

# **The Legible Rape Victim: How Disciplinary Discourses in the Legal System Create a New Victim Identity**

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Dissertation presented for the degree of Philosophiae Doctor (Ph.D.)

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University of Oslo

March 2020

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*Series of dissertations submitted to the  
Faculty of Law, University of Oslo  
No. 152*

ISSN 1890-2375

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Cover: Hanne Baadsgaard Utigard.  
Print production: Reprintsentralen, University of Oslo.

## Acknowledgements

This thesis would not have existed without the Center for Gender Research who believed in this project and offered me a position to carry it out. I am thankful for this opportunity to pursue my academic interests. Writing this dissertation has been a great journey, and my work has been informed by a number of people that I would like to thank.

First of all, I am grateful to all the women who decided to tell me their stories about sexual violence in a research interview. Without their stories, this thesis would not have been possible to write. I am further thankful to people working in various institutions and organizations who facilitated the recruitment of interviewees. I am also indebted to the Compensation Authorities for facilitating my research on legal decision regarding criminal injuries compensation.

In the process of conducting this research project and writing this thesis, I have been lucky to have two wonderful supervisors. May-Len Skilbrei has had the main responsibility, with help from Kari Nyheim Solbrække, of guiding me through this process. I have been inspired by their knowledge, professionalism and ambitions. I am grateful for their generous guidance, critical comments and support throughout the process. With May-Len, I share research interests and an interest in the legal system. This has been valuable when I needed advice on these specific issues, as well as support and encouragement to pursue my perspectives in my analysis of the data. May-Len's insightful comments and thought-provoking questions have pushed me to aim higher. Kari has encouraged me to critically reflect on my work throughout the process. She has given me valuable comments on my texts that have contributed to improve the quality of this thesis.

The Center for Gender Research has been a great place to work with inspiring academic activities and good colleagues. I have benefitted greatly from research seminars, workshops and presentations. I have in particular enjoyed working and socializing with Anna Young and Reinert Skumsnes.

Through my membership in the steering committee of the Nordic Network of Sexual Violence, I have organized seminars and conferences that have introduced me to interesting

scholars and research projects in the Nordic countries. I am especially grateful for meeting Hildur Fjola Antonsdottir. Thank you for your feedback on my work, and for all the great discussions and laughs we have had!

I spent three wonderful months at the Center for the Study of Law and Society at Berkeley Law. I enjoyed participating in the academic activities at the center, and I am thankful for all the comments I received on my work during presentations and discussions. I am especially thankful for the feedback I received on my work, from Professor Jonathan Simon.

Writing this dissertation has been incredibly enjoyable, but also challenging. Sometimes my work has been an all-encompassing activity. It would not have been possible to pursue this job, without you, Eystein. Thank you for parenting for us both when I have been away or too busy with work. Thank you, Eystein, Oda and Nora for your support, patience and love. I love you!

Oslo, October 24, 2019

Solveig Laugerud



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## Introduction

The study of crime, it has been argued, traditionally has marginalized victims (Dahl, 1994; Walklate, 2004). A partial explanation of the marginalization of victims is that criminological studies' concern with finding the causes of crime makes the victim of little interest. The positivist school of criminology, in particular, has sought to identify who commits crimes and why by searching for biological, psychological, and sociological explanations (Cullen et al., 2018). Since Lombroso's work in 1876, the positivist school that focused on developing criminal typologies has been highly influential in criminological studies. This approach to crime has neglected not only victims but also violent crime occurring in the private sphere—the kind of crime that tends to victimize women (Dahl, 1994; Walklate, 2004; Gavey, 2005).

Walklate (2004) describes how victimology, which emerged as a distinct area of study in the late 1940s, resembles criminology in many ways. Victimology focuses on the victim as criminology does on the criminal, and furthermore, victimology uses the same research methods as criminology. This positivist approach led early victimology to focus on developing victim typologies to identify victims. Studies of crime have constructed victim typologies in which the victim and the offender are perceived to have a relationship of equality in which who becomes the victim and the offender is sometimes considered to be incidental (Dahl, 1994; Walklate, 2004). Based on this work, victimization has been explained with categories such as victim proneness, victim culpability, and victim precipitation. The use of victim precipitation in relation to rape has been especially controversial and has incited immense criticism from feminists conceptualizing rape as a product of gendered power relationships (Dahl, 1994; Walklate, 2004; Gavey, 2005).

Against this backdrop of positivist criminological and victimological research, feminist researchers and activists have criticized the study of crime and initiated studies of violence against women. These efforts have contributed to increased focus on female victims and crime conducted in the private sphere (Skjærten, 2004). Accordingly, research on sexual and domestic violence constitutes a large number of studies of violence today. This research has focused on the victim, symbolic denial of victim status due to the attribution of blame, and victims' limited access to justice due to the few participatory rights in the criminal justice

system afforded to them. This development has further pushed a theoretical shift from victim typologies to victim status (e.g., who is easily recognized as a victim) and institutions' contributions to further victimizing victims ("revictimization" or "secondary victimization"). While positivist criminology and victimology have relied heavily on quantitative studies, feminist victimological scholarship has often drawn on qualitative methods.

According to Walklate (2007) and Skjørten, Bakketeig, Bjørnholt, and Mossige (2019), research emanating from the women's movement has helped move male violence against women from the margin closer to the center with respect to victim-oriented research and policy initiatives. Victims have simultaneously gained increased access to legal, medical, and psychological institutions that process their cases and offer treatment. The greater focus on victims in policy initiatives and institutions has increasingly subjected victims to experts and institutional discourses regarding sexual violence. For example, the development of the diagnosis of psychological trauma has intensified the focus on professional interventions and treatment for victims of sexual violence. For example, in forensic medical examinations, experts collect and analyze evidence for use in criminal proceedings. This move, though, has garnered little scrutiny even as research on experts and institutional discourses has tended to concentrate on the offender. For instance, Foucault (2014) and criminological research inspired by his work have tended to problematize the subjection of the offender to expert examination and judgement.

The study of how expert knowledge is active in relation to institutional interventions after victimization can draw insight from scholarship on offenders, particularly Foucault's (1999; 2014) writing on expert discourses. In *The History of Sexuality, Volume One*, Foucault (1999) tells a story to demonstrate how medicine, psychiatry, and criminal justice have produced discourses constituting sex as dangerous and in need of control. The story is about a man in a village who "obtained a few caresses from a little girl" (Foucault, 1978: 31). The girl's parents reported him to the mayor of the village, who reported him to the police, who brought him before a judge, who turned him over to a doctor and experts, who measured his brainpan and his facial bone structure and searched for possible signs of degenerated anatomy. What concerns Foucault is how these "pleasures, could become, from a certain time, the object not only of a collective intolerance but of a judicial action, a medical intervention, a careful

clinical examination, and an entire theoretical elaboration” (Foucault, 1978: 31)<sup>1</sup>. According to Foucault, the experts in this case turned the man of the village into an object of medical and legal knowledge. The concept of sex as dangerous shifted the focus from a person’s actions to what a person was capable of and from sexual practices to sexual identities (Foucault, 2000; Foucault, 2014). The man became a sexual pervert as his identity, more than his actions, was evaluated and criminalized. The man of the village became a pervert and a criminal. In this way, medicine, psychology, and law have created criminal identities (Foucault, 2014).

What does not appear in Foucault’s story, though, is what happened to the girl. Perhaps at that time, no experts examined the girl, but today, in Norway, a range of institutions would be involved. A likely scenario would involve the police, child protection services, and kindergarten or school where she is enrolled. Today, experts turn such girls into objects of medical and legal knowledge. In this thesis, I explore how the rape victim becomes an object of knowledge. Today, a range of medical and legal experts and institutions become involved in rape cases to investigate and adjudicate rape and treat its psychological trauma. These figures include experts who collect and analyze evidence; police investigators and legal decision-makers who consider the victim’s credibility and evidentiary value; psychological, psychiatric, and other therapists who offer treatment; and organizations that promote self-help strategies.

In this thesis, I investigate how disciplinary discourses shape the ways in which victims navigate medical and legal institutions while responding to sexual violence and how legal decisions are made in rape cases. I focus on female victims of sexual violence because women who constitute the largest group of rape victims more frequently than men consult medical and legal institutions after rape (Thoresen and Hjemdal, 2014). I argue that the disciplinary discourses of medicine and law create a victim identity in the same way as the criminal identity, according to Foucault (2014). The research literature has largely left these institutionalized practices unproblematic. There has been a call for increased expert interventions to improve the legal processing of rape and the quality of forensic evidence

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<sup>1</sup> Feminist researchers such as Taylor (2009), Alcoff (2018), and Cahill (2001) have criticized Foucault’s writings on sexual violence. For instance, Cahill (2001) criticized Foucault’s comments on rape law, arguing that he is concerned only with liberating male sexuality—not rape. Although I agree with feminist criticism of Foucault’s trivialization of rape, I also think the story well illustrates the relationships among the institutions of law, psychiatry, and psychology, which is the reason I use it in this thesis.

collection to counter what is often considered to be biased decision-making in the legal system.

In the following, I briefly introduce the Norwegian context before giving an overview of two prominent concepts and their interlinkages in previous research on the legal processing of rape. These two concepts, rape myths and the ideal victim, have been used to problematize bias in the operations of the legal system. Moreover, the concepts of rape myths and the ideal victim have been argued to be extralegal factors that should be disregarded in the legal system. I further describe how researchers, politicians, and activists have called for increased use of expert knowledge to counter prejudices in the legal processing of rape. Next, I point to the little attention paid to how victims of sexual violence navigate the legal system in the literature on the legal processing of rape. I then account for Foucault's (2014) argument that disciplinary discourses create a criminal identity before I introduce and bring together the four articles in this thesis to show how the disciplinary discourses of the legal system create a new victim identity.

## **The Norwegian Context**

Norway is a social democratic welfare state that relies on public institutions to secure welfare, including equality in the areas of the economy, education, health, and gender. The development of the welfare state has created trust in public institutions and the state. Feminists, in particular, have trusted the state and considered it to be an ally in their fight against gender inequality (Hernes, 1987). The welfare state tends to be perceived as women-friendly due to policies that facilitate women's labor market access and political participation, such as generous parental leave, affirmative action, and extensive, affordable public care services for children and the elderly (Borchorst and Siim, 2008; Teigen and Skjeie, 2017). The women's movement has further looked to the state in the fight against gender-based violence. For instance, the shelter movement demanded and acquired public funding for hotlines and shelters for raped and battered women from its start in 1976 (Ahnfelt, 1987). In 2009, after years of campaigns and discussions, the government implemented the Crisis Center Act instructing all municipalities to offer organized help to victims of domestic violence, for example, by funding crisis centers (Ot.prp.nr. 96, 2008-2009; Laugerud, 2014). Skilbrei and Stefansen (2018) interpret this development as an example of how domestic and

sexual violence have become obvious responsibilities of the welfare state. The state's acknowledgement of responsibility for victim welfare has been characterized as a state-feminist success achieved after long-term, concerted feminist action (Skjørten, 2004; Bjørnholt, 2019). Tham, Rönneling, and Rytterbro (2011) argue that state responsibility for crime victims characterizes all countries in Scandinavia. For example, the category of crime victim did not exist in Sweden before 1970 but emerged due to the efforts of the women's movement, eventually resulting in a special crime victim policy (Tham et al., 2011). Tham et al. (2011) consider Sweden to have played a leading role in these developments in Scandinavia but argue that similar developments have occurred in Norway and Denmark.

The women's movement has contributed to placing victims of gender-based violence at the center of policy initiatives. Skjørten et al. (2019) characterize this shift from the margin to the center of policy initiatives over the past 40 years as movement from ignorance to zero tolerance. Since the 1990s, the Norwegian authorities have developed a range of policy documents such as governmental reports and actions plans related to sexual violence, suggesting great interest in this policy area (Skilbrei and Stefansen, 2018). The stated policy aim has been to improve victims' health, welfare, and rights, in particular, the ways in which the legal system processes rape. The chapter on sex crimes in the Norwegian Criminal Code has undergone major changes in the past 20 years. In an especially important change, the government included incapacitated rape and rape by gross negligence in the rape provision in 2000 (Ot.prp. nr. 28 1999-2000). In 2010, the authorities established a specialized task force in the National Criminal Investigation Service<sup>2</sup> to guide and support local police in investigating rape cases (Skilbrei and Stefansen, 2018). In 2008, authorities implemented reform granting victims of violence and sexual violence a range of participatory rights in legal proceedings, including the right to be present in court throughout trials (Ot.prp.nr. 11, 2007-2008). Victims also have the right to legal representation who can access most documents in cases, appeal police decisions to dismiss cases, and question the accused and all the witnesses during trials.

In addition, for many years, the government has expressed concern with the large number of rape victims who do not report their cases to police and the significant attrition of rape cases in the legal system (NOU2008:4). Police dismiss most reported rape cases, and many prosecuted cases end in acquittals (Kripos, 2018). The United Nations, Amnesty, and various

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<sup>2</sup> In Norwegian, *Voldtektsgruppa i Kripos*.

women's groups have criticized the Norwegian police and legal system for not taking rape seriously. To ensure more prosecutions and convictions, the government has turned to forensic science to improve the quality of forensic medical examinations, increasing the qualifications of forensic medical examiners and securing funding for forensic examinations and tests (NOU2008:4).

The issue of rape has also been widely debated in the media. Commentators have often criticized the legal system for the high number of cases dismissed by police and the low number of convictions. They have tended to assume that the poor legal treatment of rape can be attributed to the existence of rape myths and prejudiced legal and lay judges (see for instance Håland, 2016; Hansen et al., 2019).

## **Previous Research on Rape and the Legal Processing of Rape**

### **Connecting the Concepts of Rape Myths and the Ideal Victim**

In research on rape, especially the legal processing of rape, the concept of rape myths emerged and gained prominence in the 1970s and has continued to be used, discussed, and further conceptualized. In an early example of this research, Griffin (1971) uses the concept of rape myths to repudiate contemporary assumptions regarding gender and sexuality blaming women who were raped. She criticizes the legal system, in particular, for using women's sexual history as evidence during rape trials because it makes them feel that they are the ones on trial. Berger (1977) also notes that the legal system inflicts indignities on rape victims by focusing on their reputation and degree of resistance during the incident, which she attributes to a stereotyped concept of rape based on deep-seated cultural myths about women. Later, Estrich (1986) argues that the legal system considers only the most violent stranger rape to be real rape.

In social psychological studies, Burt (1980) elaborate on and test support for the concept of rape myths, defined as "prejudicial, stereotyped or false beliefs about rape, rape victims and rapists" (Burt, 1998: 129). She argues that rape myths contribute to creating a hostile climate for rape victims because they function to deny that many instances of coercive sex are rape, and they refuse women the victim role (Burt, 1998; Burt, 1980). Burt and Estep (1981),



therefore, argue that victimization is political, and they encourage all women subjected to coercive sex to claim victim status. Persons who have suffered sexual assault have an interest in acquiring victim status because it relieves them of blame, legitimizes their suffering, and grants them a “right to claim assistance, sympathy, temporary relief from other role responsibilities, legal recourse and other similar advantages” (Burt and Estep, 1981: 16). According to Dunn (2010) and Ericsson (1993), the anti-rape movement and women’s movement have used the language of victimization to reclaim women’s inculpability.

To be recognized as a victim, certain requirements have to be fulfilled (Christie, 1986). To acquire victim status, one must be perceived as an ideal victim who is weak, carrying out a respectable project, and unable to be blamed for being present at the place the assault took place. Furthermore, an ideal victim depends upon an ideal offender who is big, bad, and unrelated to the victim (Christie, 1986). At the core of the recognition of victim status then is perceived blamelessness. Perceived blame is related to what victimized women do, such as whether they are performing a respectable project, avoid inappropriate places, and do not engage in any activities that could harm their reputation as respectable women—in short, whether they comply with norms of appropriate female behavior.

Since the women’s movement took up the concept of the victim, it has been problematized for its association with passivity. According to Ericsson (1993), victim status elicits not only rights but also duties—particularly the duty to be pitiful, weak, and a passive object of others’ actions. Ericsson (1993) argues that being regarded as a blameless victim presupposes passivity because agency is inextricably linked to responsibility and, therefore, blame. She further contends that passivity tends to be interpreted as an intrinsic quality of the victim’s identity, an all-encompassing trait that describes the victimized person (Ericsson, 1993). The associations between the words *victim* and *female* “imply that the passivity and powerlessness associated with being a victim are also associated with being female” (Walklate, 2007: 27). Resistance to the concept might be related to a disconnection between such a fixed term and a fluid sense of self (Alcoff, 2018).

To avoid the negative connotations of the victim label, the concept of the survivor has been introduced in an attempt to reconcile victimization (read, blamelessness) and agency (Dunn, 2010). The survivor concept comes from the concepts of healing and recovery from psychological trauma, which are seen as effecting the transition from passive victim to active survivor (Davis, 2005). The survivor story is about personal change, agency, and inner

strength. Sweet (2018), though, argues that the survivor story puts strain on victims, requiring that they demonstrate psychological recovery to experts. Victims who fail to recover and take responsibility for their health risk being blamed for their victimhood. Kelly, Burton, and Regan (1996) criticize the concepts of both victim and survivor for being too simplistic and dualistic and failing to capture the complexity of being subjected to sexual violence. Kelly et al. (1996) note that the survivor concept assumes that victims are passive during assaults and that the medical metaphors of healing and recovery suggest that individuals can escape the victim role with the “right cure.” In this way, Kelly et al. (1996) contend, inequality and power relations become transformed into individual problems.

The contested nature of the victim status is further manifested in institutions, resulting in what has been termed secondary victimization. As described by Williams (1984), in secondary victimization, negative and judgmental attitudes directed toward and blaming the rape victim prolong and compound the consequences of rape because the victim lacks support. Secondary victimization, also called the second assault and the second rape, has been considered to be a problem in various institutional settings, particularly legal institutions, because victims feel further victimized by various institutional interventions. In recent years, the concept of secondary victimization has been applied to all kinds of insensitive and inappropriate treatment by system personnel (McGarry and Walklate, 2015), in addition to treatment based in victim-blaming attitudes. This development probably has partly paved the way for the concept of retraumatization, which sometimes is conflated with the notion of secondary victimization, in the same manner as the concepts of victimization and traumatization are conflated (McGarry and Walklate, 2015). Herman (2003) argues that the rules and procedures of the legal system pose risks to victims’ mental health because they are not designed to accommodate victims’ need and safety. Consequently, legal proceedings can further traumatize traumatized victims.

The concepts of rape myths and the ideal victim and the concomitant institutionalized manifestations of secondary victimization all concern the ideas of blame and culpability, at least in their original meanings. Research on the legal processing of rape utilizing these concepts, therefore, has addressed the legal system’s focus on how the victim’s behavior prior to rape can result in attribution of blame to the victim.

## Legal and Extralegal Factors

The concepts of rape myths, the ideal victim, and secondary victimization still frequently arise in criminological and socio-legal research on the legal processing of rape. In this research, scholars have problematized the imbuelement of legal proceedings with rape myths and their influence on the quality of the investigation and prosecution of rape cases.

According to Conaghan and Russell (2014), concern about rape myths has grown in recent years because it has become increasingly apparent that legal reforms have done little to increase conviction rates in rape cases. Scholars, therefore, have directed attention to the interrelation of legal processes and cultural norms. Studies on how police investigate rape cases in the United States have shown that stereotypes related to ideas about real rape and ideal victims influence police decisions to further investigate cases (Campbell and Fehler-Cabral, 2018) and to unfound cases (Spohn et al., 2014).

In research on the prosecution and adjudication of rape, rape myths have commonly been portrayed as part of decision-makers' common sense, a kind of prejudiced non-expert knowledge. Ellison (2018) questions whether the common-sense knowledge on which lay decision-makers are supposed to rely when making credibility assessments constitutes an adequate foundation for credibility assessments in rape cases. Ellison (2018) argues that common reactions to rape, especially in intimate relationships, are not self-evident to laypeople, and consequently, defense counsels can exploit laypeople's ignorance by evoking rape myths, which studies on rape trials have suggested that defense counsels' include in their strategies. For instance, it has been argued that rape myths are routinely used in trials in the United Kingdom to distance cases from "real rape" stereotypes and discredit complainants (Temkin et al., 2016). Prosecuting barristers find it challenging to prosecute a rape case if the rape victim presents an inappropriate appearance in court, has a bad sexual reputation, or previously was in a relationship with the accused because defending barristers look for ways to discredit the rape victim (Temkin, 2000). Similarly, in a study on mock jurors' decision-making in rape cases involving intoxication, the jurors insisted that they needed information about the woman's past sexual history to be able to consider whether the complainant was the "sort of woman" who would do "this sort of thing" (Finch and Munro, 2005: 36). Smith and Skinner (2017) argue that rape myths are kept relevant throughout trials through a focus on what is seen as rational behavior. In their account, courts consider rational behavior to be behavior that complies with rape myths. One way to counter stereotypical assessments by

juries is to introduce educational guidance through judicial instruction and general expert testimony during trials (Ellison, 2018). A mock jury study suggested that educational guidance can redress popular misconceptions of rape (Ellison and Munro, 2009), but rape trial studies have indicated that judges do not always use educational guidance (Smith and Skinner, 2017; Temkin et al., 2016).

In research on Norwegian lawyers' defense strategies in rape trials based on trial observations and interviews with defense lawyers, Bitsch (2018) argues that open displays of sexism and misogynistic attitudes toward rape victims are less common than could be expected based on literature from the U.S. and the UK. She suggests two reasons for this difference: one, lawyers have sympathy for the victim or antipathy toward their client; and second, defense lawyers' attempt to behave respectfully toward the victim to comply with legal and societal norms and regulations concerning how to treat rape victims. However, Bitsch and Klemetsen (2017) argue that sentencing is stratified based on the private/public divide and the prior relationship between the accused and complainant. Stranger rape in public spaces stands at the top of this sentencing hierarchy (Bitsch and Klemetsen, 2017).

These studies have problematized lay knowledge, contrasted it to expert knowledge, and proposed the latter as the solution to biased common-sense knowledge. The studies have also distinguished between legal and extralegal factors and criticized the legal processing of rape for its reliance on extralegal factors. However, Rose and Valverde (1998: 546) argue that extralegal processes and practices are always intermixed with the workings of law. Similarly, Matoesian (1995) questions whether, in a rape trial, it is possible to neatly divide substantive testimony and other materials into legal evidence, on one hand, and extralegal factors, on the other hand, thus separating facts from values and descriptions from evaluations. This distinction implies that legal evidence refers to relevant, objective, "hard" evidence about rape, while extralegal factors are irrelevant and subjective factors that reflect potentially prejudiced moral values (Matoesian, 1995). In a study of court transcripts, Matoesian (1995) argues that the language of evidence in testimony challenges this distinction and consequently renders ineffective the rape shield legislation intended to exclude extralegal factors by limiting the ability to introduce evidence and cross-examine rape victims about past sexual behavior.

## **Forensic Science to the Rescue**

To overcome gendered stereotypes in the legal processing of rape, activists, politicians, and researchers have looked to forensic science to produce evidence corroborating rape claims. Aims to increase rape convictions and technological developments have made forensic evidence integral to the legal processing of rape. Urged by feminist activists, the life sciences have developed rape kits to facilitate the production of reliable evidence from forensic medical examinations, thereby increasing the likelihood of prosecution of rape (Shelby, 2018). Rape kits were designed to guide and standardize forensic evidence collection in rape cases (Du Mont and Parnis, 2001). DNA testing is an important part of rape kits today, but they predate the DNA technique. They were developed over 1975–1978 (Shelby, 2018), and the first criminal trial to include DNA evidence was a U.S. rape trial in 1987 (Aronson, 2008). Rape kits “emerged as a strategic feminist and criminological intervention, in which discourses about the perceived reliability and objectivity of the kit were believed to counter gendered stereotypes embedded in the criminal justice system” (Shelby, 2018: 2). The development of rape kits, therefore, rested on an assumption that forensic science was unbiased and able to challenge existing biases in the legal system.

Although a rather recently developed profiling technique, DNA evidence has gained prominence in rape investigations today. In Norway, DNA technology is considered to be important in the investigation and prosecution of rape (Dahl and Lomell, 2013). Police and legal actors tend to place much trust in this technology (Dahl, 2012). In its initial deployment, DNA profiling was mostly used in sexual assault cases because early DNA technology required semen or blood traces to create DNA prints (Cole, 2007). Today, DNA technology has advanced considerably, and profiles can be made based on a range of bodily bits and fluids, including saliva and hair and skin tissues (Johnson et al., 2012). DNA technology has contributed to revitalizing rape kits and making them credible, reliable technoscientific witnesses of rape (Quinlan, 2017). Consequently, rape kits have become increasingly important in the investigation and prosecution of rape.

However, rape kits are not sufficient to ensure collection of reliable evidence from medical examinations. Medical examiners also need to know how to carry out the tasks included in rape kits. To ensure proper training of medical examiners, programs specialized in gathering forensic evidence such as the Sexual Assault Nurse Examiner (SANE) program have been implemented in the U.S. An important aim of SANE is to increase police reporting and

prosecution of rape, and the program design combines forensic services with comprehensive psychological and medical care (Campbell et al., 2011). SANE not only secures forensic evidence but also affects police investigation practices (Campbell et al., 2011). Police are more likely to interview the accused and collect other kinds of evidence if the victim has had a forensic medical examination, which, in turn, increases the likelihood of case referral for prosecution (Campbell et al., 2011). Medical examination and forensic evidence thus are perceived as the best way to secure prosecution and eventual convictions in rape cases. Consequently, U.S. police are criticized for not submitting rape kits for forensic DNA testing (Campbell and Fehler-Cabral, 2018; Johnson et al., 2012). For years, police have failed to submit rape kits for forensic DNA testing dating to the 1980s (Campbell and Fehler-Cabral, 2018). In response to recent discoveries of large backlogs of untested sexual assault kits in cities across the U.S., legislators, advocates, and activists have mobilized campaigns to test rape kits and prevent future backlogs (Quinlan, 2019). These campaigns portray untested rape kits as threats to public safety, justice, and healing for victims. The development and support of a forensic machinery indicate strong belief in forensic science's ability to solve rape cases.

Corrigan (2013), however, problematizes this very belief. She argues that the focus on forensic examinations can actually discourage reporting, investigation, and prosecution of rape in all cases that do not include violent or stranger rapists (Corrigan, 2013). Forensic science discriminates against non-stranger rape cases and favors stranger rape cases partly because DNA profiling identifies or links a perpetrator to the crime scene—which, in rape cases, is the victim's body (Corrigan, 2013). Cole (2007) note that DNA evidence offers little help in acquaintance rape cases in which the disputed issue is consent rather than identity. When the accused in acquaintance rape cases argues that the incident was consensual sex, DNA evidence has little evidentiary value. This criticism suggests that forensic science can contribute to sustaining and possibly reinforcing rape myths in the legal processing of rape. In other words, forensic science might be unable to counter gendered stereotypes in the legal system.

### **The Politics of Psychological Trauma**

Forensic science is not the only possible solution to increase rape victims' credibility in court. The diagnosis of psychological trauma, Posttraumatic Stress Disorder (PTSD), has also made its way into the legal system. Psychological trauma connects experiences of sexual violence

with psychiatric symptoms, which makes trauma different from other psychiatric diagnosis, because external events explain trauma, while other diagnoses are explained by individuals' personal and biological predispositions (Breslau, 2004; Fassin and Rechtman, 2009; Young, 1997). Consequently, trauma is increasingly invoked in medical and legal institutions to identify victims, explain their behavior, and justify official responses to crime and disasters (Breslau, 2004). In this way, the trauma framework contributes to recognition of rape as a harmful experience that requires medical and legal interventions considered to be beneficial for victims of sexual violence.

Psychological trauma gained legitimacy with inclusion in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)* manual published by the American Psychiatric Association (APA) in 1980 (Fassin and Rechtman, 2009). The APA included trauma after Vietnam War veterans and the women's movement formed an alliance with psychiatrists and campaigned for the recognition of trauma (Fassin and Rechtman, 2009). Shortly after trauma was included in the *DSM*, attempts were made to treat psychological trauma as admissible evidence of rape in U.S. courts (Burgess, 1983). Today, trauma evidence is admissible in some jurisdictions in the U.S. and Norway but not the UK (Harris, 2008; Ward, 2009). Trauma evidence is controversial, Harris (2008) and Ward (2009) contend, because whether it can prove rape and might usurp the role of the jury is disputed. Trauma evidence is mostly used to prove a lack of consent and explain counterintuitive behavior by complainants, such as late police reports (Harris, 2008; Murray, 2012). Some feminist scholars have also skeptically viewed the use of trauma evidence in court. Murray (2012) argues that counterintuitive victim behavior can be explained by doubts in the legal system instead of individual pathology. Furthermore, in a legal context, the trauma narrative might be a double-edged sword because even if it might be beneficial for victims to evoke the trauma discourse to increase the likelihood of conviction, it also reconfirms that women are irrational human beings (Edgren, 2016).

The women's movement and feminist scholars have consistently deployed arguments of trauma to raise awareness and concern about the impacts of sexual violence (Taylor, 2019). However, Taylor (2019) questions whether sexually victimizing experiences are always traumatizing and warns against making sexual violence solely a question of harm. Taylor (2019) argues that sexual violence is morally wrong regardless of whether it is traumatizing and raises the concern that a strong emphasis on the harm of rape makes trauma essential to

understand sexual violence. Lamb (1999), for instance, describes how popular images of victims of sexual violence tend to construct victims as traumatized and enduring eternal suffering. Being victimized has become equivalent to having a chronic mental illness (Lamb, 1999), and trauma has become the dominant way of understanding the impact of crime (McGarry and Walklate, 2015). In the unintended consequences of the politics of trauma, women subjected to sexual violence who do not feel traumatized or are not diagnosed with trauma might not recognize their experiences as rape or be recognized as rape victims by others (Taylor, 2019). Additionally, victims who are not traumatized might not be considered worthy of policy or practice interventions (McGarry and Walklate, 2015). The politics of rape thus might complicate the process of acquiring victim status due to a too strong emphasis on harm at the expense of wrongdoing.

### **How Rape Victims Navigate the Legal System**

The literature on the legal processing of rape has included few accounts on how victims navigate and negotiate the legal system. According to Konradi (1996b; 1996a), studies on the legal processing of rape have generally focused on the behavior of legal professionals. The studies that have focused on rape victims, she continues, have primarily analyzed how the demands of the trial process *affect* victims, and these experiences have been conceptualized as the “second assault.” Konradi (1996b; 1996a) argues that this research direction has resulted in representing victims’ legal experiences as what *happens to them* in court. In an unintended consequence, this perspective has reinforced perceptions of victims as passive and helpless (Konradi, 1996b; 1996a). For this reason, Konradi (1996b; 1996a) calls for studying how rape victims pursue justice and their agency in this process. By *agency*, Konradi (1996b; 1996a) means how rape victims respond to the constraints of the legal process.

Konradi (1999; 1996b) describes the different strategies rape victims adopt when they prepare to go to court and testify in court. Preparatory strategies include appearance work (purposeful clothing and make-up), rehearsal of the details of their assault, emotion work (pre-court efforts to produce feelings and emotional displays deemed appropriate for court), team building (the presence of supportive allies in court), role research (seeking legal information to successfully perform as a witness), and case enhancement (bringing documentation to the prosecutor or the court (Konradi, 1996b). In court, victims engage in emotional management strategies, including controlling feelings they deem inappropriate and staring down the



assailant (Konradi, 1999). Konradi demonstrates that victims do have some agency, even if the victims have few legal rights to influence legal proceedings. Others have assumed that victims' legal status conditions their agency. For instance, Garvin and Beloof (2015) argue that victims need independent lawyers to have real agency in the criminal justice system.

Although Konradi's criticism dates from some years back, it remains relevant today. Most studies still focus on how the legal system affects the victim. For example, in an article on legal compensation for sexual violence in civil legal processes and from a Canadian government agency, it is argued that civil legal processes can have therapeutic and nontherapeutic consequences for victims (Des Rosiers et al., 1998). Therapeutic consequences are the prime focus of therapeutic jurisprudence, an interdisciplinary legal approach that proposes that the law should be designed to serve as a therapeutic agent (Wexler and Winick, 1991). The design of the legal system, Herman (2003) contends, may compound rape victims' psychological trauma because its rules and procedures do not take into account their mental health. For example, another study in Canada finds that in the legal process victims experience "the same loss of control, violation of trust, and sense of betrayal that often accompany sexual victimization" (Regehr et al., 2008: 111). However, some studies on the harm of participating in legal proceedings do not use the language of therapy. For example, a study on rape victims' experiences with the British legal system indicates that legal proceedings continue to revictimize victims (Wheatcroft et al., 2009). In this way, studies that focus on individuals' experiences with the legal system tend to emphasize the harmful effects on victims in legal proceedings due to a lack of agency.

## **Theory**

### **Foucault: The Criminal Identity**

In *Discipline and Punish*, Foucault (2014) describes how legal decision-making has become a process that includes diagnostic, prognostic, and normative judgements. According to Foucault, adjudication has become a scientific-judicial complex in which scientific experts from a range of institutions examine the accused to determine how normal or dangerous he is. The discourses and activities of psychiatry and psychology, in particular, provide the legal system with opportunities to observe and categorize the offender (Taylor, 2019: 1-2). This

means that the adjudicative process investigates not only who committed the crime but also the accused's motivations for the crime and his future prospects for the potential to reoffend. The aim of creating this hybrid process that includes extra-judicial expert opinions is not to integrate scientific experts into the power to punish but to share responsibility for the judgement (Foucault, 2014). Thus, not only the judge and the legal system but a whole network of experts and institutions adjudicates and punishes persons.

In Foucault's (2014) work, experts examine the accused, transforming him into an object of knowledge. Consequently, a rape trial adjudicates not the crime of rape but the accused's perversions. The focus is on the accused's motivations, intentions, and psychological state (Alcoff, 2018: 94). The judges need to understand the criminal and why he did what he did (Taylor, 2019). Thus, the primary concern moves from actions to actors. For this reason, Foucault (2014) argues that the penal system produces a criminal identity. Thus linked to identity, crime is no longer seen as a normal response to conditions of poverty, distress, and oppression but is perceived as emerging from a pathologized identity (Taylor, 2019: 3). For Foucault, Taylor continues, the purpose and function of prisons is not to rehabilitate offenders but to transform unpredictable offenders into predictable delinquents. Turning offenders into psychiatric cases makes them manageable objects of knowledge rather than political threats (Taylor, 2019). The legal system thus constitutes the criminal in terms of his crime.

The criminal is transformed by means of discipline, defined by Foucault (2014) as continued judgement of individuals through constant surveillance and examinations. Individuals are judged by a set of standards and values associated with normality enforced by the power of the norm (McNay, 2007). This normalizing judgement is supposed to correct deviations through a surveilling gaze, or constant observation by an invisible power manifested solely by its gaze (Foucault, 2000; 2014). The architectural figure of the surveilling gaze is Bentham's panopticon, an annular building whose center is a tower pierced with windows (Foucault, 2012). The peripheric building is divided into cells with windows facing the tower. This design facilitates constant surveillance. Those in the tower can observe every person in every cell at any time, but those in the cells never know if and when they are observed because they cannot see the observers in the tower. Consequently, those in the cells start to correct themselves and behave as if they are observed at all times. Panopticism is a form of automatized and deindividualized power that incorporates a notion of self-control and a specific understanding of the soul and the body (Rodemeyer, 2017). The soul keeps the body

under tight control to increase the utility of the body, so it may be used, transformed, and improved (Foucault, 2014). Discipline thus creates docile bodies that may be subjected. However, people do not necessarily conceive of this form of bodily control as repressive. Instead, they might feel proud and be rewarded when they control their bodies in this manner; indeed, they tend to think of it as a form of personal success (Rodemeyer, 2017). This is especially well illustrated in how women are disciplined to control their bodies to achieve a feminine body of the right size and shape, sufficiently ornamented and displaying appropriate bodily comportment (Bartky, 1988; Bordo, 2004; Heyes, 2007).

Examination is a disciplinary procedure that makes individuals visible to differentiate and evaluate them, subjecting them to a normalizing gaze. Foucault distinguishes examination from what he calls an inquiry. An inquiry is a search for truth investigating who did what and focusing on criminal actions (Foucault, 2000). Examination, in contrast, is organized around the norm and considers how normal a person is. The focus is the person, not his actions. This disciplinary procedure makes it possible to classify, label, and punish individuals (Foucault, 2014). It generates medical and psychological knowledge that “produce[s] the pathologized subject of the ‘delinquent’” (McNay, 2007: 94). Examination, which operates via notation and registration in schemas, surveils and captures individuals in a mass of documents (Foucault, 2014). The apparatus of writing that accompanies examination constitutes the individual as a describable and analyzable object. Examination makes each individual a “case” that simultaneously constitutes an object of knowledge and an object of power.

The identity of the sex offender, according to Taylor (2009; 2019), is developed at the intersection of Foucault’s *Discipline and Punish* and the first volume of *The History of Sexuality*. Applying this perspective to developments in the U.S., she finds that disciplinary measures that have become common in the U.S., such as notification of the release of sex offenders in communities, constitute the subject in terms of his crime and produce a subject bound to reoffend. The offender recidivates according to the previously committed crime because the crime has become intrinsic to his identity. Sex offenders are especially likely to do so because “they are the most highly stigmatized and intensely monitored category of criminal, and due to the identification of sex with identity in the modern West” (Taylor, 2009: 6). The sex offender, in other words, is caught up with not only a criminal identity but also a sexual identity (Taylor, 2009; 2019). This is because, following Foucault (1999), the move from a concern with actions to a concern with actors is evident in relation to sex. Certain

sexual acts become characterized as perversions conducted by perverts. To understand the identity of the pervert, experts examine not only the acts performed but also the kind of person who performs them. Accordingly, the sex offender is constructed to re-offend due to his delinquency and his sexual truth (Taylor, 2009; Taylor, 2019). A sex crime is interpreted as a consequence of the identity that determines the sex offender. When the sex offender starts to confess, he takes on the identity of the criminal because scientists view him as such and make him speak in these terms. The subject thus incorporates the criminal identity as an all-encompassing identity.

Taylor (2009; 2019) further develops an argument of how a person subjected to sexual violence becomes entangled in a victim identity based on Foucault's (1999) first volume of *The History of Sexuality*. She argues that when sexuality is perceived to be at the core of a person's identity, the rape victim is bound to be scarred sexually because sexual experience is caught up with identity. Sexual violence becomes damaging and traumatizing to the victim, she continues, because the victimizing experience becomes solidified into the victim's identity and undermines and determines the victim's sense of who she is. "A woman who is raped is henceforth a rape victim or a rape survivor, with all the consequences that this entails" (Taylor, 2019: 93). This victim identity, Taylor contends, is constituted by medical and therapeutic discourses. The sexual offence thus becomes entangled in the identity of both the criminal and the victim (Taylor, 2009; Taylor, 2019).

Taylor's argument represents a new way of understanding how victims become entangled in a victim identity created by disciplinary discourses. However, her analysis of the victim identity does not take into account the workings of the disciplinary discourses of the legal system. The centrality of victims to the legal process and the increased reliance on forensic science and psychiatric and psychological knowledge suggest that, similar to offenders, victims might become objects of knowledge. Understanding how disciplinary discourses create a new victim identity, therefore, constitutes my contribution to this field of knowledge. In the presentation and discussion of the articles in this thesis, I show how institutional discourses discipline the woman from the moment she discloses that she has been subjected to sexual violence. The sexually violated woman is encouraged to report the incident to police to have the offender convicted. In this process, she needs to transform her body into legal evidence to ensure its utility in convicting the defendant. The body is transformed into evidence through the forensic medical examination in which medical and psychological experts examine and evaluate the

victim's body and mind. In cases of sexual violence, it is primarily the victim's body and mind that are examined and evaluated—not the defendant's body and mind. Throughout the investigation and prosecution of the case, the legal gaze is directed toward the victim, and the disciplinary discourses turn the victim into an object of knowledge. In this way, the disciplinary instruments and procedures in the legal system create a victim identity—a legible victim—that victims need to affirm in court.

## **Methods**

### **Research Design and Data Material**

This thesis has a qualitative research design and draws on two sources of data: legal documents and individual interviews. The legal documents include legal decisions regarding compensation for criminal injuries in rape cases from the Compensation Authorities and rape verdicts from district and appellate courts in Norway. The Compensation Authorities process crime victims' applications for criminal injuries compensation from the state. The courts decide the accused's criminal guilt and liability to pay compensation to the victims. I chose these texts to analyze how legal decision-makers process rape cases and accordingly construct knowledge of rape. Legal texts can be considered to be a place where legal knowledge and meaning are produced (Niemi-Kiesiläinen et al., 2016). I further interviewed victims of sexual violence to analyze their reflections on how experts and institutions process rape cases and how the knowledge of rape created by these experts and institutions shapes the ways in which the interviewees constitute their selves. I chose qualitative interviews because I wanted to focus on individuals' meaning-making processes in the context of institutionalized discourses on rape (Kvale and Brinkmann, 2009; Maxwell and Reybold, 2015). Together, these sources of data allow investigating how disciplinary discourses shape the ways in which victims navigate medical and legal institutions in response to sexual violence and the ways in which legal decisions are made in rape cases.

Overall, I perform a theory-informed qualitative analysis of the data material. The analysis of documents and interviews is influenced by post-structural policy analysis (Bacchi and Goodwin, 2016) and post-structural interview analysis (Bacchi and Bonham, 2016). These analytical approaches focus on "problematization," as described in the following. I analyze

the data material from an epistemological position grounded in Foucault's (1972) work on discourse. Consequently, my epistemological stance is constructivist, as is common in discourse analysis. According to Gill (2000), discourse analysis dissents from the realist notion that discourse simply reflects and describes the world and instead holds that discourse constructs social life. The focus is on what written texts do rather than any hidden reality or underlying causes in the text. Discourse is perceived as social practice. "People use discourse to do things—to offer blame, to make excuses, to present themselves in a positive light, etc." (Gill, 2000: 175).

In relation to the legal decisions I analyze, this means that I am interested in what the legal decisions *do* or *produce*. For instance, in the first article, I consider how the Compensation Authorities and the courts constitute evidence and credibility through the ways in which they argue their decisions. My research thus asks about what Valverde (2000) terms *effects* rather than *interests* because I consider the significance of arguing in particular ways and their effects on the readers rather than decision-makers' intentions for making those arguments. This further means that legal decisions have truth effects instead of revealing any underlying truths. In the interview material, the focus is similarly on how the interviews produce something, such as how the interviewees constitute themselves in relation to institutionalized discourses on rape.

The first article in the thesis is a comparative analysis of legal decision-making practices in compensation cases from the Compensation Authorities and the criminal courts. I analyze written legal decisions on rape and consider how the two institutions constitute evidence and credibility. The third article is a document analysis of verdicts from the courts analyzing how they invoke common sense in their reasoning of criminal guilt. The second and fourth articles are based on an analysis of interviews with rape victims. The second article investigates how victims invoke different models of psychological trauma when they narrate the harm of rape. The fourth article examines how victims invoke a game metaphor to create room for agency in court.

### **Written Legal Decisions from the Compensation Authorities**

The Compensation Authorities process criminal injuries compensation for crime victims after police have dismissed their cases. To consider how the Compensation Authorities handle rape cases and thereby construct knowledge of rape, I decided to analyze written legal decisions

from the Compensation Authorities. The Compensation Authorities address compensation applications from victims of sexual violence based on the police investigations of their cases. The case files consist of police reports, including forensic and medical reports. I wanted access to the case files in addition to the decisions, but legal decisions regarding criminal injuries compensation are not public information. To gain access to both the decisions and the associated case files, I had to send an application to the Ministry of Justice and the Police<sup>3</sup>. I first approached the Compensation Authorities and asked them whether it would be possible to conduct my planned research and whether they would facilitate it. The Compensation Authorities responded positively and recommended my application to the Ministry of Justice and the Police. My application was approved under the condition that I not reveal any identifying information. Accordingly, I have anonymized identifying information in the decisions and avoided referencing case numbers in publications.

The Compensation Authorities is a bureaucratic office with caseworkers with legal education. Most caseworkers starting with the agency have recently completed their legal education, and turnover is high because the office is on a small island called Vardø in northern Norway. I conducted a field trip to the Compensation Authorities' office and spent one week in the office collecting cases for my study. While there, I had opportunities to talk informally with caseworkers during lunch hours.

At the office, I had electronic access to decisions and the associated case files. I started to select cases but had to anonymize all the documents I wanted to bring with me, both decisions and case files. A case file usually included the compensation application and a police report including medical and forensic reports. All the documents in the case file amounted to a large number of pages, typically around 100–200 pages. Quite a few of these pages were standardized forms that typically included identifiable information. For this reason, it took a long time to anonymize the documents in the casefiles that I wanted to take with me. I, therefore, made an agreement with the Compensation Authorities, which was approved by the Ministry of Justice and the Police, to gain electronic access to the Compensation Authorities' system from Oslo through a secure server. This arrangement facilitated my work substantially because then I did not have to take any more cases out of the system and anonymize them. Instead, I directly worked with the cases in the system through a laptop from the

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<sup>3</sup> To grant me access to the decisions and associated case files to facilitate my research, caseworkers with the Compensation Authorities had to be relieved of their duty not to disclose confidential information, which in Norwegian is called: *fritak fra taushetsplikt*.

Compensation Authorities. However, I could not print any documents and had to work on two computers at the same time, reading decisions and case files on one computer and writing on my own computer. Additionally, my access to the laptop from the Compensation Authorities was time limited.

Through the electronic system, I accessed a list of cases developed by the department head of caseworkers at the Compensation Authorities. He made the list based on the results of a search for cases concerning the rape provision and dismissed by police for a lack of evidence. The list included the case numbers and the applicants' names and birthdates for all cases from 2015, creating a total of 512 cases. I started at the beginning of the list and selected cases with female applicants older than age 16 years. I excluded cases involving domestic violence as they often included more than one indictment. Moreover, I excluded cases involving male victims and female perpetrators because these cases constitute few, if any, of the legal decisions regarding rape. Additionally, I excluded cases involving the rape of daughters by fathers because I believed that evidence and credibility would have different meanings in these cases. Based on these criteria, I selected 50 cases from 2015. About half of these cases resulted in compensation being awarded, and half in denial of compensation. I made this selection to serve the purposes of the study, and it did not reflect the overall share of awarded cases.

The written decisions were usually two or three pages long. About half of a document was an explanation of the decision, while the rest was mostly standardized text with references to sources of law. The formulation of the Compensation Authorities' decisions usually started with a presentation of the evidentiary material in a short summary of relevant police interviews, usually with the victim, defendant, and other witnesses, in addition to extracts from reports on forensic scientific evidence. The summary of the evidentiary material offered little, if any, explanation of how the legal caseworker interpreted the evidence. After the summary, a conclusion with a brief justification was offered. The language was characterized by general and standardized phrases, including passive and impersonal formulations in old-fashioned language.

I used the case files to gain access to background information about the cases. By reading the case files, I could see what information was available to the caseworkers and how they used it to justify their decisions. In this way, I could recognize information left out from the decisions. For example, if a granted decision was justified by reference to DNA evidence but



without any explanation of why and how the DNA evidence was relevant, the police interviews in the case files contained information on how the defendant accounted for the incident and whether the accused claimed consensual sex or denied any sexual contact. Since DNA evidence is usually only relevant if the accused denies sexual contact or does not know the victim beforehand, it is relevant to know what the accused testified. However, the decisions tended to leave out this information. Access to the case files facilitated the analysis by making it possible to consider the kind of information the caseworkers left out.

### **Written Verdicts from the Courts**

In Norway, both district and appellate courts review evidence to make decisions regarding criminal guilt and liability to pay compensation. A related criminal case and compensation case are processed during the same legal trial, so the written verdicts include decisions for the questions of both criminal guilt and compensation claim. To consider how the criminal courts assess rape cases and accordingly construct knowledge of rape, I decided to analyze written verdicts from district and appellate courts. I had access to court verdicts through the University of Oslo's Lovdata database<sup>4</sup>. Additionally, decisions may be requested directly from the courts, which usually are very accommodating. Verdicts are public information, so anyone may access them. The verdicts published in Lovdata do not have identifiable information such as the names and addresses of the people involved. The only identifiable information in the verdicts is the case numbers. Given that verdicts are public information, I decided to use the case numbers in publications of my analysis. This approach raised ethical issues because my decision could potentially direct unwanted public attention to those involved in the cases (although without identifying any persons) and risked exposing some courts and judges to criticism. Despite these potential risks, I decided that it was important that other scholars could verify the information I used from the verdicts.

I selected cases in the database by searching for decisions based on the rape provision. I looked through the most recent decisions to select cases using the same criteria as applied to cases from the Compensation Authorities. The cases selected for a comparative analysis in article one were from the Courts of Appeal. These courts gave the grounds for the decisions on criminal injuries compensation made by legal judges but not the questions of guilt decided by juries. I selected all the Court of Appeals cases during 2015 and 2016 I found published in

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<sup>4</sup> Lovdata includes sources of law and various legal decisions and is available to subscribers.

the Lovdata database that fit the inclusion criteria. I performed the search in the middle of 2016, so more cases have been added to the database since my search. The selection comprised 26 cases, and all but one resulted in a ruling of liability to pay compensation.

For the second article, I analyzed the grounds for decisions regarding criminal guilt in cases from the district courts and the Courts of Appeal. All the cases included in this analysis were decided on by a mixed panel of legal judges and lay assessors. I selected 15 district court cases from 2014 to 2016. I requested a few of these cases directly from the courts because the database included only a few acquittals. Juries decided rape cases in the Courts of Appeal until 2019, when the use of juries was discontinued. However, the legal judges supervising juries could set aside jury decisions if convinced they were wrong. Such cases were then rescheduled with a panel of lay assessors and legal judges who stated their reasons for the decisions. From the Courts of Appeal cases, I selected all rescheduled trials published in Lovdata since 2011. I found 14 rescheduled cases, half of them from 2015 and 2016. I selected a total of 29 cases from both the district courts and the Courts of Appeal.

The written verdicts usually were three to eight pages and were formulated rather differently than the legal decisions from the Compensation Authorities. The court verdicts often started with a short summary of the incident in question, typically on what the victim and perpetrator agreed before continuing to the contested parts of the case. When the judges reviewed disagreements, evidence in favor of and against the accounts of the aggrieved person and the defendant was considered, and discussion of the relevance and value of the evidence in question continued. Sometimes, the summary was based on the testimony of the aggrieved person if the decision was in her favor, with a review of the evidence substantiating her rape claim. Although the structure of the written legal decisions varied, the contested points generally were discussed, and an explanation of how the evidentiary material contributed to the judges' conclusion was offered at the end of the decision. The language was quite accessible, without complicated legal concepts.

### **Interviews with Victims of Sexual Violence**

To consider sexual violence victims' reflections on how experts and institutions process rape cases and how this knowledge shapes their processes of self-making, I decided to perform qualitative individual interviews. Interviews can give knowledge about people's reflections on norms, expert knowledge, and institutionalized practices. Interviews also enable investigating

how interviewees identify and see themselves as particular kinds of subjects through the ways in which they speak of their selves based on the available subject positions (Bacchi and Bonham, 2016; Bonham and Bacchi, 2017). I consider the reflections appearing in interviews and the ways in which interviewees constitute their selves in research interviews to be products of the interviews. According to Kvale and Brinkmann (2008: 1), “the research interview is an inter-view where knowledge is constructed in the inter-action between the interviewer and the interviewee.” In qualitative research, the researcher common is considered to inevitably be part of the situation studied (Maxwell and Reybold, 2015).

To be able to conduct research interviews, I was obliged to protect the interviewees’ privacy and respect their dignity and integrity according to the Research Ethics Act, Personal Data Act, and Guidelines for Research Ethics in the Social Sciences, Humanities, Law, and Theology developed by the Norwegian National Research Ethics Committee<sup>5</sup>. Before recruiting participants for the research interviews, I notified the data protection services at the Norwegian Centre for Research Data. I decided to recruit participants who could consent to participation by themselves, which, in Norway, meant that the participants had to be age 16 years or older.

I decided to recruit interviewees through institutions and organization working with victims of sexual violence because the project focus was on expert knowledge and institutionalized practices. This approach was also the easiest means to contact victims of sexual violence because it allowed more convenient outreach to the target group, and professionals could facilitate the recruitment process. The advantage of recruiting through institutions and organizations was that the interviewees were in a system of care, which could create a safe framing of the interview. The system of care could allow me to more easily gain the interviewees’ trust and provided a safety net for interviewees who needed further support. However, in a disadvantage, the interviewees might have thought that I was affiliated with the institutions and organizations that distributed information about the interview study. Consequently, the interviewees might have felt obliged to participate or thought that they would gain benefits by participating in the interviews. Furthermore, they might have hesitated to criticize the help they received from the professionals in these institutions and organizations. To avoid the pitfalls of association with other institutions and organizations, I

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<sup>5</sup> <https://www.etikkom.no/en/ethical-guidelines-for-research/guidelines-for-research-ethics-in-the-social-sciences--humanities-law-and-theology/>

emphasized throughout the recruitment phase that I was a researcher from the University of Oslo and worked independently of these organizations and institutions.

When I approached institutions and organizations that potentially could facilitate contact with rape victims, I told them I was performing a socio-legal study about rape as part of doctoral studies in sociology of law. I sent them an informational letter describing the interview study. I stressed my previous experience conducting qualitative interviews with victims of rape and terror to address any concerns about my qualifications to conduct research interviews with victims of violent crimes. I contacted a self-help center for raped women and men, hospital-based sexual assault centers, organizations working against honor-based violence, a youth health care center, a university health care center, high school advisors and nurses, victims' counsels, and a law student organization giving free legal advice to women. The organizations that agreed to distribute information about my project and helped me recruit interviewees posted on Facebook an announcement<sup>6</sup> of the project I made, advertised my study on their premises (e.g., offices, meeting rooms, and bathroom stall doors), and directly asked rape victims if they would like to participate in the study.

In the advertising letter and poster, I did not mention the word rape but instead asked questions about experiences with sexual victimization, such as "Have you been forced to have sex when you did not want to, and did you feel violated afterwards?" "Has anyone had sex with you when you were sleeping or too intoxicated to resist?" I did not mention the word *rape* to avoid excluding women who did not define their experiences as rape because the term tends to be interpreted narrowly and is often associated with violent stranger rape (Gavey, 1999). Anyone who wanted to participate could contact me by phone, text message, or e-mail.

The organizations responded to my request in a number of ways. Two organizations and some victims' counsels assisted me in disseminating information about my project, and a number of victims contacted me to sign up for interviews. Other organizations distributed information about my project, but their work did not result in any women signing up for interviews. One organization rejected my request because it had received a large number of requests from other researchers and said it was too time consuming to assist all. Some never responded to my request. Others rejected my request and made arguments that, in different ways, suggested that they wanted to protect the victims due to their vulnerability and the risk of disturbing

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<sup>6</sup> The announcement was a short version of the information letter.

their psychological healing process. Quite a few were concerned about victims' mental health and assumed that interviews could potentially harm them. Accordingly, they felt a need to protect victims by creating a safe space within their institution or organization. Some organizations argued that timing could be challenging because they only encountered raped women immediately after rape or in relation to trials. In this way, they portrayed victims as especially vulnerable in certain situations. Some organizations, especially those that did not specialize in helping rape victims, said that rape is a sensitive subject that is inappropriate to address when somehow "out of context." Most of these arguments constructed victims as vulnerable, research interviews as potentially retraumatizing, and rape as an issue that should be handled by specialized professionals in appropriate settings. These constructions have commonly appeared in research on violence based on the concern that recalling traumatic experiences such as rape is distressing and prompts retraumatization and secondary victimization (Burgess-Proctor, 2015). Based on these arguments, the organizations rejected my request in the name of trauma. They used trauma as a language of protection, and this might indicate how prominent the trauma discourse has become.

Rejecting my request to facilitate recruitment of rape victims for research interviews in this manner, the organizations acted as gatekeepers, keeping me as a researcher away from rape victims. "Gatekeepers are individuals who have some power over the research location, and have the ability to control access to a research site and contacts with potential study participants" (Chaudhuri, 2017: 132). The gatekeepers' concerns regarding victims' vulnerability could also have been influenced by their perceptions of the researcher (Kennedy-macfoy, 2013). Perhaps they viewed my qualifications as insufficient because I was a social scientist doing socio-legal studies at a university rather than a medical or psychological scientist or professional with a health care institution.

These organizations and their gatekeepers were supposed to protect their users, and their decisions to deny me access to potential study participants could have been correct. However, when gatekeepers deny researchers access to victims of sexual violence in general, they exclude victims as a group from the knowledge production process. Although research interviews are not appropriate for everyone in every possible situation, excluding victims of sexual violence as a group from research can be considered to be problematic because it limits understanding of criminal victimization, and rape victims themselves often express a desire to participate in research to make a difference (Burgess-Proctor, 2015). Furthermore, the

emphasis on vulnerability and trauma keeps the focus on the rape victim rather than the researcher's ethical obligation to do no harm. According to Fineman (2010), the concept of vulnerability traditionally has been applied to set aside groups based on their perceived disadvantageous individual characteristics. However, she contends, vulnerability is a universal human condition that can be lessened and compensated through institutional arrangements and social relationships. In this way, she attempts to detach the concept of vulnerability from specific subgroups and to redirect attention to how the distribution of power and opportunities through institutions and social relationships make distinctions among people, not human characteristics. Applied to research ethics, Fineman's theorization of vulnerability implies that the focus should be on conducting responsible research rather than on subgroups as vulnerable. I, therefore, attempted to obtain informed consent throughout the recruitment process and to give the interviewee some control over the interview situation.

To gain informed consent, I wrote an informational letter about participation in the research interview that the institutions and organizations distributed to potential participants. In the letter, I stated that I wanted to interview victims of sexual violence, and the aim of the interviews was to gain knowledge of how victims of sexual violence make sense of their experiences in light of legal and medical knowledge of sexual violence. I explained that the interviews would be conducted in a flexible manner, allowing the interviewees themselves to decide how much information they wanted to share. I shared that the interview topics would be victimizing experiences, interactions with medical and legal professionals, and everyday life before and after the victimizing incident. I further promised that I would treat information about the participants as confidential, and participation in the study would be anonymous. When potential interviewees contacted me, I gave them more information about the project and the research interview before asking if they had additional questions. I did the same at the beginning of the interviews. I described in as much detail as possible how the interviews would be carried out and explained that the participants could ask for a break or withdraw from the interviews at any time. I wanted to make participation as predictable as possible. I also told the interviewees that they could contact me later to get more information about the project or to withdraw from the study. After conducting the interviews, I kept the interview recordings on a password-protected USB stick locked in a locker in my office. The stored

interview recordings did not include the interviewees' names or other identifying information. In addition, all the interviewees were anonymized in the publications.

I recruited 24 participants for interviews. Twelve of the participants had reported sexual violations to police, and six of these women had their cases prosecuted. The violations were perpetrated mostly by men the women knew (i.e., friends, acquaintances, ex-boyfriends, dates, and relatives); only three perpetrators were strangers. The participants' ages ranged from 18 years old to mid-50s. The most recent experience with rape was about three months before the interview, and the oldest experience occurred about 27 years before the interview. Most participants were in their 20s and had experienced rape within the last three to five years. The only inclusion criteria were women older than age 16 years with self-defined experiences of sexual violence.

The interviews lasted from approximately one hour to almost four hours, but most lasted about two hours. The interviewees choose the interview locations. I did most interviews at my office at the University of Oslo, a few at the interviewees' offices after working hours, and one at the interviewee's home. I wanted to record all the interviews but was prepared to only take notes if any interviewees did not want me to record the interviews. All the interviewees consented to recording the interviews. However, during one interview, I decided to turn off the Dictaphone after a while because the interviewee obviously was not comfortable speaking while I was recording. Before the interview, she talked a lot and with ease about the interview topics. Once I turned on the Dictaphone, though, her voice became strained, and she spoke only short sentences in a formal tone and language. When I paused the Dictaphone, she talked easily again, but when I restarted the Dictaphone, she became constrained. I, therefore, decided to complete the interview without recording it.

I conducted all the interviews but had someone else transcribe most of the interviews after signing a declaration of confidentiality. I started the interviews by asking the participants about their thoughts when they read my advertisement. I did this to prompt their reflections on how they conceptualized their experiences because I assumed that they had reflected on whether they qualified to participate in the study when they saw my advertisement. As I intended, many participants reflected on whether they could conceptualize their experiences as rape and accordingly whether they were qualified to participate in the study. However, many also expressed their motivations for participating in the study, which were usually related to helping others by contributing to knowledge production of sexual violence.

To conduct the interviews, I used a narrative approach inviting the interviewees to tell me about their experiences. I opened questions with phrases such as “tell me about” and “tell me more about.” The narrative approach is based on the premise that people tell stories to organize and connect important events in their lives, and they present these stories in a manner to direct attention to particular aspects of their lives (Riessman, 2008). I chose this approach because I wanted an open, flexible structure in which I could explore issues important to the interviewees that I could not have anticipated. During the interviews, I tried not to interrupt the narrative but took notes to be able to ask follow-up questions later. To facilitate continuation of the narrative, I sometimes said “yes” and “hm,” paused for a while, and repeated the last words the interviewees had said. When the interviewees stopped narrating their experiences, I picked up on themes and issues from the narratives.

I was especially interested in statements indicating that the interviewees somehow problematized their conduct in relation to established norms (Bacchi and Bonham, 2016). For instance, one interviewee quoted in article four sometimes described herself as cynical in her narrative. I was curious what she meant by cynical and why she considered herself to be cynical, so throughout the interview, I picked up on this issue to encourage her to explain and reflect on it. I found that she considered herself to be cynical because she acted strategically in relation to the legal processing of her case. By describing herself as cynical, she indicated that she was not conforming to norms of victims’ appropriate courtroom behavior.

Most narratives included the incident, interactions with institutions and organizations (e.g., police, court, health institutions, and organizations helping sexual assault victims), and the interviewees’ everyday life (e.g., work, school, university, and interactions with family and friends). These were the same themes I wanted to cover in the interview and prepared in the interview guide. If the narratives did not include any of these themes, I ask the participants to tell me about these topics. Additionally, I encouraged the interviewees to reflect on how they related their selves to concepts such as rape and victim. For instance, I noted what words they used in their narratives (e.g., rape, sexual assault, and sexual abuse) and asked why they used those terms. Although desired, a narrative approach was not always suitable. Some interviewees talked less and preferred more structured interviews. In these cases, I asked specific questions based on the interview guide throughout the interviews.

In the analysis of the interview data, I worked with the transcripts while simultaneously listening to the recorded interviews. Transcripts tend to lose some information such as pauses,



emotions, and sometimes even the meaning of the sentences. However, working solely with recordings complicates the coding process because there is no text to code and take notes on. I, therefore, worked with both transcripts and recordings to facilitate the coding process and ensure that I did not lose any information.

### **Analysis of the Legal Decisions and Interview Material**

I analyzed the data material by applying a theory-informed reading influenced by Foucault's (1972) writings, particularly on discourse. Foucault is sometimes associated with discourse analysis because he uses the word *discourse* (Valverde, 2000), but his concept of discourse refers to knowledge, not language (Bacchi and Bonham, 2016; Foucault, 1972). Foucault's concept of discourse was relevant to my analysis of the data material because my interest was knowledge. I focused on how the legal decision-makers evoked, relied on, and dismissed various types of knowledge in their decisions. The legal decisions valued and undermined medicine, psychological knowledge, and common-sense knowledge in various ways and to different degrees. Sometimes these knowledges were pitted against each other, and sometimes they complemented each other. Additionally, I considered how these discourses appear in the victims' narratives of rape.

Foucault's (1972) concept of discourse was also valuable to consider in relation to knowledge production processes in the legal system, especially the transformation of medical knowledge into legal facts. According to Foucault, discourse consists of statements, and each statement is linked to the *act* of speaking or writing and the *materiality* of manuscripts or recordings. In other words, a statement is a *doing* that *produces* something. This simultaneous practice and product constitute the materiality of his concept of discourse. Furthermore, according to Foucault, a statement is unique yet is subject to repetition, transformation, and reactivation. In my understanding, therefore, a statement can be repeated, but its meaning is unique.

Moreover, new concepts appear as old concepts are transformed and reactivated. For example, the meaning of the concept of trauma has been transformed from a physical wound to a psychological wound and has moved from the medical emergency room to the psychological therapeutic room (Hacking, 1994). When psychological trauma enters the court, its meaning is further connected to the question of guilt and the victim's credibility. In a rape trial, the victim's psychological trauma indicates that the sexual incident happened without consent or by means of force. However, to make sense, a statement has to derive meaning and value

from existing and future knowledge. For instance, it makes sense to use psychological trauma as evidence in court because it has already been closely linked to rape and harm in psychological clinical practice and research. A statement that potentially contradicts previous knowledge (e.g., consensual sex is traumatizing) does not make sense because it contradicts previous knowledge. A statement derives its meaning and becomes accepted as true based on previous statements and associated practices and institutions in a discursive field (Schaanning, 1996). The psychological trauma discourse thus constitutes evidence and credibility in legal decisions regarding rape, which became apparent in my analysis of the legal texts in the first article in this thesis.

A central concept in Foucault's (1972) work is the object of discourse. By *objects*, he means, for instance, *madness*. To study an object is not to study the object per se but instead the discursive formations that allow it to appear. A discursive formation is a group of statements that are different in form and dispersed in time but refer to the same object. To study discursive formations entails a focus on how, when, and where an object appears in talk and practices (Schaanning, 1996). An object appears through the various ways in which people with different statuses and expertise talk about and act on it at different times within distinct institutional settings. To study trauma evidence, therefore, is not to study trauma evidence as such but to study how trauma appears in legal decisions. In my reading of the legal texts, I focused on how legal decision-makers constitute evidence and credibility through the ways in which they argue and justify their decisions. In this process, I noted that trauma appears in the arguments of legal decisions, especially in relation to the victim's credibility.

To study the formation of objects, we need to map the surface of their emergence, that is, the places they appear. In addition, we must establish who has the authority to define and name an object. The object of psychological trauma appeared in psychological clinics and therapeutic settings long before it was included in the *DSM-III*, in which psychology and psychiatry defined and named the object of trauma (Herman, 1997). Foucault (1972) argues that the psychiatric discourse is characterized by the way in which it forms highly dispersed objects made possible by the discursive relationships established between medical and legal institutions and processes. An example of a discursive relationship between medical and legal institutions is courts' use of psychological trauma as evidence in criminal trials. Today, psychological trauma appears in not only therapeutic settings but also legal institutions, which became evident in my analysis of the legal texts and the interview transcripts. In the legal

texts, trauma tended to appear in the ways in which the victims' credibility was reasoned. In the interview transcripts, trauma tended to appear in the ways in which the interviewees narrated the harm of rape. Trauma discourses appeared in the interviewees' narratives in relation to their interactions with both medical and legal institutions.

The central Foucauldian notion of problematization was important in my analysis (Bacchi, 2012; Arribas-Ayllon and Walkerdine, 2008). This concept has different meanings. In the analytical approach developed by Bacchi and termed "What's the Problem Represented To Be?," problematization possesses two distinct meanings (Bacchi and Goodwin, 2016). First, it refers to the process of critically analyzing assumptions and presuppositions in texts and other data sources—in other words, questioning what is taken for granted in texts. Foucault (1972) argues that questioning the self-evidence of a discursive object highlights that its unity is variable and relative. It shows that unities are not given but are constructed because institutional discourses tend to produce objects in a manner that make the productive activity disappear so that the objects appear to be natural and factual (Rodemeyer, 2017). According to Bacchi (2012), questioning the taken-for-granted in a text does not mean to reveal any illusionary truths or find the "real" truth; instead, it questions the ways in which something becomes a truth. In other words, it dismantles the status of what Foucault (1972) calls objects of discourse (e.g., madness) as fixed, naturalized entities. Problematization emerges in practices, Bacchi (2012) adds; for instance, madness arises from social and medical practices. The madman thus is simultaneously caught and defined in a network of institutions and practices.

Second, problematization refers to how people (e.g., politicians and experts) make problems into certain kind of problems (Bacchi and Bonham, 2016). Accordingly, the analyst's task is to consider how these problems have been made. To problematize is to make something "problematic" and, therefore, visible and knowable (Arribas-Ayllon and Walkerdine, 2008). Problematization tends to occur at the intersections of different discourses and to display knowledge and power relations (Arribas-Ayllon and Walkerdine, 2008). Problematization allows analysts to question taken-for-granted assumptions and trace how discursive objects are constituted and governed.

Bacchi and Goodwin (2016) argue that their analytical approach is designed to analyze what Foucault (1986, p. 12–13) calls prescriptive texts "written for the purpose of offering rules, opinions, and advice on how to behave as one should" (Foucault 1986:12-13 in Bacchi, 2012:

3). I considered the legal decisions to be prescriptive texts because they made judgements on (in)appropriate behavior in relation to the criminal act and the reasonable behavior of both the accused and the accuser in a case. Additionally, the legal texts advised how the victims should behave because the prosecutors and victims' lawyers based their advice to the victims on previous rulings. This was something the interviewees talked about in the interviews. I therefore used the concept of problematizations to analyze the legal decisions.

I used the concept of problematizations to critically analyze the legal decisions, particularly the assumptions and presuppositions in the legal texts, and to question what the decision-makers took for granted and problematized in the legal decisions. I considered how the decision-makers' sometimes presented the evidence and claims by parties in cases as true, sometimes did not comment on them, and sometimes problematized them. Sometimes the decision-makers presented claims as true by simply stating that they were true or credible. To identify the ways in which things were taken for granted, I looked for what the decision-makers presented as given and apparently needing no further explanation or justification. When the decision-makers silenced explanations and justifications, they contributed to presenting things as true and natural. To dismantle these naturalized entities, I tried to identify things not communicated in the texts using a comparative method. I compared decisions by the two legal institutions, grants/rulings and rejections/acquittals, the ways in which different knowledges were presented, and whether the same kind of evidence was presented in different ways in various decisions. I thus could more easily recognize what was not communicated in decisions. The decisions varied, and the decision-makers emphasized various aspects in their writings, so this comparative method facilitated readings of the texts to make apparent what the texts did not communicate. For instance, when comparing decisions from the two legal institutions in article one, I noted that they valued and depended on different types of knowledge. The Compensation Authorities silenced credibility appraisals and placed much emphasis on forensic science without offering any explanation of why and how it was relevant. The criminal courts, though, placed much emphasis on credibility appraisals and discussed what made things and people credible.

Problematizations make things visible because they include evaluative judgements of the things problematized. To identify what the decision-makers problematized in cases, I looked for formulations indicating value judgements in which the decision-makers presented a person or thing as unthinkable, normal, abnormal, incredible, odd, or peculiar, among other

descriptions. These formulations indicated and created assumptions about what the courts considered to be normal, good, right, and desired. The decision-makers typically formulated these value judgements in old-fashioned, formal language downplaying the content of these expressions. For instance, rather than writing that the accused lied, they stated that his story was constructed, or his claim beggared belief or was contrary to expectations<sup>7</sup>. These formulations appeared to be peculiar and were quite noticeable in the legal texts, so they caught my attention, and I investigated them in article three. Many of these expressions typically reappeared in a number of decisions. I realized that these value judgements constituted part of the credibility appraisals and were based on common-sense knowledge. Additionally, these judgements privileged common-sense knowledge by problematizing expert knowledge usually taken for granted in the decisions.

Accordingly, the concept of problematization was central in the analysis of the interview material. This notion can be used to consider the ways in which interviewees problematize their conduct in relation to established norms (Bacchi & Bonham, (2016). Statements made in interviews often have normative implications that establish ways for people to be and make apparent how interviewees can speak of themselves as particular kinds of subjects (e.g., gendered subjects) (Bacchi and Bonham, 2016; Bonham and Bacchi, 2017). I, therefore, focused on how the interviewees talked about their selves in relation to institutional discourses, particularly how they identified themselves with subject positions in relation to processes of victimization and traumatization. Much of what is said in interviews appears to be ordinary, common knowledge, or common sense, posing a challenge to the analytical process because it makes it difficult to choose what to scrutinize in the interviews (Bacchi and Bonham, 2016). Bacchi and Bonham's (2016) analytical approach encourages analysts to look for comments that appear unusual, inappropriate, or out of context. Accordingly, in the individual interviews and across the interviews, I looked for contradictory and ambiguous comments and statements that at first appeared to make little sense because they challenged what commonly was taken for granted.

I started the analytical process by simultaneously reading and listening to a few interviews. At the same time, I took notes to gain an overview of the statements and their formulation in each interview. Many interviewees seemed to be occupied by specific issues that reappeared

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<sup>7</sup> In Norwegian, these expressions are called *konstruert/oppkonstruert, står ikke til troende, and mot formodningen*. It is challenging to translate these expressions to English without losing their meaning or the characteristics of the formulations.

throughout the interviews in different ways. These occupations often expressed the interviewees' problematizations of their own and others' conduct in relation to institutional discourses. After conducting a few interviews, I started to compare the interviews. At this point, I had a decent overview of central issues in the interviews and started to decide which issues to pursue in the analytical process. Then I performed the rest of the interviews with a particular focus on these issues.

I identified the first issue, discussed in the fourth article, after working with an interview<sup>8</sup> in which the participant made some unusual comments about the legal trial of her case. At least, her comments appeared unusual to me at this point in the analytical process. She explicitly compared her legal trial to a game and problematized her role in it. This issue reappeared throughout the interview, raised by both the interviewees and the interviewer (because it also caught my attention during the interview). I thought her comments were surprising, and I became interested in mapping the ways in which the interviewees invoked the game metaphor and other legal metaphors. While rereading this interview and other interviews looking for legal metaphors, I realized that most interviewees who had been to court applied the game and stage metaphors but in more subtle ways than this interviewee. For this reason, I had not noticed these metaphors earlier in the analytical process.

I identified the second issue, which I write about in article two, after noticing that some interviewees seemed to make contradictory comments regarding psychological health and trauma. A few interviewees explicitly and strongly resisted the trauma label, while others appeared to resist the label but also made ambiguous comments regarding their future health. These ambiguous comments, in particular, caught my attention. The interviewees typically stated that they felt fine now and did not think they needed help from therapists, but they did not know whether they would have a breakdown in the future. I could not make sense of this statement at first and decided to map and analyze the ways in which the interviewees talked about psychological trauma.

In this thesis, I also problematize and challenge some assumptions about sexual violence. I question the appropriateness of what has become a dominant framework for understanding sexual violence, especially within legal and medical institutions: the psychological trauma framework. Doing so raises ethical issues because psychological trauma has been used to gain

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<sup>8</sup> This was the last interview I conducted but one of the first I worked with in the analytical process.

recognition for rape victims. Any attempts to scrutinize the trauma framework, therefore, can be read and understood as criticism of victims. However, I am not trying to raise any suspicion toward rape victims but solely am scrutinizing trauma as expert knowledge. Fassin and Rechtman (2009) examine what they term a dual genealogy of trauma: a scientific and moral history of trauma. The scientific history is concerned with the definition of trauma and is characterized by historical continuity, whereas the moral history is concerned with acknowledgement of trauma victims and is characterized by discontinuity, starting with suspicion transforming into recognition. In this thesis, I am concerned with the scientific development of the trauma framework, but doing so might be read as criticism of trauma victims if one does not separate the moral and scientific dimensions. I question not the status or the suffering of victims but solely the scientific definition of the PTSD diagnosis and its prevalence within the field of sexual violence.

### **Validity and Transferability of the Knowledge Claims in this Thesis**

The data are from the Norwegian context, in particular, institutions working with rape victims and the Norwegian legal system. The data material thus is localized in a specific context, and the knowledge produced in this thesis is specific to this context. However, the knowledge claims presented in this thesis are not necessarily limited to this particular context. A common aim of research is to be able to generalize the knowledge produced beyond a particular context to increase its value and utility. However, generalizability is a contested concept. The traditional meaning derived from statistics “refers to the extent to which a study’s results apply to a wider range of people and settings than those actually studied” (Maxwell and Reybold, 2015: 688). Statistical generalization requires probabilistic sampling methods rarely used in qualitative research (Maxwell & Reybold, 2015). A common approach in qualitative research called purposeful or theoretical sampling is to select participants or other study objects capable of answering the research questions, which makes it impossible to do statistical generalizations from the sample to the population sampled.

Alternative concepts to generalizability developed within qualitative research are transferability, applicability, and analytical generalizability. Transferability and applicability describe knowledge claims that “*may* apply more broadly, depending on differences in the nature and context of the situation to which they are transferred” (Maxwell and Reybold, 2015: 688 emphasis in original). Analytical generalization refers to “a reasoned judgement

about the extent to which we can use the findings from one study as a guide to what might occur in another situation” (Kvale, 1999: 107). The context, therefore, is important when considering the transferability of a study. Moreover, the transferability of knowledge claims has to be argued; it cannot be uncritically or automatically assumed. Finally, the reader or the person making the transfer—not the original researcher—determines the applicability of knowledge claims. Andenæs (2000) argues that knowledge claims apply not only to other phenomena or the same phenomenon in different situations but also to conceptual frameworks. Knowledge claims can be made in relation to concepts, models, and theories. For instance, if a concept developed or reconceptualized in one study can be applied in the analysis in another study, that knowledge claim is transferrable.

To consider the transferability of knowledge claims, it is necessary to look back to how the knowledge was produced and to look forward to how it may be applied to other situations. Looking back entails evaluating the validity or quality of the research conducted, including the data material and the interpretations of it (Polkinghorne, 2007). The quality of the data material depends on clarifying what it is intended to represent. In this thesis, what the legal decisions and the interview material are intended to represent is clarified. The Compensation Authorities’ legal decisions and the court verdicts included in this thesis are intended to represent the decision-makers’ stated reasons and justifications for decisions. The decisions do not necessarily present detailed depictions of everything that happened in court. The decisions leave out much information, and the decision-makers frame the information included. I, therefore, cannot claim to have detailed knowledge of the cases or access to the victims’ narratives of the incidents, so I use the legal decisions to analyze how the decision-makers constitute evidence and credibility through the ways in which they argue their decisions. Similarly, I use the interviews with victims of sexual violence to analyze their *reflections* on how experts and institutions process rape cases, not how experts and institutions actually process rape cases.

The validity of my interpretations of the material depends on how I account for the gathering and analysis of the data material, how thick the descriptions of the cases I present are, how I contextualize them, how I argue for the relevance of the literature and the theory I apply, and how I formulate and structure my arguments (Polkinghorne, 2007). The reader has to be convinced of the validity of my interpretations, so accordingly, I can test it on different audiences (Kvale and Brinkmann, 2009). I have presented the analyses in all the articles to



researchers at the Center for Gender Research at the University of Oslo, where I work; researchers in my network; researchers at the Center for the Study of Law and Society at Berkeley Law, where I was a visiting scholar; attendees at various national and international conferences; and peer reviewers in different journals, in addition to my supervisors. Based on comments from these readers, I have sometimes had to better contextualize and account for how I conducted the analysis. I have also revised some of my interpretations. Validity judgements allow for gradations of confidence and the aim is to develop not necessarily consensus but a certain degree of credibleness or trustworthiness through dialogue (Kvale and Brinkmann, 2009; Polkinghorne, 2007).

I propose that some knowledge claims in this thesis, although made in particular contexts, can be useful as a guide of what might happen in similar situations and can be applied conceptually in other studies. I suggest these possibilities for two reasons. First, I focus on knowledge discourses that exist not only in Norwegian institutions but also in similar institutions in other Western countries. Second, my analysis is conceptual and does not make any claims about what the Norwegian legal system is.

### **Introducing the Articles: The Victim Identity**

In the introduction of this thesis, I point out that Foucault's (1978; 2014) conceptualization of the disciplinary discourses in the legal system is not concerned with the victim of sexual violence. In his writing, it appears that disciplinary power operates solely on the offender's body. However, I argue that disciplinary power also operates on the victim's body. This is particularly evident in the Norwegian context because implemented reforms increasing victims' rights have integrated the victim as an active participant in legal proceedings. The victim now occupies a central space in an institution characterized by disciplinary discourses. In recent decades, the victim has also become a central stage of criminal justice policy initiatives, partly due to political concerns regarding victims' welfare and access to justice. However, this new attention to victims' rights and welfare can also be explained by the legal system's acknowledgement of its failure to combat crime (Garland, 1996).

To ensure victims' access to justice, the authorities aim to increase the numbers and quality of rape investigations and prosecutions. One means to accomplish this aim has been to

implement measures that facilitate forensic medical examination in all rape cases. For example, the authorities have created and disseminated information leaflets through various channels to encourage victims to report rape to police and consult hospital-based sexual assault centers for forensic medical examinations. This encouragement is prominent on the Internet portal “A National Guide for Assistance, Information, and Knowledge Available on Rape and Violence”<sup>9</sup> developed by the Ministry of Justice and Public Security for victims, perpetrators, and their relatives and friends. The national guide attempts to persuade the victim to consult a hospital-based sexual assault center and police as quickly as possible after the incident, even if the victim does not feel like talking to a doctor or police<sup>10</sup>. The national guide acknowledge that the victim might prefer to take a shower, throw away the clothes she was wearing during the incident, and hide from everyone instead. However, the victim is strongly encouraged to resist these temptations, and the national guide emphasizes that if the victim manages to consult a sexual assault center, she can receive medical and psychological help and secure evidence if she at some point decides to report the case to police. Assault centers, police, and other organizations repeat this message<sup>11</sup>. Such a message can discipline the victim, directly and through family and friends, to transform her body into evidence. The victim can transform her body into evidence if she consults a sexual assault center or police as soon as possible after the incident and has a forensic medical examination. She can increase the utility of her body by avoiding showering or changing clothes. This preserves biological traces that indicate sexual contact and injuries that suggest the use of force and allows documenting them before they disappear.

If the victim consults police or a sexual assault center, she most likely is introduced to a network of legal, medical, and psychological experts. If the victim contacts police first, they usually escort her to a sexual assault center to conduct a forensic medical examination. If the victim consults a sexual assault center, it offers her assistance contacting police and a victim’s counsel. In addition, the sexual assault center offers referrals to psychiatrists and psychologists and gives information about other follow-up services. The victim thus potentially can become entangled in a network of experts who examine and evaluate her body and mind. The experts take notes, fill out forms, and write the results in various reports that

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<sup>9</sup> <https://dinutvei.no/en/#>

<sup>10</sup> <https://dinutvei.no/utsatt/254-orke-du-ikke-legevakt-eller-politi-na>

<sup>11</sup> [https://www.politiet.no/en/rad/voldtekt-og-seksuelle-overgrep/utsatt-for-voldtekt-eller-seksuelt-overgrep/http://uni.no/media/manual\\_upload/64351\\_engelsk\\_trykk.pdf](https://www.politiet.no/en/rad/voldtekt-og-seksuelle-overgrep/utsatt-for-voldtekt-eller-seksuelt-overgrep/http://uni.no/media/manual_upload/64351_engelsk_trykk.pdf)

can be presented as evidence in court. In Norway, psychological trauma is admissible as evidence in court, so forensic, medical, and psychological reports are created and can be presented as evidence in rape trials. The network of experts and the examinations they conduct thus can constitute the victim as a describable, analyzable object of knowledge.

In court, the legal gaze is directed toward the victim when the court evaluates the evidence presented in court and considers the victim's credibility. This is because in rape cases, the victim's body becomes a crime scene and is scrutinized through the written reports and the testimony evidence presented in court. The court examines the clues and marks on the victim's body and accordingly evaluates its legibility. The court also considers the victim's inner wounds, in other words, the psychological trauma of the incident. The court evaluates the evidence and the victim's credibility to make judgements regarding guilt and liability for paying criminal injuries compensation. In this process, the court can make potentially normalizing judgements. Legal decisions reward the victim who successfully transforms her body into evidence by convicting the defendant or awarding compensation.

### **Article 1: “Embodied Truths and Authentic Selves—the Constitution of Evidence and Credibility in Rape Cases”**

This article is a comparative study of legal decisions regarding criminal injuries compensation in rape cases by two institutions in Norway. I compare written legal decisions from the Compensation Authorities with written verdicts from the criminal courts. The Compensation Authorities decide criminal injuries compensation from the state, while the criminal courts determine the accused's liability to pay compensation to the victim. In these written decisions, the Compensation Authorities and the criminal courts state the reasons and justifications for their decisions. When they give the grounds for their decisions, they invoke, rely on, and dismiss various kinds of knowledge, such as forensic, medical, and psychological knowledge. I investigate how these two institutions consider the relevance and value of different kinds of expert knowledge and thereby constitute evidence and credibility through the ways in which they reason their decisions.

In my analysis, I use the concept of chronotopes, which refers to time-space and how spatial and temporal dimensions interact with and shape one another (Valverde, 2015). I apply this concept to analyze how the incident (here, rape) is chronotopically transposed from the past to

the present and from the crime scene to the legal institutional space through expert knowledge to allow the legal decision-makers to make decisions. For instance, in temporal proximity to the incident, police investigators collect biological traces at the crime scene, and hospital medical experts examine the victim's body (and sometimes that of the accused). Next, laboratory technicians test the biological material and finally write the results in a report presented in legal institutions distant in time and space. I further use the concept of legal chronotopes to show how the space-time of the two institutions simultaneously shapes the kinds of expert knowledge adopted and valued by the legal institutions. These two legal institutions constitute different spaces (the bureaucratic office and the courtroom) governed by different rules and procedures regarding the presentation of evidence (the former depends on written documentation; the latter on the principle of orality). The two institutions thus are chronotopically distinct, and for this reason, they adopt and value expert knowledge differently and consequently constitute evidence and credibility in different ways.

My analysis in this article shows how victims who successfully transform their bodies into evidence are rewarded with criminal injuries compensation. Victims who consult the right institutions at the right time increase the possibility of transforming their bodies into evidence. This is because victims who consult police or sexual assault centers immediately after incidents have timely forensic medical examinations, which increases the likelihood of finding biological clues to analyze for DNA and documenting physical injuries. However, not all bodies are marked or stained by these incidents, which means that they have no evidence to collect. Additionally, bodies can only tell whether there was sexual contact and who had contact with whom, not whether incidents were consensual. Still, victims can gain credibility by consulting the right institution at the right time because their behavior implies that they were raped. Finally, victims who continue to consult therapeutic experts for a while after incidents can have their trauma reactions documented and presented in court.

This article shows how institutional discourses contribute to constituting evidence and credibility in legal decisions regarding rape. This suggests that the ways in which victims navigate institutions after rape can corroborate or undermine their rape claims. By consulting the right institutions at the right time, victims can benefit their rape claims because they transform her body into evidence and increase their credibility by doing what the experts expect them to do.

## **Article 2: “Narrating the Harm of Rape: How Rape Victims Invoke Different Models of Psychological Trauma”**

In this article, I analyze qualitative interviews with rape victims investigating how psychological trauma emerges in their narratives of rape. I thus consider the ways in which the trauma discourse shapes how victims make sense of and respond to experiences of rape. Psychological trauma has become the main framework for understanding the impact of rape on individual victims. Accordingly, rape victims have to relate their selves to the trauma discourse in their interactions with various health institutions and self-help organizations. When victims report rape to police and consult sexual assault centers and therapists, they usually become introduced to a network of medical, psychological, and legal professionals in which the trauma discourse appears to be prominent. The institutions and organizations working with rape victims seem to make the trauma discourse relevant to some extent regardless of how rape victims themselves view their health.

Trauma traditionally has been understood as a mental illness conceptualized in opposition to normality. This dichotomous model normalizes judgements by professionals who classify people according to diagnostic criteria distinguishing normal people from traumatized (or abnormal) people. However, the dichotomous model of trauma now competes with a scale model that conceptualizes trauma on a scale of normality. Within this model, trauma is considered to be something victims can develop in the future if they do not take responsibility for their health. Consequently, victims are encouraged to and rewarded for taking responsibility for their future health by participating in various interventions in relevant institutions. Health thus becomes an institutionalized doing in which victims can choose to comply with institutionalized norms.

I argue that the interviewees primarily talk about trauma on a scale of normality portraying trauma as a condition they can develop if they do not take responsibility for their health. In this way, they can escape trauma and thus the potentially stigmatizing effects of psychiatric labels. However, escaping trauma in this manner also makes trauma inescapable because it imposes a continued commitment to take responsibility for their health.

This article directs attention to the network of institutions that turn victims into objects of knowledge. This network constitutes medical, psychological, and legal institutions that cooperate in processing rape cases and treating rape victims. Once victims disclose rape, they

are often encouraged to consult institutions in this network, and they tend to become entangled in it because the institutions cooperate. Within this network, victims risk normalizing judgements through diagnostic examinations and being held responsible for their future health. The ways in which trauma is modelled further entangle victims in the network. The dichotomous model with its normalizing judgement keeps a hold on victims throughout therapeutic treatment. The scale model keeps a hold on victims through the obligation to prevent trauma through institutional consultations. The trauma discourse thus makes it difficult to escape the institutional network after rape. However, institutional consultations can affect the ways in which legal decisions are made, so being entangled in this network might also benefit victims' legal cases, as discussed more in the fourth article.

### **Article 3: "Common Sense, (Ab)Normality and Bodies in Norwegian Rape Verdicts"**

In this article, I analyze written rape verdicts from district and appellate courts in Norway. I focus on common-sense reasoning, which constitutes an important part of legal decisions. Common-sense reasoning refers to non-expert knowledge and judgements rooted in daily life experiences and contributes to decision-makers' legal discretion. I study how the female victim's body appears in written rape verdicts by investigating how common sense invokes ideas about the normal and the abnormal. My aim is to further conceptualize common sense by theoretically and empirically connecting it to the concepts of normality and the norm to direct attention to how common-sense reasoning constitutes a normalizing legal gaze.

In this article, I show that the victim is subjected to evaluations by the judges in a trial. These evaluations are not informed by expert knowledge (e.g., forensic evidence) but by common-sense perceptions of the victim's body. The judges' common-sense perceptions of the victim's body shape the ways in which they interpret forensic evidence. For example, if they consider the victim's body abnormal because it is uncommonly large and strong, forensic evidence of physical injuries is not necessarily interpreted as indicating the perpetrator's use of force but rather how easily the strong body bruises. In this way, the victim's body becomes evidence that can tell the court whether the incident was rape or consensual sex. When the judges rely on common sense, they invoke ideas about the normal and the abnormal and accordingly make normalizing judgements. In this way, common-sense reasoning constitutes a normalizing legal gaze.

This article suggests that even if the victim consults the right institutions at the right time after rape, as described in the earlier articles, she might not benefit from her actions if the judges consider her body to be uncommon. Consequently, it does not necessarily matter what the victim *does* after rape because the judges are more concerned about who she *is* based on a reading of the size and shape of her body. This article further suggests that when making judgements in court, the judges do not solely rely on expert knowledge but also draw on and sometimes privilege common-sense knowledge.

#### **Article 4: “It’s All Just a Game’—How Victims of Rape Invoke the Game Metaphor to Add Meaning and Create Agency in Relation to Legal Trials”**

This article studies the game metaphor sometimes used to characterize legal trials. The game metaphor traditionally has been associated with legal professionals’ work in court. In this article, I investigate how the game metaphor adds meaning to rape victims’ understanding and experiences of legal trials and creates room for agency in the prosecution of their rape cases. By agency, I mean how rape victims actively pursue their aims in court by navigating and responding to the constraints of the legal process in various ways. The article is based on interviews with rape victims whose cases were prosecuted.

I show how the game metaphor is related to the stage metaphor because victims need access to the legal stage to play the legal game. Participation rights give victims access to the legal stage, and once on it, they can perform appropriate reactions and responses to rape to increase their credibility. Furthermore, they can speak the language of truth by invoking the trauma discourse. By redefining the rape trial as a game, victims can behave strategically to try to win the game. However, the game metaphor creates a dilemma: by playing a strategic game, victims risk undermining their credibility.

This article shows how victims can actively pursue their aims in court even if legal constraints limit their scope of action. Their agency is partly related to their participation rights but also to the ways in which they navigate the institutional network before their case comes to court. If they consult the right institutions at the right time and continue consulting appropriate therapeutic institutions to show that they take responsibility for their health to prevent trauma, experts can document their actions and present them as evidence in court. In this way, victims can produce trauma evidence without feeling traumatized because the scale model of trauma

is primarily concerned with prevention rather than diagnosing trauma. Consequently, they can invoke the trauma discourse in their testimonies, perform appropriate emotions on the legal stage, and corroborate these emotions by the ways in which they navigated the institutional network before the trial. Evidence and credibility thus become doings that give victims some scope of action. However, when victims start behaving and speaking in terms of medical and legal discourses, they simultaneously confirm the victim identity produced by the disciplinary discourses.

### **The Legible Victim**

Together, these four articles show how the disciplinary discourses of the legal system create a new victim identity. The disciplinary discourses encourage the victim to report sexual violence to police to have the offender convicted. This approach often concurs with the victim's own interests. She wants to have her offender convicted, so she complies with the disciplinary discourse. To succeed, the victim needs to transform her body into evidence to increase its utility in convicting the defendant. The disciplinary discourses shape the ways in which the victim is supposed to respond to and handle rape. These discourses thus normalize reactions and responses to rape. By responding according to the disciplinary discourses, the victim further increases her credibility because her responses substantiate her rape claim. Once the victim consults a sexual assault center or police, she becomes entangled into a medico-legal network that examines and evaluates her body and mind to turn her into an object of knowledge. In this network, the victim is subjected to diagnostic, prognostic, and normative judgements related to psychological trauma and evidence collection. The legal gaze thus is directed toward the victim rather than the incident itself.

In this way, the disciplinary instruments and procedures of the legal system create a victim identity that the victim has to affirm in court. When the victim behaves and speaks as proscribed in medical and legal discourses, she confirms the victim identity produced by the disciplinary discourses. Consequently, the legal decisions are shaped by the ways in which the victim navigates medical and legal institutions and acts in court after rape. The legal decisions further discipline future victims because legal professionals tend to base their legal advice to victims on previous rulings.

The disciplinary discourses of the legal system construct a victim identity: a legible rape victim. This victim has a body marked by bruises and other injuries and stained with semen



and other bodily bits and fluids from the perpetrator. Her body is normally sized and shaped, not abnormally large. Her mind is also injured or traumatized, and she accordingly displays emotional and bodily reactions and distress. Furthermore, she acts and speak in terms of medical and legal discourses of rape. By reading her body and mind and interpreting the ways she acts and speaks, experts can consider throughout legal proceedings whether the woman claiming to be raped is, in fact, a rape victim.

Norwegian authorities increasingly seek to manage sexual violence because they seem unable to combat this crime. In this adaption to failure, in Garland's (1996) terminology, the Norwegian authorities focus on directing most incidents of sexual violence through the legal and medical systems. According to Foucault (2014), disciplinary measures work through inclusion rather than exclusion by making the subject an object of analysis. By disciplining all rape victims into the legal and medical systems, the authorities can give the impression that they are doing something to combat rape. Additionally, disciplining victims in this manner produces predictable victims who report rape to police and seek help rather than unpredictable victims who potentially threaten society through revengeful acts or become social liabilities due to poor mental health. In this way, rape is managed rather than combatted.

The legible victim differs from victim identities previously described in the sexual violence literature. The earlier victim identity criticized by feminist researchers is associated with passivity, which is problematized by its association with being female (Ericsson, 1993; Walklate, 2007). This gendered victim identity accordingly is related to the victim's sense of self. Similarly, the victim identity proposed by Taylor (2019) is also related to the victim's sense of self because it emphasizes that rape harms or, more specifically, sexually scars victims because sexual experience is caught up with identity. In contrast, the legible victim is created by an institutional gaze that considers how evident it is that a person is a victim based on how easy it is to read signs of sexual violence in her body and conduct.

## Discussion

### From Victim-Blaming to Disciplinary Discourses

Since the early victimological research focused on victim typologies, researchers and activists have both seen victim-blaming as a common concern. Concepts such as rape myths, ideal victims, secondary victimization, and extralegal factors have been used to illustrate and problematize the ways in which female victims of sexual violence are blamed for what has happened to them and are denied symbolic victim status. This literature emphasizes women's reputation, which is closely related to whether their conduct *before* and *during* the incident in question matches appropriate female behavior. This research suggests that the problem with the legal system is that it judges rape cases or, rather, female victims based on stereotypical sex and gender assumptions. The high attrition of cases of sexual violence in the legal system accordingly is criticized for and explained by prejudiced decision-makers. In other words, the problem in the legal processing of sexual violence is conceived to be prejudiced attitudes in the legal system. The proposed solution to this problem is to secure more and better evidence in rape cases to counter victim-blaming attitudes and increase conviction rates. Consequently, the focus is to investigate institutional practices related to the production of forensic evidence, such as medical examiners' use of rape kits and police's failure to forensically test rape kits. Additionally, the legal system is criticized for not taking into account how victims might be psychologically traumatized and for not using psychological trauma to inform credibility assessments. This literature suggests that legal decision-making should focus on expert knowledge produced *after* the incident in question, rather than women's conduct *before* and *during* the incident in question.

In other words, the solution to the problem of victim-blaming attitudes in the legal processing of sexual violence is to increasingly depend on experts and institutional discourses regarding sexual violence. This solution portrays forensic science, medicine, and psychology as unbiased and able to inform the legal system of the truth in cases of sexual violence. This way of relying on science has been criticized. Quinlan (2017) argues that rape kits are a technoscientific witness that, unlike victims, has gained credibility as a reliable witness of sexual assault because the technology has gained trust. Despite this trust, however, she remarks, it is far from clear that evidence developed from rape kits actually improves victims' chances of prosecution and conviction. One reason for this, according to Quinlan, is that in all

non-stranger rape cases—the majority of rape cases—the accused can argue that the incident was consensual sex, rendering any DNA evidence useless because it can only prove sexual contact, not a lack of consent.

Quinlan (2017) also notes that DNA evidence can create expectations of scientific corroboration of women's reports, termed the “*CSI* effect.” Popular television shows such as *CSI: Crime Scene Investigation* communicate that testimonies and circumstantial evidence should be distrusted in favor of crucial bits of physical trace evidence such as DNA (Lynch et al., 2010). The popularity of these shows has raised concerns about a possible *CSI* effect, that is, that watching *CSI* and similar shows increases jurors' expectations of and demands for scientific evidence to convict defendants (Lynch et al., 2010). Although most studies have concluded that there is no such effect, Shelton, Kim, and Barack (2006) argue that expectations of scientific evidence have increased among all jurors, not only those watching *CSI* and similar shows. Shelton et al. (2006) call this the “tech effect,” referring to broader changes in society related to scientific and technological advancements. Rather than a *CSI* effect, these shows simply depict scientific and technological developments in society in general. Jurors' expectations of and demands for forensic evidence, particularly DNA evidence, are especially high in rape cases (Shelton et al., 2006).

The technoscientific witness of rape highlights the increased focus on expert interventions in the investigation and adjudication of sexual violence. Criticism of this increased reliance on expert knowledge, though, has not pointed to the problems associated with disciplinary discourses. I argue that increased reliance on institutional discourses and experts directs attention and focus to the victim. Rather than the incident, the victim is scrutinized. Accordingly, the outcome of the legal case depends on the legibility of the victim, which, in turn, rests on how the victim navigated the institutional network after the incident.

This thesis, therefore, suggests that in the Norwegian legal system there has been a shift in focus from considering the female victim's reputation based on what she was doing *before* and *during* the incident to interrogating what she did *after* the incident. Her conduct after the incident relates to various experts and institutional practices. Rape has become an experience about which expert knowledge is claimed and produced through the medical and legal processing of rape. This knowledge transforms rape into a public concern that creates expectations of how victims should respond to rape to secure legal redress. Expert knowledge, furthermore, creates the legible victim.

This shift in focus from what the victim was doing *before* and *during* the incident to what she did *after* the incident can be characterized as a shift from victim-blaming attitudes to disciplinary discourses. When I characterize this as a shift, I do not necessarily mean that disciplinary discourses have replaced victim-blaming attitudes; the disciplinary discourses and victim-blaming attitudes might co-exist with various emphasis on either one, but they do represent two different logics in the legal system. This thesis points to the existence, workings, and effects of these two logics.

The disciplinary discourses have created an institutional network that victims have to navigate and can be characterized as a medico-legal network that works together to produce knowledge or evidence of the incident in question (Mulla, 2014; Quinlan, 2017). This network creates evidence by referring to each other. This evidence is used to corroborate rape claims in legal cases. Similarly, victims gain credibility if they consult various institutions in the network, which can be documented in legal cases. The ways in which this network works to produce evidence and credibility suggest that it has self-referential or autopoietic (Luhmann, 1988) characteristics because it is mostly concerned with its own internal workings rather than factors outside it.

### **Agency and Disciplinary Power**

Victims' agency is a recurrent topic in the literature on rape, particularly in relation to the concept of the victim. As discussed in this thesis, the concept of the victim tends to be linked to passivity, and agency tends to be associated with responsibility and, therefore, blame (Ericsson, 1993; Walklate, 2007). The perceived connection between agency and blame is considered to be related to women's conduct in relation to rape, such as whether they violate informal norms regarding appropriate female conduct in relation to the rape. In this context, agency refers to the possibility to be an active person without being blamed for rape. In this thesis, I show that the disciplinary discourses require an active victim who consults institutions and transforms her body into evidence, who *does* something to enhance the chances of convicting her perpetrator. In this way, agency becomes a consequence of institutionalized discourses regarding rape and is not solely related to norms of appropriate female conduct.

However, the disciplinary discourses contribute to responsabilizing the victim. Munro (2017) describe how UK police campaigns have responsabilized women by encouraging them to avoid

making themselves vulnerable to sexual assault by drinking too much or walking home alone at night. Similarly, I argue that when the victim is encouraged to transform her body into evidence, the disciplinary discourses make her responsible for the outcome of the case. The police and the legal system thus do not have to take responsibility for the decision made in the case. Instead, they can point to the lack of evidence in the case because the victim did not consult the right institutions at the right time. Without evidence, the legal system cannot convict the offender. Accordingly, the victim is responsible not only for initially avoiding rape but also for the outcome of the legal case. Increased focus on potential victims' responsibility to avoid crime constitutes part of what Garland (1996) called the process of responsabilization. In this process, the problem of crime no longer needs solving but managing—and not by state agencies but by individual citizens. I argue it is not only potential victims but also actual victims are made responsible for avoiding crime.

Agency is also relevant to Foucault's (2014) concept of disciplinary power. Discipline is not a repressive but a positive and normalizing form of power (McNay, 2007) because it produces meaning, desires, behaviors, and practices that can be both pleasurable and unpleasurable, liberating and oppressive (Gavey, 2005: 87). Discipline includes techniques of observation, measurement, reward, and punishment that pressure people to strive for conformity.

Foucault (2014) conceptualizes power as a positive force, but his view has been criticized for reverting to a negative notion of power in his one-sided analysis of institutional power (McNay, 2007). According to McNay (2007), Foucault's (2014) concept of docile bodies replaces a concept of subjects with the capacity for action. In this thesis, I show how the concept of docile bodies can be combined with the concept of agentic subjects. My analysis demonstrates that victims actively use the medico-legal network to pursue their interests, although their agency is simultaneously framed by legal constraints. Consequently, they can behave strategically in relation to the legal processing of their cases even though they have a limited scope of action. By analyzing the disciplinary discourses from the perspectives of both the legal system and individual victims, it is possible to consider how disciplinary power works without simultaneously erasing people's agency.

## **Concluding Remarks**

The victim does not appear in Foucault's (1978) story about the man in the village presented in the introduction. Foucault does not consider the victim in his writings on discipline. However, the increased focus on the effects of crime rather than its causes (Garland, 1996; Garland, 2000) suggests the victim will appear more often in various contexts. The more the victim appears in the legal system and criminal justice policy initiatives, the more likely it is that the victim will be subjected to disciplinary discourses. This is evident in Norway, making the country an illustrative case of how authorities' attempts to manage the problem of rape have disciplined and responsabilized rape victims. This development suggests that future research and theories of crime should direct more attention to the relationship between disciplinary discourses and crime victims.

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Accepted for publication in BioSocieties

## Narrating the harm of rape: how rape victims invoke different models of psychological trauma

**Abstract:** Psychological trauma has become the main framework for understanding the impact of rape on individual victims. Trauma has traditionally been understood as a mental illness conceptualized in opposition to normality. This dichotomous model of trauma is now in competition with a scale model in which trauma is conceptualized on a scale of normality. In this article, I study these two models of trauma by analyzing victims' narratives of rape. I investigate how trauma emerges in victims' narratives of rape to consider the ways in which the trauma discourse contributes to shaping how victims make sense of, and respond to, experiences of rape. The analysis is based on qualitative interviews with rape victims. I argue that the interviewees primarily talk about trauma on a scale of normality in which they portray trauma as something they can develop if they do not take responsibility for their health. In this way, they can escape trauma and, accordingly, the potential stigmatizing effects of psychiatric labels. At the same time, however, escaping trauma in this manner makes trauma inescapable, as it entails their continued commitment to take responsibility for their health.

**Key words:** psychological trauma, rape, (ab)normality, DSM

### Introduction

In the 1970s, the women's movement directed attention to rape and its consequences to repudiate contemporary trivializing attitudes and responses to rape. Quickly, rape became politicized and the target of social change. In this process, trauma became a means to ensure

the acknowledgement of rape victims' suffering because trauma directed attention toward the harm of rape. As early as 1974, Burgess and Holmstrom concluded in a study of rape victims that rape has detrimental health consequences, and the authors delineated the rape trauma syndrome. However, it was not until 1980 that the American Psychiatric Association (APA) decided to include posttraumatic stress disorder (PTSD) as a part of its third revision of the Diagnostic and Statistical Manual of Mental Disorders (DSM). PTSD was included in DSM after Vietnam veterans had paved the way for recognition of trauma by contributing to develop knowledge and treatment programs for traumatized veterans and the women's movement had formed an alliance with mental health professionals (Fassin and Rechtman, 2009; Herman, 1997). The trauma framework has since become a dominant way of understanding the impact of rape both inside and outside therapeutic rooms (Gavey and Schmidt, 2011; Egan, 2016; Marecek, 1999).

The medicalization of trauma has contributed to the acknowledgement of the existence and harm of sexual violence by connecting the traumatic event with psychiatric symptoms (Breslau, 2004; Fassin and Rechtman, 2009; Herman, 1997; Kleinman and Desjarlais, 1997). In this way, victims' reactions and behavior can be explained by the trauma framework as a normal reaction to an abnormal situation, rather than the other way around, which is as a pathological reaction to a normal situation (Fassin and Rechtman, 2009). The trauma diagnosis therefore represents an important shift in the ways in which psychology/psychiatry perceives women. According to Marriner (2012), these disciplines have traditionally pathologized female victims of men's violence by diagnosing women with hysteria and masochism, which has contributed to erasing male culpability. The etiology of the traumatic event has accordingly relocated the cause of distress outside of women (Fassin and Rechtman, 2009). Therefore, the diagnosis of trauma can be distinguished from psychiatric disorders that tend to pathologize women, and it represents a preferred diagnosis for feminist psychologists



(Marecek, 1999). However, the medicalization of trauma simultaneously transforms rape into an experience in which expert knowledge is claimed, which, in turn, shapes the ways in which victims understand the causes and consequences of victimization.

Accordingly, the medicalization of trauma has caused concern among some researchers. Psychiatric diagnostic standards, in general, and the trauma diagnosis, in particular, have been argued to contribute to medicalizing social problems, as well as pathologizing and stigmatizing victimized women (Gavey and Schmidt, 2011; Lamb, 1999; Romelli et al., 2016). McGarry and Walklate (2015) therefore question the appropriateness of trauma as a conceptual tool to make sense of victimization. According to Guilfoyle (2013), a psychiatric diagnosis can be considered a knowledge system that creates pre-scripted accounts of what a person is. These accounts privilege expert knowledge and reduce alternative avenues of personhood. The diagnostic system, Guilfoyle continues, therefore pushes people to understand themselves through the diagnostic lens of trauma in order to know the truth about themselves.

The criticism of the diagnosis of trauma outlined above portrays trauma as a mental illness conceptualized in opposition to normality—a dichotomous model in which psychological/psychiatric knowledge and practice define who is within the scope of normality. However, this way of modeling trauma is now in competition with a scale model, which conceptualizes trauma on a scale of normality (Sweet and Decoteau, 2018; Rose, 2001a). The introduction of the scale model represents the shift from medicalization, e.g., the process of making problems medical to emphasize control over them, to biomedicalization, e.g., the further emphasis of the transformation of medical phenomena by technoscientific means for enhancement or optimization (Clarke and Shim, 2011; Conrad, 2005). The scale model fuses trauma with other health discourses and further appears in non-medical institutions.

In this article, I study these two models of trauma by analyzing victims' narratives of rape. I investigate how trauma emerges in the victims' narratives of rape to consider the ways in which the trauma discourse contributes to shaping how victims make sense of and respond to experiences of rape. The analysis is based on qualitative interviews with rape victims. I argue that the dichotomous model is not particularly apparent in the interviewees' accounts. Only a few interviewees talk about trauma in this manner and accordingly resist or embrace this trauma framework. Most interviewees talk instead about trauma on a scale of normality, in which they portray trauma as something they can develop if they do not take responsibility for their health. In this way, they can escape trauma and thus the potential stigmatizing effects of psychiatric labels. At the same time, however, escaping trauma in this manner makes trauma inescapable, as it entails their continued commitment to taking responsibility for their health. The two models of trauma appear through the victims' interactions with institutions working with rape. Victims are encouraged to consult these institutions when they disclose rape. The trauma discourse both permeates and connects medical and legal institutions and practices. This is because the development of the trauma diagnosis entailed the development and institutionalization of various interventions and treatment programs. Trauma has also spread to other societal institutions, as psychiatric diagnoses elicit rights to various welfare benefits. Furthermore, trauma has gained the status of proof and is used as legal evidence when the police investigate and the courts adjudicate rape. I therefore begin by describing the institutionalized context before accounting for the two models of trauma.

#### The institutionalized context

In Norway, the government has aimed at combating rape for the last 10 years by implementing a plan to increase the quality of forensic medical examinations in rape cases, and, further, to encourage all rape victims to undertake a medical examination and report the rape to the police (NOU2008:4). Another important aim has been to strengthen access to

psychological treatment and promote cooperation between experts and institutions working with rape victims. These aims have created institutional practices that have contributed to making rape an experience that requires expert knowledge and intervention. In turn, this has transformed rape into a public concern, in which a network of institutions and practices is initiated whenever someone claims to have been raped.

A similar network of medical and legal professionals and expert practices has been described in the US and Canada (Marriner, 2012; Bumiller, 2008; Quinlan, 2017). At the core of this network, Quinlan (2017) contends, is the sexual assault center and the rape kit that draw together various knowledges and coordinate expert efforts that contribute to increasing victims' credibility. According to Marriner (2012), these knowledges reinforce one another so that truth claims of both law and psychology/psychiatry benefit by invoking the other. When victims report a rape to the police or consult a sexual assault center, they become intertwined in this expert network (Quinlan, 2017; Marriner, 2012).

In Norway, the first sexual assault center was established in the capital Oslo in 1986 (Dahl, 1993). According to Dahl (1993), this center was opened in response to the poor treatment accorded to rape victims by public health services. At the time it opened, Dahl initiated a longitudinal study of rape that aimed to identify the nature of the health problems caused by rape. At this time, knowledge of psychological trauma was limited in Norway. The study concluded that nearly half of the participants had developed PTSD a year after the incident. The sexual assault center used to be called the rape crisis center, but it changed its name after an evaluation of the center suggested that many victims do not consult it if they are raped by someone they know because they associate the concept of rape with a violent rape by a stranger (Fladby, 2004). Today, every county in Norway has a sexual assault center located at a public hospital, usually in relation to the emergency room, which conducts forensic medical examinations. This examination includes the collection of biological samples to test for DNA

and toxicology. During the forensic medical examination, documenting physical injuries to prove violence or the lack of consent in rape cases is also common. The assault centers additionally offer medical treatment and psychological evaluation, as well as a short-term psychological follow-up that is free of charge. During the psychological evaluation, the examiner documents the victim's immediate psychological reactions, which will be used in the criminal investigation of the rape case. The short-term psychological follow-up includes an introduction to various self-help strategies. These strategies are published on YouTube<sup>1</sup> and on different websites offering psychological help<sup>2</sup>. In addition, other resources are available online, such as trauma-related apps<sup>3</sup>. The self-help strategies advise on how, for example, to control intrusive thoughts and images, bodily uneasiness, and sleep disturbances. One such strategy for controlling intrusive thoughts and images asks victims to imagine their thoughts and images as appearing on a TV screen. Then, the victims are supposed to imagine that they can stop, play, rewind, or fast-forward the thoughts and images with an imagined remote control. In addition, the victims are supposed to imagine that they can move the images around on the screen. Advice on how to ease bodily uneasiness includes breathing techniques, massage, physical exercise, and controlling the consumption of substances. An example is reducing caffeine, sugar, and nicotine intake. A strategy<sup>4</sup> to cope with anxiety attacks is to exercise in order to induce the bodily physiological reactions that are common during panic attacks, such as increased heartbeat and shortness of breath, and thus learn how these bodily reactions ease off quickly if the victim accepts them rather than tries to fight them. These strategies encourage the victims to take responsibility for their own lives when they do not attend therapeutic sessions.

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<sup>1</sup> <https://www.youtube.com/watch?v=YVExdTPaPSs>

<sup>2</sup> <https://krisepsykologi.no/> [www.kognitiv.no](http://www.kognitiv.no) (ABC øvelser) [www.krisepsyk.no](http://www.krisepsyk.no) (SMART)

<sup>3</sup> [https://www.ptsd.va.gov/public/materials/apps/index.asp?utm\\_source=hootsuite&utm\\_campaign=hootsuite](https://www.ptsd.va.gov/public/materials/apps/index.asp?utm_source=hootsuite&utm_campaign=hootsuite)

<sup>4</sup> <https://www.kognitiv.no/wp-content/uploads/2014/11/Angst-en-alarmsreaksjon-TB-21.06.pdf>

The sexual assault center offers help to all victims of sexual violence, regardless of whether they choose to report the case to the police. Additionally, the assault center informs their patients about the long-term follow-up treatment available from other institutions, offers referrals to specialists, and assists rape victims with contacting the police and victims' counsel. In Norway, victims of sexual violence have the right to legal representation if they report their case to the police. The counsel will assist the victim and assure the victim's rights when interacting with the police and the legal system. Similarly, other health institutions, the police, and self-help organizations accompany the victims to a sexual assault center if they have not yet consulted one. This means that if a rape victim consults an assault center or any other institution, the victim will accordingly be introduced to a range of experts who will offer treatment and follow-up for a shorter or longer period. This further means that if a rape victim consults the assault center or the police to report the incident rather than to seek therapy, the victim will nevertheless be introduced to therapeutic interventions. In this way, it is the institutions and their experts who introduce the victim to the trauma framework.

The reports from the forensic medical examination and the psychological evaluation conducted at the assault center will be included in the police's investigation of the case, if the case is reported to the police. The reports will further be presented in court as evidence, if the police prosecute the case. Sometimes, the prosecutor will subpoena a professional at the sexual assault center to appear as an expert witness in court and explain the examinations and results. The prosecutor will present the forensic and medical reports in court, regardless of whether DNA evidence, physical injuries, or other forensic evidence is available to be reported on. In most cases, no forensic evidence is available, which means that the only thing to report on is the potential for trauma-related psychological reactions. For this reason, the initial psychological evaluation from the assault center, as well as the documentation from the long-term psychological follow-up of the victim, becomes important evidence in court.

According to Mulla (2014), rape crisis centers constitute a medico-legal complex in which legal considerations structure the medical examination. This means that the aim of collecting evidence that can prove rape shapes the ways in which the examination is completed. A crucial component is time, which frames the examination as urgent. The urgency is both medical and legal. Biological traces in the evidence collection can deteriorate if not collected in time, and sexually transmitted infections, pregnancy, and physical and psychological traumas threaten the victim's health. This medical urgency contributes to the professionals' readiness to intervene to secure the victims' future health.

Bumiller (2008) and Marriner (2012) have criticized this network of responders because they argue that it constitutes a professional apparatus that rationalizes sexual violence as a treatable problem. Professionals translate sexual violence into symptoms and transform sexual traumas into a disease that has to be managed to avoid a threat to public health. The victims become responsible for coping with their situation by means of therapy and drugs. The focus is on the victim who is rewarded for compliance with treatment programs that aim to transform the victim into a successful survivor. A successful survivor is a victim who is able to demonstrate psychological recovery via expert means (Sweet, 2018). A critical component of survivorhood, according to Sweet (2018), is creating a narrative of psychological transformation, which can be used to access aid. This medical narrative is valuable as currency to gain sympathy and recognition, as well as legal outcomes.

#### The two models of psychological trauma

The DSM-III is based on a biomedical construction of distress, in which trauma is conceptualized in opposition to normality (Young, 1997). The biomedical model was introduced to add scientific legitimacy to the diagnostic system (Romelli et al., 2016; Young, 1997) because the profession of psychiatry and the previous editions of the DSM had been criticized for lacking a scientific basis (Fassin and Rechtman, 2009; Young, 1997). To give

the DSM-III a scientific basis, the APA therefore created a standardized classification system based on the symptoms evident in acts and the bodily conditions intended to be universally recognizable and treatable (Young, 1997). According to Young (1997), the nosology included two main categories: symptoms of pain (distress) and symptoms of impairment in areas of functioning (disability). He explains that the original idea behind the classification system was that the symptoms are tokens of the underlying pathological structures and components of a system of meaning (a syndrome). The concept of psychological trauma—which, metaphorically, means a psychological wound—was created as an analogy to physical injury, which was the original meaning of the term trauma (Hacking, 1994; Young, 1997). In this way, the symptoms express a mental illness, or a psychological wound, which is a binary opposition to normality. The normal constitutes the key organizing concept of medicine, a concept that is both descriptive and evaluative (Hacking, 1995). Classifying humans according to diagnostic criteria always involves values, according to Hacking (1995), even if one attempts to strip the classifications of moral content by biologizing and medicalizing them. For this reason, people might want to embrace or resist these classifications because of their moral connotations. Additionally, people might change their behavior when labeled with a diagnosis, which again contributes to the change in diagnostic classifications.

According to Sweet and Decoteau (2018), the fifth and latest version of the DSM is no longer based on a binary model of normality but on scales of normality. In their article on debates surrounding the fifth edition of the DSM, Sweet and Decoteau (2018) point to the tensions between those who want to save the normal from increasing psychiatric labeling and those who want to achieve normality via psychiatrization. The critics of the proposed revision were concerned with the expanding scope of psychiatric diagnosis in contemporary life, whereas proponents considered normality to be the end goal of intervention. The first position considers normality as a natural foundation of the self, and the second position considers



normality as something achievable through optimization and medicalization. Underneath these positions, Sweet and Decoteau continue, normality is constructed either dichotomously or in terms of spectrums.

Sweet and Decoteau (2018) base the scale model on Rose's (2001a) argument that advances in the life sciences challenge the binary opposition between normality and abnormality, and this variation is the new norm. Within this model, health is conceptualized in terms of susceptibility and optimization. Susceptibility to various health conditions requires people to constantly monitor their health, engage in risk management, take care of themselves, and adjust their lifestyle to improve and promote their health (Rose, 2001a). In a world of susceptibilities, the new norm is to manage uncertainty in the present by attempting to identify and treat predicted future ills (Rose, 2007; Rose, 2001a). It is no longer individual suffering but professional predictions into the future that require medical attention and intervention. Rose (2001b) characterizes the intensification and generalization of health promotion strategies as a will to health. This, he continues, has opened up space for new health promotion professionals, including those he calls somatic experts—not just medical professionals but also alternative therapists and food and fitness experts (Rose, 2001a; Rose, 2007). In this context, Rose explains, people need to shape their life to restore the free autonomous individual who takes responsibility for his/her own life by behaving prudently. In this way, the scale model is transforming the trauma model into a hybrid field of knowledge, which engages a range of therapeutic and non-therapeutic institutions and practices.

The need to constantly work on the self in order to avoid trauma can be derived from the individual's relationship to the environment. Canguilhem (2012) conceptualizes illness and health as an individual's ability to adapt to his/her environment. He uses the concept of the individual norm, which refers to an individual's relationship to his/her environment. He explains illness as an individual's reduced ability to tolerate a changed environment and



health as an individual's ability to transcend the norm. According to Herman (1997), trauma destroys relationships, particularly one's relationships to others, to oneself, and to the community. A traumatic incident can therefore change or narrow an individual's relationship to his/her environment. In order to adapt to the new situation or to transcend it, an individual needs to work on his/her self.

When there is an expectation to work on one's self, the focus is on what one does, rather than on one's symptoms. This focus on doing is also characteristic of self-help groups. Valverde and White-Mair (1999) describe how the self-help organization Alcoholics Anonymous (AA) consists of a set of practices—the 12 steps—rather than a set of ideas. The members of AA work through the steps to recover, but recovery does not mean to be cured; rather, it is to learn to live peacefully with one's dysfunctions. The steps are not a means to an end, and recovery is not an end to be achieved, but instead, it constitutes a *doing*. The steps are a lifelong commitment to oneself and the organization.

In rape cases, professional opinions on how rape is traumatizing contribute to the construction of victims as vulnerable to a future breakdown. Thus, to avoid a breakdown, victims must take responsibility for their health by participating in different interventions offered by psychological professionals and other health promoters. Psychological concepts and insights, such as trauma, are integrated into alternative therapeutic interventions because, as Rose (1996) has noted, the psy disciplines have been eager to lend their vocabularies and explanations to other professional groups. Professionals working with rape victims accordingly constitute a hybrid field of knowledge that includes legal and psychological professionals and various self-help organizations and alternative experts. The two distinct models of trauma suggest that trauma is no longer simply a syndrome or a sign of pathology but a vulnerability that requires intervention, if a breakdown is to be avoided.

## Methods

In this article, I analyze qualitative interviews with women who have experienced sexual violation. I recruited the participants through a youth health center, an organization working with rape victims, and victims' counsel. The health center and the organization advertised my study on their premises (i.e. in offices and meeting rooms and on the inside of bathroom stall doors) and on Facebook. The victims' lawyers asked their clients directly if they wanted to participate. In the advertising letter/poster, I did not mention the word rape but instead asked questions about experiences with sexual victimization: for instance, "Have you been forced to have sex when you did not want to, and did you feel violated afterwards?"; and, "Has anyone had sex with you when you were sleeping or too intoxicated to resist?" I did not mention the word rape in order to avoid excluding women who do not define their experiences as rape; the term rape tends to be interpreted narrowly and is often associated with a violent stranger rape (Gavey, 1999). Anyone who wanted to participate could contact me by phone, text message or e-mail.

I recruited 24 participants for interviews. Twelve of these participants had reported the sexual violation to the police, and six had had their cases prosecuted. Not all 12 women who reported had consulted a hospital-based sexual assault center, but among all the interviewees, 13 had consulted a sexual assault center. Only three interviewees had not consulted any organization or institution in person; instead, they regularly visited such organizations on Facebook. Most interviewees had been violated by men they knew (friends, acquaintances, ex-boyfriends, dates, and relatives); only three perpetrators had been strangers. The interviewees' age ranged from 18 years to the mid-50s; the majority were in their 20s and had experienced rape within the last three to five years. The most recent rape had happened about three months before the interview, and the oldest had occurred about 27 years before the interview. The only inclusion criteria were being a woman and having a self-defined experience of sexual violation.

The interviews were audio-recorded and transcribed. I started the interviews by asking the interviewees to narrate their sexually victimizing experiences before I asked follow-up questions based on their narratives. I had an interview guide that included the topics I wanted to cover, such as interactions with family, friends, police, the assault center, the court, professionals and non-professionals regarding the rape. I also encouraged them to reflect on different concepts such as rape, victims and health. The interviews lasted from approximately 1½ hours to 4 hours.

Participation in the study was based on informed consent. All participants had to be 16 years or older to give consent for themselves. I conducted the study in line with Norwegian legal requirements and ethical guidelines for research.

My analysis is informed by the poststructural interview analysis approach developed by Carol Bacchi and Jennifer Bonham (2016). This strategy examines what is said in an interview and encourages reflection on how things that are said are considered intelligible, legitimate and truthful. It further scrutinizes what the things said *do* or *produce*. The key term in this analytical approach is problematization: that is, how the things said question what is commonly taken for granted and how the participants problematize the world in which they live. The starting point of this approach is that the things said invoke certain norms and establish ways for people to be. This approach consists of a set of questions to apply to the transcriptions to guide the analysis. For instance, “Precisely what is said in the interview?”; “How was it or is it possible to say those things?”; and “Which ‘things said’ put into question pervasive ways of thinking? (Bacchi and Bonham, 2016)” With regards to what is said in the interviews, I focus in particular on metaphors, both because the interviewees tend to talk about their health in metaphors and because metaphors can provide important information about the trauma discourse. According to Lakoff and Johnson (1980), our ordinary language and conceptual system are metaphorical in nature, such that metaphor structures not only our

language but also our thoughts and actions. Metaphors set meaning in motion because when metaphors are used, something is experienced and understood by means of something else. Lakoff and Johnson call metaphors that address health and emotions “orientational” metaphors because they have a spatial orientation that corresponds with one’s bodily or physical posture. For instance, they argue that “happy” is up and “sad” is down because sad people have a drooping posture, whereas happy people have an erect posture. Additionally, “conscious” and “health” are up, and “unconscious” and “sickness” are down because people sleep lying down and are forced to lie down when sick, whereas they stand up when they are awake and healthy.

#### The dichotomous model: how rape victims resist or embrace the trauma framework

Most of the interviewees (17) in this study include reflections on trauma or mental health in their narratives of rape. Trauma appears as a part of the interviewees’ narratives of rape in different ways. Some of these interviewees (6) invoke the dichotomous model, but most of them (11) invoke the scale model. The remaining interviewees (7) do not talk about trauma according to either models.

The interviewees who invoke the dichotomous model clearly distance themselves from the trauma model, or they speak about their experiences within a trauma narrative. These interviewees talk about the trauma model in either/or terms, placing themselves within or outside the trauma framework or the broader category of mental illness.

One interviewee claims that rape has not traumatized her. When I ask her if she has suffered from the incident, she replies as follows:

Yes, I have. Purely bodily, I did feel pain during the sex and after for several days. And I’ve suffered in the sense that, I did have, I know that there’s some clinical definition of what trauma is, but in the days following the incident, I did feel the way I felt. At the time, I

conceptualized it as a kind of trauma. Because I kept experiencing the incident over and over again. I was kind of haunted by these glimpses from that evening. And also, I suffered emotionally because I was very sad. For a long time, I didn't have sex with my girlfriend, and when we did have sex, for a very long time, I couldn't come because I couldn't let go.

Her brief mention of a clinical definition of trauma before stating that she conceptualizes what she feels as trauma indicates that she is making a distinction between an expert opinion and her conceptualization of her immediate reactions to the incident. Even if she conceptualized it as trauma initially, she does not define the incident as traumatizing at the time of the interview. She explains why in the following:

Let me first say that what I experienced those days afterwards wasn't trauma, and I wasn't traumatized. At that time, it felt like a kind of trauma. But I guess that trauma is something more lasting, and also, you know, what happened those days was just a very strong reaction, over a few days. I guess that trauma would've been that, perhaps, say I couldn't have sex for a long time afterwards. Perhaps if I was afraid or anxious for a long time afterwards, maybe then it could've been trauma.

The duration of symptoms is an important feature of the PTSD diagnosis (Young, 1997), and this interviewee is resisting the trauma category by claiming that her reactions to the incident did not last long. Her resistance can be interpreted as a way of escaping a psychiatric label with potentially stigmatizing connotations. Note, however, that she contradicts herself in the two quotes because she explains why it is and is not trauma in the same manner. This can indicate limited ways of narrating the harm of rape outside diagnostic categories (Bumiller, 2008; McGarry and Walklate, 2015; Guilfoyle, 2013). However, the interviewee is also using a different argument: she rejects the trauma framework because the term "traumatized" has gained a common sense meaning (Gavey and Schmidt, 2011). The interviewee says, "Maybe because we say it [trauma] when we want to emphasize and exaggerate things, then you're

traumatized.” Trauma has become a part of our everyday vocabulary—a metaphor for almost anything unpleasant (Fassin and Rechtman, 2009)—and this is why and how this interviewee uses the concept initially. The ways in which the concept of trauma has gained a common sense meaning makes it possible for her to resist the diagnostic framework. Still, she apparently feels the need to explain her immediate emotional reactions.

I’ve always been very emotionally extreme, kind of, I can be very, very—kind of ecstatic in one moment and feel hopeless in another. I can react very strongly to things, when normal people will just be annoyed and then forget about it or be sad and then, I don’t know. I can be very overwhelmed by feelings, and I can feel them so strongly it feels like I can’t be in my own body. (...) I just, I can react strongly, and then in a glimpse, it can pass, and I think that’s what happened. It was a very, very strong reaction for a few days, and then I could let go of it again. So, it wasn’t trauma, that’s my point. So it sort of makes sense that I reacted in that way because that’s my personality or pattern of behavior.

To avoid the trauma framework, she explains her initial emotional reaction as a part of her personality because any effusive or excessive emotions can potentially be considered abnormal (Sweet and Decoteau, 2018).

Another interviewee similarly distances herself from psychological categories. “It’s not like I’m mentally ill, even if I’ve had some mental challenges in this process.” When I ask her to elaborate on this, she replies as follows:

Well, I haven’t really been depressed or on a sick leave. It’s not like I’ve been floored and unable to work and function. I’ve basically functioned normally; I’ve been sad at times, but I don’t think I’ll call it depression.

In her account, psychological disorders do not fit her understanding of how the rape has affected her life. She is referring both to her feelings and to functionality when making her argument. In other words, she resists the trauma framework by referring to a lack of

symptoms of distress and dysfunction. She is not using the concept of trauma, but she is talking about her health in terms of everyday metaphors when she says she has not been floored. This metaphor suggests that she has been on her feet. Metaphorically speaking, to be on one's feet is to be healthy and good—good is up and bad is down, happy is up and sad is down, conscious is up and unconscious is down, and health and life are up, and sickness and death are down (Lakoff and Johnson, 1980). When this interviewee implies that she has been on her feet, she is further implying that she has not had a breakdown. She accordingly constructs the breakdown as a distinction between the normal and the mentally ill, placing herself firmly within the category of the normal. To break down belongs to the mind is a machine metaphor, which refers to mental experiences in which one ceases to function (Lakoff and Johnson, 1980).

A few interviewees, who talk about trauma in dichotomous ways, embrace the trauma discourse. One interviewee, who uses the concept of trauma throughout the interview and speaks of her experiences within a trauma narrative, explains how it is her “emotional life that is hurt by this [incident], not the body.” She also talks about pain: “It’s strange because a pain that’s so strong that you don’t want to live anymore is inside you, but it’s not bodily pain. If that makes any sense.” When she characterizes her emotional life as painful, she invokes trauma metaphors to account for symptoms of distress. Trauma metaphors include wounds, injury, pain, damage, and brokenness, which create an analogy to physical injury (Marecek, 1999; Young, 1997). These metaphors are different from the ordinary orientational metaphors described earlier. This interviewee further applies an image of something broken: “Your whole life is pulverized.” For something to have been pulverized suggests that something has been crushed. This metaphor can be said to belong to the mind is a brittle object metaphor, which refers to psychological strength in which certain experiences can be said to shatter people (Lakoff and Johnson, 1980). By using trauma language in this way, the interviewee

has come to understand herself through the diagnostic lens of trauma (Guilfoyle, 2013).

Furthermore, to talk about health in dichotomous terms presumes that recovery is an end to be achieved.

The trauma discourse also has specialists that the interviewees might prefer over regular psychiatrists. One interviewee, who was raped 27 years ago and who has been a psychiatric patient for many years, tells me that she was once diagnosed with a personality disorder. She is very upset about this diagnosis, and she has attempted to contest it without succeeding. She says, "Some people like to pathologize their patients and give them medicine, rather than look at the whole picture." She tells me that she has been trying to be referred to a trauma specialist. When I ask her why she wants to talk to a trauma specialist, she replies, "They don't look for diagnosis and failings and shortcomings. They rather focus on how you're doing." In her account, trauma specialists do not focus on the person but consider a person's situation ("the whole picture"). For that reason, she wants to consult a trauma specialist rather than psychiatrists, who pathologize her.

As outlined above, some of the interviewees in this study explicitly challenge the appropriateness of the trauma model, whereas others embrace it. When they resist or accept the trauma model, they portray trauma in dichotomous ways. When a few of the interviewees resist the trauma model, this suggests that the trauma discourse does not necessarily fit the way they make sense of how the rape has affected their lives. It can further be an expression of how they attempt to resist labels with potentially stigmatizing connotations. However, for a few interviewees, the trauma model makes sense or appears as a better option than other psychiatric diagnoses.



### The scale model: how rape victims attempt to escape trauma by behaving prudently

The interviewees who invoke the scale model do not resist or embrace trauma, but they talk about trauma or mental illness as something they can develop if they do not pay attention to their health. They compare themselves with other people but do not place themselves in either categories, but on a scale of normality. They do not use diagnostic language, but they talk about what they do to prevent trauma or a breakdown. This way of talking about trauma indicates a general concern regarding health and everyday functioning. They engage in different therapeutic interventions offered by medical and psychological experts, as well as other health promoters. In this context, they place trauma within a general health discourse.

One interviewee explains how, from the start, she decided to take responsibility for her future.

“I started to challenge myself shortly after the incident, so I’ve never been stuck in one place.” To be stuck in one place suggests that one is not able to move on, to escape the traumatic experience. One is caught in the trauma, which manifests itself through symptoms. The persistence of symptoms makes the traumatic experience pathological (Kleinman and Desjarlais, 1997). According to the trauma framework, symptoms that ease off with time constitute a normal response to trauma. By challenging herself in terms of forcing herself to do things that scares her, the victim can ease off the symptoms, and she can move on rather than be stuck in the trauma. She elaborates by comparing herself with others:

I’m a part of this self-help group, and some of the women in that group are in the same spot now as they were immediately after the incident, even 3, 4, and 10 years after. (...)

That made me think, “I need to rise to my feet. I’m not going to be in the same spot for 10 years.” (...)

I don’t want to lie down because of one thing [the rape], even if it’s a big thing.

By using orientational metaphors in which up is healthy and down means sickness, as described earlier, the victim indicates that she does not want to give up and become sick, but

she aims to stay healthy. Furthermore, by comparing herself with others in the self-help group, she can differentiate herself from other raped women who have apparently not succeeded in managing their lives. In this way, by taking responsibility for her future, she can negotiate her position on the scale of normality. Conceptualizing trauma on a scale of normality therefore gives her the opportunity to position herself as more normal compared with others in the self-help group.

Similarly, another interviewee negotiates her position on the scale of normality by comparing herself with a good friend who has been a psychiatric patient for many years. “I’m trying not to become like her. She’s very suicidal, very negative. I don’t think she has been very solution oriented with her life. I’m more focused on solutions. I want help.” She distinguishes herself from her friend by emphasizing how she is managing her situation by being solution oriented and optimistic. She sees herself as taking responsibility for her future. In this manner, she can escape the label of mental illness even if she experiences some mental challenges. However, she has to pay attention to her future to stay on the healthy path.

The future tends to appear in the victims’ narratives as fragile. One interviewee, who is describing her health as good at the time of the interview, expresses the following:

Who knows what it has done to me. If we’re talking about trauma [she laughs a bit], that’s something that can happen after some time, and then you can trace it back to something you’ve experienced. So, maybe it hasn’t done anything to me now, not yet at least, but that, you know, if I have a breakdown in 12 years [she laughs a bit again], maybe it did affect me after all.

The interviewees picture the future as fragile regardless of how they feel at the present time. This picture can be traced back to experts in the field who have told them that they have to invest in their future. One interviewee attempts to resist this advice, but does not seem able to escape it in her interactions with organizations working with rape victims. She tells me she is

doing fine and that she does not think she needs any help from a psychologist, but a self-help organization tells her she must go through certain steps after a rape in order to stay healthy. In the following quote, she is talking about skipping a part of this recovery process.

I think I skipped that part, or at least that's what they tell me at X [self-help organization], that I've been focusing on the practical stuff, you know, reporting the case to the police. Then when the police dropped the case, I moved on and started to think, 'Now, I'm doing OK! I'm going to focus on what's positive.' So, I've kind of skipped the part where I feel what it feels like, but I don't want to. 'Do I really need to go through it? No, I don't think so.'" So, it might backfire, but then I guess I'll just deal with it when that happens.

The institutional framing of rape victims as vulnerable to trauma prescribes a stage model that anyone who has experienced rape must adapt to in order to avoid the risk of a future breakdown. This model defines a path that all rape victims need to follow to manage their lives. Even if this interviewee is challenging the proposed need for engaging with her emotions, she is still accepting the premise of the model when she says that it might backfire. She is not resisting the trauma model per se but one of the steps she is supposed to go through. This stage model creates an assumption that victimization cannot escape traumatization; either trauma occurs immediately after victimization or has a late onset, if not managed properly. In other words, victimization creates an inescapable vulnerability for future breakdowns. A breakdown indicates that stress, which can be considered both productive and pathological, has not been adapted to and managed properly (Kugelmann, 1992). This future risk of a breakdown needs to be managed by adhering to the prescribed path. However, this interviewee challenges such a prescribed path when she resists engaging with her emotions.

Another interviewee, on the other hand, takes responsibility for her future by engaging with her emotions. She invokes images of something frightening when she describes the

importance of thinking about the rape every once in a while, “to avoid turning it into a ghost or a monster under your bed, kind of thing.” A ghost refers to how the rape will haunt her if she does not think about it; similarly, a monster is created under her bed if she hides the rape in her subconsciousness. These metaphors evoke what Gavey and Schmidt (2011) term pop psychological knowledge, which includes simplified psychoanalytical concepts of trauma that are different from trauma metaphors based on the biomedical model described earlier. By thinking about the rape every once in a while, she attempts to take responsibility for not developing trauma in the future.

The constructed threat of a breakdown also creates a fear of emotions.

It [the incident] has become this thing that I know has affected my life, but I’m not able to connect to my feelings. I know what I felt at that time, but it has become something that I don’t dare to think about when I’m alone because then, I don’t know what I’ll think. So, I don’t think about it when I don’t talk to people—like I do here [during the interview] or at X [self-help organization]. So, it’s kind of this big elephant in the room—only it’s in my head.

Fearing her emotions is not only fearing breaking down and suffering the consequences; it is also fearing being unable to manage her emotions on her own. In the above quote, she is assuming that she needs professional assistance to engage with her emotions. The emphasis on trauma as a severe, inescapable condition creates a requirement for professional help to deal with assumed uncontrollable emotions to manage stress productively, avoid breakdowns, and optimize the future. This is an example of how psychological/psychiatric knowledge has constructed the mind as a brittle object that can easily shatter and have uncontrollable consequences unless managed by professionals. As such, potential trauma requires professional supervision.

However, experts do not necessarily engage with emotions. A common feature regarding the treatment offered by health professionals is an emphasis on trauma symptoms and standardized treatment. One interviewee describes her therapy sessions as follows:

The main focus was on techniques—what to do when you get those thoughts, and how, you know, get rid of those thoughts. I had to practice those techniques, but it was difficult to do on your own. Because you sit at home and you think, ‘What did she say?’ Then you look in your book.

The therapy sessions focus on self-help techniques that she can apply when she is alone. In this way, she can continue investing in her future, even when the therapy sessions come to an end. She continues, “We didn’t really have much time together, so she didn’t really know what had happened, you know, details and stuff. I told her what had happened, but we didn’t really dig into it.” Working with different techniques is also a way of avoiding to talk about the rape, which can be a relief for either one of them. Turning rape into trauma therefore facilitates treatment without ever talking about rape. According to Hacking (1991), introducing medical models can facilitate professional intervention in relation to issues no one wants to talk about.

When the interviewees talk about trauma as something they can develop if they do not pay attention to their health, they invoke the scale model that requires them to act prudently to take responsibility for their future and thus avoid breakdowns and becoming a liability to others and to society. They engage in various interventions facilitated by different experts and accordingly become entangled in a network of institutions and practices in an attempt to escape trauma. Furthermore, when the interviewees talk about trauma on a scale of normality rather than in dichotomous terms, they have the opportunity to negotiate their position on the scale to escape the label of abnormality. Still, this model portrays the future as uncertain and the victims as vulnerable to future breakdowns. For this reason, they need to participate in the

interventions they are offered to stay on the healthy path. In this way, recovery is a continuous doing rather than a distant end to be achieved.

#### Entangled in a network of institutions and practices of trauma interventions

The life sciences have contributed to developing knowledge about rape to facilitate recovery and legal redress. This knowledge constitutes a network of institutions and practices that brings together legal, medical, and psychological institutions and experts, as well as alternative experts and self-help organizations (Bumiller, 2008; Marriner, 2012; Quinlan, 2017; Mulla, 2014). This has created a hybrid field of knowledge about trauma in which trauma discourse is fused with alternative knowledge discourses and self-help practices. The trauma discourse shapes the ways in which people understand and conceptualize the impact of crime (McGarry and Walklate, 2015). The victims participating in this study who speak about trauma talk about it in two different ways: as something they resist or embrace (in dichotomous terms) and as something they can develop if they do not pay attention to their health (in terms of a scale). The dichotomous model is less prominent than the scale model, which suggests that traditional psychiatric/psychological discourses are challenged by hybrid health discourses.

Previous research on trauma has focused on and criticized the dichotomous model of trauma. The interviewees in this study who resist the trauma framework do so for the same reasons as already described in other studies—it makes little sense in their understanding of how the rape has affected their lives (Gavey and Schmidt, 2011; McGarry and Walklate, 2015). They reject the framework either because they consider themselves to be without trauma symptoms or because they want to resist psychiatric labels that they consider stigmatizing. Still, a few embrace the trauma framework because they feel pain from an inner wound and struggle with daily chores. Accordingly, the trauma framework makes sense. Within this dichotomous model of trauma, trauma becomes real through symptoms, and recovery is an end to be

achieved. Additionally, women diagnosed with other psychiatric diagnoses may desire to work with trauma specialists to be relieved from other psychiatric diagnoses and to be acknowledged as victims of rape. The medicalization of trauma, in this view, is a desired process not only because of how it can improve victims' mental health but also because it can contribute to acknowledging someone's victim status, although it simultaneously contributes to transforming a victim into a patient.

Most of the interviewees who reflect on trauma and their mental health, on the other hand, talk about it as something they can develop in the future if they do not pay attention to their health. This model portrays trauma on a scale of normality (Rose, 2001a; Sweet and Decoteau, 2018). As rape has become almost synonymous with trauma, the scale model offers victims agency because they can renegotiate their position on a scale of normality and escape trauma by participating in the various interventions offered by experts and institutions. Within this model, trauma becomes real through the threat of an uncertain future, and recovery becomes a continuous doing and not an end to be achieved. This model promises victims that they can escape trauma by investing in their future health. At the same time, the continued commitment to taking responsibility for their future health contributes to the construction of trauma as an inescapable vulnerability for victims of rape. In other words, trauma becomes inescapable through attempts to escape trauma. Rather than trusting their own knowledge of how they feel in the present time, they become entangled in expert discourses that reduce alternative avenues of personhood (Guilfoyle, 2013). Accordingly, both models of trauma create limited options for victims to understand the causes and consequences of victimization outside the purview of these expert discourses. However, some interviewees did not talk about trauma according to either model, which suggests that some do escape the trauma discourse. In relation to previous criticism of the trauma discourse, this study shows that although an alternative model of trauma can allow victims to escape potentially stigmatizing labels of

psychiatric diagnoses, as an expert discourse, it still shapes how victims make sense of victimization.

Marriner (2012) argues that medical knowledge regarding sexual assault permeates courtrooms and tends to be used against victims in family courts, mental health courts, and drug treatment courts. In her account, the expert can be located close to the victim, both inside and outside the courtroom. In Norway, trauma evidence is allowed in rape trials, which means that the expert will be close to the victim to secure evidence. The production of evidence presupposes victims who adopt the trauma discourse and comply with expert interventions. This has to be documented outside the courtroom before it is presented in court. Although expert knowledge in terms of trauma evidence has the potential to benefit victims' legal case, it still contributes to disciplining women, and it offers justice to women who manage to take responsibility for their health. In this way, Mulla's (2014) argument that medico-legal knowledge reshapes the relationship between care and investigation, as well as healing and justice, becomes evident.

Additionally, the trauma discourse reshapes the relationship between health care and crime control. The ways in which the scale model places the responsibility to heal on the victims parallels the responsibility placed on victims to avoid rape. Munro (2017) describes how police campaigns to prevent sexual assault in the UK encourage victims to avoid activities that make them more vulnerable to sexual assault, such as drinking too much or walking home alone at night. In this way, Munro contends that the police use the language of vulnerability to responsabilize and discipline women. This process of responsabilization is part of a new form of crime control that Garland (1996) has characterized as an adaption to failure in which authorities focus increasingly on the effects of crime, rather than its causes. Within this view, the crime of rape is no longer a problem to be solved, but a problem to be managed. One way to manage rape is to make victims responsible for their own health. The scale model,



with its emphasis on managing future health, thus fuses with crime control, such that it is no longer the causes of the crime that need to be treated (the pathological sex offender), but the effects of the crime that need to be managed (potential trauma victim). This study accordingly shows how new norms derived from biomedicine (Rose, 2001a), in the context of trauma, not only challenge the original structure of DSM (Sweet and Decoteau, 2018) but also contribute to a shift in responsibility from professional therapists to individual victims. How victims are responsabilized can further be interpreted as a way of managing the crime of rape.

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## Common sense, (ab)normality and bodies in Norwegian rape verdicts

**Abstract:** Common sense, which refers to judgment rooted in everyday life experiences, constitutes an important part of legal decisions. In this article, I study how the female victim's body appears in written rape verdicts, by investigating how common sense invokes ideas about the normal and the abnormal. This builds on a discourse analysis of written rape verdicts handed down by Norwegian courts. I find that the (female) victim's body in these is problematized if its size and shape is considered uncommon and that the more (un)common something/someone is considered, the more (ab)normal that event/person is perceived to be. I argue that common sense reasoning becomes a normalizing legal gaze directed towards the female victim's body in a way that makes the court evaluate the body's relation to the norm to assess whether the incident was rape or consensual sex.

**Key words:** rape, body, normality, norm, verdicts, common sense

### Introduction

Common sense, which refers to non-expert knowledge and judgment rooted in daily life experiences, constitutes an essential part of legal decisions. A central concern regarding common sense in legal decisions pertains to the risk of making prejudiced decisions based on gendered stereotypes (Cochran 2017), and some have argued that common sense is imbued with rape myths (Ellison 2018). Rape myths have been described as “prejudicial, stereotyped, or false belief about rape, rape victims or rapists,” which function to deny that a rape has happened, belittle rape, or blame the victim (Burt 1998, 129). A key component in such

gendered stereotypes about rape is normative evaluations of female victims' sexual conduct. This means that some rape myths can be linked to ideas of normal sex, which, according to anthropologist Gayle Rubin (1984), is monogamous, heterosexual sex at home, while promiscuous sex, sex in public, and homosexual sex tend to be considered abnormal and inappropriate. In the context of rape trials, being portrayed as promiscuous can challenge the credibility of a rape claim and has, for this reason, been used by defense lawyers to discredit the victim (Matoesian 1995; Temkin, Gray, and Barrett 2016). Consequently, legislative changes to prohibit evidence that concern the victim's sexual history have been implemented in various countries. However, the question of norming sexual practices is a thorny question within feminist research, because of a tension between sexual liberation and protection. To prohibit and protect from sexual violence, the judgment of sexual acts and desires is needed: something that takes part in establishing normative sexuality (Alcoff 2018, 77). Nevertheless, judgments based on standards and values associated with normality are not only directed towards sexual practices, but also towards bodies, which is the prime focus of the current study.

In this article, I study how the female victim's body appears in written rape verdicts, by investigating how common sense invokes ideas about the normal and the abnormal. I do a discourse analysis of written rape verdicts handed down by Norwegian courts. My aim is to further conceptualize common sense by connecting it to the concepts of normality and the norm, both theoretically and empirically, to direct attention to how common sense reasoning constitutes a normalizing legal gaze. I argue that this normalizing legal gaze is directed towards the female victim's body in a way that makes the court evaluate its relation to the norm to assess whether the incident was rape or consensual sex. This means that bodies considered uncommon because of their size and shape risk normalizing judgments by the courts.



### The Norwegian context

In Norway, the rape provision is coercion-based as opposed to consent-based. According to section 192 in the penal code (1902), rape is sexual activity by means of violence or threats or sexual activity with any person who is unconscious or incapable for any other reason of resisting the act. Both district and appellate courts make decisions regarding criminal guilt based on evaluations of the evidence in a case. The legal proceedings are based on the principle of orality, in which all information in a case needs to be presented orally in court. The principle of freedom of evidence allows any type of evidence to be presented in court if it is considered relevant by the court. One exception is the prohibition of sexual history evidence and other forms of evidence that target a witness' character or credibility in general. The standard of proof in criminal cases is that the evidence adduced must be beyond reasonable doubt. The courts are characterized by high discretion and a valuation of common sense (Kolflaath 2013).

In Norway, for the past 20 years, rape has been a political concern that has resulted in legislative changes and various measures to improve the situation for rape victims. Incapacitated rape and rape by gross negligence were included in the rape provision in 2000 (Ot.prp. nr. 28 1999-2000). In 2008, a governmental report regarding the legal processing of rape was published that recommended a range of measures to improve the quality of the investigation and prosecution of rape (NOU2008:4). In the same year, the legal rights of victims were substantially strengthened in a reform initiated in part because of rape victims' experiences with the police and the legal system (Ot.prp.nr. 11 2007-2008)<sup>1</sup>. This reform strengthens victims' legal rights in legal proceedings to be enforced by their legal representative. For instance, victims gained additional rights to information at all stages of the

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<sup>1</sup> The government appointed committee that suggested these amendments agreed on increasing victims' rights to participate in legal proceedings, but disagreed on the issue of giving the victims party status (NOU 2006:10).

criminal proceedings; a right to appeal the police's decision not to prosecute their case; the right to be present throughout the trial; and the right to question the accused, witnesses and expert witnesses. In 2019, the government additionally launched a new action plan on rape to ensure coordinated efforts to combat it.

### Conceptualizing common sense

Common sense is a form of reasoning that refers to the relationship between law and society because of how judgment connects with community, specifically in terms of how ideas about what is common and common knowledge inform legal decision-making (Cochran 2017). According to legal scholar Cochran (2017), common sense is used to describe a type of judgment or sensibility, a way of exercising good sense that is grounded in everyday life experiences and is readily understood by nonexperts. In other words, good sense is a kind of practical, pragmatic and experience-based judgment. She further argues that the concept of common sense tends to escape critical scrutiny and becomes self-justifying. For instance, if something is commonsensical, it appears to be self-evident, as it describes what is intuitive and obvious, a kind of knowledge that is readily available to everyone through everyday life experiences.

That which is not questioned constitutes the norm, and in the article, I apply the concept of normality as it is conceptualized by philosophers, Ian Hacking (1990) and Francois Ewald (1990), as a way to investigate the work of common sense reasoning in court. The concept of normality and the idea of a norm are closely associated with statistics but originated in the medical context of pathology (Hacking 1990, Ewald 1990). Consequently, the concept of normality refers to both a quantitative dimension and health. The quantitative dimension refers to concepts such as probability, normal distribution, and the average (Ewald 1990, Hacking 1990). According to Ewald (1990) and Hacking (1990), categories within

statistics do not signify or refer back to any external object or explanatory principle but have become self-referential and self-explaining. Thus, the concept of normality has a numerical quality in which occurrence and repetition itself, as well as being part of a larger group and the position that one has within that group, are what creates meaning (Ewald 1990). In other words, the more often something occurs, the more common and normal it is, and the more likely it is to occur again. Similarly, being average, doing what most people do, and not being at the extremes are common and normal. I therefore suggest that the numerical quality of the concept of normality is closely associated with various meanings of “common,” such as usual, ordinary, and regular, in relation to the term common sense. Nevertheless, the medical roots of the concept of normality were the study of unhealthy organs, a field of study called pathology (Hacking 1990). According to Hacking (1990), the word pathological is defined as deviation from the normal that constitutes an abnormal or diseased state. Thus, the normal is healthy, and the healthy is normal, which is also considered good and desired. In contrast, the abnormal is deviant in terms of being different, uncommon, unhealthy and negative. According to Hacking (1990), the concept of normality bridges the distinction between fact and value by implying that the normal is both right and good. Furthermore, he continues, one can use the word normal to describe how something *is* while simultaneously suggesting how it *should* be.

The ways in which legal practice engages with questions of normality and abnormality and centers on the norm constitute a form of power that philosopher Foucault (2000, 2014) called “panopticism”. Panopticism is a surveilling gaze that makes the target of the gaze visible while simultaneously hiding the owner of the gaze. This type of power rests on what he termed an examination, which he contrasted to an “inquiry” (Foucault 2000). The judicial practice of the inquiry is a search for truth aimed at reconstituting an event through testimony. The examination, on the other hand, is ordered around the norm, and it focuses on questions

of what is normal or not and whether the person conforms to the norm. According to Foucault (2014), panoptic power subjugates the body by turning it into an object of knowledge.

Building on Foucault, I will argue that the legal gaze is directed towards the victim's body, which becomes the object of examination during rape trials. In other words, the female victim's body becomes an object of knowledge (Smart 1995). Sociologist Smart (1995) describes how legal discourse attributes sexualized meanings to women's corporeality and constantly reproduces women as sexed bodies. She uses the concept of "sex" to refer to both sexuality and biological sex (as opposed to gender). The sexed body, she explains, is both saturated with sex and is biological womanness. She argues that a rape trial in particular sexualizes the woman's body. By speaking about sex and, therefore, figuratively re-enacting sex, her body and its responses become evidence, and she becomes a biological woman. Her body becomes evidence, according to Smart, because sex has become the ultimate truth of a person. In a rape trial, the woman's body and its emotions and responses become the focus of enquiry and are regarded as the problem, as falling outside the bounds of social and legal convention.

Not all female bodies are scrutinized in legal proceedings, as I will show in the analysis: only bodies that are considered to be abnormal. According to Bordo (2004), the body and its shape and weight have become symbols of how normal a woman is considered to be in our society. Being slender is considered normal, while being at the extremes (being obese or anorectic) is considered pathological because of how they deviate from the norm. Bordo argues that women achieve an idealized and normalized slender body by means of self-monitoring and self-control, in which the aim is mastery of bodily desires such as hunger, sexuality and emotions. She further argues that excess body weight can be viewed as reflecting moral or personal inadequacy because of unsuccessful self-containment or a lack of will to play by the rules, thus incurring a risk of humiliation or other forms of punishment. In

the analysis, I will show how the courts, through common sense reasoning, consider some bodies to be uncommon and, thus, abnormal because of their size and shape and, accordingly, problematize these bodies.

### Methods and materials

I selected court cases from both district and appellate courts published in the “Lovdata”<sup>2</sup> database. Most cases from the appellate courts and some cases from the district courts are published in the database. In addition, I requested a few additional district court cases directly from the district courts.

All the cases included in this study involve an indictment in relation to section 192 (the rape provision) of the penal code. I excluded cases involving victims under the age of 16. I also excluded cases that involved domestic violence because these cases often include more than one indictment. Moreover, I excluded cases involving a large number of victims and perpetrators because these cases tend to focus less on the individual victims because of the size of the cases.

I performed a search on the rape provision in the Lovdata database and selected cases according to the criteria stated above. I selected 15 cases from the district courts from 2014 to 2016. The selected cases from the appellate courts consisted solely of rescheduled trials in which the legal judges set aside the jury’s decision; I selected rescheduled trials because they include a written justification of the grounds of the decision. I selected all rescheduled trials published in Lovdata since 2011. I found 14 rescheduled cases, half of which were from 2015/2016. I selected a total of 29 cases from both district courts and courts of appeal. In all the cases, the perpetrators were male and the victims were female. All the decisions included

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<sup>2</sup> Lovdata is a database that includes sources of law and legal decisions. It is available to subscribers, and I have access through the university.

in this study, have been decided on by a mixed panel consisting of legal judges and lay assessors. The written decisions consist of the decision-maker's stated reasons for making a decision and a justification of it, and they do not necessarily represent a detailed description of everything that happened in court. Common sense traced in these decisions can be characterized as legal expertise rather than "pure" common sense typically embodied by a jury.

All the legal decisions are in Norwegian, and I translated the quoted extracts included in this article into English. An analysis of common sense in legal texts implies that I had access only to common sense reasoning that the written decisions accounted for, which may have been limited to whatever the judges considered necessary to explain the decision and whatever they considered legitimate to justify the verdict.

In my reading of the legal decisions, I share the epistemological position common to discourse analysis, as outlined by Gill (2000), in which I map knowledge practices and their effects rather than looking for any hidden reality or underlying causes in the texts. This means that I am interested in what the written decisions do in terms of how they construct or represent something (e.g., "normal" women) and how they assign blame, responsibility and justifications rather than attempting to analyze how the decision makers actually made a decision or their intentions in making a decision.

My analysis is informed by the approach developed by Carol Bacchi called "What's the Problem Represented to Be?", which offers a way of thinking differently about what is commonly taken for granted (Bacchi and Goodwin 2016). The key term in this analytical approach is "problematization", that is, how the text produces "problems". The approach consists of a set of questions for critically scrutinizing what is taken for granted or problematized in the text, for instance, "What is the problem represented to be?"; "What

assumptions underlie this representation of the ‘problem?’; “How has this representation of the problem come about?”; and “What is left unproblematic in this problem representation?”. This analytical strategy is useful when analyzing common sense because common sense reasoning typically includes taken-for-granted assumptions and problematizations, for instance, assumptions regarding what is common and normal.

The analysis in this text will contribute to make certain aspects of decision-making practices visible and others invisible while simultaneously adding a critical focus on certain practices that, together, do not necessarily tell “the whole story” of legal decision-making. However, I do not aim to present any universal claims regarding legal decision-making; rather, I intend to contribute to further conceptualizing common sense in legal decision-making to broaden our understanding of the concept, which, in turn, can be useful for future analyses of common sense reasoning.

### Nonsense and self-evidence

The first case I present illustrates how the court actively engages with common sense in its reasoning of the question of guilt. The case illustrates how the court grounds common sense reasoning in details of everyday life and in what is considered common and reasonable. I exemplify how the court engages with common sense by combining the conceptual components in different ways and creating assumptions regarding common behavior that it uses as a norm. If the accused and the victim do not behave according to expectations, the court will accordingly problematize their behavior.

In case LB-2015-125563, two old friends are reunited after being invited to a party. The man (A) is staying at a hotel. At a pub after the party, the woman (B) meets an acquaintance (C), and they start flirting with each other. The woman’s friend, A, asks them both to stay with him in his hotel room, where they continue drinking and talking. After a



while, the woman's friend (A) goes to bed, while the woman (B) and the man (C) with whom she was flirting continue flirting before going to bed. They all share the same bed, and the woman lies in the middle between the two men. The next day, the woman reports her friend A to the police.

According to the woman, she woke up as A was having sex with her. She grabbed C's neck to signal that something was wrong, and he lifted her to the other side of the bed so that she was no longer in the middle of the bed next to A. She cried, and C asked her if they should leave; they then went to her apartment. According to the accused, he woke up when B and C went to bed and started having sex. He got excited watching them and asked her if she wanted to have sex with him after she was done having sex with C. She said yes, and they had sex until she asked him to stop. Both B and C claimed that they did not have sex when they went to bed but fell asleep immediately, and their accounts of the night are similar.

The accused and his lawyer argued that C and B had sex but that they did not remember that they did. The accused and his lawyer argued that this account was substantiated by the fact that C was sleeping without his boxer shorts on and because he was unable to recall when he took them off or how they ended up next to the bed, where the police found them the next day. They further argued that C's lack of memory or uncertainty regarding what happened to his boxer shorts created doubt regarding his participation in sexual activity during the night.

The court states, "The accused's account of how B and C had sex when they went to bed and that B was awake and excited and wanted to engage in further sexual activities with the accused after her sexual encounter with C can be ruled out". The court justifies its position in the following argument:



“The court does not consider C’s uncertainty regarding his underwear to be an expression of doubt concerning whether he was engaging in sexual activity but, rather, an expression of doubt concerning how and when he took his underwear off. C has explained how he usually sleeps without underwear, and in cases in which he does not take it off before going to sleep, he often kicks it off during sleep. The court considers it likely that he either removed his underwear before he went to sleep or kicked it off during sleep but is unable to recall exactly how it happened because of alcohol consumption”.

In this extract, the line of reasoning involves drawing conclusions regarding the night in question by considering what C *ordinarily* does. The way in which he usually behaves indicates what he *probably* did during the incident in question. I understand the reasoning to be commonsensical, as the judges ground it in C’s everyday life. What he regularly does informs the interpretation of his actions during the night in question. The fact that his actions are consistent with his usual behavior appears to make sense. In this way, the court constructs actions according to habits as reasonable.

The court continues to argue that his testimony is credible because he told it in a consistent manner and in accordance with the victim’s testimony. Additionally, it adds, he was clearly surprised when confronted with the accused’s story in the police interview. “His immediate reaction when confronted by the police with the accused’s statement was, ‘This caught me by surprise; I cannot remember anything like that’”. The court presents his spontaneous reaction as though it reveals sincerity, creating an assumption that spontaneous reactions are out of a person’s control and thus cannot be planned or performed. The court also comments on a conversation that the accused had with C on the phone the next morning, in which the alleged sexual activities between B and C as well as those between A and B were not mentioned. “It is slightly odd that the accused did not mention the sexual activities if they in fact took place”. This remark illustrates how the court creates assumptions regarding

normal behavior and expects the accused to act accordingly. When the accused behaves differently, the court problematizes his conduct and questions his credibility. The remark presents a value judgment in which behaving contrary to anticipated conduct is given value in terms of presumed (ab)normality.

The court further invokes common sense when remarking on how likely it is that C would have had sex that night without any recollection of it. “The court finds it unthinkable that he (C) does not remember having sex that night”. It continues by referring to how he was able to recall the main features of the night in question even though he had been drinking alcohol. The court considers it unthinkable that he would not recall having had sex, as it does not make any sense for C to recall some but not all of the main features of that night. Remembering some of the main features, but not all, is presented as contradictory to common sense. The court makes the same remark regarding the victim’s supposed lack of memory but adds how she was also attracted to C, which, it implies, makes the probability that she would not recall having sex with him even less likely.

The court further argues that the woman’s testimony is credible because it is consistent, nuanced and in accordance with C’s testimony. It continues by remarking on another detail:

“In the consideration, the court has also taken into account how the aggrieved<sup>3</sup> person was menstruating that night and, for her, having sex was out of the question. Her claim is credible. It is not contested that she had her period that night, and according to the evidence, she told this to her friend earlier that night and to another friend the day after”.

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<sup>3</sup> In the Norwegian legal system, a victim is called an aggrieved person and not only a complainant, due to a range of participatory rights.

Again, the court presented it as though it makes little sense that she would have engaged in sexual activities later that night when earlier that night, she had stated that she would not do so because of her period. The court constructs it as *inconsistent* to do the opposite of what one has said because it would have contradicted what is presumed to be reasonable behavior.

In addition, the court argues that the woman's testimony is substantiated by her subsequent behavior and reactions, such as starting to cry immediately after she woke up and expressing how it "all felt unreal". The court states, "It is difficult to suppose that the aggrieved person would have reacted in this manner if she had engaged in consensual intercourse with the accused – even if she regretted it afterward". It continues with the following argument:

"It is difficult to find a motif of why the aggrieved person would have given a false statement regarding rape to the police. The defense lawyer has argued that she could have done so because she was too ashamed of having sex with the accused after having sex with C and that she reported the incident to the police in order to give C a better impression of her. The court considers such a plan fabricated and believes that it is unthinkable that the aggrieved person would have submitted a false report to the police to impress a man she had just met, considering the cost of a charge of false report".

The court rejects the defense lawyer's attempt to construct the victim's actions as a result of something that she regretted having done. Its line of reasoning is based on the assumption that it makes no sense for the victim to behave and react as though something wrong had happened if in fact nothing wrong had occurred. The court constructs the victim's reactions as the self-evident truth of a crime. It further presents submitting a false report to the police as nonsense because the victim's potential gain would have been far less than the loss she would have risked. In other words, constructing a woman who claims to have been raped

as someone who regrets having had sex makes little sense because of how it *contradicts* the circumstances of the case.

The court continues to argue that the defendant's account is not credible because his testimony regarding substantial issues changed and because his account is not supported by any other evidence. However, the court remarks on one argument made by the defense lawyer in which the accused mentioned how he used lubricant when having sex that night and the defense lawyer argues that the accused would not have mentioned using lubricant if he had in fact raped the victim. First, the court remarks, "There can be many reasons the accused in the first police interview accounted for something that later on appears inexpedient". Later, it continues, "The court notes that it would be contrary to expectation that he needed the lubricant if in fact his statement was true". The defense lawyer and the court create an assumption that the lubricant reveals what actually happened that night because it targets supposedly common knowledge along the lines that everybody knows that lubricant is not necessary when having ordinary (consensual) sex. The defense lawyer appears to be concerned with how to rationalize the accused's apparent slip of the tongue. He invokes common sense by claiming that it makes no sense to say something that can be detrimental to one's own case. However, the court does not seem to accept this argument, possibly because it intuitively makes more sense to treat it as a slip of the tongue rather than as an expression of sincerity or as an account of the true course of events. A slip of the tongue might be considered to reveal the truth about a person because it is an immediate response that is beyond the person's control. The line of reasoning seems to be that there is no turning back once what is said is said. When something is exposed in an apparently accidental manner, it becomes a self-evident and indisputable truth. When the court assumes that normal sex does not require a lubricant and the accused told the police he used lubricant, his use of lubricant is problematized, and his credibility is questioned.

In this case, common sense reasoning is identified by tracing meaning-making practices in which purported common knowledge and common practice frame what is considered (un)likely and how it is evaluated according to presumed (ab)normality. Whatever is assumed to be common is considered likely, normal and reasonable to do. What apparently makes sense and seems to be reasonable complies with common knowledge and common practice, whereas the opposite makes no sense. Common sense reasoning is normative because it adds value to practices depending on whether the court places them within or outside the norm. Sometimes, common knowledge has truth effects, for instance, in the example with the lubricant. However, it is not only common knowledge that has potential truth effects; immediate reactions or responses also have potential truth effects, possibly because they are spontaneous and, therefore, uncontrolled and unprepared. The court intuitively accepts immediate reactions and responses as self-evident truths. When common knowledge and immediate reactions are considered to have truth effects, they have the potential to reveal someone's actions and implied guilt. In this verdict, common sense reasoning constitutes the basic arguments made throughout the decision. The court invokes common sense to refute the defendant's claim that the woman reported him to the police because she regretted having sex. According to the decision, it makes no sense that women, at least under certain circumstances, report rape if they regret having sex. In this case, the accused did not behave according to the court's expectation, and his behavior is accordingly problematized and questioned in terms of credibility.

### Normal and abnormal

As discussed above, common sense reasoning creates a connection between the common and the normal. Conforming to whatever is considered to be common is perceived to be normal. In the following, I investigate what constitutes the normal by exploring how the boundaries between the normal and the abnormal are drawn. The court draws this line by making

assumptions regarding what constitutes normal sex and implicitly problematizes what falls outside the boundaries of normal sex. These assumptions resemble the notions of normal sex, as outlined by Rubin (1984) and mentioned in the introduction. In case LB-2015-85818, in which three men were acquitted of raping a young woman, the court states, “The court considers the defendants’ accounts of how the aggrieved person wanted and initiated repeat sexual intercourse with all three defendants over a long period of time as far-fetched and implausible”. According to the court, it makes no sense that a young woman has a seemingly limitless appetite for sex. The district court decision (THALL-2014-194988) in the same case adds the following remark: “They were ten years older than her and unfamiliar to her”. This remark suggests that the court makes age and the relationship relevant when adding a normative dimension to the reasoning by which it distinguishes between normal and abnormal sexual conduct. The court made a similar commonsensical statement in case THALD-2014-14182, in which three men were convicted of raping a woman:

“The defendants’ claim that the aggrieved person had consensual sex with all three is contrary to expectation. As long as the case does not involve the sale of sexual services or a lack of intimate boundaries due to previous sexual abuse, such behavior must be considered very rare. This is further substantiated by the fact that she did not know two of the men before”.

Having sex with multiple strangers simultaneously does not make sense, at least as long as the woman is considered ordinary. An ordinary woman does not engage in uncommon sexual practices or have unresolved issues with sex. The court thereby constructs normal women by distinguishing them from women who sell sex or have previous experiences of sexual abuse. The courts also seem to reject the notion of women as sexually aggressive. In decision LH-2016-54362, in which the court characterizes the accused’s testimony as “striking”, it is stated that “The courts of appeal agree with the district court that the accused’s statement, in which he claims that it was she [the aggrieved person] who tried to have sex

with him against his will, is unbelievable”. Picturing women as sexual predators does not resonate with the decision makers’ common sense. Sexual aggression is thus a characteristic that distinguishes normal women from abnormal women. Similarly, the courts do not readily accept a perception of a woman as someone who treats sex like a commodity. In case LB-2014-67450, the court convicts a man of raping a woman who wanted to buy drugs. The woman claims that he raped her, while the man claims that she traded sex for drugs. The court argues that it seems to be unreasonable that the woman would trade drugs for sex when the drugs are apparently inexpensive and she has a regular income. The court dismisses his claim by invoking common sense. “It is highly unlikely that she would initiate sex with a far older African stranger without the protection of a condom to pay an amount of NOK 100 (USD 12)”. By invoking age, race, the relationship and the threat of sexually transmitted diseases or pregnancy, the court presents it as unlikely that the woman would have had sex with this *particular* man because the court places him outside the norm. Although age and the relationship were made relevant in the previously described cases, the lack of protection in terms of a condom was not made relevant, even if the description of the cases revealed that a condom was not used. The condom appears to be relevant in this particular case because of the race of the accused, in which case it was the risk of sexually transmitted diseases and not necessarily pregnancy that created worry and that distinguished this man from other ordinary men. The court problematized the accused’s race and age and accordingly indicated that the incident was a rape. These examples suggest that even if the courts actively refute claims that draw on common stereotypical assumptions regarding women and sex, there is still a normative element guiding the court’s commonsensical reasoning. In other words, stereotypical assumptions regarding women and sex do not apply to cases with “normal” women; however, they can become relevant if the woman is placed outside the norm or if the man is placed firmly within the norm, as I illustrate under the next heading.

### Turning the legal gaze toward uncommonly large female bodies

Although the court has not invoked common sense to problematize the victims' conduct in the cases discussed so far, common sense reasoning can still problematize the victim when she is considered uncommon and abnormal in other ways. In the following decisions, the victim's body does not act according to the court's expectation and is consequently problematized.

In the following decision, violence is not a prominent theme, although there is forensic medical documentation of extensive physical injuries. The reason could be that common knowledge is privileged at the expense of expert knowledge. Instead, the decision makers turn their gaze toward the female victim's body rather than the criminal act when examining the rape claim.

In district court decision 14-190616MED-DRAM, a man is acquitted of raping a female acquaintance. He is also acquitted in the courts of appeal. The woman had major injuries, which were documented in a forensic medical report, including bruises all over her body and a rib fracture, in addition to vaginal tearing and bruises. The woman claimed that she had been raped multiple times during the night, both vaginally and anally. At the crime scene, the woman's apartment, the police found bloodstains in the bed and the defendant's handprint with the woman's blood on the wall and window. The court argues that his handprints are inconsistent with her account of how he was holding her tightly the whole time. In relation to this argument, the court remarks on her body and her education. "The aggrieved person is a large woman; she weighs 80 kilos [176 lbs] and is trained as a security guard". Remarkings on her size and her training as a security guard contributes to constructing the woman or her body as *uncommonly* large and strong for a woman. Commenting on her size and assumed strength in relation to her account of the use of force during the incident further creates an image of the woman as a person (who should be) able to defend herself. Her body is constructed as masculine and able to defend itself because of her size and assumed



strength. In addition, her injuries are constructed as somewhat *uncommon* and thus *abnormal* by the court. The court describes how the forensic doctor who examined her accounted for her injuries: “The forensic doctor told the court that it is rare to see that many bruises on a woman’s body and that the bruises are very different from the ones he usually sees in the rape reception center. He described the vaginal tears as larger but also unlike the ones he usually sees”. When the court constructs the woman’s injuries as *uncommon* in this manner, it places emphasis on her body; her body and the manner in which it behaves become evidence. The court then scrutinizes why her body reacts in this somewhat *unusual* way rather than inquiring into the accused’s use of violence. The court asks the doctor to elaborate on how easily her body bruises, but he is unable to do so. However, the court apparently has access to a text message written by the woman herself where she claims her skin bruises easily. The woman’s *nonexpert knowledge* or *experience-based knowledge* of her own body is accepted by the court as a sufficient explanation of her supposedly *uncommon* injuries. Moreover, the decision mentions how a witness, a friend of both parties, had previously received an SMS from the woman in which she wrote that she likes “sex that is slightly more rough than normal”. Finally, the court mentions how one of the previously mentioned text messages included information about how she was previously bruised while having sex with a different man. Based on all these factors, the *uncommon* injuries that the victim experienced are constructed as *common* to her, both because her body bruises easily and because her body has previously been bruised during sex. By interpreting physical injuries as an *uncommon* bodily reaction rather than as a result of the use of violence, the court’s decision transforms the question of force into a question of bodily characteristics. In addition, the woman had expressed enjoyment of rough sex, in which the coupling of pleasure and pain is presumed to be normal. The court concludes that the evidence in the case does not exclude the possibility of consensual “clumsy sex between drunk grown-ups”, according to the defendant’s claim. By

relying on nonexpert or experience-based information, the court resorts to common sense to dismiss the woman's claim of rape by constructing the woman and her body as somewhat abnormal and as engaging in abnormal sex that was apparently normal to her.

The woman's body is also made relevant in the next case; here, however, it is not large and strong but heavy and unmanageable. In case LB-2012-106980-2, in which the defendant is acquitted of a rape charge, two women meet one man on a night out. The women end up in his apartment, and after some drinking and talking, one of the women goes to sleep in his bed. Later, the man starts having sex with her. The forensic report documents both vaginal and anal penetration, but the defendant claims it was consensual sex. The court invokes common sense knowledge in its decision:

"The court finds it difficult to comprehend how anal penetration, especially if conducted by a penis, could occur without the knowledge of the aggrieved person. The court refers to how the aggrieved person at the moment of the incident weighted 110 kilos (242 lbs), which clearly indicates the difficulty of anal penetration without participation by the aggrieved person. The court has been informed that the aggrieved person was 165 cm (65 in) tall.

In addition, the court thinks there is reason to believe that she would have woken up from sleep if she was penetrated anally during sleep. However, the fact that excrement was detected inside her vagina reduces the likelihood of her waking up as a result of anal penetration. Even though she has explained that she needs multiple alarm clocks to wake up, this does not change the court's consideration of doubt.

Furthermore, it is questionable whether it is possible to fall into a deep sleep so quickly and not notice how the accused undressed and raped her, both anally and vaginally".

The court concludes by stating that it cannot rule out the possibility that the aggrieved person was awake at the time and tacitly consented to the sexual acts in question.

The reasoning in this decision suggests that the court resorts to common assumptions that portray anal penetration as a demanding and painful type of sexual activity. It is supposedly challenging for the man to perform if the woman does not assist him, and if she does not take part in the activity, then he must be able to move her into the appropriate positions to succeed. However, in this case, the woman's body seems to be too heavy to move for what is implied to be a normal man, as his size and strength are not remarked upon. The anal penetration of a large woman by a supposedly normal man is thus considered *unusual* and *peculiar*. Furthermore, constructing anal sex as a painful sexual activity suggests that an ordinary woman is unable to sleep through it. The court suggests that the aggrieved person should have been woken up by anal sex, something the court reasons that she *obviously* could not have done, as vaginal penetration must have occurred after anal penetration according to the medical examination. By assuming, first, that a large woman cannot be penetrated anally without her participation and, second, that it is impossible to sleep through the pain, the court dismisses the woman's claim of rape because of how it does not make sense. By resorting to assumptions of purported (un)common sexual practices, the court constructs anal sex as uncommon and unpleasant, reconfirming heteronormative ideas of normal sex as vaginal intercourse. When the court constructs anal sex as abnormal, the legal gaze is directed toward the size of the woman's body and its threshold of pain rather than the accused's use of force. Her body becomes evidence that is scrutinized, and the body's behavior is problematized.

In the two cases discussed above, it is the uncommonness of the female body in terms of size and shape that is emphasized and problematized. The body becomes evidence that can tell the court whether the incident was rape or consensual sex.

### Common sense reasoning – a normalizing legal gaze

This study shows how common sense reasoning invokes ideas about normality. Common sense reasoning can construct claims of innocence by the accused as nonsense based on common assumptions regarding women who report rape. Claims such as “women who report rape regret having sex” or claims that picture women as sexually acting out or aggressive or as traders of sex for goods do not seem to resonate with the decision makers’ common sense – at least if the woman is considered normal. As long as there are others who can be constructed in opposition to the victim, such as women without sexual boundaries, the female victim can be considered normal. Moreover, the more abnormal the accused is considered to be, the more normal the victim is considered to be, and vice versa. Similarly, the less feminine the female victim is considered to be, the less normal she is considered to be, as becomes apparent in the last two legal decisions analyzed, which focus on the women’s abnormal bodies.

Based on the works of Bordo (2004), the uncommonly large bodies in this study might be viewed as uncommon because they do not represent the idealized female body. Because of their size and shape, the women are defeminized and are therefore considered abnormal. Furthermore, the strong body is masculinized, which, in turn, removes it even further from the norm. Because they are large, the bodies are considered to symbolize a failure to play by the rules. Unruly bodies are in danger of being put in their place. When legal decisions focus on women’s bodies as a way of interpreting consent, women risk normalizing judgment rather than legal protection. The woman’s body becomes an object of knowledge that must be examined in Foucauldian (2000, 2014) terms. Accordingly, the legal gaze is directed towards abnormal female bodies rather than towards the criminal act. In this manner, common sense reasoning becomes a normalizing legal gaze. Furthermore, the sexed body, which is both biological womanness and saturated with sex (Smart 1995), becomes evidence that is able to tell the truth.

The analysis in this article indicates that common sense reasoning in Norwegian courts problematizes abnormal female bodies. This is because the concept of common sense can be connected to the concept of normality, which is at the core of Foucault's concept of panoptic power. Panoptic power subjugates the body by turning it into an object of knowledge. This phenomenon is different from how research from other countries argues that the focus is on women's sexual conduct (Temkin, Gray, and Barrett 2016). When the focus is on women's sexual conduct, common sense rests on moralizing norms regarding appropriate female behavior rather than ideas about normal female bodies.

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## Appendix





## **Appendix 1: «Svar fra Justis- og beredskapsdepartementet»**





DET KONGELIGE  
JUSTIS- OG BEREDSKAPSDEPARTEMENT

Kontoret for voldsoffererstatning  
[post@voldsoffererstatning.no](mailto:post@voldsoffererstatning.no)

Solveig Laugerud  
[solveig.laugerud@gmail.com](mailto:solveig.laugerud@gmail.com)  
[solveig.laugerud@stk.uio.no](mailto:solveig.laugerud@stk.uio.no)

Deres ref.

Vår ref.  
15/3465 - MYO  
8436

Dato  
16.12.2015

### Fritak fra taushetsplikt i doktorgradsprosjekt

#### *Bakgrunn*

Solveig Laugerud har søkt Kontoret for voldsoffererstatning (KFV) om innsyn i saksmapper om seksuelle overgrep/voldtekt til bruk i sitt doktorgradsprosjekt i retts sosiologi ved Universitetet i Oslo. Målet for prosjektet er todelt. Hun vil forske på hvordan søknader om oppreisning vurderes, herunder hvordan ordningen vil fungere etter intensjonene i loven. Hun vil også forske på hvilke forventninger søkerne har til loven.

Laugerud har søkt om innsyn i hele sakskomplekset i 50-60 saker. Hun vil i hovedsak gjennomgå saksdokumentene i KFVs lokaler, men det er også søkt om å ta med aidentifiserte dokumenter. Disse vil da bli oppbevart og nedlåst på Laugeruds kontor ved Universitetet i Oslo. Doktorgradsprosjektet har oppstart i januar 2016. Kontoret for voldsoffererstatning anbefales at søknaden innvilges.

#### *Regelverk*

Når det finnes rimelig og ikke medfører uforholdsmessig ulempe for andre interesser, kan departementet bestemme at et forvaltningsorgan kan gi opplysninger til bruk for forskning, og at dette skal skje uten hinder av organets taushetsplikt, jf. forvaltningsloven § 13 d. Til vedtaket kan det knyttes vilkår.

Før det blir truffet vedtak om å gi opplysninger undergitt taushetsplikt til bruk for forskning, skal saken i utgangspunktet forelegges for Rådet for taushetsplikt og forskning, jf. forvaltningsforskriften § 9 annet ledd. Dersom departementet finner det klart at søknaden bør innvilges, behøver saken ikke forelegges Rådet. Ved avgjørelsen

---

Postadresse	Kontoradresse	Telefon - sentralbord	Sivilavdelingen	Saksbehandler
Postboks 8005 Dep	Gullhaug Torg 4a	22 24 90 90	Telefaks	Matora Yoga
0030 Oslo	0484 Oslo	Org.nr.: 972 417 831	22 24 27 22	22 24 52 45
				<a href="mailto:matora.yoga@jd.dep.no">matora.yoga@jd.dep.no</a>

av om en sak ikke skal forelegges, skal det særlig legges vekt på om de opplysninger det søkes om tilgang til, må anses som følsomme. Ellers bør det legges vekt på om den materialet skal stilles til rådighet for, har betryggende faglig kompetanse eller er undergitt forsvarlig faglig veiledning.

#### *Departementets vurdering*

Justis- og beredskapsdepartementet bemerker at de opplysninger det søkes om tilgang til, må anses som meget følsomme. Justis- og beredskapsdepartementet legger imidlertid vekt på prosjektets samfunnsmessige betydning. Prosjektet vil kunne sikre at voldsoffererstatningen fungerer i tråd med intensjonene. Vi er enige i at prosjektet kan kaste lys over hvordan voldsoffererstatningsloven virker, noe som kan komme voldsofrene til gode. Det kan også gi myndighetene viktige innspill. Vi legger også vekt på at Laugerud vil være undergitt forsvarlig faglig veiledning.

Det er for øvrig av betydning at dette arbeidet ikke er belastende for KfV. De har opplyst om at deres ressursbruk i forbindelse med dette prosjektet anses som minimal.

Vi viser til at Rådet for taushetsplikt og forskning har samtykket i at det dispenseres fra taushetsplikten i en lignende sak (daværende Justis- og politidepartementets referanse 2007/2931). Saken forelegges derfor ikke for Rådet for taushetsplikt og forskning.

På denne bakgrunn innvilger departementet Siri Laugeruds søknad om fritak for taushetsplikt i voldsoffererstatningssaker i anledning doktorgradsprosjektet, på følgende vilkår:

#### *Vilkår*

- Det skal ikke etableres kontakt med de personene som opplysningene angår.
- De grunnleggende prinsippene for anonymisering og forsvarlig oppbevaring avmateriale mv. må følges, herunder må alle personidentifiserende opplysninger anonymiseres ved eventuell publisering.
- Gjennomgåelsen av dokumentene må bare foretas i lokalene til Kontoret for voldsoffererstatning. Laugerud kan ta med seg dokumenter som er tilstrekkelig sladdet, men disse må oppbevares på en forsvarlig måte.
- Innsynsretten gjelder maksimalt 60 saksmapper.
- Prosjektet må ledes av en person med førstestillingskompetanse.

#### *Konklusjon*

På vilkår som nevnt, innvilger departementet Siri Laugeruds søknad om fritak for taushetsplikt i voldsoffererstatningssaker i anledning doktorgradsprosjektet.

Til slutt tillater vi oss å be om å bli gjort kjent med avhandlingen når den foreligger, og vi ønsker Solveig Laugerud lykke til med doktorgradsprosjektet.

Med vennlig hilsen



Brita Mellin-Olsen  
underdirektør



Matora Yoga  
førstekonsulent



|

## **Appendix 2: «Svar fra personvernombudet, NSD»**







Harald Hårfagres gate 29  
N-5007 Bergen  
Norway  
Tel: +47-55 58 21 17  
Fax: +47-55 58 96 50  
nsd@nsd.uib.no  
www.nsd.uib.no  
Org.nr. 985 321 884

Solveig Laugerud  
Institutt for kriminologi og rettssosiologi Universitetet i Oslo  
Postboks 6706 St. Olavs plass  
0130 OSLO

Vår dato: 11.05.2015

Vår ref: 43121 / 3 / LT

Deres dato:

Deres ref:

## TILBAKEMELDING PÅ MELDING OM BEHANDLING AV PERSONOPPLYSNINGER

Vi viser til melding om behandling av personopplysninger, mottatt 14.04.2015. Meldingen gjelder prosjektet:

43121 *Forståelser av seksuelle krenkelser i spenningsfeltet mellom den juridiske profesjonen og ulike hjelpeprofesjoner, samt mellom ulike kulturelle verdier og normer*  
Behandlingsansvarlig *Universitetet i Oslo, ved institusjonens øverste leder*  
Daglig ansvarlig *Solveig Laugerud*

Personvernombudet har vurdert prosjektet, og finner at behandlingen av personopplysninger vil være regulert av § 7-27 i personopplysningsforskriften. Personvernombudet tilrår at prosjektet gjennomføres.

Personvernombudets tilråding forutsetter at prosjektet gjennomføres i tråd med opplysningene gitt i meldeskjemaet, korrespondanse med ombudet, ombudets kommentarer samt personopplysningsloven og helseregisterloven med forskrifter. Behandlingen av personopplysninger kan settes i gang.

Det gjøres oppmerksom på at det skal gis ny melding dersom behandlingen endres i forhold til de opplysninger som ligger til grunn for personvernombudets vurdering. Endringsmeldinger gis via et eget skjema, <http://www.nsd.uib.no/personvern/meldeplikt/skjema.html>. Det skal også gis melding etter tre år dersom prosjektet fortsatt pågår. Meldinger skal skje skriftlig til ombudet.

Personvernombudet har lagt ut opplysninger om prosjektet i en offentlig database, <http://pvo.nsd.no/prosjekt>.

Personvernombudet vil ved prosjektets avslutning, 31.03.2019, rette en henvendelse angående status for behandlingen av personopplysninger.

Vennlig hilsen

Katrine Utaaker Segadal

Lis Tenold

Kontaktperson: Lis Tenold tlf: 55 58 33 77

*Dokumentet er elektronisk produsert og godkjent ved NSDs rutiner for elektronisk godkjenning.*

Avdelingskontorer / District Offices:

OSLO: NSD, Universitetet i Oslo, Postboks 1055 Blindern, 0316 Oslo. Tel: +47-22 85 52 11. nsd@uio.no

TRONDHEIM: NSD, Norges teknisk-naturvitenskapelige universitet, 7491 Trondheim. Tel: +47-73 59 19 07. kyrre.svarva@svt.ntnu.no

TROMSØ: NSD, SVF, Universitetet i Tromsø, 9037 Tromsø. Tel: +47-77 64 43 36. nsdmaa@sv.uit.no

Vedlegg: Prosjektvurdering



Formålet med studien er å få større kunnskap om de problemstillingene, utfordringene og kontroversene som kan oppstå i spenningsfeltet mellom ulike profesjonelle, institusjonelle og personlige perspektiver på seksuelle krenkelser og hvordan disse kan spille inn på den enkeltes handlingsrom og konseptualisering av egne erfaringer, samt de profesjonelles intervensjoner og praksis.

Utvalget omfatter jenter over 16 år og kvinner (ca. 15-20 kvinner) med minoritets- og majoritetsetnisk bakgrunn som har opplevd seksuelle overgrep og voldtekt og ansatte i hjelpeapparatet som møter/hjelper jentene/kvinnene. Utvalget omfatter også ansatte i organisasjoner som jobber med overgrepssproblematikk. Utvalget rekrutteres fra skolehelsetjenesten og minoritetsrådgivere på videregående skole, helsestasjoner for ungdom, hjelpeapparatet (overgrepsmottakene, krisesentrene og bokollektivet) og frivillige organisasjoner som jobber med overgrepssproblematikk som for eksempel, Dixi – landsforeningen for voldtatte og sentre mot incest og overgrep, samt organisasjoner som arbeider mot tvangsekteskap. Det er disse institusjoner/organisasjoner som formidler henvendelsen for prosjektleder. De som ønsker å delta tar selv direkte kontakt med prosjektleder.

Utvalget informeres skriftlig og muntlig om prosjektet og samtykker til deltakelse. Informasjonsskrivet er godt utformet.

Det behandles sensitive personopplysninger om etnisk bakgrunn eller politisk/filosofisk/religiøs oppfatning, helseforhold, seksuelle forhold, medlemskap i fagforeninger, jf. personopplysningsloven § 2 punkt 8, a), c), d) og e).

Personvernombudet legger til grunn at forsker etterfølger Universitetet i Oslo sine interne rutiner for datasikkerhet. Dersom personopplysninger skal sendes elektronisk eller lagres på privat pc/mobile enheter, bør opplysningene krypteres tilstrekkelig.

Forventet prosjektslutt er 31.03.2019. Ifølge prosjektmeldingen skal innsamlede opplysninger da anonymiseres. Anonymisering innebærer å bearbeide datamaterialet slik at ingen enkeltpersoner kan gjenkjennes. Det gjøres ved å:

- slette direkte personopplysninger (som navn/koblingsnøkkel)
- slette/omskrive indirekte personopplysninger (identifiserende sammenstilling av bakgrunnsopplysninger som f.eks. bosted/arbeidssted, alder og kjønn)
- slette digitale lydopptak

Personvernombudet forstår at det også søkes om innsyn i voldsoffererstatningssaker fra justisdepartementet og Riksadvokaten, men at innsynet ikke innebærer at det samles inn og registreres personopplysninger. Det vises her også til telefonsamtale med prosjektleder 11.05.2015 som bekrefter dette.

REK sør-øst har vurdert prosjektet til å falle utenfor helseforskningslovens virkeområde (ref. 2015/518 A).



### **Appendix 3: «Informasjonsbrev til deltakere»**



## Vil du være med i et forskningsprosjekt?

Har du blitt pressa, tvunget eller truet til å ha sex når du ikke ønsket det og har du følt deg krenket etterpå? Har noen mot din vilje hatt sex med deg mens du har sovet eller når du har vært full eller dopa ned? Eller har noen du trodde du kunne stole på utnyttet sin posisjon til å ha sex med deg mot din vilje?

Målet med studien er å undersøke hvordan den enkelte forstår sine erfaringer og sin situasjon i dag og se disse forståelsene i lys av juridiske og helsefaglige perspektiver for å få kunnskap om hva som kan bidra til positive møter med rettssystemet og hjelpeapparatet.

### Hva innebærer deltakelse i studien?

Hvis du ønsker å delta i studien kan du ta kontakt med meg på sms, telefon eller e-post slik at vi kan avtale tid og sted for et intervju. Intervjuet kan vi gjøre på mitt kontor eller et sted du foretrekker hvor vi kan sitte i fred og snakke sammen. I intervjuet vil jeg be deg fortelle om det du har opplevd, hvordan hverdagen har vært etterpå og hva slags hjelp du har fått og hvorvidt du har anmeldt det du har opplevd. Du bestemmer selv hvor mye du ønsker å fortelle og hva du ønsker å fortelle. Hvis det er greit for deg vil intervjuet tas opp på bånd og senere skrives ut på papir.

### Hva skjer med informasjonen om deg?

Alle personopplysninger vil bli behandlet konfidensielt. Det er kun undertegnede som vil ha tilgang til personopplysninger i prosjektet. Lydfiler vil være aidentifisert og lagres nedlåst på minnepinner, før det skrives ut og lagres på samme måte. Lister over navn og kontaktinformasjon vil oppbevares nedlåst i et annet skap. I publikasjoner vil deltakerne anonymiseres ved at direkte gjenkjennbare opplysninger fjernes og indirekte gjenkjennbare opplysninger endres der det er nødvendig.

Prosjektet skal etter planen avsluttes 31.03.2019. Alle personopplysninger og lydfiler vil da slettes og datamaterialet vil anonymiseres.

### Frivillig deltakelse

Det er frivillig å delta i studien, og du kan når som helst trekke ditt samtykke uten å oppgi noen grunn. Dersom du trekker deg, vil alle opplysninger om deg bli anonymisert.

Dersom du ønsker å delta eller har spørsmål til studien, ta kontakt med Solveig Laugerud på tlf. 91 55 13 53 / 22 85 89 47 og [solveig.laugerud@stk.uio.no](mailto:solveig.laugerud@stk.uio.no) Hvis du er litt nysgjerrig på hva dette er, men vil vite mer før du bestemmer deg for om du vil delta, send meg en SMS/e-post med «Jeg vil vite mer». Hvis du har bestemt deg send «Jeg vil delta».

Intervjuet er en del av et forskningsprosjekt ved universitet i Oslo og studien er meldt til Personvernombudet for forskning, Norsk samfunnsvitenskapelig datatjeneste AS.

Med vennlig hilsen,

Solveig Laugerud  
Doktorgradsstipendiat ved senter for tverrfaglig kjønnsforskning  
Universitetet i Oslo





## **Appendix 4: «Intervjuguide»**



## Intervjuguide

Husk: Informasjonsskriv, samtykke, diktafon. Spørsmål? Fortelle om intervjuet, form og innhold.

Hva tenkte du da du så min forespørsel?

- Fortell (så mye du vil) om det du har opplevd (voldtekt/overgrepet).
  - Tid, sted, situasjon, overgriper
- Fortell om perioden etter hendelsen
  - Hvordan har hverdagen vært?
    - I familien, blant venner, på jobb/studier? Åpenhet?
    - Hvordan skiller den seg fra tidligere?
  - Hvordan har du hatt det?
    - Hvordan ser du på din egen helse?
      - Reflektere rundt begrepene syk/frisk/helse? Hva er helse? Hva innebærer det å være syk/frisk i forhold til seksuelle krenkelses?
  - Fortell om hva har du gjort.
    - Anmeldt?
      - Hvordan var møte med politi/rettssystem?
      - Hvordan gikk det med saken?
    - Søkt hjelp?
      - Hvordan var møte med hjelpetilbudet?
    - Søkt voldsoffererstatning?
      - Hvordan gikk det?
  - Hva har vært viktig i denne perioden?
- Defineringsprosesser: legg merke til hvilke begreper hun bruker og hvordan hun omtaler hendelsen og seg selv.
  - Vil du kalle hendelsen en voldtekt/overgrep? Hvorfor/hvorfor ikke?
  - Hvilke begreper foretrekker du?
  - Vil du si at du er et offer for voldtekt/overgrep? Hvorfor/hvorfor ikke?

