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Sentencing of Sexual Assault and Rape: The Ripple Effect

Thank you for allowing us to make the following submission, which will be in two chapters:

Chapter 1 – Submission of TASC Legal Services

Chapter 2 – Submission of TASC Social Advocacy

Who is TASC National Ltd

TASC Legal and Social Justice Service is a not-for-profit organisation that serves over 4,000 people per year across more than 400,000 square kilometres of Ipswich and Southwest Queensland. Now in our 41st year, TASC has developed from a small community legal centre to a committed provider of high-quality legal advice, social justice, and advocacy services. TASC is one of the largest regional community legal and advocacy services in Queensland, where the community and staff work together in partnership to continue to enable justice and change lives.

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We are focused on social justice and support, and advocate for our clients, who are culturally and linguistically diverse, and come from the most vulnerable and marginalised sectors of our community. They include First Nations people, refugees and those with disabilities, mental illness, and financial disadvantage. We do our best to support the community we work with to promote, protect, and preserve their legal and human rights.

Chapter One

Human Rights

Women should have sole rights over their own body. However, in some circumstances of domestic and family violence, they do not. They must live outside their bodies, compliant to the will and violation of the person they have vowed to trust.

In *Yaman v R*¹, her Honour said: “Offences committed by (mostly) men who refuse to accept that a partner or former partner is entitled to a life of her own choosing, must be dealt with sternly by the courts, to mark society’s strong disapprobation of such conduct, and to reinforce the right of women to live unmolested by a former partner. Offences involving domestic violence are frequently committed, and the criminal justice system must play a part in protecting those who have been or may be victims of it.”

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), or the Bill of Rights for Women, defines discrimination against women as “Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

¹ [2020] NSWCCA 239, 131.



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exercise by women”.² Sexual violence by an intimate partner most certainly creates an environment of exclusion and restriction, and is a betrayal of a person’s human rights.

Our government has an obligation to Queensland women to “take reasonable and effective measures to prevent, investigate and punish domestic violence”, as stated in the Human Rights and Domestic Violence Fact Sheet from the Human Rights Law Centre.³

Signatory to the CEDAW, the Australian Government, which includes Queensland, has a responsibility to adopt legislative measures to “provide protections for women”, specifically, and importantly to TASC, rural women.⁴ Women in our catchment face isolation both geographically and emotionally, compounded by domestic and family violence, which all too often includes sexual violence.

Domestic Violence Penalties

Research suggests there is a real dichotomy with respect to penalties for breach of domestic violence orders. On the one hand, in circumstances where an offender has received a fine only penalty, victims report feeling the court undervalues their experience, not giving enough weight to the impact to their lives.⁵ Further, victim/survivor feared a monetary penalty may inflame the offenders behavior, feeling aggrieved by having such a penalty imposed.⁶ However, on the other hand, those same victim/survivors also reported that they felt a heavier penalty such as

² United Nations, “Women Watch”, (Overview of the Convention on the Elimination of All Forms of Discrimination against Women) [Convention on the Elimination of All Forms of Discrimination against Women \(un.org\)](#)

³ The Human Rights Law Centre, “Human Rights and Domestic Violence” (Fact Sheet, 30 September 2013) [Human Rights and Domestic Violence Fact Sheets | Human Rights Law Centre \(hrlc.org.au\)](#).

⁴ Discrimination against Women) [Convention on the Elimination of All Forms of Discrimination against Women \(un.org\)](#); Article 2.

⁵ Christine E.W Bond & Caitlin Nash, “Sentencing Domestic and Family Violence Offences: A Review of Research Evidence” (Griffith University, Griffith Criminology Institute, September 2023) p33.

⁶ Christine E.W Bond & Caitlin Nash, “Sentencing Domestic and Family Violence Offences: A Review of Research Evidence” (Griffith University, Griffith Criminology Institute, September 2023): Law Reform Commission of Western Australia, 2014, p141.

incarceration were too harsh and inappropriate for the offence.⁷ There is also tension between the provision of security through incarceration of offenders, and ensuring the human rights are respected.⁸

This contrast is mirrored in the opinion of the general public, in which, “surveys of community-based samples”, reveal, current punishments for domestic and family violence offences are “too lenient in their severity”.⁹ Despite this, the same sample reported heavier penalties as too harsh for the offence.¹⁰

Overall, though, it seems neither lenient or harsh penalties have any real effect, with evidence, or lack thereof, suggesting no single sentence type has created a reduction in offending for domestic and family violence offences.¹¹ What evidence does demonstrate, is that the solution to lowering recidivism may lay in a combination of penalty, both punitive and therapeutic.¹² Victim/survivors favored a penalty that not only punished, but also “targeted to confront the abusive behavior”.¹³ However, the theory of general deterrence assumes that offenders are less likely to commit an offence knowing that the sentence will be more severe.¹⁴

The Queensland Government are introducing new diversion orders with the amendments to the *Domestic and Family Violence Protection Act 2012*, which will assist to educate offenders about their offending.¹⁵ This scheme will give offenders opportunity to focus on, defining, recognising and understanding, the broad range of

⁷ Christine E.W Bond & Caitlin Nash, “Sentencing Domestic and Family Violence Offences: A Review of Research Evidence” (Griffith University, Griffith Criminology Institute, September 2023): Pavlou & Knowles, 2001 & Taylor & Mouzos 2006, p30.

⁸ ‘The role of human rights in long-term sentencing’ (2015) 26 (2-4) *Security and Human Rights* p281-293, 13

⁹ Christine E.W Bond & Caitlin Nash, “*Sentencing Domestic and Family Violence Offences: A Review of Research Evidence*” (Griffith University, Griffith Criminology Institute, September 2023): Phillips & Vandenbroek, 2014, p30.

¹⁰ Ibid.

¹¹ Christine E.W Bond & Caitlin Nash, “*Sentencing Domestic and Family Violence Offences: A Review of Research Evidence*” (Griffith University, Griffith Criminology Institute, September 2023): Raaijmaker et al., 2017, Crank & Brezina, 2013 & Cullen, et al., 2011.

¹² Christine E.W Bond & Caitlin Nash, “*Sentencing Domestic and Family Violence Offences: A Review of Research Evidence*” (Griffith University, Griffith Criminology Institute, September 2023) p31

¹³ Ibid.

¹⁴ ‘Old Behind Bars’ *Human Rights Watch* (News Release, 2012) <https://www.hrw.org/report/2012/01/28/old-behind-bars/aging-prison-population-united-states>

¹⁵ *Domestic and Family Violence Protection Act 2012* (Qld) P4A Diversion Orders Scheme.

behaviours associated with domestic and family violence, and realise the impacts on their victim/survivors, assisting to reduce the rate of reoffending. Court ordered programs such as those used for the diversion orders should be considered with each and every penalty for domestic and family violence offence.

TASC recommends adding behavioral program orders in addition to existing penalties for domestic and family violence offences.

Intimate Partner Sexual Assault Penalties

Frequently, victim/survivors of domestic violence offences suffer the trauma and humiliation of enduring sexual assaults and rape, at the hands of their intimate partners, often in silence.

Intimate sexual assault and rape are bundled into the contravention of domestic violence order offences instead of stand-alone offences, as usually they are perpetrated in unison with physical, emotional, and psychological abuse.

I had to sit in court and listen to my rape be trivialised as domestic violence.

TASC client

Many women fear reporting sexual violence in domestic violence circumstances as they know a domestic violence order will not protect them from continued attacks of that nature. Fear of exacerbating the situation by reporting it to police and knowledge

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that penalties for contravening a domestic violence order, such as fines, are no protection, women suffer in silence.

Penalties in Queensland for contravening a domestic violence order is a maximum three (3) years imprisonment and 120 penalty unit fine for the first offence, with subsequent offending attracting a maximum of five (5) years imprisonment and 240 penalty unit fine.¹⁶ Sexual assault and rape carry a much larger penalty, with rape attracting life imprisonment as the maximum penalty and sexual assault, maximum ten (10) years imprisonment.¹⁷

The Australian Bureau of Statistics reported that in the year 2021-2022, One in six women and one in 13 men had experienced physical AND/OR sexual violence by a current or previous cohabitating partner since the age of 15.¹⁸ That represents 3.8million Australian adult victims of intimate partner abuse.¹⁹ TASC questions, would those numbers be as high if the penalties were equal to those under the Criminal Code Act?²⁰

TASC recommends equal penalties for rape and sexual assault offences regardless of the relationship between the offender and victim.

Character References in the use of Sentencing

The issue regarding the use of good character references in sentencing for sexual assault and rape cases is of paramount importance due to its significant implications for survivors of sexual violence and the need for our legal system to reflect a modern understanding of accountability and justice. In Queensland, a court is required to consider the character of the person being sentenced. This evidence can be provided

¹⁶ *Domestic and Family Violence Protection Act 2012* S178(2)(b) & S178(2)(a).

¹⁷ The Criminal Code Act 1899 (Qld) S349(1) & S352(1).

¹⁸ Australian Bureau of Statistics 2021-2022 PSS, <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>.

¹⁹ Ibid.

²⁰ The Criminal Code Act 1899 (Qld) S349(1) & S352(1).

by way of reference letters from individuals who know the offender. When sentencing, the Court may take a number of accounts and considerations in the judging of the person's character – ranging from contributions to the community, any history of domestic violence, or previous convictions for example. While character references can provide insight into the offender's background and behavior, they also pose a significant challenge in cases of sexual violence and rape.

For sexual assault survivors, the legal process can often be complex and retraumatizing. Hearing and witnessing individuals vouch for the character of the perpetrator, particularly in cases where the offender has pleaded guilty, can be deeply distressing for survivors. Moreover, the reliance on good character references as a mitigating factor in sentencing can undermine the severity of the offence and perpetuate harmful stereotypes about victims of sexual assault and violence.

Importantly, victims and survivors of sexual assault are not afforded the opportunity for a character reference, despite often facing immense pressure and scrutiny from their communities. In many cases, survivors are cast out of their social circles and support networks for coming forward with their experiences, while perpetrators, often deemed “good guys” face little to no social consequences for their actions. This double standard not only exacerbates the trauma experienced by survivors but also perpetuates a culture of impunity for sexual offenders.

Unlike crimes that occur in public settings, sexual assault and rape often take place behind closed doors – as such is the insidious nature of the crime. This of course, makes it difficult for individuals to accurately assess the character of the offender. The submission of character references in these cases may not provide a comprehensive understanding of the offender's true character, particularly in relation to their propensity for sexual violence.

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The 'Me Too' movement has catalysed a cultural shift in how society perceives survivors of sexual assault and rape, placing the blame squarely on the perpetrators rather than the victims. It is imperative that our legal system reflects this evolving cultural and societal understanding and prioritises the needs and rights of survivors.

TASC recommends Queensland enact legislation to explicitly exclude character references as a mitigating factor in sentencing for sexual assault and rape cases.

By doing so, we can ensure that victim-survivors are afforded the respect, dignity, and justice they deserve – and that perpetrators are properly held accountable for their actions. By doing this, we will finally begin to operate a legal system with victims firmly at the center.

Chapter Two

Sentencing: Each One of Us is More Than the Worst Thing We Have Ever Done and the Worst Thing That Was Done to Us

“Each one of us is more than the worst thing we’ve ever done” Bryan Stevenson (Lawyer, Social Justice Advocate, Activist, Law Professor, Director of Equal Justice Initiative). We are also arguably more than the worst thing that was ever done to us.

This submission honors and acknowledges TASC’s commitment to social justice.

The author is not a lawyer but a counselor advocate and a clinician with a background in both psychology and social work and a strong interest in human behavior and wellbeing, development, and trauma (including trauma in the form of domestic and family violence).

Introduction: Rape and other forms of sexual assault are unique in their ability to create significant harm. While rape is an act of violence, it nevertheless intersects

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with aspects of human sexuality (Calloway, 2011), resulting in a form of assault imbued not only with the threat of physical harm but with an intense form of emotional suffering as well (Maung, 2021). While society does not tend to judge someone for being struck multiple times with a stick, it has infused rape and other forms of sexual assault with moral judgement.

Cahill (2021) writes, “Few women would agree that being raped is essentially equivalent to being hit in the face or otherwise physically assaulted” (p.3). These acts also often take place in private, leaving a victim-survivor alone, vulnerable, and without corroboration.

For women whose experience of rape reaches the stage of sentencing, they have already been thrown into the depths of a social and political chasm where gender inequity, “rape culture,” hegemonic patriarchy, and the challenges of the judicial system join hands with their memories of rape and the often re-traumatisation of court proceedings. Attending to their rights and needs is vital.

The challenge is in finding ways to meet these rights and needs, and the rights and needs of the community, while providing a sentence to offenders which ensures that the harmful impacts of punishment and attempts at denunciation do not negatively impact pathways towards rehabilitation – the aspect of sentencing with the most potential to better both individuals and society (Brown, 2010; Johns, 2018).

A second challenge rests upon the ability of society – and therefore, the courts – to use reforms in sentencing as a means of taking steps towards its own accountability, and its own needs for rehabilitation, when it comes to violent sexual assaults such as rape. Men do not rape in a social vacuum. While women’s voices are currently being heard in terms of low rates of conviction and the harmful impacts of moving through the criminal justice process, these voices must simultaneously compete with ongoing female objectification and gender inequity both inside and outside of the criminal justice system.

I am reminded of a case where male police officers reportedly stood on the veranda smoking and laughing alongside an accused perpetrator while the naked victim-survivor packed up her urine-soaked items. In an inebriated and outraged state of

mind, her partner had reportedly urinated on both her and her clothing while she slept. Signs of strangulation were visible on her neck. She was told that the only reason she wasn't being raped was the fact that she was a whore and therefore full of disease. I know the perpetrator and he is more than the "worst thing he has ever done" – TASC Advocate

In the process of assessing aspects of moral and criminal culpability and accountability, the court system has effectively allowed societal contributions to "the making of a criminal" (authors voice) to silently slip into the background amidst calls for longer and more punitive sentencing of those convicted of rape.

Ultimately, the goal is to find a place of balance between both individual and societal culpability. The hope is that sentencing could become a means of finding this balance.

Should Punishment Fit the Crime or the Criminal?

According to a seminal piece of work by psychiatrist, Menninger (1968), when it comes to the adequacy of sentencing, it is important to consider whether punishment should fit the crime or the criminal? As someone who believed in treatment instead of punishment, Menninger's answer to this question was, "the criminal." Justifying the role of psychiatry in the criminal justice system, Menninger, wrote, "As a science dealing with the ...untoward behavior of human beings, psychiatry is naturally much concerned with crime" (p.423).

If the goal is to help lift women out of the above chasm – in addition to preventing them from getting too close to the edge of its depths – a more moderate answer to the above question would be, both.

While it is important that perpetrators be held accountable for their actions, and that communities, including victim-survivors, be made to feel that their safety and rights are important, to do so without taking into account just how it is that an infant male who came into the world primed for connection and attachment becomes someone capable of rape, sidesteps viable pathways forward when it comes to generating a more humane and less violent world. It is also important to understand that not all

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infant would-be-offenders take the same path towards the act of rape and other forms of sexual violence.

Understanding the reasons behind rape speak not only to the lives and futures of individual men, their families, and communities, but to why it is that 22% of females over the age of 15 have been the victim of rape and other forms of violent sexual assault (Australian Bureau of Statistics, 2021-2022). 22% is likely a low estimate due to tendencies not to report. Ultimately, this figure has something to say about the psychosocial wellbeing of Australia as a nation.

Why Men Rape

Psychological Make-up: While a small proportion of individuals come into the world with the makings of psychopathy, it is much more likely that sexual violence stems at least to a significant degree to adverse experiences during development – experiences which include insecure attachment to maternal caregivers (frequently due to domestic and family violence or their own histories of trauma); direct and indirect exposure to violence; consistently harsh punishment; financial strains; and ongoing exposure to social networks where criminal behavior is often the norm.


Over time, these experiences contribute to a rising up of emotions such as anger, shame, impulsivity, lack of frustration tolerance, self-disregard, and antisocial behaviors – behaviors strongly associated with interpersonal violence, sexual violence, and the loss or shutting down of empathy and compassion towards others. (Lehrner and Yehuda, 2018; Ramirez, Jeglic, and Calkins, 2015; Fazel et al, 2018).

Some offenders come from privileged environments where a sense of threat does not always stem from the kinds of trauma and structural inequity seen in other cases. It is important to remember however that money, status, and opportunity do not always negate the possibility of developmental and environmental stressors and the presence of trauma.

It is also possible that in these cases, whatever stress is present during both childhood and adulthood may take added advantage of cultural norms and belief systems associated with patriarchal systems and entrenched ideas of gender

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inequity. Men with privilege may experience, and fight for, both social and personal power more acutely than those without this kind of power. *Regardless of the background of the men involved, however, offenses like rape often rely upon an intersection between psychological mechanisms and the overlay of cultural norms, structures, and belief systems capable of rationalising inclinations toward sexual violence. Psychological theories of rape do not need to exclude more feminist understandings.*

In the end, intense emotions stemming from negatively impactful experiences can be hard to contain and are therefore often expressed via violent acts targeting individuals, society, and at times, oneself. While this can be seen to speak to aspects of entitlement, males are also quite violent towards themselves with rates of male suicide far exceeding those of females worldwide. In the case of the perpetrator mentioned above, his childhood included aspects of neglect, abuse, violence, and sex trafficking when he was 8. He has a history of several suicide attempts.

While many men found guilty of rape are capable of intellectually understanding that rape is against the law – and therefore something that is wrong - if the press of emotions and belief systems stemming from both past and present stressors are strong enough, reason and executive function may fade into the background. During times of intense emotions, the thinking parts of the brain shut down. This is particularly true when substance abuse is part of the wrongdoing.

The Role of Mother Nature and Biology:

While the law focuses on individual accountability (Kelly, 2023; Meloni, 2003), based on what is known about developmental science, Mother Nature/Biology is of mixed minds about this. While the human psyche can engineer a sense of positive agency under certain contexts, biology has developed a means whereby the brain does not need to rely upon reason during times of intense emotions or perceptions of threat. It does this by embedding our response to past experiences both within the brain and by way of altered genetic expression (Gonzalez-Pardo and Alvarez, 2013).

A relevant example of altered genetic expression includes prenatal alterations in the HPA axis – a part of the body responsible for organising responses to stress and

significant threat - during times of high or chronic maternal stress. In these cases, the fetus prepares itself for entry into an unsafe world by producing an HPA axis with increased excitability and the potential to respond more quickly to environmental stress. This in turn leads to struggles externalising behaviors, dysregulation, a lack of frustration tolerance, anger, depression, and anxiety throughout the lifespan if not treated (Ping et al, 2020).

It is important to remember that perceptions of threat do not rely upon the actual existence of threat. It is a tragic irony of human behavior that when someone lashes out under a feeling of threat, it is often those who cross paths with them who are the ones actually under threat.

Typologies of Rape:


In a seminal article exploring why men rape, Knight (1999) names four primary motivations for rape. These categories include, opportunity (where sexual assaults appear to be impulsive and based on situational and contextual factors); pervasive anger (characterised by men motivated by global and undifferentiated anger); sexual gratification (defined by sexual preoccupation and a tendency to fuse sexual and aggressive feelings); and vindictiveness (acts of violence specifically motivated by misogynistic anger and behaviors designed to degrade, denigrate and humiliate women).

Knight goes on to explain the developmental pathways leading to these traits. These pathways are in line with the more current literature cited above (Lehrner and Yehuda, 2018). Seminal work from Nagin and Paternoster (1993) confirm the validity of these categories.

The understanding that men rape for varied reasons highlights the potential to not only target key underlying motivators for their abhorrent behavior, but the ability to find ways to acknowledge and build upon their strengths while avoiding overt triggering of their weaknesses. While sentencing allows for the potential to find ways to attempt to remedy the behaviors of offenders, society's notions of punishment can be problematic.

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Sentencing

There is a strong likelihood that the criminal justice system cannot punish or deter its way out of the challenge presented by rape and other forms of sexual assault. While it may be effective for select individuals, it stands to increase criminogenic tendencies in many others. For individuals who were raised in violent and harsh environments, prison only confirms what these individuals already believe to be true. Deviant behavior reflects both a deviant developmental environment and the overlay of social norms and belief systems which make it easier for these disordered inclinations to be rationalised and acted upon.

When met with an intense emotional need, in most cases, the thinking part of the brain goes offline – or assesses the attractiveness of meeting this need against other variables (Nagin and Paternoster, 1993). Even here however, the push of intense emotional need stands to impact reasoning. Fears of consequences may therefore become far less effective. Punishment can be effective when someone has the ability to succumb to fear. If fear has become a part of life and if individuals have developed adaptive coping mechanisms to deal with fear, dodging and defending against fear can begin to feel normal. Some individuals may also have concluded that they have little volition when it comes to avoiding harsh outcomes in life (Jean-Richard, 2021).

According to Law Emeritus Professor David B Brown, “Deterrence is very largely an article of faith”. “What research is increasingly showing is that that imprisonment itself and punishment more generally is fundamentally criminogenic...” (UNSW Newsroom, 2020). Brown adds that incarceration can serve as ‘schools of crime’ while having an adverse effect on mental health (Brown, 2010). The United Nations has condemned the state and operation of Australian prisons for human rights violations (Mackay,2021).

While incarceration appears to have some effect on recidivism, recidivism rates are relatively low in the first years out of jail but increase over time - reaching levels of up to 24% (Harris and Hanson, 2004). These rates are unreliable however as they rely upon victim-survivors reporting assaults. They also do not tend to account for other

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forms of crime following release. According to Hanson and Morton-Bourgon (2005), antisocial behaviors and ideas (impulsivity, substance abuse, unemployment, a history of rule violation, recklessness, and fighting), and increase risks of re-offending.

In the case of the perpetrator referenced in the opening statement, he was smart, he knew the system, and he had become adept at working it.

The Potential of Rehabilitation and Prehabilitation.

Citing the theories of Brazilian Law Professor (Harvard), Roberto Mangabeira Unger, author Campbell 2001) writes that in order to think about law a person needs imagination, creativity, and the ability to take culturally inherited concepts such as liberty, justice, and rights and shape them into different patterns so that society can envisage new possibilities in order to conceive of a different type of social and political life (p.43). Campbell argues that while law has traditionally been the purview of individual justice, and politics the domain of social justice, increasingly people are looking to the law for matters of social justice.

In, Notes Toward a Demosprudence of Law and Social Movements (Guinier and Torres, 2014), the authors write “One of the important functions of law resides in its power to translate lived experience into a series of stories about individual and social fairness and justice (pg.2745).

The law presents the idea of a proper society pitted against individuals choosing to do the wrong thing. To a significant degree, however, individuals carry society within them – while some carry more of its positive features, others carry its darker side. Environmental Epigenetics provides theoretical backing for the reality of this (Guthman et al, 2012). Within the parameter of sentencing guidelines, rehabilitation carries the greatest potential for proactively reducing the rate of rape and other forms of violent sexual assault. While important, it is also possible that society – through acts of sentencing if possible – look to ways of rehabilitating itself.

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TASC Recommends:

- Assessing lengths of incarceration based on the understanding that less punishment and not more may aid in efforts towards rehabilitation.
- Increased use of community orders where programs are invested in ideas of therapeutic justice and offender related prehabilitation (programs aimed at potential offenders and communities and neighborhoods at risk before crime happens).
- When safe to do so, educate offenders not only so that they can better control themselves, but so they can pass this information on to younger generations at risk.
- Use of rehabilitation programs that stress accountability while also acknowledging the ways in which criminal behavior develops in people.
- As part of prehabilitation sentencing can suggest the use of parenting support programs targeting families at risk due to parental stressors and structural inequity.
- In cases of offenders with wealth, provide fines where the funds go to supporting prehabilitative programs.
- Use of specialized Sexual Violence Courts
- Sentencing offenders to accountability programs which also acknowledge the role of trauma and environmental factors in offending.
- Forming a collaboration between criminal law and public health law by finding creative ways to sentence offenders to participation in public health approaches to resolving the challenge of rape and sexual assault (Kaplan, 2017). Public health campaigns are able to confront society's rape culture and misogynistic myths.



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