Justice after you have been courageous and disclosed the sexual violation you have experienced, that your experience just doesn't make the cut. You are not an "ideal victim," the evidence doesn't support your claim, and thus you are deemed less credible and reliable in courts. In the research WAVAW conducted during the summer of 2012, we found that out of 327 women who reported to police through our Victim Service Program at WAVAW, only 34 of those women saw their case before the courts and only 24 of them saw a conviction. These statistics are in line with the national survey that was done in 1993[i].

Why haven't the sexual assault law reforms of the 1990's lead to any significant changes for survivors? As a society we do purport to believe it's wrong to hurt women and that women are entitled to equal rights, safety and dignity. We believe that Canada is a world leader in the protection of women's rights and gender equality. We have laws that back this up which feminists and their allies have been fighting hard for, for decades. We even have strong legislation in the provisions of the Criminal Code of Canada that are quite progressive. We have affirmative consent provisions, the Code acknowledges and draws attention to the potential harms of discriminatory beliefs and bias of rape myths in the courts as well as women's rights to dignity, privacy, security, and the full protection and benefit of the law. The pre-amble to the bills leading to the 1990 sexual assault law reforms highlight the importance of women's equality before the courts and focus on acknowledging and working to address the systemic context of rape and sexual assault. However, the Code is problematic in that it is degendered, narrowly defines consent, and does not elaborate on how to ensure the complainants rights are effectively recognized in the courts. Sadly, this leaves the Code vulnerable to judicial discretion and interpretation and the core purposes and principles have been lost in the courts.

It should be an ethical requirement to ask: Do we actually ground our criminal justice responses to sexual violence against women in law as it was intended? At WAVAW, we would argue that our society is not doing a very good job of actually grounding our responses in law as intended.

Our legal system is predicated on the notion that Justice is blind. This paper will argue that justice is not blind; in fact most sexual assault cases are seen through a rape culture lens. We cannot continue to pretend that objectivity and neutrality exist and that some of us, based on our professional occupation, can have a clean slate and wipe away the constant socialization of this rape culture, and the context in which a rape occurs.

Neo-liberal ideology is the social milieu in which our society and our institutions operate. As Margret Thatcher declared in the 1980's "There is no such thing as society: there

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are individual men and women, and there are families." Even though our federal government seems to acknowledge through the preambles in the Criminal Code that gender inequality leads to violence against women we continue to see neo-liberal ideology running through our Criminal Justice System. This notion that we are all individuals, equals, responsible for our own destinies, untouched by collective values or thoughts has significant implications for women trying to access justice after a sexual assault. Neo-liberal hegemony socializes and supports the judiciary and crown counsel to believe and act as though they are untouched by Rape Culture and that structural oppression and systemic inequality do not exist. This creates a huge departure for women's experiences. Most women, when contemplating accessing the Criminal Justice System, believe that they will get justice based on the democratic values that the Canadian Federal Government espouses for the treatment of women. However, we have found that this is not the reality that women encounter when engaging with the Provincial system here in BC.

To bring us back to where we started. There are a number of ways in which the Criminal Justice System could continue to be improved for women accessing justice. The focus of this paper is on the role that the Judiciary and Crown Counsel play in women's experiences before the courts. The courts have yet to formally, and in a binding or precedent setting way, recognize sexual assault as a form of gender-based systemic discrimination against women. The Supreme Court of Canada and/or Parliament need to create a systemic remedy until we have a criminal bar and judiciary that deeply understand, respect, and are attuned to the inequality, discrimination, and gender based violence women face. Bringing this context into the courts isn't prejudicial

TOLD BY A SYSTEM THAT PURPORTS TO
URAGEOUS AND DISCLOSED THE SEXUAL

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or political. It is factual. In Canada there has not been a case of an adult woman sexually assaulting an adult male before any court. Women and children are abused by men every day in this province and country. Women and children who are poor, Aboriginal, disabled or otherwise marginalized face even more violence in their lives and are even less likely to be treated equally before the courts. These are facts that are clearly documented by various sources[ii] and these factual realities have changed very little since the 1990's when the law reforms took place.

We call on the Crown and members of the Judiciary to readily acknowledge these facts in sexual assault cases and fight for women's equality in the courts. We call on them to uphold the laws of the land, to apply them the way they were intended to be applied acknowledging the reality of sexism in our society. We call on them to investigate their own biases and how the current rape culture impacts them. They must unpack their learning's and socialization about the value of women. They must think about how they ask questions and how they deal with women as witnesses. They must recognize the significant impact these processes have on women's lives, how it informs a woman's understanding of herself, and speaks to how society values women. We live in a society where we are not all equals, we all need feminism, and we all must lend a hand in stopping rape and providing women with the Justice they deserve.

[i]*Statistics Canada. 1994. Violence Against Women Survey, 1993 [public use microdata file]. Ottawa, Ontario: Statistics Canada. [producer]. Data Liberation Initiative, Statistics Canada, Ottawa, Ontario [distributor].*

[ii]*Academics, Statistics Canada, WAVAW*

II. CONTEXTUALIZING SEXUAL ASSAULT

Sexual assault is unlike any other type of crime.[2] Unlike other violent crimes, sexual assault is a social problem, a systemic form of sexualized gender based violence, and an assault against human dignity that consequently denies women social and legal equality. Sexualized violence impacts women's ability to participate equally in the world by influencing the choices women make, consequently restricting their social and economic freedoms daily. Sexualized violence also undermines women's sense of autonomy, trust, and personal boundaries[3]. One can argue that sexual assault, and the context of rape culture in which it occurs, negatively affects all members of society and not just women because of the harshly scripted gender roles this culture reinforces and the strain it places on social systems.[4]

Numerous feminist legal scholars note that sexual assault is not simply about sex and gender inequality. It is clear that racialized, indigenous, mentally ill, poor, and disabled women, as examples, face higher risks of experiencing sexualized violence and have greater difficulty seeking justice before the courts, than do white able-bodied middle class women.[5] This reality highlights the true nature of sexualized gender based violence as a form of social inequality, a power-based crime related to men abusing their social power in order to exert control and domination. This is not an "Orwellian" idea and does not stem from "rape hysteria" as Men's Rights Movements and many members of mainstream society would like to believe.[6]

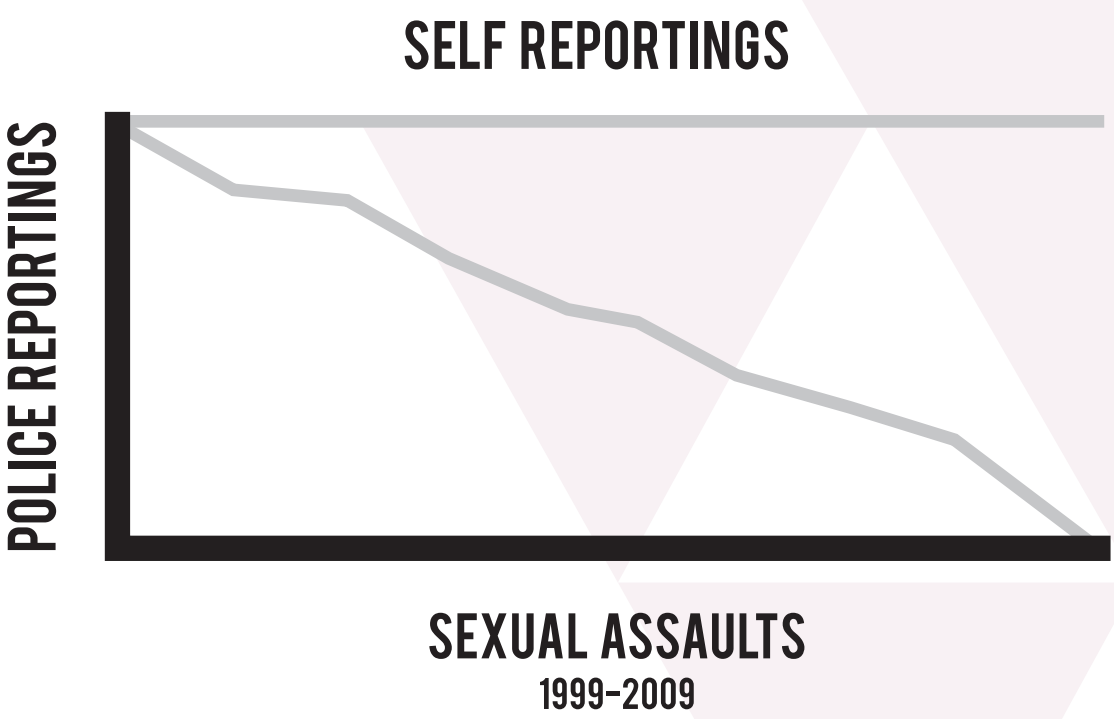
These are facts supported by empirical

"...HIGHLIGHTS THE TRUE NATURE OF SEXUALIZED GENDER BASED VIOLENCE AS A FORM OF SOCIAL INEQUALITY, A POWER-BASED CRIME RELATED TO MEN ABUSING THEIR SOCIAL POWER IN ORDER TO EXERT CONTROL AND DOMINATION."

statistical evidence. It is noteworthy that these statistics have hardly changed over the last decade or more, and only capture reported sexual assaults in a world where most sexual assaults are never formally reported. For example, Holly Johnson found three victimization surveys taken between 1993 and 2004 estimate that less than ten percent of sexual assaults are reported to police; of those reported sexual assaults that are prosecuted only .3% result in convictions. Most women never formally report experiences of sexual assault making the true prevalence difficult to quantify.

Two methods of data collection have been used most in assessing the prevalence of this crime, the General Social Survey on Victimization, a self-reported statistic, and the Uniform Crime Reporting Survey, a police reported statistic. While statistics from victimization data on sexual assault remained consistent in studies conducted between 1999 and 2009, the police data reveal a steady decline in the number of reported sexual assaults since 1993.

Of the cases coming to police attention, the 2007 data shows the 86% had charges laid as the least serious type of sexual assault. Across the studies it has been found that sexual offences are less likely to have charges approved when compared with other violent crimes, at a rate of 1 in 3 for sexual offences and 1 in 2 for violent crimes. Violence among aboriginal persons is double that of non-aboriginal persons. In 2009 51% of sexual assault victims self-reported the perpetrator



was known to them. This rate is higher, 81%, when reported by legal scholars.

It is troubling that while self-reported rates of experiencing sexual assaults remained consistent from studies conducted over the decade of 1999 to 2009 the reporting rates for sexual assault in police reported statistics have gone down. In addition, contrary to the myth that strangers commit most sexual assaults, statistics confirm that most victims know their offenders.[7]

Statistics and trends from the last five years (2008-2012) of WAVAW client files mirrored these national statistics. Not all survivors of sexual assault in Vancouver seek the services of WAVAW, and are thus not reported in the statistics. As exhibited in the pyramid in the Introduction, of those women who did access services at WAVAW 62.1% reported their sexual assault to police, and only 6.5% of those women's cases were prosecuted in trials, and not all resulted in convictions.[8]

These statistics leave a number of questions unanswered, such as why the law reforms enacted with the goal of enhancing reporting and conviction rates for sexual offences have not proven to be effective. Even more disconcerting is the question of why reporting rates have decreased and not just remained the same when approximately the same numbers of women are self-reporting experiencing sexual violence.

Statistics aside, feminists have long been aware of the fact that "rapists are ordinary men who operate within comfort zones" like their own family, social circles, and neighborhoods.[9] Why is it that mainstream society and the courts are so reluctant to acknowledge this fact? Why do we continue to turn a blind eye to sexual assaults, particularly, in the context of domestically violent relationships? Why have reporting and conviction rates not drastically improved as a result of legal reforms made to effect this change? What is necessary to truly effect change and enhance women's equality before the courts and in society at large? These are some of the questions this paper aims to address.

"A TERM DESIGNED AND USED TO DRAW ATTENTION TO THE WAYS IN WHICH SOCIETY BLAMED VICTIMS OF SEXUAL ASSAULT AND NORMALIZED MALE SEXUAL VIOLENCE."

III. RAPE CULTURE

It is not enough to discuss myths and stereotypes regarding women who are sexually assaulted to appreciate the struggle for women's equality. One major problem with combating myths about sexual assault and improving women's equality is that these false beliefs are woven into the very fabric of society creating a culture of rape. A culture many people are completely oblivious or willfully blind too.

Rape culture is a term that was coined by feminists in the United States in the 1970's. At that time sexual assault was on the rise and reporting and conviction rates were very low. Rape culture was a term designed and used to draw attention to the ways in which society blamed victims of sexual assault and normalized male sexual violence.

This culture must be exposed and understood, but rape culture is insidious and difficult to define, "having saturated every corner of our culture so thoroughly that people can't easily wrap their heads around what rape culture actually is."[10]

Emilie Buchwald comments that when society normalizes sexualized violence, it accepts and creates rape culture. In her book she defines rape culture as:

> *a complex set of beliefs that encourage male sexual aggression and supports violence against women. It is a society where violence is seen as sexy and sexuality as violent. In a rape culture, women perceive a continuum of threatened violence that ranges from sexual*

remarks to sexual touching to rape itself. A rape culture condones physical and emotional terrorism against women as the norm... In a rape culture both men and women assume that sexual violence is a fact of life, inevitable... However... much of what we accept as inevitable is in fact the expression of values and attitudes that can change.[11]

Women's realities are trivialized and unacknowledged in a rape culture. Though women "perceive and experience a continuum of sexualized violence[12]" that effects their daily life choices, this reality and the severity and impact of all types of sexualized violence from street or work place harassment, threats of rape, acts of sexual groping, to penetrative rape are minimized in the larger social context.

Melissa McEwen notes that in coming to understanding rape culture what is most helpful may not be a definition but more a description, "something substantive enough to reach out and touch, in all its ugly, heaving, menacing grotesquery,"[13] but in a culture so desensitized to violence against women such a description is hard to design.

In a rape culture women are caught in constant double binds, anything can be used to excuse men, and fault and blame women for sexualized violence. Rape culture is misleading. It instructs women that if they dress the right way, are careful when alone and avoid strangers then they can likely avoid being raped; when the social messages should be that only men who commit sexualized violence can truly be blamed, faulted, and responsible for preventing it. Further, most rape is committed by men known to their victims and not by strangers. If a man is determined to sexually assault a woman, the harsh reality is that there may be very little she can do to stop it. It is a falsity created by rape culture that women can prevent being raped.

A. NORMALIZING, PRIVILEGING AND PRIVATIZING MEN'S DOMINANCE OVER WOMEN

Interestingly, McEwan finds that rape culture creates a link between romance, women's sexual desire, and violence, like in instances of what she refers to as "fight fucking," in various forms of media representations that work to normalize rape and male sexualized violence.

Rape Culture treats rape as a compliment... as diminished capacity to consent as the natural path to sexual activity... as the unbridled passion stirred in a man by a beautiful woman making irresistible the urge to rip open her bodice or slam her against a wall...- pull her by her hair, or shove her onto a bed.[14]

From this example it is extrapolated that rape culture privileges a straight sexuality that strictly defines gender roles of male dominance over female submission. Non-normative heterosexual sex practices, even when consensual, are thus read as obscene, while normative heterosexual sex that is violent, obscene, and questionably consensual can be normalized as "kinky" and the product of a woman's "sexual autonomy" in a rape culture.

Khan finds that the liaison between law and pop culture has penetrated socio-legal imaginary in a way that regulates deviations

FOUR THEMES TO

Mary Ann Carter's four themes of rape culture, as perceived from analysis of Supreme Court decisions.

GAME, SPORT OR CONQUEST

MALE ENTITLEMENT

from a hetero-normative scripture and at the same time increases the measure of tolerance for sadistic-masochistic behavior within the strictures of hetero-normative and gender-normative sexual relations.

In *R v Butler,* [1992] 1 SCR 452, the accused was charged with possession and distribution of obscenity, under what is now s.163 of the *Criminal Code*. This case sets out the legal definition of obscene material as material that depicts explicit sex with violence or sex without violence but which involves degrading or dehumanizing treatment. This decision also notes that sex that is "generally tolerated in society" will not qualify as obscene.

Butler was affirmed in *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, a case related to the importation of material, deemed to be obscene, which depicted gay and lesbian sex acts. Little Sisters argued that the obscenity laws were used in a discriminatory fashion to censor gays and lesbians. The Supreme Court disagreed with Little Sisters argument, but there may be some truth to it given homosexual sex acts are generally less tolerated in society than normative heterosexual sex acts as noted by scholars like Pat Califia, and are thus more readily viewed as obscene.

Califia argues the law is disproportionately used to regulate non-normative sex and gender relationships. To make this point he discusses two cases, one involving two gay men engaged in consensual bondage-discipline, sadistic-masochist (BDSM) sex who were both charged and found guilty in law, and another where a man branded his initials into his wife's behind and this was deemed to be consensual, not obscene, and no finding of guilt was made despite the increased level of bodily harm and violence of this act.[15]

Through the operation of rape culture's hetero-normative privileging, the courts privatize the interests of men in intimate heterosexual relationships, where the law has chronically been applied differently or where men in these relationship are found to be outside the

SEXUAL ASSAULT

INEVITABLE FACT OF LIFE

PORNOGRAPHIC VIGNETTES

boundaries of criminal law altogether.

Feminist legal scholars note that one way in which this occurs is by rape culture objectifying and dehumanizing women, rendering their consent an irrelevant factor and thus giving men free access to, ownership of, and control over women's bodies. This is especially seen in the context of relationships where rape is a part of a larger picture of domestic violence.[16]

B. COMMON THEMES OF RAPE CULTURE IN THE SUPREME COURT

Mary Ann Carter believes that rape culture still permeates society today, and names four themes related to rape culture that emerge from her analysis of Supreme Court decisions. These themes include: sexual assault as a game, sport, or conquest; sexual assault as male entitlement to female sexual access; sexual assault as an agent-less act and as inevitable fact of life; and sexual assault trials as pornographic vignettes.

Elizabeth Sheehy also comments on the theme of sexual assault trials as pornographic vignettes. She notes the male judiciary finds men's stories to be more believable because they are consistent with the male belief in the "unknowability of women's sexual desires" and the "phallocentric male pornographic imagination." Sheehy provides the example of men claiming the defense of mistaken belief in consent and being acquitted by lower courts after being found to have been "seduced by unconscious women."[17]

When these themes of rape culture are operating in Canadian courts it renders men less morally culpable for sexual and gender-based transgressions. It is extremely problematic that moral culpability is a standard largely set by community and social standards when these standards readily normalize sexual violence perpetrated by men against women, thus reducing the moral culpability assigned to men who commit sexual assault.

C. RAPE MYTHS IN COURTS

Judges are members of the community and are both susceptible to the influence of rape culture and also help to reinforce and strengthen it through their decision-making processes. Former Supreme Court Justice L'Heureux-Dube finds there is long-standing, deeply held biases against women who complain of sexual assaults in the courts because judges are far from being impartial, gender-neutral, objective, or equality based in their legal decision making processes.

Honorable Justice L'Heureux-Dube lists the following as myths that are supported by the courts and contribute to rape culture: rapists are strangers; women are less credible and reliable if they have had prior sexual experiences; women are more likely to have consented to sex if they have had prior sexual relations with the accused; women will always struggle when being sexually assaulted; women are more emotional so unless they become hysterical, nothing must have transpired; women mean 'yes' even when they say 'no'; women who are raped deserve it because of their conduct, dress, demeanor.[18]

Many lower court decisions operate to exonerate and normalize male sexual transgressions as being separate and apart from the image these decisions create of injurious 'real rape' committed by violent truly morally culpable men. These decisions also tell women who are raped that no matter what they do or do not do they will be on trial and they will be judged harshly.[19]

D. DE-POLITIZING AND DE-CONTEXTUALIZING OF RAPE BY COURTS

However, at the same time it is apparent that certain classes of women fare better before the courts in a rape culture. The courts, in constructing images of "real" or "ideal" victims, fail to acknowledge they are effectively decriminalizing rape against classes of the most vulnerable women.[20] These false constructs ultimately results in the perpetuation of many myths and stereotypes that create rape culture.

Finally, when the courts neglect to contextualize sexual assault they reinforce the notion that these are individualized and isolated acts of violence like any other. Instead of placing equality at the forefront of exercises of judicial discretion this de-contextualizing reinforces rape culture by hiding the realities of sexual assault, and enhancing a sociolegal context that allows rape culture to flourish. To follow is a brief history of the sexual assault law reforms, many of which, it is argued, have been ineffective as a result of the operation of rape culture.

IV. SEXUAL ASSAULT

LAW REFORMS

Criminal law is concerned with culpability and morality. Behavior that is deemed immoral by majority social standards is criminalized. However, moral culpability in the criminal context has been shaped in a culture of rape and from a predominately male point of view given the vast majority of government officials, judges, and lawyers, are men.[21] So while members of the feminist movement were involved in shaping the sexual assault law reforms, much of the social context of rape and the equality goals of the movement have been lost in translation. That being said, reviewing the history of sexual assault law in Canada is useful, it provides a window into socio-cultural attitudes about gender, sex, relationships, and sexual violence.[22] Assessing where we have come from may accentuate how rape culture is impacting the use of discretion in the courts and help shape the direction of future reform.

The feminist movement started in the 1960's and 1970's. The root of this movement was to fight against gender inequality. A predominant issue in that fight was raising awareness that sexualized gender based violence is a social problem. Prior to the law reforms in the 1980's rape was almost impossible to prove.

In 1980's reforms made it impermissible, by operation of s.277 of the *Criminal Code*, to adduce evidence of complainants' sexual reputation in sexual assault trials. These amendments responded to "deep seated sexism" and "blatant distrust of women claiming rape" that existed prior to this date.[23] The goals of these reforms were to improve low reporting and conviction rates of sexual assault, focus on the violent nature as opposed to the sexual aspect of this offence, and limit the impact of rape myths on judicial discretion.[24]

These amendments completely reclassified and redefined acts of sexualized gender based violence. Parliament rejected *Criminal Code* categories of rape, attempted rape, indecent assault, and gross indecency[25] that were seen as privileging the interests of men and instead classified rape as a type of assault, adopting a stratified system of three levels of sexual assault offences based on degree of severity, or to put it in other terms, based on the amount of physical violence used.[26]

The change in terminology and reclassification has been viewed positively by those who find the new provisions capture a wider array of sexually offensive behaviors[27], but has also been subject to criticism. For one, the new provisions are gender-neutral which conceals the reality of this crime being committed by men against women, and thus fails to shift the focus away from sex to focusing on the violence against women.[28] Another criticism, which may have more to do with prosecutorial discretion and the operation of rape culture than the code provisions, is that 98% of sexual assaults are prosecuted as level I, sexual assault *simplicitor*, offences whether or not the offensive activities include rape and bodily harm, and could, therefore, be prosecuted as level II, sexual assault causing bodily harm, or level III, aggravated sexual assault, offences.[29] Some also argue this change may obscure the true colour of the crime committed.[30] For example, an offender who sexually gropes a woman and an offender who violently rapes a woman will likely be charged under the same *Criminal Code* provision; if the offender who gropes a woman is charged at all.

Another issue this reform responded to was the social inequality faced by married women who were the sexual possessions of their husbands. In law, men had complete sexual right and freedom to their wives' bodies. In 1983 sexual assaults by husbands against their wives were recognized as criminal. Wives were no longer a rapable class of women. However, we still see sexual assault cases in the criminal justice system plagued by ideas of women's bodies being the sexual property of their male partners, women's consent being differently and unlawfully understood as continuous in the context of relationships, and the misapplication of defenses pertaining to mistaken belief in consent.[31]

The 1990s saw a number of changes to the criminal code provisions regarding sexual assault. Law reforms included defining consent, and amending the defense of honest mistaken belief in consent to ensure that reasonable steps were taken by men to ascertain consent in a sexual context.[32] Further, a number of evidentiary provisions were amended to enhance complainants' rights to privacy, dignity and equality when the accused sought third party records or evidence pertaining to sexual history.[33]

PARLIAMENT'S 3 LEVELS OF SEXUAL ASSAULT

1. SEXUAL ASSAULT SIMPLICITOR
2. SEXUAL ASSAULT CAUSING BODILY HARM
3. AGGRAVATED SEXUAL ASSAULT

The law was also changed to reflect that the complainant's account of sexual assault no longer needs corroboration in order to convict.[34]

A. RECOGNITION OF EQUALITY RIGHTS IN LEGISLATION

It is interesting to note that the Preamble of Bill C-49, one of the bills leading to evidentiary reforms noted above, is the first government enactment to explicitly reference women's equality rights as constitutional support for this criminal law reform. Parliament was clearly influenced by the submissions provided to them by LEAF. These submissions contained the following discussion of women's equality rights.

> *The guarantees contained in s.15 of the Charter constitute principles of fundamental justice no less than do fair trial rights. Sexual violence deprives many women of life, and all women of liberty and security of person no less than imprisonment abridges convicted offenders' liberty and security. In the face of the sheer scale and pervasiveness of violence against women and children, and the criminal law's historic ineffectiveness in either deterring such violence or fully redressing it, Parliament must not allow the conventions of traditional legal thinking to foreclose new ways of thinking shaped by a new constitutional reality.*[35]

The Supreme Court in R v Mills, where the majority upheld the reforms enacted by Bill C-46, another bill relating to evidentiary provisions[36], specifically note the Preamble

must be read in order to assist the courts in understanding the purpose and objective of the reform.[37] The preamble to this Bill clearly contextualizes sexual assault as a systemic social problem that affects women's ability to participate fully, as equal citizens in society; it states the

> *Parliament of Canada recognizes that violence has a disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to the security of the person, privacy, and equal benefit under the law.*[38]

These provisions are progressive and like the reforms in the 1980s were enacted with the goal of debunking myths and stereotypes about women who are sexually assaulted, encouraging reporting of sexual assaults by ensuring women feel the justice system will be responsive to their dignity and right to equality.[39] However, feminist academics argue the application and interpretation of these provisions by Canadian courts has been inconsistent and problematic, that "interpretation is 9/10 of the law and this shifts with community standards of tolerance and legal precedent."[40] This has resulted in the equality enhancing goals being undermined,

> *laws alone cannot provide the changes demanded by feminists... law reform leaves untouched the institutions and practices that are at the root of women's subordination.*[41]

B. A LOOK AT THE ROLE THE SUPREME COURT HAS PLAYED IN INTERPRETING LEGISLATION AND ADVANCING WOMEN'S EQUALITY IN THE COURTS: EWANCHUK, JA, AND MILLS

A number of Supreme Court decisions can be read as both successes for women as they have reaffirmed the law and resulted in convictions of sex offenders, and also understood as failures because they have not provided clear interpretation and direction of the law's application and have neglected to contextualized sexual assault and advance women's equality.[42]

I. DEFENCE OF MISTAKEN BELIEF IN CONSENT: WHERE ARE THE REASONABLE STEPS?

For example, Ewanchuk has been criticized for neglecting to mention the reasonable steps the accused must take in order to ascertain consent and rely on the defense of mistaken belief in consent. By failing to provide direction to lower courts regarding how to interpret and apply the reasonable steps criteria rape culture has negatively impacted the operation and interpretation of this defense in the lower courts.

This is extremely problematic given most sexual assault cases are decided in provincial courts. These courts seem to face the greatest difficulties applying this defense in cases of men raping their intimate partners or unconscious complainants.

Lower courts have assumed consent to be continuous in cases where men rape their intimate partners, and have also neglected to look for reasonable steps to ascertain consent altogether. When courts have looked for reasonable steps, in cases of the unconscious complainant, they have erroneously concluded that sexually touching the unconscious complainant in an attempt to wake her for the purpose of sex counts as a reasonable step, instead of seeing this type of sexual groping as a form of sexual assault.[43]

The honest mistaken belief in consent defence to sexual assault was adapted from the defence to the crime of assault *simplicitor*. The defence to assault requires the accused belief to be honestly held, but in law, the accused did not need to take reasonable steps to confirm his belief in consent. The defence continues to be applied in this way to sexual assault cases, despite the reasonable steps being necessary in law.

Elizabeth Sheehy notes that the interpretive conflict of the mistake defence arises when the court believes what the accused claims the complainant's words or actions meant to him (consent), even when the complainant clearly testifies that her words or actions did not equate to her consenting to the sex act in question. When judges believe the accused version of events over the complaints this amounts to a decision based on "dangerous speculation of consent" and not based in evidence. This operates to legally reinforce women's inequality by failing to condemn rape by "honest" men.

Lucinda Vandervort argues one problem with this defense is the name it has been given which "perpetuates assumptions that no longer have a place in Canadian law" and suggests that

> *to curtail reliance by [judges] on mere intuition and hunches shaped by cultural bias, we need a fully articulated analysis of "moral innocence" and "culpable awareness" in sexual assault.*[44]

In order to ground the analysis of consent in law as opposed to assumptions Christine Boyle suggests that instead of allowing men to get away with predatory behavior under the guise of errors, we need courts to focus on balancing the complaint's equality rights and rights to security of person with the accused rights to fair trial as a guiding factor of their use of judicial discretion.[45]

II. THE TROUBLE WITH CONSENT WHEN CONTEXT IS LOST

The most recent Supreme Court decision, *R v A(J)*, 2011 SCC 28 [*JA*], dealt with the issue of consent to sexual activity. By way of background, in *JA* the accused choked his partner of 8 years into an unconscious state, tied her up and penetrated her anally with a dildo, an activity they had discussed previously but never attempted. This relationship was one plagued by domestic violence, and this accused had been previously charged with violently offending against the complainant.

He was in fact in breach of his probation order by committing this sexual assault. The couple had engaged in S&M type sexual behavior in the past, such as erotic asphyxiation.

The complainant reported to the police she did not consent to the violent sex act in question after the accused threatened to seek sole custody of their son. She later recanted this version of events at trial by answering affirmatively to questions posed by the defence, as often is seen in the context of domestically violent relationships, agreeing she gave prior consent to being choked and gave consent after the fact to the anal penetration. The accused was convicted at trial. The trial judge in Ontario (*R v A(J)*, 2008 ONCJ 195) found that while the complainant may have consented to being choked, she could not legally consent in advance or after the fact to sexual activity while unconscious.

The accused appealed and the appellate court (*R v A(J)*, 2010 ONCA 226) overturned this conviction finding there was insufficient evidence to conclude that the complainant did not consent to the insertion of the dildo in advance of her being rendered unconscious by the accused. This court compared the complainant offering her advanced consent in this case to a competent person providing advanced consent for surgery. The court also suggested finding the accused guilty in this case was akin to charging a partner who sexually caresses their sleeping spouse with sexual assault. The court did not believe the working of the *Criminal Code* precluded a person freely consenting to sexual activity in anticipation of being unconscious while that sex act occurred. The court in fact believed that legally permitting advanced consent was "entirely consistent" with the principle of protecting individuals' security of person which lies at the heart of the sexual assault provisions of the criminal code, and was in line with the sentiment expressed by the Supreme Court in *Ewanchuk* that "having control over who touches one's body, and how, lies at the core of human dignity and autonomy". The Crown appealed.

The Supreme Court restored the conviction and in a very technical decision affirmed the consent provisions in the *Criminal Code*. The Supreme Court found that Parliament intended consent to be the product of a conscious operative mind that is capable of granting, revoking, or withholding consent to each and every sex act. Parliament did not define consent to include advanced consent to sexual activity committed while the complainant is in an unconscious state. Madame Justice McLachlin, for the majority, found it would be inappropriate to carve out exc eptions to the concept of consent, as suggested by the Ontario Court of Appeal, as it would undermine Parliament's choice. She states, "any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the criminal code."

This decision is notably absent of any contextualization of this sexual assault, is completely de-gendered, and is void of the context of violence against women which is pervasive in Canada, and which Justice McLachlin has been a strong advocate of advancing in the courts in past dissenting opinions of sexual assault cases.

Even more troubling is the dissent of Justice Fish, which follows the line of reasoning

taken up by the appellate level court. He agrees that the law governing sexual assault has as a fundamental principle of consent that only 'yes' will mean 'yes'. However, he argues in this case the complainant did say "yes" and this "yes" was freely and voluntarily given prior to the asphyxiation. He argues that the complainant's "yes" cannot be found to mean "no" in law. He too negates to discuss the realities of the domestic violence that surrounded this sex act, and that the anal penetration was not consented to at any prior-point, it was simply an activity the accused and complainant had previously discussed but never engaged in.

Justice Fish further argues that the *Criminal Code* is meant to protect women, and to "enhance the sexual autonomy of women" not to make choices for them. This implies he wrongfully believes the complainant consented to this sex act; the facts show this is not the case. This argument is also blind to considering the complexities of 'choice' and 'consent' for women in violent relationships.

The line of reasoning taken up on appeal and by Justice Fish seems to be a result of ongoing fear of criminalizing private sexual conduct in adult relationships. However, Parliament is attuned to the need to protect women while in relationships, as evidenced by the 1980's reform making it illegal to commit sexual assault against your spouse. Notwithstanding the reform, this clearly continues to be an area of sexual assault law plagued by myth and stereotype about how consent should operate differently in the context of intimate relationships.

Another problem is that the courts hearing *JA* did not give consideration to the reality that "the nature of consent and negation between partners in sadomasochistic (SM) encounters must be extremely problematic."[46] Lindon notes that in sadomasochism,

> *women are exploited and portrayed as desiring pleasure from pain by being humiliated and treated only as an object of male domination, sexually or in cruel or violent bondage... sometimes the very appearance of consent makes the depicted acts even more degrading and dehumanizing... consent cannot save otherwise degrading or dehumanizing scenes.*

She goes on to discuss the impact of SM for women's equality,

> *women who say they like SM are caught in general patriarchal relationships of power and don't really know why they have the*

desire, SM merely replicates the worst aspects of a sexuality premised on male domination and female subordination.[47]

When, like in *JA*, the superior courts fail to acknowledge the replication of male domination and the obscenity and violence inherent in some SM sex acts, or the courts support these acts under the false rhetoric of upholding women's right to choice, they also fail to advance women's equality, as they perpetuate rape culture and post-feminist neoliberal ideals.[48]

The nature of consent and negotiation in relationships like the one portrayed in JA are even more complex than the nature of consent to SM, given the history of not only sadomasochism but also domestic violence present in these relationships. The courts and Parliament must find some way to enunciate and distinguish the difference between true consent and the 'choice' some women are forced to make to submit in order to survive.[49] *JA* is a good "example of how questions of male violence against women can be stripped of their social context and privatized into questions of individual choice."[50] It is impossible to have the ability and autonomy to negotiate choice without equality. In an unequal society the nature and considerations taken in making personal choices are entirely different for men than for women.

Furthermore, case law like *JA*, that frames the issues narrowly and removes the inherent violence involved in the acts in question, shifts the focus away from equality toward an impoverished version of women's autonomy --the ability to make sexual choices. This shift normalizes patterns and practices of male violence harmful to women, and focuses attention "only on how to minimize ancillary harms, while leaving the core practice (of violence against women) intact."[51]

Another neoliberal theme present in the trilogy of *JA* cases is that the law has no place in individuals' private lives and choices, particularly in the context of their private sex lives. This is most apparent in the Court of Appeal's arguments against paternalizing women's choice. However, it is clear that if the criminal law is nothing else it is "paternalistic, [because] to some degree-top down guidance is inherent in any prohibitive rule."[52] The real outcome of the argument against paternalism is to hide the true privileging and normalizing of men's rights to and violence over women's bodies that the argument inherently supports. Thus, women need the state and social resources to protect their right to equality

and sexual integrity. However, neoliberalism erodes these safeguards and leaves women in a state of self-blame for their sexual vulnerability. In so doing, it shields men and larger systems of oppression from taking responsibility for women's subordination, objectification, and inequality.

Lise Gotell argues that the focus "on law as prohibition obscures profound anxieties that exist about whether specific consent must be applied within intimate heterosexual relationships." She goes on to discuss how the Supreme Court majority in *JA* has a "post-feminist thrust" that "extends the requirements of ongoing conscious consent into intimate relationships" but at the same time

> *detaches consent from context . . . resting upon a current of individualism that erases notions of the social or political and any idea of the individual as subject to constraints. The majority reasons are framed in gender-neutral terms that ignore any connections between sexual violence and gendered power relations.*[53]

Thus, *JA* is an example of how recent neoliberalism in Canadian judicial discourse has erased the systemic nature of sexual violence against women. This has largely been achieved through reinforcing the affirmative standard of consent in a way that "individuates and subjectifies-it does not contextualize."[54] In the context of neoliberal governance the court constructs a new female sexual subjects who "practice sexual safekeeping" and are thus able to "govern themselves without the need for state control or repression." As with past common law, through the construction of this new autonomous female sexual subject, victim blaming emerges when "complainants fail to behave as responsible risk managers"[55]. Through the lenses of rape culture and neoliberalism, whether or not a victim avoided risks sufficiently continues to function as a standard against which to test complainant's credibility. When the sexual act is viewed in isolation, the risk management choices of the complainant are viewed in ways that "ignore constraints on action arising out of situations of marginalization, including the necessity of continuing to interact with a violent man.[56]"

This standard ignores the possibility of women being psychologically forced into states of submission in order to survive in violent relationships. Instead these women are subtly blamed for failing to remove themselves from the risks of abusive relationships and sexual encounters, but in many cases these women likely feel they have no other option but to comply. This too exhibits how rape culture and neoliberal "criminal law frames sexual assault as a discrete and isolated incident--a violent sexual incident and a matter of individual deviance,"[57] as opposed to seeing the systems of oppression in place that maintain violence against women and children, like poverty, disability, rape culture and domestic violence.

Cases like *JA* make clear for society at large that the focus of sexual assault law is on psychically embodied sex acts, and much less obviously focused on the "psychic experiences" of the complainant, or even the accused to a large degree. For instance, no consideration is given to how coerced sex, is also experienced as a form of sexual violence and assault to the coerced party. Consider how threats to cause bodily harm or rape, or being forced to watch

"...THIS STANDARD IGNORES THE POSSIBILITY OF WOMEN BEING PSYCHOLOGICALLY FORCED INTO STATES OF SUBMISSION IN ORDER TO SURVIVE IN VIOLENT RELATIONSHIPS. INSTEAD THESE WOMEN ARE SUBTLY BLAMED FOR FAILING TO REMOVE THEMSELVES FROM THE RISKS OF ABUSIVE RELATIONSHIPS AND SEXUAL ENCOUNTERS..."

or engage in SM sex are experienced by women in sadomasochistic relationships with dominant and controlling men, or women and children in domestically violent relationships. This type of sexual assault on women is more abstract, and the law does not appear to be written in a way that responds to the various forms of disembodied coerced sex that exist as forms of sexualized gender based violence in society.[58]

When women are subject to these various disembodied psychological forms of sexual assault and bodily harm, like being aware of their partner's SM or rape fantasies, they are unable to act as free citizens and autonomous beings; their daily lives become governed by their

> *awareness of danger, self-censorship of activities, impairment of ability to trust, the indescribable feeling of being used for sex, and appropriate for such use, by others without consent.*[59]

This feeds into larger rape culture which leads all women to censor their daily lives according to their assessment of the degree of risk of sexualized violence they might face, and allows men to continue operating as if they are above the law, as the law will likely exonerate them of their sexual transgressions, if they come to the attention of the criminal justice system at all. It normalizes and permits less obvious psychological sexual transgressions to take place that allow men to coerce and push women into sexual submission.

III. PRIVACY RIGHTS

As a final example, *Mills* has been critiqued as eroding the true meaning and intent of Bill C-46 by feminist academics who argue that this decision is overly individualistic thus de-politicizing the context of complainants sexual assaults and therefore, women's ability to be equally seen and heard as credible counterparts to their male accuseds in courts.[60] Further, court decisions have resulted in a narrow and male dominated understanding of the privacy rights and concerns of complainants in the context of third party record and sexual history disclosure applications, which fail to consider and address what is at stake for complainants' sense of dignity and autonomy.[61]

C. TWIN MYTHS

Academics note that despite the clear intention of s.276 and s.277 of the *Criminal Code* to dispel the "twin myths"[62] in sexual assault cases, these provisions continue to be inappropriately interpreted by trial and appellate level courts.[63] The "twin myths" are identified by the Supreme Court as the suggestion that prior sexual activity of complainant means she is more likely to have consented to the act in question, and that she is less credible. These myths are particularly problematic in cases where the accused and complainant are in relationships; generally relationships which are violent and abusive.[64]

D. RULES OF CRIMINAL LAW

In sexual assaults cases where the complainant and accused know one another, or where the complainant was intoxicated during the sex act in question, complainants are vulnerable to being seen as lacking in reliability and credibility notwithstanding s.274 of the *Code* outlining that corroboration is not required in order to convict an accused of sexual assault.[65] One reason for this, aside from the operation of rape culture in the courts, is the design of criminal law.

In all criminal law cases there is the high burden of proof that must be met; accused individuals are innocent until proven guilty beyond a reasonable doubt. An additional barrier faced by complainants in sexual assault cases arises as a result of the decision of the Supreme Court Case *R v W.D.*, which has been referred to as the "rapist charter". This case permits the *trier of fact* to believe the complainant and disbelieve the accused, but still find a reasonable doubt based on the entirety of the evidence before the court.[66]

Most recently in 2012, Bill C-10 changed the sentencing laws related to sexual assault by enforcing a mandatory minimum sentence for sexual assaults on persons under the age of 16. This Bill also re-introduces more lenient sentencing for sexual assaults perpetrated against women over 16 where the Crown proceeds summarily.[67] This is a curious decision for Parliament to make given the fundamental principles of sentencing include denunciation and deterrence and statistics show that the rate of sexual assaults against adult women has not improved.

IV. INTERVIEWS WITH CROWN PROSECUTORS

This section moves on to explore the impact of rape culture on the use of judicial and prosecutorial discretion in the courts from the perspective of crown prosecutors who have all prosecuted sexual assault cases before provincial courts.

The goal of conducting these interviews was to gather information about prosecutors' thoughts and experiences in regards to working on sexual assault files, and to assess more generally their thoughts and experiences regarding how the sexual assault law reforms of the 1980's and 1990's have effected women's access to justice and equality in the courts.

For the purpose of these interviews rape culture was defined using the broadest available frame of reference to ensure any and all thoughts, feelings, experiences working in the area of sexual assaults and within the culture of the criminal law bar were open to discussion. In order to elucidate any confusion regarding the plethora of ways in which the term rape culture may be defined and understood, all prosecutors were read a definition of this term to ensure the existence of mutual understanding.

Currently, little qualitative exploratory research of this kind has been done on this topic as researchers have focused on analyzing case law in their studies of rape culture and the impacts of the sexual assault law reforms in the courts. Based on the existing literature it was hypothesized that these interviews would shed light on personal experiences of how

rape culture effects prosecutorial and judicial discretion thus limiting women's equality in the courts, in effect negating the progressive legislative reforms made in the area of sexual assault law.

Participants were all working as provincial crown prosecutors at the time of the study and had worked on sexual assault files. A purposive sampling selection process was used based on prosecutors who had worked on WAVAW client files or were known to WAVAW staff. Prosecutors were also recruited using a variety of non-probability sampling techniques, including snowball and convenience sampling methods through networking with participants and professionals working in the area of sexual assault.

This sampling procedure created a fairly homogeneous sample in terms of race and other socio-cultural factors. A total 6 prosecutors participated in the interviews; as such the generalizability of the findings is extremely limited.

These interviews were conducted over a two-month period. Prosecutors were ensured strict confidentiality. All identifying information was kept confidential, and was destroyed once data collection was complete. Interviews were conducted in person for one to one and a half hours each. This author conducted all interviews and took written notes which did not have any identifying information written on them during these interviews. These notes were shared with a WAVAW staff member for the purposes of preparing for a conference presentation, and participants were aware the interview data would be used for this purpose and for the completion of a paper. All interview notes will be kept in a secured private area for a year and will then be destroyed. Both practicality and convenience were considered when deciding where to conduct interviews, and all interviews were held in a location chosen by each participant at a mutually agreed upon time.

Interviews employed a semi-structured design to be flexible and exploratory in nature, in order to collect rich descriptions of participants' experiences. A colleague at

RAPE CULTURE EFFECTS PROSECUTORIAL AND JUDICIAL DISCRETION THUS LIMITING WOMEN'S EQUALITY IN THE COURTS, IN EFFECT NEGATING THE PROGRESSIVE LEGISLATIVE REFORMS MADE IN THE AREA OF SEXUAL ASSAULT LAW.

WAVAW reviewed the interview guide, and a practice interview was conducted with a fellow law student prior to beginning the interviews in an effort to reduce any bias.

The interviews contained open ended questions asking prosecutors to share their thoughts and experiences in relation to the following topic areas:

1.) training received in regarding to prosecuting sexual assault files;
2.) thoughts on the topic of prosecutorial and judicial discretion;
3.) thoughts on the sexual assault law reforms;
4.) and any thoughts or ideas they had regarding enhancing women's equality before the courts.

Throughout these interviews this author picked up on comments pertaining to the presents of rape myths in the courts, and flagged this as a fifth area for thematic analysis.

Thematic analysis was utilized to organize the information collected during the interviews under the topic headings listed above. Once all interviews were complete, the words, themes, and issues discussed by participants and recorded in written note form were explored for commonalities and differences with the intent of better conceptualizing the unstructured information and categorizing it under the topic areas explored during the interviews. The following are a selection of statements from participants that reflect the major themes that emerged across the interviews. The terms "crown" and "prosecutor" and "crown prosecutor" are used interchangeably and refer to the same thing.

A. TRAINING

All prosecutors noted that no specific training was provided in regards to prosecuting sexual assault cases. This is interesting considering the British Colombia *Crown Policy Manual* in section SEX 1 on page 2 states that sexual assault files will be assigned early and "*when possible* assigned to a crown with specialized training on sexual assault."

Three prosecutors reported they could choose to attend workshops and conferences pertaining to sexual assault as professional development. Another crown noted there was a mentoring system in place for new prosecutors so there was the possibility to be matched with someone who shared a similar interest in sexual assault prosecution if that interest was expressed and this may enable the prosecutor to gain more knowledge and experience working these cases.

One crown noted that sexual assault victims are the most complex to work with and there was no training regarding interviewing witnesses, but that this would be useful.

This prosecutor also felt that specialized training on sexual assault prosecution and a specialized prosecution service would be beneficial, however, feared that it would be difficult to find a group of crowns willing to work exclusively in the area of sexual assault prosecution "because it would cause burn out." She went on to discuss how a system could be put into place where "crown's rotate through a sexual assault prosecution position and share their knowledge with crowns who are rotating in to the position before they move on to other types of prosecutions," as a way to share knowledge and create a team of specialize prosecutors who would also be protected from burnout.

B. DISCRETION

All prosecutors reported receiving general training on the use of discretion and running trials, and felt that discretion was a valuable and beneficial tool to promote justice and efficient functioning of the justice system.

One crown reported that the use of prosecutorial discretion is not often questioned, and when it is "the crown must be able to justify their decisions." Another noted that use of discretion is based on their "knowledge of the case and context, which includes considering who the judge hearing the case will be."

This crown went on to explain that she is aware of a judge who did not appreciate receiving evidence in camera, (where the witness is behind a screen or on video) as he felt he could not properly assess her demeanor, credibility, and reliability and the crown felt this hurt her case, despite the fact that the complainant had a legal right to testify in camera, and it is not lawful to hold this against a witness in weighting the evidence they provide.

This crown then explained that now if she had a sexual assault case before this judge she "wouldn't want to put a witness up who wanted to testify in camera if at all possible, and would weight this in making decisions about whether or not to run the case, make a deal, stay the charges, etc . . ." This is one of many examples provided, more of which

will be explored in a later section, of how rape culture does impact the use of discretion in the court process and impact women's access to justice and equality in the courts.

One crown made a comment regarding judicial discretion in the sentencing process. She noted, "in the worst of the sexual assault cases [she's] dealt with the longest sentence you'll get is 18 months because [we] have a very liberal bench and sometimes [she] wonder[s] if there's any logic left in that [courthouse]."

This crown reported frustration feeling that sentences were not appropriate given the nature of the crime and degree of responsibility of the offender. She also stated it was her practice not to lessen a charge from sexual assault to assault because to her, "it was either sexual or not at all," but did go on to state that she was aware of many prosecutors who regularly engaged in the practice of dropping charges to a lesser charge of assault during the plea bargaining or court process.

Another prosecutor spoke about the charge approval process, reporting charges were approved when the prosecution "was in the public interest and there is a substantial likelihood of conviction." This sentiment was echoed by all of the participants; with others commenting that a sexual assault was always in the public interest to prosecute. Another crown noted thinking "about the complainants safety and the public interest of the prosecution. [She] tries to support the complainant to testify as it's likely in cases where she won't it will be hard to proceed with the charges." This comment touches on a theme running through the interviews of complainants being largely viewed and treated as evidence by crown prosecutors, who are neutral parties and officers of the court.

A final point made by 3 prosecutors interviewed was in regards to the use of discretion in appealing decisions. They commented cases were appealed on errors of law, and it was unlikely to have a case appealed based on a factual error.

It seems that in sexual assault cases rape myths and culture may strongly impact the interpretation and judicial reporting of accepted facts. These facts if plagued by rape myth may then distort the application of the law and result in legal errors, but this interplay of errors of mixed fact and law is potentially overlooked.

C. EFFECTIVENESS OF THE SEXUAL ASSAULT REFORMS

Prosecutors all noted the sexual assault law reforms have not been entirely effective. The greatest difficulty noted by five of the crowns interviewed was with the law stating there is no need for corroboration of the complainants report of sexual assault to prosecute and convict on the one hand coupled with a high burden of proof on the other. One crown states,

> *the law reform regarding corroboration is ineffective in practice. Corroboration is needed because of the credibility context at play in most sexual assault cases, R v WD, and the burden of proof being high; beyond a reasonable doubt. Issues with proving sexual assaults often arise in cases where women are inarticulate and there's no corroboration of their accounts to police. This is a major issue with prosecuting assaults.*

A second crown acknowledged that corroboration is "not legally necessary" but also believed it was "a disservice to go forward with a case to trial where there is not enough evidence; the hardest cases are those without corroboration of the complainants account." Another felt that while cases are "very difficult to prove without corroboration, that doesn't always mean [thecrown] won't proceed with the charges or doesn't believe the charges."

Two prosecutors discussed examples of the effects of when evidence is and is not present to corroborate a complaint. One notes "when bodily harm is present this corroborates the case and makes it easier to meet the standard of proof and *R v WD* test; the reasonable doubt framework otherwise makes it hard

without corroboration." Another states, "if rape kit results don't match the complainants story this will affect her credibility and the likelihood of conviction."

This issue with corroboration negatively impacts the truth seeking aspirations of the criminal justice process. High burdens of proof impact the ability to convict without corroboration, and shape the discretion of the crown in putting women's cases before the courts, women are not given equal rights, and as a result truth and justice cannot be found in the courts. One crown comments

> *high standard of proof and reluctance on the judiciary to make adverse findings against accused, especially where the accused take the stand in his own defence make sexual assaults hard to prove. This is true of all crimes where the accused takes the stand. So this standard of proof combined with a testifying accused is where cases really fall apart, because it's not really about who is more believable. You have cases where the judge says I believe the complainant and there is still a reasonable doubt on the whole of the evidence. At [provincial court] judges are reluctant to say an accused is lying and this happens more in sexual assault cases because there's no corroboration of the victims account and because of this the system, the safeguards of the criminal code, have no impact. . .*
>
> *The complainant's recovery is the most important thing, but the goal is also to convict and deter this conduct. Prosecuting this charge is challenging, and I'm not sure these goals are being met. The criminal justice system is part of the picture, but not a solution to this problem.*

Other prosecutors similarly felt that legislation was not the answer to improving equality for women who experience sexual assaults, and felt the most recent reforms in Bill C-10 will not be effective. A few prosecutors noted "there will be judicial backlash with increased legislation, and this isn't the solution to improving outcomes for sexual offences," believes a prosecutor. The prosecutor making this statement also felt as a result of this bill,

> *there will be less accused pleading out because there will be less incentive with the new mandatory minimums in play, Minimums bind the hands of the crown and court in the sentences they can offer. Pleas are good for victims because it means they don't have to go through the trial process, which is emotionally taxing; and with a plea they're vindicated, the accused is found guilty.*

On the same note this author heard from a second prosecutor,

> *Parliament uses mandatory minimums as a way to control judicial discretion, but this is ineffective because it results in the lower court judiciary rebelling by acquitting because they don't want to send an offender to jail. I don't believe further legislation is the solution.*

Another aspect of legal reform touched on by a number of prosecutors was in regards to the admission of third party records and sexual history evidence. It seems the court has been more successful, from these crown's

perspectives, at balancing the equality and privacy rights of complainants in regards to third party applications as intended by the legislation. For instance, one crown reports, "I've never seen third party records or sexual history evidence be allowed in a sexual assault case, wait, except once where only the relevant portions were admitted to rebut recent fabrication." Another states,

> *judges are reluctant to release records to the accused as it's hard to establish relevancy. I see no rape myths at play there. . . judges are very alive to issues of sexual history as well and these lines of questioning are often shut down.*

To end this section on a positive note, one crown commented, "I'm over all impressed by the awareness of the evidentiary law on sexual assault by the judiciary. I see no rape myths."

D. RAPE CULTURE

However, as alluded to above this was not the experience of all crown. Even some crown, like the one making this comment who stated she saw no rape myths at play, reinforced the idea that rape culture and myths do impact the court process in other responses provided during the interview. For instance, this crown believed,

> *the police are the public face of the justice system and it's more important the complainant has a positive experience at this stage. The courtroom process has less of an impact on effecting reporting rapes and shaping societal beliefs about the criminal justice process for sexual assault victims.*

> *Ya, I don't think the courts play much of a role in shaping societal beliefs and perspectives, most people don't go to court, don't read case law, but people interact with police. It's all a very individual process so it may shape an individual but not society or culture.*

Another similarly stated she noticed "no difference between sexual assault cases and other violent crimes," and a third crown didn't believe

> *low reporting and conviction rates are a reflection of myths in the justice system, they're more a reflection of personal decisions and personalities of the victims and other issues that are more individual in nature. . . I don't see crowns supporting rape myths about short skirts or defence counsel doing this probably because judges would shut this down or crown would object for relevancy.*

These examples illustrate how insidious rape culture is, and how the subtleties of it are easily overlooked, even by those knowledgeable of its harms.

Similarly, these examples have a common thread of individualizing instead of contextualizing sexual assault, as well as displacing any blame or error on the part of the criminal justice system to the police. This may be due to the uncomfortably many people experience in thinking about and discussing sexual assault. Many people who work to improve justice and society likely do not want to view themselves as occupying a position which may be negatively impacting the justice process for women accessing justice services,

LOOK AT WHO COMMIT SEXUAL ASSAULTS, OFTEN MEN WITHOUT PRIOR CRIMINAL RECORDS... THE SYSTEM IS FLAWED BY CRIMINAL STANDARDS, ACCUSED RIGHTS AND VICTIMS RIGHTS AREN'T REALLY BALANCED IN THE TRUTH SEEKING PROCESS.

and are thus largely unconscious to the role they play in that regard. For instance, one prosecutor provided the following example,

> *Crowns are sometimes blind to issues of sexual assault in files where that is not the initial charge that is laid. I had a case of domestic violence that went through the hands of three other crowns before I was assigned the case and noticed the sexual assault issue.*

Another crown noted the added difficulties of proving cases when "the complainant is unconscious" and also in cases "where a relationship is present between the accused and the complainant because this leaves more room for misunderstanding and miscommunication." Meaning more potential for rape myths and culture to insidiously impact the interpretation of the events in question. This is likely true, because as one crown notes,

> *look at who commit sexual assaults, often men without prior criminal records... the system is flawed by criminal standards, accused rights and victims rights aren't really balanced in the truth seeking process. Most sexual assaults go to trial, less plea out because of the operation of myths in the system and the likelihood of being acquitted... Society hasn't moved as far as the Supreme Court and Criminal Code say we should have.... like society the criminal bar and judges are no different in thinking that if a woman does 'X' then it equals interest in sex a and mistaken consent is at play... I've rarely even seen taken as a fact that an accused planned to sexually assault*

the woman, even in cases where the woman says she was given drugs or alcohol by the accused because the judge will always question and believe the woman just voluntarily consumed.

Various prosecutors also note,

Judges ask "why didn't she" they don't get fear, gender issues, or that a woman could change her mind and then it becomes rape.

Judges often factor in pre-conduct behavior of victims way too much in determining the outcome of the case. The myth that you'd do something in the moment of assault to stop the assault, also factors into the mistaken consent defence. Similarly, the courts factor post-assault conduct of the victim into decisions way too much and myths about this conduct also effect trial outcomes.

Myths are hard to address in court, they are all the background, rarely are they out in the open to challenge head on and be able to attack. Even the defence lawyers are smart enough to avoid outwardly stating myths.

A lot of judges think they know it all and don't and haven't informed themselves on cycles of abuse, myths, and stereotypes.

Notwithstanding the insidious nature of rape culture, a crown provided an example of a very blatant display of rape culture in the following comments:

The judge is an old white guy who has probably groped someone. Judges and male prosecutors in the office have jokingly said "is that an offence" when cases of sexual groping come up . . . I've seen judges out drinking and groping women. But I have also seen women blackout drunk consenting to things. In these situations it's hard to know what to do, I don't want to prosecute someone who isn't guilty.

This crown went on to explain,

in the past psychology was used in court to support the theory that women and kids seduced their offenders. This belief system and the twin myths are still pervasive in the system because these beliefs are from the era of the members of the judiciary.

E. ENHANCING WOMEN'S EQUALITY IN THE COURTS

One prosecutor feared

> *Sexual assault will become harder to prosecute in the future given how sexualized society has become with more kink culture and younger kids engaging in sex. This leaves women more vulnerable and at risk with a more open sex culture.*

Hopefully this will not be the case, and there are ways in which to improve outcomes for women that can be implemented to increase equality and access to justice. A number of prosecutors shared their thoughts on this topic.

For example, one prosecutor discussed how it is currently seen as inappropriate in law to introduce expert evidence in court regarding the sociological and cultural context of rape to assist the court by explaining why women respond to rape in various ways. This would be viewed as "prejudicial" this crown stated in the case of an adult sexual assault trial because these are topics that are not seen as areas where the court needs assistance or education.

While this crown felt being able to introduce this type of expert evidence would be useful in advancing women's equality rights, she did not feel it would likely come to fruition. She also noted crown cannot lead this evidence because crown are a "neutral officer of the court and not looking out for the interests, advocating, or representing the complainant." Another crown disagreed and felt "there's a void and need to get evidence about the psychological responses of women who are sexually assaulted before the courts." She suggested one way this might be done is

> *to include secondary sources as part of the book of authorities crowns provide to the courts to ensure judges properly understand the social context and women's equality issues at stake in*

sexual assault cases.

Another crown suggested working to provide advocacy to women in the courts by affording them standing and their own legal representation throughout the sexual assault trial, but this sentiment was not shared by all, as many felt this would ultimately impede and complicate the trial process. These crowns felt it was more beneficial to have a support person available throughout the trial for complainants.

A crown commented that it would also be useful for there to be "more discussion among sexual assault responders, service providers, and the criminal justice system" to improve the quality of services women received.

A number of prosecutors felt that changes would really need to "start with the judges." One rhetorically inquired,

what do judges bring to the table and understand about power between men and women? Over time, in sometime, changes to the bench will help change the process, if the Supreme Court has more female justices who are willing to delve into decisions and arguments.

Another commented, "there's a need to change the face of the judiciary which is currently monopolized by old white men, and in the interim judicial training on sexual assault is needed." In a similar regard, one crown noted feeling that more female prosecutors would also lead to improvements as "female crowns do better with this type of prosecution."

A final comment made by a crown was that "society as a whole needs to look at how we teach right and wrong, and respect for women is a must... young girls need to be aware of the perpetuation of myths and stereotypes... children get stuck in cycles of abuse and become sexual victims, we need to teach our young kids."

VIII. CONCLUSION: RETHINKING STRATEGIES AGAINST SEXUALIZED GENDER BASED VIOLENCE

Despite individual convictions for sexual assaults, statistics, case law and interviews with crown prosecutors show that the courts continue to focus on these acts in isolation and ignore the systemic context and consequences of violence against women that maintain the status quo of women's inequality in society and perpetuate a culture of rape. Similarly, notwithstanding the disappearance of sexual violence in policy rhetoric and public discourse which has reframed violence against women into the de-gendered post-feminist rhetoric of victim services, rates of sexual assault show no signs of improvement.[68] How now should the courts and society at large work to ensure the law "lives up to its constitutional obligation of equal protection and equal benefit of the law for women."[69]

A. THE ROLE OF THE CHARTER

It is hopefully clear that the "deep rooted inadequacies of a justice system steeped in social inequality have been virtually unaffected"[70] by the sexual assault law reforms.

One reason for this that has been touched on in this paper, but not yet fully enunciated, is that the living tree doctrine which promotes the *Charter*[71] as a tool that develops and grows with the needs of society has not lived up to this potential, and has fallen short as the equality promoting tool envisaged by the drafters of the *Charter*. Its limits for promoting equality are apparent in the way the *Charter* has been applied to the

criminal law of sexual assault. The inability of the *Charter* to promote women's equality in these cases is likely a result of rape culture which privileges men's right to women, and postfeminist neoliberal ideology in the courts and society that views women as equal to men and does not see women as a social group in need of equality based advocacy that the *Charter* has the potential of promoting. These assumptions of neoliberalism and rape culture have effectively straightjacketed the equality provisions of the *Charter*. Many lawyers and judges feel it would be inappropriate to raise s.15 equality arguments in sexual assault cases, and the *Charter* is inaccessible to the complainants who lack standing as third parties in sexual assault proceedings where their rights are very much at stake.[72]

Instead of seeing equality arguments as inappropriate forms of "hysterical feminism" the courts need to move to a system that uphold the equality based purposes of the sexual assault law reforms and the *Charter*. Section 15 could then be an interpretive tool routinely used by responsible advocates as a conventional way to give meaning to criminal law concepts and balance the rights of accused with female complainants.[73] The *Charter* is "a conscious reconceptualization of Canadian democracy," and the courts role under the *Charter* cannot be anti-democratic.[74] The *Charter* demands active participation by the judiciary in a dialogue with the legislature about how to balance the individual rights of accused and complainants properly, but also how to balance these individual rights with larger societal common purposes like equality.[75] The courts cannot simply remain ignorant and blind to the need to consider actively, discuss and apply an analysis that moves beyond an examination of the accused s.7 rights in the context of sexual assault law.

B. LEGAL REPRESENTATION AND ADVOCACY

One way to shift the socio-legal culture, and make systemic changes that would work to ensure complainant's rights in sexual assault cases were addressed, would be to afford complainants greater legal protection and a stronger legal voice in sexual assault proceedings.

For instance, the United Kingdom recently afforded complainants of sexual assaults the right to appeal charge approval decisions of the Crown.[76] A similar model could be implemented in Canada, so when the Crown decides to drop charges or proceed under a lesser charge, the complainant would be empowered to appeal this decision. This would create a system of more transparency and greater accountability of Crowns use of discretion in situations that so intimately touch on complainants' rights and sense of justice.

Another systemic change would be to allow women to have standing in their own sexual assault trials with their own counsel who work to ensure their rights to equality do not go unheard and unnoticed.[77] This type of a model exists in family and child welfare cases where children, who are otherwise third parties, are provided with standing and legal counsel to represent their wishes and best interests, given how intimately effected children are by the decisions the court will render.

In addition, the system could provide publicly funded counsel to support complainants in appealing sexual assault cases were rape culture bias impacted the use of discretion. Currently, complainants are only allowed to participate with counsel in trial applications where their third party records are being sought, however, this right should be extended to the trial proper given women's concerns with their rights to privacy and equality are present throughout sexual assault trials and not just in the hearings of these third party applications. This would be a time consuming and costly remedy, but ensuring equality and public accountability are of the utmost importance in ensuring the public has faith in the administration of justice and rule of law.

A less costly but potentially effective measure would be to allow Crown counsel to address complainants rights, experiences, and concerns more adequately by calling experts to testify, much in the same way they do in child sexual abuse hearing. These experts could offer evidence to educate the judges and public about rape, systemic discrimination, cycles of violence, women's equality and oppression.[78] Notwithstanding rape culture and neoliberal beliefs, it is clear that judges do not fully understand or appreciate these factors, and decisions continue to be shaped by misassumptions and myths. Judges need support to more fully and correctly understanding the nature of sexual assault and its effect on women who are subject to this crime.

C. PUBLIC ACCOUNTABILITY

"Justice must not only be done; it must be seen to be done by those who have been subjected to criminal violence."[79] In order to ensure greater accountability to the public and complainants of sexual assaults, complainants should be given the right to personally record their own trials if they so desire. Currently many sexual assault trials are heard in provincial courts and the decisions are given orally. There is no public record of these proceedings, and ordering transcripts is costly and inaccessible to many complainants. This was one dilemma faced in studying the past five years of WAVAW client files. Of the 34 complainants whose sexual assaults went to trail, only one decision was publicly reported.

It should be mandatory to report and publish all sexual assault decisions. Decisions that affect the equality rights of groups, like sexual assault decisions for women, should be reported in plain language women can access and understand. The system of publishing decisions must no longer only respond to the limited needs and interests of practicing lawyers, as so doing creates a "gap in women's legal history"[80] and decreases the level of accountability of the judiciary and members of the criminal bar. In order to increase public accountability further, a system for complaint reporting that was overseen by civilians and not members of the justice system could be put into place.[81] This system could be further divided to ensure it appropriately responds to

the needs of all women; seeing as some women like disabled women, racialized women, and Aboriginal women face even greater difficulties having their voices heard and rights respected.

D. SOCIAL CONTEXT EDUCATION

It is likely the system will never support these kinds of changes without changing the social consciousness of members of the judiciary and criminal bar as a prerequisite. In order to combat rape culture, and post-feminist neoliberalism judges need education to help them reflect on the underlying issues present in society that cause inequality and oppression.

Judges need to assess their own underlying assumptions based on the false beliefs upheld by the society they are very much apart of. Judges should be given social context training especially in the areas of "gender equality, racial equality, and Aboriginal justice." This training would help judges challenge traditional and socially reinforced assumptions and would increase their awareness of broader social, economic, cultural, and political contexts within which the courts function.[82] Such training could also be a venue for reinforcing the utility of the *Charter* in criminal law, as a tool for not only understanding and upholding the accused rights, but also understanding how principles of equality and fairness should apply to all people, accused and complainants alike.

It is not only judges who would benefit from such training but all members of the criminal bar. Crown lawyers especially should be receiving training on how to run sexual assault trials and work with complainants of sexual assaults effectively and respectfully.

E. IS EQUALITY A PIPE DREAM?

Christine Boyle raises the question of whether these equality aspirations are realistic in the criminal justice system, which still resorts to the barbarity of incarceration. She finds criminal law is a punative system, based in "punishment, depersonalization, and stigmatization," and argues such a system is "incapable of promoting any equality."[83] It is true that statistics do not show the criminal justice system has been effective in deterring and denouncing crime[84] or improving outcomes for women who have experienced sexualized violence and come into contact with the criminal justice system.

However, this is the system we currently have to work with, and something needs to be done to change the culture and send a clear message to men that rape is unacceptable in a society committed to the true equality of all its citizens.

F. ADEQUATE FUNDING

Government also has a role to play in changing social attitudes and the current cultural climate of the country. For instance, one victim service worker felt that

> *if the government deemed sexual assault services essential services and was committed to adequately funding them, we would be able to do more public education, awareness and affect change, rather than simply putting band-aids on victims. We need an upstream, preventative, pro-active approach but lack the funds to carry this out adequately.*[85]

Government funding needs to be present for groups who continue to be socially marginalized. Democracy is not possible without all voices being equally heard, valued, and respected. Women need social services and supports to be able to escape men's violence and heal from the traumas sexualized violence leaves behind. Many women feel that ensuring women fully recover from sexualized gender based violence is even more important for ensuring their ability to participate in society as fully as possible, than the criminal justice response which has in many ways only proven to be another form of gender based trauma and discrimination for most women. If we as a society are not actively working to fix the criminal justice system and change the culture of rape, then we must fund services to support women who live with the daily reality of violence, oppression, and inequality.

G. CHILDREN'S EDUCATION AND SOCIALIZATION

Perhaps the most important change must come from and begin outside of the justice system entirely. Children are all currently born into a cultural of rape and oppression. We need to start by changing the ways we socialize and raise our children. We need to prioritized the rights of children and show and teach children from a young age that no matter their gender, race, or ability they are all equally deserving of respect, fair treatment, and equal protection and treatment under the law.

Numerous lawyers have commented that the system will change when the judiciary changes, given many members of the judiciary were raised in a different era and culture where violence against women was acceptable. However, if we as a society do not actively work to change the culture and differently educate and socialize of our future generations, it is unlikely that a new generation of judges will effect any kind of systemic change given many of the same beliefs that normalize and encourage violence against women are still ever present in the current cultural reality.

FOOTNOTES

1 Rape culture was a term first used in: Noreen Connell and Casandra Wilson, *Rape: The First Sourcebook for Women* (October 31, 1974) New American Library, p.105

2 *R v Seaboyer*, [1991] 2 SCR 577 at 648-649.

3 K Edward Renner, "Re-conceptualizing Sexual Assault from an Intractable Social Problem to a Manageable Process of Social Change" in D. Kelley and J. Hodgson, *Sexual Violence: Policies, Practices, and Challenges* (Greenwood Publishing: 2002). Melanie Beres, Barbara Crow, & Lise Gotell, "The Perils of Institutionalization in Neoliberal Times: Results of A National Survey of Canadian Sexual Assault and Rape Crisis Centers" in Sheehy, Elizabeth, ed, *Sexual Assault Law, Practice & Activism In a Post-Jane Doe Era Ottawa*: University of Ottawa Press, 2011) preprints online: University of Ottawa <http://www.ruor.uottawa.ca/en/handle/10393/19876>.

4 A great deal of resources are spent, and in a sense wasted, on hospital services providing rape kits, which collect forensic evidence from complainants following a sexual assault, and victim impact statements given it is found that these resources are of very little use to the complainant, if any use at all, in sexual assault cases. Furthermore, in some cases information collected in rape kits and written in victim impact statements can be used to discredit complainants in court. See: Rakhi Ruparelia, "All That Glitters Is Not Gold: The False Promise of Victim Impact Statements" and Jane Doe, "Who Benefits from the Sexual Assault Evidence Kit?" in Sheehy, Elizabeth, ed, *Sexual Assault Law, Practice & Activism In a Post-Jane Doe Era* Ottawa: University of Ottawa Press, 2011) preprints online: University of Ottawa <http://www.ruor.uottawa.ca/en/handle/10393/19876>.

5 Dorothy Chunn, Susan Boyd & Hester Lessard, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007); LEAF, *Submissions of: Women's Legal Education and Action Fund to The legislative Committee of Parliament on Bill C-49, An Act Respecting Sexual Assault* (May 1992) online: <www.leaf.ca/legal/submissions/1992-billc49.pdf>; Jeniffer Koshan,"Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*" (2002-2003) 40 Alta L Rev 655 at 657.

6 A Voice for Men, *AVfM Radio: Her body, her choice* (November 15, 2012) online: <http://www.avoiceformen.com/a-voice-for-men/avfm-radio/avfm-radio-her-body-herchoice/>

7 Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Sheehy, Elizabeth, ed, *Sexual Assault Law, Practice & Activism In a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2011) preprints online: University of Ottawa <http://www.ruor.uottawa.ca/en/handle/10393/19876>; Anna Paletta, *Understanding Family Violence and Sexual Assault in the Territories, First Nations, Inuit and Metis Peoples*" (2008) online: Department of Justice Canada; Statistics Canada, *Criminal Victimization in Canada* (2004) online: <http://www5.statcan.gc.ca/access_acces/alternative_alternatif.action?l=eng&loc=http://www.statcan.gc.ca/pub/85-002-x/85-002x2005007eng.pdf&t=Criminal%20victimization%20in%20Canada,%202004>; Statistics Canada, *Criminal Victimization in Canada* (2009) online: http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11340-eng.htm; Statistics Canada, *Sexual Assault in Canada 2004 and 2007* (2008) online: <http://www.statcan.gc.ca/pub/85f0033m2008019-eng.htm>.

8 Many thanks to Pakka Liu at WAVAW for creating and sharing the statistics and pyramid image.

9 Elizabeth Sheehy, "The Victories of Jane Doe," at 1, in Sheehy, Elizabeth, ed, *Sexual Assault Law, Practice & Activism In a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2011) preprints online: University of Ottawa <http://www.ruor.uottawa.ca/en/handle/10393/19876>

10 Melissa McEwan, *Rape Culture 101* (October 9, 2009) online: <http://shakesville.com/2009/10/rape-clture-101.>

11 Emillie Buchwald, Transforming a Rape Culture (Milkweed Editions: 2005)

12 *Ibid*

13 *Supra* note 8

14 *Ibid*

15 Ummni Khan "Putting a Dominatrix in Her Place: The Representation and Regulation of Female Dom/ Male Sub Sexuality" (2009) 21 CJWL 143; *R v Butler,* [1992] 1 SCR 452; s.163 of the *Criminal Code; Little Sisters Book & Art Emporium v Canada* (Minister of Justice), 2000 SCC 62; Pat Califia, *Public Sex: The Culture of Radical Sex*, 2d ed (San Francisco: Cleis Press, 2000)

16 Christine Boyle, "Sexual Assault in Abusive Relationships: Common Sense About Sexual History" (1996) 19 Dalhousie LJ 223; Melanie Randall, "Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest but Mistaken Judicial Beliefs" (2006-2008) 32 Man L J 144.

17 Mary Ann Carter, "Unmasking Rape Culture in Sexual Assault Judgments: An Analysis of the Ewanchuk and J.A. Decisions" (Paper delivered at the FREDA National Research Day Conference, 9 November 2012), [unpublished]; Elizabeth Sheehy, "Judges and Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Sheehy, Elizabeth, ed, S*exual Assault Law, Practice & Activism In a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2011) preprints online: University of Ottawa <http://www.ruor.uottawa.ca/en/handle/10393/19876> at 5.

18 Claire L'Heureux-Dube, "Beyond the myths: Equality, Impartiality, & Justice" (2001) 10 J.Social Distress & Homeless 1, at 89-90.

19 Ruparelia, *Supra* note 3 at 11.

20 Sheehy, *Supra* note 15.

21 Beres, *Supra* note 2.

22 Kwong-Leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) International Journal of Offender Therapy and Comparative Criminology 42(3) p. 258-270

23 *Supra* note 1; *Criminal Code*, supra note 30 at s.277.

24 *Supra* note 20.

25 *Criminal Code Canada* Rev. Stat. Ch C34, ss. 143, 144, 145, 149 (1970) [repealed] to establish rape the Crown must prove the male accused vaginally penetrated the victim with his penis without consent. This is a very sex and gender specific definition of the offence. If this was not established the accused could only be charged with a less serious offence of attempted rape or indecency.

26 Sexual assault is now found in the *Criminal Code* as sexual assault *simplicitor* (s.271)"level I", sexual assault with a weapon, causing bodily harm, with another person, or threats to a third party (s.272) "level II", and aggravated sexual assault where the complainant is maimed, seriously wounded, or disfigured (s.273) "level III"; Christine Boyle, "Sexual Assault and the Feminist Judge" (1986) 1 Can J Women & L 93, at 95. Boyle notes there were a number of evidentiary rules associated with the repealed criminal classification of rape that were based on the assumption that women who reported rape were "lying or fantasizing," such as the need for corroboration and extensive questioning about complainants sex lives and elaborate details of the sexual attack in question.

27 Sexual assault is now any kind of sexual touching with out consent, so for instance forced oral or anal sex is now sexual assault. In the past these activities did not constitute rape.

28 *Supra* note 20; LEAF, Supra note 4; Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effect of *R v JA*," CJWL [forthcoming in 2012];

29 Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" at 5. Johnson notes in 2007 98% of sexual assaults were prosecuted as level 1 sexual assault (s.271 of the *Code*), and this number was up from 1983 statistics of 88% of sexual assaults being

prosecuted at this level.

30 Christine Boyle, "Disembodied Sexual Assault: McCraw v R" (1992) 26 U Brit Colum L Rev 28.

31 Boyle, *Supra* note 14; Gotell, *Supra* note 26; Randall, *Supra* note 14; Lucinda Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault" (2004) 42 Osgoode Hall LJ 625

32 *Criminal Code Canada* RSC 1985, c. C-46, s.273.1, 273.2, were amendments to the *Code* made in 1992 that defined consent, when no consent can be obtained, and that a defense of mistaken belief in consent must be both reasonable and honestly held in the context of a sexual assault. To prove sexual assault a Crown must show that a sexual touch was applied to another person without their consent. The Supreme Court in *R v Ewanchuk*, [1999] 1 SCR 330, affirmed these consent provisions and asserted there is no implied consent, as the trial judge had erroneously found. However, it is worth noting this case is not a total success. Major J. speaking for the majority failed to discuss the need for the accused to take 'reasonable steps' to ascertain consent for the defense of mistaken belief in consent to operate. This has left this defense open to misapplication and misinterpretation in the lower courts. Further it is only in the concurring opinions, delivered by Madam Justice McLachlin and Madam Justice L'Heurex-Dube, that violence against women and the trouble with myths and stereotypes regarding women who are sexually assaulted are mentioned and contextualized as a pervasive problem in Canada. L'Heurex-Dube is critical of the majority decision for not going far enough in discussing when consent should be vitiated, she finds that consent is vitiated when the complainant is silent or passive (ie. not communicating affirmative consent as required in law). Most recently the Supreme Court in R v A (J) , 2011 SCC 28 [JA], reaffirmed these provisions. Yet again this decision encapsulates to many of the same shortcomings discussed in regards to the decision provided in *Ewanchuk*.

33 *Supra* note 1. Seayboyer was a Supreme Court Decision that challenged the credibility of the "rape shield" provisions of the *Criminal Code*; s.276 and 277. Bill C-49 was passed in August 1992 and introduced provisions that limited the admissibility of sexual history information of the complainants in sexual assault trials. The Supreme Court found these provisions met constitutional muster more recently in *R v Darrach*, 2000 SCC 46. Bill C-49, An Act to amend the *Criminal Code* (prohibiting the admission of sexual history evidence), c.38, Ss.276, 276.1, 276.2 (August 1992) online: <http://www.parl.gc.ca/HousePublications/Publicationaspx?DocId=2329533&Language=E&Mode=1&File=16>

34 *Criminal Code, Supra* note 30 at s.274

35 LEAF, *Supra* note 5 at 3-4.

36 Bill C-46, An Act to amend the *Criminal Code* (production of records in sexual offence proceedings), 2d Sess., 35th Parl. 1997 (assented to 25 April 1997), S.C. 1997, c.30 (Bill C-46) online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2329533&Language=E&Mode=1&File=16> In the early 1990s the women's movement drew attention to the increasing number of requests for complainants third party records in sexual assault trials; noting they were requested for the primary purpose of invading the complainants privacy and challenging her credibility and reliability. Parliament enacted Bill C-46 in 1997 as a response to consultations with women's groups and after the Supreme Court decision in R v O'Connor, [1995] 4 SCR 411. In this decision the majority neglected to consider the importance of balancing the accused *Charter* rights with those of the complainants in the context of sexual assault records disclosure. The dissenting opinion of O'Connor became the basis for this law reform.

37 *R v Mills*, [1999] 3 SCR 668 at para48.

38 Bill C-46 *supra* note 34.
39 *R v Osolin*, [1993] 4 SCR 595

40 Terry Hoople, "Conflicting Visions: SM, Feminism, and the Law-A Problem of Representation" (1996) 11 Can. J.L. & Soc. 177.

41 *Supra* note 20 at 266.

42 *Ewanchuk*, *supra* note 30, Mills, *supra* note 35, *JA supra* note 30.

43 *Ewanchuk supra* note 30 ; *JA supra* note 30; Sheehy, *supra* note 15; Randall, *Supra* note 14; Benedet, Janine, "The Sexual Assault of Intoxicated Women" in Sheehy, Elizabeth, ed, *Sexual Assault Law, Practice & Activism In a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2011) preprints online: University of Ottawa <http://www.ruor.uottawa.ca/en/handle/10393/19876> ; Boyle, Christine, "Reasonable doubt in credibility contests: sexual assault and sexual equality" (2009) 13 Int'l J Evidence & Proof 269;

44 Vandervort, *Supra* note 29 at 7; Sheehy, *Ibid* at 7.

45 Boyle, *Supra* note 4.

46 Robin Ruth Lindon et. al, eds, *Against Sadomasochism: A Radical Feminist Analysis* (San Francisco: Frog In The Well, 1982).

47 *Ibid*

48 Neoliberalism has come to have a variety of meanings. In the context of this discussion neoliberalism refers to a state of law and social culture that is based on protecting the private sphere and free market economy through creating general laws and cultural norms that perpetuate the believe that we, as individuals, are all equal and are all responsible for our own destinies. People are not viewed as unique beings, differently affected by discrimination and privilege, but are understood to all share the same general characteristics. Similarly, post-feminism means different things to different people. Here, it is a reference to the current cultural state that believes the goals of the feminist movement (ie. the struggle for equality) have been achieved, and that women no longer need feminism and should thus distance themselves from a feminist identity. Postfeminist rhetoric clearly came about as a result of neoliberal backlash to the feminist movement. Post-feminists still relate to the feminist movement of the past, but largely feel this struggle is behind women and do not fully relate to the term feminism or the women's movement any longer. The emergence of post-feminism in a neoliberal context has equated to a lost focus on feminism, women's equality and the collapse of a unified women's movement in general. Feminism, as understood by this author is "an awareness of the political and social implications of sex and discrimination within society. It is an understanding that the discrimination facing women is not just a concern about equality among individuals but is systemic. Feminism is a political commitment to changing the systemic force and values inherent in patriarchy." See: Richard Devlin citing Christine Boyle in "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001-2002) 27 Queen's LJ 161 at 184 citing Christine Boyle.

49 Gotell, *Supra* note 26 at 21

50 Benedet, *Supra* note 73.

51 *Ibid* at 4.

52 JA, *Supra* note 56 at para 12.

53 Gotell, *Supra* note 26 at 4

54 *Ibid* at 6

55 *Ibid* at 7.

56 *Ibid* at 8.

57 Beres, *Supra* note 2.

58 *Supra* note 61. Boyle discusses how the concept of disembodied sexual assault helps to make visible the invisible link between sexual assault and pornography, which is not one some consider to be obvious. The same argument can be made in relation to sexual assault and sadomasochistic sexual practices that work to degrade and dehumanize women. These disembodied practices place women in positions to be easily subjected to male sexual objectivity and aggression, and viewed and treated as second-class citizens.

59 *Ibid* at 291.

60 Jodie Van Dieen, "*O'Connor* and *Bill* C-46: Differences in Approach" (1997-1998) 23 Queen's LJ 1; Koshan, *Supra* note 4; Gotell, Lise, "The Ideal Victim, The Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of The *Charter* for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 251; Gotell, Lise, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2005-2006) 43 Alta L Rev 743

61 "When Privacy is Not Enough" *Ibid*

62 *Ewanchuk*, *Supra* note 30.

63 Susan Chapman, "Section 276 of the *Criminal Code* and the Admissibility of "Sexual Activity" Evidence" (1999-2000) 25 Queen's LJ 121

64 Boyle, *Supra* note 14.

65 *Ibid*; Benedet, *Supra* note 42; Randall, *Supra* note 14; *Criminal Code* supra note 30 at s.274; John McInnes, and Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 U Brit Colum L Rev 341.

66 *R v W*(D), [1991] 1 SCR 742; Boyle, *Supra* note 42.

67 Parliament of Canada, *Bill C-10* (May 29, 2007) online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=2980100&file=>; Elizabeth Sheehy, "We Fought the Law-Did the Law Win?" (Paper delivered at the FREDA National Research Day Conference, 8 November 2012) [unpublished].

68 Around the time of the sexual assault law reforms, when feminist backlash increased, the government stopped funding rape crisis centers and other gender specific supports for women who have experienced violence, and moved to a generalist victim service model. This system has not proven to be as effect for responding to the specialized needs of female survivors of sexual assault who come into contact with the justice system, and has also worked to dismantle and undermine unified responses to sexualized violence against women that focus on improving women's equality. See: Ruparelia, supra note 3; Beres, *supra* note 2.

69 *Supra* note 7.

70 McInness, *Supra* note 50 at 341.

71 *The Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 at s.7 & s. 15. [*Charter*]. Section 7 provides for the legal right to life, liberty, and security of person when dealing with the criminal justice system; while section 15 is the equality right to equal treatment before and under the law, and equal protection and benefit of the law without discrimination.

72 McInnes, *Supra* note 50 at 342

73 *Ibid* ; LEAF, *Supra* note 4.
74 Christopher Manfredi and James Kelly, "Dialogue, Deference, and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask L Rev 323, at 324.

75 *Ibid*.

76 BBC news UK, *Victims to get right to challenge 'no charge' decisions* (July 27, 2012) online: http://www.bbc.co.uk/news/uk-19008958

77 *Supra* note 7

78 *Ibid* at 8

79 *Ibid* at 3.

80 *Ibid*.

81 *Ibid* at 12.

82 Devlin, *Supra* note 100.

83 *Supra* note 115 at 348.

84 For example, the accused in *Ewanchuk* has committed numerous sexual offences for which he was sentenced to periods of incarceration. In 2007, after his last sexual offence, he was deemed a long-term offender.

85 Beres, *Supra* note 2 at 159

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