MASTER OF PROFESSIONAL COMMUNICATION

MAJOR RESEARCH PAPER

(DE)CONSTRUCTING THE "PERFECT RAPE VICTIM": AN ANALYSIS OF SEXUAL ASSAULT AND SURVIVOR DISCOURSES IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

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Abstract

The Canadian criminal justice system has seen many progressive changes to the way sexual assault cases are investigated and prosecuted over the past several decades. From the acknowledgement of spousal rape to the introduction of rape shield provisions, the law has seemingly changed to broaden the definition of what is considered a sexual assault. However, sexually-based offences are still vastly underreported and have the lowest attrition rates of indictable offences. Larger societal discourses around sexual assault and survivor-hood consist largely of rape myths, such as the idea that "real rape" only occurs when an "undeserving" woman is sexually assaulted by a "stranger in the dark." These discourses permeate the Canadian criminal justice system, negatively influencing the experience of survivors who do not fit the narrow mould "real rape." Drawing from Norman Fairclough's Critical Discourse Analysis and Stuart Hall's Discursive Approach, this Major Research Paper traces the effects of these discourses on constructions of sexual assault and survivor-hood in the legal system. Through a theoretical analysis of existing literature on the experiences of sexual assault survivors, this paper also examines the ways in which the language we use to describe sexual assault serves to cement rape myths and invalidate survivor experiences in every stage of the Canadian criminal justice system.

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Lastly, to my parents—thank you for everything.

Dedication

I dedicate this Major Research Paper to the survivors of sexual assault across the country, whose courage inspires me every single day. Whether you have told a handful of loved ones, or no one at all, or stood in open court and confronted your assaulter, your bravery is commendable. And to the bright souls we have lost to sexual violence, I am sorry our systems failed you—you deserved better.

This is dedicated to every single one of you.

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Introduction

In 2017, *The Globe and Mail* published a scathing investigative piece on the number of sexual assault cases that were deemed "unfounded" by local police forces (Doolittle, 2017). Labelling a case "unfounded" meant police were closing a case based on the conclusion that "a crime was neither attempted, nor occurred" (Doolittle, 2017, para. 16). *The Globe and Mail* reported that police jurisdictions across Canada designated one in five sexual assault reports across Canada as "unfounded," effectively deeming the sexual assault accusations baseless and not substantial enough to justify a follow up. Public reaction to this piece was rage, but not disbelief—there is a shared belief among survivors and the general public that only very specific cases get taken seriously by police forces, and survivors who do not fit that mould will be shamed, blamed, judged, and their accusations will be deemed "unfounded" (Johnson, 2017). If cases are taken seriously by police, then the likely outcome is still shame and blame, but in court and in the media rather than at a police station. This Major Research Paper will examine how discursive constructions of consent and sexual violence influence sexual assault cases in the Canadian legal system. This research will focus on the way language can validate or invalidate a survivor's experiences. It will explore the schemas that members of the legal system (e.g. police, lawyers, trial judges, etc.) rely on to comprehend, codify, and construct cases of sexual assault. Drawing from existing feminist, legal, and critical discourse literature, it will discuss the changing landscape of sexual assault cases through analysis of existing literature and the ways in which the discourse and language must change for the legal process to be survivor-centric.

An important consideration in examining the legal process related to sexual assault is that the definition of sexual assault varies across time and legal jurisdictions. In Canada, legal reforms to the law of rape, more recently termed sexual assault, have "shifted [the principles of the law]

from protecting men's proprietary interests in women's bodies, to promoting the sexual autonomy of both partners" (Phillips, 2017). At the crux of sexual assault law are definitions of consent, which have also developed over time since their introduction. Changes to Criminal Code of Canada and influential case law over the past twenty years have seen the acknowledgement of spousal rape, the introduction of rape shield provisions, and the shift to gender-neutral statutory language (Phillips, 2017). The changes in legal language and protections provided by the law coincide with changes in societal opinion, but have also been met with criticism when the laws were more progressive than the public discourse.

For example, the use, efficacy, and constitutionality of rape shield provisions in Canada have been debated since their introduction. The purpose of rape shield provisions was to "restrict the admissibility and use of sexual history and reputation evidence" (Phillips, 2017, p. 1145), but the initial provisions enacted in 1982 were ultimately deemed unconstitutional by the Supreme Court of Canada in *R. v. Seaboyer* in 1991 (Gotell, 2015). Changes in rape shield provisions over time exemplify the tension between maintaining survivors' dignity and the accused's *Charter* right to make a complete answer and defence to the accusations being levied. In 1992, rape shield provisions were changed once again in order to comply with the Supreme Court of Canada's ruling; sexual history could be admissible in certain situations, up to judicial discretion (Gotell, 2015). Notably, use of a survivor's sexual history would be prohibited in cases where previous sexual acts were being used to "show that the complainant was more likely to have consented or is less worthy of belief" (Gotell, 2015, p. 867). This exemplifies a small step towards removing rape myths from the courtroom; specifically, the myth that a woman who engages in sexual activity frequently is more likely to have consented, or to fabricate a rape accusation when consensual sex occurred.

Rape myths are sets of beliefs, schemas, and ideas that "serve to justify and dismiss male sexual aggression against women" (Stuart, McKimmie, & Masser, 2019, p. 312). Rape myths build upon the core ideas that women are deserving of rape, were not raped in the first place, or were responsible for being raped. Grubb and Turner (2012) explain the existence of rape myths through two main theoretical lenses. First, *defensive attribution hypothesis* posits that "people increase or reduce blame depending on their perceived similarity with the victim and the perceived likelihood of similar future victimization befalling them" (p. 444). Second, the *just world theory* may fuel rape myths, insofar as people want to "believe that the world is a fair place and that behavioral outcomes are deserved" (p. 444). In the context of sexual assault, the *just world* conclusion is that survivors' actions directly led to their rape, that they were, in some way, deserving of what happened to them. People inherently want to believe rape myths, for the aforementioned reasons, thus rape myths persist and are introduced, consciously or subconsciously, into courtrooms and sexual assault proceedings.

The Supreme Court of Canada case *R. v. Ewanchuk* (1999) exemplifies the persistence of rape myths in the courtroom, and how case law can dismiss these myths. A 17-year-old girl accused Steve Ewanchuk of rape, and the original ruling in this case acquitted the accused, agreeing that the survivor did not vocally continue to say no when, and thus consent was implied. This ruling was upheld by the Alberta Court of Appeal, and the ruling relied upon the problematic assumption that "viewed women's verbal refusals as necessary to resistance and equated women's lack of physical responsiveness with consent" (Ehrlich, 2007, p. 472). Though ultimately overturned by the Supreme Court of Canada, the original rulings relied on the cultural constructions of femininity and consent, where passivity and silence were indicative of consent (Ehrlich, 2007). *R. v. Ewanchuk* established that implied consent was not a viable defence in

court and is considered a landmark case in sexual assault law. Another more recent landmark Supreme Court of Canada case is *R. v. J.A.* (2011), which delved into modern issues of "kinky sex," specifically erotic asphyxiation. In this case, the Supreme Court of Canada ruled that consent needs to be ongoing and is withdrawn when a person becomes unconscious—meaning that consent need not be verbally revoked to be deemed invalid (Phillips, 2017). These landmark rulings changed the face of sexual assault and law in Canada but remain reminders that the law is a human construct, contingent on the beliefs and assumptions held by the legal actors making arguments and issuing rulings.

Definitions from statues and interpretations through case law provide a framework to understand the acts of violence that constitute sexual assault, the same definitions that survivors rely upon when seeking justice. However, the language used to describe acts of sexual assault inside and out of the legal system do not always use the language of violence, blurring the line between what is sex and what is assault. There are numerous "ways of describing and therefore characterizing a sexual offense…the choice of term profoundly affects how we see the crime and its consequences" (Coates & Bavelas, 2001, p. 30). The use of this language stems from arguably outdated societal constructs of what violence against women should look like—Susan Estrich's (1986) analysis of "real rape" being constructed as violent rape committed by a stranger in the dark in order to invalidate acquaintance rape is decades old, but unfortunately still relevant to this day. Though these definitions have changed to some extent over time, this persisting discursive construction of what consent and sexual violence constitute influences legal discourse and the ways these courses are handled in the legal system (Ehrlich, 2001). Most importantly, these discourses shape the sexual assault survivor's experience both of the sexual assault and the legal process (Ehrlich, 2014). The goal of this Major Research Paper is to explore these discourses in

the current legal system and their effects on survivor's experiences navigating seeking justice in the Canadian criminal justice system, through review and analysis of existing literature.

Research Methodologies

This research examines the ways in which language and discourse can influence constructions of sexual violence and consent, specifically in the context of sexual assault in Canada. Through theoretical analysis, it will focus on the ways in which these constructions affect the experiences of survivors in the Canadian criminal justice system, spanning from reporting a sexual assault crime through trial. Though sexual assault encompasses numerous experiences of survivors and perpetrators of all gender identities, this research will focus on sexual assault cases where the perpetrators are cis-identifying men and the survivors are cis-identifying women. In this paper, the terms rape and sexual assault will be used interchangeably, though the latter term will be used predominantly to reflect Canadian laws and the Canadian Criminal Code's shift from rape to sexual assault (Phillips, 2015). These terms will refer to male-perpetrator/female-survivor sexual assault cases unless otherwise specified. Existing literature uses the terms "survivor," "victim," and "survivor-victim," interchangeably; I will not be altering source literature in direct quotations and I will predominantly use the term survivor when referring to women who have experienced an instance of sexual assault. This linguistic choice also serves as an example of the way language constructs identities; "victim" is a legal term, a necessary one in criminal justice proceedings, whereas "survivor" centres healing and empowerment. Neither term is incorrect, and the term a woman who experience an instance sexual assault uses will be situational and therefore appropriate for her. Nevertheless, I will choose to use the term survivor to centre the experiences of women in these situations.

This research will be guided by the following two questions:

> **RQ1:** How do the discursive constructions of consent and sexual violence underlie the legal process in heterosexual and cisgender male-on-female sexual assault cases in Canada?
>
> **RQ2:** How can legal discourse be reframed to centre survivors of sexual assault?

Theoretical Lenses and Approaches

This Major Research Paper will review and analyse existing literature on select sexual assault cases and interactions within and adjacent to the Canadian criminal justice system. Theoretical frameworks in feminist studies, discourse studies, and legal studies will be used to address my research questions. Norman Fairclough's (1989) contributions to the study of power structures perpetuated by language focus on the study of "'common-sense' assumptions" (p. 3), which he defines as ideologies that underlie the language that we use. Fairclough defines discourse as "language as a form of social practice" (p. 20), wherein the aforementioned ideologies are cemented and reproduced in a society. Critical discourse analysis, therefore, allows for examination of the way social inequality and injustice is perpetrated in societies through language; the criminal justice system is the primary place where justice is formally sought, and thus the language surrounding the criminal justice system provides unique insight into the ways in which injustice presents itself in language.

Stuart Hall (1997) builds upon Fairclough's work and further defines the discursive approach as the "effects and consequences of representation" (p. 6). Hall posits that language creates "shared meanings" (p. 1) which in turn define cultures. Discourse as it relates to power in society, therefore, is both created by and perpetuated by language and the "shared meanings" prescribed to language. Language can either reproduce power or challenge power by either

aligning itself with or attempting to redefine "shared meanings." These "shared meanings" include definitions of identities and representations of bodies (Hall, 1997) such as the gender roles that construct the definitions of what a man and woman should be, which perpetuate (or challenge, in some cases) power structures related to gender. The construct of sexual assault, which includes for example definitions of consent, are "shared meanings" that change over time, but ultimately rely on the language used to describe them.

When these critical discourse analysis techniques are applied to the analysis of how ideologies around gender are reproduced, critical discourse analysis must intertwine with critical feminist approaches to the study of language, gender, and power. Michelle Lazar (2007) defines the aim of feminist critical discourse as the critical analysis of how "taken-for-granted gendered assumptions and hegemonic power relations are discursively produced, sustained, negotiated, and challenged in different contexts and communities" (p. 142). Sexual assault discourse exists at the intersection of language, gender, and power and is produced in the legal system; the analysis of sexual assault discourse must take into account these feminist ideas.

Moreover, Lazar (2007) expands on feminist critical discourse analysis by positing that class analysis can be applied to gender, in that gender constructions of men and women have a history of aligning with dominant and subordinate roles. Traditional ideas of masculinity and femininity are constructed with this power imbalance in mind; for example, masculinity is equated to a protector role and femininity to a need for protection (Lazar, 2007). The need for feminist critical discourse analysis as a separate approach arises from the complexities of these constructions. Therefore, feminist critical discourse analysis provides a framework to analyse the discourse around sexual assault on women perpetrated by men, which this paper will focus on.

Building on Fairclough's and Hall's definitions of critical discourse and discursive studies, I will first establish the various discourses that exist pertaining to sex, consent, sexual violence, and sexual assault. These discourses exist at the intersection of language, gender, race, and power; feminist research that explores the construction of gender roles will provide a framework to analyse sexual assault as a power relation. Lazar outlines a need for feminist critical discourse analysis studies, which many of the chosen academic studies employ. Furthermore, I will acknowledge the complexities of these issues in the context of race and Indigeneity, and the effects racism has on seeking justice through state systems such as the legal system as a survivor. I will discuss how these discourses influence the legal system and its agents. I will also outline the role of the media as a tool to not only amplify pre-existing discourses but introduce new narratives.

In my discussion and analysis, I will examine the ways in which the legal process affects, supports, invalidates, and retraumatizes survivors using the aforementioned theoretical lenses. I will propose ways in which language can be altered to challenge sexual assault discourses, with the goal being to mitigate survivor harm in the future. Drawing from modern feminist legal scholars in Canada, like Ehrlich and Gotell, as well as British scholar Daly and other feminist legal researchers, I will discuss alternatives to the traditional retributive justice model that the Canadian criminal justice system takes, and briefly discuss the effects of engaging in quasilegal discourse outside of the legal system.

Literature Review

Constructing the "Perfect Rape Victim"

Prior to discussing sexual assault discourses, and more specifically, the language used to describe acts of sexual assault, we must first establish definitions of rape culture from which these discourses stem. Rape culture, which primarily consists of widespread insidious and pervasive rape myths, serves to "create parameters of who 'counts' as a victim and what 'counts' as rape" (Whalley, 2018, p. 26). Susan Estrich (1986) used the term "real rape" in order to differentiate the palatable stranger rape—when a woman is assaulted by a stranger in the dark—and the more uncomfortable and more common acquaintance rape. In essence, this creates a strict definition of rape that only includes undeserving women ravaged unexpectedly by an unhinged stranger. Feminists argue that this ideal exists solely to diminish the real experiences of sexual assault survivors of acquaintance rape, where a woman does not give or retracts consent (Estrich, 1986).

These constructions can even go so far as to condone sexual assault in other contexts. Gatekeeping sexual assault with societal requirements such as "[the survivor] must have done nothing to warrant the assault, vigorously resisted the perpetrator (and be physically injured whilst doing so), report the rape immediately to police, and be appropriately emotionally traumatized after the event," (Stuart et al., 2019, p. 314) can exclude sexual assault survivors who do not fit these narrow schemas from identifying as survivors, or publicly seeking validation and/or justice. Coercion and the retraction of consent further complicate these issues.

Post-penetration rape is a particularly interesting subsect of sexual assault cases. Amanda Davis (2005) examined post-penetration rape and defined it as follows:

> A situation in which both parties initially consent to sexual intercourse, but, at some time during the act, one party communicates to the other that he or she is revoking consent and wishes to terminate the intercourse. After the revocation of consent, the other party forces the revoking party to continue the intercourse against his or her will. (p. 730-731)

The hesitation to accept post-penetrative rape as a "real" or valid rape is a prime example of rape myths and/or rape culture (ie, discourses around what constitutes a rape victim and what does not). Not all courts acknowledge post-penetrative rape as a form of prosecutable sexual assault (Ehrlich, 2016), influencing not only how society at large views a sexual assault survivor, but how sexual assault survivors view themselves. Defining consent and sexual assault is further complicated by the fact that "women often submit to unwanted sex in order to avoid more prolonged or more severe instances of violence" (Ehrlich, 2016, p. 66). This raises a relevant question to the present research: how can sexual assault survivors define their experiences when some courts legitimize their experiences and others invalidate them? Language is a conundrum for survivors that do not fit the mould of the "perfect rape victim"—and arguably, very few, if any, survivors do. Thus, the law and cultural definitions of rape create and perpetuate rape culture through legal discourse itself.

Sexual Assault Narratives, Racism, and Colonial Violence

Any analysis of sexual assault and the Canadian criminal justice system would be incomplete without analyzing the ways in which racism and colonial violence interplay with the experiences of survivors of sexual assault — racialized and marginalized women are the least likely to fit the mould of the "perfect rape victim." Sexual assault cases are unique in that both jurors and the general public are forced to "consider questions of violence, sexuality, and consent that often rely on their personal understandings of gendered, racialized, and sexualized norms"

(Hlavka & Mulla, 2018, p. 406). Both rape myths and structures of blame attribution are heavily influenced by racism, which underlies the way a perpetrator and a survivor are portrayed in a particular case.

Roxanne Donovan's (2007) research focuses on the way black bodies are constructed in and around sexual assault. Donovan (2007) identifies two main stereotypes that categorize black women who are survivors of sexual assault: the *jezebel*, which "depicts a lustful, hypersexual, promiscuous woman" (p. 723); and the *matriarch*, which depicts "black women as tough, aggressive, unfeminine, and strong" (p. 724). The *jezebel* stereotype plays into the idea that promiscuous women are either deserving of their experiences of sexual assault or lying about the acts being non-consensual. The *matriarch* stereotype invalidates black sexual assault survivors in a more insidious way, playing into the ideal that women who "appear not to have suffered enough trauma" (Hildebrand-Edgar & Ehrlich, 2017, p. 104) deserve to be attributed more blame (in some cases, more than their perpetrator). Survivor-centrism, therefore, must acknowledge that black survivors are even less likely to be believed than their white counterparts. Legal discourse therefore perpetuates anti-black racism by the state.

Survivor-centrism in the criminal justice system and legal process is further complicated when considering cases of black perpetrators. Not only are white survivors more likely to be believed when their perpetrators are black (as opposed to white), but white rape survivors are attributed less responsibility when compared to black survivors of interracial sexual assault (Donovan, 2007). This is corroborated downstream when considering that Canadian prisons are predominantly filled with black and Indigenous bodies (Daly, 2014)—laws and criminalization in Canada are often products and extensions of state violence under the guise of justice.

Moreover, Donovan & Williams (2002) highlight the complexities of the experiences of Charlotte-Pierce Baker, a black survivor whose perpetrator was a black man. Pierce-Baker (1998) writes that she "felt responsible for upholding the image of the strong black man for our young son…[she] didn't want to confirm the white belief that all black men rape" (p. 64). Further studies have explored the phenomenon (McGuffey, 2013) black survivors, especially those who have black sons, hesitate and fear contributing to the idea that black men are rapists, at least partially to protect their black sons from negative reputations in the future. Discourses about blackness, therefore, inevitably influence the way black survivors interact with discourses about sexual assault.

Discourses, both racial and related to sexual assault, are "key determinant[s] in the manner in which a victim will be perceived and treated by the courts as they are key determinants in the manner in which the victim will approach the judicial process" (Dylan, Regehr, & Alaggia, 2008, p. 693). Indigenous women in Canada experience violence "at disturbingly high rates" (Dylan, Regehr, & Alaggia, 2008, p. 679), and due to predisposed police prejudices toward Indigenous women, "the possibility of being categorized as a 'good victim' is narrowed" (p. 691-692). In an analysis of the Canadian Inquiry into Missing and Murdered Indigenous Women, Pamela Palmater (2016) expands on this idea:

> Just as police forces and many men in society have normalized the racist and misogynist views that Indigenous women and girls can be violated and exploited with little fear of prosecution, many Indigenous women and girls have normalized an expectation of racism and gendered violence from the police, without any hope of holding them accountable. (p. 269)

Indigenous women are historically oppressed individuals, given that sexual violence was a tool for control in early settler Canada (Razack, 2000). Due to being construed at "imperfect survivors" due to discursive constructions of Indigenous people (but especially women) as drug addicts and promiscuous prostitutes (Palmater, 2016), Indigenous women face unparalleled levels of sexual violence and subsequent barriers to seeking justice for those instances of violence in Canada. Indigenous survivors cannot be blamed for having little faith and underreporting in a settler colonial justice system that can act as an insurmountable barrier to seeking justice in a state that continues to enact colonial violence through a disregard for the wellbeing and safety of Indigenous women and girls (Palmater, 2016). Thus, racial discourses are just as, if not more important than, discourses that construct sexual assault in Canada in the context of survivors seeking and finding justice.

The Sexual Assault Discourse and Blame Attribution

In addition to examining the language and discourse around survivors of sexual assault, the language of heterosexual sex must be critically discussed. The language of heterosexual sex is gendered; Deborah Cameron (1992) outlines the ways in which sex is constructed through language as an act a man performs on a woman—words like 'penetrated' and 'screw' form an androcentric construction. This choice is arbitrary; Cameron (1992) argues that terms such as engulf would be just as anatomically accurate and would centre women. To this day, these constructions persist; male bodies are ascribed agency in the act of sex, which allows for the construction of heteronormative ideals of sex to be produced and perpetuated. These ideals of agency in sex are also used to define sexual assault, given that the language of sex is often used to describe and therefore to minimize, sexual assault. Bavelas & Coates (2001) build upon this idea and argue that "only when the acts are mutually consensual should they be described in

sexual terms, because these terms inevitably connote mutuality and consent" (p. 33). Bavelas & Coates (2001) argue further that terms like "fondling and caressing" (p. 31) carry the connotation of consent, pleasure, and reciprocity, and that these "terms [ignore] the difference between sexual activity and the crime of sexual assault." (p. 31). The assumption of consent underlies these linguistic representations, which is harmful and arguably reckless when using these terms to describe acts of (alleged) sexual assault.

Susan Ehrlich (2001) discusses the way these linguistic representations used in legal contexts around sexual assault and discusses the way blame is assigned. Ehrlich calls this "the accused's grammar of non-agency," (p. 36) describing the way passive language is used by accused perpetrators to deny responsibility for the act:

> [The accused] consistently de-emphasized his agentive role by (1) mitigating his agency when casting himself as the subject of transitive verbs designating acts of aggression, (2) diffusing his agency by referring to the complainants as the agents of sexually-initiative events or referring to himself as a co-agent with one of the complainants and (3) obscuring and eliminating his agency through grammatical constructions that concealed his responsibility in sexually-initiative sexual acts. (p. 43)

Ehrlich (2001) uses a critical discourse analysis approach to outline three ways in which accused perpetrators of sexual violence employ specific grammar and sentence structure to reject agency for the event. These decisions are conscious however, in a courtroom, where a defence lawyer is alluding to sex discourse in order to refute the accusation of sexual assault.

Ehrlich also notes, however, that these linguistic choices also exist in the context of larger power imbalances around gender and the act of sex and argues that language both allows people to produce gender identities for themselves and draw on cultural productions of gender (through

interpretation). Ehrlich's (2007) analysis of *R. v. Ewanchuk* trial highlights the decision of the court that acquitted the accused based on the assumption that the complainant (female) "implied consent" through her silence, or rather, her inaction in communicating fear or non-consent otherwise. Ehrlich outlines that in making this ruling, the courts considered "passive behaviour" (Ehrlich's term applied to the court descriptions of behaviour) as "implied consent." Ehrlich further discusses the femininity of passivity; that is to say, the cultural "shared meaning" (Hall, 1997) of passivity as a feminine role in the act of sex, and therefore, affirming the perpetrator's interpretation of passivity as consent. Though the appellate court's decision analysed by Ehrlich was overturned by the Supreme Court, Ehrlich (2007) argues that this is an example of ideologies producing cultural ideas of gender and the act of sex. The ideologies and constructions were more valuable in the ruling than the survivor's perspective, narrative, and assertions.

However, the legal process does sometimes allow for survivors to present their perspectives. Sara Potter (2017) uses a critical discourse analysis approach to the sexual assault case of *Emily Doe v. Brock Turner,* more commonly known as the Stanford Swimmer rape case, which made headlines due to the powerful victim impact statement read by Doe at the sentencing hearing post-conviction. In this statement, Emily Doe uses powerful language to explain the pain and suffering she had been forced to overcome following her rape. Potter analysed both the aforementioned victim impact statement and the statement made by Turner at his sentencing hearing, by coding the grammar, word usage, and sentence structure, by examining each individual narrative surrounding the same event. Potter successfully "demonstrated that the differences in their narratives reveal direct attempts to shift power, regain personal agency, and place/skirt accountability and blame" (p. 25). Emily Doe's language is direct, highlights injustice in this situation, and holds Brock Turner accountable for what he did to her. Brock Turner, in

contrast, rejects that accountability and refuses to accept blame, instead implying that Emily Doe was a willing participant who was not an object he performed sexual assault upon, but rather a co-actor he performed sexual activities with (Potter, 2017). This example of using language to shift blame is relevant to the study of sexual assault discourse because it provides a clear context in which the language of the survivor and the perpetrator to describe what in essence is the same event, can be compared and contrasted.

Sexual Assault Discourses in the Media

Blame in sexual assault cases is also assigned, shifted, and negotiated in the media, outside of the courtroom. Lisa Barca (2018), in an analysis of news media coverage of a high school rape case in Steubenville, Ohio (commonly referred to as the "Steubenville rape case"), argued that unfortunately, discursive patterns establish that "victims are responsible for exerting a kind of negative or misused agency that causes their victimization" (p. 266). Barca concludes that negative agency constructed through grammar in news reporting is essentially a form of victim-blaming, which at best invalidates, and at worst retraumatizes, a sexual assault survivor. Agency and nonagency are therefore negotiated in the media.

Survivors themselves can also contribute to the discourse and construct ideas of agency and nonagency using traditional and participatory media. Dana Phillips (2017) examined survivor narratives in the media following the Jian Ghomeshi rape accusations. Ultimately, Phillips (2017) concluded that the survivors' "accounts should be read as both resisting and reflecting legal scripts" (p. 1113). According to Phillips (2017), the survivor narratives in the wake of the Ghomeshi rape show that survivors must draw from legal meanings in order to challenge legal discourses. Words like "consent," "crime," and "assault" are grounded in their legal meanings. Thus, the survivor discourse outside of the courtroom does not necessarily exist outside of the

law. This conclusion is particularly important when assessing how survivors may seek justice outside of the Canadian criminal justice system, because narratives and experiences are inextricably tied to the law and legal discourses, as well as feminist discourses.

The discursive construction of nonagency is performed both in the media (Barca, 2018) and in the courtroom (Ehrlich, 2001), further establishing Fairclough's (1989) idea that language (re)produces ideology, which in turn influences language in society. These ideologies are diametrically opposed to the survivor's beliefs and experiences, arguably acting as barriers to justice. Racism further complicates these issues, as the race of a survivor has immense bearing on blame attribution and whether the survivor will be believed by society and police forces (Hlavka & Mulla, 2018). These ideologies are arguably exploited by defence lawyers in order to provide the best possible defence to their client, but survivors must also to some extent rely on the language of these ideologies in order to refute them. Thus, exploring the ways in which sexual assault discourse is (re)produced inside and outside of the legal system provides the context for analysing whether the system itself can be more survivor-centric, if at all.

Findings and Discussion

The traditional retributive justice-based legal process in Canada for sexual assault survivors consists of reporting to a police officer (or equivalent), working with the police and/or prosecutors, and the trial itself. In this section, I will provide a brief overview of legal process and I will discuss how the discursive constructions of consent, sexual assault, and survivor-hood influence the experience of survivors at each step of the legal process. I will then outline alternatives to the retributive justice system and reflect on the barriers to justice that survivors face in Canada.

Scholars agree that "fundamental elements and procedures within the court process fail victims because it was neither designed to function on their behalf nor to meet their needs" (Spencer, Dodge, Ricciardelli, & Ballucci, 2018, p. 191). The Canadian criminal justice system is adversarial; the survivor getting justice is not the goal, rather it is the state's goal to punish the offender. In this goal, the survivor often becomes a "pawn in the prosecutorial attempt to establish guilt" (Dylan et al., 2008, p. 691). However, the process itself can be far more survivor-centric than it currently is.

After a sexual assault, survivors face the potentially life-altering decision of whether or not to report. For a number of reasons, the majority of sexual assault survivors will not report their experiences of sexual violence to the police (Phillips, 2017); it is agreed upon across literature that sexual assault crimes are vastly underreported (Patterson, 2011). According to Statistics Canada (Rotenberg, 2017), in cases of sexual assault examined by the report between 2009 and 2014, a perpetrator was identified in only 59% of cases, and of those 59%, 74% resulted in charges being laid. Only half of those charges resulted in court trials, and only half of the cases that proceeded to court resulted in convictions. This dwindling of number of cases

progressing through the Canadian criminal justice system is referred to as a "'drop-off' of cases out of the justice system between police and court" (Rotenberg, 2017, p. 4). Only 12% of reported sexual assault cases went to court, compared to 39% of murder cases (Rotenberg, 2017). Not only is sexual violence severely underreported, but the retributive justice system in Canada, more often than not, fails to provide justice to survivors in the form of incarcerating the perpetrator.

Members of police forces also acknowledge how difficult the process can be for survivors, at least partially due to the process rarely resulting in traditional justice. Many officers "recognize that the trial process can be traumatizing or 're-victimizing'" (Spencer et al., 2018, p. 197). This is termed "secondary victimization" (Dylan et al., 2008), and is partially due to the fact that "pervasive myths that sexual assaults are predominantly committed by strangers and that women routinely fabricate reports of sexual assault" (Quinlan, 2016, p. 302) still guide police questioning and law enforcement responses to disclosure to this day. It is reliance on these discourses around "real rape" that heavily contributes to the re-victimization of women in the criminal justice system, particularly at the stage of reporting and providing a statement to the police.

The majority of women who do report their sexual assaults to the police end up not assisting in the prosecution of their assailant (Anders & Christopher, 2011); those who do assist in the prosecution are likely to have had strong police support, often in the form of "not having their accounts questioned by the officers" (p. 102). Whether or not a survivor will fully cooperate in the proceedings has great bearing on whether the prosecution will choose to see a sexual assault trial through; it is difficult to win a case without a cooperating survivor and prosecutors are most likely to choose to pursue cases based on the likelihood that they will win (Alderden &

Ullman, 2012). Due to the fact that rape myths still reign supreme even in the courtroom (Hockett, Smith, Klausing, & Saucier, 2016), whether or not a survivor fits closely to a traditional "real rape" case will also greatly influence whether or not the case will go to trial—"real rape," or sexual assault that closely resembles the larger societal discourse on what rape *should* look like, is much more likely to get a conviction.

When a case goes to trial and survivors cooperate, survivors often are required to testify. During the trial, survivors will likely experience two forms of questioning: evidence-in-chief and cross-examination (Westera, Zydervelt, Kaladelfos, & Zajac, 2017). Evidence-in-chief is when the prosecution will likely aid the survivor in establishing the facts of the case: the events, the timeline, etc. The cross-examination is the opposing counsel's right to also question the witness, test its validity and accuracy, and/or try to build an opposing narrative (Westera et al., 2017). The cross-examination is often where rape myths are relied upon to invalidate a survivor's story—to suggest the incident did not happen at all, or to suggest the incident did happen but was consensual and the survivor is misremembering or is a liar. For example, in *R. v. M.S.*, the survivor's inability to remember on the stand was construed as lying by the defence attorney and that argument ultimately contributed acquittal in the judicial ruling (Gotell, 2015). These types of strategic characterizations (arguably *mis*characterizations) are effective, as "juries and judges must often draw inferences in determining whether or not a woman has consented to sex and these inferences may be based on questionable or offensive (some would say: patriarchal) assumptions" (Ehrlich, 2014, p. 462). Unfortunately, in addition to courtroom proceedings, the rulings of judges are not impervious to rape myths either (Bavelas & Coates, 2001).

Judges must rule partially on the credibility of witnesses and gendered assumptions about what sexual assault survivors should say and do to be credible, and what makes them incredible

(often proposed during cross-examination) also influence judicial rulings. For example, the utmost resistance standard is a dated standard used in sexual assault trials used to suggest that a survivor did not resist *enough,* that the survivor could have done more to resist or display non-consent, and therefore, the accused is not *entirely* responsible, if at all (Ehrlich, 2014). This stems once again from the "real rape" standard, implying that vehement resistance and a perpetrator resorting to traditional violence is the only acceptable and convictable definition of rape.

At every step in the Canadian criminal justice system, survivors face unique difficulties, and survivors whose stories and sexual assaults do not fit the mold of the socially constructed idea of rape suffer the most. This is due both to external actors imposing their ideas of "real rape" on survivors and survivors internalizing ideals of "real rape" and acting accordingly, by not reporting or not self-advocating as fervently as they could. This is glaringly apparent in the case of black, racialized, and Indigenous survivors who already feel alienated by criminal justice systems and law enforcement officers at large, due to racism and colonial violence. Though the system's main goal is not to, nor was the system constructed to, support survivors, it is still the responsibility of the justice system and legal actors (police, prosecutors, and even opposing defence lawyers to an extent) to mitigate the harm and trauma they further inflict on survivors of sexual assault.

The language used during the legal process to describe is the first thing that needs to change. Acts of sexual violence are too often described by sexualized language and ignore the violent aspect of the crime. This may be due to the "the initial assumption that the perpetrator's motivation is in fact sexual rather than, for example, power, control, or violence" (Bavelas & Coates, 2001, p. 31). Fairclough's idea of language as social practice supports the theory that changing the language used to describe sexual assault will be a small step toward changing the

way sexual assault discourse is constructed and cemented in a society. Sexual assault does not need to, or rather should not need to, result in visible physical injury to be considered a violent crime. Sexual violation in and of itself is a violent, traumatic event and should be treated as such by the survivor, the legal system, and the general public.

Currently, the use of sexualized language to describe instances of sexual assault is pervasive. Ehrlich (2008), in an analysis of a sexual assault case (*Marciano v. Metzger & Metzger)*, notes that the complainant "very rarely named her experiences with her father as sexual abuse or sexual assault," (p. 163). This was a case of incest, and the assailant in this was known to the survivor. Ehrlich discusses how the lack of recognizable violence due to the instance of non-stranger rape made it difficult for the survivor herself to describe the events that had occurred with a "language of abuse, force and violence, [due to the survivor] not recognizing her experiences in this language" (Ehrlich, 2008, p. 169). The complainant used the same language to describe the abuse as she did to describe consensual sex with other men when asked to discuss it. The hesitation to accept the language of abuse and violence in instances of sexual violence amongst survivors is a repercussion of the "real rape" ideal.

Those who do not experience "violent stranger rape" feel alienated from the language they feel is reserved for those instances, such as "force," or even the word "rape," itself (Riley, 2019). Though "non-consensual sex," is the definition of rape, survivors have an easier time using that term as opposed to the term "rape," because of the weight that the word carries and the discourse around rape (Riley, 2019)—calling back to Hall, the shared meaning that the word "sexual assault" holds in our society. Expanding the shared meaning of the terms, "rape" and "sexual assault" is the first step toward ensuring that all survivors of sexual assault receive justice.

Regarding justice for survivors, exploring restorative justice models instead of a retributive justice model has been suggested by a number of scholars (Joyce-Wojtas & Keenan, 2016). The retributive justice model that ends in a conviction and a perpetrator's incarceration only serves to provide justice for a very specific category of survivor: one that wants to see their perpetrator behind bars (Daly, 2014). Trying to acknowledge and alter narrow discursive constructions of sexual assault while remaining tied to a limited retributive justice model is counterintuitive. In cases of domestic sexual violence and sexual assault, for example, survivors may suffer in the long term due to the incarceration of their perpetrators who also may be a large or main source of income (Joyce-Wojtas & Keenan, 2016). Survivors' unique best interests should also be considered in determining the best justice outcomes.

However, Kathleen Daly (2017) critiques the survivor-based considerations, arguing the importance of distinguishing between "justice and therapeutic ('healing') outcomes" (p. 118). Here, Daly argues that the needs of survivors as citizens (justice outcomes) differ from their needs as individuals recovering from trauma (therapeutic outcomes), highlighting the importance of not conflating the two. Justice outcomes may inadvertently also provide therapeutic outcomes in an ideal case, but the focus of examining justice mechanisms should not be on providing therapy and healing to survivors; healing should be sought elsewhere (Daly, 2015). This complicates the desire to incorporate survivor interests into the legal and justice processes, because inevitably, it will be impossible to heal a survivor and somehow attempt to fully rectify a sexual assault. Current issues in retributive justice include a disconnect between what survivors feel the system will deliver, and what outcomes actually are (Joyce-Wojtas & Keenan, 2016); restorative justice models should strive to address this issue, but it should not preclude restorative justice models from being introduced.

Restorative justice practices in cases of Indigenous offenders provide a framework for larger responses to gendered violence. These solutions also arise from and serve to tackle the related issue of over-incarceration of Indigenous perpetrators compared to non-Indigenous perpetrators, in all crimes, including sexual crimes, non-violence crimes, and violent crimes (Friend, 2016). These issues with roots in colonialism and systemic discrimination serve as reminders that the criminal justice system as a whole is a colonial institution and Indigenous people are precluded from finding any form of meaningful justice at all through these processes (Milward & Parkes, 2014). One model of restorative justice for gendered crimes used in Indigenous communities is the Sentencing Circle (Friend, 2016), where members of the community sit in a circle, discuss the sentence with the survivor and the accused present. There is value in this model, from providing a space for survivors to break the silence and providing space for those traditionally oppressed by the criminal justice system as a whole to voice their concerns (Friend, 1996). However, similar issues outlined in the retributive justice model arise, such as being "focused on the offender" and "failing to consider the emotional and safety needs of the victims" (Friend, 2016, p. 10). Thus, the crux of the issue once again becomes what a method of providing justice owes a survivor and what a survivor should be able to reasonably expect from a justice proceeding.

What the accused deserves and can expect from a criminal justice proceeding is clearly defined. The Canadian criminal justice system hinges on the belief that everyone is innocent until proven guilty, with the right to counsel, right to a fair a speedy trial, right to not be forced to testify, and more enshrined in the *Canadian Charter of Rights and Freedoms* (1982). Not all proposals for restorative justice models align with these rights (Joyce-Wojtas & Keenan, 2016). A mixed-methods approach, where restorative justice can be implemented after conviction through

the traditional retributive system, replacing traditional incarceration is an evidence-based solution for which scholars have advocated (Joyce-Wojtas & Keenan, 2016). However, I maintain that the Canadian criminal justice system is dominated by harmful discursive constructions of sexual violence and consent, and until the language and discourse changes, the majority of sexual offenders will not be held accountable for their actions.

Conclusion

Discursive constructions of sexual assault and consent influence every step of the legal process, and they will continue to influence the ways in which sexual assault cases pass through and are tried in the Canadian criminal justice system. This is not inherently harmful to survivors, but sexual assault discourse as it exists currently is incredibly harmful to survivors, whether it manifests in the way police respond to reports of sexual assault (Quinlan, 2016), the ways in which survivors are questioned in court (Hildebrand-Edgar & Ehrlich, 2017), or the ways in which judicial rulings are written (Bavelas & Coates, 2001). The construction of the "real rape victim," (Estrich, 1986) has persisted for decades, and continues to persist, despite small steps forward in case law and legislation that have expanded the definitions of sexual assault in Canada to be more inclusive of the varying experiences of survivors across the country that deserve to be validated.

I continue to attest that the first step to sexual assault reform needs to occur not in case law or legislation, but in the language that legal actors use when interacting with survivors of sexual assault. It would be impossible to hold legal actors to a neutral standard, because "language can never be neutral" (Bavelas & Coates, 2001, p. 29), but we must acknowledge that language "creates versions of reality" (p. 29). Perhaps it is idealistic to suggest that these versions of reality can reconcile the seemingly opposing needs of survivors to be believed and the *Charter* rights of the accused, but it is still an ideal towards which we should strive. If nothing else, these seemingly minuscule changes in language and approach may encourage more survivors to come forward, which will further expand the acceptable definitions of survivor, consent, and sexual assault. This will ideally feed back onto itself and in turn, encourage more survivors to come forward. In this Major Research Paper, I contemplated what the Canadian criminal justice system

owes survivors throughout its lengthy processes, but I remain committed to the idea that we, as a society, owe survivors our unwavering belief that they have experienced trauma.

Believing that a person has had a traumatic sexual experience can co-exist with the belief that the accused is not a rapist, or not deserving of incarceration. This idea may seemingly be contradictory, but I strongly believe that these ideas can co-exist under the assumption that the Criminal justice system operates on the principle that we as a society would rather have a guilty party walk free than incarcerate an innocent party. I acknowledge that this is idealistic as well—we know that black, racialized and Indigenous people are disproportionately incarcerated in all criminal proceedings, including sexual assault (McGuffey, 2013). This Major Research Paper has focused on ways in which to improve the experience of survivors in the Canadian criminal justice system, but this area of research ought to continue to explore alternatives to our retributive system built on colonial violence (Tomiak, 2016). Meanwhile, we ought to support survivors by creating and funding spaces where healing and therapeutic outcomes can be achieved, because that is something they need and will continue to need outside of our criminal justice system, no matter how much we reform it.

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