



# PREVENT RESIST SUPPORT

## Episode 12: Sexual Violence & Civil Law

with Gillian Hnatiw



University  
of Windsor

Sexual Misconduct Response  
and Prevention Office

### **Prevent Resist Support Podcast**

#### **Episode 11: Sexual Violence & Civil Law with Gillian Hnatiw**

Gillian Hnatiw: If you understand the criminal system from watching too much Law and Order, you know, Special Victims Unit probably

Anne Rudzinski: I love Special Victims Unit. So, it's like guilty pleasure in this line of work?

Gillian: Well, there's nothing wrong with that except that it's an American show. So the terminology is different. And that that is a show that set in the strictly criminal context.

(Transition music)

Anne: Hi, everyone, I'm Anne, and this is Prevent Resist Support, a podcast by the Sexual Misconduct Office at the University of Windsor. Today, I get to talk with Gillian Hnatiw, who is a lawyer in Toronto, who has specialized in sexual assault, harassment and violence, and has worked on lots of cases where she's advocated for survivors in different ways. So today, Gillian joins us to talk about the difference between the criminal and civil legal options that survivors have, which is really excellent, because I think that folks often don't have a great understanding of what that looks like. So Gillian is going to walk us through some of those options. As always, this means that we'll be talking about sexual assault. And so if you need support, and you're a member of our UWindsor community, you're welcome to reach out to us at the uwindsor sexual misconduct office, you can find all of our contact info

uwindsor.ca/sexual-assault, or you can email us at [svsupport@uwindsor.ca](mailto:svsupport@uwindsor.ca). And if you are not a member of our uwindsor community, you can find support in your community, in Windsor or anywhere in Ontario at the Ontario coalition of rape crisis centers, which you can find at [sexualassaultsupport.ca](http://sexualassaultsupport.ca). So as always, I'm going to make sure that all of the links and resources that Gillian talks about today can be found in the episode description. And if you would like to access a transcript of this podcast episode, you can find that on our website, the link to that will also be in our episode description. So let's start our chat with Gillian.

Transition music: I got your back my dear and I know that you got mine. I feel that hope and fear but I know we'll hold the line. Keep your head up. Keep your hand out when your breath is feeling short. Prevent, Resist, Support.

Anne: So our discussion today is going to be about the criminal justice system and the civil law side of things and different routes to accessing justice. So I thought it would be nice to start with what does justice mean to you?

Gillian: Oh, that's an easy question to start off with.

Anne: I know that's a big one.

Gillian: Yeah. I mean, for me, justice means what it means to my clients to some extent, I think it really means accountability and change, as opposed to necessarily strict criminal consequences. And so accountability can take different forms. Very often in my work that it takes the form of money, which is an important way of assisting survivors get their life back together. It also takes the form of deconstructing the power that enabled the individual to commit the acts of violence in the first place.

Anne: I love that. So it's not just about sending folks to jail.

Gillian: No, I think that at the end of the day, that's not a satisfying result for really anybody. I have yet to have somebody call me up and say the

most important thing for me is that this person goes to jail. That can sometimes be in the mix of things that they are potentially looking for. But the most common call I get is from somebody who hasn't, who has experienced a trauma or experienced a series of traumas, sometimes recently, sometimes in the distant past, and they are feeling a need to do something about it. And they want to know what their options are. And that's typically how it starts. They sometimes can't name the fact that they're looking to empower themselves around that experience. But often once you peel back the layers, that's kind of what's at the center of it. I often hear about a desire to protect others or support others and in equal parts, sort of a desire to have some kind of accountability from that individual, but it doesn't usually start with, "I want so and so to go to jail."

Anne: That is such a helpful kind of breakdown of things. Your work is survivor centered, and you've put a lot of energy into representing survivors of sexual violence in a really empowering way. So what does that look like for you? And why have you put your attention into this aspect of the legal world?

Gillian: So for me, it looks like starting with the human being in front of me, hearing about their experience, and what has brought them to a place in life where they are reaching out to a lawyer for some help, or some advice, and understanding what they hope to achieve. If that sounds really basic, and simplistic, it probably is. But it just starts with the idea that my work starts with my clients. And I try and create a strategy that achieves their individual goals, as opposed to being a kind of lawyer that tells them what they should do. When people talk about sexual violence, so often, the knee jerk response is to tell them to call the police. And there are all sorts of barriers to reporting, in addition to legitimate reasons why people may choose not to report. And so often I hear, "I don't want to go to court, I don't want this person to go to jail, I just want it to stop" or "I just want to prevent this from happening to somebody else." Or "I want to be able to afford therapy", or other goals that are much more survivor centered, then certainly the criminal justice system allows and even sometimes the civil justice system. So I think that's a long winded answer, but I hope it addressed your question.

Anne: Yes, absolutely. And then a lot of folks think about the criminal justice system when they think about reporting sexual violence. So they think about, you know, reporting to the police, but that's not the only route. So can you tell me a little bit about the difference between criminal and civil law?

Gillian: I will do my best to explain it in plain language. So as I said to you, before we started the podcast, please stop me if I start to talk too much like a lawyer or if I'm using terms that are unfamiliar, because I appreciate that this is complicated. So the criminal justice system is about whether or not an individual is guilty or not guilty of a crime. And you access that system through either the police or Crown Council, but 99% of the time through the police, you make a report to the police, they hand off your allegations to a Crown, and that Crown prosecutes that case. Now, they're not prosecuting that case, on your behalf, they're prosecuting it on behalf of the Crown, believe it or not, the Queen in the name of the Queen, which is a fancy and antiquated way of saying The Public. And so you are not the client in that case, you're not in the driver's seat. The Crown will call you as a witness. You are the key witness in most of these cases, but it's not your case. And so I think that that's an important place for people to start in an understanding to go in to. The Crown is not your lawyer. And in fact, the Crown has obligations to the lawyer for the accused to share information that you that you disclose to either police or the Crown. And so it's set up in a way that can be very disorienting, I think, for victims when they come forward. And it's not a relationship that is designed to encourage further disclosure or free discussion of experiences. It's set up in a very rigid way, for some very good legal reasons that I think are probably beyond my ability to explain in plain language right now. But that's how it's set up. Once the allegations move forward, if there is a trial, then the Crown will have to prove the allegations beyond a reasonable doubt. So that's a very high evidentiary standard. It basically means that it's not for the judge to decide sort of 50/50 who do they do they believe more, the judge has to be satisfied that there, there's basically no other reasonable explanation for what occurred. And so, you know, it's already sort of stacked in favor of the accused to some extent. The accused cannot be found innocent, all that they can do is be found not guilty,

which is basically the courts way of saying there wasn't enough evidence to satisfy me beyond a reasonable doubt that these events occurred. So that's sort of the first major reason that the process is skewed in favor of the accused. The second is that because it's the state using its power against an individual, the Charter of Rights and Freedoms applies, and one of the rights is that the accused can remain silent. They don't have to help the state, prove allegations against them. So, so often, when you hear that these cases are, he said, she said, in reality, they're just she said, the accused will sit quietly and silently through the trial, and their lawyer will cross examine the complainant, or that's the word that they will use the complainant for purposes of our discussion, that's the victim or the survivor. And they will try and poke holes in their story, and create enough reasonable doubt through those holes alone, that the accused will never testify. And so that is so often why women in particular talk about feeling like they are the ones being put on trial, because often at a trial, they're the only ones who will testify. And that is part of the the strategy that that criminal defense lawyers validly employs. I mean, this is it does exercise a degree of moral outrage for people right now. But there's sort of nothing ethically wrong with that from a legal perspective. And so you know, that that's the other major factor in favor of the accused. And it's often why survivors come out of that process feeling like it was almost more traumatic than the assault itself, that they are being sort of asked to relive and share a deeply traumatic moment in public, and that the person who they say did that to them doesn't even have to respond. So in terms of being a survivor centric process, or being sort of restorative or trauma informed in any way, shape, or form, it leaves a lot to be desired. There has been a ton of public time, money and attention invested over the last decade in trying to fix the criminal justice system. And I will say that, for me, that is wasted time, energy money. To a certain extent. I think that there have been some good reforms and some necessary reforms. But at the end of the day, it's a system. It's a system that's designed to do a particular thing and met out a particular kind of punishment. And I would really like to see conversations, move to other forms of justice and accountability, that are not so boxed in, by what our constitution and what the Charter of Rights and Freedoms will enable us to do. So I think that's a that's a long explanation of the criminal system.

Anne: No, that's so useful. And I think I think that folks think that it is their case that they go to the police, but it's like their case, and that they have power to shape it or stop it. Or that, you know, they can make those choices. And I think, you know, you've laid out really well, that that's not the case. One of the things I would love to know about is how can a survivor, you know, have a lawyer during the criminal process, what are the ways that a lawyer can help them during that process? Or like what is the role of the lawyer that works for the survivor.

Gillian: So the survivor can have a lawyer in relation to the criminal process. It's a very delicate it's a very delicate process. So but I would say that for any survivor that is thinking of going to the police first, um sorry, of thinking of going to the police that it is worthwhile for them to speak with a lawyer first. And Ontario actually does have a program that entitles survivors to up to four hours of free legal advice, if they are contemplating disclosure, and try to find to get basically more information about the legal options that are available to them. So I assume that in the episode notes or something like that, there will be a link to that information, but I mean, at its most basic, a lawyer can help you make sense of your statement and put it together in a cohesive way so that when you go and sit down and report to the police, you reported your allegations in a way that can best withstand the future scrutiny. So often, survivors reach out to the police in a state of some some form of crisis. They don't understand that, that their statement will be not just a first conversation, but probably the only conversation. There's so much interesting research that's done on the the neuroscience, in relation to trauma and how that affects memory. And to I'm not a neuroscience, but to try and explain it in a summary way. You don't remember these events in a cinematic, cinematic way. It's not like you're replaying a movie in your own mind. Often, it's more like a series of snapshots of Polaroids, if people knows what those are anymore, and somebody's sort of taken them and throw them up into the air, and they're all in the wrong order. So when I have when I have clients come to me, what what I end up doing with them, first and foremost, no matter which route forward we take, is working with them to try and make sense of the story, basically, and I always call it homework, and I say to them, like, "this is gonna start with you doing some homework." And I want them to write it down, because it's through that process, that they are just

working within themselves, to clarify their own memories. I mean, and that's true, I think of so many emotional memories, and we have in life, if you are trying to tell a story about something that happened to you 10 years ago, the first time you try and recount it, it's probably going to be very sort of fractured. And you'll interrupt yourself a lot to say, "Oh, wait, actually, maybe this happened first. And oh, wait, I forgot this detail" and that sort of thing. And so if your report to the police comes out in that scattershot way, it leaves a lot of leaves you very vulnerable at in the criminal process moving forward. So first and foremost, that's that's what a lawyer can do. If there are charges laid in a criminal process moves forward, there are a couple different points in time where the survivor can have their own lawyer involved in the process. Those are usually around if the defense is trying to get access to documents in the survivor's possession, medical or counseling records, increasingly correspondence that they may have had either with the accused or with other friends around the incident, any documents that they want to get access to through the survivor, they have to bring an application to the court. And the survivors entitled to get a lawyer to respond to that application. So that's one area where you may have your own lawyer. The other is that if they if the accused lawyer or the Crown, want to introduce the survivor's sexual history for any reason, then they have to get sort of pre approval from a judge to do that. And that is another situation where the survivor may have their own lawyer as part of the criminal process. Those are both discrete court hearings, basically, people come to court and they argue about that issue alone. And then the judge makes a decision. And it happens, usually in advance of trial. But if it happens in the middle of trial, it's done as what's called a voir dere, so almost like in a secret, separate room. So the survivor doesn't have a lawyer in the courtroom during trial is really what it comes down to. You know, the third thing a lawyer can do if you are engaged in the criminal processes just explain things to you. I mean, often I'm retained behind the scenes to sort of have the sort of detailed conversations, frank conversations, that Crown's have a limited ability to have with survivors. They have that limited liability, in part because of case loads, I think and but also in part because anything the survivor tells a Crown the Crown has to turn around. And disclose to the accused. And so I think Crown's are for very good reason, very careful to keep survivors at arm's length because they don't want to be continually disclosing

further information that might hurt the survivor's case or hurt the Crown's case. And too I think there's some recognition of how that's damaging to the survivor's trust in the system. So even though there are good reasons for Crown's, keeping survivors at arm's length, I think it's very poorly understood and explained. And it leaves survivors feeling extremely isolated, because who are they supposed to talk to? Who are they supposed to get answers from? And so that's the sort of thing that I end up doing in relation to criminal processes, and lawyers, like me end up doing in relation to criminal processes. There is not a lot of, quote, real lawyer work that goes into it. I'm not in the courtroom of cross examining witnesses, for example. But it's like very delicate work. And it's not for dabblers, I think I would say because it's easy to screw things up in an in a multitude of ways. But, you know, the sort of the thing I keep alluding to, that maybe you haven't addressed head on is that I don't particularly like the criminal justice system, it's not my default way of moving forward, I will engage with it, if that's what the client really wants to do, or if or if that's kind of what's already in motion when I meet them. But I find it wholly dissatisfying on and on in a number of ways. So for the most part, that's about 5% of the work that I do.

Anne: I think that is such a great transition into the next piece of our conversation, which is about the civil process. So let's say that we have a survivor who's considering the civil process, what can of civil process look like?

Gillian: So, I mean, the the first most obvious answer is a lawsuit. And that in involves suing somebody, and to try and leave that in plain language. It's different than the criminal process for a couple of significant reasons. First, you do have your own lawyer, and you are in the driver's seat, you are the plaintiff. And so you get to call the shots and make decisions about, you know, how the case proceeds. And when, I mean, you don't have 100% control, there's still a process laid out by the legal system and and the defendant once sued, also has some procedural rights, but you have a lot more control than you do in the criminal system. Secondly, allegations in the civil system are tested on what's called balance of probabilities. So it is sort of 50% plus one is the way that it's described, it feels like sort of messy human stories don't easily

translate into mathematical equations. But that is visually if you want to sort of visualize it. Balance of probabilities, just 50% plus one, I usually tell people that beyond a reasonable doubt is sort of 90%. And so it's possible to prove things on the civil standard that that can't be proved in the criminal standard. And it's not unusual for me to be suing somebody in the wake of a criminal acquittal. So there's been a criminal trial, the accused has been acquitted. And we still sue them, because we think that we can prove it on a civil standard. I recognize that I'm older than I perhaps appreciate, but there was the OJ Simpson trial way back when I was in high school. And you know, he was acquitted criminally but he was later held civilly responsible for the deaths of the people that he was acquitted of murdering. So that was a case that I used to talk about a lot because people understood that from pop culture, I need to find a perhaps more current one. But that's, that's a situation that can arise. And then the other major difference, I mean, huge difference about the civil process is that it's about compensating the survivor, as opposed to punishing the offender. And so it's framed differently. It can be more intrusive in some ways. I will just say that out front, because the survivor is expected to put their trauma on the table because that's how the court can understand and ascribe a dollar value to it. So there will be the disclosure of medical and counseling records, which is something that I talked to clients about upfront that that did that in some ways, this involves you opening your life even more. But hopefully, we are able to sort of compensate for that, in the protection we give to them in other ways. And the fact that that hopefully, they're going to get more out of the process at the end of the day. The the I've lost track, but the third or fourth major differences, there's no right to remain silent. And so once you have sued somebody for sexual assault, they do have an obligation to show up and submit to an examination. And so both sides have to tell their stories, both sides have to produce their documents, the the playing field is even in terms of the exchange of information. So and I think this is my fifth difference, but the vast, vast majority of these cases do not go to court, they settle behind the scenes. And because it's about money, there's a lot of, there's a lot of room for negotiation, right? Whereas the criminal process is so often all or nothing guilt or not guilt. So I think that it gives me a ton of latitude to try and help my clients navigate a process that's responsive to their needs and their goals. So that is the first thing that I do, I will say

upfront that the hugest barrier to people accessing the civil system is money. You know, I regularly work on what I call a contingency fee. Not exactly how it works with me, but I don't expect anybody to pay me until we recover money for them. But there has to be money to recover. And so if it's a situation where you have been assaulted by somebody who does not have money, that is that is for sure a barrier. And so in light of that, there are sort of some sometimes other approaches that we help people to try and navigate. You know, sometimes it's simply a demand letter where we know that there are limited resources to try and find limited things such as counseling, for example, or past or future. I have yet to actually have a restorative justice process lift off the ground. But that would certainly be something that could potentially be done, be done outside of the formal legal systems. And then (coughs), excuse me, if you have been assaulted in the workplace or in a university environment, then there are often processes in that organization that can be accessed. So for example, the University of Windsor has a sexual violence complaints process, and sort of that that is part of its big picture, academic misconduct, or not academic, university misconduct. So that would be another potential avenue, which kind of is a third. I don't know if you want me to just launch into talking about this, but it's not a criminal process. In a lot of ways, it resembles the civil process, but it but it doesn't end with compensation to the survivor, usually. And so people engage in it because they want protections, or they want circumstances around them to change. Often it's about wanting a neutral third party to recognize and acknowledge the harm or, and or wanting to pretend protect others from going through it.

Anne: Yeah, so it sounds like there are just a wealth of options in the civil side. And so it seems to me and tell me if I'm wrong, but it seems to me like the best thing might be that if somebody is thinking about that, to reach out to someone like you to have the conversation about, like, what are my options? What could this look like?

Gillian: Absolutely. I think that it's like the smartest first step forward. It's complicated. I could probably be on here for a couple hours trying my best to explain the legalities of the different options. You know, and so when I said at the beginning, for me, it starts with the client, it really

does start with trying to understand what's happened to you, and what are you hoping to achieve? Because from there, I can help you try and figure out a strategy to that goal, or I can at least give you candid advice on whether or not it's achievable.

Anne: Amazing. So um, the next question I have is, can we talk about some of the things that I've seen in my work that survivors have wanted? And maybe you can tell me about like, what are the best routes to access those things or, you know, what are the limits to the law around those things?

Gillian: Absolutely.

Anne: Amazing. So one of the things that I hear all the time is that somebody just wants an apology from the perpetrator or an acknowledgement of harm, or that they just want the perpetrator to have to go to therapy. So what like, if that's what somebody wants to have happen, what are the routes that they could use to access that?

Gillian: So that's a laudable goal, and one I'm extremely sympathetic towards, but probably one of the most difficult to achieve through legal processes, I'm just going to tell you that right up front, an apology is only as good as the remorse and sincerity behind it. And so when it's something that I often get asked either as a standalone request, or as part of trying to resolve a dispute, sometimes we'll have an agreement as to the payment of money and then the survivor wants an apology. And we get into a situation where we're negotiating the language of that apology. And I say to them, what, what good is this to you, if you are putting words in this individual's mouth, how sincere is it going to feel? Like this is probably not a fight that it's worth happening, you know, forcing the therapy, the individual go to therapy, also an extremely challenging thing to do, because you can put them in the room, but until they're prepared to actually engage in that therapy, it's not going to do much good. And so one of the things I talk to clients about is the need to centre themselves to start by centering themselves. And it's funny how with women in particular, it seems easier to prioritize the needs of others often. And so when we start talking about apologies, and the need for therapy, any any sort of start

to tease that apart, often, it's about wanting that individual to recognize that they did wrong, so that they won't do wrong to another person. And again, I think it's a laudable thing, but you need to start by centering your own needs. And if you want that offender to understand what they did wrong, then it probably starts with what they did wrong to you. And so you can't skip that step. Obviously, this is like very general, these are very general comments. And and sometimes you do have an offender who comes forward with incredible amounts of remorse. There are approaches to restorative justice that have been very successful for survivors. But I will say that those are the exception and not the rule. And it takes a lot of stars to align to make that happen. I wish it happened more, I wish that there were systems that were sort of encouraged perpetrators to engage in that way. It's something I think the criminal justice system should look into. But it's a difficult thing to force is is my high level response. And I think that people should just be realistic about that going in. Otherwise, it sets them up for disappointment.

Anne: Yeah, I think that's so helpful. And I feel like I could just chat with you all day about these topics. But I just have one more question for today, which is, let's say that our survivor is now decided that they would like to go through a civil case, what are some questions they should ask a lawyer that they're considering working with? Or like, what what should they be looking for and somebody to represent them?

Gillian: I think they should be looking for a lawyer who has experience and expertise in this area. And who starts by treating them like a human being and not a case. My I hope that's not too simplistic. But this area of law is a complicated mix of for legal expertise, and also the ability to see people and listen to them, and understand what their goals are, and what a good outcome is going to look like for them. And I think that you need the equal mix of those two things, to navigate these situations successfully. I think a lot of lawyers sometimes try and dabble in this area, because it seems sexy. And please know that I'm putting air quotes around that word, or interesting or it's in the media, but it's it's not easy work to do. And so I'm certainly not by any means the only lawyer that does it I hope well, but you do want to look for somebody who has an experience and understanding of these issues.

Anne: Amazing. So one last thought, is there anything that you would really like survivors who are listening to know before we sign off today?

Gillian: I'd like them to know that they're not powerless. And that so often it feels like everything's terrifying and nothing can change. I'd like them to know that the police are not their only option. And if they are in a dark place where they feel disempowered, and like, there is no way out, that there's nothing to be lost from calling [Anne], or from calling me or from calling somebody who does what we do to talk through the options that they may not know they have.

Anne: I love that. I always just wish, yeah, that folks would reach out and, you know, engage with us in that process of just exploring and collecting information and not having to make any decisions upfront, but just figuring out what's out there. So I think that's such a lovely message.

Gillian: Yeah, they say what information is power, but it's, it's true. Yeah, true.

Anne: It is. Yeah. Well, thank you so much for chatting with me today. I think this is going to be so helpful for folks who are thinking about some kind of process to help them you know, reflect on what their goals are, and what might be the best fit for them. So thank you so much for taking the time today.

Gillian: It's been a real pleasure. Thanks for having me on.

(Transition music)

Anne: So that was our chat with Gillian, if you would like to learn more about the work that Gillian's doing or he would like to access her legal support, you can find out more about her and her services at [gillianandco.ca](http://gillianandco.ca). So that will be in our episode description for you. And again, all of those links and information about various forms of support that you can access. If you just want to talk to somebody or you need some support, there's lots of options for that in our episode description. And again, all of the links for the things that Gillian talked about with us are in there. And we also have our transcription in there for you so you have all of the resources in our episode description. Thank you so much

for joining us today. If you like this podcast, please think about liking and subscribing. And I hope you all have a really great week. Thanks so much, everyone.