

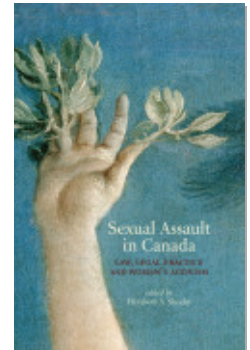


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26. All That Glitters Is Not Gold: The False Promise of Victim Impact Statements

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26.

All That Glitters Is Not Gold: The False Promise of Victim Impact Statements

Rakhi Ruparelia*

This chapter interrogates whether or not the criminal justice system holds potential for fairly representing women's experiences of harm while affirming their dignity, equality, and autonomy. Specifically, Rakhi Ruparelia questions the opportunity to present a "victim impact statement" (VIS) to the judge who is sentencing a sex offender. While not opposing a criminalization strategy, as do Alison Symington and Julie Desrosiers in the specific contexts discussed in their respective chapters, Rakhi expresses similar skepticism that the law permitting the filing of a VIS is actually premised on deeply conservative ideologies regarding who are "real victims" and what their proper role in the criminal justice system is. Like the Sexual Assault Evidence Kit originally touted as a positive development for women, the VIS is more likely to be used to discredit women's claims than to validate them when it comes to sexual assault. Rakhi explores systemic racism in sentencing and argues persuasively that Aboriginal and racialized men will bear the brunt of VIS use and that Aboriginal and racialized women have little if anything to gain from the VIS. The VIS, she argues, is really about appeasing "victims" and maintaining the individualized focus of the criminal justice system.

The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, ie who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed.¹

* I am deeply indebted to Liz Sheehy for encouraging me to pursue this project and for offering me invaluable support and feedback throughout the process. I also would like to thank Ruth Sullivan for her kindness and expert editorial assistance, and an anonymous reviewer for insightful comments.

1 L'Heureux-Dubé J in *R v Seaboyer*, [1991] 2 SCR 577 at para 140 [*Seaboyer*] (dissenting in part).

If government policy is shaped by the unacknowledged racial categorizations inculcated and acted on in daily life, the risk is substantial that government policy reflecting racialist preferences will, in the end, prove racially oppressive.²

The last few decades have brought increasing attention to the experiences of victims in the Canadian criminal justice system. Such experiences have been commonly referred to as a “second victimization” given the insensitive treatment often suffered by victims of crime. Growing awareness of secondary victimization and the backlash against what is perceived as an expansion of the rights of the accused have catalyzed political momentum for the victims’ rights movement.

The “plight” of the victim has become a popular cause for interests across the political spectrum. It appeals as equally to the liberal call for increased sensitivity to the needs of victims as it does to the conservative law and order approach, which seeks harsher penalties for accused persons. Indeed, politically, victims’ rights are often pitted directly against those of the accused.³ Policies to get tough on criminals have neatly coincided with an apparent concern for the victim.

In response to lobbying efforts by victims’ rights groups over the years, the *Criminal Code of Canada* now offers victims of crime the opportunity to submit a written victim impact statement and to present it orally at the sentencing hearing.⁴ Victim impact statements are intended to relate to the sentencing judge the harm inflicted upon the victim by providing an assessment of the physical, financial, and psychological effects of the crime. Judges “shall consider” such statements “for the purpose of determining the sentence to be imposed on an offender.”⁵ This right has been heralded as one of the most significant victories of the victims’ rights movement.

2 Stephen L Carter, “When Victims Happen to be Black” (1988) 97 Yale LJ 420 at 436.

3 For example, see comments offered by various Members of Parliament during debate on the motion to create a victims’ rights bill. As Mr Grant Hill of the Reform party stated: “Reformers, every one of us, stand here today saying that if the rights of the victim collide with the rights of the perpetrator, the rights of the victim shall take precedence.” *House of Commons Debates (Hansard)*, No 35 (29 April 1996) at 1350. Similarly, Mr Leon E Benoit, also of the Reform party, described the justice system as giving “too high a priority to the rights of the accused and the criminal. Their rights are put higher than the rights of citizens and victims to feel safe and be safe.” *House of Commons Debates (Hansard)*, No 141 (10 March 1997) at 1254.

4 *Criminal Code*, RSC 1985, c C-46, s 722.

5 *Ibid* at s 722(1).

In my view, the use of victim impact statements as a response to secondary victimization is misguided and problematic, particularly for women who have been raped. It is a token and flawed attempt to meaningfully include victims of crime in the process: it does little to address the true needs of complainants. Rather, it tackles the issue of victim involvement only insofar as is necessary to appease political pressures. It fails to challenge the status quo in any significant way by leaving the sources of crime unaddressed. Victim impact statements are the product of the victims' rights movement, not feminist advocacy;⁶ they do not reflect anti-racist, feminist objectives. Sexual assault complainants and other marginalized victims, who are not reflected in the victims' rights agenda, have little to gain from the availability of victim impact statements.

In this paper, I will argue that victim impact statements are not useful for women who have been raped and they risk causing further harm to racialized and other marginalized women. This is because they inevitably play into and potentially reinforce the sexist and racist stereotypes entrenched in the criminal justice system that apply to both victim and accused. Any potential benefit of victim impact statements is available only to a narrow category of "ideal" victims, who are defined in terms of their identity, the type of offence committed against them, and the identity of the offender.

Victims of gendered violence, especially those from racialized communities, including Aboriginal ones, have the least to gain from the availability of victim impact statements, and racialized offenders have the most to lose. Even for the narrow category of "ideal" victims, the usefulness of victim impact statements is questionable. The main beneficiary of victim impact statements appears to be the criminal justice system itself, which secures the co-operation of victims who choose to exercise their "rights" as victims and silences those who "choose" not to exercise their rights.

6 Edna Erez notes that "[v]ictim input rights have been particularly criticized for their presumed alliance with, or exploitation by, 'law and order' campaigns." Edna Erez, "Integrating a Victim Perspective Through Victim Impact Statements" in Adam Crawford & Jo Goodey, eds, *Integrating a Victim Perspective within Criminal Justice: International Debates* (Burlington, VT: Ashgate Publishing, 2000) 165 at 168. For a general discussion on why feminists oppose law and order agendas, see also Lynne Henderson, "Co-Opting Compassion: The Federal Victim's Rights Amendment" (1998) 10 St Thomas L Rev 579; Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 CJLS 75.

In the first section, I examine social notions of victimhood, both as a status and a label, and certain barriers to achieving “victim” status. Specifically, I consider the construction of the ideal victim through a critical race feminist lens and reflect on what this means for sexual assault complainants. I also look at legal constructions of victim hierarchy, using US data on sentencing that shows the role of victim and offender race in death penalty and rape cases. In the second section, I examine the alleged benefits of victim impact statements and their potential impact on sentencing. I question the likelihood of victims of rape, particularly marginalized women, reaping any such benefit. I also discuss the ways in which victim impact statements may be improperly considered by judges, drawing from both American and Canadian examples. I conclude that given the invidiousness of discrimination and its permeation into every aspect of our criminal justice system, we have no reason to believe that the use of victim impact statements can be immune from racial, class, and gender biases. The appropriateness of victim impact statements at sentencing is questionable for any crime; however, victim impact statements are particularly dangerous for sexual assault.

WHO IS A VICTIM?

In ordinary language use, a victim is a person who has suffered loss or injury as a result of something outside his or her control. We speak of victims of crime, victims of war, and victims of circumstance. In different contexts, the word carries different denotations and associations. In some, it is a status to be aspired to; in others a label to be shunned.

Victim as Status

In the context of the victims’ rights movement, being a victim is a status to be aspired to in that it confers rights and it is something for which one must qualify. Robert Elias points out that in this context the state is prepared to recognize someone as victim only if their injury or loss can be acknowledged without challenging the status quo.⁷ As a result, the emphasis of victims’ rights movements and the corresponding services and programs offered to victims is on individuals who can demonstrate immediately perceptible harm resulting from a recognized crime.⁸ In these circumstances, the harm can be directly at-

7 Robert Elias, “Community Control, Criminal Justice and Victim Services” in Ezzat A Fattah, ed, *From Crime Policy to Victim Policy: Reorienting the Justice System* (Basingstoke: MacMillan Press, 1986) 290 at 301.

8 Inkeri Anttila, “From Crime Policy to Victim Policy” in Fattah, *ibid*, 237 at 244.

tributed to the actions of the individual offender; other (more systemic) factors are not implicated. This analysis is borne out by section 722 of the *Criminal Code of Canada*, which entitles a person to prepare a victim impact statement only if the person is the victim of an offence. Within this context, as defined in subsection 722(4), “victim”

- (a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
- (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1) [victim impact statement], includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

According to this definition, a victim is the person or the family of a person who was the target of a crime that has been the subject of a criminal conviction. These are persons who have suffered harm through no fault of their own and entirely because of the wrongful act of the offender. To the extent the victim is innocent and undeserving of the harm she has suffered, the criminal is deserving of condemnation and the crime and its impact is deserving of attention.

A regime of this sort serves a number of purposes. First, it ties the concept of victim to the concept of crime — a concept that is carefully controlled by the existing power structure.⁹ Second, it deflects attention away from state action or inaction that results in injury or loss to marginalized groups.¹⁰ As a result, people are not officially recognized as being harmed by state violence, war, patriarchy, racism, colonialism, inequality, or poverty since these wrongs incriminate the state. Narrowing the definition in such a way allows state actors such as the military, the police, or other criminal justice officials to avoid being identified as sources of injury and loss. Focusing on individual “deviant” offenders is a safe way to address the issue of victims’ rights without challenging an important source of criminality. In the context of sexual assault, this diversion of blame absolves the state of responsibility for its role in condoning sexual assault through its creation and perpetuation

⁹ Elias, *supra* note 7 at 301.

¹⁰ *Ibid.*

of gender and racial inequality.

Thus, one reason that feminist interests do not converge with those of the victims' rights movement is because of the latter's refusal to recognize systems of domination, such as patriarchy, white supremacy, and capitalism, as root causes of violence against women. As Sandra Walklate notes, the term victim is "sterile," specifically in its inability to capture the processes of victimization.¹¹ Universalizing causes and experiences of victimization through a single label obscures the important distinctions that exist between various types of crime. All victims are not the same. And more importantly for the purposes of this paper, "[s]exual assault is not like any other crime."¹² Unlike other violent crimes, as Madame Justice L'Heureux-Dubé noted in *Seaboyer*, sexual assault is perpetrated largely by men against women, is mostly unreported, and is subject to extremely low prosecution and conviction rates.¹³ Furthermore, "[p]erhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society."¹⁴ Sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women."¹⁵

Focusing on the "victim" also takes attention away from the abuser, thus facilitating victim-blaming attitudes. For example, society frequently questions why a woman remains in an abusive relationship, but rarely asks why a man abuses his intimate partner. Similarly, women who have been sexually assaulted are scrutinized for their own role in the assault. This narrow focus ignores the larger social structures that enable marginalized groups, including women, to be victimized in the first place.

Victim as Label

While achieving the status of victim may entitle a person to benefits, it may also expose the person to negative stereotyping and a negative self-image. It is not surprising that some participants in a Canadian focus group on victim impact statements resisted the term "victim" and

11 Sandra Walklate, *Imagining the Victim of Crime* (Maidenhead, UK: Open University Press, 2007) at 27.

12 *Seaboyer*, *supra* note 1 at para 137 (L'Heureux-Dubé J, dissenting in part).

13 *Ibid.*

14 *Ibid.*

15 *R v Osolin*, [1993] 4 SCR 595 at para 165 [per Cory J].

instead suggested the statements be called “crime impact statements.”¹⁶

Identifying oneself as a victim can be disempowering. David Weisstub notes that we consider victims to be in some way subhuman, in need of our care and assistance.¹⁷ As a result, victimization not only violates the moral autonomy of another person; it also makes that person an “ineffectual and submissive object of our benevolence.”¹⁸ For women in particular, “the passivity and powerlessness associated with being a victim are also associated with being female.”¹⁹ Yet at the same time, “rejecting victim talk may lead to blaming powerless people for their powerlessness.”²⁰ While a preference for the term “survivor” has emerged within the feminist movement in an attempt “to capture women’s resistance to their structural powerlessness and consequent potential victimization,”²¹ as Martha Minow notes, “[v]ictimhood remains central, despite the use of survivor language.”²²

The politics of victim terminology are complicated, and the label of “victim” can be troubling. While the victims’ rights movement has embraced the term, it undoubtedly deters some from submitting a victim impact statement. While I share concerns about the term victim, it is the language used in the *Criminal Code* and thus will be language that is referenced throughout this paper.

Social Understandings of “Victim” Status: The Ideal Victim

It is necessary to be the victim of a crime in order to be assisted by the criminal justice system. However, all victims are not created equal. As Walklate observes, “becoming a victim is neither simple nor straightforward.”²³ Rather, achieving victim status involves a process that requires not only recognition of one’s own victimization but also

16 Department of Justice, *Summary Report on Victim Impact Statement Focus Group* by Colin Meredith & Chantal Paquette (Ottawa: Department of Justice, August 2001) at 23.

17 David N Weisstub, “Victims of Crime in the Criminal Justice System” in Fattah, *supra* note 7, 191 at 195–96.

18 *Ibid* at 196.

19 Walklate, *supra* note 11 at 27.

20 Martha Minow, “Surviving Victim Talk” (1993) 40 *UCLA L Rev* 1411 at 1420.

21 Walklate, *supra* note 11 at 27.

22 Minow, *supra* note 20 at 1426. Jane Doe also takes issue with the label “survivor.” She explains that she “was already surviving the normal pain and hardships of life” before she was raped. Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Random House, 2003) at 120.

23 Walklate, *supra* note 11 at 28.

social acknowledgement of that victimization.²⁴ This begs the question: what makes a “good” victim or someone worthy of assistance?

As Lynne Henderson remarks, “the image of the victim has become a blameless, pure stereotype, with whom all can identify.”²⁵ Some victims are viewed as more sympathetic than others, a reality that Eamonn Carrabine refers to as a “hierarchy of victimization.”²⁶ As Walklate explains: “At the bottom of this hierarchy would be the homeless, the drug addict, the street prostitute — all those groups of people for whom it is presumed that victimization is endemic to their lifestyle, thus rendering any claim to victim status a highly problematic one.”²⁷

Nils Christie describes the “ideal” victim as a person or category of individuals who is given “complete and legitimate status” of victim when affected by crime.²⁸ He offers the example of the “little old lady” who is attacked by an unknown assailant in broad daylight while walking home from caring for her sick sister.²⁹ In this example, the victim is weak (she is old), she is engaged in a respectable task (that of caring for a sick relative), and cannot be blamed for being where she is (on the street in the middle of the day). Importantly, Christie points out the crucial role that the offender plays in slotting a given victim into the hierarchy of victimization. For a woman to be the ideal victim, she also needs to be violated by the ideal offender, who in this case is “big and bad,” and unknown to her.³⁰ It is crucial that the offender be characterized as different from the victim, seemingly dangerous and bordering on non-human.³¹

The Non-Ideal Victim

Christie’s paradigm is useful for considering the role of race in the construction of the ideal victim and ideal offender. In terms of the weakness requirement, the general threat that dominant society feels from marginalized groups makes racialized people unsympathetic and a group to be feared rather than protected. The element of victim weak-

24 *Ibid.*

25 Lynne Henderson, “The Wrongs of Victims’ Rights” (1985) 37 *Stan L Rev* 937 at 951.

26 Eamonn Carrabine, *Criminology: A Sociological Introduction* (Florence, KY: Routledge, 2004) at 115.

27 Walklate, *supra* note 11 at 28.

28 Nils Christie, “The Ideal Victim,” in Fattah, ed, *supra* note 7, 17 at 18.

29 *Ibid* at 18–19.

30 *Ibid* at 19.

31 *Ibid* at 26.

ness must also be understood as culturally defined and reflective of a hegemonic expectation of appropriate victim behaviour. For individuals who do not react in a manner consistent with weakness, the genuineness of their victimization and its impact may be challenged.

Similarly, the situational requirement that the victim be carrying out a respectable task in a location where she cannot be blamed for being has serious implications for a racialized person and particularly a racialized or Aboriginal woman who has been sexually assaulted. What is considered respectable and blameworthy is determined from dominant raced, gendered, and classed perspectives. The luxury of being able to protect oneself from dangerous conditions is not available to everyone, whether one is working in the sex trade or simply taking the bus at night. Victims will be blamed for being the target of crime if they are perceived to have engaged in behaviour that deviates from the culturally dominant norm.

A poignant example of the construction of the unsympathetic victim is offered by Sherene Razack in her insightful analysis of the brutal murder of Pamela George, an Aboriginal woman working as a prostitute, by two young middle-class white men.³² One of the men hid in the trunk while the other lured Pamela George into the car.³³ The men then drove Pamela George to an isolated area, and following oral sex, took turns beating her, after which they left her to die on the ground with her face in the mud. As Razack demonstrates, race “overdetermined” what brought Pamela George and her killers to this violent encounter, and race “overdetermined” how the men’s culpability was minimized.³⁴ Pamela George’s occasional work as a prostitute was viewed as inviting violence, while the white men’s participation in violent domination of an Aboriginal woman was viewed as natural. As Razack notes, both the Crown and the defence suggested the fact that Pamela George was engaged in prostitution was relevant. The judge instructed the jurors to keep this in mind during their deliberations, a direction that the Court of Appeal found did not degrade Pamela George.³⁵

As demonstrated in Pamela George’s case, and consistent with

32 Sherene H Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” (2000) 15 *CJLS* 91.

33 *R v Kummerfield*, [1998] 163 *Sask R* 257 at para 12. See also discussion in Razack, *ibid* at 125.

34 Razack, *supra* note 32 at 126.

35 *Kummerfield*, *supra* note 33 at para 64.

Christie's model of ideal victimization, the racial identity of the offender is important in determining victim status. The ideal victim needs to be harmed by a "bad man" in order to be sympathetic. Assumptions that racialized people, especially black and Aboriginal men, are inherently dangerous and violent, are deeply ingrained in our society. White men and women benefit from these constructions of racialized criminality that render them "innocent" in comparison. Our criminal justice system not only fails to challenge these notions, but is complicit in perpetuating white supremacy through its criminalization of racialized peoples and its differential treatment of racialized offenders.

In Pamela George's case, the brutality of her two white killers was minimized by the lawyers and the judge given the raced, gendered, and classed access to respectability the defendants enjoyed as young, economically privileged white men. In other words, Pamela George, a quintessentially "bad" victim as a racialized prostituted woman, was made an even worse victim by the "innocence" of her offenders, precluding her access to legitimate victim status. As Razack notes, "because Pamela George was considered to belong to a space of prostitution and Aboriginality, in which violence routinely occurs, while her killers were presumed to be far removed from this zone, the enormity of what was done to her and her family remained largely unacknowledged."³⁶ "The 'naturalness' of white innocence and Aboriginal degeneracy"³⁷ was left undisturbed. This understanding of innocence and degeneracy has also made it possible to ignore the hundreds of Aboriginal girls and women, many of whom were prostituted women, who have gone missing over the past three decades.³⁸

The Victim of Sexual Assault

The importance of the features in Christie's paradigm is amplified when the crime in question is a sexual assault. The victim of rape must effectively establish her weakness and her respectability and must show that

³⁶ Razack, *supra* note 32 at 125–26.

³⁷ *Ibid* at 127–28.

³⁸ See Yasmin Jiwani & Mary Lynn Young, "Missing and Murdered Women: Reproducing Marginality in News Discourse" (2006) 31 Can J Comm 895, for an interesting examination of the Vancouver news media's treatment of missing women from the Downtown Eastside. The authors argue "that prevailing and historically entrenched stereotypes about women, Aboriginality, and sex-trade work continue to demarcate the boundaries of 'respectability' and degeneracy, interlocking in ways that situate these women's lives, even after death, in the margins" (at 895).

her assailant is big, bad, dangerous and unknown to her.

Women who allege sexual assault are presumed to be lying. As Madame Justice L'Heureux-Dubé remarked: "The common law has always viewed victims of sexual assault with suspicion and distrust."³⁹ The myth that women often lie about sexual assault forms the basis of all other rape myths ingrained in our criminal justice system.⁴⁰ In this sense, women are presumed to be guilty of manufacturing their rape unless they can prove themselves "innocent." While a defendant is presumed innocent, "there is no presumption that the complainant is telling the truth."⁴¹ Thus, as Karen Busby observes: "One is not a victim until a conviction is entered."⁴² To describe someone as a victim before conviction would be contrary to the presumption of the accused's innocence.

While all complainants are considered "alleged" victims according to the *Criminal Code*,⁴³ sexual assault complainants are nonetheless distinguished from "real" victims, whether or not a conviction has been entered. This distinction was sharply exemplified during the parliamentary debates on the victims' rights bill that ultimately was enacted in 1999. Art Hanger, a Reform Party MP from Calgary, agreed with the general thrust of the proposed bill, but indicated his concern that "victims" in this context included sexual assault complainants. He stated: "One must admit that when it comes to some of the sexual abuse charges which have been laid not all complainants are true victims."⁴⁴ From his experience as a police officer, he suggested that "people" sometimes come forward with false accusations.

Women's victimization in the context of sexual assault is challenged in other ways as well. For example, women who know their rapists are viewed as less credible, despite the fact that women are far

39 *Seaboyer*, *supra* note 1 at para 165.

40 Karen Busby, "'Not a Victim Until a Conviction is Entered': Sexual Violence Prosecutions and Legal 'Truth'" in Elizabeth Comack, ed, *Locating Law: Race/ Class/ Gender Connections* (Halifax: Fernwood, 1999) 260 at 261.

41 *Ibid* at 262.

42 *Ibid*.

43 The *Criminal Code* defines "complainant" as "the victim of an alleged offence" (s 2). Madame Justice L'Heureux-Dubé rejected the term "alleged victim" in her opinion in *Seaboyer*, finding it problematic in its "presumption that the woman has nothing to complain of" (*Seaboyer*, *supra* note 1 at para 135, L'Heureux-Dubé J, dissenting in part).

44 *House of Commons Debates (Hansard)*, No 150 (7 April 1997) at 1555 (Art Hanger).

more likely to be sexually assaulted by someone they know than by a stranger.⁴⁵ The racial categorization of the woman who has been raped also plays a role in attributing blame in cases of acquaintance rape. One study found that white perceivers viewed black victims raped by a dating partner as more responsible than black victims of stranger rape. However, no distinction was made between white victims in parallel contexts.⁴⁶

Moreover, women are hyperscrutinized for any “risk-taking” behaviour that is perceived to have contributed to their assault, such as the consumption of drugs or alcohol. For Aboriginal women, as Margo Nightingale notes, being intoxicated at the time of the assault suggests they are “‘looser’ and less worthy of protection.”⁴⁷ Similarly, prostituted women, like Pamela George, are seen as blameworthy, inviting the violence they encounter. As Yasmin Jiwani explains, “[i]deologically, such stereotypes reinforce middle-class notions of propriety and hegemonic femininity,”⁴⁸ thus affirming the genuineness of some victimization but not others. Focusing on the characteristics and actions of individual sexual assault victims leaves women vulnerable to being labelled as either “innocent” or “blameworthy” victims,⁴⁹ a determination that will be affected by racism and other systems of oppression that make some women more sympathetic than others.

In a recent example of blaming the victim, Carleton University focused on what precautions a female student should have taken to prevent her sexual assault on campus. In its Statement of Defence against an action in negligence, the university argued that the student, after

45 Canadian Centre for Justice Statistics, *Canadian Centre for Justice Statistics Profile Series: Sexual Assault in Canada 2004 and 2007* by Shannon Brennan & Andrea Taylor-Butts (Ottawa: Minister of Industry, 2008) at 13 (“in cases where the relationship could be determined, police-reported data for 2007 show that the victim and accused were known to each other in 82% of sexual assault incidents”); Melanie Randall & Lori Haskell, “Sexual Violence in Women’s Lives: Findings from the Women’s Safety Project, a Community Based Survey” (1995) 1:1 *Violence Against Women* 19 (“Women are twice as likely to be sexually assaulted by a man known to them, than by a stranger”); *Changing the Landscape: Ending Violence — Achieving Equality: Final Report of the Canadian Panel on Violence Against Women* (Ottawa: Minister of Supply and Services, 1993) at 30 (31 percent of sexual assaults occur in a dating or acquaintance context).

46 Cynthia E Willis, “The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions” (1992) 26 *Sex Roles* 213 at 219.

47 Margo L Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” (1991) 23 *Ottawa L Rev* 71 at 98, 87–90.

48 Jiwani & Young, *supra* note 38 at 901.

49 Carrabine, *supra* note 26 at 116. See also Wendy Larcombe, “The ‘Ideal’ Victim v Successful Rape Complainants: Not What You Might Expect” (2002) 10:2 *Fem Legal Stud* 131.

choosing to remain on the premises alone, failed to keep a “proper lookout” for her own safety, and suggested, among other things, that she should have locked the door to the laboratory in which she was working late at night.⁵⁰ Similarly, a woman who was raped at gunpoint in front of her children in the parking garage of a Marriott hotel in Connecticut “failed to exercise due care for her own safety and the safety of her children and proper use of her sense and faculties,” according to the defence to the negligence action brought forth by the woman.⁵¹ There is no shortage of examples of women blamed for their own sexual assaults.

For women who have been sexually assaulted, the ideal victim requirement, and in particular the expectation that she be weak, poses a “curious paradox.”⁵² Whereas any deviation from scripts of powerlessness dictated by dominant norms of femininity is viewed as suspect, women still are expected to forcefully resist their attack in cases of rape. A lack of physical resistance, corroborated by bodily injuries, is typically equated with consent⁵³ and responsibility for the rape.⁵⁴ Consequently, it should not be surprising that women who suffer physical injuries are more likely to report their rape to the police than women who do not have physical corroboration of their assault.⁵⁵ Yet, women who do physically resist may be seen as less sympathetic for deviating from appropriate gender roles.⁵⁶ Ultimately, women who are raped are

50 Andrew Seymour, “Sex-assault victim sues Carleton; Woman claims security was inadequate; university says she didn’t do enough to protect herself” *The Ottawa Citizen* (7 August 2009) A1.

51 Thomas Heath, “Marriott Disowns One Hotel’s Defense in Rape Case” *The Washington Post* (19 August 2009) A16. The “victim-blaming” defence was eventually dropped.

52 Jan Jordan, *Serial Survivors: Women’s Narratives of Surviving Rape* (Sydney, Australia: Federation Press, 2008) at 14.

53 *Ibid.*

54 Jennifer Temkin & Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Portland: Hart Publishing, 2008) at 46. One study cited by Temkin also found that women seen as less physically attractive were viewed more negatively when they resisted their sexual assault (*Ibid.*).

55 See eg Janice Du Mont, Karen-Lee Miller & Terri L Myhr, “The Role of ‘Real Rape’ and ‘Real Victim’ Stereotypes in the Police Reporting Practices of Sexually Assaulted Women” (2003) 9 *Violence Against Women* 466 at 478 (finding in their study of a large urban centre in Ontario that “[w]omen who sustained bruises, lacerations, abrasions, bumps, internal injuries, and/or fractures were approximately three and one half times more likely to contact the police than those who were not clinically injured”; Margaret J McGregor *et al.*, “Why don’t more women report sexual assault to the police?” (2000) 162 *Can Med Assoc J* 659).

56 Temkin & Krahé, *supra* note 54 at 46.

judged harshly no matter what they do or do not do.

The same systems of oppression that deem some victims more blameworthy also render the same women more vulnerable. As Razack indicates, racialized women are viewed as “inherently less innocent and less worthy than white women, and the classic rape in legal discourse is the rape of a white woman.”⁵⁷ Similarly, Kimberlé Crenshaw argues:

[S]exualized images of race intersect with norms of women’s sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores. Thus Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot.⁵⁸

White women benefit from these dehumanizing constructions of racialized women, which make them “worthy” by comparison; white women’s experiences of victimization are thus privileged. The result is that only an exceptionally narrow class of “ideal” sexual assault complainants will ever have access to victim status. As Walklate notes, “[t]he power of such ‘ideal’ images results in some people being viewed as deserving and other people being viewed as undeserving victims who may never be labelled as victims.”⁵⁹

LEGAL UNDERSTANDINGS OF “VICTIM” STATUS: RACE AND VICTIM WORTH

The criminal justice system makes clear which victims are worth protecting by the way it treats them. In this section, I focus on how the courts value harm caused to white victims differently from victims who are racialized.

The most obvious examples emerge from the United States, where empirical research on race and criminal law is more extensive and available than in Canada. The Baldus study, reviewed by the US Su-

57 Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 2001) at 68. See also Veretta D Young, “Gender Expectations and their Impact on Black Female Offenders and Victims” (1986) 3 Just Q 305 at 323, for a discussion on how black women are characterized as “seductress,” and “loose, immoral and sexually depraved,” and therefore, incapable of being a legitimate rape victim.

58 Kimberlé W Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan L Rev 1241 at 1271.

59 Walklate, *supra* note 11 at 27.

preme Court in *McCleskey v Kemp*,⁶⁰ is one of the most comprehensive and well-known studies on race in the criminal justice system. David Baldus, Charles Pulaski and George Woodworth examined over 2,000 capital murder cases to determine the role of race in the imposition of the death penalty. They found that juries imposed the death penalty in 22 percent of cases involving black defendants and white victims; 8 percent of cases involving white defendants and white victims; 3 percent of cases involving white defendants and black victims; and only 1 percent of cases involving black defendants and black victims.⁶¹ Even after controlling for thirty-nine non-racial variables, the study found that capital defendants convicted of killing a white victim were more than 4.3 times likely to be sentenced to death than those convicted of killing a black victim.⁶² The authors concluded that race of the victim, more than any other factor, influenced prosecutors to seek the death penalty⁶³ and juries to impose it.⁶⁴ These findings were replicated in another study that considered persons executed between 1976 and 1997. Of the 403 persons executed during that period, 228 were white (56.6 percent), 147 were black (36.5 percent) and 23 were Latino (5.7 percent). However, the composition of the victims of those executed was more telling, with the 455 white victims constituting the vast majority at 83.2 percent.⁶⁵

Discrimination in the capital sentencing outcomes for defendants in

60 The study, David C Baldus, Charles A Pulaski & George Woodworth, *Equal Justice and the Death Penalty* (Boston: Northeastern University Press, 1990) was reviewed in *McCleskey v Kemp*, where the defendant's lawyer argued that his client's death sentence should be invalidated given there was a constitutionally impermissible risk that the race of both the defendant and the victim played a role in the decision to impose the death sentence. *McCleskey*, a black man, was convicted of killing a white police officer. Ultimately, the US Supreme Court rejected the challenge but did not question the validity of the study: 481 US 279 (1986).

61 *Ibid* at 286.

62 *Ibid* at 287.

63 *Ibid*. In the study, prosecutors sought the death penalty in 70 percent of cases involving black defendants and white victims; 32 percent of cases involving white defendants and white victims; 19 percent of cases involving white defendants and black victims; and 15 percent of cases involving black defendants and black victims.

64 For an interesting analysis of *McCleskey* from the perspective of its failure to recognize the harm done to black victims, see Randall L Kennedy, "McCleskey v Kemp: Race, Capital Punishment, and the Supreme Court" (1988) 101 Harv L Rev 1388.

65 NAACP Legal Defense and Education Fund, *Death Row USA. Reporter 1040* (1997), cited in Jeffrey J Pokorak, "Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors" (1998) 83 Cornell L Rev 1811 at 1812. Of the remaining victims, sixty-six were blacks (12.1 percent) and nineteen were Latinos (3.5 percent).

rape cases was no less startling. Of the 455 men executed between 1930 and 1967 on the basis of rape convictions,⁶⁶ 405 of them were black.⁶⁷ Between 1908 and 1949, no white man had been executed for rape, although forty-five black men had suffered that fate.⁶⁸ Again, the race of the victim appears to have been an important variable. Similarly, Marvin Wolfgang and Mark Riedel in an extensive study that looked at 1,265 rape cases between 1945 and 1965, found that black defendants convicted of raping white women were approximately eighteen times more likely to be sentenced to death than any other racial combination.⁶⁹ Indeed, as the studies indicate, the death penalty for rape cases appears to have been specifically used to target black men who raped white women.⁷⁰

Historically in the United States, as Angela Davis notes, “the fraudulent rape charge stands out as one of the most formidable artifices invented by racism.”⁷¹ Black rapist mythology “has been methodically conjured up whenever recurrent waves of violence and terror against the Black community have required convincing justifications.”⁷² All chivalrous measures to protect white women from the fabricated sexual threat posed by black men were deemed appropriate, thus justifying

66 The US Supreme Court in *Coker v Georgia*, 433 US 584 (1977) struck down the death penalty for the rape of an adult woman as “cruel and unusual” punishment, thus ending an expanding campaign to reform racially discriminatory sentencing practices for rape. See discussion in Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage Books, 1997) at 323–26.

67 These Justice Department statistics were cited by Justice Marshall in *Furman v Georgia*, 408 US 238 at 364 (1972).

68 Kennedy, *supra* note 66 at 312.

69 Marvin E Wolfgang & Mark Riedel, “Rape, Racial Discrimination, and the Death Penalty” in Hugo Adam Bedau & Chester M Pierce, eds, *Capital Punishment in the United States* (New York: AMS Press, 1976) at 111–12.

70 Both innocent and guilty black men were captured under strict and discriminatory rape laws. Moreover, in some cases where there was sexual contact, it was consensual. Given the social prohibition against interracial relationships, white women would have been reluctant to admit willingly participating in sexual relations with a black man. Moreover, as Kennedy notes, lawyers for black defendants accused of raping white women might have been reluctant to raise consent as an issue for fear of alienating the judge or jury who would have found the suggestion offensive. Kennedy, *supra* note 66 at 320. See also Jennifer Wriggins, “Rape, Racism, and the Law” (1983) 6 *Harv Women’s LJ* 103 at 111, for further discussion on how, in some cases, jurors were permitted to infer that a black man intended to rape a white woman based on race alone, given the assumption that a white woman would never consent to sex with a black man.

71 Angela Y Davis, *Women, Race & Class* (New York: Vintage Books, 1983) at 173.

72 *Ibid.*

the lynching of black men.⁷³ In the aftermath of the civil war, lynching, combined with the continued rape of black women, ensured the political domination of black people as a whole.⁷⁴

In addition to punishing black men, the “myth of the Black rapist” has been promulgated to legitimize the rape of black women, or as Davis bluntly explains, “the mythical rapist implies the mythical whore.”⁷⁵ She observes:

The fictional image of the Black man as rapist has always strengthened its inseparable companion: the image of the Black woman as chronically promiscuous. For once the notion is accepted that Black men harbor irresistible and animal-like sexual urges, the entire race is invested with bestiality.... Viewed as “loose women” and whores, Black women’s cries of rape would necessarily lack legitimacy.⁷⁶

As Davis notes, “[o]ne of racism’s salient historical features has always been the assumption that white men — especially those who wield economic power — possess an incontestable right of access to Black women’s bodies.”⁷⁷ During slavery, black women could be raped with relative impunity. Sexual coercion was a defining feature of the slaveowner’s relationship with his female slaves, a tool, Davis notes, used not only to expand property by white slaveowners but also to exercise domination over black people.⁷⁸ Until the Civil War, many states overtly differentiated between sexual assaults committed by and against blacks and whites. For example, Georgia law provided that the rape of a white woman by a black man “shall be” punishable by death, while the rape of a white woman by anyone else was punishable by imprisonment for two to twenty years.⁷⁹ For the rape of a black woman, punishment was “by fine and imprisonment, at the discretion of the court.”⁸⁰ The imple-

73 *Ibid* at 189–90; Wriggins, *supra* note 70 at 107–09.

74 Davis, *ibid* at 185.

75 *Ibid* at 191.

76 *Ibid* at 182.

77 *Ibid* at 175.

78 *Ibid*.

79 Stephen B Bright, “Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty” (1994–1995) 35 Santa Clara L Rev 433 at 439.

mentation of more facially neutral laws after the Civil War made little practical difference, as the studies above indicate.

This enduring racist legacy haunts the differential treatment raped women receive in the criminal justice system. Several important studies have found that black men who rape white women continue to receive more severe punishments than black men convicted of raping black women or white men convicted of raping white women. Gary La-Free found that the racial composition of the victim–defendant dyad, and not the individual race of the defendant or victim, was the most important racial consideration in processing decisions, predicting charge seriousness, felony screening, sentence type, place of incarceration, and sentence length.⁸¹ White on white rape was considered less serious than black on white rape, but more serious than black on black rape. Anthony Walsh conducted a similar study, but also considered the effect of the relationship between the defendant and the victim.⁸² He found that black men who had sexually assaulted white women, regardless of whether the victim was a stranger or an acquaintance, received significantly harsher penalties than blacks who had sexually assaulted blacks, or whites who had sexually assaulted whites.⁸³ Moreover, in cases of intraracial rape, black defendants received more lenient sentences when they were acquainted with their victim.

80 *Ibid.* For examples in other states, see Wriggins, *supra* note 70 at 105, n 8.

81 Gary D LaFree, “The Effect of Sexual Stratification by Race on Official Reactions to Rape” (1980) 45 *Am Sociological Rev* 842 at 852. His study examined 881 suspects charged with “forcible sexual offenses” in the US between 1970 and 1975.

82 Anthony Walsh, “The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race” (1987) 25 *Criminol* 153. He examined more than 400 cases of sexual assault in Ohio between 1978 and 1983.

83 Walsh, *ibid* at 161. Walsh found that blacks who sexually assaulted whites were over four times more likely to be imprisoned than blacks who sexually assaulted blacks, and twice as likely to be sentenced to prison as whites who had sexually assaulted whites.

These studies, the results of which have been replicated elsewhere,⁸⁴ should alarm us for many reasons, including the harsher penalties imposed on racialized men. But we should also be disturbed by the devaluation of racialized women as victims of rape. As Crenshaw has noted:

Black women are not discriminated against simply because white men can rape them with little sanction and be punished less than Black men who rape white women, or because white men who rape them are not punished the same as white men who rape white women. Black women are also discriminated against because intraracial rape of white women is treated more seriously than intraracial rape of Black women.⁸⁵

Research has confirmed this devaluation. One study involving a hypothetical date rape scenario found that rape was considered less serious when the victim was a black woman than when the victim was white. If the woman was black, respondents were less likely to define the incident as a crime and less likely to suggest that the perpetrator be held legally accountable for his actions.⁸⁶

While the United States has a distinct history of racism that differs in significant ways from that of Canada,⁸⁷ we should not fool ourselves

84 See eg Cassia Spohn & Jeffrey Spears, "The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions" (1996) 13 *Just Q* 649. They found in their study of 1,152 sexual assault cases in Detroit that blacks who sexually assaulted white women received considerably longer sentences than in cases of intraracial rape. They also found that the impact of race was complicated by evidence that challenged victim behaviour and credibility, which tended to result in more lenient outcomes. See also: Cassia Spohn, "Crime and the Social Control of Blacks: Offender/Victim Race and the Sentencing of Violent Offenders" in George S Bridges & Martha A Myers, eds, *Inequality, Crime, and Social Control* (Boulder, CO: Westview Press, 1994) 249 (finding black men who sexually assaulted white women faced a greater risk of incarceration than in cases of black or white intraracial rape, particularly where the offender and victim were acquainted); Robert W Hymes *et al*, "Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions" (1993) 133 *J Soc Psychol* 627 at 628, for a useful overview of research done in this area.

85 Crenshaw, *supra* note 58 at 1277.

86 Linda A Foley *et al*, "Date Rape: Effects of Race of Assailant and Victim and Gender of Subjects on Perceptions" (1995) 21 *J Black Psychol* 6.

87 Although our histories of racial discrimination are distinct, there is some overlap in our legacies of slavery and racial segregation, a part of the Canadian story that is often glossed over. For brief but useful overviews of the legal history of racism in Canada, see: Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (Toronto: Ontario Human Rights Commission, June 2005) at 5–8, online: <<http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy>>; Beverley

into thinking that our own situation is any less problematic. Until the death penalty was abolished in 1976, it was implemented in discriminatory ways in Canada as well. Carolyn Strange notes that racist paternalism in clemency decisions sometimes spared the lives of Aboriginal convicted persons who were considered “savage” and intellectually and morally inferior to whites. However, executions were rarely commuted if the victims were white.⁸⁸ Kenneth Avio, who studied executive clemency decisions between 1926 and 1957, found that an Aboriginal person convicted of killing another Aboriginal person faced a 62 percent risk of execution. If the victim was white, this risk jumped to 96 percent. In contrast, an Anglo-Canadian convicted of killing an Aboriginal person faced an execution risk of only 21 percent.⁸⁹ As Strange remarks: “Capital punishment could be an instrument of racist terror, yet selective mercy toward Aboriginal capital offenders was no less racially informed or politically hued.”⁹⁰

Our situation resembles the American one in other compelling ways as well. Historically, sexual violence against Aboriginal women was a strategy of domination by settlers in the process of colonization,⁹¹ not unlike the tactics used against black communities in the United States. Additionally, racism continues to be a salient feature of our criminal justice system, both in its targeting and punishment of racialized individuals as offenders, and in its callous disregard for the harm racialized people suffer as victims of crime, particularly racialized women who have been sexually assaulted. This is a reality at every stage of the criminal justice process, including policing. As Yasmin Jiwani remarks, “[w]hile over-policing contributes to a greater scrutiny and criminalization of racialized peoples, under-protection renders the victims of crime within racialized groups more vulnerable.”⁹² In the courtroom, racialized victims face a similar fate.

McLachlin, “Racism and the Law: The Canadian Experience” (2002) 1 *JL & Equality* 7 at 10–14. For a more extensive overview, see Clayton James Mosher, *Discrimination and Denial: Systemic Racism in Ontario’s Legal and Criminal Justice Systems, 1892–1961* (Toronto: University of Toronto Press, 1998) for a historical account of discrimination within Ontario’s criminal justice system. No historical (or contemporary) picture of racism in Canada is complete without recognition of the role of colonialism.

88 Carolyn Strange, “The Lottery of Death: Capital Punishment, 1867–1976” (1995) 23 *Man LJ* 594 at 603–05.

89 Kenneth L Avio, “The Quality of Mercy: Exercise of the Royal Prerogative in Canada” (1987) 13 *Can Pub Pol’y* 366 at 372.

90 Strange, *supra* note 88 at 604.

91 Razack, *supra* note 32 at 130.

92 Yasmin Jiwani, “The Criminalization of ‘Race’/The Racialization of Crime” in Wendy Chan & Kiran Mirchandani, eds, *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Scarborough: Broadview Press, 2002) 45 at 73.

As suggested above, the gendered counterpart to the violent black or Aboriginal male stereotype is the racialized female body upon which violence may be perpetrated without sanction.⁹³ The harm suffered by racialized women as victims of sexual assault is perceived to be less serious by the white mainstream. Emma Larocque described violence against Aboriginal girls and women to the Aboriginal Justice Inquiry of Manitoba in the following way:

the portrayal of the squaw is one of the most degraded, most despised and most dehumanized anywhere in the world. The “squaw” is the female counterpart to the Indian male “savage” and as such she has no human face; she is lustful, immoral, unfeeling and dirty. Such grotesque dehumanization has rendered all Native women and girls vulnerable to gross physical, psychological and sexual violence.⁹⁴

In the courtroom, this dehumanization is manifested in the way that male judges continue to minimize the harm suffered by Aboriginal women.⁹⁵ A well-publicized example of this diminishment of injury was evident in the comments of Judge Michel Bourassa following a particularly lenient sentencing order for the sexual assault of a young Aboriginal girl by a former politician. Judge Bourassa suggested that rapes in the (predominantly Aboriginal) North were less violent than in southern Canada because “[t]he majority of rapes in the Northwest Territories occur when the woman is drunk and passed out. A man comes along, sees a pair of hips and helps himself.”⁹⁶ He further stated: “That contrasts sharply to the cases I dealt with before (in southern Canada) of the dainty co-ed who gets jumped from behind.”⁹⁷ His remarks support Razack’s contention that Aboriginal women are viewed as “inherently rapeable.”⁹⁸ Moreover, courts fail to recognize that Aboriginal and

93 Razack, *supra* note 57 at 69.

94 Cited in Razack, *ibid.*

95 Nightingale, *supra* note 47 at 84–91.

96 Laurie Sarkadi, “Rape in North different, judge says” *Edmonton Journal* (20 December 1989) A1.

97 *Ibid.* His comments were not found to constitute judicial “misbehaviour” when later investigated. For a discussion of these comments as well as an overview of other cases involving the sexual assault of Inuit women, see Teresa Nahanee, “Sexual Assault of Inuit Females: A Comment on ‘Cultural Bias’” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 192.

98 Razack, *supra* note 57 at 69.

other racialized women may experience unique forms of harm.⁹⁹ Judicial reliance on degrading stereotypes allows both Aboriginal and white men to be absolved of responsibility for the rape of Aboriginal women.

Nothing in this discussion should suggest that harsher punishments are necessarily the solution to discrimination against racialized victims.¹⁰⁰ To the contrary, feminists have warned against adopting the law and order strategy of seeking more severe penalties for offenders. Tougher penalties disproportionately impact racialized offenders, who already suffer racist treatment at the hands of the criminal justice system. Racialized offenders are victims too, both inside and outside of the criminal justice system,¹⁰¹ although their victimization remains unacknowledged in victims' rights campaigns.

Moreover, as critics of the law and order agenda have cautioned, the line between victim and offender in the criminal justice system is a blurry one, particularly for women and members of racialized communities. The Native Women's Association of Canada notes, "The law rather than protecting women vilifies, criminalizes and imprisons them,"¹⁰² subjecting poor and racialized women to "hyper-responsibilization" for their lived realities of marginalization and victimization.¹⁰³ Criminalization has been the reality for women who act violently in self-defence against an abuser. As Donna Edwards of the National Network to End Domestic Violence remarked at a Senate hearing on

99 Nightingale notes that Aboriginal women may be ostracized from their families or communities after being sexually assaulted or after reporting it to the police. Moreover, in isolated communities, women who have been sexually assaulted may not be able to access support or counselling services (*supra* note 47 at 86). Immigrant women often face similar threats of ostracism from their communities, as well as difficulty accessing culturally and linguistically appropriate services. Further, some immigrant women may fear deportation if they report abusive partners or family members.

100 Randall Kennedy in his discussion of *McCleskey* reflects on the challenge of remedying the devaluation of black victims when equal treatment would result in harsher penalties for black offenders (*supra* note 64 at 1392–93).

101 See Fran Sugar & Lana Fox, "Survey of Federally Sentenced Aboriginal Women in the Community" (Ottawa: Native Women's Association of Canada, 1990), online: <<http://www.csc-scc.gc.ca/text/prgrm/fsw/nativesurvey/surveye03-eng.shtml>>; Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 173; Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) at 211.

102 Native Women's Association of Canada, "Aboriginal Women in the Canadian Justice System: A Policy Paper" (2008) at 5, online: <<http://www.nwac-hq.org/en/documents/AboriginalWomenintheCanadianJusticeSystem.pdf>> [NWAC].

103 *Ibid.*

a proposed constitutional amendment to protect victims of crime in the US, “There could be but a day’s difference between the battered woman ‘victim’ and the battered woman ‘defendant.’”¹⁰⁴ Given the reality that women engage with criminal justice as both offenders and victims, often simultaneously, we must, as Elizabeth Sheehy argues, employ an equality analysis when evaluating criminal law reforms. She reminds us that “women’s experience of criminal law is mediated through social class, racism, lesbophobia, and disabilityism,”¹⁰⁵ and that “calls for law and order or victim’s rights initiatives undermine democratic values and institutions, reinforce state power and relations of dominance, and divide us further along those lines.”¹⁰⁶

In the next section, I will explore how the context described above should inform our analysis of victim impact statements.

VICTIM IMPACT STATEMENTS: WHAT ARE THE BENEFITS AND WHO REAPS THEM?

Victim impact statements allow victims of crime to participate in the criminal justice system. It remains to be seen whether this participation is beneficial to the victim or useful to the system, or whether it does or should have an impact on sentencing.

Impact on the Victim

In delivering a victim impact statement, a victim of crime assumes a public role in the sentencing process. She tells her story in her own words, describes her experience of the crime and the loss or harm she has suffered at the hands of the offender. In principle, by telling her story at this point in the trial, after conviction, the victim’s claim to victimization is vindicated. The wrong done to her is publicly acknowledged and she receives the attention and sympathy she deserves. Her own innocence is confirmed. A public vindication of this sort is likely to be gratifying and may even be therapeutic for the victim. Despite this potential benefit, participation rates in Canada appear to be very low.¹⁰⁷ There are a number of possible explanations for this.

First, there is the matter of prosecutorial discretion. Generally, stud-

104 Cited in Henderson, *supra* note 6 at 586.

105 Elizabeth Sheehy, “Equality Without Democratic Values? Why Feminists Oppose the Criminal Procedure Reforms” (1999) 19 *Can Woman Stud* 6 at 14.

106 *Ibid.*

107 Julian V Roberts & Allen Edgar, “Victim Impact Statements at Sentencing: Perceptions of the Judiciary in Canada” (2003) 1:4 *Int’l J of Victimology* 111 at 118.

ies have indicated that few victims exercise their right to submit a victim impact statement unless specifically informed of this opportunity and invited to participate by the prosecutor.¹⁰⁸ That prosecutors are to a great extent the guardians of the victim impact statement regime gives rise to concerns about the scope of discretion in this context. Prosecutorial discretion has been identified as a critical site for racially discriminatory practices.¹⁰⁹ One can expect that some victims are deemed more worthy than others and thus given more encouragement to participate.¹¹⁰ More generally, prosecutors may find white victims more credible than racialized victims, or “their troubles more worthy of full prosecution.”¹¹¹

Second, there are cultural reasons why some women may decline to participate. The notion that describing the harm one has suffered in a public way is therapeutic turns on a particular conceptualization of healing that is not shared across (or within) cultures. For some, to express victimization in a public forum may be seen as improper, stigmatizing, and, in some cases, downright dangerous. This is especially so for women who have been abused.¹¹²

There is also the important issue of trust. To ask someone to indi-

108 Dina R Hellerstein, “The Victim Impact Statements: Reform or Reprisal?” (1989) 27 *Am Crim L Rev* 391 at 399.

109 See eg Angela J Davis, “Prosecution and Race: The Power and Privilege of Discretion” (1998) 67 *Fordham L Rev* 13; Sheri Lynn Johnson, “Unconscious Racism and the Criminal Law” (1988) 73 *Cornell L Rev* 1016; Pokorak, *supra* note 65; Raymond Pateroster, “Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina” (1983) 74 *J Crim L & Criminology* 754.

110 Some studies have found that prosecutors selectively use victim impact statements depending on how helpful the statement will be to their case. See eg Madeline Henley, Robert C Davis & Barbara E Smith, “The Reactions of Prosecutors and Judges to Victim Impact Statements” (1994) 3 *Int’l Rev of Victimology* 83 at 88–89. See also Department of Justice, *Assessment of the Victim Impact Statement in British Columbia* by Tim Roberts (Ottawa: Department of Justice, 1992), cited in Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 291. In his study in British Columbia, Roberts found that victim impact statements were obtained in only 2–6 percent of cases and filed in court in only 1–2 percent of cases. The statements were most likely to be used when the prosecutor found them to be important.

111 Martha A Myers & John Hagan, “Private and Public Trouble: Prosecutors and the Allocation of Court Resources” (1979) 26 *Social Problems* 439 at 447.

112 As one American judge noted in a study on victim impact statements: “If she is really the victim of on-going abuse, I think that standing up in the courtroom puts her in harm’s way” in Mary Lay Schuster & Amy Propen, 2006 *WATCH Victim Impact Study* (1 August 2006) at 10, online: <<http://www.watchmn.org/reports.html>>.

cate how she has been harmed by an offender is to ask her not only to identify herself as a “victim” but to expose her vulnerability publicly: to the court, to her family and friends, and to the offender. To disclose this intimate harm to the court requires trust, a trust that many racialized people, women who have been sexually assaulted, and others who have had negative experiences with the justice system simply do not enjoy. Women will avail themselves of this opportunity to participate in the sentencing process only if they feel confident that their voices will be heard and their experiences validated.

Given the widespread discrimination in criminal justice administration and the negative encounters that racialized individuals have with the system both as offenders and victims, it should come as no surprise that few racialized women feel safe in the system. It would be shocking if they did. As the Commission on Systemic Racism in the Ontario Criminal Justice System stated:

Many racialized women do not see the criminal justice system as an ally, but as an overly intrusive and destructive force ... They want in particular to limit their subsequent involvement in the criminal justice system, which they may perceive as alien, overwhelming, and a source of yet more problems.¹¹³

While the Commission focused primarily on the experiences of black communities, the picture is no more optimistic for Aboriginal peoples. Despite the fact that Aboriginal women are five times more likely to be sexually assaulted than non-Aboriginal women, under-reporting is particularly pronounced within this community, due in part to a lack of confidence in the system.¹¹⁴ This lack of confidence stems not only from discriminatory treatment within the system, but also from an incongruence between Canadian criminal justice and Aboriginal values.¹¹⁵ As Patricia Monture-Angus notes, the failure to take responsibility for the ongoing perpetuation of colonialism “magnifies the contempt that Aboriginal peoples have for a system that is neither fair and

113 Commission, *supra* note 101 at 211.

114 Department of Justice, *A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 to 2001* by Larry Chartrand & Celeste McKay (Ottawa: Department of Justice Policy Centre for Victim Issues, 2006) cited in NWAC, *supra* note 102 at 2.

115 Monture-Angus, *supra* note 101 at 173.

just nor responsible.”¹¹⁶ Aboriginal peoples have little reason to trust a justice system that sustains colonial relations.

Closely related to lack of trust is the fear that instead of achieving vindication, the victim will be revictimized by the very process that is supposed to help her heal. Because victims of crime may be questioned by the defence on the content of their statements, those who participate must “expose their suffering to adversarial challenge.”¹¹⁷ Women who have been raped also face the possibility that their statements will be greeted by sneers or smirks or other defence counsel tactics intended to undermine their credibility and minimize the harm they suffered.¹¹⁸

Women who are racialized or otherwise marginalized are also deterred by the very real possibility that no matter what they say, they will not be heard by the judge; they will not be allowed victim status. Victims will be more sympathetic when the sentencing judge can relate to them, a depressing consideration for racialized women who face a predominantly white male and upper-middle-class judiciary. Can the psychological harm of racist violence or colonialism ever be heard in this forum? If the harm they describe is not acknowledged or, worse yet, denied, the victim impact statement will be a source of additional harm.

Even sympathetic victims may find it difficult to persuasively communicate the harm they have suffered. Where the ability to express oneself effectively is hindered by language barriers, educational disadvantage, or other factors that make the person less eloquent (factors that are borne disproportionately by racialized individuals), the statement will be less compelling. Moreover, to succeed victims must not only be articulate but must also be *perceived* as articulate, a status that is selectively accessible given racist and classist stereotypes.

Given prosecutorial discretion, lack of trust, and a well-warranted fear of not being heard, those likely to benefit from a victim impact statement are few. Those who do not fit the ideal victim paradigm are more likely to experience revictimization than vindication. The case of *R v Labbe*¹¹⁹ offers a helpful illustration. In this case, an Aboriginal wo-

116 Patricia A Monture-Angus, “Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice” in David Long & Olive Patricia Dickason, eds, *Visions of the Heart: Canadian Aboriginal Issues*, 2d ed (Toronto: Harcourt Brace, 1996) 361 at 362.

117 Roach, *supra* note 110 at 291.

118 Jane Doe, *supra* note 22 at 75.

119 *R v Labbe*, [2001] BCJ No 184 (SC).

man, described as an alcoholic and “street” person by the judge, was viciously killed by an intoxicated man with whom she was acquainted, though it is not clear from the statement of facts whether they were in an intimate relationship. Former Justice John Bouck remarked that the victim often invited the defendant to join her in her drinking binges and mocked the defendant’s efforts to abstain from alcohol.¹²⁰ Victim impact statements were filed by both her mother and brother, who were described by Bouck J in the following way:

Mrs. Martin [the mother] admits to being an alcoholic. She is aboriginal and lives on a reserve near Duncan, BC She is angry with Mr Labbe for taking her daughter’s life. She is trying to rebuild her life but finds it difficult to do so because of her tragic loss.

A Mr and Mrs. Fraser adopted Ms Martin’s brother shortly after his birth on 23 April 1971. He states he was brought up in a good home and learned right from wrong. Around 1989 he sought out his natural mother and moved to Duncan from New Westminster. He did not know his sister Krista very well as she lived in Victoria. Nonetheless, her death caused him much sadness. He is angry because Mr Labbe’s actions deprived him of a lifetime of getting to know his sister. He hopes his surviving sisters will not suffer the same fate.¹²¹

That the victim’s mother is an alcoholic or that her brother has good moral values has no obvious relevance to any issue in the proceedings, particularly without further elaboration by the judge. On its face, the decision puts into question not only the deceased’s character and contribution to her victimization, but also the character of the family left to mourn her death. The decision to include these details about the victim and her family was likely subconscious, although it is impossible to fully evaluate this choice without the benefit of the full victim impact statements. Regardless of whether subconscious bias ultimately played a role in this particular sentencing determination, its potential to influence decisions should make us wary. The risk of subconscious bias is heightened by its typical invisibility, making it practically impossible to assess with any accuracy its impact on decision making or to challenge that impact.

For the reasons described above, I have grave concerns about re-

¹²⁰ *Ibid* at para 15.

¹²¹ *Ibid* at paras 11–12.

lying on victim impact statements as a panacea for the ills that plague victims in the criminal justice system. They have the potential to legitimize the experiences of some victims while further harming others. As Jane Doe notes, victim impact statements were not designed to benefit women who have been raped; rather, they were intended to assist the family members of homicide victims.¹²² And even that assistance may be limited to families of victims who resemble the ideal victim prototype.

Input into Sentencing

The argument most often raised in opposition to victim impact statements is the risk they pose to a defendant's fair trial rights. This fear stems from the assumption that most victims, fuelled by a need for vengeance, will campaign for a severe penalty to be imposed against the perpetrator. In Justice Casey Hill's view, personal revenge on the part of the victim should not be fostered through the victim impact statement regime, which he acknowledges is "a very real danger" if the regime is not carefully structured.¹²³

Certainly, many victims assume their victim impact statement will directly influence the sentence, a misunderstanding arguably facilitated by the victims' rights movement, and they are disappointed when their input has no discernable effect. One Canadian study found that influencing sentencing was the most frequently cited reason for filing a victim impact statement.¹²⁴ However, victim impact statements, according to judicial interpretation of the relevant statutory provisions, are not supposed to include sentencing recommendations, nor are they supposed to include criticisms of the offender.¹²⁵ In some cases, judges or prosecutors must edit victim impact statements to ensure compliance with these requirements or, in more extreme cases, reject them altogether.¹²⁶

122 Jane Doe, *supra* note 22 at 75.

123 *R v Gabriel* (1999), 137 CCC (3d) 1 at 13 (Ont Sup Ct) [*Gabriel*].

124 Department of Justice, *Victim Impact Statements in Canada: Evaluation of the North Battleford Project* by Campbell Research Associates, vol 3 (Ottawa: Department of Justice Canada, 1990) at 34, cited in Julian V Roberts, "Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings" (2002-03) 47 *Crim LQ* 365 at 380.

125 *Gabriel*, *supra* note 123 at 15.

126 See eg *R v Unger*, [2007] Sask R 191 at para 37 (Prov Ct) (court excised portions of the statement that contained facts of the offence, and inflammatory and vengeful comments about the defendant's character that were prejudicial); *R v Sparks* (2007), 251 NSR (2d) 181 at para 18 (Prov Ct) (court edited "suggestions as to severity of the sen-

Concerned about how victim “worthiness” may affect an offender’s sentence, the United States Supreme Court in *Booth v. Maryland*¹²⁷ in 1987 held that the introduction of a victim impact statement at the sentencing phase of a capital murder trial violated the 8th Amendment prohibiting cruel and unusual punishment. The court found that the admission of a victim impact statement created “a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.”¹²⁸ According to Justice Powell, the focus of a victim impact statement is “on the character and reputation of the victim and the effect on his family,” factors that may be entirely unrelated to the defendant’s blameworthiness,¹²⁹ and that could lead to a “mini-trial” on the victim’s character.¹³⁰ Moreover, the court cautioned that while the victim’s family members in the case before them were “articulate and persuasive in expressing their grief,” this would not always be the case and should not determine whether a defendant lives or dies.¹³¹ Nor should a decision “turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.”¹³² The court cited a passage from its decision in *Furman v Georgia* to support this point:

We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.¹³³

A study conducted on mock jurors in the United States following *Booth* found that the concerns raised in that judgment were valid, and that victim evidence impacted juries in different ways depending on the respectability of the victim.¹³⁴ It may be the case that any poten-

tence, statements that sought to achieve personal retaliation, assertions as to the facts of the offence and criticisms of the offenders”); *R v MacDonough* (2006), 209 CCC (3d) 547 at para 23 (Ont Sup Ct) (prosecutor “blackened out” sections that were inappropriate before submitting victim impact statement to the court).

¹²⁷ 482 US 496 (1987).

¹²⁸ *Ibid* at 503.

¹²⁹ *Ibid* at 504.

¹³⁰ *Ibid* at 507.

¹³¹ *Ibid* at 505.

¹³² *Ibid* at 506.

¹³³ *Ibid* at n 8, citing *Furman*, *supra* note 67, Douglas J, concurring.

¹³⁴ Edith Greene, Heather Koehring & Melinda Quiat, “Victim Impact Evidence in Capi-

tially inflammatory effect of victim impact statements will not cost a defendant his life in Canada; however, the loss of liberty remains a serious risk. Similarly, the possibility that a defendant's punishment will turn on the worthiness of his victim or on her ability to articulate grief effectively is not one that should be taken lightly. The risk is too grave in a criminal justice system saturated with racial, gender, and class bias.

Although *Booth* was concerned with the effect of victim impact evidence on juries, there is no reason to believe that judges are immune to the emotional pleas of victims during sentencing. Indeed, some judges in the United States have suggested that no distinction is warranted between judges and juries in this context.¹³⁵ Concern that the sentencing hearing could turn into a "mini-trial" for extraneous considerations has been raised by Canadian judges as well.¹³⁶ Even when the good character of the victim is not openly refuted, there remains a risk that inappropriate factors will influence the sentencing judge, even subconsciously.

Astonishingly, the US Supreme Court overturned its decision in *Booth* in 1991 in *Payne v Tennessee*,¹³⁷ finding that victim testimony introduced at the penalty phase of a capital trial did not violate the 8th Amendment. Sadly, yet perhaps predictably, the case that incited the court to overrule itself involved a black defendant and two white victims, a mother and her two-year-old daughter whom the defendant killed. A third victim, the three-year-old son of the woman, survived. According to the court, the defendant passed the day of the crime injecting cocaine, drinking beer, and browsing through pornographic magazines, before making sexual advances towards the adult vic-

tal Cases: Does the Victim's Character Matter?" (1998) 28:2 J App Soc Psychol 145.

135 For example, Justice Marshall, in his dissent, wrote the following in *Post v Ohio*, 484 US 1079 at 1082 (1988):

the presumption that judges know and apply the rules of evidence should not be converted into license to conclude that judges are inhuman, incapable of being moved by passion as well as by reason. It would be unrealistic and unwise to presume that no judge could be moved, in both heart and deed, by the anguish and rage expressed by a murder victim's family. The potentially inflammatory effect of such evidence convinced this court in *Booth* that its admission endangered the reasoned decisionmaking required in capital cases . . . there is no reason to denigrate that danger simply because the recipients of the evidence wore judicial robes.

See also *People v Simms*, 121 Ill. 2d 259 at 274 (1988), where Justice Simon noted: "The sentencer is given such wide discretion to dispense mercy that it is risky to presume to know how great an influence, conscious or subconscious, a victim impact statement admitted in evidence had on the sentencer."

136 *Gabriel*, *supra* note 123 at 13.

137 501 US 808 (1991).

tim. Apparently, he became violent when he was resisted.¹³⁸ Justice Rehnquist, who delivered the opinion of the court, quoted a police officer who had described the defendant following the murders as having “a wild look about him,” as “foaming at the mouth.”¹³⁹ As Jennifer Wood argues, “Rehnquist’s crime narrative, which depends upon representation of the Christophers’s innocent victimization, also carefully offers a characterization of Payne as a drug-crazed animal,”¹⁴⁰ thus justifying the violence of his death sentence.¹⁴¹

It is difficult to assess the extent to which victim impact statements influence sentencing in practice. Studies on this issue have been mixed, but most have concluded that sentencing practices have not changed with the introduction of victim impact statements.¹⁴² However, these studies generally fail to take into account possible outcome variations due to the nature of the crime or the identity of the victims and offenders. A notable exception to this is a study that specifically examined the relevance of an offender’s sex on the influence of the victim impact statement. A study using mock jurors in Australia found that victim impact statements resulted in more severe sentences for female offenders, seemingly the result of an increase in perceived deviancy as measured by volition and future dangerousness.¹⁴³ As the study revolved around the commission of a violent offence, it appears that female offenders were punished for not conforming to accepted female roles.

Given that victim impact statements are only one of a number of factors that a judge is mandated to consider in the sentencing decision, it is difficult to assess how and to what extent the statement plays a role. A recent survey of the Canadian judiciary suggested that judges found

¹³⁸ *Ibid* at 812.

¹³⁹ *Ibid* at 813.

¹⁴⁰ Jennifer K Wood, “Refined Raw: The Symbolic Violence of Victims’ Rights Reforms” (Winter 1999) 26 *College Literature* 150 at 157.

¹⁴¹ *Ibid* at 158.

¹⁴² Julian V Roberts, “Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole” in Michael Tonry, ed, *Crime and Justice*, vol 38 (Chicago: University of Chicago Press, 2009) at 373. For a helpful overview of studies on this issue, see Roberts, “VIS and the Sentencing Process,” *supra* note 124 at 381–83; see also Edna Erez & Pamela Tontodonato, “The Effect of Victim Participation in Sentencing on Sentencing Outcome” (1990) 28 *Criminol* 451; Robert C Davis & Barbara E Smith, “Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting” (1994) 11 *Just Q* 453.

¹⁴³ Lynne Forsterlee *et al*, “The effects of a victim impact statement and gender on juror information processing in a criminal trial: Does the punishment fit the crime?” (2004) 39 *Australian Psychologist* 57.

victim impact statements to be useful sources of information,¹⁴⁴ but it was not clear specifically how this information was used in determining an appropriate sentence. The Ontario Court of Appeal has described the role of victim impact statements in the following way:

Parliament has provided in s 722 of the *Criminal Code*, however, that the court “shall consider” such statements “for the purpose of determining the sentence to be imposed on an offender.” The court must therefore take them into account; otherwise there is no point in having them. Whether victim impact statements may be used by the sentencing judge, in themselves, to increase or decrease the fitness of the sentence, is an issue I leave for determination on another day. What they do at least, in my opinion, is help the judge to understand the circumstances and consequences of the crime more fully, and to apply the purposes and principles of sentencing in a more textured context.¹⁴⁵

Justice Bouck was similarly uncertain about the intent of Parliament:

It is not clear whether Parliament meant that judges must impose a more severe sentence than is usual for a particular crime if there is a victim impact statement, or a less severe sentence if there is not. Nor is it clear whether the more grievous the loss suffered by the victim, or the surviving family of the victim, the more severe the sentence should be.¹⁴⁶

Ultimately, Bouck J found that victim impact statements offered important information to the judge, without suggesting how this information should be incorporated into the complicated sentencing determination.

If the effectiveness of victim impact statements is measured by their influence on sentencing, it then would be impossible to say at this point whether they are in fact “effective.” However, defining effectiveness in this way would be problematic. A sentence should reflect a defendant’s culpability, not the relative worth of the victim. As judges have often

¹⁴⁴ Department of Justice, *Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions — A Survey of Three Jurisdictions* by Julian V Roberts and Allen Edgar (Ottawa: Canada Department of Justice, 2007).

¹⁴⁵ *R v Taylor*, [2004] OJ No 3439 at para 42 (CA).

¹⁴⁶ *Labbe*, *supra* note 119 at para 47.

remarked, “the criminal law does not value one life over another.”¹⁴⁷ If victim impact statements were evaluated by their ability to elicit more severe sentences, then having “effective” victim impact statements would be undesirable for the reasons discussed earlier. In conceptualizing what victim input into sentencing should look like, we need to be cognizant of its potential to perpetuate racial, gender, class, and other forms of discrimination that are presently rampant in the criminal justice system. From this perspective, victim impact statements should have no impact on sentencing.

Victim Satisfaction with Criminal Justice System

Yet another possible effect of victim impact statements is improved satisfaction with the criminal justice system. It is assumed that victims will be more satisfied with their involvement in the criminal justice process if they are given an opportunity to voice the harm they have suffered.¹⁴⁸ This satisfaction in turn is expected to renew confidence in the administration of justice. For the few victims who take advantage of the opportunity to submit a victim impact statement, the preponderance of studies suggest that the process is perceived as unsatisfactory, particularly when the victims have raised expectations about their ability to influence a sentence.¹⁴⁹ Some victims are frustrated when their statements are edited by prosecutors for inappropriate content, including sentencing recommendations.¹⁵⁰ On the other hand, some research has indicated that the therapeutic value of having an opportunity to participate is more critical to victim satisfaction than how severely defendants are punished.¹⁵¹ At best, research can be said to be

147 *R v M (E)*, (1992), 10 OR (3d) 481 at 486 (CA), Finlayson JA, dissenting. Similarly, Southin JA remarked: “To my mind, it matters not if the deceased is young, promising and much-loved, or old, deranged and despised by all who knew him. The law ought not to measure the value of the life taken, for to do so would be to diminish every person’s essential right to live out his or her appointed span”: *R v Eneas*, [1994] BCJ No 262 at para 53 (CA).

148 Dean G Kilpatrick & Randy K Otto, “Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning” (1987) 34 Wayne L Rev 7.

149 See eg Erez, “Integrating a Victim Perspective,” *supra* note 6 at 166; Edna Erez, Leigh Roeger & Frank Morgan, “Victim Harm, Impact Statements and Victim Satisfaction with Justice: An Australian Experience” (1997) 5 Int’l Rev of Victimology 37; Robert C Davis & Barbara E Smith, “Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?” (1994) 22 J Crim Just 1.

150 Roberts, “Listening to the Crime Victim,” *supra* note 142 at 378.

151 Deborah P Kelly, “Victims’ Perceptions of Criminal Justice” (1984) 11 Pepp L Rev 15.

inconclusive.¹⁵²

This begs the question: if there is no consistent evidence that victim impact statements improve victim satisfaction with the system, and they are vulnerable to discriminatory application, why do we use them? One important reason is that they clearly offer some benefit to the functioning of the criminal justice system. Victims are easier to manage when they feel they have a role, despite the fact that many feel disappointed after the proceedings. Anthony Walsh argues that victim impact statements may be useful for their “placebo value,” in that they give the impression that something is being done for victims.¹⁵³ Victim impact statements facilitate the co-operation of victims while also appeasing political pressures to involve victims in the process without challenging why they were victimized in the first place. The statements have the potential to divert attention away from systemic issues by focusing on individuals, both as victims and offenders. As Julie Stubbs and Julia Tolmie note, the individualized focus of criminal law “too often translates structural disadvantage into individual deficit or pathology and obscures gender and race inequalities.”¹⁵⁴

CONCLUSION

Martha Minow notes that “The stories of victims are attractive because they arouse attractive emotions. Possessing some aspect of victims’ lives can engender a sense of one’s capacity to respond, whether or not that capacity is exercised in any practical way.”¹⁵⁵ Moreover, victimhood is

152 While an exhaustive overview of the potential benefits of victim impact statements to victims is beyond the scope of this paper, interested readers may wish to consult Roberts, *supra* note 124 at 371–72. Professor Roberts emphasizes the importance of giving victims an opportunity to communicate with the offender through victim impact statements (375–78). Further, in one qualitative study, sexual assault complainants “explained that they had been primarily motivated in the expressive purpose of the VIS” to communicate to judges and offenders the harm they suffered. See Karen Miller, *Empowering Victims: The Use of the Victim Impact Statement in the Case of Sexual Assault in Nova Scotia; The Perspective of Victims and Victim Services Staff* (Toronto: Centre of Criminology, University of Toronto, 2008) at 33, cited in Roberts, “Listening to the Crime Victim,” *supra* note 142 at 364).

153 Anthony Walsh, “Placebo Justice: Victim Recommendations and Offender Sentences in Sexual Assault Cases” (1986) 77 J Crim L & Criminology 1126 at 1139.

154 Julie Stubbs & Julia Tolmie, “Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women” (2008) 41 Aust Crim & NZ J 138 at 139.

155 Minow, *supra* note 20 at 1414.

appealing because “it secures attention in an attention-taxed world,”¹⁵⁶ a “precondition for any response, including sympathy or help.”¹⁵⁷ This is the power of “genuine” victim status in the criminal justice system; without access to this status, those impacted by crime will be given no attention and no assistance. While sexual assault complainants and other marginalized victims of crime want the criminal justice system to be attentive to their needs, they have advocated for meaningful involvement at *all* stages of the criminal justice process, not token inclusion after the most critical issues have already been resolved.

As currently structured, the use of victim impact statements is left to the discretion of the judge. Julian Roberts, who has written extensively on the subject of victim impact statements, cautions that without adequate direction, judges will exercise their discretion in inconsistent ways.¹⁵⁸ The studies canvassed above suggest that they will also exercise their discretion in ways that are discriminatory.

If victim impact statements carry the risk of further subordinating already vulnerable groups, then they should be abandoned altogether, particularly if adequate safeguards cannot be put into place to protect these groups from discriminatory treatment. One commentator suggests that the rights of both victims and defendants could be better protected if victim impact statements were presented *after* the sentencing determination,¹⁵⁹ an option that warrants further consideration in my view. In any event, victim impact statements should not be relied upon as the primary response to the innumerable problems faced by victims of crime in the justice system. In addition to risking further marginalization of particular victims, this approach carries with it the danger that the state, believing its duty to victims discharged, will fail to pursue more meaningful action to remedy the systemic problems that persist.

Even assuming that victim impact statements have a role to play in sentencing, the daunting question remains: what *should* a court do with the information presented? We need to ask ourselves, in an ideal world, what we hope to achieve through victim impact statements? Do we want to “potentially create a situation in which sentencing length may be determined by the eloquence and social standing of the victim

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at 1415.

¹⁵⁸ Roberts, *supra* note 124 at 370.

¹⁵⁹ Carrie L Mulholland, “Sentencing Criminals: The Constitutionality of Victim Impact Statements” (1995) 60 Mo L Rev 731 at 747.

rather than the severity of the offense and the specific underlying facts of the crime”?¹⁶⁰ How would an assessment of the victim’s loss in determining sentences privilege certain victims according to race, gender, class, ability, and sexuality, thereby making some lives or harms more worthy than others? How do we ensure that women are not silenced “in the name of giving victims a voice”?¹⁶¹ And finally, can the focus on individual victims and individual offenders ever address larger systemic harms, including gendered and racialized violence, and the roots of such crime? There is no question that our criminal justice system is failing women who have been sexually assaulted and other vulnerable groups harmed by crime. However, token responses, such as victim impact statements, will not remedy this failure.

160 Abraham Abramovsky, “Victim Impact Statements: Adversely Impacting Upon Judicial Fairness” (1992–93) 8 St John’s J Legal Comment 21 at 21–22.

161 Henderson, *supra* note 6 at 585.