

Societal Perceptions of Sexual  
Assault: Effects on the Judicial  
System

Laws in society play an integral role in providing social order, however they also exist in an interdependent and mutual affinity within a social structure. Legislation has controlling influences over society; conversely, society influences its laws based on the moral values of the collective conscience (Comack and Brickey 17). As discussed in *The Social Basis of Law*, "...law is merely the institutional expression of the norms and values of the majority." and a breach of these codes reflects behavior that goes against norms and values that are deemed acceptable (Comack and Brickey 18). One of the designations of the criminal justice system is to produce a sentence that is reasonable, based on the severity of the offence, the nature of the offender, as well as the impact on the victim. This paper will examine how cognitive biases, rape mythology, and the existence of ambiguous definitions of sexual assault affects a judge's decision-making process when sentencing male offenders who victimize females. Discussion will also include societal efforts to challenge the status quo in rape mythology that perpetuates women's inequality which has repercussions on impartiality within the judicial process. In the case of sexual assault, this process may be challenging to accomplish due to the range in severity of the crime from sexual fondling to violence-based assault with sexual intent. To define the social construct of sexual assault is arduous, potentially due to the value-based, individualized perspective of what constitutes sexual assault, the substantial breach of intimacy and the demoralization of the victim. Moreover, sexual assault naturally fosters inconsistent definitions due to the singular experiences and social contexts of decision-makers within a society.

Due to the many complexities of this topic, when we discuss gender role stereotypes, we will focus the subject matter on heterosexual men and women. Since a large majority of sexual assault cases involve men as perpetrators and women as victims, the discussion will be restricted to these offenses. In the Juristat Article, *Self-Reported Sexual Assault in Canada*, 2014, the

majority of those accused of perpetrating sexual assaults were men under the age of 35. Additional stats indicate nearly half (47%) of sexual assaults were committed against women, 15-24 years old (Conroy and Cotter 3). In comment about the restrictive age range, it would be feasible to assume that if the range was enlarged, the percentage of victims would, in fact escalate. It is also important to make note that the number of sexual assaults with women victims only includes those that are reported. This number would increase should there be consideration for those that go unreported. The scope of this paper will only consider the aforementioned subject matter. Although women make up a large percentage of sexual assault victims, it is essential to mention marginalized groups such as the LGBTQ community. Canadians who identify as homosexual and bisexual experience a risk of being sexually assaulted 6 times higher than a heterosexual individual (Conroy and Cotter 8). Research in this area is undeveloped which is a rationale for focussing on heterosexual victims for the purpose of this paper.

Socialization and language transmit cultural assumptions about men, women, violence and sexuality, which all contribute to a rape-supportive belief system (Morris 179). Sexual assault is inaccurately labelled as an offense motivated by sexual desire when in reality, it is about power assertion through the use of force or violence utilizing a sexual act. This naturally fosters confusion among society as to what constitutes sexual assault and contributes to the ambiguity towards the definition of this crime (Coates et al. 190). So much so that, "...victims may not realize that they have actually experienced legally defined rape or sexual assault..." depending on the context in which the offense was committed (Antonia 43). The words that are then chosen to describe the assault become even more critical as it frames people's judgments and beliefs about what allegedly occurred, contributes to the under-reporting of sexual assault and the significant victim blaming that occurs as a result.

To further complicate the issue, stereotypic beliefs place men in sexually dominant roles, in contrast, the female's response is to submissively refuse the advances of men. Gender role stereotypes such as women needing to control their sexual urges, men viewing women as sexual objects, and sexual coercion seen as normal and acceptable, fuel the victims' sense of self-blame, guilt, and embarrassment (Frese 144). This in turn, causes the victim to not report the assault to authorities for fear of being discredited and facing blame for the assault. The intensity of the belief an individual holds about rape myth stereotypes, termed "rape myth acceptance" (RMA), largely influences societal perceptions about sexual assault. RMA is conceptualized as the stereotypic ideas about rape including, but not limited to, women falsely accusing men, rape is not harmful, and women deserve rape because of inappropriate or risky behavior (Frese 145). These appear to be longstanding myths that one would hope, if given the opportunity to evaluate on a logical level, would find that there is no sound rational behind them.

However, Frese et al. observed in studies that, "... the more stereotypic ideas an individual has about gender roles or rape, the less likely he or she is to interpret forced sexual intercourse as rape and the more likely it is they blame the victim and justify the assailant's behavior." (145). In this case, it is the stereotypic lens in which the individual perceives the situation that seems to define its "reality" and the consequences of such. In relation to reporting of sexual assault, it was found that individuals who have high RMA would attribute more responsibility to the victim, estimate victim trauma as less severe and less likely to recommend police reporting of the assault (Frese 153-154). In essence, this indicates that stereotypic views create a negative outlook on the parameters and the experience of rape.

Furthermore, additional factors related to the assault that impacts victims reporting is the level of violence associated with the assault and the victim-perpetrator relationship. The amount

of force used is positively correlated with victims deciding to report the assault to authorities. This is due in part to the increased amount of physical evidence available such as bruising, lacerations, abrasions, internal injuries, and/or fractures caused by the assailant, which in turn gives the victim the credence that authorities will postulate the accusation and conduct an investigation (Du Mont et al. 478). A study conducted in Vancouver, Canada in 2000 found that "...women with documented injuries were twice as likely to report to the police." (Du Mont et al. 478). The victim-perpetrator relationship additionally affects the reporting of sexual assault in that stranger rape is more likely to be reported to police when compared to acquaintance rape (Frese 153). It can be ascertained that in an assault involving strangers, it is plausible that more significant force might be used in comparison to levels of violence used in cases involving acquaintances. Also, if the assailant is known to the victim, individuals are more likely to attribute blame to victims and minimize the seriousness of the sexual assault (McCormick et al. 414). In addressing the above issues, it is imperative to take into consideration how the application of these issues relate to perceptions of the individual judges presiding over a trial and sentencing of a sexual assault.

The judicial system including trial judges are influenced by the collective conscience of society but also play a major role in forming the collective conscience. In the Canadian Encyclopedia, judge's roles are described as, "...public officers appointed to preside in a court of justice, to interpret and apply the laws of Canada." (Gall 1). It is vital for effectiveness of the judiciary system that judges "...must serve as impartial arbiter[s]." (Gall 3). As such, research has indicated that stereotypes, expectations and self-fulfilling prophecies unconsciously play an integral part in analysis of fact and evidence when determining a sentence. When presiding over a sexual assault case, preconceived notions about a situation or person could impact the interpretation of information presented in court. The information presented will often be altered

by what fits the judge's hypotheses or minimizes the facts that contradict their preconceived schemas relating to sexual assault (Antonia 48). Given the fact that judges are also members of society, they are not immune to developing their own biases which are socialized through a lifetime of experiences despite their education and chosen profession. With this taken into consideration, it is important to understand that, "Perceptions can certainly influence judicial decision making, given that judges are also subject to cognitive and social influences." (McCormack et al. 418).

Judges and their sentencing decisions can be strongly influenced by previously identified factors such as RMA, victim-perpetrator relationship, and level of violence. Judges are placed in such a role where, trial evidence must filter through individualized schemas resulting in inconsistent application of the law where many sexual assault decisions are permeated by myths and stereotypes that uphold the confusion around unwanted sexual intrusions (Gotell 871). We can extrapolate from this circumstance that, similar to individual frameworks, judges would also be impacted by the values and beliefs of the collective conscience. Obviously, judges are not above the potential effects of RMA which can play a prominent role in their sentencing decision. Even when RMA is low within an individual, they still express skepticism regarding the victims' responsibility where the victim was intoxicated and dressed in a tantalizing way (Frese 156). This surprising conclusion uncovers that even with the absence of stereotypic ideas about sexual assault, a person is not impervious to the influence of situational factors. Frese et al. found that the gender of the judge does not come into consideration when deciding whether the mitigating circumstances would be considered sexual assault but more heavily relies on his or her own perception of sexual assault (157). Ambiguity in a sexual assault trial is present when there is not enough direct evidence, when the evidence doesn't support the "traditional" definition of a sexual assault and when there is a need to rely on indirect evidence which is defined by the judge. An example of

indirect evidence would be in the case of a “gang rape” where the judge would ascertain from the fact that it is not typical for an individual to have unprotected sex with multiple partners at the same time, therefore concluding consent was not given. When there is ambiguity in the facts presented in sexual assault cases, cognitive biases often become tools of influence on the perception of evidence.

Often when the sexual assault is committed by a person who is known to the victim, it is less likely that it will be reported to the police and therefore not make it to court. Bradmiller and Walters found that “...offenders who are related to their victims were charged with less serious offences than those who were unrelated.” (McCormick et al. 414) With regards to acquaintance rape, mitigating factors, such as drinking, lack of resistance, or provocative dressing, have the ability to reinforce the already perceived ambiguity of sexual assault (Frese 146). The differential perceptions of individual judges may also be caused by the type of relationship that is held between victim and perpetrator. If the sexual assault was committed by an acquaintance then the crime is “...less likely to result in the perpetrator’s arrest, prosecution, and conviction.” (McCormick 418). The victim-offender relationship is influential of sentence length which again brings attention to the differences that are perceived in a sexual assault by the judges (McCormick 418).

The severity of violent crime is generally gauged by obvious somatic injury and sexual assault is no outlier. Dubiety in whether a sexual assault has occurred is created by the amount of force that may or may not have been used. Du Mont et al. concluded that there is a significant relationship between the presence of mild, moderate, or severe injury and the laying of charges, sentence length as well as positive correlation between the need to report an offense to the police and the amount of bodily harm inflicted (478-479; McCormick et al. 418). One could infer that since a limited amount of sexual assaults make it to court, a judge is going to be more prone to

look at direct evidence as being more conclusive when determining a sentence. This evidence taints the types of cases that arrive in a court of law, therefore judges will more likely look for unequivocal facts as they sit before a trial.

A judge, by necessity, must stay impartial which is traditionally one of the most basic and fundamental qualities they need to possess. Nightingale proposes “This is required to maintain public trust in the judiciary and the justice system, and to protect individual litigants who appear before a court.” (79). However, as plainly as it has been stated, there are implicit challenges on a practical level. Comack states that cultural mythologies about rape are reflected in judicial decisions which continues to raise issues regarding sentencing (234). Recent historical Canadian cases involving sexual assault have been thrust into the spotlight because of cognitive biases and traditional rape mythologies seeping through judges’ sentencing remarks causing much controversy. Cognitive biases are communicated as well through the vocabulary chosen by judges when describing the components of a given sexual assault trial. In *Anomalous Language in Sexual Assault Trial Judgments*, the authors reviewed a number of court cases for the type of vocabulary that was utilized in describing a sexual assault. The term ‘intercourse’ is often used by judges to describe sexual assault which in fact mollifies the offense. The vocabulary that a judge uses needs to be equivalent to the level of severity of the assault whether there is explicit violence evidenced or not.

Court of Queen’s Bench Justice Robert Dewar, sparked controversy in 2011 while overseeing a sexual assault case involving a victim, forced to have sex in the woods along a dark highway. He referenced the accused Manitoba man as a “clumsy Don Juan” and stated that when the accused met the victim outside of a bar, they were under “inviting circumstances” (Manitoba Judge Rebuked, CBC). Justice Dewar conveyed gender role stereotypes when he “...pointed out



the victim and her friend were dressed in tube tops, no bras, and high heels and noted they were wearing plenty of makeup.” (Manitoba Judge Rebuked, CBC). This is a direct example of the notion that rape mythologies are present in individual judge’s schemas and that gender role stereotypes are a liable threat to impartiality of the justice system in Canada.

Federal Court Justice Robin Camp also faced criticism for his comments made in a 2014 trial of a sexual assault case where a homeless youth was accused of raping a homeless 19-year old woman in a bathroom (Fine, “Robin Camp Transcript”). Justice Camp’s comments consisted of him questioning the victim, “why couldn’t you just keep your knees together?” and “why didn’t you just sink your bottom down into the basin so he couldn’t penetrate you?” (Fine, “Robin Camp Transcript”). This demonstrates the very narrow lens in which this particular judge viewed the victim and conformed to rape mythologies.

In yet another case, Provincial Court Justice Michael Savaryn’s acquittance in 2016 of a 15 year-old boy who sexually assaulted a 15 year-old girl in a high school hallway, garnered attention from the public. Justice Savaryn ruled that the young girl had not clearly expressed objection to the assailant even though the incident was caught on video where she explicitly indicated non-consent. (Fine “Another Alberta Judge”). Given the fact that consent was not articulated, it is surprising that the judge came to the conclusion that he did. This could be attributed to the evidence presented being suffused through out-dated and stereotypic biases.

With respect to sexual assaults that occur in intimate relationships, a 2017 decision by Ontario Provincial Court Justice Robert J. Smith acquitted a husband on a technicality of not acquiring consent before having sexual contact with his wife. Justice Smith found that “...“the accused probably had sex with his wife multiple times without her specific consent, as both he and she believed that he had to right to do so.””(Koshan). Regardless of the victim-perpetrator

relationship, clear words and actions need to be expressed and should be required by judges before consent can be considered official. Judges should also be, "...placing onus on those who initiate sexual contact to secure agreement." (Gotell 872). Males are often assumed be the ones to initiate sexual contact, as part of socially defined gender roles, which in turn requires them to take responsibility gaining consent before any sexual exchange. In *Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases* by Nightingale it is argued that "...every judge will consider an issue in accordance with his or her own values, assumptions, and experiences."(80). In identifying such, judges need to be cognizant of their own cultural and individual biases that modify the way in which they view cases presented before them therefore "...the ideal of "impartiality" is virtually impossible." (Nightingale 80).

Over the past four decades, issues regarding sexual violence have developed into a political and societal movement with women's groups at the forefront. There has been concerted effort in lobbying the government for changes which has resulted in legislative amendments of the Canadian Criminal Code in 1983, 1985, 1992, and 1995. (Comack 234). This was in an effort to broaden the definition of offenses that would fall under ones previously termed as rape, attempted rape, and indecent assault. These efforts were in hope of impacting the rate of reporting of sexual assault although "...results from studies evaluating their effectiveness have been mixed."(Du Mont et al. 468). There is great cost to women as well as to society when sexual assault goes unreported. Sexual assault that is not disclosed to authorities poses a risk to public safety because offenders who go without punishment continue to act as regular citizens in the community and may victimize again.

Movements that promote the reporting of sexual assault decrease the chances of "...repeat victimization through the potential apprehension, punishment, and rehabilitation of the

offender...”(Du Mont et al. 467). Such public awareness campaigns that shine a light on issues such as the definition of consent and sexual violence, how to treat victims, and what resources are available, promote reporting of such crimes. Some of the resources that are available for victims would include crisis centers, victim assistant programs, hospital-based sexual assault care and treatment programs (Du Mont et al. 467). Recently, a massive international movement known as #MeToo, has created a wave of disclosures of sexual violence that people endured in their lives. Previously there was fear of shame, retaliation and retribution, (Manikonda at el. 1) whereas now social media platforms provide a means to share adversities while retaining anonymity allows victims to be able to connect with others who have similar experiences. The #MeToo movement has continued to garner attention and bring focus to sexual violence on a global scale. High profile cases involving many celebrities coming forward and sharing their stories has arguably been the major factor in creating awareness around the world. On a smaller scale, there has been grassroots movements such as #IBelieveYou which advocates for individuals to believe survivors of sexual abuse and to respond in a supportive manner which intends to increase the reporting rate of sexual assault. Both of these examples serve as tools to change societal views towards sexual violence and stereotypes, and dissipate the sense of blame and embarrassment that often surrounds the victim.

There has also been efforts to change the judicial system in response to sexual violence norms and the ways that they address sexual assault cases. One such example that was addressed by Alison Gray who is a lawyer from the Women’s Legal Education and Action Fund stated that “...judges should also be educating themselves on issues outside their own life experience.” (4 Alberta Judges under Scrutiny, CBC). In the Huffington Post article, *Canadian Judges Can Now Take Steps To Better Understand Sexual Assault*, Johanna Laporte is quoted as saying “...Canada

has "extensive" training for judges on a range of issues and the website is intended to inform Canadians of how judges keep up to date with the law and social context." (Dickson). Another area for consideration is the discourse used to present evidence as well as summary comments in a court of law. Judges needed to be cognizant of the words they choose and the implicit meaning that is expressed in their use to describe sexual assaults. As stated earlier, words such as 'intercourse' is often used to describe rape when the terms are really antonyms of each other, similar to "...describing someone's punching another as 'mutual touching' or 'caressing'." (Coates et al. 193). Language is a powerful manifestation of culture through which change can be initiated both in our social context as well as the judicial institutions. Over and above educational and prevention efforts that focus on changing beliefs and perceptions of sexual violence for victims, additional attempts need to also focus on abolishing rape mythologies and gender role stereotyping as well as factors that remain ambiguous in sexual assault cases.

Many issues have yet to be addressed with respect to modernizing society's primitive conscience surrounding rape mythology and stereotypes. Sexual assault remains a categorically complex issue, both socially and legally. Considering the reciprocal influences between society and law, it will require gargantuan amounts of effort to revise society in order to create an impetus so that law will also be transformed. Unfortunately, the existence of skewed perceptions of sexual assault is perpetuated in our cultural context, manifested by legal agents in judiciary institutions who protract rape mythology and stereotypes through their judgments. Social movements are being cultivated using social media as a platform to induce alterations in the social discourse regarding rape mythology which has been entrenched within the collective conscience for decades. There are minute exertions being made to impact the judicial system and their representation of sexual

assault though, there is much more to be done; however, efforts have begun and as long as people continue to challenge the status quo, we have hope for the future.

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