R V DESJOURDY: A NARRATIVE OF WHITE INNOCENCE AND RACIALIZED DANGER

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Ottawa police sergeant Steven Desjourdy was the first officer in Canada to be prosecuted for sexual assault based upon an illegal strip search of a woman, arguably a "sexual assault by the state."[1] *Sexual assault prosecutions present innumerable hurdles for all complainants, but when the accused is a police officer engaged in his duties, those hurdles are almost insurmountable. The prospect of racism loomed large in this case, given that Desjourdy was white and SB was a Black Canadian woman portrayed as volatile and dangerous. Using the transcripts of Desjourdy's trial and drawing upon sexual assault and critical race literatures, this article explores the systemic biases that favour police officers on trial and facilitate the construction of white innocence and racialized danger.*

Le sergent Steven Desjourdy, de la police d'Ottawa, a été le premier policier au Canada à être poursuivi en justice pour agression sexuelle à la suite d'une fouille à nu illégale d'une femme, ce qui constitue sans doute une « agression sexuelle par l'État ». Les poursuites pour agression sexuelle présentent d'innombrables obstacles pour tous les plaignants, mais lorsque l'accusé est un policier dans l'exercice de ses fonctions, ces obstacles sont presque insurmontables. La perspective du racisme était très présente dans cette affaire, étant donné que Steven Desjourdy était blanc et que SB était une femme noire canadienne décrite comme volatile et dangereuse. À l'aide des transcriptions du procès de Steven Desjourdy et en s'appuyant sur les écrits en matière d'agressions sexuelles et de critiques de la race, les auteurs explorent les préjugés systémiques qui favorisent les policiers en instance de procès et facilitent la fabrication de la chimère d'une innocence blanche et d'un danger racialisé.

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1 Amanda George, "Strip searches: Sexual Assault by the State" (1993) 18:1 Alternative LJ 31.

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1. Introduction

Canadian judges have condemned the practice of men strip-searching women since 1996 when the Honourable Louise Arbour, reporting on the strip-searching of women by male guards at the Prison for Women ("P4W"), called the practice "cruel, inhumane and degrading."[2] She found such searches violated the *Corrections and Conditional Release Act*[3] and the *Canadian Charter of Rights and Freedoms*.[4] Five years later in 2001, the Supreme Court of Canada in *R v Golden* ruled that strip searches must not be carried out as routine policy, describing them as "inherently humiliating and degrading."[5] It specified a legal standard that police must meet before a lawful strip search can be undertaken and prohibited opposite-sex strip-searching in the absence of exigent circumstances.

Yet on 6 September 2008, more than a decade after the Arbour Inquiry and seven years after *R v Golden*, another strip search of a woman detainee—SB—by male officers took place in Ottawa. SB had been arrested for public intoxication and frisked on the street. Once at the station where she was searched again, a female Special Constable put her hand down

2 The Honourable Louise Arbour, *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Ottawa, Ont: Public Works and Government Services Canada, 1996), 83.

3 SC 1992, c 20.

4 s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5 *R v Golden*, 2001 SCC 83 [*Golden*].

the back of SB's pants. SB yelled in protest while kicking backwards at the constable, striking her in the crotch and shin. SB was quickly taken down to the floor by three male officers who used a riot shield to pin her. A fourth, Sergeant Steven Desjourdy, cut off her shirt and bra while she lay face down on the floor. She was then placed in a cell in soiled pants without cover for her upper body and left in that condition for over three hours.

At trial, *R v SB*,[6] on charges of assaulting a police officer in 2010, SB was granted a stay of proceedings due to the *Charter* violations occasioned by her illegal arrest, arbitrary detention and unlawful strip search, captured by videotape. The judge condemned the Ottawa police in forceful terms:

> It is quite clear that the Ottawa Police Service has not been made aware, or is lending a blind eye to the recommendations of the Supreme Court of Canada in *Regina vs. Golden*…
>
> I was appalled by the fact that a strip search was undertaken by Constable Morris in the presence of, and with the assistance of at least three male officers.
>
> It is quite evident that none of these officers have received gender training, and that they do give only lip service to female dignity and privacy.
>
> …
>
> There is no reasonable explanation for Sergeant Desjourdy to have cut Ms. [SB]'s shirt and bra off, and there is no reason, apart from vengeance and malice to have left Ms. [SB] in the cell for a period of three hours and 15 minutes half naked and having soiled her pants, before she received what is called a blue suit. That is an indignity towards a human being and should be denounced.[7]

SB's acquittal and the release of the videotapes of her strip search spurred widespread public criticism and calls for police accountability. David Tanovich denounced Desjourdy's actions as amounting to sexual assault, and criticized Ottawa prosecutors for proceeding with charges against SB.[8] Ottawa Police Chief Vern White launched an internal probe, while

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6 *R v SB*, 2010 ONCJ 561 [*SB*].

7 *Ibid* at paras 22–27.

8 David M Tanovich, "What Were the Prosecutors Thinking?", *The Ottawa Citizen* (19 November 2010) A15; David M Tanovich, "*[SB]*: Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power" (2011) 79 CR (6th) 132 [Tanovich, "*SB*"].

the Ontario Provincial Police (OPP) investigated the employees involved.[9] The sole charge laid by the Ontario Special Investigations Unit (SIU) was sexual assault.

Desjourdy's sexual assault trial took place in 2012–2013, before Judge Timothy Lipson in *R v Desjourdy*.[10] Judge Lipson made findings of fact that conflicted with those made in the prior trial. He characterized the Special Constable's hand down SB's pants as caused by SB's resistance to the search. While rejecting the defence argument that SB was stripped because she was a suicide risk, the judge ruled that the officers needed to "clear" SB before she was put in a cell, and that due to her own actions, "exigent circumstances" required a male officer to strip search SB. Judge Lipson decided that the circumstances in which Desjourdy did so were not of a sexual nature and that he did not intend to punish or humiliate SB.[11] Although the judge described as "unnecessary and demeaning" Desjourdy's behavior of leaving the woman topless for more than three hours and in soiled pants, he entered an acquittal.

SB initiated a $1.2-million civil suit against Ottawa police and the officers involved, which ended in settlement.[12] Desjourdy was found guilty of discreditable conduct under the *Police Services Act*[13] and docked 20 days' pay.[14] The adjudicator did not accept that Desjourdy's actions were justified by concerns about SB's safety, and commented: "It is troubling in the extreme that an officer with the extraordinarily positive attributes that are described in his background materials, leads a blemish-free, stellar policing career since 1994, and then … within a span of four days, seems to veer so far off his normal trajectory that it is remarkable."[15]

In fact this was Desjourdy's second disposition for conduct violating the *Police Services Act* involving a female detainee. He had been found guilty of discreditable conduct in 2009 and demoted to constable for a three-month period for an incident on 2 September 2008, days before he encountered SB. He kicked a female detainee, described only as a homeless,

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9 Gary Dimmock & Don Butler, "SIU investigates strip search", *The Ottawa Citizen* (20 November 2010) A1; Joanne Chianello, "OPP clears employees in [SB] case", *The Ottawa Citizen* (28 May 2011) D1.

10 *R v Desjourdy*, 2013 ONCJ 170 [*Desjourdy* 2013].

11 *Ibid* at para 108.

12 Shaamini Yogaretnam, "Police settle strip-search lawsuit", *The Ottawa Citizen* (16 April 2014) B1.

13 RSO 1990, c P-15 (the *Police Services Act* has been replaced by the *Community Safety and Policing Act, 2019*, SO 2019, c 1).

14 "Sgt. Steven Desjourdy docked 20 days of pay for discreditable conduct", *CBC News Ottawa* (21 October 2014), online: <www.cbc.ca> [perma.cc/KXE4-SSTR].

15 *Ibid*.

intoxicated woman,[16] in the Ottawa cell block while she was kneeling on the cell floor. He then tasered her twice when she grabbed at his leg while being strip searched.[17]

And in a third matter in the same period, Desjourdy was named by Roxanne Carr in a lawsuit alleging that on 23 August 2008, he was one of eight Ottawa officers who wrongfully arrested and imprisoned her, stripped her, assaulted and injured her, and then left her naked for hours in a cell.[18] Carr was awarded $255,000 by an Ottawa jury after a nine-day trial of her allegations.[19]

This article attempts to unravel how the illegal strip search of SB in one trial came to be characterized as lawful due to "exigent circumstances" in a later trial of the same facts, albeit for a different charge and accused person. Given that SB was a Black Canadian, we first place this strip search in the larger context of the history of anti-Black racism in Canada to expose the historical origins and contemporary continuity of police racism and impunity for abuse of power. Second, we place the strip search in the context of institutionalized misogyny as reflected by police treatment of women—and particularly Black women—as accused and as victims of male violence seeking police intervention. Third, we use the trial transcripts from *R v Desjourdy* and media accounts to describe the evidence, the tactics of Crown and defence and the arguments that shaped Desjourdy's acquittal. We rely upon Harry Glasbeek's 1994 analysis of eight files from the office of the Attorney General of Ontario regarding police killings of unarmed Black men to assist us in dissecting the defence strategies and understanding their success.[20] Fourth, we apply Critical Race Theory to Desjourdy's trial. We suggest that structural racism and other relations of power must shape our understanding of sexual assault, and that police will not be held to account in criminal law for their violence until prosecutors grapple with systemic racism.

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16 Joanne Chianello, "Hearing should be about faith in police", *The Ottawa Citizen* (6 April 2013) E1.

17 Gary Dimmock, "Desjourdy had previous run-in for how he treated female prisoner", *The Ottawa Citizen* (20 May 2014), online: <ottawacitizen.com> [perma.cc/D39Z-GMU9].

18 Andrew Seymour, "Lawsuit against Ottawa police by woman stripped, left naked in cell, heads to trial", *The Ottawa Citizen* (12 May 2016), online: <ottawacitizen.com> [perma.cc/S7A9-DV8K].

19 Kelly Egan, "$255K awarded to woman for wrongful arrest, imprisonment by Ottawa police", *The Ottawa Citizen* (16 July 2017), online: <ottawacitizen.com> [perma.cc/HXW3-C8YH].

20 Commission on Systemic Racism in the Ontario Criminal Justice System, *Police Shootings of Black People in Ontario*, by HJ Glasbeek (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1994) [Glasbeek, *Police Shootings*].

2. Anti-Black racism as a structural feature of policing

The strip search of SB by police and the justice system's exoneration of the officer who committed it reflect Canada's long history of structural violence that has deprived Black people of their liberty and dignity since slavery.[21] Indeed, current attitudes and stereotypes about Black Canadians, for example, their alleged propensity for laziness, criminality and violence, found their genesis in the crucible of slavery.[22]

Despite its smaller scale in Canada than other regions of the world,[23] slavery has left an indelible mark on the Black experience in Canada.[24] The abolition of slavery in the British colonies, including Canada, ended institutionalized chattel slavery but not the need to control and manage Black bodies.[25] Canada instituted its own "Jim Crow" laws and policies to systemically exclude and separate Black Canadians from "mainstream institutions."[26]

The legal system played a significant role in expressing virulent anti-Black racism and developing methods to control Black bodies.[27] Over time, those methods of control have included the toleration of rape of Black women and girls,[28] anti-miscegenation laws,[29] segregation,[30] intimidation,[31] anti-immigration laws and policies,[32] and discriminatory

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21 Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point, NS: Fernwood Publishing, 2017) [Maynard, *Policing Black Lives*].

22 James W St G Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa: The Canadian Historical Association, 1985) at 8 [St G Walker, *Racial Discrimination*].

23 See generally Robin W Winks, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1997).

24 St G Walker, *Racial Discrimination*, *supra* note 22.

25 Maynard, *Policing Black Lives*, *supra* note 21.

26 Barrington Walker, "Finding Jim Crow in Canada, 1789-1967" in Janet Miron, ed, *A History of Human Rights in Canada: Essential Issues*, Toronto: Canadian Scholars' Press, 2009) 81 at 140.

27 See generally James W St G Walker, *"Race", Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo, Ontario: Wilfrid Laurier University Press, 1997).

28 Afua Cooper, "'Deluded and Ruined': Diana Bastian-Enslaved African Canadian Teenager and White Male Privilege" (2017) 27:1 Brock Education J 26 [Cooper, "Deluded and Ruined"].

29 Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 186.

30 *Ibid* at 250–252.

31 *Ibid* at 173–193.

32 *Ibid* at 175–176, 279.

housing and employment laws.[33] However, the "criminalization" of Black bodies was largely accomplished through the racialization of crime,[34] targeted policing,[35] and mass incarceration.[36]

The hyper-criminalization of Black Canadians continues as a conspicuous method of control in the matrix of structural and systemic violence and discrimination.[37] In fact, Stephen Lewis' 1992 report on *Race Relations in Ontario* signalled, at the time, that anti-Black racism was a virulent form of racism in Ontario requiring urgent attention.[38] In 1995 the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* provided incontrovertible evidence of the prevalence of anti-Black racism within the criminal justice system.[39] Black Canadians are more likely to be arrested, detained, charged, assaulted, and killed by police in comparison to their white counterparts.[40]

The criminal justice system manufactures "truths" about Black bodies as bounded by risk, violence, and dangerousness, then harnesses these to justify the harsh and degrading treatment imposed on Black Canadians.[41] Prevalent stereotypes about the supposed volatility and dangerousness of Black Canadians allow them to be defined as the archetypal suspect, arguably placing them in a perpetual state of criminal liability and rendering

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33 Clayton James Mosher, *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems 1892-1961* (Toronto: University of Toronto Press, 1998) at 96 [Mosher, *Discrimination and Denial*].

34 *Ibid* at 129.

35 *Ibid*.

36 Clayton Mosher, "The Reaction to Black Violent Offenders in Ontario -1892-1961: A Test of the Threat Hypothesis" (1999) 14:4 Sociological Forum 635.

37 Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: OHRC, 2018) [OHRC, *A Collective Impact*]; David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR 656.

38 Canadian Race Relations Foundation, *Report on Race Relations in Ontario*, by Stephen Lewis (Toronto: CRRF, 1992).

39 Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1995) [Commission on Systemic Racism in the Ontario Criminal Justice System, *Systemic Racism in Ontario*].

40 *Ibid*.

41 Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts 1858-1958* (Toronto: University of Toronto Press, 2010) at 20.

them vulnerable to police violence[42] and discriminatory treatment by other criminal justice actors, resulting in their overincarceration.[43]

In turn, police discrimination and violence contributes to and entrenches the mistrust, fear and anger expressed by Black Canadians towards the criminal justice system. In *R v Le*, a case involving the arbitrary detention of five racialized men, one Asian and four Black, a majority of the Supreme Court of Canada accepted that the police practice of carding Black youth "contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization."[44]

Police misconduct and violence against Black Canadians[45] are often shielded from oversight by criminal courts and public complaint bodies,[46] which furthers distrust and cynicism. Only in rare circumstance are police officers charged criminally or with internal disciplinary offences.[47] Convictions are rarer still.

One reason for the lack of accountability is the difficulty complainants face in proving a causal link between the police action and their race.[48] Direct evidence of racial bias by police is difficult to obtain,[49] as is proof that it motivated them.[50] Furthermore, almost no "race" data has been collected by police, hampering researchers and advocates examining whether Black Canadians are more likely to be strip-searched than others in similar circumstances. Thus while a recent report by the Office of the Independent Police Review Director for Ontario found widespread failures by police departments to follow the strip search rules from the 2001 *Golden* decision, it was unable to determine whether racism plays

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42 David M Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905 at 913–916.

43 OHRC, *A Collective Impact*, *supra* note 37.

44 *R v Le*, 2019 SCC 34 at para 95 [*Le*].

45 Commission on Systemic Racism in the Ontario Criminal Justice System, *Systemic Racism in Ontario*, *supra* note 39.

46 Ontario, Ministry of the Attorney General, *Report of the Independent Police Oversight Review*, by The Honourable Michael H Tulloch (Toronto: Queen's Printer for Ontario, 2017) [Tulloch, *Independent Oversight Review*].

47 But see *R v Forcillo*, 2018 ONCA 402 (prosecution for the police killing of Sammy Yatim) and Dakshana Bascaramurty, "Judge hears final arguments in case of Dafonte Miller's alleged beating", *The Globe and Mail* (29 January 2020), online: <www.theglobeandmail.com> [perma.cc/777Q-HVB7] (prosecution of police officers for the beating and blinding of Dafonte Miller).

48 *R v Brown* (2003), 64 OR (3d) 161 (CA) at para 45, 2003 CanLII 52142.

49 *Peart v Peel Regional Police Services* (2006), 217 OAC 269 (CA) at para 95, 2006 CanLII 37566.

50 See e.g. *R v Dudhi*, 2019 ONCA 665.

any role.[51] Consequently, unless a police interaction is overtly racist, it will likely be insulated from judicial or administrative scrutiny.[52]

While anti-Black racism has been named in the context of jury selection, sentencing, and in the relatively few cases where racial profiling has been addressed, it is otherwise rarely acknowledged as legally or factually relevant, even in those cases where it is clearly the "elephant in the room."[53] The resounding silence around racism in criminal law can also be attributed to the presumed neutrality of the justice system. The consequence of the historical and current concealment of racism by and through law is the under-development of legal and evidentiary tools to confront it.

3. Misogyny as a structural feature of policing

SB's experience of sexual violation and the law's response must also be understood in the context of structural misogyny. There are no comparable commission reports documenting gender bias in the justice system in Canada. Our courts have barely acknowledged structural sexism in very specific legal contexts, such as the historic exclusion of the experience of battered women from the law of self-defence[54] and the discrimination sexual assault complainants face in the justice system.[55]

There is, however, abundant research documenting misogyny in the policing of sexual assault. Police have demonstrated long-standing disbelief when women report sexual offences, as well as indifference to sexual violence as a serious crime.[56] Widespread and persistent police practices of unfounding of sexual assault,[57] disrespectful treatment of

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51 Office of the Independent Police Review Director, *Breaking the Golden Rule: A Review of Police Strip Searches in Ontario*, by Gerry McNeilly (Toronto: OIPRD, 2019) at 10 [McNeilly, *Breaking the Golden Rule*].

52 Tulloch, *Independent Police Oversight Review*, *supra* note 46 at chapters 10–11.

53 Danardo S Jones, "Lifting the Judicial Embargo on Race-Based Charter Litigation: A Comment on *R. v. Le*" (2019) 67 Crim LQ 42.

54 See *R v Lavallee*, [1990] 1 SCR 852, 76 CR (3d) 329.

55 *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (Ct J (Gen Div)), 1998 CanLII 14826 [*Doe*]; *R v Find*, 2001 SCC 32 at paras 101–103.

56 *Ibid*.

57 Lorenne M G Clark & Debra J Lewis, *Rape: The price of coercive sexuality* (Toronto: Women's Press, 1977); Teresa DuBois, "Police Investigation of Sexual Assault Complaints: How Far Have We Come Since *Jane Doe*?" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 191; Robyn Doolittle, "Unfounded: Police dismiss 1 in 5 sexual assault claims as baseless", *The Globe and Mail* (3 February 2017), online: <www.theglobeandmail.com> [perma.cc/A6D3-FMK6] (the Unfounded series).

victims,[58] and sloppy investigations[59] inhibit the legal system's ability to hold men accountable for sexual violence.

There is some evidence that women who use violence, and particularly those who use violence against men, are over-charged, face serious challenges to their credibility, and are sentenced harshly.[60] Women who are arrested also experience police violence and strip-searching. One Canadian study found that women made 25% of claims for illegal strip searching, a third of which involved male officers.[61] This study revealed police preoccupation with women's bras as a source of danger, used to justify their routine removal by police. Such practices have been condemned by some judges[62] and by a report that found Toronto Police removed the bras of 35.22% of women they strip searched in 2014–16.[63]

Strip searching of women is made all the more intimidating and humiliating by the paramilitary and hyper-masculine culture of policing. This culture has been notably hostile to women as peers,[64] which should not be surprising given that individual police also participate in violence against women as batterers and as rapists.[65] In fact, investigations regarding allegations of sexual violence by police constituted the second largest category of investigations by the SIU in Ontario in the period

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58 Holly Johnson, "Improving the Police Response to Crimes of Violence Against Women: Ottawa Women Have Their Say", *World of Ideas* (Fall 2015), online (pdf): <socialsciences.uottawa.ca> [perma.cc/8ADT-LZ7K].

59 *Doe*, *supra* note 55.

60 Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (Vancouver: University of British Columbia Press, 2014). See e.g. Elizabeth Sheehy & Lynn Ratushny, "Opinion: Another abused woman failed by the justice system", *The Edmonton Journal* (10 December 2020), online: <edmontonjournal.com> [perma.cc/DPT7-E4PU] (the case of Helen Naslund is a recent example).

61 Michelle Psutka & Elizabeth Sheehy, "Strip-searching of women: Wrongs and rights" (2016) 94:2 Can Bar Rev 241.

62 See *R v Lee*, 2013 ONSC 1000; *R v Judson*, 2017 ONCJ 439.

63 McNeilly, *Breaking the Golden Rule*, *supra* note 51 at 97.

64 *Clark v Canada*, [1994] 3 FC 323, 1994 CanLII 3479; Natalie Clancy, "More women alleging harassment want to join lawsuit against RCMP", *CBC News* (31 May 2015), online: <cbc.ca> [perma.cc/V5JP-5HCQ].

65 Leigh Goodmark, "Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse" (2015) 5 BYUL Rev 1183; Jasmine Sankofa, "Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform" (2016) 59:3 How LJ 651 at 653–656 (describing an Oklahoma City police officer who used police resources to track and rape 13 Black women) [Sankofa, "Mapping the Blank"].

2015–2019,[66] consistent with a US study that found sexual violence is the second largest category of complaints against police.[67]

Turning to Black women, Black feminist scholars argue that it is neither a Black woman's "race" nor her sex that is under suspicion, but instead what is produced when those identities intersect.[68] Black women are subjected to heightened scrutiny by apparatuses of the state, whether welfare officials, border agents, police, or courts.[69] Thus, while racism provides the accelerant for an analysis of Black women's experience of policing, an intersectional approach rooted in historical context permits a deeper inquiry.

From the earliest periods of Canadian history, Black women endured state-sanctioned violence in similar, but fundamentally different ways than Black men. Their bodies were *terra nullius*: violable, uninhabited and ripe for conquest. Black women have historically been perceived as hypersexual, promiscuous Jezebels, inhabiting bodies that never truly "belonged" to them.[70] During slavery, the master had a proprietary interest in her body and her progeny, perpetuating the subjugation of future generations of Black bodies.[71]

Slave masters also weaponized rape and other forms of sexual violence to control Black women's bodies.[72] Women slaves could not be raped because they lacked legal standing and their alleged "licentious" nature

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66 Special Investigations Unit, "Annual Report 2019" (2019) at 19, online (pdf): *Special Investigations Unit* <www.siu.on.ca> [perma.cc/YX32-MG3H].

67 CATO Institute, "Annual Report 2010" at 4, 7–8, online (pdf): *CATO Institute* <www.cato.org > [perma.cc/WYN8-APLE], cited in Sankofa, "Mapping the Blank", *supra* note 65 at 669.

68 See Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43:6 Stan L Rev 1241 at 1243.

69 Maynard, *Policing Black Lives*, *supra* note 21 at chapters 4–5.

70 Cooper, "Deluded and Ruined", *supra* note 28 at 32.

71 See generally Ken Donovan, "Female Slaves as Sexual Victims in Île Royale" (2014) 43:1 Acadiensis 147.

72 Linda Carty, "African Canadian Women and the State: 'Labour only, please'" in Peggy Bristow, ed, *We're Rooted Here and They Can't Pull Us Up: Essays in African Canadian Women's History* (Toronto: University of Toronto Press, 1994) 193 at 203.

made them responsible for male sexual aggression.[73] So, both biologically and legally, the Black woman was unrapeable.[74]

Her body was constructed not only as commodity but also as aberration, animalistic. Patricia Hill Collins discusses the public "freak show" of the genitalia and buttocks of Sarah Bartmann, an African woman toured at parties and events in Paris as the "Hottentot Venus." Upon her death in 1815, her genitalia and buttocks were displayed in pickling jars in a Paris museum until 1974.[75] Hill Collins argues that the public viewing of Bartmann's sexual parts and other Black women's bodies on the auction block, often in proximity to animals, was central to "creating the icon of Black women as animals" that appears in medical literature and is foundational to pornography.[76]

Black women in Canada were stereotyped as sexually deviant and morally unfit as immigrants and mothers.[77] Prostitution laws were used to control their access to public spaces and to justify criminal investigation.[78] They were arrested for prostitution, vagrancy, and morality offences across Canadian cities at rates disproportionate to their population,[79] and portrayed as "subhuman and bestial."[80]

Black women continue to be targeted for sexual violence, associated with prostitution, and subjected to police surveillance and abuse. Black women in the US are more likely to be raped, less likely to report, and

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73 Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies" (1989) 1989 U Chicago Legal F 139 at 158 ("When Black women were raped by white males, they were being raped not as women generally, but as Black women specifically: Their femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection.").

74 Sankofa, "Mapping the Blank", *supra* note 65 at 675.

75 Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, 2nd ed (New York: Routledge, 2000) at 168–169, 171–172, 175 [Collins, *Black Feminist Thought*].

76 *Ibid* at 171–173.

77 Agnes Calliste, "Race, Gender and Canadian Immigration Policy: Blacks from the Caribbean, 1900-1932" (1993–1994) 28:4 J Can Studies 131 at 134, 140–141.

78 Maynard, *Policing Black Lives*, *supra* note 21 at 138.

79 *Ibid* at 46 (referring to studies in Halifax (1864-1873), Vancouver (1912-1917), Calgary and Toronto (early 19th century)) cited in Constance Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (1985) 18:36 Soc History 387 at 401; Mosher, *Discrimination and Denial*, *supra* note 33 at 44 (referring to studies in Hamilton).

80 Maynard, *Policing Black Lives*, *supra* note 21 at 46, citing the reported arrest of a "misshapen coloured woman [who] had lived as a wild beast on the outskirts of the city" described by Mosher, *supra* note 33 at 174.

face distinct attacks on their credibility when they do report.[81] They are blamed for their victimization[82] and punished for failing to meet standards of "white femininity"—"female vulnerability, sexual inaccessibility, and submissiveness."[83] A 2003 report by the Ontario Human Rights Commission found that Black women in white men's cars were profiled as engaged in prostitution,[84] and a similar finding was made by a 2001 Nova Scotia study.[85]

Black Canadian women are racially profiled by police: a Kingston study found they were stopped at a rate of three times that of white women and slightly more than white men;[86] a Montreal study reported that Black young women were three times more likely than their white counterparts to have been arrested two or more times;[87] and Black women made more than twice the number of complaints to Ontario's SIU regarding sexual assault and other violence by police than white women.[88] Further, Black women, like Black men, have been shot by police while unarmed[89] and publicly strip searched.[90]

Jasmine Sankofa argues that sexual violence—including strip searches, body cavity searches, sexual extortion, and rape—by police against Black

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81 Sankofa, "Mapping the Blank", *supra* note 65 at 653–655, 680–681.

82 Nicole Pietsch, "'I'm Not That Kind of a Girl': White Femininity, the Other, and the Legal/Social Sanctioning of Sexual Violence Against Racialized Women" (2010) 28:1 Can Woman Studies 136 at 138 [Pietsch, "'I'm Not That Kind of a Girl'"], citing Roxanne A Donovan, "To Blame or Not to Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution" (2007) 22:6 J Interpersonal Violence 722.

83 Pietsch, "'I'm Not That Kind of a Girl'", *supra* note 82.

84 Maynard, *Policing Black Lives*, *supra* note 21 at 138, citing Ontario Human Rights Commission, *Paying the price: The human cost of racial profiling* (Toronto: OHRC, 2003) at 45.

85 Maynard, *Policing Black Lives*, *supra* note 21 at 138, citing Wanda Thomas Bernard, *Including Black Women in Health and Social Policy Development: Winning Over Addictions Empowering Black Mothers with Addictions to Overcome Triple Jeopardy* (Halifax: Maritime Centre of Excellence for Women's Health, 2001) at 15.

86 Akwasi Owusu-Bempah & Scot Wortley, "Race, Crime and Criminal Justice in Canada" in Sandra M Bucerius and Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime and Immigration* (London: Oxford University Press, 2014) 281 at 294.

87 Léonel Bernard & Christopher McAll, "La surreprésentation des jeunes noirs montréalais" (2008) 3:3 R CREMIS 15, cited in Maynard, *Policing Black Lives*, *supra* note 21 at 126.

88 Scot Wortley, *Police Use of Force in Ontario: An Examination of Data from the Special Investigations Unit, Final Report* (Toronto: Ipperwash Inquiry, 2006) at 38, cited in Maynard, *Policing Black Lives*, *supra* note 21 at 125–126.

89 Maynard, *Policing Black Lives*, *supra* note 21 at 103.

90 Henry Hess, "Inquiry dismisses misconduct allegations against police", *The Globe and Mail* (22 September 1995) A5.

women is facilitated by the frequency of police contact through racial profiling, the normalization of a police presence in Black communities, the historical degradation of Black women's sexual integrity, police access to state-sanctioned authority, violence and personal information, and the relative impunity of police, such that they are only rarely held accountable for abuses. Police culture is conducive to male sexual violence, premised as it is on gaining control and maintaining obedience by using or threatening force.[91] The police code of silence about fellow officer behaviour, their ability to charge victims who resist with assaulting a police officer or for alleged "false allegations," and the barriers to reporting sexual violence by police to police together mean that any data is likely an undercount.[92]

What little Canadian criminal law jurisprudence there is addressing anti-Black racism in the criminal justice system focuses almost exclusively on Black men.[93] Those rare judicial accounts of Black women arise in drug importation cases,[94] where Black women have become the face of the "drug mule" discourse, animalized as the "mules of the world."[95] Sonia Lawrence and Toni Williams argue, "because the [mule] image is of a racialized and impoverished woman whose social context locates her squarely within the dangerous classes, the threat she poses to society and the extent to which she is seen as an appropriate target of criminal justice interventions and harsh sanctions is heightened."[96] Our courts have repudiated lower court efforts to recognize the roles of systemic racism, sexism, and poverty in the prosecution of Black women for drug importation through sentencing principles.[97] Only human rights tribunals have recognized that race and sex intersect to create a particular axis of oppression for Black women by law enforcement.[98]

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91 Sankofa, "Mapping the Blank", *supra* note 65 at 656, 666–673.

92 *Ibid* at 670–671.

93 *Le*, *supra* note 44; *R v S (RD)*, [1997] 3 SCR 484, 1997 CanLII 324.

94 *R v TG*, 2015 ONCJ 751; *R v Clarke*, 2019 ONSC 5868; *R v Reid*, 2018 ONSC 3754.

95 Zora Neale Hurston, *Their Eyes Were Watching God* (New York: Harper Perennial Modern Classics, 1998) at 16.

96 Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 UTLJ 285 at 330.

97 *R v Hamilton*, (2003), 172 CCC (3d) 114 (ONSC), rev'd (2004), 72 OR (3d) 1, 241 DLR (4th) 490 (CA).

98 See *Nassiah v Peel (Regional Municipality) Services Board*, 2007 HRTO 14; *Abbott v Toronto Police Services Board*, 2009 HRTO 1909 ("I have tried to hypothesize a White woman out delivering papers in the early morning having fairly routine traffic matters escalate into an arrest. I have been unable to do so" at para 44) [*Abbott*].

4. The trial of Steven Desjourdy

The trial before Judge Lipson in the Ontario Court of Justice commenced September 27, 2012. The theory presented by Crown counsel was simple: Desjourdy's acts amounted to an illegal strip search because they fell outside the constitutional limits articulated by the Supreme Court in *Golden* in several respects. There were no reasonable and probable grounds related to securing evidence or disarming SB to justify the search; there were no exigent circumstances to permit a male on female strip search; and multiple requirements of the lawful process of a strip search set out in *Golden* were breached: SB was not invited first to remove her own clothing; the search was not conducted in a private room; and the number of officers participating in the strip search was not kept to a minimum.

The Crown argued that because the strip search fell outside *Golden* it amounted to excessive force, for which police officers are liable pursuant to *Criminal Code* s 25. This assault, he argued, was a "sexual" one, either because cutting off a woman's shirt and bra, in the presence of male officers, would appear "sexual" to the reasonable observer, or because Desjourdy's act was intended to "punish, humiliate or put [SB] in her place."[99] SB did not testify, pursuant to an agreement between the prosecution and defence that her evidence would instead be provided through a statement she made to the SIU.[100]

All of the Crown's witnesses were police officers: John Flores and Cameron Downie, who arrested SB, Jennifer Biondi, who searched SB on the street, Melanie Morris and Michael Bednarek, the special constables at the station, and David Christie, a sergeant before whom SB was paraded at the station. The defence kept open the possibility of calling Steven Desjourdy, and won a ruling that would preclude the Crown from cross-examining Desjourdy on the evidence he gave in SB's own trial because it would violate his section 13 *Charter* right against self-incrimination.[101] But counsel decided against calling his client to testify and presented no witnesses, resting his case on reasonable doubt created by cross-examination of the police witnesses.

To dissect the role systemic racism had in Desjourdy's acquittal, we rely on Harry Glasbeek's insights from his work on behalf of the Commission on Systemic Racism in the Ontario Criminal Justice System. He was given full access to internal police and other files and asked to

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[99] *R v Desjourdy*, 2013 ONCJ 170 (Trial Transcript) 24 September 2012 at 2–3 [*Desjourdy Transcript*].

[100] Andrew Seymour, "Not guilty plea in cellblock assault case", *The Ottawa Citizen* (8 May 2012) C1.

[101] *R v Desjourdy*, 2012 ONCJ 648 [*Desjourdy* 2012].

determine whether racism was implicated in the outcomes of seven cases where police officers killed unarmed Black men, all of which resulted in either no charges or acquittals. Based on his detailed review, Glasbeek concluded that "the effect of the normal operation of the criminal justice system is to hide the issue of racism and, thereby, to perpetuate it."[102] He provided observations that are at play in every trial of a police officer.

First, Glasbeek observes that police on trial have access to vast resources: "They are supported by their unions, police associations. Very well-known lawyers will be hired … The defence may—not improperly—find it a little easier to present its theory favourably."[103]

Second, Glasbeek notes that in prosecuting police, Crowns must rely on the evidence of police witnesses: "They were the ones on the scene; they were the ones who conducted most of the investigation. They are likely to be very sympathetic to their colleague. The Crown will find it instinctively difficult, and strategically awkward, to try and treat these witnesses as possibly adverse to its own case, thereby weakening its case in an unusual way."[104]

Third, criminal law individualizes both crime and policing, eliding the structural conditions of power, authority and coercion that police officers enjoy: "The fact that [the officer] was white, the other black, one a member of a power structure and the other one of its objects, is ignored …."[105] The officer on trial is treated as "just another accused," ignoring all the privileges attached to their position.

Fourth, police benefit from the compartmentalization of their functions: "Each component, in large part to justify and legitimate its actions, has developed standard operating procedures to attain its specific goals. … [F]or the most part, the individual, independent decisions can be defended rationally, yet the outcomes of the criminal justice system may be racist in effect."[106]

Fifth, police receive the highest standards of trial and constitutional protections: "Judges are used to seeing police officers as accusers and, therefore, more credible witnesses than the accused [victim]…Because the accused police officer will claim that s/he was executing her duty and/or a moment of crisis created danger when [the alleged crime] took place, the

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102 Glasbeek, *Police Shootings*, *supra* note 20 at 14.

103 *Ibid* at 20.

104 *Ibid* at 19–20.

105 *Ibid* at 17.

106 *Ibid* at 8, 9.

normal justifications and defences available to accused persons are given more scope than they usually are."[107]

Sixth, racism cannot easily be confronted: "The…criminal justice system … start[s] off from the assumption that [it] ….is a neutral system. Equality before, according to and under the law, are considered the norm. Law is assumed not to be racist."[108] Glasbeek concludes that that the criminal trial perpetuates racism "by making it difficult to confront this issue, even when the race of the victim plays a crucial, if unarticulated, role in the trial."[109]

A) Police have access to vast resources

Desjourdy was amply supported by his union, both at trial and his disciplinary hearing, and was represented by a prominent defence lawyer in both venues. The Police Services Board agreed to pay Desjourdy's $550,000 defence bill contingent on his acquittal.[110] Its contract also stipulated that "the board may refuse to pay costs if the actions of the officer 'amounted to a gross dereliction of duty or deliberate abuse of his/her powers as a police officer.'" When Desjourdy was found guilty of discreditable conduct in his internal disciplinary hearing, the Board contested payment of the defence bill, and the union took it to arbitration.[111]

Police also have control over access to evidence that other accused persons may not have. Mid-way through the trial, the defence handed to the Crown five hours of video evidence from the cellblock that the SIU had been unable to obtain because it was told that it had been erased. Defence counsel did not disclose how he obtained this "destroyed" video evidence, and Ottawa's police chief refused to comment.[112]

Other officers supported Desjourdy through their presence in the court during the trial. As the acquittal was delivered, more than a dozen uniformed officers erupted into applause and cheered in the corridor as he left the court room.[113] Desjourdy's chief nominated him for an award

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107 *Ibid* at 19, 10, 17–18.

108 *Ibid* at 12.

109 *Ibid* at 10.

110 Shaamini Yogaretnam, "Officer's disciplinary hearing begins", *The Ottawa Citizen* (6 January 2014) B1, B4.

111 "Cellblock police officer's $540K legal bill goes to arbitration", *CBC News* (23 July 2013), online: <www.cbc.ca> [perma.cc/9GQ5-ZZEP].

112 Meghan Hurley, "'Destroyed' cellblock video obtained by defence team", *The Ottawa Citizen* (6 October 2012) E2.

113 Andrew Seymour, "'Brotherhood' cheers", *The Ottawa Citizen* (4 April 2013) A1.

for creating an online program to assist police in following investigative policies, even as his disciplinary charges were pending.[114]

The Ottawa Police Association reinforced Desjourdy's defence through media commentary, particularly the claims that Desjourdy was judged by a "previously non-existent, after-the-fact created standard,"[115] and that the cell block was understaffed such that once Morris was injured by SB, it became difficult to safely search SB without strip-searching her, and to provide her with other clothing. After Desjourdy's disciplinary hearing resulted in loss of pay without demotion, Matt Skof, President of the Association, stated:

> From our position, there's a huge culpability that wasn't being addressed—the service needed to improve the cellblock … Since this incident there's been significant changes to the cellblock.
>
> …
>
> This is not something that Sgt. Desjourdy should be wearing. This is something that the entire service should take culpability for.[116]

B) Reliance on police witnesses

The Crown called six police witnesses, each of whom testified favorably to the Crown's case, but then softened their evidence considerably under defence cross-examination. Ordinarily in such cases the Crown can apply to the judge to declare the witness "adverse," and if successful, cross-examine the witness to show their earlier evidence as more reliable. But as Glasbeek observes, for the Crown to attack the credibility of its main witnesses puts the entire prosecution at risk.

For example, the Crown's first witness was PC Jennifer Biondi. She was called to the street scene where SB was arrested by PCs Flores and Downie for public intoxication to execute a female on female pat-down search, which included searching SB's pockets, the waistband of her trousers, and the underwire of her bra. Biondi said that SB was "belligerent,"[117] but seemed to agree with the Crown's proposition that

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114 Meghan Hurley & Zev Singer, "Police Act charge and a commendation", *The Ottawa Citizen* (24 April 2013) C2.

115 Danielle Bell, "Officer found guilty of discreditable conduct", *The Kingston Whig-Standard* (9 April 2014) B3.

116 Shaamini Yogaretnam, "Sergeant in strip search case docked pay but not demoted", *The Ottawa Citizen* (22 October 2014) A8.

117 *Desjourdy Transcript*, *supra* note 99, 24 September 2012 at 21.

it was her responsibility to ensure that SB had nothing dangerous on her person before being transported to the station.[118]

The defence cross-examination of Biondi began a pattern that was repeated for every Crown witness. Unlike a typical cross-examination, where the witness is asked questions designed to destroy their credibility, counsel asked each witness to agree with a series of propositions that undermined their testimony in chief, without painting the witnesses as dishonest or gravely unreliable. The effect of the witnesses' testimony was a show of loyalty to a senior officer and the repair of a sullied public image of the Ottawa police.

Biondi did not resist the implicit challenge to her evidence but rather readily agreed that she may have missed certain items like needles and razor blades in her pat down street search of SB, that she had "heard of" weapons being found on detainees at police stations,[119] and that police face extreme dangers from "spitting" and the "growing crack cocaine problem."[120] Similarly, Special Constable Melanie Morris affirmed in her evidence in chief that nothing said or done by SB indicated that she was suicidal,[121] but in cross-examination she readily acceded to defence counsel's suggestions that intoxicated people can be unpredictable, that SB's behaviour was "erratic," "not normal," and that therefore suicide was a "possibility."[122]

The Crown successfully applied to cross-examine Morris on her evidence,[123] and attempted to have Flores declared an adverse witness. He abandoned that application when the judge persuaded him that he would not gain any advantage from that strategy.[124] The Crown tried to repair the testimony of his witnesses in re-examination, but defence counsel repeatedly objected to that re-examination as improper.[125] The judge frequently asked the Crown to re-phrase or accede. In the end, the Crown was stuck with testimony from its own witnesses that was at best equivocal about the key issues of whether SB was either possibly suicidal or so out of

118 *Ibid* at 28.

119 *Ibid* at 34.

120 *Ibid* at 35.

121 *Ibid*, 1 October 2012 at 36, 100.

122 *Ibid* at 151–155, 2 October 2010 at 8–10.

123 *Ibid*, 1 October 2012 at 81–86.

124 *Ibid*, 3 October 2012 at 40–47.

125 *Ibid*, 2 October 2012 at 122–131,137–143, 147–150, 151–153, 154–164, 3 October 2012 at 4–10, 11–19 (Defence counsel objected that the Crown's questions amounted to cross-examining his own witness, were leading, or concerned subjects not covered by cross-examination).

control that an immediate strip search was the only way to ensure prisoner and officer safety.

The defence also used cross-examination to portray SB's statements as simply wrong regarding many details, with the resulting implication that her claims in her statement to the SIU, e.g., police laughing about her wet pants or using racial epithets, were unreliable according to the Crown's own witnesses. Thus, SB said she was denied water but Melanie Morris testified that she had a drinking fountain in her cell;[126] SB said that Morris delivered blows to her kidneys but Morris testified that she delivered strikes to SB's thigh;[127] SB wasn't thrown to the ground but was rather "lowered";[128] police did not pile on top of her when she was taken to the floor but rather "held" her there;[129] Morris did not grope SB's genitals or buttocks but may have accidentally brushed her hip or thigh.[130]

Cameron Downie's evidence on cross-examination went further, agreeing with defence counsel's suggestion that SB was not simply mistaken, but rather made "false"[131] statements to the SIU. Downie said it was "absolutely false" that she was paraded in front of Desjourdy[132] — rather it was Sgt David Christie; Downie denied taunting SB about her soiled pants and making racist comments.[133] He also testified that she wrongly claimed she was clutching her shredded clothes to her chest when she was taken to the cell,[134] although video evidence supported her assertion.[135]

C) Individualization

The criminal law's individualization stripped the interaction between police and SB of the power differentials produced by misogyny, anti-Black racism, and Desjourdy's access to use-of-force as a sergeant in a para-military organ of the state. At SB's trial, she was described by the judge as co-operative and non-aggressive when she was patted down on the street, when she was brought into the station, when it was discovered that one of her hands was out of the handcuffs, and when she was brought to the floor

126 *Ibid,* 2 October 2010 at 98.

127 *Ibid* at 100. But see *infra* note 137.

128 *Ibid*, 2 October 2012 at 101.

129 *Ibid* at 102.

130 *Ibid*, 1 October 2012 at 68, 2 October 2012 at 67, 71.

131 *Ibid*, 3 January 2013 at 11.

132 *Ibid* at 17.

133 *Ibid* at 90.

134 *Ibid* at 91.

135 Andrew Seymour, "'Bad attitude' led to violence, Ottawa defence lawyers say", *The Ottawa Citizen* (26 November 2010) A1.

after kicking Morris.[136] The most damning thing her judge said was that she "was not being one hundred percent compliant" just before Morris delivered "two extremely violent knee hits in the back," pulled SB by the hair, then "shoved" her face to the desk.[137]

In Desjourdy's trial the Crown highlighted SB's vulnerability through police testimony acknowledging that four male officers would have no difficulty controlling a small woman. Bednarek took SB to the ground after she kicked Morris. He said it did not take much force to do so because he was 6'1", 200–220 lbs to her 5', 100 lb stature[138] and because she was passive at that point.[139] Similarly, Downie acknowledged that he was 6'4", 215 lbs, and could handle SB on his own.[140]

Nonetheless, defence counsel asked Bednarek to agree that while SB was small in stature, even small people can be a danger.[141] Downie concurred that SB was in fact 5'3" and 119 lbs, slightly taller and heavier than earlier described.[142] Downie also testified that the initial assessment could be wrong and the smaller person could be stronger—scuffles with females can also be dangerous.[143]

Even the social sexualization of women's bodies disappeared. Bednarek insisted there was nothing "sexual" about Desjourdy's acts of cutting off SB's bra and clothing while surrounded by three other male officers.[144] Downie admitted that he had never seen anyone's clothes cut off, and had never requested a strip search for a violent or intoxicated arrestee.[145] Sgt David Christie testified that in 23 years he had never strip-searched a female.[146]

Yet Downie's evidence was that he neither heard nor saw anything sexual or humiliating.[147] He did not see "any breast."[148] The male officers' views were supported by Morris, to whom counsel suggested that "as a woman in a man's world, she would be sensitive to sexually charged

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136 *SB*, *supra* note 6 at paras 10, 11, 14, 19
137 *Ibid* at para 15.
138 *Desjourdy Transcript*, *supra* note 99, 24 September 2012 at 73.
139 *Ibid* at 81.
140 *Ibid*, 2 January 2013 at 131.
141 *Ibid*, 27 September 2012 at 98–99.
142 *Ibid*, 3 January 2013 at 101.
143 *Ibid* at 99.
144 *Ibid*, 28 September 2012 at 91, 108–109.
145 *Ibid*, 3 January 2013 at 107–109.
146 *Ibid*, 2 January 2013 at 24.
147 *Ibid*, 3 January 2013 at 103–104.
148 *Ibid* at 71.

comments to a female prisoner."[149] Morris readily agreed that the strip search was the "furthest thing from sexual"[150] and that there was no indication that Desjourdy acted out of malice.[151]

When Bednarek acknowledged seeing SB's breasts, he de-sexualized the interaction by describing her body as aberrant. He questioned whether he was really seeing her breasts, relying on his art lessons, because they were "misproportioned to where they should have been on her body."[152]

Individualization and de-contextualization obscured SB's acute vulnerability and portrayed her—the person with the least power and physical capacity—as the agent of her own arrest, her "escape" from handcuffs, her assault by police, and her prolonged nakedness in the cell block.

First, Flores and Downie claimed that SB's belligerent behaviour caused them to arrest her as a danger to herself or others.[153] SB's statement recounted that one of the officers had asked whether she was soliciting for prostitution. Downie could not recall if he asked her if she was a prostitute,[154] but admitted that he may have thought SB was soliciting and may have asked her about the man to whom she was speaking while leaning into his car window.[155] They arrested SB because she repeatedly approached them, demanding to know why she had been stopped, asking if she was suspected of prostitution,[156] shouting she hated police,[157] and swearing.[158] Christie described SB as a "pissed off person coming into the cell block,"[159] but could not provide detail: "she seemed to have a defiant look on her face but I—I can't really be specific."[160]

Second, SB was credited with "escaping" from one of her handcuffs, even though Flores testified that SB's hand may have come out of the handcuff because he did not tighten it or did not "double lock" it.[161]

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149 *Ibid*, 2 October 2012 at 90–91.
150 *Ibid*.
151 *Ibid* at 88–91.
152 *Ibid*, 27 September 2012 at 2–3.
153 *Ibid*, 2 January 2013 at 115.
154 *Ibid*, 3 January 2013 at 16.
155 *Ibid*, 2 January 2013 at 112.
156 *Ibid* at 55–57.
157 *Ibid* at 118.
158 *Ibid*, 3 October 2012 at 25–31.
159 *Ibid*, 2 January 2013 at 90.
160 *Ibid*.
161 *Ibid*, 3 October 2012 at 55–57.

Downie agreed with counsel's suggestion that she "shook a cuff,"[162] potentially endangering officers. Bednarek grabbed SB's free arm and put her in a wrist lock because "the handcuff can become a weapon quite easily."[163]

Third, SB was blamed for Morris's hand touching her buttocks inside her pants. Morris agreed with counsel's suggestion that Bednarek and Flores had difficulty controlling SB,[164] and that if she touched SB's buttocks it was because SB was "wiggling around"[165] making the touching accidental.[166] This attribution of responsibility made it easier for the defence to argue that, contrary to the findings in SB's own trial, SB's response of kicking backwards at Morris when her hand touched her buttocks was assaultive behavior justifying a strip search.

Fourth, SB's behavior allegedly delayed the provision of a blue suit for hours. Bednarek testified that she was repeatedly flushing the toilet in her cell,[167] which can be done to clog toilets and flood the cells.[168] He testified that the video captured SB sticking her arms and legs out of the bars in her cell.[169] Morris agreed with counsel's suggestion that such behaviour would be a reason to delay provision of a blue suit,[170] although Bednarek acknowledged that being combative would not be a reason to withhold clothing.[171]

The defence suggested that SB further prolonged her own nakedness by failing to don the blue suit immediately when it was given to her. Bednarek testified that he gave it to her at 9:44 a.m. but she did not put it on until Morris at 10:02 a.m. came and told her to do so.[172] SB then put it on backwards[173] and left her soiled pants on underneath. In fact, SB was protecting her privacy as best she could. The blue suit is described as a "disposable, one-use-only, paper-fibre" "flimsy jumpsuit."[174] By putting

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162 *Ibid*, 3 January 2013 at 23.

163 *Ibid*, 24 September 2012 at 69.

164 *Ibid*, 1 October 2012 at 155–159.

165 *Ibid*, 2 October 2012 at 67.

166 *Ibid* at 68–69.

167 *Ibid*, 27 September 2012, 57 at 116.

168 *Ibid*, 27 September 2012 at 116.

169 *Ibid*, 2 September 2012 at 127–128.

170 *Ibid*, 2 October 2012 at 108–110.

171 *Ibid*, 28 September 2012 at 154.

172 *Ibid*, 27 September 2012 at 77–78.

173 *Ibid* at 129–131.

174 Shaamini Yogaretnam, "Officer left woman soiled, topless in cell", *The Ottawa Citizen* (7 January 2014) C3.

the suit on backwards, SB was left with her bare back, rather than her chest, exposed.[175]

Nonetheless, SB was portrayed as neither humiliated nor upset by either the strip search or the prolonged deprivation of clothing. Counsel suggested to Bednarek, who agreed: "Now, would you not think that if someone was feeling humiliated and degraded by being left topless in a cell, they would put on the top as soon as they got it?"[176] Morris also agreed that SB was not "cowering" in her cell[177] and could be seen on the videotape laughing and smiling when she was released from custody by Desjourdy.[178]

A different story was told by the video that showed SB in the stairwell after her release:

> The 27-year-old woman signed her release papers and then, moments before being let go, a police officer presented her with her torn clothes on the way out the door.
>
> The door closed behind her, and [SB] stopped in her tracks —a lonely figure at the bottom of a stairwell at the police station.
>
> There, she held up her top and bra, in tatters, then slung on her torn clothes under a sweater, put her ball cap on and walked up the stairs and out onto the street.[179]

D) Compartmentalization of functions

The compartmentalization of police functions served to assign responsibility for police acts elsewhere and to generate sufficient confusion regarding the relevant policies and internal practices to create a reasonable doubt about who was responsible for which decisions. For example, in 2011, in response to a review ordered by the chief and a decade after *Golden* was released, the Ottawa Police Services again set out the rules governing lawful strip searches.[180] Even though the policy in force at the time SB was searched already fully accounted for *Golden*,[181] counsel referred to

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175 Andrew Seymour, "Woman waited hours to dress, trial told", *The Ottawa Citizen* (29 September 2012) E1.

176 *Desjourdy Transcript*, *supra* note 99, 27 September 2012 at 123–125.

177 *Ibid*, 2 October 2012 at 94.

178 *Ibid* at 92.

179 Gary Dimmock, "Strip-search victim's image angers, saddens lawyer", *The Times Colonist* (5 December 2010) A11.

180 Meghan Hurley, "Police spell out rules on strip searches", *The Ottawa Citizen* (22 January 2011) C1.

181 *Desjourdy Transcript*, *supra* note 99, 2 October 2012 at 122–131.

the "vast changes" made to the policy manual since 2008,[182] implying that Desjourdy was relying on unclear directives.

Defence counsel suggested to Melanie Morris that the strip search policy developed after *Golden* was available on the police intranet but not circulated to individual officers.[183] Morris stated that she had not been instructed that opening a person's waistband and visually inspecting their undergarments or body amounted to a strip search, even though this was a clear ruling by the Court in *Golden*; Bednarek similarly claimed that only later was he advised that this conduct amounted to a strip search.[184]

Another defence theme was that the cellblock did not have the staffing resources needed to either search SB while avoiding a male-on-female strip search or to provide her with clothing at an earlier opportunity. This strategy shifted responsibility from Desjourdy to Police Services. In his disciplinary hearing Desjourdy stated that he only received five shifts of training before he commenced as sergeant in charge of the cell block, commenting "I had no clue what I was getting into."[185]

Responsibility for discrete acts was attributed elsewhere. For example, Morris testified that it was not her job to determine whether SB had been lawfully arrested: she (and by implication Desjourdy) had to rely on the judgment of the arresting officers.[186] Although Morris engaged in an unlawful strip search by pulling away and looking down into SB's pants and by putting her hand down her pants (which in turn precipitated SB's backward kicks), these acts were treated as unrelated to SB's reactions characterized as violent and out of control. Furthermore, Bednarek testified that it was Morris who pulled away the shreds of SB's top and bra from her body before she was locked in a cell, implying that Desjourdy did not bear full responsibility for SB's half naked state.[187]

As to why SB was not given the blue suit for more than three hours, Bednarek said that the decision is usually made collectively even though Sergeant Desjourdy ultimately had the final authority.[188] Morris agreed that it was usual for Special Constables to provide an assessment to Desjourdy as to whether SB was ready for a blue suit.[189] She testified that

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182 *Ibid*, 24 September 2012 at 14.

183 *Ibid*, 2 October 2012 at 55–60.

184 *Ibid*, 24 September 2012 at 85–87.

185 Shaamini Yogaretnam, "Feared for woman's safety, officer says", *The Ottawa Citizen* (8 January 2014) C1, C4.

186 *Desjourdy Transcript*, *supra* note 99, 2 October 2012 at 62.

187 *Ibid*, 27 September 2012 at 15–19.

188 *Ibid* at 47.

189 *Ibid*, 2 October 2012 at 84–85.

prisoner movement, searching, and monitoring—including the decision to provide a blue suit—are all the responsibility of the Special Constable, not the Sergeant, although he has the last word.[190]

E) Police receive the highest standards of criminal and constitutional protections

Counsel was able to secure for Desjourdy an exceptional standard of constitutional protection regarding the privilege against self-incrimination, as well as a generous interpretation of "exigent circumstances" to justify departure from the rules for strip searches.

Several trial days were consumed by legal argument about whether, should Desjourdy testify, the Crown could cross-examine him on the evidence he previously provided in SB's trial. In her trial he testified that he would have provided a blue suit to SB to cover herself had she been suicidal, which was contradicted by the current position that SB had been stripped and left without clothing for her upper body because she was possibly suicidal. The Crown argued that Desjourdy had not testified under subpoena; instead his evidence was provided as part of the job requirements for police. By voluntarily engaging in police work, Desjourdy should not be protected against cross-examination in a later trial regarding evidence he provided against an accused person.

The Crown also argued that the policy implications of allowing police to be protected for their testimony in prior trials would hamper efforts to hold them accountable for wrong-doing:

> [G]ranting use immunity for police officer testimony can only exacerbate and perpetuate any alleged abuse of power by the state. [M]ost members of the public would be troubled at the prospect that the evidence that an officer gives to incriminate an accused could not be used against the officer if it turns out that the officer committed a criminal offence against that person. [191]

Defence counsel successfully argued that the notice requesting Desjourdy to appear in court was the equivalent of a subpoena because he faced disciplinary consequences if he failed to testify, and that no special policy reasons justified lesser protection against self-incrimination for police than others. Although Judge Lipson noted that police can be prosecuted for perjury for their testimony,[192] this interpretation of the s 13 *Charter* right grants a substantive, substantial, and systemic immunity to officers

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190 *Ibid* at 38.

191 *Desjourdy* 2012, *supra* note 101.

192 *Ibid* at para 37.

who are later criminally prosecuted that simply cannot be compared to the rights accorded to ordinary citizens.

The defence also secured an enlarged interpretation of "exigent circumstances" by casting events as an emergency requiring an urgent strip search. Counsel described it as a "fast moving and unpredictable situation."[193] He suggested that Bednarek was recalling it through "the fog of battle"[194] and that the station motto was "always expect the unexpected."[195] Further, the station is an "unpredictable place"[196] because intoxicated detainees can be "Jekyll and Hyde" types[197] who can "explode."[198]

To each witness counsel proposed a litany of possibly concealed items. He elaborated on the dangers of women's bras: the underwire can be used as a weapon—"they would wrap it around their index finger and their middle finger"[199]—it could be used to puncture, take an eye out, or to pick a lock;[200] bras can be used to conceal razor blades, crack pipes, small knives, pins, and needles, all of which can be weaponized.[201] Melanie Morris was led through violent cell block incidents[202] and dangerous things to do with handcuffs[203] and bras.[204] Bednarek readily agreed that prisoners present many dangers, including head butting[205] and the risk of "deadly disease"[206] caused by biting and spitting.

The defence portrayed SB as wildly unpredictable, having "flipped a switch."[207] Bednarek and Morris said SB was physically resistant to Morris's efforts to search her. SB repeatedly turned her head to Morris rather than facing forward as instructed,[208] allegedly presenting a risk of head butting or spitting. Morris testified that SB lowered her centre of

193 *Desjourdy Transcript*, *supra* note 99, 2 October 2012 at 53.
194 *Ibid*, 27 September 2012 at 19.
195 *Ibid* at 94–95.
196 *Ibid* at 96.
197 *Ibid*.
198 *Ibid* at 107.
199 *Ibid*, 28 September 2012 at 9.
200 *Ibid* at 8–10.
201 *Ibid* at 12.
202 *Ibid*, 1 October 2012 at 128.
203 *Ibid* at 128–129.
204 *Ibid*, 1 October 2012 at 130.
205 *Ibid*, 27 September 2012 at 143.
206 *Ibid* at 136–139.
207 *Ibid*, 3 January 2013 at 44, 50.
208 *Ibid*, 27 September 2012 at 143.

gravity, possibly preparing to assault the officers. Bednarek said his face was sprayed with SB's saliva as she shouted.[209]

Bednarek testified that the female strip search policy was not followed because SB exhibited "active assaultive behavior" and Morris had been injured.[210] He said that Desjourdy acted to protect the safety of the officers and SB, although he acknowledged that re-cuffing SB and taking her to a separate room to wait for another female officer would have been a better way to handle the situation.[211] Under cross-examination by the defence, Sgt David Christie agreed that he would not call a female officer off the road to strip search a "volatile, assaultive prisoner,"[212] and that assault disabling a Special Constable would be an exigent circumstance justifying departure from the strip search rules.[213] Morris agreed with counsel's suggestion that SB's kick when she was searching her suggested she was hiding something, providing "reasonable and probable grounds" for a strip search.[214]

F) Racism cannot be confronted

The role of racism, and particularly systemic racism, is difficult to prove in any particular encounter. Although SB alleged in her SIU statement that racist epithets were used by police, racism is so dangerous an accusation that early on SB tried to distance herself from such a claim. To media she said: "I don't want to make it into a big black and white issue. I think it's more an issue of questioning authority."[215]

The defence repudiated the notion that racism was implicated in SB's arrest, assault, and strip searching, despite the Crown's silence on racism. Defence counsel cross-examined the police witnesses using SB's civil statement of claim because her allegations had received media attention and harmed the reputation of the Ottawa police: this was their opportunity to refute SB's claims although they were not part of the Crown's case.[216] Counsel also wanted to use her civil claim because it showed motive to fabricate: SB had a "massive" lawsuit in play.[217]

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209 *Ibid*, 24 September 2012 at 78–79.

210 *Ibid* at 107.

211 *Ibid*, 27 September 2012 at 108.

212 *Ibid*, 2 January 2013 at 44.

213 *Ibid* at 47, 68.

214 *Ibid*, 2 October 2012 at 63.

215 Gary Dimmock, "'I hope and pray it's not a racial thing'", *The Ottawa Citizen* (28 November 2010) A1 [Dimmock, "A racial thing"].

216 *Desjourdy Transcript*, *supra* note 99, 28 September 2012 at 113–116.

217 *Ibid*.

In cross-examination Bednarek stated that he did not observe any "racial issues."[218] He was "hurt" and "shocked" by the allegations in SB's civil claim about the racial motivations for her treatment,[219] noting that one of the arresting officers, Flores, was "non-white."[220] Christie too agreed that he did not observe any "racial component."[221] Had he heard racial abuse, he testified, he would have addressed it on the spot and probably would have made a note of the behavior.[222] He stated he had never encountered racist abuse by police.[223]

But it is at least arguable that prisoners and SB were de-humanized—and possibly animalized—through the linguistic choices deployed. Bednarek described how detainees are searched before being placed in the cells: "I like to take the body and quarter it."[224] Defence counsel focused on the mouth as "one of the most dangerous weapons police encounter with individuals."[225] They present risks of "deadly disease," such that police are trained "to control the mouth."[226] Further, explaining the failure to provide SB a blue suit earlier, Bednarek mentioned that he was occupied with "feeding the inmates."[227] Counsel and the witnesses also variously described SB as having "mule-kicked,"[228] "hoofed,"[229] or "donkey-kicked" Morris.[230]

5. Critical race analysis of the *Desjourdy* trial

SB's body bore the inscription of a historical narrative that forecast her treatment by the police even though her actions of drinking a beer on the street and talking to a man in car seem innocuous. The police suspicion that she was engaged in prostitution/sex work reveals suppositions about Black women who talk to men in vehicles in the early morning hours.[231] The officers imagined no innocent reason, placing the burden on SB to defend her "honour." Even if unconscious, the officers' suspicion was

218 *Ibid* at 100.
219 *Ibid* at 111–113.
220 *Ibid* at 114.
221 *Ibid*, 2 January 2013 at 80.
222 *Ibid* at 81.
223 *Ibid.*
224 *Ibid*, 24 September 2012 at 62.
225 *Ibid*, 3 January 2013 at 22.
226 *Ibid*, 27 September 2012 at 135.
227 *Ibid* at 74.
228 *Ibid*, 28 September 2012 at 31–37.
229 *Ibid*, 1 October 2012 at 159–161.
230 *Ibid*, 2 October 2012 at 17.
231 See Ray Kuszelewski & Dianne Martin, "The Perils of Poverty: Prostitutes' Rights, Police Misconduct, and Poverty Law" (1997) 35:3&4 Osgoode Hall LJ 835.

rooted in sexist and racist notions about the availability, licentiousness, and promiscuity of Black women.[232]

To compound this alleged offence, SB persisted in questioning the reasons for her detention, which is in fact a constititutional right. By challenging police authority and being "uppity," she ostensibly became the architect of her own abuse.[233] Prevailing tropes about Black women's arrogance, rebelliousness, and rudeness[234] arguably informed both the police treatment of SB and Desjourdy's acquittal. These traits are assigned at birth within patriarchy and white supremacy. They are not benign and can have "harmful or even deadly"[235] consequences.

SB's actions, characterized as a reasonable and lawful response in her own criminal trial, were re-cast as dangerously belligerent in Desjourdy's trial. How can asserting one's *Charter* rights to be free from arbitrary detention and entitled to equal treatment be characterized as belligerence? Interestingly, even Desjourdy's trial judge was able to see that her arrest was retaliatory and her enforced nudity in the cell was punitive.[236] Yet he focused narrowly on Desjourdy's act of cutting off SB's shirt and bra, allowing the rights violations experienced by SB from police on the street and in the station to fade away as legally irrelevant. Black Canadians remain rights bearers in theory only, these rights amounting to a "hollow hope."[237]

SB was also constructed as wild, unpredictable, and violent, presenting risks to the public, to the police, and to herself. Indeed, Black bodies are ascribed non-human and even superhuman features and abilities in particular situations.[238] The transmogrification from human to animal, weak to strong, and passive to violent is a common feature in the discursive understanding of Black bodies. SB's body, exposed and on display for male officers, was not assigned any measure of autonomy, dignity, or physical integrity. In fact, she was barely recognized as female—her breasts described by police as in the wrong place, curses streaming from her dangerous mouth, her pants soiled, her spittle flying.

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232 See generally Cooper, "Deluded and Ruined", *supra* note 28.

233 See *Abbott*, *supra* note 98 at para 45.

234 Maynard, *Policing Black Lives*, *supra* note 21 at 118.

235 *Ibid.*

236 *Desjourdy* 2013, *supra* note 9 at para 69.

237 Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed (Chicago: University of Chicago Press, 2008).

238 Camisha Sibblis, "Expulsion Programs as Colonizing Spaces of Exception" (2014) 21:1/2 Race, Gender & Class 64 at 75.

While physically outmatched, SB was met with extreme violence relative to her threat. The construction of SB as "man-like, aggressive and combative,"[239] stereotypes that originated in slavery, provided a reasonable doubt to the judge. Beneath the surface of the testimony lurked prevailing suppositions about Black women as mentally unstable, unruly, violent, barely human. Take for example, the description of SB's defensive acts in "barn yard" terms. SB did not simply kick Morris. Rather she hoofed, donkey-kicked, or mule-kicked her, language suggesting bestial strength and contrary, reflexive behaviour. Such rhetoric supports racist suppositions that construct Black bodies in animalistic terms that in turn rationalize physical, even violent restraint.

The focus on SB's resistant behavior and her alleged ease in remaining topless in her cell even when given the blue suit and poking her limbs through the bars, is suggestive of the Jezebel discourse, which characterizes Black women as governed by their sexual desires. Patricia Hill Collins asserts that the "Jezebel's function was to relegate all Black women to the category of sexually aggressive women, thus providing a powerful rationale for the widespread sexual assaults by White men typically reported by Black slave women."[240]

The Jezebel trope is so pernicious as to lead some to suggest that Black women would voluntarily remove their own clothing and expose their genitalia. Audrey Smith, a Black Jamaican woman was stripped by police in the summer of 1993 on a busy downtown street in Toronto. She told reporters that "[t]here I was, naked as the day I was born on the street. I have never felt so ashamed and humiliated in my life."[241] Police countered that she stripped herself to embarrass them.[242] They suggested that "Smith stripped voluntarily, and that this was a 'common practice among Jamaican women rounded up in drug busts … as a way of showing disrespect for the police."[243]

Furthermore, the trial judge's decision that the strip search of SB had no sexual context flies in the face of SB's experience as well as the historical use of sexual violence to demean and dehumanize Black women. Even in criticizing the police decision to leave SB topless in a cell for more than three

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239 Michelle S Jacobs, "The Violent State: Black Women's Invisible Struggle Against Police Violence" (2017) 24:1 William & Mary J Women and L 39 at 50 [Jacobs, "Violent State"].

240 Collins, *Black Feminist Thought*, *supra* note 75 at 81.

241 Glen Colbourn, "Strip-search of woman has stunned Toronto", *The Vancouver Sun* (7 October 1993) A7 [Colbourn, "Strip-search of woman"].

242 Nicolaas van Rijn, "Ruling that dismissed charges in strip-search case appealed", *Toronto Star* (20 October 1995) A24.

243 Colbourn, "Strip-search of woman", *supra* note 241.

hours and suggesting it could be fairly characterized as "punishment," the judge failed to name the sexual aspect of what was done to SB, let alone the racial resonance of a caged, naked Black woman:

> That kind of treatment was both unnecessary and demeaning. I am driven to conclude that S.B. was either the victim of unacceptable indifference on the part of the cellblock officers or, worse, was being punished for her earlier assault on Special Constable Morris.[244]

The judge also had a reasonable doubt that Desjourdy intended to punish or humiliate SB. Although such a motive would render the strip search "sexual," "sexual assault does not require proof of an improper or ulterior purpose."[245] It is notable that the trial judge was willing to impute a motive to punish to the decision to arrest SB and possibly to Desjourdy's decision to leave SB without clothing for hours in the cell, but not to the decision to cut off her shirt and bra.

The judge failed to center SB's experience in determining whether she was sexually assaulted, as required by Supreme Court jurisprudence, which has ruled that the test is objective: "[I]s the sexual or carnal context of the assault visible to a reasonable observer?"[246] The focus must be "on the sexual integrity of the victim."[247] Carissima Mathen explains:

> What [sexual assault] does require is that, on an objective view of all the circumstances, the defendant has violated the victim's sexual integrity. The focus is thus on a reasonable understanding of how the act affects the victim. In a society committed to protecting sexual autonomy, this is the correct approach.[248]

Assessing the circumstances that might make non-consensual touching "sexual" should require attention to relations of power that eroticize dominance. Here these power differentials included: police versus a private citizen; male versus female; four males versus one female; and white versus Black. The use of force to bring SB to the floor and scissors to cut off her clothes combine violence with the sexual dominance already inherent in the scenario, mirroring common images in pornography of men ripping and cutting off women's clothing, multiple men surrounding one woman, and white men "taming" Black women. The refusal to see the Black

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244 *Desjourdy* 2013, *supra* note 9 at para 94.

245 *R v Lutoslawski*, 2010 SCC 49.

246 *R v Chase*, [1987] 2 SCR 293 at para 11, 45 DLR (4th) 98.

247 *R v Larue*, 2003 SCC 22 at para 2; *R v Jarvis,* 2019 SCC 10 at para 124.

248 Carissima Mathen, "Verdict leaves tough questions, few answers about sex assault", *The Ottawa Citizen* (4 April 2013) A11.

woman's nakedness as "sexual" replicates the historical understanding of Black women as "half a woman" or "ungendered," less than human.[249]

Women who allege sexual violence are frequently discounted by police, judges, and juries as lacking in credibility, whether tainted by ulterior motives or as unreliable witnesses. Black women come to the law already stereotyped as natural liars,[250] making them the quintessential "incredible woman."[251] While the defence denied that Desjourdy's acts were "sexual," it invoked the typical narratives of defence attacks on sexual assault complainants through cross-examination: SB neither labelled Desjourdy's acts as sexual assault nor reported in a timely manner;[252] she did not appear distressed by his acts when she was in a cell, but rather was in control and almost seemed to enjoy herself; and her civil suit provided a "motive to fabricate."

Despite the video, SB's ordeal remained invisible. This erasure of Black pain and degradation is a disturbingly common occurrence.[253] The video's clarity could not displace deeply entrenched notions about Black women's behaviour. While the recording depicted a young, vulnerable woman assaulted and stripped by police, Desjourdy's trial judge accepted a reimagined version that constructed SB as belligerent, aggressive, unpredictable, and ultimately responsible for the violence inflicted upon her.

6. Conclusion

Essentialized notions about Black women's violent disposition lay at the center of this trial and seem to have driven the judge's analysis. SB's race and sex intersected to create a pathologized image of Black womanhood. As Tanovich comments: "gendered and racialized violence … provides the only reasonable explanation for the conduct of the police."[254]

In *Golden*, the Supreme Court of Canada explained that "some commentators have gone as far as to describe strip searches as 'visual rape.' Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault."[255]

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249 Saidiya Hartman, *Wayward Lives, Beautiful Experiments* (New York: WW Norton, 2019) at 184–186.

250 Jacobs, "Violent State", *supra* note 239 at 49–50.

251 Jocelynne A Scutt, "The Incredible Woman: A Recurring Character in Criminal Law" (1992) 15:4 Women's Studies Intl Forum 441.

252 *Desjourdy Transcript*, *supra* note 99, 28 September 2012 at 107–108, 111–113.

253 See e.g. *R v Forcillo*, 2018 ONCA 402.

254 Tanovich, "*SB*", *supra* note 8 at 138.

255 *Golden*, *supra* note 4 at para 90.

Strip searching is felt profoundly by Black women as deeply rooted in slave history and discourses. This structural devaluation of the Black body results in social death and a certain "nothingness."[256] Thus, Black lives do not matter.

SB explained the impact on her life:

> "The whole thing has shaken my confidence in a lot of things. I have a loss of words. It's hard to describe what happened."… "After all of this, I'm trying to figure out who I am and trying to figure out my way in life. I don't know who I am anymore," said [SB], a normally full-of-life woman.[257]

Altogether the defence of Desjourdy benefitted from structural racism and sexism, while explicitly denying SB's experience of these harms.[258] These influences were left unnamed by the Crown. It may not be in the Crown's interest, as representative of the state charged with the prosecution of "criminals" who are disproportionately racialized, to highlight the role of racism and sexism in the targeting and police handling of SB. Although the Crown asked police witnesses pointed questions about whether they had ever seen a man's clothes cut off, he did not return to this theme in his closing address.

Yet one might ask, given the structural advantages that police on trial enjoy and narratives that inevitably feed racist and sexist beliefs, regardless of counsel's intent, whether such a prosecution could ever succeed without exposing these intersecting systems of oppression. When prosecutors, judges, and defence lawyers fail to confront our history of racism and misogyny as they manifest in current policing and criminal justice practices in Canada, we should hardly be surprised by the results.

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256 Calvin L Warren, *Ontological Terror: Blackness, Nihilism, and Emancipation* (Durham: Duke University Press, 2018); Lisa Marie Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012).

257 Dimmock, "A racial thing", *supra* note 215.

258 David M Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006) 38 CR (6th) 84.