‘Non-Ideal’ Victims:
The Persistent Impact of Rape Myths on the Prosecution of Intimate Partner Sexual Violence against Racialized Immigrant Women in Canada

By

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Abstract

Intimate Partner Sexual Violence (IPSV) is a global issue that impacts women of all social locations, but it disproportionately impacts racialized immigrant women. While there is a lack of literature on the topic of IPSV in general, there is a particular dearth of research on the prosecution of IPSV cases involving racialized immigrant women in Canada. There is little research on how these women are revictimized within the criminal justice system because of rape myths pertaining to IPSV, race, and citizenship. In this project, I aim to interrogate the legal rhetoric within judicial decisions regarding cases of IPSV involving racialized immigrant women. In so doing, I ask: *How do judges conceptualize racialized immigrant women in cases of IPSV? How do these conceptualizations reproduce myths and stereotypes about these women who report IPSV?*

I use Feminist Critical Discourse Analysis (FCDA) to mobilize law as a gendering and racializing practice in my analysis of eight summaries of judicial decisions of criminal and immigration proceedings pertaining to IPSV. Critical Race Theory (CRT) contributes to my theoretical framework to advance our understanding of law as a gendering and racializing practice. Through an abductive process, I find three discourses that dominate judicial decisions: 'ideal' victims resist sexual assault and do not delay in reporting; 'ideal' victims do not know or maintain ongoing contact with the accused; and judges excuse defendants of sexual assault due to the beliefs that male sexuality is uncontrollable, and women pursue false allegations. These rape myths normalize violence against women of colour and immigrant women by reinforcing the view that they are 'non-ideal' victims.

Table of Contents

Chapter 1: Introduction

Gender Based Violence (GBV) is a symptom of patriarchy that impacts women globally. Sexual violence is a common form of GBV as women are victimized at a significantly higher rate than men. Further, most sexual assaults against women are perpetrated by men (Roberts & Mohr, 1994, p. 3). Women are often sexually victimized by someone they know, and this may include former or current partners, which is known as Intimate Partner Sexual Violence (IPSV) (Benoit et al., 2016, p. 15). There have been significant efforts to create and enforce laws that define and deter all forms of sexual assault in Canada. Yet, sexual assault is the only violent crime rate that has not decreased in the last 20 years (Benoit et al., 2016, p. 14).

Feminists theorize that sexual assault remains prominent due to the overarching rape culture. Rape culture is a set of beliefs and conditions that encourage male sexual aggression and supports violence against women (Hildebrande & Naidowski, 2014, p. 1062). These beliefs and conditions can include patriarchal definitions of sexual assault and the criminal justice system. Thus, within rape culture, rape-supportive attitudes are widespread, regardless of changes to the law. This leads to rape myths, which are "prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists" (Burt, 1980, p. 217). Men benefit from rape culture because it normalizes blaming the victim and questions her actions and decisions as opposed to those of the accused (Hildebrande & Naidowski, 2014, p. 1062).

Rape myths contribute to rape culture by narrowly defining characteristics of 'real' sexual assault. 'Real' rape is perceived to be violent, forced sexual assaults committed by strangers that women actively resist (Hildebrande & Naidowski, 2014, p. 1063). This perception often contradicts common aspects of actual sexual assaults. There have been specific efforts to challenge rape myths by amending legislation to change rape offences to sexual assault offences.

Specifically, rape law outlawed vaginal penetration against a woman by a man who was not her husband. The change to sexual assault was intended to disassociate the offence from the stigma associated with rape by reconstructing the offence to outlaw all forms of sexual violence perpetrated against anyone, including intimate partners (Los, 1990, pp. 160–161). Despite these changes, rape myths persist and further create the stereotype of the 'ideal' victim - who resists sexual assault, sustains physical injuries, reports the incident right away and maintains a consistent account of the events (Gotell, 2002, p. 276). In this work, I explore how the 'ideal' victim stereotype is linked to rape myths because both are a product and important facet of rape culture. Judges continue to perpetuate both rape myths and the 'ideal' victim stereotype because sexual assaults and complainants who fit the narrow criteria increase the chances of successful conviction. For instance, IPSV continues to be difficult to prosecute because of the perception that 'real' rape is perpetrated by strangers (Barn & Powers, 2021, p. 3515).

Further, rape culture does not impact all women equally. Women of colour and immigrant women are more vulnerable to sexual violence due to their race and lower socioeconomic status and location (Benoit et al., 2016, p. 19; Olive, 2012, pp. 1–2). Rape myths and the perception of the 'ideal' victim contribute to women of colour and immigrant women's increased marginalization by constructing their bodies as less valuable than those of white women due to intersecting systems of colonialism and patriarchy (Olive, 2012, p. 3). Within these systems, women of colour and immigrants are marginalized through sexual domination and so they are excluded from the 'ideal' victim narrative due to racial stereotypes that sustain historical social orders (Anthias, 2014, p. 161). As a result, legislation has yet to target the inequalities that are created and reflected by sexual violence. Thus, cases that involve racialized and immigrant women

are less likely to lead to convictions because the normalization of sexual violence against them is within systems of race and gender (Armstrong et al., 2018, p. 100; Bonnycastle, 2000, p. 64).

1.1 Research Objectives

There is need for additional research on IPSV perpetrated against women of colour and immigrant women to highlight the specific impact of rape myths on the prosecution of these cases. It is integral to draw academic, political, and public attention to the conceptualization of racialized immigrant women who report IPSV to gain insight and demystify the links between patriarchy and racism. My research is guided by the following questions: *How do judges conceptualize racialized immigrant women in cases of IPSV? How do these conceptualizations reproduce myths and stereotypes about these women who report IPSV?* To answer these questions, I critically examine the persistence of rape myths from a feminist socio-legal perspective.

My study is critical of Canadian legislation, *the law-on-the-books,* and jurisprudence, *the law-in-practice,* by using feminist critical discourse analysis to consider implicit messages in case decisions that perpetuate rape myths. The goal is to develop a two-prong approach that addresses both gender and racial inequalities reproduced by sexual violence. The conceptualization of the 'ideal' victim and 'real' rape influence rape myths and their specific impact on women of colour and immigrant women who report IPSV. In examining rape myths as expressions of links between systems of patriarchy and racism, we can better understand the general persistence of sexual violence and increased victimization of racialized immigrant women. I also intend to showcase implicit mechanisms in patriarchal societies that are intrinsically linked to systems of colonialism, such as the constitution and reproduction of sexual violence, as part of an overall system of domination. This may contribute to challenging the current social order and inform policy on sexual violence to better address biases held against sexual assault survivors.

This research examines dominant understandings of sexual violence and survivors within society, and the impact these stereotypes have on the prosecution of IPSV perpetrated against women of colour and immigrant women. The objective is to demonstrate the persistence of rape myths, despite changes to legislation and challenges in case decisions, by considering the power dynamics that foster rape culture. This can help demonstrate the law as an active process in constituting and creating gender and racial inequalities in society; examine rape myths and stereotypes pertaining to the 'ideal' victim that reinforce the law's role in domination; consider biases against IPSV survivors within judicial decisions; and challenge the view that the law is objective considering its specific domination of racialized immigrant women.

1.2 The Role of Agents in the Criminal Justice System in 'Rape Culture'

As aforementioned, rape culture is a set of views that encourage and justify male sexual aggression and ultimately normalizes GBV. Sexual assault laws have evolved considerably to address rape myths that create a perception that only a small number of sexual assaults are 'real.' However, rape culture is difficult to transform because it exists at both an individual and institutional level (Fanghanel, 2019, p. 1). The law is an institution that reinforces rape culture through agents of the criminal justice system, which includes police officers, defence lawyers, and judges who each mobilize and confirm rape myths (Comack & Balfour, 2004, pp. 15–17).

First, police officers are considered 'gatekeepers' to the criminal justice system. They are often the first point of contact for sexual assault survivors. Police officers contribute to rape culture by categorizing complaints as 'real' or 'unfounded.' 'Real' allegations will lead to charges and be prosecuted on the basis that they are plausible, as per stereotypes of 'real' rape – violent, perpetrated by a stranger, and resisted by a woman (Soulliere, 2015, pp. 416–417). Whereas, 'unfounded' claims do not meet the threshold of 'real' rape because "police conclude that no actual

violation of the law took place or was attempted" (Quinlan, 2016, p. 301). Sexual assault complaints are evaluated using rape myths and stereotypes which reinforces rape culture because only cases that confirm myths and stereotypes move forward. The first obstacle to transforming rape culture is the lack of enforcement of changes to sexual assault laws (Doolittle, 2019, p. 29).

Second, defence lawyers contribute to rape culture by continuing to challenge the plausibility of sexual assault allegations. In an effort to protect their client's interests, defence lawyers "whack the complainant hard" to undermine their credibility and further deter them from testifying against the accused during later trial proceedings (Comack & Balfour, 2004, p. 110). Specifically, defence lawyers perpetuate rape myths in their questioning by distinguishing the incident in question from a 'real' rape. Comack and Balfour argue that defence "lawyers resist legislative reforms intended to constrain the influence of rape myths to balance the rights of the accused to a fair trial with the complainant's right to protection of law and privacy" (2004, p. 118). Thus, this is an obstacle to overcoming rape culture because defence lawyers mobilize rape myths to raise reasonable doubt of the complainant's allegations by attacking their credibility.

Third, judges are integral to maintaining rape culture as they determine the conviction of sexual assault cases. Though some cases may involve a trial by jury, I focus on the role that judges play in creating and maintaining rape culture to gain insight into the biases they hold as powerful members in society (Smart, 1989, pp. 10–11). Regardless of the outcome in specific cases, judges contribute to rape culture because they decide cases based on the complainant and whether or not the allegations fit the stereotypes of the 'ideal' victim and the 'real' rape (Johnston, 2020, pp. 287–288; Larcombe, 2002, p. 132). Thus, despite feminist inspired legal amendments, judges continue to interpret complaints and complainants of sexual assault from a gendered and racist lens (Boyle, 1994, p. 102). This is an obstacle to transforming rape culture because judges fail to condemn

IPSV and address the intersections between patriarchal and colonial systems that specifically impact women of colour and immigrant women. This research engages in a top-down analysis of rape culture by examining judges' narrow conceptualization of the 'ideal' victim as it excludes of women of colour and immigrant women who report IPSV.

1.3 Chapter Outline

Chapter 2 explores the evolution of sexual assault laws in Canada and the associated critiques of each change. The nature of sexual offences has long been contested due to the overarching rape culture creating narrow definitions of 'real' rape and 'ideal' victims (Los, 1990, pp. 160–161). This review explains the ongoing perpetuation of rape myths despite legislative efforts to constrain their influence during the prosecution of sexual assault. In this chapter, I define six rape myths that are relevant to this study: ideal victims verbally resist; sexual assault only occurs between strangers; women pursue false allegations out of revenge, regret or for personal gain; 'ideal' victims do not delay reporting; 'ideal' victims do not maintain contact with the accused; and men's sexuality is uncontrollable (Smith, 2018, p. 55). These rape myths provide insight into the conceptualization of racialized immigrant women who report IPSV, as they speak to specific aspects of stereotypes of 'real' rape and the 'ideal' victim raised in their cases.

Chapter 3 details the theoretical lenses used in this research: feminist socio-legal theories and critical race theories (CRT). Here, Smart's concept of law as a gendering practice is informed by both theoretical perspectives. This chapter begins with a brief overview of feminist socio-legal theories that give rise to this concept. In specific, I outline the theoretical tenets of how legal institutions create gender; 'Woman' is a social category defined by the law; the law either constrains or enables the role of women to reinforce gender roles and power dynamics; and the law is a constant site of struggle (Chunn & Lacombe, 2000, pp. 13–18; Smart, 1992, pp. 33–40).

In this view, the law is an active and discursive process that constitutes and reproduces the category of 'Woman' that is endorsed in rape myths and stereotypes pertaining to 'real' rape and the 'ideal' victim.

This chapter continues with a discussion of how Smart's views have been adopted by scholars when addressing sexual assault laws and extended to include law as a racializing practice because of the view that law misses the impact of race on the interpretation of sexual assault (Comack & Balfour, 2004, p. 80). As a result, I mobilize CRT to fill in the gaps of feminist socio-legal theories. I create a theoretical framework that optimizes law as a gendering and racializing practice by also using the following tenets of CRT: racism is normative; white people typically benefit from it; race is a social construct; perception of race is relevant to an era; and no individual holds a single identity. The theoretical contribution of this research uses the law as an active and discursive instrument in a gendered and racist society that creates a limited conceptualization of women of colour and immigrant women who report IPSV (Möschel, 2011, p. 1649; Varghese et al., 2019, p. 685).

Chapter 4 details my methodological use of Feminist Critical Discourse Analysis (FCDA). I begin with an overview of data collection procedures that I used to pinpoint my data pool: eight summaries of Canadian judicial decisions that occur at various levels of the court in various provinces. This is followed by a discussion of Discourse Analysis (DA) and Critical Discourse Analysis (CDA) as they serve as the foundations of FCDA. FCDA specifically unveils the implicit political messaging in language, that is created and conveyed through summaries of judicial case decisions. In this chapter, I discuss the assumptions of FCDA and how its foundational methods align with my theoretical framework, as they both argue that beliefs, like the law, require an in-depth analysis to fully capture the messages they produce and maintain (Lazar, 2007, p. 183).

Chapter 5 explores the findings of the data analysis where I present discourses pertaining to the previously defined rape myths and their specific impact on racialized immigrant women. First, 'ideal' victims resist and report sexual assault right away. Second, 'ideal' victims do not know or maintain contact with the perpetrator. Third, the judges excuse the defendants of responsibility due to the beliefs that male sexuality is uncontrollable, and women lie. In each of, I begin by situating how they are used to maintain a narrow mould of the 'ideal' victim, despite amendments to Canadian legislation. Further, I consider how race and citizenship are primarily used to draw negative inferences regarding the complainant's credibility. I also note when these factors are not discussed in these cases, to demonstrate the nuanced implications of these rape myths.

Chapter 6 is a discussion of the perpetuation of rape myths due to gendered and racist stereotypes fostering rape culture. This chapter begins with discussion of how the findings exemplify the theoretical views that law is a gendering practice through the narrow conceptualization of the 'ideal' victim of sexual assault. Specifically, I demonstrate that through this lens, IPSV complainants' credibility are scrutinized because of the pervading views that 'real' sexual assault occurs among strangers. Further, in applying this in conjunction with law as a racialized practice, I demonstrate that factors of race and citizenship are further used to draw negative inferences on their credibility, which leads to them being conceptualized as 'non-ideal' victims. This chapter closes with a discussion of the importance of converging these two perspectives to overthrow rape culture as it provides an opportunity for reform and revolution by fully considering the impact and persistent use of rape myths.

Chapter 2: Literature Review

There is a lack of literature on the legal prosecution of IPSV involving racialized and immigrant women. Though this work pertains to women of colour who are also immigrants, due to the dearth in scholarship some of the literature I reference only discusses racialized women and some only discusses immigrant women. In this literature review, I first provide an overview of the evolution of sexual assault laws and their impact on judicial decisions. I then review the literature that examines the reproduction of myths and stereotypes of women who report and pursue IPSV charges. In completing my review, I draw from a variety of sources on feminist critiques of law in Canada, the United States, and the United Kingdom.

2.1 Evolution of Sexual Assault Laws and Related Critiques

The history of rape laws in Canada begins in 1841, with the passing of *An Act for Consolidating and Amending the Statues in this Province Relative to Offences Against the Person* deeming capital punishment as the "first criminal penalty attached to rape" (Backhouse, 2012, p. 728). After Canada gained independence from the United Kingdom, Parliament added an alternative punishment of imprisonment from seven years to life. However, capital punishment remained on the books because of the racist belief that black men frequently raped white women. Thus, Parliament maintained the death penalty to ensure that the punishment was severe enough to avoid "people taking the law into their own hands" (Backhouse, 2012, p. 729).

In 1892, rape was entrenched in Canada's first *Criminal Code* under s.266: "the act of a man having carnal knowledge of a woman who is not his wife without her consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act" (*The Criminal Code*, 1892). The legislation specified that 'carnal knowledge' occurs upon penetration, even if the man

did not ejaculate. Rape was considered an indictable offence and the maximum sanctions were capital punishment or life imprisonment (*The Criminal Code*, 1892). Judges typically ordered sentences of five to ten years of imprisonment, though on occasion, they ordered terms as high as 25 years or as low as 18 months. Despite judges rarely ordering it, Parliament did not consider eliminating the death penalty altogether. Instead, in 1921, Parliament added the penalty of whipping because they found judges were being too lenient in their sentences for rape. After this change, judges sentenced those guilty of rape to five to thirty lashes, in addition to imprisonment (Backhouse, 2012, p. 729).

In 1954, Parliament eliminated the death penalty for rape, but life imprisonment and whipping remained on the books (Backhouse, 2012, p. 730). Rape was redefined as [a] male person commits rape when he has sexual intercourse with a female person who is not his wife, (a) without her consent, or (b) with her consent if the consent (i) is extorted by threats or fear of bodily harm (ii) is obtained by personating her husband, or (iii) is obtained by false and fraudulent representations as to the nature and quality of the act" (*Criminal Code,* 1970). Over time, judges sentenced offenders to whipping less frequently due to its perceived immorality. In 1956, the Joint Committee of the Senate and the House of Commons for Capital and Corporal Punishment and Lotteries recommended the abolishment of whipping.

In 1983, Parliament passed *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof* (Bill C-127). Rape was renamed and restructured into the three-tiered offence of 'sexual assault': tier 1 sexual assault; tier 2 sexual assault with a weapon, threats to a third party or causing bodily harm; and tier 3 aggravated sexual assault. This bill also established corresponding maximum sentences that increase with the severity of the offence: 10 years, 14

years and lifetime imprisonment (Backhouse, 2012, p. 731; *Criminal Code, R.S.C.* 1985; Roberts & Mohr, 1994, p. 6).

The conversion of rape as an offence of sexual assault occurred because of feminist critiques for reforms. First, feminists argued that rape as a legal offence was anchored in the patriarchal notion that rape is detrimental to a woman's value as she is no longer sexually pure. In this view, rape has been historically understood as a means to emasculate other men because "men have defined rape as a sexual offence because it is an attack on their sexual property" (Clark & Lewis, 1977, p. 160). Thus, when rape allegations were brought to court, the goal was to settle whether the man's sexual property was violated.

Second, Los suggests that prior to the 1983 reforms, rape laws relayed the message that the patriarchal basis of marriage must be protected, which is reflected in the following ways. First, through marriage, men possessed the right to have sex with their wives anytime they wished, as they were considered their sexual property. Second, the legal offence of rape only included heterosexual penetration because this could result in a potential child out of wedlock. This outcome was perceived to be more important to address than other forms of sexual violence, like forced oral sex. Third, a man who violated a young virgin with the false promise of marriage was guilty of an indictable offence and this perpetuates the notion that women are weaker and dependent within a relationship (Los, 1990, p. 161). Overall, the legal offence of rape was constructed within and perpetuated by patriarchal beliefs that limited the circumstances of 'legitimate rape,' considering rape as a property offence, which eliminated wives as potential legitimate victims.

Third, feminists critiqued that rape laws perpetuated the view that women's sexuality was defined and created to complement male sexuality. Specifically, women did not possess the right

to consent to sex with some men and refuse others because of the underlying belief that some women are sexually available to all men. Past sexual conduct becomes key in establishing consent, as women who were promiscuous were not entitled to legal protections (Busby, 1999, p. 268). This was further established through the view that a rape conviction required forcible penetration because it defined the 'man's sexual organ' as the only tool that could sexually violate a woman's body. Further, the initial definition of consent is derived from pre-1983 rape law's definition of rape when consent was ascertained through threats or fear of bodily harm. In this way, men believed women were always providing consent due to the male disbelief that rape was entirely against their will and even in a legitimate rape, the complainant was a participant under duress (Los, 1990, p. 162; Roberts & Mohr, 1994, p. 6). This definition of consent demonstrates that rape laws challenged the validity of rape allegations because they did not align with male's sexual needs and desires. This critique demonstrates that rape laws were defined from a male perspective because the laws optimized male sexual autonomy at the expense of female right to consent.

Fourth, pre-1983 rape laws perpetuated stereotypes pertaining to women's credibility as a testifying witness. Specifically, the requirements for a successful rape conviction were narrow because the prosecution of rape was more concerned with protecting men's rights of ownership to female sexuality (Clark & Lewis, 1977, pp. 159–161). As a result, these laws perpetuated the belief that women's credibility was linked to her sexual reputation, but men's credibility did not. The accused's criminal record was protected from disclosure in testimony, while information about the complainant's sexual history was considered admissible to assess her credibility. Similarly, pre-1983 reforms contributed to the view that women were morally underdeveloped as judges were required to inform the jury that it would not be just to convict a defendant solely on the complainant's testimony because women were not considered credible (Los, 1990, p. 162). In

addition, common law stipulated that true rape victims would file the complaint immediately after the attack. Otherwise, due to the belief that women were devious and lacked morals, any delay in reporting suggested they had enough time to fabricate a story and make a false accusation. This assumption is anchored in the common law doctrine of recent complaint, which is made up of the following two rules. First, the prosecution could substantiate a rape claim by highlighting evidence of a recent complaint and rebut any adverse inference made based on delayed reporting. Second, judges were required to instruct juries that they could make an adverse inference against the complainant if they delayed reporting (Dufraimont, 2019, pp. 343–344). Ultimately, biases against women's credibility limited the scope of rape laws, as they functioned to protect men from false allegations based on the view that women were inherently immoral.

Bill C-127 involved a change in name to distance the offence from the aforementioned critiques of the offence of rape. First, the reformulation of sexual assault intended to put the focus on the harm against the victim, instead of an offence against the property of men. As such, the definition of sexual assault was written in gender neutral terms to go beyond the definition of rape, which only outlawed heterosexual forcible penetration. Further, the requirements for the *actus reus* required a 'sexual element,' which eliminated the need for proof of penetration (Busby, 1999, p. 269; Gotell, 2010, p. 210). Women's groups and the Law Reform Commission of Canada both suggested sexual assault as a substitute for rape to model it after the multi-tiered offence of assault, allowing the court to address different degrees of severity. Second, with the entrenchment of the *Canadian Charter of Rights and Freedoms*, married women became legally protected against sexual assault, as they could no longer be discriminated against due to their marital status. As a result, the 1983 reforms modified the legal definition of consent to clearly state that it can only be obtained upon a voluntary act (Boyle, 1985, p. 97; Los, 1990, p. 164). This change signified the

official abolishment of the marital exemption rule and challenged the belief that women are always consenting. By modelling after the offence of assault, the goal was to ensure that the *actus reus* of sexual assault could be established in broader circumstances than the offence of rape.

Third, the rules regarding evidence were aligned with comparable offences, which eliminated the special rules for corroboration and recent complaint requirement. Rape complainants were often questioned about their sexual history, including with the accused and other men. This information was deemed relevant because of the common law view that 'unchaste' women are less worthy of belief and/or more likely to consent. These myths came to be known as the 'twin myths' because they are two inferences regarding the complainant's character and credibility that are drawn from her sexual history. This has disadvantaged sexual assault complainants because it unfairly puts the complainant on trial to determine whether she meets the standards of the 'ideal' victim. In an attempt to protect women from these interlinked biases, the 1983 reforms included rape shield provisions (Dufraimont, 2019, p. 334). Specifically, s. 276 of the *Criminal Code* rendered evidence of the complainant's sexual reputation inadmissible to speak to their credibility and excluded all evidence of a complainant's sexual history with anyone other than the accused, with the following three exceptions: it rebuts the evidence of the complainant's sexual activity or lack thereof; provides insight into the identity of the accused ;or it is evidence of sexual activity that occurred on the same day of the accused sexual assault and it relates to the accused's belief of the consent given by the complainant (*Bill C-127,* 1983).

Fourth, the recent complaint rule was abrogated in the 1983 reforms because the common law premises that immediate reporting was the 'normal' course of action. However, given that it is now common knowledge that most women never report and many delay reporting, the recent complaint rule was deemed discriminatory and invalid. Thus the 1983 reforms eliminated the

following rules: the prosecution cannot lead evidence of immediate reporting unless the defence raises the issues of delay; and juries are not to be instructed to consider delayed reporting as measure of the complainant's accountability. Beyond this, the amendment did not outline if delayed reporting was admissible and if it was, what references could be reasonably drawn from it (Dufraimont, 2019, p. 344).

Despite the significance of the 1983 reforms, they were subject to several criticisms. First, tier 1, the lowest level of sexual assault, is a hybrid offence that can be advanced as a summary conviction where the maximum penalty is six months' imprisonment or a $2,000 fine. It is only if the Crown chooses to proceed with it as an indictable offence where the maximum sentence of 10-year imprisonment comes into effect. Roberts and Mohr explain that this is similar to the offence of assault, where the same flexibility exists for the lowest level of assault (1994, p. 7). Feminists raised this as an issue because the conflation of assault with sexual assault leaves a lack of consideration for the gendered aspects of the crime (Hengehold, 1994, p. 101).

Los also highlights that "women's groups agreed that in order to correct the inequities of [pre-1983 rape] law, the double standard and different treatment inherent in the offence of rape had to be abolished" (1990, pp. 165–166). She further notes that this could only be done in the law by implementing gender neutrality and legal consistency with the offence of assault. However, Los argues this approach does not consider the gendered aspects of sexual victimization with the victims being predominately women and the assailants being men. Specifically, the offence of sexual assault does not capture women's right to sexual autonomy because it does not challenge men to modify their view of women's sexuality. Therefore, in desexualizing the crime of rape through its reformulation into sexual assault to promote equal treatment of women under the law, post-1983 law was ill-equipped to consider the marginalization of women through sexual violence

due to male understandings of female sexuality (Los, 1990, p. 1666). Thus, the stigma surrounding the rape offence remains, despite the shift in the requirements to prove the *actus reus* of sexual assault because gender neutrality does not challenge these views.

Second, women's rights groups had demanded *mens rea*, the intent behind the crime, be required for sexual assault convictions to align with other criminal offence in the *Criminal Code*. This was explicitly included in the new legislation but the honest belief of consent to the incident in question can constitute a defence and it does not need to meet the test of a reasonable man, let alone a reasonable woman. Women's groups had demanded an objective test where mistaken belief of consent can only be accepted as a defence during a rape trial if it is based on reasonable grounds. Los highlights that men and women define consent differently, as men perceive a women's resistance as a possible challenge or an invitation to rough/unfamiliar sex. This is grounded in the myth of the sexual conquest, where a man has every right to take charge to satisfy himself. As such, men often believe women provide consent if they accept a ride home, go to his house, invite him over, or accept a drink or dinner. Thus, the prohibition of sexual assault has no meaning until mistaken belief of consent is better contextualized, as their honest belief does not mean consent was really provided. In addition, though the marital exemption rule was formally abolished, the lenient use of honest belief of consent makes this difficult to prove because the patriarchal belief that men have a right to sex still prevails (Bonnycastle, 2000, p. 542; Busby, 2012, p. 331; Los, 1990, p. 166). The reformulation of rape into sexual assault did not explicitly address that definitions of male sexuality marginalize women's sexuality.

Third, the focus on relabelling and restructuring rape into the broader category of sexual assault created a misperception that the sexual degradation of women would be reduced without directly addressing it in the new legislation. Despite having defined 'sexual element' of sexual

assault offences, with the passing of *Bill C-127*, these offences were written under 'Offences against Person and Reputation,' whereas rape was classified under 'Sexual Offences, Public morals and Disorderly conduct' (Roberts & Mohr, 1994, p. 7). Further, the shift in terminology only provides attention to the perpetrator's motives and "deliberately underplaying the women's experience of rape as a *sexual* violation" (Los, 1990, p. 167). A major issue of the stress on violence perpetuates the view that only brutal rapes are criminal, and non-violent sexual violation is not as serious. By focusing on the physical harm, economic and cultural aspects of heterosexual relations that are linked to the victimization of women, like attacking women's sexual identity as women, the 1983 reforms contributed to the desexualisation of rape. As a result, feminists argue that the desexualisation of rape rendered the focus to be on the threat to the physical integrity of the complainant as a genderless legal person (Los, 1990, p. 167; Warburton, 2004, p. 542).

Fourth, the punishment for sexual assault became a point of contention for women's groups. Like other victim's groups, anti-rape women's groups adopted the view that perpetrators are an enemy that need to be punished severely. A key goal for lobbyists in the reformulation of rape into sexual assault was better law enforcement and wider application of punishment. Some women's groups suggested moderate penalties in hopes that the jury would be more likely to convict. However, many feminists opposed lowering penalties because it would symbolically undermine the seriousness of sexual assault in relation to other crimes. Los considers that the desire to imprison rapists is understandable, but prior to the 1983 reforms, research had suggested that imprisonment only aggravates the issue. Specifically, in stripping convicted rapists of all their power, prison only makes them more frustrated and less able to view women as their equals. Still, women's groups accepted 'man-made' images of justice without fully considering alternative programmes due to the escalating fear of rape (Los, 1990, p. 168).

Moreover, women's groups legal proposals were solely focused on gender-based discrimination and overlooked class and race biases in the application of penal law, in hopes that making sexual assault laws harsher and increasing enforcement would send a symbolic message to all members within society. Pitch explains that this hope is unrealistic and misguided because penal law cannot be expected to establish universal values without addressing the reality of conflict and inequality (1985, p. 264). Thus, Los notes that women's groups were in search of the legal formulae that would cause the least amount of damage when implemented by sexist legal actors (1990, p. 168). However, Boyle argues that any legal solution could be easily manipulated to function in favour of existing gender relations (1985, p. 102). This final critique demonstrates that the focus on traditional forms of justice to condemn gender-based violence in the drafting of the 1983 reforms entrenched legislation that does not fully address the causes of sexual violence and the impacts of other race- or class-based inequalities on punishment.

Deficiencies with the 1983 reforms led to calls for further changes to the law, which in turn resulted in the introduction of *An Act to amend the Criminal Code (sexual assault)* [Bill C-49] in 1992. This change occurred because of the *R v Seaboyer; R v Gayme* decisions, in which the Supreme Court struck down rape shield laws outlined in the 1983 reforms because the exceptions for admitting sexual history evidence did not include all possible situations where it would be relevant. In *R v Seaboyer,* the accused was charged with sexual assault of a woman he met in a bar. The trial judge refused to allow the defence to cross-examine the complainant on her prior sexual conduct. The accused successfully appealed the decision on the basis that the complainant's sexual history should have been allowed to confirm whether there were other acts of sexual intercourse where she may have sustained bruising. Meanwhile, *R v Gayme* involves a sexual assault perpetrated by a friend of the complainant. The defence argued that the accused honestly

believed the complainant consented to the activity, as the complainant was the sexual aggressor. Again, the trial judge did not allow the defence to cross-examine and present evidence on prior and subsequent sexual conduct (*R v Seaboyer; R v Gayme,* 1991*)*. The accused successfully appealed the decision on the same basis as *R v Seaboyer*, with the Supreme Court ruling rape shield laws were unconstitutional and did not allow for a full defence.

Women's groups condemned the Supreme Court's decisions and, as a result, the 1992 changes set out the conditions under which a complainant's past sexual history can be admitted into trials, and defined consent for the first time in Canadian legislation, therein constraining the defence of mistaken belief of consent (Roberts & Mohr, 1994, pp. 10–11). First, *Bill C-49* restricted sexual history evidence to directly prevent any 'twin myths' inferences, stating under s.276 of the *Criminal Code*: "evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief" *(Bill C-49, 1992)*.

Second, *Bill C-49* defines consent as "the voluntary agreement of the complainant to engage in [the] sexual activity in question" (Bonnycastle, 2000, p. 73; Gotell, 2010, p. 212). Further, *Bill C-49* (1992) states that there are five circumstances in which consent cannot be obtained:

> (a) the agreement is expressed by words or conduct of a person other than the complainant.
> (b) the complainant is incapable of consenting to the activity.
> (c) the accused induces the complainant to engage in this activity by abusing a position of trust, power, or authority.

(d) the complainant expresses by words or conduct, a lack of agreement to engage in the activity.
(e) or a lack of agreement to continue to engage in the activity

Bill C-49 was created in consultation with a coalition of women's organizations who successfully fought for "gender specific" preamble and the addition of the aforementioned rule (d) as it "offers enormous promise for combatting the inequalities that foster sexual assault" (McIntyre, 1994, pp. 294–295). Through this bill, the defence must prove that the assailant took 'reasonable steps' to obtain consent, instead of proving reasonable belief in consent (Bonnycastle, 2000, p. 61; Boyle, 1994, p. 149; Busby, 1999, p. 271; Gotell, 2010, p. 212). But the defence bar successfully set out that "legally blameless rapes" require "less than 'all' reasonable steps" (McIntyre, 1994, p. 310). *Bill C-127* and *Bill C-49* are marked shifts from the initial *Criminal Code's* definition of rape because women's groups were consulted to destigmatize sexual violence by challenging stereotypes (Bonnycastle, 2000, p. 61).

Despite this progress, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)* [Bill C-46] was introduced in 1997 to expand rape shield legislation. This bill introduced s.278.1-279.97 in the *Criminal Code* to emphasize the equality rights of sexual assault complainants by preventing the disclosure of third-party documents, like therapeutic records. However, through its interpretation, judges have determined that they should err on the side of disclosure if they find themselves unsure of the relevance of such documents during trial. Though this bill was also created in consultation with women's groups, this exception allowed for defence lawyers to successfully argue for sexual history and other restricted evidence to be introduced to ensure the accused received a fair trial (McNabb & Baker, 2021, p. 31; Shaffer, 2012, p. 340). The most recent changes occurred due to a series of high-profile cases in which judges made problematic assumptions about the complainants' reaction and credibility, based on their

sexual history. For example, in 2014, Alberta provincial judge, Robin Camp, questioned why a complainant could not prevent the rape by keeping her knees together. Then, in 2017, Québec provincial judge, Jean-Paul Braun, suggested there are different degrees of consent and that since the complainant flirted with the accused, she enjoyed receiving attention from him because he was attractive. Thus, in 2018, Parliament introduced *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* (Bill C-51) to minimize instances where the law is "misunderstood or applied improperly" (McNabb & Baker, 2021, p. 32).

Bill C-51 was created with consideration of the past issues in implementing rape shield laws. It significantly shifted the rape shield regime by adding sections 278.92-278.97. to the *Criminal Code*. First, complainants were provided the formal right to appear, make submissions, and be represented by counsel at the proceedings pertaining to admissibility of sexual history evidence. Second, the amendments required judges to consider "society's interest in encouraging the obtaining of treatment by complainants of sexual offences," when deciding on the admissibility of records in the possession of the accused" *(Bill C-51, 2017).* Third, *Bill C-51* expands the definition of 'sexual activity' to encompass any communication for sexual purpose, or whose content is of a sexual nature, which includes emails, text messages, images, and videos. Fourth, judges must provide reasons for admissibility decisions and a publication ban will cover this and all the rape shield proceedings (McNabb & Baker, 2021, pp. 32–33). Ultimately, the amendments demonstrated that Parliament intended to protect sexual assault complainants during trial, but there has always been a focus on protecting rights of the accused to due process (Dufraimont, 2019, p. 353; McNabb & Baker, 2021, pp. 49–40; Shaffer, 2012, p. 343). In the next section I present rape myths and discuss their continued perpetuation despite the changes to the law presented here.

2.2 Relevant Rape Myths

Feminists first started researching rape myths in the late 1970s and early 1980s. Brownmiller and Estrich were among the first to use the term 'rape myth' when referring to assumptions surrounding sexual violence (Brownmiller, 1993, p. 312). Rape myths are cultural beliefs regarding rape, rape victims and rapists that obscure the true nature of rape by focusing on disparaging details about the victim. They are often used during trials as reasons for acquittals because assailants are often absolved of any guilt by fueling and relying on rape culture (Barnett et al., 2018, p. 1221; Suarez & Gadalla, 2010, p. 2013; Zidenberg et al., 2021, pp. 3–4). Lonsway and Fitzgerald argue that rape myths are similar to stereotypes because they involve "ascribing generalised assumptions to specific offences" but the former are like myths as they hold a cultural function (1994, p. 134). Thus, it does not matter if rape myths are true or widely believed because their function is to maintain the status quo pertaining to gender roles by raising questions about whether the complainant was 'legitimately' raped (Skinner, 2017, p. 443).

There are six rape myths relevant to this study: 'ideal' victims resist sexual assault; sexual assault is only perpetrated by strangers; women make false allegations out of revenge, regret or for personal gain; 'ideal' victims do not delay reporting; 'ideal' victims do not maintain contact with the perpetrator; and male sexuality is uncontrollable. These rape myths are a product of the prevailing belief that a perceived 'real' rape involves one of the following factors: it was committed by a total stranger, at night, in an outdoor area, involves a weapon and the victim sustained serious injuries (Hill, 2014, pp. 472–473). In this section, I define each myth and discuss their persistence despite the changes to the law that were implemented to limit their influence.

2.2.1 'Ideal' Victims Resist Sexual Assault

'Real' rape survivors, also known as 'ideal' victims, scream for help, physically resist, or sustain physical injuries from the attack. This is a rape myth that blames the complainant because

survivors who do not resist and deviate from the 'ideal' victim are perceived as less worthy of belief. This deviation incites doubts in victims that they will be believed and makes them less likely to report and pursue charges, which further fuels the rape myth that 'real' rape occurs between strangers (Burrowes, 2013, p. 6; Ellison & Munro, 2013, pp. 300–301). Thus, even with the changes to the legal definitions of consent in *Bill C-49*, complainants must make explicit that they are not consenting to sexual intercourse through physical acts that can be substantiated by a witness or medical exam.

R v Ewanchuk is a key case precedent that specified the definition of consent presented in *Bill C-49* to limit the impact of rape myths that blame survivors. This case involved a 17-year-old female complainant who was interviewed by the accused for a job in his van. The accused forced himself on her sexually and she verbally refused but she did not physically resist. She only complied out of fear, and she made it clear that she was not participating willingly. The accused was acquitted at trial and at appeal due to the defence of implied consent (*R v Ewanchuk*, 1999). This ruling was heavily criticized because it perpetuated the belief that it was the complainant's fault for failing to resist and thus 'implied consent' (Busby, 1999, p. 278; Vayeghan, 2016, p. 232). The Supreme Court rejected the doctrine of implied consent set out in the context of sexual assault law because only the complainant's perspective should be taken into perspective. Thus, consent is affirmative and can be proven if the complainant did not say yes or did say no. Further, the onus is placed on the accused to prove they took reasonable steps to secure consent prior to all sexual acts with the complainant (Koshan, 2018, p. 334; Plaxton, 2015, p. 14).

This ruling challenged the myth that 'real' rape survivors resist because there is a shift toward accepting varying reactions to sexual assault. However, this myth persists because it is still used to substantiate that the complainant did not consent to the sexual activities in question. Sexual

assault allegations are disqualified on a case-by-case basis to make complainants appear indecisive, inconsistent, and incompetent in their summary of key details of the event. Defence lawyers attempt to discredit the complainant's account by challenging their behaviour and sexualizing complainants to demonstrate it was unlikely that the complainant did not consent (Larcombe, 2002, p. 141). In this way, sexual assault trials mimic the domination of sexual assault itself because complainants are revictimized through models of domination. Complainants must resist discursively during sexual assault trials to prove they are credible, which is perceived as a reflection as to whether they consented during the events in question. Sexual assault complainants continue to be blamed for the assault throughout trial and only those who successfully resist the defence's strategies are believed. Ultimately, the belief that 'ideal' victims resist persists because it is embedded into the structure of sexual assault trials (Gotell, 2007, p. 150).

2.2.2 Sexual Assault is Perpetrated by Strangers

Second, certain women are excluded from the 'ideal' victim narratives due to certain social characteristics, like relationship status. The focus on the inaccurate view that stranger rape is more prevalent has maintained an informal marital exemption because it continues to exclude intimate partners from being considered 'real' survivors of rape. This is a myth because victimisation surveys have consistently demonstrated that women are most likely to be assaulted by husbands, current or past partners (Benoit et al., 2016, p. 15).

Ellison and Munro examine the views on ''real' rape survivors by analyzing how mock juries interpreted a rape allegation between a complainant and defendant who were in a relationship at the time of the offence. The mock jurors were provided with the following information: during the sexual assault, the complainant explicitly dissented and physically pushed the assailant away. A forensic examiner presented evidence at the trial that the complainant suffered bruises and

scratches that were consistent with the application of force. However, since she did not suffer internal bruising, the forensic examiner could not confirm or deny that the evidence was consistent with rape. Ellison and Munro did not find any clear indication that the mock jurors perceived stranger sexual assault was more serious than IPSV. They did find evidence that the mock jurors believed being assaulted by someone they knew was more traumatic. Still, mock jurors found it would be more difficult to secure a rape conviction for IPSV because the relationship between the accused present a certain level of ambiguity. Specifically, the mock jurors concluded there is a larger margin for sexual miscommunication within a relationship than during a violent stranger attack (Ellison & Munro, 2013, pp. 304–305, 309–310).

Like Ellison and Munro, Waterhouse et. al. draw on mock jury studies to demonstrate that juries are less likely to find a complainant's allegations to be genuine if the accused is known to her. In their study, they examine cases reported to a UK police force over the course of two years to analyze the ''real' rape myth in action in Britain. They found that 70% of rapes were perpetrated by men known to the victim and 40% of these cases were carried out by an intimate partner. Meanwhile, stranger rapes accounted for slightly less than a third of all reported cases but of these cases, 70% of the victims had met their perpetrator and did not know them well or knew of them. While no cases involved all of the criteria of a ''real' rape, stranger rape cases were more likely to involve the other factors, such as having occurred outside, at night, involved a weapon, or the victim sustained serious injuries (Waterhouse et al., 2016, pp. 2–3, 5,7).

R v Ewanchuk, addressed the issue of 'implicit consent,' in regards to sexual violence between strangers but the issue was revisited in 2011 when *R. v J.A.* was brought before the Supreme Court (Busby, 2012, p. 331). This case involved intimate partners who had been together for about seven or eight years at the time of the incident. They had spent the night together at

home, watching TV and drinking. They began kissing in bed but did not explicitly discuss engaging in sex. J.A. proceeded to squeeze her neck until she passed out and she woke up naked, tied up with her hands behind her back, while being penetrated in the anus by a dildo. There is no evidence stating how long she was unconscious for and whether the assailant checked her vital signs. The two had engaged in bondage and anaspholexia before, though the complainant's testimony on the frequency of these activities was inconsistent. Still, this was the first time the accused penetrated the complainant anally. The trial judge convicted J.A. of sexual assault but the Court of Appeal overturned the conviction. Upon further appeal, the conviction was later reinstated by the Supreme Court (Busby, 2012, pp. 331–333; Koshan, 2017, pp. 7–8).

This ruling is significant because the Supreme Court decided on whether or not an unconscious complainant can consent during sexual activity. Specifically, the discussion in *R. v J.A.* was about 'advanced consent' and whether parties can effectively consent to sexual activity that will occur when they are asleep or unconscious (Busby, 2012, p. 352; Koshan, 2018, p. 323). The defence argued the assailant's actions when the complainant was unconscious were based on sexual preferences and desires that she had expressed in the past. The majority rejected this defence as an unconscious complainant cannot communicate consent. Thus, *R. v J.A.* concludes consent within intimate partner relationships should not be any different than between strangers, because non-consensual sexual touching under all circumstances can have serious effects on the victim (Busby, 2012, pp. 333–335; Plaxton, 2015, p. 13). Thus, the precedents set by *R. v J.A.* and *R v Ewanchuk* are efforts to prevent judicial interpretations that reinforce rape culture by expanding the criteria of the ideal victim. Ultimately, in eliminating implicit and advance consent as a possible defence, these rulings challenge rape myths that blame survivors and assume that 'real' sexual assault only occurs between strangers.

R v Goldfinch is a 2019 Supreme Court ruling that further refines the relevance of sexual history evidence when parties have a past sexual history. In this case, the parties had previously dated and lived together for seven months, and they both agreed that they were 'friends with benefits.' The complainant ended the relationship prior to the incident in question. There was a voir dire to determine if the two were indeed 'friends with benefits' at the time of the incident and whether this evidence could be admitted during trial. The evidence was admitted as it was deemed necessary for context and the judge would instruct the jury only to consider it for those purposes. The jury found the complainant not guilty, and this decision was appealed because the admission of the friends with benefits evidence was not in accordance with s 276(2). A new trial was ordered by the Court of Appeal based on the trial judge's erroneous admission of the friends with benefit evidence. The Court of Appeal found the jury could only make inferences that relied on the twin myths and limiting instructions could not change that the jury heard this inadmissible evidence.

This decision was appealed to the Supreme Court. The majority found that the evidence did not meet the requirements of section 276 and deemed it a reversible error that may have influenced the accused's acquittal. The dissenting judge argued that the relationship needed to be discussed to provide context to the events in question, as the accused's action would be unfairly represented without considering their relationship status (*R v Goldfinch,* 2019). This case demonstrates that women in relationships are still excluded from the victim narrative. The Court of Appeal and the Supreme Court intended to limit the influence of the rape myth that sexual assault is perpetrated by strangers by determining the complainant and accused's relationship history was wrongly admitted. In *R v Goldfinch*, the judges in favour of the new trial argued that there was no need to divulge the history between the complainant and assailant because it inadvertently fed into the twin myth issue (*R v Goldfinch*, 2019).

Despite changes in legislation and case law, the belief that stranger assault is 'real' sexual assault persists because judges continue to admit sexual history evidence when the accused and complainant have a history as intimate partners (Dufraimont, 2019, p. 343). There is significant debate regarding the relevance of sexual history in these cases due to *Bill C-46* instructing judges to err on the side of admitting third-party records when they are uncertain if they should admit this evidence. This is fueled by the overarching rape culture, in which the defendant's rights during trial are prioritized over the complainant's, due to rape-supportive attitudes that encourage and justify male sexual aggression. Thus, the legislative abolishment of the marital exemption is not enough, as judges have not condemned the use of past instances of consensual sex to break down the complainant's credibility and rationalize the defendant's behaviour (McNabb & Baker, 2021, p. 31; Shaffer, 2012, p. 340).

2.2.3 Women Make False Allegations out of Revenge, Regret or for Personal Gain

Rape culture creates a general sense of doubt of allegations because men are excused due to overarching values that encourage and legitimize male sexual aggression. There is a general belief that women often falsely accuse men of rape due to revenge, regret, or personal gain. Reported sexual assault cases are subject to attrition, as they are subject to a highly selective process of elimination. In Canada and the United States, the police are integral to this filtering process because they hold discretion over many important decisions that determine if the complaint becomes a charge and proceeds to prosecution, or if it is deemed unfounded and requires no further action (Soulliere, 2015, p. 416). Spencer et al. conducted interviews with sex crimes police officers to gain insight into these decisions. They found that officers may not believe that women make false allegations, but they consider that this belief prevails during the prosecution of sexual assault allegations and they filter complainants by assessing if they will meet the narrow criteria of the 'ideal' victim and be believed in court (2018, p. 206).

The myth of false allegations is further reflected during prosecution, as rape complaints are deemed either 'real,' thereby true, or false accusations (Weiser, 2017, pp. 48–50, 54–55). Complainants hold a significant burden of proof during prosecution because they are expected to have absolute recall of the events. However, they face normal memory decay but further compounded by the delays in the criminal justice system and the effects of sexual violence (Spencer et al., 2018, p. 199). The goal of a trial is to prove the *actus reus* – that a 'legitimate rape' did indeed occur by exploring possible motives for the complainant that may explain inconsistencies in testimony. In a rape culture, male sexual aggression is encouraged and justified, so there are limited circumstances where men are seen to have denigrated a women's sexual integrity because they are only doing what is commonly believed to be 'normal'(Soulliere, 2015, p. 418). This myth persists because cases often lack physical evidence, so judges assess the complainant's credibility to substantiate the claims. However, this is skewed by the perception that women are less morally developed than men, so they are willing to pursue false allegations to fulfil an end (Burrowes, 2013, p. 1; Los, 1990, pp. 161–162).

2.2.4 'Ideal' Victims Do Not Delay Reporting or Maintain Contact with the Perpetrator

There is a belief that any delay in reporting is suspicious because it leaves time for women to fabricate false allegations. Though the recent complainant requirement was removed from Canadian legislation and further negated through amendments, the Supreme Court of Canada has yet to explicitly condemn its advancement in certain cases (Shaffer, 2012, p. 350). Specifically, judges do not consider that reporting time varies among sexual assault complainants for various reasons. Survivors of severe violence and verbal threats present themselves to authorities earlier because their injuries required immediate medical attention. They may also have a greater feeling of fear, so they seek safety sooner. However, survivors who were intoxicated at the time of the assault may feel guilt or shame, so they delay reporting the crime. Further, when the assailant was

known to the victim the complainant may delay reporting because they blame themselves or do not want the accused to get in trouble (Carr et al., 2014, p. 222).

The issue of delayed reporting is further compounded by the rape myth that ideal victims do not pursue contact with the perpetrator. This belief does not consider the complexities of sexual assault, as complainants may maintain contact with the accused in an attempt to deny the assault and, hence, protect themselves from the associated pain and trauma (Ward, 1988, p. 172). Moreover, in cases of IPSV, relationships are dichotomized as either wholly good or wholly bad, so if they maintain contact or stay in the relationship after the assault, then it was not a 'real' rape (Skinner, 2017, p. 450). Thus, delayed reporting and continued contact with the accused are justified as rape myths within a rape culture. A complainant's behaviour must consistently demonstrate she did not consent, because the behaviours of the 'ideal' victim are normalized as reasonable reactions to sexual assault. These aspects of the 'ideal' victim persist, in spite of abolishment of the recent complaint requirement and the marital exemption because the focus of the trial is credibility, which relies on evidence of consistent refusal of sexual assault even after the fact (Smith, 2018, p. 65). Overall, these two beliefs contribute to casting doubt on allegations because they are perceived as rational 'common-sense' assumptions within a rape culture due to limiting what constitutes 'legitimate' rape and 'ideal' victims.

2.2.5 Male Sexuality is Uncontrollable

Finally, rape culture justifies sexual assault and excuses the accused by perpetuating the belief that male sexuality is uncontrollable. Rape-supportive attitudes incite that men are less culpable if the accused showed interest (Skinner, 2017, p. 444). In this view, men cannot be held accountable for sexual urges that are supposedly provoked by the victim, whether it be a misunderstanding of consent having been communicated because sexual assault laws prioritize

male sexuality. In addition, men are excused from violence they perpetuate against racialized women because they have been sexualized to further marginalize them by devaluing their bodies (Cossins, 2003, p. 78). Further, it is believed that men cannot be held accountable for acting on a sexual urge that has previously been fulfilled in a relationship as there is evidence that the complainant had consent to sex, which can lead to an honest mistaken belief of consent. This rape myth makes it difficult to prove *mens rea* because men's uncontrollable sexuality distances the accused from intending to sexually violate the complainant, as he was focused on satisfying his urges (Smith, 2018, p. 626). The belief that male sexuality is uncontrollable persists because women's bodies are sexualized, especially those of racialized women, in patriarchal and colonial systems (Smart, 1989, p. 42).

2.3 Conclusion

There have been significant efforts to challenge rape myths and rape culture by amending legislation and setting relevant jurisprudence. I began this chapter by reviewing the history of sexual assault legislation in Canada and the critiques that fueled these changes. I then examined six rape myths: ideal victims physically resist; sexual assault only occurs between strangers; women pursue false allegations out of revenge, regret or for personal gain; 'ideal' victims do not delay reporting; 'ideal' victims do not maintain contact with the accused; and men's sexuality is uncontrollable.

These six rape myths are relevant to my research because they highlight issues in pursuing IPSV charges, namely that these allegations do not align with 'real' rape criteria, nor do the complainants fulfill the 'ideal' victim stereotype. Moreover, though all survivors of IPSV are impacted by these rape myths as their credibility and sexual history is put into question to substantiate the validity to their allegations, women of colour and immigrants are further

scrutinized due to their social location. Specifically, rape culture does not impact all women equally because systems of gender intersect with those of race (Gul & Schuster, 2020, p. 350). These rape myths reveal issues of race and citizenship because efforts to address rape myths and associated rape-supportive attitudes do not contextualize the differential treatment that women of colour and immigrants face.

In the next chapter I examine the theoretical literature on these myths, with the goal to examine the extent to which they exist in the cases I examine for this project. I create a theoretical framework that considers the specific impact of these rape myths of IPSV survivors who are women of colour and immigrants by drawing on theorizations of rape-supportive attitudes that are reflections of a rape culture anchored in patriarchal and colonial systems.

Chapter 3: Theoretical Framework

In this chapter, I begin with an overview of feminist socio-legal theories that gave rise to the concept of law as a gendering practice. I then present the meaning of this concept and the theoretical tenets that inform its practice. Finally, I highlight CRT to further consider the law as a racializing practice. These theories form a theoretical framework that can address and critique rape myths that are present in judicial decisions pertaining to IPSV perpetrated against racialized and immigrant women.

3.1 Law as a Gendering Practice and Racializing Practice

Feminist socio-legal theories address "how law can operate to exclude and marginalize women, facilitate and contribute to their experiences of wider inequalities and omit their subjectivities whilst presenting male subjectivities as objectively legitimate or simply as common sense" (Mant, 2020, p. 1466). This has led to a theoretical position that 'law is a gendering practice' because it defines the experience of each gender through their distinction. This position is fostered by a 'hybrid approach' that draws on three branches of feminism: liberal feminism, radical feminism, and socialist feminism. Both liberal and radical feminisms believe non-sexist language in the law is key to ensuring equal treatment, but the latter considers the limitations of language to describe women's experiences. Socialist feminists build on the views of radical feminists by demonstrating that the law and legal institutions do not impact all women the same whether it be positive or negative. This creates a hybrid approach that involves using multiple perspectives to capture and address all impacts of the law on the lives of women. Therefore, amending language in legislation has been a key aspect in improving women's treatment under the law. However, this hybrid approach allows for socio-legal feminists to further consider the limits of the law and the impacts of law as productive of gender (McLaren, 2002, pp. 6–11).

Feminist socio-legal theorists have "turned law into a *site* of struggle, rather than being taken only as a tool of struggle" by using the law to recognize and resolve gender inequalities (Smart, 1992, p. 30). For example, women's groups lobbied for changes to rape laws to address the continued sexual victimization of women. Smart argues that this has led to "contradictory consequences," because viewing the law as a site of struggle ensures it can be mobilized in favour of women, but this often overshadows the structural deficiencies of the law. This can be seen in the continued perpetuation of rape myths, despite amendments to legislation and significant case precedents because the law's patriarchal foundations remain unaddressed. Still, Smart cautions against viewing the law as solely coercive because of the positive impacts that the law has had on the women's liberation movement (Chunn & Lacombe, 2000, pp. 9–11).

I am choosing to focus on law as a gendering practice because it moves beyond debates about law's negative or coercive impacts to consider law's productive qualities. Smart's pioneering work speaks to law's gendering practice, which provides insight into law as an active form of domination and empowerment (Smart, 1992, p. 30). To establish her position, she critiques liberal and radical conceptions of the law. First, liberal feminists believe the 'law is sexist,' as "the law actively disadvantaged women" based on sex to challenge "the normative order in law and [reinterpret] such practices as undesirable and unacceptable" (Smart, 1992, p. 31). Smart argues that this simplifies the issue of gender inequality by suggesting the law's perception of women as 'irrational' and 'incompetent' can be corrected through gender neutral language to ensure equal treatment of all legal subjects. According to Smart, this is a superficial analysis as it fails to address the mechanisms that construct the sexed social order, nor does it consider that the goal of feminism is to distinguish between the experiences of men and women to recognize and prevent further gendered discrimination.

Second, radical feminists view the 'law is male' by considering lawmakers and lawyers as typically male. This goes beyond the liberal view that the law is sexist by considering gender as a social construct. As a result, the law is not biased against the female subject on the basis of sex, but instead "it does apply the objective criteria and these criteria are masculine" (Smart, 1992, p. 32). In this view, seeking principles of equality under the law is really calling for all to be judged based on masculinity. According to Smart, this is still a limited perspective because it "perpetuates the idea of law as a unity rather than problematizing law and dealing with its internal contradictions," and it wrongfully assumes that the law "serves in a systematic way the interests of men as a unitary category" (1992, p. 32). Smart argues that the law does not serve all men as though they are a homogenous group, which is the basis for the view that the 'law is gendered' to gain further insight into divisions of class, age, race, and religion (1992, p. 33).

Smart's shift away from the theoretical positions that 'law as male' to the 'law as gendered' is nuanced because the latter does not reject the insights of the former. Though women have always existed as a social category, legislation has defined a narrow version of women in opposition of men. Smart argues that the law should be viewed as gendered because it provides the basis to "deconstruct law as gendered in its vision and practices" and "we can also see how law operates as a technology of gender....We can begin to analyse law as a process of producing fixed gender identities, rather than simply as the application of law to previously gendered subjects" (Smart, 1992, p. 34). This new understanding of the law dismisses the need for gender neutrality and instead addresses how the law is a structure that actively *produces* and *reproduces* polarized differences of gender. Thus, the law brings together "both gendered subject positions" and "subjectivities or identities to which the individual becomes tied" (Smart, 1992, p. 34). Ultimately,

considering the law as gendered is beneficial to theorizing the law as both a structure and a vessel that reproduces categories of gender.

The law as a gendering practice demonstrates that there is a dialogue between law and society that work to create and constitute the types of ideal 'Woman.' This dialogue occurs as values and beliefs pertaining to gender and women are embedded and further empowered by legislation. Smart highlights the link between law and society by considering how the category of 'Woman' is reinforced through rape trials, such as:

> Promiscuous women, women who say no when they mean yes, oversexed but hypocritical housewives and so on. The jury will recognize this Woman, they have been warned about her (whether they are men or women), it will be hard for them to be certain that the individual woman before the court is not this archetypal Woman. If she is black, or poor, or a prostitute it will just be easier to fit her into this category. (Smart, 2002, p. 30).

In this excerpt, Smart demonstrates that the law is productive by contributing to the narrow image of women and this impacts women differently depending on their race and class.

However, the Smart argues that this is not a theory, but an orienting concept that deploys different theories to demonstrate how law (re)produces gender. Smart's concept provides the basis to understand that the law is both ingrained in the social fabric and contributes to its reproduction. Smart argues that the law interprets the actions of men and women differently, because it creates a narrow category of an acceptable 'Woman.' Current legislation builds "upon an understanding of the category 'Woman' of which law is a partial author. It is this 'Woman' of the law that feminism must continue to deconstruct but without creating a normative 'Woman' who reimposes a homogeneity which is all too often cast in our own privileged, white likeness." (1992, p. 39). In this view, the law is an active tool of repression that defines gender, race, and class by (re)creating the ideal 'Woman.'

Further, the trial process is gendering, because ideal victims are created in relation to male perspectives of sex and relationships. Smart claims: "[t]he whole rape trial is a process of disqualification (of women) and celebration (of phallocentrism)," because successful cases do not challenge the patriarchal system itself (Smart, 2002, p. 26). Instead, successful cases further contribute to the belief that 'ideal' victims exist because only those who can reinforce the homogenous experience are accepted. The view that law is a gendering practice provides the basis to theorize the rape myths as products of systems that actively polarize victims as 'ideal' or 'non-ideal' to limit possibilities of prosecution. Thus, only women who act 'reasonably' are entitled to justice because they fit within the 'ideal' victim mould. 'Reasonable behaviours' include, but are not limited, to explicitly saying no, physically fighting the aggressor or accusing a stranger. Though 'reasonable behaviours' are based on narrow circumstances of sexual assault, they are maintained through the trial as a vessel (re)creating the category of 'Woman.' (Martin & Mosher, 1995, p. 42).

However, reasonable behaviours are further limited based on the complainant's race because they are inherently 'non-ideal' victims due to colonial power dynamics. Daly draws on Smart's argument to further theorize the law as a racializing practice because racializing beliefs are "everywhere apparent and move in crosscutting ways" (1994, p. 460). For example, with race being a sociological factor, racist images pertaining to victimhood can contribute to legal constructions of crime. Further, Kline mobilizes the notion of 'racist ideologies' when theorizing the law. She defines ideology as "[b]eliefs, images, attributions which are constructed historically in conjunction with and in relation to material and cultural conditions and power relations, are presented as natural, inevitable and necessary within the current social order" (1994, p. 452).

Racist ideologies are the product of dominant power dynamics, as they are discursive phenomena that define individuals who can participate "legitimately and equally" on the basis of race (Kline, 1994, p. 453). Kline considers how judges and lawyers both internalize racist ideologies pertaining to Indigenous people during the prosecution of Indigenous rights cases and child welfare cases. Specifically, she suggests that racist ideology is demonstrated through its effects within dominant society, rather than its ability to control those who are minoritized. She theorizes that the representation of Indigenous people are "denigrating and stereotypical," as opposed to something aspirational because they are a mechanism for the dominant group to justify oppression (Kline, 1994, p. 454).

Comack and Balfour draw on Smart, Daly and Kline in their analysis of violence against women to theorize race as part of larger colonial frameworks because it speaks to the nuances between law as a gendering and racializing practice. As mentioned in the literature review, they interviewed lawyers and judges on route to demystify the law. Comack and Balfour further draw on Razack's analysis of Pamela George's murder to theorize "this trial as spatialized justice and this murder as gendered racial or colonial violence" (2000, p. 93). Razack theorizes that violence is perceived to be routine and inevitable when it is perpetrated against Indigenous bodies:

> a number of factors contributed to masking the violence of the two accused and thus diminishing their culpability and legal responsibility for the death of Pamela George. Primarily, I claim that because Pamela George was considered to belong to a space in which violence routinely occurs, and to have a body that is routinely violated, while her killers were presumed to be far removed from this zone, the enormity of what was done to her remained largely unacknowledged. My argument is in the first instance an argument about race, space, and the law. I deliberately write against those who would agree that this case is about an injustice but who would de-race the violence and the law's response to it and label it more generically as patriarchal violence against women, violence that the law routinely minimizes. While it is certainly patriarchy that produces men whose sense of identity is achieved through the brutalizing of a woman, the men's and the court's capacity to dehumanize Pamela George derived from their understanding of her as the

> (gendered) racial Other whose degradation confirmed their own identities as white - that is, as men entitled to the land and the full benefits of citizenship. (Razack, 2000, p. 93)

In this passage, Razack identifies that when theorizing violence against marginalized individuals, the race of victims must be recognized and contextualized within a colonial system. Race and class are often actively dismissed and leaves cases such as this to be conflated with violence against women, which is already minimized as per Smart's theorization.

Like Daly and Kline, Razack's theorization shows the law is a racializing practice that is contingent on racist ideologies that are key to reinforcing the dominance of white men. This theorization contributes to filling the gaps by demonstrating that the 'ideal' victim is a technique through which systemic racism continues to exclude minorities from justice-seeking processes. Razack "reject[s] the view that spatialized justice, the values that deem certain bodies and subjects in specific areas as undeserving of full personhood, has more to do with class than it does with race" (2000, p. 94). Still, Comack and Balfour argue that class is integral to their theoretical framework because the close intersections between systems of sex, race and class, make it difficult to tease them apart (2004, p. 39).

Comack and Balfour draw on Messerschmidt's theory of structured action because it provides analytical tools that can capture the intricacies of social interaction due to simultaneous systems of sex, race, and class. Messerschmidt defines structured action as "what people do under specific social structural constraints" and he argues that "the accountability of persons to these categories is the key to understanding the maintenance of existing social structures, such as divisions of labor and power" (1997, p. 6). Comack and Balfour theorize that lawyering is a structured action that produces gender, race, and class inequalities. However, they indicate that their theoretical framework goes beyond Messerschmidt's structured action theory by noting how

"principles of fundamental justice sit uneasily with the gendering, racializing and class-based practices in which lawyers engage and to consider how these practices are altered by the wider socio-political context in which they unfold" (Comack & Balfour, 2004, p. 48). In this way, Comack and Balfour consider the gendered and racializing impacts of the law in their theoretical framework to analyze the reification of intersecting inequalities that occur during the criminalization of violence against women.

My theoretical framework is primarily grounded in law as a gendering practice because its main tenets align with my research objectives. Chunn and Lacombe explain that this is an analytical lens that can be used to demonstrate the various ways the law constructs womanhood. In this view, one becomes a woman and that it is not self-evident, because "[a] woman's identity…is never fixed or stable" (Chunn & Lacombe, 2000, p. 17). The law is one of many cultural strategies involved in this process. Chunn and Lacombe set out to reveal "how law intersects with other institutions and core beliefs in society. in the construction of woman"(Chunn & Lacombe, 2000, p. 18). There are four tenets relevant for this study. First, gender is actively produced through legal institutions. Second, 'Woman' is a social category that is narrowly defined through the law. Third, the law either constrains or enables the role of women to reinforce gender roles and power dynamics. Fourth, the law is a constant site of struggle and amending the category of 'Woman' is endless (Chunn & Lacombe, 2000, pp. 13–18; Smart, 1992, pp. 33–40). I will also mobilize law as a racializing practice to further the analysis of sexual assault trials when complainants are racialized immigrant women. To do so I will include CRT to highlight the gender roles of women across different social locations. This is possible because it aligns with the goal of demonstrating how the law produces and reproduces gender roles that inform understandings of the 'ideal' victim.'

3.2 Defining Critical Race Theory (CRT) and its Critiques

Socio-legal feminists are often critiqued for neglecting the experiences of racialized women. Critical race theorists address this gap by considering alternative histories and knowledge but also economic and political systems, as well as uses of the law to render racialized people in permanently precarious positions. This has been demonstrated through the lack of protection of racialized women against VAW because such violence is normalized under systemic racism (Lovelace, 2018, p. 15; Razack, 1994, pp. 897–899). Razack argues that judges engage in "pluralistic ignorance" where "mostly affluent white males [talk] among themselves about what are the reasonable choices for poor people of color to be making in situations virtually none of the judges have been in" (1994, p. 898). Even in attempts to become culturally sensitive, the law in practice is still full of gendered and racial bias. IPSV against racialized women is enabled by the current system because it fails to consider that they are at risk, whether or not they engage in precautionary acts of resistance. In this way, judges actively construct the ideal victim without understanding the experiences of all women.

CRT was born out of critique that even after the civil rights movement, racialized Americans were still treated unjustly due to systemic racism. CRT argues that we live in a post-racial society as it is seeking to resolve all forms of racism beyond those that are overt. There are six agreed upon tenets: racism is normative; white people typically benefit from it; race is a social construct; perception of race is relevant to an era; no individual holds a single identity; and lived experiences of race are key to understanding racism (Möschel, 2011, p. 1649; Varghese et al., 2019, p. 685). For the purposes of this research, the first and second tenets referring to racism as normative and that white people usually benefit from it are particularly relevant. They demonstrate that individuals are racialized as part of an active processes, like citizenship, that maintains white power. In particular, whiteness involves "institutional discourses and exclusionary practices

seeking social, cultural, economic and psychic advantage for those bodies racially marked as white'' (McDonald, 2009, p. 9). These two tenets are useful for my analysis because they allow for me to note that the law enables racism as a standard that ensures white people benefit from it. In this view, the third tenet arguing that race is a social construct demonstrates that whiteness and racialization are intertwined social processes that are carefully constructed to create a particular social order in which racialized immigrant women are not protected by the law.

The fourth tenet pertaining to the perception of race being relative to an era is pertinent to this research because I consider that those who are currently racialized is linked to both ethnicity and citizenship. However, racialization is discussed through perceptions of the cultures of marginalized individuals and how they differ from the dominant group. Further, the fifth tenet on no individual holding one identity is relevant because it showcases how the intricacies related to living as a racialized person and as an immigrant within the current climate can impact judicial decisions surrounding their cases. Though the final tenet is of great theoretical importance, in this project, I am not analyzing the experiences of racialized women. Instead, I will use the other five tenets to demonstrate the importance of increasing racial diversity in the judicial system because the bias against racialized and immigrant women is partially due to biases held by judges, which leads to an institutional reinforcement of rape culture

CRT provides an opportunity to have in-depth discussions about the origins of the social locations of racialized individuals. It is important to consider that they exist within a state of exception when it comes to human rights because these are so evidently violated. Thus, they are deemed less worthy because they are not ideal victims. This is a purposeful act that the law reinforces because it is supposedly written from a colour-blind approach. The law operates with the intention to exclude because the field is only as valuable as it is exclusive. It is imperative that

we use CRT to go beyond evaluating the system as we know it is not working. We must create action and build our repertoires so that we can recognize the lived realities of those who are subjugated by these systems because it was created with intentions that have real impacts on racialized individuals.

Conclusion

In this chapter, I have outlined the tenets and critiques of law as a gendering practice and critical race theory. First, I note how gender is produced through judicial decisions by identifying rape myths that reinforce the notion of 'real' rape and the ideal victim. Second, I consider how the category of women is narrowed through the law by considering those who are excluded from the ideal victim narrative due to rape myths that blame survivors and reinforce the belief that sexual assault only occurs within certain social groups. Third, I address how the law either constrains or enables gender roles by considering how IPSV is addressed under the law through the analysis of rape myths that cast doubt on allegations. Fourth, I address the law as a site of struggle by noting the tensions in understandings of consent and criminal responsibility of IPSV by identifying references to rape myths that excuse the accused (Chunn & Lacombe, 2000, pp. 13–18; Smart, 1992, pp. 33–40).

Moreover, I advance five tenets of CRT to further demonstrate its capacity as a racializing practice. First, I mobilize the tenets that racism is normative and white people typically benefit from it by considering that the ideal victim does not include racialized women due to the normalization of violence perpetrated against them. Then, I take note of race as a social construct by considering when ethnicity and citizenship is noted and linked to rape myths that blame survivors. Moreover, I explore the tenet regarding perception of race within the current era by analyzing the connections between rape myths that cast doubt on allegations and the race and

citizenship status of survivors. Finally, I address the tenet pertaining to the existence of multiple identities by considering how gender, race and citizenship status simultaneously influence judges' perpetuation of rape myths that excuse the accused.

In the next chapter, I outline the methodological framework that I use to apply my theoretical lens in my data analysis. Specifically, law as a gendering and racializing practice demonstrates that the law itself is discursive but also creates beliefs because it is working to maintain the current social order. Therefore, I am using FCDA to advance my theoretical framework and highlight the way rape myths continue to be perpetuated in IPSV cases involving racialized and immigrant women.

Chapter 4: Methodological Framework

In this chapter, I present the methodological framework for my project. First, I present my research design, in which I describe my material and sample, as well as the data gathering methods that I used. Second, I describe and explain my application of Feminist Critical Discourse Analysis (FCDA), specifically modelling it after Lazar's work. This chapter engages in a reflection on feminist methodologies that inform my project. As aforementioned, the following research questions were mobilized for this project: *How do judges conceptualize immigrant women and women of colour in cases of IPSV? How do these conceptualizations reproduce myths and stereotypes about these women who report IPSV?* The following methodological approach was created to investigate these questions.

4.1 Research Design

I used convenient sampling to gather the data, as I looked for cases that involved IPSV in which the complainant is racialized immigrant woman I obtained my sample based on resources available to me (Marshall, 1996, p. 523). First, I consulted with a librarian at the Brian Dickson Law Library at the University of Ottawa. After attempting a search in legal databases, we concluded that the way cases are organized does not permit a search based on IPSV, race or citizenship. At her recommendation, I looked for cases mentioned in articles. Specifically, Koshan analyzed 400 cases of IPSV in Canada and referenced seven that she noted involved immigrant women (2017, pp. 10, 24–25). I was able to find six of the eight summaries of judicial decisions on public legal databases. Second, my supervisor requested assistance from his professional network. This led to the addition of the last two cases to my data pool, both of which involve the same accused and complainant. Finally, I engaged one last time with organizations and professors in the field to exhaust all possibilities and this last wave was fruitless.

4.1.1 Data

My data pool consists of eight summaries of judicial decisions, two of which are proceedings of the same case. Three of the summaries are of trial proceedings, four are of appeals and one is a sentencing hearing. Six of these cases were heard in Ontario at either of the following three levels: Court of Justice, Superior Court of Justice or Court of Appeals. The other two occurred at Court of Appeals, one in British Columbia and the other in Québec.

I searched for case proceedings that addressed IPSV and involved racialized immigrant women. I set these parameters for the search because my research question and objectives revolved around pinpointing the conceptualization of racialized immigrant women. This is a limitation of this work because I am excluding potential cases that do not fit this strict criterion. Specifically, I acknowledge that not all immigrants are racialized, so I am excluding white immigrant women and racialized women who are not immigrants. Further, I acknowledge that many sexual assault cases go unreported. This and my narrow search criteria are a limitation because they lead to a very small sample of judicial decisions available to me for this research.

Summaries of judicial decisions for criminal matters begin with a statement of the charges and the purpose of the proceeding. Then, they summarize the events in question and point to discrepancies between the complainant and defendant. If it is an appeal, sentence, or bail hearing, these often involve a summary of the previous proceeding. This is followed by an analysis of relevant case law and then the judge issues their decision and reasoning. In a decision that is an appeal or sentencing. the analysis may be geared toward specific issues raised by the appealing party or the judge.

The summaries of judicial decisions ranged from six to 28 pages. These cases are dated between 1996 and 2019, spanning a 23-year period, and occur at various levels of the court. All

but one case involves complainants who are immigrants. All eight of these cases occurred after the passing of *Bill C-127* and *Bill C-49,* which were laws that redefined rape as sexual assault, outlawed the marital exemption and introduced rape shield regulations. However, one case pre-dates the passing of *Bill C-46* and all but one pre-date the passing of *Bill C-51*. I am not distinguishing between older and newer cases because there are no significant differences in the occurrences of rape myths in cases based on when the proceedings took place.

The cases only involve heterosexual couples, in which the complainants are women, and the defendants are men. In six cases, the complainants immigrated to Canada with the defendant after their marriage, except for in two cases where the complainants sponsored the defendant's immigration. In all but one of the cases, the complainant's ethnicity and country of origin are explicitly noted. In this circumstance, I find race and ethnicity align with one another due to the demographics of the country of origin, as well as the discussions of the differences in culture that the complainants experienced as new immigrants to Canada. In the one where it is not noted, it is replaced by "Foreign country A" but the analysis draws on culture, like the other ones, so I am confident in assuming that it involves a complainant who is a woman of colour. Of the other seven cases, one immigrated from each of the following countries: Pakistan, Iran, South Korea, India, and Kuwait. The complainant who immigrated from Kuwait appears in two of the proceedings and it is noted that her parents are originally from Palestine.

Many of the cases are claims of IPSV, among other forms of Intimate Partner Violence (IPV), like physical assaults or threats. All eight judges note the complainant and the defendant's journey to Canada and the history of their relationship as part of the background to the case. Though these are all criminal proceedings, in some of the cases the judges reference divorce proceedings, custody battles and immigration hearings in their analysis. All eight of these cases

were decided by a judge, but one case is an appeal of a decision made during a trial by jury. Though they all note that these instances were part of a long history of violence among the parties, the cases tend to focus on specific incidents of IPSV. As a result, the judges note that the complainant alleged chronic IPSV throughout the marriage, but the case decisions are describing the judicial decision-making regarding verdicts for the specific incidents discussed in the trial.

4.2 Methodological Approach

4.2.1 Defining FCDA

Discourse analysis (DA) emerged as a method to allow researchers to investigate beyond the content of empirical material. Specifically, Gee defines DA as "the study of language in use" and there are many ways of investigating this, as some only address content and others look at the themes or issues being discussed in a conversation or text (2011, p. 8). Some researchers have further developed DA to consider the ways in which discourse is created and the associated implications. This may include the architecture of institutions and the presentation of content itself (Krippendorff, 1984, pp. 21–22; Rose, 2016, p. 220).

For this research, I am drawing on Gee's definition of discourse, in which the term is used to combine and integrate "language, actions, interactions, ways of thinking, believing, valuing and using various symbols, tools and objects to enact a particular sort of socially recognizable identity" (2011, p. 29). This can include ways of communicating or acting, which can vary across the contexts (Gee, 2011, p. 30). In this view, the law functions as a way of communicating how individuals should behave. As discussed in the theory chapter, Smart argues that law is a discursive and it works in conjunction with other discourses, like science and politics, contribute to this by perpetuating stereotypical views of women (1992, p. 39).

This line of inquiry has been further developed into critical discourse analysis (CDA), which asserts that individuals establish relations through language Specifically, "CDA is a problem-oriented interdisciplinary research movement, subsuming a variety of approaches, each with different theoretical models, research methods and agenda" (Fairclough et al., 2011, p. 357). In this view, discourses contribute to social patterns, which include domination and 'common sense' anchored in ideology, and if unveiled with the goal of consciousness, emancipation and social action give rise to the possibilities of change. Thus, CDA addresses the construction of beliefs and how they uphold the power dynamics within society, which further evaluates what is right and wrong to mitigate social problems at the discursive level (Fairclough et al., 2011, p. 11; McKenna, 2004, pp. 14–15; Waugh et al., 2016, p. 72).

Gee argues that all DA is in a way 'critical,' because language itself is 'political (2011, p. 69). Through CDA, it becomes possible to analyze texts to deconstruct how rape myths are entrenched within institutions. Ehrlich conducts a CDA of transcripts of audiotaped recordings of a York University disciplinary tribunal addressing sexual harassment, and a criminal trial where the same defendant was charged with two counts of sexual assault, against two women (Ehrlich, 2003, pp. 31–32). She describes CDA as a method that assumes "dominant social structures and processes are partly discursive in their nature and aim to expose how such discursive practices contribute to the production and reproduction of unequal social relations" (Ehrlich, 2003, p. 35). Ehrlich engages dialogically between the literature and verbatim transcripts of these two cases.

Based on her analysis, she finds that the accused and the complainant perform gender through language. Specifically, in contextualizing their language within normative beliefs of gender formation, like the view that male sexuality is uncontrollable, she finds that the accused perceives himself to be a non-agent of sexual aggression and that the complaints internalize the

stereotype that women are weak and passive (2003, pp. 149–150). She concludes "the absence of alternative narratives (i.e., the complainants') and the counter-hegemonic ideologies they embody did nothing to challenge prevailing notions of violence against women" (Ehrlich, 2003, p. 152). This means that if the complaints were able to represent themselves as 'strategic actors,' the adjudicators would have been less likely to analyze their cases using rape myths, like the utmost resistance standard. Ultimately, Ehrlich finds that in using discursive practices to identify the core issue of rape trials means, we can recognize language's capacity to structure relations and constitute "objects of which it speaks" and the effects of its structuring on the enforcement of rules and implementation of sanctions (2003, p. 152).

Similarly, Comack and Balfour examine the effectiveness of feminist-inspired legal reforms in reducing gendered biases present in the law. Though Comack and Balfour engage in a content analysis of their selected cases, like Ehrlich, they choose their method to align with their purpose of deconstructing language to create space for change (Comack & Balfour, 2004, p. 15; Ehrlich, 2003, p. 35). They argue there are two readings of the law as the law simultaneously promotes "the image of equality (and sometimes living up to that image)" and constitutes gender, race and class-based inequalities (Comack & Balfour, 2004, p. 10). They choose to examine violent crime cases because they are likely to generate public attention in our society and "lead to a scrutiny of law's ability to dispense justice in these cases" (Comack & Balfour, 2004, p. 11). Specifically, one would think that the law's perceived impartiality is most apparent in these cases because of the seriousness of violent crime. However, violence is defined based on culturally and historically specific understandings, which are also in some regard, gendered, racialized and classist. Feminists have been integral in addressing the gendered inequalities by challenging the

conception of violence against women as a private issue and reimagining it as a public issue worthy of law's attention (Comack & Balfour, 2004, p. 13).

Comack and Balfour examine the effectiveness of feminist-inspired reforms by investigating "ninety violent crime cases covering a four-year period (1996-99)" and interviews with twelve criminal defence lawyers (2004, pp. 15–17). They conclude the law holds significant power within society and the key to its execution is the premise that it is impartial. However, Comack and Balfour find that the law is not 'blind' because the Crown and defence build case strategies that "draw on ideological and discursive constructions relating to masculinity, femininity, race, class and dangerousness" (2004, p. 173). Feminist-inspired reforms to the law have not necessarily made it safer for women to engage in the legal process, because the legislation underestimate a lawyer's capacity to undermine reforms and reinforce the rape myths and stereotypes. I am modeling my methods after Comack and Balfour's and Ehrlich's work because I share their goals to demystify structures that dictate gender and race relations. This research differs from theirs because I am not examining dialogue, rather I build on their conclusions by examining the impact and reproduction of these views in conceptualization of racialized immigrant women as complainants of IPSV in judicial decisions.

In this view, I am using FCDA to examine the presence and impacts of gendering and racializing beliefs in the data. Feminist researchers have put forth DA as a means to showcase the construction of meaning within the political realm (Bacchi, 2005, p. 198). Parker argues that since "discourses are sets of meanings which constitute objects, [they] contain subjects [so] we cannot avoid the perceptions of ourselves and others that discourses invite" (1990, pp. 195–196, 200–201). From a feminist methodological stance, it is important to address the rape myths generated through the summaries of judicial decisions to understand the dominant ideologies underlying the

criminal justice system. I am primarily using FCDA as I am mobilizing Smart's view that the law is an active form of discourse that contributes to the (re)creation of gender norms and stereotypes.

Lazar notes feminists have often used CDA without necessarily naming it a 'feminist approach' because the two share similar goals of challenging language and are in favour of action. However, it is important to establish it as a methodological perspective and consider that note not all studies dealing with gendered stereotypes are mobilizing FCDA. Specifically: "[f]eminist CDA as a political perspective on gender, concerned with demystifying the interrelationships of gender, power, and ideology in discourse, is applicable to the study of texts and talk equally, which offers a corrective to approaches that favour one linguistic mode over another" (Lazar, 2007, p. 144). This is key to my analysis of sexual assault because I am using written documents, to tease out rape myths that reveal underpinnings of systems of gender and race.

According to Lazar, there are five principles of FCDA that distinguish it from CDA. First, this is a form of analytical activism because the goal of critique is to challenge social order to seek out radical change, based on feminist views of social justice. Second, FCDA is grounded in the notion that gender is an ideological structure that divides people in two categories, and this constrains their behaviour because the two roles are complimentary. Third, FCDA "aims to provide contextualised analyses of gender and sexism in contemporary societies in their complex and multiple forms" (Lazar, 2008, p. 91). Fourth, in this method, discourse is considered one element of the social and the object of analysis is the discursive aspects of social practices. In the context of gender, FCDA considers the categories of gender as co-constructed through discursive practices. Finally, critical feminist reflexivity is a key principle of FCDA because work should contribute to radical emancipation for women and should not perpetuate dominant and marginalizing systems (Lazar, 2008, pp. 90–92). I am choosing to mobilize aspects of CDA with

FCDA because they overlap and provide for a deeper reflection of the law by inciting an abductive approach that ultimately demystifies gender and racial power dynamics within society.

4.2.2 Mobilizing FCDA

I engaged in the first phase of CDA in establishing my research questions. My two research questions are critical in nature because they allow for an investigation into systems and further recognize the behaviour that is deemed 'correct' based on the rape myths that the law perpetuates. These questions establish my goals to challenge patriarchal norms using my theoretical framework. In this way, this question establishes the first two principles of FCDA and the first stage of CDA because the question aligns with the goals of the feminist movement for female emancipation that relies on the belief that gender is an ideological structure as I investigate how the category of 'Woman' is constituted and produced through the law. Further, I selected judicial summaries because they are a document in which the judge communicates their analysis of the case. In these documents they share their perceptions, and it provides grounds to investigate gendered and racializing beliefs at work.

This was followed by stage two of CDA as I engaged in multiple readings of the empirical material. Upon first acquiring the summaries, I organized the information into a chart to take notes of the facts of the case. Specifically, I noted the time periods during which the incidents of IPSV and the trials occurred. I also noted the outcomes, citizenship status and any reference to ethnicity, if specified. During the preliminary reading, I generated initial codes that stuck out in each case. In respect to this study, the written summaries of judicial decisions operate in the same fashion that all texts do. It has been understood that texts are considerably influential in producing and reproducing social orders, as well as resisting cultural beliefs (Leavy, 2007, p. 230). With an aim

to engage in an ideological feminist critique, I sought out the implications of ideology on institutions of power (Fairclough et al., 2004, p. 5).

During the second reading of each decision, I continued to take note of possible codes and sub-codes with the assistance of NVivo. I began to note rape myths during my third reading to create a dialogue between all the judicial decisions. I engaged in mutually exclusive categorization of the codes and sub codes, which allowed for me to construct a theme that invokes an interpretive meaning. During the third reading, I considered the various roles at play and the different genres within the summaries (Gaudet & Robert, 2018, p. 59). Specifically, I took note of the judge's definition of women as they took on the role of complainant during the proceedings. This demonstrates my mobilization of the third principle of FCDA because I considered various forms of sexism through the judges' conceptualization of racialized immigrant women, and the perpetuation of rape myths. This is where I began to contextualize my analysis in gendered power dynamics to further mobilize the fourth principle of FCDA, as gender is co-constructed through the reproduction of rape myths.

Further, in between my third and fourth reading, as well as fourth and fifth reading of the empirical material, I revisited the literature to inform the further construction of these discourses (Graneheim & Lundman, 2004, pp. 107–109). Specifically, I revised literature regarding rape myths and selected the most relevant ones based on my readings of the data. I engaged in an abductive analysis to ensure my ideological critique reflected my data and the findings within literature. After the fifth reading, I began to engage in the third stage of CDA by writing narratives of the data and integrating quotes from the summaries of judicial decisions and then reread the literature to gain further understanding of the data.

My next seven readings of the data involved looking for distinct quotes that exemplified the six rape myths identified in the literature review, I reread the literature to confirm the identification of relevant rape myths to this dataset. I then read through the data six more times, one round per myth, to note specific examples of the selected rape myths. This was followed by a twelfth and final reading to identify discussions on culture that speak to race and citizenship of the complainant. Throughout this process, I continued to work abductively to engage with quotes from the data as they speak to wider findings within the literature. This demonstrates my transition from stage three of CDA to stage four as I pinpointed three discourses apparent in the data. In the final chapter, I mobilize the final principle of FCDA as I consider the findings in the larger context by linking them to my theoretical framework, which contributes to the demystification of systems of gender, race and class that serve as the foundation for rape myths and vice versa.

3.3 Conclusion

In this chapter, I have demonstrated how I executed the methodological analysis of this project, as well as the subsequent analysis. Then, I provided my research design to explain my empirical material and gathering strategies. This was followed by a detailed presentation of FCDA to demonstrate how I engaged with the empirical material. The methodological framework of this project was constructed to ensure the most appropriate methods were used to examine the research questions and meet the research objectives. In the analysis, I will go on to demonstrate the discourses I have generated in applying my theoretical and methodological framework. Specifically, through FCDA, I can mobilize law as a gendering and racializing practice, as well as CRT, by considering these judicial decisions as fertile ground for an analysis of the legitimation of IPSV against racialized immigrant women through rape myths.

Chapter 5: Findings

In this chapter, I present my data analysis. There are three discourses apparent in the data: 'ideal' victims resist and report sexual assault; 'ideal' victims do not know or maintain contact with the perpetrator; and defendants are excused from responsibility due to the prevailing beliefs that male sexuality is uncontrollable, and women pursue false allegations. In discussing each of, I begin by situating relevant literature and then I find specific evidence within the data. In each of these discussions I take into consideration the impact of the complainant's race and citizenship in the judge's advancement of rape myths.

5.1 Discourse #1: 'Ideal' Victims Resist and Report Sexual Assault

The first discourse apparent in the data is that judges largely focus on the complainant's resistance and reaction to IPSV to determine the plausibility of their claims. Gotell argues that the 'ideal' victim makes an active effort to either verbally or physically resist and likely gets injured in the process to indicate that they are not consenting to the sexual activity. The passing of *Bill C-127* and *Bill C-49* challenged this rape myth by stipulating that consent cannot be assumed, as it must be provided voluntarily and explicitly (Gotell, 2007, pp. 145–147).

In the data, the complainant's resistance is further linked to the persistent belief that 'ideal' victims report the assault immediately because negative inferences regarding the complainant's credibility are further substantiated by a discussion of the timing of her reporting of the allegations. Specifically, delayed reporting is considered suspicious because of the perception that the complainant had time to fabricate the allegations (Los, 1990, p. 162). The recent complainant requirement was removed with the passing of *Bill C-127* and further condemned in the subsequent amendments. However, Canadian courts have not explicitly condemned the negative inferences that come with delayed reporting (Carr et al., 2014, p. 222).

The data reflects the literature review's findings that despite changes to the law, the judges continue to use the complainant's level of resistance and the timing of their reporting to assess their credibility. In this section, I explore how effective resistance and reporting is used to draw inferences regarding the credibility of the complainants. As per the findings of the literature review, these are further complicated by the complainant's race and citizenship status because their deviation from perceived effective resistance and reporting is further scrutinized and more likely to lead to negative inferences regarding their credibility.

In *R v A.R.*, the judicial decision is centered around resistance and reporting to assess her credibility, as opposed to the accused's actions. *R v A.R.* involved a complainant who immigrated from Iran in 1993 after marrying the accused in 1991. In this case, the judge notes the complainant "made it clear that on the basis of several times a week, although the specific number of times changed, the accused would demand that she submit to sexual intercourse with him. She said that she agreed to do so on some occasions but not on others" (*R v A.R.*, 1996, p. 2). The judicial decision for *R v A.R.* addressed the complainant's reaction to chronic IPSV she faced during her marriage to the accused. Upon her arrival to Canada, the complainant refused to have sex with him because she was not satisfied with the cleanliness of the apartment (1996. p. 2).

The judge notes she refused to engage in sexual intercourse, "until he changed and stopped engaging in what was referred to as "vigorous sexual intercourse" with her," (*R v A.R.*, 1996, p. 3). The complainant stated "'And as long as you want to be forceful about it, I don't want to have sex,'" (*R v A.R.*, 1996, p. 3). The judge also refers to two examples of the complainant unsuccessfully resisting sexual advances from her husband: "she resisted, she began to cry, and against her will, verbalized by her, he had sexual intercourse with her," and after she received abortion surgery, she woke up "at about 4 a.m. to find him on top of her, still spot bleeding from

the surgery and told him so," but he continued to have sexual intercourse with her (*R v A.R.*, 1996, p. 3). The judge notes the complainant is resisting 'sexual intercourse' that is not to her liking but there is no record as to how the accused asserted his dominance over her. The complainant's credibility is scrutinized because she did not meet the specific indicators of the 'ideal' victim by resisting or reporting immediately. As a result, the judge draws negative inferences on her credibility and acquits the accused of sexual assault.

Despite the preceding discussions on the complainant's resistance, the judge in *R v A.R.* further focuses on instances when she did not resist 'effectively.' The judge notes the complainant testified that "she would get so fed up she would eventually say 'Okay, let's have sex and get it over with.' No sooner had she uttered these words then I noticed she abruptly changes what she had just said and told the court that she told the accused she did not want sexual intercourse but when he persisted, she, in her words said: 'I gave up'" (*R v A.R.*, 1996, p. 3). The judge then considers that "however unhappy she was with the accused and the area of sexual relations" she proceeded with a legal marriage ceremony and the complainant did not report the "sexual misconduct" (*R v A.R.*, 1996, p. 3-4). In making these statements, the judge contributes to the view that the 'ideal' victim resists and reports sexual assault immediately because, although the complainant resisted at times, the judge doubted her testimony due her tendency to comply, marriage to the accused, and failure to report.

Further, the judge concludes "At the end of the evidence, I am more suspicious that the complainant, understandably from her own personal viewpoint, was perhaps more interested in securing a permanent home in Canada than anything else…. I draw the irresistible inference that the complainant did not want to return to Turkey or certainly to Iran. Having observed her demeanour as she testified, I am not able to find that the complainant was adhering to the straight

line of truth in most, if not all, of the essential evidence that she gave." (*R v A.R.*, 1996, p. 6). Despite noting the complainant's reasoning for delaying her reporting: "'In her Iranian culture, once married, criminal assaultive behaviour is proscribed against strangers but not husband's.' Further that the accused told her no one would believe her in any event" (*R v A.R.*, 1996, p. 5). The judge does not take into consideration the complainant's explanation that these beliefs had impacted her resistance and reporting behaviour in response to the alleged IPSV. Not only does the judge doubt the complainant's testimony, because she did not resist effectively and report the sexual assaults, but the judge specifically finds "[the] timing of her Ontario marriage" particularly suspicious due to the perceived underlying motive to gain citizenship (*R v A.R.*, 1996, p. 6).

It is routine for judges to draw on demeanour of witnesses and inconsistencies in their testimony to assess credibility. However, in this case, it is problematic, because the judge solely draws on the complainant's status as an immigrant to substantiate their negative inferences regarding her credibility. The judge concludes the complainant is not credible, because she did not meet these two tenets of the 'ideal' victim, rather than taking into consideration that her status as a racialized immigrant woman in an abusive relationship complicated her journey to resistance and reporting. There is no discussion regarding the role the accused played in delaying her reporting by preying on her belief that she would not be believed. Instead, the judge draws negative inferences on her credibility due to the possible ulterior motive of pursing allegations to gain citizenship, even with the complainant offering her cultural understandings of sexual assault as a rationale for her compliance and delayed reporting.

A key issue in the judicial decision for *R v H.E.* (2017) is the complainant's lack of overall resistance and the timing of her reporting coinciding with a custody battle. The complainant had immigrated to Canada from Palestine in 1989 and married the accused three years later. The judge

notes that the complainant "has essentially testified that she never consented to sex with her husband from 1992 until they separated on January 1, 2013, and that she only fulfilled what she believed was her obligation as the accused's wife" (*R v H.E.*, 2017, p. 3). However, the judge notes that "[m]arriage is not a shield for sexual assault; however, the issue in this trial is whether considering the whole of the evidence the Crown has proven the allegations beyond a reasonable doubt" and this necessitates "[a]n assessment of credibility involves an evaluation of both the honesty and reliability of the witnesses' evidence" (*R v H.E.*, 2017, p. 1). The judge explicitly notes that the marital exemption can no longer be used as a defence. Still, the judge finds that her staying married to the defendant, which reflects poorly on her resistance and the timing of her reporting. This detracts from her credibility because the judge perceives her motive in advancing such allegations had more to do with winning custody.

The judicial summary is centered around one instance of sexual assault in which the complainant "testified that she asked him to stop 3 times but the accused continued until he ejaculated. She closed her eyes and prayed for it to end and then took a shower" (*R v H.E.*, 2017, p. 2-3). Unlike in *R v A.R.*, the judge in *R v H.E.* (2017) addresses the accused's testimony and even finds it "not believable and did not raise a reasonable doubt" (*R v H.E.*, 2017, p. 3). The judge finds the complainant's evidence to be credible but still concludes that the Crown did not prove *mens rea* beyond a reasonable doubt because "the complainant had lived in Canada since 1989, did not make any complaint until the parties had a dispute involving access" to their kids and "continued to have sex with the accused…for a period of 11 years" after the incident in question (*R v H.E.*, 2017, p. 3-4). Thus, the judge finds the complainant credible but still doubts her allegations due to her long-term compliance and delayed reporting. Like in *R v A.R.*, the judge notes the complainant's cultural background, but it is not a mitigating factor in the analysis of her

credibility, instead the judge finds the timing of her resistance and reporting to be suspicious by focusing on her ulterior motive.

The complainant's credibility in *R v H.E.* (2017) is scrutinized again during an appeal of the conviction. The appeal judge in *R v H.E.* (2019) begins the analysis by noting "[t]he only issue in this trial is one of credibility" (*R v H.E.*, 2017, p. 5). The appeal judge reviews the complainant and the appellant's testimony and finds that "[t]here were serious inconsistencies in [the complainant]'s evidence that led [to the conclusion] she is not a reliable witness. In addition there was significant motive to fabricate" (*R v H.E.*, 2017, p. 6). There is a summary of the events in question, which includes her resistance during the assault and that she was unaware of her right to refuse sex with her husband (Case, 2017, p. 4-5). There is a more extensive discussion of the inconsistencies regarding the timing of the reporting of the sexual assault than in the judicial decision for the trial, as the appeal judge doubts that the complainant was unaware that IPSV was a punishable offence.

The judge notes that the detective prepared a report in March 2014, in which the complainant "told the constable that she had suffered "years of sexual abuse, including rape, painful rough sex and unwanted sexual touching" at the hands of the accused." The complainant testified that these were conclusions drawn by the officer and that she was truly unaware that IPSV was illegal in Canada until she met with the officer in April 2021 due to an access issue (*R v H.E.*, 2019, p. 9). Still, the judge finds the information in the report indicated "that she was also well aware of the potential legal consequences of the allegations of non-consensual sex" (*R v H.E.*, 2019, p. 9). In so doing, the judge doubts the complainant's reasons for delaying reporting and her compliance throughout the marriage, and so the complainant did not meet the standards of the 'ideal' victim, and as a result, the judge draws negative inferences regarding her credibility.

Like in the judicial decision for the initial trial, the appeal judge found the complainant had "significant motive to fabricate" as the complainant's report to the police coincides with her custody dispute with the appellant (*R v H.E.*, 2019, p. 10-11). The judge only considers her ulterior motive to gain full custody of her kids to explain the complainant's lack of resistance and delayed reporting and dismisses her stipulation that she was unaware of her right to refuse sex with her husband and lay charges against him. The judge does not consider that the complainant herself consistently testified that the police officer's notes misrepresented that she already knew that IPSV was a criminal offence when she met with him regarding her custody battle. The complainant consistently maintained throughout the trial proceedings that she learned of her right to refuse sex with her husband during this meeting. The judge dismisses the complainant's account of events and as a result, the decision reinforces the view that the 'ideal' victim resists and reports right away by finding the complainant's shift in understanding of consent as an inconsistency which further reflects negatively on her credibility

On the other hand, in *R v Sandhu*, the complainant's credibility is not assessed in this decision, which is an appeal of a conviction. The complainant, a Canadian citizen, married her spouse in 1996 and sponsored his immigration to Canada. The couple separated in 2002 and the appeal judge notes that "[a]fter separation, [the complainant] went to the police" and reported that her husband physically and sexually abused her during their marriage, and even threatened to kill her" (*R v Sandhu*, 2009, p. 2). This appellant was convicted of two counts of sexual assault with the first occurring in 1999 when the complainant was pregnant and the appellant "physically forced her to have intercourse with him" after "she turned him down. She told him, '[y]ou are drunk and I don't want to,' and '[m]y child is heavy'" (*R v Sandhu*, 2009, p. 4). The second incident occurred in the same year, shortly after the complainant had a caesarean birth, and she refused because her

stitches had not healed. The judge notes "'[s]he therefore told [the appellant] not to have sex with her'" but the appellant "forcibly had sex with her" (*R v Sandhu*, 2009, p. 4).

Unlike the previous cases, the judge reinforces the view that 'ideal' victims resist and report immediately because the appeal is dismissed without further discussion on the complainant's credibility. Specifically, the judge finds that the jury did not need to be instructed because the complainant's credibility is supported by what is perceived to be effective resistance and reporting. The complainant is conceptualized as credible, even though she too remained married to the defendant and delayed reporting until after the marriage ended. In this case, the judge does not discuss any possible ulterior motives or shifts in her understanding of consent.

R v J.S.Y. is another appeal of conviction that was dismissed where the complainant is found to be credible after the judge's assessment. The complainant and appellant married in South Korea in 1992 and immigrated to Canada in 1996 (Case, 2013, p. 3). At the time of the incident in question, the parties were attempting to reconcile after separating due to a previously reported instance of IPV. The appellant appealed the conviction to determine if the trial judge rightfully found no "air of reality to the defence of honest mistaken belief in consent" (*R v J.S.Y.*, 2013, p. 2). The trial judge only accepted the complainant's version of events in which the assailant physically assaulted her and restrained her. He told her he wanted to have sex and she physically and verbally resisted but ultimately complied out of fear that her daughter may overhear and call the police (*R v J.S.Y.*, 2013, p. 4-6). The complainant did not want to report it to the police, because she worried it would make her husband more upset (*R v J.S.Y.*, 2013, p. 7). There is no further discussion regarding the timing of the complainant's reporting, possibly because she had previously reported IPSV. There is also no discussion revolving around her awareness of her right

to refuse consent to sex based on her cultural background. In this case, the trial and appeal judge drew on her relationship dynamics to justify her apprehension.

The judicial decision for *R v J.S.Y.* is centered around the complainant's shift from resistance to compliance to determine if the appellant could have reasonably interpreted consent. Since the complainant and the defendant had two opposing views regarding the incident, particularly the complainant's level of resistance, there is extensive discussion regarding the events leading up to and the complainant's role during the sexual activity in question. It is noted that the complainant initially resisted but gave in and "was in control during sexual intercourse" physically, and she "determined when the sex began and when it ended" (*R v J.S.Y.,* 2013, p. 12).

Still, the appeal judge found the trial judge rightfully dismissed the defence of honest mistaken belief in consent as a defence because "this trial became, essentially a question of credibility. As the complainant was believed, the actus reus was made out and the *mens rea* followed straightforwardly" (*R v J.S.Y.*, 2013, p. 15). Unlike in *R v A.R.* and *R v H.E.* (2017), in *R v J.S.Y.,* there are no ulterior motives identified and the complainant's testimony that she complied and delayed reporting out of fear is accepted and is not deemed suspicious. This complainant is granted an exception for deviating from these two tenets of the 'ideal' victim, demonstrating that fear is considered a reasonable justification, but different cultural understandings of consent are not. This judicial decision reinforces the view that 'ideal' victims resist and report because her compliance and delayed reporting are noted and justified within the dynamics of the relationship.

In these five judicial decisions, the complainant's credibility is gauged based on their level of resistance and the timing of their reporting. The first three judicial decisions demonstrate that the complainants' credibility is doubted when the complainant fails to fully resist the incidents of

sexual assault, and that the timing of the report coincided with their plans to obtain or win a custody battle. In these cases, the complainants' citizenship status is noted, along with their internalized cultural belief that they could not refuse to have sex with their husband. Even though their initial unawareness of their rights to consent to sexual activity could be used to rationalize their lack of resistance and delayed reporting, the judges either do not include it in their analysis of the complainant's credibility or use it to further doubt their testimonies.

Meanwhile, the latter two cases' lack of discussion regarding the complainant's resistance and reporting indicates that these two tenets of the 'ideal' victim are analyzed when they lead to negative inferences on the complainant's credibility. In these cases, the complainants' shifting understanding of consent is not raised at all, nor are any ulterior motives. The judge in *R v Sandhu* notes the complainant was pregnant during the first incident and recovering from birth during the second, which may explain her eventual compliance. The timing of her reporting is not explored, though it is noted she delayed reporting until after they were separated. Further, in *R v J.S.Y.*, the judge implies that the complainant's compliance and delay in reporting can be explained by her fear. These cases still contribute to the view that 'ideal' victims resist and report sexual assault immediately because they are still considered in the analysis of their credibility. The impacts of citizenship and race on this analysis are apparent as they are only used to substantiate negative inferences regarding credibility. The judges in these cases continue to uphold the narrow view that all sexual assault victims react the same way and that only these 'ideal' victims deserve justice because they are putting forth 'real' or 'legitimate' claims of IPSV.

5.2 Discourse #2: 'Ideal' Victims Do Not Know or Maintain Contact with the Perpetrator

The second discourse apparent in the data pertains to the 'ideal' victim's relationship to the perpetrator. There is a prevailing belief that sexual assault only occurs between strangers, despite

IPSV being officially outlawed in Canada in 1983, with the passing of *Bill C*-27. This bill led to the conversion of rape to sexual assault to shift away from the stigma associated with rape victims by outlawing any behaviour that compromises the sexual integrity of a complainant of any sex, even if it was perpetrated by an intimate partner (Busby, 1999, p. 269; Koshan, 2017, p. 2). This bill also rendered evidence of the complainant's sexual reputation inadmissible to establish the complainant's credibility and excluded all evidence of the complainant's sexual history with anyone other than the accused, with three exceptions that are all related to the accused's rights: it rebuts the evidence of the complainant's sexual activity or lack thereof, provides insight into the identity of accused or it is evidence of sexual activity that occurred on the same day of the accused sexual assault that may have led to the accused's mistaken belief of consent (*Bill C-127,* 1983*).*

Still, judges continue to uphold the marital exemption in their rulings because the defendants are given the benefit of the doubt since the complainant had consented to sex before (Vayeghan, 2016, p. 240). As noted in the literature review, *R v. Goldfinch*, is a recent decision that tackles the issue of admitting relationship evidence. The Supreme Court ruled against admitting relationship evidence even if it is for context, because it gives rise to the idea that the complainant consented before. Further, due to the belief that IPSV is not 'real' sexual assault, judges fail to consider that complainants of IPSV do not all feel compelled to leave the relationship, or they may not have the means to do so (Ward, 1988, p. 172). Like effective resistance and delayed reporting, cutting off contact with the accused is considered reasonable behaviour of a complainant in a rape culture. Relationships are categorized as entirely 'good' or 'bad' and IPSV can only occur in the latter. Thus, a 'real' complainant of IPSV would not maintain contact with the accused, because it is 'common sense' to leave a bad relationship (Skinner, 2017, p. 450).

In this section, I demonstrate that in focusing on specific incidents of sexual assault, judges fail to recognize the differences between stranger sexual assault and IPSV. First, I demonstrate that the judge's analysis is limited by only considering specific instances of IPSV because the power dynamics of an abusive relationship are not further considered to give insight into why the complainant stayed. Second, like in the previous section, the complainant's race and citizenship status are not used to provide context or insight into the complainant's 'deviant' responses.

In all the cases, the complainant and the defendant were married or recently separated at the time of the alleged sexual assault. *R v A.* involves a complainant and accused who immigrated from Pakistan separately in 2008. They knew each other when they lived in Pakistan and got back in touch upon arriving in Canada. They married in July 2010 and moved in together in October 2010. The judicial decision is centered around an alleged incident of kidnapping and sexual assault that occurred on November 29, 2010. The judge is sceptical about both parties' testimony but finds "[t]here is no dispute that the complainant and the accused had sexual intercourse" (*R v A.*, 2011, p. 3). There is no discussion regarding the complainant's ongoing contact with the accused but the judge notes that she "portrayed her husband as controlling and obsessively jealous man who resorted to physical violence including sexual assault in order to both control and punish her for perceived infidelity" (*R v A.*, 2011, p. 3).

While there is no discussion pertaining to the complainant's credibility, based on her having maintained contact with the accused, this judicial decision does contribute to the view that IPSV is not 'real' sexual assault, because the judge uses terms like 'sexual intercourse' to describe the alleged events and even categorizes IPSV as an example of physical assault in the latter statement. The judge dismisses the allegations as there was no physical evidence to corroborate the injuries she claimed to have sustained (*R v A.*, 2011, p. 5). There is no discussion surrounding

physical evidence pertaining to the specific incident of sexual assault on November 29, 2010, nor the chronic IPSV she raised in her testimony. The judge conflates IPV and IPSV and determines that the sexual aspects of the assault do not need to be explored because the physical aspects of the assault could not be proven beyond a reasonable doubt. The judge contributes to the view that sexual assault only occurs among strangers and is violent because there is no analysis beyond the physical aspects of the alleged IPSV.

Similarly, *R v Owjee* is an appeal of a sexual assault conviction regarding whether the trial judge erred in allowing a letter addressed to the appellant's lawyer from the complainant's lawyer as evidence regarding the history of the relationship between the parties. The case involves a complainant who immigrated to Canada after marrying the appellant during a visit to Iran in 2000. The appeal judge allowed the appeal, on the basis that "the trial judge erred by relying on a letter dated November 7, 2005, from the complainant's lawyer in matrimonial proceedings to the appellant's lawyer in the matrimonial proceedings as confirming a history of violence in the marriage" (*R v Owjee*, 2008, p. 3). Still, there is a summary of the complainant's views on her relationship with the appellant, noting he "was a domineering and abusive spouse" (*R v Owjee*, 2008, p. 3). Further, the complainant "alleged that the appellant abused her physically" and "forced her to have anal intercourse against her will" (*R v Owjee*, 2008, p. 3). The complainant's allegations are doubted due to a lack of physical evidence because the letter cannot be used as evidence as it was not written by the complainant.

However, there is still no further discussion on the complainant's claims of chronic IPSV and the focus remained on the physical abuse she suffered. This judicial decision perpetuates the view that sexual assault only occurs among strangers because the allegations of IPSV are dismissed due to the letter being the only evidence that substantiated the relationship dynamics. In this case,

the rules against admitting sexual history evidence make it difficult for the complainant to establish a patter of IPSV because such evidence is only explored on an exceptional basis to benefit the defendant's testimony. Thus, the focus remains on one instance of sexual assault and only the physical aspects of the assault are addressed in the analysis, because without the letter, there is no evidence to substantiate the complainant's claims pertaining to the history of IPSV within the marriage.

Similarly, in *R v H.E.* (2017), the complainant essentially never testified to sex but only fulfilled her perceived duty as a wife, yet the judicial decisions only focus on one specific incident. As previously noted, the accused is acquitted on the basis that the complainant had significant motive to fabricate the allegations because she continued to comply with sex for eleven years after the incident and she only raised the allegations once the couple had a custody issue. In the following excerpt the judge concludes that the accused is not guilty because:

> I find that the accused probably had sex with his wife on many occasions without her specific consent, as both he and she believed that he had the right to do so….but since the complainant had lived in Canada since 1989, did not make any complaint until the parties had a dispute involving access, where the complainant continued to have sex with the accused [for] a period of approximately 11 years, I am not satisfied that the Crown has met its burden of proving beyond a reasonable doubt based on all of the evidence that the accused had the required mens rea to have sexually assaulted the complainant in 2002. (*R v H.E.*, 2017, p. 3-4)

This reinforces the view that 'real' sexual assault only occurs between strangers because IPSV is not handled differently by the court, instead only the aspects like stranger sexual assault are discussed during prosecution, like continuing a relationship with the accused after the incident. Further, IPSV is conceptualized as 'non-consensual sex' and distinguished from the incidents in question that are labelled potential or proven acts of 'sexual assault.' The distinction between the incidents of sexual assault from other 'non-consensual' sex within the marriage demonstrates that

these judicial decisions are denouncing specific instances of IPSV. Thus, chronic IPSV is not explicitly condemned, and this contributes to the view that 'real' sexual assault occurs between strangers because the judges choose to define all but a few as 'non-consensual' sex, as opposed to categorizing it all as sexual assault.

Meanwhile in *F.J. c R.*, the seriousness of IPSV is acknowledged during an appeal proceeding, in which the trial judge convicted the appellant of multiple counts of sexual assault. The complainant and the appellant married in 1992 and immigrated from what is referred to as "Foreign Country A" in 2001 (*F.J. c R.*, 2007, p. 3). The appellant did not appeal the conviction but appealed the punishment of 43 months imprisonment and a probation order. The appeal judges note that "the trial judge considered that the Crown had established five separate such assaults beyond a reasonable doubt, all of which involved vaginal penetration. He considered this to represent a high degree of criminal responsibility, as he did the fact that most of the offences occurred when B was his wife" (*F.J. c R.*, 2007, p. 6).

Unlike the previous cases, this judicial decision challenges the rape myth that sexual assault only occurs among strangers by considering the relationship dynamics to analyze the multiple counts of sexual assault. In particular, the judges consider that "[s]ubsequent to September of 2003, B testified that any sexual relations between the parties, although infrequent, were involuntary insofar as she was concerned, while the appellant claimed they were consensual. Some of them, she says, were accompanied by violence" (*F.J. c R.*, 2007, p. 4). There is no further information provided regarding the trial judge's analysis of the complainant and the appellant's initial testimony, so it is difficult to pinpoint specific differences from the other cases, but it is important to note that the verdict is centered around the IPSV being a chronic offence, rather than a single occurrence.

Further, in *F.J. c R.* the sexual relations between the parties are conceptualized as "involuntary" or "forced" after 2003, which allows for long-term relationship dynamics to be fully considered in the analysis because it is not centered around specific incidents (Case, H, 2007, p. 4). While the judge still counts specific incidents of sexual assault in the verdict, the trial judge provides a narrative of the relationship to contextualize the complainant's behaviour. The judge notes that the complainant testified the physical abuse began "not long after they married" in 1992 and they separated twice because of this, and the complainant even contemplated divorce in 1999 but did not initiate any proceedings (*F.J. c R.*, 2007, p. 3). It is then noted that "the complainant expressed a desire to immigrate to Canada, but could not do so without her husband's consent," and they decided to immigrate together, but the complainant "insisted on there being no further spousal violence" (*F.J. c R.*, 2007, p. 3-4).

They arrived in Canada together in 2001 but because of "further violence on the part of the appellant and continuing matrimonial discord," the complainant ended up initiating divorce proceedings in December 2003 (*F.J. c R.*, 2007, p. 4). The complainant testifies that the IPSV began in September 2003 and continued after the divorce judgement was rendered in March 2004. The complainant was "afraid to inform the appellant of the divorce and only insisted he move out when he learned of the divorce while "preparing his income tax return" (*F.J. c R.*, 2007, p. 4). In this case, the complainant's desire to move to Canada is not discussed as a possible ulterior motive for filing allegations and the ongoing relationship with the complainant is not used to challenge the validity of her claims. Instead, both are stated as part of the context and the state of fear she lived in until reporting the assaults to the police in September of 2004 (*F.J. c R.*, 2007, p. 5).

The judicial decision does not go in depth into the evaluation of the complainant's testimony, because the appellant is not appealing the conviction, but it is still worth noting that the

context of immigration and maintaining a relationship is not used to minimize the seriousness of the offence. The trial judge convicted the appellant, as "he did not believe the exculpatory testimony of the appellant to the effect that the parties enjoyed a normal relationship, which, he found, was affected by conjugal violence from the outset of the marriage" and "he stated he believed the testimony of [the complainant], taken in conjunction with the other evidence heard (*F.J. c R.*, 2007, p. 5). Thus, the judge accepts the testimony of the complainant but there was some other evidence heard during the trial that further substantiated her claims. There is no discussion pertaining to details of the evidence he heard, but it is possible that he is referring to evidence that corroborated the claims of physical abuse, like the bruising noted after he hit her in the stomach when she was pregnant in 1993 (*F.J. c R.*, 2007, p. 3).

Unlike the previous two cases, the chronic nature of the IPSV is addressed as an aggravating factor, but this decision begs the question whether the accompanying evidence referred to physical aspects of the assault. Thus, the accompanying evidence may have challenged the possible negative inferences that the judge may have drawn due to the ongoing relationship, so this is an exception to the general belief that sexual assault occurs among strangers. As a result, it is important to consider that this judicial decision does not challenge the view that sexual assault mainly occurs among strangers, because there needed to be further evidence to support the complainant's persistent experience of IPV. Even though this case does address the chronic behaviour of sexual assault, it still presents stranger sexual assault as the default and ongoing contact needed to be rationalized by the complainant's fear.

In this section, I have demonstrated the underlying rape myths that 'ideal' victims of sexual assault do not know or maintain contact with their perpetrators in three ways: First, in *R v A.*, there is a disregard for the chronic IPSV the complainant claims to have faced and the judge focuses on

one instance of sexual assault. However, the judge conceptualizes the sexual assault as an extension of physical assault and so the discussion pertained to the lack of physical evidence corroborating her details of the alleged physical injuries she sustained. This perpetuates the view that sexual assault only occurs among strangers by failing to discuss the chronic nature of IPSV and dismissing the one incident based on the lack of physical evidence. In particular, the judge's ruling demonstrates that the doubts pertaining to the physical aspects of the assault are enough to dismiss the sexual aspects of the assault without any further discussion.

Second, in *R v Owjee*, the appellant successfully appealed the conviction because the judge dismissed the letter evidence that substantiated the complainant's allegations of IPSV and other forms of abuse. This led to the charges being dismissed because this was the only evidence that supported the complainant's testimony. This still perpetuates the view that sexual assault only occurs among strangers because sexual history evidence is rejected due to the 1983 reforms state that it is not to be used to draw conclusions of the complainant's credibility or character, but this elimination prevents the admission of evidence that can provide insight into chronic IPSV. This rule was created to ensure that the assessment of the complainant's credibility is not dismissed due to past occasions where she has consented. While it can be a similar issue in trials involving couples, who have had sex before the incident in question, in this case it could have helped demonstrate a pattern of chronic IPSV. Meanwhile in *R v H.E.* (2017), the judge dismisses all the complainants' claims of IPSV based on the findings of one instance of IPSV that is determined using the same indicators of stranger sexual assault, like ongoing contact, to dismiss. These rulings support the view that sexual assault only occurs among strangers because the judge is unable to draw on relevant relationship history evidence, as it is accepted on an exceptional basis to support arguments of mistaken belief of consent or that the assault did not occur.

Third, in *F.J. c R.*, even when relationship dynamics are considered and the complainant's status as an intimate partner is considered an aggravating factor in sentencing, evidence beyond the complainant's testimony is necessary to effectively substantiate these claims and justify her ongoing relationship with the accused. As such, in the appeal, the judge does not assess the plausibility of the complainant's claims based on her continued attempts to reconcile with the complainant and immigrating to Canada with the appellant. The judge does not consider the complainant's cultural background either, as the name of the country is replaced by *[Foreign Country A]*. In this way, the complainant's culture and citizenship status are only relevant in drawing negative assessments regarding the complainant knowing and maintaining a relationship with the defendant. The rape myths that 'ideal' victims do not know or maintain contact with their victim is upheld implicitly because the way evidence is analyzed works best for stranger sexual assault. As a result, the complainants in the first two cases are not conceptualized as victims of sexual assault but the latter is considered because there was other evidence that could mitigate any doubt raised by her maintaining a relationship with the complainant.

5.3 Discourse #3: Male Sexuality is Uncontrollable and Women Lie

The final discourse present in the data is the view that perpetrators cannot be held accountable because of two prevailing beliefs. First, in rape culture, men who engage in sex are acting on urges that were provoked by the victim in any way, even if it is a misunderstanding of consent (Skinner, 2017, p. 444). In rape culture, it is also deemed reasonable that if the complainant has provided consent before, a man can reasonably assume that they would consent again, especially if they are or have previously been in a relationship with the complainant. This is also a reflection of the belief that sexual assault only occurs among strangers, but in this section, I explore the difficulty in proving *mens rea* because the defendant's actions are attributed to biological sexual urges and that male sexuality is ultimately uncontrollable (Smith, 2018, p. 626).

I consider that in the data, it is difficult to prove *mens rea* in cases of IPSV perpetrated against racialized immigrant women because the complainant and the defendant both believe that wives do not have the right to refuse their husband's sexual advances. I address the difficulty of holding men accountable for sexual violence against racialized immigrant women because race and citizenship is mentioned selectively. Racialized women's bodies are further sexualized due to their marginalization in systems of patriarchy and colonialism. This is demonstrated through sexual violence, because it was and continues to be a mechanism of domination, across, race, nation, gender and other dimensions of inequality (Armstrong et al., 2018, p. 101). As a result, racialized immigrant women are inherently less likely to be believed because they are less likely to be viewed as victims. Rather they are actively portrayed as devious to justify the need to control them through sexual domination (Razack, 1994, pp. 897–898).

Second, it is difficult to secure convictions of sexual assault because of the misconception that women pursue false allegations more often than 'real' ones. In all criminal cases, the defendant is considered innocent until proven guilty. However, sexual assault complainants are inherently perceived to be liars because of the belief that women lie due to their under-developed sense of morality (Ruparelia, 2020, p. 676). As a result, rape claims are viewed to be 'real' or false to protect innocent men from being wrongfully labelled as 'rapists.' Thus, the complainant's credibility is further brought into question during trials because of the prevailing rape myth that women pursue false allegations out of revenge, regret or for personal gain. This is a belief that casts doubt on allegations because the accused's rights are prioritized due to threatening stereotypes about women (Los, 1990, pp. 161–162; Weiser, 2017, pp. 48–50, 54–55). This sets a high standard of proof that complainants must meet during trial to ensure their claim is 'real.' As a result, complainants are expected to have absolute and consistent recall of the events because

otherwise they risk being perceived as liars. This does not consider that people face normal memory loss over time and this is worsened by the delays in the criminal justice system and after experiencing sexual violence (Spencer et al., 2018, p. 199).

I have combined these two, because they reflect Smart's view that law creates roles for both men and women. This is a realm where men are conceived as passive, because they are unable to 'act' and control themselves. Meanwhile, women are conceived as 'active' agents, because they are required to 'act' in particular ways to ensure they are accepted as 'ideal' victims. More broadly, in feminist socio-legal theory, women are portrayed as liars, because they are the counterpart to the rational male (Gotell, 2007, p. 134). The caveat here is that men are portrayed as passive, because they are acting as they are expected to in a rape culture – asserting their sexual dominance. Whereas women are portrayed as liars to ensure that rape culture and male dominance is not challenged.

In this section, I discuss that the view that male sexuality is uncontrollable is upheld in two ways. First, I demonstrate that the defendant is depicted as a 'non-agent', so it is difficult to meet the requirements to prove *mens rea* because they do not know how to control their sexual urges. Further, the defendants are often given the benefit of the doubt because judges draw on defendant's cultural understandings of abuse to rationalize their inability to control their sexual urges. This means they did not intend to intend to sexually violate their partner. Rather, they are only seeking to fulfill their sexual needs and the sexual assault is a secondary effect of this. Second, judges conceptualize the complainant as an 'agent' who actively pursues false allegations by default, unless there is evidence to prove otherwise. In this way, unless these women satisfy the narrow criteria of the 'ideal' victim, they are not believed. In addition, judges tend to only use the complainant's status as am immigrant woman and a woman of colour when drawing negative

inferences on the plausibility of their allegations, as opposed to using these factors to contextualize their behaviour, like they do for the defendant. In *R v A.R.*, there is an extensive discussion regarding both the complainant and the defendant's belief that she could not legally refuse sex with her husband. While I previously discussed that in this case, this belief is dismissed as a reason to explain the significant delay in reporting the IPSV, here I note that this belief contributes to excusing the defendant from having sex with his wife without her consent. In particular, the judge notes that

> Undoubtedly, the accused, her husband, should have undertaken marriage counselling. I doubt that he had sufficient intelligence to understand that he had a problem, and that problem related to his inability to perform an act of sexual intercourse only thinking of himself and not his partner. A selfish lover he may have been, but a person committing sexual assault has not been proven, in my satisfaction, to a moral certainty. (*R v A.R.*, 1996, p. 6)

In this statement, the judge finds that the accused could not be held responsible, because his lack of intelligence prevented him from understanding his partner's needs. The judge finds that the accused played a passive role in his sexual encounters with the complainant because he did not have the mental or emotional capacity to consider the impact his actions had on the complainant. As a result, the judge does not conceptualize him as someone who committed sexual assault because the judge perceives that he does not know any better. This contributes to the view that this defendant cannot be held accountable for sexual assault, because he lacks intelligence and is too selfish to think beyond his urges and control his sexuality.

In *R v A.R.*, there are no other comments made regarding the defendant, which further contributes to perception that he is a 'non-agent' during sexual intercourse. The judicial decision builds on this in the credibility assessment of the complainant, which as previously mentioned, deemed her suspicious due to inconsistent testimony regarding her resistance and the timing of her

reporting coinciding with her obtaining citizenship. In this way, the complainant is blamed for failing to take appropriate measures at the correct time and this leads to the judge finding that she had ulterior motives to pursue false allegations. The complainant is constructed as an active agent, as the judge analyzes the complainant's motives to fabricate her claims. The judge draws inferences based on the accused's testimony:

> [stating] that the incident which precipitated the arrival of the police at her residence arose after the accused told her he intended to leave to go to London to live. She became highly emotional. She admitted she screamed and stamped her feet and engaged in very loud, and what I find, to have been hysterical raucous talk, that undoubtedly caused the neighbours to summons the police (*R v A.R.,* 1996, p. 5).

In this statement, the complainant's actions and tone are described in detail, while the accused's actions are not. In doing so, the judge creates the perception that the accused is in the background of the scene, while the complainant is the focal point and, in a sense, an instigator. As a result, the judge conceptualizes the complainant as hysterical and highly emotional. The judge does not expand on this and instead draws the conclusion that the complainant was so disruptive, the neighbours had to complain to the police. There are no other details regarding the neighbours' complaint but in referencing it, the judge uses it to substantiate her view that the complainant was out of control.

The judge goes onto chronicle the complainant's actions after the police arrived:

> She was taken to a shelter, and as I understand it the accused was not then arrested. She did not at that time allege sexual assault. It was only after her arrival at the shelter that she spoke to other persons there, who I infer quickly made her aware of what happens to a male spouse in Canada when an allegation of sexual assault is alleged. Accompanied by an interpreter some days later, she went to the police station and made a formal statement alleging sexual assault, and in the result the accused was arrested and is now here on trial. (*R v A.R., 1996, p. 5*)

In the first sentence, the judge uses the passive voice when describing her journey to the shelter. Subsequently, the judge uses past tense to describe the process she underwent to report the sexual assault, which the judge infers began when she learned that IPSV is a punishable offence in Canada. The judge does not make any reference to the evidence from which this inference is made, which demonstrates that within the judicial decision evidence against the accused is not analyzed under the same level of scrutiny as the complainant's testimony. This judge suggests that the complainant fabricated an allegation because she learned of the possible consequences and further presents her as an active agent in the reporting process due to her ulterior motives.

There is no consideration that her allegations may be sincere and that her timing is truly because of her learning of the consequences of IPSV in Canada. Instead, the complainant's hysteria and being emotional is considered to fuel her actions. This is confirmed through the testimony of another witness, an acquaintance to the complainant. The judge describes that "[s]he is Iranian by birth. She is mature in years and married to an Iranian man…. From her evidence, I draw the inference that she and the complainant, while well acquainted with one another, were not close friends" (*R v A.R.*, 1996, p. 4). Through this statement, this witness is conceptualized as a 'good' woman from whose evidence the judge can reasonably draw inferences, due to her 'maturity' and her possible lack of bias toward the complainant.

Like the complainant, the witness's credibility is assessed, and the judge finds "[i]t goes without saying that the evidence given by [the witness] was thoroughly and skillfully tested in cross-examination by [the defence's lawyer]. In the end, I find that the evidence of this witness remained essentially intact" (*R v A.R.*, 1996, p. 4). This witness is further portrayed as credible because unlike the complainant, her testimony remained consistent, and she did not have any motive to "bear false witness against [the complainant] or to deliberately fabricate evidence in

favour of the accused," nor did she have any ulterior motive to travel from New Jersey to give evidence. As a result, the judge "believe[s] and accept[s] the evidence of [the witness] in general and specifically where her evidence differs from that of the complainant, and it does in many areas of the evidence, I prefer and accept the evidence of [the witness]" (*R v A.R.*, 196, p. 5-6). There is no consideration that the complainant's testimony may be impacted by her shifting understanding of consent and the impact traumatic events could have on her memory.

Instead, the judge conceptualizes the complainant as a hysterical woman who is willing to create false allegations to fulfill an end because the witness is portrayed in opposition to her, rendering the complainant not only untrustworthy but that the witness is more credible than her. The judge notes:

> [she] asked the complainant why she, the complainant, was doing this, and why she alleged that the sexual assault charge against her husband was continuing. She swore that the complainant replied that she, the complainant, was charging the accused to punish him for 'the hard time' he had given her, and that she would eventually go to the police and have the sexual assault charge dropped. (*R v A.R.*, 1996, p. 4)

This testimony is used to suggest that the complainant actively pursued false allegations with a malicious intent to seek revenge on the accused. Specifically, the witness testified the complainant told her that she was "in love with another man…whom she met in Ankara, that she was pregnant, she wanted [the witness] to arrange an abortion, and that [the complainant] was not in love with the accused" (*R v A.R.*, 1996, p. 4). While the judge does not explore the abortion, the complainant's timing of this statement to the witness is used to further support the judge's view that she only married the accused and made the allegations to gain citizenship (*R v A.R.*, 1996, p. 6). The judge draws on the witness's conceptualizations of the complainant as a supposed adulteress who sought revenge to inform the dismissal of the charges. In contrast, the accused and

witness's credibility are not discussed extensively. Further, the complainant, being unaware of IPSV being a crime in Canada, is scrutinized because the judge finds she actively uses her newfound information to create false allegations. This contributes to the perception that women lie about sexual assault allegations because the judge inferred that the complainant had significant motive to fabricate due to her status as an immigrant. This further contributes to the view that the perpetrator cannot be held accountable, because the witness' testimony substantiates the view that the complainant is malicious.

Similarly, in *R v H.E* (2019), the complainant is portrayed as deceptive as the timing of her complaint coincided with a custody battle. Both parties testified they did not discuss sexual relations, and this reduces the accused's responsibility because he was unaware of any issues regarding their sex life until the complainant pursued allegations. In this way, the complainant and the accused held the same attitude and belief that sexual relations are not to be discussed, but this is only used to draw negative inferences regarding the complainant's credibility. The judge notes that "[o]ne area where there is significant disagreement with respect to the marriage is the issue of the parties' sexual relations" (*R v H.E.*, 2019, p. 3). The appellant testified their sexual relationship "was always loving and respectful and that he never had non-consensual sex with [the complainant]" (*R v H.E.*, 2019, p. 3). He further stated, "there was never any suggestion made by [the complainant] that she was experiencing any discomfort during sexual relations" and that he respected her decision when she did not want to have sex (*R v H.E.*, 2019, p. 3). As a result, the appellant argues that the incident in question never occurred.

According to the complainant's testimony regarding the incident in question, the appellant forced her to have sex after he underwent a hair transplant procedure. She states she specifically resisted because she found his appearance to be "repulsive" as "his scalp was bloody and covered

in stitches" (*R v H.E.*, 2019, p. 4). Meanwhile the accused states that "he decided to undergo a hair transplant procedure despite the fact that [the complainant] was opposed to it" and he did it without telling her, so she was not pleased with him but "nothing untoward occurred that day," (*R v H.E.*, 2019, p. 5). The judge does not accept all the appellant's evidence but does accept the aspects that "are supported by documentary evidence" and this left the judge with some doubt regarding the incident that the complainant alleges occurred (*R v H.E.*, 2019, p. 5-6).

Specifically, the judge does not accept that the appellant made important decisions with his wife in mind, because he stated to the police that "she has to obey" him because she is his wife, so "her allegiance has to be to her husband" and "it's either she listens to what I say or…I'm going to divorce her" (*R v H.E.*, 2019, p. 6). The judge accepts these statements as his true view, despite contradicting this in his testimony during the trial. Yet, the judge still conceptualizes him as a passive actor who acted "in accordance with the customs of his culture" and this kept the marriage "very traditional" (*R v H.E.*, 2019, p. 6). In doing so, the judge excuses the appellant from any responsibility because he is unable to view the complainant as his equal due to his cultural views. In this view, the appellant is portrayed as a 'non-agent,' as he is a product of a culture in which IPSV is not only normalized, but it is not a punishable offence.

Meanwhile, the complainant's allusion to culture to explain her delay in reporting is used to further denigrate her credibility and character, despite some of the appellant's testimony supporting her allegations regarding his intolerance for her insubordination. The complainant testified that she always experienced pain during sexual intercourse, and she repeatedly asked the appellant "to desist from sexual relations, at a minimum, until she had recovered from the pain" but he continued to insist on having sex (*R v H.E.*, 2019, p. 3). Like in *R v A.R.*, the judge in *R v H.E.* (2019) conceptualizes the complainant as deceitful because the judge finds that the

complainant was "well aware of the potential legal consequences of the allegations of non-consensual sex" (*R v H.E.*, 2019, p. 9). The judge contributes to the view that women lie about allegations because the judge doubts the complainant's claims as to how she learned about her right to refuse to sex with her husband. Based on this, the judge draws negative inferences on her credibility and doubts her claims and her character. Even in noting that the appellant tended to assert power over the complainant, she is portrayed as the active instigator who is perceived to be devious for making these allegations at the time of a custody battle.

Previously, I discussed that in *R v H.E.* (2017), the initial proceeding for this case, the judge finds the complainant's evidence to be credible. However, in *R v H.E.* (2019), the appeal proceeding involving the same complainant, the judge disagreed because there were inconsistencies in her testimony regarding the relationship context and the incident in question. First, the judge took note of inconsistencies between her testimony that she was unaware that non-consensual sex within a marriage was a punishable offence in Canada until meeting with a detective, and the same detective's report that she solicited his services to report years of IPSV (*R v H.E.*, 2019, p. 9). Second, the judge finds that the complainant's testimony at trial regarding the incident in question lacked detail and at times contradicted her previous testimony to the detective (*R v H.E.*, 2019, p. 8).

The judge draws on these inconsistencies in conjunction with her evasive evidence to claim that she is pursing false allegations, which is further substantiated with the judge finding she has a significant motive to fabricate. The judge draws this conclusion, despite noting that "[demeanour] evidence is controversial, and it would be unwise to rely solely or primarily on this type of evidence" (*R v H.E.*, 2019, p. 7). However, unlike the accused, the complainant's culture is not considered to rationalize her attitudes and behaviour, and she is portrayed as a relentless woman

who will do anything to achieve her goal of gaining custody of her child. This perpetuates the view that women lie by only considering this as a significant motive to fabricate, and there is no consideration that she may be protecting her son from an abusive environment.

This case highlights that the judge accepts that the appellant held more power in the relationship – he is depicted as aloof and not knowing any better due to his traditional views of marriage. Though they both testified that "the discussion of sexual relations within a traditional marriage, such as theirs was essentially taboo" and that they would never broach the subject "with someone outside the marriage" (*R v H.E.*, 2019, p. 3). However, as demonstrated above, the appellant is conceptualized as a passive agent of culture, while the complainant is presented as a 'bad' woman who is too much of an instigator to have truly believed she had no right to refuse sex with her husband. The complainant is depicted as actively deceptive, even though the judge notes that "the timing of the allegations does not make the allegations necessarily untruthful" but the charges are dismissed because the judge doubted the complainant's claims due to the possible motive to fabricate (*R v H.E.*, 2019, p. 11).

In the end, the judge excuses the accused of any responsibility because the analysis is anchored in the view that women lie, and male sexuality is uncontrollable by depicting the complainant as having ulterior motives, and the accused as being stuck in his traditional mindset. All these views are reinforced in this decision because they both previously shared the view that sex was not discussed in their relationship but contrasting inferences are drawn about their credibility. Though the judge accepts the appellant as a domineering partner due to his culture, he is still accepted as clueless when having forced himself upon her sexually, while the complainant's cultural views are not used to contextualize her behaviour and instead, she is portrayed as a deceptive woman.

In other cases, judges do not explicitly conclude that the complainant pursued false allegations due to ulterior motives, but they still conceptualize the women as lying even when the accused holds a possible motive for lying about his version of events. In *R v A.*, the judge doubts the complainant on the basis that there is no physical evidence to corroborate the physical aspects of the assault. Like in *R v H.E.* (2019), the judge doubts aspects of the accused's testimony, as he "downplayed the notion that he was an obsessively jealous husband" but also stated that "he resented his wife" for talking to other men and made her "swear on the Koran that she had not been unfaithful to him" (*R v A.*, 2011, p. 4). Though he claimed not to be a religious person, this oath was deemed important to him as he was incredibly suspicious of her, which is further demonstrated as he "admitted checking her cellphone to see if other men were sending her messages" (*R v A.*, 2011, p. 4). As a result, the judge concludes: "Mr. was jealous and angry with his wife and would have had a motive to assault the complainant" (*R v A.*, 2011, p. 4).

The judge further addresses the accused's testimony regarding his reasons for meeting with the complainant on the day of the incident. The accused testified he met with the complainant at her home in "Mississauga to get his car back was convoluted and didn't accord with common sense" (*R v A.*, 2011, p. 4). Specifically, the judge doubts that he went to see the complainant to retrieve the car, because he did not bring anyone to drive the other car back to his residence. The judge dismisses his version of events, as the complainant's version in which he came to transfer the deed of the car to the complainant is more plausible. The judge also rejects the accused's testimony that the complainant moved out for economic reasons and accepts the complainant's testimony that she no longer wanted to be with him, rather than the other way around (*R v A.*, 2011, p. 5). In doing so, the judge perpetuates the view that the complainant cannot control himself due to his jealousy and anger by accepting the possible motive and dismisses aspects of his testimony

without drawing any conclusions regarding his credibility or character. This also perpetuates the view that women lie about sexual assault because even when the accused has motive, it is dismissed without discussion as he is given the benefit of the doubt.

Meanwhile, even when the judge finds the Crown proved the charges beyond a reasonable doubt, the accused's responsibility can still be reduced during sentencing. The core issue in *F.J. c R.* is whether the punishment was appropriate because the trial judge found "that the degree of criminal responsibility of the appellant was median insofar as the sexual assault was concerned" due to "[r]elatively attenuating factors, however, included the absence of related disorders, the absence of any prior criminal record, belated remorse with recognition of the standards of conduct expected in Canada, good possibility of rehabilitation, and the extent of pre-trial detention since his arrest" (*F.J. c R.*, 2007, p. 6). The trial judge sentenced the appellant based on a review of jurisprudence which was unanimous in "the objectives of denunciation and dissuasion had to trump that of rehabilitation" (*F.J. c R.*, 2007, p. 6).

The appealing judges agrees that the punishment is "severe" but dismiss the appeal because the sentence is not "unreasonable" and the trial judge heard "extensive testimony of the victim and accused…and the trial judge's assessment is entitled to curial deference that should not be easily disturbed" (*F.J. c R.*, 2007. p. 9). There is no further discussion regarding the contents of the testimony. In this way, this case clearly condemns IPSV, as "the nature of the charges (repeated sexual assaults)" is "indicative of the gravity and moral blameworthiness of the offences for which the complainant was convicted" (*F.J. c R.*, 2007, p. 27). This still perpetuates the view that the accused was unaware how to control his sexuality and he shows good prospects to learn Canadian standards in relationships. Meanwhile, the complainant's culture is not used as a rationale for maintaining a relationship with the accused. Thus, the complainant is portrayed as a 'non-agent'

on an exceptional basis because the complainant does not cite her cultural beliefs as a reason for delaying her allegations, rather her fear of the accused is used to rationalize her actions.

In this section, I have demonstrated that judges excused defendants of sexual assault by conceptualizing their sexual inhibitions as uncontrollable, and the complainants as likely to lie. First, the defendants are depicted as 'non-agents' who either lack the mental or physical capacity to contain themselves. Further, judges rely on their cultural beliefs to argue that even though they did have sex with the complainants against their will, the *mens rea* is not proven beyond a reasonable doubt because they truly believed they had the right to have sex with their wives whenever they wished. Second, the complainants are conceptualized as emotional and selfish, especially when they are perceived to have ulterior motives to create false allegations. In this way, the complainant's credibility is scrutinized at a higher level than the defendant and their culture is only used to support negative conclusions, rather than provide context. Though this often leads to the acquittal of the defendant, it is also reinforced in *F.J. c R.*, because the complainant is portrayed as a 'non-agent,' rather than devious, due to her failure to cut off contact with the defendant was because of her fear. Thus, fear is deemed a viable reason for her believing her, despite her having stayed in the relationship contradicting the narrow conceptualization of the 'ideal' victim.

Conclusion

In this chapter, I presented the findings from my analysis of eight summaries of judicial decisions. First, I discussed evidence of the rape myths that 'ideal' victims resist and report sexual assault immediately. Despite the changes to legislation, judges continue to draw on the complainant's effective resistance and reporting in their assessment of their credibility. This is rendered more complicated when the complainants raise their cultural beliefs that they cannot refuse sex with their husbands. In this way, racialized immigrant women are not perceived as

'ideal' victims, because indications of their culture are used to selectively explain why they cannot be trusted.

Second, I discussed that judges uphold the beliefs that 'ideal' victims as people who do not know or maintain contact with the perpetrator, because they assess claims of IPSV in the same manner as stranger sexual assault. In only considering specific instances of sexual assault, the judges often ignored the wider power dynamics in abusive relationships that could explain the complainant's decision to continue maintaining a relationship. Instead, the judges often did not discuss the recurring IPSV as potential sexual assault, rather they conceptualized it as 'non-consensual sex.' Further, the complainant's culture is only used to distance them from 'ideal' victimhood, rather than use it to rationalize their behaviour as a reasonable reaction.

Third, judges advance the view that men cannot be held accountable for sexual assault, because of the belief that their sexuality is uncontrollable and women are likely to pursue false allegations. Specifically, men are 'non-agents' during the alleged sexual assault, while women are conceptualized as 'agents' who are inherently devious. Racialized immigrant women are subject to a higher assessment of credibility as complainants than the defendant and at times other witnesses, because unlike the latter two, judges do not draw on their cultural understandings to contextualize inconsistencies in their testimony.

In the concluding chapter, I link these findings to my theoretical framework. Specifically, I address how these rape myths reflect gendered stereotypes through the conceptions of the 'ideal' victim. I further build on this by demonstrating that these views come together or coalesce to reproduce the view that complainants of IPSV that racialized immigrant women are 'non-ideal' victims.

Chapter 6: Conclusion

As this thesis demonstrates, there are several forces at work in the conceptualization of racialized immigrant women as 'non-ideal' victims. The findings of this research align with those in the literature, as they highlight that despite legislative changes, these rape myths persist due to an overarching rape culture. Within rape culture, male sexual aggression is justified and rationalized. This contributes to the normalization of violence against women in general, which is demonstrated through the limited conceptions of 'real' rape and the 'ideal' victim. I found that the eight judicial decisions I examined perpetuate the following rape myths: 'real' sexual assault is perpetrated by a stranger; 'ideal' victims verbally resist, report right away and do not maintain relationships with the perpetrators; racialized immigrant women are inherently 'non-ideal' victims; women, especially immigrant women, make false allegations out of revenge and for personal gain; and male sexuality is uncontrollable, especially in the face of sexualized racialized women.

The results of this analysis are consistent with the literature and theoretical framework on rape myths and stereotypes pertaining to 'real' rapes and 'ideal' victims. It reveals that the normalization of sexual violence against women is enmeshed within patriarchal and racist systems. Making this connection is important because it demonstrates that legal amendments need to be crafted in ways that consider the intersections between these systems to effectively challenge rape myths that impact racialized and immigrant women who are survivors of IPSV (Fanghanel, 2019, pp. 8–9; McNabb & Baker, 2021, p. 43). Therefore, the theoretical contribution of this research seeks to establish law as a gendering and racializing practice that is integral to the continued normalization of violence against women in relationships, particularly racialized immigrant women.

All the discourses explained in the analysis add up to a narrow conceptualization of the stereotypes of the 'ideal' victim. First, judges' application of rape myths suggests that a woman's credibility is used to determine if her sexual assault can be proven beyond a reasonable doubt. There is a pattern in the data that demonstrates judges' gauge credibility of claims based on the complainant fitting the criteria of the 'ideal' victim (Carr et al., 2014, p. 220). Specifically, the judges often engage in an extensive assessment of the complainant's credibility, based on the complainant's level of resistance and the timing of her reporting of the sexual assault. In so doing, the judges rely on and contribute to the stereotype that 'ideal' victims resist consistently and report the sexual assault right away because the narrow view that women must actively demonstrate they are not consenting to sexual activity throughout the assault continues to prevail despite changes in legislation (Gotell, 2007, p. 157).

These two factors, resistance and timing of reporting are typically discussed to draw negative inferences regarding the complainants' credibility and are not discussed when the judge finds the complainant to be credible. The complainant's cultural beliefs are not used to rationalize and better understand her behaviour. Instead, judges draw on these cultural beliefs only during discussions of their ulterior motives, such as gaining citizenship or acquiring custody of their kids. This demonstrates because the conceptualization of the 'ideal' victim remains narrow pervading beliefs that further limit their perceived credibility and rights to sexual autonomy.

Second, judges uphold the view that 'ideal' victims do not know or maintain contact with the perpetrator. In this view, the judges often analyze these cases in the same way that they do stranger sexual assault because they address one particular incident and fail to consider the nuances in the behaviour of different victims in general and specifically those who have experienced chronic IPSV. In so doing, the judges often do not conceptualize these incidents as sexual assault,

rather only the physical aspects of these incidents are considered (Hengehold, 1994, p. 93). Further, there are discussions surrounding racialized immigrant women's perceptions that wives could not refuse sex. Therefore, these judicial decisions contribute to the view that racialized immigrant women are 'non-ideal' victims because the judges examination brings attention to cultural understandings that distinguish them from Canadian-born, white female survivors only when it supports negative inferences regarding their credibility (Larcombe, 2002, p. 137).

Third, judges define the roles of the complainant and defendants in opposition to one another, where the latter is considered a 'non-agent' during the incident in question. This contributes to the view that defendants cannot be held accountable for sexual assault due to their inability to control their sexual inhibitions. In some cases, this is attributed to the defendant being intellectually or physically incapable, but this is further contextualized in respect to both he and the complainant believing that a husband can have sex with his wife without acquiring consent. However, when the complainant offers this as a reason for ineffective resistance, delaying reporting and maintaining a relationship with the defendant, is often used to fuel negative inferences against her credibility.

Meanwhile, the complainant's credibility is further scrutinized because of the prevailing belief that women pursue false allegations. From this perspective, men need to be protected from false allegations and the judges depart from the position that complainants are lying. The same testimony that is used to conceptualize the defendant as a non-agent is used against the complainant because it is not considered to contextualize the inconsistencies in her testimony but they are used to reduce the accused's criminal responsibility (Razack, 1994, p. 894). As a result *mens rea* is difficult to prove in these cases because the men are constructed as passive participants that are acting on their perceived right to have sex with their wife (Abraham, 1999, pp. 591–592).

The selective discussion of cultural discussions in IPSV cases reinforces the general rape myth that racialized immigrant women are 'non-ideal' victims. As the judges, in these cases, predominately draw on race and immigration status to confirm rape myths, racialized immigrant women's credibility is further scrutinized due to gendered and racial prejudice that is entrenched within the law. As a result, case decisions fail to fully mobilize changes in legislation that are meant to limit the influence of rape myths and instead reinforce stereotypes about 'ideal' victims and 'real' rape by excluding racialized immigrant women who report IPSV because they are conceptualized as untrustworthy and devious. This contributes to rape culture because it normalizes violence against racialized immigrant women by failing to critically examine the intersections between patriarchal and colonial ideologies that constitute the current social order (McGuffey, 2013, p. 110).

6.1 Converging Law as a Gendering and Racialized Practice

This thesis has offered insight into rape myths and the stereotypes of the 'ideal' victim and 'real' sexual assaults, how such stereotypes constitute and reproduce patriarchal and racial stereotypes by conceptualizing racialized immigrant women who report IPSV as untrustworthy. The law on the books provides a perception of change, while the law in action demonstrates otherwise. Judges even go so far as acknowledging these legislative amendments, but they continue to mobilize and confirm rape myths and stereotypes regarding the 'ideal' victim and 'real' rape by drawing on them to gauge the credibility of the complainant. It is difficult for them to enact real change because the legal system cannot be disassociated from rape culture and rape-supportive attitudes.

Regardless of the outcomes of these cases, the summaries of judicial decisions demonstrate the law as an active process that constrains and enables survivors of IPSV by perpetuating rape

culture through the reification of the 'ideal' victim and 'real' rape. The 'ideal' victim has been constructed in relation to the perception that 'real' rape is violent, perpetrated by a stranger, outside, at night. As a result, there are also misconceptions that the ideal victim resists, reports the assault immediately after and cuts off all contact with the perpetrator (Burrowes, 2013, p. 6; Ellison & Munro, 2013, pp. 300–301). Further, within rape culture, sexual violence against women is normalized due to male sexual aggression being promoted and rationalized, which leads to a perception most sexual assault allegations are false (Weiser, 2017, pp. 48–50, 54–55). The narrow criteria of the 'ideal' victim and 'real' rape are reinforced during sexual assault trials because the complainant's credibility is integral to determining if the allegations can be proven beyond a reasonable doubt. This process reflects the law's capacity to create gender roles as it further constitutes that only the *good* 'Woman' is credible (Smart, 1989, pp. 68–71).

Racialized and immigrant women are portrayed as *bad* women through explicit and implicit discourses of the law that conceptualize them as 'untrustworthy' (Vandervort, 2012, p. 113). This was evident in the analysis where race and citizenship are only explicitly discussed when it contributes to negative inferences regarding the complainant's credibility or reducing the accused's culpability, which in turn contributes to the overall perception that racialized immigrant women are 'non-ideal' victims. The implicit beliefs of the law that reflect and contribute to law as a racializing practice are beyond the scope of the data, but CRT can fill in this gap.

The first two tenets, where racism is normative and white people typically benefit from it, are demonstrated through the inclusion of race in judicial decisions when the individual is racialized. I noticed this pattern in my initial data collection, which further engrains that racism is normative and that white people benefit from it because their race goes without saying (Möschel, 2011, p. 1650). The next two tenets, race is a social construct, and that race intersects with other

identities, are highlighted due to the view that law as a racializing practice. Specifically, the data suggests that race is a social construct because it is only constituted through social processes, like trials, as it determines which races are credible. In the data, these processes are further influenced by gender and race, because these historical systems of oppression are expressed simultaneously in classifying racialized immigrant women as *bad*.

Feminist scholars have noted that racialized women are excluded from the narrative of the ideal victim due to longstanding, purposeful societal prejudice that enables racial hierarchies. Specifically, violence against racialized women is normalized within colonial and patriarchal systems of power. Colonial systems are founded upon the notion that white individuals hold power based on race. Patriarchy is further intermingled with colonization as women were disempowered upon the arrival of Europeans. These systems are founded on the notions of dissent and dispossession, as colonizers imposed their values and systems upon Indigenous populations. Thus, racialized people are prescribed a vulnerable position so that the overarching systems of power are not threatened (McGuffey, 2013, p. 124; Pietsch, 2009, p. 137–139).

The reproduction and preservation of patriarchal and colonial power pertains to gender and racial domination, but it produces a complex covert stereotype that normalizes sexual violence against racialized women by sexualizing their bodies and rendering them invisible through a 'colour-blind' approach (Ruby, 2016, p. 131, 136; West, 2002, p. 2–5). Racialized bodies are devalued to sustain colonial power dynamics, which is demonstrated through the belief that they are inherently lying. A colour-blind approach ensures that women of colour's bodies are sexualized by failing to contextualize racial prejudice that renders them 'non-ideal' victims. Thus, racialized women who report sexual assault are inherently 'bad' as they do not fit within the 'ideal' victim narrative, so they are deemed unworthy of justice. As a result, the colour-blind approach to the law

leaves room for rape myths pertaining to both racialized and racialized immigrant women because the law operates under the false pretenses that it is objective (Pietsch, 2009, pp. 137–139).

A main goal of this work was to challenge the narrow conception of 'real' rape within rape culture. The 'ideal' victim narrative excludes racialized and immigrant women due to racial prejudice and stereotypes that are interwoven into rape culture. Despite the changes in legislation, the law fails to consider the impact that multiple systems of oppression have on judicial decisions. It is important to consider that rape myths and stereotypes pertaining to racialized and immigrant women are designed to reinforce systems of patriarchy and colonization because of the law's structure. The prosecution of sexual violence using a colour-blind legal approach fails to critically examine the revictimization of racialized immigrant women (Armstrong et al., 2018, p. 100; Pietsch, 2009, p. 136). It is important that we continue to further consider CRT to fully capture the law's role in maintaining and contributing to inequalities within society.

The theorization of law as a gendering and racializing practice provided in this research is not meant to undermine the progress put forth in Canadian legislation. The current sexual assault laws were created in partnership with women's groups to ensure that the amendments respond to feminist critiques pertaining to the law's role in promoting and enforcing rape culture (McNabb & Baker, 2021, p. 43). Though rape myths persist, there have been significant rulings to challenge aspects of the 'ideal' victim. There is potential to transform rape culture with legislation and jurisprudence, but the issues lie in the continued focus on searching for the truth during trial (Smart, 1989, p. 68). Thus, the focus on the credibility of the complainant limits legal analysis because there is a no critical consideration of the roots of the 'ideal' victim stereotype and the bias held within the institutional level of the criminal justice system, especially when it challenges the belief that stranger rape is more prominent. Racialized immigrant women will continue to be

conceptualized as untrustworthy and this contributes to the normalization of sexual violence perpetrated against them.

A more radical solution is required to ensure that racialized immigrant women who report IPSV are not conceptualized as 'non-ideal' victims. It is unlikely that current Canadian sexual assault legislation will challenge and reduce the influence that rape myths have on the prosecution of IPSV cases involving racialized immigrant women, because the law is designed to exclude their perspectives. These legislative changes do indicate that the law can be used to challenge inequalities, as the shift from rape to sexual assault laws intended to do. Further, Smart's theoretical lens that law is a gendering practice makes way for discussions on the law's role in creating inequalities and consider preventative measures that ensure judges act reflexively and avoid perpetuating rape myths in their analysis of cases of IPSV perpetrated against racialized immigrant women. This provides an opportunity to develop the perspective of law as a racializing practice that is founded in CRT's tenets by explicitly discussing the impacts of race and racism.

Cossins' convergence approach is an appropriate method to further bring law as a gendering practice in conversation with CRT. Cossins explains that convergence analysis is one that examines the overlap of sex and race, inviting us to consider the unique cultural space created by sex and race. Thus, it is important to look at the two factors together This allows for a stronger, more in-depth analysis of rape myths that target racialized women by considering systems of gender, and race (Cossins, 2003, pp. 94–97). The convergence approach can better fuse theorizations of gender and race, because it allows for a consideration of both gender and race as social constructs that interact with other identities. This is more appropriate than using concept of intersectionality, because the latter was created to explore the particularities of Black American Women's experiences (Crenshaw, 1991, p. 1244).

By converging these two views, research can be created with reform and revolution in mind. This can contribute to disrupting rape culture to focus on the needs of sexual assault survivors by unveiling the connections between patriarchal and colonial structures that are inherent within the law and further reflected through rape myths. In this view, it is imperative that practitioners of the law use converging analysis to demonstrate a higher level of understanding of the unique space that sex and gender occupy. Particularly, this research indicates it is important that judges include these considerations in their analysis, as opposed to solely considering one or the other to substantiate any of their previously held biases. A further consideration is restructuring the law through a convergence approach by engaging in cultural-sensitive approaches.

Razack focuses on the risks and benefits for racialized women complying with cultural modes. For example, Indigenous people view maintaining eye contact to be a form of disrespect, they are often misconstrued in the courtroom where eye contact is expected as a custom in Canadian culture. Thus, instead of using culture in defence of the complainant, she further argues "[f]ar more typical is culture used as a defence of the accused when the accused is of Aboriginal or non-Anglo-Saxon origin" (1994, p. 895). Convergence analysis challenges rape myths and stereotypes because it links their deviation from 'ideal' victim behaviour to their marginalization within systems of race and gender. This demonstrates the CRT tenet pertaining to individuals holding multiple identities at once and drawing on the perspectives of the communities in question, because it provides the analytical tools to consider the interconnections between systems of oppression but also putting marginalized individuals' interests at the forefront by considering culture to draw positive inferences as well.

Razack expands on this through a discussion on the 'culturalization of racism' within the modern context, as the discussion has shifted away from racial class differences to those of culture.

This highlights that modern racism involves covert operations and demonstrates how denial is integral to its processes, which speaks to the tenet that perceptions of race are relative to the time period (Möschel, 2011, p. 1649). As a result, Canadian courts must engage in self-reflexivity when seeking culturally sensitive solutions to ensure responses include rather than exclude Indigenous women and other women of colour. This involves an "interrogation into how culture is gendered and gender is culturalized" (Razack, 1994, p. 913). An initial step to this is first creating more resources that can inform cultural sensitivity training provided to judges. Beyond, this I find that lawyers should also be taught in their training that it is important to advocate for their clients and ensure their arguments draw on their cultural background for context. Though this study involved looking at judicial summaries of cases, I argue that the solution must involve all members in the courtroom.

Despite the changes in the law, rape myths continue to make their way into judicial decisions. This leads to a limited legal understanding of sexual assault that reinforces the stereotypes that 'ideal' victims resist and report immediately after the assault, but also do not know or maintain contact with the defendants. This contributes to racialized and immigrant women complainants of IPSV being conceptualized as 'non-ideal' victims because their credibility is further scrutinized as they tend to deviate from the expected behaviour of the 'ideal' victim. Future reforms should be made in consultation with feminist and anti-racist perspectives to ensure that steps are taken toward abolishing rape culture and eventually systems of patriarchy and colonization. Reforms should ensure that law is widely understood as a gendering and racializing practice and that the convergence approach is used in practice to ensure that both types of inequalities are addressed.

On the other hand, understanding the link between patriarchy and colonialism, and the law's role in maintaining this relationship by producing and sustaining rape culture is that we must reconsider our understandings of sexual violence against women and challenge it at an individual level. These two systems work by distorting dangers within society. Many women adjust their lifestyle to avoid the stranger rapist by avoiding walking alone at night (Waterhouse et al., 2016, p. 1). These preventative behaviours do little to prevent IPSV and further reinforce rape culture by perpetuating the notion of 'real' rape. Further, sexual assault continues to be underreported for fear of being revictimized during the trial due to analyses of credibility that are constrained by the narrow conceptualization of 'ideal' victims. So they risk being portrayed as 'bad' women whoa re not worth being believed.. (Gotell, 2007, p. 151; Lonsway & Fitzgerald, 1994, p. 135). Meanwhile, survivors of IPSV continue to face obstacles in seeking justice through the law, because they do not fit within 'ideal' victim narrative and their credibility is tainted by the sexual relationship they previously had with the accused (Koshan, 2017, p. 25).

The interpretation of rape culture, rape myths and stereotypes pertaining to the 'ideal' victim and 'real' rape presented in this research seeks to offer new insight into sexual violence against racialized and immigrant women. This research supports reimagining a social order that could create a society where all women are truly safe from sexual violence and survivors are not further victimized in the criminal justice system. Though this may seem idealistic, it is imperative that we remain inspired by feminist lobbyists that contributed to restructuring the rape offence as the sexual assault offence because radical change is the only way to dismantle rape culture once and for all. In particular, the conceptualization of racialized immigrant women as non-ideal victims should not be taken lightly because it speaks to the law's discursive ability as a gendering and racializing strategy.

This provides hope for solutions that raise a convergence approach because a wholistic approach is necessary to fully capture and address the effects that rape culture poses on all women. It is imperative that all members in the criminal justice system strive to evaluate the mechanisms in place and consider how they impact the most vulnerable people in society. As this work focused on racialized immigrant women, it highlights that they experience rape culture differently than those who considered to be a 'Woman' in society. In this view, racialized immigrant women are purposefully to be excluded from the 'Woman' and so they are not conceptualized as victims of sexual violence to maintain colonial and patriarchal power structures. This goes beyond the idea that no one is safe until we are safe from sexual violence. Instead, meaningful reflections must consider that particular bodies are protected at the expense of others. The real work begins with a redistribution of power that can guarantee safety for all *women.*

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R v A.R. (1996). O.J. No. 367

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R v H.E. (2017). ONSC 4277

R v H.E. (2019). ONSC 5014

R v J.S.Y. (2013). BCCA 451

R v Owjee. (2008). ONCA 409

R v Sandhu. (2009) ONCA 102

R. v Seaboyer; R v Gayme, No. 2. (SCR 1991).

Appendix A: Details of Cases

**All the information here comes from case summaries made available through legal databases.*

F.J. c R. (2007). QCCA 541

F.J. c R. is a 2007 appeal proceeding in a Quebec court regarding the appellant's punishment. The appellant was sentenced to 43 months in prison after being convicted of sexual assault against his former wife. The defence appealed the sentenced as the trial judge claimed the level of seriousness of the offence was median but provided an excessive sentence. The appellant and B emigrated from an unnamed country to Canada in 2001 after their marriage in the same unnamed country in 1992. The complainant testified that the marriage became abusive early on, and she left the accused. They attempted to reconcile, and the complainant wished to divorce in 1999 but did not initiate any proceedings. Instead, the complainant expressed a desire to move to Canada but could not do so without her husband's consent, so she agreed to immigrate on the condition that there would be no further spousal violence. Since it continued, the complainant filed divorce and papers were served in December 2003. The complainant testified that all sexual relations between the parties after September 2003, although infrequent were involuntary, despite the accused denying these claims.

The divorce was rendered in March 2004, but the complainant was too afraid to let the accused know and tell him to move out of their home. The complainant insisted that the appellant move out after he learned of the abuse while filing his taxes. The incidents of forced sex continued until September 2004, and they came to an end with the complainant called the police because she feared for her life as the appellant had come into the bathroom, ripped off her clothes and tore her undergarments. The trial judge did not believe the appellant and found him guilty of sexual assault. The trial judge notes that the complainant being his former wife is an aggravating factor when considering her punishment. The appeal judge dismisses the appeal because the trial judge heard extensive testimony of the complainant and appellant and the trial judge's assessment is entitled to curial deference that should not be disturbed easily

R v A. (2011). ONCJ 541

R v A. is 2011 proceeding in an Ontario court where the accused is dismissed of one count of sexual assault, two counts of assault and a count of forcible confinement. The complainant and the accused immigrated separately to Canada in 2008 from Pakistan. They knew each in Pakistan through the accused's brother and they reacquainted upon arriving to Canada. The two got married in July 2010 and they moved in together in October 2020 for a few weeks, before the complainant moved out. The incidents in question occurred on November 29th, 2010. The complainant claims the accused kidnapped her and beat and raped her. She further alleges that he confined her to his apartment and attempted suicide multiple times. After the complainant cut herself, the accused called the police, he was arrested, and she went to the hospital. The judge dismissed the charges on the basis that the complainant's testimony was consistent and lacked physical evidence.

R v A.R. (1996). O.J. No. 367

R v A.R. is a 1996 trial proceeding in an Ontario court, pertaining to one count of sexual assault. The accused and the complainant married Iran in 1991. They lived in Turkey from 1992-1993 and

in August 1993, the complainant moved to Canada to be with the accused. It was at this time she became unhappy. She claimed the accused demanded sexual intercourse and then she would submit, despite experiencing pain during sexual intercourse. The complainant never reported the allegation to any doctor, hospital person or nurse, even though she took numerous visits to the hospital. The count of sexual assault was dismissed due to the complainant's acquaintance testifying that the complainant pursued false allegations to punish the accused for giving her a hard time. The judge draws the inference that the complainant only married the accused in Canada only to regularize her status as a laned immigrant. The judge concludes that the accused may have been a selfish lover, but the crown did not prove he committed sexual assault.

***R v H.E.* (2017). ONSC 4277**

R v H.E. (2017) is a trial proceeding in an Ontario court, involving one count of sexual assault against his wife and one count of both assault and threatening to kill his daughter. The accused denied all allegations. The complainant testified that their marriage was arranged by her parents and the accused's mother. Though she did not consent to the marriage, she followed her parents' wishes as per the expectations in her culture. The complainant was raised in Kuwait by Palestinian parents and immigrated to Canada in 1989, when she was 19 years old. In 1992, She withdrew from university and married the accused in Gaza. The judge accepts the complainant's testimony that she and the accused both believed that she did not have the right to refuse sex with her husband. She testified that it was only in 2013 during a meeting with a detective that she learned that forced sex, even in a relationship, is a criminal offence in Canada.

This detective attended her home to address access problems with the accused after their separation. The parties separated in 2013 and the complainant testified that she had essentially never consented to sex throughout their marriage. The judicial decision focused on one incident of forced sex after the accused underwent a hair transplant. She asked him to stop three times, but he continued until he ejaculated. The accused denied that this incident had occurred, but the judge found his evidence was not believable, nor did it raise reasonable doubt. The complainant's evidence was perceived to be credible as her evidence was straightforward, but the judge doubted her allegations because she did not report any issues to the police until they had a custody issue. In particular, the judge notes that the complainant had lived in Canada since 1989 and continued to have sex with the accused for eleven years after the alleged incident, so the judge is not satisfied that the Crown proved the accused met the requirements for *mens rea* to have sexual assaulted the complainant in 2002.

***R v H.E.* (2019). ONSC 5014**

R v H.E. (2019) is the appeal proceeding of *R v H.E.* (2017) to a higher-level court in Ontario. The Crown appealed the decision to dismiss the sexual assault charge. The same background as *R v H.E* (2017). is provided and the appeal judge notes that a great deal of the trial was spent discussing the history of the marriage. The parties do not have the same view of the marriage, as the complainant states it was an arranged marriage, in which she had little to no say in any major decision. The accused argued that while the marriage was traditional, he had great respect for her and discussed major decisions with her. Further, the appellant denied that he ever had sex with the complainant without her consent, but the judge also notes that both parties felt sex was a taboo topic of discussion, so not only did this leave the appellant unaware of issues in their sex life but therefore the complainant did not report the issues outside the marriage either.

The appeal judge found the complainant was not credible due to inconsistencies in the testimony regarding the alleged incident and the context of their relationship. The judge ultimately dismisses the charges because the judge finds these inconsistencies coupled with the timing of her allegations and the appellant's testimony cast doubt on the complainant's allegations.

***R v J.S.Y.* (2013). BCCA 451**

R v J.S.Y. is a 2013 appeal proceeding in a British Columbia court considering whether the judge erred in denying the appellant the defence of honest mistaken belief of consent. The complainant and the appellant married in South Korea in 1992. The two immigrated to Canada in 1996 and settled in Vancouver. The complainant testified that the relationship had been abusive from the beginning and the accused denies these allegations. The incident in question occurred on December 5, 2009, when the parties got into an argument that became physical. The appellant then demanded to have sex and the complainant complied out of fear that her daughter would hear her resist and call the police. The trial judge accepted the complainant's evidence and rejected the appellant's testimony that the complainant-initiated sex and he assumed consent because she left the room and came back and had sex with him in their usual position. The appeal was dismissed because the complainant was believed so the *actus reus* and *mens rea* were proven effectively.

***R v Owjee.* (2008). ONCA 409**

R v Owjee is a 2008 appeal proceeding in an Ontario court to determine if the trial judge erred in admitting a letter the complainant's lawyer sent to the appellant's lawyer as evidence that the complainant would attempt a reconciliation and of the violent past between the parties. The appellant came to Canada from Iran at the age of fifteen and in 2000, he married the complainant during a trip to Iran. According to the complainant, the appellant was a domineering and abusive spouse. The appellant was convicted in the previous proceeding and the appealing judge found that the trial judge did err in relying on this letter to confirm her statement regarding the history of violence during the marriage, which included forced sexual assault. Ultimately, the judge concluded that the letter bolstered the complainant's credibility and ordered a new trial.

***R v Sandhu.* (2009) ONCA 102**

R v Sandhu is a 2009 appeal proceeding in an Ontario Court, involving a complainant and appellant who married in 1996 in India. The complainant is a Canadian citizen, and she sponsored the appellant's immigration to Canada. They lived together for six years, had a daughter and the parties separated in 2002. After their separation, the complainant reported that the appellant physically and sexually abused her throughout their marriage The appellant was convicted by jury of assault, uttering a death threat and sexual assault. The defence appealed the conviction on the basis that the judge did not instruct the jury properly to mitigate the bias against him. The judicial decision is centered on two incidents of sexual assault: the first occurring early in 1999, while the complainant was pregnant; the second occurring a couple weeks after giving birth via c-section and he forced himself on her. The complainant resisted both times, but the accused forced her to have vaginal sex both times. The appeal was dismissed on the basis that the judge's instruction did not compromise the jury's unanimous decision.