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To cite this article: Solveig Laugerud (2020) Common Sense, (Ab)normality and Bodies in Norwegian Rape Verdicts, NORA - Nordic Journal of Feminist and Gender Research, 28:1, 18-29, DOI: [10.1080/08038740.2019.1697748](https://doi.org/10.1080/08038740.2019.1697748)

To link to this article: <https://doi.org/10.1080/08038740.2019.1697748>



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Published online: 18 Dec 2019.



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Common Sense, (Ab)normality and Bodies in Norwegian Rape Verdicts

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ABSTRACT

Common sense, which refers to judgement 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.

ARTICLE HISTORY

Received 2 April 2019

Accepted 19 November 2019

KEYWORDS

Rape; body; normality; norm; verdicts; common sense

Introduction

Common sense, which refers to non-expert knowledge and judgement 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 legal scholar Ellison (2019) have argued that common sense is imbued with rape myths. 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, p. 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 Rubin (2011), 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 defence lawyers to discredit the victim (Matoesian, 1995; Temkin, Gray, & 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 judgement of sexual acts and desires is needed: something that takes part in establishing normative sexuality (Alcoff, 2018, p. 77). Nevertheless, judgements 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 judgements 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, 2008). 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)¹. 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 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 judgement 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 judgement 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 judgement. 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, Hacking (1990) and 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 (Ewald, 1990; Hacking, 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 centres 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”² 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 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 analyse 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 & 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 analysing 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.

How the courts create a connection between the (un)common and the (ab)normal

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 behaviour that it uses as a norm. If the accused and the victim do not behave according to expectations, the court will accordingly problematize their behaviour.

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 behaviour 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 behaviour 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 judgement 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 aggrieved³ 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”.

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 behaviour.

In addition, the court argues that the woman’s testimony is substantiated by her subsequent behaviour 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 afterwards”. 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 defence 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 defence 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 defence lawyer in which the accused mentioned how he used lubricant when having sex that night and the defence 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 defence 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 defence 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 behaviour is accordingly problematized and questioned in terms of credibility.

How the courts draw boundaries between the normal and the 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 (2011) 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.

How common sense turns the legal gaze towards 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 towards 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". Remarkingly 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 centre. 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 weighed 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 towards 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 behaviour 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 analysed, 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 judgement 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 et al., 2016). When the focus is on women's sexual conduct, common sense rests on moralizing norms regarding appropriate female behaviour rather than ideas about normal female bodies.

Notes

1. 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 (NOU2006:10, 2006).
2. Lovdata is a database that includes sources of law and legal decisions. It is available to subscribers, and I have access through the university.
3. In the Norwegian legal system, a victim is called an aggrieved person and not only a complainant, due to a range of participatory rights.

Disclosure statement

No potential conflict of interest was reported by the author.

Notes on contributor

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