Therapeutic jurisprudence : a just framework for Indigenous victim/survivors of sexual violence?

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Therapeutic jurisprudence: A just framework for Indigenous victim/survivors of sexual violence?

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PRESENTATION LIST

- Therapeutic Jurisprudence: An Appropriate Framework for Law Reform in Matters Involving Indigenous Women and Sexual Violence?‘, International Congress on Law and Mental Health, Amsterdam (17 July 2013)

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TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

I THESIS BACKGROUND

I first encountered the term _therapeutic jurisprudence' four years ago, when I was working on a national inquiry into violence against women at the Australian Law Reform Commission. I observed how therapeutic jurisprudence tended to polarise: a relatively new term in Australia, it was regarded with disdain by many academics and those in the upper echelons of the legal profession. The Commission noted these debates, and decided not to adopt it in that inquiry.[1] Yet magistrates, and those non-lawyers who had heard of it, were exceptionally positive. My initial impression was that therapeutic jurisprudence had the potential to make a humane contribution to the law. While working as a nighttime solicitor at community legal centres in Sydney's Redfern and Kings Cross, I had realised that my simple acknowledgment of a client's challenging situation would visibly affect their wellbeing, resulting in what a client would tell me was a positive legal interaction for them, and sometimes even rendering a cathartic experience. In foregrounding how legal interactions could affect the wellbeing of those who interacted with the law, therapeutic jurisprudence seemed to reveal a reality about the operation of the law which was lacking from my legal education. In emphasising how the law should do no harm—and where possible, try to do good—it also justified a compassionate approach to legal analysis, practice and reform.

Given all of this, I wondered: why was therapeutic jurisprudence so divisive? Intrigued, I decided to embark upon a PhD to dig deeper, and this thesis is the result of that consideration. I chose a _tough' case study—the legal response to Indigenous women who have experienced sexual violence—in order to really test the boundaries of what therapeutic jurisprudence has the capacity to achieve in justice terms. As a non-Indigenous person living in contemporary Australia, I have been committed to understanding the historical relationship between Indigenous peoples and the state, and through my work, contribute to

[1] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks (Consultation Paper 1)* (2010) [20.162]–[20.163]. The Commission focused on therapeutic jurisprudence in relation to problem-solving courts.

improving the current situation of Indigenous peoples. I also share a sense of injustice about the way the law does not adequately respond to victim/survivors of sexual violence, a matter which became clear to me while working in family and sexual violence law reform, and which I discuss at length in Chapter 5 of this thesis. I had noticed that, in focusing on offenders, therapeutic jurisprudence seemed to make assumptions about what it could deliver to victim/survivors, and I wondered what it actually offered to this category of legal participant.

II RESEARCH QUESTION

With this as background, my research question for this thesis is as follows:

Can a therapeutic jurisprudence framework for the development, implementation and reform of the law provide a 'just' legal response to sexual violence experienced by Indigenous women?

III METHODOLOGY

My research involves theoretical analysis of the advantages, if any, of using a therapeutic jurisprudence approach to guide the legal response to sexual violence in the specific context above.[2] This includes an in-depth theoretical consideration of therapeutic jurisprudence. The thesis has elements of doctrinal research in its analysis of law and procedure relevant to sexual violence, and also contains some law reform suggestions.

In embarking upon this thesis, I critically explored Indigenous and feminist research methodologies.[3] I have considered the categories of _inside' and _outside' Indigenous

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2 In designing my thesis methodology, I considered approaches to legal research identified in the Council of Australian Law Deans, *Statement on the Nature of Legal Research* (2005) 2.

3 See, eg, Fiona Cownie, *Legal Academics: Culture and Identities* (2004); Kyllie Cripps, *Enough Family Fighting: Indigenous Community Responses to Addressing Family Violence in Australia and the United States* (Unpublished PhD Thesis, Monash University, 2004); Uwe Flick, *An Introduction to Qualitative Research* (4th ed, 2009). I respond to criticisms of feminists being primarily interested in, and at times explicitly advancing the interests of, a certain group—namely, those who identify as white, middle-class, able-bodied, heterosexual, female and human. Particularly for a critique of white

culture and the law, whilst also noting that these are fluid distinctions that can operate on multiple levels.[4] My approach in this thesis is a product of reflection upon myself as a cultural 'outsider' in that I am not Indigenous: in demanding equality in the legal response to gendered violence, I note my role as a 'white feminist'.[5] I also am an outsider as I have not interacted with the legal system as a victim of sexual violence. However, I am an 'insider' in other ways relevant to my topic in that I have trained and practised in the legal system that I am analysing, and have worked in family and sexual violence law reform. While conscious of being a cultural outsider, I argue that this should not preclude engagement with this research area. No researcher is able to be fully 'inside' every violent interaction that she or he studies, nor know the precise causes, nuances or effects of a particular violent relationship. Further, as a cultural outsider, the effects that my research will have on my personal and familial relationships are limited and will not guide my findings. I have consistently endeavoured to engage with the subject matter in a respectful manner, have always attempted to be self-reflective as to my status, and have carefully developed my views with the input of insiders.

Both insider and outsider status have potential implications for approaching research and there are advantages and pitfalls with respect to both—for instance, a researcher may be more or less likely to access information as an insider, and she may need to guard against blindness and preconceptions both because she is too close to, or because she is inexperienced with, her or his subject-matter.[6] I see various perspectives as valid if the research process and its presentation are approached with a degree of reflexity. I avoid retreating from the issue because I am white and educated; I have chosen to speak even while I am member of a privileged group, and take great care with my words and intention.

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women writing about Indigenous women, see Jackie Huggins, *Sister Girl–The Writings of Aboriginal Activist and Historian* (1998).

4 See the discussion of these concepts and the work of HLA Hart in Margaret Davies, *Asking the Law Question* (3rd ed, 2008) 12–15.

5 Some white feminists still continue the racist practice of supporting white 'experts' to speak and write about Aboriginal women, thus maintaining their role of misinterpreting and misappropriating Aboriginal women's culture and history and undermining their politics. This practice reinforces the exploitative roles of 'expert' from the dominant colonising culture and 'subject' from the colonised and oppressed group: Huggins, *Sister Girl–The Writings of Aboriginal Activist and Historian*, above n 3, 33.

6 For an insightful general discussion on the benefits and drawbacks of insider research, see, eg, Cownie, *Legal Academics: Culture and Identities*, above n 3, 22–25.

Through this thesis, I hope to contribute to a third space, one beyond black and white; what Adrian Howe has termed an ‗enunciative space'.[7] In this, I have also been influenced by Gail Mason and Julie Stubbs, who write:

> Whilst distinctions between speaking ‗for', speaking ‗about' and speaking ‗with' have consumed considerable feminist attention, the issue is more helpfully approached, as noted by post-colonial critic Gayatri Spivak (1988), as less about who does the speaking and more about what we say, how we say it and who listens.[8]

Indigenous scholar Kyllie Cripps has described an ‗Indigenist research agenda' as including elements such as cultural identification, ethical considerations and the identification of a researcher's purpose.[9] Further to the above points elucidated by Spivak, then, is the issue of ‗why' something is said: what is the intention underlying the research? My research is undertaken with the hope that it may provide some benefit to Indigenous women who interact with the legal system in an indirect way—at the very least, by providing a fuller and more critical picture to those involved in the development and reform of laws affecting Indigenous women. In summary, I have approached my thesis with an awareness of the sensitivity of my topic and the potential effects of my research.

Finally, I note that a reader may wonder why I am not embarking on an empirical analysis in this thesis. I have not omitted empirical work because I do not see it as important: quite the opposite. As I argue at length in this thesis, theoretical analysis is what is lacking to the discourse of therapeutic jurisprudence. In my view, it is essential to ensure that the conceptual analysis of therapeutic jurisprudence is correct in justice terms before conducting empirical work. In other words, conceptual analysis is a necessary *prerequisite* to empirical research. Researchers need to get the conceptual and justice questions right before launching into further empirical work, and perpetuating the same problems that I have identified in the therapeutic jurisprudence literature. Thus, in situating my thesis on a conceptual level, I certainly do not dismiss the importance of empirical research.

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7 Adrian Howe, ‗Addressing Child Sexual Assault in Australian Aboriginal Communities: The Politics of White Voice' (2009) 30 *Australian Feminist Law Journal* 41, 60.

8 Gail Mason and Julie Stubbs, ‗Feminist Approaches to Criminological Research' in D Gadd, S Karstedt, and S Messner (eds), *The Sage Handbook of Criminological Research Methods* (2012) Ch 32, 491.

9 See, eg, Cripps, *Enough Family Fighting: Indigenous Community Responses to Addressing Family Violence in Australia and the United States*, above n 3, 86–88.

IV INTRODUCTION TO THE THERAPEUTIC JURISPRUDENCE LITERATURE

This thesis traverses much terrain: it engages with literature relevant to therapeutic jurisprudence, justice, victimology, and sexual violence. I provide context for all these areas in the following sections of this chapter. However, it is primarily a thesis about therapeutic jurisprudence. As I approach all of these other bodies of work through this lens, I include in this introductory chapter an overview of only the therapeutic jurisprudence literature. I review in greater detail the literature related to this body of work, and each of the other areas canvassed in my thesis, in the ensuing chapters.

The term ‗therapeutic jurisprudence' was coined in the late 1980s by David Wexler, a United States (US) law professor. According to Wexler, his ‗light bulb' moment was when he was asked to deliver a conference presentation on ‗law and therapy' and realised he was most interested in ‗law *as* therapy'.[10] Therapeutic jurisprudence may have emerged partly as a frustration with existing legal culture, still a live issue, with Arie Freiberg writing of the general disenchantment with the criminal law, citing ‗[r]ising case loads, crowded court dockets, growing prison populations and high recidivism rates'.[11] Other approaches have attempted to grapple with these issues, and Susan Daicoff situates therapeutic jurisprudence and related approaches, such as alternative dispute resolution, as ‗vectors' within a Comprehensive Law Movement that encourages ‗a common goal of a more comprehensive, humane, and psychologically optimal way of handling legal matters'.[12]

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10 This was in 1987, when he was asked to present a paper on law and therapy by the US National Institute of Mental Health: David Wexler, ‗Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17, 22.

11 Arie Freiberg, ‗Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' (2011) 8 *European Journal of Criminology* 82, 82.

12 Susan Daicoff, ‗The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement' in Dennis Stolle, David Wexler and Bruce Winick (eds) *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) 465, 466–467. Daicoff suggests that the other vectors include preventive law, procedural justice, restorative justice, facilitative mediation, transformation mediation, holistic law, collaborative law, creative problem solving, and specialised courts: Ibid. This was cited by Winick and Wexler in David Wexler and Bruce Winick, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) 106. See also Susan Daicoff & David Wexler, ―Therapeutic Jurisprudence" in Alan Goldstein (ed), Handbook of Psychology: Forensic Psychology (2003), 561. Although see the suggestion by Mae Quinn that therapeutic jurisprudence merely reflects existing best practice: Mae Quinn, ‗An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged' (2007) 48 *Boston College Law Review* 539, 542.

Whatever the reason for its origins, therapeutic jurisprudence clearly touched a nerve amongst legal scholars and practitioners, and it gathered interest in North America (and more recently in other jurisdictions, including Australia[13]). In 1990, Wexler edited the first book collection on therapeutic jurisprudence[14] and he went on to develop the concept with Bruce Winick. Wexler and Winick have continued to publish extensively in the field,[15] and the literature has proliferated. A comprehensive bibliography on the Wexler-moderated website for the International Network on Therapeutic Jurisprudence[16] now lists nearly two thousand relevant sources, including monographs, book chapters, journal articles, journal special editions, symposia, videos, conference proceedings, benchbooks and websites. The literature addresses issues in many legal jurisdictions, and much of it is interdisciplinary in nature, with authors bringing to bear knowledge from a range of disciplines including psychology,[17] psychiatry,[18] nursing,[19] education,[20] literature[21] and theology.[22] Contributions

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13 I discuss Australian contributions to the therapeutic jurisprudence literature in Ch 2.

14 David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (1990).

15 Winick until his death in 2010. Wexler and Winick co-edited other monographs, starting with *Essays in Therapeutic Jurisprudence* (1991) and *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003). Wexler and Winick also co-edited a volume with Daniel Stolle: *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) (considering the relationship between preventive law and therapeutic jurisprudence). Wexler edited another monograph on his own: *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008). Winick went on to author two other books explicitly on therapeutic jurisprudence: *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (1997) and *Civil Commitment: A Therapeutic Jurisprudence Model* (2005). He also worked on other books with a therapeutic jurisprudence theme: Bruce Winick (ed), *The Right to Refuse Mental Health Treatment* (1997); Bruce Winick, Steve Behnke and Alina Perez, *The Essentials of Florida Mental Health Law* (2000); and Bruce Winick and John LaFond (eds), *Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy* (2003). Wexler and Winick have authored multiple additional articles and book chapters, and given many presentations on therapeutic jurisprudence.

16 The website for the International Network on Therapeutic Jurisprudence invites readers to contact David Wexler on his published yahoo email address. The website also invites you to join the ‗international and interdisciplinary listserv' and directs you to the therapeutic jurisprudence facebook page: David Wexler, ‗International Network on Therapeutic Jurisprudence' <http://www.law.arizona.edu/depts/upr-intj/>.

17 See, eg, ‗Symposium—Therapeutic Jurisprudence' (1996)1(1) *Psychology, Public Policy & Law* 6.

18 See, eg, Tony Bogdanoski, ‗Psychiatric Advance Directives: The New Frontier in Mental Health Law Reform in Australia?' (2009) 16 *Journal of Law and Medicine* 891. See also ‗Therapeutic Jurisprudence Symposium' (2010) 33(5), (6) *International Journal of Law and Psychiatry* 279–482.

19 See, eg, ‗Symposium—Therapeutic Jurisprudence and Nursing' (2002) 8(4) *Journal of Nursing Law* 1.

20 This is primarily in the context of legal education. See, eg, Bruce Winick, ‗The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic' (2006) 13 *Clinical Law Review* 605.

21 See, eg, Amy Ronner, *Law, Literature and Therapeutic Jurisprudence* (2010).

to the literature have been made from scholars and practitioners in Australia, Sweden, Israel, and many countries in Latin America. In recent years, a week-long therapeutic jurisprudence sub-conference has been held as part of the biannual Congress of the International Academy for Law and Mental Health. David Wexler continues to present at each Congress, and this event has become the focal meeting point for therapeutic jurisprudence scholars and legal practitioners from around the world.[23]

Publications by Wexler and Winick are treated as authoritative by scholars working in the field, but their 1996 co-edited collection, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, is one of the most cited texts, particularly for its definition of therapeutic jurisprudence: in its introduction, Wexler and Winick define therapeutic jurisprudence as _the study of the role of the law as a therapeutic agent'.[24] I discuss this definition in detail in the following chapter of this thesis.

Many therapeutic jurisprudence scholars are extraordinarily positive, even uncritical, about the topic—perhaps because it is such a supportive intellectual community. In the small pockets of critique, staunch opponents to therapeutic jurisprudence may be found,[25] as may nuanced considerations by those who are not convinced that therapeutic jurisprudence is the

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22 See, eg, Thomas Asbury, _Spiritual Outputs Approach to Rehabilitation: Alternative Sentencing Theory' (2000) 3 *Florida Coastal Law Journal* 41.

23 The program for the most recent Congress, held in Amsterdam in July 2013, is available at the website of the International Academy of Law and Mental Health <http://www.ialmh.org>.

24 David Wexler and Bruce Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) xvii. I explore this definition in much greater detail in Ch 2 of this thesis.

25 Some judges writing extra-curially fall within this category: for US examples, see Morris Hoffman, _Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' (2001) 29 *Fordham Urban Law Journal* 2063; Arthur Christean, *Therapeutic Jurisprudence: Embracing a Tainted Ideal* (2002) Focus On Utah <http://psychrights.org/articles/TherapeuticJurisprudenceTaintedIdeal.htm>. Hoffman has stated that, _[t]rue to their New Age pedigree, therapeutic courts are remarkably anti-intellectual and often proudly so': Ibid. There may be a high degree of skepticism amongst especially senior members of the Australian legal profession, although this is not always made clear in the literature. In the recent inquiry into Australia's family violence laws, the Australian Law Reform Commission and New South Wales Law Reform Commission referred to the controversial nature of therapeutic jurisprudence amongst those with whom it had consulted (particularly judicial officers): see, eg, Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks (Consultation Paper 1)*, above n 1, [20.162].

panacea for all problems caused by the law, but who are eager for its further exploration.[26] Work in the latter category is of the most interest for this thesis, and this is also where I position myself. Specific criticisms of therapeutic jurisprudence are that: it has a disproportionate focus on offenders and judging, particularly problem-solving courts; its meaning and purpose are unclear; it infringes the separation of powers; it is, alternatively, too radical or too mundane;[27] it merely re-traverses familiar terrain;[28] it perpetuates the power imbalances inherent in the legal system;[29] and it provides fertile ground for paternalism.[30] These criticisms, and more of my own, are considered throughout this thesis.

Therapeutic jurisprudence scholars have clustered around mental health, offenders and problem-solving courts, largely because Wexler and Winick were at first most interested in these areas. There are a number of exceptions to these focal points—including essays on a range of laws in *Law in a Therapeutic Key*—indicating that Wexler and Winick did not intend for such a narrow construction, nor are such parameters necessary.[31] For the purpose

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26 For example, in the context of problem-solving courts, Jane Spinak observes that the 'inability of supporters and critiquers to listen to the others' concerns has limited the effectiveness of both reform efforts and alternative or supplemental reform regimes'. Jane Spinak, 'A Conversation About Problem-Solving Courts: Take 2' (2010) 10 *University of Maryland Law Journal of Race, Religion, Gender & Class* 113, 133. Another example in this category is James Nolan, *Reinventing Justice: The American Drug Court Movement* (2009).

27 Samuel Brakel and Isaac Ray, 'Searching for the Therapy in Therapeutic Jurisprudence' (2007) 33 *New England Journal on Criminal and Civil Confinement* 455, 467. Astrid Birgden provides an overview of this debate: Astrid Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' (2009) 78 *Revista Juridica Universidad de Puerto Rico* 43, 50.

28 Therapeutic jurisprudence proponents often contest that therapeutic jurisprudence is just 'old wine in new bottles', arguing that it offers something fundamentally new in introducing wellbeing as a relevant criterion in legal decision-making. Bruce Winick, "The Jurisprudence of Therapeutic Jurisprudence" (1997) 3(1) *Psychology, Public Policy and Law* 184, 185. David Wexler expressly addresses this in his latest piece: David Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' [2012] *Arizona Legal Studies, Discussion Paper No 12-16*.

29 See, eg, Bruce Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' (2004) 11 *Psychiatry, Psychology and Law* 23.

30 See, eg, Eilis Magner, 'Therapeutic Jurisprudence: Its Potential in Australia' (1998) 67 *Revista Juridica Universidad de Puerto Rico* 121; Quinn, 'An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged' above n 12.

31 Of the fifty chapters in *Law in a Therapeutic Key*, a number dealt with issues outside this limited scope: see, eg, Leonore Simon 'A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases' at 243; Murray Levine, 'A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists' at 323; Kay Kavanagh, 'Don't Ask, Don't Tell: Deception Required, Disclosure Denied' at 343 (on the law to do with sexual orientation); Daniel Shuman, 'Therapeutic Jurisprudence and Tort Law: A Limited Subjective

of answering my research question, I am interested in the therapeutic jurisprudence literature that explores:

- the Australian context;[32]
- sexual violence;[33]
- victims;[34]
- Indigenous peoples, in Australia and other jurisdictions;[35]

Standard of Care' at 385; Amiram Elwork and G Andrew H Benjamin 'Lawyers in Distress' at 569; Mark Small, 'Legal Psychology and Therapeutic Jurisprudence' at 611; and Bruce Feldthusen 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' at 845.

32 The first Australian law journal article purporting to employ a therapeutic jurisprudence framework dealt with sexual assault and NSW evidence law: Miiko Kumar and Eilis Magner, 'Good Reasons for Gagging the Accused' (1997) 20 *University of New South Wales Law Journal* 311. Magner published at least two further articles on therapeutic jurisprudence, but appears not to have published in the area for the past decade: Magner, 'Therapeutic Jurisprudence: Its Potential in Australia' above n 30; Eilis Magner, 'Proving Sexual Assault' (2000) 18 *Behavioral Sciences and the Law* 217. The most prolific Australian academic in the field is Michael King, a former Western Australian magistrate who, since 2002, has authored at least thirty relevant journal articles, mostly related to therapeutic jurisprudence and judging, in addition to the *Solution-Focused Judging Bench Book* (2009). Arie Freiberg has published several relevant journal articles since 2001, mostly focusing on problem-solving courts, and he co-authored *Non-Adversarial Justice* (2009) with Michael King, Becky Batagol and Ross Hyams. I have noted other Australian authors in subsequent footnotes.

33 Note that such sources tend to be offender-focused. In the Australian context, Astrid Birgden has written a number of such articles. Exceptions include the articles by Magner above n 32 and Tyrone Kirchengast, 'Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' (2007) 10 *Flinders Journal of Law Reform* 143.

34 See, eg, Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011). Several articles on victims deal with domestic or family violence: see, eg, Leonore Simon, 'A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases' (1995) 1 *Psychology, Public Policy and Law* 43; Michael King, 'Roads to Healing: Therapeutic Jurisprudence, Domestic Violence and Restraining Order Applications' (2003) 30 *Brief* 14; Robyn Holder, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30; Lauren Bennett Cattaneo, 'Through the Lens of Therapeutic Jurisprudence: The Relationship Between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims' (2010) 25 *Journal of Interpersonal Violence* 481. Others focus on victim impact statements: see, eg, Kirchengast above n 33 and Edna Erez, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 *Criminal Law Bulletin* 483.

35 Again, many such articles emphasise the offender. See, eg, Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415; Valmaine Toki, 'Are Domestic Violence Courts Working for Indigenous Peoples?' (2009) 35 *Commonwealth Law Bulletin* 259; Michael King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133. Note that Elena Marchetti's most recent article deals with Indigenous sentencing courts and she claims that these courts are not based on either therapeutic jurisprudence or restorative justice: Elena Marchetti, 'Indigenous Sentencing Courts and Partner

- non-court processes;[36] and
- ethics/legal theory.[37]

While there are relatively few sources in each of the above categories, an even smaller number comprise content that crosses these categories. For example, most of the literature on Indigenous peoples and Australian issues focuses on offenders, and much of the work from a jurisprudential perspective does not consider Indigenous peoples, women or sexual violence. Moreover, the _theory of therapeutic jurisprudence' is a field of nascent scholarship. I position my research within these gaps. In this thesis, I consider Indigenous women as victim/survivors, squarely interrogating what therapeutic jurisprudence may offer these victim/survivors. I also introduce the important criterion of justice to my assessment of whether therapeutic jurisprudence is an appropriate framework for the development, implementation, and reform of relevant laws. I set out the reasons for this, and foreshadow my main arguments, below.

Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing' (2010) 43 *Australian and New Zealand Journal of Criminology* 263.

[36] For instance, see this interesting piece on the applicability of therapeutic jurisprudence to legal academia: David Yamada, _Therapeutic Jurisprudence and the Practice of Legal Scholarship' (2010) 41 *University of Memphis Law Review* 121.

[37] See, eg, Arrigo, _The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' above n 29; Dale Dewhurst, _Justice Foundations for the Comprehensive Law Movement' (2010) 33 *International Journal of Law and Psychiatry* 463; Moa Kindstrom-Dahlin, Pernilla Leviner and Anna Kaldal, _Swedish Legal Scholarship Concerning Protection of Vulnerable Groups: Therapeutic and Proactive Dimensions' (2010) 33 *International Journal of Law and Psychiatry* 396; Adrian Evans and Michael King, _Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence' (2012) 35 *University of New South Wales Law Journal* 717.

V INDIGENOUS VICTIM/SURVIVORS: SOME CONTEXT

A Victim/survivors

I discuss victims in great detail in Chapter 4, and here provide some context for the victim focus in this thesis. First, I note that today's victim occupies a legal role greatly diminished from that inhabited by the victim in the historical English criminal legal system, the ancestor of the current Anglo-Australian criminal legal system.[38] Victims once bore responsibility for apprehending perpetrators, yet generally now report incidents to the police rather than apprehend the perpetrator themselves, or raise the 'hue and cry' to gain the assistance of the community in so doing.[39] This means that the state now bears the burden of prosecution, but in cases where a perpetrator is found guilty or has admitted responsibility for an offence, a victim has little direct input into what happens to that perpetrator. Victims once had the right to intervene at the sentencing stage.[40] Now, while victim impact statement (VIS) legislation provides a statutory basis in most Australian jurisdictions to introduce the voice of the victim at the sentencing stage, there is a growing body of literature that queries the role and efficacy of such statements.[41]

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38 See, eg, Sandra Walklate, *Victimology: The Victim and the Criminal Justice Process* (1989) Ch 5.

39 As recently as the eighteenth century, Crown prosecutions in England were unusual, with private prosecutions the norm. The contemporary victim rarely undertakes her own prosecutions, and the state prosecuting agency retains power to 'no bill' or take over a matter, although this also means that the Crown carries the burden of prosecuting in the public interest: Douglas Hay and Francis Snyder, *Policing and Prosecution in Britain, 1750–1850* (1989); Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (2006). In one (rare) recent matter in NSW, a victim/survivor of domestic violence commenced a private prosecution, which was taken over by the Office of the Department of Public Prosecutions: Catherine Smith, 'Submission to NSW Legislative Council Standing Committee on Social Issue—Inquiry into Domestic Violence Trends and Issues in NSW' (2011).

40 Walklate, *Victimology: The Victim and the Criminal Justice Process*, above n 38, 109.

41 See, eg, Edna Erez, 'Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective in Criminal Justice* (2000). The effects of such statements on sentences also often is curtailed by the legislation itself, or interpretative case law—in NSW, for instance, a victim is unable in a VIS to provide an opinion as to the appropriate sentence that should be meted out to the offender: *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3 Div 2 deals with victim impact statements, which are defined in s 26 as being able to refer to the 'personal harm' experienced by the victim as a result of the offence. The impact of VIS was further curtailed by *R v Slack* [2004] NSWCCA 128. See further discussion in Kirchengast, 'Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' above n 33.

The rise of police forces and the growing centrality of legal administration throughout the eighteenth and nineteenth centuries contributed to the shift away from the once central role of victims in the criminal legal process.[42] Around this time, ‗public emotions and compassion started to be directed towards the offender' and a growing interest in the abuses of the state against offenders saw increasing preoccupation in academic and policy circles with the rights of offenders.[43] Since the latter part of the twentieth century, academic, political and public attention in jurisdictions with an Anglo heritage has been returning to victims, with Jo Goodey suggesting that ‗change is afoot for victims and for the criminal justice system as we currently know it, albeit the precise outcomes and implications of this change remain uncertain.'[44] Carolyn Hoyle and Lucia Zedner suggest that victims now have become a ‗key player' in the criminal legal process.[45] This is reflected in the several international and domestic instruments that address victim interests.[46] However, I query whether the reality is in fact different for victims ‗on the ground', and it remains that some victims may enjoy greater attention than others.[47] While the women's movement of the 1970s placed the spotlight onto female victims of domestic and sexual violence (as well as female offending),[48] in the contemporary sexual violence literature, it is more common to

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42 See, eg, the discussion in Kirchengast, *The Victim in Criminal Law and Justice*, above n 39, Ch 1.

43 Susanne Karstedt, ‗Emotions and Criminal Justice' (2002) 6 *Theoretical Criminology* 299, 313, en 4.

44 Jo Goodey, ‗An Overview of Key Themes' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice* (2000) 13, 30.

45 Carolyn Hoyle and Lucia Zedner, ‗Victims, Victimization and Criminal Justice' in *Oxford Handbook of Criminology* (2007) 463, 473.

46 See, eg, domestic charters of victims' rights such as that set out in s 5 of the *Victims Rights Act 1996* (NSW). At the international level see aspirational and enforceable rights instruments including: the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, 29 November 1985; art 19 of the *Convention on the Elimination of All Forms of Discrimination against Women*, A/RES/34/180, 18 December 1979 (entered into force 3 September 1981) (art 19 provides that violence against women is a form of discrimination, breaking down the public/private rights distinction); and arts 21, 22(2) and 44 of the United Nations *Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 2 October 2007 (arts 21, 22(2) and 44 refer to improving economic and social conditions for Indigenous women, protecting Indigenous women and children against violence and discrimination, and ensuring equal rights for male and female Indigenous peoples).

47 Indeed, it may always have been thus: the victims who were ‗central' in past centuries generally were those who enjoyed a high social position and level of wealth. See Walklate, *Victimology: The Victim and the Criminal Justice Process*, above n 38.

48 See, eg, Carol Smart, *Women, Crime and Criminology* (1976); Loraine Gelsthorpe and Allison Morris (eds), *Feminist Perspectives in Criminology* (1990). See also the discussion of the women's movement in Paul Rock and David Downes, *Understanding Deviance* (2011) 298.

suggest there is some distance to travel before victim/survivors are situated as central players.[49] I position this thesis within this gap.[50]

B Indigenous victim/survivors

The neglect of victims is heightened for those located towards the lower end of social hierarchies. It is difficult to find research into the experiences of adult Indigenous victims of sexual violence within Australia. In the past decade, there has been no shortage of policy attention paid to Indigenous family violence and child sexual abuse, with a raft of relevant federal, state and territory government reports being produced in Australia in the first decade of the twenty-first century.[51] The controversial 2007 Northern Territory Emergency Response (NTER) represented the high water mark of this interest. The NTER was a federal legislative response to a report detailing child sexual abuse in the Northern Territory.[52] Amongst other things, the NTER legislative package suspended the *Racial Discrimination Act 1975* (Cth), involved changes to the regulation of Aboriginal land, and instituted compulsory income management for persons living in certain communities and receiving social security benefits. However, the emphasis of the NTER was on family violence and child sexual abuse. Whilst sexual violence may take place in a family violence

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49 See, eg, Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008) 9. This view often is linked to low conviction and high attrition rates in this area, an issue discussed further in Ch 5 of this thesis.

50 I also note that I have spent much time during this PhD traversing the lengthy distance between the Law Faculty to the Social Sciences Library, as the literature on victims is not housed in the Law Library. This is not to suggest that Law should have a monopoly on considering victims, but I do think that the virtual *absence* of literature on victims in the otherwise well-equipped Law Library at my university speaks volumes about the legal academy's lack of interest in this legal participant.

51 See, eg, Paul Memmott et al., *Violence in Indigenous Communities* (Report to Crime Prevention Branch of the Attorney-General's Department, 2001); Victorian Indigenous Family Violence Task Force, *Final Report* (2003); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities—Key Issues* (2006); Fadwa Al-Yaman, Mieke Van Doeland and Michelle Wallis, 'Family Violence Among Aboriginal and Torres Strait Islander Peoples' (Australian Institute of Health and Welfare, 2006). Sue Gordon, *Putting the Picture Together—Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002); Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future—Addressing Child Sexual Assault in Aboriginal Communities in NSW* (2006); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle—Little Children Are Sacred* (2007).

52 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle—Little Children Are Sacred*, above n 51.

context, the specific interests of *adult* Indigenous women who interact with the legal system following an experience of specifically *sexual* violence have remained virtually invisible through this increased awareness of Indigenous violence.[53]

Susanne Karstedt writes that, in the criminal justice context, ‗a certain balance of public interest, moral commitment and compassion toward the victim is obvious'.[54] Yet it is questionable whether the victim who is Other—she who has different characteristics to members of the dominant society—shares in this sentimental bounty. Why is little policy, public and academic attention paid to adult Indigenous women who have experienced sexual violence? There is a general focus on offenders in the criminological literature. There are certainly sensitivities related to research with women who have experienced sexual violence. There are cultural sensitivities around working with Indigenous peoples. Yet these reasons have not precluded some research into sexual violence with non-Indigenous women, and into Indigenous family violence and child sexual abuse. It is in the combination of sexual violence, race and gender that the vanishing act occurs.[55] The Royal Commission into Aboriginal Deaths in Custody (1991) (RCIADIC) also may have played an inadvertent part in this. The RCIADIC was initially a review into why Indigenous offenders were dying at a higher rate in custody, and became a broader national

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53 There are some exceptions: NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault* (1996); Hannah McGlade, ‗Aboriginal Women, Girls and Sexual Assault: The Long Road to Equality Within the Criminal Justice System' (2006) 12 *Australian Institute of Family Studies—ACSSA Newsletter* 6; Natalie Taylor and Judy Putt, ‗Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia' (No 345, Australian Institute of Criminology, September 2007). For Indigenous sexual violence in a family violence context, see Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response* (2010).

54 Karstedt, ‗Emotions and Criminal Justice' above n 43, 304.

55 Heather Douglas suggests this is a result of ‗male-centred understandings and interpretations of customary law', noting the emphasis placed by the non-Indigenous judge on evidence provided by male experts in a 2003 sexual assault case, and concluding that the young Indigenous woman in that case was ‗doubly silenced' by her gender and race: Heather Douglas, ‗"She Knew What Was Expected of Her": The White Legal System's Encounter with Traditional Marriage' (2005) 13 *Feminist Legal Studies* 181, 200. The relevant case was *Hales v Jamilmira* (2003) 13 *Northern Territory Law Reports* 14. This case involved the sexual assault of a 15 year old Aboriginal girl who was violently raped by a much older Aboriginal man to whom she was alleged to be a promised wife. See also analysis of the case in McGlade, ‗Aboriginal Women, Girls and Sexual Assault: The Long Road to Equality Within the Criminal Justice System' above n 53.

investigation into why Indigenous peoples were overrepresented in custody.[56] While RCIADIC cast much needed light over socio-economic issues faced by Indigenous peoples in Australia, its focus on reducing overrepresentation of Indigenous offenders may have contributed to the policy preoccupation with the complex set of reasons why Indigenous peoples do harm.[57] While an important and relevant concern—and noting that strict demarcations must be approached with caution—this focus may have been at the expense of how, when, where, and which Indigenous peoples are harmed, whether by Indigenous perpetrators or otherwise.[58]

Whatever the reasons, preoccupation with Indigenous male offenders at all stages of interaction with the legal system has a disproportionate effect on the position of Indigenous victims—in cases of adult sexual violence, most frequently Indigenous women. Police in several Australian jurisdictions collect data on the Indigenous status of offenders but not on victims, so it is even unclear how many Indigenous women initially attempt an engagement with the legal system after experiencing sexual violence, in turn affecting policy and funding arguments.[59] Indigenous scholar Megan Davis observes that Aboriginal Legal Services were set up following the Royal Commission to deal with Indigenous offenders, but Family Violence Prevention Legal Services, which were set up to address the legal needs of Indigenous women, are ‗severely underfunded' and located almost exclusively outside urban areas highly-populated by Indigenous peoples.[60] Kyllie Cripps suggests that

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56 Australian Government, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991).

57 See, eg, Elena Marchetti, *Missing Subjects: Women and Gender in the Royal Commission into Aboriginal Deaths in Custody* (PhD Thesis, Griffith University, 2005).

58 I discuss this further in Ch 5. Indigenous scholar Megan Davis writes that ‗the reality is that the majority of the violence committed against Aboriginal women is perpetrated by Aboriginal men': Megan Davis, ‗Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Access to Justice' (2009).

59 See, eg, Anastasia Hardman, ‗The Not-So-Standard Indigenous Question: Identifying Aboriginal and Torres Strait Islander Victims' 7 *Indigenous Law Bulletin* 17, 18.

60 Davis, ‗Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Access to Justice' above n 58, 2. See also Australian Parliament Legal and Constitutional Affairs Committee, *Access to Justice* (2009). There is one Family Violence Prevention Legal Service (FVPLS) located in Collingwood, Melbourne. For details on the funding and administration of the FVPLS scheme see: Australian Government Attorney-General's Department, *Family Violence Prevention Legal Services Program* (2013) <http://www.ag.gov.au/LegalSystem/IndigenousLaw/Indigenousjusticepolicy/Pages/Familyviolencepreventionlegalservices.aspx>. The role of Aboriginal Legal Services in dealing with violent

the emphasis on Indigenous offenders also is found at the judicial decision-making end of the legal system. Cripps states that the original intent of Indigenous sentencing courts such as the Victorian Koori Court was to respond to the needs of Indigenous offenders, and when the Victorian Koori Court deals with Indigenous women who have experienced family violence, it ‗alienates and intimidates victims … it isn't a place or process that has thoughtfully engaged them in any meaningful way'.[61] This even carries through to my personal conversations about my thesis with several legal academics, lawyers and policy-makers—again and again, as I explain my topic, questioning and pronouncements directly proceed to the lot of (male) Indigenous sex offenders, with the central part of my stated thesis topic ignored. In this thesis, I explore more deeply the justice implications for this invisible victim.

V IMPORTANCE OF MY CASE STUDY AND JUSTICE

I have started with an understanding that the current legal response to sexual violence falls well short of delivering justice. Several matters are already well understood in the sexual assault literature: that despite the persistence of ‗stranger rape' myths in public and legal culture, sexual violence often occurs in the context of known relationships.[62] Further, sexual violence is often repetitive, takes many forms, accompanies other forms of violence, and has cumulative negative effects on the wellbeing of victim/survivors.[63] Moreover, the legal system only ever deals with a tiny fraction of the sexual violence that victimisation surveys indicate actually occurs in Australia,[64] in no small part because of the law's retraumatising effects, and in turn the deterring effects on the willingness of

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conflicts between Indigenous peoples has been critically discussed since the 1990s: see, eg, Audrey Bolger, *Aboriginal Women and Violence* (1991) 84–86; NSW Ministry for the Status and Advancement of Women, *Dubay Jahli: Aboriginal Women and the Law Report* (1994) 10–11.

61 Kyllie Cripps, ‗Speaking up to the Silences: Victorian Koori Courts and the Complexities of Indigenous Family Violence' (2011) 7 *Indigenous Law Bulletin* 31, 33.

62 Kathleen Daly and Brigitte Bouhours, ‗Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (2010) 565, 576.

63 Liz Kelly ‗Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005), 3.

64 This was a focus of recommendations in NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward* (2005).

victim/survivors to make an initial report to police, and then remain engaged with the subsequent legal processes.[65]

The criminal legal system is even less accessible for Indigenous victim/survivors of sexual violence, who experience disproportionately high levels of sexual violence,[66] but who have a 'chronic disadvantage' in accessing justice in Australia and other jurisdictions, in part because of socio-economic and geographical constraints.[67] Once Indigenous victim/survivors do interact with the law, they are subject to both racial and gendered discriminatory issues, and must negotiate intra-cultural complexities when the violence is perpetrated by Indigenous men.[68]

The issues I have raised with respect to sexual assault and Indigenous access to justice are not new (although issues to do with Indigenous *women* and justice are often overlooked, as I discuss throughout this thesis). As I noted above, the dysfunction of the legal system in this area is the starting point for this thesis. There have been decades of law reform in the field of sexual assault, addressing these well-known issues, and myths such as: women are likely to lie about sexual assault; that the allegation of rape is easy to make but difficult to challenge; that sexual assault is likely to be committed by a stranger; that women cannot be sexually assaulted by their partner; that a lack of consent will be evidenced by physical

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65 See, for instance, Judith Herman, 'Justice From the Victim's Perspective' (2005) 11 *Violence Against Women* 571. I discuss these issues in depth in Chs 4 and 5 of this thesis.

66 Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004) 29. Indigenous women were up to three times more likely to report sexual violence in the 12 months prior to the survey, although Mouzos and Makkai also note the small sample size and potential for error at 30. Disproportionate levels of sexual violence are reflected in other surveys, discussed in Ch 5 of this thesis.

67 The Legal and Constitutional Affairs Committee of the Australian Senate reported in 2009 that it 'received evidence concerning Indigenous women's chronic disadvantage in their ability to access justice, including in relation to domestic/family violence and sexual assault. In this regard, the committee considers it highly important for governments to provide Indigenous women with appropriate victim support measures, as well as addressing their legal needs." Australian Parliament Legal and Constitutional Affairs Committee, *Access to Justice*, above n 60, xix.

68 Research discussed in Ch 5 of this thesis suggests that a significant proportion of sexual violence that is experienced by Indigenous women, and which comes to the attention of the legal system, is perpetrated by Indigenous men.

injuries and struggle; and that a victim will immediately report sexual assault.[69] Procedural law reform efforts have differed between jurisdictions, but have included: ameliorating the deleterious effects of legal engagement, for example, through restricting cross-examination and questioning about past sexual experiences, amending jury warning procedures on matters such as how juries should view delayed reports, and allowing evidence to be given in less traumatic ways in some circumstances, such as through CCTV.[70] Substantive legal reforms also have differed between Australian jurisdictions, but generally have included: changing terminology in legislation, for example from rape to sexual assault; defining consent; broadening the definition of sexual assault, for example to include penetration by things other than a penis; amending laws so that these are gender neutral; and removing the marital immunity.[71]

While there have been some results—with reporting rates, for instance, appearing to rise[72]—on the whole, law reform efforts have failed to address the fundamental issues outlined above. The legal experience is still traumatic for victim/survivors, and conviction rates across common law countries have declined in the past 35 years.[73] Liz Kelly summarised the issues bluntly at a 2005 United Nations meeting:

> The simple truth is that despite three decades of research, advocacy and campaigning, even the most basic matters, such as ensuring that women reporting sexual violence are treated with respect and dignity, cannot be guaranteed even in high resource contexts.[74]

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69 Susan Estrich, *Real Rape* (1988). Also note the summary of these issues in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [24.56]–[24.65].

70 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [24.87]. See also Jenny Bargen and Elaine Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995); Temkin and Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude*, above n 49.

71 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [24.86]. See also Temkin and Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude*, above n 49. For a recent consideration of the Australian High Court on the ‗falling away' of the marital immunity in Australian common law from 1935, see *PGA v The Queen* (2012) 245 CLR 355.

72 Samantha Bricknall, ‗Trends in Violent Crime' [2008] *Australian Institute of Criminology—Trends & Issues in Crime and Criminal Justice No 359*.

73 Daly and Bouhours, ‗Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' above n 62, 565.

74 Liz Kelly ‗Promising Practices Addressing Sexual Violence' above n 63, 2.

I agree, which begs the question: is the law the correct vehicle through which to address sexual violence? I acknowledge that the law is a blunt instrument, and that a truly adequate response to sexual violence must involve the establishing and funding of adequate support structures, and most importantly, changing outdated views in the legal profession towards sexual assault and Indigenous women. This notwithstanding, my view is that the law is the strongest coercive mechanism available, and so it is essential that the law must respond to sexual violence. My project is to contribute to a just legal response, and given that I argue that the current legal response is inadequate in this regard, I aim to contribute to an enhanced conceptual framework for the further development and reform of law and practice in this area.

Given this, my question is what shape such a conceptual framework should take, and it is here that I return to therapeutic jurisprudence. Like all therapeutic jurisprudence proponents, I agree that considering the wellbeing of those who come before the law is a worthwhile exercise. There are good reasons for this: moral, economic and pragmatic. In this thesis, I am most concerned with justice, and the relationship between the wellbeing of legal participants, and their capacity to even access justice, is nowhere as stark as in my thesis case study. There is a strong link between the wellbeing of victim/survivors of sexual violence, and their decision to report sexual violence to police, and then remain involved in the legal process.[75]

In highlighting wellbeing, therapeutic jurisprudence appears to have immediate relevance. I go deeper. In asking whether therapeutic jurisprudence is an adequate framework for the development, implementation and reform of the law in this area, I assess it against the criterion of justice. In synthesising several important and inter-related themes for the first time, my thesis makes a unique contribution to the critique of therapeutic jurisprudence. My thesis conclusions have implications for defining the parameters of therapeutic jurisprudence, and its ongoing development.

[75] I discuss this in the context of underreporting and attrition in Chs 4 and 5 of this thesis.

In Chapter 3, I introduce the justice criterion, and seek to apply it to therapeutic jurisprudence, arguing that therapeutic jurisprudence must appeal to a more innovative normative framework. I argue that such a normative framework should be informed by justice. Justice is an essential measure for the assessment of any approach to the law. Justice speaks to deep equality and inclusiveness, and has a unique relationship with the law, in that it is both internal and external to it. Justice is commonly appealed to by the law, and it is a standard to which it should be held. As I argue in the following chapters, therapeutic jurisprudence currently does not have a clear vision of justice, and this has practical ramifications which show up in the inability of therapeutic jurisprudence to address conflicts in the _tough' cases—those where the interests of victims may not be aligned with those of other legal participants, such as perpetrators. There are important reasons, then, for the adoption of an innovative vision of justice as the measure of whether therapeutic jurisprudence has the capacity to deliver justice for Indigenous women who have experienced sexual violence.

What is the meaning of justice? In this thesis, I have adopted Barbara Hudson's justice principles set out by her in 2003.[76] In particular, I consider Hudson's principles of *relationalism*, which means that justice should be alive to the relationships between individuals and groups, and how power plays and emotional connections may affect positions of parties; *reflectiveness*, which means that any decision-maker must pay close attention to the specifics of a particular case, and not simply apply general rules to individuals, and *discursiveness,* meaning that justice requires constructive dialogue between parties, facilitating claims and counter-claims, and requiring the discussion to take place in a way that is not dominated by one party who enjoys a degree of socially sanctioned power outside the resolution process.[77]

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[76] Barbara Hudson, *Justice in the Risk Society* (2003) 206. Hudson discussed the relevance of these justice principles in relation to gender and race issues in a later article: Barbara Hudson, _Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' (2006) 10 *Theoretical Criminology* 29, 29.

[77] Hudson, *Justice in the Risk Society*, above n 76, 206. In her 2003 work, Hudson also suggested two related principles of *plurivocalism*: justice must acknowledge that contemporary society is a complex mix of cultures, genders, ages and people who may fit into other categories that affect the ways of understanding the world, and who must find ways of co-existing. Undergirding these principles is an understanding of justice as *rights regarding* in that it acknowledges that both individuals and

As I explain in Chapter 3, there are a number of reasons why I use Hudson's justice as the criterion against which I assess therapeutic jurisprudence. The first of these is that she is interested in asking what justice should be, rather than focusing first and foremost on pragmatic considerations. As a philosopher and criminologist, her thinking is not limited by what could be achievable within the existing system. Such an aspirational vision provides a frame for the radical rethinking that is necessary in an area of serious legal dysfunction. The second reason is that Hudson's justice is deeply inclusive, and I argue that any rethinking of the legal response to sexual violence must speak to those who are excluded, such as Indigenous women.

Relevantly, Hudson considers the interests of individuals and any conflicting interests of the wider group within which that individual is located. She places the _other' (the real, concrete, other) as central to her vision of justice. She favours Seyla Benhabib's understanding of discursive justice, which involves a careful listening to the perspectives and claims of the concrete other in a deliberative democratic process, rather than trying to find a consensus.[78] This is relevant to this thesis for two reasons: firstly, because much Indigenous sexual violence takes place in the context of known and/or intra-cultural relationships, and secondly, because Indigenous women are so frequently absent from a broader discourse in this area.[79] Hudson's necessary precondition to justice is that this legal participant becomes an equal collaborator in seeking justice. A major attraction of Hudson's work is that rather than emphasising the issues where interests converge, she squarely considers the complex situations where they do not. In so doing, she provides a potential way to navigate the protracted and complex conflict of the _tough' case.

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communities have rights and that these should be protected: Ibid 206. In Hudson's later work, though, she proposes only the first three principles mentioned in the text: discursiveness, relationalism, and reflectiveness: Hudson, above n 76, 29.

78 Hudson, *Justice in the Risk Society*, above n 76, 124.

79 See discussion in Gayatri Spivak, _Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds) *Marxism and the Interpretation of Culture* (1988) 271. Of course, the first finding should not be taken to suggest that all Indigenous men are perpetrators. I note many Indigenous women are concerned not to _stigmatise' Indigenous men. Hannah McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights* (2012) 1.

VI CASE STUDY DEFINITIONS

As noted above, the 'tough' case study used in this thesis is the legal response to sexual violence experienced by Indigenous women. I do not visit my case study in detail until Chapter 5 of this thesis, but as I make observations relevant to my case study throughout the earlier chapters of this thesis, I set out some important definitions in this introductory chapter.

A Indigenous

The term 'Indigenous' is used adjectivally throughout the thesis to refer to Australia's first peoples. The definition of an 'Indigenous person' is a person who: has Aboriginal and/or Torres Strait Islander heritage; identifies as Indigenous; and who is accepted as Indigenous by the relevant group.[80] However, the term 'Indigenous' has been the subject of criticism on the basis that it obscures difference between Aboriginal and Torres Strait Islander peoples and may diminish Aboriginal or Torres Strait Islander identity.[81] The use of this term in this thesis also may be problematic as studies referred to in this thesis do not always use this definition (for example, in some cases Indigenous identification appears to have been solely on the part of the researcher) or may only represent data on Torres Strait Islander, or more frequently, Aboriginal peoples.

The capitalised terms 'Indigenous' and 'Indigenous peoples' are adopted in this thesis with these shortcomings noted. The term 'Indigenous peoples' was accepted by the former Aboriginal and Torres Strait Islander Social Justice and Race Commissioner, Tom Calma, as reflecting accepted international usage and 'acknowledg[ing] a particular relationship of aboriginal people to the territory from which they originate'.[82] An exception to this nomenclature in this thesis is where a referenced source uses another term, for example

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80 See, eg, Australian Human Rights Commission, *Face the Facts—Questions and Answers About Aboriginal and Torres Strait Islander Peoples* (2008) <http://www.humanrights.gov.au/racial_discrimination/face_facts/chap1.html#fn2>.

81 See, eg, Making Two Worlds Work, *Building the Capacity of the Health and Community Sector to Work Effectively and Respectfully with Our Aboriginal Community* (2008) <http://www.whealth.com.au/mtww/communicating.html>.

82 See, eg, Australian Human Rights Commission, 'Face the Facts—Questions and Answers About Aboriginal and Torres Strait Islander Peoples' above n 80.

_Aboriginal‘—in these circumstances, the other term may be used in the text of the thesis. It also should be noted that some Indigenous peoples use the terms _Indigenous‘ and _Aboriginal‘ interchangeably.[83]

B Women

The term _woman‘ refers to both sexual identity and age. A reference to a woman is a reference to a person who identifies as female. Sexually diverse Indigenous peoples who do not wish to identify as female (including transgender, transsexual and intersex persons) still may be identified as female by those collecting quantitative data or undertaking qualitative research. As there is a dearth of research into all sexually diverse persons in Australia—compounded by a lack of nuance in the collection of information about sexual identity—I acknowledge this issue here but do not deal with it further.

Secondly, a reference to a _woman‘ is a reference to a woman who is aged 17 or above. My case study includes women aged 17 and above because the criminal law effectively dictates that the age of _consent‘ to most sexual activity is 16 years of age.[84] While I do not confine my discussion in this chapter to the criminal law, it is relevant that the Australian people represented by state and territory parliaments have found that a person over 16 years of age has the capacity to engage in consensual sexual activity.[85] This definition also is practical as some criminal statistical data is linked to the offences in this way.[86] While other types of research such as surveys may not collect information from respondents about sexual assault

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83 See, eg, Cripps, *Enough Family Fighting: Indigenous Community Responses to Addressing Family Violence in Australia and the United States*, above n 3, 17, fn 2.

84 South Australia is an exception in that the age of _consent‘ to sexual activity is 17 years of age in that jurisdiction: *Criminal Law Consolidation Act 1935* (SA) s 49. Also note that some jurisdictions permit that activity to take place in the context of a marriage: see, eg, *Crimes Act 1958* (Vic) s 45; *Criminal Code Compilation Act 1913* (WA) s 321.

85 See *Crimes Act 1900* (NSW) s 66C (age of consent is 16 years old); *Crimes Act 1958* (Vic) s 45 (age of consent is 16 years old, unless the two parties are married); *Criminal Code Act 1899* (Qld) s 215 (age of consent for carnal knowledge is 16 years old); *Criminal Code Compilation Act 1913* (WA) s 321 (age of consent for sexual penetration is 16 years old, unless the parties are married; see also indecent dealing offences to do with young children under authority, eg s 322); *Crimes Act 1900* (ACT) s 55 (age of consent for sexual intercourse is 16 years old; see also indecency offence with young person in s 61); *Criminal Code Act* (NT) s 127(1)(a) (age of consent for sexual intercourse is 16 years old; see also gross indecency offence with young person in s 127(1)(b)).

86 This may be because different offences, which do not require lack of consent, may be charged with respect to sexual assault against victims under the age of 16.

if the respondent is under the age of 18, this does not significantly skew the data as most of these surveys have not specifically examined the experiences of Indigenous women.

C Sexual violence

In this section, I outline current Australian offence-based definitions of sexual assault. I first note experience-based definitions, which are not necessarily derived from legislation but are in common usage, and which can be broader in scope. These definitions usually refer to ‗unwanted behaviour of a sexual nature' that results in harm or injury to a person, or results in that person feeling uncomfortable, distressed, frightened or threatened.[87] Experience-based definitions also include situations where there has been a lack of consent and where another person has used force or coercive behaviour.[88] The continuum of behaviour is from sexual harassment to ‗rape'.[89] Anti-discrimination laws tend to use experience-based definitions, referring to ‗unwelcome' conduct.[90] Much of what we know about sexual violence is derived from victimisation surveys because of underreporting to police,[91] and these surveys often include a combination of offence and experience-based definitions. For instance, relevant surveys conducted by the Australian Bureau of Statistics,[92] and the International Violence Against Women Survey,[93] used broader definitions than may be captured by these offence-based definitions.

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87 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004) 8.

88 Ibid 8.

89 Ibid 8. For a discussion on the continuum of sexual violence, see Liz Kelly, ‗The Continuum of Sexual Violence' in Jalna Hanmer and Mary Maynard (eds), *Women, Violence and Social Control* (1987) 59.

90 See, eg, *Anti-Discrimination Act 1977* (NSW) s 22A. Similar definitions are contained in the legislation of federal and other state and territory jurisdictions. Differences include whether the person who was harassed thought they may suffer some detriment; and whether a harassing person intended to cause offence, humiliation or intimidation. See, eg, *Sex Discrimination Act 1984* (Cth) s 28AA; *Equal Opportunity Act 1995* (Vic) s 85; *Anti-Discrimination Act 1977* (Qld) s 119; *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA) s 87; *Anti-Discrimination Act 1998* (Tas) s 17; *Discrimination Act 1991* (ACT) s 58; *Anti-Discrimination Act* (NT) s 22.

91 This is discussed in Chs 4 and 5.

92 See, eg, the Women's Safety Survey Australian Bureau of Statistics, *Women's Safety Australia, 1996—4128.0* <http://www.abs.gov.au/ausstats/abs@.nsf/cat/4128.0>. See also The Personal Safety Survey Australian Bureau of Statistics, *4906.0—Personal Safety, Australia, 2005 (Reissue)* (2007).

93 For example this survey included a catch-all definition of ‗any other sexual violence', making this potentially a very broad offence- and experience-based definition: Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 66, 10.

I adopt a broad and inclusive definition of sexual violence in this thesis, seeing both offence and experience-based definitions as valid. This is because offence-based definitions do not always cover the full range of circumstances involving sexually violent behaviour. Experience-based definitions may include conduct that is not physical or prohibited by the criminal law, but which still adversely affects the victim.[94] Experience-based definitions are unique in their focus on the perspective of victim/survivors, rather than leaving an assessment of harm or reasonableness to a third party. However, as some victim/survivors of sexual violence may experience difficulty in identifying what happened to them as impermissible—even when the law describes it as such—a purely subjective definition of sexual violence is not necessarily the best approach.

Specifically, I use the term _sexual violence' to mean an unwanted sexually violent experience that a person has with another person(s). _Unwanted' implies lack of consent but does not require verbal communication of this. _Violent' conduct may vary significantly in type and gradations, and includes behaviour that is intended to result and/or may result in some type of harm, including emotional, psychological or physical harm. What is a _sexual experience' will depend on the context, but would include sexual contact, and its attempts.

Notwithstanding this, it is still useful to outline offence-based definitions, as these are relevant to the criminal legal response. Each state and territory jurisdiction in Australia contains legislation prohibiting sexual violence against adults. Criminal legislation in all Australian jurisdictions contain two types of offences—a main or _penetrative' offence (generally dealing with some form of penetration of the vagina, anus or mouth by a body part or object)[95] and a secondary or _indecency' offence.[96] Maximum penalties for the main

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94 For instance, what of situations where there is a fear of sexual violence because of threats or other behaviour on the part of the perpetrator, even if no attempt actually is made? What of _indecent assault' cases where there is no physical contact or where force is not used?

95 This main offence is entitled _rape' in Victoria, Queensland, South Australia and Tasmania; _sexual assault' in NSW; _sexual intercourse without consent' in the ACT and the Northern Territory; and _sexual penetration without consent' in Western Australia: *Crimes Act 1958* (Vic) s 38; *Criminal Code Act 1899* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1924* (Tas) Sch 1 s 185; Sch 1 s 127A *Crimes Act 1900* (NSW) s 61I; *Crimes Act 1900* (ACT) s 54; *Criminal Code Act* (NT) Sch 1 s 192; and *Criminal Code Compilation Act 1913* (WA) Sch s 325. Most jurisdictions also include a separate aggravated main sexual violence offence, for example, where egregious harm was inflicted or where there were multiple offenders. See, eg, *Crimes Act*

sexual offence range from 12 years imprisonment in the ACT[97] to life imprisonment in Queensland, South Australia and the Northern Territory,[98] with maximum penalties for the indecency offence ranging from 5 years in the NSW and ACT[99] to 14 years in the Northern Territory. [100]

The core objective or physical elements of the penetrative offence involve: a person (the perpetrator) engaging in some form of sexual act with another person (the victim), who does not consent to that act.[101] The relevant conduct differs between jurisdictions, but all jurisdictions include: penetration or introduction of the perpetrator's penis, another part of the perpetrator's body, or an object manipulated by the perpetrator into the genitalia/vagina or anus of the victim, without the consent of the victim.[102] The objective elements of the

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1900 (NSW) ss 61J, 61JA; *Criminal Code Compilation Act 1913* (WA) Sch, s 325. Tasmanian legislation also includes a separate offence entitled 'aggravated sexual assault' which provides for the penetration of the vagina, genitalia or anus by any part of the human body other than a penis or an inanimate object: *Criminal Code Act 1924* (Tas) Sch 1 s 127A. Note that in many jurisdictions, the circumstances of aggravation are that a victim is under the age of 16 years—these offences fall outside the scope of my study.

96 The indecent assault offences are entitled: 'indecent assault' in NSW, Victoria, South Australia, Western Australia and Tasmania; and 'sexual assault' in Queensland. The other indecency offences with respect to adult victims are entitled: 'act of indecency' in NSW'; 'sexual assault' in Queensland; 'act of indecency without consent' in the ACT; and 'gross indecency without consent' in the Northern Territory: *Crimes Act 1900* (NSW) s 61IL; *Crimes Act 1958* (Vic) s 39; *Criminal Law Consolidation Act 1935* (SA) s 56; *Criminal Code Compilation Act 1913* (WA) Sch s 323; *Criminal Code Act 1924* (Tas) Sch 1 s 127; *Criminal Code Act 1899* (Qld) s 352(1)(a); *Crimes Act 1900* (NSW) s 61N; *Criminal Code Act 1899* (Qld) s 352(1)(b); *Crimes Act 1900* (ACT) s 60; *Criminal Code Act* (NT) Sch 1 s 192. The legislation of several jurisdictions includes an aggravated indecency offence: see, eg, *Crimes Act 1900* (NSW) s 61M.

97 *Crimes Act 1900* (ACT) s 54(1); see also the offence created by s 54(2) with respect to acting in company, which attracts a maximum penalty of 14 years imprisonment.

98 *Criminal Code Act 1899* (Qld) s 349(1); *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Criminal Code Act* (NT) Sch 1, s 192(3).

99 *Crimes Act 1900* (NSW) s 61L; *Crimes Act 1900* (ACT) s 60(1); see also the offence created by s 60(2) which relates to acting in company and attracts a maximum penalty of 7 years imprisonment.

100 *Criminal Code Act* (NT) Sch 1, s 192(4).

101 Legislation in all jurisdictions other than the ACT make clear in the definition what consent is—at the very least, that it means 'free' agreement. Legislation in all jurisdictions also set out factors that vitiate consent, including use of threats or intimidation to procure consent, lack of capability to provide consent, and provision of consent on the basis of mistaken identity.

102 *Crimes Act 1900* (NSW) s 61H(1); *Crimes Act 1958* (Vic) s 35(1); *Criminal Code Act 1899* (Qld) s 349(2); *Criminal Law Consolidation Act 1935* (SA) s 5(1); *Criminal Code Compilation Act 1913* (WA) Sch, s 319; *Criminal Code Act 1924* (Tas) Sch 1 s 1; *Crimes Act 1900* (ACT) s 50; *Criminal Code Act* (NT) Sch 1, s 1. Note that the penetration by a part of the body other than the penis or an object is contained in a separate offence in Tasmanian legislation: see fn above and *Criminal Code Act 1924* (Tas) Sch 1 s 127A. All jurisdictions also expressly include the introduction of the penis into the mouth of the victim, other than in the criminal legislation of South Australia, which does include fellatio within the definition of sexual intercourse without further definition: *Criminal Law*

indecency offence require a perpetrator to have committed an ‗act of indecency' or ‗act of gross indecency', or to have acted ‗indecently' or in ‗indecent circumstances'. These terms are not defined further in the legislation of any jurisdiction, and the breadth of these terms in the common law is unclear.[103]

The core subjective, mental or fault elements of the penetrative offence are: the perpetrator must have intended to engage in the act; and, depending on the jurisdiction and the offence, must have engaged in the act while knowing that the victim did not consent, not giving any thought to whether the victim consented, or being otherwise reckless about whether the victim consented.[104] Only Victoria, the ACT and the Northern Territory include lack of consent as a component of the indecency sexual violence offence.[105]

In this thesis, I limit my *legal* consideration to the criminal law. This is because most sexual violence that reaches the attention of the legal system is dealt with by the criminal legal system—first through reporting to police, and then the investigation, prosecution and trying of sexual offences, and sentencing of sexual offenders. I also acknowledge that many other legal frameworks may be relevant in situations where sexual violence occurs,

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Consolidation Act 1935 (SA) s 5(1)(b). Most jurisdictions also expressly include ‗cunnilingus' in the main sexual violence offence, again usually without further definition: *Crimes Act 1900* (NSW) s 61H(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 5(1)(c); *Criminal Code Compilation Act 1913* (WA) Sch, s 319(1)(d); *Crimes Act 1900* (ACT) s 50(d); *Criminal Code Act* (NT) Sch 1, s 1.

103 See, eg, the history and interpretation of the term ‗act of indecency with or towards a person' as it appears in NSW legislation, discussed by Justice McHugh in *Saraswati* (1991) 172 CLR 1, 25.

104 The subjective elements also differ between jurisdictions. For instance, for the offence to be made out in NSW, the perpetrator must know that the victim does not consent to the act. The perpetrator knows that the victim does not consent where the perpetrator: [actually] knows that the victim does not consent; is reckless as to whether the victim consents; or has no reasonable grounds for believing that the victim consents: *Crimes Act 1900* (NSW) s 61HA(3)(a), (b), (c). In Victoria, the requirement is that the perpetrator must intentionally have engaged in the act while: being aware that the victim is not, or might not, be consenting; or not giving any thought to whether the victim is not, or might not, be consenting: *Crimes Act 1958* (Vic) s 38(2)(a)(i), (ii). Note that only the first fault element, awareness, applies to continuation of sexual activity: s 38(2)(b).

105 *Crimes Act 1900* (ACT) s 60(1); s 60(2) (aggravated offence); *Crimes Act 1958* (Vic) s 39(2)(a), (b); *Criminal Code Act* (NT) Sch 1, s 192(4). This may be because the other jurisdictions craft the offence as ‗assault' (violence rather than sex, with the concomitant difficulty in criminal law with respect to consenting to an assault: See, eg, discussion as to how the language of ‗sex' rather than ‗assault' in Canadian sexual assault trials minimises and obscures sexual violence: Janet Bavelas and Linda Coates, ‗Is It Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments' (2001) 10 *Journal of Social Distress and the Homeless* 29, 38. See also *R v Brown* [1994] 1 AC 212. One question is whether the lack of a consent requirement may encourage the charging of ‗secondary' rather than main sexual violence offences.

including family law, tort law, protection order proceedings, and victim compensation schemes.[106] None of these laws operate in a vacuum: for instance, protection orders may be sought while criminal proceedings are underway, and victims' compensation applications may be lodged during or after criminal proceedings. The relationship between these laws raises a host of potential issues. For instance, where conduct may form the basis of both criminal and protection order proceedings, police may choose to pursue one avenue over the other based on workload, or the different levels of proof required, rather than the best interests of the victim/survivor.[107] I acknowledge a panoply of concerns and issues like this, but focus on the criminal law in this thesis, for the reason that most (visible) sexual violence still is addressed by the criminal law.

VII CHAPTER OUTLINES

In this final section, I provide an overview of the remaining six chapters in this thesis.

Chapter 2 of this thesis comprises a detailed examination of therapeutic jurisprudence. I undertake an analysis of the literature and find it to be a descriptive and normative theory. I outline the advantages of therapeutic jurisprudence as an approach to the reform and application of the law, and canvass the many arguments in its favour. I also contest the claim that therapeutic jurisprudence has universal application. In particular, I am concerned that therapeutic jurisprudence does little to mediate value conflicts when there is a divergence of interests between relevant parties. Further, in its implicit acceptance of the

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106 See, eg, Chris Cunneen, 'Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship?' (2009) 20 *Current Issues in Criminal Justice* 323; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks (Consultation Paper 1)*, above n 1, Terms of Reference.

107 For example, a recent review of Western Australian protection order legislation suggested that in some circumstances it appeared that police were commencing protection order proceedings rather than criminal proceedings as the former consumed 'less police time': Western Australia Department of the Attorney-General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) 23. In contrast, the Commissions noted comments by South Australian magistrates that indicated that in that jurisdiction police favour criminal proceedings over protection orders as the latter require the preparation of an affidavit: Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks (Consultation Paper 1)*, above n 1, [5.34].

status quo, I argue that therapeutic jurisprudence may not be equipped to frame transformative reform in areas where the law does not operate in a way that delivers justice.

In Chapter 3, I detail the key criterion against which I assess the appropriateness of therapeutic jurisprudence as a framework for legal responses to sexual violence experienced by Indigenous women. As discussed above, the yardstick I use is the innovative theoretical work of Barbara Hudson, and it is in this chapter that I articulate Hudson's approach, and explain the particular relevance of her transformative justice principles for the material in this thesis. I also consider the implications for therapeutic jurisprudence, further exploring its current normative confusion about justice.

In Chapter 4, I delve deeply into the question: therapeutic for *whom*? As noted, I am interested in the legal participant who has until now escaped extensive and critical notice in the therapeutic jurisprudence literature—victim/survivors—and here I situate my examination of Indigenous victim/survivors of sexual violence in the broader context of the relevant victimisation and criminology literature. In this chapter, I explore the legal concept and role of the victim/survivor generally and argue that the legal response to victim/survivors of sexual violence requires greater consideration than has been afforded by therapeutic jurisprudence to date. I seek to ascertain the goals and concerns of victim/survivors interacting with the legal system following an experience of sexual violence, arguing that understanding what Indigenous victim/survivors want, in terms of both process and outcome, is central to delivering justice.

Chapter 5 constitutes an in-depth discussion of my case study—the legal response to sexual violence experienced by Indigenous women. Sexual violence is heavily gendered: this is particularly so when sexual violence is perpetrated against adults.[108] As noted above, while

[108] Liz Kelly, *Surviving Sexual Violence* (1988). The gendered nature of sexual violence is well understood in Australia: see, eg, National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 25. In making this statement, I do not wish to underplay the existence of sexual violence perpetrated against men, and the detrimental effects of such violence on men and their communities: see, eg, Stephanie Allen, 'Male Victims of Rape: Responses to a Perceived Threat to Masculinity' in *New Visions of Crime Victims* (2004) 23.

there has been a great deal of work done on Indigenous child sexual assault and Indigenous family violence, there is a gap in the literature specifically with respect to sexual violence experienced by adult Indigenous women.[109] The same findings from the same few studies,[110] mostly conducted in the 1980s and 1990s, tend to be repeated in the literature.[111] I situate this chapter in this gap, attempting to uncover what is distinct about the legal experiences of adult Indigenous victim/survivors of sexual violence. I also identify a number of deficiencies inherent in the current legal response to such violence, making the case for further law reform in this area.

In Chapter 6, I draw together the key findings in the preceding chapters to directly answer the research question: is therapeutic jurisprudence the appropriate frame for the further reform to law and practice, which I have argued is necessary in this area? I interrogate therapeutic jurisprudence to ascertain whether it can deliver justice to Indigenous victim/survivors of sexual violence, demonstrating how the theoretical issues identified in Chapter 2 result in specific shortcomings when tested against my case study. Notwithstanding this, in this chapter I am concerned with making practical suggestions as

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109 See, eg, Gordon, *Putting the Picture Together—Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, above n 51; Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future—Addressing Child Sexual Assault in Aboriginal Communities in NSW*, above n 51; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle—Little Children Are Sacred*, above n 51.

110 The key studies that present findings for the first time are: Edie Carter, Adelaide Rape Crisis Centre Inc, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse* (1987); Judy Atkinson, ‗Violence in Aboriginal Australia: Colonisation and Gender' (1990) 14 *Aboriginal and Islander Health Worker Journal* 5; Judy Atkinson, ‗Violence in Aboriginal Australia: Part 2' (1990) 14 *Aboriginal and Islander Health Worker Journal* 4; Bolger, *Aboriginal Women and Violence*, above n 60; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (2000); Memmott et al., *Violence in Indigenous Communities*, above n 51; Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 68.

111 One example of a specific finding is Edie Carter's finding that 88% of rapes among Aboriginal women in Adelaide go unreported—this statistic is repeated in a number of other works, frequently without citation of Carter on this point. See, eg, Atkinson, ‗Violence in Aboriginal Australia: Colonisation and Gender' above n 110, 6; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 98; Memmott et al., *Violence in Indigenous Communities*, above n 51, 41. The former was, in turn, cited by Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report: The Interaction of Western Australian Law with Aboriginal Law and Culture* (2006) Ch 7, 284, fn 16. The Memmott report cited the article by Atkinson.

to specific reforms that could be guided by therapeutic jurisprudence. I argue that such reforms could go some way towards improving the legal experience for victim/survivors of sexual violence, especially in the stages prior to establishment of guilt—most notably the trial—which are so detrimental to the wellbeing of victim/survivors, and yet frequently overlooked in the literature on innovative or alternative justice mechanisms.

Finally, in my concluding chapter, I explore the implications of my findings in this thesis for therapeutic jurisprudence more generally, and draw together the analysis from the previous sections to make suggestions for the continued evolution of therapeutic jurisprudence.

CHAPTER TWO: THERAPEUTIC JURISPRUDENCE

I CHAPTER OVERVIEW

In this chapter, I lay the groundwork for my measure of therapeutic jurisprudence against Barbara Hudson's innovative approach to justice. I first ascertain what therapeutic jurisprudence actually is—what is its definition, and is it a theory? I consider the intentions of the founders, noting the emergence of a secondary literature on therapeutic jurisprudence. I then embark upon an examination of the literature relevant to the case study in this thesis. In the previous chapter, I provided a general overview of the therapeutic jurisprudence literature. In this chapter, I closely review literature relevant to my case study, namely, work that considers the Australian context, victim/survivors, sexual violence and Indigenous peoples. In so doing, I find that there is a lacuna in the area of my case study, and also that the application of therapeutic jurisprudence to victim/survivors and Indigenous peoples is often assumed rather than clearly articulated.

At the core of my inquiry in this thesis—whether therapeutic jurisprudence can deliver justice for Indigenous women who experience sexual violence—is ascertaining the extent to which therapeutic jurisprudence can address the needs and interests of victim/survivors, and especially female Indigenous victim/survivors of sexual violence. Thus, I am concerned with unpacking the assumption that therapeutic jurisprudence is automatically equipped to do this—and in this chapter, I argue that, in fact, there is a major obstacle in this regard. This argument sets the scene for why I have reached for another framework, namely that of justice, to assess therapeutic jurisprudence and to guide its future direction.

II THERAPEUTIC JURISPRUDENCE, ACCORDING TO ITS FOUNDERS

Therapeutic jurisprudence is personality-led: it does not bear the names of David Wexler and Bruce Winick, but the parameters of therapeutic jurisprudence were developed by these men throughout the 1980s and 1990s, and many of their assumptions remain accepted in the therapeutic jurisprudence literature. Winick died in 2010, but Wexler remains active, still engaging publicly with new work that he deems interesting and relevant. Wexler manages an interdisciplinary International Network on Therapeutic Jurisprudence, which involves updating an online bibliography with any new related publications, sending regular news emails to an extensive email list, engaging in personal email correspondence with individual and small groups of therapeutic jurisprudence academics, and connecting scholars through email and organised face-to-face events.[112] There is, therefore, a strong sense amongst the therapeutic jurisprudence community that Wexler remains the leader of the movement, and often a deferral to Wexler's opinions. This is not to suggest that Wexler does not encourage critical engagement with his views, but rather to highlight the central position that Wexler still occupies in relation to therapeutic jurisprudence, which means that he is still looked to by advocates for guidance to do with any new approach or critique. Thus, while Wexler does not purport to 'own' therapeutic jurisprudence, it is both necessary and appropriate first to consider how he (and, originally, Winick) conceives of therapeutic jurisprudence.

Thus, in this section, I consider Wexler and Winick's approach, and also address some key criticisms of therapeutic jurisprudence. As I foreshadow in this section, I do not agree with the normative constraints placed on therapeutic jurisprudence by its founders. Before I set about arguing why, I spend some time explaining Wexler and Winick's original and sophisticated vision. In my view, therapeutic jurisprudence is too often conflated with 'problem-solving courts', but as I make clear in this section, the founders intended it to have far greater scope.

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[112] These observations are drawn from my personal experience interacting with David Wexler, and my informal conversations with those in the therapeutic jurisprudence community. See also David Wexler, *International Network on Therapeutic Jurisprudence* <http://www.law.arizona.edu/depts/upr-intj/>.

A Definition and Central Claims

In the introduction to *Law in a Therapeutic Key*, Wexler and Winick define therapeutic jurisprudence as ‗the study of the role of the law as a therapeutic agent'.[113] Wexler and Winick make three preliminary points regarding this definition. First, they claim that the law produces ‗therapeutic or antitherapeutic consequences'.[114] Wexler later noted that this meant consequences for anyone who comes into contact with the law.[115] Wexler has stated that participants are not merely individuals; he suggests that therapeutic jurisprudence may have application for families, groups, communities and societies.[116]

Secondly, the ‗law' comprises legal actors, legal rules, and legal procedure, all of which are ‗social forces' that produce these consequences.[117] Legal actors are those who make decisions about the law, mainly construed in the literature to mean judges and others involved in the court context, such as defence counsel and prosecutors.[118] Legal rules often are interpreted as the substantive law—found in statutes, regulations or the common law. Legal procedures refer to the way the law operates in practice, and these also may be enshrined in legislation, contained in practice notes, or form conventions.

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113 As noted in the Introduction chapter to this thesis, this is a key early text. Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii.

114 Ibid xvii.

115 See, eg, David Wexler ‗A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research and Practice' in David Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008) 9–11.

116 David Wexler, ‗Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy and Law* 220, 224. See also Michael King et al., *Non-Adversarial Justice* (2009) 27. Wexler refers to Martha Minow, ‗Questioning Our Policies: Judge David L Bazelon's Legacy for Mental Health Law' (1993) 82 *Georgetown Law Journal* 7; Daniel Shuman, ‗Making the World a Better Place Through Tort Law? Through the Therapeutic Looking Glass' (1993) 10 *New York Law School Journal of Human Rights* 739. King references a work that considers the role of the Supreme Court of Canada in adjudicating the constitutionality of a Quebecois unilaterial succession (note, though, that the consideration is limited in terms of considering a conflict between groups; the matter arose as a result of a Canadian federal government request at a time where there was no planned referendum on the subject, and the Quebec government did not participate in the hearing): Nathalie Des Rosiers, ‗From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts' (2000) 37 *Court Review* 54.

117 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii.

118 Institutions involved with making the law, such as law reform bodies, generally are overlooked in the consideration of legal actors.

Thirdly, Wexler and Winick stated that their observations about the therapeutic effects of the law do not lead to a requirement that therapeutic considerations should be prioritised above other _justice values' such as due process or _individual autonomy, integrity of the fact-finding process, community safety and efficiency and economy'.[119] Wexler and Winick claimed that therapeutic jurisprudence merely illuminates conflicting _justice values' in a given situation.[120] This is the major ground upon which I critique therapeutic jurisprudence, and I take this up below, and in detail in the following chapter.

Wexler and Winick intended for scholars to conduct research to _determine whether the law actually operates in the way that theory assumes'. In *Law in a Therapeutic Key*, they explicitly exhorted scholars to conduct research to prove or disprove their claim that the law has therapeutic or antitherapeutic consequences.[121] They expected this research would be conducted using _the tools of the mental health disciplines',[122] or social science research methods. Wexler and Winick also articulated their hope that *Law in a Therapeutic Key* itself would _stimulate thought, further scholarship, and needed law reform'.[123] My view is that law reform or policy initiatives that purport to be grounded in therapeutic jurisprudence, should find some basis in, and be evaluated at least partly in line with, the findings of this research. That this is not always the case is a problem, supporting a valid concern that therapeutic jurisprudence has progressed too quickly from theory to practical application.[124] This process may need to slow down to allow relevant research to be done to support law and policy developments.

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119 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii.

120 Ibid xvii.

121 Ibid xvii.

122 Ibid xvii.

123 Ibid xx.

124 Dennis Roderick and Susan Krumholz, _Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence' (2006) 1 *Southern New England Roundtable Symposium Law Journal: Trends and Issues in Scientific Evidence* 201, 204. This comment was made in the US context but is also persuasive in the Australian context.

B 'Therapeutic': meaning and critique

Wexler and Winick did not adopt a _tight definition' of therapeutic. This was a deliberate move, intended to promote greater empirical investigation and allow scholars to _roam within the intuitive and commonsense contours of the concept'.[125] In the therapeutic jurisprudence literature, _therapeutic' generally has been construed to mean an enhancement of health and/or wellbeing, and _antitherapeutic' is construed to mean a state deleterious to health and/or wellbeing.[126] Wexler indicated in 1995 that he would prefer to keep therapeutic jurisprudence _as a discipline relating to mental health and psychological aspects of health'.[127] By 1996, however, Wexler and Winick had endorsed Christopher Slobogin's definition referring to _psychological and physical well-being'[128] of participants.[129] Notwithstanding this, the focus in the literature to date has been on mental and emotional health and/or wellbeing, rather than physical health. Australian writers have viewed health and wellbeing in broad terms. For instance, Michael King, one of the most prolific Australian therapeutic jurisprudence scholars (and a magistrate) refers to matters _encompassing health, economic, vocational, familial, social and, for some, spiritual

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125 Wexler, _Reflections on the Scope of Therapeutic Jurisprudence' above n 116, 221. See also Susan Daicoff and David Wexler, _Therapeutic Jurisprudence' in *Handbook of Psychology: Forensic Psychology* (2003), 561.

126 See, eg, King et al., *Non-Adversarial Justice*, above n 116, 22.

127 Wexler, _Reflections on the Scope of Therapeutic Jurisprudence' above n 116, 223.

128 Christopher Slobogin, _Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy and Law* 193, 196. The full definition relates to therapeutic jurisprudence more broadly: _the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects'. Slobogin comes to this definition after considering two other potential definitions of _therapeutic jurisprudence', the first of which deals with the meaning of _therapeutic'. First, broadly defined, therapeutic could mean beneficial, and anti- or countertherapeutic could mean harmful. Such a definition, however, is so broad as to be meaningless; many laws deal with benefits and harms. A second possible definition of therapeutic jurisprudence is what _behavioral science has to say about the effect of the law and why people behave the way they do'. But, as Slobogin notes, if therapeutic jurisprudence is only about introducing the social sciences into law then it does not add much in terms of _jurisprudential import'. Thus, he prefers the third definition: Ibid, 196.

129 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24. In 1997 Winick again noted that physical health was incorporated in the meaning of therapeutic: Bruce Winick, _The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy and Law* 184, 192. A broader definition accords with the World Health Organization definition of _health': _a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity': *Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference*, Official Records of the World Health Organization (19–22 June 1946, entered into force 7 April 1948), 2.

domains'.[130] Kate Auty, the inaugural magistrate at the Shepparton Koori Court in Victoria, argues that what is therapeutic for Indigenous peoples needs to be considered from beyond a Western standpoint.[131] A more holistic conception of health/wellbeing, which encompasses social, spiritual and cultural dimensions, may be of particular import for Indigenous women. Such a definition is accommodated rather than precluded by Wexler and Winick's preference to keep the definition broad, and as I argue below, this is an attractive feature of therapeutic jurisprudence.

Specific 'processes' and 'values' that may effect therapeutic outcomes have been identified in the literature. Winick has explored the therapeutic import of individual autonomy[132] and Amy Ronner and Winick have drawn on Tom Tyler's work on procedural justice to identify voice, validation and voluntary self-participation as specific processes that may lead to therapeutic outcomes.[133] Similarly, King refers to therapeutic values of voice, validation, respect and self-determination.[134] References to lawyering or judging with an 'ethic of care' also have been mentioned in recent scholarship referring to therapeutic processes.[135] Values

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130 Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1122.

131 Auty has classified a variety of terms as fitting within the definition of 'therapeutic': ameliorative; dialogue; engagement; listening; respectful; attentive; gender balance; inclusive; inquisitive; cautious; quiet; poised; complexity; recognition; thematic; reconciliation; pausing; knowing; organic; fluid; and reflective. Terms on her 'non-therapeutic' list are: assumptions; haste; over-riding; stereotypes; ignoring; contempt; mechanical; directory; medicalised; and myths. Auty notes that the penultimate term is 'paradoxically' non-therapeutic; and the final term may be therapeutic or non-therapeutic, depending on the context: Kate Auty, 'We Teach All Hearts to Break—But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' [2006] *Special Series–Murdoch University Electronic Journal* 101–102 <https://elaw.murdoch.edu.au/archives/issues/special/we_teach.pdf>.

132 Bruce Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1715–21.

133 Amy Ronner and Bruce Winick, 'Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance' (2000) 24 *Seattle University Law Review* 499.

134 Michael King, 'Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' (2008) 32 *Criminal Law Journal* 303, 312. See also King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' above n 130, 1115.

135 See, eg, David Wexler 'A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research and Practice' in David Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008) 11. See also Warren Brookbanks, 'Therapeutic Jurisprudence: Conceiving an Ethical Framework' (2001) 8 *Journal of Law and Medicine* 328, 329; Auty, 'We Teach All Hearts to Break—But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' above n 131; King, 'Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' above n 134; Evans and King, 'Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence' above n 37, 304.

such as self-determination and an ethic of care have strong roots or significance in Indigenous and feminist literature.[136] Incorporating these values may enhance the applicability of a therapeutic jurisprudence framework for Indigenous women who have experienced sexual violence, although I consider this critically further below. Here, I summarise the key principles that the literature indicates may effect therapeutic outcomes, in this way: (i) validation/respect, (ii) knowledge/control, and (iii) voice/participation.[137] Of course, there is scope to analyse all these in greater detail. For example, I note that Jo-Anne Wemmers critically considers what may be therapeutic about participation, distinguishing between active participation with decision-making power and passive participation where victims are consulted and kept informed.[138]

Lack of clarity as to what is meant by the terms _therapeutic' and _antitherapeutic' is a key issue upon which therapeutic jurisprudence attracts criticism, although in my view, this is not warranted. For instance, Dennis Roderick and Susan Krumholz find that the theoretical potential of therapeutic jurisprudence is limited because broad concepts such as _therapeutic' and _antitherapeutic' cannot be observed and measured.[139] However, using prescriptive or pre-determined definitions of what is therapeutic is to run the risk of paternalism through excluding the actual experiences of participants.

Broadly drafted definitions of _therapeutic' and _antitherapeutic' guards against such concerns, in that expansive definitions allow legal participants to frame their own experiences and identify specific laws, processes or interactions that lead to therapeutic or antitherapeutic outcomes. One insight from an empirical study into sexual violence victim/survivors, studied further below, illustrates the importance of this: while _revenge'

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136 I note feminist research in Ch 3 and Indigenous literature in Ch 4.

137 Jo-Anne Wemmers also notes that outcome may be a therapeutic consideration for victims: Jo-Anne Wemmers, _Victims in the Criminal Justice System and Therapeutic Jurisprudence: A Canadian Perspective' in Edna Erez, Michael Kilchling, and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011) 67, 78. I discuss the importance of outcomes further in Ch 4.

138 Ibid 69. Wemmers concludes that passive participation shows victim/survivors the requisite degree of respect and recognition and is appropriate _as this cushions the possible negative impact of confrontation and cross-examination without limiting the rights of the accused': Ibid 81.

139 Roderick and Krumholz, _Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence' above n 124, 209.

generally is not seen as having therapeutic outcomes and thus unlikely to make it onto a list of enumerated therapeutic values or processes, a victim/survivor reflecting on her civil trial stated it was exactly revenge which had helped her ‗heal'.[140] Other examples of how a broad definition of ‗therapeutic' can encapsulate various understandings of wellbeing, relevant to this thesis, is how Indigenous conceptions of wellbeing may differ from non-Indigenous conceptions in the way outlined by Auty above; and also that wellbeing may extend to physical health as a direct result of a negative emotional response, for example, high anxiety may lead to nausea and sleeplessness, which in turn may lead to injury. The law also may affect the physical safety of a victim/survivor, for example, where a woman is required by court order to share custody of children with the perpetrator of violence. The literature does not fully explore physical effects on victim/survivors, but a broad definition of ‗therapeutic' that contemplates holistic effects of legal interactions in a way that researcher or legal decision-makers may not automatically think of, is another reason in its favour.

In summary, I agree with Wexler and Winick's decision to leave the definition of ‗therapeutic' broad. Its wide range of meanings render it virtually impossible to categorise what is ‗therapeutic' in a way that does justice to all the meanings that individuals may ascribe to it. Hence, the term ‗therapeutic' is best construed as an undeterminable horizon to which legal decision-makers may strive to achieve (within the boundaries of the theory) rather than a clearly definable concept.[141] To reiterate, my view is that this is an attractive feature of therapeutic jurisprudence in its theoretical form, for the reason that it allows a degree of autonomy on the part of participants to characterise personal wellbeing, and is a way to avoid the criticism of paternalism.

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140 ‗I knew he'd declare bankruptcy and lose [his professional] license. This was my best revenge. It helped me heal': Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, ‗Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 66, 103. See also Bas van Stokkom, ‗Victims' Needs, Well-Being and "Closure": Is Revenge Therapeutic?' in Edna Erez, Michael Kilchling & Jo-Anne Wemmers (eds) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011) 207.

141 I am grateful to Ben Golder for this formulation.

This approach does not mean, however, that 'therapeutic' and 'antitherapeutic' are terms 'at large'. Some parameters are envisaged, for instance, the concepts that draw on multifaceted conceptions of health and wellbeing and focus on process. I summarised above the key principles that may have therapeutic effects (validation, knowledge and participation), and also note that these are commensurate with themes in the victimology literature, explored in Chapter 4. My view is that broadly construed understandings of 'therapeutic', together with principles such as these *and* a requirement to conduct empirical research to determine what actually is therapeutic and antitherapeutic in particular areas, are positive elements of therapeutic jurisprudence when considering its capacity to respond adequately to sexual violence experienced by Indigenous women.

C 'Jurisprudence': meaning and critique

Most authors disavow use of the term 'theory' when describing the nature of therapeutic jurisprudence,[142] variously describing it as a lens, process, vehicle, doctrine, frame, tool, research agenda, movement or heuristic device.[143] Of these descriptions, the 'lens' characterisation is the most popular, with Nigel Stobbs writes that it is 'virtually canon' in the therapeutic jurisprudence community to refer to it in this way.[144] In this section, I make the argument that therapeutic jurisprudence is in fact a theory. This is relevant because of the trend in the therapeutic jurisprudence community to maintain the idiosyncratic

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142 Some explicitly, see, eg, Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2008) 30 *Thomas Jefferson Law Review* 575. Freckelton states at 576 that '[t]herapeutic jurisprudence is no more and no less than "the study of the role of the law as a therapeutic agent"' rather than a theory.

143 For example, Astrid Birgden argues for a therapeutic jurisprudence normative framework (which she conceives as a 'legal philosophy' that prescribes what the law 'ought to do', in distinction from a 'legal theory' which 'explains or predicts behavior without providing an opinion on how the law ought to function'): Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' above n 27, 48. In particular, Birgden argues that 'taking an ideological position on policy approaches to offenders allows therapeutic jurisprudence to engage in the required value-laden debate and suggest therapeutic laws, procedures and roles that maximize human rights in offenders': Ibid 57. In the US context, see Robert Madden and Raymie Wayne, 'Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model' (2002) 18 *Touro Law Review* 487; Susan Brooks, 'Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities' (2006) 13 *Clinical Law Review* 213; Roderick and Krumholz, 'Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence' above n 124.

144 Nigel Stobbs, 'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 4 *Washington University Jurisprudence Review* 97, 140.

distinction between a theory and a _lens'. Most importantly, clinging to such a meaningless distinction stymies further intellectual analysis, such as whether and how therapeutic jurisprudence has the capacity to adequately deal with _tough' cases.

The distinction between a _theory' and a _lens' is not explained in the literature. For example, King has stated that _Roderick and Krumholz incorrectly contend that therapeutic jurisprudence is a theory and then proceed to critique the supposed elements of that theory'.[145] This constitutes the sole engagement by King with a considered critique of the elements of therapeutic jurisprudence as articulated by Wexler and Winick—significant here because King is the most prolific of Australian contributors on therapeutic jurisprudence.[146] The issue may be, in part, because of different conversations about what is meant by the term _theory'. For instance, Roderick and Krumholz draw from a social science understanding of what is necessary to fit the definition, arguing that therapeutic jurisprudence has theoretical deficiencies because it does not have _precise operational definitions of theoretical constructs',[147] and further, are anxious that it does not decide on _directly observable and measurable referents (indicators) of the abstract concepts (operationalize the concepts) and use them to generate testable hypotheses to empirically examine the theory'.[148]

My view is that Roderick and Krumholz indeed raise a valid point—that is, therapeutic jurisprudence may need further methodological development and clarification—yet I disagree with their implicit assumption about what is necessary to satisfy the definition of a _theory'. Legal theories do not need to be entirely comprehensive and do *everything,* nor do they need to be prescriptive.[149] As I explain below, legal theories can describe the effects of

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145 King, _Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' above n 130, 1118.

146 Since 2002, King, a Western Australian magistrate and academic, has authored at least thirty relevant law journal articles, mostly related to therapeutic jurisprudence and judging, in addition to the *Solution-Focused Judging Bench Book* (2009).

147 Roderick and Krumholz, _Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence' above n 124, 206, fn 23. Roderick and Krumholz cite Liqun Cao, *Major Criminological Theories: Concepts and Measurements* (2004).

148 Ibid 209.

149 See, eg, Margaret Davies, _The De-Capitation of a Discipline, or How Legal Theory Lost Its Head' (2000) 4 *Flinders Journal of Law Reform* 127.

the law, and can state how the law should be, and still be a ‗theory'. Indeed, I argue that therapeutic jurisprudence is a theory in that it describes the effects of legal interactions and foregrounds wellbeing as a relevant factor in legal analysis.

I suspect that, one real reason behind the rejection of a theoretical dimension to therapeutic jurisprudence is the intention of its proponents to make it immediately accessible to legal practitioners, decision-makers, and those involved in legal policy development. Positioning therapeutic jurisprudence as something other than a ‗theory' gives a strong impression that it has practical application. Yet my view is that merely *saying* that ‗therapeutic jurisprudence is not a theory' does not meet the standard of rigorous academic analysis. I argue that therapeutic jurisprudence can still have practical application when it is correctly characterised, and that in an academic context, engaging with the substance of what is claimed by therapeutic jurisprudence is an exercise of far greater import than is disputing the nomenclature. In this section, I move beyond what I term the ‗theory allergy' of therapeutic jurisprudence to consider its jurisprudential dimension in a way that has application to my research question.

The general term ‗jurisprudence' has been used in different ways over time. An early seminal text on the subject—Sir John Salmond's *Jurisprudence, or The Theory of the Law*—starts with a definition of jurisprudence as ‗the science of the law'.[150] Contemporary texts are more likely to impute a philosophical basis to the term. Denise Meyerson states that ‗[j]urisprudence is generally conceived of as the attempt to understand the social institution of law from the perspective of philosophy'.[151] An example of this is found in a 2010 report on the South Australian justice system, where Judge Peggy Hora, who is well-regarded by Wexler, described therapeutic jurisprudence as ‗a philosophy of law which

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150 John Salmond, *Jurisprudence, or, The Theory of the Law* (1st ed, 1902) 1. In that text, Salmond referred to law ‗in that vague and general sense, in which it includes all species of obligatory rules of human action' and was concerned specifically with examining ‗the science of the first principles of the civil law': Ibid 1, 4.

151 Denise Meyerson, *Jurisprudence* (2011) 1. It also has been noted that the distinction between jurisprudence (consideration of the nature of a legal right or duty), philosophy of the law (moral or political philosophising about the law), and legal theory (consideration of the phenomenon of law) appears to be disregarded by most contemporary authors: Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (2nd ed, 2005) 12, fn 1.

takes into account people's well being and social needs rather than just applying the rules of law and legal procedure'.[152]

Contemporary texts on jurisprudence divide the work of jurisprudence scholars into descriptive/analytical or normative categories.[153] Descriptive theories describe or explain a law, its theoretical basis, or its consequences. Normative theories focus on what the law should be, and tend to be imbued with values or morals. These theories may work within the status quo of the political/legal landscape (non-ideal normative theories), or may attempt to transcend such a landscape (ideal normative theories).[154] Theories do not necessarily fall within one of two distinct categories: Raymond Wacks describes Ronald Dworkin's theory of _law as integrity' as an example of a theory that allows _descriptive doctrinal theory to coalesce with normative theory'.[155] Wacks also notes that a normative theory, say one with a utilitarian basis, may consider descriptive dimensions such as the utilitarian consequences of a law.[156] In other words, the _descriptive' and _normative' are not always clearly delineated, but these remain useful ways to clarify the precise element with which I take particular issue in this thesis—the normative limb.

I argue that I am not imposing a theory _on' therapeutic jurisprudence in this section: rather, I am identifying that it already has one. My understanding of therapeutic jurisprudence as a theory with descriptive and normative components is actually consistent with how the founders initially conceived of it. As noted above, a legal theory does not need to _do' everything, although having said that, therapeutic jurisprudence actually purports to do a great deal. The descriptive dimension of therapeutic jurisprudence is clear from the above discussion of *Law in a Therapeutic Key*—Wexler and Winick argued that the law has effects on the wellbeing of those who come into contact with it, in both positive and negative ways. The founders also saw therapeutic jurisprudence as having a _normative

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152 Peggy Hora, _Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System' (South Australian Department of the Premier and Cabinet, 2010) 1.

153 See, eg, Meyerson, *Jurisprudence*, above n 151, 1.

154 Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, above n 151; Meyerson, *Jurisprudence*, above n 151.

155 Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, above n 151, 8.

156 However, descriptive theories do not contain a normative dimension. Ibid 8.

orientation', with Winick expressly stating this in the late 1990s,[157] and Wexler reiterating this in 2011.[158] This orientation appears to be a broad one: that the law should promote the law's therapeutic effects within the outlined parameters. This is key to understanding how therapeutic jurisprudence differs from other socio-legal schools: Slobogin has described its key distinguishing feature as its 'prescriptive jurisprudence'.[159] Wexler further states that the normative dimension of therapeutic jurisprudence 'sharpens the debate, focuses the debate; it does not really provide answers'.[160] Some scholars have argued that its normative orientation should be more concrete: for example, as noted in the next chapter, Astrid Birgden has argued that therapeutic jurisprudence should take a rights-based, value-laden stance when balancing offender rights (and particularly autonomy) against community interests.[161] This has not been taken up by the founders of the theory, and the normative orientation of therapeutic jurisprudence remains broad or unspecified.

In summary, I argue that therapeutic jurisprudence, as defined by its founders, has a descriptive element of the theory—that is, the law has an effect on the health of participants—which could be proved and elaborated, disproved, or remain unproved.[162] In addition to this, therapeutic jurisprudence has a twofold 'normative orientation' in that (i) it has an agenda as to what the law should look like and how it should operate (albeit not one specified in concrete terms); but (ii) this agenda operates only within delineated boundaries, that is, it defers to existing justice values by not requiring therapeutic concerns to be weighted more heavily than other matters. My view is that the curtailment of (i) by (ii)

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157 Winick, 'The Jurisprudence of Therapeutic Jurisprudence' above n 129, 188.

158 Wexler wrote of the "soft" normative element of therapeutic jurisprudence, a point that I take up further below: David Wexler 'From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' (2011) 37 *Monash University Law Review* 33, 33, fn 3.

159 Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' above n 128, 198.

160 David Wexler, 'Therapeutic Jurisprudence: An Overview' in David Wexler (ed) *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008) 5.

161 Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' above n 27, 48.

162 I support empirical research, but do not undertake it as part of this PhD, for the reasons set out in Ch 1 of this thesis: namely, it is essential to perfect the conceptual foundation of therapeutic jurisprudence before collecting empirics (otherwise, there is a risk of re-perpetuating existing issues). Potential future empirical research could consider whether legal interactions have: (i) a positive effect on the health/wellbeing of Indigenous women who interact with the law following an experience of sexual violence; (ii) a negative effect on the health/wellbeing of these victim/survivors; (iii) a positive and negative effect; (iv) a nil or uncertain effect.

means that therapeutic jurisprudence is a non-ideal normative theory; it does not purport to upset the status quo. For reasons explored in the following chapter, I argue that it is this facet of therapeutic jurisprudence that is problematic when considering whether it should be used in regulating sexual violence experienced by Indigenous women. I argue that the curtailment of (ii) by (i) also is problematic for supporters who want to engage with the normative dimension of therapeutic jurisprudence—such as Birgden, Dale Dewhurst, and others discussed in the next chapter.

The theory discussion in this section has not merely been a semantic exercise. The main reason why I demand therapeutic jurisprudence proponents to be upfront about its theoretical status is because I argue in this thesis that there is a gap in the rhetoric about the potential of therapeutic jurisprudence, and the reality of what it can actually deliver in the form defined by its founders. To call therapeutic jurisprudence what it is (a theory), and then to characterise the nature of this theory, is to bring this disconnect into sharp focus. It allows us to understand precisely how a secondary school of therapeutic jurisprudence is diverging from the original school—a matter I discuss in the next chapter, showing where some therapeutic jurisprudence proponents are expanding the original concept of justice espoused by the founders of the theory. It also gives me a stronger footing upon which to argue that therapeutic jurisprudence, because of its existing normative curtailment and reference back to the status quo, cannot deal with the _tough' case where interests do not converge—specifically, where some interests of victim/survivors of sexual violence may be in conflict with the perpetrators of that violence. To make out this argument, and to take therapeutic jurisprudence further in a constructive direction, is why I argue that a new normative framework is required—a normative framework that appeals squarely to justice, and which does not perpetuate the existing injustices of the current legal response.

III FINDING A LACUNA IN THE LITERATURE

I now delve into the literature identified as relevant to my case study: that which considers the Australian context, victim/survivors of sexual violence, and Indigenous peoples.

A The Australian context

Therapeutic jurisprudence was first mentioned in Australian legal scholarship in the late 1990s. Since that time, it has been the subject of several articles, including those written by judicial officers,[163] and in recent years has formed the basis of various government policies,[164] although it is not viewed favourably by all those involved in legal policy reform. Whether it is appropriate to apply the concept of _therapeutic jurisprudence' in a particular inquiry has been considered by Australian law reform bodies—the Law Reform Commission of Western Australia (LRCWA), in its inquiry into court intervention programs; and the Australian and New South Wales Law Reform Commissions (ALRC/NSWLRC) in their federal inquiry into family violence laws and procedures. All law reform bodies explicitly chose not to use therapeutic jurisprudence in their respective inquiries. For the LRCWA, this was on the basis that _[f]requent and unnecessary references to therapeutic jurisprudence are liable to distort the true message: the purpose of court intervention programs is to reduce crime.'[165]

The ALRC/NSWLRC did not reject therapeutic jurisprudence as invalid, rather hinting at the reluctance of judges in higher Australian courts to take it up:

> a number of philosophical and practical concerns have been raised with the adoption of problem-solving approaches in the context of family violence. There are a range of views as to the appropriateness of problem-solving approaches in the context of family violence; the appropriateness of the changed role of the judicial officer; and the claims, implicit in such approaches, for the potential of the legal system to address deep-seated social problems. Further, offender programs and judicial supervision of the progress of offenders are resource-intensive and the empirical evidence of their effectiveness is mixed. Perhaps the

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163 See, eg, Jelena Popovic, _Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2002) 20 *Law in Context* 121; Wayne Martin, _Address' 3rd International Conference on Therapeutic Jurisprudence, 11 January 2009.

164 See, eg, Victorian Government Department of Justice—Corrections Victoria, *Offender Management Framework—Achieving the Balance* (2010) 1.

165 Law Reform Commission of Western Australia, *Court Intervention Programs—Consultation Paper* (2008) 7–8.

> greatest practical issue, however, is the willingness of the judicial officers to embrace a problem-solving approach.[166]

In other words, while the ALRC/NSWLRC contemplated philosophical issues, the decision not to pursue therapeutic jurisprudence in their Family Violence Inquiry was based at least in part on pragmatism. The ALRC/NSWLRC also appeared to limit their consideration of therapeutic jurisprudence to problem-solving courts.

The earliest Australian academic work on therapeutic jurisprudence was concerned with victim/survivors of sexual violence, with Eilis Magner considering its application to sexual assault victim/survivors in court.[167] Over the past decade, there have been some other Australian scholarly publications on sexual violence,[168] victim/survivors,[169] and Indigenous peoples.[170] In recent years, however, King and Freiberg have become the most visible

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166 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks (Consultation Paper 1)*, above n 1, [20.162]–[20.163].

167 Note that, for the most part, this consideration was in brief. The first Australian law journal article purporting to employ a therapeutic jurisprudence framework dealt with sexual assault and NSW evidence law: Kumar and Magner, ‗Good Reasons for Gagging the Accused' above n 32. Magner published at least two further articles on therapeutic jurisprudence: Magner, ‗Therapeutic Jurisprudence: Its Potential in Australia' above n 30; Magner, ‗Proving Sexual Assault' above n 32.

168 Note that such sources tend to be offender-focused both in the Australian and international therapeutic jurisprudence literature. For instance, over the past decade forensic psychologist Dr Astrid Birgden has considered how therapeutic jurisprudence may apply to sex offenders at the corrections stage, together with a consideration of the nature of therapeutic jurisprudence, but without an explicit consideration of Indigenous peoples or victims/survivors: see, eg, Birgden, ‗Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' above n 27. Birgden's work was a strong influence on the therapeutic jurisprudence framework advanced in Denise Lievore, ‗Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (Australian Institute of Criminology, 2004). Exceptions include the articles by Magner, above, and Kirchengast, ‗Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' above n 33. As discussed below, these articles accept key contentions of therapeutic jurisprudence without discussion.

169 Several articles on victims/survivors deal with domestic violence: see, eg, King, ‗Roads to Healing: Therapeutic Jurisprudence, Domestic Violence and Restraining Order Applications' above n 34; Holder, ‗The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' above n 34; Michael King and Becky Batagol, ‗Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' (2010) 33 *International Journal of Law and Psychiatry* 406. Others focus on victim impact statements: see, eg, Linda Rogers and Edna Erez, ‗The Contextuality of Objectivity in Sentencing Among Legal Professionals in South Australia' (1999) 27 *International Journal of the Sociology of Law* 267; Kirchengast, ‗Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' above n 33.

170 Again, many such articles are focused on the offender. See, eg, Elena Marchetti, ―Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing" (2010) 43(2) *Australian and New Zealand Journal of Criminology* 263; Elena Marchetti & Kathleen Daly, ―Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model" (2007) 29 *Sydney Law Review* 415; Michael

Australian therapeutic jurisprudence scholars. Their research interests lie with non-adversarial justice, problem-solving courts and therapeutic judging.[171] They have considered Indigenous peoples—in particular, Indigenous sentencing courts—but neither have undertaken a lengthy examination of the theoretical underpinnings of therapeutic jurisprudence,[172] nor, for the most part, the relationship of therapeutic jurisprudence with victim/survivors, sexual, or other gendered violence.[173]

The legal practice of therapeutic jurisprudence in Australia has mirrored this research agenda—it is most visible in the problem-solving court arena.[174] At the local court level, some jurisdictions purport to be framed by therapeutic jurisprudence; for instance, some state and territory family violence and drug courts draw on therapeutic jurisprudence principles.[175] For example, several Victorian and Western Australian magistrates are

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King, ―Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts" (2010) 19 *Journal of Judicial Administration* 133. Note that Marchetti & Daly argue that Indigenous sentencing courts are not based on either therapeutic jurisprudence or restorative justice: this is discussed further below.

171 Arie Freiberg has published several relevant journal articles since 2001, mostly focusing on problem-solving courts, including most recently Freiberg, ‗Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' above n 11. Freiberg also co-authored *Non-Adversarial Justice* (2009) with Michael King, Becky Batagol and Ross Hyams.

172 See, though, the discussion of paradigm shifts in Arie Freiberg, ‗Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2002) 20 *Law in Context* 6.

173 Note, though, that in recent years King has published a handful of articles that consider issues beyond offenders/courts: see King, ‗Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' above n 134; Michael King and Robert Guthrie, ‗Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' (2008) 89 *Precedent* 39; King and Batagol, ‗Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' above n 169.

174 This focus also is reflected in the discussion of the final report of the Victorian Parliament Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009). Here, the magistrate of the Victorian Neighbourhood Justice Centre explained the therapeutic jurisprudence as having a judge-led approach to problem solving; and the representative for Victorian Police differentiated therapeutic jurisprudence and restorative justice as the former having an emphasis on offenders, with the latter having an emphasis on victims/survivors: Ibid 198. Note that Wexler has described problem-solving courts and therapeutic jursiprudence as ‗close cousins rather than identical twins': David Wexler, ‗Therapeutic Jurisprudence: It's Not Just for Problem-Solving Courts and Calendars Anymore' in Carol Flango et al (eds) *Future Trends in State Courts* (2004), 88, fn 15. Freiberg has further distinguished specialist courts and problem-solving courts, with former courts specialising in a particular subject matter and not necessarily using a therapeutic approach: Arie Freiberg ‗Innovations in the Court System' (Paper presented at the Australian Institute of Criminology International Conference on Crime in Australia: International Connections, Melbourne, 30 November 2004), 2.

175 See, eg, Magistrates' Court of Victoria, *Magistrates' Court of Victoria—Drug Court Processes* (2010) <http://www.magistratescourt.vic.gov.au/wps/wcm/connect/justlib/magistrates+court/home/specialist+jurisdictions/drug+court/magistrates+-+drug+court+processes>.

sympathetic to therapeutic jurisprudence,[176] and the Neighbourhood Justice Division of the Victorian Magistrates' and Children's Court has a legislative basis that explicitly states that the court is intended to utilise therapeutic approaches.[177] As magistrate court decisions are reported only rarely, however, it is difficult to discern magistrates' application of therapeutic jurisprudence principles.[178] Thus, curtailed access to information means that the types of cases in which therapeutic jurisprudence is considered remains obscured, as are the types of participants considered by decision-makers—for instance, has the relevant participant experienced or perpetrated harm, are they Indigenous, and what is their sex? As cases explicitly involving sexual violence (beyond indecent assault) usually are heard at the higher court levels, it is unlikely, at least, that local court matters in which therapeutic jurisprudence is applied involve such conduct.

Australian tribunal decisions may apply therapeutic jurisprudence principles—and sexual violence may be considered in tribunals such as those dealing with victims compensation matters—although such matters rarely are reported.[179] A search of reported tribunal decisions on internet case law databases shows that, in 2007, a member of the Administrative Appeals Tribunal (AAT), applied therapeutic jurisprudence in four matters

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176 See, eg, Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' above n 163; Jelena Popovic, 'The Art of Judging' (2008) 12 *Southern Cross University Law Review* 169. See also Michael King, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 32 *Brief* 23.

177 Section 1(b) of the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) provides that Neighbourhood Justice Divisions of the Magistrates' and Children's Courts are established 'with the objectives of simplifying access to the justice system and applying therapeutic and restorative approaches in the administration of justice'. The legislation also includes provisions governing the appointment of magistrates to the court.

178 One recent example of a reported decision from a (Tasmanian) magistrate's court is: *Lane v Johns* [2012] TASMC 31 (27 August 2012). In that matter, therapeutic jurisprudence was treated favourably in Chief Magistrate Hill's discussion of the role of legal decision-makers in matters where a defendant is ordered to complete a drug treatment plan: see, eg, [41]–[42]. Note that it has been queried whether such courts always practice therapeutic jurisprudence, or merely appropriate the phrase: see, eg, Kate Diesfeld and Brian McKenna, 'The Unintended Impact of the Therapeutic Intentions of the New Zealand Mental Health Review Tribunal? Therapeutic Jurisprudence Perspectives' (2007) 14 *Journal of Law and Medicine* 566; Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' above n 142.

179 See, eg, Jill Toohey 'Use of Therapeutic Jurisprudence in the Work of the State Administrative Tribunal: Tribunal Hearings' (Conference paper presented at 3rd International Conference on Therapeutic Jurisprudence, 7–9 June 2006, Perth). The State Administrative Tribunal is in Western Australia.

dealing with social security or veterans affairs.[180] Therapeutic jurisprudence is contained in the curriculum of the National Judicial College of Australia,[181] but a search of Australian case law indicates that therapeutic jurisprudence has only been referred to a handful of times in reported higher court decisions. In 2003, the Victorian Court of Appeal noted but did not apply a defendant counsel's request to consider therapeutic jurisprudence in a Crown appeal against sentence in an aggravated burglary and armed robbery matter.[182] In 2006, the Supreme Court of New South Wales considered literature on therapeutic and antitherapeutic consequences of a sex offender undertaking sex offender treatment mandated by a parole board.[183] And, in 2010, Justice Gray of the Supreme Court of South Australia noted that he had had regard to a number of articles on sentencing Indigenous offenders, including several articles on therapeutic jurisprudence, in considering whether an Indigenous defendant who had pleaded guilty to an aggravated offence of causing serious harm should be sentenced by way of sentencing conference.[184]

Taken as a whole, then, the Australian case law provides little insight into therapeutic jurisprudence in general—let alone therapeutic jurisprudence applied in matters involving Indigenous women who have experienced sexual violence—other than to reveal enthusiasm on the part of some policy-makers and lower courts dealing with minor offences, and apparent wariness on the part of higher court judges. The third, most recent, higher court example noted above is of interest as it is the only reported Australian matter that considered therapeutic jurisprudence in relation to an Indigenous person; but, like all the

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180 *Carter v Secretary, Department of Families Community Services and Indigenous Affairs* [2007] AATA 1101 (20 February 2007); *Collier v Repatriation Commission* [2007] AATA 1134 (28 February 2007); *Crook v Secretary, Department of Families, Community Services and Indigenous Affairs* [2007] AATA 1253 (26 March 2007); *Fairhall v Secretary, Department of Families, Community Services and Indigenous Affairs* [2007] AATA 1323 (16 May 2007). The presiding member in these matters was Dr Christie. This member included a Wikipedia citation only a brief description of therapeutic jurisprudence in each decision. In the same year, the Queensland Guardianship and Administration Tribunal published a decision on the revocation of a power of attorney in which the presiding members stated that the Tribunal 'endeavours to practise the principles of therapeutic jurisprudence': *Re CAB* [2007] QGAAT 23 (12 April 2007), [40].

181 See, eg, National Judicial College of Australia, *A Curriculum for Professional Development for Australian Judicial Officers* (2007), 26–27.

182 *DPP v Stone & Uren* [2003] VSCA 208 (20 November 2003).

183 *Lee v State Parole Authority of New South Wales* [2006] NSWSC 1225 (17 November 2006).

184 *R v Wanganeen* [2010] SASC 237 (30 July 2010) (Justice Gray). In South Australia, sentencing conferences are held pursuant to s 9C of the *Criminal Law (Sentencing) Act 1988* (SA).

reported matters, the consideration of therapeutic jurisprudence is in passing. At least in the higher courts, relevant participants are offenders rather than victim/survivors, and there is little detailed consideration of therapeutic jurisprudence itself. Thus, Australian decision-makers duplicate trends in the academic literature, to which I now turn.

B Victim/survivors

Much of what has been written about victim/survivors and therapeutic jurisprudence *generally* focuses on domestic/family violence[185] and victim participation, such as through victim impact statements (VIS).[186] In the therapeutic jurisprudence community, it is widely accepted that therapeutic jurisprudence can be applied to victim/survivors. King roundly criticises those who suggest that therapeutic jurisprudence is offender-focused,[187]

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185 In terms of domestic/family violence generally, see, eg, Simon, ‗A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases' above n 34; Bruce Winick, ‗Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri—Kansas City School of Law* 33; Sharon Portwood and Julia Heany, ‗Responding to Violence Against Women: Social Science Contributions to Legal Solutions' (2007) 30 *International Journal of Law and Psychiatry* 237; Bruce Winick et al., ‗Dealing with Mentally Ill Domestic Violence Perpetrators: A New Judicial Model' (2010) 33 *International Journal of Law and Psychiatry* 428. Much of the therapeutic jurisprudence debate on domestic/family violence victims/survivors has centered around whether mandatory arrest policies are therapeutic or antitherapeutic: See, eg, Dennis Saccuzzo, ‗How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest' (1999) 39 *Santa Clara Law Review* 765; Edna Erez and Carolyn Copps Hartley, ‗Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective' (2002) 4 *Western Criminology Review* 155; Leonore Simon, Steven Ellwanger and John Haggerty, ‗Reversing the Historical Tide of Iatrogenic Harm: A Therapeutic Jurisprudence Analysis of Increases in Arrests of Domestic Batterers and Rapists' (2010) 33 *International Journal of Law and Psychiatry* 306. Saccuzzo argues that therapeutic jurisprudence requires mandatory arrest in such cases, a point upon which Winick disagrees. Winick is in favour of presumptive arrest policies, arguing that there are times where a woman may be incapable of making a choice.

186 See, eg, David Wexler ‗Victim Legal Clinics and Legal System Victim Impact Statements: Addressing the Therapeutic Aspects of Victim Participation in Justice' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011) 89; Carolyn Hoyle ‗Empowerment through Emotion: The Use and Abuse of Victim Impact Evidence' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011) 249; Rogers and Erez, ‗The Contextuality of Objectivity in Sentencing Among Legal Professionals in South Australia' above n 169; Erez, ‗Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' above n 34; Kirchengast, ‗Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' above n 33.

187 See, eg, King and Batagol, ‗Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' above n 169, 407, fn 7.

cautioning against reading the offender-focused Australian literature in a vacuum,[188] and Andrew Cannon, a former Western Australian drug court magistrate, argues that if therapeutic jurisprudence ‗is to be credible, it needs to have regard to the harm that defendants' conduct is causing to others and to ensure the process offers something for them'.[189] Nonetheless, the vast bulk of the international therapeutic jurisprudence literature duplicates the offender-focus found in the criminal, criminological and sociological literature,[190] with most work on sexual violence and therapeutic jurisprudence following this trend by focusing on sex offenders.[191] Interest in offenders is so pervasive that an ostensible focus on a legal matter related to victim/survivors does not necessarily result in the anticipated consideration; Erez, who has written extensively about the therapeutic effects of victim impact statements (VIS),[192] notes that some authors discussing such statements highlight the therapeutic effects of such statements on the *offender* through the evocation of empathetic feelings.[193]

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188 See, eg, King, ‗Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' above n 130, 1117.

189 Andrew Cannon, ‗Therapeutic Jurisprudence in Courts: Some Issues of Practice and Principle' (2007) 16 *Journal of Judicial Administration* 256. Cannon also links this to ‗genuine' healing for the defendant, who can only heal if he or she is truly sorry rather than regretful: Ibid 260–261.

190 There are several examples of the offender-focus in the literature; one explicit one is Mark Harris, ‗The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) 1 (special series) *E LAW | Murdoch University Electronic Journal of Law* 129, 132. In the context of the restorative justice movement, Herman expresses well the effects of a phenomenon echoed in the therapeutic jurisprudence literature: ‗Because the movement has been highly defendant oriented at the grassroots level, it has reproduced many of the same deficiencies as the traditional justice system with respect to victims/survivors' rights. The concerns of victims/survivors are insufficiently represented, and the interests of victims/survivors may be easily subordinated to an ideological agenda, in this instance an agenda of reconciliation rather than punishment'. Herman, ‗Justice From the Victim's Perspective' above n 65, 578. Herman cites Daly, 2002 and Stubbs, 2002.

191 An Australian example is Birgden, ‗Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' above n 27. Indeed, there is a dearth of research into legal system experiences of sexual violence victims/survivors, although one exception is the *Heroines of Fortitude* report discussed in Ch 5. Note too that more work has been done on the impacts on the victim of the sexually violent conduct as opposed to the law: see, eg, Haley Clark and Antonia Quadara, ‗Insights into Sexual Assault Perpetration: Giving Voice to Victim/Survivors' Knowledge' [2010] *Australian Institute of Family Studies, Research Report No 18*; Cameron Boyd, *The Impacts of Sexual Assault on Women—ACCSA Resource Sheet* (2011) <http://www.aifs.gov.au/acssa/pubs/sheets/rs2/index.html>.

192 See, eg, Edna Erez, ‗Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' [1999] *Criminal Law Review* 545; Rogers and Erez, ‗The Contextuality of Objectivity in Sentencing Among Legal Professionals in South Australia' above n 169; Erez, ‗Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' above n 34.

193 See, eg, Erez, ‗Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' above n 192, 552, fn 45. Erez cites David Wexler and

King argues that values that are considered in a therapeutic jurisprudential balancing act are universal and do not conflict with the interests of victim/survivors.[194] I argue that a major issue is the extent to which such balancing acts, in practice, conflict with the interests of victim/survivors. This is not a new observation: Slobogin has expressed concern that therapeutic jurisprudence proponents may be lost in the ‗excitement of recognizing that a rule is therapeutic for some' while it has a potentially negative impact on others.[195] Winick argues that therapeutic jurisprudence has the potential to promote discussion about controversial application of values, but ultimately deals with Slobogin's criticism by urging therapeutic jurisprudence scholars to focus on situations where participant interests converge.[196] However, I argue that in matters involving sexual violence experienced by Indigenous women, the interests of victim/survivors and perpetrators may conflict more than they converge. The ACT Victims of Crime Coordinator, Robyn Holder, illustrates this most starkly when, in writing about the application of therapeutic jurisprudence to family violence, she notes that scholars generally do not envisage that ‗the anti-therapeutic impact of a sentence may be a lifesaver for the victim'.[197]

In summary, as discussed above and in detail in the next chapters, I approach the claims of therapeutic jurisprudence with respect to victim/survivors with a degree of caution.

Bruce Winick, *Law in a Therapeutic Key* (1996) and Peggy Hora and W Schma ‗Therapeutic Jurisprudence' (1998) 82 *Judicature* 9.

194 King, ‗Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' above n 130, 1116.

195 Slobogin, ‗Therapeutic Jurisprudence: Five Dilemmas to Ponder' above n 128, 216.

196 Ibid 216, fn 108.

197 Holder, ‗The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' above n 34, 37.

C Victim/survivors of sexual violence

This section examines literature that expressly considers therapeutic jurisprudence and victim/survivors of sexual violence. For the most part, the literature on therapeutic jurisprudence and sexual violence focuses on how the sexual assault trial is highly anti-therapeutic for victim/survivors. In other words, this literature is oriented to critiquing problematic legal processes[198] and making practical suggestions as to how therapeutic jurisprudence can be applied to effect outcomes that are less detrimental to the wellbeing of victim/survivors, and perhaps even ways that the law can be used 'as therapy'. The fact that therapeutic jurisprudence addresses the trial process is a real strength of the theory, as compared to other 'innovative' or 'alternative' justice theories or mechanisms that purport to deal with sexual violence.[199] This is because other such approaches, such as restorative justice, but rather focus on the relatively rare situation in which the perpetrator has accepted responsibility for what has happened. Restorative justice is not a fact-finding forum, but rather focuses on the more common, distressing situations where the victim/survivor is challenged in court, generally on consent.[200] The piecemeal reform envisaged by the work reviewed in this section show that therapeutic jurisprudence certainly makes a contribution to improving the sexual assault trial—and even the pre-trial processes[201]—even while I argue in later chapters that its theoretical restrictions mean that this will be limited in more fundamental reform.

For instance, Miiko Kumar and Eilis Magner argue that, in not allowing victim/survivors the choice in deciding whether to submit to cross-examination on their sexual history, NSW evidence law is antitherapeutic by denying victim/survivors 'self-determination' in, or

198 As discussed in Chs 1, 4 and 5 of this thesis.

199 For an overview of innovative responses to sexual violence, see Kathleen Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' [2011] *Australian Centre for the Study of Sexual Assault, Issues Paper 12*.

200 Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in Heather Strang and John Braithwaite (eds) *Restorative Justice: From Philosophy to Practice* (2001) 33.

201 For an examination of the important stage of police questioning (in general matters), see, eg, Ronald Fisher and R Edward Geiselman 'The Cognitive Interview Method of Conducting Police Interviews: Eliciting Extensive Information and Promoting Therapeutic Jurisprudence' (2010) 33 *International Journal of Law and Psychiatry* 321.

control over, proceedings.[202] In another article Magner writes that, while contemporary sexual assault legislation may represent an improvement from the old common law, the way that the law operates still causes trauma for victim/survivors.[203] For instance, where a victim had consensual sexual intercourse some hours before a sexual assault, extensive questioning by defence counsel on her sexual history would be antitherapeutic as it might ‗threaten to distort and pollute her memories and her views of sexual encounters generally.'[204] Magner's arguments are based on her personal experience with the law in this area and the evidence collected for the report entitled *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault* (*Heroines*).[205]

Hadar Dancig-Rosenberg argues for reforms to criminal proceedings in Israeli sexual assault trials to ensure a more therapeutic process for sexual assault victims, including a proposal for reform of the hearsay rule.[206] She approaches the issue by asking how to preserve ‗the classic goals of the criminal trial and, at the same time, acknowledges [victim/survivor] experiences and offers them a therapeutically valuable tool of empowerment'.[207]

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202 Miiko Kumar & Eilis Magner, ―Good Reasons for Gagging the Accused" (1997) 20 *University of New South Wales Law Journal* 311, 330–331, fn 140. In support of this proposition, the authors cite Bruce Winick, ‗The Side Effects of Incompetency Labelling and the Implications for Mental Health Law' (1995) 1 *Psychology, Public Policy, and Law* 6; Tom Tyler, ‗The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' (1996) 42 *Southern Methodist University Law Review* 433. Note that the Kumar & Magner article really reads like a critique of s 409B of the *Crimes Act 1900* (NSW) as it stood at the time of publication with therapeutic jurisprudence ‗tacked on'; therapeutic or antitherapeutic effects of the law rarely are mentioned in the piece. Also note that Magner argues that victims/survivors should be referred to as ‗accusing witnesses'. For the reasons discussed in Ch 4 of this thesis, I refer to ‗victims/survivors' throughout this chapter.

203 Magner, ‗Proving Sexual Assault' above n 32.

204 Ibid 234.

205 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53. While extrapolations as to the therapeutic and antitherapeutic effects of the law may be made upon reading that report, it should be noted that the project from which it arose was not conducted through a ‗therapeutic jurisprudence' lens. It also was published some years ago now, and considers only a small sample of Indigenous women whose court experiences appeared to be even more traumatic than those of non-Indigenous women.

206 Hadar Dancig-Rosenberg, ‗Sexual Assault Victims: Empowerment or Re-Victimization? The Need for a Therapeutic Jurisprudence Model' in Natti Ronel, K Jaishankar, and Moshe Bensimon (eds), *Trends and Issues in Victimology* (2008) 150.

207 Ibid 151.

King writes about the antitherapeutic effects of current legal practice on (child) victim/survivors.[208] Other than the points to do with child development, all these are relevant in adult sexual assault matters. In particular, King encourages judicial officers to pay greater attention to ameliorating the antitherapeutic effects on child victim/survivors of the evidentiary and summing-up stages of sexual assault trials.[209] He recommends a therapeutic approach to judging, based on _voiœ, validation, respect and self-determination'.[210] Drawing on a study into the experiences of child sexual assault victim/survivors in three Australian jurisdictions conducted by Christine Eastwood and Wendy Patton,[211] he identifies specific issues that may lead to antitherapeutic outcomes:

> delays in cases proceeding to trial meaning children cannot move on with their lives soon enough; child complainants giving evidence in court and being subjected to intense and in some cases intimidating cross-examination; a lack of support through the court process; a lack of concern or care on the part of judges, magistrates and lawyers for the situation of child complainants; and lawyers', jurors', judges' and magistrates' misunderstanding of child complainants' evidence and/or the court's inability to elicit sound evidence from them due to a lack of awareness of their cognitive, linguistic and emotional development and of proper means to speak with, listen to and understand them; and the court's reliance on unjustifiable assumptions concerning child functioning in assessing children's credibility.[212]

The last point is particularly relevant when the emphasis on _unjustifiable assumptions' is extended to legal actors deploying general victim/survivor stereotypes. This issue may be even more applicable when there are more negative stereotypes to draw on: for example, the NSW report *Heroines of Fortitude: The Experience of Women in Court as Victims of*

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208 There is an interesting discussion on the rights of witnesses (victims/survivors) in a criminal trial on 306–307, King citing Brennan J in *Jago v District Court of NSW* (1989) 168 CLR 23 at 49–50 and then Chief Justice Spiegelman, writing extra-curially, in _The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Alternative Law Journal* 29, 43.

209 King attributes much to judicial attitudes, stating that, _[t]o some degree, the judiciary has frustrated law reform in this area': King, _Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' above n 134, 311.

210 Ibid 312.

211 Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002). The authors interviewed child sexual assault victims/survivors who had navigated the criminal legal system, together with legal actors, in NSW, Queensland and Western Australia. The conclusions were damning, with the authors stating at the outset that: _the criminal justice system remains the legally sanctioned context for the abuse of children': Ibid iv. Indigenous children were not examined, although it is highly likely that there must have been Indigenous children in the case sample as four children in WA noted that they would have preferred to have been interviewed by an Indigenous police officer: Ibid, 48.

212 King, _Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' above n 134, 305.

Sexual Assault found that Aboriginal women were subject to several stereotypes about misusing alcohol and making victim/survivors compensation claims.[213]

Tyrone Kirchengast writes about the _therapeutic benefits that come with participation'[214] for victim/survivors presenting a VIS where a court sentences an offender for sexual assault. He links these therapeutic benefits to two principles I set out above: firstly, _voice', namely _the opportunity to be heard and involved in key justice proceedings related to their case'[215] and secondly, _validation', when the victim's statement is addressed by the judicial officer.[216] Kirchengast notes Tracey Booth's finding that, even where VIS presented by family members of victim/survivors of intimate partner homicide are not used to influence the sentence, the process of presenting the VIS is therapeutic in and of itself.[217] Kirchengast queries this finding where a VIS is not paid judicial attention, but accepts that _where desirable, impact statements should be prepared as a matter of therapeutic jurisprudence' in sexual assault matters.[218] Yet, he underscores existing standards, such that a VIS should be _objective, fair and ultimately tenable',[219] and does not argue against the cross-examination of victim/survivors on their VIS; an element of the process that can cause great distress. These conclusions raise more questions than are answered: if a VIS needs to be crafted so that it fits the relevant legal landscape, for example, by expressing subjective harms in an objective way, does this affect its therapeutic value such that a purported therapeutic tool may have antitherapeutic effects? To what extent do victim/survivors need to adapt what they say about the offence to fit the offence for which the offender is ultimately convicted? Are victim/survivors pushed into making a VIS because judges assume that if there is not a VIS then there has not been serious harm? What of victim/survivors who did make a VIS and this was never presented as the offender was never convicted? What may be the

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213 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 95.

214 Kirchengast, _Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' above n 33, 157. Kirchengast draws on the work of Edna Erez.

215 Ibid 155.

216 Ibid 155.

217 Tracey Booth, _Homicide, Family Victims/survivors and Sentencing: Continuing the Debate About Victim Impact Statements' (2004) 15 *Current Issues in Criminal Justice* 253.

218 Kirchengast, _Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' above n 33, 158.

219 Ibid 159.

antitherapeutic effect of being challenged in court on the veracity of harm experienced, or even the prospect of being challenged? These questions indicate that the situation for victim/survivors is often more complex than what may seem to be the case at first instance.

Swedish academics Christian and Eva Diesen explicitly consider therapeutic jurisprudence in the stages of the legal process that precede the trial. This represents what I see as another strength of therapeutic jurisprudence, that is, its consideration of the matters that have an effect, in practice, on victim/survivors' early experiences with the legal system, and in many cases, their willingness to remain in that system.[220] Of particular note is that Swedish law allows for a counsel to support victim/survivors of violent and sexual offences from the time of reporting such offences.[221] Diesen and Diesen's piece also is interesting for its consideration of the way that laws are structured: they discuss the antitherapeutic effects of rape laws structured on coercion rather than on non-consent (Swedish sexual assault law is based on the former, whereas Anglo-Australian law is based on the latter).[222] For Diesen and Diesen, the antitherapeutic dimensions of coerced rape laws include: the perpetuation of a 'real rape' myth that conceptualises rape as a violent attack on a woman; the impact of this myth on women who need to be physically injured when subjected to sexual violence; and the effect of the myth on all women, who are encouraged to be fearful of the violent stranger lurking in the night's shadows.[223]

While the above authors focus on legal process, Diesen and Diesen introduce an interesting idea to the literature: that structurally antitherapeutic sexual violence law may have

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220 Christian Diesen and Eva Diesen, 'Sex Crime Legislation: Proactive and Anti-Therapeutic Effects' (2010) 33 *International Journal of Law and Psychiatry* 329. Diesen and Diesen have also conducted a review of sexual violence laws in Sweden and have participated in a Europe-wide study of attrition in sexual assault cases: Christian Diesen & Eva Diesen, *Övergrepp Mot Kvinnor Och Barn-Den Rättsliga Hanteringen* ('The Legal Handling of Sex Crimes and Family Violence'), (2009); Liz Kelly & Jo Lovett, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, Daphne II Study* (EU) (2009).

221 Diesen and Diesen also note there are frequently delays in allocating such counsel: Ibid 333.

222 Ibid 333. It is also worth noting other linked Swedish laws, discussed by the authors in another part of the article: the 'gross violation of women's peace' inserted into the *Swedish Penal Code* in 1998 (Prop 1997/98:55), where a man commits three or more violent acts against a victim and demonstrates controlling behaviour, which is an offence that attracts a more severe penalty than would the separate violent offences; and the prohibition on buying sex under the *Swedish Sex Purchase Act* (1998), which provides only for the prosecution of the purchaser.

223 Ibid 330.

negative effects on the wellbeing of women regardless of whether they are personally subjected to sexually violent conduct, because of the effect of the myths set out above. Yet my view is that Diesen and Diesen are too idealistic about the therapeutic effects of _non-consent' law in common law countries, their optimistic arguments including that non-consent laws can result in victim rehabilitation through being _heard without being questioned', that non-consent laws enhance women's integrity in requiring _every man [to] take great pains to establish what the woman wants'.[224] and that the lack of an injury requirement in non-consent jurisdictions means that, _it can be reasonably assumed that the attitude of the investigators must shift from mere evidence-gathering to understanding and support'.[225]

As noted in the introduction to this thesis, I am primarily considering the criminal law. However, it is worth mentioning here some themes emerging from rare empirical research on therapeutic jurisprudence and victim/survivors of sexual violence, even though this was on the basis of non-criminal law actions. In a 1990s Canadian study, carried out by Bruce Feldthusen, Nathalie Des Rosiers, and others,[226] surveys and interviews were conducted with 87 victim/survivors who had participated in one of three types of proceedings that may have led to financial compensation: a civil trial; a government victim/survivors

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224 Ibid 332.

225 Ibid 332. Ultimately, as non-consent laws maintain gender divisions—the man as the subject who makes a sexual invitation, the woman as object—Diesen and Diesen would prefer Professor Catharine MacKinnon's formulation of rape law based on reciprocity, where it _should be asked not whether any violence was used or whether the woman had consented, but rather, –Was it equal?"': Ibid, 330. They do not make clear the therapeutic effects of this third formulation, but perhaps this could have broader cultural therapeutic ramifications; an interesting concept, but one not extrapolated here. The authors cite Catharine MacKinnon, (Paper presented at the conference _Rethinking Rape Law', Durham University, 2008).

226 In an early piece, Bruce Feldthusen wondered whether civil actions may be better alternatives to the criminal law. _The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' in David Wexler and Bruce Winick (eds) *Law in a Therapeutic Key* (1996) 845. He carried out a study with colleagues: Nathalie Des Rosiers, Bruce Feldthusen and Olena Hankivsky, _Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System' (1998) 4 *Psychology Public Policy and Law* 433; Feldthusen, Hankivsky, and Greaves, _Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' above n 140. The former article presents the results of the project research, and the latter discusses preliminary findings from surveys conducted with victims/survivors/survivors who had commenced either civil trial or victims compensation proceedings. This project built on an earlier article by Bruce Feldthusen in which he analysed a number of sexual assault matters that had been pursued under common law such as tort and battery: Bruce Feldthusen, _The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' (1993) 25 *Ottawa Law Review* 203. This was republished in David Wexler and Bruce Winick (eds) *Law in a Therapeutic Key* (1996) 845.

compensation process; or a compensation process for former residents of a particular children's home in Ontario, referred to as a 'Grandview healing package', and which was designed with therapeutic values in mind.[227] Ninety-eight percent of participants were women; information about Aboriginality was not collected in their study. The purpose of the study was to determine whether the proceedings were therapeutic, and if not, which aspects of the proceedings could be modified to provide for a more therapeutic experience. The authors made a number of recommendations for improving the therapeutic effects of all processes, with provision of full and accurate information about processes topping the list and underlying many other recommendations.[228] In conclusion, the authors stressed that 'therapeutic healing' is not just about achieving financial compensation, but 'is dependent on a procedure that does not further traumatize victims/survivors but rather values survivors' dignity, participation, and worth as human beings'.[229]

In greater specificity, the results showed that 84% of all participants had negative emotional experiences going through the relevant process and more than half had negative physical experiences.[230] Eighteen percent would not go through the relevant process if they could start again.[231] Comments ranged from: '[i]t changed my life. It gave me some assurances, it's made me a very strong person' [232] to: '[a]lthough at some level I felt validated ... in the long run the amount of stress wasn't worth it' [233] and even: 'I felt like I had been raped. I didn't come out feeling empowered'.[234] When asked if participating in the process changed their outlook on life, 36% of the civil litigants reported having a more positive overlook after the process, as did 42% of the compensation scheme participants, and 35% of the

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227 Interestingly, these three proceedings required some type of fault to be proven in order to gain financial compensation, although only in the case of the former was the compensation paid by the perpetrator: Feldthusen, Hankivsky, and Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' above n 140, 114.

228 Ibid 104–112, 115. The authors recommend further multi-disciplinary research on a range of matters, and were interested in a comparison between various options, including the option to do nothing.

229 Ibid 116.

230 The nature of these negative physical effects were not extrapolated further although there were a number of extracts from participants throughout the piece: Ibid 113.

231 Ibid 113.

232 Ibid 104.

233 Ibid 103.

234 Ibid 113.

Grandview healing package participants.[235] Just over a quarter of civil litigation participants still would recommend that process. More of those who went through the government compensation process would recommend that process (42%), and half of the Grandview healing package participants would recommend that process.[236] Perhaps this is a fair reflection of what the law can offer victim/survivors of sexual violence.

Assumptions of therapeutic benefits for victim/survivors are scattered throughout the literature surveyed in this section. These assumptions are not just an issue in the therapeutic jurisprudence scholarship on sexual violence: in the context of policies dealing with mandatory arrest in cases of domestic violence, Leonore Simon notes that therapeutic effects of such policies, while likely, are inferred.[237] I acknowledge that concerns have been raised around solely relying on 'evidence' in criminal justice policy development, with Arie Freiberg and WC Carson suggesting attention to what counts as evidence, encouraging consideration of factors such as emotions and beliefs, and emphasising the importance of dialogue with interested and affected parties.[238] This is commensurate with Barbara Hudson's approach to justice, discussed in the next chapter, which requires an engaged and meaningful dialogue with all those involved in a particular dispute. Yet this does not mean that attention should not be paid towards enhancing the evidence base for the therapeutic (and antitherapeutic) effects of legal interactions on victim/survivors of sexual assault. Currently, this is far too limited, and even more so with respect to Indigenous women.[239] A major issue, then, is that the literature surveyed in this section does not contribute much in the way of badly needed empirical evidence to guide reform. This is not necessarily a theoretical failing of therapeutic jurisprudence; rather, it may be an illumination of its

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235 Ibid 104.

236 Ibid 113. The authors note that it is difficult to compare the samples as the numbers are relatively small and each process had different purposes and constraints.

237 In full, she states: 'In describing arrest within the context of TJ, we must make inferences about the effects of policies and legal actor practice on the well-being of the victim. Cross-sectional data do not allow us to follow the victim over time, nor do the data contain variables that measure well being or iatrogenic effects. Consequently, we must make inferences about the effects of police behavior on victim well-being.': Simon, Ellwanger, and Haggerty, 'Reversing the Historical Tide of Iatrogenic Harm: A Therapeutic Jurisprudence Analysis of Increases in Arrests of Domestic Batterers and Rapists' above n 185, 317.

238 Arie Freiberg and WG Carson, 'The Limits to Evidence-Based Policy: Evidence, Emotion and Criminal Justice' (2010) 69 *The Australian Journal of Public Administration* 152, 157–161.

239 These shortcomings and the need to expand this evidence base is discussed in Ch 5 of this thesis.

unfulfilled potential, and a reason to heed Wexler and Winick's exhortation to undertake empirical research.

Any research into the therapeutic or antitherapeutic effects of the law needs to be carefully designed with a strong methodology; an area where the legal discipline, with its doctrinal focus, has lagged behind the social sciences. This is the point that I drew out from Roderick and Krumholz's contribution, above. The merits of different methods and methodologies have not been explored at length in the literature, and legal researchers may need to pay careful attention in conducting interdisciplinary research employing such tools. Moreover, future empirical research needs to be specifically targeted to enable the drawing of conclusions that are relevant to the regulation of this issue. Victim/survivors of sexual violence are not a homogenous group, and Indigenous women who have experienced sexual violence may have a different take on whether something is 'therapeutic' than a non-Indigenous woman who had been subjected to conduct that, on its face, may seem similar. The literature reviewed in this section has little to offer on this front. I am not suggesting that the effects of legal interactions always will be different for different women—rather, the point is that without the research it is unclear whether the effects will differ, and research should demonstrate with some precision which aspects of a process are therapeutic, and which are antitherapeutic and in need of reform. In other words, more research is necessary here, to test these assumptions.

In summary, the therapeutic jurisprudence work on sexual violence reviewed in this section provides several examples of how the law currently operates in a way that could be described as 'antitherapeutic'. A strength of therapeutic jurisprudence is how it provides a framework to analyse this, and the way that it emphasises wellbeing in what can be a particularly traumatic legal encounter. Therapeutic jurisprudence is also helpful in the way it allows consideration of the trial (and pre-trial) processes in sexual assault matters.

These strengths of therapeutic jurisprudence, though, need to be balanced against its normative limitations set out in the previous section. If a more transformative change project rather than 'tinkering' is necessary—and I argue it is—then there may be situations

in which victim/survivor interests may need to be elevated over other _justice values', such as efficiency or the autonomy of the offender, or there may need to be creative rethinking about conflict resolution in this area. The way that authors such as Kirchengast are so careful to ensure that a purported therapeutic tool such as the VIS fits within the status quo are practical examples of the normative limitations of therapeutic jurisprudence in an area where the law requires fundamental reform, as discussed throughout this thesis.

D Indigenous peoples

Some authors claim that therapeutic jurisprudence has strong parallels with Indigenous culture.[240] If it were so, then it would seem that therapeutic jurisprudence may be suited for Indigenous women who have been subjected to sexual violence—assuming, of course, that Indigenous culture adequately deals with the issue. However, the claims that therapeutic jurisprudence is rooted in, or is paralleled, in Indigenous culture are not explained anywhere in detail. Moreover, Indigenous groups the world over do not share a homogenous culture (nor, indeed, do Indigenous groups in Australia), and greater evidence is required before accepting such claims. This does not mean that the connection necessarily is tenuous, but rather that it remains important to consider whether therapeutic jurisprudence has the capacity to provide an adequate framework with respect to Indigenous women who have experienced sexual violence. Thus, in the same way that potential benefits of therapeutic jurisprudence are assumed for victim/survivors of sexual violence, many of the assumed benefits of therapeutic jurisprudence for Indigenous peoples require further investigation.

I address three further themes in this section. First, I note optimism around Indigenous sentencing courts, and then consider the emphasis on procedure in the Indigenous literature. I also note that consideration of intra-cultural conflict is missing from the therapeutic jurisprudence literature.

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[240] See, eg, Valmaine Toki, _Therapeutic Jurisprudence and Mental Health Courts for Maori' (2010) 33 *International Journal of Law and Psychiatry* 440, 443.

First, there is clear enthusiasm for problem-solving courts, and specifically the potential of Indigenous sentencing courts or tribal courts, to address Indigenous issues in an appropriate way.[241] Yet much of this problem-solving court literature does not deal with sexual violence, presumably because the jurisdiction of most Indigenous sentencing courts does not extend to sexual assault.[242] Specific advantages written of Indigenous sentencing courts is that they promote some combination of voice, validation, respect and self-determination—for offenders.[243] The literature is indeed preoccupied with Indigenous offenders, and in this thesis I am primarily interested in female Indigenous victim/survivors.

One partial exception is the work of Maori (New Zealand) scholar Valmaine Toki, who argues that therapeutic jurisprudence should inform the establishment of a domestic violence court, accompanied by a Maori legal system. Toki does consider Indigenous women and victims, although she is also primarily concerned with investigating rates of Indigenous offending rather than victimisation.[244] Toki favours therapeutic jurisprudence for the reason that she sees it as being able to coexist with Maori law, and she also argues that a significant advantage of therapeutic jurisprudence is its capacity to coexist with the current legal system.[245] This latter point is indeed practical, but if the existing legal response is problematic—as it is with sexual violence—I query whether fitting in with that system, without challenging the inherent limitations of that system, is really a virtue.

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241 See, eg, Michael King and Kate Auty, ‗Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30 *Alternative Law Journal* 69. Also note that the Australasian Institute of Judicial Administration Therapeutic Jurisprudence Clearinghouse has a page devoted to ‗Indigenous Issues and Indigenous Sentencing Courts': Australasian Institute of Judicial Administration, *Therapeutic Jurisprudence Clearinghouse—Indigenous Issues and Indigenous Sentencing Courts* (2011) <http://www.aija.org.au/research/australasian-therapeutic-jurisprudence-clearinghouse/indigenous-issues-and-indigenous-sentencing-courts.html>. Also see that a piece that contests the therapeutic jurisprudence basis for Indigenous sentencing courts, discussed in a later chapter of this thesis: Marchetti and Daly, ‗Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' above n 35. Valmaine Toki has also examined the therapeutic jurisprudence potential of mental health courts for Indigenous peoples: Toki, ‗Therapeutic Jurisprudence and Mental Health Courts for Maori' above n 240.

242 See, eg, *Criminal Procedure Act 1986* (NSW) s 348(2)(b) and Magistrate Shane Madden, *The Circle Court in the ACT—An Overview and its Future* (2007), 5.

243 See, eg, King, ‗Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' above n 35.

244 Valmaine Toki, ‗Domestic Violence and Women: Can a Therapeutic Jurisprudence Approach Assist?' (2009) 78 *Revista Juridica Universidad de Puerto Rico* 61.

245 Toki, ‗Are Domestic Violence Courts Working for Indigenous Peoples?' above n 35, 282.

I briefly address a critique of therapeutic jurisprudence in the problem-solving context: it has been suggested that it demands a changed judicial role, which infringes the separation of power doctrine.[246] Given the enthusiasm for Indigenous sentencing courts, this is worth addressing here. The Australian separation of powers doctrine is that the judicial arm of government, established by Chapter III and especially s 71 of the federal *Constitution*, is separate to the executive and legislative arms.[247] Judicial power only may be conferred on courts established under s 72 of the *Constitution* and that only judicial power may be conferred upon such courts.[248] The doctrine applies to both federal and state courts; the High Court's decision in *Kable v Director of Public Prosecutions (NSW)*[249] (*Kable*) established that state courts exercising federal jurisdiction enjoy some constitutional protection because the Australian court system is integrated in nature.[250] The issue is more complex than it seems at first glance, and the decision of the High Court in *South Australia v Totani*[251] indicates that this issue needs to be paid very close attention. In my view, however, this does not strike a fatal blow to the theoretical capacity of therapeutic jurisprudence. The Australian constitutional structure, of itself, does not prevent judges from paying attention to the wellbeing of those appearing before the court, but if this is a requirement with legislative basis, then it is necessary that any conferral of power to a court is compatible with the exercise of federal judicial power.[252]

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246 See, eg, Hoffman, _Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' above n 25.

247 *Holmes v Angwin* (1906) 4 CLR 297; *Attorney General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 540–541 (Viscount Simmons).

248 *R v Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 256, 296; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 512.

249 (1996) 189 CLR 51.

250 See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 114–115 (McHugh J). The *Kable* principle was affirmed recently in the decision of the High Court in *South Australia v Totani* (2010) 271 ALR 662.

251 *South Australia v Totani* (2010) 271 ALR 662.

252 See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 104 (Gaudron J), cited with approval in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 (Gummow J), 648 (Hayne J).

A second theme emerging from the Indigenous literature is the importance of process, and there is a neat fit here with a key strength of therapeutic jurisprudence.[253] S James Anaya is one of several Indigenous authors who strongly emphasise the importance of process in dispute resolution, a theme analogous to procedural justice in the non-Indigenous therapeutic jurisprudence literature.[254] Specifically, Anaya argues that the US Supreme Court has functioned in ‗an antitherapeutic role in the context of majority-minority conflicts'.[255] For Anaya, key to a successful legal process is its attendance to the following principles: the listening to and respectful treatment of ‗both majority and minority voices and viewpoints'; and the determination of the outcome ‗through negotiation and mutual accommodation rather than through a determination of a winner and a loser'.[256]

The process theme in therapeutic jurisprudence also is explored by Ambelin Kwaymullina, an Indigenous lawyer from the Pilbara in Western Australia, who has explained the difference between Indigenous and Western legal systems as follows:

> Indigenous law recognises the inter-connectedness and the inter-dependency of process and result. A wrong process can never lead to a right result. The process must itself sustain and renew the pattern of creation – for if it does not, the result that emerges at the end will be something that is less than creation, less than life, less than humanity. The process *creates* the result. …[257]

From a theoretical perspective, the emphasis on process (or procedural justice) is commensurate with Hudson's approach to justice, which looks at how justice is arrived at rather than merely its outcomes. Indigenous women are vulnerable to dual discrimination: like all Indigenous peoples in Australia, Indigenous women have experienced the historic

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253 See, eg, discussion above; also see Tyler, ‗The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' above n 202. This piece was republished in *Law in a Therapeutic Key*.

254 James Anaya, ‗The United States Supreme Court and Indigenous Peoples: Still a Long Way to Go Toward a Therapeutic Role' 24 *Seattle University Law Review* 229, 229. Anaya has also been the United Nations Special Rapporteur on the Rights of Indigenous Peoples since 2008.

255 Ibid. Anaya also argues that, for any jurisprudence to function in a therapeutic way for Native Americans, it ‗should include a recognition of the wrongful nature of historic events and the suffering those events have caused': Ibid 230.

256 Ibid 231. This observation was made in the context of a discussion on the Canadian Supreme Court case considering a Quebec succession, Anaya cites Professor Nathalie Des Rosier's work on the Quebec successionist dispute: Des Rosiers, ‗From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts' above n 116, 61–62.

257 Ambelin Kwaymullina, ‗Country and Healing: An Indigenous Perspective on Therapeutic Jurisprudence' in *Transforming Legal Processes in Court and Beyond: A Collection of Papers from the 3rd International Therapeutic Jurisprudence Conference 7-9 June 2006* (2006) 1, 2–3.

wrongs against their people; like all women in Australia, Indigenous women have experienced the discriminatory effects of the law because of their gender.[258] It is vitally important that the state—as expressed through the making, administration and upholding of the law—ensures that justice is not only done, but is seen and felt to be done. This is the case for all matters, although is especially important in those cases where there is a history of dispossession, suppression or vulnerability. Put simply, the way of reaching a particular outcome is important, although not to the exclusion of the outcome; the emphasis should be on the means *in relation to* the ends, and it is this that is envisaged by the founders' evolving conception of therapeutic jurisprudence.

As noted above, an interesting gap in the Indigenous literature on therapeutic jurisprudence is the lack of nuanced analysis on minority-minority conflicts—specifically, where Indigenous women are harmed by Indigenous men. Therapeutic jurisprudence scholars have touched on this issue in non-Indigenous contexts, for instance, in writing about 'battered immigrant women', Edna Erez and Carolyn Copps Hartley note that members of that vulnerable group may need to balance community inclusion with personal safety.[259] They do not, though, query the ability of therapeutic jurisprudence to deal with this balance. Bruce Arrigo is more damning, arguing that an epistemological dilemma of therapeutic jurisprudence is that it 'conceives of the public as an undifferentiated and homogenous whole' and 'denies individual and group differences'.[260]

This strikes at the heart of what is often accepted in the self-determination or Indigenous literature—that policy responses to Indigenous peoples must be grounded in the needs expressed by the community, rather than imposed 'top down' by government or other outsiders—but that the expression of the community's needs may not always reflect those of the most vulnerable within that group. This argument echoes a debate on the value of

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258 For an excellent critique of the gendered nature of contemporary Australian law, see the following well-regarded reports: Australian Law Reform Commission, *Equality Before the Law—Justice for Women: Part I* (1994); Australian Law Reform Commission, *Equality Before the Law—Womens Equality: Part II* (1994).

259 Erez and Copps Hartley, 'Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective' above n 185.

260 Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' above n 29, 37.

autonomy, criticised by some feminist theorists as reflecting male individual values at the expense of the more collective female experience, but defended by other feminist legal scholars as actually promoting women's interests.[261] It creeps into the discussion of Indigenous peoples in Australia: when King and Rob Guthrie suggest that a therapeutic jurisprudence framework with a particular emphasis on collective self-determination should have informed the Northern Territory Emergency Response/Intervention,[262] they do not engage with 'ambiguities and conflicts' between the legal rights of Indigenous women, children and men in the Northern Territory.[263]

I argue that, notwithstanding the context of colonisation, the harm considered in this thesis is not about the state (representing the majority) wronging an Indigenous group (the minority). Rather, it is about members of an at-times vulnerable minority who are subjected to a serious form of violence, at least sometimes at the hands of another member of that minority (and then potentially harmed again by the legal response on the part of the state). In Chapter 5 of this thesis, it is concluded that many Indigenous women who experience sexual violence are subjected to this violence by Indigenous male offenders, at least in matters that reach the attention of the legal system.[264] It is possible—if not probable—that both victim/survivor and offender share membership of the same group, at least broadly construed. In such cases, it is difficult to see how Kwaymullina's process of negotiation or mutual accommodation will necessarily be therapeutic for *all* members of that group, as the interests of victim/survivors may conflict with those of offenders. I discuss in Chapter 4 the different views of Indigenous women on the importance of community 'healing', but note

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261 See, eg, Robin West 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1, cf Martha Nussbaum, *Sex and Social Justice* (1999) 59, 62, 63; discussed in Meyerson, *Jurisprudence*, above n 151, 352–353. Nussbaum argues that autonomy in fact may enhance women's interests.

262 King and Guthrie, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' above n 173. The 'Northern Territory Emergency Response' (NTER) or 'Intervention' refers to the 2007 federal legislative response to a report detailing child sexual abuse in the Northern Territory: Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle—Little Children Are Sacred*, above n 51. Amongst other things, the NTER legislative package suspended the *Racial Discrimination Act 1975* (Cth), involved changes to the regulation of Aboriginal land, and instituted compulsory income management for persons living in certain communities and receiving social security benefits.

263 Such ambiguities and conflicts are considered in: Megan Davis, 'International Human Rights Law, Women's Rights and the Intervention' (2009) 7 *Indigenous Law Bulletin* 1.

264 See, eg, Indigenous Law Centre, 'Sexual Violence and Indigenous Victims: Women, Children and the Criminal Justice System—Research Brief No 1' (2010) 3.

here that an Indigenous woman may have no desire to repair a relationship with her perpetrator. Even if the violence took place in the context of a known relationship, that relationship may have been highly dysfunctional in the first place. Forcing her to engage in a reparative process may disempower her, leading in fact to an antitherapeutic result. Thus, even when focusing on correct _process', the focus should be squarely on what processes are in fact therapeutic for Indigenous women who interact with the law following an experience of sexual violence, with a consideration of what processes are appropriate in Indigenous culture as a secondary consideration.

In this section, I have canvassed several matters to do with Indigenous peoples and therapeutic jurisprudence. In summary, while it is often assumed that therapeutic jurisprudence may offer Indigenous peoples a better legal solution than that offered by adversarial justice, or that therapeutic jurisprudence may have some resonance with Indigenous culture, these claims do not critically engage with what it may mean to be Indigenous *and* female, Indigenous *and* harmed by another Indigenous person: although, of course, an intersectional and not mere _additive' approach is necessary.[265] Moreover, the literature does not address sexual violence experienced by Indigenous women, nor does it deal with the question of what may constitute justice for these women. It is to an examination of this that I turn in the following chapter.

IV CONCLUDING CHAPTER REMARKS

This chapter has revealed a gap in the therapeutic jurisprudence literature with respect to sexual violence experienced by Indigenous women. The therapeutic jurisprudence work on sexual violence does not engage with Indigenous women, the work on domestic/family violence does not engage with adult sexual violence, and the work on Indigenous peoples does not engage with victim/survivors. I situate this thesis in this gap, and in Chapter 5,

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[265] See discussion in Kimberle Crenshaw, _Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241; Larissa Behrendt, _Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal* 27.

undertake a detailed study of the nature, extent and legal response to sexual violence experienced by Indigenous women.

In this chapter I have shown that therapeutic jurisprudence has the capacity to expose the negative effects of the law on Indigenous women who have experienced sexual violence, although extensive empirical research is lacking. Therapeutic jurisprudence also has the capacity to emphasise the legal experiences of Indigenous women who have survived sexual violence, and perhaps contribute to understanding as to the law‘s defects in this area. These are important benefits.

I have made a number of further arguments in this chapter. The first is that therapeutic jurisprudence is a descriptive and normative theory. In stating that the law has an effect on the wellbeing of participants—whether therapeutic, antitherapeutic, or neutral—therapeutic jurisprudence is descriptive. It describes the effects of the law, and calls for empirical testing to prove its propositions. In addition, therapeutic jurisprudence has a twofold normative orientation in that it has an agenda as to what the law should look like and how it should operate; but that this agenda defers to existing justice values by not requiring therapeutic concerns to be weighted more heavily than other matters. I argue that it is the latter point which means that therapeutic jurisprudence is a non-ideal normative theory—it works within, rather than purports to contest, the status quo.

I have argued that therapeutic jurisprudence must address the theory issue because there is currently a disconnect between the potential of therapeutic jurisprudence, and some of the claims it makes about being able to deal with victim/survivors. Specifically, I have argued that cases where the interests of legal participants conflict rather than converge must be directly considered: cases currently actively avoided by therapeutic jurisprudence, which cannot offer much here because of its limited normative vision, situated as it is within the existing system. I argue that this normative curtailment should be revised to really make a difference for the _tough‘ cases such as Indigenous victim/survivors of sexual violence, a case where the current legal response is so flawed.

In the next chapter, I argue that _justice‘ is the strongest benchmark for a revised framework: justice is the standard so often appealed to by those within the law, and is particularly relevant here because it speaks to a need for inclusiveness which is currently lacking for Indigenous women who experience sexual violence, and who are often absent in the literature and policy-making about an adequate legal response to that violence. Also in the next chapter, I explain why I have adopted Barbara Hudson‘s justice as the standard against which I measure therapeutic jurisprudence—namely, because she has developed an innovative vision of justice that squarely addresses competing interests such as those in the _tough‘ case.

CHAPTER THREE: ASPIRING TO JUSTICE

I CHAPTER OVERVIEW

In the previous chapter, I made clear that therapeutic jurisprudence has a great deal to offer, but that in its current formulation, what it can offer in the 'tough' case studies where interests conflict is limited. The agenda of this chapter is to articulate the standard against which I consider therapeutic jurisprudence, and to suggest a framework which may be useful in ongoing conversations about its reform. Thus, I argue that justice should be used when assessing a therapeutic jurisprudence approach to the law. I argue that justice is an inclusionary concept that can provide an important measure of the adequacy of a therapeutic jurisprudence approach, particularly when considering how the law affects those in contemporary society who do not enjoy the characteristics of the most privileged, as is the case for Indigenous women. I argue that therapeutic jurisprudence does not have a clear vision of justice, and so turn outside therapeutic jurisprudence to ascertain what is meant by the concept.

I have found particularly fertile ground in the work of Barbara Hudson, who refers to justice as welfare (satisfaction of needs) or justice as self-actualisation (the freedom to follow one's own ends).[266] I draw primarily on Hudson's vision of justice explored in her 2003 work *Justice in the Risk Society,* in which she seeks to ascertain justice principles after observing that 'modernity's aspiration to justice is in crisis'.[267] In evaluating and borrowing from feminist, communitarian, postmodern and critical theory, Hudson radically reconstructs justice in a way that is applicable for contemporary pluralist societies. As the title of a 2006 article by Hudson suggests—*Beyond White Man's Justice: Race, Gender and Justice in Late Modernity*[268]—the themes explored in *Justice in the Risk Society* translate to

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266 Hudson, *Justice in the Risk Society*, above n 76, 14.
267 Ibid 151.
268 Hudson, 'Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76.

the case study in this thesis, Indigenous women who interact with the law following sexual violence.

II WHY JUSTICE?

A A key criterion

In this chapter, I explore Hudson's approach to justice in detail, and explain its value for the themes and subject matter explored throughout this thesis. First, I explain why I adopt justice as the extra-legal normative criterion against which I assess therapeutic jurisprudence. There is a special connection between law and justice. Justice is an external criterion against which the law is measured in popular discourse, and it is also internal to the law: it is one of the identified goals of the *justice* system, and is a value to which the law actively aspires and attempts to implement. Moreover, the relationship between justice and the women in the case study in this thesis is charged with *injustice*. The experiences of Indigenous women who experience sexual violence, often in an intra-cultural context, must be read at least in part against the backdrop of colonisation. Finally, as noted in the previous chapter, justice speaks to an inclusiveness which is currently lacking for Indigenous victim/survivors, too often absent in the literature and policy-making about that violence.

It is possible to assess the law, legal theories, or approaches to the law, in a variety of ways. One can ask whether the law is effective—is there compliance with the law, does it curtail deviant behaviour, and does it provide security for the vulnerable, or society more broadly? One also could ask whether a law is legal—was it made in accordance with the relevant legal and constitutional framework? One could ask whether the law operates in accordance with an ethic of care as articulated by Carol Gilligan[269]—is the law applied compassionately, and did the law makers turn their minds to the wellbeing of those that it may affect? Much therapeutic jurisprudence work is concerned with this question, and in a recent piece, David Wexler writes explicitly of therapeutic jurisprudence being concerned

[269] See, eg, Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (1982).

with an ethic of care.[270] There is, though, another question; one that is asked with surprising infrequency. One could ask whether the law exists or is implemented in accordance with justice. This final question in particular necessitates extra-legal analysis, considering matters outside of the existing legal order to decide whether a law is indeed legitimate. Whether a law, or legal approach, is *just* is a different question than whether a substantive or procedural law reduces crime, would be upheld by a relevant court, or negatively affects the wellbeing of a victim or offender. It is a deeper question that goes to the underlying values of those who make and interact with the law, a question that asks whether the law is *right*, whether the law was made or is implemented in accordance with a specific framework.

Why ask the justice question when assessing law, or a legal approach? Sometimes the law is not *right* even if it is *legal.* One need only look at the history of discrimination against Indigenous peoples in Australia since the time of British Settlement to find examples of effective and aberrant actions or discrimination sanctioned—at times, indeed, required—by the law. Another reason is found in the work of Jürgen Habermas, who sees the law as a key mechanism of social integration, the _means for keeping together complex and centrifugal societies that otherwise would fall into pieces'.[271] Habermas calls justice a _legitimating norm', or the reason why people obey the law, the institutions of which play a crucial social function.[272] In other words, while _justice' and _law' are not synonymous, these two concepts are intimately linked. The law is crucial for ensuring social order, and justice is of the highest influence in ensuring acceptance of the law.

A focus on justice allows us to go beyond the status quo, instrumental questions around _what works' and the rigid category of legality. A focus on justice allows moral and ethical considerations into an assessment of law, and invites us to envision a legal system respectful of equality and difference. This is relevant for all those touched by the law. Most

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270 Wexler, _New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence —Code" of Proposed Criminal Processes and Practices' above n 28, 1. See also Evans and King, _Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence' above n 37.

271 Jürgen Habermas, —Between Facts and Norms: An Author's Reflections" (1999) 76(4) *Denver University Law Review* 937, 937.

272 Hudson, *Justice in the Risk Society*, above n 76, 163.

importantly for this thesis, I argue that a focus on the criterion of justice speaks to the normative importance of including the voices and considering the interests of *all* those affected by and in relationship with others in a highly complex society. In this thesis, my gaze is set firmly on the Other, she whose interests are often rendered invisible. This means victims as well as offenders, the woman who is also Indigenous, and the Indigenous person who is also female. As explored in this chapter, Hudson's approach to justice brings to the forefront she who is elided by policy-makers and academics.

While concern for the wellbeing of those touched by the law may be relevant for the women in the case study in this thesis, as explored below and in later chapters, a focus on justice is relevant because it is a pre-eminent and constituent principle that is fundamental to the law: it is not merely equal with other values. My point here is not that other criteria are unimportant, but rather that justice is *crucially* important—and as discussed in the next section—underexplored in the therapeutic jurisprudence literature. I argue, therefore, that justice is a worthy criterion for the assessment of the law in the context of this thesis, and I use this criterion to consider the adequacy or worth of a therapeutic jurisprudence approach to the law affecting Indigenous victim/survivors of sexual violence.

B An underexplored consideration

Therapeutic jurisprudence is not as preoccupied with justice as other recent 'alternative' legal theories with which it enjoys frequent comparison, such as restorative justice. This is not to say that proponents of therapeutic jurisprudence can be taken to have ignored the justice implications of the movement—the views of Wexler and Winick, and other scholars who have touched on the issue, are considered later in this chapter. For the most part, though, those writing about therapeutic jurisprudence do not articulate what vision of justice is embraced, nor unpack the assumptions being made about justice.

When Wexler and Winick do engage with justice, it is to emphasise the minimal justice implications of therapeutic jurisprudence. Wexler and Winick have argued since the 1990s that any consideration of the therapeutic effects of the law does not lead to a requirement

that therapeutic considerations should be prioritised above existing ‗justice values'. For instance, in *Law in a Therapeutic Key* (1996), one of the early and still frequently cited therapeutic jurisprudence sourcebooks, Wexler and Winick introduce therapeutic jurisprudence by describing it in the following terms:

> Legal rules, legal procedures, and the role of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences, and that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values.[273]

This concept has been reiterated constantly over the years by Wexler and Winick (and others), with a few variations. Winick and Wexler emphasised early on that ‗we are *not* suggesting that therapeutic interests ―trump" other values'.[274] In his most recent volume, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008), Wexler underlines the importance of remaining ‗vigilant about so-called therapeutic goals not ―trumping" legal and due process considerations'.[275] Rather than articulate a clear vision of what justice is—and, importantly, should be—the founders of therapeutic jurisprudence took a reserved view, assuming that the values underpinning the existing legal order are sound, or at least not wanting to critically engage with them. The secondary literature is more expansionary, but the justice perspective remains incomplete.

My argument that therapeutic jurisprudence does not engage sufficiently with justice should not be read as a suggestion that therapeutic jurisprudence lacks innovation. Rather, the most interesting contribution from the therapeutic jurisprudence literature is not a claim made in explicit justice terms. It can be viewed as the introduction of health and wellbeing as legitimate considerations in developing and implementing the law. Here, I find the work by Warren Brookbanks informative: he makes a case for an ethic of care,[276] which is a phrase that has started to emerge in the therapeutic jurisprudence literature, with Wexler a

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273 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii. My emphasis.

274 David Wexler and Bruce Winick, ‗Patients, Professionals and the Path of Therapeutic Jurisprudence: A Response to Petrila' (1992) 10 *New York Law School Journal of Human Rights* 907, 908. Original emphasis.

275 David Wexler, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (2008) 45.

276 Brookbanks, ‗Therapeutic Jurisprudence: Conceiving an Ethical Framework' above n 135.

key proponent of therapeutic jurisprudence meaning lawyering and judging in accordance with an ethic of care.[277] I refer too to the work of Peter Bal, who delineates between Habermas' _substantive moral principles': justice and solidarity. Whereas *justice* involves equal respect and equal rights, *solidarity* may involve empathy and care for the wellbeing of our fellow human beings.[278] These are useful reminders that justice is a key criterion through which to approach any assessment of law.

Therapeutic jurisprudence introduces important considerations around health and wellbeing into a study of, and approach to, law: this reflects a valuable addition to legal considerations, but are not necessarily constituent of justice. Justice is not the sole criterion through which to assess the law, but it is a crucial one for the reasons articulated above, and it is an area that has not enjoyed sufficient attention in the therapeutic jurisprudence literature to date. If therapeutic jurisprudence does not unpack its assumptions about justice, I must go beyond therapeutic jurisprudence to consider the validity of its inferences, and consider to what vision of justice we should aspire, and what vision of justice should complement an understanding of the concepts that therapeutic jurisprudence introduces in relation to wellbeing.

As I explain later in this chapter, the theory of therapeutic jurisprudence suffers from a lack of normative clarity around justice. This is evidenced by the problem I exposed in the

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277 Wexler, _New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence ―Code" of Proposed Criminal Processes and Practices' above n 28, 1. Such references often are made without engagement with the extensive supporting (and critical) literature on this concept, such as the work of Frances Heidensohn who distinguished between ethics of justice and care. There is an extensive body of literature on this point, starting with the seminal work of Frances Heidensohn _Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice' (1986) 14 *International Journal of the Sociology of Law* 287. See also Guy Masters and David Smith _Portia and Persephone Revisited: Thinking About Feeling in Criminal Justice' (1998) 2 *Theoretical Criminology* 5. Note too the critical engagement with an ethic of care in the literature: for instance, Kathleen Daly has written that it would be _misleading' to assume that alternatives to existing criminal law and practice involve merely _reconstituting the system along the lines of an ethic of care': see Kathleen Daly and Julie Stubbs _Feminist Engagement with Restorative Justice' (2006) 10 *Theoretical Criminology* 9, 10; Kathleen Daly _Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice' (1989) 17 *International Journal of the Sociology of Law* 1.

278 The work of Peter Bal is discussed in Hudson, *Justice in the Risk Society*, above n 76, 175.

previous chapter, namely, that the theory cannot deal with conflicting interests of parties, which is a likely occurrence in criminal justice.

III THE WORK OF BARBARA HUDSON

A Why Hudson?

I have adopted Hudson as my guide in this thesis for several reasons. Her work represents an inclusive, and carefully considered, understanding of the process through which to resolve competing interests. Hudson is also interested in asking what justice should be, rather than focusing first and foremost on pragmatic considerations. As a philosopher and criminologist, her thinking is not limited by what could be achievable within the existing system. Such an aspirational vision provides a frame for the radical rethinking that is necessary in an area of serious legal dysfunction. The second reason is that Hudson's justice is deeply inclusive, and as noted in the previous chapter, any rethinking of the legal response to sexual violence must speak to those who are currently excluded from discourse, such as the Indigenous women in my case study.

It is relevant that Hudson considers the interests of individuals and any conflicting interests of the wider group within which that individual is located. Rather than shy away from difference, she places the _other' (the real, concrete, other) as central to her vision of justice. She is strongly influenced by the discourse ethics of Jürgen Habermas, and favours Seyla Benhabib's take on discursive justice, which involves a careful listening to the perspectives and claims of the concrete other in a deliberative democratic process, rather than trying to find a consensus.[279] This is relevant to my thesis for two reasons: firstly, because much Indigenous sexual violence takes place in the context of known and/or intra-cultural relationships, and secondly, because Indigenous women are so frequently absent from a broader discourse in this area. Hudson's necessary precondition to justice is that this legal participant becomes an equal collaborator. Again, the attraction of Hudson's formulation of justice is that, rather than emphasising the issues where interests converge,

[279] Ibid 124.

she squarely considers the complex situations where they do not. In so doing, she provides a potential way to navigate the protracted and complex conflict of the ‗tough' case.

Hudson writes that justice ‗has come to be almost synonymous with punishment'.[280] Justice has a far more expansive significance than this. For thousands of years there have been recorded disputes about the meaning of justice, conducted mostly by those holding the most privileged positions in various societies by virtue of their race, sex and class, amongst other attributes. I note this extensive tradition and its influence over current jurisprudential theory and practice, and my focus in this thesis is ascertaining principles foundational to justice in contemporary Australia. Hudson situates justice at the intersection of moral, political and legal philosophy, and she examines only the dimensions of this agenda relevant to justice in the contemporary era, as this is what is relevant to her project. I mirror this focus. As noted above, Hudson's ideas have broader application than the ‗risk society': in two pieces published since *Justice in the Risk Society*, she has examined justice ramifications for legal participants structured by gender and race,[281] and justice and citizenship in Brazil.[282] In this section, I primarily examine *Justice in the Risk Society*, as this is the extended volume in which Hudson develops her approach to justice.

B What is Hudson's justice?

Hudson's justice principles reflect a considered engagement with the work of Jürgen Habermas, updated with critical contributions from feminist and postmodern traditions. In the following sections, I give a brief explanation of the major theories of justice from which Hudson draws and synthesises. As I explain below, I have adopted Barbara Hudson's principles of *relationalism*, which means that justice should be alive to the relationships between individuals and groups, and how power plays and emotional connections may affect positions of parties; *reflectiveness*, which means that any decision-maker must pay

280 Ibid 203.

281 Hudson, ‗Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76.

282 Barbara Hudson, ‗Regulating Democracy: Justice, Citizenship and Inequality in Brazil' in Hannah Quirk, Toby Seddon and Graham Smith (eds) *Regulation and Criminal Justice: Innovations in Policy and Research* (2010) 283.

close attention to the specifics of a particular case, and not simply apply general rules to individuals, and *discursiveness,* meaning that justice requires constructive dialogue between parties, facilitating claims and counter-claims, and requiring the discussion to take place in a way that is not dominated by one party who enjoys a degree of socially sanctioned power outside the resolution process.[283]

Hudson rejects utilitarian approaches to justice, namely because the _limitations on the distribution and nature of punishment are entirely contingent on the preferences of the majority'.[284] This is particularly relevant for the case study in my thesis, which looks at a minority often rendered voiceless in law-making and its implementation: Indigenous women who have experienced sexual violence. As I explain further below, Hudson also rejects other post-liberal traditions such as communitarianism on the basis that it does not adequately deal with group dynamics. Communitarianism is a body of work which places value on the entity of a community, and focuses on the responsibilities that individuals have towards their community.[285] This has obvious relevance to the case study in this thesis, as much of the studied sexual violence takes place in the context of intracultural relationships, where conflicts are both gendered and racialised.

Hudson's principles of justice speak to the several themes explored throughout this thesis:

- The relevance of procedure, outcome and the relationship between the two;
- How to balance or otherwise negotiate the interests of individuals and the interests of groups in cases where these interests are not aligned;
- The central relevance of the _other', in this case the _structured' victim/survivor;

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283 Interrelated with this is *plurivocalism*: justice must acknowledge that contemporary society is a complex mix of cultures, genders, ages and people who may fit into other categories that affect the ways of understanding the world, and who must find ways of co-existing. Undergirding these principles is an understanding of justice as *rights regarding* in that it acknowledges that both individuals and communities have rights and that these should be protected. Hudson emphasises the first three principles in her later work. Hudson, _Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76.

284 Hudson, *Justice in the Risk Society*, above n 76, 26.

285 Ibid Ch 3.

- The preference of ideal theories or visions of justice over non-ideal theories (or what justice *should* look like, rather than working within the status quo).

Hudson's principles of justice are particularly relevant to the case study that I use in this thesis: Indigenous victim/survivors of sexual violence. Hudson's very approach is 'radical' in nature, in that she draws back from current (and often unarticulated) visions of justice to consider what 'would characterize a justice that has the potential to escape being sexist and racist'.[286] Her discursive and reflective justice principles speak to a just process as well as a just outcome, and the relational principle speaks to the role and rights of the individual vis-à-vis the group. Central to Hudson's vision of justice is an engagement with alterity or 'otherness' (which is where she parts ways with Habermas), and an insistence on engaging with the multiple voices of those who come into contact with the law—particularly relevant when considering the voices of Indigenous women, so often subsumed into the Indigenous group, or not considered in wider discourse at all. Hudson's work provides a concrete foundation for understanding and working with these themes, and thus provides a useful conceptual framework for my adoption in this thesis.

In this thesis, I am particularly interested in exploring what justice may look like for victim/survivors, for the reason that these legal participants are often overlooked in legal philosophical discussions to do with justice, and do not enjoy anywhere near as much consideration in the therapeutic jurisprudence literature as do offenders. Whilst this offender interest is also seen in Hudson's work, I do not read her as precluding a consideration of other perspectives. Indeed, at one point Hudson writes of Peter Bal and Willem de Haan, two scholars who have considered Habermas' discursive justice in the context of criminal justice, as urging 'equal participation of all parties, and claim that all perspectives (victim, offender, community) should be included in discourse'.[287] I turn to a deeper consideration of justice for victim/survivors in the following chapter of this thesis.

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[286] Hudson, 'Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76, 29.

[287] Hudson, *Justice in the Risk Society*, above n 76, 175.

Thus, my focus is on Hudson's approach to justice, for the reasons articulated in this section. But in order to do *her* justice, I need to first briefly discuss her understanding of the traditions upon which she draws.

IV HUDSON'S JUSTICE IN DETAIL

A Utilitarian and deontological traditions

Hudson writes that modern liberals still fall broadly within two main strands of liberalism, either utilitarian or deontological, and these inform approaches to justice today.[288] A review of Hudson's view on these traditions, therefore, is an essential grounding for a discussion of her more critical work. She writes that the central concern of utilitarianism is the promotion of the 'good', or happy, life for the greatest number. In his *Introduction to the Principles of Morals and Legislation* (1789), Jeremy Bentham saw happiness as the balance between the maximum of pleasure and a minimum of pain.[289] There is no *a priori* good; happiness is what people themselves value or desire.[290] If one will be sanctioned by the state for maximising one's pleasure, then one will minimise pain and modify behaviour in accordance with the rules, in turn minimising pain to others. Contentious matters for Hudson here are how to prioritise various pleasures, and importantly for the question of justice, how to balance one's own happiness with the happiness of others.[291] For Hudson, a crucial problem with utilitarian justice is:

> the *contingency* of liberty, and of individual rights. … These values will only be inscribed into the rules and institutions of a society if people really do desire freedom and security rather than more immediate or ephemeral goods.[292]

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288 Ibid 36.

289 Ibid 14.

290 Ibid 13.

291 Ibid 14. In particular, she writes that in *On Liberty* (1859) and *Utilitarianism* (1861), Mill tried to show that rights are aligned with utilitarianism through arguing that liberty is a condition of happiness, and that the only circumstances in which liberty should be curtailed is to prevent harm to others: Ibid 15.

292 Ibid 17–18. For Hudson, this is the case with respect to both act-based utilitarianism (where the balance of happiness and welfare is calculated for each action) and rule-based utilitarianism (where institutions and practices are designed to promote general wellbeing).

For Hudson, then, utilitarianism cannot adequately navigate the tension between utility and rights; it is unable to ‗offer adequate protection of each individual citizen against encroachments in the name of the good of society as a whole, or of the majority'.[293]

Hudson has greater sympathy for justice theories in the deontological vein, the second significant liberal tradition stemming from the Enlightenment era, which draws on Immanuel Kant's work in the *Critique of Pure Reason* (1781) and the *Critique of Practical Reason* (1788). Kant's interest lies with what is ‗right', rather than the ‗good' that is central to utilitarianism.[294] Kant's justice principles are ‗derivable from the categories of reason, rather than from any conditions of life in an actual society'.[295] In other words, Kant approaches justice by first ascertaining the *a priori* principles of that society. The ‗right' for Kant, writes Hudson, is the ability to exercise free will, rather than the substance or intention of that will.[296] Justice means that those expressing their will in relation to others must be able to do so ‗in accordance with a universal idea of freedom'.[297] Equal freedom thus underpins the Kantian categorical imperative, or universal law: all must be treated as ends and never as mere means (because all persons have equal freedom to determine their own ends); and secondly, each must only act if he or she could will that act to be universalised.[298]

Hudson reviews other scholars in the deontological tradition, and is particularly inclined to John Rawls' difference principle, developed in *A Theory of Justice* (1972). This requires that ‗social and economic inequalities are only justifiable to the extent that they are to the benefit of the least advantaged'.[299] This reflects Hudson's interest in all in society, and not just those who occupy majority or privileged positions, a perspective which also speaks to the experiences of the victim/survivors considered in this thesis. Hudson also appreciates

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293 Ibid ix.

294 Kant observed that people frequently want to do things that they do not do, and frequently are compelled to do other things that they do not want to do, and so he reasoned that pleasure-seeking cannot be the guiding principle of morality or justice: Ibid 12–13.

295 Ibid 11.

296 Ibid 11.

297 Ibid 11.

298 Ibid 12.

299 Ibid 21.

how Rawls' justice theory accommodates preferences external to those held by communities; here she refers to Ronald Dworkin's rights-based approach to equality in cases where, say, most community members are racially prejudiced.[300]

Yet, amongst other things, Hudson notes Dworkin's concern that Rawls privileges liberty over equality.[301] She also cautions that proponents of the penological derivation of deontological theory—the retributivist approach, which looks backward to punish the offender for what happened—assume _too readily that crime is a matter of freely willed choice, and it pays insufficient attention to the differences in circumstances under which choices are made.'[302] In this way, I think Hudson is hinting at a more complex understanding of the relationship between structure and agency. One of Hudson's greatest concerns with deontological approaches to justice is related to its assumed universability and the abstract Kantian _person of reason': she emphasises differences amongst people living in contemporary societies, whether these differences be related to gender, culture or religion, and concludes that:

> The perennial problems of liberalism, must, therefore, be reviewed in the light of a radical, fissured pluralism that calls into question even the _thin theory' of the good, and of understandings held in common, on which Rawls's theory rests.[303]

In inquiring more deeply into issues of membership of the _just' community, Hudson turns to other theories to underpin her more inclusive understanding of justice.

In summary, Hudson starts her quest for justice by examining utilitarian and deontological approaches to justice, but is dissatisfied with both, for different reasons. Therefore, she goes outside liberalism for a better approach.

B Shaking the liberal foundation

In reviewing the main critiques of liberalism levelled from twentieth century theoretical traditions, Hudson further clarifies the core issues that a new, radical and principled justice

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300 Ibid 22.
301 Ibid 22.
302 Ibid 31.
303 Ibid 37.

must address. She first analyses communitarianism, a body of work which places value on the entity of a community, and focuses on the responsibilities that individuals have towards their community.[304] In brief summary, communitarian positions take issue with the Kantian abstraction of the individual from his or her society. According to Hudson, scholars such as Alasdair MacIntyre

> [contrast] the *unencumbered self* of Kantian-Rawlsian liberalism with the *embedded self* of Aristotelian republicanism and contemporary communitarianism. The actual person, they argue, has a range of commitments (to family, to neighbours, to society, to religion, to colleagues) which structure their choices and form a bedrock of relationships.[305]

Hudson has sympathy for the communitarian ‗situated' self, and I agree that it makes sense that our decision-making takes place not in a vacuum, but ‗within a set of available rules, traditions, roles and relationships'.[306] However, Hudson ultimately does not support communitarianism, on the basis that critique is limited: in this school of thought, values arise within communities, so there is ‗no possibility of legitimate critique of a community's values and traditions arising outside of that community'.[307] Even within communities, there are limitations on critical engagement, as communitarianism does not address the issue of how to protect the individual from the wishes of a potentially repressive majority.[308] This critique of communitarianism is a familiar one: like utilitarianism, it has an inability to protect minority interests, when these do not align with those of the majority. This issue of whether communities serve all members is mirrored in the more critical Indigenous literature discussed in the next chapter, and I agree with Hudson's critique, adding to it the concern that communitarianism effectively privileges the wishes or preferences of a powerful few, or those who utilise violence or other forms of domination over more physically vulnerable community members.

Feminist critiques of liberal justice theories and institutions offer more for Hudson: given that the vast majority of victim/survivors of adult sexual violence are women, I pay close attention to this body of work. Hudson sees some overlap of themes between the feminist

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304 Ibid Ch 3.
305 Ibid 95.
306 Ibid 95.
307 Ibid 102.
308 Ibid 103.

and communitarian literature—in particular, the notion of the situated self, and the dilution of abstract reason.[309] Many feminists, though, share Hudson's reservations about the potential and actual repressiveness of communities, and the _othering' that is part and parcel of communitiarianism—you are either in the community, or outside it.[310] Hudson notes criticism of Gilligan's ethic of care on this basis: an ethic of care may fall prey to a group's version of morality, and so care should remain secondary to impartiality.[311] Many feminists also critique the way that strands of liberalism overlook difference, and in so doing, many feminists reject the universal or transcendental subject as formulated in many liberal philosophies.[312] There is, of course, divergence between feminisms, as there is between liberalisms. One such distinction is between identity and difference feminists, and the rejection of the universal subject by the latter; another is what must follow such a rejection.[313] For difference feminists such as Seyla Benhabib and Iris Marion Young, identifying the masculine nature of the universal subject does not require the rejection of Enlightenment thought completely, as

> only philosophical traditions rooted in universalist values can generate the necessary critical evaluation of existing ideas and institutions of justice, and show the way to reform which is likely to be effective because it is not based on totally alien or unknown traditions.[314]

Hudson writes that Benhabib and Young explore the extent to which and how the universal tradition must be reformed to speak to the experiences of women and others.[315] Benhabib sees principles of universal moral respect and egalitarian reciprocity as being important and worthy of protection; she also follows Kantian justice traditions in prioritising the right of these values, or procedure, over the good, or outcomes.[316] Yet, Benhabib's issue with the liberal universal subject is that it assumes that _one voice can speak for all, rather than all must have a voice'.[317] Hudson writes positively of Benhabib's preference for an _interactive

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309 Ibid 108.
310 Ibid 108.
311 Ibid 122. Here, Hudson cites the work of Lawrence Blum, who in turn investigates a dispute between Lawrence Kohlberg and Carol Gilligan: see Lawrence Blum, _Gilligan and Kohlberg: Implications for Moral Theory' (1988) 98 *Ethics* 472.
312 Hudson, *Justice in the Risk Society*, above n 76, 111, 129.
313 Ibid 111.
314 Ibid 109.
315 Ibid 110.
316 Ibid 126.
317 Ibid 124.

universalism‘; one where the ‗generalised other‘ of liberalism becomes the ‗concrete other‘.[318] Those holding a range of—sometimes conflicting—demands and aspirations from each other and the universal subject constitute the ‗concrete other‘.[319] This is particularly relevant for me, given my take on the heterogeneous Other considered in this thesis. Hudson builds on this further in terms of discourse ethics and her take on Habermas‘ discursive justice, discussed further below. Hudson also cites with approval here Young‘s embracing of a plurivocal justice: the universalist values to which Young subscribes include self-expression and self-determination through participation.[320]

According to Hudson, feminists influenced by post-structural traditions, such as Judith Butler and Drucilla Cornell, see difference as so fundamental that critique of existing justice institutions and values ‗must restrict itself to historical, social and culturally specific claims‘,[321] although Butler agrees that there may be ‗contingent universals‘.[322] For Hudson, Cornell frames justice as an (important) aspiration only,[323] and Butler sees Benhabib‘s ‗concrete other‘ as trapped in liberalism‘s logic of identity.[324] Hudson writes that:

> Post-structuralist feminists insist on the constant fluidity and perpetual reconstitution of identity, so that the self and other who relate to each other will not bring a fully formulated identity to the encounter: identity, commonality and difference will emerge during the encounter, they are contingent on the encounter.[325]

To this, Hudson adds the insights of Angela Harris, who reminds us that there are not only two subjectivities, male and female; the experience of the white middle class woman must be unpacked to allow the perspectives of, for instance, black women.[326]

Hudson is greatly influenced by feminist perspectives on justice. She prefers to see the ‗subject‘ as embodied and gendered, agreeing that the universal subject means that ‗the

318 Ibid 125.
319 Ibid 125.
320 Ibid 128.
321 Ibid 110.
322 Ibid 137.
323 Ibid 134.
324 Ibid 130.
325 Ibid 136.
326 Ibid 141.

concepts on which philosophies of morality and justice are based are also masculine'.[327] She acknowledges the insights of Butler, Cornell and Harris and writes that, whether engaging with the law as offenders or victims, women must be treated as different from men and from each other.[328] In what may be a weakness, Hudson does not resolve the competing elements of feminist ontologies. She revisits postmodern affirmations of the justice ideal in her final formulation of her justice principles, discussed in the next section. Yet she does not clearly articulate the implications of, nor reject, the poststructural fluid identity raised by Cornell and Butler. This is one (rare) area where I do not entirely follow Hudson's line of reasoning. Hudson does not want to "throw the "baby" of reflexive, freedom, cherishing liberalism out with the "bathwater" of the masculine false universalism of the transcendent subject'.[329] But perhaps Hudson has not explored (deeply, at least) Cornell and Butler's critical engagement with liberal traditions, and this marks an area for my future research.

In summary, Hudson concludes her examination of communitarian, feminist and post-structural traditions in favour of discourse ethics and Benhabib's interactive universalism. Perhaps this is sufficient, although it would have been helpful for Hudson to more clearly articulate here why she is inclined to this perspective, and what she does and does not accept from the postmodern tradition. Regardless, the reconstruction of post-liberal justice values and institutions, to which Hudson next turns, is grounded in her analysis of liberal justice traditions and their critics. In the next section, I explain how Hudson brings these themes together with her understanding of Habermas' work, and formulates her justice principles.

C Hudson's justice reconstruction

Having examined these important critiques of liberal justice traditions, Hudson turns to the mighty task of reconstructing justice. The central plank of her approach is the discursive justice theory of Jürgen Habermas, who situates the subject in her social context whilst

327 Ibid 121.
328 Ibid 142.
329 Ibid 124.

remaining committed to a form of universalism.[330] Hudson is attracted to Habermas' continued commitment to Enlightenment ideals of rights, equal respect and equal liberty, and she finds in his discourse ethics a way to defend and support these values. The main themes of Habermas' discourse ethics, as it relates to justice, involve his preference for communicative rationality (is it morally right?) over instrumental rationality (is it effective?), and his understanding of truth as synonymous with justice.[331] According to Hudson, Habermas' communicative rationality is a schema through which _rules and procedures [can] be democratically validated and thus attain legitimacy'.[332]

Hudson is not wholly comfortable with Habermas' emphasis on truth finding through consensus. Even while he has engaged with the concerns of Benhabib and other feminists, Hudson's main concern is that Habermas leaves the Other unincorporated in his vision of justice,[333] and it is on this point that Hudson returns to postmodernism to support her development of new justice principles. In particular, she draws on the ethics of alterity developed by Emmanuel Levinas, which in turn informs—albeit differently—the work of scholars such as Jacques Derrida and Jean-François Lyotard. According to Hudson, these scholars focus on the essential polarity of liberal philosophy, based at it is on the logic of language: something is only reasonable if another thing is unreasonable, for instance; something is only good if something else is bad.[334] It is not an accident, then, but rather a _constitutive principle of liberalism to divide people, at home and abroad, into the civilised and the barbarians'.[335] The problem with this, for Hudson, is that liberalism is concerned with justice only for those on the _positive' pole, justice for only the civilised, or _those who meet the criteria for reasonable citizenship'.[336] Contrary to this, a postmodern ethics sees

> the Other, the recipient or target of an action, at the heart of morality. Postmodern ethics is an ethics of alterity, postmodern justice is a justice of alterity rather than a justice of

330 Ibid 176.
331 Ibid 153.
332 Ibid 152–153.
333 Ibid 175.
334 Ibid 181.
335 Ibid 183.
336 Ibid 183.

> fairness; it is a substantive justice of ethical attention to the Other rather than a procedural justice of distributive fairness.[337]

Hudson sees the ethics of alterity as going some way towards resolving the dilemma of *how* to

> give a respectful, attentive hearing, accepting our responsibility to respond with justice, to the incomprehensibly outsider narrative, to the stories of those we react to as irrational, bizarre, hostile, perhaps monstrous, and of course risky?[338]

An ethics of alterity underpins a radical rethinking of justice, one that starts with difference.[339] An ethics of alterity is one concerned with moral responsibility to the Other, which is logically prior to the self.[340] For Levinas, this responsibility does not depend on reciprocity: rather, ‗[r]esponsibility to Otherness is the beginning, the foundation of the moral relationship, not something that derives from it'.[341] Hudson sees an important principle of justice emerge from this ethics: that of a ‗dæp' equality, where all have equal claims regardless of behaviour or difference.[342] In practice, a judge (or other third party) is responsible for negotiating such rival claims.[343] Hudson also sees this playing out in the practical context of human rights, a concept which she values highly for its universalism: here, she writes that a ‗Levinasian uncoupling of rights and responsibilities is needed to restore security and justice to their full meanings'.[344] For me, this seems to be a way to link rights and justice discourse in a meaningful way. Hudson foregrounds the importance of rights in her discussion of the Other and restorative justice, arguing in particular that:

> Discursive justice—whether restorative justice or formal criminal justice reconstructed to give voice to victims and offenders, witnesses and advisers representing a wider range of standpoints—may be able to help ameliorate the first problem I suggested faces risk society, the demonization of fellow members of society who perpetrate routine harms which, even though they are condemned, can be comprehended. It is difficult to see, however, how it can secure justice for those whom, for whatever reason and in whatever way, we do not recognise as our fellows. To do justice to the ultra-Other, we need to put rights at the centre of our models of justice.[345]

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337 Ibid 194–195.
338 Ibid 201.
339 Ibid 194.
340 Ibid 195.
341 Ibid 195.
342 Ibid 196.
343 Ibid 196.
344 Ibid 225.
345 Ibid 213.

Hudson also is inclined to Lyotard's adoption of the concept of reflective justice, which draws in part from Kant's *Critique of Judgment* (1790). An individual (aesthetic) judgment is made notwithstanding the existence of other, broader systems.[346] For Hudson, the application of this in the criminal justice context requires being able to apply general rules in specific circumstances. Perhaps again as a weakness, Hudson does not discuss this extensively, but this theme comes up in her principle of reflective justice.

Hudson's attraction to Levinasian ethics and sympathy to postmodern critiques does not mean she is not committed to discursive justice, but rather that she approaches it in a different way. Hudson's discursive justice must be supported by the principle of plurivocalism, where the Other is a constant presence and whose voice always must be heard. It requires, however, _at least some comprehension of the other's point of view'.[347] As noted, Hudson is particularly partial to Benhabib's take on discourse ethics, which involves sensitively listening to and engaging with the myriad perspectives and claims of the concrete other in a deliberative democratic process, rather than trying to find a consensus or even pretending to be impartial or trying to find the legitimating voice of reason.[348] Benhabib's concrete other holds appeal for Hudson because it reflects the reality of the wide range of views in a society and encourages the participation of all those holding these views. It also holds appeal for me, as I ask in this thesis to what extent therapeutic jurisprudence is able to speak to those who do not enjoy the characteristics of society's privileged in terms of race, class and gender when interacting with the legal system.

In this way, Hudson attempts to marry the reconstructive justice work of Habermas, Benhabib and Young with the elements of postmodern critique that she finds most compelling—although in endorsing elements of both, I would again caution that perhaps Hudson does not fully resolve contradiction between aspects of these philosophical approaches, and I suggest this is an area for further inquiry. She appears to try to give practical application to working with difference in criminal justice through endorsing Nancy Fraser's typology of difference: specifically, there are those differences which are

346 Ibid 199.
347 Ibid 212.
348 Ibid 124.

desirable and should be generalised (such as female _caring'); those differences which should be merely seen and acknowledged; and those which should be eradicated (such as racism).[349] This does not appear to be fully thought through. There is more work to do in terms of delineating what is and is not accepted within an ethics of alterity—such as when to reject any manifestations of the third type of difference—and how any adjudication of this is played out. This notwithstanding, Hudson's analysis and synthesis of such a wide range of philosophical views on justice remains extremely valuable, and for the most part extremely compelling.

D Summary of Hudson's Approach to Justice

The _equilibrium of justice', for Hudson: _entails openness of discourse for claiming redress for harm done and for promulgating policies to prevent future harms, balanced by strong commitment to universal, inalienable, human rights'.[350] The principles that she sets out to further that aim—all committed to the principle of equal respect—are as follows:

- ***Relational*:** justice must take account of relationships between individuals, groups and communities;

- ***Discursive*:** it must allow claims and counter-claims, critiques and defences of existing values to be weighted against each other in undominated discourse;

- ***Reflective*:** justice must flow from consideration of the particulars of the individual case rather than subsuming unique circumstances under general categories.[351]

Hudson also includes the following two discrete principles in *Justice in the Risk Society,* but she does not include these in her later work, perhaps because these are subsidiary

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349 Ibid 206.

350 Ibid 225.

351 Ibid 206. See also the emphasis on these principles in Hudson's 2006 piece: Hudson, _Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76.

principles: plurivocalism of discursiveness, and rights-regarding as an underlying principle. I note here, though, that in 2003 she did also identify the following principles:

- ***Plurivocal*:** it must recognise and hear the different voices of the plurality of identities and social groups that must have their claims met and find ways of living together, in radically pluralist contemporary societies; and

- ***Rights regarding;*** justice involves defending the rights of individuals and of communities.[352]

In the following sections, and particularly in Chapter 6, I explore further why the critiques of liberal theory that are canvassed by Hudson, and the new justice principles proposed by her, are relevant for my study of therapeutic jurisprudence and victim/survivors.

[352] Hudson, *Justice in the Risk Society*, above n 76, 206.

IV THERAPEUTIC JURISPRUDENCE AND JUSTICE

A Introduction

To date, Hudson has not expressly considered therapeutic jurisprudence.[353] In Chapter 6 of this thesis, I consider in detail how a therapeutic jurisprudence response to Indigenous victim/survivors of sexual violence measures up against Hudson's approach to justice—before I do that, I explore a number of matters relevant to Indigenous victim/survivors in Chapters 4 and 5. Some preliminary comments on the work of those going beyond the existing boundaries of therapeutic jurisprudence are pertinent here, though, as this work raises issues explored in greater depth throughout this thesis.

Most critics of therapeutic jurisprudence are concerned with arguing that therapeutic jurisprudence is not constitutionally sound[354] (for instance, whether it transcends the separation of powers fundamental to the United States—and to a lesser but still important extent, the Australian—constitutional system), or that therapeutic jurisprudence approaches are ineffective[355] (for instance, doubting whether the law truly does or is capable of having the positive effects on participant health and wellbeing in the way claimed by proponents of therapeutic jurisprudence). In other words, critics of therapeutic jurisprudence tend to assess it in accordance with criteria internal to the law, or are most interested in its instrumental value. As noted above, supporters of therapeutic jurisprudence tend to underscore its legality or efficacy, claiming that it does not disturb existing justice values or focusing entirely on the contribution made in relation to wellbeing. Dale Dewhurst, is one exception here, and I consider his thoughtful contribution further below.

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353 Hudson has written about the relationship between her approach to justice and restorative justice, which she sees as holding up better in theory rather than practice: see Chapter 7 of *Justice in the Risk Society* (2003).

354 See, eg, Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' above n 25.

355 See, eg, Samuel Brakel, 'Searching for the Therapy in Therapeutic Jurisprudence' (2007) 33 *New England Journal on Criminal and Civil Confinement* 455.

B The original school

In this section, I consider the vision of justice embodied by the founders of therapeutic jurisprudence. There are only brief glimpses into how the founders of therapeutic jurisprudence initially conceived its philosophical foundation, and Wexler and Winick did not comment on this point after the 1990s. Initially, therapeutic jurisprudence was seen to have a deontological grounding.[356] Deontology is associated with Kantian justice, and is interested in the intentions, duties and rights of individuals. In 1995, Christopher Slobogin suggested that Winick had inadvertently veered off into consequentialism, a charge which Winick appears to have accepted in *Therapeutic Jurisprudence Applied* (1997).[357] In 1999, Ken Kress argued that therapeutic jurisprudence is a hybrid consequentialist and rights-based theory because it considers consequences of the law together with individual values such as autonomy.[358] In brief, consequentialism, a form of utilitarianism, is associated with effects, outcomes and maximising the ‗good'. In a foreword to a 2003 book edited by Dennis Stolle, Wexler and Winick, Stolle states that therapeutic jurisprudence takes a ‗quasi-utilitarian approach to jurisprudence'.[359] The ‗utilitarian' component is because therapeutic jurisprudence asks ‗how can the law maximize therapeutic outcomes'.[360] The ‗quasi' element is because therapeutic jurisprudence does not require such outcomes to be sought over other outcomes. This remark is significant because it appears in a foreword to a collection co-edited by the founders of the theory; it may mark a shift in what they accept

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356 David Wexler ‗Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship' in David Wexler and Bruce Winick (eds) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996) 597, 610. Note that the reference to deontology was brief, and was made in the context of drawing a comparison between therapeutic jurisprudence and the ‗New Public Law' scholarship of Professor Edward Rubin.

357 Slobogin, ‗Therapeutic Jurisprudence: Five Dilemmas to Ponder' above n 128. Slobogin is supportive of the concept of balancing therapeutic values with ‗other individual-centered interests and the interests of society': Ibid 215. However, in concluding that he is a ‗TJ-symp' but also that therapeutic jurisprudence may ‗support paternalistic results', Slobogin may in fact support a justice view more consequentialist than deontological in nature: Ibid 218. See also Bruce Winick, *Therapeutic Jurisprudence Applied* (1997) 11.

358 Ken Kress, ‗Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory' (1999) 17 *Behavioral Sciences and the Law* 555, 558–559.

359 Dennis Stolle, ‗Introduction' in Dennis Stolle, David Wexler and Bruce Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) xv.

360 Ibid.

about its jurisprudential basis, although this is my speculation, as this was not examined in depth by the founders of the theory.

In an earlier chapter I suggested that the founders' formulation of therapeutic jurisprudence is extremely careful not to disrupt existing justice values. I flesh out that argument in this section. There is some slippage in the literature with respect to the relationship between therapeutic consequences and these justice (and other) values or considerations. At times the language of Wexler and Winick appears to indicate that therapeutic considerations themselves comprise justice values: for instance, Winick wrote in one of his final publications that therapeutic jurisprudence asks that, 'when consistent with other justice values, that law's potential for increasing the emotional well-being of the individual and society as a whole be increased'.[361] At other times, therapeutic considerations appear to be considered *additional* to justice. For instance, Wexler has written that, amongst other things, therapeutic jurisprudence

> wants us to see whether the law can be made or applied in a more therapeutic way so long as **other values,** such as justice and due process, can be fully respected.[362]

While subtle, this slippage is indicative of some vagueness around the relationship between therapeutic jurisprudence and justice on the part of the founders. There also is little extrapolation in the literature as to what therapeutic considerations are competing *against*, or in other words, what 'justice values' therapeutic jurisprudence purports not to threaten. Wexler and Winick indicated early on that these values include due process, and other values such as 'individual autonomy, integrity of the fact-finding process, community safety and efficiency and economy'.[363] Some values are explored more deeply: for instance, in one paper, Winick analysed the value of individual autonomy.[364] For the most part though, justice (and other) values are referred to only in brief, including in Wexler's most

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361 Bruce Winick 'Therapeutic Jurisprudence and Victims of Crime' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (2011) 3.

362 David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125, 125. My emphasis.

363 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii.

364 Winick, 'On Autonomy: Legal and Psychological Perspectives' above n 132.

recent work noted above, where he mentions ‗due process' and ‗legal system goals' before moving onto a more practically-oriented study.[365]

Wexler and Winick do not tell decision-makers how to carry out any balancing of values, factors or considerations.[366] This is intentional, and Wexler reiterated this at an international gathering of therapeutic jurisprudence scholars in Puerto Rico in March 2012.[367] Both urge therapeutic jurisprudence advocates to pursue situations where there is overlap between therapeutic and other values, with Winick exhorting therapeutic jurisprudence advocates to pursue a convergence approach.[368] The closest that Winick, at least, came to modifying this was in relation to Kress' suggestion that a therapeutic jurisprudence approach can resolve value conflicts through employing a process of ‗maximising balancing' amongst conflicting values; to find creative, win-win strategies, which allow for one interest or value to be weighted more heavily than others.[369] As this ‗friendly amendment' to Winick's convergence thesis was accepted by Winick in a personal email communication to Kress,[370] it may be accepted as an explanation of how therapeutic jurisprudence should deal with value conflict scenarios. However, the balancing act proposed by Kress is expressed in still very broad terms, and does not take the situation of interests or values that relate to a particular participant much further than previously; it allows only for some values to be weighted more heavily than others, and not for the privileging of values relating to specific participants. Moreover, it does not query the

365 Wexler, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice*, above n 275, 45.

366 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii. My emphasis.

367 International Therapeutic Jurisprudence Workshop, Department of Law, University of Puerto Rico, 7–9 March 2012. I participated in discussion at this workshop.

368 Winick, *Therapeutic Jurisprudence Applied*, above n 357.

369 Kress draws on unpublished work of Simon Mount in arguing that there are four methods of resolving value conflicts that are relevant in therapeutic jurisprudence contexts: binary balancing (winner takes all); trade-off balancing (a zero-sum game where A takes what B loses); balancing to find an optimum mixture (where bits of all factors are taken to make the best outcome); and maximizing balancing (where obtaining as much as possible from the relevant values): Arrigo, ‗The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' above n 29. Kress, ‗Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory' above n 358, 587, fn 127.

370 Kress asserts that Winick accepted this ‗friendly amendment' to his convergence thesis in a personal email to him: Kress, ‗Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory' above n 358, 587, fn 127.

justice values with which therapeutic jurisprudence should be balanced, nor does it consider whether the balancing act itself is legitimate.

There is very little implicit or explicit consideration in the therapeutic jurisprudence literature around whether the justice values to which it refers are indeed valid. One of the only pieces on this point is by Bruce Arrigo, whose radical critique of the legitimacy of therapeutic jurisprudence, considered below, is rarely cited in the therapeutic jurisprudence literature.[371]

Wexler has recently stated that, at the time of developing therapeutic jurisprudence, he and Winick were conscious that the law and economic movement was criticised for its exclusive focus on efficiency. Hence, Wexler and Winick were careful to ensure that therapeutic jurisprudence was not criticised for its exclusive focus on therapeutic aims.[372] Even though one of the main critiques against therapeutic jurisprudence has always been that it infringes existing values, such as the separation of powers and due process,[373] Wexler and Winick intended their contribution to legal scholarship to be a more modest *recognition* of the importance and relevance of wellbeing as a criterion worthy of consideration, without infringing other values. This is made clear in the above quote from the introduction to *Law in a Therapeutic Key*. Wexler and Winick's original project was not to challenge the normative framework of the law, nor to question the validity of the existing legal order. In a footnote to a recent article, Wexler indicated that the normative dimension of therapeutic jurisprudence was not static:

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371 In part, this may be because Arrigo relies on highly theoretical explanations, and in the therapeutic jurisprudence community, there is a great deal of pride taken on the accessibility and practical application of concepts and writing.

372 Personal communication with David Wexler, 6 August 2013.

373 See, for instance, Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' above n 25; Christean, 'Therapeutic Jurisprudence: Embracing a Tainted Ideal' above n 25. Hoffman has stated that, '[t]rue to their New Age pedigree, therapeutic courts are remarkably anti-intellectual and often proudly so': Ibid.

> The normative side of TJ is still being worked out, but, for now, suffice it to say that, even as a field of inquiry, there is a ‗soft' normative element in the sense of suggesting that emotional consequences are interesting, important and ought to be explored.[374]

Yet the key assumption of therapeutic jurisprudence with respect to justice still is that the existing ethical foundation of the law is fundamentally sound: at most, Wexler and Winick are concerned with inserting the legitimacy of considerations related to health and wellbeing into the balancing act, and at the least, therapeutic considerations are situated *outside* of justice.

C A new relationship with justice?

It should not be assumed that Wexler and Winick have the final word on what therapeutic jurisprudence actually is, nor as Wexler's note above suggests, that even they intended it to be static. Indeed, a (sometimes implicit) widening of justice claims can be found in the secondary literature. Perhaps this widening is on the basis that later waves of therapeutic jurisprudence scholars have become frustrated, or concerned, with its limitations, and are looking for a way to take it further. In this section, I provide a brief overview of the work of scholars who *have* engaged, even implicitly, with therapeutic jurisprudence and justice—and then I turn to the work of Dale Dewhurst, whose work is most closely aligned with my question.

Over the years, there have been a few critiques of the way that therapeutic jurisprudence deals with conflicts with other values, although not always in explicit justice terms: in 1999, John La Fond argued that therapeutic jurisprudence ‗must develop a normative philosophy and rhetorical strategies for responding to a law whose goal *is* expressly antitherapeutic'.[375] There have been a handful of constructive suggestions on some amendments to therapeutic jurisprudence, although not all consider a normative framework based on justice (and none on an innovative vision of justice). In 2002, Robert Madden and

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374 David Wexler ‗From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' above n 158, fn 3.

375 John La Fond, ‗Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy' (1999) 41 *Arizona Law Review* 375, 413.

Raymie Wayne suggested that therapeutic jurisprudence should adopt a social work framework,[376] a call echoed in a 2005 piece by Susan Brooks, on the validity and importance of social work values in clinical legal training.[377] Neither of these suggestions were taken up by the founders of the movement or explored in the literature. In 2009, Astrid Birgden touched on the justice question in the context of punishment of offenders. She argued that therapeutic jurisprudence should adopt a human rights framework to ensure offender autonomy.[378] In ascertaining what normative framework should be adopted by therapeutic jurisprudence, Birgden was interested in *balancing* deontological and consequentialist punitive approaches to punishment of offenders.[379] Again, the main thrust of Birgden's article remains unexamined in the broader therapeutic jurisprudence literature. Further, I argue that Birgden still works within the status quo, by referring to the two main liberal traditions of deontology and utilitarianism (with consequentialist theories of punishment derived from the latter). As discussed at length earlier in this chapter, more than a balancing of these two major liberal traditions is required for a meaningful justice for all legal participants, especially those who are Other.

Reiterations and variations as to what justice values are may be found in the broader therapeutic jurisprudence literature: Robert Schopp identified individual liberty as an important value,[380] concluding with encouraging further consideration of the potential conflict between the individual liberty and therapeutic values,[381] and King and Batagol noted that therapeutic jurisprudence is concerned with minimising negative and promoting positive effects on wellbeing, 'particularly when associated' with justice system goals.[382] The relationship between these therapeutic and non-therapeutic values and goals, therefore, remains vague.

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376 Madden and Wayne, 'Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model' above n 143.

377 Brooks, 'Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities' above n 143.

378 Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' above n 27, 43, 45.

379 Ibid 47.

380 Robert Schopp, 'Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law' (1993) 11 *Behavioral Sciences and the Law* 31, 31.

381 Ibid 45.

382 King and Batagol, 'Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' above n 169, 407.

There are plenty who are dissatisfied with the failings of the criminal legal system—and, as discussed in the introduction to this thesis, there is a particularly strong groundswell of dissatisfaction with the criminal response to sexual violence. There is a tendency to hold up therapeutic jurisprudence as a potential method for addressing the failings of the current criminal legal system. In 2011, Nigel Stobbs tentatively suggested that therapeutic jurisprudence may herald a new juristic paradigm beyond the non-adversarial model.[383] Stobbs' piece is at least partly descriptive, while others are more prescriptive. For instance, a recently published collection of essays on victims and therapeutic jurisprudence is indicative of some grander aspirations around what justice may mean for victims.[384] In that volume, Erez and others write of enhanced victim participation in the existing system in recent decades, concluding that _to completely eliminate onerous experiences for victims, the legal system would have to abolish its adversarial justice principles'.[385] While suggesting this is unlikely to happen, there is a strong sense that the authors of that piece would prefer such a development: indeed, that they would see this as the highest application of therapeutic jurisprudence for victim/survivors.

Michael King, a proponent of Indigenous sentencing courts in Australia, argues that these courts draw on therapeutic jurisprudence principles *and* that such courts can deal with the deeper causes of Indigenous offending.[386] Assuming that Indigenous sentencing courts are involved with such a radical change project, such courts do not operate consistently with therapeutic jurisprudence as construed as a non-ideal theory, or one that essentially works within the status quo. With respect to this, it is interesting that Elena Marchetti and Kathleen Daly reject a therapeutic jurisprudence basis for Indigenous sentencing courts, perhaps indicating an acceptance the founders' definition of therapeutic jurisprudence.

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383 Stobbs, _The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' above n 144.

384 Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011).

385 Edna Erez, Peter Ibarra & Daniel Downs _Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective' in Erez et al (eds) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011) 15, 37.

386 King, _Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' above n 35, 133.

They argue that Indigenous sentencing courts have an explicit ‗political agenda for social change in race relations' and that this goes beyond the claims of therapeutic jurisprudence.[387] While radical justice claims for Indigenous sentencing courts are made by many, what is most interesting to me here is that King is another therapeutic jurisprudence advocate who does not see any theoretical problem in using therapeutic jurisprudence to promote deeper justice aspirations.

Every two years, a week-long therapeutic jurisprudence ‗mini conference' is held as part of the International Law and Mental Health conference, with the most recent such ‗mini conference' taking place in Amsterdam in July 2013. For the first time, the Amsterdam Conference involved a panel on the theory of therapeutic jurisprudence. One of the participants on that panel was Dale Dewhurst, who has been a lone voice in raising the justice issue at previous conferences. Dewhurst does engage directly with the justice question in relation to the comprehensive law movement (CLM). The CLM movement comprises multiple ‗vectors' such as restorative justice, problem solving courts and therapeutic jurisprudence. As noted in the introduction to this thesis, Susan Daicoff sees the ‗vectors' of this movement as all moving ‗towards a common goal of a more comprehensive, humane, and psychologically optimal way of handling legal matters'.[388] Dewhurst suggests that currently the discussions in the CLM field

> are actually going on at three levels. There is the applied level of ‗legal practice,' a higher theoretical/ideological level of ‗legal theory,' and the highest meta-theoretical level of ‗legal order.'[389]

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387 Marchetti and Daly, ‗Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' above n 35, 443. They also state: Whereas Indigenous sentencing courts ‗have political aspirations to rebuild and empower Indigenous communities, court staff and Indigenous offenders, and by changing the way justice is achieved in the ―white" court system to better reflect Indigenous knowledge and values': Ibid 442. Note that Marchetti and Daly also argue that the philosophy of restorative justice differs from the jurisprudence of Indigenous sentencing courts.

388 Susan Daicoff, ‗The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement' in Dennis Stolle, David Wexler and Bruce Winick (eds) *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (2000) 465, 466–467. Daicoff suggests that the other vectors include preventive law, procedural justice, restorative justice, facilitative mediation, transformation mediation, holistic law, collaborative law, creative problem solving, and specialised courts: Ibid. This was cited by Winick and Wexler in *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) 106. See also Susan Daicoff & David Wexler, ―Therapeutic Jurisprudence" in Alan Goldstein (ed), Handbook of Psychology: Forensic Psychology (2003), 561.

389 Dewhurst, ‗Justice Foundations for the Comprehensive Law Movement' above n 37, 465.

Dewhurst argues that the CLM debates do not engage with the meta-theoretical normative level—but it is essential to clarify the philosophical foundations of the CLM. In particular, he argues, scholarship in therapeutic jurisprudence currently takes place at the first two levels: that of legal practice standards, and at the level of system goals. Both of these levels are internal to the law.[390] Dewhurst is in favour of further exploration of the third level, or extra-legal considerations, for the CLM more generally, and he is exploring Aristotlean natural law virtue ethics theory in relation to this.[391] In indicating that an Aristotlean approach is a desirable one for therapeutic jurisprudence, Dewhurst has written that

> an Aristotelian natural law virtue theory puts legal systems and alternative dispute resolution vectors in their proper place as a means to the end of promoting human virtue and happiness.[392]

I note that Dewhurst's work is still in an exploratory phase, but I express some initial reservations.[393] I note that virtue ethics still gives rise to issues around how to determine what is 'good'. For me, the biggest question remains: how to guarantee the rights of the individual when her interests, or methods of pursuing these interests, differ from those of the majority? Notwithstanding this, I find Dewhurst's work to be important because he is pushing forward the debate on therapeutic jurisprudence and justice.

Finally, I note the critique by Bruce Arrigo, who assesses therapeutic jurisprudence against anarchist theory as well as critical and radical feminist theory. Arrigo's conclusion is damning: that therapeutic jurisprudence is unable to deliver justice. He takes issue with the emphasis given to procedural, rather than substantive, justice in the therapeutic jurisprudence literature. His rejection is on the basis that, amongst other things, procedural justice assumes the legitimacy of law, and Arrigo rejects the law as a legitimate forum through which to seek justice.[394] I disagree that the law *per se* is illegitimate; like Hudson, I

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390 Dewhurst, 'Justice Foundations for the Comprehensive Law Movement' above n 37.

391 Personal communication with Dale Dewhurst, 17 July 2013 and 7 August 2013.

392 Dewhurst, 'Justice Foundations for the Comprehensive Law Movement' above n 37, 472.

393 A recent Australian piece also noted the congruence between virtue ethics and therapeutic jurisprudence, although the authors did also note that 'while a TJ practitioner and a virtue ethicist are often in agreement, they are fraternal rather than identical twins'. I did not read the authors as fully accepting the sole connection between virtue ethics and therapeutic jurisprudence: Evans and King, 'Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence' above n 37, 717.

394 Arrigo, 'The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime' above n 29, 28.

query whether existing legal system norms are in line with better aspirations to justice, but I am more optimistic about the capacity of the law to be at least one vehicle through which justice claims may be pursued. Nonetheless, some of the issues raised by Arrigo, such as the way that therapeutic jurisprudence privileges procedure over substance, and whether the law (at least, as it currently is founded and operates) is legitimate, are taken up in this thesis. He touches too on feminist concerns to do with knowledge and identity, although not as thoroughly as Hudson, and I also consider these issues in greater depth in Chapter 6 of this thesis.

What to make of this secondary literature? The views of these proponents do not fit within the vision of therapeutic jurisprudence developed by Wexler and Winick. Is therapeutic jurisprudence in the process of evolving or transforming into a broader approach to law and justice, one not anticipated or intended by its founders? Or, is this literature representative of a misunderstanding of what therapeutic jurisprudence really is or can achieve? Is it the ~~"f~~eel-good" language of therapeutic jurisprudence that has attracted those who are (in my view, justifiably) dissatisfied with the current legal system to align with therapeutic jurisprudence? And does the genuinely kind and inclusive atmosphere of the therapeutic jurisprudence community—with the emphasis on support rather than criticism—act to its normative detriment, in inviting in and even encouraging grander claims and visions without engaging with the theoretical ramifications of these?

What I pay most attention to in this section is the very fact of divergence between the relationship between therapeutic jurisprudence and justice on the part of the founders and on the part of those who follow in their footsteps. Amongst the continually expanding therapeutic jurisprudence literature I also wonder why there is such little direct engagement with the question of justice.

I also am interested in *why* therapeutic jurisprudence does not have a unitary and coherent theory of justice. Perhaps it is no surprise that there is divergence in the therapeutic jurisprudence community: from its early days, it was a broad movement, inviting the contribution and involvement of scholars and practitioners from multiple perspectives and

jurisdictions. If one aspiration for therapeutic jurisprudence was for it to have broad relevance and influence, then its tolerance for pre-existing values with which it may conflict means that it has increased application. On this reading, a lack of a theory of justice is not an oversight: it is an imperative for therapeutic jurisprudence's holding of a passport, to afford its entry into 'the mainstream'—an explicit project of Wexler and others[395]—and into other jurisdictions. Another, more latent, reason for the lack of a justice theory may be related to the fact that therapeutic jurisprudence considerations are not (yet) widely accepted or understood in the broader legal profession, and so therapeutic jurisprudence is somewhat defensive: there is sometimes a defensiveness in the literature, a sense of non-conformism. On this point, perhaps it is telling that in the United States the proponents of therapeutic jurisprudence generally sit outside the establishment, are not at the highly ranked law schools and are not published in the top law reviews. In this way, therapeutic jurisprudence feels like the outsider who looks in on the action; its request to play sweetened by its promise not to disrupt the game.

I also suspect that the lack of an articulated justice theory is because most of those writing about therapeutic jurisprudence have inherited the theory allergy manifest in the therapeutic jurisprudence community. As discussed in the previous chapter, it is fashionable to start a therapeutic jurisprudence publication with an insistence that therapeutic jurisprudence is not a theory, and then carry on without acknowledging any implicit assumptions on the part of the author. Even if the proponents of therapeutic jurisprudence say that it is not a theory, or its founders say that it does not disrupt justice values, this is not the end of the story. In this section, I have looked more carefully at what therapeutic jurisprudence actually *is* and have observed that in some way at least some of its proponents do engage with justice. However, taken as a whole, therapeutic jurisprudence suffers some normative confusion with respect to the concept of justice, and there is a particularly interesting and unexamined divergence between the justice vision of Wexler and Winick, and many others who have followed in their footsteps.

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395 David Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' (2012) *Arizona Legal Studies Discussion Paper* No 12–16. See also Michael King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts" (2010) 19 *Journal of Judicial Administration* 133.

V CONCLUDING CHAPTER REMARKS

In this chapter, I have argued that justice is a key criterion through which to assess the legitimacy or adequacy of an approach to the law. In introducing considerations to do with health and wellbeing into the law, the founders of therapeutic jurisprudence have always been very clear that it does not intend for such considerations to be privileged over existing values. Therapeutic jurisprudence is not, and has never been, interested in exploring the legitimacy or adequacy of existing justice values: it takes these as written. Thus, therapeutic jurisprudence positions itself within the existing justice paradigm, whether or not this is explicated. Most frequently, this is assumed, although Dewhurst is an exception in his attempt to describe a meta-theoretical framework for therapeutic jurisprudence in justice terms.

It is also the latter point which gives rise to important implications for justice, especially the form of justice envisaged by Hudson. In this thesis, I argue that the founders of therapeutic jurisprudence did not develop a theory of justice *other than* implicitly accept the existing mainstream adversarial justice paradigm—which admittedly on one reading may be sufficient to constitute a justice theory, although hardly a critical one. Secondly, a review of the secondary therapeutic jurisprudence literature reveals that some scholars in the therapeutic jurisprudence community have a grander vision of justice, and indeed, that these scholars see therapeutic jurisprudence as a vehicle through which to further this vision. The most important finding of this chapter is that there is ample scope to consider therapeutic jurisprudence in relation to justice, and specifically, assess therapeutic jurisprudence in accordance with the criterion of justice. This is a task to which I turn my full attention in the penultimate chapter of this thesis.

As discussed in the previous chapter, there is a problem with this. I argued that therapeutic jurisprudence must address the theory issue because of the disconnect between the potential of therapeutic jurisprudence and some of the claims it makes about being able to deal with victim/survivors. Specifically, I have argued that cases where the interests of legal participants conflict rather than converge must be considered head-on: cases currently

actively avoided by therapeutic jurisprudence, which cannot offer much here because of its limited normative vision, hooked as it is to the existing system. I go further, arguing that this normative curtailment should be revised to really make a difference for the ‗tough' cases such as Indigenous victim/survivors of sexual violence, a case where the current legal response is so flawed, as I discuss further in Chapter 5.

In this chapter, I have reviewed secondary contributions to the therapeutic jurisprudence literature and justice, namely that of Dewhurst, but also note that I am not convinced as to Dewhurst's proposed direction. I have suggested that an assessment of therapeutic jurisprudence should be carried out in accordance with an innovative approach to justice: a principled and inclusive approach that aspires towards equality in contemporary pluralist societies. That a more aspirational approach to justice is necessary is demonstrated by the case study in this thesis, which exposes latent problems with current legal approaches to sexual violence in considering issues related to gender, race, power and victim/survivorhood. Thus, I argue that Hudson's analytical synthesis represents a more creative and far-reaching conception of justice. Her aspirational justice principles move beyond the deontological or utilitarian liberal divide in a principled and innovative way. Hudson's approach speaks to the experience of the female, black Other, but it bears more general relevance for contemporary society, which comprises a multitude of voices and perspectives that can no longer be ignored.

In the next chapter, I have listened to the voices of victim/survivors—and particularly Indigenous victim/survivors of sexual violence—to find out what justice means to these women.

CHAPTER FOUR: JUSTICE FOR WHOM? VICTIM/SURVIVORS

I CHAPTER OVERVIEW

In the previous chapter, I concluded that Barbara Hudson's approach to justice provides a strong basis for the assessment of a therapeutic jurisprudence approach to the law. The next question, the one I address in this chapter, is: justice for whom? The purpose of this chapter is to underscore the relevance of victim/survivors, investigate the justice needs and wants of victim/survivors, and situate these justice aspirations within the conceptual framework informed by the work of Hudson. I start with a critical examination of the concept of the 'victim', drawing out three relevant themes from the victimology literature. I then provide an overview of the current legal role of victim/survivors in a legal context, discuss the near invisibility of Indigenous victim/survivors of sexual violence in the literature, and argue that a focus on the aspirations of victim/survivors is warranted.

I then proceed to analyse the aspirations of victim/survivors who interact with the criminal legal system following an experience of sexual violence. I find that the victimology and sexual violence literature reveals that the justice aims of victim/survivors of sexual violence are not as retributivist as political rhetoric and public opinion may suggest. The literature reveals three key aims of victim/survivors are related to both process and outcome. These are (i) validation, whether on the part of legal actors or the perpetrator, that sexual violence happened and the woman was harmed; (ii) an ability to speak, in her own way, about what happened and the harm she suffered as a result (or freedom to abstain from participating); and (iii) having a degree of control, or at the very least knowledge, about what would happen next in the legal proceedings, and what the outcomes may be (for instance, a prison sentence or reconciliation).[396]

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396 See, eg, Herman, 'Justice From the Victim's Perspective' above n 65; Mary Koss, 'Restoring Rape Survivors: Justice, Advocacy and a Call to Action' (2006) 1087 *Annals of the New York Academy of Sciences* 206; Haley Clark, '"What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' [2010] *Australian Institute of Family Studies—Family Matters* 28.

These aims echo the three key therapeutic jurisprudence principles of validation, participation and knowledge, noted in Chapter 2 with respect to how to practically effect therapeutic outcomes for legal participants. Importantly, there is close connection, between what therapeutic jurisprudence offers and what the literature indicates are the wants and needs of victim/survivors in legal interactions. The key issue with therapeutic jurisprudence comes back to what I identified in Chapter 2: that it is unable to deal with the circumstances in which the interests of victim/survivors conflict with the perpetrator. As explored below, this may also be the case when victim/survivor aspirations conflict with the views of legal decision-makers, one potential scenario when sexual assault experienced between Indigenous peoples is addressed by the Anglo-Australian criminal legal system.

Therefore, I explore how the victim/survivor aspirations that I identify here may be served by Hudson's innovative justice principles. The relevance of Hudson's approach becomes even clearer in the final section of this chapter, which constitutes an analysis of how justice may mean something different for Indigenous victim/survivors of sexual violence. Too often, the interests of victim/survivors are framed in terms of the status quo, or to what extent the current system can be modified to accommodate justice _needs'. I have argued that Hudson's intention of re-imagining justice is amongst her most valuable contributions: in asking what an ideal justice may look like, Hudson's work welcomes the question of the aspirations of victim/survivors, and opens a space for a creative consideration of how to negotiate conflicts.

II ISSUES EMERGING FROM THE LITERATURE

In this section, I discuss four key relevant issues from the vast victimology literature on conceiving victimhood, to provide depth and nuance for my discussion and conclusions on victim/survivors in this thesis. The first matter relates to the victim/perpetrator dichotomy, specifically how boundaries between these categories may be blurred in practice. The second is how social context is an important factor when analysing Indigenous victim/survivors. Thirdly, I explore the concepts underpinning the language of _victim' and _survivor', and the reasons why I have adopted the terminology of _victim/survivor',

highlighting the critical realist victimology of Sandra Walklate. Finally, before turning to a detailed consideration of the aspirations of victim/survivors in the following section, I provide important reasons for my focus on victim/survivors in this thesis, beyond the gap mentioned in the introductory chapter.

A Victim 'contribution'

The lack of a bright line between the categories of victim and perpetrator has long been acknowledged in the victimology literature. In his seminal 1948 text on victims, Hans von Hentig suggested that the law's demarcation of a relationship into two categories—the one who acts, and the one acted upon—may differ from the 'sociological and psychological quality' of a situation.[397] For von Hentig, these two categories may be blurred, with the person 'acted upon' involved to varying degrees in the precipitation of a particular act, in accordance with victim precipitation typologies.[398] While the work of von Hentig and his contemporaries represented a step away from the offender orientation in the criminological literature, a key criticism of this (positivist) victimology is that its typologies lead to the development of concepts of the 'ideal' victim—or 'innocent', deserving, or passive victims—as distinguished from those victims involved in their own downfall and not deserving of sympathy and support. Even if victim precipitation does not necessarily involve a causative dimension, in practice, it is usually deployed to accord blame and responsibility to the victim.[399] A serious ramification of an insistence upon lack of any victim 'contribution' to sexual violence was vividly explained by Kristin Bumiller, who writes that, because the sexual assault trial turns on a woman's "freedom from guilt", a woman who accuses such violence in court is effectively 'forced into the role of an "angel" who must defend her heavenly qualities after her fall from grace'.[400] The literature on

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397 Hans von Hentig, *The Criminal and His Victim* (1948) 383–384.

398 Ibid.

399 For instance, Erin Pizzey's controversial work on why women enter and remain in violent relationships has been contested by feminist scholars, so much so that Pizzey left the United Kingdom as a result of death threats. Interestingly enough, Pizzey occupies a central place in the feminist narrative, frequently reported as opening the first women's refuge in the 1970s: Rock and Downes, *Understanding Deviance*, above n 48, 298. See also Erin Pizzey, *Prone to Violence* (1982).

400 Kristin Bumiller, 'Fallen Angels: The Representation of Violence Against Women in Legal Culture' 18 *International Journal of the Sociology of Law* 125, 126. In the context of Australian Indigenous women who kill their intimate partners, Stubbs and Tolmie sound a cautionary note against simplistic

Indigenous victim/survivors of sexual assault, noted in the next chapter, documents how legal actors have deployed myths related to alcohol consumption and government entitlement to hasten this fall from grace. Thus, Indigenous victim/survivors of sexual violence may need to contend against discriminatory racial and gendered stereotypes.

B The importance of social context

Sandra Walklate underscores the relevance of social context and structure when considering victim/survivors, in a way that is particularly relevant to my case study, which considers Indigenous victim/survivors.[401] The term ‗structure' is used to indicate various definitional categories such as race, gender, class and age. Of course, we are all structured in the sense that we could be slotted into different categories in such a taxonomy: in this thesis, I am most interested in the categories which too often fall towards the lower end of hierarchies of privilege. I investigate the legal response to victims who are ‗structured' in terms of having a particular race and gender: Indigenous women. I do not consider class as a separate category in this thesis, but I note the relevance of Indigenous women featuring disproportionately on measures of disadvantage in Australia.[402] In considering how crime data indicates the reality of structured victimhood, Walklate writes that it is rare to find a victim who sits within a single category of potential discrimination such as being female, or being of a low socio-economic standing.[403] In other words, victims are often Indigenous *and* female, poor *and* female, disabled *and* poor *and* female, and so forth. Notwithstanding this, responses to crime seem to respond to the victim as structurally neutral (without engaging with intersectional issues).[404] Given the absence in the literature of the adult Indigenous woman who has experienced sexual violence, I argue that this victim has the

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constructions of these women as either passive victims or rational agents exercising free will, noting that ‗the relationship between a background of having been abused and criminal offending may be complex and multivalent': Julie Stubbs and Julia Tolmie, ‗Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women' (2008) 41 *Australia and New Zealand Journal of Criminology* 138, 141.

401 See, eg, Walklate, *Imagining the Victim of Crime* (2007), 50–55, 133.

402 Australian Government Productivity Commission, *Framework for Reporting on Indigenous Disadvantage* (2006) <http://www.pc.gov.au/gsp/indigenous/consultations2006/report>.

403 Walklate, *Imagining the Victim of Crime,* above n 401, 133.

404 Walklate, *Imagining the Victim of Crime*, above n 401, 133.

characteristics of difference which constitute the Other who is so emphasised in Hudson's approach to justice.

In cases involving Indigenous female victims, a nuanced appreciation of cultural realities is necessary. As discussed in Chapter 5, much sexual violence experienced by Indigenous women takes place in the context of known relationships, and while not all known relationships involve Indigenous men, the data indicate that many do. As noted in the introduction to this thesis, I do not attempt a detailed anthropological exploration of the causes of violence in Indigenous communities, but it is relevant to note here that some Australian Indigenous women attribute this violence to colonisation. For instance, Aileen Moreton-Robinson writes of the deleterious effects of '_patriarchal white sovereignty',[405] and Irene Watson has written of how '_grandmother's law' in traditional Aboriginal culture was disturbed by the ongoing effects of colonisation:

> With the white-washing or the making invisible of women's law came the transferred western values, which left Aboriginal women little opportunity to represent their law stories, or hold in place our own meanings and functions of the law.[406]

Larissa Behrendt has written that Indigenous women's interests are linked to those of Indigenous men, arguing that '_[t]he experiences of minority women have as much to do with racism as sexism'.[407] For Behrendt, racism is perpetrated as much by '_white' women as men, and Behrendt argues that Aboriginal women's '_alienation from the feminist movement … will not change until the oppression of black women is acknowledged'.[408]

Kyllie Cripps and Hannah McGlade go further in teasing out specific causative factors for Indigenous family violence. They group these factors into two groups: factors in the first group relate to colonisation and may contribute to violence, and factors in the second group

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405 Aileen Moreton-Robinson, '_Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15 *Cultural Studies Review* 61, 77.

406 Irene Watson, '_Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' (2007) 26 *Australian Feminist Law Journal* 95, 100. See also 107.

407 Behrendt, '_Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' above n 265, 35.

408 Ibid 42. See also Huggins, *Sister Girl–The Writings of Aboriginal Activist and Historian*, above n 3.

relate to issues faced by Indigenous peoples which _also contribute to high levels of distress that can in turn lead to violence'.[409] Specifically,

> Group 1 factors include colonisation: policies and practices; dispossession and cultural dislocation; and dislocation of families through removal. Group 2 factors include: marginalisation as a minority; direct and indirect racism; unemployment; welfare dependency; past history of abuse; poverty; destructive coping behaviours; addictions; health and mental health issues; and low self-esteem and a sense of powerlessness.[410]

In giving insight into the causes of Indigenous violence, Cripps and McGlade imply an interweaving of interests between Indigenous men and women, criticising _western' legal responses to Indigenous family violence which _focus on the separate needs of victims and perpetrators, with a particular focus on a criminal justice response'.[411] Yet do the above factors outlined by Cripps and McGlade, many of which are shared experiences of Indigenous men and women, lead to shared interests between Indigenous women who are harmed and the perpetrators of that violence? While there may be shared needs and preferences, the paucity of research on the experiences of Indigenous women in the legal system means that it is difficult to understand the nature of interconnected interests for Indigenous men who harm and Indigenous women who are harmed—and whether and how such experiences are consistent for all Indigenous peoples in various contexts.

Other critical insights into the relationship between the processes of colonisation and violence are found in the Canadian Indigenous literature. Native Canadian woman Emma LaRocque is highly critical of typologies of Aboriginal justice that suggest that the goals of Aboriginal peoples differ from those of non-Aboriginal peoples. LaRocque queries on whose Aboriginal traditional practices are the much-touted mediation style practices at Hollow Water[412] based, writing that, _[i]n effect, much of what is unquestionably thought to

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409 Kyllie Cripps and Hannah McGlade, _Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' (2008) 14 *Journal of Family Studies* 240, 242.

410 Ibid 242. See also the discussion in McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights*, above n 79. I note that some of the _Group 2' factors are shared by other non-Indigenous women who experience sexual violence.

411 Cripps and McGlade, _Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' above n 409, 243.

412 The alternative justice program at Hollow Water in Canada was set up following revelations about sexual abuse in the community: for more information see Berma Bushie, *Community Holistic Circle Healing* (1999) International Institute for Restorative Practices <http://www.realjustice.org/articles.html?articleId=474>. The program has had a positive response amongst many, although others raise concerns: See discussion in this chapter below, and also Cripps

be tradition is actually syncretized fragments of Native and Western traditions which have become highly politicized because they have been created from the context of colonization.'[413] Similarly, research with Canadian Native women on restorative justice practices indicates concern with romanticising Aboriginal culture.[414] Interviews with these women repeatedly underscores the silencing that goes on in Native Canadian communities when victim/survivors speak out about violence, with a powerful reflection on the reality of what accompanies a revelation of violence in her community: _Don't rock the boat unless you're getting off. And if you're not getting off, get ready to be pushed off'.[415]

While this research draws on the Canadian experience, and Australian Indigenous women may contest the applicability of such statements for their experiences, I argue that the point as to the nature of the condemnation of victims in communities who speak out is relevant in the Australian context. Indigenous writer Melissa Lucashenko argues that _Black women' can talk about state injustice but _[t]alking about the bashings, rapes, murders, and incest for which Black men themselves are responsible … is seen as threatening in the extreme'.[416] While victim/survivors who are both black and female undoubtedly may be subject to dual discrimination—a point demonstrated in the detailed case study in this thesis—there must be great care when falling back on political claims to do with self-determination in the context of gendered violence. LaRocque is cautious about self-determination arguments that find racism to be more fundamental than sexism, arguing these _serve to mask the power which the new elites enjoy in decision-making in negotiations, in their interactions with the instrument of the state. Not surprisingly, a feminist analysis is threatening both to the colonizer and to the colonized'.[417]

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and McGlade, _Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' above n 409.

413 Re-examining Culturally Appropriate Models in Criminal Justice Applications, in *Aboriginal and Treaty Rights in Canada* 75, 76.

414 Wendy Stewart, Audrey Huntley and Fay Blaney, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities In British Columbia* (2001) 41.

415 Ibid 46.

416 Melissa Lucashenko, _Violence Against Indigenous Women: Public and Private Dimensions' (1996) 2 *Violence Against Women* 378, 380.

417 _Re-examining Culturally Appropriate Models in Criminal Justice Applications' above n 413, 95. LaRocque cites an unpublished conference paper presented: Diane Bell, _Considering Gender: Are

The issue here is not whether Australian Indigenous culture was violent prior to Settlement and how conflict resolution was carried out in pre-Settlement communities—I argue that we do not know, and I suspect that we may never know, the specific and true nature of Indigenous cultures prior to Settlement.[418] LaRocque exposes a deeper point, one which has currency for the sexual violence considered in this thesis: it is that the interface between traditional and Western society has seen the development of new traditions, which in fact incorporate elements of Western society and understanding of justice.[419] For instance, healing circles often are understood to be Indigenous in nature, generally without recognition that Western (Christian) religion and Western (New Age) culture may have influenced resolution processes as constituting elements of forgiveness and healing.[420] Yet contesting the cultural basis for, or the efficacy of, such justice traditions often is not acceptable in this area, for culturally-sensitive reasons. I do not suggest here that justice practices which are claimed to be Indigenous are not such—my point is that the complex heritage of such practices in fact may be multifaceted, and that I am wary when critique is effectively precluded on the basis of purported Indigenous heritage of justice practices.

On the efficacy point, my observation is not intended to suggest that traditional or Western law, or combinations, are unable to deliver justice: rather, this is an observation that in much of the Indigenous Australian literature, the interests of the Indigenous female victim

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Human Rights for Women Too?' (Unpublished paper presented at the International Conference on Human Rights in Cross-Cultural Perspectives, College of Law, University of Saskatchewan, 1989).

418 Note that there is a debate in the literature on violence against Indigenous women, and in Indigenous culture generally prior to colonisation. Peter Sutton is an anthropologist who argues that Indigenous culture was highly violent prior to colonisation: see, eg, Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (2010). Indigenous scholars such as Behrendt contest this: see Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' above n 265. In consultations held by the Australian Law Reform Commission as part of the Customary Laws Inquiry in the 1980s in Derby, Western Australia, Olive Bieundurry appeared to indicate to the Australian Law Reform Commission that rape was not an offence under customary law: Australian Law Reform Commission, *Aboriginal Customary Laws Inquiry Transcript of Proceedings—Women's Meetings* (1981) 112. These debates are not confined to the Australian context: see, eg, Rashmi Goel, 'No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases' (2000) 15 *Wisconsin Women's Law Journal* 293, 300, fn 37.

419 For a discussion of potential distinctive hybrid approaches in the Australian context, see Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2008).

420 'Re-examining Culturally Appropriate Models in Criminal Justice Applications' above n 413.

are set up as contrary to the interests of the broader Indigenous community, in a way that may not actually serve the highest interests of these women. This is why Hudson's critique of communitarianism, discussed in the previous chapter, speaks to the experience of those who do not necessarily fit within the dominant narrative of communities. It underscores why a more critical, discursive and relational approach to justice is necessary: why an understanding of the realities of the sometimes fraught relationships between an individual and her group must be continually contemplative of the experiences of the woman who is subject to violence. This is most relevant in the context of communities where the reality of what happens is the silencing of the voices of victim/survivors through damming them with the 'white feminist' brush. On this point, the comments of Native Canadian woman, Joyce Green, are particularly powerful:

> It is a painful thing to be labelled as a dupe of the colonizing society for undertaking to name and change women's experience.[421]

Constantly underscoring levels of violence and highlighting the multiple ways in which Indigenous women may experience discrimination further runs the risk of constructing Indigenous women as being born into an extreme and permanent state of victimhood with an attendant absence of agency. The research discussed in Chapter 5 of this thesis indicates that Indigenous women experience sexual violence at a disproportionate rate to non-Indigenous women. Yet, passivity does not capture the experience of the many Australian Indigenous women who, on a personal and daily level, resist violence in relationships and communities,[422] and on a macro-level, actively work to reform relevant law and policy change in this area.[423] I now consider more closely the agent side of this dichotomy.

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421 Joyce Green, 'Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government' (1993) 4 *Constitutional Forum* 110, 111. Cited in 'Re-examining Culturally Appropriate Models in Criminal Justice Applications' above n 413, 94.

422 Even to the extent that personal resistance is physical and violence, in turn resulting in arrest of the 'victim': see, eg, Judy Atkinson, 'Voices in the Wilderness—Restoring Justice to Traumatised Peoples' (2002) 25 *University of New South Wales Law Journal—Forum, Family Violence in Indigenous Communities* 233, 237. See also Victoria Burbank, *Fighting Women: Anger and Aggression in Aboriginal Australia* (1994).

423 There are a myriad examples of Indigenous women working in this field. See, eg, the work of June Oscar and Emily Carter of the Marninwarntikura Fitzroy Women's Resource Centre in leading community-based Indigenous women's resistance to intra-Indigenous violence in Fitzroy Crossing. Their work was documented in a 2009 film and shown that year at the United Nations Commission for Women. See Melanie Hogan, *Yajilarra* (2009).

C Agency and survivorship

In the sexual violence literature, the existence and value of agency is often conveyed through use of the term ‗survivor'. The term is used to identify a person who experienced an act (or a pattern of acting), and yet was not a ‗victim'—that she was not passive in her immediate response, nor forever disabled and defined by that experience and its effects.[424] The link between resistance and at least a limited agency is a key finding in research with women who have experienced sexual violence. For instance, Liz Kelly reported that none of the sixty women she interviewed in the United States in the 1980s fit within understandings of passive victims. All had experienced and resisted sexual violence in some way, whether this resistance was physical, verbal or via the psyche and emotions, such as through disconnecting body and mind.[425] Even where rape was not avoided, resistance sometimes led to a woman negotiating the course of the rape.[426] As most sexual violence experienced by Indigenous women appears to take place in the context of known relationships, it is important to note that, in Kelly's study, resistance was most effective in cases where the women did not know the perpetrator.[427] In her study, ending the relationship was the most successful strategy for women experiencing sexual violence within intimate relationships.[428] In a New Zealand study by Jan Jordan, a woman vividly illustrates a psychological form of resistance:

> I mean, this guy had me strewn over a bed half naked, bound with blankets over my face, in position, just totally ready to rape me and he's going through the knife drawer, coming back into the room. … I thought, ‗What can I do, what can I do to protect myself?' So I closed my eyes really hard, and I decided to just fill up the entire room with myself so that as much of that room had me in it … And he comes back in and he tries to rape me and he can't. … It really changed my life because I started to believe that if I asked for help I would get it, and it wouldn't be from people. I could do it myself.[429]

While the literature indicates that it is empowering for some women who have experienced sexual violence to conceive of themselves as survivors in order to recover or move on from

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424 Walklate, *Victimology: The Victim and the Criminal Justice Process*, above n 38, 141.

425 Kelly, *Surviving Sexual Violence*, above n 108, 169–171.

426 Ibid 166–167.

427 See, eg, Ibid 166. Kelly also cites a study with the same findings: Pauline Bart and Patricia O'Brien, ‗Stopping Rape: Effective Avoidance Strategies' (1984) 10 *Signs* 83.

428 Use of similar forms of resistance in similar circumstances resulted in dramatically different outcomes—the avoidance of rape in some cases, the use of greater force on the part of the perpetrator in others. Ibid 166.

429 Jan Jordan, ‗What Would MacGyver Do? The Meaning(s) of Resistance and Survival' (2005) 11 *Violence Against Women* 531, 548.

the violence, the nomenclature of ‗victim' has advantages. Jordan acknowledges that an overemphasis on survival can make victims feel deficient if they do not quickly recover, resist and be strong, at the risk of not processing and working through ‗the very real harms they have experienced and the needs these may engender'.[430] Such harms are not limited to the violence itself, as surviving rape also meant surviving the retelling of the story, anniversaries and legal processes.[431] Jordan writes of the conditions required to make the transition from victim to survivor, such as police response.[432] She decides it is possible to be simultaneously a victim and survivor, a conclusion informed by another quotation from a woman interviewed in her study:

> I don't think there is a shift in what happens, I think there is a shift in consciousness…. I was a victim of sexual abuse and I have survived it.[433]

The emphasis on agency through survivorship is helpful in pushing back on notions of passive or ideal victims, but standing alone, it does not really assist in an understanding of relationships between the person harmed and the person doing the harming—what were the conditions for the violence? *Linking* the concepts of ‗victim' and ‗survivor' is a way to accentuate, through the nomenclature, the intricate and fraught relationship between something that happens *to* someone, and something that happens because of other choices, and where a person's freedom of choice affects their response to what happened. Does the literature offer a theoretical way to address the dichotomy of passivity and agency, a way that does not work with the gendered concept of agency as ‗passive', and which is not limited to the either/or, or the duality, of the victim/perpetrator experience, or which is linked to a particular characteristic or identity politics?

Critical victimology may represent one path forward here. It is concerned with a more nuanced investigation of the relationship between agency and structure than is found in other schools of victimology.[434] Within this, Walklate's critical realist take on victimology

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430 Jan Jordan, ‗Victims as Survivors' (Paper presented at Sydney, 19 June 2008) <http://www.cjrn.unsw.edu.au/critcrimproceedings2008.pdf>.

431 Ibid 155.

432 Jan Jordan, *The Word of a Woman?: Police, Rape and Belief* (2004) 235–236.

433 Jordan, ‗Victims as Survivors' above n 430, 150.

434 Basia Spalek, *Crime Victims: Theory, Policy and Practice* (2006); Walklate, *Imagining the Victim of Crime*, above n 401.

is useful. Walklate is concerned with going beyond _mere appearances' to discover what is _real'.[435] To determine this reality, a critical realist stance on victimology is interested in the structural location of individuals, determined by social conditions, together with how individuals negotiate this structural location. As noted above, Walklate challenges a _structurally neutral' view of the victim/survivors, seeing victims as _highly structured' in the sense of being _shaped by class, gender, ethnicity, race, age and sexuality'.[436] The dynamic interplay between structure and agency contemplated by critical realist victimology may accommodate the many and varied historical layers and contemporary conditions that inform the experience of being an Indigenous woman who experiences sexual violence in Australia.

A critical realist take on victimology also may be a theoretical way in which to conceive the relationship between Indigenous women who are harmed and the person who does the harming, whether or not the perpetrator is also Indigenous, or shares the experiences of that woman. It also moves beyond the _victim precipitation' model of positivist victimology in that it does not assume the individual was involved in causing the commission of an act. Indeed, it appears equipped to accommodate a potential acausal—and yet meaningful—relationship between those who harm, and those who are harmed. It is the way that critical realist victimology imbues relationships with complexity and meaning that is most useful for thinking about the position of individuals. In particular, the way that critical realist victimology conceives of the relationship between how an individual is constructed (structure) and how that individual constructs or reconstructs herself against that backdrop (agency) as meaningful, complex and variable is extremely valuable. Critical realism suggests that the context of violence, and how an Indigenous women responds to that violence, may be influenced by a wide range of interrelating factors—some determined by gender, race and class, and others depending on volition, and some a complex fusion of free will and circumstance. This is a subtle but important orientation that informs much of the thinking throughout the rest of this chapter and thesis.

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435 Walklate, *Imagining the Victim of Crime*, above n 401, 46.

436 Ibid 52.

D Conflicting interests

As discussed at length throughout this thesis, I am concerned with the 'tough' cases in which victim/survivor interests conflict with other interests. I do acknowledge that the aspirations of Indigenous victim/survivors will not always be in conflict with other interests. I explore the confluence of Indigenous victims and perpetrator interests in the context of community 'healing' below, although I engage with this literature critically. I also note that the cooperation and engagement of Indigenous women is in the interests of the State and criminal legal agencies seeking to enhance the efficacy of the criminal legal system, crime prevention, and the 'fight against crime'.[437] Victim involvement is especially valuable in cases involving sexual violence because the victim/survivor may be the sole witness (and thus the only 'evidence provider') in matters where increasing reporting rates mean more cases to solve.[438] However, there may not always be overlap between the interests of electable representatives and those of victims. Sanders has noted that punitive aims advanced by the State in fact may fit a 'political projection of victims', and may not always be aligned with the actual desires of victim/survivors.[439]

There are numerous flow-on costs and effects experienced by others such as family, community and employers as a result of violence. These are not limited to financial costs, although these may result from victim/survivors and her supporters taking leave to engage with the legal process, and engage with various government-funded paid support services whilst in the system.[440] Psychological and economic costs that result from the legal

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437 Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice* (2000).

438 For increasing reporting rates, see Success Works, for the Victorian Department of Justice, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) iii.

439 Andrew Sanders, 'Victim Participation in an Exclusionary Criminal Justice System' in Carolyn Hoyle and Richard Young (eds) *New Visions of Crime Victims* (2002) 197, 209.

440 Recognition of this is a driver of the second Family Violence Inquiry conducted by the Australian Law Reform Commission: Australian Law Reform Commission, *Family Violence and Commonwealth Laws* (2011) <http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws>. See also David Miers, 'Situating and Researching Restorative Justice in Great Britain' (2004) 6 *Punishment & Society* 23. In relation to crime generally, Miers refers to the 'massive direct costs to the NHS, to insurance and to the social security system, and in the maintenance of criminal and penal justice systems', with the British Home Office estimating a cost of around 60 billion pounds: Ibid 24.

interaction, in addition to the initial trauma, may be substantial. Paying greater attention to the interests of victim/survivors may ultimately result in mitigation of the costs of violence. The costs of domestic violence, for instance, were estimated to be $8.1 billion in Australia in the years 2002–2003.[441]

Moreover, I argue that considering the aspirations of victim/survivors is in accordance with Hudson's vision of justice. To confine the application of justice to only some participants, to pick and choose the Other, would run counter to the very essence of Hudson's approach to justice: that of equal respect. Moreover, Hudson's emphasis on the importance of participation and dialogue is premised on her core arguments to do with the importance of including a range of different perspectives, and as noted above, she expressly envisages that victims should be included in her vision.

There may, however, still be situations of conflict between the interests of victim and offender. It is often assumed that the goals of victim/survivors will be to the detriment of offenders—namely, that victims will want to deprive offenders of their liberty.[442] Indeed, Susanne Karstedt writes:

> In a public sphere constituted by distant suffering, and the emotions it arouses and the moral commitment it induces, the task of criminal justice is extremely simplified: justice for victims means making offenders suffer the harshest punishment available.[443]

Research with victim/survivors indicates that this is not always so. As discussed below, retribution and punishment are elements of what *some* victim/survivors want *sometimes* but this does not provide the full picture. Providing validation for victim/survivors may not of itself run against the interests of the offender (particularly after guilt is proven). A legal model that takes into account greater consideration of victim interests will not always be a model that will work to the detriment of offenders. Edwards urges a deeper evaluation of the rhetorical 'balancing act' between victim and offenders,[444] and Pat O'Malley argues it is necessary to get away from the 'zero-sum' game that is a feature of risk-based 'actuarial

441 Access Economics, *The Cost of Domestic Violence to the Australian Economy: Part One* (2004) vii.
442 Ed Cape, *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (2004).
443 Karstedt, 'Emotions and Criminal Justice' above n 43, 303.
444 Ian Edwards, 'An Ambiguous Participant' (2004) 44 *British Journal of Criminology* 967.

justice'.[445] O'Malley states _[i]f the risk is defined as a social problem in terms of a society that is culturally and socially saturated with sexual violence, then neither the victim-offender binary nor the exclusionary response appear adequate or even productive'.[446] I agree that a more complex vision of the relationship between victim/survivors and perpetrators, and the shared and conflicting interests, is necessary.

In cases where interests of victim/survivors *do* conflict with those of offenders, then human rights is one way to ground victim/survivor interests. Hudson emphasises the importance of rights in her approach to justice, with rights a key way to give protection to that which arises from the ethics of alterity: the obligation for one to listen to the other, no matter how _irrational', _bizarre' or _risky' is such an outsider narrative.[447] The language of human rights is consistently deployed in the context of offenders—including in the therapeutic jurisprudence literature.[448] Yes, offender rights need to be guarded against the excesses or abuse of state power. But victim/survivors also are humans with rights, and women and children experience the brunt of sexual violence. International human rights law makes it incumbent upon the State not to ignore this. Francesca Krug argues that

> The state has a special role in international human rights law as the body charged with remedying abuses, whether by refraining from actively oppressively itself or preventing and restraining private parties from so doing.[449]

Walklate writes of treating all people, regardless of their status in the criminal legal system, with respect.[450] Whether the appeal is to rights or respect, in order to effect substantive equality for Indigenous victim/survivors in an area where the current legal response is not working, there must be some way to assess competing rights and interests in a way more sophisticated than simply through prioritising defendant interests—because Indigenous

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445 Pat O'Malley, _The Uncertain Promise of Risk' (2004) 37 *The Australian and New Zealand Journal of Criminology* 323, 335.

446 Ibid 335.

447 Hudson, *Justice in the Risk Society*, above n 76, 20.

448 See, eg, the human rights framework advocated in Birgden, _Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' above n 27.

449 Francesca Krug, _Human Rights and Victims' in Ed Cape (ed), *Reconciliable Rights? Analysing the Tension Between Victims and Defendants* (2004) 111, 127. See also Catherine MacKinnon, *Towards a Feminist Theory of the State* (1989) and McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights*, above n 79.

450 Sandra Walklate, _Justice for All in the 21st Century: The Political Context of the Policy Focus on Victims' in Ed Cape (ed), *Reconciliable Rights? Analysing the Tension Between Victims and Defendants* (2004) 27, 35–36.

women living in the context of violent relationships *do* have a lot to lose from the lack of legal protection or redress.

III JUSTICE ASPIRATIONS OF VICTIM/SURVIVORS

In this section, I examine what the literature reveals about the justice aspirations of victim/survivors of sexual violence. At the outset of this section, I note that victim/survivors may primarily go to the law to seek safety.[451] I also note that victim needs _have been constructed and tied predominantly to processes of the criminal justice system'.[452] I acknowledge that there is a tension in, first, arguing that the aspirations of victim/survivors should be construed in broader terms than is currently allowed by the criminal legal system, and then, secondly, documenting aspirations that are related to this system. Yet much of the literature hooks the justice aspirations of victim/survivors back to existing law and procedure. Thus, while I acknowledge that the justice aspirations of victim/survivors are not reducible to the current legal landscape, the existing literature does constrain the discussion in this chapter.

Harvard psychiatrist Judith Herman argues that the goals of victim/survivors _are not congruent with the sanctions that the system imposes'.[453] In this section, then, I consider what victim/survivors of sexual violence may want from legal interactions, and what Hudson's conceptual framework may achieve with respect to such aspirations. While victim/survivors who engage with the law may have a number of motives, understanding what underlies legal engagement is an essential precursor to designing or implementing a legal response to sexual violence that places importance on the aspirations of victim/survivors. The majority of victim/survivors of sexual violence do not ever engage with the criminal legal system.[454] Once victim/survivors make a police report, they may be coerced into continuing that participation, for instance, through being subpoenaed to give evidence at trial. Low reporting and high attrition trends are amplified for Indigenous

451 Judith Herman, _Justice From the Victim's Perspective' above n 65, 597.
452 Walklate, *Imagining the Victim of Crime*, above n 401, 133.
453 Herman, _Justice From the Victim's Perspective' above n 65, 575.
454 This is discussed at length in Ch 5 of this thesis.

women.[455] The question explored in the following sections, then, is why the victim/survivors who interact with the criminal law *do* initially engage, and continue to interact, with the law—what do these women hope to achieve, and what do they get out of the interaction?

Also as preface to this section, I note that appealing to the law is not as straight-forward as it seems. Sally Engle Merry has written about a 'general pattern' which sees vulnerable people appeal to the courts in dealing with relationships of unequal power,[456] although she notes too the 'fundamental paradox' in so doing.

> The use of law by those at the bottom of the social hierarchy empowers the individual with relation to his or her neighbors and family members. On the other hand, it increases his dependence on the institutions of the state. The plaintiff draws on the symbolic power of the law to gain strength in fights with those he or she knows, but he or she loses control over this power when the problem moves into the courts.[457]

Invoking the law can lead to other unintended consequences, especially in the context of the historical relationship between Indigenous peoples and the police in Australia. For instance, in Edie Carter's 1986 study of sexual violence experienced by Aboriginal women in Adelaide, the reason most frequently provided for *not* reporting violence was fear—'of repercussions, of police, of violence'.[458] Yet I also note that recourse to the law can also constitute a safety effort in small, remote and/or tightly knit Indigenous communities, where distance, community ties and the normalisation of violence may limit the ability of victim/survivors to escape entrenched and ongoing violence, or to enjoy de facto protection through informal community policing of norms.[459] For instance, while acknowledging the many and trenchant criticisms about the Northern Territory Emergency Response

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455 See, eg, Daly and Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' above n 62.

456 Sally Engle Merry, *Getting Justice and Getting Even* (1990) 178.

457 Ibid 181.

458 Edie Carter, Adelaide Rape Crisis Centre Inc, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse*, above n 110, 7. About a quarter of participants in Carter's study did not report because of fear of not being believed: Ibid 7. See also Judy Atkinson, 'Violence Against Aboriginal Women: Reconstitution of Community Law—The Way Forward' (1990) 2(51) *Aboriginal Law Bulletin* 4, 7. Cripps and McGlade suggest Indigenous women and children may fear that 'they would get it worse' after an incapacitated perpetrator is released: Cripps and McGlade, 'Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' above n 409, 243.

459 Incapacitation only will be a viable option for a judicial decision-maker in cases where the perpetrator is convicted of a serious offence (or, in the case of remand, where certain legal requirements are met with respect to a charged person).

(NTER),[460] one cannot ignore the voices of the Indigenous women in the Northern Territory who have spoken about how elements of the NTER have enhanced physical safety for women and children in their communities, such as through increased police presence. Bess Price, chair of the Northern Territory's Indigenous Affairs Advisory Council, was quoted in 2011 as saying that

> income management was 'saving lives' in the Territory, women and children felt safer 'in some places' and Alice Springs town camps were being transformed.[461]

This is a heated debate, with Indigenous women weighing in both for and against the NTER.[462] Diverse views on the value and characterisation of legal responses here serves as a reminder of the complexity of situations that must be addressed by blunt legal responses to sexual violence, and underscores the heterogeneity of Indigenous views and experiences in Australia. In summary, I note here that Indigenous victim/survivors appeal to the law for multiple reasons, although legal engagement does not come without its own costs, namely the potential disempowerment that comes with involving the State.

In this section, I am concerned with uncovering the justice aspirations that inform an appeal to the law by Indigenous women. For instance, Indigenous lawyer Hannah McGlade decided as an adult to report her child sexual assault (not perpetrated by an Indigenous man), stating that, amongst other things, 'I wanted them held responsible'.[463]

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460 See, eg, Larissa Behrendt, *The NT Intervention Is a Fraud* (2010) Australian Aboriginal Online Television <http://aatv.atsiphj.com.au/index.php?option=com_videoflow&task=play&id=463&sl=search&Itemid=1&layout=listview>. See also the essays in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007).

461 Stuart Rintoul, 'Bess Price Takes on Her Critics Over NT Intervention', *The Australian* (online), 8 November 2011 <http://www.theaustralian.com.au/national-affairs/indigenous/bess-price-takes-on-her-critics-over-nt-intervention/story-fn9hm1pm-1226188154969>.

462 Indigenous academic Marcia Langton gives her insight into the nature of the politicking ensued after Larissa Behrendt disagreed with the views expressed by Bess Price on an ABC television broadcast: Marcia Langton, 'Aboriginal Sophisticates Betray Bush Sisters', *The Australian* (online), 15 April 2011 <http://www.theaustralian.com.au/national-affairs/opinion/aboriginal-sophisticates-betray-bush-sisters/story-e6frgd0x-1226039349353>.

463 McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights*, above n 79, 14–15.

A Just outcome

While aspirations related to process and to outcomes may at times be distinct, and other times likely will overlap, I consider in this section what may be considered claims related to the latter.[464] Victim/survivors have expressed that ideal outcomes in relation to justice are broad themes of resolution or closure,[465] 'reconnection with ordinary life',[466] or whatever it takes for a victim/survivor to release or 'move on'.[467] In this section, I consider the limited research that has engaged directly with victim/survivors, noting that Indigenous voices generally are absent here.

As noted above, there is a wide-spread expectation that victim/survivors are primarily retributive. Indeed, some victim/survivors of sexual violence have indicated that retribution is one aim, with Haley Clark reporting that one of her research informants as saying: 'I want consequences to this and I want him to be punished'[468] and another telling Feldthusen that her perpetrator going bankrupt as a result of civil legal proceedings 'was the best revenge'.[469] Yet this is not across the board. When victim/survivors are asked about their reasons for interacting with the law following sexual violence, or about what they got out of the experience, validation is the most recurrent driver.[470] Louise Phillips, a victim/survivor of sexual violence in Sydney, expressed at the conclusion of her account of the experience that when 'the rape had been recognised as true in the public domain, I could relax and release and release'.[471]

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464 Concrete procedural or outcome aspirations in the family violence context are explored by Robyn Holder & Nicole Mayo, "What Do Women Want—Prosecuting Family Violence in the ACT" (2003) 15 *Current Issues in Criminal Justice* 5.

465 Feldthusen, Hankivsky, and Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' above n 140, 69.

466 Judith Herman, *Trauma and Recovery* (1997) 155.

467 See discussion of the role of forgiveness in moving on in Herman, 'Justice From the Victim's Perspective' above n 65, 593. This comprises the main part of the title of a book by a victim/survivor of sexual violence: Louise Phillips, *Moving On: A Journey Through Sexual Assault* (1994).

468 Clark, 'What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' above n 396, 30.

469 Feldthusen, Hankivsky, and Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' above n 140, 103.

470 See, eg, Ibid 69; Julie Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 *Criminology and Criminal Justice* 169, 172.

471 Phillips, *Moving On: A Journey Through Sexual Assault*, above n 467, 264.

In Herman's study, the primary objective for the victim/survivors she interviewed was _to gain validation from the community'.[472] For Herman, validation had two components—acknowledgement and vindication. The first constitutes recognition of the basic facts and resulting harm.[473] The second involves denunciation of the violence, which has the effect of transferring _the burden of disgrace from victim to offender'.[474] Herman sees sexual violence as designed to shame, isolate and dishonour, with victim/survivors therefore wanting to reclaim dignity, connection and space.[475]

The actor who provides validation is important. Herman suggests that third party validation is more important than that of the perpetrator.[476] Scholars have underscored the role that may be played by a collective affirmation of a norm—in this case, the value of freedom from violence.[477] In Herman's study, validation on the part of family or others in her network was most important for victim/survivors whose accounts of sexual violence were not believed by those close to her, for instance, where family members denied the perpetration of sexual violence by the father of a victim/survivor.[478] In other situations, community denunciation was key.[479] In Clark's study, some victim/survivors wanted a more abstract recognition and documentation of the violence by _system authorities'.[480]

The perpetrator also may provide validation, for instance, through accepting responsibility and expressing remorse for what happened and the harm caused.[481] Expression of remorse may take place through conventional justice responses, and it is built into the design of

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472 Herman, _Justice From the Victim's Perspective' above n 65, 585.
473 Ibid 585.
474 Ibid 585.
475 Ibid 585.
476 Ibid 585.
477 Julie Stubbs, _Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence' (2002) 16(2) *University of New South Wales Law Journal* 970, fn 107.
478 Herman, _Justice From the Victim's Perspective' above n 65, 585.
479 Loretta Kelly, _Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments' (2002) 5 *Indigenous Law Bulletin* 7, 9.
480 Clark, _"What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' above n 396, 30.
481 Koss, _Restoring Rape Survivors: Justice, Advocacy and a Call to Action' above n 396, 209.

restorative justice practices through the practice of giving an apology.[482] Issues around assessing validity of remorse are highlighted in some critical restorative justice literature.[483] Doak reviews a number of restorative justice studies in which victim/survivors had differing views on the sincerity of apologies—the most stark disparity found in Daly's study of youth conferencing in South Australia, where 60% of offenders reporting that their apology was sincere, with only 30% of victim/survivors believing that offenders gave genuine apologies.[484]

What follows an expression of remorse on the part of the perpetrator? Herman contests that victim/survivors of sexual violence aspire to restoration of their relationship with the perpetrator. She did, however highlight an internal process of forgiveness as one way of achieving resolution.

> [i]f forgiveness is understood in this very limited sense of letting go of resentment and moving on with life, then all of the informants aspired to it.[485]

The conventional criminal legal system is not greatly concerned with what happens for victim/survivors after an expression of remorse on the part of a perpetrator, which may be why restoration has not been an aim with a high profile in the research with victim/survivors of sexual violence and the criminal legal system. In terms of restoration as personal recovery, one Canadian study on why victim/survivors voluntarily engaged with civil law or compensation programs found that 'healing' was the aim of those engaging with these non-criminal legal processes.[486] There is a lack of clarity in the literature as to what is meant by 'healing'. For instance, will it always require reconciliation with the

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482 See, eg, Jonathan Doak, 'Honing the Stone: Refining Restorative Justice as a Vehicle for Emotional Redress' (2011) 14 *Contemporary Justice Review* 439, 444. Doak cites a 2003 study by Poulson in which apologies were given in around three-quarters of restorative justice practices and *not* given in around three-quarters of conventional practices: ibid 445. For more on the philosophy and design of restorative justice practices, see John Braithwaite, *Crime, Shame and Reintegration* (1989).

483 See, eg, Doak, 'Honing the Stone: Refining Restorative Justice as a Vehicle for Emotional Redress' above n 482.

484 Ibid 446. Doak cites Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4 *Punishment & Society* 55, 70.

485 Herman, 'Justice From the Victim's Perspective' above n 65, 593.

486 'Healing' was noted by several participants in Feldthusen, Hankivsky, and Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' above n 140, 102.

offender, restoration of other relationships, or may it also involve exiting a community, or establishing new connections?

Reconciliation with perpetrator or community as a form of restoration for the victim/survivor has been extolled in restorative justice practices.[487] Restorative justice practices rarely consider sexual violence explicitly, although Kathleen Daly has recently reported that conferencing currently takes place informally in sexual violence matters in Victoria, and as a matter of course in juvenile justice matters in South Australia.[488] Issues around placing pressure on the victim to _forgive' the offender and therefore take on the responsibility for some form of reconciliation have been explored in the literature.[489] John Braithwaite argues strongly that it would be unjust to require a victim to forgive.

> Apology, forgiveness and mercy are gifts; they only have meaning if they well up from a genuine desire in the person who forgives, apologizes or grants mercy. Apart from it being morally wrong to impose such an expectation, we would destroy the moral power of forgiveness, apology or mercy to invite participants in a restorative justice process to consider proffering it during the process.[490]

In the specific context of restorative justice practices for violence in the context of known relationships,[491] Stubbs finds that a central feature of restorative justice processes—the giving of an apology—may provide the conditions for continued domestic violence:

> a common strategy used by abusive men to attempt to buy back the favour of their abused partner. It is a well-recognized tactic described by Walker as a feature in the _cycle of violence' (1989; see also Acorn, 2004).[492]

Many scholars and government reports have sidestepped the issue somewhat, suggesting further _cautious exploration' of the benefits of restorative justice practices in

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487 See, eg, Doak, _Honing the Stone: Refining Restorative Justice as a Vehicle for Emotional Redress' above n 482.

488 Daly, _Conventional and Innovative Justice Responses to Sexual Violence' above n 199, 21.

489 See, eg, Doak, _Honing the Stone: Refining Restorative Justice as a Vehicle for Emotional Redress' above n 482.

490 John Braithwaite, _Setting Standards for Restorative Justice' (2002) 42 *British Journal of Criminology* 563, 570–571.

491 Such processes are multi and varied, but purport to be based on the theoretical work of John Braithwaite. See, eg, Braithwaite, *Crime, Shame and Reintegration*, above n 482; John Braithwaite, *Restorative Justice & Responsive Regulation* (2002).

492 Stubbs, _Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' above n 470, 177.

domestic/family violence and/or sexual violence cases.[493] This means there is little research and analysis to draw on here.

The research with victim/survivors of sexual violence who have engaged with the adversarial justice system is informative in that it demonstrates that some justice aims appear to be consistent—for instance, that a victim/survivor seek validation—but that there is a wide variation as to what individuals want in specific circumstances. This variation demonstrates the particular importance of Hudson's principle of reflective and discursive justice: assumptions that there are generalisable rules that could apply to each victim/survivor may be damaging because the aims of victim/survivors may depend on the individual, the situation, and even the stage at which the victim/survivor has reached in the legal process as well as her own process of personal recovery and negotiation of her relationship with the perpetrator. Engaging in a dialogue with victim/survivors is a sensible method through which to determine any desired aims as to outcome, and an essential justice requirement is ensuring that the needs and wants of victim/survivors are communicated and understood by all relevant parties.

B Just process

Much victimological work has been directed towards the interests of victim/survivors during the legal process. Many of the contributions here come from the fields of procedural justice and therapeutic jurisprudence literature. In particular, Tom Tyler suggests that a fair

493 See, eg, Hannah McGlade, 'New Solutions to Enduring Problems: The Task of Restoring Justice to Victims and Communities' (2010) 7(16) *Indigenous Law Bulletin* 8, 107; National Council to Reduce Violence against Women and their Children, 'Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021,' above n 108, 107; Kathleen Daly, 'Sexual Assault and Restorative Justice' in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 62, 77; Rowena Lawrie & Winsome Matthews, 'Holistic Community Justice: Proposed Response to Family Violence in Aboriginal Communities' 25(1) *University of New South Wales Law Journal (Forum—Family Violence in Indigenous Communities: Breaking the Silence)* 228; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, 'The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report,' above n 110, 176; Judy Atkinson, 'Violence Against Aboriginal Women: Reconstitution of Community Law—The Way Forward' (2001) 5(11) *Indigenous Law Bulletin* 19. For further discussion of these and opposing views, see overview in Julie Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in James Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 103.

process is essential for victim satisfaction, and that fairness is an integral element of such a process.[494]

Victim/survivors generally are described as wanting to ‗participate'. Ian Edwards has unpacked the ‗hooray' word participation.[495] He classifies four types of participation: control, consultation, information-provision, and expression.[496] Jo-Anne Wemmers argues that it is more important for a victim/survivor to have some influence (and be heard) rather than control the outcome.[497] Amy Ronner draws on Tyler's work on procedural justice to identify ‗voice, validation and voluntary self-participation' as specific processes that may lead to therapeutic outcomes.[498] Similarly, King refers to therapeutic values of ‗voice, validation, respect and self-determination'.[499]

These themes appear to have played out in the limited research with victim/survivors of sexual violence. Clark concludes that information, validation, voice and control were the most important justice needs for the women she interviewed.[500] Feldthusen et al concluded that, for engagement with civil legal frameworks:

> Therapeutic healing is dependent on more than just a final outcome involving financial compensation. It is dependent on a procedure that does not further traumatize victims but rather values survivors' dignity, participation, and worth as human beings.[501]

There is a preoccupation in the literature with how to get through the *process* rather than how to achieve an overall optimal outcome. This echoes debates around service and

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494 See, eg, Tyler, ‗The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' above n 202; Tyler Blader, ‗A Four-Component Model of Procedural Justice: Defining the Meaning of a ―Fair' Process' (2003) 29 *Personality and Social Psychology Bulletin* 747.

495 Edwards, ‗An Ambiguous Participant' above n 444, 973.

496 Ibid 975.

497 Jo-Anne Wemmers, ‗Victim Policy Transfer: Learning from Each Other' (2005) 11 *European Journal on Criminal Policy and Research* 121, 130.

498 Ronner, *Law, Literature and Therapeutic Jurisprudence*, above n 21, 23.

499 King, ‗Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' above n 134, 312. See also King, ‗Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' above n 130, 1115.

500 Clark, ‗―What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' above n 396, 34.

501 Feldthusen, Hankivsky, and Greaves, ‗Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' above n 140, 116.

procedural rights.[502] Clark's recent findings with respect to interviews with twenty-two victim/survivors of sexual violence in Victoria underscores this. Clark found that _an unsatisfactory outcome (such as the case not progressing beyond the police) could undermine even the most respectful, supportive treatment by system authorities'.[503] Conversely, Bruce Feldthusen and others found in their research with Canadian victim/survivors who interacted with the civil system, that the many who were satisfied with outcome were not content with the process.[504]

As discussed in the previous chapter, Hudson is keen to preserve elements of the Kantian justice tradition related to the emphasis of means and not mere ends; I read her formulation of justice as bearing a concern with correct process in addition to outcome. In conversations about participation, however, caution must be taken to guard against conceptions of the _ideal' victim. What of those who do not present well, who are considered suspect by others in the room? If there is an increased emphasis on participation, as suggested by Hudson's adoption of the principle of discursive justice, then the relevance of an ideal victim takes on greater weight. For instance, even encouraging a victim/survivor of sexual violence to have her say, to front up to a courtroom or alternative justice process, may shift the burden of presentation from the prosecutor to the victim. What happens when that victim does not express herself in a way that resonates with the decision-makers? What if her English is flawed, or if she expresses emotions that are not deemed socially acceptable, or strategically directed to an outcome most favourable to her? What if she feels pressured to speak up when she would have preferred to have remained silent? It is important that the burden (ostensibly) undertaken by the prosecutor, does not shift to a victim who is Other.

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502 For example, Andrew Sanders argues that Packer's analytical categories of _due process' norms (privileging the interests of the accused) and _crime control' norms (privileging the interests of the state) are no longer adequate. This is because _procedural rights' (which give the victim a greater role in decision-making) are of ever increasing relevance. Sanders contests Ashworth's rejection of procedural rights in favour of _service rights' (which Sanders refers to as _victim oriented interests') on the basis that the distinction between procedural and service rights _does not hold up in practice'. Sanders, _Victim Participation in an Exclusionary Criminal Justice System' above n 439, 203. See also A Sanders, C Hoyle, R Morgan and E Cape, _Victim Impact Statements: Don't Work, Can't Work' [2001] *Criminal Law Review* 447.

503 Clark, _–What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' above n 396, 32.

504 Des Rosiers, Feldthusen, and Hankivsky, _Legal Compensation for Sexual Violence' above n 226, 436.

It is also worth noting that much of the literature is concerned with victim 'satisfaction'. Asking whether a victim is *satisfied* still seems to fall within the more limited context of justice as 'welfare' rather than the more aspirational justice envisioned by Hudson. Assessing therapeutic benefits of restorative justice, Jonathan Doak highlights Caroline Angel's observation that 'measurements of emotional and psychological health have been confused with measures of satisfaction'.[505] Many of the pros and cons of conventional or innovative practices are assessed in reverse—for instance, in asking what was positive or negative about an encounter is a different question to what victim/survivors wanted out of an encounter, and if the outcome did or did not match these goals. A focus on satisfaction also limits the focus to the process that the victim engaged with, rather than developing the criteria for a better experience. For these reasons, it is more meaningful to delve deeper into what a victim/survivor wants, or what are her combined requirements and preferences ('interests'), rather than linger at the preliminary station of satisfaction or needs.

As noted in the previous chapter, Hudson differentiates between justice that focuses on needs and that which focuses on self-actualisation (the freedom to follow one's own ends).[506] In this section, it becomes apparent that there has been overemphasis in the literature on the *needs* of victim/survivors who do engage with the law, rather than considerations of *intended* or *preferred outcomes* of such legal engagements.[507] There are two dimensions to this observation. The first is a focus on baseline 'needs' rather than active desires or preferences. Victim/survivors certainly do require some things, and ascertaining what a victim/survivor wants should not be conducted in the absence of support. An exclusive focus on 'needs', though, has shades of helplessness or passivity rather than agency, a tension partly reflected in debates around victim needs vis-a-vis

505 Doak, 'Honing the Stone: Refining Restorative Justice as a Vehicle for Emotional Redress' above n 482, 442. Doak cites Caroline Angel, *Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims' Post-Traumatic Stress Symptoms* (Unpublished thesis, University of Pennsylvania, 2005).

506 Hudson, *Justice in the Risk Society*, above n 76, 14.

507 See, eg, the emphasis on needs in Clark, '"What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' above n 396.

victim rights.[508] As discussed above, the relationship between passivity and agency, and needs and preferences, requires critical analysis.

IV INDIGENOUS VICTIM/SURVIVORS: WHAT IS DIFFERENT?

In this section, I draw from Indigenous literature to explore what may be different about the aspirations of Indigenous victim/survivors, as preface to a much more detailed examination in the next chapter of my thesis, in which I more closely explore the case study.

A Community healing?

Some Indigenous women have queried whether punishment has the same meaning for Indigenous women as it does for _white' feminists and criminologists[509] (although, of course, not all _white' feminists stress retribution: Kathleen Daly writes that retribution does not necessarily equate with a punitive response[510]). Some Indigenous women emphasise holistic, community-driven and non-punitive aims.[511] What the literature reveals is that for every individual Indigenous perspective, there is a counter-perspective about priority justice goals. While _healing' is often suggested to be an aim of particular importance for Indigenous peoples, as I explore further in this section, Indigenous women have emphasised other goals: for example, Kyllie Cripps criticises the Victorian Koori Court on the basis that it does not deliver justice in the form of _retribution' for victims of

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508 Spalek, *Crime Victims: Theory, Policy and Practice*, above n 434, 115–129. The _victims rights' movement arose partly as a response to the limitations of the _victim needs' movement. Spalek notes that victims rights' legislation does not tend to contain rights but is service or support oriented. In other words, victim rights are still a fair way coming.

509 See, eg, Atkinson, _Voices in the Wilderness—Restoring Justice to Traumatised Peoples' above n 422; Hannah McGlade, _New Solutions to Enduring Problems: The Task of Restoring Justice to Victims and Communities' (2010) 7 *Indigenous Law Bulletin* 8. For an alternative non-Indigenous approach, see Heather Nancarrow, _In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives' (2006) 10 *Theoretical Criminology* 87.

510 Daly, _Conventional and Innovative Justice Responses to Sexual Violence' above n 199, 26.

511 See, eg, Larissa Behrendt, —Lessons from the Mediation Obsession: Ensuring that Sentencing "Alternatives" Focus on Indigenous Self-Determination" in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 178, 190; Loretta Kelly, –Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities" in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* 206, 208; Cripps, _Enough Family Fighting: Indigenous Community Responses to Addressing Family Violence in Australia and the United States', above n 3, 242–243.

Indigenous family violence,[512] and Pam Greer indicates that Indigenous community healing must be a longer-term goal, with her work highlighting the immediate concern of ensuring the safety of women and children.[513] Greer also prioritises self-healing over community healing.[514]

Restorative justice mechanisms are appealed to by some Indigenous women as better alternatives to the mainstream law. Atkinson highlights aims familiar to the non-Indigenous proponents of restorative justice:

> The key prerequisite of restorative justice is an acknowledgment of responsibility by the offender. The offender is encouraged to accept responsibility for the harm done to another, to demonstrate remorse to the victim and to the community (sometimes described as _shaming'), and to commit to appropriate restitution.[515]

Indigenous academic Loretta Kelly also appeals to restorative justice in the Indigenous family violence context, writing that _[t]he community is able to support and protect the interests of the victim, and can act to prevent future violence.'[516] Importantly, though, _ommunities' do not always provide the informal control that is sought. Greer states that she does not believe that mediation and restorative justice work in NSW:

> Restorative justice might work within traditional Aboriginal communities where they have their councils with their president, their mayors, where they have Aboriginal police. But that doesn't mean that's the only thing that's operating there because the other systems do come into those traditional communities. I think where restorative justice and where mediation is happening, once again it's the victim who's victimised again and again. The winners are the perpetrators, the losers are the victims.[517]

A critical question is whether the relevant community or network is an _ideal' one, or at least willing and able to implement such informal control mechanisms. Interviews with Aboriginal women in Canada also suggest this may not be the case, with an inquiry report concluding:

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512 Cripps, _Speaking up to the Silences: Victorian Koori Courts and the Complexities of Indigenous Family Violence' above n 61.

513 Lesley Laing, *Pathways to Safety: An Interview with Pam Greer About Indigenous Family Violence* (2001) 1.

514 Ibid 13.

515 Atkinson, _Voices in the Wilderness—Restoring Justice to Traumatised Peoples' above n 422, 238.

516 Kelly, _Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments' above n 479, 8.

517 Laing, *Pathways to Safety: An Interview with Pam Greer About Indigenous Family Violence*, above n 513, 13.

> Because a radical transformation of existing structures of domination have not yet happened, women expressed fear that restorative justice reforms would fail to address the underlying power inequity rife in communities from years of oppression.[518]

Other alternatives, such as Indigenous sentencing circles, also may not serve the interests of female victim/survivors of sexual violence. Again in the Canadian context, Rashmi Goel writes powerfully that:

> The healing, reconciliation, and acceptance on which the sentencing circle is premised are all offender-focused. … Meanwhile, the victim is also experiencing race, class and gender discrimination, but these go unexamined. Even though she actually suffers the blows, *the victim is obscured by central focus on the offender as a victim of colonial society.* … Thus, even within the practice rooted in a Golden Age where women were honoured, the female victim in the Modern Age is marginalized.[519]

In reflecting on the Community Holistic Circle Healing that was established to deal with sexual violence in Hollow Water, Canada, Berma Bushie suggests that it was the *combination* of community control with the power of the law that made the offender accept responsibility and participate in a _healing process'.[520] In summary, the issues with respect to community _healing' are more complex than may seem at first blush.

B The political context

Another difference between the goals of Indigenous and non-Indigenous victim/survivors is seen in the way that broader political claims are rolled into discussions of justice objectives when Indigenous women are involved in intra-cultural violence. Behrendt writes that _principles of self-determination and empowerment need to guide any restorative justice strategy that seeks to navigate and negate the dynamics and forces that encourage family violence to flourish'.[521] In research conducted with Indigenous women in Queensland, Heather Nancarrow found that central to these women's

> concept of restorative justice was the promise of an element of self-determination for Indigenous people, exemplified in [a participant's] statement that _it could be part of

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518 Stewart, Huntley, and Blaney, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities In British Columbia*, above n 414, 39.

519 Goel, _No Women at the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases' above n 418, 324 (emphasis in original).

520 Bushie, _Community Holistic Circle Healing' above n 412.

521 Behrendt, _Lessons from the Mediation Obsession: Ensuring That Sentencing —Alternatives" Focus on Indigenous Self-Determination' above n 511, 189–190.

> empowering ourselves … taking on board our own problems and looking for solutions to our own problems'.[522]

One question underexplored in the literature is the extent to which empowerment or self-determination claims may actually represent 'idealistic longing' around community consensus.[523] While Australians value the debating culture of parliamentary democracy, does our surprise at—or even condemnation of—disagreement amongst Indigenous peoples indicate a utopian vision of what it means to be part of (at least a broader) Indigenous community? As explored above in the discussion on authority to speak in Indigenous communities, does this idealistic longing equate with a failure to acknowledge a 'micro-community' actually involved in community decision-making?[524] Indigenous voices may indeed illuminate the aspirations of Indigenous groups, but these voices do not automatically speak to the experiences and interests of Indigenous women who have experienced sexual violence. Because research with Indigenous victim/survivors is lacking in this area, it is difficult to ascertain the extent to which (all) Indigenous victim/survivors of sexual violence are concerned with, or prioritise, broader community interests when considering whether to interact with the law, as noted above with respect to differing views between, for instance, Pam Greer and Judy Atkinson. This evokes the discussion above about whether the category of 'victim' can and should be extended beyond the individual. It is unlikely that there will be a single view on this, and views between communities may also differ. In the absence of extensive research with Indigenous victim/survivors of sexual violence, it is worth reiterating that any attempts at such expansion of the victim category must tread carefully, so that the interests of these women are not obscured.

Some communities may be dysfunctional or based on law breaking norms. I discussed Hudson's critique of communtarianism in detail in the previous chapter: in essence, she cautions that this paradigm does not always support the interests of the vulnerable, writing

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522 Nancarrow, 'In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives' above n 509, 94.

523 See, though, Kathleen Daly and Julie Stubbs 'Feminist Theory, Feminist and Anti-Racist Politics, and Restorative Justice' in Gerry Johnstone and Daniel van Ness (eds) *Handbook of Restorative Justice* Ch 9.

524 Donna Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 128.

that _[i]t is not axiomatic that indigenous or community justice schemes represent an embracing of diversity'.[525] In some communities, the interests or goals of others who may be affected by sexual violence, including family or community members, do not match those of victim/survivors. For example, Judith Herman's study with sexual violence victims, discussed further below, highlighted instances where the aims of supporters were more likely to be retributive than those they supported.[526] In the Australian context, Elena Marchetti writes of how structural constraints on the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) meant that cultural protocols were unable to be adhered to, with Indigenous women not interviewed separately to men and thus leaving issues related to gender unaddressed.[527] Indigenous scholar Marcia Langton writes of _big bunga' (_big men') politics in Indigenous communities, where the interests of victim/survivors may conflict with those in power:

> it describes something we know too well—the real politic of power in our world—power that is all too often used against women and children, power that takes many forms, and has too frequently been used for personal aggrandisement.[528]

Ann-Claire Larsen's point about the burden to Indigenous offenders, and by extension, Indigenous communities, to deal with family violence is an important one.

> we do not know how the intricate balance between social and psychological factors produces individuals capable of injuring vulnerable family and community members. But if we accept that the range of social and environmental factors such as poverty, parenting skills, lack of education and unemployment predispose individuals to violent behaviour, then expecting offenders to maintain meditative skills and interact without violence on return to dysfunctional communities seems a tall order.[529]

Of course, not all Indigenous communities or networks fall within a dysfunctional or unsupportive category. And, of course, care must be taken not to _stigmatise' all Indigenous men as perpetrators.[530] Yet care also must be taken in the conversations about Indigenous justice to ensure that individual interests are not subsumed into those of the group.

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525 Barbara Hudson, _Diversity, Crime, and Criminal Justice' in *Oxford Handbook of Criminology* (2007) 160, 170.

526 Herman, _Justice From the Victim's Perspective' above n 65, 586.

527 Elena Marchetti, _Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody' (2005) 5 *Macquarie Law Journal* 103, 118. See also Marchetti, *Missing Subjects: Women and Gender in the Royal Commission into Aboriginal Deaths in Custody*, above n 57.

528 Marcia Langton, _The End of –Big Men" Politics' (2008) 22 *Griffith Review* 8, 8.

529 Ann-Claire Larsen, –Mobilising International Human Rights Norms to Reduce Violence Against Australian Indigenous Women: A Way Ahead" (2004) 10 *Australian Journal of Human Rights* 9.

530 McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights*, above n 79, 1.

Hudson's principle of discursive justice, discussed in the previous chapter, is pertinent here: this principle requires listening to the voices of all those who are affected, regardless of whether they are part of a community. Finally, while the political context through which the offender is 'victimised' by colonisation is an Indigenous-specific situation, I do not suggest the issue of lack of informal control is exclusive to Indigenous communities. For instance, in her non-Indigenous research, Herman found that her informants often did not enjoy community protection or support mechanisms. Rather, victim/survivors 'were as likely to be shamed and humiliated in their own families, schools, or churches as in the police station or the courtroom'.[531]

C Summary

In summary, the limited literature discussed in this section suggests some areas of potential difference between the responses of Indigenous and non-Indigenous victim/survivors. Indigenous victim/survivors of sexual violence may contend with a politicised context that makes engagement with the law in this area particularly fraught. There *may* also be an emphasis on community healing, although as the discussion in this section has shown, care should be taken with making assumptions about this. A sexually assaulted Indigenous woman in La Perouse, Sydney, may want something different to a sexually assaulted Indigenous woman living in a remote Northern Territory community, but both women may have different needs and desires than her sexually assaulted next-door neighbour. This particularity continues to underscore the applicability of multiple justice principles devised by Hudson: finding out what the 'concrete other' wants requires engagement with that other, and discussion in every circumstance.

[531] Herman, 'Justice From the Victim's Perspective' above n 65, 598.

V CONCLUDING CHAPTER REMARKS

Justice means justice for all. In particular, justice must be for those who do not enjoy privileged location, who can be specifically _structured' in the sense of having a particular gender and race, and who experience discrimination on this basis. This chapter has delved beneath the surface of debates around victim/survivors, and revealed three key aims of victim/survivors are related to both process and outcome. These are (i) validation, whether on the part of legal actors or the perpetrator, that sexual violence happened and the woman was harmed; (ii) an ability to speak, in her own way, about what happened and the harm she suffered as a result (or freedom to abstain from participating); and (iii) having a degree of control, or at the very least knowledge, about what would happen next in the legal proceedings, and what the outcomes may be.[532] Interests, though, may vary. Indeed, whilst resolution for victim/survivors almost always entails validation in the sense of recognising what happened *did* happen, and how a victim/survivor is affected by what took place, who provides validation, and how it is provided, depends on context. Perhaps most importantly, Indigenity does not mean consistency of needs and wants: community healing may be key for a victim/survivor, or she may pursue a different justice goal. Safety may be paramount. Regardless, the aspirations of Indigenous victim/survivors must be read (critically) against the backdrop of colonisation and the realities of community dynamics.

Thus, while the above three principles are likely to be consistent, the interests of victim/survivors of sexual violence vary, and it is not sufficient to attribute variances along racial or cultural lines. Interests are linked to complex structural forces and personal preferences, are bound to both outcomes and procedure, and may evolve over time. Indeed, the complexity and variability of what victim/survivors of sexual violence want—whether Indigenous or non-Indigenous—is unable to be accommodated by the current legal system. As articulated throughout this chapter, difference is key, and Hudson's principles of justice provide a strong grounding for navigating highly individualised interests. One example of

[532] See, eg, Koss, _Restoring Rape Survivors: Justice, Advocacy and a Call to Action' above n 396; Clark, _"What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' above n 396.

how this could play out in a concrete sense is found in Daly's recent proposal for a 'menu of options' for victim/survivors of sexual violence.[533]

Whilst noting more gaps than providing clear guidance around how to respond to problems that are deeply entrenched, this chapter at least has underscored the issue with considering whether therapeutic jurisprudence can provide a just legal response to Indigenous victim/survivors of sexual violence: firstly, in the examination of the relationship of 'victim' and 'perpetrator', an identifying where these categories and interests collide, and when they conflict; and secondly, between the social context of a victim—what are her racial and gendered characteristics that inform her social location and exposure to violence—and the choices exercised by that person. Inequality may be inadvertently be reproduced in any response guided by therapeutic jurisprudence, if it does not adequately engage with these matters critical to justice. I turn to a deeper examination of these issues in Chapter 6, but first ground my conclusions with a detailed examination of my case study in the following chapter.

[533] Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' above n 199, 25–27.

CHAPTER FIVE: CASE STUDY

THE CRIMINAL LEGAL RESPONSE TO SEXUAL VIOLENCE EXPERIENCED BY INDIGENOUS WOMEN

I CHAPTER OVERVIEW

The purpose of this chapter is to draw a detailed picture of the legal response to sexual violence experienced by Indigenous women—the _tough' case against which I test the adequacy of a therapeutic jurisprudence framework in this thesis. I first set out the _problem' of sexual violence, outlining characteristics of sexual violence experienced by Indigenous women, and finding that Indigenous women experience this harm disproportionately to non-Indigenous women. Understanding the _problem' of Indigenous sexual violence sets the scene for the second section of the chapter, in which I explicitly consider shortcomings with the current legal response to that problem. In this latter part of the chapter, I set out the ways that the criminal legal response to sexual violence experienced by Indigenous women is left wanting, especially when held up against Hudson's vision of justice.

II SEXUAL VIOLENCE EXPERIENCED BY INDIGENOUS WOMEN

In this section, I survey the available sources about sexual violence experienced by Indigenous women. The most notable finding is that there is limited data available on this issue, and this raises a number of interesting issues that I explore in the first part of this section. Then, I consider the prevalence, incidence and characteristics of what written records indicate about Indigenous sexual violence.

A The data problem

At first blush, there appear to be several sources from which to derive information about Indigenous women who have experienced sexual violence. Quantitative data about victims of sexual violence may be obtained from institutions within the criminal legal system, service providers, and community, health or victim surveys. Qualitative information may be derived from consultations, submissions, interviews and court transcripts. Indeed, the government and academic literature on Indigenous family violence and sexual abuse of Indigenous children is vast.[534] However, Kyllie Cripps argues that ‗*accurate* statistics relating to the incidence of child abuse and family violence as it occurs in Indigenous communities across Australia remain illusive'.[535] Information about the characteristics of *sexual* violence experienced by *adult* Indigenous women is even more difficult to ascertain. The many inquiries into violence experienced by Indigenous peoples have tended to focus on the nature, causes and prevalence of family violence[536] or child sexual abuse, assault or

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534 See, eg, Melissa Lucashenko and Odette Best, ‗Women Bashing: An Urban Aboriginal Perspective' (1995) 14 *Social Alternatives* 19; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 119; Memmott et al., *Violence in Indigenous Communities*, above n 51; Judy Atkinson, *Trauma Trails: Recreating Song Lines* (2002); Gordon, *Putting the Picture Together—Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, above n 51; Victorian Indigenous Family Violence Task Force, ‗Final Report' above n 51; Cripps, *Enough Family Fighting: Indigenous Community Responses to Addressing Family Violence in Australia and the United States*, above n 3; Jackie Huggins, ‗Keynote Address for the Indigenous Family Violence Prevention Seminar' Central Queensland University, Mackay, 4 May 2004; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities—Key Issues*, above n 57; Australian Institute of Health and Welfare, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (2006); Al-Yaman, Van Doeland, and Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples*, above n 51; Langton, ‗The End of ―Big Men" Politics' above n 528; ACT Victims of Crime Coordinator, *We Don't Shoot Our Wounded: What Aboriginal Victims of Family Violence Say About the Violence, Their Access to Justice and Access to Services in the ACT* (2009); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks (Consultation Paper 1)*, above n 1.

535 Kyllie Cripps, ‗Indigenous Family Violence: A Statistical Challenge' (2008) 39 *INJURY: The International Journal for the Care of the Injured* S25, S26.

536 See, eg, Memmott et al., *Violence in Indigenous Communities*, above n 51; Victorian Indigenous Family Violence Task Force, ‗Final Report' above n 51; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities—Key Issues*, above n 51; Al-Yaman, Van Doeland, and Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples*, above n 51.

victimisation.[537] Audrey Bolger reported on this in 1991, in her report into Indigenous violence in the Northern Territory.[538] Bolger sought to remedy the dearth of research on violence against Aboriginal women, but only touched on sexual violence in her report.[539] In 1986, Edie Carter of the Adelaide Rape Crisis Centre conducted a study into the incidence and nature of sexual violence experienced in the urban Aboriginal community in Adelaide.[540] This is an important albeit localised survey, and it is notable that Carter's findings have not been significantly updated.

Studies into Indigenous domestic/family violence sometimes result in a consideration of adult sexual violence in a context in which such violence may take occur—indeed, it is likely that it will occur in this context.[541] The 2001 seminal report on Indigenous violence by Paul Memmott et al, entitled *Violence in Indigenous Communities* (Memmott report), contained only some references to sexual violence.[542] Most studies on Indigenous violence reference the Memmott report,[543] but it should be noted that the sections on sexual violence

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537 See, eg, Gordon, *Putting the Picture Together—Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, above n 51; Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future—Addressing Child Sexual Assault in Aboriginal Communities in NSW*, above n 51; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle—Little Children Are Sacred*, above n 51.

538 Bolger, *Aboriginal Women and Violence*, above n 60, 3.

539 Bolger drew together both quantitative and qualitative research on this violence, although the information about sexual violence appears to be more quantitative in nature: Ibid 23.

540 In Carter's study, 120 participants answered a survey asking questions about 'rape'. She followed up responses with interviews conducted in the homes of victims. Carter's study did not define the term rape, and it may have been left to the understanding of the particular woman surveyed and interviewed: Edie Carter, Adelaide Rape Crisis Centre Inc, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse*, above n 110.

541 The Australian and New South Wales Law Reform Commissions Family Violence Inquiry is one example of an inquiry that considered sexual violence in a family violence context, although the consultation documents in that inquiry did not contain any questions or proposals specifically directed towards Indigenous victim/survivors of sexual violence See the several questions and proposals set out in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—Improving Legal Frameworks (Consultation Paper 1)*, above n 1, Part D.

542 Memmott et al., *Violence in Indigenous Communities*, above n 51.

543 See, eg, Monique Keel, 'Family Violence and Sexual Assault in Indigenous Communities—'Walking the Talk'' [2004] *Australian Institute of Family Studies—ACSSA Newsletter 4*, 6. Exceptions, to some degree, are Atkinson, 'Violence in Aboriginal Australia: Colonisation and Gender' above n 110; Atkinson, 'Violence in Aboriginal Australia: Part 2' above n 110; Larissa Behrendt, 'Consent in a (Neo) Colonial Society: Aboriginal Women as Sexual and Legal "Other"' (2000) 15 *Australian Feminist Studies* 353; Denise Lievore, 'Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review' (Australian Institute of Criminology for the

in that report relied heavily on newspaper articles by journalist Tony Koch and the work of Indigenous scholar Judy Atkinson,[544] both of whom relied heavily on the Bolger and Carter reports together with anecdotal evidence.[545] Since that time, the Australian component of the International Violence Against Women Survey (IVAWS)[546] and police data cast a little more light on the matter, but tracing the ancestry of knowledge about sexual violence experienced by Indigenous adult women still reveals threads of research that are dated and localised.

One reason for the lack of data concerning sexual violence experienced by Indigenous women may be because research findings are not always made public. For example, research may not be published because of issues to do with respect, confidentiality, sensitivity, and community requests.[547] Some surveys have attempted to include Indigenous women in their coverage, but large standard errors made the data unreliable and so information about Indigenous victim/survivors of sexual violence was not included in the findings.[548] There also may be reasons why empirical research is not conducted at all. For instance, this may be linked to a reticence on the part of researchers to re-traumatise victims of sexual violence by delving into horrific experiences. Some non-Indigenous researchers also may be concerned about their lack of cultural authority to conduct research in this area—it was a matter that I considered at length before starting a PhD in this area, but

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Commonwealth Office of the Status of Women, 2003) 55–63. Also note that, while the finding that 88% of rapes among Aboriginal women go unreported was contained in Carter's study, this statistic is repeated in a number of other works without direct citation of Carter on this point. See, eg, Atkinson, 'Violence in Aboriginal Australia: Colonisation and Gender' above n 110, 6; Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 98; Memmott et al., *Violence in Indigenous Communities*, above n 51, 41. The former was, in turn, cited by Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report: The Interaction of Western Australian Law with Aboriginal Law and Culture*, above n 111, Ch 7, p 284, fn 16. The Memmott report cited the article by Atkinson.

544 See, eg, Atkinson, 'Violence in Aboriginal Australia: Part 2' above n 110; Atkinson, 'Violence in Aboriginal Australia: Colonisation and Gender' above n 110; Atkinson, 'Violence Against Aboriginal Women: Reconstitution of Community Law—The Way Forward' above n 458.

545 See, eg, Memmott et al., 'Violence in Indigenous Communities," above n 51, 40–41.

546 See Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 66.

547 Private communication with Dr Kyllie Cripps on reasons why she did not publish her thesis, which involved extensive consultations on family violence with Australian Indigenous and Native American communities.

548 See, eg, Australian Bureau of Statistics, *Women's Safety in Australia* (1996).

ultimately I decided that it was more important to make a contribution to the literature, although my contribution is at the conceptual level. In addition, university, government or state ethics committees have onerous processes, which may not always strike the right balance between ensuring that research is done in an ethical manner and facilitating the carrying out of properly-designed research plans. These committees may play a role in stifling useful research in this area, or if their reputation precedes them, even may deter researchers from embarking upon an ethics approval process.[549]

Poor data collection may be indicative of a deeper problem—lack of interest in victim/survivors. Anastasia Hardman has compared the data available on the Indigenous status of victim/survivors of sexual violence in all Australian jurisdictions with the more extensive data on Indigenous offenders, perhaps as a result of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).[550] Hardman concludes that all police in all jurisdictions should be required to ask the Standard Indigenous Question of victims of sexual violence because

> the collection of statistical information should begin at the earliest possible stage, providing a comprehensive record from the very first point of contact with the criminal justice system. When this does not occur, forming a complete, national picture of how these individuals fare through the judicial process is close to impossible.[551]

Different definitions of sexual violence also may affect the comparability of data collected in studies, inhibiting an understanding of the extent to which Indigenous women (and indeed all women) experience sexual violence in Australia. Even within studies that examine offence-based definitions, jurisdictional variation and frequent amendment of sexual violence offences make for a challenging comparative exercise. The Australian Bureau of Statistics (ABS) recorded crime data examined below are not directly comparable between jurisdictions. Even within the same jurisdiction there may be difficulty—Salmelainen and Coumarelos stated in 1993 that _frequent changes to the

549 See, eg, Mark Israel and Iain Hay, *Research Ethics for Social Scientists: Between Ethical Conduct and Regulatory Compliance* (2006).

550 Hardman, _The Not-So-Standard Indigenous Question: Identifying Aboriginal and Torres Strait Islander Victims' above n 59, 18. See also Marchetti, *Missing Subjects: Women and Gender in the Royal Commission into Aboriginal Deaths in Custody*, above n 57.

551 Hardman, _The Not-So-Standard Indigenous Question: Identifying Aboriginal and Torres Strait Islander Victims' above n 59, 19.

[NSW] sexual assault laws in recent years make it impossible to analyse police and court data using a consistent set of legal definitions of sexual assault.'[552] Further, the several different formulations of experience-based violence affect the comparability of individual surveys or research projects. For example, Jenny Mouzos and Toni Makkai caution against making comparisons between the International Violence Against Women Survey (IVAWS) and the ABS Safety Surveys because of different definitions and methodologies used in those surveys.[553]

I can only speculate on why government inquiries and academic research has placed such an emphasis on Indigenous domestic/family violence and child sex abuse rather than sexual violence. It is understandable (and important) for child sexual abuse to be considered—the innocence of children captivates the Australian political imagination, most recently seen in the high levels of public support for the Royal Commission into Institutional Child Sex Abuse, announced by (then) Prime Minister Julia Gillard in late 2012.[554] Yet why is adult sexual violence ignored? Perhaps adult sexual violence really is the last taboo. The general invisibility of sexual violence may be a factor. Underreporting because of shame and fear, amongst other things, prevents accurate attempts to measure the extent of sexual violence through reference to police or court data. As discussed in detail below, many cases never reach the attention of the legal system because of barriers to reporting, and many 'drop out' of the legal process before the matter reaches trial and legal conclusion.

In summary, the reasons as to the absence of adequate research in this area, therefore, are many and varied. Much of the information in this chapter is anecdotal in nature, and it is

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552 P Salmelainen and C Coumarelos 'Adult Sexual Assault in NSW' (1993) *Crime and Justice Bulletin No 20*, cited in Bargen and Fishwick, *Sexual Assault Law Reform: A National Perspective*, above n 70, 39.

553 Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 66, 14–15, Appendix 2. See also Australian Bureau of Statistics, *Women's Safety in Australia* (1996) 77. Further, offence-based definitions likely will dictate the types of sexual violence that are recorded by police and passed on to the next stage in the criminal legal process. Measuring the extent of sexual violence through recorded police data or conviction rates, therefore, precludes a study of the full range of sexual violence that may be experienced by Indigenous women.

554 See Australian Government, *Letters Patent for the Royal Commission into Institutional Child Sex Abuse* (2013) <http://www.childabuseroyalcommission.gov.au/LettersPatent/Pages/default.aspx#LettersPatent>.

important to underscore that this is the only way that much of the information about Indigenous sexual violence will be brought to light. This is for two main reasons: the first is that much sexual violence simply is not brought to the attention of the legal system and so while improvements may be made to the ways that data is recorded, the extent of sexual violence will always remain significantly higher than reflected in police data because of the many other factors, canvassed above, that relate to underreporting. Because of the issues to do with lack of police data, victimisation surveys are used as the best way to ascertain the extent of sexual violence. Yet here we confront the second reason, specific to minority communities, namely that randomised victimisation surveys require a defined population from which to derive a sample. There is no national 'list' identifying all Indigenous peoples in Australia, and so it is not possible to ascertain whether a sample is representative of the Indigenous population.[555]

It is necessary to think critically and expansively about how to glean information about the incidence and prevalence of Indigenous sexual violence, and the reasons why Indigenous women do not report this violence to the legal system. On this point, Matthew Willis is instructive. He writes of the need to contextualise Indigenous disadvantage and grassroots progress to adequately measure Indigenous access to justice.[556] Providing several ideas from India, New Zealand and Europe as what it is important to measure—such as procedural justice indicators, victim perceptions of the justice system and improved support services—he concludes that:

> New indicators need to be valid, reliable, consistently repeatable, able to be disaggregated in the context of small sample sizes and able to account for under-reporting of victimisation. These are not minor issues to resolve. Nonetheless, indicators able to measure constructs related to stressors and their impact on wellbeing, community-level impacts of justice services and quality of service provided at all levels of the criminal justice system, may ultimately be the best way forward in understanding and addressing the real impacts of justice system disadvantage for Indigenous Australians.[557]

Willis' argument is compelling. Given the data limitations explored at length in this chapter, it is important to think creatively about how to get a better understanding of the

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555 I am grateful to Julie Stubbs for this formulation.

556 Matthew Willis, 'Indicators Used Internationally to Measure Indigenous Justice Outcomes' (2010) Brief 8 *Indigenous Justice Clearinghouse* 1, 1.

557 Ibid 5–6.

nature of the problem examined in my case study, and especially in the context of the wellbeing of Indigenous women who interact with the law following sexual violence. This is a reason for further qualitative or mixed methods research in this area.

B What is the extent of Indigenous sexual violence?

In this section, I consider what is revealed about Indigenous sexual violence by police data, victimisation surveys, and other studies and evidence. While police statistics do not provide the final word on occurrences of sexual violence, they are capable of providing objective assessment of what is recorded by police.[558] In summary, the police data shows that Indigenous women are at least between two and four times more likely to experience sexual violence than are non-Indigenous women.[559]

I also note that the Memmott report includes unpublished Queensland police recorded crime data for the years 1996–1997 for rape/attempted rape in four remote Indigenous communities.[560] While the overall Queensland rate for rape/attempted rape was 17 per 100,000 persons, the rates for these four communities were: 233 per 100,000 (Aurukun), 470 per 100,000 (Kowanyama), 335 per 100,000 (Doomadgee) and 82.2 per 100,000 (Mornington Island).[561] The likelihood that Indigenous women in (at least these) remote communities have experienced sexual violence, and reported this to police, may be greater, therefore, than Indigenous women living in other parts of Queensland.

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558 Frank Morgan and Don Weatherburn, ‗The Extent and Location of Crime' in *Crime and Justice: A Guide to Criminology* (4th ed, 2011) 22.

559 Australian Bureau of Statistics, *4510.0—Recorded Crime—Victims, Australia,* (2012), Supplementary Data Cube, Victims of Crime, Selected States and Territories.

560 Memmott et al., *Violence in Indigenous Communities*, above n 51, 14–17. The Memmott report notes that this data was sourced from a Queensland Criminal Justice Commission (CJC) report that was ‗being prepared for the Queensland Police Department in 1998'. Ibid 116. These statistics also were reported in a newspaper article by Tony Koch in the *Courier-Mail* on 31 October 1998: Ibid 40. As the information contained in the Memmott report was not made public by the CJC, the Memmott report appears to be the only source for this data (the most relevant CJC publication in 1998 and following years, which contained some data cited by Memmott but not the data dealing with sexual violence, appears to be: Queensland Criminal Justice Commission, ‗A Snapshot of Crime in Queensland' (1999) 5(1) *Research Paper Series*).

561 Ibid 17, Table 3.

Victimisation surveys consistently indicate higher rates of violence than does the police data. This follows from the findings, above, that most sexual violence is not reported to the police. Frequently cited is the report by Mouzos and Makkai on the Australian component of IVAWS.[562] This was a victimisation survey, based on a random sample of women, which was conducted in Australia between December 2002 and June 2003.[563] Mouzos and Makkai found that, nationally, just over a third of surveyed Australian women had experienced sexual violence in their lifetime, and 11 percent of those surveyed had experienced sexual violence in the twelve months preceding the survey.[564] According to IVAWS, Indigenous women were nearly three times more likely than non-Indigenous women to have experienced physical or sexual violence in the past 12 months.[565] Over the course of their lifetimes, Indigenous women were more likely to experience physical and any form of violence but slightly less likely to experience sexual violence.[566]

Disproportionate rates of violence are reflected in other studies and surveys. The *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault* (*Heroines* report) concluded that Aboriginal women in NSW were ten times more likely than non-Indigenous women to be a complainant in the sexual assault matters studied.[567] In 2007, the Australian Institute of Criminology found that _sexual violence is endemic in many Indigenous communities'.[568] In the 2004 Victorian Law Reform Commission (VLRC) inquiry into sexual offences, a police stakeholder asked _[w]hat aboriginal adolescent girl hasn't been sexually assaulted?'[569] In another Victorian report, anonymous Indigenous

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562 Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 66.

563 Ibid.

564 Ibid 20.

565 Ibid.

566 Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 66, 31, Figure 5. Mouzos and Makkai, however, note that the high relative standard error with respect to the statistics relating to Indigenous victim/survivors mean that these should be treated with caution: 30.

567 In the *Heroines* study, 11% of women sexual assault victims were _from Aboriginal communities': NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 2.

568 The study included qualitative research conducted through the holding of roundtables, focus groups and interviews. Taylor and Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia*, above n 53, 3.

569 The Final Report was released on 25 August 2004 and included recommendations to improve training for police, lawyers and judges, reducing the number of times children and people with a

workers spoke about the increase in sexual assaults: ‗[w]hole generations of our young people are growing up thinking that this stuff is normal behaviour'.[570] These findings are not new. In 1992, Karen Mow found that ‗[s]exual assault counsellors in South Australia have estimated that few Indigenous girls reach the age of 14 without being raped or assaulted'.[571] In 1991, Bolger stated that in one town camp that she visited, ‗it was said that there was no girl over the age of ten years who had not been raped'.[572] In Edie Carter's 1986 study in South Australia, 59 cases of rape were recorded amongst the 120 participants surveyed.[573]

The Memmott report found that ‗[r]ape and sexual assault are two very violent and permanently debilitating forms of abuse that are reported as increasing in frequency and in intensity (eg group rape) in certain Aboriginal communities'.[574] In 1990, Atkinson stated that ‗[r]ape is a daily occurrence in many places and is more often only reported if it is pack rape'.[575] She writes that she heard that ‗[r]apes are now being carried out on drunken women by groups of boys aged 10 to 15'.[576] In another article, Atkinson cited a 1989 Palm Island study that expressed concern that ‗in one town no Aboriginal girl over the age of ten had not been raped'.[577] These appear to be the findings cited by the Memmott report.

Relevant data that may be collected by state and territory prosecuting agencies are difficult to access in all jurisdictions. In 2003, Lievore cited the Queensland Office of the

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cognitive impairment give evidence and allowing CCTV testimony routine., Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) [2.33], fn 105.

570 Lisa Thorpe, Rose Solomon and Maria Dimopoulous, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People—A Partnership Project Between Elizabeth Hoffman House and CASA House* (2004) 22.

571 Karen Mow, *Tjunparni: Family Violence in Indigenous Australia—A Report and Literature Review for the Aboriginal and Torres Strait Islander Commission* (1992) cited in Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*, above n 543, 56.

572 Bolger, *Aboriginal Women and Violence*, above n 60, 32.

573 Edie Carter, Adelaide Rape Crisis Centre Inc, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse*, above n 110, 6.

574 Memmott et al., *Violence in Indigenous Communities*, above n 51, 40.

575 Atkinson, ‗Violence in Aboriginal Australia: Part 2' above n 110, 6.

576 Ibid 10. See also Atkinson, *Trauma Trails: Recreating Song Lines*, above n 534.

577 Atkinson, ‗Violence Against Aboriginal Women: Reconstitution of Community Law—The Way Forward' above n 458. The study cited was JG Barber, J Punt and J Albers ‗Alcohol and Power on Palm Island' (1990) 23(2) *Australian Journal of Social Issues* 87–101, not available online. In her article, Atkinson also stated that ‗[m]ore Aboriginal women have died from violent assault in a number of communities than all the deaths in custody in the states concerned': Ibid 4.

Department of Public Prosecutions as suggesting that ‗most sexual assault cases heard in North Queensland courts involved Aboriginal women'.[578] Also in Queensland, the Aboriginal and Torres Strait Islander Women's Task Force on Violence, chaired by Boni Robertson found that,

> [a]ccording to many Indigenous women, rape or sexual abuse is becoming a frequent occurrence in their Communities. It has been estimated that 88% of rape cases go unreported. This situation may be more common in Communities in remote and isolated regions, but there have been many cases cited of similar offences occurring against women in rural and urban areas of the state.[579]

The prevalence rate for sexual violence among the female prison population in New South Wales appears to be extremely high. In 2003, Rowena Lawrie of the NSW Aboriginal Justice Advisory Council (AJAC) conducted a study into the experiences of 50 Aboriginal women in prison in NSW, including sexual assault, finding that 44% of these women had experienced sexual assault as adults.[580]

In summary, it is apparent that—despite a high underreporting rate—Indigenous women appear to experience sexual violence at much higher rates than non-Indigenous women. In some jurisdictions, Indigenous women experience *significantly* higher rates of sexual violence than non-Indigenous women. Studies show that sexual violence is endemic for Indigenous women. Even a cautious analysis of the research considered in this section must lead to the conclusion that Indigenous women appear to be more likely to experience sexual violence than non-Indigenous women in Australia. This finding parallels findings of major reports into Indigenous child sexual violence/abuse, such as those by the Northern Territory

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578 Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*, above n 543, 57. The cited study was Queensland Office of the Director of Public Prosecutions, *Indigenous Women Within the Justice System* (1996).

579 Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 98–99. As noted above, the estimation of 88% of unreported rapes is not cited, but may refer to Edie Carter's study which reached this finding and was cited later in the report.

580 Rowena Lawrie, *Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody* (2003). The explanations were not provided in the report, but the use of the term ‗sexual assault' may indicate that an offence-based definition was used: Ibid 54. The report states that the survey recipients were asked about several different types of abuse, including physical abuse, mental abuse, and sexual assault, and provided with an explanation of the meaning of these terms.

Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse[581] and the New South Wales Aboriginal Child Sexual Assault Taskforce.[582]

C Known relationships

Academic research shows that most sexual violence takes place in the context of known relationships. In the *Heroines* study, for instance, 90% of all victim/survivors knew the perpetrator of the violence.[583] Trends as to known relationships also appear to be consistent for Indigenous women. The ABS report on crime recorded in 2012 gives an offender-focused relationship breakdown—it breaks down the relationship categories between all female sexual assault victims and Indigenous perpetrators. For the four jurisdictions included in the report, the data show that the majority of Indigenous offenders who commit sexual assault against women know their victim—there was a known relationship in 79% of these sexual assault matters recorded in New South Wales, in around 72% of these sexual assaults in Queensland, 76% in South Australia, and in 66% in the Northern Territory.[584]

In 2010, the Indigenous Law Centre (ILC) released the preliminary findings of a study into the experiences of Indigenous victim/survivors of sexual violence in the court system.[585] In the only published finding from that study, 81% of offenders were known to the victim, and the relationship was unclear in a further 4% of cases:

> Of the offenders that were known to the victim, 41 per cent were known through the community, 35 per cent were known through family and kinship relations, 11 per cent were the current partner (or promised husband) of the victim, 7 per cent of the offenders

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581 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle—Little Children Are Sacred*, above n 51.

582 Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future—Addressing Child Sexual Assault in Aboriginal Communities in NSW*, above n 51.

583 The Indigenous status of victims/offenders is not made clear here. NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 2, 58.

584 See Australian Bureau of Statistics, *4510.0—Recorded Crime—Victims, Australia* (2012), Supplementary Data Cube—Victims of Sexual Assault, Relationship of Offender to Victim by Aboriginal and Torres Strait Islander Status.

585 Indigenous Law Centre, 'Sexual Violence and Indigenous Victims: Women, Children and the Criminal Justice System—Research Brief No 1' (2010). To date, there have not been any further publications from this project.

> were the former partner of the victim, and 5 per cent of the offenders were in a relationship with the victim's mother.[586]

Of the 59 rapes in Carter's study, 95 perpetrators were involved as 17% of rape survivors were _pack raped'.[587] In Carter's study, nearly half of the individual rapes were in the context of known relationships, whether by an intimate partner (31%), relative (10%) or friend (6%), and a further 27% were known to the survivor by sight.[588] Further, _80% of rapists involved in pack rape knew the survivor'.[589] Of the 10 pack rapes, two involved boyfriends and friends, one involved friends, three involved persons _known by sight', two involved gaol mates and two involved strangers.[590] Where _the rapist was aboriginal, he most often knew the survivor intimately or by sight'. On the other hand, _[w]here the rapist was white, he was most often a stranger to the survivor, or known by sight'.[591] Repeat victimisation is also an issue. In Carter's study, four women (7% of victims) reported being raped repeatedly. In three of these cases, the relationship with the perpetrator was described as _lover' and in one case, as _boyfriend'.[592] Therefore, the limited available data show that a known relationship is typical in cases of sexual violence. In Carter's study, 51% of rapes occurred in either the victim or perpetrator's home.[593] This also may indicate relationship links between the victim and perpetrator.

Moreover, Indigenous women may be likely to experience rape in the context of intra-cultural relationships. In Carter's study, _41% of rapists were aboriginal, 42% were white and 17% were aboriginal and white rapists acting together'.[594] Other studies suggest that sexual violence against an Indigenous woman may be perpetrated by an Indigenous man. In an analysis of New South Wales recorded police data from 2000, Jacqueline Fitzgerald and Don Weatherburn found that, for 73% of sexual assaults reported by Aboriginal victims

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586 Ibid 3.

587 Edie Carter, Adelaide Rape Crisis Centre Inc, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse*, above n 110, 7. Note that, of the ten _pack rapes', two involved two male victims: Ibid, 9–10.

588 Ibid 13.

589 Ibid 8.

590 Ibid 14. Of the cases involving strangers, three involved taxi drivers and three involved police (not specified whether this was in pack rape or non pack rape scenarios).

591 Ibid 7.

592 Ibid 10.

593 Ibid 15.

594 Ibid 7.

(102 victims), the offender also was Aboriginal.[595] In the *Heroines* study, nearly two thirds of Aboriginal women were sexually assaulted by Aboriginal men.[596] The first findings of the ILC study found that, ‗in the vast majority of located cases the offenders were Indigenous men'.[597]

In summary, a significant proportion of the sexual violence experienced by Indigenous women appears to take place in an intra-cultural context. This is not all that surprising, given that the available data for Indigenous women parallels the general trend of sexual violence taking place in the context of known relationships, and Indigenous communities are frequently close knit in nature. It is a finding that has implications for the legal response to the violence, which is explored in the next section.

III ISSUES WITH THE CRIMINAL LEGAL RESPONSE TO SEXUAL VIOLENCE

In the previous section, I set out what is known with respect to the nature of the problem. In this section, I first provide an overview of the criminal law response to sexual violence, and then consider issues faced by victim/survivors who interact with the criminal legal system following an experience of sexual violence. For each issue, I consider first how it may affect victim/survivors of sexual violence generally, and then turn to consider other matters that may be relevant for Indigenous women who interact with the criminal law following an experience of sexual violence. In this way, I highlight what is distinct for Indigenous victim/survivors. Unsurprisingly, there also is limited publicly available data on Indigenous women who have interacted with the legal system following sexual violence.[598] There have

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595 Jacqueline Fitzgerald and Don Weatherburn, ‗Bureau Brief—Aboriginal Victimisation and Offending: The Picture from Police Records' (NSW Bureau of Crime Statistics and Research, 2001).

596 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 97. In a 2004 study, Lievore explicitly did not make findings on the racial composition of the victim/offender ‗dyad' with respect to prosecutorial bias as the data were not available or reliable. Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study (Prepared for the Australian Government Office of the Status of Women)* (2004) 24.

597 Further analysis is required to determine whether the high number of cases from the NT reflect higher rate of sexual violence in that jurisdiction or better data collection methods or willingness to proceed with a prosecution. Indigenous Law Centre, ‗Sexual Violence and Indigenous Victims: Women, Children and the Criminal Justice System—Research Brief No 1' above n 585, 3.

598 Cripps has highlighted challenges of data collection generally in the Indigenous domestic/family violence context: Cripps, ‗Indigenous Family Violence: A Statistical Challenge' above n 535, S27–

been a number of inquiries into the legal response to sexual violence, but such inquiries tend to avoid a close examination of how these laws impact on *adult Indigenous women*.[599] In part, this may be because of scant publicly available data. It also may be due to a lack of representation of, or consultation with, Indigenous women in such inquiries. One exception is the way in which *Heroines* report considered how adult female victims of sexual assault are treated in the NSW criminal legal system, and whether legislative provisions were operating in accordance with the stated aims of the provisions.[600] The report has been referred to as 'the most comprehensive study of rape cases in Australia'.[601] It was relatively broad in scope, including an analysis of 150 sound recorded sexual assault hearings, where the victim was an adult female, conducted in the NSW District Court over a year in the mid 1990s.[602] It is not a recent study, but the *Heroines* report is unique in that it provides quantitative and qualitative findings on the actual experiences of Indigenous women in court. Only a relatively small number of cases (17) involved Indigenous women, but even

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S28. See also Taylor and Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia*, above n 53. For an exception, discussed further below, see the NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53. The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report also touched on how the criminal legal system responds to sexual assault, although notes that Indigenous women with whom the Task Force consulted experienced difficulty in discussing this issue: Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, xiii.

599 See, eg, Bargen and Fishwick, *Sexual Assault Law Reform: A National Perspective*, above n 70; Queensland Crime and Misconduct Commission, *Seeking Justice: An Inquiry into How Sexual Offences Are Handled by the Queensland Criminal Justice System* (2003); Victorian Law Reform Commission, *Sexual Offences: Final Report*, above n 569; NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward*, above n 64; Criminal Law Review Division, NSW Government Attorney-General's Department, *The Law of Consent and Sexual Assault* (Discussion Paper, May 2007).

600 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 27.

601 McGlade, 'New Solutions to Enduring Problems: The Task of Restoring Justice to Victims and Communities' above n 509, 8.

602 Of these: 77 constituted trials where the accused(s) pleaded not guilty and was/were acquitted or the matter was not finalised but the complainant had given her evidence in full and cross-examination in full; 34 constituted trials and subsequent sentencing hearings where the accused(s) pleaded not guilty but was/were found to be guilty (treated as the same matter throughout *Heroines*, hence the varied number); and 39 constituted sentencing hearings where the accused pleaded guilty. NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 44.

this small number indicates an over-representation of Aboriginal women relative to population.[603]

A Overview of the criminal legal response to sexual violence

As police are the agency responsible for investigating allegations of sexual violence and laying charges, a victim/survivor will first encounter the police when interacting with the criminal legal system. This encounter may be through the woman directly contacting police herself, or by coming into contact with police with the advice or support of a legal and/or health support service. Therefore, the relationship between the police and the victim/survivor needs to be a safe and respectful one in which the woman feels comfortable and assured that she will be taken seriously. As discussed below, for Indigenous women, this is not always the case.

In those cases where charges are laid, it is the role of the prosecuting agency (or police prosecutor) to determine whether to commence, and then whether to proceed with, a prosecution.[604] In NSW, the primary prosecuting agency is the Office of the Director of Public Prosecutions (ODPP). The ODPP's decision to prosecute rests on a narrower test than the 'prima facie' test applied by the police—namely, whether it is in the public interest for a prosecution to take place, including whether there is a reasonable prospect of conviction.[605] The ODPP is also required to consider whether the matter should not proceed as a result of other discretionary public interest factors.[606] Relevantly for sexual violence offences, discretionary factors may include a consideration of: when the offence was committed; the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or victim; the attitude of a victim or

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603 The data for the *Heroines* study were collected from: the District Court Justice Information System; files of the NSW Office of the Director of Public Prosecutions; and sound recordings of the sexual assault trials: Ibid 1, 30, 44. As Indigenous peoples comprise only a small proportion of the population of NSW, it is not surprising that these women represent a small proportion of the study.

604 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*, above n 596, 6, Figure 1. Private prosecutions also are possible, but are expensive and rare.

605 The public interest is assessed with respect to: whether there is a reasonable prospect of conviction, including whether the admissible evidence is capable of establishing each element of the offence; and NSW Office of the Department of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 4.

606 Ibid Guideline 4.

in some cases a material witness to a prosecution; and any mitigating or aggravating circumstances.[607] Some Commonwealth laws contain offences of a sexual nature (for example, trafficking offences), which are subject to prosecution by the Commonwealth Director of Public Prosecutions upon satisfaction of a similar test.[608]

After perpetrators are charged, they may be held on remand or released pending a court appearance. The court stage involves three main stages: pre-trial, trial, and sentencing. At the pre-trial stage or the committal hearing, preliminary evidence will be assessed by a magistrate and if there appears to be a case to answer, perpetrators will enter a plea of guilty or not guilty. If perpetrators enter a plea of guilty, they will proceed to the sentencing stage, but if they enter a plea of not-guilty, they will proceed to the trial stage, where criminal culpability will be assessed by judge or jury. If they are convicted of the offence, perpetrators will be sentenced. At this stage, a restitution order may also be made, requiring the offender to compensate the victim/survivor for the harm caused by the sexual violence.[609]

In Australia, sexual violence offences are rarely dealt with expressly in ‗restorative justice' or ‗alternative justice' forums such as conferencing, victim-offender mediation and circle or forum sentencing.[610] Currently there are no specialist courts dealing with sexual offences

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607 Ibid Guideline 4.

608 The Commonwealth test is formulated as: there must be reasonable prospects of conviction and it must be in the public interest to prosecute, but the decision to prosecute must not be influenced by certain factors (including race of the offender or any other person involved): Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2008) [2.1]–[2.14].

609 See, eg, *Victims Support and Rehabilitation Act 1996* (NSW) ss 71, 77B. Research suggests that such orders rarely are made to benefit victims of crime: see, eg, Vincenzo Morabito ‗Compensation Orders Against Offenders: An Australian Perspective' (2000) 4 *Singapore Journal of International and Comparative Law* 59.

610 See, eg, *Criminal Procedure Act 1986* (NSW) s 348(2)(b) and Magistrate Shane Madden, *The Circle Court in the ACT—An Overview and its Future* (2007), 5 <http://www.aija.org.au/Ind%20Courts%20Conf%2007/Papers/Madden.pdf >. Alternative justice forums generally are linked to the criminal legal system in depending upon this system for referral of offenders once specific conditions have been met (for example, after a plea of guilty to a charge) or for sentencing or monitoring of an agreement that has been reached.

perpetrated against adult women, but there is increasing academic and policy interest in this type of specialisation.[611]

B Non-engagement

1 Victim/survivors of sexual violence

The most pressing issue is that most cases never reach the attention of the law. It is well accepted in the literature that police data does not reflect the true prevalence of sexual violence experienced by women because there is a range of inhibiting factors that prevent victim/survivors from reporting this violence.[612] Research into the underreporting of sexual violence in Australia indicates that only 10–30% of such violence is reported to the police.[613]

Why is this the case? It has been noted that ‗the reporting and non-reporting of sexual offences is often driven by different motivations and controlled by different conditions'.[614] A contributing factor to a victim's lack of reporting may be a feeling of extreme shame and/or embarrassment about the violence. Further, as most sexual violence in Australia takes place in the context of known relationships, one of the principal barriers to reporting is the victim's fear of a range of potential ramifications that may result from reporting sexual violence perpetrated by a partner, family or other community member. Additional reasons why women may be reluctant, or find it difficult, to report sexual violence to the

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611 See, eg, Haley Clark, ‗Seminar Review—The Legal System's Response to Sexual Assault—Do Specialist Courts Offer the Best Way Forward?' [2007] *Australian Centre for the Study of Sexual Assault Newsletter No 14*, 5. In their recent inquiry into family violence laws, the ALRC and NSWLRC endorsed specialisation for all actors in the criminal legal system and the establishment of specialist family violence courts with the jurisdiction to deal with criminal matters arising in a family violence context: Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, Recs 32–1, 32–3, 32–4 and 32–5.

612 See, eg, Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*, above n 543.

613 Taylor and Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia*, above n 53, 3. This study also cited Australian Bureau of Statistics, Personal Safety Survey—4906.0 (2006); Denise Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (2003); Maria Borzycki, *Pilot Study on Sexual Assault and Related Offences in the ACT: Stage 3* (2007).

614 NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward*, above n 64, 10.

police include: limited access to police (particularly if the victim lives in a remote or rural area, or if there are language barriers); the nature of the relationship with the police and legal system (the relationship between a particular woman and police officer/force and that of the police/legal system actors and the community more generally[615]); whether the victim perceives the violence to be a crime (for example, because of an intimate relationship with the perpetrator, lack of physical injuries, lack of information about the law or the extent or normalisation of violence in a community or area[616]); access to trusted and appropriate support services; and practical and legal ramifications of reporting (such as whether reporting would, or there is fear that it would, trigger a child protection investigation[617]).

2 Indigenous victim/survivors of sexual violence

Indigenous women may be even less likely than non-Indigenous women to report sexual violence, whether to support services or to the police. A 2004 survey carried out by the Australian Centre for the Study of Sexual Assault (ACSSA) into sexual assault in rural communities found that most of the services identified links with Aboriginal communities in their regions, [but] very few Indigenous service users attended any of the services'.[618] Even data and anecdotal evidence from service providers and workers, therefore, may underestimate the extent of the violence.

Many experiences of non-Indigenous victim/survivors are shared by Indigenous women,

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615 See, eg, Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 99. See also Chris Cunneen, Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful?' in *Chris Cunneen (ed) Aboriginal Perspectives on Criminal Justice* (1992).

616 See, eg, Queensland Office of the Director of Public Prosecutions, *Indigenous Women Within the Criminal Justice System* (1996). This report cited in Western Australian Office of the Director of the Public Prosecutions, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Office of Director of Public Prosecutions for Western Australia* (2001) 114–115.

617 See, eg, Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*, above n 543, 59–63. With respect to sexual abuse and sexual violence involving children, reasons for underreporting are explored in: Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future—Addressing Child Sexual Assault in Aboriginal Communities in NSW*, above n 51, 52–55; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle—Little Children Are Sacred*, above n 51, Ch 5. See also eg, Taylor and Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia*, above n 53, 4.

618 Alexandra Neame and Melanie Heenan, Responding to Sexual Assault in Rural Communities' [2004] *ACSSA Briefing No 3—Australian Institute of Family Studies* 7 .

but may be felt differently and intersect with different dynamics of colonialism, historical disadvantage and related matters. In a 1986 study conducted by Edie Carter in the urban Aboriginal community in Adelaide, only 12% of those who had experienced rape formally reported this to police.[619] This finding was echoed by that of an online survey for sexual violence support workers, carried out as part of an Australian Institute of Criminology (AIC) study in 2007.[620] Support workers in that study estimate that only 10% of Indigenous and culturally and linguistically diverse women report sexual violence to the police.[621] In the 2011 evaluation of the Victorian Sexual Assault Reform Strategy, stakeholders suggested that police did not get involved:

> almost all sexual assault in Indigenous communities arises in the context of family violence and that police attending family violence incidents neither expect nor seek the disclosure of sexual assault and it is therefore easier all round for the victim survivor to remain silent.[622]

In Carter's study, the reason most frequently provided for not reporting was fear—'of repercussions, of police, of violence'.[623] Whether fear of repercussion is heightened for Indigenous women may well depend on community context.[624] One of the two Indigenous victim/survivors interviewed in the 2011 evaluation of the Victorian Sexual Assault Reform Strategy indicated the currency of these concerns:

> I'm very frightened. The Aboriginal community is so small, my life has been really limited. It includes funerals, gatherings, celebrations, everything, because he's gonna be there. I can't move forward, yeah, and the other thing that it impacts – because our – our Aboriginal community's so small, it impacts on the community members as well because they know what's happened ... when I went to one funeral after it had happened the community members, instead of being there, you know, dealing with their sorry business,

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619 Edie Carter, Adelaide Rape Crisis Centre Inc, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse*, above n 110, 7. This statistic has been used several times, although not always with citation to Carter's study. See further above.

620 Taylor and Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia*, above n 53.

621 Ibid 3.

622 Success Works, for the Victorian Department of Justice, *Sexual Assault Reform Strategy: Final Evaluation Report*, above n 438, 188.

623 Edie Carter, Adelaide Rape Crisis Centre Inc, *Aboriginal Women Speak Out About Rape and Child Sexual Abuse*, above n 110, 7. About a quarter of participants in Carter's study did not report because of fear of not being believed: Ibid 7. See also Atkinson, 'Violence Against Aboriginal Women: Reconstitution of Community Law—The Way Forward' above n 458, 7.

624 This includes Indigenous women living in urban environments: see, eg, Lani Brennan's discussion of the ramifications of reporting violence perpetrated by her Indigenous partner in Sydney's La Perouse area in Wendy Bacon, 'Black Mark for White Man's Justice', *Sydney Morning Herald*, 18 December 2006 <http://www.smh.com.au/news/national/black-mark-for-white-mans-justice/2006/12/17/1166290412432.html>.

> were more concerned about making sure that he stayed away. I stopped going to funerals for a while because I thought, they should be focussing on their sorry business, not worrying about me. (Female, 41-45, Regional Victoria).[625]

The historical and contemporary relationship between Indigenous peoples and Australian police is critical to any consideration of the conditions affecting the likelihood of Indigenous women to report sexual violence, although this again will depend on specific jurisdictional and community contexts. For example, the Aboriginal & Torres Strait Islander Women's Task Force on Violence noted that the information that it received in its inquiry indicated _ontinuing hostility, mistrust, suspicion and fear between Communities and Queensland Police'. In part, this is because:

> Historically, in Australia, the police administered the laws that legitimised the displacement of Indigenous people to reserves and the removal of Aboriginal children, which in other colonised countries, was a role facilitated by the military. The memory of massacres and severe mistreatment by police has been passed from generation to generation of Indigenous Australians as an integral part of their oral history. Clashes between police and Indigenous people have also occurred in the relatively recent past and it was clear, during the consultations, that such events still invoke traumatic reactions.[626]

The Aboriginal and Torres Strait Islander Women's Taskforce on Violence report indicated that police frequently do not intervene when contacted.[627] The report cites an Indigenous woman in Central Queensland:

> I have lost two daughters killed by their husbands. One was getting bashed and the police did not come until it was too late. She was dead. The other one tried to stay alive and she took out an Order but he kept coming back and making trouble. The police would not come when they were called and they let him get away with it. Eventually he bashed her so hard she died in hospital.[628]

Aboriginal and Torres Strait Islander justice and service workers in the ACT told Kerry Arabena in an inquiry conducted in 2008–2009 that, in the domestic/family violence

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625 Success Works, for the Victorian Department of Justice, *Sexual Assault Reform Strategy: Final Evaluation Report*, above n 438, 187.

626 Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 4.7.3.1. See also NSW Ministry for the Status and Advancement of Women, *Dubay Jahli: Aboriginal Women and the Law Report*, above n 60, 13–14.

627 Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 158–161.

628 Ibid 160.

context, ‗[p]olice involvement is not widely viewed as a ―protective measure" for victims'. This is because police ‗are dismissive of Aboriginal and Torres Strait Islander victims of violence'.[629] Therefore, at least in these jurisdictions, if police do not ‗choose' to proceed with either civil or criminal law proceedings, then the legal system may be providing only a curtailed response to even the limited amount of violence that comes to its attention.[630]

The *Heroines* report highlighted the dangers for Indigenous women reporting violence to the police, noting one case where a woman

> was locked up for several hours after she had made a complaint of sexual assault. The woman reported her gang rape to Darwin police and instead of taking her to hospital for medical treatment they took her to the police watch house at Berrimah and detained her on outstanding warrants. The three men she accused of the rape were also detained but later released on bail. The complainant had an outstanding warrant for failing to appear in court on a charge of drinking alcohol in public.[631]

The position for Indigenous women is exacerbated when the sexual violence is perpetrated *by* the police. For example, in its submission to the ALRC's inquiry into women's equality before the law in the early 1990s, the Illawarra Legal Centre described the situation for Indigenous women seeking justice for sexual violence as ‗so bad, it would be impossible to imagine'.[632]

> ‗[the law] never helped me', said Lyn, one of 70 women who responded to the centre's phone-in this year. She says she was raped by two police officers in the cells in Sydney. ‗I'm not the only Koori woman that's been raped by the police.' She didn't take action, she said, ‗because there's no point. They'd only get you for something else when they see you next time.'[633]

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629 ACT Victims of Crime Coordinator, *We Don't Shoot Our Wounded: What Aboriginal Victims of Family Violence Say About the Violence, Their Access to Justice and Access to Services in the ACT*, above n 534, 19.

630 Ch 2 discusses police underreporting of violence, including sexual violence, that is experienced by Indigenous women.

631 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 95. Similar reactions from police were told in consultation to the Aboriginal Torres Strait Islander Women's Task Force on Violence: Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 262.

632 Reported in Amanda Matheson, ‗Rough Justice: Women and the Law', *New Woman*, 2 November 1994 <http://www.greenleft.org.au/node/7829>. See also reports made by Aboriginal women in Carol Thomas, ―Sexual Assault: Issues for Aboriginal Women" in Patricia Easteal (ed) *Without Consent: Confronting Adult Sexual Violence, Australian Institute of Criminology Conference Proceedings No 20* (1993), 141.

633 Matheson, ‗Rough Justice: Women and the Law' above n 632. See also Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in*

Hannah McGlade states that:

> As an advocate for Aboriginal women and children who have experienced sexual assault, I am conscious of the level of trauma and abuse that is frequently experienced at the hands of the justice system. All too often the result is one of injustice against the victims. It is little surprise that most cases are never reported.[634]

The AIC has noted that, 'if reporting of sexual violence is to be encouraged then clear benefits from reporting need to be demonstrated'.[635] In this section, I have presented evidence that suggests there may be a causal relationship between low levels of reporting sexual violence and the negative experiences of Indigenous women with the legal system.

C Attrition

1 All victim/survivors of sexual violence

'Attrition', a well-known phenomenon in sexual violence research, refers to the multiple points at which a case may drop out of the criminal legal system.[636] Kathleen Daly and Brigitte Bouhours surveyed attrition studies conducted in five common law countries, and found:

> In the past 15 years in Australia, Canada, England and Wales, Scotland, and the United States, victimization surveys show that 14 percent of sexual violence victims report the offense to the police. Of these, 30 percent proceed to prosecution, 20 percent are adjudicated in court, 12.5 percent are convicted of any sexual offense, and 6.5 percent are convicted of the original offense charged.[637]

For those few incidents of sexual violence that are reported, it has been estimated by the NSW Bureau of Crime Statistics and Research (BOCSAR) that more than 80% of cases in

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Australia (1991) cited in Behrendt, 'Consent in a (Neo) Colonial Society: Aboriginal Women as Sexual and Legal "Other"' above n 543, 361–362.

634 McGlade, 'New Solutions to Enduring Problems: The Task of Restoring Justice to Victims and Communities' above n 509, 8.

635 Taylor and Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia*, above n 53, 6.

636 See, eg, NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward*, above n 64, 8.

637 See, eg, Daly and Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' above n 62. Some studies used combined data, so the actual data sets surveyed in their study was 75: Ibid: 527.

NSW do not proceed past the investigative stage.[638] The first major point of attrition is at the police ‗clear-up' stage.[639] In a study of NSW police data collected in 2004, Jacqueline Fitzgerald found that, 180 days after an incident of adult sexual assault had been reported, only 32% of reports had been ‗cleared'. Clearing generally takes place when criminal proceedings have been commenced (for example, by police filing a court notice) or a complaint has been withdrawn. However, for the 2004 data, criminal proceedings had only been commenced in 59% of cleared matters involving adult sexual assault 180 days after these matters were cleared.[640] This is the second major point of attrition, with the data highlighting that criminal proceedings are not pursued in over 40% of even the low proportion of matters that are cleared.[641] This means that, within 180 days, criminal proceedings are commenced in only 19% of reported sexual offence incidents involving adult victims.[642] In December 2008, BOCSAR released figures indicating a dramatic decline in clear-up rates for matters involving sexual assault in NSW.[643] Over 1995 to 2006, matters recorded as fully or partially cleared fell from 63% to 28%.[644]

If a prosecutor decides not to continue with a matter, the matter may be withdrawn or ‗no billed'.[645] The *Heroines* report found that there was a high rate of no bills for sexual assault cases in NSW in the 1994–1995 reporting period.[646] In a 2004 study of prosecutorial

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638 Jacqueline Fitzgerald, ‗The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 1, 15.

639 Ibid 4.

640 Ibid 3–4.

641 Ibid 4.

642 Ibid 4.

643 Kate O'Brien, Craig Jones and Victor Korabelnikoff, ‗What Caused the Decrease in Sexual Assault Clear-up Rates?' 125 *Crime and Justice Bulletin* 1, 1–2, Figure 2. The study considered offences that police had recorded as sexual assault, aggravated sexual assault or assault with intent to have sexual intercourse (indecent assault, acts of indecency and other sexual offences were not included in the analysis): Ibid 8, fn 1.

644 The authors of the study concluded that the decline in the clear-up rate appeared to be attributable to a decrease in the number and proportion of cases in which the police laid charges. This may be because of a ‗changing profile' of matters coming to police attention and preparedness of victims to give evidence—for example, there had been a decrease of matters involving a weapon and an increase in matters involving current or former intimate partners. O'Brien, Jones, and Korabelnikoff, ‗What Caused the Decrease in Sexual Assault Clear-up Rates?' above n 643, 8.

645 Generally this is done by (or in the name of) the director of the prosecuting agency: see, eg, the functions of the NSW Director of the Office of Public Prosecutions as set out in *Director of Public Prosecutions Act 1986* (NSW) s 7(2)(a).

646 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 91–92.

decisions in sexual assault matters in five Australian jurisdictions conducted by Denise Lievore, the exercise of prosecutorial discretion to withdraw a case was a significant source of attrition across jurisdictions, with 36% of matters in the study withdrawn by the prosecutors.[647] Lievore found that the matters

> that proceed to trial tend to be those that are the most serious and have the strongest evidentiary basis. At the same time, there is substantial evidence that that prosecutors' case decisions are also open to influence by factors that are extraneous to the legal elements of the case, such as race, the relationship between the victim and the defendant, the defendant's criminal history and the victim's promptness in reporting the offence to police.[648]

Frequently, a prosecution of a sexual assault case will turn on the evidence of the victim, who will be a material—and sometimes the only—witness.[649] This means that major factors contributing to the prosecutor's decision to prosecute, and continue to prosecute, will be the strength of the victim's (often uncorroborated) evidence, and the victim's willingness to proceed. In *Heroines*, for example, 27% of cases that were no billed were done so for reasons personal to the victim, for example, where proceeding with the trial would cause too much stress.[650]

In her study of NSW data, Fitzgerald found that attrition does take place at the court stage but, as the number of cases that reach this point is relatively small, the volume of cases that drop out of the system at this point is not large.[651] The 2011 evaluation of the Victorian Sexual Assault Strategy indicated that, following the reforms to Victorian sexual assault

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647 38 of these cases were withdrawn prior to indictment, with 15 being withdrawn after the indictment: Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study (Prepared for the Australian Government Office of the Status of Women)*, above n 596, 31.

648 Ibid 12.

649 See, eg, discussion in NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward*, above n 64, 13.

650 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 91–92. Lievore discusses other limited research on no bills: Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study (Prepared for the Australian Government Office of the Status of Women)*, above n 596, 8. The most recent annual report of the NSW ODPP states that 6.1% of matters were 'no billed' in 2007–2008 but the report does not include the reason why cases were 'no billed', nor the number of 'no billed' matters involving sexual violence offences: NSW Office of the Director of Public Prosecutions, *Annual Report 2007–2008* (2008) 40.

651 Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' above n 638, 4. Ibid 4.

law that occurred as a result of the Victorian Law Reform Commission inquiry into sexual offences, attrition actually was increasing at the Magistrates' Court stage.[652]

2 Indigenous victim/survivors of sexual violence

The limited available data suggest that low reporting and high attrition trends are amplified for Indigenous women.[653] In a study of rapes reported to the Victorian police over the years 2000–2003, Melanie Heenan found that no charges had been laid in the fifteen cases involving Indigenous women,[654] whereas charges were laid in 15% of matters overall.[655] Apart from that study, statistics are poor and the proportion of matters involving Indigenous women that are subject to attrition in the investigative stage in all jurisdictions is not readily ascertainable. The same applies for the prosecuting stage: for instance, it is unclear whether the Indigenous status of the accused affects the decisions of prosecuting agencies to pursue the matter. The *Heroines* report found that in 11 of the 17 cases involving Aboriginal women, or in 61% of cases, the accused was an Aboriginal man.[656] In the study noted above, Lievore explicitly did not make findings on how the race/ethnicity of the victim (or the racial composition of the defendant/victim 'dyad') influenced the exercise of prosecutorial discretion, as the data were not available or reliable.[657]

Taking the Heenan study together with the general statistics on attrition at the investigative stage, and the above discussion of the difficult relationship between Indigenous women and police, it is highly likely that there is a high rate of attrition for matters involving sexual violence and Indigenous women at this stage—and possibly even a higher rate than for matters involving non-Indigenous women.

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652 There also was a higher rate of matters withdrawn in regional Victoria than in Melbourne. Success Works, for the Victorian Department of Justice, *Sexual Assault Reform Strategy: Final Evaluation Report*, above n 438, 181.

653 See, eg, Daly and Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' above n 62.

654 Eight cases were 'ongoing', five resulted in no further police action, two were withdrawn and one was classified as a false report. Some children were included in this small sample as these females were aged 10–49, without further age breakdown: Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003—Summary Research Report* (2006) 36.

655 Ibid 21.

656 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 97.

657 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study (Prepared for the Australian Government Office of the Status of Women)*, above n 596, 24.

D Navigating the system

1 All victim/survivors of sexual violence

Charge negotiations frequently take place as part of the prosecution process. Such negotiations may result in the ODPP prosecuting a lesser charge if the offender agrees to plead guilty to that charge. The Sexual Offences Taskforce noted that charge negotiations are _based on a consideration of the prospects of conviction and may also be influenced to some degree by attempts to spare the complainant from giving evidence'.[658] In describing the difficulty for an innocent person accused of a sex offence, a NSW Public Defender demonstrates the great incentive to engage in such negotiations.

> The lesser charge may or may not carry a standard non-parole period. In any event, the accused will be sentenced much more leniently if he or she were to plead guilty. Sometimes it is as stark a choice as a plea of not guilty with a 15 year non-parole period on conviction versus a 0–2 year non-parole period on a plea to a lesser charge.[659]

Lievore has noted that a lack of adequate communication between the prosecuting agency and victim means that _victims can experience charge negotiations as a betrayal or secondary victimisation'.[660] She also suggests that charge negotiations may be another point of attrition:

> overall, 44 per cent of cases resulted in a conviction, but this figure encompasses a sizeable number of cases finalised by way of a guilty plea. This points to prosecutors' willingness to negotiate concessions on charges and penalties in exchange for the defendant agreeing to plead guilty, rather than risk an acquittal.[661]

The reasons why attrition may take place at the court stage—or even why the court stage may be a deterrent and lead to attrition at the earlier stages—is at least partly explained by the deleterious effects of court appearances on victim/survivors of sexual violence. These effects are powerfully elucidated by Professor Judith Herman, who does not explicitly

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658 NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward*, above n 64, 12.

659 Leonie Flannery, —ADefence Lawyer's Perspective" 28(1) *University of New South Wales Law Journal* 252, 253.

660 Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study (Prepared for the Australian Government Office of the Status of Women)*, above n 596, 10.

661 Denise Lievore, _Prosecutorial Decisions in Adult Sexual Assault Cases' (2005) 291 *Australian Institute of Criminology—Trends & Issues in Crime and Criminal Justice* 1, 5.

consider Indigenous women in her research, but whose comments are still worth bearing in mind for the clarity of her explanation of the effects of adversarial legal processes on women with whom she has conducted empirical research. She found that ‗the wishes and needs of victims/survivors are often diametrically opposed to the requirements of legal proceedings'.[662] As discussed in more detail in Chapter 4, and particularly the elements of validation and control, essential to victim wellbeing, which often are inverted in the legal process: so much so, Herman concludes that ‗if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law'.[663]

Other issues include the fear of giving evidence in open court because of the shame attached through public airing of matters, the prospect of cross-examination by the perpetrator of violence, and community/family pressure in court.[664] In a national inquiry into Australian family violence laws, conducted in 2010 by the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC) (Family Violence Inquiry),[665] the Commissions made findings to do with the problems experienced by victim/survivors going through the court system. To this end, the Commissions made recommendations directed towards reducing trauma caused by criminal evidence and procedure, including the use of pre-recorded evidence,[666] the ordering of joint trials in sexual offence proceedings wherever possible,[667] and restrictions on evidence relating to a victim/survivor's sexual experience[668] and tendency or coincidence evidence.[669]

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662 Herman, ‗Justice From the Victim's Perspective' above n 65, 574.

663 Ibid 574.

664 Rosalind Croucher and Amanda Alford, ‗Family Violence: A National Legal Response—The ALRC and Indigenous People: Continuing the Conversation' (2011) 7 *Indigenous Law Bulletin* 14.

665 Note that the ALRC subsequently undertook a related inquiry, although this did not consider sexual violence matters in any depth: *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (2012).

666 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, Rec 26–6, 26–7.

667 Ibid Rec 26–5.

668 Ibid Recs 27–5, 27–6, 27–7.

669 Ibid Rec 27–13.

2 Indigenous victim/survivors of sexual violence

Rosalind Croucher and Amanda Alford point out that Indigenous victim/survivors of sexual violence may experience compounding factors such as 'logistical difficulties, including transportation and movement between communities' and 'language barriers and difficulties in giving oral evidence, including judicial attitudes towards the necessity of interpreters'.[670]

A women's legal service coordinator also suggest that Indigenous women may experience prejudices that belie the purported equality of sexual assault law and practice:

> [There was] one case where [a young] Indigenous … woman went through the whole process of providing evidence against her ex-partner for assaulting her. There were eight charges pending and each involved a serious domestic violence incident. The matter was resolved by the prosecution doing a deal with the defence. They agreed to dropping five charges and three were downgraded so that the ex-partner ended up with only a four month suspended sentence. The victim was not consulted and neither were we as the victim's advocate in the matter. To have something like that happen sends a negative message not only to that particular woman but to all other women. Essentially, although the law may in essence appear to be colour blind, in practice it is not always colour blind. Before an Indigenous or Culturally and Linguistically Diverse woman can even get her matter to trial she needs to convince the police to proceed with her matter and then she needs to navigate the complicated pre-trial processes.[671]

Lack of culturally appropriate support services may affect an Indigenous victim/survivor's inclination to interact with the law. Services such as Indigenous Family Violence Prevention Legal Services, which were set up to address the legal needs of Indigenous women, are 'severely underfunded' and located primarily in remote and regional areas.[672]

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670 Croucher and Alford, 'Family Violence: A National Legal Response—The ALRC and Indigenous People: Continuing the Conversation' above n 664. The ALRC and NSWLRC identified 'seamlessness' as the overarching principle for the Family Violence Inquiry: Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response—Summary Report* (2010) 16. The Commissions also made a number of recommendations directed towards improving the integration of legal frameworks: Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, Ch 29.

671 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [26.61]. The citation is to *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.*

672 Davis, 'Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Access to Justice' above n 58, 2. There is one Family Violence Prevention Legal Service (FVPLS) located in Collingwood, Melbourne. For details on the funding and administration of the FVPLS scheme see: Australian Government Attorney-General's Department, 'Family Violence Prevention Legal Services Program' above n 60. The role of Aboriginal Legal Services in dealing with violent conflicts between Indigenous peoples has been critically discussed since the 1990s: see,

The Family Violence Protection Legal Service in Victoria has suggested that problems with the police could be ameliorated by Indigenous-specific support services:

> Significant problems remain with respect to contact between ATSI [Aboriginal and Torres Strait Islander] people and police. Appropriate support at the point of crisis intervention is more likely to lead to safer outcomes in the short and long term. Significant decisions are required to be made at the point of crisis when women are traumatised and generally ill-equipped to make considered decisions. Mistrust of police and legal processes by ATSI women compound these difficulties. Attendance of workers with police at family violence incidents should be trialled. In large rural areas this may not be practical however offering an ATSI family violence victim the option to contact a dedicated ATSI crisis service by telephone would be an improvement. The service could assist in communicating/negotiating with police.[673]

The support provided by Indigenous Liaison Officers—in NSW, such court support is provided by the ODPP Witness Assistance Service[674]—is extremely valuable, but for the same reasons given in the previous chapter, I argue that this will not ameliorate the issues raised by Herman. This is because support services operate within the status quo: such services are absolutely essential, but cannot address fundamental system problems.

In summary, the research considered in this section gives weight to the proposition that negative legal interactions experienced by Indigenous victim/survivors who seek the protection of the law may act as a deterrent for future legal interactions for those women or others in similar positions who hear about their experiences with the legal system.

E Myths and stereotypes

1 All victim/survivors of sexual violence

There are common misconceptions to do with sexual violence. The term ‗real rape' is used in the sexual violence literature to refer to sexual offences that conform with stereotypical understanding of how sexual violence offences are carried out, for instance, the

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673 eg, Bolger, *Aboriginal Women and Violence*, above n 60, 84–86; NSW Ministry for the Status and Advancement of Women, *Dubay Jahli: Aboriginal Women and the Law Report*, above n 60, 10–11. Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [29.141]. The citation is to Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

674 See, eg, NSW Office of the Director of Public Prosecutions, *Witness Assistance Service—Rights as a Victim* <http://www.odpp.nsw.gov.au/was/victims-rights/yraavdoc.htm>.

hypothetical knife-wielding stranger who accosts a young woman walking home alone at night.[675] The reality of sexual violence, of course, is very different. Yet are the ‗real rape' cases most likely to come to court—whether because of the understanding of investigators and prosecutors, or an assumption about the prejudices of jury members, or even because of how a woman herself classifies the violence? For example, in the Australian component of IVAWS, 42% of all women who experienced violence by a stranger perceived that as a crime, and 38% of those who experienced violence by a former husband/partner saw that as a crime. On the other hand, 11% of women who experienced violence by a current husband/partner saw that as a crime and 21% of violence experienced by a non-partner relative and friend/acquaintance, respectively, was seen as a crime.[676] In IVAWS, regardless of the nature of the relationship, all women were more likely to report to police violence that resulted in physical injuries. Those women that reported physical and sexual violence perpetrated by intimate partners were just as (un)likely to report sexual as physical violence—reporting both types of violence at rates of 15%. With respect to violence perpetrated by non-partners, however, women were more likely to report physical violence (19%) than sexual violence (12%).[677]

In *Heroines*, at least, the sample was fairly representative of what research shows about known relationships between victims and perpetrators—90% of the complainants knew the offender, and in 27% of cases there was evidence of a prior consenting sexual relationship between the woman and offender.[678] In Lievore's study, however, while 76% of offenders were known to victims, ‗fewer strangers had their cases withdrawn ... or negotiated charges in exchange for a guilty plea, while partners and former partners were more likely to have their cases withdrawn'.[679]

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675 See, eg, Estrich, *Real Rape*, above n 69.

676 Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 66, 96–97, 101–102, Figures 38, 39. See also Taylor and Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia*, above n 53, 4–5.

677 Mouzos and Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, above n 66, 102.

678 The Indigenous status of victims/offenders is not made clear here. NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 2, 58.

679 Lievore, ‗Prosecutorial Decisions in Adult Sexual Assault Cases' above n 661, 4.

Another factor in making the decision to prosecute may be how quickly the victim reported the violence. In *Heroines,* half of all women reported the violence to the police within five hours of it occurring, with a third of women reporting it to police within an hour.[680] In nearly half the cases, Indigenous women reported the assault to the police within five hours; in other words, at about the same rate as non-Indigenous women.[681] Even those women who do report sexual violence frequently delay for a wide range of reasons. Given that ‗delay in complaint' frequently is raised as an issue in cross-examination, such a rapid reporting rate for the sample in *Heroines* may have influenced prosecuting agencies to proceed with these matters. For example, in *Heroines*, defence counsel raised the issue of delay of complaint in: over a third of cases where the complainant had told someone within an hour of the sexual violence occurring; 75% of cases where the complainant had told someone within one to five hours; over half of the cases where the complainant had told someone within six to 12 hours; and 100% of cases where a complainant had told someone within 13 to 24 hours.[682]

In recognition of the misunderstanding of the contexts in which sexual violence takes place, the ALRC and NSWLRC recommended in 2011 that Australian sexual assault legislation should contain guiding principles to which courts should have regard when interpreting sexual offence provisions.[683] The Commissions recommended, at a minimum, such guiding principles should refer to the following:

> (a) sexual violence constitutes a form of family violence;
>
> (b) there is a high incidence of sexual violence within society;
>
> (c) sexual offences are significantly under-reported;
>
> (d) a significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Indigenous and culturally and linguistically diverse backgrounds, and persons with a cognitive impairment;

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680 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 2.

681 Ibid 98.

682 Ibid 221, Table 4.

683 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, Ch 25.

(e) sexual offenders are commonly known to their victims; and

(f) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.[684]

This recommendation may not address the invisibility problem, nor lead to cultural change more broadly, but it may assist in educating members of the judiciary interpreting criminal sexual assault provisions. More research is required into further structural problems in legal responses to sexual violence, and also into how legal actors in the criminal legal system treat victim/survivors of sexual violence when that violence takes place in the context of known relationships. Does this affect decisions of the investigative or prosecuting agencies to intervene or proceed? Does it affect the sentencing process? How are Indigenous women particularly affected?

2 Indigenous victim/survivors of sexual violence

Real rape myths also affect Indigenous victim/survivors of sexual violence. For instance, the report of the Aboriginal and Torres Strait Islander Women's Task Force on Violence found that '[m]any cases of rape or sexual abuse occur in a domestic situation, yet these are rarely identified as rape by Indigenous women or addressed as such by the courts'.[685] In addition to misunderstandings about sexual violence, Indigenous women are affected by cultural and racial myths. The *Heroines* report found that '[i]t is clear that beliefs, myths and stereotypes about Aboriginal women, which have their basis in the views and treatment of Aboriginal women over the last two centuries, have pervaded the community and in particular the legal system to this day'.[686] In 1994, Aboriginal women advised the NSW Ministry for the Status and Advancement of Women 'that they felt they were often confronted with hostile or ill-informed attitudes of members of the bench who were overseeing trials involving allegations of violence against Aboriginal women'.[687] These

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684 Ibid Rec 25–9.

685 Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, above n 110, 99. The citation is from National Injury Surveillance Unit, *Study of Injury in Five Cape York Communities* (1997) 43–45.

686 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 96.

687 NSW Ministry for the Status and Advancement of Women, *Dubay Jahli: Aboriginal Women and the Law Report*, above n 60, 17.

myths are harnessed by defence counsel in attempting to discredit complainants before the jury. Lievore found that defence lawyers in sexual violence cases ‗construct Aboriginal women as amoral, unsophisticated and vengeful'.[688] For instance, Indigenous victim/survivors were asked more questions than non-Indigenous victims on matters such as victims' compensation applications (that is, was the victim/survivor motivated by financial gain) and alcohol consumption at the time the alleged sexual violence occurred.[689] Prosecutors—the legal actors representing the interests of Indigenous women—also deploy these myths. The *Heroines* report cites one Crown Prosecutor, in summing up, describing the complainant as ‗an unsophisticated Aborigine' who is ‗not very bright' and therefore unlikely to have made up the story.[690]

These issues remain live. In 2010, a women's legal services coordinator told the Family Violence Inquiry that Indigenous (and culturally and linguistically diverse) women:

> have to counter issues/stereotypes that intersect between racism and sexism. On top of this, their access to justice is also hampered by the lack of suitable interpreters and by the general lack of cultural sensitivity and awareness of professionals within the system.[691]

Another distinct issue is related to customary law. There is dispute amongst Indigenous peoples over whether, and in what contexts, behaviour defined in this thesis as sexual violence is permitted by Indigenous customary law.[692] Sharon Payne rejects customary law as condoning sexual violence, memorably stating that Aboriginal women in the Northern Territory are subjected to ―white man's law, traditional law and bullshit law', the latter being used to describe a distortion of traditional law used as a justification for assault and

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688 *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*, above n 543, 62.

689 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault,* above n 55, 132.

690 Ibid 132.

691 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [26.61]. The citation is to *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.*

692 See, eg, the comments made in meetings between the Australian Law Reform Commission and Indigenous women held between March–May 1981 in several communities in the Northern Territory, Western Australia and Queensland as part of the Aboriginal Customary Laws Inquiry: Australian Law Reform Commission, *Aboriginal Customary Laws Inquiry Transcript of Proceedings—Women's Meetings*, above n 418. See also Diane Bell and Pam Ditton, *Law: The Old and the New—Aboriginal Women in Central Australia Speak Out* (1980) [4.110].

rape of women'.[693] In the 2011 evaluation of the Victorian Sexual Assault Reform Strategy, one of the two Indigenous woman interviewed rejected sexual violence as a part of Aboriginal culture, suggesting that the violence that pervades Victorian Aboriginal society today is a result of the 'mission' rather than traditional culture.[694]

Those within a community who contest that culture permits—or even requires—sexual violence often are silenced. Bolger noted that Indigenous women in a community who disagreed that the rape of two young girls by a male community member was in accordance with culture 'appeared to be unable to intervene'.[695] The NSW inquiry, Dubay Jahli, recommended that the ODPP 'develop a network of female experts in the field of Aboriginal culture who can be called to dispute claims that physical or sexual violence is 'normal" or 'ordinary part" of Aboriginal culture'.[696] This has not been implemented.

Regardless of whether sexual violence is in fact part of Indigenous customary law, the effect of evoking culture in sexual violence cases means that Indigenous women who interact with the legal system following an experience of sexual violence perpetrated by a community member face a unique disadvantage. As recently as 2005, the Chief Justice of the Northern Territory Supreme Court received evidence of custom in mitigation of sentence, delivering a five month sentence—suspended after one month—for the anal rape of a 14 year old Indigenous girl and a related firearm offence.[697] This decision was overturned on appeal[698] and s 91 of the *Northern Territory Emergency Response Act 2007* (Cth) now precludes the consideration of customary law or cultural practices in mitigation or aggravation of sentence for all offences.[699] More research is required into the extent to

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693 Sharon Payne, 'Aboriginal Women and the Criminal Justice System' (1990) 46 *Aboriginal Law Bulletin* 9. See also Jane Lloyd and Nanette Rogers, 'Crossing the Law Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia' in *Without Consent: Confronting Adult Sexual Violence: Proceedings of a Conference Held 27–29 October 1992* (1993) 149, 161.

694 Success Works, for the Victorian Department of Justice, *Sexual Assault Reform Strategy: Final Evaluation Report*, above n 438, 187.

695 Bolger, *Aboriginal Women and Violence*, above n 60, 52–53.

696 NSW Ministry for the Status and Advancement of Women, *Dubay Jahli: Aboriginal Women and the Law Report*, above n 60, 17.

697 See discussion of the first instance judgment in *The Queen v GJ* [2005] NTCCA 20.

698 *The Queen v GJ* [2005] NTCCA 20.

699 *Northern Territory National Emergency Response Act 2007* (Cth) s 91.

which customary law is still raised in sexual violence matters in the Northern Territory and other jurisdictions.

Some research indicates that cultural matters may not only affect the experiences of Indigenous victim/survivors interacting with the legal system, but cultural matters also may affect legal outcomes. In *Heroines,* only in one out of 17 cases did a perpetrator accused of sexually assaulting an Indigenous woman plead guilty, compared with guilty pleas in 26% of cases involving non-Indigenous women. The effect of this is that more Indigenous victim/survivors had to go on to endure the trial process. Also in the *Heroines* study, a lower proportion of accused who pleaded not guilty were convicted by a judge or jury where the victim was an Indigenous woman—four out of 16 (or 25%) compared with 31% convicted of offences against non-Indigenous women. Piecing together the data in *Heroines,* the overall conviction rate for persons accused of a sexual violence offence against an Indigenous woman was 29% as opposed to 49% for persons accused of the same offences against women who were not identified in the study as Indigenous.[700] These statistics are disturbing as they indicate a markedly different conviction outcome for those accused of committing sex offences against Indigenous women.[701]

Once there has been a conviction in a matter where both perpetrator and victim are Indigenous, then there may be judicial sensitivity towards the number of Indigenous offenders in custody as a result of RCIADIC. In her research into sexual violence in the Northern Territory around the time of RCIADIC, Bolger stated that:

> It has been shown that the legal system serves female victims of violence badly, and this is particularly so for Aboriginal women. The situation is complicated by the desire to reduce

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700 NSW Department for Women, *Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault*, above n 53, 76.

701 The overall conviction rates in *Heroines* are broadly consistent with current conviction rates on sexual violence. The most recent statistics on conviction rates released by BOCSAR in September 2007 show that, between 2004 and 2006, there was a rise in conviction rates for persons charged with sex offences in NSW. For persons charged with sex offences not involving children, and appearing in the higher courts, the conviction rate increased from 35% to 49%. For persons charged with sex offences not involving children, and appearing in the local courts, the conviction rate increased from 47% to 52%. See: NSW Bureau of Crime Statistics and Research, ‗Information Sheet—Increase in the Conviction Rate for Sexual Offences in NSW Courts' (2007).

> the proportion of Aboriginal men in prison. However, this goal needs to be balanced by consideration for the rights and welfare of the female victims.[702]

Again, more research is required to determine how this specific matter plays out in practice.

In their Family Violence Inquiry, the ALRC and NSWLRC dealt with issues specific to Indigenous victim/survivors through indicating the need for cultural awareness education and training for all relevant legal actors; prioritising provision and access to culturally appropriate victim support and advocacy services; and ensuring the provision of translating and interpreting services.[703] The 2011 evaluation of the Victorian Sexual Assault Reform Strategy indicated that education and training for police and prosecutors was improving experiences of a number of victim/survivors in Victoria.[704] I agree that challenging gendered and racial prejudices necessitates careful, directed and perhaps compulsory education and training amongst the legal profession. And improving the attitudes of police and prosecutors is a complementary step to addressing more fundamental problems within the legal system.

IV CONCLUDING CHAPTER REMARKS

The dearth of publicly available data and analysis into sexual violence experienced by Indigenous women is disturbing. The lack of research into sexual violence more generally in Australia—even the lack of a clear, accepted definition of sexual violence—speaks to the historical invisibility of sexual violence. The focus of the last decade has been on Indigenous family violence and violence in Indigenous communities. While this has been laudable, it has resulted in the further obscuring of sexual violence that is experienced by women in these contexts, even while the limited available research indicates that here is where most sexual violence takes place. Research into this issue is critical, and more is

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702 Bolger, *Aboriginal Women and Violence*, above n 60, 95–96.

703 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53. See, eg, Recs 9-3, 26-3, 29-4, 31-1. Croucher and Alford, 'Family Violence: A National Legal Response—The ALRC and Indigenous People: Continuing the Conversation' above n 664.

704 Indigenous status was not noted here, but the general comments are relevant. Success Works, for the Victorian Department of Justice, *Sexual Assault Reform Strategy: Final Evaluation Report*, above n 438, 172–180.

urgently required. This may need to be undertaken in creative ways, acknowledging the issues to do with researching this specific type of violence in this specific minority Australian community.

Notwithstanding this gap in the literature, certain things can be extrapolated from existing research about the nature and extent of sexual violence experienced by Indigenous women. First, Indigenous women experience much higher rates of sexual violence than non-Indigenous women. Even though Indigenous women who are victim/survivors of sexual violence are less likely to engage with the legal system, Indigenous victim/survivors are overrepresented in that system. This underscores why there should be specific consideration of how the law should respond to this problem. Secondly, Indigenous women who are victim/survivors of sexual violence experience that violence primarily in the context of known relationships. Further, existing research suggests that the perpetrator of sexual violence against Indigenous women is frequently—if not usually—an Indigenous man. This finding is pertinent as it means that, in the development and implementation of legal responses to the problem, gendered harm committed within relationships of trust *and* the complexities of intra-cultural disputes must be addressed.

In September 2011, the former Chair of the Victorian Law Reform Commission and Justice of the Victorian Supreme Court, Marcia Neave, expressed the view that ‗the criminal justice system cannot meet all the concerns of victims of sexual assault'.[705] In this chapter, I have argued that the current legal response to sexual violence experienced by Indigenous women is falling far short of providing justice for victim/survivors, in that it is not providing meaningful protection or closure for Indigenous women who have experienced sexual violence. The limited research with Indigenous women who have interacted with the legal system following an experience of sexual violence indicate these women are not satisfied with the legal response. The inadequacy of the current response is evidenced by the very low level of initial engagement with the legal system by Indigenous women who have experienced sexual violence, and the high attrition rate following that initial

[705] Justice Marcia Neave, ‗New Approaches to Sexual Offences' Australian Institute for Judicial Administration Conference on Criminal Justice in Australia and New Zealand—Issues and Challenges for Judicial Administration, Sydney, 8 September 2011.

engagement (this notwithstanding the overrepresentation of Indigenous women as victim/survivors of sexual violence at all stages of the legal process). The legal system is preventing—or at least not facilitating—full interaction by Indigenous victim/survivors of sexual violence seeking protection or closure.

The inadequate legal response is characterised by certain features. First, the legal landscape can be costly and difficult to navigate. This may have a disproportionate effect on Indigenous women who are more likely than non-Indigenous women to face income, linguistic and geographical challenges in negotiating the legal system. Secondly, legal interactions—and particularly interactions with the criminal law—are commonly distressing and even traumatic for women who have experienced sexual violence. This is a major factor that discourages legal participation on the part of victim/survivors. Thirdly, while many factors will affect a woman's interaction with the law following sexual violence, an Indigenous woman's encounter with that system likely will be affected by her gender and her race or culture.[706] Indigenous women experience the same pressures as all adult women who interact with the legal system following an experience of sexual violence *and* are vulnerable to cultural stereotypes deployed by legal actors.

As noted in the introduction to this thesis, the law is a blunt way to deal with sexual violence issues, as laws and legal actors are not sufficiently alive to the fact that most Indigenous women who have experienced sexual violence know the perpetrator of the violence and that the perpetrator of that violence is likely to be Indigenous. This brings with it the challenge of regulating intra-cultural sexual violence and violence in the context of known relationships. The education and training of legal actors can go some distance towards ameliorating this problem, but the problems are deeply entrenched, and education and training does not deal with the more fundamental problems of the current adversarial court process.

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[706] See, eg, Australian Law Reform Commission, *Equality Before the Law—Justice for Women: Part I*, above n 258, [5.24].

If the current legal system is not dealing with the perpetrators of sexual violence experienced by Indigenous women, and victim/survivors of that violence are negatively affected by their interactions with the legal system, then the relevant systems, laws, or implementation of those laws, are not achieving the desired objectives. Most importantly, from the perspective of this thesis, the current legal response to sexual violence experienced by Indigenous women cannot be seen to be delivering justice, especially in the sense extrapolated at length in Chapter 3 of this thesis. The current legal response is falling far short of addressing principles such as discursiveness and reflectiveness: Indigenous women are even rarely engaging with the legal system, and when they do, they are maligned on the basis of race and gender. In this chapter, I have set up this case study as an area of the law that is in an urgent need of reform. In the next chapter, I consider whether therapeutic jurisprudence offers a theoretical framework that is able to guide such a reform project, and consider facets of Hudson‘s approach to justice more directly in this approach.

CHAPTER SIX: THERAPEUTIC JURISPRUDENCE, JUSTICE AND THE CASE STUDY

I CHAPTER OVERVIEW

In this chapter, I draw together the key findings in the preceding four chapters: those relating to justice, therapeutic jurisprudence, victim/survivors, and specifically, the legal response to sexual violence experienced by Indigenous women. Those chapters have laid the groundwork for this chapter, which now allows me to answer the research question in this thesis: can therapeutic jurisprudence inform an appropriate legal response to Indigenous victim/survivors of sexual violence? I have argued that there are shortcomings with the current legal response to sexual violence, evidenced by low initial engagement with the law and high rates of attrition. Now, I ask whether therapeutic jurisprudence should be the frame for reform in this area. As discussed in Chapter 3, I use Barbara Hudson's approach to justice as the standard against which I measure therapeutic jurisprudence: her justice is one based on deep equality, emphasising the voices of the oppressed.

This chapter constitutes a critical consideration of whether therapeutic jurisprudence can provide justice, as envisaged by Hudson, for Indigenous victim/survivors of sexual violence. If therapeutic jurisprudence is able to improve the experience of an Indigenous victim/survivor moving through all stages of the legal system, and ameliorate the lack of engagement in so doing, then I argue that it makes a valuable contribution to the law. In this way, the justice that therapeutic jurisprudence can effect is partial, but not negligible. In this chapter, I also discuss practical ways to manifest just responses, framed by therapeutic jurisprudence, for Indigenous victim/survivors of sexual violence.

II APPLYING THE THEORY TO THE TOUGH CASE

A Victim/survivors

I have no problems with several key elements of therapeutic jurisprudence. I agree that the effects of the law are therapeutic or antitherapeutic, or sometimes, perhaps, neutral. I also agree with therapeutic jurisprudence proponents that consideration of the wellbeing of those who come before the law is a worthwhile exercise. I noted three central principles of therapeutic jurisprudence as follows: (i) validation/respect, (ii) knowledge/control, and (iii) voice/participation. Also in that chapter, I argued that many of the criticisms levelled against therapeutic jurisprudence are unfounded, and I contributed a new observation. This is that therapeutic jurisprudence has a built-in normative restraint, at least as it was formulated by David Wexler and Bruce Winick, in that it does not disturb existing legal system values, nor does it deal with the balancing of interests in tough cases. This is not resolved with coherence in a secondary body of literature. I discuss this further below. Whether this is a shortcoming depends on a number of factors, including the nature of the law and the issue under review. As discussed in this thesis, developing and implementing a just legal response to Indigenous victim/survivors of sexual violence, in accordance with a therapeutic jurisprudence framework, presents a tough challenge.

In turning the lens onto victim/survivors in this thesis, I suggest that the question is rarely asked in the therapeutic jurisprudence literature: therapeutic for *whom*? An easy criticism of therapeutic jurisprudence is that the literature has been preoccupied with offenders, although this has been defended.[707] Therapeutic jurisprudence advocates have made claims about its relevance for victim/survivors. In 2011, the first volume expressly dealing with victims and therapeutic jurisprudence was published. The foreword suggests that the offender roots and present focus of therapeutic jurisprudence does not mean _that TJ lacks

[707] For example, Michael King writes that the offender-focused therapeutic jurisprudence literature should not be read in a vacuum: King, _Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' above n 130, 1117.

the potential for making contributions to the area of victims, and to victimology'.[708] Support for this position is that work has been done on victims since the early days of therapeutic jurisprudence research, such as the victim-focused pieces in David Wexler and Bruce Winick's *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996).[709] My understanding is different. I note there has been application in the literature of therapeutic jurisprudence principles to victim/survivors—as documented in Chapter 2, to victim/survivors of sexual violence and to Indigenous peoples, if not to women who fit within both categories. Yet pointing to the existence of this literature alone does not prove the relevance of therapeutic jurisprudence to the interests of victim/survivors; it merely proves that others have purported to apply therapeutic jurisprudence principles to this category of legal participant. It is too superficial to claim that therapeutic jurisprudence takes victims on the journey to survivorship status. Even in the 2011 volume noted above, the case has not been made that the theory is *suited* to victim/survivors. Moreover, if it is suited, it is not clear what the limitations of therapeutic jurisprudence may be for victim/survivors. The first key limitation may be related to when the therapeutic interests of one party conflicts with those of another: a worthy reminder of this is found in Robyn Holder's observation that _the anti-therapeutic impact of a sentence may be a lifesaver for the victim'[710]. As discussed in Chapter 2, therapeutic jurisprudence does not guide the navigation of conflicts of interests between parties. This has been noted by therapeutic jurisprudence proponents with Winick encouraging an emphasis on research in areas where interests converge.

I argue that there is a second key theoretical limitation for victim/survivors. I have noted Nigel Stobbs' observation that it is _virtually canon' in the therapeutic jurisprudence community to refer to it as a lens, and not a theory.[711] I argue that, not only is therapeutic jurisprudence a theory, but that any discussion of its relevance must flow from a strong

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708 *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives*, above n 34, x.

709 For instance, Bruce Feldthusen _The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' above n 226.

710 Holder, _The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' above n 34, 37.

711 Stobbs, _The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' above n 144, 140.

understanding of its theoretical foundation. Thus, in Chapter 2, I set about ascertaining what therapeutic jurisprudence actually is, and concluded that Wexler and Winick have developed a descriptive and normative theory. The descriptive component of therapeutic jurisprudence is its assertion that the law has therapeutic, antitherapeutic, or neutral effects on the wellbeing of those who come into contact with the law. In addition to this, therapeutic jurisprudence has a dual normative orientation. This is core to my overall argument in this thesis. First, therapeutic jurisprudence says that the law should be developed and applied in a way that would enhance its therapeutic effects. Secondly, however, it defers to existing justice values by not requiring therapeutic concerns to be weighted more heavily than other matters.[712] In other words, therapeutic jurisprudence says that the law should function therapeutically *unless* this would impede upon existing justice values. I argue that the curtailment of the therapeutic scope of therapeutic jurisprudence situates it as a non-ideal theory; it makes no pretensions about transformative system change.[713]

Now, this is fine if the law is functioning adequately. My view is that, where the law is functioning in a just manner, therapeutic jurisprudence adds to decision-making the valuable criterion of wellbeing with potential positive flow-on effects (for at least one participant), and does not jeopardise the system as it does not threaten existing legal rules and values. It also may be well suited in situations where parties share interests, with each other or with the state. Yet situations such as these are not my primary concern in this thesis. Rather, I am concerned with the tougher case, the situation where the legal response to a particular problem is fundamentally flawed, and where one category of legal participant—a victim of sexual violence—is routinely adversely affected by existing law, practice and culture. In this way, I put therapeutic jurisprudence to the test, and in so doing, provide a better understanding of its contribution to legal academic literature, and the part that it can play in law reform.

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712 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii.

713 There has been a secondary literature concerned with broader justice aspirations, but as explored in Ch 4, this remains in a state of development.

Against this backdrop, in Chapters 4 and 5, I argued that not only are legal interactions likely to be highly antitherapeutic, the criminal legal system does not provide justice for Indigenous women who experience sexual violence. Desirable processes and outcomes are missing: the legal encounter is distressing and the experiences of Indigenous women are too often invalidated on grounds related to gender and race, with convictions or commensurate resolution not secured in the vast majority of cases. Law is not synonymous with justice, but law devoid of justice cannot be tolerated in contemporary Australia. The problems are so ingrained here—the numbers and prejudice so shocking—that tinkering around the edges is not sufficient to realise justice for Indigenous women who have experienced sexual violence, but rather, that there must be radical rethinking of the legal response in this area. *And so it is here that I return to a fundamental issue with therapeutic jurisprudence.* In being so careful to not disturb existing justice values, it does not allow for such profound change: in its modest aims, it reinscribes the system status quo.

B Justice

Any reform project of the nature that I propose must have a strong theoretical grounding. In Chapter 3, I provided such a frame through my exploration and adoption of Barbara Hudson's innovative vision of justice set out in her 2003 work, *Justice in the Risk Society*. In Chapter 3, I discussed Hudson's key justice principles: *relationalism*, *reflectiveness*, and *discursiveness*.[714] Hudson seeks to redeem valid ideas from liberal Enlightenment traditions, and she updates these to develop a principled justice for contemporary developed societies. She is informed by deontological liberal justice theories, but she reads these critically and carefully incorporates contributions from feminist and postmodern traditions. For instance, she prefers the notion of the 'situated' self over than the liberal universal self, but she does not abandon universalism altogether, acknowledging that some universal values, such as self-expression and self-determination, are worth preserving. Hudson is deeply committed to acknowledging difference, ensuring equality between different parties,

[714] Hudson, *Justice in the Risk Society*, above n 76, 206. In 2003, Hudson also identified *plurivocalism* and *rights-regarding,* but she did not single these out in a later piece, published in 2006: see Hudson, 'Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76. This does not represent a marked change in direction, but perhaps rather because these were subsidiary or underlying principles.

and finding justice through looking at the way that things are done as much as outcomes of disputes. For Indigenous women who may be construed as ‗different' from dominant norms in appearance and culture, and whose specific intersectionalism may place them in a social location that renders them vulnerable to misunderstanding and stereotypes, her approach has undeniable attraction.

There are a number of reasons as to why I use Hudson's approach to justice as the yardstick of the appropriateness of therapeutic jurisprudence. The first is she is interested in asking what justice should be rather than thinking about could be undertaken pragmatically, or what could be achievable within the existing system. This unconstrained approach to justice is what is necessary to think beyond the constraints that lawyers and policy makers may not see: it should be the role of the academic to identify problems that are not apparent to those embedded in systems through their operational roles, and academic philosophers have the time and freedom—at least in theory—to seek imaginative solutions to such problems. Hudson's vision of justice provides a frame for the radical rethinking that is necessary in an area of serious legal dysfunction.

Hudson is also deeply interested in how to negotiate the interests of individuals and any conflicting interests of the wider group within which that individual is located. This is seen in her embrace of discourse: not merely in the sense developed by Jürgen Habermas (who, Hudson writes, was concerned with truth-finding through consensus) but in a way which emphasises difference in voices. Hudson places the Other (the real, concrete, other) as central to her vision of justice. She favours Seyla Benhabib's interpretation of discursive justice, which involves a careful listening to the perspectives and claims of the concrete other in a deliberative democratic process, rather than trying to find a consensus.[715] This is relevant to this thesis for two reasons: firstly, because much Indigenous sexual violence takes place in the context of known and/or intra-cultural relationships, and secondly, because Indigenous women are so frequently absent from a broader discourse in this area. Hudson's necessary precondition to justice is that this legal participant becomes an equal collaborator.

[715] Hudson, *Justice in the Risk Society*, above n 76, 124.

Hudson's justice is aspirational, and she makes no pretence that it is anything other than this, nor indeed that an aspirational concept of justice is in anyway subordinate to a justice that could be rapidly effected. Influenced in this by Immanuel Kant, Hudson is concerned with both process and outcome: the journey towards justice is as important as reaching the justice outcome An understanding of a symbiotic relationship between means and ends is embodied in Hudson's approach. This is a neat fit with the literature on aspirations of victim/survivors, surveyed in Chapter 4. There, I concluded that the research with victim/survivors of sexual violence who have engaged with the adversarial justice system do so for safety and justice reasons.[716] I am most concerned here with the justice aspirations, and the research indicates some consistency with respect to some of these aims: a primary driver for a victim/survivor is to obtain resolution through seeking acknowledgment that what happened was wrong and that she was hurt in the experience, whether such validation comes from the perpetrator or society more generally. When she is going through the legal process, she wants to be treated with respect, have a degree of control over the process including whether she has to face the perpetrator, and if she wants to, be able to express her views about what happened, and what the outcome will be (although note that victims do not necessarily want responsibility for determining outcome, nor facing the perpetrator again).[717] In other words, victim/survivors have interests related to both proceeding through the legal encounter, and she may also have evolving goals as to what she wants out of the experience.

Research with Indigenous victim/survivors is sparse, but it indicates similar trends, sometimes with the added complexity of expectations, internal or external to communities, around community healing.[718] Such community aims of course may be shared by the woman in question, but she may also have other priorities. This is another important finding in Chapter 4, which is that, beyond some clear trends, there is a wide variation as to

716 See, eg, Koss, _Restoring Rape Survivors: Justice, Advocacy and a Call to Action' above n 396.

717 See, eg, Merry, *Getting Justice and Getting Even*, above n 456; Herman, _Justice From the Victim's Perspective' above n 65; Kathleen Daly, _Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334.

718 See, eg, Cripps and McGlade, _Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' above n 409.

what individuals want in specific circumstances, and it may not always be possible to predict with certainty what individuals will want, regardless of gender, race, or other categories. This is one of the reasons why Hudson's principles of reflective and discursive justice are so important. Making assumptions as to victim/survivor goals may preclude listening to what that individual actually does want. This may depend on her personality, her financial needs, her relationship with the perpetrator and with her broader community, and the stage at which she has reached in the legal process and personal recovery. Emphasising dialogue between individual victim/survivors and other relevant parties, such as decision-makers, community members—and, if desired, the offender—is a way to ensure that any desired aims as to outcome are made clear.

This also is consistent with a critical realist take on victimology, which I introduced in Chapter 4. Sandra Walklate's critical realism suggests that the context of violence may be influenced by a wide range of interrelating factors.[719] These factors may be related to gender, race and class—a person's social location or structure. There will also be a degree of volition, and an association between free will and circumstance. In particular, in saying that the relationship between how an individual is socially constructed (structure) and how she reconstructs herself against that backdrop (agency) is meaningful, complex and variable is congruent with Hudson's relational principle, which emphasises the importance of an individual's relationships with others in negotiating process and outcomes. The complexity of social location and the element of agency also reinforces the importance of Hudson's discursive justice: how it is crucial for decision-makers and possibly other parties to hear the voices of victim/survivors to find out what they want in a given situation. This is essential because ultimately, researchers and policy designers cannot know specifically what individual Indigenous women who have experienced sexual violence will want from the law and in terms of resolution, regardless of whether they live in urban or regional locations, whether they are rich or poor, disconnected from culture or deeply culturally connected. While some victim aspirations are clear and consistent, others may be fluid, and any approach to justice must understand and facilitate this. I argue that Hudson's approach is structurally equipped to do so.

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[719] See, eg, Walklate, *Imagining the Victim of Crime*, above n 401, 46.

C A therapeutic jurisprudence approach

There are several advantages to a therapeutic jurisprudence approach to reforming sexual violence law. When it deals with Indigenous women who have experienced sexual violence, it also can meet a number of Hudson's justice criteria. In its focus on individual dignity and autonomy, therapeutic jurisprudence highlights the rights, interests or concerns of individuals, including those who are obscured amongst those of their group. In many circumstances, the interests of a member of a cultural group will overlap with the interests of the group. In these cases, therapeutic jurisprudence may contribute some changes to practices. It can inform appropriate cultural practices in the courtroom such as those espoused by Indigenous sentencing courts.

Moreover, in the same way that Hudson would suggest that justice is relevant beyond dispute resolution, therapeutic jurisprudence is not merely interested in the matters that get to court: in its interest in all legal actors, its concern is not merely how a judge applies the law in a way that promotes the wellbeing of that victim/survivor. Therapeutic jurisprudence sees all legal encounters as relevant fields for inquiry and improvement. As discussed in Chapter 4, the stage of reporting to police is a key point at which sexual violence matters drop out of the legal system—almost three quarters of matters drop out of the system at this stage[720]—and so applying therapeutic jurisprudence at the stage that a victim/survivor first engages with police is critical. As discussed in Chapter 5, the relationship between Indigenous peoples and police is steeped in a brutal history, and at times, a discriminatory contemporary context. Paying close attention to the way that police apply the law—how seriously they take the complaint, the questions asked, and the effects of this on the wellbeing of Indigenous victim/survivors—is a way that therapeutic jurisprudence can guide victim/survivors to have a better experience of the law, perhaps then remaining in the system. This also applies to other stages of the legal encounter. The way that the victim/survivor is treated by other actors in the system such as the prosecutor, a challenging and disempowering point at which she shifts from being a victim to a witness,[721] can affect

720 Daly, _Conventional and Innovative Justice Responses to Sexual Violence' above n 199, 5.
721 Ibid 6.

how she feels, and hence the likelihood that she will want to remain involved in a difficult legal process.

Yet therapeutic jurisprudence cannot fix the profound difficulties that plague the legal response to sexual violence. In firmly expressing a desire to not upset the status quo in structural terms, in not drawing on values external to the existing legal system, therapeutic jurisprudence, as it is currently formulated, fails to squarely meet all of the principles of justice espoused by Hudson, especially those relating to discursive and plurivocal justice. The Anglo-Australian legal system is not one concerned with everyone having their say in a manner that fits with the way they communicate: it is an adversarial system with a defined legal process from a police investigator to court, with speaking parts for decision-makers, counsel and prosecutors. It is one that, sometimes inadvertently and blindly, services the needs and interests, the styles and perceptions, of those who are of a certain class, race and gender: at least middle-class, white and male.[722] Without challenging some major assumptions and components of this system, without explicitly advancing the interest of a legal participant who is routinely disadvantaged, Hudson's justice principles cannot be realised. Therapeutic jurisprudence does not purport to change the fundamental nature of the adversarial legal system. I contend that a main issue when measuring therapeutic jurisprudence against Hudson's approach to justice is that therapeutic jurisprudence defers to existing system values, rather than stepping back and asking what justice requires in any given situation. It also does not guide decision-making in cases where the interests of victims may conflict with those of the community or offender. In the same way that an inequality structure may be reproduced in restorative justice initiatives,[723] such inequality may be inadvertently be reproduced in any legal response guided by therapeutic jurisprudence. To the extent, then that a more radical and creative rethinking of the entire response to sexual violence is necessary, my thesis is that therapeutic jurisprudence cannot do this—and, moreover, it does not purport to do so, perhaps because of the context in which it arose and its original modest aims, as discussed in Chapters 2 and 3.

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722 For a further discussion of this in common law jurisdictions, see Hudson, ‗Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76.

723 Goodey, ‗An Overview of Key Themes' above n 44.

I have made clear that I am measuring therapeutic jurisprudence against the highest standard of justice. Financial and other obstacles to this may be identified, but this does not mean that we should be constrained in our thinking about what constitutes justice: I argue that we should aspire to a radical justice. I have not argued that therapeutic jurisprudence is worthless, even for victims, or that it should not be used in policy design or legal implementation. Arguably, if the legal experience can be made less threatening and more positive, if it has greater therapeutic value, then this may result in higher engagement levels for Indigenous victim/survivors. Fear of revictimisation through the legal process is only one reason for low reporting and high attrition rates, but it is an important one. As noted above, if therapeutic jurisprudence is able to better the experience of an Indigenous victim/survivor moving through all stages of the legal system, and have a positive effect on legal engagement, then it can make a valuable contribution to the way that the law is developed and implemented. In this way, the change that therapeutic jurisprudence can bring is incremental rather than radical. As argued above, Hudson's justice schema is instructive here, and so I explore specific dimensions of such reform in accordance with this.

III A PARTIAL REALISATION OF JUSTICE

In the remainder of this chapter, I make a number of suggestions about further reform in this area. My aim here is not to design a complete, streamlined policy for sexual violence law and practice—that is not the project for this thesis. I touch only briefly on many reforms that warrant further extensive study. These are worth including in this thesis as they provide constructive potential examples of therapeutic jurisprudence approach, and also illustrate its shortcomings when measured against Hudson's approach to justice.

A Relational Justice

Hudson's relationalism '…recognizes individuals as embodied in a network of relationships, which include relationships with community and with the state'.[724] Her relational justice is especially concerned with identities (formed, and re-formed, in interactions with others). With respect to the latter, she writes that '…rights are, above all, to do with conditions of discourse: denial of rights means silencing of the Other; denying her pain and exclusion; refusing her membership, her freedom and her identity'.[725] In practical terms, then, what may a relational justice steeped in discourse look like for Indigenous women, and to what extent could a therapeutic jurisprudence approach effect this?

1 Indigenous sentencing courts

One option is the establishment of culturally specific courts.[726] In cases where both victim/survivor and perpetrator are Indigenous, these courts warrant further consideration. These already exist in Australia in the form of Indigenous sentencing courts,[727] although none of these courts currently deal explicitly with sexual violence.[728] Indigenous sentencing courts may satisfy elements of therapeutic jurisprudence in that sentencing is carried out through situating parties within a broader social and community context. For instance, the (recently de-funded) Murri Court in Queensland aimed to provide supportive methods of

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724 Hudson, '…Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 85, 38.

725 Ibid 37.

726 Recommended, for instance, in the NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward*, above n 64.

727 Besides Tasmania, all state and territory jurisdictions now have established more formalised methods of dealing with the sentencing of certain Indigenous offenders. Circle Courts have been established in New South Wales and Victoria; Murri Courts in Queensland; Aboriginal Sentencing Courts in Western Australia; Nunga Courts in South Australia; the Darwin Community Court in the Northern Territory; and the Ngambra Circle Court in the ACT: Elena Marchetti and Kathleen Daly '…Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415, 416–418. Special courts to sentence Aboriginal offenders operated at earlier times in some Australian jurisdictions, eg, *Native Administration Act 1936* (WA) ss 59A, 59C and the *Aboriginals Preservation and Protection Act 1939* (Qld). In the 1986 landmark report, *The Recognition of Aboriginal Customary Laws*, the Australian Law Reform Commission (ALRC) found that several magistrates had developed informal practices to deal with the sentencing of Aboriginal offenders. See Australian Law Reform Commission, *Aboriginal Customary Laws—Vol 1* (1986), Ch 4, [55] and Ch 29 [722].

728 Even while a court may not explicitly deal with sexual assault offences, sexual violence may in fact be present in the relationship between those who appear before the court.

communication for Indigenous offenders, including modifying the courtroom to allow for greater informality, and therefore encouraging a therapeutic environment. This court, and others like it, are intended to allow Elders and respected persons in relevant Indigenous communities to contribute to the sentencing process.[729] The involvement of community members in decision-making and sentencing is a way to situate at least one participant—currently the offender—within the broader context of community norms.

Indigenous sentencing courts have attracted attention in the therapeutic jurisprudence literature,[730] although it should also be noted that Elena Marchetti and Kathleen Daly suggest that these courts go beyond therapeutic jurisprudence in their agenda.[731] Notwithstanding this, Indigenous sentencing courts may have some potential therapeutic effects, which would need to be demonstrated by empirical study. For instance, the inaugural magistrate of the Koori Shepparton Court in Victoria, Kate Auty, writes that

> For Aboriginal people the Koori Court is empowering, inclusive and, ironically, it demonstrably reduces previously entrenched confrontation across cultures. Although the sentencing process may be very confrontational, this is not embedded in the system in the old counterproductive way, where blame is ascribed to the participants, at a distance, in court, rather than in response to certain troublesome conduct. These positive attributes are all therapeutic.[732]

Indigenous sentencing courts are not without their critics. For instance, some evaluations of the NSW Indigenous courts suggest that such courts do not reduce recidivism, although other goals are met.[733] There also have been concerns that Indigenous sentencing courts

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729 Anthony Morgan and Erin Louis, *Evaluation of the Queensland Murri Court: Final Report* (Australian Institute of Criminology 2010) xii. There are other, similar, courts in other Australian jurisdictions: Marchetti and Daly, ‗Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' above n 35.

730 See, eg, King and Auty, ‗Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' above n 241.

731 Marchetti and Daly, ‗Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' above n 35, 443. They also state: Whereas Indigenous sentencing courts ‗have political aspirations to rebuild and empower Indigenous communities, court staff and Indigenous offenders, and by changing the way justice is achieved in the "white" court system to better reflect Indigenous knowledge and values': Ibid 442. Note that Marchetti and Daly also argue that the philosophy of restorative justice differs from the jurisprudence of Indigenous sentencing courts.

732 Auty, ‗We Teach All Hearts to Break—But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' above n 131, 122.

733 See, eg, Cultural and Indigenous Research Centre—NSW Attorney-General's Department, *Evaluation of Circle Sentencing Program* (2008); Jacqueline Fitzgerald, ‗Does Circle Sentencing

constitute a ‗soft' response, but Indigenous offenders who have been through this process have expressed how they were held accountable in a way more gruelling than in mainstream sentencing,[734] and Auty relates how one police officer appearing before her thought the Koori Court process ‗was probably a bigger deterrent value than many other punishments'.[735] The main issue for my thesis is how such courts affect the wellbeing of victim/survivors—legal participants virtually ignored in much of the existing literature on Indigenous sentencing courts. Current Indigenous sentencing courts were set up by state and territory governments, in response to the Royal Commission into Aboriginal Deaths in Custody, to pay attention to offenders rather than victims.[736] While the Elders look out for the community interests, it is not clear how much attention is paid to whether these interests align with those of the victim, should she also be Indigenous. Kyllie Cripps, an Indigenous scholar, cautions that positive effects for victim/survivors cannot be assumed. Indeed, she writes that when the Victorian Koori Court deals with Indigenous women who have experienced family violence, it ‗alienates and intimidates victims … it isn't a place or process that has thoughtfully engaged them in any meaningful way'.[737]

Better victim engagement, informed by therapeutic jurisprudence, could involve: respecting and acknowledging the harm caused to victim/survivors by perpetrators, notwithstanding the debilitating circumstances that may be experienced by Indigenous offenders who perpetrate such violence. It would also require greater participation on the part of victim/survivors who, if they want to, should be able to contribute to the process even in

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Reduce Aboriginal Offending?' (2008) 115 *Crime and Justice Bulletin* 1; Kathleen Daly and Gitana Proietti-Scifone, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending* (2009). On the other hand, see Morgan and Louis, *Evaluation of the Queensland Murri Court: Final Report*, above n 729. The lack of evidence to do with reducing recividism was relied on by the Queensland Government in their recent decision to remove funding from the Murri Court: see Matt Foley, ‗Court Closures a Savage Blow to Justice and Respect for Law', *CourierMail* (online), 25 September 2012 <http://www.couriermail.com.au/news/opinion/court-closures-a-savage-blow-to-justice-and-respect-for-law/story-e6frerc6-1226480447344>.

734 Mark Harris, ‗The Koori Court and the Promise of Therapeutic Jurisprudence' [2006] *Special Series—Murdoch University Electronic Journal* 129.

735 Auty, ‗We Teach All Hearts to Break—But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' above n 131, 123.

736 Australian Government, *National Report of the Royal Commission into Aboriginal Deaths in Custody*, above n 56, Recs 104, 110, 111. See also Robert Tumeth, *Is Circle Sentencing in the NSW Criminal Justice System a Failure?* (2011) 5.

737 Cripps, ‗Speaking up to the Silences: Victorian Koori Courts and the Complexities of Indigenous Family Violence' above n 61, 33.

ways that challenge dominant narratives about what Indigenous women want out of legal interactions.

Focusing on offenders to the potential detriment of victims is not an issue confined to Indigenous sentencing courts. Hudson notes that community power plays may be present in other alternative mechanisms such as restorative justice, discussed further below.[738] In some circumstances, there may be a conflict between the interests of a woman who has experienced sexual violence and the group. In some cases, for instance, incapacitation of an Indigenous perpetrator of sexual violence may be in accordance with the immediate safety goals or justice interests of an Indigenous woman. In other cases, she may wish to receive an apology (validation) and focus on healing. Community cohesiveness may be paramount for her, or protection may be the most important thing for her at this point. While therapeutic jurisprudence *does* emphasise the health and wellbeing of that individual at the time of legal interaction, it cannot do this and also say that it is responsive to Indigenous community aims of healing and reconciliation *if these conflict with the interests of the individual woman.* Here, therapeutic jurisprudence is unable to contribute meaningfully to any resolution of value conflicts. The justice that it provides can only be partial; it does not fully interrogate the complexity of these relationships.

Reconfiguring Indigenous sentencing courts so as to highlight the interests of victim/survivors is essential to ensure the wellbeing of victim/survivors who come before such courts. One way is to introduce Indigenous sentencing courts that are alive to the interests of the victim, or to include protocols in existing courts that highlight the interests of victim/survivors. However, even if Indigenous sentencing courts do become more sensitive to victim/survivors, these courts are not involved in the fact-finding process. Putting the possibility of future appeals to one side, the sentencing stage is the final stage of the legal process, that which takes place after responsibility or guilt has been determined. In other words, the trial process—the point which has been identified as the stage of the legal process where the credibility and character of victim/survivors of sexual violence are live

738 See, eg, Barbara Hudson, ‗Restorative Justice: The Challenge of Sexual and Racial Violence' (1998) 25 *Journal of Law and Society* 237, 256.

issues—are not dealt with by Indigenous sentencing courts, and the ability of such courts to deal with the challenging gendered components of this offence are limited.

2 Specialisation

The NSW Criminal Justice Sexual Offences Taskforce Report noted that there was some confusion around the term 'specialisation' and ultimately adopted Arie Freiberg's definition of a specialist court as one 'with limited or exclusive jurisdiction in a field of law presided over by a judicial officer with experience and expertise in that field'.[739] In understanding that it is the fact-finding stage that is the most antitherapeutic for victim/survivors of sexual violence (as discussed in Chapters 4 and 5), therapeutic jurisprudence can be directed towards improving the wellbeing of victim/survivors at this point of legal encounter. Reconfiguration of the trial process could take a lead from (non-Indigenous) family violence lists in Australia, many of which pay close attention to victim/survivors. Most jurisdictions have lists or divisions of existing magistrate courts that deal explicitly with family violence.[740] Examples range from the specialised list in the ACT Magistrates Court, which has jurisdiction over criminal proceedings,[741] to the Family Violence Division of the Magistrates Court in Victoria: the courts at Ballarat and Heidelberg have integrated lists dealing with related civil, criminal and family matters.[742] These and other Australian 'family violence courts' include features such as identifying and listing related matters on the same day where jurisdiction permits (for example, protection order and criminal proceedings); specialised legal and support personnel; and arrangements for victim safety. Attention has been paid to these courts at the federal policy level, with the establishment of

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739 NSW Government Attorney-General's Department, *Criminal Justice Sexual Offences Taskforce—Responding to Sexual Assault: The Way Forward*, above n 64, 148. The report cited Arie Freiberg 'Innovations in the Court System' (Paper presented at the Australian Institute of Criminology Conference, 30 November, 2004) 2.

740 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [32.3].

741 *Magistrates Court Act 1930* (ACT) s 291K. The Family Violence Court in the ACT is established by s 291J of the *Magistrates Court Act* and is part of the ACT Family Violence Intervention Program, a joint venture between ACT Policing, the ACT Domestic Violence Crisis Service, the ACT Office of the Director of Public Prosecutions, ACT Corrective Services, Relationships Australia (Canberra & Region), the ACT Victims of Crime Coordinator and the ACT Legal Aid Office. The FVIP was recently positively reviewed: Tracy Cussen and Mathew Lyneham, *Australian Institute of Criminology—ACT Family Violence Intervention Program Review* (2012).

742 Victorian Government Department of Justice, *Family Violence Court Division* (2012) <http://www.justice.vic.gov.au/home/courts/victorian+courts/family+violence+court+division>.

further specialist family violence courts recommended by the ALRC and NSWLRC in their 2010 Family Violence Inquiry.[743] While the Commissions approached the question of specialised courts through the prism of safety, efficiency, and victim satisfaction (rather than through an explicit justice or therapeutic jurisprudence lens), I explain below how specialist family violence and sexual violence courts could also be consistent with a therapeutic jurisprudence approach to victim/survivors.[744]

Currently, specialist courts operate at the magistrate level in Australia. Thus, like Indigenous sentencing courts, most specialist courts do not have jurisdiction over the majority of sexual violence offences. Even though sexual violence offences may take place in a family violence context, such offences will be addressed with other alleged sexual assaults in the District Court level or above. Specialist sex offence courts have been established in jurisdictions such as South Africa,[745] and the establishment of specialist sexual violence courts for dealing with more serious offences has been encouraged by Australian researchers, particularly in the context of child sexual assault.[746] This is because such courts would be staffed by those with expertise in the area, who would be alive to the reality of sexual violence and quickly able to identify and deal with issues such as the power dynamics that comes along with sexual violence that takes place in the context of

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743 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, Rec 32–1.

744 Michael King and Becky Batagol have suggested that judging in the family violence context could be done in accordance with principles of therapeutic jurisprudence, although their focus was on offenders: King and Batagol, ‗Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts' above n 169. They write that, ‗where the factual disputes are relevant to court outcomes, then the usual fact-finding processes of the court should be used. Where the offender has pleaded guilty or the court has determined his guilt, the judicial emphasis should be in promoting offenders taking responsibility for developing solutions and engaging in positive behavioral change and rehabilitation': 416.

745 See, eg, Mastoera Sadan, Lulama Dikweni and Shaamela Cassiem, *Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and Related Services* (2001). The evaluation found that the specialist sex offence courts resulted in some retraumasation of victim/survivors of sexual violence, although it also found that ‗Secondary trauma is reduced when complainants deal with officials who are well trained and follow the procedures set in the National Policy Guidelines. Secondary trauma is further reduced when roleplayers collaborate with one another to offer an integrated set of services to victims': Ibid 35.

746 See, eg, Anne Cossins, *Report of the National Child Sexual Assault Reform Committee—Alternative Models for Prosecuting Child Sex Offences in Australia* (2010).

known relationships.[747] Further specialisation to an Indigenous list could be one option for future reform, and education about cultural matters for all staff and decision-makers in such courts could be another way to effect the relational dimension of Hudson's justice through institutionalising understanding about the realities of sexual violence, for instance, that a victim may also be negotiating complex relationships with the perpetrator and her community when seeking legal redress.

Practical ways that a therapeutic jurisprudence lens could guide the application of sexual assault law involve: providing regular training on sexual violence and Indigenous cultural issues for judicial officers, prosecutors, lawyers and registrars; providing culturally-appropriate support to victim/survivors, including legal and non-legal services; and making arrangements for victim safety, such as providing separate entry and exits from the court, and alternative methods of giving evidence. Decision-makers should also be responsible for dissuading defence counsel from deploying myths: training alone is not sufficient as cultural and gendered stereotypes may still be deployed by defence counsel, knowing these are false, to garner support for perpetrators.[748] There also could be solution-focused or therapeutic approaches in specialist courts, concerned with the wellbeing of victim/survivors, such as recognising such practical matters as whether urgent victims compensation orders are necessary to fund the changing of locks at her home.[749] Other elements of Hudson's approach to justice are relevant here too, for instance, discursiveness is discussed further below.

So far in this section I have focused on courts, but the stages prior to fact-finding also can be distressing for victim/survivors. As discussed in Chapters 4 and 5, considerable attrition takes place at the investigation stage, and the relationship between Indigenous women and police often is characterised by mistrust and cultural stereotypes. This could be ameliorated,

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747 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [32.10].

748 Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 *Feminist Criminology* 298, 316.

749 Some of these matters were discussed in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [32.22], See also Recs 32–3, 32–4.

at least partly, through improving the reporting and investigation process. Police responding to Indigenous victim/survivors must be sensitive to culture and gender, and a therapeutic jurisprudence approach would require attention to the wellbeing of those who report sexual violence. Amongst other things, this could involve ensuring that the victim/survivor is carefully listened to at the reporting stage, and that any hardship she is experiencing is acknowledged as a result of the violence (validation/respect). It could also mean that she is kept well-informed about the progress of investigation (knowledge/control). Again, one way to effect this is through a specialised approach, with the Commissions reporting in their Family Violence Inquiry that one specialist model in Victoria worked particularly well:

> In Victoria, two Sexual Offences and Child Abuse Investigative Teams (SOCITs) … are co–located with sexual assault units, child protection and victim support organisations. SOCIT members are specially trained detectives who are able to investigate matters, take victim statements and collect and prepare briefs of evidence. There are currently five SOCIT units in Victoria, with more units in transition as part of an expansion by Victorian police. … SOCIT members are required to take a four week course covering video and audio recorded evidence, sexual assault investigation and victim management. Members also have access to specialist training in interviewing suspects and victims, in particular in the context in which sexual assault occurs.[750]

The same points apply to the legal stage following police reporting: that of the further consideration and prosecution by independent prosecuting agency. Victoria also has a model from which to draw here, with the Victorian Office of the Director of Public Prosecutions establishing a specialist sex offence unit in 2007. This unit works closely with Victoria Police and witness support services, aiming ‗to prosecute sex offences in a way that minimises the stress for victims and enhances their confidence in the justice system'.[751] This and the other suggestions in this chapter are framed by therapeutic jurisprudence: in understanding that the entire legal encounter can be brutal for Indigenous victim/survivors, and so underscoring her wellbeing through being respectful, thoughtful, keeping her informed, and ensuring her participation if she wants it, can mean that victim/survivors will be far more likely to remain engaged with the legal encounter, and will have a better experience while so doing.

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750 Ibid [32.112]–[31.113].

751 Victorian Government, *Specialist Sex Offences Unit—Office of Public Prosecutions* (2012) <http://www.opp.vic.gov.au/Our-Work/Specialist-Sex-Offences>.

Ideally, specialist policing, prosecuting, and policing would have an effect on the mainstream legal system through informing of best practice in this area[752] (although whether this is what happens in practice is another question, or if it actually results in siloing of best practice). Indeed, sharing specialised responses could be the first step to mainstreaming a therapeutic jurisprudence approach to sexual violence throughout all stages of the legal encounter, a step encouraged in general terms by therapeutic jurisprudence proponents.[753] In other words, specialisation is an important beginning, but not the end, to an improved legal response in this area.

The therapeutic potential of the suggestions in this section are clear, but these suggestions also are limited in their ability to effect the more radical dimensions of Hudson's approach to justice. This is because specialist courts (and, for that matters, Indigenous sentencing courts) are situated within the existing legal system. Such courts apply legal and evidentiary rules in the same way as other courts, although there may be greater scope to pay attention to wellbeing of participants. Therefore, while innovative, such measures are constrained by the existing system, with all its flaws set out in Chapters 4 and 5 of this thesis. This is really at the heart of my argument about why therapeutic jurisprudence, in its current formulation, is flawed. It takes the status quo, in the form of the adversarial legal system, as written: it does not seek to interrogate, critique, or engage with the fundamental tenets of that system. Yet, as I have argued at length in this thesis, this is exactly what is required with respect to sexual violence experienced by Indigenous women, as this is one example of where the law does not deliver justice.

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752 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, Rec 32–2. The Commissions recommended that state and territory governments should ensure that specialised family violence courts are able to exercise powers to determine: family violence protection matters; criminal matters related to family violence; and family law matters to the extent that family law jurisdiction is conferred on state and territory courts. The Commissions did not recommend the establishment of specialist sexual assault courts.

753 See the discussions on the wider applicability of therapeutic jurisprudence in Michael Jones, 'Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners' (2012) 5 *Phoenix Law Review* 753; Wexler, 'New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices' above n 28.

An approach more aligned with Hudson's relational approach to justice, and the interests of victim/survivors, would be to go outside the existing system. This would involve, for example, taking as a starting point, the justice goals of victim/survivors, whilst acknowledging the likely connections between a victim/survivor of sexual violence and the perpetrator of this violence. If she wants the sexual violence validated as wrong—by society, as well as by the offender—and her own pain acknowledged, if she wants input into the decision-making and relationship-management process and greater control over outcomes (and not just punitive outcomes), yet one which does not trample all the rights of perpetrators, then quite a different picture emerges, one not within the context of traditional retributive justice, one that is likely non-adversarial. A conceptual framework for this is what is offered by Hudson's approach to justice.

3 Restorative justice mechanisms

Moving away from retributive justice, another way to realise non-adversarial aims with therapeutic jurisprudence is through restorative justice processes. Adult sexual violence has long been left out of restorative justice initiatives, but recent years have seen positive reflections on pilot studies into adult sexual violence and restorative justice from New Zealand[754] and the United States.[755] Sarah Curtis-Fawley and Kathleen Daly suggest that restorative justice mechanisms could meet identified victim/survivor interests by focusing on victim participation and victim validation.[756] These are good reasons to investigate restorative justice further. Indeed, Hudson also has seen restorative justice mechanisms as one method through which her vision of justice may be realised, at least for those who are not Other.[757] In *Justice in the Risk Society,* Hudson writes that

> As well as by approximating as nearly as possible to Habermas's undominated, thematically open ideal speech situation striving for intersubjective understanding, restorative justice can best avoid the potential problems of using either victims or

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754 Shirley Julich et al., *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (2010).

755 Keith Bletzer and Mary Koss, 'From Parallel to Intersecting Narratives in Cases of Sexual Assault' (2012) 22 *Qualitative Health Research* 291.

756 Kathleen Daly and Sarah Curtis-Fawley, 'Justice for Victims of Sexual Assault: Court or Conference?' in Karen Heimer and Candace Kruttschnitt (eds) *Gender and Crime: Patterns of Victimization and Offending* (2006) 230, 234.

757 Hudson has considered the potential of restorative justice in the context of sexual violence: see, eg, Hudson, 'Restorative Justice: The Challenge of Sexual and Racial Violence' above n 738.

> offenders, or even communities, as means rather than ends, by adopting a ‗deep' relationalism.[758]

I engage with the discursive potential of restorative justice in the following section. Here I note Hudson's view that the restorative justice literature has not engaged with this deep relational potential. With the emphasis on the situated self in Hudson's vision of justice, it is not surprising that she zeroes in on the ‗complex web of relationships of responsibilities, opportunities and pressures' that inform the lived reality of victims and offenders, concerned not to ‗lock' participants into their role as parties in the crime relationship.[759]

Hudson does not altogether condone restorative justice, cautioning that courts must stand behind such practices to ensure the rights of offenders: especially in cases of the Other, any approach to justice must be supported by a rights-approach.[760] In Chapter 4, I outlined the pros and cons of restorative justice practices for Indigenous victim/survivors. For instance, Indigenous academic Loretta Kelly has appealed to restorative justice in the Indigenous family violence context, writing that ‗[t]he community is able to support and protect the interests of the victim, and can act to prevent future violence.'[761] However, the same issue as above remains: that is, ‗communities' do not always provide the informal control that is sought. A critical question is whether the relevant community or network is an ‗ideal' one, or at least willing and able to implement such informal control mechanisms. Rare interviews with Aboriginal women in Canada suggests that this may not be the case:

> Because a radical transformation of existing structures of domination have not yet happened, women expressed fear that restorative justice reforms would fail to address the underlying power inequity rife in communities from years of oppression.[762]

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758 Hudson, *Justice in the Risk Society*, above n 76, 210.

759 Ibid 211.

760 Ibid 212–213.

761 Kelly, ‗Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments' above n 479, 8.

762 Stewart, Huntley, and Blaney, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities In British Columbia*, above n 414, 39.

Julie Stubbs also underlines the ‗resilience of cultural mythologies about women and about sexuality' in the face of law reform, and cautions against ‗assumptions that alternative strategies will be any less influenced by those very mythologies'.[763]

The Indigenous literature emphasises that any strategies to combat intra-cultural violence must be developed by Indigenous communities. While supportive of elements of restorative justice, Hudson is still concerned it ‗may be encouraged by some states to shift responsibility from their own policies and from their own neglect of racial, sexual and economic inequalities, leaving communities and individuals to deal with what are in large part social problems'—a typical neo-liberal approach.[764] Jane Dickson-Gilmore and Carol La Prairie also warn against using Indigenous communities as a ‗social laboratory' for restorative justice practices, noting that the empirical research to support such practices has not yet been conducted.

> While Aboriginal community justice is promoted as assisting communities to take control over conflict and disorder, and thereby remove their people from a two-tiered criminal justice system that offers one form of justice to Aboriginal people and a quite different form to non-Aboriginal people, the unfortunate outcome of these efforts may well be to remove Aboriginal victims and offenders in a third tier which simply replicates in a community setting the unequal and inadequate justice they receive in the dominant system.[765]

I agree with Dickson-Gilmore and La Prairie's conclusion: that further evidence is necessary before endorsing the establishment of restorative justice (or other community justice mechanisms) for Indigenous sexual violence, and that properly-implemented accountability mechanisms are an essential element of the viability of restorative justice practices.[766] Moreover, while Indigenous involvement in designing justice programs is critical, Indigenous self-determination must not be an excuse for the state to shift responsibility to Indigenous communities, and it must not justify the continued perpetuation

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763 Julie Stubbs, ‗Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women Against Violence: An Australian Feminist Journal* 14, 23.

764 Hudson, ‗Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76, 38.

765 Jane Dickson-Gilmore and Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice and the Challenges of Conflict and Change* (2005) 207.

766 Ibid 222–226.

of existing power imbalances. These are all matters to be kept in mind for the design of restorative justice practices, or indeed any other community justice approach.

It is clear that there are a number of challenges for restorative justice, and certainly scope for its further study (and collection of evidence) to support its justice potential. What of its relationship with therapeutic jurisprudence? The 'father' of restorative justice, John Braithwaite, has written of how restorative justice and therapeutic jurisprudence have methodological similarities in that both are interested in the human consequences of the law.[767] The contribution of therapeutic jurisprudence here will be the extent to which it can highlight the interests of Indigenous victim/survivors of sexual violence. There is not always a neat fit between restorative justice aims and therapeutic consequences: for instance, Braithwaite writes of shaming for the purpose of reintegration, which may not always be therapeutic for the offender.[768] Potential antitherapeutic consequences are not precluded by therapeutic jurisprudence, though, as it is interested in ensuring therapeutic outcomes *except to* the extent that these impinge upon existing justice values. Whether reintegration is considered an existing justice value is one question. Regardless, in any restorative justice approach informed by therapeutic jurisprudence, the restoration of community relationships should not automatically be prioritised over the wellbeing of individual victim/survivors, when these two elements are not in alignment.

Finally, assuming the sensitive gender and cultural design of Indigenous restorative practices, the same issue I raised above with respect to Indigenous sentencing courts is also relevant here. Restorative justice practices also generally deal with the easy cases, as in, where the offender has accepted responsibility for what happened. Conflicts of interest between the parties are not adequately dealt with in the restorative justice literature. There are many other cases where the offender does not accept responsibility: these are the hard cases that come to court for more traditional dispute resolution. If Indigenous offenders are genuinely committed to community healing then we may see greater take-up of restorative

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767 John Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38 *Criminal Law Bulletin* 244, 262.

768 Ibid 257.

practices. Indigenous women should not be responsible for carrying the heaviest burden of such community repairwork.

4 Culturally-specific support services

A relational approach also situates victim/survivors in the context of her relationship with the state. As discussed in Chapter 5, stakeholders who made submissions to the ALRC and NSWLRC Family Violence Inquiry repeatedly identified a lack of culturally-appropriate support services as a barrier for Indigenous women achieving justice. Therefore, state-funded support services constitute another important element of realising the relational dimension of Hudson's justice. Such support services can work with women prior to police reporting, and others may provide advice and support in interacting with the system. An example is the support provided to Indigenous witnesses by the NSW Witness Assistance Service,[769] and Victim Support ACT, which provides (non-Indigenous) support, counselling and other services, along with 'information, advocacy and assistance with the criminal justice system, your rights and entitlements'.[770] Funding Indigenous-specific support services would be one way to assist Indigenous women to have a healthy relationship with the state, in knowing her rights in encountering the legal system and its actors, and through being validated and acknowledged by those with some connection to the system.

Increased victim support certainly embraces key values of therapeutic jurisprudence, and would be supported in a therapeutic jurisprudence approach that emphasises the wellbeing of individuals without making more radical structural changes to the law. There is little question that providing knowledge and support in navigating the law would alleviate some anti-therapeutic effects related to victim/survivors feeling neglected in the process, or out of control because of neglect on the part of busy legal actors. As discussed in Chapter 5, the prosecution charge bargaining process has taken place typically without informing or requesting the input of a victim/survivor. Services that are sensitive to intra-Indigenous

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769 NSW Office of the Director of Public Prosecutions, *Services for Witnesses and Victims of Crime* (2012) <http://www.odpp.nsw.gov.au/was/was.html>.

770 These two functions are provided through the Victim Services Scheme and the Justice Advocacy Unit: ACT Government, *Victim Support ACT* (2012) <http://www.victimsupport.act.gov.au/>.

group dynamics can provide that information in a culturally appropriate way, understanding the dynamics between an Indigenous woman and her community, and advising accordingly. This point is also relevant to Hudson's principle of reflective justice, discussed below.

While Indigenous-specific victim support services are an important component of both a therapeutic jurisprudence approach and also Hudson's justice, through supporting victim/survivor engagement with the legal system, and enhancing wellbeing, such victim support can only be complementary to other more wide-ranging and structural reforms. Of itself, victim support will not realise Hudson's justice writ large: such support services are makeshift, and cannot fully realise justice aspirations. Thus, more substantive legal reform must take place alongside the increased development and funding of support services to promote greater and more meaningful engagement with the law on the part of Indigenous victim/survivors of sexual violence.

5 Summary

In summary, then, one of the most useful things about therapeutic jurisprudence is that it has the potential to addresses stages of the legal process that are most painful for victim/survivors: the actual trial process, and the stages leading up to that point, such as interaction with investigative and prosecuting agencies. Yet therapeutic jurisprudence is not equipped to engage with the deeper aspirations of relational justice. Its project is not to dismantle the conditions of oppression that mean that Indigenous women are more likely to experience sexual violence. Therapeutic jurisprudence certainly sees the individual encountering the law within a broader context—this is implicit in understanding that how the individual feels is crucial to the legal outcome, and I would add, also whether the individual will go to the law in the first place. In this way, it can modify practices in a positive way for Indigenous women going through the system, in a way that contemplates that the relationships that the woman has with the offender and the community most likely will affect her engagement with the system, and the realisation of her sought justice goals.

Yet, while noting a number of advantages for the reform of specialist courts in this section, I note that these do not resolve a theoretical issue with therapeutic jurisprudence. For

example, if specialist courts are designed with victim/survivors in accordance with a therapeutic jurisprudence framework, then such courts may be consistent with therapeutic jurisprudence. There are good policy arguments to suggest that the interests of victim/survivors are important in such situations: these are canvassed in Chapter 4. But there is nothing within therapeutic jurisprudence that requires that the interests of victim/survivors must be balanced with those of other relevant stakeholders, or in which circumstances victim interests should be privileged over those of other stakeholders. While I am not saying that therapeutic jurisprudence cannot guide the implementation of alternative justice mechanisms, I do argue that there is nothing within it to say with any consistency when offender interests are more relevant than victim's interests, or the community interests: therapeutic jurisprudence cannot do this on its own, and rather requires an overreaching conceptual framework to determine this. And, as I have argued throughout this thesis, more radical reform is outside the scope of what is contemplated by therapeutic jurisprudence.

As discussed in Chapter 3, I agree with the first part of Dale Dewhurst's argument. In essence, he argues that therapeutic jurisprudence must draw on a defined meta-ethical framework to make normative claims. However, as I also discussed in Chapter 3, I find Hudson's approach to be a better fit for my subject-matter than the Aristotlean virtue ethics approach proposed by Dewhurst.[771] With its emphasis on the _goods' of virtue and happiness, an (at least partial) Aristotlean justice foundation for therapeutic jurisprudence starts to look like a utilitarian approach, with its attendant difficulties of *whose* happiness, and how to go about achieving this? And, of course, the biggest question remains: how to guarantee the rights of the individual when her interests, or methods of pursuing these interests, differ from those of the majority? As I have discussed throughout this thesis, Hudson's more differentiated approach to justice, which engages with critical, feminist and postmodern contributions, is better suited to the challenge of designing legal responses to socio-legal problems affected by gender and culture, amongst other factors.

[771] Dewhurst, _Justice Foundations for the Comprehensive Law Movement' above n 37, 472.

B Discursive and plurivocal justice

Hudson's discursive justice would allow for the discussion of various claims and counter-claims in an undominated environment. Hudson writes that this principle _also means that any topic can be raised by any participant'.[772]

In this section, I focus on legal reforms and practical ways to ensure better communication. I also note that the restorative justice mechanisms discussed above, such as the dialogic model promoted by Sarah Curtis-Fawley and Kathleen Daly, may contribute to discursive and plurivocal justice. Indeed, Hudson writes that

> Restorative justice fulfils the discursive condition outlined by Benhabib and Habermas. Its processes are meetings or conferences in which victims, offenders and (in some models) community representatives offer their account of what has happened and what should be done to make amends and to reduce the likelihood of future offending. At its best, this means that victims and offenders are able to give their accounts in their own terms, and be supported by families, friends or other supporters (communities of care). They can tell of the harm suffered, the reasons for the offence, the fear caused in the community—victims and offenders are revealed to each other as real people and communities have a presence as entities that can be harmed.[773]

Ensuring that restorative justice mechanisms are carefully designed to take into account the important issues identified in the previous section is also envisaged by Hudson.[774] Other ways that legal engagement could be carried out in accordance with her discursive and plurivocal principles are considered in this section.

1 Communication between legal actors and Indigenous peoples

Improving communication with Indigenous victim/survivors on the part of all legal actors falls well within the remit of discursive justice, and a therapeutic jurisprudence approach would encourage respect in communicating about sensitive matters. Indeed, adequate communication would be a prerequisite to participation in legal proceedings, should this be desired by victim/survivors.

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772 Hudson, _Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 77, 35–36.

773 Hudson, *Justice in the Risk Society*, above n 76, 207–208.

774 Ibid 208. See also Barbara Hudson, _Restorative Justice and Gendered Violence: Diversion or Effective Justice?' (2002) 42 *British Journal of Criminology* 616.

In 2009, during a national inquiry into the *Royal Commissions Act 1902* (Cth), the Australian Law Reform Commission consulted widely on matters affecting formal evidence-giving by Indigenous peoples. The Commission made a number of findings in that inquiry that would also bear relevance to Indigenous witnesses in sexual assault matters:

> Indigenous witnesses are … susceptible to agreeing to a question rather than disagreeing, particularly if the questioning takes place in an oppressive environment and over a long period of time. … Another feature of Indigenous communication styles is that silence may indicate a number of different things. For many Indigenous groups, silence is a common and positively valued part of conversation that allows time for thinking. In a courtroom, however, it may imply that the person is not in control of, or not comfortable with, the dialogue. It may also indicate a lack of authority to speak about a matter, or criticism or disapproval if there is conflict within an Indigenous group. Further, silence may indicate a failure of the person questioning to understand matters important to the Indigenous person.[775]

The way that an Indigenous victim/survivor is engaged with by legal actors in the court system is fundamental to the way that she then, in turn, can be heard. Taking steps directed towards ensuring that women are able to participate in a meaningful way (or that she has control over her participation) is essential for both a discursive justice and therapeutic jurisprudence approach to hearing sexual violence offences.

These practical examples illustrate how important it is that lofty aims of justice need to be broken down to the reality of legal interactions, and also how therapeutic jurisprudence fits well with discursive justice to enhance trusted interactions between a client and legal actor who is 'on her side'. These suggestions also support the argument for the victim/survivor to have more than just counselling support, but also legal support in going through the process. In Sweden, for instance, victim/survivors are regarded as a party to proceedings rather than simply a witness, and thus victim/survivors of serious offences such as sexual violence have legal representation.[776] Institutionalising victim legal representation could be

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775 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* (2009) [16.95]–[16.96]. References are to Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) 19.

776 Christian Diesen, 'Therapeutic Jurisprudence and the Victim of Crime' in F Veeken, S Bogaerts, and J Lucieer (eds), *Progression in Forensic Psychiatry: About Boundaries* (2012), 579.

a positive reform in this area, consistent with both a therapeutic jurisprudence framework and enhancing the potential for discursiveness.

2 Law reform: consent

One legal response that may be relevant here comes well before a victim interacts with the institutions of the law—reform of the law of consent. In its Family Violence Inquiry, the Commissions recommended that all federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement, reflecting law reform that already had taken place in some Australian jurisdictions.[777] In 2004, the Victorian Law Reform Commission recommended the introduction of a requirement for a defendant to provide some evidence to demonstrate he was holding a reasonable belief that the victim was not consenting to the sexual act,[778] but this was not adopted in the Family Violence Inquiry.[779]

English rape law once expected a victim to physically resist her attacker, who was expected to overpower her and flee.[780] More subtle understandings of resistance in rape led a lack of consent, rather than coercion, to become the basis of the objective component of sexual assault law in all Australian jurisdictions.[781] The virtues of this approach have been debated at length in the sexual violence literature: for instance, Jenny Bargen and Elaine Fishwick

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777 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [25.84]–[25.88], Rec 25–4 . See also *Criminal Code* (Cth) s 192(1); *Crimes Act 1900* (NSW) s 61HA(2); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code* (NT) s 192(1).

778 Victorian Law Reform Commission, *Sexual Offences: Final Report*, above n 569, 422, Rec 174.

779 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, above n 53, [25.162].

780 Matthew Hale, *Historia Placitorum Coronae (The History of the Pleas of the Crown)* (1736) 633. This influential jurisprudence text provided that a rape victim's testimony was more likely to be legitimate if, amongst other things, she pursued the offender directly after the offence and 'shewed circumstances and signs of the injury, whereof many are of that nature': ibid 633.

781 See *Crimes Act 1900* (NSW) s 61HA(3)(a), (b), (c); *Crimes Act 1958* (Vic) s 38(2)(a)(i), (ii); *Criminal Code Act 1899* (Qld) s 349; *Criminal Code Compilation Act 1913* (WA) Sch s 325; *Criminal Law Consolidation Act 1935* (SA) s 48(1), (2); *Criminal Code Act 1924* (Tas) Sch 1 s 185; *Crimes Act 1900* (ACT) s 54(1); *Criminal Code Act* (NT) Sch 1, s 192(3)(b), (4A). Legislation in all jurisdictions also set out factors that vitiate consent, including use of threats or intimidation to procure consent, lack of capability to provide consent, and provision of consent on the basis of mistaken identity. Further research is required into whether the inclusion of statutory factors that negate consent has affected the complainant emphasis in sexual assault trials. See, eg, little enthusiasm in the mid-1990s as to whether such a shift would occur following law reform in this area: Bargen and Fishwick, *Sexual Assault Law Reform: A National Perspective*, above n 70, 62–68.

write that, requiring lack of consent on the part of the victim, ‗ensure[s] that the ensuing trial will focus firmly on the complainant'.[782] Vanessa Munro has argued for a ‗consent-plus' definition which would require more than mere ‗acquiescence or affirmation in the absence of force or deception'.[783] Instead,

> A token of consent must be accompanied, under this approach, by a critical endorsement of a reciprocal benefit (be it emotional, relational, physical, or even material), which accrues as a result of engaging in sexual intercourse. Genuine, and transformative, agency is expressed not simply when individuals are in a position to articulate and implement their desires, but when they have hitherto ‗taken charge' of those desires in a particular way.[784]

I cite this approach as an example of a legal construction of consent that requires a more critical evaluation by all parties of what it means to have true agency. This could be one way to embed discursive justice principles deeper in the legal response to sexual violence. In other words, requiring evaluation and a form of communication to take place at the time of the relevant conduct would constitute a radical rethinking of the legal approach to consent. Would this type of reform fit within a vision of therapeutic jurisprudence? Delving into the way that the law is developed is definitely within the scope of therapeutic jurisprudence. Requiring a clear understanding of what will be gained from the court experience may be therapeutic for women but cannot be said to be antitherapeutic for the defendant, so may not involve a conflict.

3 Giving evidence in accordance with gender and culture

Hudson's discursive justice requires the giving of evidence in a way that is not constrained by existing law and procedure. Writing from a therapeutic jurisprudence perspective, Hadar Dancig-Rosenberg speaks to more creative methods of providing evidence in sexual assault matters. She notes how therapeutic environments often involve activity that is not permitted in the courtroom environment. Expression of pain may be expressed in ways that are easily digestable to the court or to the other parties involved, but it may be authentic to the experience of the woman. It also may not speak to a harm directly defined by the law, but which may be very real to the woman involved. Creative expression (such as painting,

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782 Ibid 61.

783 Vanessa Munro, ‗From Consent to Coercion: Evaluating International and Domestic Frameworks for the Criminalization of Rape' in Claire McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2010) 17, 22.

784 Ibid 22.

sculpture, and movement) may be essential as method of self-expression, and as an additional language among victims suffering dissociation for discovering, examining, and processing traumatic experiences.[785] This could involve a victim/survivor presenting evidence in court about how she was harmed, and the effects of that, in ways other than the traditional oral or written form.

Indigenous (and other) women should be able to take more control over the process and give her evidence in narrative form, rather than through the artificial yes-or-no structure that often takes place in legal proceedings. Legislation governing the provision of evidence in some Australian jurisdictions courts permit the giving of narrative evidence,[786] although in its 2006 review of Australian evidence laws, the Australian Law Reform Commission noted that such provisions rarely were utilised (at that time of that inquiry, the party calling the witness was required to make an application to the court to permit the giving of evidence in this manner).[787] The narrative provisions were amended in some jurisdictions following the ALRC inquiry: for instance, courts in federal and NSW jurisdictions now may, *on their own motion*, as well as upon application by a party, direct that the witness give evidence wholly or partly in narrative form.[788] A therapeutic jurisprudence approach to judging would take advantage of these provisions and be sensitive to the ways in which as giving evidence in this way that would be consistent with Indigenous story telling, with the way that women speak.

Whilst this may be consistent with a therapeutic jurisprudence approach—and promote greater participation on the part of the victim/survivor, in turn leading to her greater wellbeing—this may not go far enough to meet elements of Hudson's justice. Judges may be keen to reign in non-admissible or irrelevant evidence. In terms of content, though, victim/survivors should be able to freely speak to the more radical elements of Hudson's discursiveness, outlined above: that she should not be constrained by what the law actually is but to be able to say this is what happened and it hurt, regardless of how the law currently

785 Dancig-Rosenberg, ‗Sexual Assault Victims: Empowerment or Re-Victimization? The Need for a Therapeutic Jurisprudence Model' above n 206, 164.
786 See, eg, *Evidence Act 1995* (Cth) s 29(2); *Evidence Act 1995* (NSW) s 29(2).
787 Australian Law Reform Commission, *Uniform Evidence Law* (2006) [5.6]–[5.7].
788 See, eg, *Evidence Act 1995* (Cth) s 29(2); *Evidence Act 1995* (NSW) s 29(2).

defines consent or other elements of sexual assault. This correlates with the alterity emphasised in Hudson's approach to justice, although it may also have an effect on defendant rights.

4 Freedom from participation

It is also worth mentioning that there are reasons why Indigenous women may wish *not* to participate in legal proceedings. She may not wish to be cross-examined in an Indigenous or specialist sex offence court, or she may not wish to participate in all stages of a restorative justice initiative or healing circle. In analysing how sexual violence was dealt with in recent restorative justice initiatives in the United States, Mary Koss writes of how, in not attending the final restorative justice conference in a restorative process, victim/survivors often make the clearest point about the degree to which they were affected by the experience.[789] The option of *no* participation is rarely canvassed in the therapeutic jurisprudence literature. Many sexual violence victims express a desire not to interact with the offender, and so allowing *no* in-person participation may greatly alleviate the antitherapeutic effects of the legal encounter.

One way that the victim/survivor could be involved without actually having to speak in court would be via independent legal representation: the Swedish example noted above being one potential model here. Victim legal representation is different from victim support as it involves someone acting on behalf of the victim, doing the work to carve out space for her voice. Of course it may not actually be the voice of the victim, but it may be a way for the victim to be heard without having to push against the limits of the systems herself: to have her interests advanced by someone whose interests are hers, rather than that of the prosecuting agency, whose primary interest is arguably that of the state (remembering that the offender actually offends against the state).

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789 Bletzer and Koss, 'From Parallel to Intersecting Narratives in Cases of Sexual Assault' above n 755, 10.

5 Summary

In this section, I have presented a number of practical ways to realise discursive and plurivocal justice for Indigenous women who have experienced sexual violence. Some ideas, such as communication protocols, would be happily contemplated by therapeutic jurisprudence: others push its boundaries a little more, and thus sit outside its parameters.

C Reflective justice

Currently the courts decide what is relevant or irrelevant in relation to the crimes that come before them; Hudson's problem with this is that the prohibited acts and methods for dealing with these, penalties, defences and the like, are _derived from white, male idealized characteristics and modes of life'.[790] Hudson's reflective justice situates _particular circumstances in their wider social context rather than only considering the restricted range of legal categories of crimes, aggravations and mitigations which act precisely to abstract individuals from wider inequalities and oppressions'.[791] In other words, the context in which an act of sexual violence takes place is key—that the victim and offender knew each other, and any familial, cultural or community ties may be relevant to understanding what happened, and navigating the outcome, in which both parties have vested interests. For Hudson, rather than spelling out particular things _each case should be considered in terms of all it subjectivities, harms, wrongs and contexts, and then measured against concepts such as oppression, freedom, dignity and equality'.[792] Hudson does say that this is a principle that requires some constraint to meet the interests of all participants—the extent to which it should be constrained is not made clear.[793]

Therapeutic jurisprudence is well suited to understanding this complex cultural environment—it understands that people are feeling, emotional and at times fallible beings. This can be seen in the context of the therapeutic jurisprudence literature discussed in Chapter 2. The emphasis, however, has been on the offender. It is not merely a matter of

790 Hudson, _Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76, 38.
791 Ibid 39.
792 Ibid 39.
793 Ibid 39.

switching the lens to victim/survivors but also acknowledging that there may be bigger social forces operating that affect victim/survivors, and the offender is certainly part of the problem. This is where therapeutic jurisprudence must come back to the point around conflict of values.

The reflective principle speaks to the real experience of sexual violence in Indigenous communities. In this case, it could mean opening dispute resolution processes right up in circumstances of intra-cultural violence and thinking creatively about the cultural oppression of offenders as well as victims. As Daly explains, punitive outcomes often are not desirable for *anyone* affected by sexual violence.[794] Working more directly and constructively with the justice goals of victim/survivors (rather than just their _needs', or their _satisfaction' within the existing system), together with understanding and responding to the lived realities of contemporary Indigenous communities in which sexual violence takes place, must inform a reflective approach to justice. This will likely involve thinking more creatively about justice practices, challenging preconceptions or received wisdom about what victim/survivors want from legal interactions, and balancing these interests with other relevant priorities accordingly.

This also speaks to the point: where does Indigenous self-determination fit in all of this? Ultimately, it will come back to Indigenous voices to determine the way forward, and especially the voices of Indigenous victim/survivors.

In summary, removing cultural oppression, and introducing greater considerations of the interests of victim/survivors where these do not converge with offender interests, are much bigger projects than anticipated by therapeutic jurisprudence as it is currently understood. Should its proponents claim its applicability in the context of such matters, then therapeutic jurisprudence will need to be guided by a clearer theoretical framework.

[794] Daly, _Conventional and Innovative Justice Responses to Sexual Violence' above n 199, 26.

IV CONCLUDING CHAPTER REMARKS

In this chapter, I have re-asserted that the position of victim/survivors is qualitatively different from that of offenders, and care must be taken before assuming the relevance of therapeutic jurisprudence to victim/survivors. After examining the current legal response to Indigenous women who have experienced sexual violence, I have argued that therapeutic jurisprudence has serious limitations when measured against Hudson's innovative vision of justice. These are twofold. Firstly, therapeutic jurisprudence does not provide guidance for working out what is therapeutic for *whom* in cases where the interests of the victim, offender (and perhaps community) are not aligned. Secondly, therapeutic jurisprudence works within the status quo, and there are significant structural constraints to justice for Indigenous women who have experienced sexual violence. If existing _justice values' do not provide meaningful justice for one party, and therapeutic jurisprudence does not purport to dislodge existing justice values, then it always will be limited in what it can achieve in justice terms. Therapeutic jurisprudence does not work well for the _tough case' considered in this thesis, but this will be the case for any case study in matters where the parties have conflicting interests, and where there is no clear alliance between law and justice. In other words, the inability of therapeutic jurisprudence to deal with conflict issues of itself, and its lack of an innovative vision of justice to which it could appeal to assist in the resolution of such competing values are the reasons why I cannot fully endorse it in relation to Indigenous victim/survivors of sexual violence. The engagement of therapeutic jurisprudence with victim/survivors is nascent, and implications such as these have not been fully considered.

This does not mean, however, that therapeutic jurisprudence lacks value. Firstly, whether therapeutic jurisprudence will be an appropriate framework to law reform is contextual: in other words, first the problem will need to be identified, and the current legal response to that problem assessed in justice terms. In many cases, such as those with confluence of interests and values, then therapeutic jurisprudence may be considered an appropriate response.

Secondly, therapeutic jurisprudence has the potential to contribute even to the _tough case'. I noted above that the justice it can deliver is partial, but not negligible. Therapeutic jurisprudence may not be the panacea for Indigenous women who have experienced sexual violence, but it can guide some changes at particular points in the system, in a way that is beneficial for victim/survivors. In underscoring the wellbeing of those interacting with the law, therapeutic jurisprudence lays the groundwork for a more healthy interaction with the law, one that promotes dignity and respect for all legal participants. This alone is a desirable objective. In demanding that the law be alive to the wellbeing of those who have experienced sexual violence, perhaps there is a better chance of engaging and retaining Indigenous women in the legal process, and therefore re-establishing the law as a forum in which to defend the right of Indigenous women to be free from violence, and defend their rights to be heard and so forth while going through the process. To the extent that it encourages the wellbeing of victim/survivors within the existing system, then, I conclude that a therapeutic jurisprudence framework for law reform and implementation could lead to improvements to legal experiences and potentially increased legal engagement of victim/survivors in this area. In this chapter, I have set out a number of examples through which therapeutic jurisprudence could realise such improvements. The most important of these is that therapeutic jurisprudence offers the potential to re-shape trial processes, at least to some degree, and it could guide the establishment of specialist courts in this area.

The implications of the shortcomings of therapeutic jurisprudence are considered in the following chapter.

CHAPTER SEVEN: CONCLUSIONS

I OVERVIEW

In this thesis, I have been concerned with ascertaining the nature and scope of therapeutic jurisprudence, which highlights the relevance of the wellbeing of those who interact with the law. The therapeutic jurisprudence literature lacks clarity. It is also preoccupied with offenders: in its nascent engagement with the victimological literature, the relevance of therapeutic jurisprudence to victim/survivors has not been clearly elucidated. I have aimed to address these matters in this thesis, in order to contribute to the ongoing development of therapeutic jurisprudence. In particular, I have contributed the following to the literature:

1. A more critical examination of the application of therapeutic jurisprudence to victim/survivors than evidenced in the literature to date, through an in-depth analysis of the claims of therapeutic jurisprudence in relation to victim/survivors, and especially those who are subordinated as a result of being _structured' in accordance with a particular gender and race (that is, Indigenous women who experience sexual violence).

2. Clarification of the status of therapeutic jurisprudence as a descriptive and normative theory, and the elucidation of the normative limitations of therapeutic jurisprudence, when measured against the criterion of justice and applied to a case study where the interests of parties may conflict rather than converge.

3. A strong foundation for the argument that there should be a new normative basis for therapeutic jurisprudence to deal with _tough' cases before the law.

In this concluding chapter, I bring together the key findings from preceding chapters that relate to the above concerns, and expound my core thesis argument—that a therapeutic jurisprudence approach to sexual assault law and practice could contribute to a partial realisation of justice, but that absent a more developed justice perspective, it fails to deliver justice for Indigenous victim/survivors of sexual violence. I conclude the thesis with a

section that explores the implications of my findings for therapeutic jurisprudence more generally, and suggest a direction for the ongoing theorising that I argue is necessary for the most useful development of therapeutic jurisprudence.

II MAIN FINDINGS

1 Overview and core argument

As I wrote in Chapter 1, the primary motivation for this PhD was my interest in the parameters of therapeutic jurisprudence, the mere mention of which seemed to invite either prompt dismissal or deep fervour by those in the legal profession or academy. Responses of non-lawyers seemed to me to be universally enthusiastic, bolstered by recounts of personal negative legal encounters. Intrigued, I decided to subject therapeutic jurisprudence to rigorous academic analysis and test it against a _tough' case study, wondering what this would reveal about its potential. Hence, I asked: could therapeutic jurisprudence provide a just approach to sexual assault law and practice, especially when the victim/survivors were Indigenous?

I set about answering this question as follows. In Chapter 2, I undertook a detailed examination of the nature and scope of therapeutic jurisprudence, and reviewed the literature engaging with issues relating to victim/survivors, sexual violence and Indigenous peoples. In Chapter 3, I explained why I use justice as the standard against which I measure the adequacy of therapeutic jurisprudence, and specifically why I adopt Barbara Hudson's principles of justice. In Chapter 4, I articulated key goals of victim/survivors derived from the victimology and Indigenous literature, and in Chapter 5, set out specific problems with the current legal response to Indigenous women who experience sexual violence, asserting that further reform to law and practice is necessary for a just legal response in this area.

In Chapter 6, I synthesised the key themes from these earlier chapters and explicated my fundamental thesis: that therapeutic jurisprudence has a limited, but not inconsequential, capacity to provide justice for Indigenous victim/survivors of sexual violence. In other

words, a therapeutic jurisprudence approach to the development, application and reform of sexual assault law may result in changes that ameliorate the negative effects often experienced by Indigenous women who interact with the legal system following sexual violence. I set out a number of practical examples as to what a just legal response to sexual assault may look like, and identified several ways in which a therapeutic jurisprudence approach to the reform of law and practice could achieve this. However, I also identified where therapeutic jurisprudence falls short in this regard, and concluded that it is not structurally equipped to guide a fully just legal response to sexual violence experienced by Indigenous women, at least as justice is understood by Hudson. This is because the criminal legal response to this harm falls so short of justice, and in its current formulation, therapeutic jurisprudence has normative constraints that prevent it from guiding the more fundamental reform that I argue is necessary. This has implications for the scope of therapeutic jurisprudence, which I explore further in the following section. In the remainder of this section, I set out the conclusions that lead to the position I take in Chapter 6.

2 Key issues in the therapeutic jurisprudence literature

A review of the therapeutic jurisprudence literature in Chapter 2 revealed three relevant matters. The first is that there is a gap within which I have situated this thesis: scholars have tended to focus on Indigenous offenders. Where victim/survivors are considered in the literature, this has been in general terms, rather than any specific consideration of Indigenous victim/survivors of violence. As adult victims of sexual violence are generally women, a focus on offenders has gendered overtones. Moreover, as noted above, when victim/survivors are the subject of inquiry, the relevance of therapeutic jurisprudence is assumed rather than demonstrated: for instance, Bruce Winick wrote that therapeutic jurisprudence could guide the progression of victims to ‗survivor' status.[795] But the claim about the applicability of therapeutic jurisprudence is subject to circular reasoning. That is, justification for the relevance of therapeutic jurisprudence to victim/survivors often takes the form of a statement that earlier scholars have applied therapeutic jurisprudence to

[795] Bruce Winick, ‗Therapeutic Jurisprudence and Victims of Crime' in Edna Erez et al (eds) *Therapeutic Jurisprudence and Victim Participation in Justice* (2011) 3, 3.

victim/survivors, even when earlier works have not directly engaged with problems in so doing.

In Chapter 2, I argued that merely referring to preceding therapeutic jurisprudence work on victim/survivors is an unsatisfactory argument for the applicability of therapeutic jurisprudence to victim/survivors. Most of this work does not engage with the implications of what I argue is a key problem—for *whom* is a law therapeutic? This question is not only *not* answered by therapeutic jurisprudence, it is actively avoided. The founders of therapeutic jurisprudence encourage its application in areas where there is convergence between interests, and insist that it does not purport to guide the resolution of value conflicts. This, then, is more than a failure to articulate the applicability of therapeutic jurisprudence to victim/survivors: it strikes at the heart of what can be meaningfully contributed by therapeutic jurisprudence in the hard cases, those where the interests of parties, such as victim and offender, may conflict.

In cases where a decision-maker directs his or her attention towards a specific party, then therapeutic jurisprudence may indeed have benefits for the wellbeing of that party. In other words, if a legal decision-maker purporting to apply therapeutic jurisprudence does so with the express intention of improving the situation of victim/survivors, then that may mean that therapeutic jurisprudence can contribute to exactly that. But the point is that this decision is external to therapeutic jurisprudence—therapeutic jurisprudence does not, of itself, guide the balancing of interests here. This becomes a real problem where one legal participant routinely experiences unjust treatment because the legal system is structurally and culturally flawed: decision-makers are limited in their interpretation and application of the law. As I explained at length in Chapter 5, the Indigenous victim/survivor of sexual violence falls within this category. The work of Chapter 2, then, laid the first plank in my argument that, in hard cases, therapeutic jurisprudence *itself* will likely be limited in what it can achieve. In other words, as a non-transformative theory that does not purport to affect the status quo, therapeutic jurisprudence is complicit in existing injustices.

My second relevant finding, as detailed in Chapter 2, is the disconnect between how the founders of therapeutic jurisprudence defined it, and how it has been subsequently interpreted, by both its detractors and supporters. While David Wexler and Bruce Winick introduced wellbeing as a relevant consideration for legal analysis and practice, they were very clear that any consideration of wellbeing must be *strictly curtailed.* In their formulation, therapeutic jurisprudence was intended to:

- highlight how the law affected the wellbeing of those who came into contact with the law, *and*

- ask decision-makers to ensure that the law would not harm the wellbeing of those interacting with the law, and where possible should enhance the wellbeing of legal participants (for instance, through complying with principles drawn from the psycho/legal literature, namely voice/participation, validation/acknowledgement, and knowledge/control), *but*

- if there was any conflict between existing _justice values' and therapeutic outcomes for participants, decision-makers should defer to existing justice values.[796]

Wexler and Winick have repeatedly re-affirmed this understanding of therapeutic jurisprudence.[797] However, many of the detractors of therapeutic jurisprudence do not engage with it on these terms. I surmised that this may be because of a resistance on the part of the legal establishment to the foregrounding of emotional and psychological wellbeing—matters which, for instance, the literature on underreporting and attrition in sexual assault matters indicates is an issue highly relevant to the legal engagement of victim/survivors[798]—but which is rarely emphasised in objective and rational legal decision-making. The critical response to therapeutic jurisprudence may also be because

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796 Wexler and Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, above n 24, xvii.

797 See, eg, Wexler, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice*, above n 275.

798 See, eg, Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*, above n 543.

many of the proponents of therapeutic jurisprudence make claims or assumptions that do not neatly fit within the ambit of its original parameters. In other words, there appears to be an original school of therapeutic jurisprudence, and a more ambitious, burgeoning secondary literature, the claims of which do not always cohere with the original definition, even when purporting to align themselves with Wexler and Winick.[799] This is a relevant observation because it indicates that therapeutic jurisprudence is suffering from a lack of clarity around what it actually is. This muddies the debate as to its relevance, and it also obscures an internal tension which is relevant to determining its actual claims, applicability, and ongoing development.

A third notable finding deepened this tension: what I have termed the 'theory allergy' of therapeutic jurisprudence. The majority of its proponents state that therapeutic jurisprudence is a lens rather than a theory, without properly explaining the difference.[800] I have argued that this is a meaningless distinction, most often utilised as a jingoistic defence to critics of therapeutic jurisprudence. This is not just a quibble over nomenclature: it is a finding that deeply informs the discussion in this thesis, because the insistence on the definition of therapeutic jurisprudence as a 'non-theory' precludes nuanced debate about its nature, scope and limitations. If further development to therapeutic jurisprudence is necessary—as I argue it is—then a reasoned and reflective debate should proceed from an understanding of what it actually is.

To this end, I argued that therapeutic jurisprudence is a legal theory, and specifically that it is a descriptive and normative theory. Therapeutic jurisprudence is a *descriptive theory* in the sense that it seeks to observe a phenomenon (the law affects the wellbeing of those who come into contact with it). It is a *normative theory* in that it sets out an, albeit limited, prescription about the way the law should be developed and applied (to the extent that it does not dislodge other existing values, the law should be developed and applied in a way that promotes the therapeutic effects for those who come into contact with it). As I wrote in

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799 See, eg, King and Guthrie, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' above n 173.

800 See, eg, Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' above n 142. Freckelton states that '[t]herapeutic jurisprudence is no more and no less than "the study of the role of the law as a therapeutic agent"': Ibid 576.

Chapter 2, there are many different types of theories, and that all approaches _have' a theory, whether or not this is acknowledged by those working within the tradition. Therapeutic jurisprudence may not be one specific type of theory—ie one that requires measureable hypotheses—but this does not preclude its characterisation as _theory'. Theories do not need to provide a comprehensive description of the way that things are, and the ways that should be.[801] Theories do not need to neatly define every concept, for instance, the fact that therapeutic jurisprudence does not define what is _therapeutic' does not preclude its categorisation as a theory—indeed, the view I expressed in Chapter 2 is that one of the strengths of therapeutic jurisprudence is that it leaves this concept broad, allowing an understanding of this to evolve, and leaving space for individuals to influence the understanding of what the concept means for them. Thus, I asserted that it is time for therapeutic jurisprudence to progress beyond the faux distinction between a _lens' and a theory, in order to allow for its proper assessment, and to provide a coherent basis for discussions about its future development.

3 Justice as the standard

As noted above, I have used _justice' as the criterion against which I measure therapeutic jurisprudence in this thesis. In Chapter 3, I argued that justice is a valid standard against which to measure a legal theory such as therapeutic jurisprudence. This is because law and justice are tightly intertwined: justice is a standard to which law so frequently aspires in its rhetoric, with _justice' often used as a synonym for the law. Resolution through justice is one of the purposes of legal processes. Moreover, justice speaks to the inclusion which is paramount for my case study, which looks at a minority affected by discrimination on gender and racial grounds: Indigenous women who have experienced sexual violence.

More specifically, I have adopted the inclusive and contemporary vision of justice suggested by Barbara Hudson, who draws carefully from justice traditions grounded in

[801] See, eg, the discussion on the diversity of contemporary legal theory in Davies, _The De-Capitation of a Discipline, or How Legal Theory Lost Its Head' above n 149.

Kantian liberalism, feminism, and the critical theory of Jürgen Habermas.[802] I adopted Hudson's approach because it specifically anticipates situations where there are conflicts between parties, and because her justice principles are informed by a deep commitment to negotiating difference and ensuring equality. This is relevant to my thesis because I am looking at situations where the interests of parties may not converge, and am looking at the legal response to a legal participant often constructed as the Other: Indigenous women are _different' from dominant gendered and racial norms, and vulnerable to suppression and stereotyping by legal actors. Ensuring that the justice interests of _different' legal participants, such as Indigenous women, are equally heard is a neat fit with Hudson's justice. Another reason why I have adopted Hudson's vision is because she emphasises the relevance of just process as much as just outcomes. This matches the emphasis of therapeutic jurisprudence, and as I discuss in the next chapter, victim/survivors who have negotiated the legal system following sexual violence.

In summary, Hudson's three core justice principles are: relationalism, reflectiveness, discursiveness, plurivocalism and rights regarding. *Relationalism* means that justice should be alive to the relationships between individuals and groups, and how power plays and emotional connections may affect positions of parties. *Reflectiveness* means that any decision-maker must pay close attention to the specifics of a particular case, and not simply apply general rules to individuals. *Discursiveness* means that justice requires constructive dialogue between parties, facilitating claims and counter-claims, and requiring the discussion to take place in a way that is not dominated by one party who enjoys a degree of socially sanctioned power outside the resolution process.[803] I explained the application of these specific principles in Chapter 6.

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802 This was set out most fully in Barbara Hudson, *Justice in the Risk Society* (2003), and applied in later pieces such as Hudson, _Beyond White Man's Justice: Race, Gender and Justice in Late Modernity' above n 76.

803 Two related principles, also discussed in Ch 3, are: *plurivocalism* meaning that justice must acknowledge that contemporary society is a complex mix of cultures, genders, ages and people who may fit into other categories that affect the ways of understanding the world, and who must find ways of co-existing; and *rights regarding* means that both individuals and communities have rights and that these should be protected.

4 Legal needs and interests of Indigenous victim/survivors of sexual violence

The relevance of Hudson's approach to justice became even more clear in my Chapter 4 analysis of what justice means for Indigenous victim/survivors of sexual violence. Too often, the interests of victim/survivors are framed in terms of the status quo, or to what extent the current system can be modified to accommodate justice 'needs'. I have argued that a theory with a more aspirational justice is another valuable contribution on the part of Hudson: she asks what an ideal justice may look like, what the interests of stakeholders actually are, and how conflicts can be negotiated.

In Chapter 4, I found that the victimology and sexual violence literature reveals that the justice aims of victim/survivors of sexual violence are not as retributivist as political rhetoric and public opinion may suggest. The literature reveals the three key aims of victim/survivors are related to both process and outcome. These are (i) validation, whether on the part of legal actors or the perpetrator, that sexual violence happened and the woman was harmed; (ii) an ability to speak, in her own way, about what happened and the harm she suffered as a result (or freedom to abstain from participating); and (iii) having a degree of control, or at the very least knowledge, about what would happen next in the legal proceedings, and what the outcomes may be (for instance, a prison or suspended sentence).[804] Importantly, these aims overlap with the three key therapeutic jurisprudence principles of validation, participation and knowledge, noted above in relation to how to practically effect therapeutic outcomes for legal participants.

The research on the justice goals of Indigenous victim/survivors of sexual violence is scarce, and it may be that creative qualitative methodologies could be deployed in future research to work out this issue. The small amount of existing research, though, does indicate a confluence between the justice aims of Indigenous and non-Indigenous women. There may be a fourth interest for Indigenous women, and that is the interest or 'healing' of

[804] See, eg, Herman, 'Justice From the Victim's Perspective' above n 65; Koss, 'Restoring Rape Survivors: Justice, Advocacy and a Call to Action' above n 396; Clark, '"What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/survivors' Criminal Justice Needs' above n 396.

the community, although this is not universal: some Indigenous female scholars, such as Pam Greer, have contested claims that community healing is the first priority. I conclude Chapter 5 by finding that it is important to ask *every* victim/survivor what she wants, regardless of her race, and also reaffirmed the relevance of Hudson's justice principles here, in that these can shape the negotiation of individualised interests. This is consistent with two key themes discussed in this chapter: critical realist victimology, which finds there to be a relationship between individuals and their evolving social location; and self-determination, which requires the involvement of Indigenous peoples in determining resolution processes. I contended that the criminal legal response to sexual violence is not consistent with the key three aims of victim/survivors, foregrounding an argument that further reform is necessary. I concluded that one practical and consistent reform in this regard is Kathleen Daly's proposal for a 'menu of options' for victim/survivors of sexual violence,[805] which provides a number of different ways that victim/survivors can choose to proceed with a legal interaction, for instance, going down a restorative justice, civil claim, or conventional criminal path.

5 Further reform of sexual assault law and practice is necessary

In Chapter 2, I explained that one of the key issues with therapeutic jurisprudence is that it does not deal with the resolution of value conflicts, and conflicting interests between parties, and foregrounded an argument that it is especially ineffective when the law is not currently operating in a just manner. In Chapter 5, I buttressed this assertion with a detailed overview of the problematic legal response to sexual violence experienced by Indigenous women, and explained how it does not meet the justice goals of victim/survivors articulated in Chapter 4, nor Hudson's vision of justice explored in Chapter 3.

I first argued that the legal response to sexual violence is left wanting, evidenced by the gap between incidence and conviction rates, the re-traumatising effects of legal encounters, and the deployment of 'real rape' myths. As Judith Herman most notably writes, 'the wishes and needs of victims/survivors are often diametrically opposed to the requirements of legal

[805] Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' above n 199, 26.

proceedings. … if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law'.[806] What is different for Indigenous women? The research canvassed in this chapter shows that Indigenous women experience higher rates of sexual violence, and the nature of sexual violence experienced by Indigenous women follows the same lines as that experienced by non-Indigenous women: it is often experienced in the context of known (and intra-cultural) relationships, rather than by a knife-wielding stranger accosting a short-skirted woman in a dark laneway. This experience inevitably plays out in different ways for Indigenous women because of the dynamics of racism, colonialism and community values.

Despite higher rates of sexual violence, Indigenous women are less likely than non-Indigenous women to interact with the law. In Chapter 5, I argued that Indigenous women who interact with the law often are subjected to re-traumatising components, as written about by Herman. Many other issues are amplified for Indigenous women, and these legal interactions must be cast against the backdrop of the contemporary and historical nature of the relationship between Indigenous peoples and Australian police. I canvassed many reports of police not responding to sexual violence, and even arresting Indigenous women who report sexual violence. This likely has an effect on low reporting rates: as little as ten per cent of Indigenous sexual violence comes to the attention of police. In addition to this, as a result of social class, geographical location and language differences, Indigenous women may be more likely to face income, linguistic and other practical challenges in accessing and negotiating the legal system. Once in the system, Indigenous women may be subjected to 'real rape' *and* cultural myths deployed by legal actors from police through to judges, such as misunderstandings that sexual violence is condoned by customary law in cases where perpetrators also are Indigenous, and other myths to do with alcohol abuse and 'sophistication'. If Indigenous women are deterred from even accessing the legal system that is meant to dispense justice, and if that system brutalises her wellbeing once she is in it by routinely invalidating her and rendering her silent, whilst reinforcing discriminatory myths, and rarely leading to resolution through convictions or other determinations of guilt, then on no reading can this constitute a 'just' legal response for these women. Moreover, in

[806] Herman, 'Justice From the Victim's Perspective' above n 65, 574.

those cases where a perpetrator is convicted, a sentence of imprisonment may not accord with what a victim/survivor wants (in some cases).

In summary, the current legal response certainly does not equate with therapeutic outcomes, nor does it deliver a 'just' legal response when measured against any of Hudson's more nuanced understandings of justice. There is such a mismatch between what victim/survivors want and need out of legal interactions, and what Indigenous women receive from the system, that I argue that there must be transformative rethinking of the legal system in this area. I am not alone in reaching this conclusion: many other studies and inquiries have found that the current legal response to sexual violence is seriously flawed.[807] My contribution is to consider to what extent an alternative approach to reform, such as therapeutic jurisprudence, can make a difference.

6 A therapeutic jurisprudence approach to reform cannot fully realise justice

My conclusion in Chapter 5 leads me to a consideration of whether therapeutic jurisprudence can guide such transformative rethinking. In Chapter 6, I articulated the 'sticking point' of therapeutic jurisprudence in this regard: its failure to guide relevant balancing acts, between the interests of victims and offenders, and between wellbeing and other considerations. I argue that in its determination not to provide guidance about for whom justice is supposed to be therapeutic, it does not of itself demand justice for Indigenous (and, for that matter, non-Indigenous) victim/survivors of sexual violence, the vast majority of whom do not currently experience justice before the law. One of the key reasons why victim/survivors do not even engage with the law in the first place (and then drop out after an initial engagement) is because this particular legal encounter typically has especially negative effects on the wellbeing of victim/survivors. In Chapter 6, I showed how therapeutic jurisprudence falls short of the substantive elements of Hudson's justice because in not privileging therapeutic values over other values, therapeutic jurisprudence does not allow for such profound change. In its modest aims, it reinscribes the system status quo. Where reflective justice may demand more creative thinking about how to alleviate the

807 See, eg, Temkin and Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude*, above n 49; Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' above n 199.

oppression of victims *and* offenders—for instance, Daly writes of how punitive outcomes may not be desirable or helpful for any of the parties involved in a circumstance of sexual violence—therapeutic jurisprudence is determined not to dislodge existing legal system values. Alleviating such oppression, and introducing further considerations of the interests of victim/survivors where these do not converge with offender interests are beyond the current scope of therapeutic jurisprudence—and it will need to be guided by a stronger theoretical framework should it purport to deal with such matters.

Yet, also in Chapter 6, I reviewed the contribution that therapeutic jurisprudence could make to partially realising Hudson's justice. For instance, relational justice may be achieved through specialist sex offence and Indigenous sentencing courts that pay greater attention to the interests and needs of victim/survivors of sexual violence. I also found that the principles of voice/participation could contribute to Hudson's discursive justice, through ensuring best-practice communication protocols with Indigenous women. I noted Hadar Dancig-Rosenberg's suggested reforms with respect to improving the trial process, for instance, through reforming the hearsay rule and promoting the giving of evidence in narrative form and in other more creative ways.[808] The emphasis on the interests of victim/survivors prior to the admission or allocation of guilt on the part of the offender differentiates therapeutic jurisprudence from other 'alternative' justice approaches, such as restorative justice measures and even Indigenous sentencing courts. In most instances involving adult offenders, these other initiatives deal with matters at the post-conviction stage, or where the offender has accepted responsibility prior to a decision about guilt being made by judge or jury. As a great deal of harm to the wellbeing of victim/survivors of sexual violence is incurred during the fact-finding process, it can be seen that the contribution of therapeutic jurisprudence to the trial—and the stages of the legal process that precede the trial, such as the harmful stage of police reporting—is a unique and important contribution, even in the context of innovative legal responses to sexual violence. While most of the sexual violence and victimology literature points to the difficulty that victim/survivors experience during the trial process, the trial is exactly what is sidestepped

[808] Dancig-Rosenberg, 'Sexual Assault Victims: Empowerment or Re-Victimization? The Need for a Therapeutic Jurisprudence Model' above n 206.

by innovative or alternative approaches. This is not merely to criticise other innovative approaches, but to suggest that such approaches will be best equipped to deal with the ideal case where a perpetrator accepts guilt, or in what statistics suggest is the infrequent case where a sexual assault conviction is secured, following trial.

From a practical perspective, then, I conclude that therapeutic jurisprudence has the potential to deliver a great deal to Indigenous victim/survivors of sexual violence. Yet the practical benefits of therapeutic jurisprudence to a particular category of legal participant is dependent on an approach to therapeutic jurisprudence that was interested and sympathetic to that legal participant. I could have written a thesis about the application of therapeutic jurisprudence to Indigenous sex offenders, and reached positive conclusions about its applicability, and this would have been valid within the existing scope of the theory, although some of the proposals that I would have made may have been detrimental to the wellbeing of victim/survivors. Equally, some of the proposals I make in this thesis with regard to victim/survivors may not necessarily promote wellbeing of offenders to the same extent that an offender-focused therapeutic jurisprudence approach may do so. Therapeutic jurisprudence, therefore, is dependent on external considerations to make it most useful for victim/survivors of sexual violence: in such cases, it can make a partial contribution to justice, but in its current formulation, it will always be a contextual approach. As I argue further below, however, the ‗external considerations' could be seen as a new normative framework grounded in justice.

In summary, I argue that therapeutic jurisprudence is an extremely valuable contribution to the law, and scholars, and those working with the law, should take note. In cases where all interests converge, or where the existing law delivers justice, then therapeutic jurisprudence may deliver adequate outcomes. When assessed with respect to a challenging case study, however, it is revealed that therapeutic jurisprudence, as currently formulated, is limited in a fundamental way. Therapeutic jurisprudence does the most work where there is the least work to do—that is, where interests converge—and the least work where the most is required—that is, where interests conflict. And it is this limitation that means that, for most Indigenous (and non-Indigenous) women who interact with the law following an

experience of sexual violence, a legal response guided by therapeutic jurisprudence will not lead to the innovative meaning of justice embraced in this thesis.

III IMPLICATIONS OF MY FINDINGS FOR THERAPEUTIC JURISPRUDENCE

As I have argued at length throughout this thesis, therapeutic jurisprudence is curtailed in terms of what it can deliver to victim/survivors in justice terms. If therapeutic jurisprudence is able to improve the experience of a victim/survivor moving through all stages of the legal system, and ameliorate the lack of engagement in so doing, then this is a valuable contribution. In this way, the change that therapeutic jurisprudence can bring is incremental rather than radical.

However, I have shown a _tough' case where the interests of parties conflict, and where a therapeutic jurisprudence approach cannot deliver justice in this area. This is not a conclusion limited to my case study. My finding here also casts doubt over whether therapeutic jurisprudence is theoretically equipped to deliver justice in those many other cases where those interacting with the law represent diversity of human characteristics, experiences and interests; in those other cases where legal rules, actors and institutions are asked to judge widely misunderstood harms, or are asked to enter the complex territory of intra-familial or intra-cultural relationships. Such _tough' cases frequently come before the law, and the law *must* deal with these in a better way than it currently does.

In undertaking a rigorous test of how therapeutic jurisprudence applies to the _tough' case, rather than the relatively easy cases where interests converge, I have demonstrated the very real need for a sound normative framework that deals with these matters. Others such as Dale Dewhurst and Astrid Birgden have argued for a normative framework although I have reached the same place through a different route, and I make another suggestion as to the nature of this normative framework. I argue that *if* therapeutic jurisprudence is to ensure a meaningful justice for everyone who comes into contact with the law, including those who are routinely disadvantaged by the status quo, then therapeutic jurisprudence must adopt an

overarching normative framework to allow for the resolution of stakeholder and value conflicts.

In essence, Dewhurst argues that therapeutic jurisprudence must draw on a defined meta-ethical framework to make normative claims.[809] As noted above and in Chapter 3, I agree with this first part of Dewhurst's argument. However, as I also discussed in Chapter 3, an Aristotlean justice foundation, with its emphasis on the 'goods' of virtue and happiness, seems not to address issues that I have identified in this thesis, namely, *whose* happiness, and how to guarantee the rights of the individual when her interests, or methods of pursuing these interests, differ from those of the majority? As I have discussed throughout this thesis, Hudson's more differentiated approach to justice, which engages with critical, feminist and postmodern contributions, is better suited to the challenge of designing legal responses to socio-legal problems involving gender and race, amongst other factors.

I also do not agree that the approach advocated by Birgden—therapeutic jurisprudence should adopt a human rights framework to ensure offender autonomy[810]—is the right approach in this context, for the reason that it does not take us much further than the existing situation. As I discussed in Chapter 3, Birgden touched on the justice question in the context of punishment of offenders. In ascertaining what normative framework should be adopted by therapeutic jurisprudence, Birgden was interested in balancing deontological and consequentialist punitive positions.[811] I argue that Birgden still works within the status quo, by referring to the two main liberal traditions of deontology and utilitarianism (with consequentialist theories of punishment derived from the latter), and that more than a balancing of these two major liberal traditions is required for a truly creative and meaningful justice for all legal participants. For the reasons discussed above and at length throughout this thesis, I propose Hudson's justice as a potential normative framework for further analysis and consideration, although before it is adopted, this would require further investigation as to how it would apply to other case studies. At the very least, Hudson's

809 Dewhurst, 'Justice Foundations for the Comprehensive Law Movement' above n 37.
810 Birgden, 'Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required' above n 27, 43, 45.
811 Ibid 47.

justice has served to show that, when measured against an innovative yardstick, therapeutic jurisprudence falls short of delivering justice.

As I have made clear throughout this thesis, I recognise the existing potential of therapeutic jurisprudence for improving the legal experience. It is for this reason that I argue that it should be made stronger, that it should demand that decision-makers pay attention to the wellbeing of all those who are rendered vulnerable in their interactions with the law, whether by reason of gender, race or socio-economic standing, regardless of whether this person is a victim or perpetrator. The reality is that the interests of legal participants are likely to conflict as much as converge, and if the goal is to achieve justice, then it is not sufficient to hope that the person who applies a therapeutic lens always will be sufficiently alive to this complexity of interests: the historical and contemporary situation for Indigenous victim/survivors of sexual violence who interact with the law shows us how cultural conditioning (about black women) and legal conditioning (about offenders) continues to lead to grave injustice. Put simply, something more must be done, for therapeutic jurisprudence to be an adequate framework to guide such reform.

IV CONCLUDING REMARKS

In this thesis, I have brought together disparate schools of thought to further serious and critical study of therapeutic jurisprudence. I have shown that the engagement of therapeutic jurisprudence with the interests of victim/survivors is still in a state of development. My concern has been to progress the contribution that therapeutic jurisprudence can make to victim/survivors, through considering how to improve the flawed legal response to Indigenous women who interact with the legal system following sexual violence. I have considered the claims that therapeutic jurisprudence makes about victim/survivors, and argued these claims are limited. I have been careful to point out the potential to improve specific practices. But I do not overstate the contribution of therapeutic jurisprudence in this area. The standard against which I measure therapeutic jurisprudence is ‗justice', and here, the key issues are inclusiveness and the resolution of conflicts between the interests and wellbeing of victims, offenders, and potentially others in the community. Of course, it

is up to Indigenous peoples to assess therapeutic jurisprudence on their own terms, but I have argued in this thesis that it is able to support self-determination through ascertaining the needs of all victim/survivors (and other legal participants) against the backdrop of the principle of participation.

For the reasons given above, I have not been able to conclude that therapeutic jurisprudence, in its current formulation, can deliver justice, in the way that I understand that term, for Indigenous women who interact with the law following an experience of sexual violence. I support the continued use of therapeutic jurisprudence in this area, but in so doing, I argue that is important to identify its benefits, at the same time as being realistic about what therapeutic jurisprudence can achieve. I have taken the stance in this thesis that therapeutic jurisprudence does not deal adequately with the _tough' cases, and Indigenous victim/survivors of sexual violence represent only one example of this, one which illuminates a much more profound problem with therapeutic jurisprudence. I argue that a reformulation of therapeutic jurisprudence is necessary to realise a full and meaningful justice for women who have experienced sexual violence. In particular, therapeutic jurisprudence must be developed further with respect to the core issue raised in this thesis, for it to be an effective framework to guide the development, implementation, and reform of the law. I understand that therapeutic jurisprudence emerged in the 1980s with modest aims, as a response to the problems that plague the criminal legal system. These problems have not shown any indication of reversing, and I argue that it is time for therapeutic jurisprudence to expand its contribution. My view is that therapeutic jurisprudence has a great deal more to offer, and it is stymied by its current normative constraint. My view is that therapeutic jurisprudence proponents must desist in perpetuating the existing injustices of the legal system, and become genuinely reflective about how to allow therapeutic jurisprudence to deliver more in the next stage of its development.

The next question is how proponents of therapeutic jurisprudence can take it to the next level, and I suggest an innovative and transformative imagining of justice is what is necessary. I have suggested a new normative framework based on Hudson's justice in this

thesis. I support the essence of Hudson‘s approach, and note that the deep implications of her justice are yet to be explored. I suggest this is an essential future research project.

In conclusion, and at a bare minimum, I argue that proponents of therapeutic jurisprudence cannot have it both ways. They cannot promise therapeutic outcomes to all legal participants, and not be realistic about the capacity of the theory to deliver on this. If therapeutic jurisprudence proponents want to defer to existing justice values, and thus be circumscribed by existing legal and system frameworks at the same time as having the potential for some practical outcomes for stakeholders, then they need to be upfront about its limitations, particularly in relation to victim/survivors. This is the very least that must be done to avoid unacceptable tension between the claims made by therapeutic jurisprudence, and what it is able to deliver.

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