Rethinking the Criminalization of Sexual Violence: The Limits of the Criminal Justice Paradigm

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ABSTRACT

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The domination of the criminal justice paradigm suggests that criminalization is the best paradigm to address violence and to provide public safety. Despite decades of criminal justice reforms, the stable rates of sexual crimes call for a discourse analysis on societal understanding of justice. This thesis is an analysis of the efficiency of the criminal justice paradigm's operationalization to address sexual violence in the Canadian context. The analysis conducted centered on the four sentencing principles of the criminal justice paradigm: retribution, deterrence, incapacitation, and rehabilitation and demonstrated the inability of the Canadian criminal justice system to convict individuals who commit sexual harm. Furthermore, the power of the criminal justice system to institutionalize the social categorization of individuals within a binary, as victims and as offenders, further entrenches cycles of harm. The victim/offender binary erases the complexities and nuances of sexual harm limiting healing and transformation for both individuals involved in the harmful interaction. Thus, it is argued that the criminal justice system has failed to prevent and address sexual violence and to create more harm by creating disposable identities in with the victim/offender binary. A shift in justice paradigm towards transformative justice and carceral abolition is proposed here as a hopeful avenue to better address sexual violence in Canadian society. Abolition praxis encourages the experimenting of community-based transformative justice practices to both prevent and address sexual violence without the intervention of police and prisons.

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I am hopeful we can collectively and individually heal and embark on a transformative journey removed from violence.

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INTRODUCTION

In the summer of 2020 in Quebec, lists of alleged sexual violence perpetrators started circulating on social media with the hashtag #DisSonNom. The objectives of #DisSonNom are to free the voice of victims and to protect society from alleged sexual predators ("Dis Son Nom" 2021). This practice of creating lists of names of people to avoid finds its roots in the sex-work business, where sex workers – who are deemed disposable, and unworthy of protection because of the very nature of the work they do – created lists of "bad dates" and would pass them on to fellow sex works to reduce harm in their community (Hassan cited in Kaba 2021). #DisSonNom subscribes in the continuity of movements denouncing sexual violence such as #AggressionNonDenoncee and #MeToo. Sexual assault survivor and activist Tarana Burke's use of the hashtag #metoo on MySpace in 2006, which became viral when it was mobilized by celebrities in the fall of 2017 to denounce their sexual abusers, following sexual abuse allegations against Harvey Weinstein.

The backlash and critiques of both #DisSonNom and #MeToo movements provide an interesting lens to showcase the dominance of the criminal justice discourse to address the intersection of sexual violence and justice. In Quebec, #DisSonNom's backlash was mainly focused on the aspect of denouncing sexual violence on social media equated creating popular tribunals where presumption of innocence of the perpetrator was not maintained (Couture 2020). Civil procedures of defamation are now in process against the collective. Critiques also included the notion that calling out sexual violence perpetrator on social media caused punishment without due process to establish guilt. Due process here refers to the criminal justice system. Léa Clermont-Dion reflected this pressure on victims of sexual assault to go through the criminal justice system in her documentary "T'as juste à porter plainte"[1] (Pineda 2021). Fears that false reports and defamation also demonstrate the centrality and reliance on the criminal justice system to address sexual violence. Women that shared their stories online were asked why they did not simply report the incident to the police. Women were also accused of fabricating experiences of sexual assaults, because if it were true they would have reported the incident to the police (Grady 2018). All these critiques illustrate the centrality of the criminal justice paradigm in shaping how society conceives of addressing sexual violence.

Problem

The Canadian criminal justice system's role is to "preserve public safety, promote respect for the law and address crime in a just, fair, efficient and compassionate manner" (Department of Justice Canada 2019a, 15). The Canadian Department of Justice describes its criminal justice system as "among the best in the world – a model for other countries, and a source of pride for Canadians" (2019a, 5). Despite its strong foundations, the Canadian criminal justice system has

[1] "T'as juste à porter plainte" would be translated to "You should just file a report".

faced, and continues to face, many challenges and critiques. Canadian institutions, public society, interest groups, international organizations and the media have contributed to the conversation about the challenges the criminal justice system is facing. The Canadian criminal justice system has been criticized for its lack of legitimacy by Indigenous scholars (Simpson 2017; Coulthard 2014; Borrows 2016), for its overincarceration of racialized and vulnerable populations, especially Indigenous peoples (Maynard 2017; Simpson 2017; Martens and Needham 2021; Malone 2016; Humans Right Watch 2013), for the underreporting and lack of trust of the public in its institutions (Clay-Warner and Burt 2005; Sable et al. 2006; S. C. Taylor and Gassner 2010; Cotter 2021), for its trial delays (Runciman and Baker 2016; CBC News 2022) and for police violence (Maynard 2017; Palmater 2016; Razack 2014).

The criminal justice system's role in providing public safety extends to preventing and holding accountable those who perpetrate sexual violence. The Canadian *Criminal Code* distinguishes three levels of sexual assault, defining level one sexual assault as "any form of sexual contact without the consent of both parties, and includes intercourse as well as unwanted touching or fondling" (1985a, sec 271). Other related sexual offenses are classified under "crimes of sexual nature." Although crime rates in Canada have been declining over the past two decades (Statistics Canada 2021b), sexual violence is the only crime not in decline in Canadian society (Canadian Women's Foundation 2021). Sexual violence remains a highly gendered issue; in 2007, only 3% of the people charged with sexual assault offence in Canada were women, whereas women and girls accounted for 86% of the victims of sexual assault. The prevalence of sexual violence in Canadian society is high, with estimates that 1 in 3 women report having been sexually assaulted at least once throughout her life (Canadian Women's Foundation 2021). Sexual violence is experienced unequally among women. Race, disability, age, history of problematic substance use, homelessness, poverty and other experiences of marginality all increase risks of sexual victimization (Cotter 2021). The prevalence of sexual violence in Canadian society has important social and financial costs. Costs of sexual violence and related offences were estimated at $4.8 billion dollars in 2009, making up almost 40% of the economic impacts of victimization of assault, criminal harassment, homicide, robbery and sexual assault and other sexual offences (Department of Justice Canada 2014). For the victims of sexual violence, the literature documents physical and psychological trauma (Department of Justice Canada 2019c; Canadian Women's Foundation 2021; H. Johnson 2017; Adebanjo 2020).

Research questions

Considering that the Canadian criminal justice system is the primary mechanism to address sexual violence in Canadian society, this thesis seeks to answer the following question:

Does the criminal justice paradigm effectively address sexual violence in Canadian society?

To tackle this central interrogation, four sub questions will guide the present analysis:

1- *What are the ideal principles of the criminal justice paradigm?*

2- *How does the Canadian criminal justice system perform in achieving the ideal principles of the criminal justice paradigm in the context of sexual crimes?*
3- *What factors sustain the criminal justice system's performance in addressing sexual violence?*
4- *How can abolition praxis provide an alternative to the criminal justice paradigm?*

In the first chapter, I define the ideal principles of the criminal justice paradigm by providing an overview of the literature on the topic. Four main principles emerged from the literature to define the criminal justice paradigm: retribution, deterrence, incapacitation, and rehabilitation. I examine the meaning and evolution of those principles as the foundation of the criminal justice system. Retribution is the main function of the criminal justice paradigm, which enables the three other principles to function as crime-prevention elements. This definition of the criminal justice paradigm based on the four ideal principles guides the rest of the present thesis.

In the second chapter, I provide an evaluation of the Canadian criminal justice system's ability to address sexual violence through the four ideal principles of the criminal justice paradigm. Using governmental data, I analyze indicators related to retribution, deterrence, incapacitation, and rehabilitation. The findings of my evaluation are that the high levels of attrition for cases of sexual violence prevent the criminal justice system from abiding by the four ideal principles, given that most incidents of sexual assault cannot even be addressed in court, as cases are dropped in the process for various reasons. As will be shown in Chapter II, the great majority of individuals who commit a sexual crime are not convicted for their offense and the evaluation of the system's ability to deter, incapacitate, and rehabilitate must be considered within this broader context.

In this third chapter, I examine the factors that sustain the criminal justice system's performance in addressing sexual violence, despite several barriers to abiding by the four principles. I turn to Achille Mbembe's concept of necropolitics and to Giorgio Agamben's concept of *homo sacer*, to argue that the carceral state relies on disposable bodies to sustain itself. The criminal justice system's *raison d'être* is legitimized by needing to protect society from the "dangerous few" (i.e., society's perception of the most violent criminalized individuals). This creates a focus on the victim/offender binary which – while harming the individuals confined in those identities – removes the focus on the role society plays in enabling sexual violence and the effects sexual violence has on communities.

In the fourth and final chapter, I examine abolition praxis as a potential alternative to the criminal justice paradigm, one which could help mitigate the challenges faced by the current paradigm. Specifically, I argue that the issue of sexual violence can be better addressed through abolition praxis than our current criminal justice paradigm. This argument is first situated in the Black and Indigenous feminist abolitionist framework and praxis. Penal abolition is defined as both a framework and a praxis that rejects the criminal justice paradigm. Abolition is also anchored in transformative justice, which argues that punishment only further harms and limits accountability. In the construction of my argument for a shift in the judicial paradigm, I also look at the three crime-prevention principles of the criminal justice paradigm – deterrence,

incapacitation, and rehabilitation – and propose how the abolitionist model answers the very immediate and real dangers of sexual violence in Canadian society.

Relevance of topic

Sexual violence is a prevalent issue bearing important social and economic cost which ought to be addressed. The impacts of sexual violence are multileveled. Sexual violence affects victims physically and psychologically, they affect society by imposing a culture of fear for those most at risk of being victimized and have important financial costs. With regards to the victim's physical health, some of the potential harms include assault-related injuries, pregnancy, sexually transmitted infections, urinary tract infections, vaginal or anal bleeding or infections and short-term and long-term sexual health problems (INSPQ 2022). The physical harm may also further stress and anxiety following the assault. This is no surprise considering that research demonstrates that physical and mental health are inexorably connected (Benoit and Shumka 2009). Public Health Agency of Canada (Public Health Agency of Canada 2012) correlates the declining of mental health with stress, risk taking and substance use which all affect the physical wellbeing of victims. The range of mental health impacts is wide "including post-traumatic stress disorder, depression, psychosis and substance abuse problems" (Oram 2019). Relationally, sexual violence can also impact capacity for intimacy, or connection to the support system which in the long term may increase isolation. In a study about female patients who were in contact with secondary mental health services and that had experienced raped or attempted rape, more than half had attempted suicide resulting from their experience of sexual victimization (Khalifeh et al. 2015). The compounding of physical, emotional, psychological, and mental harm affects victims' capacity to fully participate in society.

The prevalence of sexual violence against women not only impacts women who are sexually victimized but also impacts all women by subjugating them to the threat of being victimized. Women thus must navigate their lives with the fear of sexual assault. This considerably limits some women to live their life as freely as they should. Women may fear walking in parks at night or taking public transportation alone (Gordon and Riger 1991). The fear of sexual violence incapacitates women to enjoy their rights and freedoms in the same way men would. Sexual violence acts as a barrier to gender equality and infringes on fundamental freedoms and human rights (Sinha 2013).

On a systemic level, financial costs of sexual violence vary and remain mostly unknown due to the variation in self-reporting and police reported numbers. Kate McInturff (2013) estimated the direct costs of sexual assaults in Canada to be more than $546 million a year. However, this estimate is based on police-reported incidents, which we know represent only a small percentage of sexual violence in Canada. When accounting for loss of productivity, and medical and psychological costs, the costs of sexual violence in Canada is estimated annually to be $4.8 billion (Department of Justice Canada 2014).

This research topic problematizes a very sensitive topic: the relationship between sexual violence and the judicial mechanisms who ought to address it. While carceral feminism and public

opinion have supported the increased criminalization of sexual violence and have mobilized moral outrage around sexual assault, the criminal justice system has been very responsive to its own flaws by continually reforming its processes and definitions to better address sexual violence in Canadian society. The Department of Justice's most recent report reviewing the criminal justice system provides an overview to address some of the most challenging issues faced by the criminal justice system. Specifically, it mentions the need to take a more victim-centered and trauma informed approach, as well as having a better monitoring system to understand what is happening in the system (Department of Justice Canada 2019a). Meanwhile, sexual violence has remained a prevalent issue in Canadian society bearing important social and economic costs. The reforms proposed by the criminal justice system have yet to examine how the criminal justice paradigm itself may consist of the main barrier to effectively tackle sexual violence.

Amidst the killing of George Floyd which mobilized important segments of the United States population to question the existence and the role of policing. Debates around the legitimacy of the Canadian criminal justice system remain mostly quiet in public spaces. In Quebec, conversations around the harms produced by policing are usually framed with regards to defunding the police and readjusting budgets to support in-community social services (Defund the SPVM 2022). In the Canadian context, research questioning the efficiency of the criminal justice paradigm in addressing violent crimes has so far been limited, even more in the context of sexual violence. In this thesis, I propose to shift the focus away from the reforms proposed by the Canadian government, and to examine the way the criminal justice paradigm shapes how sexual violence is addressed.

Positionality as a researcher

Acknowledging my positionality while undertaking this research project is essential as my personal experience with sexual violence and the criminal justice system is driving this inquiry. Whereas there are debates in academia about the personal being political, it has been recognized that positionality influences the researcher's relation to the subject (Wilson 2008). Beyond motivating this inquiry, my own experience is shaping the way I interpret and analyze the criminalization sexual violence and its outcomes.

At the beginning of my second year as a Master of Arts student in the Department of Political Science at Concordia University, I was raped by a friend, at my best friend's house. This was not my first time experiencing sexual harm, but this was the drop that made the vase overflow. My mental health declined rapidly, and the physical marks the assault left on my body was a daily reminder of the traumatic event. After spending a week in a crisis centre, my support system, friends, and family, asked me if I wanted to report the assault to the police. At first, I was reticent namely due to my own previous experiences with police officers, my lack of trust in the justice system, and by fear that the judicial process would make me have to relive this moment repeatedly through my storytelling. I also felt that my memory was playing with me and that I may not remember all the details necessary for charges to be laid. I doubted myself. My then ex-boyfriend offered to join me while I was doing the deposition. I gathered my courage and decided to go

through the process. In October 2018, I filed a complaint for this assault, but also for three other assaults which had happened before but for which I had convinced myself they weren't serious enough to report. It is important to mention that, at that time, I also worked as an intervention worker with Indigenous youth and my job entailed hearing and supporting some of these youths through stories of incest and violent sexual assaults. I felt selfish to think of my own experiences as crimes when I had a good support system and could access therapy if needed.

Three months after my depositions, two cases were dismissed, because the cases lacked proof. Three years after my deposition, the sexual assault that triggered this whole process made it on a prosecutor's desk and after evaluation of the file decided not to lay charges. During my first meeting with said prosecutor, he mentioned that filing four complaints of sexual assault at the same time would play against my credibility. Forty-one months later, I am currently still waiting to hear from the Director of Criminal and Penal Prosecution of Amos for the fourth case.

My experience of reporting my victimization of sexual assault to the criminal justice system was negative. Delays made me fear for my safety, made me feel that my cases were not serious enough. I felt revictimized, judged and retraumatized by many of the state actors I encountered. My experience of navigating the criminal justice system also led me to develop a critical gaze towards my own understanding of justice; I started asking myself "Where and when does my healing take place?", "What are they [the perpetrators] going to learn from this?", "When and where will their healing take place?", "What happens if they are not found guilty? Does it mean it [the sexual assaults] did not happen", "That justice does not need to be served?" I had contradictory feelings as per the dominant discourse about sexual violence justice in Canada is associating reporting sexual assault to the "right" thing to do. Yet, it did not feel right, and still does not.

My experience sparked an interest in understanding how the criminal justice discourse came to be and how it affects our understanding of justice. Discourse analysis theories do reflect the influence of the position and subjectivity of the researcher in analyzing the material. My own experience of victimization does inform the way I am interpreting and analyzing the discourse and its effects. As I was seeking ways to enter a healing journey for the harms that were done to me, I found solace in abolitionist literature and authors such as Angela Davis, Mariame Keba, Erica Meiners, and Gwendola Ricordeau. Penal abolitionism posits that the criminal justice paradigm and its apparatus, prisons, criminal courts, and prisons should be abolished and that social regulation through transformative justice should be mobilized to address social transgressions. Whereas the abolitionist discourse is gaining attention in the United States, it has been limited in the Canadian context. My recommendation of abolition as an alternative to address sexual violence in Canada is thus part of an exploration to understand how we, as a society can do better, taking a stance against sexual violence in all its forms and to hold each other accountable.

Finally, acknowledging my positionality as a White middle-class cisgender woman is also important, as I will be discussing the ways the justice system is failing women in ways that go beyond sex and gender and that my experience cannot speak to those realities. As this inquiry will also speak to the experiences of racialized women, namely Black and Indigenous, it is important to recognize that although we share a "common oppression", that of sex, – to put it in bell

hooks'(1984) words – the political predicaments of other women are also further complexified by layered identities which are oppressed in the Canadian state.

Chapter I – Foundational Principles of the Criminal Justice Paradigm

In most states, harm is usually dealt with through a criminal justice system. Defining what are the principles guiding this justice paradigm is necessary to understand how it functions. In this chapter, I provide an overview of the literature to first define how crime and criminal law area constructed and understood. Then, I present the ideal principles of the criminal justice paradigm. Four main principles emerged from the literature on the criminal justice paradigm: retribution, deterrence, incapacitation, and rehabilitation. A discussion of the meaning, debates and evolution of those principles enabled to draw a cohesive foundation of what the criminal justice system ought to do. Punishment is the main function of the criminal justice paradigm, which enables the three other principles to function as crime-prevention elements. This definition of the criminal justice paradigm based on the four ideal principles guides the rest of the present thesis. Finally, I end this chapter by contextualizing the findings in the operationalization of the Canadian criminal justice system.

1.1 Crime and criminal law

Criminal law reinforces the dynamic of power between the state and citizens as it provides a set of rules by which citizens may live and allows for the state to punish any offender. Criminal law can be distinguished from civil law which manages the relationships between moral or physical individuals which establishes responsibilities or reparation, but without sanctions. The carceral system thus refers to the criminal justice institutions, including laws, police, courts, prisons, that relate to the sanctions of criminalized behaviors. The social and historical production of "crime" is the result of a state recognizing some transgressions of social norms as unacceptable. In other words, crime and punishment are socially constructed (Calathes 2017). The codification of these transgressions as "crimes" has led to the creation of practices, theories and dominant discourses which are now better understood as the paradigm of "criminal justice" (Coyle and Schept 2018). The criminal justice system is thus a product of the much-accepted paradigm of criminality discussed above. William Chambliss and Robert Seidman (1971) argue that those who hold power, which also correlates with those who own the means of production, and that criminal law has been shaped to reflect their interests. Elite interests are thus represented in laws being passed by the legislatures which are then enforced by the whole criminal justice apparatus (Turk 1969).

In the criminal justice paradigm, "crimes" are violations of the law and the state which creates guilt for people who engage in said behaviours. Individuals committing crimes and recognized guilty by the state apparatus are named "criminals". The "criminal" must go through an elaborated system aimed at providing justice. The state's power to arrest, surveil, and incarcerate those who transgress the law is legitimated in the paradigm of an ever-growing carceral state. The state also has the choice to choose who is arrested and who is guilty. Punishment is "the natural solution to social ills and human relationships are delivered as differential rather than connective" (Gilmore 2007, 109). For Michel Foucault, the "art of punishing, in the regime of

disciplinary power, is to "normalize" the offender (Foucault 1977, 182–83). However, Michel Foucault's explanation of the role criminal justice system has been criticized by race-radical feminists. Joy James counterargues that Michel Foucault's approach erases the harm of state-sanctioned violence targeting Black and Indigenous peoples: "some bodies cannot be normalized no matter how they are disciplines, unless the prevailing social and state structures that figuratively and literally rank bodies disintegrate" (James 1996, 27).

The carceral state expands beyond the criminal justice apparatus. Michel Foucault's carceral state expands beyond the walls of the prisons to networks of surveillance control and discipline (Foucault 1977). Lena Palacios refers to this reach of state control as the "transcarceral continuum" which she defines as the "intrusive reach of punitive carceral controls into the everyday lives and onto the marked bodies of perpetually criminalized Indigenous women and Black women" (Palacios 2020, 528). In other words, it blurs the boundaries between prisons and the outside world by stigmatizing women of color and ensuring a tight state surveillance and control on them. Lena Palacios argues that this continuum takes place in multiple aspects of social life including education, welfare, child protective services, and health facilities which pathologize, individualize and responsibilize marginalized women. Critiques of the carceral state have pointed that increased policing and incarceration has been presented as a solution to political, economic, and social crises.

Foundational to contemporary criminal justice systems are public safety and justice. The theorization and legitimization of the state's right to punish individuals is anchored in four different aspects which are what the criminal justice system ought to provide: retribution, deterrence, elimination of threat, and rehabilitation (Ricordeau 2019). **Retribution** means that individuals deserve to be punished for breaking the law. This argument of retribution has gained popularity in imagining criminal justice systems as it pushes that for justice to be restored, offenders need to be punished (Calathes 2017). The argument for punishment is also rooted in social and cultural norms. Punishment and vengeance find its roots in religion and were first understood as various acts that gods wreaks (Kaba 2021). That is also how humans have been socialized to deal with hurt: through vengeance and punishment. In other words, dealing with hurt by hurting back. **Deterrence** refers to the process through which individuals will be discouraged to commit crimes by fear of punishment or by fear of being reincarcerated. However, research demonstrates how prisons act as vectors of recriminalization by building social networks with criminals during incarceration and the risk of recidivism is heightened when individuals are incarcerated (Borrows 2010). **Elimination of threat** refers to the concept by which if an individual is not freely roaming in the society, they cannot commit harm. The elimination of threat calls for a utilitarian harm of taking someone's freedom away. There is also an argument to be made about isolation of dangerous individuals as displacing a problem instead of tackling it directly. **Rehabilitation** is the function through which by incarcerating an individual will allow them to amend their behavior and not to repeat them before reinserting society. The concept of rehabilitation assumes that offenders were once habilitated to navigate society according to social

norms. Many incarcerated individuals were marginalized prior to conviction and have never been fully "inserted" in the community.

The criminal justice paradigm beyond intervening when a crime takes place, also holds a crime-prevention rationale by which we can also prevent crime. Retribution, or the punishment of reprehensible behaviour, serves as the entry-point through which the three other criminal justice paradigm principles can be enacted. Indeed, deterrence, incapacitation and rehabilitation serve to address a crime that has already occurred, but also hold larger crime-prevention ideals by influencing the accused and the public. Rehabilitation, incapacitation, and specific deterrence assume that the offender is at high-risk of reoffending and that the criminal justice system can identify that risk. Evaluating the risk of reoffending is important to prevent future crime. Recidivism is "most commonly defined as the rearrest, reconviction, or reincarceration of a former offender within a specific time frame" (Austin et al. 2016, 50).

As discussed, criminal law indicates a community's values and morals. It allows to restrain offenders and impose sanctions for behaviors that the community deems reprehensible. David Milward (2022) distinguishes two different views on crime. First, he presents crime as a moral choice done by the wrongdoer. In this context, the state is responsible for punishing the offender. Second, he presents crime "as a reaction by the offender to adverse personal and social circumstances that law-abiding persons may not have to worry about" (Milward 2022, 4). This tension between the two visions of crimes is also expressed in the four pillars of what society expects from the criminal justice system to do. Whereas retribution, deterrence and incapacitation focus on the first definition, rehabilitative theories can also find roots in the second approach to crime. Those two theoretical approaches to crime do have a practical influence on how societies deal with crime and how policies about criminal justice are constructed and presented.

1.2 Retribution

The criminal justice paradigm assumes that justice is retributive. In other words, punishment is the path through which balance can be re-established and justice served (Davis et al. 2022, 46–47). Philosophers and social science scholars have suggested various justifications as to why individuals who break the law should be punished. There are two school of thoughts when it comes to explaining punishment, one being the retributionist approach or nonutilitarian approach and the other being the utilitarian or consequentialist approach to punishment. Retribution is the consequence of breaking the law by which individuals deserve to be punished for their transgressions. Retribution has dominated social understanding of justice as it establishes the notion that through retribution justice can be restored (Calathes 2017). The argument for punishment is also rooted in social and cultural norms. Punishment and vengeance find its roots in religion and were first understood as various god wreaks (Kaba 2021). That is also how humans have been socialized to deal with hurt: through vengeance and punishment, in other words, dealing with hurt by hurting back. Developmental psychologists have also documented the value of punishment in modifying behaviors in children (Darley, Carlsmith, and Robinson 2000). Retribution focuses on the moral wrong committed by the individual who engaged in a behaviour

that is deemed reprehensible by the community. The theory of punishment does not consider the effects of sentencing on the individual or on society, but that punishment is deserved (Frase 2005). In that sense, punishment can be understood as a vengeance for the wrongful act.

Nonutilitarian retribution

The retributionist approach posits that the perpetrator deserves to be punished for the harm caused. In this case, the punishment is a valuable end that does not require further justification. The retributionist approach embodies "principles of justice and fairness which are viewed as ends in themselves, without regard to whether they produce any particular social or individual benefit" (Frase 2005, 69–70). The literature also refers to this position as "just desert" perspective. In the late 18th century, Immanuel Kant positioned himself as a retributionist: "punishment can never be administered merely as a mean for promoting another good" (Kant 1955, 397).

Utilitarian retribution

The utilitarian approach to punishment focuses on achieving greater purposes then solely punishing the offender. This rationale is anchored in other sentencing principles such as incapacitation, deterrence and rehabilitation which will be discussed in the next section. Jeremy Bentham argued that "general prevention ought to be the chief end of punishment, as it is its real justification" (Bentham 1962, 396). In this sense, punishment through its visibility should encourage general and specific deterrence, incapacitate the offender while they are incarcerated and could rehabilitate if they enter treatment programs during their sentence. Retribution may also serve other purposes than crime control such as giving closure and compensation to victims, promoting satisfaction and reassuring the public that crime has been taken seriously (Frase 2005).

Punishment can also be understood as a tool to reaffirm social rules and norms. In their study of the psychology behind public support for punishment of criminal offenders, Tom Tyler and Robert Boeckmann (1997) found that the concern about crime and public security are only factors influencing public feelings about punishment. In fact, the approval of punitive criminal policies has been more strongly associated with the justification of reasserting societal rules as crimes and reinforcing moral cohesion.

How much should we punish?

Both just deserts and practical sentencing purposes benefit from proportional sentencing. However, the justification and application of proportional sentencing varies for both perspectives. From a nonutilitarian perspective, scholars agree that punishment should be proportional to the harm caused or to the offender's blameworthiness. Societal consensus on the seriousness of a crime will dictate how the crime ought to be punished. Murder and other violent crimes against individuals, may be seen as more serious than harm against property and thus be punished more severely. Proportionality and uniformity can also be useful from an utilitarian standpoint as it reinforces shared understanding of the seriousness of the crimes and encourages individuals to

respect laws and the criminal justice system (Frase 2005). A fair criminal justice system also carries importance when it comes to social policy and public compliance with criminal law. Individuals eagerly comply with the law when they perceive that the criminal justice system treats individuals fairly (Carlsmith, Darley, and Robinson 2002). Procedural justice is the best predictor of compliance with criminal law (Tyler 2006). Thus, from a social policy perspective, it becomes important to understand public opinion of what is just and why, how, and how much offenders should be punished.

The utilitarian approach to punishment may however call for disproportionate sentencing if the goal of preventing future crime is the only one taken in consideration. Indeed, disparate sentencing may be applied to "send messages" to the population. Thus, through the sentencing process it is important to consider all principles which may guide the final decision. Richard Frase (2005) suggests that criminal justice systems should not adopt a narrow understanding of punishment theory, but also include other principles such as deterrence, incapacitation and rehabilitation, as to adjust sentencing accordingly. By considering these other elements, judicial actors can engage with the parsimony principle, which values the least severe alternative that achieves the purpose of sentencing. The parsimony principle "recognizes that severe penalties are expensive and usually harmful to offenders and that crime-control benefits of such penalties are uncertain and often quite limited" (Frase 2005, 69). Judges may also consider aggravating and mitigating factors to select the appropriate sentence. Aggravating factors are elements such as the risk of recidivism and the vulnerability of the victim that, if accepted in a court, make the offense more serious (Milward 2022, 13). Aggravating factors tend to legitimize more severe punishment and reinforces the assumption that crime is a choice. Mitigating factors are elements which make the offence less serious and legitimize a less severe sentence. Pleading guilty, apologizing to the victim, or explaining the criminal behaviour through a traumatic past could serve as mitigating factors if accepted as true by the court. Considering the life conditions of the accused gives legal power to social factors of crime.

Retribution as a necessary component of justice has mainly been criticized by abolitionist theorists and activists who argue that a punishment only fuels cycles of violence (Kaba 2021; Davis 2003; Davis et al. 2022; Coyle and Schept 2018). Although this critique of punishment will be fully addressed in the fourth chapter of the thesis, there are some core elements that can be summarized as part of this literature review. One core argument is the criminal justice paradigm is driven by vengeance and not by justice (Davis et al. 2022). Retribution is also said to assume that when a crime happens, it should equate punishment. However, when we look at the factors driving incarceration, race, gender, class, and sexuality are way more relevant determinants in defining who is incarcerated (Davis et al. 2022, 47).

1.3 Deterrence

Deterrence is a public safety rationale by which crime can be reduced by discouraging individuals to engage in criminal behaviour through sanction. *Specific deterrence* refers to discouraging the accused from committing further crime, by making them fear that they will be

penalized, and potentially more harshly penalized, in the future if they re-engage in the behaviour (Frase 2005). *General deterrence* refers to the effect the publicization of the punishment of one accused may have on the general population. Historically, general deterrence used the shock effect of the spectacle of capital penalty and other corporal punishment on the public place to instil fear in the community (Foucault 1977). In modern society, punishments are no longer designed to inflict pain on the human body, and community participation in the administration and infliction of the pain (Pratt 2000). General deterrence can take place through awareness of the consequences and by media representation of high-level cases. This is part of the utilitarian approach of retribution, meaning there is a longer end goal by punishing the offender, that of its own deterrence and discouraging others of engaging in criminal behaviour.

Deterrence theory posits that humans are rational actors that can be discouraged from engaging in criminal behavior because of a utilitarian calculation of the harm following the crime through punishment. The calculation is done by calculating the benefits of committing the crime, versus the benefits of not committing the crime. By increasing the cost of committing a crime to the point where committing the crime presents a lot less benefits, humans would be discouraged from engaging in criminal behaviour.

According to Cesare Beccaria (1872), criminal law allows to organize society and for it to be freed from the threat of chaos. Laws were established to prevent war and chaos to emerge in a society and the punishment following the violation of laws had the purpose to "prevent others from committing the like offence" (Beccaria 1872, 16). Punishment thus had to be proportionate to the gravity of the crime as to discourage citizens to commit the greater offenses by fear of the consequences that would follow. In *An Introduction to the Principles of Morals and Legislation,* Jeremy Bentham's utilitarian stance was also translated to deterrence theory in the sense that human's decision-making is governed by pleasure and pain. Aiming to optimize their pleasure, humans will act to increase happiness and prevent pain. Being aware of the pain resulting from committing a crime, humans would avoid engaging with that behaviour (Bentham 1907).

An economic model of rational deterrence was developed by Gary Becker (1968). It posits that criminal acts are the result of rational and conscious decisions. Meaning that crime prevention must involve policies that balance the cost of crime and expensive police state that eliminates freedom. If the cost of committing an offense becomes too high, criminals won't engage in the behavior. This theory also puts forward that there is no difference between criminals and noncriminals, other than the assessment of the cost and benefits of engaging in criminal behaviour (Paternoster 2010). Gary Becker's model of deterrence also included the need to make legal activities more attractive as to increase legal outcome, thus facilitating the calculation of not needing to engage in criminal behaviour.

Under the economic theory of deterrence, three factors influence deterrence. Certainty applies to the likelihood of being caught engaging in an illegal behavior. If there is no possibility of being caught, the threat of punishment is useless. Celerity applies to the speed to which one will be punished after being caught. Severity applies to the weight of the punishment vis-à-vis the

offense. Severity also functions as a general deterrent by signalling that a behavior is not acceptable.

Among the three elements, the one the state has the most control over is increasing the severity of the punishment. Severity can simply be changed by striking an existing penalty and replacing it by a greater penalty. Increasing certainty requires more enforcement and a change to practices of control, surveillance, and policing. Increasing the speed of punishment is sensitive as the reality of the court system and the right to due process involve time. Although there was little research studying the effects of severe punishments until the 1960s, severity has long thought to be the key component of deterrence models (Tomlinson 2016). Also, because of its malleability, decision-makers often rely on policy changes affecting severity to deter crime (Antunes and Hunt 1973).

The economic model of deterrence relies on rational choice theory which functions if we assume that individuals engaging in criminal behavior are apt to conduct a cost-benefit analysis of their behaviour. However, a high proportion of crime is committed under the influence of drugs and alcohol (Wright 2010). Likewise, violent crimes can be committed under emotions. Substance use, emotional distress may impair the individual's ability to think rationally and, thus, proceed to the cost-benefit analysis of engaging in criminal behaviour.

Awareness of consequent sentencing is also important in evaluating the severity component. Potential offenders need to be aware of the risks and consequences of their behavior prior to engage in criminal behavior (Wright 2010). In other words, it is the subjective belief about the severity of the consequences of the action that allows for deterrence. In a 2002 study conducted with inmates in Kentucky and North Carolina, David Anderson interviewed incarcerated men about their prior knowledge about the sentencing related to criminal behavior they engaged in. Seventy-eight percent of the inmates had no idea what the punishment for their crime would be and more than half did not even consider punishment. This study also specified that among the inmates incarcerated for deadly crimes, 55% of the respondents said they did not even think about the punishment (Anderson 2002). Eighty-nine percent of the most violent criminals perceive no risk of apprehension or have no knowledge of associated sentencing for their crimes (Anderson 2002). The increase in sentencing must then be associated with increasing knowledge about the change. Beyond prior knowledge about the consequences related to the offense, studies have also suggested that individuals prioritize immediate circumstances instead of longer term legal consequences and punishment when engaging in criminal behaviour (Austin et al. 2016). Those who are socialized into or whose lifestyles depend on criminal behaviour usually lack legitimate opportunities which would allow for a utilitarian calculation favouring not to engage in criminal behaviour. A meta-analysis of more than a dozen studies on general studies concluded that "the evidence on the deterrent effect of length suggests that the relationship between crime rate and sentence length" has "diminishing returns" at best (Travis, Western, and National Research Council (U.S.) 2014). Duration of sentencing is not proportionality perceived as associated with severity by potential offenders. In other words, sentences that are twice as long are not perceived as twice as severe. A

20-year sentence is only perceived as six times harsher than a one-year sentence (Paternoster 2010).

The severity of punishment is argued to have other positive utilitarian effects such as preventing individuals to engage in criminal behavior through incapacitation, severity of punishment denounces publicly unacceptable behaviors, and may be conducive for rehabilitation treatment to take place during incarceration (Frase 2005).

Severity of punishment only deters crime when associated with the certainty of being apprehended is high enough (Antunes and Hunt 1973). Lower crime rates cannot be influenced only by the severity of the punishment (Antunes and Hunt 1973). From a rational choice perspective, this can be explained that if the individual is not expecting to be caught anyways, the severity of the punishment is not even factored in the cost-benefit analysis.

Increased certainty of punishment allows for deterrence to take place by risk of apprehension. An example could be how there are more road controls during the holidays, thus influencing drivers to drive more carefully. Studies suggest that certainty has a far stronger effect than severity of punishment (Paternoster 2010; Durlauf and Nagin 2011). Subjective certainty is more important than objective certainty (Kennedy 1983). The belief of certainty of being punished has a stronger deterrent effect. This belief can come from awareness campaign, personal experience or anecdotal events from peers (Kennedy 1983). A study suggested that an individual who engages in criminal behavior and avoids punishment will increasingly engage in the behavior as their experience suggests that punishment remains uncertain (Tomlinson 2016). Substance use, peers and emotional distress may influence perception of risk (Apel 2013). Research has attempted to quantify the point to which perceived risk of apprehension influences behaviour. Perceived risk of apprehension must exceed 30 percent to have a deterrent effect, which increases steadily until 70 percent, after which deterrence effect insignificantly change (Paternoster 2010). Valerie Wright (2010) points out that the criminal justice system cannot have a certain risk of apprehension (i.e. 100%) since most crimes do not result in an arrest or in a conviction, this overall effects of deterrence are reduced. The societal costs of increasing the certainty of punishment to 100% would involve extreme conditions of surveillance, control and policing and surrendering individual liberties (B. Johnson 2019).

Celerity, which is the speed to which a punishment is applied after being apprehended for breaking the law, has received the less amount of attention in research (Tomlinson 2016). Research suggests that the speed of punishment does not influence deterrence. Another study suggests that individuals prefer getting their punishment earlier (Tomlinson 2016).

Awareness of the factors at play in deterring individuals from committing crimes is often used to guide policy making. Considering the role of severity, celerity, and certainty, discouraging existing violent crimes would require increasing the certainty of being caught and not just focusing on increasing the severity of the sentence. To discourage a currently legal activity, criminalizing the behavior, associating it with a reasonable consequence, developing an awareness campaign

around those changes, creating periods of target enforcement and publicizing effects of enforcement period will create deterrence.

1.4 Incapacitation

Incapacitation is a public safety rationale which posits that keeping the offender out of society limits their capacity to commit another crime (Austin et al. 2016). In other words, by incarcerating people who were convicted of crimes, society is preventing them from committing additional crimes. Incarceration does temporarily ensure public safety, by separating the individual found guilty of causing harm from the rest of society. In that sense, the benefits of incapacitation are ensured at the individual level by ensuring that the threat is eliminated. Approaches to incapacitation have evolved over time, whereas capital punishment was the harshest way to incapacitate an individual from reengaging in criminal behaviour, other techniques such as incarceration have gained greater importance, with most states abolishing capital punishment in the 20th century.

The incapacitation principle can be legitimized by the right to self defense and defense of others from the general public (Pereboom 2020). Gregg Caruso (2017) developed an analogy made with the public health model which helps framing the importance of incapacitation. Like the public health system's role is to prevent disease, the criminal justice system's role is to prevent crime. When prevention fails, diseases may be quarantined. Similarly, within the criminal justice system, when prevention fails, people who engage in criminal behavior may be isolated. For Gregg Caruso (2017), this is to be done only with cases of dangerous offenders from which the public needs to protect itself.

Incapacitation theory could be used to incarcerate individuals for the longest time possible as the longer they are removed from society the longer their capacity of committing crime is limited. From a utilitarian standpoint, this idea of permanently removing a threat from society is appealing. However, most states adopt a proportional approach: incapacitation should be proportional to the crime committed and its impacts on the society and the victim (Austin et al. 2016). This proportional approach is reflected in the severity of incarceration punishment between "serious" offenders and "low-level" offenders. High-risk offenders are physically restrained from committing further crimes by being isolated from the public (Frase 2005).

Incapacitation may also face challenges as the physical space to incarcerate individuals may be limited. Although states have seen an increase in prison-building following World War II (Davis 2003), this structural barrier has led to a theory of selective incapacitation, positing that very few offenders commit a large proportion of the crimes. This theory of selective incapacitation requires a profound understanding of the risk-assessment of offenders and assumes that selected offenders won't be replaced by others (Blumstein 1983).

Critiques of incapacitation theory argue that by physically isolating individuals, the problem of criminality is only displaced instead of being tackled directly. The incapacitation theory also assumes that the state, through its courts, can properly assess who is most at-risk of recidivism and

would need to be isolated from the rest of society (Frase 2005). Furthermore, it assumes that through incarceration, criminalized individuals won't be made worst.

With the abolition of the death penalty in certain states, even for the offenders presenting the highest risk of recidivism, incapacitation remains a temporary solution. Even life sentences are often associated with possibility of release after a certain amount of time. The threat is thus temporarily removed from society. There have been critiques of the incapacitation argument as the offender may reoffend upon release. It is with concern over the release of offenders that the last sentencing principle, rehabilitation, was developed.

1.5 Rehabilitation

Rehabilitation is a tool to address recidivism by tackling criminal deviance as its roots in individual psychology. Rehabilitation functions to deter future crimes by an individual who has already been found guilty of committing an offense. It is thus assumed that effective rehabilitation programs would lower recidivism (Austin et al. 2016). Rehabilitation assumes that the offender has identifiable and treatable problems which can be treated in order to reduce their future criminality and facilitate reinsertion in their community if they are incarcerated (Frase 2005). Rehabilitation works on the power of the prison environment to influence the behavior of inmates. In its early days, the promises of rehabilitation were questionable as it implied that penal institutions could modify individuals. Specialized programs for sexual offenders started being developed in the 1970s. Nowadays, rehabilitation programs are introduced at diverse stage of the criminal justice process, through specialized courts, diversion programs and alternative sentencing.

With a shift away from death penalty as a permanent incapacitation method and with incapacitation only offering a temporary separation mechanism came a concern for what would happen after the release of offenders. With the integration of rehabilitation in the criminal justice paradigm, prisons shifted as a technology of discipline to one of treatment (Simon 2000). Jessica Evans (2021) contextualizes the evolution of penal nationalism in Canada with the confederation period being marked by retributive justice structures, the post-war period marked by a mobilization to modernize punishment through rehabilitation and the neoliberal period which is marked by a depoliticized approach of crime based on individual responsibility. Rehabilitation assumes that the offender has identifiable and treatable problems which can be treated in order to reduce their future criminality and facilitate reinsertion in their community if they are incarcerated (Frase 2005). Rehabilitation and incapacitation play an important function in indeterminate sentencing systems as judges will be given broad discretion "to assess the degree of risk posed by the offender, diagnose the causes of that risk, assess whether those causes can effectively and safely be treated without incarceration, and if they cannot, decide the maximum and sometimes the minimum term of incarceration" (Frase 2005, 71). Offenders' ability to access rehabilitation programs includes an evaluation of risk-factors composed of static information such as age, ethnicity and gender and dynamic information such as employment and educational degrees. Yet individualized risk and progress assessments of offenders is highly discretionary and very difficult to make reliably and

consistently (Frase 2005). This means that similar offenders with resembling cases may receive different sentences and treatments based on the judge and parole board that will examine their case. Although risk-assessments are commonly used to facilitate treatment, research suggests that those factors are more reflective of an individual's marginalization than their risk of recidivism (Maurutto and Hannah-Moffat 2007).

Neoliberal cooptation of the concept of rehabilitation emphasized that it is the personal responsibility of criminals to reform, and the state offers tools to do so. This rhetoric emphasizes the criminal behaviour is the result of individual circumstances rather than systemic conditions. Individuals are thus seen as "defects" with problems that are fixable by state institutions. There has been much criticism of the rehabilitative approach as it "facilitated and legitimized a deep-seated suspicion of those who did not or could 'reform' and assimilate into the mainstream" (Evans 2021, 258). In that sense, rehabilitation has been criticized as a tool to force assimilation into white norms (Evans 2021). Furthermore, rehabilitation as part of a neoliberal project has been criticized for investing in the transformation of individuals not for their own good but as part of creating political subjectivities (Simon 2000).

With the inclusion of rehabilitation under sentencing principles, restorative justice practices have emerged within the criminal justice system. The restorative paradigm views crime as a violation of people and relationships which creates obligations on the wrongdoer to repair harm. This vision of justice goes beyond the strict retributive model determining blame and imposing punishment to including victims, perpetrators, and community members to repair harm. Restorative justice takes roots in Indigenous justice practices (Whynacht 2021). Practices of restorative justice have been co-opted and integrated in the criminal justice system (Kim 2018). The lack of recognition of the Indigenous and diasporic roots of the restorative justice practices can be referred to as what Aileen Moreton-Robinson (2015) defines as "white possessive logic" which tends to erase Indigenous possession of knowledge and the settler state claims possession over said knowledge. The co-optation of restorative justice practices in settler state institutions has been criticized by Indigenous authors, not only because it represents an ongoing erasure of Indigenous peoples through politics of dispossession, but also because Indigenous people remain the most incarcerated population in Canadian prisons.

The rehabilitation and restorative aspects of the criminal justice system have been criticized for focusing on the individual harm that happened rather than considering the context which allowed for the harm to take place in the first place (Kaba 2021). Also, the idea of "restoring" can be limiting as the initial situation prior to the crime may have been unhealthy or harmful. This is especially the case for sexualized and domestic violence, where the restoration of a relationship between the survivor and the perpetrator often perpetuates harm (Howe 2018). In the same way, the reinsertion tenet of rehabilitation has been criticized as it supposes that the offender was once inserted in the community where they live. Considering that most individuals incarcerated are

marginalized in Canadian society and were never fully "inserted" in society, it is complex to see how they could be "reinserted".

1.6 Criminal justice paradigm in the Canadian context

The Department of Justice (2021a) defines the role of the criminal justice as "keeping Canadian families safe and secure, while supporting victims of crime". The Canadian criminal justice system has three main institutions: police, courts, and prisons. Those institutions are driven by principles of public safety and keeping criminal offenders accountable of their acts (Department of Justice Canada 2019a). Criminal law can be distinguished from civil laws due to the prosecution of parties charged with crimes. Publicly elected legislators are at the forefront of creating and shaping the law, including criminal law. In Canada, criminal law is codified under the *Criminal Code of Canada.* The code defines criminal offenses and attaches minimum and maximum sentences for each of the offenses. Criminal infractions can be found in the Canadian Criminal Code, which was created in 1892. Criminal law allows for pursuing infractions present in the Criminal Code and provides judgment instances through courts. Criminal law also provides sanctions for each infraction. The term "indictable offences" refers to the most "serious" crimes – murder, manslaughter, armed robbery, violent physical and sexual assaults as well as thefts and frauds involving large sums of money. Individuals charged with these offences have a right to a jury trial. Since the abolition of the death penalty in 1976 in Canada, life sentence is the strictest penalty one may get after committing an infraction (Ricordeau 2019). Retribution takes the form of penalties which include diversion programs, community work, incarceration, fines, or surveillance program.

The party charged with crime is prosecuted by the Crown which acts on behalf of the state. The rationale for the Crown representing the state and not the victim is that a crime is a violation against the whole Canadian society. The prosecutor represents the Crown and their role excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with a greater responsibility" (Public Prosecution Service of Canada 2014). This means that prosecutors must present credible evidence but need to act fairly to ensure justice. The burden of proof is on the Crown, meaning it is the Crown's responsibility to have enough credible proof of the defendant is guilty of an offence. The presumption of innocence also calls for offences being proven "beyond a reasonable doubt." In other words, guilt needs to be proven with absolute certainty. At every stage of the prosecution a defendant must be treated as an innocent person.

Federal policing in Canada is done by the Royal Canadian Mounted Police, provinces and municipalities have the power to create their own police services. Police are responsible for investigating cases reported to them. Police may "arrest suspects, search homes and offices and seize evidence" under subjection to Charter protections (Canadian Judicial Council 2007, 32). Once police officers have reasonable and probable grounds to believe an individual has committed

a crime, charges can be laid either by the police or by a prosecutor depending on the jurisdiction where the crime took place.

The Canadian Constitution empowers Ottawa and the provinces to create courts and jurisdiction over specific types of cases. Courts of superior jurisdiction, including the Supreme Court of Canada, are under federal responsibility, meaning that appeals to provincial courts and indictable offences are heard in those courts. Provinces are responsible for operating courts on their territory and establishing inferior courts which have limited powers and jurisdiction. They deal with less serious crimes. Nonetheless, inferior courts need to follow precedents set by higher courts in the province or nationally. Meaning that Supreme Court decisions influence judicial rulings across the country.

Sentencing happens in courts at the end of trial. Maximum penalties for each offence are clearly indicated in the *Criminal Code.* The Canadian *Criminal Code* defines the purpose of sentencing as

> to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> a) to deter the offender and other persons from committing offences;
> b) to separate offenders from society, where necessary;
> c) to assist in rehabilitating offenders;
> d) to provide reparations for harm done to victims or to the community; and
> e) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community. (*Criminal Code* 1985b, sec. 718)

The *Criminal Code* explicitly reflects the sentencing principles put forward by the criminal justice paradigm as discussed in the first parts of this chapter. The approach of "crime as a moral choice" which needs to be punished still dominates in the Canadian criminal justice system (Milward 2022). Punishment is the guiding principle which allows for crime-prevention principles, deterrence, incapacitation, and rehabilitation to be enacted. Interestingly, the restorative justice approach which was discussed under rehabilitation is formally recognized in explaining the purpose of the Canadian criminal justice system.

This is concurrent with the most recent survey to reform the criminal justice system where participants agreed that the Canadian criminal justice system should "hold individuals accountable for their actions and work collaboratively with other sectors to prevent crime, rehabilitate offenders and repair the harm done by crime." (Department of Justice Canada 2019a, 4). Restorative justice

has been integrated to some extent through programs and policies and at different steps of the criminal justice process for the last forty years (Department of Justice Canada 2021b). However, it was only in 2004, that Canada developed the *Principles and Guidelines for RJ practice in Criminal Matters.* There needs to be an admission of guilt for an individual who has caused harm to access those programs.

The institutionalization of a penal system in Canada takes form in 1835 with the opening of the first prison: Kingston Penitentiary. The first women's prison in 1934 in Kingston Ontario and remained the only federal penitentiary for women until 2000 (Government of Canada 2019). Although incarceration as an incapacitation mechanism started in the early 19th century, death penalty was *de facto* suspended in 1962 with the last hangings being carried out, and *de jure* abolition happening in 1976. The criminal justice system had barriers to abolishing death penalty with public opinion being worried that homicides would increase as a result of removing this permanent mechanism to eliminate dangerous threats in society (Fattah 1983).

Today, incarceration is the most common method to incapacitate dangerous individuals. Indeed, the criminal justice system remains "fundamentally committed to deterrence and retribution through incarceration" (Milward 2022, 6). In the 1980s, neoliberalism reinstated the model of "crime as a choice" and criminality became associated with individual irresponsibility and a threat to the wellbeing of the nation (Evans 2021). Correctional Service Canada is responsible for 43 institutions, six maximum security, nine medium security, five minimum security, 12 multilevel security and 11 clustered institutions. In those institutions, there are also four healing lodges aimed at providing spiritual and cultural support for Indigenous inmates allowing for rehabilitation programs to be delivered to facilitate reinsertion after incarceration. There are also five regional treatment centres across Canada to address the needs of inmates with serious mental health conditions (Correctional Services Canada 2021). Provincial corrections are responsible for offenders who have been sentenced to two years minus a day only, federal corrections are concerned with those being sentenced to two years or more. Correctional Service Canada is responsible for federal prisons across the country.

Criminal justice in the Canadian context is guided by the four sentencing of the criminal justice paradigm presented earlier in this chapter. Considering the foundational nature of the four sentencing principles for the criminal justice paradigm to function properly, the next chapter of this thesis will be measuring the capacity of the Canadian criminal justice system to address cases of sexual violence through punishment, deterrence, incapacitation and rehabilitation.

Chapter II – Evaluating Criminal Justice Paradigm's Ability to Tackle Sexual Violence

The criminal justice paradigm has dominated how as a society we engage with behaviors that are deemed marginalized or dangerous. The prevalence of the criminal justice discourse has shaped the way public policy around the crime and justice are designed. Public opinion and mobilization have supported the legitimization of the criminal justice paradigm to address violence in Canada.

Feminist movements against sexual and gendered violence are relatively new in Canada. Their first feminist mobilizations in the 1970s called for increase state support to intervene in this realm of violence which was previously considered as a private realm issue. For decades, the prevalent feminist response to sexual violence was relying on carceral systems, asking for harm perpetrators to be punished and incapacitated. Elizabeth Bernstein (2007) coined the term "carceral feminism" which refers through to the feminist movement which seeks to achieve gender justice through a strengthening of the carceral apparatus such as harsher sentences for sexual violence perpetrators (Srinivasan 2021, 159). Policing, prosecution, and punishment became the primary tool to address sexual violence (Richie 2012; Law 2014). The decades following this mobilization in the 1970s were marked by a trend towards harsher sentencing, policing, and investigating to prosecute sexual offenders. The "though on crime" rhetoric led to an intensified collaboration between carceral feminists and the criminal justice (Bumiller 2008). An illustration of how feminist social movements continue to mobilize the criminal justice system to address sexual violence in communities is how the #MeToo movement beyond public denunciation also heavily relied on the criminalization of the individuals called out for causing harm (Tambe 2018).

This public support for the criminal justice paradigm and especially retribution as a path to conduct justice is reflected in all criminal offenses. Indeed, in the 1990s, public opinion surveys in Australia, Canada, England, Netherland and United States demonstrate consistently that 80% of respondents believed sentencing in their country is too lenient (Ashworth and Hough 1996). The perception of needing to be "tough on crime" has been mobilized by political parties to gain power during electoral periods. In Canada, the political response to this has been to increase terms of imprisonment for crimes. This can be illustrated by the Liberal government's increase in sentencing for auto theft, street racing and the possession and trafficking of crystal meth in 2005.

In 2007, the Conservative Party ran on a platform that sought to increase sentencing and police presence. This "tough on crime" approach was supported by two-thirds of Canadians (Latimer and Desjardins 2007). Bill C-10 the Safe Streets and Communities Act which was enacted in 2012. Bill C-10 includes mandatory minimums for several offences, including sexual offenses (Barnett et al. 2012). The mandatory minimums presented in C-10 can also be increased if aggravating factors are found proven in court. Under Bill C-10, targeted offenses are no longer eligible for conditional sentence. This includes offenses that prescribe a maximal offense of 14 years or more and offenses punishable by 10 years or more in which the Crown proceed by indictment. Human trafficking, sexual harassment and sexual assault also fall within this category when the Crown proceeds by indictment (Barnett et al. 2012). The *Safe Streets and Communities*

Act aligns very well with the retributive aspect of the criminal justice paradigm. When enacted, it was accompanied by the following public statement:

> Canadians want and deserve to feel safe in their homes and communities, and this means that dangerous criminals need to be kept off our streets. Our Government is committed to ensuring that criminals are held fully accountable for their actions and that the safety and security of law-abiding Canadians comes first in Canada's judicial system. We will continue to fight crime and protect Canadians so our communities are safe places for people to live, raise their families and to their business (Nicholson 2012).

The public statement emphasizes the role of the state, and especially of the criminal justice institutions – police, courts and prisons – role in protecting Canadians. Electoral success has been associated with justice policy that reassert the criminal justice paradigm (Garland 2002). Platforms engaging with the "though on crime agenda" are a valuable commodity for political parties during elections as they allow to win vote, whereas platforms promoting alternative methods of engaging with crime have been associated with a decline in votes.

The prevalence of the criminal justice paradigm in both public opinion and in the enactment of policies centralizing the criminal justice system as the legitimate mechanism to address harm, begs us to reflect on the capacity of the Canadian criminal justice system to deliver on its goal to punish, deter, incapacitate, and rehabilitate. In this chapter, I provide an evaluation of the Canadian criminal justice system's ability to address sexual violence through the four ideal principles of the criminal justice paradigm. Using governmental data, I analyze indicators related to retribution, deterrence, incapacitation, and rehabilitation.

2.1 Retribution

The selected indicators to evaluate the criminal justice system's ability to punish sexual crimes will be conviction rates within the larger context of attrition rates and the length and type of sentences for those offenses. Usually, only conviction rates are considered in the evaluation of the criminal justice system, but by including the cases that never made it to court and understanding why they never made it can give a better picture of the criminal justice system's performance. The public safety rationale of the criminal justice paradigm relies on the principles of deterrence, incapacitation, and rehabilitation. In other words, under the criminal justice paradigm for crime prevention to take place offenders must be convicted and punished so that the three other sentencing principles can be enabled. This public safety rationale emphasizes the centrality of conviction and punishment within the criminal justice paradigm. Thus, the capacity of the criminal

justice system to effectively punish offenders directly relates to the outcomes of the three other foundational principles of the criminal justice paradigm.

Sexual assault is the most underreported crime

For most crimes, the number of alleged perpetrators outweighs the number of people convicted and sentences for their crimes. The phenomenon by which individuals who commit crime are not sentenced is referred to as "attrition". For sexual crimes, most of the attrition prior to the interaction with the criminal justice system. Indeed, attrition for sexual violence is largely due to the fact that it is an unreported crime with estimation of only 6% of sexual violence crimes being reported to the police (Cotter 2021). Consistently, sexual assault is the most underreported crime. Crime reporting rates are an essential element to understand the criminal justice system's ability to tackle that crime. Indeed, an infraction to the *Criminal Code* that has been committed can only be addressed if it is reported to the criminal justice system. There is thus a difference between infractions that are committed and those treated by the Criminal justice system (Ricordeau 2019). The low reporting rates of sexual violence crimes limit the criminal justice system ability to punish offenders and thus to deter, incapacitate and rehabilitate offenders.

For sexual violence, the ratio of self-reported surveys to police reports before and after the #MeToo movement have been consistent (Rotenberg and Cotter 2018). In the literature, deterrence from reporting sexual assault has been associated with a hesitancy to engage with the criminal justice institutions. Some of the key factors have been previous negative experience with the system (personal or that of others) as well as fear that expectations and needs about the judicial process will not be met (H. Johnson 2017; Venema 2016). Other important barriers to report sexual assault include shame and dishonour, the fear not to be believed, perpetrators not being held accountable, and a misunderstanding of what constitutes sexual assault (H. Johnson 2012; Sable et al. 2006; Venema 2016; S. C. Taylor and Gassner 2010). The most recent Canadian victimization survey points to some of the reasons victims chose not to report (Cotter 2021). Victims of sexual assault have cited not wanting to deal with the police (57%) or the court process (42%) as grounds for not wanting to report incidents of sexual assault. The belief that the perpetrator would not be adequately punish also demotivates 43% of women victims (versus 25% of men). Sexual assault survivors may choose not to go through the system, because of previous negative interactions, but also because they do not want their loved ones to be caught up in it (Kaba 2021). As discussed, many survivors of sexual violence suffer from their victimization and the process of reporting the event can be re-traumatizing (Avina and O'Donohue 2002). Lack of knowledge of what consists of a sexual violence crime also reflects why 38% of women do not report their experience (Cotter 2021). Research demonstrate that the internalization of rape myths by victims disincentivizes them to report (Heath et al. 2013). Shame, and embarrassment, not being believed and dishonour are also often cited as reasons why victims chose not to report (Heath et al. 2013; Sable et al. 2006).

The underreporting of sexual violence is further complexified when taking race into account. Shawn McGuffey's (2013) analysis of personal accounts of Black rape survivors draws a clear

distinction of these survivors with White rape survivors: where White survivors discussed the challenges of accessing resources to support, as well as shame and isolation, Blacks survivors consistently added the notion of how race shaped the assault and the aftermath of the assault in conjunction with the challenges addressed by white survivors. Participants in Shawn McGuffey's research also felt like no one cared about their rape or that people wouldn't believe it happened, further demonstrating that the framing and discourse around Black women is also deeply internalized by Black rape survivors and impact how they chose to navigate the justice system or not. The power of this discourse also influences social behaviors of their support system and people they reached out to: "peers, social service providers, and even the rapists themselves used language to control women's assessment of the assault and their reactions to it" (McGuffey 2013, 126). As much as the political discourse around race and sexual assault will influence the perceptions and treatment of the victim by legal actors, they are also "key determinants in the manner in which the victim will approach the judicial process" (Dylan, Regehr, and Alaggia 2008, 693). Racialized sexual assault survivors' awareness about their racial social location influences the reporting of sexual violence (Washington 2001). Studies have also demonstrated that Black women who experience sexual assault, and have black sons, fear reporting as they do not want to create a future for their own sons which perpetuates the black men as rapist myth (Nash 2005). This is also illustrated by the testimony of Charlotte Pierce-Baker, who was raped by a Black man: "I felt responsible for upholding the image of the strong black man for our young son, *and* for the white world with whom I had contact. I didn't want my son's view of sex to be warped by this crime perpetrated upon his mother by men the color of him, his father, and his grandfathers. I didn't want to confirm the white belief that all black men rape" (Pierce-Baker 1998, 64).

Social relations in Indigenous communities with police services deter community members from cooperating and even reporting to police forces when criminal behavior takes place (Fiske and Patrick 2000). Indigenous women also experience a normalization of racism and gendered violence from the police with being able to hold them accountable, namely because of the discourse normalizing sexual violence towards them (Palmater 2016). A report on the incarceration of Indigenous women stated that the Canadian State "effectively trained Aboriginal women to believe they are on their own in circumstances where they face violence" and that "when women are forced to meet violence with violence, the travesty is they are then susceptible to facing criminal charges" (Native Women's Association of Canada 2017, 7). This was also reflected in this testimony: "There is no accidental relationship between our convictions for violent offences, and our histories as victims. As victims we carry the burden of our memories: of pain inflicted on us, of violence done before our eyes to those we loved, of rape, of sexual assaults, of beating, of death. For us, violence begets violence: our contained hatred and rage concentrated in an explosion that has left us with yet more memories to scar and mark us" (Sugar and Fox 1990, 8). The settler colonial

justice system upholds great barriers for Indigenous women to be believed and for their wellbeing and safety to be regarded equally as that of white women (Razack 2002; 1994).

Unfounded sexual assaults reported to the police

Once a sexual crime has been reported to the police, police get to do an investigation and determine if indeed the incident represented a violation of law. An unfounded crime is defined as "determined through police investigation that the offence reported did not occur, nor was it attempted" (Greenland and Cotter 2018). In 2018, Statistics Canada investigated the unfounded cases of sexual assault for the year 2017 after national media attention. The *Globe and Mail* article "Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless" was a 20-month investigation revealing that Canada dismissed 19.39% of all police-reported sexual assaults (Doolittle 2017). Comparatively, internationally, false complaints or mistaken reports are recorded to be between two and eight percent. Robyn Doolittle (2017) argues that those inflated unfounded cases give the impression that more complaints lead to a case being charged. The article also pointed to great discrepancy across jurisdictions, with over 115 communities having at least one out of three complaints dismissed as unfounded. This high rate of unfounded sexual assault cases is a symptom of "deeper flaws in the investigative process: inadequate training for police, dated interviewing techniques that do not take into account the effect that trauma can have on memory; and the persistence of rape myths among law-enforcement officials" (Doolittle 2017). The investigation also pointed that people who reported their experience of victimization were told it was dismissed without charge, but without letting them know it was deemed unfounded.

Cases being determined as "unfounded" because they lacked evidence. In 2018, a new standard had been established; if there is no concrete evidence that the crime did not happen, it will be classified as founded, even without an accused. This marks a shift in the classification of cases which is victim centred. In 2017, Statistics Canada found that 14% of sexual assault cases were unfounded, compared to 7% of all reported *Criminal Code* violations (Greenland and Cotter 2018). The more violent levels of sexual assaults (two and three) had less attrition rates due to the case being unfounded, namely because of the physical nature of those incidents usually involve bodily harm and physical evidence.

Attrition at the next levels

Attrition also happens at the charging stage, where once the police determine there was indeed a violation of the law, the individual can be charged, cleared, or not cleared but won't

proceed to court if they weren't able to identify the alleged perpetrator. Once a charge is laid, the case may proceed to court.

Between 2009 and 2014, 43% of the incidents of sexual assault reported to the police had a charge laid[2]. This represented 40,490 cases. Of those 19,806 (49%) went to court. Guilty decisions were found for 8,742 cases and 3,846 adult cases were sentenced to adult custody. This means that of the 93,501 cases that were reported to the police, only 9% were found guilty and 4% ended incarcerated. Considering that sexual assault is only reported to an estimated 6% rate, that would mean that only 0,5% of sexual assault cases would have been sentenced and only under 0,3% would end with the perpetrator incarcerated. This is consistent with Johnson (2012) estimates that only 0.3% of perpetrators of sexual assault were held accountable by the criminal justice system and 99.7% were not.

Table 1
Retention of sexual assault criminal incidents in the criminal justice system, 2009 to 2014

	Sexual assault cases	Overall percentage based on incidents reported to the police	Overall percentage considering that only 6% of the cases are reported to the police
Incidents reported to police in Canada	93,508		6%
Incidents with a charge laid	40,490	43%	2.6%
Incidents that went to court	19,806	21%	1.3%
Guilty decisions	8,742	9%	0.5%
Adult cases sentenced to custody	3,846	4%	0.24%

Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey and Integrated Criminal Court Survey Linked file

Sentencing and conviction

Proportional approaches to punishment suggest that crimes should be punished proportionately to the harm it has caused. Shared understanding of a crime within a society plays a function in determining sentencing: "the moral outrage harmful act provokes determines the magnitude of the punishment assigned to it" (Darley et al., 2000, p. 661). Sexual violence has been

[2] The main reason why charges may not be laid include that police decided there was not sufficient evidence to proceed (Rotenberg 2017).

associated with high moral outrage. The literature provides criminological explanations to the extreme responses to sex offenders such as moral panic (Spencer 2009), the New Penology (Simon 1998), and populist punitiveness (Lynch 2002). Sentencing must reflect criminal violation, for the sake of restation and the maintenance of public order. The moral outrage caused by sexual offenders incentivise harsher sentencing (Spencer 2009).

For cases of sexual assaults that will end with a guilty conviction, sentencing is generally harsher than in cases of physical assault. Over half of the cases of sexual assault treated in adult court will lead to the incarceration of the offender, compared to one-third of physical assault cases (Rotenberg 2017). Other sentences included probation (29%), conditional sentences (9%), fines (3%) and other types of sentences for the remaining 3% including restitution, absolute and conditional discharge, suspended sentence, community service order and prohibition order.

The seriousness of sexual violence is reflected in the incarceration rates of guilty cases. However, when considering the high attrition rate that happens before a case goes to court, and the difficulty to prove that a sexual assault took place, namely because of the presumption of innocence and the burden of proof on the Crown, cases are sentenced to custody to a rate of 0.24%.

2.2 Deterrence

In the Canadian context, deterrence usually dominates as the primary consideration of sentencing (Milward 2022). Considering that deterrence theory, often relies on the "crime as a moral choice" approach and assumes that individuals are rational actors, it is important to consider the conditions under which crimes have been committed in Canada. Eighty percent of federal offenders have had or have substance-use issues, and relatively two-thirds of crimes have been committed under the influence of substances (Department of Justice Canada 2021c). In other words, two-thirds of the crimes were perpetrated by an individual who was impaired by substances. Although there might not always be a rational decision-making process, it is still important to understand how in cases of sexual assault, severity, certainty, and celerity may be a disincentive from engaging in that behaviour.

Severity

Conviction is also influenced by the severity of the sexual assault (Rotenberg 2017). A sexual assault involving a weapon is more likely to be convicted and sentenced more harshly. Those cases represent only 4% of all cases reported to the police. Sixty percent of cases involving a weapon are sentenced to custody. Similarly, sexual assault with physical proof of bodily harm have been the strongest indicator of a sentencing outcome in the criminal justice system. However, these cases only account for 44% of all sexual assault cases reported to the police (Rotenberg 2017). Lenient sentencing has been associated with the following factors: the absence of a weapon

or bodily harm, an adult being assaulted by someone in their age group, and cases where victims knew each other, or were in a previous or current relationship with the assailant (Rotenberg 2017).

Certainty

In the examination of the attrition rates for cases of sexual assault, it was established that only 0.5% of all estimated sexual assaults, including those that were not reported to the police, ended in a guilty verdict[3]. Thus, sexual assault cases have a very low certainty of being caught. If we assume that individuals are rational actors making a cost-benefit analysis before engaging in non-consensual sexual activity, the very low risk of being caught does little impact to disincentive someone from engaging. Lower conviction rates have been associated to cases where there was a delay in reporting the incident to the police, when the perpetrator was a female, an accused aged over 55 years older, a parent assaulting their child or when the incident occurred between adults of the same age, especially if they knew each other (Rotenberg 2017). Certainty is however increased when the severity of the crime, namely physical harm and the involvement of a weapon, can be used as proof in court (Rotenberg 2017).

Celerity

Celerity works in favor of sexual crime perpetrators. Delays between the moment of the incident and reporting to the police influence attrition rates (Rotenberg 2017). The likelihood of conviction decreases importantly the longer the period is between the incident and the report. There are multiple reasons explaining the link behind timely reporting and conviction. Time may undermine the victims or witness's memories thus affecting their credibility, forensic elements may be lost, and the delay in reporting may affect the victims legitimacy in their allegations. (Rotenberg 2017)

The criminal justice system institutions also experience celerity. Amidst crime rates decreasing, the Canadian criminal justice has experienced increasing delays in processing cases which put burdens for both offenders and victims who are seeking for justice through the system (Department of Justice Canada 2019a). In 2013-2014, the median time from the laying of a charge to the case's final disposition was 451 days for homicide, 321 days for sexual assault and 314 days for attempted murder (Runciman and Baker 2016).

Delays affect victims and their families who feel revictimized by a process that does not serve justice in a timely manner (Runciman and Baker 2016). Due to delays in trial, there are more people in provincial correctional facilities awaiting trial than people actually serving sentences (Department of Justice Canada 2021c). The Supreme Court of Canada's *Jordan Decision* has seen some charges being dismissed before reaching trial because of constitutionally unacceptable delays. Due to the presumed innocence before proven guilty of the Canadian criminal justice

[3] Police reported sexual assault incidents are only a fraction of the total of sexual assault incidents. Data collection on sexual assault is not limited to police reported incidents. Statistics Canada also collects data on sexual assaults through its victimization surveys estimating that only 6% of sexual assaults are reported to the police (Cotter 2021).

system, it was deemed unconstitutional to lengthen the wait for the verdict of guilt for presumed offenders. COVID-19 has added further delays in trial, and judges have stated that a global pandemic qualifies as "exceptional circumstances" under which the *Jordan decision* would not apply for delay due to the pandemic (Bridges and Latimer 2021). "Administration-of-justice" charges, such as offences like probation breach and bail conditions that are not criminal in nature or failure to appear in court, contribute largely to slowing down the processing of judicial cases. Although they require a lot of financial and time resources, they take away the focus of the criminal justice system in providing safe communities (Runciman and Baker 2016). Normalization of delays has allowed for a culture of complacency to exist and has influenced public confidence in the criminal justice (Department of Justice Canada 2021c).

General deterrence and prevalence of sexual assault

Overall, with such a low certainty rate of being caught, the deterrence crime-prevention principle of the criminal justice paradigm, may not work as efficiently as for other crimes. Sexually violent crimes have proven to be more challenging to charge and convict. Impacts on general deterrence have also been limited with self-reported cases of sexual assault remaining stable overtime (Department of Justice Canada 2019b). General deterrence may be influenced by such high attrition rates of sexual assault and that many of the assaults go unpunished.

2.3 Incapacitation

Between 2009 and 2014, 4% of cases of adult sexual assault reported to the police led to a custody sentence. If the victim is older than 16 years old, there is no mandatory minimum sentence, and the maximum sentence is between four and fourteen years based on the type of assault the individual is indicted for. In 2019-2020, 32% of sexual assault cases were convicted to a custody of less than six months, 38% were convicted to being in custody between six and twenty-four months and 21% were convicted to being in custody twenty-four months or more (the remaining amount were coded as unknown length) (Statistics Canada 2021a). Incapacitation of individuals who committed sexual assault is relatively low considering the minimum and maximum penalties.

Longer sentencing has been associated by higher risk of recidivism. Incarcerated offenders have high rates of recidivism than those who remain in their community (Department of Justice 2019). Imprisonment has been associated with the learning of criminal skills and the creation of criminal networks (Durlauf and Nagin 2011; Borrows 2010). This furthering of the criminalization while incarcerated has been linked to the prison countercultures where conventional societal norms are replaced by defiance, and violent behaviour (Milward 2022). Other elements influencing recidivism are that offenders may build resentment against society and struggle to reintegrate their community professionally and relationally after release (Durlauf and Nagin 2011).

Incapacitation enabling sexual violence

Incapacitation theory has been argued to prevent crimes to be committed by physically isolating a high-risk offender from the public through incarceration. However, Canadian prisons

are also enabling sexual violence within its institutions. In Canada, the issue of sexual harm in prison has rarely been raised in public and political discourse. Unlike the United States who have the *National Prison Rape Commission,* Canada has little to no knowledge of the prevalence of sexual coercion in its federal prisons. There are no Canadian studies, reviews or academic literature looking at this issue, mainly because the data does not exist (Office of the Correctional Investigator of Canada 2020). The closest data we may have come from the 2007 National Inmate Survey conducted by Correctional Services Canada which found that 17% of men inmates engaged in sexual activity while incarcerated and 31% of women (Zakaria et al. 2010). However, there is no question to validate if this sexual activity was coerced or not. This lack of data also means that there is no public policy in place to address this issue or to facilitate the reporting of this issue. In the United States, the Prison Rape Elimination Act (PREA) is a policy that was adopted in 2003 which enforce all facilities across the country to adopt a zero-tolerance policy amongst inmates, but also with staff-on-inmate misconduct. Sexual coercion surveying and reporting is also mandatory (National PREA Resource Center n.d.). The lack of data in Canada should not be associated with the idea that Canadian correctional facilities are without exempt from sexual violence: "without proper reporting mechanisms, record keeping, and research, CSC runs the risk of using this absence of evidence as evidence of the absence of a problem. Turning a blind eye to this issue or looking the other way when it happens only serves to reinforce a culture of silence and indifference" (Office of the Correctional Investigator of Canada 2020, 24).

In response to this lack of data, the CIC *Annual Report 2019-2020* included a special investigation on sexual assault in Canadian federal prisons: "A Culture of Silence: National Investigation into Sexual Coercion and Violence in Federal Corrections." The CIC commented on the national underreporting of sexual offences which they argued that prison sexual violence is probably even less reported due to the closed view. Incidents reports were gathered from April 2014 to 2019 for a total of 72 incidents reported. Of the few complaints that were filed, few ever reached the court. In the general population, only 5% of sexual crimes are estimated to be reported to authorities (Cotter 2021). With the realities of shame and violence experienced by inmates, it is realistic to estimate that even less sexual crimes happening in correctional facilities are reported.

Based on the CIC's analysis and interview with staff and inmates, both incarcerated individuals and prison workers are aware that prison rape remains largely unreported: "many are afraid to report, fearing retaliation, retribution, or re-victimization by the perpetrators, be it other inmates or staff. Furthermore, they face the risk of not being believed, being ridiculed, or even punished for reporting coerced sex" (Office of the Correctional Investigator of Canada 2020, 23). Staff have reported that sexual violence potentially happens daily in the facility, but that they are not aware of the incident. One staff clearly illustrated this state of denial of this endemic, "staff either don't know what's going on – or if they do, they won't tell you" (Office of the Correctional Investigator of Canada 2020, 46). Inmates also communicated that staff often look away from abusive dynamics amongst inmates even when they are reported. This is consistent with the

literature on denial (Cohen 2001; Alexander 2012), where the unacceptable and the uncomfortable become more manageable when the victims have already been constructed as disposable.

Similarly to society at large, individuals the most at risk of sexual assault in correctional facilities are individuals with history of trauma and abuse, queer individuals, women, youth and individuals with physical disability, mental illness or cognitive/developmental issues (Office of the Correctional Investigator of Canada 2020, 24). Indeed, victims were often younger than the perpetrator, were most likely to be serving a first sentence, were more likely to have serious mental health and concerns. The 2SLGBTQQIA+ were also overrepresented both as victims and perpetrators, but especially as victims.

The populist vilification of the sex offender also extends to prisons. Sex offenders are at the bottom of the prison hierarchy and suffer from abuse from other inmates which has causes fear of death and sometimes acts of self-destruction (Spencer 2009). Sex offenders are also sexually victimized; 33.3% of the victims of sexual assault in prison had a history of perpetration of sexual assault (Office of the Correctional Investigator of Canada 2020). This is consistent with the interviews conducted by the CIC with inmates where it was explained that sexual violence was perpetrated as a punishment for the victim's own sexual offences.

This was also reflected in an interview with an inmate who decided to disclose their experience of sexual abuse in prison to staff. The staff replied to the inmate that they "deserved it" because they were incarcerated for an offence of sexual nature. That same inmate was never offered services to address with the harm of his sexual victimization. Punishment of incarcerated sexual offenders by other inmates can also be illustrated by the infamous case of convicted child sex offender Joseph Fredericks. Joseph Fredericks was stabbed to death by Daniel Poulin, a fellow inmate while in prison in 1992. Joseph Fredericks' presence in the prison was so loathed by staff and inmates "that a story, perhaps apocryphal, circulated that some guards at the prison where the murder took place rewarded Poulin by giving him a cigar" (Petrunik and Weisman 2005, 87). The lack of proactive prevention effort, the delays in reporting accidents to authorities, the high degree of variability of processes by facilities and the inaccessibility or lack of knowledge of staff to address sexual violence has all been critiqued by the CIC about federal correctional services. Placing the disposable or "less than" subjects in prison subjects them to violence that goes unaddressed, because it is outside and committed against individuals that have been othered by the process of their criminalization.

Whereas cases of physical violence and abuse by staff are being reported sexual violence produced by staff can only rely on anecdotal evidence as inmates report these cases even less than inmate-on-inmate violence because of the dynamics at play as well as by fear of retaliation. Physical violence is often justified and legitimized although Indigenous people are disproportionately represented as they account for 30% of all use of force incidents in penal institutions (Office of the Correctional Investigator of Canada 2016, 31). The Correctional Investigator Canada's report justifies that this use of force is only used once verbal intervention has failed. Physical and punitive responses are used to control the inmates. Modern criminal justice

apparatuses thus retain some elements of "torture" which is "enveloped, increasingly, by the non-corporal nature of the penal system (Foucault 1977, 16).

Sexual violence caused by staff to inmates was also reported in the CIC's *Annual Report 2019-2020* interviews, such incidents include "inappropriate relationships between officers and inmates, officers watching women undress through the slots, staff using sexually derogatory terms to refer to inmates, as well as flirting and sexual harassment going both ways between inmates and guards. The use of unnecessary or excessive strip searches was also raised at both men's and women's facilities" (Office of the Correctional Investigator of Canada 2020, 48). Although Correctional Service Canada does not keep track of employees accused of sexual charges or against whom criminal charges have been laid, it is well-known that sexual violence perpetrated by prison staff is rampant. In a recent article of the *Globe and Mail,* this very lack of data has been pointed as "allowing a culture of abuse to flourish inside women's prisons" (Kirkup 2021).

In a report for the Native Women's Association of Canada, Sugar and Fox surveyed incarcerated Indigenous women about their experience. They found that relationships with correctional authority was also very negative and included physical abuse, rape, sexual harassment, and verbal intimidation (Sugar and Fox 1990). Prisons were perceived by these women as a continuation of the white male authority which cannot be trusted. Women also reported not trusting the court system and the lawyer who was representing them. The *Annual Report 2019-2020* also sheds light on a correctional officer from Nova Institution for women who had charges of sexual assaults against seven female inmates (Office of the Correctional Investigator of Canada 2020). Two other cases were reported by the *Globe and Mail,* one from a guard sexually assaulting two inmates at the Okimaw Ohci Healing Lodge in Saskatchewan, and another correctional officer in Grand Valley Institution in Ontario (Kirkup 2021). Roderick MacDougall who worked in B.C. Corrections from 1976 to 1997 had 200 former inmates file a civil claim in court against him alleging he had perpetrated sexual assault on. Justice Mary Ellen Boyd identified its victims as "vulnerable boys" and stated that MacDougall had "extensive power" over them, which allowed him to exchange or threaten their incarceration conditions against sexual services. Court documents point to "devastating emotional and psychological impacts" of this sexual violence on the victims (Culbert and Fumano 2020).

The imbalance of power has been explained as a root cause of why victims of sexual assault by prison staff is not reported. Emilie Coyle, the executive director of the Canadian Association of Elizabeth Fry Societies, points to an "automatic disbelief" when prisoners report being victimized (Kirkup 2021). Victims have reported from childhood sexual abuse and trauma which compounds the harm of this form of assault: "They're already vulnerable, and then you couple that vulnerability with this violent environment, this toxic culture within the prisons, and you have a

cocktail of pain and harm that is not believed – which creates even more pain" (Coyle cited in Kirkup 2021).

2.4 Rehabilitation

Collective imagination frames the sex offender as inherently recidivist and incapable of rehabilitation (Spencer 2009). In its latest review of the criminal justice system, the Department of Justice (Department of Justice Canada 2019a) argued that its institutions relied too heavily on punishment and incarceration and not enough on rehabilitation.

Violent offenders have generally been excluded of general rehabilitation and reinsertion program. An illustration of this is the Mother-Child program, which was established in 2001 to allow women to keep their young children with them while being incarcerated. In 2008, this very same program was modified to restrict access to offenders of serious crime such as sexual assault (Wesley 2012). This exclusion of non-specialized programs is problematic as it further isolates incarcerated sex offenders.

In the 1970s specialized programs for sex offenders were developed in order to reduce risk of recidivism upon release. Most contemporary sexual offender rehabilitation programs privilege cognitive-behavioural treatment. In their meta-analysis of the effectiveness of treatment for sexual offenders, Karl Hanson et al. (2009) recidivism has been established as the preferred measure of effectiveness of treatment programs. Perpetrators of child sexual abuse have been some of the most engaged participants in correctional rehabilitation treatment. Indeed, when they receive appropriate treatment, they represent low recidivism rates (Gilmore 2007). However, the authors recommending expanding the scope to look at short- and medium-term targets, yet little research has been done to assess those other elements. In 2009, 81.9% of sexual offender rehabilitation treatment were community-based, accessible through diversion programs, and 18.1% were institutionally based. Community-based programs deserved 62.1% of clients and institutional-based programs served 37.9% of clients (Ellerby et al. 2010). In their meta-analysis of the efficiency of rehabilitation programs, community-based programs have been found to be the most effective method to reduce recidivism. There is thus an argument to be made for rehabilitation programs taking place outside of prisons. Community-based programs would also bypass the need for community reinsertion. Reinsertion has proven to be challenging as illustrated by the case of Lake Babine First Nations. The result of a consultative study in Lake Babine First Nations in British Colombia discusses how community members felt unsafe after violent and sexual offenders were released from short term incarceration (Fiske and Patrick 2000).

Institutional programs have also been proven to be effective when it is tailored to the needs of the offenders expand beyond the sexual offense itself. Tupiq sex offender program is an intensive holistic treatment which seeks to address sexually abusive behaviour among Inuit men (Stewart et al. 2015). The program is offered to Inuit in federal correctional facilities. The program

has successfully presented optimistic results, which have been attributed to the cultural relevance of the programming which put forward Inuit cultural elements in the treatment.

Rehabilitation and restorative programs have also been criticized for not always considering the dynamics of powers at play when having the victim and their abuser having to confront each other. In that sense, the Department Justice of Canada (2019) mentioned in their report that there is still some work to be done for rehabilitation and restorative programs to be used in a way that appropriately holds offenders accountable.

Conviction and incarceration have had no measurable impact on sexual crime rates in Canada; sexual violence's prevalence in Canadian society has remained stable. Also, as demonstrated by the high attrition levels, a very small proportion of sexual assault cases are criminalized through a conviction in court. Considering the discrepancy between punishment and crime, and between sexual harm and criminalization, it appears that the criminal justice system is doing poorly to address sexual violence in Canadian society. The promise of retribution does little for survivors and limits possibilities of understanding what enables harm in society. Policing and punishment are failing to reduce rates from sexual violence and a very small portion of the victims are seeking assistance from the state to address their experience of victimization.

In the next chapter, I argue that beyond the quantitative evaluation of the sentencing principles of the criminal justice paradigm, one of the core predicaments of the criminal justice logic limits possibility for justice: the strict binary between the offender and the victim. Using Achille Mbembe's concept of necropolitics and Giorgio Agamben's concept of *homo sacer*, I draw a theoretical argument about criminal justice system's propensity to create disposable bodies amongst which violence is legitimated. The argument posed is a sensitive one; criminal justice systems create imposes identities on individuals, as either the victim or the convicted sex offenders, and relegates them as bare life.

Chapter III – The Necropolitics of the Criminal Justice Paradigm

Ruth Morris argues that "the greatest fraud perpetrated by our retributive justice system, is that it exists to protect us from the dangerous few" (Morris 2000, 101). Indeed, our criminal justice system aims at providing public safety by punishing, incapacitating, deterring, and rehabilitating those who represent a danger to the safety norms which are codified as criminal law. The issue is that violent offenders, or the "dangerous few" comprise a minuscule proportion of Canadian inmates (Whynacht 2021). Meanwhile, sexual violence continues to take place in Canada every day. Paul Butler (2020), a former American public prosecutor, argued that instead of focusing on the type of dangerous people that are incarcerated, the focus should be on the dangers the carceral system produces.

The notion of the "dangerous few" sexual offenders fuels moral outrage in our society and has mobilized a desire for an increasingly powerful carceral state to address sexual harm as illustrated by the carceral feminists' collaboration with the criminal justice system to address sexual and intimate violence. Sexual violence perpetrators such a Robert Pickton, Karla Homolka, Paul Bernardo have marked our collective imaginary and have legitimized the need for a state apparatus to safeguard the rest of Canadian society through retribution, deterrence, incapacitation, and rehabilitation. Those highly publicized cases, alongside fictional sexual crimes stories on prime television – which also feed copaganda[4] – have fed the idea of the "dangerous few" criminals which roam the streets, legitimized the need for carceral responses and has distorted our understanding of the actual prevalence of sexual violence in Canadian society. Indeed, sensationalized narratives about violence in the media misrepresent the very existing threats of violence in our everyday lives; the dangerous few are in fact many and multiple and may cause harm at various level of intensity.

To legitimize the punishment of individuals who violate criminal law, the state proceeds to an othering of individuals who deviate from the rest of society and engage in crime as a moral choice. In the early days of the Canadian Confederation, White men had been holding those means of production and powers. Penal authority and punishment have also been associated as an effort to reassert control over a territory. Looking at the American context, William Calathes (2017) makes a connection between the carceral state and race arguing that racial capitalism motivated the expansion of the penal system. Governing through the punishment of crime can thus be used as a mechanism of subordination to annihilate and bring to a 'social death' – through the process of criminalization and of incarceration – racialized groups. In that sense, the carceral state depends on "oppressive systems of racism, classism, sexism, and homophobia operating within White settler societies" (Palacios 2020). The Harper policies with regards to criminal law were very explicit about this othering of criminals as they attempted to create a division amongst Canadians: "offenders are not the product of social circumstances but are inherently bad people who should be distinguished from law-abiding citizens" (Doob 2015). More recently the Department of Justice's review of the criminal justice system report conveyed that it needed to provide "the

[4] Portmanteau word formed of "cop" and "propaganda".

appropriate supports to individuals who don't belong in the criminal justice system in the first place" (Department of Justice Canada 2019a, 10). This statement of the Department of Justice implies that some people do belong in the criminal justice system. Critiques of the criminal justice paradigm argue that this othering facilitates the disposability of "othered" individuals which in turn sustains the criminal justice system. Disposability can be defined as "the tendency to consider someone's life as worthless or beyond saving when they cause harm" (Whynacht 2021, 118).

Expanding on Achille Mbembe's concept of necropolitics, this chapter is an investigation of the effects of the criminal justice paradigms to address sexual violence. Specifically, I shed light on how the criminalization of sexual violence requires the creation of disposable subjects, which are othered, silenced and excluded, and how it fails to address sexual violence. Considering that the discourse of criminal justice "institutionalises the domination of the individual and frequently enforces a limited, punitive, exclusive and non-pluralistic view of individuals accused of deviance and criminality" (Chamberlain 2013, 136), I propose that Canadian state governance of sexual harm through its criminal justice system has led to power dynamics legitimizing violence against "disposable bodies." Disposable bodies refers to the notion by which some political subjects are not worthy of state protection and can be easily disposed (Razack 1994). The foundations of the Canadian criminal justice system are adversarial and creates a binary where an individual has caused harm to an individual. The former is referred to as "the offender" and the latter as "the victim". Without being apologetic about the harm caused, I argue that the criminal justice system makes both the victim and the convicted offender disposable. The criminal justice system also creates other sets of binaries and subjectivities which, I argue, limit the possibilities of achieving justice and addressing sexual violence in Canadian society. Other sets of binaries include the dichotomy between being innocent and guilty, as well as who is deserving and who is underserving of state protection and of state violence. Lastly, I argue that the focus on the offender and the victim erases society's role in enabling violence and fails to address sexual violence in communities. The political importance of creating an analytic framework to understand criminal justice violence is to reconnect the apparently disconnected institutions of the carceral state which produce and police social difference by legally marginalizing groups of people to precarious futures and premature deaths. This chapter's focus in on the current political constructions of a duality between the "victim" and the "offender." This duality has allowed to otherize the "criminal" and allows to enter them in a state of exception where violence against them by the state is justified and framed as necessary for the greater good of the society. On the other hand, the limited understanding of "victim" has excluded many sexual violence survivors to ask for justice through the criminal justice system.

3.1 Necropower and homo sacer

Adopting Ariadna Estévez's approach to Achille Mbembe's necropolitics through the rule of law rather than through a state of exception, and Agamben's approach to the bare life subject, or *homo sacer*, I provide a necropolitical analysis of the criminal justice system. Building on Michel Foucault's concept of biopower and Frantz Fanon's decolonial approach, Achille Mbembe

constructs a postcolonial approach to biopower in the concept of necropolitics. Through necropolitics, Achille Mbembe defines sovereignty as "the capacity to define who matters and who does not, who is disposable and who is not" (Mbembe 2003, 27). For Achille Mbembe the sovereignty of the state can only be asserted through necropower. Authority and power stem from the right to kill. Although the years of capital punishment are not so far, necropower continues to create spaces and subjectivities in and in-between life and death. Different mechanisms and processes have been put in place in colonial spaces to assert necropower, "necropower engages in a range of deadly measures – from permanent exile to indefinite renditions, from colonial occupation to racialized incarceration – that often include the grotesque and bloody displays of the sovereign will on the mutilated bodies of those designed as unassimilably foreign and criminal" (Rafael 2019, 143).

Although developed in the postcolonial Third World countries, Achille Mbembe's approach to power through death has been applied to First World states by Ariadna Estévez. Estévez (2021) argues that instead of necropower finding its sources in state of exception, necropower happens through legal frameworks. The rule of law is what guides countries such as the United States in Canada with legal principles such as accountability, just laws, open government, accessible justice. However, Ariadna Estévez criticizes Canada and the United States for not necessarily being guided by moral principles such as "fairness, justice and truth" (Estévez 2021, 10). In other words, necropower policies although they are not always fair or just, they are always legal because necropower, in democracies, works through law. The rule of law legitimizes immoral, but legal practises through state policies. Policies informed by necropower are "most visible in the hyper-criminalization, mass incarceration, deportation, and exportation of Indigenous nations and Black communities" (Palacios 2020, 530). Thus, the state has sovereignty over death along the lines of race, class, ethnicity, and gender. Necropower thus becomes a useful lens to shed light on how the criminal justice discourse has assigned differential values to human life.

The penological approaches to the state's exertion of its power can also be framed in an Agambenian approach by which the state's power is used to protect the sacred in its polity. The state would then exert its power to maintain or restore the sacred. Necropower then becomes a tool to manage populations that pose a threat to the sacred. The offenders can be perceived as *homo sacer* which Spencer defines as "life without form and value, stripped of political and legal rights accorded to the normal citizens" (Spencer 2009, 220). Agambenian's definition of bare life is based on Hannah Arendt's (1966, 300) work on totalitarian states and the stripping of rights of certain subjects leading to "a man who is nothing but a man that has lost the very qualities which make it possible for other people to treat him as a man." The *homo sacer*, although being stripped of its rights maintains its extralegal relations, because he has been confined or exiled by the very legal system. The sex offender as *homo* sacer legitimizes the degrees of violence and forms of abjection and moral outrage visited upon them by both the state and society. Through the criminal justice discourse categorization of *homo sacer* and of the sacred have changed as their social constructions rely on the state's ability to decide who is disposable and who is not.

Necropower as a conceptual framework also facilitates the understanding of how the criminal justice discourse legitimized the state's power to control, monitor and kill the disposable. Incapacitation has created social death for the subjects deemed to be a threat to the sacredness of the polity. This is congruent with the focus our penal system has given on incapacitating offenders (Pratt 2000). Dangerous offenders and threats will be detained and have restrictions even after being released from prison. Detention then is facilitated by the framing of certain bodies as disposable thus legitimizing their social death. Prisons have been a tool to confine targeted population in specific spaces in which the unwanted can be controlled, surveilled and potentially killed. Vicente Rafael illustrates how necropower has been used to deal with criminality, "historically states have executed criminals and in so doing claim the power of death over life in the name of preserving order and defending society. Usually the state has recourse to the law and follows a judicial process" (Rafael 2019, 145). The stereotyping and criminalization of the "other" justified a governing through crime approach and a state of exception legitimizing state violence by society. Collateral damages of conflict, policing, prison, and violence in general goes back to who matters and who does not. Imprisonment of groups for the "better life" of other citizens whose life value is more important. Necropolitics is a political calculus of whose life is worth saving or protecting and whose life isn't. The state places signifiers on certain bodies by subjectifying them as criminal threats whether symbolically or legally, which further marginalizes these individuals. Criminalized individuals are driven to a social death that strains and denies interrelationality. Systemic violence and isolation against these individuals made them disposable bodies. This symbolic and legal othering has been politically justified by management of dangerous populations for the public safety of its subjects.

3.2 The criminal justice system relies on binaries

The Canadian state possesses an enormous power over the lives of its subjects, it can privilege, punish, or confine at will. The adversarial model of the criminal justice paradigm relies on a set of binaries such as innocent/guilty, victim/offender, deserving/undeserving of state violence and protection. Guilt is first introduced as a concept that flattens the complexity of sexual violence. The centrality of the notion of guilt in the criminal justice paradigm has created a false binary between the victim and the offender. In his comparison of the Canadian criminal legal tradition and Indigenous tradition, John Borrows (2016) claims that the state is concerned about defining who is guilty, whereas the Indigenous tradition is more focused on relationships. The innocent/guilty binary is also problematic as the criminal justice system does not necessarily recognize that harm has taken place if the alleged perpetrator is found innocent through judicial process. In continuity with Mariame Kaba's (2021) argument that not all crimes are harm, and not all harm are crimes, if an individual who has committed harm is not convicted due to lack of evidence or to prosecutorial process there is no recognition of the harm that took place and no opportunity for accountability or the part of the person who caused harm. The state only intervenes when an individual has broken a rule rather than caused harm, and it will get to decide based on

its own rules whether an individual is found guilty of breaking that rule. If the individual is found guilty, predetermined punishments established by the states will be imposed on the individual.

The adversarial approach to justice of the criminal justice paradigm also relies on needing to have a victim and an offender. Although in the criminal justice system the offended party is the state, and more precisely in Canada the crown, the model is sustained by the victim/offender binary. The discursive duality between the victim and the offender serves to reinforce the role of the state "as an expert on danger, endowed with the power as risk predictors and risk communicators" (Spencer 2009, 220). The victims here represent the sacredness of the democratic polity and the sex offender a threat to the state itself. The creation of an evil and criminal figure to justify the expansion and strengthening of the carceral state to the cost of the person labelled offender who will be subjected to necropower through social death.

3.3 Constructing the convicted sex offender[5]

The "sex offender" has been constructed as a terrifying, dangerous figure in need of a special control. Like Giorgio Agamben's homo sacer, which is the "life deemed impure, dirty or accursed" (Spencer 2009, 224), the convicted sex offender is being cast as deviant and deserving social exclusion for the greater good. The figure of the sex offender has received a particular level of attention from media and governments (Spencer 2009). Sex offenders are portrayed by governments and media as recidivists and incapable of rehabilitating society (Brown 2011). The construction of the figure of the sex offender has been attached to signifiers such as "animal" and "monster" since they are a threat to social morality. Compared to other offenders, including violent offenders, the sex offender has been constructed as an aberration and a subject incapable of rehabilitation. This framing of the sex offender resembles Giorgio Agamben's conception of homo sacer. The sex offender as homo sacer is among the community, but not in the community and must be surveilled and controlled, if not placed in a space where he cannot cause harm and out of sight. In Canada, the social death of the sex offender does not take place through a state of exception where law and juridical powers are suspended to harm, but rather through the law itself.

Legally, sexual offenders are identified through one or a combination of the following criteria: "1) a person who has been convicted of a sexual offense, 2) a person who has been convicted of a sexually motivated crime, or 3) a person who has admitted to a sexual offence, whether or not there has been a conviction" (Hylton et al. 2002, 51). However, the socio-political construction of the identity of the sexual offender has varied. Because the "offender" is a politically constructed label, the twentieth century saw a high variability in terms of defining what a "sexual offender" is. Dale Spencer notes that such a label was always linked to a "permanently depraved

[5] For this section, when using "sex offender" I refer to *convicted* sex offenders meaning those that the criminal justice system has found guilty of a sexual offense. This nuance is important as most individuals who commit sexual offenses are not convicted and their identity is thus not tied to their sexual behavior. Furthermore, by choosing only to make some of the individuals who commit sexual offenses liable of their actions by associating their identity to the harm they have caused, we witness a selective disposability. This is not to defend convicted sexual offenders, but rather to demonstrate that the majority of those who cause sexual harm are not subjected to the same process of becoming disposable and thus to the legitimization of violence against them.

soul" although the definition varied based on the moral panic and political discourses (Spencer 2009, 224). Homosexuality was included as a sexual deviance for the better part of the twentieth century as it threatened the sacredness of morals and society according to the state (Pratt 1997). Homosexuality was decriminalized in Canada in 1969. Political discourses around this evil figure often framed the sexual deviant as the "middle-aged sex fiend" or "dirty old man", never as someone the victim knew. In the 1980s, public safety became threatened by the "date rapist." In the 1990s, pedophiles became what society had to be protected from and was framed as the most dangerous offender as his victims were the sacred and very vulnerable children of Canadian society (Kitzenger 1999; Cowburn and Dominelli 2001). The moral panic around the figure of the paedophile led to the conflation of this figure with sex offenders in general, although sex offenders is a way broader category which includes offences also targeted at adults (Spencer 2009).

Recent neoliberal discourses have put forward the flexibility and capability to regenerate putting the impetus on the individual to be able to change. The sex offender is the exception to this as it has been framed as rigid and unchangeable in its capacity to threaten public safety. This justifies why the very existence of the sex offender must be controlled and regulated under the carceral state in neoliberal policies. In the exertion of its power, the state places sex offenders in an "out of sight" space. Davis (2003) illustrates this notion that prisons form camp which are simultaneously present, through media representation, and absent of the collective imaginary, prison "functions as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers" (Davis 2003, 16). That way order is restored and the sacredness of the virtuous and the vulnerable is protected. The acts of sex offenders as a challenge to the sacred and to moral order to incite political and public mobilization against this figure. The underlying logic is that sexual predators need to be punished, incapacitated, and controlled to protect the most vulnerable in our society. The legitimization happens through a process of distancing which "occurs through the process of 'othering' the sex offender based on dangerousness. This 'othering' casts him as non-human different from and outside the community of 'normal' men" (Cowburn and Dominelli 2001, 408). The high rates of sexual assaults against sexual offenders in correctional facilities discussed in the previous chapter illustrates the construction of the "sex offender" as *homo sacer* as their previous "crime" legitimates violence, and sometimes to the extent of death[6] – against them. The political mobilization against sex offenders which has been sustained and elevated by media outlets created incompatibility between the community and the sex offender.

The sex offender as homo sacer is also maintained after liberation where sex offenders, and their families are stigmatized (Spencer 2009). The sex offender is thus placed in opposition to the community but is never really outside the circuit of surveillance and control of the state. Section 161 of the Canadian *Criminal Code* proposes restrictions to be placed on sexual offenders after release. Its purpose is to protect vulnerable children from sexual violence. Those include

[6] The case of Joseph Fredericks murdered by fellow inmate Daniel Poulin illustrates the extent to which sex offenders become disposable when convicted (Petrunik and Weisman 2005).

geographical restrictions from spaces where children may be present like parks, schools, playgrounds and daycare. Sex offenders are restricted from working or volunteering with children. No contact with children unless supervised by court. Restriction from using the internet may also be enforced.

Canada's national Sex Offender Information Registration Act was implemented in 2004. The Royal Canadian Mounted Police manages the National Sex Offender Registry (NSOR) in Canada. Data is collected and submitted by police agencies across the country. It allows to have an updated database with information relative to sex offenders. Information includes names and aliases, gender, date of birth and physical description, contact information, registration to educational institutions, offence information, vehicle information, employment and address, driver's license, and passport information. Contrarily to the United States, Canada's NSOR is accessible only to Canadian police agencies and in special cases to international police agencies if the request respects the Sex Offender Information and Registration Act (SOIRA). Offenders must report annually to a designated registration site in their region. Offenders must inform their registration of any changes to their status (employment, car, passport, address, name passport) within a seven-day framework. Termination order may be requested to a court after half of the time of the prescribed order or 20 years if a lifetime order was issued. There has been an increased interest in knowing where sex offenders live as *The Globe and Mail* used the freedom to access information to get access to where sex offenders live in Ontario. The polemic surrounding this was about not wanting to give out the information as the American experience demonstrated that vigilantes harassed and became violent with sex offenders in their neighbourhood. This desire to know is also deeply interconnected to the creation of the sex offender as a stranger. When in fact, sexual assaults are usually committed by someone known to the victim. In Quebec, 80% of sexual assaults are committed by someone known to the victim (Table de concertation sur les agressions à caractère sexuel de Montréal - n.d.). Elizabeth Stanko (1990) and Vikki Bell (2002) point to the feminist movements' desire to show that this dangerousness came from inside the home and the family, although the public narrative about pedophiles was always framed in terms as a stranger.

Through criminal law, the state can dispose of individuals who are found guilty of sexual offenses and legitimize a physical and social ban on them, through punishment and incarceration, and subjecting them to a social death. The public moral outrage around sexual crimes also exposes individuals found guilty of sexual offenses to various degrees of violence. Labelling individuals as sex offenders or sex criminals pathologizes them. Their identity also becomes intrinsically linked by the harm they have caused, although it may be circumscribed to a very specific situation and context. This link between the action and identity is also formalized in restraining movement when offenders are places in databases such as the sex offender database. This tight association between the production of harm by an individual and their identity is that it places the blame on an individual person and does not consider the systemic issues that allowed for this harm to take place. The incapacitation of the individual by removing them from the community also breaks ties and complicates the reintegration once the state has deemed that they have "paid" for the time they owed to society. The incapacitation of offenders also assumes that by removing the sexual

offender, the criminal justice system is solving the issue of sexual violence, although sexual violence still takes place in and outside of prison.

3.4 The Sacredness of the "Perfect Rape Victim"

The discursive construction of the "victim" conflated with the sacredness of the state has acted as a repression of the sovereignty of the body. Victimization is after all a process of creating parameters of "who 'counts' as a victim and what 'counts' as rape" (Whalley 2018, 26). Discursive elements of sexual offences and consent have influenced the way sexual violence is dealt with in the Canadian criminal justice system. Vanshika Dhawan (2019) presents how rape myths are founded on three perspectives (1) women deserve to be raped, (2) women were not raped, and (3) women are responsible for being raped. This is consistent with Amy Grubb and Emily Turner's *defensive attribution* hypothesis and *just world theory*. The *defence attribution* theoretical lens refers to the idea that "people increase or reduce blame depending on their perceived similarity with the victim and the perceived likelihood of similar future victimization befalling on them" (Grubb and Turner 2012, 444). The *just world* theory refers to the belief that "the world is a fair place and that behavioral outcomes are deserved (Grubb and Turner 2012, 444). "Unfounded rapes" has been correlated with the notion that "women routinely fabricate reports of sexual assaults" (Quinlan 2016, 302). "Unfounded" means that the case is closed based on police conclusion that the crime was neither attempted, nor occurred. However, many sexual assault survivors do not have the necessary proof to demonstrate unequivocally that they have been sexually harmed.

Also, in the Canadian criminal justice system, the person who has been harmed is not represented in juridical processes as the harm done has been done to the state represented by the Crown. The state will be accusing the defendant. The adversarial nature of the Canadian criminal justice system is centred on the punishment of the offender, rather than centring the victim's need for justice. In that sense, the victim is often a "pawn in the prosecutorial attempt to establish guilt" (Dylan, Regehr, and Alaggia 2008, 681). The current structure of the criminal justice system fails victims as it simply isn't designed to meet their needs (Spencer et al. 2018). Delays in the administration of justice and the lack of supporting psychosocial services are two examples that make the criminal justice system retraumatizing for victims.

The myth of the "perfect rape victim" has been the product of narratives constructed on the legitimacy of who is deserving of the state's protection. Indeed, it is only recently that legal reforms to rape laws have "shifted from protecting men's proprietary interests in women's bodies, to promoting the sexual autonomy of both partners" (Philips 2017). Whether that shift seems to make a move away from white heteropatriarchy, not all victims are equal. There has been a legal and social gatekeeping of defining the "perfect victim" which entails that the survivor "must have done nothing to warrant the assault, vigorously resisted the perpetrator (and be physically injured whilst doing so), report the rape immediately to police, and be appropriately emotionally traumatized after the event" (Stuart, McKimmie, and Masser 2019, 314). The importance of proof is also often underestimated, which is why being physically injured may be important to demonstrate the harm

caused. Sexual assault survivors who do not correspond to these characteristics will have a harder time proving their worth as victims. Luwa Adebanjo (2020) also discusses how reporting right after the incident, being kind when reporting, presenting as sexually pure, conforming to standards of beauty and being discrete about the assault are barriers for women of colour to be believed when they share their experiences of sexual assault. The broken relationship with police and communities of colors, the narrative of hypersexualization of women of colour, the definition of attractiveness and trauma can impede victims to be believed. It is already extremely difficult for victims to come forward (trauma, knowing services, fear of vengeance), but the myth of the "perfect rape victim" draws an uneven field for many women and girls. Going through the criminal justice system as a victim of sexual offense, can be "traumatizing or 're-victimizing" (Spencer et al. 2018, 197). This "secondary victimization" is the process victims of sexual offences must go through when recounting their stories over and over again in the hopes that they are met with belief at all institutional levels (Dylan, Regehr, and Alaggia 2008). Social understandings around requirements to be a "real victim" of a "real rape", also influence the court process in which actors are forced to "consider questions of violence, sexuality, and consent that often rely on their personal understandings of gendered, racialized, and sexualized norms" (Hlavka and Mulla 2018, 406).

Many victims of sexual assault have been denied both the political legitimacy and moral credibility to be fully recognized as victims in the Canadian justice system. This testifies to the importance the state has in framing the ideal victim which needs to be protected by the state, placing all others in a social death where state action will be limited. Although all women navigating the criminal justice system as part of their sexual victimization face challenge in demonstrating their worth as a credible victim, the situation of women of color, and especially Indigenous and Black women, is particularly harsh. In the Canadian context, racism and colonialism play a role in defining credibility as a victim of sexual assault. Colonization worked through a racially anthologized hierarchy of spaces allowing for the exploitation of racialized bodies and land. Settler power and sovereignty are embedded in the white nationalism supremacy. Racism is expressed here as "the state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerabilities to premature death, in distinct yet densely interconnected political geographies" (Gilmore 2002, 261). In necropolitical states, racism is a driving force in determining who is disposable and who is not. The philosophical foundations of necropolitics are entrenched in the practices of colonization and slavery as being the start of necropolitical practices, both taking their source in white supremacy (Mbembe 2019). Racism has been after all a political tool socially dividing human groups and used to legitimize the extermination of groups deemed inferior by those in power. Necropolitics are then fuelled through systemic racism which is perpetuated in discursive elements of criminal justice. Those elements also influence everyday interaction. Achille Mbembe refers to this as "nanoracism" which can be described as everyday racism, in other words, racism that is present in ordinary social relations which further stigmatizes and marginalizes the "Other" or, in other words, they who are not deemed to be us (Mbembe 2019). Politically, racism is expressed through public policy. In other words, racism is expressed in

whatever governments choose to do or not do. The aspect of passivity in choosing not to do is important here as necropower can also act through inertia and deciding not to address a problematic situation. For this analysis on sexual violence, gender will be added as a key intersectional dimension with race. In a settler country like Canada, we need to consider that processes of dispossession and settler colonialism are highly gendered as they structure heteropatriarchy (Simpson 2017), as sexual violence has been a key mechanism of colonial dispossession (Simpson 2017). Although Black and Indigenous women suffer differently for the politicization of sexual violence than their male counterparts, their subjection to state violence is also the product of ongoing colonialism and racism in Canada. The structuring of settler society along racial and gendered lines engendered particularly damaging stereotypes for racialized women who increased their risk of experiencing sexual harm, but also framing them as "bad" victims, blaming their experiences on individual "at-risk" behavior. Their victimization is thus not taken seriously by society as illustrated in the media. The construction of the hypersexualized Black woman served to justify their rape by white men during slavery. Following the abolition of slavery, the rape of a Black woman still did not have the same public outrage as that of a white woman. After all, the collective imaginary did not associate Black women to the idealized notion of White womanhood and considered them as less than human (Haley 2016). The narrative of Black women as sexually immoral was also associated with prostitution (Walker 2010), making them "rapeable" in the eyes of the law (Maynard 2017, 45). Leanne Betasamosake Simpson (2017) recounts how, in the absence of white women, in the early days of colonization, Indigenous women were used as sexual gratification for white colonizers. That was until the mid-19th century, where Indigenous women's sexual agency was deemed as subversive and illicit. This led to the construction of figures outside of the norm constructed by whiteness such as "squaws" and "savages". The degradation of Indigenous women in Canada can be explained through the identity marker "squaw" which was used to refer to Indigenous women as being "lustful, immoral, unfeeling and dirty" (Aboriginal Justice Inquiry of Manitoba 1999, 479). The term "squaw" has been defined as a "grotesque dehumanization [which] has rendered all Native women and girls vulnerable to gross physical, psychological, and sexual violence" (Aboriginal Justice Inquiry of Manitoba 1999, 479). Indeed, Indigenous women were framed as "inherently rapeable" (A. Smith 2005, 3). Indigenous women were othered and their imagery was criminalized by associating it to prostitutes (Comack 2012, 168). This criminalization of identity facilitated victim-blaming whenever they were victims of sexual violence as they were framed as criminal individuals and as having at-risk lifestyles (Gilchrist 2010). This narrative of pejorative identities reinforced the premise of guiltiness assumed by the criminal justice system with regards to racialized peoples in Canada. Sherene Razack (2014) claims that bureaucratized dehumanization of the Indigenous body made it "a body that cannot be murdered," because it is not a human (p.54). Beyond being harmful to the individual, those collective narratives about the hypersexualization and criminalization of racialized peoples contribute to systemic racism as they are normalized and internalized in society through media and politic-legal discourses. Paradoxically, while Indigenous and Black women were pictured as sexually deviant, they also suffer disproportionately from sexual violence and are not deemed

worthy of state protection. Canadian state's inertia is explicit in addressing the Missing and Murdered Indigenous Women and Girls epidemic across the country:

> The data and information gap with Missing and Murdered Indigenous Women and Girls is also telling when it comes to the treatment of Indigenous women in Canadian society. These women suffer violence and yet little is done by our very criminal justice system to address this systemic issue (D. M. Smith 2020).

The prejudices of the criminal justice system – and of Canadian society – towards Indigenous women has narrowed "the possibility of being categorized as a 'good victim'" (Dylan, Regehr, and Alaggia 2008, 691–92). The sexual violence experienced by Indigenous women across the country goes with impunity, forcing Indigenous women to bear the burden of racism, discrimination, and violence in their social death (Razack 2002). Research on Black women's experiences of sexual assault and the criminal justice system are like that of Indigenous women: they are often dismissed because of the constructed identity narratives of hypersexualization as well as their strength. Roxanne Donovan (2007) refers to those two identities as *the jezebel* which "depicts a lustful, hypersexual, promiscuous woman" (p.723); and *the matriarch* framing "black women as tough, aggressive unfeminine and strong" (p.724). Both identities affect the moral worth of black victims, the hypersexualization enhances the idea that they are deserving of this violence or that they are lying about them nonconsenting. The strong Black women myth plays into the idea that they cannot suffer trauma, are too angry to be raped, or that they are to blame for the harm experienced. Roxanne Donovan's (2007) research also extends to the way white victims have more chances to be believed when the perpetrator is Black, rather than white.

This differential treatment between White women and racialized women can also be illustrated by their media portrayal. The normalization of systemic racism against the disposable appears to diminish the moral worth of racialized individuals as victims of sexual violence and violence in general. A comparative analysis of the representation of Indigenous bodies in the media provides an argument to demonstrate the disparity between this group of people and the rest of the Canadian population:

> The Aboriginal women received three and a half times less less coverage; their articles were shorter and less likely to appear on the front page. Depictions of the Aboriginal women were also more detached in tone and scant in detail in contrast to the more intimate portraits of the White women (Gilchrist 2010, 373).

What may have been constructed first as symbolic violence in the subjection of racialized individuals as criminals and thus disposable, has rendered "the crushing materiality of systemic violence invisible, appear natural and acceptable" (Coulthard 2014, 117). The moral worth of Indigenous individuals as victims can also be understood by analyzing the impacts of the kidnapping and murder of 11-year-old white Christopher Stephenson in Brampton, ON in June

1988 and the brutal assault of teenage Indigenous Trina Campbell also in 1988 in Brampton. Whereas the murder of Christopher mobilized the entire country with a highly publicized Coroner's Inquest, Trina's story received "only a modicum of attention" (Petrunik and Weisman 2005, 76). A lawyer of The Coroner's Office who was involved in Christopher's case clearly formulated the disparities between the value of life of the victims: "Christopher was everybody's child, Trina was nobody's child" (Petrunik and Weisman 2005, 76).

To increase their moral worth in the eye of the state, marginalized bodies and groups may adhere to the politics of respectability. The term "politics of respectability" was coined by Evelyn Brooks Higginbotham and refers to the adoption of behaviours that appeal to societal white norms to demonstrate worthiness and dignity. Adopting such behaviours would allow racialized people to "counter racist images and structures" and be better treated by society (Higginbotham 1993, 187). This approach puts forward that if Black people behave according to White societal norms they would be seen as equals and be treated equally (Alexander 2012). With the perspective that one only has influence over their own behaviour, cooperating with the caste system made sense to many racialized folks. This places the weight of racial inequality on the oppressed. In the context of the carceral system, the politics of respectability is widely criticized as it puts the onus of responsibility on the individuals and forgets the systems in place that oppress the same individuals. Respectability would justify who is deserving and undeserving of state protection and state violence. In other words, "good citizens" would be deserving of protection and those who do not correspond to the standard of respectability would be left behind this system and suffer from violence. In the United States during the Jim Crow era, this had for effect that wealthy and educated Black folks distanced themselves from the urban poorer Black community as to be respectable (Alexander 2012). Many anti-racist and critical race feminist theorists have criticized the politics of respectability as it falls into the traps of the politics of recognition (Coulthard 2014; Simpson 2017; Palacios 2016). Roberts (1994) goes as far as saying that the construction blackness itself places Black people beyond the bounds of respectability. Robyn Maynard (2017) points to the disposability and stigmatization of individuals involved in underground or illicit economies (people selling drugs, sex workers, undocumented migrants) who'd be most vulnerable to state violence or whose death with cause no outcry.

The notion of the "perfect rape victim" is also tested when police officers commit sexual violence. Pamela Palmater (2016) provides an overview of the ways crimes committed by police forces are depicted in the media through a spectrum of what content is portrayed. Crimes against Indigenous peoples in prisons or by police officers are usually not covered in the media; the norm is to manage those crises internally and to hide them (Palmater 2016). When media coverage is attempted, there is no focus or concern for the Indigenous victims, but rather a focus on the necessity of presumed innocence of the state officer (Palmater 2016). When there is high media coverage in certain cases, such as the cases of alleged sexual and racial violence against Indigenous women in Val d'Or, media participate in the production of counter-narratives, where state agents are presented as overwhelmed hard-working officers with a long history of successes in the police forces (Palmater 2016). When the actions of the agents cannot be covered or justified well, they

are presented as "bad apples" and "isolated incidents" within the system (Palmater 2016, 279). The narrative of isolating the crime and associated it to the individual that perpetrated it deconstructs the idea that such violence can be intrinsically systemic. Through their framing of the Indigenous as the criminal or as exhibiting at-risk lifestyles, media enter a process of othering of this population. According to Stuart Hall (1997), this "facilitates the 'binding' or bonding together of all of Us who are 'normal' into one 'imagined community'; and it sends into symbolic exile all of Them — 'the Others' — who are in some way different —'beyond the pale'"(p. 258). This social and media propagation of the otherness and repression of Indigenous women's body sovereignty has been argued to legitimize the violence against Indigenous women and for the epidemic of Missing and Murdered Indigenous Women and Girls to go unaddressed for so long (Simpson 2017).

The process to file a complaint is feared by victims and witness statements are discouraged and discredited (Palmater 2016). There is a spectrum of techniques to dissuade victims from filing complaints such as intimidation. Those techniques usually work and when deterrence fails, police counter-charge with the insulting and resisting argument in which the perpetrator (police officer) becomes a victim (Palmater 2016). Crimes committed by police officers on Indigenous peoples are marked with impunity: 'the chance of getting caught are slim, financial repercussions are minimal, and the chance of conviction is extremely remote " (Palmater 2016, 275). Furthermore, police officers have tools to hide their crimes. Police impunity constitutes as a mechanism to dissuade people from filing complaints (Palmater 2016), mainly because the cost-benefit analysis behind it has a negative impact for the victim.

The construction of "disposable bodies" in Canadian society have allowed to justify the non-recognition of targeted individuals to be victims worthy of a prosecutorial process for the sexual harms caused to them. The need for a victim is nonetheless at the very basis of our criminal justice system, and narratives of "perfect victims" being sexually assaulted by deviant sex offenders has been at the very core of the strengthening of the Canadian criminal justice system. The notion of "perfect victim" brings us back to Agamben's notion of sacredness which the state defines and then instrumentalizes to criminalize undesirable groups. By only believing certain victims, our criminal justice system produces violence through re-traumatization, shaming and blaming: "violence can never be understood solely in terms of its physicality – force, assault, or the infliction of pain – alone. Violence also includes assault on the personhood dignity, sense of worth or value of the victim. The social and cultural dimensions of violence are what gives violence its power and meaning" (Scheper-Hughes and Bourgois 2004, 1). The construction of a "victim" identity in the criminal justice process strips sexual violence survivors of their agency. Although they are necessary for the criminal justice to run its course, their role is very limited as they are represented by the state and have little to stay with regards to the predetermined punishment that will be imposed on the person who has harmed them if the court finds them guilty. This is only if the case makes it to court. At all steps of the criminal justice system, survivors are forced to establish detailed linear narratives, without considering how the traumatic events may affect their memory. Furthermore, survivors are retraumatized through the expectation of memory and recollection and

if they cannot present proof and a coherent story, survivors are blamed. The fact that the criminal justice system places the burden of proof on sexual assault victims, which are especially intimate crimes, often leads to low success conviction rates while furthering the harm experienced by the victim.

Sexual harm survivors resisting disposability of their abusers

Victims of sexual violence often resist the disposability of their abuser by refusing to report them. Aware of the harm the criminal justice system produces and the little protection it can offer them, survivors may choose not to feed the system by yet creating another individual whose identity will be fixed by their action. This may also be because survivors understand that punishing their abuser won't fix their situation or the elements which allowed for the violence to take place in the first place. It may also be because survivors understand that their abuser's life experience is way more complex than defined by the incident of sexual violence. Albeit this resistance to the disposability of individuals who cause harm may enable dangerous and toxic situations, putting them at risk of further harm.

In her book, Lindsay Nixon, Cree-Métis-Saulteaux, shares her feelings toward her abusive ex-partner: "I don't want them punished. I don't want them isolated. I don't want to enact carceral cultures, make myself a cop, judge, and executioner, I don't want to 'name my abuser' just to see them dragged through narrowly defined accountability processes that might kill them" (Nixon 2018, 110). Lindsay Nixon also adds they don't want their abusive ex-partner to be in their life anymore. Similar narratives have been shared by survivors who fear to be retraumatized, revictimized and not believed by the criminal justice system, only to maybe punish the person who caused harm in a way isn't aligned with the survivors' values and understanding of safety. Kai Cheng Thom wrote that what she wanted from her abusers was for them to understand how she felt and for them not to reproduce harm (Thom 2017). Kai Cheng Thom (2017) also chose not to report for various reasons: "I never report the men who assaulted me in public spaces because they were mostly men of colour – Black and Brown men whom I was afraid would be brutalized or killed by the police. I never named the hook-up partners because I didn't see the point. I didn't name my ex-boyfriend, a mixed-race man of colour, because, in a way, I still love him." While it is not the role of survivors to protect their abusers, survivors should not have to live with the consequences of carceral punishment on society. This is even furthered, as survivors being stripped of their agency in the criminal justice system also have no control on the outcomes once they have reported their abuser. As illustrated by the cases of Kai Cheng Thom and Lindsay Nixon, survivors resist the disposability of the individuals who have caused harm to them.

3.5 Criminal justice identities are not fixed

The offender/victim binary is narrow and static and locks individuals in an identity that relates to a very situational and contextual event. These identities stick even when an individual falls in more than one category. The criminal justice system relies on this binary to function and thus maintains it: "the logics of criminalization necessitate a binary relationship between a victim

and a perpetrator in which the best, most effective solutions require the two to be separated from one another" (Gehi and Munshi 2014, 32). This very mechanical function of the criminal justice paradigm, however, flattens the lived experiences of individuals who were harmed and who have caused harm. The criminal justice system forces us into binaries, imagining that people who are locked up could not have been harmed either. The perpetrator/victim binary only works in a very specific context. In another context, the victim may have caused harm. This binary has been criticized by abolition activist Mariame Kaba who argues that victim and offender are not fixed identities, but rather that individuals are constantly in fluidity between those states (Kaba 2021). To illustrate this, we can think back to residential school survivors who reported "greater cumulative childhood abuse, neglect, and indices of household dysfunction (e.g., being raised in a household affected by domestic violence, substance abuse, criminal behaviour and mental illness)" (Bombay, Matheson, and Anisman 2014, 326). Compounded colonialism with health and social insecurity increases the risk of incarceration by being both a victim and an offender. Amongst incarcerated Indigenous women, 30% were hospitalized in psychiatric institutions, 70% had experienced sexual abuse and 86% physically abused (Malone 2016). Indigenous women also speak to their experience in residential schools, foster care and prisons and end up being marginalized that they end up with little employment opportunities and get involved in sex work which further marginalizes them and risk for recriminalization (D. M. Smith 2020). The construction of this duality by the criminal justice discourse as two distinct and irreconcilable identities does not hold in this context.

3.6 Going Beyond the Victim/Offender Binary: Including Society in the Analysis

While crimes are framed as against the state and the raison d'être of the criminal justice system is to provide public safety to the community, the almost exclusive focus of the criminal justice paradigm on this offender/victim binary is to the exclusion of the community.[7] The victim/criminal binary occupies such a central space in the criminal justice discourse, that the role of society in enabling sexual harm and the effects of the binary on society neglected.

This focus on pathologizing and criminalizing individuals for their role in an incident of sexual violence eliminates all consideration for the role society may play in creating conditions for sexual harm to take place. By suggesting that sexual violence can be addressed through punishment, deterrence, incapacitation, and rehabilitation of the "dangerous few", the state creates an illusion of security. Indeed, while some individuals who commit harm are disposed of and subjected to bare life through punishment, sexual violence continues. Although incapacitation can be perceived as containing the most dangerous elements of our society, "a system that never addresses the *why* behind a harm never actually contains the harm itself" (Kaba 2021, 62). The very same disposability that sustains the criminal justice system, fuels violence by enforcing

[7] Almost, because the restorative justice programs that are incorporated in the criminal justice system under the rehabilitation principle may include relationships and communities outside of the binary.

judicial mechanisms and institutions that operates on the oppression of targeted individuals and communities and on the harm it imposes disproportionately on marginalized groups.

The discourse produced by the criminal justice system about the dangerous few sex offenders and the perfect victims distorts society's understanding of sexual violence. The low conviction rates of the criminal justice system, and the highly publicly mediated cases of violent sexual offenders builds the illusion that sexual assault only exists in very violent forms and in very few cases. In other words, our shared understanding of sexual violence relies on the very violent depictions that lead to incarceration, in our television through fiction and through news coverage. This distorted understanding of sexual assault normalizes all other expressions of sexual assault and allows them to continue to be exempted from the consequences of the harm caused. Those representations may also discourage sexual assault victims from reporting their experience of sexual victimization to the police by framing it as not violent enough for the criminal justice system to intervene, thus reducing reporting rates of sexual assault. In other words, communities are subject to ongoing sexual violence as the state is unable to ensure that most of those who cause sexual harm can be accountable and enter a process of amending harm. Communities are thus alienated by the criminal justice system, disempowered, and forced into a reliance on the state apparatus to inadequately address a prevalent social problem.

Chapter IV – Abolition Praxis an Alternative to the Criminal Justice Paradigm

In November 2021, the province of Québec adopted Bill-92: *An Act to create a court specialized in sexual violence and domestic violence.* This bill is the product of a recommendation from an expert group report on the support for victims of sexual violence and domestic violence. Interestingly, the report title of the report "Rebâtir la confiance"[8] refers to one of the core critiques of the criminal justice system, the lack of confidence the population has in its institutions (Clay-Warner and Burt 2005; Sable et al. 2006; S. C. Taylor and Gassner 2010; Cotter 2021). The goal of those specialized courts will be to adapt the justice system to the victims' needs while preserving the accused's rights. Among the tools proposed to accommodate victims, specialized courts will provide reserved rooms, video conferences, assistance services at all steps of the process. Training will also be offered to all actors that will be involved in the judicial process so that they are in a better position to understand the particularities of this type of cases. In the first phase, nine pilot projects will be carried out in the province to select the best model. A first pilot-project started in Valleyfield in March 2022, which was followed by the one in Quebec City in May 2022 (Bordeleau 2022; Richer 2022). This initiative has been applauded by all provincial parties mentioning that this is an important step in a culture shift in the criminal justice system and that victims have been heard (Cabinet du ministre de la Justice et procureur général du Québec 2021).

This initiative is the latest in a long line of reforms of the criminal justice system. The criminal justice system has been responsive in addressing some of its issues and has undergone multiple reforms to address the situation. In 2019, the Minister of Justice and Attorney General of Canada produced a report on the review of the Canadian criminal justice system which contained an extensive evaluation of its institutions and argued the need for "changes to sentencing, increasing the use of restorative justice, taking a more victim-centered and trauma-informed approach, increasing understanding of what is happening in the system and the ability to monitor progress and focusing on the root causes of crime" (Department of Justice Canada 2019a, 4). The language of criminal justice reform is thus entrenched in the discourse about justice. The abolition of capital punishment for offences under the Criminal Code in 1976 is an illustration of a reform affecting how incapacitation and deterrence are addressed in the criminal justice system. In their work, John Hylton et al. (2002) present the various justifications why the criminal justice system undergoes reforms. The system has been reformed to modernize the law and stay up to date with societal values and what is deemed inappropriate. An example for this is the recognition of marital rape in 1983. Reforms have also been adopted to strengthen penalties reflecting the social reprobation of sexual behaviour. Another reason for reform has been to respond to emerging forms of inappropriate behavior such as child pornography on the internet. Reforms have also been adopted to explicit rules to use in prosecution. Finally, reforms have been adopted to increase reporting by reducing stigma and better supporting victims. *An Act to create a court specialized in*

[8] Translatable as "Rebuilding Trust"

sexual violence and domestic violence is a reform that fits in the latter category portrayed by John Hylton et al.

Although the multiplicity of reforms attests to the capacity of the criminal justice system to be responsive to the challenges it faces in its operationalization, reforms can be criticized as they remain within a punitive framework. In fact, the more the system is reformed, the more the prison complex grows (Coyle and Nagel 2022). The criminal justice paradigm has dominated discourses around how we conceive justice in Canadian society, however with its sentencing principles of punishment, deterrence, incapacitation, and rehabilitation, we found ourselves in a very limiting framework of action. Even with the arrival of rehabilitation as a sentencing principle, the fact that it is enacted within a framework of crime and punishment limits potential for repairing harm. To this day, the prevailing discourse about sexual violence is that it can be addressed through legal remedies, and especially through the criminal justice system. Restraining orders, prosecution and criminal charges are tools the state uses. The dominance of this discourse forecloses the exploration of addressing sexual violence through other avenues. As the criminal justice system's narrative of public safety and security has been normalized, it has made it difficult to take a step back and imagine a just world without police and prisons (Kaba and Duda 2017). As the dominant discourse in Canadian society to address and understand sexual violence has been through a criminal justice paradigm, this chapter focuses on looking outside the criminal justice paradigm and especially the disarticulation of crime and punishment to address sexual violence. Specifically, the question driving this chapter is: how can an abolition praxis provide an alternative to the criminal justice in addressing sexual violence? Abolition praxis can be thought of as a "replacement discourse" to that of the criminal justice paradigm, which has been marginalized from dominant narratives of sexual violence, because of the strength of the discourse on criminal justice to settle violence.

I examine abolition praxis as a potential alternative to the criminal justice paradigm, one which could help mitigate the challenges faced by the current paradigm. Specifically, I argue that the issue of sexual violence can be better addressed through abolition praxis than our current criminal justice paradigm. This argument is first situated in the Black and Indigenous feminist abolitionist framework and praxis. Penal abolition is defined as both a framework and a praxis that rejects the criminal justice paradigm. Abolition is also anchored in transformative justice, which argues that punishment only further harms and limits accountability. In the construction of my argument for a shift in judicial paradigm, I also look at the three crime-prevention principles of the criminal justice paradigm – deterrence, incapacitation, and rehabilitation – and propose how the abolitionist model answers the very immediate and real dangers of sexual violence in Canadian society. Finally, I illustrate what abolitionist responses to sexual harm can be deployed by overviewing grassroots abolitionist organizations.

4.1 Situating carceral abolition

Carceral abolition refers to the argument that the criminal justice paradigm ought to be abandoned (Coyle and Nagel 2022). Abolition is about creating a world without prison and police.

Abolition is not only focused on what needs to be dismantled, but also on experimenting and building community-based responses to prevent and address harm. Abolition praxis is about investing in creating a world that is rooted in collective safety and wellness. Abolitionists historicize the carceral system as "a tool of white supremacy, colonialism, heterosexism and the numerous forms of heteropatriarchal capitalist hierarchy" (Coyle and Nagel 2022, 4). They contest that the raison d'être of the criminal justice system is centred on public safety and justice, rather they argue that the carceral state fuels cycles of violence, especially in marginalized community. In that sense, the criminal justice system does not promote a society in the interest of all, as some individuals are disposable and subjected to state violence. Penal abolition work also relies on data and empirical grounds to argue that the criminal justice practices do not address social transgressions - "crime" – effectively. State violence exacerbates intimate, gendered, and sexual violence.

Due to its rejection of the criminal justice paradigm, abolition is also driven by a shift in understanding justice. It moves away from the punitive justice paradigm to a framework of transformative justice. The transformative justice paradigm views crime as socially constructed and urges rather to focus attention on harms. Harm offers opportunities for individuals, communities, and social structures to be accountable. Transformative justice seeks to transform the conditions that made the harm possible in the first place. Comparatively, restorative justice seeks to return to the conditions altered by harm. Although the two have been used interchangeably by abolitionist feminists at the turn of the twenty-first century, transformative goes beyond returning to the initial conditions (Kim 2018). Transformative justice seeks to prevent, intervene, and address harm through non-punitive accountability. It is deeply vested in securing safety and healing. To do so, it disarticulates crime and incarceration by emphasizing redistributive justice. Transformative justice is interested in the root causes of the harm, including societal structures, privileges and power in the community and larger systems. Its unit of analysis is the harmful behavior. In other words, an individual is not defined by its actions, and has some healing to do. This allows to move away from the perpetrator/victim binary and gives space to recognize the possible experiences of victimization lived by the person who has caused harm in that specific situation. Transformative justice also moves away from criminal justice as it considers and relies on the fundamental interdependence of individuals. To do so, it recognizes the value of relationships and community in addressing harm, while acknowledging that harm expands beyond the individual who directly received harm.

Prison abolition is foremost a Black movement. It emerged in the 1960s in the American context, where the discourse around criminal justice took a shift back to punishment and control after giving more space to rehabilitation. This was in response to a growing Black urban organizing against white establishment in the American South. Angela Davis became a prominent figure of prisoners' rights and of prison abolition through her involvement in defending committees of incarcerated Black individuals. Situating penal abolition's roots in activism is important to understand how to this day it remains both an intellectual framework and a praxis. Although theorists and academics have supported the development and definition of the movement in the

following decades, it has always been sustained by the very communities that were the most violently affected by the criminal justice system.

Abolitionists are not unaware of ongoing crime and violence. However, they reject the idea that crime is a moral choice. Rather, abolitionists view crime as a "manifestation of social deprivation and the reverberating effects of social discrimination, which locks poor and working-class communities of color out of schooling, meaningful jobs, and other means of keep up with the ever-escalating costs of life" (K.-Y. Taylor 2021). With this vision of crime, police, and prisons, which bear an important economic cost on society, become an ineffective way to address the underpinnings of crime. Abolitionists have also criticized the criminal justice system's focus on crime as a moral choice:

> It would be far more accurate to say that most 'crime' is being ignored. Indeed, the conversation begins and ends with an idealism and a dis-attachment from the realities of human being and community life: that norm breaking behavior ('crime') is the norm, that what we have built (the 'criminal justice system') does not achieve what we claim it does and that we are not addressing the needs of our communities (healing, justice, and the end of white supremacy, heteropatriarchy, colonialism and racial capitalism). Penal abolition is interested in an entirely different conversation, namely, that transgression ('crime') is normative and ubiquitous. (Coyle and Nagel 2022, 5)

The penal abolitionist framework requires to eliminate the notion of crime which is a politically constructed and malleable term that can be instrumentalized to surveil, control, and incarcerate communities and instead seek to respond to harm.

4.2 Shifting sexual violence as a crime to sexual violence as harm

The abolitionist framework views sexual harm not as a matter of law. Whereas crime is a legal category and a malleable political term, harm attests to the lived relationships and experiences. Criminal justice discourse simplifies the dynamics that foster sexual violence by creating fixed identities of victims and offenders. However, this socially accepted understanding of sexual violence flattens a far more complex issue. Abolitionists argue that there is a need to deconstruct this widely accepted understanding of sexual violence to uproot all the conditions allowing for it to happen and addressing its interconnectedness with other forms of violence. Sexual violence "is used as a form of social control, across the board, with many people from all different genders, all different races, and all different locations" (Kaba 2021, 46). At the same time, sexual violence is also argued to be a symptom, and not the disease of "hurt and trauma form the ongoing violence and dispossession" (Simpson 2017, 42). The criminal justice system's

tendency to focus on the incident as being a moral choice negates the complex relationships that enable sexual violence. The focus of the criminal justice system on the victim/rapist narrative fails to address the actual harm and the complex factors which enable it in the first place. Sanitized narratives about sexual violence have also excluded some discourses which may complexify some of the issues at stake: "we can't have complicated conversations about sexual violence because then you are accused of rape apologia or you are accused of coddling rapists" (Kaba 2021, 47). Mariame Kaba refers to the fact that people will experience sexual harm differently and will want to address their own harm in their own way. People may also choose not wanting to be labelled as victims and prefer to be labelled as survivors, while others may chose not to have their identity connected with the violent event throughout their lives.

Abolitionist feminists attribute sexual violence not only to patriarchy and misogyny but go beyond to draw a larger causal framework which includes racial capitalism and settler colonialism. In fact, they argue that an overreliance on gender-based causes to explain sexual violence essentializes ideas of men's predisposition to violence and legitimizes structures of coercion in the settler state. Indigenous authors position the source of the prevalence and normalization of sexual violence in the broader context of colonization. Those social ills won't be fixed

> without addressing the politics of land and body dispossession serves only to reinforce settler colonialism, because it doesn't stop the system that causes the harm in the first place while also creating the opportunity for neoliberalism to benevolently provide just enough ill-conceived programming and 'funding' to keep us in a constant state of crisis, which inevitably they market as our fault (Simpson 2017, 42).

Leigh Goodmark (2018) argues to shift the focus of violent behaviour from a criminal one to a public health approach. She argues that the public health approach may be a better framework to understand violent behaviour and provide a better space to understand the causes of intimate violence. The narrow scope of the Canadian criminal code offers little space in the court of law to address causes of violence.

The dominance of the criminal justice paradigm to tackle sexual violence has neglected the healing process of the sexual violence survivor. The criminal justice system does not hold firm for survivor. There is this belief that by reporting and entering through the prosecutorial system, victims of sexual assault will find healing. This is when the system can appear to betray victims' because it is not its intent (Hassan cited in Kaba 2021). The system is not equipped to transform the harm that occurred. That is not to mean that people won't feel relief or joy from someone's incapacitation through incarceration. The fact that the dominant discourse pushes the idea of legal redress of (past) situations of sexual violence, but do not address the conditions that allowed for it to happen is problematic. Healing is a complex concept. Healing is not a destination, but a process.

Processes of accountability that are put forward in abolition praxis allow for participants to achieve self-agency and self-accountability for the harm that happened (Kaba 2021).

Approaching sexual harm systemically and understanding are the underlying conditions enabling sexual harm means, society could equip itself to address it before it occurs. In other words, if people's most critical needs were met sexual harm could be mitigated. The choice of word mitigated is important, because with the best prevention tools and care, sexual harm can still happen. In those cases, abolition praxis rooted in accountability, and not in punishment, could attend to the situation and to the reasons that enabled it.

4.3 Rejection of retribution as a justice principle

The criminal justice paradigm operationalization is centred on punishment, which then enables three crime-prevention principles: deterrence, incapacitation, and rehabilitation. Abolitionists reject retribution as a principle of justice. This rejection of retribution has fed the myth that abolitionism underplays the importance and damages caused by sexual harm. This feeds into yet another binary created by the criminal justice system: "it's prison or nothing" (Kaba 2021, 137). Instead of retribution, abolitionist suggest that consequences that are directly linked to the harm done and involving the people who are influenced by them can serve as a more appropriate response to violence (Kaba 2021). Consequences are not about constricting the freedom of an individual or harming them. An example of a consequence for a case where an individual in a position of power has used its position to sexually assault a subordinate would be to remove that person from that position of power. Consequences would mean that a person could no longer benefit from the privileges that have allowed them to abuse of others. Through socialization, punishment can feel good as it can be an expressed form of vengeance and has been strongly associated with societal understanding of the restoration of justice. Accountability, forgiveness, and growth can be arduous and painful processes, but that does not make them any less useful. Two of the main abolitionist arguments for the rejection of retribution are examined in this section. The first is concerned by how punishment furthers cycles of harm and the second is concerned by how punishment does not allow for accountability, and thus transformation.

Punishment fuels cycles of harm

In the first chapter of this thesis, punishment was defined as one of the core foundations of the criminal justice system. Punishment undermines safety as it inflicts suffering on others as a response to harm or wrongdoing. Thus, abolitionists posit that punishment is harmful and destructive. Penal abolition prompts a reflection on the incompatibility of using retribution, and thus harm, to end sexual harm. Abolitionists argue that we cannot effectively teach individuals not to harm others by harming them (Davis et al. 2022). In the same way, we cannot ask other not to harm, while the state perpetuates harm (Kaba 2021).

When we focus on individual culpability and punishment, we lose sight of the bigger structures that allow for harm to take place in the first place. Transformative justice rather proposes

that we broaden our understanding of a sexual assault between two individuals to examine the greater structures that threaten safety and freedom from sexual violence.

Prisons are not feminist as they reproduce fear and sexual violence (Hassan cited in Kaba 2021, 47). Kaba draws this continuum between sexual violence outside and in prisons: "When we put people in prisons and in jails, often we are sentencing them to judicial rape because we know they are going to be assaulted when they go inside" (Kaba 2021, 46). This reproduction of sexual harm within the criminal justice system prompts us to reflect to feminists' commitments to anti-rape and anti-violence in society at all. When criminal justice institutions, police and prisons especially, perpetrate sexual violence, they cannot be the solution to it (Davis 2003).

Elizabeth Sheehy (1999) explains how the state's response was the mobilization of punishment of harm doers rather than protecting victim's lives and safety. In fact, the "white feminist anti-violence movement was becoming more entrenched in an overly simplistic analysis that argued that gender inequality was the main factor that motivated violence against women – almost to the exclusion of other factors (Richie 2012, 2). According to abolitionist feminists, this understanding of what creates violence does not consider the ways in which the state has normalized forms of violence through colonialism, racism, and capitalism. Historically, white women involved in anti-violence movements aligned themselves with the very same institutions that caused harm on underserved communities and marginalized individuals (Whynacht 2021).

Those historical and contemporary considerations of the harms caused by the criminal justice system justify the intersectional positioning of abolition praxis. Indeed, the abolitionist movement takes a holistic approach to understanding what creates sexual and gendered violence. The Montreal-based Third-Eye Collective insists that abolitionist practices must "be linked to strategies that combat police violence, hate violence, as well as anti-Black, racist, colonial and anti-immigrant violence that persists against our communities"(Third-Eye Collective 2015).

Punishment is not accountability

The current adversarial structure proposed by the criminal justice paradigm does not incentivize individuals to be accountable for the harm that they caused. For people to be accountable, they need to decide that what they did was wrong. An abolitionist analysis prompts the following questions: "What in our culture allows people to do that [be accountable]? What are the structural things that exist? What in our culture encourages people who assault people and who harm people to take responsibility?" (Kaba 2021, 44). In a criminal justice paradigm, if you admit you committed a sexual offense, there is a threat of being prosecuted and incarcerated. The inexistence of incentive then just forces perpetrators of criminalized sexual harm to deny their actions. In that sense, the criminal justice puts the survivor on trial to prove that the violence took place. The Canadian criminal justice system also allowed alleged perpetrators to plead guilty in order to mitigate their case, it remains questionable if this is really an illustration of an individual taking responsibility for their actions, or with their lawyers, judging that pleading guilt is the most cost-efficient solution for their situation. For abolitionist, accountability "has to be a voluntary process through which somebody decides to do that. You can never actually make anybody

accountable. People have to be accountable" (Kaba 2021, 141). Accountability can be defined as the active process through which a person decides to recognize the harm they have caused and want to redress them. This moves away from the carceral notion of accountability, where the adversarial model between the perpetrator and the victim often distort accountability as being accountable means being guilty or someone may express responsibility with the goal of entering a plea deal. In the criminal justice system, accountability is linked to coercion and the threat of punishment to keep offenders in the right path. Accountability goes beyond apologizing for the harm caused, it includes self-reflection, apology, repair and changed behaviour. Accountability in that sense is something we do for ourselves with ourselves.

Accountability processes are at the centre of transformative justice. adrienne maree brown, an abolition activist and mediator, discusses the importance to interrogate the roots systems of harm in the life of individuals who have caused harm while recognizing that for most individuals the intention is never to cause harm or to be a horrible person ("Transforming Harm: Experiments in Accountability" 2019). She explains that individuals who caused harm often were socialized to think that harm is normal, or that they never had the appropriate tools to process hurt or express sexual desire. This desire to understand the root system of violence is in no way a justification to harm, but rather sets a foundation to understand the source of harm to better address it in accountability processes. adrienne maree brown's approach to facilitating mediation in sexual violence is thus guided by three questions: (1) why did the violence took place?, (2) what can we learn from the situation?, and (3) how can we transform the situation? (maree brown 2015).

In accountability processes, mediators also interrogate what barriers may refrain both parties to participate in process of accountability. Those barriers may include logistical aspects such as transportation, housing, or even support they can call on within their networks. From there, facilitators can evaluate the necessary conditions for the process to take place. Facilitators shared that individuals who cause harm are usually not feeling seen, loved, and held, or some of their emotional, social or materials are not being met. Without those basic needs being met, mediators find it challenging just to expect them to be ready to enter an accountability process. When individuals who caused harm feel seen and held, there is a greater openness to participate fully in the process ("Transforming Harm: Experiments in Accountability" 2019). This is how Philly Stands Up approaches accountability processes in cases of sexual harm: the organization meets regularly with individuals participating in the process, stays closed to them on extended period of time from a position of care and love, while acknowledging that people have needs, even those who have caused harm ("Philly Stands Up" n.d.).

Mia Angus also refers to the ways in which everyone has caused harm or colluded with harm in their life ("Transforming Harm: Experiments in Accountability" 2019). Acknowledging that everyone causes harm sets the ground to have more nuanced and complex conversations about harm rather than reinforcing a dichotomy between individual who cause harm and those who experience harm. In accountability processes, this notion that individuals make mistakes or behave in ways that are not aligned with their values fuels this notion that mistakes are part of the human experience and that from those mistake individuals can chose to grow and transform. Although it

may be easier to fall in binaries or the logic of irreparability, mediators also emphasized the importance to create a non-judgemental place and believing that the people they work with can transform. Seeing the transformative capability of the person who has caused harm is essential for the said individual to embark on their own accountability and transformative journey.

4.4 Deterrence through prevention

Deterrence theory approached from a utilitarian standpoint posits that individuals optimize their wellbeing by proceeding in a cost-benefit rationale before engaging in criminal behaviour. Abolitionist praxis aims at nurturing conditions and opportunities deter from engaging in harmful behaviour (Davis et al. 2022; Kaba 2021). Considering that two-thirds of crimes in Canada took place when an individual was under the influence of substance, programs that would support individuals before they engage in harmful behaviour have a great deterrence potential. Such programs could include accessibility to harm reduction education and therapy. Vulnerable individuals would be equipped to deal with those challenges without resorting to harming others.

Abolition is about nurturing collective future, shorter- to longer-term preventative frameworks. Imagining abolitionists futures can also means building new skills and developing new social relationships in our community which would allow us to intervene proactively when we see harm taking place, without having to call the police. The development of those intervention skills could act both to prevent harm, but also to intervene when harm is taking place. An example of a tool that is readily accessible is planning for exposure to harm: Who are you going to turn to if you are harmed? Who are you going to turn to if you cause harm? In sum, abolition praxis invites to experiment the creation of communities that are preventative and respond to harm in a non-punishing/violent way.

Abolitionist strategies to prevent and address sexual harm need to be sensitive to the specific conditions that allowed for the harm to take place. Previous abolitionist work has been criticized as flattening all experiences of violence by bringing them back to structural processes and delegitimizing the very bodily assault that happens. This theorization of violence can provide a framework to understand how violence is maintained, however it is important to bring nuance and particularity to those who are the subject of said violence (Whynacht 2021). Thus, community building practices are not to be uniformly used across all cases of sexual violence, and building safety requires an observation of the unicity of the case at hand as to not endanger the survivor (Milward 2022). Penal abolition won't end all forms of harm and violence. Rather the work involves both preventing and reducing harm, while practice transformative ways to address harm when it occurs.

4.5 Incapacitation: harm is still taking place

Whereas the criminal justice system presents as a system to address current issues, which can be criticized concerning the delays in processing cases and the structure of the system which addresses urgent matters only after the harms have taken place, an abolitionist praxis remains a

slow process event in urgent times. The temporalities of abolitionist praxis are important, as the current work happening today is constructed on centuries of work. The abolitionist project of disarticulating the criminal justice system, including notions of crime and punishment, is not short-sighted. Inevitable harms are going to happen. It is challenging to work to work in an abolitionist present when forms of violent abuse are still happening, without systems of accountability that don't rely on the carceral system in place, individuals may face very real dangers: "it's an uncomfortable truth: we can't abolish prisons and not have a plan for ensuring restorative and transformative community process for those who have hurt" (Nixon 2018, 91). Developing tools and practices to respond to ongoing harm in a non-violent way. Abolition praxis allows to create spaces to listen to people who harmed and honoring the agency and needs of individuals who have been harmed. This approach is different of restorative justice because the need of the individual who have been harmed may be not to be in contact with the person that has caused harm to them. In that case, incapacitation looks like allowing for a safe distance between the survivor and the person who has harmed them.

Whereas carceral feminism's approach to addressing sexual violence has been to incapacitate sexually violent men by incarcerating them, this approach has limits as it will not stop other men to learn to be sexually violent. Unless society deal with the systemic causes of violence, sexual violence will be perpetuated. While the immediate safety of survivors remains a priority, the incarceration of sexual harm perpetrators, which plays on the four sentencing principles of punishment, deterrence, incapacitation, and rehabilitation, does little to address the conditions that made the sexual violence possible in the first place:

> If we want to reduce (or end) sexual and gendered violence, putting a few perpetrators in prison does little to stop the many other perpetrators. It does nothing to change a culture that makes this harm imaginable, to hold the individual perpetrator accountable, to support their transformation, or to meet the needs of the survivors (Kaba 2021).

An abolitionist argument is that the system that incarcerates individuals deemed disposables also incapacitates communities through policing, surveillance, and control (Davis et al. 2022, 47). The criminal justice system perpetuates harm as illustrated by the case of the women in Val d'Or whose sexual victimization by police officers was not recognized, and by the rates of sexual violence in prisons. Committing to an abolition praxis also means not going to carceral solutions when we are confronted with harm. In an article looking at the conviction of R. Kelly (a prominent American rapper who was convicted for the rape of underage girls), Mariame Kaba confessed being surprised that people who identify as abolitionist found joy in R. Kelly's conviction. Mariame Kaba's response is that abolition praxis is a commitment that is not about our emotions. In the same way, abolitionists are less interested in prosecuting police that harm, but focus on repair and accountability. An abolitionist praxis requires resisting the most prominent approaches to sexual violence that rely on carceral solutions (Davis et al. 2022). The mobilization of abolitionist

organization is broad: abolitionist can do the work to close jails and abolish prison, while supporting inmates in prisons through education and support criminalized individuals at their parole hearings (Davis et al. 2022). Enacting abolition praxis means responding to immediate needs, of those who harm and those who have been harmed, while consistently working towards structural change to move away from the criminal justice paradigm.

4.6 Broadening rehabilitation: reactive engagement to abolition

In the criminal justice paradigm, the rehabilitation rationale serves to reduce risks of recidivism at the level of the individual who committed harm by treating the individual conditions that led to the perpetration of the crime. As the abolitionist framework seeks to broaden the scope of understanding of how harm takes place, its focus for addressing sexual harm that took place despite pre-emptive measures, is through community accountability. This means that an abolition praxis can be reactive to events when harm and violence take place.

Community accountability practices are strategies and practices that allow to address violence without relying on the criminal justice system. Some practices have involved group of peers involved in pods, or circles and allow for a survivor to lead a space where a person who engaged in harmful behavior to develop healthier coping mechanisms than causing harm while recognizing their responsibility for the harm caused (INCITE! Women of Color Against Violence 2016; Barrie 2020; Kim 2018). Those practices have been established to create spaces outside of the criminal justice system. Although in practice they are not consistently providing positive outcomes "they have left a meaningful outcome" (Bierra, Kim, and Rojas 2011, 4). In fact, while not always formalized those practices may be present in families, and group of friends, and are far more common than criminal responses to harm.

As early as the 1980s, Mennonite and Quaker organizing in Canada were organizing transformative healing circles for child sexual abuse with great success (Morris 2000). Since then, family case conferencing has been used to address child sexual abuse (in some jurisdictions, other jurisdictions not allowing it) (Knoke 2009). Those processes have encouraged accountability, while limiting harm caused by traditional adversarial models of justice, and have facilitated the integration of the individual who caused harm in the community by those who participated in the community process (Whynacht 2021). The absence of incapacitation through isolation and the involvement of the community in the transformative process renders reintegration obsolete. Rather, it aims at transforming the relationship of the individual who has caused harm with their community thus facilitating their existence in the community following the harmful incident.

Similarly, Generation FIVE is a volunteer collective working adopting a transformative justice framework working specifically within the realm of children sexual abuse. Hannah Barrie (2020) considers how sexualized violence and child sexual abuse reflect broader systems of oppression and argues that child sexual abuse is a good entry point to shed light on structural systems that allow it to happen and to dismantle them. The volunteer collective, like many community-based programs has been successful in lowering recidivism risk by facilitating transformative justice strategies with participants.

4.7 Abolition praxis

The end goal of carceral abolition is to live in a world without policing and prisons. As of now, such places are inexistent. Abolition praxis thus is a process of experimenting and strategizing on ways communities can address harm outside of the criminal justice paradigm. While there is a strong argument to be made that the criminal justice system is failing to stop cycles of violence, and as demonstrated in this thesis, cycles of sexual violence, abolitionist praxis do not always have perfect answers to address all the issues that arise from violence. In other words, abolitionist praxis does not come with handbooks or blueprint. It carries histories, memories, experiments, networks, deep contradictions, and constant work towards a liberatory future. In mapping the different abolitionist organizations working with sexual violence, what came out is the diversity of praxis and the important lineage of abolition work and networks of solidarity within the abolitionist movement. The diversity of expressions of transformative justice reflects the need for experimenting justice outside of the criminal justice framework all while empowering the agency of all parties involved, including the community.

Abolition organizing ranges from harm-reduction approaches to minimize reliance on the criminal justice system to non-punitive processes of accountability and transformation. A particular characteristic of abolitionist work which also differentiates it from restorative justice practices is that abolitionist responses outside of the criminal justice system. Restorative justice holds a promise of change within state institutions and have historically been co-opted by the criminal justice system. The carceral abolition movement being born as a response to the institutional violence of the criminal justice system is thus situated outside of it.

The community-based aspect of abolitionist responses is well-reflected by Communities Against Rape and Abuse's (CARA) organizational structure. CARA, like many other abolitionist grassroots movements, rejects the differentiation between its workers and the survivors they work for: "We understand ourselves as community members who are survivors of sexual and domestic violence and whose experience as survivors helps to inform our work and accountability to our constituents" (Bierra 2009, 160). The absence of a rhetoric of professionalization of staff allows to blur the boundaries between staff and community. Concretely, this is expressed by developing a leadership encompassed of individuals who receive the services, organization of community gatherings, accessibility to office for community members. All in all, this allows to develop tools that are not developed for survivors but by survivors of sexual harm. From a prevention perspective, CARA sponsors trainings on sexual violence nationally. CARA has also developed many tools to support the community accountability strategies.

INCITE! Women, Gender Non-Confirming, and Trans People of Color Against Violence[9] was launched in 2000 following "The Color of Violence: Violence Against Women of Color" which was held in California. During the Convention, women realized that more radical approaches could be experimented to address violence in their community. INCITE! criticized the professionalization of the anti-rape movement and the lack of acknowledgement of the

[9] Formerly known as INCITE! Women of Color Against Violence, hereafter INCITE!

intersectional violence lived by women of color. INCITE! presents a political understanding of violence which is two-fold "violence *directed* at communities" and "violence within communities." Violence directed at communities refers to institutional violence such as police, prisons and colonialism and violence within communities refers to interpersonal violence such as sexual and domestic violence. The organization's work is thus at the intersection of dismantling both structural and interpersonal violence and adopt a transformative justice and abolitionist praxis to do so. INCITE! encourages the development of community-based responses to violence as to address violence without the intervention of police or prisons. The collective presents "community accountability" as an alternative to police or prison-based strategies. An important contribution of INCITE! to the abolitionist organizing is that it laid a framework consisting of four areas of concern for abolition responses to violence: community prevention, survivor self-determination, accountability for individuals who caused harm and social transformation at both the micro and macro level.

Some abolitionist organizations work specifically in supporting survivors. Rape crisis centers and hotlines the prioritize the agency of the sexual assault survivors in the process do this work. Another example of organizing supporting survivors is the community-based organizing collecting and investigating cases of Missing and Murdered Indigenous Women and Girls. Other organizations work with individuals that have caused sexual harm. The goal of those collectives is to facilitate accountability processes instead of reinforcing shame and denial. The Montreal-based Third-Eye Collective illustrates how community-based organizing can allow for transformative justice to take place, thus avoiding rendering survivors and those who have caused harm disposable by the criminal justice system. The collective organizes accountability processes within the community. It also offers a range of informal practices of care and support. Third-Eye collective also organizes spaces to strategize about safety plans. Similarly, the Ahimsa Collective based in California offers services for sexual, domestic, and interpersonal violence. They work within communities with those who survived harm, those who've caused it and individuals impacted by the harm. Agency of participants is a core element of their approach which can take multiple forms: facilitation of dialogue between individuals, individual approaches to support healing and transformation journeys and supporting those who are seeking to be accountable for causing harm. Similarly, the Ahimsa Collective facilitates Victim Offender Dialogue (VOD). VOD are between the individual who was harmed and the person who has caused harm. With the help of facilitators, it allows for both parties to get a full voice about their experience and what took place after the incident. The facilitator creates a collaborative and non-adversarial process focused on accountability and healing. Individuals who caused harm can consider the complex impact of their actions and make amend when possible. The outcome of the dialogue is determined by participants. At the Ahimsa Collective, the VOD process is initiated by the person harmed, however it requires both parties to consent into taking part in the conversation.

Abolitionist organizing also takes place in the development of tools, programs, and trainings to empower individuals to de-escalate and intervene in the context of crisis without relying on the carceral system. An example of a tool to minimize interaction with police is a flowchart which was

created by Safety Beyond Police that helps individuals witnessing a potentially dangerous situation decide if they should call the police or if other measures can be taken. This step-by-step guide is useful to minimize police interaction and to reflect on other ways crisis or dangerous situations can be addressed. Similarly, Don't Call the Police is a referral directory available online, which indicates what services can be contacted in your city for issues that would normally be handled by emergency services. The directory offers alternatives to calling the police in over 65 cities in the United States as well as in Toronto, Canada. This abolitionist praxis facilitates access to alternatives to calling the police when individuals are faced with situations requiring de-escalation and intervention. The categories of intervention covered by Don't Call the Police are housing, LGBTQ+, mental health, domestic violence and sexual assault, youth, elders, crime, and substance use. Every time a resource is listed on the website, there is a note if the service has any obligation to contact medical or police services for specific cases. Disclosing that a resource may redirect their call to the police empowers the individuals to make an informed choice based on their situation.

An example of abolitionist organizing that centers its work around the creation of tools and strategies of transformative justice is Creative Interventions. Creative Interventions was launched in 2004 by sexual and domestic violence activist Mimi Kim and aimed to create spaces for individuals impacted by harm to explore creatives ways to put an end to it. Creative Interventions also collects and analyzes accounts of experiences of responses to violence that are not police or prison based. This practice of collection and analysis allows to perpetuate abolitionist genealogies and to inspire others into their community-based strategizing against harm. Creative Interventions objective is thus twofold: supporting communities in their capacity building and encouraging storytelling and sharing of non-carceral responses to violence. In 2012, Creative Interventions created a toolkit which cumulated the experience the organization has gained. The toolkit provides concrete tools to support individuals who want to pursue or organize community accountability processes as well as workshops allowing individuals to strategize on how to address harm within the community without going to the police. With over 500 pages of tools, the tool developed by Creative Interventions demonstrates the infinite possibilities to intervene when facing violence without police intervention. The length of this toolkit also emphasizes that intervention is rarely a one-size fits all model and rather requires to reflect on what will work best in the situation at hand.

This work, capacity building efforts, storytelling, and toolkits, can be very effective at supporting community-based strategies responses to harm, and nourish projects internationally. The *He Ara Matora (Tools to Stop Violence)* is a good illustration of how collective organizing can happen at international levels. This interactive online tool was created by New Zealand Māori University Te Wānanga o Raukawa in collaboration with the team behind the Creative Interventions toolkit. It gives concrete tools to the individual who is harmed, to the individual causing the harm, to the community and to the facilitator as to how to address the harm all while empowering actors in their journey. Indeed, the tools proposed are by no means a "step-by-step" process of what the harm doer or the person harmed must go through but allows them to select what they choose to go with. The collaboration between Te Wānanga o Raukawa and Creative

Interventions demonstrates the importance of international abolitionist networks in developing local and adapted solutions to tackle sexual violence without making individuals disposable within the criminal justice system.

Melanie Brazzell theorization of safety as a "toolkit to be deployed" summarizes the diversity of experimenting and approaches in abolitionist organizing. While not all experiments of abolitionist praxis lead to measurable or even positive outcomes, the goal is to increase the number of tools accessible and get rid of tools that are not serving the community such as the overreliance on police and state intervention. The dismantlement of crime and punishment will not take place suddenly. Penal abolition praxis requires experimenting justice differently by rejecting punishment as a guiding principle. It goes beyond the negation and absence of the criminal justice apparatus. Rather it proposes the creation of both preventive and reactionary tools to address the underlying circumstances that lead to violence. To do so, transformative justice proposes an understanding of justice that is centred around accountability, safety, relationality, and healing. This shift away from criminal justice paradigm may be a very promising avenue to tackle sexual violence as a systemic issue rather than an individual problem. Penal abolition is a praxis that requires "steady work of eliminating the use of surveillance, policing, sentencing and imprisonment" (Kaba 2021, 137). For that to happen, we need to exist and operate outside the criminal justice paradigm, discourse, and its attached institutions. Meanwhile, it can support those who are caught in the criminal justice system while respecting the agency of those who have been harmed.

CONCLUSION

The intersection of the criminal justice discourse and sexual violence is a sensitive issue. Sexual violence itself raises feelings of shame and discomfort, and accounts of sexual assault outrages most of us. Yet, sexual violence, in its many forms, takes place daily in workplaces, universities, in families and in friend circles. Whereas crime in Canada has been decreasing for the past two decades, rates of sexual violence have remained stable. Sexual violence is the only crime not in decline in Canadian society (Canadian Women's Foundation 2021). The criminal justice system is aware of its failures when it comes to addressing sexual violence which is why the Canadian criminal justice system has undergone multiple reforms attempting to address the situation. The most recent reform is the creation of specialized tribunals in matters of sexual crimes which will be aiming at better supporting survivors of sexual violence. Also, shifts in discourse from punishment to rehabilitation have taken place with civil society partaking in the debate. Nonetheless the criminal justice paradigm and the criminalization of sexual violence have yet to be formally contested. Indeed, the dominance of the criminal justice system can be argued to narrowing practices addressing sexual violence and limiting the exploration of other avenues to properly tackle sexual violence in Canadian society. The criminal justice system remains the gold standard to address sexual violence in Canadian society.

The domination of the criminal justice paradigm suggests that criminalization is the best paradigm to address violence, and to provide public safety and social regulation. The stable rates of sex crimes despite decades of reforms of the criminal justice system call for an analysis of this discourse on our societal understanding of justice. Therefore, an analysis of the efficiency of the criminal justice paradigm and its operationalization in the Canadian criminal justice system is significant in understanding the performance of criminal justice in tackling sexual violence. The need to analyze the criminal justice system also stems from its power to institutionalize the social categorization of individuals, as victims and offenders, and the enforced punitive ways of addressing deviance and criminality.

This thesis sought to evaluate how efficiently the criminal justice system addresses sexual violence in Canadian society. The analysis of the performance of the criminal justice system was done in four stages. First, a review of the literature about the criminal justice paradigm mapped out an analytical framework consisting of the four ideal sentencing principles of the criminal justice paradigm. Second, a quantitative analysis of the performance of each sentencing principles with regards to cases of sexual assault was performed. Third, a theoretical analysis of macro factors sustaining the criminal justice system's performance was conducted. Finally, an alternative approach to justice (i.e., abolition praxis) was presented to look at how other approaches to justice may better address sexual violence.

Findings

A review of the literature allowed to construct an analytical framework to evaluate the criminal justice system's ability to address sexual violence cases. Four sentencing principles

emerged from the literature review: retribution, deterrence, incapacitation, and rehabilitation. Retribution refers to punishing an individual for the social transgressions, defined within this paradigm as a "crime" for the behaviour. The three other sentencing principles also play into a public safety rationale and function to reduce crime in society. Deterrence is meant to both discourage the individual and the community as whole to engage in that behaviour. Incapacitation is meant to isolate the individual from the rest of the community, thus impeding them from engaging in more crime. Rehabilitation is meant to facilitate the reintegration of the individual found guilty upon release and reduce risks of recidivism. Those four sentencing principles define how the Canadian criminal justice system operates.

The analytical framework was then mobilized in the second chapter to evaluate the performance of the criminal justice system in addressing sexual violence. For retribution, reporting rates as well as attribution rates were first considered. Sexual assault is the most underreported crime with reporting rates being stable for the past decades at 6%. Reported cases also face high attrition rates due to lack of evidence, pressure on the plaintiff, and delays. Considering the underreporting of sexual assault with attrition rates within the criminal justice system, only 0,5 % of sexual assaults have led to a conviction and only 0,3% of individuals who commit sexual assaults are incarcerated. The low level of conviction and incarceration challenges the whole criminal justice's paradigm. Indeed, as the criminal justice system relies on punishing those who are guilty of crimes to efficiently facilitate the crime prevention principles – deterrence, incapacitation, and rehabilitation – such a low level of retribution limits the ability of the system to tackle sexual violence. Thus, in the analysis of the three other sentencing principles, the low percentage of convictions for sexual assaults had to be kept in mind to put in perspective the effects of deterrence, incapacitation, and rehabilitation.

Deterrence's efficiency is usually measured by three indicators: severity, celerity, and certainty. Severity of punishment for sexual crimes is consistent with the literature. Harshest sentencing for sexual assault crimes was associated to cases where weapons were used (representing 4% of convictions), followed by cases where bodily harm was physically proven (representing 44% of convicted cases). Celerity, or the speed to which one will be punished after they have engaged in criminal behavior, also influences deterrence. Sexual crimes being usually reported years after the fact and administrative delays in trial which are rampant in the Canadian criminal justice system have negatively affected celerity with regards to deterrence. The literature on deterrence theory places certainty as the most influential deterrent variable in crime prevention. Certainty is the risk of getting caught for a crime and cost-benefit approaches to deterrence state that individuals will deter from engaging in criminal behaviour if the certainty of being apprehended is higher. For sexual assault cases, only 0,5% of cases lead to a conviction meaning that deterrence is highly limited by the low level of certainty.

Incapacitation of individuals who cause sexual harm has been illustrated as problematic since it places those individuals at risk of being sexually victimized and harmed during their incarceration. Thus, while the incapacitation principle aims at limiting harm from being

perpetuated by isolating the individual away from its community, the same individuals are risking being harmed at higher rates compared to inmates accused of non-sexual offenses.

Rehabilitation, which is the fourth sentencing principle, gained more prevalence in the criminal justice approach when the death penalty became obsolete, and society had to deal with the reinsertion of violent offenders after their incarceration. Community-based rehabilitation and restorative justice programs have had more success at lowering recidivism among individuals who committed sexual offenses in comparison to institutionalized programs such as those offered in prison. Overall, while some of the criminal justice paradigm principles have shown positive results, the fact that only a small proportion of the individuals who commit sexual harm is convicted explains why sexual crimes have remained stable and sexual violence continues to be prevalent in Canadian society. Using the criminal justice paradigm's principles as an analytical framework allowed to shed light on the limited efficiency of said principles, because of the inability of the system to convict individuals who commit sexual offenses.

The reliance of the criminal justice system on the dichotomy between "victim" and "offender" was also investigated as a factor sustaining the performance of the system in addressing sexual violence. Mobilizing Achille Mbembe's concept of necropolitics and Giorgio Agamben's concept of homo sacer, I demonstrated how the focus of the criminal justice system on the victim/offender binary creates disposable identities through which the system is sustained, while harming both the victim and the offender. Disposability refers to considering someone's life as worthless and unworthy of protection. The adversarial model creating a dichotomy between individuals who have been harmed (i.e., "the victim") and the individual who has caused harm (i.e., "the sexual offender") only fuels cycles of violence by negating the complex dynamics behind said cycles of violence. If the case leads to a guilty verdict, the convicted sex offender is punished and rendered disposable and subject to further violence. Indeed, convicted sex offenders are more at-risk of sexual assault while incarcerated and will have limited freedoms upon release – in addition to suffering marginalization in their community. If the case leads to a non-guilty verdict, the experience of the survivor is negated and the harm that occurred is minimized as not being sexual violence. I discussed how accounts of sexual victimization that do not fit the myth of the perfect victim (i.e., sober, chaste woman who fought back the assault) are dismissed. This was further explored with the cases of Indigenous and Black women sexual harm survivors. In both the case of the sex offender and of the victim, identities are disposed and collective understanding of what consists sexual violence is flattened, leaving behind the complexities of human interaction and the ways sexual violence is experienced. In that sense, punishment limits a deepened understanding of what has caused harm in the first place and often negates the experiences of violence that are very real but not proven to be true beyond reasonable doubt in court. This focus on the figure of the rapist also individualizes the issue of sexual violence without concern for the greater conditions that allowed for the harm to take place in the first place.

Carceral abolition and praxis were explored in the fourth chapter as an alternative to address sexual violence. Abolition as a political framework considers sexual violence not as the problem of the dangerous few, but a social problem that the criminal justice system is just not equipped to

address. It rejects the retribution principle of criminal justice as it is argued to perpetuate cycles of harm and does not allow for individuals who caused harm to be accountable for their actions. Abolitionists propose the creation of both preventive and reactionary tools to address the underlying circumstances that address violence. They do not argue that there is a one-size fits all formula to tackle sexual violence, but rather encourage experimenting with transformative justice practices that are centered on accountability, safety, relationality, and healing. Deterrence is thus approached through prevention. Incapacitation and rehabilitation are addressed through community-based strategies of accountability.

The fourth chapter concludes with real-world examples of tactics and experiments currently being conducted in carceral abolitionist organizing spaces. These include, but are not limited to, the creation of toolkits spearheaded by abolitionist collectives, educational tools to prevent and to address sexual harm, the mobilization through service directories that can support intervention and de-escalation without involving the police, and the type of work community-accountability praxis mediators and facilitators do to support both the individual who was sexually harmed and the one who has caused harm. Most importantly, what these cases demonstrate is the importance of sharing experiences amongst different movements.

Further research

This thesis sought to analyze the efficiency of the criminal justice paradigm to address sexual violence in the Canadian context. The thesis also presented abolition praxis and transformative justice as a potential avenue to tackle sexual violence. Further research both on the criminal justice paradigm and on the transformative justice paradigm could deepen our understanding of the optics of a shift in paradigm to better tackle sexual violence.

With regards to the criminal justice paradigm, the analytical framework presented in this thesis based on the four sentencing principles was only applied to cases of sexual violence. This framework could be applied to other crimes to measure the efficiency of the criminal justice system. The case of sexual assaults – which is at the heart of this thesis – has sensitive characteristics as it represents intimate interpersonal forms of violence, which may carry feelings of shame. The very sensitive nature of this set of crimes may limit the ability of the criminal justice system to properly apply its principles. Another important element which was not addressed in this thesis would be to inquire into how the criminalization of sexual violence has come to be. As illustrated in this thesis, the criminal justice paradigm dominates social understanding of justice and survivors are often pressured to report their experience of victimization. A genealogical analysis of the criminal justice discourse as it relates to sexual violence would allow to expose the various intersectional underpinnings that have shaped how we think and speak about sexual violence over time. Discursive analysis methods would allow to investigate what motivates the discourse and sustains it over time. From there, an impact analysis of the discourse could look at the impacts and effects of the criminalization of sexual violence in Canadian society over time. An extensive socio-political historical consideration of the politicization and criminalization of sexual

harm has the potential to shed light on the racial and gendered tensions that are still influencing the way sexual crimes are treated in the criminal justice system. Although some historical elements are used to contextualize public support for the "tough on crime" approach to sexual assault, the examination of the problem in this thesis focuses on the contemporary relation between the sexual assault and the criminal justice system.

With regards to abolition praxis and transformative justice, further research could investigate abolitionist grassroots movement in the Canadian context. The literature of alternative approaches to justice in the Canadian context is filled with restorative approach practices which are often co-opted by the criminal justice system or developed within the criminal justice ecosystem. Restorative justice programs are often well funded as they are institutionalized and recognized by the government. Case studies of specific practices of transformative justice as they relate to sexual harm would be relevant to inform research and fuel the reflection on abolition praxis and community strategies to address sexual harm. Cases could look at program development and delivery, efficiency of programs, as well as barriers to implementation. Documenting experiments in abolition praxis would be useful both to academia and to grassroots abolitionist organizers.

Author's final thoughts

As discussed in the positionality section of the introduction of this thesis project, my experience of sexual victimization is at the root of this research. Selecting such an intimate topic has both contributed to my healing process while challenging me in various ways. For one, it allowed to normalize my difficult experience navigating the criminal justice system and to shed light on alternative praxis of justice and healing that are not grounded in furthering violence. It has also been a very triggering journey both as I uncovered the complexities and the harm produced by the criminal justice system, and as I discussed my research with peers, family, and strangers. Conversations about prison and police abolition consistently raised the following question: "what about rapists?"

Prison and police produce and reinforce many forms of violence, including sexual violence, while using survivors of sexual violence to justify its existence. The fear of the "dangerous few" has been weaponized to justify a criminal justice system that is not broken but doing exactly what it is supposed to do: instigating significant violence for many people while doing little to address the violence experienced by those who are harmed. Rape triggers discomfort and moral outrage; yet, shared understanding of what sexual harm *is* has been misconstrued by the criminal justice system and the notion that rapists are roaming our streets.

The figure of the rapist allows us to dissociate ourselves from the potential that we have also caused harm. In other words, the victim/offender binary erases the complexities and nuances of sexual harm. The figure of the rapist also reinforces the idea that sexual violence is an individual issue and not a social problem. This limits healing and transformation for both individuals involved in the harmful interaction. Abolition praxis encourages the experimenting of community-based

transformative justice practices to both prevent and address sexual violence without the intervention of police and prisons.

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