

The Legal Grading of Sexual Citizenship: Sentencing Practices in Norwegian Rape Cases

Anne Bitsch (MA Human Geography)*

Center for Gender Research, University of Oslo, Norway

Gaustadalléen 30D, Oslo 0315

Norway

anne.bitsch@stk.uio.no

Marit Elisabeth Klemetsen (PhD Economics)

Department of Economics, University of Oslo, Norway

Oslo 0317

Norway

m.e.klemtsen@econ.uio.no

Word count: 8071

Ackn: yes

CN: yes

The Legal Grading of Sexual Citizenship: Sentencing Practices in Norwegian Rape Cases

Anne Bitsch (MA Human Geography)*

Center for Gender Research, University of Oslo, Norway

Gaustadalléen 30D , Oslo 0315

Norway

anne.bitsch@stk.uio.no

Marit Elisabeth Klemetsen (PhD Economics)

Department of Economics, University of Oslo, Norway

Oslo 0317

Norway

m.e.klemtsen@econ.uio.no

Abstract

This article maps and discusses the legal processing of rape cases in Norwegian appellate courts. Drawing on data from a multivariate regression analysis and a qualitative frame analysis, we examine the significance of space, accuser-convict prior relationship, the social context, accuser-convict marital relationship status, and convict racial background for grading of sentences in rape cases. The dataset consists of 176 rape cases that were processed in 2011 and 2012. Excluding acquittals and controlling for the application of relevant legal provisions (i.e. §), we find that sentences are reduced by 30 percent if the rape occurs in a private space as opposed to a public space. If the rape occurs at a party or is committed by a perpetrator who is a member of a racial majority, we find that sentences are reduced by 20 percent. A prior relationship between the victim and the perpetrator

reduces sentencing by 18 percent. Results regarding victims of marital rape are inconclusive. The study concludes that sentencing is stratified according to the public/private divide, prior relationship, social context and race. Despite progress made on behalf of victims of domestic violence and a gradual implementation of stricter sentencing in line with legislative intentions, the legal processing of rape cases is permeated by race and gender discrimination.

Keywords: rape, spatial justice, discrimination, legal sentencing, multivariate regression analysis.

Introduction

This article maps and discusses the legal processing of rape cases in Norway as it pertains to women's sexual citizenship and access to legal justice. Using multivariate regression analysis and frame analysis (Entman 1993), we examine the significance of space, accuser-convict prior relationship, the social context, accuser-convict marital relationship status, and convict racial background on the grading of sentences in rape cases.

In many feminist accounts, rape and violence against women is understood as the ultimate manifestation of patriarchy where men as a group dominate women as a group, leaving violence in private spaces unprosecuted (Christie 1986, Johnston and Longhurst 2010, Lees 2002, Tyner 2012). The historical exclusion of women's interests from public decision-making has rendered their experiences of intimate partner violence a private and personal issue, rather than a public and legal issue (Okin 1989, Valentine 1992). Impunity for sexual violence and maltreatment of victims in the legal process is perceived by feminists to be a symptom and outcome of patriarchy, gender inequality and institutionalized sexism.

Feminist geographers have been leaders in theorizing about spatial aspects of gender-based violence, in particular as it pertains to the public/private divide and women's fear of crime in urban settings (Koskela 1999, Valentine 1989, Day 1999). The wrongful notion that violence

against women is most often committed by strangers lurking in dark alleyways or other public spaces is criticized by Pain (1997, 233), who correctly asserts that ‘an accurate map of urban rape would highlight far more bedrooms.’ Historically, domestic violence has been ignored by the police, in part because it is framed as interpersonal conflicts in the home, rather than as structural violence against women and children (Tyner 2012). This is indicative of the inherent spatiality of law, violence and sexual citizenship, in so far as women both are less safe in private spaces and that the sexual violence committed in these spaces are regarded as somehow less serious, if even worthy of prosecution. This happens through the process of constructing and construing some women as risk seeking or ‘out of place’.

By the term ‘sexual citizenship’, we refer first and foremost to all women’s access to legal justice and sexual rights, in particular the right to sexual self-determination, pleasure and safety (Richardson 2000, 114). Being recognized before the law entails that when seeking to pursue these rights, one is not discriminated against because of institutionalized gender and sexuality stereotyping. In the case of rape more specifically, access to sexual citizenship, for example, should not depend on who the perpetrator is, the social standing of the victim, or where the rape is committed. Our conceptualization of sexual citizenship is closely connected with how Razack (2002, 126) operationalizes spatial injustice as ‘the values that deem certain bodies and subjects in certain spaces as undeserving of full personhood’, thereby diminishing predominantly white men’s culpability.

The starting point for the forthcoming analysis is an inquiry into how the state fulfills its human rights obligation to protect women’s sexual citizenship, and how it promotes, or fail to promote, spatial justice. Specifically, this entails that if it is possible to establish beyond a reasonable doubt that a crime occurred, all sexual offenses should be prosecuted in a non-

discriminatory manner, regardless of spatial and social context, race, whether the victim and the perpetrator had a prior relationship, and the convict's racial background.

Despite important scholarly contributions on violence against women, the legal processing of rape remains remarkably under-explored in feminist geography, in particular in Scandinavian countries, where one might expect significant progress on behalf of women's sexual citizenship to have occurred due to 'woman-friendly' policies. Furthermore, while plenty of valuable work has been done on attrition and in victimology, there has been less systematic academic engagement with sentencing practices in cases concerning violence against women (Ferraro 1993). Apart from a qualitative study on how perceptions of race and so-called honor-based crimes affected sentencing practice in partner homicide cases (Karim 2015), we are not aware of reliable, systematic studies on how convicts' racial background influences sentencing practice in rape cases in Norway.

This article fills a gap in the literature by examining how rape victims' access to sexual citizenship is enacted in one of the countries with the highest degree of gender equality in the world. Our study aims to account for the contributions of legal and extralegal factors to rape sentencing, including the location of the crime scene (space), accuser-convict prior relationship, social context, accuser-convict marital relationship status, and convict racial background. Although the primary focus for this article is a quantitative regression analysis of appellate judgments in 2011 and 2012, our conclusion and discussion is also informed by a qualitative reading and frame analysis of the same dataset (Bitsch forthcoming-a).

Legal processing of rape

In law, criminology and feminist legal studies, the issue of high attrition rates in rape cases, also known as 'the justice gap', has received a fair amount of attention (Kelly, Lovett, and Regan

2005, Temkin and Krahe 2008). Scholars disagree about whether the legal system at all is an appropriate instrument for securing women freedom from violence and the right to sexual safety and pleasure. Nevertheless, a common denominator of feminist research is that it is often victim-centered, and aims at uncovering sexist and racist bias and stereotyping.

The 1966 landmark study by Kalven and Zeisel of six audiotaped trial deliberations, as well as questionnaire responses from 555 judges presiding over criminal trials, was the first American study to suggest that juries differentiated between rape victims with 'good and bad reputations'. Twenty years later, Norwegian criminologist Christie (1986) proposed that in order for victims to be recognized as worthy of sympathy, they must exhibit signs of weakness and cannot be blamed for being in the 'wrong place'. The construction of ideal victims depends on constructions of ideal perpetrators, who are perceived to be 'big and bad' strangers (Christie 1986, 25). In the context of rape, such convictions are known as 'real rape' stereotypes or 'rape myths' (Brownmiller 1975, Bumiller 1990, Burt and Hendrick 1980, Estrich 1987). The aforementioned stereotypes are found to influence how courts perceive allegations of violence, both with regards to conviction rates and grading of sentences with regards to gender and sexuality (Bumiller 2008, Ehrlich 2001, Lees 2002, Razack 1998, Temkin 2000, Temkin, Gray, and Barrett 2016).

Class and race are also examples of extraneous factors that are found to affect all types of sentencing practices in the criminal justice system (Bumiller 1987, Daly and Michael 1997, Razack 1998, Razack 2002), not just rape. Images of ideal victims and perpetrators intersect with race and space: In North-America, for instance, Black men have historically been more likely to become associated with real rape stereotypes and are assumed to have a more violent sexual nature than Whites. Furthermore, victims belonging to minority groups, in particular prostitutes,

are sometimes marked off as coming from ‘degenerate spaces’ or as being ‘women out of place’, and White perpetrators are either entirely acquitted or receive light sentences (Bumiller 1987, Cresswell 1996, Razack 2002). The violence inflicted on these victims is routinely framed as a coincidence, rather than as a crime. These victims enjoy less sexual citizenship and spatial justice.

Rape laws have changed in many American and European jurisdictions the past 40 years or so. Consistent with the objectives of legal reforms and changes in cultural attitudes to rape, more victims than ever are filing police reports (Baumer 2004, Flatley 2016, Hennem 2004). Nevertheless, subtle forms of sexism and stereotyping continue to exist, not least in the criminal justice system. Researchers have found a systematic lowering of sentences when the offender and the victim had a prior relationship (Rumney 1999). So-called negative victim characteristics (such as the use of alcohol or drugs at time of assault, references made in the crime report to a possible past or present involvement in prostitution, presence alone in a bar or in public at night, self-assistance in removing clothing, hitchhiking or other kinds of ‘risk-taking behavior’) have also been associated with lenient sentencing practices and victim blaming (Kingsnorth, MacIntosh, and Wentworth 1999, Spohn and Spears 1996, Bumiller 2008). These findings resemble the situation in Norway.

The Norwegian geography of rape

Consistent with feminist geographers’ assertion that ‘private’ violence is under-communicated and -acknowledged compared to public violence (Johnston and Longhurst 2010, Tyner 2012, Valentine 1992), public stranger rape has attracted more attention and public indignation in Norway, compared to other types of violence against women. Like in the United States and the United Kingdom, the gravitation point of Norwegian public policy is the protection of the

nuclear family. Historically speaking, this entailed an economic model with a male breadwinner, which may explain why marital rape in many countries has been associated with impunity (Christie 1986, Lees 2002, Nast 1998). Today, Norwegian gender equality policy is based on a model with dual-worker couples and in 1974, following Supreme Court ruling where a man was convicted of domestic abuse and rape, the marital rape exemption officially died.¹ Since the 1970s, the Norwegian state – under the influence of the women’s movement –invested heavily in policies promoting gender equality, including parental benefits and shelters for women and children exposed to domestic violence. National action plans to combat domestic violence have been in place since the 1980s. Over the past 16 years, the issue of consent and women’s right to sexual integrity has been debated in public and Norway has been criticized by civil society and the UN for failing to adopt a legal framework that address this (Bitsch and Kruse 2012, Committee on the Elimination of Discrimination Against Women 2012). In 2000, incapacitated sexual assault was included in the rape provision, and rape by gross negligence was also criminalized, thereby enforcing prosecution of less physically violent types of sexual abuse. In 2010, new sentencing guidelines instructed courts to apply the same level of sentencing regardless of whether a case was prosecuted and convicted as forcible rape or incapacitated rape (The Norwegian Ministry of Justice and the Police 2008, 229). In 2012, the first national action plan to address rape was launched by the government. It targeted party-related rape, which had hitherto been fairly invisible as an independent priority area. However, observation of court trials and qualitative readings of judgments suggest that victim resistance and victim prevention (i.e. that women can and should attempt to deter rapists) still constitutes a crucial component of the courts’ constructions of ideal victims, in particular when an offense is committed in private spaces, behind closed doors (Bitsch forthcoming-a, Bitsch and Kruse 2012).

The systematic failure to effectively sanction private sexual violence speaks to the inherent spatiality of law and the geography of rape. Attrition and under-reporting still constitutes major problems, leaving 90 percent of all cases unreported and only about 14 percent of fully investigated cases prosecuted and punished (Kruse, Strandmoen, and Skjørten 2013, 36). In the public debates about attrition, the police and the courts often dismiss feminist claims about systematic gender and race bias, and assert that the high level of acquittals is due to the ‘state of the evidence’, if not outright false allegations (Grytdal and Sætre 2011).

Contemporary media debates about rape and other forms of violence against women are often infused with racial anxieties and perpetuation of the myth that most rapes are committed by ‘dark strangers’ – men who are labeled different in every respect, such as skin color and moral character, and thus excluded from community with ‘normal people’ (Bitsch and Kruse 2012). These myths often blend with legal understandings of ‘real rape’ and culpability. Following recent high-profile rape trials and public campaignsⁱⁱ, there is now more focus on party-related rape and intimate forms of abuse, but as in the courts, media debates center on consumption of alcohol or victim prevention, rather than the complex configurations of gender inequality and white male privilege. This resonates with points made by feminist scholars, who assert that certain kinds of sexual violence are understood exclusively as outcomes of individual psychopathology instead of being co-determined by structural factors (Bumiller 2008, Ferraro 1993).

The causes of the poor protection of some rape victims’ sexual citizenship are many and complex, and it is beyond the scope of this article to offer a full explanation. Victims and perpetrators may come from different social and racial strata in society, but the aforementioned studies suggest that they are all measured against a stereotyped and normative template for

innocence or culpability. After an overview of the legislation, this study's research methods, and a presentation of the dataset, we will investigate whether any such bias is present in the contemporary processing of rape cases.

Norwegian law and rape sentencing

Rape is defined by § 192 in the Norwegian Penal Code.ⁱⁱⁱ In this statute, different types of rape are listed and carry different liabilities and sentencing levels, which are defined in so-called provisions (i.e. §). § 192, section 1 distinguishes between forcible and incapacitated rape. Forcible rape refers to acts where a person 'engages in sexual activity by means of violence or threats'. When a person 'engages in sexual activity with any person who is unconscious or for any other reason incapable of resisting the act', that person is guilty of incapacitated rape. A person who is found guilty of committing intentional rape is liable to imprisonment for a term not exceeding 10 years, normally four years in cases without mitigating and/or aggravating circumstances. A minimum sentence of three years' imprisonment applies if the rape is premeditated and/or involves intercourse cf. § 192, section 2. Rape by gross negligence (i.e. where the perpetrator failed to understand that sex was unwanted, but remains blame-worthy) was in 2011-2012 subject to up to five years in prison cf. § 192, section 4. If the victim dies or is severely bodily injured, or the crime was committed in a particularly harmful manner, perpetrators can be sentenced to 21 years in prison or to indefinite incarceration (psychological treatment) cf. § 192, section 3.

Several other factors may lawfully be taken into account by judges in determining an appropriate sentence for a criminal offense. Chapter 14, §§ 77-78 in the Norwegian Penal Code (2005) regulates lawful differential treatment pertaining to so-called aggravating and mitigating circumstances. According to these provisions, a reduction or increase in sentencing, or

alternative forms of punishment, may be justified if such circumstances apply to the crime in question. Examples of aggravating circumstances are excessive use of force or violence, if the perpetrator is a repeat offender, or if the rape involved several perpetrators. Mitigating circumstances may be applied if the crime was attempted rather than completed, if the perpetrator confessed, is a juvenile, or has good prospects of rehabilitation, or if the processing time has been very lengthy. Judges can, and do, exercise discretion in individual cases when it is deemed 'appropriate, useful, necessary and fair' (Gisle 2010, 378). Discretion may not relate to extralegal factors or stereotypes that result in discrimination.

Research design and method

This article draws on data from a PhD project examining the legal processing of rape cases in Norway. The purpose of the project is to analyze how legal actors construct and construe rape as a social and gendered issue in court proceedings and in sentencing practice. The qualitative part of the project employs ethnographic methods, such as observation of trials in appellate courts, informal conversations and semi-structured interviews with legal actors, as well as frame analysis of judgments from appellate courts (2011-2012). The quantitative part of the project, which is the primary point of departure for the forthcoming analysis, is a statistical analysis of sentencing practices in these judgments.

Coding

The 176 cases were extracted from the official database lovdata.no, and concern attempted and completed rape (excluding statutory rape), processed by Norwegian appellate courts in 2011 and 2012. All the judgments were thoroughly read and the facts from each case were coded into a database. The facts include the applied law provisions, such as mitigating and aggravating

circumstances, whether the crime was committed before or after the 2010 revisions of sentencing guidelines, as well as information about our variables of main interest. Unfortunately, our dataset does not allow for a comprehensive operationalization of class, because the judgments contain no information about income or education level. For the purpose of in-depth qualitative analysis, we also registered information in the database about how notions about gender, race, sexuality and power relations were constructed and construed in the judgments.

The purpose of the study presented in this article is to examine whether courts unlawfully discriminate against otherwise similar rape cases, and discuss that through the lens of sexual citizenship and spatial justice. Such discrimination, when applied without reference to law, might be associated with pursuing the ideal victim and perpetrator stereotype.

Variables

We limited our study to test the significance of the five variables of main interest to us: space, prior relationship, party/social context, accuser-convict marital relationship status and perpetrator racial background. Separate analyses were run for all variables of main interest. These variables function as ‘proxy variables’ that allow examination of our research question. Every crime scene that not was a property or a home (such as parks, alleyways, hiking tracks, construction sites and taxis) was coded as a public space. The prior relationship variable is defined dichotomously, either as ‘have met or know each other’ or ‘stranger’. In order to get a more nuanced picture of the significance of prior relationship, we included a variable concerning whether the accuser and convict were married/cohabiting with one another or not (marital relationship status) prior to or at the time of the offense. Every rape where the perpetrator and the victim were currently or previously co-habiting or married to one another was categorized as a marital relationship rape. We distinguish between relationships *prior to the offense* and *at the time of the offense*. The

reason for this distinction is that courts may be more lenient toward offenders who rape someone they are intimate with.^{iv}

Party-related rapes often, but not always, include cases where the victim and the perpetrator had some prior relationship and most typically take places indoors. The cases are portrayed in Norwegian media and police reports as ‘he said-she said’ cases, and sexually active women are held partly responsible for unwanted sex and rape, presumably because they send ‘mixed signals’ to men and engage in ‘non-Victorian risk behavior’ (see for instance Grytdal & Sætre [2011]; Hansen [2013]; Olsen [2011] and Ørjaseter [2016]). This indicates that the variable ‘party-related’ can be used as a proxy measure for the Whore/Madonna stereotype, the cultural idea that women can be sorted into either of two camps: saintly, pure and virginal ‘Madonnas’ or degenerate, aggressive and sexually risk seeking ‘whores’.

Finally, we recorded measures of whether or not the person belonged to a racial majority group. With racial majority, we first and foremost refer to ethnically Norwegian white men. We do not define race as a biological category, but as a socially constructed one. Markers for whiteness and normalcy influence how the court constructs and construes an offense. This is partly so because class or deviance markers interfere with perceptions of race. Consequently, in determining whether an offender belongs to a minority or majority group, we do not limit the operationalization of race to citizenship status or skin color. When appropriate, we added ethnicity and socio-cultural markers for what could loosely be defined as ‘white normalcy’.^v

We include dummy variables that are equal to 1 if the rape occurred in a private space, occurred at a party, involved people who had some kind of prior relationship, were currently or formerly married or cohabiting prior to or at the time of the offense, and if the offender belonged to a ‘majority’ racial group.

In order to control for factors that may *lawfully* influence sentencing, we include dummy variables that are equal to 1 if the court found mitigating circumstances (§ 78), aggravating circumstances (§ 77), and/or if the rape was committed after the legislative reform in 2010 when sentencing levels were increased. Moreover, we control for the legal grading of sentencing by including a set of dummy variables that indicate which of the provisions or sections in the rape statute were applied (§§ 192a, b or c, section 1; § 192, section 2, § 192, section 3; § 192, section 4; § 49, § 205). By including these provisions, we control for the significance of the level of injury inflicted upon a victim.

We also control for how many victims the perpetrator is convicted of having raped. Marital rape cases sometimes include additional charges for battering and/or domestic violence (cf. Penal Code § 219 and/or § 228), which justifies a stricter sentence. In the sub-study of marital rape, we control for the effect of such additional charges. Finally, we control for whether the convicted person was sentenced for other offenses in addition to the rape and/or whether he had prior convictions for sexual or violent crimes. We assume that the applied provisions adequately capture factors that are allowed to influence sentencing practice, but we cannot exclude that non-observable factors are correlated with our explanatory variables of main interest.

Procedure and analysis strategy

In order to answer our research question, we specified one equation for each hypothesis and tested them in the statistical software program Stata. By applying this procedure, the issue of multicollinearity was reduced.^{vi} The dependent variable is the logarithm of the number of unconditional prison sentence months. The variables of main interest are the extra-legal factors: private space, prior relationship, social context (party), accuser-convict marital relationship

status, and convict racial background. We also include the control variables mentioned above – all the legal provisions that are taken into account by the court in each specific case, as well as legislative change. The error term is assumed to be independent of the control variables and the explanatory variables of main interest.

Data

The initial dataset consists of 176 cases. Cases concerning statutory rape and rape of children were excluded. All the victims were female, and all the perpetrators were male. We have not deliberately excluded male victims or female perpetrators, but since very few such cases are brought to court, these victim and perpetrator groups did not figure in the dataset. Of the 176 cases, 35 were acquitted, equivalent to an acquittal rate of 20 percent. After dropping the acquitted cases, the sample was further reduced to 141 cases. By excluding acquittals, we avoided selection problems that might occur when certain types of rape turn out difficult to prove. This means that the study controls for ‘the-state-of-the-evidence’-explanation, which is often put forward by the police and legal professionals in public debates about possible gender discrimination and sexism in the criminal justice system’s handling of rape cases. Cases where insufficient information is provided (missing values) were automatically dropped, leaving us with a final sample size of 135 cases.^{vii}

In the final estimation sample, the average (mean) number of unconditional sentence months is 44,9. The median (most typical) sentence is 39 months, well below the legislative intent of four years (48 months) for a ‘normal rape’ without mitigating or aggravating circumstances, as well as the upper sentencing frame of ten years (120 months).

Table 1 provides a description of the dataset used in the analysis, i.e., the 135 cases in the final estimation sample. The table illustrates the share of cases where the respective

circumstances occurred and legal provisions (i.e. §) were applied. We see that 77 percent of the rapes occurred in a private space; 55 percent occurred between people with a prior relationship; 43 percent were party-related; 11 percent involved people who were married or co-habiting at the time of the offense, whereas 8 percent concerned people who were married or co-habiting prior to the offense.

[Table 1: Summary statistics, convictions from Appellate courts, 2011-2012 near here]

Table 2 illustrates the average unconditional sentence in months, based on how the law was applied to the estimation sample (the 135 cases). According to this table, strict sentences are associated with forcible rape and particularly violent rapes, such as gang rape, or cases where the victim was severely bodily injured or died. Lighter sentencing applied to incapacitated rape, attempted rape and rape that did not involve intercourse. Moreover, a conviction for rape by gross negligence received on average a sentence 63 percent lower than intentional rape (17 months compared to 46).

[Table 2: Average unconditional sentence months for cases where the respective circumstance occurs ('yes') and when it does not ('no') near here]

Table 3 illustrates the average unconditional sentence in months, based on whether the rape occurred in a private space or in a public space; within the social context of a party; whether the accuser and convict had a prior relationship or were strangers; whether the accuser at the time of the assault currently or previously was married or co-habited with the convicted person or not; and whether the convicted person belonged to a racial majority group or not.

On average, rapes that occurred in a public space received sentences of 55 months, whereas those committed in private spaces received sentences of 42 months. Cases in which the victim and offender had a prior relationship were on average sentenced to 42 months, whereas

stranger rapes on average received sentences of 50 months. Furthermore, rape cases that were not party-related were on average sentenced to 53 months, whereas party-related rapes on average resulted in a 35-month sentence. Ethnically Norwegian perpetrators were on average sentenced to 36.5 months, whereas ethnic minority perpetrators on average received sentences of 52.8 months. Marital rapes resulted in higher-average sentences than non-marital rapes. However, insofar as convictions for marital rapes often occur within a context of systematic domestic violence, this does not necessarily mean that marital *rapes* are given higher sentences. In the analysis below, we will take these factors into account.

[Table 3: Average sentence months for cases for rapes that did ('yes') or did not ('no') happen in a private space; at a party, between parties with a prior relationship; between currently or formerly married or cohabiting partners; and by a perpetrator belonging to a racial majority group near here]

Tables 1-3 illustrate descriptive statistics, not causal relationships. The provisions taken into account by the court have not been controlled for, such as for example the level of injury, aggravating and mitigating circumstances, legislative revisions regarding increased sentencing levels put into effect as of June 2010, and so on. In the following analysis, these variables will be controlled for.

Results

The results of our study are displayed in Tables 4-8. The estimates in the result tables reflect the average percentage increase or reduction in unconditional prison sentence months due to each of the extra-legal factors, and from each of the penal code provisions being applied. The first 11 rows in Table 4 display the estimated effects of the control variables on the number of unconditional sentence months. The next row of the table displays the estimated effect of private

space. In Tables 5-8 we do not report the estimates of the control variables, as these are almost identical to Table 4. In Tables 5-8, only the estimated effects of the explanatory variables of main interest are reported.

[Table 4 Results. The effects of spatial context and the control variables on the number of unconditional prison sentence months near here]

Table 4 reports the results of the study of the effects of the control variables and the spatial context (private or public space) on sentencing. The results show that premeditated rape (for instance by drugging the victim) or completing intercourse increases the average sentence by approximately 29 percent (the estimate, 0.29, is significant within the 1 percent level). The sentence is reduced by 71 percent (significant at the 1 percent level) if the rape is prosecuted under the gross negligence provision, and reduced by approximately 41 percent (significant at the 5 percent level) if the rape is attempted rather than completed. Aggravating circumstances increase the sentence by 35 percent (significant at the 1 percent level), whereas mitigating circumstances reduce the sentence by 30 percent (significant at the 1 percent level). Rapes that occurred after the sentencing reform in 2010 receive a 47 percent stricter sentence (significant at the 1 percent level), indicating that the reform has had an actual effect on the courts' sentencing assessments. For serial rapists, an increase in the number of victims by 100 percent (for example, an increase from one to two victims) increases the average sentence by 24 percent (significant at the 5 percent level). Being convicted of other crimes in addition to the rape increases the average sentence by 24 percent (significant at the 5 percent level). Finally, rapes occurring in private spaces are sentenced 30 percent more leniently (significant within the 1 percent level) than rapes occurring in public spaces.

[Table 5 Results. The effects of prior relationship on the number of unconditional prison sentence months near here]

Table 5 displays the results regarding the effect of a prior relationship between the perpetrator and the victim on sentencing. We observe that if the victim had a prior relationship with the perpetrator, the average sentence was reduced by 18 percent (significant within the 10 percent level).

[Table 6: The effects of social context (party) on the number of unconditional prison sentence months near here]

Table 6 displays the results regarding the effect of social context on sentencing. Rapes occurring in party-related contexts are sentenced 20 percent lower than rapes occurring in other contexts (significant at the 10 percent level). It is worth noting that the vast majority of rapes prosecuted under the gross negligence, which reduced sentencing by 71 percent (see Table 4), are party-related.

[Table 7 Results. The effects of accuser-convict marital relationship status on the number of unconditional prison sentence months near here]

Table 7 displays the results regarding the effect of accuser-convict marital relationship status on sentencing. In addition to the other control variables, we now add a control for whether battering and/or domestic abuse occurred in addition to rape. Domestic violence increases the average sentence by 51 percent (significant within the 5 percent level). Current marital or co-habiting status reduces the average sentence by 21 percent, whereas former marital or co-habiting status reduces the average sentence by 26 percent. However, these findings may be coincidental as neither of these estimates are significant at the conventional levels. We cannot claim that marital rapes are sentenced differently than other rapes, as the results are inconclusive.

[Table 8 Results. The effects of convict racial background on the number of unconditional prison sentence months near here]

Table 8 displays the results regarding the effect of the perpetrator's racial background on sentencing. When controlling for the severity of the crime, defendants from a racial majority group receive a 20 percent lighter sentence (significant almost at the 5 percent level). This means that defendants from a racial minority receive sentences that are 20 percent stricter, because of their racial background.

Discussion and conclusion

Our study shows that sentencing practices in rape cases are contingent upon a number of legal and extra-legal factors. The extra-legal factors that affect sentencing are space, prior relationship, social context and race. A sentencing hierarchy emerges, placing rapes by strangers in public spaces at the top and indoor or party-related rapes by someone the victim knows at the bottom.

More specifically, the regression analyses shows that sentences were reduced by 30 percent if a rape took place in a private space as opposed to in a public space, by 20 percent if the rape occurred within the social context of a party, and by 18 percent if the victim and offender had a prior relationship. Perpetrators belonging to a racial majority are punished 20 percent more leniently than perpetrators belonging to a racial minority. These practices of differential treatment are often applied without reference to law, and may constitute a form of gender and race discrimination.^{viii} The most influential *legal factor* influencing sentencing was when rape was prosecuted under the gross negligence provision, thereby resulting in a reduction of the average sentence. If a woman was raped as part of a systematic regime of domestic violence, harsh sentencing was more likely. Finally, the 2010 legislative sentencing reform has had a positive and significant impact on sentencing levels. A likely explanation for these findings is

that concerted feminist efforts to put domestic violence on the agenda, as well as the political intentions to punish rape stricter, are beginning to pay off.

In support of existing scholarship, this study indicates that extra-legal factors influence the courts' perception of victims and the respective grading of perpetrators' liability in sentencing practice (Kingsnorth, MacIntosh, and Wentworth 1999, Spohn and Spears 1996, Rumney 1999). As anticipated, the rare public stranger rape is considered more worthy of punishment than any other kind of rape. The logic behind the sentencing process is thus more than a matter of 'applying law to facts'. It also expresses socio-legal attitudes to danger. These attitudes are shaped by the same images that inform women's fear of crime, i.e. an implicit understanding by state agencies and media that women predominantly need protection from strangers and male aggressors in an unpredictable public world (Valentine 1992), or that violence committed by someone you know is less traumatic for the victim. These spatial ideologies produce sentencing hierarchies, which to a large extent are connected to gendered and racialized images of danger: The vast majority of *detected* rapes committed in public spaces involve men who are unknown by the victims, with backgrounds from Africa or the Middle East (Grytdal and Sætre 2011, The National Criminal Investigation Service 2015). The relatively harsher sentencing in these types of cases might indicate a racial bias. This was in fact confirmed by our study. Our finding is thus in line with existing scholarship from North America, which suggests that the sentencing practice is racially biased and discriminatory (Bumiller 1987, Daly and Michael 1997, Razack 2002).

Within the current interpretative normative and legal framework, girls and women engaging in a lifestyle where sexuality is used for recreation, rather than procreation, seem to be defined as less-deserving victims. They are women 'out of place' (Cresswell 1996) who unsettle

public gender conservatism, as well as the heteronormative family ideology that permeates private spaces. As noted by feminist geographers and socio-legal scholars, the realization of sexual citizenship and protection of sexual rights too often depends on how ‘responsible’ a person is assumed to be, and how well that person manages his or her sexuality (Johnston and Longhurst 2010, Richardson 2000). In many ways, the legal practice seems to reflect the notion that women should exercise a healthy, non-promiscuous sexuality in the home, preferably with a spouse or stable partner.^{ix} When reading the judgments in the dataset, it seems acquaintance- and party-related rapes (which involved racial majority men in 46 out of 82 cases) are framed in terms of accidental damage by or immature behavior by the perpetrators. An alternative interpretative frame, which is almost invisible in the judgments, is that such rapes are in fact serious assaults on a person’s sexual autonomy and closely related to a culture of white male privilege and sexual objectification of girls and women. The sentences and their rhetorical justification did not always reflect the severity of the offense. Contrary to research stating that being raped by dates or partners are no less traumatizing to the victim than being raped by a stranger (Kilpatrick et al. 1988), party-related rape and/or rape between people with a prior relationship were not consistently recognized as being just as damaging as public rape by a stranger. In terms of access to sexual citizenship and spatial justice, then, the personhood of victims of party-related rape and acquaintance rape was to a lesser degree acknowledged by lawyers and courts (Bitsch forthcoming-b, a).^x

Moreover, even if the law does *not* require that victims physically resist their assailants, lack of resistance is used by legal actors, including judges, to construct ambiguity and diminished culpability even when the salient point is *precisely* that the victims were incapable of doing so because of fear, sleep or intoxication. Many victims who are raped by someone they

know, or in the social context of a party, experience their' cases to be ineffectively investigated, and/or that they end with acquittals or with lenient sentences.

Our study focuses on convictions, and the victims in the dataset may therefore, to some extent, constitute ideal victims. Even so, the courts do not fully acknowledge all rape victims' personhood and right to sexual integrity. The legal treatment of their cases may therefore serve not only as examples showing a sentencing hierarchy, but also an extra-legal grading of women's sexual citizenship and spatial justice. As mentioned previously, the spatiality of legal practice works to preserve the tendency to regard sexual violence in private spaces as less serious and to deem certain groups of women as 'out of place'.

We do not identify evidence of discrimination against victims raped by a current or former partner or spouse. These rapes are on average sentenced more leniently than other rapes, but as the estimates are not significant, it is uncertain whether such discrimination takes place. We thus cannot confirm the finding of Rumney (1999) that marital rape is treated as a lesser crime than acquaintance rape. However, the relatively strict sentencing of *domestic violence* (excluding rape) could be due to successful feminist advocacy and legal reforms from the mid-1970s and onward.

To conclude, our study suggests that rape victims' access to justice is unjustly stratified, spatially as well as socially. Victims are less likely to be taken seriously if raped in a private space, by a friend, relative or partner, in particular within the social context of parties, which are constructed by judges and juries as spaces of risk. Even if party-related rapes are being prosecuted, the lenient sentences shows that the state finds these social spaces less worthy of protection, and constructions of mitigating circumstances tend to blend with archaic conceptions about women's duty to guard their sexuality and defend their purity.

The study further indicates that sentencing practice is biased in favor of convicts belonging to a racial majority group. As noted by Razack (2002, 126), to deem certain bodies and subjects in certain spaces as less deserving of personhood lies at the core of spatial injustice. Our argument is that such spatial injustices can be inferred from the sentencing process and its respective hierarchy. The current study indicates that future advocacy and reform must address such spatial injustices by focusing on victims of party-related rapes and acquaintance rapes, so they can enjoy equal protection by the law and full access to sexual citizenship. Work also remains to be done in addressing racial bias and white male privilege in the courts' constructions of culpability, as well as how bias may influence attrition on lower levels in the criminal justice chain of commanding.

Even if the development of Norwegian gender equality legislation has limited the public expression of the most blatant forms of prejudice, and domestic violence to a larger extent is taken seriously, sexism and racism persist and affect the prosecution of rape in Norway.

Notes

1. See Supreme Court ruling Rt. 1974, page 1121.
2. Recent examples of high profile media rape trials include a case from 2011 where the court, referring to the victim's sexual history, acquitted four men of raping a woman at Oslo Fjordcamp; a much discussed case from 2013, where a popular mayor was convicted of sexual abuse of a young girl in the village of Vågå; as well as acquittals in an alleged gang rape case in Hemsedal in 2014, where three men drugged a woman down and had intercourse with her. In 2013, the Norwegian police launched a social media campaign against party-related rapes, which explicitly addressed men and boys as bystanders ('Kjernekar').
3. In October 2015, a new penal code was put into effect. Rape is currently defined in Chapter 26, § 291-294. The old provision (cf. The Norwegian Penal Code (1902), Chapter 19 on Sexual Offenses, § 192) is cited in this study, because it is applicable to the sentences in our sample. Rape by gross negligence can now be punished with up to six years imprisonment whereas it previously was five years.

4. Thanks to an anonymous reviewer for helping us making this point clearer.
5. For instance, an ethnically Norwegian offender and an ethnically Swedish offender may not be perceived so different from one another, as would an ethnically Norwegian and Romani ('gypsy') offender, although all three offenders are non-Black and from Western Europe. Because membership of a racial category interfere with other markers of deviance and normalcy, we would typically define a Norwegian and a Swedish perpetrator as 'majority', because of the racial, social and cultural similarities that unite them, whereas the Romani would be defined 'minority', because that person inhibits signs of difference (i.e. nomadic life-style, often uneducated/unemployed, slightly darker skin, and in public discourse portrayed as member of a group frequently engaged in criminal and asocial behavior). For concrete examples in the dataset, consider and compare how perpetrator identities are framed/constructed rhetorically in the judgments: LA-2011-144951, LA-2011-187926 and LF-2010-151196 (accessible via lovdata.no).
6. Multicollinearity is when two or more explanatory variables in a multiple regression model are highly correlated. Multicollinearity affects the validity of the coefficient estimates of the individual explanatory variable.
7. A 'missing value' can occur if information about one or more variable in a sentence is missing. If so, the case is automatically excluded from the analysis.
8. In Norway, The Act Relating to Gender Equality (2013) defines discrimination as 'direct and indirect differential treatment that is not lawful. Direct differential treatment shall mean an act or omission that has the purpose or effect that a person is treated worse than others in the same situation, and that is due to gender. Indirect differential treatment shall mean any apparently neutral provision, condition, practice, act or omission that results in persons being put in a worse position than others, and that occurs on the basis of gender. Differential treatment that is necessary in order to achieve a legitimate aim, and which does not involve a disproportionate intervention in relation to the person or persons so treated is not regarded as discrimination pursuant to the present Act.'
9. Thanks to an anonymous reviewer for helping us making this point clearer.
10. See for instance Supreme Court ruling: Rt. 2012, p. 659.

Acknowledgements

The authors wish to thank three anonymous referees for valuable comments to earlier versions of this manuscript. We will also express gratitude to Professor Kristian Stokke at the Department for Sociology and Human Geography at University of Oslo for helpful comments and suggestions, and Jessy LaHood at

Sexual Violence Response & Rape Crisis/Anti-Violence Support Center at Columbia University for emotional support during the course of reading the judgments in the dataset.

Notes on Contributors

Anne Bitsch is working on a PhD project about the legal processing of rape cases in Norway. The purpose of this project is to analyze how rape cases are constructed in court proceedings and sentencing practice, and how this relate to cultural perceptions about gender, power and sexuality. The project employs ethnographic methods and quantitative analysis. Her degree in human geography from the University of Oslo includes a minor in gender studies. With the support of The Norway-America Association, she was a visiting scholar at Columbia Law School at the time this article was written.

Marit Elisabeth Klemetsen holds a PhD in economics from the University of Oslo, Norway. Her degree includes a minor in law. Her primary research field is applied econometrics and statistics, i.e. methods for investigating and identifying causal effects. Her dissertation includes four empirical studies on the effects of government policies on pollutant emissions and environmental innovation among Norwegian firms. At the moment, she holds a government position as an analyst aiming to reduce labor crime.

References

- Baumer, Eric P. . 2004. *Temporal Variation in the Likelihood of Police Notification by Victims of Rapes, 1973-2000*. Washington D.C: National Institute of Justice.
- Bitsch, Anne. forthcoming-a. "'In the Dead of Winter Behind the Bushes': Shaming Narratives in Norwegian Rape Cases."
- Bitsch, Anne. forthcoming-b. "'She could have been my daughter': Defence lawyers' emotional and narrative labour in Norwegian rape trials."
- Bitsch, Anne, and Anja Emilie Kruse. 2012. *Behind Closed Doors: A Book About Rape*. Oslo: Cappelen Damm.
- Brownmiller, Susan. 1975. *Against Our Will. Men, Women and Rape*. New York Simon and Schuster
- Bumiller, Kristin. 1987. "Rape as a Legal Symbol: An Essay on Sexual Violence and Racism." *University of Miami Law Review* 42:75-91.
- Bumiller, Kristin. 1990. "Fallen Angels: The Representation of Violence Against Women in Legal Culture." *International Journal of the Sociology of Law* 18 (2):125-142.
- Bumiller, Kristin. 2008. *In An Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence*. Durham, NC: Duke University Press.
- Burt, Martha R., and Clyde Hendrick. 1980. "Cultural myths and supports for rape." *Journal of Personality and Social Psychology* 38 (2):217-230.
- Christie, Nils. 1986. "The ideal victim." In *From crime policy to victim policy*, edited by Ezzat A. Fattah, S. 17-30. London: Macmillan.

- Committee on the Elimination of Discrimination Against Women, (CEDAW). 2012. Concluding Observations of the Committee on the Elimination of Discrimination Against Women CEDAW/C/NOR/CO/8. Geneva, Switzerland.
- Cresswell, Tim. 1996. *In place/out of place: geography, ideology, and transgression*. Minneapolis, Mn.: University of Minnesota Press.
- Daly, Kathleen, and Tony Michael. 1997. "Gender, Race, and Sentencing." *Crime and Justice* 22:201-252.
- Day, Kristen. 1999. "Strangers in the Night: Women's Fear of Sexual Assault on Urban College Campuses " *Journal of Architectural and Planning Research* 16 (4):289-312.
- Ehrlich, Susan. 2001. *Representing rape : language and sexual consent*. London: Routledge.
- Entman, Robert M. 1993. "Framing: Toward Clarification of a Fractured Paradigm." *Journal of Communication* 43 (4):51-58.
- Estrich, Susan. 1987. *Real Rape*. Cambridge, Mass: Harvard University Press.
- Ferraro, Kathleen J. 1993. "Cops, courts and woman battering." In *Violence against women : the bloody footprints*, edited by Pauline B. Bart and Eileen Geil Moran. Newbury Park, Calif: Sage.
- Flatley, John. 2016. Crime in England and Wales: year ending Mar 2016. In *Statistical Bulletin: Office for National Statistics*.
- Gisle, Jon. 2010. *Law Encyclopedia*. 4 ed. Oslo, Norway: Kunnskapsforlaget.
- Grytdal, Veslemøy, and Marianne Sætre. 2011. *Rape in the Global City: Changing Trends in Reported Rapes and Sexual Culture in Oslo Oslo, Norway: Oslo Police District*.
- Hansen, Rune Bård. 2013. "From Indecent Assault to Incapacitated Rape - Sentencing Gone Wild." *Lov og Rett* 53 (10):688-701.
- Hennum, Ragnhild. 2004. "The legal processing of rape - Why is Norway criticized by the UN? ." *Materialisten. Tidsskrift for forskning, fagkritikk og teoretisk debatt* (1).
- Johnston, Lynda, and Robyn Longhurst. 2010. *Space, Place, and Sex: Geographies of Sexualities, Why of where*. Lanham, Md: Rowman & Littlefield.
- Kalven, Harry, Hans Zeisel, Thomas Callahan, and Philip Ennis. 1966. *The American Jury*. Boston: Little, Brown and Company.
- Karim, Nasim. 2015. "Partner homicide: Family tragedy or honor killing." MA, Faculty of Law, University of Oslo, Norway.
- Kelly, Liz, Jo Lovett, and Linda Regan. 2005. *Gap or a Chasm?: Attrition in Reported Rape Cases*. London, UK: Great Britain Home Office Research Development and Statistics Directorate.
- Kilpatrick, D. G., C. L. Best, B. E. Saunders, and L. J. Veronen. 1988. "Rape in marriage and in dating relationships: how bad is it for mental health?" *Annals of the New York Academy of Sciences* 528:335.
- Kingsnorth, Rodney F., Randall C. MacIntosh, and Jennifer Wentworth. 1999. "Sexual assault: The role of prior relationship and victim characteristics in case processing." *Justice Quarterly* 16 (2):275-302.
- Koskela, Hille. 1999. "'Gendered Exclusions': Women's Fear of Violence and Changing Relations to Space." *Geografiska Annaler. Series B, Human Geography* 81 (2):111-124.
- Kruse, Anja Emilie, John-Filip Strandmoen, and Kristin Skjærten. 2013. *Menn som har begått voldtekt - en kunnskapsstatus*. Oslo: Nasjonalt kunnskapssenter om vold og traumatisk stress.
- Lees, Sue. 2002. *Carnal knowledge: Rape on trial*. London, UK: Women's Press, Ltd.

- Ministry of Children, Equality and Social Inclusion., 2013. *The Act Relating to Gender Equality*. 1902. *Norwegian Penal Code*.
- Nast, Heidi. 1998. "Unsexy Geographies." *Gender, Place & Culture* 5 (2):191-206.
- Okin, Susan Moller. 1989. *Justice, gender, and the family*. New York: Basic Books.
- Olsen, Inger Anne. 2011. "Scary Sexuality." *Aftenposten*, June 4th. Accessed March 4th 2016. <http://www.aftenposten.no/meninger/kommentatorer/olsen/Skremmende-seksualitet-6280738.html>.
- Pain, Rachel H. 1997. "Social Geographies of Women's Fear of Crime." *Transactions of the Institute of British Geographers* 22 (2):231-244.
- Razack, S. 2002. *Race, Space, and the Law: Unmapping a White Settler Society: Between the Lines*.
- Razack, Sherene. 1998. *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*. Toronto, Canada: University of Toronto Press.
- Richardson, Diane. 2000. "Constructing sexual citizenship: theorizing sexual rights." *Critical Social Policy* 20 (1):105-135.
- Rumney, Philip N. S. 1999. "When rape isn't rape: court of appeal sentencing practice in cases of marital and relationship rape." *Oxford Journal of Legal Studies* 19:243-270.
- Spohn, Cassia, and Jeffrey Spears. 1996. "The effect of offender and victim characteristics on sexual assault case processing decisions." *Justice Quarterly* 13 (4):649-679.
- Temkin, Jennifer. 2000. "Prosecuting and Defending Rape: Perspectives From the Bar." *Journal of Law and Society* 27 (2):219-248.
- Temkin, Jennifer, Jacqueline M. Gray, and Jastine Barrett. 2016. "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study." *Feminist Criminology*. doi: 10.1177/1557085116661627.
- Temkin, Jennifer, and Barbara Krahe. 2008. *Sexual assault and the justice gap: A question of attitude*. Portland, OR: Hart Publishing
- The National Criminal Investigation Service. 2015. The rape situation 2014 Kripos, Taktisk etterforskningsavdeling, Voldtektsgruppa.
- The Norwegian Ministry of Justice and the Police. 2008. Ot.prp. nr. 22 (2008-2009) Regarding Law About Revisions of The Penal Code May 20th 2005 No. 28. In *Ot. prp.* Oslo, Norway.
- Tyner, James A. 2012. *Space, place, and violence: violence and the embodied geographies of race, sex and gender*: Routledge.
- Valentine, Gill. 1989. "The Geography of Women's Fear." *Area* 21 (4):385-390.
- Valentine, Gill. 1992. "Images of Danger: Women's Sources of Information about the Spatial Distribution of Male Violence." *Area* 24 (1):22-29.
- Ørjaseter, Elin 2016. "Rape and unwanted drunken sex." *Morgenbladet*, August 19th 2016. Accessed September 6h 2016. <https://morgenbladet.no/2016/08/elin-orjasaeter-voldtekt-og-uonsket-fyllesex>.