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Survivors of Sexual Assault on the Stand: A New Feminist and Victim-Centered Bioethical Framework to Discuss Justice and Trauma

By Mathilde Genest¹

Abstract
This essay argues that neuroscientific knowledge of trauma should be utilized to address injustices experienced by survivors of sexual assault (SA) in the courtroom and introduces a new feminist and victim-centered bioethical framework. Survivors face several injustices during a SA trial. Rape myths and victim stereotypes, which stem from gender discrimination, create unrealistic expectations for survivors’ behaviors and engender epistemic injustices. Other injustices are inherent to SA trials. Notably, the justice system fails to protect survivors and actually harms them by granting them little agency while risking secondary victimization. Many injustices experienced by survivors are linked to their reactions to trauma during and after the SA. However, neuroscientists have an extensive understanding of trauma, and they shed light on its mechanisms, effects, and consequences. Neuroscientific knowledge of trauma can improve survivors’ experience in the courtroom through two core means: educating stakeholders and implementing trauma-sensitive and trauma-informed practices in the justice system. A traditional evidence-based framework aims to balance the defendant’s rights and society’s interest in justice, hence eclipsing the survivor’s interests. An evidential framework appears inefficient for discussing survivors’ experiences in the courtroom. Consequently, a new feminist and victim-centered bioethical framework is introduced as it allows for a focus on survivors’ health needs and well-being without compromising the justice system’s need for fairness.

Keywords: Bioethics, Sexual assault, Legal system, Trauma, Justice

Introduction
Social movements such as #MeToo exposed the prevalence of sexual assaults (SA). In the United Kingdom, 1 in 4 women have experienced SA during adulthood (Rape Crisis, 2022). Only 1 in 6 rapes is reported to the police, and only 1% of those rapes went to trial in 2021 (Rape Crisis, 2022). The conviction rate is approximately 70% (Home Affairs Committee, 2022). This begs the question of the system’s ability to bring justice to survivors of rape and SA. In a SA trial, survivors’ testimonies are crucial since they provide key evidence. Survivors carry the burden of proof, but their credibility is hindered by rape myths and victim stereotypes (Randall, 2011). Such misconceptions are linked to stereotypical gender roles or a misunderstanding of the effects of trauma (Haskell & Randall, 2019). Neuroscientific knowledge can explain human reactions to trauma, such as survivors’ behaviors during and after a SA (Randall, 2011; Mason & Lodrick, 2013).

I argue that neuroscientific knowledge of trauma can and should be used to address injustices experienced by survivors in the courtroom. I suggest a feminist and victim-centered

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bioethical framework as a helpful lens to look at this issue. First, I describe injustices experienced by survivors in the courtroom, some of which arise from gender discrimination, and others that are inherent in sexual assault trials. Second, I present a neuroscientific account of trauma and how such knowledge could be used in the courtroom to address injustices experienced by survivors. Third, I show the need for a specifically feminist and victim-centered bioethical framework to remedy this problem.

In this essay, I focus on women who have experienced SA during adolescence or adulthood as they are the most common victims (Rape Crisis, 2022). I refer to survivors as victims, victim-witnesses (VW), and complainants, but I favor the terms “survivors” and “victim-witnesses.” Here, I consider women as if they were a homogeneous group; however, I acknowledge that women in different social positions have different lived experiences (Putnam, 1995). Hence, an intersectional framework would be ideal to have a more accurate understanding of how oppression shapes women’s experiences of SA and SA trials. Since most acts of SA are perpetrated by men, I assume that the terms “defendants” and “accused” refer to men (Rape Crisis, 2022). I refer to sexual assault as a general term encompassing the legal definitions of SA, including rape, oral rape, and assault by penetration. Essentially, I define SA as someone intentionally performing a sexual act on a person or “causing a person to engage in sexual activity” without their consent (Rape Crisis, 2022). Consent is generally the central element of SA trials as the prosecution must prove that the survivor did not consent and that at the time the defendant did not reasonably believe the complainant consented (Crown Prosecution Service, 2022).

This essay relies on a broad definition of justice: giving people what they are due and not giving them what they are not due (rights and liberties or material goods) (Swift, 2014). This concept of justice is grounded in equality, notably gender equality, and it focuses on substantive equality, rather than formal equality, meaning that all should be “treated as equal while taking account of the context of our lives” (Kennedy, 2005, p. 4). The emphasis is not on distributive justice (of material goods) but rather on the harm suffered due to failure of recognition. In that sense, justice is being adequately and appropriately recognized by others, thus guaranteeing that people are treated with dignity and granted the freedom and rights to which they are entitled (Miller, 2021). There is an injustice when one is not recognized since it infringes on that person’s agency. For instance, one might not be treated respectfully because one is not recognized as an equal. In this essay, the issue of retributive justice is left aside, mainly because the focus is on survivors’ experiences and retributive justice is centered on the accused and his actions.

**Injustices that Survivors of Sexual Assault Face in the Courtroom**

Survivors experience injustices during SA trials because of gender discrimination as it creates unrealistic expectations for their behavior and leads to epistemic injustices. The justice system does not protect survivors; instead, it harms them because they have little agency and the courtroom puts them at risk of secondary victimization.

**Gender Discrimination: Rape Myths and Victim Stereotypes**

Rape myths and victim stereotypes refer to the set of common but inaccurate beliefs regarding SA, survivors and their expected behaviors. Rape myths have a descriptive and prescriptive function since they depict what rapes are thought to be, and they stipulate what criteria make an event a “real rape” (Krahé, 2016). “Real” rapes are thought to be violently committed by a man “out of the blue in a remote outdoor location” (Krahé, 2016, p. 676). Another commonly
believed myth is that SA is predominantly committed by strangers; however, many survivors often know their assailant (Mason & Lodrick, 2013; McKimmie et al., 2020).

Several myths are related to the supposed behaviors of “ideal” or “genuine” survivors, creating unrealistic expectations for survivors’ behavior during and after the assault (Haskell & Randall, 2019; McKimmie at al., 2020; Randall, 2011). The ideal victim is expected to have physically resisted, to have attempted to flee or to have called for help, and she must have “[expressed] clear and explicit non-consent” (Haskell & Randall, 2019, p. 8; Mason & Lodrick, 2013; McKimmie at al., 2020). Afterwards, she should be able to give a clear, linear, and consistent account of the events, while being visibly and authentically distressed (Haskell & Randall, 2019; Randall, 2011). According to the twin myths, a “promiscuous” woman is not trustworthy and/or is more likely to consent to sexual activities (Haskell & Randall, 2019; McGlynn, 2017; Randall, 2011). The general attitude of “victim blaming” is accentuated when a survivor’s behaviors are considered “risky,” such as using drugs or alcohol or wearing “provocative clothing” (Haskell & Randall, 2019).

Rape myths and victim stereotypes have such power that women tend to internalize them, sometimes to the extent of undermining their own experience, as in the concept of “unacknowledged rapes” (Krahé, 2016, p. 676). Such rapes refer to the experience of women who do not consider having been raped but acknowledge having experienced forced sexual intercourse without given consent or when the victim was incapacitated, which is a behavioral definition of rape (Krahé, 2016). There is a disconnect between definitions of rape in a legal sense and what rape is understood to be in daily life. Therefore, one can mislabel their own experience because it does not match the definition of a “real rape” (Krahé, 2016).

Studies have been conducted on how the perception of survivors’ credibility is impacted by attributes and gender of both the victim witnesses and the jurors. Extra-legal factors impact how survivors are perceived. For instance, perceivers’ attributes such as gender can influence their assessment of survivors’ credibility (Ask & Landström, 2010; Hackett et al., 2008; Nitschke et al., 2019). The credibility granted to survivors is impacted by their non-verbal behaviors, particularly their degree of emotionality (Ask & Landström, 2010; Hackett et al., 2008; McKimmie et al., 2020; Nitschke et al., 2019). Survivors who appear emotionally distressed are viewed as more credible than more emotionally controlled survivors (Nitschke et al, 2019). Survivors are judged more harshly when their behaviors fail to correspond to the believed norm of emotionality (Ask & Landström, 2010; Hackett et al., 2008; McKimmie et al., 2020; Nitschke et al., 2019). The more divergence, the harsher the credibility judgement even though “real rapes” correspond to a minority of assaults (McKimmie et al., 2020; Nitschke et al, 2019). When an observed behavior deviates sufficiently from expected norms, it is interpreted as a sign of deception (Hackett et al., 2008).

_Epistemic Injustices: Testimony, Hermeneutics, and “Himpathy”_

Fricker (2007a) presents epistemic injustices as instances in which one is wronged specifically as a knower. They arise from epistemic practices like transmitting knowledge to others and giving meaning to our social experiences (Fricker, 2007a; Fricker, 2007b). Fricker identifies two corresponding types of epistemic injustices: testimonial and hermeneutical (Fricker 2007a; Fricker 2007b). Epistemic injustices are wrong in and of themselves because they are based on the “prejudicial exclusion from participation in the spread of knowledge.” (Fricker, 2007b, p. 162) Nevertheless, they can be intertwined with other forms of oppression, leading to adverse consequences and/or more injustices (Fricker, 2007b; Fricker, 2007c).
First, testimonial injustices occur when a knower’s credibility is doubted due to the perceiver’s unconscious or conscious prejudice regarding the knower’s social identity (Fricker, 2007d). Jenkins (2021) connects testimonial injustices to rape myths that invoke distrusting and doubting women as a group. SA survivors’ credibility is deflated because they are women. So, when a survivor testifies in court, her testimony is likely to be met with doubt and suspicion (Jenkins, 2021). When a survivor’s experience diverges from a “real rape,” her behavior is unexpected, and she is granted even less credibility. Because these women survivors lack credibility, they are not able to convey the perceived truth of their experience, which is an injustice. It is inherently wrong that when testifying about their experience, women are disbelieved based on myths and stereotypes (Jenkins, 2021).

Second, hermeneutical injustices occur when a significant part of a knower’s experience is concealed from social understanding because their social group has limited access to shared hermeneutical resources, which are “shared tools of social interpretation” (Fricker, 2007b; Fricker 2007c, p. 5; Jenkins, 2017). Hermeneutical injustices impair one’s understanding of their experience and themself (Fricker, 2007b, 2007c; Jenkins, 2017). For Jenkins, they have two origins: a conceptual lacuna or a faulty concept (2017, 2021). A typical example of the former is the coining of the term “sexual harassment” (Fricker, 2007b; Jenkins, 2021). While the behaviors that we now call sexual harassment existed prior to the term, women lacked the words to accurately articulate their experiences (Fricker, 2007b). Otherwise, faulty concepts can create hermeneutical injustices due to a wrong understanding of the explicit concept (the factual definition) or the implicit concept (induced from social practices) (Jenkins, 2017, 2021). Rape myths stem from a faulty implicit concept of rape—the “real rape” stereotype—whereas the explicit concept is the legal definition of rape (Jenkins, 2021). This disconnect can greatly impact jurors because they could base their judgement on the faulty concept of rape (Jenkins, 2017).

A third type of epistemic injustice is caused by men’s epistemic privilege, which is the flipside of survivors’ testimonial injustices (Fricker, 2007d). Unwarranted excess of credibility creates an epistemic injustice by advantaging some individuals because of their identity (Fricker, 2007d). Filling a gap in the hermeneutical resources, Manne coined the term “himpathy,” which is “the excessive sympathy sometimes shown toward male perpetrators of sexual violence” (2017, p. 197). Himpathy can arise from the perceived differences between the accused and the stereotypical “real” rapist who is “creepy, uncanny, and wearing their lack of humanity on their sleeve” (Manne, 2017, p. 198). It is difficult (or impossible) to reconcile the known character of the accused with this portrayal of a “real rapist” who is monstrous, frightening, and cruel (Manne, 2017). Often it is concluded that the perpetrator could not possibly be a rapist so he is granted sympathy and concern for his future and wellbeing (Manne, 2017). Consequently, the accused becomes a victim, and the survivor is responsible for his demise (Manne, 2017). Men accused of SA thus hold the privilege of excess credibility while survivors’ credibility is deflated, particularly in “he-said-she-said” situations. It further harms survivors since “the problem of himpathy [is that] when our loyalties lie with the rapist, we add profound moral insult to the injuries he inflicts on his victim” (Manne, 2017, p. 204). Hence, the injustices experienced by survivors are increased.

*Injustices Inherent in SA Trials: Double Status of the Victim-Witness and the Harm of Testifying*

The current legal procedures are evidence-based, and survivors have the onus of proving an SA happened, especially since most cases are “he-said-she-said” situations and forensic evidence is scarce. A survivor’s testimony is the chief evidence, and because rape myths are common social beliefs, the survivor must convince the jury that she is telling the truth (Randall,
She “must be able to resist and oppose the defense’s attempts to denigrate, sexualize, or otherwise discredit her to prove her veracity and credibility” (Randall, 2011, p. 422). In SA trials, survivors have a double status as both a victim and a witness, hence the term victim-witness (VW). On the one hand, she is a victim and a survivor. On the other hand, she is the witness whose testimony is central to the trial, and this is prioritized in the courtroom. This double status creates unrealistic and often contradictory expectations. A “genuine” and credible victim is expected to be visibly distressed and emotional whereas a witness must be civil, polite, and calm (Craig, 2016; Nitschke et al., 2019). Because of the courtroom’s “ritual of civility,” the survivor is held to the same standards of politeness and etiquette as any witness, despite being required to detail a traumatic, intimate, and sexualized event in front of strangers (Craig, 2016; Tanovich, 2015). The ritual of civility hides the violence of SA trials, especially during the cross-examination of VW (Craig, 2016). Craig suggests that “the subordinate role that complainants perform […] may further the gendered […] dominance perpetuated through sexual violence itself” (2016, p. 31). The survivor’s witness status overshadows her victim status; indeed, it is as a witness that she is invited to (minimally) participate in the meaning-making practices. Still, she has little agency, in the courtroom, as she is only allowed to speak when questioned (Craig, 2016). The victim does not have a role in the courtroom since the trial opposes the court and the defendant since “his [crime was] committed against the people,” rather than against the survivor (Manne, 2017, p. 204). The lack of recognition for the woman as the victim of the crime takes away her voice. Survivors have almost no way to contribute to the social understanding of their experience of SA, which perpetuates structural hermeneutical injustices.

The cross-examination of VW materializes the adversarial nature of common law and subjects survivors to unjustifiable harm (Craig, 2016; Craig 2018; Ellison & Munro, 2017). In SA trials, defense lawyers often adopt a “‘whack the complainant’ strategy” (Tanovich, 2015, p. 498), which aims to shift the blame and responsibility away from the defendant (Craig, 2018; McGlynn, 2017). They focus on the survivors’ behavior and character rather than on the defendant’s actions, and they commonly appeal to rape myths and victim stereotypes to question the VW’s credibility, reliability, and moral status (McGlynn, 2017). Some lines of inquiry concern the survivor’s consumption of drugs or alcohol, her psychiatric history, or her clothing choices (Tanovich, 2015). Additionally, there is a “tendency of defense advocates to portray common trauma reactions as abnormal or suspicious” by relying on widespread misconceptions of trauma (Ellison & Munro, 2017, p. 189). For instance, defense lawyers might repeat the same question, or they may focus on spatial-temporal details such as a precise timeline (Craig, 2018; Ellison & Monro, 2017; Haskell & Randall, 2019). They aim to unsettle the VW to create confusion and then concentrate on possible inconsistencies (Craig, 2018; Ellison & Munro, 2017; Haskell & Randal, 2019). The defense lawyers regularly rely on irrelevant evidence such as past sexual history as an attempt to normalize SA as regular sex (McGlynn, 2017). Attacking a VW’s character has multiple effects as it undermines her credibility and trustworthiness, humiliates her, and insinuates that the blame or responsibility lies with her (Craig, 2018; McGlynn, 2017).

Neuroscientific Knowledge of Trauma to Reduce Injustice in SA Trials

Rape myths and negative attitudes toward survivors are often connected to their reactions to trauma. However, neurosciences now have a wide understanding of trauma as a health issue. Neurobiology, neurophysiology, neuropsychology, and behavioral neurosciences have shed light on trauma’s mechanisms, effects, and consequences.
When a person experiences a traumatic event, it provokes fear and a sense of loss of control (Haskell & Randall, 2019; Kelly & Valentine, 2016). The perceived threat induces automatic and innate reactions with continuing physiological and psychological effects (Haskell & Randall, 2019; Kelly & Valentine, 2016; Mason & Lodrick, 2013; Valentine et al., 2015). However, reactions can vary depending on the individual and their circumstances (Mason & Lodrick, 2013; Valentine et al., 2015). The response to a traumatic experience is characterized by conscious feelings (such as fear and panic) and unconscious feelings, which are reflected by physiological and behavioral consequences (Haskell & Randall, 2019).

An existential threat triggers survival mechanisms, and the brain’s defense system becomes dominant (Haskell & Randall, 2019; Mason & Lodrick, 2013). The initial physiological cascade suppresses the body’s nonessential functions and prepares a survival response (Haskell & Randall, 2019; Kelly & Valentine, 2016). Consequently, higher cognitive functions, such as decision-making, are inhibited (Haskell & Randall, 2019; Kelly & Valentine, 2016). Victims cannot purposefully decide which survival strategy to adopt—fight, flight, or freeze (Haskell & Randall, 2019; Kelly & Valentine, 2016; Mason & Lodrick, 2013). SA victims commonly experience tonic immobility, an “involuntary paralysis” (Haskell & Randall, 2019, p. 16) making it impossible to move, resist, or call for help (Kelly & Valentine, 2016; Valentine et al., 2015). Victims are commonly unable to rationally elaborate an exit strategy during the assault, and afterwards they might be confused by their earlier reactions (Haskell & Randall, 2019). The mechanisms of memory encoding are modified by the activation of the defense brain circuit. Explicit memories (spatial-temporal and contextual aspects) are less likely to be encoded than implicit sensorial memories (Haskell & Randall, 2019; Kelly & Valentine, 2016). Thus, survivors tend to recall some sensory information about the assault, whereas contextual information might be incomplete or impaired and the timeline might be fractured (Haskell & Randall, 2019; Kelly & Valentine, 2016; Mason & Lodrick, 2013).

Neuroscientific knowledge of trauma explains commonly misunderstood behaviors of survivors that can appear counter-intuitive, such as the freezing reaction or incomplete memories, and thus can be used to debunk rape myths (Haskell & Randall, 2019; Kelly & Valentine, 2016). Neuroscientific knowledge of trauma can be integrated into trauma-sensitive and trauma-informed care and practices, which are grounded in the understanding of trauma and its widespread impact on survivors. Such practices aim to actively avoid the re-traumatization of survivors by integrating the scientific knowledge of trauma and fostering feelings of empowerment and safety. The adversarial nature of the trial, the power dynamics involved, and the necessity of reliving the traumatic experience during the testimony and cross-examination can cause secondary victimization (Craig, 2016; Ellison & Munro, 2017, Haskell & Randall, 2019; Mason & Lodrick, 2013). Incorporating trauma-informed strategies—such as accommodating circumstances to facilitate evidence-giving and more comprehensive preparation for trial—minimizes the VW’s distress and is recommended in SA trials (Craig, 2016; Ellison & Munro, 2017, Haskell & Randall, 2019).

There are two main ways in which neuroscientific knowledge of trauma can be concretely used to improve survivors’ experience in the courtroom: educating stakeholders (police, judges, and jurors), and implementing trauma-sensitive and trauma-informed practices in the justice system.

The police are the gatekeepers of the justice system and the first point of contact between survivors and the justice system. This initial encounter influences the survivors’ trust in the police, and educating the police on trauma could reduce the phenomenon of attrition (Kelly & Valentine,
An awareness of “potential psychological reactions to sexual assault and its aftermath” would change the police’s attitude and they would not interpret the same signs as indicators of unreliability (Mason & Lodrick, 2013, p. 32). Improving the survivors’ experience with the police would increase their trust in the justice system, and more cases of reported SA would likely go to trial, which is an essential step toward justice.

The initial interaction between the police and the survivor can impact the quality of her report and the quantity and accuracy of her memories. It is crucial to understand how memory and trauma interact when conducting interviews (Haskell & Randall, 2019). For instance, neurosciences have shown that techniques such as asking open-ended questions, not interrupting the survivors, or focusing on sensory memories are likely to improve the recall process (Ellison & Munro, 2017; Haskell & Randall, 2019; Lacy & Stark, 2013). Then, the police would gather more information and stronger evidence, which would strengthen the prosecution’s case and lead to more convictions in SA trials (Ellison & Munro, 2017; Haskell & Randall, 2019).

Neuroscientific knowledge of trauma can inform initiatives to make the courtroom “more humane and hospitable” (Craig, 2016, p. 36). Craig elaborates: “It is difficult to imagine that testifying as a complainant in a sexual assault trial could ever be anything other than disruptive and painful. […] [but] steps could be taken to minimize the violent impact of those ritualized practices that are considered necessary” (Craig, 2016, p. 36). Trauma-sensitive approaches aim to minimize the risks of re-victimization, thus reducing the harm experienced and allowing the VW to give a stronger testimony (Ellison & Munro, 2017; Haskell & Randall, 2019). “Special measures” for VW testimonies “can enable them [survivors] to give evidence that they would not otherwise have been prepared or able to give” (Ellison & Munro, 2017, p. 191). Such measures can include testifying through a live stream from outside the courtroom (Haskell & Randall, 2019).

It is noteworthy that such measures may be a trade-off as it is unclear how they affect the jurors’ perceptions of VW’s credibility (Ellison & Munro, 2017).

Judges should “take modest steps to make the trial more hospitable to sexual assault complainants without threatening the due process rights of the accused” (Craig, 2016, p. 41). Judges should be educated regarding the psychological and physiological effects of trauma and secondary victimization so they can better satisfy their responsibility to protect witnesses from unnecessary harm, notably during cross-examination (Ellison & Munro, 2017). For Craig, “the authority of judges […] represents one of the more plausible means to discourage lawyers from repetitive, irrelevant, or unnecessarily humiliating questioning” (2016, p. 43). Essentially, judges’ interventions during the trial could guarantee a fairer trial and treatment of VW, particularly when they understand the effects of trauma. Judges have the means to set limiting parameters for cross-examination before the trial, hence avoiding unduly long or repetitive questioning (Craig, 2016; Ellison & Munro, 2017). By understanding trauma, judges could actively prevent VW from being humiliated or re-traumatized. However, judges’ interventions aimed at protecting survivors can be interpreted as unfair and biased towards the survivor (Craig, 2016). However, McGlynn (2017) suggests requiring judges to explain their decisions in writing.

Jurors’ assessments of survivors’ credibility, and consequentially their decisions, are likely to be tainted by rape myths and victim stereotypes (Dinos et al., 2015; Ellison & Munro, 2017). Most jurors are unaware of the effects of trauma on survivors, and they do not receive training in this regard (Ellison & Munro, 2017; Mason & Lodrick, 2013). Dinos and associates state that “educational guidance in rape trials [is] vital in terms of redressing or challenging assumptions and attitudinal biases that the jurors may hold” (Dinos et al., 2015, p. 47). If jurors were educated on trauma, they would not rely on misconceptions and would be likely to assess VW’s credibility
more fairly, which would reduce testimonial injustices. The first strategy to educate jurors is to have an expert witness testify for the prosecution on the effects of trauma. However, this expert would open the door to cross-examination and allow the defense to have a contradicting expert testify, which could create uncertainty or confusion (Nitschke et al., 2022). Otherwise, jurors can receive judicial instructions about trauma. Such directions can be on “how to evaluate the evidence given by a rape complainant to assist the jury to accurately evaluate complainant credibility in rape trials” (Nitschke et al., 2022, p. 1). Judges’ instructions are not subject to debate between the prosecution and the defense. In general, however, studies on the effectiveness of judicial instructions have mixed or inconclusive results (Lacy & Stark, 2013; McKimmie et al., 2020; Nitschke et al., 2022).

Adopting a Feminist Bioethical Framework to Integrate Neuroscientific Knowledge of Trauma in the Courtroom

Survivors require health and social care after a SA, even when they do not have direct traumatic physical injuries (Long & Butler, 2018). Indeed, they endure physical and mental health consequences in the short- and long-term due to trauma (Long & Butler, 2018; Mason & Lodrick, 2013). Many survivors’ life activities are also disrupted (Mason & Lodrick, 2013; Valentine et al., 2015). The immediate post-trauma reaction to a survivor’s environment is an indicator of their future well-being; for instance, survivors who are supported and whose testimony is believed have better health outcomes (Mason & Lodrick, 2013). It is essential to acknowledge survivors’ victim status to fully recognize the health consequences of trauma and avoid harming survivors any further. When considering SA as a health issue, acknowledging survivors’ health needs becomes indissociable from obtaining justice. Indeed, it entails recognizing the harm that was done to survivors, and providing care is a way to do so. The justice system must focus on survivors for SA trials to be considerate of the survivors’ well-being and health. When health and well-being are important considerations, a victim-centered approach must be adopted. This is not to say, however, that the survivor’s role as a witness should be ignored.

It is imperative to adopt a bioethical perspective to look at survivors’ experiences in the courtroom since health and well-being must be central considerations. Wickenheiser (2019) puts in parallel the bioethics of clinical medicine and the bioethics of forensic sciences, creating what I consider to be a false dichotomy between health and justice, and between the individual and society. Since forensic sciences serve society by allowing the justice system to secure convictions relying on evidence, the bioethics of forensic sciences align with an evidence-centered approach (Wickenheiser, 2019). Conversely, medical care is centered on patients as individuals. Wickenheiser suggests that the “ethical concept [of proportionality] can fill [the] void to balance the rights of the individual versus society,” since proportionality is a found equilibrium among different interests (2019, p. 39).

If proportionality is applied to SA trials, the survivors’ health and well-being must be balanced with society’s interest in justice, which requires fairness and the presumption of innocence. Deploying the proportionality principle would entail assessing how much harm can be justifiably caused to a VW to guarantee justice. Proportionality resonates with utilitarianism in that it puts the interests of the individual and those of the many in competition. In that perspective, it appears justifiable to focus on a survivor’s witness status and subject her to lengthy and intrusive cross-examination, risking secondary trauma when her health needs and well-being are not prioritized. Such an approach is deemed necessary to ensure the “defendant’s right to a fair trial,” including cross-examining the witness (Craig, 2016; McGlynn, 2017, p. 375). This approach
opposes the interests of the survivor as a victim and the interests of society—determining if the defendant is guilty, which depends on the survivor’s completion of her witness role. Consequently, an evidence-centered framework is not effective when looking at the experience of survivors during a SA trial. A victim-centered framework would be more fruitful.

A gender-sensitive approach is important because SA is recognized as an infringement on gender equality (Kennedy, 2005; Randall, 2011). It is “overwhelmingly a gendered crime and women’s responses to sexual assault are deeply shaped by gender socialization” (Haskell & Randall, 2019, p. 7). How SA are investigated, prosecuted, and defended reflects inherent gender biases (Haskell & Randall, 2019). Paradoxically, there are efforts to “claim for equivalency” or to treat SA as a genderless crime in the justice system (Kennedy, 2005, pp. 8-9). Yet, “it seems perverse that there would be roadblocks to claims of discrimination because of the gendered nature of the crime” (Tanovich, 2015, p. 509). Hence, it is essential to look at the experience of survivors in the courtroom through gendered lenses. A Gender-Based Analysis (GBA) is a tool to study “issues unique to women, more common in women, experienced in particular ways by women, or less understood in women” (Armstrong & Pederson, 2015). When GBA is integrated into a framework, it always considers gender as a possible variable (Armstrong & Pederson, 2015). A feminist framework with GBA is relevant here since gender is a central factor in rape myths, victim stereotypes, and SA trials.

I suggest looking at injustices in SA trials through the lens of “contextually problematic” acts and practices to pinpoint ethical issues (Schmidt, 2020). For Schmidt, an act is morally acceptable but contextually problematic when the situation that led to the act could have been prevented (Schmidt, 2020). For instance, driving is morally acceptable, but drunk driving is contextually problematic because the circumstances of the driver deciding to drive while intoxicated could have been prevented. A practice can only be morally justified when it is contextually justified (Schmidt, 2020). A practice is contextually justified “if and only if (i) (enough) instances of it are morally permissible […] and (ii) justifiable and sufficient efforts are undertaken […] to prevent” the situations leading to contextually problematic acts (Schmidt, 2020, p. 140). Driving is contextually justifiable because most drivers are not intoxicated and there are sufficient efforts to prevent drunk driving, such as law, education, and social awareness.

This framework is relevant here because some of the injustices experienced by survivors are not intrinsically wrong and arise from contextually problematic practices. For instance, cross-examinations of witnesses are usually morally permissible, even warranted. However, injustices arise from their practice in SA trials because of the inhospitable courtroom and the prevalence of rape myths and victim stereotypes. This upstream situation could be prevented if survivors were perceived and treated differently in the courtroom. For example, judicial interventions restricting the defense’s reliance on rape myths could prevent some of the humiliation and the secondary trauma experienced by survivors. If enough precautions were taken for the cross-examinations to be less harmful, the situation would not be as morally problematic, and the cross-examination would not be as contextually problematic. Subsequently, if we consider that enough efforts were undertaken to prevent the practice from being contextually problematic, then it is morally justifiable. In the current situation, sufficient efforts are not conducted to prevent morally problematic situations, so cross-examinations of the VW in SA trials are contextually problematic and cannot be morally justified.

I believe that a victim-centered, feminist, and principlist approach would reconcile the double status of VW by considering the survivors’ health needs while honoring the commitment to justice and protecting society. Indeed, rather than looking for a balance between the survivors’
well-being and the defendant’s right to a fair trial and society’s interest in justice, the focus would be on the tension between the following bioethical principles. According to principlism, the four bioethical principles are respect for autonomy, non-maleficence, beneficence, and justice (Beauchamp, 2010). Respect for autonomy requires recognizing an individual as an agent entitled to their beliefs and decisions (Beauchamp, 2010). The non-maleficence principle is often summarized by the injunction “do no harm” (Beauchamp, 2010). The beneficence principle goes beyond and requires acting in the best interest of others (Beauchamp, 2010). Finally, justice does not correspond to a specific theoretical conception of justice, but it is “the minimal (formal) principle that like cases should be treated alike, or, to use the language of equality, equals ought to be treated equally and unequals unequally” (Beauchamp, 2010, p. 41).

The four bioethical principles can be applied to SA cases and trials. Overall, when it comes to the defendant, the principles are respected in the courtroom. Indeed, the presumption of innocence is an application of non-maleficence while the right to a lawyer representing the defendant’s interests is an application of beneficence. The commitment to justice is characterized by the defendant’s right to a fair trial and the threshold of evidence needed to prosecute a suspect. The defendant’s autonomy is generally respected as he ultimately decides to plead guilty or not, although it is hindered by his participation in a ritualized process of the trial.

Conversely, looking at survivors’ situations in the courtroom through principlism reveals ethical concerns and contextually problematic practices. Since the justice system is evidence-centered, the VW’s well-being is not a central concern, so the beneficence principle is not prioritized. Concerning non-maleficence, there are few mechanisms in place to protect the VW from some harm, which could include special measures for her testimonies or prohibiting most use of her sexual history in court (McGlynn, 2017). The VW has little to no autonomy as she plays a submissive role in the ritualized proceedings (Craig, 2016). Overall, survivors are not treated justly by the justice system.

The four bioethical principles highlight some morally problematic situations, which can lead to contextually problematic practices. When these situations are preventable, such practices are contextually unjustified. Improving compliance with the four bioethical principles would make it less likely for a situation to be morally problematic. Respect for the autonomy of the survivor is fundamental, and she should be given as much agency as possible, particularly since it was taken from her during the SA. For example, asking for consent at each step of the forensic medical examination gives control to the survivor (Long & Butler, 2018; Valentine et al., 2015). This principle requires recognizing a person’s individuality (Beauchamp, 2010), so it follows that it is essential to recognize that the survivor is the victim as well as the witness. The beneficence principle would require adequate medical, psychological, and social care for the survivor. As a victim, her interests would need to be protected in the courtroom and throughout the criminal justice process. Since the prosecutor represents the interests of society, survivors could have a victim advocate accompanying them through the process (Haskell & Randall, 2019). All trauma-sensitive and trauma-informed practices would heavily contribute to the non-maleficence principle as they aim to avoid harming the survivor.

I believe that trauma-informed and trauma-sensitive practices ought to be implemented in the criminal justice system. However, it is important to only consider those that do not impinge on the defendant’s rights, to avoid compromising the process of justice. Such practices are feasible and effective (Ellison & Munro, 2017; Haskell & Randall, 2019). Indeed, they can improve the quality of survivors’ testimony and reduce secondary victimization, which represents an important cause of the harm experienced by survivors, thus preventing some morally problematic situations.
Trauma-informed practices could prevent regular legal practices, like cross-examinations, from being contextually problematic in SA trials. For instance, educating judges and jurors about trauma aims to ensure a fair assessment of the facts of the trial and reduce reliance on rape myths and victim stereotypes. However, such interventions have not been proven to be effective so far, but new research could lead to improvements. While trauma-informed practices contribute to the non-maleficence principle, optimizing educational practices on trauma and memory could contribute to the beneficence principle.

Conclusion

Survivors experience several injustices during a sexual assault trial. The failure to prosecute and convict perpetrators of SA is misconduct of justice reflecting gender discrimination persisting in the courtroom through rape myths and victim stereotypes. Consequently, survivors face skepticism and epistemic injustices as their credibility is assessed in comparison to untenable standards and unrealistic expectations for their behavior. Additionally, the justice system fails survivors by not protecting them and harming them. In the courtroom, survivors have little agency and lack opportunities to contribute to the social understanding of their experience. The victim is erased from court rituals by their status as a witness. Consequently, survivors risk experiencing secondary victimization, notably during their cross-examination.

Several injustices experienced by survivors in the courtroom are preventable. Indeed, neurosciences can explain many survivors’ reactions and behaviors during and after a SA. Hence, neuroscientific knowledge of trauma has the potential to address injustices faced by survivors in the courtroom. Indeed, trauma-informed, and trauma-sensitive practices would allow for a better quality of evidence and victim testimony and would reduce harm. Initiatives to educate on the effects of trauma during and after an assault can debunk rape myths and victim stereotypes, consequently changing the expectations for survivors, and possibly leading to fairer decisions in the courtroom.

An evidence-based framework eclipses the survivor’s interests by concentrating on her witness status and erasing her victim status while attempting to achieve a proportional balance between the rights of the defendant and society’s interest in justice. I suggest adopting a feminist and victim-centered bioethical framework to focus on the survivors’ health needs and well-being, without compromising the fairness of the criminal justice system. Through that framework, I argue that injustices stemming from contextually problematic practices ought to be prevented, which is achievable by using neuroscientific knowledge of trauma and trauma-informed and trauma-sensitive practices.

References


