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## Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault

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*In this final section of Part II, Holly Johnson's paper puts in perspective the criminal law response to sexual assault. She examines the filtering effect of the criminal justice process, with the end result that only .3 percent of perpetrators are convicted whereas fully 99.7 percent are never held accountable for their crimes. Holly reviews current trends in the legal processing of sexual assault, revisiting the issue of the police response to sexual assault reports explored in Part I and raising questions about a seeming downturn in women's reporting rates — possibly in response to the continuing barriers erected by police and defence counsel. In light of the overwhelming trend by police to charge sexual assault at the lowest level of seriousness, the declining rate of conviction, and the use of conditional sentences (house arrest) for sex offenders, her chapter forces us to ask what possible role the criminal law can play when it condemns only a tiny fraction of this pervasive crime.*

Sexual assault is the most gendered of crimes. Only 3 percent of those charged by police with sexual assault offences in Canada in 2007 were women, yet 86 percent of those victimized were women and girls.<sup>1</sup> It is no coincidence that the most gendered crime is also the most under-reported. According to Statistics Canada's crime victimization survey, which interviews women anonymously, an estimated 460,000 Canadian women were victims of sexual assault in 2004 and just 8 percent reported the crime to the police.<sup>2</sup>

1 Data for this article were retrieved from Statistics Canada's Uniform Crime Reporting Survey (UCR), which incorporates data provided by all police departments across the country on an annual basis since 1962. Aggregate trends on sexual assault are available back to 1983, and data on rape and indecent assault back to 1977. The more detailed Revised UCR Survey (UCR II) contains complete information about victims, accused persons, and incidents for 2007 only.

2 Maire Gannon & Karen Mihorean, "Criminal Victimization in Canada, 2004" 25 *Juristat* 85-002-XPE (Ottawa: Statistics Canada, 2005) 7 at 23.

Rape laws underwent major reform in Canada in 1983, in part to improve the dismal rate of reporting and the high rates of attrition throughout the criminal justice processing of these offences, by reducing prejudicial attitudes toward women in the investigation, rules of evidence, and instructions to the jury.<sup>3</sup> Twenty-five years after law reform, there is evidence that simply eliminating the formal expression of bias in the law has not made a real difference in the treatment of sexually assaulted women throughout the justice system. The purpose of this article is to present a critical analysis of the criminal justice response to sexual assault in Canada by drawing on available statistical evidence from the perspective of women, police, prosecution, conviction, and sentencing. This paper argues that widespread discriminatory attitudes toward sexual violence and the way these attitudes play out for women and for criminal justice processing of these cases continue to minimize women's experiences, exonerate violent men, and distort public understanding of this crime.

#### TRENDS IN SEXUAL ASSAULT

The true incidence of sexual violence in women's lives will likely never be known. The stigma, shame, and blame associated with sexual violence have cast a shroud of silence over women's experiences and affect their willingness to report to police or to disclose to other public agencies.

The most reliable information available to chart the prevalence of sexual assault among women in the population is obtained when researchers bypass police and other agencies and interview random samples of women directly. These victimization surveys are based on a methodology developed in the 1970s to interview samples of the population about their experiences and perceptions of crime without having to rely on victims or witnesses reporting to police. However, these early surveys skirted around the issue of sexual violence based on an assumption that it was inappropriate to ask women about such private experiences. Early versions of the National Crime Victimization Survey [NCVS]<sup>4</sup> conducted annually by the US Bureau of Justice Statist-

3 Sheila McIntyre *et al.*, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" (2000) 20 *Can Woman Stud* 72 at 75. The objective of law reform was broader than this and included de-genderizing the law (in order to comply with the gender equality provisions of the newly created *Charter of Rights and Freedoms*) and shifting the focus from the sexual to the violent nature of the assault.

4 The original name of the survey was the National Crime Survey [NCS].

ics did not ask respondents directly about rape or attempted rape but screened them into questions about rape only if they said they were attacked or threatened. The first such large-scale survey in Canada, the 1982 Canadian Urban Victimization Survey, was somewhat more direct and included a screening question that specified that an attack included rape and molesting.<sup>5</sup> Precise definitions were not provided leaving it up to respondents to determine whether their experiences fit within these categories. In the 1980s, feminist researchers began to conduct independent surveys of rape and intimate partner violence, the results of which raised questions about the reliability and validity of estimates of rape produced by government surveys. One of the most influential was the Sexual Experiences Survey developed by US researcher Mary Koss,<sup>6</sup> which incorporates detailed questions about rape and attempted rape as well as unwanted sexual experiences. When applied to college women, more than one-quarter disclosed experiences of rape or attempted rape, which was significantly higher than the rate of 0.12 percent estimated by the NCVS.<sup>7</sup> Later replicated with Canadian colleges and universities, the Sexual Experiences Survey produced similar results.<sup>8</sup> Canadian researchers Michael Smith<sup>9</sup> and Melanie Randall and Lori Haskell<sup>10</sup> were among the first in this country to develop innovative methods of interviewing women about partner violence and sexual violence. This work led to doubts about the validity of estimates produced by Canadian government victimization surveys.<sup>11</sup>

The work of Koss, Diana Russell,<sup>12</sup> and others was influential in per-

- 5 Holly Johnson & Myrna Dawson, *Violence Against Women in Canada: Research and Policy Perspectives* (Toronto: Oxford University Press, 2011) at 41.
- 6 Mary Koss, Christine Gidycz & Nadine Wisniewski, "The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students" (1987) 55 *J Consulting and Clinical Psych* 162.
- 7 Mary Koss, "The Underdetection of Rape: Methodological Choices Influence Incidence Estimates" (1992) 48 *J Social Issues* 64.
- 8 Walter DeKeseredy & Katherine Kelly, "The Incidence and Prevalence of Woman Abuse in Canadian University and College Dating Relationships" (1993) 18 *Can J Soc* 137.
- 9 Michael D Smith, "Sociodemographic Risk Factors in Wife Abuse: Results from a Survey of Toronto Women" (1990) 15 *Can J Soc* 39.
- 10 Melanie Randall & Lori Haskell, "Sexual Violence in Women's Lives: Findings from the Women's Safety Project, a Community-based Survey" (1995) 1 *Violence Against Women* 6.
- 11 The first victimization survey conducted by Statistics Canada in 1982 produced an estimate of 0.6 percent for sexual assault while admitting that "this survey was not designed specifically to measure sexual assault" (1985) 2 *Bulletin* 11, Solicitor General of Canada, *Female Victims of Crime, Canadian Urban Victimization Survey*.
- 12 Diana Russell, "The Prevalence and Incidence of Forcible Rape and Attempted Rape

suading the Bureau of Justice Statistics to rethink their method of measuring sexual violence and intimate partner violence on the NCVS. In 1992, this survey underwent a significant redesign. Questions about sexual violence were expanded and question wording improved to ask more directly about experiences of rape, attempted rape, and other unwanted sexual experiences involving threats or harm. Rates produced by this expanded method jumped three to four times what they had been in previous years.<sup>13</sup> Influenced by these events, Statistics Canada determined that a survey dedicated entirely to women's experiences of violence would yield the most comprehensive information.<sup>14</sup> The agency fielded the national Violence Against Women Survey in 1993, funded by the federal department of health and welfare and developed through extensive consultation with community groups, advocates, service providers, and researchers. Its unique methodology took account of safety concerns and incorporated a broad range of questions on sexual harassment, sexual assault, and intimate partner violence in recognition of the interconnections among these acts. Similar surveys followed in several other countries, and aspects of this approach have been incorporated into Statistics Canada's ongoing crime victimization survey. However, the breadth of questions on sexual violence is much more limited in scope compared to the specialized survey.

Victimization surveys produce more reliable estimates of the prevalence of sexual assault compared to police statistics;<sup>15</sup> however, they are conducted only periodically and thus are an imperfect measure of trends over time. Victimization surveys have been conducted in Canada in 1993, 1999, and 2004 and all estimate that the incidence of sexual assault has affected about 3 percent of women in the previous twelve-

of Females" (1982) 7 *Victimology: Int J* 81.

- 13 Ronet Bachman & Linda Saltzman, "Violence Against Women: Estimates from the Redesigned Survey" (1995) in Washington, Bureau of Justice Statistics, NCJ-154348; Ronet Bachman & Bruce Taylor, "The Measurement of Rape and Family Violence by the Redesigned National Crime Victimization Survey" (1994) 11 *Just Q* 499.
- 14 Johnson & Dawson, *supra* note 5 at 52.
- 15 While far superior to police statistics for researching women's experiences of male violence, victimization surveys are not without important limitations. Surveys conducted by telephone effectively exclude marginalized populations living in shelters, unstable housing, or on the street; those without landlines; those who cannot respond in English or French; and cultural and linguistic minorities for whom telephone surveys are not a familiar medium for disclosing personal or sensitive experiences. The extent to which they can be used to explore intersections of violence and other forms of oppression based on race, ethnicity, sexual orientation, and disability is also limited.

month period.<sup>16</sup> By contrast, police recorded a drop in the rate of sexual assault since 1993. Over the longer term, police recorded a small but steady rise in rates of rape and indecent assault on females prior to law reform in 1983, followed by a sharp increase following implementation of the new law of sexual assault (Figure 1). In 1993, the rate of sexual assault reached a peak of 121 per 100,000 of the population and by 2007 had dropped to 65 per 100,000.

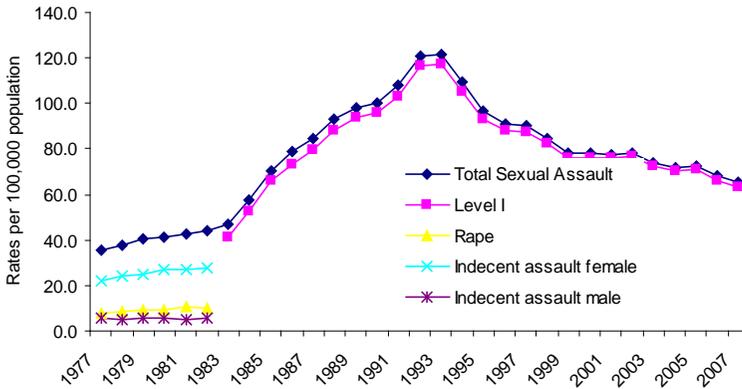
It is not clear whether this trend reflects a real rise and fall in the occurrence of sexual assault in the population, changes in the way police respond to the assaults reported to them, or a rise and fall in women's confidence in the criminal justice system reflected by their reporting behaviour. Some researchers attribute the rise prior to 1993 to an increased willingness of sexually assaulted women to report to the police as a result of law reform<sup>17</sup> and other social changes that occurred simultaneously, such as an expansion of services, growth in specialized sexual assault units and training for police, and development of Sexual Assault Nurse Examiner programs in hospital-based sexual assault care centres.<sup>18</sup> It is difficult to test this claim empirically since so few women report to the police and victimization surveys are conducted too infrequently to establish with certainty whether reporting behaviour has influenced this trend. Yet, in all three victimization surveys between 1993 and 2004, fewer than 10 percent of sexual assaults were reported to police. If improvements to the justice system response to sexual assault were indeed associated with the rise in reported sexual assaults prior to 1993, it is feasible that negative experiences with the legal process since that time may have reduced women's confidence that they will be treated with dignity, fairness, and compassion, resulting in a decline in willingness to engage with the criminal justice system.

16 Gannon & Mihorean, *supra* note 2; Rebecca Kong *et al*, "Sexual Offences in Canada" (2003) 23 *Juristat* 85-002-XPE 6 at 19; Sandra Besserer & Cathy Trainor, "Criminal Victimization in Canada, 1999" (2000) 20 *Juristat* 85-002-XIE 10 at 19.

17 Julian Roberts & Michelle Grossman, "Changing Definitions of Sexual Assault: An Analysis of Police Statistics" in Julian Roberts & Renate Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 57.

18 Scott Clark & Dorothy Hepworth, "Effects of Reform Legislation on the Processing of Sexual Assault Cases" in Roberts & Mohr, *ibid* at 113.

Figure 1: Police-Recorded Rates of Rape, Indecent Assault, Total Sexual Assault, and Level I Sexual Assault



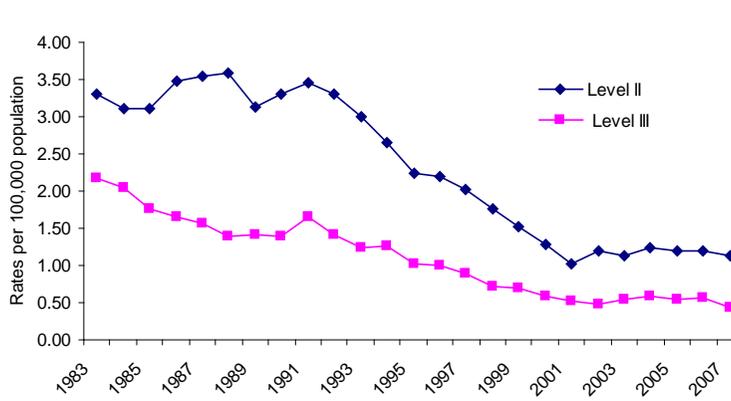
Source: Uniform Crime Reporting Survey, Statistics Canada.

### POLICE RECORDING PRACTICES

Rape reform in 1983 abolished the offences of rape, attempted rape, indecent assault on a male, and indecent assault on a female and replaced them with a gender-neutral gradation of three levels of sexual assault. The most serious, level III, contained in section 273 of the *Canadian Criminal Code*, includes aggravated sexual assaults that result in wounding, maiming, disfiguring, or endangering the life of the victim. Level II, contained in section 272, is defined as sexual assaults that occur with a weapon present, that cause bodily harm, that involve threats of bodily harm to a person other than the victim, or that are committed with another person. Level I, contained in section 271, is undefined and is presumably any sexual assault that does not include elements of levels II or III. A man who commits forced penetration, formerly legally known as rape, can be charged and prosecuted under any of these sections, including 271 if it is determined that the attack did not involve a weapon, bodily harm, or multiple assailants.

Tracking trends in police-recorded sexual assaults over time reveals some troubling patterns in the way police have classified these crimes. Since the inception of the sexual assault law in 1983, police have recorded the vast majority of these crimes as level I. This proportion has grown to the point that sexual assaults are recorded almost exclusively in the least serious category. In 2007, 98 percent of all sexual assaults were recorded as level I, up from 88 percent in 1983. The percentage re-

Figure 2: Police-Recorded Rates of Levels II and III Sexual Assault



Source: Uniform Crime Reporting Survey, Statistics Canada.

corded as levels II and III have always been relatively small, but have dropped dramatically from 7 percent to 2 percent in the case of level II, and from 5 percent to 1 percent in the case of level III (see Figure 2 for trends in rates of level II and III sexual assaults recorded by police). Because of the much different scale, level I is shown in Figure 1). The law is supposed to account for different degrees of severity yet, unless the nature and severity of the sexual assaults reported to the police have changed dramatically (and there is no evidence that this is the case), these figures suggest that some incidents that previously would have been classified as level III are now being classified as level II or level I and many previously classified as level II are now treated as level I offences.

In an independent research study of hospital, police, and prosecution records, Janice Du Mont<sup>19</sup> found support for the claim that police under-classify large numbers of sexual assaults. The purpose of this study was to examine the congruency between the seriousness of sexual assault offences as indicated by the *Criminal Code* and the seriousness of charges at three points in the criminal justice processing of sexual assault cases: charges laid by police, offences for which offenders were convicted, and the sentences imposed. She concludes that the

19 Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15 CJWL 305.

expected charge corresponded to the charges laid by police in only 40 percent of cases, and in only 20 percent of cases resulting in conviction. Many cases charged under sexual assault level I involved rape, the use of force, and injury to the victim. In just half of cases where the charges laid matched the severity of the crime were offenders convicted of the same offences without charges being reduced.

Further evidence of misclassification emerges from statistics submitted by police across Canada to Statistics Canada's Revised Uniform Crime Reporting (UCR II) Survey. Out of a total of 17,374 level I sexual assaults recorded in the UCR II Survey in 2007, 386 involved some type of weapon. Twenty-eight of these weapons were firearms, seventy-four were knives, and thirty-nine were blunt instruments. Furthermore, 17 percent of level I sexual assaults resulted in physical injury and this likely undercounts the true percentage since many injuries, such as bruising and internal injuries, are not immediately evident to police investigators. Classifying these incidents as level I sexual assault is contrary to the *Criminal Code*, which clearly specifies that any sexual assault involving a weapon or resulting in bodily harm warrants categorization at least as a level II offence.

The view of sexual assault from the perspective of women on the receiving end adds another dimension to this discussion. Statistics Canada's victimization surveys ask women about their experiences of sexual assault in two categories as follows:

1. Has anyone forced you or attempted to force you into any unwanted sexual activity, by threatening you, holding you down or hurting you in some way?
2. Has anyone ever touched you against your will in any sexual way? By this I mean anything from unwanted touching or grabbing, to kissing or fondling.

Together, these questions are intended to capture the range of assaults included under the sexual assault sections of the *Criminal Code*. When women are directly interviewed about their experiences, 19 percent are classified as sexual attacks involving force or the threat of force and the remaining 81 percent are classified as unwanted sexual touching.<sup>20</sup> What is more, sexual attacks involving force or threats are more likely than unwanted sexual touching to be reported to the police, which lo-

20 Shannon Brennan & Andrea Taylor-Butts, *Sexual Assault in Canada, 2004* (2008) Statistics Canada 85F0033M No 19 at 11.

gically would suggest that a higher proportion of assaults recorded in police statistics should be level II or III assaults.<sup>21</sup>

Under-classification of sexual assaults has obvious implications for the treatment of these cases in court and for the sentences imposed.<sup>22</sup> Under-classification of sexual assaults by police also has implications for the way this crime is understood by police officers as professionals who respond to sexual assault complainants, and by members of the general public. Statistics legitimated by official government sources can negatively influence public perceptions when levels II and III sexual assaults are described as very low and dropping and the vast majority are described as not serious, whether or not there may have been weapons, force, injuries, or long-lasting emotional trauma. Feminists point out that one result of law reform has been to downgrade the offence substantially since rape and unwanted sexual touching technically can now occupy the same offence category, and both can be dealt with under section 271 as summary conviction offences punishable by a maximum of eighteen months imprisonment.<sup>23</sup> Prior to law reform, rape made up almost one-quarter of police-recorded sexual offences, many of which are now coded and portrayed as “non-violent” or “less serious” level I offences. While the shift from rape to sexual assault was intended to reduce the stigma associated with being a victim of rape, as Elizabeth Sheehy points out, in de-gendering the law and replacing rape with a gradation of sexual assault offences, an important shared social understanding of the meaning and impact of rape for women has been lost.<sup>24</sup>

In a research experiment designed to assess public perceptions of rape law reform, Roberts and his colleagues<sup>25</sup> found empirical support for the concern that a change in name has served to downgrade the offence. When presented with scenarios depicting the same acts but labelled either rape or sexual assault, study participants attrib-

21 According to the 1993 Violence Against Women Survey, 11 percent of cases of forced sexual activity were reported to police compared to 4 percent of cases of unwanted sexual touching.

22 Julian Roberts & Robert Gebotys, “Reforming Rape Laws: Effects of Legislative Change in Canada” (1992) 16 *Law & Hum Behav* 555.

23 Jennifer Temkin, *Rape and the Legal Process* (New York: Oxford University Press, 2002) at 162.

24 Elizabeth Sheehy, “Legal Responses to Violence Against Women in Canada” in Katherine McKenna & June Larkin, eds, *Violence Against Women: New Canadian Perspectives* (Toronto: Inanna Publications, 2002) 480.

25 Julian Roberts, Michelle Grossman & Robert Gebotys, “Rape Reform in Canada: Public Knowledge and Opinion” (1996) 11 *J Family Violence* 146.

uted less punitive responses to scenarios described as sexual assault than the same acts defined as rape. This suggests that the general public interprets sexual assault according to understandings of rape and that the crime of sexual assault is seen as less severe. The unforeseen consequences of law reform may have been to minimize the crime of sexual assault in public consciousness, legal discourse, and the legal response.

### **BARRIERS TO JUSTICE**

Defining and talking about experiences of sexual violence is a difficult process for women and is undertaken with considerable risk. When women disclose to others that they have been sexually assaulted, they are often confronted with skepticism, doubt, and outright blame for provoking or at least not resisting the attack strenuously enough. Reactions from others in the woman's social world contain both explicit and implicit messages about how to make sense of what happened. These reactions have a direct impact on her ability to interpret the experience as a violent act for which she is not responsible.<sup>26</sup>

A rich literature documents the widespread acceptance of negative stereotypes about women who complain of rape held by the police, defence counsel, prosecutors, judges, juries, and the general public.<sup>27</sup> The widely held belief that "real rape" happens when a previously chaste woman is assaulted by a stranger, suffers serious injury, and immediately reports the attack to the police also affects the way women perceive their own experiences of sexual violence. At this very first step, when a decision is made to engage with the justice system, to seek support elsewhere, or to remain silent, this decision is affected by deeply engrained societal attitudes that hold women responsible for sexual assault and absolve men of wrongdoing. Research has documented the widespread acceptance of prejudicial attitudes and belief in myths and negative stereotypes about rape victims among the general public.<sup>28</sup> For

26 Rebecca Campbell, Emily Dworkin & Giannina Cabral, "An Ecological Model of the Impact of Sexual Assault on Women's Health" (2009) 10 *Trauma, Violence & Abuse* 225; Denise Lievore, *No Longer Silent: A Study of Women's Help-seeking Decisions and Service Responses to Sexual Assault* (Canberra: Australian Institute of Criminology and Office for Women, 2005).

27 See Jennifer Temkin & Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2008) 31–51 for a review.

28 Michael Flood & Bob Pease, "Factors Influencing Attitudes to Violence Against Women" (2009) 10 *Trauma, Violence & Abuse* 125; Temkin & Krahé, *ibid* at 31; Colleen Ward, *Attitudes Toward Rape: Feminist and Social Psychological Perspectives* (London:

instance, in a representative survey of Australian adults, 23 percent disagreed with the statement that “women rarely make false claims of being raped” and 11 percent were unsure.<sup>29</sup> In other words, one-third of Australians are fairly certain or suspect that women “cry rape” falsely. Almost one-quarter agreed or were unsure that women often say “no” when they mean “yes” (15 percent and 8 percent respectively), and over 40 percent agreed or were unsure that rape results from men not being able to control their need for sex (38 percent and 5 percent respectively). In a representative sample of adults in the United Kingdom, substantial proportions believed a woman is partially or totally responsible for being raped if she behaved in a flirtatious manner (34 percent), was drunk (30 percent), was wearing sexy or revealing clothing (26 percent), or has had many sex partners (22 percent).<sup>30</sup>

Rape myth adherence has been the subject of extensive study by social psychologists. It has been established that belief in rape myths and negative stereotypes are correlated with gender (men are more likely than women to adhere to rape myths), culture and religion, hostile attitudes toward women, and beliefs about adversarial gender roles.<sup>31</sup> Although attitudes and beliefs do not always predict behaviour, there is evidence that bystanders who hold prejudicial beliefs are less likely to be empathetic or to report the incident to police, and are more likely to attribute blame to victims and recommend lenient penalties;<sup>32</sup> men who score higher on rape-supportive beliefs and negative attitudes toward women are more likely to say that they would be sexually violent or coercive;<sup>33</sup> and women who hold stereotypical beliefs about rape and rape victims are less likely to define their own experiences as sexual assault

Sage, 1995).

29 Natalie Taylor & Jenny Mouzos, *Community Attitudes to Violence Against Women Survey: A Full Technical Report* (Canberra: Australian Institute of Criminology, 2006) at 67.

30 Amnesty International UK, *Sexual Assault Research Summary Report* (2005) at 5, online: <[http://www.amnesty.org.uk/uploads/documents/doc\\_16619.doc](http://www.amnesty.org.uk/uploads/documents/doc_16619.doc)> (retrieved 29 May 2009).

31 Flood & Pease, *supra* note 28; Kimberly Lonsway & Louise Fitzgerald, “Attitudinal Antecedents of Rape Myth Acceptance: A Theoretical and Empirical Re-examination” (1995) 68 *J Per & Soc Psych* 704.

32 Flood & Pease, *supra* note 28 at 127.

33 Veanne Anderson, Dorothy Simpson-Taylor & Douglas Hermann, “Gender, Age, and Rape-supportive Rules” (2004) 50 *Sex Roles* 77; Sarah Murnen, Carrie Wright & Gretchen Kaluzny, “If ‘Boys Will Be Boys,’ then Girls Will Be Victims? A Meta-Analytic Review of the Research that Relates Masculine Ideology to Sexual Aggression” (2002) 46 *Sex Roles* 359.

or to seek help.<sup>34</sup> Consequently, sexual assaults reported to the police are more likely to be those that conform to “real rape” stereotypes.<sup>35</sup>

Biases and myths about women, men, and rape have also been formally and informally entrenched in the administration of the law. Research provides evidence that negative attitudes and beliefs about sexual assault complainants often overshadow the facts of the case in police charging, prosecutorial decision making, and jurors’ deliberations.<sup>36</sup> Far from being impartial, gender-neutral, and objective as the “official version of law”<sup>37</sup> would have us believe, much of the decision making around sexual assault — from initial decisions by the woman to tell anyone about the assault, to the decisions of police, courts, prosecutors, juries, and judges — are influenced by long-standing, deeply entrenched biases. Claire L’Heureux-Dubé, former justice of the Supreme Court of Canada, has identified myths and stereotypes entrenched in the Supreme Court that have skewed the law’s treatment of sexual assault claimants.<sup>38</sup>

- 34 Zoe Peterson & Charlene Muelenhard, “Was It Rape? The Function of Women’s Rape Myth Acceptance and Definitions of Sex in Labelling their Own Experiences” (2004) 51:3/4 *Sex Roles* 129.
- 35 Ronet Bachman, “The Factors Related to Rape Reporting Behaviour and Arrest: New Evidence from the National Crime Victimization Survey” (1998) 25 *Crim Just Beh* 8; Janice Du Mont, Karen-Lee Miller & Terri Myhr, “The Role of ‘Real Rape’ and ‘Real Victim’ Stereotypes in the Police Reporting Practices of Sexually Assaulted Women” (2003) 9 *Violence Against Women* 466; Rosemary Gartner & Ross Macmillan, “The Effect of Victim-offender Relationship on Reporting Crimes of Violence Against Women” (1995) 37 *Can J Crim* 393.
- 36 Janice Du Mont a& Terri Myhr, “So Few Convictions: The Role of Client-related Characteristics in the Legal Processing of Sexual Assaults” (2000) 6 *Violence Against Women* 1109; Bonnie Fisher *et al*, “Reporting Sexual Victimization to the Police and Others” (2003) 30 *Crim Just Beh* 6; Jan Jordan, “Beyond Belief?: Police, Rape and Women’s Credibility” (2004) 4 *Crim Just* 29; Denise Lievore, “Victim Credibility in Adult Sexual Assault Cases” in *Trends and Issues in Crime and Criminal Justice* (Canberra: Australian Institute of Criminology, 2004) 288; Natalie Taylor, “Juror Attitudes and Biases in Sexual Assault Cases” in *Trends and Issues in Crime and Criminal Justice* (Canberra: Australian Institute of Criminology, 2007) 344; Elizabeth Comack & Gillian Balfour, *The Power to Criminalize: Violence, Inequality and the Law* (Halifax: Fernwood, 2004); Jeffrey Spears & Cassia Spohn, “The Genuine Victim and Prosecutors’ Charging Decisions in Sexual Assault Cases” (1996) 20 *Am J Crim Just* 183; Emily Finch & Vanessa Munro, “The Demon Drink and the Demonized Woman: Socio-sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicateds” (2007) 16 *Soc & Leg Stud* 591; Tempkin & Krahe (2008) *supra* note 27 at 84.
- 37 Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).
- 38 Claire L’Heureux-Dubé, “Beyond the Myths: Equality, Impartiality, and Justice” (2001) 10 *J Social Distress & Homeless* 89.

- The rapist is a stranger
- Women are less reliable and credible as witnesses if they have had prior sexual relations
- Women are more likely to have consented to sexual advances if they have had prior sexual relations
- Women will always struggle to defend their honour
- Women are “more emotional” than men so unless they become “hysterical,” nothing must have happened
- Women mean “yes” even when they say “no”
- Women who are raped deserve it because of their conduct, dress, and demeanour
- Women fantasize about rape and therefore fabricate reports of sexual activity even though nothing happened

According to McIntyre et al, rape myths serve an important purpose:

... these “myths” help men individually and as a class to rationalize their sexual abuses or to distinguish their own “natural” sexual aggression or ordinary sexual opportunism from the really culpable and injurious kind practiced by those aberrant, truly violent, genuinely scary men the criminal law is meant to isolate and jail.<sup>39</sup>

Acceptance of rape myths is linked to minimization of harm and attribution of blame to victims, and reduction of responsibility attributed to perpetrators.<sup>40</sup> The widely held belief that “real rape” happens when a previously chaste woman is assaulted by a stranger, suffers serious injury, and immediately reports the attack to the police affects decisions women make to engage with the justice system, to seek support elsewhere, or to remain silent.<sup>41</sup> They also influence decisions made by police to treat the complaint as false, prosecutors’ decisions not to proceed with a prosecution, jurors’ decisions that complainants’ claims of non-consent are not credible, and judges’ decisions about sentencing in the rare event that a perpetrator is convicted. Decisions based on these biases obviously disadvantage certain women more than others — including those who are poorly educated; those who are inarticulate or poorly spoken in the dominant language; those who are ethnic minority or Aboriginal; those who have chosen certain occupations; those who have mental health problems or a history of abuse; and those

39 McIntyre *et al*, *supra* note 3 at 74.

40 Temkin & Krahe, *supra* note 27 at 38.

41 *Ibid* at 32.

who generally transgress stereotypes of the “good” woman.<sup>42</sup> According to Liz Kelly, “rape law defines the mental element ... in terms of the social meaning of the woman’s conduct, rather than the legal meaning of a man’s.”<sup>43</sup> These biases demonstrate a lack of understanding of the contexts in which most sexual assault occurs, typically by men known and trusted by women engaging in normal activities such as accepting a lift home or socializing, and the complex range of responses victims adopt — such as failing to resist strenuously in order to avoid further injury, and taking time to make the difficult decision of making the attack public.

#### ATTRITION THROUGH THE CRIMINAL JUSTICE SYSTEM

One objective of reform of the sexual assault law was to reduce the attrition of these cases through the criminal justice system, from reporting to police to conviction in court. Attrition refers to the gradual dropping off or discontinuation of cases due to decisions by women who have been raped and justice officials as cases proceed through the system. While it is true that all criminal incidents are subjected to multi-layered decision-making processes, none are forced to endure the level of skepticism and outright bias that greet women who report sexual assault.

Unless the attack occurs in a public place in full view of witnesses who make the decision for her, a woman who is sexually assaulted must first weigh the benefits and costs of sharing this with others in her social network, asking for medical assistance, emotional support, or help from police. She must first consider whether others in her social network will support her decision — whether they will support her perception of events or see her as somehow complicit or responsible for the attack.<sup>44</sup> If significant proportions of a woman’s social and familial network believe that women falsely complain about rape, that they do not know their own minds when it comes to agreeing to sex, or that the uncontrollable male sex drive renders men blameless for their actions, she is unlikely to bring a complaint forward.<sup>45</sup> Her decision to report to

42 Denise Lievore, “Prosecutorial Decisions in Adult Sexual Assault Cases” in *Trends & Issues in Crime and Criminal Justice* (Canberra: Australian Institute of Criminology, 2005) 291; McIntyre *et al*, *supra* note 3 at 74; Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900–1975* (Toronto: Irwin Law, 2008).

43 Liz Kelly, *Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases* (London: Child and Woman Abuse Studies Unit, University of North London, 2001).

44 Lievore, *supra* note 26.

45 A common reason for not reporting the crime to the police given by women who

the police is also affected by shame and embarrassment, a desire to protect others, especially family members, and concern about whether the police will take her complaint seriously, treat her with respect, and not subject her to ill treatment.<sup>46</sup>

Once an assault is reported to the police, they make a decision how to respond and whether to make an official record of the crime. They make decisions about how much effort they will dedicate to investigating the crime and whether charges will be laid against a suspect. Each call to police is subject to an initial investigation at which time they can decide if a crime did not occur and will code the complaint as “unfounded.” Police statistics show that sexual assaults are subjected to “unfounding” to a far greater extent than any other crime. According to coding rules for Statistics Canada’s Uniform Crime Reporting Survey, incidents are to be coded as unfounded when an investigation determines that a crime did not take place.<sup>47</sup> Statistics Canada no longer publishes unfounding rates for any crime due to concerns that police are inconsistent in their use of this category in the absence of other coding options, and that it has become a catch-all for complaints that do not go forward. In 2000, the last year this information was made public, police across the country declared 16 percent of sexual assaults to be unfounded compared with 9 percent of other assaults.<sup>48</sup> In a study of four police jurisdictions in British Columbia, unfounding rates for sexual assault ranged from 7 percent to 28 percent, which suggests to the authors that there are variations in police beliefs and attitudes and investigative procedures surrounding sexual assault.<sup>49</sup> Unfounding was more common in cases involving non-strangers who raped women

have been sexually assaulted is that the incident was not important enough. How should this be interpreted when a large proportion of people to whom women turn for support minimize the severity of the assault or suspect her of complicity?

46 Denise Lievore, *Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Canberra: Commonwealth Office of the Status of Women, 2003).

47 Statistics Canada. *Uniform Crime Reporting, Version 1.0, Reporting Manual*, online: <[http://www.statcan.gc.ca/imdb-bmdi/document/3302\\_D7\\_T1\\_V1-eng.pdf](http://www.statcan.gc.ca/imdb-bmdi/document/3302_D7_T1_V1-eng.pdf)> (retrieved 9 August 2009).

48 Julian Roberts, Holly Johnson & Michelle Grossman, “Trends in Crimes of Sexual Aggression in Canada: An Analysis of Police-Reported and Victimization Statistics” (2003) 2 *Int J Comp Crim* 18.

49 Tina Hattem, “Highlights from a Preliminary Study of Police Classification of Sexual Assault Cases as Unfounded” 14 *Just Research* (Ottawa: Department of Justice), online: <<http://canada.justice.gc.ca/eng/pi/rs/rep-rap/jr/jr14/p9.html>> (retrieved 15 January 2009).

without using force; in cases where women with mental health problems did not clearly say “no”; and in cases where women were not emotionally upset.

In a study for the British Home Office, 25 percent of sexual assaults were “no-crimes” (the equivalent of unfounding), ranging from 14 percent to 41 percent among individual police departments.<sup>50</sup> Reasons given for no-crimes included a belief that the complaint was false or malicious, but also included complainants who were unwilling to testify, as well as cases with insufficient evidence, even though police are directed that no-crimes is appropriate only when the complainant retracts completely and admits to fabrication. A second analysis of police data in the United Kingdom found a no-crime rate of 22 percent.<sup>51</sup> Included were cases where women withdrew the complaint, cases that were dropped because the woman was ill or especially vulnerable, and cases where there was insufficient evidence or no suspect was identified. Reasons behind the classification of cases as false allegations included mental health problems, previous allegation of sexual assault, and alcohol and drug use.<sup>52</sup> Upon closer inspection of case files, the authors determined that only 3 percent of no-crime cases had a high probability of being falsely reported. Very little empirical research has been conducted to investigate reasons behind false reports, but a New Zealand study found that about half of all allegations of sexual assault that were later retracted were cases where someone else initially called the police or pressured the woman to make a report, which she later stated to be false.<sup>53</sup> Thus, recantations typically arose from misinterpretations by third parties and not vengeful or malicious complaints of rape.

Once a complaint of sexual assault is declared “founded,” police may or may not follow up with an investigation. Some women opt not to proceed but to have forensic evidence taken to retain the option to pursue the case at a later time. In other cases, police determine there is insufficient evidence to establish “reasonable grounds” required to lay a charge, the circumstances of the case do not fit the officer’s personal bias of what constitutes a “real” or “legitimate” victim,<sup>54</sup> or they con-

50 Jessica Harris & Sharon Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* (London: Home Office, 1999) at 14.

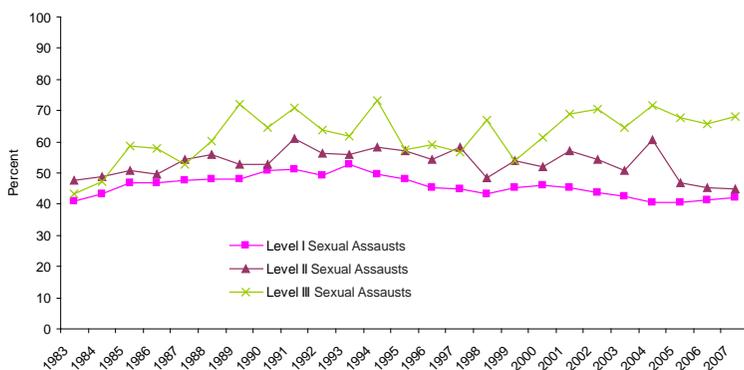
51 Liz Kelly, Jo Lovett & Linda Reagan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (London: Home Office, 2005) at 38.

52 *Ibid* at 49.

53 Jordan, *supra* note 36 at 29.

54 Tempkin & Krahé, *supra* note 27 at 36–41.

Figure 3: Percent of Founded Sexual Assaults that Resulted in Charges Laid Against A Suspect



Source: Uniform Crime Reporting Survey, Statistics Canada.

sider the evidence too weak to withstand typical defence counsel tactics to attack the woman's credibility. Whatever the reasons for not proceeding, the result is a charging rate of less than one-half of all founded cases. The percentage of cases in 2007 that led to a suspect being charged was less than half for those categorized as level I or level II assault (42 percent and 45 percent respectively); even those that reached the very high threshold of classification at level III sexual assaults resulted in criminal charges in only two-thirds of cases (68 percent) (Figure 3). The higher charging rate for level III offences may be a reflection of a narrowing down of cases classified as level III assaults to the top few in terms of injury and trauma, and greater resources and specialist investigators assigned to solving high profile sexual assaults. Nonetheless, this is a charging rate of just two-thirds for the most severe of all sexual assaults.

Attrition takes the shape of a pyramid where the actual number of sexual assaults forms the base and the levels of the pyramid in decreasing width are formed by the number of assaults reported to police, the number recorded by police as "founded," the number with a suspect being charged, and the number prosecuted, up to the peak, which contains a considerably reduced number of criminal convictions (shown in Figure 4). These data sources — all from Statistics Canada — are the best available to estimate the flow of sexual assault cases from occurrence to conviction, but each has important methodological shortcom-

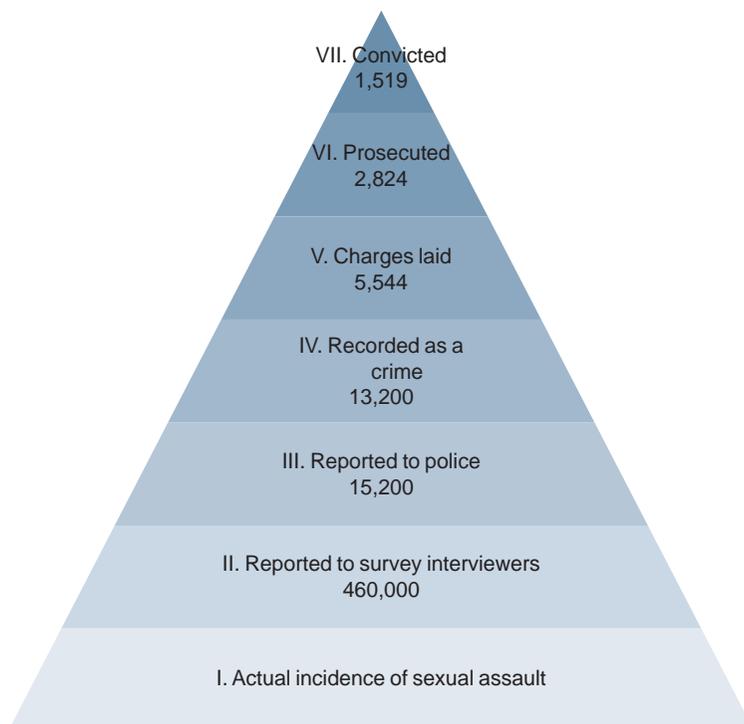
ings. In the first place, we will likely never know the actual incidence of sexual violence. Victimization surveys are far more comprehensive and produce more reliable estimates than any other source, but it cannot be assumed that all women will divulge such intimate and potentially stigmatizing experiences to a stranger in the context of an anonymous interview. Police may not record all incidents reported to them (even “founded” cases), and they may record a sexual assault as some other type of crime.<sup>55</sup> Some cases reported to the police as sexual assault may result in a suspect being charged but with a different offence. The number of charges laid does not equate to the number of persons charged since more than one person can be charged in one incident and one person can be charged with many incidents. “Charges laid” here refers to the number of sexual assault incidents that were officially cleared by the laying of a charge, not the number of offenders charged. Criminal justice datasets are not linked and use different units of count: police statistics count “incidents,” which is based on the number of victims of sexual assault, while court-based statistics related to prosecutions and convictions count the number of “cases,” which is based on the number of accused persons.<sup>56</sup> A person who is prosecuted for sexual assault may have many sexual assaults against many different victims dealt with in one court case and, at the top of the pyramid, he may be convicted of many counts of sexual assault or sexual assault in combination with other crimes. Those convicted of other crimes and not sexual assault do not appear in these calculations.

With these limitations in mind, it is possible to make general statements about attrition of sexual assault through the criminal justice system. At the base of the attrition pyramid (I) are an undetermined number of actual sexual assaults; the next level (II) are the 460,000 incidents of sexual assault reported in Statistics Canada’s 2004 victimization survey. The estimated number of “founded” cases (IV) involving women and girls twelve years of age and older was 13,200; since “unfounded” figures are no longer published, 15,200 is an estimate (III) derived from the total number recorded by police as founded on the basis

55 In addition, UCR scoring rules require that if an incident contains more than one offence type, it is recorded according to the most serious, which is determined by the maximum sentence under the *Criminal Code*. Level I sexual assaults that occur in the context of an offence that carries a maximum sentence of more than 10 years imprisonment will be recorded as the other offence and will not appear in this analysis.

56 The definition of a “case” is all charges against the same person having overlapping court dates. Michael Marth, “Adult Criminal Court Statistics, 2006/2007” (2008) 28 *Juristat* 85-002-XPE (Ottawa: Statistics Canada) at 10.

Figure 4: The Attrition Pyramid

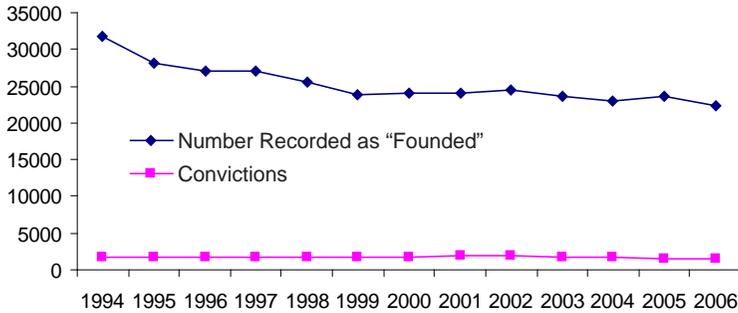


Source: Adapted from Lievore, *supra* note 46 at 41.

(I) Likely will never be known; (II) 2004 General Social Survey on Victimization; (III) The number recorded by police adjusted for 15 percent declared unfounded; (IV) The number of sexual assaults against women twelve years of age and older recorded on the Revised Uniform Crime Reporting Survey in 2007. This represents 82 percent of cases involving female victims and 70 percent of all cases of sexual assault recorded by police as founded. Original data retrieval; (V) Calculated based on the number of sexual assaults in IV and the 42 percent cleared by charge in the Uniform Crime Reporting Survey; (VI) The number of males prosecuted in criminal courts in fiscal year 2006/07 on the Adult Criminal Court Survey. Original data retrieval; (VII) The number of males who were found guilty of sexual assault (following a plea of guilty or were found guilty after trial) in fiscal year 2006/07 on the Adult Criminal Court Survey. Original data retrieval.

Sources: Statistics Canada.

Figure 5: Number of Sexual Assaults Recorded by Police as “Founded” Compared to the Number of Convictions



Sources: Uniform Crime Reporting Survey and Adult Criminal Court Survey, Statistics Canada.

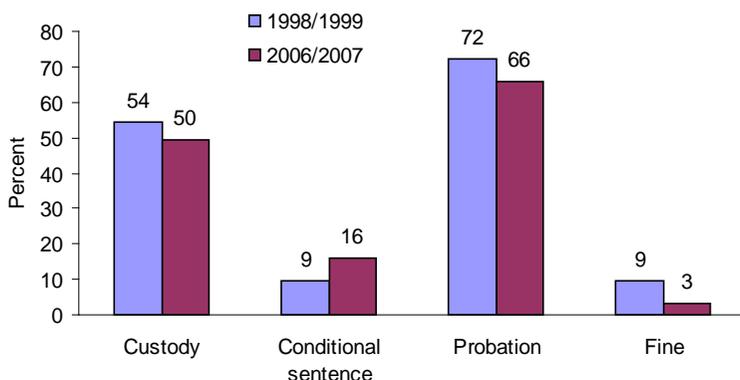
that 15 percent are declared unfounded.<sup>57</sup> Less than half of these (5,544) led to a suspect being charged (V). About half of suspects (2,848) were prosecuted (VI), and half of those cases prosecuted resulted in a conviction for sexual assault (VII).<sup>58</sup> As a result, just 25 percent of suspects initially charged with sexual assault were convicted of sexual assault, possibly at a reduced level. If attrition is calculated from the estimated 460,000 sexual assaults that occurred in one year and follows through to the 1,406 offenders convicted in criminal court (VII), the result is that 0.3 percent of perpetrators of sexual assault were held accountable and 99.7 percent were not.<sup>59</sup> It would take dramatic changes in women's

57 This is a conservative estimate. If this figure were calculated on the basis of the 8 percent of 460,000 victims in the victimization survey who reported to the police, the figure would be 43,760.

58 It is not possible to identify the age and sex of victims in court statistics; therefore, these figures include some cases involving child victims and male victims. If these calculations had been possible, the final conviction rate would for sexual assault against women have been even lower.

59 Bill C-9, enacted in 2007, abolished the use of conditional sentences for serious personal injury offences, including sexual assault. In 2012, Bill C-10 revised section 742.1 of the *Criminal Code* to eliminate the reference to serious personal injury offences; now conditional sentences are unavailable in cases of level I sexual assault only where the Crown proceeds by indictment, where the accused faces a maximum sentence of ten years or more. Given that 98 percent of all sexual assaults are level I offences, a great many once again become eligible for conditional sentencing.

Figure 6: Type of Sentence for Sexual Assault Convictions



Source: Adult Criminal Court Survey, Statistics Canada.

willingness to report these assaults to the police, or a concerted effort to alter current police and prosecutor policies, to improve this dismal rate of attrition and address what amounts to impunity for sexually violent men in Canada.

The most significant point of attrition after police become involved in sexual assault cases occurs when they record the incident as a crime and fail to lay a charge. Only 42 percent of all “founded” cases result in a suspect being charged and no more than 11 percent have led to a conviction since Statistics Canada began providing court data in 1994. Figure 5 shows the declining number of sexual assaults recorded by the police as “founded” since 1994 and the consistently low number of convictions. The number of men convicted of sexual assault in the last two years recorded on the table is the lowest in this entire time period.

Furthermore, patterns in sentencing for sexual assault convictions show a decline in severity, which is consistent with the decline in the proportion of sexual assaults charged under sections 273 and 272 (levels II and III). Just half of convicted offenders were sentenced to a term of imprisonment in 2006/07, down slightly from 1998/99; the percentage sentenced to probation also declined (Figure 6). Conditional sentences were introduced in 1996 as an alternative to incarceration for offenders deemed not to pose a threat to the community and were to be considered for offences punishable by less than two years imprisonment. Section 271 (level I) sexual assaults are hybrid offences, which prosec-

utors can choose to proceed with summarily or by indictment; as an indictable offence, section 271 assaults are punishable by a maximum term of ten years imprisonment, and as a summary offence they are punishable to a prison term not exceeding eighteen months. While it is not possible from the available data to determine what proportion are proceeded with summarily, based on the fact that 98 percent of all sexual assaults are recorded under section 271, it can be assumed that a large portion must be considered for conditional sentences. Over this time period, conditional sentences almost doubled for convicted sexual offenders. Some of these convictions involve rape and attempted rape and others involve unwanted sexual touching, but it is not possible to discern from the adult court database the severity of cases that result in different sentencing outcomes.<sup>60</sup>

### CONCLUSION

Twenty-five years ago, law makers and equality-seeking groups were optimistic that, by reforming sexual assault laws that were prejudicial toward women, rape myths and biases could be eliminated, women would be encouraged to come forward, and rates of attrition would be reduced. It is clear that rape law reform and the efforts of grassroots feminist organizations to raise awareness and challenge widespread discriminatory stereotypes have not resulted in improvements to women's willingness to come forward, or in the response of the criminal justice system toward women who report. This analysis suggests that while law reform can eliminate the formal expression of rape myths, on its own it cannot alter the harmful attitudes and behaviour that continue to influence the reactions of women, perpetrators, and bystanders, police screening practices, court processes, jurors' decisions, conviction rates, and sentencing practices. Far from emphasizing the assaultive nature of the crime, police practices unfound large numbers of complaints and classify almost all remaining cases as level I. The effect has been to portray sexual assault complaints as vexatious and frivolous. Until a commitment is made to address the prejudices in the response to sexual violence, women's experiences will continue to be trivialized, male-centred definitions of women's sexuality will be reinforced, violent men will not be held accountable, and women's rights to sexual integrity, equality, and justice will continue to be denied.

60 *An Act to amend the Criminal Code (Ending Conditional Sentences for Property and Other Serious Crimes Act)*, SC 2007, C 12, s 1, abolished the use of conditional sentences for serious personal injury offences, including sexual assault levels I, II and III.