Disqualification by design: Strategic inefficiencies in Canada's legal response to sexual assault

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Abstract

In Canada, perpetrators of sexual assault (SA) continue to benefit from near legal immunity, with the overwhelming majority of criminal complaints being funneled out of the justice system without legal accountability. This project explores the mechanisms within the legal system that work to slow and stop complaints of SA, analyzing them as barriers to justice. Drawing on intersectional feminist and decolonial theory and autoethnographic methodology, I analyze my own experiences of reporting my SA to the police and serving as a complainant in the SA trial that followed in conversation with selected narratives of other survivors in the feminist literature. I show that within Canadian policing systems, survivors encounter several barriers including a culture of skepticism, investigative apathy, and patterns of critical police errors. In the trial process, barriers include the misapplication of SA law, a hostile courtroom culture, the "reasonable" perspective, alienation and domination through courtroom talk, and strategies to "whack the complainant". Indigenous women, women with mental health or substance use issues, and poor women may be more likely to experience barriers in the justice system and may experience them more harshly. Drawing on Ahmed's (2018, December 20) concept of strategic inefficiency, I argue that inefficiencies within the justice system are not simply "failures" to do something, but that they *are doing something*. Barriers in the criminal justice response to SA work to support existing hierarchies including (White) heteropatriarchal domination and men's access to the bodies of those considered to be outside the circle of respectable femininity.

KEYWORDS: sexual assault; law; strategic inefficiency; rape myths; barriers

Acknowledgements

The land on which this research was carried out is the traditional territory of Anishinaabeg, Ojibway/Chippewa and Haudenosaunee peoples (known as Niagara Region, Ontario). This land is covered by the Upper Canada Treaties and protected by the Dish with One Spoon Wampum Agreement. As an uninvited guest living and working on Indigenous land, the opportunity I was afforded to do this research is directly related to the systems of colonization that I discuss in this analysis. Many First Nations, Métis, and other Indigenous peoples continue to live and work on this land today, and I want to acknowledge the importance of their contributions to shaping and strengthening the community in which I live and work. In line with our collective commitment of Truth and Reconciliation, to acknowledge and challenge oppressive colonial systems, support Indigenous sovereignty, and stand in solidarity with Indigenous communities, this thesis is, in part, a call for justice for murdered and missing Indigenous women, girls, and Two-Spirit peoples.

This project is both an academic analysis of personal experiences as well as an act of justice. I feel privileged and proud to have done this work, and have earned more from this experience than a Master's degree.

This work reminded me how fortunate I was to have a support system as a young sexual assault survivor, working through the impact of a traumatic sexual assault and navigating the reporting and court processes. I want to thank my mom, who gave everything she had to nurturing my healing process, for her insight, and her advocacy. She was my rock. And to my brother James, for sitting with me in my dark place, and for always making me laugh. You will always be my hero.

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During a conversation I had with Dr. Francis, before I began this thesis and before she became my research supervisor, she asked me a question that planted the seeds for the current project: "where does your interest in social justice come from?" I explained that it was in the lecture halls of this academic institution, in Sociology and Women's Studies classes during my undergraduate degree, where I was given powerful tools to be able to understand my own experiences surrounding my sexual assault. I told Dr. Francis that I was sexually assaulted by two men when I was 16 and that after pursuing charges through Ontario's criminal justice system for over two years, I received two "not guilty" verdicts on October 31, 2005. The criminal trial process left me with another experience that I had to recover from, in addition to the sexual assaults themselves. Through the CJ process I experienced a level of trauma that was equivalent to the sexual assaults, and I was not able to understand these experiences until I made it into a university classroom. When I was introduced to the concepts of rape culture and rape myths, I was provided the language to understand my own experiences in the CJ process. I was struck by the discovery that my experiences were not extraordinary but were part of a pattern of the normalization and justification of male sexual violence against women. Later I was provided the language of White privilege, class privilege, and ableism which gave me additional lenses through which to understand the experiences of my SA trial. Together, this collection of sociological concepts provided a lens through which to understand my own experiences of inequality, trauma, and violence and to link these personal experiences to ideological and political systems that continue to reproduce male domination and access to the bodies of those considered outside the circle of respectable femininity. These connections sparked a passion for social justice and led me to consider this program. Later, Dr. Francis encouraged me to view these experiences as potentially worthy of academic study, leading to the focus of the current project.

Inspired by my experiences navigating Southern Ontario's criminal justice (CJ) process as a sexual assault (SA) survivor and galvanized by the above conversation with Dr. Francis, this project explores the handling of SA cases in the Canadian CJ system focusing on the barriers to justice and the mechanisms that contribute to a harmful experience for survivors. In light of the near immunity granted to perpetrators of SA by the CJ system (Johnson, 2012), and the experiences of harm and trauma reported by some SA survivors who enter the CJ process (Craig, 2018; Doolittle, 2017, March 17), research is urgently needed to better understand the barriers within the process, and the emotional labour and harm they create for survivors.

In Canada, there are approximately 460 000 sexual assaults perpetrated every year (Johnson, 2012). Only about 5 percent of incidents are reported to police (Perreault, 2015) and of these, less than 10 percent lead to a conviction of the perpetrator (Johnson, 2012). That is, of the overall incidents of SA in Canada, a perpetrator is held legally accountable in 0.03 percent of cases (Johnson, 2012). Johnson (2012) identifies a "filtering effect" (p. 131) of the CJ response to SA where complaints are funneled out of the system at various points during the process. Broadly speaking, this project aims to understand how the

"filtering effect" of the CJ process (Johnson, 2012) is experienced by SA survivors, how it works to stop complaints of SA and harm survivors, and the processes and mechanisms within the legal system that support it. In Canada, rates of SA are disproportionately high for teens and young women ages 15 to 24, Indigenous women, women with (dis)abilities, those who report substance use, those who identify as lesbian or bisexual (Conroy & Cotter, 2017), and transgender, Two-Spirit, and gender non-conforming people (Bauer & Scheim, 2015). However, there is a critical lack of research investigating how these marginalized groups experience barriers in the CJ process.

In this thesis I critically examine my own experience of reporting my SA to the Niagara Regional Police (NRP) and my experience of the SA trial that followed in the Southern Ontario criminal court system. I use a critical-analytic autoethnographic methodology informed by anti-colonial and intersectional feminist theory. Following Anderson's (2006) description of analytic autoethnography, including individuals beyond the self, I examine my experiences in conversation with the narratives of other SA survivors in the existing feminist literature (Craig, 2018; Miller, 2019; Randall, 2010a) as well as survivors whose stories are documented in the "Unfounded" series by *The Globe and Mail* (Doolittle, 2017, March 17). Based on this analysis, I map the barriers commonly experienced by SA survivors in the CJ process; describe the differential impact of these barriers; and explore how they may be shaped by the social location of survivors. Overall, I demonstrate a series of strategic inefficiencies within the CJ response to SA that work to filter complaints out of the system and render the process largely ineffective.

The research questions for the current project are informed by two theoretical frameworks: anti-colonial theory and intersectional feminist theory. I employ an anti-colonial lens for this project in recognition of Canada as a White settler colonial state and of the fundamental connection between colonial violence and sexual violence (Hunt, 2016; Simpson, 2017; Smith, 1999). Intersectional feminism is critical to understanding how multiple and conflicting systems of domination and oppression work together to shape the operation of power, including in the CJ system. It is also a useful tool for dissecting the complex treatment of SA survivors. As the analysis developed, I incorporated additional theoretical lenses to guide my analysis and answer my research questions: Sara Ahmed's concepts of "institutional

walls" (2018, June 28) and "strategic inefficiency" (2018, December 20) and Beverly Skeggs' (2002) concept of "respectable femininity". Ahmed's work on institutional complaint guided the direction of this research and analysis by providing me with the theoretical and conceptual language to describe the problematic treatment of SA in Canada's CJ system. Skeggs (2002) conceptualization of respectable femininity as an ideological framework for social stratification provided a lens through which to examine and explain rape mythology and the differential experiences of SA survivors.

The specific focus of this project shifted over time. I began with three research questions that relied on my ability to access the transcripts of my criminal trial as the main data source. When I was denied such access, I adjusted my research questions accordingly, to explore my experiences of barriers alongside those of other SA survivors. I provide more detail about the transformation of my research questions below.

An enduring commitment in this project is to integrate and centre survivors' voices in the discussion of the CJ response to SA. I start this process by critically examining my own experience of reporting my SA to the NRP and of the SA trial that followed in relation to the broader literature on this subject. Specifically, my original set of questions included: (1) how, and in what ways, might ideologies reflective of rape culture, and hierarchies within the CJ system (including the bureaucracy and courtroom), be visible in the court transcript, in my memory of the experiences of reporting, and in the broader process of gaining access to a record of the criminal trial?; (2) How might my treatment in this process have been influenced by ideologies of Whiteness, poverty, gender, and (dis)ability?; (3) How do the narratives that emerge in this analysis compare to the experiences of other women whose cases have been studied in the scholarly literature (Craig, 2018; National Inquiry, 2019; Oppal, 2012; Randall, 2010a), and to those detailed in the "Unfounded" series (Doolittle, 2017, February 3a; Doolittle, 2017, February 3b; Doolittle, 2017, March 17) by the *Globe and Mail*?

The process of seeking access to the trial transcripts began in May 2017 and lasted more than seven months. Ultimately, I was unable to access the trial records, so my focus shifted to an examination of barriers. The issue of survivors accessing CJ data on SA to ensure accountability in the process and the

rights of complainants to records of our own SA trials are important and urgent areas of research but are beyond the scope of the current investigation. It is worth highlighting here, however, that inaccessibility of the court transcripts served as a major barrier for the current analysis, while at the same time amplifying all the more saliently the need to address the multiple barriers faced by complainants.

While I was attempting to get access to my court transcripts, I began reading Ahmed's work on complaint, described in detail in the next chapter, and found her concept of walls (2018, June 28) a useful way to understand the things that slow and stop complaints of SA and simultaneously harm survivors who enter the process. An analysis of barriers provided a way of understanding how the funneling effect (Johnson, 2012) operates and is experienced by survivors. Given this shift in focus, my revised questions are as follows: (1) What are the barriers to justice for SA survivors in Canada's CJ process and how are these barriers experienced at the individual level of the survivor?; (2) How do systems such as gender, colonization, class, race, and (dis)ability shape the experiences of these barriers? That is, how might these barriers be experienced differentially, based of survivors' social location?; (3) What does an analysis of the barriers for survivors in the CJ system tell us about the CJ handling of SA in Canada?

Three key arguments developed from answers to these questions: (1) Within the reporting process and through interactions with police, SA survivors encounter several barriers including a culture of skepticism, investigative apathy, and patterns of often unmitigated critical police errors. Survivors whose cases make it to trial encounter another set of barriers including a hostile courtroom culture, alienation from our stories, domination through courtroom talk, aggressive defense tactics such as "whacking the complainant", and the misapplication of SA law; (2) The barriers to justice within the CJ process are experienced differently by survivors based on their social location. Women from particularly marginalized groups in Canada, such as Indigenous women, women with mental health or substance use issues, and women struggling with poverty may be more likely to experience barriers in the CJ process and may experience them more harshly; (3) An analysis of the barriers experienced by survivors in the CJ process for SA in Canada demonstrates multiple patterns of strategic inefficiency (Ahmed, 2018, December 20) that work to render the process largely ineffectual. This concept helps us to recognize that

system inefficiencies are not simply "failures" to do something, but rather mechanisms that *do or achieve something*. That is, barriers are not "flaws in the system"; they are *part of the system*. In this way, barriers for survivors in the CJ response to SA work to support existing hierarchies including (White) heteropatriarchal domination and men's access to the bodies of those considered outside the circle of respectable femininity.

In the literature review that follows, I discuss contemporary trends in the CJ handling of SA and examine research related to barriers within the CJ process. I review the trend of disproportionate rates of cases of SA that are deemed "unfounded" in Canada's policing systems (Doolittle, 2017, February 3), as well as the "filtering effect" (Johnson, 2012) of the CJ process, and I discuss barriers specific to Indigenous women and women with mental health issues or (dis)abilities. I also discuss SA in the context of trauma, explore trauma reactions, and review its impact on memory. Trauma is a key theme related to the barriers survivors encounter in the CJ process. Finally, I lay out my theoretical framework and discuss colonialism in relation to respectable femininity (Skeggs, 2002), linking them to several key rape myths and stereotypes active in the CJ response to SA.

In Chapter 3 I outline the legal foundations of SA and highlight an ongoing pattern of legal resistance to SA law reform that shapes the experiences of survivors who serve as complainants in the criminal trial process. This chapter provides the legal context necessary to understand the multitude of complex ways the legal system creates barriers to justice for SA survivors. Chapter 4, which focuses on methodology, discusses different approaches to autoethnography, including the one I use here: critical-analytic autoethnography. In this section, I also describe which survivor voices I have selected for this project and how I analyze them, and I provide a detailed review of the processes I used in "doing" and "writing" my autoethnographic analysis.

My main analysis is separated into two chapters, one focusing on barriers to justice for SA survivors in policing systems and the other focusing on barriers in the trial process. The barriers I examine in police systems include a culture of skepticism and investigative deficiencies. I also examine the investigative mishandling of cases of MMIWG in Canada. In the criminal trial process, I examine five key barriers SA

survivors may encounter: misapplications of consent law, a hostile trial process, the "reasonable" perspective, alienation and domination through courtroom talk, and patterns of aggressive defense counsel conduct including "whack the complainant" strategies. Finally, my conclusion summarizes the findings, suggests which survivors may be most likely to encounter the barriers described in this paper, and discusses the time and work of complaint. I underscore the processes of strategic inefficiency in the CJ process and how, overall, this works to harm survivors, exonerate perpetrators, and legally validate male sexual violence against those considered to be outside the bounds of respectable femininity.

Chapter 2: Literature Review

2.1 SA in Canada's Criminal Justice System

Of an estimated 460 000 sexual assaults (SA) every year in Canada, the perpetrator is held accountable by the criminal justice (CJ) system in only 0.03 percent of cases (Johnson, 2012). Overall, approximately 5 percent of incidents of SA are reported to police (Perreault, 2015) and of these, less than 10 percent result in a conviction (Johnson, 2012). That is, over 90 percent of perpetrators of SA who are reported to police benefit from near legal immunity for SA. In particular, the sexual integrity of women and sexual and gender minorities continues to be chronically under-protected by the CJ response to SA. Research identifies a trend in police handling of SA where reports of SA are deemed baseless and categorized as "unfounded" at disproportionately high rates, resulting in the disqualification of approximately 19 percent of all reports of SA in Canada's policing systems (Doolittle, 2017, February 3b). Johnson (2012) identifies a "filtering effect" (p. 131) of the CJ response to SA where complaints are funneled out of the system at various points during the process; these are referred to as attrition points. I review the unfounded rates of SA and Johnson's (2012) filtering effect in detail in the following two subsections.

Another key barrier for survivors in the CJ response to SA relates to rape myths and stereotypes about SA, survivors, and perpetrators (Craig, 2018; Larcombe, 2002; Randall, 2010b; Smith & Skinner, 2017). Wendy Larcombe (2002) describes the failure of SA complaints within the CJ process as systematic, but not inevitable, explaining that the processes of validation and disqualification of complaints of SA are rooted in rape myths and stereotypical ideas about SA and SA survivors. I explore the literature on rape myths in more detail in the final section of this chapter, linking them to White settler colonialism in Canada and the ideology of respectable femininity (Skeggs, 2002).

There is a striking lack of research relating to the differential experiences of barriers based on survivors' social locations. We know that, in Canada, rates of SA are considerably higher for teens and

young women ages 15 to 24, Indigenous women, women with disabilities, those who report substance use, and those who identify as lesbian or bisexual (Conroy & Cotter, 2017). Bauer and Scheim (2015) describe that, in Ontario, transgender people are "targets of specifically directed violence" (p 4), with 20 percent reporting an experience of physical or sexual assault, and 34 percent experienced verbal threats or harassment. However, there is a critical lack of research investigating how these marginalized groups experience barriers in the CJ process. Millar and Owusu-Bempah (2011) argue that CJ data related to race are being suppressed by Canada's policing institutions, preventing quantitative antiracist research. This process of whitewashing CJ data, they argue, serves the interests of policing institutions at the expense of the public (Millar & Owusu-Bempah, 2011). The absence of data related to the impact of race on experiences of SA survivors in the CJ was an issue that came to light in my literature review process, as was the lack of available research on the impact of gender identity, sexuality, and class. Limited research related the experience of Indigenous SA survivors and those with (dis)abilities was available and is reviewed below.

2.1a "Unfounded"

In February 2017, Robyn Doolittle of *The Globe and Mail*, one of Canada's most prominent national news outlets, began publishing a series of articles centered on the treatment of SA cases by Canadian police forces (Doolittle, 2017, February 3a; Doolittle, 2017, February 3b; Doolittle, Pereira, Blenkinsop & Agius, 2017, February 3). Doolittle et al. (2017, February 3) analyzed data from 873 police jurisdictions across Canada, which represents approximately 92 percent of Canada's population, and found that there are significant differences in the numbers of cases of SA that are deemed "unfounded" across these different jurisdictions. A complaint is labelled "unfounded" when police decide the allegations are baseless and that no crime has occurred, at which point it is dismissed, not recorded as a crime, and not reported to Statistics Canada (Doolittle, 2017, February 3b). The findings in this series of articles are based on data from a five year period, from 2010 to 2014, and reveal a national unfounded rate of 19.39 percent, with significant variance between jurisdictions and over time (Doolittle et al., 2017, February 3). The variance between jurisdictions is vast: in Saint John, New Brunswick, 51 percent of SA

complaints are dismissed as “unfounded”; in Yellowknife, Northwest Territories, the rate is 36 percent; and in Toronto, Ontario, 7 percent are labelled “unfounded” (Doolittle et al., 2017, February 3). In Niagara Region, where my trial took place, the unfounded rate for this five year period overall is 22 percent (Doolittle et al., 2017, February 3). However, and importantly, there is significant variance over time: 21 percent in 2010; 14 percent in 2011; 22 percent in 2012; 20 percent in 2013; and 32 percent in 2014. Compared to national unfounded complaints of physical assault (10.84 percent), SA complaints are labelled unfounded at nearly twice the rate (Doolittle et al., 2017, February 3).

These results tell us two important things about the reporting process of SA in Canada: (1) that sexual assault complaints are disbelieved at significantly higher rates than complainants of other crimes; and (2) that the process of deciding whether a complaint has validity is not uniform within and between police jurisdictions or over time. As Doolittle et al. (2017, February 3b) describe, seeking justice for SA is “a game of chance for Canadian sex-assault complainants” (para. 40), dependent on the facts of the alleged assault, the police jurisdiction within which the crime occurred, and the individual police officers who are assigned to the case. The section below that focuses on police mishandling explores survivors’ experiences of this “game of chance”, demonstrating that, rather than an issue of probability, the factors shaping police responses to survivors are systemic, and rooted in rape mythology,White heteropatriarchal colonalism, abelism, and classism. I describe some of these systemic mechanisms, including patterns of police skepticicm, investigative apathy, and largely unmitigated critical police error.

In a related analysis of 50 complaints reported to police across Canada, Doolittle (2017, July 7) found a pattern of problematic investigative practices, regardless of whether cases were deemed “unfounded”. These include skipping basic steps in the investigative process, such as collecting relevant video surveillance; identifying and interviewing witnesses; and reviewing phone records, social media, and e-mail; (some) investigators’ lack of understanding of Canadian consent law; and significant variation in the quality of investigations depending on the police force and the types of offences that are reported (Doolittle, 2017, July 7). Doolittle (2017, March 17) interviewed survivors about their experiences of reporting and found that, of 36 survivors, eight described a positive experience in their interactions with

police in the reporting process; 11 noted that they were not kept informed about the investigation; 12 revealed that they felt blamed or shamed during their interview with police; and 25 had their complaint dismissed before making it to court. These 36 SA survivors bravely agreed to share their stories publicly through *The Globe and Mail*, and I compare my own experiences of reporting with theirs.

2.1b The filtering effect

When we compare cases of SA in the Canadian CJ system with those of physical assault, we see that cases of SA are less likely to result in criminal charges being laid, less likely to proceed to court after charges have been laid, and less likely to result in conviction (Rotenberg, 2017a; Rotenberg, 2017b). These trends reflect Johnson's (2012) "filtering effect of the CJ process" (p. 613), which she illustrates in a figure she refers to as *The Attrition Triangle* (p. 631). Attrition points are different stages within the criminal process at which cases drop out of the system (Johnson, 2012). The 2004 General Social Survey estimates that there were 460 000 incidents of SA that year, which is almost certainly an underestimation (Johnson, 2012). Johnson's (2012) figure illustrates that 15 200 (3.30 percent) of these incidents were reported to police; 13 200 of these were recorded as a crime (86.84 percent); charges were laid in 5 544 these cases (42 percent); 2 842 of these cases were prosecuted (50.94 percent); and 1 519 resulted in a conviction (53.79 percent). Overall, only 0.3 percent of the total incidents of SA, and 10 percent of those reported to police, led to a conviction. This "filtering effect" of the CJ process is ongoing, working to limit legal accountability for sexual violence significantly by disqualifying complaints of SA and eliminating them from the system.

Understanding the experiences of survivors as they navigate through this process is a central goal of the current investigation. What factors influence how survivors navigate a case through these attrition points, and how does race, class, gender, and (dis)ability impact this process? This information is not available in Johnson's (2012) study. Using an intersectional lens in a study such as this can be difficult because data related to social location is not often collected or reported in the literature. To approach this review of the literature from an intersectional perspective, I pulled in resources that provide insight into how social location may influence survivors' interactions with the CJ process.

2.1c (Dis)ability, mental health, and sexual violence

Women with (dis)abilities experience physical, emotional, and sexual abuse at significantly higher rates than women without (dis)abilities (Curry, Hassouneh-Phillips, & Johnston-Silverberg, 2001; Perreault, 2015) and are vulnerable to repeated acts of violence due to factors such as dependency on the perpetrator or difficulty identifying their abuser (Foster & Sandel, 2010). There are certain risk factors of SA that are also associated with (dis)ability, such as poverty and social isolation (Benedet & Grant, 2007a). Women with mental health (dis)abilities are more likely to be dependent on people in a position of authority or trust, such as medical professionals and caregivers, and are more likely to have limited financial resources, making it especially difficult to escape abusive environments (Benedet & Grant, 2007a).

Women with mental and physical (dis)abilities face stigmatization and social barriers related to two contradictory stereotypes that position them as either dependent, asexual, and childlike, or hypersexual and indiscriminate in their choices of sexual partners (Benedet & Grant, 2007b). The tendency to view and treat women with (dis)abilities like children has been termed "infantilization" (Benedet and Grant, 2007b). Infantilization can serve to undermine the credibility of SA complainants with (dis)abilities; increase the likelihood of them being perceived as incapable to be sworn in or to testify in court; cause their testimony to be given less weight or to be highly scrutinized (more than a non-[dis]abled woman); or can negatively affect procedural rulings that allow the use of third-party records or hearsay as evidence at trial (Benedet & Grant, 2007b). In the context of presumed asexuality, the exercise of sexual autonomy by women with (dis)abilities is often perceived as inappropriate, and they are likely to be viewed as hypersexual and met with increased scrutiny (Benedet & Grant, 2007b). Assumptions of hypersexuality can undermine women's credibility and make them less likely to be believed (Benedet & Grant, 2007b).

Overall, research suggests that women with (dis)abilities are at a high risk of experiencing sexual violence (Curry, Hassouneh-Phillips, & Johnston-Silverberg, 2001; Foster & Sandel, 2010; Perreault, 2015); have more barriers to accessing violence protection and treatment resources than non-(dis)abled

women (Foster & Sandel, 2010); and are more likely to have their credibility questioned and be disbelieved (Benedet & Grant, 2007b). Reports of SA by women with (dis)abilities are often not thoroughly investigated and not followed through to prosecution because of issues related to the complainant's (dis)ability (Benedet & Grant, 2007a). As Benedet and Grant (2014) note, the experiences of sexual violence of women with (dis)abilities "do not always fit neatly into the CJ system's limited idea of what a SA is supposed to look like" (p. 131), which results in a reduced likelihood of accountability for perpetrators of sexual violence against women with (dis)abilities within the CJ system.

2.1d Sexual violence against Indigenous women in Canada

Indigenous people in Canada experience SA at rates three times higher than non-Indigenous people (Conroy & Cotter, 2017). For young Indigenous women, rates are even more alarming with more than one in five (22%) reporting they have been sexually assaulted (Conroy & Cotter, 2017). However, little is known about Indigenous people's interactions with the CJ system in relation to SA.

In an international literature review, Lievore (2003) suggests some Indigenous peoples distrust the justice system and view it as part of the problem in their communities, rather than an avenue for protection or justice. Indigenous people's experiences of racial discrimination, brutality, disbelief, and indifference by police shape their perceptions of the CJ system, and influence the likelihood that they will report a violent victimization (Lievore, 2003). In Canada, many Indigenous people feel they have little reason to trust policing systems, perceptions shaped by patterns of police indifference, reckless disregard, and violence against Indigenous peoples (Amnesty International, 2004). Indeed, Amnesty International (2004) notes that Canada's policing institutions routinely fail to provide Indigenous women with adequate protection, contributing to their increased vulnerability to being targeted for violent victimizations. As a prominent example of Canada's institutional indifference to the alarming rates of violent crimes against Indigenous women, the federal government did not begin to collect or maintain official records of Missing and Murdered Indigenous Women and Girls (MMIWG) until 2014, even as it acknowledged this ongoing crisis (Amnesty International, 2017).

Less is known about the experiences of Indigenous SA survivors within the criminal trial system. International research suggests that Indigenous SA complainants may encounter cultural stereotypes during questioning at trial, constructing them as vengeful, amoral, or unsophisticated. It also demonstrates that Indigenous complainants impacted by language barriers appeared to experience greater shame and emotional distress than those who can testify in their first language (Lievore, 2003). Due to institutional practices of "whitewashing" CJ data in Canada (Millar & Owusu-Bempah, 2011) and the limited transparency and accessibility of CJ data such as trial records (Craig, 2018), it is difficult to know if Indigenous women in Canada face similar barriers.

2.2 The Trauma of Sexual Assault

Key to understanding the experiences of SA survivors is recognizing them as a form of trauma. A traumatic event is one in which a person experiences or witnesses a threat to the physical and/or psychological integrity of themselves or another, and responds with intense fear, terror, and/or helplessness (Lodrick, 2007). People process traumatic experiences differently than non-traumatic experiences right down to the neurobiological level, and this difference impacts how a person responds to threat and how they are able to remember and describe these experiences later. How survivors respond to SA, that is, how we react when under threat of SA and in the immediate aftermath, becomes a key focus of how we are perceived and believed, and, I argue, often how we are disqualified in the CJ process. The ways in which survivors are able to recall and describe our experiences also comes under scrutiny in both police investigations and in courtroom proceedings and can be another means through which we are doubted and disqualified at either stage of seeking justice. My analysis demonstrates there is a critical lack of trauma-informed approaches to the CJ handling of SA, especially in relation to the treatment of survivors.

2.2a Trauma and post-trauma responses

Trauma and intense fear overwhelm executive brain functioning that is responsible for rational, analytical thought, causing humans to respond to threats reflexively and instinctively. Research identifies a set of instinctual, reflexive fear responses that humans experience when they encounter a threat,

including freeze, flight, fight, friend, and flop (Bracha, Ralston, Matsukawa, Williams, & Bracha, 2004; Lodrick, 2007). Freezing is often the initial response to a perceived threat, which is characterized by physical immobility, musculature tension, hyperawareness, and hypervigilance (Bracha et al., 2004; Hagenaars, Stins, & Roelofs, 2012). It has been called the "stop, look and listen" fear reaction (Bracha et al., 2004) and has clear evolutionary benefits; freezing focusses the senses to identify a threat and avoid detection by predators (Lodrick, 2007). Flight is a fear response with other straightforward evolutionary benefits; flight responses include any method to create space between self and a threat (Lodrick, 2007). Fight responses include physical aggression and resistance but also more subtle resistant behaviors like verbal assertions (Lodrick, 2007). Saying "no" is a fight response.

Bracha et al. (2004) argue that since the "fight or flight" response was coined by Walter Cannon in 1929, it has become foundational to how we understand human behavior, especially human trauma reactions. They argue that the prominence of this dyad may have obscured the more complex and nuanced reactions people have to threatening stimuli, which more recent research supports (Hagenaars, Stins & Roelofs, 2012; Lodrick, 2007; Thompson, Hannan, & Miron, 2014). However, Cannon's notion of fight or flight influenced popular culture's representations of fear and stress and ingrained assumptions in clinical practices (Bracha et al., 2004), which have shaped dominant perceptions of "normal" behavior. These assumptions pervade normative perceptions of SA survivors, particularly the enduring expectation that they will persistently and aggressively resist their attackers, as I discuss below.

In addition to freeze, fight, and flight responses (Bracha et al., 2004; Hagenaars, Stins, & Roelofs; Nijenhuis, van der Hart, & Steele, 2010; Thompson, Hannan, & Miron, 2014), Lodrick (2007) identifies "friend" and "flop" responses. "Friend" is described as the earliest survival strategy in which humans use language and/or social engagement to negotiate, plead, or bribe themselves out of a threatening situation. For example, an infant who cries to signal terror and solicit a caregiver displays a friend response (Lodrick, 2007).

The flop response refers to a neurobiological state known as tonic immobility (Bracha et al., 2004). Flop is often confounded with the freeze response because both include sudden bodily immobility.

However, they are distinct fear responses (Bracha et al., 2004). Freezing is often an initial response; if it fails to ensure survival, then a flop response sometimes follows (Bracha et al., 2004). Flop is triggered by the brain, which signals the nervous system to shift from a position of musculature tension (freezing) to a "floppy" state in which muscle tension is released and the mind and body become pliable (Lodrick, 2007). Lodrick (2007) argues that higher level brain functions are severely impaired during this response, facilitating the malleable state. This response may be adaptive when individuals have no possibility of escape and cannot win a fight (Bracha et al., 2004). In terms of survival, the flop response may minimize the damage of physical impact and make traumatic, fearful experiences more bearable by shutting off higher level brain functioning (Lodrick, 2007).

Besides these five common neurobiological responses to trauma, researchers have identified the factors that influence which response will be used and how it will be executed. As Nijenhuis, van der Hart, and Steele (2010) explain, threat does not trigger a single unconditional response but rather evokes a system that includes a series of possible neurobiological responses that are adapted to meet the degree of current threat. Lodrick (2007) contends that subjective experience influences how individuals respond to threatening stimuli; past strategy successes and failures will influence the responses we are likely to use in the future. Research suggests that past experiences of trauma shape how an individual may respond to a threat to their bodily integrity. Chronic childhood maltreatment is related to a sensitive fear response system, indicated by heightened fearfulness, threat-readiness, and hypersensitivity to threat cues (Thompson, Hannan, & Miron, 2014). Aversive life events also impact the likelihood of an individual's flop response when faced with a threat (Hagenaars, Sins, and Roelofs, 2012). The goal of our evolved fear response system is to preserve survival until the danger has passed; the response most likely to achieve this end will be activated.

The terror of threatening stimuli inhibits processing in the upper level of the brain, which means we respond to traumatic events before we have a chance to consciously process them. That is, we act before we think. Recognizing the automatic nature of trauma responses and the common lack of conscious decision-making is important to understanding the harmful process of cross-examination for SA

survivors, who are often forced to explain their responses to SA within a framework of "reasonableness" and "common sense". This research demonstrates the complexity of trauma responses. Operating with the fundamental goal of human survival, responses to traumatic events may not follow what are perceived as normal or "common sense" behavioral patterns.

During and immediately following traumatic experiences, many individuals experience symptoms indicative of peritraumatic distress (Brunet, Weiss, Metzler, Best, Neylan, et al., 2001). These include heightened emotional distress and bodily arousal including fear, horror, guilt, shame, sadness, anger, helplessness, sweating, trembling, and racing heart (Brunet, Weiss, & Metzler et al., 2001). Some individuals have dissociative experiences during and after a traumatic event, which have been shown to be correlated with the development of PTSD (Lensvelt-Mulders, van der Hart, Jacobien, van Ochten, Maarten, et al., 2008). Dissociative experiences include blanking out, losing track of time, a sense that one is out of their body, or acting on auto-pilot, and confusion or lack of awareness about what is happening (Tichenor, Marmar, Weiss, Metzler, & Ronfeld, 1996).

2.2b Trauma and memory

Traumatic memories are qualitatively different from non-traumatic memories. Related to the fear response system and the associated release of stress hormones, traumatic experiences are processed, encoded, and stored in memory differently by the brain and central nervous system (Nijenhuis, van der Hart, & Steele 2010; *Trauma and Memory*, 1993). Consequently, these memories are recalled and accessed in distinct ways (*Trauma and Memory*, 1993). Non-traumatic experiences are processed and analyzed by the upper level of the brain as they are encoded, whereas traumatic experiences can trigger intense emotions that block these higher-level brain functions. As such, traumatic events are often encoded without being processed and analyzed and can remain inaccessible to the upper, rational, analytical level of the brain (Harper, 2011).

The activation of the brain's fear response system at the time of processing and encoding means that traumatic memories are qualitatively different from non-traumatic memories. Research suggests they may be stored with sensorimotor and affective elements so that individuals "remember" their trauma in the

form of behavioral responses and sensory perceptions (Nijenhuis, van der Hart, & Steele, 2010). Because non-traumatic memories are passed through the upper level of the brain, they benefit from rational, analytical processes and are encoded and retrieved as declarative memories (Nijenhuis, van der Hart, & Steele, 2010). Declarative memories are accessible, verbal, social, and reconstructive; they are easily used to construct a narrative to the listener (Nijenhuis, van der Hart, & Steele, 2010). Traumatic experiences are stored as sensory-motor memories and consist of visual images, motor actions, and sensations (Nijenhuis, van der Hart, & Steele 2010; *Trauma and Memory*, 1993). As sensory-motor memories, they are often stored and recalled as images, scents, noises, and feelings (*Trauma and Memory*, 1993). When recalled, they can be overwhelming as it can often feel as if the fearful event is happening in the here-and-now (Nijenhuis, van der Hart, & Steele, 2010). As opposed to declarative, non-traumatic memories that are more easily recalled as stories, the process of recounting traumatic experiences involves taking these visual, affective, sensory-motor memories and weaving them into a story that makes sense (*Trauma and Memory*, 1993).

The distinct features of traumatic memories and the atypical processes involved in constructing a clear narrative of them are rarely recognized or considered by police, lawyers, or other legal actors. The legal perspective and norms of defence counsel conduct are designed in such as way as to exacerbate survivors' difficulties recalling their experiences, rather than support them.

In the CJ process, a trauma-informed approach is critical to recognizing the diversity of responses to SA, understanding survivors' narratives of their own experiences, and effectively responding to SA in a way that protects against rather than perpetuates harm. The lack of a trauma-informed lens in the criminal handling of SA, I argue, is a key theme within the barriers to justice and causes harm to survivors.

2.3 Theoretical Framework

This project was guided by four theoretical lenses: anti-colonial theory (Simmons & Sefa Dei, 2012), intersectional feminism (Mann, 2012; Crenshaw, 1989; Shields, 2008), Ahmed's work on complaint (https://feministkilljoys.com/), and Skeggs' (2002) concept of respectable femininity. In this section I outline intersectional feminism and key concepts from Ahmed's work and describe how I used them to

guide this project. I discuss anti-colonialism and respectable femininity together in the next section of this chapter, linking them to rape mythology and several key stereotypes about SA and survivors that are commonly evidenced in the CJ response to SA.

Intersectional feminism is a theoretical position that recognizes the multidimensionality of women's experiences, views social identities as being mutually constitutive, and highlights that social reality is socially constructed, situated, and dependent upon social location (Mann, 2012; Crenshaw, 1991; Shields, 2008). That is, intersectionality challenges the idea of a universal experience of womanhood and emphasizes how gendered experiences are shaped by multiple and conflicting social identities. Social categories of identity are discursive constructs and include race, gender identity, sexuality, (dis)ability, and class ─ all of which shape each other in a fluid and interlocking process. An individual's social location is a complex web of social categories that form an integral whole. Power operates through social constructs such as race, class, and gender to create multiple and sometimes contradictory situations of privilege and oppression depending on one's social location (Mann, 2012). For these reasons, an intersectional lens is critical to understanding the diversity of experiences of SA survivors within the CJ process.

SA is a gendered crime because it is overwhelmingly committed by men against women (Conroy & Cotter, 2017; Perreault, 2015). However, the power dynamics that structure sexual violence do not include gender alone. As Stephanie Shields (2008) notes, "gender must be understood in the context of power relations embedded in social identities" (p. 301), a principle that applies to the gendered crime of sexual violence. The experiences of SA must be understood in the context of broader power relations. This is why an intersectional lens is necessary for the current project.

In a series of blog posts, independent feminist scholar Sara Ahmed provides a useful framework for understanding the CJ process for SA and the experiences of survivors who navigate these complaint processes. Her work focuses on complaint processes in the university setting and analyzes the experiences of university students, administrators, and academics who registered complaints of sexual harassment, sexual misconduct, transphobia, homophobia, ageism, classism, racism, and sexism. Despite different

institutional settings, many of the patterns and concepts Ahmed identifies are evident in the institutional context of SA complaints in Canada's CJ system. Specifically, I borrow the ideas of complaint biography, institutional walls, institutional violence, and strategic inefficiency in my analysis of the CJ handling of SA in Canada.

Ahmed (2017, November 3; 2018, February 11) explains that the experiences of people who enter complaint processes can be understood as "complaint biographies". "Complaint biographies" are not simply records of what happens to a complaint within an institution, but stories of the experiences that necessitate complaint in the first place. They are *personal*, records of what happened to a person, as well as *institutional,* documentations of the institutional processes of complaint (Ahmed, 2018, February 11). As Ahmed (2017, November 3, para. 1) argues, "A complaint brings you up against the culture of an institution" and complaint biographies can teach us about that culture. That is, "complaint is feminist pedagogy" (Ahmed, 2017, November 3, para. 1). She suggests that opening complaint files, "our own files" (2018, February 11, para. 16), might enable a conversation between complaints and allow us to assemble a "shared history" where we can "listen for patterns and resonances" (2018, February 11, para. 17). In addition to validating the experiences of survivors as worthy and useful sources of information for scholarly analyses, this framework of complaint biographies shaped my analysis and writing processes by encouraging me to ask: "What do these experiences of SA survivors teach us about the CJ system as an institution?"

"Institutional walls" (Ahmed, 2018, June 28; 2018, December 20) are mechanisms within complaint processes that work to slow or stop complaints. "Making a complaint can also involve coming up against walls. If a policy appears to create a path, a path can be how you are stopped from getting through" (2018, June 28, para. 50), Ahmed states. These mechanisms can also operate as doors, she explains, opening and closing, stopping some complaints, and allowing others to pass through (Ahmed, 2018, June 28). Institutional violence is described as "becoming the location of the problem" (Ahmed, 2017, November 10, para. 14). This is when institutional responses to complaint work to disqualify complaints by discrediting complainants. In the CJ process we see patterns of this kind of institutional violence, in

which SA survivors are shamed and blamed by police and within the court system. This shaming and blaming causes harm through institutional processes. These concepts shape my definition of (institutional) barriers for survivors in the CJ process. For this project, barriers can be understood as aspects of the CJ complaint process that work to slow and stop complaints of SA and harm survivors. Survivors face barriers within this process that may not originate from the CJ system itself but are exacerbated through the process, such as shame and self-blame. This project describes the experiences of survivors as they navigate these barriers, institutional and otherwise, and argues that the harm they experience within the CJ response to SA must be understood as state-sanctioned, institutional violence.

Ahmed's concept of "strategic inefficiency" (2018, December 20) has played a key role in my analysis and writing process, providing a foundation for understanding the lack of justice regarding SA in Canada's CJ process. Ahmed (2018, December 20) explains that "inefficiency is not just about the failure of things to work properly but can be how things are working" (para. 1). Inefficiency can be a style, performance, or tendency; it does not require intention or effort and can be a habitual response, patterns developed over time. Strategic inefficiency elucidates "how a *bumbling along*, a being ineffectual, can be achieving something" (Ahmed, 2018, December 20, para. 18). So, inefficiency can be useful; the failure to do something *is doing something*. This "something" that inefficiency in complaint processes often achieves is the reproduction of existing hierarchies. Understanding inefficiency as "a means to achieving an end" (Ahmed, 2018, December 20, para. 24) and as a mechanism of reproducing existing hierarchies is foundational to my arguments.

2.4 Colonialism, Respectable Femininity, and Rape Mythology

Canada is a White settler society; its history is one of colonialism and attempted genocide of Indigenous peoples. Canada's institutions are colonial institutions, which were developed to support the state's goals of occupation and dispossession of Indigenous lands and assimilation and genocide of Indigenous peoples. This history is important to understanding the contemporary operations of the CJ system and is central to the current analysis. Using an anti-colonial lens (Simmons & Sefa Dei, 2012), I draw on the work of Indigenous scholars Robyn Bourgeois (2018), Leanne Betasamosake Simpson

(2017) and Sarah Hunt (2016) to show that Canada's history of colonial violence against Indigenous peoples is foundational to the operation of the CJ system.

Anti-colonial theory aims to center the voices of Indigenous people and examines experiences and social phenomena in the context of colonialism, colonial relations, and other associated oppressions (Simmons & Sefa Dei, 2012). Understanding the CJ response to SA in the context of colonialism means recognizing rape culture as fundamental to White settler societies. Sarah Hunt (2016) describes how "rape culture emerges from, and is fostered through, colonial ways of seeing the world which are expressed in the daily interpersonal actions, beliefs and attitudes of all who make up the settler colonial nation of Canada" (p. 2). These colonial ways of seeing the world are the basic pillars of rape culture. The colonial gender binary and hierarchy – the forced adherence to hetero-patriarchal gender roles that position men as dominant and controlling and women as subservient and as lacking agency – is the foundation upon which gendered violence is normalized (Hunt, 2016; Simpson, 2017).

Robyn Bourgeois (2018) describes the conflation of Indigenous femininity with sex work as "ideological and discursive violence" (p. 382). Phipps (2009) uses the term symbolic violence to discuss the projection of negative value onto others, which she says is a central mechanism of class politics. Similarly, Leanne Simpson (2017) calls the idea that Indigenous peoples are naturally "less than" White settlers the "pillar of White supremacy and colonialism" (p. 98). Kimberle Crenshaw (1991) talks about the cultural imagery of blackness that represents Black men as inherently violent and Black women as hypersexual as determinative in the social and cultural response to violence against Black bodies and communities. While they are using different terminology, each of these scholars is discussing the same mechanism: how normative ideas and systems constructed to justify, normalize, and inflict harm on specific groups of people work to reproduce systems of dominance and subordination. Crenshaw (1991) describes a two-step process of categorization, or "the politics of naming" (p. 1297), whereby power is exercised, first through the process of categorization, or labelling, and second, through the power that causes this label to have social and material consequences. Processes of categorization, the projection of

negative value onto others, and the positioning of one group as inferior are exercises of power and the social and cultural values attached to these constructed ideologies foster and create social hierarchies.

This process of labeling, and of utilizing ideas to position specific groups of people as inferior to justify, normalize and inflict violence against them, is what I will call ideological violence. Ideological violence is a central mechanism through which colonial violence and assimilation were justified and carried out (Bourgeois, 2018; Hunt, 2016; Simpson, 2017; 2020, March 24), through which class politics operates (Phipps, year; Skeggs, 2002) and, as my analysis shows, is a central mechanism through which SA survivors are disqualified from, and harmed by, the CJ process. I assess how these ideas can be seen as parts of a classed, racialized system of heteropatriarchal regulation that is active in the mishandling of SA complaints, and that shape the state-sanctioned, institutional violence many survivors are required to endure as complainants in the CJ process.

Leanne Simpson (2017) describes how "intense sites of assimilative education" (p. 96) were designed to force Indigenous peoples to conform to rigid heteropatriarchal gender roles based on the colonial gender binary and White settler conceptualizations of masculinity and femininity. An examination of this history shows that the gender binary is a tool of heteropatriarchy, designed to confine Indigenous peoples to heteronormative families and police and regulate gender and sexuality. Heteropatriarchy is a system of male heteronormative dominance, designed to reinforce and reproduce heterosexuality, erase gender diversity, and exploit women and gender non-conforming people. Sexual and gendered violence are part of this system and the gender binary facilitates, normalizes, and justifies this violence through the reproduction of a gendered hierarchy (Hunt, 2016; Simpson, 2020, March 24). Simpson (2017) describes how the colonial gender binary is founded in a hierarchy that positioned men at the top, women in the middle, and Two-Spirit (2S), transgender, and gender non-conforming individuals at the bottom, targeted to near erasure through systemic violence. Dividing the social world into two distinct groups and normalizing gender roles that position men as dominant and in control and women as passive and without agency, creates a power structure where one group "gains its sense of being" (para. 21) through

dominating and asserting power over the other (Hunt, 2016). These are the coercive power dynamics necessary for sexual violence and rape culture to thrive.

The colonial gender binary is an inherently violent ideology. It positions gender diversity as illicit and harmful, and facilitates the marginalization of transgender, Two-Spirit, and gender non-conforming peoples. It is important to understand that the ongoing discrimination and violence gender non-conforming people encounter in their daily lives is rooted in, and reproduced by, White settler ideologies of binary and rigidly-defined gender identities. In a gender-diverse sample of Indigenous participants over the age of 15 in Ontario, Scheim et al. (2013) reveal that 47 percent of participants reported experiencing poverty, 34 percent were unhoused or underhoused, 61 percent had at least 1 unmet healthcare need, and the majority, 73 percent, reported being targeted for violence because of their gender identity. These patterns of oppression, discrimination and violence are facilitated by colonial gender ideologies, and are critical to understanding the differential valuing of gender and sexual minorities and the pattern of men's sexual violence against women and transgender, Two-Spirit, and gender-non-conforming people.

This hierarchical gender binary does not exclusively restrict, enforce, and reproduce systems of gender; systems of racialization and class inequality work together with gender and are mutually constitutive and reinforcing. Binary gender roles work to enforce and regulate heterosexuality by sanctioning any displays of sexuality outside of the confines of heteronormative, monogamous, marriage as illicit, destructive, and criminal (Simpson, 2017). Much of the colonial and assimilatory violence committed against Indigenous peoples was justified through dominant constructions of morality (Bourgeois, 2018; Simpson, 2017) where the White, middle-class family was positioned as constructive of moral stability and White, middle-class women, through their domestic and caring roles, were positioned as a civilizing force. Concerns about the potentially destructive and polluting working-class (Skeggs, 2002) and the violent and dangerous Indigenous peoples (Simpson, 2017; 2020, March 24) were assumed to be resolvable through the imposition of modes of civility and moral values enforced through Christianity and the heteropatriarchal family system.

Respectable femininity is an ideology through which dominant constructions of morality, civility, and normativity are articulated; sexuality is evaluated and (self-)regulated; and distinctions in femininity are constructed, legitimated, and reproduced (Skeggs, 2002). This ideology works alongside the power dynamics inherent in the gender binary to support heteropatriarchy and male domination. Through norms of passivity, submissiveness, and domesticity, and through the sanctioning of female sexuality as acceptable only within monogamous, heteronormative relationships and under men's control, male domination is built into conceptualizations of respectable femininity. Respectable femininity functions as a means of social stratification where power is written onto female bodies in differential and contingent ways (Skeggs, 2002). This stratification reproduces a hierarchy of femininities that positions some feminized bodies as valuable; others as deficient but with potential for reform; and others still as inherently illicit and destructive. Ideologies of morality construct sex as the ultimate threat to civil order, and the regulation of women's sexuality as crucial to social stability (Skeggs, 2002). In this context, the ideology of respectable femininity is constructed.

Women are not positioned as simply having respectability or not having it, although it is read onto certain (White, middle-class) bodies with more ease than others. Rather, women are required to continually maintain and prove their respectability through their appearance and conduct. Respectable femininity is performed: one must *look* as well as *act* the part (Skeggs, 2002). Respectable feminine bodies are White, desexualized, and usually middle-class (Skeggs, 2002). Certain feminine bodies are automatically disqualified from respectability: fat bodies are constructed as socially immobile, representative of the lazy, uncivilized, vulgar working-class (Skeggs, 2002); Black bodies are positioned as hypersexual and sexually available (Crenshaw, 1991; Smart, 1989); and Indigenous bodies are conflated with sex work and promiscuity (Bourgeois, 2018). Skeggs (2002) describes how working-class women positioned at a distance from respectability have opportunities to reposition themselves as respectable through fashion choices and investments in their appearance. She explains that for women positioned *with* respectability, appearance is used to mark them as distinct and to *display* their superiority; for women positioned *without* respectability appearance is used as a way of *deflecting* negative

associations projected onto their bodies. In this way, feminine appearance can be a site of pleasure as well as a method of surveillance, regulation, and anxiety (Skeggs, 2002).

Clothing and fashion are central mediums through which women construct their feminine appearance. Skeggs (2002) describes how the White working-class women in her investigation used clothing to position themselves as respectable, to gain legitimacy, and to distance themselves from pathological and worthless associations with unrespectable femininity. Clothing "as a vocabulary which conveys moral quality" (Skeggs, 2002, p. 85) was used by working-class participants to attempt to "pass" for respectable. The current analysis builds on this discussion of feminine appearance and clothing to demonstrate how survivors' clothing is often used to sexualize and discredit them, which acts as a barrier to justice. In this context it is important to question not only how bodies are positioned through appearance in relation to respectable feminine ideology, but also which groups of women have access to the means to reposition themselves in relation to it.

The power dynamics of the gender binary are written into ideologies of masculinity and respectable femininity, and women are subordinated through them. Skeggs (2002) describes the ideal of respectable femininity as "uninhabitable" (p. 102) as it represents the ultimate symbol of powerlessness— a total lack of agency. She is passive, dependent, helpless, submissive, and conditioned to live under male domination. In contrast to poor and working-class femininity, constructed as loud and vulgar, respectable women are positioned with "divine composure" (Skeggs, 2002, p. 100): emotionally composed, silent, stationary, and invisible. Women must continually prove their respectability and goodness to avoid the consequences of being positioned against it.

With investments in the domestic-feminine ideal, women mark themselves as distinct from dangerous and destructive femininities and earn small amounts of social power. Through respectable femininity, women are defined in opposition to each other. The "vulgar," "uncivilized" working-class other and the "savage," "promiscuous" Indigenous other not only serve to devalue these femininities and justify violence against them, but also serve as a gauge against which respectable femininity can be measured and defined (Anderson, 2013; Skeggs, 2002). Through "the productive power of caring" (Skeggs, 2002,

p. 54) working-class women could attempt to disidentify themselves with the "immoral," "uncivilized" working-class and shift themselves closer to the respectable ideal. Other groups of women, however, are positioned at a distance too far — respectable femininity is out of reach and the best they can hope for is to avoid violence.

Dispositions of respectability are classed and racialized, and as Skeggs (2002) highlights, not all women have access to the cultural knowledge and resources required to display ideal femininity. Additionally, the consequences of existing outside of norms of respectable femininity differ for women depending on how far they are positioned in relation to the ideal. For some women, embodying the respectable feminine ideal is a protective strategy (Simpson, 2017) and a necessity, something they must do to avoid consequences. Others see it as more of an inconvenience (Skeggs, 2002). Simpson (2017) describes her childhood experiences of "the threat" (p. 112) of being sent to reform school and being taught to regulate herself and conform to colonial ideals of femininity "to protect [her] from a racist, heteropatriarchal colonizing society that had the ability to punish [her] for behaviour it deemed transgressive" (p. 112).

Historically, for many Indigenous women, consequences for non-conformity have included arrest, institutionalization, and criminalization as well as the removal of their children to residential schools and child welfare agencies, where they were systemically traumatized and victimized (Bourgeois, 2018; Hunt, 2016; Simpson, 2017). This violence committed against Indigenous women and girls through the regulation of femininity and sexuality is ongoing; Simpson (2017) describes it as a powerful site of dispossession and cultural genocide. In contrast to the violent policing of femininity described by Simpson (2017), some White working-class women who exist outside respectable femininity have been offered, encouraged, and enticed to participate in domestic education as it was understood to provide them one of the only routes to power and respectability available. For these working-class women, investments in caring were opportunities to reposition themselves, to halt losses, and earn value in response to being positioned as deficient.

This contrast demonstrates how differential positioning in relation to respectable femininity creates and reinforces a hierarchy of femininities whereby some feminized bodies are constructed as inherently more valuable than others. This differential positioning shapes the experiences of ideological violence for women from different social locations, a pattern we can see replicated in the differential treatment of SA survivors. Much of the state inaction and harm experienced by SA survivors within the CJ system is rooted in ideologies of respectable femininity.

Sexuality is perhaps the most fundamental aspect of respectable femininity; it is deeply connected to sexual control, and regulation. Female sexuality outside of heteronormative, monogamous relationships is positioned as illicit and women's sexual autonomy and agency as destructive and dangerous — the antithesis of morality and respectability (Skeggs, 2002). Respectability is defined in opposition to sexuality, requiring woman to distance themselves from sexuality to achieve respectability (Skeggs, 2002). Clothing perceived as revealing or sexual marks a woman as unrespectable, as displays of sexuality are always perceived as degrading unless "protected and defended" (Skeggs, p. 110) by indicators of upper or middle-class respectability. Skeggs (2002) describes "glamour" as a way of displaying sexuality while maintaining respectability, but notes this is a difficult position to achieve, and nearly impossible for non-White bodies.

Some groups of marginalized women are automatically disqualified from the respectable feminine ideal through constructions of them as inherently sexual, promiscuous, or sexually available. Phipps (2009) describes sex workers as the "ultimate example of the unrespectable poor" (p. 675). Robyn Bourgeois (2018) describes how Indigenous femininity was conflated with sex work as part of a colonial agenda designed to criminalize and devalue Indigenous bodies in order to justify violence against them. Simpson (2017) notes that the more Indigenous women would exercise their sexual freedom and autonomy the more they were criminalized and targeted by colonial violence. Under the ideology of respectable femininity, Black and White working-class bodies were subordinated, constructed as precisely what respectable femininity was not (Skeggs, 2002). However, Skeggs (2002) notes that within this

dynamic, Black and White working-class bodies were sexualized differently. Within the framework of respectability, sexuality is a key marker of difference.

Leanne Simpson (2017) describes colonial conceptualizations of sexuality as being defined within the confines of shame and modesty. Skeggs (2002) suggests that shame is built into conceptualizations of respectable femininity and serves a regulatory function. A coercive shame is produced when women recognize themselves as deficient against the sexual standards of respectable femininity, parameters established by and in the interests of others. This shame encourages women to contain and regulate their sexual expressions and practices. To protect themselves from the devaluation, degradation, and potential violence of being associated with sexualized, unrespectable femininity, women are conditioned to police their own sexualities.

Shame has been identified as one of the most common barriers that prevent survivors from disclosing an experience of sexual violence or reporting it to police (Craig, 2018; Weiss, 2010). Craig (2018) describes how shame functions as a "negative feedback loop" (p. 8) that discourages reporting and contributes to the invisibility of sexual violence: shame inhibits reporting; the lack of reporting reduces the visibility of sexual violence as a social problem; this invisibility encourages self-blame. In this way, we can see how respectable feminine ideology that positions female sexual agency as dangerous and illicit works to contribute to rape culture. Through a culture of skepticism within policing systems, a hostile courtroom culture, and harmful defence counsel tactics such as "whacking the complainant", my analysis demonstrates how shame can be weaponized against survivors, used to discredit and disqualify their complaints and constitutes a central mechanism of the state-sanctioned, institutional violence survivors are often required to endure within the CJ process.

It is critical to understand that although ideologies of respectable femininity position feminized bodies in relation to the differential exercise of power and social value, and that this differential power does shape women's experience of sexual violence and the social and CJ response to it, it does not provide protection against sexual violence, regardless of where women are positioned on the ideological

spectrum. That is, within the context of heteropatriarchy, no woman is safe from sexual victimization. I call this the heteropatriarchal Catch 22 of respectable femininity.

Respectable women – those who are attributed the highest value under heteropatriarchal ideologies – are designed to be sexually violated and conditioned to be silent through norms of passivity, submissiveness, and divine composure. Women are conditioned not to resist men's sexual violations and trained not to name them (Mackinnon, 2012). In this way, and through the normalization of male domination, sexual violence against respectable women is simultaneously prescribed, normalized, and erased. Unrespectable women – those deemed valueless – are automatically positioned as sexual and seen to have consent written onto their bodies. Through heteropatriarchal ideologies they are constructed as inviting or deserving of sexual violence, and their victimizations are justified and made invisible. Respectability is inversely connected to consent: women who fail to meet the standards of respectable femininity have permanent sexual consent projected onto them (Phipps, 2009), while women who conform to it are silenced through their feminine performances.

The ideologies of respectable femininity and its inherent hierarchy shape the experiences of survivors within the CJ process. They impact who will report, who is believed, whose cases are deemed "unfounded" or otherwise disqualified and ultimately, whose bodies are worthy of protection. Stereotypes about victims and sexual violence active in the CJ process are rooted in respectable feminine ideology and work to minimize and justify sexual violence and exonerate perpetrators.

2.4a Rape myths and stereotypical figures

Rape myths are a central feature of rape culture. They can be understood as a set of stereotypical prescriptive and descriptive beliefs about sexual violence, victims, and perpetrators that create and reproduce perpetrator absolution, victim-blame, and the perpetuation, minimization, justification, and validation of male sexual violence against women (Edwards et al., 2011; Smith & Skinner, 2017). Formed within the inequitable power dynamics of heteronormative, binary gender (Hunt, 2016), rape myths serve a cultural function in that they work to explain the social phenomenon of sexual violence in a way that

maintains the status quo of male domination (Smith & Skinner, 2017). They are a key element of the barriers to justice and healing for SA survivors within and outside of the CJ process.

Respectable feminine ideology maps onto cultural ideas about authentic victimization of sexual violence seamlessly. Rape myths are vehicles through which dominant ideologies of heteropatriarchy, class, race, ability, and respectable femininity operate to disqualify SA survivors' experiences and to validate perpetrators' violent acts. Rape myths mirror dominant representations of rape, perpetrators, and victims and reflect and reproduce overarching hierarchies of heteronormative gender, race, (Crenshaw, 1991) and class. They impact how survivors are perceived by police, how complaints are handled within the criminal process, how likely bystanders are to intervene and be empathetic, and how survivors' understand their own victimizations, including whether they recognize it as sexual violence at all (Johnson, 2012). Below I describe a set of rape myths that commonly influence the CJ handling of SA and the experiences of survivors as they navigate the CJ process. These fall into two categories: victim-centred stereotypes and ideas about "real" rape.

Just as categories of unrespectable and respectable femininity are defined in opposition to each other, the figure of the *authentic victim* is set against the *non-victim*, with rigidly defined boundaries. This strict, dichotomized conceptualization of authentic victimhood creates conditions where women are swiftly and easily categorized: one or the other. The figure of the authentic victim shares elements of respectable feminine embodiment: she is White, middle-class, heterosexual, educated, and mentally stable (McIntyre, Boyle, Lakeman, & Sheehy, 2000). But she is much more than that. She is virtuous as well as sensible, responsible, and cautious; the authentic victim understands and appreciates the risk of sexual violence and takes practical steps to avoid creating opportunities for being attacked (McIntyre, et al., 2000). This ideology sets up a dynamic where accepting blame for sexual victimization is built into classifications of authentic versus non-victims.

According to Melanie Randall (2010b), "the 'ideal victim' myth continues to undermine the credibility of those women who are seen to deviate too far from stereotypical notions of 'authentic' victims and too far from what are assumed to be predictable and 'reasonable' victim responses" (p. 398).

This definition has two components: characteristics about the person, the survivor, that mark them as "ideal" or "authentic" victims and expected or "reasonable" emotional and behavioural responses to victimization. In relation to the latter, "authentic" victims are expected to resist SA vigorously physically and verbally, to be able to offer proof of non-consent, and to immediately report the SA (Randall, 2010b).

Perhaps most fundamentally, the figure of the authentic victim of SA is chaste, modest, and sexually pure (Larcombe, 2002; McIntyre et al., 2000; Randall, 2010b). Just as women are disqualified from respectable femininity through associations with sexuality, so too do sexual agency and autonomy deny women the status of authentic victimhood. Non-victims are women positioned as having no virtue or value; they are constructed as *at least* partially culpable for their own victimizations and are therefore seen as unworthy of the law's protection (McIntyre et al., 2000; Randall, 2010b). The figure of the non-victim encompasses many other famed ideological femmes: the temptress, the home wrecker, the slut; and she is sexually indiscriminate, provocative, and presumed consenting, irrespective of her efforts to challenge that presumption (McIntyre et al., 2000). Through this rigidly dichotomized conceptualization of authentic victimhood, women are filtered into non-victim status; some simply by the presentation of their bodies and others through their characteristics, backgrounds, or lived experience.

As Randall (2010b) describes, within this ideological context, racialized and marginalized women are less readily identified as authentic victims and more effortlessly labeled with non-victim status. Racialized women are "prepackaged as bad women" (Crenshaw, 1991, p. 1271), the very presentation of their bodies suggests they are not respectable and are making inauthentic claims of victimhood (Crenshaw, 1991). Women whose bodies do not render them automatically disqualified from authentic victim status are vigorously assessed on other dimensions of the narrow category. Working-class (Phipps, 2009) and poor women, women who do not strictly conform to heterosexuality, and those with mental illness are also disqualified from authentic victim status through associations with deviant and destructive femininity (Du Mont, Miller, & Myhr, 2003; McIntyre et al., 2000). Phipps (2009) describes sex workers as "the worst complainant[s] of all" (p. 675), constructed as incapable of consent. Sex workers are

assumed to exist for the exclusive purpose of being sexually available to men and are therefore denied any claim to authentic victimization (Randall, 2010b).

Women's behavior is highly scrutinized in relation to the authentication process of SA claims. Substance use and alcohol consumption are often perceived as indicative of women who cannot be believed (Craig, 2018; Du Mont, Miller, & Myhr, 2003; Randall, 2010b). In their literature review, Grubb and Turner (2012) show that women who violate traditional gender roles, use substances, or drink alcohol are attributed higher levels of blame in instances of sexual victimization than women who conform to gender roles and those who did not ingest intoxicants. Of particular importance to perceptions of the validity of SA claims is how women behave during and after an experience of sexual violence. Post-victimization conduct is an important focus of assessments of survivors' credibility. Two central myths associated with this theme are the *"*hue and cry*"* stereotype (Craig, 2018), and the "expectation of resistance" (Craig, 2018; Randall, 2010b).

There are two parts to the hue and cry stereotype that center on the idea that women who have "actually" been sexually violated will "raise a hue and cry" (Craig, 2018, p. 34). Consequently, during an assault, women are expected to be loud, cry, and scream, and after an assault, women are expected to disclose their assault immediately, at the first opportunity (Craig, 2018; Johnson, 2012; Randall, 2010). Failure to adhere to this script often results in skepticism about a woman's claim. The expectation of resistance is a pervasive belief so that a lack of physical resistance indicates consent (Craig, 2018; Johnson, 2012; McIntyre et al., 2000; Randall, 2010). In order to meet the standards of acceptable victim-behavior, survivors must not only strenuously resist, but we must also have physical injuries to corroborate our aggressive resistance (Johnson, 2012; McIntyre et al., 2000). Failure to show vocal and persistent resistance often results in a classification as a non-victim.

The expectation of resistance within a culture that places the burden of rape prevention on women, who "are called on to maintain a constant vigilance over and self-surveillance of their bodies in order to prevent rape" (Lorenzi, 2015, p. 142) shapes a legal response to SA that "emphasizes women's personal 'responsibility' for risk management" (Randall, 2010b, p. 414). Craig (2018) explains that SA

complainants are often asked to answer stereotype-infused questions about the context of the sexual violation such as whether they flirted with the perpetrator, why they went somewhere alone with him, why they did not scream or fight back, and whether they were wearing underwear. These questions demonstrate the failure to understand SA as a form of trauma and the emphasis on personal responsibility for SA survivors in the legal system. My analysis of courtroom talk and "whacking the complainant" strategies below provides numerous examples of stereotype-infused questions and the blame, shame, and harm they direct towards survivors who serve as complainants in the CJ process.

Two pervasive myths within the authentic versus non-victim dichotomy relate to women's sexual agency: women who are sexually active are less credible, and women who have more sexual experience are more likely to have given consent (Craig, 2018). These are called the twin myths in Canadian legal culture (Craig, 2018). Bound up with ideas about chaste women and respectable femininity, these myths permeate the CJ handling of sexual violence and work to push women into the non-victim category, where our consent is presumed (Craig, 2018). A common figure of the non-victim that emerges from this mythology is that of the "promiscuous party girl" (Craig, 2018). The party girl's consent is written into her behaviour, and every move she makes on the night of her assault is suggested to be indicative of consent. This figure makes "risky" choices; she flirts, dances, perhaps drinks alcohol or uses substances, and is constructed as uninhibited and "ready and willing to consent to sex anywhere, with anyone" (Craig, 2018, p. 37). The promiscuous party girl is almost never believed in the CJ system.

A second stereotypical figure of the non-victim is "the woman scorned", born from the belief that women and children are uniquely inclined to lie about sexual victimization (McIntyre et al., 2000). This deceitful mythological figure has various purported motivations. She is thought to be vengeful and spiteful, lying just to cause harm (Craig, 2018). She is also said to lie about sexual victimization because of a mythological phenomenon termed "post-sex regret" (Craig, 2018). This myth is where women supposedly consent to the sexual activity in question but soon after become embarrassed and grow to regret giving consent. In this scenario, women lie about sexual victimization to cover up an embarrassing sexual experience. Some women are accused of rape fantasies they might be embarrassed to

acknowledge, have their mental health scrutinized, or are asked if they have delusions (McIntyre, 2000) in order to create doubt about their truthfulness and construct reasons they are likely to be lying about the SA complaint. Poor women are often thought more likely to lie about sexual violence because of financial motivations (Phipps, 2009).

Research on false allegations of sexual violence is plagued by a multitude of problems that make clear conclusions difficult. Some key issues in research on false allegations include the common dependence on (often problematic) police department data and the lack of systematic methods of analysis and a clear definition of a false report (Lisak, Gardinier, Nicksa, & Cote, 2010). However, drawing from a small pool of seven research projects that utilized clear definitions of false reports and made some effort to evaluate police department data, Lisak et al. (2010) show that false allegations make up approximately 2.1 percent to 10.9 percent of reports of sexual violence. In their own analysis of SAs reported to a Northeastern United States University police department over a ten-year period, Lisak et al. (2010) found that eight of 136 (5.9 %) reports had reasonable basis to be classified as false allegations. Although it is clear we cannot make any firm conclusions about rates of false allegations until researchers refine systematic methodologies and work through some of the issues with sexual violence research more broadly, we do know that false allegations are uncommon. Yet the figure of the woman scorned persists. Craig's (2018) analysis highlights the pervasiveness of the figure of the woman scorned and shows how this ideology is reflected in the ways some criminal defence lawyers advertise their services.

Whether perceived as a woman scorned or met with initial open-mindedness, women's SA complaints are inevitably subjected to remarkable scrutiny. Stereotypical ideas about victims are compounded by ideas about "real" rape and "real" perpetrators, which further impact survivors' chances of being believed when they disclose or report.

Stereotypes about "real" rape include ideas about victim resistance, perpetrator violence, and the use of weapons (Larcombe, 2002; Smith & Skinner, 2017). Perhaps the central feature, however, is the figure of the "rapist as other", a narrative woven from sexist, racist, and classist assumptions (Anderson, 2010; Crenshaw, 1991; Larcombe, 2002; Smith & Skinner, 2017). One aspect of this stereotype is the idea that

"real" rapists are unknown to the victim, which does not match research on experiences of sexual violence. The myth of the stranger rapist persists despite the reality that sexual violence is more often committed by someone who is known to the victim, such as an acquaintance, friend, or family member (Conroy & Cotter, 2017).

In my analysis I show how ideologies of respectable femininity work through myths and stereotypes about rape and survivors to privilege some narratives, disqualify others, and perpetuate institutional violence against survivors as they report their experiences to police and serve as complainants in trial processes. Before that, however, I review the laws relevant to SA and examine the legal culture of Canada's CJ system.

Chapter 3: Legal Foundations

Rooted in heteropatriarchal colonial ideology, the superiority and protection of masculinity is an observable theme in the history of Canadian SA law. Canada's laws related to sexual violence have been undergoing significant reform beginning in the early 1980s, with the passage of the *Canadian Charter of Rights and Freedoms* (1982). Before this era of reform, however, SA law was blatantly sexist. This sexism is perhaps most powerfully exemplified in Canada's definition of rape in the 1982 *Criminal Code* (*CC)*, where rape within marriage was excluded as a criminal offence. This definitional gap in legal protection against sexual violence has been referred to as "spousal immunity" (Randall, 2010a, p. 6), and, as I highlight below, has since been formally (but not informally, Randall, 2010a) removed from the legal definition. "Spousal immunity" is an example of the explicit legal protection of men's rights of sexual access to women— of sexual violence against women— within the heteropatriarchal institution of marriage.

Examples of blatant sexism in pre-*Charter* SA law are plentiful. Evidence of survivors' sexual histories was regularly used to challenge their credibility (Tang, 1998), capitalizing on and perpetuating myths about respectable femininity and authentic victimhood. Complaints of rape that were not reported immediately following an assault were not considered legally valid (Tang, 1998), highlighting myths about authentic victim behaviour entrenched in the legal understanding of sexual violence. Illustrating the deep-seated distrust of women permeating the social and legal culture, a man accused of rape could not be convicted on the word of a woman alone – a legal requirement of corroboration for rape claims prevented this (Tang, 1998). Importantly, and fundamental to this paper's arguments, despite reforms that formally removed the requirements of recent complaint and corroboration and changes to the law that excluded victims' sexual history as admissible at trial, these practices continue with astonishing regularity in contemporary legal handling of SA. As I review below, Canada's era of SA reform has been met with powerful, ongoing resistance from within the legal culture.

3.1 Reform and Resistance

In 1982 the *Canadian Charter of Rights and Freedoms* became "entrenched" as part of Canada's constitution, meaning all federal and provincial laws must comply with the *Charter's* protections (Paradis & Karbani, 2017). Canadian courts were charged with the task of "giving meaning to the *Charter*" (n.p.) through interpreting existing laws in ways consistent with the Charter protections. SA law became the scene of critical post-*Charter* legal changes which (ironically) included the privileging of legal rights of the accused and the erosion of legal protections for complainants, setting up what Gotell (2002) refers to as a "complex dance between the legislatures and the courts" (p. 254). In this dance, basic equality rights under the *Charter* are used to resist legislative reform intended to make the criminal process more equitable and less harmful for SA survivors. Survivors who decide, or are forced, to enter the CJ process as complainants are often unknowingly caught in this dance.

Sections 7 and 15(1) of the *Charter* became important tools for feminist law reform, as they guarantee the right to equality and security of person and equitable treatment under the law without discrimination based on sex, respectively (Sheehy, 2000). In part out of concern that existing laws for sexual violence were not aligned with equality protections of the Charter, Canada's Parliament passed comprehensive amendments to the *CC* in 1983 (Benedet, 2014; Randall, 2010b; Tang, 1998). However, as many scholars have now documented, these reforms, and those that followed, were met with powerful and systemic resistance within the legal system (McIntyre, Boyle, Lakeman, & Sheehy, 2000; Sheehy, 1996).

Beginning in the 1980s, a series of pivotal legal events took place in relation to Canadian SA law. A critical reading of these legislative reforms and case law illustrates an ongoing conflict within SA law whereby the rights and liberties of accused persons are set against those of the individuals they are accused of victimizing. Given the gendered nature of SA, this can be understood as a battle of women's versus men's rights in the context of SA. I outline the basis of this legal "dance" below, establishing a trend that continues to impact the contemporary handling of SA cases. I demonstrate that this pattern of resistance is active in many SA cases and works to ensure there are real barriers to achieving legal

accountability for perpetrators while at the same time perpetuating institution violence against survivors of SA.

This post-1983 era of change in SA law can be understood as focusing on two broad issues: evidentiary rules and the definition and interpretation of consent. I outline these two streams of reform below.

3.1a Evidentiary and procedural reform

The 1983 amendments to the *CC* Bill C-127 eliminated the legal concept of rape and restructured it with gender-neutral language as a three-tiered definition of SA (Kong, Johnson, Beattie, & Cardillo, 2003; Randall, 2010b; Tang, 1998). It did not, however, provide a legal definition of consent, the consequences of which can be seen in case law in subsequent years. The definitional transition from rape to SA also removed spousal immunity.

Bill C-127 also eliminated the requirements of recent complaint and corroboration and prohibited the use of evidence of a complainants' sexual history and sexual reputation to attack her credibility, except in four narrow circumstances (Randall, 2010b; Sheehy, 2000; Tang, 1998). These protections against attacks on complainants' credibility have come to be known as Canada's "rape shield" laws. Evidentiary rules limiting sexual history evidence are articulated in section 276 of the *CC*, and those limiting evidence of sexual reputation are outlined in section 277. The objectives of Bill C-127 included encouraging women to report sexual violence and limiting biases and reliance on discriminatory legal assumptions (Tang, 1998). Two specific stereotypes, the "twin myths" (Craig, 2018), were addressed by this legislation: ideas about sexually active women being (a) more likely to consent to sex, and (b) inherently dishonest and distrustful.

The protections for complainants outlined in C-127 were subsequently challenged in the courtroom, coming to a head in *R v Seaboyer* in 1991. Section 276 of the *CC* was challenged as unconstitutional to the men accused of SA, violating sections 7 and 11(d) of the Charter by compromising their presumption of innocence until proven guilty beyond a reasonable doubt and their right to full answer and defence (*R. v. Seaboyer,* 1991; Sheehy, 2000). The prohibition of the use of sexual history evidence was argued to be

depriving men accused of SA of their liberties under the *Charter*. In 1991, the Supreme Court of Canada agreed section 276 violated the *Charter* rights of the accused, and looser restrictions were put on the use of sexual history evidence in SA trials as a result. In *Seaboyer* (1991) the rights of accused to a fair trial were held up over-and-against protections for complainants from a harmful and discriminatory process; the Supreme Court decision affirmed that the rights of the accused took precedence. McIntyre et al. (2000) describe this decision as explicitly disregarding women's constitutional rights under section 15 of the Charter.

In direct response to the public outcry surrounding *Seaboyer* (1991), in 1992, Parliament passed Bill C-49, formalizing eight evidentiary guidelines for the admittance of sexual history evidence, as outlined in section 276(3) of the *CC* (McIntyre et al., 2000; Randall, 2010b). Rape shield restrictions were challenged again in *R. v. Darrach* (2000), but were upheld (Gotell, 2002).

In what some legal scholars (Gotell, 2001; McIntyre et al., 2000; Sheehy, 2000) argue was a response to *Seaboyer* (1991) and the rape shield laws, defence lawyers developed a new tactic that allowed them to utilize everything prohibited by C-49 and *Seaboyer* (1991) through a different legal avenue: complainants' personal records (McIntyre et al., 2000). McIntyre et al. (2000) refer to this newly developed legal tactic as a "spectacular evasion of s. 276" (p. 76). Gotell (2002) calls the pursuit of complainants' confidential records an important feature of SA law in the post-*Charter* era, emphasizing its role as a key mechanism to attack complainants' credibility. Relying on "an almost inviolable interpretation of the right to a fair trial" (Gotell, 2001, p. 316), this tactical response by defence attorneys to skirt rape shield laws enabled them to radically widen their access to complainants' therapeutic, medical, education, social service, and other confidential records. This broadening of access and the corresponding erosion of complainants' privacy rights was established through a series of Supreme Court decisions focusing on the issue of access to complainants' confidential records in relation to the rights of the accused to full answer and defence. The 1995 Supreme Court decision in *R. v. O'Conner* (1995) highlights the degree to which the court had sided with the rights of the accused to fair trial at the expense of complainants' privacy.

As described by Gotell (2001), the complainants in *O'Conner* (1995) were four former students in a residential school for Indigenous children; the accused had been their principal and religious leader. In the interests of full and fair defence, the legal process allowed O'Conner's defence team "extremely sweeping" (Gotell, 2001, p. 321) access to the entire contents of all four complainants' therapy, school, employment, and medical records, some of which were coercively obtained through the exploitation and violence inherent in the residential school system. Despite explicit acknowledgement of the significant social and personal harms of disclosure of complainants' confidential records, including the infringement on complainants' privacy protections, impacts on the therapeutic relationship, survivors' likelihood of seeking therapeutic intervention, reduction in reporting rates, and the psychological harm experienced by survivors forced to disclose intimate details to their abusers, the Supreme Court decision in *O'Conner* (1995) created a common-law test of "likely relevance" for disclosure of records that, according to Gotell (2001) paved the way for "fishing expeditions" (p. 323). Gotell (2002) notes that overall, 60 to 75 percent of all applications for complainants' personal records were granted during the *O'Conner* regime (1995-1997), which ended with the passing of Bill C-46 in 1997 (p. 261-262).

The institutional violence and harm experienced by survivors who are forced to endure invasions of their privacy with the intention of attacking their character and credibility, in a public forum and in a context in which they have no agency, cannot be understated. It is also critical to note that some women may be more vulnerable to this specific defence strategy. The *O'Conner* (1995) case exemplifies how intersecting power structures work to position some complainants as more vulnerable to harmful defence tactics. These young Indigenous survivors were sexually victimized within an inherently violent residential school system. Within this institution, they were carefully controlled and documented. Through the process of seeking justice for sexual violence at the hands of a prominent figure in their colonial school system, their records were used in an attempt to discredit them. Gotell (2002) notes that, in general, "extensively documented women" are likely more vulnerable to attacks on their credibility, which are fuelled by confidential records: these include women with mental health or substance use issues, with child welfare histories, SA survivors, immigrant women, Indigenous women, and women

with (dis)abilities. This tactic is a powerful example of institutional violence against women who already receive unequal treatment by the state as a result of colonization, race, disability, mental illness, and immigrant status in ways that reproduce the powerlessness, humiliation, and domination of sexual violence. Counselling and therapy records were most commonly sought during the *O'Conner* regime (1995-1997) and were often used to support stereotypes about women as inherently unreliable and dishonest, or to utilize stereotypes about people with psychiatric histories as fundamentally untrustworthy and suspicious (Gotell, 2002). Gotell (2002) describes the "impossible choice" faced by SA survivors during this period: seek counselling and don't report, or report and don't seek counselling.

The phrase "whack the complainant," coined by prominent Canadian defense lawyer Michael Edelson (Craig, 2018, p. 42), clearly exemplifies the violent force with which these legal tactics were (and continue to be) used to attack complainants. At a widely publicized personal development session in 1988, Edelson is said to have instructed a group of criminal lawyers to "whack the complainant hard" through aggressively seeking access to personal records and using them as the basis for brutal cross-examination (Craig, 2018; Gotell, 2001). At this same conference, Tanovich (2015) notes defence lawyers were instructed to "attack the complainant with all [they've] got" and told "if you destroy the complainant in a prosecution…you cut off the head of the Crown's case and the case is dead" (p. 495). The legal framework described here laid the foundation for the continuation of "whack the complainant"-like strategies as a common practice in the adjudication of SA law. I discuss "whack the complainant" strategies further in the analysis as these constitute a critical barrier to justice and key mechanism of institutional violence against survivors in the CJ process.

In 1997, Parliament passed Bill C-46 to push back against the routine invasions of complainants' confidential records in SA trials, established by *O'Conner* (1995) (Gotell, 2002). This legislative effort restricted access to complainants' confidential records, but did not eliminate them (Gotell, 2002). Very quickly after Bill C-46 (1997) was enacted, it was challenged, and lower courts ruled it violated the rights of the accused to a fair trial (Gotell, 2001). Making its way to the Supreme Court in *R v Mills* in 1999, the issue of disclosure of complainants' personal records was said to have been a victory for feminist law

reformers because the higher court decision upheld the Bill C-46 (1997) test for access to records (Gotell, 2001). However, Gotell (2001) argues the idea of *Mills* (1999) as a victory does not hold up under scrutiny, highlighting how the decision underscores the importance of judicial authority and discretion for decisions about disclosure and works to privilege the rights of the accused. Gotell (2001) suggests that despite *Mills* (1999) decision upholding C-46 (1997) it is likely that the pursuit of complainants' confidential records remains a "crucial weapon in defence counsel's arsenal" (p. 271). Supporting this suggestion, Gotell (2001) cites an article in the Criminal Lawyers Association newsletter referring to disclosure of complainants' personal records as "an essential tool", encouraging defence lawyers to be "relentless" in reminding the courts of the critical importance of the rights of the accused to full and fair answer defence (p. 272). As I show in my analysis, access to complainants' records and "whack the complainant" strategies remain key barriers for survivors who navigate the criminal trial process for SA in Canada.

3.2b Reforming legal definitions of consent

The 1983 amendments to the *CC* left a gap in legal understanding of consent that was soon taken up in the Supreme Court of British Columbia in *R. v. Letendre* (1991). This "notorious" (Benedet, 2014, p. 136) case exemplifies the opportunity for harm the law creates through its failure to effectively define legal concepts or give clear direction in SA law. When the adjudication of SA law creates opportunities for SA survivors to be harmed, I argue, this must be understood as state-sanctioned, institutional violence. With no formal definition of consent, courts commonly interpreted it by drawing on common ideas about resistance and instructing juries to consider whether there is evidence of non-consent in the forms of forceful physical or verbal resistance (Benedet, 2014). That is, without clear evidence of a "no", the default assumption was consent. This notion is clearly exemplified in Justice Hood's decision in *Letendre* (1991) where, despite his belief that the complainant may not have wanted to participate in sexual activity, he noted that, "At times 'no' can mean 'maybe', or 'wait awhile'…" (as cited in Benedet, 2014, p. 136). Based on what was understood as the complainants' failure to provide "clear and unequivocal

communication" (p. 136) of non-consent, the judge ruled in favour of the accused, claiming the Crown failed to prove non-consent.

In response to *Letendre* (1991), consent was addressed in Bill C-49 (1992), often termed Canada's "no means no" bill (Gotell, 2001). With this legislative reform came Canada's first statutory definition of consent (s. 273.1 [1]), a non-exhaustive list of situations where consent is *not* present (s. 273.1 [2]) and the requirement of "reasonable steps" (s. 273.2) accused must have taken to determine consent (Gotell, 2001). Despite this legal clarity defining consent as a voluntary agreement, as the 1992 decision by the Nova Scotia Supreme court in *R. v. M(ML)* (1994) demonstrates, the courts continue to interpret and apply these laws in problematic and harmful ways. In *R. v. M(ML)* (1994) a teenaged girl was repeatedly sexually touched by her stepfather while she was lying in her bed at night. Convicted at his first trial, in 1992 the NS Supreme Court overturned this decision, saying "a victim is required to offer some minimal word or gesture of objection and that lack of resistance must be equated with consent" (as cited in Benedet, 2014, p. 137). In direct contradiction to legislation emphasizing the voluntary nature of the legal definition of consent (s 273.1 (1) of *CC*), passivity in this case was nevertheless interpreted as consent. The Supreme Court of Canada overturned this decision, restoring the conviction in 1994, but as this paper shows, the interpretation and application of consent law continues to be ineffective for holding abusers accountable and harmful to survivors.

The issue of consent was addressed again in what has become a critical Supreme Court of Canada decision, *R. v. Ewanchuk* (1999). This case and its impact on consent law are described in detail by Benedet (2014). The complainant in *Ewanchuk* (1999), a 17-year-old girl, *did* explicitly verbally resist *three times*. The judge in the initial trial acquitted the accused based on a notion of "implied consent". The judge accepted the fact that the complainant was afraid, that she had not wanted the sexual contact, and that she told the accused to stop three times, but nevertheless concluded that "there was an 'implied consent' to sexual activity based on her actions" (Benedet, 2014, p. 138). When appealed, this ruling was validated in a split decision by the Alberta Court of Appeal. In explaining his reasons for upholding the acquittal, Justice McClung referenced the complainants' clothing and conduct, including that she lived

with another couple and was the mother of a baby, to support a notion of implied consent to sexual activity (Benedet, 2014). Notions of implied consent and "contributory" behaviour (Benedet, 2014, p. 132) are critical means through which SA survivors are blamed for their own victimizations.

Further, McClung suggested the complainant's fear of the accused was misplaced, and that his actions were hormonal, not criminal— they amounted to "clumsy passes" (as cited in Benedet, 2014, p. 139) rather than SA. McClung's comments here are a clear example of judicial minimization and justification of SA. Through stereotypes based on expectations of perpetrator behaviour, this man's sexually violent actions were minimized, justified, and excused based on notions of normal, acceptable masculinity. My analysis shows this pattern is firmly in place in the handling of SA within Canada's CJ process, despite the appeal that followed.

When *Ewanchuk* (1999) was taken to the Supreme Court of Canada in 1999, the unanimous ruling entered a conviction and clarified some key points about the legal understanding of consent, marking it as a pivotal decision in SA law: no concept of implied consent exists in Canadian law, passivity and lack of an objection do not equal consent, and consent is an affirmative communication to participate in sexual activity (Benedet, 2014, p. 141). A belief of consent cannot be based on any lack of objection or resistance and must be based on a belief that the person expressed a "yes" through words or actions. As Sheehy (2000) notes, in many ways the *Ewanchuk* (1999) decision helped switch the legal burden from women's duty to resist to men's duty to ask.

The preceding account demonstrates how the legal definition of consent stands in Canada. However, the shift from the woman's duty to resist to the men's duty to ask (Sheehy, 2000) is not often how it is applied in court. As Sheehy (1996) notes, all of the advancements feminist law reforms have achieved through the courts and the political process have been aggressively resisted and subjected to rigorous attack within the legal system with the consequence that, overall, the reforms have not been effective. Evidence of sexual history and reputation are still regularly used to challenge complainants' credibility (Craig, 2018), myths and stereotypes continue to bias decisions in SA trials (Craig, 2018; Randall, 2010b; Smith & Skinner, 2017), and expectations of resistance and notions of implied consent and "contributory"

behaviour are commonly used to disqualify complaint of SA (Craig, 2018). Thus overall, legal definitions related to SA and rules protecting survivors are frequently resisted, disregarded, misapplied, side-stepped, and outright ignored, making them ineffective to ensuring a fair and just process and to protecting survivors from harm. As I show in my analysis, the misapplication of the law governing SA continues to act as a significant barrier for SA survivors in the criminal trial process and is a key mechanism of institutional violence.

Chapter 4: Methodology

Autoethnography can be understood as a combination of autobiography and ethnography, as it describes and systematically analyses (*graphy)* personal experience (*auto*) as a way to understand cultural phenomena (*ethno*) (Ellis, Adams, & Bochner, 2010). Autoethnography developed, in part, as a way to challenge the insistence of researcher objectivity and to address concerns about the representation of research participants (Adams, Ellis, & Jones, 2014; Ellis, Adams, & Bochner, 2010). This methodology acknowledges the inescapability of researcher subjectivity and, rather than aim for a standard of objectivity, seeks to pull researcher experience, perspective, and subjectivity into the research process ─ not only to acknowledge it, but also to centralize it (Adams, Ellis, & Jones, 2014; Mendez, 2013). Autoethnography makes explicit the connections between the researcher, their positionality, and their research, and incorporates these into the investigative process (Adams, Ellis, & Jones, 2014).

I start this section with a brief description of my social location and explanation of why I chose autoethnography for this project. Then I move on to a more substantive discussion of autoethnography: first I describe the autoethnographic approaches I chose for this analysis; next I review the main sources from which I selected the survivors' narratives and explain how I use them in this project; and finally, I outline the specific methods I selected for doing and writing autoethnography.

Autoethnography utilizes the researcher's experience to describe and critique social phenomena and cultural practices, beliefs, and experiences (Adams, Ellis, & Jones, 2014). Using careful, in-depth self-reflection, called reflexivity, autoethnography is a method of interrogating the relationship between individual experience and broader social and cultural systems, exploring the connection between the personal and the political (Adams, Ellis, & Jones, 2014). Due to this intimate connection between the researcher and the research, the choice of topic for an autoethnographic project tends to be inspired by a researcher's knowledge, positionality, or experience, as is the case for this project. My social location shaped my experiences as a SA complainant in the CJ system and it shapes my current perspective. In these ways, my social location is central to the current analysis:

> *I am a White, heterosexual, and cis-gendered person who is also a woman from a low-income background. At the time of the SA I was 16, and two years later during my testimony I was being treated for depression, anxiety, and post traumatic stress disorder (PTSD).*

My research aims to explore how all of these contradictory factors were woven into my experiences of reporting my SA to police and the criminal trial, with a particular focus on how Whiteness, poverty, and (dis)ability may have impacted my experiences in the CJ process.

As described by Adams, Ellis, and Jones, (2014) autoethnography is a research methodology that often focuses on issues of social justice, which is a central reason why I was drawn to it. This affinity is not only because my project aims to examine the experiences of survivors within the CJ system, but also because of the focus on individual experiences in relation to issues of justice. As Sarah Wall (2008) notes, autoethnography gives voice to personal experience as a way of extending sociological knowledge and enables researchers to write first-person accounts that allow their voices to be heard. Méndez (2013) talks about autoethnography as an emancipatory process in that it represents the right of a researcher to "tell their truth as experienced without waiting for others to express what they really want to be known and understood" (p. 282).

This focus on the researcher's freedom to tell their story at least partially on their own terms makes this methodology especially valuable for exploring experiences surrounding sexual violence. The stories of survivors are consistently and persistently ignored, trivialized, and invalidated: indeed, this dismissal is the basis of a rape culture where sexual violence continues to be normalized and supported (Harding. 2015; Raphael, 2013). A research methodology such as autoethnography that highlights and validates personal narratives as valuable in contributing to knowledge about social phenomena is an ideal investigative tool to utilize in seeking to understand the complex experiences of SA survivors in a rape culture.

Due to the emphasis on researcher subjectivity and personal narrative, autoethnography allows for the examination of emotions, motivations, intuition, and thought processes. Another key reason why I chose autoethnography for this project is that it allows for insights into the emotional and often traumatic

(Craig, 2018) experiences of SA survivors as they navigate the CJ process. In addition to a structural analysis of the barriers in the CJ process, autoethnography facilitates an understanding of how these barriers are experienced by survivors. It is through this window that autoethnography provides an opportunity to examine the institutional violence and harm experienced by survivors within Canada's policing and court systems.

4.1 Approaches to Autoethnography

There are many different approaches to autoethnography (Anderson, 2006; Ellis, Adams, & Bochner, 2010; Reed-Danahay, 2017a; Reed-Danahay, 2017b) and a variety of different methods used within them (Adams, Ellis, & Jones, 2014; Duncan, 2004). Approaches to autoethnography differ in terms of how much focus is put on the researcher's self, their interaction with others, the examination of others, power dynamics, the research process, and the interview context (Ellis, Adams, & Bochner, 2010). Some different forms of autoethnography include Indigenous ethnographies, reflexive and/or dyadic interviews, reflexive ethnographies, narrative ethnographies, community autoethnography, co-constructed narratives, personal narratives (Ellis, Adams, & Bochner, 2010), critical autoethnography (Reed-Danahay, 2017a; Reed-Danahay, 2017b), and analytic autoethnography (Anderson, 2006). For this project, I have chosen to use methodological principles from both critical autoethnography (Reed-Danahay, 2017a; Reed-Danahay, 2017b), and analytic autoethnography (Anderson, 2006) and I have created what I call a critical-analytic methodological framework.

As described by Reed-Danahay (2017a; 2017b), critical autoethnography incorporates aspects of critical theory into the reflexive research process and examines personal experiences in cultural contexts to contribute to knowledge about power, oppression, and social inequality. This form of autoethnography examines lived experiences in context; fuses together theory and analysis to confront processes of oppression and domination; and interrogates oppressive power dynamics, often as they relate to the institutional contexts and professional practices that shape researchers' academic endeavours (Reed-Danahay, 2017a; 2017b). The aspects of critical autoethnography that are of most relevance to the current project are its focus on the examination of lived experience in context; its emphasis on interrogating

processes of domination and oppression; and its goal of understanding power dynamics. Using my own lived experience of navigating the CJ process as a SA survivor, a main goal of this project is to understand the experiences of SA survivors in the CJ system in the context of rape culture. Specifically, I examine the social and institutional power dynamics that shape the barriers experienced by survivors. The utilization of intersectional feminist theory and anti-colonial theory to frame this project is an effort to center the impact of White settler colonization and heteropatriarchy in shaping my experiences and those of the survivors in the literature and to highlight social and institutional power dynamics. These goals align well with the principles of critical autoethnography noted above and will therefore be incorporated into my methodological framework.

Analytic autoethnography, according to Anderson (2006), is a form of ethnographic research that is fully committed to analyses in which the researcher is a full participant of the issue/group under study and is visible in the published texts of the project. That is, the research emphasizes full researcher participation and subjective experience, yet remains committed to ensuring that relevant theoretical understandings of the social issue under investigation are incorporated into the analysis. Central to analytic autoethnography is the concept of analytic reflexivity as well as the inclusion of others (Anderson, 2006).

Analytic reflexivity is described as the practice of examining the self in a detailed introspective fashion as well as recognizing the influence of the self on the research process, as a complete member of that process. That is, analytic reflexivity involves an awareness of the mutual influence of the research environment and the researcher. The personal experience I examine for this project began 17 years ago, thus my use of analytic reflexivity involved a critical awareness of how my position as a student-researcher and my goals for this project have impacted my interpretation and analysis of my memories. As I describe in more detail below, I analyzed my own memories and self-reflective notetaking related my own experiences as a SA survivor in the CJ process, looking for connections between my experiences and the experiences of other survivors in the literature. It is in this process of self-reflective analysis that I made most use of Anderson's (2006) principle of analytic autoethnography, looking inward for the key

aspects of my own experience that felt particularly harmful, or that worked to slow or stop my complaint, and taking care to link these experiences to the literature and the experiences of other survivors.

Inclusion of dialogue with individuals beyond the self is another key feature of analytic autoethnography (Anderson, 2006). I did not conduct interviews with other individuals for this project, but I did engage with the stories of other SA survivors, described below. My aim was to understand how my experiences may be similar to and different from other survivors' and to identify the overarching systems of power, domination, and oppression that shape—and continue to reinforce— the barriers to justice for SA within Canada's legal institutions. In this way, a dialogue with the research on SA survivors' interactions with the CJ process is central to this project.

Taking from the principles of both critical and analytic autoethnography, the features of the current autoethnographic methodology are (a) an examination of lived experience in context; (b) analysis of the experiences of others beyond the self; (c) critical-analytic reflexivity that involves critical self-reflection, attention to the influence of social location, and an interrogation of processes of domination and oppression; (d) a focus on power dynamics and institutional and social hierarchy; and (e) a commitment to drawing on relevant theoretical and conceptual knowledge.

4.2 Survivors' Voices

The narratives of SA survivors in this investigation were selected using a purposive sampling technique (Etikan, Musa, & Alkassim, 2016). Survivors' stories were chosen deliberately because they were accessible, having been published, and because their experiences reflected broader patterns of experience within the CJ process. Perhaps most fundamentally, I chose these narratives because the patterns of experience resonated or contrasted with my own experience in a meaningful way. In my analysis sections I highlight these resonances and contrasts and weave them together into a "shared history" (Ahmed, 2018, February 11) of barriers for SA survivors in the CJ system.

The two main sources from which I drew narratives of survivors' experiences were the "Unfounded" series by *The Globe and Mail* (Doolittle, 2017, February 3a; Doolittle, 2017, February 3b; Doolittle, 2017, March 17) and Elaine Craig's *Putting Trials on Trial: SA and the Failure of the Legal Profession*

(2018). In a publication titled “Unfounded: What it’s like to report a SA” (Doolittle, 2017, March 17), 36 SA complainants shared their experiences of reporting a SA to police. I draw on the stories of these survivors to demonstrate the problematic treatment of SA cases by police across Canada and the barriers for survivors within the reporting and investigative processes. My analysis of police mishandling extends beyond a focus on SA cases to include a discussion of the stories of Missing and Murdered Indigenous Women and Girls (MMIWG) from across Canada (National Inquiry, 2019; Oppal, 2012). An analysis of patterns of police mishandling of cases of MMIWG demonstrates the broad and systemic nature of barriers within policing cultures in Canada. Together these voices show broad and enduring patterns of strategic inefficiencies in police responses to crimes involving to the protection of women, especially those from marginalized communities who face the greatest risk of experiencing sexual and gender-based violence.

Research demonstrating the pervasiveness of discrimination and violence against transgender, Two-Spirit, and gender non-conforming Canadians (Bauer & Scheim, 2015; Scheim, 2013) suggests that SA survivors from these communities may experience barriers to justice and institutional violence at greater rates than cis-gender survivors. Additionally, in the context of institutionalized racism, racialized survivors may also be likely to experience barriers and violence within the CJ response to SA most profoundly. The narratives from transgender, Two-Spirit, and gender non-conforming survivors as well as those from non-Indigenous, racialized communities were largely unavailable in the feminist research. Therefore, their experiences are not centralized in this analysis.

I analyze the stories of survivors described by Elaine Craig (2018) in the section focusing on barriers in the criminal trial process for SA. In these sections I also draw on the experience of survivors described by Melanie Randall in “SA in Spousal Relationships, 'Continuous Consent', and the Law, Honest but Mistaken Judicial Beliefs” (2010a) and the experiences of Chanel Miller, who shared her story of serving as a complainant in a highly publicized SA trial in the United States in *Know My Name: A Memoir* (Miller, 2019). Together these narratives helped me to weave together a “shared history” of experience

(Ahmed, 2018, February 11); detect patterns in the narratives of SA survivors; demonstrate common barriers; and delineate strategic inefficiencies inherent in the CJ process.

4.3 Doing and Writing Autoethnography

Ellis, Adams, and Bochner (2010) describe autoethnography as "both process and product" (p. 1) and note that there are many ways of *doing* and *writing* autoethnography. Doing autoethnography involves selecting and reflecting on specific experiences, examining them in the context of culture, and analyzing them in relation to relevant scholarly literature and/or the experiences of others (Ellis, Adams, & Bochner, 2010). For this project, doing autoethnography involved a series of spinning and collaging sessions and reflexive notetaking. When writing autoethnography, the aim is to produce a thick description of personal experience, identify patterns, and then describe these patterns through storytelling (Ellis, Adams, & Bochner, 2010). Writing autoethnography for the current project utilized vignettes, to present a thick description of my experiences, intertwined with sections of detailed analysis. Below I describe my processes of text spinning and collaging (Adams, Holman & Ellis, 2015) and reflective notetaking (Duncan, 2004) and explain my use of vignettes (Humphreys, 2005).

Text spinning and collaging is a multi-step process that has been suggested as a useful way to develop a starting point for narrative creation (Adams, Holman, & Ellis, 2005). The first step involves collecting textual material relevant to your area of exploration. These written works can be books, essays, poems, or any kind of writing that is compelling, evokes emotion, or that you feel has a connection to the experiences you will highlight. Secondly, you read these texts, and pick out passages that you find especially noteworthy. You then go through the works again, collecting the parts you've highlighted "building and spinning out a collection of notable passages" (Adams, Holman & Ellis, 2015, p. 72). The final step in this process involves reviewing this collection of passages, perhaps reviewing the sources again and creating more, until you feel inspired to begin writing.

I used spinning and collaging in collaboration with reflexive notetaking, a process based on Duncan's (2004) method of self-reflexive journaling. Duncan (2004) describes four main purposes of her journaling process: (1) externalizing reactions and assumptions that may have otherwise been overlooked; (2)

helping to crystallize ideas and form the direction and design of her research; (3) helping to recognize, define, and resolve inner conflicts; and (4) illuminating turning points in the understanding of concepts and allowing for the examination of the "evolution of understanding" (p. 32). Given that much of the self-reflection involved in my research relates to accessing and analysing my memories of this time in my life, reflexive note-taking allowed me to externalize my memories as I interacted with relevant literatures, and to quite literally draw connections as I read.

I used text spinning and collaging as a starting point and throughout my analysis as a method for weaving together related concepts and experiences and discovering patterns in the experiences of survivors. Reflexive notetaking allowed me to mark themes and explore connections that I could follow up in later, more focused spinning and collaging sessions. Together, these methods were useful for making connections between my experiences and those described in the literature and for linking these experiences to theoretical concepts. As two important projects inspired this research direction, I began spinning and collaging with them: *The Globe and Mail*'s "Unfounded" series and Elaine Craig's *Putting Trials on Trial* (2018). Later I also included Sara Ahmed's (https://feministkilljoys.com/) work on complaint. Using reflexive note-taking and color-coded highlighting, I picked out themes such as strategic inefficiency, police mishandling, skepticism of survivors, hostile courtroom culture, and "whacking the complainant" strategies and noted them as streams of analysis to build on. I used the themes in the literature to analyze my own experiences and used my own experience to interpret the texts and guide the direction of further sessions. Reflexive-note taking was useful to write about pieces of my experience relevant to the various themes, and to compare and contrast them to the narratives from survivors in the literature.

The approach I use for writing autoethnography uses vignettes as a means of describing memories of my experiences as a survivor in the CJ process. These are set within a broader text where I unpack these experiences, analyze them alongside the experiences of other survivors, and describe patterns as they relate to barriers in the CJ process. One of the goals of autoethnographic work is to present an insider perspective to an outsider audience in an accessible and engaging way (Ellis, Adams, & Bochner, 2010;

Humphreys, 2005). One way to do this, suggests Humphreys (2005), is to incorporate narrative vignettes into the research. The use of vignettes offers a richness of context and vivid portrayals of experience that facilitate an intimate connection between the writer and the reader (Humphreys, 2005). The use of vignettes allows me to paint a picture of some of the most important interactions in my analyses, describe my feelings during these moments, and to re-create some of the most relevant dialogue. Ideally, this method helps draw the reader in and facilitate a deeper understanding of the moments I dissect.

Chapter 5: Barriers in Policing Systems

Within Canada's policing systems there are systemic barriers and strategic inefficiencies that slow and disqualify complaints of SA, contributing to near legal immunity for perpetrators of SA. These barriers result in the chronic under-protection of women's bodies and sexual integrity. Below I explore some of these barriers, including a widespread culture of skepticism and patterns of investigative apathy and critical police errors. I explore these police failures with a joint focus; first in the context of SA, and secondly in police responses to cases of MMIWG in Canada. I argue that these barriers constitute pervasive mechanisms of strategic inefficiency that have disproportionate impacts on marginalized groups of women, including women with mental health and substance use disorders, Indigenous women, poor women, and women in the survival sex trade. I argue that ongoing patterns of police mishandling ensure that the complaint process for SA survivors and investigative processes for finding MMIWG remain profoundly inefficient and ineffective. In this way, policing systems work to protect violent men and maintain a central aspect of the status quo of White settler societies: male domination and access to women's bodies.

5.1 Culture of skepticism

When they enter the CJ process in reporting their SA to police, many survivors encounter what Johnson (2017) refers to as a "culture of skepticism" (p. 40). Andrea Quinlan (2016) refers to this phenomenon as "systemic doubt of survivors of SA" and argues it is a critical barrier for many survivors as they navigate the early stages of the criminal process. I explore systemic skepticism in police culture as a central feature of police mishandling of SA. I focus on normative assumptions and rape myths inherent in police practices, the deeply entrenched belief that false reports of SA are a common occurrence (Light & Ruebsaat, 2006; Quinlan, 2016), and perceptions of complaints of SA as "vandalism" (Ahmed, 2017, December 19).

The narratives used in this section are taken from the "Unfounded" series, (Doolittle, 2017, February 3a; Doolittle, 2017, February 3b; Doolittle, 2017, March 17), where an extensive investigation uncovered several patterns in police mishandling of SA and survivors' experiences. Recall the findings from the

"Unfounded" investigation (Doolittle et al., 2017, February 3), described above, which revealed that, nationally, an average of 1 in 5 SAs reported to police is deemed baseless and labeled unfounded. Additionally, there was significant variance in unfounded rates of SA across provinces and police jurisdictions. By analyzing the narratives of the survivors in the "Unfounded" series alongside my own experiences, I highlight problematic patterns in police responses to SA and demonstrate the ways in which some survivors are slowed, stopped, and harmed by systemic doubt, but also how other survivors are not. That is, here I explore multiple police practices that shape who is a "suspect survivor" (Quinlan, 2016) and who is perceived as authentic.

In my own experience:

> *I was perceived as authentic by the police. I recall very little about the responding officers, but I do remember after I was sexually assaulted, when I was curled up in a ball on my friend's kitchen floor, the bald-headed uniformed officer came into the room, respectfully kept his distance, and asked me if I was okay and if I wanted to go to the hospital to get checked out. I remember he was gentle in his approach; he was kind. The next police interaction I recall was in the hospital, being introduced to the detective who was assigned my case, Detective K. As I will explain in more detail below, I do not recall ever feeling as if detective K doubted the legitimacy of my SA; he was sympathetic and respectful, even caring and supportive.*

These experiences are in stark contrast to many other survivors who are met with skepticism from police and presumed to be lying, mistaken, or confused about their experiences of SA.

As noted, Robyn Doolittle (2017, February 3b) describes the experience of reporting a SA as "a game of chance" (para. 40) for Canadian survivors, citing the significant variance in unfounded rates within and across Canadian provinces and territories as well as over time. Research tells us that reports of SA are more than twice as likely than those who report other violent crimes to be deemed "unfounded" by police (Doolittle et al., 2017, February 3) and that this difference has been sustained over decades (Light & Ruebsaat, 2006). Andrea Quinlan (2016) examines police practices underlying unfounded trends to understand how some survivors become suspect. This research shows that systemic issues in policing policies and practices, such as a lack of standardization in investigative practices for SA, contribute to significant differences in individual police officers' responses. Further, Quinlan (2016) shows that many

police investigative tactics are rooted in normative assumptions about "real" survivors and authentic victim behaviour. Light and Ruebsaat's (2006) findings also support this notion.

In an effort to understand the factors impacting police decisions to classify a case as unfounded, Light and Ruebsaat (2006) examined 148 SA case files across four police jurisdictions in British Columbia. Results reveal that police were more likely to perceive a complaint of SA as authentic if a survivor conformed to stereotypical expectations of resistance and emotionality, and if the SA reflected stereotypical notions of "real" rape. Specifically, police officers in this study were more likely to interpret a complaint of SA as legitimate if force was used, if the survivor physically resisted, said "no", appeared upset, or if they did not have a mental health or substance use disorder.

Stories from the "unfounded" series also demonstrate patterns of police decision-making rooted in stereotypical ideas about SA and survivors. For example, the expectation of resistance is evident in Ava's experience of reporting, where police noted that her "clothing wasn't torn or anything" (Doolittle, 2017, March 17, n.p.). In Ava's case, other victim-blaming assumptions can be interpreted as guiding police questioning, such as when an investigator asked Ava to comment on the "discharge" they found in her underwear as if it was an indication of consent and suggested that her memory loss was unusual and suspicious (Doolittle, 2017, March 17, n.p.). Similarly, Kelly recalls officers said they had "concerns" with her statement and asked her why she stayed in the room and why she did not scream for help (Doolittle, 2017, March 17, n.p.). Another survivor, K, was asked if she said "no", tried walking away, and why she did not just leave (Doolittle, 2017, March 17, n.p.). Another, Kerra, was asked why she did not scream for help (Doolittle, 2017, March 17, n.p.). The persistence of expectations of resistance in police investigative strategies is prominent in the stories of these survivors.

In addition to exemplifying police skepticism and the normalization of rape mythology in these officers' interactions with SA survivors, these narratives underscore a profound failure to understand the impact of trauma on responses to SA. Recall that traumatic experiences evoke reflexive and instinctual fear responses, which can take many forms depending on context and individual experience (Lodrick, 2007). Fear responses, including freeze, flight, fight, friend, and flop, are initiated by neurobiological

processes that operate below the level of conscious, analytical thought. Despite this neurobiological reality, we see a pattern of police practice where survivors are required to justify their responses to SA when they do not conform to stereotypical expectations of resistance. Expecting torn clothing in order to substantiate a claim of SA and requesting justifications for staying in a room or not walking away or verbalizing the word "no" are clear examples of this failure to take a trauma-informed approach to investigation.

Other rape myths evident in police practices include those that blame survivors and shift blame away from perpetrators. Kerra, for instance, was asked several times by an officer what she had been wearing and whether she thought her jeans and tank top may have made the men she was reporting want to touch her (Doolittle, 2017, March 17, n.p.). The officer who took Marley's written statement smirked when he said "you really let this guy get away with a lot. Was he a sweet talker or something?" (Doolittle, 2017, March 17, n.p.). An officer told Taylor that "any normal person" who went to another person's home alone and late at night would expect something sexual to take place (Doolittle, 2017, March 17, n.p.).

Another survivor, E, recalls questions such as "is this the first time you reported a rape?", "what's your agenda?" and "are you into threesomes?" and statements including "well, you drank alcohol" (Doolittle, 2017, March 17, n.p.). E was also asked if she might have said or done anything at some point in the evening that may have led the man who assaulted her to think she wanted to engage in sexual contact with him later (Doolittle, 2017, March 17, n.p.), underscoring an astonishing lack of understanding of the definition of consent and working to direct blame toward E and away from the perpetrator. These stories of reporting demonstrate a police response to SA that emphasizes women's responsibility for risk management (Randall, 2010b) and that blame the victim.

Another key finding of Quinlan's (2016) investigation is significant variance among police officers' conceptions of the frequency of false reports of SA; some officers recognized false reports of SA as an uncommon occurrence, others suggested approximately 10 to 25 percent of reports are false, and one police officer estimated that as many as 50 percent are false reports. Officers suggested several reasons why women might lie about SA, such as to avoid an exam or justify being late for curfew or being caught

cheating on a spouse (Quinlan, 2016). One officer suggested that a survivor's hesitance to report a SA to police could be a "red flag" of a false report. Others identified specific groups of women more likely to make a false report of SA: young women and women with mental health issues. One officer alleged that women with mental health issues may be more likely to lie about SA and also more likely to convince themselves that their false allegation is real and persuade others that it is real as well.

Similarly, Light and Ruebsaat (2006) note that officers suggested victims may be motivated to lie about SA. Officers in this study also offered potential motivations for false reports of SA, including for revenge, to win custody of their children, to attract attention, or to cover-up an extra-marital affair (Light & Ruebsaat, 2006). These results suggest that the pervasive skepticism about survivors in police culture is rooted, in part, in a basic distrust of women. Regardless of its roots, we can see the harmful impact of this wide-spread doubt in the stories of survivors who shared their experiences in the "Unfounded" series (Doolittle, 2017, March 17). Often, survivors are simply disbelieved.

Justice, a self-identified intersex woman, describes that she was not only disbelieved when she reported her SA to police, but she was told that they were considering a criminal mischief charge against her for making a false report (Doolittle, 2017, March 17, n.p.). K remembers being told police would not be pressing charges because the suspect said it was consensual (Doolittle, 2017, March 17, n.p.). It is not difficult to believe this suspect claimed the sexual interaction was consensual, but it is difficult to understand why police appeared to simply take his word for it. K also recalls an officer telling her to "get over it and get on with [her] life" (Doolittle, 2017, March 17, n.p.). Emilie was told "these guys don't look like sexual predators" (Doolittle, 2017, March 17, n.p.), as if sexual predators have a distinctive appearance by which they can be identified. These stories of rape myths and skepticism about survivors' experiences on the part of police are patterned assumptions that make it extremely difficult and highly unlikely that perpetrators of SA will be held legally accountable.

Sara Ahmed (2017, November 5; 2017, December 19) describes a related trend in the context of institutional complaints processes in which men who abuse power are often understood as complex individuals with a sympathetic point of view, while women who lodge complaints against such men are

understood as mean and unsympathetic. Abusers "…are benevolent; they feel bad; they are complex: they didn't mean anything by it; they are full of meaning" (Ahmed, 2017, November 5, para. 17), whereas those who complain are perceived as unkind, as harming someone who is fragile. Those who complain are heard as destructive and negative, a phenomenon Ahmed (2017, December 19) refers to as "complaint as vandalism".

Complaint as vandalism involves the framing of complaint as intentional damage and the perception and treatment of "complainers" as vandals (Ahmed, 2017, December 19). This trend is evident in some of the stories of survivors in the "Unfounded" series. B.B., for example, reported to police that she was assaulted by a municipal employee who had come to her home to survey her property for a free tree-planting program offered by the city (Doolittle, 2017, March 17, n.p.). She explained to the investigating officer that the man approached her from behind, wrapped his arm around her body, restricting her arms to her sides, and pressed his body tightly against her body as he moved a small aerosol can toward her face. B.B. felt it was not a SA, but worried that was the intention of her attacker. As she describes, the investigating officer was dismissive, suggesting she must have "misunderstood" what the man was doing. He was also accusatory towards B.B. asking her "How do I know that you aren't making this up to try and get $10-million from the city?" (Doolittle, 2017, March 17, n.p.). Further, the investigator told her she was not being fair to this municipal employee, who was set to retire in three years (Doolittle, 2017, March 17, n.p.).

We can see from this investigator's response that B.B.'s complaint was heard as destructive and she was perceived to be the cause of damage. Her complaint was understood as "unfair" to her attacker, rather than his violent attack being viewed as an offence against her; B.B. was understood as the problem, not the municipal employee who attacked her. We can also see perceptions of "complaint as vandalism" in the experience described by E, who was asked by an investigator if she wanted the man she was reporting to end up in prison and if she wanted to ruin his life (Doolittle, 2017, March 17). Stacey was reminded that her report was "a very serious accusation" and K was told that the man she reported was "bawling his eyes out" (Doolittle, March, 2017, n.p.) at the police station. In contrast, I remember:

> *Detective K describing the response of my rapists when he questioned them about raping me, and unlike many of the survivors in the "Unfounded" series, he was not sympathetic to their viewpoints. He believed me, and he did not believe them. Detective K gave me the impression that he thought these men were arrogant, and that they assumed they would get away with raping me. They each came from a wealthy family, and each hired an expensive lawyer to defend them against the charges. Seemingly in an attempt to offer me some comfort, detective K. explained to me that the lawyer bills for every phone call, meeting, and hour in court would be extremely expensive. With obvious satisfaction, he told me that one of my rapists was experiencing tension within his family because of the financial burden they were bearing for his criminal defence. His family was not happy with him and detective K. made a point of sharing this with me. When it felt like I was the only one bearing any burden for the violence these men inflicted on me that night, that little piece of information did, in fact, provide quite a lot of comfort.*

For reasons that I still am not clear about, detective K. believed me and even took steps to offer me support and comfort, while these other survivors are met with skepticism, rape myths, and mistreatment. This is the "lottery" Doolittle (2017, February 3b) describes. But rather than "a game of chance", I suggest systemic factors, beyond the awareness of many survivors, are working to validate some complaints of SA and disqualify others. I was able to pass through the police culture of skepticism, as it did not work to disqualify my narrative or cause me harm. In this sense, I pulled winning numbers at this stage, but many survivors do not.

Another "game of chance" that survivors unexpectedly enter when they report SA to police relates to the adequacy of the investigative process. Below I show that systemic mechanisms shape this "game" for SA survivors, demonstrating patterns of investigative deficiencies in police handling of SA cases that work to disqualify complaints, leaving them vulnerable to insufficient evidence if they proceed to court, and contribute to the overall inefficiency of the CJ process for SA survivors.

5.2 Investigative deficiencies

The second critical aspect of police mishandling of SA cases is the quality of the investigation that follows survivors' reports. Simply put, police routinely fail to respond to and investigate complaints of SA adequately. Below I explore police practices in this light, demonstrating patterns of investigative apathy, including inaction and a lack of urgency, as well as patterns of critical police errors.

Central to the disqualification of SA reports is investigative apathy; police fail to initiate or follow through on even the most basic investigative steps. In addition to failures to act, investigative apathy characterizes police responses that lack urgency and investigative steps that are carried out at a pace insufficient for an effective fact-finding process. Another aspect of Light and Ruebsaat's (2006) examination of SA cases in B.C. focuses on the nature and extent of police investigations as reflected in case files. Three findings from this investigation are relevant to our current examination of police mishandling and strategic inefficiency. First, their analysis shows that, regardless of the classification as founded or unfounded, police files routinely lacked formal records of key investigative steps including interviews or statements from victims, witnesses, and suspects. In many cases, rather than official statements or interviews, files included police accounts of these narratives. Essentially, critical evidence was not being fully and effectively documented. This failure is certain to have a negative impact on the quality of the criminal case, should it move forward in the justice process.

Next, Light and Ruebsaat (2006) demonstrate that the quality and extent of investigative files is related to the decision about whether a case is "founded" or "unfounded". Specifically, the more formal and thorough the information in the files is, the more likely the case is to be deemed "founded". Last, their analysis shows that cases of SA are commonly classified as unfounded without a documented, thorough investigation. Specifically, 24 "unfounded" files lacked formal victim statements, 18 wanted formal witness statements, and 26 files excluded formal suspect interviews. Notably, these case files did include police accounts of these investigative steps but the lack of formal documentation of these critical interviews is especially problematic, given their classifications as "unfounded". Recall the definition of "unfounded" as cases in which an investigation revealed that a crime did not occur or was not attempted (Light & Ruebsaat, 2006), yet these findings suggest that police may be disqualifying cases via "unfounded" codes without thoroughly exploring fundamental investigative avenues. An investigation cannot reasonably be said to reveal that a crime did not occur or was not attempted if the investigation is superficial or incomplete.

Doolittle's (2017, July 7) research also reveals a pattern of investigative apathy in which police routinely fail to follow through basic investigative steps including collecting and reviewing potential evidence such as social media and phone records, emails, and video surveillance and identifying and interviewing witnesses. Put simply, Doolittle's investigation provides multiple examples in which police routinely fail to investigate complaints of SA effectively. In 1999, when L was 14 years-old, she reported to the Ottawa police that she had been sexually assaulted by a friend of her family, a 27-year-old man (Doolittle, 2017, February 3b). As a result of the rape, she became pregnant and gave birth. The police took a video statement from L, but when L's mother followed up months later, she learned that police were skeptical of L's report because she had giggled during the interview and the suspect told police he was sterile. Consequently, the case had been deemed unfounded (Doolittle, 2017, February 3b). L's mother was told that the man had procured a lawyer and that there was nothing the police could do, but a later examination of the file revealed that investigators did very little. Beyond L's video statement, a brief note from the social worker to whom L originally disclosed, and a report for a "general occurrence", there was no evidence to suggest that police executed any investigative processes; they did not require the 27-year-old man to provide evidence of his purported sterility and they did not take any steps to verify L's report with DNA testing of the child (Doolittle, 2017, February 3b). Police in this case utterly failed L, a Grade 8 student, by making no apparent attempt to verify her report of SA. It appears as if they simply believed the man when he claimed his innocence.

In November 2012, a 21-year-old woman, A.S., reported to Ottawa police that while on the elevator of her apartment building, a man she did not know took his erect penis out of his boxer shorts and touched it against the back of her hand. While doing this, A.S. described the man said "Oops" and smirked at her (Doolittle, 2017, March 17, n.p.). An investigator of the Ottawa police department met with A.S. and took a statement. After this initial statement, she did not hear from police for months until she received a phone call explaining the investigator on her case had retired and the file had been given to another officer. She also learned that an investigation produced video surveillance showing the perpetrator lived in the building, but that the previous officer did not attempt to contact him. When the new officer attempted to

contact him, he had moved. The file was closed without charges. An Ottawa Police spokesperson explained the reasoning, saying "the suspect is no longer in this area. They don't know where he is" (Doolittle, 2017, March 17, n.p.). Recall that when police *did* know where this man was, they failed to act. Later, the police spokesperson used the fact that the suspect was inaccessible as justification for their failure to act.

When 14 years-old A.M. went to a hospital and learned she was having a miscarriage, a social worker contacted police (Doolittle, 2017, March 17, n.p.). When asked by police about the father of her baby, she reported she was raped by three boys at a school party. She recalls that police questioned her about her mental illness, about why she was at the party, and about her substance use. When she explained she did not drink and was not drunk, police did not believe her. She recalls an officer saying "Oh, come on, you had to have had something". The officers told A.M. they would be in touch; she did not hear from them again. Years later, when A.M. contacted the social worker to attempt to get a copy of the police report she learned there was no record of her report. Given that police failed to document A.M.'s report, it is very likely that they also failed to investigate. In this case, we can see how police biases related to perceived mental illness worked to facilitate police skepticism of A.M. When police perceptions of survivors with mental illnesses encourages skepticism and enables their exclusion from the CJ process, we must recognize this exclusion as an aspect of ableism.

The experiences of B.D. powerfully illustrate investigative apathy. B.D. reported experiences of SA by a former partner in Ottawa in July 2014 (Doolittle, 2017, March 17, n.p.). The incidents of SA she reported were more than one year old at the time of her initial contact with police; she was warned that because of this perceived delay, her case would be lower on the department's priority list, and it would take an extended period of time before an investigator would be in contact with her. Here we see inefficiency through time, through the lack of urgency with which complaints are handled. Ahmed (2018, December 20) explains that strategic inefficiency can help us understand how slowness in response to complaint can be useful and purposeful; "slowness [is used] as a deliberate tactic used to try to stop them from taking a complaint forward" (para. 12). She also explains that power can work through relative

speed, shaping who is allowed to move forward more quickly, who is slowed, and who is stopped (Ahmed, 2017, December 19). Drawing on this perspective, we can see how the decision to place survivors who delay in reporting a SA on a low priority list is one that contributes to the overall pattern of strategic inefficiency in the police response to SA.

Over 30 days later, on September 3, 2014, B.D. received a phone call from the investigator who had been assigned her case saying he would begin his investigation "shortly" (Doolittle, 2017, March 17, n.p.). Approximately two months later, B.D. had still not heard from the investigator; in November she called him for an update. The investigator told B.D. that he had attempted to contact her multiple times, did not receive a response, so he closed the file. B.D. challenged this claim, insisting there was no record of any attempt to contact her and "convinced him to re-open the case" (Doolittle, 2017, March 17, n.p.). B.D. gave a two-hour interview about the SAs, offered potential witnesses with whom she had shared information about the SAs, and provided diary entries relevant to the incidents. The investigator told her the evidence would be reviewed by the Crown, to see if there was enough to merit proceeding with charges.

However, the investigator did not follow through. Near the end of January 2015, B.D had not heard back from him, so she called him. B.D. explained the officer told her "The last time we spoke, I said your case was closed" (Doolittle, 2017, March 17, n.p.). Through this phone conversation B.D. also learned that the investigator had informed the perpetrator, her former partner, that the case had been closed, but had not informed her. Displaying tremendous determination in the face of what must be understood as clear attempts to slow and stop her complaint, B.D. challenged the investigator's actions by filing a complaint with the Office of the Independent Police Review Director. Results from an internal investigation of the officer's actions revealed that he did not make any attempts to contact B.D. as he had claimed. That is, he lied to B.D. about having tried to contact her repeatedly and about closing the case because he did not receive a response. *He lied*. Additionally, his records did not include any indication that he took even the most basic investigative steps; there was no record that he had tried to contact B.D., witnesses, the suspect, or any of the individuals involved in the case. The internal investigation

determined that the investigator in B.D.'s case violated the Police Act and he was found to have committed insubordination, neglect of duty, and deceit. However, before the hearing involving the Independent Police Review board, the investigator was allowed to retire.

The experiences of B.D. highlight the work of complaint; survivors are often forced to advocate for themselves as they navigate a route strewn with institutional barriers. To keep her complaint active, B.D. was required to continually initiate contact with police. She was faced with a complaint process *within* a complaint process, neither of which resulted in accountability for either man who perpetrated harm. The investigator retired before he was reprimanded, and the man who sexually assaulted her was not charged. In addition to the use of time as a management technique, Ahmed (2018, December 20) explains that exhaustion can also be used in this way. Exhaustion can be *the point* of a complaint process, Ahmed (2018, December 20) explains, not simply the effect: "you tire people out so they will give up". The work of complaint and its associated exhaustion are themes in the experiences of SA survivors who enter the CJ process.

Two other survivors in the "Unfounded" series also found it necessary to file complaints with police review boards addressing the mishandling of their complaints of SA: Maddie and Ms. Sandhu (Doolittle, 2017, July 7). The review team in Maddie's case determined that police misconduct was "unsubstantiated", but the team did find that the officers made critical "errors" by failing to obtain key evidence, submit the SA evidence kit for toxicology analyses, and interview important witnesses (Doolittle, 2017, July 7). They also ruled that police failed to understand and effectively apply consent laws, and that comments made by one of the officers were unprofessional and insensitive.

For Ms. Sandhu, the review team found her complaint was inadmissible. Despite the fact that officers closed her file without collecting relevant video surveillance, canvassing for witnesses, or consulting with the specialized SA unit in the Vancouver Police Department, the review board found that Ms. Sandhu's case was not mishandled. When critical aspects of survivors' cases are mishandled and these are not understood as misconduct, these actions, or lack thereof, are normalized. When investigators are allowed

to fumble complaints of SA with little accountability, we must understand these as not simply "failures" of the police response, but as *part of* the police response.

Melodie was also required to advocate for herself when she was told by police that they would not be pressing charges against the man she reported had choked and raped her. Following her experience of SA in September 2015, Melodie went to the hospital to get a rape evidence kit collected and gave a detailed statement to investigators, but a month later she was told, "Well, he doesn't feel he raped you", and that police decided it was a "misunderstanding" (Doolittle, 2017, March 17, n.p.). Melodie took her story to local media, whose television and print stories put pressure on police to take a second look at Melodie's complaint. This second look led to a charge, suggesting that the evidence *was* available to support a charge, but that the initial investigators failed to act. However, before the suspect could be charged, he fled the country. In 2016 he was arrested coming back into Canada.

The stories of these survivors' interactions with investigators are drastically different from my own. Whereas many survivors describe lack of communication from investigators, Detective K went out of his way to keep me informed.

> *At the time of my SAs my family was very poor; we did not have access to a phone or a vehicle. Despite these facts, Detective K. made sure I remained informed. He made regular visits to my home, mostly when there were important updates and sometimes to simply check-in. He personally drove me to the police station to create composite images of the men who raped me, to the meetings with the Crown attorneys, and even to court once we got to that stage.*

In contrast to many survivors who describe investigators' lack of urgency and failures to take effective investigative steps, Detective K took a patient, detailed approach.

> *Detective K. was thorough and careful in his investigation. For example, he already knew the names of the men who raped me because one of them used his identification to register the hotel room I was raped in. He had discovered their names by following up with this investigative lead. In addition to effectively following through on basic investigative tasks such as witness and suspect interviews, Detective K. took me to the police station to create composite computer images of the men who raped me, "just in case" it was necessary.*

Where some survivors have had to insist that police take their formal statement or had to wait long periods of time before being given an opportunity to make a formal victim statement, the detective in my case was diligent.

> *I was not able to articulate a clear account of what happened to me when I met detective K. in the hospital. It was the early hours of the morning, I had not slept, and I was experiencing a trauma reaction. Detective K. did not push me; he explained it was important to take my formal statement as soon as I was able, in order to begin the investigation, but that he could wait until I felt comfortable and capable. He explained it was okay to need some time, given the difficult circumstances, and that he would follow up with me the next day. He did. I did not have a phone at home so Detective K. came to my house. When I still did not feel able to review the details of the events, he did not pressure me to an extent that I felt uncomfortable, but he did persist until I gave a formal victim statement approximately 48 after the assaults.*

In contrast to many survivors who describe investigators' disregard and mistreatment, Detective K was compassionate and supportive in his approach. In some instances, he exceeded what would reasonably be expected in terms of support, going out of his way to encourage my healing process.

> *Detective K talked to me about trauma a few different times. I was being treated by a psychiatrist for PTSD symptoms but did not understand why I had continual physical pain. When I shared this confusion with him, he shared his own experience of trauma with me. He told me he had a motor vehicle accident years before and explained that, for many people, psychological pain can manifest physically. This commonality we shared appeared to have been a foundation for compassion in the way he approached me. I am certain detective K. knew we were poor, and I am convinced he could tell my home environment was not ideal for healing from trauma. I think this is, in part, was why he went out of his way to show me kindness and support.*
>
> *Knowing I had begun coping with my trauma through snacking, in preparation for our trip to the police station, Detective K. gave me a pink gift bag full of chocolatey treats. Upon learning that I was getting comfort from my brother's new kitten, Detective K consulted with my Mom and together they surprised me with my own kitten, straight from the detective's own farm. More than anything in the whole CJ process, that kitten helped to heal me.*

The commonalities between detective K and I extended beyond our shared experiences of trauma; we are also both White and come from similar cultural backgrounds. In fact, every individual I interacted with through the CJ process, as well as individuals in the SA unit at the hospital, was White. It is reasonable to suggest that our shared Whiteness and cultural similarity also impacted our interactions and the extent to which detective K viewed my complaint as valid.

Like me, some survivors in the "Unfounded" series described positive experiences with police. Arlene, who reported a SA perpetrated by a police officer in March 2016, describes a thorough investigation and a compassionate approach from the officers involved in her case (Doolittle, 2017, March 17, n.p.). K.S. does not recall ever feeling skepticism or blame and explains that, "all the police officers [she] dealt with were great" (Doolittle, 2017, March 17, n.p.). Her positive perceptions of police responses are likely shaped in relation to the perpetrator being charged, tried, and found guilty in October, 2016.

Shannon describes the lead investigator on her SA case as "amazing" but also recalls that he began his process with a warning about the seriousness of filing a false report of SA (Doolittle, 2017, March 17, n.p.). Lisa reported a historic SA in Montreal, Quebec in December 2014 and felt that the police believed her (Doolittle, 2017, March 17, n.p.). Paola describes being taken seriously by police, and that the investigator she dealt with, Constable Hollywood, was calm and non-judgemental (Doolittle, 2017, March 17, n.p.). Notably, Constable Hollywood had specialized SA training and four years' experience in a SA unit, something that is neither required nor widely practiced in police jurisdictions across Canada. The perpetrator in Paola's SA, her former partner, was charged with two counts of assault and one count of SA.

Marley and S.S. were each laughed at by police officers when they made their reports (Doolittle, 2017, March 17, n.p.); I received compassion and a kitten. Police surprised T.R. when they treated her professionally, kept her informed, did not pressure her, and made her feel safe (Doolittle, 2017, March 17, n.p.); Ava describes her interview with police as "a traumatic event" where she felt "gutted" and "violated" (Doolittle, 2017, March 17, n.p.). It appears that the quality of the police response to any particular complaint of SA; the urgency in their approach; the efficacy and effort put into each investigative step; and the level of respect, compassion, or harm in their interactions with survivors is another "game of chance" that women who report are forced to play. That is, whether police will adequately and effectively respond to a complaint of SA is another "lottery" that survivors enter when they decide to report.

Sara Ahmed (2018, December 20) explains that inefficiency can be "beneficial insofar as it supports an already existing hierarchy" (para. 21). Police inaction and investigative failures stop complaints of SA, and in turn, do not stop perpetrators. In this way, they are a key example of strategic inefficiency in the CJ response to SA: they support the status quo of rape culture and male sexual violence against women and gender minorities by failing to effectively respond to complaints of SA. Strategic inefficiency does not necessarily require intentionality or effort. Rather, it can operate through habitual patterns of response (Ahmed, 2018, December 20). These patterns, intentional or not, differentially impact SA survivors and overwhelmingly benefit perpetrators.

Importantly, strategic inefficiency cannot only be found in police responses to SA; many of the patterns of investigative apathy, inaction, and critical failures in police handling of SA can be seen, arguably more distinctly, in police responses to MMIWG in Canada. Though there are many important differences between police responses to these two inter-related aspects of gender-based violence in Canada, there are crucial patterns that are similar. Below I briefly explore these similarities to highlight the pervasive use of strategic inefficiency within policing institutions; to underscore its differential impact on women from particularly marginalized communities; and to demonstrate its utility as a tool of heteropatriarchal colonialism.

5.3 Missing and Murdered Indigenous Women and Girls: Lost in the system

> Missing files, missing persons: a history can be what is erased; a history of what didn't make it; who didn't make it; who wouldn't take it. Strategic inefficiency: how some disappearances are not counted by being deemed "lost in the system" (Ahmed, 2018, December 20, para. 32).

A comprehensive analysis of strategic inefficiency in police responses to MMIWG is beyond the scope of the current discussion. However, an overview is critical as it demonstrates the pervasiveness of patterns of strategic inefficiency in police responses to sexual and gender-based violence. Despite the rarity of criminal investigations that result in legal accountability and findings of fact on which to base analyses, we can reasonably assume that at least some of the Indigenous women who are discovered missing or murdered in Canada are targeted for sex-based crimes. Violence against Indigenous women is

structured by colonial policies and practices, shaping their increased vulnerability to experiencing sexual violence. Indigenous women, girls, and Two-Spirit individuals experience higher risks of murder, serial predation, and SA (National Inquiry, 2019). The ongoing crisis of MMIWG is a manifestation of a broader pattern of colonial violence and systematic marginalization (National Inquiry, 2019).

The ongoing crisis of MMIWG in Canada is supported by the targeting of Indigenous women and girls for sexual and gender-based violence as well as the chronic lack of institutional protection of Indigenous peoples by Canada's policing systems. This section focuses on the latter and explores police responses to reports of missing Indigenous women, highlighting patterns of strategic inefficiency. This analysis focuses, in large part, on police investigations of missing women from Vancouver, British Columbia's Downtown Eastside (DTES), a group of women predominately working in the survival sex trade, many of whom had mental health or substance use disorders, and a number of whom were being targeted by at least one known serial killer during the 1990s into the 2000s (Oppal, 2013, Executive Summary). Indigenous women were overrepresented within this group, as they are overrepresented within the survival sex trade across Canada (Oppal, 2013, Executive Summary). This section also utilizes some experiences described by family members involved in the National Inquiry into MMIWG (National Inquiry, 2019).

The missing women from DTES faced particular barriers that shaped their vulnerability to violence: extreme poverty, inadequate housing, food insecurity, health inequities, substance dependency and withdrawal, and, for many, involvement in the survival sex trade (Oppal, 2013, Executive Summary). Shoved to the most extreme margins of society, sex workers are often understood as perpetually consenting and unrapable: the ultimate example of the disreputable woman (Phipps, 2009). This positioning on the social hierarchy shapes sex workers' experiences of—and vulnerability to— violence, as well as police responses to it. It is perhaps because of this positioning within the most extreme margins of society that these cases make visible the most powerful examples of police failures and strategic inefficiency.

In late 2010, the Lieutenant Governor of Canada established the Missing Women Commission of Inquiry, an investigation into the police response to the missing women in Vancouver's DTES between January 23, 1997 and February 5, 2002 (Oppal, 2013a). This inquiry entailed a comprehensive review of police investigative responses to MMIWG and to women in the sex trade more broadly and offers a unique opportunity for exploring police practices. In addition to the availability of this unusually thorough review of police practices, another reason for focusing on the missing women in Vancouver's DTES is the overwhelming, profound failure of the CJ system they experienced. During this period alone, *at least* 69 women were discovered missing, none of whom were found alive and all of whom were forsaken by utterly profound and incomprehensible patterns of police inaction and inefficiency (Oppal, 2013b).

Investigative apathy in response to missing persons cases in Vancouver's DTES was multidimensional and pervasive. In some cases, family members were refused the opportunity to make a report entirely (Oppal, 2013b). Elsie Sebastian, for example was discovered missing in 1992, and despite at least 5 documented attempts by her family to file a missing person's report, an official report was not recorded until 2001, almost a decade later (Oppal, 2013b). In March 2001, when Marion Bryce called 911 to report her daughter Patricia Johnson as missing, she describes being told "Oh, she will show up. She's just out there partying because she's a working girl" (Oppal, 2013b, p. 21). After persistent follow-up, Ms. Bryce eventually persuaded the Vancouver Police Department to file an official report, dated May 31, 2001, more than two months after her initial attempts. Bernice C. describes a strikingly similar experience when reporting her daughter Jennifer missing to the RCMP Portage la Prairie detachment in June 2008. As she explained to the National Inquiry into MMIWG, Bernice was told "Oh, give her a week. She's on a drunk" (National Inquiry, 2019, p. 649). Similarly, Pamela F. describes being met with indifference and inaction when she reported her 16-year-old daughter Hilary missing "…we called the police and nothing" (National Inquiry, 2019, p. 651).

These experiences are indicative of a broader pattern of discrimination and dismissal of reports of violence against Indigenous women, the foundations of which are rooted in stereotypes about Indigenous women as drunks, partiers, and disreputable women (National Inquiry, 2019). These refusals to take

reports are clear examples of police denying protection to Indigenous bodies and to women engaged in the sex trade and are powerful examples of strategic inefficiency. Refusals to take reports are not simply failures to do something; in Ahmed's words, *they are doing something*.

Once initiated, reports of missing women were frequently mishandled in a variety of critical ways. Oppal (2013b) notes that in *most* cases of missing women from the DTES, very few initial or follow-up investigative steps were taken despite clear investigative opportunities. That is, fact-finding routes were often available for police to inquire into the location and safety of these women but were frequently ignored. In the majority of cases, police failed to take even the most basic steps including attending the women's last known addresses, canvassing the areas they frequented, or interviewing family members, friends, or acquaintances (Oppal, 2013b). Additionally, police often underutilized key resources, such as missing person's posters, family, community, and media involvement, search warrants, surveillance, and undercover operations (Oppal, 2013b). Frequently and persistently, police in the DTES failed to take meaningful steps to find the missing women.

Further, when investigations were carried out by police, they commonly proceeded at a "glacial pace" (Oppal, 2013b, p. 25), and sometimes stopped entirely or had significant, unexplained gaps where no action was taken. In these cases of missing women, the lack of urgency was astounding. Delays and gaps in investigations into missing women from the DTES commonly lasted weeks or months, but sometimes no investigative actions were taken for years. For example, Dawn Crey was reported missing on December 11, 2000, but an active investigation did not begin until 45 days later (Oppal, 2013b, p. 25). The investigation into Tanya Holyk began in November 1996, but was closed within a month, without verification that she was safe and alive; when re-opened, there was another 11-month gap from April 1997 to March 1998 where police took no investigative action despite having identified two persons of interest (Oppal, 2013b). Leigh Miner was reported missing in February 1994; after a few basic preliminary steps, her case "was just sitting in abeyance" (Oppal, 2013b, p. 26) for seven years: no steps to investigate her disappearance had been taken. Taressa Williams was reported missing to two separate police departments in 1988 and 1989; police did not take *any* investigate steps and the file was closed in

1989 (Oppal, 2013b). That is, *police did nothing* to look for Taressa until nine years later in March 1998 (Oppal, 2013b).

In missing persons investigations, time is of critical importance. In missing Indigenous women's cases, and in cases of missing women from the DTES, time was a central mechanism of strategic inefficiency. Ahmed (2018, December 20) explains that strategic inefficiency can be about the slowness of a response or uptake, but also how that slowness is useful. Failing to adequately and promptly respond to reports of missing Indigenous women is a pattern reflective of the colonial foundations on which Canada's policing systems were built; this pattern is a central mechanism of the ongoing attempted genocide of Indigenous peoples. Women have been targeted by colonial violence since colonization began in Canada; through racialized strategic inefficiency in the CJ process, Indigenous women continue to be targeted by colonial violence.

The failures of police to protect the women in Vancouver's DTES were multi-dimensional, ongoing, and extensive. Despite their mandate to protect public safety and their legal obligation to warn the women at risk, police not only failed to caution the women who were being targeted, but they publicly denied and downplayed the possibility of a serial killer in the DTES, despite mounting evidence (Oppal, 2013b).

Robert Pickton was arrested in February 2002 and subsequently convicted of second-degree murder of six women from the DTES: Marnie Frey, Georgina Faith Papin, Andrea Joesbury, Brenda Ann Wolfe, Sereena Abotsway, and Mona Wilson (Oppal, 2012). He is suspected to be responsible for many more murders of missing women from the DTES. Astoundingly, Pickton was brought to the attention of Vancouver Police Department in relation to the serial murders in July 1998, acknowledged as a potential serial killer by police in September 1998, accepted as a person of interest in the serial murders and brought to the attention of senior police managers in this respect in October 1999, but was not even interviewed until January 2000 (Oppal, 2013b). Throughout this extended period, police received numerous tips regarding Pickton's viability as a suspect in the serial murders, which they ignored. Oppal (2013b) notes that there is no evidence to suggest that police took even the most fundamental of investigative steps to confirm or rule out Pickton as a suspect, such as canvassing areas he frequented and

interviewing his known associates. When Pickton was eventually interviewed in January 2000, it was "an unmitigated failure" (Oppal, 2013b, p. 143), completely unplanned, and fell far short of even the most basic policing standards.

These patterns of inaction and critical investigative failures by police had fatal consequences for women from the DTES. Pickton's ongoing targeted violence of women in the sex trade was facilitated by police practices. It must be recognized that Indigenous women face a profoundly disproportionate impact as a result of these investigative failures.

Chapter 6: Barriers in the Criminal Trial Process

"The complainant's failing is engineered, it must be stressed." (Larcombe, 2002, p. 134)

Below I describe five barriers survivors may encounter during the trial process for SA. We can understand each of these as mechanisms of "failing" SA complainants and part of the engineered process described by Larcombe (2002). These "failures" are achieved through the disqualification of complaints of SA and discrediting survivors. They include misapplications of consent law, a hostile trial process, alienation and domination through courtroom talk, the "reasonable" perspective, and aggressive defence strategies including "whacking the complainant".

6.1 Misapplications of Consent Law

The legal definition of consent as it relates to SA is not straightforward. Its full articulation is spread across at least five parts of Canada's *CC*: the formal definition of consent, described in positive terms, can be found in section 273.1 (1); lists of specific situations where consent cannot be present are located in sections 265 (3) and 273.1 (2); the circumstances under which an individual accused of SA can and cannot evoke the defence of "honest but mistaken belief in consent" are reviewed in sections 265 (4) and 273.2, respectively. Section 273.2 is referred to as the "reasonable steps" clause and is critical to the interpretation of consent as affirmative. Additionally, there are common-law rules impacting how these statutes are interpreted and applied (*Ewanchuk* 1999, for example), adding another layer of complexity to the legal definitions governing SA. To understand the multiple and complex ways SA survivors are discredited and the ways their experiences of violence are invalidated through the CJ process, it is necessary to outline some fundamental points about the legal interpretation of consent in Canada.

All acts under Canadian law must have two essential elements to be considered criminal offences: *actus reus* and *mens rea* (Craig, 2018). The *actus reus* refers to the offence, "the guilty act". The *mens rea* refers to "a guilty mind" and requires that the accused knowingly and intentionally committed the act. In the case of SA, where the *actus reus* is proven or agreed upon, but the *mens rea* is refuted, the defence of honest but mistaken belief in consent becomes potentially viable. That is, if a person commits an act of sexual violence but can show they did so with an honest belief that they had consent, they can be

acquitted of the charge as if no crime has been committed. However, Canada's "reasonable steps" clause requires accused individuals who use the defence of mistaken belief to demonstrate that their belief, although purportedly mistaken, had an "air of reality". Specifically, one must present evidence to show they took reasonable steps to ascertain consent from the complainant. In court, this means that if the defence's position is honest but mistaken belief in consent, the onus is on them to prove the accused took reasonable steps. However, if the defence is that consent was given, the burden of proof is on the Crown to show non-consent beyond a reasonable doubt (Benedet, 2014). Research suggests it is extremely difficult to meet this burden of non-consent, and the weight of it is often thrown entirely on the shoulders of the survivor to prove she "effectively" communicated consent (Larcombe, 2002; Randall, 2010a; Sheehy, 2000).

As established with the passing of the "no means no" bill, Bill C-49 (1992), the legal definition emphasizes that consent is contemporaneous and ongoing; it must be given at the time of contact and can be revoked at any point. Consent is voluntary; if it is coerced or extracted through abuse of power it is not legally valid. Consent is affirmative, meaning that it is expressed in positive terms, through words or actions. That is, the lack of a "no" cannot be interpreted as consent; evidence of passivity, of lack of words or actions to suggest "no" does not constitute consent. This affirmative definition means that reasonable steps must be attempts to attain or confirm positive expressions of consent. An accused cannot use "willful blindness" or "recklessness" in establishing mistaken belief in consent as a defence; reliance on these notions is understood as a mistake of the law, not a mistake of consent, and should result in conviction of SA (Randall, 2010a).

A key barrier for SA survivors within the CJ process is the misapplication of consent law. The ways in which consent law is mishandled in SA trials are varied, but common and persistent themes include a focus on (legally erroneous) (a) notions of implied consent, (b) complainants' failure to resist, and (c) complainants' failure to effectively communicate non-consent. These three strategies ignore the amendments established with bill C-49 (1992) but are frequently used by defense lawyers to shame and

blame survivors of SA. In this way, survivors are often forced to serve as witnesses to the legal invalidation of some of their most traumatic moments.

As was made clear in the *Ewanchuk* (1999) decision, the notion of implied consent is not legally valid (Benedet, 2014). The decision in *R. v. T. S.* (1999) also makes the legal invalidity of implied consent clear stating that, "[a]s a general rule, non-verbal behaviours, when relied upon as an expression of consent, must be unequivocal" (as cited in Sheehy, 2000, p. 101). Consent must be clear and unambiguous; it can never be presumed. Nevertheless, I show that it is not unusual for legal actors to suggest that a woman's consent can be assumed based on context or her behaviour related to the assault. Benedet (2014) uses the term "contributory" behaviour (p. 131-132) to refer to conduct by a woman that is thought to have contributed to her SA and actions she (purportedly) could have taken to avoid it. Contrary to the legal definition of consent, Benedet (2014) shows how "contributory" behaviour can be used by defense lawyers to shift blame away from perpetrators onto survivors. Importantly, the concept of "contributory" behaviour is shaped by sexist ideas about women that typically hold survivors culpable for their own victimizations. Nevertheless, according to the law, SA is *not* "provokable" and the responsibility for sexual violations rests solely with perpetrators.

A complainant's "failure" to resist, often argued to be "contributory" behaviour, also cannot be used as evidence of her consent. This legal nuance is made clear in Canada's articulation of consent as *affirmative* (Bill C-49, 1992). Nevertheless, there are numerous examples of legal decisions that do precisely this, resulting in perpetrators of sexual violence being rewarded with acquittals for legal misinterpretations of consent (Craig, 2018; Randall, 2010a). These legal errors are facilitated by stereotypical expectations about resistance, myths about "authentic" victim behaviour, and the heteronormative sexual script. Beginning with my own case as an example, I demonstrate a pattern of legal errors that work to subvert legal advancements in SA law and perpetuate women's fundamental inequality, lack of safety, and lack of institutional protection.

> *The legal defence taken in court for the two men who raped me was consent; they argued I gave consent to have sexual intercourse with each of them, one immediately after the other. I did not; I clearly and unequivocally said "no" to their verbal invitation, said "no"*

> *repeatedly as they took turns raping me, and cried through the entire experience. I was terrified, frozen with fear. I vividly recall the exchange of my hips between their hands as Jason passed me to Jamie. The exchange of women between men. Neither of them said a word to me during this exchange. As I was paralyzed in fear, they passed me between them as if I was an inanimate object, a sex toy. After Jamie began raping me, four people came out of the bathroom, two of my friends and two of my rapists' friends. My friend Amie was under the influence of ecstasy (and in the early stages of developing schizophrenia, we later learned) and came to sit on a nearby chair, staring at us blankly. I reached out for her, tried to say "help" but no words came out. My other friend JJ began yelling: "get the fuck off her! Get the fuck off her Tony!" Jamie had given us a fake name. That night we knew him as Tony. I remember JJ hitting him with her fists, or with something. I remember his cold response "not till' I'm done". He wasn't done with me yet. I don't know how I got away; if he was done and let me go, if he got tired of my friend beating on him and let go, or if I was able to push him off, but somehow I got out from under him and ran out of the hotel door, down the stairs, and in the direction of JJ's house, where we had planned to sleep that night.*

When I was being cross-examined, the defence lawyers' questions focused a lot on my failure to resist, on my failure to "raise a hue and cry", and on my failure to make my non-consent clear to the men who were raping me.

> *The defence lawyer asked a lot of questions about how loudly and clearly, I said "no". I was confident in the fact that both the men clearly heard my first "no" in response to their verbal request to "suck his dick while I play with you". I explained I clearly said "no" and began to move away, but Jason grabbed me, pulled me toward him, pulled my skirt up, and began raping me. The defence lawyer repeatedly asked why I had not resisted more adamantly, screamed louder, or articulated my non-consent in a more assertive fashion: why didn't I fight them? Why didn't I scream, call out for my friends? Why didn't I run? He noted that I did not have any injuries from kicking, scratching, or hitting them, explicitly highlighting my lack of resistance. He also noted my clothing was not torn and suggested it would be reasonable to assume that if what happened was rape, my clothing would show signs of my resistance. A "reasonable" person, he insisted, would adamantly resist unwanted sexual contact. That I had not done so, was clear evidence that it was not rape, he argued.*

Blame was shifted away from them towards me through repeated suggestions that I had failed to respond properly to these sexual violations. My response to rape was a "flop" response, over which I had little control. As a common trauma response, I did not think and act; my body responded by freezing and my mind felt "shut off". The Crown failed to present evidence related to trauma, so the jury was unable to interpret my response in the context of trauma-related fear responses. I was interrogated, shamed, and blamed for this response, and it led to the conclusion that these men were "not guilty". From my failure to resist, evidenced by my body and my clothing, to my inability to convince the defence lawyer that my response *was* reasonable, he steadfastly maintained that *I* was the problem, not these two men.

> *The DL repetitively implied that the problem was not a failure by these men to ascertain consent; it was not that these men raped me, but rather, the problem was with me. He had what felt like hundreds of suggestions of what this problem with me might have been. He suggested I might have been confused, thinking I was saying no, but actually I was not. Or maybe I did not say it loudly enough, or clearly enough. Maybe, he suggested, I thought I was crying but was actually moaning in pleasure. Was I confused? Perhaps I was not obvious enough in my non-consent. Maybe I should have screamed loud, or ran out, or called for my friends. He wasn't sure exactly what the problem was, but he was sure it was located with me, and he was sure it wasn't rape. I was 18 when I was on the witness stand, 16 when I was raped. During my testimony I did not have the clarity of mind or the understanding of trauma responses to be able to explain why I didn't just scream as loud as I could. I could only tell him "I don't know" and "I wish I had".*

At different points throughout the cross-examination, as may be evident above, the defence lawyer appeared to be arguing "honest but mistaken belief in consent", rather than consent:

> *"When you say you were crying, how did these cries sound? Could they have sounded like moans of pleasure? Did these gentlemen hear you when you said 'no'?" At times it appeared as if the defence lawyer was accepting the fact that I was crying during the rapes, even the fact that I had said "no", but suggested the way I did these things were just not quite clear enough for the two men to have been able to recognize them as clear indications of my non-consent.*

The lawyer's strategy was likely to avoid the reasonable steps clause but still suggest to the jury that, even if they did accept that I did not want to have sex with these men, they still could not be held accountable. After all, how could they reasonably have been expected to have understood my non-consent? The implication here is that it mattered less how the violence was experienced by me, and more how it was interpreted by the men raping me. Carol Smart (1989) might interpret this strategy and its implications as evidence of a phallocentric legal culture that prioritizes the masculine experience of and meaning of sexuality over the feminine (p. 27-28). The privileging of the male perspective is an underlying principle of any legal system that allows a defence of mistaken belief in consent for sexually violent crimes: harm is measured from the perspective of the perpetrator, not from the perspective of the victimized. The law assumes that because the perpetrator failed to interpret that the woman did not want sexual contact with him, she was not violated (MacKinnon, 2012). In relation to the validity of the honest but mistaken belief in consent defence for SA, MacKinnon (2012) asks "[f]rom whose standpoint, and in whose interest, is a law that allows one person's conditioned unconsciousness to contradict another's violation?" (p. 479). The systemic valuing of male perspectives over women's is emphasized in the

acceptance of mistaken belief in consent as a valid defence to sexual violence. The reasonable steps clause was intended to place limits on the circumstances under which an accused could argue he mistakenly believed he had consent. However, case law suggests the circumstances under which men are granted legal immunity for having mistakenly assumed consent are anything but reasonable.

For example, Justice Baldwin, in *R. v. T.V.* (2006), accepted T.V.'s defence of honest but mistaken belief in consent, ruling that it was "reasonable to infer that he thought she was consenting when she lay down on the bed after he made it known that he wanted to make love to her" (as cited in Randall, 2010b, p. 417). The judge based this decision on her assessment of the complainant as "an assertive and strong-willed woman", based on her testimony, and the fact that she "made no attempt to sit up or leave the room" (as cited in Randall, 2010b, p. 417). In *R. v. R.V.* (2001, 2004), a woman experienced unwanted sexual contact forced upon her at the hands of her estranged husband; her repeated, unambiguous verbal and physical resistance were noted in some of the judge's comments, yet two judges still found reasonable grounds to accept the perpetrator's defence of honest but mistaken belief in consent. In this case, her resistance was accepted as fact, yet it did not seem to matter. At least, it mattered less than her perpetrator's entitlement to assume her consent.

In *R. v. B(IE)* (2011, 2013), as described by Craig (2018, p. 192-196), the survivor and B(IE) were drinking together in a tavern on the night of the SA. B(IE) invited her outside, "led her behind a dumpster in the parking lot, opened his pants, removed his penis, placed it in her hand and then grabbed her hair, pulled her head down, and inserted his penis into her mouth" (Craig, 2018, p. 192). After B(IE) ejaculated he told his victim "this never happened Corporal" (as cited in Craig, 2018, p. 192). The complainant testified that she did not say "no", that she did not say anything, because it was so unexpected, and she was shocked and crying. Read this as a trauma reaction. Critically, however, SA is rarely examined in the context of trauma in the CJ process. Legally, she is not required to say anything; the accused is expected to ensure he has consent. He did not. This was SA.

The trial judge found the complainant credible and accepted as fact that she did not consent to oral sex with the accused. Nevertheless, Justice Moir found reasonable grounds to suggest that B(IE) may

have had an honest but mistaken belief in consent. The judge justified this finding by referring to the complainant's "contributory" behaviour: she agreed to go outside with her to-be attacker "for no explicit purpose" (as cited in Craig, 2018, p. 193). Further, Justice Moir suggests that after B(IE) opened his pants "he is entitled to think, absent complete drunkenness, that [the survivor] knows his intent and is going along with it. There is no evidence he saw tears or heard cries. In all the circumstances, the absence of a protest is significant" (as cited in Craig, 2018, p. 193). However, while the absence of protest should not have been legally significant; his lack of reasonable steps was.

The legal definition of consent established with the "no means no" Bill (C-49, 1992) was completely disregarded in this case. This ruling is wrong in law, ignoring the reasonable steps clause (273.2 [b]) entirely, and misapplying the affirmative definition to consent to shift blame away from the perpetrator and place it on the survivor. It mattered less to this judge that this man forced this woman to perform oral sex than it did that she did not make her non-consent clear. The privileging of the male perspective in this case is glaring, as is the entitlement for men to assume a woman is consenting until she "adequately" demonstrates non-consent. Additionally, absent the contextual evidence necessary to understand this survivor's response to SA in the context of trauma, she was discredited based on her trauma response to SA. The description she gave of being "shocked and crying" describes the experiences of many survivors after an experience of SA. Her "absence of protest" was used to disqualify her complaint and her trauma was weaponized against her.

In the context of spousal relationships, the circumstances in which mistaken belief of consent can be accepted as a valid defence to SA is sometimes astonishing. Justice Crawford J., in *R. v. C.M.M* (2002), accepted the defence of mistaken belief in consent where the survivor's estranged husband broke into her home while she was at work, found a handgun he kept inside, confronted her with the gun, threatened to kill her, and forced her to "prove [she] still love[d] [him]" by "mak[ing] love" (as cited in Randall, 2010a, n.p.). In *R. v. MacFie* (2001), the trial judge accepted the defence of mistaken belief of consent, even as he ultimately murdered his former wife. After physically abusing her throughout their years-long relationship, Mr. MacFie ultimately abducted his former spouse, took her to a gravel pit, raped her in the

back of his van, and murdered her (Randall, 2010a). He was convicted of the murder but acquitted of the SA; ultimately this ruling was overturned on appeal, and Mr. MacFie was convicted of both charges (Randall, 2010a).

Craig (2018) describes the case of *R v Adepoju* (2014), in which the judge accepted that the complainant "*initially* objected" to her attacker's actions but acquitted him because her testimony indicated that she eventually stopped objecting. This survivor's failure, in the eyes of Justice Sisson, was her lack of persistence in her resistance to SA. Yet, a text message from the perpetrator to the survivor that acknowledged the assault was entered into evidence: "I had to force you, you didn't want to do it" (as cited in Craig, 2018, p. 196). Almost unbelievably, Judge Sisson still managed to find reasonable grounds to acquit, claiming the Crown did not prove non-consent beyond a reasonable doubt. If an outright confession of forced sexual activity can still be interpreted as reasonable doubt of non-consent, then the reasonableness of the system must be questioned.

In what has become an infamous criminal trial in Canadian SA law, *R. v. Wagar* (2014), Justice Camp affirmed what many legal scholars have long suspected: the failures to effectively interpret SA law are sometimes grounded in individual legal actor's disdain for SA law. As Craig (2018, p. 199-204) outlines, in addition to failing to properly apply the affirmative definition of consent, Judge Camp made multiple statements that suggest contempt for SA law and explicitly blamed the victim for her lack of resistance. Some of these include "why couldn't you just keep your knees together?", "why didn't you just sink your bottom into the basin so he couldn't penetrate you?" and "[s]he knew she was drunk … Is [there] not an onus on her to be more careful?" (as cited in Craig, 2018, p. 199). The disdain in these comments is not only directed at SA law, but also this survivor, a young Indigenous woman. The prosecutor in *Wagar* (2014) vigilantly worked to shield the complainant from the harmful biases throughout the trial. However, these protective efforts were ineffective against Justice Camp (Craig, 2018).

These actions by the survivor – getting drunk, not keeping her knees together or moving her "bottom into the basin" – can be understood as "contributory" behaviour. They were used by Judge Camp to

suggest she was responsible for her own victimization. The defence lawyer in my case bombarded me with a variety of suggestive questions that were weighted down with similar assumptions:

> *Every decision I made that night, except the decision to say "no", the choice of non-consent to have sex with these two men, was put under a microscope. It mattered why I took drugs, why I drank alcohol, and when, how much, and how often I used illegal substances. It mattered where I got the alcohol, where I went that night, what I was wearing, who I flirted with, who I was attracted to, where I urinated, why I was wearing one shoe, why I decided to stay out late, why I went back to the hotel room, why I played strip poker, why I sat on the bed. All these decisions seemed to matter a lot. But the one that didn't seem to matter, the one that should have mattered, given the legal context, was the decision of non-consent.*

A defence lawyer's obligation is to protect the interests of their client. They have a duty of loyalty, ethically requiring that they thoroughly cross-examine complainants and witnesses (Craig, 2018). To this end, defence lawyers must be allowed to ask detailed questions and seek to demonstrate inconsistencies. A common way defence lawyers operate in the interests of their clients in SA trials is through attempting to show inconsistencies in a complainant's various statements, hoping to undermine her credibility or reliability (Craig, 2018). However, when these strategies employ questions informed by stereotypes and make implications about a survivor's supposed "contributory" behaviour, they cross from legitimate defence practices into harmful and unlawful acts. Vandervort (2002) talks about "red herrings" (p. 117) in relation to SA cases, referring to legally irrelevant issues intended to distract judges and juries. The "contributory" behaviour highlighted by the defence lawyer in my case, and in these others, was intended as a red herring. Implied consent is not a legally valid concept, therefore evidence of it is a red herring that is useful in eroding survivor credibility and rendering a judgement of "reasonable doubt" more likely.

Drawing on hue and cry and failure to resist stereotypes, defence lawyer Elizabeth Bristow emphasized "contributory" behaviour by the survivor in *R. v. Ururyar* (2016, 2017). In her cross-examination, she questioned the survivor's decisions to go home with Ururyar, to stay after he became angry and began yelling, and her "failures" to "flag someone down, call a friend or do anything to get [herself] away" (as cited in Craig, 2018, p. 35). These decisions, all red herrings, were represented as relevant to her non-consent, which is legally inappropriate.

Randall (2010a) examines SA trails that involve former spouses and highlights legal decisions that use notions of implied consent and "continuous consent" within the context of heterosexual relationships. Randall's (2010a) analysis reveals that, despite the removal of "spousal immunity" in the 1983 *CC* amendments, SA law continues to insulate men who sexually assault their spouses. That is, despite legislation explicitly intended to affirm that the laws of SA apply in all contexts, including spousal relationships, the law is often applied differently in spousal SA.

This idea is explicitly articulated in Judge Koenisgsberg's decision for the British Columbia Court of appeal in *R. v. Went* (2004) when he suggests that implied consent *can* be valid in spousal relationships (Randall, 2010a). Judge Koenisgsberg states that, "Mr. Went had an honest but mistaken belief in her consent, based largely on the sexual history and pattern of behaviour between the couple" (as cited in Randall, 2010a, n.p.). In *R. v. Latreille* (2005), Judge Heeney J. suggested that evidence of "a pattern of repeatedly consenting to sex with the accused in similar circumstances" (as cited in Randall, 2010a, n.p.) was relevant to the complainant's assertion of non-consent in the case at hand. Justice Tetley J., in *R. v. D.M.* (2004), ruled that the accused was "entitled to rely … on previous sexual encounters with the [complainant] where consent to the continuation of a sexual act was given in spite of protestations to the contrary" (as cited in Randall, 2010a, n.p.). These rulings directly contradict the contemporaneous requirement of consent and ignore the reasonable steps clause entirely.

In case after case, we see similar experiences: women are disqualified by their "contributory" behaviours and "failures" to adequately resist or effectively convince her attacker of her non-consent. Their instinctive fear responses are often weaponized against them when they are forced to account for reactions to SA that are argued to be "unreasonable". The idea that consent can be implied based on the context of spousal relationships permeates the legal process and serves as a particularly powerful barrier for survivors who are sexually assaulted by their spouses. While I was able to avoid this barrier, given I was sexually assaulted by men I had just met, we can see from this analysis that differently situated survivors experience the CJ processes of subordination in a range of ways, but almost inevitably, we all experience them. These failures to effectively apply consent law and the failures to consider the impact of

trauma are two of the many mechanisms in the CJ response to sexual violence that ensure that the "complainant's failing is engineered" (Larcombe, 2002, p. 134).

6.2 Hostile Trial Process

Discussing anti-racist work within educational institutions, Sarah Ahmed (2018, May 4) explains that being in an institution that is not built for you can be hard work. She talks about the work people of colour have to do to enter a room, stay in the room, and transform it so it is accommodating: "how difficult and hostile institutions are or can be; how White, how male-dominated; how racist, how sexist and so on" (Ahmed, 2018, May 4 para. 3). The CJ system was designed and is largely operated by White, able-bodied men (Craig, 2018), and its foundation is firmly rooted in heteropatriarchal colonialism. It was not built for or in the interests of women, and certainly not for women challenging a man's sexual access to her body through a SA charge. The criminal trial process, I argue, is a hostile environment for SA survivors: hostile to our recovery, our empowerment, and our mental health and well-being.

In this section I show how the identity of the CJ system as a heteropatriarchal, colonial system differentially impacts the experiences of survivors and contributes to an intimidating and hostile atmosphere. I show how the subordinate role survivors are forced to perform reflects and reproduces social hierarchies based on class, gender, race, and colonialism and replicates the power dynamics of sexual violence in the courtroom (Craig, 2018). That is, the harm experienced by survivors who navigate this process mimics the harm experienced as a result of SA and can reinforce feelings of powerlessness and vulnerability.

6.2a Hierarchy in the courtroom

A longstanding practice of the CJS is the display of judicial portraits in courthouses across Canada, a ritual Craig (2018) suggests reflects and constitutes the identity of the court as an institution and articulates the qualities and characterizations of the Canadian state. Overwhelmingly, these portraits reflect Whiteness and masculinity, contributing to an atmosphere of colonial heteropatriarchy within the halls of the courthouse (Craig, 2018). Further shaping the identity of the institution are explicit representations of imperial and colonial power in the trial process through the display of the Royal Coat

of Arms, the role of "the Crown", and the prosecution of criminal activity in the name of the British monarchy (Craig, 2018). Craig (2018) describes representations of colonialism in the trial processes for some remote, Northern Indigenous communities across Canada; mostly non-Indigenous legal actors fly in and place a federal flag outside a community building to designate it as a courthouse, signalling the powerful visual imagery of the colonial trial system.

For non-Indigenous women, this colonial imagery may be of little consequence to our experiences as survivors in the CJ process. But as Sarah Hunt (2016) notes, Indigenous people enter into Canadian institutions with existing relationships to them (and to rape culture), so for them and perhaps other racialized women who have been targeted by colonial powers, this imagery carries a different weight and is freighted with a history of targeted genocidal violence and a visual reminder of its ongoing harm. This layer of institutional violence did not impact my experience because of my history and social location, specifically my Whiteness. However, the overwhelmingly masculinist orientation of the institution, did impact my experience at trial:

> *I did not notice portraits in the courthouse where my rape trial was held, but I certainly felt the maleness of the institution. Other than myself and the stenographer, all of the legal professionals I interacted with were men: the police officers, the detective, the lead Crown who reluctantly made the decision to prosecute, the Crown who prosecuted my case, the judge, and the two male defence lawyers who represented the men who raped me. There were women in the jury, but I don't remember how many. I do remember the humiliation I felt having to say words like "my vagina" in front of so many men I did not know. I felt exposed and vulnerable and being surrounded by men who held more power than me exacerbated these feelings profoundly. I was outnumbered and overwhelmed by male power on the night that I was raped and in a similar way I was outnumbered and overwhelmed by male power in the courtroom.*

In addition to these representations of colonialism and masculinity in the trial process, hierarchy is reproduced through specialized language, legal rituals and rigid procedures, and the physical setting of the courtroom (Craig, 2018). Through these mechanisms the power dynamics of domination and subordination at the root of sexual violence are replicated in the courtroom.

Deeply rooted in British imperialism, aristocracy, and notions of nobility, Craig (2018) describes how the legal culture and its "overly formal and archaic language" (p.188) contribute to an atmosphere of

hierarchy within the court process. Specialized and technical legal terminology are used in legal definitions as well as the rules governing rigid procedures within the process: plea, disclosure, adjournment, subpoena, pre-trial, preliminary trial, objection, sustained, overruled. The rules governing the trial process shape the role and expectations of survivors, and our ability to perform this role depends on our knowledge of these expectations. When the language used within the courtroom is inaccessible to survivors, so too are the tools we need to perform our required roles competently, to tell our stories, and to appear credible. In this way, legal jargon has an exclusionary effect for SA survivors.

This exclusionary effect can be intensified when Crown prosecutors fail to properly prepare survivors for our role in the trial process (Craig, 2018). Effective witness preparation by Crown attorneys that provides survivors with basic knowledge of legal terms and processes could lessen or neutralize the intimidating effect of legal jargon, depending on the quality of the preparation and survivors' desire and ability to participate. However, importantly, learning legal terminology and preparing to perform the role of a witness is work. The work a survivor has to put in to learn about the trial process, to learn the expectations of her role as complainant, to learn the language of the courtroom, is work she may not have the time, energy, resources, or desire to do. Additionally, the extent to which specialized trial language is (in)accessible is dependent upon each individual survivors' mental ability, level of education, and indirectly her social class. Here we see mental (dis)ability and class location as exacerbating barriers within the CJ process.

Trial procedures themselves, not just the language governing them, can also contribute to an atmosphere of hierarchy. Craig (2018) describes court processes, such as the swearing in of witnesses and standing up when judges enter the courtroom, as rituals or micro-ceremonies. Trial rituals are inherently hierarchical: their rigidly prescribed rules position legal actors at the top and require survivors to perform a subordinate role (Craig, 2018). The expectations that survivors participate in legal practices steeped in ritual and tradition, in which rules are defined by others and survivors' agency and choices are restricted, contribute to the difficulties faced in performing the role of complainant. Justice for SA survivors is conditional, based on our performance in unfamiliar trial rituals. As we are required to retell our stories in

public in exchange for a chance that the perpetrator will be held accountable, we are expected to do so from subordinate positions and on someone else's terms.

Hierarchy within the trial process is also facilitated by the spatial organization of the courtroom: judges sit in the center of the courtroom on a raised bench; the room is physically divided by a "bar" excluding entrance to individuals who are outside of the legal profession except under limited and specific circumstances; witnesses are positioned so as to be visible to the judge and jury (Craig, 2018). Even through the way survivors are seated in relation to other actors in the courtroom, we are reminded of our subordinate roles. Although the practice has largely been discontinued, witnesses have traditionally been expected to stand while testifying in court (Craig, 2018), exemplifying the extent of the control exercised through the legal process. I was provided seating for the duration of my testimony. As Craig (2018) describes, the survivor in *R v Khaery* (2014) was not afforded this basic decency despite recognition by the trial judge of her physical discomfort and exhaustion (p. 185). Not only was this survivor told "no" when she asked the judge if she could sit down, she was admonished for being apparently difficult to see or hear because she was "slumped down in the witness box" (as cited in Craig, 2018, p. 185). Survivors are often required to give testimony for hours at a time, day after day (Craig, 2018). The expectation that we endure physical discomfort as a cost of providing testimony of our victimization is blatantly ableist and punitive. The problem extends beyond the fact that survivors' comfort is not a priority of the CJP. It seems, rather, that survivors' discomfort is sometimes actively constructed.

Masculine and colonial representations in the courtroom, inaccessible language, and trial rituals constitute a foreign environment for SA survivors. Rather than a safe space where survivors feel comfortable and capable of telling their stories, these elements can be intimidating, and make the process difficult to navigate.

6.2b Subordinate role of survivors

The prosecution of SA is done "in the name and interests of the public" (Craig, 2018, p. 16), which means that survivors who enter the criminal trial process do not have legal rights to prosecution, to decide

whether to be a participant in a prosecution, or to have any input on the way the prosecution unfolds (Craig, 2018). That is, survivors do not have legal standing in the criminal prosecution of our own SA cases (Craig, 2018); we have no agency or control. Rather, we are performing a role in a public process that operates in the interests of others. It is critical to recognize that, in the social and institutional context of heteropatriarchal colonialism, "the interests of others" rarely aligns with the interests of those who have experienced the violence of SA.

When seeking access to the transcripts of my SA trial for the current project, I had an experience that crystalized my role as a complainant:

> *On May 15th, 2018, I called the records management department at the courthouse where my trial was held to make a general inquiry into the process of accessing digital records of my SA trial. The individual who answered the phone asked a few questions and informed me, briskly and dismissively, that as a complainant I am not considered "a party to the proceedings" and therefore am not entitled to access to the recordings.*

That is, for criminal trial proceedings during which the main issue centered on *my consent* and *my vagina*, I was incredibly not legally considered "a party". This legal reality is something I was not aware of when I entered the criminal trial process. And this experience of attempting to obtain the transcript was a reminder of my vulnerability as a SA survivor in the CJ system, crystalizing why I felt so powerless and disenfranchised as a complainant. The court clerk's dismissive tone was illustrative of my overall experience as a survivor in the CJ process: dismissed, denied, disqualified.

For some survivors, the legal framework that relegates victims to subordinate roles and removes their agency is especially harmful. The survivor in *R v Khaery* (2014) did not want to participate in the trial process and stated this explicitly eight times during her testimony (Craig, 2018). Imagine being forced to describe the details of your violent SA repeatedly, in public, to strangers, against your will. The powerlessness of this experience can be profound. This survivor was arrested and held in custody on a witness warrant to ensure she fulfilled her public role of testifying in minute detail about her sexual violation (Craig, 2018). As characterized by the judge in *R v L(G)* (2014), another survivor was forced to endure days of "long, repetitive, bullying, and painful" (as cited in Craig, 2018, p. 66) questioning about

her SA because it was reported by a third party without her knowledge. Craig (2018) says most Crown attorneys do not pursue a prosecution unless the survivor is a willing participant (p. 5); however, as these cases demonstrate, this protocol is not required and can be selectively applied.

I was a willing and eager participant in the prosecution of the two men who raped me. I advocated for the opportunity to hold these men accountable through a criminal trial process. At the time, I felt I had control. However, I was naive; I did not have control. Rather, my objective happened to align with the state's intentions in the (eventual) decision to prosecute, so in this way I felt supported by the process. The part of my experience that felt out of my control and that was especially difficult to cope with was the timeline of the process:

> *From arrest to prosecution, it took two years and three months before two "not guilty" verdicts were read. I went through three separate prosecutors before I met the one who would question me in court. Each time my case exchanged hands in the prosecutor's office, the court date was set further back. It was set and re-set over and over. With each new date the suspense would begin to build. As each date approached, the frequency with which I would vomit increased; my anxiety took over my life. I was living in a suspended state, with no control over when it would end. The repeated and prolonged delays felt intentional, designed to make me quit. Being forced to live in this suspended state for an unpredictable and undetermined amount of time was difficult for me. And because I had an open case in the CJ system, the counsellor I was seeing through the local SA centre suggested we not talk about the rapes themselves, only the trauma symptoms I had experienced as a result of them.*

I did not fully understand at the time but discussing the details of the rapes in therapy would have exposed the centre to the potential that my records be subpoenaed (Gotell, 2001; Gotell, 2002). Also, it would have provided defence lawyers with the opportunity for credibility challenges based on my therapy records (Gotell, 2001; Gotell, 2002).

> *I was unable to work through the trauma of my rapes with my counsellor because of my decision to enter the CJ system. Further, having to retell my story and start a new process each time my case switched prosecutors was hard on my mental health; every time I got myself to a place where I felt (somewhat) prepared there would be a change and I would have to restart my process of mental preparation. Even at the time I recognized these as clear barriers. If felt as if no one was in a rush to get this trial over with, except me.*

In addition to lacking any control over whether and how the case is prosecuted, survivors also lack legal representation in the SA trial process. That is, no one in the courtroom of a typical SA trial is there

to advocate for the survivor. People accused of criminal acts have the right to legal representation. The role of the defence lawyer is to work as a legal advocate for the accused, to tell his side of the story, and to protect his legal rights (Craig, 2018). Crown prosecutors' role is to ensure a fair process for all individuals involved and to advocate for the interests of the public (Craig, 2018). The Crown's duty includes the protection of vulnerable witnesses, but they are not expected to work in the interests of survivors (Craig, 2018). The system does not include a legal advocate for complainants. Defence lawyers have a "duty of loyalty" to their clients (Craig, 2018), but no one in the courtroom has a duty of loyalty to the survivor. Craig (2018) notes that this discovery can be particularly distressing for survivors, when they learn that no one is in the courtroom to protect their rights or look out for their interests.

The role of the complainant involves serving as a witness to our own victimization. Relegated to being bystanders (Smart, 1989), providing evidence in someone else's narrative, survivors have no power in the criminal trial process. Institutional disempowerment as a response to sexual disempowerment is not only counterproductive as a means of understanding the reality of a situation, but it is profoundly harmful for the very individuals whom the trial process should be designed to protect: survivors.

6.3 Alienation and Domination Through Courtroom Talk

Sarah Ahmed (2018, February 11) says that filing a complaint within an institution can mean that we become alienated from our own histories, as our personal experiences are entered into institutional files over which we have little control. In this section I examine how the structuring of testimony in SA trials works to restrict how survivors can tell our stories, often distorting our narratives and limiting our agency. In this way, the stories we tell in court become not fully our own. Employing Matoesian's (1993) concept of courtroom talk, I also show how the power dynamics of sexual violence are reproduced in the cross-examination of survivors through the asymmetrical relationship between victims and defence lawyers, the power imbalance in courtroom talk, and the unequal distribution of persuasive conversational resources. Specifically, I examine the requirement for explicitly sexual language, defence lawyers' control over the turn-taking system, and the use of a coercive question format, all of which demonstrate the structural disempowerment of survivors through courtroom talk. Finally, I discuss the concept of discursive

resistance (Larcombe, 2002), demonstrating how the structural disempowerment produced by courtroom talk necessitates that survivors play out a scenario of resistance on the witness stand (Larcombe, 2002), opposing damaging constructions of our narratives and character. I argue that the aggressive disqualification of our stories is structurally enabled through the court testimony process and that this structural enablement is critical for understanding the strategic inefficiencies of the CJ process and the extent to which survivors' failure engineered.

Serving as a complainant in the CJ system requires that survivors translate their stories of trauma and violation into another format (Smith & Skinner, 2017). Strict legal rules frame the production of evidence, determine what is relevant, and shape how a survivor can tell her story (Larcombe, 2002; Smart, 1989). In preparation for trial, some Crown prosecutors explain the process to survivors, including the rules of testimony, and how to effectively tell our stories in court. I do not remember being given much direction, but I do recall one piece of advice in relation to the language I was required to use to describe the SAs:

> *In preparation for my testimony, I was instructed by the Crown that I had to describe the details of the assault with explicit language, using words like 'penis' and 'vagina'.*

This requirement, and the seeming discomfort it brought to the survivor, is evident in the Crown's examination in *R v Khaery* (2014):

> [Crown]: —, you said that he wanted you to give him oral sex. I want you to tell the Court what you mean by that, what he did.
> [survivor]: I can't even talk about it.
> …
> [Crown]: —, you said he forced his something. I want you to tell the Court –
> [survivor]: His penis in my face. He put it in my – he was sitting on – with his legs over top of me and he took his pants off and put his penis in my face. And I was crying. And I told him I didn't want to do that.
> (As cited in Craig, 2018, p. 7)

Smart (1989) explains this aspect of the rape trial as an act of sexualization, in which being forced to name parts of our bodies with the public gaze upon us becomes "almost a sexual act" (p. 39), drawing attention to the sexualized body. Distorted through cross-examination, our stories can be re-scripted, from SA to consensual sex, and our descriptions of our assaults can be manipulated into "pornographic vignette[s]" (Smart, 1989, p. 39). An explicit example of sexualization through cross-examination can be

seen in *R v Wright* (2012, 2013), in which defence counsel was permitted to ask the survivor if she recalled being given the nickname "Perky Tits" (Craig, 2018, p. 48) on the night she was sexually assaulted. Similarly, in *R v Johnson* (2016) defence lawyer Patrick Ducharme repeatedly referred to the survivor's breast as her "tit", using words she texted to her sister – "I have a guy's initials tattooed on my tit" (as cited in Craig, 2018, p. 88)– as a reason to use the degrading and sexualized term repeatedly at trial.

Survivors do not have a voice in the trial process; we tell our stories in court through questioning with the Crown prosecutor and defence lawyers. As Matoesian (1993) explains, the restriction of talk to specific speaking roles is one of the features of the courtroom speech exchange system that structurally disempowers survivors. Two other features include the organization of talk around specific court procedures (direct and cross-examination of witnesses, opening and closing arguments, judicial instructions, etc.) and a fixed and rigid turn-taking system (Matoesian, 1993, p. 107). Through this speech system, survivors' narratives are significantly constrained. Chanel Miller (2019) describes this experience of constraint: "I was attempting to tell the same story through two different filters; through the questions of [the Crown] and the questions of the defence. Their questions created the narrative, building the framework that shaped what I said" (p. 179-180). In this way, through the structure of the trial process, the stories we tell are filtered through two separate frameworks, neither of which are our own.

The courtroom speech exchange differentially distributes conversational resources in the trial process, positioning defence lawyers with the power to define reality, to "make [their] account count" (Matoesian, 1993, p. 2) and the ability to restrict the persuasive resources of survivors. Some of these resources include control of the turn-taking system, the question format, and the topic and agenda (Matoesian, 1993). Collectively, these conversational resources allow for the defence to construct a cohesive narrative and significantly limit survivors' persuasive power and our ability to make our stories heard as credible.

Structurally empowered through the courtroom speech exchange system, in cross-examination, defence lawyers manage and constrain speaking order as well as the length and type of speaking (Matoesian, 1993). That is, through the form of their questions, defence lawyers can control the type of

response survivors are able to give. Matoesian (1993) explains that defence lawyers can do this overtly, by insisting on yes/no answers and not allowing survivors to elaborate, and covertly, through interruptions, objections, or speaking over them. An example of both covert and overt turn minimization can be found in *R v L(G)* (2014), in which Craig (2018) describes that defence lawyer Todd White frequently interrupted the survivor and refused to allow her to fully explain her answers:

> [survivor]: Can I explain now?
> [defence]: No. Do you recall being asked those questions and giving those answers?
> [survivor]: Yes. Can I explain now?
> [defence]: No.
> [survivor]: Why can't I explain?
> (As cited in Craig, 2018, p. 67)

In this case the judge repeatedly intervened to instruct White to allow the survivor to answer the questions (Craig, 2018).

Similarly, the survivor in *R v G(A)* (2015) was reprimanded by the defence for "making speeches" (Craig, 2018, p. 28). Chanel Miller (2019) describes the experience of being "struck silent" (p. 165) by the defences' repeated objections, saying "[m]y memory was being flicked on and off like a light. She's wrong, shut up, hurry up, stop talking, so stricken, keep going, narrative, objection. I couldn't get oriented. The interruptions felt like being hit" (p. 166). This strict and often aggressive control of survivors on the witness stand can be experienced as violence. Indeed, Chanel describes it as feeling like physical blows.

Control of the turn-taking system in cross-examination also allows defence lawyers to manipulate silence, something Matoesian (1993) describes as a critical power resource for impression management and a rich interpretative device. By delaying the start of a question defence lawyers can make a "silent comment" (Matoesian, 1993, p. 144) to convey disbelief, imply blame, or stress the significance of an answer. Survivors do not have the conversational resources in court to create silences; the speed at which we are able to respond to questions is largely out of our control.

Through the design of different kinds of questions, defence lawyers are also able to regulate the trajectory of the discussion, exert control over the length and choice of a survivor's answer, lead her to a

desired response, and structure the context in which her answer can be understood (Matoesian, 1993). Defence lawyers commonly deploy many kinds of coercive questioning strategies (Matoesian, 1993) that can have the effect of disorienting survivors. Craig (2018) describes the use of long or compound questions with multiple factual assertions that work to confuse survivors. For example, the survivor in *R v L(G)* (2014) was asked three questions at once: "You just say whatever you want to go home, right? Whatever comes to your mind, right? You didn't want to be in the police station, right?" (As cited in Craig, 2018, p. 70). The survivor in this case recognized the defence's confusing question form as an attempt to fluster her, saying "…You were confusing me" and "You were asking me the same question over and over and rewording the thing over and over again" (As cited in Craig, 2018, p. 70). Her confusion in response to the coercive questioning was presented as dishonesty and used to discredit her: "So you're just [saying] whatever you want?", "You just made things up" (As cited in Craig, 2018 p. 70).

Matoesian (1993) explains that by insisting on finer and more specific responses, defence lawyers can weaken and discredit almost any account from a survivor. In this way, defence lawyers can discredit survivors' memory of even irrelevant details. This tactic can be seen in *R v Finney* (2011); the defence asked the complainant more than 10 times (in total) about the precise timing of her first bowel movement after she had been anally raped:

> You said you waited a week from the time this [anal rape] happened before you had a bowel movement. Is that what you're telling this court today?
> ...
> Could it have been more than seven days?
> …
> It might have been ten days?
> …
> Was it eight days?
> …
> Well, you said seven days when you testified. Was it seven?
> …
> Did you wait a week before you had a bowel movement? Maybe that's a fair question. Did you wait a week before you had a bowel movement?
> (As cited in Craig, 2018, p. 30).

In addition to attempting to discredit the survivors' memory, this line of questioning was also likely designed to humiliate her.

Other specific examples of coercive defence lawyers' questions include loaded and leading questions, rapid-fire questioning, and prompts. Loaded questions have assumptions, blame inferences, or implications about the truth content of the answer embedded into them, and leading questions direct survivors to a specific answer and frame expectations about the response (Matoesian, 1993). Both of these features can be seen in the questioning in *R v Ururyar* (2016, 2017): "You didn't think it would be a wise decision to get out of there while you could?", "You had a phone, right? … You could have called someone?", and "Instead you chose to go home with someone who was berating you, angry and yelling at you?" (As cited in Craig, 2018, p. 35). Chanel Miller (2019) was able to recognize a similar pattern of loaded and leading questions by the defence, explaining how it made her feel on the stand:

> He'd planted answers in his questions rather than leave them open ended: *Right? Isn't that right? Correct? Right?* To an observer, it would seem he was just verifying facts. But so much of it had not been right. It made me self-conscious, disagreeing with him repeatedly in front of the jury… The entire time I felt he was pulling my hand in one direction and I was digging my heels into the ground attempting to resist. (p. 180, emphasis in original).

In order to make our narratives count, we are forced to continually resist the implications embedded in defence questioning.

The focus on the survivors' choices and potential actions in the questioning in *Ururyar* (2016, 2017) is a specific kind of loaded question that works to highlight survivors' behaviour and imply they are relevant to the issue of SA. Chanel Miller (2019) detected this pattern in her experience of cross-examination, saying that, "I had also heard an underlying pattern: *that's what you decided to do at that time, right? That was an intentional thing. And that was a decision you made.* He littered my night with intentions and poor decisions, suggesting they had everything to do with the final act" (p. 181, emphasis in original). The defence lawyer used this tactic on me during my cross-examination. The effect was so powerful that it reinforced my pre-existing (and powerful) feelings of self-blame.

Rapid-fire questioning is a coercive interrogation tactic that was used in *R v Luceno* (2015) (Craig, 2018). It was coupled with frequent interruptions to create the impression that the survivor was difficult and uncooperative:

> [Judge]: You've got to let her finish. She's giving an answer and you're interrupting,
> Mr. White.
> [Defence, Mr. White]: Unresponsive, Your Honour. Unresponsive to my question.
> [Judge]: Well, you know what, I understand that, but she starts talking and she's got
> to be allowed to explain if she starts to give an explanation.
> (As cited in Craig, 2018, p. 177)

This style of questioning maintains strict control over the flow of the conversation and pressures survivors to formulate their answers quickly (Matoesian, 1993). Chanel Miller (2019) describes this experience: "[t]his was a game of speed, stepping stones disappearing beneath my feet. I could not move as quickly, but I was determined to keep up" (p. 177). She describes the defence lawyer's use of nonverbal communication to make his irritation at the pace of her answers apparent: "I watched his eyebrows lift, heard his loud exhales, angry when I took too long" (Miller, 2019, p. 178). Defence lawyers' displays of irritation are also devices of impression management, suggesting that the survivor is reluctant to answer or being evasive.

Through the careful formulation of their questions, defence lawyers also have the power to selectively reinterpret, neutralize, and delete survivor's responses (Matoesian, 1993). For example, in *R v Cain* (2009, 2010), through carefully worded questioning, the defence ignores and overrides the survivor's response that she *did* say "Stop":

> [defence]: Okay. You didn't say anything to him like "Don't" or "Stop"; is that right?
> [survivor]: Not at the very beginning, but *I did tell him to stop.*
> [defence]: In fact, not only — do you agree with my suggestion not only did you not say to him "Stop", the two of you kept going at each other; isn't that right?
> [survivor]: All I did was kiss him. That's all I did.
> [defence]: There was never any time when you said "Don't"; isn't that right?
> (As cited in Craig, 2018, p. 178, emphasis added).

The impact of this line of questioning was to effectively delete the survivor's answer that she did, in fact, say "Stop". Her response appears to have been irrelevant, as the defence lawyer ignored it and continued to insist on the opposite reality, as if she had not responded at all. In this way, we can see how, even when survivors are given an opportunity to speak, what we have to say often does not register as valid.

The overall effect of the differential distribution of these persuasive conversational resources is that defence lawyers have the power to weave together a seemingly cohesive, credible narrative while survivors seldom do. Chanel Miller (2019) describes the power of the defence to define her character to the jury: "… the defence would be creating a new persona; the version he would show the jury would be someone I'd never seen" (p. 174). The structure of courtroom talk allows defence lawyers to maximize their persuasive resources while they minimize those available to the survivor (Matoesian, 1993). Through their power to phrase evidence, selectively combine aspects of testimony, formulate coercive questions, summarize, and pursue or abandon responses, defence lawyers have the ability to transform and re-script survivors' experiences of SA into consensual acts of sex (Larcombe, 2002; Matoesian, 1993). The following example is illustrative of this transformative power, where the defence works to re-define the survivor's dancing as a sexual act:

> [defence]: And when you're asked to describe it yesterday, you described that [dancing] as 'obnoxious'?
> [survivor]: Yes.
> [defence]: That, at least of your own perception of yourself, is not like you at all. Is that what you're saying?
> [survivor]: No.
> [defence]: You saw that grinding of your bottom into the pelvic area of this young man as distasteful and offensive?
> [survivor]: Yes.
> [defence]: And you didn't see anything in that six minutes of grinding yourself into him — anything to do with dancing. You weren't dancing, you were just grinding, right?
> [survivor]: I would describe that as dancing.
> [defence]: I see. There were dance moves in there somewhere?
> [survivor]: Yes.
> …
> [defence]: In those six minutes you positioned your private area of your bottom against his private area – his pelvic area – didn't you?
> [survivor]: Yes.
> [defence]: And you pushed yourself back against him?
> [survivor]: Yes.
> [defence]: And what you described as a little stumble or something, was simply you keeping that position in those high heels you were wearing?
> [survivor]: I stumbled.
> [defence]: You were wearing high heels?
> [survivor]: Yes.
> [defence]: And you were pushing backwards into him?
> [survivor]: And I was drunk.

> [defence]: So the fact is that it can't be easy to make that push back into him with high heels on? That can't be an easy move, is it?
> [survivor]: I don't know.
> [defence]: And while you were doing this you were wearing the thinnest, smoothest, tightest of leggings, weren't you?
> [survivor]: I had leggings on.
> [defence]: You said they were thin, right?
> [survivor]: Yes.
> [defence]: You said they were tight-fitting?
> [survivor]: Yes.
> [defence]: And they were smooth?
> [survivor]: Yes.
> [defence]: And you had no underwear, so you would be able to feel his anatomy quite easily through that thin clothing?
> (As cited in Craig, 2018, p. 89-90)

Here we can see the defence lawyer using loaded and leading questions, summarization, and the selective combining of evidence to reformulate this survivor's narrative and to re-define dancing as a sex act. We can also see the narrative of the promiscuous party girl.

Chanel Miller (2019) describes the impact of these coercive conversational tactics as follows: "…he wanted to … erase my specific experience, abstract me into stereotypes of partying and blackouts, to ask technical questions that tied my shoelaces together, tripping me as he forced me to run" (p. 180). In my experience, the most powerful effect of being dominated through cross-examination was disorientation, to the point that my ability to express myself was severely impaired:

> *The cross-examination was the most distressing experience of the entire CJ process. I struggled to think clearly, to understand some of the questions, and to articulate my answers. Part of this was a stress reaction which affected my ability to advocate for myself. The symptoms of my PTSD were exacerbated on the stand.*

It is important to understand the impact of trauma and mental health on survivors' abilities to recall, explain, and defend our experiences. That is, the extent to which survivors are able to successfully navigate this often hostile and aggressive questioning process, to maintain a cohesive narrative despite repeated challenges and interruptions, is dependent on our mental and emotional health. Craig (2018) suggests that in addition to the trauma related to sexual victimization, the experience of testifying can invoke a trauma response, adding an additional layer of harm to survivors required to perform this role. Testifying often involves intense stress or fear and can activate the fear circuitry causing the body to react

to the experience as if it's a threatening or dangerous stimulus. Recall the experience of trauma, how it impairs executive functioning and shuts off the upper level of the brain and consider the impact of this trauma response on survivors' abilities to maintain a cohesive narrative in opposition to aggressive challenges. Additionally, many survivors suffer from PTSD. The trauma of the experience of testifying, exacerbated by my symptoms of PTSD, were fatal barriers in the criminal trial for my SA complaint.

Larcombe (2002) suggests that the key to the "successful" rape complainant is being able to demonstrate discursive resistance. That is, for SA survivors testifying at trial, "the requirement for resistance re-emerges" (Larcombe, 2002, p. 140), particularly during cross-examination. Discursive resistance refers to a survivor's ability to endure the pressure of cross-examination, maintain her narrative, and present herself as credible despite repeated, calculated, and often aggressive attempts to re-script her experiences, to disqualify her, and to re-define her character (Larcombe, 2002). For survivors, this process requires that we continually challenge and oppose coercive attempts to confuse us, and control and undermine our narratives; that we refuse to withdraw or relent, and that we remain resolute in the face of explicit and inexorable attempts to dominate us through courtroom talk (Larcombe, 2002). Because survivors commonly testify for multiple hours, and even days (Craig, 2018), consistent discursive resistance is a nearly insurmountable obstacle for many survivors.

Nevertheless, as a testament to the power and resilience of so many SA survivors, it is not hard to find examples of survivors' discursive resistance in the pages of court transcripts. In *R v Schmaltz* (2013, 2015), for example, we can see the survivor refusing to allow the stereotype-infused suggestion regarding the moisture level of her vagina to go unchallenged:

> [defence]: You would agree with me that your vagina was wet because it was stimulated. Right?
>
> [survivor]: I will agree that it was wet. Why was it wet? I do not agree because it was stimulated. I don't know, maybe he greased his fingers. I have no idea but it was not from stimulation, and if you look at one of my statements, I'm known to be quite dry. It's in one of my statements. Either the police – I believe the police report.
>
> [defence]: I'm going to suggest to you that your vagina was wet because you were stimulated and enjoying yourself?
>
> [survivor]: Well, I'm suggesting to you – and I'm not suggesting, I'm telling you that that is not the case. I was not enjoying nothing. I did not give him

> permission to come on that bed. That bed was put out for me, not him. He had no right to be on that bed.
>
> (As cited in Craig, 2018, p. 40).

The violence of being forced to publicly justify the wetness of your vagina in order to receive the law's protection from sexual violence is intense. The courage and persistence of this survivor to detect and intercept this strategy is powerful.

Another example of this violence can be seen in the case of *R v B(S)* (2014, 2016), in which the survivor was humiliated and degraded when the defence read personal text messages exchanged between her and a sexual partner and excerpts from a transcript of a video of (consensual) sex between her and her rapist (Craig, 2018). Craig (2018) describes this case as "one of the worst misuses of prior sexual history evidence I have studied" (p. 225). Despite the extent of the institutional violence thrown at this survivor, she remained resolute:

> [survivor]: Again, I've made many statements, word for word is gonna be different.
>
> [defence]: Word for word?
>
> [survivor]: Absolutely.
>
> [defence]: No, no, see, word for word is what you're going to use to convict this man. Word for word is you were thrown off the mattress. Word for word is you didn't like anal sex, when we got 46 minutes of it, and I don't need to go through the other quotes, do I?
>
> [survivor]: Anal sex, I can repeat ten different times –
>
> [defence]: Okay.
>
> [survivor]: – if you would like for me to, Mr. Simmonds, until you understand what I am saying.
>
> (As cited in Craig, 2018, p. 225-226).

To maintain composure when confronted by this kind of apparent disdain, in the face of a threat of further public humiliation, is remarkable. This level of composure was unattainable for me at my trial.

> *I felt overpowered when I was being cross-examined. I felt a force being exerted over me that I could not quite pinpoint, but also could not escape. I felt dominated, unable to make myself heard.*

However, I do remember one time that I felt vindicated during my cross-examination.

> *In reiterating my previous testimony, the defence lawyer misquoted me. I do not recall the specifics, but I remember he was not pleased when I explained he misrepresented my previous statement. He challenged me: "is that right? Would you like me to have the court recorder read it back to us?" I accepted his challenge, and*

> *she read the previous exchange aloud. I was right, and his manipulative, coercive tactic was exposed. This was one small battle I felt I won.*

Larcombe (2002) suggests that if a survivor is perceived, even occasionally, to resist the defences' attempts to dominate her narrative, "a scenario of *non-consent* will have been played out" (p. 143, emphasis in original). This performance, she argues, can contribute to the persuasiveness of her story of non-consent to the SA, and support the perception of her as credible. The impact of this scenario, however, may not always be favourable for the survivor. As we see below in the example of *R v TV* (2006), performances of discursive resistance on the witness stand can sometimes be the reason survivors are disqualified. In this case, the survivor's experience of SA was invalidated because her "assertive and strong-willed" (p. 417) behaviour in court was interpreted as inconsistent with her narrative of victimization and her perceived "failure" to leave the room when she was being sexually assaulted (Randall, 2010b). From this analysis we can see that although discursive resistance may be one of the very few (and very limited) opportunities for survivors to attempt to take some form of control over their narrative in trial process, more often than not our resistance is sabotaged. We are set up to fail, and domination through courtroom talk is a central mechanism through which this failure is accomplished.

6.4 The Reasonable Perspective

The legal method is based largely in the rationalist tradition, as evidenced through its reliance on reason and its search for objective truth (Smith & Skinner, 2017). Fundamental to this perspective is binary thought, which divides reality into an either/or designation: reasonable or unreasonable, logical or illogical, truthful or untruthful (Larcombe, 2002; Smart, 1992; Smith & Skinner, 2017). Binary logic splits reality into oppositional terms. Binary opposites are of unequal value: one is subordinate to the other, facilitating power imbalances and the projection of negative value. Based in rationality and binary logic, the legal method employs a "reasonableness" framework that is a critical barrier for SA survivors and a key mechanism through which stereotypes operate in SA trials. Drawing on the work of Smith and Skinner (2017), the narratives of survivors detailed in their analysis, and the narratives of survivors

provided by Randall (2010a; 2010b) and Craig (2017, 2018), I outline a legal perspective based in rationality which facilitates the ongoing and routine use of stereotypes as weapons against SA survivors.

Woven into notions of reasonableness are socially constructed ideals of normalcy (Larcombe, 2002). Carol Smart (1989) explains that cultural views of women form the basis of the legal treatment of sexual violence. This gendered legal context means that the ideology of respectable femininity and the rape myths and stereotypes that flow from it are foundational to the CJ response to SA. That is, through the "reasonableness" framework, colonial, heteropatriarchal, White supremacist, ableist, and middle-class ideologies saturate the legal process. Masculinity and maleness are embedded in the law's practices and values, meaning that the law's "objective" criteria are male criteria, and its "universal" values are male values (Smart, 1992). Rather than arguing that the law is male, Smart (1992) claims it is gendered, emphasizing the importance of acknowledging that the law does not serve the interests of *all* men, and demonstrating that "man" and "woman" are not homogeneous categories.

This foundation in rationality and binary logic sets up a dynamic in which evidence and witness testimony are measured against assumptions of how a "reasonable" person would act, ignoring the structures of power that shape designations of what constitutes normalcy and reasonableness (Smith & Skinner, 2017). The focus on "reasonableness" serves to create particular expectations based on normative (implicitly masculinist) behaviour and survivors' actions (Smith & Skinner, 2017). In this way, the actions of survivors are constructed as irrational, unusual, abnormal, and suspicious.

I illustrate this argument through reference to research from England and Wales that used court observation and critical discourse analysis to assess 28 SA trials across a two-year period from 2010 to 2012 (Smith & Skinner, 2017). Their results show that rape myths were used routinely and extensively at every trial to undermine the credibility of survivors. Smith and Skinner (2017) reveal how juries are instructed to assess whether survivors' demeanor is consistent with expectations, almost explicitly asking them to compare individual survivors to stereotypical ideas about victims. They discuss the adequacy of survivors' physical resistance in 12 trials and show how survivors' "failures" were presented as abnormal and suspicious. This was also a key strategy used by the defence lawyer in my case:

> *A central tactic employed against me on the witness stand involved questioning me about my thoughts on what "a reasonable person" might think, say, or do in a given situation. It felt like a strategy of showing the court what I should have done, or to show that I was not a reasonable person. I had to repeatedly explain why I had not done what "a reasonable person" would have done. The defence attorney questioned me about this reasonable person in relation to how I resisted the SA and how I expressed non-consent. He questioned why the two rapists had no marks or bruises on them, as he assumed a reasonable person would scratch, bite, or kick if they were being raped. He assumed a reasonable person would scream to her friends in the bathroom. She would run down to the hotel office and tell them to call the police immediately, not walk to her friend's house. A reasonable person wouldn't take 48 hours to give a statement to police of what happened. A reasonable person who was just raped would want the information taken down immediately. A reasonable person would get the rape kit done immediately. Using this language and this strategy he almost had me convinced I was an unreasonable person.*

This strategy of comparing victims' every action to that of a "reasonable" person invokes myths about resistance to sexual violence, hue and cry, and authentic victim behavior, and to place me (and others) in the non-victim box. Indeed, Smith and Skinner (2017) show that it was common to present delays in reporting as unusual. This inconsistency between our actions and those of the hypothetical "reasonable" person created space for defence lawyers' suggestions; it is in this space where much of the blame work is achieved (Larcombe, 2002). In my case, a delay in reporting was represented as a need for time to "come up with a story" that explained or justified what the defence argued was an embarrassing but consensual sexual experience. Here the defence invoked myths of post-sex regret and stereotypes about women who lie about SA. In trial 12 described by Smith & Skinner (2017), the complainant's delay in reporting was represented as suspicious and vengeful, motivated by her obsession with the accused (p. 450- 451). Thus, although there may be many "reasonable" motivations for survivors to delay reporting, they are often ignored in favour of the myth of the "woman scorned" – a key figure in rape culture, who is willing to lie in service of her desire for vengeance.

My experience above also exemplifies, as does the analyses of Smith and Skinner (2017), that resistance to SA is commonly presented as a conscious, thought-out decision. By contrast, survivors' lack of resistance is often presented as an irrational choice. However, in both scenarios the impact of power dynamics, trauma, and sexual coercion are downplayed or outright ignored (Smith & Skinner, 2017). Similarly, survivors' character and credibility are questioned based on the perceived quality of their

response to SA. This strategy is one of the ways survivors are disqualified by our trauma responses. However, research on trauma tells us that resistance is only one of many possible responses to a threat of sexual violence:

> *My response to being raped, to the sudden realization that I was in a dangerous situation and these two men were not listening to my "no", was to disassociate, go into shock, and "flop". I experienced a sense of bewilderment and immobility and felt removed from my body, unable to will it to respond. Even when I tried to say "help" to my friend who had eventually come out of the bathroom, my voice would not cooperate with my intentions; when I spoke, nothing came out. While much research on trauma suggests this response is common and normal, in court I was disqualified for my lack of a "reasonable" response. The defence lawyer told me, explicitly and repeatedly, that it was unreasonable to believe that I did not scream if I was being raped. It was unreasonable that I did not scratch, bite, kick, or punch my way out of that situation. It was illogical that I did not simply get up and run.*

Trauma-informed research was not introduced to the jury in my trial. The prosecutor did not present evidence about the "flop" response, or the range of common responses to trauma that might have provided critical context to help them understand that my response to SA *was a normal response* to trauma. The defence lawyer's attempts to paint my response to this double rape as "unreasonable" and use it to disqualify me could have been challenged in this way. They were not. At 18, I did not have enough knowledge about trauma to be able to understand my own inaction. I was deeply ashamed of it. I could not explain why I went into shock, or why I did not "adequately" defend myself against the barrage of assertions that, as a matter of common sense, I did not react normally. This "unreasonable" reaction meant, the defence lawyer implied, that I was responsible for these rapes, not the men who raped me. The assumption that people respond to trauma consistently across all situations and make rational decisions directly contradicts research on trauma and SA. This assumption works to disqualify survivors' diverse narratives of non-consent and presents their narratives as inconsistent with "reasonable" behavior and therefore suspicious (Smith & Skinner, 2017).

Rooted in the rationalist tradition, expectations that people act consistently across all situations underlie the "juxtaposition" tactic of disqualification used by some defence lawyers. This is a tactic in which survivors' behaviour and demeanor in court are contrasted with their narratives of victimization and behaviour on the night in question to expose discrepancies (Randall, 2010b; Smith & Skinner, 2017).

These discrepancies are then used to create an either/or scenario: either she is lying about what happened, or she is acting in court. Randall (2010b) notes that how survivors are perceived in court has a powerful impact on assessments of their credibility. Survivors' assertive demeanor, as they serve as witnesses in their own rape trials, is often presented as indicative of deceit when compared to their (sometimes passive) behaviour during their SA.

> *The defence lawyer asked me, if I was able to explain to him so clearly that I did not want to have sex with these men, why I was unable to explain this clearly on the night I was raped. I was speaking clearly on the stand, he noted, so he was confused as to why I had trouble expressing myself that night.*

Smith and Skinner (2017) also describe the use of this tactic in two trials they investigated. In one, the defence lawyer suggested to the jury that, "it's hard to imagine [the survivor] submitting" (p. 452). The defence lawyer in the second argued that the survivor "was very difficult to control as a witness", and asked jurors: "[w]as that the downtrodden woman imprisoned in her own home?" (Smith & Skinner, 2017, p. 452-453). Evidence that this tactic is effective at discrediting and disqualifying survivors is offered by Randall (2010b), who cites Justice Lesley Baldwin's decision in *R. v. T.V.*(2006): "[a]fter having had the benefit of listening to the complainant testify for three days, I am satisfied that the complainant is an assertive and strong-willed woman. Her failure to simply leave the room was not credibly explained in her evidence" (p. 417). However, trauma-informed perspectives could have provided a way for this "failure" to be credibly explained. Instead, this survivor's behaviour on the stand was juxtaposed against her behaviour during her SA, and she was disqualified based on the discrepancy.

The construction of "rational" versus "inconsistent" responses to sexual trauma as a method for disqualifying a survivor is perhaps most clearly illustrated in the case of *R v Al-Rawi* (2017), in which defence counsel quite literally invented an alternate personality for the survivor as an attempt to portray her as likely to have consented to sex with the taxi driver accused of sexually assaulting her (Craig, 2017; Craig, 2018). Arguing that alcohol consumption has transformative effects, defence lawyer Greg Lenehan suggested that she became a different type of person, less inhibited, referring to this alter-ego as "Drunk Jane" (Craig, 2017, p. 196). Here we can also clearly see the figure of the promiscuous party girl. Relying

heavily on the language of rationality and reasonableness, Lenehan suggested that "the logical inference, the likely inference" in this case was that "Drunk Jane" was "exercising questionable judgement" and consented to sex, not that she was sexually assaulted (as cited in Craig, 2017, p. 197).

The ways in which dominant notions of normalcy become benchmarks for survivors being believed, and the ways our clothing, demeanor, and choices are broken down and reconstructed as unreasonable, suspicious, and abnormal, are clear barriers for SA survivors. Our stories of SA are taken from us, reformulated, discredited, and then often disqualified. Just as in many actual experiences of SA, what we say does not matter. Power is taken from us when alternate personalities can be constructed and used to call us liars and sluts. The legal framework that facilitates this distortion is a critical barrier for SA survivors within the CJ process as well as a form of institutional violence.

6.5 "Whacking the Complainant"

The concept of whacking the complainant was coined in reference to defence lawyers' use of survivors' personal records as a means of aggressively questioning them, working to discredit them and forcing them to drop out of the criminal process (Craig, 2018), but the practice extends beyond this type of evidence-based questioning. David Tanovich (2015) describes "whack the complainant" strategies as:

> humiliating or prolonged cross-examination that 'seek[s] to put the complainant on trial rather than the accused'; specious applications to obtain the complainant's records; and the invoking and exploiting of stereotypical assumptions about women and consent, including assumptions about communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure (p. 498-499).

Developed as a strategy to intimidate SA survivors, the intent is to cause harm to the survivor to the point that she feels the defense questions are intolerable, to the point that she can no longer take it, to the point that she quits. This strategy is in line with the celebration of aggression within the legal culture (Craig, 2018), is openly acknowledged by some legal actors as active in SA adjudication (Craig, 2018, p. 42-42, 52), and is even defended as ethical in some cases. In Craig's (2018) investigation, defence lawyer 9 revealed they believed there should be a certain balance involved in whacking, explaining they do not want to embarrass the complainant to the extent that the judge may have sympathy for them, but "if I can, I will go after her" (p. 53). Similarly, defence lawyer 4 openly acknowledged sidestepping legal rules

designed to protect complainants, describing how they view it as advocacy to exploit "character issues" and highlight a survivors' "promiscuity," if they think it will "weigh against them" (Craig, 2018, p. 53). When referring to "frail" complainants, defence lawyer 6 mentioned smelling "blood in the water" (Craig, 2018, p. 93). I wonder, did the defence lawyers in my case smell blood?

Below I discuss my own experiences of being whacked alongside other key examples in recent cases before the courts in Canada. The whacking strategies below exclude, for the most part, those that utilize stereotypes. The use of stereotypes in SA trials will be discussed in detail the subsequent section, as their use is extensive.

Discovering the concept of "whacking the complainant" was a profoundly validating experience, as it served as an acknowledgement of the harm I felt on the witness stand and contextualized my experience within a body of research that revealed that many defense lawyers sidestep legal rules meant to protect complainants.

> *What I experienced on the stand felt violent. It felt like a force was being thrown at me, but I couldn't see it, I couldn't name it, I couldn't understand it. I didn't expect it. It felt like an attack. I felt badgered, bullied, harassed. It was public humiliation. I couldn't understand why it was being allowed, why the defence lawyer was allowed to repeatedly say such demeaning, degrading things about me. Why was he being so cruel?*

A defence lawyer's ability to whack a given SA survivor depends on the tools made available to them within the CJ process: accepting and condoning the exploitation of stereotypes that may work in their clients' favour, access to and admitting complainants' confidential records into evidence, and the ability to present evidence of or make assumptions about SA complainants' sexual history or reputation. The extent to which defence lawyers decide to employ harmful whacking strategies is shaped by the degrees to which Crown prosecutors (fail to) challenge and object to their unlawful use, and the extent to which judges restrict abusive tactics and uphold legal protections for SA complainants. I recall a moment during my cross-examination when one of the defence lawyers started down a path of questioning about my past and discovered the probable strategic inadvisability of making an application for my records:

> *I was questioned about my school history, about my work history, and about my mental health. Previously, I had been an excellent student. I graduated with honours from grade eight, two years before I was raped. School was very important to me, but since my dad died*

> *in 2000 (three years before the rape) and my home life became increasingly dysfunctional and unsafe, my attendance dropped significantly, and I began failing frequently. I remember the defence lawyer implying that I was a difficult or troublesome student, or that I lacked the ability, intelligence, or work ethic to attend school on a consistent basis. I was being discredited because of my school record, though there had not been an application to enter it into evidence. I remember defending this, arguing that I was an excellent student, an honour roll student, and that he could track my grade trajectory with the death of my dad and the chaos that followed from the grief and trauma of watching our father slowly die in our family home. I was still working through the death of my dad, and I am sure the pain of this was conveyed in my testimony. When I explained the loss of my father and its impact on my mental health and my schooling, it was clear these were not responses the defence lawyer wanted to hear.*

Reflecting on this experience on the witness stand in light of Craig's (2018) analysis that reveals how defence lawyers try to avoid creating opportunities for the judge and jury to sympathize with the complainant, the defense lawyer in my case might suddenly have realized this line of questioning was not effective for his client. Rather than supporting his representation of me as a disreputable, dishonest, promiscuous party girl, his questions highlighted my genuine trauma, potentially evoking empathy from the jury. Critically, some survivors might be easier for certain judges or juries to empathize with than others.

Had I not been a young White woman who recently lost my father to cancer, the defence lawyer may have gone further to use my (grief-related) mental health issues and their impact on my school record against me. He may have even applied to seek access to these records. To my knowledge, there were no applications made to the court for any of my therapeutic, school, or other records.

SA survivors from marginalized groups may be at higher risk of more severe levels of whacking because of the whacking tools available to defence lawyers. For example, women who have had multiple interactions with police (racialized and Indigenous communities are more intensively policed than White communities) and those further away from the ideal of White, respectable femininity are likely to appear more vulnerable or "frail" and have more exploitable "character issues". In this way, poor women, those with (dis)abilities or histories of mental health issues, and racialized and Indigenous women may be more vulnerable to the violence of legal whacking strategies and may experience more intense whacking.

The institutional violence experienced by the complainant in *R. v. B(S)* (2014, 2016) was profound and exemplifies how the system as a whole allows whacking strategies to proliferate, particularly if the defense can portray the complainant as disrespectable or hypersexual. The whacking weapon of choice in this case was evidence of complainant's prior sexual history, which as Craig (2018) describes in detail, was inconsistent with evidentiary rules laid out in section 276 of the *CC*. That is, the judge did not effectively apply the rape shield laws; therefore, the survivor was not effectively protected. This situation facilitated the defense's use of whacking strategies against the complainant, which is an example of institutional violence.

This survivor had been repeatedly sexually assaulted by her spouse over a period of years; his defence was consent. To support his case of consent, Justice Robert Stack permitted defence lawyer Robert Simmonds to enter sexually explicit text messages between the complainant and a third party and a transcript of a 46-minute graphic sex videotape of the complainant and the accused into evidence. This transcript described use of a sex toy as well as oral, anal, and vaginal penetration of the complainant by the accused. The sexual acts in this tape were not the sexual acts contested as SA at this trial and, as Craig (2018) outlines, were not legally relevant to the case. Nevertheless, Simmonds was permitted to read aloud from this transcript, describing to the court how the complainant referred to herself as the accused's "ass slut" and "slut wife", and told him to "stick that hard cock in [her ass]". According to the legal actors in this trial, it was relevant and fair for the jury to hear how the complainant "poses, on her knees, leans forward, touches her rear end and says, 'right there…stick your cock up my ass'" (as cited in Craig, 2018, p. 82). Additionally, the court heard text messages between the complainant and a third party read aloud, in which she describes herself as "horny", the third party as "an instant orgasm", and reveals she "would really love to fuck" (Craig, 2018 p. 78-79).

As Craig (2018) describes, Simmonds' 276 request included admitting the sex videotape and showing it to the jury. Justice Stack allowed the transcript only but left open the possibility of showing the video if it became legally relevant. Importantly, had the law been properly interpreted and applied, this evidence would have had no legal relevance (Craig, 2018). When questioning the complainant about this tape,

Simmonds warned her: “you be very careful you go down this road, because I got no urge, believe me to put on the sex tape” (as cited in Craig, 2018, p. 81). Craig (2018) suggests this statement could be interpreted as a threat to play the video for the jury (p. 81). I cannot see how it could be interpreted otherwise. The failure of Justice Stack to effectively apply the rape shield laws gave Simmonds permission to humiliate and degrade this SA survivor on the witness stand. There was no legal basis for this evidence to have been allowed, and no legal justification for describing the complainant was an “ass slut” or an “ass wife” on the stand. The Supreme Court of Canada, upon appeal, ruled this cross-examination as “gratuitous humiliation and denigration of the complainant” (Craig, 2018, p. 83). A more accurate description would be state-sanctioned, institutional violence. A process that allows this type of harm cannot be said to be equitable, or even safe, for SA survivors.

Another example of profound harm perpetrated against a SA survivor using whacking strategies is the case of *R. v. Khaery* (2014). As described by Craig (2018) (p. 71-75), the survivor in this case was a 19-year-old Indigenous woman who had a history of substance use and struggled with poverty. Responding to a 911 call from the roommate of the accused, four police officers interrupted the rape, pulled Khaery off the survivor, and arrested him. Even though four police officers witnessed the rape and were able to provide testimony, the complainant was cross-examined for approximately five days. Defence lawyer Naeem Rauf was disrespectful and antagonistic towards the complainant, repeatedly accused her of lying, of participating in a conspiracy with Khaery’s roommate, and of using drugs and being high on the stand. The young survivor was visibly distraught, fatigued, and highly emotional, as noted by the trial judge. After her first day of testifying, the complainant’s distress was so intense that she did not return the following day. A warrant was issued by the trial judge; she was arrested, detained, and compelled back to court to perform her role as witness.

During her testimony, this survivor stated repeatedly that she did not want to testify and was not mentally or emotionally prepared to do so. Midway through the cross-examination, “driven to the brink of a breakdown” (Craig, 2018, p. 73) and concerned about suicide, she admitted herself to hospital. Upon her mandatory return to court, Rauf continued to assert that she was actively using drugs and suggested

she was in hospital because of an overdose. Rauf was able to make these accusations without introducing evidence to support them, attempting to exploit this survivor's substance use issues to the advantage of her rapist. Legal rules designed to protect this young survivor were not upheld. Similarly, in *R. v. L(G)* (2014), defence lawyer Todd Brett White was disrespectful, sarcastic, and condescending towards the complainant, repeatedly accused her of lying, insulted her, asked her confusing, compound questions, refused to allow her to explain her answers, and interrupted her so frequently that the judge intervened on more than 15 occasions to direct him to stop (Craig, 2018, p. 65-71).

More broadly, Craig (2018) suggests that whacking strategies have historically been the "bread and butter" of defense lawyers (p. 141) and are a key illustration of the "promotion of an aggressive approach" (p. 92) within the legal culture. This aggressive approach is on display on the websites of many prominent criminal defence lawyers in Canada, as some describe "whack the complainant" type strategies, presumably as a means of demonstrating their effectiveness as SA defense lawyers (Craig, 2018). For example, Craig (2018) analysed criminal lawyer Paul Gracia's website, where he details his defence of his client, a habitual sexual offender, who was accused of raping a 14-year-old girl, alongside two other men. The website describes the incident as if the man was guilty, and as if Gracia was aware of this: "my client removed his clothing and proceeded to have sex with one of the girls and demanded oral sex from her" (as cited in Craig, 2018, p. 53). He noted his client had two previous SA convictions and was accused of another SA, on a child with a (dis)ability, when released on bail for this offence; this description seems to emphasize the violence perpetrated by his client before describing how he used aggressive tactics to get him acquitted. He describes that his questions at the preliminary trial "frustrated" (Craig, 2018, p. 54) the complainant to the extent that she quit. More accurately described, as Craig (2018) suggests, this 14-year-old girl was "bullied into submission and retreat from the CJ system" (p. 54).

Similarly, Craig (2018) describes the website of Toronto criminal lawyer Craig Penny, where he admits making an application under section 276 of the criminal code to admit evidence he knew was irrelevant or inadmissible. In this case, the Crown met with the complainant regarding this application and

she subsequently decided not to proceed. Here whacking served as an intimidation strategy. For these lawyers, whacking strategies have proven so effective that they are useful promotional tools as well. They are not hiding their intent to harm SA survivors. They are earning a living from it. This can be understood as commodification of humiliation and violence against SA complainants.

Defence lawyers continue to whack SA survivors because they are often allowed to do so by the prosecutors and judges who work alongside them. They continue to whack because, it is often an effective strategy to derail charges of SA. Consequently, I argue, consistent with Craig (2018), that whacking strategies against complainants are not isolated incidents. Rather, they are part of a pattern of harmful barriers set up to slow or stop SA survivors within the CJ system and a central mechanism of the institutional violence SA survivors often experience.

6.5a Stereotypes as weapons

David Tanovich's (2015) definition of "whacking the complainant" includes tactics that invoke and exploit myths and stereotypes about women and SA. From this understanding, all the ways in which defence lawyers use rape mythology and rely upon stereotypes to inform their defence tactics can be understood as whacking strategies. Importantly though, the ways in which stereotypical ideas pervade the CJ handling of SA are not straightforward. Above I discuss how rape myths impact police mishandling of SA and how stereotypes distort legal interpretations of consent. In this section I highlight how, despite legal reforms explicitly designed to eliminate stereotypes from the criminal trial process for SA, survivors continue to be discredited and often disqualified based on stereotypical ideas about authentic victims, respectable women, "real" rape, and men who perpetrate SA. Below, drawing on the narratives of SA survivors described in Craig (2018), I provide examples of stereotype-infused reasoning used in defence tactics and judicial decision-making, focusing on the figure of the promiscuous party girl. I show how survivors' clothing can be used to construct an image of her as an inauthentic victim.

In some SA trials, the reliance on stereotypes is obvious, such as the case of *R v B(IE)* (2011, 2013), in which the position taken by the defence was consent, explicitly arguing that the report of SA was the result of post-sex regret (Craig, 2018, p. 45). In *R v Schmaltz* (2013), defence lawyer Kyrsia Przepiorka

argued that the fact that the complainant's vagina was moist was an indication that she was "stimulated and enjoying [her]self" (as cited in Craig, 2018, p. 40) and therefore that she consented. Similarly, in *R v Rhodes* (2011), Justice Robert Dewar apparently made little effort to disguise his stereotyped reasoning when he characterized a convicted violent rapist as a "clumsy Don Juan" (Craig, 2018, p. 207) who, purportedly, did not knowingly impose violence on his victim when he forcibly penetrated her vagina and anus with his fingers and penis. According to Dewar's judgement, this violent rape was "a case of misread signals and inconsiderate behaviour" (p. 207). Here, rape myths wielded by defence attorneys and judges explicitly worked to minimize the actions of perpetrators. As a consequence of this stereotyped reasoning, the rapist in this case was given a two-year conditional sentence, meaning he would not be incarcerated and could serve his sentence in the community (Craig, 2018). The effectiveness of these types of rapes myths at minimizing the consequences of sexual violence for perpetrates is unambiguous in this case; fortunately, the Manitoba Court of Appeal subsequently overturned Justice Dewar's conviction and ordered a new trial (Craig, 2018, p. 291 note 89). Dewar faced public criticism because of these remarks and in response "expressed his sincere regret" and offered an "unequivocal apology" (Craig, 2018, p. 207) to the survivor for the harm he caused with his statements.

However, Dewar's harmful and problematic actions went beyond those described above, as he also made his decision based on stereotypical reasoning related to the survivor in this case. It is noteworthy that the survivor in *Rhodes* (2011) is a young Indigenous woman. A common theme in defence tactics and judicial decision-making in relation to SA relates to reliance on the stereotype of the "promiscuous party girl". Craig (2018) identifies this stereotype as central to the disqualification of SA complainants. Judge Dewar's reasoning in *Rhodes* (2011) emphasized the survivor's clothing and appearance, noting that she wore makeup, high heels, a tube top, and did not wear a bra and suggested that "sex was in the air" that night (as cited in Craig, 2018, p. 207). Despite a conviction, Dewar referred to this incident as "sex". *It was SA.* Further, we can see that judgements about the survivor's character and the likelihood that she gave consent were based, in part, on her appearance. Suggestions that a woman is soliciting sex, untrustworthy, or "promiscuous" because of the way she is dressed are, of course, rape myths, and are

central to the figure of the promiscuous party girl. Even after a conviction, this survivor's clothing was used to disqualify the legitimacy of her SA and shift blame away from the rapist onto her.

Similarly, in *R v Cain* (2009) defence lawyer Naeem Rauf used a survivor's clothing, a T-shirt he suggested had a picture of a penis on it, to contradict the young woman's narrative of SA. Asking the jury "[d]oes this suggest to you a young woman who has suffered trauma?" (Craig, 2018, p. 39), Rauf implied that the decision to wear this t-shirt the day after she had been sexually assaulted was inconsistent with the reality of a traumatic victimization. Defence lawyer Patrick Ducharme questioned the complainant in *R v Johnson* (2016) in great detail about her clothing: "You were wearing high heels"; "…you were wearing the thinnest, smoothest, tightest of leggings, weren't you?"... (Craig, 2018, p. 90). Implicitly, Ducharme was attempting to link the woman's clothing to her credibility and character. The defence lawyer in my case made similar attempts, but his approach was somewhat more explicit:

> *The clothing that I decided to wear the night that I was raped became a focus in my cross-examination. I remember having to justify my clothing choice. The defence lawyer suggested my clothing was sexy, and that I chose that clothing because I had plans for sex that evening. I remember being angry that he was able to get away with his "suggestions" that my clothing choice had any relationship to whether I was sexually assaulted. I defended my choice by explaining that my best friend and I were young girls planning a night on the town; we chose clothing that matched each others' and made us feel beautiful. I told him it was a hot summer night and I was dressed as any young girl might have been dressed. I'm not sure if I used the word then, if I had the confidence to, given the context, but we dressed up to feel sexy, as some young girls do. We matched our outfits, did our hair and make-up together, and set out for a night on the town. He asked how much of my body was exposed, and what messages I was sending with my outfit. "What might a reasonable person think of the way I was dressed?", he asked.*
>
> *The skirt I was wearing that night had a small hole in the waistband. It could easily be hidden by rolling it up, so I kept it in my wardrobe. During cross-examination the defence lawyer suggested I made this hole purposefully, as a way to make my outfit more provocative. When I explained I rolled up my skirt to hide it he asked how high my skirt was, how many times I rolled it up. Wouldn't it be reasonable to just get a new skirt rather than rolling this one up? I remember having to explain that I was poor, that I didn't have many "cool clothes" and that I wore what I wore because it was hot out and it made me feel good. I felt like I looked good that night. The defence attorney insisted something else about how I looked. He insisted it said something about "my intentions" that night and was adamant that what I wore and how I looked was relevant to whether I was raped. I felt so helpless to defend myself, so powerless. I knew I would have to defend myself about whether I provided consent to sexual activity, but I never imagined I would have to defend my outfit. In the end, it didn't matter what I said about how I was dressed. The defence lawyer got to decide*

> *what it meant, and what it said about "what I had planned" that night, the type of person I was, or whether I was "actually" raped.*

Skeggs (2002) talks about bodies as sites of investment upon which classed distinctions can be drawn, and clothing and appearance as means through which (working-class) women carefully manage their image, deflect negative associations of value, and distance themselves from the pathological. Theorizing sexuality as the antithesis of respectable femininity, Skeggs (2002) describes how, in part through clothing, women carefully construct their image to generate value. A sexual body has no value, therefore when sexuality is projected onto and interpreted from our bodies we are immediately read as lacking respectability (Skeggs, 2002). We can see how this was done in the cases described above. Skeggs (2002) describes "glamour" as an illusive mechanism that holds together respectability and sexuality; glamorous women can be sexual and maintain respectability, but only when protected by other marks of middle-class respectability. Glamour is nearly impossible to achieve, according to Skeggs (2002), and completely inaccessible for non-White, working-class, and poor bodies.

The way I decided to dress on the evening I was raped was significant at trial. For me, as a 16-year-old, it meant I felt beautiful, sexy, and cool on a hot night. I felt glamorous. But that is not how my appearance was interpreted at trial. The lawyer explicitly told me my clothing was sexual. He insisted my clothing represented my sexual motivations that evening and that it described my character. I was forced to argue with an adult man about the meaning of my clothing, an argument that I lost. Glamour was not accessible for me, and I was degraded and disqualified because of the way I was dressed. Skeggs (2002) argues it can be humiliating for women when their attempts to "pass" as respectable are recognized and exposed as "fabrications". When what I understood as a normal, acceptable teenage outfit became a tool to paint me as a promiscuous party girl, the humiliation was profound.

Clothing is just one of many tools relied on to shove SA complainants into the promiscuous party girl box, thereby disqualifying our narratives. Defence lawyer Kevin Burke in *R v B(IE)* (2011, 2013) asked the complainant if she had told her friends that she was "going to get fucked that night" (as cited in Craig, 2018, p. 46). Highly prejudicial, as Craig (2018) argues, this is a clear attempt to paint this complainant as

the "type" of woman willing to consent to sex with anyone, anywhere. Whether she wanted to have sex that evening is not relevant to her specific decision of non-consent in this case. Based on this defence lawyer's logic, any woman who ever expressed a desire to have sex would be presumed to consent to any subsequent sexual activity. Comments to friends, real or fabricated, can be used to disqualify survivors, shaping perceptions of the "type" of people we are.

Nicknames can also be used to construct a narrative of the promiscuous party girl. As Craig (2018) describes, without making a 276 application to introduce evidence of sexual history the defence lawyer in *Wright* (2012, 2013) asked the complainant about dancing around the bonfire, about taking her top off while dancing, and if she remembered having a nickname at the gathering she attended on the night she was sexually assaulted. She did not remember. Ignoring section 277 of the *CC* which excludes evidence of complainants' sexual reputation, the defence suggested that she had been given the name "Perky Tits" (as cited in Craig, 2018, p. 48). With no attempt to explain the legal relevance of this evidence, Craig (2018) suggests it was intended to trigger discriminatory stereotypes about promiscuous women being more likely to consent or less worthy of belief.

In the first of two trials for *R v Wagar* (2014) (discussed in detail in the consent section above), the defence lawyer constructed a narrative of the young survivor involved in a "weekend…of promiscuous activity" (as cited in Craig, 2018, p. 39) during which she apparently enjoyed the dancing of the accused, flirted, had a "romantic fling" (as cited in Craig, 2018 p. 40), and made love with the accused. He characterized the survivor as "no shrinking violet" who could "take care of herself" (as cited by Craig, 2018, p. 40). Through this language, the defence lawyer reconstructed the narrative from violent SA to a harmless incident that was the result of the survivor's risky, promiscuous behaviour. As described by Craig (2018, p. 243, note 80), Justice Camp acquitted Wagar in his 2014 trial, but this decision was overturned in 2015. A new trial was ordered; Wagar was acquitted a second time in 2017.

The survivor in *Wagar* (2014, 2017) was a young Indigenous woman with a history of substance dependency and homelessness. It is critical to understand that the ease with which the defence was able to fit this survivor into the promiscuous party girl box, and therefore relegate her to non-victim status, is

rooted in classist, colonial stereotypes. Women of Colour and poor women are more easily shoved into the category of inauthentic victims because of the distance at which they are positioned from respectable femininity. Further, we know that substance dependency is often rooted in trauma and mental health issues, so when survivors' histories of mental illness or substance use are used to construct narratives that disqualify them from being victims in sexual violence trials, we must understand this as a clearly ableist framework.

The harmful impact of the promiscuous party girl narrative constructed by the defence in the first trial for *Wagar* (2014) can be seen in the comments of Judge Camp and by the survivor in this case. Camp's bias and contempt for the young survivor was blatant, as he repeatedly referred to her, the complainant, as "the accused" and even called her an "amoral" person (as cited in Craig, 2018, p. 204). Craig (2018) cites the complainant as she describes the impact of Judge Camp's harmful and discriminatory acts: "[h]e made me hate myself and he made me feel like I should have done something … that I was some kind of slut" (p. 204). The narrative of the promiscuous party girl is not only an effective barrier, working to disqualifying complaints of SA, but also a central mechanism of institutional violence. Sexual violence survivors are not only degraded in the eyes of the law but are often made to question our own worth and value. Rape mythology validated through the CJ process is not only powerful enough to make juries question survivors' character, but to make us question our own selves.

As a cornerstone of defence counsel tactics, and as a result of a legal process that validates and facilitates these strategies, "whack the complainant" strategies continue to be a common barrier for survivors who testify at their SA trial. As a mechanism of domination, the violence inflicted through whacking strategies mimics the violence of SA through coercion and the infliction of harm. These efforts to intimidate, humiliate, discredit, and disqualify SA complainants are targeted strategies to stop complaints of SA. And they are often very effective.

Chapter 7: Conclusion

Overall, the CJ response to SA in Canada is ineffective at protecting women, including our bodies and sexual integrity, and at holding perpetrators accountable. This analysis reveals a series of barriers SA survivors may encounter when they report a SA to police and participate in the criminal trial process. Heteropatriarchal notions of respectable femininity, rape myths, and stereotypes about "real" rape and "authentic" victims shape the barriers survivors encounter within the CJ process. The experiences of these barriers are further shaped by survivors' social location in relation to class, culture, race, and (dis)ability. After a brief discussion of the decision to report SA, I summarize these barriers and their differential impact on survivors below.

The overwhelming majority of SA survivors, approximately 95 percent, do not report their victimizations to police (Perreault, 2015). It is at this juncture of the CJ process, its entry point, where most survivors are stopped. An analysis of the barriers that influence the decision not to report an experience of SA to police was beyond the scope of this investigation; however, it is important to recognize this reporting pattern is part of the problem of the CJ response to SA. It is critical to recognize low reporting rates for SA as alarm bells to an ineffective system and as a key mechanism of strategic inefficiency. As Sara Ahmed (2018, June 28) explains, "you can stop others from using a space by how a space is being used, by what a space is used for" (para. 73).

Indeed, Lievore's (2003) international literature review suggests that Indigenous women tend to see the CJ system as part of the problem of sexual and family violence, rather than a solution to it, and often view reporting as an inappropriate response to victimization. Research suggests other marginalized groups in Canada are also likely to hold unfavourable attitudes toward the CJ system. In two separate investigations with similar methodologies, separated by more than a decade, Wortley (Wortley 1996; Wortley & Owusu-Bempah, 2009) demonstrates racial differences in participants' perceptions of police and the court system, noting in both investigations that Black participants tended to perceive higher levels of discrimination than White or Chinese-Canadian participants. Similarly, Cao (2011) shows that racialized people reported lower levels of confidence in police than individuals who are not visible

minorities. Future examination of barriers to reporting SA need to center the voices of marginalized survivors and explore how the mechanisms of strategic inefficiency impact the near-zero reporting rates for SA in Canada.

The current analysis demonstrates that once they enter the system, a series of mechanisms work to slow and stop complaints of SA and inflict harm on survivors. Survivors unwittingly enter a police culture of skepticism in which it is common to be questioned and discredited based on normative assumptions about "real" survivors and "authentic" victim behaviour. Police approaches rarely include a trauma-informed perspective, resulting in the disqualification of many survivors whose fear-response systems initiate freeze, friend, and/or flop reactions, as they defy stereotypes about how "authentic" survivors react to SA. Survivors who do not physically resist, say "no," or whose resistance is not judged as sufficient by police are particularly likely to encounter skepticism by police. Young women and women with substance use disorders and mental illnesses are also more likely to encounter the police culture of skepticism.

In my own experience, barriers within the policing system did not work against me. The detective in my case was respectful, patient, and even kind; he gave me a kitten. He employed a trauma-informed approach in his interactions with me and performed a thorough investigation in a timely manner. If he was skeptical of the credibility of my complaint, he did not convey his skepticism to me in any way. He believed me. It is likely that my Whiteness and our cultural similarity worked to protect me from experiencing skepticism to the extent many survivors do in their police interactions. Without systematic investigations into the impact of race on the experiences of survivors in the CJ system, however, we cannot know how this factor shapes police perceptions of SA survivors. More research is needed to understand the impact of racism on the police culture of skepticism as a barrier for SA survivors. I was not doubted, slowed, stopped, or harmed by my experience of reporting or throughout the investigation of my SA, as many other survivors are. For me, reporting operated as a door and allowed my complaint to pass through.

Patterns of delaying responses, refusing to take reports, skipping and fumbling basic investigative steps, and closing cases without adequate investigations into SA cases, particularly in the cases of MMIWG across Canada, demonstrate a chronic under-prioritization of police work aimed at protecting women's safety and sexual integrity and holding violent men legally accountable. Investigative apathy appears to be especially powerful for particular groups of marginalized women, including Indigenous women, women with mental health or substance use disorders, poor women, sex workers, and women in the survival sex trade; those positioned furthest from the respectable feminine ideal. In relation to MMIWG across Canada, investigative apathy costs lives. Understanding the strategic inefficiencies active in police responses to MMIWG is an important area for future research.

Another set of barriers awaits survivors whose cases are allowed to advance to the criminal trial process. The decades-long feminist legal battle for SA law reform in Canada has been persistently challenged and resisted through case law, playing out through the complaints of Canadian SA survivors. Despite legal protections for survivors and a clear definition of consent as voluntary, affirmative, and ongoing, legal actors continue to discredit survivors and disqualify complaints of SA based on legally erroneous notions of implied consent and "contributory" behaviour and assertions of complainants' "failures" to effectively communicate non-consent and adequately resist SA. The legal definition of consent is frequently misapplied and protections for survivors are routinely ignored, demonstrating ongoing patterns of failure and resistance to the proper application of consent law.

Survivors of SA are structurally disempowered by their subordinate role as complainants. We do not have a legal right to prosecution or any control over the form or direction of the process, but we do have a legal obligation to perform the role of complainant once the case enters the trial system. Two cases I detail describe instances in which survivors were forced to perform the role of complainant against their will: *R v L(G)* (2014), and *R v Khaery* (2014). The survivor in *R v Khaery* (2014) was arrested and held in custody to ensure she fulfilled her role of testifying. Rigid courtroom procedures and rituals, specialized legal language, and the spatial organization of the courtroom reinforce hierarchies in the trial process and contribute to the subordination of survivors, exacerbating feelings of powerlessness and replicating the

power dynamics of domination foundational to SA. Representations of the colonial framework in Canadian courtrooms may act as a symbolic reminder of the historical and ongoing state-sanctioned violence against Indigenous peoples in Canada, adding an additional layer of emotional work for Indigenous SA complainants and underscoring how survivors' differential positioning in relation to the CJ system and its barriers can shape the difficulty and harm of the process.

Survivors' responses to SA are challenged by a legal perspective based in rationality where notions of "reasonableness" serve as a normative standard from which to measure survivors' credibility and the legitimacy of their SA. Through this legal framework, my "flop" response to SA was decontextualized and presented as a conscious, irrational choice, indicative of a "non-victim". My "failures" to resist were constructed as unreasonable and I was discredited for not measuring up to normative expectations of victim behaviour. This strategy is commonly used by defence lawyers during SA trials, facilitating the ongoing and routine use of rape myth and stereotypes to discredit survivors. Those who are positioned further from ideals of respectable femininity and whose fear response systems produce reactions to SA that fall outside of normative expectations are likely to experience the harm of the reasonableness barrier more powerfully.

Power dynamics of domination and resistance are replicated in the trial process through the structure of courtroom talk (Matoesian, 1993) and the process of cross-examination. During cross-examination, survivors are structurally disempowered through the unequal distribution of persuasive resources, heavily restricting our abilities to convey a cohesive narrative of our experiences. When survivors speak and what we are allowed to say is heavily restricted by the organization of talk around specific court procedures and filtered through the questions of the Crown and defence counsel. In this way, the trial process works to alienate survivors from our stories of SA. The structure of courtroom talk positions defence counsel with control over the turn-taking system and the power to carry out coercive question formats, and to reinterpret, override, and delete survivor's responses. Distorted through these cross-examination tactics, survivors' stories can be re-scripted, from SA to consensual sex, disqualifying complaints of SA. For SA survivors, cross-examination requires we endure strategic and often aggressive attempts to re-script and

disqualify our narratives and re-define our character. Larcombe (2002) refers to this requirement as discursive resistance, where survivors must continually oppose coercive attempts to confuse and disorient us and undermine and control our narratives. Survivors' capacities to endure the harmful process of domination through courtroom talk and our abilities to perform discursive resistance during cross-examination are reliant on our coping skills, mental and emotional health, cognitive and communicative abilities, our cultural capital and resources, and likely the quality of our support systems. In this way, experiences of alienation and domination through courtroom talk may be more harmful and more difficult to navigate for neurodiverse SA survivors, those with emotional and mental illnesses, cognitive disabilities, and survivors who struggle with assertive communication and effective self-advocacy than for survivors who do not.

The final barrier in the criminal trial process that I address in my analysis is a pattern of abusive "whack the complainant" strategies indicative of a broader aggressive legal defence culture. Survivors can be forced navigate hostile and aggressive barriers including baseless applications to obtain their personal and confidential records and use them as evidence at trial, the exploitation of rape myths, stereotypes, and normative assumptions about women and consent, and strategies designed to humiliate survivors and intimidate them towards retreat from the CJ process. Whacking strategies are openly verified by some members of the criminal defence bar in Canada, defended as ethical by others, and are even used as advertising content for legal clients. They are a key feature of a harmful, inefficient, and ineffective CJ response to SA. Overall, I argue that the harm that SA survivors are often required to endure as they interact with police and navigate the criminal trial process are examples of state-sanctioned, institutional violence and contribute to an environment that is unsafe for many SA survivors.

It is critical to understand the mechanisms within Canada's CJ system that contribute to conviction rates of less than 10 percent of the incidents of SA that are reported to police (Johnson, 2012). This thesis identifies some of these mechanisms, building on the work of others who have examined the problematic treatment of SA survivors by legal systems and offering insight into the experience of these barriers at an individual level. Overall, this analysis suggests that Indigenous women, women with mental health issues

or substance dependency, sex workers, and women in the survival sex trade may be most powerfully impacted by these barriers within the CJ process for SA. It is reasonable to suggest that other groups of racialized survivors may also be particularly likely to encounter barriers and harm within the CJ system, but the voices of non-Indigenous, racialized survivors were unavailable in the literature, and were therefore not centralized in this analysis. Future research to understand how racialized survivors experience barriers in the CJ response to SA is critical.

Women who have powerful trauma reactions to SA, such as disassociation, those whose fear responses are "freeze", "friend" or "flop" or whose reactions to SA fall outside of normative expectations of resistance and "authentic" victim behaviour may be more likely to be met with police skepticism, to be labeled unreasonable, to have their narratives re-scripted into stories of consent, and to be whacked on the witness stand. In many ways, we can see that survivors who exist further away from the ideal of (White) respectable femininity and the normative assumptions associated with it are more likely to be slowed, stopped, or harmed as SA survivors within the CJ system. An examination of the experiences of transgender, Two-Spirit, and gender non-conforming people were also not centralized in this analysis.. However, research demonstrating deeply entrenched patterns of gender discrimination and violence against these marginalized groups (Bauer Scheim, 2015; Scheim, 2013) suggests that SA survivors from these communities may be particularly likely to encounter barriers to justice, harm, and institutional violence in the CJ system. This is another important issue in need of further research.

There is another layer to the process of navigating barriers within the CJ system that shapes who is likely to be disqualified and who is allowed to proceed: the time and work of complaint. We can see the work of complaint exemplified by B.D. (Doolittle, 2017, March 17) who had to persistently contact and follow up with police in order to remain informed about her investigation. Many family members of MMIWG had similar experiences with police inaction and lack of responsiveness. Some SA survivors including B.D. (Doolittle, 2017, March 17, n.p.), Maddie, and Ms. Sandhu (Doolittle, 2017, July 7) had to enter complaint processes by filing reports for police mishandling of their reports of SA.

Similarly, accounts of survivors' experiences during cross-examination underscore the utility of communication and self-advocacy skills for SA survivors performing the role of complainant. Survivors who have these skill sets may be able to navigate the barriers in the CJ process more effectively than those who do not. Emotional and mental health as well as survivors' abilities to navigate the trauma and coping processes of SA certainly impact the extent to which we are able to perform the work of complaint.

The process of making a formal complaint is a time-consuming and life-consuming project and it can be slowed down even further by having to navigate barriers (Ahmed, 2018, May 30). Time can be used as a tool in complaint processes (Ahmed, 2018, May 30); the process advances slowly, progress is out of survivor's control, and we are left waiting. From the report to police to the date of the verdict, in my case, two years and three months passed. During this time, I felt like I existed in suspended animation, waiting to learn when I would be able to finish the process and move on with my life. During this time, my life was on hold.

Ahmed describes the experiences of a university employee who entered a formal complaint process to report bullying:

> waiting for the next response to her complaint was like waiting for a bill to come through the door. You do not know whether the next bill will be the one that breaks you. You don't know, so waiting can feel like breaking. The longer it takes to receive a response, the longer you are on high alert; anxiety about what might happen can be enough to make a complaint impossible to sustain (as cited in Ahmed, 2018, May 30, para. 18).

Anxiety also characterized the waiting period for my trial process. As did PTSD, unpredictability, stress, a sense of powerlessness, and exhaustion. I wanted to give up; I almost gave up. But I suspected that giving up was precisely what was expected of me, by the defence and even the prosecutors, and this impression solidified my determination to continue. It is important to recognize that there are costs associated with the time that must be given to follow through on a complaint process (Ahmed, 2017, December 19). This cost for me included putting school on hold to focus on healing myself and preparing for my role as a complainant. I tried to go to school, but my mental and emotional health made it difficult

to maintain, so I dropped out. Importantly, many survivors may not be able to give the time that is required for a complaint process. This may be especially true for low-income women, those in precarious work or dependent on waged work for survival, women with significant caregiving responsibilities, and women with little social support.

Exhaustion can be an effect of navigating the CJ process for SA as a survivor. As Ahmed (2018, May 30) explains, this effect could be considered more than simply an outcome of complaint processes; it could also be the point. Recognizing "exhaustion as a management technique" (Ahmed, 2018, May 30) is a key piece to understanding the overall use of strategic inefficiency of the CJ response to SA. Time and exhaustion can be the cost of complaint in the CJ process for SA, as can harm and ideological and institutional violence.

The barriers within the CJ response to SA, and the time, work, and cost of complaint contribute to a profoundly flawed process. It is crucial that we ask what an ineffective CJ response to SA enables, and who it enables. Ahmed explains that, "[s]trategic inefficiency can help us to understand that not creating a record is not simply about the failure to do something but is an attempt to do something" (2018, December 20, para. 16). When records are not made, reports are met with skepticism, investigations are mishandled, SA laws are misapplied, and survivors are routinely controlled, dominated, intimidated, and humiliated through legal processes, complaints are stopped, and survivors harmed. When complaints are stopped, perpetrators are not (Ahmed, 2018, June 28). In this way, male access to those considered to fall outside the circle of respectable femininity is facilitated by the police and criminal justice response to SA.

References

Adams, T. E., Ellis, C., & Jones, S. H. (2014). *Autoethnography: Understanding Qualitative Research*. Oxford University Press, Incorporated. Retrieved from: http://ebookcentral.proquest.com/lib/brocku/detail.action?docID=1784095

Ahmed, S. (2017, November 2). Cutting yourself off [Web log]. Retrieved from: https://feministkilljoys.com/2017/11/03/cutting-yourself-off/

Ahmed, S. (2017, November 5). The figure of the abuser [Web log]. Retrieved from: https://feministkilljoys.com/2017/11/05/the-figure-of-the-abuser/

Ahmed, S. (2017, November 10). Complaint as diversity work [Web log]. Retrieved from: https://feministkilljoys.com/2017/11/10/complaint-as-diversity-work/

Ahmed, S. (2017, December, 19). Diversity work as complaint [Web log]. Retrieved from: https://feministkilljoys.com/2017/12/19/diversity-work-as-complaint/

Ahmed, S. (2018, February 11). Opening the file [Web log]. Retrieved from: https://feministkilljoys.com/2018/02/11/opening-the-file/

Ahmed, S. (2018, May 4). Confrontation? [Web log]. Retrieved from: https://feministkilljoys.com/2018/05/04/confrontation/

Ahmed, S. (2018, May 30). The time of complaint [Web log]. Retrieved from: https://feministkilljoys.com/2018/05/30/the-time-of-complaint/

Ahmed, S. (2018, June 28). Refusal, resignation, and complaint [Web log]. Retrieved from: https://feministkilljoys.com/2018/06/28/refusal-resignation-and-complaint/

Ahmed, S. (2018, December 20). Strategic Inefficiency [Web log]. Retrieved from: https://feministkilljoys.com/2018/12/20/strategic-inefficiency/

Amnesty International. (2004). *Stolen sisters: A human rights response to discrimination and violence against Indigenous women and girls in Canada.* Amnesty International Publications. Retrieved from: https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf

Amnesty International. (2017). *Canada: Submission to the United Nations committee on the elimination*

of racial discrimination. London, UK: Amnesty International Publications.

Anderson, K. (2013). The construction of a negative identity. In M. Hobbs & C. Rice (Eds.), *Gender and women's studies in Canada: Critical terrain* (pp. 269-279). Women's Press.

Anderson, L. (2006). Analytic autoethnography. *Journal of Contemporary Ethnography, 35*, 373-395. doi: 10.1177/0891241605280449

Anderson, M. J. (2010). Diminishing the legal impact of negative social attitudes toward acquaintance rape victims. *New Criminal Law Review: An International and Interdisciplinary Journal*, *13*(4), 644–664. https://doi.org/10.1525/nclr.2010.13.4.644

Bauer, Greta & Scheim, Ayden. (2015). Transgender People in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy.

Bell, C., & Schreiner, K. (2018). The international relations of police power in settler colonialism: The "civilizing" mission of Canada's mounties. *International Journal*, *73*(1), 111-128. doi:10.1177/0020702018768480

Benedet, J. (2014). Sexual assault cases at the Alberta Court of Appeal: The roots of Ewanchuk and the unfinished revolution. *Alberta Law Review*, *52*, 127.

Benedet, J., & Grant, I. (2007a). Hearing the sexual assault complaints of women with mental disabilities: Consent, capacity, and mistaken belief. *McGill Law Journal*, *52*(2), 243–289.

Benedet, J., & Grant, I. (2007b). Hearing the sexual assault complaints of women with mental disabilities: Evidentiary and procedural issues. *McGill Law Journal*, *52*(3), 515–552.

Benedet, J., & Grant, I. (2014). Sexual assault and the meaning of power and authority for women with mental disabilities. *Feminist Legal Studies*, *22*(2), 131–154. https://doi.org/10.1007/s10691-014-93-3

Borja, S. E., Callahan, J. L., & Long, P. J. (2006). Positive and negative adjustment and social support of sexual assault survivors. *Journal of Traumatic Stress*, *19*(6), 905–914. https://doi.org/10.1002/jts.20169

Bourgeois, R. (2018). Race, space, and prostitution: The making of settler colonial Canada. *Canadian Journal of Women & the Law*, *30*(3), 371–397. https://doi.org/10.3138/cjwl.30.3.002

Bracha, H., Ralston, T. C., Matsukawa, J. M., Williams, A. E., & Bracha, A. S. (2004). Does "fight or flight" need updating? *Psychosomatics*, *45*(5), 448–449. https://doi.org/10.1176/appi.psy.45.5.448

Brownmiller, S. (1975). *Against our will: Men, women and rape*. New York: The Random House Publishing Group.

Brunet, A., Weiss, D. S., Metzler, T. J., Best, S. R., Neylan, T. C., Rogers, C., Fagan, J., & Marmar, C. R. (2001). The peritraumatic distress inventory: A proposed measure of PTSD criterion A2. *American Journal of Psychiatry*, *158*(9), 1480–1485. https://doi.org/10.1176/appi.ajp.158.9.1480

Cao, L. (2011). Visible minorities and confidence in the police. *Canadian Journal of Criminology and Criminal Justice, 53*(1), 1-26. doi: 10.3138/cjccj.53.1.1

Conroy, S., & Cotter, A. (2017). Self-reported sexual assault in Canada, 2014. *Canadian Centre for Statistics,* (85), 34.

Craig, E. (2017). Judging sexual assault trials: Systemic failure in the case of Regina v Bassam Al-Rawi, 95-1 *Canadian Bar Review, 95*(1), 179-211. Retrieved from: https://canlii.ca/t/73c

Craig, E. (2018). *Putting trials on trial: Sexual assault and the failure of the legal profession*. McGill Queen's Press - MQUP.

Crenshaw, K. (1991). Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review, 43*, 1241-1299. Retrieved from http://jstor.org/stable/1229039

Curry, M., Hassouneh-Phillips, D., & Johnston-Silverberg, A. (2001). Abuse of women with disabilities. *Violence Against Women*, *7*(1), 60–79. https://doi.org/10.1177/10778010122182307

Doolittle, R. (2017, February 3a). The story behind The Globe's Unfounded series. *The Globe and Mail.* Retrieved from: https://www.theglobeandmail.com/news/investigations/unfounded-backstory- sexual-assault-claims/article33891825/

Doolittle, R. (2017, February 3b). Unfounded: Why police dismiss 1 in 5 sexual assault claims as

baseless. *The Globe and Mail.* Retrieved from: https://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/

Doolittle, R. (2017, March 17). Unfounded: What it's like to report a sexual assault. *The Globe and Mail.* Retrieved from : https://www.theglobeandmail.com/news/investigations/what-its-like-to-report-a-sexual-assault-36-people-share-their-stories/article34338353/

Doolittle, R. (2017, July 7). Unfounded: How police missteps can derail sex-assault cases. *The Globe and Mail.* Retrieved from: https://www.theglobeandmail.com/news/investigations/how-police-missteps-can-derail-sex-assault-cases/article35555702/

Doolittle, R., Pereira, M., Blenkinsop, L., & Agius, J. (2017, February 3). Unfounded: Will the police believe you? *The Globe and Mail.* Retrieved from: https://www.theglobeandmail.com/news/investigations/compare-unfounded-sex-assault-rates-across-canada/article33855643/

Du Mont, J., Miller, K.-L., & Myhr, T. L. (2003). The role of "real rape" and "real victim" stereotypes in the police reporting practices of sexually assaulted women. *Violence Against Women*, *9*(4), 466–486. https://doi.org/10.1177/1077801202250960

Duncan, M. (2004). Autoethnography: Critical appreciation of an emerging art. *International Journal of Qualitative Methods*, *3*(4), 28–39. https://doi.org/10.1177/160940690400300403

Edwards, K. M., Turchik, J. A., Dardis, C. M., Reynolds, N., & Gidycz, C. A. (2011). Rape myths: History, individual and institutional-level presence, and implications for change. *Sex Roles*, *65*(11–12), 761–773. https://doi.org/10.1007/s11199-011-9943-2

Elliott, D. E., Bjelajac, P., Fallot, R. D., Markoff, L. S., & Reed, B. G. (2005). Trauma-informed or trauma-denied: Principles and implementation of trauma-informed services for women. *Journal of Community Psychology*, *33*(4), 461–477. https://doi.org/10.1002/jcop.20063

Ellis, C., Adams, T. E., & Bochner, A. P. (2010). Autoethnography: An overview. *Forum Qualitative*

Sozialforschung / Forum: Qualitative Social Research, *12*(1). http://www.qualitative-research.net.proxy.library.brocku.ca/index.php/fqs/article/view/1589

Etikan, I., Musa, S. A, Alkassim, R. S. (2016). Comparison of convenience sampling and purposive sampling, *American Journal of Theoretical and Applied Statistics*, *5*(1), p. 1-4. doi: 10.11648/j.ajtas.20160501.11

Foster, K., & Sandel, M. (2010). Abuse of women with disabilities: Toward an empowerment perspective. *Sexuality & Disability*, *28*(3), 177–186. https://doi.org/10.1007/s11195-010-9156-6

Gotell, L. (2001). Colonization through disclosure: Confidential records, sexual assault complainants and Canadian law. *Social & Legal Studies*, *10*(3), 315–346. https://doi.org/10.1177/096466390101000302

Gotell, L. (2002). The ideal victim, the hysterical complainant, and the disclosure of confidential records: The implications of the Charter for sexual assault law. *Osgoode Hall Law Journal, 40*(3), 251-295. Retrieved from https://digitalcommons.osgoode.yorku.ca/ohlj/vol40/iss3/3/

Grubb, A., & Turner, E. (2012). Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming. *Aggression and Violent Behavior*, *17*(5), 443–452. https://doi.org/10.1016/j.avb.2012.06.002

Hagenaars, M. A., Stins, J. F., & Roelofs, K. (2012). Aversive life events enhance human freezing responses. *Journal of Experimental Psychology: General*, *141*(1), 98–105. https://doi.org/10.1037/a0024211

Harding, K. (2015). *Asking for it: The alarming rise of rape culture— and what we can do about it*. Da Capo Press.

Harper, S. (2011). An examination of structural dissociation of the of the personality and the implications for cognitive behavioural therapy. *The Cognitive Behavioural Therapist, 4*, 53-67. doi:10.1017/S1754470X11000031

Hughes, V. (2006). Women in Public Life: The Canadian Persons Case of 1929. *British Journal of Canadian Studies*, *19*(2), 257–I. https://doi.org/10.3828/bjcs.19.2.10

Humphreys, M. (2005). Getting Personal: Reflexivity and Autoethnographic Vignettes. *Qualitative*

Inquiry, *11*(6), 840–860. https://doi.org/10.1177/1077800404269425

Hunt, S. (2016). *Decolonizing the Roots of Rape Culture: Reflections on consent, sexual violence and university campuses*. Speech presented at The Power of Our Collective Voices Changing the Conversation on Sexual Violence at Post-Secondary Institutions in University of British Columbia, Vancouver. from Retrieved from: https://www.academia.edu/30006930/Decolonizing_the_Roots_of_Rape_Culture_reflections_on_consent_sexual_violence_and_university_campuses

James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L. & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality. Retrieved from: https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF

Johnson, H. (2012) Limits of a criminal justice response to sexual assault. In E. Sheehy (Ed.) *Sexual Assault in Canada* (p. 111–150). University of Ottawa Press.

Johnson, H. (2017). Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police. *Canadian Journal of Women & the Law*, *29*(1), 36–59. https://doi.org/10.3138/cjwl.29.1.36

Kong, R., Johnson, H., Beattie, S., & Cardillo, A. (2003). Sexual offences in Canada. *Canadian Centre for Statistics 23*(6), 1-26.

Larcombe, W. (2002). The "ideal" victim v successful rape complainants: Not what you might expect. *Feminist Legal Studies, 10*, 131-148. doi: 10.1023/A:1016060424945

Lensvelt-Mulders, G., van der Hart, O., van Ochten, J. M., van Son, M. J. M., Steele, K., & Breeman, L. (2008). Relations among peritraumatic dissociation and posttraumatic stress: A meta-analysis. *Clinical Psychology Review*, *28*(7), 1138–1151. https://doi.org/10.1016/j.cpr.2008.03.006

Lievore, D. (2003). *Non-reporting and hidden recording of sexual assault: An international literature review*. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/archive/archive-135

Light, L., & Ruebsaat, G. (2006). *Police classification of sexual assault cases as unfounded: An*

exploratory study. https://arcabc.ca/islandora/object/jibc:3065

Lisak, D., Gardinier, L., Nicksa, S. C., & Cote, A. M. (2010). False allegations of sexual assault: An analysis of ten years of reported cases. *Violence Against Women*, 16(12), 1318–1334. https://doi.org/10.1177/1077801210387747

Lodrick, Z. (2007) Psychological trauma – what every trauma worker should know. The British Journal of Psychotherapy Integration. Vol. 4(2) 1-19.

Lorenzi, L. (2015). Deconstructing docility: Sexual assault law and embodied resistance to violence. *TOPIA: Canadian Journal of Cultural Studies*. https://doi.org/10.3138/topia.33.133

MacKinnon, C. (2012). Rape: On coercion and consent. In *Applications of Feminist Legal Theory* (p. 471–483). Temple University Press.

Mann, S. A. (2012). *Doing feminist theory: From modernity to postmodernity*. New York: Oxford University Press.

Matoesian, G. M. (1993). *Reproducing rape: Domination through talk in the courtroom*. Chicago: Polity Press.

McIntyre, Sheila, Boyle, C., Lakeman, L., & Sheehy, E. A. (2000). Tracking and resisting backlash against equality gains in sexual offence law (SSRN Scholarly Paper ID 2289335). Social Science Research Network. https://papers.ssrn.com/abstract=2289335

Méndez, M. (2013). Autoethnography as a research method: Advantages, limitations, and criticisms. *Colombian Applied Linguistics Journal*, *15*(2), 279-287. Retrieved from http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0123-46412013000200010&lng=en&tlng=en.

Millar, P., & Owusu-Bempah, A. (2011). Whitewashing criminal justice in Canada: Preventing research through data suppression. *Canadian Journal of Law and Society*, *26*(3), 653–661.

Miller, C. (2019). *Know my name: A memoir*. USA: Viking.

National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada), Final Report Vol.

1a. Buller, M., Audette, M., Eyolfson, B., & Robinson, Q. (2019). *Reclaiming power and place: The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. Retrieved from: https://www.mmiwg-ffada.ca/final-report/

Nijenhuis, E., van der Hart, O., & Steele, K. (2010). Trauma-related structural dissociation of the personality. *Activitas Nervosa Superior*, *52*(1), 1–23. https://doi.org/10.1007/BF03379560

Oppal, W. T. & British Columbia, Missing Women Commission of Inquiry. (2013, Executive Summary). *Forsaken. how and why we failed the missing and murdered women, Executive Summary: The report of the Missing Women Commission of Inquiry.* Missing Women Commission of Inquiry. Retrieved from: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/forsaken-es.pdf

Oppal, W. T. & British Columbia, Missing Women Commission of Inquiry. (2013a). *Forsaken. how and why we failed the missing and murdered women, part 1 and 2: The report of the Missing Women Commission of Inquiry Vol. IIA*. Missing Women Commission of Inquiry. Retrieved from: http://ra.ocls.ca/ra/login.aspx?inst=centennial&url=https://www.deslibris.ca/ID/235957

Oppal, W. T. & British Columbia, Missing Women Commission of Inquiry. (2013b). *Forsaken. how and why we failed the missing and murdered women, part 3, 4 and 5: The report of the Missing Women Commission of Inquiry Vol. IIB,* Missing Women Commission of Inquiry. Retrieved from: https://www.deslibris.ca/ID/235958

Paradis, P. & Karbani, T. (2017). The significance of the Charter in Canadian legal history. *Law Now, 41*(5). Retrieved from https://www.lawnow.org/significance-charter-canadian-legal-history/

Perreault, S. (2015). Criminal victimization in Canada, 2014. *Canadian Centre for Statistics*.

Phipps, A. (2009). Rape and respectability: Ideas about sexual violence and social class. *Sociology*, *43*(4), 667–683. https://doi.org/10.1177/0038038509105414

Quinlan, A. (2016). Suspect survivors: Police investigation practices in sexual assault cases in Ontario, Canada. *Women & Criminal Justice*, *26*(4), 301–318. https://doi.org/10.1080/08974454.2015.1124823

R. v. Ewanchuk, 1 SCR 330 (Supreme Court of Canada 1999). http://canlii.ca/t/1fqpm

R. v. Mills, 3 SCR 668 (Supreme Court of Canada 1999). http://canlii.ca/t/1fqkl

R. v. O'Connor, 4 SCR 411 (Supreme Court of Canada 1995). http://canlii.ca/t/1frdh

R. v. Seaboyer; R. v. Gayme, 2 SCR 577 (Supreme Court of Canada 1991). http://canlii.ca/t/1fskf

R. v. Ururyar, CR-16-10000069-00AP (Superior Court of Justice July 20, 2017). http://canlii.ca/t/h5018

Randall, M. (2010a). Sexual assault in spousal relationships, "continuous consent", and the law, honest but mistaken judicial beliefs. University of Manitoba Law Journal, 32(1). Retrieved from: https://ssrn.com/abstract=1473153

Randall, M. (2010b). Sexual assault saw, credibility, and "ideal victims": Consent, resistance, and victim blaming. *Canadian Journal of Women and the Law*, *22*(2), 397–433. https://doi.org/10.3138/cjwl.22.2.397

Raphael, J. (2013). *Rape is rape: How denial, distortion, and victim-blaming are fueling a hidden acquaintance rape crisis.* Chicago: Lawrence Hill Books.

Reed-Danahay, D. (2017a). Bourdieu and critical autoethnography: Implications for research, writing, and teaching. *International Journal of Multicultural Education, 19,* 144- 149. doi: http://dx.doi.org/10.18251/ijme.v19i1.1368

Reed-Danahay, D. (2017b). Teaching with critical autoethnography. *International Journal of Multicultural Education, 19*(1)*,* 150- 154. doi: http://dx.doi.org/10.18251/ijme.v19i1.1368

Rotenberg, C. (2017a). From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014. Juristat, Catalogue no. 85-002-X, Ottawa: Statistics Canada.

Rotenberg, C. (2017b). Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile. Juristat, Catalogue no. 85-002-X. Ottawa: Statistics Canada.

RSC 1985, c C-46 | Criminal Code. (n.d.). CanLII. Retrieved from https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html

Scheim, A., Jackson, R., James, L., Dopler, T., Pyne, J., & Bauer, G. (2013). Barriers to well-being for Aboriginal gender-diverse people: Results from the Trans PULSE Project in Ontario, Canada.

Ethnicity and Inequalities in Health and Social Care, *6*, 108–120. https://doi.org/10.1108/EIHSC-08-2013-0010

Sheehy, E. (1996). Legalising justice for all women: Canadian women's struggle for democratic rape law reforms. *Australian Feminist Law Journal*, *6*(1), 87–113. https://doi.org/10.1080/13200968.1996.11077196

Sheehy, E. (2000). From women's duty to resist to men's duty to ask: How far have we come? *Canadian Woman Studies*, *20*(3), 72-83. Retrieved from: https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1016&context=emeritus_pubs

Shields, S. A. (2008). Gender: An intersectionality perspective. *Sex Roles*, *59*(5–6), 301–311. https://doi.org/10.1007/s11199-008-9501-8

Simmons, M., & Dei, G. (2012). Reframing anti-colonial theory for the diasporic context. *Postcolonial Directions in Education*, *1*(1). Retrieved from: http://projects.um.edu.mt.proxy.library.brocku.ca/pde/index.php/pde1/article/view/9

Simpson, L. B. (2017). *As We Have Always Done: Indigenous Freedom Through Radical Resistance*. University of Minnesota Press. Retrieved from: http://ebookcentral.proquest.com/lib/brocku/detail.action?docID=5047206

Simpson, L. B. (2020, March, 24). *Not Murdered, Not Missing: Rebelling against Colonial Gender Violence*. Versobooks.Com. Retrieved from: https://www.versobooks.com/blogs/4611-not-murdered-not-missing-rebelling-against-colonial-gender-violence

Skeggs, B. (2002). *Formations of class and gender: Becoming respectable*. SAGE Publications Ltd. Retrieved from: https://www-doi-org.proxy.library.brocku.ca/10.4135/9781446217597

Smart, C. (1989). *Feminism and the power of law*. London: Routledge.

Smart, C. (1992). The woman of legal discourse. *Social & Legal Studies - SOC LEGAL STUD*, *1*, 29–44. https://doi.org/10.1177/096466399200100103

Smith, A. (1999). Sexual violence and American Indian genocide. *Journal of Religion & Abuse*, *1*(2), 31 52. https://doi.org/10.1300/J154v01n02_04

Smith, O., & Skinner, T. (2017). How rape myths are used and challenged in rape and sexual assault trials. *Social & Legal Studies*, *26*(4), 441–466. https://doi.org/10.1177/0964663916680130

Tanovich, D.M. (2015) "Whack" no more: Infusing equality into the ethics of defence lawyering in sexual assault cases, 2015 45-3 *Ottawa Law Review* 495-496. Retrieved from http://canlii.ca/t/74z

Tang, K. (1998). Rape law reform in Canada: The success and limits of legislation. *International Journal of Offender Therapy and Comparative Criminology, 42*(3), 258–270. https://doi.org/10.1177/0306624X9804200307

Thompson, K. L., Hannan, S. M., & Miron, L. R. (2014). Fight, flight, and freeze: Threat sensitivity and emotion dysregulation in survivors of chronic childhood maltreatment. *Personality and Individual Differences*, *69*, 28–32. https://doi.org/10.1016/j.paid.2014.05.005

Tichenor, V., Marmar, C. R., Weiss, D. S., Metzler, T. J., & Ronfeldt, H. M. (1996). The relationship of peritraumatic dissociation and posttraumatic stress: Findings in female Vietnam theater veterans. *Journal of Consulting and Clinical Psychology, 64*(5), 1054-1059. doi:10.1037/0022-006X.64.5.1054

Trauma and Memory II: The Intrusive Past. (1993). [Motion Picture]. Cavalcade Productions Inc. Retrieved from https://brocku.kanopy.com/video/trauma-and-memory-ii-intrusive-past

Vandervort, L. (2012). Lawful subversion of the criminal justice process? Judicial, prosecutorial, and police discretion in Edmondson, Kindrat, and Brown. In E. Sheehy (Ed.) *Sexual Assault in Canada* (p. 111–150). University of Ottawa Press.

Wall, S. (2008). Easier said than done: Writing an autoethnography. *International Institute for Qualitative Methodology, 7*(1), 38-53.

Weiss, K. (2010). Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization. *Feminist Criminology*, *5*(3), 286–310. https://doi.org/10.1177/1557085110376343

Wortley, S. (1996). Justice for all? Race and perceptions of bias in the Ontario criminal justice system – a Toronto survey.(Racism and Criminal Justice - Le racisme et la justice penale). *Canadian Journal of Criminology*, *n4*, 439.

Wortley, S., & Owusu-Bempah, A. (2009). Unequal before the law: Immigrant and racial minority perceptions of the Canadian criminal justice system. *Journal of International Migration and Integration / Revue de l'integration et de La Migration Internationale*, *10*(4), 447–473. https://doi.org/10.1007/s12134-009-0108-x