Courts of Justice, not Law: Analysing the place of the #MeToo movement in our legal system

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Introduction

Legend has it that, in response to being implored to 'do justice' in his judicial role, US Supreme Court Justice Oliver Wendell Holmes Jr. replied "this is a court of law, young man, not a court of justice".[1] Evidence that Holmes' perspective remains the guiding philosophy of English common law jurisdictions can be seen in the aims, processes and outcomes of the New Zealand criminal justice system. However, a reciprocal formulation of Holmes' theory has gained attention in recent times, with the MeToo movement attempting to do extra-legal justice, beyond the courts of law.

The MeToo movement has been inescapably divisive. Reaction to initiatives such as the publication of a legally unsubstantiated list of 'Shitty Media Men' have been simultaneously heralded as watershed moments of the feminist movement,[2] and decried as evidence that MeToo has 'gone too far'.[3] Even the US President has waded into the controversy, claiming that the MeToo movement has made it "a very scary time for young men".[4]

A. Aims and Methodology

This dissertation seeks to understand why such adversarial discourse remains one of the defining characteristics of the MeToo movement. This is not in an effort to label MeToo as

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[1] Oliver Wendell Holmes Jr., quoted in Frank Walters *Justice is God's idea: Man has corrupted and destroyed it!* (AuthorHouse, New York, 2012) at 24.
[2] Bridget Haire, Christy E. Newman, and Bianca Fileborn "Shitty Media Men" in Bianca Fileborn and Rachel Loney-Howes (eds) *#MeToo and the Politics of Social Change* (eBook ed, Palgrave MacMillan, 2019) 201 at 205.
[3] Megan Garber "Is #MeToo Too Big?" (14 July 2018) *The Atlantic* <Has #MeToo Gone Too Far? - The Atlantic>.
[4] Donald Trump, quoted in Jeremy Diamond "Trump says it's 'a very scary time for young men in America'" (2 October 2018) *CNN* <https://edition.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html.>; cited in Lauren Rosewarne "#MeToo and the Reasons To Be Cautious" in Bianca Fileborn and Rachel Loney-Howes (eds) *#MeToo and the Politics of Social Change* (eBook ed, Palgrave MacMillan, 2019) 171 at 174.

‘good’ or ‘bad’, but instead to break down why a movement which aims to promote justice – a notion with ostensibly universal allegiance – has become a subject of considerable controversy. My hypothesis is that this can be achieved by pinpointing the main areas of friction between the MeToo movement and the ideals of criminal justice.

My approach is to critically interrogate the three most widespread criticisms of MeToo by way of reference to the legal values and principles that underpin New Zealand’s criminal justice system. This analysis reveals that, while many of the arguments decrying MeToo may appear somewhat rudimentary and underdeveloped in popular discourse, their intuitive appeal can be traced to foundational principles of substantive due process.

Ultimately, my analysis suggests that some of the risks highlighted in criticism of MeToo’s boundary-setting and procedural functions are not as severe as is commonly portrayed. This is due to the specific character of the offending MeToo seeks to address, which appears to justify its departure from traditional criminal justice principles. Nevertheless, concerns surrounding the power that MeToo gives to media institutions may be valid regardless of its specific context. While not damning MeToo in its entirety, this concession does present a significant theoretical deficiency of the movement. In this vein, this dissertation attempts to show both *why* the MeToo movement is controversial, as well as whether certain controversies can be justified.

Given the desire for such a nuanced evaluation of the MeToo movement, this dissertation will also seek to provide a broad account as to what the MeToo movement is by way of reference to the criminal justice process. This also speaks to a broader question that surrounds MeToo – whether its inherent limitations and points of divergence with a formalised criminal justice process preclude any hopes of its widespread acceptance and effectiveness in Aotearoa.

Throughout this dissertation, the example of the New Zealand criminal justice system is used as a point of reference against which the MeToo movement is compared. The reason for this is

to highlight where the two differ in terms of aim, mandate and process. These deviations are a means of tracing whether the source of the controversies surrounding MeToo are the common values, principles and expectations that have been shaped by the criminal justice system. In other words, the comparison between the MeToo movement and the New Zealand criminal justice system is not premised on an assumption that MeToo is attempting to detect and prosecute sexual offending in as systemic a fashion as the institutions of criminal justice. Rather, the criminal justice system is taken as the point of reference based on a hypothesis that critiques of MeToo stem from certain assumptions, expectations and values, widely held in society, that draw from criminal justice theory. Such a comparison is justified by the MeToo movement and criminal justice system sharing the common goal of deterring egregious sexually inappropriate behaviour by punishing those who engage in it.

An important point to note is that the State also uses non-criminal methods to deal with inappropriate sexual behaviour, such as harassment laws and civil wrongs. However, a comparison between MeToo and other areas of the New Zealand legal system is beyond the scope of this dissertation.

B. Outline of Thesis

Chapter I contextualises the study by introducing both the New Zealand criminal justice system and the MeToo movement. It begins with a historical account of the origins of criminal law, which explain its theoretical justifications and subsequent processes for responding to, preventing and deterring instances of sexual offending. Having established this, focus will then turn to the MeToo movement, explaining its historical roots, theoretical basis and process for dealing with sexually inappropriate behaviour. This dual analysis points to the underlying

question of whether criminal justice principles should be applied to a social movement, which is examined at the conclusion of the chapter.

With the environment and subject adequately defined, Chapters II to IV will hone in on three specific points of controversy widely associated with the MeToo movement. The structure adopted will be to firstly identify discussion of the common criticism in popular discourse. This stance will then be developed through a jurisprudential lens in order to form a defensible critique of the MeToo movement, with particular focus on the autonomy/welfare tension discussed in Chapter I. Finally, the critique will be assessed for validity by illuminating its potential shortcomings and noting where it raises legitimate concerns.

Specifically, Chapter II addresses anxiety surrounding the MeToo movement's standards being too indeterminate to regulate people's conduct, while Chapter III asks whether it is appropriate for non-State actors to be quasi-legislating these standards in the first place. Chapter IV analyses fears surrounding the reversal of traditional procedural safeguards in the MeToo movement, before Chapter V concludes by assessing what MeToo's future in New Zealand may hold.

A final important point is that, while sexually inappropriate behaviour is not *confined* to the traditional male-perpetrator/ female-victim paradigm, this model is the vastly predominant form in which it occurs. As such, this dissertation will mainly conceptualise sexually inappropriate behaviour in this manner, particularly when implementing feminist understandings of the criminal law. Nevertheless, it is acknowledged that issues of sexually inappropriate behaviour can also be examined via other lenses, particularly in relation to intersectionality with orientation, race and gender identity. While these are alluded to in Chapter IV, they are generally beyond the scope of this dissertation.

I. The Respective Approaches of the Criminal Law and the MeToo Movement to Achieving Sexual Offending Justice

1.1 THE CRIMINAL APPROACH TO JUSTICE IN THE REALM OF SEXUAL OFFENDING

In order to map the configuration of the New Zealand criminal justice system, it is useful to understand the basis of the English criminal law from which it originates.

1.1.1 *The origins and development of criminal law in England*

Legal historians have claimed that "the penal law of ancient communities is not the law of crimes but the law of torts".[5] Despite this claim, history reveals that the inflicting of punishments beyond mere compensation of the victim preceded Anglo-Saxon times.[6] Ancient communities in Britain shunned and exiled individuals who committed particular grave wrongs.[7] This ancient example of moving past individualistic retribution and into the realm of communitarian deterrence for certain misbehaviour is vital for understanding the development of the criminal law.

The Anglo-Saxon period developed this theme, as the notion of the "king's peace" came to shape the modern conception of criminal law.[8] It was understood that every freeman possessed their own peace, or *mund*, conferring a right to vindication if their body or property was

[5] Henry James Sumner Maine *Ancient Law; Its Connection to the Early History of Society, and Its Relation to Modern Ideas* (10th ed, John Murray, London, 1908) at 328.
[6] William John Victor Windeyer *Lectures on Legal History* (2nd revised ed, Marchant & Co., Sydney, 1957) at 19.
[7] William A. Robson "Sir Henry Maine To-day" in Humphrey Milford (ed.) *Modern Theories of Law* (Oxford University Press, London, 1933) at 160.
[8] Windeyer, above n 6, at 19.

interfered with.[9] However, independent of this existed the belief that the presence of a strong king could maintain a general state of peace between citizens: the king's peace.[10]

The corollary of this was that wrongs done within the vicinity of the king (even if not directly to his person) constituted a breach of his *mund*.[11] While at first this only extended to the king's immediate locale, over time it was believed that through his armies, allies and authority, the king's peace could come to cover the entire kingdom.[12] The king's peace signifies the basis for a sovereign's responsibility to maintain order in their domain. It also reveals the understanding that even offences which were not against the king's person could constitute a wrong against the sovereign.

At the same time, the idea of *wite*, a type of Anglo-Saxon damages distinct from the compensation-based *wer*, developed.[13] *Wite* was enforced in Anglo-Saxon communities to atone for severe wrongs, and was not paid to the victim, but instead to the community or king.[14] For the most deeply offensive actions, no payment could reflect the breach, and the consequences ranged from enforced slavery and banishment to mutilation.[15]

Read together, the combination of the king's peace and *wite* can be seen as forming the vital ingredients of the modern day criminal law. The king's peace reveals the origins of the sovereign's responsibility to maintain a certain standard of order across their dominion; while *wite* underpins the reciprocal duty for citizens to abide by such standards, a duty owed to the community, rather than the party directly injured by the breach alone.

[9] Augustus H.F. Lefroy "Anglo-Saxon Period of English Law" (1917) 26 Yale L.J. 388 at 391.
[10] Windeyer, above n 6, at 19.
[11] At 20.
[12] At 20.
[13] At 20.
[14] At 20.
[15] Windeyer, above n 6, at 21.

With the entrenchment of these 'criminal' offences throughout English statute and common law, a consistent internal structure for crimes (as distinct from other variants of offending) developed. Not only does a crime require that an injurious act be committed (the *actus reus*),[16] but the individual must have contemporaneously possessed a condemnable state of mind (the *mens rea*).[17] Though the latter may require varying degrees of culpability depending on the offence, it nevertheless highlights how criminal offending is not solely concerned with the material outcome of the action. Instead, the intention or mindset of the actor is necessary for it to be condemnable.[18]

Despite the multitude of criminal offences created over the years, the English Parliament never followed through on calls to codify this body of offences into a single statute. Instead, their judges have relied on a mixture of legislated provisions and common law doctrines. By contrast New Zealand's Parliament first sought to catalogue all criminal offences into the Criminal Code Act 1893.[19] Today, the Crimes Act 1961 stands as New Zealand's legislative authority on criminal offending.[20]

1.1.2 *Theoretical justifications for criminal law*

An individual's *mund* and the king's peace provide theoretical justification for the concept of crimes. This section focuses on how the tension between the competing values of individual autonomy and welfare lies at the heart of criminal law.

[16] Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013) at 6.
[17] At 7.
[18] At 2.
[19] Criminal Code Act 1893.
[20] Crimes Act 1961.

Flowing from the Anglo-Saxon concept of each person's "*mund*", individual autonomy suggests that every human is a self-governing agent who is responsible for their actions and should be able to pursue their own goals without undue interference from others.[21] This perspective underpins the political theory of liberalism, which champions every human's equal and indefeasible right to live and flourish in the quest of whatever they envisage to be the 'good life'.[22] This belief in the inherent dignity of all people makes the protection of their individual autonomy or sovereignty through inviolable rights utterly integral to a liberal form of social organisation.

Counterbalancing individual autonomy is the notion of welfare. Building on the "king's peace", welfare refers to securing certain social conditions within a community which act as a platform from which individual goals may be pursued.[23] Thomas Hobbes famously conceptualised this as a 'social contract', in which individuals agree to cede some of their sovereignty to the king in exchange for protection from the 'state of nature'.[24] The state of nature envisaged by Hobbes refers to a world in which each person exercises their unconstrained individual autonomy in an untrammelled fashion, resulting in an anarchical environment where weaker individuals would be vulnerable to having their autonomy infringed on a regular basis.[25] Hobbes saw the social contract as a way of avoiding such anarchy, as individuals would find it advantageous to repose centralised authority in one figure, a king. This leader could then act as an arbiter and enforcer of common, basic standards which facilitate universal, if slightly inhibited, individual autonomy.[26]

[21] Ashworth, above n 16, at 23.
[22] John Rawls *Political Liberalism* (2nd edition, Columbia University Press, New York, 2005) at 171.
[23] Ashworth, above n 16, at 26.
[24] Thomas Hobbes *Leviathan* Hermann Klenner (ed) (Meiner Verlag, Hamburg, 2005) at 112.
[25] At 72.
[26] At 97.

The need to fulfil these dual principles in a liberal democratic state means that criminal law can be seen as a tense struggle between individual autonomy and welfare.[27] The price paid for social coordination of the community through accountability and redress for wrongs is sacrifice of absolute individual sovereignty to a centralised authority, who has the power to set binding standards across the community.

The judging of these standards may be clear-cut in compensatory situations, where the redress generally attempts to mirror the loss incurred. In the realm of criminal law, however this tension becomes particularly fraught. Extending punishment beyond mere compensation threatens to unjustifiably invade an individual's autonomy, tipping the scales too far in favour of welfare. As such, scholars have emphasised that the creation of criminal laws must be a strongly principled process, lest the sacrifice of autonomy demanded by the social contract be too high to justify the welfare it engenders.[28]

These traditional tensions are particularly relevant to sexual variants of criminal offending. The threat posed to bodily integrity by sexual offending requires that it be discouraged by the criminal law.[29] Given the immense physical, mental and emotional toll of sexual invasions, to permit such an exploitation of power to occur "amounts to the sheer use of a person, and in that sense the objectification of a person – a denial of personhood" and a failure to secure welfare.[30]

Countering this, the autonomy principle asserts that each individual should have the right to pursue their sexual choices free of interference from the central authority.[31] This applies to both initiator and recipient: they should each be allowed to consensually engage in healthy

[27] Ashworth, above n 16, at 40.
[28] Liz Campbell, Andrew Ashworth and Mike Redmayne *The Criminal Process* (5th ed, Oxford University Press, Oxford, 2019) at 23.
[29] Ashworth, above n 16, at 338.
[30] John Gardner and Stephen Shute "The Wrongness of Rape" in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (4th Series, Oxford University Press, Oxford, 2000) 205 at 227.
[31] Ashworth, above n 16, at 338.

manifestations of their sexuality without inhibition.[32] To do so would limit the autonomy of individuals to perform one of the most intrinsic aspects of one's identity.[33]

As such, criminal law in the realm of sexual offending requires the balancing of individual autonomy and welfare. This endeavours to permit people to partake in sexual activity unless it can be found that there is public interest in preventing such conduct. In order to strike this balance, a liberal democracy's criminal justice system is underpinned by the values of predictability, democratic accountability and proceduralism, each of which will be developed in the following chapters.

1.1.3 *The criminal sexual offending environment in New Zealand*

Having delineated the theoretical justification for a system of criminal justice, I now turn to see its influence on the environment in which criminal sexual offending is addressed in New Zealand.

In Aotearoa, sexual crimes are addressed in Part 7 of the Crimes Act 1961.[34] It is publicly available and covers a wide range of sexual offending. Its provisions are consistently constructed, requiring the impugnable actus reus, mens rea and lack of a reasonable belief in consent. Their formalistic nature is evident through "sexual violation' being defined in s 2 and applicable across multiple offences.[35] Constructing criminal provisions is the responsibility of the State, with Parliament specifically being the branch of government which creates

[32] Ashworth, above n 16, at 338.
[33] At 338.
[34] Crimes Act 1961, pt 7.
[35] Section 2.

legislation.[36] This is justified on the basis of the Legislature's public mandate, as they are held accountable every three years through general elections.[37]

Enforcing these provisions is the responsibility of the Executive branch of government. The police are statutorily tasked with the prevention of crime and enforcement of laws in New Zealand.[38] Complaints are either reported directly to the police, or are redirected to them via support agencies.[39] In support the victim while investigating the complaint, the police may work alongside Non-Government Organisations and Community Service Providers who assist in victim support and coordination.[40]

As they possess considerable power and are not democratically accountable, the police are held to strict procedural standards, including statutory limits on how they investigate potentially criminal activity.[41] In addition, further regulations such as the Practice Note on Police Questioning ensure that while police may question any potential suspects with their consent, they are limited in their powers to do so.[42]

Upon arrest, a suspect must be cautioned, told they have the right not to answer questions, and that they possess the right to consult a lawyer under the New Zealand Bill of Rights Act 1990.[43] If the accused is unable to call on their own lawyer, they may gain access to one through the State's Police Detention Legal Assistance (PDLA) scheme.[44] This indicates that the investigative process is highly cognisant of avoiding breaches of individual rights without just cause.

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[36] Ashworth, above n 16, at 2.
[37] Ashworth, above n 16, at 26.
[38] Policing Act 2008, s 9.
[39] Yvette Tinsley "The Current Process for Prosecuting Sexual Offences" in Elizabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 85 at 85.
[40] Tinsley, above n 39, at 88.
[41] Policing Act 2008, pt 3.
[42] Evidence Act 2006, s 30(6).
[43] New Zealand Bill of Rights Act 1990, s 23(1)(b).
[44] Tinsley, above n 39, at 94.

Any cases set to go to indictment will be transferred to the Police Prosecution Service, an independent firm given a warrant to prosecute on the Crown's behalf.[45] They are bound by Prosecutorial Guidelines which explicitly note that their duty is owed to the court and society rather than the victim.[46] While the principle of open justice allows for the publication of the defendant's name, they may be suppressed during the trial if their identification would have a detrimental impact on their reputation.[47] In this sense, welfare is protected through the prosecutor's communitarian loyalties, while autonomy is safeguarded through name suppression. The defendant will also be granted bail unless the court finds that the defendant poses a risk to others or themselves.[48] During this period, the prosecution and defence's legal teams will assemble evidence, have its admissibility assessed by a judge, and prepare for trial.

In New Zealand, the trial process is by and large an adversarial one, in which the legal teams representing either party battle at trial to provide the most compelling case for their client, after which an impartial judge or jury will reach a verdict.[49] In New Zealand, the separation of powers ensures that the third branch of government, the Judiciary, is neither aligned with nor vulnerable to the other branches of government, as judges cannot be removed, nor have their salaries reduced, at the behest of Parliament.[50] Furthermore, the presence of a jury stands as a means of enabling community involvement in criminal offending, ensuring that societal views are brought to bear in the criminal process.[51]

[45] At 96.
[46] At 89.
[47] Criminal Procedure Act 2011, s 200.
[48] Bail Act 2000, s 21(1)(a).
[49] Jacqueline Hodgson "Conceptions of the Trial in Inquisitorial and Adversarial Procedure" in Anthony Duff and others (eds) *The Trial on Trial Volume Two: Judgement and Calling to Account* (Hart Publishing, Oxford, 2006) 223 at 223-224.
[50] Constitution Act 1986, pt 4.
[51] New Zealand Law Commission *Juries in Criminal Trials Part One: A Discussion Paper* (NZLC PP32, 1998) at [57].

While the victim and defendant need not take an active role in the trial, they are frequently required to testify and undergo cross-examination by the opposing counsel.[52] Nevertheless, the defendant has the right to silence before and throughout the trial process, though the latter may be used to support an inference of guilt in some cases.[53] The trial is a battle between the prosecution and defence to prove the credibility of their version of events and undermine the testimony of the opposing party, bringing into question their fidelity and reliability by highlighting particular aspects of their character.[54]

At the conclusion of the trial the defendant will be free to leave if they are acquitted of the crime.[55] If they are convicted, they will then be sentenced at a separate hearing, which may involve a fine, community service, home detention or imprisonment, with various modifications possible.[56] The victim may contribute a Victim Impact Statement in order to help the judge reach an outcome, but it is not determinative.[57] If the defendant or plaintiff are unsatisfied with the result of either the trial or sentencing, they may seek leave to appeal the decision to a higher court.[58]

1.1.4 *Conclusion*

This section has described the criminal justice system's approach to achieving sexual offending justice. In doing this the historical basis for criminal law, its theoretical justification and subsequent process in New Zealand have been delineated. Without yet interrogating its

[52] Amanda Konradi *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger, London, 2007) at Ch 4.
[53] For discussion on this point, see *McLachlan v R* [2014] NZCA 462 and *R v McRae* (1993) 10 CRNZ 61 (CA).
[54] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 49.
[55] Tinsley, above n 39, at 100.
[56] At 102.
[57] At 101.
[58] At 102.

effectiveness, what is clear is that the underlying philosophical concerns of individual autonomy and welfare are manifested in the process and structure of the criminal justice system.

1.2 THE METOO MOVEMENT

In this section, a similar analysis is applied to the MeToo movement. This will allow for understanding of the philosophical concerns which have moulded the movement's distinct approach to addressing sexually inappropriate behaviour.

1.2.1 *The origins and development of the MeToo movement*

Defining the "problematically diffuse" MeToo movement is not a simple task.[59] This section seeks to formulate a working definition by honing in on two key roots of the movement. The first of these is the use of the hashtag "#MeToo" by victim-survivors, while the second is the censuring of powerful figures who have engaged in sexually inappropriate behaviour by journalists. The two phenomena are motivated by differing intentions. The former is an effort to raise awareness of the commonality of sexual abuse and destigmatise the experiences of victim-survivors. The latter focuses on holding to account offenders who are protected from the grasp of the criminal law by social, financial and legal barriers. The convergence of these two forces in 2017 combined to create a movement which has dominated popular sexual discourse for the past four years.

Despite exploding into public consciousness in 2017, the origins of the hashtag #MeToo can be traced to the expansion of internet use in the 1990s. This facilitated the dawn of a number

[59] Lauren Rosewarne, above n 4, at 177.

of third-wave feminist online blogs such as *Sassy*, *Feministing*, *Angry Black Bitch* and *Jezebel*.[60] The popularity of these sites provided early indications of the internet's ability to provide a platform for radical feminist thinkers who were unable to have their voices heard in the traditional media. This unparalleled reach was accentuated by the proliferation of social media such as Twitter and Facebook toward the end of the 2000s. The first use of the #MeToo hashtag was in a Tweet in 2006, when Tarana Burke relayed a past occasion during which she felt unable to be a young sexually abused girl's confidant.[61] Burke noted how her own experience with sexual abuse made her push the young girl away, and how she wished she had had the power to tell the girl "Me Too".[62] Burke's tweet represented a call for solidarity among women (particularly those of colour) who had experienced sexual abuse.[63]

Burke's ongoing activism would highlight this, demanding greater acknowledgement of and support for women's experiences as victim-survivors of sexually inappropriate behaviour. It is worth noting that before 2017, other hashtags focused on promoting awareness and sisterhood among sexual abuse victim-survivors also experienced varying degrees of prominence, including #yesallwomen, #WhatIWasWearing and #BeenRapedNeverReported.[64] The reasons why #MeToo became so widespread requires analysis of another developing online trend.

Hollywood provides a shining example of the extent to which women have struggled to have the profligacy and gravity of sexually inappropriate behaviour taken seriously. For decades, the "casting couch" culture, in which women aspiring to find work in the entertainment industry are sexualised and objectified in order to further their career, has been widely recognised and

[60] Linda Hirshman *Reckoning: The Epic Battle Against Sexual Abuse and Harassment* (Mariner Books, New York, 2019) at 137.
[61] Angela Sawyer "Tarana Burke tells the story behind the #MeToo movement" *The Collegian* (online ed, Manhattan, 23 October 2018).
[62] Sawyer, above n 61.
[63] Karen Boyle *#MeToo, Weinstein and Feminism* (eBook ed, Palgrave MacMillan, 2019) at 5.
[64] Bianca Fileborn and Rachel Loney-Howes "Introduction: Mapping the Emergence of #MeToo" in Bianca Fileborn and Rachel Loney-Howes (eds*) #MeToo and the Politics of Social Change* (eBook ed, Palgrave MacMillan, 2019) 1 at 10.

accepted.[65] Far from a shameful secret, it has often been presented in a somewhat comical way, with mainstream media portraying the women involved as exploiting the totally justified lust of powerful older men for their own benefit.[66]

This utter mischaracterisation of a deeply misogynistic and imbalanced workplace was evident in the newsroom of the Fox corporation, headed by Roger Ailes in 2016. Despite whispers of his sexual misconduct having circled for decades, Ailes had remained in positions of power across various networks.[67] Those he harassed were frequently either prevented from speaking out due to the vulnerability of their employment, or paid money to sign non-disclosure agreements.[68]

Given this background, former Fox host Gretchen Carlson's sting operation which exposed Ailes' abhorrent behaviour was a significant step. The media coverage which accompanied it and messages of support from other victim-survivors highlighted the potential for engagement with the traditional media to combine with dissemination via social media in order to permeate the financial and legal walls of protection which surrounded Ailes. Ailes' demise provided a blueprint for tackling institutionally insulated offenders, which would be applied to other notorious offenders such as Harvey Weinstein.[69]

The fall from grace of film mogul Weinstein is arguably the defining achievement of the MeToo movement.[70] It represents the fusion of the aforementioned ingredients of social and traditional media applied in relation to a figure who fit the profile of a sexual abuser.[71] Like Ailes, rumours of Weinstein's sexually inappropriate behaviour were rife, to the point of being

[65] April Slusser "Welcome to Hollywood – Shedding the Casting Couch Culture" (14 November 2017) Wayne County Sexual Assault Forensic Examiner's Program <https://wcsafe.org/2017/11/welcome-to-hollywood-shedding-the-casting-couch-culture/>.
[66] Slusser, above n 65.
[67] Hirshman, above n 60, at 171.
[68] At 172.
[69] Hirshman, above n 60, at 185.
[70] Boyle, above n 63, at 1.
[71] Slusser, above n 65.

something of an open secret in Hollywood.[72] Despite this, Weinstein's economic power, cultural relevance, social clout (which included publicly identifying as a feminist) and legal safeguards meant that accusations directed at him, which included exposure, harassment, blackmail and rape, were never seriously pursued by police authorities.[73]

However, investigative journalists Jodi Kantor and Meghan Twohey at the *New York Times* [74] and Ronan Farrow at the *New Yorker* had responded to these whispers and collected evidence to paint a true portrait of Weinstein's character.[75] The release of their articles in October 2017 was followed by a slew of corroborating stories which saw Weinstein's film empire crumble, as he was fired from all positions of power and socially outcast.[76] Ten days after Weinstein's story broke, actress Alyssa Milano Tweeted:[77]

> Me Too. Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote "Me Too" as a status, we might give people a sense of the magnitude of the problem".

The following 24 hours saw 12 million posts on Facebook referencing #MeToo and a further one million uses of the hashtag on Twitter.[78] The sheer number of posts catapulted MeToo into public discourse, as the engagement served to present a "collectively produced story about sexual harassment and assault".[79] MeToo was soon being used by women in over 85 countries, highlighting the universal nature of sexual offending.[80] While Milano's Tweet was not the first

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[72] Hirshman, above n 60, at 227.
[73] At 228.
[74] Jodi Kantor and Meghan Twohey "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades" *New York Times* (online ed, New York, 5 October 2017).
[75] Ronan Farrow "From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories" *The New Yorker* (online ed, New York, 10 October 2017).
[76] Sarah Almukhtar, Michael Gold and Larry Buchanan "After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall From Power" *New York Times* (online ed, New York, 8 February 2018).
[77] Alyssa Milano (@Alyssa_MIlano) "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet" <https://twitter.com/alyssa_milano/status/919659438700670976?lang=en>.
[78] Boyle, above n 63, at 3.
[79] Tanya Serisier *Speaking Out: Feminism, Rape and Narrative Politics* (eBook ed, Palgrave Macmillan, 2018) at 101.
[80] "What #MeToo has meant around the world" (26 November 2018) *Devex* <What #MeToo has meant around the world | Devex>.

instance of women speaking out against sexual offending, it was arguably the first time that women were truly heard on a wider public scale.[81] The combination of the investigative prowess of the traditional media, unrivalled reach of social media and newfound power of 'cancellation' among the public combined to provide a platform upon which MeToo was born.[82]

In the years that followed, newspapers reported that MeToo's influence saw 400 people fall from positions of power following revelations of sexually inappropriate behaviour.[83] The route to this occurring was not always uniform. Some featured victim-survivors crediting the MeToo movement as having given them the confidence to approach the police or complaints divisions within their workplace, while others featured a Weinstein-esque investigation by media sources.[84] With regard to the latter, whether it be politicians such as Al Frankton and Roy Moore, or entertainers such as Bill Cosby and Kevin Spacey, the core ideas remained the same.[85] Powerful men who had previously been shielded from the law now found themselves exposed, censured and economically punished (to some extent) by the media, *before* the criminal justice system was involved, and sometimes *completely independent* of it.

New Zealand has also experienced the spread of the MeToo phenomenon. In 2018, commercial law firm Russell McVeagh was the subject of an exposé which revealed sexually inappropriate behaviour by its partners toward summer interns, prompting considerable re-examinations of the culture of the legal profession.[86] Flowing from this, revelations of sexual misconduct being

[81] Boyle, above n 63, at 5.
[82] Cancellation will be expanded upon in Ch III.
[83] Jeff Green "#MeToo Snares More Than 400 High-Profile People" (26 June 2018) *Bloomberg* <#MeToo Snares More Than 400 High-Profile People - Bloomberg>.
[84] Michael Salter "Online Justice in the Circuit of Capital: #MeToo, Marketization and the Deformation of Sexual Ethics" in Bianca Fileborn and Rachel Loney-Howes (eds) #MeToo and the Politics of Social Change (eBook ed, Palgrave MacMillan, 2019) 317 at 318.
[85] Lauren Rosewarne, above n 4, 171.
[86] Sasha Borissenko and Melanie Reid "The summer interns and the law firm" (14 February 2018) *Newsroom* <https://www.newsroom.co.nz/2018/02/14/88663/the-summer-interns-and-the-law-firm>.

covered up during the Labour Party's Youth Camp also made national headlines.[87] In recent times, individuals have also been the subject of reports, with local musicians,[88] academics,[89] politicians,[90] and members of state institutions having been reported on and reproached for alleged sexual misbehaviour. [91]

Returning to the aim at the beginning of this section, describing the MeToo movement is a vexing task. Revelations of Iain Lees-Galloway's consensual sexual relationship with an employee may not appear to reflect the intention of Tarana Burke in 2006.[92] This reflects the present tendency to use the phrase 'MeToo' as "a shorthand for anything vaguely feminist".[93] Nevertheless, this amorphousness does not necessarily damn efforts to define the MeToo movement. Like the criminal law, MeToo's basis is as a response to social reality. Tarana Burke's desire to broadcast the tragic normality of sexual abuse and promote unity among victim-survivors reflects the kind of welfare concerns discussed earlier in the chapter. Similarly, efforts by the public to 'cancel' high-profile figures seem to resonate with the conception of crimes as offences that the community feels a responsibility to administer.[94]

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[87] "Man faces four charges of indecent assault at Labour Party summer youth camp" *The New Zealand Herald* (online ed, Auckland, (26 June 2018).
[88] Eva Corlett and Harry Lock "Wellington musicians accused of sexual assault, violence" (20 October 2020) *Radio New Zealand* <https://www.rnz.co.nz/news/national/428742/wellington-musicians-accused-of-sexual-assault-violence>.
[89] Alison Mau "Trans-Tasman universities at war over top scholar's 'sexual stalking'" (24 May 2020) *Stuff* <https://www.stuff.co.nz/national/education/300018873/transtasman-universities-at-war-over-top-scholars-sexual-stalking>.
[90] Henry Cooke "Andrew Falloon sent sexually explicit photos to another young woman" (21 July 2020) *Stuff* <https://www.stuff.co.nz/national/politics/300061529/andrew-falloon-sent-sexually-explicit-photos-to-another-young-woman?rm=a>.
[91] Melanie Reid and Bonnie Summer "'Go back into a room with a predator? No thank you'" (21 July 2020) *Newsroom* <https://www.newsroom.co.nz/go-back-into-a-room-with-a-predator-no-thank-you>.
[92] In July 2020, it emerged that Workplace Relations Minister Iain Lees-Galloway had engaged in an inappropriate relationship with a staffer. This led to his dismissal as minister and stepping down as an MP at the following election. See also Collette Devlin "Workplace Relations Minister Iain Lees-Galloway dismissed following relationship with staffer" (22 July 2020) *Stuff* <Workplace Relations Minister Iain Lees-Galloway dismissed following relationship with staffer | Stuff.co.nz>.
[93] Lauren Rosewarne, above n 4, 172.
[94] Grant Lamond "What is a Crime?" (2007) 27 OJLS 609 at 615-620.

Thus, the MeToo movement is best conceptualised as the combination of these dual elements, an intersection of social and traditional media to create a series of reports into sexually inappropriate behaviour. The stories are linked by an overarching narrative and corroborated by victim-survivors in order to promote solidarity, and hold offenders in positions of power to account.

Some have argued that MeToo's style of reporting is not particularly unusual, as it conforms with journalistic scholar Jen Birks' description of "campaign" journalism.[95] This refers to coverage which "advocates or opposes particular policies and overtly expresses a substantive, value-oriented bias, with the purpose of influencing policy decisions".[96] Examples of campaign journalism include the Watergate scandal in the U.S.[97] and the Roastbusters investigation in New Zealand.[98]

However, MeToo differs from these examples in terms of both approach and philosophy. Regarding the former, it has the ability to penetrate institutionally and procedurally protected offenders through the corroboration and awareness offered by social media.[99] For the latter, journalists have stated that only recently have stories into systemic sexual misconduct been "considered newsworthy".[100] Together, these indicate that MeToo presents something of a novel development in the field of investigative journalism.

As such, though the focus of this dissertation will be on the MeToo campaign *process*, the indelible role played by social media and the public at large in the adjudication and punishment

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[95] James Hollings "It Does Become Personal: Lessons From a News Organisation's #Metoo Campaign" (2020) 14(2) *Journalism Practice* 225 at 227.
[96] Jen Birks "The Democratic Role of Campaign Journalism: Partisan Representation and Public Participation" (2010) 4(2) *Journalism Practice* 208 at 209.
[97] James Varney "John O'Conner: Watergate Led to Partisan Journalism" *The Washington Times* (online ed, Washington D.C., 25 October 2020).
[98] "Roast Busters, New Zealand 'Teen Rape Club,' Allegedly Preyed On Drunk, Underage Girls" (6 November 2013) *The Huffington Post* <https://www.huffpost.com/entry/roast-busters-new-zealand-teen-rape-club_n_4221597>.
[99] Salter, above n 84, at 322.
[100] Interview with Alison Mau, Senior Journalist at *Stuff* (the author, via telephone, 27 October 2020).

stages mean that it remains conceptually useful to refer to the MeToo *movement*, rather than the journalistic campaign alone.

1.2.2 *Theoretical justifications for the MeToo movement*

Surveys of those taking part in the MeToo movement have cited education, awareness, solidarity and accountability as motivating their participation.[101] The MeToo movement's existence is justified on the basis that it is *necessary* due to the failings of the criminal justice system.[102] Three particular shortfalls can be identified as having necessitated the MeToo movement's efforts to fill the gaps: a lack of accountability for those who commit sexual offences; a failure to adequately capture the true scope of sexual offending; and the punishing impact of the existing system upon victims.

While these reasons will be explored in greater depth throughout this dissertation, the thrust of the argument from those within the MeToo movement is that it would not exist if the current system was holding those who act in a sexually inappropriate way to account in a manner which avoids further harm to victim-survivors.[103] Its perceived failure to do so has prompted the rise of a movement which seeks to give effect to the social contract. In order to counter these deficits in the existing system, it is evident that the MeToo movement is comparatively informal, decentralised, and deregulated in its process in New Zealand.

[101] Kaitlynn Mendes and Jessica Ringrose "Digital Feminist Activism: #MeToo and the Everyday Experiences of Challenging Rape Culture" in Bianca Fileborn and Rachel Loney-Howes (eds) *#MeToo and the Politics of Social Change* (eBook ed, Palgrave MacMillan, 2019) 37 at 39.
[102] Bianca Fileborn and Nickie Phillips "From 'Me Too' to 'Too Far'? Contesting the Boundaries of Sexual Violence in Contemporary Activism" in Bianca Fileborn and Rachel Loney-Howes (eds) *#MeToo and the Politics of Social Change* (eBook ed, Palgrave MacMillan, 2019) 99 at 111.
[103] Mau, above n 100.

1.2.3 *The MeToo movement in New Zealand*

MeToo journalists have indicated at times a willingness to report on behaviour which falls outside of the criminal or even civilly legal definitions of sexual misconduct.[104] Examples of those embroiled in the MeToo campaign range from naval officers accused of rape,[105] through to misogynistic disrespect and bullying in the workplace.[106] Rather than focusing on a strictly legalistic criteria for investigation, reporting instead focuses on factors such as prominence, unusualness, public interest, celebrity involvement and plausibility.[107]

Similar to the criminal justice system, the MeToo campaign generally relies on people bringing forward their complaints to the publication. While there is some investigation of rumoured misconduct, the predominant form of detection is through contact with an anonymous hotlines.[108] Upon receiving complaints or allegations, a news corporation may triage complaints as to whether their description constitutes a situation of immediate danger to themselves or others.[109] If this is the case, they are recommended to lay a complaint with the police, as well as made aware of available counselling services.[110]

While the MeToo desk is distinct from other areas of reporting, those within it have noted that the approach taken is "like any other investigation."[111] Whether a complaint is subject to deeper investigation primarily depends on whether it involves an ongoing situation, alongside consideration of the aforementioned criteria.[112] If deemed worthy of pursuit, the subsequent

[104] Mau, above n 100.
[105] Alison Mau "Abused airwoman Mariya Taylor faces Supreme Court battle for compensation" (30 July 2020) *Stuff* <Abused airwoman Mariya Taylor faces Supreme Court battle for compensation | Stuff.co.nz>.
[106] "Haumaha 'disrespects and bullies women' - Louise Nicholas" (10 August 2018) *Radio New Zealand* <https://www.rnz.co.nz/news/political/363783/haumaha-disrespects-and-bullies-women-louise-nicholas>.
[107] Hollings, above n 95, at 229.
[108] At 229.
[109] Hollings, above n 95, at 229.
[110] Mau, above n 100. See also Hollings, above n 95, at 229.
[111] Mau, above n 100.
[112] Hollings, above n 95, at 229.

investigation occurs at the complainant's behest.[113] While there are no laws delineating this process, news corporations such as *Stuff* have stated their commitment to allowing participants to choose to remain anonymous or even stop pursuing the story at any point.[114]

The journalistic approach predominantly favoured within the movement places focus on sensitivity toward complainants, rather than sceptically interrogating their veracity.[115] While possessing an advocative attitude toward complainants in the sense of accepting their stories, there nevertheless remains an overlay of objectivity required in order to retain credibility in the eyes of their audience.[116] Thus, the choice of news corporations has been to allow a complainant-centric investigative process, with alleged victim-survivor desires and interests placed at the forefront.

Rather than being the determinant of the accused's culpability, adjudication of guilt in the MeToo movement usually occurs within the news corporation's legal team. Their chief concern is that since such stories often name the perpetrator and play a strong censuring role, there is the possibility of reputational damage to the accused, which could give rise to a claim in defamation or libel.[117] In New Zealand, the law concerning defamation is present in the Defamation Act 1992, which will be explored in greater depth in Chapter IV.[118]

The key point is that lawyers in a MeToo campaign will only be swayed into allowing publication where they believe there is sufficient evidence to refute a claim of defamation through the defence of truth.[119] This disincentivises news corporations from publishing stories

[113] At 230.
[114] At 230.
[115] At 232.
[116] At 232.
[117] Mau, above n 100.
[118] Defamation Act 1992.
[119] Mau, above n 100. See also Hollings, above n 95, at 234.

with less evidence, and highlights how even in this decentralised process, the law still dictates (albeit comparatively informally) adjudication of the accused's culpability.

Following publication, 'punishment' of the accused may come in a variety of forms. If the story raises sufficient evidence to justify police intervention, they may launch an investigation, as was the case with Weinstein. In addition, the reputational damage may see the figure suffer removal of positions, endorsements and support from employers and stakeholders.[120] This can endure for extended periods, during which the figure may be unable to find work due to the negative perception of them. Notably, the practice of 'cancelling' public figures, which is expanded upon later in this Chapter, represents a third form of punishment.[121] While there is no formal appeal system, the accused usually has a right of reply through the media, as well as recourse to courts with a claim of defamation if they dispute the veracity of the story.

1.2.4 *Conclusion*

This section has laid out the MeToo movement's approach to instances of sexually inappropriate behaviour. Analysis of its history reveals the combination of two strands of social phenomena: the use of the hashtag "#MeToo" by victim-survivors of sexually inappropriate behaviour; and the efforts of investigative journalists to hold powerful figures accused of sexual misconduct to account. The wider scope, complainant-centrism and lack of strict legal procedural limits reflect how the MeToo movement's characteristics represent attempts to remedy the deficiencies of the criminal justice system.

[120] Susannah Goldsbrough "Cancel culture: what is it, and how did it begin?" *The Telegraph* (online ed, London, 30 July 2020).
[121] Fileborn and Phillips, above n 102, at 111.

1.3 THE APPROPRIATENESS OF APPLYING CRIMINAL JUSTICE STANDARDS TO THE METOO MOVEMENT

As has been established, the MeToo movement is not underpinned by the coercive power of the State. This raises the question as to whether it is appropriate for this dissertation and society at large to hold what is a social movement to the same standards as the criminal justice system. Social sanctions have existed long before the existence of law and continue to operate in the "extra-legal realm of mores".[122] Thus, it could be argued that to apply standards borne out of fears of abuse of State power to a movement which operates within the confines of the law ignores the fundamental reason for the principles of criminal justice: that they protect people from abuse backed by the State's monopoly on legitimate violence.

1.3.1 *The raw-power rejoinder: the clout of the MeToo movement*

However, the combination of social media's ubiquity allied with the investigative resources of media organisations mean that the MeToo movement may represent something beyond a mere social sanction. While the origins of its power are not linked directly to the king's *mund*, the MeToo movement is arguably better conceptualised as an institutional power akin to the criminal justice system in terms of its raw power to infringe upon individual freedoms.

The most prevalent example of this is the process of 'cancelling'. Described as a "cultural boycott", it refers to large groups refusing to engage with an individual's work, art or identity as a result of their publicised misdeeds.[123] Initially used in reference to retracting support for reality television stars, the phraseology has come to be applied to public figures whose words

[122] Marjorie Williams "How Bill Clinton Neutered The Feminist Movement" *The Independent* (online ed, London, 3 April 1998).
[123] Lisa Nakamura, Professor in the Department of American Cultures at the University of Michigan, Ann Arbor quoted in Jonah Engel Bromwich "Everyone Is Cancelled" *New York Times* (online ed, New York, 28 June 2018).

or actions triggered similar urges to cease endorsing them.[124] With the interconnectivity enabled by social media, the effects of cancellation can be wide-ranging. News of the impugned action or statement is disseminated at a greater rate than previously seen across history, and arguably echoes the censuring function of the criminal law by framing the information through a lens which is condemnatory of the individual.

The consequences of this are generally twofold. Firstly, growing public dissatisfaction with high-profile individuals may lead their employers or stakeholders to remove endorsements or publicly disavow affiliation with the figure.[125] When occurring in relation to people involved in politics or entertainment, this seems like the logical operation of a democratic and capitalist system: investment in an individual will only endure so long as they can garner support or profit.

An interesting additional aspect in the age of the internet is that cancelling can often have a far more *direct* economic consequence for individuals whose revenue is linked to online traffic. By refusing to pay attention to the figure online, financial fortunes can be adversely affected following cancelling. This transfer of tangible economic clout to the public has become particularly potent in demanding change from economically powerful institutions. Examples of this include platforms such as Spotify and Netflix being prompted to remove music and media associated with figures exposed by the MeToo movement.[126]

[124] Goldsbrough, above n 120.
[125] Bromwich, above n 123.
[126] See Spotify: Dan Rys "XXXTentacion's 'SAD!' Also Removed From Spotify Playlists Under New Policy" (10 May 2018) *Billboard* <https://www.billboard.com/articles/business/8455405/xxxtentacion-sad-removed-spotify-playlists-new-hate-conduct-policy>; Netflix: "Cancel culture of censorship? Netflix in US pulls Johnny Depp films" (26 December 2020) *The Global Herald* <https://theglobalherald.com/news/cancel-culture-of-censorship-netflix-in-us-pulls-johnny-depp-films/>.

In this sense, the MeToo movement is comparable to that of the state in terms of the inherent censuring effect of cancelling, the highly-developed investigative abilities of news corporations and the far reach of social media.

1.3.2 *Interrogating the effects of cancellation*

While acknowledging that the MeToo movement's considerable scope, power and influence may justify the imposition of criminal justice standards to its exercise, it does not necessarily follow that cancellation can be equated with State criminal sanctions. Cancellations do not have the explicit limits and requirements associated with State punishment. Many 'cancelled' individuals such as Louis C.K. have found themselves once again gainfully employed in their previous sector after what can best be described as a hiatus rather than an exile.[127] Similarly, while Aziz Ansari's received criticism from some news outlets following his "bad date",[128] he did not experience detrimental effects in the sense of having his television shows or films removed from streaming platforms.[129]

It could be argued that the reason that coercive masturbator Louis C.K. and 'non-verbal cue'-ignorer Ansari have found themselves back in the spotlight is because their degree of offending

[127] Following multiple allegations, stand-up comedian Louis C.K. admitted to having masturbated in front of up-and-coming comediennes on numerous occasions. While at the time he defended this on the basis that "I never showed a woman my dick without asking first", he subsequently acknowledged "the power I had over these women is that they admired me. And I wielded that power irresponsibly": Izadi Elahe "Louis C.K. responds to sexual misconduct allegations: 'These stories are true'" *The Washington Post* (online ed, Washington D.C., 10 November 2017). In relation to C.K.'s return to comedy within a year of the scandal, see Amanda Arnold "What's going on with Avital Ronnell, the prominent theorist accused of harassment?" (21 August 2018) *The Cut* <https://www.thecut.com/2018/08/avital-ronell-professor-accused-ofharassment-what-to-know.html.>.

[128] An article published by *Babe.net* chronicled actor and comedian Ansari's date and subsequent sexual encounter with a young photographer who met him at a party. Significantly, the facts provided by the young woman did not accuse nor insinuate that Ansari had sexually assaulted her, but instead that he had "ignored clear non-verbal cues" in continuing to pursue sexual interactions with her throughout the evening: Katie Way "I went on a date with Aziz Ansari. It turned into the worst night of my life" (13 Janurary 2018) *Babe.net* <https://babe.net/2018/01/13/aziz-ansari-28355>.

[129] Amanda Arnold "What's going on with Avital Ronnell, the prominent theorist accused of harassment?" (21 August 2018) *The Cut* <https://www.thecut.com/2018/08/avital-ronell-professor-accused-ofharassment-what-to-know.html.>.

was deemed less abhorrent in the eyes of the public than that of alleged and proven rapists Weinstein, Kevin Spacey or Bill Cosby. In this sense, it seems far easier to liken the punishments 'handed down' by the MeToo movement to social sanctions. The reality that they are neither 'binding' nor absolute suggests that it would be an exaggeration to equate them with arbitrary and indiscriminate punitive displays of State power.

As such, to characterise the MeToo movement as either harmless or a descent into internet vigilantism through a "trial by Twitter" is insufficiently nuanced. Instead, it is acknowledged that the tangible economic invasions resulting from MeToo are insufficiently binding to be equated with coercive State punishment. However, the institutional and communicative capabilities of the MeToo movement alongside their inherent censuring function can be likened to the criminal justice system. As such, the application of criminal justice principles to the MeToo movement is appropriate, with the tacit understanding that the focus must be on the *reputational* punishments meted out on cancelled individuals.

II. "Where's the Line?" – Concerns at the MeToo Movement's Standards Being Too Indeterminate to Regulate Conduct

2.1 THE COMMON CRITICISM

In 2016, Donald Trump claimed that the MeToo movement had made the current social climate "a very scary time for young men".[130] Trump's claim is a useful starting point for this chapter, which examines the "where's the line" criticism of the MeToo movement: that its standards as to what constitutes impugnable behaviour are too indeterminate.

It is frequently claimed that the MeToo movement's ambiguous standards make 'the line' between acceptable and unacceptable sexual conduct unclear. In a now infamous open letter signed by 100 French women including actress Catherine Deneuve in 2017, it was bemoaned that the paranoia bred in males by these amorphous boundaries undermines romance and deprives women of sexual agency.[131] Particularly, it was asserted that the removal of a man's "right to pester" women represents a totalitarian subversion of innate sexual impulses.[132]

Furthermore, the likes of actor Matt Damon have questioned whether there is sufficient nuance in such transient standards.[133] Aziz Ansari is typically cited as having been tarred with the same brush as Harvey Weinstein despite having been accused of merely "ignore[ing] clear non-verbal cues" on a date compared to Weinstein's demonstrably illegal misdeeds.[134] Damon's

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[130] Donald Trump, quoted in Jeremy Diamond "Trump says it's 'a very scary time for young men in America'" (2 October 2018) *CNN* <https://edition.cnn.com/2018/10/02/politics/trump-scary-time-for-young-men-metoo/index.html.>.
[131] Letter from Sarah Chiche (writer/psychoanalyst), Catherine Millet (author/art critic), Catherine Robbe-Grillet (actress/writer), Peggy Sastre (author/journalist) and Abnousse Shalmani (writer/journalist) to *Le Monde* (newspaper) regarding the MeToo movement (10 January 2018).
[132] Ciche, above n 131.
[133] Interview with Matt Damon, actor (Peter Travers, *Popcorn with Peter Travers*, *ABC*, 12 December 2017) <https://abcnews.go.com/Entertainment/matt-damon-opens-harveyweinstein-sexual-harassment-confidentiality/story?id=51792548>; cited in Boyle, above n 63, at 62.
[134] Way, above n 128.

comment that individuals like Ansari are not in the "same category" as Weinstein reveals the concern that distinctions between varying levels of misbehaviour are ignored by the MeToo movement.[135]

The substance of this criticism is thus that the MeToo movement's absence of a strict set of rules has undermined society's attitudes toward sex and romance. Sexual advances are now seen as being risky for initiators, who, in acting in ways deemed legal by the law, may still find themselves liable for punishment from MeToo. This inhibition of sexual freedom purportedly undermines the agency of initiators and receivers to engage with their sexual identity freely. Furthermore, the indiscriminate banner of the #MeToo hashtag is seen as failing to "grapple with [the] reality" that there is a "difference between sexual assault and horny dudes who move too fast on dates".[136]

2.2 THE JURISPRUDENTIAL BASIS OF THE CRITICISM

Criminal jurisprudence is useful for shedding light on the roots of this criticism. One way in which the criminal law addresses concerns surrounding unjustified invasions of autonomy is through formalism. Formalists such as John Smillie see the law as consisting "largely of posited precepts laid down in legislation or leading judicial precedents."[137] This requires that laws are 'positivistic', that is to say uniform in source; consistently interpreted and indiscriminately applied; easily accessible; and clearly codified.[138] To do this is to respect the autonomy of

[135] Damon, above n 133.
[136] Robin Abcarian, "She wanted to go slow; he wanted to go fast. She told the world. Is Aziz Ansari a victim or a perpetrator?" *Los Angeles Times* (online ed, Los Angeles, 17 January 2018).
[137] John Smillie "Formalism, fairness and efficiency: civil adjudication in New Zealand" (1996) NZLR 254 at 255.
[138] At 255.

citizens as rational actors who can understand and tailor their behaviour according to certain standards.[139]

The aim of these factors is to enable the law to be an authoritative guide against which citizens can regulate their behaviour to avoid incurring punishment. Holmes noted that "people want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves."[140] This reverence for autonomy and fear of the potential for overreach of State power means that there must be painstaking justification for any infringement of autonomy in the form of a breach of a clear standard. Holmes reasoned that the best way to do this was to look at the law from the perspective of the "bad man" who seeks only to exercise his agency as far as possible within the confines of the law and regardless of morality.[141] The law must thus acknowledge the existence of the "bad man", and seek to be sufficiently explicit and authoritative as to prevent and deter him from engaging in social wrongs while also respecting his intrinsic dignity as a citizen. To instead wield the State's coercive powers to punish someone for breaching a standard which they did not have a reasonable opportunity to be aware of would be repugnant to their autonomy.[142]

The aforementioned common criticism of MeToo's indeterminacy resonates with this jurisprudential perspective on the importance of formalism in the criminal law. The fact that Ansari and Lees-Galloway felt the sting of MeToo despite Ansari going on what has been described by some as merely a 'bad date' and Lees-Galloway having a consensual relationship with a subordinate employee may thus suggest that MeToo's standards are not sufficiently positivistic. From a theoretical perspective, the ability to be reputationally tarnished by MeToo

[139] Ashworth, above n 16, at 23.
[140] Oliver Wendell Holmes, Jr. "The Path of the Law" (1897) 1 10 Harv.L.Rev. 457 at 460.
[141] At 461.
[142] Ashworth, above n 16, at 25.

without having breached an explicit standard reveals the potential for the movement to facilitate unjustified intrusions of individual autonomy.

Furthermore, MeToo's inhibiting of the "right to pester" specifically highlights the autonomy/welfare tension of sexual crimes elucidated in Chapter I.[143] It implies that the MeToo movement impedes individuals' autonomous freedom to pursue sexual choices in the name of societal welfare and the recipient's bodily integrity. These limitations are said to be unjustified as neither welfare nor autonomy are actually at risk through mere attempts to "touch a woman's knee, try to steal a kiss, talk about "intimate" things during a work meal, or send sexually-charged messages to women who did not return their interest."[144]

Finally, Damon's declaration that certain individuals subjected to MeToo exposure are not in the "same category" as Weinstein aligns with the criminal justice concept of 'fair labelling'.[145] Fair labelling requires that the name given to certain types of offending should be specific and discrete so as to avoid a flattening of distinctions between variants of misbehaviour.[146] The lumping together of Weinstein and Ansari under the MeToo banner could arguably be cited as an example of this, with the movement failing to exercise nuance in describing differing misconduct. Furthermore, it is feared that such mislabelling may actually undermine efforts to hold sexual offenders accountable. Reports of the 'more serious' misdeeds such as Weinstein's may be given less credibility due to public backlash at a perceived lack of journalistic integrity following overzealous reporting of the 'less serious' actions of Ansari.[147]

[143] See Chapter 1.1.2 above.
[144] Ciche, above n 131.
[145] Damon, above n 133.
[146] Ashworth, above n 16, at 77.
[147] Boyle, above n 63, at 53.

2.3 ANALYSING THE CRITICISM

2.3.1 Should the Criminal Law treat sexual crimes differently?

It has been countered that the MeToo movement's refusal to lay down explicit guidelines for what constitutes sexually inappropriate behaviour does not necessarily undermine its legitimacy. Instead, its anti-formalist approach may be justified on the basis that sexual invasions are distinct from other variants of offending. This reveals scepticism toward the appropriateness of the traditional autonomy/welfare dichotomy in the realm of sexual offending.

As was mentioned in Chapter I, sexual crimes have a clear welfare purpose: discouraging sexual invasions of another person's body is necessary in order to give effect to the social contract.[148] Society's abhorrence towards rape can thus be seen as an application of this principle, as rape clearly invades the autonomy of the recipient without sufficient reason to constitute a legitimate exercise of the initiator's autonomy.

Over time, criminal laws have come to cover more than just forcible rape. Sexual violation,[149] indecent assault,[150] and a range of more specific variants of sexual offending are enshrined in the Crimes Act,[151] while the civil law also addresses sexual harassment and other 'lower level' sexual offending.[152] This expansion reflects the progression of society's views as to what constitutes sexually inappropriate behaviour. Just as rape is a clear breach of bodily integrity, less graphic intrusions are now also considered to be unacceptable exercises of one's own, and invasions of another's, autonomy. This echoes feminist scholar Liz Kelly's view that all sexual

[148] See Chapter 1.1.2 above.
[149] Crimes Act 1961, s 128.
[150] Section 135.
[151] Sections 128A – 144C.
[152] Human Rights Act 1993, s 62.

misbehaviour from making inappropriate comments through to forcible rape possess a "basic common character".[153]

Though the law's implied adoption of this spectrum may at first seem progressive, it remains subject to Smillie's formalist impulse. Despite acknowledging the appropriateness of the spectrum, New Zealand's laws continue to conceptualise it as being hierarchical. Only certain behaviours are crimes, while others are civil wrongs and others merely unsavoury but legal. This formulation reveals the law's irrepressible desire to clearly demarcate a line between conduct which is worthy of sanction and that which is not.

The issue with this approach in the realm of sexual offending is that it ignores Kelly's assessment that, while all behaviours on the continuum possess a "basic common character" as means of "abuse, intimidation, coercion, intrusion, threat and force", none is inevitably more harmful than another.[154] Rather than focusing on the action itself, Kelly notes how the situational and relational context in which they occurred are more determinative of the level of intrusion perceived by the recipient.[155] Thus, it is arguable that positivistic concerns surrounding the lack of a clear boundary between acceptable and unacceptable behaviour in the MeToo movement represent a misconception of the nature of sexual harm.

This objective approach favoured by the criminal law in determining sexual harm may be borne out of the distinctively masculine gaze of the criminal law.[156] Historically, criminal laws have been written by men, reflecting male experiences and concerns and envisaging male participants.[157] The predominant lack of sexual offending as against men may serve to explain why sexual invasions are siphoned through this male gaze and roughly equated with that of any

[153] Liz Kelly *Surviving sexual violence* (University of Minnesota Press, Minneapolis, 1988) at 76.
[154] At 76.
[155] Liz Kelly "The continuum of sexual violence" in Jalna Hanmer and Mary Maynard (eds) *Women, violence and social control* (Humanities Press International, Atlantic Highlands, New Jersey, 1987) 46 at 50.
[156] Katherine O'Donovan "Defences for battered women who kill" (1991) 18 *Journal of Law and Society* 219 at 220.
[157] At 222.

other breach of bodily integrity, failing to encompass the deeply traumatic implications of sexual violations on the victim-survivor.[158] Instead, just as some forms of assault and battery such as bumping into someone on a busy street are regarded as having been consented to in order to facilitate individual autonomy in practicality, so too are certain 'minor' sexual transgressions regarded as having been implicitly consented to in order to accommodate "ancient rituals of the human mating dance" in modern society.[159]

Thus, it is arguable that MeToo's failure to follow the traditional formalistic approach for identifying sexual misbehaviour is justified due to the unique nature of sexual offending. This is based on the view that the law's current understanding of sexual infractions is anachronistic, and thus the MeToo movement's refusal to 'draw a line' represents an effort to more authentically reflect the autonomy/welfare tension at play in the realm of sexual offending.

2.3.2 Just how 'unfair' is MeToo's labelling?

Similarly, the MeToo movement's apparent rejection of the 'fair labelling' principle has been justified as an effort to characterise sexually inappropriate behaviour with greater accuracy. As was established in Chapter I, the reputational effects of MeToo remain sufficiently serious to justify the engagement of criminal justice principles.[160] Thus, the grouping of various types of sexually inappropriate behaviour under the "#MeToo" banner could flatten distinctions between differing levels of misbehaviour, potentially inflicting unjustified reputational punishment upon lesser offenders.[161] Even feminist scholars have acknowledged that this exposes the double-edged sword of the #MeToo hashtag, as its ability to link various misdeeds

[158] Carine M. Mardorossian, "Toward a new feminist theory of rape" (2002) 27(3) *Signs: Journal of Women in Culture and Society* 743 at 746.
[159] *Peters v Police* HC Whangarei CRI-2006-088-4622 at [33] per Priestley J.
[160] See Chapter 1.3.2 above.
[161] Boyle, above n 63, at 53.

into a cohesive narrative may also serve to unfairly label individuals.[162] Furthermore, public backlash against reporting on 'less serious' misdeeds such as Ansari's may discredit the legitimacy of more abhorrent offending.[163]

However, other scholars have noted how seemingly minor sexual invasions can be instrumental in cultivating a culture of sexual objectification of women, or "rape culture".[164] The underlying principle that women's bodies may be invaded for one's own sexual pleasure in 'less serious' contexts implicitly affirms invasion of that individual's personal autonomy.[165] Not only is this antithetical to the criminal law, but it fosters an unspoken acceptance of such behaviour, potentially justifying further invasions.

As such, nominally linking socially-accepted but harmful intrusions of a person's bodily autonomy with actions agreed by society to be unacceptable may well be justifiable. Associating what the law perceives to be 'lower level' offending with the heinous actions of the likes of Weinstein could certainly be detrimental to C.K., Lees-Galloway or Ansari's reputation. However, it may also serve to illuminate the relationship between these different yet inherently connected actions.[166]

On this basis, MeToo's apparent failure in the realm of fair labelling is justified as serving to highlight an indelible link between types of behaviour. By recognising and holding individuals accountable for such infractions, it may be argued that the insidious causes of sexual offending can be more effectively targeted and counteracted.

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[162] Boyle, above n 63, at 54.
[163] At 53.
[164] See Emilie Buchwald, Pamela Fletcher and Martha Roth (eds) *Transforming a rape culture* (Milkweed Editions, Minneapolis, 1993).
[165] Heidi Matthews "#MeToo as Sex Panic" in Bianca Fileborn and Rachel Loney-Howes (eds) *#MeToo and the Politics of Social Change* (eBook ed, Palgrave MacMillan, 2019) 267 at 277.
[166] Kelly, above n 153, at 75.

2.4 CONCLUSION

From this chapter, it is clear that questions as to where the MeToo movement 'draws the line' between acceptable and unacceptable conduct resonate with traditional jurisprudential fears of unjustifiably invading the autonomy of citizens. Furthermore, the indiscriminate nature of the tagline "MeToo" across a vast and differing array of misbehaviours contradicts the principle of fair labelling.

However, the justification for these divergences from traditional criminal justice principles is that sexual offending is distinct in its effects on victim-survivors, and thus requires a reformulation of the traditional approach. The MeToo movement refuses to 'draw a line' in a positivistic sense, as it envisages efforts to do so as implicitly affirming perceived 'lesser' but actually dangerous misbehaviours. This novel perspective opposes the 'male gaze' which underpins the criminal law, and seeks to depict the autonomy/welfare tension evident in sexually inappropriate behaviour in a more genuine manner. Furthermore, the lack of differentiation between offenders represents a less permissive and more concerted effort to curtail sexual offending. The apparent cost of these initiatives may be the curtailing of individual autonomy, including spontaneous displays of romance and the right to be fairly labelled.

III. "Says Who?" – Concerns at Entrusting Journalists with Setting Societal Standards

3.1 THE COMMON CRITICISM

Mike Hosking maligned *Stuff*'s decision to launch a dedicated #MeToo campaign in 2017 as "tabloid news at its worst - masquerading under the blanket … of a deeply serious "issue"."[167] Hosking's indignance is helpful for illuminating the "says who" criticism of the MeToo movement: that it illegitimately entrusts the media with taking on a quasi-legislative function.

Hosking's subsequent assertion that "we don't need a newspaper company pretending to be cops as well as judges and jurors" develops this argument, suggesting that private institutions such as the media should not be involved in functions generally carried out by the State.[168] From Hosking's perspective, the inevitable consequence of news corporations' central motive of "get[ting] clicks on their website" means that "a lot of the "Me Too" campaign is not about illegal activity ... it's about hearsay, rumour, innuendo, scuttlebutt - sleaze and gossip".[169]

Thus, the thrust of this criticism is that news corporations' fundamentally profit-driven loyalties make their role in the field of justice indefensible. They are characterised as opportunistically and disingenuously aligning with the MeToo movement for their own gain, motivating them to report on the basis of maximizing publicity and profit, rather than based on a desire to seek a *democratically* approved form of justice. This lack of a guiding force beyond media exposure means they do not possess an adequate incentive to genuinely uphold justice in the standards

[167] Mike Hosking "Fairfax's 'Me Too' campaign tasteless, tacky and tabloid" *The New Zealand Herald* (online ed, Auckland, 2 March 2018).
[168] Hosking, above n 167.
[169] Hosking, above n 167.

of behaviour they deem worthy of broadcasting. The result of this is an incentive to engage in the supposedly frivolous reporting seen in the cases of both Ansari and Lees-Galloway.[170]

3.2 THE JURISPRUDENTIAL BASIS OF THE CRITICISM

Hosking's apprehensions appear to have their basis in criminal justice theory. One of the requirements of a formalistic approach to criminal law is that the responsibility for creating behavioural standards is reposed with a centralised, constitutionally legitimated authority.[171] This is due to the high risks associated with criminal convictions mentioned in Chapter I.[172] Not only do they include potential infringing of individual autonomy through punishments,[173] but also reputational damage stemming from the criminal law's inherent censuring function.[174]

With such important values at stake, theorists have identified the State as the appropriate actor to oversee this process.[175] The reason for this is that, regardless of the ideological affiliation or policy approach of those in government, the State's core aim remains giving effect to the social contract: protecting citizens' wellbeing from the state of nature without unduly constraining their personal sovereignty.[176] An important manifestation of this is maintaining a criminal system which evenly balances welfare and autonomy. The State is the ideal actor to carry this out as its dedication to the task is ensured through constitutionally-engendered democratic accountability.

[170] See Collette Devlin, above n 92; and Katie Way, above n 128.
[171] Campbell, Ashworth and Redmayne, above n 28, at 23.
[172] See above, Chapter 1.1.2.
[173] Ashworth, above n 16, at 22.
[174] At 1.
[175] Campbell, Ashworth and Redmayne, above n 28, at 23.
[176] At 28.

The Constitution Act 1986 requires that members of the Legislature (from which the Executive are selected) are democratically elected,[177] and that elections must occur every three years.[178] This regular form of public scrutiny guarantees that representatives have the greatest incentive in ensuring that the criminal justice system is sufficiently certain in its scope and effective in its function. This is because a failure to do so would presumably result in the government finding themselves vulnerable at the polling booth.

Furthermore, by having its members elected by the citizenry, the imposed standards of criminal law crafted should reflect publicly-accepted social attitudes.[179] As the legislature is meant to be "representative" of the populace, they should only promulgate laws which a majority of society support. Thus, as societal attitudes develop over time, they can be translated into legislation, allowing the law to shift incrementally alongside the evolution of societal mores.[180]

This jurisprudential perspective on the rightful source of criminal standards resounds with Hosking's criticisms of the MeToo movement. The controversial aspect of allowing journalists to dictate what constitutes sexually inappropriate behaviour is that they lack democratic accountability relative to that of the State. Furthermore, the control exercised by expressly commercial enterprises over a public censuring function akin to that held by the State could be cause for legal concern.[181] The fear is that this could see the journalistic apparatuses of the MeToo movement exploited through sensationalism in pursuit of profits, as the media lack the State's democratic incentive to enforce only those standards actually held by a majority of the population.

[177] Constitution Act 1986, s 10(4).
[178] Section 17(1).
[179] Victor Tadros 'Fair Labelling and Social Solidarity' in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, Oxford, 2012) 67 at 78.
[180] At 78.
[181] See Chapter 1.1.2 above for more discussion on this point.

3.3 ANALYSING THE CRITICISM

3.3.1 *Is the MeToo movement sufficiently democratic to allay concerns?*

Despite being a private institution, there has long existed the belief that the media serve a vital democratic role in society. The notion of the 'Fourth Estate' coined by Thomas Carlyle theorises that in a society where political power is predominantly held by the nobility and clergy (the *First* and *Second* Estates), the interests of the vulnerable populace (the *Third* Estate) require protection by an autonomous watchdog in the form of the press: the *Fourth* Estate.[182]

This perception of the media's role as using their investigative and distributive clout to represent public consensus and hold powerful institutions to account has been defended by journalists and organisation for over a century.[183] From this perspective, concerns surrounding the lack of democratic accountability in the traditional media are allayed by the claim that the media's interests lay in performing their Fourth Estate function.

Furthermore, the advent of social media has been hailed by some academics as a huge boon to democratisation. In contrast to the top-down information flow of traditional journalism, social media fosters a two-way dialogue for rigorous deliberative discussion.[184] Accordingly, social media may supplement the Fourth Estate role of the traditional media by providing a democratised platform which enables greater influence of public discourse for individuals, forming a 'Fifth Estate'.[185]

The most practical example of social media empowering democratisation may be evident through the process of cancellation. It was noted in Chapter I that most tangible toll inflicted

[182] Thomas Carlyle *Heroes: Hero-worship and the heroic in history* (Charles Scribner and Sons, New York, 1841) at 37.
[183] George A. Donohue, Phillip J. Tichenor, and Clarice N. Olien "A guard dog perspective on the role of media" (1995) 45(2) *Journal of Communication* 115 at 118.
[184] Geoff Kemp "Media, Politics and Democracy" in Babak Bahador, Geoff Kemp, Kate McMillan, and Chris Rudd (eds) *Politics and the Media* (2nd ed.) (Auckland University Press, Auckland, New Zealand, 2016) 3 at 15.
[185] William H. Dutton "The fifth estate emerging through the network of networks" (2009) 27(1) *Prometheus* 1 at 2.

upon targets of the MeToo movement generally comes from the swathes of the citizenry who 'cancel' the individual, rather than the actual news networks.[186] Thus, in a capitalist and democratic society, it is *the people* who can determine whether the individual will continue to hold their position of political or economic power and influence. Rather than being the product of news organisations, it has been argued that cancellation is essentially a plebiscite, or public "trial by Twitter".[187] In this sense, social media can be seen as providing a novel form of popular participation in the determination of what sexual conduct is unacceptable.

This retort therefore suggests that fears as to the MeToo movement's lack of democratic accountability are exaggerated. Faith is placed in the traditional media's self-identified role as the Fourth Estate and the common platform provided by social media, exemplified in the plebiscitary nature of cancellation.

While these idealistic conceptions of traditional media are comforting, political theorists have countered that such an interpretation is ultimately inaccurate. Practically speaking, the notion of a single public interest which the media can represent is unrealistic, as public opinion is virtually always fragmented.[188] The media is only capable of presenting a limited array of views, and academics have argued that those given prominence generally belong to groups which possess sufficient power within the structure to register.[189]

As adherents of the 'guard dog' conception of the media note, traditional news corporations have long represented the interests of organised and powerful groups, sustaining existing power structures.[190] This is deepened through the monopolisation of media by politically powerful

[186] See above, Chapter 1.3.2.
[187] Elisabeth Beattie "Trial by Twitter – how social media has made juries of us all" (30 March 2016) *The Spinoff* <https://thespinoff.co.nz/featured/30-03-2016/trial-by-twitter-how-social-media-has-made-juries-of-us-all/>.
[188] Donohue, above n 183, at 119.
[189] At 119.
[190] At 119.

moguls like Rupert Murdoch.[191] This is of particular concern in New Zealand, where it has been observed that "[t]he rulers of New Zealand's media system could squeeze into a closet".[192] As such, it is difficult to justify the perspective that New Zealand's media are capable of representing public opinion in a genuinely democratic fashion. Not only is the presentation of varying perspectives extremely difficult, but media ownership is also concentrated in the hands of a small number of individuals.

The issue of ownership has additional ramifications, namely that the possession of news organisations predominantly belongs to commercial entities.[193] Analysts have claimed that "[t]he hallmark of the global media system is its relentless, ubiquitous commercialism", creating an incentive to cut costs and provide content which appeals to advertisers.[194] Such "media logic" is detrimental to the supposed goals of representation, information and accountability.[195] Instead, a commercial focus demands that content is designed to attract publicity rather than uphold justice or provide proportional representation. This explains the roots of Hosking's fears that MeToo journalism could fall prey to the temptation of profitable sensationalism.

Hopes that social media could counter news corporations' commercial focus through decentralised provision of platforms appear similarly forlorn. Studies suggest that social media has in fact exacerbated commercial concerns in the traditional media by presenting further advertising competition.[196] The same reliance on advertising which besets traditional media

[191] Greg Simons "The Death of the fourth Estate: Corporate Media and News Production" (2013) 3(118) *Izvestia: Ural Federal University Journal* 145 at 148.
[192] Robert W. McChesney *Rich Media, Poor Democracy: Communication Politics in Dubious Times* (University of Illinois Press, Urbana and Chicago, 1999) at 89.
[193] Edward S. Herman and Noam Chomsky *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, New York, 2002) at 14.
[194] McChesney, above n 192, at 108.
[195] Mel Bunce *The Broken Estate: Journalism and Democracy in a Post-Truth World* (Bridget Williams Books, Auckland, New Zealand, 2019) at 65-66.
[196] Robert W. McChesney and John Nichols "Flawed choices, false hopes" in Robert W. McChesney and John Nichols (eds) *The death and life of American journalism: the media revolution that will begin the world again* (Nation Books, New York, 2010) 75 at 75.

also afflicts social media, and is arguably worse due to phenomena such as "infrastructural capture".[197] This refers to news organisations tasked with scrutinising powerful platforms like Google and Facebook being incapable of operating sustainably without the access to audiences provided by those corporations.[198] Such a conflict of interest clearly compromises any news outlet's ability to hold the institutions with the most power in society to account.

These flaws in the media serve to highlight the imperfection of cancellation. Social media initially appears to be a force for democratisation through its unrivalled facilitation of mass public interaction with justice. On the surface it seems to give the populace the power to determine which actions are acceptable and which are not. However, this mischaracterises the true localisation of power in the MeToo realm. The most influential power is not in who *judges* whether someone is cancelled, but rather who determines whether someone's conduct is *up for judgement* in the first place. In other words, the power to control what information the public are exposed to via a judgemental lens is more important than the power to judge.

It was noted in Chapter I that the factors which motivate media's publicity include prominence, unusualness, public interest, celebrity involvement and plausibility – none of which are directly related to justice.[199] As such, the stories presented in the would-be plebiscite are not necessarily reflective of the general shape and nature of sexually inappropriate behaviour in New Zealand, nor the aims of the MeToo movement. Instead, stories selected according to a news corporation's rubric are presented through #MeToo's condemnatory lens.

The concern is that powerful traditional and social media sources have retained the power to set the public agenda.[200] Even where power may appear to lie in the hands of the masses, media

[197] Efrat Nechushtai "Could digital platforms capture the media through infrastructure?" (2018) 19(8) *Journalism* 1043 at 1048.
[198] Nechushtai, above n 197, at 1048.
[199] See above page 25.
[200] Samantha Bradshaw and Philip Howard "The Global Organization of Social Media Disinformation Campaigns" (2018) 71 *Journal of International Affairs* 23 at 23.

institutions continue to control what stories the public express judgement on, stories which cannot be divorced from their ultimately commercial imperatives. Additionally, offenders within or connected to media organisations may possess additional protection by virtue of their position. For example, NBC delayed Ronan Farrow's investigation into Harvey Weinstein for up to eight months, and made concerted efforts to dissuade him from publishing, prompting his move to the *New Yorker*.[201]

It should be noted that this criticism does not seek to vilify individual journalists. Instead, it is merely stating that the lack of concrete democratic controls on traditional and social media, in addition to their vulnerability to manipulation for personal gain suggest that this criticism of the MeToo movement is, at least in theory, well-founded. To expect such power to be used in a democratic fashion based on the good will of individuals rather than deliberate controls is a step which cannot be justified under the principles of criminal justice.

3.3.2 *How important is democratic accountability?*

Having acknowledged this democratic shortfall evident in the MeToo movement, it is worth asking whether the failing can be justified in the process of setting standards for what constitutes sexually inappropriate behaviour. Thus, this section shifts focus to the criminal justice system, interrogating it in order to assess how important and achievable public representation is in defining sexual misconduct.

Analysis of the legislative process within New Zealand's criminal justice system demonstrates how difficult it is to fashion standards of behaviour in a genuinely democratic manner. The creation of laws appears to be one of the most ostensibly democratic aspects of the criminal

[201] Hirshman, above n 60, at 249.

justice system, as those who pass Bills into law are elected representatives. However, it does not necessarily follow that the legislation represents a crystallisation of societal mores into law. Academics have noted that the development of criminal legislation is generally stimulated by political opportunism rather than a systematic synthesis of prevailing attitudes.[202] In the wake of widely-publicised events, politicians use public outrage to justify changes to the criminal law. Examples of this include emotive cases such as the murders of Sophie Elliot and Christie Marceu, after which politicians of various affiliations supported the removal of the defence of provocation and stricter conditions for granting bail.[203] While democratic in the sense of being 'what the people want', it does not denote the evolution of social attitudes. Rather, they may in some cases exemplify knee-jerk reactions to media-fuelled occurrences which are not representative of the general characteristics of these kinds of crimes.[204]

The extent of democratic accountability in the criminal justice system is also called into question when one considers the role played by judges and juries in determining the scope of criminal liability. Judges are intentionally unelected, justified on the basis that they are tasked with interpreting, rather than creating, law.[205] This, however, ignores that reality that judges are required to define the breadth of criminal legislative terms, and that many criminal defences are found in the common law.[206]

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[202] Ashworth, above n 16, at 39.
[203] 22-year old Sophie Elliot was brutally murdered by Otago University lecturer Clayton Weatherston in 2008. Weatherston's subsequent invoking of the defence of provocation, despite having inflicted 216 wounds upon Elliot through the use of a knife, resulted in a considerable media-fuelled public attention, eventually resulting in Parliament abolishing the defence of provocation in 2009. See "Provocation defence abolished" *The New Zealand Herald* (online ed, Auckland, 27 November 2009). Similarly, 18-year old Christie Marceau was stabbed to death by Akshay Chand, who was on bail after having been charged with kidnapping, threatening to cause grievous bodily harm, and assault with intent to sexually violate Marceau. The fact that he was given bail despite residing a mere 300 metres from her home prompted media and public uproar, culminating in more stringent bail requirements being legislated through the Bail Amendment Act 2013. See also Isaac Davison "Stricter bail decisions thanks to 'Christie's Law'" *The New Zealand Herald* (online ed, Auckland, 5 December 2013).
[204] Jeremy Finn, Elizabeth McDonald and Yvette Tinsley "Identifying and qualifying the decision-maker: The case for specialisation" in Elizabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 221 at 232.
[205] Jerome Frank *Law and the Modern Mind* (Transaction Publishers, New Jersey, 1930) at 35.
[206] Crimes Act 1961, s 20(1).

Counteracting the lack of democratic accountability of judges are juries, representing the populace within the judicial branch of government.[207] Despite the idealistic intentions of the jury system, juries are bound to rule according to the criminal law which, as was explained in Chapter II, often reflects a male bias.[208] Furthermore, New Zealand's judicial branch has historically been dominated by white males.[209] Thus, while the idea of juries as bastions of democracy is attractive, even the New Zealand Law Commission have acknowledged that it rarely reflects reality.[210]

Just as the public engaging in cancelling of public figures have the agenda pre-set for them by the media, juries can only judge the cases which have reached them through the system, are presented evidence in a manner which panders their pre-existing beliefs regarding sexual offending, and are asked to make their decision according to the existing positivistic laws. All this would serve to suggest that democratic accountability is more of an ideal of criminal justice rather than a value which appears in practice.

Ultimately however, these shortfalls within the existing criminal justice system do not negate the weaknesses of the MeToo movement. While highlighting how difficult genuine democratic accountability is to coordinate on a nation-wide scale, it does not excuse the fact that the MeToo movement is comparatively lacking in democratic input. Dissatisfaction with the criminal justice system can still be responded to at the polling booth. Regardless of whether or not genuine representative democracy is exercised in practice, the existence of democratic recourse in the criminal justice system and its absence in the media is enough to highlight a significant weakness of the MeToo movement.

[207] New Zealand Law Commission, above n 51 at [57].
[208] See above, page 37.
[209] Finn, above n 204.
[210] New Zealand Law Commission, above n 51 at [58].

3.4 CONCLUSION

Following this analysis, it is above all clear that democratic accountability is a difficult ideal to uphold in a practical sense. Just as the Fourth and Fifth Estate roles of the media are undermined by inherently commercial motivations, so too may truly representative democracy in Parliament be vulnerable to opportunism.

Unlike in Chapter II however, there does not appear to be any justifiable defence for this deficiency of the MeToo movement. It seems to be an inevitable feature of MeToo's commercial roots, and is not any less damning in the face of a democratically-compromised criminal justice system. Thus, the criticism of the MeToo movement as illegitimately entrusting journalists with setting societal standards represents a valid theoretical and practical concern.

IV. "What If She's Lying?" – Concerns Surrounding the Lack of Formal Procedure in the MeToo movement

4.1 THE COMMON CRITICISM

Following allegations of engaging in sexual assault alongside his client Jeffrey Epstein, celebrity lawyer Alan Dershowitz claimed that, in the MeToo climate:[211]

> [i]f you call a woman a liar, even if you didn't do it, you're guilty of calling a woman a liar, so there's no way out. If you don't deny it, you're thought to be guilty. If you do deny it, you've committed an additional political sin, so it's a trap.

Dershowitz's declaration highlights the "what if she's lying" criticism of the MeToo movement: that it reverses the presumption of innocence, opening innocent people up to being found guilty of wrongs they did not commit. Mike Hosking highlighted the risks of such a precedent when he asked:[212]

> What if they get it wrong? What if they drag a name front page in their zeal for clicks and it doesn't quite pan out to be true? What then? A page 18 apology, while the poor sap's life is over?

This criticism encompasses fears that journalists and social media users within the MeToo movement are not bound by a due process which fairly and adequately tests the veracity of complainants and their stories. Thus, efforts to "believe all women" have the potential to cause underserved reputational damage of innocent individuals.

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[211] Alan Dershowitz quoted in Karlyn Borysenko "The Dark Side Of #MeToo: What Happens When Men Are Falsely Accused" (12 February 2020) *Forbes* <https://www.forbes.com/sites/karlynborysenko/2020/02/12/the-dark-side-of-metoo-what-happens-when-men-are-falsely-accused/?sh=578af3a4864d>. See also Alan Dershowitz *Guilt by Accusation: The Challenge of Proving in the Age of #MeToo* (Simon and Schuster, New York, 2019).

[212] Hosking, above n 167.

4.2 THE JURISPRUDENTIAL BASIS OF THE CRITICISM

Dershowitz and Hosking's concerns tap into fundamental criminal justice principles. As was outlined in Chapter I, one of the overarching philosophical anxieties associated with the social contract is the State's immense powers over its civilians.[213] With the ability to set standards of behaviour, monopoly on legitimate violence to enforce them and right to judge whether they have been breached, 'the Crown' represents a hugely coercive force when pitted against a mere defendant in the criminal justice context.[214]

One of the key limiting measures on the use of this power is democratic accountability, which was discussed in Chapter III.[215] However, democratic accountability is difficult to engender on an ongoing basis due to elections only occurring once every three years. As such, the powers of the State need to be limited in some other way, lest the Leviathan-like State rule tyrannically by abusing its coercive might.[216]

The State is thus constrained by the imposition of limits, procedures and presumptions which ensure that it may *only* invade individual autonomy as far as is necessary to secure the conditions of societal welfare, and no further.[217] This ensures that the State's use of power not heavy-handed, and that its ability to invade autonomy may only be engaged where the proof of culpable harm to societal welfare is extremely high. To allow the State to breach individual liberties in an unconstrained fashion and justify it to any lesser a standard of proof in the claimed pursuit of justice would undermine the very fabric of the social contract.[218]

[213] See above, Chapter 3.2.
[214] Ashworth, above n 16, at 71.
[215] See above, page 42.
[216] Hobbes, above n 24, at 72.
[217] Campbell, Ashworth and Redmayne, above n 28, at 25.
[218] Hobbes, above n 24, at 112.

The consequence of this conceptualisation of the State/defendant dynamic is that pursuit of the *truth* does not lay at the heart of the adversarial criminal justice system.[219] Instead, the key is that the manner in which justice is sought is defensible and precludes unjustified invasions of individual autonomy.[220] Accordingly, the criminal justice system's perspective is that it is preferable to acquit someone who has factually committed a crime rather than convict someone who has not.[221] William Blackstone's legendary formulation of this principle was that "[i]t is better that ten guilty persons escape than that one innocent suffer."[222] While the acquittal of a guilty person may reduce confidence in the system and upset the victim, it is seen as less dangerous than permitting the State to use its powers in an unjustified fashion.

The limits referred to are numerous, and are evident throughout the process of criminal investigation outlined in Chapter I.[223] These safeguards include restrictions on the ability to question and arrest suspects,[224] how evidence is collected,[225] and whether it may be presented in court.[226] Once arrested, the accused can generally secure name suppression throughout the process.[227] Additionally, initiatives such as bail prevent the defendant from having their freedom of movement limited without strong evidence suggesting that they pose a threat to the welfare of society.[228] They are given the opportunity to confront their accuser, face an unbiased tribunal, and present evidence to refute accusations of guilt.

However, the important presumption which underpins all of those aforementioned is that the burden of proof lays with the State. The corollary is that the defendant is presumed to be

[219] Jenny McEwan "Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial" in Anthony Duff and others (eds) *The Trial on Trial Volume 1: Truth and Due Process* (Hart Publishing, Oxford, 2004) 61 at 61.
[220] Ashworth, above n 16, at 25.
[221] Campbell, Ashworth and Redmayne, above n 28, at 26.
[222] William Blackstone *Commentaries on the laws of England* (J.B. Lippincott Co., Philadelphia, 1893) at 359.
[223] See above, pages 14-15.
[224] Crimes Act 1961, s 315(2).
[225] Evidence Act 2006, s 30(6).
[226] Evidence Act 2006, pt 2.
[227] Criminal Procedure Act 2011, s 200.
[228] Bail Act 2000 s 21(1)(a).

innocent until it can be proven beyond reasonable doubt that they are guilty.[229] Famously referred to as the "golden thread" running through English criminal law, it stands as the foundational philosophical proposition which seeks to rebalance the power disparity between the State and the defendant: the onus is on the State to use its immense powers in a constrained and thus justifiable fashion to prove that the defendant is culpable of committing a wrong against society.[230]

In light of this stance, the resonance of the common criticism is clear. The safeguards which judiciously control the criminal justice process do not appear to be as prevalent in the MeToo movement. The methodology for investigative questioning and evidence collection in journalistic circles is not uniformly regulated by law or code.[231] Standards vary between outlets, and limits in approaches are mainly self-imposed based on "the judgement we have built up" rather than express guidelines.[232]

Significantly, the presumption of innocence is a constraint which does not appear to be as steadfastly enforced within the MeToo movement. Studies indicate that journalists involved with MeToo reporting tend to reverse the presumption of innocence in their investigative approach, initially accepting the testimony of complainants to be true.[233] Borne out of the desire to treat victim-survivors carefully, reports into MeToo reporting have noticed how this 'source subjectivity' "approached survivors with an attitude that they were truthful, until proven otherwise."[234]

[229] New Zealand Bill of Rights Act 1990, s 25(c).
[230] *Woolmington v DPP* [1935] UKHL 1 at 8 per Viscount Sankey.
[231] Mau, above n 100.
[232] Mau, above n 100.
[233] Hollings, above n 95, at 233.
[234] At 233.

Thus, this criticism posits the MeToo movement's demonstrably institutional powers and their potentially damaging censuring effects make it dangerous to allow it to contradict integral principles of the criminal justice system such as the presumption of innocence.

4.3 ANALYSING THE CRITICISM

4.3.1 Existing laws as de facto procedural safeguards

While it is true that the MeToo movement is not subject to direct procedural safeguards in the manner of the criminal justice system, it has been argued that existing laws act as de facto procedural safeguards. With regard to the investigative process, a clear example of this is that (unlike the police) journalists are unable to gather evidence via illegal means. While the practical efficacy of this is difficult to calculate with developments in technology, the existence of concerted efforts to bring those who breach to justice highlights that these transgressions do not occur with impunity.[235] This stems from the simple fact that the media is not backed by the coercive power of the State, and thus may not need to be as strictly limited as a State institution.

Another important legal constraint on journalistic behaviour is the law of defamation. Defamation law provides an important protection for MeToo "defendants", as the law in New Zealand regarding defamation favours the supposedly defamed individual.[236] They are regarded to have been defamed if the statement is a false statement "to the discredit of" the plaintiff in the estimation of right-thinking members of society generally.[237]

This wide ambit is accompanied by a low threshold for what constitutes publication; which requires that someone is made aware of what is said; as well as reference to the plaintiff, which

[235] John Cassidy "The Full Rupert: Murdoch at the Leveson Inquiry" *The New Yorker* (online ed, New York, 25 April 2012).
[236] Hollings, above n 95, at 234; see also Mau, above n 100.
[237] *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 at 625 per Blanchard J.

can be implied.[238] Finally, the evidential burden for the defence of truth lies with the defendant publisher to prove that what has been claimed is not materially different from the truth.[239] The consequence of such a high standard is that news organisations are vulnerable to costly defamation claims unless they are confident that the evidence they possess meets the legal threshold to discharge this burden.

Furthermore, accepted standards of journalistic practice often echo the key principles of criminal justice. Approaching the accused for comment and allowing them to face their accuser frequently feature in typical journalistic practice.[240] Ansari's story is often cited as an example where this did not occur, as publishers *Babe.net* only gave Ansari six hours to respond before the story was published.[241] However, such an approach undermines public faith, exemplified by the considerable backlash received by *Babe.net* following the article, and their subsequent folding within a year.[242] In this sense, the need for journalists to be seen as reputable generally requires them to adhere in practice to the principles of criminal justice.

As such, while the law may not possess provisions which explicitly bind journalists in the way that it does the criminal justice process, it nevertheless inhibits news organisations in the manner in which they gather evidence and publish stories. These safeguards are de facto in that they are weaker than the deliberate constraints placed on the State. The fact that they are neither standardised nor enforced by law (at least not to the same standard as the justice system) may show that there is cause for concern. Nevertheless, it is inaccurate to portray the MeToo movement as being an entirely anarchical, deregulated force which operates outside the confines of due process.

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[238] *Sellman v Slater* [2018] 2 NZLR 218 at [22] – [46] per Palmer J.
[239] *Weir v Karam* (HC Auckland CP 139/98, 20/9/2000 at [16] per Anderson J.
[240] Mau, above n 100.
[241] Caroline Framke "The controversy around Babe.net's Aziz Ansari story, explained" (18 January 2018) *Vox* <Babe.net's Aziz Ansari story, and the controversy around it, explained - Vox>.
[242] Allison P. Davis "The Wild Ride at Babe.Net" (23 June 2019) *The Cut* <The Rise and Fall of Babe.Net and The Aziz Ansari Story (thecut.com)>.

4.3.2 Assessing the suitability of MeToo procedural safeguards in the face of a reversed power imbalance

While acknowledging that the MeToo movement does feature some procedural safeguards, it is clear that they are weaker than those of the criminal justice system. This section asks whether such relaxed limits are justified by the context of the type of offending addressed by the MeToo movement.

As has been established, the reason for requiring the imposition of strict procedural requirements on the State throughout the criminal justice process is due to the power imbalance between the State and defendants.[243] However, it is arguable that the weakened due process requirements of the MeToo movement are justified on the basis that they address a more pertinent disparity of power.

The individuals generally targeted by the MeToo movement are those with wealth, power or influence.[244] The economic, social and legal clout of figures like Weinstein allows them to escape accountability from the law for their actions through the means at their disposal.[245] Threatening subordinates with loss of employment and costly legal processes, coercing the signing of non-disclosure agreements and promising rewards brings into focus a separate power imbalance evident in the realm of sexually inappropriate behaviour.[246]

The legal system expects victim-survivors to risk their current employment by producing evidence from generally private encounters that must satisfy a hugely demanding legal burden. In this sense, the presumption of innocence designed to protect vulnerable individuals serves

[243] See above, Chapter 4.2.
[244] Matthews, above n 165, at 272.
[245] At 272.
[246] Boyle, above n 63, at 22.

to perpetuate the position of powerful individuals, who use their status to infringe the autonomy of others, to the detriment of society's general welfare.

As such, it has been argued that weakened due process requirements in the MeToo movement are justified in their ability to address this more relevant power imbalance. The narrative envisaged of a powerless defendant against the Leviathan State is replaced by the reality of a hugely privileged defendant against a compromised victim-survivor. This common power dynamic may allay concerns at the relaxed procedural requirements. Not only are they necessary in order to more authentically pursue justice, but they also apply to defendants who possess sufficient economic clout and legal recourse to respond to them.

Concerns of discrimination against celebrities can arguably be refuted by the law's existing acceptance of a different standard of personal privacy for celebrities in the law through the *Hosking v Runting* privacy tort.[247] As such, it could be argued that the MeToo movement's softened procedural requirements are vindicated by the context of the power imbalance which they seek to rectify.

4.3.3 Implications of the rebalance

The aim of the MeToo movement's approach to justice is that it possesses the ability to do better by victims than the criminal justice system. Ali Mau, New Zealand's most experienced MeToo journalist, commented:[248]

> nobody ever gets in touch with a journalist unless they are at the end of their tether … people do … what society considers the right thing, and follow their workplace process or go to the

[247] *Hosking v Runting* [2005] 1 NZLR 1 at [121] per Gault and Blanchard JJ.
[248] Mau, above n 100.

> police. We generally only see them when they're out the other end of that process and it has been a deeply injurious or unsatisfying one for them.

This demonstrates how the MeToo movement's points of difference stand as an effort to make the process of addressing sexually inappropriate behaviour better for victim-survivors. Studies in New Zealand reveal that sexual offending and rape in particular feature an unusually high rate of attrition throughout the investigative and prosecutorial stages.[249] Some of this has been attributed to the persistence of societal misconceptions as to what "real rape" looks like.[250] These myths include police being less likely to pursue a charge and juries being less likely to convict in sexual cases where the victim: had an ongoing relationship with accused, was intoxicated, lacked injury or was not visibly upset.[251] This endures despite the fact that none of these factors are determinative or even necessarily 'normal' in victim-survivors of sexually inappropriate behaviour.[252]

Furthermore, sexual offending features some of the lowest reporting rates of any crime in New Zealand.[253] A significant reason for this is that the autonomy-centric process places such high burdens upon complainants that not only does it reduce their likelihood of success, but it also revictimises them.[254] Invasive medical examination, sceptical police questioning and accusatory cross-examination have all been cited as aspects of the system which may make it just as bad as the original intrusion.[255] The result of this deeply damaging experience is that

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[249] Sue Triggs and others *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Ministry of Women's Affairs, Wellington, 2009) at 171.
[250] Elizabeth McDonald and Rachel Souness "From "real rape" to real justice in New Zealand Aotearoa: The Reform Project" in Elizabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 31 at 41.
[251] Mary R. Rose, Janice Nadler and Jim Clark "Appropriately Upset? Emotion Norms and Perception of Crime Victims" (2006) 30 Law & Hum Behav 203.
[252] Richard B Felson and Paul-Phillipe Pare "Gender and the victims' experience with the criminal justice system" (2008) 37 Social Science Research 202.
[253] Ministry of Justice *The New Zealand Crime and Safety Survey 2009: Main Findings Report* (Wellington, 2010) at 45.
[254] Venezia Kingi and others *Responding to Sexual Violence: Pathways to Recovery* (Ministry of Women's Affairs, Wellington, 2009) at 174.
[255] At 174.

victim-survivors of sexually inappropriate behaviour are often advised by friends not to go through the official State process.[256]

It is therefore clear that the MeToo movement's relaxed procedural requirements at least partially seek to fill a gap left by the criminal justice system. Source subjectivity, the absence of aggressive cross-examination and allowance of the victim-survivor's genuine autonomy as to whether their story is published all represent initiatives which both protect and empower the victim-survivor. Furthermore, academics have emphasised how traditional conceptions of justice may still be achievable despite contradiction of certain traditional principles. Deb Waterhouse-Watson argues that just as "accused persons must be held innocent until proven guilty, a complainant must equally be presumed 'innocent' of fabricating the charge."[257] This is particularly relevant given the societal belief that false rape accusations are common, despite a lack of evidence supporting such a claim.[258] As such, the MeToo movement's perspective is that its softened procedural rigour enables it to be more victim-survivor-centric, opening up the possibility for better fulfilment of the welfare requirement of the social contract.

However, it would be inaccurate to assume that these relaxed safeguards evident in the MeToo movement are not without risk. Of particular concern are observations that the MeToo movement often misrepresents the realities of sexually inappropriate behaviour. Snubbing of non-white, LGBTQi+ and male victim-survivors are significant shortfalls in the current processes of the movement.[259] Part of the issue stemming from its non-systemic mandate is that stories which are popular in society are given the platform to do so. This may motivate

[256] New Zealand Law Commission *Juries in Criminal Trials Part One*, above n 51, at [194].
[257] Deb Waterhouse-Watson "Framing the victim: sexual assault and Australian footballers on television" (2012) 27(71) Australian Feminist Studies 55 at 56.
[258] Louise Ellison and Vanessa Munro "A Stranger in the Bushes or an Elephant in the Room? Critical Reflections on the Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13 New Crim LR 781 at 801. See also Triggs, above n 249, at 42.
[259] Jess Ison "'It's Not Just Men and Women': LGBTQIA People and #MeToo" in Bianca Fileborn and Rachel Loney-Howes (eds) *#MeToo and the Politics of Social Change* (eBook ed, Palgrave MacMillan, 2019) 151.

media to fall into popular narratives in the style of "missing white woman syndrome" in its approach to reporting.[260]

Furthermore, some fear that MeToo could set a precedent for exposing ordinary members of the public through a similar mechanism which is justified by the power imbalance referred to above.[261] Examples include New Zealand's stand-up comedy and musical communities, where individuals have 'named and shamed' people whom they allege of sexually inappropriate behaviour on social media.[262] While concerning, this fear may be refuted by the reality that social media alone is unlikely to disseminate claims far enough to warrant comparison with a State sanction, even in a reputational sense. Public disclosure of such facts does undermine due process, but it does not engage the kind of criminal justice concerns that an institutional force such as a media outlet might. The law of defamation also remains available to those accused, and social media platforms possess functions for reporting false statements.

4.4 CONCLUSION

The claims that the MeToo movement contradicts key principles of due process appears to be persuasive. However, fears that it is some sort of anarchical, deregulated area outside of legal constraint are overstated. While the limits are certainly less onerous than those imposed on the State, this is done in an effort to rebalance the social contract in response to the failure to adequately address sexually inappropriate behaviour in New Zealand.

[260] 'Missing White Woman Syndrome' refers to the belief that white women tend to disproportionately receive the most amount of news coverage compared to other demographics. For more see Zach Sommers "Missing White Woman Syndrome: An Empirical Analysis of Race and Gender Disparities in Online News Coverage of Missing Persons" (2016) 106(2) J.Crim.L.& Criminology 275.
[261] See above, Chapter 4.3.2.
[262] Corlett and Lock, above n 88.

It has been argued that MeToo's approaches "'certainly aren't due process, but they also don't bypass due process: they exist in a vacuum of due process'—a symptom of pervasive injustice and institutional failure".[263] While not perfect, the MeToo movement appears to play a valuable role in rebalancing the power disparity which prevents accountability within the criminal justice system. The key will be whether the media's utilisation of their relaxed restrictions will see them portray offending authentically, or fall into the trap of what is commercially successful. Even if this is the case, it is arguable that perfect should not be made the enemy of good, as even a compromised portrayal of sexually inappropriate behaviour may be preferable to that which presently occurs within the criminal justice system.

[263] Sarah Jeong "When Whisper Networks Let Us Down" (21 February 2018) *The Verge* <When whisper networks let us down: how communities struggle — and sometimes fail — to stop sexual assault - The Verge> quoted in Haire, Newman and Fileborn, above n 2, at 213.

V. Conclusion

This dissertation has demonstrated how common expectations as to how justice should be delivered are shaped by the nature of the criminal justice system. As such, the MeToo movement's controversy stems from how its philosophy, source and process depart from those of the State.

In Chapter II, it was indicated that the MeToo movement fails to promulgate clearly-defined standards of what constitutes inappropriate behaviour. While this does contradict the law's formalistic impulse, it is likely justified due to its ability to acknowledge the subjectively damaging impact of sexually inappropriate behaviour, while also highlighting the intrinsic link between 'less serious' misbehaviour and criminal offending.

In Chapter III, it was conceded that the lack of democratic accountability in MeToo journalism is concerning. However, the fact that similar pitfalls beset the criminal justice system reveals how difficult genuine democratic input into justice is. This represents the most convincing of the criticisms levied at MeToo, and indicates that perhaps for MeToo to be accepted, there needs to be wider participation in its discourse. Whether this is achievable given the seemingly inevitable commercial pressures attached to both the traditional and social media remains to be seen.

Finally, Chapter IV noted the lack of specific procedural safeguards governing the MeToo movement, particularly in relation to the presumption of innocence. Close analysis indicated that the MeToo movement still possesses procedural limits, with their slightly weaker thresholds warranted on the basis of the reversed balance of power evident in the situations targeted by MeToo. Nevertheless, this does indicate a different procedural standard being applied against celebrities, which is potentially discriminatory. Furthermore, the precedent set

by this may be a source of concern in the future if applied to non-celebrities, though the likelihood of the media's might being used against such figures seems unlikely.

These conclusions confirm that the MeToo movement's embedment within a capitalist, profit-seeking framework is not conducive to *systematically* achieving sexual offending justice in a sustainable fashion. However, its points of divergence from the traditional approach in relation to how it *defines* sexually inappropriate behaviour and *investigates* individual instances are neither so radical nor damaging as to preclude their peaceful coexistence alongside the criminal justice system. Instead, these represent a reconceptualisation of sexual criminality, seeking to address damaging sexual behaviour in an authentic manner, realistically represent power dynamics and genuinely accommodate victim-survivors.

The MeToo movement is not an attempt to replace the criminal justice system. Instead, it is a combination of the good intentions of individual journalists and survivors and the lucrative avenues opened up by social media. Unless the existing system recognises that the delivery of justice outweighs the sanctity of legal principles, the MeToo movement will continue to fill this gap outside the courtroom.

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