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**SEEKING JUSTICE FOR VICTIM-SURVIVORS:  
UNCONVENTIONAL LEGAL RESPONSES TO RAPE**

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**NICOLA GODDEN**

This thesis argues for legal responses to rape that better recognise and are more responsive to the diversity of harms that victim-survivors suffer. Securing justice for rape victim-survivors has been high on feminists' agendas since the 1970s. Justice is typically assumed to equate to punishing the perpetrators of rape, and as the criminal justice system all too often fails to achieve this goal it is deemed to be unjust. However, some feminists are beginning to challenge this assumption, and to consider whether justice could be achieved through other methods. While some have begun to explore unconventional legal responses to rape, there has been little discussion of these responses and the meanings of justice for victim-survivors. As such, this thesis explores what constitutes justice from the perspective of victim-survivors, and, in light of this, evaluates the criminal justice system and the unconventional responses of restorative justice and tort law. It questions whether these unconventional responses can offer good means and ends to justice in themselves, and uses them as different perspectives from which to reconsider the criminal justice response to rape. To these ends, the thesis analyses a restorative justice conference which addressed sexual violence – adding to the little empirical research in this area – and explores the small body of case law in which victim-survivors have brought a civil claim in trespass to the person for rape, which has, thus far, been paid little academic attention. Suggestions are made as to how the criminal law, restorative justice and tort law could be improved to enhance justice for victim-survivors. It is argued that different legal responses should be increasingly utilised in addition, or as an alternative to, the criminal law, and that the criminal justice system should be more responsive to the diversity of harms of rape to secure justice for victim-survivors.

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**SEEKING JUSTICE FOR VICTIM-SURVIVORS:  
UNCONVENTIONAL LEGAL RESPONSES TO RAPE**

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**Nicola Godden**

PhD Thesis

Durham Law School, Durham University

2012

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## DECLARATION

The material in this thesis has not been submitted previously for examination at this or any other institution.

Chapter 6 of this thesis includes an analysis of an empirical research study that was undertaken with Professor Clare McGlynn (Durham Law School, Durham University) and Dr Nicole Westmarland (School of Applied Social Sciences, Durham University). The research was published in the following form:

Clare McGlynn, Nicole Westmarland and Nikki Godden (2012) “‘I just wanted him to hear me’”: Sexual Violence and the Possibilities of Restorative Justice’, *Journal of Law and Society*, 39: 213

The project design and the author’s role are set out in the methodology (chapter 2). The ways in which the thesis analysis differs from the co-authored work is explained in the thesis, and references are made to the publication where points are replicated.

This thesis draws on material which has been published in the following forms:

Nikki Godden (2012) ‘Tort Claims for Rape: More Trials, Fewer Tribulations?’, in Janice Richardson and Erika Rackley (eds) *Feminist Perspectives on Tort Law* (Abingdon: Routledge)

Nikki Godden (2011) ‘Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?’, *King's Law Journal*, 22: 157

The ways in which the thesis differs from these publications is indicated throughout, apart from where due reference is made.

## **STATEMENT OF COPYRIGHT**

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# INTRODUCTION

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## 1.1 RETHINKING WHAT JUSTICE MEANS FOR RAPE VICTIM-SURVIVORS

This thesis argues that to provide justice for rape victim-survivors<sup>1</sup> there needs to be a reorientation of focus from punishment for the ‘core’ harm (or wrong) of rape towards responses which can better accommodate for the diversity of harms of rape. To do so, it will suggest increasing the possibility of additional and alternative routes to justice, such as restorative justice and claims in tort for compensation, and shifting the criminal justice focus on traditional forms of punishment, typically imprisonment, towards reparative outcomes. Currently, few rape victim-survivors receive justice, which is highlighted by the low national conviction rate of approximately six per cent.<sup>2</sup> Women disproportionately suffer the harms of rape and the injustices of the legal system, as rape is a gendered problem – it is a form of violence perpetrated by men against women in the majority of cases.<sup>3</sup> Indeed, data from the annual population survey the Crime Survey for England and

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<sup>1</sup> Similarly to Liz Kelly, Jo Lovett and Linda Regan (2005) *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293, London: Home Office), the term ‘victim-survivor’ is used throughout this thesis. As explained by Koss, this is to ‘retain the empowerment conveyed by the word *survivor* and the outrage implied by the word *victim*’; Mary Koss (2010) ‘Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes’, in James Ptacek (ed) *Restorative Justice and Violence Against Women* (Oxford: Oxford University Press), p 219 (emphasis in original).

<sup>2</sup> The conviction rate for rape is typically measured as the percentage of cases that result in a conviction out of those that are recorded by the police. For an overview of studies and data as to the conviction rate, see Jennifer Brown, Miranda Horvath, Liz Kelly and Nicole Westmarland (2010) *Connections and Disconnections: Assessing Evidence, Knowledge and Practice in Response to Rape* (London: Government Equalities Office), pp 25-27.

<sup>3</sup> By definition in England and Wales, women cannot be the perpetrators of rape as only penile penetration of another’s vagina, anus or mouth can constitute rape; Sexual Offences Act 2003, section 1(1)(a). As such, when discussing rape (or sexual violence more generally) victim-survivors will be referred to as female and the perpetrators of rape will be referred to as male.

Wales in 2010-2011 (previously known as the British Crime Survey)<sup>4</sup> shows that 4.5 per cent of women and 0.5 per cent of men between the ages of 16 and 59 have experienced rape (or attempted rape) since the age of 16.<sup>5</sup> During this year, 9,509 rapes of females over the age of 16 were recorded by the police, in comparison to 392 males over the age of 16.<sup>6</sup> However, it is estimated that nearly 90 per cent of rape victim-survivors do not report it to the police,<sup>7</sup> and thus the actual number of rapes that occur each year is likely to be considerably higher than these figures. While men can be the victim-survivors of rape, it is nevertheless clear that rape is a harm that women most commonly suffer.<sup>8</sup> Women in particular, then, suffer the injustices of the criminal justice system which all too often fails to provide victim-survivors with justice.

So viewed, feminists have been arguing for justice for rape victim-survivors since tackling the problem of sexual violence was prioritised in the 1970s. Many feminists have turned to the criminal law to address rape because crimes are understood to be the most serious

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<sup>4</sup> This thesis centres on the law and legal system in England and Wales, as comparing different substantive and procedural rules within the same branches of law but in different jurisdictions would be unlikely to be a helpful comparison as the focus – as will be outlined in this chapter – is on comparing and evaluating different forms of legal responses to rape. However, reference will be made to other jurisdictions and international research where it is relevant.

<sup>5</sup> Kevin Smith (ed), Sarah Osborne, Ivy Lau and Andrew Britton (2012) *Homicides, Firearm Offences and Intimate Violence 2010/11: Supplementary Volume to Crime in England and Wales 2010/11* (London: Home Office Statistical Bulletin), p 99. However, the results from this survey are likely to be underestimates due to the focus on crime, the fact that it is not representative in terms of age of respondents, and excludes certain vulnerable people in society such as the homeless or institutionalised; Brown *et al.*, *Connections and Disconnections*, pp 8-10. Consequently, the prevalence of rape is likely to be much higher than the figures from the Crime Survey for England and Wales suggest.

<sup>6</sup> Rupert Chaplin, John Flatley and Kevin Smith (2012) *Crime in England and Wales 2010/11: Findings from the British Crime Survey and Police Recorded Crime* (2<sup>nd</sup> edn, London: Home Office Statistical Bulletin), p 43.

<sup>7</sup> Baroness Vivien Stern (2010) *The Stern Review – An Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales* (London: Home Office), p 12.

<sup>8</sup> 'Male rape' will not be discussed in the thesis because women are the most common victim-survivors. In addition, male rape raises different issues because of the gender dimension to the wrong and harm; see Gillian Mezey and Michael King (eds) *Male Victims of Sexual Assault* (2<sup>nd</sup> edn, Oxford: Oxford University Press).

forms of wrongdoing, which are not only harmful to the individual victim but also to society in general, and because criminalisation and punishment are symbolically powerful in condemning and proscribing wrongdoing.<sup>9</sup> Viewing the criminal law in this way, many feminists have argued for changes in the legal definition of rape so that it better reflects and captures women's lived experiences, and for prison sentences which reflect the severity of rape and will punish perpetrators accordingly.<sup>10</sup>

In addition, arguments for improvements in the criminal justice process have commonly been made, as victim-survivors are often treated with hostility and disbelief within a system which marginalises their needs and interests.<sup>11</sup> Indeed, over the past few decades there have been gains made in relation to both substantive law and procedural rules and policies. For example, the marital rape exemption was abolished in 1991,<sup>12</sup> and legislation has been enacted which restricts the admissibility of sexual history evidence.<sup>13</sup> And yet, what the criminal law promises – that is, protection of actual and potential victim-survivors, and legal recognition and punishment of rape – it continually fails to deliver. The conviction rate remains at a constant low, and there has been little significant systematic improvement in the treatment of rape victim-survivors in the criminal justice system.<sup>14</sup>

Nevertheless, many feminists continue to focus almost solely on the criminal justice system as the legal response to rape, arguing that it should be improved so that it better meets victim-survivors' needs,<sup>15</sup> the conviction rate increases and the perpetrators of rape are

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<sup>9</sup> As explained by Clare McGlynn (2011) 'Feminism, Rape and the Search for Justice', *Oxford Journal of Legal Studies*, 31: 825, p 836.

<sup>10</sup> *Ibid*, p 837.

<sup>11</sup> For example, see Kelly *et al.*, *A Gap or a Chasm?*. Similar points have been made in relation to victims generally. For an overview, see Jonathan Doak (2008) *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford and Portland, Oregon: Hart), pp 7-12.

<sup>12</sup> *R v R* [1991] 3 WLR 767; Criminal Justice and Public Order Act 1994, section 142.

<sup>13</sup> Sexual Offences (Amendment) Act 1976, section 2; Youth Justice and Criminal Evidence Act 1999, section 41.

<sup>14</sup> Stern, *The Stern Review*.

<sup>15</sup> For example, Susan Miller (2011) *After the Crime: The Power of Restorative Justice Dialogues Between Victims and Violent Offenders* (New York: New York University Press); Wendy Larcombe (2011) 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law', *Feminist Legal Studies*, 19: 27.

severely punished.<sup>16</sup> Others, however, are concerned with the reliance on the criminal law and carceral punishment, in particular with the unintended alliance or association with an increasingly punitive crime control agenda and neo-liberal state.<sup>17</sup> Taking this view, Ptacek and Bumiller argue that the state has ‘co-opted’ or ‘appropriated’ feminists’ anti-sexual violence agendas to the effect of strengthening state power, particularly over those who are most vulnerable and marginalised in society.<sup>18</sup> Bumiller argues that criminal justice practices emphasise the individualisation of responsibility and risk avoidance and management techniques, which reinforces victim-survivor blaming where the alleged appropriate strategies to avoid being raped have not been adopted.<sup>19</sup> Engle and Lottmann also raise the concern that focusing on defining and criminalising the wrong and harm of rape, and punishing perpetrators severely because it is a serious crime, may represent and reinforce the experience of rape as a life shattering experience – a ‘fate worse than death’.<sup>20</sup> In addition to potentially reifying the harm of rape, Gruber has argued that the focus on punishment has eclipsed the aims of ‘forgiveness, victim healing, elimination of socio-economic predicates of crime, and victim social services’.<sup>21</sup>

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<sup>16</sup> See an overview of this interpretation of feminists’ engagement with the criminal law in relation to rape in Dianne Martin (1998) ‘Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies’, *Osgoode Hall Law Journal*, 36: 151, pp 164-166.

<sup>17</sup> Martin, *ibid*; Kristin Bumiller (2008) *In An Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Durham and London: Duke University Press); and see also Doris Buss (2011) ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’, *International Criminal Law Review*, 11: 409, extending these arguments to the international criminal law context. For discussion of the increasing use of the criminal law and punitive strategies in accordance with a shift towards neo-liberal forms of governance, see Nikolas Rose (2000) ‘Government and Control’, *British Journal of Criminology*, 40: 321; Pat O’Malley (1999) ‘Volatile and Contradictory Punishment’, *Theoretical Criminology*, 3: 175.

<sup>18</sup> James Ptacek (2010) ‘Resisting Co-Optation: Three Feminist Challenges to Anti-Violence Work’, in Ptacek (ed) *Restorative Justice and Violence Against Women*; Bumiller, *ibid*.

<sup>19</sup> Bumiller, *ibid*, p 8; see also Lise Gotell (2010) ‘Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-inspired Law Reforms’, in Clare McGlynn and Vanessa Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge).

<sup>20</sup> Karen Engle and Annelies Lottmann (2010) ‘The Force of Shame’, in McGlynn and Munro (eds) *Rethinking Rape Law*.

<sup>21</sup> Aya Gruber (2009) ‘Rape, Feminism and the War on Crime’, *Washington Law Review*, 84: 581, p 615.

Given the limited improvement in the criminal justice system to date and the drawbacks of relying on the criminal law, some feminists have suggested looking beyond the criminal law and criminal justice system.<sup>22</sup> Also taking this position and exploring the unconventional responses of restorative justice and tort law, the thesis contributes to the small body of scholarship which is developing and challenging the general presumption of many criminal justice and feminist legal scholars that justice for victim-survivors equates to retributive justice. However, the thesis goes further by questioning what constitutes justice from the perspective of rape victim-survivors, if not retributive justice. Typically scholars have not discussed in any significant detail the relationship between alternative or additional responses and justice, although they have highlighted that exploring alternative or additional pathways to justice may offer new insights as to how to improve the legal response to rape.<sup>23</sup> In addition, the majority of studies focus on victim-survivors' experiences of the criminal justice system and how it could be made more just,<sup>24</sup> which is a narrower approach than questioning what victim-survivors see as justice, or aspects of justice, more generally. Consequently, by exploring what constitutes justice from the perspective of rape victim-survivors and using this as a means to evaluate and interrogate legal responses to rape, the thesis adds a different view of justice and begins to raise and explore wider questions regarding justice and different legal responses to rape.

The unconventional legal responses to rape that will be explored are restorative justice and tort law. These have been chosen because they are already existing potential responses to rape, and, indeed, in a few cases victim-survivors have turned to restorative justice and tort

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<sup>22</sup> For example, see McGlynn, 'Feminism, Rape and the Search for Justice'; Ilene Seidman and Susan Vickers (2005) 'The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform', *Suffolk University Law Review*, 38: 467; Bronwyn Naylor (2010) 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways', *UNSW Law Review*, 33: 662; Nikki Godden (2011) 'Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?', *King's Law Journal*, 22: 157.

<sup>23</sup> For example, Seidman and Vickers, *ibid*, simply title their proposals as 'rights and remedies', and Naylor, *ibid*, does not explain what 'effective justice' means.

<sup>24</sup> For example, see Shirley Jülich (2006) 'Views of Justice Among Survivors of Historical Child Sexual Abuse', *Theoretical Criminology*, 10: 125, p 129.



law.<sup>25</sup> Nevertheless, restorative justice is rarely used in cases of sexual violence and there are only a few published evaluations across the world, and the thesis includes a case study of a restorative justice conference which was used to address historic child rape and other forms of sexual abuse.<sup>26</sup> Similarly, claims in tort (specifically the trespass to the person torts) that are brought against a person who commits rape are rare, however, there is a small body of case law which has been subject to little analysis, and which will be explored in detail in this thesis.<sup>27</sup> In addition, much of the literature which explores unconventional legal responses to rape most commonly considers only one response and compares this to the criminal justice system. However, this thesis brings together and compares criminal justice, restorative justice and tort law, which is beneficial as themes and issues are more prominent in different areas and are presented in different ways. Thus more questions can be explored to a greater extent and from different perspectives than are currently considered in the existing literature. This allows for a more thorough investigation into how the law and legal system could improve its responses to rape and provide justice for victim-survivors. So understood, the aim and objectives of this thesis are as follows:

*Aim:*

To assess the traditional criminal justice response to rape and to explore and evaluate additional and/or alternative ways in which the law can or could provide justice to rape victim-survivors.

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<sup>25</sup> The inquisitorial model, as an alternative to the adversarial system, was not explored because it differs significantly from the legal system in England and Wales and there are no case examples from within this jurisdiction to examine.

<sup>26</sup> The empirical research was undertaken with Professor Clare McGlynn and Dr Nicole Westmarland (Durham University), the findings of which have been published in an article: Clare McGlynn, Nicole Westmarland and Nikki Godden (2012) ‘“I just wanted him to hear me”: Sexual Violence and the Possibilities of Restorative Justice’, *Journal of Law and Society*, 39: 213. The discussion of the case study in the thesis (chapter 6) differs from the co-authored project as, here, restorative justice is evaluated with reference to the aspects of justice that are important to some victim-survivors, as will be set out in chapter 3.

<sup>27</sup> These cases have been examined in Godden, ‘Claims in Tort for Rape’; Nikki Godden (2012) ‘Tort Claims for Rape: More Trials, Fewer Tribulations?’, in Janice Richardson and Erika Rackley (eds) *Feminist Perspectives on Tort Law* (Abingdon: Routledge); however, as with restorative justice, here the analysis is different as it focuses on justice from the perspective of rape victim-survivors.

*Objectives:*

- (1) To explore the problem of rape and evaluate the criminal justice response and recent proposals for improvement.
- (2) To consider problematic conceptions and attitudes towards rape and assess the extent to which they are tied to the criminal law and criminal justice system.
- (3) To examine the restorative justice response to rape and claims in tort law brought directly against the wrongdoer<sup>28</sup> in trespass to the person for rape.
- (4) To consider what justice is for rape victim-survivors, and, in light of this, evaluate the potential and limits of each additional/alternative response to rape (in comparison to the criminal law) with regard to the form(s) of justice they aim to achieve, the symbolic roles of the responses, the different doctrinal definitions and concepts, and varying practical benefits and limitations.
- (5) To determine if either or both restorative justice and tort law can offer good means and ends in themselves as a substitute or an addition to criminal justice; and/or if they may shed light on ways in which to reconsider and improve the criminal justice response to rape.

The thesis will conclude that legal responses to rape should better recognise and be more responsive to the diversity of harms of rape than the current criminal law and criminal justice system, which contrasts with the dominant approach which associates justice for rape victim-survivors with lengthy prison sentences for perpetrators. In relation to restorative justice, it will be argued that it may provide victim-survivors with justice; however, as it needs to be explored further in practice, the thesis will set out the ways in which this should be done to ensure the safety of victim-survivors and to enhance the possibilities for justice. In relation to tort law, it will be argued that it would provide the greatest sense of justice if used in addition to the criminal law, although given the problems in this regard it can, at least, provide some form of justice when used as an

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<sup>28</sup> Throughout the thesis, the term 'wrongdoer' will primarily be used as those who commit the wrong of rape have committed both a criminal and a civil wrong, and to consider unconventional responses to rape is to draw attention, to some extent, away from the criminal law. Therefore, the terms 'offender', 'perpetrator', and 'defendant' will only be used when referring to a particular criminal case, or principles of the criminal law, or a particular aspect of the criminal process. Similarly, the terms 'defendant' and 'tortfeasor' will be used when referring to particular tort cases or processes.

alternative. In addition, suggestions will be made as to how to improve tort law so that it can better provide justice to victim-survivors. However, restorative justice and tort law are likely to be options in a relatively low percentage of cases, and, while it would be beneficial to increasingly offer and utilise additional and alternative responses to rape, the criminal justice system also needs to be improved. Reflecting on the benefits and limitations of restorative justice and tort law, it will be suggested that more victim-survivors would be provided with a stronger feeling that justice has been done if there is an increase in focus on and use of reparation in the criminal justice system.

## 1.2 CHAPTER OUTLINES

The next chapter will set out the methodological approach and methods used in this thesis. Overall, the research can be characterised as feminist, and will use traditional doctrinal methods and a variety of socio-legal methods to, broadly, explore the gendered content, gender disparate effects and gendering nature of law.<sup>29</sup> More specifically, it will use these methods to evaluate to what extent the criminal law, restorative justice and tort law can provide justice for victim-survivors. In addition, the thesis includes an empirical element which used the case study method to explore a restorative justice conference which addressed historic child rape and other forms of sexual abuse. The nature, benefits and limitations of the methods used will be discussed throughout this chapter.

The third chapter will set out the approach to justice that is taken, and explore justice from the perspectives of some rape victim-survivors. Rather than determining what constitutes ideal justice in an ideal world, Sen's approach to justice will be adopted, which focuses on the means by which to reduce injustices in an imperfect society by evaluating and comparing different social structures and institutional arrangements.<sup>30</sup> The chapter will then examine different legal outcomes – specifically punishment, reparation and financial compensation, and apology – and the relationship to the harms of rape and victim-survivors' perspectives on what constitutes a just outcome. The ways in which justice can

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<sup>29</sup> Conaghan identifies these three points as broad themes of feminist legal research; Joanne Conaghan (2000) 'Reassessing the Feminist Theoretical Project in Law', *Journal of Law and Society*, 27: 351, pp 359-361. See also a similar assessment in Katharine Bartlett (1990) 'Feminist Legal Methods', *Harvard Law Review*, 103: 829, pp 837-843.

<sup>30</sup> Amartya Sen (2009) *The Idea of Justice* (London: Allen Lane, Penguin Books).

manifest through legal processes – specifically through the nature and implementation of legal rules and policies, and the role and treatment of victim-survivors in the legal process – will then be explored and justice will be considered from the position of victim-survivors. This chapter will conclude that some victim-survivors see justice as including the recognition and redress of the material harms of rape, which is not typically conceived of in dominant understandings of criminal justice which is, primarily, guided by retributive punishment. From this view, to improve legal responses to rape and to reduce the injustices that victim-survivors suffer is:

- (1) to provide recognition of a wrongful and harmful violation of the victim-survivor's sexual autonomy;
- (2) to respect the diversity of experiences and harms of rape;
- (3) to allow victim-survivors to tell their stories and be heard in a meaningful way;
- (4) to hold wrongdoers responsible for the harms of rape;
- (5) to provide symbolic and material reparation for the harms of rape.

These five aspects of justice, as seen by some victim-survivors, provide a means by which to evaluate and compare legal responses to rape. This is done in the remaining three parts of the thesis which explore the traditional legal response to rape, that is, criminal justice, and the additional and alternative responses of restorative justice and tort law.

In the first part, chapter 4, the criminal law on rape and the criminal justice system's response to rape will be analysed. First, it will be evaluated on its own terms – that is, whether it can protect victim-survivors and punish the perpetrators of rape – and secondly, it will be evaluated in relation to the five aspects of justice that are set out in chapter 3. To do so, it will begin by discussing debates as to the conceptualisation of rape and the current legal definition. Following this, the failures with regard to the implementation of rape laws will be highlighted by setting out the ways in which victim-survivors' cases are responded to at different stages of the criminal justice system. Although there have been procedural and policy changes made over the last few decades in attempts to improve the criminal justice response to rape, there has been little comprehensive improvement, as illustrated by the high attrition rate and low conviction rate. While the criminal justice system has often been criticised for failing on its own terms, this chapter will also draw attention to the limitations of the criminal law to provide justice to rape victim-survivors from their perspective. Although in theory the criminal justice system may recognise violations of victim-survivors' sexual autonomy, in practice it fails to do so. In addition, due to the focus

on punishment for the 'core' harm of rape, the criminal justice system is limited in the extent to which it can meet the other requirements of justice for victim-survivors, eclipsing, marginalising and distorting the variety of harms that rape victim-survivors experience.

The second part of the thesis explores restorative justice as an unconventional legal response to rape which may provide justice to victim-survivors. Chapter 5 focuses on restorative justice and the limitations and possibilities of its application to cases of rape. Restorative justice is a means by which to respond to wrongdoing, which can operate in isolation from or be integrated with the criminal justice system at different stages. There are disagreements among theorists and practitioners as to how to define restorative justice and what its main aims are, which will be explained in chapter 5, but for this thesis it will be defined as a process in which those with a stake in a wrong done engage in dialogue, as directly as possible, to collectively decide how to repair, as far as possible, the harms of the wrongdoing. The theoretical and empirical research will then be discussed, which indicates the extent to which restorative justice may provide a more effective means by which to hold wrongdoers responsible for their behaviour and the harm they caused than the criminal justice system. It may also repair the harms caused to victims and develop communities within which crime is minimised. It will be argued that restorative justice illustrates the possibility of different processes and outcomes which can take greater account of and contribute to repairing the harms caused by wrongdoing, while at the same time ensuring that wrongdoers' rights are respected. The approach that is taken to restorative justice influences the analysis of restorative justice and sexual violence, specifically rape, which constitutes the remainder of the chapter. Many feminists are highly critical of applying restorative justice in this context,<sup>31</sup> however, it will be argued that it is worth exploring the possibility further. To be most beneficial for victim-survivors and adaptable depending on the particular case, it is suggested that it would be best to investigate restorative justice at all stages of the criminal justice system, as well as its possible operation in isolation from the criminal justice system.

Chapter 6 will then evaluate the extent to which restorative justice can meet the five aspects of justice as understood by some victim-survivors. Largely due to feminists' concerns as to the risks of applying restorative justice to sexual violence there are few

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<sup>31</sup> For an overview, see the discussions and debates in Ptacek (ed) *Restorative Justice and Violence Against Women*.

programmes which do so, and consequently few empirical research studies to test feminists' theories.<sup>32</sup> This chapter will explore the few instances where restorative justice has addressed a case of rape in the UK, and the few projects which have been initiated and evaluated internationally. It includes an evaluation of a UK-based restorative justice conference which addressed historic child rape, a case study of which was undertaken partly for the purpose of this thesis,<sup>33</sup> and which adds to the little empirical research in this area. While strong conclusions and generalisations cannot be drawn from an analysis of this research, at the same time it indicates that, at least in some cases, restorative justice may be appropriate and provide some form of justice for victim-survivors. In particular, restorative justice may better respond to the diversity of harms of rape than the criminal justice system. The final part of the chapter will suggest ways to increase the potential for restorative justice to respond to rape. It will end by reflecting on the criminal law in light of the preceding analysis, and propose that reorientating the focus of criminal justice to reparation rather than punishment by imprisonment may be a means by which to increase the criminal justice system's capability to provide justice for victim-survivors.

The third part of the thesis (chapters 7 and 8) which evaluates legal responses to rape in light of some victim-survivors' view of justice turns to tort law, in particular, claims in trespass to the person (battery, assault and false imprisonment). Compensation claims brought directly against a person who commits rape by the victim-survivor have long been a theoretical possibility. However, chapter 7 will highlight the ways in which such claims have been prevented in practice due to the privileging of the criminal law and punishment, and the conceptualisation of rape as a harm against the public and victim-survivors' families, fathers or husbands. Nevertheless, more recently the harm of rape as a violation of victim-survivors' sexual autonomy has been recognised, and procedural barriers to civil claims have, to some extent, been reduced, so that, since the mid-1980s there have been a number of claims in trespass to the person brought for rape. Chapter 7 will examine the extent to which the trespass to the person torts can provide a remedy for rape, arguing that they may place a higher value on victim-survivors' sexual autonomy than the criminal

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<sup>32</sup> Sarah Curtis-Fawley and Kathleen Daly (2005) 'Gendered Violence and Restorative Justice: The Views of Victim Advocates', *Violence Against Women*, 5: 603, p 609.

<sup>33</sup> The research was also conducted for the purpose of a co-authored journal article; see McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice'.

law due to the position of consent as a defence, and its more limited role which can exclude reasonable belief in consent as a defence to trespass to the person.

Chapter 8 will then analyse the small body of case law that is developing in the UK in this area, and evaluate the extent to which tort law can provide justice to rape victim-survivors from the perspective set out in chapter 3. While tort law does not offer a substitute for criminal justice and is better seen as an additional response to rape, given that the criminal justice system fails so many victim-survivors it may provide some form of justice in some cases.<sup>34</sup> Although victim-survivors' experiences of a civil trial are unlikely to be an improvement on criminal trials, it will be argued that tort law can, nevertheless, better respect the diversity of harms of rape, and allow victim-survivors to explain their experiences, as the remedy of compensation is directed toward the particular harms that flow from a particular instance of wrongdoing. Consequently, tort law may provide symbolic and material reparation for the harms that victim-survivors experience, which is typically absent from the criminal justice system. However, this is likely to be possible only in a few cases, and reflecting on the criminal law in light of the analysis of tort law it will be argued that focusing on reparation rather than punishment by imprisonment may be the best way to move towards providing justice for victim-survivors.

The thesis will conclude in chapter 9, reviewing the comparisons of criminal law, restorative justice and tort law with regard to the extent to which each legal response to rape can provide justice for victim-survivors, as some have understood it. It will summarise the limitations of each response, and the suggestions that are made in the previous chapters as to the improvements that should be made to criminal justice, restorative justice and tort law so that they enhance the justice that they can deliver to victim-survivors. Arguing that none of the three responses alone is sufficient, it will be proposed that the best way to increase the possibilities for justice for victim-survivors is to provide a variety of responses which are more flexible and sensitive to the diversity of harms of rape.

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<sup>34</sup> Godden, 'Claims in Tort for Rape'.

# METHODOLOGY

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## 2.1 INTRODUCTION

Despite incremental and radical changes in policy, and procedural and substantive laws relating to the crime of rape over the past four decades, the criminal law continues to fail to provide justice for victim-survivors. And yet, in relation to rape, justice – a contested concept – has been and remains associated with lengthy prison sentences to punish the perpetrators and condemn their harmful actions. Taking a different approach, this thesis considers what constitutes justice from the perspective of some rape victim-survivors. In light of this, the criminal justice response to rape, and the unconventional responses of restorative justice and tort law are evaluated to explore ways in which to seek and secure justice for victim-survivors. This chapter will set out the methodological approach and methods used in undertaking this research, which have been selected and influenced by the feminist underpinnings of the thesis.

While there is no one feminist perspective, Munro claims that '[w]hat diverse feminist approaches share is a core belief that the value, integrity and justice of our historical and present day society, and its practices and institutions, is undermined by a pervasive tendency to privilege the interests and experiences of men over women'.<sup>1</sup> This belief is reflected throughout this thesis. However, there is no single feminist methodology, but rather it is the goals and application of methods that characterise research as feminist.<sup>2</sup>

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<sup>1</sup> Vanessa Munro (2007) *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Oxford and Portland, Oregon: Hart), p 11.

<sup>2</sup> Gayle Letherby (2003) *Feminist Research in Theory and Practice* (Buckingham: Open University Press), p 81; see also Liz Kelly, Sheila Burton and Linda Regan (1994) 'Researching Women's Lives or Studying Women's Oppression? Reflections on What Constitutes Feminist Research', in Mary Maynard and June Purvis (eds) *Researching Women's Lives from a Feminist Perspective* (London: Taylor and Francis); Nicole Westmarland (2001) 'The Quantitative/Qualitative Debate and Feminist Research: A Subjective View of Objectivity', *Forum: Qualitative Social Research*, 2: 13.



Consequently, for the purposes of this thesis a variety of research methods are used to feminist ends.<sup>3</sup> Doctrinal methods of legal analysis are used in ways which reveal the gendered underpinnings of and gender disparate effects of certain laws and legal procedures. Socio-legal research methods are used to highlight the social, political and other contexts which influence and are influenced by law, particularly the circumstances which shape and inform women's lives. The thesis also includes an empirical research study of a restorative justice conference which addressed historic child rape and other forms of sexual abuse, giving voice to a particular victim-survivor's experience and perspective. The purpose of this chapter is to set out, explain and justify these methods in turn, and to acknowledge the limitations. To begin, the chapter will discuss method in the context of feminist legal scholarship, which shapes and guides the way in which the research methods adopted in this thesis are applied.

## **2.2 FEMINISM, METHOD AND LAW**

The importance of method is explained by MacKinnon: method, she says, 'organises the apprehension of truth; it determines what counts as evidence and defines what is taken as verification'.<sup>4</sup> Method and its application is, therefore, linked to, shaped by and reinforces particular epistemologies – that is, theories of knowledge, or how we know what we know – and ontological assumptions – that is, the way in which the nature or the existence of the subject/object of inquiry is viewed or understood.<sup>5</sup> Feminists have challenged theories of knowledge and reality which claim to 'objectively' interpret and 'neutrally' present aspects of the social world, arguing that knowledge is partial and situated, shaped and influenced by the social position and identity of the subject; that which is purported to be 'objective knowledge' reflects and privileges the perspectives of those (men) who are 'culturally enabled to deny [their] positionality – it is the position which is empowered to know'.<sup>6</sup>

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<sup>3</sup> The aims of the thesis are set out in chapter 1, section 1.1.

<sup>4</sup> Catharine MacKinnon (1982) 'Feminism, Marxism, Method and the State: An Agenda for Theory', *Signs*, 7: 515, p 527.

<sup>5</sup> Malcolm Williams and Tim May (1996) *Introduction to the Philosophy of Social Research* (London: Routledge), p 96.

<sup>6</sup> Margaret Davies (1994) *Asking the Law Question* (Sydney: Law Book Co.), pp 176-177, extract in Regina Graycar and Jenny Morgan (2002) *The Hidden Gender of the Law* (2<sup>nd</sup> edn, Sydney: The Federation Press), p 57.

Knowledge which does not represent the dominant epistemological order is discounted, invalidated as 'subjective' and marginalised.<sup>7</sup>

So understood, feminists typically disrupt 'objective' claims to 'universal truth' by revealing the gendered assumptions which disregard and misrepresent women's lived experiences. Many have questioned whether there are particular methods by which to do so, and to illuminate, respect and validate women's lives.<sup>8</sup> For example, during the 1970s 'consciousness-raising', in which women share individual experiences revealing their commonality and shared social condition, was a quintessential feminist method.<sup>9</sup> In relation to law, Bartlett has, in addition to consciousness-raising, set out two 'feminist legal methods': 'asking the woman question' which 'identif[ies] the gender implications of rules and practices which might otherwise appear to be neutral or objective',<sup>10</sup> and 'feminist practical reasoning' for which there is a 'focus on the specific, real-life dilemmas posed by human conflict' which demand attention to context and particular circumstances of women's lives rather than purely abstract notions, concepts and universal principles.<sup>11</sup>

These methods and techniques of feminism are characteristically, in Conaghan's words, 'woman-centred'.<sup>12</sup> Women's lives and lived experiences are placed at the centre of legal analysis, and, therefore, here the 'problem' of rape is taken as a starting point – but understood as a wrong and harm to women generally and not a criminal wrong in particular.<sup>13</sup> However, feminists have been struggling over whether there is an identifiable

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<sup>7</sup> *Ibid.*

<sup>8</sup> Bartlett, 'Feminist Legal Methods'.

<sup>9</sup> MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory', pp 535-537.

<sup>10</sup> Bartlett, 'Feminist Legal Methods', p 837.

<sup>11</sup> *Ibid*, p 850.

<sup>12</sup> Conaghan, 'Reassessing the Feminist Theoretical Project in Law', p 363.

<sup>13</sup> Starting from women's harms and experiences can cut across or fragment traditional legal categories and orderings that have been developed largely by men and without women in mind; Regina Graycar and Jenny Morgan (1996) 'Legal Categories, Women's Lives and the Law Curriculum OR Making Gender Examinable', *Sydney Law Review* 16: 431; Graycar and Morgan, *The Hidden Gender of the Law*. Indeed, in this thesis rape cuts across the criminal law and the civil law. Nevertheless, the thesis will be structured for the most part in relation to 'areas' of law, rather than, say, thematically or in relation to different aspects of justice, as placing rape within different legal frameworks – criminal law, restorative justice and tort law – can offer a different way of highlighting

and definable category 'women' that can be placed at the centre of feminists' analyses, which raises both epistemological and ontological issues.<sup>14</sup> First, it renders suspect knowledge based on what is claimed to be 'women's experience', and is linked to criticism that such claims apply predominantly to white, heterosexual, middle-class women, obscuring and marginalising many women's experiences which may differ due to different identity characteristics.<sup>15</sup> Secondly, if gender is socially constructed then relying on the category 'woman' may simply reinforce and reproduce the category that is the subject of feminist critique.<sup>16</sup> The so-called 'essentialist critique' has thus undermined feminism as a political strategy, as without a category 'women' it is questionable as to whose interests feminists are acting in, and also 'traditional' feminist methods which tend to be 'woman-centred'.<sup>17</sup>

As a consequence of the 'essentialist critique', Conaghan explains, feminists have increasingly taken to analysing the way in which gender is represented in and (re)produced through law as a discursive practice rather than engaging with the material effects on women's lives.<sup>18</sup> As such, many feminist legal scholars have taken a theoretical turn, conducting less empirical research,<sup>19</sup> and there has been less emphasis on specific feminist methods, and a wider variety of research methods, approaches and so on have been adopted. However, Conaghan argues, the 'essentialist critique' does not necessitate a retreat from engaging with women's lived experiences.<sup>20</sup> Rather, it 'implies a *much greater attention* to the particularities of women's lives and to the differences such attention is likely to reveal, differences which should inform the analyses of women's situation and the

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the limitations of the conceptual underpinnings, purposes and structures of traditionally bounded areas of law.

<sup>14</sup> Conaghan, 'Reassessing the Feminist Theoretical Project in Law', p 366.

<sup>15</sup> For example, see Angela Harris (1990) 'Race and Essentialism in Feminist Legal Theory', *Stanford Law Review*, 42: 581 (on the exclusion of black women from feminist theories); Patricia Cain (1989-1990) 'Feminist Jurisprudence: Grounding the Theories', *Berkeley Women's Law Journal*, 4: 191 (on the exclusion of lesbian women from feminist theories).

<sup>16</sup> On gender as a discursive practice, see Judith Butler (1999) *Gender Trouble: Feminism and the Subversion of Identity* (10<sup>th</sup> Anniversary edn, New York and London: Routledge).

<sup>17</sup> Conaghan, 'Reassessing the Feminist Theoretical Project in Law', p 367.

<sup>18</sup> *Ibid*, p 369.

<sup>19</sup> *Ibid*, p 370.

<sup>20</sup> *Ibid*, pp 370-371.

development and prioritizing of policy prescriptions and reform proposals'.<sup>21</sup> Aligning with Conaghan's view of feminist legal scholarship, the position is taken here that, if knowledge is partial and situated, then women are in the best position to articulate the harms that they suffer, which can provide the basis for feminist theories on the conditions that the requisite attention is paid to the particularities of women's lives, and a critically reflective approach is taken to minimise the risks of reproducing problematic social constructions which inform – but do not entirely dictate – women's experiences.<sup>22</sup> As such, it is significant that this thesis includes an empirical research project which focuses on a rape victim-survivor's experiences.

Nevertheless, in the wake of anti-essentialism and the challenges that it poses for (*inter alia*) feminist methods, it is common for a variety of methods to be adopted, with Letherby's view taken that 'it is not the use of a particular method or methods which characterise a researcher or a project as feminist, but the way in which the method(s) are used'.<sup>23</sup> This thesis is no exception. Broadly, then, the thesis is characterised as feminist, illustrating the gendered content of law, its gendered distributive effects and the ways in which law contributes to constructing gender ideals and identities, aiming to affect social and legal change to the benefit of women.<sup>24</sup> Throughout this thesis a variety of different methods are used in ways which give rise and effect to these broad themes and goals. In the following sections, then, doctrinal research methods, socio-legal research methods, and the methods drawn from the social sciences in undertaking an empirical research project will be explained, the limitations set out, and discussed as to the way in which these methods are used for the particular feminist aims and objectives of this thesis.

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<sup>21</sup> *Ibid*, p 371.

<sup>22</sup> *Ibid*, pp 379-382.

<sup>23</sup> Letherby, *Feminist Research*, p 81. See also Sandra Harding (1987) 'Introduction: Is there a Feminist Method?', in Sandra Harding (ed) *Feminism and Methodology* (Milton Keynes: Open University Press), p 9. In the context of law, see for example Rosemary Hunter, Clare McGlynn and Erika Rackley (2010) *Feminist Judgments: From Theory to Practice* (Oxford and Portland, Oregon: Hart Publishing), in which 'traditional' legal methods of judging are interpreted and employed to feminist ends.

<sup>24</sup> Conaghan, 'Reassessing the Feminist Theoretical Project in Law', pp 359-361. See also, Bartlett, 'Feminist Legal Methods', pp 837-843.

## 2.3 DOCTRINAL RESEARCH

At points throughout the thesis doctrinal legal methods will be used, primarily in relation to the substantive and procedural legal rules relating to the crime of rape and the trespass to the person torts. However, the overall methodological approach of this thesis is not doctrinal, which will become clear from the feminist critiques of the traditional doctrinal method that will be discussed after this method is outlined. Dobinson and Johns quote Williams' explanation as to two main doctrinal approaches. One is 'the task of ascertaining the precise state of the law on a particular point' and the other is 'the sort of work undertaken by lawyers (often but not always academic lawyers) who wish to explore at greater length some implications of the state of the law'.<sup>25</sup> A doctrinal analysis of the law starts from and places considerable weight on primary sources – that is, legislation and/or case law, particularly that which is most authoritative. Dobinson and Johns list methodological tools for ascertaining the relevant primary sources.<sup>26</sup> A good example is legal encyclopaedias, for instance *Halsbury's Laws of England*, which set out legal statements supported by primary authority, indicating the most relevant sources of law for particular principles or in particular areas. There are also case citators which help the researcher to determine the status of a case, and whether it has been followed, applied or distinguished in subsequent case law.<sup>27</sup> In relation to legislation, statute annotators can assist the researcher's analysis as they outline the development of the legislation to date of publication, list amendments and the date from which they are in force, and judicial consideration of the statute.<sup>28</sup>

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<sup>25</sup> Ian Dobinson and Francis Johns (2007) 'Qualitative Legal Research', in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh: Edinburgh University Press), p 19; quoting Glanville Williams (2002) *Learning the Law* (12<sup>th</sup> edn, London: Sweet and Maxwell), pp 206-207. Williams, however, sees these descriptions as two different approaches to legal research rather than two forms of doctrinal research, although this may just highlight the extent to which 'legal' research is typically understood to be doctrinal in nature.

<sup>26</sup> *Ibid*, pp 23-29. The examples given below are those most relevant to UK-based legal research, however similar texts and databases exist in other jurisdictions.

<sup>27</sup> *Ibid*, p 26. The legal database Westlaw includes a 'case analysis' of each case which provides a digest, case citator, and a list of relevant legislation, journal articles and books.

<sup>28</sup> *Ibid*, p 27.

Secondary sources, such as text books and journal articles, are useful for different reasons. They are not typically used for identifying and tracking primary sources, but rather to understand the ways in which legal issues or developments have been interpreted. In this respect, leading textbooks in the areas of law which the researcher is engaging with are important.<sup>29</sup> In the contexts of tort law and criminal law this might include, for example, *Winfield and Jolowicz on Tort*<sup>30</sup> and *Smith and Hogan's Criminal Law*.<sup>31</sup> Aside from textbooks, other relevant books and articles in law journals and law reviews will need to be searched for using library catalogues, databases – such as LexisNexis, Westlaw and HeinOnline – and legal journal indexes (which list articles that are relevant to a particular topic). Such searches are of course limited by the library and databases holdings, and the search terms used by the researcher.

The methods described above are central to classic doctrinal analyses – or the ‘black-letter law’ tradition – in which the researcher engages in a ‘search’ for general principles and maxims underpinning legal rules.<sup>32</sup> When the principles have been ‘found’, the researcher can predict future decisions which logically follow from these established generalisations, criticise those which do not adhere to principle – and are thus ‘wrongly decided’ – and recommend alternative legal rules which are consistent with the underlying rationale.<sup>33</sup> ‘Black-letter’ lawyers are guided by an approach whereby social reality can be objectively observed and factually described. Law is seen to ‘consist of data, primarily legal rules derived from legislation or cases, that [can] be recognized and observed without speculating about what lies behind those rules’.<sup>34</sup> Therefore, Westerman explains, for ‘black-letter’ lawyers ‘the legal system is not just the subject of inquiry, but its categories and concepts form at the same time the conceptual framework of legal doctrinal

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<sup>29</sup> *Ibid*, p 28.

<sup>30</sup> WVH Rogers (2010) *Winfield and Jolowicz on Tort* (18<sup>th</sup> edn, London: Sweet and Maxwell).

<sup>31</sup> David Ormerod (2005) *Smith and Hogan's Criminal Law* (11<sup>th</sup> edn, Oxford: Oxford University Press).

<sup>32</sup> Lord Robert Goff (1999) ‘The Search for Principle’, reprinted in William Swadling and Gareth Jones (eds) *The Search for Principle* (Oxford: Oxford University Press).

<sup>33</sup> Graham Virgo (2008) ‘Doctrinal Legal Research’, in Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (Oxford: Oxford University Press).

<sup>34</sup> Douglas W Vick (2004) ‘Interdisciplinarity and the Discipline of Law’, *Journal of Law and Society*, 31: 163, p 180.

research'.<sup>35</sup> Bradney puts it this way: 'reasoning in doctrinal study must be about a particular range of questions. The question which cannot legitimately be answered by reference to a statute or judgment lies outside the doctrinal gaze'.<sup>36</sup> As such, doctrinal research is extremely limited in its scope, and critique is restricted to illustrating incoherence or inconsistencies in legal rules.

Feminists – though far from being alone – have criticised traditional representations of law as a coherent and apolitical body of rules and principles.<sup>37</sup> Feminists typically highlight the underlying politics, the partial perspectives and ideological values that influence apparently 'objective' legal reasoning, which typically privileges men's experiences, perspectives, values and interests over women's.<sup>38</sup> In addition, many feminists are critical of 'liberal legalism' which influences the modern legal framework,<sup>39</sup> rejecting the construction of the (male) legal subject as an atomistic individual who is free to make rational choices in his own self-interest which does not account for conceptions of the (female) person who is connected to others and perceives the self in relational terms.<sup>40</sup> Going further, Smart (drawing on Foucault) has argued that turning to law validates its claims to legitimacy and truth which, *inter alia*, (re)presents and (re)produces gendered norms and ideologies.<sup>41</sup> Thus, she argues, law should be 'de-centred' from feminist reform agendas.<sup>42</sup> However, Munro provides a reading of Foucault to counter Smart's claim, saying that where 'legal power, like other forms of power, is diffuse, complex, and interdisciplinary, allowing for the possibility of attaining some level of reform through mechanisms of legal challenge not

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<sup>35</sup> Pauline Westerman (2011) 'The Debate on Legal Methodology as a Reflection of the Debate on Law', in Mark van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart), p 87.

<sup>36</sup> Anthony Bradney (1998) 'Law as a Parasitic Discipline', *Journal of Law and Society*, 25: 71, p 76.

<sup>37</sup> For example, in relation to tort law, see Joanne Conaghan and Wade Mansell (1999) *The Wrongs of Tort* (2<sup>nd</sup> edn, London: Pluto Press).

<sup>38</sup> Bartlett, 'Feminist Legal Methods'; Joanne Conaghan (1996) 'Tort Law and the Feminist Critique of Reason', in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish).

<sup>39</sup> For an overview, see Munro, *Law and Politics at the Perimeter*, ch 2.

<sup>40</sup> For example, see Robin West (1987) 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory', *Wisconsin Women's Law Journal*, 3: 81.

<sup>41</sup> Carol Smart (1989) *Feminism and the Power of Law* (London: Routledge).

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

only makes logical sense, it also becomes a practical necessity integral to the prospect of achieving subversive change'.<sup>43</sup> In addition, eschewing law leaves problematic gendered norms unchallenged and law's material effects on women's lives unaddressed,<sup>44</sup> so that, although the limits of the law must remain in sight, it is a risky strategy to abstain from law reform efforts. Overall, then, the approach taken here is not doctrinal, although the thesis aims to utilise doctrinal methods to disruptive or strategic effect, highlighting the gendered and gendering content and nature of legal rules relating to rape laws, the substantive law on trespass to the person, and related criminal and civil procedural rules.

However, because the thesis does not follow the 'black-letter law' tradition there are additional limitations of the doctrinal methods discussed above. As the thesis starts from rape as a social problem and gendered harm rather than starting from legal categories, the tort cases which address rape that have been litigated in the higher courts may not be linked by legal principles, and may not be referred to by judges hearing cases with this common content if the legal issues that are raised are different. They may not be found through case citators, and there is no specific category of tort cases which address rape that can be found in textbooks. The method of searching for these cases, then, is simply through legal databases using Boolean inquiries, recording the search terms so that the searches can be reproduced and any subsequent developments or new cases can be identified. These searches, carried out periodically up until June 2012, were carried out using the following databases: British and Irish Legal Information Institute, Commonwealth Legal Information Institute (English Reports, 1220-1873), Westlaw and LexisNexis. The searches consisted of combinations of one 'tort' term with one 'rape' term (either in text or in keywords depending on the database). The tort terms were: 'tort', 'civil', 'battery', 'assault', 'trespass to the person' and 'compensation'. The 'rape' terms were: 'rape', 'sex', 'sexual abuse', 'carnal knowledge', 'carnal connexion', 'seduction' and 'ravish'. The first few lines of each case had to be read to determine if it did involve a civil claim for rape. To minimise the numbers of cases by limiting the number of criminal law cases coming within the search, and by limiting the number of cases (particularly before the 20<sup>th</sup> century) which address issues relating to rape seed or rape oil, the words 'regina' and 'rex' were excluded

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<sup>43</sup> Vanessa Munro (2001) 'Legal Feminism and Foucault – A Critique of the Expulsion of Law', *Journal of Law and Society*, 28: 546, pp 566-567.

<sup>44</sup> Rosemary Hunter, Clare McGlynn and Erika Rackley (2010) 'Feminist Judgments: An Introduction', in Hunter, McGlynn and Rackley (eds) *Feminist Judgments*, p 9.



from the case name, and 'crop', 'seed' and 'oil' were excluded from the text where the search facility allowed. The cases discussed are, of course, limited to those which are reported, and it is possible that some relevant cases will not have matched the search criteria, particularly those before the 20<sup>th</sup> century in which the language used to refer to rape and sexual assault varied widely and was often euphemistic or vague. Nevertheless, as the focus of the thesis is on exploring what justice means for, and how it can be provided to, rape victim-survivors rather than the project constituting a systematic analysis of all claims for compensation for the harms of rape, this is not a significant limitation.

This discussion of doctrinal methods illustrates that it is less the methods themselves than the ways in which they are used, and the uses to which they are put, that makes research feminist. Nevertheless, while doctrinal research methods may be used in feminist legal analyses, it is unlikely that they are used in isolation, as broadly such research can be categorised as 'socio-legal'.

## **2.4 SOCIO-LEGAL RESEARCH**

Socio-legal research can include a wide variety of different theoretical approaches, different methodologies underpinned by different epistemological and ontological assumptions, and different methods, with aspects of substance and method drawn from disciplines other than law. Originally, socio-legal research was associated with the application of empirical techniques from the social sciences to law, to understand the ways in which the 'law works in action' and diverges from the 'law in books', driven by a reformist agenda to close these gaps. However, socio-legal studies has developed to become more theoretical, with less emphasis on the empirical,<sup>45</sup> drawing on and including aspects from, for instance, social theory, sociology, and what could be termed more critical approaches to law, such as critical legal studies, feminist legal studies and so on.<sup>46</sup> Broadly, Wheeler and Thomas suggest that socio-legal studies be understood as a challenge to

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<sup>45</sup> This is lamented by some researchers, see for example Dame Hazel Genn, Martin Partington and Sally Wheeler (2006) *Law in the Real World: Improving our Understanding of How Law Works* (The Nuffield Inquiry on Empirical Legal Research, Nuffield Foundation).

<sup>46</sup> Reza Banakar and Max Travers (2005) 'Introduction', in Reza Banakar and Max Travers (eds) *Theory and Method in Socio-Legal Research* (Oxford: Hart), p xii.

doctrinal research.<sup>47</sup> With such a wide remit, however, there is little agreement as to a precise definition,<sup>48</sup> although, generally it could be said that socio-legal research ‘takes all forms of law and legal institutions, broadly defined, and attempts to further our understanding of how they are constructed, organised and operate in their social, cultural, political and economic contexts’.<sup>49</sup> So understood, this thesis can be described as socio-legal. However, in particular it adopts a feminist perspective which takes gender as a highly influential organising category in social life – as well as other identity characteristics, such as class, ethnicity and sexuality. As such, socio-legal methods are used to highlight and challenge inequalities perpetuated by the reliance on, and (re)production of, gendered norms and other problematic categories through, *inter alia*, law. In addition, an empirical research project is undertaken which explores the experience of a rape victim-survivor’s participation in a restorative justice conference designed to respond to the abuse. Such feminist legal research cannot be undertaken by referring to legal doctrine alone because the ‘law neither possesses an internal metric nor a methodology for determining its effects’,<sup>50</sup> so research and methods need to be drawn on from other disciplines, thus challenging not only the doctrinal method but also law as an autonomous discipline.<sup>51</sup>

Given the breadth of socio-legal research there are no particular methods as such, and researchers gather ‘data wherever appropriate to the problem’ and use any variety of methods which will generate that data.<sup>52</sup> For instance, here, in addition to case law, statutes and law textbooks, academic research from disciplines besides law – primarily the social sciences – is drawn on, and policy documents, government papers, newspaper articles and so on are also relevant and important data sources. There tends to be no

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<sup>47</sup> Sally Wheeler and Philip Thomas (2002) ‘Socio-Legal Studies’, in David J Hayton (ed) *Law’s Future(s)* (Oxford: Hart Publishing), p 271. See also David Campbell (1997) ‘Socio-Legal Analysis of Contract’, in Philip A Thomas (ed) *Socio-Legal Studies* (Aldershot: Dartmouth Publishing Company Limited), p 252.

<sup>48</sup> Thomas (ed) *Socio-Legal Studies*.

<sup>49</sup> Paddy Hillyard and Joe Sim (1997) ‘The Political Economy of Socio-Legal Research’, in Thomas (ed) *Socio-Legal Studies*, p 45.

<sup>50</sup> George L Priest (1993) ‘The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Ideas: A Reply to Judge Edwards’, *Michigan Law Review*, 91: 1929, p 1933.

<sup>51</sup> Vick, ‘Interdisciplinarity and the Discipline of Law’, p 185.

<sup>52</sup> Alan Bradshaw (1997) ‘Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods’, in Thomas (ed) *Socio-Legal Studies*, p 99.

precise replicable search methods, with searches being conducted through academic databases, internet search engines, library catalogues, and references being followed up from other sources. The material that is found is restricted by the researcher's aims, objectives and perceptions as to what is relevant for the purposes of the project. There are, however, four broad categories of socio-legal research that have been identified: empirical, theoretical, policy-orientated and comparative.<sup>53</sup> This thesis includes aspects of each category, as in addition to having a theoretical orientation it includes an empirical research project, engages with and recommends changes in policy, and compares different areas of law, specifically criminal law, restorative justice and tort law.

There are particular challenges which researchers may face when undertaking socio-legal research and adopting methods or drawing on theories from disciplines other than that with which they are most familiar. For example, there is greater potential for misunderstandings, particularly where terminology is the same or similar but has different meanings, connotations and historical development, which could contribute to misinterpretations of outcomes or data.<sup>54</sup> In addition, the application or limitations of a research project or a particular method may be misunderstood.<sup>55</sup> Such problems are most prominent where legal scholars undertake empirical research but do not have much relevant experience and skills.<sup>56</sup> Further, primarily library-based researchers may be unfamiliar with ethical issues, and if they lack adequate training may risk breaching ethical codes of conduct.<sup>57</sup> To address these issues, Vick and Genn *et al.* have recommended more inter-disciplinary collaborations.<sup>58</sup> Indeed, for these reasons it was beneficial that the empirical research project that is a part of this thesis was undertaken with a colleague from

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<sup>53</sup> Michael Salter and Julie Mason (2007) *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Harlow: Pearson, Longman), pp 165-166.

<sup>54</sup> Vick, 'Interdisciplinarity and the Discipline of Law', p 185.

<sup>55</sup> *Ibid*; with reference to Garry Brewer (1999) 'The Challenges of Interdisciplinarity', *Policy Sciences*, 32: 327.

<sup>56</sup> Jennifer K Robbennolt (2002-2003) 'Using Empirical Research in Law and Policy: Evaluating Empirical Research Methods', *Nebraska Law Review*, 81: 777, pp 797-797; Genn *et al.*, *Law in the Real World*.

<sup>57</sup> Of course, researchers must gain approval from the relevant body confirming that an empirical project meets the required ethics standards, but nevertheless unforeseen ethical issues may arise in the process of research and this is when such training and knowledge is essential.

<sup>58</sup> Vick, 'Interdisciplinarity and the Discipline of Law', p 192; and Genn *et al.*, *Law in the Real World*.

the School of Applied Social Sciences in addition to a colleague from the Law School at Durham University. The research methods used in this project and the limitations are discussed in the final section of this chapter.

## **2.5 SOCIAL SCIENCE RESEARCH METHODS**

### **2.5.1 An Overview of the Empirical Research**

One of the ‘unconventional’ responses to rape that is explored in this thesis in seeking justice for victim-survivors is restorative justice. Restorative justice is controversial in this context and it is therefore relatively rare in practice.<sup>59</sup> Consequently, this thesis includes an empirical element which involved using the case study method to investigate a restorative justice conference that addressed sexual violence in the North of England in February 2010. It centred on a woman called ‘Lucy’, who is an adult survivor of child rape and other forms of sexual abuse.<sup>60</sup> The abuse took place several decades ago by a male member of her family, who was also a young person at the time. The project was undertaken with Dr Nicole Westmarland (School of Applied Social Sciences, Durham University) and Professor Clare McGlynn (Durham Law School, Durham University), and the case was brought to the attention of the researchers due to one researcher’s involvement with the rape crisis movement. It was agreed that the data would be used for a co-authored article<sup>61</sup> and this PhD thesis. The aim of the project was established as:

to describe the process and outcomes of a restorative justice conference involving sexual violence and to investigate the participants’ experiences.

This aim was agreed upon as it is important to investigate the process of restorative justice as well as any outcomes of the conference, because restorative justice includes a wide variety of different processes and forms which may affect the participants’ experiences. The participants’ experiences were focused on, rather than evaluative measures (for example, whether restorative justice ‘repaired the harms’ of sexual violence) in order to avoid, as far as possible, imposing certain views of restorative justice on the participants.

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<sup>59</sup> Curtis-Fawley and Daly, ‘The Views of Victim Advocates’, p 609.

<sup>60</sup> Lucy is a pseudonym and this is her chosen term of reference. After asking her whether she would prefer to be referred to as ‘victim’, ‘survivor’, some combination of the two or an alternative, she preferred this solution as she did not feel any of the other terms reflected how she felt or saw herself.

<sup>61</sup> See McGlynn *et al.*, ‘Sexual Violence and the Possibilities of Restorative Justice’.

It was decided that the research subjects would only be those who were directly involved in the restorative justice conference and its organisation, particularly because of ethical considerations, such as confidentiality. Only a few people were involved in the case and knew the identity of the wrongdoer and victim-survivor, and there was a significant possibility that their family and friends did not know about the conference. As such, semi-structured interviews were conducted with Lucy, Lucy's rape crisis counsellor who acted as her supporter at the conference, the conference facilitator and the police officer who brought the parties together. The wrongdoer declined to be interviewed and he had not brought a supporter to the conference, so no interview was possible.<sup>62</sup> The conference facilitator did provide some insights as to the impact of the conference on the wrongdoer and his experiences, as he was in contact with him before and after the conference, but of course this may not reflect the wrongdoer's experiences. While the wrongdoer's views would have added a valuable dimension to the case study, it was not essential for the purposes of this project. A victim-survivor-led approach was taken to the study and analysis, driven by the criminal justice system's failures to provide justice for victim-survivors and this thesis which explores justice from the victim-survivor's perspective.

### **2.5.2 The Case Study Method**

A case study typically involves a detailed investigation and analysis of a single case.<sup>63</sup> A case, according to Stake, is a 'bounded system',<sup>64</sup> or as put by Graham, 'a unit of human activity embedded in the real world ... which can only be studied or understood in context'.<sup>65</sup> Bryman considers that the term 'case study' is 'reserve[d] ... for those instances where the "case" is the focus of interest in its own right', and, as such, researchers usually focus on its 'unique' features.<sup>66</sup> For Stake, the benefit of case studies is that they can explore the particularity of the situation, the context, and complexities in relationships that cannot be captured or analysed using basic causal models or statistical analyses.<sup>67</sup> This

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<sup>62</sup> See Appendix 1 for the template letter of invitation to participate in the project.

<sup>63</sup> Alan Bryman (2004) *Social Research Methods* (Oxford: Oxford University Press), p 48.

<sup>64</sup> Robert Stake (1995) *The Art of Case Study Research* (London: Sage), p 2.

<sup>65</sup> Bill Graham (2000) *Case Study Research Methods* (London: Continuum), p 1.

<sup>66</sup> Bryman, *Social Research Methods*, p 50.

<sup>67</sup> Stake, *The Art of Case Study Research*, p xi.

project thus adopted the case study method to investigate in detail the particularities of a restorative justice conference that addressed sexual violence, and in particular to give voice and prominence to the experience and perspective of the victim-survivor.

However, there are a number of critiques of the single case study. First, it is said that it is difficult, or impossible, to draw causal inferences from them.<sup>68</sup> As King, Keohane and Verba explain, single case studies are at risk of indeterminacy if more than one explanation can be given for a particular outcome or point identified.<sup>69</sup> Secondly, it is typically thought that they cannot be generalised, or, put another way, that they have limited 'external validity'.<sup>70</sup> Flyvbjerg outlines another three common criticisms: one, that 'general, theoretical (context-independent) knowledge is more valuable than concrete, practical (context-dependent) knowledge'; two, that case studies are biased, tending to reflect and confirm what the researcher set out to find in the first place; and three, that the case study is most suitable for generating rather than testing hypotheses.<sup>71</sup> Seen in this way, he explains, case studies appear to have issues with theory, validity and reliability – the bases of 'scientific' research.<sup>72</sup> Consequently, some see the status of the single case study as that of an anecdote or story.

Nevertheless, Flyvbjerg argues that all of these five ideas about case study research are misunderstandings and that this method is of considerable value. He explains that cases are 'close' to 'real-life situations', reflecting the view that 'human behaviour cannot be understood as simply the rule-governed acts at the lowest levels of the learning process'.<sup>73</sup> He refers to Campbell:

After all, man is, in his ordinary way, a very competent knower, and qualitative common-sense knowing is not replaced by quantitative knowing. ... This is not to say that such

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<sup>68</sup> Mary M Kennedy (2006) 'Generalising from Single Case Studies', in Matthew David (ed) *Case Study Research: Volume II* (London: Sage), p 3.

<sup>69</sup> Gary King, Robert O Keohane and Sidney Verba (1996) *Designing Social Inquiry* (Princeton, NY: Princeton University Press), pp 208-211.

<sup>70</sup> Kennedy, 'Generalising from Single Case Studies', p 3.

<sup>71</sup> Bent Flyvbjerg (2004) 'Five Misunderstandings about Case Study Research', in Clive Seale, Giampietro Gobo, Jaber F Gubrium and David Silverman (eds) *Qualitative Research Practice* (London and Thousand Oaks, CA: Sage), p 421.

<sup>72</sup> *Ibid*; see also King, Keohane and Verba, *Designing Social Inquiry*, ch 1.

<sup>73</sup> Flyvbjerg, 'Five Misunderstandings about Case Study Research', p 422.

common-sense naturalistic observation is objective, dependable, or unbiased. But it is all that we have. It is the only route to knowledge – noisy, fallible, and biased though it be.<sup>74</sup> Moreover, if all knowledge – even ‘scientific’ knowledge – is not objective and value-free, but rather it is socially situated and influenced by, *inter alia*, identity characteristics such as gender,<sup>75</sup> then case studies which can be used to investigate different perspectives on a particular phenomenon can be equally valid as other methods. Of course, this means that all research is always inevitably shaped to some extent by the subjectivity of the researcher and her/his preconceptions, and the researcher using case studies, as in adopting other research methods, should be self-reflexive and acknowledge values which influence her/his research.<sup>76</sup> Further, if it is accepted that social and other specific contexts to any given situation influence the way in which it is perceived, experienced and understood, then context-sensitive methods are useful for investigating social life.<sup>77</sup> This appears fitting for feminists who typically emphasise gender as a particularly important contextual factor of people’s lives, and who aim to give voice to and validate women’s lived experiences. Indeed, for many feminists stories are an important method by which to illustrate and reveal views of the social world that are otherwise silenced, marginalised or distorted through dominant perspectives.<sup>78</sup> The case study method provides a good means by which to present such stories.

Flyvbjerg also describes the sorts of situations in which findings from case studies can be generalised.<sup>79</sup> For example, where the case is contrary to the norm it may be possible to disprove of general assumptions.<sup>80</sup> Thus, the case study can be useful ‘to obtain information on unusual cases, which can be especially problematic or especially good in a

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<sup>74</sup> *Ibid*; quoting Donald T Campbell (1975) ‘Degrees of Freedom and the Case Study’, *Comparative Political Studies*, 8: 178, pp 178-191.

<sup>75</sup> See above, section 2.2.

<sup>76</sup> Bryman, *Social Research Methods*, pp 24-25.

<sup>77</sup> Flyvbjerg, ‘Five Misunderstandings about Case Study Research’, p 423.

<sup>78</sup> On feminism, storytelling and women’s lived experiences, see further chapter 3, section 3.5.2(c).

<sup>79</sup> Flyvbjerg, ‘Five Misunderstandings about Case Study Research’, pp 423-424.

<sup>80</sup> Shulamit Reinharz (1992) *Feminist Methods in Social Research* (Oxford: Oxford University Press), p 167. She argues that ‘exceptional’ case studies are extremely important for feminist research so as to disprove generalisations made in research, typically where men’s experiences and views have been generalised to every individual, p 168.

more closely defined sense'.<sup>81</sup> This reflects the position of Lucy's case – the restorative justice conference addressing sexual violence – which is only one of a handful of similar cases. Further, there is a perception that restorative justice is not suitable for sexual violence, but the case study could indicate otherwise, potentially challenging the general assumption.

### 2.5.3 Interviews

Interviews have been seen as the feminist research method of choice because they emphasise the subjective dimensions to ways of knowing and knowledge production.<sup>82</sup> Nevertheless, Oakley has argued that traditional conceptions of the interview method are problematic because of a power imbalance between the researcher and the research participant: they posit the process as a one way channel of information going from the participant and to the researcher, and researchers are supposed to remain 'detached' from participants.<sup>83</sup> However, the interview has been understood as a site for the production of meaning rather than simply an explanation of certain facts or past experiences, emphasising the research participant as a producer of knowledge.<sup>84</sup> And there has been an emphasis on interviews as a two-way process so that the researcher engages with the participant<sup>85</sup> and 'elicit[s] and listen[s] closely to the interviewee's life experiences'.<sup>86</sup>

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<sup>81</sup> Flyvbjerg, 'Five Misunderstandings about Case Study Research', p 424.

<sup>82</sup> For a discussion, see Westmarland, 'The Quantitative/Qualitative Debate and Feminist Research'.

<sup>83</sup> Ann Oakley (1981) 'Interviewing Women: A Contradiction in Terms', in Helen Roberts (ed) *Doing Feminist Research* (London: Routledge and Kegan Paul).

<sup>84</sup> Jaber F Gubrium and James A Holstein (2001) 'From the Individual Interview to the Interview Society', in Jaber F Gubrium and James A Holstein (eds) *Handbook of Interview Research: Context and Method* (London: Sage Publications), pp 13-14.

<sup>85</sup> See for instance Mies's 'conscious partiality' and her approach to interviews in which researchers partially identify with and personally interact with the participants; Maria Mies (1983) 'Toward a Methodology for Feminist Research', in Gloria Bowles and Renate Duelli Klein (eds) *Theories of Women's Studies* (London: Routledge and Kegan Paul).

<sup>86</sup> Shulamit Reinharz and Susan E Chase (2001) 'Interviewing Women', in Gubrium and Holstein (eds) *Handbook of Interview Research*, p 230. The focus on creating non-exploitative relationships is even more important when the subject matter of the research is 'sensitive', such as marital rape; Raquel Kennedy Bergen (1993) 'Interviewing Survivors of Marital Rape', in Claire M Renzetti and Raymond



There are a number of different types of interviews and different ways in which they can be conducted. For this project semi-structured rather than fully or un-structured interviews were used. This form of interview has pre-determined but open-ended questions around themes or topics that the researcher would like to discuss.<sup>87</sup> At the same time, semi-structured interviews are flexible to allow the participant to carry the discussion in different ways or on subjects which the researcher might not have foreseen, to which the researcher can respond by omitting or adding questions as the interview progresses.<sup>88</sup> This ensured that issues that were important to answer the research question were covered, but at the same time it allowed the participants to convey what they thought was important by raising or emphasising particular aspects of their experiences.<sup>89</sup> From a feminist perspective this was important to allow participants to communicate the messages they wished, so that they could feel they had more of their own 'input' and there was more engagement between interviewer and interviewee than structured interviews typically allow.

The majority of interviews – those with the rape crisis counsellor, police officer and conference facilitator – were conducted face to face. Interviewers may have been able to gain a sense of what information, opinion or experience the participant wanted to convey through facial expressions and body language, and also were able to read from these signals if the participant was feeling any discomfort with the discussion.<sup>90</sup> These three interviews were conducted by the author and McGlynn. They lasted approximately one hour, were recorded (with the permission of the participants) and were transcribed by the author at a later date. The interview with Lucy was conducted over the telephone by

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M Lee (eds) *Researching Sensitive Topics* (Sage Publications). This was, therefore, true of the case study as it involved a woman who had been subject to rape and sexual abuse when she was a child.

<sup>87</sup> Piergiorgio Corbetta (2003) *Social Research: Theory, Methods and Techniques* (London: Sage), p 270.

<sup>88</sup> *Ibid.*

<sup>89</sup> The interview schedules varied slightly from participant to participant to accommodate for their different roles in the process and the restorative justice conference. The interview schedules had nine main questions which were presented to the participants beforehand in their invitation letters. An example – the interview schedule for the counsellor – is provided in Appendix 2.

<sup>90</sup> See generally Roger W Shuy (2001) 'In-person versus Telephone Interviewing', in Gubrium and Holstein (eds) *Handbook of Interview Research*.

Westmarland and transcribed contemporaneously. This decision was taken because Westmarland has experience of interviewing vulnerable participants and discussing sensitive subject matter, and thus this minimised the risks of further harm to Lucy. Although a telephone interview may have made it more difficult for Westmarland to assess if she was uncomfortable or becoming distressed with the discussion at any time, it was important for maintaining Lucy's anonymity. Out of the three researchers on the project only Westmarland knew Lucy's real name and any information disclosed in the interview which could potentially breach her anonymity was omitted from the transcript.

#### **2.5.4 Ethics**

Bryman outlines four main ethical concerns that can arise when undertaking empirical research:<sup>91</sup> potential harm to participants, lack of informed consent, invasion of privacy and deception. These points are evident in the Economic and Social Research Council (ESRC)'s Framework for Research Ethics<sup>92</sup> which lists six key principles:

- 1) Research should be designed, reviewed and undertaken to ensure integrity, quality and transparency.
- 2) Research staff and participants must normally be informed fully about the purpose, methods and intended possible uses of the research, what their participation in the research entails and what risks, if any, are involved.
- 3) The confidentiality of information supplied by research participants and the anonymity of respondents must be respected.
- 4) Research participants must take part voluntarily, free from any coercion.
- 5) Harm to research participants must be avoided in all instances.
- 6) The independence of research must be clear, and any conflicts of interest or partiality must be explicit.

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<sup>91</sup> Bryman, *Social Research Methods*, p 507; with reference to Edward Diener and Rick Crandall (1978) *Ethics in Social and Behavioural Research* (Chicago: Chicago University Press).

<sup>92</sup> The framework can be obtained from the ESRC's website: <http://www.esrc.ac.uk/about-esrc/information/research-ethics.aspx> (last accessed 17 October 2012). See also the Socio-Legal Studies Association's Statement of Ethics (2009): [http://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20\\_final\\_%5B1%5D.pdf](http://www.slsa.ac.uk/images/slsdownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf). (last accessed 17 October 2012).

In consideration of these principles, ethical approval of the project was sought and obtained from the Ethics Committee in Durham University's School of Applied Social Sciences, with notification of Durham Law School. The application for ethical approval was primarily drafted by the author, and then reviewed by Westmarland who has experience of undertaking empirical research, illustrating a benefit of interdisciplinary collaborations, as discussed above. One initial concern was whether or not to invite Lucy to participate as she may have found the restorative justice conference traumatic, may have moved on from it, and may find being presented with the possibility of discussing the conference and past abuse distressing. Westmarland discussed this with the rape crisis counsellor who knew Lucy, and it was decided that Lucy would be likely to appreciate the opportunity of participating in the project rather than a decision being made not to contact her. All participants were informed both in their letter of invitation and at the beginning of the interview of the purpose of the research, that it was voluntary and they could withdraw at any time. Verbal consent was given by the participants at the beginning of each interview. The interview recordings, once transcribed, were deleted, and participants were anonymised in the transcripts. The other main ethical issues that the project raised have been discussed above in relation to interviews.

### **2.5.5 Analysing and Presenting Data**

The computer software Nvivo 9<sup>93</sup> which assists qualitative analysis was used to store and manage the data. There are a variety of ways in which to organise and code data using Nvivo, however, only those which were used for this project will be explained.<sup>94</sup> The data (the interview transcripts) were coded at 'nodes'. Initially, 'free nodes' were used to code themes and ideas which appear throughout the data. Examples of 'free nodes' that were used were 'criminal justice system' and 'restorative justice and types of offences'. When the project progressed, 'tree nodes' which make it possible to organise nodes into a hierarchy of categories ('parent node') and subcategories ('children nodes') were used, for example, 'moving forward' was a 'parent node', with (*inter alia*) 'political context' and 'relationship between RJ and CJ' as 'children nodes'. Two forms of 'links' were also used,

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<sup>93</sup> QSR International (2010) *NVivo Qualitative Data Analysis Software* [Computer Software] (Version 9; Doncaster, Australia: QSR International).

<sup>94</sup> For an overview of Nvivo (and for the in text details below), see Patricia Bazeley and Lyn Richards (2000) *The Nvivo Qualitative Project Book* (London: Sage).

one being 'see also' links which provide a means by which to cross-reference the transcripts, and the second being 'annotations' which allow for the author's comments to be attached to a particular section of the transcript.

The way in which Nvivo was used here is akin to colour coding themes on hard copies of or word processed transcripts, and adding notes and cross-references. However, Nvivo makes it easier to use these methods as amendments can be made as the project progresses (such as creating 'tree nodes') without completely recoding the data, and the data that is grouped together under a node can be accessed in one place, rather than switching between documents. Thus, it was decided that it would be valuable to use Nvivo for this project.<sup>95</sup>

While Nvivo can carry out some analytical functions, there were none that were applicable to this project. The data was analysed in accordance with the aims and outcomes of the thesis, as set out in the introduction, and in relation to the five aspects of justice that many victim-survivors see as important for a just legal response to rape, which are discussed in the next chapter. Based on the researcher's selection and analysis of relevant literature and previous studies, then, the data is interpreted and presented by the researcher, which contributes to constructing a particular view of the social phenomena that is being researched. As such, Skinner *et al.* explain, many feminists have been concerned with 'representing, or more accurately trying not to misrepresent, those in less powerful positions'.<sup>96</sup> To guard against this as far as possible, Lucy was sent a draft of the article and asked if she was happy with the way in which the conference and her experiences were portrayed, or if she had any other concerns. When she responded that she was very happy with the article, it was then forwarded to the other participants, again to confirm that they did not feel as though what they said had been misrepresented.

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<sup>95</sup> Nvivo was only used to analyse the data for this thesis, it was not used to analyse the data for the co-authored journal article.

<sup>96</sup> Tina Skinner, Marianne Hester and Ellen Malos (2005) 'Methodology, Feminism and Gender Violence', in Tina Skinner, Marianne Hester and Ellen Malos (eds) *Researching Gender Violence: Methodology in Action* (Devon: Willan), p 12.

## 2.6 CONCLUSION

This chapter has set out the methods used in undertaking the research for this thesis. Predominantly, a feminist approach is adopted, which, in broad terms, aims to reveal the gendered and gendering content of law, and its gender distributive effects.<sup>97</sup> While the value of 'women-centred' approaches and methods was affirmed, and the thesis includes an empirical project which centres on the experience of a rape victim-survivor, the thesis nevertheless utilises a variety of methods, albeit to feminist ends. Doctrinal legal methods are used, but only to the extent that this forms a part of a wider exploration of law in its social and political context. As such, the research can also be understood to be socio-legal. In line with feminist approaches, rather than a particular legal subject or principle being the primary focus, the 'problem' of rape as particularly harmful in women's lives is the starting point, questioning what constitutes justice from the perspective of rape victim-survivors and how to improve the legal response or responses. In addition, an empirical research study is included in the chapters exploring restorative justice and rape, which utilised the case study method to provide an insight into one victim-survivor's experience of a restorative justice conference which addressed sexual violence. The next chapter will explore the theoretical and empirical literature as to rape victim-survivors' views on justice, providing the criteria by which to evaluate the traditional legal response to rape – that is, the criminal law – and the unconventional responses of restorative justice and tort law in the subsequent chapters.

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<sup>97</sup> Conaghan, 'Reassessing the Feminist Theoretical Project in Law', pp 359-361. See also, Bartlett, 'Feminist Legal Methods', pp 837-843.

# SEEKING JUSTICE: RAPE VICTIM-SURVIVORS' PERSPECTIVES

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## 3.1 INTRODUCTION

Securing justice for rape victim-survivors has been high on feminists' agendas since the 1970s. Justice in this context is typically assumed to equate to punishing the perpetrators of rape,<sup>1</sup> and as the criminal justice system all too often fails to achieve this goal it is deemed to be unjust. However, some feminists are beginning to question whether this equation necessarily balances, or whether justice may have different meanings and could be achieved through other methods.<sup>2</sup> For many, this has meant broadening the concept of justice within the criminal law sphere to better meet victim-survivors' needs and interests through additional outcomes, improved legal processes, and an increase in health and support services.<sup>3</sup> For others, the remit of justice in this context needs to be even wider due to the repeated failures of the criminal justice system,<sup>4</sup> and because criminal law reforms may have strengthened state power and control, particularly over those who are most vulnerable and marginalised in society.<sup>5</sup> However, scholars who have looked beyond the criminal justice system have tended not to engage in significant discussion of the relationship between alternative or additional solutions and justice.<sup>6</sup> Consequently, this chapter will explore what it is that victim-survivors might want from a legal response to rape, the conceptions of justice underpinning these ideas, and thus what the important features of justice are for some victim-survivors.

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<sup>1</sup> McGlynn, 'Feminism, Rape and the Search for Justice'.

<sup>2</sup> McGlynn, *ibid*; Seidman and Vickers, 'An Agenda for Rape Law Reform'; Larcombe, 'Feminist Aims and Measures for Rape Law'.

<sup>3</sup> For example, Larcombe, *ibid*; Stern, *The Stern Review*; Miller, *After the Crime*.

<sup>4</sup> McGlynn, 'Feminism, Rape and the Search for Justice'; Seidman and Vickers, 'An Agenda for Rape Law Reform'; Naylor, 'Alternative Pathways'.

<sup>5</sup> Martin, 'Retribution Revisited'; Bumiller, *In An Abusive State*.

<sup>6</sup> As was explained in chapter 1, section 1.1.

This purpose of this chapter is not, however, to conceptualise ideal justice in an ideal world, from the perspective of rape victim-survivors. Taking a similar approach to justice as Sen, which will be explored at the start of this chapter, the focus is on ways in which to reduce injustices in an imperfect world, or to enhance the quality of justice, with regard to actual institutional structures and human behaviour.<sup>7</sup> A significant part of reducing the injustice of rape is to better address the harms, and therefore different conceptualisations of the harms of rape will be outlined. It will be concluded that there has been a focus on the 'core' harm of rape that characterises rape as wrongful, at the expense of the diversity of material harms that rape victim-survivors suffer.

The remainder of the chapter will explore different manifestations of justice in legal outcomes and legal procedures, and their relationship to what some victim-survivors' perceive as a just response to rape. The manifestations of justice which are categorised as outcomes are: punishment, reparations and compensation, and apology. The manifestations of justice which are categorised as part of the legal procedures and process are: the implementation of legal rules and policies, and the role and treatment of the victim-survivor. Each will be explored in turn in relation to the theoretical underpinnings, the research as to what some victim-survivors see as important for a legal response to the harms of rape, and also the relationship between these particular victim-survivors' perspectives and justice.

The chapter will conclude that some victim-survivors are more concerned with having the material harms that they have suffered recognised and redressed than can be achieved by retributive punishment. While many victim-survivors do want the wrong and harms recognised and the wrongdoer held responsible, it seems that they may be satisfied when this is achieved through a variety of means, for example reparation, compensation and/or apology, rather than purely or primarily punishment. Moreover, a number of victim-survivors emphasise the need to ensure that legal procedures and processes are just, which amounts to according them respect to signify their worth. These aspects of justice will be set out in the conclusion, providing a reference point by which to analyse, compare and evaluate different legal responses to rape (namely, criminal law, restorative justice and tort law) throughout the subsequent chapters.

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<sup>7</sup> Sen, *The Idea of Justice*.

### 3.2 WHY NOT A THEORY OF IDEAL JUSTICE IN THE CONTEXT OF RAPE?

To begin with, it is important to set out the approach to justice that is taken in this thesis. The purpose is not to develop an ideal theory of justice in the context of rape, neither is it to explore ideal justice more broadly and then apply a particular theory of justice and how to achieve it in the context of rape. Both these approaches would start from the point of theorising ‘ideal justice’,<sup>8</sup> which Sen sees as the dominant trend in contemporary political philosophy, influenced by Rawls’ *A Theory of Justice*.<sup>9</sup> Indeed, Rawls explains that ‘the reason for beginning with ideal theory is that it provides ... the only basis for the systematic grasp of these more pressing problems’ that persist in everyday life.<sup>10</sup> However, Sen aims to buck this trend,<sup>11</sup> arguing that justice should be approached in the way of a ‘realization-focused comparison’, which is more concerned with ‘social realizations’ (‘actual institutions’, ‘actual behaviour’ and so on), and comparing societies and institutional arrangements to find ways in which to reduce injustice.<sup>12</sup>

To make his argument, Sen identifies a number of limitations of ideal theory. One of the main problems, Sen explains, is that even if a reasoned agreement as to what constitutes a just society can be achieved,<sup>13</sup> it does not indicate the means by which to realise this goal, or how to weigh up the different possible routes to achieve ideal justice.<sup>14</sup> In addition, in an

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<sup>8</sup> The former approach is what Robeyns identifies as a ‘partial’ theory of ideal justice, which focuses on a particular domain, whereas the latter is reliant on a ‘comprehensive’ theory of ideal justice which provides the conditions to remove every example of injustice; Ingrid Robeyns (2008) ‘Ideal Justice in Theory and Practice’, *Social Theory and Practice*, 34: 341, p 344.

<sup>9</sup> Sen, *The Idea of Justice*, refers to this form of ideal justice as ‘transcendental institutionalism’, referring specifically to theories which focus on perfectly just institutional arrangements. However, the term ‘ideal justice’, a slightly broader but more common term, will be used here.

<sup>10</sup> John Rawls (1971) *A Theory of Justice* (Harvard: Harvard University Press), pp 8-9.

<sup>11</sup> Others similarly refute the importance of theorising ideal justice: Colin Farrelly (2007) ‘Justice in Ideal Theory: A Refutation’, *Political Studies*, 55: 844; Robert E Goodin (1995) ‘Political Ideals and Practice’, *British Journal of Political Science*, 25: 37; Robeyns, ‘Ideal Justice’.

<sup>12</sup> Sen, *The Idea of Justice*, p 7.

<sup>13</sup> And Sen doubts whether it is feasible to agree on an ideal theory of justice, and describes this as another limitation of this approach; *ibid*, pp 9-15.

<sup>14</sup> *Ibid*, pp 98-101.



imperfect society the only available choices may be imperfect;<sup>15</sup> however, ideal justice does not provide direction as to how to rank situations as being less unjust and more just,<sup>16</sup> and therefore it does not help in making 'decisive comparisons among imperfect alternatives'.<sup>17</sup> Moreover, Goodin points out that what is considered valuable or just in an ideal society may not be so in a non-ideal society.<sup>18</sup> As such, what constitutes justice may vary depending on the social context.<sup>19</sup>

This is not to say that ideal theory is redundant, but rather that more attention should be paid to non-ideal theory. Often, non-ideal justice is understood as the method by which to achieve or move towards an ideal and just society.<sup>20</sup> But viewing non-ideal justice in this way means that a theory of justice is nevertheless essential. Sen, however, argues that a theory of ideal justice is not necessary to guide decision making as to how best to reduce a particular injustice by making comparative assessments.<sup>21</sup> For example, he says, knowledge that Mount Everest is the tallest mountain in the world is unnecessary to decide which of Mount Kilimanjaro and Mount McKinley is the tallest.<sup>22</sup> However, this example is somewhat misleading: 'tallness' as an evaluative measure is likely to be relatively easy to agree upon, whereas in comparing two or more possible imperfect alternatives relating to justice the evaluative measures are unclear and unlikely to be easily agreed upon.<sup>23</sup> Consequently, principles or ideas as to what is unjust and what is just are necessary, to some extent, for a comparative evaluation of different alternatives.<sup>24</sup>

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<sup>15</sup> *Ibid*, pp 15-19.

<sup>16</sup> *Ibid*, p 100.

<sup>17</sup> *Ibid*, p 97; see also Margaret Jane Radin (1990) 'The Pragmatist and the Feminist', *Southern California Law Review*, 63: 1699, pp 1699-1704.

<sup>18</sup> Goodin, 'Political Ideals and Practice', p 55.

<sup>19</sup> *Ibid*.

<sup>20</sup> Radin, 'The Pragmatist and the Feminist', p 1701.

<sup>21</sup> Sen, *The Idea of Justice*, pp 98-102, 105.

<sup>22</sup> *Ibid*, p 102.

<sup>23</sup> Frances M Kamm (2011) 'Sen on Justice and Rights: A Review Essay', *Philosophy and Public Affairs*, 39: 82, p 85 (the same point is made with regard to a different analogy drawn by Sen).

<sup>24</sup> Kamm, *ibid*; Radin, 'The Pragmatist and the Feminist', p 1701; cf Sen, *The Idea of Justice*, p 102.

What this means is that complete and comprehensive conceptualisations of an ideal and just society should not be the starting point of a project based on justice,<sup>25</sup> but that ideals nevertheless do have a role. This thesis is, like any feminist project, a normative one, which does, consequently, contain and proscribe ideological principles, values and an idea (or ideas) of what constitutes justice. But as feminists (and critical theorists) have pointed out, knowledge, principles, and normative goals are a product of discourse and social practices.<sup>26</sup> Relying on Fraser, Conaghan argues that this does not preclude normative justifications, but requires recognition that 'critique is *socially situated*'.<sup>27</sup> Consequently, feminists must take an approach to their goals, projects, strategies and theories which is 'tentative, revisionist, and relentlessly self-critical', and must 'embrace values of openness, reflexivity, and contextual methods' so as to 'not bring about unnecessary or undesirable political or conceptual closure' in trying to achieve their normative goals.<sup>28</sup> This sits well with arguments to avoid prioritising accounts of ideal justice. If knowledge and critique is situated, and open to critical reflection and revision, then '[t]here is no general solution; there are only piecemeal temporary solutions', and 'making our decisions of nonideal justice ... will help to reconstitute our ideals'.<sup>29</sup>

Due to the limitations of ideal justice, Sen says that 'the theory of justice, as formulated under the currently dominant transcendental institutionalism, reduces many of the most relevant issues of justice into empty – even if acknowledged to be 'well-meaning' – rhetoric'.<sup>30</sup> As such, a more pragmatic approach will be taken which emphasises the need to address the 'real problems' and harms that people suffer.<sup>31</sup> To do so, the thesis starts from the 'view from the lives of rape victim-survivors', recognising that there is only partial and situated knowledge, and that those on the margins, who experience oppression and domination, are in the best position to articulate such harms and the problems that they

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<sup>25</sup> Sen, *ibid*, pp 103-105.

<sup>26</sup> Conaghan, 'Reassessing the Feminist Theoretical Project in Law', p 380.

<sup>27</sup> *Ibid*, p 381; with reference to Nancy Fraser (1997) *Justice Interruptus: Critical Reflections on the Postsocialist Condition* (New York and London: Routledge), pp 211-217.

<sup>28</sup> *Ibid*. It is also important to note that there is not one feminism, but this is the interpretation and approach for the purpose of this thesis.

<sup>29</sup> Radin, 'The Pragmatist and the Feminist', pp 1700-1701.

<sup>30</sup> Sen, *The Idea of Justice*, p 26.

<sup>31</sup> Martha Nussbaum (2002) *Sex and Social Justice* (USA: Oxford University Press), pp 6-10.

experience in social life.<sup>32</sup> The following section thus examines the harms of rape, before exploring what some victim-survivors want from a legal response to address the wrong and harms of rape, which indicates what these victim-survivors may see as justice.

### **3.3 THE HARMS OF RAPE**

Many feminists have explored, revealed and conceptualised the wrong of rape, the harm of rape and the harms that rape can cause. What is wrong and harmful about rape shapes the legal conception and definition, determining what the law is prohibiting and redressing. In addition, the way in which the wrong or harm is conceptualised determines what is considered to be a just response – for example, criminal wrongs have certain features (although they are debated) which is thought to justify punishment.<sup>33</sup> As such, this section will first explore conceptualisations of the ‘core’ harm of rape, which defines rape as a particular criminal wrong. However, victim-survivors may also experience any number or variety of material harms as a consequence of rape, which will also be discussed. In addition, the legal system is said to increase the harms of rape, which will be examined. Setting out the harms of rape is important as what some victim-survivors perceive as a just legal response is likely to be shaped by their experience of rape and the harmful effects it has had on their lives.

#### **3.3.1 The ‘Core’ Harm of Rape**

Many feminists have debated what constitutes the ‘core’ harm of rape – that is, the harm that is a defining characteristic of rape.<sup>34</sup> In the 1970s, feminists began to challenge previous conceptualisations of rape as an assault on a woman’s honour, and damage to a

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<sup>32</sup> See further, chapter 2, section 2.2.

<sup>33</sup> For example, see Andrew P Simester and Andreas von Hirsch (2011) *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford: Hart).

<sup>34</sup> At times, this is referred to as the wrong of rape, because (taking a classic liberal approach) conduct is considered to be wrong (particularly a criminal wrong) because it is harmful (in that the act or behaviour of the actor sets back another’s and/or society’s interests; see ‘the harm principle’: Joel Feinberg (1987) *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford: Oxford University Press). Here, the term ‘core’ harm will be used, as the focus is on the effects of rape on victim-survivors, but throughout the thesis the term wrong will be used in addition to ‘core’ harm at times to indicate the culpability of the actor.

man's interest in a woman's sexuality, and, instead, conceived rape as a product and (re)producer of gender inequality.<sup>35</sup> However, with the influence of post-modernism, structural analyses have been criticised for being 'essentialist' and reproducing the gender and sexual categories that are the subject of critique.<sup>36</sup> Consequently, it is argued, for example by Henderson, that rape should be understood as an individualised (and not gendered or sexual) act of violence which violates a person's bodily integrity and autonomy.<sup>37</sup> This eschews, problematises and undermines the construction of the female as inherently rapeable.<sup>38</sup> However, Cahill points out, law is not alone in discursively tying femininity, rape and sexuality, and therefore to desexualise rape does not disrupt problematic sexual identities but allows their continual (re)production.<sup>39</sup> Moreover, Bourke argues, the strategic move to desexualise rape is made at the expense of women's lived experiences of rape as shaped by and connected to their gender and sexuality.<sup>40</sup>

The other main conception of the 'core' harm of rape is that it is a violation of an individual's sexual autonomy, and rape is seen as sex without consent (and without belief in consent).<sup>41</sup> On the one hand, this view positions women as moral agents with the

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<sup>35</sup> Not all feminists agree on how to understand the nature of rape and its relationship to gender inequality. Compare, for example, Brownmiller's view that rape is not about sex and untrammelled desire or misspent passion, but a political act which keeps all women in fear of male violence (Susan Brownmiller (1975) *Against Our Will: Men, Women and Rape* (London: Penguin)), and MacKinnon's view that violence and sex cannot be disentangled because the violent abuse of power inherent in rape is predicated on sexual inequality, a model of (hetero)sexuality in which the dominance of masculinity and the submissiveness of femininity is eroticised (Catharine MacKinnon (1987) *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press); (1989) *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press)).

<sup>36</sup> See for example, Roach Anleu's critique of MacKinnon; Sharon L Roach Anleu (1992) 'Critiquing the Law: Themes and Dilemmas in Anglo-American Feminist Legal Theory', *Journal of Law and Society*, 19: 423, pp 430-432; and more generally, Butler, *Gender Trouble*.

<sup>37</sup> Holly Henderson (2007) 'Feminism, Foucault and Rape: A Theory and Politics of Rape Prevention', *Berkeley Journal of Gender, Law and Justice*, 22: 225.

<sup>38</sup> *Ibid.*

<sup>39</sup> Ann J Cahill (2000) 'Foucault, Rape, and the Construction of the Feminine Body', *Hypatia*, 15: 43, pp 58-60.

<sup>40</sup> Joanna Bourke (2007) *Rape: A History from 1860 to the Present* (London: Virago Press), p 408.

<sup>41</sup> Susan Estrich (1986) 'Rape', *Yale Law Journal*, 95: 1087; Stephen Schulhofer (1998) *Unwanted Sex* (Cambridge, MA: Harvard University Press).

capacity for sexual self-determination.<sup>42</sup> But on the other hand, some feminists argue that the individual at the centre of this conception is 'male',<sup>43</sup> that women do not value autonomy in the same way as men,<sup>44</sup> and that the reliance on consent conceals the extent to which women's choices are restricted and shaped by (unequal) social contexts.<sup>45</sup> Nevertheless, while there are limitations to conceptualising the 'core' harm of rape as a violation of an individual's sexual autonomy, it is important that women are deemed to be moral agents, and there is the possibility that concepts such as consent and autonomy can be reshaped and redefined to satisfy feminist critiques.<sup>46</sup> Moreover, taking such an approach may allow for the recognition that while the harm of rape is primarily located in the individual, the gendered and social context shapes the nature, extent and experience of rape.

However, linking the violation of sexual autonomy with gender, rape has been viewed as the 'shattering of identity', as a 'fate worse than death'.<sup>47</sup> Feminists have raised concerns that treating rape as a 'fate worse than death' contributes to women experiencing rape as such, and shapes others' perceptions of victim-survivors as forever damaged, reifying the harms of rape.<sup>48</sup> This does not necessarily mean, however, that rape should not be understood as a violation of sexual autonomy, and of women's sexual autonomy in particular, but rather, perhaps, that there should be less emphasis on or prioritisation of the 'core' harm of rape. Focusing on the 'core' harm may reify the harm of rape, may fail to reflect the diversity of experiences of rape, and may draw too much attention away from the consequential and material harms of rape.

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<sup>42</sup> Vanessa E Munro (2008) 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy', *Akron Law Review*, 41: 923, pp 940-941.

<sup>43</sup> For an overview of feminists' conceptions and critiques of the legal person, see Ngaire Naffine and Rosemary J Owens (1997) *Sexing the Subject of Law* (Sydney: LBC Information Services).

<sup>44</sup> West, 'The Difference in Women's Hedonic Lives'.

<sup>45</sup> MacKinnon, *Toward a Feminist Theory of the State*, p 174.

<sup>46</sup> Sharon Cowan (2007) 'Freedom and Capacity to Make a Choice', in Vanessa E Munro and Carl Stychin (eds) *Sexuality and the Law: Feminist Engagements* (Abingdon: Routledge-Cavendish), p 53.

<sup>47</sup> Bourke, *Rape: A History*, p 425.

<sup>48</sup> Karen Engle (2005) 'Feminism and its (Dis)contents: Criminalizing War Time Rape in Bosnia and Herzegovina', *American Journal of International Law*, 99: 778, p 813. See also Kelly Askin (2003) 'Prosecuting War Time Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, 21: 288, p 347.

### 3.3.2 Consequential and Material Harms of Rape

In addition to the 'core' harm of rape, there are many different types of harm which individuals may suffer and experience, in various ways and to differing extents, as a result of rape.<sup>49</sup> For example, victim-survivors could suffer any number of physical injuries, and there is the possibility of contracting a sexually transmitted infection. Rape can also result in pregnancy and either an abortion or childbirth and parenting, both of which may have an enormous impact on women's bodies and lives in many different ways.

However, there is an increasing understanding that rape can and does occur without physical symptoms, with a corresponding emphasis on the emotional and psychological injuries that may be caused by rape.<sup>50</sup> For instance, rape victim-survivors often experience powerlessness, fear, shame, embarrassment, guilt, and humiliation, and often suffer what are typically categorised as psychiatric illnesses and harms, such as post-traumatic stress disorder, depression and anxiety.<sup>51</sup> In addition, victim-survivors may find aspects of their daily lives challenging and difficult, for example, building trust in relationships, either as a result of their experience of rape and/or as an effect of the psychological consequences that can follow.<sup>52</sup>

In turn, all these effects of rape can result in financial losses or have other financial implications.<sup>53</sup> This may be lost earnings from time off work; it may be that the victim-survivor becomes unemployed. As Seidman and Vickers summarise, '[t]he loss of wages, cost of health care and counseling, loss of tuition, expenses of moving, and the loss of

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<sup>49</sup> When referring to these harms throughout the thesis they will be termed 'material harms'. Where both the core and material harms are being referred to, the term 'harms' will be used.

<sup>50</sup> Joanna Bourke (2007) *Rape: Sex, Violence, History* (Berkeley: Counterpoint), pp 428-429.

<sup>51</sup> The London Rape Crisis Centre (1999) *Sexual Violence: The Reality for Women* (3<sup>rd</sup> edn, The Women's Press), pp 17-30.

<sup>52</sup> *Ibid*, pp 36-37, 26-26.

<sup>53</sup> For a discussion of many of the individual and social economic consequences of rape, see Lori A Post, Nancy J Mezey, Christopher Maxwell and Wilma Novales Wilbert (2002) 'The Rape Tax: Tangible and Intangible Costs of Sexual Violence', *Journal of Interpersonal Violence*, 17: 773.

financial support if the assailant is a spouse are among the staggering economic consequences of rape'.<sup>54</sup>

However, stressing the emotional and psychological harms of rape (and consequential financial losses) may result in an expectation that rape victim-survivors respond in a particular way, for example, showing signs of trauma.<sup>55</sup> In addition, Engle and Lottmann argue, the 'medicalisation' of rape as 'trauma' has led to the individualisation of rape with a focus on individual healing, which fails to challenge harmful social structures which give rise to and reinforce rape.<sup>56</sup> Consequently, in paying attention to the harms that can be caused by rape, the diversity of harms should be emphasised so as to avoid constructing a stereotypical response which can have negative repercussions. While some rape victim-survivors will experience significant physical, emotional, psychological, social and economic consequences, others may not. In addition, it is important to recognise the ways in which institutional and other social structures contribute to causing or shaping experiences and perceptions of the harms of rape, and which can be challenged and addressed.<sup>57</sup>

### **3.3.3 Harmful Legal Responses to Rape**

A final dimension of feminists' analyses of the harms of rape is the harmful effects the legal response to rape can have on victim-survivors. The experience of the criminal justice system is often said to be akin to a 'second rape', which may be due to the outcome of the case but is primarily through the legal process.<sup>58</sup> Both the outcome of the case (including the length of a prison sentence, acquittals, cases which are not prosecuted and so on) and the treatment of the victim-survivor through the legal process can reinforce certain types of rape as 'real' rape excluding and denying the majority of victim-survivors' experiences.<sup>59</sup>

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<sup>54</sup> Seidman and Vickers, 'An Agenda for Rape Law Reform', p 481.

<sup>55</sup> Helena Kennedy (2005) *Eve was Framed* (London: Vintage), pp 133-134; Marc A Klippenstine and Regina Schuller (2012) 'Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim Over Time', *Psychology, Crime and Law*, 18: 79.

<sup>56</sup> Engle and Lottmann, 'The Force of Shame', p 81.

<sup>57</sup> *Ibid.*

<sup>58</sup> The potential harmful experiences and effects of the criminal legal process in rape cases are explored in more detail in chapter 4.

<sup>59</sup> Lee Madigan and Nancy Gamble (1991) *The Second Rape: Society's Continued Betrayal of the Victim* (New York: Lexington Books).

In addition, legal processes or the victim-survivor's role (for example, as a victim and witness to the state's action in the criminal justice system) can reinforce women's victimhood status and powerlessness.<sup>60</sup> Going further, du Toit argues that because the patriarchal symbolic order denies women's subjectivity systematically, the erasure of this through rape cannot be seen under contemporary legal and social conditions so rape is regarded as an 'impossibility'.<sup>61</sup> Another reason the legal process is said to be like a 'second rape' is because the victim-survivor must explain what happened repeatedly, and is questioned about her body, sexual behaviour and dress and so on in great detail, which may be like 'reliving it'.<sup>62</sup> Consequently, the legal process and the trial in particular can increase or aggravate the harms which rape victim-survivors may suffer.

### **3.3.4 Summary: The Harms of Rape**

Conceptualising the harm of rape has been an important part of feminists' theories of sexual violence, in particular to harness the symbolic power of the criminal law to proscribe the harm of rape. Although here it has been said that the 'core' harm of rape should be understood as the violation of an individual's sexual autonomy, the main point is that there has been too much attention paid to this debate, losing sight of the diversity and extent of material harms that victim-survivors may experience. In addition, the legal process itself often reinforces and aggravates the harms of rape. Different legal processes and outcomes can address (or potentially aggravate) different harms of rape, and different aspects of justice may relate to a particular form of harm – 'core', material or legal. Thus, the harms of rape will be discussed throughout the rest of the chapter in determining what aspects of justice are important for rape victim-survivors.

## **3.4 LEGAL OUTCOMES AND JUSTICE**

One form or dimension of justice is its embodiment in legal outcomes. The outcomes of punishment, reparation and compensation, and apology will be examined in turn, and the conceptions of justice underpinning these outcomes will be explored. Following this, rape

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<sup>60</sup> *Ibid.*

<sup>61</sup> Louise du Toit (2009) *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (New York, London: Routledge), p 31.

<sup>62</sup> Sue Lees (1996) *Carnal Knowledge – Rape on Trial* (London: Penguin).



victim-survivors' views on each manifestation of justice will be discussed,<sup>63</sup> and which of the three forms of harms of rape – 'core', material and legal – are addressed, to come to a conclusion as to what aspects of justice are important for some victim-survivors.

### 3.4.1 Punishment

Retributive punishment through the criminal justice system is typically seen as the way to provide justice for rape victim-survivors. Retribution is one of two primary approaches to theories of and justifications for punishment as a means by which to hold individuals responsible for certain wrongful acts. Retribution is backward looking, and punishes for past wrongs, whereas the other approach – a consequentialist approach – looks to future changes which can be secured through punishment.<sup>64</sup> These theories will be outlined, and then discussed in relation to rape victim-survivors' perspectives on punishment and its relationship to the harms of rape and justice.

There are a number of conceptualisations of retribution as the basis for punishment (in the criminal law). Typically, retributive punishment should be proportionate to the wrongdoing because this is what the wrongdoer 'deserves', which Lewis argues connects punishment with justice.<sup>65</sup> Retribution may 'restore an order of fairness which was disrupted by the criminal's criminal act',<sup>66</sup> 'vindicate the value of the victim',<sup>67</sup> and censure the wrongdoer

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<sup>63</sup> It is important to investigate victim-survivors' views in particular, and not only or primarily victims' views in general, because of the particular social context and gendered nature of rape. The empirical research in this respect is limited, and studies tend to be small, however, it is nevertheless significant to upfront and highlight these perspectives which are typically marginalised and excluded from discussions of rape law and justice.

<sup>64</sup> Andrew von Hirsch (1976) *Doing Justice – The Choice of Punishments* (Report of the Committee for the Study of Incarceration), pp 45-49.

<sup>65</sup> CS Lewis (1953) 'The Humanitarian Theory of Punishment', *VI Res Judicate*, 224; extract in Christopher MV Clarkson, Heather M Keating and Sally R Cunningham (2007) *Clarkson and Keating, Criminal Law: Text and Materials* (London: Sweet and Maxwell), p 29.

<sup>66</sup> Wojciech Sadurski (1985) 'Distributive Justice and the Theory of Punishment', *Oxford Journal of Legal Studies*, 5: 47, p 55.

<sup>67</sup> Jean Hampton (1992) 'Correcting Harms versus Righting Wrongs: The Goal of Retribution', *UCLA Law Review*, 39: 1659, p 1686.

and her/his conduct.<sup>68</sup> To achieve these aims the punishment must reflect the wrongfulness of the wrongdoer's conduct,<sup>69</sup> that is, the 'core' harm of rape.

In terms of consequentialist theories of punishment, there is deterrence, which relates to deterring people from committing crimes generally and deterring an individual from reoffending. Alternatively, wrongdoers may be incapacitated if they are a risk to public safety. Finally, there is rehabilitation, which aims to alter the wrongdoer's behaviour or outlook in a positive way to secure social obedience. These justifications have largely fallen out of favour,<sup>70</sup> as to achieve consequentialist aims punishment can be imposed to whatever extent is necessary, which commentators argue is to treat people as means to an end and potentially to punish people for crimes that they may commit in the future.<sup>71</sup> Furthermore, empirical research indicates that punishment is not very effective in achieving these goals.<sup>72</sup>

From the perspective of some rape victim-survivors, there is an emphasis on recognising the 'core' harm of rape, which would seem to align with the expressive function of retributive punishment.<sup>73</sup> Providing recognition of the 'core' harm is important for victim-survivors as without this those who nevertheless experience it as harmful may face a disjuncture, their lived realities trivialised and misrepresented. As Konradi explains,

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<sup>68</sup> Andrew von Hirsch (1993) *Censure and Sanctions* (Oxford: Clarendon Press).

<sup>69</sup> Hampton, 'Correcting Harms or Righting Wrongs', p 1686.

<sup>70</sup> Nevertheless, consequentialist justifications for punishment are listed as aims of sentencing in the Criminal Justice Act 2003, section 142.

<sup>71</sup> von Hirsch, *Censure and Sanctions*, p 1.

<sup>72</sup> Andrew Ashworth (2009) *Principles of Criminal Law* (Oxford: Oxford University Press), pp 16-17; with reference to Andrew von Hirsch, Anthony E Bottoms, Elizabeth Burney and P-O Wikstrom (1999) *Criminal Deterrence and Sentencing Severity: An Analysis of Recent Research* (Oxford: Hart).

<sup>73</sup> For example, see Judith Lewis Herman (2005) 'Justice from the Victim's Perspective', *Violence Against Women*, 11: 571, p 585; Marianne Hester, Carol McNaughton Nicholls, Martin Mitchell, Ian Simpson and Stephen Webster (2012) *Attitudes to Sentencing Sexual Offences* (Sentencing Council Research Series 01/12, Sentencing Council), p vii; available online:

[http://sentencingcouncil.judiciary.gov.uk/docs/Attitudes\\_to\\_Sentencing\\_Sexual\\_Offences\\_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Attitudes_to_Sentencing_Sexual_Offences_(web).pdf) (last accessed 17 October 2012).

recognition of the harm provides a means by which for the 'survivor to regain a sense of positive social value and a place in the social fabric from which she was torn'.<sup>74</sup>

However, while it is clear that rape victim-survivors want the 'core' harm recognised, there is less clarity in the literature as to whether victim-survivors see (proportionate) punishment as the *necessary* means by which to do so. For example, in Baroness Stern's review of public authorities' responses to rape, which included interviews with victim-survivors, she said that for many a criminal conviction was a 'very worthwhile' outcome.<sup>75</sup> Here, the emphasis is on conviction – finding that the wrongdoer was legally responsible for the 'core' harm – rather than on punishment as the consequence of a conviction. Indeed, Herman found that the majority of participants in her study, which investigated 22 sexual and domestic violence victim-survivors' views on justice and the legal system, were not driven by an interest in seeing the wrongdoer punished for the sake of punishment.<sup>76</sup> Only one participant expressed a desire for retribution, and no participants were motivated by vengeance, which is often understood as a motivation for greater than proportionate punishment.<sup>77</sup> Despite this, victim-survivors' most important objective in Herman's study was to receive validation, which 'required an acknowledgement of the basic facts of the crime and an acknowledgement of harm'.<sup>78</sup> The views of the victim-survivors in Herman's study differ from the attitude of the public in general, which it seems has become increasingly punitive, as Hough and Roberts show in relation to burglary and car theft in a study drawing on data from the British Crime Survey for 12 years from 1984.<sup>79</sup> In addition, the sentences which are imposed for burglary, theft and rape are typically underestimated by the public, more frequently so by women than by men, and sentences are seen as too lenient.<sup>80</sup> More in line with the general public's views, where victim-survivors were

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<sup>74</sup> Amanda Konradi (2007) *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Westport, CT: Praeger Publishers), p 191.

<sup>75</sup> Stern, *The Stern Review*, p 46.

<sup>76</sup> Herman, 'Justice from the Victim's Perspective', pp 589-590.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, p 585.

<sup>79</sup> Michael Hough and Julian V Roberts (1998) *Attitudes to Punishment: Findings from the British Crime Survey* (Home Office Research Study No. 179, London: Home Office), p 42; see also Joanna Mattinson and Catriona Mirrlees-Black (2000) *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey* (London: Home Office), p 21.

<sup>80</sup> Hough and Roberts, *ibid.*, pp 15 and 21.

involved in a study discussing sentencing in the criminal justice system they commonly wanted the sentence to reflect the seriousness of the wrong and the harms that they had suffered.<sup>81</sup> But in this study the focus seemed to be on what the length of a custodial sentence should be and why, and it is unclear from the way that the research is presented whether this was of primary significance for victim-survivors, or whether this focus was researcher-driven. It is unclear whether there was (the potential for) discussion as to other outcomes that could reflect the seriousness of the wrongdoing or which might be desired for other purposes that could not be achieved by a prison sentence.

While some victim-survivors desire a retributive response, it does not seem to be given the primacy that retribution has in criminal justice, and it seems that rape victim-survivors commonly look to a legal response to protect them from violence in the future.<sup>82</sup> Indeed, in the research on sentencing sexual offences victim-survivors emphasised the importance of rehabilitation to prevent further violence by the wrongdoer.<sup>83</sup> Similarly, a priority for the victim-survivors interviewed by Herman was that they would be safe from further abuse by the wrongdoer.<sup>84</sup> Other studies indicate that many sexual violence victim-survivors also want to protect others from violence from the wrongdoer.<sup>85</sup> Feeling safe from or protecting others from future violence could be achieved because punishment may achieve any or all of the following (consequentialist) goals: incapacitation, rehabilitation or deterrence. However, as outlined above, these aims have been criticised as justifications for punishment, and it may be that other means are more appropriate and effective for achieving these goals.

From the perspective of rape victim-survivors, it seems that punishment for retribution is not of primary importance. Rather, their ideas of the purpose of punishment are much more consequentialist, focusing on deterrence (both in the individual and general sense),

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<sup>81</sup> Hester *et al.*, *Attitudes to Sentencing Sexual Offences*, p vii.

<sup>82</sup> Herman, 'Justice from the Victim's Perspective', p 597.

<sup>83</sup> Hester *et al.*, *Attitudes to Sentencing Sexual Offences*, p v.

<sup>84</sup> Herman, 'Justice from the Victim's Perspective', p 594.

<sup>85</sup> Debra Patterson and Rebecca Campbell (2010) 'Why Rape Survivors Participate in the Criminal Justice System', *Journal of Community Psychology*, 38: 191, p 195; Kelly *et al.*, *A Gap or a Chasm?*, p 32; Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves (2000) 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse', *Canadian Journal of Women and the Law*, 12: 66, p 76.

rehabilitation and incapacitation for the protection of themselves and/or others from the wrongdoer. Moreover, it may be that such goals are better achieved by other means. Rape victim-survivors do, however, emphasise the significance of recognition of the 'core' harm of rape, which it seems is first and foremost achieved by a legal judgment against the wrongdoer. While some victim-survivors have indicated that a custodial sentence should reflect the severity of the wrong, it may be that this and other aims could be achieved through other means. The outcomes of reparation and compensation, and apology will be explored in this respect, and also more broadly in relation to their relationship to justice from rape victim-survivors' perspectives.

### **3.4.2 Reparation and Compensation**

Doak explains that reparation 'is frequently used to describe a range of measures that aim to rectify the harm caused and to restore the victim to his or her position before the act in question occurred, insofar as that is possible'.<sup>86</sup> Reparation can include the restitution of property, the provision of some form of service to the victim or community, or some other task that is deemed to repair the harms that are caused by wrongdoing. Financial compensation is not synonymous with reparation, but rather compensation is one form of reparation, although often the two concepts are equated.<sup>87</sup> Consequently, in relation to rape victim-survivors the literature typically discusses financial compensation specifically (sometimes using the term 'reparation'), and therefore this will be the focus here. However, when discussing what it is that is important about compensation, or what makes it just from the perspective of some victim-survivors, it will be considered whether these goals are necessarily achieved through compensation or whether other forms of reparation may also suffice.

Compensation is typically understood as a means by which to make good the harmed person's losses: it can provide symbolic recognition and reparation of the harms, and/or it can be used as a means to achieve other ends, such as recovering medical costs.<sup>88</sup> It is

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<sup>86</sup> Doak, *Victims' Rights, Human Rights and Criminal Justice*, p 207.

<sup>87</sup> *Ibid*, pp 207-208.

<sup>88</sup> Elizabeth Sheehy (2004) 'Compensation for Women who have been Raped', in Julian V Roberts and Renate M Mohr (eds) *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: Toronto University Press), p 206.

important to distinguish the source of compensation, as whether it is the wrongdoer who pays or, for example, whether it is from a state funded scheme may affect understandings of the purpose of the compensation, and influence the concept of justice which underpins it. First, compensation paid by the wrongdoer will be explored, and then secondly, compensation under a state scheme will be examined, both in relation to theories of the justice of such mechanisms and the harms that they address, and justice from the perspective of some rape victim-survivors.

#### 3.4.2(a) Compensation from the Wrongdoer

When full compensation is paid from the wrongdoer to the victim, this is typically understood as a manifestation of corrective justice. Corrective justice means that the wrongdoer is held responsible for the harms that s/he has caused by her/his wrongful actions, and compensates the victim to put her/him in the position s/he would have been in had the wrong not occurred.<sup>89</sup> Shapland's study of 278 violent crime victims'<sup>90</sup> experiences of the criminal justice system and their views on compensation found that receiving compensation from the wrongdoer, as opposed to from a third party, was important to them.<sup>91</sup> Similarly, in Feldthusen *et al.*'s study which compared 87 victim-survivors' experiences of seeking compensation for sexual violence through different means in Canada,<sup>92</sup> the majority of those who pursued a civil claim against the abuser did so because they wanted the wrongdoer to pay – literally and symbolically – for his actions.<sup>93</sup> And after A was sexually assaulted by and successfully sued lottery winner

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<sup>89</sup> See, for example, Ernest Weinrib (1995) *The Idea of Private Law* (Harvard: Harvard University Press). In the criminal law context, see Burt Galaway and Joe Hudson (1972) 'Restitution and Rehabilitation: Some Central Issues', *Crime and Delinquency*, 18: 403, p 405; with reference to Stephen Schafer (1968) *The Victim and His Criminal* (New York: Random House).

<sup>90</sup> This included victims of physical assault, robberies (of the 'mugging' type) and female victim-survivors of sexual assault; Joanna Shapland (1984) 'Victims, the Criminal Justice System and Compensation', *British Journal of Criminology*, 24: 131, pp 131-132.

<sup>91</sup> *Ibid*, p 135.

<sup>92</sup> The different sources of compensation were the Criminal Injuries Compensation Board, the 'Grandview Agreement' – a unique government scheme set up in Ontario to provide compensation for victim-survivors of abuse that occurred at a particular training school for girls – and civil claims.

<sup>93</sup> Feldthusen *et al.*, 'Therapeutic Consequences of Civil Actions', pp 76, 79.

Hoare<sup>94</sup> she was reported to say that the case is 'not about money, but about a just result'.<sup>95</sup> The point here is that it is not simply receiving compensation for purely instrumental purposes that is important, but the fact that it is the wrongdoer who pays the compensation.

However, for corrective justice to be done the wrongdoer must pay *full* compensation and the victim must receive *full* compensation – but it seems that this is not always necessarily required by rape victim-survivors and other violent crime victims. For example, Shapland found that many violent crime victims are willing to forgo full compensation if the compensation they receive is paid by the wrongdoer,<sup>96</sup> and Feldthusen reports the same result in relation to sexual violence victim-survivors.<sup>97</sup> Being ordered to pay compensation may be important for vindication, to expose the wrongdoer as a wrongdoer and recognise the harms that he caused, and to hold him accountable in a public forum. In addition, the victim-survivor may also experience the payment of compensation as a form of cathartic relief or 'therapeutic justice'.<sup>98</sup> Alternatively or additionally, it could be perceived as a form of – or part of – punishment.<sup>99</sup> However, there is scant research on precisely what the symbolic value of compensation is from the perspective of rape victim-survivors, and these aims could perhaps be achieved through other forms of reparation. For example, one participant in Feldthusen *et al.*'s study did not receive compensation from the wrongdoer and instead the wrongdoer made monthly payments to a rape crisis centre.<sup>100</sup> And after the victim-survivor's claim was successful in *A v Hoare* she gave all of her compensation money to charity.<sup>101</sup> From these examples it is clear that there is symbolic value in having

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<sup>94</sup> *A v Hoare* [2008] UKHL 6.

<sup>95</sup> Francis Gibb (2008) 'Lotto Rape Victim Wins Hope for Thousands', *The Times* (30 January 2008).

<sup>96</sup> Shapland, 'Victims and Compensation', p 135.

<sup>97</sup> Feldthusen *et al.*, 'Therapeutic Consequences of Civil Actions', p 79.

<sup>98</sup> Bruce Feldthusen (1993) 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence', *Ottawa Law Review*, 25: 203.

<sup>99</sup> Stephen Schafer (1965) 'Restitution to Victims of Crime – An Old Correctional Aim Modernized', *Minnesota Law Review*, 50: 243, p 248.

<sup>100</sup> Feldthusen *et al.*, 'Therapeutic Consequences of Civil Actions', p 79.

<sup>101</sup> Ben Quinn (2012) 'Lotto Rapist Victim Reveals Her Identity after Receiving an MBE', *The Guardian* (4 January 2012); available online: <http://www.guardian.co.uk/uk/2012/jan/04/lotto-rapist-shirley-woodman-iorworth-hoare> (last accessed 17 October 2012).

the wrongdoer pay – at least some – compensation to the victim-survivor or providing another form of reparation.

What may be symbolically important about compensation is that it can provide recognition of and hold the wrongdoer responsible for both the ‘core’ and the material harms of rape, in comparison to punishment which focuses almost solely on the former. Indeed, it may be for these reasons that Shapland has drawn attention to the fact that many violent crime victims see compensation from the wrongdoer as important in addition to other criminal justice sanctions,<sup>102</sup> and there have been a number of civil claims brought in addition to criminal convictions for rape.<sup>103</sup> As has been discussed, wrongdoers may not be able to pay full compensation, however where this ideal cannot be achieved it seems that victim-survivors would rather receive less than full compensation from the wrongdoer to part satisfy their desire for both symbolic and material reparation.

#### *3.4.2(b) Compensation from the State*

It is possible for the state to offer crime victims some level of compensation from a publically funded scheme, which in England, Wales and Scotland is the Criminal Injuries Compensation Scheme (CICS). There are a number of different justifications for such a scheme, and different reasons as to why crime victims may see it as fair that the state provides them with some level of compensation. Some have argued that society is responsible for preventing crime, and where it fails to do so is morally obligated to indemnify those who have suffered harm as a result.<sup>104</sup> Others see it as demonstrating social solidarity, so that where an individual has suffered through no fault of her/his own but by another’s wrongdoing then a sense of injustice can be relieved by the payment of compensation.<sup>105</sup> It is also justified on humanitarian or welfare based grounds that the

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<sup>102</sup> Shapland, ‘Victims and Compensation’.

<sup>103</sup> See for example, *A v Hoare; W v Meah; D v Meah* [1986] 1 All ER 935; Adam Fresco (2009) ‘Victims of Taxi Driver Rapist John Worboys to Claim Compensation’, *The Times* (20 May 2009).

<sup>104</sup> Enrico Ferri (1917) *Criminal Sociology* (Boston, MA: Little Brown), p 514; quoted in Marvin E Wolfgang (1965) ‘Victim Compensation in Crimes of Personal Violence’, *Minnesota Law Review*, 50: 223, p 234.

<sup>105</sup> Sveinn A Thorvaldson and Mark R Krasnick (1980) ‘On Recovering Compensation Funds from Offenders’, *Victimology*, 5: 18.



state should provide compensation where harm is caused by criminal activity. The reasons the Home Office gave for introducing a state funded scheme in England, Wales and Scotland were to show 'social solidarity' and to 'express public sympathy for the victims of crime'.<sup>106</sup> Indeed, Miers says that the scheme is primarily symbolic, as it does not refer to individual victims' needs and the harms that they have suffered, but rather the state sets standard tokenistic awards.<sup>107</sup>

In Shapland's study, violent crime victims did tend to view compensation under the CICS as important symbolically, 'making a statement about the offence, the victim and the position that the criminal justice system was prepared to give the victim'.<sup>108</sup> Similarly, Feldthusen *et al.* found that sexual assault victim-survivors applied to the Canadian criminal injuries scheme for compensation, primarily for reasons such as 'justice', 'closure' and to receive 'public affirmation of the wrong', and only a fifth of participants said they did so for the money.<sup>109</sup>

Other studies, however, have demonstrated that rape victim-survivors are concerned with recovering the financial losses that flow from sexual violence. Rubin has conducted a study in Nova Scotia which includes an exploration of what abused women want from a legal

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<sup>106</sup> Home Office (1978) *Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party* (London: HMSO); quoted in Shapland, 'Victims and Compensation', p 138.

<sup>107</sup> David Miers (1983) 'Compensation and Conceptions of Victims of Crime', *Victimology*, 8: 204, p 211; Peter Duff (1998) 'The Measure of Criminal Injuries Compensation', *Oxford Journal of Legal Studies*, 18: 105. Note that the scheme was originally more victim-centred, focusing on the particular harms suffered in a given case, but now it is more offence-centred, and has set tariffs by type of offence and broad type of harm suffered.

<sup>108</sup> Shapland, 'Victims and Compensation', p 144.

<sup>109</sup> Bruce Feldthusen, Nathalie Des Rosiers and Olena AR Hankivsky (1998) 'Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Legal System', *Psychology, Public Policy and Law*, 4: 433, p 442. The Canadian scheme does not provide full compensation for the harms that victims suffer, and it may be because the awards were perceived as relatively low that victim-survivors said that they did not apply primarily for the monetary award.

response, and the study included focus groups of 80 abused women.<sup>110</sup> Of five main themes which Rubin highlights from the responses, economic independence and restitution is one.<sup>111</sup> Given the material harms that can flow from abuse, and the extent to which it can interfere with women's everyday lives, Rubin says that it 'is not surprising that many women identified economic help as primary to restoring the harm they have experienced'.<sup>112</sup> Providing a state funded compensation scheme means that many costs of crime are shifted from victim-survivors and are distributed among society, and because certain groups are more likely to be victims of crime – typically those which are marginalised in society – dominant groups are more likely to bear greater costs as they are less likely to be victims of crime.<sup>113</sup> Redistributing losses in this way can, consequently, be seen to address social inequalities and move towards social justice which cannot be achieved through corrective justice as it aims to shift losses from an individual wrongdoer to an individual victim-survivor, maintaining the status quo.<sup>114</sup>

Overall, it seems that compensation is important for rape victim-survivors for both symbolic and instrumental reasons whether paid from the wrongdoer or the state, although what is symbolised is different in each case. Compensation is important to provide recognition of the harms caused by the wrongdoer's conduct, and where the wrongdoer pays compensation it can also hold the wrongdoer responsible. Moreover, it

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<sup>110</sup> Pamela Rubin (2003) *Restorative Justice in Nova Scotia: Women's Experience and Recommendations for Positive Policy Development and Implementation* (Independent Research, funded by Status of Women Canada's Women's Program).

<sup>111</sup> The others are: woman-centredness and the undermining of systemic discrimination, support for women's services and other community resources, better physical security measures for victim-survivors of male violence, and community education and activism; *ibid*, p 19.

<sup>112</sup> *Ibid*, p 20. However, it is important to note here that this research covered many forms of and contexts to male violence against women, and was not only sexual violence, or rape in particular. Consequently, it included domestic violence in its remit, and the victim-survivor's concerns generally, and economic concerns and needs specifically, may be different, for example, because the victim-survivor may be economically dependent upon, or share finances with, the abuser, and/or share dependent children or others in need of care, which requires considerable financial support.

<sup>113</sup> Comment (1965-1966) 'Compensation for Victims of Crime', *University of Chicago Law Review*, 33: 531, pp 533-534.

<sup>114</sup> Wade Mansell (2009) 'Tsachi Keren-Paz, Torts, Egalitarianism and Distributive Justice', *Feminist Legal Studies*, 17: 239, p 239.

can provide a means by which to redress some of the material harms that victim-survivors experience. This could also be true of other forms of reparation. While full compensation is not always provided, and thus not all the harms of rape may be recognised and the wrongdoer may not be held fully responsible, Fraser has argued that there has been too much of an emphasis on the recognition of cultural harms – for example, the ‘core’ harm of rape – and more attention should be paid to the material harms that women suffer.<sup>115</sup> Reparations and compensation shift the focus from solely the ‘core’ harm of rape that is represented in punishment, to the recognition and redress of these material harms.

### 3.4.3 Apology

Similarly to reparations and compensation, an apology is thought to demonstrate the wrongdoer’s responsibility for the wrongful act and harms that are caused, which may provide symbolic reparation of the harms and contribute to the victim’s healing process. Consequently, it is typically assumed that many victims desire an apology from the person who harmed them.<sup>116</sup> An apology is typically understood as an acceptance of wrongdoing and an expression of remorse or regret,<sup>117</sup> which is important for restoring the balance between victim and wrongdoer.<sup>118</sup> In Abel’s view, an ‘apology is a ceremonial exchange of respect’.<sup>119</sup> The wrongdoer has disrespected the victim, and demonstrates respect for the victim by apologising which reaffirms the status of the victim. Abel summarises that ‘apologies are degradation rituals for wrongdoers who must affirm the norm of status equality, admit violating it, and accept responsibility’.<sup>120</sup>

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<sup>115</sup> Nancy Fraser (2000) ‘Rethinking Recognition’, *New Left Review*, 3: 107.

<sup>116</sup> Carrie J Petrucci (2002) ‘Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System’, *Behavioral Sciences and the Law*, 20: 337, p 345.

<sup>117</sup> Hiroshi Wagatsuma and Arthur Rosett (1986) ‘The Implications of Apology: Law and Culture in Japan and the United States’, *Law and Society Review*, 20: 461, p 469.

<sup>118</sup> *Ibid*, p 462.

<sup>119</sup> Richard Abel (1998) *Speaking Respect, Respecting Speech* (Chicago, IL: University of Chicago Press), p 265.

<sup>120</sup> *Ibid*. This, however, is in the context of harmful speech, putting forward the point that ‘speech can heal as well as harm’ and thus an apology is a good way to equalise the imbalance between speaker and victim, where the status of the speaker has been ‘elevated’ at the expense of the victim; pp 264-265.

In contrast to coerced outcomes, such as state enforced punishment or restitution, an apology is supposed to be offered of the wrongdoer's free will, which may more meaningfully demonstrate that the wrongdoer has understood the harms they caused and is regretful. It may also demonstrate that the wrongdoer, to some extent, empathises with the victim.<sup>121</sup> Empathy is not the same as sympathy which means sharing similar feelings, or feeling what another person is feeling; empathy goes further.<sup>122</sup> It requires imagining from another's perspective – that is, seeing the world from an unfamiliar (and complex) viewpoint.<sup>123</sup> As such, it may be that rather than simply recognising the harms that the wrongdoer has caused, an apology may demonstrate that the wrongdoer has an understanding of the way in which the harms are perceived and experienced by the victim. This may signify respect for the victim and her/his particular experiences, and in the context of rape that the victim-survivor's perspective is shaped by gender and other identity characteristics.

Apologies are thought to improve the well-being of victims.<sup>124</sup> Although Regher and Gutheil say that research is inconclusive on this point, they nevertheless suggest that an apology may be a necessary if insufficient step in the healing process.<sup>125</sup> An apology may reduce a victim's anger and provide her/him with a sense of closure, allowing her/him to move on with her/his life.<sup>126</sup> Further, Levi suggests that an apology can empower victims,<sup>127</sup> particularly as victims can decide whether or not to accept an apology.<sup>128</sup> In addition, the

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<sup>121</sup> Donna L Pavlick (2002-2003) 'Apology and Mediation: The Horse and Carriage of the Twenty-First Century', *Ohio State Journal of Dispute Resolution*, 18: 829, p 844.

<sup>122</sup> See, for example, Henderson's concept of empathy which involves: 1) the capacity to perceive others as having different goals, interests and experiences; 2) the imaginative experience of the situation of another; and 3) the distress response that accompanies this experiencing – which may (but not must) lead to action to ease the pain of another; Lynne Henderson (1987) 'Legality and Empathy', *Michigan Law Review*, 85: 1574, pp 1579-1582.

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

<sup>124</sup> Alfred Allan (2007) 'Apology in Civil Law', *Psychiatry, Psychology and Law*, 14: 5, p 8.

<sup>125</sup> Cheryl Regher and Thomas Gutheil (2002) 'Apology, Justice and Trauma Recovery', *Journal of the American Academy of Psychiatry and Law*, 30: 425, p 430.

<sup>126</sup> Daniel W Shuman (2000) 'The Role of Apology in Tort Law', *Judicature*, 83: 180-189, p 183.

<sup>127</sup> Deborah Levi (1997) 'The Role of Apology in Mediation', *New York University Law Review*, 72: 1165.

<sup>128</sup> Petrucci, 'Apology in the Criminal Justice Setting', p 352.

wrongdoer takes responsibility for the wrong, removing blame and/or shame from the victim, which is regarded as 'central to apology's restorative relational benefits'.<sup>129</sup>

However, the meaning, importance and role of apology are socially and culturally contingent,<sup>130</sup> may have a gender dimension (for instance, women may be more likely to apologise than men, or feel more pressure to apologise),<sup>131</sup> and may also depend on the context. For example, in relation to domestic violence, Stubbs says that admitting the offence, feeling or appearing guilty and apologising is often a part of the 'cycle' of abuse.<sup>132</sup> Although this may not apply in relation to all rapes – if at all, outside the domestic violence arena – at the same time, it may be important to consider whether rape victim-survivors in particular desire an apology. In Feldthusen *et al.*'s study, 38 per cent of victim-survivors said they wanted an apology from the wrongdoer or representative of the responsible institution or third party.<sup>133</sup> In Herman's study, the participants were divided as to whether an apology was desirable or valuable.<sup>134</sup> While some 'expressed a fervent wish for a sincere apology',<sup>135</sup> others were wary of the potential manipulative motives behind this act, and some doubted the capability of wrongdoers to provide a 'meaningful' apology, claiming that 'offenders are empathetically disabled'.<sup>136</sup>

There is no strong conclusion as to whether rape victim-survivors' desire an apology from the person who has harmed them. However, for those who take a negative attitude toward an apology, it seems that it is more to do with being uncertain as to whether the apology would be genuine. As this could be a general concern, Garvey and Scheff argue that the wrongdoer must undertake some burden, such as providing material reparation to

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<sup>129</sup> Shuman, 'Apology in Tort Law', p 183.

<sup>130</sup> Wagatsuma and Rosett, 'The Implications of Apology', p 461.

<sup>131</sup> Petrucci, 'Apology in the Criminal Justice Setting', p 345.

<sup>132</sup> Julie Stubbs (2007) 'Beyond Apology: Domestic Violence and Critical Questions for Restorative Justice', *Criminology and Criminal Justice*, 7: 169.

<sup>133</sup> Feldthusen *et al.*, 'Therapeutic Consequences of Civil Actions', p 76.

<sup>134</sup> Herman, 'Justice from the Victim's Perspective', p 586.

<sup>135</sup> *Ibid*, p 586.

<sup>136</sup> *Ibid*, p 587.

reinforce an apology and demonstrate that it is genuine and meaningful.<sup>137</sup> This aligns with Henderson's idea of empathising with another, which she says may lead to actions which will lessen the harm of the other.<sup>138</sup> If a wrongdoer has empathised with the victim-survivor, and if an apology is considered to show respect and it can be demonstrated as genuine by some form of reparation, then an apology may be important for some victim-survivors. It can reaffirm their worth, contribute to the healing process, confirm that the wrongdoer is taking responsibility for his actions, and may result in redress for some of the material harms that they suffer.

#### **3.4.4 Summary: Legal Outcomes and Justice**

In terms of substantive outcomes, it seems that rape victim-survivors may be less concerned with punishment *per se* – that is, because the wrongdoer deserves it – than is commonly assumed, and more with consequentialist aims of punishment, such as the protection of themselves and others from further harm, and the rehabilitation of the wrongdoer. While there is an important expressive dimension to punishment, as it reflects the severity of the 'core' harm and censures wrongdoing, it may be that rape victim-survivors are satisfied with the 'core' harm being recognised and the wrongdoer being held responsible through different means, for example, reparation or compensation from the wrongdoer or an apology. In addition, rape victim-survivors emphasise the need for the recognition of and redress for the material harms they have suffered, which are not typically achieved by punishment but may be so in other outcomes, such as reparation, compensation or an apology.

### **3.5 INSTITUTIONAL PROCEDURES AND PROCESSES**

Procedural rules and experiences of the legal process are likely to have a significant bearing on whether victim-survivors perceive a response to rape as just, and consequently aspects of legal procedures will be discussed here. Main explains that:

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<sup>137</sup> Stephen P Garvey (1999) 'Punishment as Atonement', *UCLA Law Rev*, 46: 1801; Thomas J Scheff (1998) 'Community Conferences: Shame and Anger in Therapeutic Jurisprudence', *Revista Juridica UPR*, 67: 97.

<sup>138</sup> Henderson, 'Legality and Empathy', pp 1579-1582.

Procedure is an instrument of power and social control. Procedures alter the conduct of groups and individuals, and thus can privilege some over others. And procedure can, in a very practical sense, negate, resuscitate, or generate substantive rights.<sup>139</sup>

Procedure is related to substantive outcomes (or substantive justice or rights and so on) primarily in two ways. First, procedure relates to, influences and shapes substance, and secondly, procedural rules and processes contain substantive principles of justice. And yet, while the false dichotomy of procedural and substantive justice is well known, it is fundamentally relied upon in contemporary legal thought.<sup>140</sup> Drawing a distinction between procedure and substance here, however, does not necessarily reinforce the fictional dichotomy. The concepts of procedure and substance remain analytically useful in relation to evaluating institutional processes and procedures, and the substantive outcomes or aims that can result from a decision or judgment. Even if, for example, the reasons why victim-survivors perceive a particular outcome and particular process as just are the same, the outcome and process remain categorically distinct as different manifestations or representations of the particular idea or aspect of justice. The main aspects of institutional processes and procedures that will be examined here are the implementation of procedural laws, rules and policies; and the role and treatment of victim-survivors in the legal process. Each dimension of institutional procedures will be examined in relation to justice from the perspective of rape victim-survivors, and it will be argued that having just procedures is at least as important as just outcomes.

### **3.5.1 The Implementation of Procedural Laws and Policies**

An important aspect of any legal process is its procedural rules and policies. There are a wide variety of such rules and policies which guide cases through the system, dictate the format and shape the content of a trial, and balance the parties' respective legal rights. The content of the rules and procedures varies depending on the legal process, as each process typically has different aims and potential outcomes.<sup>141</sup> Legal rules are supposed to be

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<sup>139</sup> Thomas O Main (2006) *Global Issues in Civil Procedure* (Thomson, West), p 1; quoted in Thomas O Main (2010) 'The Procedural Foundation of Substantive Law', *Washington University Law Review*, 87: 801, p 818.

<sup>140</sup> Main, 'The Procedural Foundation of Substantive Law', pp 802-803.

<sup>141</sup> A classic example is the higher standard of proof required to establish criminal responsibility in comparison to civil liability. To convict a person accused of a crime, it must be determined beyond reasonable doubt that they are guilty of the offence, whereas in a civil case it need only be proved

consistent and certain, and be applied with impartiality and neutrality, which means that neither party is privileged, that the rules and decision-maker are not biased against one party, and the parties' rights are appropriately balanced. Neutrality and impartiality are conventionally understood as meaning that the decision-maker exercises objective reasoning without allowing her/his experiences, ideas, and perspectives to influence the decision-making process.<sup>142</sup> However, from a feminist perspective, that individuals' backgrounds and characteristics will shape their perception, interpretation and views on events and the behaviours of other human beings is a given.<sup>143</sup> As put by a victim-survivor interviewed as part of the *Stern Review*:

social attitudes, stereotypes and rape myths have a huge impact and influence the ways in which public authorities respond to rape complaints. All public authorities are staffed by people, many of whom believe in rape myths; these views will influence their judgement and actions regardless of whether they are supposed to be impartial and put their own beliefs aside. It is impossible, in reality, to completely put aside one's personal point of view.<sup>144</sup>

What is therefore needed, McLachlin argues, is 'informed impartiality', which 'implies an appreciation and understanding of the different attitudes and viewpoints of the parties to a controversy'.<sup>145</sup> However, all too often decision-makers do not practice 'informed impartiality' but rather 'uninformed impartiality' – which is not really impartiality at all – which reflects and reinforces dominant assumptions and norms, which tends to privilege

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more probable than not that the defendant had committed the wrongful act. This is because in the criminal law a person will be punished for her/his wrongdoing, potentially by imprisonment and thus having her/his liberty considerably restricted, whereas in the civil law the focus is on compensating the claimant for the harm caused by the defendant which demands a more equal balancing of the claimant's and defendant's interests; Mike Redmayne (1999) 'Standards of Proof in Civil Litigation', *Modern Law Review*, 62: 167.

<sup>142</sup> As explained in Erika Rackley (2005) 'When Hercules Met the Happy Prince: Re-Imagining the Judge', *Texas Wesleyan Law Review*, 12: 213, p 216.

<sup>143</sup> Beverley McLachlin (2012) *Judging: The Challenges of Diversity* (Edinburgh, Scotland: Judicial Studies Committee Inaugural Annual Lecture, 7 June 2012); available online: <http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf> (last accessed 17 October 2012).

<sup>144</sup> Stern, *The Stern Review*, p 34.

<sup>145</sup> McLachlin, *Judging: The Challenges of Diversity*, pp 10-12.



the perspective of those who are already advantaged in society.<sup>146</sup> In the context of rape, what this typically means is that views as to a particular case or victim-survivor are influenced by gender stereotypes and assumptions as to what constitutes appropriate male and female sexual behaviour, which denies and limits victim-survivors' sexual choices. Given the debates as to what impartiality means – and that conventional understandings continue to prevail – rather than adopting the term 'informed impartiality' what may be better to examine here is whether the rules and/or the way in which they are implemented negate the perspectives of victim-survivors and rely on gender stereotypes and sexual norms, or whether the particular context and characteristics of the case and parties are taken into account.<sup>147</sup>

### **3.5.2 The Role and Treatment of Victim-survivors in Legal Processes**

#### *3.5.2(a) Choice, Control and Decision-Making*

Generally, it is thought inappropriate for legal processes and decisions to be influenced by victims as they may interfere with the wrongdoer's rights.<sup>148</sup> This is partly based on an assumption that victims are motivated by vengeance and may desire a punishment that is lengthier or more burdensome than what the wrongdoer 'deserves'. Indeed, a historical reason for the development of the contemporary criminal justice model was that the state obtained control to punish the wrongdoer, supposedly providing a fairer and more just response than a victim-driven response to crime. As such, the worry is that if victims have a more participatory role in the process then this will influence the outcome in a way which may be disproportionate and unfair.<sup>149</sup>

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<sup>146</sup> Catharine MacKinnon (1983) 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence', *Signs*, 8: 635, pp 638-639.

<sup>147</sup> Patricia Cain (1988) 'Good and Bad Bias: A Comment on Feminist Theory and Judging', *Southern California Law Review*, 61: 1945.

<sup>148</sup> As explained by Doak, *Victims' Rights, Human Rights and Criminal Justice*, pp 10-11.

<sup>149</sup> Andrew Ashworth (1993) 'Some Doubts About Restorative Justice', *Criminal Law Forum*, 4: 277, p 291.

Against these concerns, research illustrates that victims are typically not as vengeful as is assumed,<sup>150</sup> and that they do want a greater level of participation in their cases, in the sense that they have the power to make decisions about the case and/or can potentially influence the outcome to some extent.<sup>151</sup> Participating in such ways is thought to be potentially empowering for victims, and in being a part of the decision-making process victims may view the agreed outcomes as more satisfactory, and be more content with the overall process.<sup>152</sup> However, this research applies to victims in general, but Lovett *et al.* point out that the idea that rape victim-survivors in particular may want choice, control and influential power has been subject to little empirical research.<sup>153</sup> They summarise that in their study of Sexual Assault Referral Centres which included questionnaires and interviews with 228 rape victim-survivors, the participants ‘provided eloquent and powerful challenges to the reactive empowerment philosophy’.<sup>154</sup> Nevertheless, Payne explains that she has spoken to victim-survivors who felt frustrated when they had ‘no real choices’ or they were not fully informed as to the possible choices available to them that related to their case.<sup>155</sup> It is unclear, then, as to the extent to which, if at all, victim-survivors want to participate in their case. What may be more important is that they are treated properly through the process, which is likely to involve keeping victim-survivors involved to the

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<sup>150</sup> For example, see Jonathan Doak and David O’Mahony (2006) ‘The Vengeful Victim?: Assessing the Attitudes of Victims Participating in Restorative Youth Conferencing’, *International Review of Victimology*, 13: 157.

<sup>151</sup> Heather Strang (2002) *Repair or Revenge? Victims and Restorative Justice* (Oxford: Oxford University Press), pp 8-13. See also Jo-Anne Wemmers (1996) *Victims in the Criminal Justice System* (Amsterdam and New York: Kugler Publications).

<sup>152</sup> Strang, *ibid.* For an overview of studies which confirm these findings in relation to procedural justice and decision-making processes more generally, see Edgar Allan Lind and Tom R Tyler (1988) *The Social Psychology of Procedural Justice* (New York and London: Plenum), ch 9.

<sup>153</sup> Jo Lovett, Linda Regan and Liz Kelly (2004) *Sexual Assault Referral Centres: Developing Good Practice and Maximising Potentials* (Home Office Research Study 285, London: Home Office), p 54.

<sup>154</sup> Lovett *et al.*, *ibid.* See also Ivana Bacik, Catherine Maunsell and Susan Grogan (1998) *The Legal Process and Victims of Rape* (Dublin: The Dublin Rape Crisis Centre), highlighting that there is not such strong evidence to suggest that rape victim-survivors in particular desire greater participation, in relation to control and decision-making (sections 3.3 and 4.3).

<sup>155</sup> Sara Payne (2009) *Rape: The Victim Experience Review* (London: Home Office), p 13.

extent that they are informed as to the process of their case and of the options and choices that are available to them.<sup>156</sup>

### 3.5.2(b) *The Treatment of Victim-survivors in Legal Processes*

Valuing victim-survivors in the legal process may not be so much to do with increasing their decision-making power than with the way in which they are treated by institutional personnel. One significant criticism of the criminal justice process (and other institutions that respond to rape) is that victim-survivors are often met with hostility and disbelief.<sup>157</sup> Insensitive treatment can make victim-survivors feel as though they are to blame or that they were not really raped, exacerbating the powerlessness, shame and guilt that many victim-survivors experience.<sup>158</sup> One point, then, is that many victim-survivors want institutional personnel to accept their views of events, and treat them as though they are telling the truth. Indeed, many victim-survivors who participated in the *Stern Review* saw this as more important than receiving legal recognition that they had been wronged.<sup>159</sup>

An important aspect of responding to rape is to treat rape victim-survivors in ways which account for their specific needs.<sup>160</sup> For example, in Lovett *et al.*'s study the majority of victim-survivors (83 per cent) said that they would prefer a medical exam to be carried out by a woman as it would make them feel safer, and would show care, understanding and sensitivity to their needs.<sup>161</sup> They also showed that victim-survivors value being treated calmly and with respect, and being informed throughout the process of examination.<sup>162</sup> In addition, Stern says that it is important to 'explain to them fully what is happening, what is going to happen ... If the prosecution decides the case cannot go to court, then a full discussion should take place to explain why'.<sup>163</sup> Herman has said that one of the main

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<sup>156</sup> See Bacik *et al.*, *The Legal Process and Victims of Rape*, section 4.3.

<sup>157</sup> Stern, *The Stern Review*, p 14.

<sup>158</sup> Shirley Feldman-Summers and Gayle P Palmer (1980) 'Rape as Viewed by Judges, Prosecutors, and Police Officers', *Criminal Justice and Behavior*, 7: 19, p 20.

<sup>159</sup> Stern, *The Stern Review*, pp 46, 102.

<sup>160</sup> Feldman-Summers and Palmer, 'Rape as Viewed by Judges, Prosecutors, and Police Officers'.

<sup>161</sup> Lovett *et al.*, *Sexual Assault Referral Centres*, p 31.

<sup>162</sup> *Ibid*, p 32. See also Stern, *The Stern Review*, p 63, on appropriate medical examination.

<sup>163</sup> Stern, *ibid*, p 102.

things that victims want from a legal process is to be informed, firstly, of their legal rights, and secondly, as to specific aspects and the progress of their case.<sup>164</sup> Similarly, Shapland found that for many violent crime victims the fairness of the process from their perspective – that they have been informed and authorities have seemed to have put effort into their case – is more important than the outcome.<sup>165</sup>

Tyler explains that being treated with ‘dignity and respect are important because they tell people that they have status within the group’.<sup>166</sup> In particular, when a person has suffered an injury or wrong which conveys that they are worth less than the wrongdoer, s/he can ‘learn a considerable amount about his or her status by viewing the way that others react to acts that diminish that status’.<sup>167</sup> This is why a legal system in which women’s subjective experiences and harms are denied and marginalised is criticised for harming individual victim-survivors and women collectively by reinforcing their subordinate status. And it is likely to be the reason why Stern concluded from her review that rape victim-survivors want a process which ‘honours the experience’ of rape.<sup>168</sup>

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<sup>164</sup> Susan Herman (2010) *Parallel Justice for Victims of Crime* (Washington, DC: The National Centre for Victims of Crime), p 46; citing Susan Howley and Carol Dorris (2007) ‘Legal Rights for Crime Victims in the Criminal Justice System’, in Robert C Davis, Arthur J Lurigio and Susan Herman (eds) *Victims of Crime* (Thousand Oaks, CA: Sage Publications), p 300.

<sup>165</sup> Shapland, ‘Victims and Compensation’, pp 134-135.

<sup>166</sup> Tom R Tyler (2001) ‘Procedural Strategies for Gaining Deference’, in John M Darley (ed) *Social Influences on Ethical Behavior in Organizations* (Taylor and Francis), p 80; quoted in Jennifer K Robbennolt (2008) ‘Apologies and Civil Justice’, in Brian H Bornstein, Richard L Viener, Robert Schopp and Steven Willborn (eds) *Civil Juries and Civil Justice: Psychological and Legal Perspectives* (New York: Springer), p 205.

<sup>167</sup> Dale T Miller (2001) ‘Disrespect and the Experience of Injustice’, *Annual Review of Psychology*, 52: 527, p 538; with reference to James T Tedeschi and Mitchell S Nesler (1993) ‘Grievances: Development and Reactions’, in Richard B Felson and James T Tedeschi (eds) *Aggression and Violence: Social Interactionist Perspectives* (Washington, DC: American Psychological Association), pp 13-46.

<sup>168</sup> Stern, *The Stern Review*, p 101.

It could be summarised that what rape victim-survivors want from legal processes is to be treated with respect.<sup>169</sup> Respect is an idea which is tied to liberal thought, and is assumed to align with equality – that is, equal respect for individuals who have equal moral worth on the basis of their humanity.<sup>170</sup> However, the limitations of the concept of equality are well known, and it has been strongly argued that equality is not an end in itself; rather, Munro argues, equality should be seen as a means to an end of respect.<sup>171</sup> Respect does not simply equate to formal equality, as Frankfurt explains, '[f]ailing to respect someone is a matter of ignoring the relevance of some aspect of his nature or of his situation ... the person is dealt with as though he is not what he actually is'.<sup>172</sup> And 'when a person is treated as though significant elements of his life count for nothing, it is natural for him to experience this as in a certain way an assault upon his reality'.<sup>173</sup> What this means is that institutional personnel should not rely on or be influenced by gender and sexual stereotypes and assumptions which deny women's sexual autonomy. What is important is to treat rape victim-survivors with respect which means recognising and condemning the acts which have disregarded an aspect of their humanity, and also accounting for and responding to the material harms of such acts through institutional processes and procedures.

### 3.5.2(c) *The Telling and Hearing of Victim-survivors' Stories*

To respect rape victim-survivors' humanity is, in part, to recognise and respond to the harms that they have experienced, and thus they need space within legal institutional processes to explain these experiences.<sup>174</sup> However, women have been – and continue to be – denied respect, with their voices silenced, unheard and distorted in legal (and other)

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<sup>169</sup> Respect is a term which is often used in rape law scholarship, typically in the context of arguing that rape victim-survivors should be respected by institutional personnel. But often this is included as one element of a number of requirements (for example, offering support services), rather than seeing these elements as demonstrating respect; for an example of this see Kelly *et al.*, *A Gap or a Chasm?*, pp 87-89.

<sup>170</sup> Leslie Green (2010) 'Two Worries About Respect for Persons', *Ethics*, 120: 212, p 213.

<sup>171</sup> Munro, *Law and Politics at the Perimeter*, pp 141-150.

<sup>172</sup> Harry Frankfurt (1997) 'Equality and Respect', *Social Research*, 64: 3, p 12.

<sup>173</sup> *Ibid.*

<sup>174</sup> This does not mean directly influencing or contributing to the decision-making process as to the substantive outcome of a case.

processes.<sup>175</sup> In relation to rape, the silencing of women's subjective experiences 'denies personhood',<sup>176</sup> reinforcing the 'core' harm of rape which is represented (and may be experienced) as a loss of self. Therefore, the telling and hearing of women's stories (and, more generally, those of the powerless, disadvantaged or oppressed groups in society) has been emphasised by feminists (and others) as a means to express alternative viewpoints, and, in so doing, to challenge dominant perceptions and interpretations of events to reveal their harmful effects.<sup>177</sup> In this sense, storytelling can be seen as a means to an end. As Young explains, 'storytelling is often the only vehicle for understanding the particular experiences of those in particular social situations, experiences not shared by those situated differently, but which they must understand in order to do justice'.<sup>178</sup> Whether this means to respect or understand differences and the implications for justice, or whether this means to recognise sharing common humanity, identifying with the other, is debated.<sup>179</sup> This is not important for the present purposes; the point is simply that storytelling is 'an important bridge ... between the mute experience of being wronged and political arguments about justice'.<sup>180</sup>

Of course, listening to stories, and understanding them, or perceiving situations from the storyteller's (or character's) perspective(s) goes hand in hand with the telling of stories. Consequently, the concept of empathy has been drawn on and discussed in feminist literature regarding (but not limited to) storytelling.<sup>181</sup> However, Massaro says, empathy

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<sup>175</sup> For a recent account, see Patrizia Romito (2008) *A Deafening Silence: Hidden Violence Against Women and Children* (Bristol: The Policy Press).

<sup>176</sup> Nicola Lacey (1998) 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law', *Canadian Journal of Law and Jurisprudence*, 11: 47, p 62.

<sup>177</sup> Kathryn Abrams (1991) 'Hearing the Call of Stories', *California Law Review*, 79: 971; Richard Delgado (1988) 'Storytelling for Opportunists and Others: A Plea for Narrative', *Michigan Law Review* 87: 2411.

<sup>178</sup> Iris Marion Young (2000) *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press), pp 73-74. But on the 'dangers of deceit and manipulation' through storytelling, see p 77.

<sup>179</sup> Cynthia V Ward (1994) 'A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature', *The University of Chicago Law Review*, 61: 929, pp 939, 941.

<sup>180</sup> Young, *Justice and the Politics of Difference*, p 72.

<sup>181</sup> The idea of empathy often features prominently in feminist scholarship more widely, typically in opposition to or to undermine dominant conceptions of knowledge. For example, it relates and is central to debates as to the role of emotions (and imagination) in the concept of reasonableness, of

does not provide a measure by which to decide who we should empathise with.<sup>182</sup> And Rackley admits that ‘empathy ... can be both good and bad’, with bad empathy being that which is coloured by prejudice, bigotry and stereotypes (although, it may be that, properly understood, such an instance is not an example of empathy).<sup>183</sup> While there are limitations to the concept of empathy,<sup>184</sup> and it does not indicate what action should be taken or provide clear goals, it is nevertheless a useful methodological concept.<sup>185</sup> At the least, empathy draws attention to the human dimensions and moral responsibility of actors within legal institutions.<sup>186</sup> At its best, empathy provides a means by which the perspectives and harms of those whose experiences are typically eclipsed, marginalised and distorted through law and legal processes are better heard, understood and accounted for.<sup>187</sup> This could play a part in ensuring against prejudice and rape myths in legal processes, and that victim-survivors are respected by institutional personnel.

Further, in addition to invoking empathy and encouraging recognition of understandings of injustice and harm, storytelling has an important normative dimension. As Massaro explains, it ‘implies that all voices are equal, and that diversity of voice should be a paramount political value. Human dignity – each storyteller is an end, not a means – seems to be an implicit normative principle of the legal storytelling approach’.<sup>188</sup> Thus, storytelling both paves the way to respect and conveys respect for the storyteller.

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which there is a significant body of literature. For example, see Martha Nussbaum (1997) *Poetic Justice: The Literary Imagination and Public Life* (Boston, MA: Beacon Press); Rackley, ‘Re-Imagining the Judge’.

<sup>182</sup> Toni Massaro (1989) ‘Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?’, *Michigan Law Review*, 87: 2099, pp 2099-2100, 2109.

<sup>183</sup> Rackley, ‘Re-Imagining the Judge’, p 224; with reference to Henderson, ‘Legality and Empathy’, p 1638.

<sup>184</sup> As outlined by Massaro, ‘Empathy, Legal Storytelling, and the Rule of Law’, pp 2106-2110.

<sup>185</sup> Rackley, ‘Re-Imagining the Judge’, p 224.

<sup>186</sup> Henderson, ‘Legality and Empathy’, p 1638. Rackley and Henderson are both discussing the concept of empathy in the context of judging, where there are specific implications and debates in relation to the deployment or use of empathy, whereas here the use of the concept is relative to all legal institutional actors and decision-makers.

<sup>187</sup> *Ibid.*

<sup>188</sup> Massaro, ‘Empathy, Legal Storytelling, and the Rule of Law’, p 2106.

### 3.5.3 Summary: Institutional Processes and Procedures and Justice

The form, values and rules of institutional processes and procedures considerably affect whether victim-survivors perceive a response to rape to be just. Indeed, Kelly *et al.* have emphasised the ‘significance of a sense of procedural fairness to [sexual violence] victims’.<sup>189</sup> In relation to procedural laws and policies (such as laws regulating the trial process, and policies informing criminal justice personnel of the appropriate treatment of victim-survivors and their cases) and their implementation, feminists have been critical of the way in which appeals to formal equality, neutrality and impartiality present an illusion of objectivity which masks the particular (gendered) perspective and values that are privileged in society.<sup>190</sup> What is important and ‘fair’ from the perspective of rape victim-survivors is that they are valued and treated with respect. This does not necessarily mean having an influential role in decision-making, but relates to the way in which they are treated by institutional personnel and the services that are available and offered to them. It means that there must be no reliance on myths and stereotypes as this denies respect for victim-survivors by failing to treat them as individuals.<sup>191</sup> To respect rape victim-survivors is to treat victim-survivors without hostility and doubt, recognising and condemning the wrongful act that they have been subject to, and responding to the harms that they may have suffered by engaging with the victim-survivor throughout the legal process and offering them appropriate and available services. This also requires providing a space in which rape victim-survivors can tell of their experiences, which conveys respect for the individual storyteller and signifies that the harms they have experienced matter and demand attention and redress.

### 3.6 CONCLUSION

The legal system repeatedly fails to provide justice for rape victim-survivors. An assumption is often made that the best way to reduce the injustice of rape is to increase the punishment of perpetrators, which would provide recognition and condemnation of the ‘core’ harm of rape. However, it is relatively rare for the perpetrators of rape to be

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<sup>189</sup> Kelly *et al.*, *A Gap or a Chasm?*, pp 87-89.

<sup>190</sup> For example, MacKinnon, ‘Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence’, pp 638-639.

<sup>191</sup> On respect, stereotypes and the individual generally see Frankfurt, ‘Equality and Respect’, p 12.



punished and it may be that this is not the only or best way to respond to rape, considering the actual institutional structures and human behaviour in our imperfect society. Consequently, in subsequent chapters additional and alternative means by which to secure justice for rape victim-survivors will be explored and examined, taking Sen's approach of a 'realization-based comparison'.<sup>192</sup> However, to undertake such a comparison nevertheless requires evaluative measures. Developing evaluative measures in relation to what rape victim-survivors see as providing some form of justice, and to address the harms caused by rape, has been the focus of this chapter. It is notable that these evaluative measures may not constitute justice in an ideal society, and finding ways in which to improve legal response to rape in line with these aims may not lead to a perfectly just response to rape. Moreover, as society and social institutions change the criteria will be subject to critical reflection and revision to continually seek ways in which to enhance justice for victim-survivors.

In relation to outcomes of the legal system, rape victim-survivors emphasise the need for recognition and redress of the material harms of rape, which requires legal responses to allow for a more nuanced understanding of and sensitivity to the diversity of harms that can be caused by rape, than can be achieved by punishing the wrongdoer. While there is an emphasis on holding wrongdoers responsible, this typically relates to both the fact that there has been a violation of the victim-survivor's sexual autonomy and the material harms that have been caused. Some victim-survivors appear to be open to different methods for holding wrongdoers responsible, and seem willing to sacrifice either complete symbolic recognition of the 'core' harm or full financial compensation for the material harms they have suffered for an outcome which provides both, but less than ideal, recognition and reparation. This could be achieved, for example, through financial compensation from the wrongdoer, other forms of reparation, or an apology.

What is at least as important for rape victim-survivors is that the process and procedures of the legal system are just, which, for many, requires respect for the diverse experiences of rape. This means that institutional personnel should not be influenced by prejudice, myths and stereotypes which deny the individual's perspective, basing assumptions about them on misguided and misinformed views of particular social groups to which they belong. It means that rape victim-survivors' complaints should not be treated with hostility and

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<sup>192</sup> Sen, *The Idea of Justice*.

doubt, and they should be treated sensitively and provided with information and choices throughout the legal process. Victim-survivors should also have the opportunity to tell their stories, both demonstrating respect, and providing a means by which for others to listen, potentially leading to an empathetic understanding of the victim-survivor's experience and the harms that they have suffered. This does not necessarily individualise the harm of rape or minimise the injustice of rape, as to understand the individual's experiences is to necessarily recognise and appreciate her social location and identity characteristics, such as gender, which shape the victim-survivor's perspective.

To summarise, the ways in which to improve legal responses to rape, and to reduce the injustices that victim-survivors suffer is:

- (1) to provide recognition of a wrongful and harmful violation of the victim-survivor's sexual autonomy;
- (2) to respect the diversity of experiences and harms of rape;
- (3) to allow victim-survivors to tell their stories and be heard in a meaningful way;
- (4) to hold wrongdoers responsible for the harms of rape;
- (5) to provide symbolic and material reparation for the harms of rape.

These aspects of justice will be used to compare different legal responses to rape – namely criminal justice, restorative justice and tort law – and to consider the best ways in which to secure justice for victim-survivors.<sup>193</sup>

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<sup>193</sup> Striking a balance between the victim-survivor's and wrongdoer's interests and rights so that the wrongdoer is not subject to injustice will be discussed throughout the thesis in relation to each particular legal context.

# THE CRIMINAL JUSTICE RESPONSE TO RAPE: FAILING TO DO JUSTICE, HOWSOEVER MEASURED

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### 4.1 INTRODUCTION

Over the last four decades, feminists have revealed the prevalence of sexual violence and campaigned to improve the criminal justice response. During the so-called ‘second-wave’, feminists increasingly understood the extent and nature of sexual violence, and the House of Lords’ decision in *DPP v Morgan* ‘sparked’ feminist activism directed at law reform.<sup>1</sup> *Morgan* was criticised as a ‘rapists charter’, potentially allowing defendants to escape criminal liability on the basis of an honest belief in consent regardless of how unreasonable such a belief may be, which ‘crystallised’ feminists concerns of gender bias in the legal system.<sup>2</sup> Alongside an increase in feminist practical organising around sexual violence, women – including feminists – were entering the academy in growing numbers as the higher education system expanded during the latter half of the 20<sup>th</sup> century, raising, emphasising and theorising feminist issues, which supported feminist activism.<sup>3</sup> That sexual violence is accepted as an issue which demands address by the state and its civil institutions is typically ascribed to feminist campaigning.<sup>4</sup>

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<sup>1</sup> Clare McGlynn (2010) ‘Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?’, in McGlynn and Munro (eds) *Rethinking Rape Law*, p 139.

<sup>2</sup> *Ibid.*

<sup>3</sup> Rosemary Auchmuty (2010) ‘Feminists as Stakeholders in the Law School’, in Fiona Cownie (ed) *Stakeholders in the Law School* (Oxford and Portland, Oregon: Hart), pp 51-56. However, on the increasing disjuncture between feminist activism and scholarship, see Conaghan, *Reassessing the Feminist Theoretical Project in Law*, and chapter 2, section 2.2

<sup>4</sup> Clare McGlynn and Vanessa Munro (2010) ‘Rethinking Rape Law: An Introduction’, in McGlynn and Munro (eds) *Rethinking Rape Law*, p 5.

While feminists raised issues regarding the legal system's treatment of sexual violence victim-survivors, in the 1980s and 1990s other specific victim interest groups developed, and – despite being unconnected and having different and potentially conflicting priorities and goals – a broader victims movement gathered force.<sup>5</sup> As such, criminal justice policies and the criminal justice system were being criticised from many angles for failing to provide justice for victims. In addition, media attention paid to crime – typically serious crimes, such as sexual violence – and the problems in the criminal justice system raised public concern; indeed, there have been public uproars following expositions of the treatment of rape victim-survivors in the criminal justice system.<sup>6</sup> The government became under increasing pressure to improve the criminal law and legal system, with sexual violence one issue featuring prominently in policy debates. As a result, there have been significant incremental and radical changes to the sexual offences and criminal justice procedures in the name of victim-survivors (or victims in general), often with feminist input into official consultation processes.<sup>7</sup>

And yet, in spite of substantive law reform as well as procedural and policy changes, the conviction rate for rape has decreased over the years, from 32 per cent of cases reported to the police resulting in a conviction in 1979,<sup>8</sup> to a national conviction rate which has hovered between five and eight per cent since the late 1990s.<sup>9</sup> Furthermore, Stern highlights that rape is only reported to the police in approximately 11 per cent of cases,<sup>10</sup> in part due to negative perceptions of the criminal justice response to rape,<sup>11</sup> which means that the 'justice gap' is wider than the conviction rate conveys. Part of the problem is attitudes towards women and women's sexuality which have shaped the implementation

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<sup>5</sup> Doak, *Victims' Rights, Human Rights and Criminal Justice*, pp 8-9.

<sup>6</sup> McGlynn, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?', p 140; with reference to Melissa Benn, Anna Coote and Tess Gill (1986) *The Rape Controversy* (London: National Council for Civil Liberties), p 3.

<sup>7</sup> *Ibid.*

<sup>8</sup> Temkin, *Rape and the Criminal Justice Process*, p 27.

<sup>9</sup> Brown *et al.*, *Connections and Disconnections*, pp 25-27.

<sup>10</sup> Stern, *The Stern Review*, p 12.

<sup>11</sup> Nicole Westmarland and Jennifer Brown (2012) *Women's Views on the Policing of Rape, Domestic Violence and Stalking within the Cleveland, Durham, Northumbria and Cumbria Police Force Areas* (Durham University and Northern Rock Foundation).

of the law and hampered improvements in practice.<sup>12</sup> In addition, some feminists, such as Bumiller, argue that the state has been ‘appropriating’ feminists’ aims and strategies for ulterior purposes.<sup>13</sup> Being seen to be ‘tough on crime’ and improving the treatment of victims is viewed as a good political strategy, and changes in rape law and criminal justice procedures and policies to these ends, some argue, have increased state power and control over the lives of citizens, particularly those who are already vulnerable and marginalised in society, but yet without significantly improving institutional responses to rape.<sup>14</sup> Nevertheless, Hudson explains that as the criminal law is the ‘recognized way of demonstrating that society takes something seriously’ many continue to press for more perpetrators of rape to be punished more severely.<sup>15</sup> The first part of this chapter explores the limitations of this approach, illustrating the difficulties of providing criminal justice to rape victim-survivors. To this end, it will analyse the criminal justice system on its own terms, discussing the legal definition of rape, changes in policy and procedure, and how rape cases are responded to throughout the criminal justice system. It will be argued that the criminal justice system fails to provide justice to rape victim-survivors on its own terms – that is, it fails to protect the public and punish the perpetrators of rape – because the dominant paradigm does not readily account for victims’ needs and interests, and legal actors are resistant to challenges to gender and sexual assumptions and stereotypes.

Given that law reforms directed at improving the criminal justice response to rape and increasing the conviction rate have not been particularly successful, Larcombe argues that measures for reform need to be determined by feminist goals.<sup>16</sup> To ensure that rape laws and the criminal justice system, or future changes in this respect, are operating in ways which will provide justice for victim-survivors (and are not being ‘appropriated’ to increase state power through punitive crime control strategies) the second part of the chapter explores the extent to which the criminal law does or could provide justice for victim-survivors by evaluating it in relation to the five aspects of justice that some victim-survivors

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<sup>12</sup> Brown *et al.*, *Connections and Disconnections*, pp 5-6.

<sup>13</sup> Bumiller, *In An Abusive State*; see further the discussion in the introduction, chapter 1, section 1.1.

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

<sup>15</sup> Barbara Hudson (2002) ‘Restorative Justice and Gendered Violence: Diversion or Effective Justice?’, *British Journal of Criminal Justice*, 42: 616, p 629.

<sup>16</sup> Larcombe, ‘Feminist Aims and Measures for Rape Law’.

have said are integral to a just legal response to rape.<sup>17</sup> It will be argued that the criminal justice system meets the first aspect of justice – recognition of the violation of the victim-survivor’s sexual autonomy – in theory, but fails to do so in practice. In relation to the remaining four aspects of justice – respect for the diversity of experiences and harms of rape, allowing victim-survivors to tell their stories and be heard in a meaningful way, holding the wrongdoer responsible for the harms of rape, and providing symbolic and material reparation for the harms of rape – it will illustrate that the criminal law is limited in the extent to which it can meet these aims both in theory and in practice. Therefore, it is concluded, unconventional additional and alternative legal responses to rape should be explored to determine if they could better provide justice for victim-survivors, or at least provide a different perspective from which to reconsider the criminal justice response.

#### 4.2 THE CRIME OF RAPE

To condemn what is wrongful about rape and to punish perpetrators, feminists typically argue that the legal definition must reflect the ‘core’ harm of rape.<sup>18</sup> In the 1970s, feminists began to illustrate the law’s failings in this respect. Many argued that the common law definition of rape as sexual intercourse against a woman’s will ‘by force, fear or fraud’,<sup>19</sup> and then the 1976 statutory definition of rape as sexual intercourse with a woman without her consent and with knowledge of her lack of consent or with recklessness as to her consent,<sup>20</sup> were typically interpreted narrowly to require, for example, the use or threat of physical violence, or signs of physical resistance.<sup>21</sup> Such interpretations, it was argued, do not encompass the many ways in which women may be coerced into sex, and, consequently, many women’s experiences of non-consensual sex were, in effect, considered to be lawful. Many feminists thus argued for the legal definition of rape to be changed to better capture victim-survivors’ lived experiences of sexual violence and its harmful consequences. Indeed, there have been piecemeal amendments to the substantive law over the years, for example, in 1991 in *R v R* it was held that a woman’s refusal of

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<sup>17</sup> See chapter 3.

<sup>18</sup> On feminist debates as to what constitutes the ‘core’ harm of rape, see chapter 3, section 3.3.1.

<sup>19</sup> Archbold (1973) *Criminal Pleading, Evidence and Practice* (38<sup>th</sup> edn), para 2871; referred to by Lord Hailsham and Lord Edmund-Davies in *DPP v Morgan* [1976] AC 182, pp 220 and 225 respectively.

<sup>20</sup> Sexual Offences (Amendment) Act 1976, section 1(1).

<sup>21</sup> Lees, *Carnal Knowledge: Rape on Trial*, pp 112-119.

consent to sex with her husband would constitute rape, and in 1994 the act of rape was extended to include non-consensual penile penetration of another's anus,<sup>22</sup> meaning that men can also be raped. In 2003 the sexual offences were radically reformed in the Sexual Offences Act 2003. The current definition of rape as defined under the Act will be discussed below, and it will be argued that while it does reflect the 'core' harm of rape, in practice rape laws are interpreted in ways which do not properly value women's sexual choices, and thus many victim-survivors do not receive (criminal) justice.

#### 4.2.1 The Act of Rape

Rape is a gendered act, defined in the Sexual Offences Act 2003 as the 'penile penetration' of another person's vagina, anus or mouth,<sup>23</sup> and thus can only be perpetrated by men. It has been argued that including a wider number of acts in the definition of rape and men as potential victim-survivors, acknowledges that these forms of sexual violation can be as harmful as non-consensual penile penetration of the vagina.<sup>24</sup> The focus on penile penetration has been criticised, for example, by Smart for perpetuating an overtly masculine view, and by Naffine for representing a heterosexual view, of sexuality,<sup>25</sup> and it has, consequently, been suggested that a gender-neutral definition of rape should be employed.<sup>26</sup> However, as McGlynn argues, gender-neutral definitions misrepresent the gendered nature of rape, which is a wrong mostly perpetrated by men against women,<sup>27</sup> and therefore the act of rape should be limited to non-consensual penile penetration of another's vagina, anus or mouth.<sup>28</sup>

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<sup>22</sup> Criminal Justice and Public Order Act 1994, section 142.

<sup>23</sup> Sexual Offences Act 2003, section 1(1)(a).

<sup>24</sup> Stuart Turner (2000) 'Surviving Sexual Assault and Sexual Torture', in Mezey and King (eds) *Male Victims of Sexual Assault*.

<sup>25</sup> Smart, *Feminism and the Power of Law*, ch 2; Ngaire Naffine (1994) 'Possession: Erotic Love in the Law of Rape', *Modern Law Review*, 57: 10.

<sup>26</sup> This has been the approach taken in some Australian jurisdictions and in Canada. For an analysis, see Naffine, *ibid*.

<sup>27</sup> Clare McGlynn (2008) 'Rape as "Torture"? Catharine MacKinnon and Questions of Feminist Strategy', *Feminist Legal Studies*, 16: 71, p 77.

<sup>28</sup> Due to the particular harm that is associated with non-consensual anal sex, it is right that this is included in the definition of rape, thus meaning both men and women can be victim-survivors of rape; Turner, 'Surviving Sexual Assault and Sexual Torture'.

#### 4.2.2 Defining and Interpreting (Lack of) Consent and Reasonable Belief in Consent

Lack of consent renders the acts described above criminal and harmful because a person has been denied the freedom to choose not to engage in sexual relations.<sup>29</sup> The defendant must also lack a reasonable belief in consent, which is a welcome change from the previous law whereby the defendant would not be guilty of rape if he held an honest belief in consent, even if the reasons for his belief appeared irrational to others.<sup>30</sup> The Sexual Offences Act 2003 does not provide a definition of consent, but section 74 states that a person consents to sex where s/he 'agrees by choice and has the freedom and capacity to make that choice'. In addition, there are a number of circumstances set out in sections 75-76 which raise a conclusive or rebuttable evidential presumption that the sex was not consensual and that the defendant did not make a reasonable mistake as to consent. These include situations in which the defendant induced consent to the relevant act by impersonating a person known personally to the complainant,<sup>31</sup> or where the complainant was asleep or unconscious.<sup>32</sup> However, the presumptions, for the most part, are a strengthening of common law principles,<sup>33</sup> and do little to clarify what 'freedom' and 'capacity' mean for the purposes of consent. Indeed, some feminists, such as MacKinnon, argue that consent is a futile concept as women's sexual choices are never made entirely 'freely': they are shaped, inhibited and distorted in a society in which women's submission

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<sup>29</sup> Schulhofer, *Unwanted Sex*; John Gardner and Stephen Shute (2000) 'The Wrongness of Rape', in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (4<sup>th</sup> series, Oxford: Oxford University Press).

<sup>30</sup> *DPP v Morgan*; Sexual Offences (Amendment) Act 1976, section 1(2). For a discussion, see Jennifer Temkin (2002) *Rape and the Legal Process* (Oxford: Oxford University Press), pp 116-122.

<sup>31</sup> section 76(2)(b); the other conclusive presumption arises where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; section 76(2)(a).

<sup>32</sup> section 75(2)(d). Other examples of when the evidential presumption arises include where the defendant was, at the time of the relevant act or immediately before it, using violence against the complainant or causing the complainant to fear that immediate violence would be used against her or against another, or the complainant had a physical disability precluding her from communicating her consent to the defendant; sections 75(2)(a),(b), and (e).

<sup>33</sup> Andrew Ashworth and Jennifer Temkin (2004) 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent', *Criminal Law Review*, 328, p 335; and see cases such as *R v Clarence* (1888) 22 QBD 23; *Elbekkay* [1995] CrimLR 163 and *R v Flattery* (1877) 2 QBD 410.



and male dominance is eroticised.<sup>34</sup> Thus, MacKinnon argues that rape should be defined by reference to structural inequalities – that is, as a ‘physical invasion of a sexual nature under coercive conditions’.<sup>35</sup>

Also illustrating problematic social conditions, many feminists argue that social norms, gendered assumptions and stereotypes – which are far from women’s experiences of non-consensual sex – influence interpretations of women’s consent (or lack of consent), and when it is reasonable for a man to believe a woman is consenting to sex.<sup>36</sup> Misrepresenting women’s lived realities, these (mis)perceptions of rape are called ‘rape myths’. The classic myth is that rape is perpetrated by a stranger who violently attacks a young woman, alone, at night, using physical force and threats to overpower her verbal and physical resistance.<sup>37</sup> However, the majority of rapes occur most commonly between people who know each other and a significant proportion are perpetrated by partners or ex-partners.<sup>38</sup> The most common location of rape is in the victim-survivor or wrongdoer’s home, and rape does not always involve physical force or resistance.<sup>39</sup> In addition to this stereotype of rape, there are assumptions which operate to indicate whether or not sex is consensual, or whether or not it was reasonable for the wrongdoer to believe that the victim-survivor was consenting to sex. For example, an Amnesty International study found that a significant proportion of people thought that the victim-survivor was wholly or partially responsible if she had been flirting (34 per cent), she was drunk (30 per cent), was wearing sexy or revealing clothing (26 per cent), or did not say ‘no’ clearly enough (37 per cent).<sup>40</sup> These views often function

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<sup>34</sup> MacKinnon, *Toward a Feminist Theory of the State*, p 174.

<sup>35</sup> Catharine MacKinnon (2006) ‘Defining Rape Internationally: A Comment on *Akayesu*’, *Columbia Journal of Transnational Law*, 44: 940, p 956.

<sup>36</sup> Jennifer Temkin and Barbara Krahé (2008) *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing), ch 2.

<sup>37</sup> *Ibid*, p 31; Estrich, ‘Real Rape’.

<sup>38</sup> In Kelly *et al.*’s research on attrition rates for rape and serious sexual assaults in the criminal justice process, of 228 cases, 53 per cent of the crimes were between intimates, 13 per cent between acquaintances and 24 per cent between strangers, but in 22 per cent of cases the relationship between the wrongdoer and the victim-survivor was unknown; *A Gap or a Chasm?*, p 10 and table 3.4., p 21.

<sup>39</sup> Kelly *et al.*, *A Gap or a Chasm?*, p 21.

<sup>40</sup> Amnesty International UK (2005) *Sexual Assault Research Summary Report* (London: prepared by ICM).

to blame the victim-survivor for giving the impression of inviting sexual intercourse, shifting responsibility from the wrongdoer, deeming it reasonable for him to believe the sex was consensual as he was simply acting on and acting out sexual scripts. Consequently, women's subjective desires and experiences are eclipsed, and their sexual choices limited and denied by gender stereotypes and sexual norms that are reflected and reinforced in rape myths.

Despite the problems with the concept of consent and its interpretation, Munro argues that it is necessary as it imbues women with sexual agency, capacity and autonomy.<sup>41</sup> Moreover, consent can require an interrogation of the conditions under which an individual's choice is made, and can, Cowan says, be imbued with 'feminist values encompassing attention to mutuality, embodiment, relational choice and communication'.<sup>42</sup> To ensure such an interpretation, and to challenge rape myths and beliefs as to when, where and with whom women consent to sex, some have argued that something more than consent is required to legitimise sexual relations, for example, mutuality, agreement or 'wantedness'.<sup>43</sup> While the concept of consent is, therefore, necessary and important for a definition of rape to reflect and reinforce women's sexual autonomy, the concept as set out in the Sexual Offences Act 2003 does not adequately safeguard against interpretations of consent and reasonable belief in consent that are reliant on rape myths.<sup>44</sup>

Overall, the Sexual Offences Act 2003 has done much to improve the law on rape by expanding the *actus reus* ('guilty act'), and amending the *mens rea* (guilty mind) so that an honest but unreasonable belief in consent will no longer negate criminal responsibility for rape. In addition, the Act set out the conditions of consent, and presumptions as to when consent and a reasonable belief in consent are absent. As such, the definition of rape provides symbolic recognition of the 'core' harm of rape, and could capture women's

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<sup>41</sup> Munro, 'Constructing Consent', pp 940-941.

<sup>42</sup> Cowan, 'Freedom and Capacity to Make a Choice', p 53.

<sup>43</sup> Martha Chamallas (1987-1988) 'Consent, Equality, and the Legal Control of Sexual Conduct', *Southern California Law Review*, 51: 777; Michelle Anderson (2005) 'Negotiating Sex', *Southern California Law Review*, 78: 1401; Munro, 'Constructing Consent'.

<sup>44</sup> Emily Finch and Vanessa E Munro (2006) 'Breaking the Boundaries: Sexual Consent in the Jury Room', *Legal Studies*, 26: 303, p 307.

experiences of unwanted and harmful sexual violations. However, rape laws may be interpreted and applied in ways which do not protect women's sexual choices, as rape myths and gender stereotypes influence ideas as to the circumstances in which sex is consensual, or at least it is reasonable to believe it is consensual. Indeed, many feminists have highlighted the problematic ways in which rape laws are interpreted and applied throughout the criminal justice system.

#### **4.3 RAPE IN THE CRIMINAL JUSTICE SYSTEM**

Despite changes in the substantive law on rape, there continue to be many problems with the way in which rape laws, procedural rules and policies are implemented in the criminal justice system. This is indicated by the national conviction rate which remains at approximately six per cent, and the high proportion of cases which filter out of the criminal justice system and do not go to trial, providing few victim-survivors with justice.<sup>45</sup> In addition, victim-survivors' reports of rape are often met with scepticism, and they are not infrequently treated poorly by professionals within the criminal justice system.<sup>46</sup> Furthermore, throughout the process – and particularly at trial – they are typically subject to what can be intrusive and distressing interrogations about their clothing, behaviours and bodies.<sup>47</sup> Although improvements in the treatment of victim-survivors throughout the criminal justice system were noted by Baroness Stern in her review of public authorities' responses to rape, she concluded that there is little evidence of comprehensive and significant improvement of victim-survivors' experiences, and that there are too many 'appalling failure[s]'.<sup>48</sup>

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<sup>45</sup> For an overview of studies illustrating this conviction rate, see Brown *et al.*, *Connections and Disconnections*, pp 25-27.

<sup>46</sup> Lees, *Carnal Knowledge: Rape on Trial*.

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

<sup>48</sup> Stern, *The Stern Review*, pp 7-8. The problems of negative victim-survivor experiences in the criminal justice system, high attrition rates and low conviction rates are not restricted to England and Wales and can be described as international issues. There are, of course, many differences between legal systems – for example, whether they are adversarial or inquisitorial – which may affect aspects of the case process and outcome, and therefore detailed comparisons of rape in other jurisdictions will not be discussed. Despite differences in legal systems and different socio-economic conditions of jurisdictions, Lovett and Kelly's research illustrates that 68 per cent of European countries reflect a 'classic attrition' trend, that is, an increasing number of rapes being reported to

In part, the problematic procedures and outcomes are a result of rape myths which cultivate negative attitudes towards rape cases which do not reflect aspects of the rape stereotype, or towards complainants who may be perceived as being blameworthy.<sup>49</sup> However, partly, the problems can be understood by looking to the position of victims more generally in the criminal justice system. Over the latter half of the 20<sup>th</sup> century, scholars, practitioners and policy makers have emphasised the need to better account for victims' needs and interests, and guarantee 'victims' rights', throughout the criminal justice system.<sup>50</sup> However, Doak argues that wholesale change is limited due to the form and structure of the current criminal justice paradigm which centres on balancing the offender's rights with the state.<sup>51</sup> Thus, Casey, former Commissioner for Victims and Witnesses, has described victims as the 'poor relation' in the criminal justice system.<sup>52</sup> With an eye to this wider context, this section will outline the main procedural and policy changes relating to rape victim-survivors in the criminal justice system, and the difficulties of implementing these changes. It will be suggested that the dominant interpretation of the criminal justice paradigm does not readily allow for victim-survivors' (and victims') needs and interests to be met, or rape myths to be challenged. Thus, few men who commit

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the police but a decrease in the conviction rate (Jo Lovett and Liz Kelly (2009) *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe* (Child and Women Abuse Studies Unit, London Metropolitan University), p 22). In addition, they highlight that the closer the rape reflects the stereotypical assumptions the more likely the case is to proceed through the legal system (p 112). For similar discussions of attrition and conviction rates for Australia, Canada, England and Wales, Scotland and the United States, see Kathleen Daly and Brigitte Bouhours (2010) 'Rape and Attrition in the Legal Process: A Comparative Analysis Across Five Countries', *Crime and Justice*, 39: 565, and for a detailed comparison of Ireland, Belgium, Denmark, France and Germany see Bacik *et al.*, *The Legal Process and Victims of Rape*. In addition, research also indicates similar problems relating to the treatment of the victim-survivor through the legal process across jurisdictions, and a lack of substantial improvement in legal responses to rape in spite of changes in law and policy; see for example the chapters in McGlynn and Munro, *Rethinking Rape Law*, and Temkin, *Rape and the Legal Process*.

<sup>49</sup> Temkin and Krahe, *Sexual Assault and the Justice Gap*. See also, for example, Kelly *et al.*, *A Gap or a Chasm?*

<sup>50</sup> For an overview, see Doak, *Victims' Rights, Human Rights and Criminal Justice*, pp 7-19.

<sup>51</sup> *Ibid*, p 36.

<sup>52</sup> Louise Casey (2010) *The Poor Relation: Victims in the Criminal Justice System* (Office of the Commissioner for Victims and Witnesses).

rape are convicted and punished, the 'core' harm of rape is, in practice, not censured, and actual and potential victim-survivors are not protected by the criminal justice system.

#### 4.3.1 Police and Crown Prosecution Service Responses to Rape

The police investigation is the point at which the highest proportion – over half – of rape cases leave the criminal justice system.<sup>53</sup> Poor medical examinations, treatment and evidence collection has been noted,<sup>54</sup> and police officers and other criminal justice personnel have been shown to be influenced by myths which foster negative attitudes towards complainants.<sup>55</sup> These issues contribute to victim-survivors' decisions to withdraw complaints and police officers' decisions to end an investigation or to refrain from referring the case to the Crown Prosecution Service (CPS).<sup>56</sup> Consequently, there have been a number of changes in policy addressing these issues,<sup>57</sup> including providing specially trained police officers<sup>58</sup> and Sexual Assault Referral Centres (SARCs) which offer medical care and counselling for victim-survivors, and support for police investigations.<sup>59</sup> While research has

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<sup>53</sup> Liz Kelly (2002) *A Research Review on the Reporting, Investigation and Prosecution of Rape Cases* (London: HMCPsi), p 25. On attrition at this stage of the criminal justice system, see generally, HMCPsi and HMIC (2002) *Joint Inspection Report into the Investigation and Prosecution of Cases Involving Allegations of Rape* (London: HMSO).

<sup>54</sup> Jennifer Temkin (1998) 'Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice', *Modern Law Review*, 61: 821; Jennifer Temkin (1996) 'Doctors, Rape and Criminal Justice', *Howard Journal of Criminal Justice*, 35: 1.

<sup>55</sup> Payne, *Rape: The Victim Experience Review*, p 13.

<sup>56</sup> Kelly, *The Reporting, Investigation and Prosecution of Rape Cases*, p 17.

<sup>57</sup> See HMCPsi and HMIC (2007) *Without Consent: A Report on the Joint Review of the Investigation and Prosecution of Rape Offences* (London: HMSO), which is a review of the changes and progress made since the publication of Home Office, Court Service, CPS (2002) *Action Plan to Implement the Recommendations of the HMCPsi/HMIC Joint Investigation into the Investigation and Prosecution of Cases Involving Allegations of Rape* (London: Home Office).

<sup>58</sup> Miranda AH Horvath and Mark Yexley (2012) 'Developments in Investigative Approaches to Rape: The Investigating Heritage', in Jennifer M Brown and Sandra L Walklate (eds) *Handbook on Sexual Violence* (London; New York: Routledge), p 118.

<sup>59</sup> Horvath and Yexley, *ibid*, p 126; and see Lovett *et al.*, *Sexual Assault Referral Centres*.

shown that victim-survivors and police value these services,<sup>60</sup> provision is inconsistent and varies depending on the policies and priorities of local police, SARCs, or Victim Support.<sup>61</sup>

When cases are referred to the CPS, a decision is made as to whether or not to prosecute the suspect. In 2008-2009, the CPS made a decision to charge the suspect with an offence in 39 per cent of rape cases.<sup>62</sup> The CPS base their decisions (*inter alia*) on the public interest in prosecuting, the extent of the evidence, and the likelihood that a case will result in a conviction.<sup>63</sup> Potentially due to assumptions based on rape myths, cases which reflect the rape stereotype are more likely to be prosecuted, as shown by Kelly.<sup>64</sup> There have been improvements in CPS policies;<sup>65</sup> however, they are not consistently implemented effectively. For example, Stern found that cases were not always properly prepared,<sup>66</sup> and in deciding whether or not to prosecute the CPS may focus more on the reliability of the victim-survivor as a witness than on the credibility of the suspect.<sup>67</sup> Consequently, while there are improvements in many areas, overall there is much to be done to ensure adequate services and responses are offered to rape victim-survivors by the police, CPS and other criminal justice personnel.<sup>68</sup>

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<sup>60</sup> Horvath and Yexley, *ibid*, p 122; Brown *et al.*, *Connections and Disconnections*; Lovett *et al.*, *Sexual Assault Referral Centres*; Payne, *Rape: The Victim Experience Review*.

<sup>61</sup> Kate Cook (2012) 'Public Sector and Voluntary Sector Responses: Supporting Survivors', in Brown and Walklate (eds) *Handbook on Sexual Violence*, p 422; HMCPSI and HMIC, *Without Consent*.

<sup>62</sup> Stern, *The Stern Review*, p 85.

<sup>63</sup> See the *Code for Crown Prosecutors* (February 2010), pp 7-15; available online: <http://www.cps.gov.uk/publications/docs/code2010english.pdf> last accessed 17 October 2012).

<sup>64</sup> Kelly, *The Reporting, Investigation and Prosecution of Rape Cases*, p 30; see also Temkin and Krahé, *Sexual Assault and the Justice Gap*, pp 50-51.

<sup>65</sup> See the Crown Prosecution Service's 2009 Policy for Prosecuting Rape cases; available online: [http://www.cps.gov.uk/publications/docs/prosecuting\\_rape.pdf](http://www.cps.gov.uk/publications/docs/prosecuting_rape.pdf) (last accessed 17 October 2012).

<sup>66</sup> Stern, *The Stern Review*, p 16.

<sup>67</sup> HMCPSI and HMIC (2012) *Forging the Links*, pp 50-51.

<sup>68</sup> Stern, *The Stern Review*, ch 2.

### 4.3.2 Victim-survivors in the Rape Trial

Of the rape cases which do proceed to trial, a significant proportion are not tried for rape but are tried for a lesser offence.<sup>69</sup> Of the cases tried for rape or another sexual offence in 2009, 58 per cent resulted in a conviction; however, in relation to rape specifically 33 per cent resulted in a conviction.<sup>70</sup> In addition to a potentially disappointing outcome, the trial process may be a traumatic, distressing and humiliating experience for victim-survivors. One particular problem that may contribute to negative outcomes and harmful trial processes is the use of complainants' sexual history as evidence to invoke rape myths, such as those which imply that sexually active women are untrustworthy and have a propensity to consent to sex.<sup>71</sup> Responding to feminists' criticisms that this practice undermines and limits women's sexual choices, the admissibility of sexual history evidence is restricted by statute.<sup>72</sup> However, judges have routinely relaxed the restrictions in their application of the law,<sup>73</sup> most notably in *R v A (No 2)*.<sup>74</sup> Here, in accordance with the Human Rights Act 1998, section 3, the Law Lords adopted a wide interpretation of 'similar fact' evidence that would be admissible under the Youth Justice and Criminal Evidence Act 1999, section 41(3)(c) to avoid declaring that the legislation breached the defendant's right to a fair trial under Article 6 of the European Convention on Human Rights. However, McGlynn has argued that the legislation, interpreted more narrowly, does not breach Article 6, and the decision in *R v A (No 2)* hinders the potential of the legislation to increase respect for victim-survivors' sexual autonomy.<sup>75</sup> This case therefore illustrates the challenges of improving rape trials

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<sup>69</sup> For example, of the rape cases selected for prosecution in 2003 only 64 per cent were tried for rape; Temkin and Krahe, *Sexual Assault and the Justice Gap*, p 19.

<sup>70</sup> Ministry of Justice (2010) *Providing Anonymity to those Accused of Rape: An Assessment of Evidence* (Ministry of Justice Research Series 20/10, London: Ministry of Justice), p 27.

<sup>71</sup> Lees, *Carnal Knowledge: Rape on Trial*, especially ch 5; Zsuzanna Adler (1987) *Rape on Trial* (London: Routledge and Kegan Paul).

<sup>72</sup> Previously in the Sexual Offences (Amendment) Act 1976, section 2, and now in the Youth Justice and Criminal Evidence Act 1999, section 41.

<sup>73</sup> For example, see Jennifer Temkin (1993) 'Sexual History Evidence – The Ravishment of Section 2', *Criminal Law Review*, 3 (in relation to the previous law as set out in the Sexual Offences (Amendment) Act 1976).

<sup>74</sup> [2001] UKHL 25.

<sup>75</sup> Clare McGlynn (2010) '*R v A (No 2)*', in Hunter, McGlynn and Rackley (eds) *Feminist Judgments*.

due to rape myths and interpretations of the appropriate balance of victims' and offenders' rights and interests.

There have, however, been other procedural and policy changes aimed at dispelling rape myths; for example, judges must attend seminars on sexual offences to be eligible to hear such cases.<sup>76</sup> And more generally a number of measures, such as screening the witness from the accused or allowing the witness to give evidence via live link, have been introduced to protect vulnerable witnesses and assist them in giving their best evidence at trial.<sup>77</sup> However, such measures are unlikely to be available in all rape cases, and an inspectorate report has highlighted that the measures are not always applied when they may be beneficial for a vulnerable witness.<sup>78</sup> Moreover, Ellison argues, the adversarial framework – which relies on oral evidence and cross-examination of witnesses to ensure a fair trial for the defendant – limits the extent to which vulnerable witnesses can be protected and assisted to give their best evidence.<sup>79</sup>

A suggestion that has been made to improve rape victim-survivors' experiences of the trial, and the criminal justice process as a whole, is to provide them with independent legal representation (ILR). Raitt explains that ILR may ensure that the trial is conducted in a way which protects the interests of the victim-survivor as far as possible, and could provide a point of contact, support and legal advice throughout the entire criminal justice process.<sup>80</sup> However, ILR is seen by some to interfere with defendants' due process rights and to disrupt the bipartite structure of criminal justice prosecutions by equally protecting private

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<sup>76</sup> Until April 2011, such training was the responsibility of the Judicial Studies Board, but now it is overseen by the Judicial College. For an evaluation of this training, see Philip NS Rumney and Rachel Anne Fenton (2011) 'Judicial Training and Rape', *Journal of Criminal Law*, 75: 473.

<sup>77</sup> Youth Justice and Criminal Evidence Act 1999, sections 23 and 24; though see Part 2 generally, and the Coroners and Justice Act 2009, Part 3.

<sup>78</sup> HMCPSI, HMICA, HMIC (2009) *Joint Thematic Review of Victim and Witness Experiences in the Criminal Justice System* (HMCPSI: London), p 10.

<sup>79</sup> Louise Ellison (2001) *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press).

<sup>80</sup> Fiona Raitt (2010) 'Independent Legal Representation for Complainants in Rape Trials', in McGlynn and Munro (eds) *Rethinking Rape Law*, p 269.



third-party interests.<sup>81</sup> Consequently, rape myths and dominant interpretations of the criminal justice model have restricted the introduction and effective implementation of measures which may improve the experience of the trial for some victim-survivors.

### 4.3.3 Sentencing

After what is likely to be a distressing trial for the victim-survivor, if there is a conviction there follows the issue of determining the appropriate sentence. As, according to Ashworth, '[t]he sentencing decision can often be seen as the core of the labelling or censuring process by giving a judgment of "how bad" the offence was',<sup>82</sup> imposing sentences for rape that are too short undermines the seriousness and harmfulness of the offence.<sup>83</sup> Rumney has illustrated that, until the 21<sup>st</sup> century, sentences for rape in marriage or relationships were often shorter than those for rape perpetrated by a stranger, implying that – contrary to empirical research – such rapes are less harmful.<sup>84</sup> However, in 2002 the Sentencing Advisory Panel advised the Court of Appeal to revise the sentencing guidelines for rape cases, stressing that intra-relationship rapes are equally as harmful as

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<sup>81</sup> Andrew Ashworth (1986) 'Punishment and Compensation: Victims, Offenders and the State', *Oxford Journal of Legal Studies*, 6: 86, pp 120-122.

<sup>82</sup> Andrew Ashworth (2010) *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press), p 74. However, the sentencing aims set out in the Criminal Justice Act 2003, section 142 are: (a) the punishment of offenders, (b) the reduction of crime, (c) the reform and rehabilitation of offenders, (d) the protection of the public, (e) the making of reparation by offenders to persons affected by their offences. Each aim, if taken in isolation, may require a different sentence and thus this section of the 2003 Act has been subject to the criticism that it 'invite[s] inconsistency'; Ashworth, *Sentencing and Criminal Justice*, p 78. Nevertheless, Ashworth points out that the Sentencing Guideline Council has made clear that the 'proportionality principle' (ensuring the sentence is proportionate to the offender's culpability) underpins their guidelines; Ashworth, *Sentencing and Criminal Justice*, p 78; with reference to Sentencing Guideline Council (2004) *Overarching Principles – Seriousness* (London: Sentencing Guidelines Council); available online: [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_seriousness\\_guideline.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf) (last accessed 17 October 2012).

<sup>83</sup> Rape is considered to be an extremely serious and harmful offence, the maximum sentence for which is life imprisonment; Sexual Offences Act 2003, section 1(4).

<sup>84</sup> Philip Rumney (1999) 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape', *Oxford Journal of Legal Studies*, 19: 243.

stranger rapes, which was confirmed in *Millberry and others*<sup>85</sup> and the updated Sentencing Guidelines in 2007.<sup>86</sup> Despite substantial improvements in relation to the sentencing of rape cases,<sup>87</sup> Wells and Quick explain that sentences that are in line with the guidelines are still criticised for failing to reflect the severity of rape.<sup>88</sup> More significantly, it remains the case that only a relatively small proportion of cases that are reported to the police eventually result in a conviction, and given the high rate of non-reporting this is a considerably lower proportion of rapes overall.

#### **4.4 SUMMARY: RAPE, THE CRIMINAL LAW AND CRIMINAL JUSTICE SYSTEM**

Over the last four decades there have been significant changes to the legal definition of rape so that it better reflects and addresses women's lived experiences of sexual violations. Rape is currently defined as the penile penetration of another's vagina, anus or mouth without consent and without reasonable belief in consent.<sup>89</sup> While this is an improved definition, it is often interpreted in ways which undermine that which it is trying to protect – that is, sexual autonomy. In particular, rape myths and gender stereotypes foster negative attitudes towards rape cases and complainants, contributing to sustaining the high attrition rate, low conviction rate and complainants' negative experiences of the criminal justice process.<sup>90</sup> There have been many changes in policy and procedure in order

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<sup>85</sup> [2003] 1 WLR 546; see also, more recently, *Attorney-General's Reference (No 66 of 2010)* [2011] EWCA Crim 97.

<sup>86</sup> The Sentencing Guideline Council (2007) *Sexual Offences Act 2003, Definitive Guideline* (London: Sentencing Guidelines Council); available online:

[http://sentencingcouncil.judiciary.gov.uk/docs/web\\_SexualOffencesAct\\_2003.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_SexualOffencesAct_2003.pdf) (last accessed 17 October 2012). The Sentencing Guideline Council has been replaced by The Sentencing Council for England and Wales, which was established on 6 April 2010.

<sup>87</sup> In addition to changes in the length of sentences, there have been amendments to the sentencing process to improve the experiences for victims, notably the introduction of victim impact statements. These are discussed below in section 4.5.3.

<sup>88</sup> Celia Wells and Oliver Quick (2010) *Lacey, Wells and Quick, Reconstructing Criminal Law: Text and Materials* (4<sup>th</sup> edn, Cambridge: Cambridge University Press), pp 538-539.

<sup>89</sup> Sexual Offence Act 2003, section 1(1).

<sup>90</sup> Temkin and Krahé, *Sexual Assault and the Justice Gap*.

to address these issues; however, they often do not translate into practice.<sup>91</sup> This is both a result of persisting rape myths, and approaches to criminal justice which view the marginalisation of victims' needs and interests as necessary in order to protect the rights of defendants. In addition, as Jackson argues, many proposals are presented as meeting victims' needs and supporting victims' rights – such as those put forward in the Government's White Paper, *Justice for All*<sup>92</sup> – which conceals the underlying crime control agenda behind the proposals which provides little benefit to victims.<sup>93</sup> Consequently, the criminal justice system fails to punish the perpetrators of rape and to protect the public, with few victim-survivors gaining (criminal) justice.

What may be fruitful is to explore the extent to which the criminal law does or could (as it is currently conceived) provide justice as it has been understood by some rape victim-survivors. This may indicate different possibilities and limitations of the criminal justice system, and whether more effective prosecutions and more severe punishment of offenders should be the primary focus of feminists' pursuit of justice for victim-survivors. As such, the final section of this chapter will evaluate the criminal justice response to rape by reference to the five aspects of justice which were set out in chapter 3. It will be concluded that the criminal law not only fails to provide justice for rape victim-survivors on its own terms, but also on the terms of justice as understood by some victim-survivors.

#### **4.5 CRIMINAL LAW AS JUSTICE FOR RAPE VICTIM-SURVIVORS?**

##### **4.5.1 Recognition of a Wrongful and Harmful Violation of the Victim-survivor's Sexual Autonomy**

In terms of substantive law, to a significant extent the criminal law meets the first aspect of what a number of rape victim-survivors see as justice – that is, providing recognition that rape is a wrongful and harmful violation of the victim-survivor's sexual autonomy. Rape is

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<sup>91</sup> Brown *et al.*, *Connections and Disconnections*, p 6; Payne, *Rape: The Victim Experience Review*, p 17; HMCPSI and HMIC, *The Investigation and Prosecution of Cases Involving Allegations of Rape*, p 5; Stern, *The Stern Review*, p 8.

<sup>92</sup> Home Office (2002) *Justice for All* (London: Home Office).

<sup>93</sup> John D Jackson (2003) 'Justice for All: Putting Victims at the Heart of Criminal Justice?', *Journal of Law and Society*, 30: 309.

defined as the intentional penile penetration of another's vagina, anus or mouth without consent, and without a reasonable belief in consent.<sup>94</sup> Consent, as discussed above, signifies that individuals are moral agents with the freedom, capacity and right to choose with whom to engage in sexual relations.<sup>95</sup> Rape is thus a violation of this autonomous choice. In addition, it is important that it remains a gendered crime – one that can only be perpetrated by men – because such violence is most commonly by men against women.<sup>96</sup> Defining rape as a particular crime has symbolic value. As a particularly apparent and coercive use of state power, the criminal law proscribes the most serious and harmful wrongs by punishing and censuring those who are guilty of such wrongs. Thus, the criminal law provides recognition of the wrongful and harmful violation of the victim-survivor's sexual autonomy through the definition of rape and by conceptualising it as a particular crime.

However, while in theory the criminal law provides victim-survivors with recognition of the 'core' harm of rape that many see as important for justice, in practice, very often violations of women's sexual autonomy go unrecognised and unpunished. To a significant extent this is due to social norms and assumptions as to appropriate male and female sexual behaviour which influence the application of rape laws and policies. Failing to give due regard to women's sexual choices, many women's experiences of sexual violence are not recognised as such, indicated by the high attrition rate and the consistently low conviction rate for rape. While in theory the criminal law provides recognition of violations of women's sexual autonomy, in practice many women's experiences of rape are not formally recognised by the criminal law, failing to provide this aspect of justice to many victim-survivors.

#### **4.5.2 Respect for the Diversity of Experiences and Harms of Rape**

Many feminists have illustrated that victim-survivors' experiences of rape are typically not respected within the criminal justice system, thus failing to meet the second aspect of justice as understood by some victim-survivors. This is largely due to rape myths and stereotypes which, by nature, operate as generalised assumptions which do not account

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<sup>94</sup> Sexual Offences Act 2003, section 1.

<sup>95</sup> Munro, 'Constructing Consent'.

<sup>96</sup> McGlynn, 'Rape as "Torture"?', pp 77-78.

for individual experiences.<sup>97</sup> Although there has been improvement regarding the treatment of victim-survivors in the criminal justice system, reports continue to highlight the inconsistencies in responses to rape, with a significant number of complainants experiencing hostility, distressing procedures, a lack of communication and information about their case, and inadequate support services.<sup>98</sup> Furthermore, the difficulties of respecting victim-survivors' experiences are exacerbated in an adversarial trial in which it is the defence's aim to discredit the complainant and, in the majority of cases, convince the jury that the complainant consented to sex with the defendant, or at least it was reasonable for him to believe that the sex was consensual.<sup>99</sup> While there have been measures put in place to improve victim-survivors' experiences of rape trials, for example, the statutory restrictions on the admissibility of sexual history evidence, the impact of such measures has been limited due to persisting rape myths and concerns regarding the rights of offenders.<sup>100</sup> In addition, Ellison argues that the adversarial system which demands direct oral evidence and cross-examination of witnesses limits the extent to which the treatment of vulnerable and intimidated witnesses at trial can be improved.<sup>101</sup> Overall, this amounts to a failure, as put by Baroness Stern, to 'honour the experience' of rape.<sup>102</sup>

Where it may seem that the criminal law has more flexibility to respond to and recognise the diverse experiences of rape is in relation to victim-survivors' applications to the Criminal Injuries Compensation Authority (CICA) for compensation under the Criminal Injuries Compensation Scheme (CICS).<sup>103</sup> Awards are not reliant upon the wrongdoer being

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<sup>97</sup> See more generally, Frankfurt, 'Equality and Respect', p 12; discussed in chapter 3, section 3.5.2(b).

<sup>98</sup> HMIC and HMCPSC, *The Investigation and Prosecution of Cases Involving Allegations of Rape*; Kelly *et al.*, *A Gap or a Chasm?*; Payne, *Rape: The Victim Experience Review*; Stern, *The Stern Review*.

<sup>99</sup> In some cases the defendant may argue that he did not have sex with the complainant.

<sup>100</sup> See above, section 4.3.2.

<sup>101</sup> Ellison, *The Adversarial Process and the Vulnerable Witness*.

<sup>102</sup> Stern, *ibid.*

<sup>103</sup> The CICA and CICS are governed by the Criminal Injuries Compensation Act 1995. The Government is consulting on changes to the scheme, however, it does not seem that there will be any changes that will significantly affect these provisions in the way that they apply in rape cases – see Ministry of Justice (2012) *Getting it Right for Victims and Witnesses* (London: The Stationary Office), paras 196-274.

investigated, prosecuted or convicted of rape,<sup>104</sup> but rather the victim-survivor must meet certain eligibility criteria, including satisfying a claims officer that it is more probable than not that they were raped.<sup>105</sup> However, compensation is typically only awarded to the 'good' victim, and the eligibility criteria may disadvantage rape victim-survivors.<sup>106</sup> For example, an award may be denied or reduced if the applicant did not report the crime to the police promptly,<sup>107</sup> and many victim-survivors delay reporting rape to the police.<sup>108</sup> Furthermore, the applicant's conduct before or at the time of the offence, if viewed as contributing to the cause of the crime, can provide grounds for reducing or refusing an award,<sup>109</sup> which is concerning given the prevalence of myths that blame victim-survivors for rape.<sup>110</sup> Consequently, rape myths may influence whether victim-survivors will receive compensation from the CICA. Therefore, the criminal justice system, at least as it is currently conceived and operating, is very limited in the extent to which it can secure respect for the diversity of victim-survivors' experiences.

#### **4.5.3 The Telling and Hearing of Victim-survivors' Stories**

There has been a significant amount of feminist research which documents the ways in which women's stories of rape and sexual violence are silenced and distorted through and by the legal system.<sup>111</sup> Indeed, victim-survivors' explanations of rape are restricted and shaped by the process, aims, concepts and language of the criminal law, which, for example, guides the investigation and evidence collection process.<sup>112</sup> Furthermore, at trial the victim-survivor is restricted by the questions asked, which may not focus on what is

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<sup>104</sup> CICS 2008, para 10.

<sup>105</sup> CICS 2008, para 20.

<sup>106</sup> Stern, *The Stern Review*, pp 108-109.

<sup>107</sup> CICS 2008, para 13(1)(a) and (b).

<sup>108</sup> Kelly *et al.*, *A Gap or a Chasm?*, p 43.

<sup>109</sup> CICS 2008, para 13(1)(d).

<sup>110</sup> There was particular criticism of award reductions for rape victim-survivors due to their intoxication at the time of the offence, and thus it is the Authority's policy that this particular criterion (CICS 2008, paras 13(1)(d) and 14(2)) will not limit awards for rape; referred to in Stern, *The Stern Review*, p 109.

<sup>111</sup> For a relatively recent in depth discussion, see Romito, *A Deafening Silence*.

<sup>112</sup> Kristin Bumiller (1987) 'Rape as a Legal Symbol: An Essay on Sexual Violence and Racism', *University of Miami Law Review*, 42: 75.

significant from her perspective – for example, the pain, shame, violation and objectification – but rather draws attention to particular body parts, physical actions, her conduct and her behaviour.<sup>113</sup> Consequently, the criminal justice system provides little opportunity for victim-survivors to tell their stories of rape, failing to meet the third aspect of what some victim-survivors see as important for justice.

However, victim-survivors may have this opportunity at the sentencing stage where they may provide an impact statement to explain the harms that the offence has caused them. Impact statements provide the possibility for victim-survivors to tell of the harms that they have suffered which may be empowering and therapeutic and may, Erez argues, ‘enhance justice’.<sup>114</sup> Of course, the majority of victim-survivors’ cases do not reach the sentencing stage, and, in any event, there are doubts as to the benefit of the scheme for victims in practice due to the way that they are implemented.<sup>115</sup> Moreover, many challenge victim participation in sentencing on the basis that it may interfere with the defendant’s due process rights.<sup>116</sup> In addition, there is a question as to what extent victim impact statements mean that victim-survivors are heard in a meaningful way. If a sentence is handed down following an impact statement which the victim-survivor believes does not reflect the severity of harm suffered – which according to Hester *et al.* is a relatively common occurrence<sup>117</sup> – it can be perceived as demonstrating disregard of and ambivalence towards the victim-survivor’s experience of rape. Therefore, the criminal law provides little opportunity for victim-survivors to tell their stories and be heard in a meaningful way.

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<sup>113</sup> Lacey, ‘Unspeakable Subjects’, p 61; Alison Young (1998) ‘The Waste Land of the Law, The Wordless Song of the Rape Victim’, *Melbourne University Law Review*, 22: 442, pp 456-462.

<sup>114</sup> Edna Erez (1999) ‘Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice’, *Criminal Law Review*, 545.

<sup>115</sup> Erez, ‘Who’s Afraid of the Big Bad Victim’, p 555; Andrew Sanders (2001) ‘Victim Impact Statements: Don’t Work, Can’t Work’, *Criminal Law Review*, 447. The Government is, however, trying to improve the implementation of impact statements by making clearer the purpose and benefits of such statements; Ministry of Justice, *Getting it Right for Victims and Witnesses*, paras 94-100, although it remains to be seen whether the efforts will be effective.

<sup>116</sup> Andrew Ashworth (1993) ‘Victim Impact Statements and Sentencing’, *Criminal Law Review*, 498.

<sup>117</sup> Hester *et al.*, *Attitudes to Sentencing Sexual Offences*, p 23.

#### 4.5.4 Holding the Wrongdoer Responsible for the Harms of Rape

The criminal law aims to hold the wrongdoer responsible for rape through a conviction and the consequential sanctions, primarily punishment by imprisonment, indicating that the criminal law may meet the fourth aspect of justice as understood by some rape victim-survivors. As discussed above, there are signs that the courts are handing down sentences in line with sentencing guidelines which indicate that the 'core' harm of rape is equally as harmful in all circumstances.<sup>118</sup> While those who are convicted of rape may receive what is perceived to be an appropriate sentence given the severity of the crime, the majority of men who commit rape are not found and held responsible for rape: as explained above, approximately 11 per cent of rapes are reported to the police, and only six per cent of these result in a conviction.<sup>119</sup>

In addition, it is important to recognise that the wrongdoer is typically punished relative to her/his culpability, which does not generally indicate responsibility for the particular material harms that were caused by her/his wrongful conduct. There is an obligation on the Sentencing Council to consider 'the impact of sentencing decisions on victims of offences' when devising guidelines,<sup>120</sup> and in individual cases the actual or foreseeable material harm caused to the victim is a factor the judge should take into account in determining the seriousness of an offence.<sup>121</sup> However, in relation to sexual offences (and thus rape), the guidelines state that it is unlikely that there will be any disparity between the defendant's culpability and harm, as 'where the activity is in any way non-consensual, coercive or exploitative, the offence is *inherently harmful* and therefore the offender's culpability is high', referring to the 'core' harm of rape being taken into account, but not the diversity of possible material harms that can be caused by rape.<sup>122</sup> Of course, punishing the offender primarily in relation to her/his culpability may be most appropriate for the purposes of

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<sup>118</sup> See above, section 4.3.3.

<sup>119</sup> See section 4.1; with reference to Stern, *The Stern Review*, p 12.

<sup>120</sup> Coroners and Justice Act 2009, section 120(11)(c). For an argument that this obligation is purely a rhetorical device and is impractical and inconsistent with the Council's other obligations, see Ian Edwards (2012) 'Sentencing Councils and Victims', *Modern Law Review*, 75: 324.

<sup>121</sup> Criminal Justice Act 2003, section 143(1).

<sup>122</sup> Sentencing Guideline Council, *Sexual Offences Act 2003, Definitive Guideline*, paras 1.12-1.13 (my emphasis). See also 'the nature of the sexual behaviour will be the primary indicator of the degree of harm caused in the first instance'; para 2.4.



punishment as currently constructed and employed in the criminal justice system.<sup>123</sup> If victim-survivors, however, do want wrongdoers to be held responsible for the material harms that they have suffered, then this may indicate that different outcomes and other processes whereby it is justifiable to hold the wrongdoer responsible for the consequences of his actions should be considered.

Overall, in theory the criminal law can hold wrongdoers responsible for the 'core' harm of rape, but not generally for the material harms, although in practice it fails to do so in a high proportion of rape cases, thus providing little justice for victim-survivors on the ground.

#### **4.5.5 Symbolic and Material Reparation for the Wrong and Harms of Rape**

The criminal law offers little symbolic and material reparation for the wrong and harms of rape, the final feature of justice in the view of some victim-survivors. The majority of mechanisms with these goals tend to be seen, in Stern's words, as 'beyond criminal justice' – that is, beyond the punishment of offenders and the protection of the public, and outwith the criminal legal process.<sup>124</sup> There are a range of support services available for victims generally or rape victim-survivors specifically, for example Victim Support (an independent charity for victims and witnesses), Witness Care Units (a point of contact and support for victims and prosecution witnesses) and Rape Crisis Centres,<sup>125</sup> many of which are accessible regardless of a criminal complaint and which may assist in repairing the material harms caused by rape. In addition, under the Code of Practice for Victims of Crime it states that all victims should have access to support services and are entitled to receive information regarding local support services.<sup>126</sup> However, no legal liability follows a breach of the code, support services are not available by right or guaranteed and are not adequately available across England and Wales, and are typically viewed as optional, purely 'therapeutic' additions.<sup>127</sup> The Coalition Government has recently proposed that the majority of funding

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<sup>123</sup> See generally chapter 3, section 3.4.1.

<sup>124</sup> Stern, *The Stern Review*, ch 4; see also Sara Payne (2009) *Redefining Justice: Addressing the Individual Needs of Victims and Witnesses* (London: Ministry of Justice).

<sup>125</sup> See an overview in Stern, *The Stern Review*, p 100.

<sup>126</sup> *The Code of Practice for Victims of Crime* (2005, Office for Criminal Justice Reform), 1.6-1.7.

<sup>127</sup> Stern, *The Stern Review*, p 101.

decisions regarding victims' services be shifted to the local level,<sup>128</sup> which many consultation respondents warned may lead to 'fragmented' and 'inconsistent' service provision.<sup>129</sup> While the Government listened to the concerns of women's organisations and added rape support centres and other sexual and domestic violence services to the exceptions which will continue to be commissioned nationally,<sup>130</sup> the funding proposals in general indicate that victim services are viewed as optional additions rather than a part of (criminal) justice.

What might initially seem more promising is the opportunity for victim-survivors to apply to the CICA for compensation. However, awards are made on an *ex gratia* basis, meaning that victims do not have a right to compensation.<sup>131</sup> The amount of compensation awarded is determined by a tariff, which for rape ranges from £11,000 to £22,000 depending on the circumstances (such as the number of perpetrators, and the extent of physical and psychological injuries caused). Thus, awards are relatively 'objective', and do not address the extent and range of material harms a particular victim-survivor may have experienced.<sup>132</sup> Consequently, the CICS does not provide adequate material reparation to rape victim-survivors, and while it may provide a level of symbolic reparation, as indicated in chapter 3, victim-survivors may see greater value in some compensation being paid from the wrongdoer.<sup>133</sup>

It may be, therefore, that court-ordered compensation paid by the wrongdoer provides reparation for the harms of rape.<sup>134</sup> However, compensation orders tend to be used in a

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<sup>128</sup> Ministry of Justice, *Getting it Right for Victims and Witnesses*, p 12.

<sup>129</sup> See, for example, Victim Support (2012) *Victim Support's Response to Getting it Right for Victims and Witnesses* (April 2012, Victim Support), pp 3, 4, 8.

<sup>130</sup> Ministry of Justice (2012) *Getting it Right for Victims and Witnesses: The Government Response* (London: The Stationary Office), pp 19-20.

<sup>131</sup> Jo Goodey (2005) *Victims and Victimology: Research, Policy and Practice* (Harlow, England: Pearson Longman), p 142.

<sup>132</sup> Doak, *Victims' Rights, Human Rights and Criminal Justice*, p 228.

<sup>133</sup> See chapter 3, section 3.4.2.

<sup>134</sup> Since the Powers of Criminal Courts Act 1973, section 35, criminal courts have had the power to make a compensation order in respect of injury, loss or damage. The entire Act was repealed by the Powers of Criminal Courts (Sentencing) Act 2000, Schedule 12, Part 1. For compensation orders now see section 130 of the 2000 Act, and from 1998 courts have been required to give reasons as to why

minority of cases and it is typically a small amount of money that is ordered to be paid.<sup>135</sup> In an attempt to address this issue, the Legal Aid, Punishment and Sentencing of Offenders Act 2012, section 63, places a positive duty on courts to consider making a compensation order in all eligible cases; however, this does not mean that the amount of compensation ordered to be paid is likely to increase. It is also notable that the Coalition Government has said that there should be more of a focus on reparation orders; however, it is indicated that this does not apply for more serious offences, such as rape.<sup>136</sup> As such, particularly in relation to serious offences, it seems unlikely that compensation and reparation orders will be seen as anything more than ‘an awkward adjunct to a penal system where punishment alone is viewed as the core objective of the official response to offending’.<sup>137</sup> Overall, the criminal justice system does little to secure symbolic and material reparation for victim-survivors, which is typically seen as ‘beyond’ its main aims. Consequently, reparation and support services which can address the harms of rape are viewed as optional additions to criminal justice, so that services for victim-survivors and mechanisms such as the compensation order are limited, inconsistent and inadequate.

#### 4.6 CONCLUSION

The criminal law is not only failing to provide justice to rape victim-survivors on its own terms, but it is limited in the extent to which it can provide what some victim-survivors see as justice. While there have been attempts – notably from feminists and those within the victims’ rights movement – to increase the provision of victim/victim-survivor services and to improve the treatment of victim-survivors in the criminal justice system, overall the response to victim-survivors has not progressed satisfactorily. Nevertheless, the criminal law continues to be at the centre of feminist rape law reform efforts, with the aims of ensuring the symbolic recognition of the ‘core’ harm of rape and increasing the punishment

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a compensation order is not made where the offence has caused injury, loss or damage; Criminal Justice Act 1998, section 104(1), repealed by Powers of Criminal Courts (Sentencing) Act 2000, Schedule 12, para 1, and replaced by section 130(3).

<sup>135</sup> Ministry of Justice (2010) *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (London: the Stationary Office), para 72; Desmond Greer (1991) *Criminal Injuries Compensation* (London: Sweet and Maxwell), p 168.

<sup>136</sup> Ministry of Justice (2012) *Punishment and Reform: Effective Community Sentences* (London: The Stationary Office), paras 2 and 20.

<sup>137</sup> Doak, *Victims’ Rights, Human Rights and Criminal Justice*, p 236.

of offenders. Given that there has been little comprehensive improvement of the criminal justice response to rape, with the attrition rate remaining high and the conviction rate low, some have suggested looking to additional and/or alternative means by which to respond to rape, such as restorative justice and tort law.<sup>138</sup> While there have been some explorations of some such responses,<sup>139</sup> the following chapters will provide a different analysis and perspective by evaluating restorative justice and tort law by reference to what some rape victim-survivors see as important aspects of justice, and, in light of this, re-considering the criminal justice response and directions for reform.

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<sup>138</sup> Mary Heath and Ngaire Naffine (1994) 'Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law "Reform"', *Australian Feminist Law Journal*, 3: 30, p 51; Seidman and Vickers, 'An Agenda for Rape Law Reform'; McGlynn, 'Feminism, Rape and the Search for Justice'.

<sup>139</sup> For example, Ptacek (ed) *Restorative Justice and Violence Against Women*; McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice'; Godden, 'Claims in Tort for Rape'; Kathleen Daly (2011) 'Conventional and Innovative Responses to Sexual Violence', *ACSSA Issues: Australian Centre for the Study of Sexual Assault*, No 12.

## RESTORATIVE JUSTICE: POSSIBILITIES FOR REPAIRING THE HARMS OF RAPE

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### 5.1 INTRODUCTION

As has been illustrated, the criminal justice system is criticised for failing to provide (criminal) justice to rape victim-survivors – that is, it fails, in the majority of cases, to punish those who perpetrate rape, and does not protect actual and potential victim-survivors. Moreover, as was argued in the previous chapter, the criminal justice system, at least as it is currently conceived, cannot adequately provide victim-survivors with what many see as key aspects of a just legal response. Consequently, the remainder of this thesis will analyse and evaluate unconventional legal responses to rape as to whether they may better provide justice for victim-survivors. One of these responses is restorative justice.

Restorative justice can be understood as a different means by which to address criminal or other wrongful behaviour;<sup>1</sup> however, how to define or conceptualise restorative justice is much debated, and will be discussed further below. For now, suffice it to say that it is an inclusive and collaborative decision-making process which typically values outcomes such as repairing the harms caused, or restoring relationships among victims, wrongdoers and the community. It may be seen as a distinct and complete form of justice, which is contrary to and substitutes criminal justice – although as restorative justice is not typically a fact-finding process and the wrongdoer must admit that they committed the wrongful act, it is often seen as an alternative sentencing practice.<sup>2</sup> Alternatively, it may be seen as compatible with criminal justice principles, and integrated with the criminal process, either as a diversion from traditional criminal justice interventions, or pre-sentence, as part of

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<sup>1</sup> Kathleen Daly and Russ Immarigeon (1998) 'The Past, Present, and Future of Restorative Justice: Some Critical Reflections', *Contemporary Justice Review*, 1: 21, p 21.

<sup>2</sup> Chris Cunneen and Carolyn Hoyle (2010) *Debating Restorative Justice* (Oxford, Portland and Oregon: Hart Publishing), (Hoyle) p 3.

sentencing, or post-sentencing in prison or on release from prison. Restorative justice is argued to encourage wrongdoers to take responsibility, and to be more effective in reducing reoffending.<sup>3</sup> And it is also seen to better meet victims' needs and interests than criminal justice, as victims have a greater role overall and in the decision-making process, and the outcomes are directed at repairing the harms caused by wrongdoing.<sup>4</sup> Consequently, and particularly in light of the failures of the criminal justice system to respond to rape, some feminists have explored the possibility of applying restorative justice in this context.<sup>5</sup>

Examining debates as to the merits and demerits of applying restorative justice to sexual violence, specifically rape, is the focus of this chapter. However, to enable an analysis in this regard, first, what restorative justice is, how it developed and how it is defined for the purpose of this thesis must be explained. Secondly, theories underpinning restorative justice, theoretical debates and empirical studies confirming or challenging the theoretical propositions will be discussed. Drawing on this literature, restorative justice is seen here as compatible with criminal justice (and thus can operate both in conjunction with or in isolation from the criminal justice system), rejecting conceptions of restorative justice as an alternative to criminal justice which is incompatible with its process and principles. It will be argued that through the process and outcomes of restorative justice that the wrongful conduct can be addressed, as the wrongdoer will experience a form of punishment, and, at the same time, some of the harms can be repaired, without violating the rights of the wrongdoer. Understanding restorative justice in this way influences the analysis of its application to rape, which constitutes the final section of this chapter. Many feminist scholars and activists are critical of restorative justice, arguing that it is risky for victim-survivors, does not hold wrongdoers to account and minimises the severity of the wrong and harms.<sup>6</sup> However, here it will be suggested that the possible benefits provide good

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<sup>3</sup> Howard Zehr (2005) *Changing Lenses: A New Focus for Crime and Justice* (3<sup>rd</sup> edn, Scottsdale, PA: Herald Press), pp 40-42.

<sup>4</sup> Strang, *Repair or Revenge*.

<sup>5</sup> See, for example, Ptacek (ed) *Restorative Justice and Violence Against Women*; Hudson, 'Restorative Justice and Gendered Violence'; Curtis-Fawley and Daly, 'The Views of Victim Advocates'; Kathleen Daly (2006) 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases', *British Journal of Criminology*, 46: 334.

<sup>6</sup> See further the discussion in section 5.4. For example, Julie Stubbs (2002) 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice', in Heather Strang and John Braithwaite

reasons to investigate it further. It is argued that, to ensure that restorative justice is adapted to meet the needs of the particular victim-survivor and respond to the facts of the particular case, it should be further investigated as a response which can be entirely community-based, and also can be integrated with and available at every stage of the criminal justice system.

## **5.2 RESTORATIVE JUSTICE: DEVELOPMENT, DEFINITIONS AND FORMS**

### **5.2.1 The Development of Restorative Justice**

Restorative justice is aligned with, is part of and has developed from a number of different social movements (such as those relating to prison reform and victims' rights), alternative processes (for example mediation, community based programmes and other informal justice procedures), and various theories underpinning critiques of and alternatives to criminal justice.<sup>7</sup> Consequently, practices such as victim offender mediation, family group conferences and sentencing circles, which have been evolving since the 1970s, have a wide base of origin and restorative justice has been and is used for different and conflicting agendas.<sup>8</sup> For instance, Daly and Immarigeon explain, restorative justice has been seen as a solution to the over-criminalisation and over-incarceration of African-Americans and Native Americans in the US, and has been promoted for similar purposes in relation to indigenous groups in countries such as Canada, New Zealand and South Africa.<sup>9</sup> In addition, from the political left, restorative justice has been seen as a means by which to avoid the use of severe punitive state-sanctions which (re)produce social inequalities, offering more humane responses and progressive outcomes to crimes.<sup>10</sup> However, those on the political right have also seen potential in restorative justice, but, Braithwaite explains, as means by which to decentralise responsibility (and costs) from the state and to shift them to local

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(eds) *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press); Andrea Smith (2010) 'Beyond Restorative Justice: Radical Organizing Against Violence', in Ptacek (ed) *Restorative Justice and Violence Against Women*.

<sup>7</sup> Carrie Menkel-Meadow (2007) 'Restorative Justice: What is it and Does it Work?', *Annual Review of Law and Social Science*, 3: 161.

<sup>8</sup> Daly and Immarigeon, 'The Past, Present, and Future of Restorative Justice', p 23.

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

<sup>10</sup> As explained in Menkel-Meadow, 'Restorative Justice', p 165.

communities.<sup>11</sup> Also, Sarre and Young highlight that the Christian faith – which is associated with more conservative rather than progressive ideas – has been and is influential in the development of restorative justice in the Western world, sharing values such as rebuilding relationships, healing and forgiveness.<sup>12</sup>

These various alternative practices and calls for change were not always grouped together until the 1990s<sup>13</sup> when the term restorative justice came into common parlance.<sup>14</sup> Since the 1990s, the use of restorative justice has increased significantly across the world,<sup>15</sup> extending to over 80 countries and gaining recognition and acceptance from the United Nations.<sup>16</sup> While many restorative justice schemes operate independently of the criminal justice system, many are integrated with the formal legal system and are governed by legislation.<sup>17</sup> And yet, there is no agreement among scholars and practitioners as to what restorative justice is and how to define it.

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<sup>11</sup> John Braithwaite (1999) 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts', *Crime and Justice*, 25: 1, p 4.

<sup>12</sup> Rick Sarre and Janette Young (2011) 'Christian Approaches to the Restorative Justice Movement: Observations on Scripture and Practice', *Contemporary Justice Review*, 14: 345.

<sup>13</sup> Although Daly and Immarigeon point out that in the 1970s and 1980s some legal scholars were exploring alternatives to traditional criminal justice under the umbrella term 'informal justice'; 'The Past, Present, and Future of Restorative Justice', p 23.

<sup>14</sup> *Ibid.* Usually, the term is traced to Albert Eglash's 1977 paper: 'Beyond Restitution: Creative Restitution', in Joe Hudson and Burt Galaway (eds) *Restitution in Criminal Justice* (Lexington, MA: DC Heath), but it can also be traced back to three of his earlier articles: (1958) 'Creative Restitution: A Broader Meaning for an Old Term', *Journal of Criminal Law, Criminology and Police Science*, 48: 619; (1958) 'Creative Restitution: Offender's Comments', *Journal of Social Therapy*, 4: 32; (1958) 'Creative Restitution: Some Suggestions for Prison Rehabilitation Programs', *American Journal of Corrections*, 20: 20; cited in Daniel Van Ness and Karen Heetderks Strong (2006) *Restoring Justice* (3<sup>rd</sup> edn, Cincinnati, OH: LexisNexis), p 22.

<sup>15</sup> For an overview, see Marian Liebmann (2007) *Restorative Justice: How it Works* (London and Philadelphia: Jessica Kingsley Publishers), chapter 11.

<sup>16</sup> Explained by Daniel Van Ness in 2005 at a United Nations conference; discussed in Abbey Porter (2005) 'Restorative Justice Takes the World Stage at the United Nations Crime Congress'; available online: <http://www.realjustice.org/library/uncrimecongress.html> (last accessed 17 October 2012).

<sup>17</sup> See further the discussion below as to the main forms of restorative justice, section 5.2.3.



### 5.2.2 Definitions of Restorative Justice

To evaluate the possibilities and limitations of restorative justice in the context of rape, it is necessary to have a clearer idea as to what constitutes restorative justice. There is much debate among practitioners and theorists as to a definition, particularly whether restorative justice is a specific process, or whether it should be seen primarily as a set of values or aims, or whether it is a combination of both.<sup>18</sup> Moreover, what these practices encompass, what the values or aims of restorative justice are and what they mean are not settled on either. This section will outline these debates, and conclude that restorative justice is best defined by both the process and aims.

In an overview of restorative justice for the Home Office, Marshall provides a commonly cited process-based definition: it is 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.<sup>19</sup> This definition was accepted by the Working Party on Restorative Justice of the Alliance of NGOs on Crime Prevention and Criminal Justice, in a project involving many prominent restorative justice scholars and practitioners in the 1990s.<sup>20</sup> A similar definition was adopted by the United Nations in 2002.<sup>21</sup> Nevertheless, Marshall's definition is not without criticism. In emphasising direct meetings it excludes processes where this physical proximity is absent.<sup>22</sup> Furthermore, it does not specify the aims and values of restorative justice, and therefore, Doolin argues,

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<sup>18</sup> Kathleen Daly (2008) 'The Limits of Restorative Justice', in Dennis Sullivan and Larry Tifft (eds) *Handbook of Restorative Justice* (London and New York: Routledge), p 135.

<sup>19</sup> Tony F Marshall (1999) *Restorative Justice: An Overview* (London: Home Office), p 5.

<sup>20</sup> Paul McCold (1997) 'Working Definition of the Working Party on Restorative Justice' (14 March 1997); available online:

<http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/lesson-1->

[definition/wpdef/?searchterm='Working%20Definition%20of%20the%20Working%20Party%20on](http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/lesson-1-definition/wpdef/?searchterm='Working%20Definition%20of%20the%20Working%20Party%20on)  
(last accessed 17 October).

<sup>21</sup> The Economic and Social Council adopted Resolution E/CN.15/2002/L.2/Rev.1, *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters*.

<sup>22</sup> James Dignan (2005) *Understanding Victims and Restorative Justice* (Maidenhead: Open University Press), pp 3-5.

the practices Marshall describes could potentially be employed to reach degrading and humiliating outcomes.<sup>23</sup>

For many, then, restorative justice should be defined by core values or aims rather than by key elements of the process. Often, the primary aim is seen to be restoration, which is commonly understood as 'repairing the harm' caused by wrongdoing.<sup>24</sup> Indeed, this aim is often seen to 'trump' other possible outcomes of restorative justice, such as reducing reoffending, which may be viewed as incidental benefits rather than legitimate goals in themselves.<sup>25</sup> In contrast, Braithwaite says that restorative justice has a number of goals, stating that it aims to repair the harms that the wrongdoer has caused the victim, to restore the relationships between the wrongdoer, victim and community, and to reintegrate the wrongdoer back into the community.<sup>26</sup> However, broken relationships, damaged communities within which crime is perpetuated, and the isolation of the wrongdoer from the community can be understood as 'harms' caused by the wrongdoing. Therefore if 'repairing the harm' is interpreted broadly it can be seen as the main aim of restorative justice.

However, there may be schemes which aim to repair the harms caused by wrongdoing, for example, victim support programmes, offender rehabilitation programmes and victim compensation schemes, which are not necessarily restorative *justice*, but rather, according to Vaandering, are restorative *practices*.<sup>27</sup> Restorative justice – as opposed to restorative practices – must involve both victims and wrongdoers in a dialogical process,<sup>28</sup> or, Sherman

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<sup>23</sup> Katherine Doolin (2007) 'But What Does it Mean? Seeking Definitional Clarity in Restorative Justice', *Journal of Criminal Law*, 71: 427. See also Dignan, *ibid*, pp 4-5.

<sup>24</sup> Hoyle, *Debating Restorative Justice*, p 6.

<sup>25</sup> For this view, see Paul McCold (2004) 'What Is the Role of Community in Restorative Justice Theory and Practice?', in Howard Zehr and Barb Toews (eds) *Critical Issues in Restorative Justice* (Cullompton: Willan), p 158; and Martin Wright (2002) 'The Court as Last Resort: Victim-Sensitive Community-Based Responses to Crime', *British Journal of Criminology*, 42: 654, p 659.

<sup>26</sup> Braithwaite, 'Optimistic and Pessimistic Accounts', p 6.

<sup>27</sup> Dorothy Vaandering (2011) 'A Faithful Compass: Rethinking the Term Restorative Justice to Find Clarity', *Contemporary Justice Review*, 14: 307, pp 313-316.

<sup>28</sup> *Ibid*; see also Hoyle, *Debating Restorative Justice*, p 15.

*et al.* argue, in decisions as to how to deal with the wrongdoing and its consequences.<sup>29</sup> Consequently, restorative justice should be defined by reference to the process and aim, for example, as in Zehr's definition: restorative justice is 'a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible'.<sup>30</sup> Van Ness similarly says that: 'Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through inclusive and cooperative processes'.<sup>31</sup> These definitions imply that, in practice, particular schemes or processes can be more restorative and just than others, which Zehr and Van Ness have said explicitly.<sup>32</sup> As ideals will not always be achieved in practice, the definition of restorative justice adopted here is that it is a process in which those with a stake in a wrong done engage in dialogue, as directly as possible, to collectively decide how to repair, as far as possible, the harms of the wrongdoing.<sup>33</sup> The next section will outline some of the main forms of restorative justice, which reflect, to differing extents, this definition.

### 5.2.3 Forms of Restorative Justice

There are many different manifestations of restorative justice, some of which operate independently of the criminal justice system, and some of which are integrated into the criminal justice system. This may be as a diversion from formal criminal justice, at the time of or as part of the sentencing process, or post-sentence. In addition, restorative justice has

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<sup>29</sup> Lawrence Sherman, Heather Strang and Dorothy Newbury-Birch (2008) *Restorative Justice* (Youth Justice Board), pp 8-9.

<sup>30</sup> Howard Zehr (2002) *The Little Book of Restorative Justice* (Intercourse, PA: Good Books), p 37.

<sup>31</sup> Daniel Van Ness (2004) 'RJ City: Contemplating a Restorative Justice System', paper presented at *Building a Global Alliance for Restorative Practices and Family Empowerment* (5-7 August 2004, Richmond, BC, Canada); quoted in Daniel Van Ness (2005) 'An Overview of Restorative Justice Around the World', paper presented at 'Workshop 2: Enhancing Criminal Justice Reform' of *Including Restorative Justice* (22 April 2005, International Centre for Criminal Law Reform and Criminal Justice Policy, University of British Columbia, Canada).

<sup>32</sup> Zehr, *The Little Book of Restorative Justice*, pp 54-55; Daniel Van Ness (2002) 'Creating Restorative Systems', in Lode Walgrave (ed) *Restorative Justice and the Law* (Cullompton: Willan), p 132.

<sup>33</sup> The term harm is being used to refer to what has been identified as the 'core' harm and the material harms; see chapter 3, section 3.3.

been drawn on in the international context of responding to war crimes and mass human rights violations in transitional states, for example Truth and Reconciliation Commissions.<sup>34</sup> However, because dialogue between the victim and the wrongdoer is very often absent in 'transitional justice' mechanisms,<sup>35</sup> and because the international context differs from crimes and criminal justice systems at the national level, these practices will not be discussed here. What will be outlined are the four main forms of restorative justice that are applied to domestic crimes: victim offender mediation, restorative conferencing, restorative circles and restorative panels.<sup>36</sup>

### 5.2.3(a) Victim Offender Mediation

Zehr sees victim offender mediation programmes which developed in the 1970s and 1980s, expanding from Canada to the US and the UK, as providing the basis for current theories of restorative justice.<sup>37</sup> Unlike civil mediation in which the parties negotiate the facts of an event and come to an agreed settlement, in victim offender mediation the wrongdoer must

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<sup>34</sup> Jennifer J Llewellyn and Robert Howse (1999) 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission', *University of Toronto Law Journal*, 49: 355.

<sup>35</sup> Hoyle, *Debating Restorative Justice*, p 15.

<sup>36</sup> Gordon Bazemore and Mark Umbreit (2001) 'A Comparison of Four Restorative Conferencing Models', *Juvenile Justice Bulletin* (Office of Juvenile Justice and Delinquency Prevention); available online:

[https://www.nttac.org/views/docs/jabg/balancedRestoreJustice/comparison\\_four\\_rc\\_models.pdf](https://www.nttac.org/views/docs/jabg/balancedRestoreJustice/comparison_four_rc_models.pdf) (last accessed 4 January 2013); Joanna Shapland (2003) 'Restorative Justice and Criminal Justice: Just Responses to Crime?', in Andrew von Hirsch, Julian Roberts, Anthony E Bottoms, Kent Roach and Mara Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford and Portland, Oregon: Hart), p 197-200; Dignan, *Understanding Victims and Restorative Justice*, pp 6-7. However, the categorisation of forms of restorative justice is not uncontested; for example McCold sees three main models of restorative justice (mediation, conferencing and circles), Paul McCold (2008) 'The Recent History of Restorative Justice', in Sullivan and Tiffet (eds) *Handbook of Restorative Justice*. For an overview of debates as to how to categorise forms of restorative justice, see Aidan Wilcox and Carolyn Hoyle (2004) *The National Evaluation of the Youth Justice Board's Restorative Justice Projects* (Youth Justice Board), pp 16-17.

<sup>37</sup> Zehr, *The Little Book of Restorative Justice*.

admit that s/he committed the offence(s) in question.<sup>38</sup> The wrongdoer and victim engage in a dialogue – directly or indirectly – with the assistance of a trained mediator, to decide how the wrongdoer should take responsibility for and repair the harms that have been caused.<sup>39</sup> Typical outcomes include financial compensation, work for the victim, and/or participation in support or rehabilitation programmes. Referrals to restorative programmes may operate to divert wrongdoers from prosecution – although the criminal process may continue if an agreement is not completed – and some are a condition of probation if a guilty plea has been accepted by the court.<sup>40</sup>

### 5.2.3(b) Restorative Conferencing

Restorative conferencing also involves meetings with wrongdoers and victims; however, family, community members or other supporters are commonly included in the process.<sup>41</sup> Conferences focus on wrongdoers acknowledging responsibility and understanding the harms that they have caused, engaging the participants in a collective decision-making process as to how amends are to be made.<sup>42</sup> One particular form of conferencing is family group conferences, which have a particular family and child-care orientation. There are many examples of such conferences operating outside mainstream legal and social responses to family problems all over the world,<sup>43</sup> and also legislative models integrating conferences into criminal justice systems. For example, in New Zealand, the Children, Young Persons and Their Families Act 1989 made family group conferences a part of the youth justice system, and in Northern Ireland the Justice (Northern Ireland) Act 2002

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<sup>38</sup> Mark S Umbreit, Robert B Coates and Betty Vos (2001) 'Victim Impact on Meeting Young Offenders', in Allison Morris and Gabrielle Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart Publishing), p 125.

<sup>39</sup> *Ibid*, for an overview.

<sup>40</sup> *Ibid*, pp 123-124.

<sup>41</sup> Gabrielle Maxwell and Allison Morris (1993) *Families, Victims and Culture: Youth Justice in New Zealand* (Wellington, New Zealand: Social Policy Agency and Institute of Criminology).

<sup>42</sup> Gabrielle Maxwell, Allison Morris and Hennessey Hayes (2008) 'Conferencing and Restorative Justice', in Sullivan and Tifft (eds) *Handbook of Restorative Justice*, pp 91-92.

<sup>43</sup> Paul Nixon, Gale Burford, Andrew Quinn and Josh Edelbaum (2005) *A Survey of International Practices, Policy and Research on Family Group Conferencing and Related Practices* (Englewood, Colorado: National Centre on Family Group Decision Making), p 71.

established the Youth Conference Service which engages with various statutory and voluntary agencies to provide community-based programmes for young offenders.<sup>44</sup>

From family group conferencing grew police-led conferencing, first in Wagga Wagga, Australia by Terry O'Connell. As it is police-led it is always integrated with the criminal justice system, typically substituting the traditional police caution, and the conferences follow a script which was developed for consistency and to ensure that they remained restorative.<sup>45</sup> This practice has been employed in the US,<sup>46</sup> Canada and the UK (most notably by Thames Valley Police).<sup>47</sup>

### 5.2.3(c) Restorative Circles

Sentencing, healing or peacemaking circles are most strongly linked to or embedded within First Nation, indigenous or Aboriginal communities. In Canada, where they developed, judicially convened sentencing circles are typically used in Aboriginal communities to determine an appropriate response for a criminal offence that has been formally acknowledged in the criminal justice system.<sup>48</sup> In restorative circles there is a focus on the culture of particular communities, and a more contextual approach is taken than in family group conferencing.<sup>49</sup> This form of restorative justice has been practiced outside of Canada and North America, including in England and Wales, taking shape in 'circles of

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<sup>44</sup> For a brief overview, see Liebmann, *Restorative Justice*, pp 171-172.

<sup>45</sup> As explained by the Criminal Justice Review Group (2000) *Review of the Criminal Justice System in Northern Ireland* (30 March 2000), p 200; available online: <http://cain.ulst.ac.uk/issues/law/cjr/chap9.pdf>. (last accessed 17 October).

<sup>46</sup> Through the organisation *Real Justice*, now *The International Institute for Restorative Practices*; see the website: <http://www.iirp.edu/> (last accessed 17 October).

<sup>47</sup> Carolyn Hoyle, Richard Young and Roderick Hill (2002) *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning* (York: Joseph Rowntree Foundation).

<sup>48</sup> Curt Taylor Griffiths (1996) 'Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities', *International Journal of Comparative and Applied Criminal Justice*, 20: 195.

<sup>49</sup> Donna Coker (2000) 'Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking', *UCLA Law Review*, 47: 1, p 98.

accountability' in which community members agree to work with the wrongdoer to ensure that s/he does not reoffend.<sup>50</sup>

### 5.2.3(d) Restorative Panels

Community panels or boards, neighbourhood panels or boards, and youth panels were introduced in the United States early in the 21<sup>st</sup> century, later developing into forms which often reflect the practices and philosophies of the restorative justice movement,<sup>51</sup> and thus here are broadly labelled 'restorative panels'. These panels have typically been used to address low-level adult offending, and more recently juvenile offenders, bringing together – usually at the order of a court – a small group from a community to discuss the wrongdoing, agree the sanctions and ensure that the wrongdoer complies.<sup>52</sup> This model of restorative justice was adapted and implemented in England and Wales in the late 1990s to address youth crime.<sup>53</sup> A young person must be referred to a Youth Offender Panel when they have pleaded guilty to a first offence punishable by imprisonment, except where the sentence is fixed by law.<sup>54</sup> The panel is attended by the offender, a member of a youth offending team, and two lay members of the community.<sup>55</sup> The offender's family members may also attend, and so may the victim.<sup>56</sup> The panel members discuss the offence and the harms caused, and reparation, rehabilitation and a contract for the offender to complete are agreed upon.<sup>57</sup>

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<sup>50</sup> Anne-Marie McAlinden (2007) *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration* (Oxford: Hart), pp 41, 181-182.

<sup>51</sup> Bazemore and Umbreit, 'A Comparison of Four Restorative Conferencing Models'.

<sup>52</sup> *Ibid.*

<sup>53</sup> For further detail on restorative justice and youth crime in England and Wales in relation to the policy context, see chapter 6, section 6.2.

<sup>54</sup> The 'referral order'; originally introduced in the Youth Justice and Criminal Evidence Act 1999, Part 1, but now governed by the Powers of Criminal Courts (Sentencing) Act 2000, Part III.

<sup>55</sup> Dignan, *Understanding Victims and Restorative Justice*, pp 122-123.

<sup>56</sup> Carolyn Hoyle (2010) *Restorative Justice Working Group Discussion Paper* (prepared for the Commission on English Prisons Today), p 2; available online: [http://www.prisoncommission.org.uk/fileadmin/howard\\_league/user/pdf/Commission/Howard\\_League\\_RJ\\_Working\\_Group\\_Discussion\\_Paper.pdf](http://www.prisoncommission.org.uk/fileadmin/howard_league/user/pdf/Commission/Howard_League_RJ_Working_Group_Discussion_Paper.pdf) (last accessed 17 October 2012).

<sup>57</sup> *Ibid.*

#### **5.2.4 Summary: Development, Definitions and Forms of Restorative Justice**

While victim offender mediation, restorative conferencing, restorative circles and restorative panels can be seen as the four main forms of restorative justice, there are other practices which can and are considered to be restorative justice. Indeed, there is scope for new practices to develop, given the relatively wide remit of restorative justice, which has been defined here as a process in which those with a stake in a wrong done engage in dialogue, as directly as possible, to collectively decide how to repair, as far as possible, the harms of the wrongdoing. However, as the remit of restorative justice is so wide it has developed in different ways and has been used for different purposes, including conflicting political agendas. It is perhaps, in part, its malleability that has contributed to the rise of restorative justice in countries across the world, particularly since the 1990s, as community-based programmes have increased and restorative justice practices have been integrated into formal criminal justice systems. Unsurprisingly, as restorative justice has been used more in practice, theories of restorative justice have been developing and tested in empirical studies. It is the theoretical and empirical research that is the focus of the following section.

#### **5.3 CAN RESTORATIVE JUSTICE EFFECTIVELY RESPOND TO AND REPAIR THE HARMS OF WRONGDOING?**

As has been discussed above, restorative justice engages in dialogue those who are affected by wrongdoing to agree how to repair the harms. This section will discuss theoretical claims as to the benefits of restorative justice in relation to the three main parties – victims, wrongdoers and communities – and empirical research testing these claims.<sup>58</sup> In so doing, it will touch on key debates among theorists, such as whether restorative justice and criminal justice are compatible, the relationship between the

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<sup>58</sup> It is important to note that there are many different forms of restorative justice, used in different contexts (for example, in relation to youth crime or adult offenders), for different crimes (for example, less serious rather than more serious crimes, such as murder or sexual violence), and restorative justice can operate separately to or in relation to different stages of the criminal justice system. These variable factors and contexts will be discussed throughout this section as they shape practitioners' and scholars' views as to the possibilities, issues and limitations of restorative justice, and may influence the effectiveness of restorative justice; Lawrence W Sherman and Heather Strang (2007) *Restorative Justice: The Evidence* (London: The Smith Institute), p 14.



community and the state, and the balance of victims' and offenders' needs, interests and rights.<sup>59</sup> The understanding of restorative justice adopted here will be situated within these debates, which is important as the position taken will influence the analysis of restorative justice and rape (the final section of this chapter). It will be argued that restorative justice can be integrated with criminal justice, and that restorative justice has the potential to hold wrongdoers responsible for the wrong they have done, and repair the harms, while respecting the wrongdoer's rights. And it will be concluded that, overall, the research is significantly positive to warrant an investigation of the possibilities of restorative justice to respond to rape.

### 5.3.1 Victims

#### 5.3.1(a) Victim Participation in Restorative Justice

Victims play a key role in restorative justice which, Strang argues, meets their needs and accounts for their views, and provides a less formal process in which victims have expressed a 'strong desire' to participate.<sup>60</sup> However, not all victims choose to participate for reasons such as being afraid or angry with the wrongdoer and disbelieving the sincerity of the wrongdoer.<sup>61</sup> There is also evidence to suggest that victims are less likely to participate the less serious the offence.<sup>62</sup> However, while the type of offence and the victim's view of the wrongdoer may affect her/his decision to participate, it seems that the most influential factors may be the form of restorative justice, and funding, resources and priorities of a particular scheme. So, in relation to the restorative conferences arranged by the Thames Valley Police over three years from 1 April 1998, victims attended in just 14 per

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<sup>59</sup> For a discussion, see von Hirsch *et al.*, *Restorative Justice and Criminal Justice*.

<sup>60</sup> Strang, *Repair or Revenge*, pp 8-23, 122 (with reference to results from the Canberra 'RISE' study, discussed further below, section 5.3.1(b)).

<sup>61</sup> David O'Mahony and Jonathan Doak (2008) *Restorative Justice and Criminal Justice: International Developments in Theory and Practice* (National Commission on Restorative Justice), p 132.

<sup>62</sup> Sherman *et al.*, *Restorative Justice*, p 57; Sherman and Strang, *Restorative Justice: The Evidence*, p 37; Strang, *Repair or Revenge*, p 79. However, compare Wemmers and Cyr who discuss a 1999 Canadian victim survey which found that fewer victims of violent crimes were interested in victim offender mediation than victims of property offences: Jo-Anne Wemmers and Katie Cyr (2004) 'Victims' Perspectives on Restorative Justice: How Much Involvement are Victims Looking For?', *International Review of Victimology*, 11: 259, p 262.

cent of cases,<sup>63</sup> and there was a 20 per cent participation rate in a similar scheme in Northern Ireland.<sup>64</sup> Hoyle suggests that this is because the Thames Valley scheme prioritises wrongdoers' needs and interests over victims' needs and interests.<sup>65</sup> Similarly, Sherman *et al.* have explained that low levels of victim participation in Youth Offender Panels is not due to a lack of victim demand for restorative justice but rather because Youth Offending Teams have a low level of resources for victims.<sup>66</sup> In comparison, Wilcox and Hoyle found a 67 per cent victim participation rate (of the 80 per cent of victims who were contacted) in an investigation which covered a variety of restorative justice schemes in England and Wales, including family group conferencing, direct and indirect mediation, and victim awareness programmes (80 per cent of which addressed juvenile offenders).<sup>67</sup> And, reviewing the research, O'Mahony and Doak say that there tends to be higher levels of victim participation where there is direct communication with the wrongdoer, such as in restorative conferencing.<sup>68</sup>

To summarise, it seems that many victims, including those of serious offences, do desire restorative justice processes and outcomes, but that in practice their expectations are not always met. For restorative justice to be sufficient for victims it is important that programmes properly account for victims' needs and interests.

### 5.3.1(b) *Repairing the Harms*

Many restorative justice advocates argue that one of its main advantages over the criminal justice system is that the harms – from social and emotional to physical – caused to victims are repaired. Repairing the harms is typically not seen as part of criminal justice, but rather it is achieved through separate therapeutic and other processes and support

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<sup>63</sup> Hoyle *et al.* *Proceed with Caution*, p 16.

<sup>64</sup> David O'Mahony, Tim Chapman and Jonathan Doak (2002) *Restorative Cautioning: A Study of Police Based Restorative Cautioning Pilots in Northern Ireland* (Belfast: Northern Ireland Office), p 5.

<sup>65</sup> Carolyn Hoyle (2002) 'Securing Restorative Justice for the "Non-Participating Victim"', in Carolyn Hoyle and Richard Young (eds) *New Visions of Crime Victims* (Oxford and Portland, Oregon: Hart), p 116.

<sup>66</sup> Sherman *et al.*, *Restorative Justice*, pp 13 and 57.

<sup>67</sup> Wilcox and Hoyle, *The Youth Justice Board's Restorative Justice Projects*, p 6.

<sup>68</sup> O'Mahony and Doak, *Restorative Justice: International Developments*, p 131.

organisations.<sup>69</sup> Restorative justice envisages therapy and healing as part of justice, both through the process and outcomes.<sup>70</sup> In relation to the process, the victim can explain her/his experience and the harms that s/he has suffered in her/his own words which may be therapeutic.<sup>71</sup> Furthermore, victims hear the wrongdoer explain her/his motivation for and perspective of 'what happened', which, Zehr argues, contributes to a victim's recovery because '[c]rime may upset our sense of meaning, which is a basic human need'.<sup>72</sup> Victims also often experience blame and shame, and witnessing the wrongdoer accept responsibility may help shift those emotions to the wrongdoer.<sup>73</sup> Indeed, Strang highlights that in the Reintegrative Shaming Experiments (RISE) in Canberra, Australia<sup>74</sup> that a conference helped 67 per cent of violence victims overcome shame.<sup>75</sup>

In relation to outcomes, restorative justice may provide material and symbolic reparation, which demonstrates to the victim that the wrongdoer is taking responsibility for the wrong done and harms caused, may contribute to recovering the financial costs of crime to the victim, and compensate for the physical and psychological harms that s/he may have suffered.<sup>76</sup> However, in the RISE experiments Strang found that conferences were no more effective at delivering financial restitution to victims than courts, although conference victims were less likely than court victims to desire restitution.<sup>77</sup> Nevertheless, victims did

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<sup>69</sup> See chapter 4, section 4.5.5.

<sup>70</sup> See generally, John Braithwaite (2002) 'Restorative Justice and Therapeutic Jurisprudence', *Criminal Law Bulletin*, 38: 244.

<sup>71</sup> Wright, 'The Court as Last Resort', p 655; Hudson, 'Restorative Justice and Gendered Violence', p 625.

<sup>72</sup> Zehr, *Changing Lenses*, p 29; See also Scheff, 'Shame and Anger in Therapeutic Jurisprudence', p 105.

<sup>73</sup> Scheff, *ibid*, p 105.

<sup>74</sup> This consisted of four experiments using the randomized controlled trial to compare restorative justice conferences and court processes which addressed drink driving, shoplifting, property crime involving personal victims, or violent crime; for further detail of the study design, see Strang, *Repair or Revenge*, pp 65-87.

<sup>75</sup> *Ibid*, p 111, table 5.9.

<sup>76</sup> *Ibid*, pp 54-56.

<sup>77</sup> *Ibid*, pp 93-94.

receive some other form of material reparation in a greater number of conferences than court cases.<sup>78</sup>

Furthermore, some restorative justice theorists argue that victims may prefer 'mercy' to compensation,<sup>79</sup> or believe that receiving an apology is more important.<sup>80</sup> Indeed, approximately 90 per cent of victims in the RISE study believed that the wrongdoer should apologise for the loss and harms caused,<sup>81</sup> which occurred in 86 per cent of conference cases and only 19 per cent of those that went to court.<sup>82</sup> Similarly, in Shapland *et al.*'s review of three UK-based restorative justice schemes in the early 2000s, it was illustrated that 90 per cent of victims received an apology in restorative justice.<sup>83</sup> However, victims may not gain any form of restoration from an apology or the conference dialogue more generally as the participants may misinterpret each other, or may not believe that the other person is sincere.<sup>84</sup> Nevertheless, in the RISE conferences 77 per cent of victims said that they felt the apology was sincere, whereas only 41 per cent of court victims who received an apology believed it was sincere.<sup>85</sup> There is also the possibility that a victim will forgive the wrongdoer, which is thought to be important for the victim in terms of letting go of feelings of resentment or anger, and to, ultimately, restore the relationship between the parties.<sup>86</sup> However, while many theorists say that apology and forgiveness is ideal, they acknowledge that apology and forgiveness cannot be expected or enforced.<sup>87</sup> It should also be noted Van Ness and Strong, Garvey, and Scheff argue that a verbal apology alone is insufficient, and material reparation or other burdensome outcomes should be undertaken

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<sup>78</sup> *Ibid*, p 92.

<sup>79</sup> Braithwaite, 'Optimistic and Pessimistic Accounts', p 20.

<sup>80</sup> Strang, *Repair or Revenge*, p 55.

<sup>81</sup> *Ibid*, p 114, figure 5.20.

<sup>82</sup> *Ibid*, p 115, figure 5.21.

<sup>83</sup> Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby (2007) *Restorative Justice: The Views of Victims and Offenders. The Third Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield), p 25.

<sup>84</sup> Cunneen, *Debating Restorative Justice*, p 135; Daly, 'The Limits of Restorative Justice', pp 139-140.

<sup>85</sup> Strang, *Repair or Revenge*, p 115.

<sup>86</sup> Strang, *ibid*, pp 20-21; Zehr, *Changing Lenses*, p 193; Stephen P Garvey (2003) 'Restorative Justice, Punishment, and Atonement', *Utah Law Review*, 2003: 303, p 303.

<sup>87</sup> Zehr, *ibid*, p 193.

by the wrongdoer to underscore the sincerity of an apology and address the point that apologies and other forms of symbolic reparation may 'cheapen' justice.<sup>88</sup>

In terms of whether restorative justice, overall, contributes to repairing victims' emotional and psychological harms, evaluating the evidence, Sherman and Strang conclude that it may reduce post-traumatic stress<sup>89</sup> and reduce the anger victims may feel towards wrongdoers.<sup>90</sup> However, in Daly's South Australia Juvenile Justice (SAJJ) Research on Conferencing Project<sup>91</sup> she found that the more 'distressed'<sup>92</sup> a victim was the less likely they were to have fully recovered a year after the conference.<sup>93</sup> From the RISE data, Strang found that there was no significant difference in relation to emotional harms suffered by victims – such as sleeplessness, headaches and other physical symptoms, or an increase in suspicion or distrust – between those whose cases went to court and those whose went to conference.<sup>94</sup> Furthermore, it is possible that engaging in dialogue with the wrongdoer and discussing the offence could trigger trauma symptoms for victims, causing further harm instead of promoting healing.<sup>95</sup> Indeed, in evaluations of conferencing in New Zealand and Australia there is evidence to show that a significant minority of victims felt worse after a

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<sup>88</sup> See also below, section 5.3.2(a), with reference to Van Ness and Strong, , *Restoring Justice*, pp 84-87; Garvey, 'Punishment as Atonement'; and Scheff, 'Shame and Anger in Therapeutic Jurisprudence'.

<sup>89</sup> Sherman and Strang, *Restorative Justice: The Evidence*, p 64, with particular reference to Caroline Angel (2005) *Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims' Post-Traumatic Stress Symptoms* (PhD dissertation, University of Pennsylvania).

<sup>90</sup> *Ibid*, pp 23 and 63, with particular reference to Strang, *Repair or Revenge*.

<sup>91</sup> The project involved an analysis of 89 youth justice conferences in 1998 which addressed violent crimes and property offences; see further Kathleen Daly (2005) 'A Tale of Two Studies: Restorative Justice from a Victim's Perspective', in Elizabeth Elliott and Robert M Gordon (eds) *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Cullompton, England: Willan), p 154.

<sup>92</sup> Distress was measured by the factors of fear of being alone, sleeplessness or nightmares, general health problems, worrying about the security of property, increase in suspicion or distrust, sensitivity to particular sounds or noises, loss of self-confidence, loss of self-esteem, and other problems; *ibid*, p 159.

<sup>93</sup> *Ibid*, p 162.

<sup>94</sup> Strang, *Repair or Revenge*, p 96.

<sup>95</sup> Susan Herman (2004) 'Is Restorative Justice Possible without a Parallel System for Victims?', in Zehr and Toews (eds) *Critical Issues in Restorative Justice*.

conference.<sup>96</sup> Despite some conflicting studies, reviewing the research Sherman *et al.* conclude that evidence relating to repairing the harms caused to victims is ‘most consistent with the predictions made from the theories’.<sup>97</sup>

### 5.3.1(c) *Victim Satisfaction*

Restorative justice theorists predict that victims will be more satisfied with restorative justice than criminal justice because it is likely to better satisfy their needs, interests and desire for justice. Victim satisfaction is often an evaluative measure in empirical research on restorative justice, however exactly what is meant by this term is often unclear, and its meaning may vary between projects. Nevertheless, for the purposes of the summary of restorative justice and victims, illustrating results of studies as to victim satisfaction is an indicator of whether restorative justice may be beneficial for victims, even if it is unclear precisely what this means. In the Canberra RISE experiments, 70 per cent of victims who attended a conference were satisfied, in contrast to 42 per cent of victims whose cases went to court.<sup>98</sup> Similarly, Shapland *et al.* report that 75 per cent of victims were satisfied with an outcome agreement from a Justice Research Consortium conference.<sup>99</sup> Moreover, Umbreit, Vos and Coates conclude from their review of 85 restorative justice studies from across the world that victim satisfaction rates are high ‘across sites, cultures, and seriousness of offenses’.<sup>100</sup>

However, there is research which suggests that satisfaction rates are not as high when victims and wrongdoers engage indirectly.<sup>101</sup> Shapland *et al.* report some victim dissatisfaction with such forms of restorative justice, but note that this was typically where there was a conflict between the victim and the wrongdoer, or where the victim had not

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<sup>96</sup> Maxwell and Morris, *Families, Victims and Culture*, p 119.

<sup>97</sup> Sherman, *et al.*, *Restorative Justice*, p 17.

<sup>98</sup> Strang, *Repair or Revenge*, pp 101-102.

<sup>99</sup> Shapland *et al.*, *The Views of Victims and Offenders*, p 26.

<sup>100</sup> Mark Umbreit, Betty Vos and Robert B Coates (2006) *Restorative Justice Dialogue: Evidence-based Practice* (Centre for Restorative Justice and Peacemaking, University of Minnesota), p 4; available online:

[http://www.cehd.umn.edu/ssw/rjp/PDFs/RJ\\_Dialogue\\_Evidence-based\\_Practice\\_1-06.pdf](http://www.cehd.umn.edu/ssw/rjp/PDFs/RJ_Dialogue_Evidence-based_Practice_1-06.pdf). (last accessed 17 October 2012).

<sup>101</sup> Shapland *et al.*, *The Views of Victims and Offenders*, p 5.

received adequate information about her/his case.<sup>102</sup> In Strang's view, victim satisfaction tends to relate to failures in restorative justice practice, rather than policy, for instance, insufficient preparation for victims, inadequate training of facilitators, or lack of follow-up on conference agreements.<sup>103</sup> More generally, however, some are concerned that, similarly to criminal justice, restorative justice tends to be centred on wrongdoers, and victims' involvement in restorative justice is used to achieve goals directed towards the wrongdoer, such as to reinforce the harmfulness of their actions to prevent future wrongdoing.<sup>104</sup> This seems to suggest that where restorative practices are operating effectively (for example, in relation to contacting and communicating with victims, providing victims with choices and decision-making power) a significant proportion of victims are likely to be satisfied with the process and outcomes.

### 5.3.2 Wrongdoers

#### 5.3.2(a) Responsibility

Restorative justice advocates typically argue that it provides a more meaningful way of holding wrongdoers responsible for their actions, and that it can be more effective in preventing future wrongdoing than traditional criminal justice. For restorative justice to proceed the wrongdoer must acknowledge that they did the wrongful act, but in order to take responsibility the wrongdoer must understand the impact of her/his actions, which is thought to be achieved by hearing from and engaging with those affected by her/his wrongdoing.<sup>105</sup> When wrongdoers understand the effects of their behaviour, they then can take responsibility, Zehr explains, by participating in a discussion as to how 'to make things right' and undertaking the actions agreed, which is supposedly more meaningful and effective than sanctions being imposed on wrongdoers.<sup>106</sup> Many theorists say that, ideally, the wrongdoer should apologise and convey sincerity through adhering to the agreed

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<sup>102</sup> *Ibid*, pp 4, 43.

<sup>103</sup> Strang, *Repair or Revenge*, pp 150-152.

<sup>104</sup> Heather Strang (2004) 'Is Restorative Justice Imposing its Agenda on Victims?', in Zehr and Toews (eds) *Critical Issues in Restorative Justice*; Kelly Richards (2009) 'Taking Victims Seriously? The Role of Victims' Rights Movements in the Emergence of Restorative Justice', *Current Issues in Criminal Justice*, 21: 302, p 308.

<sup>105</sup> Zehr, *Changing Lenses*, pp 41-42; Miller, *After the Crime*, pp 192-193.

<sup>106</sup> Zehr, *ibid*, pp 40-42. See also Van Ness and Strong, *Restoring Justice*, p 87.

outcomes.<sup>107</sup> In over 85 per cent of cases in the schemes evaluated by Shapland *et al.* and RISE conferences the wrongdoer apologised.<sup>108</sup> And in the latter, a higher percentage of wrongdoers who attended a conference believed that they had been able to repay society and the victims, saying that they 'felt good' about being 'able to do something about the offence I committed', in contrast to wrongdoers whose cases proceeded through the courts.<sup>109</sup>

Of course, restorative justice does not always achieve its ideals in practice, and not all wrongdoers will fully accept that what they did was wrongful and harmful or take full responsibility for their actions. For instance, Wilcox and Hoyle found that the completion rate for Final Warnings of interventions in relation to youth crime was 83 per cent in their national evaluation.<sup>110</sup> And Shapland *et al.*'s UK based study revealed that in 11-18 per cent of cases agreements were definitely not completed, while the rest were fully or partially completed.<sup>111</sup> However, they concluded that, '[g]iven the seriousness of the offences and the entrenched nature of many of these problems, these are in fact very low failure rates'.<sup>112</sup>

Nevertheless, there are many scholars who challenge restorative justice theories, arguing that it does not satisfactorily hold wrongdoers responsible for their wrongful and harmful actions. Most notably, this view is taken by desert theorists who argue that wrongdoers deserve punishment that is proportionate to the severity of their wrongdoing, which also

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<sup>107</sup> Van Ness and Strong, *ibid*, pp 84-87. See also Garvey, 'Punishment as Atonement'; Scheff, 'Shame and Anger in Therapeutic Jurisprudence'.

<sup>108</sup> Shapland *et al.*, *The Views of Victims and Offenders*, p 25; Strang, *Repair or Revenge*, p 115, figure 5.21; also see apology discussed in relation to victims, above, 5.3.1(b).

<sup>109</sup> Lawrence W Sherman, Heather Strang, Geoffrey C Barnes, John Braithwaite, Nova Inkpen and Min-Mee Teh (1998) *Experiments in Restorative Policing: A Progress Report on the Canberra Reintegrative Shaming Experiments (RISE)* (Institute of Advanced Studies, Australian National University), p 127.

<sup>110</sup> Wilcox and Hoyle, *The Youth Justice Board's Restorative Justice Projects*, p 8.

<sup>111</sup> Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, Emily Colledge, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby (2006) *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (Centre for Criminological Research, University of Sheffield), p 68.

<sup>112</sup> *ibid*.



censures the wrongful act.<sup>113</sup> Indeed, many restorative justice advocates argue that it should not involve punishment,<sup>114</sup> and desert theorists see restorative justice as being ‘too lenient’, a ‘soft option’, which fails to denunciate the wrong done and impose full responsibility on the wrongdoer, particularly if it operates as a diversion from formal criminal justice.<sup>115</sup> However, some, such as Hudson, Daly and Garvey see punishment as a part of restorative justice as the wrongdoer is likely to experience the process and outcomes as painful or burdensome.<sup>116</sup> This is the view adopted here, which takes this understanding as the way for restorative justice to perform the expressive function of criminal justice, recognising and condemning the wrongful act.<sup>117</sup> Nevertheless, as sanctions may differ for the same offence in restorative justice, questions are raised as to whether restorative justice is fair for, and respects the due process rights of, wrongdoers as it does not meet the proportionality and consistency of outcomes requirements of desert-based theories.

### 5.3.2(b) Fairness to Wrongdoers and Due Process

In addition to concerns that wrongdoers do not receive their ‘just deserts’ through restorative justice, desert theorists argue that it is only fair if sentencing outcomes are proportionate to the seriousness of the offence, and outcomes are consistent for wrongdoers with equal levels of culpability.<sup>118</sup> In comparison, restorative justice outcomes are designed, to a considerable extent, to repair the harms that have been caused, which

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<sup>113</sup> For example, see von Hirsch, *Censure and Sanctions*.

<sup>114</sup> Martin Wright (1991) *Justice for Victims and Offenders* (Milton Keynes, Philadelphia: Open University Press), pp 108, 115, 125; see also generally, Lode Walgrave (2003) ‘Imposing Restoration Instead of Inflicting Pain’, in von Hirsch *et al.*, *Restorative Justice and Criminal Justice*.

<sup>115</sup> As discussed in Cunneen, *Debating Restorative Justice*, p 146.

<sup>116</sup> Kathleen Daly (2000) ‘Revisiting the Relationship between Retributive and Restorative Justice’, in John Braithwaite and Heather Strang (eds) *Restorative Justice: Philosophy to Practice* (Dartmouth: Ashgate), p 35; Antony Duff (1992) ‘Alternatives to Punishment – Or Alternative Punishments?’, in Wesley Cragg (ed) *Retributivism and its Critics* (Stuttgart: Steiner).

<sup>117</sup> Garvey, ‘Punishment as Atonement’, p 1844; Antony Duff (2003) ‘Restoration and Retribution’, in von Hirsch *et al.*, *Restorative Justice and Criminal Justice*, p 46.

<sup>118</sup> Outcomes may not be exactly the same, as there are aggravating and mitigating circumstances, but these affect the culpability of the offender and thus what sentence s/he deserves; Ashworth, *Sentencing and Criminal Justice*, chs 4 and 5.

may differ for victims of the same crime and thus wrongdoers who are equally culpable may be treated differently.<sup>119</sup> However, as Zedner explains, desert theories are not without their problems, for instance, they tend to eschew structural disadvantages as they are predicated on the notion of free moral choice, and there is a significant level of subjectivity and arbitrariness in determining what level of sentence, what conditions of probation and so on, match a particular crime.<sup>120</sup> Although she says that traditional forms of punishment such as imprisonment may lean towards an internal consistency, Zedner argues that this, and a level of proportionality, is possible through reparative outcomes.<sup>121</sup> Within a sentencing framework, this may simply require that forms and levels of reparation are determined, ranked and set at particular levels for crimes, aiming to repair the harms, to the extent that is appropriate, rather than aiming primarily to punish the wrongdoer relative to her/his culpability.<sup>122</sup> With restorative justice, it is more complicated as the participants discuss and agree the outcomes rather than adhere to a standardised framework. However, this does not mean that upper and lower limits cannot be set to ensure that the wrongdoer is not over- or under-burdened – and, indeed, many restorative justice advocates do suggest such standards.<sup>123</sup>

However, restorative justice is not only challenged on the fairness of its outcomes but also on the fairness of the process. It is questioned whether it is truly ‘voluntary’, particularly if it is a diversionary scheme, as there may be a level of coercion in relation to wrongdoers’ choices as to admitting their guilt and choosing to participate in restorative justice.<sup>124</sup> Nevertheless, in general, wrongdoers tend to report that they experience high levels of procedural justice in restorative conferences,<sup>125</sup> and in the RISE experiments most

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<sup>119</sup> Ashworth, ‘Some Doubts about Restorative Justice’, pp 285-286.

<sup>120</sup> Lucia Zedner (1994) ‘Reparation and Retribution: Are they Reconcilable?’, *Modern Law Review*, 57: 228, pp 230-231.

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

<sup>122</sup> *Ibid.*, p 246; see also, Doak, *Victims’ Rights, Human Rights and Criminal Justice*, p 238.

<sup>123</sup> Duff, ‘Restoration and Retribution’, p 57; Michael Cavadino and James Dignan (1997) ‘Reparation, Retribution and Rights’, *International Review of Victimology*, 4: 233.

<sup>124</sup> Cunneen, *Debating Restorative Justice*, p 146.

<sup>125</sup> Kathleen Daly (2001) ‘Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects’, in Morris and Maxwell, *Restorative Justice for Juveniles*; Kathleen Daly (2003) ‘Mind the Gap: Restorative Justice in Theory and Practice’, in von Hirsch *et al.*, *Restorative Justice and Criminal Justice*, p 225.

wrongdoers thought that the conferences were fairer than the courts.<sup>126</sup> In Wilcox and Hoyle's national evaluation, they found that three quarters of wrongdoers thought that the process was fair and that their participation was voluntary.<sup>127</sup> And in Daly's SAJJ study, 81 per cent of wrongdoers said that the way in which the agreement was reached was fair.<sup>128</sup> In Shapland's study, 73 per cent of wrongdoers thought that having a restorative conference was a good way of dealing with the offence.<sup>129</sup> Overall, then, theorists and restorative justice practices illustrate ways in which restorative justice can be fair for wrongdoers in relation to the process and outcomes.

### 5.3.2(c) Reintegration and Reoffending

Restorative justice theorists argue that the more meaningful and constructive outcomes of restorative justice may be more successful in preventing reoffending than the criminal justice system. Braithwaite argues that it does so through 'reintegrative shaming' which stigmatises the wrongful act, conveying that the 'disapproved behaviour is transient, performed by an essentially good person', so that when the wrongdoer feels shame and undertakes actions to repair the harms they can be reintegrated into the community.<sup>130</sup> This contrasts to the criminal justice system which, in his view, stigmatises individual wrongdoers, creating a 'class of outcasts' and 'subcultures of criminality' which perpetuates crime.<sup>131</sup> Indeed, in the Canberra RISE experiments, the level of reintegrative shaming was considerably higher in conferences in comparison to court proceedings, and wrongdoers showed greater respect for law and officials when cases went to conference rather than court.<sup>132</sup>

However, not all restorative justice theorists and practitioners subscribe to Braithwaite's reintegrative shaming theory, but nevertheless consider that restorative justice prevents reoffending because of the way in which the wrongdoer has taken responsibility and is

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<sup>126</sup> Sherman *et al.*, *Experiments in Restorative Policing*.

<sup>127</sup> Wilcox and Hoyle, *The Youth Justice Board's Restorative Justice Projects*, p 8.

<sup>128</sup> Daly, 'Restorative Justice in Theory and Practice', p 226.

<sup>129</sup> Shapland *et al.*, *The Views of Victims and Offenders*, p 40.

<sup>130</sup> John Braithwaite (1989) *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press), p 55.

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

<sup>132</sup> Sherman *et al.*, *Experiments in Restorative Policing*, p 136.

remorseful for her/his wrongdoing.<sup>133</sup> Generally, the results from empirical studies on restorative justice and reoffending tend to be mixed for many forms of restorative justice (such as conferences, mediation and circles) and in the context of adult and youth crime. Therefore, the positive conclusions that are drawn are typically tentative, such as that restorative justice 'may work differently on different kinds of people'.<sup>134</sup> Moreover, Roche points out that results relating to reoffending should be treated with caution as often study samples are selected on the basis that officials believe it is an appropriate case and the wrongdoer is co-operative, and thus it may be these factors that affect the recidivism rate rather than restorative justice *per se*.<sup>135</sup> However, the Canberra RISE experiments, which offer a relatively reliable and internally valid methodological basis for comparing court and conferences because samples were randomly selected, offer some preliminary results which suggest that restorative conferences do have a greater impact on reoffending rates, but that this may be dependent on the type of offence committed.<sup>136</sup> Furthermore, drawing on this and other empirical research, Sherman and Strang suggest that restorative justice may be more effective in reducing recidivism than conventional criminal justice in cases of more serious crimes rather than less serious offences.<sup>137</sup> In addition, in their meta-analysis reviewing the research on restorative justice and recidivism, Bonta *et al.* highlight that there is, on average, small but significant reductions in recidivism, although it seems that restorative justice has no impact on wrongdoers who are at a high risk of reoffending, but it does have an impact on wrongdoers who are low risk.<sup>138</sup> While there is little strong evidence to suggest that restorative justice can considerably reduce recidivism, it does

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<sup>133</sup> Zehr, *Changing Lenses*, pp 41-42.

<sup>134</sup> Sherman and Strang, *Restorative Justice: The Evidence*, p 8 (emphasis removed); see also Wilcox and Hoyle, *The Youth Justice Board's Restorative Justice Projects*, p 8; Umbreit *et al.*, *Restorative Justice Dialogue*, pp 9-11.

<sup>135</sup> Declan Roche (2003) *Accountability in Restorative Justice* (Oxford: Oxford University Press), p 11.

<sup>136</sup> Lawrence W Sherman, Heather Strang and Daniel Woods (2000) *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (Australian National University); available online:

[http://www.aic.gov.au/criminal\\_justice\\_system/rjustice/rise/~media/aic/rjustice/rise/recidivism/report.pdf](http://www.aic.gov.au/criminal_justice_system/rjustice/rise/~media/aic/rjustice/rise/recidivism/report.pdf) (last accessed 17 October 2012).

<sup>137</sup> Sherman and Strang, *Restorative Justice: The Evidence*, p 8.

<sup>138</sup> James Bonta, Rebecca Jesseman, Tanya Ruggie and Robert Cormier (2008) 'Restorative Justice and Recidivism: Promises Made, Promises Kept?', in Sullivan and Tifft (eds) *Handbook of Restorative Justice*, p 117.

have other goals and it may be that its most significant advantages in comparison to the criminal justice system lay with what it can offer victims, as discussed above.

### 5.3.3 The Community

#### 5.3.3(a) *The Role and Concept of Community*

Christie famously argued that the state has stolen crimes and conflicts from victims, wrongdoers and communities, and that they should be returned to and addressed by these parties.<sup>139</sup> From this communitarian-based view, rather than the acclaimed oppressive, controlling, top-down state power, restorative justice offers community-based justice and freedom.<sup>140</sup> Restorative justice practices are developed by and within the community, the community provides support and protection for the victim and the wrongdoer, and the wrongdoer is reintegrated into the community, contributing to preventing reoffending. However, there have been many questions raised as to the concept and role of the community in restorative justice with more issues raised than satisfactory answers offered.<sup>141</sup> The intention is not to seek solutions here, but rather is to highlight approaches to the 'community' which influence practitioners' and scholars' views as to the relationship between restorative justice and the criminal justice system (or the state more generally). Such debates are important to outline as they are reflected in the literature on restorative justice and sexual violence, and the view accepted here influences the analysis of restorative justice in this context which is undertaken in the last section of this chapter.<sup>142</sup>

To begin with, there is little clarity as to whom or what constitutes the, or a, community. Sometimes community refers to a geographic community – the local community where the crime took place – or it may refer to a 'community of care' – which draws together and emphasises relationships among those close to the victim and/or wrongdoer – or it may

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<sup>139</sup> Nils Christie (1977) 'Conflicts as Property', *British Journal of Criminology*, 17: 1.

<sup>140</sup> Communitarianism is a distinct political position which emphasises the importance of community values and the relationship between the community and the self, but has a more specific focus in the context of restorative justice; see an explanation in Dignan, *Understanding Victims and Restorative Justice*, p 97; Nicola Lacey and Lucia Zedner (1995) 'Discourses of Community in Criminal Justice', *Journal of Law and Society*, 22: 301.

<sup>141</sup> Dignan, *ibid*, pp 98-99.

<sup>142</sup> See especially 5.4.3.

refer to an identity-based community, and sometimes the word can be used synonymously for civil society as a whole.<sup>143</sup> In addition, many are concerned that communities may be repressive, intolerant, and coercive,<sup>144</sup> and that problematic categories, values, norms and standards (such as those that are sexist and racist) may be protected and valorised within them.<sup>145</sup> In comparison, rather than promoting ‘bad values’, some have questioned, with the influence of post-modernism, whether there are any shared values or a shared identity amongst a definable category of persons to constitute a community that can be harmed by wrongdoing and can encourage future law abiding behaviour.<sup>146</sup>

In addition to conceptual uncertainty, the ‘community’ harbours a political uncertainty as it is an ideologically loaded concept – evoking ideas of harmony, shared values, solidarity, connection, mutuality – with rhetorical power that can be harnessed from almost any point on the political spectrum.<sup>147</sup> Consequently, as well as emphasising the collective and social dimensions to the causes of and solutions to criminal activity of the political left, from the political right locating restorative justice within the community can be a means by which to minimise criticisms of state failures in a covert privatization strategy that shifts responsibilities – including those which are administrative and fiscal – from the state to the community and individuals.<sup>148</sup> Given these issues, a narrow approach is taken here which sees the community as a ‘community of care’<sup>149</sup> consisting of those who protect and support the victim and the wrongdoer.<sup>150</sup> Without a communitarian inspired vision of restorative justice, the possibility is open for a more flexible relationship with the state and the integration of restorative justice with the criminal justice system.

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<sup>143</sup> Van Ness and Strong, *Restoring Justice*, p 44; Robert Weisberg (2003) ‘Restorative Justice and the Danger of “Community”’, *Utah Law Review*, 2003: 343, p 347.

<sup>144</sup> Dignan, *Understanding Victims and Restorative Justice*, p 102.

<sup>145</sup> Kimberly J Cook (2006) ‘Doing Difference and Accountability in Restorative Justice’, *Theoretical Criminology*, 10: 107, p 121.

<sup>146</sup> Weisberg, ‘The Danger of “Community”’, p 348; Barbara Hudson (1998) ‘Restorative Justice: The Challenge of Sexual and Racial Violence’, *Journal of Law and Society*, 25: 237, pp 251-252.

<sup>147</sup> Adam Crawford (1995) ‘Appeals to Community and Crime Prevention’, *Crime, Law and Social Change*, 22: 97, p 97; Lacey and Zedner, ‘Discourses of Community in Criminal Justice’, pp 301-302.

<sup>148</sup> As explained by Lacey and Zedner, *ibid*, p 305.

<sup>149</sup> Braithwaite, ‘Optimistic and Pessimistic Accounts’, p 17.

<sup>150</sup> For a discussion of this interpretation, see Dignan, *Understanding Victims and Restorative Justice*, p 100.

### 5.3.3(b) Restorative Justice in the Community or in the Criminal Justice System

As indicated above, for many scholars and practitioners restorative justice is an alternative paradigm to criminal justice,<sup>151</sup> and they lament that fact that it has 'generally suffered incorporation into existing criminal justice schemes'.<sup>152</sup> However, while Cunneen explains that the promise and possibility of restorative justice is undermined when it operates within a legal and administrative framework constructed by the state,<sup>153</sup> others see its integration or amalgamation with state apparatus as the means by which to transform criminal justice. For example, Hudson argues for criminal justice to become more 'restorative', developing a hybrid system which combines restorative justice and retributive justice principles and practices for more 'effective justice'.<sup>154</sup> However, she explains, the more restorative justice is integrated with the criminal justice system, the more questions are raised as to the need for standards (particularly in relation to principles of due process) in restorative justice to protect and balance the interests of victims and wrongdoers.<sup>155</sup> This issue has been debated among restorative justice and retributive justice theorists,<sup>156</sup> but here, as is indicated above in the discussion of the wrongdoer and restorative justice, standards such as upper and lower limits on outcomes so as to have a level of proportionality are necessary and not incompatible with restorative justice. Moreover, there should be a system to enforce such standards, for example, Roche argues for accountability mechanisms in restorative justice – checks on the use of power by decision-makers and officials in restorative processes, justifications for their decisions which may be subject to review – which would increase the quality and legitimacy of restorative justice

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<sup>151</sup> For example, Zehr, *Changing Lenses*.

<sup>152</sup> Cunneen, *Debating Restorative Justice*, p 103.

<sup>153</sup> Cunneen, *ibid*, p 138; see also Lode Walgrave (1995) 'Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?', *The Howard Journal of Criminal Justice*, 34: 228.

<sup>154</sup> Hudson, 'Restorative Justice and Gendered Violence', p 631; see also, Hoyle, *Debating Restorative Justice*, pp 40-71; Duff, 'Restoration and Retribution'.

<sup>155</sup> *Ibid*, p 629.

<sup>156</sup> See, for example, John Braithwaite (2002) 'Setting Standards for Restorative Justice', *British Journal of Criminology*, 42: 563; and Ashworth, 'Some Doubts about Restorative Justice'.

processes.<sup>157</sup> The point here is not to provide a comprehensive overview of the appropriate standards and safeguards, but it is to set out the approach taken to restorative justice in this thesis which sees the possibilities of integrating practices and principles with criminal justice, which has implications for analysing restorative justice in cases of sexual violence.

#### **5.3.4 Summary: Restorative Justice in Theory and in Practice**

Restorative justice provides a response to crime which theorists argue is more meaningful and effective for both victims and wrongdoers than criminal justice. For victims, it is argued that restorative justice better meets their needs and interests as they will be engaged in the overall process, as well as in decision-making, and outcomes are more likely to benefit them personally – indeed, there tends to be relatively high levels of victim satisfaction with restorative justice. In relation to wrongdoers, it is argued that they are better able to understand the repercussions of their behaviour through restorative justice, which empirical research supports, and the wrongdoer then agrees to and undertakes measures to take responsibility for her/his actions. The process and outcomes, theorists argue, are likely to benefit the wrongdoer who may be reintegrated into the community and may be less likely to reoffend in the future, which is suggested by empirical studies, although conclusions are necessarily tentative. Theorists and restorative justice practices illustrate ways in which to negate, to some extent, concerns regarding the need for a response to crime which recognises and censures the wrong done, not just repairs the material harms caused, and accounts for due process principles and wrongdoers' rights. To do so, it was argued that reparative and other outcomes of restorative justice should be understood as including a punitive element, and that there should be upper and lower limits on the burdensomeness of outcomes. Finally, in relation to the third main party involved in restorative justice, the community, there is considerable debate as to the meaning of this concept and its role in the process. Due to the issues raised, a narrow understanding was adopted, taking it to mean the victim and wrongdoer supporters. This approach provides the possibility for a close and flexible relationship between restorative justice and the criminal justice system. Indeed, it was suggested that such a relationship is beneficial to set

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<sup>157</sup> Roche, *Accountability in Restorative Justice*, pp 41-50; see also Richard Young (2001) 'Just Cops Doing "Shameful" Business? Police-led Restorative Justice and the Lessons of Research', in Morris and Maxwell (eds) *Restorative Justice for Juveniles*, p 211.



and enforce standards for restorative justice to ensure that the rights of victims and wrongdoers are respected.

Despite the drawbacks in theory and in practice, restorative justice nevertheless seems to be relatively successful in achieving its goals.<sup>158</sup> Consequently, and particularly in light of the continual failings of the criminal justice system, feminists have explored whether or to what extent restorative justice may offer an appropriate and effective response to sexual violence.

#### 5.4 APPLYING RESTORATIVE JUSTICE TO SEXUAL VIOLENCE

Adjin-Tettey explains broadly that '[t]he focus of restorative approaches on crime prevention and healing rather than on punishment creates greater potential to empower and improve conditions for victims, which is consistent with the underlying goal of feminism to empower and remedy victimization'.<sup>159</sup> However, in relation to sexual violence, many feminists are concerned that restorative justice fails to protect victim-survivors, risks causing further harm and re-victimisation, and minimises the harms of rape. Nevertheless, in light of the fact that the criminal justice system continues to fail to protect victim-survivors, in some cases causes further harm to victim-survivors, and does not provide legal recognition of rape in the majority of cases, Smith says that restorative justice is no less risky than the conventional system.<sup>160</sup>

While it would initially appear that there is a wealth of feminist literature on this topic, much of this is about domestic violence rather than sexual violence.<sup>161</sup> And sometimes

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<sup>158</sup> Sherman and Strang, *Restorative Justice: The Evidence*, p 8.

<sup>159</sup> Elizabeth Adjin-Tettey (2007) 'Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples', *Canadian Journal of Women and the Law*, 19: 179, p 192; with reference to Laureen Snider (1994) 'Feminism, Punishment and the Potential of Empowerment', *Canadian Journal of Law and Society*, 9: 75, p 77; and Martin, 'Retribution Revisited'.

<sup>160</sup> Smith, 'Beyond Restorative Justice', p 261.

<sup>161</sup> As pointed out by Curtis-Fawley and Daly, 'The Views of Victim Advocates', p 608; and see generally, Strang and Braithwaite (eds) *Restorative Justice and Family Violence*; and Ptacek (ed) *Restorative Justice and Violence Against Women*, in which many of the chapters focus on domestic violence in particular.

authors extrapolate conclusions regarding restorative justice and domestic violence to gendered violence or violence against women more broadly, which includes sexual violence and child abuse and so on.<sup>162</sup> However, while there are similarities and connections (such as gendered power imbalances) between these forms of violence,<sup>163</sup> there are differences which may contribute to determining the possibilities and limitations of restorative justice. Domestic violence includes a variety of control mechanisms and coercive behaviours, such as physical, psychological and emotional abuse, which are employed strategically, typically to enforce gendered ideologies in which women are subservient to men.<sup>164</sup> It is not usually an isolated incident, but a combination of coercive behaviours which are perpetrated over what can be a long period of time, and which are complicated by relational, family, and financial ties.<sup>165</sup> In addition, there may not be as great a risk of further abuse from the wrongdoer in cases of sexual violence in comparison to domestic violence.<sup>166</sup> While domestic violence can therefore include sexual violence, such as rape or sexual assault, it has particular features which distinguish it from sexual violence *per se*. Consequently, the possibilities and limitations of restorative justice should be discussed in relation to each form of violence. Here the focus is on sexual violence – rape in particular – and restorative justice, which will be analysed in relation to the three main parties, the victim, the wrongdoer, and the community, to refer back to the theories and empirical studies that were discussed above. It will be suggested that the flexibility of restorative justice – that is, where it is offered both outwith the criminal justice system and at various stages of the criminal justice system – is its strength to providing case- and victim-survivor-sensitive responses to rape.

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<sup>162</sup> For a recent example of this, see Theo Gavrielides and Vasso Artinopoulou (2012) 'Restorative Justice and Violence Against Women: Comparing Greece and the United Kingdom', *Asian Criminology*, published online, 26 January 2012, which claims the focus is on violence against women, however, all the UK-based restorative justice projects address domestic violence only.

<sup>163</sup> For a discussion, see Liz Kelly (1988) *Surviving Sexual Violence* (Cambridge: Polity Press).

<sup>164</sup> Stubbs, 'Domestic Violence and Women's Safety', p 43; Elizabeth A Stanko (2006) 'Theorizing about Violence: Observations from the Economic and Social Research Council's Violence Research Programme', *Violence Against Women*, 12: 543, p 551.

<sup>165</sup> Stubbs, *ibid*, pp 43-44.

<sup>166</sup> C Quince Hopkins and Mary Koss (2005) 'Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses', *Violence Against Women*, 11: 693, p 710.

### 5.4.1 Victim-survivors of Sexual Violence

Restorative justice may be more advantageous to victim-survivors of sexual violence than the criminal justice system in which their views, experiences, needs and interests are typically marginalised.<sup>167</sup> As Presser and Gaarder point out, restorative justice offers the possibility for victim-survivors to be more involved in their case, and their views are taken into account in a process of collaborative decision-making that determines how the wrongdoer is going to make amends for the wrong and to repair the harms caused, which may be an empowering experience.<sup>168</sup> While empowerment may be important for victims in general, it is particularly important in the context of sexual violence which is embedded within and perpetuates a culture of gendered power imbalances.

In addition, in restorative justice the victim-survivor is offered the opportunity to tell her story, for others to hear it, for it to be validated and for wrongdoers to hear that validation.<sup>169</sup> Victim-survivors of sexual violence said that this was of utmost importance to them in Herman's study as it emphasises the wrongdoer's responsibility.<sup>170</sup> It may also assist in the victim-survivor's healing process, and is another potential means of empowerment.<sup>171</sup> Indeed, feminists who engage with restorative justice commonly say that the opportunity to tell the story is the most important benefit for victim-survivors that it can offer.<sup>172</sup> There is the possibility that victim-survivors will be re-victimised, disempowered and silenced through the process, although feminists who advocate restorative justice in the context of sexual violence argue that these risks can be reduced by

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<sup>167</sup> See chapter 4, sections 4.3, 4.5.2, 4.5.3.

<sup>168</sup> Lois Presser and Emily Gaarder (2000) 'Can Restorative Justice Reduce Battering? Some Preliminary Considerations', *Social Justice*, 27: 175, p 183.

<sup>169</sup> Allison Morris and Loraine Gelsthorpe (2000) 'Re-visioning Men's Violence Against Female Partners', *The Howard Journal*, 39: 412.

<sup>170</sup> Herman, 'Justice from the Victim's Perspective', pp 585-586.

<sup>171</sup> Presser and Gaarder, 'Can Restorative Justice Reduce Battering?', p 185.

<sup>172</sup> For example, see Hudson, 'Restorative Justice and Gendered Violence', p 625; Vesna Nikoloc-Ristanovic (2005) 'Sexual Violence, International Law and Restorative Justice', in Doris Buss and Ambreena Manji (eds) *International Law: Modern Feminist Approaches* (Oxford and Portland, Oregon: Hart), p 288.

careful assessments of the victim-survivor, the wrongdoer and the particular context of the abuse.<sup>173</sup>

A further possibility for empowerment, Lamb explains is often cited, is that the victim-survivor has the capacity to choose whether or not to forgive the wrongdoer, and whichever choice is made may convey to the wrongdoer that they no longer hold power over the victim-survivor.<sup>174</sup> However, she asks, '[c]an a person in a subordinate position forgive someone in a dominant position without reinforcing that subordination?'<sup>175</sup> But to say that forgiveness is not possibly empowering is to deny what some victim-survivors may experience. It may be that as long as the restorative justice facilitator and supporters are sensitive to manipulation by the wrongdoer and are careful to ensure that the victim-survivor does not feel coerced into forgiving the wrongdoer, then providing the possibility for forgiveness might be important for some victim-survivors.

In addition, as discussed above, restorative justice may hold wrongdoers responsible in more meaningful ways, by a collaborative decision-making process and outcomes which may address the causes of wrongdoing and its harmful consequences.<sup>176</sup> For many victim-survivors, acknowledgement of the wrongdoer's responsibility is imperative, but imprisonment to hold wrongdoers to account is not always of upmost importance.<sup>177</sup> Indeed, some feminists have highlighted that addressing the material harms caused by rape is a priority for many victim-survivors.<sup>178</sup> And restorative justice may provide the possibility of meeting the emotional, physical, psychological and social needs of victim-survivors more so than criminal justice, because of a focus on repairing the harms through both the process and outcome.<sup>179</sup>

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<sup>173</sup> Quince Hopkins and Koss, 'Feminist Theory and a Restorative Justice Response to Sex Offenses', pp 710-711.

<sup>174</sup> Sharon Lamb (2002) 'Women, Abuse and Forgiveness: A Special Case', in Sharon Lamb and Jeffrie G Murphy (eds) *Before Forgiving: Cautioning Views of Forgiveness in Psychotherapy* (Oxford: Oxford University Press), p 165.

<sup>175</sup> *Ibid.*

<sup>176</sup> See above, section 5.3.2(a).

<sup>177</sup> Herman, 'Justice from the Victim's Perspective', p 590; and see chapter 3, section 3.4.1.

<sup>178</sup> Seidman and Vickers, 'An Agenda for Rape Law Reform'; and see chapter 3, section 3.4.2.

<sup>179</sup> Adjin-Tetty, 'Sentencing Aboriginal Offenders', p 192; Morris and Gelsthorpe, 'Re-visioning Men's Violence Against Female Partners'.

However, rather than repairing the harms, restorative justice may risk causing further harm and trauma in encouraging communication between the victim-survivor and wrongdoer, potentially in close proximity, and having the victim-survivor explain the experience of rape and its effects.<sup>180</sup> While there is conflicting evidence as to whether restorative justice can repair the harms in cases where the victim/victim-survivor has suffered a high level of harm,<sup>181</sup> it may be that it can contribute to the healing process through other benefits, such as the satisfaction of knowing that the wrongdoer has accepted and undertaken responsibility. However, what is important to acknowledge is that victim-survivors/victims who suffer greater levels of harm will need other forms of support and services alongside restorative justice. Consequently, Cossins argues that in strategic and practical terms it would be better for funding and resources to be channelled into counselling and other support services for victim-survivors of sexual violence rather than being directed to restorative justice programmes.<sup>182</sup> This point is strengthened when it is considered that restorative justice is likely to be a possible, safe and desirable option for only a small number of rape victim-survivors.<sup>183</sup>

Another practical concern that is raised is that restorative justice may be overly focused on wrongdoers' needs, interests and appropriate sanctions for their wrongdoing, failing to give due regard to victim-survivors.<sup>184</sup> Indeed, Cameron argues that this is true in relation to sentencing circles in Canada which are used in Aboriginal communities, including in cases of intimate violence.<sup>185</sup> Consequently, to ensure that victim-survivors are properly and adequately cared for, responding to rape should not be incorporated into existing practices, but specific programmes should be developed if it is to be used in such cases.

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<sup>180</sup> Julie Stubbs (2004) *Restorative Justice, Domestic Violence and Family Violence* (paper 9, Sydney: Australian Domestic and Family Violence Clearinghouse), p 15.

<sup>181</sup> See above, section 5.3.1(b).

<sup>182</sup> Annie Cossins (2008) 'Restorative Justice and Child Sex Offences: The Theory and Practice', *British Journal of Criminology*, 48: 359, p 373. See also Lee Lakeman (2005) *Obsession, with Intent: Violence Against Women* (Black Rose Books), p 115.

<sup>183</sup> This point is made elsewhere more generally by victim-rights advocates, see for example, Richards, 'Taking Victims Seriously?'

<sup>184</sup> Herman, 'Justice from the Victim's Perspective', p 578.

<sup>185</sup> Angela Cameron (2006) 'Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective', *Canadian Journal of Women and the Law*, 18: 479.

Moreover, to ensure that restorative justice is available if and when a victim-survivor believes that it should be considered as a possible response to the wrongdoing, it should be available in isolation from the criminal justice system, and at all stages of the criminal justice process. This would render it more victim-survivor-centred and provide the possibility – at least in the longer term – that a greater number of victim-survivors would benefit. Overall, then, while there are disadvantages and risks in restorative justice for victim-survivors, it may be that these can be reduced and addressed in carefully designed schemes.

#### 5.4.2 Wrongdoers

McAlinden has taken theories regarding restorative justice and wrongdoer responsibility, reintegrative shaming and reoffending and applied them to sexual offenders.<sup>186</sup> Through a process of accepting responsibility, agreeing to and undertaking actions to make amends and repair the harms, she argues that restorative justice is effective in censuring those who commit sexual offences, and also rehabilitates and reintegrates them into society which reduces their chances of reoffending.<sup>187</sup> It also, she says, contributes to forming stronger communities which are more resistant to crime and that denounce sexual wrongdoing,<sup>188</sup> in contrast to the prison system which is said to create a culture of masculinity that reinforces misogynist views.<sup>189</sup> For these reasons, Braithwaite and Daly argue that family group conferencing (when based on reintegrative shaming theory) can be beneficial for both victim-survivors and wrongdoers in cases of violence against women.<sup>190</sup> In general, studies indicate that restorative justice may reduce recidivism to a greater extent than criminal justice, and potentially more so in relation to serious crimes;<sup>191</sup> however the

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<sup>186</sup> McAlinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration*.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid*; see also Hudson, 'Restorative Justice and Gendered Violence'.

<sup>189</sup> Joe Sim (2006) 'Tougher than the Rest? Men in Prison', in Yvonne Jewkes and Helen Johnston (eds) *Prison Readings – A Critical Introduction to Prisons and Imprisonment* (Devon: Willan).

<sup>190</sup> John Braithwaite and Kathleen Daly (1994) 'Masculinities, Violence and Communitarian Control', in Elizabeth A Stanko and Tim Newburn (eds) *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge), p 193.

<sup>191</sup> Sherman and Strang, *Restorative Justice: The Evidence*, p 8.

evidence is relatively weak and conclusions tentative,<sup>192</sup> and not necessarily directly applicable to sexual violence.<sup>193</sup>

Another benefit of restorative justice is that where it is used as a diversion it may ensure a response to cases where there may not have otherwise been a prosecution or conviction. In cases which are addressed by restorative justice, the wrongdoer will have acknowledged that he did the wrongful act, which provides a minimum level of responsibility and validation for the victim-survivor.<sup>194</sup> However, the wrongdoer may perceive restorative justice as a means by which to avoid more punitive sanctions, and may even victimise the victim-survivor through the process and gain satisfaction from hearing the harm that he caused her. Moreover, some feminists argue that restorative justice (or other diversionary programmes) may also be perceived by society as a 'soft' option that does not hold the wrongdoer adequately responsible and could trivialise the wrong and harms of sexual violence.<sup>195</sup> In addition, as not all cases of rape would be responded to by restorative justice – for example, either or both the wrongdoer and victim-survivor may decide not to

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<sup>192</sup> See above, section 5.3.2(c).

<sup>193</sup> For results of Daly's SAJJ study in the context of youth sex offences and reoffending rates, see chapter 6, section 6.3.2, which indicates that restorative justice may reduce recidivism in this context.

<sup>194</sup> Morris and Gelsthorpe, 'Re-visioning Men's Violence Against Female Partners', p 419.

<sup>195</sup> Liz Kelly and Jill Radford (1996) "'Nothing Really Happened": The Invalidation of Women's Experiences of Sexual Violence', in Marianne Hester, Liz Kelly and Jill Radford (eds) *Women, Violence and Male Power* (Buckingham: Open University Press), p 31. Indeed, the responses to Ken Clarke's (then Justice Secretary) proposals to increase the sentence reduction from 30 per cent to 50 per cent where the offender pleads guilty to rape illustrate the idea that anything less than a lengthy prison sentence fails to acknowledge the severity of rape and fails to provide justice (see Press Association (2011) 'Rape Victim Brands Kenneth Clarke's Rape Law Reforms "a Disaster"', *The Guardian (online)* (18 May 2011); available online:

[http://www.guardian.co.uk/society/2011/may/18/kenneth-clarke-legal-reforms-rape-](http://www.guardian.co.uk/society/2011/may/18/kenneth-clarke-legal-reforms-rape-victim?INTCMP=SRCH)

[victim?INTCMP=SRCH](http://www.guardian.co.uk/society/2011/may/18/kenneth-clarke-legal-reforms-rape-victim?INTCMP=SRCH)) (last accessed 17 October 2012). However, as McGlynn points out, the furore was primarily provoked by Clarke's comment that some rapes are more harmful than others which prevented a debate as to the merits and demerits of encouraging guilty pleas to rape through sentence reductions; Clare McGlynn (2011) 'Ken Clarke was Right to Start a Debate about Sentencing in Rape Cases', *The Guardian (Online)* (19 May 2011); available online:

<http://www.guardian.co.uk/law/2011/may/19/ken-clarke-debate-sentencing-rape> (last accessed 17 October 2012).

participate – then it could create a hierarchy of seriousness of sexual violence, with the most harmful wrongs resulting in the traditional prison sentence, which is disproportionately those which reflect elements of the paradigmatic stranger rape,<sup>196</sup> and supposedly ‘less serious’ cases responded to by restorative justice. However, as Hudson points out, this perception may be strongest if restorative justice is used only or primarily as a diversion from formal criminal justice, but, she says, if it can provide ‘more effective’ justice, then restorative justice principles and practices should be integrated throughout the criminal justice system.<sup>197</sup> Indeed, as was discussed above, theorists have argued that restorative justice can censure wrongdoing through the recognition that the wrongdoer did the wrongful act, and reparations can be punitive, condemning the wrong done (the ‘core harm’) and responding to the harmful consequences.<sup>198</sup>

#### **5.4.3 The Community, the State and the Criminal Justice System**

Morris and Gelsthorpe suggest that through restorative justice sexist values and assumptions that are prevalent in society may be challenged, and the community may be educated as to the nature and harms of sexual violence by hearing the victim survivor’s experience, the denunciation of the wrongdoer’s conduct as wrong and the alleviation of blame from the victim-survivor.<sup>199</sup> However, if ‘community standards are the standards of patriarchy’, it is possible that gender and sexual stereotypes will be endorsed, rape myths will be relied upon and the victim-survivor will be blamed for the violence.<sup>200</sup> Indeed, in Rubin’s interviews with sexual violence victim-survivors as to the prospect of participating in restorative justice, some were concerned that those with the most power in the community were the ones who would be heard and listened to, and that they would be silenced.<sup>201</sup> Further, if the community does not condemn the wrongdoer’s actions restorative justice would be ineffective in shaming and deterring wrongdoers, or

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<sup>196</sup> See chapter 4, section 4.3.

<sup>197</sup> Hudson, ‘Restorative Justice and Gendered Violence’, p 631.

<sup>198</sup> See above, sections 5.3.2(a) and (b).

<sup>199</sup> Morris and Gelsthorpe, ‘Re-visioning Men’s Violence Against Female Partners’, p 418.

<sup>200</sup> Herman, ‘Justice from the Victim’s Perspective’, p 598. See also Stephen Hooper and Ruth Busch (1996) ‘Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea’, *Waikato Law Review*, 4: 10, p 118; Rubin, *Restorative Justice in Nova Scotia*, pp 73-77.

<sup>201</sup> Rubin, *ibid*, p 74.



reintegrating them in to the community,<sup>202</sup> potentially reinforcing gender inequalities and normalising sexual violence. Alternatively, if the community involved in restorative justice is constituted by representatives of women's groups and feminist organisations and so on, such a community could contribute to reducing the risks of restorative justice for victim-survivors, and provide them with a support network.<sup>203</sup> Consequently, if restorative justice is to address sexual violence then such practices must involve victim-survivor support organisations.

Taking a different approach, some feminists argue that women-centred communities should not only be involved in such a process, but that these communities should provide restorative justice as an alternative to state responses which have, thus far, 'co-opted' and undermined the violence against women movement.<sup>204</sup> In contrast, some are concerned that locating restorative justice entirely within the community may 'privatise' public, social and gendered wrongs by removing them from the traditional criminal arena, divesting the state of responsibility for addressing sexual violence and burdening typically under-resourced women's groups.<sup>205</sup>

Rather than seeing restorative justice as a means by which to eschew state power which may be seen to reflect and reinforce gendered power relations, in particular through responses to sexual violence which re-victimise victim-survivors and all too often exonerate the wrongdoers,<sup>206</sup> many feminists who see the possibilities of restorative justice to address sexual violence argue that it must be accompanied by standards to protect victim-survivors. For example, standardised screening procedures could be in place so that cases

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<sup>202</sup> Hooper and Busch, 'Domestic Violence and the Restorative Justice Initiatives', p 118.

<sup>203</sup> Presser and Gaarder, 'Can Restorative Justice Reduce Battering?'

<sup>204</sup> This is a theme of and debate throughout Ptacek's edited collection *Restorative Justice and Violence Against Women* – see, in particular, Ptacek, 'Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work'; Kim, 'Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges'; Smith, 'Beyond Restorative Justice: Radical Organizing Against Violence'.

<sup>205</sup> *Ibid.*

<sup>206</sup> Shirley Jülich (2010) 'Restorative Justice and Gendered Violence in New Zealand: A Glimmer of Hope', in Ptacek (ed) *Restorative Justice and Violence Against Women*, pp 239-241; and more generally see Barbara Hudson (2006) 'Beyond White Man's Justice: Race, Gender and Justice in Late Modernity', *Theoretical Criminology*, 10: 29.

in which 'offenders [are] deficient in particular social, cognitive and psychological characteristics', such as 'manipulativeness and an incapacity for empathy' will not proceed to a restorative meeting, and there could be safeguards to ensure that victim-survivors are not coerced into participating.<sup>207</sup> Further, it is possible that even when a restorative justice process has been initiated that the case will not proceed to completion, for example, because the wrongdoer is not adequately accepting responsibility or the wrongdoer does not complete the agreed sanctions. To ensure the safety of victim-survivors and that wrongdoers are held responsible for their actions if restorative justice is not possible or is unsuccessful, measures and sanctions to address the wrongdoing in such cases, which are likely to be state enforced sanctions, are necessary.<sup>208</sup> In addition, the view is taken here that this is right to ensure that the state takes responsibility for addressing sexual violence.

Taking a different approach, Miller argues that restorative justice should be used and developed in response to violent offences, including sexual violence, post-conviction only, before community-based or diversionary restorative justice responses are explored further and developed.<sup>209</sup> This would, she says, provide a safe way to test restorative justice in contexts of sexual violence without undermining the severity of the wrongdoing as the wrongdoer will have been convicted and imprisoned. However, McGlynn argues that this strategy may represent retributive punishment as 'justice', indicating that restorative justice is purely therapeutic,<sup>210</sup> when healing and justice may be intertwined.<sup>211</sup> Furthermore, she says, as there is a low conviction rate for rape the number of victim-survivors who could potentially participate would be limited, and victim-survivors who may be interested in restorative justice would be precluded from exploring this possibility.<sup>212</sup> Therefore, to ensure that – if it is to be introduced or tested – restorative justice is safe for victim-survivors and wrongdoers are held to account it should be integrated with the criminal justice system at all stages (although this does not exclude the possibility of

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<sup>207</sup> Presser and Gaarder, 'Can Restorative Justice Reduce Battering?', p 187.

<sup>208</sup> Kay Pranis (2002) 'Restorative Values and Confronting Family Violence', in Strang and Braithwaite (eds) *Restorative Justice and Family Violence*, pp 32-32; Braithwaite and Daly, 'Masculinities, Violence and Communitarian Control'.

<sup>209</sup> Miller, *After the Crime*.

<sup>210</sup> Indeed, Miller describes the programme as 'therapeutic', emphasising that it does not affect the outcome of a criminal case; *ibid*, p 6.

<sup>211</sup> McGlynn, 'Feminism, Rape and the Search for Justice', p 835. And see above, section 5.3.1(b).

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

community-based programmes). And, as suggested above, this would ensure that restorative justice is victim-survivor-centred in the context of rape and is possible if and when the victim-survivor is ready.<sup>213</sup>

#### **5.4.4 Summary: Restorative Justice and Sexual Violence**

While many feminists are critical of the use of restorative justice in cases of sexual violence (and rape specifically), being concerned with the risks of further harm to the victim-survivor or that it will trivialise sexual violence, others highlight the possible advantages of it over the criminal justice system. For victim-survivors, restorative justice can offer the possibility of telling their stories, may contribute to repairing the harms they have suffered and may empower them through their active and influential role. In relation to wrongdoers, it may be that restorative justice is more effective than the criminal justice system in ensuring that the wrongdoer understands the impact of his actions, takes responsibility for them and will not reoffend. However, there would need to be careful screening and assessment processes in place to ensure that it is appropriate for the wrongdoer to engage in a dialogue with the victim-survivor. Further, as was also argued in the previous section, restorative justice can censure wrongdoing and provide some form of punishment, in addition to repairing the harms, and, particularly if it is not used only as a diversionary practice, does not necessarily trivialise the wrong and harms of sexual violence. To ensure the safety of victim-survivors, and that wrongdoers are held accountable for their behaviour, if restorative justice is tested in practice then it should be integrated with the criminal justice system at all stages, rather than operate only as a community-based practice. Moreover, it may provide a means by which to reconsider what is meant by 'justice' in the context of rape,<sup>214</sup> and question the centrality of carceral punishment through the criminal justice system which is not what victim-survivors unanimously see as a just response.<sup>215</sup>

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<sup>213</sup> See above, section 5.4.1.

<sup>214</sup> McGlynn, 'Feminism, Rape and the Search for Justice', p 835.

<sup>215</sup> See chapter 3.

## 5.5 CONCLUSION

Restorative justice is a response to wrongdoing which can be used as an alternative to or be integrated with the formal criminal justice system. It differs from the criminal justice system in process, primary aim and outcomes. In general, restorative justice may encourage wrongdoers to more fully accept responsibility for their actions and the harmful consequences, and there is the possibility – although the empirical research is relatively weak – that it may reduce recidivism to a greater extent than the criminal justice system. In addition, it may better accommodate victims' needs and interests than the criminal justice system as they are often included to a greater extent in the process, involved in decision-making, and the material harms that they have suffered have a direct bearing on the outcomes. While the extent to which this is the case is dependent on the form of restorative justice practice and the priorities of the particular scheme, it has been concluded that empirical research shows that restorative justice is relatively effective in repairing the harms caused to crime victims.<sup>216</sup> It is important, however, to note that there are many different conceptions of restorative justice, and the approach taken here envisages it as possible to combine the principles and practices of restorative justice and criminal justice. To do so, it was argued, is to provide a response which can address the wrongfulness of the wrongdoer's conduct and her/his culpability, as well as repair, to some extent, the consequential and material harms caused by the wrongdoing, while respecting the rights of the wrongdoer.

Due to the possible benefits of restorative justice for victims in general, and particularly in light of the failings of the criminal justice system, feminists have considered restorative justice as a means by which to respond to sexual violence. Significantly, it can offer victim-survivors a space in which to tell their story, conveying the harms of abuse to the wrongdoer, it can empower victim-survivors through their participation in the process and can hold wrongdoers to account in ways that the criminal justice system does not. However, there are also considerable limitations, and restorative justice may put victim-survivors at risk of further harm and re-victimisation. What was argued above was that there may be ways in which to maximise the benefits of restorative justice in cases of rape while reducing the risks by developing particular programmes and standards in accordance with feminist and women's organisations. In addition, to ensure that restorative justice is

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<sup>216</sup> Sherman *et al.*, *Restorative Justice*, p 17.

victim-survivor-centred in this context, and to allow for the possibilities of conceptions of justice that challenge the centrality of traditional forms of punishment, if restorative justice is offered in this context it should be available outwith the criminal justice system and integrated with it at every stage. However, restorative justice should not be explored only in relation to whether it provides justice as understood through restorative justice and can address feminists' concerns, but rather whether, or to what extent, it can provide justice as understood by some victim-survivors, which was discussed in chapter 3. This is the focus of the following chapter.

### RESTORATIVE JUSTICE AND RAPE: JUSTICE FOR VICTIM-SURVIVORS?

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#### 6.1 INTRODUCTION

In light of the failures of the criminal justice system to adequately respond to sexual violence, some feminists have explored applying restorative justice in this context. Taking account of feminists' analyses of the benefits and limitations of restorative justice that were discussed in the previous chapter, this chapter will evaluate the extent to which it can meet the five aspects that constitute justice as seen by some victim-survivors.<sup>1</sup> This exploration will, primarily, be located within England and Wales, discussing current restorative justice schemes and contemporary criminal justice policy which may shape the possibilities and limitations of implementing restorative justice practices. Therefore, this chapter starts with a brief overview of the development of restorative justice in England and Wales and responses to suggestions of using this response in cases of sexual violence, and rape in particular. Following the dominant trend, the Coalition Government has been discussing increasing the use of restorative justice primarily in relation to youth crime, excluding and/or ignoring its potential application to sexual violence. And yet, some restorative justice measures that apply in the youth justice context are responding to sexual offences, but there is little acknowledgement or evaluation of such cases.<sup>2</sup> In addition, there are a few isolated examples where restorative justice has been applied to rape in the adult context in the UK, and there are a few international projects complete with an evaluation.<sup>3</sup> An overview of these projects will form the second part of this chapter, and the literature will inform the subsequent analysis as to restorative justice and justice for victim-survivors.

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<sup>1</sup> See chapter 3.

<sup>2</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice', pp 219-220.

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

Nevertheless, overall, there is a 'dearth of evidence' to assess critics' and advocates' claims as to the merits and demerits of restorative justice and sexual violence.<sup>4</sup> As such, the third and fourth sections of this chapter will centre on an empirical research study of a restorative justice conference that was used to address a case of historic child rape and other forms of sexual abuse in the North of England. While this is only one case, with one victim-survivor's story, it nevertheless adds an important perspective to the existing literature. Drawing on this case study, restorative justice will be evaluated as to the extent to which it can provide what many rape victim-survivors see as important for justice, that is: recognition of a wrongful and harmful violation of the victim-survivor's sexual autonomy, respect for the diversity of experiences and harms of rape, to allow the victim-survivor to tell her story and be heard in a meaningful way, to hold the wrongdoer responsible for the harms of rape and to provide symbolic and material reparation for the harms of rape. It will be concluded that restorative justice may meet each of these aspects of justice to a greater extent than the criminal justice system. However, considering that the criminal law is likely to remain the dominant response to rape, it will be reflected on in light of the restorative justice analysis. It will be argued that reorientating the focus of criminal justice in rape cases to reparative outcomes may be a means by which to increase the possibilities of providing justice for victim-survivors.

## **6.2 THE HISTORICAL AND POLICY CONTEXT TO RESTORATIVE JUSTICE AND SEXUAL VIOLENCE IN ENGLAND AND WALES**

### **6.2.1 Background**

In line with countries such as New Zealand and the US, contemporary restorative justice practices began to emerge in England and Wales in the 1980s in the forms of victim offender mediation<sup>5</sup> and family group conferences.<sup>6</sup> And in the mid-1990s police-led conferencing was taken up by Thames Valley Police.<sup>7</sup> Other informal justice practices were

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<sup>4</sup> Curtis-Fawley and Daly, 'The Views of Victim Advocates', p 609.

<sup>5</sup> Tony F Marshall (1996) 'The Evolution of Restorative Justice in Britain', *European Journal on Criminal Policy and Research*, 4: 21, p 23.

<sup>6</sup> Jim Dignan and Peter Marsh (2001) 'Restorative Justice and Family Group Conferences in England', in Morris and Maxwell (eds) *Restorative Justice for Juveniles*, p 86.

<sup>7</sup> For an evaluation, see Hoyle *et al.* *Proceed with Caution*.

also on the rise, such as civil mediation, which many feminists argued should not be used in cases where there is domestic violence as it may reinforce inequalities between the parties and may 'privatise' or 'decriminalise' violence.<sup>8</sup> These critiques were extended to restorative justice and domestic violence, and then further to restorative justice and sexual violence.<sup>9</sup> Largely due to these concerns, domestic violence and sexual violence (alongside other serious offences) have commonly been excluded from restorative justice programmes.<sup>10</sup>

Nevertheless, in 2003 in *Restorative Justice: The Government's Strategy*, which contained a plan to integrate restorative justice with the criminal justice system at various stages, the question was asked: 'What would be the benefits and disadvantages of developing more specific principles in particular areas – for example for sensitive offences such as hate crimes, sex crimes and domestic violence?'.<sup>11</sup> In the Labour Government's overview of the responses, it was summarised that 'domestic violence specialists were strongly against their use in any such cases, while proponents of restorative justice thought they could be beneficial in some cases, with adequate safeguards'.<sup>12</sup> However, there was no discussion of restorative justice and sexual violence, such as rape and sexual assault in particular, but it was assumed that it would also be inappropriate in this context.<sup>13</sup> Overall, the Government concluded that more research needed to be done in this area.<sup>14</sup>

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<sup>8</sup> Barbara Hart (1990) 'Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation', *Mediation Quarterly*, 7: 317; Hilary Astor (1994) 'Swimming Against the Tide: Keeping Violent Men Out of Mediation', in Julie Stubbs (ed) *Male Violence and the Law* (Sydney: Institute of Criminology, Sydney University Law School).

<sup>9</sup> A point made by Curtis-Fawley and Daly, 'The Views of Victim Advocates', pp 607-608. It should be noted that in restorative justice there is a defined wrongdoer and victim (or victim-survivor), in comparison to mediation where parties are intended to negotiate on apparently equal terms, although this difference does not alleviate all of feminists' concerns with restorative justice.

<sup>10</sup> Curtis-Fawley and Daly, *ibid*, p 609.

<sup>11</sup> Home Office (2003) *Restorative Justice: The Government's Strategy* (London: Home Office), question 19, p 35.

<sup>12</sup> Home Office (2004) *Restorative Justice: The Government's Strategy – Responses to the Consultation Document* (London: Home Office), p 13.

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

<sup>14</sup> *Ibid*, p 14.



However, no government supported research was done, and the possibilities of exploring restorative justice and sexual violence in the adult context have been limited as restorative justice has been more consistently and systematically applied in relation to youth crime in England and Wales. Despite the Government's strategy to increase restorative justice in relation to adult offenders, the plans never got far beyond legislating for restorative or reparative conditions to be attached to cautions.<sup>15</sup> Looking back from 2010, Hoyle says that, for the most part, the strategy was 'all talk and little or no action', and preliminary studies show that conditional cautions are adopted by very few police forces, with very few involving victims.<sup>16</sup> Consequently, in this context restorative justice remains marginalised, with unstable support and funding.<sup>17</sup>

In comparison, the use of restorative justice (or restorative justice-like practices)<sup>18</sup> has increased significantly in the youth crime context since the end of the 20<sup>th</sup> century. However, while young offenders do commit sexual offences, there has been little acknowledgement or concern regarding the possibility that such crimes will be within the scope of restorative justice practices. In 1997 the Labour Government chose an approach to youth justice which 'combines the principles of restorative justice with more traditional punitive measures',<sup>19</sup> aiming primarily to 'prevent offending by children and young persons'.<sup>20</sup> With this in mind, a new framework for dealing with youth offending was created, which saw the implementation of a national network of Youth Offending Teams and a Youth Justice Board. The Crime and Disorder Act 1998 introduced reparation orders which require the young offender to make reparations to the individual victim and/or the community.<sup>21</sup> The Youth Justice and Criminal Evidence Act 1999 brought in the referral

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<sup>15</sup> Criminal Justice Act 2003, sections 22-27.

<sup>16</sup> Hoyle, *Debating Restorative Justice*, pp 26-27.

<sup>17</sup> See an overview of UK projects in Liebmann, *Restorative Justice*, p 198.

<sup>18</sup> It is acknowledge that not all – if any – of the responses to youth crime may constitute restorative justice, depending on the definition; however, it is significant that they have been influenced by restorative justice theories and practices and therefore they are discussed here.

<sup>19</sup> Home Office (1997) *No More Excuses* (London: Home Office), para 9.59.

<sup>20</sup> Crime and Disorder Act 1998, section 37(1).

<sup>21</sup> section 67; repealed by Powers of Criminal Courts (Sentencing) Act 2000 and replaced by section 73 of this Act. In addition, action plan orders, reprimands and final warnings were introduced; sections 69, 65 and 66. Further significant changes to youth justice were made in the Criminal Justice and Immigration Act 1998: action plans were repealed, alongside curfew orders, exclusion orders,

order, where a juvenile offender must be referred to a Youth Offender Panel if it is a first offence (except where the sentence is fixed by law), and they plead guilty.<sup>22</sup> Consequently, it is possible that sexual offences, when committed by a juvenile, may trigger a restorative justice (or restorative justice-like) response.<sup>23</sup> There is, however, very little recognition of this issue, or that youth sex crime may be a category that should be analysed and evaluated in isolation.<sup>24</sup> This is particularly concerning considering that Dignan argues that neither reparation orders nor referral orders are truly restorative, as they are primarily offender-focused, typically involve low-levels of victim participation, and direct reparation to the individual victim is made in only a small percentage of cases.<sup>25</sup> Apart from the referral order, restorative justice in the youth context – similarly to the adult context – continues to rely on the particular priorities of and relationships with local criminal justice agencies, in the absence of specific and mandatory statutory regulations.<sup>26</sup> Many restorative justice schemes, such as the three which were funded by the Home Office under its Crime Reduction Programme, are designed to work in conjunction with the criminal justice system at different stages, although most commonly they are diversionary in nature or are used in addition to sentencing.<sup>27</sup> They are therefore reliant on referrals from the local

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attendance centre orders and supervision orders (section 6(1)), and the youth rehabilitation order was introduced (section 1), and the adult conditional caution was extended to young offenders (section 48 and Schedule 9).

<sup>22</sup> See Part I; though now referral orders are legislated for in the Powers of Criminal Courts (Sentencing) Act 2000, Part III.

<sup>23</sup> Julie Henniker and Vince Mercer (2007) 'Restorative Justice: Can it Work with Young People who Sexually Abuse?', in Martin C Calder (ed) *Working with Young People who Sexually Abuse: Taking the Field Forward* (Lyme Regis: Russell House Publishing), p 230; Liebmann, *Restorative Justice*, p 297.

<sup>24</sup> As pointed out by McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice', pp 219-220.

<sup>25</sup> James Dignan (2007) 'Juvenile Justice, Criminal Courts and Restorative Justice', in Gerry Johnstone and Daniel Van Ness (eds) *Handbook of Restorative Justice* (Cullompton: Willan); Tim Newburn, Adam Crawford, Rod Earle, Shelagh Goldie, Chris Hale, Angela Hallam, Guy Masters, Ann Netten, Robin Saunders, Karen Sharpe and Steve Uglow (2002) *The Introduction of Referral Orders into the Youth Justice System: Final Report* (Home Office Research Study 242, London: Home Office), ch 8.

<sup>26</sup> Dignan, *ibid*, p 271.

<sup>27</sup> See the overview of these three schemes in Joanna Shapland, Anne Atkinson, Emily Colledge, James Dignan, Marie Howes, Jennifer Johnstone, Rachel Pennant, Gwen Robinson and Angela Sorsby

police, courts or probation service, and due to competing demands on agencies and services, restorative justice schemes typically suffer from a low level of referrals.<sup>28</sup> As such, restorative justice schemes continue to be 'informal, small scale, ad hoc and locally based'.<sup>29</sup> Nevertheless, while there are, therefore, few cases of sexual violence which are being addressed by restorative justice, as it is typically considered to be risky and potentially harmful for victim-survivors, then it is concerning that its use in relation to sexual offences committed by youths is not being paid more attention.

There has also been a lack of attention paid to youth sex offences and restorative justice in Northern Ireland where restorative justice is more extensively applied to youth crime.<sup>30</sup> Following the recommendations of the Criminal Justice Review Group in 2000,<sup>31</sup> restorative justice was institutionalised for youth justice by the Justice (Northern Ireland) Act 2002. Cases are referred to the Youth Conferencing Service either by the Public Prosecution Service or by the court,<sup>32</sup> and a conference is arranged at which the victim or victim representatives, the victim's supporters, the offender and the offender's supporters may be present.<sup>33</sup> The court 'must' order a youth conference if the young person has been found guilty of an offence, except in cases where the offence (in the case of an adult) carries a fixed sentence of life imprisonment, is triable by indictment only or is a scheduled terrorism offence.<sup>34</sup> A recent review has commended youth conferencing, stating that it 'has proved highly successful and is an achievement of which Northern Ireland can be

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(2004) *Implementing Restorative Justice Schemes (Crime Reduction Programme): A Report on the First Year* (London: Home Office).

<sup>28</sup> *Ibid*, p vii-viii.

<sup>29</sup> Dignan, 'Juvenile Justice, Criminal Courts and Restorative Justice', p 281.

<sup>30</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice', p 219.

<sup>31</sup> Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland*.

<sup>32</sup> Justice (Northern Ireland) Act 2002, section 58, inserting sections 10A-D into the Criminal Justice (Children) (Northern Ireland) Order 1998; and Justice (Northern Ireland) Act 2002, section 59, inserting sections 33A-D into the Criminal Justice (Children) (Northern Ireland) Order 1998.

<sup>33</sup> See Justice (Northern Ireland) Act 2002, section 57.

<sup>34</sup> Justice (Northern Ireland) Act 2002, section 59, inserting 33A(2) into the Criminal Justice (Children) (Northern Ireland) Order 1998. However, if the offence in question is one of the latter two, then the court 'may', 'where it considers it appropriate to do so', refer the case to a youth conference coordinator; Justice (Northern Ireland) Act 2002, section 59, inserting section 33A(3) into the Criminal Justice (Children) (Northern Ireland) Order 1998.

rightly proud'.<sup>35</sup> But, again, there is no published data of the numbers of conferences that have addressed sexual offences,<sup>36</sup> and neither are there evaluations of conferences addressing this type of crime.<sup>37</sup> First, this knowledge could inform future practice as to the use of restorative justice in cases of sexual violence,<sup>38</sup> and secondly, it is concerning as such cases could be harmful for victim-survivors and offenders.

### 6.2.2 Current Policy Context (England and Wales)

While restorative justice, once again, features in current criminal justice policy, there has been little discussion as to restorative justice and sexual offences committed by adults. The Coalition Government considered increasing the use of restorative justice in *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*. However, although the Government has said that it will encourage the use of restorative justice at all stages of the criminal justice system, its support primarily lies with 'low-level offences' and youth crime.<sup>39</sup> Consequently, Victim Support see the Green Paper as a 'missed opportunity', pointing out that 'research evidence demonstrates that RJ can actually prove more effective when applied to more serious crimes', and may be something victims of such crimes desire.<sup>40</sup> In addition, Casey – then Commissioner for Victims and Witnesses – argues

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<sup>35</sup> Youth Justice Review Team (2011) *A Review of the Youth Justice System in Northern Ireland* (Department of Justice Northern Ireland), p 60; available online:

<http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/youth-justice-review.htm> (last accessed 17 October 2012).

<sup>36</sup> For an example, between April 2009 and April 2011, there were 13 cases referred to the Youth Conferencing Service in Greater Belfast which addressed sexually harmful behaviour, including a case of unlawful carnal knowledge of a girl under 17 years of age. This data was provided via email by a contact at the Youth Justice Board in Northern Ireland between 23 May 2011 and 10 August 2011.

<sup>37</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice', p 219.

<sup>38</sup> *Ibid.*

<sup>39</sup> Ministry of Justice (2011) *Breaking the Cycle – Government Response* (London: The Stationary Office), paras 29-30.

<sup>40</sup> Victim Support (2011) *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders – A Response by Victim Support* (March 2011), p 9.

that the proposals are overly offender-focused.<sup>41</sup> However, in *Getting it Right for Victims and Witnesses* it states that the Government is committed to ensuring that restorative justice is 'at all times ... led by the interests of victims, not offenders'.<sup>42</sup> Nevertheless, the proposals lack bite. While the Government wish to see a 'step change in restorative justice'<sup>43</sup> it is, ultimately, down to local police crime commissioners to implement, and while those who have responded to the consultation document have typically been supportive of increasing restorative justice they have been highly critical of the localisation of funding decisions for victim support services.<sup>44</sup> It is likely, they argue, to render victim services vulnerable, fragmented, under-resourced and inconsistent.<sup>45</sup> Moreover, the Government's proposed change to the Victim's Code to 'give victims an entitlement to request restorative justice in their case and to receive this where it is available and resources allow'<sup>46</sup> provides no right for victims to access restorative justice, which, the Restorative Justice Council points out, 'places no onus on local commissioners to make any restorative justice service available to victims'.<sup>47</sup> As such, the Government has demonstrated no real commitment to providing restorative justice in the interest of victims.

### 6.2.3 Summary: Restorative Justice in England and Wales

Restorative justice has developed in England and Wales to predominantly respond to youth crime, with restorative responses to adult wrongdoers typically marginalised and unstable. With this background and feminist critiques of restorative justice in the context of sexual violence, it is unsurprising that there has been little in depth discussion or consideration of

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<sup>41</sup> Louise Casey (2011) *Green Paper Response – Commissioner for Victims and Witnesses* (March 2011), p 9.

<sup>42</sup> Ministry of Justice, *Getting it Right for Victims and Witnesses*, para 19.

<sup>43</sup> *Ibid*, p 14.

<sup>44</sup> For example, Restorative Justice Council (2012) *Getting it Right for Victims and Witnesses – RJC Response to Ministry of Justice Consultation* (19 April 2012); Liberty (2012) *Liberty's Response to the Ministry of Justice's Consultation 'Getting it Right for Victims and Witnesses'* (April 2012); Victim Support, *Response to 'Getting it Right for Victims and Witnesses'*.

<sup>45</sup> See, for example, Victim Support, *ibid*; and Liberty, *ibid*.

<sup>46</sup> Ministry of Justice, *Getting it Right for Victims and Witnesses*, para 20.

<sup>47</sup> Restorative Justice Council, *RJC Response to Ministry of Justice Consultation*, paras 6-7. See also Victim Support, *Response to 'Getting it Right for Victims and Witnesses'*, p 4.

this possibility. And yet, some restorative justice (or at least restorative justice-like) practices in the youth context in England, Wales and Northern Ireland are ‘netting’ sexual offences. However, there is little recognition of this as a category which requires particular attention, and there is no discussion of this at the policy level and very little in feminist debates as to restorative justice and sexual violence. Given the concerns regarding restorative justice in relation to sexual offences, this is perplexing. To ensure that victim-survivors and offenders are not harmed, restorative justice and youth sexual offending should be evaluated as a distinct category.<sup>48</sup> Moreover, these evaluations may inform debates as to restorative justice and sexual violence more generally.<sup>49</sup> However, given that restorative justice tends to be overly focused on wrongdoers in England and Wales, care must be taken in discussing restorative justice and sexual violence in this context to ensure that if it is implemented and tested in practice that it will operate in the best interests of victim-survivors.

### **6.3 RESTORATIVE JUSTICE AND SEXUAL VIOLENCE IN PRACTICE**

Due to feminist challenges, sexual violence is commonly excluded from restorative justice programmes in the majority of world jurisdictions.<sup>50</sup> This typically leads to the cyclical critique that there is insufficient empirical research as to restorative justice and sexual violence to implement it in practice.<sup>51</sup> Nevertheless, there are a few UK-based and international projects which address sexual violence. However, in the UK, there are no published evaluations of these cases, and the empirical research internationally, while important, is based on relatively small studies and few cases, and therefore no strong conclusions can be drawn. Consequently, the case study which was undertaken as part of this thesis<sup>52</sup> is an important addition to the little empirical research internationally and is particularly significant for providing a UK-based case and perspective. The case study will be discussed after these projects, followed by an evaluation which considers to what extent, if at all, restorative justice can provide justice for rape victim-survivors.

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<sup>48</sup> For the few existing evaluations in this context, see below, section 6.3.1.

<sup>49</sup> McGlynn *et al.*, ‘Sexual Violence and the Possibilities of Restorative Justice’, p 219.

<sup>50</sup> Curtis-Fawley and Daly, ‘The Views of Victim Advocates’, p 609.

<sup>51</sup> As explained in McGlynn *et al.*, ‘Sexual Violence and the Possibilities of Restorative Justice’, p 218.

<sup>52</sup> And also for a journal article, see McGlynn *et al.*, *ibid.*

### 6.3.1 UK-based Projects

Restorative justice and sexual violence in the UK is rare, however, in 2010 and 2011 there were two cases reported in the news in which a rape victim-survivor met her abuser in a post-conviction conference.<sup>53</sup> Jo Nodding wanted a restorative justice meeting because she 'hadn't had the opportunity to tell him how he'd made me feel'.<sup>54</sup> While she had attended court voluntarily (the wrongdoer had pleaded guilty and therefore she was not required to attend) 'to face him', it left her without 'closure'.<sup>55</sup> As to the conference, she said '[h]e heard it from me that day, what he'd done to me' and 'I could see the impact that what I was saying was having on him'.<sup>56</sup> He apologised and she offered him her forgiveness because, she explained, 'I wanted myself to be free of that burden of grievance'.<sup>57</sup> Similarly, Claire Chung wanted a conference 'to get him [her abuser] to think about his crime in a different way',<sup>58</sup> and she said that the conference 'helped me to readdress some of the balance of power he took away when he raped me'.<sup>59</sup> Although she did not get 'closure', it gave her a 'voice' and 'allowed [her] to be heard', 'start[ing] the process of a positive change'.<sup>60</sup> These two stories illustrate that some victim-survivors may find restorative justice beneficial. In both cases, however, restorative justice was an addition to criminal justice, and it is unknown whether the victim-survivors would have felt differently if the conference outcomes reduced the prison sentence.

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<sup>53</sup> Zoe Williams (2011) 'Restorative Justice: Why I Confronted the Man who Raped Me', *The Guardian* (27 January 2011); This is Kent (2010) 'Why I Had to Meet the Man who Raped Me' (6 February 2010); available online:

<http://www.thisiskent.co.uk/meet-manwho-raped/story-12021550-detail/story.html> (last accessed 17 October 2012); David Barrett (2011) 'Why I Confronted the Man who Raped Me', *Telegraph* (12 March 2011).

<sup>54</sup> Quoted in Williams, 'Why I Confronted the Man who Raped Me'.

<sup>55</sup> *Ibid.*

<sup>56</sup> Restorative Justice Council, *Jo's Story*; available online:

<http://www.restorativejustice.org.uk/resource/jo/> (last accessed 17 October 2012).

<sup>57</sup> *Ibid.*

<sup>58</sup> Barrett, 'Why I Confronted the Man who Raped Me'.

<sup>59</sup> This is Kent, 'Why I Had to Meet the Man who Raped Me'.

<sup>60</sup> *Ibid.*

In addition, restorative justice is being used to address some sexual offences committed by youths by AIM: Assessment, Intervention and Moving On in Manchester.<sup>61</sup> Initiated in January 2000, AIM brings together the 'world of children and young people who sexually abuse and the world of restorative justice "RJ" that incorporates both the criminal and welfare approach to resolution'.<sup>62</sup> Most referrals are from Youth Offending Teams,<sup>63</sup> and AIM co-ordinates family group conferences,<sup>64</sup> typically following a criminal justice sanction (such as a reprimand or final warning).<sup>65</sup> The majority of offenders and victim-survivors are known to each other, and most cases involve intra-familial abuse.<sup>66</sup> AIM includes an assessment framework for young people who display sexually harmful behaviour, which is sensitive to the risks of re-victimisation of the victim-survivor, the possible manipulation of the process by the wrongdoer, and the potential for further harm to be caused to both the victim-survivor and wrongdoer. A 'major' issue for restorative justice that is highlighted is the 'fragmented nature of services to victims',<sup>67</sup> and a 'parallel planning process' to address the victim's needs is suggested.<sup>68</sup> Nevertheless, AIM's evaluation<sup>69</sup> of its work drew

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<sup>61</sup> REMEDI, an independent voluntary sector organisation that provides (amongst other things) victim-offender mediation and restorative conferencing in Barnsley, Doncaster and Sheffield, has also used restorative justice in a few cases of sexual violence since 2008. Two cases involved offences committed by youths, one of which was intra-familial, and both were referred from the youth justice system which had already imposed a referral order in one case and a community order in the other. A third case was a self-referral where a man had sexually abused his step-granddaughter. There was mediation between the families. Detailed information about the cases is unavailable, and there are no published evaluations. This information is from personal communication with the REMEDI manager at Sheffield; 21 September 2011.

<sup>62</sup> Henniker and Mercer, 'Restorative Justice and Young People who Sexually Abuse', p 230. AIM has produced three guides: *Referral Orders and Sexually Harmful Behaviour*, *Restorative Justice and Sexually Harmful Behaviour*, and *Victim Contact and Sexually Harmful Behaviour*; available to order from the AIM website: <http://www.aimproject.org.uk/index.php> (last accessed 17 October 2012).

<sup>63</sup> AIM: *Referral Orders and Sexually Harmful Behaviour*, Appendix, figure 1, p 27.

<sup>64</sup> This is similar to the New Zealand model and does not use a script, unlike the model used in police-led conferencing in England (see chapter 5, section 5.2.3(b)).

<sup>65</sup> AIM: *Restorative Justice and Sexually Harmful Behaviour*, p 13.

<sup>66</sup> *Ibid*, pp 18, 12 and 15.

<sup>67</sup> *Ibid*, p 33.

<sup>68</sup> *Ibid*, p 25; see also Henniker and Mercer, 'Restorative Justice and Young People who Sexually Abuse', p 241.

<sup>69</sup> The evaluation is not published, but it is referred to in the practice guidelines and other literature.



attention to the ‘opportunity for dialogue and improved communication’ through restorative justice which is important for victim-survivors.<sup>70</sup> Overall, in the experience of AIM the advantages of a restorative approach ‘in cases of sexual abuse generally outweigh the disadvantages’.<sup>71</sup> This indicates that restorative justice may be appropriate to address some cases where young people sexually offend, but that processes must be carefully designed to ensure that victim-survivors receive the services and support that is necessary.

### 6.3.2 Beyond the UK

Similarly to the UK, in New Zealand and South Australia restorative justice can be used to address sexual violence committed by young offenders,<sup>72</sup> and Daly’s research in South Australia is the first study comparing court proceedings (118 cases) and conferences (226 cases) in this context.<sup>73</sup> She argues that the court encourages denials of responsibility, illustrated by the fact that in 49 per cent of court cases the offence was not proved whereas 94 per cent of conference cases included an admission of responsibility.<sup>74</sup> Moreover, the more serious the offence was the more likely it was to go to court and the more likely it would result in an acquittal.<sup>75</sup> In addition, reoffending rates were higher for the court cases (66 per cent) which typically focused on ‘scaring youth’ with the threat of more severe sanctions in the future, in comparison to conferences (48 per cent) in which outcomes focused primarily on rehabilitation through counselling, and secondarily community sentences.<sup>76</sup> Overall, she says, the research ‘challenges those who believe that the court is a place that sends “strong messages” that serious offending is treated seriously, or that it holds greater potential to vindicate victims than RJ conferences’.<sup>77</sup>

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<sup>70</sup> AIM: *Referral Orders and Sexually Harmful Behaviour*, p 15.

<sup>71</sup> Henniker and Mercer, ‘Restorative Justice and Young People who Sexually Abuse’, p 236.

<sup>72</sup> Daly, ‘Restorative Justice and Sexual Assault’, p 334.

<sup>73</sup> *Ibid*, p 350. The data was collected between 1 January 1995 and 1 July 2001.

<sup>74</sup> *Ibid*, p 342.

<sup>75</sup> *Ibid*, p 346.

<sup>76</sup> *Ibid*, pp 348-349. Although she suggests this outcome could be attributed to the higher number of offenders who participated in a rehabilitation programme following a conference, or that offenders have more readily admitted responsibility and agreed to the outcomes in the conference; pp 349 and 351.

<sup>77</sup> *Ibid*, p 351.

Alongside the archival study, Daly conducted in-depth studies of 14 sexual and family violence cases which went to conference, two of which Daly and Curtis-Fawley present from the perspective of the victim-survivor.<sup>78</sup> In both cases the wrongdoer was 17 years old at the time of the offence, and knew the victim-survivor who was between three and four years younger. While one victim-survivor said that she felt empowered and that 'it [the conference] just helped me get over it', the process was less positive for the other victim-survivor who was very afraid of the wrongdoer.<sup>79</sup> In both cases, the victim-survivor wanted the penalty to be harsher and said that her view as to an appropriate sanction was not taken into account, and that this part of the process was dominated by the wrongdoer's parents and the professionals.<sup>80</sup> These two examples raise some issues from the perspective of victim-survivors. However, it may be that there are particular challenges as to including victim-survivors in the process when they are minors, which may not apply in cases of adult sexual violence or historic child abuse.

In relation to adult sex offences, there are a few projects of which the details have been published. RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience) in Arizona is a pilot project designed to address acquaintance rape and misdemeanor sex crimes.<sup>81</sup> RESTORE began to operate in 2003, and aimed 'to facilitate a victim-centred, community-driven resolution of selected individual sex crimes that creates and carries out a plan for accountability, healing and public safety'.<sup>82</sup> Prosecutors refer the case to RESTORE, and if the victim-survivor consents then the programme is offered to wrongdoers.<sup>83</sup> Over a two year period there were 65 referrals which led to 20 conferences. Extensive preparation is undertaken before a conference, particularly to ensure that the 'responsible person' understands and acknowledges that their behaviour

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<sup>78</sup> Kathleen Daly and Sarah Curtis-Fawley (2006) 'Justice for Victims of Sexual Assault: Court or Conference?', in Karen Heimer and Candace Kruttschnitt (eds) *Gender and Crime: Patterns of Victimization and Offending* (New York: New York University Press).

<sup>79</sup> *Ibid.*

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

<sup>81</sup> Which Koss explains excludes sexual violence perpetrated by an intimate partner and those who repeatedly perpetrate sexual violence; Koss, 'Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes', p 218.

<sup>82</sup> *Ibid.*, pp 218-219; quoting RESTORE (2006) *RESTORE Overview Manual* (Revised March 2006; Tucson: University of Arizona).

<sup>83</sup> *Ibid.*, p 230.

was wrong and harmful.<sup>84</sup> Post-conference there is a monitoring period, and if the 'responsible person' fails to adhere to the conference agreement the case is referred back to the criminal justice system for prosecution.<sup>85</sup> Koss, a director of the programme, argues that RESTORE presents a 'strong case' for offering victim-survivors of sexual violence expanded justice alternatives.<sup>86</sup> However, there is no full, published evaluation which details participants' experiences of the project.

RESTORE Arizona inspired Project Restore-NZ in New Zealand which similarly addresses sexual violence using restorative justice conferences.<sup>87</sup> Drawing heavily on the restorative justice and sexual violence literature, the project facilitators ensured that the professionals involved understood the nature and power dynamics of sexual violence, were aware of and would challenge rape myths, and would be able to recognise manipulation by the wrongdoer.<sup>88</sup> Project Restore-NZ accepted 29 referrals which were from either the District Court System pre-sentencing, the community, or from the victim-survivor or wrongdoer, of which nine progressed to conference.<sup>89</sup> Before a case is accepted, it undergoes a rigorous assessment by a specially trained facilitator, and a victim-survivor and a wrongdoer specialist.<sup>90</sup> There is then extensive preparation before a conference to ensure that participants are fully informed and have support networks in place.<sup>91</sup> Agreements from the conferences typically included a requirement that the wrongdoer complete a form of community service, attend a therapeutic programme, provide financial compensation to the victim-survivor, and/or write her a letter of apology.<sup>92</sup> In the project evaluation, Jülich

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<sup>84</sup> *Ibid*, p 231.

<sup>85</sup> *Ibid*, p 229.

<sup>86</sup> *Ibid*, p 234.

<sup>87</sup> Shirley Jülich, John Buttle, Christine Cummins and Erin V Freeborn (2010) *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (Auckland: Auckland University of Technology), available online:

[http://aut.academia.edu/JohnButtle/Papers/221442/Project\\_Restore\\_An\\_Exploratory\\_Study\\_of\\_Restorative\\_Justice\\_and\\_Sexual\\_Violence](http://aut.academia.edu/JohnButtle/Papers/221442/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence) (last accessed 17 October 2012).

<sup>88</sup> Shirley Jülich, Kim McGregor, Jennifer Annan, Fiona Landon, Dorothy McCarrison and Kathryn McPhillips (2011) 'Yes! There is Another Way', *Canterbury Law Review*, 17: 222, pp 226-227.

<sup>89</sup> Jülich *et al.*, *Project Restore*, pp 17, 25-26.

<sup>90</sup> *Ibid*, p 18.

<sup>91</sup> *Ibid*, p 19.

<sup>92</sup> *Ibid*, p 54.

*et al.* said that '[v]ictim-survivors were not necessarily seeking retribution', and the empowerment, personal healing and recovery that may be experienced through restorative justice was more important to gain a 'sense of justice'.<sup>93</sup> From this project, McGlynn *et al.* say that 'we can begin to see what "survivor-driven" restorative justice in cases of sexual violence can look like and what it can possible offer'.<sup>94</sup>

Another example is 'Victims' Voices Heard' (VVH), a restorative justice programme in the US which operates post-conviction and responds to serious offences, including sexual violence.<sup>95</sup> It highlights that even when victim-survivors' cases result in a conviction they are not completely satisfied and may feel some elements of justice are lacking. Victim-survivors participated in the programme because they wanted to be heard,<sup>96</sup> and Miller summarises that they found the process 'transformative, empowering and cathartic'.<sup>97</sup> There are other examples which highlight that some victim-survivors may desire restorative justice. The Centre for Sexual Assault in Copenhagen, Denmark has used indirect and direct victim offender mediation to address sexual violence, which Sten Madsen suggests can be empowering for victim-survivors.<sup>98</sup> In South Africa, the Phaphamani Rape Crisis Counselling Centre completed 63 conferences and 72 victim offender dialogues responding to sexual violence during 2004-2005.<sup>99</sup> There is no formal evaluation; however, centre staff have reported that while victim-survivors sometimes found that the processes brought back the pain of the sexual assaults, overall participants were satisfied with the programme.<sup>100</sup>

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<sup>93</sup> *Ibid*, pp 57-58.

<sup>94</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice', p 221; quoting Jülich *et al.*, *Project Restore*, p 2.

<sup>95</sup> See Miller, *After the Crime*.

<sup>96</sup> *Ibid*, pp 163 and 175.

<sup>97</sup> *Ibid*, p 164.

<sup>98</sup> Karin Sten Madsen (2004) 'Mediation as a Way of Empowering Women Exposed to Sexual Coercion', *NORA: Nordic Journal of Women's Studies*, 12: 58.

<sup>99</sup> Discussed in Mary Koss and Mary Achilles (2008) 'Restorative Justice Responses to Sexual Assault' (VAWnet); available online: [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_RestorativeJustice.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_RestorativeJustice.pdf) (last accessed 17 October 2012).

<sup>100</sup> Ann Skelton and Mike Batley (2006) *Charting Progress, Mapping the Future: Restorative Justice in South Africa* (Pretoria: Institute for Security Studies), pp 33-34.

### 6.3.3 Summary: Restorative Justice and Sexual Violence in Practice

In the UK, there are a few isolated examples of restorative justice being used to address adult sexual violence. These restorative justice meetings have occurred post-conviction, whilst the offender was serving his sentence, and there are no published evaluations.<sup>101</sup> In the context of youth justice, referral orders in England and Wales and youth conferencing in Northern Ireland are capturing sexual offences. Consequently, the AIM project in Manchester is addressing cases of this kind by restorative justice, accepting referrals from and working with the Youth Justice Board. Nevertheless, that youth sexual offences may be dealt with by restorative justice (or restorative justice-like) practices is often not recognised, and there are no published formal evaluations.<sup>102</sup> There are, however, a few restorative justice projects in some countries worldwide which have been specifically designed to address sexual violence. These projects have not only used restorative justice in cases after a criminal justice sanction has been imposed, and restorative justice has been applied at different stages of the criminal justice system, or separately from formal legal interventions. Although no firm conclusions can be drawn as to the suitability and possibility of restorative justice in the context of sexual violence, these projects highlight the potential of restorative justice, indicating that ‘there is an appetite among some victim-survivors, and those working with them, for forms of justice beyond the conventional criminal justice system’.<sup>103</sup> Adding to this call for further exploration of restorative justice for sexual violence is a conference which was based in the North East of England, a case study of which was undertaken, partly for the purposes of this thesis.<sup>104</sup> Given that there are few evaluations of restorative justice and sexual violence internationally, and even less in the UK, this case study is a significant addition to the literature.

### 6.4 RESTORATIVE JUSTICE AND SEXUAL VIOLENCE: A CASE STUDY

In February 2010, in the North of England, a restorative justice conference addressed the rape and sexual abuse of a woman, Lucy,<sup>105</sup> which had been perpetrated by a male family

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<sup>101</sup> McGlynn *et al.*, ‘Sexual Violence and the Possibilities of Restorative Justice’, p 214.

<sup>102</sup> *Ibid*, p 219.

<sup>103</sup> *Ibid*, p 223.

<sup>104</sup> And partly for a journal article; *ibid*.

<sup>105</sup> Lucy is a pseudonym and this was her chosen term of reference.

member over a five-year period when she was a child and he was a young person, approximately four decades ago. The restorative justice process was initiated by a police officer, and it was then convened by an experienced facilitator who attended with Lucy, Lucy's rape crisis counsellor, and the wrongdoer who chose to participate without a supporter.

Focusing on historic child sex abuse that was perpetrated by a young person, this case study differs from the main focus of the thesis which is rape that occurs between adults. However, at the time of the conference both parties were adults, did not have an interactive relationship although they had a family tie, and the sexual violence had happened a long time ago. As such, the circumstances of this case set it apart from other cases of child sex abuse where there are on-going relationships with a greater possibility for further violence, and young people involved which may raise different issues such as the young person's capacity to consent to participate in restorative justice.<sup>106</sup> Lucy's case therefore may raise similar concerns as to restorative justice in cases of adult rape and sexual violence, where there is not the same cycle of abuse or such a high likelihood of violence.

Toward the end of 2010, with Professor Clare McGlynn (Durham Law School, Durham University) and Dr Nicole Westmarland (School of Applied Social Sciences, Durham University), an empirical investigation of Lucy's conference was undertaken.<sup>107</sup> The aim was to describe the process and outcomes of a restorative justice conference involving sexual violence and to investigate the participants' experiences. To this end, semi-structured interviews were conducted with Lucy, Lucy's rape crisis counsellor, the conference facilitator, and the police officer who brought the parties together. The wrongdoer declined to be interviewed, which means that a valuable perspective is missing from the study and actual or potential problems with the process for the wrongdoer may be overlooked. Nevertheless, the facilitator who had the most contact with the wrongdoer

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<sup>106</sup> Gavrielides suggests that restorative justice may be particularly beneficial in cases of historic child sex abuse (although this relates more specifically to historic abuse within the Roman Catholic Church); Theo Gavrielides (2012) 'Clergy Child Sex Abuse and the Restorative Justice Dialogue', *Journal of Church and State*, Advance Access, published online, 23 April 2012.

<sup>107</sup> For more detail about the design of the study, the methods used, the process and ethical considerations, see chapter 2, section 2.5.

before and after the conference had some insights into his experiences, although, of course, these should be treated with the requisite caution. Furthermore, given the wider social and legal context to sexual violence, and that it is actual and potential sexual violence victim-survivors who are likely to be at the greatest risk of harm from restorative processes, taking a victim-survivor-focused approach to this study is appropriate.

Lucy's case will be analysed in detail, with reference to, and organised in relation to, the five aspects of a just legal response to rape, as understood by some victim-survivors. In addition, the extent to which, if at all, the process and conference addressed feminist concerns regarding the use of restorative justice in cases of sexual violence that were discussed in chapter 5<sup>108</sup> will be taken into account in the analysis. Other restorative justice programmes which have addressed sexual offences that were outlined in the previous section will also be considered to strengthen the evaluation. It will be concluded that restorative justice may provide victim-survivors with a greater sense of justice than the criminal justice system, and that the case study provides a grounded base from which to consider taking restorative justice further in the context of sexual violence.<sup>109</sup>

#### **6.4.1 Lucy's Story**

After years of silence as to the sexual abuse she had been subject to as a child, Lucy reported it to the police in February 2009 after hearing that the wrongdoer was in contact with young family members. Her local police force took a 'thorough statement'; however, the case was referred to the police force in the area where the abuse occurred, which said that there was nothing that could be done because it took place decades ago and the wrongdoer was a juvenile at the time. The wrongdoer then offered a statement at Lucy's request, and he was interviewed, bailed and cautioned.

Lucy was very 'upset' with the second police force, feeling as though the wrongdoer 'just had his wrist slapped with no thought to what he had done'. What she wanted was to have her say and have him hear her, and the counsellor said that Lucy had 'got to a stage where she just wanted to go down to his house and bang on his door and confront him'. Consequently, the counsellor suggested the possibility of restorative justice, a concept and

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<sup>108</sup> See section 5.4.

<sup>109</sup> See also, McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice'.

process which she knew a little about. She contacted a local police officer who gave her the contact details of an experienced conference facilitator who agreed to manage the process.

Once Lucy and her counsellor decided that restorative justice may provide a safe environment for a dialogue between Lucy and the wrongdoer, the facilitator contacted the wrongdoer. At first, the facilitator said, the wrongdoer was unsure, but during a later one of four pre-conference conversations – each lasting approximately 30 minutes – the wrongdoer agreed to participate. He chose not to have a supporter outside or inside of the conference.

Lucy and her counsellor met weekly for approximately three months, and for two weeks prior to the conference the counsellor was on call. During this time, she said, 'it was all about risk assessment'. The conference followed a script setting out the participants' roles and order of who is to speak, which Lucy and her counsellor said was helpful in their preparations. They also planned a post-conference de-brief and ensured that Lucy had follow up support in place.

The practicalities of the conference were planned in detail. The building had particular security features which made it safe for Lucy, and various work tasks and projects took place there so that Lucy felt 'anonymous'. Travel plans and arrival times were agreed to ensure that Lucy and the wrongdoer did not come into contact with each other outside of the conference. Lucy and her counsellor arrived first, and the facilitator met the wrongdoer at the train station to bring him to the conference. The facilitator entered the room first to introduce himself to Lucy and her counsellor in person, and then the wrongdoer was invited in.

Following the script, the facilitator introduced the conference and then the wrongdoer explained what he did, why, what he subsequently thought and who it had affected. Lucy, her counsellor and the facilitator noticed that the wrongdoer was blaming his troubled childhood for his harmful behaviour. The facilitator explained to the wrongdoer that he was not taking on the responsibility that he had said he accepted, and that he would have to end the conference if the wrongdoer did not do so. After this, the facilitator recalls the wrongdoer admitting that there was no excuse for his actions.



It was then Lucy's turn to speak about how she felt at the time of the abuse, how she felt currently, and how the wrongdoer's behaviour had affected her. Lucy and her counsellor planned that the counsellor would explain the harms of sexual abuse in general terms, so that they could convey to the wrongdoer the wrongfulness and harmfulness of his actions, but, at the same time, Lucy had the freedom to choose how much information to reveal about her own life.

Toward the end of the conference, the wrongdoer told Lucy that he was sorry, and she replied that she could not accept his apology or forgive him. They then agreed that the wrongdoer would stop trying to contact Lucy directly or through other family members. While they did not rule out the possibility of future contact, Lucy was clear that she must be the one to initiate it, which the wrongdoer accepted. At the time of the interview, Lucy told us that he had kept his word.

Immediately after the conference, the counsellor was unsure as to whether it would have made a difference to Lucy. Indeed, Lucy explained that 'it dangerously unhinged me at the time because it was like reliving it'. Nevertheless, following a period of reflection she said 'it's done more for me than anything I've ever done'. She said that she was able to have her say and 'have him listen', and that he appeared to understand and take on responsibility for his harmful behaviour.

As the wrongdoer chose not to participate in the study, the extent to which, if at all, the conference had an effect – positive or negative – on his life cannot be known. However, the other participants commented on the wrongdoer's behaviour and comments and so tentative suggestions can be made as to what his experience may have been. Lucy, the counsellor and the facilitator believed that the wrongdoer began to accept responsibility for his harmful actions throughout the conference. The counsellor explained that, while they did not dismiss the wrongdoer's experiences and circumstances, she and Lucy thought that he began to realise the harms that he had caused her, and stopped only thinking about the ways in which his past contributed to his current problems. That he agreed not to contact Lucy and has not done so, at least until the time of the interview, may also be evidence of this. The facilitator recalls the wrongdoer saying to him after the conference that: 'I can't believe I've been through that and I want it all gone now'. This may indicate

that the conference helped the wrongdoer accept what he has done and move on with his life.

## **6.5 JUSTICE FOR RAPE VICTIM-SURVIVORS?**

### **6.5.1 Was this Restorative Justice?**

Restorative justice was defined in chapter 5 as a process in which those with a stake in a wrong done engage in dialogue, as directly as possible, to collectively decide how to repair, as far as possible, the harms of the wrongdoing.<sup>110</sup> In Lucy's case there was a face to face meeting with the victim-survivor and wrongdoer, providing the dialogue that is key for restorative justice. It may seem like victim offender mediation as there is no clear 'community' involved in the process, but the facilitator did not play the role of a mediator and the conference followed a script that is used in some restorative justice conferences. However, it is unclear whether the aims of the conference were to restore or repair the harms of the wrongdoing. Nevertheless, Lucy and her counsellor thought that the process may have contributed to Lucy's healing process, and restorative justice theorists have recognised that particular cases may not be 'fully restorative' but rather there are different degrees of restoration.<sup>111</sup> Lucy's case is characterised by the main elements of restorative justice, as envisaged here, and can therefore be described as a restorative justice conference.

### **6.5.2 Recognition of a Wrongful and Harmful Violation of the Victim-survivor's Sexual Autonomy**

The first aspect of justice that is important for some victim-survivors, as discussed in chapter 3, is that the wrongful and harmful violation of their sexual autonomy is recognised. As is typical for restorative justice, the wrongdoer in Lucy's case admitted that he had committed the wrongful acts in question, that is, sexual offences against Lucy when she was a child. While this may not equate to a formal conviction<sup>112</sup> – a legal declaration of

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<sup>110</sup> See chapter 5, section 5.2.2.

<sup>111</sup> On 'restorativeness' as a continuum, see Zehr, *The Little Book of Restorative Justice*, pp 54-57; Van Ness, 'Creating Restorative Systems', p 131.

<sup>112</sup> Although in Lucy's case it did lead to the wrongdoer receiving a caution.

the wrong – at the same time, an admission of guilt can provide recognition of a wrongful and harmful violation of the victim-survivor’s sexual autonomy. Indeed, Lucy said that it was not until the restorative justice conference that ‘he admitted that he had deliberately created harm and that he knew that having sexual intercourse with me would be harmful’.

It should be noted, however, that unlike Lucy’s case, not all cases which are referred to a restorative justice process lead to a conference, or other form of dialogue. This may be for many reasons, for example, the wrongdoer is assessed as too violent and manipulative to participate in restorative justice. However, in relation to Project Restore-NZ, one victim-survivor said that having the wrong and harm that she had experienced validated by others through the preliminary process was important and contributed to her recovery process.<sup>113</sup> Similarly, for many victim-survivors interviewed by Herman, ‘validation’ – ‘acknowledgment of the basic facts of the crime and an acknowledgment of the harm’ – by ‘so-called bystanders’ was at least as, if not more, significant than an expression of guilt from the wrongdoer.<sup>114</sup> Such validation is much more likely to occur through a restorative justice process where one of the aims is to repair the harms that are caused to victims, in comparison to the criminal justice system in which rape victim-survivors continue to complain that they are treated with hostility and are disregarded by criminal justice personnel.<sup>115</sup>

However, it is unlikely that the majority of wrongdoers will admit their guilt, choose to and be eligible to participate in a restorative justice process. Indeed, this can be seen from Restore-NZ where of the 29 referrals only nine cases proceeded to conference. Nevertheless, it is possible that restorative justice could encourage admissions of responsibility,<sup>116</sup> for example if the case is self- or community-referred and has not gone to the criminal justice system, or where restorative justice is offered as a diversionary or pre-sentencing practice. Overall, it is significant that if restorative justice is to proceed the victim-survivor may at least have the benefit of knowing that the wrongdoer has admitted that he did the wrongful act.

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<sup>113</sup> Jülich *et al.*, *Project Restore*, p 59.

<sup>114</sup> Herman, ‘Justice from the Victim’s Perspective’, p 585.

<sup>115</sup> See chapter 4, section 4.3.

<sup>116</sup> Daly, ‘Restorative Justice and Sexual Assault’, p 346.

### 6.5.3 Respect for the Diversity of Experiences and Harms of Rape

Many rape victim-survivors want legal processes in which their particular experience of rape is acknowledged and respected, which is the second aspect of justice set out in chapter 3. Like many victim-survivors, Lucy said that she felt ‘completely discounted’ in the criminal process and that her experience of rape was not appreciated by institutional personnel who did not contact her or inform her of the progress and outcome of the case. She was not informed of, and was not aware of, other options available to her, such as applying for compensation through the criminal injuries compensation scheme or pursuing a civil suit.

Both Lucy’s rape crisis counsellor and the police officer were keen to give victim-survivors more choice and potential involvement in responses to crime, and possibly the option of restorative justice. Commenting on those who are critical of using restorative justice for serious offences, the police officer was concerned that victims were being ignored, that they were ‘patronised’ and seen as unable to ‘make a rational choice’. While the counsellor understood that restorative justice would not be suitable for every case of sexual violence, she nevertheless said that, ‘I never want to deprive a victim of having that opportunity if they had really been well prepared’. It is clear that Lucy’s case, like Project Restore-NZ and RESTORE, was victim-survivor-driven, victim-survivor-centred, and was sensitive to the diverse experiences of victim-survivors.

In contrast to the criminal justice system where the primary focus is on the wrongdoer’s culpability and the ‘core’ harm of rape, in restorative justice there is more attention paid to the material harms. The outcomes may be agreed in relation to these as well as the ‘core’ harm of rape, addressing the harmful experiences of the particular victim-survivor. Indeed, Claire Chung who participated in a restorative justice meeting addressing rape said that she wanted the wrongdoer to see her ‘as a real person whom he had harmed’.<sup>117</sup> As such, restorative justice may encourage and demonstrate respect for the diversity of harms of rape. There is, however, the possibility that rape myths and gender stereotypes will cloud participants’ views. Consequently, the counsellor emphasised that the professionals involved should be knowledgeable about the context and nature of sexual violence so as to

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<sup>117</sup> This is Kent, ‘Why I Had to Meet the Man who Raped Me’.

challenge problematic assumptions. This is a view strongly supported by feminist restorative justice scholars and practitioners.<sup>118</sup>

While the counsellor believed that focusing on the impact of the wrongdoer's behaviour was a positive aspect of restorative justice, at the same time, she said, for the victim-survivor, explaining the harms she has suffered may reinforce feelings of victimisation and disempowerment. Therefore, at the conference, the counsellor discussed the harms of sexual abuse in general terms, so that Lucy could choose how much information about her life to disclose to the wrongdoer. It was important for her that he would not see her as a 'victim' or a 'weak person', but that he would nevertheless be made aware of the harmfulness of his actions. Overall, the counsellor said that Lucy was 'fantastic' and that 'she seemed empowered'.

In summary, with more of a focus on the harmful consequences of wrongdoing in restorative justice in comparison to the criminal justice system, there is greater scope to respect the diversity of harms of rape. Moreover, as the process can be victim-survivor-driven and it can result in any number of potential outcomes, the response can be tailored to the case to redress the harms caused to the victim-survivor.<sup>119</sup>

#### **6.5.4 The Telling and Hearing of Victim-survivors' Stories**

The third way to improve justice for victim-survivors is to provide a forum in which they can tell their story and be listened to. This is unlikely to occur in the criminal justice system.<sup>120</sup> Indeed, after Lucy's negative experience with the criminal justice system, the counsellor recalls her saying that she wanted to confront the wrongdoer, which, in her experience, was not uncommon for a victim-survivor. And Lucy stressed that, 'I just wanted him to hear me'. However, she knew that he was not 'going to listen without an audience and without a structure to it'. The police officer also recognised how important this was for Lucy, explaining that 'there's that history of people not listening'.

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<sup>118</sup> See, for example, Jülich *et al.*, 'There is Another Way', pp 226-227.

<sup>119</sup> As was argued in chapter 5, section 5.3.2(b), while there are different forms of outcomes, standards could be imposed to ensure that there is no breach of the defendant's rights.

<sup>120</sup> See chapter 4, section 4.5.3.

Some feminists are concerned that where there has been sexual violence that a victim-survivor will be silenced by an intimidating and manipulative wrongdoer in restorative justice.<sup>121</sup> It seems that these concerns were not borne out here: the counsellor said that Lucy was ‘great in ... getting her message across’, and Lucy said that she felt she was able to ‘have the last word’. In order for Lucy to do this, she spent a considerable amount of time with her counsellor rehearsing what she wanted to say, what the wrongdoer might say, and how this could make Lucy feel. They planned the points that Lucy wished to make, and how the counsellor might support her throughout the conference to ensure that she said all that she wanted to say. Indeed, extensive preparation is a feature of the restorative justice projects that have been designed to address sexual violence.<sup>122</sup>

Overall, one of the most beneficial aspects of the conference for Lucy was that she was able to tell her story of how the abuse affected her to the wrongdoer. Similarly, for the victim-survivors participating in VVH, and for Jo Nodding and Claire Chung, being able to ‘have their say’ was of prime importance.<sup>123</sup> Indeed, the high value Lucy placed on being able to tell her story aligns with research as to what victim-survivors want from a legal response to rape,<sup>124</sup> as well as victims in general who tend to highlight that this is the most beneficial aspect of restorative justice.<sup>125</sup> In addition, it also accords with feminist theories which highlight the significance of victim-survivors’ voices.<sup>126</sup> Moreover, seeing that the wrongdoer learned of the harms that he caused and demonstrated this in some way – for Lucy the agreement that he would stop trying to contact her – showed that the story had been heard. Consequently, this aspect of restorative justice may be the most significant advantage over the criminal justice system, and which provides victim-survivors with a sense of justice.

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<sup>121</sup> See chapter 5, section 5.4.1.

<sup>122</sup> For example, see RESTORE and Restore-NZ, above, section 6.3.2.

<sup>123</sup> See above, section 6.3.

<sup>124</sup> Herman, ‘Justice from the Victim’s Perspective’, p 590 (although this is in the context of victim-survivors’ particular experiences being validated).

<sup>125</sup> See for example, Strang, *Repair or Revenge*; and more generally, chapter 5, section 5.3.1(b).

<sup>126</sup> Abrams, ‘Hearing the Call of Stories’, and Young, *Justice and the Politics of Difference*; and see chapter 3, section 3.5.2(c).

### 6.5.5 Holding the Wrongdoer Responsible for the Harms of Rape

The fourth aspect that many victim-survivors see as important for justice is to hold the wrongdoer responsible for the harms of rape. Lucy was ‘disgusted’ with the police response as there was no action taken on her complaint until the wrongdoer provided a statement. However, as there was a formal legal outcome – the wrongdoer was cautioned – the case may be categorised as a criminal justice ‘success’. But Lucy felt that he had had ‘no consequences’ for his actions. This may be seen as unusual, as typically a custodial sentence is imposed for rape, and restorative justice is seen as a ‘soft option’ – as the facilitator noted – because it does not result in carceral punishment. And yet, Lucy said that ‘[i]t was more important to have my say and have him listen than for him to go to prison’.<sup>127</sup> That the wrongdoer agreed not to contact Lucy and has not done so, at least until the time of the interview, and that he offered her an apology, may indicate that he did ‘listen’ and take on responsibility for his actions.

Furthermore, although the wrongdoer admitted to the police that he had done the wrongful act, it seems that it was not until the conference that he accepted responsibility. At the beginning of the conference, Lucy, her counsellor and the facilitator noticed that the wrongdoer was minimising his behaviour, and was blaming his upbringing and childhood experiences. However, after the facilitator intervened and told him that he was not taking on the responsibility that he had said he accepted, the facilitator recalls the wrongdoer saying that there was no excuse for his actions. Lucy said that she could see the wrongdoer’s demeanour changing when she was talking, and the counsellor said that he ‘physically shrank’ from his initial presentation of being ‘quite charming’. She also recalls him saying that ‘he hadn’t appreciated the damage he could do’. The facilitator, Lucy and the counsellor believed that the wrongdoer gradually accepted responsibility for not only the wrongfulness but also the harmfulness of his actions. That he agreed not to contact Lucy and has not done so, at least until the time of the interview, may also be evidence of this.

A restorative justice process in which the wrongdoer should understand and accept responsibility for his actions and the consequences may be challenging – as the facilitator

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<sup>127</sup> This also reflects the views of many victim-survivors interviewed by Herman, ‘Justice from the Victim’s Perspective’, p 590.

said, 'It's the hardest of the options. Going to court is the simple option. You don't have to do nothing'. Indeed, he remembers the wrongdoer saying in their post-conference conversation: 'that's the hardest thing I've ever done in my life'. The counsellor thought that the conference must have been 'incredibly difficult for him', and Lucy remembers him saying that he 'felt shame'. Without the wrongdoer's view it cannot be concluded that he did feel shame, nor whether this was a stigmatising shame or if it was more akin to Braithwaite's reintegrative shaming.<sup>128</sup> What can be said, though, is that some of the blame and shame that Lucy felt seemed to be shifted from her to the wrongdoer. She explained that the conference 'was a really big turning point for me actually ... I could stop hating myself and put the blame where it should be'. Consequently, it seems that, in line with theories of restorative justice, the conference provided a more effective way of ensuring that the wrongdoer understood and accepted the harms that he caused,<sup>129</sup> and demonstrated this by agreeing and adhering to Lucy's request.

#### **6.5.6 Symbolic and Material Reparation for the Harms of Rape**

In Lucy's case, what was most important was that she explained to the wrongdoer the harms that she had experienced, and that he understood and accepted that his wrongful actions were the cause. There was no material reparation as such, although the wrongdoer agreed that he would no longer attempt to contact Lucy directly or through other family members. This may be symbolically important, demonstrating and reinforcing recognition of his wrongdoing by respecting Lucy's wishes. Moreover, Lucy explained that a 'happy consequence' of the process is that it has helped to 'improve things with extended family ... it gave me the ability to pick up the phone and talk to members of the family'. The wrongdoer's experience may have been somewhat different, as Lucy thought that he wanted to 'restore [their] relationship' and 'to regain ... extended relatives and come out and everything would be all hunky-dory and he got the opposite of that'.

Nevertheless, it seems that the process itself may have contributed to repairing some of the emotional and psychological harms that the wrongdoer caused Lucy. In particular, the counsellor ensured that the process was as empowering for Lucy as possible. For instance, when she was in touch with the conference facilitator, Lucy would always be copied into

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<sup>128</sup> See chapter 5, section 5.3.2(c).

<sup>129</sup> See chapter 5, section 5.3.2.



emails as she wanted her to 'take as much control of the process as she could' and did not want Lucy to see her as 'more powerful' than herself. The counsellor explained that Lucy 'wanted to be able to come out of there with her head held high and meet him on an equal level'. Similarly, for Jo Nodding, the conference was also 'about me taking control of the situation, re-balancing what he had taken away from me that day'.<sup>130</sup>

In addition, it does seem as though the conference did not cause further harm – something that many feminists believe is a significant risk in restorative justice.<sup>131</sup> Lucy did say that it 'hurt hearing' the wrongdoer tell his story, but that she knew it was 'necessary' and it was 'important' to hear 'why he did it'. She also explained that 'it dangerously unhinged me at the time because it was like reliving it. I've not forgotten the abuse memories, but deliberately hidden them, so to have to face him and talk about the abuse was almost like being eight again'. She also said, '[d]on't expect immediate benefit, afterwards it felt a waste of time and an anti-climax, because I was so drained from the whole thing'. Similarly, Skelton and Batley have said that although restorative justice brought back the pain of the sexual assaults, overall participants were satisfied with the programme provided by the Phaphamani Rape Crisis Counselling Centre.<sup>132</sup> Nevertheless, following a period of reflection Lucy said she realised that 'it's done more for me than anything I've ever done'. This indicates that time is important in restorative justice, and that the healing process, reflection and understanding the impact of the conference may take place over a period of time, and this point was reiterated by the counsellor.<sup>133</sup>

While it seems that the conference may have helped to heal some of the harms that the wrongdoer caused Lucy, it cannot be concluded that this was the case as she was working with a number of professionals to address the abuse and other social and health issues. Nevertheless, Lucy did say that she had been 'on and off sick leave all my life and just before [the conference] had had six months off. Since the conference I've not been off at all', which indicates that it probably had some positive impact.

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<sup>130</sup> RJC, *Jo's Story*.

<sup>131</sup> See chapter 5, section 5.4.1.

<sup>132</sup> Skelton and Batley, *Charting Progress, Mapping the Future*, pp 33-34.

<sup>133</sup> Daly's study also indicates that victims' perspectives on the extent to which restorative justice has helped them heal, if at all, may change over time; see Daly, 'A Tale of Two Studies', pp 162-163.

In relation to reparation, then, this conference did not result in significant material reparation for the wrong and harms of child rape and sexual abuse; however, it was symbolically important that the wrongdoer agreed not to contact Lucy and has not done so. In addition, the agreement may have contributed to Lucy's overall view that the conference was a positive experience, and it seems as though the process itself may have contributed to repairing the harms. In contrast, in the criminal justice system the outcomes typically focus on punishing the wrongdoer for the 'core' harm of rape, and the process is not intended to be therapeutic for victim-survivors and more commonly is harmful.

#### **6.5.7 Summary: Restorative Justice as Justice for Rape Victim-survivors**

Overall, from Lucy's perspective it seems that restorative justice provided her with a form of justice which was lacking from the criminal justice response to the sexual abuse she experienced as a child and the material harms that she continued to suffer as an adult. The violation of Lucy's sexual autonomy was recognised in the criminal law and in restorative justice. As the wrongdoer must admit his guilt before restorative justice can proceed, this aspect will, to some extent, be met in every case. Of course, this will occur if a wrongdoer admits that he is guilty in the criminal justice system, however, it is possible that restorative justice may encourage admissions of responsibility.<sup>134</sup> What is likely to be more significant is the extent to which restorative justice may meet the other aspects of justice, as understood by some victim-survivors. Lucy's case highlights the possibility for restorative justice to ensure respect for the diversity of harms of rape, as the process and outcomes are flexible and may accommodate the needs of the particular victim-survivor. Many victim-survivors want to be able to tell their story and be heard, which, from Lucy's perspective seems to be the most beneficial aspect of the conference. Lucy believed that she was heard, as it appears that the wrongdoer began to accept responsibility for his actions throughout the conference, and demonstrated this by agreeing to Lucy's request not to contact her. Finally, it seems that the process and conference outcomes contributed to Lucy's healing process. Overall, Lucy said that if the victim-survivor wants a dialogue with the wrongdoer, is at the right stage in her recovery and is provided with the proper support then she should 'take a deep breath and do it'.

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<sup>134</sup> Daly, 'Restorative Justice and Sexual Assault', p 346.

## 6.6 INCREASING THE POSSIBILITIES OF JUSTICE FOR RAPE VICTIM-SURVIVORS

Lucy's experience is not an isolated one, and other victim-survivors of rape and sexual violence have similarly found it beneficial to gain a sense of justice. Nevertheless, the projects are small and empirical research is limited, and no firm conclusions can be drawn as to whether restorative justice should be advocated for rape. However, first, Lucy's case adds another voice to the call for alternative ways of responding to rape to provide justice for victim-survivors, and when considered alongside other research in this field provides the impetus for further investigating the possibility of using restorative justice in this context.<sup>135</sup> Secondly, the case study does provide an insight into how to alleviate some of the risks of restorative justice, and therefore what precautions should be taken in future projects that pilot restorative justice in this context.<sup>136</sup> These will be discussed below alongside the question of whether restorative justice may be more suited to certain forms of sexual violence, and what the relationship to the criminal justice system should be. Finally, considering the UK policy context and history of restorative justice, it will be discussed to what extent supporting restorative justice is a risky strategy for feminists and whether restorative justice can indicate ways in which to improve the criminal justice system.

### 6.6.1 Addressing Safety Concerns

As Lucy's conference was not a part of a project designed to address sexual violence there were no specific standards in place to minimise the risks of further harm to Lucy, or to ensure that the wrongdoer would adhere to the agreed outcomes.<sup>137</sup> Nevertheless, the counsellor prioritised Lucy's interests, and the case indicates the safeguards that should be in place if restorative justice addresses sexual violence.

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<sup>135</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice'.

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

<sup>137</sup> These are standards listed by Pranis as necessary in cases of family violence; 'Restorative Values and Confronting Family Violence', p 32.

### 6.6.1(a) Preparation and Risk Assessments

The counsellor explained that 'preparation is key', and risk assessments were continually undertaken in the lead up to the conference. She said:

It was all about looking at every eventuality, what was the worst case scenario, what was the best case scenario ... we discussed power dynamics, we discussed all the potential things that she could feel in that room with him, so that she'd considered everything.

She and Lucy knew that the ultimate manipulation was for him to 'not arrive on the day, or have changed his mind for quite legitimate reasons'. Nevertheless, they 'work[ed] very very hard to get to the point where she felt that it was absolutely the right thing', so that this was a risk worth taking. Extensive preparation and risk assessments are features of restorative processes addressing sexual violence, including rape, which have reported positive results, such as RESTORE and Restore-NZ, and are essential to minimise the risks to the victim-survivor.

One particular feature of this conference was that it adopted the conference model which follows a script. From Lucy's perspective, the 'sheer structure' was a 'really positive thing' as 'it enabled me to plan and prepare and make sure I said everything I wanted to say'. She also said that her 'worst case scenario' was that 'he was going to trivialise it and he was going to say water under the bridge', but she thought that 'the structure protected against that'. Similarly, the counsellor explained that the script helped in preparation, although she said that there may need to be some flexibility to address power imbalances in the conference if such issues arise.<sup>138</sup> Consequently, it may be that a scripted conference is advisable in cases of sexual violence, although this is a point that needs to be discussed further.

### 6.6.1(b) Professionals with Knowledge of Sexual Violence

What is undoubtedly important is that the professionals involved are knowledgeable about the power dynamics and harms of sexual violence, a view taken by the counsellor.

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<sup>138</sup> Supporting this point, evaluating Thames Valley Police's use of scripted conferences, Hoyle *et al.* conclude that, 'whilst flexibility is certainly needed in the use of the script, the empirical evidence strongly suggests that facilitators who keep within the parameters it establishes for their role will achieve the better outcomes'; *Proceed with Caution*, pp 59-60.

However, the facilitator placed more emphasis on having an experienced facilitator who has ‘an understanding of the human nature of people’. Nevertheless, he later admitted that ‘the person facilitating the conference – ... I think I was slightly flippant about – does need to have an understanding of what the kind of offence means and the ramifications for the people’. Indeed, in the Restorative Justice Council’s *Best Practice Guidance* 2011 it is stated that in ‘sensitive and complex cases’ – including those involving sexual violence – facilitators must have additional knowledge of restorative processes, such as the way in which wrongdoers can manipulate the process, and a more detailed knowledge of the nature of the offence and particular vulnerabilities of the parties.<sup>139</sup> However, it should be ensured that the victim-survivor and wrongdoer supporters are also knowledgeable about sexual violence.<sup>140</sup> Lucy recognised the key role that her counsellor had played, saying that, ‘I needed a lot of support – it couldn’t be done without that level of support. Someone like [the counsellor] would be the ideal. She was stunning’.

#### *6.6.1(c) Support for the Wrongdoer*

The conference raises some concerns regarding the wrongdoer, and limited insight is gained into his perspective from the case study. The wrongdoer may have felt some pressure with regards to participating in the conference, as the facilitator said that he was unsure at first and was worried that ‘[Lucy] will lose it and she will get up and rant and rave’. However, the facilitator explained that he would end the conference at any confrontational or argumentative attitude. Lucy also contacted the wrongdoer to say that she would not shout at him, she just wanted to have a conversation. When he agreed to participate, the facilitator emphasised that it was his choice, and at the beginning of the conference he explained that it could be stopped at the request of a participant.

The main issue, however, is that the wrongdoer chose not to have a supporter outside or inside the conference. The counsellor discussed this with the facilitator as she recognised

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<sup>139</sup> Restorative Justice Council (2011) *Best Practice Guidance for Restorative Practice* (Restorative Justice Council), p 22. While there is, therefore, some guidance as to particular features of restorative justice in ‘sensitive and complex cases’, specific standards should be developed in relation to sexual violence because of the particular risks and problems it poses in this context.

<sup>140</sup> McGlynn *et al.*, ‘Sexual Violence and the Possibilities of Restorative Justice’, pp 236-237.

that the wrongdoer ‘could potentially come out of that as vulnerable as the victim can’.<sup>141</sup> They agreed that it should not prevent the conference from taking place as the wrongdoer was well informed as to the process and that it was voluntary. They agreed that the facilitator would meet him beforehand and would debrief him afterwards. While it is impossible to know whether the conference was a harmful or helpful experience for the wrongdoer, the facilitator said that he did contact him a few weeks afterwards – a ‘thanks very much, bye, sort of thing’ – which may indicate that it was more of a positive than negative experience. Nevertheless, both the counsellor and the facilitator admitted that ideally the wrongdoer would also have a supporter. This should indeed be the case, and the wrongdoer should also be subject to risk assessments, as in Restore-NZ and AIM.<sup>142</sup>

#### *6.6.1(d) Secure Location*

The conference itself was planned with great care. The building had particular security features and it was a location in which various projects are undertaken so Lucy said that it felt ‘safe’ and ‘anonymous’. The arrival times and routes of the parties were planned so that Lucy and the wrongdoer would not come into contact outside of the conference. This is important as there are risks of further victimisation in cases of sexual violence.

In summary, although there is disagreement as to whether restorative justice should be used in cases of sexual violence, or rape in particular, the majority of scholars and practitioners agree that when it is used for such cases particular care must be taken. Lucy’s case provides support for this and indicates what safeguards should be in place to ensure the safety of victim-survivors. In particular, it highlights the need for sexual violence specialists to be a part of the process. In addition, it indicates that restorative justice is resource intensive in cases such as this, as the victim-survivor – and likely the wrongdoer – needs considerable support prior to, during and after the restorative dialogue.<sup>143</sup>

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<sup>141</sup> See also victim advocates interviewed by Curtis-Fawley and Daly expressing this concern; ‘The Views of Victim Advocates’, p 626.

<sup>142</sup> For a detailed assessment framework, see the AIM booklets, *Referral Orders and Sexually Harmful Behaviour, Restorative Justice and Sexually Harmful Behaviour*.

<sup>143</sup> McGlynn *et al.*, ‘Sexual Violence and the Possibilities of Restorative Justice’, p 237.

## **6.6.2 Forms of Sexual Violence, Restorative Justice, and the Criminal Justice System: Listening to Victim-survivors**

All four participants in the case study were keen that restorative justice should be available in some cases of sexual violence. The facilitator and the police officer both believed that restorative justice can and should be used for every type of offence, for youths and adults. The counsellor was more cautious, and thought that restorative justice should not be uniformly offered in cases of sexual violence. Like Lucy, however, she said that if a victim-survivor expresses a desire to contact the wrongdoer or have some form of dialogue then restorative justice could be discussed, and proceed if there is the proper support for the victim-survivor and the wrongdoer. However, Lucy's case differs from many other rape or sexual violence cases, in that the conference addressed historic child rape. As the abuse occurred decades ago and Lucy had been having counselling for some time then restorative justice may have been more appropriate and less risky. However, this does not necessarily mean that it is likely to be appropriate in similar cases, or inappropriate in cases with different factors. Indeed, the risks of further harm to Lucy, for example, 'reliving' the abuse, the power imbalances between the parties and vulnerabilities of Lucy are likely to be similar in many other cases of sexual violence. This case study indicates ways in which the risks can be addressed and that restorative justice may be beneficial for some victim-survivors. Consequently, the counsellor said that it is the particularities of the case, including the victim-survivor's vulnerabilities and nature of the wrongdoer, which indicates whether restorative justice might be possible. But overall she emphasised that 'we should never underestimate the strength of victims'. If restorative justice is explored further in cases of sexual violence, then cases should not be included or excluded depending on the 'type' of violence, but rather cases should be assessed on their facts, so as not to 'deprive victims of that opportunity'.

If restorative justice is tested further in cases of sexual violence, including rape, then the question is raised as to the appropriate relationship with the criminal justice system. In Lucy's case, the wrongdoer received a criminal justice sanction in the form of a caution, however, for Lucy the criminal justice system was insufficient, and the counsellor explained that restorative justice provided the only possibility for Lucy to achieve 'justice' and 'closure'. While the counsellor and police officer thought it would be appropriate at any stage of the criminal justice system (or outside it entirely), they both suggested that,

strategically, it may be best to test it post-conviction. This is because it will take place in a 'controlled environment', the wrongdoer does not have anything to 'gain' in the sense of potentially avoiding or reducing a prison sentence, and it will address concerns that restorative justice may minimise the seriousness of sexual violence.<sup>144</sup> However, as was argued in chapter 5, positioning restorative justice *only* post-conviction may reinforce that punishment by imprisonment is 'justice', presenting restorative justice as a purely therapeutic exercise.<sup>145</sup> In addition, as McGlynn points out, as so few rape cases result in a conviction there would be few possibilities for victim-survivors to receive justice through restorative justice.<sup>146</sup> Furthermore, if restorative justice is to be victim-survivor centred or driven, then it should be possible at every stage of the criminal justice process, or outwith it entirely, depending on when is most appropriate and safe for the victim-survivor.

It must also be kept in mind that a high percentage of victim-survivors do not report the crime to the police, but may be accessing general or specialist victim/victim-survivor services which could have information and support for restorative justice. As has been shown by projects such as Restore-NZ, some victim-survivors may see the appeal in restorative justice but not the criminal justice system, and therefore it is recommended that projects accept self- or community-referrals.<sup>147</sup> To accept referrals to restorative justice as a form of 'diversion' from formal criminal justice interventions is perhaps most controversial in cases of sexual violence, as the wrongdoer (and public) may see restorative justice as a means by which to avoid what is perceived to be a harsher sanction – imprisonment. However, restorative justice may encourage admissions of responsibility

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<sup>144</sup> For this view, see also Miller, *After the Crime*, pp 12-13.

<sup>145</sup> See also McGlynn, 'Feminism, Rape and the Search for Justice', p 835.

<sup>146</sup> *Ibid.*

<sup>147</sup> Jülich *et al.*, *Project Restore*, p 26. In such cases consideration must be given to the wrongdoer who, despite participating in restorative justice and undertaking certain responsibilities, may still face the possibility of a criminal or civil case against him; James Dignan (2002) 'Restorative Justice and the Law: The Case for an Integrated Systematic Approach', in Walgrave (ed) *Restorative Justice and the Law*, p 179. It may be possible for such conversations to be legally protected, but providing that wrongdoers are advised to seek legal advice before agreeing to participate in restorative justice, are fully informed as to possible future legal cases, and little information is retained in such cases to protect confidentiality and privacy as in Restore-NZ, then this should not prevent restorative justice in such cases – especially as it may be that it negates the desire or need for a criminal or civil case; Jülich *et al.*, *Project Restore*, p 53.



and may relieve victim-survivors from what is often a distressing and traumatic trial,<sup>148</sup> at the same time as censuring the wrong and potentially reducing the likelihood of reoffending, and achieve other goals such as repairing harm caused to victim-survivors.<sup>149</sup> Consequently, Hudson argues that, rather than a ‘diversion’ restorative justice may provide more effective justice.<sup>150</sup> In addition, if no agreement can be made through restorative justice or the wrongdoer does not complete the outcomes agreed, then the case can be referred back to the court.<sup>151</sup> This does not necessarily indicate that the court provides a more severe or effective response, but rather that where there has been a wrong done – especially a serious wrong such as sexual violence – and the wrongdoer does not engage satisfactorily with restorative justice then the only option left to hold the wrongdoer responsible is court-ordered sanctions.

Restorative justice can also be provided pre-sentence – either following a guilty plea or a conviction – and may influence the sentence and sanctions imposed, or it can be a condition of a sentence, with sanctions for non-completion. Again, from the victim-survivor’s perspective this may provide an opportunity to tell her story, convey to the wrongdoer the wrong and harms and to receive symbolic and perhaps material reparation for the harms that she has suffered. In addition, such a structure would demonstrate a commitment by the state to responding to sexual violence, and offer a more flexible framework to better address individual instances of wrongdoing, which may also repair the harms caused to victim-survivors.

To take restorative justice further and investigate as to whether it could and should be provided in more cases of sexual violence (and rape in particular), there are a few projects which illustrate what such a programme might look like. In such a case, restorative justice should be victim-survivor driven because of the particular risks it poses to the victim-survivor, and because of the nature of sexual violence as an abuse of power that is infrequently satisfactorily addressed by the criminal justice system. Of course the wrongdoer has the choice as to whether or not to participate, but what this means is that it should be available at different stages of the criminal justice system, or outwith it entirely,

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<sup>148</sup> Daly and Bouhours, ‘Rape and Attrition in the Legal Process’, p 623.

<sup>149</sup> Hudson, ‘Restorative Justice and Gendered Violence’, p 626.

<sup>150</sup> *Ibid.*

<sup>151</sup> For example, this was done in RESTORE; Koss, ‘Restorative Justice for Acquaintance Rape’, p 229.

so that there is not just 'one chance' for the victim-survivor and wrongdoer to engage in restorative justice. However, restorative justice is unlikely to provide a viable option for many victim-survivors in the near future, and what may be beneficial is reflecting on criminal justice in light of the benefits and limitations of restorative justice.

### **6.6.3 Reflecting on Criminal Justice: Reorientation towards Reparations?**

While it is important to listen to victim-survivors and further investigate restorative justice for rape, such investigations need to assess the possibilities and limitations of moving forward with it in the current policy context. As restorative justice in England and Wales can be overly wrongdoer-focused, and primarily applies in the youth justice context, great care must be taken to ensure that in suggesting restorative justice for sexual violence it remains victim-survivor centred. In addition, Lucy's case demonstrates that restorative justice is resource intensive in the context of rape.<sup>152</sup> However, it is well known that the costs of the criminal justice system and the costs of rape to society are high,<sup>153</sup> and restorative justice may not be any more expensive. A stronger point is that restorative justice is likely to only be a possible option for a small number of rape victim-survivors. Consequently, Cossins argues that funding and resources should be channelled into counselling and other support services, which assist many victim-survivors, rather than being directed to restorative justice programmes.<sup>154</sup> However, this does little, if anything, to address the 'justice gap'. If some victim-survivors do want to participate in a restorative justice process, and those that do find that it provides them with a sense of justice, then this may challenge assumptions that punishment by imprisonment necessarily equals justice in the context of rape.

Restorative justice, then, is useful to reflect on the criminal justice process, and to consider ways in which to improve the response to victim-survivors. In terms of outcomes, it may be that feminists should be arguing to reorientate the criminal justice system towards providing reparation for victim-survivors, and not purely punishing wrongdoers by

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<sup>152</sup> See also Angela Cameron (2005) *Restorative Justice: A Literature Review* (Vancouver, BC, Canada: British Columbia Institute Against Family Violence), p 53.

<sup>153</sup> See, for example, see Post *et al.* 'The Rape Tax'.

<sup>154</sup> Cossins, 'Restorative Justice and Child Sex Offences', p 373. See also Lakeman, *Obsession, with Intent*, p 115.

imprisonment. As has been highlighted in chapter 5, reparation can provide symbolic recognition of and material redress for the 'core' harm of rape and the material harms that victim-survivors may experience.<sup>155</sup> To do so, the harms suffered by the victim-survivor would need to be understood, and therefore she may have the opportunity to explain her experiences and, through the respective outcomes, receive recognition that her story has been heard. Moreover, unlike financial compensation, reparation is not heavily reliant on the means of the wrongdoer, and can be adapted to the particular case.<sup>156</sup>

The Government is intending to increase the use of compensation and reparation orders in the criminal justice system,<sup>157</sup> indicating that it may be open to such a suggestion. However, it seems as though such orders are unlikely to apply to serious offences or necessarily address the harms that victims have suffered,<sup>158</sup> and questioning the association of lengthy prison sentences as justice for rape victim-survivors is likely to be met with resistance. In addition, it should be acknowledged that reparation only provides a different outcome and may do little to change the criminal justice process, particularly the adversarial nature of the trial. However, if repairing the harms of wrongdoing – here, specifically rape – is understood as an aim of criminal justice, then this may influence and shape the process if it is directed not only at punishing by imprisonment but responding to and addressing the harms suffered by victim-survivors. While this may not be ideal justice, it may nevertheless provide a means by which to reconsider what justice means for rape victim-survivors, reduce the injustices of the criminal justice system, and increase the possibilities of providing a form of justice.

## 6.7 CONCLUSION

Restorative justice is a possible response to rape that may provide justice for some victim-survivors and it should be further explored, particularly considering the failings in the criminal justice system. While not providing conclusive evidence either way, the empirical

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<sup>155</sup> See section 5.3.2(a).

<sup>156</sup> As was discussed in chapter 5, section 5.3.2(b), it is possible to develop reparative outcomes that give due regard to the rights of the wrongdoer and principles such as proportionality and consistency.

<sup>157</sup> Ministry of Justice, *Punishment and Reform*.

<sup>158</sup> See chapter 4, section 4.5.5.

studies and restorative justice projects that have tackled sexual violence (including rape) indicate that some victim-survivors do desire and value such a response.<sup>159</sup> There does, however, need to be more research in this area, for example, more published evaluations of restorative justice practices that have addressed sexual violence, and in the UK in particular there needs to be an exploration and analysis of the restorative justice schemes that are addressing sexual offences committed by youths.<sup>160</sup> In light of the little national and international empirical research on restorative justice and sexual violence, this chapter included a case study of a UK-based restorative justice conference which addressed historic child rape and other forms of sexual abuse.

For Lucy, restorative justice was a positive experience which allowed her to tell her story and may have contributed to the healing process. Indeed, in Lucy's case it seems that restorative justice fulfilled the requirements of justice to a greater extent than the criminal justice system. As the wrongdoer must admit he did the wrongful act then the victim-survivor receives a minimum level of acknowledgement that her sexual autonomy was violated. Being more flexible and centring on dialogue, restorative justice may better respect the diversity of experiences and harms of rape, and offer a space for victim-survivors to tell their story and be heard in a meaningful way. In comparison to punishment by imprisonment, through the process and reparative outcomes restorative justice may hold the wrongdoer responsible for the particular harms that the victim-survivor suffers. Overall, the case study highlights the possibility that restorative justice may provide justice for victim-survivors, and indicates the possibilities for a victim-survivor driven process, and the ways in which to minimise the potential risks. However, there is further research that needs to be done in this area, and, while alternative and additional responses to the criminal justice system should be encouraged to try to secure justice for victim-survivors, restorative justice is unlikely to be an option in a high proportion of cases. What may, however, be gleaned from an analysis of restorative justice is potential ways in which to improve the criminal justice response to rape. It was suggested that focusing on reparative outcomes through the criminal justice system may increase the possibilities of providing justice for victim-survivors, as this could respond to the 'core' harm of rape but also account for, and to some extent, address, the material harms that they may have suffered.

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<sup>159</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice', p 223.

<sup>160</sup> *Ibid*, p 219.

## TORT LAW AND RAPE: FROM COMPENSATING MEN'S INJURIES TO VALUING WOMEN'S SEXUAL AUTONOMY

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### 7.1 INTRODUCTION

Many criminal wrongs are also civil wrongs for which a claim for compensation can be brought in tort law, and rape is a prime example. It is well known that the trespass to the person torts, which protect against violations of an individual's right to bodily and mental integrity and liberty of movement, can encompass acts of rape and sexual assaults, such as an unwanted kiss.<sup>1</sup> Moreover, civil claims can be brought as an alternative to or in addition to a criminal case (regardless of the outcome), largely due to the different purposes and functions of the two branches of law. In a nutshell, criminal law is classified as 'public law', which aims to punish wrongdoers, to deter them and others from wrongdoing, and to protect the public. In comparison, tort law is categorised as 'private law', offering a remedy, typically compensation, when an individual has been caused (certain types of) harm by another's fault. Nevertheless, in the UK, the fact that civil liability can flow from many crimes is often bypassed in theory and in practice. As Dyson says, scholars, politicians and legal actors have tended to privilege the criminal law over tort law where they converge.<sup>2</sup> Moreover, he explains, 'English law has no general theory to co-ordinate tort law and criminal law'.<sup>3</sup> As rape is conceptualised as a particularly heinous and harmful crime for which perpetrators should be severely punished, the point that it is also a tortious wrong and a civil claim for damages can be brought seems to be often overlooked. It is not that civil claims for rape are non-existent in the UK – indeed, there are a few that have

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<sup>1</sup> See, for example, Lord Denning in *R v Chief Constable of Devon and Cornwall, ex parte CEBG* [1982] QB 458, p 471; with reference to RFV Heuston (1977) *Salmond on Torts* (17<sup>th</sup> edn, London: Sweet and Maxwell), p 120.

<sup>2</sup> Matthew Dyson (2012) 'The Timing of Tortious and Criminal Actions for the Same Wrong', *Cambridge Law Journal*, 70: 86, p 86.

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

been reported – but they are, nonetheless, relatively rare, and have not been paid much academic attention. As acts of rape have constituted both a criminal and civil wrong for centuries and this is well understood (though typically given little thought), this begs the question of why is it worthwhile exploring tort law now?

First, tort law is not a static system, but a dynamic collection of legal rules and individual torts which have changed and developed over time, and there are significant disputes as to whether there is a principled basis.<sup>4</sup> Thus, although it has been possible to conceive of rape as a tort for centuries, in particular as trespass to the person (or trespass *vi et armis* as it used to be), the relationship of these torts to rape has changed, the role of these torts has changed and procedural rules which shape and limit claims have changed, meaning that the position of rape in relation to tort law is very different today than it has been in the past.

Secondly, as was argued in the introduction, the point that the criminal justice system is failing to properly respond to rape, despite decades of feminist campaigns, legal reforms and policy changes, should be sufficient to command attention to exploring alternative ways of conceptualising and addressing rape. Admittedly, tort law is unlikely to be a panacea: feminists have exposed the extent to which tort law is underpinned by an ‘architecture of bias’<sup>5</sup> which privileges men’s interests over the harms that commonly appear in the biographies of women, and has reinforced and perpetuated social and gender inequalities.<sup>6</sup> Consequently, some feminists, such as MacKinnon, have doubted whether tort law is a useful means by which to respond to gendered harms.<sup>7</sup> For others, however,

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<sup>4</sup> Weir says that ‘tort is what is in the tort books, and the only thing holding it together is the binding’; Tony Weir (2006) *An Introduction to Tort Law* (Oxford: Clarendon), p ix; cf others who argue that there is a principled basis underpinning tort law (although they disagree on what the basis is) – for example, Weinrib, *The Idea of Private Law* (corrective justice); Robert Stevens (2007) *Torts and Rights* (Oxford University Press) (rights).

<sup>5</sup> Martha Chamallas (1988) ‘The Architecture of Bias: Deep Structures in Tort Law’, *University of Pennsylvania Law Review*, 146: 463.

<sup>6</sup> For an overview, see Joanne Conaghan (2003) ‘Tort Law and Feminist Critique’, *Current Legal Problems*, 56: 175; Martha Chamallas and Jennifer Wriggins (2010) *The Measure of Injury: Race, Gender and Tort Law* (New York: New York University Press).

<sup>7</sup> Catharine MacKinnon (1979) *Sexual Harassment of Working Women* (Yale, MA: Yale University Press), pp 164-174.

whether tort law can be ‘salvaged to good egalitarian effects’ despite its gendered and sexist underpinnings is a question worth asking and exploring.<sup>8</sup> Indeed, as Chamallas and Wriggins point out, ‘[n]ot all tort rules disadvantage women and racial minorities, and it is important to recognize that tort law has been a site for promoting equality as well as for perpetuating hierarchies’.<sup>9</sup> Moreover, exploring the ways in which tort law conceptualises, constructs and responds to the wrong and harms of rape, may provide a means by which to reflect on the criminal justice system’s failures, and to consider ways in which to provide a more just legal response (or responses) to rape. Therefore, this chapter will investigate the ways in which rape can be conceptualised as trespass to the person in tort law, the doctrinal similarities and differences between these torts and the crime of rape, and the extent to which they can value and protect women’s sexual autonomy. In so doing, it will provide support for Chamallas and Wriggins’ more positive view of the possibilities of tort law to respond to gendered harms, such as rape.

This chapter will begin by outlining the ways in which rape and women’s sexuality have been conceptualised and responded to through law since the emergence of the common law shortly after the Norman Conquest.<sup>10</sup> First, this historical perspective will illustrate the relationship between tort law, rape and social conceptions of the ‘core’ harm, as well as the gendered bias of tort law that feminists have carefully documented. Secondly, this brief history will outline the beginnings and separation of the modern criminal law and tort law, and the conceptualisation of rape as a particularly serious crime which has influenced procedural barriers that have prevented victim-survivors from initiating actions for compensation, and rendered conceptualising rape as a tort an oddity. Nevertheless, legal developments and changes in social understandings of rape mean that bringing a claim in trespass to the person for rape may now be a possibility for some victim-survivors.

Next, the chapter will explore the way in which rape takes shape within the doctrinal boundaries of the trespass to the person torts. It will do so by exploring the few civil claims for rape that have been made, but that have rarely been discussed. Similarly to the criminal law, these torts locate the ‘core’ harm of rape within the violation of an individual’s sexual

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<sup>8</sup> Conaghan, ‘Tort Law and Feminist Critique’, p 185.

<sup>9</sup> Chamallas and Wriggins, *The Measure of Injury*, p 1.

<sup>10</sup> On the emergence of the common law, see John H Baker (1990) *An Introduction to English Legal History* (3<sup>rd</sup> edn, London: Butterworths), p 14.

autonomy, and, likewise, consent and lack of consent draws the line between lawful and unlawful behaviour. Consequently, the trespass to the person torts may be subject to the critiques of consent that apply in relation to the crime of rape. In addition, rape myths which indicate when, where and with whom women consent to sex are likely to influence and shape the case process and outcome. Indeed, exploring the few civil claims for rape that have been litigated in the higher courts confirms this. However, there are a number of differences between the role of consent in relation to the crime of rape and the place and scope of consent in relation to the trespass to the person torts. In contrast to the crime of rape where the prosecution must prove lack of consent and lack of reasonable belief in consent,<sup>11</sup> it is argued here that the defendant must prove that the sexual intercourse was consensual as a defence to an action for trespass to the person, and that a reasonable belief in consent should not negate liability.<sup>12</sup> Consequently, the trespass to the person torts may place a high value on sexual autonomy. This highlights the possibility for victim-survivors to pursue a tort claim for compensation and the potential value in doing so, paving the way for the next chapter to evaluate the extent to which tort law can meet the five aspects of justice that are important to some victim-survivors.

## **7.2 HISTORICAL CONCEPTIONS: WOMEN'S SEXUALITY, RAPE AND 'CIVIL' CLAIMS FOR COMPENSATION**

Although the modern day conceptual distinctions between the criminal law and tort law are relatively recent,<sup>13</sup> for centuries (since Henry II's reign (1154-1189)) rape victim-survivors have been able to (at least in theory) seek a legal response to rape through different proceedings which can be viewed through contemporary eyes as 'civil' and 'criminal' law<sup>14</sup> (at least in the sense that in relation to the former the remedy was primarily a form of damages to the victim and in relation to the latter the response was loss

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<sup>11</sup> Sexual Offences Act 2003, section 1.

<sup>12</sup> See also, Godden, 'Claims in Tort for Rape', pp 163-167.

<sup>13</sup> Stroud Francis Charles Milsom (1981) *Historical Foundations of the Common Law* (2<sup>nd</sup> edn, London, Edinburgh, Dublin: Butterworths), pp 403-404.

<sup>14</sup> For the historical distinction between the 'criminal law' and 'tort law,' see Baker, *English Legal History*, pp 570-572. Prior to this, throughout the Anglo-Saxon period there was no such 'criminal law' and the state provided a means by which for individuals to resolve disputes 'privately', typically by a form of compensation for loss caused by the wrongdoer; Doak, *Victims' Rights, Human Rights and Criminal Justice*, p 2.



of life, limb or liberty of the wrongdoer, and/or forfeiture of property to the Crown).<sup>15</sup> Rape (howsoever conceptualised and defined at the time) was viewed as a serious wrong, which rendered it a felony. An action for a felony could either be brought by the Crown, or by the victim (by appeal of felony), for which the penalty for rape was death.<sup>16</sup> In addition, convicted felons were forced to forfeit their property to the Crown.<sup>17</sup> As an alternative to an action or appeal of felony, the victim could initiate a writ of trespass, which, if successful, would result in damages, and if it was a serious wrong also a fine to the King.<sup>18</sup> Rape, which was defined at common law as ‘the carnal knowledge of a woman forcibly against her will’,<sup>19</sup> could also constitute trespass *vi et armis* (with force and arms)<sup>20</sup> which encompassed various harms to and interferences with land, goods or persons, the ‘essence’ of which, Milsom explains, was ‘direct forcible injury’.<sup>21</sup> It seems that, historically, the differences between what are now categorised as criminal law and tort law did not differ on the basis of substantive wrongs or who initiated the action against the wrongdoer, and victims could make a choice as to how to proceed depending on whether they preferred vengeance or compensation.<sup>22</sup>

Nevertheless, there is typically no mention of ‘civil’ claims brought by rape victim-survivors before *W v Meah; D v Meah* in 1986, a successful action in trespass to the person – comprised of battery, assault and false imprisonment – which developed from trespass *vi*

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<sup>15</sup> Milsom, *Historical Foundations of the Common Law*, pp 404-405.

<sup>16</sup> Statute of Westminster 1285; although in practice it may be that capital punishment was not typically imposed, as Blackstone says castration or other forms of dismemberment were common: Wayne Morrison (ed)(2001) *Blackstone’s Commentaries on the Laws of England* (London, Sydney: Cavendish), Volume IV, p 211; hereafter *Blackstone’s Commentaries*). See also John B Post (1978) ‘Ravishment of Women and the Statutes of Westminster’, in John H Baker (ed) *Legal Records and the Historian* (London: Royal Historical Society), p 151.

<sup>17</sup> Baker, *English Legal History*, p 572.

<sup>18</sup> *Ibid*, p 71. Cases involving trespass were not limited to victims as royal officers could also initiate an ‘indictment of trespass’; David J Seipp (1996) ‘The Distinction between Crime and Tort in the Early Common Law’, *Boston University Law Review*, 76: 59, p 76.

<sup>19</sup> *Blackstone’s Commentaries*, Volume IV, p 210.

<sup>20</sup> See, for example, *Wellock v Constantine* (1863) 2 H & C 146; discussed below.

<sup>21</sup> Milsom, *Historical Foundations of the Common Law*, p 283.

<sup>22</sup> Seipp, ‘Crime and Tort in the Early Common Law’, pp 59-60, 84.

*et armis*.<sup>23</sup> But why are there not significantly more claims for compensation for rape, brought by victim-survivors, throughout the latter half of the Middle Ages and Modern Era? The forms of action clearly encompassed acts of rape as it was understood then – that is, as sex procured by force – which, while very narrow in comparison to contemporary definitions of rape<sup>24</sup> is unlikely to have prevented some trespass actions for rape. Rather, there are two other factors that may have been more significant in restricting claims for compensation for rape. One is procedural rules that developed to privilege the criminal law over tort law,<sup>25</sup> as their differences became clearer and more prominent over the centuries. As rape was (and is) understood as an offence against the public – a felony or crime – claims for damages for the harms suffered by the victim-survivor have been marginalised. In addition, procedural differences which developed and contribute to the distinctions between the modern criminal and civil justice systems – such as the burden on the claimant to pursue a civil case (in comparison to the state which has the burden of prosecution in a criminal case), the potentially high costs for claimants, the possibility that the wrongdoer will not have the financial means to pay damages if awarded, and potential difficulties in evidence gathering in a civil case (in comparison to an investigation in a criminal case) – also limit civil actions.<sup>26</sup> The second factor is women’s sexuality which was conceived of in property terms, the primary interest in which belonged to men, typically a father or husband. As such, the wrong was not based on whether or not the woman was forced into sex, but rather the harm was caused to men, and depended on whether sex occurred within or without marriage. First, the procedural problems will be illustrated by the merger doctrine, and then the way in which women’s sexuality was viewed and

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<sup>23</sup> The victim-survivors – whom Meah had imprisoned in their homes, raped and physically abused – sued only after Meah himself had won a civil suit for the imprisonment and consequential losses which followed his conviction for rape; *Meah v McCremer (No 1)* [1985] 1 All ER 367. He successfully argued that his intentional unlawful acts were committed as a consequence of a personality disorder which he suffered following a car accident caused by a negligent driver. It is no surprise that this case prompted W and D to bring a civil claim themselves.

<sup>24</sup> It was not until the 20<sup>th</sup> century that rape came to be described as sexual intercourse with a woman without her consent, and even then lack of consent was initially interpreted as being indicated by the presence of ‘force, fear or fraud’; Archbold (1973) *Criminal Pleading, Evidence and Practice* (38<sup>th</sup> edn), para 2871; referred to by Lord Hailsham and Lord Edmund-Davies in *DPP v Morgan*, pp 220 and 225 respectively.

<sup>25</sup> Dyson, ‘The Timing of Tortious and Criminal Actions’, p 86.

<sup>26</sup> For further discussion, see chapter 8, sections 8.5 and 8.6.2.

(re)constructed through tort law will be demonstrated by a discussion of the tort of seduction.

Initially, the merger doctrine deemed that there could be no writ of trespass for an act that constituted a felony (as the trespass 'merges' in the felony),<sup>27</sup> although by the 18<sup>th</sup> century it required victims to prosecute wrongdoers (or have the wrongdoer prosecuted by a relevant authority) for the wrong against the public before any 'civil' claim could be made.<sup>28</sup> For those who attempted a writ of trespass for a wrong that also constituted a felony in the absence of an appeal of or action for felony, there was the threat of prosecution for misprision of felony – that is, failing to inform authorities of a potential crime. In practice, however, misprision of felony cases were rare,<sup>29</sup> but courts chose to non-suit the writ of trespass instead. Indeed, this occurred in a case of rape. In *Wellock v Constantine*, a woman initiated a writ of trespass when the defendant had forced her to have sexual intercourse with him, and consequently she gave birth to a child. The court non-suited her case, deciding that if the plaintiff was raped then this was a felony which must be prosecuted before a trespass action could be brought. In a similar case, *Smith v Selwyn*,<sup>30</sup> the plaintiffs who were husband and wife attempted to avoid the merger rule by framing the rape as a misdemeanour, however the court held that the act was properly a felony and therefore the case must be prosecuted first.

Although women could, in theory, bring a civil action following a prosecution, prosecutions were burdensome so may not have been pursued.<sup>31</sup> In addition, if a prosecution was successful it was unlikely that damages could be claimed subsequently as until the Felony Act 1870 convicted offenders were required to forfeit their property to the Crown. Therefore, as rape was emphasised as a wrong against society and harmful to public morals, the harms that rape caused women were eclipsed and marginalised, and the practical possibilities of redress were minimised.<sup>32</sup>

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<sup>27</sup> See, for example, *Higgins v Butcher* (1607) 80 ER 61.

<sup>28</sup> See, *Dawkes v Coveleigh* (1652) 82 ER 765; *Crosby v Leng* (1810) 12 East 409; and *The Midland Insurance Co v Smith* (1881) 6 QBD 561; discussed in Dyson, 'The Timing of Tortious and Criminal Actions', pp 89-91.

<sup>29</sup> Dyson, *ibid*, p 109.

<sup>30</sup> [1914] 3 KB 98.

<sup>31</sup> Dyson, 'The Timing of Tortious and Criminal Actions', p 106.

<sup>32</sup> Lea VanderVelde (1996) 'The Legal Ways of Seduction', *Stanford Law Review*, 48: 817, p 847.

Although the merger rule did not develop until the 17<sup>th</sup> century, prior to this it nonetheless seems that rape victim-survivors did not bring actions in trespass. This may be partly due to conceptions of female sexuality and men's proprietary interests in women, which were damaged when she was raped by or had sex with a man who was not her husband. Since the Statute of Westminster 1285, a woman's father, husband or guardian was provided with the right to seek compensation from, or bring an appeal of felony against, a man who 'ravished' (that is, abducted) his daughter, wife or ward.<sup>33</sup> Later, actions for ravishment were replaced by the common law tort of seduction, which originated in the middle of the 17<sup>th</sup> century.<sup>34</sup> This tort allowed the master (or other guardian) to bring a claim for loss of services from his servant (or child or wife), and it was used, typically by a man, most commonly a father or husband, to bring a claim against a man who had seduced a woman, causing him to lose her services.<sup>35</sup> It was not, therefore, the woman who had been 'seduced' who had a claim for damages.<sup>36</sup> Initially, such cases were typically brought when pregnancy resulted from the 'seduction', however the loss of service requirement was relaxed,<sup>37</sup> and cases became less focused on economics and more focused on morals, social status and the wealth of the defendant.<sup>38</sup> Therefore, as Cornish *et al.* put it, seduction was 'an action *sui generis* to compensate parents for the corruption of their daughters, masquerading as an economic tort'.<sup>39</sup> So understood, Larson argues, '[l]ike the law of rape, the seduction tort developed as a means to enforce men's property interests in women's

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<sup>33</sup> Post, 'Ravishment of Women', pp 158-159.

<sup>34</sup> Baker, *English Legal History*, p 519.

<sup>35</sup> Michael BW Sinclair (1987) 'Seduction and the Myth of the Ideal Woman', *Law and Inequality: A Journal of Theory and Practice*, 5: 33, p 35.

<sup>36</sup> There were, however, three cases in Scotland in the early 20<sup>th</sup> century in which an action for seduction brought by a woman was successful; *Brown v Harvey* (1907) SC 588; *Murray v Fraser* (1916) SC 623; *Reid v Macfarlane* (1919) SC 518.

<sup>37</sup> See, for example, Lord Thankerton, *Brownlee v Macmillan* [1940] AC 802, p 809.

<sup>38</sup> Sinclair, 'Seduction', pp 37-39. And see, for example, *Tullidge v Wade* (1768) 3 Wils. KB 18; *Bennett v Allcott* (1787) 2 TR 166; *Irwin v Dearman* (1809) 11 East 23.

<sup>39</sup> William Cornish, Stuart Anderson, Raymond Cocks, Michael Lobban, Patrick Polden and Keith Smith (2010) *The Oxford History of the Laws of England, Volume XII 1820-1914: Private Law* (Oxford: Oxford University Press), p 1041.

bodies and sexuality'.<sup>40</sup> While the tort did not distinguish wrongdoing on the basis of forced or non-forced sexual intercourse, seduction nevertheless illustrates the extent to which the harms of rape for women have been concealed and distorted. For example, in *Smith v Selwyn* the court held that the rape victim-survivor had no claim in trespass as the act was a felony, however her husband could claim for seduction as the felony was not committed against him.<sup>41</sup> Although the tort of seduction was rarely used by the beginning of the 20<sup>th</sup> century, it was not abolished in England and Wales until 1970.<sup>42</sup>

### 7.2.1 Summary: Tort Law and Historical Conceptions of Women's Sexuality

This brief historical view has illustrated part of the gendered development of tort law, and the relationship between tort law and conceptions of the 'core' harm of rape. Restrictions on women claiming compensation for rape have not been due to a lack of a cause of action – it is clear that rape could constitute trespass *vi et armis* and later trespass to the person. As rape was (and is) conceived of as a particularly serious crime (or felony), the privileging of the criminal law, for example through the merger doctrine, contributed to preventing trespass actions being brought. However, while rape victim-survivors struggled to secure redress for the harms that they suffered, men created and were provided with the right to seek compensation when a woman over whom they had authority had sex with (or was raped by) a man out of wedlock. Consequently, the harms of rape for women were eclipsed and marginalised by views of rape as harmful to the public and damaging to men's authority, status and economic interests. Similarly to the current criminal justice response to rape, then, in theory there is a possible legal route to justice (howsoever conceived) through tort law, but in practice the path is hindered by procedural rules and societal assumptions as to (in)appropriate female sexual behaviour and ideas as to what constitutes 'ordinary' and lawful sex.

Where are we now? By the 20<sup>th</sup> century, women began accruing legal rights, for example, until the Married Women's Property Act 1882 married women could not sue and could not

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<sup>40</sup> Jane Larson (1993) 'Women Understand So Little, They Call My Good Nature Deceit: A Feminist Rethinking of Seduction', *Columbia Law Review*, 93: 374, p 382, and footnote 25.

<sup>41</sup> See also *Osborne v Gillett* (1873) LR 8 Ex. 88; *Appleby v Franklin* (1886) LR 17 QBD 93.

<sup>42</sup> Law Reform (Miscellaneous Provisions) Act 1970, section 5(b); Administration of Justice Act 1982, section 2(c)(ii).

be sued due to the common law doctrine of coverture which deemed that a married man and woman were one legal person, the woman's legal identity ceasing to exist.<sup>43</sup> The merger rule was abolished in its historical form when the distinction between a felony and a misdemeanour was removed in the Criminal Law Act 1967, section 1, and it was replaced by a less restrictive timing rule in *Jefferson v Betcha*,<sup>44</sup> which provides judges with the discretion to stay civil proceedings until a criminal case has been pursued or completed if it is in the interests of justice to do so. And conceptions of women's sexuality and understandings of rape have changed, with rape being seen as non-consensual sex and the 'core' harm of rape viewed as the violation of sexual autonomy. While trespass *vi et armis* was not utilised in practice to address rape, it nevertheless provided the basis for and put in place concepts which underpin the modern trespass to the person torts, which can encompass the wrong and 'core' harm of rape, understood as a violation of sexual autonomy. Claims in tort for rape, however, are nonetheless uncommon; but there is a small – and growing – body of case law in the UK, and a greater increase in such cases in other jurisdictions such as Canada and the US.<sup>45</sup> What will be examined in the following section is the way in which rape (by contemporary definitions) can be conceptualised as a trespass to the person. It will be argued that these torts provide the possibility of highly valuing women's sexual autonomy, due to the role and scope of consent in relation to trespass to the person, which differs from the role and scope of consent for the crime of rape. Moreover, this indicates that, despite its gendered history and development, there is the possibility to utilise tort law in ways which are more responsive to the harms that women suffer.

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<sup>43</sup> *Blackstone's Commentaries*, Volume 1, p 442. Of course, unmarried women or women whose husbands had been banished (and thus were 'dead' in law), for example, were considered 'femme sole' and could sue and be sued in tort; *Blackstone's Commentaries*, Volume 1, p 443.

<sup>44</sup> [1979] 2 All ER 1108; discussed in Dyson, 'The Timing of Tortious and Criminal Actions', p 101.

<sup>45</sup> For a discussion, see Feldthusen, 'The Civil Action for Sexual Battery'.

### 7.3 CONTEMPORARY APPLICATION: THE TRESPASS TO THE PERSON TORTS AND THE CRIME OF RAPE

In the first of the more recent tort suits for acts that could amount to rape in England and Wales,<sup>46</sup> *W v Meah; D v Meah*, it is stated that the claim was made out for 'intentional assault and battery'.<sup>47</sup> This is the only reference to the trespass to the person torts in the judgment; there is no discussion as to the way in which acts of rape constitute battery, assault and possibly false imprisonment. Perhaps it is because it has long been understood that acts of rape or sexual assault, such as an unwanted kiss, constitute trespass to the person in tort law<sup>48</sup> which protects against intentional interferences with a person's bodily and mental integrity, and liberty. This trend has continued in subsequent civil claims for rape in which there is typically no mention of the trespass to the person torts, with the most notable reference being a parenthetical one in *Griffiths v Williams*.<sup>49</sup> Nevertheless, it is important to outline the conceptual underpinnings of the trespass to the person torts to demonstrate the extent to which these torts can provide recognition of and redress for the harms of rape.

Trespass to the person is comprised of three torts, which are battery, assault and false imprisonment. For each tort, the defendant must act intentionally (in the wilful sense) and

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<sup>46</sup> There may be civil claims brought for rape that have been settled out of court, or were not litigated in the higher courts and therefore no case report is readily available. Discussing every such case involving rape is not necessary for the purpose of this thesis. Although the sense of justice may differ slightly in a case that is settled out of court in comparison to a case in which there is a civil trial, there are no reports or literature on settled civil claims for rape which are available to analyse. As such, the focus of chapters 7 and 8 is on civil claims for rape which have been litigated in the higher courts.

<sup>47</sup> *W v Meah; D v Meah*, Woolf J, p 936.

<sup>48</sup> For example, see Lord Denning, *R v Chief Constable of Devon and Cornwall, ex parte CEGB*, p 471; referring to Heuston, *Salmond on Torts*, p 120.

<sup>49</sup> (1995) *The Times*, 24 November 1995, Rose LJ. (This case is discussed further below, section 7.3.3.) For *Griffiths v Williams*, *Parrington v Marriott* (1999) Unreported, Court of Appeal, 19 February 1999, and *Miles v Cain* (1989) *The Times*, 15 December 1989 – all civil claims for rape that will be discussed throughout chapters 7 and 8 – the case reports do not include page or paragraph numbers. Therefore, there will be no references to specific page or paragraph numbers for these cases.

either intend the consequences of her/his action, or, it seems, be subjectively reckless as to the consequences occurring.<sup>50</sup> The torts are actionable *per se*, which means without proof of damage, because they are rights based torts – so the mere fact of the defendant’s action breaching the claimant’s right is enough to found a claim – protecting against interferences with a person’s right to bodily and mental integrity, and freedom of movement. As rape is a violation of an individual’s sexual autonomy, a particular dimension of bodily and mental integrity, the trespass to the person torts can easily encompass such acts.

### 7.3.1 Battery

Battery is the tort which bears the most obvious similarities to the crime of rape. Battery protects individuals from having their right to bodily integrity violated, and is committed when a person intentionally contacts another, directly and immediately,<sup>51</sup> in a way that is unlawful.<sup>52</sup> It is clear that the wrongdoer must have undertaken an intentional positive action,<sup>53</sup> but it is unclear as to whether s/he must have intended the consequence (the contact with the claimant) and it seems that subjective recklessness will suffice – that is, where the particular wrongdoer knew that the consequences were likely to occur as a result of her/his wilful actions.<sup>54</sup> In relation to acts that could constitute the crime of rape, this is not an issue as the wrongdoer will have intended to contact the claimant, and could not have done so negligently. It is also clear that the penile penetration of a person’s vagina, anus or mouth is direct and immediate for the purposes of the tort of battery.

One key point is that the contact must be unlawful, which is commonly interpreted to mean contact which is beyond what can be expected in ordinary life – for example, pushing on the London underground and touching someone’s arm to get their attention at a loud party are inevitable occurrences in social life.<sup>55</sup> Contact which goes beyond what can be expected in the course of everyday life can only be lawful if it is consensual, or if the

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<sup>50</sup> *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312.

<sup>51</sup> *Scott v Shepherd* (1773) 95 ER 1124.

<sup>52</sup> *Collins v Wilcock* [1984] 1 WLR 1172.

<sup>53</sup> *Gibbon v Pepper* (1965) 1 Ld Raym 38; *Iqbal v Prison Officers Association*.

<sup>54</sup> *Iqbal v Prison Officers Association*.

<sup>55</sup> *Collins v Wilcock*, Goff LJ, p 1177.



wrongdoer has lawful authority to interfere with the claimant's bodily integrity.<sup>56</sup> As Lord Goff explains in *Re F*, a surgeon who operates on a patient commits a battery unless the patient consents, and it is only with consent that the conduct is deemed socially acceptable.<sup>57</sup> This example also demonstrates that the contact need not be 'hostile',<sup>58</sup> and the wrongdoer need not intend to harm the claimant.<sup>59</sup> Sexual intercourse is intentional contact, is outside that which is acceptable as a part of everyday life and is rendered lawful only when it is consensual. In the absence of consent,<sup>60</sup> then, it constitutes both the tort of battery and the crime of rape.

### 7.3.2 Assault

When a person has suffered a battery in the form of rape, it is likely that they will have also suffered an assault. The tort of assault protects individuals' right to mental integrity, and is defined as intentionally causing a person to reasonably<sup>61</sup> apprehend immediate unlawful force (a battery), and is actionable regardless of whether such force occurs.<sup>62</sup> As such, an assault can occur in the absence of a battery if the claimant is put in (reasonable) fear of immediate and unwanted sexual contact. However, as Conaghan and Mansell point out, ideas as to when it is reasonable for a woman to fear such contact may demonstrate a gender bias in favour of men's perceptions of women's willingness to receive sexual compliments and contact.<sup>63</sup> Nonetheless, in instances where an act of rape is the subject matter this is unlikely to be an issue and it can be argued that the claimant was subject to an assault before the battery, reasonably apprehending the subsequent acts of the

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<sup>56</sup> For example, in the case of a police officer arresting a citizen.

<sup>57</sup> *Re F* [1989] 2 AC 1, para 73.

<sup>58</sup> Although 'hostility' was thought necessary until more recent years: Lord Holt CJ in *Cole v Turner* (1704) 90 ER 958 said, 'the least touching of another in anger is a battery'; and up until *Re F* in 1989 when Lord Goff confirmed that hostility was not an essential element of battery, there remained judicial support for this notion – see *Wilson v Pringle* (1987) QB 237.

<sup>59</sup> *Williams v Humphrey* (1975) *The Times*, 20 February 1975.

<sup>60</sup> There is some debate as to whether consent is a defence, for the defendant to prove, or whether lack of consent is a constituent of the tort, with the burden of proof on the claimant. See further below, section 7.4.2.

<sup>61</sup> *Stephen v Myers* [1830] 172 ER 735.

<sup>62</sup> *Collins v Wilcock*, Goff LJ, p 1177.

<sup>63</sup> Conaghan and Mansell, *The Wrongs of Tort*, p 170.

wrongdoer. While this may technically be the case, in the small number of reported civil claims for rape, the term assault has been used to refer to rape as a form of sexual assault, rather than to mean the trespass to the person tort.

### 7.3.3 False Imprisonment

There may also be a claim in the third trespass to the person tort, false imprisonment, where there has been rape. False imprisonment protects individuals' freedom from interference with their liberty of movement, and is defined as the intentional and complete restriction of a person's movement from a particular place.<sup>64</sup> False imprisonment occurs where a person has been confined (unlawfully) to a particular location, and therefore a claim could be made where such an act occurs, for example, a person has been tied up, in addition to a rape. This can be seen in *Lawson v Glaves-Smith, Executor for the Estate of Dawes*<sup>65</sup> in which a woman was imprisoned in the wrongdoer's hotels and (*inter alia*) raped, and thus had a claim for false imprisonment in addition to battery and assault.

However, it can be argued that while rape is 'primarily' a battery, every instance of rape involves the complete restriction of the victim-survivor's movement.<sup>66</sup> Indeed, this interpretation may have found footing in *Griffiths v Williams* in which a woman successfully pursued a civil claim in trespass to the person for rape and harassment perpetrated by her former landlord and employer. From the facts, as explained by Rose LJ, it does not seem as though there was any additional means by which the claimant's movement was restricted and there is no reference to false imprisonment, but the case was heard by a jury which is unusual for a civil case. As there is a qualified right to a jury trial for false imprisonment,<sup>67</sup> Weir deduces that the rape must have been understood to constitute this tort.<sup>68</sup> The relationship between acts of rape and false imprisonment is not simply academic: whether there is false imprisonment will have a bearing on the level of damages awarded, though of

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<sup>64</sup> *Collins v Wilcock*, Goff LJ, p 1177.

<sup>65</sup> [2006] EWHC 2865.

<sup>66</sup> WVH Rogers (2006) *Winfield and Jolowicz on Tort* (17<sup>th</sup> edn, London: Sweet and Maxwell), p 102.

<sup>67</sup> Supreme Court Act 1981, section 69(1).

<sup>68</sup> Tony Weir (2004) *A Casebook on Tort* (London: Sweet and Maxwell), p 339. However, in exceptional cases the court can exercise the discretion conferred by the Supreme Court Act 1981, section 69(3), and order a jury trial. This could have been the case in *Griffiths v Williams*.

course it will depend on the length of time that the claimant was imprisoned. It is also significant as it contributes to conceptualising the wrong and harm done to the claimant, with false imprisonment representing and remedying the loss of liberty of movement.

#### **7.4 CONSENT, RAPE MYTHS, AND THE TRESPASS TO THE PERSON TORTS**

It is clear that rape can constitute trespass to the person in tort law. An essential point to make, though, is that where the claimant has consented to the wrongdoer's act then this renders the act lawful and there is no claim.<sup>69</sup> Similarly to the criminal law on rape, therefore, consent or lack of consent draws the line between lawful sexual intercourse and trespass to the person.<sup>70</sup> Consequently, rape myths which indicate when, where and with whom women consent to sex may be drawn on and influence civil claims for rape, as is often the case in the criminal justice system. Nevertheless, there are a number of differences between the role of consent in the criminal law on rape and the place of consent in relation to the trespass to the person torts. First, in the criminal law, the burden is on the prosecution to prove that the complainant did not consent and that the defendant held no reasonable belief in consent, whereas for the trespass to the person torts consent is typically considered to be a defence for the defendant to prove, although there is some doubt on this point.<sup>71</sup> Secondly, where the complainant did not consent there is no crime of rape if it is decided that the defendant reasonably believed that the sex was consensual,<sup>72</sup> however, in relation to the trespass to the person torts it is debated as to whether a reasonable belief in consent will exonerate the defendant, or whether only actual consent will suffice in this regard.<sup>73</sup> In Keren-Paz and Levenkron's view, the weight of the case law in England and Wales points in the direction of liability for trespass to the person, regardless of a defendant's reasonable belief in consent.<sup>74</sup> Moreover, there are persuasive academic arguments to support this position.<sup>75</sup>

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<sup>69</sup> There is a debate as to whether consent is a defence or lack of consent is a constituent of the trespass to the person torts. This is discussed below, section 7.4.2 and it is argued that it should be conceived of as a defence.

<sup>70</sup> Sexual Offences Act 2003, sections 1(1)(a),(b).

<sup>71</sup> *Freeman v Home Office (No 2)* [1984] QB 524.

<sup>72</sup> Sexual Offences Act 2003, section 1(1)(c).

<sup>73</sup> Tsachi Keren-Paz and Nomi Levenkron (2009) 'Clients' Strict Liability Towards Victims of Sex Trafficking', *Legal Studies*, 29: 438.

<sup>74</sup> *Ibid*, pp 454-455.

Given the lack of clarity as to the role of consent in the context of the trespass to the person torts, it is perhaps surprising that there has been no significant discussion as to the correct interpretation and application of consent in any of the civil claims brought for rape. Nevertheless, it is clear that consent and lack of consent has shaped and determined the process and outcome of the cases that have been brought, and consent will now be explored in the context of the case law. To begin, the ways in which gender and sexual stereotypes may influence a civil claim for rape will be discussed by drawing on a few well known rape myths.<sup>76</sup> Following this, it will be argued that consent should be a defence to trespass to the person, and that the defendant's belief in consent, even if reasonable, should not negate liability for battery, assault or false imprisonment. Constructing the role of consent in this way demonstrates that women's sexual autonomy is highly valued, placing a higher burden on sexual partners to ensure that sex is consensual, and providing a greater chance of a remedy for victim-survivors when this is not the case.

#### **7.4.1 A Few Well-known Rape Myths ...**

##### *7.4.1(a) 'Unchaste' Woman are Unreliable Witnesses*

In *Griffiths v Williams*, the claimant brought a civil claim after she had been raped by her landlord and former manager. During the trial, two witnesses for the defendant alleged that the claimant was a prostitute. In addition, defence counsel pointed out that the claimant had reported a sexual assault to the police 17 years earlier when she was age 16, which led to a prosecution. The trial judge admitted that these examples were 'principally directed at blackening the claimant's character'. Although neither example indicates that the claimant was untrustworthy, s/he must have thought it admissible and therefore relevant.

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<sup>75</sup> For example, Keren-Paz and Levenkron, *ibid*; Elizabeth Adjin-Tetty (2006) 'Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery', *University of British Columbia Law Review* 39: 3.

<sup>76</sup> Rape myths have been discussed previously in relation to consent in the context of the crime of rape, see chapter 4, section 4.2.2. Whether rape myths are equally prevalent in the civil and criminal courts cannot readily be assessed from the few tort claims concerning rape which have been litigated in the higher courts; however, the likely prevalence and influence of rape myths in civil in comparison to criminal trials is discussed in chapter 7, section 7.4.5, and in chapter 8, section 8.4.

#### 7.4.1(b) *Women who Consent to Sex with A are Likely to Consent to Sex with B*

*Lawson v Glaves-Smith, Executor for the Estate of Dawes* is another civil case in which a victim-survivor sought compensation for the harms of rape. Lawson had visited the Island of Alderney to meet Dawes who had, through a mutual friend, invited her to discuss an employment opportunity. Once there, however, it quickly became apparent that no such vacancy existed and Dawes imprisoned Lawson in his properties, forced her to consume intoxicating substances, and sexually assaulted and raped her a number of times. From Eady J's judgment, it is clear that counsel for the defence drew on rape myths to bolster his argument. For example, Mr Kelsey-Fry QC called Lawson's boyfriend at the time of the incidents to give evidence that she had a cocaine habit, was sexually 'adventurous', and enjoyed going to fetish clubs.<sup>77</sup> Eady J believed that this evidence was supposed to imply that because Lawson had taken drugs before, was sexually active and consented to sex in what could be perceived as unusual environments she would have consented to sex with Dawes under these similar circumstances.<sup>78</sup>

#### 7.4.1(c) *Many Women Falsely Claim that they have been Raped*

With consent and lack of consent the dividing line between lawful and unlawful sexual intercourse, Hale's statement that rape is 'an accusation easily to be made and hard to be proved' is a belief that continues to be widely held. Indeed, in the civil claim for rape, *Parrington v Marriott*, Mummery LJ explained that:

A judge sitting alone trying a civil claim of this kind has a difficult and delicate task. The plaintiff and the defendant are the only people in the whole world who know for certain what happened. It is a case of the plaintiff's word against the defendant's word.

Consequently, it is often thought that there are many false allegations for rape.<sup>79</sup> This myth was drawn upon by Mr Kelsey-Fry QC in *Lawson v Glaves-Smith, Executor for the Estate of Dawes* to argue that Lawson consented to all that went on at Alderney but was bringing a

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<sup>77</sup> *Lawson v Glaves-Smith, Executor for the Estate of Dawes*, paras 92 and 79.

<sup>78</sup> *Ibid*, para 94.

<sup>79</sup> Typically it has been thought (mistakenly) that women may make a false allegation to protect their reputation, to hide an affair, or because they feel guilty and ashamed after a 'mistake'; Temkin, *Rape and the Legal Process*, p 5.

civil claim for rape falsely for financial gain.<sup>80</sup> To support this view, it was emphasised that Lawson had sold her story to the Mail on Sunday for £16,000 within a week of Dawes' death.<sup>81</sup> Appealing to these myths demonstrates that defence counsel thought that they may be believed, which perpetuates the power of these myths. On the one hand, it could be argued that as Eady J ultimately did not place as much weight on the defendant's case as he did on the claimant's story that this undermines the strength of these myths. On the other hand, Eady J did not challenge the myths themselves: he did not point out that the claimant's sexual history has no bearing on her credibility or whether or not she consented to sex with the defendant on this particular occasion, nor did he point out that there is no evidence to suggest that there are more false allegations for rape than any other crime.<sup>82</sup>

#### 7.4.1(d) *Visible Distress and Emotional Upset Indicates that Sex was Non-consensual*

In *Parrington v Marriott*, a woman brought a civil claim after she had been raped and sexually harassed by her former manager. Mummery LJ considered the case to hinge on the credibility of the defendant and claimant. The trial judge had summarised the defendant saying:

Throughout this case his evidence and his recall was too perfect, too precise and too glib. He stuck to his version in the witness statement as though it was a script that had been learned by him.

The trial judge considered the claimant to be more believable:

I am absolutely certain from the body language that I saw in the witness box, and from the tone and manner in which she gave her evidence and the extremes of upset into which she dissolved from time to time, that this was not a woman telling untruths to the court.

Mummery LJ accepted the trial judge's assessment. However, the claimant seems to fulfil the stereotype of the rape victim-survivor – she was distressed, upset and traumatised. What if she had not been in floods of tears and had recalled the rapes without emotion? Similarly, in *Lawson v Glaves-Smith, Executor for the Estate of Dawes*, Eady J highlighted the fact that before her experience at Alderney Lawson had a successful hairdressing business which was 'flourishing' from her 'flair and experience', whereas afterwards she underwent

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<sup>80</sup> *Lawson v Glaves-Smith, Executor for the Estate of Dawes*, para 4.

<sup>81</sup> Published on 28 March 1999 under the headline 'I was Raped and Held Prisoner for Four Days by the "Man in Black"'.

<sup>82</sup> Temkin, *Rape and the Legal Process*, p 5; with reference to Gerry Chambers and Ann Millar (1983) *Investigating Sexual Assault* (Edinburgh: Scottish Office Central Research Unit), p 86.

a 'personality change' and was 'withdrawn and lacked confidence'.<sup>83</sup> Eady J did not, at this point, draw on this evidence in assessing the level of damages, but rather used this illustration as evidence that Lawson could not have consented to sexual relations with Dawes. Consequently, victim-survivors' reactions are relied upon to determine whether or not the sex with the defendant was consensual, which emphasises and potentially reinforces a particular response to rape, which contrasts to the empirical research which suggests that victim-survivors may react in different ways.<sup>84</sup>

These case examples illustrate the ways in which rape myths have been invoked and may be influential in civil claims for rape. And yet, the claimants in all four of these cases were successful. On the one hand, it could be argued that the fact the claimants were successful illustrates the lack of weight given to rape myths by the judges in these cases, perhaps undercutting and disrupting them. On the other hand, it is nevertheless problematic that such myths are woven into the narratives of civil cases, with similar sexual scripts being written in the civil law as those that play out in the criminal law. Nevertheless, there are differences between the role of consent in the criminal law and the place of consent in relation to the trespass to the person torts, which could limit the extent to which rape myths may influence a civil claim for rape.

#### **7.4.2 Is Consent a Defence or is Lack of Consent a Constituent of Trespass to the Person?**<sup>85</sup>

In the context of the trespass to the person torts, consent is typically categorised as a defence, and therefore the burden is on the defendant to prove that the claimant consented to the conduct.<sup>86</sup> However, it is possible to view lack of consent as a constituent of these torts, as it is this fact which renders the defendant's conduct unlawful, which then places the burden of proof in this regard on the claimant.<sup>87</sup> There is no direct authority on this point in the UK; however, this issue was dealt with in the context of sexual assault by

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<sup>83</sup> *Lawson v Glaves-Smith, Executor for the Estate of Dawes*, para 28.

<sup>84</sup> See chapter 3, section 3.3.2.

<sup>85</sup> This is discussed in Godden, 'Claims in Tort for Rape', pp 167-168.

<sup>86</sup> *Ashley v Chief Constable of Sussex* [2008] 1 AC 962.

<sup>87</sup> *Freeman v Home Office (No 2)*.

the Supreme Court of Canada in *Non-Marine Underwriters, Lloyd's of London v Scalera*,<sup>88</sup> in which it was held that consent is a defence to battery. Justice McLachlin (for the majority) explained that where a person intentionally interferes with the body of another they have, *prima facie*, violated her/his bodily integrity and autonomy. If the claimant must prove that s/he did not consent to the contact then consent is impliedly presumed, which undermines individuals' right to bodily integrity and autonomy.<sup>89</sup> In the context of sexual intercourse and rape this would be particularly problematic, as it may convey the message that women's consent can be assumed. Indeed, as Justice Iacobucci (in the minority) explained: the burden should be on the claimant to prove lack of consent because:

sexual activity by itself is not inherently harmful. Without denying the seriousness and frequency of sexual assault, the simple fact is that sexual activity—unlike being punched, stabbed, or shot—is usually consensual.<sup>90</sup>

Justice McLachlin's approach was approved of by Sir Anthony Clarke MR in *Ashley v Chief Constable of Sussex* in the Court of Appeal, opining that it should not be for the claimant to prove lack of consent, which, he said, did not reflect the legal position of many Commonwealth cases.<sup>91</sup> In *Ashley*, however, the issue concerned self-defence, and while the Court of Appeal held that the defendant must prove that s/he acted in self-defence,<sup>92</sup> Sir Anthony Clarke MR considered the point in relation to consent formally 'open to debate'.<sup>93</sup>

In the reported civil claims that have been brought for rape to date, it is unclear as to whether the claimant has been required to prove lack of consent or whether consent has operated as a defence. In future cases, it is hoped that it will be clarified that the defendant must prove that the claimant did consent to the sexual intercourse which would better

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<sup>88</sup> [2000] 1 SCR 551.

<sup>89</sup> *Ibid*, para 22.

<sup>90</sup> *Ibid*, para 105. For an argument as to the 'inherently harmful' nature of sexual intercourse, see Jonathan Herring and Michelle M Dempsey (2010) 'Rethinking the Criminal Law's Response to Sexual Penetration', in McGlynn and Munro (eds) *Rethinking Rape Law*.

<sup>91</sup> *Ashley v Chief Constable of Sussex* [2006] EWCA Civ 1085 (CA), para 31; with reference to Andrew Grubb, Judy Laing and Jean McHale (2004) *Principles of Medical Law* (3<sup>rd</sup> edn, Oxford University Press), 3.09.

<sup>92</sup> This decision was accepted by the defendants and it was not considered on appeal to the House of Lords.

<sup>93</sup> *Ashley* (CA), para 31.



protect women's sexual autonomy.<sup>94</sup> In addition, this has the practical effect of easing the claimant's evidential burden, and increases the potential of tort law to provide a remedy for the harms of rape.

### 7.4.3 What Constitutes Consent?<sup>95</sup>

In addition to criticising myths and assumptions which influence interpretations as to whether or not sex was consensual in a given instance, many feminists are critical of the concept of consent.<sup>96</sup> For instance, some, such as Munro, have argued that consent is a necessary but insufficient means by which to render sexual relations lawful and something more is required (for instance, mutuality, agreement or 'wantedness' of sexual relations).<sup>97</sup> However, the approach taken to consent in this respect is the same in the criminal law and tort law, with consent being sufficient to distinguish between lawful and unlawful sexual contact. Similarly to the criminal law, in tort law consent must be given 'freely' by a person with the capacity to make a choice.<sup>98</sup> Consequently, the trespass to the person torts are subject to the critiques of consent that have been made in relation to the crime of rape, such as MacKinnon's argument that the concept cannot account for the way in which women's choices are obscured and limited by structural gender inequalities which eroticise male dominance and female submission, rendering it difficult to determine when women have made a choice 'freely'.<sup>99</sup>

How, then, have the courts approached the question of what constitutes a 'free' choice in relation to trespass to the person?<sup>100</sup> In *Chatterton v Gerson* the court held that for consent

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<sup>94</sup> Godden, 'Claims in Tort for Rape', p 168.

<sup>95</sup> This is discussed in Godden, *ibid*, pp 167-168.

<sup>96</sup> See the comments on this made in the context of the criminal law in chapter 4, section 4.2.2.

<sup>97</sup> Munro, 'Constructing Consent'; see also Chamallas, 'Consent, Equality, and the Legal Control of Sexual Conduct'; Anderson, 'Negotiating Sex'.

<sup>98</sup> Compare the Sexual Offences Act 2003, section 74; with similar points made in relation to tort law by Scott LJ in *Bowater v Rowley Regis Corporation* [1944] KB 476, p 479.

<sup>99</sup> MacKinnon, *Toward a Feminist Theory of the State*, p 174.

<sup>100</sup> In the Sexual Offences Act 2003, sections 75 and 76, are sets of circumstances which raise an evidential or conclusive presumption as to the absence of consent, and absence of reasonable belief in consent, unless (in the case of the evidential presumptions) sufficient evidence is adduced which raises an issue as to consent or reasonable belief in consent, in which case the prosecution must

to be 'real' the claimant must understand the broad nature of the act, but her/his consent does not have to be 'informed'.<sup>101</sup> In relation to the circumstances that vitiate consent, historically the courts have taken a narrow approach so that only fraud or coercion would invalidate the apparent consent of the claimant.<sup>102</sup> However, in *Freeman v Home Office (No 2)* the Court of Appeal took the view that the hierarchical context and power imbalances should be taken into account in considering whether or not a prisoner had a free choice to consent or refuse consent to medical treatment.<sup>103</sup> This point has not been mentioned in any of the civil claims for rape litigated in the higher courts, despite the fact that there are formally recognised positions of trust and power in a number of the cases: in *Parrington v Marriott* the defendant was the claimant's manager; in *Griffiths v Williams* the defendant was the claimant's landlord and former manager; in *Miles v Cain* the claimant was the patient of the defendant who was a physiotherapist. That these unequal power relations has not been considered in civil claims for rape exemplifies a failure of the courts to recognise the ways in which power imbalances can limit and shape individuals' choices, and which may, in some cases, 'render appeals to "free" choice meaningless'.<sup>104</sup> Consequently, there are issues with the way in which the concept of consent is interpreted in the civil law that are similar to the issues that arise in the criminal law. However, it is of symbolic and practical significance that the burden of proving consent is (or should be) on the defendant, which therefore means that the case starts from the point that the sex was not consensual.

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prove lack of consent. First, these presumptions are based on the common law, and, secondly, in relation to the trespass to the person torts consent is a defence – or at least, it is argued above that it should be – and the starting point is that consent is absent, so the lack of the presumptions will not make a difference in a civil claim for rape. (For further details of the presumptions, see chapter 4, section 4.2.2.)

<sup>101</sup> [1981] QB 432. For a similar point in relation to the crime of rape, see *R v Dica* [2004] EWCA Crim 1103; although if injury (for example contraction of HIV) results this does not preclude a conviction for assault occasioning actual bodily harm or grievous bodily harm under the Offences Against the Person Act 1861, sections 18 and 20; see *Konzani* [2005] 2 Cr App R 14. Similarly, in the civil law, when a person suffers harm as a result of an act to which they did not give *informed* consent then they may have a claim in negligence; *Chatterton v Gerson*.

<sup>102</sup> *Latter v Braddell* [1880] 50 LJQB 448.

<sup>103</sup> Nevertheless, the court held that in this particular instance the claimant had consented to the medical intervention.

<sup>104</sup> Godden, 'Tort Claims for Rape', p 168.

#### 7.4.4 Does or Should a Reasonable Belief in Consent Negate Liability in Trespass to the Person?

There is the possibility that only a claimant's actual consent will suffice to raise the defence of consent. This contrasts to the criminal law on rape as there is no crime if the accused held a reasonable belief in the complainant's consent, even if it is accepted that the complainant did not subjectively consent (and therefore, from her perspective, experienced a violation of her sexual autonomy). Where a woman may not have consented to sexual intercourse, it is nevertheless often viewed as reasonable to believe she was consenting, for example because she 'led the wrongdoer on' or 'did not say no clearly enough'.<sup>105</sup> Victim-survivors are, therefore, often blamed for rape and wrongdoers' responsibility for rape is reduced. There is some debate as to whether reasonable belief in consent (or a reasonable mistake more generally) has a role to play in the context of the trespass to the person torts, which will be the focus of the discussion here.<sup>106</sup> It will be argued that a reasonable belief in consent should not be a defence as this will better protect women's sexual autonomy, with violations more likely to be remedied in the civil law, and that this is doctrinally possible.<sup>107</sup>

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<sup>105</sup> Amnesty International UK, *Sexual Assault Research Summary Report*.

<sup>106</sup> It is also typically thought that 'apparent consent' – where the claimant's actions give the 'objective appearance' of consent – negates the defendant's liability (*O'Brien v Cunard Steamship Co.* (1891) 154 Mass. 272), which differs from a reasonable belief in consent which can be deduced from all the circumstances. In the majority of rape cases, apparent consent will be subsumed within questions of actual consent: if consent is a defence for the defendant to prove, he must give reasons which indicate that the claimant subjectively consented – reasons which must be apparent to someone other than the claimant; Bruce Chapman (2007) 'Allocating the Risk of Subjectivity: Intention, Consent and Insurance', *University of Toronto Law Journal*, 57: 315, p 321. Apparent consent is, therefore, most likely to be an issue in cases in which the claimant is under duress or control of a third party and therefore does not consent to sex with the defendant, but nevertheless (supposedly) portrays that the sex is consensual to the defendant who has no knowledge of the third party, for example in the context of sex trafficking (for example, see Keren-Paz and Levenkron, 'Clients' Strict Liability Towards Victims of Sex Trafficking').

<sup>107</sup> See this also argued in Godden, 'Claims in Tort for Rape', pp 164-167.

Many tort law scholars have stated that a 'mistake is no defence to intentional torts',<sup>108</sup> which would mean that a reasonable belief in the claimant's consent to sex would not be a defence to trespass to the person. However, this position may have changed since *Ashley* so that now a reasonable mistake as to the claimant's consent could absolve the defendant of responsibility. In *Ashley* a police officer mistakenly believed that he needed to act in self-defence and consequently shot and killed the son and brother of the claimants. Their claim in battery was dismissed on the grounds that an honest and reasonable belief in the need for self-defence would suffice for the defence. Although the case concerned self-defence, Lord Carswell thought that a reasonable mistake would negate liability for all the trespass to the person torts, but Lord Scott opined that in relation to consent only actual consent will raise the defence.<sup>109</sup> Lords Rodger and Neuberger abstained from giving opinion on this issue and Lord Bingham made no comment,<sup>110</sup> while Lords Scott and Neuberger considered that the point with regards to consent (and other defences) remained open.<sup>111</sup> Although *Ashley* is, therefore, not incontrovertible authority for the law relating to a mistake as to consent, it may be thought that the role of mistake should be the same for all the trespass to the person torts. Indeed, Lunney and Oliphant say that they can see no reason why self-defence should be the only defence to trespass to the person for which a reasonable mistake will suffice.<sup>112</sup> However, others do see reasons why a reasonable mistake should suffice to raise self-defence but not the other defences to trespass to the person, such as consent.

In relation to self-defence, Fleming argues that a reasonable mistake should suffice for the defence. This is because, he says, 'mistake is privileged when it appears necessary to act quickly in protection of a right, as to the existence of which the defendant is not

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<sup>108</sup> John Murphy (2003) *Street on Torts* (11<sup>th</sup> edn, London: LexisNexis), p 85; Anthony M Dugdale and Michael A Jones (2006) *Clerk and Lindsell on Torts* (19<sup>th</sup> edn, London: Sweet and Maxwell), p 881; Nicholas J McBride and Roderick Bagshaw (2005) *Tort Law* (2<sup>nd</sup> edn, London: Longman), p 248; John G Fleming (1985) *An Introduction to the Law of Torts* (Oxford: Clarendon Press), p 84. However, compare Rogers (2006) *Winfield and Jolowicz on Tort*, pp 25-26.

<sup>109</sup> *Ashley* (HL), paras 76 and 20.

<sup>110</sup> *Ibid*, paras 55, 90 and 3 respectively.

<sup>111</sup> *Ibid*, paras 20 and 55 respectively.

<sup>112</sup> Mark Lunney and Ken Oliphant (2010) *Tort Law: Texts and Materials* (4<sup>th</sup> edn, Oxford: Oxford University Press), p 103.

mistaken'.<sup>113</sup> Sir Anthony Clarke MR was of a similar opinion in the Court of Appeal in *Ashley*. He explained that usually a reasonable mistake will not negate liability because 'there may be no urgency of the kind which requires an immediate decision whereas, in a case like this, where a defendant may fear for his life and have only a split second to decide what to do, there is or may be urgency of the kind that requires an immediate decision'.<sup>114</sup> He referred to the United States Supreme Court in *New Orleans and Northeastern Railroad Co v Jopes*<sup>115</sup> which emphasised this imminence aspect which justified the mistake, providing it was a reasonable one to have made.<sup>116</sup> Adjin-Tettey similarly argues that where a defendant reasonably but mistakenly believes in the need to protect a right they do in fact have (for example, freedom from interference with one's physical integrity) and acts to protect this right, then her/his actions are excusable even if the s/he violates a right of the claimant's.<sup>117</sup> The defence of consent is quite different in this respect from self-defence, as where consent is raised the defendant will typically have intentionally contacted and interfered with the claimant's person but will not be acting in protection of a right that s/he has.<sup>118</sup> Consequently, Adjin-Tettey argues that a reasonable belief in consent is not justifiable in the same way as a reasonable belief in the need for self-defence is justifiable.<sup>119</sup>

In addition, there are strong reasons why a reasonable mistake should not, as a general rule, negate liability in trespass to the person, and particularly not in cases involving a claim for rape. Stevens argues that as the trespass to the person torts are rights based, and the defendant's actions are intentional, the defendant should be held responsible for 'exercising a liberty which [s/he] did not have with respect to the claimant'.<sup>120</sup> Furthermore, he says, '[w]e are responsible for our conscious choices and their consequences in a way which we are not where actions are unintentional'.<sup>121</sup> It was for

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<sup>113</sup> Fleming, *The Law of Torts*, p 86.

<sup>114</sup> *Ashley* (CA), para 78.

<sup>115</sup> (1891) 142 US 18, Brewer J, at paras 24-25.

<sup>116</sup> *Ashley* (CA), para 75.

<sup>117</sup> Adjin-Tettey, 'Protecting the Dignity and Autonomy of Women', p 20.

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

<sup>119</sup> *Ibid*, p 21.

<sup>120</sup> Stevens, *Torts and Rights*, p 101. See also Weir, *An Introduction to Tort Law*, p 108; Keren-Paz and Levenkron, 'Clients' Strict Liability Towards Victims of Sex Trafficking', pp 446-447.

<sup>121</sup> Stevens, *ibid*, p 102.

these reasons that Fordham commended the Court of Appeal's decision in *R v Governor of Brockhill Prison*<sup>122</sup> (approved in the House of Lords)<sup>123</sup> that a reasonable mistake as to the lawfulness of the claimant's imprisonment did not justify the defendant's intentional deprivation of the claimant's liberty.<sup>124</sup> This aligns with Lord Scott's view in *Ashley* that only actual consent will suffice to negate liability. He explains that:

every person is *prima facie* entitled not to be the object of physical harm intentionally inflicted by another. If consent to the infliction of the injury has not been given and cannot be implied why should it be a defence in a tort claim for the assailant to say that although his belief that his victim had consented was a mistaken one nonetheless it had been a reasonable one for him to make? Why, for civil law purposes, should not a person who proposes to make physical advances of a sexual nature to another be expected first to make sure that the advances will be welcome?<sup>125</sup>

Lord Scott says that the position differs from the criminal law where the focus is on punishing wrongdoers relative to their culpability, and a wrongdoer would not deserve to be punished where a reasonable mistake has been made.<sup>126</sup> However, in tort law the focus is on compensating those who have been harmed by another's wrongful conduct and consequently the claimant's and defendant's rights are more equally balanced,<sup>127</sup> and the claimant should not have to bear the loss due to another person's mistake, however reasonable.

Taking a different view, Smith says that there is no principle determining if or when a reasonable mistake will negate liability, but rather each case or set of cases should be

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<sup>122</sup> [1999] QB 1043.

<sup>123</sup> [2001] 2 AC 19.

<sup>124</sup> Margaret Fordham (2000) 'False Imprisonment in Good Faith', *Tort Law Review*, 8: 53; also approving of a similar decision by the New South Wales Court of Appeal in *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714. Cane similarly approves of the House of Lords' decision in *R v Governor of Brockhill Prison*'; Peter Cane (2001) 'The Temporal Element in Law', *Law Quarterly Review*, 117: 5.

<sup>125</sup> *Ashley* (HL), para 20.

<sup>126</sup> *Ibid*, paras 17-19. For many crimes an honest mistake is enough to lack the requisite *mens rea*, and this was one reason why it was controversial when the law in relation to rape was changed to require a reasonable belief in consent under the Sexual Offences Act 2003, section 1.

<sup>127</sup> *Ashley* (HL), paras 17-19.

decided on 'special reasons of policy or expediency'.<sup>128</sup> Taking the example of sexual intercourse, Adjin-Tettey argues that there are no policy reasons for exonerating a defendant because he held a reasonable belief in the claimant's consent. Further, she says, women's sexual autonomy is in need of significant protection as women's sexual choices are often limited and not respected due to rape myths and gender stereotypes, and therefore any appeal to policy would surely point in the direction of a narrower, not wider, defence of consent.<sup>129</sup>

In addition, Keren-Paz and Levenkron point out that it is well established that a reasonable mistake will not negate liability in trespass to land.<sup>130</sup> If this is so, they question, then it would be odd for a reasonable mistake as to a defence in trespass to the person to negate liability, because surely a person's right to bodily and mental integrity is a more important interest to protect than her/his rights over her/his land?<sup>131</sup> If a reasonable mistake does not negate liability in trespass to land, then it certainly should not alleviate a defendant of responsibility in trespass to the person, as a person's bodily and mental integrity is of greater value than her/his interests in land.<sup>132</sup>

#### **7.4.5 Summary: Consent, Rape Myths and Trespass to the Person**

It is doctrinally feasible and, moreover, justifiable to reject the notion that a reasonable belief in the claimant's consent negates liability in trespass to the person.<sup>133</sup> Although *Ashley* provides authority for the point that a reasonable mistake will suffice for self-defence, this defence is unique in the way that the defendant is acting in response to what s/he perceives is an immediate threat to a right that s/he has. In comparison, in the context of sexual intercourse the defendant intentionally contacts the claimant, interfering with her right to bodily integrity and autonomy. Where the claimant does not consent, the burden

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<sup>128</sup> Jeremiah Smith (1916-1917) 'Tort and Absolute Liability – Suggested Changes in Classification', *Harvard Law Review*, 30: 319.

<sup>129</sup> Adjin-Tettey, 'Protecting the Dignity and Autonomy of Women', p 30.

<sup>130</sup> Keren-Paz and Levenkron, 'Clients' Strict Liability Towards Victims of Sex Trafficking', p 446; with reference to *Basely v Clarkson* (1680) 83 ER 565. See also *Creswell v Sirl* [1948] 1 KB 241; *Cope v Sharpe (No 2)* [1912] 1 KB 496.

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

<sup>132</sup> *Ibid*, p 447.

<sup>133</sup> Godden, 'Claims in Tort for Rape', p 167.

of the mistake, no matter how reasonable, should be borne by the defendant. In addition, this approach may limit the relevance of rape myths which specifically go towards the belief of the defendant (in comparison to the criminal trial where such myths are typically drawn on to support arguments that the defendant lacked the *mens rea* for rape), and only those which are interpreted as indicating whether or not the victim-survivor consented to sex may be viewed as relevant. Consequently, the trespass to the person torts may provide better protection of women's sexual autonomy than the crime of rape, for which a reasonably held belief in consent will exonerate the defendant of responsibility.

### **7.5 JUSTICE FOR DEFENDANTS IN CIVIL CLAIMS FOR RAPE?**

As has been demonstrated, rape constitutes a civil as well as a criminal wrong, with tortious liability grounded in trespass to the person. Broadly speaking, these torts protect against interferences with an individual's rights to bodily and mental integrity, and liberty of movement. Consequently, the trespass to the person torts can protect against violations of women's sexual autonomy and provide redress for rape. Although technically such claims are for trespass to the person (typically battery) the courts have nevertheless used the language of the criminal law referring to 'rape' and 'sexual assault', even if it may be for the purpose of describing a particular form of battery – akin to saying 'punch' or 'kick'. While there are similarities between the substantive crime of rape and the tort of battery in that consent for both forms of wrongdoing divides lawful from unlawful behaviour, there are differences in the scope and role of consent which means that battery may be easier to prove than rape. First, consent is, or should be, a defence for the defendant to prove, which protects women's sexual autonomy by starting from the presumption that sexual intercourse is non-consensual. And secondly, it seems that a reasonable belief in consent does not – and in any event should not – exonerate a defendant of civil liability for trespass to the person. However, with a narrower defence of consent, and lower burden of proof in the civil law,<sup>134</sup> it could be suggested that bringing a claim in tort law for rape is a way in

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<sup>134</sup> In the criminal law the prosecution must prove the case beyond reasonable doubt, whereas in the civil law the claimant must prove the case on the balance of probabilities. However, there is some debate as to the appropriate standard in civil cases addressing acts which could also constitute a crime, although it has always been the case that the case does not need to be proved beyond reasonable doubt. See further the discussion in chapter 8, section 8.6.1.



which to hold individuals responsible for a sexual offence, without the strict rules and safeguards of the criminal law.

Most notably, it may be argued that civil claims for rape breach a defendant's right to a fair trial under Article 6(2) of the European Convention on Human Rights, which states that 'everyone charged with a criminal offence shall be presumed innocent until proven guilty', on the basis that although the defendant has not formally been 'charged with a criminal offence' the civil law is being used to find him 'guilty' of a crime. To determine what amounts to a 'charge of a criminal offence' what must be taken into account is the national law's classification of the offence or wrong, and either (or both) the nature of the offence or (and) the nature and degree of the severity of the penalties.<sup>135</sup> Given that a civil claim for rape would be classified and formally addressed as a civil wrong (the action being brought by the claimant and not the state, for example), and the consequences of a finding of liability would be damages, which are typically compensatory and not punitive or deterrent in nature, it is unlikely an argument as to a breach of Article 6(2) would succeed purely on the ground that the matter may also amount to the crime of rape.

However, the European Court of Human Rights (ECtHR) found a breach of Article 6(2) in *Y v Norway*<sup>136</sup> in which a national court had decided to acquit the applicant of homicide but find him liable for damages under the civil law for the same act. Nevertheless, the court pointed out differences between the civil law and the criminal law, for example, the former emphasises the payment of compensation to the person wrongly injured whereas the latter emphasises deterrence and punishment, and said that there was a *prima facie* exclusion of civil cases from the remit of Article 6(2), even if they contain acts which could also constitute crimes.<sup>137</sup> It was only on the facts of the particular case that there was a violation of the presumption of innocence as the national court had used language which doubted whether the outcome of the criminal proceedings was correct.<sup>138</sup> Moreover, the

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<sup>135</sup> *Engel and Others v Netherlands* [1976] 1 EHRR 647, paras 80-83.

<sup>136</sup> [2005] 41 EHRR 7.

<sup>137</sup> *Ibid*, paras 25, 40-41.

<sup>138</sup> See also *Orr v Norway* [2008] ECHR 387 in which the ECtHR concluded that Article 6(2) was breached in this case because of the language used by the domestic court, but that compensation claims for acts which may also constitute a criminal offence would not, *prima facie*, bring the case within Article 6(2).

ECtHR pointed out that if a criminal acquittal automatically precluded the claimant from bringing a civil claim for compensation for the same wrong, this would be an 'arbitrary and disproportionate limitation on his or her right of access to court under Article 6(1) of the Convention'.<sup>139</sup>

Consequently, although there is a lower burden of proof in the civil law, there are doctrinal differences between the crime of rape and the trespass to the person torts, and criminal procedural safeguards that do not apply in tort law, there is no, *prima facie*, violation of a defendant's right to a fair trial when a civil claim is brought for rape. Nevertheless, it may be possible to argue that using the words the 'crime of rape' and 'sexual offences' in finding a defendant liable in tort law could potentially constitute a breach of Article 6(2) if it implies he is guilty of a crime and is being labelled a 'rapist'. Therefore, judges should take care to emphasise that a claim for acts of rape or sexual assaults is based in the trespass to the person torts, and the defendant will be held liable for a civil and not a criminal wrong.<sup>140</sup>

## 7.6 CONCLUSION

Rape has long been a wrongful act (although conceptualised in different ways) for which victim-survivors could seek punishment and/or compensation. While this was certainly the case in the early common law, as the branches of criminal and civil law began to emerge and grew apart, rape was firmly entrenched in the former, being viewed as a particularly serious wrong and harm against the public. In theory, a rape victim-survivor could nevertheless bring a writ of trespass *vi et armis*, however, the 'criminal' law was privileged

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<sup>139</sup> *Y v Norway*, para 41.

<sup>140</sup> In Canada, the term 'sexual battery' has been used in the literature and in case law to refer to trespass to the person cases in which a sexual violation is involved, for example acts which also amount to the crimes of sexual assault or rape. However, there is no specific tort of sexual battery. Rather, it is a loose term for a collection of similar acts which constitute a battery; see Feldthusen, 'The Civil Action for Sexual Battery'. Adjin-Tettey has, however, argued for a distinct tort of sexual battery, but this is because in Canada a reasonable belief in consent negates liability and she argues that there should be an exception to this rule in cases of sexual battery; 'Protecting the Dignity and Autonomy of Women'. In England and Wales, therefore, a distinct tort of sexual battery (or tort of rape) is unnecessary, although the term 'sexual battery' may be useful to highlight that civil liability is being litigated and the defendant is not on trial for the crime of rape.

and an action for, or appeal of, felony had to be brought before a writ of trespass could be pursued. And yet, while victim-survivors were, in practice, denied a remedy of compensation, fathers, husbands and guardians could bring an action for compensation under the tort of seduction when a woman under their authority had been 'seduced'. For seduction the woman's consent or lack of consent was irrelevant (the relevant question being whether the sex was in or out of wedlock), and the tort reflected and contributed to constructing and reinforcing men's proprietary interests in women's sexuality. Consequently, men's reputation and economic interests linked to women's sexuality were protected, but the harms that rape can cause women were eclipsed and marginalised (and their decisions to consent/refuse consent to sex were often disregarded). Similarly to the criminal justice response to rape, a route to some form of justice through the civil law does exist in theory; however, the practical possibilities of pursuing and being successful in such an action have been limited by problematic conceptions of rape and women's sexuality.

Civil claims for rape are doctrinally possible, and it has long been understood that rape can constitute trespass to the person, which protects against violations of an individual's right to bodily and mental integrity, and freedom of movement. Since rape came to be understood as non-consensual sexual intercourse, violating a woman's sexual autonomy, the possibility of victim-survivors bringing a civil claim for rape in trespass to the person has, to some extent, opened up. Rape can constitute a battery which is intentional and unlawful contact, an assault which is where a person intentionally causes another to reasonably apprehend a battery, and false imprisonment which is the intentional and complete restriction of a person's movement to a particular place. Indeed, since the mid-1980s there have been a number of civil claims brought for rape, grounded in the torts comprising trespass to the person, which have provided victim-survivors with compensation for the harms that they have suffered. Nevertheless, this small body of case law has been subject to very little analysis. Consequently, and particularly in light of the failings of the criminal law, it is an appropriate time to investigate and evaluate civil claims for rape.

Although there are similarities between the crime of rape and the trespass to the person torts – so much so that the language of rape and sexual assault is used in civil claims – there are significant differences in relation to the role of consent. In comparison to the crime of rape, in the context of the trespass to the person torts the burden of proof is on

the defendant to prove the presence of consent, emphasising that women's consent to sexual intercourse is not assumed. In addition, it is unlikely that a reasonable belief in consent will negate liability in trespass to the person, and indeed it should not negate liability in this respect. Consequently, the trespass to the person torts may, to some extent, better protect and value women's sexual autonomy, and increase the possibility of providing rape victim-survivors with a remedy.

This illustrates the (at least theoretical) possibility for victim-survivors to bring claims in tort for rape, and claim compensation for the harms that they have suffered. However, whether or to what extent this constitutes justice for victim-survivors, from their perspective, is a different question. Therefore, the next chapter will analyse and evaluate tort law in light of the key aspects of a just legal response to rape which were set out in chapter 3.

# CLAIMS IN TORT FOR RAPE: JUSTICE FOR VICTIM-SURVIVORS?

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## 8.1 INTRODUCTION

As the previous chapter has shown, the possibility for rape victim-survivors to seek compensation for the harms that their abusers cause them has, at least in theory, existed for centuries. However, such cases have been prevented by practical barriers and conceptual inadequacies, particularly in relation to the translation of the harms of rape into legal wrongs. By the time conceptions of women's sexuality changed and rape began to be conceived primarily as a violation of women's sexual autonomy in the 20<sup>th</sup> century, the criminal law and punishment was the privileged and primary response to the most serious and harmful forms of wrongdoing. Nevertheless, it remains the case that rape can constitute trespass to the person in tort law, and a civil claim can be brought against a person who commits rape.<sup>1</sup> Indeed, a number of civil suits have been brought and litigated in the higher courts of England and Wales since the mid-1980s, the majority of which have been successful, and a slightly larger body of case law is developing in other jurisdictions, such as the US and Canada.<sup>2</sup> However, while it is clear that rape can constitute a tortious wrong as well as a crime – and potentially more highly value women's sexual autonomy due to the narrower role played by consent – the extent to which it does or can provide justice for rape victim-survivors, on their terms, is a different issue, one which will be

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<sup>1</sup> Direct civil actions against those who commit rape are the focus of this chapter, and whether such claims can provide justice for victim-survivors. Vicarious liability – where a third party who is not at fault is liable to pay damages – will be considered briefly below (see sections 8.5 and 8.7). However, it may be possible for victim-survivors to bring a civil claim against a party other than the rapist but who is also at fault, for example, a claim may be brought against an institution (such as a school) for systemic negligence which could be said to have caused the rape, or a police force which negligently failed to prevent the rape. Raising different doctrinal, conceptual and practical issues, it is beyond the scope of this thesis to consider such potential claims, but in this respect further research could build on and develop the suggestions that are made here; see further below, section 8.8.

<sup>2</sup> For commentary, see Feldthusen, 'The Civil Action for Sexual Battery'.

explored in this chapter. The purposes, procedures and outcomes of tort law differ from the criminal law and criminal justice system, and typically civil claims are directed towards providing compensation for the harms of wrongdoing rather than punishing individuals for their wrongful behaviour. This chapter will evaluate the extent to which tort law can provide justice for rape victim-survivors, by evaluating principles, procedures and outcomes by reference to the aspects of justice set out in chapter 3. Exploring the small body of case law, it will discuss the judicial application of tortious rules and principles, and tort law's overall response – and how it could respond better – to this particular tortious (and criminal) wrong. It will be concluded that it will only be in a few cases that victim-survivors will have the opportunity to pursue a civil case; however, when it is possible tort law can, to a considerable extent, meet each aspect of justice, as viewed by some victim-survivors.

To begin with, the purposes of tort law will be explored, and the reasons why rape victim-survivors may choose to make a civil claim (or choose not to as the case may be). Following this, whether tort law can provide recognition of a wrongful and harmful violation of the victim-survivor's sexual autonomy will be analysed. It will be suggested that the trespass to the person torts can reflect that there has been a violation of the victim-survivor's autonomy, but that it is a gendered and specific violation of a person's *sexual* autonomy will need to be accounted for at the damages stage.

The civil justice system will then be examined as to whether it can promote respect for the diversity of experiences of the harms of rape. Through the civil process it may be that victim-survivors' diverse experiences of rape are better respected as an individual claimant will have a legal representative to protect her interests and act on her behalf, unlike in the criminal law where she is a witness for the Crown Prosecution's case. However, the trial itself could potentially be more damaging and harmful to victim-survivors as measures designed to counter rape myths and limit the stress of the criminal trial typically will not apply in civil trials, although it will be argued that they should.

Next, the chapter will examine the extent to which tort law allows victim-survivors to tell their stories and be heard in a meaningful way. In this respect, tort law may be better than the criminal law, as the claimant is not restricted to the same extent by the legal language of the crime rape, which involves specific acts. Also, there is the possibility that the

particular harms the claimant has experienced will be acknowledged to a greater extent as damages are awarded in relation to this, in contrast to the criminal justice system which focuses on punishment, primarily in relation to the culpability of the wrongdoer. In addition, there is a greater chance that the wrongdoer will be held responsible in the civil law due to the lower standard of proof required. Although in some civil cases where the wrong may also constitute a crime, judges have required claimants to prove their case to a higher standard of proof, it will be argued that where civil consequences follow civil liability the burden of proof should be the ordinary balance of probabilities. Finally, rape victim-survivors indicate that receiving symbolic and material reparation for the harms of rape is important, which tort law may be able to provide to a greater extent than the criminal law as it focuses on compensation for the particular harms that rape victim-survivors suffer, in contrast to the criminal law which focuses almost solely on symbolic reparation for the 'core' harm of rape. However, it is likely that only a few victim-survivors will be able to pursue a civil suit against their abuser, particularly as the majority of wrongdoers will not have the means to pay damages if they are awarded. Reviewing the benefits of tort law and the limitations of the criminal justice system in providing justice for victim-survivors, it will be argued that a way to improve the criminal law's response to rape may be to focus on sanctions in the forms of reparation, rather than primarily punishment by imprisonment.

## **8.2 THE PURPOSE(S) OF TORT LAW**

While many scholars argue that tort law is underpinned and demarcated by neutral and apolitical principles, for feminists (and others) it is axiomatic that tort law, like all law, is political, being shaped by and operating in light of social goals.<sup>3</sup> Tort law does not, then, have any inherent purposes, and the debate becomes what goal(s) is/are tort law directed towards, can it achieve them or would a different system better achieve these aims. Rather than engaging in these broad debates, the question being asked here is narrower, limited to whether, or to what extent, in rape cases tort law can provide justice, as understood by some victim-survivors. Nevertheless, debates as to the purpose(s) of tort law, and to what extent it achieves these aims, are important to discuss, as they may overlap with aspects of what some victim-survivors see as justice, thus indicating the possibilities and limitations of tort law in this respect.

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<sup>3</sup> For example, Conaghan and Mansell, *The Wrongs of Tort*.

Weinrib has famously argued that tort law is an ‘autonomous’ and ‘nonpolitical’<sup>4</sup> body of rules which can only be understood on its own terms rather than by reference to external and independent values or vision of the good.<sup>5</sup> For Weinrib, deterrence, punishment and compensation cannot be goals of tort law, as the only ‘purpose of private law is to be private law’.<sup>6</sup> Tort law, he says, is a body of private law – that is, law which governs relationships between private individuals (or bodies), as opposed to public law which governs the relationships between the state (or state bodies), the public and individuals. And it is the branch of private law that addresses civil wrongs, determining the correlative rights and duties that are imposed by law upon citizens, in contrast to those which are contracted into by and between citizens. When a civil wrong has been committed, tort law provides a means by which to enforce the payment of compensation by the wrongdoer to the person who has been wronged to put them in the position they would have been in, had the tort not occurred, giving effect to corrective justice.<sup>7</sup> For Weinrib, corrective justice is what is distinctive about tort (private) law (in informing form and substance), what provides its normative justification, and what distinguishes it from other branches of law (such as public law) and other forms of justice or normative arguments (such as distributive justice).<sup>8</sup> Looking at many rape victim-survivors’ desire for recognition that the wrongdoer has done a wrongful act, to hold them responsible for this and to receive symbolic and material reparation for the harms caused would seem to align, to some extent, with the idea of corrective justice.<sup>9</sup>

However, it is often pointed out that tort law does not often provide corrective justice in practice: losses are not shifted from the claimant to the tortfeasor, but a third party pays and losses are distributed throughout society by the mechanisms of insurance and

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<sup>4</sup> Weinrib, *The Idea of Private Law*, ch 8.

<sup>5</sup> *Ibid*, pp 5-6.

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

<sup>7</sup> *Ibid*, p 56 (but chapter 3 more generally).

<sup>8</sup> *Ibid*, p 19. Weinrib is not the only scholar to develop an internalist theory of tort law. For example, Beever similarly views corrective justice as the underpinning principle (albeit in relation to negligence in particular, rather than tort law in general); Allan Beever (2007) *Rediscovering the Law of Negligence* (Oxford and Portland, Oregon: Hart), in comparison to Stevens who argues that tort law is based on rights: tort law is ‘concerned with the secondary obligations generated by the infringement of primary rights’; *Torts and Rights*, p 2.

<sup>9</sup> Feldthusen, ‘The Civil Action for Sexual Battery’, pp 211-212.



vicarious liability.<sup>10</sup> Indeed, Fleming has argued, 'the actual operation of the tort system rarely fits the classical model of individual loss bearing but rather results in collectivization of losses' and thus it 'has come to perform a not insignificant function of distributing losses in our society'.<sup>11</sup> As such, Robertson points out that many scholars see tort law as having both internal and external aims, and, although what these are may be debated, there are nonetheless a number of external goals that are commonly associated with tort law.<sup>12</sup> These are: deterrence, economic efficiency, the distribution of risks of accidents and losses, compensation,<sup>13</sup> and appeasement.<sup>14</sup> Indeed, many rape victim-survivors turn to the legal system (primarily the criminal justice system) in the hope to contribute to deterring actual or potential wrongdoers,<sup>15</sup> and it is likely that such a reason would also apply to those who make a tort claim.<sup>16</sup> In addition, some also say that receiving compensation for the harms that they have been caused is important, although they may be, contrary to ideas of corrective justice, satisfied with receiving less compensation if it is provided by the wrongdoer, which may still operate as appeasement.<sup>17</sup>

And yet, for similar reasons as to why tort law does not always achieve corrective justice it fails to appease those who are wronged or deter potential wrongdoers. If tortfeasors are not typically the party who pays damages then claimants are unlikely to be appeased, and also the deterrent function of tort law is undercut.<sup>18</sup> In addition, many people are unaware of what constitutes a tort, and many torts (for example negligence) do not rely on the tortfeasor being of a particular state of mind, and thus tort law may not deter (potential)

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<sup>10</sup> For a brief overview of the above, see Fleming, *An Introduction to the Law of Torts*, pp 6-8. And for an argument that vicarious liability is not incompatible with corrective justice, see Beaver, *Rediscovering Negligence*.

<sup>11</sup> Fleming, *ibid*, pp 16 and 183 respectively.

<sup>12</sup> Andrew Robertson (2009) 'Introduction: Goals, Rights and Obligations', in Andrew Robertson and Tang Hang Wu (eds) *The Goals of Private Law* (Oxford: Hart Publishing), p 2.

<sup>13</sup> Peter Cane (1997) *The Anatomy of Tort Law* (Oxford: Hart Publishing), p 24.

<sup>14</sup> Glanville Williams (1951) 'The Aims of the Law of Tort', *Current Legal Problems*, 4: 137, pp 138-140.

<sup>15</sup> See chapter 3, section 3.4.1.

<sup>16</sup> Feldthusen, 'The Civil Action for Sexual Battery', pp 211-212.

<sup>17</sup> *Ibid*.

<sup>18</sup> Fleming, *The Law of Torts*, p 173.

tortfeasors. As a result, compensation is sometimes said to be the main aim of tort law.<sup>19</sup> However, in practice, tort law does not compensate all individuals who suffer harm that is caused by another's tortious act: it is typically only in cases where there is a wealthy tortfeasor or other defendant (such as the tortfeasor's employer or insurer) who can afford to pay an award of damages that a case will be worth pursuing, and consequently tort victims are subject to the 'damages lottery'.<sup>20</sup> So understood, it is clear that tort law (as it currently operates) cannot provide corrective justice for the majority of rape victim-survivors. However, this does not render tort law unhelpful in seeking ways to improve legal responses to rape, as investigating to what extent tort law can provide justice for some victim-survivors, and how and why it does this, may shed light on ways to improve the criminal justice response to rape.

Moreover, feminist and other critical legal scholars have revealed the hidden political values and ideologies that underpin tort law, and its complex relationship to – rather than separation from – society, values and norms.<sup>21</sup> Seen in this way, tort law has an obvious public dimension and is not simply 'private', as suggested by Weinrib. Moreover, it is not only corrective justice that tort law is tied up with, but distributive justice. If tort law is political and is shaped by and contributes to (re)constructing social structures and norms, then it is inevitably implicated in the distribution of goods in society which is guided by such structures and norms. Indeed, as feminists argue, tort law has played a role in constructing and maintaining social hierarchies, and unfair distributions of resources and power, that underpin gender inequality.<sup>22</sup> Following on from this, feminist legal scholars have explored the potential for tort law to be reformed systematically to better achieve certain social goals;<sup>23</sup> however, consideration of suggested reforms or a proposal for

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<sup>19</sup> Apart from, according to Williams, the intentional torts for which he argues deterrence is the primary goal; 'The Aims of the Law of Tort', p 172.

<sup>20</sup> Moreover, if it is not those who are at fault paying compensation, the question is raised of why is harm caused by another's fault the criterion by which compensation is justified? Patrick S Atiyah (1997) *The Damages Lottery* (Oxford: Hart).

<sup>21</sup> Conaghan and Mansell, *The Wrongs of Tort*.

<sup>22</sup> For an overview, see Conaghan, 'Tort Law and Feminist Critique'.

<sup>23</sup> For example, Bender has argued that 'changing the values in tort law' can 'improve the quality of our lives and our communities'; Leslie Bender (1990) 'Changing the Values in Tort Law', *Tulsa Law Journal*, 25: 759, p 760. And Keren-Paz has argued for changes which would make tort law more

systematic reform or an alternative scheme is beyond the scope of this thesis.<sup>24</sup> Nevertheless, what is important is understanding the ways in which tort law relates to (amongst other things) common feminist goals (such as challenging particular gender identity constructions), and whether, at least in relation to claims brought in trespass to the person, tort law can meet aspects of justice as understood by some rape victim-survivors. With an eye to wider gender issues relating to rape in particular, the focus of the remainder of this chapter is to what extent tort law can provide recognition of a wrongful and harmful violation of the victim-survivor's sexual autonomy, provide respect for the diversity of experiences and harms of rape, can allow victim-survivors to tell their stories and be heard in a meaningful way, can hold the wrongdoer responsible for the harms of rape, and can provide symbolic and material reparation for the harms of rape. In other words, it is exploring whether tort law can provide justice for rape victim-survivors, as some conceive of it.

### **8.3 RECOGNITION OF A WRONGFUL AND HARMFUL VIOLATION OF THE VICTIM-SURVIVOR'S SEXUAL AUTONOMY**

As has been discussed in chapter 3 which explored justice from the perspective of rape victim-survivors, it is important that a wrong which has caused them harm is acknowledged, and their experience is validated. While there have been many arguments as to what is wrongful and harmful about rape, it was argued that, at its heart, rape is a violation of a person's sexual autonomy.<sup>25</sup> The trespass to the person torts do purport to protect individuals' autonomy, although, as will be discussed, there are limitations to this, particularly in relation to eschewing the gendered nature of rape. However, it will be suggested that this can be addressed at the damages stage by recognising that the gender dimension to rape may influence the way in which the harms are experienced and account for this in determining the amount of compensation to be awarded.

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egalitarian; Tsachi Keren-Paz (2007) *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate).

<sup>24</sup> Indeed, rape victim-survivors can apply to the Criminal Injuries Compensation Authority, which is a state funded scheme that provides compensation to crime victims. See the discussion in chapter 4, section 4.5.2.

<sup>25</sup> See chapter 3, section 3.3.1.

The trespass to the person torts aim to protect individuals' rights to bodily and mental integrity and autonomy, and freedom of movement. However, as was illustrated in the previous chapter, in practice, women's consent or refusal of consent to sexual intercourse may be interpreted in light of rape myths and gendered assumptions which operate to limit and constrain women's sexual choices and freedom. Nevertheless, it is possible that tort law may better protect women's sexual autonomy as consent has a narrower scope in this context than in relation to the crime of rape. As was argued in chapter 7, the burden of proof is and should be on the defendant to prove consent, which emphasises that women's consent to sexual intercourse is not assumed. Further, it is likely that a reasonable belief in consent will not negate liability (and, as was argued in chapter 7, it should not negate liability), which may mean that there will be less of a focus on the defendant's perspective as to the claimant's consent, and more of a focus on whether or not the claimant subjectively consented. Consequently, while feminist critiques of consent apply to the trespass to the person torts as well as the crime of rape, there is nevertheless greater potential for trespass to the person to protect, and highly value, women's sexual autonomy.<sup>26</sup>

It could, however, be argued that the trespass to the person torts do not adequately recognise the nature of rape as a gendered wrong and a violation of *sexual* autonomy in particular. By definition, the trespass to the person torts are much broader than the crime of rape, for example, battery encompasses any intentional, direct, unlawful touching, and the trespass to the person torts are formally gender neutral, whereas the crime of rape can only be perpetrated by men.<sup>27</sup> Framing acts of non-consensual sex as a gender neutral wrong, as is done in the trespass to the person torts, may misrepresent the nature of rape, concealing the male violence inherent in rape and the reality that the majority of rapes are perpetrated by men against women.<sup>28</sup> In addition, similar criticism can be made of the fact that when a civil claim is brought it is technically for trespass to the person, which loses the label 'rape'. The term rape has a specific meaning and symbolic value, and it may be that

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<sup>26</sup> Adjin-Tettey, 'Protecting the Dignity and Autonomy of Women'.

<sup>27</sup> Sexual Offences Act 2003, section 1(1)(a).

<sup>28</sup> Naffine, 'Erotic Love in the Law of Rape', pp 24-25; McGlynn, 'Rape as "Torture"?', p 78 (as argued in relation to debates as to redefining rape in the criminal law).

using different terminology fails to communicate the wrong and ‘core’ harm of rape, undermining and devaluing the experiences of victim-survivors.<sup>29</sup>

While there are disadvantages to a gender-neutral wrong which does not have the label ‘rape’, there are also advantages. First, the label rape can be seen as problematic, heavily invoking myths, gendered assumptions and stereotypes, as well as potentially stigmatising and shaming the victim-survivor which can aggravate and increase the harm that is suffered.<sup>30</sup> And, secondly, unlike the criminal law which defines and proscribes rape as unlawful sex, consequently prescribing lawful ‘normal’ heterosexual sex, the trespass to the person torts are not as narrowly prescriptive in this respect. Finally, these torts do still provide recognition that a person’s rights to autonomy and freedom of movement have been infringed. In addition, it may be that the sexual and gender dimension of the harms of rape can be accounted for at the damages stage,<sup>31</sup> as the compensation that is awarded will be relative to the particular victim-survivor’s harmful experiences which may be influenced by her gender. Tort law does, however, lack the symbolic strength of the criminal law that is conveyed through the ‘public’ nature of crimes (as opposed to ‘private’ law torts), and through state-inflicted punishment. Nevertheless, from the perspective of rape victim-survivors it is likely to be significant that the trespass to the person torts can provide recognition that a wrong has been done and harm has been caused. The remedy offered can compensate for what the definition of trespass to the person lacks, without being overly prescriptive as to gender and sexual identities, and thus these torts may provide recognition of a wrongful and harmful violation of a victim-survivor’s sexual autonomy.

#### **8.4 RESPECT FOR THE DIVERSITY OF EXPERIENCES AND HARMS OF RAPE**

As was explained in chapter 3, it is important for rape victim-survivors to be treated with respect throughout the legal process by institutional personnel, and that legal rules and procedures provide the possibility for individuals’ sexual choices and particular experience of rape to be accounted for. In particular, this means that institutional personnel should respect the diversity of experiences and harms of rape, without rape myths informing their

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<sup>29</sup> McGlynn, ‘Rape as “Torture”?’, p 78.

<sup>30</sup> Temkin, *Rape and the Legal Process*, p 178.

<sup>31</sup> See further below, section 8.7.

judgment, and legal rules should not adversely affect victim-survivors (or women in general).<sup>32</sup> There is the possibility that rape victim-survivors' complaints in the civil law will be treated with similar scepticism and hostility to that which many victim-survivors are subject to in the criminal justice system. Although there are different concerns guiding the acceptance of cases in the two branches of law,<sup>33</sup> the way in which a particular case is viewed and treated in both systems will largely depend on the available evidence. Rape myths which influence institutional actors' attitudes towards the evidence in the criminal justice system<sup>34</sup> are likely to have a similar influence in the civil justice system, as a significant factor influencing lawyers' decisions to accept a case is likely to be based on their prediction as to the success of the case.<sup>35</sup>

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<sup>32</sup> See chapter 3, section 3.5.2(b).

<sup>33</sup> For example, in the criminal justice system, one factor that will be taken into account in the Crown Prosecution Service's decision whether or not to prosecute a case is if it is in the public interest to do so. This is unlikely to be a factor considered by lawyers in civil cases. In relation to personal injury cases, studies in the US demonstrate that lawyers consider what fee they will be likely to receive if the claimant is successful (which could also apply to the UK) – a factor that will be irrelevant in criminal cases; Herbert M Kritzer (2004) *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Sanford, CA: Stanford University press); referred to in Rebecca L Sandefur (2008) 'Access to Civil Justice and Race, Class and Gender Inequality', *Annual Review of Sociology*, 34: 339, p 348.

<sup>34</sup> Temkin and Krahé, *Sexual Assault and the Justice Gap*.

<sup>35</sup> Mary Nell Trautner (2009) 'Personal Responsibility v Corporate Liability: How Personal Injury Lawyers Screen Cases in an Era of Tort Reform', *Sociology of Crime, Law and Deviance*, 12: 203; referred to in Sandefur, 'Access to Civil Justice', p 348. However, estimates as to success will be influenced by factors such as the lower burden of proof and different rules of evidence in the civil law which may, all things being equal, make it more likely that a case will be successful in the civil system than in the criminal justice system. Civil claims, however, must be brought within a certain time period, which for trespass to the person cases is either three years from the date upon which the tort was committed (or from the date upon which the claimant turns 18 if s/he was a minor at the time), or three years from when the harm manifests, and the claimant can reasonably be expected to know that the harm was caused by the tortfeasor's acts; Limitation Act 1980, section 11. If the claimant's case is brought out of time, the judge has the discretion to decide to allow the case to proceed in any event; Limitation Act 1980, section 33. The House of Lords decided that this limitation period applied to the trespass to the person torts in *A v Hoare*, overruling the decision in *Stubbings v Webb* [1993] AC 498 where the House held that the relevant limitation period ran for six years but only from the date upon which the tort was committed; Limitation Act 1980, section 2.

Nevertheless, there are significant differences between the process and procedures of the civil law and those of the criminal law, which may shape and alter rape victim-survivors' experiences of a civil suit. For example, in the criminal justice system the victim-survivor is a witness to the state's action against the offender, and the victim-survivor has no legal representative as the prosecutor acts on behalf of the state. In the criminal justice context, Raitt has argued that providing rape victim-survivors with independent legal representation 'could make the single most significant contribution to the ability of rape complainants to withstand the legal process'.<sup>36</sup> By comparison, in the civil justice system the victim-survivor is a party to the action and has a lawyer who will represent her interests and put forward a case on her behalf. Consequently, it may be that victim-survivors are more likely to be informed about the progress of their case, and have their perspectives, experiences and harms accounted for and valued. Moreover, legal representation and the formal equality of the civil justice system may convey that victim survivors' interests are valued as equally as wrongdoers' interests, contributing to their perceptions of fair treatment through the process.<sup>37</sup>

Much of this, however, is speculative. Given that there are few civil claims for rape, there are extremely limited opportunities to conduct empirical research in this area as to victim-survivors' experiences of and treatment within the civil justice system. Consequently, no substantial conclusion can be drawn as to whether rape victim-survivors are, or are likely to be, treated with respect in the civil justice system by institutional personnel. What can be subject to a more thorough investigation (even if necessarily tentative, given the small number of reported cases in this area), is the extent to which legal rules relating to civil procedures and trials are sensitive to victim-survivors' diverse experiences of rape. However, while in theory victim-survivors may have a more positive experience through the civil justice process, at trial it may be that victim-survivors do not feel as though their

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Despite the change in the law, A's case was still brought out of time, but Coulson J allowed her case to proceed as she was effectively prevented from suing the wrongdoer any earlier because he was in prison as a result of the tortious and criminal wrongdoing; *A v Hoare* [2008] EWHC 1573. To what extent limitation periods will pose issues for victim-survivors who chose to pursue a civil case remains to be seen.

<sup>36</sup> Raitt, 'Independent Legal Representation for Complainants in Rape Trials', p 268.

<sup>37</sup> Feldthusen, 'The Civil Action for Sexual Battery', p 217.

particular experiences of rape are understood and they may be caused further distress and harm.<sup>38</sup> To explore this, the availability of protective measures, in particular the admissibility of sexual history evidence, and whether the mode of trial – most commonly a bench trial in civil cases – may impact the trial process and outcome, will be discussed.

#### **8.4.1 Limitations on the Admissibility of Sexual History Evidence and Special Measures for Vulnerable Witnesses**

In the civil justice system, as is evident in the criminal justice system, rules of evidence and trial procedures may adversely affect rape victim-survivors' experiences of the process or the outcome of the case. However, there are differences between the civil law and the criminal law in this respect, often due to the different purposes, outcomes or sanctions, and policies of each system. Typically, there are a greater number of and stricter exclusionary rules of evidence in the criminal law than the civil law.<sup>39</sup> This is due to differences between the two branches of law, for example, because civil cases are generally not heard by a jury there is not the same concern that a judge with her/his professional skills will place an inappropriate amount of weight (if any) on certain pieces of evidence.<sup>40</sup> In addition, some rules and measures have been introduced in the criminal justice system to reduce the stress of the trial for vulnerable witnesses and to assist them in giving their best evidence, for example, by placing a screen between the witness and the accused or allowing the witness to give evidence by live link.<sup>41</sup> As such provisions do not tend to apply to civil trials, then civil trials may be more stressful and potentially harmful for rape victim-survivors than criminal trials.<sup>42</sup> However, certain rules and procedures that

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<sup>38</sup> On the adversarial nature of the trial and the problems of protecting victim-survivors (or vulnerable witnesses more generally) from harm, albeit in relation to criminal trials, see chapter 4, section 4.3.2.

<sup>39</sup> Ian Dennis (2010) *The Law of Evidence* (4<sup>th</sup> edn, London: Sweet and Maxwell), p 62. There is a 'general rule that all evidence should be admissible unless there is a good reason for it to be treated as inadmissible'; Law Commission (1993) *The Hearsay Rule in Civil Proceedings* (London: HMSO), para 4.2.

<sup>40</sup> Roderick Munday (2006) 'Case Management, Similar Fact Evidence in Civil Cases, and a Divided Law of Evidence', *International Journal of Evidence and Proof*, 10: 81, pp 88-89.

<sup>41</sup> Youth Justice and Criminal Evidence Act 1999, sections 23 and 24 respectively.

<sup>42</sup> There are some statutory and common law provisions which could be used in the civil courts to improve the trial experience for rape victim-survivors; for an overview, see Jonathan Doak (2007)



apply only in the criminal justice system may not be restricted to this context for any reason of principle or policy, but rather because their application has not been considered as potentially necessary beyond the criminal law. Consequently, there is the potential for rules and measures to be applied to the civil trial to improve the experience of victim-survivors who pursue a tort claim.

One particular issue that may affect the stressfulness of the trial, victim-survivors' perceptions as to whether the diverse experiences of rape are respected, and the outcome of a civil trial is the fact that there are no particular restrictions on the admissibility of the victim-survivor's sexual history evidence. In relation to criminal sexual offence trials there is a *prima facie* ban on admitting such evidence,<sup>43</sup> whereas in the civil law sexual history is subject to the general rule that the evidence must be 'relevant' to the case – perhaps because the possibility of a civil case was not considered by the legislature. However, judges (and others) commonly view sexual history as 'relevant',<sup>44</sup> assuming that it indicates whether or not the witness is credible (as, allegedly, particular women – such as sexually adventurous women – are untrustworthy), and indicates whether or not the complainant consented to sex with the accused (because, allegedly, if a woman has consensual sex with A under particular circumstances, then she is likely to have had consensual sex with B under similar circumstances (for example)).<sup>45</sup> Many feminists have argued that such assumptions operate to deny and limit women's sexual choices, and that sexual history is usually – if not always – irrelevant to the case in question as it has little or no bearing on whether the claimant consented to sex with the particular defendant, at the particular time or under the particular circumstances.<sup>46</sup> Indeed, it is for these reasons that there is a *prima facie* ban on the admissibility of sexual history evidence in criminal trials. However, if judges did not view such evidence as relevant, and lawyers did not see it as potentially persuasive, the legislation may not be necessary. But, as the legislation is necessary, then

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'One Size Fits All? The Case for Special Measures in Civil Proceedings', *Northern Ireland Legal Quarterly*, 58: 459, pp 469-481. And see further below, section 8.8.

<sup>43</sup> Youth Justice and Criminal Evidence Act 1999, section 41(1), however, there are 'gateways' (exceptions) through which sexual history can enter the trial (section 41(2)-(7)), and these gateways have been widened in *R v A (No 2)*.

<sup>44</sup> Aileen McColgan (1996) 'Common Law and the Relevance of Sexual History Evidence', *Oxford Journal of Legal Studies*, 16: 275.

<sup>45</sup> *Ibid.*

<sup>46</sup> For example, see McGlynn, '*R v A (No 2)*', p 221.

sexual history evidence may be drawn upon in civil claims brought in trespass to the person for rape.

It is possible, though, that judges may view sexual history evidence as less relevant – and potentially irrelevant and inadmissible – because a reasonable belief in consent should not negate liability, unlike in the criminal law on rape, and because in a civil case the judge, not a jury, is typically the trier of fact.<sup>47</sup> However, it is not known whether the judges in any of the civil claims brought for rape have determined sexual history evidence to be inadmissible, or have put little or no weight on such evidence, or if there is less emphasis on sexual history in a civil trial than there may have been in a criminal trial. It is known, however, that the claimant's sexual history has been raised in a number of civil claims for rape. Regardless of whether sexual history evidence is less prominent and less significant in a civil case of rape, its presence is nevertheless problematic as it emphasises restrictions on women's sexual choices, and can be upsetting and distressing for the claimant, potentially causing further harm.

In *Griffiths v Williams*, the claimant brought a civil action against her landlord, claiming that he raped her after he demanded some form of payment for outstanding rent. Williams argued that the sex was consensual, and implied that it was intended to clear the claimant's debt. Defence counsel called two witnesses who alleged that the claimant had previously engaged in prostitution, probably to attempt to undermine her credibility and to draw on the myths that women who have had consensual sex in certain circumstances have a propensity to consent to sex in such circumstances.<sup>48</sup> Most likely for similar reasons, in *Lawson v Glaves-Smith, Executor for the Estate of Dawes* in which the claimant argued that Dawes had raped her, sexually assaulted her, falsely imprisoned her and forced her to consume intoxicants, the defendant submitted evidence that the claimant had taken cocaine on a number of previous occasions and enjoyed going to fetish clubs.<sup>49</sup> In *Parrington v Marriott* the defendant alleged that, following her divorce, the claimant had

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<sup>47</sup> Although in rare cases a jury can hear a civil case and indeed did so in *Griffiths v Williams*; see the discussion in chapter 7, section 7.3.3, footnotes 67 and 68. See also the discussion of whether the mode of trial may have an impact on the trial and case outcome below, section 8.4.2.

<sup>48</sup> Although issues of consent and rape myths in civil cases were discussed in chapter 7, section 7.4.1, here the examples go specifically to the use of sexual history evidence.

<sup>49</sup> *Lawson v Glaves-Smith, Executor for the Estate of Dawes*, paras 92-93.

consensual sex with a number of men, which may have been an attempt to invoke the idea that if the claimant had had consensual sex with other men then she was likely to have also consented to sex with the defendant.

The use of such myths is problematic as they may distort, obscure and eclipse the sexual autonomy of victim-survivors by appealing to gendered stereotypes. Moreover, victim-survivors may perceive questions as to their sexual history as invasive and humiliating, potentially increasing the harm that they suffer. Indeed, Caulfield J in the civil case involving rape, *Miles v Cain*, said, 'I have never heard a woman subject to so thorough and ferocious cross examination as this plaintiff'. And in *Griffiths v Williams* Thorpe LJ commented that the 'defendant's attack on the claimant's character' and 'the manner in which the defendant conducted the litigation [was] extreme'. Overall, the use of sexual history evidence in civil trials focusing on liability in trespass to the person for rape is likely to deny respect for the diversity of experiences of rape, and potentially cause further harm to the victim-survivor, failing to meet this aspect of justice.

It is possible, however, that the limitations on the admissibility of sexual history evidence could be extended to cover civil trials which address tortious wrongs that could also constitute a sexual offence. Indeed, it is suggested here that they should be.<sup>50</sup> The reasons to exclude such evidence in criminal cases, as explained above, apply to civil cases, and if current restrictions can be justified – indeed narrow restrictions on the admissibility of such evidence can be justified<sup>51</sup> – in criminal trials where the offender has more than money to lose, then surely they can be justified in the civil law. Although there are differences between the two branches of law and, generally, there is a more open approach to evidence in the civil law, protecting a victim-survivor from intrusive questioning that may unfairly undermine her case should take priority.<sup>52</sup> Furthermore, in the civil law there is no systematic way to protect vulnerable witnesses more generally. However, as Doak argues, if provisions to protect vulnerable witnesses are justified in the criminal law and do not

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<sup>50</sup> Although there are criticisms of the current law (see chapter 4, section 4.3.2), the point here is not to discuss what the law should be in this respect, but rather argue that the provisions should also apply in relevant civil trials.

<sup>51</sup> See for example, McGlynn, '*R v A (No 2)*'.

<sup>52</sup> Patrick J Hines (2011) 'Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings', *Notre Dame Law Review*, 86: 879.

breach defendants' common law rights or right to a fair trial under Article 6 of the European Convention on Human Rights, and have also been accepted at the international level to ensure compliance with international human rights standards, then it is anomalous not to extend such provisions to civil trials.<sup>53</sup> In addition, it would be 'in the interests of certainty and consistency' for new legislation to be implemented that would give courts the power to better protect vulnerable witnesses giving evidence in civil trials.<sup>54</sup> Consequently, a more systematic approach with a greater number of protections for vulnerable witnesses in civil trials should be developed and adopted, and which would be likely to benefit some victim-survivors who choose to bring a civil claim for rape, and may mean that the diversity of experiences of rape can be better respected.

However, for such systematic changes to be made (if indeed they are at all) will take time, and in the meantime it remains problematic that victim-survivors may be subject to humiliating and invasive questioning, and that sexual history may continue to be perceived as relevant by judges and potentially persuasive by defence counsel. Nevertheless, it is significant that despite the evidence as to the claimants' sexual histories, in *Griffiths v Williams*, *Lawson v Glaves-Smith*, *Executor for the Estate of Dawes* and *Parrington v Marriott* the claimants were successful. Although liability was determined by a jury in *Griffiths v Williams*, the claimants' successes may have been because judges, who most commonly decide a civil case, may be more sensitive and knowledgeable as to the harms of rape than a jury.

#### **8.4.2 Mode of Trial**

In criminal rape trials, the case is heard by a jury. However, in civil claims involving rape the case will typically not be heard by a jury and a judge will decide the outcome.<sup>55</sup> There is a possibility that a bench trial will be advantageous to victim-survivors, as a judge may have

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<sup>53</sup> Doak, 'Special Measures in Civil Proceedings', pp 481-482.

<sup>54</sup> *Ibid.*

<sup>55</sup> Although it is possible that a civil claim involving rape could be heard by a jury if it involves false imprisonment or is deemed to be 'an exceptional case'; Supreme Court Act 1981, section 69(1), (3). Indeed, there was a trial by jury in *Griffiths v Williams*. In such cases, the judge's directions to the jury will be extremely important to ensure that it is understood that liability in trespass to the person is the issue, and not guilt of a criminal offence.

more experience in dealing with such issues and may better understand and respect the diversity of experiences of rape, and its harmful effects, in contrast to jurors who are likely to be heavily influenced by rape myths.<sup>56</sup>

However, rape myths do not only influence the general public, but also professionals within the legal system, including judges.<sup>57</sup> Temkin and Krahe's interviews with judges on corroboration, sexual history and third party disclosure in rape cases provide a good example of this, demonstrating that judges can be influenced by rape myths in interpreting and applying the law.<sup>58</sup> Moreover, it could be questioned whether judges hearing civil cases involving rape will be more likely to be influenced by rape myths than judges who hear sexual offence cases, as the latter are required to attend seminars on sexual assault that are organised by the Judicial College (prior to April 2011 the Judicial Studies Board), although it is likely that it will be ensured that a judge who is to hear a civil case involving rape will have the relevant training.<sup>59</sup> Overall, then, it is difficult to conclude whether or not, or to what extent, it will be an advantage for victim-survivors that a civil trial is likely to be heard by a judge without a jury, but it remains a possibility.

In summary, victim-survivors' diverse experiences of rape may be better respected through the civil process in general because of its formal equality between the complainant and defendant, and because the victim-survivor has her own legal representative. However, the civil trial is unlikely to be an improvement on a criminal rape trial. Indeed, it may be that the victim-survivor's experience of a civil trial is a negative one as there is no *prima facie* ban on the admissibility of sexual history evidence, and fewer measures that can be applied for to protect vulnerable witnesses. However, victim-survivors' experiences of civil trials focusing on rape could be improved, as the limitations on admitting sexual history evidence could and should extend to the civil law, and a more systematic approach for protecting vulnerable witnesses in civil trials should be developed. This may ensure that victim-survivors' diverse experiences of rape are better respected. Until then, claimants are reliant

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<sup>56</sup> Temkin and Krahe, *Sexual Assault and the Justice Gap*, ch 3.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid*, ch 7.

<sup>59</sup> Information regarding training seminars for judges hearing civil claims is held on file with the author.

on the judge to be knowledgeable about and sensitive to the harms of rape for a fair trial process and outcome.

## 8.5 THE TELLING AND HEARING OF VICTIM-SURVIVORS' STORIES

The third aspect of what some rape victim-survivors see as justice is being able to tell of their experiences and the harms that they have suffered, and be listened to in a meaningful way. As was discussed in chapter 3, hearing a victim-survivor's voice in this way can convey that they, as an individual, are valued.<sup>60</sup> In addition, victim-survivors' stories can also be a means by which to increase understandings of the diverse experiences and harms of rape.<sup>61</sup> Due to both these points, it may be that victim-survivors find telling their story empowering and/or therapeutic. As such, tort law may provide victim-survivors with a greater chance of explaining the harms that they have suffered and being heard than is likely in the criminal justice system.

In comparison to the criminal law, a civil claim is brought for trespass to the person, most likely the tort of battery, and not for the particular wrong of 'rape'. The crime of rape is extremely specific in relation to the acts that constitute rape, for example, in relation to whether the defendant's penis<sup>62</sup> did 'penetrate'<sup>63</sup> the complainant's 'vagina'.<sup>64</sup> As the definition of battery is much broader, encompassing many acts of intentional touching, victim-survivors may have more flexibility as to the way in which they describe their experience, and more choice as to the language and terminology they use.<sup>65</sup> In addition, Feldthusen explains, the claimant has, to some extent, control as to the facts that are presented and the expert evidence that is admitted.<sup>66</sup> Consequently, the victim-survivor

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<sup>60</sup> Massaro, 'Empathy, Legal Storytelling and the Rule of Law', p 2106; see chapter 3, section 3.5.2(c).

<sup>61</sup> *Ibid.*

<sup>62</sup> 'References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery)'; Sexual Offences Act 2003, section 79(3).

<sup>63</sup> 'Penetration is a continuing act from entry to withdrawal'; Sexual Offences Act 2003, section 79(2).

<sup>64</sup> "'Vagina" includes vulva'; Sexual Offences Act 2003, section 79(9).

<sup>65</sup> Although it is notable that the lawyer is likely to guide victim-survivors as to what information to divulge and so on, victim-survivors are likely to have more choice and control as to what to say; Feldthusen, 'The Civil Action for Sexual Battery', p 233.

<sup>66</sup> *Ibid.*, p 216; see also Sheehy, 'Compensation for Women who have been Raped', pp 214-215.

may feel as though she has, to some extent, freedom to convey her experience of rape in her own words, and may perceive the greater control as empowering.<sup>67</sup>

Perhaps of greater significance, Feldthusen suggests, is that the claimant will have the opportunity to tell the court the harms that she has suffered as a result of the wrongdoer's tortious conduct.<sup>68</sup> Because in tort law the damages awarded are measured in relation to the harms that the particular claimant has suffered,<sup>69</sup> the victim-survivor may view this as demonstrating that her story has been heard in a meaningful way. Such an opportunity is likely to be much more limited for complainants in a criminal rape case, as sentencing is measured primarily in relation to the offender's culpability.

There is, however, a problem of *whose* stories are likely to be heard in the civil justice system. The civil justice system is notoriously expensive, and victim-survivors face the possibility of being charged with considerable costs if they lose their case.<sup>70</sup> Victim-survivors are also highly unlikely to receive legal aid for this kind of case.<sup>71</sup> Consequently,

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<sup>67</sup> Feldthusen, *ibid.*

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

<sup>69</sup> For a discussion as to the extent to which the categories and level of damages can address the wrong and harms of rape, see below, section 8.7

<sup>70</sup> There is, of course, the possibility of conditional fee agreements whereby the claimant's solicitor's fees are waived, but if the claimant is successful the solicitor receives the costs plus a 'success fee', which is recoverable from the defendant but when the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (LAPSO) comes into force (the date is not yet appointed), success fees will be paid out of the claimant's damages that are awarded (section 44(4) replacing subsection 6 in the Courts and Legal Services Act 1990, section 58A). And in case the claimant is unsuccessful she can take out 'After the Event' insurance which covers the defendant's costs. Following LAPSO, a successful claimant will still bear the burden of paying the insurance premiums (section 48(1) inserting 58C into the Courts and Legal Services Act 1990), where previously this cost was also recoverable from the defendant (Access to Justice Act 1999, section 29). Overall, this means that the damages that a claimant actually receives may be considerably reduced.

<sup>71</sup> Legal aid (which is more accurately called Legal Services Commission funding) has been excluded for personal injury cases (except those relating to clinical negligence) since 1999; Access to Justice Act 1999, Schedule 2 (1)(a). Personal injury means any disease or impairment of a person's physical or mental condition: Legal Services Commission (2010) *Category Definitions*; available online:

[http://www.legalservices.gov.uk/docs/civil\\_contracting/CategoryDefinitions.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/CategoryDefinitions.pdf) (last accessed 17 October 2012). When LAPSO comes into force, the exclusion of compensation claims for assault,

many victim-survivors may choose not to initiate civil proceedings due to costs or potential costs. For this reason, amongst others, in Sheehy's view, the tort system most likely only operates to the advantage of women who are 'relatively privileged on our current social structure by being heterosexual, able-bodied, white-skinned, and not poor'.<sup>72</sup>

In addition, typically civil suits are only brought against a wrongdoer who has the financial means to pay damages if the claimant is successful.<sup>73</sup> Consequently, it may be that claims in tort are only brought for rape where either the tortfeasor is wealthy or there is a third party who can pay (such as an employer or insurance company). Indeed, in three cases (a significant proportion of the civil claims for rape that have been litigated in the higher courts), the tortfeasor's wealth had increased dramatically shortly before a claim was pursued. In *W v Meah; D v Meah* the two women who brought their claims did so after *Meah* was awarded £45,000 in a successful tort suit of his own; in *Lawson v Glaves-Smith, Executor for the Estate of Dawes* the claimant initiated a civil suit after the tortfeasor had died, leaving a substantial estate; and in *A v Hoare* the claimant was prompted to sue by the tortfeasor's £7million win in a national lottery. In addition, ten of the victim-survivors abused by John Worboys – who, acting in his capacity as a taxi driver, administered intoxicating substances to and raped a number of women – sued his motor insurance company. However, the High Court held that they could not sue the company as their injuries could not be said to have resulted from 'the use of a vehicle on the road', which the Road Traffic Act 1988, section 145(3), requires insurance policies to cover.<sup>74</sup> Further, in

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battery and false imprisonment from legal aid is under Schedule 2, Part 2, section 3. However, civil legal services may be provided to a person who was abused as a child, or a vulnerable adult who has been abused (including sexual abuse, such as rape), Schedule 2, Part 1, section 3. As such, there may be a few civil claims for rape in which legal aid may be available.

<sup>72</sup> Sheehy, 'Compensation for Women who have been Raped', p 228. However, in relation to the Canadian cases of sexual battery, Feldthusen has noted that the profile of claimants has not tended to include women who may identify with upper-middle class or professional women; 'The Civil Action for Sexual Battery', p 222, footnote 73. Of course, this is a limited observation, and no inference as to this point can be drawn from the UK cases.

<sup>73</sup> And firms are unlikely to take on cases where the defendant does not have the means to pay damages as otherwise they will not be able to recover their costs or a success fee if they win the case (although this will change when LAPS0 comes into force as the claimant's lawyer's costs and success fee will be recoverable from an award of damages made to the claimant).

<sup>74</sup> *AXN and Others v Worboys and Others* [2012] EWHC 1730.



another three of the civil claims for rape, the claimant has not only brought a direct action against the tortfeasor but a vicarious action against his employer who has much 'deeper pockets'.<sup>75</sup> While there was not the close connection between the tortfeasor's acts and his employment for vicarious liability in any of these cases, this nevertheless illustrates that victim-survivors may not pursue a civil claim without at least the possibility that a defendant has the means to pay damages.<sup>76</sup> Therefore, it is likely that a limited number of rape victim-survivors will consider a civil suit financially worth pursuing, and few will be provided with the means by which to tell their story and be heard in a court of law.

This issue, however, is a significant defect of the tort system more generally, and does raise questions as to whether an alternative scheme would be fairer and more likely to move towards social justice. Tort law does not provide the possibility to redistribute resources to rape victim-survivors on a wider scale, and may only provide a small number of victim-survivors with compensation and/or some form of justice. However, as has been explained, considering a solution to this problem is not the purpose of this thesis. Although tort law may not fairly redistribute money and tangible resources to victim-survivors in general, it may be that tort law can, in addition to providing compensation for the harms of rape to some victim-survivors, have wider positive implications. For example, West suggests, civil claims brought by victim-survivors can represent that they are empowered to challenge their rapist, inverting the imbalance of power inherent in rape.<sup>77</sup> In addition, it may be that providing a space for the telling and hearing of (albeit a few) victim-survivors' stories can indicate that the harms of rape are recognised and that victim-survivors' diverse experiences are respected.

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<sup>75</sup> *Parrington v Marriott; Makanjuola v Commissioner of Police for the Metropolis and Another* (1989) *The Times*, 8 August 1989; *N v Chief Constable of Merseyside Police* [2006] EWHC 3041.

<sup>76</sup> This contrasts to Feldthusen's surveillance of the Canadian case law in which he notes the majority of cases have involved direct actions only, often against a tortfeasor who is of limited means; 'The Civil Action for Sexual Battery', p 210.

<sup>77</sup> Nora West (1992) 'Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis', *University of Toronto Faculty Law Review*, 50: 96.

## 8.6 HOLDING THE WRONGDOER RESPONSIBLE FOR THE HARMS OF RAPE

For many rape victim-survivors, it is important that not only are the wrong and harms of rape recognised, but that the wrongdoer is held responsible for his actions and their consequences.<sup>78</sup> While, as discussed above, tort law lacks the symbolic strength of the criminal law in terms of conveying the social and public dimensions of the wrong and 'core' harm, where a victim-survivor is successful in a civil action against the wrongdoer he will be held responsible for trespass to the person and liable to pay damages for the harms that were caused. The chances of a wrongdoer being held responsible for his actions are likely to be greater in tort law than in the criminal law as the burden of proof is lower.

### 8.6.1 The Burden of Proof

In the civil law, the claimant typically must prove her case on the balance of probabilities – that is, that it was more likely than not that the wrongdoer did the wrongful act and caused the harms – whereas in the criminal law the prosecution must prove the case beyond reasonable doubt.<sup>79</sup> The victim-survivor's chance of success in the civil law is significantly increased if she initiates an action following the conviction of the wrongdoer in the criminal courts, as section 11 of the Civil Evidence Act 1968 establishes that a criminal conviction can be admitted as evidence of civil liability where it is relevant to do so. Due to the lower burden of proof in the civil law, where the wrongdoer has been convicted of the crime of rape (or a lesser sexual offence), it is likely that a tort action will succeed. However, in *J v Oyston*,<sup>80</sup> a civil claim in trespass to the person brought after a conviction for rape, the High Court emphasised that a criminal conviction is only evidence of and not conclusive of civil liability. As such – indeed, as occurred in this case – the victim-survivor may have to go through another trial, which may be long, stressful and traumatic, at the end of which the claimant may not be successful.<sup>81</sup>

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<sup>78</sup> See chapter 3, section 3.4.2.

<sup>79</sup> See the below discussed in Godden, 'Claims in Tort for Rape', pp 167-170; Godden, 'More Trials, Fewer Tribulations?', pp 170-171.

<sup>80</sup> [1999] 1 WLR 694.

<sup>81</sup> Temkin, *Rape and the Legal Process*, p 336.

Victim-survivors can, however, bring a civil claim where they have not reported the case to the police or where a criminal complaint did not lead to the wrongdoer being convicted of a sexual offence. Indeed, due to the lower burden of proof, a civil claim may still be successful in a case in which the wrongdoer was acquitted in a criminal court. However, the burden of proof in civil claims for rape may not be as low as initially appears as in civil cases involving 'serious matters' the courts have often required the claimant to prove the case to a greater degree of probability, although it has been emphasised that the case need not be proved beyond reasonable doubt as in the criminal courts.<sup>82</sup> In all the civil claims for rape that have discussed the standard of proof it is this 'intermediate' standard which has been applied.<sup>83</sup> For example, in *Griffiths v Williams* Mummery LJ agreed with the trial judge's explanation that one must 'obviously' be 'more careful' in determining liability because 'this is a more serious charge'. Presumably, this is because the civil wrong may also constitute the crime of rape, which carries a certain level of stigma.

However, although the tortious act may also constitute a crime, the case is determining civil liability from which civil sanctions follow, and therefore the case should be treated the same as any other civil wrong. In the civil law, the claimant's case is for compensation for the harms caused by the defendant, and if the defendant is mistakenly found against then her/his rights are infringed, but if the claimant is mistakenly found against then s/he is left without a remedy and bears the loss caused by the defendant's wrong.<sup>84</sup> As such, Redmayne argues, there is no reason to value either the claimant's or defendant's rights more highly and therefore they are balanced equally.<sup>85</sup> The situation is, however, very different in the criminal context where there is a much greater infringement of the defendant's rights if the defendant is mistakenly convicted and punished for a crime s/he did not commit.<sup>86</sup> Indeed, in *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)*<sup>87</sup> the House of Lords confirmed that there is only one standard of proof in the civil law, that

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<sup>82</sup> *Bater v Bater* [1950] 2 All ER 458, Denning LJ, para 37.

<sup>83</sup> See *Griffiths v Williams*; *Parrington v Marriott*; *Miles v Cain*; *Makanjuola*.

<sup>84</sup> Redmayne, 'Standards of Proof in Civil Litigation', p 171.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* The different purposes and sanctions of the civil and criminal law were confirmed to justify the different burdens of proof in cases where the wrong may constitute both a civil and criminal wrong in *Y v Norway*. For further discussion of this case, see chapter 7, section 7.5.

<sup>87</sup> [1996] AC 563.

of the ordinary balance of probabilities.<sup>88</sup> It should, therefore, be clear that in cases of trespass to the person where the wrongful act may also constitute the crime of rape the claimant must prove her case on the balance of probabilities.

Unfortunately, however, the burden of proof remains unclear. Despite confirming the balance of probabilities test, in *Re H* Lord Nicholls explained that:

The more serious the allegation the less likely it is the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.<sup>89</sup>

This statement suggesting a necessary link between the severity of a wrong and its likelihood of occurring has led to judges demanding stronger evidence in civil cases involving matters which may also constitute criminal wrongdoing. For example, in *Parrington v Marriott*, a civil claim for rape post *Re H*, Mummery LJ explained that one should be 'more sure' that the defendant was responsible. The confusion continues as Lord Nicholls' statement was doubted in the House of Lords in *Re B (Children) (Sexual Abuse: Standard of Proof)*<sup>90</sup> on the same day as it was approved in the Court of Appeal in *Re D*.<sup>91</sup> In *Re B*, Baroness Hale explained that while it is true that the less probable an event the more evidence is required to prove its occurrence, the probability of an event is dependent upon

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<sup>88</sup> Although this case and the majority of those cited in the judgment are family cases concerning care proceedings where a child may have been subject to abuse, it has been cited and followed in other contexts, including a case involving assault and battery which constitute both torts and crimes: *Duane Sheppard v The Secretary of State for the Home Department* [2002] EWCA Civ 1921. The exception to the ordinary balance of probabilities test is where civil proceedings can result in criminal-like sanctions and therefore the criminal standard of proof – proof beyond reasonable doubt – is required; *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35, Baroness Hale, paras 20 and 22; Lord Hoffmann, para 7. See, for example, *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340, involving the imposition of a 'sex offender order' under the Crime and Disorder Act 1998, section 2, and *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, involving an anti-social behaviour order.

<sup>89</sup> *Re H*, p 586.

<sup>90</sup> [2008] UKHL 35.

<sup>91</sup> [2008] 1 WLR 1499. For a discussion, see Peter Mirfield (2009) 'How Many Standards of Proof Are There?', *Law Quarterly Review*, 125: 31. Although *Re B* is more authoritative, both approaches have been taken in subsequent cases, see for example *Re D (Children)(Non-Accidental Injury)* [2009] EWCA Civ 472, which followed *Re B*; and *Muscat v Health Professions Council* [2008] EWHC 2798, which applied *Re H* and *Re D*.

the particular facts at hand and not the seriousness of the allegations.<sup>92</sup> This is correct. However, it may be that perceptions of rape as a particularly serious crime, and supposedly therefore less probable, continue to be influential in civil claims, with judges requiring the claimant to provide more cogent evidence to prove her case.<sup>93</sup> While claimants in the past have been successful in three out of the four cases in which the standard of proof was clearly higher than the ordinary balance of probabilities,<sup>94</sup> this does not justify the heightened requirement and in future civil claims for rape it should be emphasised that the trial concerns civil liability. Either way, the claimant is in a stronger position in the civil courts than the prosecution is in a criminal case, and has a greater chance of receiving a judgment against the wrongdoer as the standard of proof is lower, but it should be the ordinary balance of probabilities as the defendant is not on trial for the crime of rape. Consequently, the victim-survivor may have a greater chance of a court finding the wrongdoer responsible for his actions in the civil justice system than in the criminal justice system.

### **8.6.2 A Hierarchy of Rapes?**

Although in tort law victim-survivors may find it easier to prove that the wrongdoer is responsible for the wrong and harms of rape, it may be that tort law does not satisfactorily hold wrongdoers responsible. This is because tort law is categorised as ‘private law’ and is conceptualised as addressing wrongs that occur between two individuals, typically by means of compensation, in an action which is pursued by an individual. This contrasts to criminal law which is categorised as ‘public law’ which, by way of an action on behalf of the state, addresses wrongs that are harmful to society as well as an individual, typically by way of punishment. Without the same symbolic strength of the criminal law, and less severe sanctions, it may appear that rapes that are responded to by the civil law and not the criminal law are ‘less serious’ rapes. Moreover, as the cases which more closely match the stereotypical rape template – that is, where the rapist is a stranger who attacks an ‘innocent’ woman with physical violence while she is alone, at night – are more likely to be

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<sup>92</sup> *Re B*, paras 20-23.

<sup>93</sup> Godden, ‘Claims in Tort for Rape’, p 170.

<sup>94</sup> *Griffiths v Williams*; *Parrington v Marriott*; *Makanjuola*; and in *Miles v Cain* the claimant was successful at first instance but the Court of Appeal ordered a retrial.

successfully prosecuted in the criminal justice system,<sup>95</sup> it may be that cases which deviate from this template are more likely to succeed in the civil courts, which could reinforce rape myths which dictate that some rapes – for example, those perpetrated by a partner or an ex-partner – are ‘not really rape’.

The possible creation of a hierarchy of rapes is illustrated by civil cases of rape and their relationship to the criminal law. In *W v Meah; D v Meah* and *A v Hoare* where a civil claim was brought following a successful criminal prosecution, the wrongdoer was a stranger in the latter case and a relatively unknown neighbour in the former, and the rapes occurred with the use of physical force, violence and threats of violence. In *Lawson v Glaves-Smith, Executor for the Estate of Dawes* where the claimant was falsely imprisoned and threatened by the wrongdoer whom she had not met previously, she reported the rapes to the police and did not pursue a civil claim until a year later, after the criminal case was dropped following the death of the wrongdoer. For such cases, it may be that a criminal case must proceed first, as otherwise the victim-survivor may have difficulty identifying or notifying the wrongdoer of a civil action brought against him.

By comparison, in both *Griffiths v Williams* and *Parrington v Marriott* the parties were known to each other in the employment context.<sup>96</sup> In both cases the claimant reported the case to the police but the Crown Prosecution Service decided not to proceed with a prosecution, and yet a successful civil suit followed. Further away from the stereotypical rape as the perpetrator was the victim-survivor’s ex-partner, in *Moore v Green*<sup>97</sup> there was no mention of whether the victim-survivor reported the case to the police before initiating a civil action. Looking at these cases then, it may be that increasing the number of civil claims for rape contributes to creating and reinforcing a ‘hierarchy of rapes’ in which the most ‘serious’ – those which correspond most closely to the stereotypical rape – are successfully prosecuted in the criminal courts with the possibility of an additional civil claim, and those that are perceived to be ‘less serious’ – typically those that deviate from the stereotypical rape – are responded to by the civil law.

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<sup>95</sup> Kelly *et al.*, *A Gap or a Chasm?*; Temkin, *Rape and the Legal Process*, pp 24-25.

<sup>96</sup> Although in the latter case at the time of the rapes the claimant was no longer employed by the defendant but was his tenant.

<sup>97</sup> (1990) *The Guardian*, 13 September 1990.

Bringing claims in tort law may, therefore, undermine the harmfulness of rape – particularly rapes that occur in certain contexts – and fail to hold the wrongdoer fully responsible due to the fact that it is civil liability and civil sanctions that are imposed. However, first, it is only in a relatively low proportion of rape cases that the wrongdoer is found guilty of the crime and punished.<sup>98</sup> And, secondly, some rape victim-survivors do not prioritise traditional forms of punishment as the appropriate response to rape, but find a level of both material and symbolic reparation important to gain a sense of justice.

### **8.7 SYMBOLIC AND MATERIAL REPARATION FOR THE HARMS OF RAPE**

The final aspect of justice that was discussed in chapter 3 as being important for some rape victim-survivors is that they receive symbolic and material reparation for the wrong and harms of rape.<sup>99</sup> In the criminal justice system, symbolic is privileged over material reparation as punishment is inflicted in proportion to the wrongdoer's culpability, which primarily relates to the 'core' harm of rape, and does not typically account for the material harms that the victim-survivor experiences as a result of the wrong. However, symbolic reparation for both the 'core' and material harms is important for some victim-survivors. And material reparation, such as financial compensation, is important for some as the costs of rape can be extremely high – for example, costs of medical and health care, loss of income and so on.<sup>100</sup> Tort law may provide a more balanced approach to symbolic and material reparation for the wrong and harms of rape, as the response to wrongdoing is to award damages for the harms that the particular individual has suffered.

However, to what extent tort law provides satisfactory or ideal symbolic recognition of and material reparation for the wrong and harms of rape is questionable. First, the categorisation and level of damages awarded may limit both symbolic and material reparation. Secondly, there is the possibility that tort law may privilege material reparation over symbolic reparation where third parties are the defendants to the action, for example, through vicarious liability, or it may be that tort law fails to provide material reparation as the wrongdoer does not have the financial means to pay damages and there is no third party who may be held vicariously liable. Finally, the extent to which tort law can provide

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<sup>98</sup> See chapter 4, section 4.3.

<sup>99</sup> See chapter 3, section 3.4.

<sup>100</sup> See chapter 3, section 3.3.3.

symbolic recognition of the wrong and 'core' harm may be limited due to conceptions of tort law as 'private' law which individualises wrongs and obscures their social (and gendered) context. These issues will be discussed in turn, to evaluate to what extent tort law may provide both symbolic and material reparation for the wrong and harms of rape.

Graycar has documented the extent to which the levels and categorisation of damages in tort law have tended to place a higher value on aspects of men's lives, failing to recognise and provide adequate compensation for the harms that women more commonly suffer.<sup>101</sup> In the context of sexual violence (or 'sexual battery'), Feldthusen has argued that the Canadian courts have mischaracterised the nature and extent of the harms suffered, and failed to apply ordinary principles of damage quantification (particularly non-pecuniary damages for lost earning capacity), which has had the consequence of systematically under-compensating victim-survivors.<sup>102</sup> In relation to the UK, there are too few reported cases – and of those, few which discuss in detail the calculation of damages – to undertake a comparative analysis of damage quantification.

However, it is clear that the level of damage awards are increasing, and judges are demonstrating a greater knowledge of and sensitivity towards the variety of harms that can flow from rape. In the earlier case of *W v Meah; D v Meah* the claimants were awarded £6,750 and £10,250 respectively for the rapes and sexual assaults they were subject to at knife point, in addition to being tied up and physically assaulted. Woolf LJ emphasised that the damages should mirror 'more conventional' personal injury cases, explaining that '[a]lthough these ladies underwent terrible experiences ... unfortunately, very often the physical injuries that the victims of traffic accidents sustain are much more serious than the physical injuries that these two ladies suffered'.<sup>103</sup> Construing the harm that *W* and *D* suffered as primarily physical injury obscures the nature and experience of rape and sexual assaults as a violation of sexual autonomy. Similar levels of damages were awarded in two

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<sup>101</sup> For example, see Regina Graycar (1997) 'Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages', *University of British Columbia Law Review*, 31: 7; Regina Graycar (2012) 'Damaging Stereotypes: The Return of Hoovering as a Hobby', in Richardson and Rackley (eds) *Feminist Perspectives on Tort Law*.

<sup>102</sup> Bruce Feldthusen (1994) 'Discriminatory Damage Quantification in Civil Actions for Sexual Battery', *University of Toronto Law Journal*, 44: 133.

<sup>103</sup> *W v Meah; D v Meah*, p 942.



civil claims for rape that occurred within the following five years.<sup>104</sup> In comparison, in the mid-1990s in *Griffiths v Williams* the Court of Appeal refused to interfere with a jury's award of £50,000 to a claimant who brought a trespass to the person claim for rape, and Rose LJ emphasised that trespass to the person – here, rape – is in 'quite a different category to personal injury cases in general' and that the 'mental consequences [of rape on the claimant] were considerable'. Following suit, in *Parrington v Marriott* the claimant was awarded nearly £75,000 and Eady J awarded the claimant in *Lawson v Glaves-Smith, Executor for the Estate of Dawes* almost £259,000.

In addition to an increasing level of damages, it is interesting to note the changes in the categorisation of damage awards, although there is typically little detailed discussion of this in the cases. In *Griffiths v Williams* Thorpe LJ speculated that of the £50,000 damages no more than £15,000 could have been for the injuries that were a direct consequence of the rape (and sexual harassment), with the remaining £30,000 categorised as aggravated damages. Aggravated damages are awarded for the mental distress and anxiety the defendant causes the claimant through the way in which the tort is committed or by their subsequent behaviour, which, Conaghan suggests, may serve to recognise the abuse of trust and power that is inherent in sexual violence.<sup>105</sup> Indeed, in *Griffiths v Williams* Millet LJ commented that 'the gravity and seriousness of the outrage to a woman's feelings which is caused by the particularly intimate nature of this form of assault' needs to be redressed. Perhaps it is because of the abuse of trust and power in rape that in *Lawson v Glaves-Smith, Executor for the Estate of Dawes* Eady J did not distinguish between general and aggravated damages but awarded £78,500 to address both combined.<sup>106</sup>

However, there is a potential problem with rape victim-survivors pursuing civil claims. As Feldthusen *et al.* explain, 'in order to win "big", the lawyer is encouraged to portray [the claimant] as ... a person needing therapy for a long time and ... whose potential will never

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<sup>104</sup> The claimant was awarded £8,000 in *Makanjuola v Commissioner of Police for the Metropolis and Another*, and at first instance the claimant was awarded £12,500 in *Moores v Green*.

<sup>105</sup> Joanne Conaghan (1998) 'Tort Litigation in the Context of Intra-Familial Abuse', *Modern Law Review*, 61: 132, p 146 (in relation to intra-familial sexual abuse).

<sup>106</sup> *Lawson v Glaves-Smith, Executor for the Estate of Dawes*, para 136. The remainder of the damages were special damages for lost past and future earnings.

be fully realized'.<sup>107</sup> There are two possible consequences of this tactic. One is that the harms of rape will be 'individualised' and 'medicalised', and viewed as though the harms can be remedied through courses of mental health treatments which may distort the social and gendered dimensions of rape.<sup>108</sup> The second is that the claimant may be portrayed as a person whose sense of self has been irreparably shattered, potentially reinforcing and reifying the harm of rape as a 'fate worse than death'. Indeed, in *Lawson v Glaves-Smith, Executor for the Estate of Dawes* Eady J explained that Lawson's experience at Alderney had caused a 'personality change' which had affected her ability to manage the hairdressing salon she owned, which the claimant argued had decreased her earning capacity.<sup>109</sup> It is important to note, however, that Eady J said that the 'ordinary vicissitudes of life' would have contributed to Lawson's lessened earning capacity and a sufficient causal connection could not be established between this and the claimant's experiences at Alderney.<sup>110</sup> Moreover, Eady J could 'find no convincing reasons to suppose that Lawson will be unemployable for the next 18 years'.<sup>111</sup> Consequently, in relation to future earnings he awarded one year's worth of work for Lawson, considering that this period would give the claimant time to recover following the likely stressful trial but which, he said, hopefully, may have provided a sense of 'closure'.<sup>112</sup> On the one hand, it may be argued that the extent to which rape can affect a victim-survivor's life may have been undermined; but on the other hand it may be viewed as highlighting that rape can be moved on and recovered from: it is not a 'fate worse than death'.

Finally, there is the potential for a rape victim-survivor's case to be viewed with suspicion, and questioned as to whether it is a false claim brought to secure a high payout.<sup>113</sup> Indeed,

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<sup>107</sup> Feldthusen *et al.*, 'Legal Compensation for Sexual Violence', p 449.

<sup>108</sup> See a discussion of this issue in chapter 3, section 3.3.1; with reference to Bumiller, *In An Abusive State*; and Engle and Lottmann, 'The Force of Shame'.

<sup>109</sup> *Lawson v Glaves-Smith, Executor for the Estate of Dawes*, para 28.

<sup>110</sup> *Ibid*, paras 126 and 129. Although he attributed the dissolution of the claimant's hairdressing business to the harm caused by the wrongdoer, and thus awarded damages in respect of this; para 152.

<sup>111</sup> *Ibid*, para 129.

<sup>112</sup> *Ibid*.

<sup>113</sup> Indeed, this was the position taken by the defendant in *Lawson v Glaves-Smith, Executor for the Estate of Dawes*; paras 14 and 18. Moreover, this suspicion may be heightened due to the concerns of an increasing 'compensation culture'. See, for example, Lord Young of Graffham (2010) *Common*

the damages that have been awarded in civil claims for rape in the last 15 years have been considerably higher than the compensation awards under the Criminal Injuries Compensation Scheme (CICS). Currently, the tariff for rape begins at £11,000 where there is one rapist, and can increase to £13,500 if there are multiple rapists; and £22,000 can be awarded where there are serious internal injuries, and £27,000 where the rape has caused a severe mental illness.<sup>114</sup> This compares poorly to the £75,000 awarded in *Parrington v Marriott* and £259,000 in *Lawson v Glaves-Smith, Executor for the Estate of Dawes*. Therefore, at least financially, it may be more advantageous for victim-survivors to pursue a tort claim rather than apply to the Criminal Injuries Compensation Authority (CICA).

However, it may be that rape victim-survivors do not pursue a civil claim purely for financial compensation to address the material harms that they have suffered. In Feldthusen *et al.*'s study comparing sexual violence victim-survivors' experiences of applying to Canada's equivalent of the CICA and those who brought a claim in tort, the researchers found that victim-survivors were discontent with the scheme not primarily because of the lower awards but because it is publically funded.<sup>115</sup> Indeed, as was discussed in chapter 3, it seems that victim-survivors do not value financial compensation purely for its instrumental purposes, but because of its symbolic significance when the wrongdoer is to pay for the harms that he caused. Moreover, it may be that victim-survivors are satisfied even when the wrongdoer is unable to pay the full amount of compensation, as long as he pays some compensation to provide a level of both symbolic and material reparation for the harms that he caused.

Nevertheless, as has been noted, there have been a number of civil claims for rape in the UK in which the claimant has argued that a third party is vicariously liable for the tortfeasor's acts.<sup>116</sup> None of these claims have been successful on the basis that either the tortfeasor's acts were not 'authorised' by the third party,<sup>117</sup> or because there was not a

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*Sense—Common Safety* (London: HMSO); James Hand (2010) 'The Compensation Culture: Cliché or Cause for Concern?', *Journal of Law and Society*, 37: 569.

<sup>114</sup> CICS 2008, 'Tariff of Injuries' table.

<sup>115</sup> Feldthusen *et al.*, 'Legal Compensation for Sexual Violence'.

<sup>116</sup> *Parrington v Marriott*; *Makanjuola v Commissioner of Police for the Metropolis and Another*; *N v Chief Constable of Merseyside Police*.

<sup>117</sup> *Makanjuola and Parrington v Marriott*, at which time the relevant test was the 'Salmond' test; see John W Salmond (1936) *The Law of Torts* (9<sup>th</sup> edn, Sweet and Maxwell), p 95.

'close connection' between the tortfeasor's acts and his employment.<sup>118</sup> While it would seem that in these cases the victim-survivors have prioritised compensation *per se*, the fact that a tort had occurred – that the tortfeasor did have sex with the claimant without her consent – was established, thus providing recognition of the wrongdoer's wrongful and harmful actions, even if he did not take responsibility for them. Therefore, to some extent, victim-survivors may find it important that the wrong and harms are recognised and attributed to the wrongdoer, and perceive this as an aspect of justice, but, at the same time, also potentially receive financial compensation for the material harms of rape.

### **8.8 READING BETWEEN THE TORT LAW LINES: INDICATING WAYS TO ACHIEVE JUSTICE FOR RAPE VICTIM-SURVIVORS**

It is likely that it will be in only a few cases in which victim-survivors will have a realistic option of pursuing a tort suit, as the majority of wrongdoers will probably not be able to afford to pay damages if they are awarded, and in most cases there will be no lucrative third party who could be liable to pay damages. Nevertheless, for those victim-survivors who can bring a tort claim for compensation for the harms of rape, tort law can, to a considerable extent, meet all the aspects of justice, as understood by some victim-survivors. One main limitation, though, is that the civil trial, like the criminal trial, is adversarial in nature<sup>119</sup> which restricts the possibilities for protecting victim-survivors and meeting their needs and interests.<sup>120</sup> However, the Woolf reforms to civil procedure encourage a 'more cooperative' system in which civil claims are increasingly managed, settled and concluded without a trial.<sup>121</sup> In light of this, there is also an emphasis on 'case management' in civil trials, which has, amongst other things, reduced the extent of oral evidence which is typically replaced by written witness statements, and it may be that the trial is 'less adversarial',<sup>122</sup> particularly as a civil trial is most commonly heard and decided by a judge without a jury. Nevertheless, the nature of the trial remains fundamentally

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<sup>118</sup> *N v Chief Constable of Merseyside Police*, for which the relevant authority was the 'close connection test' from *Lister v Hesley Hall* [2001] UKHL 22. For more detail, see Godden, 'Claims in Tort for Rape', pp 175-176.

<sup>119</sup> Dennis, *The Law of Evidence*, p 15.

<sup>120</sup> Ellison, *The Adversarial Process and the Vulnerable Witness*.

<sup>121</sup> SH Bailey, Jane Ching, MJ Gunn and David Ormerod (2002) *Smith, Bailey and Gunn on the Modern English Legal System* (London: Sweet and Maxwell), p 1028.

<sup>122</sup> *Ibid.*

adversarial without guarantees that victim-survivors will be any better protected than they are in a criminal trial. There are, however, ways in which tort law could be improved within the remit of an adversarial trial to better meet the aspects of justice set out in chapter 3.

First, as was argued above, the limitations on the admissibility of sexual history evidence that apply in the criminal law should also apply in civil trials where the issue is liability for a tortious wrong that could also constitute a sexual offence. The use of sexual history in trials – whether criminal or civil – may cause victim-survivors unnecessary stress, trauma and embarrassment. Moreover, sexual history may be used or interpreted in ways that rely on gender stereotypes and rape myths, failing to respect women’s sexual choices and experiences of rape, which may influence the outcome of the case.<sup>123</sup> The current restrictions – and tighter restrictions – on sexual history evidence do not breach a defendant’s rights in a criminal trial, and therefore would not do so in a civil trial.<sup>124</sup> Consequently, the provisions as to the admissibility of sexual history evidence should also apply in relevant civil trials. In addition, a more systematic approach to protecting vulnerable witnesses in the civil law should be developed and adopted, which may also benefit some rape victim-survivors who pursue a tort suit against their abuser.

Secondly, there could be more research into actual or potential claims by rape victim-survivors against third parties in negligence, for example, for either contributing to causing the rape or for causing the victim-survivor further harm subsequently. One example is the *Hill v Chief Constable of West Yorkshire*<sup>125</sup> type of scenario, where the victim-survivor brings a claim against the police for negligently investigating and thus failing to protect her from being raped. Another possibility is where the victim-survivor has suffered further harm through a criminal investigation, and it can be argued that it was caused by negligent working practices or policies. These cases overlap with human rights claims – either in relation to a positive duty placed upon the state to ensure that victims’/victim-survivors’ rights under the European Convention on Human Rights are secured, for example by

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<sup>123</sup> Lees, *Carnal Knowledge: Rape on Trial*.

<sup>124</sup> See above, section 8.4.1.

<sup>125</sup> [1989] AC 53. Here, the claimant was the mother of the last of Peter Sutcliffe’s murder victims who argued that her daughter would not have been killed had the defendants investigated the case to the appropriate standard of care. However, the House of Lords held that the police did not owe the claimant’s daughter a duty of care and thus her case failed.

adequately investigating crimes, or in relation to the legal process, for example, not to cause harm that amounts to torture (Article 3) and not to breach the right to respect for private and family life (subject to the public interest test; Article 8). There have been some investigations into the ways in which the criminal justice response to rape may violate victim-survivors' human rights in some cases, such as in Londono's work.<sup>126</sup> And there is research into the overlap between tort law and human rights in general.<sup>127</sup> However, what has not been given much consideration is whether such approaches can provide justice in the view of victim-survivors. This thesis provides an evaluative measure as to what constitutes justice from the perspective of some victim-survivors which can be used to explore this proposition, and provides some of the general groundwork as to tort law and justice for victim-survivors.

If tort law can only provide a sense of justice for a minority of victim-survivors, it may be that an alternative scheme would be more beneficial. However, there exists a state funded compensation scheme for crime victims – the CICA – and victim-survivors do not always see this as providing justice precisely because it is state funded. Similarly to the exploration of restorative justice and justice for rape victim-survivors, the analysis of tort law may also indicate that increasing the use of reparation in criminal law, with less emphasis on traditional forms of punishment, may be a way to move towards securing justice for rape victim-survivors. Doing so would render inapplicable the issue of the wrongdoer's financial means, as there are many different ways in which reparation could be made to the victim-survivor, through which the wrongdoer would be held responsible for his wrongful and harmful conduct, and the victim-survivor would receive both symbolic and material reparation. With a focus on reparation, the victim-survivor would also be more likely to have the opportunity to explain the harms that she has suffered and be provided with a more meaningful response. Although this may not directly improve the legal process for victim-survivors, it may be that by shifting the focus towards reparation that, overall, there is more attention paid to and respect for the diversity of experiences and harms of rape.

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<sup>126</sup> Patricia Londono (2007) 'Positive Obligations, Criminal Procedure and Rape Cases', *European Human Rights Law Review*, 158.

<sup>127</sup> For example, Jane Wright (2001) *Tort Law and Human Rights* (Oxford and Portland, Oregon: Hart).

## 8.9 CONCLUSION

For a few rape victim-survivors, tort law may provide some form of justice as, when a successful civil claim is brought, all the aspects of justice that are set out in chapter 3 are met to a significant extent. First, civil liability in trespass to the person and the award of damages signifies that the victim-survivor has suffered a violation of her sexual autonomy. Secondly, it may be that, through the civil process, the diversity of harms of rape are better respected as victim-survivors have a legal representative to protect their interests and put forward a case on their behalf, in contrast to the criminal justice system in which the victim-survivor is a witness to the state's action against the offender. However, the experience of a civil trial is unlikely to be much of an improvement on a criminal trial, and could be more distressing as there are no particular restrictions on the admissibility of sexual history evidence, and few special measures available to vulnerable witnesses. Thirdly, tort law may provide victim-survivors with a greater chance of telling of their experience in their own words, with more of an emphasis on the particular harms that they have suffered as this dictates the level of damages that should be awarded if the wrongdoer is held liable. Fourthly, due to the lower burden of proof in the civil law (although, wrongly it was argued, it may not always be as low as the ordinary balance of probabilities), victim-survivors may have a greater chance of winning their case in the civil law than they have of the wrongdoer being convicted of a sexual offence in a criminal court. However, due to the nature of the civil law and the consequences of civil liability, tort law may not hold the wrongdoer fully responsible for the 'core' harm of rape, although, unlike the criminal law, tort law also holds wrongdoers responsible for the material harms. Finally, the levels of damages awarded for rape have been increasing, indicating that victim-survivors who have a successful civil claim are more likely to receive closer to complete symbolic and material reparation.

However, an obstacle that prevents most victim-survivors pursuing a civil claim is that the majority of wrongdoers will not be worth suing as they will not have the financial means to pay damages if they are awarded. In addition, it is unlikely that there will be many cases in which a third party could be liable to pay damages – such as an employer or an insurance company – and in no civil claim for rape has such an action been successful. While there is a state funded compensation scheme – the CICA – that victim-survivors could apply to, often they are not satisfied that it provides a sense of justice because it is state funded.

Consequently, except for in a few cases, tort law is unlikely to be able to provide justice for victim-survivors. Nevertheless, there are ways in which tort law could be improved to increase justice for victim-survivors, which may be worth pursuing. To make civil trials fairer and potentially less stressful for victim-survivors, the limitations on the admissibility of sexual history evidence and special measures for vulnerable witnesses that apply in the criminal law should also apply in the civil law, where they are relevant. There could also be further research as to actual and potential claims that rape victim-survivors could bring against third parties who have negligently caused or failed to prevent rape, or have negligently caused further harm to victim-survivors, and to what extent these claims might provide a means to secure justice. Of course, this will not solve the problems with tort law that make it an unlikely solution for many victim-survivors. Considering the positives and negatives of the tort law response to rape in reflecting on the criminal justice system, a way towards justice for rape victim-survivors may be to focus on reparation, rather than primarily carceral punishment, in the criminal law.



# CONCLUSION

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## 9.1 JUSTICE AND THE DIVERSE HARMS OF RAPE

This thesis has argued for legal responses to rape that better recognise and are more responsive to the diversity of harms that rape victim-survivors suffer. Such an approach contrasts with the dominant trend of equating justice in this context with carceral punishment. Traditionally, many feminists have endorsed this conception of justice, arguing that what is needed is legal recognition of the ‘core’ harm of rape – that is, what makes it wrongful and harmful to actual and potential victim-survivors – through the definition of rape as a particular crime, and severe punitive sanctions for those who commit rape.<sup>1</sup> However, in practice the criminal justice system fails to recognise many rapes. Gendered stereotypes and myths as to what constitutes ‘rape’ and what is acceptable, and expected, female and male sexual behaviour are often endorsed, which, as they are far from representative of women’s lived experiences of sexual violations, contribute to maintaining the high attrition rate and low conviction rate.<sup>2</sup> In addition, with the focus of criminal justice on the ‘core’ harm of rape (the violation of sexual autonomy), the diversity of material harms that rape victim-survivors suffer tend to be unaddressed in the legal system, and victim-survivors are reliant on state welfare, themselves or a community (such as family). This thesis has explored unconventional legal responses to rape, specifically restorative justice and tort law, to interrogate what constitutes justice for victim-survivors and to consider how the diverse harms of rape may be recognised and redressed in law. What has been argued is that different legal responses should be increasingly offered and utilised in addition or as an alternative to the criminal law, and that the criminal justice system needs to be more sensitive to the diversity of harms that rape victim-survivors suffer in order to secure justice.

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<sup>1</sup> As explained by McGlynn, ‘Feminism, Rape and the Search for Justice’; Bumiller, *In An Abusive State*, p 1; Martin, ‘Retribution Revisited’, pp 164-166.

<sup>2</sup> Temkin and Krahe, *Sexual Assault and the Justice Gap*.

With the thesis underpinned, shaped and driven by feminist theories and methods, explored in chapter 2, the starting point has been the ‘problem’ of rape (as a social phenomenon rather than a particular crime) and how the law and legal system should address it. In addition, the thesis drew on the views of victim-survivors in a case study of a restorative justice conference addressing historic child rape and sexual abuse, and in exploring what constitutes justice for some rape victim-survivors. Drawing on theoretical and empirical research as to victim-survivors’ perspectives on legal responses to rape, chapter 3 explored conceptions of justice underpinning legal outcomes and processes. In this respect, the outcomes of punishment, reparation and financial compensation, and apology, and then aspects of legal procedure, namely the nature and implementation of legal rules and policies, and the role and treatment of victim-survivors, were analysed. It was argued that some victim-survivors seem more concerned with having the particular material harms that they have suffered recognised and redressed than can be met by retribution and traditional forms of punishment. In addition, it may be that victim-survivors more highly value aspects of justice that may be experienced through the legal process than is typically assumed, as the focus tends to be on the justness of legal outcomes. Summarising these points, the chapter concluded that to improve legal responses to rape and to enhance the possibilities for justice is:

- (1) to provide recognition of a wrongful and harmful violation of the victim-survivor’s sexual autonomy;
- (2) to respect the diversity of experiences and harms of rape;
- (3) to allow victim-survivors to tell their stories and be heard in a meaningful way;
- (4) to hold wrongdoers responsible for the harms of rape;
- (5) to provide symbolic and material reparation for the harms of rape.

A theory of ideal justice in the context of rape was not conceptualised from these points, but rather, following Sen’s approach,<sup>3</sup> these criteria were used to comparatively evaluate the conventional response and two unconventional legal responses to rape. To this end, the remainder of the thesis was split into three parts, exploring justice from the perspective of some victim-survivors and, first, criminal law, secondly, restorative justice and thirdly, tort law.

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<sup>3</sup> Sen, *The Idea of Justice*.

## 9.2 CRIMINAL JUSTICE AND RAPE

Chapter 4 began by evaluating the extent to which the criminal justice system can condemn rape, protect the public and punish the perpetrators of rape, concluding that it fails to achieve its own standards for justice. Despite decades of feminist campaigns and law reforms, the implementation of rape laws remains problematic, and it seems unlikely that there will be a significant improvement in the attrition rate and conviction rate in the near future.<sup>4</sup> While many of the issues may be addressed by changes in societal attitudes,<sup>5</sup> this is likely to be slow. This does not mean that feminists should give up on attempting to affect social changes, but it does mean that the utility of the criminal justice system warrants closer scrutiny. As such, this chapter then analysed the extent to which the criminal justice system does (or can) provide justice from the perspective of rape victim-survivors.

On the terms of what some rape victim-survivors see as justice, the criminal justice system also fares badly. It seems that many victim-survivors want some form of authoritative recognition that there has been a wrongful and harmful violation of their sexual autonomy, which the criminal justice system fails to provide in the majority of cases. While in theory the criminal justice system may effectively provide this form of recognition, it focuses on defining, censuring and punishing for the 'core' harm of rape, which limits the possibilities for recognising and redressing the diversity of harms that victim-survivors suffer. Furthermore, the criminal justice system, at least as it is currently conceptualised and structured, does not adequately allow for victim-survivors to tell their stories and be heard in a meaningful way, nor does it allocate responsibility or provide reparation for the harms of rape. As such, it can be said that the criminal justice system fails on its own terms, and the terms of justice as seen by some victim-survivors. Consequently, the possibilities of restorative justice and tort law (specifically the trespass to the person torts) to provide justice for rape victim-survivors were explored, as alternative or additional legal responses to rape. In addition, these explorations were used to reflect on the criminal justice system, and to consider whether these different paradigms can indicate ways in which to improve the criminal justice system's response to rape.

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<sup>4</sup> Stern, *The Stern Review*; Brown *et al.*, *Connections and Disconnections*; Temkin and Krahé, *Sexual Assault and the Justice Gap*.

<sup>5</sup> Temkin and Krahé, *ibid.*

### 9.3 RESTORATIVE JUSTICE AND RAPE

Chapters 5 and 6 explored the possibilities and limitations of restorative justice to provide justice for rape victim-survivors. In this thesis, restorative justice has been defined as a process in which those with a stake in a wrong done engage in dialogue, as directly as possible, to collectively decide how to repair, as far as possible, the harms of the wrongdoing. Definitions of restorative justice, including this one, are typically relatively broad. As such, many different practices and models may constitute restorative justice, and its relationship with the criminal justice system, in theory and practice, varies. Perhaps because of its malleability restorative justice has become increasingly practiced, and theoretical and empirical research has flourished. It indicates, as discussed in chapter 5, that restorative justice may encourage wrongdoers to take responsibility for their actions and the consequences in more meaningful ways which respond to victims' experiences and redress the particular harms they suffer. In addition, restorative justice may address negative impacts on the community and wrongdoers themselves, potentially reducing repeat offending. Nevertheless, restorative justice does raise certain issues, for example, it may risk breaching a wrongdoer's due process rights. However, it was argued that there are justifications and practical examples of ways in which to address some of these issues, in particular, by placing upper and lower limits on the burdensomeness of outcomes for each wrong so that outcomes are, to some extent, proportionate and consistent. In general, empirical research is relatively positive regarding the extent to which restorative justice in practice reflects the theories, suggesting that it may be a more effective response to wrongdoing – at least under certain conditions and for some offences – than the criminal justice system.<sup>6</sup> As a result, and particularly in light of the failings of the criminal justice system, some feminists have explored the application of restorative justice to sexual violence, and rape in particular.

On the one hand, restorative justice may provide a space in which victim-survivors can tell their stories, which may be empowering, and it may encourage wrongdoers to take responsibility.<sup>7</sup> On the other hand, it has been pointed out that restorative justice may cause further harm to victim-survivors, put them at greater risk of further violence, and

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<sup>6</sup> Sherman and Strang, *Restorative Justice: The Evidence*, p 8.

<sup>7</sup> For example, see Hudson, 'Restorative Justice and Gendered Violence', p 625; Quince Hopkins and Koss, 'Feminist Theory and a Restorative Justice Response to Sex Offenses'.

may undermine the severity of the wrong and harms of rape.<sup>8</sup> To minimise these risks, some argue that only feminist organisations should facilitate restorative justice (or restorative justice-like processes) in rape cases to ensure the protection of victim-survivors, and to resist and challenge state power.<sup>9</sup> Taking a contrary approach, Miller argues that restorative justice should only be used following a conviction for rape so as to test its application in such cases but avoid trivialising rape.<sup>10</sup> Chapter 5 challenged both these positions. It was argued that the state should take responsibility for responding to rape, in part by funding and providing legal responses (such as restorative justice). And the view was taken that providing restorative justice only post-conviction further embeds the association between traditional forms of punishment and justice for rape victim-survivors, with restorative justice potentially being viewed as ‘purely’ therapeutic when therapy (or repairing the harm) should be considered a part of justice.<sup>11</sup> In addition, chapter 5 illustrated that much feminist research in this context is specific to domestic violence and that there should be further research as to the use of restorative justice in relation to sexual violence, or rape in particular. This was taken up in the next chapter, questioning to what extent restorative justice can provide justice for rape victim-survivors.

### **9.3.1 Justice for Rape Victim-survivors?**

Chapter 6 explored the possibilities of restorative justice to provide justice, as it is understood by some victim-survivors. As the focus of this thesis has been how to increase justice in an imperfect society taking account of actual institutional structures and human behaviour,<sup>12</sup> current restorative practices and the criminal justice policy context in England and Wales were important to factor in to the analysis. It was highlighted that it seems that the Coalition Government is relatively receptive to the idea of restorative justice, however, maintaining the historical trend, its primary use is in relation to youth crimes, and it risks being overly focused on wrongdoers. Its use in relation to sexual violence remains

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<sup>8</sup> Kelly and Radford, “‘Nothing Really Happened’”, p 31; Stubbs, ‘Domestic Violence and Women’s Safety’.

<sup>9</sup> Smith, ‘Beyond Restorative Justice’.

<sup>10</sup> Miller, *After the Crime*, pp 12-13.

<sup>11</sup> See also, McGlynn, ‘Feminism, Rape and the Search for Justice’, p 835.

<sup>12</sup> See Sen, *The Idea of Justice*.

controversial and, as such, is typically avoided in policy-level debates.<sup>13</sup> Thus, the subject must be broached with sensitivity and care must be taken to ensure that in the context of sexual violence, or rape in particular, restorative justice practices would be victim-survivor centred.

Nevertheless, in England and Wales, and to a greater extent Northern Ireland, restorative justice practices that operate in connection with the criminal justice system are addressing sexual offences committed by youths. And yet, this point is largely unacknowledged and there are no readily available evaluations of such cases. In addition, there are a couple of examples of restorative justice being used in relation to adult sexual violence within the UK, and internationally there are a few programmes which have done so.<sup>14</sup> Nevertheless, overall there are very few cases where restorative justice has addressed sexual violence, and fewer evaluations of such cases.<sup>15</sup> As such, a case study was undertaken, partly for the purpose of this thesis,<sup>16</sup> of a restorative justice conference which addressed historic child rape and other forms of sexual abuse in the North of England. It was evaluated in light of what some victim-survivors see as justice, as discussed in chapter 3.

So, does restorative justice provide justice for rape victim-survivors? In relation to the first aspect of justice, that there should be recognition of a wrongful and harmful violation of the victim-survivor's autonomy, restorative justice provides this at a minimal level as the wrongdoer must admit responsibility. At best, the process will lead to the wrongdoer having a greater understanding of and accepting the harmfulness and harmful consequences of his actions. In addition, restorative justice typically pays much more attention to the material harms, providing the possibility of respecting the diversity of harms that rape victim-survivors may experience, which is the second aspect of justice. Furthermore, restorative justice may allow victim-survivors to have their say and be heard in a meaningful way – the third aspect of justice – which is highlighted by Lucy's case. Although it is possible that victim-survivors may be silenced, re-victimised or further harmed through the process, the case study, considered alongside other examples of

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<sup>13</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice', p 220.

<sup>14</sup> *Ibid*, pp 218-223.

<sup>15</sup> Curtis-Fawley and Daly, 'The Views of Victim Advocates', p 609.

<sup>16</sup> And partly for a co-authored article, see McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice'.

restorative justice and sexual violence, illustrates that these risks can be reduced by extensive preparation, the inclusion of trained and experienced professionals who are knowledgeable about sexual violence, and appropriate follow-up support.

The fourth aspect of justice, according to some victim-survivors, is to hold wrongdoers responsible for the harms of rape. Some feminists argue that restorative justice cannot provide this as the outcomes do not convey the severity of the wrongdoing which is best achieved through severe state-inflicted forms of punishment.<sup>17</sup> However, as was argued in chapter 5, restorative justice outcomes can be understood as alternative forms of punishment to address the wrongfulness of the wrongdoer's behaviour but, at the same time, they can redress, and hold the wrongdoer responsible for, the particular harms that the victim-survivor suffers. In relation to the final aspect of justice, restorative justice may provide both symbolic and material reparation for the 'core' and material harms of rape, whereas the criminal justice system typically provides only symbolic reparation for the 'core' harm of rape. Overall, it seems that restorative justice has the potential to provide a form of justice for some rape victim-survivors. This raises a question, however, as to the ways to investigate further and enhance the possibilities for restorative justice to provide justice in the context of rape.

### **9.3.2 Increasing Justice for Rape Victim-survivors Through Restorative Justice**

In Lucy's case it is clear that restorative justice provided her with a sense of justice, and it was more satisfactory than criminal justice. When the case study is considered alongside the evaluations of restorative justice projects that have addressed sexual violence in other countries, it challenges assumptions that restorative justice is not appropriate in this context.<sup>18</sup> Lucy's case provides a good basis for further investigations and evaluations of existing practices, providing *ad hoc* restorative justice responses where it is desired by victim-survivors, and developing pilot programmes for restorative justice and sexual violence, including rape.<sup>19</sup>

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<sup>17</sup> Kelly and Radford, "Nothing Really Happened", p 31; Stubbs, 'Domestic Violence and Women's Safety'.

<sup>18</sup> McGlynn *et al.*, 'Sexual Violence and the Possibilities of Restorative Justice'.

<sup>19</sup> *Ibid.*

In terms of further research, there are examples of restorative justice being used in relation to sexual violence in England, Wales and Northern Ireland in the youth justice context of which there should be published evaluations.<sup>20</sup> This would expand the breadth of research in this area and ensure that restorative justice is being used appropriately and safely in these cases. Further, due to the particular risks of restorative justice to victim-survivors, the gendered power dynamics of rape and the lack of justice provided by legal and social institutions currently, such research should evaluate restorative justice in this context in relation to victim-survivors' ideas of justice, thus building on and developing the research of this thesis. Finally, the restorative justice and sexual violence projects and evaluations, as well as any future examples of restorative justice and sexual violence or empirical studies, should be brought to the fore in policy-level and political discussions, to inform the debates and take them forward.<sup>21</sup>

In terms of restorative justice in practice, the case study supports the literature which suggests that the risks to victim-survivors can be minimised by certain safeguards which are:

- 1) extensive preparation and risk assessments;
- 2) professionals with knowledge of sexual violence;
- 3) support for the wrongdoer;
- 4) a carefully planned and safe environment and location.

One notable aspect of Lucy's case is the use of a script, which may provide a means by which to ensure that the wrongdoer accepts responsibility for the wrong and harms of his conduct, and all the parties have their say and are listened to. These factors mean that restorative justice in the context of sexual violence is resource intensive, although it may be that in the long run it is more cost effective than criminal justice. However, while there are ways to take restorative justice forward in this context, it is likely to be applicable only in a small number of cases. Nevertheless, as victim-survivors' experiences of rape and sexual violence are diverse, and the criminal justice system fails to provide an adequate response in a high proportion of cases, it may be best to avoid a 'one-size-fits-all' model of criminal justice or restorative justice and work towards more flexible responses, and different options, which can be tailored to the particular case. As such, chapter 6 concluded by

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<sup>20</sup> *Ibid*, p 235.

<sup>21</sup> *Ibid*.



reflecting on criminal justice in light of the analysis of restorative justice, and considered ways in which it could be improved to better satisfy rape victim-survivors' desire for justice.

### **9.3.3 Reflecting on and Reforming Criminal Justice**

Exploring restorative justice in the context of rape strengthens the argument for rethinking what constitutes justice for victim-survivors, rather than assuming that it necessarily equates to current conceptions of criminal justice. It is important to note that the restorative justice process differs significantly from the adversarial criminal justice system, particularly because it is not typically a fact-finding process. Nevertheless, restorative justice illustrates the ways in which processes and outcomes can contribute to repairing the harms of wrongdoing, and that this is a part of justice. In addition, it shows the possibilities of providing different sanctions for crimes, and can challenge the view that punishment by imprisonment is the only sufficient way to respond to serious wrongdoing. Increasing and emphasising reparations in criminal law as a response to rape may be a means by which to increase justice for victim-survivors. Reparation can be understood as a form of punishment, but one that also provides redress for the particular harms suffered by the victim-survivor. So understood, reparation can demonstrate that the wrongdoer takes responsibility not only for the wrongful and harmful violation of the victim-survivor's sexual autonomy, but also for the material harms. Aiming for reparation may mean that victim-survivors' experiences and perspectives are better respected and accounted for throughout the legal process, and repairing the harm in this way may come to be understood as part of justice.

## **9.4 TORT LAW AND RAPE**

The final part of this thesis (chapters 7 and 8) explored the relationship between tort law, specifically the trespass to the person torts, and justice for rape victim-survivors. To begin, in chapter 7 a brief historical perspective of claims for compensation for rape, in what is now understood as tort law, was outlined. First, this illustrated the ways in which tort law reflects and contributes to constructing views of women's sexuality. Secondly, it showed part of the gendered development of tort law and the way in which men's interests in women have been privileged over the harms that women suffer. Thirdly, it highlighted the ways in which the criminal law has been prioritised over tort law, and the punishment of

wrongdoers is prioritised over compensating victims. As a result, the diverse harms of rape have been eclipsed and marginalised by the harm that rape has been understood to cause to society, and the damage that it has been seen to do to men's social and economic interests. Nevertheless, chapter 5 suggested that due to changing conceptions of women's sexuality and understandings of rape, it may be that tort law can now be used in ways which better respond to the harms of rape, and can reflect and represent more positive views of women's sexuality and sexual autonomy.

To explore this proposition, the conceptualisation of rape as trespass to the person in tort law was discussed. It is clear that rape can constitute battery, assault and false imprisonment, and, similarly to the criminal law, these torts distinguish lawful from unlawful sexual relations by consent or lack of consent. Indeed, there are a few cases in which a victim-survivor has brought a civil claim in trespass to the person for the harms of rape. However, similarly to criminal rape trials, in these cases it seems that rape myths informed judges' ideas as to when, where and with whom women consent to sex. Nevertheless, there are differences in the role and scope of consent in the context of the trespass to the person torts in comparison to the crime of rape, which means it may place a higher value on women's sexual autonomy. First, it was argued that consent is properly a defence for the defendant to prove, which emphasises that consent to sex cannot be assumed, and also means that the claimant's evidential load is lighter in comparison to the criminal trial where the burden of proving lack of consent lies with the prosecution. Secondly, it has been argued that the defendant's reasonable belief in the claimant's consent will not negate liability for the trespass to the person torts, which reinforces the value of and better protects women's sexual autonomy. Finally, it was illustrated that bringing civil claims for the harms of rape does not, *prima facie*, breach a defendant's right to a fair trial, but it should be made clear that what is at issue is liability for trespass to the person and not the crime of rape. While this chapter showed the possibilities of civil claims for rape, it did not discuss to what extent tort law may provide justice for rape victim-survivors, which was the subject of chapter 8.

#### **9.4.1 Justice for Rape Victim-survivors?**

In Chapter 7, the extent to which tort law could provide justice for rape victim-survivors, as understood in chapter 3, was explored. In relation to the first aspect of justice, the trespass

to the person torts can provide recognition of a violation of the victim-survivor's sexual autonomy, as battery, assault and false imprisonment protect against interferences with an individual's physical and mental autonomy and integrity, and liberty of movement. Although the trespass to the person torts do not convey the gendered nature of rape, this can be accommodated for at the damages stage, in relation to the particular victim-survivor's experience. In addition, the civil process may encourage respect for the diversity of experiences and harms of rape – the second aspect of justice – to a greater extent than the criminal justice process as the claimant is a formal party to the case, whose interests will be of equal weight as the defendant's. However, the civil trial, like the criminal trial, encourages denials of responsibility and provides an adversarial forum which typically fosters reliance on rape myths and gender stereotypes by legal personnel, which not only denies respect for women's sexual choices but also can be distressing for the victim-survivor. As such, it is unlikely that the second aspect of justice will be met in the civil trial. If the defendant is held liable, though, tort law may better meet aspect three of what some victim-survivors see as justice, that is, to allow victim-survivors to tell their stories and be heard in a meaningful way. This is because the remedy is typically financial compensation which is awarded in relation to the harms caused to the victim-survivor, which she may have been able to explain to the court herself. In addition, compensatory damages can demonstrate that the wrongdoer is responsible for both the 'core' harm of rape and the material harms caused to victim-survivors. This may provide some level of symbolic and material reparation, meeting, to a certain degree, the final aspect of justice as understood by some victim-survivors.

Overall, tort law provides some theoretical advantages over the criminal law as to the extent to which it can offer justice for rape victim-survivors. Conceptualised as private law, tort law is, however, limited in the sense that it cannot capture sufficiently the social and public dimension to the wrong and harms of rape. This does not mean that it should not be used or should not be encouraged. First, it can be used in addition to a criminal justice response, which would mean that the public dimension to the wrong would be captured and addressed, but at the same time that the victim-survivor may receive compensation for the harms. Secondly, the criminal justice system is failing in so many cases that it is beneficial if tort law can, in some cases, provide a form of justice.<sup>22</sup> Nevertheless, tort law has significant practical limitations in the sense that it is potentially costly and the

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<sup>22</sup> Godden, 'Claims in Tort for Rape'.

wrongdoer may not have the means to pay compensation. A state funded compensation scheme would be a way to address these issues, but this already exists in the form of the Criminal Injuries Compensation Authority (CICA) which rape victim-survivors can apply to for compensation. However, victim-survivors do not always see such a scheme as providing justice precisely because it is state funded, and gaining compensation *per se* is not, as discussed in chapter 3, justice for many victim-survivors. As such, less radical legal changes that could be made should be focused on to improve tort law's response to rape for those victim-survivors who do make a civil claim, and other ways in which victim-survivors could gain a sense of justice through tort law could be explored.

#### **9.4.2 Increasing Justice for Rape Victim-survivors Through Tort Law**

One way of improving the civil trial for victim-survivors who do bring a claim for rape would be to extend protections that apply in the criminal law to rape victim-survivors, and vulnerable witnesses in general, to the civil law. In particular, it was argued in chapter 8 that the limitations on the admissibility of sexual history evidence should apply to civil trials which address a wrong that may also constitute a sexual offence. In addition, protections that are available for vulnerable witnesses in the criminal trial could be justified in the civil trial for the same reasons that they are justified in the criminal trial.

In addition, there could be further research into claims in tort against third parties who are responsible for either contributing to causing the rape, or for causing further harm subsequently. Examples include potential cases against the police, for instance if they have negligently failed to protect a victim-survivor from rape, or where there has been further harm caused to the victim-survivor due to a negligent investigation or prosecution of a rape case. Such scenarios also potentially involve a breach of the victim-survivor's human rights (most likely Article 3, freedom from torture, or Article 8, the right to respect for private and family life, under the European Convention on Human Rights), which has been explored by Londono.<sup>23</sup> However, there could be an examination of the relationship between these types of cases and justice, in particular, justice from the perspective of rape victim-survivors, thus building on and developing aspects of this thesis.

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<sup>23</sup> Londono, 'Positive Obligations, Criminal Procedure and Rape Cases'.

### 9.4.3 Reflecting on and Reforming Criminal Justice

Similarly to restorative justice, the analysis of tort law and justice for rape victim-survivors can be used to reflect on criminal justice. Highlighting the possibility that victim-survivors can bring claims in tort may, at first blush, seem to reinforce the separation and distinction between the criminal law and tort law, punishment and compensation, as advocated by criminal law theorists such as Ashworth.<sup>24</sup> However, this distinction is not one that is being upheld here. While some may argue that repairing the material harms of rape (or crimes in general) should not be a part of criminal justice, and that victim-survivors can turn to tort law for compensation, if this is not a practical possibility in the majority of cases then surely this demands a rethink of the ways in which to address the harms victim-survivors (or victims in general) suffer.

Of course, it could be pointed out that compensation for victims has been integrated, to some extent, into the criminal justice system, through the CICA and court-ordered compensation. Nevertheless, as was discussed in chapter 4, both are limited in the extent to which they can provide justice for victim-survivors, and both provide tokenistic awards which do not reflect the extent or variety of harms that can flow from rape. However, a substantial increase in CICA awards would, while be an improvement, do little to address victim-survivors' dissatisfaction that the compensation is paid by the state. And increasing the use of court-ordered compensation in criminal cases – or more radically, looking at the possibilities of bringing criminal and civil proceedings in conjunction<sup>25</sup> – would be of limited practical use as many wrongdoers will not have the financial means to pay compensation.

So viewed, it may be that, like the exploration of restorative justice, this analysis points towards increasing the use of reparative measures in the criminal justice system to move towards providing justice for rape victim-survivors. This would both address the issue raised by tort law regarding the wrongdoer's ability to pay, and the problem of addressing both the moral wrongness of the wrongdoer's conduct and the material harms that may be caused to the victim-survivor. In addition, as was discussed in relation to restorative justice, moving towards centralising reparation may alter the focus of the criminal justice system, to some extent, to repairing the harms caused to victim-survivors, and, in so doing, pave

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<sup>24</sup> Ashworth, 'Punishment and Compensation'.

<sup>25</sup> Doak, *Victims' Rights, Human Rights and Criminal Justice*, pp 239-240; p 272.

the way to better respect the diversity of experiences and harms of rape. Moreover, it may avoid reinforcing and (re)producing conceptions of rape as a 'fate worse than death', and demonstrate ways in which the harms can be redressed and victim-survivors can move on with their lives.

## **9.5 ENHANCING JUSTICE FOR RAPE VICTIM-SURVIVORS THROUGH A PLURALITY OF RESPONSES**

This thesis has highlighted ways that restorative justice and tort law could be improved to increase justice for victim-survivors, and the limitations of the criminal justice response, as it currently is conceived and operates. To improve the criminal justice system, it has been argued that there should be a greater use of, and emphasis on, reparative outcomes. While the additional or alternative responses of restorative justice and tort law, to some extent and in some cases, interact with the criminal justice system, it will be indicated how these responses could begin to interact in different ways or establish closer relationships to enhance the possibilities of and quality of justice for victim-survivors.

It must first be explained that restorative justice and tort law will remain as alternative routes to justice in only a small proportion of rape cases, due to the practical limitations of these legal responses to wrongdoing. The criminal justice system will remain the primary means by which to respond to rape, however, the links and interaction between criminal justice and restorative justice and tort law – in terms of practical operation and principles – should be developed to improve the criminal justice system, which may encourage more victim-survivors to report rape. In the first instance, when victim-survivors report rape to the police they should be informed about the possibilities of tort law and restorative justice, and how each may relate to and be available at different stages of the criminal justice process or outwith it entirely. That is, they should be informed that restorative justice is reliant on the wrongdoer acknowledging his wrongful actions, as well as both the victim-survivor and wrongdoer agreeing to participate in the process. How restorative justice can work at different stages of the criminal justice system – as a diversion, and pre- or post- or part of sentencing – should be briefly explained, which indicates that restorative justice is not only a diversionary 'soft' option, but that it can be an effective response which may be punitive, be rehabilitative, prevent reoffending and contribute to repairing that harm caused by wrongdoing. With regards to tort law, victim-survivors should be informed

of the possibility of a claim in the absence of a criminal investigation, prosecution or conviction, and that if the wrongdoer is convicted then a civil case is likely to be successful as the conviction can be used as evidence.<sup>26</sup> Victim-survivors should also be provided with a list of local restorative justice service providers and a list of solicitors which accept these kinds of cases. Requiring the police to provide this information to victims in general should be written into *The Code of Practice for Victims of Crime*, which already requires the police to ensure victims can access local support services.<sup>27</sup>

In addition, independent legal representation for rape victim-survivors should be introduced which would – as well as probably improving the treatment of victim-survivors – provide a means by which to better inform and support victim-survivors with choices as to restorative justice and civil claims. While there are debates as to whether independent legal representation for victim-survivors would risk infringing the rights of defendants, there are many different forms and models of independent legal representation and research illustrates how it operates in different countries without compromising the position of defendants in systems which are either, or have elements of both, inquisitorial and adversarial models.<sup>28</sup> What the specific nature and extent of independent legal representation, and who the legal representatives would be, are matters which go beyond the scope of the discussion here. However, what can be said is that the independent legal representative should provide information and support to victim-survivors as their case proceeds through the criminal justice system, and inform and advise victim-survivors as to the options of restorative justice and tort law and which, if either, may be worth pursuing, which would not interfere with the defendant's rights.

Furthermore, the independent legal representative may participate in restorative justice, if this is a part of the response, and may fulfil the requirement that in cases of sexual violence a sexual violence specialist should support victim-survivors. In relation to tort law, this would be unnecessary as the victim-survivor would have a lawyer to act on her behalf; however, the independent legal representative may nevertheless provide support to victim-survivors pursuing this possibility in the first instance, and relate information from a

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<sup>26</sup> Civil Evidence Act 1968, section 11.

<sup>27</sup> *The Code of Practice for Victims of Crime* (2005, Office for Criminal Justice Reform), 5.3.

<sup>28</sup> As pointed out by Raitt, 'Independent Legal Representation for Complainants in Rape Trials', pp 269-271.

criminal investigation, if applicable, to the lawyers acting on behalf of the victim-survivor in civil proceedings. Independent legal representatives would, therefore, provide significant links between the criminal justice system and what can be unknown or unconnected legal processes with different outcomes (restorative justice and tort law).

While the different ways that restorative justice can be integrated with the criminal justice system are well known and practiced in England and Wales, albeit to varying extents, civil proceedings only operate independently of criminal investigations and trials. One possibility to increase the likelihood that victim-survivors would receive compensation from the wrongdoer as symbolic and material reparation would be to have joint criminal and civil proceedings, so that there is one trial with separate decisions being made as to the outcomes of punishment and compensation, based on different standards of proof. However, as was discussed above, it is unlikely that the majority of wrongdoers will have the financial means to pay full compensation for the harms of rape, and thus what may be a better solution is to alter the range of outcomes following a criminal conviction for rape. Reparation should be made available and encouraged in serious cases, rather than purely in less serious cases as the Coalition Government has suggested,<sup>29</sup> which may be in addition to a prison sentence, and which could include an order to pay compensation. Victim-survivors should be able to continue to make impact statements, however they should go further to indicate what forms, if any, of reparation (including compensation) the victim-survivor believes is appropriate. Victim-survivors would not be able to decide what the outcomes of the case should be, but their views should be taken into account in determining what forms reparation would take if a reparation order is made. To ensure that defendant's rights are protected, and outcomes are not disproportionately burdensome, there should be tariffs and guidelines on the possible forms of reparation and the extent to which it is punitive and the extent to which it repairs the harms of rape.<sup>30</sup> Increasing the use of reparation does not necessarily mean that the public functions of censuring wrongs, deterring criminal activity and protecting the public would be undercut or superseded by reorientating the focus of criminal justice to reparation. Evidence suggests that the criminal justice system, as it currently is conceived and operates, fails to

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<sup>29</sup> Ministry of Justice, *Punishment and Reform: Effective Community Sentences*, paras 2 and 20.

<sup>30</sup> For example, see Zedner, 'Reparation and Retribution: Are they Reconcilable?', and Cavadino and Dignan, 'Reparation, Retribution and Rights'.



fulfil many of its public functions, such as deterrence,<sup>31</sup> and reparation and other orders would retain a punitive dimension to censure conduct and potentially meet, to a greater extent, other criminal justice goals, but also provide symbolic and material reparation for victims-survivors.<sup>32</sup>

If more compensation and reparation is provided through the criminal justice system, then the place of tort law following a criminal conviction would need to be reviewed. Of course, a civil case would still be a possibility if there has been no criminal case or a criminal case does not lead to a conviction, due to the different purposes of the two systems and the lower burden of proof in the civil law. However, if compensation has been awarded to the victim-survivor and other forms of reparation are outcomes in a criminal case, and thus, to some extent, the wrongdoer has symbolically and materially repaired the harms of rape, then full compensation should not be available in a civil case. Therefore, in addition to guidelines on the outcomes available and their relative weight there should be reference to civil cases making clear the relative extent of any compensation which could be awarded, depending on the outcomes of a criminal case.

This approach is limited in the extent to which the focus is on changing the outcomes of criminal justice, which may do little to address the challenges of meeting victim-survivors' needs and interests posed by the adversarial process. However, restorative justice may offer an alternative process to the traditional trial in some cases, and, moreover, if reparation and repairing the harms caused by wrongdoing becomes seen as part of criminal justice, then victim-survivors experiences and perspectives of sexual violence and its consequences may be better respected through the process.

In summary, this thesis has drawn attention to some rape victim-survivors' ideas as to what constitutes justice, a perspective which is typically eschewed in mainstream – and many feminist – discussions of rape law and justice. Although it is the view of only some victim-survivors that are presented in this thesis, at the same time it challenges assumptions as to what constitutes justice in the context of rape. What this thesis has argued is that legal responses to rape should better respect and respond to the diversity of experiences and

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<sup>31</sup> Ashworth, *Principles of Criminal Law*, pp 16-17.

<sup>32</sup> Zedner, 'Reparation and Retribution: Are they Reconcilable?', and Cavadino and Dignan, 'Reparation, Retribution and Rights'.

harms of rape. To do so, it was suggested that rather than providing a single legal response there should be an emphasis on securing justice through a diversity of legal responses to rape. Such responses should work separately and together, and provide different perspectives from which to continually reflect on, interrogate and revise the legal responses to rape to enhance the quality of justice for victim-survivors.

## **APPENDIX 1: INTERVIEW INVITATION LETTER**

Tuesday, 09 November 2010

Dear .....

### **Restorative justice and sexual abuse study**

We are researchers in the Schools of Law and Applied Social Sciences at Durham University, and are planning a project investigating the use of restorative justice in a case of sexual abuse. The project aims to explore the process and outcomes of this case, and to investigate the participants' experiences.

As a part of this case study, we are planning to conduct interviews with those who were involved in a specific case and conference. We would be grateful if you would be willing to participate in this study. You will be contacted by Nicole Westmarland who will arrange a suitable time for an interview to be conducted. The questions we would like to ask you are enclosed with this letter.

The information that you give us will be included in an article intended for publication in an academic journal, and in the doctoral thesis of Nicola Godden. Interviewed participants will not be referred to by name in either written project.

If you have any queries, please do not hesitate to contact Nicole on [phone number].

Yours sincerely

Ms Nicola Godden

Professor Clare McGlynn

Dr Nicole Westmarland

## **APPENDIX 2: INTERVIEW SCHEDULE (COUNSELLOR)**

***Aim:** to describe the process and outcomes of a restorative justice conference involving sexual violence and to investigate the participants' experiences*

### **INTERVIEW SCHEDULE**

- ❖ Introductions
- ❖ Explanation of the research
- ❖ Consent, anonymity and confidentiality
- ❖ Any questions?

1. Can you describe how you were introduced to restorative justice, and about the process, the preparation and conference?
2. Can you talk about your reasons for agreeing to participate?
3. Did you have any concerns before the conference took place – and can you tell us about the preparation for the conference?
4. Can you talk me through what happened at the conference?
5. Can you describe your experience of the conference? Was it positive?
6. What do you think were the victim's expectations of the conference and what do you think her experience was?
7. What do you think were the offender's expectations and views of the outcomes of the conference and what do you think his experience was?
8. Thinking about using restorative justice more widely in cases of sexual abuse, can you talk about the positive and negative aspects and what lessons might be drawn from your experience for the future?
9. What would you say to another counsellor who was thinking about doing something similar?

### **FINAL COMMENTS**

- ❖ How have you found today's interview?
- ❖ Any comments/questions?

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