Speaking into a Void: Parliamentary Action Ignored in Sexual Violence Sentencing

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ABSTRACT

Canadian sentencing jurisprudence is heavily reflective of the Alberta Court of Appeal's determination of a three-year starting point for major sexual assaults in *R v Sandercock*, even in those jurisdictions that did not adopt it. This decision, issued in 1985, reflects attitudes and beliefs about sexual assault that are outdated and rely on improper myths and stereotypes. The Court also relied on sentencing guidance from England that was revisited in that country the very next year and has been revised numerous times since. Additionally, Parliament has made significant changes to the *Criminal Code* in the sentencing realm since.

Despite these factors and the significantly greater understanding of the harm caused by sexual violence since 1985, courts continue to impose sentences that reflect the *Sandercock* starting point. Often, courts go below it, failing to account for the significant impacts of sexual violence on offenders.

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It is time to revisit sentencing guidance in this area. In this article, we look to comparable legal systems, and demonstrate that while other countries have adjusted their sentencing guidance to reflect the greater understanding that society now has of the harms caused by sexual violence, Canada has not. Instead, judges have talked tough, but failed to follow through. We provide numerous principled reasons that appellate courts across the country need to provide updated sentencing guidance and argue that sentences in this area must increase to properly account for appropriate sentencing principles.
Keywords: sexual assault, sentencing, comparative analysis, starting point, victim impact, harm, sentencing guidelines, sentencing range, rape.

I. INTRODUCTION

The year 1985 featured several notable events. Mikhail Gorbachev became the leader of the Soviet Union, *The Cosby Show* climbed to become the top-rated primetime television series of the year, and the popular comic strip *Calvin and Hobbes* debuted in a 35-newspaper syndication. Closer to home and with far less fanfare, the Alberta Court of Appeal released its decision in *R v Sandercock*, in which it sought to provide guidance to sentencing judges for sexual assault offences by articulating a three-year starting point for a "typical" crime of sexual violence, which it characterized as a "major sexual assault."[1]

Of course, the USSR no longer exists; Bill Cosby's spectacular fall from grace due to sexual assault allegations transfixed a nation that previously dubbed him "America's Dad;" and even Calvin and his adventurous – and completely real – best friend have long-since gone off to explore without us. Put simply, in the 39 years since 1985 the world has changed.

Canadian sentencing guidance for major sexual assaults, however, has not. Both Parliament and the courts have become increasingly aware of the lifelong – and sometimes inter-generational – devastation caused by sexual violence.[2] Both have acknowledged the need to denounce and deter such behaviour. Unfortunately, the sentences generally applied continue to reflect the starting point established in *Sandercock* – one that resulted from a problematic analysis, has not been updated for more than three-and-a-half

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[1] 1985 ABCA 218 at paras 1, 13, 17 [*Sandercock*].

[2] See e.g. *R v Goldfinch*, 2019 SCC 38 at para 37 [*Goldfinch*].

decades, and does not exhibit a modern understanding of the harm caused by the offence.

This stagnation is unfortunate, as it results in two uncomfortable inferences: first, that for all its talk the judiciary does not recognize any need to take these offences more seriously than it did in 1985; and second, that judges simply refuse to see these offences for what they are – the most fundamentally invasive thing a person can do to another – and sentence accordingly.[3] It takes little imagination to picture a sexual assault victim who, upon being informed of the sentences frequently imposed, concludes that the courts do not take the actions of her attacker seriously, and declines to become involved in the criminal justice system.[4] It is no wonder that sexual violence remains grossly underreported.

In this article, we highlight Parliament's legislative approach to sentencing and argue that given both Parliament's intentions and the increased knowledge we now have surrounding the impact of such offences on the victims, previously determined sentencing jurisprudence must be reconsidered and updated. In this regard we are mindful of the Supreme Court of Canada's comment in *R v Friesen* that "When a body of precedent no longer responds to society's current understanding and awareness of the gravity of a particular offence and blameworthiness of particular offenders or to the legislative initiatives of Parliament, sentencing judges may deviate from sentences imposed in the past to impose a fit sentence. That said, as a general rule, appellate courts should take the lead in such circumstances and give sentencing judges the tools to depart from past precedents and craft fit sentences."[5]

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[3] The public perception that the courts do not take the nature, severity, and impact of sexual violence seriously has been acknowledged: *R v Kolola*, 2020 NUCJ 38 at paras 53-55, affirmed 2021 NUCA 11 at paras 26-30.

[4] A note on language: in this paper, those who sexually assault others are referred to as "he" and those who are victimized as "she." We recognize that any person, regardless of gender or sexual orientation, may be a victim of sexual assault. Nonetheless, the overwhelming majority of sexual assaults are committed by men against women. See *R v Osolin*, [1993] 4 SCR 595 at para 33: "Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women."; See also Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013) 18:2 Review of Constitutional Studies 161 at 165.

[5] 2000 SCC 9 at para 35 [*Friesen*].

We likewise agree wholeheartedly with the comments of Bouchard JA in *R c Régnier* who said "[I]t is time to give the legislative intent its full effect. Sentencing ranges are merely tools intended to aid trial judges in their work, and I see no valid reason for continuing to apply, out of jurisprudential imitation, precedents rendered at a time that no longer reflect today's reality."[6]

It is not merely the passage of time since *Sandercock* that demands a change, but rather the changes in societal perspectives regarding sexual violence that have occurred since. Parliament has recognized this and acted. It is time for courts across the country to recognize and implement how society's, and Parliament's, understanding of sexual violence has evolved, and sentence offenders accordingly. We present our position in the following steps: first, we briefly outline the Canadian approach to sentencing and review existing jurisprudence, and demonstrate that current guidance is fatally flawed by outdated and unhelpful stereotypes. We review Parliament's legislative amendments surrounding sexual violence, and assert that Parliament has clearly shown its intent that strong sentences be imposed for these offences. We then present examples of recent decisions that illustrate the approach of sentencing judges in this area is either to ignore, or to merely pay lip service to, these advancements.

We next look outside our own borders to compare our sentencing guidance with that from comparable common-law countries: those of England and Wales, Ireland, and New Zealand. This examination supports our contention that Canadian sentencing practices do not reflect current societal attitudes towards sexual violence. Finally, we examine the purposes and principles of sentencing and assert that provincial appellate courts in all Canadian jurisdictions must revisit their previous guidance, update it to reflect a current understanding of the harm caused by sexual violence, and provide guidance recognizing that sentences for serious sexual assaults need to increase.

II. THE CANADIAN APPROACH TO SENTENCING AND "CURRENT" JURISPRUDENCE

As Clayton Ruby recognized in his seminal text on sentencing, it is impossible for our justice system to impose uniform sentences; rather, it is

[6] 2018 QCCA 306 at para 40 (citations omitted) [*Régnier*].

a uniform approach to sentencing that is required.[7] This approach is one of individuality and proportionality, which Rosenberg JA aptly summarized in *R v Priest*:

> The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this offender is not unjustly dealt with for the sake of the common good.[8]

The parity principle, which says similar offenders who commit similar offences in similar circumstances should receive similar sentences, plays an important role in a sentencing analysis. Consistently applied, proportionality leads to parity; conversely, imposition of similar sentences in dissimilar cases achieves neither. Accordingly, judges are assisted in calibrating the demands of proportionality by reference to sentences imposed in other cases, which embody the collective experience and wisdom of the judiciary, and are therefore the practical expression of both parity and proportionality.[9]

In *Sandercock*, the Alberta Court of Appeal adopted and explained a "starting-point approach" to sexual assaults to provide guidance to lower courts.[10] This approach is intended to inform parity considerations by providing a consistent baseline to start from. In this section we confront that decision and demonstrate that the analysis conducted no longer reflects a proper consideration of sentencing principles. We then show that key legislation governing the sentencing of these offences has changed, but that Canadian sentencing jurisprudence has not. Before delving into our critique, we provide a brief overview of the decision itself and its treatment since.

The *Sandercock* Court defined a "major sexual assault" as one where the offender, "by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or

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[7] Clayton Ruby et al, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at §2.1 [Ruby].

[8] 1996 CarswellOnt 3588 at para 26, 110 CCC (3d) 289.

[9] *Friesen*, *supra* note 5 at paras 30-33.

[10] *Sandercock*, *supra* note 1 at para 1.

psychological injury[.]" This description was intended to include forcible vaginal penetration, oral, and anal sex. The Court declared that the starting point for such an offence, presuming a mature offender of good character with no previous criminal convictions, is three years.[11] Sentencing judges were to begin at that point, then adjust the sentence up or down depending on the specific circumstances of each case.[12] This definition and starting point was affirmed more recently in Alberta – although as we will discuss, it was affirmed without meaningful analysis – and has been accepted by numerous other jurisdictions.[13]

It is not universally accepted, however: Ontario expressly declined to follow the starting-point approach.[14] British Columbia also did not endorse the *Sandercock* starting point; instead, the general range for sexual assault sentences that involve sexual intercourse in that province is two to six years.[15] Starting points have also attracted criticism from advocates and academics, as opponents argue that their use fetters judicial discretion, perpetrates systemic bias against Indigenous offenders, and effectively creates minimum sentences.[16] However, the Supreme Court of Canada recently affirmed the starting point method as an appropriate tool to assist in reaching a proportionate sentence, and that where starting points are viewed as non-binding guidance, and continue to reflect the purposes and objectives of sentencing, there is no need to disavow this approach.[17]

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[11] *Ibid* at paras 13, 17. The reasoning in *Sandercock* also influenced the determination of starting points for sexual offences against children in certain circumstances: see e.g. *R v Hajar*, 2016 ABCA 222 at para 10, where the Court fashioned a three-year starting point for what it termed "major sexual interference."

[12] *Sandercock*, *supra* note 1 at paras 6-8.

[13] *R v Arcand*, 2010 ABCA 363 at para 169 [*Arcand*]; *R v Sidwell*, 2015 MBCA 56 at para 37; *R v CER*, 2016 MBCA 74 at para 29; *R v Lemaigre*, 2018 SKCA 47 at para 20; *R v Hachey*, 2017 NBQB 60; *R v Elias*, 2012 NWTSC 13 at para 7; *R v AJPJ*, 2011 NWTCA 2 at paras 12, 17; *R c PLC*, 1998 CarswellQue 668 at para 52 (CS); *R v CJ*, 1994 CarswellNfld 410 at para 17 (Prov Ct); *R v Savoie*, 1993 CarswellNB 96 at para 9 (QB) citing *R v Cormier*, [1986] NBJ No 51 (CA); *R c Bonnier*, 1992 CarswellQue 311 at para 9 (CA); *R v PVK*, 1992 CarswellNS 247 at paras 25, 29 (SC TD).

[14] See *R v Glassford*, [1988] 42 CCC (3d) 259 at para 20 (Ont CA) [*Glassford*].

[15] *R v M(G)*, 2015 BCCA 165 at para 22; *R v Pouce Coupe*, 2014 BCCA 255 at para 31.

[16] *Friesen*, *supra* note 5 (Facta of the Intervenors, the Legal Aid Society of Alberta and the Criminal Trial Lawyer's Association); See also Paul L. Moreau, "Trouble for Starting Points?" (2021) 68 Crim R 129; and Tim Quigley, "Sadly, No RIP for Starting-Point Sentences" (2022) 75 Crim R 306.

[17] *R v Parranto*, 2021 SCC 46 at paras 3-4 [*Parranto*].

A. *Sandercock*: Not as Modern as It Once Was

When *Sandercock* was released it was in many ways novel; even progressive. Societal attitudes in 1985 towards sex, sexual assault, mental health, and emotional trauma were extremely different than they are today. For example, it was only three years earlier that Parliament ended a man's legal immunity for raping his wife,[18] and around this same time it was held to be mitigating for a child molester to violate a victim who was young enough that they "may not have understood or appreciated the abhorrent nature of the act."[19]

Despite that environment, *Sandercock* acknowledged that emotional or psychological injuries are just as real as physical ones. It explicitly recognized that significant harm is foreseeable not only in circumstances of forcible intercourse, but also other forms of sexual activity, as well as attempted sexual assault, and acknowledged that a person who commits a major sexual assault bears a high moral blameworthiness, as they have demonstrated "contemptuous disregard for the feelings and personal integrity of the victim" which must be denounced by the courts.[20]

These acknowledgements have stood the test of time. Indeed, there can be no reasonable argument against them. The same cannot be said for some of the decision's other aspects. For example, the court held that sexual violations committed against sex workers should receive lower sentences, as "a prostitute… would agree that the foreseeable risk of psychological shock to her was not as great as would be, say, a similar threat to somebody who has led a sheltered life."[21] The Court cloaked this reasoning under the guise of ascertaining the level of reasonably foreseeable harm in different circumstances. In truth this is simply victim blaming, and a declaration that sex workers are entitled to less protection than other women. What it really

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[18] *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980-81-82-83, c 125, s 6.

[19] Ruby, *supra* note 7 at §23.438 citing *R v Irwin*, 1979 CarswellAlta 165 (CA) and *R v Beriault*, 1982 CarswellBC 458 (SC) at para 13. This was firmly rejected in *R v EHM*, 2015 ABCA 131, and is obviously contrary to the Supreme Court's direction in *Friesen*.

[20] *Sandercock*, *supra* note 1 at paras 13, 15-16.

[21] *Ibid* at para 28.

does is open the door to argue that it is a less serious crime to rape a woman who is deemed to be of a lower moral character.

The Court also declared that a lesser sentence will be warranted when the victim provokes the offender.[22] It is unclear what the Court meant, as while it did say that simply being a woman, being attractive, or dressing prettily could not be characterized as provocation, it did not provide an example of conduct that would provoke a sexual assault in a way that would lower the offender's moral blameworthiness. Regardless of the Court's intent, it is difficult to imagine what a victim could do that would relieve her attacker of his responsibility for his actions and justify reducing the resultant sentence. The inescapable conclusion of such a reduction is that the victim was partially responsible for being sexually violated.

Such shifting of responsibility is unfortunately not uncommon. As Elaine Craig explained, "Blaming survivors of sexual violence for their supposedly risky choices, such as attending an area of the city frequented by men, is a common defence counsel strategy – one that trades on problematic, neo-liberal assumptions about the difference between 'ideal victims' and so-called 'risky women.'"[23]

A stark example is the argument by defence counsel before an Irish jury that they should not accept the complainant's evidence that the sex was non-consensual because she was wearing lacy panties.[24] The accused was acquitted, and the complainant later committed suicide. This is not limited to defence counsel: judges have also been complicit in such attacks on a victim. Similar reasoning was recently applied by a Peru court where three judges held that a sexual assault complainant who described herself as "shy" misrepresented herself; the court declared that, contrary to her evidence, the victim intended to have sex with her accused rapist. Their evidence: she was wearing lacy red underwear.[25]

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[22] *Ibid* at para 29.

[23] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018) at 28, citing Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: the Implications of the *Charter* for Sexual Assault Law" (2002) 40:3 Osgoode Hall LR 251.

[24] See BBC News, "Irish outcry over teenager's underwear used in rape trial" (14 November 2018), online: https://www.bbc.com/news/world-europe-46207304.

[25] See Charlotte Mitchell, "Judges throw out rape case in Peru because alleged victim's red underwear 'suggested the woman was prepared she was willing to have sex', sparking national outcry" (4 November 2020), online:

Nor is victim blaming absent from Canadian courtrooms. The now-infamous comments of Robin Camp, then an Alberta Provincial Court judge, ring loudly: "Why didn't you just sink your bottom down… so he couldn't penetrate you?" and, "Why couldn't you just keep your knees together?"[26] Equally disturbing were the comments from Manitoba Court of Queen's Bench Justice Dewar when sentencing Kenneth Rhodes that, "sex was in the air that night" and characterizing the accused as "a clumsy Don Juan." Into this mix he injected the victim, who he declared was dressed in a way that showed she "wanted to party."[27] This from an incident where Rhodes forced vaginal and anal intercourse on a woman who had already rejected him once and who expressly told him to stop.[28]

These examples reflect some of the attitudes prevalent in *Sandercock*. But societal views of sex and sexual assault have changed since 1985. This is readily apparent given not only the public furor that both Camp's and Dewar J's comments provoked, but also that each faced an inquiry before the Canadian Judicial Committee, with Camp resigning after the Committee recommended his removal from the bench.

The law has also evolved since 1985. No longer are there categories of victims who are entitled to less protection than others; in fact, courts have explicitly condemned such reasoning. In *R v Barton*, for example, the Supreme Court of Canada took pains to recognize the disproportionate impact that sexual assaults have on Indigenous women and sex workers, and acknowledged generally that, "Our society has yet to come to grips with just how deep-rooted [myths, stereotypes, and sexual violence against women] truly are and just how devastating their consequences can be."[29] Progress can also be found in other recent Supreme Court decisions. In *Goldfinch*

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https://www.dailymail.co.uk/news/article-8914001/Peru-judges-rule-rape-case-womans-red-underwear-signalled-willing-sex.html.

[26] See generally, Canadian Judicial Council, *Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice* (8 March 2017), online: https://cjc-ccm.ca/sites/default/files/documents/2019/2017-03-08%20Report%20to%20Minister.pdf.

[27] *R v Rhodes* (18 Feb 2011) Winnipeg, CR08-15-00316 (Man QB) Dewar J; See also Canadian Judicial Council, "Canadian Judicial Council completes its review of complaints made against justice Robert Dewar" November 9, 2011 press release, online: https://cjc-ccm.ca/en/news/canadian-judicial-council-completes-its-review-complaints-made-against-justice-robert-dewar.

[28] See generally *R v Rhodes*, 2013 MBQB 166, affirmed 2015 MBCA 100.

[29] 2019 SCC 33 at para 1.

and *Friesen* the Court acknowledged that, "As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens."[30]

Despite all the progress we have made, though, courts continue to rely on guidance that contains antiquated views entirely incompatible with our current law. It is not possible to simply sever the good from the bad, as the analysis conducted by the Court in *Sandercock* was obviously done with those attitudes and views in mind. Instead, appellate courts must visit the issue afresh.

Even if courts were to take the position that all the problematic aspects of *Sandercock* can be ignored, there is an additional reason why reconsideration is needed. The Supreme Court in *R v Parranto* indicated that, "Appellate sentencing guidance ought not to purport to pre-weigh or 'build-in' <u>any</u> mitigating factors" as this prevents the sentencing judge from considering and weighing all relevant individual circumstances.[31] One integral part of the *Sandercock* starting point is that it was intended to apply to "a mature accused with previous good character and no criminal record."[32] This cannot simply be excised without considering whether the Court would have instituted the same quantum for the starting point. The inexorable conclusion is that if this is not 'built-in' the starting point should be higher.

B. Amendments to the *Criminal Code* Show Parliament's Clear Intent

Parliament has repeatedly amended vital provisions of the *Criminal Code* since *Sandercock* was released. Unfortunately, those changes have not had a noticeable impact on sentences in this area. From a big-picture perspective, when numerous aspects of the law governing sentencing changes, yet sentences do not, it is difficult to escape the conclusion that courts are not giving effect to those changes.

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[30] *Goldfinch*, *supra* note 2 at para 37; *Friesen*, *supra* note 5 at para 118.

[31] *Parranto*, *supra* note 17 at para 46 (emphasis in original).

[32] *Sandercock*, *supra* note 1 at para 17.

We begin this section by stating the obvious: Parliament does not legislate without purpose.[33] Legislative changes in each area of law reflect Parliament's direction to judges making decisions in that area. In the sentencing realm, when relevant legislation changes, precedents that pre-date that change must be reconsidered, having regard to the reasons why the change was necessary, and whether it is time to leave those precedents behand. Jurisprudence must conform to the Parliament's legislative initiatives.[34]

There have been numerous significant legislative amendments since 1985. The most vital of these came in 1996, when Parliament enacted sections 718, 718.1, and 718.2 of the *Criminal Code*.[35] This was ground-breaking: for the first time, Parliament articulated the purposes and principles of sentencing for criminal offences.[36] In doing so, Parliament identified the fundamental principle of sentencing: that a sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[37] This fundamental principle has been the guidepost for every sentencing hearing and sentence appeal since. Assuming it is possible to do so, it would be difficult to overstate its importance.

Yet that is not the only relevant legislation since *Sandercock*. In 2012 Parliament enacted section 718.2(a)(iii.1), which mandates that a court shall consider the impact on the victim before imposing sentence. In 2019, Parliament enacted sections 718.2(a)(ii) and 718.04. Section 718.04 requires that that the primary sentencing consideration is to be deterrence and denunciation when a crime involves the abuse of a vulnerable individual. Section 718.2(a)(ii) mandates that when an offence occurs in the context of an intimate partner relationship, courts are to treat that as an aggravating factor.

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[33] *Arcand*, *supra* note 13 at para 37, citing *R v Proulx*, 2005 SCC 5 at para 28: "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage."

[34] *Friesen*, *supra* note 5 at paras 35, 45, 110.

[35] See Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22, s. 6.

[36] *Arcand*, *supra* note 13 at paras 16, 29; Benjamin Berger, "Reform of the Purposes and Principles of Sentencing: A Think Piece" (2016) Research and Statistics Division, Department of Justice Canada at 6, online: https://www.justice.gc.ca/eng/rp-pr/jr/rpps-ropp/RSD_RR2016-eng.pdf.

[37] *Criminal Code*, RSC 1985, c C-46, s. 718.1 [*Criminal Code*].

Far from being reflective of current legislation and case law, sexual assault sentencing has failed to reflect the series of changes that Parliament has introduced to the *Criminal Code*. Instead, sentencing judges continue to rely on precedents of a bygone era. *Sandercock* was decided 39 years ago. No consideration has been given to the deepened understanding of which the Supreme Court spoke in *Friesen*. The Court's observation in *Goldfinch* is stark:

> Sexual assault is still among the most highly gendered and underreported crimes… Even hard-fought battles to stop sexual assault in the workplace remain ongoing… As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens… Throughout their lives, survivors may experience a constellation of physical and psychological symptoms including: high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm and suicidal behaviour… The harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victorian era.[38]

The principle that legislative changes should result in changes by the courts should not be controversial. New or amended legislation is the same as a change in case law. For instance, the Supreme Court outlined in *Friesen* that a new approach was needed for sentencing sexual abuse related to children, and while some judges continued to rely on pre-*Friesen* decisions, "cases that pre-date *Friesen* should be approached with caution since they may not reflect the change in jurisprudence."[39] Similarly, when Parliament changes statutory law, cases which preceded that change must also be treated with caution as they no longer reflect the current state of the law. In the case of sexual assault there have been numerous legislative amendments since 1985, yet sentencing has remained the same. This puts Parliament in the unfortunate position of wondering what steps are needed to affect meaningful change.

1. The Ongoing Tension from Minimum Sentences

The nature of minimum sentences is that they fetter the wide discretion normally enjoyed by sentencing judges and may act in a way that is at odds

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[38] *Goldfinch*, *supra* note 2 at para 37 (emphasis in original, citations omitted).

[39] *R v Sinclair,* 2022 MBCA 65 at para 61. See also *R v EF*, 2021 ABQB 639 at para 30 and *R v Misay*, 2021 ABQB 485 at paras 183-87.

with the overarching principle of proportionality.[40] Much ink has been spilled on the propriety of Parliament instituting such sentences. It is not the purpose of this article to end that debate. However, as there are forms of sexual assault with mandatory minimum sentences, even when the victims are not children, the issue deserves some comment.[41]

Numerous minimum sentences have, in recent years, been struck down as unconstitutional. One such decision is that of *R v John*, in which the Ontario Court of Appeal struck down the minimum sentence for possession of child pornography.[42] In doing so, Pardu JA expressed the curious opinion that "The mandatory minimum is entirely unnecessary" as a result of the Court's recent decisions in *R v Inksetter* and *R v JS*[43] Put in other words, she told Parliament, "Judges do not need your guidance."

With respect to Pardu JA, her reasoning is based on a false premise: the idea that sentencing judges, given the facts of a particular case, will apply governing principles and come to the same or substantially similar results, is simply wrong.[44] Consider, for example, that one month after *Inksetter* was released, the same Court, despite recognizing that "possession of child pornography poses a grave risk to children" and is "an abhorrent crime that causes extreme harm" upheld an intermittent sentence of 45 days.[45] When one considers that in *Inksetter* the Court increased a sentence of two years less one day followed by three years' probation to three and one half years' imprisonment, stating the sentence did not do enough to address denunciation and deterrence, the imposition and affirmation of 45 days intermittent for the same offence seems wildly disparate. More recently, Chris McCaw was convicted of possessing child pornography for the third time. His first conviction resulted in a conditional sentence order. His second, a sentence of two years less one day incarceration. On his third, MacLure J of the Ontario Court of Justice sentenced him to <u>another</u> conditional sentence.[46] The Ontario Court of Appeal intervened and

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[40] See *R v LWW*, 2000 SCC 18 at paras 18-19, 21; *R v Hills*, 2023 SCC 2 at para 38; Ruby *supra* note 7 at §7.6.

[41] *Criminal Code, supra* note 37, ss. 272(2), 273(2).

[42] 2018 ONCA 702 at paras 29-30, 38-40.

[43] *Ibid* at para 41 citing *R v Inksetter*, 2018 ONCA 474 [*Inksetter*] and *R v JS*, 2018 ONCA 675 [*JS*].

[44] *Arcand*, *supra* note 13 at para 8: "The proposition that if judges knew the facts of a given case, they would all agree, or substantially agree on the result, is simply not so."

[45] *R v Schulz*, 2018 ONCA 598 at paras 1, 3, 53.

[46] *R v McCaw*, 2023 ONCA 8 at para 1.

substituted a sentence of three years' incarceration. However, the mere fact that a sentencing judge felt that a conditional sentence was appropriate for a third conviction is a reminder that judges approach sentencing differently, and further illustrates the error in Pardu JA's opinion.

Where disparate sentences are perceived as not fully reflecting the seriousness of the criminal conduct, mandatory minimums may not be the appropriate recourse. However, one motive for Parliament enacting such minimums is the perception that judges are not imposing fit sentences – perhaps in part because they are ignoring all the other legislative actions articulated above. If that is perceived, and mandatory minimums are the result, rather than making comments that they are unnecessary judges should consider whether, if appropriate sentences been imposed previously, the minimums would have been enacted in the first place.[47] In other words, it is the judiciary's perspective that must change, not that of Parliament or society.

C. Canadian Sentencing Jurisprudence Has Not Evolved

In the years since *Sandercock*, most jurisdictions have considered whether to follow the starting point articulated and proceeded accordingly. However, in those jurisdictions where it was adopted, it has effectively been applied with little or no further consideration of whether the starting point itself needed to be reconsidered. In those jurisdictions where it was not adopted, most notably Ontario and British Columbia, appellate courts have provided ranges that encompass and are similar to the *Sandercock* starting point.[48]

In this section we consider sentences for major sexual assaults from various jurisdictions across Canada. This review illustrates that despite the massive societal changes to how sexual violence is viewed and the numerous legislative amendments listed above, sentences for sexual offences remain heavily influenced by *Sandercock* in the jurisdictions where it was accepted.

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[47] See *Arcand*, *supra* note 13 at para 8: "If the courts do not act to vindicate the promises of the law, and public confidence diminishes, then Parliament will."

[48] The Ontario Court of Appeal has endorsed a general sentencing range of three to five years for sexual assaults involving "forced penetration": *R v AJK*, 2022 ONCA 487 at para 77. It is difficult to see how a range beginning at three years is different than a starting point of three years for the same conduct. As noted earlier, the British Columbia Court of Appeal has endorsed a general range of 2-6 years for sexual assault involving intercourse: see M(G) and *Pouce Coupe*, *supra* note17.

We begin with the Alberta Court of Appeal's confirmation of the starting point for major sexual assaults in *Arcand*. Although the Court spent much time setting out the history and debate between starting points and ranges, it did not conduct an actual analysis of the three-year starting point itself. There was no discussion, or even reference, to the legislative changes since 1985, nor a recognition of modern societal perspectives. The Court also did not engage in a comparative analysis of international guidance. Instead, despite acknowledging a "wide unjustified disparity" in sentences for major sexual assaults, the Court simply declared that the starting point from *Sandercock* still applies.[49]

This omission is truly unfortunate. The Court in *Arcand* convened in a panel of five to expressly reconsider four of its own decisions, which the appellant used to impugn the *Sandercock* starting point.[50] The Court was thus perfectly positioned to answer the question of whether the starting point itself remained appropriate. The majority's choice to render a mere conclusory statement rather than engaging with the substantive issue deprived not only sentencing judges of updated guidance, but also resulted in an inappropriate starting point being maintained.

The Alberta Court of Appeal is not the only court that clings to this outdated determination. Sentencing on other jurisdictions continues to reflect the *Sandercock* starting point, and similarly fails to recognize why it is problematic. Perhaps the most illustrative – and egregious – example of this is the recent case of *R v Bunn*.[51] The offender, who is HIV-positive, raped the victim while she was sleeping. He did this even though, as he later admitted, he was fully cognizant of his HIV status and that the condom he initially put on broke during the rape.[52]

The sentencing judge was made fully aware of the many legislative changes that were enacted over the 36 years before Bunn's sentencing, and the Supreme Court of Canada's numerous acknowledgements of the increased appreciation of the harm caused by these offences. Her response to all of this is aptly summarized in four simple words: none of those matter. She imposed a sentence that did not even approach the *Sandercock* starting point: 28 months' imprisonment.

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[49] *Ibid* at para 169.

[50] *Ibid* at paras 5-6.

[51] *R v Bunn*, 2021 MBQB 71 [*Bunn* MBQB], affirmed 2022 MBCA 34 [*Bunn* MBCA].

[52] *Bunn* MBCA, *supra* note 51 at paras 8, 23.

The Manitoba Court of Appeal agreed. Despite finding numerous discrete errors of law and principle, the Court held that none of them, taken individually or collectively, impacted the sentence imposed. The Court's decision is difficult to accept. One of the errors, for example, was to ignore an aggravating factor, yet apparently the sentence was not impacted at all. Since an aggravating factor is a circumstance that renders the offence more serious, it is difficult to see how the failure to consider such a factor could ever be said to not impact the analysis of a fit and appropriate sentence.

The result in *Bunn* forces one to ask, what will it take for Canadian judges to stop talking about taking rape seriously, and actually take it seriously? As we explore in the next section, had Bunn been convicted in nearly any of the other jurisdictions examined in this article, he would have faced a far more significant sentence.

Despite being pointed to the numerous legislative changes Parliament has implemented over the years, the Court of Appeal chose to focus on the fact that the maximum sentence for sexual assault has remained constant since January 4, 1983.[53] This reliance is, with respect, misplaced, and reflects a concerning lack of insight. Parliament can only act so many times insofar as increasing the maximum sentence for a given offence: at some point, the maximum becomes life imprisonment – a point at which Parliament's only further option is to enact mandatory minimum sentences to provide further guidance. In effect, the Court has declared that if Parliament legislates a maximum sentence of life imprisonment, it has removed itself from the conversation of what is an appropriate sentence. This cannot be a proper interpretation of the ongoing dialogue between Parliament and the judiciary.

In fact, given the way sexual violence is currently organized in the *Criminal Code*, we are already at that point. The *Code* includes three offences criminalizing sexual assault: the *simplicitor* offence in section 271; a more serious form of sexual assault in section 272, which addresses the use of a weapon, where bodily harm is caused, strangulation, and multiple-perpetrator assaults; and aggravated sexual assault in section 273, where wounding, maiming, disfiguring, or endangering life occurs. The maximum sentences for these offences are, respectively, ten years, 14 years, and life

[53] See Bill C-127, *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, 1st Sess, 32nd Parl (assented to 27 October 1982), SC 1980-81-82-83, c 125.

imprisonment.[54] These three categories of sexual assault are themselves comparable to the 'classification bands' that other countries use, as will be elaborated on further below.

The most objectively serious form of sexual assault therefore carries the longest sentence our law permits. The less aggravating forms of sexual violence have, appropriately, lower maximum sentences, but with no room between them: the *Code* does not have maximum sentences for any offence between ten and 14 years, nor between 14 years and life imprisonment. The important takeaway is that – without enacting minimum sentences – there is nowhere for Parliament to go. To increase the maximum for sexual assault *simplicitor* would be to equate it with the more serious forms of the offence in section 272. To increase the maximum in section 272 would equate it to aggravated sexual assault, which cannot be increased further. Thus, Parliament's hands are tied: to treat these offences as equal would be inappropriate – they are not the same.

Moreover, the Court of Appeal's reliance in this regard ignores that the maximum sentences are rarely imposed. It requires one to ask, what impact is that societal understanding having on the court process? If the answer – as it certainly appears – is none, then it cannot be said that sentencing judges are imposing sentences reflective of the fundamental principle of proportionality because those sentences are based on a misapprehension of the gravity of the offence.

In Ontario, which in *Glassford* explicitly rejected the approach from *Sandercock*, sentences often fall below three years. This is ironic, given that the Ontario Court of Appeal's reasoning for not following *Sandercock* included that "the cases reflect a trend in recent years towards longer sentences[.]"[55] Perhaps doubly ironic is the Court's recent affirmation in *R v Ghadghoni* that the usual sentencing range for raping an unconscious or sleeping victim is 18 months to three years.[56] It is difficult to reconcile these declarations, and they cause one to wonder whether the Ontario Court of Appeal is suggesting that taking advantage of a helpless victim is less blameworthy than giving a victim the opportunity to fight back before sexually violating them. We fail to see such a distinction: this reasoning

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[54] *Criminal Code, supra* note 37, ss. 271-273.

[55] *Glassford*, *supra* note 14 at para 20.

[56] 2020 ONCA 24 at para 48 [*Ghadghoni*]; see also *R v Smith*, 2015 ONSC 4304 at paras 32-33. Other jurisdictions have indicated similar ranges: see *R v Shalley*, 2005 MBCA 150 at para 15; *R v BAM*, 2004 NWTSC 74 at para 18.

simply perpetrates rape myths and the outdated view that the only "real" rape is one committed with violence beyond that inherent in the violation itself.[57]

Ghadghoni is another illustration of how serious misconduct is not taken seriously at the sentencing stage. The case involved acquaintances who spent the evening at a nightclub, during which time the complainant became so intoxicated she could not stand or walk without assistance. The offender took her to his home, where she passed out. She awoke to find the offender raping her, and he persisted even after she told him to stop.[58] The trial judge imposed a 30-month sentence, but the Court of Appeal held the trial judge had erred in finding the attack was premeditated, and lowered the sentence to one of two years less one day.[59]

An even more lenient sentence was imposed, and ultimately upheld, in *R v Hughes*.[60] The parties were university students and acquaintances. Hughes entered the victim's dormitory while she was asleep, and within ten minutes had sexually assaulted her. This had immediate and significant impacts: the victim was distraught for hours, required counselling, and could not sleep in her own room for some time. The trial judge sentenced Hughes to 18 months' incarceration.[61]

As an initial matter, an 18-month sentence for a sexual assault involving forced vaginal intercourse, and where victim impact was not just presumed but proven, is already questionable. More concerning, though, is the Court of Appeal's characterization of such a sentence. In dismissing the offender's appeal, the *per curiam* panel commented that, "This was a rape. Even when, as in this case, there are many legitimately strongly mitigating factors, a <u>significant</u> reformatory sentence is a fit sentence."[62] With respect, the only way this sentence was significant was the extent to which it was lenient.

Unfortunately, the sentence from *Hughes* is not extraordinary in Ontario, particularly where the victim and offender spent time together prior to the assault. In *R v Laz-Martinez*, for example, the offender and victim

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[57] See *Arcand*, *supra* note 13 at paras 269-272; see also Philip N.S. Rumney, "Progress at a Price: The Construction of Non-Stranger Rape in the *Millberry* Sentencing Guidelines" (2003) 66:6 Modern Law Review 870 at 872, 883.

[58] *Ghadghoni*, *supra* note 56 at paras 5-7, 11, 17-18.

[59] *Ibid* at paras 42, 46-47, 51.

[60] 2017 ONCA 814 [*Hughes*].

[61] *Ibid* at paras 1-2.

[62] *Ibid* at para 23 (emphasis added).

were drinking with friends at the victim's apartment.[63] The victim became intoxicated, and her friends put her to bed to sleep it off. Some time later, the friends noticed that the offender was not with them; he was found raping the victim. When told to stop, he instead continued the rape, even asking the witness if he also "wanted some" and ultimately only stopped once he climaxed. Despite a "powerful" victim impact statement and a "particularly aggravating" breach of trust, Cole J imposed a two-year sentence so that he could also order a period of probation.[64]

Another Ontario case is that of *R v RS*, which involved, as the Court of Appeal described, "a violent sexual assault on the victim in her apartment."[65] It included the offender pushing the victim to the ground, removing her pants and underwear, biting or sucking on her abdomen, and taking her tampon out of her vagina before digitally penetrating her. The victim repeatedly told the accused "no," and at one point attempted to flee. In response, the offender strangled her. He then pushed her over a counter and told her he wanted to "fuck her hard." The attack ceased only because the victim's upstairs neighbour interrupted it.[66] The offender was found guilty after trial. With that factual background, the trial judge imposed a two year less one day conditional sentence order, followed by probation. The Crown appealed the sentence, and while a majority of the Court of Appeal held that a three-year sentence should have been imposed, the Court dismissed the appeal because it determined reincarceration was not necessary and would cancel the probation order.[67]

Disproportionately lenient sentences are not uncommon in other jurisdictions. In *R v Bertacco*, Crerar J of the British Columbia Supreme Court sentenced an offender who, when he was 22 years old, lured his 16-year-old victim to his house claiming that he was sad and wanted to talk to her, but then forcibly removed her pants and underwear and held her down while he raped her for some 40 minutes.[68] The attack resulted in physical scarring and profound emotional and psychological harm.[69]

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[63] 2011 ONCJ 115.

[64] *Ibid* at paras 4-6, 24, 50-51.

[65] 2023 ONCA 608 at paras 1-2 [*RS*].

[66] *Ibid* at paras 8-11.

[67] *Ibid*, paras 41-43, 85.

[68] 2021 BCSC 597 at paras 9-12 [*Bertacco*].

[69] *Ibid* at paras 13-17.

The offender was convicted after a trial. He maintained that he had done nothing wrong to a pre-sentence report writer, saying that the victim "could have said 'no' at any time"[70] but suddenly changed his position on the morning of his sentencing.[71] Crerar J, despite acknowledging that sexual assault is "a uniquely physically and psychologically violent, degrading, and invasive crime that cuts to the core of the victim's dignity and autonomy" that had a significant impact on the victim, imposed a sentence of only 16 months' custody for raping a child.[72]

III. CANADIAN GUIDANCE IS INCONSISTENT WITH INTERNATIONAL NORMS

In coming to a starting point of three years in *Sandercock*, the Alberta Court of Appeal considered that quantum was "substantially in accord with sentencing policy elsewhere" and specifically relied on the "sentencing practices in the United Kingdom, [which] established a range of two to seven years, with up to ten years for extreme violence."[73] As the Court's reference to international jurisprudence was limited to this acknowledgement, it is unclear to what extent this consideration impacted its ultimate decision. Nonetheless, a comparative approach to this question is reasonable. As Graeme Brown explains, sentencing is an area in which it is particularly helpful to look to other jurisdictions, as "we are all struggling with the same fundamental questions: why punish? What range of penalties should be available? When is a custodial sentence appropriate? How, if at all, should judicial sentencing discretion be structured?"[74]

Despite these commonalities, the Supreme Court has subtly cautioned those who would engage in comparative sentencing analyses. In *R c Lacasse*, Wagner J (as he then was) emphasized that "One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is

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[70] *Ibid* at para 33. This, despite the facts found by the trial judge that the victim asked him to stop several times, attempted to prevent him from removing her pants, attempted to physically push him off her, scratched him several times on his back, and was crying throughout the rape: paras 9-10.

[71] *Ibid* at para 36.

[72] *Ibid* at paras 82-84, 100.

[73] *Sandercock, supra* note 1 at para 19.

[74] Graeme Brown, *Sentencing Rape: A Comparative Analysis* (Oxford: Hart Publishing, 2020) at 3-4 [Brown], citing Tom O'Malley, "Principles of Sentencing: Towards a European Conversation" 23 January 2008, Leiden University, Leiden.

one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate."[75] He repeated this in *R c Bissonnette*.[76]

We recognize that a comparative sentencing analysis that compares dissimilar legal systems risks an unhelpful study. We propose not to use dictatorships, countries that exercise control over their judiciaries, or even the United States, whose approach to sentencing and penal policy is vastly different than Canada's. Rather, we deliberately chose common law nations with legal systems, and indeed, governments, very much like our own. England and Wales, New Zealand, and Canada are all constitutional monarchies with parliamentary democracy. The Republic of Ireland, not being a part of the United Kingdom, is a parliamentary democracy: the substantive workings of its government are the same as the other countries', but without a monarch as the formal head of state.

Finally, and importantly, each of these employs a common law legal system that includes reforming and rehabilitating offenders as a goal. In fact, jurisprudence from the Irish Court of Criminal Appeal mandates rehabilitation as the highest priority in determining an appropriate sentence.[77] We are thus considering countries with similar legal cultures and a consistent view of the behaviour we are discussing. While Canada has repealed the former offence of rape and subsumed it within that the far broader offence of sexual assault, the comparator countries we have chosen still maintain offences called rape. Most also have additional offences designed to criminalize conduct that would equally constitute a major sexual assault under Canadian law. When viewed as a whole, these countries criminalize the same conduct we do.

When comparing sentencing guidance between Canada and England and Wales, in particular, it is worth remembering that the ultimate goal for sentencing in Canada is to craft a sentence that is proportionate to the

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[75] *R c Lacasse*, 2015 SCC 64 at para 4 (emphasis added) [*Lacasse*].

[76] 2023 SCC 23 at para 48.

[77] *DPP v GK*, [2008] IECCA 110: "This Court has to consider what is the appropriate sentence for this particular crime because it was committed by this particular offender. The Court does not participate in an exercise in vengeance or seek to retaliate against the applicant on behalf of the victim. In discharging this function, this Court examines the matter from three aspects in the following order of priority, rehabilitation of the offender, punishment and incapacitation from offending and, individual and general deterrence" (emphasis added).

gravity of the offence and the degree of responsibility of the offender.[78] The Sentencing Council of the United Kingdom requires a similar approach: it instructs judges to weigh an offence by looking at: (i) the culpability of the offender; and (ii) the harm caused by the offending.[79] We therefore see significant similarities between the guiding principles in Canadian and English law; perhaps an unsurprising result given the close ties between the countries not only in history, but in legal framework. This makes for an ideal comparative framework.

It is helpful, before embarking on a discussion of the sentencing approaches in these countries, to set out how they criminalize sexual violence.

In England and Wales, the definition of rape is the non-consensual penetration of a person's vagina, anus, or mouth by a penis.[80] Where the penetration is performed by another body part or object, the offence is called assault by penetration.[81] The former, by virtue of requiring penile penetration, can only be committed by men, but the latter can be committed by either a man or woman, against either a man or woman. The maximum sentence for both offences is life imprisonment.[82]

In Irish law there are two forms of rape, which act in tandem and are referred to as "common law rape" and "section 4 rape."[83] Common law rape is the act of penile-vaginal intercourse committed by a man against a woman who is not consenting. Section 4 rape involves bodily penetration other than penile-vaginal intercourse. This includes oral and anal penetration, and vaginal penetration with an object.[84] Both forms of rape have a maximum sentence of life imprisonment.[85]

In New Zealand, rape involves the penile penetration of the genitalia without consent.[86] Other non-consensual penetrative activity falls under the

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[78] *Friesen*, *supra* note 5 at para 30.

[79] General guideline: overarching principle (1 October 2019), online: Sentencing Council https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/.

[80] *Sexual Offences Act* (UK), 2003 c. 42, s. 1(1).

[81] *Ibid*, s. 2(1).

[82] *Ibid*, ss. 1(4), 2(4).

[83] See Brown, *supra* note 74 at 164.

[84] *Criminal Law (Rape) (Amendment) Act* (Republic of Ireland), 1990, s. 4(1).

[85] *Ibid*, s. 4(2); *Offences Against the Person Act* (Republic of Ireland), 1861, 24 & 25 Vict. c. 100, s. 48.

[86] *Crimes Act* (New Zealand), 1961, s. 128(2).

offence of sexual violation by unlawful sexual connection.[87] Both offences have a maximum penalty of 20 years.[88]

A. England and Wales

We begin our foray into international comparison with England and Wales, as that is what the Alberta Court of Appeal relied on in *Sandercock*. As we illustrate, while the general range may have been two to seven years in 1985, that guidance evolved almost immediately thereafter, and in fact sentencing in this area has received extensive attention since, with the guidance provided to sentencing judges being revised no fewer than four times.[89]

The first revisiting of sentencing guidance after *Sandercock* occurred the very next year. In 1986, the English Court of Appeal (Criminal Division) provided extensive guidance for rape sentencing in *R v Billam and others* – an amalgamation of twelve appellants and ten cases of rape or attempted rape.[90] It expressly did so to address the lenient approach adopted by some judges to sentencing in this area[91] – sentences that were imposed under the rubric relied on in *Sandercock* – and in so doing declared that sentences imposed for rape were too low.[92] In fact, Lane LCJ recognized the changing societal attitudes towards rape, and the psychological harm it causes to victims.[93]

The Court set out a series of starting points to address varying levels of conduct:

- Five years was established as the starting point for a rape committed by an adult without any aggravating or mitigating factors.
- Eight years was set for cases where rape was committed by two or more men acting together; by a man who broke into or otherwise gained access to the victim's home; by a person in a position of responsibility towards the victim; or by a person who abducted the victim and held her captive.

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[87] *Ibid*, s. 128(3).
[88] *Ibid*, s. 128B(1).
[89] For a more detailed summary of these developments and their impacts, see Brown, *supra* note 74 at 63-100.
[90] (1986) 8 Cr App R (S) 48 [*Billam*].
[91] Brown, *supra* note 74 at 65.
[92] *Billam*, *supra* note 90 at para 50.
[93] See Brown, *supra* note 74 at 65, citing *Billam*, *supra* note 90 at para 49.

- At the top of the scale comes the defendant who has carried out what might be described as a compaign of rape, cimmiting the crime on a number of different women or girls.

Lane LCJ also commented that where the offender's behaviour displayed perverted or psychopathic tendencies, or gross personality disorder, and where they were likely to remain a danger to women for an indefinite time, a life sentence would be appropriate.[94] He also set out a number of aggravating factors, and indicated that the presence of such factors should result in a substantially higher sentence than the starting point.[95]

Development of English sentencing guidance continued with the creation of the Sentencing Advisory Panel (SAP) in 1999. As Brown explains, it was designed to preserve the authority of the Court of Appeal to issue guideline judgements while simultaneously bringing experience gained outside the confines of the legal system to the sentencing process.[96] This balance was sought through non-binding recommendations by the SAP to the Court of Appeal, which could then adopt, amend, or reject the recommendations.[97] As it relates to sexual offences, the SAP provided recommendations as to the methodology of assessing the gravity of a rape, including clarifying that a rape committed by a person in a relationship with a victim is no less serious than one committed against a stranger; it expanded the application of the elevated starting points established in *Billam*; and established a detailed list of aggravating factors to assist sentencing judges. These recommendations were subsequently accepted by the Court of Appeal in *R v Millberry*.[98]

In 2004, another statutory body was formed: the Sentencing Guideline Council (SGC). The SGC was chaired by the Lord Chief Justice and included both lay members and members of the judiciary. It had the authority to issue "Definitive Guidelines" which were required to be considered by sentencing judges, and if they were departed from, a sentencing judge was required to explain why.[99] The SAP remained in place,

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[94] *Billam*, *supra* note 90 at paras 50-51.

[95] *Ibid* at para 51.

[96] Brown, *supra* note 74 at 71.

[97] *Ibid* at 72.

[98] [2003] 2 Cr App R (S) 31, [2002] EWCA Crim 2891.

[99] *Criminal Justice Act 2003*, (UK), c. 44, ss. 170(9), 172(1)(a), 174(2).

but instead of advising the Court of Appeal, it passed on its recommendations to the SGC.[100] The SGC issued a Definitive Guideline in April 2007, which adopted the starting points from *Millberry*, but set out a detailed structure to assess both the appropriate starting points, and provided a general range applicable to the offences that fell within the starting points.[101]

Despite the statutory requirement that judges consider the Guideline, sentencing judges retained significant discretion over the sentence imposed. The Court of Appeal confirmed that consideration does not equate to following the guideline, and that the statute did not require "robotic adherence."[102] Thus while the approach was intended to be structured, the individualized nature of the sentencing process remained.[103]

The final body established to provide sentencing guidelines is the Sentencing Council for England and Wales, which was created in 2010 and replaced both the SAP and SGC. In 2014, the Sentencing Council published guidelines establishing that sentences for rape range from four to 19 years. Mere "consideration" is no longer sufficient: by statute, sentencing judges "must follow" any relevant sentencing guidelines "unless the court is satisfied that it would be contrary to the interests of justice to do so."[104]

The guideline requires that the court must first determine the appropriate category of the offence. This takes place by first assessing the harm, then the moral culpability of the offender. In combination, those factors form a matrix which provides for an appropriate starting point and sentencing range for offenders that fall within the respective categories. In the case of rape, the following categories of harm are used:[105]

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[100] Brown, *supra* note 74 at 78.
[101] *Ibid* at 79-81.
[102] *R v Oosthuizen*, [2005] EWCA Crim 1978 at para 15; *R v Matthews*, [2005] EWCA Crim 2768 at para 9.
[103] See *Attorney General's References (Nos 32 to 34 of 2007)*, [2008] 1 Cr App R (S) 35 at para 16; *Attorney General's References (Nos 7 to 9 of 2009)*, [2010] 1 Cr App R (S) 67 at para 39.
[104] *Coroners and Justice Act* 2009 (UK), c. 25, s. 125(1)(a).
[105] Sentencing Council of the United Kingdon: Rape, *Sexual Offences Act 2003*, s. 1, (1 Apr 2014), online: https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/

Category 1	Category 2	Category 3
The extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors **may** elevate to category 1	• Severe psychological or physical harm • Pregnancy or STI as a consequence of the offence • Additional degradation or humiliation • Abduction • Prolonged detention or a sustained incident • Violence or threats of violence (beyond that which is inherent in the offence) • Forced/uninvited entry into victim's home • Victim is particularly vulnerable due to personal circumstances	Factors in categories 1 and 2 not present

After an assessment of the harm that it caused to the victim, a judge is then to assess the moral culpability of the offender. This again occurs by reference to various factors which determine where the offender's is categorized:

Culpability A	Culpability B
• Significant degree of planning • Offender acts together with others to commit the offence • Use of alcohol/drugs on victim to facilitate the offence • Abuse of trust • Previous acts of violence against the victim • Offence committed in the course of burglary • Recording of the offence • Commercial exploitation and/or motivation	• No factors in category A present

• Offence racially or religiously aggravated • Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity) • Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)	

Finally, after assessing the harm and the culpability of the offence, judges are then to categorize the offence accordingly, as follows:

	A	B
Category 1	Starting point: 15 years custody Category range: 13 – 19 years custody	Starting point: 12 years custody Custody range: 10 – 15 years custody
Category 2	Starting point: 10 years custody Category range: 9 – 13 years custody	Starting point: 8 years custody Category range: 7 – 9 years custody
Category 3	Starting point: 7 years custody Category range: 6 – 9 years custody	Starting point: 5 years custody Category range: 4 – 7 years custody

Once the offence is categorized, the sentencing judge assesses the aggravating and mitigating factors present, and, using the starting point as a guide, determines whether the sentence should increase or decrease.

As the above charts illustrate, although a three-year starting point may have been substantially in accord with English precedents in 1985, that is simply not true now. In fact, *Sandercock* was only in accordance with English direction for one year. Today, the lowest starting point in England and Wales presently, assuming the lowest level of both harm and culpability, would still resulting in a starting point of five years, and a sentencing range of four to seven years. That starting point is approximately 66% higher than that in *Sandercock*. It is difficult to conclude anything other than that Canada's sentencing guidelines for sexual assault simply do not treat sexual assault as seriously as it is treated in England and Wales.

B. Republic of Ireland

Ireland has traditionally employed a highly discretionary approach to sentencing and adheres to similar sentencing objectives as those laid out in section 718 of Canada's *Criminal Code.* Due to the application of common law, sentencing law in Ireland is, and always has been, uncodified.[106] Traditionally, Ireland has emphasized discretion in sentencing even more than Canada, as the Irish appellate courts resisted, until recently, even the issuance of guideline judgements for particular offences.[107]

This changed in 2014, when the Court of Criminal Appeal issued two decisions that included general sentencing guidance for manslaughter, and a 2015 decision in which the Court of Appeal[108] repeated its intention to provide non-binding sentencing guidance.[109] As Brown explains, the Court of Criminal Appeal and Court of Appeal considered it important that sentencing judges be sufficiently consistent so that similar offences would receive similar sentences.[110] Even while offering guidance, though, the emphasis remained on the individualization of sentence:

> It clearly remains a matter for the sentencing judge to form a judgment, on all of the relevant facts, as to where on that range the offence for which the accused is to be sentenced lies. It is also clearly a matter for the sentencing judge to decide on the extent to which any aggravating or mitigating factors identified ought to increase or decrease the sentence to be imposed. Thus, <u>any such range provides broad guidance but does not seek to impose any form of standardisation of penalty</u>.[111]

Irish judges take a two-step approach to sentencing. They first determine where the offence falls on the spectrum of gravity. This results in the identification of a "presumptively appropriate, or 'headline' sentence."

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[106] Brown, *supra* note 74 at 165.

[107] See e.g. *DPP v Tiernan*, [1988] IR 250, as cited by Brown, *supra* note 74 at 167, in which the Supreme Court of Ireland expressly refused to issue sentencing guidelines for rape.

[108] The Court of Appeal was created in 2014; it amalgamated the Court of Criminal Appeal and the Courts-Martial Appeal Court, and is the initial appellate authority for all matters in Ireland. The Supreme Court is the final court of appeal in Ireland.

[109] *DPP v Ryan*, [2014] IECCA 11 [*Ryan*] ; *DPP v Fitzgibbon*, [2014] IECCA 12; *DPP v Counihan*, [2015] IECA 76.

[110] Brown, *supra* note 74 at 168.

[111] *Ryan*, *supra* note 109 at para 2.3 (emphasis added).

It is at this stage that any aggravating factors are weighed and applied. Next, the sentencing judge identifies any mitigating factors, and considers the offender's individual circumstances. These are then applied to determine the final sentence.[112]

In *DPP v FE*, the Supreme Court of Ireland provided sentencing guidelines for rape.[113] The Court determined that the 'headline' sentence for a rape where no coercion, force, or other aggravating circumstances were present should be seven years.[114] This number should be increased for aggravating factors present in the offence. In setting this out, the Court cited with approval sentences that were imposed where an accused tricked a woman into a house saying he had cleaning for her to do, and she did not resist his sexual advances because she was intimidated by his stature (seven years, six months); and two cases where an offender raped a woman who was sleeping (eight years).[115]

More serious circumstances attract a higher headline sentence. Where the victim suffers greater degradation than normal, or where the offender employs violence or intimidation beyond that inherent in the crime, or where there is a breach of trust, the range of sentence is between ten to 15 years.[116] This range was reflected in *DPP v Hearn*, where the offender locked the victim in a hotel room, threw her down, tied her hands, removed her clothes, threatened her by saying he had a knife in his bag, raped her, and only stopped when a third party entered the room and tackled him.[117] The headline sentence in that case was 15 years, which was reduced by three years due to the offender suffering from psychiatric disorders.

Finally, the Court endorsed that some cases warrant sentences of life imprisonment. This may be appropriate when a rape is carried out with serious violence, if the victim is subjected to greater humiliation than is normally associated with a rape offence, or if the victim is subjected to sexual perversion.[118] One such case involved an offender who befriended a family with the plan to sexually abuse three pre-teen girls. The abuse was

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[112] Brown, *supra* note 74 at 176.

[113] [2019] IESC 85 [*FE*].

[114] *Ibid* at para 52.

[115] *Ibid* at para 53 citing *DPP v TE*, [2015] IECA 218 [*TE*]; *DPP v TV*, [2016] IECA 320 [*TV*]; and *DPP v PG*, [2017] IECA 42.

[116] *FE*, *supra* note 113 at para 57.

[117] [2019] IECA 137, as cited in *FE*, *supra* note 113 at para 58.

[118] See generally *FE*, *supra* note 113 at paras 63-68.

"systematic and depraved," including photographing some of the abuse. Notwithstanding that the offended pleaded guilty, the sentencing judge averted to the "humiliation and degradation to which [the victims]" were subjected and imposed a life sentence.[119]

Nor are life sentences reserved for offences against children. Such sentences were imposed on, for example, an accused who raped his girlfriend and then his girlfriend's mother in circumstances described as "gross," and an offender who sexually assaulted two victims in a fast-food restaurant bathroom.[120]

Because of Ireland's two-step sentencing process explained above, a headline sentence – which incorporates both the gravity of the offence itself as well as any present aggravating factors – is not identical to a Canadian starting point, which is predicated on the offence itself and is to be adjusted for any aggravating or mitigating factors. However, it is analogous, and illustrates a general starting point of seven years for a major sexual assault with no aggravating factors – more than double that from *Sandercock*.

C. New Zealand

Sentencing in New Zealand is, like the countries above, intended to allow judges a wide discretion.[121] This discretion is not without guidance, though, as direction is provided to sentencing judges both in statute and from guideline judgements, the latter of which outline ranges of sentences for various seriousness of different ways in which the offence can occur. Like Ireland and Canada, the guidelines are not meant to be applied in a formulaic or rigid manner. Rather, they are intended to ensure consistency of approach and provide guidance to sentencing judges in their exercise of discretion.[122] However, unlike in Ireland and Canada, New Zealand has a statutory presumption in favour of a custodial sentence when an offender is convicted of rape. This presumption requires that an offender receive a custodial sentence unless the sentencing judge concludes, having regard for the offender's personal circumstances and those of the offence, that imprisonment would be inappropriate.[123]

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[119] *Ibid* at para 65.

[120] *Ibid* at para 67, citing *DPP v Anon*, unreported (2 May 2016, Central Criminal Court) and *DPP v Power*, [2009] IECCA 149.

[121] See Brown, *supra* note 74 at 195-197.

[122] *R v Taueki*, [2005] 3 NZLR 372 at para 10 [*Taueki*].

[123] *Crimes Act* 1961 [NZ], s. 128B(2) and (3).

The method to determine an appropriate sentence begins similarly to that in Ireland, as New Zealand judges first identify a starting point that appropriately reflects the intrinsic seriousness of the offence. This includes aggravating and mitigating factors that are intrinsic to the offence, but not the offender.[124] This is the sentence that would be appropriate for an offender convicted after trial absent any mitigating or aggravating factors particular to the offender.[125] Next, judges modifies the sentence to account for aggravating and mitigating factors specific to the offender.[126] The third step is to apply a reduction if the offender pleaded guilty.[127]

The first sentencing guidelines for rape were provided in 1987, where the New Zealand Court of Appeal expressed approval of the English Court of Appeal's decision in *Billam*,[128] and indicated a period of five years imprisonment would be an appropriate starting point.[129] This was revisited when the legislature subsequently amended the maximum available sentence for rape from 14 to 20 years, and by 1994 the Court recognized that the five-year starting point had come to be seen as 'rather on the low side' and increased the starting point to eight years' imprisonment.[130]

In 2010 the Court again revisited its guidance, as it acknowledged that both emerging evidence about rape, and societal attitudes towards it, required attention.[131] In so doing, the Court referred again to English sentencing guidance, recognizing the similarities between the two countries' legal systems,[132] and created four "bands" of sentencing ranges to serve as starting points:

(1) Six to eight years' imprisonment;
(2) Seven to 13 years' imprisonment;
(3) 12 to 18 years' imprisonment; and,
(4) 16 to 20 years' imprisonment.[133]

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[124] *Taueki*, *supra* note 122 at para 8.
[125] *R v Mako*, [2000] 2 NZLR 170.
[126] *R v* AM, [2010] NZCA 114, [2010] 2 NZLR 750 at paras 13, 84.
[127] *R v Hessell*, [2009] NZCA 450, [2010] NZLR 298.
[128] *Billam*, *supra* note 90.
[129] *R v Clark*, [1987] 1 NZLR 380.
[130] *R v* A, [1994] 2 NZLR 129 at paras 131-132.
[131] *R v* AM, [2010] NZCA 114, 2 NZLR 750.
[132] *Ibid* at para 18.
[133] *Ibid* at para 88.

Band one was described as being appropriate for offending at the lower end of the spectrum, where aggravating features are either not present, or present only to a limited extent.[134] Band two was said to be appropriate when violence or premeditation are relatively moderate.[135] Band three applies to offending accompanied by serious aggravating features.[136] Finally, band four applies to cases involving multiple offending over considerable periods of time, or instances of gang rape.[137] Even while setting out these bands the Court emphasized judicial discretion, indicating that they are intended to serve as guidance, but that when a judge considers the circumstances of an individual case it may be that a starting point outside the guidelines may be appropriate; including one that falls below band one. This remains permitted, but a judge who finds such ought to provide detailed reasons why it is appropriate.[138]

When compared to Canada, New Zealand's approach demonstrates two readily apparent differences: the first is the provision of starting point ranges that are significantly higher than Canada's. The bottom end of the New Zealand's sentencing range for the least-serious form of a major sexual assault, for example, is double that of Canada's. However, the second difference stands in direct contrast to Canada on a big-picture level: New Zealand, like England, has repeatedly recognized that societal attitudes towards sexual assault have evolved as we have learned more about its prevalence and harm it causes, and is willing to revisit its previous jurisprudence to account for that.

D. Direct Comparisons: Canadian Sentences Put in Perspective

In this section we consider some of the Canadian cases already referenced, and apply the sentencing regimes set out above. This direct comparison definitively shows that Canadian sentencing guidance has fallen far behind that of comparable justice systems in this area.

We begin with *Bunn*, where an HIV-positive offender forcibly raped the victim while she was sleeping, despite knowing his HIV status and that the

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[134] *Ibid* at para 93.

[135] *Ibid* at para 98.

[136] *Ibid* at para 105.

[137] *Ibid* at paras 108-109.

[138] *Ibid* at para 83.

condom he initially put on broke during the rape.[139] His 28-month sentence was upheld on appeal.

In England, this would likely fall under the 2-B category of offences, as the victim was particularly vulnerable due to being unconscious from alcohol and the recognition of psychological harm in these circumstances. It is possible it would be elevated to a 1-B offence if the sentencing judge found extreme psychological harm from the HIV and broken condom factors. These categorizations would result in a starting point of eight years, and a general range of seven to nine years (2-B) or a starting point of 12 years and a range of ten to 15 years (1-B).

In Ireland, Bunn would likely fall within the elevated headline range of ten to 15 years due to his subjective knowledge of his HIV status and the broken condom, as the inherent risk of transmitting HIV would constitute a greater degradation than normal. As he was convicted after trial, it is challenging to identify any mitigating factors that would remove him from this range.

In New Zealand Bunn would fall within either the second or third band, depending on how serious the aggravating factors were viewed. If they were seen as relatively moderate, he would fall within the seven to 13 year range; if they were considered serious, the 12 to 18 year range would apply.

Ghadghoni involved another victim who was unconscious due to alcohol; the offender, knowing she was egregiously intoxicated, took her to his home, and raped her after she passed out.[140] The Ontario Court of Appeal lowered his sentence to two years less one day.

This offence would fall into the 2-B category in England, due to the particular vulnerability of the unconscious victim. The starting point would be eight years, and the general range would be seven to nine years. In Ireland, the offender would be subject to a headline sentence of seven years, but his offence is analogous to cases where eight-year sentences have been imposed.[141] In New Zealand, this offence would likely fall within band one as there was minimal force, but the victim being unconscious is aggravating and would likely result in a sentence at the higher end of the six to eight year range.

In *Hughes*, the offender entered the victim's dormitory while she was asleep and raped her. The victim was significantly impacted, being

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[139] *Bunn* MBCA, *supra* note 51 at paras 8, 23.

[140] *Ghadghoni*, *supra* note 56 at paras 5-7, 11, 17-18.

[141] See *DPP v TE* and *DPP v TV*, *supra* note 115.

distraught for hours, required counselling, and could not sleep in her own room for some time.[142] The 18-month sentence was upheld on appeal.

It is unclear how the sentence upheld on appeal considered that the victim's dormitory – effectively, her residence – was invaded. This should have been a place of safety for her. In England, this, along with the psychological harm suffered, would elevate this to a 2-B offence. Again, the starting point would be eight years, and the general range would be seven to nine years. In Ireland, given the lack of force used, this would attract a seven-year headline sentence. In New Zealand, this would fall within band one or two, depending on the level of premeditation found; ultimately, the sentencing range would be six to 13 years, depending on the band.

Finally, in *Bertacco*, the offender lured his 16-year-old victim to his house, forcibly removed her pants and underwear and held her down while he raped her for some 40 minutes – an attack that left physical scarring and profound emotional and psychological harm.[143] He was sentenced to 16 months.

If the sentencing judge found that the psychological harm was sufficiently extreme, in England this could be classified as a 1-B offence; however, it could also fall in the 2-B category. As with *Bunn*, these categorizations would result in a starting point of eight years, and a general range of seven to nine years (2-B) or a starting point of 12 years and a range of ten to 15 years (1-B). In Ireland, this would undoubtedly fall within the ten to 15 year range, given the offender employed violence above that needed to commit the offence (and caused injury in doing so). In New Zealand, depending on the significance attached to the aggravating factors present, it could fall within either band two or three, and therefore fall within ranges of seven to 13, or 12 to 18 years, respectively.

It should be recognized that in setting out the applicable starting points and ranges from each of these countries, we have not attempted to reduce any of the sentences for mitigating factors. Some of the above cases could result in reductions. However, our intention is not to speculate on the final sentence to be imposed, but rather to indicate that the above offenders would presumptively face far more significant sentences than they ultimately received. Indeed, even if every one of these offenders was sentenced at the bottom end of the applicable ranges in these other countries, or even below

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[142] *Hughes*, *supra* note 60 at paras 1-2.

[143] *Bertacco*, *supra* note 68 at paras 9-17.

those ranges, their sentences would still be significantly higher than they were in Canada.

This illustration puts Canadian sentencing for major sexual violence into stark relief. It is clear that the Canadian courts' collective disregard for our advancing societal views on sexual offences makes them the outlier when contrasted with comparable common-law legal systems.

IV. IT IS TIME FOR UPDATED SENTENCING GUIDANCE

It is therefore imperative that appellate courts provide guidance to sentencing judges. Articulated properly, appellate guidance not only assists in ensuring a proper application of sentencing principles, but also serves the important goal of promoting consistency in sentencing. This is integral to maintaining public confidence in the justice system. The Australian High Court explained that "[i]f there is insufficient guidance, and resulting inconsistency [in sentences], public confidence in the value of discretionary sentencing will suffer."[144] The Supreme Court of Canada has also acknowledged this reality, commenting that "[t]he credibility of the criminal justice system in the eyes of the public depends on the fitness of sentences imposed on offenders. A sentence that is unfit, whether because it is too harsh or too lenient, could cause the public to question the credibility of the system in light of its objectives."[145] We see this in Canada presently, where the public perception of the justice system is that of a system that prioritizes the rights of violent criminals over the safety of the public, and that does not impose sufficiently strict sentences to protect society.[146]

Similarly, the New South Wales Court of Criminal Appeal expressed that "[i]nconsistency in sentencing offends the principle of equality before

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[144] *Wong v The Queen*, [2001] HCA 64 at para 10.

[145] *Lacasse*, *supra* note 75 at para 3.

[146] One only needs to view the comment section of online news agencies, or social media discussion groups such as Reddit to see this. Unfortunately, this lack of confidence is not new: see David Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law Inc., 1999) at 4: "Canadians thumb newspapers with disgust, reading yet again about… another sentence that does not reflect the suffering that the self-indulgent or pointless acts of the offender have caused… Public opinion polls and surveys confirm what anyone who lives in this society can sense and feel… The criminal justice system is, in the eyes of many, a system in crisis."

the law. It is itself a manifestation of injustice. It can lead to a sense of grievance amongst individuals on whom uncharacteristically severe sentences are imposed and amongst the broader community of victims and their families, in the case of uncharacteristically light sentences."[147] We likewise see this problem in Canada, where studies have shown that Indigenous offenders and other visible minorities receive harsher sentences for similar offences when contrasted with white offenders.[148] While individualization of sentence will always result in some variance, when there is a persistent observable pattern of inequality, it becomes necessary to examine whether sentencing principles are being properly applied by sentencing judges. As Wakeling JA recognized, "The explanation for erratic sentencing patterns usually is attributable to the absence 'of a sound and workable analytical framework'" provided by an appellate court to ensure that all relevant considerations are rationally and transparently measured.[149]

Wagner J (as he then was) provided helpful guidance to approaching sentencing using both ranges and starting points in the majority decision in *R c Lacasse*. He acknowledged that both approaches are attempts to implement parity in sentences but went on to state that "they reflect all the principles and objectives of sentencing."[150] He summarized sentencing ranges and starting points as "historical portraits" intended to guide sentencing judges. Importantly, he explicitly stated that ranges do not replace a sentencing judge's discretion, which must still be exercised.[151] The Manitoba Court of Appeal has expressed sentencing ranges as being intended to assist judges in "their exercise of judicial discretion to impose an individualized sentence in light of the circumstances and the relevant sentencing principles and objectives."[152]

The jurisprudence is clear that the mere existence of sentencing ranges and starting points do not bind sentencing judges to a particular sentence (or even range of sentence). *Lacasse* explained that ranges are neither averages nor straitjackets, and that there will be situations that call for a

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[147] *The Queen v Jurisic*, [1998] NSWSC 423 at 216.

[148] See generally, Rhea Murti, "The Sentencing of Indigenous People in Canada: Where We Are Two Decades After *Gladue*" (2023) 19:1 Indigenous LJ 17.

[149] *R v Yellowknee*, 2017 ABCA 60 at para 57, citing *R v Vigon*, 2016 ABCA 75 at para 40 and *Arcand*, *supra* note 13 at para 53.

[150] *Lacasse*, *supra* note 75 at para 57.

[151] *Ibid*.

[152] *R v Sass; R v Zammit*, 2018 MBCA 46 at para 5; *R v Burnett*, 2017 MBCA 122 at paras 9-10.

sentence outside a particular range.[153] In *R v Blacksmith*, LeMaistre JA wrote that even a wide disparity between a starting point and the ultimate sentence does not make a sentence unfit; it simply requires that sentencing judges meaningfully explain why the sentence imposed is fit for that case.[154]

This important principle bears repeating, as one of the criticisms of starting points is that they enable a judicially-created minimum sentence. However, when properly applied, neither sentencing ranges nor starting points bind judges: sentencers may deviate from a range where appropriate to do so. What ranges and starting points do is establish a consistent approach and ensure that where they are not followed everyone involved – the offender, the victim, and the public – know why.

The historical portraits that are reflected in current jurisprudence, however, are truly historical and warrant critical attention. The three-year starting point for a major sexual assault first articulated in *Sandercock* is over 39 years old. Society's awareness of the long-term impacts on victims of sexual assault has drastically increased since that time; so too have societal attitudes towards those offenders. Both, through the principles of considering victim impact and denunciation, should be considered. When examined critically, the conclusion that sentencing ranges in this area must be reconsidered is inescapable. Put simply, the existing jurisprudence is inconsistent with both the *Criminal Code* and Parliament's intent for sentences in this area. This applies equally in those jurisdictions who purportedly reject *Sandercock* but endorse ranges that are similar or effectively the same.

It is not only these principled reasons that cry out for updated sentencing guidance. There are eminent practical reasons to do so as well. Quite simply, the current approach to sentencing in this area has not worked. Despite that violent crime in Canada has, in general, been decreasing, that is not true for sexual violence. Instead, between 2004 and 2014, sexual assault was the one violent offence for which the victimization rate remained stable, at a rate of approximately 22 incidents per 1000 people.[155] In the years since, the rate of sexual violence has increased,

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[153] *Lacasse*, *supra* note 75 at paras 57-58.
[154] 2018 MBCA 81 at para 19.
[155] Samuel Perreault, *Criminal Victimization in Canada, 2014* (Juristat, Canadian Centre for Justice and Community Safety Statstics 2015) online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14241-eng.htm#a2.

jumping to 30 incidents per 1000 people in 2019.[156] In that same time period, the robbery rate increased by only one, from six to seven incidents per 1000 people, and the rate of non-sexual physical assaults fell by two from 48 to 46.[157]

This is even though sexual assault remains one of the most underreported crimes, with an estimated six per cent of sexual assaults reported to the police.[158] Roughly one in fourteen (seven per cent) of sexual assault cases reported to police result in the offender being sentenced to jail.[159] Accordingly, if we accept that only six per cent of sexual assaults are reported, and only seven per cent of those result in jail time, less than half of one per cent of individuals who commit a sexual assault in Canada will ever be incarcerated.

This paper is not intended to be a discourse on conviction rates; however, these numbers are included to demonstrate the small percentage of offenders who ever face penal consequences for their actions. That is particularly important because sexual assault is a crime which is not only a gender-based offence, but also victimizes those who are particularly vulnerable. The rate of sexual assault against Indigenous women is approximately three times higher than among non-Indigenous women.[160] Further, of all sexual assault incidences, 47 per cent are committed against young women aged 15-24.[161]

It is not only Indigenous or young women that are at significant risk. Homelessness is uniquely dangerous for women and gender diverse people. While on the street, 37.4 per cent of young women and 41.3 per cent of trans and gender non-binary youth experience sexual assault compared to

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[156] Adam Cotter, *Criminal Victimization in Canada, 2019* (Juristat, Canadian Centre for Justice and Community Safety Statistics 2021), online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00014-eng.htm [Cotter].
[157] *Ibid.*
[158] *Ibid.*
[159] Christine Rotenberg, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014* (Juristat, Canadian Centre for Justice and Community Safety Statistics 2017), online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm.
[160] Shana Conroy & Adam Cotter, *Self-reported sexual assault in Canada, 2014* (Juristat, Canadian Centre for Justice and Community Safety Statistics 2017), online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm [Conroy & Cotter].
[161] *Ibid.*

just over eight per cent of cis-gender young men.[162] People with disabilities – particularly women and those with mental disabilities – are similarly at greater risk of sexual violence: the rate of sexual assault against those with a disability are approximately double those who are not disabled.[163]

Nor is vulnerability linked to immutable personal characteristics; it is also connected to previous victimization. Sadly, those who are sexually victimized in childhood are more likely to be victimized as adults. Those who experienced sexual abuse as children report physical and sexual assault at rates three times higher than those who did not experience childhood sexual abuse.[164]

Sexual violence is not only an ongoing problem in Canada, but a growing one. The victims of this violence and the Canadian public deserve a justice system that recognizes the harm that it causes and sentences the perpetrators of it appropriately.

A. Moral Blameworthiness for Major Sexual Offences is Always High

The fundamental principle of sentencing is that a sentence must be proportional to the gravity of the offence and the moral blameworthiness of the offender. As the gravity of the offence is informed by the range of available sentences in the *Criminal Code*, that factor remains constant. But since the offence of sexual assault covers a wide breadth of conduct, it is necessary to place the gravity of each offender's actions on the spectrum of the offence generally.[165] As this article focuses on those crimes that would fall within the category of a major sexual assault, our attention is on those crimes that will always fall at the high end of general offence.

When assessing an offender's moral blameworthiness, the factors to consider are (i) the intentional risk-taking of the offender, (ii) the consequential harm caused by the offender, and (iii) the normative character of the offender's conduct.[166] While there are many different circumstances and means to commit a major sexual assault and the facts of

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[162] Kaitlin Schwan, *The State of Women's Housing Need & Homelessness in Canada: Executive Summary* (Toronto: Canadian Observatory on Homelessness Press, 2020) at 10.

[163] Conroy & Cotter, *supra* note 160.

[164] Cotter, *supra* note 156.

[165] See *R v Gejdos*, 2017 ABCA 227 at para 38.

[166] *R v M(CA)*, 1996 SCC 230 at para 80.

each individual offence will vary somewhat, each of these factors will always support a finding of a high moral blameworthiness except in truly exceptional circumstances.

Taking the factors in order, intentional risk-taking is a hallmark of sexual violence. As the Alberta Court of Appeal recognized, "By its nature, sexual assault is volitional conduct. It is not accidental."[167] Nearly all major sexual assaults include some form of penetrative sexual contact; even in circumstances where the offender did not know the victim was not consenting and were reckless, they still chose to physically violate the victim without ascertaining whether the contact was wanted – the quintessential illustration of high-risk behaviour. For the offender who does know that the victim is not consenting, this is even more egregious. And offenders from both categories are also engaging in risk-taking behaviour as their conduct risks physical, emotional, and psychological harm to the victim.

Turning to the second factor, the consequential harm of the offence, it is now beyond dispute that sexual violence always results in harm of some kind. Actions that constitute a major sexual assault are, quite simply, one of the fundamentally invasive offences in our criminal justice system: they violate the victim's physical, emotional, and psychological integrity in significant ways. In every case, judges must recognize this reality and give real effect to it when imposing sentence.

Last is a consideration of the normative character of the offender's conduct. In all cases of serious sexual violence, an offender's conduct is entirely unacceptable. There are no major sexual assaults that are not serious. To put it in simple terms, the spectrum ranges from "bad" to "worse." As Charlton J of Ireland's High Court explained:

> Rape is an extremely serious offence… [It] constitutes a savage attack on the bodily and psychological integrity of a woman. It overrides her right to privacy in the most intimate area of human relationships. It discounts her personality by imposing a complete nullification of her existence as a sentient person who is entitled to choose where to place her affection… In rape, affection or sexual recreation is replaced by the opposites of violence and degradation.[168]

Applying the Supreme Court's guidance for determining moral blameworthiness, moral culpability is high in every major sexual assault.

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[167] *Arcand*, *supra* note 13 at para 275.

[168] *DPP v Drought*, [2007] IEHC 310 at paras 6-7 [*Drought*].

Sentencing judges need to be mindful not to confuse an offender who comes before the court with sympathetic circumstances with one whose moral culpability is low – these are not the same.

1. A Comment on Mitigating Factors

Of course, any assessment of moral blameworthiness must include factors that mitigate such culpability. Before delving into sentencing ranges and starting points specifically, it is helpful to address certain factors that have previously been considered as mitigating, as, like the starting points themselves, some are also the product of outdated perspectives. For example, as Ruby noted, courts have given weight to a lack of psychological damage to young victims, or victims that "may not have understood or appreciated the abhorrent nature of the act."[169]

Such an approach is the product of a lack of appreciation for the long-term impact of sexual offences. Even adult victims may not recognize or be able to fully explain the full impact of a sexual attack. This does not render the assault itself and less serious, nor does it decrease the offender's moral culpability for their actions. The lack of an articulated significant impact on a victim is, at most, a neutral factor.

The sentencing decision in *Bertacco* provides a helpful illustration of other factors that the sentencing judge erroneously considered to be mitigating. In that case, which involved the 22-year-old offender forcibly raping his 16-year-old victim for about 40 minutes, Crerar J indicated that the following were "significant mitigating factors":

- the conviction was a single count of sexual assault;
- this was the offender's first offence;
- the offender was young;
- the offender was unemployed, but he had worked in the past;
- the offender was "reasonably well spoken" and "appears to have the capacity to live a responsible life and contribute to society"; and,
- the offender did not appear to be "irredeemable" or "vicious."[170]

Of the above, only the offender being youthful was properly characterized as mitigating. It is not mitigating that the offender "only"

[169] Ruby, *supra* note 7 at §23.438 citing *R v Irwin*, 1979 CarswellAlta 165 (CA) and *R v Beriault*, 1982 CarswellBC 458 (SC) at para 13.
[170] *Bertacco*, *supra* note 68 at paras 86-88.

committed one offence, nor would it be even if the offence fell to the lower end of the spectrum of seriousness – which this did not.[171] The lack of a previous criminal record is neutral, as it is simply the lack of an aggravating factor.[172] The offender having been employed at some point in his past is unconnected to his crime, and does not lessen his moral culpability for it. Similarly, the last two factors, which may form part of the assessment for potential rehabilitation, likewise do not mitigate his moral culpability.

Finally, there have been many cases where sentencing judges have either implied, or stated outright, that factors such as how a victim dresses, or whether they put themselves in a vulnerable position, or whether they drank alcohol, may be mitigating. As we noted above, in *Sandercock* the Court indicated that "provocation" could be considered mitigating, without giving any guidance as to what such provocation might look like. The proper approach to provocation in the context of sentencing for rape was explained by Charleton J of the High Court of Ireland:

> It has no application to this offence... [I]t is only where there has been consent to sexual intercourse which is withdrawn during the act that anything involving the conduct of the victim can be regarded as relevant. The entitlement of a woman to refuse to consent to sexual intercourse is absolute since the presence of consent is what makes the act of sexual intercourse lawful.[173]

This victim blaming cannot continue. Women are allowed to dress in the manner they wish; they can go to bars, parties, or "dangerous" areas of town; they can drink alcohol or use other intoxicants. None of these actions constitute consent, and a woman who engages in any, or indeed all, of these behaviours retains the same right to bodily and sexual autonomy as the teetotaler who stays home every night and dresses in a nun's habit. Wolf PJ's comments in *R v NJBM* are apt: "It does not matter that she had been drinking alcohol. She is not guilty of anything. None of this was her fault...It is the fault of the man who did this to her[.][174]

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[171] *R v MGF*, 2010 ABCA 102 at para 7.
[172] *Ibid*; *R v Wright*, 2010 MBCA 80 at para 16.
[173] *Drought*, *supra* note 168 at para 52 (emphasis added).
[174] 2020 BCPC 260 at para 38.

2. Aggravating Factors that Judges Must Recognize

As we have shown, judges have repeatedly gone below the *Sandercock* starting point in numerous cases, even those with significantly aggravating factors. This suggests the approach in England and Wales, where different ranges are clearly set out to account for specific factors, may be invaluable not only to fashioning similar sentences in similar circumstances, but also to ensure that factors acknowledged to be aggravating are given effect.

Sexual assault can be committed in many different circumstances, and there are many factors that should increase the appropriate sentence. For instance, breaking into someone's home itself attracts a sentence in the general range of two years.[175] Sexual assault, based on current Canadian law, should attract a sentence in the general range of three years. Committing both of those together should not result in a free-ride for one of those offences.[176] Similarly, strangling a victim to enable a rape – another serious criminal offence[177] – should likewise result in a significantly increased sentence, not a concurrent sentence that amounts to nothing more than a notation on a criminal record.[178]

It is impossible to list all possible aggravating factors, but in this section we endeavour to set out several that are often overlooked or underappreciated, and that need to be recognized and given effect to.

i. **Abusing Those Who Are Particularly Vulnerable to Sexual Abuse**

As set out above, there are ample statistics demonstrating that certain groups are particularly vulnerable to sexual violence. Indigenous women, young women, women and gender-diverse people, people who are homeless, people with disabilities, and those who were sexually abused as children are all fall within this category.

Parliament has provided some guidance regarding particularly vulnerable victims by mandating that judges give primary consideration to denunciation and deterrence when sentencing for an "offence that involved the abuse of a person who is vulnerable because of personal

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[175] *R v Duerksen*, 2012 MBCA 41 at para 4.

[176] See e.g. *Hughes*, *supra* note 60.

[177] *Criminal Code*, *supra* note 37, s. 246.

[178] See e.g. *RS*, *supra* note 65.

circumstances[.]"[179] This clear statement must be given effect beyond mere lip service.

ii. Abusing a Sleeping or Unconscious Victim

It is now well-established that sexually abusing a sleeping or unconscious victim is a significantly aggravating factor. This is as it should be: it is an inherently predatory act that exploits the vulnerability of one who is entirely unable to protest or resist.[180] The Alberta Court of Appeal helpfully explained:

> An offender who sexually assaults a person who is asleep or passed out is treating that person as if the person were an object to be used – and abused – at will. Since the offender knows full well that the person is not consenting, this reveals an enhanced degree of calculation and deliberateness by the offender. Further, at that point, the person is at their most vulnerable, unable to defend themselves in any way and unable to call for help from others. The offender knows this too, adding further to the high level of moral blameworthiness for the illegal conduct.[181]

This is not a "minor" aggravating factor – it is one that significantly elevates an accused's moral culpability. The physical invasion of a person's body while they are sleeping or unconscious is morally repugnant and must be emphatically denounced.

iii. Photographing or Video-Recording a Sexual Attack

With the rapid advancement in technology in recent years, particularly the quality of first digital cameras and camcorders, then cameras on smartphones, it is unsurprising that they have been used during the commission of criminal offences. It is unclear precisely how prevalent the recording of sexual violence by offenders is; however, as Brown notes, several high-profile cases and recent appellate decisions from several jurisdictions support that it is increasingly common.[182] In 2011, the Lord Chief Justice of the English Court of Appeal (Criminal Division) wrote, "A

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[179] *Criminal Code*, *supra* note 37, s. 718.04.

[180] *R v Shrivastava*, 2019 ABQB 663 at para 43; *R v Milosevic*, 2019 ABQB 199 at paras 25, 31; *R v Bonni*, 2019 MBQB 76 at paras 20, 30; *R v McGregor*, 2019 CM 4016 at para 62(b).

[181] *Arcand*, *supra* note 13 at para 283 (citations omitted).

[182] Brown, *supra* note 74 at 37, citing Anastasia Powell & Nicola Henry, *Sexual Violence in a Digital Age* (London, UK: Palgrave Macmillan, 2017) at 130-31; Anastasia Powell, Gregory Stratton & Robin Cameron, *Digital Criminology – Crime and Justice in Digital Society* (Milton Park, UK: Routledge, 2018) at 93.

pernicious new habit has developed by which criminals take photographs of their victims…We make it clear that from now onwards the taking of photographs should always be treated as an aggravating feature of any case and in particular of any sexual cases. Photography in these circumstances usually constitutes a very serious aggravating feature of the case."[183]

In Canada, the recording of a sexual attack occurred (and was held to be aggravating) in *R v Katsnelson*, when the offender raped the victim, then took pictures with his cell phone of his co-accused digitally penetrating her.[184] More recent was the matter of *R v AE*.[185] In that case, the complainant accompanied three young men to a residence. They engaged in sexual activity that the males claimed was consensual (despite the complainant repeatedly crying out "No!" numerous times), but the Court of Appeal and Supreme Court both held was not.[186] The attack featured the complainant being repeatedly hit, verbally abused and degraded, and violated with an electric toothbrush. Additionally, the three rapists video-recorded some of the sexual activity, at least initially without the complainant's knowledge.[187]

AE and *Katsnelson* are just two examples of instances where sexual abuse has been recorded by attackers. Given how few judicial decisions, and particularly sentencing decisions are published, there have certainly been many more that have occurred.[188] Since the appellate decisions in *AE* stem from a Crown appeal from acquittals entered by the trial judge, the courts did not provide guidance on what aggravating factors were present for sentencing purposes. In light of the international recognition of this emerging trend, though, the question of how it should be treated at the sentencing stage in Canada ought to be considered.

There are numerous principled reasons as to why recording a sexual assault should be treated as a significant aggravating factor. The first is the potential for that recording to be distributed. After all, the internet

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[183] *Attorney General's Reference (Nos. 3, 73 and 75 of 2010)*, [2011] 2 Cr App R (S) 100 at para 7.

[184] 2010 ONSC 2246 at para 9 [*Katsnelson*].

[185] 2021 ABCA 172 [A.*E.* ABCA], affirmed 2022 SCC 4 [*AE* SCC].

[186] *Ibid* (*AE* ABCA) at para 9; *Ibid* (*AE* SCC) at para 2.

[187] *Ibid* (*AE* ABCA) at paras 5-6, 8.

[188] Outside the sentencing context, at least one judge has found that video recording otherwise consensual sexual activity constitutes fraud that vitiates consent: see Gary Dimmock, "Jacob Rockburn found guilty on two counts of sexual assault" *Ottawa Citizen* (17 February 2023) online: https://ottawacitizen.com/news/local-news/ottawa-court-ruling-makes-secret-sex-taping-sex-assault-in-ontario.

"provides 'a staggering means of amplification' as images can be e-mailed or otherwise exhibited to a victim's family, friends, peers, employers and co-workers."[189] Such media can also be uploaded for the general public to view.[190] We only need to look to the background of the legislation criminalizing such distribution[191] to see the enormity of the harm that can result: the suicides of Amanda Todd and Rehtaeh Parsons after extensive bullying due to explicit images of them being disseminated.[192]

One could argue that it was the distribution of the media, and not the recordings themselves, that lead to the tragic results of those cases. But the fact remains that distribution cannot occur without the initial recording. Furthermore, there may be circumstances where a recording is made but the attacker does not have the opportunity to distribute it – surely they should not avoid responsibility simply because they did not disseminate the media more quickly, or were unsuccessful in their efforts. In fact, lack of distribution is nothing more than the absence of an additional criminal offence.[193]

Even where the recording of sexual abuse is not distributed, the act of recording increases the seriousness of the attack itself, as it may heighten the victim's trauma during the attack and the psychological harm that follows. In a study of 51 cases from Norwegian high courts where an offender took photographs or video-recorded portions of the attacks, Professors Sandberg and Ugelvik found that in 17 of the cases a major purpose of the recording was to further humiliate the victim.[194] The authors explained, "the way the camera was used suggests that the act of the

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[189] Brown, *supra* note 74 at 47, citing Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn" (2014) 49 Wake Forest L Rev 345 at 350.
[190] See e.g. *R v SA*, 2022 MBPC 28.
[191] *Protecting Canadians from Online Crime Act*, SC 2014, c 31.
[192] Wikipedia, "Suicide of Amanda Todd" (last revised Mar 25, 2022) online: https://en.wikipedia.org/wiki/Suicide_of_Amanda_Todd; Wikipedia, Suicide of Rehtaeh Parsons (last revised Jan 3, 2022) online: https://en.wikipedia.org/wiki/Suicide_of_Rehtaeh_Parsons. See also Christie Blatchford, "Boy in notorious Rehtaeh Parsons photo talks for first time about what happened" *National Post* (January 15, 2015), online: http://nationalpost.com/opinion/christie-blatchford-boy-in-notorious-rehtaeh-parsons-photo-talks-for-first-time-about-what-happened.
[193] See *Criminal Code*, *supra* note 37, s. 162.1.
[194] Sveinung Sandberg & Thomas Ugelvik, "Why do Offenders Tape their Crimes? Crime and Punishment in the Age of the Selfie" (2017) 57:5 Brit J. Criminology 1023 at 1030 [Sandberg & Ugelvik].

recording was a way to further humiliate the victim. Forcing the victim to pose in degrading positions for the camera and in front of everyone present is a way to demonstrate ultimate power. The victim has to suffer violence, threats and sexual abuse, and is also made aware that this is filmed. The cold, penetrating gaze of the camera lens is, in effect, like a 'double rape.'"[195]

This effect was illustrated in *Katsnelson*: the victim explained in her impact statement that the offender taking photographs of his co-accused abusing her further increased the violation of her sense of privacy.[196]

The existence of a recording – even one that is not distributed to third parties – can have an ongoing impact on a victim. Over a year-and-a-half in 2016-17, the Canadian Centre for Child Protection conducted an in-depth international study to examine various facets surrounding the sexual abuse of children where child pornography is created. The result is a comprehensive examination of, *inter alia*, the impact of sexual abuse on child victims.[197] Several of the harms recognized, though, are equally relevant in the context of adult victims.

One lasting impact when a victim is aware that their sexual abuse was recorded is the fear of being recognized from that imagery.[198] Some of the comments recorded in the *Survivors' Survey* put this fear into stark relief:[199]

- "I live in constant fear that someone will recognize me and I will be abused over and over again."
- "It's stressful. You never really know, when a stranger smiles at me, or someone gives me a strange look. I never will know."
- "...I would recognize the direct perpetrators if they were to stand in front of me. I would not recognize the indirect ones who saw the films. Every day I live in fear that my pictures will be recognized..."

The fear of being recognized can easily lead to further emotional impacts. Victims described feeling hyper-vigilant and anxious, sometimes to the point of altering their appearance to avoid being recognized; limiting

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[195] *Ibid* at 1030 (emphasis added).

[196] *Katsnelson*, *supra* note 184 at para 52.

[197] See Canadian Centre for Child Protection, *Survivors' Survey: Full Report 2017* (Winnipeg: Canadian Centre for Child Protection, 2017) online: https://www.protectchildren.ca/pdfs/C3P_SurvivorsSurveyFullReport2017.pdf [*Survivors' Survey*].

[198] *Ibid* at 165-66.

[199] *Ibid* at 167-68.

social interactions in public places; worrying about being stalked or harmed by someone who recognizes them; and worrying about the shame and humiliation they would feel if they were recognized.[200] These impacts are equally foreseeable for adult victims, who are equally recognizable.

Another lasting impact is the ongoing exploitation of the victims. Simply put: the hands-on abuse ends, but recordings are a permanent record of the abuse. In fact, looking at images and watching video recordings of abuse gives rise to feelings of being abused over and over.[201] As one victim succinctly explained:

> They are the same thing. Looking at pictures and videos is the same thing as physically doing it. That's what everyone doesn't understand. It is like raping us all over again and again. Everyday I know people are looking at my pictures and there is nothing I can do to stop them.[202]

It is thus clear that recording a sexual attack significantly degrades the victim during the abuse itself, and continues to do so long after the physical attack has concluded. As Professors Sandberg and Ugelvik concluded:

> The very act of filming or taking pictures furthers the humiliation because it demonstrates the power of the offender to direct or objectify the victim, and turn her or him into an image. It also adds to the pain of a violent or sexual assault by demonstrating to the victims that they are being watched not only by the offenders and bystanders, but also potentially by many others if the images are distributed.[203]

An action that has the potential for such catastrophic emotional and psychological harm simply must be acknowledged as a significantly aggravating factor to any conviction for sexual violence.

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[200] *Ibid* at 169-71.
[201] *Ibid* at 153-54. See also *Inksetter*, *supra* note 43 at para 22.
[202] *Survivor's Survey, supra* note 197.
[203] Sandberg and Ugelvik, *supra* note 194 at 1031-32.

iv. Choking or Strangulation[204]

Finally, while the presence of strangulation can, and should, attract an elevated charge under section 272(1)(c.1),[205] where an assault is prosecuted as sexual assault *simplicitor* and there is evidence of strangulation, that is a significantly aggravating factor that must be accounted for. Strangulation is extremely serious: it can easily lead to death, permanent injury, or brain damage. It can also lead to strokes, blood clots, or aspiration (choking on vomit).[206]

Aside from the physical injuries strangulation can cause, judges also need to recognize what it signifies vis-à-vis future risk of harm, particularly in domestic relationships. Whether committed during a sexual attack or outside the sexual context, the presence of strangulation is a strong indication of more violence to come. In fact, one study concluded that the presence of strangulation dramatically increases the chances of homicide in an intimate partner relationship, and is often "the penultimate abuse by a perpetrator before a homicide."[207]

B. Denunciation is Key – Rehabilitative Sentences are Inappropriate

It is now accepted that denunciation and deterrence should be the paramount objectives in a sentencing for serious sexual offences.[208] While this is not a declaration that other factors are not to be considered, objectives such as rehabilitation should take on lesser importance. In recent years, however, a concerning trend has emerged whereby sentencing judges indicate that rehabilitation "remains relevant," but then place far more weight on it than such a statement would suggest.

To illustrate, we return to *Bunn*. The sentencing judge acknowledged the three-year starting point, ignored the aggravating aspects of the

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[204] The act should properly be characterized as "strangulation" instead of "choking" – the former consists of an action performed by a person; the latter refers to being unable to breathe due to an obstruction from food or another object. However, the *Criminal Code* uses both terms, seemingly interchangeably.

[205] See *Criminal Code, supra* note 37, s. 267(c), outside of the sexual assault context.

[206] See Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (New York: Bloomsbury, 2019) at 65-66.

[207] *Ibid* at 66-67, citing Gael B. Strack, George E. McClane, and Dean Hawley, "A Review Of 300 Attempted Strangulation Cases, Part I: Criminal Legal Issues," (2001) 21:3 The Journal of Emergency Medicine 303.

[208] *Sandercock*, *supra* note 1 at para 14; see also *Arcand*, *supra* note 13 at paras 274-279.

offender's criminal history (and indeed, every other aggravating factor present in the offence), and declared that because the offender said he was willing to engage in treatment programs, imposed a sentence of 28 months to address rehabilitation and restorative justice.[209] She did this despite that the offender had previously indicated a willingness to engage in programming when convicted of other offences – and was obviously unsuccessful.[210] Considered in context, this sentence clearly placed significant – if not paramount – importance on rehabilitation.

While the Court of Appeal made numerous references to the deferential standard of review that applies on a sentence appeal, this explanation for declining to intervene rings hollow: the deferential standard of review on a sentence appeal does not insulate sentencing judges from appellate intervention when their weighing of sentencing principles was itself unreasonable.[211]

At its most basic level, the fundamental purpose of sentencing – and arguably the entire criminal justice system – is "to protect society and to contribute... to respect for the law and the maintenance of a just, peaceful and safe society[.]"[212] Everyone has the right to live safely and peacefully. In the context of sexual violence, the goal of sentencing sexual offenders must be to protect the public from more sexual violence.

Proponents of rehabilitation argue that safety is the long-term result of effective rehabilitation.[213] This position, however, can be stated another way: that sentencing judges should gamble with the safety of the public, in the hope that offenders who deliberately committed a violent sexual offence can <u>and will</u> be effectively rehabilitated. Rehabilitation is a complex and lengthy process, and there is no guarantee of success.

Rehabilitation must also be viewed through the lens of the intentional behaviour a person has undertaken. Unlike many offences, sexual assault is an act of domination: treating the victim as a tool to be used for the offender's pleasure. Most people do not sexually violate others. Placing excessive emphasis on rehabilitation for sexual offenders may not align with the urgent need for denunciation and protection of society. When the offender is not rehabilitated – which is entirely outside the control of the

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[209] *Bunn* MBQB, *supra* note 51 at paras 25-27.

[210] *Ibid* at para 27.

[211] *R v Nasogaluak*, 2010 SCC 6 at para 46.

[212] *Criminal Code*, *supra* note 37, s. 718.

[213] See e.g. *Bunn* MBQB, *supra* note 51 at para 30.

courts – the result is that the courts have failed to protect the public from, at a minimum, the risk of further sexual violence. Further, it sends the message to both individual victims and the public at large that the offender will be prioritized above their safety. This risks retraumatizing victims and undermining their pursuit of justice. This is not to say that we are of the view that rehabilitation takes no role, but rather, deterrence and denunciation must be primary and sentences should reflect that.

In our view, it is high time courts stood up and unapologetically declared that sexual violence will not be tolerated, and that sentences will focus on denouncing the conduct at issue and public protection. Again, sexual assault is deliberate conduct. Nobody is convicted on the basis that they accidentally penetrated a victim when they tripped and fell.[214] Further, sexual offenses represent a profound violation of a victim's autonomy and dignity.

A proper approach to sentencing for sexual violence is illustrated in *R v Sousa*, where the sentencing judge imposed the maximum 10 years for sexual assault *simplicitor*.[215] The appellant, who did not know the complainant, took her in his car to a wooded area from the party. He forced her to perform oral sex, then penetrated her twice vaginally and once anally. After he was done with her, the appellant then drove the complainant back to town and left her on an unfamiliar street. He was identified through DNA and convicted after trial.[216]

We do not mean to suggest that the maximum sentence should be imposed in every case. The maximum sentence should not be the norm. In fact, the Ontario Court of Appeal appropriately reduced the sentence imposed to one of eight years, in recognition of the offender having no other criminal convictions and giving effect to the principle of restraint.[217] However, the focus of sentencing for serious sexual violence must be on denouncing the conduct, deterring the offender and others from that conduct, and protecting the public from future sexual violence. Where the offence is comprised of multiple violations, is accompanied by numerous

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[214] Postmedia Network, "Millionaire who claimed he 'fell' into teen cleared of rape" *Toronto Sun* (16 December 2015), online: https://torontosun.com/2015/12/16/millionaire-who-claimed-he-fell-into-teen-cleared-of-rape.

[215] 2023 ONCA 100.

[216] *Ibid* at para 1.

[217] *Ibid* at paras 48-49.

aggravating factors, or incorporates significant violence beyond that inherent in the offence itself, a sentence in the high single digits, or even the maximum sentence, should not raise any eyebrows.

V. CONCLUSION

In 1985, the Alberta Court of Appeal thought it was commendable that Canadian sexual assault sentences be substantially in accordance with international sentences, particularly those from England. Unfortunately, Canadian sentences have not kept pace with sentences from England and have been out-of-sync for 38 of the 39 years we have been relying on *Sandercock*.

As we have shown, numerous countries with similar systems to our own treat serious sexual violence far more gravely than Canada does at the sentencing stage. We would not suggest that the underlying reason is because these countries think sexual violence is serious and Canada does not; rather, the disparity results from other countries' willingness to continually revisit and update their sentencing guidance because of changing societal attitudes towards the offence, and increasing knowledge of the harm it causes. This commendable approach has not yet been taken in Canada.

Ironically, our own case law suggests that sentences in Canada should trend upwards:

> A second reason why upward departure from precedents may be required is that courts' understanding of the gravity and harmfulness of sexual offences against children has deepened, as we have sought to explain above. As Pepall JA observed in Stuckless, there has been a considerable evolution in Canadian society's understanding of the gravity and harmfulness of these offences. Sentences should thus increase "as courts more fully appreciate the damage that sexual exploitation by adults causes to vulnerable, young victims." Courts should accordingly be cautious about relying on precedents that may be "dated" and fail to reflect "society's current awareness of the impact of sexual abuse on children."[218]

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[218] *R v Vautour*, 2016 BCCA 497 at para. 52 (citations omitted, emphasis added).

These comments apply whether the victim is a child or an adult. The Supreme Court of Canada recognized society's increased understanding of the harms sexual assault causes in *Friesen*:

> We would emphasize that nothing in these reasons should be taken either as a direction to decrease sentences for sexual offences against adult victims or as a bar against increasing sentences for sexual offences against adult victims. As this Court recently held, our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened.[219]

It is time to give effect to these pronouncements. We would not suggest any attempt to institute further mandatory minimum sentences. Put simply, even if Parliament were to legislate an "escape valve" to its punishments, given the wide breadth of conduct that the current offence of sexual assault incorporates it is unrealistic to think any such legislation would be found constitutionally compliant.[220]

However, the guidance provided to sentencing judges in England, Ireland, and New Zealand is helpful. While each country approaches the fashioning of an appropriate sentence somewhat differently, the ultimate sentences imposed are similar for similar conduct. It is time for Canada to come in line with these comparator countries. At a minimum, it is time for Canada to stop pretending that a proper application of sentencing principles comes to the same conclusion as it did almost four decades ago, before we knew as much as we do now about the inherent harm caused and wrongfulness of sexual violence.

Parliament has amended the *Criminal Code* in numerous fundamental ways that ought to impact the sentencing process. It has done so in recognition of the impact on victims from criminal offences, and to ensure that all appropriate factors are considered by sentencing judges. Both Parliament and the courts have acknowledged their increased awareness of the devastating harm caused by sexual violence. Each has repeatedly said that this behaviour cannot be countenanced and must be addressed.

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[219] *Friesen*, *supra* note 5 at paras 110, 118 (emphasis added).

[220] For a more in-depth discussion of a statutory discretion to not impose minimum sentences and how they may result in sentencing regimes being constitutionally compliant, see Bryton M.P. Moen, "A Tale of Two Countries: Constitutionalizing the Mandatory Minimum Sentence" (2021) 44:5 Man LJ 149.

Parliament has acted. The courts have not. Despite those amendments and recognitions, sentences for serious sexual assaults continue to reflect a starting point fashioned almost four decades ago, from a case that unabashedly endorsed myth and stereotype and that has faced no significant critical review since. Further, even where the starting point is referenced, sentences below it continue to be imposed for major sexual offences where there are numerous and significant aggravating factors. Put simply, the Canadian judiciary has set a low bar, and failed to meet even that.

Rape, and other forms of major sexual assault, are uniquely serious offences. No other crime is as profoundly violative: it attacks the victim's physical, emotional, and psychological integrity. In *S v Mudau*, the South African Supreme Court of Appeal described as a "self-evident realit[y]" that:

> [R]ape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.[221]

Nations with similar legal systems and comparable societal values to Canada's have repeatedly acknowledged when their sentencing precedents and guidance did not reflect society's understanding of the harms caused by sexual violence. Whether through their courts, or legislatures, they have acted. While Parliament has taken steps to ensure that proper factors are considered, the jurisprudence shows that these amendments have not been given effect by sentencing judges. If anything, they have been paid lip service to, and then ignored. The result is that sentencing practices in Canada do not reflect current societal attitudes towards serious sexual violence.

It is imperative that this changes. Serious sexual violence must be denounced and deterred in the strongest terms. It disproportionately impacts vulnerable members of our society and causes substantial harm; society deserves to be protected from this evil. It is time to give effect to Parliament's directions and the increased societal understanding of the harm caused by sexual assault by imposing sentences that adequately reflect the harm caused by this conduct, and that protect the public.

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[221] [2012] ZASCA 56 at para 17.