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The Inhospitable Court

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THE INHOSPITABLE COURT†

Who speaks and with what authority, who is believed, what evidence is introduced, and how it is presented are all informed not only by the substantive law and the rules of evidence but also by the rituals of the trial. It is from this legal process as a whole that a judge or jury determines the (legal) 'truth' about a woman's allegation of rape. A sexual assault complainant's capacity to be believed in court, to share in the production of meaning about an incidence of what she alleges was unwanted sexual contact, requires her to play a part in certain rituals of the trial. Many of these rituals are hierarchical, requiring complainants to perform subordinate roles that mirror the gender-, race-, and socio-economic status-based societal hierarchies in which the problem of sexual violence is rooted. Relying on the work of Robert Cover and interdisciplinary work on ritual for its conceptual framework, this article pursues two objectives. First, it attempts to depict, through the use of trial transcripts, the brutality of the process faced by sexual assault complainants. Second, it exposes some of the institutionalized practices, as manifested through courtroom rituals, that contribute to the inhospitable conditions faced by those who participate in the criminal justice response to sexualized violence.

Keywords: sexual assault, feminist legal theory, Robert Cover, trial transcripts, theories of ritual

I *Introduction*

After shame and embarrassment, the most common reason for not reporting a sexual assault to the police is a lack of confidence in the criminal justice system.[1] Many survivors of sexualized violence report having little or no faith in the court process specifically.[2] Their fears may be well

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1 See Melissa Lindsay, *A Survey of Survivors of Sexual Violence in Three Canadian Cities* (Catalogue no J2-403/2014E-PDF) (Ottawa: Department of Justice Canada, 2014) at 13, online: Justice Canada, Research and Statistics Division <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_19/rr13_19.pdf>.

2 Ibid at 7: two thirds of the survey participants 'stated that they were not confident in the court process.'

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founded. Consider how this trial judge describes a sexual assault complainant's demeanour during portions of a five-day cross-examination:

> On the first day of the trial, the Complainant appeared fatigued and uncomfortable in the courtroom. She was at times very emotional; especially when she was asked to recount the sexual acts that she said occurred . . . It was clear she did not want to talk about this incident at all . . . She physically turned her body away from Defence counsel as she stood or sat in the witness stand . . . She was fatigued and highly emotional . . . As her cross-examination continued for two more days, the Complainant once again began showing up for court late, appearing exhausted and occasionally unkempt when she arrived. Once again, she began turning away from Defence counsel as he was asking his questions and she exhibited increasing frustration over being asked the same questions more than once . . .[3]

The complainant was tired, uncomfortable, emotional, and distressed. She was asked to recount the incident several times. She admitted herself to hospital mid-way through the week, driven to do so by the court process. She was afraid that she would commit suicide.[4]

The just balance between protecting sexual assault complainants and ensuring the due process rights of those accused of sexual offences remains controversial.[5] Less debatable is the negative experience of many of those who turn to the criminal justice system following an incident or incidents of sexual assault.[6] This continues to be true despite decades of law reform to the rules of evidence and the substantive law of sexual assault.

3 *R v Khaery*, 2014 ABQB 676 (CanLII) at paras 5–11, 117 WCB (2d) 422 [*Khaery* ABQB].

4 Ibid at 5–10.

5 See e.g. Don Stuart, '*Ewanchuk*: Asserting "No Means No" at the Expense of Fault and Proportionality Principles,' Case Comment (1999) 22 CR (5th) 39, discussing the implications of the affirmative definition of consent; also David M Paciocco, 'The Charter and the Rape Shield Provisions of the *Criminal Code*: More about Relevance and the Constitutional Exemptions Doctrine' (1989) 21 Ottawa L Rev 119, discussing the constitutionality of the rape shield provisions under the *Criminal Code*.

6 Mary P Koss, 'Restoring Rape Survivors: Justice, Advocacy, and a Call to Action' (2006) 1087 Annals of the New York Academy of Science 206 at 218–22 [Koss], summarizing research in several countries, including Canada, that reveals the re-traumatization experienced by sexual assault victims as a result of their participation in the criminal justice process; see also 'Sexual-Assault Victims Lack Confidence in Justice System, Study Finds,' *CBC News* (15 November 2014), online: <http://www.cbc.ca/news/canada/sexual-assault-victims-lack-confidence-in-justice-system-study-says-1.2836408>, discussing one of the most recent Canadian studies indicating that victims of sexual assault lack faith in the judicial system and that this is a common reason why they do not report the abuse; see also Bruce Feldthusen, Olena Hankivsky, & Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 CJWL 66.

Rituals are a part of that legal process.[7] Who speaks and with what authority, who is believed, what evidence is introduced, and how it is presented are all informed not only by the substantive law and the rules of evidence but also by the rituals of the trial.[8] It is from this legal process as a whole that a judge or jury draws conclusions about a woman's allegation of rape.[9] A sexual assault complainant's capacity to be believed in court, to share in the production of meaning about an incidence of what she alleges was unwanted sexual contact, requires her to play a part in certain rituals of the trial. Many of these rituals are hierarchical, requiring complainants to perform subordinate roles that mirror the gender-, race-, and socio-economic status-based societal hierarchies in which the problem of sexual violence is rooted.

The objective of the present article is twofold. First, I attempt to depict, through the use of trial transcripts, the brutality of the process faced by sexual assault complainants. Second, I expose some of the institutionalized practices, as manifested through courtroom rituals, that contribute to the inhospitable conditions faced by women who testify against the men who sexually assaulted them. Some of the institutional practices examined are a necessary part of our justice process as it is currently understood. With respect to these rituals, strategies could be adopted to minimize their negative impact on sexual assault complainants. Other rituals of the trial perform no obvious or desirable function and should simply be rejected.

7 See e.g. Christopher Tomlins, 'Pursuing Justice, Cultivating Power: The Evolving Role of the Supreme Court in the American Polity' (2006) 17 Researching Law 1, asserting that courtroom rituals do more than simply set the tone or create an atmosphere but are important in their own right; also Oscar Chase & Jonathan Thong, 'Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors' (2012) 24 Yale JL & Human 221, arguing that the ritualistic conventions of the courtroom have a substantive impact on litigants' perceptions of the fairness of the process.

8 See James Marshall, Kent Marquis, & Stuart Oskamp, 'Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony' (1971) 84 Harv L Rev 1620, questioning the effects of courtroom ritual on witnesses' sense of their role and on their testimony. For a discussion of the relationship between the rules of evidence and courtroom ritual, see Mark Cammack, 'Evidence Rules and the Ritual Functions of Trials: Saying Something of Something' (1992) 25 Loy LA L Rev 783 [Cammack].

9 People of all gender or sex identities experience sexualized violence. In the present article, I am drawing conclusions from trial transcripts where the survivors of sexual violence were women. Rates of sexual victimization of females are five to six times higher than for males; Statistics Canada, *The Nature of Sexual Offences* (January 2010) online: Statistics Canada <http://www.statcan.gc.ca/pub/85f0033m/2008019/findings-resultats/nature-eng.htm>.

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These objectives are intentionally narrow. There are various problems with the conduct of sexual assault trials, including the ongoing use of stereotypes to discredit complainants, the difficulty of recognizing non-consensual sex between intimate partners, the use of confidential records to 'whack the complainant,' and the use of preliminary inquiries to discourage complainants from continuing to engage with the criminal justice process.[10] While many of the frailties of the criminal law response to sexual harm reveal themselves in the way in which certain rituals are formulated or performed, the intention here is not to address these failings independently but rather through an examination of the impact of the rituals themselves.

Given its individualized and reactive rather than proactive character, the criminal justice process will never be a sufficient response to the social problem of sexual harm. Similarly, unavoidable aspects of a criminal trial make it likely that testifying as a sexual assault complainant will always be difficult for many survivors of sexual violence. However, neither of these factors makes it any less important to take whatever steps reasonably possible to make the legal process more humane. Nor should we allow courtroom tradition, formality, and ceremony (or for that matter interpretations of due process, duty of loyalty, and presumption of innocence) to obscure how inhospitable this process is for women who are sexually assaulted.

The remainder of the article proceeds as follows. PART II offers a brief discussion of the decision to rely on trial transcripts to illuminate the challenges faced by sexual assault complainants who testify at trial. PART II also includes short summaries of the three sexual assault cases examined. In PART III, I discuss the way in which the performance of courtroom rituals contributes to the production of meaning in a criminal trial. Three rituals of the trial are discussed using examples from the transcripts: the ritual of civility, the ritual of the script, and the ritual of

10 There is a wealth of feminist literature examining the persistence of these and other failings of the criminal law response to sexual harm. See e.g. Elizabeth A Sheehy, 'From Women's Duty to Resist to Men's Duty to Ask: How Far Have We Come?' (2000) 20 Canadian Woman Studies 98; Jennifer Temkin & Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008) [Temkin & Krahé]; Janine Benedet & Isabel Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief' (2007) 52 McGill LJ 243; Janine Benedet & Isabel Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (2007) 52 McGill LJ 515; John McInnis & Christine Boyle, 'Judging Sexual Assault Law against a Standard of Equality' (1995) 29 UBC L Rev 341; Lise Gotell, 'When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records' (2006) 43 Alta L Rev 743; Christine Boyle, 'Sexual Assault as Foreplay: Does *Ewanchuk* Apply to Spouses' Comment (2004) 20 CR (6th) 359.

courtroom aesthetic and design. In PART IV, I examine the constitutive function of trial rituals along with the impact on sexual assault complainants of performing their roles in these rituals. Again relying on the transcripts, I draw a connection between the hierarchical nature of these rituals and the potentially destructive impact of the trial on women who testify against their attackers. PART V offers three recommendations that could contribute modestly to making the criminal trial more hospitable to sexual assault complainants.

II *Working from transcripts and descriptions of the cases examined*

This work takes as its focal point transcriptions of the testimony of three sexual assault complainants. As Elizabeth Sheehy and Emma Cunliffe have noted, transcription cannot produce an exact record of an event.[11] Trial transcripts omit some oral communication (such as sighing, groaning, or weeping) and fail to capture most non-verbal content (such as tone of voice, facial expression, body language, and affect).[12] However, the content of trial transcripts, as compared to case law, reveals more clearly the trauma to sexual assault complainants caused by the criminal justice process. Despite the fact that written transcripts do not represent an exact version of the interactions between trial participants, the trauma of a trial is still better evidenced by the transcript than by what is written about the case by a judge. The power dynamics between the various parties, the humiliating exposure of the personal, and the overall cruelty of the process emerge clearly from the transcript's account of the words spoken, the questions asked and answered, and the emotions recorded. The microscopic level at which complainants are cross-examined is demonstrated by the transcripts in a way that simply cannot be captured in a judicial decision. It becomes less possible to distance ourselves from the severity of the process that sexual assault complainants undergo when we are confronted with their own words and the words spoken to them. (This is true even though their voices are severely

11 Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: UBC Press, 2014) at 92 [Sheehy, *Defending*]; Emma Cunliffe, 'Untold Stories or Miraculous Mirrors? The Possibilities of a Text-Based Understanding of Socio-Legal Transcript Research' (2013), online SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227069 [Cunliffe]. See also Austin Sarat, 'Rhetoric and Remembrance: Trials, Transcription, and the Politics of Critical Reading' (1999) 23 Legal Studies Forum 355, suggesting, in part, that trial transcripts are as informative for what they do not include, for what they are silent about, as well as for what is included.

12 Sheehy, *Defending*, ibid at 92.

limited by the rigidly proscribed form of oral testimony permitted in court.)[13]

At the same time, the attribute that makes these transcripts a critical access point to examining the process of a sexual assault trial also poses an ethical problem. The transcripts capture the words of individuals. They record stories of trauma, violence, pain, and suffering. As lawyers, judges, and academics we examine, analyse, argue, and write about other people's painful experiences – about some of the worst moments in their lives – and we often do so without their consent. This is true whether we are working from transcripts or case law, but the dilemma seems more acute when using transcripts. Absent abandoning the attempt to study these trials through examination of the complainants' own words, there is no obvious solution to this ethical issue. It is nevertheless important to be attuned to the reality that this study of the trial experiences of these three women (as represented by the transcripts) is undertaken without their consent.

A publication ban prohibits the provision of any identifying information about the complainant in each of the three cases examined in the present article. Consequently, despite the importance of information like the complainant's age, socio-economic status, and race to our understanding of the harms created by the judicial system for women subject to sexualized violence, these aspects of the women's lives will not be discussed with reference to specific cases.

I selected three recent cases with the objective of examining transcripts in which the defence asserted that the sexual contact was consensual but that resulted in convictions at trial.[14] While three cases is not a

13 In recognizing the value of examining these trial transcripts, it is important to also highlight the fundamental distinction between the narratives produced through the trial process and reflected in the transcripts and the lived experiences of these women; see Cunliffe, supra note 11 at 3. Lastly, it is important to highlight the limits of language itself. I am grateful to Ruthann Robson for drawing my attention to the point that, of course, the legal process requires complainants to verbalize and narrativize their 'story' so that it is a story.

14 It was important that the cases be recent. There have been many changes to the rules of evidence and the substantive law of sexual assault. Using older cases would risk relying on examples of trial practices that no longer occur because of these changes. I chose cases involving convictions at trial because this meant a finding by the trier of fact that the sexual assault had occurred beyond a reasonable doubt. This removed the prospect of false allegations. I chose cases in which the defence maintained that the sex was consensual because such cases put the credibility of the complainant squarely at issue. I chose cases with reported decisions referencing the cross-examination of the complainant because the cross-examination by defence counsel is often thought to be the most harrowing part of the experience for complainants. See e.g. Gillian Balfour & Elizabeth Comack, 'Whacking the Complainant Hard: Law and Sexual Assault' in *The Power to Criminalize: Violence, Inequality and Law* (Winnipeg, MB:

representative sample, this does not preclude certain types of generalizability. With case study research, the objective is to ensure the generalizability of the cases to theoretical propositions.[15] This type of purposive or theoretical sampling permits researchers to test a developed theory.[16] These three cases were selected in order to depict the brutality of the trial experience for these three women and to test the theoretical proposition that aspects of the trial process contribute to the negative experience with the criminal justice process reported by many sexual assault complainants. Given the difficulty and expense of securing trial transcripts, I chose cases where there was some reference to the length or style of defence counsel's cross-examination of the complainant in a reported decision of the case.[17] In other words, the selection criteria were based on identifying cases with relevance to the research question.[18]

Before proceeding with an analysis of the trial transcripts in these three cases it is necessary to consider a brief account of each assault. Summaries of the complainants' descriptions of the sexual assaults are

Fernwood, 2004) 110 [Balfour & Comack]; David Tanovich, '"Whack No More": Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases' 45 Ottawa L Rev [forthcoming in 2015]; Karen Busby, 'Discriminatory Uses of Personal Records in Sexual Violence Cases' (1996) 9 CJWL 148.

15 Robert K Yin, *Case Study Research: Design and Methods*, 5th ed (Thousand Oaks, CA: Sage, 2014) [Yin, *Case Study*]. See also Alan Bryman, *Quantity and Quality in Social Research* (London: Unwin Hyman, 1988); Giampietro Gobo, 'Re-conceptualizing Generalization: Old Issues in a New Frame' in P Alasuutari, J Brannen, & L Bickman, eds, *The SAGE Handbook of Social Research Methods* (London: Sage, 2008) 193 [Gobo]; Jennifer Mason, *Qualitative Researching* (London: Sage, 1996); Jane Ritchie & Jane Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: Sage, 2003); David Silverman, *Doing Qualitative Research: A Practical Handbook,* 4th ed (London: Sage, 2013).

16 Yin describes this as analytic generalization and contrasts it with statistical generalization; see Yin, *Case Study*, ibid at 24.

17 It is true that not all reported decisions make reference to the style or length of the cross-examination of the complainant. That each of these cases did make some reference to this could be relied upon to suggest that these are extreme or deviant cases. Even if these are extreme cases, and that is not conceded here, this work is methodologically defensible on the basis that there is value to selecting extreme cases to test well-formulated theories; see Yin, *Case Study*, ibid. The tendency of defence lawyers to 'whack the complainant' in cross-examination is a well-formulated feminist proposition; see Balfour & Comack, supra note 14. If, in extreme cases (which again, these are not conceded to be), the transcripts do not reveal this type of 'whacking' then the proposition might reasonably be rejected. In discussing the use of extreme cases, Gobo states that '[i]f, in these optimal conditions, the consequences foreseen by the theory do not ensue, it is extremely unlikely that the theory will work in all those empirical cases where those requirements are more weakly present'; Gobo, supra note 15 at 204–5. The transcripts of these three trials reveal cross-examinations that arguably whack the complainant.

18 Mason, *Qualitative Researching*, supra note 15 at 93.

provided in an effort to reflect the brutality of the attacks that these three women experienced.[19] Neither recitation of the *Criminal Code* provisions violated nor the judicial recounting of 'the facts' offered by a court can be expected to capture the essence of the harm perpetrated in a sexual assault case. While the descriptions drawn from these transcripts are graphic and difficult to read, consider how difficult they must have been to speak. In order to engage in an examination of the trauma of a sexual assault trial it is necessary to begin with some attempt at reflecting the trauma of the sexual assault itself.

The complainant in *R v Schmaltz* testified that she was awoken because 'something was going in and out of' her.[20] She had been asleep in her daughter's apartment when she awoke to find Joshua Schmaltz inserting his fingers into her vagina. She said, 'What the fuck are you doing?' and pushed at his hand while he tried to hold it there.[21] She had not met the accused prior to the date on which he sexually assaulted her. Schmaltz was the roommate of her daughter's then boyfriend. The defence was that she 'was a liar, a possible drug user, was drunk at the time of the assault, and consented to the sexual activity.'[22] She was cross-examined extensively about whether she had smoked marijuana that evening, whether she was flirting with Schmaltz early that night, the precise number of beer she consumed the day and evening before the assault, and whether she was wearing a bra.[23] The trial judge described the defence counsel's cross-examination as 'unnecessarily confrontational.'[24] He noted that, at one particularly vulnerable moment for the complainant during her testimony, the accused smiled. He concluded that the cross-examination was

19 The characterization of these assaults as traumatic and brutal is not intended to portray these three women as 'ideal victims' nor to represent these sexual assaults as anomalous. The three cases involve a spectrum of assaultive behaviour. The assaults are characterized here as brutal and traumatic because each of the three complainants described having experienced them in ways that are very much consistent with this characterization.

20 (12 December 2013), Medicine Hat 081056319P1 (Alta Prov Ct) at 34 [*Schmaltz*, Alta Prov Ct]. The trial judge found beyond a reasonable doubt that Schmaltz had committed the sexual assault. The conviction was challenged on the grounds that his comments and interventions created the appearance of an unfair trial and raised a reasonable apprehension of bias: *R v Schmaltz*, 2015 ABCA 4 at para 12, 320 CCC (3d) 159 [*Schmaltz* ABCA]). The majority of the Alberta Court of Appeal rejected the assertion that Judge Greaves was biased or that he created a reasonable apprehension of bias. The majority overturned the conviction on the basis that his interventions led to the appearance of trial unfairness. The description of the assault offered here is based on the complainant's testimony at trial.

21 *Schmaltz*, Alta Prov Ct, supra note 20 at 36.

22 *Schmaltz* ABCA, supra note 20 at para 86.

23 *Schmaltz*, Alta Prov Ct, supra note 20 at 73–9, 97–9.

24 Ibid at 183.

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getting 'out of hand' and that 'most of all [he] had a sense that she was truly being and felt insulted by the process.'[25] Schmaltz was convicted of sexual assault. The majority of the Alberta Court of Appeal overturned the conviction and ordered a new trial on the basis that the trial judge's interventions created the perception of unfairness.[26]

The complainant in *R v Khaery* was thrown onto the floor in the hallway of her attacker's apartment, where he forced his penis into her mouth. Mohammed Khaery slapped her repeatedly, bit her on the arm hard enough to break the skin, and threatened to cut her into pieces if she did not stop screaming. He forced her to crawl to his bedroom where he bit her shoulder and pulled her hair, pinned her body down, held her arms above her head, forced her to perform further oral sex, and then forced his penis into her vagina. At a certain point, she stopped struggling because she just 'wanted it to stop.'[27] Khaery was raping her vaginally when four police officers, responding to a 911 call from the defendant's roommate, entered the bedroom, shouted at Khaery to stop and when he would not, physically pulled him off of the complainant (as she screamed for help). *R v Khaery,* unlike many sexual assault cases, was not a he-said-she-said circumstance. There were five eyewitnesses to the attack. In addition to the complainant's testimony, there was evidence from the roommate who called 911, physical evidence of her injuries from the Sexual Assault Response Team at the hospital where she was taken, and eyewitness evidence from the four police officers who entered the bedroom while the sexual assault was in progress. Remarkably, the cross-examination of the complainant still stretched over five days.[28] The complainant

25 Ibid at 185.

26 *Schmaltz* ABCA, supra note 20 at para 60.

27 *R v Khaery,* (15 09 2014) Edmonton 121306211Q1 (Alta QB) at 16 [*Khaery* transcript].

28 *Khaery* transcript, supra note 27. In part, the process was slowed because defence counsel requested that a translator be used to translate the proceedings into the accused's first language. The trial judge noted that this made the trial even harder for the complainant – who was already visibly burdened by having to testify:

> The Accused required that an interpreter translate the evidence for him from English into Sudanese Arabic. That process exacerbated the Complainant's anxiety as it required the Complainant to pause frequently as she gave her account of what happened. Her frustration with the necessary interruptions was palpable (Khaery ABQB, supra note 3 at para 6).

The defence lawyer's justification for requiring a translator was so that he could understand what his client was saying. This justification is odd given that his client did not testify and so, but for one or two sentences, his client was not the one being translated. Moreover, the accused himself indicated that he understood English perfectly well and did not need a translator. As well, the complainant testified that she and the accused had always conversed in English and that he speaks English very well; *Khaery* transcript, ibid at 6. That said, without more background information, it would be

was so distraught after the first day of cross-examination that she failed to return the next day. She was compelled back to court after being arrested and detained under a warrant issued by the trial judge. She repeatedly stated that she was not mentally prepared and did not want to testify. Over the five-day period of cross-examination, defence counsel accused her of lying about the entire assault and cross-examined her repetitively about any inconsistencies between her testimony at trial and statements she made two years earlier to police officers and healthcare workers in the minutes and hours following the attack.[29] Defence counsel advanced a conspiracy theory between the complainant and the roommate that the trial judge characterized as 'nothing more' than a 'bald allegation.'[30] As noted in the Introduction, the trial judge described the complainant's demeanour during the cross-examination as fatigued, at times highly emotional, exhausted, and increasingly frustrated. Khaery was convicted of sexual assault causing bodily harm, assault, unlawful confinement, and uttering a death threat.[31] The conviction was not appealed.

Daniel Finney, whose weight was more than double that of the complainant in *R v Finney*,[32] completely overpowered her for the duration of the attack. He threw her against a wall with enough force to damage the paint and drywall. He repeatedly forced his fingers and penis into the complainant's anus and vagina. He wiped traces of faecal matter on her face. He pried her mouth open with his soiled fingers and 'rammed' his penis into her mouth with such force that 'it felt like it was going to puncture the back of [her] throat.'[33] He repeatedly choked the complainant so violently that she thought she was going to die. He pulled her hair hard enough that clumps of it fell out. At a certain point she acquiesced to vaginal and oral sex because she believed the assault would not end until he had ejaculated. The attack lasted for more than an hour and ended only after he had ejaculated all over her face, hair, and body.[34] Finney maintained that the complainant, whom he had met for the first time that evening, consented to and had in fact initiated all of the sexual and physically violent acts in which he engaged. The Ontario Court of Appeal described the cross-examination of the complainant,

problematic to seriously critique this lawyer's decision to request translation, particularly given the dominance of the English language and the likelihood that provision of translation services in courtroom processes in Canada is often woefully inadequate.

29 *Khaery* ABQB, supra note 3.

30 Ibid at para 102.

31 Ibid at para 141.

32 *R v Finney* (28 September 2011) Lindsay C55780 (Ont Sup Ct) at 305 [*Finney*, Ont Sup Ct].

33 Ibid at 318.

34 Ibid at 389.

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which spanned over 550 pages of transcript,[35] as lengthy, repetitive, and often difficult to follow.[36] Finney, who had a common law wife and three young children at the time he attacked the complainant, was convicted of sexual assault, choking, and unlawful confinement.[37] Finney appealed the convictions on the basis, in part, that the trial judge intervened in the cross examination of the complainant in a manner that interfered with defence counsel's ability to cross-examine, or that revealed bias, or that created an apprehension of bias.[38] The Ontario Court of Appeal rejected these grounds and upheld the convictions.[39]

III *The rituals of the trial*

One of the ways in which the criminal trial process is given meaning is through ritual. Trials are steeped in ritual.[40] The rituals of the trial involve acts and procedures exercised in accordance with prescribed rules or customs regarding attire, physical setting, manner of address, mode of communication, and observance of what might be described as micro-ceremonies (such as swearing an oath or rising from one's seat when an adjudicator enters the room). These rituals are characterized by factors such as 'formalism, traditionalism, disciplined invariance, rule governance. . . and performance.'[41] For the most part, legal professionals are the keepers of courtroom ritual: judges and lawyers perform several trial rituals themselves; together they ensure the compliance of others with many of the rituals of the trial; moreover, the legal profession holds significant power to determine which rituals to abandon or modify and which to maintain.[42] Norms of deference, compliance, and

35 Ibid at 2798.

36 *R v Finney*, 2014 ONCA 866 at para 2, 118 WCB (2d) 327 [*Finney* ONCA].

37 *Finney*, Ont Sup Ct, supra note 32.

38 Ibid.

39 *Finney* ONCA, supra note 36 at para 7. An appeal of the sentencing decision was granted. The trial judge imposed a five-year sentence for the sexual assault and unlawful confinement and a one-year consecutive sentence for the choking. The Ontario Court of Appeal varied the decision by ordering that the sentences be served concurrently.

40 Lorin Geitner, 'Social Architecture and the Law: Law through the Lens of Religion' (2013) at 4, online: <http://ssrn.com/abstract=2265600> [Geitner]: 'Proceedings in the courtroom can be just as ritualistic as what you will find in religious ceremonies: from the judge sitting in state in robes, to heightened expectations of the behavior of people in the gallery, to the formal modes of address, and highly articulated steps of a proceeding.' Indeed, trials themselves might be characterized as rituals.

41 Catherine Bell, *Ritual: Perspectives and Dimensions* (New York: Oxford University Press, 1997) at 138 [Bell].

42 Law societies, for example, determine criteria for admittance to the bar and rules of professional conduct. Lawyers perform rituals of communication in direct and cross-

professionalism regulate these rituals of the trial and ensure endurance of the hierarchical relations that underpin many of them.

Ritualization deters critique of institutional practices. Through 'order, formality and repetition' rituals present culturally constructed ideas and norms as fixed and determinate.[43] Exposing the rituals of the sexual assault trial challenges the inevitability of practices that may be (unnecessarily) harmful.

Three ritualistic aspects of the trial are examined here: the invariant performance of civility, the scripted form of communication, and the spatial and aesthetic organization of the courtroom. These rituals contribute to the inhospitable conditions faced by sexual assault complainants when they participate in the criminal justice response to the sexual harms inflicted upon them.

A THE RITUAL OF CIVILITY

All participants in a trial are expected to perform their role with propriety, decorum, orderliness, and politeness. The expectation of, and the norms associated with, the ritual of civility defines the boundaries of acceptable courtroom conduct. This regulatory function is characterized as necessary.[44] Courts and legal systems are thought to function optimally when conducted with civility and decorum.[45] The expectation of civility is said to 'level the playing field' in order to 'assist the participants, the officers of the court, and judges, in arriving at a fair, truthful and just decision.'[46]

Regulators of the legal profession in Canada have become quite passionate about the need to impose a duty of civility upon lawyers.[47] However, the concept of courtroom civility is much broader than the duty owed by lawyers under their professional codes of conduct. The

examination. Judges ensure compliance with strictly defined procedural steps, enforce rituals of communication between parties, and prescribe sartorial rituals for lawyers.

43 Sally Falk Moore & Barbara G Myerhoff, 'Secular Ritual: Forms and Meanings' in Sally Falk Moore & Barbara G Myerhoff, eds, *Secular Ritual* (Assen, The Netherlands: Van Gorcum, 1977) 3 at 24, cited in Cammack, supra note 8.

44 Steven Rau, 'Civility, Decorum, and Ritual in the Judiciary' (2011) 37 Wm Mitchell L Rev 2097 at 2099 [Rau]. Rau does qualify his arguably overly optimistic articulation of the role of civility by noting that the requirement of civility and decorum will only achieve these objectives where applied with compassion and an understanding of the purpose motivating the requirement. See also Michael Code, 'Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System' (2007) 11 Can Crim L Rev 97.

45 Rau, ibid.

46 Ibid.

47 Alice Woolley, 'Does Civility Matter?' (2008) 46 Osgoode Hall LJ 175, noting the increase in initiatives by legal regulators to promote lawyer civility in North America in the past thirty years; also Adam Dodek, 'An Education and Apprenticeship in Civility: Correspondent's Report from Canada' 14 Legal Ethics 239.

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criminally accused and the criminally victimized alike must also comport themselves with civility when performing their roles in a trial.

In examining 'legal professionalism,' Constance Backhouse notes 'the very concept . . . has been inextricably linked historically to masculinity, whiteness, class privilege, and Protestantism.'[48] Like the concept of 'legal professionalism,' the notion of civility may also invoke many of these hierarchical social structures. Alice Woolley argues that the duty of civility imposed upon lawyers risks marginalizing individuals on the basis of race, culture, or socio-economic status.[49]

The concept of civility may also reify a gendered construction of courtroom dynamics. Feminists have long critiqued the paternalistic construction of masculine as rational, unemotional, and cerebral, and feminine as irrational, emotional, and corporeal.[50] The traditional paradigm of courtroom civility presents the gentlemanly lawyer, who acts with decorum and learned rationality, and who might be juxtaposed with the emotional, irrational, or unreasonable (and thus uncivil) complainant. Primarily, the law societies seem concerned with ensuring that lawyers treat each other with courtesy.[51] Lawyers are not typically (or ever) disciplined for uncivil conduct toward opposing witnesses.[52]

There are ritualistic aspects to the obligatory performance of civility required of all courtroom participants. One of the attributes of rituals is invariance.[53] Invariance 'appears to suppress the significance of the

48 Constance Backhouse, 'Gender and Race in the Construction of "Legal Professionalism": Historical Perspectives' (2003) (Paper delivered at the First Colloquium on the Legal Profession, Faculty of Law, University of Western Ontario, 20 October 2013) at 2–3, online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf>.

49 Alice Woolley, '"Uncivil by Too Much Civility?": Critiquing Five More Years of Civility Regulation in Canada' (2013) 36 Dalhousie LJ 239 at 257–8.

50 See e.g. Raia Prokhovnik, *Rational Woman: A Feminist Critique of Dichotomy*, 2d ed (Manchester, UK: Manchester University Press, 2002).

51 Based on the types of incivility that law societies appear to take issue with, the equalizing effect of this professional duty is doubtful. Disciplinary proceedings against lawyers for uncivil behaviour primarily involve interactions between them and other professionals (either other lawyers, or judges, or other courtroom officials). While the concept of incivility purportedly encompasses 'potent displays of disrespect for . . . [all] participants in the justice system' (*Doré v Barreau du Québec*, 2012 SCC 12 at para 61, [2012] 1 SCR 395), as a regulatory matter this ethical obligation appears to be aimed largely at ensuring that members of the legal profession treat each other with dignity and respect. More problematic than the elitist application of this duty of civility to protect the most privileged individuals in the courtroom is the effect of the ritual on those who are not participating in the trial in a professional capacity.

52 Ibid.

53 Bell, supra note 41 at 150. Bell does suggest that the best examples of the 'ritual-like nature of invariance' are those concerned with precision and control and gives examples such as the routines of monastic life. However, the element of self-control central

personal and particular moment in favor of the timeless authority of the group, its doctrines, or its practices.'[54] The courtroom expectation of civility regardless of context suggests this type of invariance. Through his description of the criminal defendant's perspective of the judicial act of sentencing, Robert Cover exemplifies both the inanity of some courtroom performances of civility and the way in which law's violence gleams through this facade of civility:

> The defendant's world is threatened. But he sits, usually quietly, as if engaged in civil discourse. If convicted, the defendant customarily walks – escorted – to prolonged confinement, usually without significant disturbance to the civil appearance of the event. It is, of course, grotesque to assume that the civil façade is 'voluntary' except that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.[55]

Civility and decorum mask the violence. The perversity of this mask, however, belies, not only the law's violence, but also the mask's own hidden force. In other words, the discordant expectation of civility in some trial contexts contributes to the violence that occurs. Consider the sexual assault complainant, who is expected to take the stand and with civility and decorum answer questions about the vile acts to which she has been subjected, the contours of her humiliation, and the consequences for her of this kind of 'world destroying'[56] domination. She is expected to do so using the correct language, the appropriate tone and level of emotion, and the required degree of deference to 'the professionals' and 'the proceeding.' The ritual of civility requires a sexual assault complainant to do what is expected even when what is expected grossly exceeds, or is utterly alien to, any concept of 'civil' interpersonal interaction within her former normative universe. This expectation is exemplified in the following excerpt from the cross-examination in *R v Finney*:

> [DEFENCE] Q: You said you waited a week from the time this [anal rape] happened before you had a bowel movement. Is that what you're telling this court today?

to her concept of disciplined invariance is also present (in different form) for those who are required to act with civility and decorum in the face of inhumanity.

54 Ibid.

55 Robert Cover, 'Violence and the Word' in Martha Minow, Michael Ryan, & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor, MI: University of Michigan Press, 1992) 203 at 211, 230 [Cover].

56 Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985) at 29, cited in Cover, supra note 55 at 205.

[COMPLAINANT] A:	Yeah. I didn't want to do it because it – my bottom hurt already, and I didn't want a passing of anything to hurt it more, and I didn't even like to touch myself to clean myself there.
Q:	Could it have been more than seven days?
A:	No.
Q:	It might have been ten days?
A:	No.
Q:	Was it eight days?
A:	No. No. It was like – it was approximately from five to seven days.
Q:	Well, you said seven days when you testified. Was it seven?
CROWN:	I think she indicated it was about a week, Your Honour.
A:	It was about a week.
THE COURT:	Yes, that's what I thought too. Now I want to be careful . . . because I haven't gone back through my notes. But I'm going on my recollection, I don't remember her saying seven days.
DEFENCE:	I have, 'Waited a week', in fairness.
Q:	Did you wait a week before you had a bowel movement? Maybe that's a fair question. Did you wait a week before you had a bowel movement? I'm just taking my best note of what you said here this week.
A:	Yes, I waited a week.[57]

The good witness, that is to say the credible witness, as Lise Gotell's work has ably demonstrated,[58] does what is expected. She does not rage against the unnecessary humiliation of a defence lawyer whose professional role ostensibly demands that he interrogate, to an absurdly granular degree, the precise number of days it took for her body to recover enough

57 *Finney*, Ont Sup Ct, supra note 32 at 548.

58 See e.g. Lise Gotell, 'The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law' (2002) 40 Osgoode Hall LJ 251, demonstrating the way in which neo-liberal values privileging individualism, rationality, and 'good choices' by sexual assault complainants inform assessments of credibility [Gotell, 'Ideal Victim']; also Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 Akron L Rev 865, examining how the use of the affirmative definition of consent and discourses on risk taking and 'responsibilization' contribute to the neo-liberal construction of the 'ideal complainant.' Gotell's work focuses primarily on this construction of the 'ideal victim' at the time of the sexual assault incident: did she make 'good choices'? was she drunk or otherwise leading a risky lifestyle? I am suggesting here that a similar neo-liberal assessment of the complainant's attributes, decisions, and comportment occurs on the stand and during the criminal justice process more broadly: does she appear in court unkempt and disorganized? is she too emotional? is she responsive? are her responses rational?

to endure the pain of a bowel movement following a violent anal rape. She does not scream at the unfairness of this common defence counsel strategy – the use of cross-examination in an attempt to undermine her allegation by suggesting that even the slightest deviation over a period of years, on any detail relevant or not, between one's statement to the police, report to the hospital staff, testimony at the preliminary inquiry, examination in chief, and testimony on cross-examination, indicates unreliability if not dishonesty.[59] Instead, she is rational, responsive, sober, and consistent.[60] She is civil. She performs this role even when, 'in fairness,'[61] the cross-examiner's own notes confirm the consistency of her testimony – she complies even when the precise timing of her first post-rape bowel movement is wholly irrelevant to the issue of consent. Her credibility is contingent upon her willingness and ability to perform the ritual.[62] To be believed she must play her part. She must reply, '[a]s if engaged in a civil discourse,'[63] and without any articulation of outrage or incredulity, to the same question, asked over and over, about how many days following forced anal intercourse it took before she could endure a bowel movement. Ten times she answers this question.[64]

The degree of self-subjugation necessitated by the demand for civility in the face of humiliation and incivility reveals the way in which this ritual does not simply mask, but rather contributes to, law's violence. Rather than levelling the playing field, the obligatory performance of civility may at times be destructive for sexual assault complainants.

59 In each of the three cases, defence counsel relied heavily upon this strategy; see *Finney*, Ont Sup Ct, supra note 32; *Schmaltz*, Alta Prov Ct, supra note 20; *Khaery* transcript, supra note 27. Note that these multiple statements to multiple parties will have occurred over a period of years.

60 Gotell, 'Ideal Victim,' supra note 58 at 260. See also Melanie Randall, 'Sexual Assault Law, Credibility and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22 CJWL 397 [Randall].

61 *Finney*, Ont Sup Ct, supra note 32 at 548.

62 The transcript of the complainant's cross-examination in *Khaery* suggests that, at times, she did not present herself with the 'right' degree of emotion and deference to the defence lawyer. Recall that Khaery was convicted. The trial judge stated, 'Notwithstanding CS's demonstrated reluctance to look at Defence counsel and to repeat her story for his benefit, I conclude the Complainant exhibited a genuine effort to tell Defence counsel what she recalled and what she did not recall' (*Khaery* ABQB, supra note 3 at para 13). Note, though, that the trial judge appears to have found her credible despite – or 'notwithstanding' – her demeanour. Recall as well that in *Khaery* there was an unusual amount of corroborating evidence, including eyewitness testimony from four police officers.

63 Cover, supra note 55 at 211.

64 Following the passage excerpted here, he went on to question her about this issue several more times (*Finney*, Ont Sup Ct, supra note 32 at 549).

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B THE RITUAL OF THE SCRIPT

The form of communication accepted in trial proceedings is formal, heavily scripted, and rigid. The formality and restricted character of communication used in trial proceedings also reflects ritualistic interaction.[65] Lawyers use specialized language. Trial participants are addressed in particular forms. For example, the professional participants of a trial are typically addressed as subjects ('My Friend,' 'My Lord' or 'Your Honour') while others are often referred to as objects ('The Witness,' 'The Accused,' or 'The Complainant').[66] There are rules regulating who can speak, to whom, and when. The evidence of witnesses must be obtained through a strict, heavily structured format.

The scripted form of communication used in a trial is explicitly hierarchical. Lawyers (and judges) ask questions and complainants (and other witnesses) answer them – never the other way around. Consider the following exchanges between the defence lawyer for Mohamed Khaery and the young woman sexually assaulted by his client:

[DEFENCE] Q:	And you said to that officer . . . that you and Mr. K____ were the only two at the residence the whole time.
[COMPLAINANT] A:	Am I allowed to ask you a question?
Q:	No.[67]

And later in the same trial:

[COMPLAINANT] A:	How does that have anything to do with today?
[DEFENCE] Q:	Well, the rules are I get to answer – ask the questions . . .[68]

A few exchanges later:

[COMPLAINANT] A:	So does that answer your question?
[DEFENCE] Q:	I am not here to answer your questions. You are here to answer my questions.
A:	I did answer your question.
Q:	No. You asked me if that answered my question.[69]

65 See Bell, supra note 41 at 139: '[i]n general the more formal a series of movements and activities, the more ritual-like they are apt to seem to us. When analyzed, formality appears to be, at least in part, the use of a more limited and rigidly organized set of expressions and gestures, a "restricted code" of communication or behavior in contrast to a more open or "elaborated code."'

66 On a similar point, Ruthann Robson discusses the exclusionary effect of the use of the word 'brother' in oral arguments in the United States Supreme Court; Ruthann Robson 'Democracy and Antigone: Before and after Sapho' (2009) 39 Stetson L Rev 3 at 20.

67 *Khaery* transcript, supra note 27 at 37.

68 Ibid at 43.

69 Ibid at 48.

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The format of cross-examination (which includes leading questions, repetition, and insistence on particular answers) allows defence lawyers to exert significant control over a sexual assault complainant's testimony.[70] For example, a complainant's answer may be distorted in an effort to insist upon a desired response.[71] In the following excerpt from *Finney* the trial judge intervened:

[DEFENCE] Q:	The night that you allegedly say that you were raped, did he put a pillow over your face?
[COMPLAINANT] A:	I don't remember that right now.
Q:	I'm sorry?
A:	I'm sorry. I don't remember that.
Q:	Okay. But I'm suggesting to you that. You know like, I'm just going to ask. So it didn't happen. A hundred per cent he never put a pillow over . . .
THE COURT:	Well, but she didn't – she didn't say that.[72]

Unlike with ordinary conversation, there is very little opportunity for witnesses to seek clarification, express concerns, or contribute to the direction of the exchange.[73] Not only does this have the potential to distort the accuracy of the complainant's testimony,[74] but also it can be degrading for them. Consider this exchange between the complainant and defence counsel in *Schmaltz:*

[DEFENCE] Q:	After you get out of the bed, you end up in the washroom at some point. Right?
[COMPLAINANT] A:	Yes.
Q:	And it's fair to say that you went to the bathroom to clean yourself up. Right?
A:	That was my intention when I went there, yes.
Q:	And I'm going to suggest to you, by cleaning yourself up, you mean essentially to clean your vagina because it was wet. Right?

70 Janine Benedet & Isabel Grant, 'Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases' (2012) 50 Osgoode Hall LJ 1 at 7 [Benedet & Grant, 'Taking the Stand'], citing Louise Ellison, 'The Mosaic Art? Cross-examination and the Vulnerable Witness' (2001) 21 LS 353.

71 Benedet & Grant, 'Taking the Stand,' ibid at 5.

72 *Finney*, Ont Sup Ct, supra note 32 at 486.

73 Benedet & Grant, 'Taking the Stand,' supra note 70 at 16.

74 Frank E Vandervort, 'A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?' (2010) 16 Widener Law Review 335 at 335, noting Wigmore's recognition that cross-examination must be controlled because of its power to distort the truth. Wigmore was a great champion of the utility of cross-examination. Vandervort's point is that even Wigmore recognized the potential for uncontrolled cross-examination to subvert the fact finding process.

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A: Because it was wet and itching. I felt disgusted, yes.

Q: You would agree with me that your vagina was wet because it was stimulated. Right?

A: I will agree that it was wet. Why was it wet? I do not agree because it was stimulated. I don't know, maybe he greased his fingers. I have no idea but it was not from stimulation, and if you look at one of my statements, I'm known to be quite dry. It's in one of my statements. Either the police – I believe the police report.

Q: I'm going to suggest that your vagina was wet because you were stimulated and enjoying yourself?

A: Well, I'm suggesting to you – and I'm not suggesting, I'm telling you that that is not the case. I was not enjoying nothing. I did not give him permission to come on that bed. That bed was put out for me, not him. He had no right to be on that bed.[75]

Most of the questions put to the complainant in the above exchange suggest a particular answer – such as that her vagina was wet. Not only do the questions assert a particular answer, defence counsel uses repetition even when the complainant has definitively rejected the asserted proposition. For example, despite the complainant having stated twice, and in no uncertain terms, that any wetness she experienced in her vagina was not as a result of stimulation by the defendant's fingers, defence counsel again asserted that her vagina was wet because she was sexually stimulated and 'enjoying herself.'[76] Defence counsel's assertion connecting the amount of moisture in a woman's vagina to her level of arousal was both unsupportable on the evidence offered at trial and highly objectionable (as was noted by both the trial judge and the Alberta Court of Appeal).[77] The potential degrading effect of using repetition and the assertion of unsupportable claims to cross-examine a sexual assault complainant about her vagina should be obvious.

To access the criminal law's purported protection, a sexual assault complainant must recount the details of acts that may be experienced as intensely personal, almost unspeakable, while at the same time following a scripted form of dialogue which confines them to this particular, highly schematized role. Consider this excerpt from the evidence in chief of the young woman sexually assaulted by Mohamed Khaery:

75 *Schmaltz*, Alta Prov Ct, supra note 20 at 85.
76 Ibid at 219.
77 *Schmaltz* ABCA, supra note 20 at para 47.

[CROWN] Q:	All right. _____, after he talked about cutting you up, what happened then?
[COMPLAINANT] A:	That's like, when the sexual assault I guess happened. He, like – he was forcing me to give him oral sex, and I didn't want to do that. And I was crying, and he was hitting me asking me why I was crying.
Q:	Okay. Let's stop you there.
A:	I don't want to talk about it.
Q:	_____, would you like a couple minutes just to have a drink of water?
A:	Can I leave for a minute? I just want to – because there's like way more, and I just don't even know if I can talk about it right now because –.
Q:	You know what, I want you to stay there and just have a drink of water. All right.
A:	I really don't want to talk about this anymore because I can't do it right now.
Q:	_____, you said that he wanted you to give him oral sex. I want you to tell the Court what you mean by that, what he did.
A:	I can't even talk about it.
. . .	
Q:	What happened?
A:	He – I told him no. And then I was crying because he, like – he was hitting me. He took off his pants and, like, he forced – forced his – forced – yeah, forced his, you know, in my face basically, right. Like, I don't know how to say it.
Q:	_____, you said he forced his something. I want you to tell the Court –
A:	His penis in my face. He put it in my – he was sitting on – with his legs over top of me and he took his pants off and put his penis in my face. And I was crying. And I told him I didn't want to do that.
Q:	Okay. Stop there.
A:	And he kept hitting me. I don't want to talk about this.
Q:	Just a minute _____.
A:	I don't want to talk about this. I want to go. I am – I cannot, like, do this right now. It's really difficult to go on from here because it's really – a lot of detail.
Q:	_____, just –
A:	And it's really hard right now, okay. I can't.[78]

78 *Khaery* transcript, supra note 27 at 13.

These intensely personal accounts are then tested through cross-examination, requiring the complainant to tell her story again but this time in response to questioning by an adversary:

[DEFENCE] Q:	Okay. And according to you, did his penis actually enter your mouth at this time?
[COMPLAINANT] A:	A little bit, because I didn't – I don't – like, I was, like, didn't want to do it, but he's like: Do it. And I didn't want to do it, but he kept slapping me, so I tried to a little. I guess I did a little bit. It entered my mouth, like, and I couldn't, because he – I was crying. It was disgusting. It was –
Q:	Okay. So how long did his penis remain – the little bit of his penis remain in your mouth?
A:	Like, two minutes. Like a minute. Not even – like 30 seconds – but he was telling me: Why are you crying while sucking my dick? . . .
Q:	Now, how did it happen that his penis came out of your mouth?
A:	I don't – I don't know. Just – I don't really know – remember, like – like, how it came out of my mouth. I just know I was crying, and I didn't want to do it no more. I didn't want to do it. I tried. And he just kept hitting me. So I don't know – really know – remember that part right there. I don't know.
THE COURT:	Hang on.
A:	Just – I just stopped. You know? Just spit it out. Fuck, I don't know.
Q:	Well, did you spit it out or did he keep –
A:	I don't know. I don't want to –
Q:	Just let me finish my question.
A:	I just answered your question. I do not remember how, because he was hitting me in the face, telling me I don't suck dick properly. Why am I crying? All sorts of things like that. So I don't know. I don't want to answer your question, because I don't know how it got out of my mouth. Just – sick.[79]

Out of familiar time and place,[80] in public, and through a compulsory, highly stylized script, sexual assault complainants are required to describe intensely personal details about the sexual acts forced upon them and the corporeal and psychological impacts of these violations. In

79 *Khaery* transcript, supra note 27 at 97.

80 Amanda Konradi, 'Too Little Too Late: Prosecutors' Pre-Court Preparation of Rape Survivors' (1997) 22 Law & Soc Inquiry 1 [Konradi], describing research detailing the lack of knowledge complainants have of the sequencing of activities in court and the scope of the witness's role or the roles of the prosecutor, defence attorney, and judge.

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this sense, the restricted mode of communication established by the ritual of the script requires sexual assault complainants to speak impersonally about deeply personal experiences. The disjuncture between the imposed process for the retelling and the substance of the tale is as profound as is the collision of public and private. As with the ritual of civility, complainants who deviate from the script risk being perceived as disorderly or disrespectful, and thus untrustworthy.[81]

C THE RITUAL OF PHYSICAL SPACE AND COURTROOM AESTHETIC

The courtroom itself is a space of ritualized hierarchy.[82] The spatial design of a courtroom establishes particular lines of sight, rendering some participants more visible or more audible than others and facilitating certain hierarchical lines of engagement that distinguish between the learned legal profession and the laity.[83] Judges, for example, typically sit behind an elevated bench at the front and centre of the courtroom. They have the best view of the courtroom and are positioned so as to be heard above others. This design assists in their ability to maintain control over the proceeding.[84]

The courtroom is physically divided by a bar – only those ceremoniously inducted into the profession ('called to the bar') are seated in the front part of the courtroom. Others, including other professionals (such as social workers, medical professionals, courtroom support workers, articling clerks, and paralegals), are only permitted to cross this threshold under specific and invited circumstances. The public is always to remain behind 'the bar.'

The corporeal nature of courtroom ritual – its co-optation of the bodies of trial participants – should also be noted. Trials involve speaking, standing and sitting, leaving and returning.[85] Kirsty Duncanson and

81 See Alison Young, 'The Wasteland of the Law, the Wordless Song of the Rape Victim' (1998) 22 Melbourne UL Rev 442 [Young].

82 For a discussion of the history of court architecture, see Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (New York: Routledge, 2011) [Mulcahy]. For an examination of the many forms of sovereignty expressed in a courtroom design, see Katherine Fischer Taylor, *In the Theatre of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton, NJ: Princeton University Press, 1993).

83 See David Tait, 'Popular Sovereignty and the Justice Process: Towards a Comparative Methodology for Observing Courtroom Rituals' (2001) 4 Contemporary Justice Review 201, comparing expressions of sovereignty through the spatial design of the trial in civil and common law jurisdictions.

84 Mulcahy, supra note 82.

85 Kirsty Duncanson & Emma Henderson, 'Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials' (2014) 22 Fem Legal Stud 155 at 164 [Duncanson & Henderson]: 'Trials are physically located, materially substantive and bodily-enacted events.'

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Emma Henderson argue that the spatial design of the courtroom 'impresses [itself] upon the physicality of those within it.'[86] In this way its message of hierarchy is felt rather than simply recognized.[87]

For Aboriginal women, who are disproportionality the victims of sexual violence in Canada,[88] the hierarchized spatial and aesthetic organization of the courtroom is compounded by the ritualized representations of imperialism and colonial power present in every criminal trial proceeding in Canada. Consider, for example, the prominent display of the 'Royal Coat of Arms' in many Canadian courtrooms, the explicit presence of the monarchy as manifested in the role of the *Crown* Attorney, and the national and provincial flags flown outside courthouses across the country.

The memorialization of legal culture through judicial portraiture also contributes to an aesthetic of gender and race inequality in Canadian courts. The creation and display of judicial portraits is a long-standing ritual of the common law.[89] These visual images reflect and constitute not only the identity of the individual jurist but also that of the institution:

> The individual's image is fabricated according to the abstract ideas, values and virtues associated with the institution and the collective. Through the sitter's image, these institutional values and virtues are not only made, but are made visible, public and accessible.[90]

In this way, judicial portraiture contributes to the identity of the court as a state institution.[91] As official portraits, the images are intended to articulate the qualities and characteristics of the state.[92] The hallways and courtroom walls of many Canadian courthouses are adorned with solemn looking judges in white tabs and black robes. Many more of these formal portraits are of men than of women.[93] The overwhelming

86 Ibid at 165.

87 Ibid.

88 See John Borrows, 'Aboriginal and Treaty Rights and Violence against Women' (2013) 50 Osgoode Hall LJ 699, noting the disproportionately high rates at which Aboriginal women are sexually victimized.

89 Leslie Moran, 'Judging Pictures: A Case Study of Portraits of the Chief Justices, Supreme Court of New South Wales' (2009) 5 International Journal of Law in Context 295 at 298 [Moran], noting that legal historians have traced the tradition as far back as the fourteenth century.

90 Ibid, citing Ludmilla Jordanova, *Defining Features: Scientific and Medical Portraits 1660–2000* (London: Reaktion, 2000).

91 Moran, ibid at 298.

92 Ibid.

93 Historically, judicial appointments in Canada were almost all white men. This means more judicial portraits of white men. Unfortunately, as of this writing, the current federal government is continuing this trend; see Rosemary Cairns Way, 'Deliberate

majority of these portraits are of white people.[94] One need not turn to the undoubtedly meaningful significance of even subtle differences in portraiture style and technique to observe the masculine, colonial, and Caucasian attributes of judicial portraiture as a representation of the Canadian state.

The differences in physical presentation of trial participants also reflect ritualized hierarchy. Judge Jerome Frank's critique of the judicial robe, in which he characterized the tradition of gowning as rooted in an anti-democratic effort to insulate judges from the appraisal of laypersons, provides one well-known example.[95] Judges and lawyers, at least in superior courts, are gowned, while all other participants (excepting uniformed law enforcement) are garbed in plain clothes. Gowning distinguishes judges and lawyers from everyone else present in the courtroom: 'it emphasizes their role as something set apart from the common throng – as members of a learned profession.'[96]

Consider also the physical positioning of different trial participants. Traditionally, a witness was expected to stand while they provided testimony – thus the label 'witness stand.' While judges and jurors are seated, and lawyers sit when the other side is examining or cross-examining a witness, in some courtrooms those testifying are still expected to stand during both direct and cross-examination. In some cases, this may entail standing for hours. In *Khaery*, the complainant's request to be seated was denied, despite Justice Crighton's having observed her obvious physical and mental exhaustion:[97]

[COMPLAINANT] A: Can I sit down?
THE COURT: No.
. . .

Disregard: Judicial Appointments under the Harper Government' (2014) (University of Ottawa, Faculty of Law, working paper no 2014-08), online: SSRN <http://ssrn.com/abstract=2456792>, discussing the over-representation of white male judges in the federally appointed judiciary and demonstrating the failure of the Harper government to appoint a complement of judges that reflects gender parity and racial diversity.

94 Ibid.

95 Jerome Frank, 'The Cult of the Robe' (1945) 28:41 *The Saturday Review of Literature* 12 [Frank]. See also Charles [Yablon], 'Judicial Drag: An Essay on Wigs, Robes and Legal Change' (1995) 1995 Wis L Rev 1129; Bell supra note 41 at 146, noting arguments that robing reinforces elitism and intimidation; Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* (Cambridge, UK: Cambridge University Press, 2013) at 94 [Robson, *Dressing*].

96 Geitner, supra note 40 at 10.

97 The complainant's exhaustion and fragile state were readily apparent to the Court. Justice Crighton's decision actually opened with an usually detailed description of

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THE COURT: Ms._____ we stand in the courtroom so that everyone can hear the evidence that's being given. You're slumped down in that witness box. It is very difficult to hear and very difficult to see.[98]

Eventually the Crown also requested that the complainant be permitted to sit while testifying and her request was granted. However, on a subsequent day the complainant was again asked to stand while testifying.[99]

While offered with the kindly intention of assuring the Crown that they need not rush, the following comment by the trial judge in *Schmaltz* reflects the poignant reality that, of course, the 'we' referred to by Justice Crighton in *Khaery* does not include the judge (or anyone beyond the witness and the examining lawyer):

THE COURT: And do not hurry.
CROWN: Thank you sir.
THE COURT: I have got a nice comfortable place here.[100]

Courtrooms that position judges and/or juries in ways that do not permit them to properly observe the witness unless he or she is standing reflect hierarchy. They are designed based on an assumption that, while others may sit comfortably, it is acceptable to require witnesses to stand before the court when providing their testimony.

IV *The ritualized undoing of the complainant*

Trials are different than text.[101] Trials require doing.[102] They require embodied action – a performance with multiple, scripted roles in which participants speak, stand, swear, and move about the courtroom.[103] In this way, trials involve the 'shared production of meaning.'[104] As noted, the action – including the performance of rituals – required of trial participants unavoidably implicates bodies (including the bodies of sexual assault complainants) in this shared production of meaning.[105] According to some, the physicality of these performances heightens the

98 *Khaery* transcript, supra note 27 at 7.
99 Ibid at 139.
100 *Schmaltz*, Alta Prov Ct, supra note 20 at 10.
101 Andrew Cappel, 'Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence' (2003) 43 Santa Clara L Rev 389 [Cappel].
102 Duncanson & Henderson, supra note 85 at 164.
103 Cappel, supra note 101. See also Geoffrey Miller, 'The Legal Function of Ritual' (2005) 80 Chicago-Kent L Rev 1181 [Miller].
104 Duncanson & Henderson, supra note 85 at 164.
105 Ibid.

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affective quality and impact of the trial and contributes to the constitutive function of its rituals.[106] In part, this occurs because the participatory element of ritual diminishes the 'protective distance between self and other – observed and observer.'[107] In addition, rituals are often performed in unfamiliar contexts.[108] This would certainly be true for most complainants in a sexual assault trial.[109] The unfamiliarity of time and space – the removal of one's ordinary social anchors – make some trial participants 'more susceptible to being impressed by the ritual at a basic level of identity.'[110] In other words, the performance of ritual causes individuals to identify with their assigned roles.[111] In this sense, the rituals of the trial can be identity forming for trial participants.

For sexual assault complainants, the constitutive capacity of trial rituals may be dangerous. To some extent, it may be dangerous because many of the rituals of the trial, from how participants are dressed to how they are addressed, articulate hierarchy. As demonstrated in the preceding section, some of the rituals of our courtrooms require sexual assault complainants to play subordinate roles, and some reflect social structures of inequality that are present in broader society. Two of the most explicit social hegemonies articulated through the rituals of the sexual assault trial are class- and gender-based hierarchies. Many women who are sexually assaulted report feelings of shame, humiliation, and powerlessness.[112] For some survivors of sexual violence, the performance of

106 Cappel, supra note 101 at 462:'[r]ecall that perhaps the most salient distinguishing feature of ritual is that it invariably involves physical performance. It is this feature, for example, that separates ritual participation from related activities like being a spectator at an athletic event or a play, which by virtue of its passive nature does not have the same emotionally transformative properties as ritual . . . This ability to directly influence the bodily substrate of our emotional lives, and to generate correspondingly powerful affective force, is unique to ritual among social practices, and probably is a principal reason that ritual activity remains so potent and widespread in modern life.' See also Miller, supra note 103.

107 Ibid at 1190.

108 Ibid.

109 Konradi, supra note 80, finding very little pre-trial preparation of sexual assault complainants by prosecutors.

110 Miller, supra note 103 at 1191.

111 Ibid.

112 Marie Elena Vidal & Jenny Petrak, 'Shame and Adult Sexual Assault: A Study with a Group of Female Survivors Recruited from an East London Population' (2007) 22 Sexual and Relationship Therapy 159, stating that 75% of women who were sexually assaulted reported feeling ashamed of themselves as a result of the sexual violence they experienced; Richard B Felson & Paul-Philippe Paré, 'The Reporting of Domestic Violence and Sexual Assault by Non-Strangers to the Police' (2005) 67 Journal of Marriage and Family 597, stating that victims of sexual assault are more likely to experience feelings of embarrassment and shame than victims of other violent offences; Karen G Weiss, 'Too Ashamed to Report: Deconstructing the Shame of Sexual

rituals in which they occupy subordinate roles may reify the feelings of self-blame, shame, and powerlessness experienced as a result of the sexual assault.

A THE RELATIONSHIP BETWEEN TRIAL RITUALS AND GENDER- AND CLASS-BASED HIERARCHIES

Sexualized violence is a gendered harm.[113] Given the prevailing gender hierarchies in our society, the gendered nature of rape contributes to a complicated relationship between sexual victimization and self-blame (with corresponding feelings of shame). The problematic relationship between rape and shame might be explained as follows. Rape is gendered. The hierarchical manifestation of gender as a principle of social organization and control, through constructs such as the moral, mental, and physical inferiority of women, the presumptive sexual availability of women, and the construction of sexually active women as not to be trusted make it likely that sexual assault complainants will question their own complicity in the sexual violations they experience. They have been socialized to do so. The result may be shame.[114]

Some research suggests that shame is a particularly debilitating emotion – one that diminishes an individual's sense of self-worth and increases feelings of powerlessness.[115] Criminal trials require that sexual assault complainants give voice publicly, over and over again, to their involvement in sexual acts about which they may experience feelings of penetrating shame and self-disgust:

[CROWN] Q:	When you went to the hospital, you said you were hurting all over. How were you – other than that, how were you feeling? Tell me about the way that you felt.
[COMPLAINANT] A:	I felt sick. Like I couldn't even touch myself. I couldn't even, like rubbing my hands, I felt sick. I just wanted to stand out

Victimization' (2010) 5 Feminist Criminology 286, stating that women who are sexually abused describe feeling powerless, alone, and that they are of little worth. See also Candice Feiring & Lynn S Taska, 'The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery' (2005) 10 Child Maltreatment 337, examining the persistence of feelings of shame in youth who are sexually abused).

113 Justice Cory eloquently described the connection between gender inequality and sexual violence in *R v Osolin*, [1993] 4 SCR 595 at para 33, 86 CCC (3d) 481: '[s]exual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.'

114 It is true that self-blame might also function as a coping strategy aimed at bolstering one's sense of agency and reducing feelings of powerlessness. Arguably, the two are not mutually exclusive; see Randall, supra note 60 at 408.

115 John P Wilson, Boris Drozdek, & Silvana Turkovic, 'Post-traumatic Shame and Guilt' (2006) 7 Trauma, Violence, & Abuse 122 at 124.

> and not touch myself. Even clothing hurt on me. I was sickened with myself. I felt nauseous and I was just so disgusted with my body.[116]

The vulnerability associated with performing this witness role – with providing this particular type of gendered testimony – is compounded by the inferior position of the complainant (frequently articulated through ritual) relative to other trial participants, such as the lawyers and judge. Put differently, ritualized performances of hierarchy in which sexual assault complainants play subordinate roles may augment the very social dynamics that cause them to experience shame as a result of sexual intrusion in the first instance.

Socio-economic status may further inform the impact of rituals on the hierarchical dynamics in a sexual assault trial. Lawyers and judges have university educations and specialized legal training and knowledge. In many cases, there will be a significant gap between the educational endowment and socio-economic status of the legal professionals involved in a trial and the complainant (as well as the accused). In addition, socio-economic status is often connected in inequitable ways to race and disability. These factors contribute to the profound power differential between those controlling the process and those who are subject to the process.[117] None of the complainants in *Khaery*, *Schmaltz*, or *Finney* belonged to high paying professions or had employment that would typically correlate with a university education. At least one of the complainants in these three cases was an Aboriginal woman. One of the complainants had a physical disability.

In sexual assault cases, the relationship between the ritualized hierarchy of the trial and gender hierarchy is further aggravated by the continued use of/reliance on problematic assumptions about sexuality and sexual violence – assumptions that contribute to the ongoing disempowerment of women, and in this context in particular, women who allege rape.[118] Again, these assumptions include discriminatory notions about women's sexual availability and their own degree of culpability in causing their sexual victimization.

116 *Finney*, Ont Sup Ct, supra note 32 at 319.

117 The argument that it is only the accused who is subject to the process can be addressed using an example from one of these three cases. The complainant in *Khaery* refused to return to court after her first day of testimony. The trial judge issued a witness warrant compelling her to return for further cross-examination. She was arrested, detained, and ultimately returned to court by the police.

118 In previous work, I have demonstrated the way in which these outdated assumptions about sexuality and gender continue to inform the way some lawyers defend clients accused of sexual offences: see Elaine Craig, 'The Ethical Obligations of Defence Counsel in Cases of Sexual Assault' (2014) 51 Osgoode Hall LJ 427 [Craig, 'Ethical'].

One consequence of this continued reliance on outdated and sexist stereotypes is the near certainty that women who allege sexual assault will, regardless of the context, be questioned about things such as whether they fought back or raised a hue and cry, whether they flirted with the accused, or whether they were wearing 'panties,' and if so, of what type and colour. Even when defence counsel do not employ the type of aggressive and stereotype infused cross-examination used to suggest that a woman's supposedly provocative attire implies consent, detailed examination of the complainant's clothing remains a common topic of cross-examination.[119] In all three of the trial transcripts examined here, the complainant was required to testify in detail about her underwear.[120] In *Schmaltz*, for example, the complainant was examined not only about whether she was wearing underwear at the time of the assault but about the style and colour of her underwear.[121] She was also cross-examined at length about whether she was wearing a bra.[122] Recall that the assault took place while she was asleep. In some contexts, a complainant's undergarments will be relevant. However, whether the complainant was wearing underwear and what type of underwear she was wearing appear to be such salient aspects of a sexual assault case that some trial judges continue to include discussion of this in their decisions without any explanation as to relevance.[123] The defendant's undergarments are seldom presented as an independently relevant factor in sexual assault cases.[124]

119 Young, supra note 81 at 448.

120 See e.g. *Khaery* transcript, supra note 27 at 87; *Finney*, Ont Sup Ct, supra note 32 at 624; *Schmaltz*, Alta Prov Ct, supra note 20 at 33. While, in some cases, the location and state of the complainant's clothing may be relevant, in others cross-examination on this topic is more likely aimed at impugning the complainant's character and/or credibility; see Young, supra note 81 at 447.

121 *Schmaltz*, Alta Prov Ct, supra note 20 at 33: 'Q: Okay. What kind of panties were you wearing? A: A G-string. Q: A G-string. Do you remember what colour it was? A: No.'

122 Ibid at 73–6. Admirably, the trial judge in *Schmaltz* queried the relevance of her underwear given that the defence was consent: 'what does the colour of the complainant's panties have to do with anything . . . I mean, when your own client testifies it was consensual, I mean, I – I – I'm at odds as to how that would help me believing him it was consensual'; ibid at 187–8.

123 See e.g. *R v AG and EK*, 2015 ONSC 181 at para 30, 119 WCB (2d) 540, (noting complainant did not remember whether she was wearing underwear – based on the description of the complainant's testimony nothing appears to have turned on this fact); *R v Aulakh*, 2010 BCSC 1026 at para 9, 89 WCB (2d) 80 (noting type of underwear); *R v J(RB)*, 2010 NSSC 122 at para 12, 87 WCB (2d) 886 (noting type of underwear).

124 Young, supra note 81. The practice of invoking sexist stereotypes through trial rituals may also cause collateral damage outside of the courtroom. The impact of rituals can extend well beyond their particular sphere of power: 'a norm that is generated by, or reinforced in connection with, ritualized practices is likely to be clearer and more widely understood, more strongly held, and less susceptible to change than norms

Similarly, despite recognition by courts that the hue and cry myth is an outdated assumption, a failure to cry out or to report a sexual assault at first opportunity remains a common theme of defence counsel cross-examinations.[125] The complainant in *Finney* was cross-examined at length about her failure to scream and the timing of disclosure. Defence counsel pursued this issue through several lines of questioning. The following is one example:

[DEFENCE] Q:	And according to you, he put up to four fingers in your rectal area, is that right?
[COMPLAINANT] A:	It was full.
Q:	So you must have been screaming at the top of your lungs.
A:	No.
Q:	Excruciating pain begatting (*sic*) a scream, and that's the – you screamed, right?
A:	No, I didn't. I have a pretty high pain tolerance.
Q:	Did he put on some lubrication? Did he pull out like a – was there a jar of Vaseline that you found the next day or anything like that?
A:	No.[126]

A common and particularly entrenched gendered assumption about rape that is used to discredit complainants is the notion that 'real victims' fight back and that a lack of evidence of resistance on the part of the complainant suggests that the sex was actually consensual.[127] This remains true despite the affirmative definition of consent under Canadian law.[128] Defence counsel in *Finney* offered a particularly offensive version of this stereotype when he implied to the complainant that it was not possible to force a woman to perform oral sex – 'one would think that would be consensual.'[129] After suggesting to the complainant that

instantiated in other ways'; Cappel, supra note 101 at 392. The feedback loop between law reflecting social context and social context reflecting law is just that – a loop. Increasing our awareness and understanding of the ways in which the use of problematic assumptions about sex and gender in sexual assault trials reinforces or even instils harmful social norms remains critical – particularly if the ritualistic aspects of the trial serve to strengthen norms that disempower and marginalize women.

125 I have provided support for this claim in earlier work: Elaine Craig, 'The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence' (2011) 36 Queen's LJ 551.

126 *Finney*, Ont Sup Ct, supra note 32 at 690.

127 I have provided substantial support for this claim in earlier work: Craig, 'Ethical,' supra note 118. See also Randall, supra note 60.

128 *R v Ewanchuk*, [1999] 1 SCR 330 at para 49,169 DLR (4th) 193 [*Ewanchuk*].

129 *Finney*, Ont Sup Ct, supra note 32 at 700.

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she 'gave' the accused a 'blow job'[130] and repeatedly proposing to her that the oral sex was consensual in spite of her denials, he stated,

> Q: Right. And you're – and you're – you're biting down at the time to keep your mouth closed, right? Clenching your teeth?
> A: Yes.
> Q: And you have your – your lips sealed, right?
> A: Yes.
> Q: Because I'm putting it to you that – that the reason you're saying that today is that you know you're in a bit of a – I'm going to use the term 'pickle' or problem here, I'm suggesting to you that, because oral sex would – one would think that would be consensual. You open your mouth, you suck, you have a – it becomes erect. You – you put a – you know, you – you seal around the penis and – and that's why you're – you're saying this about him having to pry your mouth open. You agree with me?
> A: No.
> Q: Because it was consensual.
> A: No.[131]

He went on to question her repetitively about the timing of oral sex in relation to an earlier moment when she had bitten Finney's finger with her teeth. He made no effort to connect the two acts. Presumably the point of this line of questioning was to impugn her credibility based on the fact that she had not bitten Finney's penis when it was in her mouth.

The violent impact of requiring women to provide irrelevant, gender-based information or to refute sexist-stereotype-infused cross-examination, while performing a subordinate role instantiated through ritual (and its identity forming capabilities) can only be understood if we appreciate that rape is a gendered offence, disproportionately perpetuated against women by men, in a social context of gendered hierarchy. Again, the subordinate role that complainants perform in sexual assault trials may further the gendered (and often classist, racist, or able bodied) dominance perpetuated through sexual violence itself. In other words, the subjugation of the self necessary for the performance of some courtroom rituals and the co-option of the body in the production of meaning through which 'identity as sexual assault complainant'[132] is

130 Ibid at 699.
131 Ibid at 700.
132 Identity is understood here as contextual, relational, and non-static. The concept of identity is invoked in order to articulate the intensity of the impact of a sexual assault trial on sexual assault complainants. It is not intended to connote some notion that survivors of sexual assault will forever more be defined by that experience.

formed create conditions for sexual assault complainants which are hostile to empowerment, the reclamation or rehabilitation of one's sense of sexual integrity . . . even psychological survival. Thus the suggestion by some complainants that the trial is nearly as traumatic as the sexual assault itself.[133]

Robert Cover's assertion that 'legal interpretation takes place in a field of pain and death'[134] offers some insight into this common parlance of the trial as a 'second rape.'[135] While Cover focuses on the most obvious subject of law's violence, the criminal defendant, the impact of law's violence extends beyond the criminal defendant to other participants of a criminal trial. The legal process as implement of violence can also be world destroying for sexual assault complainants. The 'normative world and capacity to create shared realities'[136] (including to be believed) of some sexual assault complainants may be threatened, if not destroyed, through reiterative domination which, while instigated by the sexual assault itself, is compounded by engagement with the hierarchical criminal trial process. In this way, the sexual assault trial becomes a site of law's violence, in part, through the ritualized undoing of the complainant.

B A LEGAL PROCESS SHAPED BY VIOLENCE

While the 'field of pain and death'[137] upon which many aspects of the law operate functions differently for the sexual assault complainant than it does for the criminal defendant, the experience of violence may be no less real.[138] The transcript of the trial in *R v Khaery* provides a graphic

133 See Rebecca Campbell et al, 'Preventing the 'Second Rape': Rape Survivors' Experiences with Community Service Providers' (2001) 16 Journal of Interpersonal Violence 1239 at 1253–5; Lee Madigan & Nancy C Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* (New York: Lexington Books, 1991) [Madigan & Gamble]; Koss, supra note 6 at 218–22, summarizing research in several countries, including Canada, that reveals the re-traumatization experienced by sexual assault victims through participation in the criminal justice process.

134 Cover, supra note 55 at 203.

135 Madigan & Gamble, supra note 133.

136 Cover, supra note 55 at 206. Cover discusses torture by drawing on Elaine Scarry's analysis of the way in which pain, through its resistance to language, creates unshareability, '[t]he deliberate infliction of pain in order to destroy the victim's normative world and capacity to create shared realities we call torture . . . The torturer and victim do end up creating their own terrible "world," but this world derives its meaning from being imposed upon the ashes of another. The logic of that world is complete domination, though the objective may never be realized.'

137 Cover, supra note 55 at 203.

138 Cover focuses primarily on the physical violence inflicted on a defendant's liberty and even life. The ritualized undoing of the complainant may more commonly stem from

example. Recall that defence counsel's cross-examination of the complainant in *R v Khaery* stretched over five days.[139] At the end of each day, the trial judge reminded the complainant that she must return the next day and that, in the intervening period, she must speak to no one about her testimony or the trial.[140] This would, of course, preclude her from speaking with whomever formed the young woman's support network as she revisited/relived a trauma she had spent 'two years' trying to forget.[141]

The complainant's own account of her decompensation over this five-day period is telling. On the third day of cross-examination, defence counsel accused her of being 'completely high on drugs' the previous day.[142] In repeatedly denying his accusations, the complainant explained the emotional and physical toll visited upon her as a result of testifying against the man that raped her:

> I wasn't completely high on drugs . . . I was not prepared for the questions. I didn't think they would affect me emotionally, having to relive that after I had completely let it go from my mind for two years . . . But I wasn't prepared mentally for how – how the questions would affect me. I thought I could handle it, and by the end of the week, I was drained and just – I couldn't cope with it mentally. I thought I was going to snap.[143]

Despite this explanation, defence counsel continued to assert that she had testified while high on drugs: 'You may not have been completely high on drugs, but you were high on drugs, weren't you?'[144] Insisting that she was not, in fact, intoxicated, the complainant admitted that after her second day of cross-examination she 'didn't want to come but didn't want to go sit in pink cells again for a witness warrant.'[145] (She had been compelled to court the previous day by a bench warrant issued by the trial judge when she failed to return after the first day of trial.) Defence counsel continued to assert that she had been high on drugs and that she had in fact overdosed, ending her up in the hospital. Repeatedly, she denied his accusations. Finally, defence counsel elicited testimony from her that by the third day of cross-examination her

psychological, emotional, and mental harm (and the physical implications of such violence). However, as occurred in *Khaery*, the violent effects of the criminal justice process on a sexual assault complainant may also extend to state-imposed violations of physical liberty.

139 *Khaery* ABQB, supra note 3.
140 See e.g. *Khaery* transcript, supra note 27 at 39.
141 Ibid at 116.
142 Ibid at 115.
143 *Khaery* transcript, supra note 27 at 116.
144 Ibid at 116.
145 Ibid.

mental state had decompensated to such an extent that she took herself to the hospital that night for fear she would kill herself:

Q:	Were you high on drugs?
A:	I told you I wasn't. I told you that twice. I said no, I wasn't.
Q:	Had you used drugs the night before?
A:	No.
Q:	You ended up at the hospital; is that right?
A:	Yes.
Q:	And that was because you were – had – were –
A:	No.
Q:	You had overdosed on drugs; is that right?
A:	No. No, that wasn't it. I thought I was going to commit suicide. I was having – I was feeling very hopeless. And I needed some sort of help . . . So no, I wasn't there overdosing . . .[146]

Despite this answer, defence counsel continued to question her about her visit to the hospital.[147] In response to the Crown's objection to his continued interrogation about her hospital visit, defence counsel asserted that he was 'entitled to ask the questions as to exactly what was going on' the previous day in court.[148] He supported his assertion of this right by quoting a passage from *The Art of an Advocate*: 'With evasive and dishonest witnesses, it is only by forcing them to answer the question asked that the advocate can expose their worth.'[149] Recall that there were multiple police eyewitnesses to the sexual attack perpetrated by his client against this woman he is characterizing as evasive and dishonest. Recall that the trial judge characterized this lawyer's theory of the case as 'nothing more' than a 'bald allegation.'[150] Moreover, the transcript reveals absolutely no uncertainty as to 'exactly what was going on.'[151] The level and source of the complainant's distress were readily apparent. In both her evidence-in-chief and cross-examination, prior to the morning in which he repeatedly accused her of being 'high on drugs,' the complainant expressed in detail the traumatic impact of testifying about the rape as well as her strong desire not to talk about the incident.[152] Furthermore, the totality of her evidence provided on the day defence counsel later accused her of being high on drugs was as follows:

146 Ibid at 116.
147 Ibid at 117.
148 Ibid at 118.
149 Ibid.
150 *Khaery* ABQB, supra note 3 at para 102.
151 *Khaery* transcript, supra note 27 at 118.
152 *Khaery* ABQB, supra note 3 at para 5.

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[DEFENCE] Q: Ms. _____ after all this business you've described in the hallway, you ended up in the bedroom of that residence; is that right?

A: Yeah. Yes.

Q: And what was the first sexual activity in the bedroom? Was it oral sex or vaginal intercourse?

A: I'm sorry. This is just, like, all mentally just really too much, past couple of days. I'm going to try my best right now, like, that I can to answer these questions. It's just it's really, like – like, too much. I don't know if I can finish this, like complete it, with—it's just disturbing to me, like – is the – like, I just want to kill him, when I'm in here. I'm sorry. That's just me. Like psychologically, I'm not – I can't do this, these questions. I told – like, I just can't do this. I'm sorry. I just – like, the –

Q: My question –

A: I know. I'm not mentally prepared for this, to finish this, to talk about this.[153]

The transcript is rife with examples of the complainant expressing the psychological impact of testifying. She repeatedly articulated her level of distress. Recall that she was arrested and forced back to court to continue the cross-examination. There could have been absolutely no uncertainty as to the complainant's state of distress and disruption.

The unfamiliarity of method and role, the expectation of civility and decorum in the face of world-destroying humiliation, the social positioning of witnesses as outsiders to the institution, and the hierarchical requirements of formalized respect and deference to the process and those who conduct it (as articulated through its ceremonial practices, aesthetic presentation, sartorial traditions, and rigidly scripted communication) reflect a legal process 'distinctively shaped by violence.'[154] To be believed, to transcend that terrible world shared between complainant and attacker in which dominance denies language itself,[155] requires a subsequent incidence of subjugation – an undoing of the self performed through (perpetuated by) the rituals of the trial. For a victim of sexual violence, the paradox is profound. That the rate of reporting in Canada is as high as one in ten is astonishing.[156]

153 *Khaery* transcript, supra note 27 at 111.

154 Cover, supra note 55 at 210.

155 See discussion, supra note 136.

156 Statistics Canada, *Measuring Violence against Women* (May 2015), online: <http://www.victimsweek.gc.ca/res/r52.html> (fewer than 10% of sexual assaults are reported to police).

V *Making the trial more hospitable*

Rituals, because they are routinized, formal, supportive of *status quo* power differentials, premised on tradition, and susceptible to invariant application, do not lend themselves to critique. In this sense, ritual might be described as meaning without requiring thought. The function or utility of maintaining a particular ritual is not necessarily questioned, nor are the adverse impacts of continuing to perform most rituals.[157]

It is difficult to imagine that testifying as a complainant in a sexual assault trial could ever be anything other than disruptive and painful. Some of the factors that contribute to this trauma are likely unavoidable. For example, sexual assault complainants must, of necessity, describe to people they do not know well, or at all, the details of the unwanted sexual interaction. Similarly, it is difficult to imagine a just criminal trial process that does not include some opportunity for the defence to ask questions of the complainant.

However, some rituals of the trial, or aspects of these rituals, are unnecessary. In addition, steps could be taken to minimize the violent impact of those ritualized practices that are considered necessary. These changes could contribute, albeit only modestly, to a more humane and hospitable process. Arguably, they would do so without sacrificing the truth seeking and justice values upon which the criminal trial process is purportedly founded.

The aim of this section is to reflect critically on the justification for those trial rituals that contribute to the inhospitable conditions faced by sexual assault complainants. Three relatively modest recommendations that could marginally improve upon these conditions are offered: first, change the aesthetic of the courtroom; second, develop systems and provide adequate resources to better prepare sexual assault complainants for the criminal justice process; and third, recognize and support the important role that judicial intervention plays in alleviating these conditions of inhospitableness.

A CHANGE THE AESTHETIC OF THE COURTROOM

The most tangible, and thus perhaps easiest, changes would be to the aesthetic of the courtroom. Perhaps most obviously, we should ask what desirable function do prominent displays of imperial power perform in the courtroom? Given the role that law historically played in Canada's genocidal approach to Aboriginal peoples and the ongoing effects of this approach on First Nations in this country, it seems reasonable to

157 Cappel, supra note 101 at 392.

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assume that whatever benefit results from prominent symbolic representations of imperialism in our courts is outweighed by the harms. Remove the Royal Coat of Arms and other symbols of colonialism from Canadian courtrooms. Similarly, take all of those old judicial portraits displayed in courtrooms across the country and donate them to museums, or perhaps create judicial portraiture galleries in a separate room in the courthouse.[158] Until the judiciary in Canada is empirically reflective of the diversity of our citizenry, its gender composition, and the constitutional status of Aboriginal peoples, the ritual of judicial portraiture should be removed from conspicuous display in our halls of justice.

The physical design of some courtrooms should be reconsidered. For example, reconfigure courtrooms that are designed such that the only way the trier of fact can properly hear and observe the witnesses is if they remain standing. Given the central role of oral testimony in the trial process, this seems astonishingly straightforward. Regardless of whether one considers the criminal justice system to have done enough, too much, or not enough to protect sexual assault complainants, there is likely significant consensus within the legal profession that the process is incredibly difficult for victims of sexual offences. Disagreements more likely arise over whether some or all of these burdens on the complainant are necessary (not over whether they are burdens). Redesign the layout of courtrooms to ensure that those who endure this process are not denied basic physical comforts provided to other trial participants. Certainly, there is no inherent need to require witnesses to stand while testifying.[159]

With respect to the sartorial rituals of the legal profession, lawyers should ask themselves what function tabs and gowns serve. The most common justification offered is that gowning (and in England gowns and wigs) creates a sense of the solemnity and dignity of the law and legal process.[160] But if this is the case, why aren't all trial participants – all individuals involved in the process – required to gown? (At convocation ceremonies, for example, all participants in the academic procession don ceremonial robes.) One explanation is that the intended effect of the tabs and gowns is actually to imbue in laypersons a sense of the authority of those donning the gowns and to make visible the power

158 I am grateful to Constance Backhouse for this latter suggestion and for proposing that such judicial portraiture galleries should include navigational aids to provide viewers with context and the ability to interpret the imagery displayed.

159 The practice varies across provinces. In Nova Scotia, for example, witnesses sit while testifying. In British Columbia, witnesses may choose whether to sit or stand. The variance across jurisdictions suggests that the expectation is driven by either the physical layout of the courtrooms or tradition – neither of which is sufficient reason to deny witnesses this basic comfort.

160 Yablon, supra note 95 at 1139.

those authorities have over laypersons in the courtroom. Historically, gowns were certainly about status and hierarchy.[161] While it is perhaps arguable as to whether this is desirable with respect to judges,[162] the benefits of representing lawyers as more powerful than their clients or opposing witnesses is not obvious.[163] Moreover, the need for lawyers to be gowned in order to instil the legal process with the appropriate degree of dignity and solemnity is questionable. For instance, lawyers conducting trials in provincial courts, where a significant number of sexual assault trials occur, do not gown.

These changes to the aesthetic of the trial might require members of the bar to revise what is a strongly rooted, if dubious, narrative about the nobility – the learned aristocracy – of the legal profession.[164] This would be beneficial for all sorts of reasons, not the least of which is that it is a conceptualization of lawyering that promotes elitism while failing to reflect the actual perception of lawyers held both within the profession and by the public more broadly.[165] A profession need not project nobility, a historically hierarchical concept, in order to warrant respect, trust, and dignity. Indeed, today such an image might even be counter-productive to manifesting these more important attributes.

B BETTER PREPARE AND SUPPORT SEXUAL ASSAULT COMPLAINANTS FOR AND DURING THE CRIMINAL JUSTICE PROCESS

In addition to rejecting some of the rituals that contribute to the hierarchical, colonial, and masculine aesthetic of the trial, initiatives should be

161 Ibid; Robson, *Dressing*, supra note 95 at 94.

162 See Frank, supra note 95, for arguments as to why it is also problematic for judges to gown.

163 One potential exception to this may be that requiring male and female lawyers alike to wear robes resolves the issue of what constitutes appropriate attire for women lawyers and prevents their courtroom garb from being regulated according to gender-based standards that differ from those for male lawyers. See Robson, *Dressing*, supra note 95 at 100. While robing may help to level the playing field between male and female lawyers (in those proceedings for which it is required), it reifies the hierarchical distinction between lawyers and laypersons. Given the relative positions of power between female lawyers and female sexual assault complainants, responding to the latter hierarchy seems more pressing in this context.

164 See Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Harvard University Press, 1995), bemoaning the disappearance of the 'lawyer-statesman'; Jennifer Granholm, 'Nobility in the Practice of Law' (1999) 78 Mich BJ 1397, advancing suggestions for how the legal profession might once again become noble.

165 See e.g. Kara Anne Nagorney, 'A Noble Profession? A Discussion of Civility among Lawyers' (1998/9) 12 Geo J Legal Ethics 815, noting data confirming both that lawyers find each others' behaviour quite inappropriate and survey data indicating a decline in the public's perception of law as a prestigious profession.

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undertaken to better prepare sexual assault complainants for their encounters with the criminal justice process. While this recommendation would not involve modifying or eliminating trial rituals, it would help to ensure that the performance of these rituals by sexual assault complainants is less constitutive of their sense of self or 'identity as complainant.' Rituals frequently occur in unfamiliar contexts.[166] Recall the suggestion that a lack of familiarity strengthens the constitutive capacity of a ritual – it makes individuals more vulnerable 'to being impressed by the ritual at a basic level of identity.'[167] Sexual assault complainants are often woefully under prepared for the criminal trial process.[168] The specialized language used, the roles of particular parties, the courtroom procedures, and the trial process more generally will be unfamiliar to many sexual assault complainants. Consider, for example, the complainant in *Finney*. It is evident from the transcript that she testified at the preliminary inquiry without even knowing what it was:

[CROWN] Q:	Okay. And do you recall whether he had a heart attack during a preliminary inquiry in this matter?
[COMPLAINANT] A:	I'm not sure what a – a preliminary inquiry is, but I was in this situation while he had his second heart attack, yes.[169]
Q:	Oh, so you were in a situation where you were giving evidence in a court?

At trial, she was cross-examined at length about details from her testimony years earlier at the preliminary inquiry. The complainant acknowledged that she had never actually read the transcript of her preliminary inquiry testimony:

[DEFENCE] Q:	You just said that you had half a beer. Was that at _____'s?
[COMPLAINANT] A:	Yes.
Q:	Was it two beer?
A:	No. It was half a beer.
Q:	Was it three beer?
A:	It was half of a beer.
Q:	Okay. Because I just – you read your preliminary inquiry transcript, right?
A:	I didn't read it. I skimmed it, I think.

166 Miller, supra note 103; Bell, supra note 41.

167 Miller, ibid at 1191.

168 Konradi, supra note 80; Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' 27 JL & Soc'y 219 at 222 [Temkin], noting that many of the prosecutors she interviewed in the United Kingdom preferred to have no contact with the complainant prior to trial.

169 *Finney*, Ont Sup Ct, supra note 32 at 307.

Q:	All right. And . . .
THE COURT:	. . . I think you just said you skimmed your preliminary inquiry evidence, right?
A:	I remember skimming it the last time I came to court.
THE COURT:	Okay.
A:	But I don't . . .
THE COURT:	How long ago was that roughly? Do you know?
A:	A year.
THE COURT:	Okay. Have you read it since that time?
A:	I haven't read it, no. I have never actually read it word for word.
THE COURT:	But have you skimmed it at all since roughly a year ago when you were last in court on this matter, when it didn't go ahead?
A:	It was lightly skimmed before my first day here.[170]

Many complainants come to court unrepresented, without having completed even basic preparation such as a proper review of one's testimony at a preliminary inquiry and without familiarity of the setting, the rigid procedural requirements, and the technical language used by those 'inside the institution.'[171]

Complainants need better resources to help prepare them for trial. Familiarizing complainants with the context might reduce the impact on them arising from their trial performances. The most obvious resource in this regard would be independent, state-funded legal representation. In addition to familiarizing them with the court process, lawyers acting on behalf of sexual assault complainants can provide several greatly needed services such as preparing the complainant for the preliminary inquiry, liaising with the Crown in order to provide the complainant with updates on the case, assisting with victim impact statements, and explaining developments in the case or at trial to the complainant.[172]

170 *Finney*, Ont Sup Ct, supra note 32 at 483.

171 Konradi, supra note 80; Temkin, supra note 168.

172 Further assistance could be provided if sexual assault complainants were granted a broader right to have a lawyer represent them in the criminal proceeding. This would include protecting the complainant during cross-examination by objecting to questions that are irrelevant or unnecessarily humiliating. Sexual assault complainants do have a right to be represented when the defence has made a section 278 application for production and disclosure of third party records; see *Criminal Code*, RSC 1985, c C-46, ss 278.4(2), 278.6(2); *R v O'Connor*, [1995] 4 SCR 411, 103 CCC (3d) 1. Granting broader standing to sexual assault complainants would represent a more fundamental change to the current process, the pros and cons of which are beyond the scope of this discussion.

Ontario is the only province with an established legal aid program to provide state-funded legal representation for sexual assault complainants when the defence makes an application for third party records under section 278 of the *Criminal Code*.[173] In addition, Ontario recently initiated a pilot program to fund legal representation for sexual assault complainants generally.[174] Other provinces in Canada should follow Ontario's lead.

Related to this recommendation, strategies should be considered to better support sexual assault complainants throughout the trial. Most obviously we should re-evaluate whether it is necessary to prohibit complainants from communicating with anyone about their trial experience during an extended period of cross-examination. Is the isolating and damaging effect of preventing a woman who is spending days revisiting a traumatic rape from obtaining support from a counsellor or other mental healthcare worker warranted? Are there ways to allow them this type of assistance without risking distortion of their testimony?[175]

C SUPPORT APPROPRIATE JUDICIAL INTERVENTION

Trial judges could, and some do, take modest steps to make the trial more hospitable to sexual assault complainants without threatening the due process rights of the accused. For example, some judges embrace a more affable style of interaction with complainants simply by engaging with them as human beings.

The transcripts in both *Finney* and *Schmaltz* offer examples of trial judges attempting to make the process more humane for the complainant through very basic gestures of consideration. For instance, in *Finney*, the trial judge wished the complainant a happy birthday as he dismissed her and asked that she return for further cross-examination the

173 *Criminal Code*, s 278; see also Susan McDonald, Andrea Wobick, & Janet Graham, *Bill C-46: Records Applications Post-Mills, A Caselaw Review* (January 2015), s 4.8, online: Department of Justice <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p4_8.html#sec4.8>. While the victim's rights legislation of other provinces includes a reference to state funding for complainants in these circumstances, as a practical matter, they have not actually created a program to provide this funding; see e.g. *Victims of Crime Act*, RSBC 1996, c 478, s 3(a). For a thorough discussion of this issue, see Larry Wilson, 'Victims of Sexual Assault: Who Represents Them in Criminal Proceedings?' (Paper delivered at the Eleventh Colloquium on the Legal Profession, Ron W Ianni Law Building, University of Windsor, 24 October 2008), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/eleventh_colloquium_wilson.pdf>.

174 See Ontario, *It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment* (March 2015), online: Province of Ontario <http://www.ontario.ca/document/action-plan-stop-sexual-violence-and-harassment>.

175 I am grateful to Constance Backhouse and Ruthann Robson for drawing my attention to the need to further examine these restrictions on the complainant.

following day.[176] Likewise, at one point in the cross-examination the complainant in *Finney* asked

A:	Your honour, I'm feeling a little bit overwhelmed right now. Can I have just five minutes?
THE COURT:	Yes. Just for the record the lady appears to be crying and shaking, so we are going to take a recess.[177]

Similarly, before permitting defence counsel to begin her cross-examination, the trial judge in *Schmaltz* attempted to ensure some modicum of comfort for the complainant:

THE COURT:	Now, you make sure that you have got water and Kleenex, and all that type of stuff. If you need a break, just let us know.
. . .	
CROWN:	Now, Sir if I may, just as a point of interjection, I was wondering if the witness would be allowed to have a small break.
THE COURT:	Well, like I said, she could anytime, that is my . . . invitation to her.[178]

And later in the trial:

CROWN:	And, Sir, could it just be noted we did provide a chair in the witness box, if it is all right with the Court –
THE COURT:	Yeah, of course. If she feels weak or otherwise strange, she is certainly welcome to comfort herself in that or any other fashion that we can work out. What else?[179]

Notably, on appeal, the trial judges in both *Finney* and *Schmaltz* were accused of bias or creating an apprehension of bias.[180] Were they criticized, in part, because they did not follow the script? In *Finney*, appellant defence counsel specifically criticized Justice O'Connell for wishing the complainant a happy birthday.[181] Both the Alberta Court of Appeal and the Ontario Court of Appeal rejected the appellants' claims of bias or reasonable apprehension of bias.[182]

Trial judges are uniquely positioned to deviate from and permit others to deviate from their scripted roles. They should not be accused of bias for performing basic acts of human consideration. Indeed, a more coherent and less classist conception of the duty of civility would suggest

176 *Finney*, Ont Sup Ct, supra note 32 at 643.
177 Ibid at 681.
178 *Schmaltz* transcript, supra note 20 at 51.
179 Ibid at 79.
180 *Finney* ONCA, supra note 36 at para 3; *Schmaltz* ABCA, supra note 20 at para 12.
181 *R v Finney* 2014 ONCA 866 (Factum of the Appellant at paras 2, 610) [*Finney* factum].
182 *Finney* ONCA, supra note 36 at para 3; *Schmaltz* ABCA, supra note 20 at para 58.

that those charged with administering the criminal trial process – that is to say lawyers and judges – should behave in this manner toward all trial participants.

In addition to these types of gestures, trial judges can make the process modestly more hospitable for complainants by preventing cross-examination that is needlessly repetitive or irrelevant. The ordeal of testifying as a sexual assault complainant is aggravated by the lengthy and repetitive cross-examinations they sometimes endure. As noted, the Ontario Court of Appeal described the cross-examination in *Finney* as lengthy, repetitive, and difficult to follow.[183] In *Khaery*, the trial judge commented on the complainant's exhaustion and frustration over being asked the same questions more than once.[184] The trial judge in *Schmaltz* characterized the cross-examination of the complainant as confrontational, repetitive, and insulting;[185] and the Alberta Court of Appeal accepted that aspects of it were 'highly objectionable.'[186]

Judicial interventions to reduce repetitive and irrelevant cross-examination do not compromise trial fairness.[187] The accused's right of cross-examination is not absolute.[188] Trial judges should be given significant deference with respect to trial management and 'may properly intervene . . . to avoid irrelevant or repetitive evidence.'[189] The authority of judges to manage their courtrooms represents one of the more plausible means to discourage lawyers from repetitive, irrelevant, or unnecessarily humiliating questioning. While lawyers have an ethical obligation to cross-examine in good faith, law societies have been reluctant to enter this regulatory sphere and have been criticized when they do discipline the courtroom conduct of lawyers.[190]

One way in which a cross-examination can veer into the realm of repetitive and irrelevant involves a common defence strategy: the attempt to undermine credibility or reliability by demonstrating

183 *Finney* ONCA, supra note 36 at para 2.
184 *Khaery* ABQB, supra note 3 at para 11.
185 *Schmaltz*, Alta Prov Ct, supra note 20 at 184.
186 *Schmaltz* ABCA, supra note 20 at para 47.
187 *R v Lyttle*, 2004 SCC 5 at para 44, [2004] 1 SCR 193 [*Lyttle*]; *R v Hamilton*, 2011 ONCA 399 at para 48, 271 CCC (3d) 208 [*Hamilton*].
188 *Lyttle*, ibid at para 44.
189 *Hamilton*, supra note 187 at para 48.
190 See e.g. Yamri Taddese, 'Trial Judges Better Suited to Regulating Civility' *Law Times* (17 December 2012), online: <http://www.lawtimesnews.com/201212172119/headline-news/trial-judges-better-suited-to-regulating-civility-panel>. This article includes comments from former Supreme Court of Canada Justice Ian Binnie about the Law Society of Upper Canada's decision to discipline lawyer Joe Groia for uncivil conduct. Justice Binnie commented that judges and not law societies should be regulating courtroom conduct.

inconsistencies in a complainant's various statements to others about even very minor details. It both accords with common sense and is judicially recognized that 'inconsistencies in the evidence of witnesses in relatively minor matters or matters of detail are, of course, normal. They are to be expected.'[191] In fact, 'the absence of such inconsistencies may be of even greater concern, for it may suggest, collusion between witnesses in their evidence or fabrication or excessive rehearsal and regurgitation of a set story.'[192] It is difficult to imagine that anyone could maintain consistency with respect to insignificant details when retelling an incident that occurred months or more likely even years prior. (In *Schmaltz*, because the accused fled the jurisdiction after being released on bail, and it took several years to find him, there was a five-year lapse between the incident and the trial.)[193] The challenge is even greater for individuals who have attempted to manage their lives by not revisiting a trauma over and over again in their minds. (The complainants in both *Khaery* and *Finney* identified efforts to forget, or not to think about, the assault as a significant coping strategy in the period between being sexually assaulted and the trial.)[194] However, while it is sensible to assume that inconsistencies on minor details actually increase credibility,[195] defence lawyers frequently question complainants at length on these inconsistencies in an effort to discredit them. The cross-examinations in *Khaery*, *Finney*, and *Schmaltz* all involved this strategy.

Repetition is sometimes used to facilitate this approach. More than once during the five day period of cross-examination in *Khaery*, the trial judge had to instruct defence counsel to move on from questions already asked and answered about details of the complainant's statements to various police officers and health care workers.[196]

The trial judge's description of the cross-examination of the complainant in *Schmaltz* also reflects the use of repetition to pursue this strategy:

> Certainly any witness's mischief should be uprooted, but not simply by defence counsel's narrative or declarations continuously made in the face of the witness over and over again that she was giving contradictory, or to use her phrase, fresh evidence. I mean, that narrative was played over, and over, and over again.[197]

191 *R v Kench*, 2014 ONSC 2206 at para 32, 11 WCB (2d) 84 [*Kench*].
192 Ibid.
193 *Schmaltz*, Alta Prov Ct, supra note 20 at 133.
194 *Khaery* transcript, supra note 27 at 25; *Finney*, Ont Sup Ct, supra note 26 at 674.
195 *Kench*, supra note 191 at para 32.
196 *Khaery* transcript, supra note 27 at 140.
197 *Schmaltz*, Alta Prov Ct, supra note 20 at 184.

In addition, trial judges should be willing to intervene in lengthy cross-examinations which, while ostensibly premised on demonstrating inconsistencies in the complainant's story, may actually be driven by problematic assumptions about women and sexual violence. For example, lengthy cross-examinations on ambiguities or inconsistencies in a complainant's testimony as to whether she was flirting earlier in the evening or whether she was wearing a bra may be informed by misunderstandings of the definition of consent or by problematic beliefs such as the suggestion that women who dress a certain way are more likely to consent.[198]

Lastly, trial judges should intervene to prevent repetitive and lengthy cross-examination that is likely to unnecessarily humiliate sexual assault complainants. Unfortunately, trial judges who do intervene in this manner risk being accused of bias or of creating an unfair trial or the perception of an unfair trial. On appeal, defence counsel in *Finney* asserted that Justice O'Connell intervened in the cross-examination of the complainant 'to such an extent as to prevent the Appellant from properly testing the evidence through cross examination.'[199] Recall that the cross-examination of the complainant was very lengthy and that the accused's lawyer was permitted to question the complainant repetitively about matters such as the precise number of days it took before she could endure a bowel movement following the rape.[200] The Ontario Court of Appeal rightly dismissed the *Finney* appeal.[201]

198 For example – as the dissent in *Schmaltz* ABCA, supra note 20 at para 82, noted – the majority of the Alberta Court of Appeal characterized the flirtatious or lack of flirtatious behaviour of the complainant earlier in the evening as a potentially critical aspect of the defence. In fact, the conviction was overturned, in part, on the basis that the trial judge's interventions interfered with defence counsel's ability to explore this supposedly crucial issue (*Schamltz* ABCA, supra note 20 at para 38). Under Canadian law, whether this complainant was flirting earlier in the evening is not relevant to the issue of whether she consented to the sexual touching at issue. Consent to sexual touching must be contemporaneous (*R v A(J)*, 2011 SCC 28, [2011] 2 SCR 440 at para 66). An accused cannot rely on notions of implied consent or a mistaken belief in implied consent (*Ewanchuk*, supra note 128 at para 1). The allegation in *Schmaltz* was that he digitally penetrated her vagina while she was asleep. He maintained that she was consenting. To characterize the presence or absence of flirting earlier that night as a critical ambiguity in these circumstances suggests a misunderstanding of the law of consent.

199 *Finney* factum, supra note 181 at para 61.

200 *Finney*, Ont Sup Ct, supra note 32 at 548.

201 *Finney* ONCA, supra note 36 at para 7.

VI *Conclusion*

Speaking of the judge as interpreter, Cover illuminates 'the way in which interpretation is distinctively shaped by violence.'[202] He explains that

> [b]eginning with broad interpretive categories such as 'blame' or 'punishment,' meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence.[203]

Legal interpretation involves the construction of meaning and its imposition on institutions and individuals. The substance of that meaning is heavily informed by the roles and contributions not only of judges but also of lawyers. Indeed, lawyers are instrumental in framing the terms of the interpretive act or acts that occur in the courtroom proceeding. In this sense, lawyers also perform a role in the interpretive process. 'Due process' or 'resolute advocacy,' for example, are broad interpretive categories for which lawyers create meaning and justify courtroom conduct.

Rituals contribute meaning to the interpretive acts performed by lawyers and judges. Ritual can insulate practice from critique. The sense of inevitability or unquestionable truth that rituals lend[204] to the meaning of the legal process used to respond to sexual assault may reify the very social dynamics that produce both sexual violence itself and the impact of this gendered harm on its subjects.

Some of the rituals of the trial, such as the aesthetic presentation of imperial power in the courtroom, reflect unnecessary practices. These should be eliminated. Others, such as aspects of the rigidly proscribed mode of communication reflected in the ritual of the script, may be justified by important interpretive concepts like due process and the presumption of innocence.[205] Justification, however, does not eliminate the violence done – even if it seems in some contexts to have rendered it illegible for most of our legal history. Legal process cannot be understood without acknowledging its connection to and mediation by violence (physical but also epistemic and psychological).[206]

The legal profession must confront in no uncertain terms and with unflinching clarity, the brutality, whether justified or not, of the processes it conducts. More broadly, as a matter of social responsibility, a

202 Cover, supra note 55 at 210.
203 Ibid at 212.
204 Capel, supra note 101.
205 The degree to which this is true is an important and controversial issue, but examining this issue is beyond the scope of the present article.
206 Cover, supra note 55 at 203, 210.

society that adopts the criminal trial process as a primary response to sexual violence has an obligation to insure that that process is conducted with compassionate recognition of the violence it effects. This means creating initiatives such as state-funded legal representation for sexual assault complainants. This is particularly true given that we frequently impose upon women from marginalized communities and lower socio-economic backgrounds the burden of participating in an individualized process to respond to a social problem that might be better addressed through broader, systemic strategies like wealth redistribution and greater gender and race parity in education, governance, and the labour force.

The 'justice gap' between decades of sexual assault law reform and the actual impact on rates of reporting, rates of conviction, and most importantly complainants' experience with the criminal justice process highlights the limits of the law.[207] As noted in the introduction, many problems with the conduct of sexual assault trials persist. The recommendations offered here will not resolve any of those issues. Without radical renovation to social attitudes, the criminal trial process may always traumatize women who occupy the role of sexual assault complainant. However, there are modest measures that could be taken to make our courts more hospitable to women who have survived sexual violence.

207 Temkin & Krahé, supra note 10.