RAPE JUSTICE

Beyond the Criminal Law

EDITED BY
Anastasia Powell
Nicola Henry
Asher Flynn

Rape Justice

Rape Justice

Beyond the Criminal Law

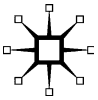
Edited by

Anastasia Powell
RMIT University, Australia

Nicola Henry
La Trobe University, Australia

Asher Flynn
Monash University, Australia

palgrave
macmillan



Softcover reprint of the hardcover 1st edition 2015 978-1-137-47614-2

First published 2015 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

Palgrave® and Macmillan® are registered trademarks in the United States, the United Kingdom, Europe and other countries.

ISBN 978-1-349-57052-2 ISBN 978-1-137-47615-9 (eBook)
DOI 10.1057/9781137476159

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

A catalog record for this book is available from the Library of Congress.

Contents

Tables

Acknowledgements

Despite decades of concerted activism, policy and legal reform, achieving justice for victim-survivors of sexual violence remains a pressing and unfinished ordeal.

This unique collection brings together expertise from across Australia, Canada, Croatia, Norway and the United Kingdom, to critically reflect on *Rape Justice: Beyond the Criminal Law*. Working with these scholars whose passion and practice reveals the limits and possibilities of justice has been a thoroughly humbling and rewarding experience. We have also had the great privilege of exploring and discussing the themes of this book with many of our contributors over the last few years, including at the 2013 colloquium of the Violence and Discrimination Against Women Research Network (VDAWnet) kindly supported by RMIT University and La Trobe University, Melbourne, Australia. It is a rare opportunity to bring together academics and practitioners from different practice backgrounds and theoretical perspectives to interrogate the social and political issues that this book explores, and we are very grateful for the conversations that have provided a basis for many of the chapters included here. We would like to thank each of our contributing authors for their diligence and their patience; for responding so graciously and positively to feedback on earlier drafts; and overall, for the tremendous contributions that their work both within and beyond this book makes to progress justice for victim-survivors.

We would like to also express our sincere gratitude to the editorial team at Palgrave Macmillan: in particular, Julia Willan, Harriet Barker and Dominic Walker, who have been constant sources of enthusiasm and support for this book throughout its journey from concept, to proposal, to publication. Thank you also to Susie Elliott for her magnificent editorial assistance. We are also very grateful to our peers and colleagues who have provided advice and guidance on the content of this book, and who also generously reviewed our own chapter contributions.

Finally, we would like to thank our families, friends and colleagues for their ongoing support and encouragement. In particular, Anastasia would like to thank her partner Matthew Weston and son Alexander. It is not easy to be a support to an academic whose work never seems to stay at work. Thank you also to her friends and colleagues including her head of discipline, Michele Ruyters, who is a constant source of

encouragement and all-important resources, and most especially to her co-editors Nicola and Asher with whom it continues to be an absolute pleasure to work. Nicola would like to thank her loving, caring and supportive partner Brent and her sweet, adorable and cute little Frederick. Thanks also to her wonderful family, especially Mum, Dad, Justine, Emma and Matt, and to friends and colleagues who have supported her immensely, in particular to Tarryn and Nesam for their constant support, advice and friendship. Lastly, Asher would like to thank Pamela and Allen for their ongoing support, unconditional love and encouragement. Thanks also to her Monash criminology colleagues for their valued support on this (and many other) research endeavours. Asher dedicates this book to her partner, Mark, and his colleagues, who are challenging stereotypes and seeking to make a real difference from within the realm of law.

Contributors

Haley Clark is a social worker and counsellor at Southland Help Rape and Abuse Support Centre, New Zealand. She has worked in research, policy and practice in the area of sexual violence for more than a decade. This includes having worked as a senior researcher at the Australian Centre for the Study of Sexual Assault and for the Victorian Department of Justice during the implementation of sexual offences law reforms, as well as for non-government organisations. She holds a MApplSW (Hons) and a PhD in criminology from the University of Melbourne. Her doctoral research examined the concept of justice from the perspectives of victim-survivors of sexual violence. She has written a number of articles and reports in the area of sexual violence and justice, and continues to provide support, education and advocacy in this area.

Kathleen Daly is Professor of Criminology and Criminal Justice, Griffith University, Brisbane, Australia. She writes on gender, race, crime and criminal justice; and on restorative, indigenous and transitional justice. Her recent work is on conventional and innovative justice responses to sexual and violent victimisation in different contexts of violence; and on redress, restoration and reparation. Her recent book, *Redressing Institutional Abuse of Children* (2014), analyses 19 major Australian and Canadian cases of historical institutional abuse. She is the editor or author of six books and over 85 journal articles or book chapters, past President of the Australian and New Zealand Society of Criminology (2005–2009) and Fellow of the Academy of the Social Sciences in Australia (2007) and the American Society of Criminology (2014).

Sara E. Davies is an Australian Research Council (ARC) Future Fellow, based at the Health Law Research Centre, Queensland University of Technology, Australia. She is the recipient of an ARC Discovery Project with Professor Jacqui True (Monash University) that examines the prevention of sexual violence in conflict and post-conflict situations in the Asia-Pacific region (PSV-AP). This ARC Discovery Project builds on her previous work on the prevention of mass atrocities and the Responsibility to Protect (co-editor, *Women Peace and Security and the Responsibility to Protect* (2013)). She has written two books, *Global Politics of Health*

(2010) and *Legitimising Rejection: International Refugee Law in Southeast Asia* (2007). She is the co-founder and co-editor of the quarterly journal *Global Responsibility to Protect*.

Benjamin de Carvalho is a senior research fellow at the Norwegian Institute of International Affairs, NUPI, Norway. His work on peacekeeping has focused on the protection of civilians (PoC) and sexual and gender-based violence (SGBV). He has undertaken fieldwork in Liberia, the Sudans and Chad.

Asher Flynn is Senior Lecturer in Criminology within the School of Social Sciences at Monash University, Melbourne, Australia, and a Research Fellow in Law within the Criminal Justice Centre at the University of Warwick, England. Her research utilises a socio-legal framework to understand, critique and transform legal policy and practice. Informed by national and international context, her research examines how accessing justice is negotiated, and the gendered, class-based application and practice of law. She has been awarded a number of prestigious international research fellowships and national awards in recognition of her work in the access to justice and plea negotiation fields, which has allowed her to spend time at the University of Manchester (Research Fellow in Law, 2013), the University of Warwick (Research Fellow in Law, 2014 – ongoing; Visiting Fellow in Criminal Justice, 2013) and Mannix College (Research Fellow in Social Sciences, 2014 – ongoing). She is a chief investigator with Emeritus Professor Arie Freiberg on a Criminology Research Council Project (2014–2016) analysing the plea negotiation process in Victoria.

Nikki Godden-Rasul is a feminist legal scholar whose research focuses on seeking justice for rape victim-survivors through unconventional legal responses. She has written on tort law and civil claims for rape in *King's Law Journal* and in *Feminist Perspectives on Tort Law* (edited by Erika Rackley and Janice Richardson), and she has also written on restorative justice and rape (with Clare McGlynn and Nicole Westmarland) in the *Journal of Law and Society*. She is the co-creator, editor and contributor of the blog *Inherently Human: Critical Perspectives on Law, Gender & Sexuality*.

Lise Gotell is Professor and Chair of Women's and Gender Studies at the University of Alberta, Canada. Her research expertise is in the area of gender and law, and she has written on such topics as equality litigation,

constitutional jurisprudence, obscenity law and sexual assault. She is a co-author of *Bad Attitude/s on Trial*: *Feminism, Pornography and the Butler Decision* (1997) and a co-editor (together with Barbara Crow) of *Open Boundaries: A Canadian Women's Studies Reader* (2009). For the past several years, her published work has focused on the implications of Canadian sexual assault reforms, including interrogating the legal standard for consent and evaluating the effectiveness of legislative restrictions on sexual history evidence and confidential records. Gotell is a founding member of Sexual Assault Voices of Edmonton, a community–police–academic collaboration that uses social marketing to educate about consent and to change attitudes that contribute to sexual assault.

Nicola Henry is Senior Lecturer in Legal Studies in the Department of Social Inquiry at La Trobe University, Melbourne, Australia. Her research focuses on justice responses to sexual violence in both international and domestic spaces. Her books include *War and Rape: Law, Memory and Justice* (2011) and *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture*, co-edited with Anastasia Powell (2014). She is a chief investigator (with Anastasia Powell) on an Australian Research Council (ARC) Discovery Project on technology-facilitated sexual violence and harassment.

Rosemary Nagy is Associate Professor of Gender Equality and Social Justice in the Faculty of Arts and Sciences, Nipissing University, Canada. Her research interests have to do with the scopes and bounds of an internationalised transitional justice. This includes the task of engendering transitional justice, the relationship between transitional justice and social or distributive justice, and legal pluralism in transitional context, in particular, the use of 'traditional' mechanisms. Rosemary's current research project is about the Canadian Truth and Reconciliation Commission on residential schools.

Niels Nagelhus Schia is an anthropologist and research fellow at the Norwegian Institute of International Affairs, NUPI, Norway, focusing on organisational culture, international organisations and peacebuilding. He has previously worked as a visiting researcher in a policy-producing section in the UN Department of Peacekeeping Operations HQ in New York and has written several peer-reviewed articles on peacebuilding.

Anastasia Powell is Senior Lecturer in Justice and Legal Studies at RMIT University, Melbourne, Australia. Her research has specialised on policy and prevention concerning violence against women. She has written widely in these fields including three books: *Sex, Power and Consent: Youth Culture and the Unwritten Rules* (2010); *Domestic Violence: Australian Public Policy*, co-authored with Suellen Murray (2011); and *Preventing Sexual Violence: Interdisciplinary Approaches to Overcoming a Rape Culture*, co-edited with Nicola Henry (2014). Her research has also focused more particularly on the interdisciplinary field of technology, sexual violence and justice, and she is currently a chief investigator (with Nicola Henry) on an Australian Research Council (ARC) Discovery Project grant *Technology-Facilitated Sexual Violence and Harassment: Violence Against Women in Cyberspace and the Implications for Reform* (2013–2016).

Ivana Radačić is a senior research associate at Ivo Pilar Institute of Social Sciences in Zagreb, working in the area of human rights and feminism. She is also a visiting lecturer at the University of Zagreb, the University of Osijek, the European Inter-University Centre for Human Rights and Democratisation, Venice, and University College London. She was a visiting lecturer at UN University for Peace, Costa Rica, and a fellow at the University of Kent and the University of Melbourne. She worked at the European Court of Human Rights, and she cooperates with a number of NGOs on strategic litigation and human rights education. She has written widely in the area of feminism and human rights, in particular on women's rights jurisprudence of the European Court of Human Rights. Her latest book analyses rape myths and gender stereotypes in the Croatian rape laws and judicial practice.

James A. Roffee is Lecturer in Criminology at Monash University, Melbourne, Australia. He holds a PhD in law from the University of Leicester. Prior to joining Monash University, he taught law part-time at De Montfort University and the University of Leicester in the United Kingdom. His field of expertise concerns legal responses to sexual offences, especially relating to familial sexual activity. He has worked on legal responses to incest in England, Wales and Scotland as well as chairing the Incest and Sexual Abuse Survivors Trust. His interdisciplinary research has involved both a historical and contemporary review of the way in which familial sexual activity has been managed in the legal sphere. This has involved reviewing punitive responses to familial

sexual activity, and understanding a human-rights based approach to the problem as well as community responses to incest.

Jacqui True is Professor of Politics and International Relations and an Australian Research Council Future Fellow at Monash University, Melbourne, Australia. She is a specialist in gender and international relations and critical international political economy, with a focus on the social dimensions of globalisation and feminist research methodologies. Her articles on gender mainstreaming and global governance rank among the most highly cited in the field. Her latest book, *The Political Economy of Violence Against Women*, was published in 2012. She is chair of the Australian Political Science Association's International Relations Standing Committee and is an editor of *International Studies Perspectives*. She is a member of the editorial boards of *International Feminist Journal of Politics*, *Foreign Policy Analysis*, *Women, Politics & Policy, Political Science* and the Palgrave Macmillan *Gender and Politics Series*.

1
The Promise and Paradox of Justice
Rape Justice Beyond the Criminal Law

Nicola Henry, Asher Flynn and Anastasia Powell

Introduction

Justice for victim-survivors of sexual violence is marred by a series of intersecting paradoxes, predicaments and contradictions. On the one hand, sexual violence is commonly understood as a 'trauma' under increasingly medicalised and individualised psychological frameworks (see Gavey & Schmidt, 2011). Rape is often rendered incomprehensible and taboo to others; seen as the 'worst of crimes', 'an assault on the soul' (Sharratt & Kaschak, 2013) or 'the ultimate violation' (Rowland, 1985). Yet on the other hand, victim-blaming cultural attitudes, stereotypes and myths continue to normalise sexual violence and trivialise victim experiences (Heenan & Murray, 2006), particularly when the perpetrator is a person known to the victim and/or when the victim is in an intoxicated state (Lynch et al., 2013; Richardson & Campbell, 1982). Indeed, cultural, structural, institutional and social values about sexual violence have been identified as part of a phenomenon which is commonly yet controversially referred to as 'rape culture', defined as 'a complex set of beliefs that encourage male sexual aggression and supports violence against women' (Buchwald et al., 2005, p. xi; see also Brownmiller, 1975; Horvarth & Brown, 2009). Arguably an outcome of these prevailing forces – between the pathological trauma of rape and the minimisation and trivialisation of rape – is to contribute to the construction of a 'spoiled identity' (Gavey & Schmidt, 2011, p. 451) and a reinforcement of stranger rape as the prototype of 'real rape' (Estrich, 1987; Williams, 1984) – both a form of misrecognition and representational injustice (Fraser, 1998).

Scholars, activists and practitioners continue to decry the perpetual silence surrounding sexual violence in public discourse and the dismal

failure of domestic and international legal courts to adequately prosecute rape, secure convictions and ensure proportionate sentences (see e.g. Mardorossian, 2002). Yet this critique of silence can be juxtaposed to the unprecedented global attention to sexual violence that has amassed in more recent times due to a number of events, including the gang rape and murder of a 23-year-old physiotherapy student in South Delhi, India, in 2012; the rape and murder of 29-year-old Irish woman and ABC employee Jill Meagher in Melbourne, Australia, in 2012; the 2014 Global Summit to End Sexual Violence in Conflict, co-chaired by UK Foreign Secretary William Hague and Special Envoy for the UN High Commissioner for Refugees, Angelina Jolie; and the dramatic profusion of online anti-rape websites offering victim-survivors a space to tell their stories to global audiences (see Powell, 2015; Rentschler, 2014). Alongside populist and intergovernmental attention, scholars, activists and victim-survivors have extensively written and campaigned about sexual violence in both peacetime and wartime contexts, culminating, amongst other things, in the recognition of rape as a crime against humanity, a war crime and a crime of genocide under international law. Yet conversely, others have questioned the desirability of fixating on rape as the 'worst of crimes', arguing that such rhetoric can be used to advance political interests and ideologies, and to present women as perpetually powerless, vulnerable, 'sexed' and in need of protection by a heroic band of 'international saviours' (Halley, 2008; Marcus, 1992; see also Henry, 2014).

Moreover, feminist academics and practitioners are divided over the extent to which '*gender* inequality should be framed as one factor among many in prevention work, or as *the* central, contributing factor underlying sexual violence in our society' (Powell & Henry, 2014, p. 11, original emphasis). The largest North American anti-sexual violence organisation RAINN (Rape, Abuse & Incest National Network), for example, expressed concern about the 'unfortunate trend towards blaming "rape culture" for the extensive problem of sexual violence on [college] campuses'. They noted that:

> While it is helpful to point out the systemic barriers to addressing the problem, it is important to not lose sight of the simple fact: *Rape is caused not by cultural factors but by the conscious decisions, of a small percentage of the community, to commit a violent crime.*
>
> (Emphasis added)

The issue is whether sexual violence and the diverse justice responses to it should be understood as an individual or collective problem. In other

words, should justice mechanisms be directed towards ensuring individual culpability and responsibility, or should energy instead be invested in tackling deep-seated gender inequality as one of the underlying causes of sexual violence?

These aforementioned paradoxes are also reflected in debates about the efficacy of rape law reform. Since the latter part of the 20th century, a raft of legislative and procedural changes to rape law across jurisdictions globally have included innovative procedures and measures to address the 'justice gap' (Temkin & Krahé, 2008), which has come to characterise the prosecution of sexual offences in diverse criminal justice systems (see McGlynn & Munro, 2010). These reforms include, *inter alia*, changes to the definition of rape and sexual consent; amendments to jury directions; the abolishment of the requirement for witness corroboration; restrictions on the admission of evidence at trial about a complainant's sexual history; protective measures for vulnerable witnesses; the establishment of witness and victim support services with specialist expertise on sexual violence; various types of legal representation for victims; reparations, compensation, restitution and rehabilitation; specialist courts; and the criminalisation of marital rape. However, although recognised as progressive measures, many scholars, legal professionals and activists argue that the impact of rape law reform has been negligible, with little change to reporting, prosecution and conviction rates, and little improvement in procedural justice for both victims and accused persons (Daly, 2011; Larcombe, 2011; Stubbs, 2003). Indeed, despite the global momentum surrounding sexual violence, and the various feminist academic debates about the impacts and hierarchies of sexual violence in diverse contexts, there is little doubt that victim-survivors continue to face insurmountable obstacles in seeking justice through the criminal law in the aftermath of sexual violence.

The above-mentioned intersecting paradoxes and predicaments underscore the discursive construction of rape or sexual violence as simultaneously *inevitable* yet *unspeakable* (Henry, 2011). These paradoxes, we contend, are ultimately concerned with the complex notion of 'justice', leading us to ask: What constitutes justice for victim-survivors of sexual violence? Is justice *recognition* of a wrong? Is justice the *primary prevention* of that wrong? Should justice responses focus on individual criminal responsibility, or instead tackle deep-seated, underlying structural inequalities? Or is justice something far more ephemeral or nebulous to victim-survivors of these harms? To date, much of the excellent work on justice for sexual violence victim-survivors has been focused foremost on criminal justice systems in both domestic and

international contexts (see McGlynn & Munro, 2010; Temkin & Krahé, 2008; Westmarland & Gangoli, 2011). Adding to this body of literature, this current collection critically examines the diverse assemblage of justice responses to sexual violence, encompassing criminal law, civil law, restorative justice mechanisms, international human rights law, civil society initiatives, customary law and online anti-rape activism. The book attempts to provide a reconceptualisation of justice both within and beyond the criminal law and to insist, as Kathleen Daly (2011, p. 2) does, that '[r]ather than one justice pathway for victim/survivors, a menu of options and varied pathways is required'. The collection is thus situated within a burgeoning interest in alternative and innovative justice responses to sexual violence both within and outside of the legal system (see e.g. Daly, 2011; Koss, 2010; McGlynn, 2011; McGlynn et al., 2012; Naylor, 2010). It addresses key debates regarding the false dichotomy between restorative and retributive justice, as well as the desirability and efficacy of legal redress for sexual violence. The book as a whole moves beyond a narrow treatment of justice through the criminal law, and instead focuses on different institutional, individualised and community-based mechanisms that are constantly changing in an age of expanding digital communication, information saturation, new forms of social activism and shifting 'imagined communities' (see also McGlynn, 2011).

In this chapter, we argue that these alternative justice sites, measures and mechanisms have potential empowering effects for individuals and groups, such as giving victim-survivors of sexual violence greater control over their narratives, challenging gendered rape myths and fostering collective, solidarity-building consensus. More broadly, creative, inventive or subaltern measures can serve to challenge the very idea that justice can and should be sought exclusively through formal legal channels. The first section of this chapter examines the philosophical and practical problematic notion of 'justice' and the array of justice mechanisms for responding to multiple forms of sexual violence in contemporary contexts. The second section provides an overview of the collection as a whole, focusing on the key themes of justice, context and moving beyond the realm of law.

The problem of justice: Beyond criminal law

Justice, according to many influential philosophers, is sacrosanct, compelling and inviolable: a 'word of magic evocations' (Cahn, 1964, p. 13). John Rawls (1976) described justice as the 'first virtue', but noted

that what is just and unjust is perpetually in dispute. Justice prompts creative forms of energy; it is a power that both drives and impassions – but it remains perpetually elusive and impossible to define. The eternal, alluring expectation of justice as 'the basis for sovereignty, the source of political authority' keeps us, as subjects of law, always 'obedient, patient and hopeful' (Martel, 2011, pp. 158–159). As Jacques Derrida (1990) acutely notes, we are *always* waiting for justice. Justice is, Derrida claims, the experience of the impossible; it is 'always to come'.

Law remains the dominant frame for thinking about justice, but the law–justice relationship is characterised by a set of paradoxes. While it is true that victims of crime often turn to law as the normative remedy for injury, law at times can engender oppressive and deleterious effects, serving as a tool of further injustice. Relatedly, although law has the power to pronounce judgement and to construct the truth about an event, it can also silence and/or suppress other narratives and 'truths' (Finley, 1989). Law can empower individuals and groups in asserting their rights, providing a benchmark from which to check the abuse of interpersonal, organisational and state power, but it can also be used by the powerful to exert more power. Law's power is itself full of complexities and contingencies (Douzinas et al., 1994). Law, disguised as justice, may bring some satisfaction and other therapeutic gains to victim-survivors and the community more generally, but law can never fully erase the injury or long-term impacts of violence. Law ultimately promises, but fails to deliver, justice.

Despite the frustrations, mysteries and impossibilities of justice, law remains compellingly central to understandings of justice. This is particularly the case with criminal law. The criminal law, and the rituals of the justice system within which it operates, carries important symbolic meanings, as well as having practical effects that extend beyond the individuals directly involved, into the broader society (Murray & Powell, 2011). If, as Durkheim (1893) famously argued, criminal law and punishment is expressive of a society's collective vengeance for the violation of a shared core value, then seeking justice through the criminal courts represents more than seeking accountability and punishment for an individual's wrongdoing. Rather, criminal justice, when successful in terms of conviction and punishment for rape, represents society's public acknowledgement not only of the harm, but also that it *should not* occur; that rape is fundamentally an outrage to our collective values. In short, criminal law is a fundamental means of both establishing and communicating normative standards

of sexual conduct (Larcombe, 2014). As David Garland (1990, p. 67) suggests:

> Rituals – including the rituals of criminal justice – are ceremonies, which, through the manipulation of emotion, prompt particular value commitments on the part of the participants and the audience and thus act as a kind of sentimental education, generating and regenerating a particular mentality and a particular sensibility.

It is perhaps a reflection of this core expressive function of the criminal law that for many victim-survivors, feminist scholars and activists, 'justice' in response to sexual violence has been pursued with specific reference to criminal convictions and carceral punishment (see Lewis et al., 2001; and for a critique, see Chapter 4). Nonetheless, there is growing acknowledgement that such measures and understandings of justice are considerably narrow (see Larcombe, 2011), and frequently fail to meet the varied justice needs of victim-survivors of sexual violence (Chapter 2). For example, feminist scholarship has long identified the criminal justice trial as analogous to a 'second rape' (Madigan & Gamble, 1989); an additional trauma endured by victim-survivors, rather than a process that offers either acknowledgement or healing. Furthermore, as Judith Herman (2005) notes, many of the processes of the criminal trial 'ritual' are antithetical to justice from the victim's perspective. At a time when victim-survivors require the opportunity to be heard, believed and regain control over their narrative, the criminal trial frequently silences, doubts and disinherits victims and renders them to the role of mere 'witnesses' (Herman, 2005). In light of such critiques, it is important to problematise the domination of criminal law in the imaginative space of justice.

As demonstrated throughout the collection, alternative sites of justice are indicative of a shift away from both the law and the state as the remedy for social injury. They signal a shift towards justice as a 'relational and contextual practice', away from institutionalisation, individualisation and libertarianism (Brown, 1995, p. 6). Thus new global and civil society configurations create new opportunities for disenfranchised groups and towards subaltern justice discourses that are capable of contesting and resisting contemporary forms of power and domination.

Differing forms of justice that move beyond the criminal law include customary law; online and offline activism and consciousness-raising; truth and reconciliation commissions; civil remedies; memorials and

other forms of commemorations; film, art and literature; reparations through compensation and restitution; public apologies; royal commissions; and other formalised independent investigations. These differing avenues offer alternative understandings, approaches and forms of justice, both formal and informal. To varying degrees, these avenues respond to the needs and contexts of *individualised* lived experiences of sexual violence victim-survivors, as well as seeking to respond to the broader *societal* contexts and collective expectations of justice. What these differing avenues, mechanisms and measures of attaining, achieving, providing, approaching and engaging with justice demonstrate is the complexity of justice, and importantly, that there is a need to move towards a more multivalent approach to justice that is not solely reliant upon the state or the criminal law as the adjudicator of wrongdoing, or the sole provider of justice.

As Nancy Fraser (1998) advocates, justice must be about both redistribution and recognition, and above all, about 'parity of participation' in social life. Drawing on Fraser's justice model, we argue that redressing the misrecognition of the law of sexual violence not only requires changing the rules within law, to achieve this 'parity of participation', but it also requires an exploration of the emerging avenues outside of law – the 'counterpublic spaces' for seeking justice for sexual violence as both redistribution and recognition (Fraser, 1998). It is important to point out that these counterpublic spaces are not immune from deeply embedded cultural, socio-economic and racial hierarchies and there are dangers, limitations and potentials that must also be examined here too. However, we contend that although law continues to dominate the imaginative space of justice, there are possibilities for expanding how we think about justice in the aftermath of sexual violence. The vexed, complex and varied ideals of justice cannot be attained through one formal mechanism of acknowledging and responding to wrongdoing. Instead, we must be prepared to work within and move beyond the realm of criminal law and recognise the importance of context in responding and preventing sexual violence (see Chapter 3).

A note on terminology

Rape Justice is a deliberately provocative title for this book, and it is not without criticism. The term 'rape' and indeed associated definitions of 'sexual assault' and 'sexual violence' are widely divergent across criminal jurisdictions, as well as within public policy and scholarly discourses. In some instances, rape is defined as a penetrative offence;

for instance, the FBI now defines rape as '[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim' (similar to the International Criminal Court's (ICC) definition). This is in contrast to the much broader definition of rape at the International Criminal Tribunal for Rwanda (ICTR), where rape was defined as 'a physical invasion of a sexual nature committed on a person under circumstances which are coercive'. The World Health Organization (WHO, 2011) meanwhile defines sexual violence as 'any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work'. Some definitions thus treat sexual assault, sexual violence and rape interchangeably, whereas definitions that focus on the penetrative element of the offence tend to treat sexual violence as the broad umbrella term that includes sexual assault as a non-penetrative sexual offence and rape as a separate penetrative offence. In some instances, sexual assault is used interchangeably with rape as a penetrative offence.

In light of these definitional dilemmas and divergences, it is interesting to note Liz Kelly's (1987, p. 54) contention that rather than discrete categories of violence and non-violence, women's experiences of violence exist along a continuum from 'choice to pressure to coercion to force'. Thus women's experiences of sexual violence are not disconnected from other coercive and discriminatory experiences, including sexual harassment, poverty and other gender-based inequalities. In line with a conceptualisation of a continuum of sexual violence in which the language of 'rape' may describe a variety of experiences of violation and abuse, throughout this book the terms rape, sexual violence and sexual assault are used sometimes interchangeably, and sometimes in the specific contexts in which the chapter authors define them.

However, it is not only in the context of a diversity of definitions and experiences that we have elected to draw together the chapters in this collection under the banner of 'rape justice'. 'Rape' and 'rape culture' are terms that have also been increasingly used in public discourse and debate, as a global community seeks to understand the basis for our shared societal epidemic of sexual violence. The dual term 'rape culture', rather than its longer counterpart referring to the 'cultural explanations or causes of rape', has become a powerful shorthand in popular discourse – instantly recognisable and attributable to a feminist-informed analysis of the collective, attitudinal, institutional and societal

underpinnings of women's experiences of sexual violence. Critiques of 'rape culture' have thus become a focal point for renewed emphasis within feminist movements and scholarship. In a similar vein, this book places 'rape justice' front and centre, though each of the chapters here elaborates on the complexity, context and contributions of justice that occur within, through and outside of criminal law responses to sexual violence.

The chapters in this book are primarily concerned with the meanings and mechanisms for achieving justice for women victims of sexual violence. In gathering together contributing authors whose work focuses foremost on women (and girls) as victims, it is not our intention to suggest that men (and boys) do not experience sexual violence, nor that they do not have justice needs and face challenges that are similar to those faced by women and girls. Yet the broad critique and conceptualisation of justice that is developed within these pages is framed within an understanding of the fundamentally gender-based nature of sexual violence. Some chapters, for example by Haley Clark (Chapter 2), Kathleen Daly (Chapter 3) and James A. Roffee (Chapter 5), specifically acknowledge both women and men as victims, the broader context to sexual violence victimisation, and the over-regulation of some sexual practices as 'harmful' by the state. However overall, and in the context of women's overwhelming sexual victimisation at the hands of men, this book unapologetically places sexual violence against women at the core of debates regarding 'rape justice'.

The structure of the book

The chapters in this book explore conceptual themes that engage with the potentials and limitations of the law and its processes for responding to women's lived experiences of sexual violence. The chapters examine the complexities and associated problems of individualised versus collective needs in considering justice responses to sexual violence, and the differing expectations of what constitutes a 'justice' outcome, within an international context. Of significance, this collection moves beyond a critique of existing mechanisms to also highlight the importance of understanding context when discussing rape and justice, by specifically taking into consideration broader gendered inequalities and wider social, economic, cultural, physiological and ecological factors. In doing so, the chapters move beyond a focus on the criminal law and legal reform as the only mechanisms for achieving justice for victim-survivors of rape.

In Chapter 2, Haley Clark places the voices and experiences of victim-survivors of sexual violence front and centre in conceptualising the meanings of justice. Drawing on interviews with women and men, Clark develops an account of victim-survivors' justice needs, including acknowledgment and validation, perpetrator responsibility and accountability, and the role of retributive and punitive responses. Not only does Clark argue that there is a need for a reconsideration of criminal justice system processes in order to be more responsive to individual needs, but that ultimately, justice for many victim-survivors requires a broader social justice agenda. Clark's chapter contextualises the challenge which is a central theme underpinning this book: how to achieve justice for victim-survivors of sexual violence.

Understanding victim-survivors' justice needs also requires a widened understanding of what constitutes justice, and an illumination of the varied contexts in which sexual violence occurs. This is a key theme developed in Kathleen Daly's discussion (Chapter 3), where she elaborates on a number of confronting case studies to challenge us to move beyond stereotypical understandings of justice, redress, retribution and restoration, and to 'not assume there is one (or perhaps a handful) of desirable justice responses'. In the same way that feminists have challenged one form of rape ('real rape') and one form of victim (the 'ideal victim'), Daly argues that we should no longer accept one form of justice. In fact, she suggests we should challenge this very idea. An equally important point emerging from Daly's chapter is the need to focus on context. As she argues, 'context matters for justice'.

This theme of 'context matters' is an important one, and like the idea of moving beyond accepting one form of justice, it permeates the entire collection in relation to arguments around meanings of justice; formal and informal responses to sexual violence; and addressing victim-survivors' justice needs. Through a discussion of criminal law and legal reforms, Lise Gotell (Chapter 4) offers an important criticism of the existing critiques of 'carceral feminism'. Gotell argues that the debates around law reform need to return their focus to the best response for victims and move away from the highly flawed presumption that feminist critiques of rape law align with 'law and order' punitivism. Drawing from Canadian examples, Gotell argues that feminist calls for legal change have always focused on increasing recognition for victims, reducing the prevalence and acceptance of rape myths and providing fair treatment for complainants. Yet some scholars, as identified by Gotell, have fused advocating for victims' rights, with carceral justice. Gotell engages with a significant body of evidence to show there is a

difference between punitivism and feminism, and suggests that feminists need to 'publicly disengage from the politics of punishment and to rearticulate . . . critiques of the law and order state'. Expanding from criminal conviction and carceral punishment as the key markers of 'justice', Gotell advocates for the success of rape law to be measured against victim-survivor outcomes and levels of satisfaction, including the extent to which the law actually reflects and responds to women's lived experiences of sexual violence.

The dominant critique of relying upon rape law to frame and attain justice is also present in James A. Roffee's chapter (Chapter 5), in which he argues that law does not 'cope well with shades of grey'. Drawing on examples of homosexuality, young people and incest, Roffee argues that the law's inability to act as an all-encompassing response to sexual violence presents challenges when it attempts to regulate those who practise non-traditional sexual scripts. Somewhat controversially, Roffee suggests that a response to this situation could involve the creation of offence levels (or some might argue, an offence hierarchy) for rape crimes. Roffee supports this argument by drawing on examples of sexual violence involving deception. While potentially having the effect of introducing a hierarchy of victimisation experiences which can reaffirm rape myths and prioritise 'real rape' above other experiences of sexual violence, Roffee contends that considering new ways of understanding consent in law, beyond what he deems an 'overly simplistic consent/non-consent binary', will go some way towards better recognising the individualised experiences of victim-survivors. In this way, Roffee engages with the 'context matters' theme, suggesting that clarifying levels of rape will assist the law in better recognising the varied contexts and situations in which sexual violence occurs.

In her analysis of innovative responses to sexual violence, Asher Flynn (Chapter 6) argues that the failings of conventional legal and prosecution processes have created an opportunity for the narratives around 'real rape' and carceral justice to be interrupted. In presenting examples of such opportunities, including shifts in rape awareness campaigns away from the actions of women victims to those of potential perpetrators, Flynn engages with two initiatives – specialist courts/prosecution units, and restorative justice models – to demonstrate a move away from a 'one size fits all' approach to justice. Supporting Daly's argument to challenge widespread acceptance of one form of justice, Flynn highlights the potential for further justice developments that operate within, alongside and beyond the criminal legal realm.