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Abstract: This paper asks how perpetrators and victims are constructed in legal rape cases, and how these constructions are informed by notions of gender, sexuality, race, and nation. It presents an in-depth frame analysis of two legal cases that were processed by appellate courts in 2012. In so doing, I show how the allocation of shame and sympathy for victims and perpetrators is connected to citizenship through gender and race discrimination. The analysis suggests that whereas the perpetrator with a majority racial background was subject to so called reintegrative shaming, the perpetrator with a minority racial background was subject to stigmatic shaming. The politics of shame in the context of rape thus manifests as attribution of guilt (but to a lesser extent shame and stigmatization) to the majority perpetrator, whereas minority perpetrator was constructed as a deviant outlaw deserving of public shame. Prior relationship with the perpetrator, sexually “risk-taking” behavior and alcohol consumption was associated with negative stereotyping of victims. Moreover, violence committed by the perpetrator from a racial-majority group was considered by the court to be a deviation from the civilized and gender-equal mainstream culture. I therefore argue that geography constitutes a specific element in the legal processing of rape cases. With the prosecution of rape as a medium, the courts produce and reproduce a moral community in which some sexual citizens are admitted a share and others are not, while the legal process simultaneously manages the sexual rights of citizens in different physical and social spaces.

Bearing in mind the feminist insight that the personal is always political, and that withholding sympathy is a powerful tool to keep people in line, the construction of rape is not only a legal issue but also a profoundly political one. Writing about the political history of rape in the US, Estelle Freedman (2013, 2) claims that rape is intimately bound up with citizenship and the politics of belonging. White men's sexual privileges have been maintained by constructions of black women as always consenting, white women as duplicitous, and black men as constant sexual threats. In this paper I contend that the stratification of citizenry may in turn account for a stratification of shame by means of two different shaming practices, what John Braithwaite has termed "stigmatic" and "reintegrative" shaming (Braithwaite 1989; see also Rossner 2014). Stigmatic shaming condemns a person's character, not just the act committed, whereas reintegrative shaming gives the offender a chance to repent and be welcomed back to society. Shame can be distinguished from guilt in that the former "runs deeper" and pertains to a trait or feature of a person rather than a single act (Nussbaum 2004, 229). In this paper, the allocation of guilt is understood as a practice of reintegrative shaming whereas the allocation of shame is thought of as a practice of stigmatic shaming. According to Erving Goffman (1963, 11-14), stigma is always associated with discrimination because it refers to real or imagined traits of an ethnic group, nationality, or religion that is considered deviant from a norm, the unblushing white male. The unblushing white male is upheld as a norm through particular forms of social organization where men and women are expected to fulfill different roles and expectations (Goffman 1977). As feminist and postcolonial scholars have pointed out, constructions of difference are never innocent; on the contrary, they are often used to justify discrimination, either on the basis of sexuality, gender, or race (Collins 2004; Gullestad 2002a; Magubane 2014). Rape and other forms of sexual violence have

proved to be particularly contentious sites for stereotyped value judgments in relation to gender, race, and sexuality on the basis of perceived sociosexual differences between men and women and racial minority and majority groups.¹ As this paper will argue, how society constructs and makes sense of sexual violence is thus also central to national formations and notions of citizenship.² This paper asks how perpetrators and victims³ are constructed in legal rape cases and how these constructions are informed by notions of gender, sexuality, race, and nation. More specifically, the legal processing of rape cases will be used as an entry point to explore the interconnectedness between the geography of rape and the politics of shame. I take the geography of rape to be a process in which the courts produce and reproduce a moral community where some sexual citizens (Weeks 1998) are admitted and others not, while the legal process simultaneously manages the sexual rights of citizens in different physical and social spaces. The politics of shame, on the other hand, is defined as the ways courts construct human beings as deserving either of punishment and blame or recognition and sympathy. Before I turn to an empirical analysis of this issue, I will next present an introduction to the gendered and racialized politics of shame in Norway.

The gendered and racialized politics of shame in Norway

Whereas the US is popularly conceived of as a nation built by immigrants, the opposite can be said about Norway. In the late 1960s and 1970s, labor migration acquired a more global character when a number of Pakistanis and Turks settled in Norway. Many of them got jobs in the service sector, primarily with cleaning, restaurant and retail, as well as taxi driving (Gullestad 2002a, 26). However, for the purpose of limiting labor immigration, Labour Party Prime Minister Trygve Bratteli issued a so-called immigration stop in 1974, which has been in effect since. According to Statistics

Norway, from the mid-1980s to 2005, immigration to Norway occurred mainly through family reunions and asylum. By 2017, immigrants and their descendants accounted for almost 17 percent of the entire population in Norway: 883,751 persons.⁴ The enlargement of the EU in 2004 to encompass several countries in Eastern Europe has brought a new wave of labor immigration, especially workers from Poland and Lithuania who are employed in the construction industry. In more recent years, poverty, wars, and regional conflicts, predominantly in the Middle East, have forced many people to flee to Europe. The majority of refugees come from Syria, Afghanistan, and Somalia.⁵ Compared to other European countries, such as Sweden and Germany, Norway has received relatively few refugees during these global crises, and the numbers have declined over the past five years. This is because the current government, a coalition of two liberal-conservative parties, has endorsed a more restrictive immigration policy.

According to Marianne Gullestad (2002b) Norway, together with the other Nordic countries, provides a particularly interesting context for the examination of the relationship between egalitarianism, nationalism, and racism in Europe. Norway has a specific combination of a bureaucratic welfare state and an open globalized capitalist economy. In recent decades, the question of how open this welfare state should be, particularly within a global context with increased migration and economic crises, has been subject to public debate. For a number of years, the governing Progress Party (*Fremskrittspartiet*), which was founded on the basis of resistance to taxes, has been engaged in issues such as better elder care, road construction, and resistance to immigration. Like other parties, such as the Freedom Party in Austria, the National Front in France, and the Danish People's Party in Denmark, the Progress Party can be categorized as a right-wing populist party; that is, it works within the framework of

democracy and bases its ideology on exclusionary nationalism, value conservatism, and antielitism (Raknes 2012).

Most immigrants in Norway live in the capital, Oslo. As in Sweden and Denmark, concerns about ghetto formations and parallel societies are frequently brought to the fore in the Norwegian immigration debate, and many – especially right-wing and conservative opinion leaders and politicians – claim that the welfare state is under pressure (Gullestad 2002b). Moreover, it is argued that the immigrants' culture is incompatible with "Norwegian values" and the Norwegian way of life. "Norwegian values" and culture tend to be defined generically, as a subscription to a modern secular and egalitarian society where the individual's rights are placed over the group's. Following the terrorist attacks on 9/11, public debates in several countries in the Western world have centered on perceived oppositions between Islam on one side and Christianity and modernity on the other. Most striking, perhaps, is the mobilization of notions of gender, race, and nation. In the name of gender equality, ideological actors have appropriated causes, such as "honor-based" violence and LGBT rights, to criticize racial minority groups in general and Islam in particular (Bacchetta et al. 2002; Puar 2007; Farris 2012). This appropriation is also known as femonationalism: a chauvinist and xenophobic ideology deployed by right-wing parties and neo-liberal governments in contemporary Europe (Farris 2012, 187).

Similar to the United States and countries elsewhere in Europe, the immigration and integration debate in Norway has been a venue for a variant of so-called sexual exceptionalism (Puar 2007), a process in which "the others'" sexual and gender practices become essentialized and differentiated from the majority population's, which in turn confirms the majority's self-image as unique and progressive (Gullestad 2002a). In this process – which is both discursive, ideological, and political – the nation is

framed as a pioneer of gender equality and sexual liberation. Everything from questions about “aggressive” Nigerian prostitutes who “harass innocent family fathers” on the capital’s main street (Skilbrei 2009) to high birth rates among the minority population, allegedly threatening to extinguish “ethnic Norwegians” as a majority group (Lorentzen 2013), are problematized in these debates. In recent years, gender-based violence has gained status as a particularly forceful symbolic currency in the immigration debate, where themes such as genital mutilation, forced marriage, and the occurrence of stranger rapes committed in public spaces by men with African and the Middle Eastern backgrounds has attracted a lot of attention.

As I note above, sexual violence is known to be a particularly contentious site for meaning-making and stereotyped value judgments in relation to gender, race, and sexuality.⁶ Although rape laws have changed in many American and European jurisdictions the past forty years or so, and more victims than ever are filing police reports (Baumer 2004; Hennem 2004; Flatley 2016), subtle forms of sexism, racism, and various forms of stereotyping have not ceased to exist. Researchers have found a systematic reduction of sentences when the offender and the victim had a prior relationship (Rumney 1999). So-called negative victim characteristics (such as the use of alcohol or drugs at time of the assault, references made in the crime report to a possible past or present involvement in prostitution, presence alone in a bar or in public at night, self-assistance in removing clothing, hitchhiking, or other kinds of “risk-taking behavior”) have also been associated with lenient sentencing practices and victim blaming (Spohn and Spears 1996; Kingsnorth, MacIntosh, and Wentworth 1999; Bumiller 2008). Research on case processing and sentencing practices in rape cases is a well-established research field internationally, and studies suggest that extralegal factors such as class and race affect prosecution and sentencing practices in the criminal justice

system (Bumiller 1987; Daly and Michael 1997; Razack 1998, 2002). These findings resemble the situation in Norway, where sentencing practices are stratified according to gender, space, and race (even when controlling for excessive use of violence and other aggravating circumstances). Offenses committed by majority men in private spaces toward women they know are treated more leniently than offenses committed by “dark strangers” in public spaces (Bitsch and Klemetsen 2017). According to national prevalence surveys, more than one in ten women in Norway have been raped during their lifetime, many before the age of 18 (Thoresen and Hjemdal 2014). Emotions like shame and self-blame affect how these rape victims perceive the acts inflicted upon them, possibly as something they should have prevented (Smette and Stefansen 2006). Many victims do not seek medical and legal attention; according to the national prevalence survey cited above, only 10 percent file a police report and two out of three women never tell anyone about the abuse (Thoresen and Hjemdal 2014). Among the 10 percent of victims who file a police report, cases are dismissed more than 80 percent of the time. When cases are prosecuted, every fourth case ends with an acquittal (Kruse, Strandmoen, and Skjørten 2013). In line with studies of rape victims’ access to legal justice in other countries, such as the US (Spohn and Spears 1996; Kingsnorth, MacIntosh, and Wentworth 1999; Lonsway and Archambault 2012), Canada (Razack 2002), and the UK (Temkin 2000; Lees 2002; Temkin, Gray, and Barrett 2016), some rape victims are exposed to shaming or blaming, in particular if they display “negative victim characteristics” such as having consumed alcohol, are known to have a background in prostitution, had prior sexual contact with the defendant, or did not effectively resist sexual contact. Shaming narratives are conveyed by both the mainstream and social media and by the police and legal professionals (Bitsch and Kruse 2012; Bitsch and Klemetsen 2017).

Although the legal protection of rape victims and victims of domestic violence has been remarkably strengthened in Norway over the years, many still have to “prove,” or substantiate, that they did not consent to sex or in any way “provoke” the violence, when they testify in court. Cross-examinations include questions about alcohol habits, sexual preferences and promiscuity, previous victimization, possible revenge motives, and mothering capabilities (Bitsch and Kruse 2012). Defense lawyers routinely distinguish between “good” and “bad” victims, and tend to frame lack of resistance as proof of consent (Bitsch forthcoming).

Whereas feminist and sociolegal studies of the legal processing of rape cases have become a relatively well-established research field, particularly in common-law jurisdictions such as Great Britain and the US, there has been little research on the sentencing practices carried out in Norway. Insofar as context shapes cultural understandings of citizenship and rights—in short, who are deemed worthy members of physical and moral communities—an assessment of how this is accomplished in one of the most gender-equal countries in the world is much warranted.⁷ Moreover, this study adds to a comparative study of rape law in its investigation of how racialized and gendered legal subjects are constructed in a national context without a historical past of colonialism or slavery but with increased right-wing populism and xenophobia.

Methods and data

The judgments chosen for analysis in this paper will not primarily be approached as “law applied to facts” but as shaming narratives mandated to devise sanctions toward perpetrators and offer compensation to victims on the basis of allocating shame and sympathy.⁸ This analytical approach fundamentally differs from traditional legal analyses of sentencing practice in that it challenges the dominant image of law as

dispassionate, affectively neutral, and impartial (Maroney 2011, 633; Roach Anleu, Bergman Blix, and Mack 2015, 145). Although law and legal practice should not be reduced to emotions, it is certainly informed by them. As Martha Nussbaum (2004, 50) has noted, compassion plays a key role in sentencing practice because human beings tend to sympathize with people they care about or can imagine a “community of vulnerability” with. Moreover, notions about fairness and the individual’s right to be protected from abuse of state power, for instance, do not exist outside human interpretation and value systems. Legal practice is fundamentally concerned with negotiation and assessment of narratives (Kjus 2005), which involves perspective-taking and human capability for sympathy and compassion among judges, prosecutors, and defense lawyers alike.⁹

As I note above, the quantitative study of sentencing practice in rape cases preceding this study found that lenient sentencing was practiced without reference to law in a number of cases (Bitsch and Klemetsen 2017). In line with the existing research, the overall pattern in the study of Norwegian sentencing practice confirms that racial and gender bias affects sentencing practice. Rapes committed in private spaces by acquaintances, in particular when the perpetrator is from a majority group, are framed as less serious and subject to more lenient sentencing (Bitsch and Klemetsen 2017). This paper seeks to make sense of these biases through an in-depth frame analysis (Entman 1993) of two rape cases from the same dataset that was used to conduct the quantitative study. Frame analysis is suitable for dissecting how social problems and causal agents are defined, how events are discursively linked together (for instance in policy documents or other types of text), and how definitions preclude or make particular versions of reality and remedies more intelligible than others (Manning and Hawkins 1990; Entman 1993).

Initially, 176 cases concerning attempted and completed rape (excluding statutory rape), processed by Norwegian appellate courts in 2011 and 2012, were extracted from the official database lovdata.no. All the victims were female, and all the perpetrators were male. Cases with male victims or female perpetrators were not deliberately excluded, but since very few such cases are brought to court, they did not figure in the dataset. Of the 176 cases, 35 were acquitted, equivalent to an acquittal rate of 20 percent. After dropping the acquitted cases, the sample was further reduced to 141 cases. With acquittals excluded, selection problems that might occur when certain types of rape turn out to be difficult to prove were avoided. Cases with insufficient information (missing values) were automatically dropped, leaving us with a final sample size of 135 cases. All the judgments were thoroughly read, and the facts from each case were coded into a database. The facts include the applied law provisions, such as mitigating and aggravating circumstances, whether the crime was committed before or after the 2010 revisions of sentencing guidelines, as well as information about the variables of main interest. For the purpose of in-depth qualitative analysis, information about how notions about gender, race, sexuality, and power relations were constructed and construed in the judgments was also registered in the database. The two cases selected for analysis in this paper were committed in public spaces and involved majority rape victims. In the first case, the perpetrator was from a minority group, and in the other the perpetrator was from a majority group. In selecting cases, I deliberately avoided so-called outlier cases, such as offenses where the victim died or offenses that were carried out in particular harmful manner, since such cases only make up 7.5 percent of the dataset (Bitsch and Klemetsen 2017). The two selected cases are thus fairly representative for their “type,” both in terms of sentence length and the seriousness of the crime.¹⁰ Insofar as the modes of the perpetrators were quite similar

and both cases did not involve complete vaginal penetration by the penis, they should be fairly comparable.¹¹ The cases are not necessarily representative of the legal processing of all public stranger rapes, nor do they allow for a comprehensive critique of rape law in all its operations. Rather, these two cases exemplify how gender and racial bias may play out in the context of sentencing and how this is intertwined with a politics of shame.

Black-on-white public stranger rape: The dark foreigner and the helpless victim

The rape cases most often associated with strict sentences are public stranger rapes, known in popular discourse as “assault rapes.” For the purpose of analytical clarity, I have chosen the former term since I regard all types of rape to entail an assault on human dignity, bodily integrity, and sexual autonomy, even if physical coercion or physical violence is modest. Minority perpetrators with backgrounds outside Northern Europe are slightly overrepresented in public stranger rapes (National Criminal Investigation Service 2013, 21). The case selected for analysis involves a 23-year-old African man who raped a Norwegian woman in a public space in 2012 and was sentenced to 54 months in prison (Case No. LH-2012-91182). The average sentence length for public stranger rapes committed by minority men in the dataset was 59.4 months in prison (n=21).

The facts of the case are presented on less than one typewritten page. According to the judgment, the victim was assaulted in a deserted, dark street at 4:30 a.m., shortly after leaving a bar where she had been out for drinks with friends. The defendant did not succeed in completing intercourse, since a man and a woman arrived at the crime scene because they heard someone call for help. The judgment starts with describing the defendant in terms of age, nationality, residence status, and occupation, which is then

followed by a very brief description of the facts of the case (p. 3). Nothing is written regarding the victim's age, occupation, or nationality. Norwegianness thus becomes a silent signifier, which is taken for granted by the court (but can be inferred from the complainant's name, which is typically Norwegian). It is unclear from the judgment exactly *how* the defendant's nationality is relevant for assessing the crime in question. Even if the court refrains from expressing blatant racial prejudices, it frames "African descent" as relevant for describing the defendant, and possibly his identity, thoughts, and motives. Being defined as different with reference to blood, nationality, or culture can potentially discredit a person and assign him or her a tribal stigma (Goffman 1963). The special thing about tribal stigma is that it contaminates all members of a group – indeed, it is noteworthy that the defendant's subjectivity is framed with reference to an entire *continent* rather than his actual citizenship.

Feminist scholars have conceptualized rape myths as perceptions that serve to minimize perpetrators' responsibility and/or minimize victims' trauma. One such myth states that it is not "real rape" unless the perpetrator is a stranger who jumps out of the bushes (Estrich 1987; Lees 2002; Temkin and Krahé 2008). In the judgment, we see how the "real rape" stereotype is operative in framing the victim as chaste and unknown to the perpetrator: "She had never met the perpetrator before" and "nothing indicated that she wanted sexual contact" (p. 4). If being raped by a complete stranger in "the dead of a dark winter night" is almost always proxy for a victim's innocence, alcohol consumption is a potential threat to her credibility. This potential negative victim characteristic is also explicitly addressed and refuted: "She was not particularly inebriated by the time of the assault" (p. 3). This information serves to buttress the court's argument and draws on the classic rape myth that it is not "real rape" if there is a prior relationship between victim and offender, lack of force or resistance, or an absence

of evidence corroborating the victim's account (Estrich 1987). In Norway, cases not resembling the "real rape" stereotype are more likely to be labeled false rape accusations or a case of a woman who "cries rape" while in fact regretting drunken consensual sex (Bitsch and Kruse 2012). When it comes to the specific constructions of shame and sympathy, consider the following description of the victim and the perpetrator: "It has been difficult for her to talk about it after the incident. She has not sought psychiatric treatment, but appeared very affected by the incident when she testified before the appellate court.... The assault, in the dead of winter, in 3.5 freezing degrees Celsius, behind bushes in a quiet street by night, is a serious assault rape ... with the intention of completing intercourse." In the process of framing the offense as a "serious assault rape," the court expresses several preconditions for sympathy and credibility. A victim must appear visibly traumatized, for instance by being affected in court. However, being too vocal about a sexual assault might be counterproductive ("it has been difficult for her to talk about it after the incident") and perhaps being perceived as attention-seeking. Moreover, the linkage of seriousness to space and the fact that the perpetrator was unknown to the victim illustrates how conceptions of place are intertwined with the politics of shame. When courts construct legal subjects as deserving either of punishment and blame or recognition and sympathy, it seems to be a more or less taken for granted that it is particularly bad to be assaulted outdoors by a stranger, possibly more traumatizing than being raped by an acquaintance indoors. This speaks to the inherent geography of rape, where certain spaces become linked with particular rights. As the quantitative study preceding this study shows, sexual violence framed as "private" is associated with lenient sentencing practice; sentences were on average reduced 30 percent when the rape was committed in a private space as opposed to a public space (Bitsch and Klemetsen 2017). In other words, "private" sexual

violence is considered much less serious by the courts. Indeed, rape in a public space seems to embody an attack on public security – perhaps even more so than an assault on the individual woman, who is barely referred to in the judgment. As feminist geographers and philosophers have noted, public stranger rape often comes to function as an epitome of unsafe urban spaces and racial tensions, in need of administration by a vigorous state (Bumiller 1987, 2008; Valentine 1992).

While a general feature of the legal categorization process entails application of reductionist language that is tasked with standardizing harm and reducing complexity (Holstein and Miller 1990; Dunn 2001; Hopper 2001), the absence of information about the victim in this public stranger rape case is remarkable. One possible interpretation is that judges can draw on relatively robust frames when they construct the official narrative. Public stranger rapes are generally considered clear-cut and unambiguous, which almost makes legal justification redundant.¹²

The politics of shame is tightly interwoven with the politics of race. Even in a country without a history of slavery and colonialism, narratives about minority men as constant sexual threats to majority women and public safety loom large, in particular in tabloid media.¹³ In the dataset, this was also evident in marital rape and domestic violence cases involving perpetrators and victims from minority groups. The courts often labeled these offenses as “honor crimes” and constructed them as qualitatively different from rape and domestic violence committed by white men, indirectly inferring that white men were not motivated by masculinist notions of honor. Presumably, gender-based and sexual violence committed by minority men is justified by bystanders and endorsed by the “their culture.”¹⁴ In contrast, Norwegian men’s violence is considered to be a deviation from the civilized and gender-equal mainstream culture. As we shall see in the next case, the lack of an interrogation of the relationship between

mainstream gender culture and sexual violence is striking in cases concerning majority men who commit rape in public spaces.

White-on-white public stranger rape: A matter of poor victim prevention?

According to official statistics, all reported public stranger rapes with detected perpetrators are committed by minority men (Grytdal and Sætre 2011). Majority men are rarely prosecuted for public stranger rapes; in the dataset, only one case was categorized by the court as such (Case No. LG-2012-27499). The crime, for which the defendant was sentenced to forty-five months in prison, involved a 27-year-old man and a 54-year-old woman. They had had limited contact prior to the assault, and the offense was conducted by means of physical violence/coercion and threats. However, in contrast to the case analyzed above, the court did not define this as a clear-cut “assault rape” despite several similarities between the cases in terms of the degree of physical violence used. This framing had consequences for allocation of shame and stigma and how the seriousness of the crime was constructed. Initially, the case was prosecuted as a completed rape, but the district court convicted the assailant for attempt only, and the prosecutor did not appeal the decision (Case No. TBERG-2011-144169).

Interestingly, the prosecutor asked the court to choose between either of two alternatives, forcible rape (§ 291a) or incapacitated rape (§ 291b). The issue at stake was that the victim was very drunk but not unconscious or too drunk to resist, which is needed for prosecuting incapacitated rape. On the other hand, the defendant had not used excess physical force, such as beating, kicking, strangling, or threatening her with a weapon, and since many people fail to recognize the power of psychological violence or intimidating behavior, the prosecutor risked that the jury would acquit the defendant of forcible rape (so-called “assault rape”). This created a tricky situation where the

prosecutor and the court had a less robust frame to project the case onto. Before I explain how this played out, a description of the case is warranted.

Similar to the rape case discussed above, the victim is described as passive and helpless, but her alcohol consumption is to a larger extent made relevant. The judgment begins with the following description of the course of events (p. 4):

Approximately at 2.30 a.m. on November 14, 2010, the police in Bergen received a phone call that a woman had been raped in Krohnengen Park in the Sandvik area, and that a man was arrested by civilians after having attempted to escape the crime scene. Upon arrival shortly after, the police found the defendant lying handcuffed outside --- street 29. The police were directed to the place in the park where the incident had occurred and where the complainant B, born in 1956, was lying on the ground, undressed from her abdomen and down. She was to a limited extent able to explain herself.

The language in the judgment is written in a standard passive, descriptive voice. From the outset, focus is placed on the victim rather than the perpetrator. The first sentence establishes that “a woman was raped.” Something was *done to her*. This choice of wording leaves out an agent who has raped – and thus results in a faceless crime. Had the court instead written “the police in Bergen received a phone call that a *man had raped a woman* in Krohnengen Park in the Sandvik area,” the perpetrator would have been constructed as an active and responsible agent. The next passage concerns the whereabouts of the complainant and the defendant on the evening in question (p. 4): “This evening, the defendant had been sitting at home with a friend, drinking significant amounts of alcohol, before they went downtown. The defendant was denied access to

different bars, and eventually went home towards --- street. The complainant had eaten dinner in a restaurant with her partner, after which they were seated at Bar Barista in the Beitostolen area until closing time, around 1.30 a.m. On their way home, they agreed that he should walk ahead without her, because he had an urgent need to go to the toilet.”

In the above excerpt, the court addresses alcohol as important. As courts must assess the reliability of evidence and this might be weakened if a witness has difficulty remembering what happened because of intoxication, this appears to be reasonable. However, placing the issue of alcohol consumption at the very beginning of the judgment and thus, one might infer, making it the most important information about the defendant, has profound consequences for how the causes of rape are defined: Rather than being caused by lack of gender equality or male sense of entitlement, rape is implicitly framed as an outcome of casual drunkenness. This framing precludes rape being understood as the outcome of a person’s inability to empathize with others or a proclivity for objectifying and humiliating women sexually. A frame like this would contextualize the assault with reference to the defendant’s *character*, whereas the “casual drunkenness”-frame consider the crime to be more a result of circumstance. By blaming the defendant solely for his *actions*, the court appears to be practicing reintegrative shaming rather than stigmatic shaming. This, in turn, illustrates the interconnection between shaming practices and citizenship, in that reintegrative shaming practices to a larger extent acknowledge the defendant’s humanity and membership of a shared moral community (Braithwaite 1989; Nussbaum 2004).

Further, in contrast to the case involving the minority defendant, the majority defendant’s nationality is not mentioned as a relevant fact, and he thus escapes a potential tribal stigma (Goffman 1963). Delinking the problem of rape from mainstream

culture forestalls a structural analysis of those very intersectional male privileges that underpin this culture.

The court proceeds to describe how the victim's intoxication affects the reliability of her testimony as well as the legitimacy of her assertion that she was raped. They write: "After the incident, the victim has only had scattered fragments of memory of what happened after she and her partner left the Bar Barista" (p. 4). Since the word "after" is used twice in a way that is probably meant to suggest a causal relationship, it is slightly unclear whether the court thinks that her impaired memory is caused by "the incident," as they call it, or the fact that she had been sitting in a bar until closing time at 1.30 a.m. This distinction, one might argue, is of central importance since the allocation of responsibility (and shame) depends on whether her impaired memory was a consequence of self-inflicted intoxication or of trauma caused by a harmful offense committed by another person. The ambiguity about cause and effect creates confusion about what actually happened, which might explain why the court prefers to use the word "incident" rather than what it really is: an attempted rape and a violent attack on the victim's sexual integrity. In establishing that her testimony is unreliable, the court in reality silences the victim, something that is reinforced by the fact that they mainly choose to rely on other witnesses, who observed what was going on. The rest of the facts of the case are constructed like this (p. 4):

The defendant and the complainant first met outside a 7 Eleven kiosk in the city of Bergen and joined each other on their way home, alongside a park. The two of them were eventually standing at the lower entrance of the park. The defendant made advances, such as attempting to touch the complainant under her outerwear. At some point, the complainant stumbled or fell near the staircase

leading into the park. It must be assumed that the victim's balance and consciousness at this time was significantly impaired. The defendant grabbed the complainant from behind and got her back up on her feet again. During this chain of events, the complainant said "no" numerous times. It was audible to the witnesses C, D and E. It is not clear whether this was uttered before or after he attempted to touch her, or before or after she fell. Along each of the outer edges of the park area, there is a path up the terrain. The defendant got the complainant with him along right path. He supported/escorted her ahead of himself up the hill, and otherwise guided her. When the two of them reached a flat part of the park area, the complainant fell down to the ground, a grassy area in a corner. It is unclear whether she fell as a result of an action taken by the defendant. The complainant was lying on the ground, on her back. The defendant then first pulled down his own trousers and underwear, before he pulled down the complainant's trousers and underwear while she was lying down. He then laid himself on top of the complainant and made movements with his naked abdomen against hers.

Here the court constructs a narrative where consensual social contact is followed by flirtation, or "advances," after which the defendant responds to the complainant's rejections with violence and coercion. Words like "support," "escort," and "guide" imply that the violence is less serious. Further, the expression "touch" (Norwegian: *beføle*) is more neutral than "grope" (Norwegian: *klå* or *grafse*). The effect is that the nonconsensual and violent nature of the abuse is toned down. Although the court acknowledges that the victim had her quality "of life substantially reduced" as a result of the "incident," the assessment of the perpetrator's wrongdoings is sparse. In contrast

to the first case involving the minority defendant, this crime is not addressed as a public security issue.

Insofar as the sole actions ascribed to the victim are that she first had been drinking to the effect of being almost unconscious (her level of intoxication, according to court records, was measured to be 2.2 percent) and then voluntarily joined the defendant (“they joined each other on their way home”), some might infer that she placed herself in a risky situation and thus is at least partly to blame for the rape. In fact, the minority of the judges dissented and indirectly reflected along these lines. They argued that the case was primarily a matter of poor prevention on the part of the victim, because she did not resist the perpetrator (p. 5): “These judges do not disagree with the majority that the defendant used force and were acting in a manner that could be considered threatening. But the dominant feature of the case, as these judges see it, however, is that the defendant took advantage of the situation that arose when he met the heavily intoxicated complainant, and *took advantage of her while she was in fact unable to resist* (emphasis added). In the above excerpt, the Norwegian idiom *ta seg til rette* has been translated to “took advantage of her.” I perceive this to be the most accurate translation, but it is still slightly imprecise. It is easy to imagine a sexual innuendo to the expression “taking advantage of.” However, the *expression ta seg til rette* is different. It is a typically Norwegian way of condemning immodest behavior, a question of impoliteness. The original meaning of *ta seg til rette* can be translated as taking something to which one feels entitled, for example food or, tellingly, “another man’s property.” In a sense, this is a way of trivializing sexual assault and a failure to fully recognize the victim’s perspective – that this is a violent assault or a violation of bodily integrity, not primarily discourteous behavior.

In Norway, this framing of causes and agents in incapacitated rape cases is fairly pervasive in cases involving intoxicated young women and men, or when the use of physical violence is relatively modest. Moreover, in defining incapacitated rape (Norwegian Penal Code § 291b) as “sexual activity with somebody who is unconscious or for any other reason *incapable of resisting the act*” (emphasis added), the provision on incapacitated rape has a concept of victim-prevention built into it. The provision was intended to protect “helpless” victims from sexual exploitation. According to law books, a state of helplessness arises when a person is asleep, is unconscious, or is physically or mentally disabled (Hoel 2012, 15). According to preparatory works issued by a government-appointed committee that revised the Penal Code in 1997 (*Seksuallovbruddsutvalget*), victims are not required to physically resist their assailants, but in legal *practice*, however, absence of resistance is often constructed and construed as indicative of consent. Resistance seems to become a requirement, which has as an effect that directs the responsibility for the assault away from the perpetrator to the victim.

As elaborated upon in the literature review above, this victim-prevention discourse extends well beyond the confines of the courtroom and is perpetuated by the media and the police as well. The fatal consequence of the discourse is that many rape victims suffer in silence, to the extent that the vast majority of rapes never are reported and many sexually abused women never seek medical attention (Smette and Stefansen 2006; Thoresen and Hjemdal 2014). When focus is placed more on the victims and their responsibility for preventing rape by “staying out of trouble,” a displacement of shame also takes place. Even if some perpetrators are convicted and serve sentences in prison, the way shaming narratives are crafted by the courts potentially obstructs the full recognition of the victim’s basic dignity and right to sympathy.

White guilt, black shame

This paper makes two central and related arguments, one concerning the significance of race, the other of gender, in shaping rape narratives and distributing shame and sympathy to victims and perpetrators. The first argument is that legal responses to rape are deeply bound up with racialized processes of stigmatization, where nationality or ethnicity is mentioned as a relevant fact only when it involves minority men but not majority men. A feature of legal constructions of marital rape and domestic violence cases in minority families, for instance, is that the courts tend to use linguistic markers that refer to patriarchal culture (and thereby implicitly race; see also Gullestad 2002a) as the root causes of such violence. These shaming narratives construct transgressive, shameful bodies and help to preserve a self-congratulatory national self-understanding.¹⁵ The framing of sexual and domestic violence in minority families is distinct from how it is constructed when majority men are involved – these crimes are perceived to be *deviating* from contemporary mainstream culture.

The second central argument in this paper has been that female rape victims are frequently gender-stereotyped and that, depending on how they manage the responsibilities associated with sexual citizenship, perceived as more or less deserving of sympathy. This may explain why, in terms of citizenship and recognition in rape trials, the drunken, promiscuous woman is awarded less sympathy than the “innocent” woman, who is raped by a stranger in a public space in “the dead of winter.” Lenient sentencing is sometimes associated with attribution of partial blame to the victim, who is expected to guard her purity and refrain from exposing herself to unnecessary risk. This speaks to the first aspect of the geography of rape, where public spaces are deemed worthier of protection by the law than private spaces.

In theorizing about shame attribution and punishment in homicide cases, Nussbaum (2004, 37) explains that the logic behind grading offenses according to severity is that courts perceive certain emotions in perpetrators to be more comprehensible than others. For instance, legal doctrines such as the so-called “provocation defense” illustrate how perpetrators can benefit from legal narratives that shame or blame victims. Stated otherwise, if a victim is perceived to be less sympathetic, the perpetrator will be less stigmatized and less subject to public shaming.

In the dataset, and as illustrated by the example in the analysis above, majority men might be found guilty because their *actions* were violating the law; that is, they were not *justified*, but courts were to some extent willing to *excuse* them, in particular in cases that do not match the “real rape” stereotype. As verified by the quantitative study, majority men averagely receive 20 percent lighter sentences than do minority men (Bitsch and Klemetsen 2017).

Further, in the second case, we saw that the defendant’s nationality was not mentioned in the judgment – it was “framed out” and deemed irrelevant (Manning and Hawkins 1990). His actions were not linked to the behaviors and attitudes of young, drunk, majority men in general (even though, statistically speaking, reported party-related rapes often involve this group of men). The politics of shame in the context of rape thus manifests as an attribution of guilt (but to a lesser extent shame and stigmatization) to the majority perpetrator, whereas the minority perpetrator is constructed as a deviant outlaw deserving of public shame. This shows how stigmatic and reintegrative shaming practices (Braithwaite 1989) operate through notions of gender, sexuality, race, and nation. In the two analyzed cases, the differentiation of shame seem to depend on the behavior of victims. Offenders are more likely to be subject to reintegrative shaming if the victim transgressed cultural ideals for the

performance of gender conformity. According to Gullestad (2002a), classic racism finds its rationale in and through the contention that an individual can and should be held accountable for the morals and behavior of his or her ethnic group. The same can be said about sexism, where women as a group are expected to fulfill expectations of how to manage their sexuality in accordance with more or less overt national definitions of “appropriate” femininity.

The analysis of these two cases supports the findings of a previous, and related, quantitative study of sentencing practices in a representative sample of court judgments (Bitsch and Klemetsen 2017), which shows that Norwegian judiciaries discriminate and differentiate between ideal perpetrators and victims on the basis of extra-legal factors, such as gender, sexuality, race and location of the crime scene (private versus public space).

The politics of shame in rape cases is espoused by a collective inability or unwillingness among people in power to fully recognize that majority men, with whom it is easy to identify a shared humanity, can and do rape. Shaming narratives serve to discipline female transgressive bodies and, in the words of Nussbaum (2004, 229), help “the normals” to gain a sense of comfort and keep their illusion of safety intact. According to Goffman (1963), processes of stigmatization are based on a failure to recognize others’ humanity. Ultimately, defining others as different prevents us from seeing our own flaws, and forestalls the effective prevention not only of rape but of all sorts of evil committed by someone with a human, likable face.

Gender and race stereotypes are central not only to how society deals with rape but to nationalist formations more broadly. This is so because women historically have been assigned the role of bearers and symbols of national purity and unity (Yuval-Davis 1997; Magubane 2014; Fischer 2016). If the history of rape is one of the stratification of

citizenship (Freedman 2013), the subtext is one of stratified shaming. Stratified shaming manifests through the legal system's construction of legal subjects who are worthy of either sympathy or blame.

As various feminist and postcolonial scholars have noted, bodies can either upset or confirm notions of gender, race, and nation and are thus intrinsically linked to nationalist formations.¹⁶ In the context of the legal processing of rape cases in Norway, majority men and women might be conceptualized as bearers and markers of the nation's honor, which may explain why drunk, promiscuous women are awarded less sympathy than victims of assault rape. It may also account for why sexually violent behavior committed by majority men tends to be constructed either as pathological and thus incomprehensible, or blameworthy but to some extent understandable. As Nussbaum (2004, 219) notes in her seminal book on shame and the law, by defining something as evil or by stigmatizing others as morally depraved, "normal" people can make themselves feel positively virtuous. The legal construction of the majority citizen group as more morally good and civilized than the minority group both serve to confirm white "normality" and to construct the nation as distinct and excellent from what is perceived to be less civilized nations. This speaks to the second aspect of the inherent geography of rape; the process through which the state, by means of rape prosecution, constructs a moral community where some citizens are admitted a share and others not.

Rape is never just rape. Investigating its institutional treatment can provide us with valuable knowledge not only about the relationship between the state and its citizens but also about how sexual citizenship is constructed, construed, and contested according to notions about gender, race, and nation in contemporary societies.

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¹ In Norway, the term "race" is rarely used because of its connotations to the Second World War. Often the term "ethnicity" or "ethnic identity" is preferred. Both of these terms typically refer to a person's country of origin, skin color, and/or cultural values. "Majority" typically encompasses persons who, statistically speaking, belong not only to the largest group of people or people with Norwegian citizenship but also people who are considered to be natives. Unless otherwise stated, then, "majority" in this paper refers to white people who are born and raised in Norway with Norwegian parents and grandparents, whereas "minority" refers to nonwhite people who either have migrated to the country or have parents/grandparents who did.

² See Burt (1980), Estrich (1987), Bumiller (1990), Collins (2004), and Freedman (2013).

³ In this paper, I use the terms "victim" and "complainant" interchangeably.

⁴ Statistics Norway: First and second-generation immigrants as per January 1st, 2017.

<https://www.ssb.no/befolkning/statistikker/innvbef/aar/2017-03-02#content>

(published March 2, 2017).

⁵Statistics Norway: Labor immigration continues to drop.

<https://www.ssb.no/innvandring-og-innvandrere/artikler-og-publikasjoner/arbeidsinnvandringen-fortsetter-a-falle>

(published June 19, 2017).

⁶ See Burt (1980), Estrich (1987), Bumiller (1990), Collins (2004), and Freedman (2013).

⁷ For a number of years, Norway has been ranked as one of the most gender-equal countries in the world (World Economic Forum 2015, 2016).

⁸ The notion of “applying law to facts” is a positivist one, which conceives of reality as a stable unit that exists outside interpretation. The position is also called the “no emotion” proposal and presupposes a sharp distinction between reason and emotion (Nussbaum 2004, 5).

⁹ See Nussbaum (2004), Jacobsson (2008), Flower (2016), Wettergren and Bergman Blix (2016), and Bitsch (forthcoming).

¹⁰ In the dataset, the mean sentence length for rapes prosecuted under § 291a was 51.4 months (Bitsch and Klemetsen 2017, 9). The mean sentence length for public assault rapes was 51 months (n=25). When a public stranger rape was committed by a minority man, the mean sentence was 59.4 months (n=22). In the dataset, there was only one incidence of public stranger rape involving a majority man that was constructed by the court as such, i.e. the case selected for analysis in this paper. The sentence length in this case was 45 months.

¹¹ According to the Norwegian Penal Code (2005) § 206, digital penetration is not equated with intercourse and therefore does not carry a minimum sentence. Attempted rape, on the other hand, is considered a mitigating circumstance, so part of the difference in sentence lengths in the two cases may be attributed to the fact that the case

involving the majority man is considered a less serious offense. The purpose of this paper, however, is not to evaluate every single factor that may influence sentence length as such but to analyze and discuss the underlying assumptions of different framings of sexual assault.

¹² It is remarkable that the court does not justify the length of this sentence in more detail, since it is stricter than prescribed by the law. According to the Norwegian Penal Code (2005) § 292, a minimum sentencing level of three years applies when intercourse has been completed. In this case, intercourse was *not* completed.

¹³ The idea that minority men are more violent and sexually rapacious than majority men has gained prominence in Norway over the past three decades. Incidents like the sexual assaults in Cologne on New Year's Eve, 2016 or the general media reporting on links between immigration and public stranger rape exacerbate this myth. Although statistics confirm a slight overrepresentation of minority men in reported public stranger rapes, one cannot infer from incidence data to prevalence. In the general crime surveys, the statistical significance of non-Western background is dramatically reduced when controlling for age, gender, level of education, unemployment, substance abuse, and other living conditions (Skarðhamar 2005, 29).

¹⁴ See for instance Case No. LB-2011-75341, a case where the known social anthropologist, Unni Wikan, was called as an expert witness on Islamic culture.

¹⁵ In Case No. LG-2011-46901, for instance, the court described the victim as “particularly vulnerable due to her minority background.” The contrast between a “backward” legal culture in North Africa and a civilized Norwegian one is even more striking in the District Court's judgment (Case No. 10-199326MED-BBYR/02), which states that “Already in Supreme Court Verdict Rt. 1974, page 1121 marital rape was criminalized. This has later been established practice in Norwegian law.... For the

record, and although the defense does not argue along these lines, the court notes that even if marital rape is not a criminal offense in [country of nationality], and the defendant may have thought it was, there is no room for exculpatory defense under Norwegian law.”

¹⁶ See Fischer (2016), Gullestad (2002b), Magubane (2014), Peterson (1999), Razack (2002) and Yuval-Davis (1997).