Restorative Justice Responses to Sexual Violence as Non-Domination Promoting Instruments

by

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Abstract

This paper introduces two international restorative justice responses (RJR) to sexual violence. I draw on these examples to propose a RJR to sexual violence that could be implemented in Canada. I analyze the RJR using Braithwaite and Pettit’s Republicanism model. I use the Republican value of non-domination, to explore the process of a RJR as against the CJS process. I focus only on offenders who are willing to admit some responsibility for their crime. The work that follows focuses on the process of both the CJS and RJR, it asks the simple question: would a RJR process promote dominion in excess of CJS process? I argue that a RJR leads to greater dominion for the survivor/victim (SV) of the sexual assault, the offender and the public. I argue that a RJR employs a process that is more efficient at rectifying the harm caused by the initial act of domination.
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Introduction

Currently, Canada offers one public response to sexual assault: prosecution in the Criminal Justice System (CJS). There is no public-based alternative to traditional prosecution.\(^1\) This paper introduces two international restorative justice (RJ) models that deal directly with sexual violence. I draw on these examples to propose a RJ response (RJR) to sexual violence that could be implemented in Canada. I analyze the RJR using Braithwaite and Pettit’s Republicanism model. I use the Republican value of non-domination, or dominion, to explore the process of a RJR as against the CJS process. I focus only on offenders who are willing to admit some responsibility for their crime. The work that follows focuses on the process of both the CJS and RJR, it asks the simple question: would a RJR process promote dominion in excess of CJS process? I argue that a RJR leads to greater dominion for the survivor/victim (SV)\(^2\) of the sexual

\(^{1}\) Sentencing circles are one restorative response to the traditional adversarial model of sentencing. They are generally only available for indigenous offenders. Sentencing circles convene members of the offender’s family, victim’s family, community members, elders, prosecutor, defence lawyer, and judge. They then discuss sentencing options and recommend a sentence to the judge. The judge is not bound by the recommendation. Sentencing circles have been used to respond to sexual violence when the offender is indigenous. See for example: R v J(J), 2004 NLCA 81, [2004] NJ No 422, 2016 ONSC 5355, [2016] OJ No 4790. For general information on sentencing circles see: Toby Goldbach, “Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial” (2015) 25:1 Transnational Law & Contemporary Problems 61 at 82-92.

\(^{2}\) I choose to use this term for political and legal reasons. The term survivor is favoured by activist groups, and restores agency to people who have experienced sexual violence. The term victim is a legal term used to describe someone who has suffered a crime or an alleged crime: Canadian Victims Bill of Rights, R SC 2015, c C-13, s 2. I choose to use the abbreviation SV to recognize this duality, and note that there will very rarely be a proper term to define the broad group of people who have, or will experience sexual violence. For similar reasoning, please see: Mary Koss, “Restoring Rape Survivors: Justice, Advocacy and a Call to Action” (2006) 1087:1 Annals of the New York Academy of Sciences at 208.
assault, the offender and the public. I argue that a RJR employs a process that is more efficient at rectifying the harm caused by the initial act of domination.

My work will be outlined as follows. Part One introduces the republicanism model and the features of a CJS that are important to republicans. Part Two introduces the current CJS response to sexual violence, and argues that the process is not dominion promoting. Part Three introduces the reader to two international RJRs to sexual violence. Part Four argues that a RJR to sexual violence promotes dominion in excess of the current CJS response. Part Four also addresses some common critiques of RJRs and argues that a RJR is better suited to rectify harm as compared to the CJS. I conclude with a call to action to implement a RJR to sexual violence in Canada.
Chapter 1
Theories

As already stated, I am focusing on the process of the CJS as against a RJR. To make a claim that a RJR to sexual assault is preferable to the status quo, I must be able to argue that it accomplishes a goal that is important to the overall functioning of the CJS. A victims-rights advocate may suggest that the current CJS model is failing victims, but for the defence lawyer, or accused rights advocate, perhaps this is a misleading statement. Perhaps the system is providing accused people with a fair trial, and therefore the system is working. A model that reduced the burden of proof on the prosecution, or eliminated the defence right of cross-examination would likely “benefit” SVs, but at what cost to other values that the CJS holds dear? So, to make a normative claim about RJR, I must choose a theory, and argue that the RJR will promote some goal. It is not enough to simply state that the RJ model better suits victims; the RJ model must promote common goals across criminal justice broadly. The question now becomes which goal I wish to utilize for my purposes.

1 Three Types of Theories: Limiting, Consequentialist and Hybrid

Most theoretical models that seek to explain how the CJS should be structured are consequentialist, limiting or hybrid. A limiting model uses a constraint as its ‘goal’. Retributivism is the most well known restraining or limiting model. Retributivism is a model that employs proportionality or “just-deserts” as its limit. True retributivism argues that punishment as a response to wrongdoing is an inherent good, if and only if, it is proportionate to the moral
blameworthiness of the offender and the seriousness of the criminal conduct.\textsuperscript{3} Any punishment that is in excess of this limit is to be eschewed and any punishment that is below this limit is an insufficient response.\textsuperscript{4} Retributivism is really only a punishment theory, it does not answer other questions such as: how should police exercise their discretion in laying charges? How should prosecutors decide which cases to prosecute with finite resources? And, how should society rank-order crimes according to their seriousness?

Retributivism is unable to answer these questions because in its pure form, it only provides an answer to one question: how much should we punish? It presupposes that punishment is appropriate. The theory does not fit well with the many other “sub-systems” of criminal law.\textsuperscript{5} For example, retributivism does not sit well with the exercise of prosecutorial discretion, plea-bargaining, or the idea of mercy, all elements of many CJS. Pure retributivism states that everyone who does the same crime should face the same punishment, regardless of whether or not they plead guilty, what their criminal record is, whether or not they assist the authorities, what their health condition is, and any other personal circumstances like socio-

\begin{flushright}
\textsuperscript{4} Ibid at 17.
\textsuperscript{5} Not Just Deserts, supra note 3 at 36-37.
\end{flushright}
economic status, etc.Only the moral culpability of the offender (at the time of the act) and the seriousness of the act may be considered by the sentencing judge.

The next type of model is a hybrid model. Hybrid models are those that employ both a target and a constraint. Most current retributivist theorists are not so-called “true” or “pure” retributivists. They instead argue for proportionality as a limit, but also advocate for a goal. For example, some retributivists argue that denunciation of criminal conduct can be achieved as a goal, while still using proportionality as a constraint. Others argue that deviations from proportionality may occur if it will protect against grievous harm (eg. indeterminate sentences). Still others argue that proportionality should be used to set the upper bounds of punishment, but within the bounds of punishment, other goals may be considered and strived for. These

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7 Censure and Sanctions, supra note 3 at 15-17.

8 Censure and Sanctions, supra note 3 at 4.

9 Not Just Deserts, supra note 3 at 48.

10 Censure and Sanctions, supra note 3 at 52. These types of models allow the goal of crime prevention to sometimes take sway over proportionality where it is particularly urgent. For example, indeterminate sentences for very dangerous offenders.

11 Censure and Sanctions, supra note 3 at 53. This is ostensibly what Canada’s sentencing regime is. S 718.1 of the Criminal Code of Canada codifies proportionality as the fundamental principle of sentencing. Yet s 718 also sets out the “purposes and principles” of sentencing which include: denunciation, specific and general deterrence, the separation of the offender from society, rehabilitation etc. Criminal Code, RS C 1985, c C-46, s 718. Some courts have held that a single sentence can accommodate all of these disparate goals, see for example: R v Arcand, 2010 ABCA 363 at para 64, [2010] AJ No 1383. But a more common sense approach is the understanding that a single sentence cannot accommodate every sentencing goal: Clayton Ruby, Gerald Chan, Nader Hasan, Sentencing, 8th ed at page 5 (Markham: LexisNexis Canada, 2012).
theorists recognize that proportionality is only applicable to punishment theory, they then co-opt other targets to supplement their models.

Lastly, a consequentialist model employs a goal or a target as its objective. Once this goal or target is defined, all aspects of the CJS should be structured to promote this goal.\textsuperscript{12} Take for example a consequentialist model that employed crime prevention as its goal. Every aspect of the CJS would be structured to achieve as much crime prevention as possible. Consider sentencing: every sentence would be crafted to reduce crime as much as possible. Taking this idea to its natural limit, it is clear that a serious issue emerges. If crime prevention was the only goal a consequentialist model strived for (with no constraints), then the punishment for every crime would be the death penalty. No one convicted of a crime would ever be able to commit another offence, and theoretically everyone would be terrified of committing crimes. Crime would be reduced as much as possible. This of course is a drastic example, but it is the one that most critics of consequentialist models make. Other consequentialist models utilize different targets such as: aggregate utility, or rehabilitation.\textsuperscript{13}

1.1 Republicanism and Non-Domination

The model I have chosen for my work is Braithwaite and Pettit’s consequentialist model developed in \textit{Not Just Deserts}.\textsuperscript{14} The dominion model, also known as republicanism, emerged as a response to preventionist, utilitarian and retributivist models.\textsuperscript{15} The republicanism model is

\begin{itemize}
\item\textsuperscript{12} \textit{Not Just Deserts, supra} note 3 at 26-27.
\item\textsuperscript{13} \textit{Not Just Deserts, supra} note 3 at 32.
\item\textsuperscript{14} \textit{Not Just Deserts, supra} note 3.
\item\textsuperscript{15} \textit{Not Just Deserts, supra} note 3 at 5.
\end{itemize}
consequentialist in that it articulates a goal that is strived for: the promotion of dominion.\textsuperscript{16}

Dominion draws on the liberal idea of liberty, but in a unique way. Braithwaite and Pettit define dominion as follows: “… the bearer of dominion has control in a certain area, being free from the interference of others, but has that control in virtue of the recognition of others and the protection of the law.”\textsuperscript{17} Dominion then is the right to interact with others, but also to be left alone by them.\textsuperscript{18} In other words, dominion is not liberty in the sense of simply being left alone in the state of nature, it is the right to interact with others, and structure ones life in the way one chooses while being free from arbitrary or uncontrolled interference.\textsuperscript{19} Interference may come either from the state or from other citizens.

A person enjoys full dominion if and only if: they have no less a prospect of liberty than anyone else in their society, and when there is common knowledge that this is the case.\textsuperscript{20} Dominion can also be thought of as non-domination. Domination is interference, or the ability to interfere with someone arbitrarily.\textsuperscript{21} An act of arbitrary interference can be thought of as interference with another’s ability to make a choice.\textsuperscript{22} In the context of sexual assault, domination is the act of another interfering arbitrarily (i.e. without the SV’s consent) with their body.\textsuperscript{23} Sexual assault is an interference with the SV’s ability to choose how to use their body. A CJS that promoted overall dominion should then respond to this act of domination by restoring

\textsuperscript{16} Not Just Deserts, supra note 3 at 37.
\textsuperscript{17} Not Just Deserts, supra note 3 at 60.
\textsuperscript{18} Not Just Deserts, supra note 3 at 57.
\textsuperscript{20} Not Just Deserts, supra note 3 at 85.
\textsuperscript{21} On the People’s Terms, supra note 19 at 61.
\textsuperscript{22} On the People’s Terms, supra note 19 at 31-32.
\textsuperscript{23} Not Just Deserts, supra note 3 at 69.
the SV’s dominion in a way that minimally impairs the dominion of the offender. The response should be such that the SV is restored to having dominion, in this case, the ability to choose what they want to do with their body. The response should also show the public that the state protects and values dominion. Any response must only interfere with an offender to the extent that it promotes an overall gain to dominion.24

Braithwaite and Pettit argue that dominion is a satiable, stable goal.25 For the goal to be stable, actors in the CJS must respect and promote dominion, and doing so must protect non-controversial legal rights.26 Any decision must be made with dominion in mind.27 If an actor within the CJS is motivated by dominion to breach non-controversial legal rights, the goal is not stable.28 Braithwaite and Pettit argue that because their definition of dominion includes the common knowledge requirement, and people must see the system as respecting everyone’s (including the offender’s) dominion, dominion is a stable goal. As soon as the public suspects that the system is depriving people of dominion on an arbitrary basis, then people will think that their dominion could be interfered with in an arbitrary way, and the system fails.29 Thus, they

24 Not Just Deserts, supra note 3 at 79.
25 Not Just Deserts, supra note 3 at 71-80.
26 Not Just Deserts, supra note 3 at 72.
27 Not Just Deserts, supra note 3 at 72.
28 Not Just Deserts, supra note 3 at 72-73. This lack of stability is the main critique that utilitarian or crime-prevention models face. A utilitarian model could foreseeably allow the punishment of the innocent in rare cases if in doing so would allow an overall increase in the public good. The main example being imprisoning an innocent to placate an angry mob who believes the innocent person is guilty and will kill the innocent person if they are not punished.
29 Not Just Deserts, supra note 3 at 74.
argue that dominion is a stable goal: actors in the CJS must always act with a view to promoting dominion and in so doing, they will promote uncontroversial legal rights.\(^\text{30}\)

The goal is also satiable in that it will never promote excess punishments, or excessively intrusive methods of crime prevention.\(^\text{31}\) Any punishment or infringement on a person’s protected sphere is an interference. Consider being removed from society and placed in prison. Outside of death or torture, this is the most severe way to interfere with someone. Thus, any interference with a person, even a person guilty of a criminal offence, must produce a net benefit of dominion overall.\(^\text{32}\) Again, Bratihwaite and Pettit’s model employs the common knowledge requirement, so if people knew that petty criminals were getting drastically punished, this would negatively impact the public’s perception of how the CJS respected dominion. Thus, there is a point at which pursuing further overall dominion will actually decrease overall dominion, and equilibrium will occur.

Braithwaite and Pettit argue that the entire CJS should be set up to promote dominion. This means that conduct that is criminalized should only be that which negatively effects others dominion.\(^\text{33}\) Conduct that is a form of domination should be criminalized only when the act of criminalization does not facilitate more domination than it removes.\(^\text{34}\) Braithwaite and Pettit make two uncontroversial assumptions about the CJS system. First, that it presents criminalized

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\(^\text{30}\) Like the right to a fair trial, the right to be presumed innocent, right not to be subject to cruel and unusual punishment etc.
\(^\text{31}\) Not Just Deserts, supra note 3 at 78.
\(^\text{32}\) Supra note 27.
\(^\text{33}\) Not Just Deserts, supra note 3 at 93-94.
\(^\text{34}\) Philip Pettit, “Republican Theory and Criminal Punishment” (2009) 9:1 Utilitas at 68
conduct as something that is wrong and shameful.\textsuperscript{35} And second that it provides disapprobation to those who commit criminal acts.\textsuperscript{36} Braithwaite and Pettit argue that committing a criminal offence leads to feelings of shame and regret, and that prosecution of such acts in the CJS is not necessary in many cases to further promote dominion.\textsuperscript{37} Only where prosecution in the CJS would promote overall dominion should such prosecutions go ahead.\textsuperscript{38} As such, non-prosecution becomes the rest state of the system at whole, and more reliance is placed on non-traditional CJS conflict resolution methods like RJR and other community based responses.\textsuperscript{39} Any community-based responses to criminalized conduct must provide an assurance of fairness and fair treatment for all parties\textsuperscript{40}, and the restoration of offender and victim to full dominion should be a top-priority.\textsuperscript{41}

1.1.1 Non-Dominating Punishment

When considering what the process of the public response to an act of domination should entail, Pettit’s later writing on the relationship between punishment and Republicanism is of some assistance.\textsuperscript{42} Pettit argues that when considering how to deal with people who have been fairly convicted of a crime, or those that have confessed to a crime, republicans should be concerned with rectifying the act of domination.\textsuperscript{43} Pettit goes on to argue that for punishment to

\begin{itemize}
\item \textsuperscript{35} Not Just Deserts, supra note 3 at 89.
\item \textsuperscript{36} Not Just Deserts, supra note 3 at 89.
\item \textsuperscript{37} Not Just Deserts, supra note 3 at 90.
\item \textsuperscript{38} Not Just Deserts, supra note 3 at 115.
\item \textsuperscript{39} Not Just Deserts, supra note 3 at 112 and 117.
\item \textsuperscript{40} Not Just Deserts, supra note 3 at 88.
\item \textsuperscript{41} Not Just Deserts, supra note 3 at 91.
\item \textsuperscript{42} Philip Pettit, “Republican Theory and Criminal Punishment” (2009) 9:1 Utilitas 59-79.
\item \textsuperscript{43} Ibid at 73.
\end{itemize}
be non-arbitrary, it must be constrained to track interests shared with both the offender, and society more broadly. Pettit poses the question to ask when considering punishment as follows:

“Ask if someone who fully internalizes the possibility of finding themselves in the position of a convicted or confessed offender, can still complain that the treatment does not answer to interests that they share with others: to these and not, for example, to their interest in being given special, lenient treatment.”

Pettit suggests that if punishment seeks to rectify the harm caused then it will not be arbitrary. Rectification of evil is a common goal among offender, SV, and society. Within rectification are the sub goals of: recognition of the act as a form of domination (by the offender), recompense (or restitution/compensation) and lastly reassurance. The first two sub-goals are self-explanatory; reassurance requires a return to the status quo before the crime occurred. Reassurance is considered both from the perspective of the SV and the general public. In other words, what is required to assure the SV and the general public that their right of non-domination will be protected in the future?

Pettit’s question and idea of shared-interests are helpful when considering what the process of the public-response to an act of sexual violence should look like. But an issue emerges immediately when we try to apply his shared-interest of rectification of evil to an adjudicative process. The interest of rectification of evil presupposes an evil was committed by the offender. What of the offender who does not believe what they did was wrong, or of the innocent offender wrongfully charged? What should a republican CJS response look like for people who do not wish to admit any wrongdoing?

44 Ibid at 73.
46 Ibid at 73.
47 Ibid at 75-77.
48 Ibid at 77.
Braithwaite and Pettit’s answer is to retain the jury trial as the gold standard in fact finding.\(^\text{49}\) Surely in a system that is set up to promote non-domination, being wrongly convicted of a crime is a serious cancer that should be avoided. So, an adjudicative process must still exist, with the shared goal of truth-seeking guiding the process. SVs, offenders and the general public would all share this interest, regardless of their own special interests. I will not spend any more time here on what this adjudication process should look like, or whether or not the current Canadian CJS fact-finding process is dominion promoting.\(^\text{50}\) Suffice it to say that having an adjudicative method is important in a dominion promoting system as there must be a way to deal with offenders who do not perceive what they have done as wrong, or those who are unable to accept responsibility.

On the other hand, what of the offender who is prepared to admit some wrongdoing, or some level of responsibility, what should occur to them under a republican framework? Again, turning back to Pettit’s work, we know that rectification of harm should be the main goal with the sub-goals being: recognition of harm done, recompense and reassurance (considering both the SV and the general public). These are goals, and to achieve them one could envisage different processes for different offenders, so at this time it is not helpful to clearly spell out what every process should look like. That being said there are some key procedural aspects that should be present in every response to sexual violence.

\(^{49}\) Not Just Deserts, supra note 3 at 120-122

\(^{50}\) Elaine Craig for example writes about some of the more problematic aspects of the adversarial method in: “The In hospitable Court” (2016) 66:2 University of Toronto Law Journal 197-243.
When considering specific procedural aspects of a republican response to an act of domination Pettit’s writing on “contestatory democracy” is of some assistance.\(^{51}\) Pettit argues that to live in a true democracy, it is not sufficient to simply have elected officials who govern according to the wishes of those who elected them.\(^{52}\) These elected officials without more of a check would at times be drawn to act in their self interest to be re-elected.\(^{53}\) Pettit also argues that at times elected officials would use moral panic and outrage to make policies that would win votes, but which would not lead to good governance.\(^{54}\) Pettit argues that for certain aspects of governance, there should be separation from elected officials. For example, he suggest an arms-length body to be set up to deal with criminal policy.\(^{55}\) Once this type of organization is set up, it should be susceptible to challenge by citizens who think decisions are not being made in the common interest (for our purposes non-domination).\(^{56}\) Furthermore, powers should be set up and structured to have clear procedural rules, and guidelines.\(^{57}\) And there should be consultation before enacting or creating an institution that will wield some sort of power.\(^{58}\) An example of a type of power can be a criminal justice response to forms of domination, including sexual assault.\(^{59}\) These features: consultation (a right to be heard), clear procedural restraints and a right of appellate challenge for a decision which an aggrieved party believes was not in the common good should all feature in any dominion-promoting process.

\(^{52}\) “Depoliticizing Democracy”, ibid at 61.
\(^{53}\) “Democracy, Electoral and Contestatory”, supra note 51 at 134.
\(^{54}\) Ibid.
\(^{55}\) “Depoliticizing Democracy”, supra note 51 at 55.
\(^{57}\) “Depoliticizing Democracy”, supra note 51 at 61.
\(^{58}\) “Depoliticizing Democracy”, supra note 51 at 63.
\(^{59}\) “Depoliticizing Democracy”, supra note 51 at 55.
A dominion-promoting response to sexual violence should be constructed after consultations, to determine what procedural restraints and upfront guidelines should exist to guide the process. I cannot guess at what the results of these consultations will be, but, that being said, there are some aspects of the process that should always be present in a dominion-promoting response to sexual violence. I have already suggested that the common goal of a non-adjudicative response to sexual violence be the rectification of the harm. The public has an interest in a response to sexual violence. Every act of sexual violence will negatively impact the general public’s perception of their own right to be free from sexual interference.\(^60\) As a result of this, neither SV nor offender should be given a ‘veto power’ when it comes to the response to sexual violence.\(^61\) It is perhaps obvious that the offender should not be able to opt out of the response to sexual violence, but why the SV should not have a veto power needs a little more explanation.

Giving the SV a veto power in deciding whether or not a prosecution should go ahead would at times foreclose any public response to an evil that affects the public. Consider Pettit’s example of where to build a highway, or a power plant.\(^62\) If every citizen had a veto power, then those aggrieved by the building of the highway, those who live closest to the proposed highway, could simply veto the project, and it would never be built. Pettit suggests that if this was the case, the government could never create projects for the common good.\(^63\) Similarly, because the public has an interest in seeing a response to sexual violence, the SV should not have a veto to simply opt out of the process. Once the public is aware of the act of domination it has an interest in

\(^{60}\) “Republican Theory and Criminal Punishment”, supra note 34 at 70.
\(^{61}\) “Democracy, Electoral and Contestatory”, supra note 51 at 118.
\(^{62}\) “Democracy, Electoral and Contestatory”, supra note 51 at 131.
\(^{63}\) “Democracy, Electoral and Contestatory”, supra note 51 at 118.
addressing it. That being said, if the SV thinks a decision is not being made with the shared interest of rectification of evil in mind, they should be allowed to challenge this decision.

To summarize, a republican process to deal with offenders who are prepared to admit some level of responsibility should be structured to rectify the evil of the domination. The SV and the offender should be given an opportunity to participate in the process and be heard, but neither should be given a veto power. And lastly, aggrieved parties who believe decisions that are not made with the shared interest in mind should be able to challenge them before an independent tribunal. With these broad ideas about what the public response to an act of domination process should employ, I now turn to the current CJS response to sexual violence.
Chapter 2
Current Response

When considering if the current process is dominion promoting we must consider the SV, offender and the general public. Decisions that affect SV and offender must be made with the shared interest of rectification of evil in mind. SV and offender must be able to participate in the process, and have their voices heard. If decisions are made which do not conform with the minimum amount of interference needed to rectify the harm done, aggrieved parties should be able to challenge them ex ante. Considering rectification of harm is not the paramount goal under Canada’s sentencing provisions, the sentencing procedure is not currently set up to promote this shared interest.

2 Pre-Sentencing

Offenders who are charged with sexual assault have three options available to them: plead guilty to the offence as charged, plead guilty to a lesser included offence, or plead not-guilty and have a trial. Diversion, or resort to a community justice response (the type that is advocated for by Braithwaite and Pettit) is generally unavailable for sexual assault in Ontario. Current Crown Policy in Ontario states that: “Generally speaking, however, crimes involving violence, other than minor non-spouse/partner offences, will not be eligible for community justice as an alternative to adjudication.”

Diversion, or community justice responses vary greatly by jurisdiction, but the general process is as follows. Offenders admit some responsibility for the act charged. This acceptance

of responsibility is not an admission of guilt. They then complete some task or program in exchange for a withdrawal or stay of the charges. The task could be community service, an educational course, a donation, a letter of apology etc. Once the task is complete the charges are withdrawn or stayed. As diversion is generally not available for sexual assault, an offender who is willing to admit some level of responsibility is unable to avail themselves of this program.

Consider an SV who agrees that a community justice response is what is appropriate to rectify the harm done to them, and consider further that this is an objectively reasonable way (from the public’s point of view) to rectify the harm. This response will be unavailable due to current crown policy and likely be unavailable due to sentencing concerns the ACA must take into account (need for deterrence for example). This is the first example of the way the current CJS procedure is deficient in dealing with sexual violence from a non-domination perspective.

The offender who wants to admit some responsibility now must either plead guilty to the offence as is, or a lesser and included offence, or force a trial. Consider the offender who pleads guilty to sexual assault as is. Accused persons, or offenders convicted of sexual assault may experience shaming and other collateral consequences like losing their jobs. This stigma begins

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65 Criminal Code, supra note 11 at s 717(1) and 717(3).
66 Supra note 64.
during the charge stage, and can continue even after an acquittal.\textsuperscript{68} If convicted of a sexual assault an offender may become the subject of ancillary orders compelling them to comply with the Sex Offender Information Registry, and to provide a DNA sample.\textsuperscript{69} Sex-offenders may also be subject to vigilante action.\textsuperscript{70} If a conviction is not necessary from a rectification of evil perspective, then all the punishment that comes with a criminal record for sexual assault will be in excess of the shared interest and will be an exercise of domination. While an offender can appeal an unfavorable sentence, they are generally unable to challenge an ACA’s decision to not grant diversion.\textsuperscript{71} This lack of appeal means the offender is being used as a means to promote a goal that does not conform with the shared interest of rectification of evil in an unchallengeable way. This is an exercise of arbitrary interference with the offender.

Furthermore, this arbitrary interference would likely harm the public’s perception of the CJS system as well. If the public knew that offenders were receiving more punishment than is necessary to rectify the evil, then citizens would understand that if they find themselves in a

\textsuperscript{68} Most of the academic literature on stigma and sexual offences involves offenders who have been accused, convicted or acquitted of sexual offences involving children, or child pornography offences. See for example: Anne-Marie McAlinden, “The Use of ‘Shame’ With Sexual Offenders” (2005) 45:3 The British Journal of Criminology 373; Douglas Evans & Michelle Cubelis, “Coping With Stigma: How Registered Sex Offenders Manage Their Public Identities” (2015) 40:3 American Journal of Criminal Justice 593. Please note that the Canadian registries are not public, so offenders do not face as much stigma as offenders in certain jurisdictions in the United States of America where registries are public.

\textsuperscript{69} See Criminal Code, supra note 11 s 490.012(1), s 487.051(1)

\textsuperscript{70} See for example in the context of sexual assault involving children: Sheena Goodyear, “These Vigilante “Creep Catchers” Bait and Trap Alleged Child Molesters” Vice (1 June 2016), online: <https://news.vice.com/article/how-canadas-vigilante-creep-catcher-network-baits-and-traps-would-be-child-molesters>

\textsuperscript{71} The decision to withdraw, proceed, or offer diversion would make up part of the “core” of Crown discretion and is thus only reviewable for abuse of process: \textit{R v Anderson}, 2014 SCC 41 at 50-51.
similar position, their dominion is likely to be interfered with in this way as well. Thus, the public also suffers a loss of dominion.

2.1 Sentencing

Next, consider the method of sentencing. An offender enters a plea of guilty, they are then sentenced for their crime. A sentencing hearing can take several minutes to several days depending on the complexity/severity of the crime. At the hearing, the ACA gets an opportunity to advocate for the type of sentence they feel is appropriate, the SV may present a victim impact statement, the offender (usually through their lawyer) presents a sentence they deem appropriate, and then the judge passes sentence. A recent paper on the concept of feminist judging is of some assistance when examining a sentencing hearing in the context of whether or not it promotes non-domination. Conventional sentencing is about communication between the judge and the accused person. The judge is impartial, and neutral, there is not to be emotional reasoning clouding the judge’s mind, and the act of sentencing is depersonalized. And the use of lawyers through traditional sentencing often leads to the removal of the actual aggrieved parties from the process.

It is challenging to see how the sentencing process achieves the goal of rectification of the original act of domination. I will address the sentencing process first from the SV’s perspective, and next from the offender’s perspective. SVs have an opportunity to participate in the sentencing hearing by preparing and/or reading a victim impact statement. A victim impact statement

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73 Ibid at 340-341.
74 Ibid at 341.
statement (VIS) is a statement prepared by the SV that can either be read in by the SV, filed in writing with the court, or read in by the ACA. A VIS’s content is restricted. The VIS is predominately focused on the economic, physical, and emotional harm suffered by the SV, not on what actually happened during the offence. It is important to note that if the ACA and defence are presenting a joint submission on sentence, the VIS will likely have very little effect on the sentence. The sentence will have been agreed to, sometimes in advance of the SV even writing the VIS. Unless something in the VIS makes the judge realize that accepting the joint position will bring the administration of justice into disrepute it will not have an effect on the sentence. Similarly, if the ACA and defence are recommending different sentences, the judge must consider relevant jurisprudence and sentencing principles before imposing sentence.

The actual completion of a VIS and/or reading in the statement allows the SV to have a voice in the sentencing process. As demonstrated however, the actual qualitative effect of this is questionable. The SV may want to see an offender do something to rectify the harm caused by their actions, but whether or not this is appropriate will be based solely on what the judge determines is an appropriate sanction. There is no appeal for an SV who feels that the sentence is

75 Criminal Code, supra note 11 at s 722(4), Form 34.2.
76 The SV may not recommend a certain sentence, nor are they allowed to write about allegations that have not been proven beyond a reasonable doubt. The court is to only consider portions of the VIS that relate to: “physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.” Any other information should be disregarded by the court: Criminal Code, supra note 11 at s 722(1) and 722(8).
77 There is not much empirical evidence on the effect VIS statements have on quantum of sentence, but there is some evidence that VIS do not lead to harsher sentences. That being said, surveyed judges have responded that VIS are helpful in crafting an appropriate sentence: UK, Commission for Victims and Witnesses in England and Wales, Victim Personal Statements: A Review of Empirical Research by Julian Roberts & Marie Manikis (London, 2011) at 30-35 online: https://www.justice.gov.uk/downloads/news/press-releases/victims-com/vps-research.pdf
inappropriate based on the shared interest of rectification of harm. Furthermore, from the perspective of recognition of the harm done, the content of the VIS is restricted, and the SV may perceive this restriction as a lack of a recognition of harm done by the offender. For example if the offender is only willing to agree to certain facts, but the SV wants to read in information about why they perceived the act as wrongful, the contentious facts will likely be omitted.\footnote{Supra note 76.} This process does not promote recognition of the harm as wrong – it focuses exclusively on the harm suffered as a result of the offence. It does not focus on the actual act and what about that act was wrongful. A focus on harm suffered post-domination is important from a recompense position, but a sentencing court will not impose restitution for an offence of sexual assault. This is only to be addressed privately through the tort of sexual assault. This focus only on harm caused and not on promoting a recognition of why the act was an act of domination is problematic from a non-domination perspective.

The VIS also does little in terms of reassuring the SV of their future status of non-domination, the offender does not have to respond to the VIS, nor do they have to admit or acknowledge anything that is contained in a VIS. So from the perspective of the shared goal of rectification of evil, it is unclear what if anything the VIS is accomplishing outside of giving the SV a feeling like they are involved in the process.

From the perspective of the offender, the sentencing hearing is generally quick and depersonalized. Offenders are being sanctioned by the public through a judge they have likely never met before. The words that are used are generally impersonal and serve to separate the
person being sentenced from the person who is actually before the court. Sentencing is an abstract practice. A judge passing sentence will speak to the offender before the court, but their sentence is based on established jurisprudence and sentencing principles that are complex, and at times conflicting. The actual act of a judge speaking to an offender may be such that it achieves some of the goal of rectification of harm, for example, it could serve to reassure the community. A judge imposing a prison sentence will protect society from future acts of domination by this particular offender for a finite period of time. But how the act of sentencing serves the goals of recognition of harm, and recompense is more challenging. The offender’s guilty plea is a recognition that what they did was wrong, but it can be as short as a one-word recognition. The judge becomes the one who characterizes the act as wrong through their sentence, the recognition of domination then flows from a third, depersonalized party, not through the offender themselves.

The recognition of harm thus becomes an abstract exercise. The judge, in an impersonal, non-emotional way is recognizing what occurred to the SV as harmful, but only through abstract sentencing principles like denunciation, and deterrence. The exercise is not one of moral education, the judge is not attempting to educate the offender, or make the offender understand why what they did was wrong. The judge simply recounts the facts as agreed upon, and then moves on to impose a sentence based on established jurisprudence and sentencing principles. The recognition of harm does not come from the person who committed the harm. Once sentence is passed, the harm is recognized only in the quantum of sentence imposed.

80 Supra note 72.
81 Sentencing, supra note 11 at 5.
82 Of course putting an offender in custody only protects the people who are not in custody. Other prisoners would still be at risk of victimization.
If the offender thinks the quantum of sentence was inappropriate, they may appeal their sentence. The grounds of appeal are narrow and a sentence can only be overturned on the following grounds: that a judge did not consider a relevant factor, or that the sentence is manifestly unfit.\textsuperscript{83} An offender cannot simply state that the sentence was in excess of what was required to rectify the act of domination. A SV does not have the right to appeal an adverse decision either by an ACA (for example to withdraw or prosecution a charge) or that made by a judge. The decision to appeal sentence is made by the ACA. There is no ability then from the SV’s perspective to challenge a decision that they see as unfavorable based on the common interest of rectification of harm.

To summarize, the lack of an option of dealing with sexual violence outside of the traditional sentencing mechanism may lead to the undesired effect of exposing offenders to punishment that is in excess of what is required to rectify the original act of domination. The lack of appeal for both SV and offender to challenge decisions on the grounds that they were made without considering what was necessary to rectify the harm, leads to a situation where citizens are unable to hold the CJS to account. Furthermore, the actual sentencing process is problematic as the role it carves out for the SV does not lead to an actual opportunity to be heard. It is merely an opportunity for the SV to feel engaged in the process, a hollow attempt at meaningful participation. Next, the sentencing process is depersonalized, and does not promote recognition of harm. Lastly, offenders face numerous serious collateral consequences from a sexual assault conviction that may be in excess of what is required to rectify the harm caused. I will return to these flaws when I argue for an adoption of a parallel response to sexual violence in Chapter Four.

\textsuperscript{83} \textit{R v Lacasse}, 2015 SCC 64 at paras 11, 41 and 44.
Chapter 3
Restorative Justice Responses to Sexual Violence

3 General Definitions

Restorative Justice (RJ) is often used to describe many different ideas and practices.\(^8^4\) Generally, RJ can be distinguished from traditional CJS in the way it defines harm. The traditional CJS understands crime as a harm against society.\(^8^5\) RJ understands crime not as a wrong against society, but as a wrong against an identified group of people.\(^8^6\) As an example, consider a theft of a motor vehicle in a small town in British Columbia. An RJ response to this harm would look to how the offender, the victim, and the smaller community are affected. The smaller community may include members of the offender’s family, members of the victim’s family, or anyone else affected by the theft (someone who car pooled with the victim, for example). RJ understands crime in this localized way.\(^8^7\) In many ways, RJ restores the role of the


\(^8^5\) Amy Kasparian, “Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault” (2014) 37:2 Suffolk Transnational Law Review 377 at 390 [“Beyond Bars”].


\(^8^7\) Koss defines this group of effected people as: “(a) direct victims, (b) family and friends of victims who suffer distress along with their loved ones, (c) family and friends of perpetrators who may experience shame, anger, and other emotions stemming from being part of an interpersonal relationship out of which the offense arose, and (d) community members who experience less safety and social connection when they perceive high levels of crime and low deterrence.” Mary Koss, “The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process and Outcomes” (2014) 29:9 Journal of Interpersonal Violence at 1624 [“RESTORE 2014”].

\(^{Ibid.}\)
victim, community and offender to the process. The harm is no longer a broad harm caused by someone breaking the social contract, or gaining an unfair advantage as against society. The harm is much more isolated, as a result, it is easier to identify and understand. RJ seeks to repair this isolated harm. RJ is not concerned with adjudicating facts, nor is it concerned with creating one narrative. To repair harm, the offender must admit some responsibility for the act that is alleged to have caused the harm.

RJ can take several different forms, but the two main ways it works as related to the CJS system are either post-conviction or pre-trial as a parallel system. A parallel RJ model works outside of the CJS system. It generally operates in the following way: the offender admits to some form of wrongdoing, or expresses a willingness to engage with an alternative process to the CJS. Once they have done so, a process begins with the aim to repair the harm. Once the process is completed, the criminal charges are either stayed or withdrawn. Case conferencing, discussed below is an example of parallel RJ. Sentencing circles are a Canadian example of post-conviction RJ. The offender has either been convicted at trial, or entered a plea of guilt. Then the circle convenes. While sentencing circles have elements of RJ, they are still heavily reliant on the traditional CJS as judges have the final say on sentence.

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90 Supra note 86 at 37.
91 Kathleen Daly, “Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases” (2006) 46:2 The British Journal of Criminology at 335 [“Archival Study”].
92 “Archival Study”, supra note 91 at 335; supra note 86 “RESTORE 2014” at 1626.
93 See for example: *R v Cooper*, 2010 ONCA 452.
I am concerned with parallel RJ. The type of RJ that I am focusing on involves a case conferencing type system. What follows is a general model, the specific examples I reference later provide a more fulsome picture of RJ in practice. A conference is convened with the following people: the offender, victim, support people for both, other affected parties, a facilitator, mental health professionals, and lastly, if necessary lawyers. The goal of the conference is to repair the harm caused by the crime. The conference hears from all the members, and attempts to work toward this stated goal. Incarceration may be available, but more creative responses to repair the harm are also available. A consensus is sought, but if this is not possible, incarceration may be resorted to. Reconciliation between the offender and the victim may occur, but it is not the goal. True RJ models rest the authority to make decisions in the hands of actors outside of the traditional CJS system. For example, in the consensus building models, if a consensus is reached on a plan to repair the harm, this is what is imposed, regardless of what actors in the CJS system think. True RJ practices also do not conform to traditional CJS sentencing models, though they may incorporate aspects of traditional sentencing concerns like protection of the victim, or reparation.

RJ responses to sexual offences have been limited. The reason for the absence of RJ responses to sexual violence is varied, but generally, the absence can be explained by the following: a concern for SV safety, a lack of confidence in a consensus building method, and a perception that RJ responses to such a serious crime are “too soft”. 94 Once I have explained the international RJ responses to sexual violence, I will come back to these critiques. I also address them in chapter four.

94 “Policy Conflict”, supra note 84; “Archival Study”, supra 91 at 337.


3.1 International RJRs to Sexual Violence

3.1.1 South Australia

South Australia has been offering RJ conferences for sexual offences where the offender is a young person for nearly twenty years now. An offender is eligible after an assessment of their: level of acceptance of responsibility, remorse, previous record, harm caused to the victim, and other matters deemed relevant. Once approved, a conference is struck. The conference involves the following people: the victim (usually), offender, police, and support people. The goal is to find a way to repair the harm caused by the offender. The conference creates a plan to repair the harm caused. If offenders do not comply with the plan developed to repair the harm, they may be placed back in the conventional criminal justice system. In this way the CJS system provides collateral support, the threat of being kicked back into the CJS system with its punitive nature provides further incentive to participate with the conference.

Daly reviewed 400 cases of youth sexual assault over six and a half years that went through court or the aforementioned conference; with an eye to understanding victim’s advocacy

“Beyond Bars”, supra note 85 at 394.
96 “Restorative Justice in the Australian Criminal Justice System”, supra note 95 at 6-13.
97 “Restorative Justice in the Australian Criminal Justice System”, supra note 95 at 13.
98 “Restorative Justice in the Australian Criminal Justice System”, supra note 95 at 6.
critiques and whether or not these critiques were valid in practice. Daly’s focus is mainly on what SVs consider to be a better legal intervention: conference, or court. Daly argues that the RJ conferences led to offender admissions of harm, and some form of outcome, whether that be an apology, treatment, or some form of repairing the harm. As such, Daly argues that this is beneficial for victims, and may also lead to an overall increase in offenders being willing to admit to their offences, seek treatment and incidentally more people may be willing to report sexual violence. Daly also points out the victimizing effects of the traditional CJS model: waiting for outcomes for years only to have charges withdrawn or pleaded guilty to on the day of the trial, as compared to conferences which allow victims to tell their story. Daly noted that of all the cases studied which went through the traditional CJS model, nearly half were dismissed, meaning the victims received no acknowledgement of the harm caused to them. Lastly, Daly pointed out that young people who completed the conference had a lower rate of reoffending than youths who went through the traditional CJS system.

99 “Archival Study”, supra note 91 at 335. Daly looked at all youth cases that involved at least one sexual offence which were completed either by conference, caution or through traditional adjudication from the time period of January 1 1995 to July 2001 (339). Daly’s results also reveal some interesting information about which cases are referred to case conferencing/caution. Unsurprisingly, no admission of guilt or refusing to comment to the police was a statistically significant variable in keeping the prosecution in the traditional CJS, as was seriousness of offence (more serious offences stayed in the traditional system) (at 345). Daly’s statistical results are still interesting even if there may be some problems with a selection bias (i.e. case-conferencing involves less serious cases), but it is important to keep this in mind when weighing the significance of the results.

100 “Archival Study”, supra note 91 at 339.
101 “Archival Study”, supra note 91 at 351.
102 “Archival Study”, supra note 91 at 352.
103 “Archival Study”, supra note 91 at 352-353.
104 “Archival Study”, supra note 91 at 342.
105 “Archival Study”, supra note 91 at 348.
3.1.2 United States of America

From 2004-2007 Arizona had a program called RESTORE (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience), which was a RJ response to adult sexual assault. The RESTORE program operated based on prosecutor referrals. RESTORE was meant to provide a different avenue to the CJS prosecution model. In this way, it was completely outside of the traditional CJS system. Victims and accused were both advised by lawyers, at no cost about their decision of whether or not to engage with the RESTORE program. The offender is not told about the possibility of participating in the program until the SV has already consented to the program. This removes the possibility that the offender would exert pressure on the SV to consent to the program. Once the SV consents to the program, the offender is given the choice to enter the program. The offender may have either already entered a guilty plea, or simply admitted some responsibility for the act. The incentive for the offender to enter the program is that if they successfully complete the program they avoid having a conviction registered against them.

106 “Beyond Bars”, supra note 85 at 395.
107 Mary Koss et al, “Expanding a Community’s Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration: Introducing the Restore Program” (2004) 19:12 Journal of Interpersonal Violence at 1448. “RESTORE 2014”, supra note 86 at 1627: Prosecutors were in charge of referrals to RESTORE, the following offenders were barred from the program: recidivist sexual offenders, offenders who had a previous conviction for physical assault, and persons with police reports for domestic violence (1627).
The RESTORE program is based on a conferencing model, similar to the Australian model, but with more emphasis on the preparation stage. The program is defined in detail through the use of a chart in Koss’s 2014 work, but can be briefly summarized here. The program is overseen by a facilitator. The SV, offender, support people for both, are all involved in the process. The preparation stage involves the SV writing out a statement of harm, the offender writing out a statement of responsibility, and all affected groups contributing to a plan of redress that will repair the harm caused. SVs could suggest treatment, restitution, and community service. Once these three documents are created, they are circulated, so there are no surprises at the actual conference. The conference involves the aforementioned parties, and involves everyone sitting around a conference table, with the SV and offender being separated by the table (as a physical barrier). At the conference, the offender reads their statement, then the SV reads their statement of harm. The offender must restate what the SV has said in their own words. This process repeats with the statements made by the friends and family of the SV/offender. The redress plan is then presented and agreed upon by all parties. Once the conference is over, the offender has at most one year to complete the redress plan. The offender must follow up with an overseer board for meetings about the progress, the SV may

112 “Koss 2010”, supra note 109 at 5 and 18.
113 “RESTORE 2014”, supra note 86 at 1628-1630.
114 “RESTORE 2014”, supra note 86 at 1628-1630.
115 “RESTORE 2014”, supra note 86 at 1628-1630.
118 “RESTORE 2014”, supra note 86 at 1628-1630.
120 “Koss 2010”, supra note 109 at 20.
attend these meetings/be kept aware of the progress the offender is making. If the board feels the threat posed by the offender is too great, or the offender is no longer trying to reform, they will be removed from the program and subject to traditional prosecution/sentencing. At the final meeting (12 months after the conference) with the overseer board, the offender prepares a letter of reflection, this letter is provided to the SV. If successful, a judge will dismiss the case without the possibility of re-laying charges.

RESTORE has been noted for it’s high completion rate: 91% of enrolled cases completed a conference program. 91% of misdemeanor participants (generally sexual exposure) completed the redress plan, as did 2/3 felony cases (more serious sexual assaults).

The program was also considered successful in changing offender’s perception of their actions. From the initial statements, taken during the preparatory stage, to the final closing letter of reflection, offenders demonstrated more understanding of the harm caused as well as more empathy towards the SV. Though this observation is perhaps overridden by the fact that most SVs viewed the apologies as insincere, and no SV chose to attend the exit meeting where the offender presented their reflection letter. The program had a high rate of satisfaction with participants: 100% of SVs were satisfied with how RESTORE handled their case, and 100% of

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127 Koss 2010”, supra note 109 at 22.
128 “RESTORE 2014”, supra note 86 at 1654. The number of cases that went through the RESTORE program was small as it was just a simple pilot program. Koss examined 22 cases, 20 of them were completed. Koss recognizes the limitations of the data set due to its small size, but still argues that these results are important given the dearth of other available information for this particular issue (1663).
129 “RESTORE 2014”, supra note 86 at 1654.
130 “Beyond Bars”, supra note 85 at 396.
them would recommend RESTORE.\textsuperscript{132} There was also high satisfaction rates among the offenders who participated in RESTORE.\textsuperscript{133}

This section has introduced two pilot projects that implement a RJ response to sexual assault. While there are others, I have chosen these two, and will be focusing on the RESTORE program due to space constraints, and what I see as its more desirable features. From this discussion we can take a general idea to be tested using Republicanism. The key features that will become important to the following discussion are the lack of influence of the CJS system (outside of being an enforcement mechanism if the RJ model fails), an alternative to traditional prosecution/sentencing, community involvement, an alternative for offenders rather than receiving a conviction for sexual assault, a more central role for SVs, and a lighter range of “sanctions” or interventions than traditionally available in the CJS response.

\textsuperscript{132} “RESTORE 2014”, supra note 86 at 1648.
\textsuperscript{133} “RESTORE 2014”, supra note 86 at 1648.
Braithwaite and Pettit are both advocates of restorative justice responses to criminal wrongs.\textsuperscript{134} When introducing their theory in \textit{Not Just Deserts} they argue that non-prosecution and community based responses to crime are to be the resting point of the CJS.\textsuperscript{135} It should therefore be uncontroversial that I am arguing that a RJR to SA is dominion promoting.\textsuperscript{136} That being said, it is important to understand what features of the RJR are desirable from a republican perspective.

4 Republican Features of a RJR

The first, and perhaps most obvious requisite feature is that a RJR should employ rectification of harm as its main target. Within this main goal are the three subsequent goals, or the three ‘Rs’: recognition of harm, recompense, and reassurance. In \textit{Compulsory Compassion} Annalise Acorn argues that RJ responses to crime strive for big picture emotional goals like forgiveness, and restoring the offender and SV.\textsuperscript{137} The author rightly takes issue with some of these goals being too lofty and unlikely to routinely be achieved.\textsuperscript{138} Acorn argues that if the RJR cannot achieve these goals then it should be seen as a failure.\textsuperscript{139} In addition to this critique, utilizing forgiveness as a goal may allow practices that are antithetical to the goal to be utilized.

\textsuperscript{134} \textit{Not Just Deserts, supra} note 3 at 128.
\textsuperscript{135} \textit{Not Just Deserts, supra} note 3 at 115-117.
\textsuperscript{138} \textit{Ibid.}
\textsuperscript{139} \textit{Ibid.}
For example, coercing the SV into forgiving the offender. Employing rectification of harm as a goal avoids these critiques as it is an attainable, satiable goal. To rectify the harm caused by the initial act of domination, no further domination can take place. Only practices that are in line with the shared interest of rectification of harm will be allowed.

Turning to the procedure of the response, I would suggest drawing heavily on the RESTORE model. The following features should be implemented in any RJR that is implemented in Canada. The program should be offered first to SV, and then to offender. Both must consent before the program can begin. The offender must admit some responsibility for the act of domination. Once the program begins a conference should be struck with offender, SV, support people for both, and an overseer. There should be at least one meeting with all parties being in the same room.\textsuperscript{140} Both SV and offender should be involved in crafting a response which would attempt rectify the harm caused. The overseer will guide the parties, but the process should be driven by SV and offender. The RJR should have clearly capped responses available. For example, there should be an upper limit on the amount of incarceration available that is a fraction of the amount available under the traditional CJS. The parties should work towards a plan that would rectify the harm. Once a plan is in place, the offender should be given time to complete the plan. Once completed the charges should be marked as withdrawn or stayed by the ACA (in the CJS). Lastly, if a party believes the redress plan does not rectify the harm, or goes above and beyond rectification of harm, they should have a chance to be heard before the plan is implemented. There should also be an \textit{ex ante} right of appeal to an independent decision maker if

\textsuperscript{140} If the SV does not wish to be in the same room as the offender, the procedure can employ a ‘surrogate SV’ who can speak on behalf of the SV. For example a sibling, or close friend etc.
the plan is implemented and a party believes it runs afoul of the shared interest of rectification of harm. Some of these features need more elaboration before turning to a dominion analysis.

First, when considering what a redress plan entail may entail, I am an advocate of creativity and allowing the parties to decide what is appropriate. That being said, there should be some limits on certain responses. A redress plan must still be crafted to only achieve rectification of the act of domination, nothing more. Incarceration may still be available under a RJR, but the maximum sentence should be substantially lower than that available under the CJS. Taking sexual assault *simpliciter* as an example, when the SV is over 16 years old, the maximum punishment is 10 years in prison.\(^\text{141}\) Under the RJR, potential sentences should be a fraction of this. The exact number again can come from consultations. But it should be substantially lower for two reasons. First, the *Code* allows sentences that employ goals that the RJR will not allow (i.e. general deterrence). As these goals are inappropriate under the RJR, this will inherently lower the amount of custody that may be imposed on an offender. Second, there must be an incentive for offender participation. Keeping incarceration low allows an offender a potentially positive trade-off: certainty of a lower sentence through the RJR and a lack of a criminal record, as opposed to a potential for a longer sentence and criminal conviction in the CJS.

Next, from a practical perspective requiring SV and offender consent is very important for a RJR. A RJR employs a consensus-based system to address and respond to the harm caused by the offender’s action. To reach consensus, all parties need to be engaged with the process and be willing to actively engage with the RJR. This cannot occur if offender/SV do not wish to engage. Requiring offender consent is also important as a RJR forgoes many procedural

\(^\text{141}\) *Criminal Code, supra* note 11 at s 271.
safeguards that exist in the traditional CJS. So it is important that both offender and SV understand what they are respectively forfeiting before entering into a RJR. Both parties should have access to state funded counsel who will advise them of their rights, obligations and what is being given up (the CJS response) before entering into a RJR.

I have suggested that the ACA offer the RJR to the SV, and that both SV and offender must consent to a RJR to sexual violence. This begs the question, when should RJR be offered to SVs? Should it always be offered? Should there ever be an override? What about a particularly violent rape? What if the offender has numerous related entries on their criminal record? What if the SV and offender have a relationship and there is pressure or coercion on the SV to agree to the RJR?

In terms of power imbalance, the fact that the SV must consent first before the RJR is offered to the offender helps shift the power imbalance to the SV. That being said, there could still be pressure if the offender knew about the RJR (i.e. if they read about it in the news or if their lawyer told them about it etc.) and pressured the SV to consent to the process. As such, resources should be set aside to have counselors, and other ‘healing professionals’ involved in the process that could assist in determining whether the SV’s consent is forced or coerced. Where there is such forced consent, response in the CJS may be more appropriate.

Being forced to participate in the RJR by the offender is an example of further domination, and the state should prevent this. The SV is arbitrarily having their choices interfered with by the offender. Response in the CJS leads to the ACA making decisions for the SV. In this situation the traditional CJS process would be less dominating then the RJR. In overriding the RJR, the ACA (an impartial person) makes the decisions, usurping the ability of the offender to further dominate the SV.
Turning now to the concerns regarding the particularly dangerous offender. Should dangerous offenders be offered a RJR? The simple answer to this question for the purposes of my work is as follows: if the RJR can rectify the harm, then it should always be offered, regardless of the severity of the crime. There may be situations however where a RJR may not be able to adequately address the third R: reassurance. If the RJR cannot reassure the public/SV of their safety, then it should not be offered to SV/offender. This may occur for example with a recidivist sexual offender. A RJR may always be appropriate in terms of recognition of harm and recompense, but there may be times when lengthy penitentiary sentences are required to protect the public from very dangerous people. The ACA will have to utilize their discretion in determining when a RJR is not appropriate in this regard, with recourse to the importance of protecting the public from future acts of domination by a particular offender. If the SV and offender consent, RJR should be the norm for most first acts of sexual violence.

As I have indicated, the preceding paragraphs are just a sketch of what I perceive as being important procedural practices from a dominion perspective. Before adopting a RJR, there needs to be consultation with a variety of stakeholders. The point here is that to build a new public response to a complex problem, many different people need to have a say, not just criminal lawyers and judges. Lawyers and judges have an inherent stake in protecting the system that they operate within, and often covet the adversarial system, they may be unable to see new ways of dealing with a problem like sexual assault as they are so enmeshed in the existing

Stakeholders should be broad enough to include: advocacy groups for SVs, prisoner/accused person advocacy groups, community groups, indigenous advocacy groups, lawyers, judges, politicians and any other interested party. In my opinion, if the advancement of dominion is the most important goal, then the voices that should be favoured in this consultation are the SVs (both present and former), and accused/offender (present and former).
4.1 Why is the RJR process dominion promoting?

The RJR process allows for practices that accomplish the goal of rectification of harm more effectively than the current CJS sentencing procedure. It allows SV/offender to have more of a voice in guiding the response to the initial act of domination. The process is focused on the SV, offender, and localized community (support people). This focus leads to greater recognition of the harm caused, and provides a forum to set up a plan that will adequately rectify the harm caused. It also produces non-domination gains for the offender as they will be subject to less punishment. Because I am arguing that the RJR is sufficient to rectify the harm, any punishment the offender would have suffered in the CJS that would be in excess of the RJR would be a form of domination. Lastly, the RJR will lead to dominion gains for the general public as it will lead to reassurance that their future non-domination will be respected and upheld.

4.1.1 First R: Recognition of Harm

A RJR has the SV and offender in the same room with supportive people. The RJR allows the SV to draft a statement of harm. Unlike the VIS, there would be no restrictions placed on how they wish to draft this, or what it may or may not contain. The offender then drafts a statement of responsibility, detailing their acceptance of responsibility for the act of domination. Then at the meeting, both offender and SV read their statements, and the offender must restate in

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144 “Democracy, Electoral and Contestatory”, supra note 51 at 121-122 and 131.
their own words the SV’s statement of harm. This is an example of the offender recognizing what they did as harmful. Having an offender recognize their act as harmful in a room with the SV will be dominion promoting. This recognition is the first step in rectifying any act of harm. Having the recognition come directly from the offender is beneficial as it is an assurance that the offender recognizes that what they did was wrong. The current CJS has most statements of recognition of harm flowing through a lawyer, the offender is not required to speak, and the lawyer is able to speak in broad terms about remorse. Requiring the offender to restate the SV’s statement of harm in their own words and have a letter of responsibility for their action is a more true form of recognition. The offender is plainly recognizing their problematic role in an act of domination. Doing so is an example of the offender affirming that they were in a wrongful position of domination over the SV.

This step is important from a community perspective and the perspective of the SV. The SV has their experience of domination acknowledged by the offender in a room of supportive people. Having the recognition of harm flow from the offender directly to the SV will be more meaningful than having the recognition of harm flow from a judge or a lawyer. The offender is the one who arbitrarily interfered with the SV, hearing an offender recognize this, is true recognition of an act of domination. Without hearing an offender recognize their act of domination in this way, there is little hope in trying to rectify the harm.

Next, support people are in the room, both those there to support the SV and those there to support the offender. This group of support people are representative of the community in the RJ sense. The community in an RJ model is localized to those affected by the act of domination,

145 “Republican Theory and Criminal Punishment”, supra note 34 at 75-76.
and that is who would be present for the conference. The support people who are present will hear the offender recognize their act of domination as wrong. Hearing the offender craft a statement in their own words promotes recognition of harm. Both of these sets of support people will also hopefully recognize the act of domination as wrong as well. This leads to further dominion from the perspective of the SV as they are being affirmed not only by the offender, but also by the community that what occurred to them was an act of domination. Furthermore, the presence of these people will increase the common knowledge requirement from a community perspective. Being present at a conference may lead to an understanding by community members that if they are the victim of an act of domination in the future, then their experience may be affirmed and recognized as an act of domination by their attacker and by their community.

From the perspective of the offender, this step is essentially dominion neutral. Again, returning to Pettit’s question, we should be concerned only with punishment that is in excess of the shared interest of rectification of harm. The offender may want special treatment, or to not participate in this portion of the exercise, but the offender surely cannot object to participating in this practice from the shared-interest of rectification of harm. The offender consents to the practice at the beginning of the procedure, indicating some level of admission of responsibility. Moving forward and having to participate more fully in recognizing the harm caused by their action is important to begin rectifying the harm. An offender should never be forced to complete the RJR, if they are unwilling to participate the CJS remains to adjudicate and prove guilt. But for offenders who are willing to participate, this step in the process is not an exercise of domination, it is in-step with the shared interest of rectification of harm.
4.1.2 Second R: Recompense

Whether or not a RJR will promote recompense and restitution depends on the structure it adopts. Ontario currently has a criminal injuries compensation board which deals with most restitution type issues. This can be seen as an insurance scheme advocated for by Braithwaite and Pettit in Not Just Deserts.\(^{146}\) Restitution for violent crimes generally does not flow from offender to SV, though there is a civil remedy for the tort of sexual assault. Restitution for financial crimes still routinely occurs under the restitution scheme in the Criminal Code of Canada in criminal courts.\(^ {147}\) That being said, when the harm is not easily financially quantifiable, restitution does not occur in criminal courts. Jail can be seen as way of recognizing the harm done to the victim, but it does not compensate SVs in any real way for the act suffered. Having an offender spend time in jail does not lead to any real recompense for the SV.

Pettit argues that other restitutionary measures, like community service, or garnishing of wages may be appropriate when offenders cannot compensate their SVs with a lump sum.\(^ {148}\) A RJR could employ restitutionary powers but they would have to foreclose the possibility of an SV also accessing the criminal injuries compensation board, or a civil remedy. A RJR could impose a restitution payment, a garnishment order, and/or a community service order as part of a redress plan. All of these features of a RJR could be employed and if they were it would help achieve the shared goal of recompense. A clear upper limit on amount of restitution, and a system to quantify how much each act of domination should be valued at would need to be established. This raises serious questions about how to quantify the harm caused by an act of

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\(^ {146}\) Not Just Deserts, supra note 3 at 103. “Republican Theory and Criminal Punishment”, supra note 34 at 76.

\(^ {147}\) Criminal Code, supra note 11 at ss 737.1, 738, 739.

\(^ {148}\) “Republican Theory and Criminal Punishment”, supra note 34 at 76.
sexual violence, questions that are best left to be addressed through empirical work, and existing jurisprudence on the tort of sexual assault.

Moving these restitutionary mechanisms into a RJR may be beneficial from the SV’s perspective. A RJR is by it’s very nature less adversarial than a civil suit, and less costly from the perspective of the SV, it may be that moving these mechanisms into a RJR would lead to cost-savings for the SV. Clear guidelines on what an offender is agreeing to at the outset in terms of quantum would be necessary. Offenders need to understand what they are agreeing to at the outset, and any restitution order must be such that it does not exceed what is needed to rectify the harm.

4.1.3 Third R: Reassurance

Reassurance, is where RJRs typically receive most criticism. Reassurance is the act of assuring the SV and the general public that their non-domination will be protected in the future. Any act of domination brings the public and SV’s feeling of safety into question. A dominion promoting response should assure the SV and the public that they are “no worse off in terms of exposure to arbitrary, criminal interference, than… prior to the offence in question.” To rectify the harm caused a response must return society to the status quo before the offence. A response does not need to provide the most assurance possible, indeed if this were the case, responses would become overly cruel. A reassuring response for someone who poses no risk of re-offence does not need to involve incarceration. But, for a dangerous offender, incarceration may be necessary to provide reassurance both to the community and the SV.

149 RJRs are often characterized as being too soft on offenders. “Policy Conflict”, supra note 67; “Archival Study”, supra note 91 at 337.
150 “Republican Theory and Punishment”, supra note 34 at 77.
151 Ibid.
A RJR provides reassurance in two main ways, procedurally it provides assurance through the process/redress plan, and then on an outcome basis resort to incarceration will provide short-term assurance. The procedure of SV, offender, support people and overseer all meeting in a room and working towards a redress plan on consent will lead to reassurance. If the offender appears to be grasping why their act is harmful and genuinely trying to address what brought them to commit it, the conferences and redress plan will lead to assurance of future safety. Consider for example an acquaintance sexual assault involving an episode of binge drinking. Let’s say that the offender is prepared to admit some responsibility but was not aware that having sex with an intoxicated person was a form of sexual assault. Then through the conferences, and the statements of harm, the offender is able to learn that having sex with an intoxicated person is sexual assault. This realization, furthered perhaps by the redress plan (through educational work, alcohol counseling etc.) will lead to protection of the community. The offender recognizes their act as wrongful, and goes back into the community understanding the problematic nature of their past actions.

The process will also be reassuring if the offender has support people who also perceive the offender’s act as wrongful and problematic. If these support people get involved with the offender’s redress plan and help the offender complete it, they can be supports in making sure the offender does not re-offend. For example, in the related field of sexual assaults involving children, circles of support and accountability (COSA) have been impressive in reducing recidivism rates for those who have been convicted of sexually assaulting children.152 COSA

provide a group of supports in the community who assist offenders in finding a job, housing, and attending support-meetings for people with sexual attraction to children. Similarly, a redress plan may involve the offender’s support people that could help address risk-factors and hopefully lower recidivism rates, thus reassuring the community and SV of their future safety.

A RJR may also employ incarceration where necessary to assure the public of their safety. A carceral response will only be appropriate with an offender who is assessed to be a risk to reoffend. Any carceral sentence must be such that it is necessary to return the SV and public to the status quo before the offence occurred. If the response is tailored in this way, then a jail sentence will not be an act of domination against the offender as it will be in line with the shared interest of rectification of harm. Jail, in both the CJS and RJR provide only a short-term assurance to the public (and only the public who are not in custody) of their safety. More focus should be placed on the RJR’s unique procedural benefits in assuring the SV and public of their future safety.

Based Management of High-Risk Sexual Offenders: Part Two – A Comparison of Recidivism Rates” (2007) 46:4 The Howard Journal at 333; showing a reduction in sexual recidivism of 70% for circle-members versus a sample of non-circle members.


154 The way I see this working in practice is as follows. The ACA screens the file as they traditionally would for sentence on a guilty plea in the traditional CJS, if appropriate to refer to the RJR, then the SV may consent, if they SV consents, the offender is asked if they wish to consent. The offender is made aware of what the sentence on guilty plea would be under the traditional CJS response, then they are made aware of what it would be under the RJR. The RJR should be a fraction of what the CJS response is. What the exact fraction should be can be a matter for upfront consultations.
4.1.4 Offender Benefits

I have argued that a RJR achieves the goal of rectification of harm. A RJR also leads to non-domination benefits for the offender. An offender who decides to participate in a RJR gains the following: knowledge that they will not receive a criminal record, and knowledge that the available jail time they may be subject to will be substantially lower. These two benefits accrue non-domination to the offender. First of all, opting into the RJR allows the offender to know that the response will only be tailored to what is required to rectify the harm, nothing more. Under the current CJS response, offenders face the possibility of having an example made of them (through principles like general deterrence). So offender’s non-domination is benefited quite clearly in this way. Next, for offenders who wish to accept some responsibility for their actions, a RJR allows them to do so in a way that will necessarily lead to less punishment and no criminal record, again clear gains to their non-domination.

4.1.5 Procedural Benefits

In Part One I argued that any public response to an act of domination should feature the following: the shared goal of rectification of harm, upfront consultations with affected parties to clearly delineate boundaries/procedures, SV/offender participation (but not a veto power), and a right to appeal an adverse decision if the decision was not made according to the shared interest. The RJR not only achieves rectification of harm through its process, it also employs all of the procedures a republican should hold dear.

Any RJR should be set up after up-front consultations with citizens. These consultations will help to clearly delineate the procedure and what parties can expect the public response to be. These consultations allow citizens to help in structuring a shared response to an act of domination. Next, the RJR allows both SV and offender a much more substantial voice in the
process. In Part Two I argued that in the CJS, the SV’s voice is largely illusory and restricted through the VIS. I argued that the VIS does little in actually changing or guiding the process. Contrast that to the role the SV plays under a RJR. The SV is guiding the process, and collaborating on a redress plan to rectify the harm caused. Similarly, the offender takes on a much bigger role under the RJR. They are able to contribute to the redress plan, and have a say in responses that they are unwilling to participate in. While the offender and SV input is all restrained by only doing what is necessary to rectify the harm, both have a right of appeal if they feel they are not being heard, but neither has a veto power. Consider the offender who opts-out of the RJR, they are put back into the CJS. Similarly the SV who doesn’t wish to complete the process also does not have a veto power, the matter goes back into the CJS. Neither have a veto power because the public has an interest in addressing sexual violence. The RJR employs more republicanism features than the CJS and its process is more adept at addressing the harm caused by the initial act of domination.

4.1.6 Anecdotal Benefits

Adopting a parallel RJR model would not only increase non-domination, it may have positive anecdotal effects that are worth considering briefly here. Much of the current public critique of the CJS’s response to sexual violence involves concerns that the system is flawed, that the adversarial model is too brutal for SVs, and that the conviction rate is too low. There also

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concerns that sexual assault is drastically underreported. Whether or not adopting a RJR will adequately address these concerns can only be tested post-adoption, but at this stage some general observations can be made. In terms of reporting rates, there is some evidence that SVs do not report sexual violence as they fear not being believed and are afraid of going through the CJS. Some SVs may perceive the ordeal of going through a lengthy trial as to be too damaging for the potential of being believed. Adopting a RJR may help address these fears. If SVs know there is an alternative to traditional prosecution that will be available to them, they may be more willing to report. The satisfaction surveys from RESTORE are interesting in this regard. Though the sample size is tiny (20 SVs), all reported being satisfied with the model, and all would recommend it. If SVs feel this way about a RJR, and the public becomes aware of this, then perhaps it will lead to an increase in reporting, as there will be less fear about the process. As the RJR involves support people which are representative of the community, this may also increase confidence in the public response to sexual violence. Support people may see the RJR as beneficial and compassionate, and if they or someone they know suffers an act of

[156] In 2008, only 1 in 10 sexual assaults were reported to the police: Statistics Canada, Sexual Assault in Canada 2004 and 2007, by Shannon Brennan and Andrea Taylor-Butts, (Ottawa: Statistics Canada, 2008) at 8. In Canada in 2001, 1 in 3 women disclosed being the victim of sexual violence, but only 6% of them informed authorities: Mary Koss, “Restoring Rape Survivors: Justice, Advocacy, and a Call to Action” (2006) 1087:1 Annals of the New York Academy of Sciences at 209.


[159] A RJR is less likely to reduce the fear of not being believed. This fear would have to be addressed through training and education for police officers who interview SVs: “Unfounded”, supra note 155.
sexual violence in the future they may be more willing to report it, or encourage someone to report it as a result.

Turning to the low conviction rate. My work has not focused on the adversarial truth-seeking function of the trial. Whether or not this system needs reform is an issue left for another author. That being said a RJR may lead to more offenders being willing to take responsibility for their actions which may in turn lead to more of an aggregate response, though the ‘punishments’ in each instance will be lower. Furthermore, if the RJR starts handling a portion of sexual assaults that would have otherwise gone to trial, perhaps the Crown will have more resources to more fully prosecute those who do not wish to plead guilty (or avail themselves of the RJR).

5 Why not change the CJS to incorporate dominion-promoting features?

Why not simply adopt some of the features I have argued that should be part of a dominion promoting response to domination in the traditional CJS? For example, why not simply give SVs and offenders the option of an ex ante appeal for decisions that breach the common goal of rectification of harm? I do not take issue with this route of reform, though I think procedurally it would be very challenging to implement such reform. That being said, even if certain tweaks were made to the CJS, the process of the RJR is still preferable and leads to dominion gains in excess of what could be accomplished by simply tweaking the existing CJS structure.

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160 See generally: supra note 155.
First, to create a CJS response to sexual violence that had rectification of harm as its main goal would require massive overhaul to the Criminal Code of Canada. This would be the first step that would be needed to make the current CJS response to sexual violence dominion promoting. Doing so would take massive amounts of consultation and consideration if it is to be done in a way that promotes common goals. Next, consider giving the SV a right to challenge a decision made by the ACA to withdraw charges, to accept a plea to less aggravating facts, or to challenge a sentence. This would be a part of a dominion promoting response to sexual violence. It allows the SV a chance to argue that a decision was not made with the shared interest of rectification of harm in mind. I take no issue with this, indeed it is one of the main aspects that Pettit sees as important when considering a well functioning democracy. That being said I think practically this would be a very challenging proposition to implement. There would likely be serious push back from ACAs within the system, and currently the standard of review for prosecutorial decisions is under the abuse of process framework, a high bar.\textsuperscript{161}

Even if the CJS employed rectification of harm as it’s only sentencing goal and adopted rights of appeal for SV and offender, having a separate RJR system still would be desirable from a republicanism perspective. First, the RJR employs a process that leads to rectification of harm in a way that an impersonal sentencing hearing does not. Second, a RJR leads to non-domination gains from the perspective of the offender as they have more certainty about what types of sentence they will receive, what is required of them, and the knowledge that they will not have a criminal conviction entered against them. And lastly, having the community involved in the RJR leads to increases both in terms of reassurance, and in the common knowledge that the public system is taking acts of domination seriously and responding to them in a non-dominating way.

\textsuperscript{161} \textit{Supra} note 71.
Having the community involved in the RJR means there is an active way citizens can participate and guide the process and the way they wish to respond to domination. This is an important benefit from a contestatory democracy perspective.

Only adopting an *ex ante* right of appeal will not lead to the creative type of response that the RJR employs. A right of appeal may have as a remedy damages, or a increase/reduction in sentence, but it would not create the unique environment that the RJR utilizes. This environment, with its upfront consultation, role for SV/offender to participate in the response and personalized forum are important in rectifying the harm caused by the initial act of domination. Having a RJR response allows for a more unique response for offenders who wish to admit some responsibility, and leads to lower punishments overall. A right of appeal on the back-end of the system will do little to achieve the unique goals that an RJR is set up to achieve from the beginning.

6  Critiques

Retributivists and others often criticize RJR as they perceive it to be too soft on offenders. There is nothing within pure retributivism that states that prison must be the only method to impose hard treatment.\(^{162}\) Feinberg perhaps most clearly articulated this by suggesting that a day could come when a complex ritual involving dance and drama could be used to express society’s condemnation of the offender.\(^{163}\) The RJR process can be seen as hard-treatment, with the actual outcome also being seen as hard treatment. Having to write letters of apology, engage in counseling/education, comply with a redress plan, and potentially spend some time in custody all fall under the category of hard treatment. There is no reason that the

\(^{162}\) *Censure and Sanction*, supra note 3 at 26: saying that censure alone may at times be sufficient, and may not require hard treatment. Joel Feinberg, “The Expressive Function of Punishment” (1965) 49:3 The Monist 397-423.

\(^{163}\) “The Expressive Function of Punishment”, *ibid* at 420-421.
RJR cannot be seen as a proportionate response. Further, most retributivists argue for a scaling back of punishments as is. Von Hirsch for example argues for a cap at five years prison.\textsuperscript{164} The RJR would allow for a scaling back of punishments, something that most retributivists would accept as a valid goal.

A more persuasive retributivist critique comes from the fact that I am arguing for an adoption of a RJR while keeping the CJS intact for people who do not wish to plead guilty, or for those who fail out of the RJR. This could theoretically lead to breaches of proportionality: two similarly situated offenders, one fails out of the RJR and gets successfully prosecuted in the CJS, one completes the RJR. The one in RJR would get a lighter sanction as compared to the one in the CJS. This would breach proportionality. This is a valid concern from a pure retributivist perspective. The only anecdotal response I have is that if adopting a RJR leads to higher reporting and more offenders participating in RJR and receiving some sort of hard-treatment, then perhaps this is a legitimate breach of proportionality for another target like crime prevention, or moral education.

Turning back to the general public, and their view of RJR, more work needs to be done to ascertain how they would view RJR. I would suggest empirical research be done to figure out this issue. Robinson’s work on empirical desert is interesting when considering how the public views crime and severity of crime.\textsuperscript{165} It would be interesting to replicate Robinson’s work and add questions focusing more on the process of the public response to criminal harms. This is one potential way that one could ascertain if the public would view the RJR process as dominion

\textsuperscript{164} Censure and Sanctions, supra note 3 at 43.
promoting. Including the process, and not just the outcomes under a RJR would be interesting as perhaps the public would be willing to sacrifice higher penalties for the certainty of more of a response to sexual assault overall.166

Another common critique of RJRs that are parallel to a CJS response is that utilizing CJS as a ‘stick’ to coerce compliance is problematic. Using the CJS as a ‘stick’ to promote compliance may be problematic under traditional RJR ideals, for example if the goals I was advocating for were reconciliation or forgiveness. It would be problematic to coerce anyone to forgive, reconcile, or love. Coercion is antithetical to the concept of love and forgiveness. That being said, my proposal only involves dominion as a target, it is not problematic that the CJS exist as a response to people who did not complete the RJR. Moral education is an important part of any response to criminal wrong, and while it would of course be ideal for offenders to want to engage with the system of their own volition, this is not generally a realistic proposition. Utilizing the threat of the ‘stick’ of the CJS interferes with the offender, but no more than usual under the status quo. Currently, offenders are already subject to the threat of prosecution under the CJS, creating more options, both for the offender and the SV allows for more choice, and an option for certain offenders to avoid a criminal conviction, a clear benefit to offenders.

166 Perhaps the public would be willing to forego the possibility of harsher penalties for the certainty of more consistent, lighter responses to sexual violence. If the RJR led to more reporting of sexual violence, more offender participation, and more SV satisfaction with the process/results of the response, then perhaps the public would also view the RJR as dominion promoting, not withstanding the lighter penalties attached to the RJR. There may be a trade off between the likelihood of many offender’s receiving some sort of reprobation through the RJR (though lower than under the CJS) as opposed to a few offenders receiving higher reprobation under the CJS. For a similar argument regarding the potential of a RJR leading to higher reporting rates see: “Archival Study”, supra note 91 at 351-352.
One critique of this argument is that I am essentially advocating for a version of coerced consent. Offenders are given the option of engaging with the RJR model while holding the CJS threat over their head. A similar argument can be made for mandatory minimums or three strikes laws. Consider a person accused of his third criminal offence, he faces life imprisonment, as it is his third strike. The person is offered a plea to a lesser charge for one year in prison. Is it fair to say this is really a free choice; surely this person is being coerced? A similar argument may be leveled at my proposal. I do not think this critique holds much weight. The RJR and CJS serve different functions, one is a fact-finding model, with punishments attached, and the other is a RJ model with its only goal being the rectification of harm.

The choice the offender makes is not a free choice; s/he must chose one or the other. There is no opportunity to simply walk away, but the offender’s consent is meaningful, and not coerced. The CJS in Canada, does not impose draconian punishment on sexual offenders (maximum sentence is ten years), and while the RJR would guarantee no criminal record upon successful completion, the offender could still receive this same result through the CJS: either through trial and acquittal, or at sentencing by advocating for a discharge.\textsuperscript{167} The offender can therefore receive the same benefit the RJR offers under the traditional CJS though the outcome is less certain.

\textsuperscript{167} \textit{Criminal Code, supra} note 11 at s 730 and s 271.
Conclusion

I have argued that the current CJS response to sexual violence for offenders who wish to admit some responsibility does not rectify harm, may lead to excess punishment for offenders, and does not give the SV nor offender much of a say in crafting a response to the initial act of domination. I have shown that a RJR is better suited to rectify the harm caused by an act of sexual violence, and can be crafted to employ procedures that are important from a republican perspective. Work can begin on making the CJS response more republican by employing features like an *ex ante* right of appeal, but even if this occurs, a RJR is still better suited to rectify harm for offenders who wish to admit some level of responsibility for their problematic action. This is so because of the unique forum a RJR employs. Having offender, SV and support people all working together to redress the harm caused in a forum that is not dominated by formality, rigidity and depersonalized processes will promote rectification of harm. The RJR allows for a personalized response to sexual violence with the SV/offender driving the process. The CJS even with an *ex ante* right of appeal will not achieve this unique benefit.

If the public is to seriously attempt to rectify the harm caused by sexual violence, employing a RJR is a step in the right direction. The current public sentiment around sexual violence at the time of writing may be indicative that there is a desire for change. Citizens seem jaded, and concerned about the current tuck of the system. Reforming the current system to incorporate more dominion-promoting procedures, like an *ex ante* right of appeal may assist in addressing some of these concerns. However, adopting a RJR will allow the offender/SV a real say in crafting a response that begins to rectify the harm caused by sexual violence. From a political perspective, there seems to be a desire for reform, adopting a RJR is a step in the right direction to begin rectifying the harm caused by sexual violence.